

IN THE SUPREME COURT OF FLORIDA
CASE NO. SC 19-1780

JAMES MILTON DAILEY

Appellant

v.

STATE OF FLORIDA

Appellee

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

EXECUTION SET FOR NOVEMBER 7, 2019

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RECEIVED, 10/21/2019 02:43:35 PM, Clerk, Supreme Court

STATEMENT OF THE CASE

This is an appeal of the circuit court's denial of James Dailey's successive motion for postconviction relief filed under warrant. The underlying successive motion for postconviction relief is primarily predicated on newly discovered evidence, as well as violations of *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972). In particular, it is based on evidence and affidavits which show that the State suppressed another confession by codefendant Jack Percy, and which also impeach the testimony of several State witnesses during Mr. Dailey's original trial. The newly discovered evidence establishes that James Dailey is innocent of first-degree murder. Dailey's co-defendant, Jack Percy, alone killed Shelly Boggio.

PRELIMINARY STATEMENT

Citations shall be as follows: The record on appeal from Dailey's first trial proceedings shall be referred to as "TR1" followed by the appropriate volume and page numbers. (volume:page). The record on appeal from Dailey's second trial proceedings shall be referred to as "TR2" followed by the appropriate volume and page numbers. (volume:page). All cites from the first postconviction record on appeal shall be referred to as "PC ROA" followed by the appropriate volume and page numbers. All cites from the first successive postconviction record on appeal, in Case No. SC17-1073, shall be referred to as "R1" followed by the appropriate page

numbers. All cites from the second record on appeal, in Case No. SC18-557, will be referred to as “R2” followed by the appropriate page number. All cites to the corrected record on appeal in this case, SC19-1780, filed on October 21, 2019, will be referred to as “R3” followed by the appropriate page number. All other references will be self-explanatory or otherwise explained herein.

REQUEST FOR ORAL ARGUMENT

James Dailey has been sentenced to death. The resolution of issues involved in this action will determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar posture. A full opportunity to air the issues through oral argument is appropriate in this case, given the seriousness of the claims at issue and the stakes involved. James Dailey, through counsel, respectfully requests oral argument.

STANDARD OF REVIEW

“When the trial court rules on a newly discovered evidence claim after an evidentiary hearing, [this Court] review[s] the trial court’s findings on questions of fact, the credibility of witnesses, and the weight of the evidence for competent, substantial evidence.” *Green v. State*, 975 So. 2d 1090, 1100 (Fla. 2008). However, when the order on appeal contains no factual findings, including on the credibility of witnesses, this Court’s review is *de novo*. See *Gino Vitiello, M.D., P.A. v. Genovese Joblove & Battista, P.A.*, 123 So. 3d 1185, 1187 (Fla. 4th DCA 2013); *Coultas v.*

State, 955 So. 2d 64, 66 (Fla. 4th DCA 2007); *Osterback v. Agwunobi*, 873 So. 2d 437, 439 (Fla. 1st DCA 2004); *Niles v. State*, 120 So. 3d 658, 663 (Fla. 1st DCA 2013). The trial court's application of the law to the facts is reviewed *de novo*. *Green*, 975 So. 2d at 1100.

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STATEMENT OF THE CASE AND OF THE FACTS

Procedural History:

James Dailey was tried by a jury and found guilty of one count of first degree murder on June 27, 1987. By a vote of twelve to zero, a jury returned a recommendation of death. Dailey was sentenced to death on August 7, 1987. On November 14, 1991, this Court affirmed the conviction but vacated Dailey's death sentence, holding that the trial court improperly instructed the jury on and erroneously found, two aggravating circumstances: (1) that the crime was "cold, calculated, and premeditated;" and (2) that the crime was committed to avoid arrest. *Dailey v. State*, 594 So. 2d 254, 259 (Fla. 1991). This Court held that neither aggravating circumstance applied to the case. *Id.* This Court further held that the trial court erred when it failed to assign any weight to numerous mitigating circumstances, and erroneously relied on evidence from the trial of Dailey's co-defendant which had *not* been introduced in any phase of Dailey's trial. *Id.* In addition to these errors, this Court identified six other errors, but deemed them harmless. *Id.*

On remand, the trial court, without empaneling a new jury, again sentenced Dailey to death. This Court affirmed. *Dailey v. State*, 659 So. 2d 246 (Fla. 1995), *cert. denied*, 516 U.S. 1095 (1996).

On March 28, 1997, Dailey filed a motion to vacate judgment and sentence pursuant to Fla. R. Crim. P. 3.850. The circuit court denied the motion after a limited

evidentiary hearing. Dailey appealed and filed a petition for state habeas relief in this Court. *Dailey v. State*, 965 So. 2d 38, 48-49 (Fla. 2007). This Court affirmed the denial of his 3.850 Motion and denied his state habeas petition. *Id.*

Dailey filed a successive motion to vacate his death sentence in the circuit court based on *Hurst v. Florida*, 136 S. Ct. 616 (2016), and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). R1 4-52. The circuit court denied Dailey's motion. R1 191-98. Dailey filed a timely appeal on June 7, 2017. R1 206-07. This Court affirmed the denial of appeal. *Dailey v. State*, 247 So. 3d 390 (Fla. 2018), *cert. denied*, 139 S. Ct. 947 (2019).

On June 21, 2017, Dailey filed a second successive motion to vacate his judgment and sentence based on newly discovered evidence of actual innocence. R2 12-36. That same day, Dailey filed a Motion to Relinquish Jurisdiction with this Court, which was granted on September 14, 2017. A case management conference was held on November 5, 2017. The lower court granted an evidentiary hearing on claims I(A) and I(B). R2 931-1024. The evidentiary hearing took place on January 3, 2018. R2 12039-12125. A records hearing was held on January 18, 2018. R2 12257-83. A final order denying all claims was issued on March 20, 2018. R2 8872-9183. A notice of appeal was filed on April 9, 2018. R2 9189. The case was submitted to this Court, without oral argument, on July 24, 2018.

A Death Warrant was signed by Governor Ron DeSantis on Wednesday, September 25, 2019. This warrant was accompanied by a letter dated September 25,

2019, to the Governor from Attorney General Ashley Moody. Despite his then-pending innocence appeal before this Court (case no. SC18-557), which had been fully briefed and submitted fourteen months prior, Dailey's execution was scheduled for Thursday, November 7, 2019.

On October 3, 2019, eight days after the signing of Dailey's death warrant, this Court denied Dailey's appeal. A motion for rehearing was filed on October 8, 2019. No response was filed. An order denying the rehearing was filed on October 14, 2019. *Dailey v. State*, – So. 3d – , 2019 WL 4865855 (Fla. Oct. 3, 2019).

Dailey filed demands for additional public records on October 2, 2019. R3 240-317. Objections were filed by the respective agencies the following day. R3 322-433. The circuit court denied the demands for records orally on October 4, 2019 during a records hearing and issued a written order that same day. Dailey filed motions for reconsideration on October 7, 2019, regarding demands for records from the Medical Examiner's Office and the State Attorney's Office. R3 450-80. The court denied the motions for reconsideration on October 8, 2019. R3 589-607. Dailey filed three additional motions to reconsider records demands on October 14, 2019 based on new information, R2 710-814, and the agencies responded on October 15, 2019. R3 824-35. The Court denied Dailey's motions on October 16, 2019. R2 836-38.

Dailey filed his successive motion on October 8, 2019, along with a motion to interview jurors and a motion for stay. R3 483-588. The State filed a response to each

motion on October 10, 2019. R3 620-85. The circuit court held a case management conference on October 11, 2019, and granted an evidentiary hearing on part of Claim 2. R3 1369-1414. The evidentiary hearing was held on October 14, 2019. R3 1415-1506. A final order denying relief was issued on October 16, 2019. R3 839-1220. Dailey timely filed a notice of appeal on October 17, 2019. R3 1221-22.

Summary of Testimony from the October 2019 Evidentiary Hearing:

James Slater

At the evidentiary hearing conducted on October 14, 2019, former Assistant State Attorney James Slater testified that he signed an affidavit under penalty of perjury on September 27, 2019. R3 1434; *see also* R3 559-62. Slater admitted that as a licensed attorney and an officer of the court, he understood the import of a sworn affidavit. R3 1434. He agreed at the evidentiary hearing that everything documented in his affidavit reflected the statements he made to postconviction counsel. R3 1438. Slater agreed that if something had been written in a way that he was not comfortable with, he would have asked for the wording to be changed. *Id.*

At the hearing, Slater testified that he worked capital homicide cases while he was employed with the Pinellas County State Attorney's Office from 1981-1985. R3 1425. Slater further testified that he was assigned to assist law enforcement on the Shelly Boggio case and was later called to testify about his involvement with statements given by a suspect in the murder. R3 1426-27.

Slater testified, consistent with his affidavit, that he had a general recollection of the case that included *someone* in law enforcement telling him that Jack Percy had attempted to have sex with the victim, but that Percy was unable to perform, the victim had then teased Percy, and Percy had subsequently stabbed her. R3 1444-45. On cross examination, Slater confirmed that he had provided to Dailey’s counsel the information contained in paragraph seven of the affidavit, which reads “Law enforcement told me that Percy attempted to have sex with the victim but that Percy couldn’t perform. The victim began teasing Percy. Percy became irate and stabbed the victim.” R3 1454-55. Slater also testified that he was “positive that those statements” were made to him. R3 1455-56.

At the hearing, Slater claimed that in the two weeks since signing the affidavit – even though he had gone to the scene of the crime and still remembered it thirty-four years later – he was now no longer sure it was this case to which this confession related. R3 1445, 1429, 1451. Slater testified that at some point between when his affidavit was filed on October 8, 2019, and the time of the evidentiary hearing on October 14, 2019, he was contacted by telephone by at least three representatives of the State,¹ one of whom is retired, and indicated that there were others whose names

¹ Slater identified Assistant State Attorney Jim Hellickson, Assistant State Attorney Glenn Martin (whom he mistakenly referred to as Glenn Miller), and retired Assistant State Attorney Marie King as three of the individuals who called him before the evidentiary hearing about this case. R3 1446.

he did not know. R3 1446-47. He testified that after this 10-15 minute phone call he felt “tugged in two directions,” and was no longer comfortable speaking to the defense without the State present. R3 1449.

In the end, Slater testified that his recollection of the events surrounding this case would have been clearer thirty-four years ago. R3 1458.

Colin Kelly

Dailey next called Colin Kelly to testify. Kelly testified that he is an investigator with CCRC-Middle and a Florida registered notary. R3 1460-61. Kelly stated that he was present on September 27, 2019, at Slater’s home when he signed the affidavit in question. R3 1461, 1463. Kelly testified that Slater clearly remembered the case, Slater only shared what he could remember, and Slater did not hesitate when asked to sign an affidavit. R3 1462-63. Kelly further confirmed that the affidavit that was submitted as Attachment C to Dailey’s Motion to Vacate was the affidavit he notarized at Slater’s house on September 27, 2019, and that Slater was present for the drafting of the entire document. R3 1465. Kelly testified that Dailey’s counsel wrote the affidavit line by line, using words spoken by Slater. *Id.* Kelly testified that Dailey’s counsel read the words aloud as they were written, and offered Slater the opportunity to alter any of the statements within the affidavit. *Id.* Slater read the affidavit before signing it and Slater indicated he knew what he was signing at the time. R3 1465-66. Kelly testified Slater specifically chose the term “law enforcement” for paragraph 7

of the affidavit. 1466. After signing the affidavit, Slater made a copy of it for his own records. R3 1468-69. The State declined to cross-examine Mr. Kelly, and asked him no questions. R3 1469.

The State did not put on any evidence at the hearing. R3 1469.

SUMMARY OF ARGUMENT

For more than thirty years, James Dailey consistently has maintained his innocence. Over that same period, Jack Percy has confessed to his guilt, and Dailey's innocence, on at least five occasions. The lower court failed to consider Dailey's powerful newly discovered evidence of innocence, including serious violations of *Brady v. Maryland* and *Giglio v. United States*.

The Court instead chose to mechanically apply rules of evidence and cite procedural bars, rather than looking at the total picture of the case by way of a cumulative analysis. Specifically, the lower court improperly refused to consider testimony from former Assistant State Attorney James Slater admitting for the first time that Percy confessed and provided a motive to law enforcement thirty-four years ago; a sworn affidavit from former inmate Edward Coleman identifying for the first time specific instances of Detective John Halliday suggesting quid pro quo benefits in exchange for jailhouse informant testimony against Dailey; and a sworn affidavit from former corrections officer David Howsare regarding Percy's manipulative and intimidating behavior in the county jail. All of these newly discovered pieces of

evidence corroborate Dailey's longstanding innocence claim and further implicate the man who has confessed five times, Dailey's codefendant Jack Percy. The lower court erred in refusing to reach the merits of this claim based on procedural bars, and further erred in failing to conduct a cumulative analysis of this evidence and the rest of the compelling evidence of innocence Dailey has presented over the years.

The lower court similarly dismissed Dailey's claim that his execution would violate the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution, specifically, that the lack of guidelines or process governing the warrant selection process in Florida is arbitrary and capricious, that the execution of an innocent man is arbitrary, and that execution after more than thirty years on Florida's death row is cruel and unusual. The lower court also dismissed Dailey's claim that in being denied access to necessary public records, he has been deprived of his due process and equal protection rights under the United States Constitution and the corresponding provisions of the Florida Constitution. The Court's summary dismissal of these serious constitutional claims was likewise error.

ARGUMENT

Argument I: The Lower Court Erred in Denying Dailey's Claim That His Execution Would Be So Arbitrary As To Violate The Fifth, Eighth, And Fourteenth Amendments To The United States Constitution And The Corresponding Provisions Of The Florida Constitution.

A. Dailey's claim is timely.

The lower court erred in dismissing this claim “as untimely and procedurally barred.” R3 1034. This finding is erroneous because Dailey could not raise a challenge to the warrant selection process unless and until the Governor signed his warrant. Dailey's death sentence did not become final until his sentence was affirmed on direct appeal. *See Mungin v. State*, 259 So. 3d 716, 717 (Fla. 2018). Had Dailey raised a challenge to the warrant selection process on direct appeal or in prior collateral proceedings, before the Governor signed his warrant, the claim would have been dismissed as not ripe. *See Johnson v. Bredesen*, 130 S. Ct. 541, 544 (2009) (Stevens, J., joined by Breyer, J., respecting the denial of certiorari) (“[A] *Lackey* [excessive delay] claim, like a claim that one is mentally incompetent to be executed, should, at the very least, not accrue until an execution date is set.”); *Jones v. State*, 845 So. 2d 55, 74 (Fla. 2003) (claim related to whether execution will pass Eighth Amendment muster is “not ripe for review” where death warrant had not yet been signed); *Jimenez v. Bondi*, 259 So. 3d 722, 726-27 (Fla. 2018) (Pariante, J., concurring) (“some claims, such as those challenging the execution method, cannot be raised or evaluated until the signing of the death warrant. At the least, defendants

must have adequate time to investigate and raise and courts must have adequate time to properly review these warrant-based claims.”).

Further, had Dailey requested review of these claims before Governor DeSantis signed the warrant, the circuit court would have deemed his motion premature: It would have been impossible to predict: (1) whether the Florida Department of Corrections would receive any guidance from the Florida legislature regarding how to execute an inmate by lethal injection; (2) what, if any, warrant-selection process the Governor would employ; (3) whether Dailey would receive a fair clemency hearing immediately before execution; and (4) how long Dailey would be on death row. Now that Governor DeSantis has scheduled Dailey’s execution, the claims raised here are finally ripe for adjudication. *See Fla. R. Crim. P. 3.851(d)(2)(A); Rivera v. State*, 995 So. 2d 191 (Fla. 2008) (no bar to state post-conviction motions where movant can show that the grounds asserted were not known and could not have been known at the time of the previous motion).

There is no guarantee that any Governor would have ever signed Dailey’s warrant. It is not uncommon for defendants to pass away while on death row awaiting execution or resentencing, never having a state governor sign their warrant.² Thus, unless and until a warrant is signed, this type of claim is not ripe for

² For example, Robert Power passed away before receiving a death warrant. <https://www.cbsnews.com/news/florida-inmate-robert-power-dies-of-natural-causes-while-awaiting-execution/>

review by the courts. The common law is clear that the courts will not address a claim unless there is an actual case or controversy. *In re Amendments to Florida Evidence Code*, 44 Fla. L. Weekly S170 (Fla. May 23, 2019), reh'g denied, 2019 WL 4127349 (Fla. Aug. 30, 2019) (issues must be left for a proper case or controversy). Here, a case or controversy did not develop until the signing of Dailey's warrant. Thus, Dailey's claim is timely.

B. Florida's utter lack of any method, criteria, or procedure in determining whom to execute is arbitrary and capricious leading to an absurd result that violates the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.

The lower court mischaracterized Dailey's claim in denying relief below. In denying Dailey's claim, the court found that the "Governor's discretion in granting clemency or signing death warrants does not render either process unconstitutional." R3 1034. This is not, however, what Dailey argued below. Dailey never argued that because the Governor has some discretion the system is *per se* arbitrary and capricious. Dailey does not dispute that if the Governor or other decision-making body³ had some criteria, the Governor or other body would be free to choose from among any of the defendants who fit the criteria. Dailey's argument is simply that there must be *some* criteria. As argued previously, other states have an orderly

³ For example, in Tennessee, the state supreme court sets execution dates. *See, e.g.,* Tennessee <http://www.tncourts.gov/news/2018/11/16/supreme-court-sets-execution-dates>

process for identifying the next death-sentenced defendant to be executed. The difference here, and the basis of Dailey's argument, is that Florida's Governor has no criteria, procedure, or guidelines in place for selecting who lives and who dies.

The Governor's counsel conceded as much during the public records hearing held in this case. When undersigned counsel asked for a copy of the criteria or guidelines that the Governor relies on in selecting which defendant to execute, counsel for the Governor confirmed that there are none.

The Court: Okay. About the request for the policy, if there is a policy, what's your response to that?

Ms. Ernst: Your Honor, I would point out that *there is no written policy*. We did not feel the need to make that plain given that we felt that there would be no colorable challenge related to the policy, but the Governor exercises his discretion independently in reviewing each case, and that has been a longstanding practice.

The Court: Okay. Any final response from the defendant's counsel?

Ms. Shirley: Yes, your Honor. I guess I would just like clarification. There is no written policy as to choosing a warrant or there is no written policy as to who gets executive clemency?

The Court: Are you talking about clemency or the warrant?

Ms. Ernst: The exercise of discretion in selecting cases.

R3 1270 (emphasis added).

The extreme arbitrariness that results from this process without process means that the resulting decisions and warrant announcements come as a complete surprise to defendants, who may learn of the warrant after decades on death row when

corrections officers come to move them to death watch. Further, the execution timeline is so truncated (here, there are 43 days between the signing of the warrant and the execution, though Section 922.052(2)(b), Florida Statutes (2019) provides for up to 180 days to execute a death warrant) that defendants and counsel – no matter how diligent – are forced to submit last-minute pleadings discouraged by courts.

Granting the Governor unfettered discretion has, in practice, led to a completely arbitrary process for determining who lives and who dies. There are no limits to cabin executive discretion, there are no guidelines for the selection process, and the entire process is cloaked in secrecy. *C.f. Furman v. Georgia*, 408 U.S. 238, 309-10 (1972) (Stewart, J., concurring) (“These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders . . . many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed.”).

One cannot treat a system entirely susceptible to caprice and chaos as the presumptive “remedy for preventing miscarriages of justice” where “judicial process has been exhausted,” much less in instances such as this one, where judicial process has simply been cut short. *Herrera v. Collins*, 506 U.S. 390, 411-12 (1993). This Court cannot elevate state procedural interests over human life, over due process of

the law, and over the Constitution itself.⁴ Instead, this Court should find Dailey's interest, and society's interest in the preservation of life, liberty, and the right to a fair trial important enough to justify vacating an unconstitutional conviction.

C. The execution of an innocent person is so arbitrary as to violate the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.

The lower court agreed that “it would certainly be cruel and unusual to execute an innocent person.” R3 1035. Yet, it failed to address Dailey's claim that he was innocent, erroneously finding that the claim is “procedurally barred.” *Id.* In contrast, what this Court has held, and has consistently repeated, is that claims of actual innocence are not cognizable under Florida law. *Dailey v. State*, – So. 3d –, 2019 WL 4865855 at *17 (Fla. Oct. 3, 2019).

In this case, no court has yet to weigh, free from the constraints and shackles of procedural bars, the extensive evidence corroborating Dailey's claim of actual innocence. The fact that this Court is poised to permit the execution of an innocent man, without weighing substantial, compelling evidence of innocence, is so arbitrary and capricious as to violate the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida

⁴ See Reinhardt, Stephen, *The Anatomy of an Execution: Fairness vs. “Process,”* New York University Law Review, May 199, Vol. 74, Number 2, at 346, 351-52, discussing *Calderon v. Thompson*, 523 U.S. 538 (1998).

Constitution. This Court is in effect turning a blind eye to the numerous, consequential errors that were made in this case.

In conclusion, absent the courts' intervention to correct the grave constitutional errors resulting from the conviction, continuing incarceration, and eventual execution of an innocent person – whose powerful case for innocence was never fully considered by the courts and for whom clemency provided no backstop to wrongful execution – James Dailey will be executed on November 7, 2019. In his majority opinion in *Herrera v. Collins*, Chief Justice Rehnquist wrote that “the central purpose of any system of criminal justice is to convict the guilty and free the innocent.” 506 U.S. 390, 398 (1993). Justice Blackmun put a finer point on it in dissent, observing that “[n]othing could be more contrary to contemporary standards of decency . . . than to execute a person who is actually innocent. . . . *The execution of a person who can show that he is innocent comes perilously close to simple murder.*” *Herrera*, 506 U.S. 430-46 (emphasis added). This Court must exercise its constitutional obligation to issue a stay, review Mr. Dailey’s substantial claims of actual innocence, and order a new trial.

ARGUMENT II: The Lower Court Erred in Denying Claim II of Dailey’s Successive Motion That Newly Discovered Testimonial Evidence Proves Dailey’s Actual Innocence and The State’s Withholding of This Exculpatory Material Violated The Constitutional Requirements of *Brady v. Maryland* and *Giglio v. United States* and Its Progeny.

Under Florida and federal law, there are two requirements for relief based on

newly discovered evidence. First, the asserted facts must have been unknown by the trial court, the party, or counsel at the time of the trial, and it must appear that the defendant or his counsel could not have learned them by the use of diligence. Second, the newly discovered evidence must be of such a nature that it would probably produce an acquittal on retrial. *See Jones v. State*, 709 So. 2d 512, 521 (Fla. 1998) (*Jones III*). The *Jones* standard also applies to the question of penalty; in other words, the newly discovered evidence would probably have led to a life sentence rather than a death sentence. *Scott v. Dugger*, 604 So. 2d 465, 468 (Fla. 1992); *see also Jones v. State*, 591 So. 2d 911, 915 (Fla. 1991) (*Jones I*).

When considering newly discovered evidence, courts “must evaluate all the admissible newly discovered evidence at this hearing in conjunction with newly discovered evidence at the prior evidentiary hearing and then compare it with the evidence that was introduced at trial.” *Jones III*, 709 So. 2d at 522. Courts must “conduct a cumulative analysis of all the evidence so that there is a ‘total picture’ of the case and ‘all the circumstances of the case’ . . . a postconviction court must even consider testimony that was previously excluded as procedurally barred or presented in another postconviction proceeding in determining if there is a probability of an acquittal.” *Hildwin v. State*, 141 So. 3d 1178, 1184 (Fla. 2014) (internal citations omitted); *see also Lightbourne v. State*, 742 So. 2d 238, 247 (Fla. 1999) (“In this case the trial court concluded that [a witness’s] recanted testimony would not probably

produce a different result on retrial. In making this determination, the trial court did not consider [another witness's] testimony, which it had concluded was procedurally barred, and did not consider [the testimony of a third witness] from a prior proceeding. *The trial court cannot consider each piece of evidence in a vacuum, but must look at the total picture of all the evidence when making its decision.*") (emphasis added).

Newly discovered evidence also satisfies the second prong of the *Jones* test if it "weakens the case against [the defendant] so as to give rise to a reasonable doubt as to his culpability." *Jones v. State*, 678 So. 2d 309, 315 (Fla. 1996) (*Jones II*). If the defendant is seeking to vacate a sentence, the second prong requires that the newly discovered evidence would probably yield a less severe sentence. *See Jones I*, 591 So. 2d at 915.

The Due Process Clause and the Eighth Amendment to the United States Constitution provide that when relevant evidence that would produce an acquittal has not been presented because it could not have been discovered, a capital defendant has a right to a new trial. Dailey identified three areas of newly discovered evidence. The lower court erred in failing to consider the totality of the evidence when evaluating Dailey's newly discovered evidence claim. It likewise erred in denying each subclaim and the claim as a whole.

The evidence relevant to this analysis also forms the basis for a *Brady* and *Giglio* claim. The State violated Dailey's due process rights under *Brady* by

withholding exculpatory evidence, and under *Giglio* by presenting false evidence at Dailey's original trial. The Supreme Court of the United States has held that both the withholding of exculpatory evidence from a criminal defendant by a prosecutor and the knowing use of false testimony violate the Due Process Clause of the Fourteenth Amendment. *See Brady v. Maryland*, 373 U.S. 83, 86 (1963) and *Giglio v. United States*, 405 U.S. 150, 153-55 (1972).

The Due Process Clause forbids official misrepresentations of fact and requires disclosure of evidence that probably could aid the defense to obtain a different outcome. *See, e.g., Mooney v. Holohan*, 294 U.S. 103 (1935); *Pyle v. Kansas*, 317 U.S. 213 (1942); and *Miller v. Pate*, 386 U.S. 1 (1967). The failure of a prosecutor to correct the false testimony of a prosecution witness also violates due process. *Alcorta v. Texas*, 355 U.S. 28 (1957); *Napue v. Illinois*, 360 U.S. 264, 269 (1959) (noting that the Due Process prohibition against the State's knowing use of false testimony includes that which "goes to the credibility of the witness.").

The Supreme Court of the United States extended the rule prohibiting misrepresentation to require disclosure of known exculpatory and impeachment evidence in the seminal case of *Brady v. Maryland*, 373 U.S. 83 (1963) (exculpatory material), and again in *Giglio v. United States*, 405 U.S. 150 (1972) (impeachment material). The *Brady* Court imposed upon prosecutors "an affirmative duty to disclose evidence favorable to the defense," *Kyles v. Whitley*, 514 U.S. 419, 432 (1995), in part

because allowing them to withhold evidence that could change the outcome of the trial “casts the prosecutor in the role of an architect of a proceeding that does not comport to the standards of justice . . .” *Brady*, 373 U.S. at 88.

In order to establish a *Brady* violation, a court must find that: (1) the evidence is favorable to the accused because it is exculpatory as to guilt or sentencing; (2) it was suppressed by the State willfully or inadvertently; and (3) it is material. *Banks v. Dretke*, 540 U.S. 668, 691 (2004). Evidence that is favorable to the accused includes both exculpatory and impeachment evidence. *Id.*

In order to establish a *Giglio* claim, the defendant must allege: (1) the testimony given was false; (2) the prosecutor knew the testimony was false; and (3) the statement was material. *Guzman v. State*, 868 So. 2d 498, 505 (Fla. 2003); *see also Ford v. Hall*, 546 F.3d 1326, 1332 (11th Cir. 2008).

A. The lower court erred in denying this claim as it relates to James Slater.

1. James Slater’s testimony is timely.

The lower court erred in finding Slater’s testimony to be untimely. The lower court held this evidence could have been presented earlier “with the use of due diligence.” R3 1038. This holding, however, completely disregards the nature of the *Brady* obligation, which places the onus on the State to disclose, *and not on the defense to find*, this information.

Though the lower court correctly cited to Dailey’s argument based on *Banks v. Dretke*, 540 U.S. 668, 696 (2004) that “A rule thus declaring ‘prosecutor may hide, defendant must seek,’ is not tenable in a system constitutionally bound to afford defendants due process,” the lower court incorrectly reasoned that this case did not overrule Florida law. R3 1038. The lower court misapplied this Court’s holding in *Smith v. State*, 931 So. 2d 790 (Fla. 2006), in finding that the “State does not have the duty to prepare the defense’s case.” R3 1038-39.

In *Smith*, the defendant argued that the State “concealed” a witness’s prior felony conviction though the conviction was a public record. *Id.* at 806. *Smith* has no bearing on the present question, where a prosecutor on the case concealed the true perpetrator’s confession regarding his motive for the crime for over three decades. Unlike *Smith*, the knowledge that law enforcement and Slater – and thus the State – possessed was known only to the State. No amount of public records requests or investigation could have uncovered this long-suppressed information, nor would or should defense counsel have assumed that the State would suppress it.

The lower court’s reliance on *Jimenez v. State*, 265 So. 3d 462, 480 (Fla. 2018) is similarly unpersuasive. In *Jimenez*, this Court found that Jimenez knew of the error – that the jury was being misled – but chose not to raise the claim until later. *Id.* Here, Dailey *did not know* of this confession by Percy, a confession which

provided Percy and Percy alone the motive for this crime, until after Dailey's death warrant was signed.

Simply because the State disclosed Slater as a known witness does not relieve the State of its *Brady* obligation. Slater, as an agent of the State, had a duty to reveal this information to the defense, and Dailey is entitled to presume that Slater would abide his constitutional obligation. The State nevertheless asserted, and the lower court embraced, the argument that the defense should have somehow intuited that a prosecutor was perhaps concealing information that struck at the heart of the case. As Slater himself testified, "When I signed the affidavit, I had a general overall feeling that that's what this entire case was about." R3 1456.

Any finding or insinuation that Dailey did not exercise due diligence runs afoul of the guiding principles of our adversary system, as underscored in *Banks*: When officers of the court for the defense ask officers of the court for the State whether they have *Brady* material, and the answer is no, the lawyers for the defense should not be forced to assume that the prosecutors are simply lying. To the contrary, the Supreme Court of the United States has made clear that the defense is entitled to presume that "public officials have properly discharged their official duties." *Banks*, 540 U.S. at 696. "Courts, litigants, and juries properly anticipate that obligations to refrain from improper methods to secure a conviction ... plainly resting upon the prosecuting attorney, will be faithfully observed." *Id.* (internal citations omitted).

The lower court here nevertheless flips that principle on its head, suggesting that, at least in Pinellas County, the defense bar is to presume that state officials are always hiding something, and failure to pursue what they have hidden at the earliest instance is deemed a kind of waiver. This apparent analysis is as deeply disturbing⁵ as it is doctrinally unsound. The suppression of exculpatory information *by a prosecutor on the case*, along with the concealment of this information from the defense, amounts to a clear violation of *Brady* and its progeny. It also satisfies the newly discovered

⁵ In light of the lower court's analysis, it is worth noting that this case arises from a time when prosecutors in Pinellas County were systematically failing to comply with disclosure obligations long required by *Giglio*, *Brady*, and related doctrine. R3 1322-27. (“[A]t the time of the trial in this case, prosecutors in the Pinellas County State Attorney’s Office were routinely employing their state attorney subpoena power to obtain sworn testimony from witnesses appearing before them without notice to [the] defense. Following these secret sworn witness interviews, prosecutors would produce documents that bore the label ‘Synopsis.’ These documents would include language explicitly noting that witnesses ha[d] been . . . sworn. The originals of the documents were printed on green paper. That’s how they acquired the ‘green sheets’ moniker. The State Attorney’s Office at that time took the rather remarkable position, citing *Miller v. State*, 360 So.2d 46 [that] the testimony obtained pursuant to a state attorney subpoena was absolutely privileged and not discoverable. Indeed, Glenn Martin, one of the prosecutors who has been involved in postconviction proceedings in this case and who was involved in other cases involving jailhouse informant Paul S[k]alnik, the same informant who offered evidence against Mr. Dailey, evidence that turned out to be as unreliable as it was inflammatory, . . . previously testified that such testimony was not discoverable and was not to be disclosed to the Defense. . . . As a result of the State Attorney’s policy, a wealth of discoverable information was not revealed to defendants in Pinellas County, including vast swaths of information that was [unquestionably] *Brady* material [or that] would have shown prosecutors’ representations at trial to potentially be false or misleading, pursuant to *Giglio*, *Napue*, and the *Mooney* line of cases.”).

evidence requirement as this was information that was presented to the court within a year of discovering it.

2. James Slater's affidavit and testimony is admissible evidence in support of Claim II.

The lower court found that Slater's affidavit is hearsay and thus not admissible in the lower court proceedings or at a new trial. R3 1039. Likewise, it found that Slater's testimony is not admissible or favorable evidence. R3 1040. This Court has never restricted *Brady* material to admissible evidence. In *Mordenti v. State*, this Court held:

Assuming without deciding whether the postconviction court erred in determining that Trevena's testimony constituted inadmissible hearsay, we conclude that even if inadmissible it was, at a minimum, **relevant information that would have led the defense to discover evidence for the impeachment of Gail**. The possible impact of the impeachment would likely have been great given the conspicuous lack of physical evidence linking Mordenti to the murder and that Gail's credibility was the anchor of the State's case... **The withholding of this information by the State precluded Mordenti from defending himself fully and fairly**. Our justice system strives to ensure that each party's right to the same information is coterminous. We conclude that information obtained from Trevena's interview casts a different light on the relationship between Larry Royston and Gail, one not revealed to the jury at trial. The State's failure to disclose this information may have also impacted the jury's decision with regard to Gail's credibility.

894 So. 2d 161, 174 (Fla. 2004). In fact, in *Brady* itself, "the suppressed confession was ***inadmissible*** as to guilt and could not have affected the outcome on that issue, [h]owever, the evidence could have affected Brady's punishment and was, therefore, material." *United States v. Bagley*, 473 U.S. 667, 710 (1985) (emphasis added).

Similarly here, whether or not Slater's testimony or affidavit was hearsay, this information was, at a minimum, relevant information that would have led the defense to discover additional evidence. As Slater acknowledged during his testimony at the evidentiary hearing, had this information been disclosed thirty-four years ago, Slater's recollection of these events would have been clearer. R3 1458. Thirty-four years ago, Slater could have disclosed the source of Percy's confession and defense counsel would then have had the opportunity to interview that law enforcement officer.⁶ *See also Duest v. State*, 12 So. 3d 734, 746 (Fla. 2009) ("The issue we focus on for purposes of determining a *Brady* violation is whether the evidence would lead to admissible substantive or impeachment evidence.").

Second, the withholding of this information also precluded Dailey from defending himself fully and fairly at trial. *See Mordenti v. State*, 894 So. 2d 161, 174 (Fla. 2004). The State had no motive for Dailey to commit this crime nor did it have a theory as to why Dailey would take the victim to the specific location where her body was found. As the State itself conceded in its sentencing memorandum for

⁶ Similarly, had the State not obfuscated Dailey's access to Percy by preventing undersigned counsel from visiting Percy at Sumter Correctional Institution, defense counsel could have asked Percy who he confessed to. At the evidentiary hearing, undersigned counsel alerted the circuit court that the Florida Department of Corrections had suddenly and without reason, revoked its permission for undersigned counsel to visit Percy to discuss the contents of Slater's affidavit. *See* R3 1421-22.

Jack Percy, Dailey had “no reason to take the victim to a deserted inlet for sex.” R2 10298. Dailey had his own room, with a door that locked.

Now, thirty-four years later, we learn that the State not only suppressed another confession by Jack Percy, but that the information obtained from Slater provides ***for the very first time*** a clear and direct motive for this murder – a motive that was Percy’s, and Percy’s alone. In fact, this motive is so particular to Jack Percy that it is utterly at odds with the theory at trial that James Dailey and Jack Percy somehow took turns stabbing the victim.

Irrespective of its admissibility, this powerful and long-suppressed evidence as to both the crime and its motive could undoubtedly have affected the outcome. Not only would it almost certainly have affected the State’s case for guilt, but there is of course a very real chance that if Dailey were tried again today, this evidence would be enough for one juror—and it would take only one—to recommend life rather than death. The lower court’s conclusion to the contrary was error.

3. The information provided by James Slater is credible.

The lower court likewise erred in concluding that Slater was not credible. According to the lower court, “Slater did not even reach the much-vaunted crucible of cross-examination before his testimony withered in court.” R3 1040. In fact, as the transcript makes clear, it was *during* the crucible of cross-examination that Slater’s credibility became clear. Indeed, perhaps the most important question of the

entire hearing was asked by Assistant State Attorney Glenn Martin during his cross-examination of Slater: “As you sit here today, are you absolutely positive that those statements were made to you?” R3 1455. Slater responded unequivocally: “***I am positive that those statements were made to me.***” R3 1456 (emphasis added). And there can be no misunderstanding regarding which statements they were referring to, because Mr. Martin had made that as clear as possible just moments before, when he engaged in the following exchange with Mr. Slater:

Q [Glenn Martin]: As you sit here today, do you recall whether or not what was read to you is exactly what was in the affidavit?

A: Yes, sir.

Q: Let’s talk about one of the paragraphs, paragraph 7, which is the subject matter of this particular hearing. Regarding the information in paragraph number 7 – and I’m gonna read it into the record. Law enforcement told me that Percy attempted to have sex with the victim but that Percy couldn’t perform. The victim began teasing Percy. Percy became irate and stabbed the victim.

R3 1454. As Slater testified, under oath, he was positive law enforcement imparted to him these particular statements about Percy attempting to have sex with the victim, not being able to perform, being teased by the victim, becoming irate and then stabbing her. When asked by Mr. Martin whether the information was “provided to you by the attorneys from Mr. Dailey or did you volunteer it?”, Slater was again clear and unambiguous: “My recollection is *I volunteered it.*” R3 1455 (emphasis added).

And the unimpeached testimony from Colin Kelly, the investigator from CCRC, made it still clearer that Slater had remembered this and volunteered it himself. Slater's recollection of these statements was immediate, particular, and certain. As Kelly testified, Slater recalled the Shelly Boggio case, provided information regarding his role in the case, and "remembered working on the case for a couple of months." R3 1462. Slater willingly drafted, reviewed, and read the affidavit, and "did partake of the creation of it." R3 1463, 1465, 1466. Moreover, Slater knew what he was signing (R3 1466), and made a copy of it (R3 1468-69). Kelly further testified that Slater changed the wording in the above-referenced statement in paragraph 7 of the affidavit: "Specifically law enforcement, I cannot recall what word we said before we wrote it down, but he said, No, law enforcement told me this." R3 1466.

Slater never waived in his testimony that law enforcement—a term he used to include members of the State Attorney's Office—told him that Percy attempted to have sex with the victim and could not perform. The fact that Slater cannot remember the name of the person who told him about this statement, some thirty-four years later, is not a reason to disbelieve his testimony:

- Q: Do you recall law enforcement telling you that Jack Percy attempted to have sex with the victim and could not perform?
- A: 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.

R3 1444-45.

As the lower court correctly noted, Slater indicated that in the weeks following his signing of the affidavit, he began to question whether his recollection was related to this case. R3 1037. What the lower court mentioned in passing, but omitted entirely from its analysis, with regard to Slater's sudden, supposed confusion about whether this was the correct case, is the troubling evidence that emerged regarding the State's group telephone call to Slater on the afternoon the lower court indicated that it would grant an evidentiary hearing for the sole purpose of considering Slater's testimony:

Q. Okay. Mr. Slater, have you spoken with anyone from the State since you met with defense counsel?

A. Yes.

Q: With whom did you speak?

A: To my recollection, Jim Hellickson, Glenn [Martin]. I believe Marie King was there, and I don't know the names of anybody else who was there.

Q: Was this in person?

A: No. No. It was a telephone call.

Q: Okay. When was that?

A: Either last Thursday or Friday. I believe it was the same day that the Court had granted this hearing, which I think was Friday. So I think that was it.

Q: And did you call them or did they call you?

A: They called me.

R3 1446-47.

That call took place on the afternoon of Friday, October 11, 2019, the same day that the lower court agreed to hold a hearing—a hearing it set it for the following

Monday, October 14, 2019. On Saturday, October 12, 2019, the day after the court set the hearing and the group of prosecutors reached out to Slater, defense counsel called Slater to inform him that a hearing had been set. Slater was asked about that telephone call at the evidentiary hearing and responded as follows:

Q: Do you recall telling [defense counsel] that you were no longer comfortable speaking to her alone?

A: Yes.

Q: Do you recall telling her that you felt tugged in two directions?

A: Yes.

Q: Do you recall telling her that you felt put in the middle?

A: I don't recall that.

R3 1448. In defense counsel's view, Slater's concomitant reluctance to connect his unambiguous recollection about the statements to this case was a direct result of prosecutors' telephone call to Slater, the one that left the witness feeling "tugged in two directions." To the extent that any portion of Slater's resulting testimony is unreliable, it is because he appeared to try and split the baby, acknowledging that he was told the statements, but suggesting that he was unsure about whether it was in the context of this case.

But of course, the suggestion that Slater got the statements right but the case wrong is ridiculous on its face. He was not mistaken about the case when he told Dailey's lawyer and investigator. Instead, when he was asked about this crime, he remembered the crime scene, and "had a general overall feeling that this is what the entire case was about." R3 1456. And it was. Slater knew exactly which case he was

talking about. To the extent that he hedged at the hearing, it was the direct result of pressure from members (and former members) of the State Attorney's Office.

The lower court erroneously concluded that Slater was not credible in his recollection of Percy's confession because law enforcement or the State would have used it at Percy's trial – if they had known about it. R3 1041. That is a two-fold presumption on the part of the lower court, neither of which Dailey had to prove.

First, the court presumed that the prosecutor who tried Percy's case knew about the confession, but chose not to use it. Beverly Andringa and Robert Heyman – not Slater – were the prosecutors at Jack Percy's trial. R2 4731-32. Dailey did not allege that either of those prosecutors knew about Percy's confession to law enforcement that was shared with Slater. It is reasonable to assume that they did not know this information, thus, that is why it was not used at Percy's trial.⁷

Second, even if Ms. Andringa and Mr. Heyman had known of this information there is a reasonable explanation as to why they chose not to reveal it at Percy's trial. The State was seeking the death penalty for both Dailey and Percy, who were tried separately, seven months apart. Percy was tried first; had Percy's confession been revealed, it would have been nearly impossible for the State to secure a

⁷ Just because Slater left the employment of the State Attorney's Office did not relieve the State of its *Brady* obligation as information known to law enforcement – as here when Slater left – is imputed to the prosecutor and is considered *Brady* material. *See Rogers v. State*, 782 So. 2d 373, 378 (Fla. 2001) (*Brady* encompasses evidence known only to police investigators and not to the prosecutor).

conviction, never mind a death sentence against Dailey. Nowhere in Percy's confession does he mention Dailey being present, let alone also stabbing the victim. Further, Percy's confession provides Percy – and Percy alone – with a motive for this crime. Revealing Percy's confession would have made securing a conviction and death sentence against Dailey harder, not easier, on the State.

Of course, the defense cannot now, in 2019, divine the reasons why the State failed to disclose this information. But the *Brady* standard does not call for divination. The State had relevant, material information in its possession and suppressed it. The witness, a former prosecutor, testified that he was absolutely sure the statements were made to him. That is the beginning and the end of the inquiry.

4. The information provided by James Slater was favorable/material.

There is no question that this powerful evidence of motive—a motive that was Percy's, and Percy's alone—was both favorable to Dailey and material under *Brady*. In assessing its materiality, moreover, a court must consider not only how the State's suppression of favorable information deprived Dailey of direct, relevant evidence, but also how it handicapped his ability to investigate or present other aspects of the case. *Rogers v. State*, 782 So. 2d 373, 385 (Fla. 2001) (“courts should consider not only how the State's suppression of favorable information deprived the defendant of direct relevant evidence but also how it handicapped the defendant's ability to investigate or present other aspects of the case.”). Even inadmissible hearsay, as

discussed above, can be material if it would have led the defense to discover additional impeaching evidence or if the withholding of evidence precluded the defendant from defending himself fully and fairly. *Mordenti v. State*, 894 So. 2d 161, 174 (Fla. 2004). The case law is very clear that “the evidence must be considered in the context of the entire record.” *Floyd v. State*, 902 So. 2d 775, 779 (Fla. 2005). “It is the net effect of the evidence that must be assessed.” *Hurst v. State*, 18 So. 3d 975, 989 (Fla. 2009); *see also Kyles v. Whitley*, 514 U.S. 419, 436 (“The . . . final aspect of . . . materiality to be stressed here is its definition in terms of suppressed evidence considered collectively not item by item.”).

In this case, that means starting at the beginning, with a case with no eyewitness evidence, no physical or forensic evidence, and where the State could offer no motive for why James Dailey would have committed this terrible crime.⁸ All of this evidence, or critical lack of evidence, is juxtaposed with a defendant who has steadfastly maintained his innocence for over three decades.

⁸ The State itself made this argument in its sentencing memorandum in Percy’s case:

...[N]o evidence exists that Percy was not the main actor in this child’s brutal murder. In fact evidence was brought out that Percy could not have brought the victim home for a sexual purpose as his pregnant girlfriend, Gail [sic] Bailey, shared his bedroom. Dailey [sic] however had his own room in the house and no reason to take the victim to a deserted inlet for sex.

R2 10298.

And then, some thirty-four years later, in 2019, two days after a death warrant was signed, the defense learns that the State not only suppressed still another confession by Jack Percy, but that this confession includes something no other confession has: the motive for the crime. As Slater stated, law enforcement told him that Jack Percy tried to have sex with the victim, could not perform, that the young girl then teased him, and that he became irate and stabbed her to death. R3 1455-57.

The information obtained from Slater provides *for the very first time* a clear and direct motive for this murder—a motive that was Percy’s alone. This motive was so particular to Jack Percy, in fact, that it is utterly at odds with the theory that James Dailey and Jack Percy somehow took turns stabbing the victim with the same knife. This information, therefore, is not only favorable evidence long suppressed by the State, but critical, damning evidence which establishes what James Dailey has said all along (and what Jack Percy has acknowledged at least four times), namely that **Jack Percy, not James Dailey, killed the victim.**

B. The lower court erred in denying an evidentiary hearing as to Edward Coleman’s testimony.

In denying an evidentiary hearing on this subclaim, the lower court concluded that Edward Coleman’s testimony was untimely and procedurally barred. R3 1038-39. Edward Coleman is a newly discovered witness and was unknown to Dailey or his counsel prior to 2019. R3 516. The lower court erred in prohibiting Dailey from calling him as a witness at the evidentiary hearing.

Since the lower court denied an evidentiary hearing on this subclaim, this Court must accept as true the defendant's factual allegations, to the extent they are not refuted by the record. *Nordelo v. State*, 93 So. 3d 178, 186 (Fla. 2012). The following factual allegations regarding Detective Halliday's visits to the Pinellas County Jail must therefore be accepted as true: (1) Halliday's request to Coleman to try and find specific information about Dailey's case; (2) Halliday showing Coleman newspaper articles about the case; (3) Halliday telling Coleman that Dailey's case was high profile and the State was under pressure to secure a conviction; and (4) Halliday's promise to reduce Coleman's charges if he would testify against Dailey. This is precisely the kind of evidence this Court has found relevant to the assessment of jailhouse informant testimony, in light of the fact that "informant witnesses . . . constitute the basis for many wrongful convictions." *In re Amend. To Rule of Crim. Proc. 3.220*, 140 So. 3d 538, 539 (Fla. 2014). This evidence, moreover, should have been considered in weighing the probability of an acquittal with respect to other newly discovered evidence and the *Brady/Giglio* evidence. The lower court erred in failing to consider it at all. "A postconviction court must even consider testimony that was previously excluded as procedurally barred or presented in another postconviction proceeding in determining if there is a probability of an acquittal." *Hildwin v. State*, 141 So. 3d 1178, 1184 (Fla. 2014); *see also Swafford v. State*, 125 So. 3d 760, 776 (Fla. 2013). In this capital case, where the defendant has always

maintained his innocence, the refusal to consider evidence powerfully undermining the jailhouse informant testimony essential to his conviction and death sentence cannot withstand scrutiny.

1. Edward Coleman's testimony is neither untimely nor procedurally barred.

The lower court found this claim to be untimely, concluding that this witness could have been found more than one year ago with due diligence. R3 1038-39. The court cites no authority, fact, or document to support this assertion that counsel for Dailey could have learned of this evidence previously. As stated in Coleman's affidavit, he did not disclose the information contained in the affidavit to Dailey or his counsel until September 29, 2019. R3 516. As required under Fla. R. Crim. P. 3.851(e)(2), Dailey presented this information within *nine days* of learning of it.

Dailey alleged in his motion that Coleman and the information he provided was newly discovered. R3 516. Since the lower court denied Dailey the opportunity to present Coleman at the evidentiary hearing to develop how and why he could not have been discovered earlier, this Court must accept as true the defendant's factual allegations. *Nordelo v. State*, 93 So. 3d 178, 186 (Fla. 2012). The lower court cannot deny Dailey the opportunity to prove this fact while simultaneously faulting him for not doing so.

2. Edward Coleman’s testimony would probably affect the outcome of the trial under *Jones*.

The lower court erroneously found that Coleman’s testimony was weak because he did not testify that he saw any of the “snitches who testified in this trial” nor did he allege “that he saw Detective Halliday question or offer the same deal to the snitches who testified at trial.” R3 1043. The lower court concluded therefore, that Coleman’s testimony would be “weak impeachment testimony.” *Id.* In so holding, the lower court misapprehended, and incorrectly applied, the *Jones* standard, such that it failed to weigh the totality of the evidence in Dailey’s case. The court erred in weighing Coleman’s testimony in a vacuum.

Jones requires that the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial. *Jones I*, 591 So. 2d at 915. In conducting this analysis, courts “must evaluate all the admissible newly discovered evidence at this hearing in conjunction with newly discovered evidence at the prior evidentiary hearing and then compare it with the evidence that was introduced at trial.” *Jones III*, 709 So. 2d at 522. “The trial court cannot consider each piece of evidence in a vacuum, but must look at the total picture of all the evidence when making its decision.” *Lightbourne v. State*, 742 So. 2d 238, 247 (Fla. 1999).

The lower court did not conduct the required cumulative analysis. Instead, it solely reviewed Coleman’s testimony, separate and apart from the other corroborating evidence, and concluded that it alone would not produce an acquittal at retrial. This is

error and subject to *de novo* review by this Court.

Specifically, the lower court failed to consider the cumulative effect of James Wright, Travis Smith, Michael Sorrentino, and Edward Coleman's testimony. What the testimony of these four men shows, and Coleman's in particular, is the lengths that the State was willing to go in order to secure testimony, no matter how unreliable, against Dailey.

In the thirteen months between Dailey's arrest and Percy's conviction, not a single inmate came forward with information implicating Dailey in Shelly's murder. TR1 9:1191. It was only after Percy was given a life sentence (not the death penalty urged by the State), and after Detective Halliday interviewed at least fifteen inmates at the jail, specifically to "find witnesses against [Dailey]," (TR1 9:1191), that jailhouse informants who testified at trial, James Leitner and Pablo DeJesus, suddenly emerged with information allegedly implicating the one defendant against whom the State still had a chance of achieving a death sentence in this high profile case.

By pulling everyone from the pod and making it a well-known fact that he was looking for witnesses against James Dailey, and making promises to help inmates with their own charges, Halliday in effect chummed the waters of the Pinellas County Jail. He then got exactly what he wanted, informants who "rush[ed] to testify . . . like sharks

to blood.”⁹

DeJesus and Leitner were critical state witnesses at Dailey’s trial. Because there was absolutely no physical evidence connecting Dailey to the crime scene, and because not a single witness could place Dailey alone with Shelly (or alone with Shelly and Percy) on the night in question, DeJesus and Leitner’s claims that Dailey had confessed to them were essential to a conviction. DeJesus alleged that Dailey had spoken with him about his case in the law library and said he was “the one that killed the girl. I’m the one that did it.” TR1 9:1095. Leitner similarly testified that he had spoken with Dailey in the law library and that Dailey allegedly said he was the “one that did it.” TR1 8:1066.

⁹ H. Patrick Furman, *Wrongful Convictions and the Accuracy of the Criminal Justice System*, 32 Colo. Law. 11, 21 (2003) (“Jailhouse informants comprise the most deceitful and deceptive groups of witnesses known to frequent the courts. The more notorious the case, the greater the number of prospective informants. They rush to testify like vultures to rotting flesh or sharks to blood. They are smooth and convincing liars. Whether they will seek favors from the authorities, attention or notoriety they are in every instance completely unreliable. It will be seen how frequently they have been a major factor in the conviction of innocent people and how much they tend to corrupt the administration of justice. Usually their presence as witnesses signals the end of any hope of providing a fair trial.”) (internal citations omitted). *See also* Rep’t of the 1989-1990 Los Angeles Grand Jury at 11-12, 31 (“The myriad benefits and favored treatment which are potentially available to informants are compelling incentives for them to offer testimony and also a strong motivation to fabricate, when necessary, in order to provide such testimony. . . . The more sophisticated may attribute their willingness to testify . . . to other motives, such as their repugnance toward the particular crime charged Nevertheless, in the vast majority of cases it is a benefit, real or perceived, . . . that motivates the cooperation. . . . [I]nformants have demonstrated [an] astonishing ability to discover information about crime in order to concoct a confession.”).

Dailey has categorically denied making these statements to DeJesus and Leitner. PC ROA 3:326-27.

Edward Coleman's testimony, in conjunction with the testimony of James Wright, Travis Smith, and Michael Sorrentino, established that following Halliday's visit to the jail, there was reason for inmates to believe that they could benefit by testifying against James Dailey. Coleman's testimony provided for the very first time direct proof that Halliday was promising to reduce inmates' charges if they provided him with the information he was seeking. In fact, according to Coleman, Halliday went so far as to tell Coleman what specific pieces of information the State needed in this "high profile" case where there was "pressure to get a conviction." R3 516; 564-65.

By Halliday's own admission at Dailey's trial, his visit to the jail made it a well-known fact that he was looking for informants to testify against Dailey.¹⁰ It was common knowledge amongst inmates at the time that the State would offer deals in exchange for testimony. R2 12088. The testimony of Wright, Smith, Sorrentino, and now Coleman proves that DeJesus and Leitner apparently saw an opportunity to help

¹⁰ At Dailey's capital trial, Halliday testified:

Q: If you were going to a cell, pull people out of the pod, that's a well-known fact you were looking for witnesses against James Dailey.

A: At that time, yes.

TR1 9:1194.

themselves at Dailey's expense. And sure enough, both DeJesus and Leitner testified that they first obtained incriminating statements from Dailey in December – the very same month that Halliday made it known that he was looking for informants. This was also after DeJesus and Leitner had already spoken to Jack Percy about the case. TR1 8:1017-19 & 9:1085-86.

Coleman's testimony is material because it establishes that the testimony of DeJesus and Leitner is utterly unreliable. The evidence demonstrates that law enforcement went to extraordinary lengths to enlist the assistance of jailhouse informants in this case. As Halliday himself previously acknowledged, nearly every person in the jail, even in an ordinary case, has a "motive to try to get out or lessen their sentence or do whatever. And I'm sure there are people that do that by reading the newspaper, saying they talked to someone and that is what they had to say." R2 9742. This was all the more true in Dailey's case, where inmates, having caught word that the State was desperate for help, could easily "refresh" their recollections regarding what Dailey "told" them from media sources like newspapers such as the ones Wright, Smith, and Sorrentino testified were spread out – by the lead detective in the case – on a table in front of them.

The testimony of DeJesus and Leitner, which was central to the State's case against Dailey, when considered in light of the testimony of Wright, Smith, Sorrentino and now Coleman, is unworthy of belief. Coleman's testimony so "weakens the case

against [the defendant] so as to give rise to a reasonable doubt as to his culpability.”

Jones II, 678 So. 2d at 315.

3. Edward Coleman’s statements satisfies the *Giglio* standard.

The lower court erroneously found that Dailey did not allege sufficient information based on Coleman’s statements to satisfy the *Giglio* standard. R3 1043-44. This finding is erroneous because the information that Coleman was prepared to testify to, which is clearly explained on page 24 of Dailey’s Motion (R3 519), is the same type of evidence at issue in *Giglio*. In *Giglio*, “the Government failed to disclose impeachment evidence...that is, a promise made to the key Government witness that he would not be prosecuted if he testified for the Government.” *United States v. Bagley*, 473 U.S. 667, 676-77 (1985). In *U.S. v. Ruiz*, the Supreme Court summarized *Giglio*’s as holding “exculpatory evidence includes evidence affecting witness credibility, where the witness’ reliability is likely determinative of guilt or innocence.” 536 U.S. 622, 628 (2002). As in *Giglio*, the State in this case failed to disclose impeachment evidence regarding the State’s key witnesses, James Leitner, Pablo DeJesus, Paul Skalnik, and John Halliday.

As stated in Dailey’s motion, Coleman was prepared to testify that Detective Halliday told inmates that: (1) the State was looking for information against James Dailey; (2) the State’s case was weak and, as a result, they were eager for certain key pieces of information in this high-profile murder; (3) the State was willing to

offer plea deals in exchange for this information; and (4) Halliday brought newspapers into the Pinellas County Jail about this case and showed these articles to inmates. R3 516; 564-65.

In the absence of any eyewitness, physical, or forensic evidence implicating Dailey, this information was critical, as the State's case rested almost entirely on the testimony of Leiter, DeJesus and Skalnik. Coleman's statements that the State told inmates what specific information it was seeking in exchange for plea deals, and then disclosed that very information by way of newspaper articles, would have seriously undermined the credibility of the three witnesses whose testimony provided principal support for finding Dailey guilty. *See, e.g., Banks*, 540 U.S. at 700-03; *Giglio v. United States*, 405 U.S. 150, 154-55 (1972). The jury, who would not only decide Dailey's guilt but was also charged with the solemn duty of recommending life or death, was entitled to know it. *See Giglio v. United States*, 405 U.S. 150, 154-55 (1972).

C. The lower court erred in denying an evidentiary hearing as to Michael Howsare's statements.

Former Corrections Officer David Howsare, who worked at the Pinellas County Jail during the mid-to-late-1980s, was prepared to testify that he knew Jack Percy while Percy was incarcerated in the Pinellas County Jail. R3 516-17; 567-68. Officer Howsare stated in his sworn affidavit that Percy was known by him and the other guards to be manipulative – of both the other inmates and jail staff. R3 566-

68. Officer Howsare stated that the guards used Percy as an example of inmate behavior to look out for; they knew to be cautious around him because he would engage in physical altercations or try to secure favors from them. R3 566-68.

The lower court denied this claim, finding that it was untimely. Order at 15. Even assuming the evidence is procedurally barred, the lower court was still required to consider it when evaluating the weight of the other newly discovered evidence. The evidence related to Dailey's other claims regarding Percy's manipulative and controlling behavior and proclivity towards violence – in contrast to Dailey who was housed in the non-violent wing of the county jail (TR1 8:1020) – and this evidence is necessary in order to evaluate whether a new trial probably would result in an acquittal.

Lastly, because the lower court denied an evidentiary hearing on this subclaim, this Court must accept as true the defendant's factual allegations, to the extent they are not refuted by the record. *Nordelo v. State*, 93 So. 3d 178, 186 (Fla. 2012). This evidence should have been considered in weighing the probability of an acquittal with respect to other newly discovered evidence. The lower court erred in failing to consider it. "A postconviction court must even consider testimony that was previously excluded as procedurally barred or presented in another postconviction proceeding in determining if there is a probability of an acquittal." *Hildwin v. State*,

141 So. 3d 1178, 1184 (Fla. 2014); *see also Swafford v. State*, 125 So. 3d 760, 776 (Fla. 2013).

D. The lower court erred in failing to conduct a cumulative analysis.

In determining whether Dailey has satisfied his burden under the *Jones* newly discovered evidence standard, the lower court was required to look at the claim through the lens of the entire record—not simply what was put before the court at the evidentiary hearing. *Hildwin v. State*, 141 So. 3d 1178, 1184 (Fla. 2014) (holding that, in evaluating newly discovered evidence, courts must “conduct a cumulative analysis of all the evidence so that there is a ‘total picture’ of the case and ‘all the circumstances of the case’ . . . a postconviction court must even consider testimony that was previously excluded as procedurally barred or presented in another postconviction proceeding in determining if there is a probability of an acquittal.”); *Lightbourne v. State*, 742 So. 2d 238, 247 (Fla. 1999) (“In this case the trial court concluded that [a witness’s] recanted testimony would not probably produce a different result on retrial. In making this determination, the trial court did not consider [another witness’s] testimony, which it had concluded was procedurally barred, and did not consider [the testimony of a third witness] from a prior proceeding. *The trial court cannot consider each piece of evidence in a vacuum, but must look at the total picture of all the evidence when making its decision.*”).

Similarly, when evaluating whether Dailey satisfied the *Brady* criteria, the lower court was likewise compelled to look at the record as a whole. *Floyd v. State*, 902 So. 2d 775, 779 (Fla. 2005) (“In applying the *Brady* criteria, “the evidence must be considered in the context of the entire record.”); *Way v. State*, 760 So. 2d 903, 913 (Fla. 2000) (“The cumulative effect of the suppressed evidence must be considered when determining materiality.”); *Kyles v. Whitley*, 514 U.S. 419, 436 (“The . . . final aspect of . . . materiality to be stressed here is its definition in terms of suppressed evidence considered collectively not item by item.”).

Had the lower court looked cumulatively at the evidence, examining “the total picture,” the materiality of the suppressed evidence would have been apparent. In this case, a consideration of “all the circumstances of the case,” including testimony that was previously excluded as procedurally barred or presented in a prior postconviction proceeding, demonstrate a probability of an acquittal, or of a sentence other than death, for Dailey.

First, in weighing Slater’s testimony, the lower court was required to consider the witness’s motive, or lack thereof, in testifying. Slater is a former prosecutor and an officer of the court. Slater testified that, as an attorney, he understood what an affidavit was and that he was signing it under penalty of perjury. R3 1434. Slater is not a lay witness who failed to grasp the significance of what he was signing or disclosing to defense counsel. Nor can it be credibly argued that Slater did not

understand the importance of his sworn testimony in court wherein he affirmed on cross-examination that the statements in the affidavit were volunteered by him, and not supplied to him by the defense, as the cross-examiner appeared to suggest. R3 1454-55 (“Q: Was [this information] provided to you by the attorneys [for] Mr. Dailey or did you volunteer it? A: My recollection is I volunteered it.”).

Relatedly, the lower court should have taken into account how Slater’s testimony, regarding the statements that formed the crux of the argument/hearing, were very specific – which lends credence to its truthfulness. More importantly, the statements spoke directly to motive – the *why* at the heart of this case. Slater was clear that the statements made to him were this: (1) it was Percy who tried to have sex with the victim; (2) it was Percy who could not perform sexually; (3) it was Percy who became irate; and (4) it was Percy who reacted by stabbing the victim. R3 1454-57.

Second, had the lower court taken a step back to consider the total picture of the case, it would have found that Slater’s testimony is powerfully corroborated by Percy’s four other confessions: (1) before trial while incarcerated at the Pinellas County Jail, Percy confessed to killing the victim and admitted that Dailey was not present; (2) in the 1990’s at Union Correctional Institution Percy confessed to being solely responsible for the victim’s death; (3) about ten years later Percy reiterated

this same confession to Juan Banda at Jackson Correctional; and (4) in 2017 Percy again confessed in a sworn affidavit.

Third, Slater's testimony fits with a cumulative review of the evidence. A review of the evidence gathered pre-trial, during trial, and in post-conviction shows that it was Percy who knew the victim prior to the murder (R2 305, 11862-63); who was warned by the victim's father warned to stay away from his daughter (R2 11863); whom the State argued to the jury was friends with the victim and whom the victim trusted enough to get in the car (R2 11505); who was dancing with the victim against the wishes of his pregnant girlfriend (TR1 8:380-81; R2 11859); who was left alone with the victim and was later seen alone with her at a bar less than a mile from the crime scene (R2 11712); and – most importantly – it was Percy who had a significant history of violence, specifically violence against women (R2 9753-9923).

This was a brutal crime with multiple stab wounds, including defensive wounds, indicating a level of rage. Very few people have what it takes to commit this kind of crime. The record in this case makes it clear that Percy had what it took. Percy has a documented history consistent with this type of behavior (R2 9753-9923). First, in Missouri, he was a participant in a murder-for-hire case and, according to his own testimony, he agreed to kill someone, in cold blood, for money. *See State v. Stith*, 660 S.W.2d 419 (Mo. Ct. App. 1983) and *State v. Danforth*, 654

S.W.2d 912 (Mo. Ct. App. 1983). Then, in Kansas, Percy was charged with numerous violent assaults, including, *inter alia*, terroristic threats and rape (R2 9753-9923). Uncontrolled rage was a running theme in Percy's criminal history – a pattern of becoming, in words the defense heard for the first time some thirty-four years too late, *irate*.

Dailey, on the contrary, has no prior history of violence against women. He has one prior conviction resulting from a bar fight years earlier. TR1 2:234; 11:1376.

In refusing to conduct a cumulative review, the lower court failed to take into account how the events leading up to the victim's murder also point directly to Jack Percy. The record demonstrates that Percy drove the victim to a bar shortly before she was killed. The car – which belonged to his pregnant, jealous girlfriend – got stuck in the sand and Percy could not push it out. R2 11146. Shelly then went into the bar, where she was noticed because she looked disheveled and (against bar policy) had no shoes on. R2 107. She asked for help getting the car out of the sand (R2 11712). Percy told law enforcement that witnesses to this event mocked him. R2 11146.

Now, for the first time, in 2019, the record is clear that the embarrassment of that incident was magnified when Percy “could not perform” when he tried to have sex with Shelly in a secluded inlet not far from the bar.

Jack Percy, given to rages resulting in terroristic threats and violence against women, could not do what he had been waiting to do all night, and was laughed at for it. A young girl teased him because he could not perform. And this made him so angry that he stabbed her with the knife *he* owned and kept in *his* car. And that is where the story begins and ends – with a puzzle piece Dailey’s defense only learned about in 2019.

That puzzle piece is proof that someone did lose it that night, but contrary to the false testimony of James Leitner, it was not James Dailey. It was Jack Percy. James Dailey was not there. ***James Dailey is, as he has always maintained, innocent. Jack Percy is, as he has repeatedly confessed, solely responsible.***

An admission by a prosecutor assigned to the case that he knew the real motive all along – a motive that belonged to the perpetrator who repeatedly has confessed to sole responsibility for the crime – leaves no doubt that there would have been a different outcome at trial had the jury heard that evidence.

Finally, this evidence must also be viewed in the context of all of the other errors made in this case. This Court found at least six errors on direct appeal, but deemed them “harmless” as to guilt phase. *Dailey v. State*, 594 So. 2d 254, 256 (Fla. 1991). The Court found additional errors in the penalty phase, and overturned Mr. Dailey sentence. *Id.* at 259. The fact that no jury heard this newly discovered information about Percy’s motive and, at a minimum, six serious errors were made

during trial, alone satisfies the burden that there is a reasonable probability of a different outcome. This meets the newly discovered evidence standard, as well as the *Brady* materiality standard.

In the face of all of the overwhelming evidence of Percy's guilt, the State asked the lower court, as it asks this Court, to send James Dailey to his death – in seventeen days – based on a pair of wet pants. The State does not want this Court to consider the very real likelihood that Jack Percy summoned James Dailey out that night, telling him he wanted to talk and play Frisbee, after he had committed the murder alone, because he wanted to set Dailey up. Percy tossed the Frisbee into the water, and Dailey retrieved it, getting his pants wet. Percy convinced Dailey to leave town, hoping that the victim's body would not be discovered for a while and he could say she had run off with his friend. Percy knew about shifting the blame. He had done it before, in Missouri, when he agreed to kill someone for money. When he was arrested in that case, he turned on the person who hired him, even though his codefendant had asked, "Maybe Percy snuck back and done it?" *See State v. Stith*, 660 S.W.2d 419, 422 (Mo. Ct. App. 1983). As the defense learned in postconviction through correctional officer David Howsare, Percy stood out for his manipulateness and connivance, even among others accused of all sorts of crimes. R3 567-68. Looking at the evidence cumulatively, it is hard to understand how a man could be executed on wet pants alone.

In the place of reliable evidence, the State elects to hold up the testimony of the three jailhouse informants, who are simply not credible. Looking at the evidence as a whole, it is clear that the jailhouse informant testimony in this case is utterly unworthy of belief. The jailhouse informants were given significant plea deals in exchange for their testimony, they testified to no fact-specific information, and their testimony did not come to light until after Detective Halliday started showing newspaper articles to inmates in the county jail. As for Paul Skalnik, even the trial prosecutor, Beverly (Andrews) Andringa, swore under penalty of perjury that he is not believable and she would never use him again. R2 10283.

In refusing to conduct a cumulative review of the evidence below, the lower court failed to consider how the newly discovered testimony of Coleman added more to the jailhouse informant picture. His statement is the first to specifically speak to Halliday's suggestion of a kind of quid pro quo – benefits in exchange for testimony. He is also the *fifth* person to come forward and say that Halliday brought newspapers to the jail. Like the others before him, he had no reason to lie. He – unlike Skalnik, Leitner, and DeJesus – certainly got no benefit from it.

The lower court's decision gives credibility to the jailhouse informants, who were given favors, over all of the other evidence, including: the testimony of a former prosecutor that he is positive that he was told Percy's motive for the murder by law enforcement; the FBI forensic results that show Dailey is not a match to the

physical evidence; Percy's own friend, Oza Shaw, who testified that Percy left the house alone with Shelly; *and* the victim's friend, Deborah North, who also saw Jack Percy alone with the victim, near the crime scene, around the time of her death. This is the absurd result reached when a court refuses to conduct a meaningful cumulative review of *all* of the evidence before it.

The total picture of this case is perhaps most clearly painted by Jack Percy himself, in his repeated confessions. This Court previously refused to consider Percy's 2017 affidavit because "questions about the truthfulness of the affidavit arose when Percy testified that its contents were false" and because he made himself "unavailable for cross-examination." Slip Op. at 8. The transcript of Percy's testimony, however, shows that both of these points are incorrect.

While Percy stated generally that some of the affidavit was false, when asked specifically *what* was false, Percy refused to answer and invoked the Fifth Amendment. Percy never denied, nor purported to deny, the paragraph in which he claims sole responsibility for Shelly Boggio's death. And in any event, because he refused to answer specific questions, whatever general averment Percy made earlier cannot be considered. *See Victorino v. State*, 127 So. 3d 478, 488-89 (Fla. 2013) (internal quotations omitted) (if a witness refuses to answer certain questions "the remedy is to strike the witness' testimony"); *Sule v. State*, 968 So. 2d 99, 105-06 (Fla. 4th DCA 2007) (holding that the trial court correctly excluded a witness's

testimony because the witness sought to invoke his Fifth Amendment privilege on material issues that would have prevented full and fair cross-examination).

The State cannot explain why Percy has repeatedly confessed – but it continues to ask every court to disbelieve him. The State cannot explain why a former prosecutor would swear, under penalty of perjury, as an officer of the court, that he “absolutely” learned of Percy’s motive from law enforcement – but it continues to ask every court to disbelieve him. Everyone understands – and no one better than the State – why these jailhouse informants lied – yet the State continues to ask every court to believe *them*.

There is no question that a jury presented with all of this evidence, including the missing piece at the center of this puzzle, would have every reason to doubt the State’s case for guilt – and, separately – its case for death as to Mr. Dailey. If Jack Percy’s jury in 1986 could recommend life, there is no reason to believe that in 2019, given all that we know, a jury would unanimously recommend death for James Dailey. That is the only reasonable conclusion one can draw from a cumulative review of all of the evidence before this Court, and it is the opposite conclusion the lower court reached.

There is only one reasonable conclusion one can draw from the total picture. James Dailey is innocent.

ARGUMENT III: Dailey Has A Constitutional Right To Have His Designated Legal Witness Be Allowed Access To Writing Materials, Two Attorneys Present During His Execution, Attorney Access To A Phone During The Execution, And A Witness Observe The Insertion Of The IV Line That Will Be Used To Administer The Lethal Drugs.

In his postconviction motion filed after the death warrant was signed, Dailey made specific requests of and for defense witnesses to his execution. Dailey requested that: (1) Dailey's designated legal witness(es) be allowed access to writing materials during his execution; (2) Dailey's designated legal witness(es) be allowed access to a telephone before and during the execution process; (3) Dailey be afforded a second witness to his execution; and (4) one of Dailey's witnesses be allowed to view the IV insertion process. Dailey has also made these same requests directly to the Florida Department of Corrections ("DOC").

These requests have been denied by the circuit court and thus far ignored by DOC. The refusal of these requests amounts to a denial of due process and access to the courts preventing Dailey and other similarly situated inmates from raising and proving the claim that Florida's execution procedures violate the Eighth Amendment. The refusal of these requests denies Dailey a fair opportunity to protect his Eighth Amendment rights because it deprives him of the necessary information and access to challenge whether his execution is constitutional. As such, he is being denied a "basic ingredient of due process – an opportunity to be allowed to

substantiate a claim before it is rejected.” *See Ford v. Wainwright*, 477 U.S. 399 (1986) (plurality opinion) (internal quotation marks omitted).

Execution is a critical stage of the proceedings. The right to counsel and the right to be free from cruel and unusual punishment will be meaningless if Dailey’s sole legal advocate present at the execution has no ability to advise the courts if his execution is being carried out in a cruel and unusual manner.

In other states where lethal injection executions have gone awry, those states have taken steps to increase transparency and attorney access.¹¹ This should be done in Florida. Further, to ensure adequate access to the courts, it is necessary to have at least two attorneys present at the viewing – one who can access a phone, and one who can continue to monitor the execution should phone access be necessary. Preventing witnessing counsel from adequate phone access – indeed, any phone

¹¹ In Ohio, for example, DOC increased the number of witnesses to allow for two attorneys to be present, made a phone available just outside the witness room, required photos of the drug packages and provided after the execution, and instituted checklists and an incident command system. *See* <https://files.deathpenaltyinfo.org/legacy/files/pdf/ExecutionProtocols/OhioProtocol10.07.2016.pdf>. Further, in Arizona, after the botched execution of Joseph Wood in 2014, the State agreed to allow witnesses to the execution to see, via video, the prisoner being strapped to the gurney, and later, by court order, the witnesses now will hear the entire execution process and see the syringes being pushed via video. *See* <https://www.latimes.com/opinion/opinion-la/la-ol-arizonaexecutions-midazolam-20161223-story.html>. Lastly, in Alabama, the defendant is allowed up to six witnesses to view the execution. *See* <https://files.deathpenaltyinfo.org/documents/AL-Execution-Protocol-April-2019.pdf>

access – during the execution, violates Dailey’s right of access to the courts. By refusing to allow a member of Dailey’s legal team to witness the IV insertion process, DOC is actively preventing Dailey from bringing an Eighth Amendment challenge that would arise after the execution process has begun yet prior to the flow of lethal chemicals that will cause death. Such a violation would serve as a basis for a stay of execution. If DOC has difficulty in achieving venous access, and it either takes an unusually long time with multiple attempts to locate a vein, and/or requires a painful cut-down procedure to be used, Dailey will have no way of communicating his pain and suffering to his counsel, in violation of both the Sixth and Eighth Amendment to the United States Constitution and corresponding provisions of the Florida Constitution.

ARGUMENT IV: Dailey Has Been Denied His Due Process And Equal Protection Rights Under The Eighth And Fourteenth Amendments To The United States Constitution And The Corresponding Provisions Of The Florida Constitution, As Access To The Files And Public Records Pertaining To His Case – In The Possession Of Various State Agencies – Which Similarly Situated Individuals Are Able To Access, Have Been Withheld From Him In Violation Of Chapter 119 Fla. Stat. And Rule 3.852 Fla. R. Crim. P.

Dailey timely requested public records directly related to his pending death warrant from various state agencies¹² pursuant to Florida Rule of Criminal Procedure

¹² Dailey filed records demands to the State Attorney’s Office (SAO), the Florida Department of Law Enforcement (FDLE), the Florida Department of Corrections (DOC), the Office of Medical Examiner for the Eighth District (ME8), the Florida Commission on Offender Review (FCOR), the Pinellas County Sheriff’s

3.852 (h) and (i) (“the Rule”) on October 2, 2019. In denying **every single records request** to which the agencies objected, the circuit court held that the Rule is “intended to provide for an update of information previously received or requested and does not allow defendants to delay public records requests until a warrant is signed.” *See* R3 589, Order on 3.852(H) and 3.852(I) Public Records Demands, dated October 4, 2019. The circuit court also held that the records demands must show “how the records relate to a colorable claim for post-conviction relief and good cause as to why the records request was not made until after the death warrant was signed.” *See* R3 591, *citing Muhammad v. State*, 132 So. 3d 176, 202 (Fla. 2013).

Dailey asserts that each of his demands was related to the subject matter of his postconviction claims and/or was reasonably calculated to lead to the discovery of admissible evidence corroborating claims raised therein. The circuit court erred in holding otherwise. Dailey clearly explained in each records demand, and again at the records hearing held on October 4, 2019, the precise reason for each request and articulated clearly to the court what the anticipated nature of admissible evidence to be discovered was. Nevertheless, the circuit court denied each of the eight (8) records demands filed on October 4, 2019. Dailey sought reconsideration as to two of the

Office (PCSO), the Office of the Attorney General (AGO), and the Office of the Governor (Governor).

agencies¹³ on October 7, 2019, which were denied on October 8, 2019. R3 3603-607. Dailey sought reconsideration regarding three agencies¹⁴ on October 11, 2019, and these were denied on October 16, 2019.¹⁵ R3 836-38.

Further, the circuit court erred in finding that Dailey's records demands to the agencies should have been filed prior to the signing of his death warrant. Dailey clearly explained to the circuit court at the records hearing precisely why the demands were not made until the warrant was signed. Unlike every other natural person or corporation in the world – including Jack Percy, Dailey's codefendant who has also been convicted of the very same crime, but sentenced to life instead of death – Dailey belongs to a unique class of individuals¹⁶ prohibited from obtaining

¹³ Dailey sought reconsideration for a limited number of requests contained in the records demand to the Office of the Medical Examiner for the Eighth District and the State Attorney's Office. *See* R3 450-80.

¹⁴ Dailey sought reconsideration of the records demands addressed to the State Attorney's Office, Attorney General's Office, and the Florida Department of Corrections. *See* R3 710-814.

¹⁵ These requests sought documents that were not requested in the original demand filed on October 1, 2019, as Dailey has reason had no reason to believe they existed at that time, and to the extent that they did, it was impossible for him to have knowledge of the documents. Nevertheless, the circuit court denied the requests, in part, based on being untimely filed after the October 1, 2019 deadline. *See* R3 836-38. This is set out more fully in Dailey's October 11, 2019 Motions for Rehearing and the Court's Order denying access to such records. *See* R3 710-814 and R3 836-38.

¹⁶ That is, all death-sentenced individuals in the State of Florida. *See* Fla. R. Crim. P. 3.852(a)(1) ("This rule is applicable only to the production of public records for capital postconviction defendants ...").

public records pursuant to the broad “Sunshine laws” Florida has enacted under Chapter 119, Florida Statutes. Instead, as a death-sentenced individual, Dailey is required to engage in an impossible endeavor of requesting records from various state agencies at precisely the correct time, and his requests are subject to the objections of the agencies, unlike requests made pursuant to Chapter 119. *See Fla. R. Crim. P. 3.852 (c)(1); (g)(3).*

Specifically, under Fla. R. Crim. P. 3.852(i), the subsection that governs requests for additional public records from an agency in a capital post-conviction case, the Defendant must assert that the public records sought are “relevant to the subject matter of a proceeding under rule 3.851, or appear reasonably calculated to lead to the discovery of admissible evidence.” *See Fla. R. Crim. P. 3.852 (i)(1)(C).* Accordingly, any requests for information regarding lethal injection protocol, clemency selection process, death warrant selection process, execution chamber access documents, denial of clemency, or – in Dailey’s case – information relevant to the denial of his Florida Supreme Court appeal, would be denied as not relevant to a pending proceeding, as any claim by an individual not under an active death warrant would not be ripe.

However, once a death warrant is signed for an individual, the Rule provides that his counsel may only request records from an agency if the following is true: 1) that agency is one from which counsel has already requested *other* public records;

and 2) that the now-requested records were not previously the subject of an objection. Fla. R. Crim. P. 3.852(h). Therefore, to obtain information regarding lethal injection protocol, clemency selection process, death warrant selection process, execution chamber access documents, and/or other warrant-related claims, the Defendant must have asked for *some* records but not *these* records from each agency. This means that if a Defendant complied with subsection (i) by asking *before* his warrant is signed, he risks an objection by the agency and a denial by the court as the request is not yet ripe. If this occurs, the Defendant is later precluded from requesting these documents again under (h), after his warrant is signed when the records would be timely. However, if the Defendant does *not* ask early, under (i) – to avoid the objection which would preclude him from later asking under (h) – and only asks pursuant to (h) once under warrant, he must answer for why he did not previously ask for these records and contend with accusations from the State and courts that the Defendant has engaged in undue delay.

Further, subsection (h) of the Rule specifically precludes the Defendant from *ever* obtaining records from certain agencies, such as the Office of the Medical Examiner for the Eighth District, from whom the Defendant has absolutely no other pertinent public records to request than those relevant to lethal injection, which does not become ripe until a warrant has been signed.

This is the Catch-22 that a capital post-conviction defendant, but not any other person or corporation, finds himself in while litigating under warrant. To the extent that Rule 3.852 prohibits Dailey from obtaining public records to which he would otherwise be entitled, Dailey asserts that the Rule violates his Equal Protection and Due Process Rights under the Fourteenth Amendment of the United States Constitution and the corresponding provisions of the Florida Constitution.

Postconviction litigation is governed by principles of due process. *Easter v. Endell*, 37 F.3d 1343 (8th Cir. 1994); *Holland v. State*, 503 So. 2d 1250 (Fla. 1987). Dailey has been denied due process and access to public records, *i.e.* records that any that any other natural person or corporation in the world is entitled to view. Dailey has a need for these records that the rest of the public does not have: they are relevant to and necessary for the presentation of his constitutional challenge to his conviction and sentence, as well as to Florida's lethal injection protocol. *See e.g. Glossip v. Gross*, 135 S. Ct. 1885 (2015).

Dailey must be given a fair opportunity to show that his conviction and sentence were subject to serious errors as a result of misconduct on the part of law enforcement and the prosecution, and to show that his execution will violate the Eighth and Fourteenth Amendments of the United States Constitution and the corresponding provisions of the Florida Constitution. *Hall v. Florida*, 134 S. Ct. 1986, 2001 (2014) (“The death penalty is the gravest sentence our society may

impose. Persons facing that most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution.”). For Dailey to have that fair opportunity, he must be provided the records requested from the State Attorney’s Office; the Florida Department of Law Enforcement; the Florida Department of Corrections; the Office of Medical Examiner for the Eighth District; the Florida Commission on Offender Review; the Pinellas County Sheriff’s Office; the Office of the Attorney General; and the Office of the Governor.

ARGUMENT V: Execution, when added to the thirty-two years that Dailey has spent on death row, constitutes cruel and unusual punishment under the Eighth Amendment to the United States Constitution and violates the precepts of *Lackey*.

Dailey is set to be executed after spending the last thirty-two years in solitary confinement, in a six by nine cell, with no air conditioning, with minimal time allowed out of that cell. The unnecessary and gratuitous psychological pain caused by spending over thirty years on death row amounts to a far more serious punishment than the death sentence imposed in August 1987, and rises to the level of cruel and unusual punishment under the Eighth Amendment and corresponding provision of the Florida Constitution. *See* U.S. CONST. amend. VIII and FLA. CONST. art. I, § 17. Confinement in a prison or isolation cell is a form of punishment subject to scrutiny under the Eighth Amendment. *See Hutto v. Finney*, 473 U.S. 678, 685 (1978). Moreover, “[t]hese facilities and procedures were not designed and should not be used to maintain prisoners for years and years.” *Swafford v. State*, 679 So. 2d

736, 744, n.8 (Fla. 1996) (Wells, J., concurring in part and dissenting in part) (citations omitted).

The Eighth Amendment requires that “the sanction imposed cannot be so totally without penological justification that it results in the gratuitous infliction of suffering.” *Gregg v. Georgia*, 428 U.S. 153, 183 (1976). Punishments that entail exposure to a risk that “serves no ‘legitimate penological objective’” and that result in gratuitous infliction of suffering violate the Eighth Amendment. *Farmer v. Brennan*, 511 U.S. 825, 833 (1994) (quoting *Hudson v. Palmer*, 468 U.S. 517, 548 (1984)) (Stevens, J., concurring in part and dissenting in part). Justices Stevens and Breyer expressed concerns regarding the length of time prisoners spent on death row prior to execution:

The cruelty of capital punishment lies not only in the execution itself and the pain incident thereto, but also in the dehumanizing effects of the lengthy imprisonment prior to execution during which the judicial and administrative procedures essential to due process of law are carried out. Penologists and medical experts agree that the process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture.

Lackey v. Texas, 514 U.S. 1045, at n.* (1995) (quoting *People v. Anderson*, 493 P.2d 894 (1972)).

Further, Justice Breyer, writing in *Glossip v. Gross*, 135 S. Ct. 2726, 2764-69 (2015), in which Justice Ginsberg joined in his dissent, observed “[t]he problems of reliability and unfairness [with the current capital punishment laws] almost

inevitably lead to a third independent constitutional problem: excessively long periods of time that individuals typically spend on death row, alive but under sentence of death.” The resulting lengthy delays “create two special constitutional difficulties,” namely (1) the “dehumanizing effect of solitary confinement” aggravated by “uncertainty as to whether a death sentence will in fact be carried out,” and (2) the undermining of “the death penalty’s penological rationale, perhaps irreparably so.” *Id*; see also *Jordan v. Mississippi*, 138 S. Ct. 2567 (2018) (J. Breyer, dissenting from denial of certiorari); *Dunn v. Madison*, 138 S. Ct. 9, 13 (2017) (Breyer, J., joining Ginsberg, J., and Sotomayor, J., concurring) (“And we may well have to consider the ways in which lengthy periods of imprisonment between death sentence and execution can deepen the cruelty of the death penalty while at the same time undermining its penological rationale.”).

Dailey recognizes that this Court has rejected this argument; but in reality the courts have reached a kind of doctrinal stalemate. The lower courts are waiting for guidance from the Supreme Court of the United States, while the Florida Supreme Court is waiting for the lower courts to address this issue. Dailey urges reconsideration of the decisions in *Jimenez v. State*, 265 So. 3d 462 (Fla. 2018); *Carroll v. State*, 114 So. 3d 883 (Fla. 2013); *Valle v. State*, 70 So. 3d 530 (Fla. 2011); and *Booker v. State*, 773 So. 2d 1079 (Fla. 2000). To execute Dailey after he has already had to endure more than thirty years of incarceration under sentence of death

would be unconstitutionally cruel and unusual punishment. Because the Eighth Amendment standards of decency are evolving, consideration of Dailey's claim is required.

CONCLUSION AND RELIEF SOUGHT

Based on the foregoing, the lower court improperly denied Dailey relief on his successive motion. This Court should order that his conviction be vacated and remand the case for a new trial, or for such relief as the Court deems proper.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing motion has been filed with Clerk of the Florida Supreme Court and served upon Assistant Attorney General Christina Pacheco (Christina.Pacheco@myfloridalegal.com and capapp@myfloridalegal.com); Assistant Attorney General Stephen Ake (Stephen.Ake@myfloridalegal.com); Assistant Attorney General Lisa Martin (Lisa.Martin@myfloridalegal.com); Florida Supreme Court (warrant@flcourts.org); on this 21st day of October 2019.

Respectfully submitted,

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**Motions for pro hac vice pending*

CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Initial Brief of Appellant, was generated in Times New Roman 14 point font, pursuant to Fla. R. App. P. 9.100 and 9.210.

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