

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

REPLY BRIEF OF APPELLANT

Chelsea Rae Shirley
Assistant CCRC
Florida Bar No. 112901

Kara R. Ottervanger
Assistant CCRC
Florida Bar. No. 112110

Julissa R. Fontán
Assistant CCRC
Florida Bar No. 32744
CCRC – Middle Region
12973 N. Telecom Parkway
Temple Terrace, Florida 33637

Counsel for Appellant

Laura Fernandez
Connecticut Bar No. 436110
127 Wall Street
New Haven, Connecticut 06511

Cyd Oppenheimer
Connecticut Bar No. 424230
155 West Rock Ave.
New Haven, Connecticut 06515

Seth Miller
Florida Bar No. 806471
Innocence Project of Florida, Inc.
1100 E Park Ave
Tallahassee, FL 32301-2651

RECEIVED, 10/24/2019 02:03:30 PM, Clerk, Supreme Court

PRELIMINARY STATEMENT

The Appellant, James Milton Dailey, relies on the arguments presented in the Initial Brief of the Appellant (“Initial Brief”), and offers the following reply to the Answer Brief of Appellee (“Answer”) dated October 23, 2019. Any claims not argued are not waived and Mr. Dailey relies on the merits of his Initial Brief.

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.

All emphasis is added unless otherwise stated.

TABLE OF CONTENTS

	<u>Page</u>
PRELIMINARY STATEMENT	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	vii
ARGUMENT.....	1
ARGUMENT I: The Lower Court Erred in Denying Dailey’s Arbitrary Claim As It Was Timely and Meritorious.....	1
A. Dailey’s claim is timely	1
B. Dailey’s claim was properly presented to the lower court and is not meritless.....	2
C. Clemency is not a failsafe in this case	4
D. 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	4
Argument II: The Lower Court Erred in Denying Claim II of Dailey’s Successive Motion.	5
A. Slater’s testimony that he had limited involvement with this case is belied by the record, including Slater’s own prior testimony.....	5
B. The State misinterprets <i>Brady</i> by claiming defense counsel is required to intuit and ferret out long-suppressed exculpatory evidence in the face of repeated denials by the state that <i>Brady</i> material exists.....	7
C. The State fails to acknowledge that, irrespective of Slater’s level of involvement, exculpatory evidence in the possession of a prosecutor on the case is unquestionably <i>Brady</i> material.....	8

D. The State fails to meaningfully address the critical fact that Slater’s sudden reluctance and confusion followed a telephone call from members (and former members) of the State Attorney’s Office	9
E. The statements that Slater is absolutely sure he was told are nothing if not a confession by Jack Percy	11
F. The lower court’s summary denial of the claim related to Edward Coleman was error	12
G. The lower court erred in failing to conduct a cumulative analysis	15
ARGUMENT III: The Denial of Dailey’s Request To Have Writing Materials, Two Attorneys Present, Access To A Phone, And To Observe The Insertion of The IV Line Is Unconstitutional.....	17
ARGUMENT IV: The Lower Court’s Denial of Dailey’s Public Records Demands Violated Dailey’s Due Process And Equal Protection Rights Under The Federal And Florida Constitutions	19
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 <i>Lackey</i>	24
CONCLUSION AND RELIEF SOUGHT.....	25
CERTIFICATE OF SERVICE	26
CERTIFICATE OF COMPLIANCE.....	27

TABLE OF AUTHORITIES

Cases

<i>Anderson v. Palmer et al.</i> , Case Number 3:14-cv-01148-MMH-JBT (Middle District of Florida).....	23
<i>Banks v. Dretke</i> , 540 U.S. 668 (2004)	7, 14
<i>Brady v. Maryland</i> , 373 U.S. 83 (1963)	passim
<i>Brant v. Reddish et al.</i> , Case number 3:13-cv-412-K-32MCR (Middle District of Florida).....	23
<i>Dailey v. State</i> , – So. 3d – , 2019 WL 4865855 (Fla. Oct. 3, 2019)	13
<i>Davis v. Reddish et al.</i> , Case Number 3:18-cv-00353-MMH-PDB (Middle District of Florida).....	22
<i>Dodson v. U.S.</i> , 23 F.2d 401 (4th Cir. 1928).....	4
<i>Giglio v. United States</i> , 405 U.S. 150 (1972).....	14, 15
<i>Glossip v. Gross</i> , 135 S. Ct. 2726 (2015)	25
<i>Herrera v. Collins</i> , 506 U.S. 390 (1993)	4
<i>Hildwin v. State</i> , 141 So. 3d 1178 (Fla. 2014)	13, 15
<i>Jackson v. Palmer et al.</i> , Case Number 3:14-cv-01149-MMH-JBT (Middle District of Florida).....	23
<i>Jimenez v. Bondi</i> , 259 So. 3d 722 (Fla. 2018).....	1
<i>Jones v. State</i> , 845 So. 2d 55 (Fla. 2003).....	1
<i>Kyles v. Whitley</i> , 514 U.S. 419 (1995).....	9
<i>Lackey v. Texas</i> , 514 U.S. 1045 (1995)	24

<i>Lightbourne v. State</i> , 742 So. 2d 238 (Fla. 1999).....	15
<i>Marek v. State</i> , 14 So. 3d 985 (Fla. 2009).....	8
<i>Muhammad v. State</i> , 132 So. 3d 176 (Fla. 2013).....	18
<i>Mungin v. State</i> , 259 So. 3d 716 (Fla. 2018).....	1
<i>Murphy v. Collier</i> , 139 S. Ct. 1475 (2019).....	19
<i>Prost v. Anderson</i> , 636 F.3d 578 (10th Cir. 2011).....	5
<i>Roberts v. State</i> , 840 So. 2d 962 (Fla. 2002).....	15
<i>Sule v. State</i> , 968 So. 2d 99 (Fla. 4th DCA 2007).....	16
<i>Swafford v. State</i> , 125 So. 3d 760 (Fla. 2013).....	15, 16
<i>United States v. Bagley</i> , 473 U.S. 667 (1985).....	14
<i>United States v. Greer</i> , 538 F.2d 437 (D.C. Cir. 1976).....	5
<i>United States v. Watson</i> , 792 F.3d 1174 (9th Cir. 2015).....	5
<i>Valentine v. State</i> , 98 So. 3d 44 (Fla. 2012).....	13
<i>Victorino v. State</i> , 127 So. 3d 478 (Fla. 2013).....	16
<i>Wyatt v. State</i> , 71 So. 3d 86 (Fla. 2011).....	19

Constitutional Provisions

Fla. Const. art. IV, § 8	4
U.S. Const. amend V	passim
U.S. Const. amend. VIII.....	passim
U.S. Const. amend IVX.....	passim

Statutes

Chapter 119, Fla. Stat. 20

§ 922.11(2), Fla. Stat. (2019)..... 18

42 U.S.C. §1983 23

Rules

Florida Rule of Criminal Procedure 3.851 20

Florida Rule of Criminal Procedure 3.852passim

Other

Evan Donovan, News Channel 8 WFLA, *Execution of Bobby Joe Long: Death sentence carried out* (updated May 24, 2019) <https://www.wfla.com/news/local-news/execution-of-bobby-joe-long-death-sentence-carried-out/> 18

Florida Department of Corrections Death Row Roster, <http://www.dc.state.fl.us/OffenderSearch/deathrowroster.aspx> 19

Tarik Minor – Anchor, I-Team reporter, News4JAX, *Tarik Minor: Eyewitness to the Execution of Gary Ray Bowles* (updated August 24, 2019) <https://www.news4jax.com/news/florida/i-witnessing-the-execution-of-gary-ray-bowles> 18

Tim Nudd, People, *Serial Killer Oscar Ray Bolin Jr., Who Married His Defense Attorney, Is Executed in Florida* (Updated January 8, 2016)(citing Tampa Bay Times) <https://people.com/crime/police-arrest-alleged-serial-killer-in-florida-after-dna-links-him-to-4-murders/> 18

ARGUMENT

Argument I: The Lower Court Erred in Denying Dailey’s Arbitrary Claim As It Was Timely and Meritorious.

A. Dailey’s claim is timely.

Though the State asserts that Dailey “could have challenged the Governor’s warrant selection process on direct appeal or in a prior postconviction proceeding” (Answer at 13), it cites no authority for this proposition.

This assertion 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 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.”).

Second, the State claims that Dailey “failed to provide any argument below to justify how these arguments were properly raised within his third successive motion.” Answer at 13. This argument too is refuted by record. Undersigned counsel argued at the case management conference, and in the initial brief, that:

this claim is not untimely as to the arbitrary signing of the warrant because it did not become ripe until Mr. Dailey had a warrant. The State claims we should have raised it on direct appeal. But, again, it would have been denied as not ripe at that time because Mr. Dailey’s death sentence is not final until the Florida Supreme Court rules. So we couldn’t raise it on direct appeal.

R2 1387; *see also* Initial Brief at 9-11. Dailey’s argument has not changed.

Lastly, the State repeatedly asserts that the Governor has “sole discretion in the warrant selection process.” Answer at 15. It follows then that if each Governor exercises his own discretion in choosing who, when, or how to sign a warrant, had Dailey previously raised this claim under Governor Robert Martinez, Lawton Chiles, Kenneth MacKay, John Ellis Bush, Charles Crist, or Rick Scott, the claim would have been dismissed as premature since none of those Governors had signed his warrant. Dailey could not have challenged their warrant selection processes as it was not yet a valid or ripe claim.

B. Dailey’s claim was properly presented to the lower court and is not meritless.

The State also mischaracterizes Dailey’s successive pleadings and arguments presented at the case management conference regarding his claim that the Governor must have some criteria or process guiding the warrant selection process. The State claims

that Dailey did not raise this claim, but instead only “mentions” this argument in his successive motion. Answer at 14. However, the State has overlooked that Dailey also raised this argument at the case management conference where the State was, again, put on notice of the argument, and given a chance to respond. At the case management conference Dailey argued:

I don't think your Honor can tell the executive branch how to select a warrant process, but I think your Honor is capable of finding that no selection process is arbitrary and in violation of Furman. So we're not saying you can't sign a warrant. We're saying there has to be some sort of process to comply with *Furman* in [sic] the Fifth, Eighth, and 14th Amendments.

R3 1388. Thus, this issue was properly presented to the lower court in Dailey's successive motion (R3 502) and at the case management conference (R3 1388) and preserved for review for this Court.

Dailey does not dispute that if the Governor had some criteria guiding his decision-making, the Governor would be free to choose from among any of the defendants satisfying the criteria, so long as the criteria were constitutionally sound. Dailey's argument is simply that there must *be* criteria. As argued previously, other states have an orderly process for identifying the next 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 determining who lives and who dies. R3 1270.

C. Clemency is not a failsafe in this case.

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.*” *Id.* at 430-46.

While the Court in *Herrera* recognized that wrongful convictions happen, the Court found clemency to be the “fail safe” mechanism to correct those errors. *Id.* at 415. That is not an available remedy here. Despite the narrowness of his clemency proceeding, Dailey is foreclosed from pursuing clemency again. Indeed, the Death Warrant explicitly states that “executive clemency for JAMES DAILEY, as authorized by Article IV, Section 8(a) of the Florida Constitution, was considered pursuant to the Rules of Executive Clemency, and it has been determined that executive clemency is not appropriate.” R3 557-58. Dailey’s argument is simply that since clemency is not a viable form of relief, this further renders the warrant process arbitrary and capricious.

D. 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.

“Important as it is that violators of the law be punished, it is of infinitely greater importance that this safeguard of the innocent be preserved inviolate.” *Dodson v. U.S.*,

23 F.2d 401, 403 (4th Cir. 1928). “It is a cardinal principle of Anglo-American jurisprudence that, in Blackstone’s immortal words, better ten guilty persons should go free than one innocent person be convicted.” *United States v. Greer*, 538 F.2d 437, 441 (D.C. Cir. 1976). “Before any conviction, the accused enjoys a presumption of innocence, a right to trial by jury, and a range of evidentiary and procedural guarantees secured by the Constitution and multifold statutes. All of this stems from our society’s aspiration to protect the innocent against the possibility of a wrongful conviction.” *Prost v. Anderson*, 636 F.3d 578, 582 (10th Cir. 2011). “No tradition is more firmly established in our system of law than assuring to the greatest extent that its inevitable errors are made in favor of the guilty rather than against the innocent.” *United States v. Watson*, 792 F.3d 1174, 1183 (9th Cir. 2015).

Consistent with the above cited case law, Dailey argued below, and maintains here, that the execution of an innocent person whose claims remain unexhausted in state and/or federal court, violates the Fifth, Eighth, and Fourteenth Amendments.

ARGUMENT II: The Lower Court Erred in Denying Claim II of Dailey’s Successive Motion.

A. Slater’s testimony that he had limited involvement with this case is belied by the record, including Slater’s own prior testimony.

The State urges this Court to accept Slater's testimony that his involvement in this case was limited almost entirely to a trip to the crime scene.¹ Of course, this is not what Slater attested to, under penalty of perjury, in his affidavit. *See* R3 561 ("While I worked at the State Attorney's Office, I worked on the investigation of S.B.'s death and resulting prosecution of Jack Percy."). Nor is it what he testified to, over three decades ago, when questioned during a suppression hearing in Jack Percy's case. *See* R2 5112-13. Slater's prior testimony makes clear that he was *assigned* to the investigation of the death of Shelly Boggio and was actively assisting the police officers and detectives conducting this investigation. Moreover, his prior testimony points to the fact that when Percy wished to speak to someone at the State Attorney's Office, a month and half or so into the investigation, Percy was directed to James Slater, because Slater was the person handling the investigation there. The State's argument that, "In order for Dailey's claim to be true, Percy would have to have confessed to law enforcement within hours of committing the murder, and law enforcement would have had to have relayed the confession to Slater while he was at the crime scene" (Answer at 27) is thus unavailing. Slater was clearly involved in this case well beyond the day of the murder itself, up to and including the time of Percy's apprehension and arrest.

¹ "Slater testified that his only work in the case involved responding to the crime scene when the victim's body was found and testifying at a subsequent hearing." Answer at 27.

B. The State misinterprets *Brady* by claiming defense counsel is required to intuit and ferret out long-suppressed exculpatory evidence in the face of repeated denials by the state that *Brady* material exists.

The State contends that “[t]he trial court properly determined that this claim was untimely, because the minimal information gleaned from Slater by Dailey’s postconviction counsel could have been discovered earlier had Dailey’s counsel spoken to him sooner.” Answer at 22. As Dailey explained in the Initial Brief, any finding or insinuation that Dailey did not exercise due diligence runs afoul of the guiding principles of our adversary system, per *Banks v. Dretke*, 540 U.S. 668 (2004), a case that is discussed in the defense’s papers and the court’s opinion, but is conspicuously absent from the State’s Answer.

When defense counsel asks counsel 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 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.² It also satisfies the newly discovered evidence requirement as this was information that was presented to the court within a year of discovery. As explained in the Initial Brief, this evidence would have changed the outcome of the case, both as to guilt and penalty, as it revealed, for the first time, the missing piece at the center of this terrible, tragic puzzle. The evidence that Percy, and Percy alone, had a motive not only “weakens the case against [Dailey] so as to give rise to a reasonable doubt as to his culpability,” but would, in addition, yield a less severe sentence. *Marek v. State*, 14 So. 3d 985, 990 (Fla. 2009).

Finally, the State incorrectly asserts that Dailey failed to address the merits of the *Brady* or newly discovered claim related to Slater. Answer at 25, fn. 2. Dailey addressed how this claim was timely and could not have been discovered earlier with the use of due diligence (Initial Brief at 19) and also argued how this evidence would probably produce a different result (Initial Brief at 31-33, 45-53).

C. The State fails to acknowledge that, irrespective of Slater’s level of involvement, exculpatory evidence in the possession of a prosecutor on the case is unquestionably *Brady* material.

The Supreme Court long ago made clear that if there is exculpatory evidence within the knowledge or possession of anyone working on behalf of the prosecution, including

² The State attempts to sidestep this conclusion by downplaying Slater’s role in the case. But as described *supra*, Slater was unquestionably assigned to the case by the State Attorney’s Office and was heavily involved in the case through and beyond Jack Percy’s arrest.

law enforcement, even if the individual trial prosecutor is personally unaware of it, the State is considered to have constructive knowledge or possession of that material, and must obtain and turn it over to the defense pursuant to *Brady v. Whitley*, 514 U.S. 419, 421 (1995) (“On habeas review, we follow the established rule that that state’s obligation under *Brady v. Maryland*, 373 U.S. 83 (1963), to disclose evidence favorable to the defense, turns on the cumulative effect of all such evidence suppressed by the government, and **we hold that the prosecutor remains responsible for gauging that effect regardless of any failure by the police to bring favorable evidence to the prosecutor’s attention.**”). Slater testified that he was absolutely certain that these statements were told to him (R3 1456), and that they came from law enforcement, specifying, importantly, that he included the State Attorney’s Office “[i]n my definition of law enforcement.” R3 1444. Slater was clearly obliged to disclose this information, which inculpated Percy and exculpated Dailey, to the defense. The State Attorney’s Office was under a continuing duty to disclose this information after Slater left the Office, irrespective of whether the trial prosecutors had direct knowledge of it.

D. The State fails to meaningfully address the critical fact that Slater’s sudden reluctance and confusion followed a telephone call from members (and former members) of the State Attorney’s Office.

The State seeks to dismiss the necessary and troubling inference that must be drawn from Slater’s “confusion” about his own recollections regarding this case. Per Colin Kelly, an investigator with CCRC, Slater appeared to clearly remember this case and had

no hesitancy in signing an affidavit that included his statement recounting what law enforcement had told him about Percy's confession. R3 1462-63. Yet less than three weeks later, at the evidentiary hearing, Slater hedged, saying, "I don't know if I had gotten confused with another case" R3 1445 – despite also testifying that he still had "nightmarish memories of having seen the victim's body." R3 1451.

Between defense counsel's visit to Slater on September 25 and the evidentiary hearing on October 14, per Slater's testimony at the hearing, he received a telephone call from several current and former members of the State Attorney's Office on the afternoon of Friday, October 11, the same afternoon that the lower court granted an evidentiary hearing for the sole purpose of considering Slater's testimony. R3 1446-47. The following day, defense counsel called Slater to inform him that a hearing had been set. Slater testified at the evidentiary hearing that he told defense counsel he was no longer comfortable speaking to her alone, and felt "tugged in two directions." R3 1448.

Slater's reluctance to connect his unambiguous recollection about the statements he had heard to this particular case appeared to be a direct result of prosecutors' telephone call to Slater. As urged in the Initial Brief, 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 the statements even related to this case. The State's decision to simply dismiss

this argument as “speculative and conclusory,” in the face of a record that could hardly be more clear, is neither persuasive nor made in good faith.

E. The Statements that Slater is absolutely sure he was told are nothing if not a confession by Jack Percy.

At the evidentiary hearing, Slater stated that he was “positive” that the statements regarding Percy’s confession “were made to me.”³

The State asserts that “Slater never testified that the statement he may have heard involved a confession from [Percy].” Answer at 22. The *only* reasonable inference from Slater’s testimony is that Jack Percy told some agent of law enforcement exactly what had happened on the night in question, and that individual conveyed his statement to the prosecutor working the case: Slater. It would likewise not be irrational to conclude that Percy made this statement during an unsanctioned interrogation, during which his counsel was not present, and that the State Attorney’s Office, knowing this statement

³ In the State’s Answer, the State claims (without citation), “[Slater] could not confirm whether the statement related to this case or whether it was just his own general impression of what the case was about.” Answer at 9-10. At the evidentiary hearing, what Slater actually said was: “When I signed the affidavit, I had a general overall feeling that that’s what this entire case was about.” R3 1456. He did *not* say that the statement was his own characterization of the case; rather, as his testimony makes clear, he felt that this statement, which was *made to him by law enforcement*, went to the very heart of the case, encapsulating means, motive, and opportunity. Slater had made this clear moments earlier in the evidentiary hearing, stating, as noted *supra*, “*I am positive that those statements were made to me.*” R3 1456.

would be inadmissible, never documented it in writing nor attempted to introduce it into evidence (neither of which remove it from the realm of *Brady* material). It is, however, beyond the pale to imagine that some police officer simply *made up* this theory and offered it up to Slater as a true account of the murder. The level of detail is too great: Percy's impotence after a night of drinking, a teenage girl's giggling reaction, Percy's humiliation, his unleashed rage. This recounting could have come from one person only, the individual solely responsible for the murder, Jack Percy himself.

Percy confessed. The confession, which included Percy's justification for his actions, and established that he, and he alone, had a motive, was relayed to the prosecution. The prosecution never relayed it to anyone else until defense counsel came knocking on Slater's door – quite literally – 34 years too late. Here, because the prosecution hid, the defendant was forced to seek, and the State's continued suggestions that it should somehow be held against the defense that memories have faded in the intervening decades are unavailing.

F. The lower court's summary denial of the claim related to Edward Coleman was error.

First, as alleged in Dailey's successive motion (R3 516) and his Initial Brief (Initial Brief at 35), Dailey did present Coleman to the court within a year of learning of the information. While the State faults Dailey for not bringing this information forward sooner, Dailey cannot control when a witness chooses to disclose information to counsel.

Further, upon review of a lower court's summary denial of a postconviction claim, factual allegations as to the merits of a constitutional claim as well as to issues of diligence must be accepted as true, to the extent that they are not refuted by the record. *Valentine v. State*, 98 So. 3d 44, 54 (Fla. 2012). Dailey has alleged in his motion and in Coleman's affidavit that he did not learn of this information until September 29, 2019. R3 516, 564-65. There is nothing in the record to refute Dailey's factual claim.

Second, the State claims that Dailey alleged "the lower court failed to consider the evidence from Coleman's affidavit," (Answer at 34) but provides no citation to Dailey's brief for this assertion. Nowhere in Dailey's brief did he make this argument. Dailey does contend, however, that the lower court incorrectly analyzed the second prong of the *Jones* newly discovered evidence test in failing to conduct the appropriate cumulative analysis. Initial Brief at 36-41.

Third, the State misunderstands this Court's holding in *Dailey v. State*, -- So. 3d --, 2019 WL 4865585 (Fla. Oct. 3, 2019). The State incorrectly asserts that in considering the cumulative prong of the *Jones* test, the lower court did not have to consider the prior testimony of Wright, Sorrentino, and Smith. Answer at 35. While acknowledging that this Court previously found that testimony procedurally barred, the State disregards this Court's ruling in *Hildwin v. State* which holds "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."

141 So. 3d 1178, 1184 (Fla. 2014).

Fourth, the State confuses the purpose of Coleman's testimony. Dailey agrees that Coleman never alleged to have seen Detective Halliday question or offer deals to the jailhouse informants who testified at Dailey's trial, but this does not lessen the impact of Coleman's testimony. The information that Coleman was prepared to testify to is the same type of evidence at issue in *Giglio v. United States*, 405 U.S. 150 (1972). 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). 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.

The State's case rested almost entirely on the testimony of Leitner, 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*, 405 at 154-55 (1972). When Coleman's affidavit is considered alongside the corroborative testimony of Wright, Sorrentino, and Smith, and beside Halliday's own acknowledgment that every person in the jail 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), it is beyond dispute that if a jury had had access to this information, it could have accorded no weight to the testimony of the jailhouse informants. And, in this entirely circumstantial case, the outcome indisputably would have been different. 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*, 405 U.S. at 154-55.

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

The State dismisses Dailey’s well pled legal argument that the lower court erred in refusing to conduct a meaningful cumulative review of *all* of the newly discovered evidence and the *Brady* evidence that has been discovered during postconviction without addressing this Court’s clear precedent that “a postconviction court must even consider testimony that was previously excluded as procedurally barred or presented in another postconviction proceeding...” even if those claims had been “previously rejected.” *Hildwin v. State*, 141 So. 3d 1178, 1184 (Fla. 2014) *citing Roberts v. State*, 840 So. 2d 962, 972 (Fla. 2002); *Lightbourne v. State*, 742 So. 2d 238 (Fla. 1999); *Swafford v. State*, 125 So. 3d 760 (Fla. 2013). Based on this Court’s clear precedent, the lower court erred in failing to conduct a cumulative review of all of the newly discovered and/or *Brady* evidence that was presented in Dailey’s Second and Third Successive Motions.

The State misunderstands that the reviewing court must “in considering the effect of the newly discovered evidence, [] consider all of the admissible evidence that could be introduced at a new trial.” *Swafford v. State*, 125 So. 3d 760, 775-76 (Fla. 2013). If evidence could be introduced at a new trial, then it must be considered as part of the cumulative analysis.

Second, the State incorrectly represents that Jack Percy “testified at the evidentiary hearing that none of the contents of the affidavit were true except for his identifying information.” Answer at 44. Although 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’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).

Nor is the State correct in its assertion that Dailey raised Percy's prior statement from 2007. The State fails to cite anywhere in Dailey's Initial Brief where this argument was made because it is nowhere to be found in the brief.

It is unquestionable that had all of this new evidence been presented to a jury, it is probable Dailey would have been acquitted or received a life sentence.

ARGUMENT III: The Denial of Dailey's Request To Have Writing Materials, Two Attorneys Present, Access To A Phone, And To Observe The Insertion of The IV Line Is Unconstitutional.

Dailey challenged the Florida Department of Correction's ("DOC") restrictions on the number and/or composition of defense witnesses he would be permitted to have witness his execution and the restrictions placed on his witness by DOC. On October 17, 2019, Dailey sent a letter to Barry Reddish, Warden of Florida State Prison, detailing his requests. In his Motion, Dailey states that he had not received a response, but based on similar requests from other defendants, he expected to have his request for writing materials granted and the remainder of his requests denied.

The State argues that this claim is not ripe because DOC has not yet denied these requests (Answer at 47). This ignores the fact that DOC has historically denied these requests, and that, had Dailey waited until DOC denied his request, he would be subject to accusations of delay, untimeliness, and procedural bars.

Second, the State argues that DOC has "valid reasons for denying requests to have additional people observe the executions, as the 'execution chamber is small and any

additional personnel could interfere with the orderly and proper administration of the lethal injection.” Answer at 47-48, *citing Muhammad v. State*, 132 So. 3d 176, 205 (Fla. 2013). Yet, DOC blatantly disobeyed its protocol and Florida law under Section 922.11(2), Florida Statutes by allowing more than twelve citizens to witness the executions of both Mr. Long and Mr. Bowles,⁴ while at the same time rejecting both of their requests for an additional attorney witness, claiming that an additional attorney witness would be a violation of the statute and policy.⁵

Lastly, the State contends the courts have no authority to address these types of requests because “Courts do not manage state execution practices and prison policies.”

⁴ It should be also noted that all of these executions were conducted under Governor Ron DeSantis, Attorney General Ashley Moody, and Secretary Inch.

⁵ See Evan Donovan, News Channel 8 WFLA, *Execution of Bobby Joe Long: Death sentence carried out* (updated May 24, 2019) <https://www.wfla.com/news/local-news/execution-of-bobby-joe-long-death-sentence-carried-out/> (“There are **26 witnesses** in the front three rows including a spiritual advisor and one of Long’s attorneys. **Several corrections officials are also seated**. The **nine media witnesses** are seated in the back row.”); see also Tarik Minor – Anchor, I-Team reporter, News4JAX, *Tarik Minor: Eyewitness to the Execution of Gary Ray Bowles* (updated August 24, 2019) <https://www.news4jax.com/news/florida/i-witnessing-the-execution-of-gary-ray-bowles> (“I counted **19 men and eight women**.”). This disregard of Florida law regarding the witnesses also occurred under the prior protocol during the execution of Oscar Ray Bolin Jr, where **there were 36 witnesses**. See Tim Nudd, People, *Serial Killer Oscar Ray Bolin Jr., Who Married His Defense Attorney, Is Executed in Florida* (Updated January 8, 2016) (citing Tampa Bay Times) <https://people.com/crime/police-arrest-alleged-serial-killer-in-florida-after-dna-links-him-to-4-murders/>. As a result, the State cannot credibly argue that allowing Dailey *one* additional witness would “interfere with the orderly and proper administration of the legal injection.”

Answer at 48-49. This is not entirely correct. The United States Supreme Court granted a stay of execution in *Murphy v. Collier*, 139 S. Ct. 1475 (2019) specifically to allow the lower court to address Texas's rule forbidding religious advisors from any denominations other than Christianity or Islam to be present either in the execution room or in the adjacent viewing room. Clearly, when a defendant's constitutional rights are at stake, the courts are empowered to review a state's execution practices.

ARGUMENT IV: The Lower Court's Denial of Dailey's Public Records Demands Violated Dailey's Due Process And Equal Protection Rights Under The Federal And Florida Constitutions.

The State argues that the lower court "acted in its sound discretion in denying Dailey's requests." Answer at 52. However, for the reasons explained in Dailey's Initial Brief, and below, this is clearly erroneous.

The State relies on *Wyatt v. State*, 71 So. 3d 86, 110-11 (Fla. 2011) for the proposition that "*reasonable* restrictions on the access to public records do not offend the constitution." Answer at 52. But Florida Rule of Criminal Procedure 3.852 imposes *unreasonable* restrictions to public records. Limiting public records to a unique class of people, 339 individuals⁶ out of a population of 7.5 billion people, a class of people who *need the records most*, is not only unreasonable, it is a violation of the Due Process and

⁶ See Florida Department of Corrections Death Row Roster, last visited 10/23/19, <http://www.dc.state.fl.us/OffenderSearch/deathrowroster.aspx>.

Equal Protection clauses of the United States Constitution and the corresponding provisions of the Florida Constitution.

The State takes the position that the limitations are permissible to avoid the “inordinate delay occasioned by securing public records for purposes of capital postconviction litigation” and prevent “eleventh-hour fishing expeditions,” and further argues that Dailey “show good cause explaining why the request was not made earlier.” Answer at 53. The State’s argument overlooks the fact that Rule 3.852 allows records requests to be sought only after a warrant is signed. At both the October 4, 2019 records hearing, and in his Initial Brief, Dailey clearly articulated to the lower court why he did not request the records until the warrant was signed. R3 1247-1368; Initial Brief at 56-62.

Rule 3.852 creates an impossible catch-22, which, notably, the State does not refute or even attempt to address. Specifically, under the Rule, Dailey must assert that the public records sought outside of warrant litigation 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.” Fla R. Crim. P. 3.852(i)(1)(C). Requests for information regarding lethal injection protocol, clemency selection process, death warrant selection process, execution chamber access documents, denial of clemency, or information relevant to the denial of his Florida Supreme Court appeal, would not have been relevant to a pending proceeding and were not ripe absent an active death warrant.

However, now that there has been a death warrant signed, Dailey is prevented from obtaining these records in a request that is finally ripe despite the fact that these records are clearly related to the postconviction claims raised in his Successive Motion.

In short, if Dailey had requested these records under subsection (i) *before* his warrant was signed, he risked almost certain objection⁷ by the State and/or the agencies and a denial by the court on the basis of the claim being not yet ripe. On the other hand, since Dailey did *not* ask too early, under (i) – in an attempt to avoid the objections which would preclude him from later asking under (h) – he now faces accusations by the State and the agencies that he has engaged in undue delay when he timely requests these relevant records under (h).

Therefore, the State’s argument that a defendant “need not await the signing of a death warrant to seek records,” (Answer at 53), and that “claims ... based on production of public record that could have been requested earlier are barred,” (Answer at 54), ignores the reality – which is clearly laid out both Dailey’s Successive Motion and in his Initial Brief – *these records could not have been requested before*. As such, the State’s argument to the contrary is disingenuous as best.

⁷ Under Rule 3.852, agencies are empowered with the ability to object to public records requests submitted by capital defendants. On the contrary, agencies are not permitted to object to public records requests under Chapter 119, which is how every other person obtains public records.

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

Finally, the State argues that the lower court was correct in finding the requested records “unrelated to a colorable claim for relief.” (Answer at 54). The State ignores that this is *not* the standard required by Rule 3.852 for a capital defendant requesting public records. A defendant need only show that the requested records are either relevant to the subject matter of the postconviction proceeding *or* are reasonably calculated to lead to the discovery of admissible evidence. In each public records request, and again at the October 4, 2019 records hearing, Dailey clearly articulated his reason for each request, the reason the records were relevant to the postconviction proceeding, and the anticipated nature of the evidence sought. The lower court erred in denying these records requests.

The State – in addressing Dailey’s requests to the Florida Department of Corrections and the Office of the Medical Examiner for District Eight as they related to lethal injection protocols – argues that it is “well settled” that such documents do not lead to colorable claims. Answer at 55. In addition to once again reciting the wrong standard, the State fails to address the substantial litigation that is pending regarding the constitutionality of Florida’s current lethal injection protocol before the Middle District

Court of Florida pursuant to 42 U.S.C. §1983. *See Davis v. Reddish et al.*, Case Number 3:18-cv-00353-MMH-PDB (Middle District of Florida); *Anderson v. Palmer et al.* Case Number 3:14-cv-01148-MMH-JBT (Middle District of Florida); *Brant v. Reddish et al.*, Case number 3:13-cv-412-K-32MCR (Middle District of Florida); *Jackson v. Palmer et al.*, Case Number 3:14-cv-01149-MMH-JBT (Middle District of Florida) (the District Court has denied the Respondents’ Motion to Dismiss and has ordered discovery to proceed).

As Dailey explained in his initial records requests and again at the records hearing conducted on October 4, 2019, though the denial of the State’s motions to dismiss in those cases is not in itself a finding that the etomidate-based lethal injection protocol is unconstitutional, the federal court clearly rejected the State’s argument that the lawsuit was meritless on its face and recognized that the protocol must be subjected to reliable testing and investigation through the discovery process. Dailey’s records requests, which were erroneously denied by the lower court, sought the disclosure of public records for that very reason.

The State also points to the lower court’s ruling that records relating to the clemency process and the death warrant selection process, as well as the records requested from the Pinellas County Sheriff’s Office, the State Attorney’s Office, and the Attorney General’s Office, are “not cognizable claims for postconviction relief.” Answer at 55-56. Dailey reiterates that this is not the correct standard, and even if it were, maintains that the lower

court erred in so finding for the reasons articulated in his records demands, Successive Motion, and Initial Brief.

A court indeed has discretion to deny public record requests that are “overly broad, of questionable relevance, and unlikely to lead to discoverable evidence.” Answer at 56. None of Dailey’s requests can be so characterized: all of the records requested by Dailey are relevant to his postconviction claim, likely to lead to discoverable evidence, timely filed, and narrowly tailored. The lower court erred in denying these requests.

However, the reframing by the State of this claim into an argument over whether these records were properly requested under Rule 3.852 (which they were) obfuscates the constitutional infirmities alleged by Dailey in his Motion in the lower court and his Initial Brief; to wit, that the mere existence of a rule which disallows criminal defendants access to records that are otherwise available to every other citizen is an impermissible violation of Dailey’s Due Process and Equal Protection rights under the United States Constitution and the corresponding provisions of the Florida Constitution.

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*.

In his *Lackey* claim, Dailey challenged the inhumane practice of confining defendants for years on Florida’s death row, then executing them. The State faults Dailey and other similarly situated defendants for the delays in executions due to the fact that they

continually challenge their convictions. Answer at 58. The State also cites to four other defendants who have spent as much time on death row as Mr. Dailey prior to their executions. Answer at 59. The State's argument misses the point.

As Justice Breyer explained in *Glossip v. Gross*, 135 S. Ct. 2726, 2764-65 (2015), while the delays in capital cases are often necessary to pass constitutional muster, they do not change the fact that defendants suffer in a cruel and unusual way, including being kept in solitary confinement 22 hours or more per day, which can cause anxiety, panic, rage, loss of control, paranoia, hallucinations, self-mutilation, and physical changes in EEG patterns consistent with stupor and delirium. (Breyer, J., joined by Ginsburg, J., dissenting).

Dailey, moreover, had no control over the length of time it took to uncover all of the new evidence in his case that he has attempted to present to the courts, nor did he have control over the procedural hurdles the courts and the State have used to hinder the proper presentation of his case. Dailey should not be forced to choose between competing constitutional rights: the right to raise newly discovered evidence claims and the right to be free of cruel and unusual punishment.

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 24th day of October 2019.

Respectfully submitted,

/s/ Chelsea Rae Shirley

Chelsea Rae Shirley
Florida Bar. No. 112901
Assistant CCRC - Middle Region
Shirley@ccmr.state.fl.us

/s/ Kara R. Ottervanger

Kara R. Ottervanger
Florida Bar. No. 112110
Assistant CCRC - Middle Region
Ottervanger@ccmr.state.fl.us

/s/ Julissa R. Fontán

Julissa R. Fontán
Florida Bar. No. 0032744
Assistant Capital Collateral Counsel
12973 N. Telecom Parkway
Temple Terrace, FL
Fontan@ccmr.state.fl.us

Counsel for Appellant

/s/ Laura Fernandez

Laura Fernandez
Connecticut Bar No. 436110
127 Wall Street
New Haven, Connecticut 06511
laura.fernandez@yale.edu

/s/ Cyd Oppenheimer*

Cyd Oppenheimer
Connecticut Bar No. 424230
155 West Rock Ave.
New Haven, Connecticut 06515

/s/ Seth Miller

Seth Miller
Florida Bar No. 806471
Innocence Project of Florida, Inc.
1100 E Park Ave
Tallahassee, FL 32301-2651
smiller@floridainnocence.org

**Motion for pro hac vice pending*

CERTIFICATE OF COMPLIANCE

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

/s/ Chelsea Rae Shirley

Chelsea Rae Shirley

Florida Bar. No. 112901

Assistant Capital Collateral Counsel

12973 N. Telecom Parkway

Temple Terrace, FL 33637

813-558-1600

Shirley@ccmr.state.fl.us