IN THE SUPREME COURT OF FLORIDA
CASE NO. SC 20-934

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

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STATEMENT OF THE CASE

Appellant James Dailey is innocent of the murder of S.B. For more than 35 years, from his arrest through the signing of his death warrant, Dailey has steadfastly maintained his innocence. In contrast, Dailey's co-defendant, Jack Pearcy—who also was convicted of the crime and is serving a life sentence with the possibility of parole—has, on numerous occasions, admitted sole responsibility for the murder.

Dailey's case bears the hallmarks of the archetypal wrongful conviction,[1] from a grossly faulty investigation to a trial rife with unreliable evidence and constitutional errors. After failing to obtain a death sentence for co-defendant Pearcy, despite arguing that Pearcy was the "main actor in this child's brutal murder,"[2] the State blindly pursued evidence implicating

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[1] *See, e.g.*, Brandon Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* 124, 134 (2011) ("I found that 21% of the exonerees (52 of 250 cases) had informant testimony at their trials. Of the 52 that had informants, 28 were jailhouse informants. . . . The most enterprising jailhouse informants did not just know specific facts about the crime. They knew the facts that the prosecutors had been unable to prove any other way. . . . The jailhouse informant became a sort of jack-of-all trades, able to plug all the holes in the State's case.").

[2] "Pearcy's numerous conflicting exculpatory stories minimize his participation, but other than his own self-serving stories no evidence exists that Pearcy was not the main actor in this child's brutal murder." State's Sentencing Memorandum, R2 10298.

Counsel for Dailey is forced to rely on the sentencing memorandum because neither Pearcy's penalty phase hearing nor his sentencing hearing

Dailey. In its quest for a death sentence, the State suppressed evidence that should have excluded Dailey as a suspect and ultimately presented a case muddled enough to obscure otherwise obvious deficiencies. As the lead prosecutor later characterized it: "It was a circumstantial case, it's not like there was an upstanding citizen eyewitness to the case. So speculation is all we have as to what happened."[3] There was no motive, no eyewitness, no physical evidence linking Dailey to the murder, and no other testimony placing Dailey with the victim at the time of her death. When prosecutors and detectives needed to fill gaping holes in their case, they turned to wildly unreliable jailhouse informant testimony and materially misled the jury about the credibility of their witnesses.

Since his conviction, Dailey has steadily discovered new evidence of his innocence, evidence that fatally undermines the State's timeline, theory, and narrative, calls into question the credibility of state investigators, and

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(where the State sought to have the judge override the jury's life recommendation and impose a death sentence) were ever transcribed. Dailey has never had an opportunity to review either transcript despite evidence that the State presented inconsistent theories regarding participation, motive, and culpability when it urged Pearcy's jury to recommend death.

[3] Sun Sentinel Editorial Board, *Florida Is Poised to Kill a Man Who May Be Innocent*, South Florida Sun Sentinel (Oct. 18, 2019, 10:30 AM), https://www.sun-sentinel.com/opinion/editorials/fl-op-edit-james-dailey-execution-20191018-boe6ysdltvbadmhmhfmrsclzau-story.html

demonstrates the wrongfulness of his conviction. However, owing to a patchwork of procedural limitations and evidentiary bars, no court has ever considered the ample cumulative proof of Dailey's innocence.

The present appeal follows from, *inter alia*, the circuit court's erroneous summary denial of facially sufficient *Giglio*[4] and newly discovered evidence claims. Specifically, the circuit court refused to consider compelling new evidence of a quintessential *Giglio* violation: evidence that the State knew that its star witness had perjured himself at trial and made a conscious decision not only to allow that perjury to stand uncorrected but to rely upon it in order to bolster the witness's credibility with the jury. The circuit court also refused to consider newly discovered evidence of Dailey's innocence, including Pearcy's admissible sworn testimony—obtained in connection with the underlying proceedings—establishing that Dailey could not have been present at the time and place of S.B.'s murder. Pearcy, *and Pearcy alone*, murdered S.B.

This compelling new evidence, extensively corroborated by the record evidence in these proceedings, is highly material to Dailey's conviction and sentence, warranted an evidentiary hearing, and is ultimately sufficient to merit the vacatur of Dailey's conviction and sentence and the award of a new

[4] *Giglio v. United States*, 405 U.S. 150 (1972).

trial. Because the circuit court's summary denial of Dailey's claims rested on misinterpretations and misapplications of this Court's precedents to factual allegations it fundamentally misunderstood, this Court must reverse.

This no ordinary case. There is no more important legal question in the American system of justice than whether someone may be executed without ever having had a meaningful opportunity to present the complete evidence of his innocence. This Court has a solemn duty to prevent "the quintessential miscarriage of justice": the consignment of an innocent person to execution, in the name of the people, at the hands of the State. *Schlup v. Delo*, 513 U.S. 298, 324-25 (1995).[5]

[5] *See also Satterfield v. Dist. Att'y Phila.*, 872 F.3d 152, 154 (3d Cir. 2017) ("Society views the conviction of an innocent person as perhaps the most grievous mistake our judicial system can commit."); *Herrera v. Collins*, 506 U.S. 390, 398 (1993) (citing *United States v. Nobles*, 422 U.S. 225, 230 (1975)) ("[T]he central purpose of any system of criminal justice is to convict the guilty and free the innocent."); *United States v. U.S. Coin & Currency*, 401 U.S. 715, 726 (1971) (Brennan, J., concurring) ("[T]he government has no legitimate interest in punishing those innocent of wrongdoing . . . ."); *Robinson v. California*, 370 U.S. 660, 667 (1962) ("Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold."); *Thompson v. City of Louisville*, 362 U.S. 199, 206 (1960) ("[I]t is a violation of due process to convict and punish a man without evidence of his guilt."); *Mooney v. Holohan*, 294 U.S. 103 (1935) (holding that where defendant asserted his innocence and a wrongful conviction due to perjured testimony and improperly suppressed evidence, habeas courts must hear the claim); *Calder v. Bull*, 3 U.S. 386, 388 (1798) ("The Legislature may . . . declare new crimes . . . but they cannot change innocence into guilt; or punish innocence as a crime . . . ."). As Judge Learned Hand recognized,

CITATIONS TO THE RECORD

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. 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 postconviction record on appeal based on *Hurst*[6] shall be referred to as "R1" followed by the appropriate page numbers. All cites from the record on appeal in Case No. SC18-557 shall be referred to as "R2" followed by the appropriate page numbers. All cites from the record on appeal in Case No. SC19-1780 shall be referred to as "R3" followed by the appropriate page numbers. All cites from the record on appeal in pending appeal Case No. SC20-934 shall be referred to as "R4" followed by appropriate page numbers. All other references will be self-explanatory or otherwise explained herein.

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our justice system is "haunted by the ghost of the innocent man" executed. Charles E. Silberman, *Criminal Violence, Criminal Justice* 262 (1978).

[6] *Hurst v. Florida*, 577 U.S. 92 (2016) and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016).

REQUEST FOR ORAL ARGUMENT

James Dailey, through counsel, respectfully requests oral argument. 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.

STANDARD OF REVIEW

Newly discovered evidence and *Giglio* claims are subject to a mixed standard of review. A trial court's legal conclusions, including the decision to grant or deny an evidentiary hearing, are subject to *de novo* review. *Nordelo v. State*, 93 So. 3d 178, 184 (Fla. 2012); *Mungin v. State*, 79 So. 3d 726, 733 (Fla. 2011) ("Determining whether the trial court erred in denying an evidentiary hearing on a successive rule 3.851 motion is a question of law subject to de novo review.").[7] Where the court below did not hold an evidentiary hearing, "this Court must accept all factual allegations in the motion as true to the extent they are not conclusively refuted by the record."

[7] This Court has encouraged trial courts "to liberally allow" evidentiary hearings on postconviction motions. *Rivera v. State*, 995 So. 2d 191, 197 n.2 (Fla. 2008) (citing *Amendments to Fla. Rules of Criminal Procedure 3.851, 3.852, & 3.993 & Fla. Rule of Judicial Admin. 2.050*, 797 So. 2d 1213, 1219–20 (Fla. 2001)).

Mungin, 79 So. 3d at 733; *Rivera*, 995 So. 2d at 197; *McLin v. State*, 827 So. 2d 948, 954 (Fla. 2002). This Court "independently reviews the application of the law to the facts." S*tate v. Dougan*, 202 So. 3d 363, 378 (Fla. 2016).

Moreover, this Court typically reviews a trial court's discovery orders and evidentiary rulings for "abuse of discretion." *Bearden v. State*, 161 So. 3d 1257, 1263 (Fla. 2015); *Hurst v. State*, 18 So. 3d 975, 1007 (Fla. 2009). "However, a court's discretion is limited by the evidence code and applicable case law. A court's erroneous interpretation of these authorities is subject to *de novo* review." *Bearden*, 161 So. 3d at 1263 (internal citations and quotations omitted).

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PROCEDURAL HISTORY

The unabridged history of Dailey's case, beginning with his conviction for first-degree murder in 1987 and continuing through the 2019 denial of his First Successive Motion to Vacate Judgment of Conviction and Sentence of Death After Death Warrant Signed, has been documented in previous filings. *See*, *e.g.*, R4 9-13. For purposes of these proceedings, the relevant procedural history is as follows.

On December 27, 2019, Dailey filed a Second Successive Motion to Vacate Judgment of Conviction and Sentence of Death After Death Warrant Signed ("Second Successive Motion"). The Second Successive Motion, as amended on January 21, 2020, sought to vacate Dailey's conviction and sentence based on newly discovered evidence in the form of: (i) a sworn declaration executed by Jack Pearcy on December 18, 2019 (the "2019 Pearcy Declaration"), in which Pearcy affirmed that Dailey was innocent and Pearcy alone was responsible for the murder of S.B. (Claim I.A); and (ii) an admission by former Assistant State Attorney ("ASA") Robert Heyman indicating that the State committed a fraud on the court when it knowingly failed to correct and proceeded to rely on the perjured testimony of Paul Skalnik, a notorious and since-discredited jailhouse informant who was the State's star witness at Dailey's trial (Claims I.C and II).

The circuit court held a case management conference ("CMC") on February 20, 2020, at which the court: (i) granted an evidentiary hearing as to Dailey's newly discovered evidence claim related to Pearcy; but (ii) denied an evidentiary hearing on Dailey's claims relating to ASA Heyman. The court expressly reserved judgment on whether to engage in a cumulative analysis of all admissible evidence of Dailey's innocence (Claim I.B).

At the CMC, the circuit court also granted Dailey permission to conduct a deposition of Pearcy in advance of the March 5, 2020 evidentiary hearing. Dailey's counsel deposed Pearcy on February 25, 2020 (the "Pearcy Deposition" or "Deposition"). The State was present. At the Deposition, Pearcy purported to renounce the 2019 Pearcy Declaration, but his testimony nevertheless provided new, critical details as to the sequence of events leading up to S.B.'s murder—details that are corroborated by extensive record evidence and entirely inconsistent with the State's theory at trial, sentencing, and on appeal.

At the March 5, 2020 evidentiary hearing, Dailey called Pearcy as a witness. Pearcy refused to testify. The State presented no witnesses. Thereafter, the court excused Pearcy from the courtroom and declared Pearcy an unavailable witness. R4 1994, 2017. On account of Pearcy's unavailability, Dailey argued that the exculpatory evidence obtained from

Pearcy was admissible as substantive evidence. R4 1997-2003, 2006-12. The circuit court reserved judgment pending receipt of written closing arguments. R4 2055.

On May 29, 2020, the circuit court issued an order (the "May 29 Order") dismissing or denying each of Dailey's claims. Specifically, the circuit court: (i) denied Claim I.A, finding that Dailey had "not presented any admissible evidence to support his claim that Pearcy confessed to committing the murder himself," R4 1459, and holding that both the 2019 Pearcy Declaration and the Pearcy Deposition were inadmissible hearsay, R4 1460; (ii) dismissed Claims I.C and II, finding that those claims, which related to ASA Heyman, were procedurally barred and immaterial, R4 1465-66; and (iii) held that Dailey was not entitled to relief or a cumulative review (Claim I.B), R4 1459, 1467. Additionally, the circuit court refused to consider the newly discovered evidence Pearcy provided at the Deposition—discussed at length during the evidentiary hearing and in Dailey's written closing—on the grounds that Dailey did not expressly raise a claim based on the Deposition in his Second Successive Motion (filed prior to the Deposition). R4 1463.

Dailey filed a Notice of Appeal on June 26, 2020. R4 1544-45. Dailey then filed a Third Successive Motion to Vacate Judgment of Conviction and Sentence of Death After Death Warrant Signed ("Third Successive Motion")

with the circuit court on July 31, 2020. R4 2186-2212. The Third Successive Motion raised a single claim of newly discovered evidence based on the testimony obtained during the Pearcy Deposition. In light of the circuit court's May 29 Order, in which it held that the Pearcy Deposition was inadmissible, and in an effort to obtain Pearcy's exculpatory evidence in a form the circuit court would deem admissible (without conceding the inadmissibility of the Pearcy Deposition), Dailey simultaneously filed a Motion to Take a Deposition to Perpetuate the Testimony of Jack Pearcy ("Motion to Perpetuate"). R4 2173-2181. Finally, Dailey filed a Motion to Relinquish Jurisdiction with this Court, asking this Court to allow the circuit court to adjudicate the Third Successive Motion. R4 2389-2400.

On August 21, 2020, this Court granted Dailey's Motion to Relinquish Jurisdiction. The circuit court proceeded to hold a CMC on the Third Successive Motion and the Motion to Perpetuate on September 10, 2020. R4 2089-2146. Thereafter, on September 21, 2020, the circuit court issued an order (the "September 21 Order") denying Dailey an evidentiary hearing, dismissing Dailey's claim as untimely, and denying Dailey's Motion to Perpetuate as both moot and unduly speculative. R4 2454-92. Dailey filed a Notice of Appeal on October 20, 2020, R4 2151, and this Court ordered the consolidation of Dailey's pending appeals on October 27, 2020.

SUMMARY OF ARGUMENT

From the day of his arrest in 1986, James Dailey has consistently maintained that he had nothing to do with the murder of S.B. In the 33 years since his conviction, evidence of his innocence has trickled out little by little, leading to a series of postconviction motions that have been denied on procedural and evidentiary grounds rather than on the merits. To date no court has considered the cumulative evidence of innocence that has piled up over the past three and a half decades.

This appeal addresses the circuit court's erroneous denial of four claims based on three distinct pieces of newly discovered evidence: (1) a January 2020 admission by former ASA Heyman that demonstrates that the State had *actual knowledge* that its star witness had lied on the stand at Dailey's trial and nevertheless failed to correct the record and then relied on the perjured testimony; (2) the 2019 Pearcy Declaration, which contains Pearcy's sworn confession that he committed the murder alone; and (3) the Pearcy Deposition, at which Pearcy testified—under oath and available for cross-examination by the State—to critical new details regarding the night in question, details that prove Dailey could not have been present at the time and site of the murder.

First, the circuit court summarily denied Dailey's *Giglio* claim based on

ASA Heyman's recent admission incorrectly holding that it was untimely and procedurally barred. In so holding, the circuit court failed to recognize that this *Giglio* claim was: (i) timely as a matter of federal constitutional law; and (ii) materially distinct from any previous claim.

Second, the circuit court erroneously conflated Dailey's newly discovered evidence claim based on Heyman's admission with Dailey's separate *Giglio* claim, leading the circuit court to improperly summarily deny the former based on the same flawed analysis it applied to the latter. Under the correct legal standard as articulated by *Jones v. State*, 709 So. 2d 512 (Fla. 1998), Heyman's admission constitutes newly discovered evidence.

Third, the circuit court improperly rejected Dailey's newly discovered evidence claim related to the exculpatory confession set forth in the 2019 Pearcy Declaration—the only claim the circuit court considered after an evidentiary hearing—based on its misapplication of *Chambers v. Mississippi*, 410 U.S. 284 (1973), and its progeny.

Fourth, the circuit court summarily denied Dailey's newly discovered evidence claim related to the Pearcy Deposition, refusing to reach the merits of the claim after erroneously concluding that the claim was barred on evidentiary and procedural grounds. The circuit court's conclusion that the Pearcy Deposition was inadmissible as substantive evidence was based on

its misinterpretation of the Florida Evidence Code (the "Evidence Code"), as well as its failure to consider, let alone apply, *Chambers*. The circuit court further compounded this error when it summarily denied Dailey's claim as procedurally barred based on a misinterpretation of controlling law and a misreading of the factual basis for Dailey's claim. Its ultimate denial of Dailey's Motion to Perpetuate was also in error, as Dailey satisfied the standard to obtain perpetuated testimony.

The circuit court's erroneous denials of each of Dailey's claims led it to commit further error by refusing to conduct the requisite cumulative review of the extensive evidence of Dailey's innocence. Had the circuit court properly granted an evidentiary hearing on Dailey's claims and conducted the requisite cumulative review, it would have found it more probable than not that if a jury heard the complete evidence of Dailey's innocence, that jury would acquit, or, at the very least, recommend a life sentence.

ARGUMENT

ARGUMENT I. The Circuit Court Erred in Denying Dailey's *Giglio* Claim that Former ASA Heyman's 2020 Admission Proves the State Willfully Committed Fraud on the Court.

During Dailey's trial, Paul Skalnik, a jailhouse informant who served as the State's star witness, testified that Dailey had confessed to him, and, specifically, that Dailey had told him that "the young girl kept staring at him,

screaming and would not die." TR1 9:1116. On cross-examination, Skalnik testified that his prior criminal charges were "grand theft, counselor, not murder, *not rape, no physical violence in my life.*" TR1 9:1158 (emphasis added). In fact, however, the Pinellas County State Attorney's Office had previously charged Skalnik with lewd and lascivious assault on a child under 14. R2 21, 30, 90, 2286. The lead detective on the case, John Halliday, testified immediately following Skalnik. The State did not ask either Skalnik or Halliday a single question about this charge. Instead, it allowed Skalnik's false testimony to stand uncorrected and proceeded to rely heavily on that perjured testimony in its closing arguments to the jury. *See* TR1 11:1415.

Despite repeated requests for any and all *Brady*[8] material spanning decades,[9] and despite the State's repeated affirmations that all such material has been turned over,[10] Dailey never received any information from the

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8 *Brady v. Maryland*, 373 U.S. 83 (1963).

9 This includes, *inter alia*, requests made on February 25, 1997, R2 811-40, as well as on October 2, 2019. R3 240-317 ("The records requested are relevant to or could lead to the discovery of admissible evidence related to his right to the disclosure of exculpatory evidence, including impeachment evidence. *See Brady*, 373 U.S. 83; *Giglio v. United States*, 405 U.S. 150 (1970).").

10 See, for instance, representations made to the court by the Attorney General's Office, R3 1312 ("Ms. Pacheco (OAG): in terms of *Brady*, there is nothing else that we have not – that we have that we haven't provided"), and the State Attorney's Office, R3 1338 ("Ms. Macks (SAO): [I]f there was *Brady* material in there, we would have provided it"), at the October 4, 2019 Hearing, following issuance of the death warrant.

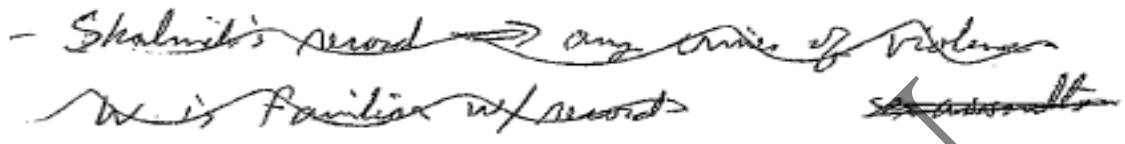
State—*including the notes that are the subject of this claim* (along with the admission itself)—reflecting that the State actually knew, at trial, that its linchpin witness had perjured himself. More than thirty years after the trial, by sheer happenstance, Dailey's defense team obtained these notes, after they were disclosed in an unrelated capital case in which Skalnik also testified. The notes were undated and unsigned. Dailey's counsel suspected these pages were ASA Heyman's notes from Dailey's trial, and exercised due diligence: trying without success to interview Heyman. R4 202.

Then, on January 14, 2020, ABC News reporter Matt Gutman conducted a videotaped interview with ASA Heyman. During that interview, Gutman presented Heyman with the notes in question and asked if Heyman could identify them. Heyman identified them as his notes from Dailey's trial in June 1987, remarking "obviously I knew about it" (*i.e.*, Skalnik's sexual assault charge).[11]

The notes reveal that ASA Heyman was aware, *at the time of trial*, that Skalnik had perjured himself, and nevertheless chose not only to allow the perjury to stand uncorrected, but also to rely upon this perjured testimony in order to bolster the credibility of this critical witness. Specifically, the notes,

[11] *The Perfect Liar*, ABC: 20/20 (Oct. 24, 2020), https://abc.com/shows/2020/episode-guide/2020-10/23-the-perfect-liar.

which track Heyman's questioning of Detective Halliday regarding jailhouse informant Paul Skalnik's criminal record, show that the term "sexual assault" (or "sexual assaults") has been repeatedly scratched out:



R4 104.

On January 21, 2020, Dailey filed an amendment to his Second Successive Motion which raised, *inter alia*, a *Giglio* claim alleging that ASA Heyman's admission established that, at the time of trial, the State had knowingly concealed impeachment evidence from not only Dailey but also his judge and jury, thereby perpetrating fraud on the court. R4 204-08. The circuit court denied this claim, finding Heyman's admission immaterial under *Giglio* and the claim procedurally barred. R4 1465-66. Federal courts, however, have overturned convictions in cases with materially identical features. This Court should find that the circuit court erred in finding the claim to be procedurally barred and address the claim on the merits.

A. The Circuit Court Erred in Finding that Former ASA Heyman's Recent Statements Were Not Material and Thus Did Not Merit Relief.

Because the circuit court denied an evidentiary hearing on this

subclaim, this Court must accept Dailey's factual allegations as true "unless the record *conclusively* demonstrates that [Dailey] is not entitled to relief." *Rivera*, 995 So. 2d at 197; *see also Nordelo*, 93 So. 3d 186. The following factual allegations must therefore be accepted as true: (1) Skalnik's testimony that his prior criminal charges were "grand theft, counselor, not murder, *not rape, no physical violence in my life,*" TR1 9:1158, was false; (2) the unsigned, undated notes were ASA Heyman's notes, made contemporaneously with Dailey's trial; (3) the notes reflect that ASA Heyman was aware of Skalnik's previous sexual assault charge; and (4) the term "sexual assault" in the notes is crossed out, indicating that, after Skalnik testified that he had never been charged with physical violence or rape, Heyman made a conscious decision not to ask Detective Halliday about Skalnik's charge of lewd and lascivious assault on a child under 14; in other words, he made a conscious choice to let the record stand uncorrected.

(1) *The Legal Standard for* Giglio *Materiality*

For nearly a century, beginning with *Mooney v. Holohan*, 294 U.S. 103 (1935), the United States Supreme Court has affirmed and reaffirmed the principle that prosecutors are constitutionally foreclosed from relying on perjured testimony. In *Alcorta v. Texas*, 355 U.S. 28 (1957), the Court extended *Mooney*, holding that false testimony includes situations where a

witness's failure to be entirely truthful creates a "false impression" that the prosecutor allows to stand uncorrected. 355 U.S. at 31-32. And in *Napue v. Illinois*, 360 U.S. 264 (1959), the Court clarified that the State is obliged to correct false testimony even in situations where the testimony speaks only to the credibility of the witness.

> The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness. The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend . . . . 'It is of no consequence that the falsehood bore upon the witness' credibility rather than directly upon defendant's guilt. *A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth*.'

360 U.S. at 269-70 (emphasis added) (internal citation omitted). Finally, in *Giglio*, the Court made clear that this obligation was incumbent upon the State irrespective of whether the specific prosecutor trying the case had actual knowledge of the falsity. 405 U.S. at 154.

Under *Giglio*, "*the fact that testimony is perjured is considered material unless failure to disclose it would be harmless beyond a reasonable doubt.*" *United States v. Bagley*, 473 U.S. 667, 680, 682 (1985) (emphasis added); *see also Guzman v. State*, 941 So. 2d 1045, 1050 (Fla. 2006) (recognizing

that the test of materiality under *Giglio* is more "defense-friendly" than that of *Brady*); *Guzman v. Sec'y, Dep't of Corr.*, 663 F.3d 1336, 1348 (11th Cir. 2011) (same). It is the State's burden to prove, beyond a reasonable doubt, that the presentation of false testimony at trial was harmless. *Bagley*, 473 U.S. at 680 n.9; *Guzman,* 663 F.3d at 1348 (holding that a new trial is required "unless the prosecution persuades the court that the false testimony was harmless beyond a reasonable doubt") (internal citation omitted).

(2) *ASA Heyman's Admission Is Material as to Both Guilt and Punishment.*

In this entirely circumstantial case, the State's star witness, Paul Skalnik, a lifelong con man and serial jailhouse informant, perjured himself, and, in so doing, created a false impression in the minds of the jurors. The prosecutor knew all of it: that Skalnik was an inveterate con,[12] that he had previously been charged with sexually assaulting a child, that this charge had been dismissed over the course of his cooperation with the State in many cases, that he had lied under oath, and that his lie in turn created a false impression regarding his character and credibility. And yet the prosecutor repeatedly crossed out the note proposing a correction in his trial

[12] *The Perfect Liar*, *supra* note 11 ("MATT GUTMAN: This is a guy who is a professional con man at this point, and you knew it. And you knew it. ASA HEYMAN: Absolutely.").

preparation materials and allowed the perjury to stand. And then, after perpetrating this fraud on the court, the State weaponized the perjured testimony in its argument to the jury, repeatedly vouching for Skalnik's credibility by urging jurors to accept the premise that there is a "moral hierarchy" in jail (where Skalnik purportedly ranked higher because his crimes were less serious), without ever mentioning the child sex assault charge that had been dismissed over the course of his cooperation with Pinellas County prosecutors–a charge that would have turned the prosecution's moral hierarchy argument on its head. The prosecution's actions in this case bespeak the kind of bad faith and guile that brought the *Mooney* line of cases into being, making this "aggravated species" of constitutional violation more aggravated still. *Guzman*, 663 F.3d at 1355.

A recent case from the Fourth Circuit Court of Appeals is instructive. In *Long v. Hooks*, 972 F.3d 442 (4th Cir. 2020) (en banc), the Court held that the state postconviction court's finding (that the *Brady* material at issue would have had no impact on the Petitioner's trial) was "objectively unreasonable."[13] At Long's trial, the State had asked the jury to trust the

[13] Notably, in *Long*, the Fourth Circuit found a *Brady* violation, despite the fact that the materiality standard under *Brady* is harder to satisfy than the *Giglio* materiality standard at issue in the present case. *Guzman*, 663 F.3d at 1348. (As noted *supra*, this is so because the *Giglio* line of cases has been

"perfect honesty" of the officers investigating the crime. However, the "trickle of post-trial disclosures" over 44 years "unearthed a troubling and striking pattern of deliberate police suppression of material evidence." *Id*. at 446. In particular, the Fourth Circuit noted that the evidence "completely undermined" the testimony and credibility of the two detectives who testified in the case. *Id*. at 465. In a strongly worded concurrence, Judge Wynn emphasized the egregiousness and effect of the behavior of the officers, upon whom the State so heavily relied:

> The officers in this case plainly did not act with 'perfect honesty.' In fact, some of them acted with deliberate deceit – at the time of the investigation, on the stand at trial, and in the ensuing decades, when they never revealed the existence of the suppressed evidence. The impact on Mr. Long's case was profound. The impact on his life was disastrous.

Id. at 483 (Wynn, J., concurring).

The Eleventh Circuit's opinion in *Guzman v. Secretary, Department of Corrections* is also instructive. Guzman raised a *Giglio* claim based on evidence that the critical witness (Martha Cronin) and the lead detective had both testified falsely at trial that Cronin had received nothing in return for her testimony (in fact, she had been given $500). *Guzman*, 663 F.3d at 1339.

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recognized as an "aggravated species," *id.* at 1355, of the broader category of constitutional violations recognized by the Supreme Court in *Brady* (specifically: suppression by the prosecution of evidence favorable to the accused).

While this Court held that there was no reasonable possibility that knowledge of the monetary reward and the witness's and detective's perjury could have affected the outcome of the case, *Guzman*, 941 So. 2d at 1051, the Eleventh Circuit found this Court's application of the *Giglio* standard of materiality to be "objectively unreasonable" and affirmed the district court's grant of habeas relief. *Guzman*, 663 F.3d at 1349. Recognizing that the United States Supreme Court's precedents mandate consideration of "the cumulative effect of the false evidence for the purposes of materiality," the Eleventh Circuit highlighted the degree to which the impeachment evidence would have undermined not only the credibility of "the State's key witness" but that of the lead detective. *Id.* at 1351. Just as the Fourth Circuit in *Long* found that the evidence at issue would have called into question the officers' "perfect honesty," the Eleventh Circuit found that the impeachment of the detective would have "impugned not only her veracity but the character of the entire investigation." *Id.* at 1353 (quoting *Guzman v. Sec'y, Dep't of Corr.*, 698 F. Supp 2d 1317, 1332 (M.D. Fla. 2010), *aff'd*, 663 F.3d 1336 (11th Cir. 2011)).[14]

[14] A materiality analysis under *Brady* may properly include whether the evidence in question could have been used to "discredit the caliber of the investigation," including "police methods employed in assembling the case." *Kyles v. Whitely*, 514 U.S. 419, 446 (1995) (internal citations omitted).

Finally, *Silva v. Brown*, 416 F.3d 980 (9th Cir. 2005), provides another useful parallel. In *Silva*, the prosecution agreed to a plea deal with one of Silva's co-defendants, Norman Thomas, conditioned not only on Thomas's promise to testify against Silva at trial, but also on his agreement to forego a psychiatric examination prior to testifying. The Ninth Circuit granted habeas relief, finding that the State had committed a *Brady* violation (again, a higher, more stringent materiality standard than that required by *Giglio*) by failing to disclose this aspect of the plea deal to Silva's counsel. In determining that this evidence was material, the Court noted that "the very fact that the prosecution had sought to keep evidence of Thomas's mental capacity away from the jury might have diminished the State's own credibility as a presenter of evidence." *Silva*, 416 F.3d at 988.

Similarly here, had Dailey's jury known that the State was aware of Skalnik's lie on the stand and had chosen not to correct him, the jury would have had reason to doubt not only the entirety of Skalnik's testimony but the integrity of the State and its case writ large. The jury would have been far more skeptical not only of Skalnik but of the other two jailhouse informants who testified against Dailey, both of whose characters the State also

vouched for, and who, the State assured the jury (falsely, as it turned out[15]), were not "getting out of jail free." TR1 10:1278, 10:1279. And because, just as the Eleventh Circuit held in *Guzman*, "the evidence connecting [the defendant] to the crime was circumstantial and far from overwhelming," 663 F.3d at 1354, the State's case would have been gravely undermined. *See also East v. Johnson*, 123 F.3d 235, 239 (5th Cir. 1997) ("[W]hen the withheld evidence would seriously undermine the testimony of a key witness on an essential issue . . . the withheld evidence has been found to be material.") (citation and internal quotation marks omitted).

As in *Long*, *Guzman*, and *Silva*, the materiality of the State's knowledge of Skalnik's perjury cannot be disentangled from the substance of the perjured testimony itself. In *Long*, the Court found that the detectives' behavior "demonstrate[d] a pattern of deceitfulness and suppression that not only signifies that state actors conducted themselves in a corrupt manner, but also that they believed the withheld evidence was *material enough to hide*." *Long*, 972 F.3d at 466 (emphasis added). Similarly, in *Guzman*, the Court found that "[t]he fact that the lead detective . . . twice denied the

[15] In fact, as a result of their plea agreements, neither James Leitner nor Pablo Dejesus served a single additional day in jail than required by the sentences they were already serving in Colorado and Maryland respectively—the exact same outcome they would have experienced if their Florida charges had been dropped altogether.

existence of the payment is at least a tacit admission that it was perceived to have relevance to a reasonable fact finder viewing the credibility of this witness." *Guzman*, 663 F.3d at 1350 (citing *Guzman*, 698 F. Supp. 2d at 1332). And, finally, in *Silva*, the Court noted that "[t]he prosecutor's own conduct in keeping the deal secret underscores the deal's importance" and held that "a prosecutor's assessment of undisclosed evidence can support a finding of materiality by highlighting the importance of that evidence." *Silva*, 416 F.3d at 990.

In this case, the very fact that Heyman did not ask Halliday to set the record straight regarding Skalnik's history of sexual assault, as his notes make clear he considered doing, is evidence that Heyman believed—correctly—that the matter *was material*. That is, Heyman understood that a jury would have taken a different view of Skalnik's testimony had it known: first, that Skalnik had lied on the stand;[16] second, that his crimes were not

[16] *See*, *e.g.*, *United States v. Wallach*, 935 F.2d 445, 457 (2d Cir. 1991) ("Had it been brought to the attention of the jury that [the witness] was lying after he had purportedly undergone a moral transformation . . . his entire testimony may have been rejected by the jury. It was one thing for the jury to learn that [the witness] had a history of improprieties; it would have been an entirely different matter for them to learn that after having taken an oath to speak the truth he made a conscious decision to lie."); *United States v. Seijo*, 514 F.2d 1357, 1364 (2d Cir. 1975) (where critical witness lied about his criminal record, "his false and conscious concealment of the prior conviction

mere financial ones; third, that he had sexually assaulted a child; and fourth, that the resulting charge against him had been dropped over the course of his cooperation with Pinellas County prosecutors, although there had been eyewitnesses to the crime.[17] The jury would have had reason to doubt Skalnik's credibility, character, and motives for testifying.

Heyman could not take this risk, because Skalnik was the linchpin of his case against Dailey, just as Martha Cronin was the linchpin of the case against James Guzman, just as Norman Thomas was the linchpin of the case against Benjamin Silva. As in *Silva*, where the State's deliberate decision to suppress rather than disclose "suggests the weakness of its post hoc claims that the evidence was irrelevant," *Silva*, 416 F.3d at 990, so too here: Heyman's deliberate and strategic decision not to correct Skalnik's perjury—as evinced by the notes he avowed were his own—puts the lie to the claim that both the fact and substance of Skalnik's perjury were immaterial to Dailey's verdict and sentence.

The State's closing argument advancing the deception to the jury as grounds to credit the testimony of Paul Skalnik further speaks to its materiality. It was Skalnik's perjury that made possible the State's

render[ed] . . . his testimony suspect" even if the prior conviction itself "would not have seriously damaged [his] credibility" with the jury).

[17] R2 21, 30, 90 (probable cause finding), 2286 (charging document).

subsequent and peculiar vouching for his credibility. In closing, the State urged the jury to believe Skalnik's testimony because "there is a hierarchy over in that jail just like in life," where brutal crimes against children are worse than "buying stolen cars." TR1 10:1278. The State repeated in closing Skalnik's false testimony that his crimes were limited to non-violent offenses. TR1 10:1283. In other words, the State not only permitted Skalnik's duplicity, but deployed it. As in *Mordenti v. State*, 894 So. 2d 161, 171 (Fla. 2004), where this Court found a *Brady* violation as a result of the State's suppression of evidence regarding a critical witness, "[t]he undisclosed evidence . . . would have stifled the prosecution's fervid efforts to portray [its star witness] as . . . believable [ ]." Skalnik did not sit atop any moral hierarchy and the State knew it. The State nevertheless urged the jury to believe that he did.

In 1991, this Court held that the trial court's refusal to allow defense counsel to question Skalnik concerning the specifics of charges pending against him at the time of Dailey's trial (which were admissible to show possible bias) was error, though at the time it deemed the error harmless. *Dailey v. State*, 594 So. 2d 254, 256 n.2 (Fla. 1991). This error must now be considered in conjunction with what the Court did not know in 1991, including that: (1) Skalnik had offered information against no fewer than 36 defendants

in Pinellas County in a six-year period (1981-1987), helping to land at least four on death row,[18] and (2) Skalnik lied on the stand about his criminal history, and the State recognized his perjury and chose not to correct it. A 2012 report from the Florida Innocence Commission noted that "fabricated testimony [from jailhouse informants] [was] a leading cause of wrongful convictions in capital cases. . . . [S]tudies have shown that informant perjury was a factor in nearly 50% of wrongful murder convictions."[19] This Court relied heavily on this report and its recommendations in its 2014 Amendment to Florida Rule of Criminal Procedure 3.220, which acknowledged that an "informant witness' prior history of cooperation, in return for any benefit, as known to the prosecutor" is directly relevant to credibility. *In re Amends. to Fla. Rule of Crim. Proc. 3.220*, 140 So. 3d 538, 539 (Fla. 2014).

"The thrust of *Giglio* and its progeny has been to ensure that the jury know the facts that might motivate a witness in giving testimony, and that the

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[18] Pamela Colloff, *How This Con Man's Wild Testimony Sent Dozens to Jail, and 4 to Death Row*, The New York Times Magazine (Dec. 4, 2019), https://www.nytimes.com/2019/12/04/magazine/jailhouse-informant.html.

The fact that Skalnik had a longstanding relationship with the Pinellas County State Attorney's Office, wherein he received benefits in exchange for his cooperation, such as the dismissal of his child sex assault case, was critical evidence directly relevant to bias.

[19] *Florida Innocence Commission*, *Final Report to the Supreme Court of Florida* 49 (June 25, 2012), available at https://www.flcourts.org/content/download/218230/file/Innocence-Report-2012.pdf.

prosecutor not fraudulently conceal such facts from the jury." *Craig v. State*, 685 So. 2d 1224, 1226-27 (Fla. 1996) (internal quotations and citations omitted); *see also State v. Dougan*, 202 So. 3d 363, 383 (Fla. 2016) ("jury may have believed [the witness] had a reason to lie and would therefore [have] question[ed] his credibility" had it known the witness was facing "a contingent sentence at the mercy of the State"); *Benn v. Lambert*, 283 F.3d 1040, 1056 (9th Cir. 2002) (evidence that key witness had used drugs while acting as an informant in the past and had not been prosecuted was "relevant to show [witness's] bias.").

In this case, had the jury known that Skalnik was a repeat player who had substantially benefited in the past from his cooperation with the State (and, specifically, that the State had dismissed a child sexual assault charge against Skalnik during a period in which Skalnik had provided information in multiple high-profile cases), the jury might well have believed that Skalnik, who had additional charges pending, who was facing a sentence of up to twenty years, and who knew that the State was desperate for information against Dailey,[20] had a reason to tell the story the State wanted the jury to

[20] When cross-examined at Dailey's capital trial, Detective Halliday admitted that, prior to Dailey's trial but subsequent to having failed to obtain the death penalty against Pearcy, he had pulled and then questioned everyone in Dailey's housing pod. Halliday acknowledged that within the jail

hear. Had the jury further known the State was willing to allow Skalnik's perjury to stand uncorrected so that its past dealings with Skalnik would not be brought to the fore, the jury might well have found Skalnik—and the State's case more broadly—unworthy of belief.

Skalnik claimed on the stand that Dailey had told him the "young girl" "kept staring at him, screaming and would not die." TR1 9:1115. This graphic testimony, typical of Skalnik's "lurid" and "provocative" testimony in other cases,[21] was not unlike Norman Thomas's testimony against Benjamin Silva, which the court described as the "most specific," "the most powerful," and "the crux of the [State's] case." *Silva*, 416 F.3d at 987. Skalnik's testimony was far more dramatic and indeed inflammatory than the relatively anodyne testimony of the other two jailhouse informants.

The State's decision to reference the staring-screaming-would-not-die statement in closing argument—half a dozen times—further underscores Skalnik's centrality to its case. TR1 10:1255, 10:1265, 10:1281, 10:1285.

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it would have been a "well-known fact [that the State was] looking for witnesses against James Dailey." TR1 9:1194.

[21] Colloff, *supra* note 18 ("The demand for convictions and long, tough sentences made Skalnik's testimony invaluable. The confessions he recounted were lurid and dramatic, strewn with provocative details that prosecutors used not just to show the guilt of the defendants but also to establish that they were diabolically evil. Skalnik told of victims' begging for their lives and of remorseless killers who laughed after their slaughters, boasting that they had outsmarted prosecutors and the police.").

These "statements of the prosecutors themselves" provide "ample support that [the witness's] testimony was critical to the State's case." *Dougan*, 202 So. 3d at 382.

The State's failure to correct Skalnik's perjured testimony could not possibly be harmless beyond a reasonable doubt in light of the State's repeated reliance on Skalnik's testimony, coupled with its improper vouching for Skalnik's character and its conscious omission of Skalnik's relevant prior dealings with Pinellas County prosecutors. *See, e.g.*, *Craig*, 685 So. 2d at 1228 (finding *Giglio* violation where the State "presented a false and misleading picture to the jury" thus "depriv[ing] the jury of critical information regarding" the witness's credibility); *Maxwell v. Roe*, 628 F.3d 486, 508 (9th Cir. 2010) (finding jailhouse informant's false testimony prejudiced trial where the importance of that testimony "was underscored by the prosecution in its closing argument"); *Jenkins v. Artuz*, 294 F.3d 284, 293-94 (2d Cir. 2002) ("Any doubts we might have about the existence of an 'increment of incorrectness beyond error' are eliminated by [the ADA's] summation, which placed the State's credibility behind [the witness's] untruthful testimony.") (internal citation omitted).

Nor could the State's deception at the penalty phase of Dailey's trial be deemed harmless beyond a reasonable doubt. The State made repeated

references to Skalnik's testimony at the penalty phase, TR1 11:1407, 11:1411, just as it had in its guilt-phase closing argument. The trial court, moreover, relied heavily on Skalnik's inflammatory testimony in finding the heinous, atrocious, and cruel aggravating factor in both its original sentencing order and its resentencing order. R4 45-46, 54. The trial court also relied on Skalnik's testimony, in both of its sentencing orders, to discount two weighty statutory mitigating factors, namely that: (1) Dailey was an accomplice in the capital felony committed by another person and his participation was relatively minor; and (2) the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. *Id*. at 47-48, 55-56. In addition, Skalnik's testimony was cited in the trial court's resentencing order to discount the non-statutory mitigating factor that another person may have been the perpetrator of the homicide. *Id*. at 57.

Given how heavily the State and the court relied upon Skalnik's testimony, at both the guilt and penalty phases of his capital trial, the State *cannot satisfy its burden of establishing beyond a reasonable doubt that its knowing use of perjured testimony did not affect the verdict and sentence*. *See Guzman*, 941 So. 2d at 1050-51. "In cases in which the witness is central to the prosecution's case, the defendant's conviction indicates that in all

likelihood the impeachment evidence introduced at trial was insufficient to persuade a jury that the witness lacked credibility." *Benn*, 283 F.3d at 1055.[22] The State cannot possibly meet its burden in this case, where one of the trial prosecutors later testified that she would never call Skalnik as a witness again due to his lack of credibility. PC ROA 3:397-98.

Rather than analyze the *Giglio* claim before it, the circuit court erroneously relied on this Court's materiality analysis in *Dailey v. State*, 279 So. 3d 1208, 1217 (Fla. 2019) ("*Dailey V*"), where the claim then under review concerned only the State's failure to disclose Skalnik's prior sexual assault charge, not proof of its *actual knowledge* of that charge and *willful deception* regarding same. The Court had no cause to consider the distinct question at issue here: whether the jury's verdict would have been affected had it learned not just of Skalnik's criminal history, but also that *the prosecution knew* that this lifelong liar had just lied yet again, under oath and in a court of law, with a man's life at stake and nevertheless *willfully* failed to correct that testimony, instead choosing to affirmatively rely upon it to vouch for Skalnik's credibility in its closing argument to the jury.

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22 *See also The Perfect Liar*, *supra* note 11 (Carol Martin (juror at Dailey's trial): Skalnik's testimony "was actually the only information that we ever got that supposedly came from James Dailey because he never took the witness stand . . . that was the only way we could hear James Dailey's voice.").

Heyman's admission makes clear that the State: (1) acted in bad faith in questioning its own witness; (2) engaged in deliberate deceit in its closing arguments in the guilt phase and again in the penalty phase; and (3) failed to discharge its constitutional obligation over the ensuing decades by failing to disclose that it had known all along that its star witness had lied on the stand. This Court has long recognized that perjured State testimony is presumptively material, and that the presumption of materiality can only be rebutted if the State proves harmlessness beyond a reasonable doubt. The State cannot carry its burden here.

"[I]n our American legal system there is no room for such misconduct, no matter how disturbing a crime may be. . . . The same principles of law apply equally to cases that have stirred passionate public outcry as to those that have not." *Johnson v. State*, 44 So. 3d 51, 73 (Fla. 2010).

> In our justice system, the prosecuting attorney occupies a special position of public trust. Courts, citizens, and even criminal defendants must rely on these public servants to be honorable advocates both for the community on whose behalf they litigate and for the justice system of which they are an integral part. When prosecutors betray their solemn obligations and abuse the immense power they hold, the fairness of our entire system of justice is called into doubt. . . . The particularly atrocious nature of [certain] crimes . . . cannot diminish the prosecutor's – and our court's – duty to ensure that all persons accused of crimes receive due process of law.

Silva, 416 F.3d at 991-92.

In this case, the State failed to uphold its solemn obligations, abusing its power and betraying the public trust. The impact of its "fraud, collusion [and] trickery," *Lisenba v. People of California*, 314 U.S. 219, 237 (1941), on Dailey's case was profound. The impact on his life was disastrous.

B. The Circuit Court Erred in Finding this Claim to Be Procedurally Barred.

The circuit court held that Dailey's claim regarding Heyman's statements was procedurally barred because "Defendant was fully aware of Skalnik's prior charge when he filed the 2017 motion containing two claims based on that charge." R4 1465. This holding, however, completely misunderstands the nature of Dailey's claim.

The 2017 *Giglio* claim, which was filed immediately after postconviction counsel learned of Skalnik's sexual assault charge, argued that there was a reasonable possibility that the jury's verdict would have been affected had the jury known of that charge. In contrast, the claim at issue in this appeal, which could not have been presented before (because it is based on subsequently discovered evidence in the form of Heyman's recent admission and notes), is that there is a reasonable possibility that the jury's verdict would have been affected had it known not only of the child sex charge dismissed over the course of his cooperation, but also of the *prosecution's actual knowledge* and *willful deception*: the contemporaneous recognition of

its star witness's perjury, the decision not to correct it (then or ever), and the choice to then rely on the perjury to vouch for the witness's ersatz credibility.

The claims are distinct, just as this Court found the two successive *Giglio* claims to be distinct in *Johnson v. State*, 44 So. 3d 51 (Fla. 2010). In *Johnson*, the defendant raised an initial *Giglio* claim arguing that the main witness against him had lied at trial under instructions from the State. This claim was denied. More than a decade later, Johnson's counsel was able to identify certain handwritten notes in its possession as belonging to Johnson's trial prosecutor. These notes proved that the prosecutor had indeed known of the witness's perjury at trial. Relying on this proof of the State's actual knowledge, this Court found that the State was unable to meet its burden of showing that there was no "reasonable possibility" that the conduct at issue did not impact Johnson's sentence. *Johnson*, 44 So. 3d at 72; *see also Wallach*, 935 F.2d at 456 ("[I]f it is established that the government knowingly permitted the introduction of false testimony reversal is 'virtually automatic.'"). Furthermore, Dailey could not have raised the latter claim in 2017 as he did not learn of the State's actual, contemporaneous knowledge of Skalnik's perjury until ASA Heyman's interview with ABC News in 2020. *See also Johnson*, 44 So. 3d at 72 n.18 (although notes had been in Defendant's possession for a decade prior to raising the instant claim,

Defendant had exercised due diligence in trying to identify them and could not be faulted for being unable to do so).

As Dailey argued to the circuit court, he is not required to somehow intuit and then ferret out the kind of undisclosed exculpatory material at issue here. 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 v. Dretke*, 540 U.S. 668, 696 (2004) (internal quotations and citation omitted). "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 quotations, alterations, and citation omitted). The duty to disclose *Brady* and *Giglio* material, moreover, extends through collateral proceedings. *See, e.g.*, *Scott v. Butterworth*, 734 So. 2d 391, 392 (Fla. 1999); *Roberts v. Butterworth*, 668 So. 2d 580, 582 (Fla. 1996).

In the absence of any *Brady* or *Giglio* disclosures, counsel for Dailey had only unsigned and undated handwritten pages, sufficient to engender suspicions, but insufficient to raise an affirmative claim of State misconduct. Heyman's identification of the notes and acknowledgment of them as his own were the necessary predicates for raising this claim, and neither was met until January 14, 2020.

Here again, *Long v. Hooks* provides guidance. In *Long*, exculpatory and impeachment evidence "trickled out" over 44 years of postconviction proceedings: first, a doctored police report; later, laboratory results regarding evidence at the scene that failed to inculpate Long; still later, analysis of fingerprints taken from the scene that excluded Long as the source of the prints. 972 F.3d at 466-67, 483, 490. After each disclosure, Long filed postconviction motions and was denied relief—only to learn of still more evidence that could potentially exonerate him. Similarly here, exculpatory and impeachment evidence has trickled out over the past 34 years: a police report from the Indian Rocks Beach Police Department containing a critical statement from a critical witness (Oza Shaw); proof that Paul Skalnik lied on the stand about his criminal past; and, now, evidence that the trial prosecutor knew that he lied and knowingly chose not only to let his perjury stand but to rely upon it in order to bolster Skalnik's credibility with the jury. And, unlike in *Long*, none of this evidence was disclosed by the State, in spite of Dailey's repeated *Brady* requests and the State's constitutional and ethical obligations.

For 34 years, Dailey "has been in prison, all the while maintaining his innocence." *Long*, 972 F.3d at 448. As in *Long*, "we arrive at this point as a result of the action of the state – the slow, stubborn drip of undisclosed

evidence." *Long v. Hooks*, 947 F.3d 159, 187 (4th Cir. 2020) (Thacker, J., dissenting), *rev'd en banc*, 972 F.3d 442 (4th Cir. 2020). It is through no fault of Dailey's that he was unable to file this claim in 2017. To hold that he is procedurally barred from filing this claim because the State suppressed evidence that it knew of Skalnik's perjury at the time of trial "would provide incentive for the state to lie, obfuscate, and withhold evidence for a long enough period of time that it can then simply rely on the need for finality." *Id.*; *see also Gonzalez v. Wong*, 667 F.3d 965, 980 (9th Cir. 2011) ("For us simply to ignore [impeachment evidence] that did not emerge until the federal habeas proceedings would be to reward the prosecutor for withholding them."). Such a holding cannot be countenanced.

Furthermore, this Court's resolution of Dailey's federal constitutional claims on state procedural bar grounds alone would not yield an independent and adequate basis to sustain the judgment in federal court. *See Michigan v. Long*, 463 U.S. 1032 (1983). The United States Supreme Court has long been clear that state procedural rules incompatible with the requirements of due process do not stand as a bar to relief. *See, e.g., Lee v. Kemna*, 534 U.S. 362 (2002); *Reece v. Georgia*, 350 U.S. 85 (1955); *Brinkerhoff-Faris Tr. & Sav. Co. v. Hill*, 281 U.S. 673 (1930). Accordingly, independent of addressing the circuit court's holding with regard to the procedural bar, this

Court can and should engage in a separate materiality analysis of the claim itself. Were this Court to do otherwise, and affirm based solely on state procedural grounds, it would invite a remand from the United States Supreme Court for consideration of the federal question on the merits.

C. The Circuit Court Erred in Denying an Evidentiary Hearing on Dailey's *Giglio* Claim.

At a minimum, this Court should find that the circuit court erred in denying an evidentiary hearing on this claim. Where, as here, "the record does not conclusively refute [the defendant's] extensive factual allegations that the State knowingly presented false or misleading testimony in violation of *Giglio,"* an evidentiary hearing is required. *Rivera*, 995 So. 2d at 197 (reversing summary denial of *Giglio* claim and finding that evidentiary hearing was warranted to determine, *inter alia*, whether State knowingly presented false testimony from its "star witness," a jailhouse informant who testified about incriminating statements made by the defendant); *see also Maharaj v. State*, 684 So. 2d 726, 728 (Fla. 1996) (evidentiary hearing warranted to resolve issue of whether "perjured testimony was knowingly presented at trial by the State"). Dailey alleged a facially sufficient *Giglio* claim—*i.e.*, that Heyman's admission that the notes in question were his demonstrates that: (1) the State knew, at the time of Dailey's trial, that Skalnik had perjured himself before the jury when he testified he had no

history of sexual assault; and (2) the State chose to allow the jury to rely upon Skalnik's false representations, which were deliberately designed to inflate his credibility in the eyes of the court. Because this claim is not conclusively refuted by the record, Dailey should have been afforded the opportunity to examine Heyman regarding his knowledge of Skalnik's criminal past at the time of trial and the State's use of Skalnik's perjured testimony in closing arguments. *Rivera*, 995 So. 2d at 197.

ARGUMENT II. The Circuit Court Erred in Denying Dailey's Claim that Former ASA Heyman's Admission Regarding His Trial Notes Constituted Newly Discovered Evidence and Required Relief.

In its May 29 Order, the circuit court conflated Dailey's distinct *Giglio* and newly discovered evidence claims, improperly assessing them both under the same standard. Under Florida and federal law, there are two requirements for relief based on newly discovered evidence. *See*, *e.g.*, *Jones*, 709 So. 2d at 521. First, it must appear that defendant could not have obtained critical facts in admissible form by the use of diligence. Second, the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial or yield a lesser sentence.

First, Dailey's claim based on Heyman's admission is timely because Dailey filed the claim within a year (*i.e.*, one week) of Heyman's admission to ABC News. After obtaining the notes in question (*not* from the State),

Dailey made diligent efforts to determine their origins, including by attempting to speak with Heyman. *See supra* Argument I. Because those efforts proved unsuccessful, Dailey was left with mere suspicions, insufficient predicates for raising this claim. This Court repeatedly has held that, so long as a defendant exercises due diligence, a newly discovered evidence claim is timely where it is based on evidence that was "previously unavailable" to the defendant on account of a witness's "previous unwillingness to testify." *Taylor v. State*, 260 So. 3d 151, 160 (Fla. 2018); *see also Nordelo*, 93 So. 3d at 187 (newly discovered evidence claim timely where witness was previously unavailable); *Davis v. State*, 26 So. 3d 519, 528 (Fla. 2009) (newly discovered evidence claim timely where investigators were unable to make contact with the witnesses); *Hunter v. State*, 29 So. 3d 256, 262-63 (Fla. 2008) (newly discovered evidence claim timely where the witnesses previously refused to provide information).

Second, Heyman's admission that the unsigned notes are his notes from Dailey's trial is highly material to Dailey's conviction and sentence because it provides proof, for the first time, that the State knew that its star witness perjured himself, elected to allow that perjured testimony to stand uncorrected, and then delivered a closing argument that relied on Skalnik's false claim. *See Jones*, 709 So. 2d at 521; *see also Hildwin v. State*, 141 So.

3d 1178, 1184 (Fla. 2014). As illustrated by the State's repeated references to Skalnik's language during its closing argument, and by the trial court's reliance on this language in its sentencing orders, *see supra* Argument I.A.2, Skalnik's credibility was essential to the State's case, to the jury's finding of guilt, and to the trial court's sentencing determination. The newly discovered evidence shows not just that Skalnik was utterly unreliable but that the State actively embraced its star witness's perjury in pursuit of a conviction and death sentence for Dailey. Considered in conjunction with all other admissible evidence, this new evidence merits relief.

At a minimum, this Court should find that the circuit court erred in denying an evidentiary hearing on this claim. As described in Argument I.C, *supra*, Dailey made a facially sufficient claim that required further factual development. Accordingly, an evidentiary hearing should have been held. *Nordelo*, 93 So. 3d at 187-88 (quashing summary denial where motion alleged facially sufficient claim); *McLin*, 827 So. 2d at 955-56 (vacating summary denial).

ARGUMENT III. The Circuit Court Erred in Denying Dailey's Newly Discovered Evidence Claim Based on the 2019 Pearcy Declaration.

The sworn confession set forth in the 2019 Pearcy Declaration—Pearcy's admission that he was the sole perpetrator of the murder for which Dailey is set to be executed—is admissible as substantive evidence of

Dailey's innocence under *Chambers v. Mississippi*, 410 U.S. 284 (1973), and its progeny. The circuit court denied this claim, holding that the 2019 Pearcy Declaration does not qualify as a third-party admission of guilt and is inadmissible hearsay. R4 460. In so doing, the court relied solely on this Court's decision regarding a similar issue in *Dailey V*, 279 So. 3d 1208. Dailey respectfully submits that *Dailey V* misapprehended *Chambers* and *Holmes v. South Carolina*, 547 U.S. 319 (2006). It is also inconsistent with this Court's prior applications of *Chambers* in *Bearden*, 161 So. 3d 1257, and *Aguirre-Jarquin v. State*, 202 So. 3d 785 (Fla. 2016). Dailey accordingly requests that the Court recede from its prior decision and find that the 2019 Pearcy Declaration is admissible as substantive evidence of Dailey's innocence under *Chambers* for the reasons set forth in the prior briefing. *See* Initial Brief of Appellant at 16-22, *Dailey V*, 279 So. 3d 1208 (No. SC18-557).

ARGUMENT IV. The Circuit Court Erred in Holding that the Pearcy Deposition Is Inadmissible as Substantive Evidence.

The circuit court erroneously refused to admit the sworn testimony Pearcy provided at the Pearcy Deposition, which was conducted on February 25, 2020 in connection with the underlying postconviction proceedings. The Pearcy Deposition is admissible as substantive evidence at Dailey's retrial for two independently sufficient reasons.

First, the Pearcy Deposition satisfies each of the requirements of the

former testimony hearsay exception under the Evidence Code. *See* Fla. Stat. § 90.804(2)(a). Specifically: (1) Pearcy is an unavailable witness on account of his refusal to testify at the March 5, 2020 evidentiary hearing;[23] (2) the Pearcy Deposition was conducted in "compliance with law" because it satisfied each of the requirements of the Florida Rules of Civil Procedure (the "Civil Rules"), which govern depositions conducted in postconviction proceedings; and (3) the State had the same motive and a full and fair opportunity to cross-examine Pearcy at the Deposition, which was conducted a mere nine days before the March 5, 2020 evidentiary hearing.

Second, the newly discovered evidence of innocence from the Pearcy Deposition is otherwise admissible under *Chambers v. Mississippi*, 410 U.S. 284 (1973), and its progeny as its exclusion would improperly deprive Dailey of his constitutional right to due process.

In its May 29, 2020 Order, the circuit court erroneously held that the Pearcy Deposition was "not admissible as former testimony" under the Evidence Code for two reasons: (1) the Florida Rules of Criminal Procedure (the "Criminal Rules") bar the admission of pre-trial "discovery depositions"

[23] At the March 5, 2020 evidentiary hearing, the State conceded, and the circuit court explicitly held, that Pearcy's persistent refusal to testify rendered him unavailable. R4 2017-19.

conducted during the course of criminal proceedings, R4 1461-62; and (2) the State lacked the requisite "similar motive" to cross-examine Pearcy at the Pearcy Deposition. R4 1462-63. The circuit court did not address the admissibility of the Pearcy Deposition under *Chambers*. The circuit court's exclusion of the Pearcy Deposition, which was based on an erroneous interpretation of the applicable Evidence Code provisions and this Court's precedents, is subject to *de novo* review and constitutes reversible error. *See Bearden*, 161 So. 3d at 1263.

A. The Pearcy Deposition Is Admissible Pursuant to the Former Testimony Hearsay Exception in the Florida Evidence Code.

(1) *The Pearcy Deposition Was Conducted in Compliance with Applicable Law.*

The Pearcy Deposition is admissible as former testimony pursuant to the Evidence Code because it was conducted in "compliance with law." Fla. Stat. § 90.804(2)(a). This Court has interpreted the Evidence Code's "compliance with law" requirement to incorporate the procedural rules pursuant to which a deposition was conducted. *See, e.g.*, *Rodriguez v. State*, 609 So. 2d 493, 499 (Fla. 1992). Although the circuit court recognized that Criminal Rule 3.190(i), which governs pre-trial motions to perpetuate testimony, "exists in criminal cases, but not civil cases," and "technically does not apply in postconviction," the circuit court nevertheless excluded the

Pearcy Deposition on the basis that Dailey did not comply with the requirements of Criminal Rule 3.190(i). *See* R4 1461-62. In so doing, the circuit court misapprehended and misapplied this Court's precedents: (1) interpreting the Criminal Rules to require compliance with Criminal Rule 3.190(i) as a prerequisite to the admission of a pretrial deposition conducted pursuant to the Criminal Rules; and (2) "reviewing orders denying depositions to perpetuate testimony in postconviction." *See* R4 1461-62.

First, this Court's precedents interpreting the Criminal Rules to mandate compliance with Criminal Rule 3.190(i) as a prerequisite for the admission of a pre-trial criminal deposition conducted pursuant to the Criminal Rules are inapplicable to the Pearcy Deposition, which was conducted in connection with the below postconviction proceedings. Postconviction proceedings, like the one in which the Pearcy Deposition was taken, are civil, not criminal proceedings. *See State v. Jackson*, 2020 WL 6948842, at *5 (Fla. Nov. 25, 2020).[24] As such, postconviction proceedings

[24] *See also Carter v. State*, 706 So. 2d 873, 875 (Fla. 1997); *Jackson v. State*, 452 So. 2d 533, 537 (Fla. 1984) ("[T]he designation of . . . criminal procedure rule [3.850] is a misnomer in that the proceeding is civil in nature, rather than criminal . . . ."). To the extent this Court has characterized postconviction proceedings as "quasi-criminal in nature," it has done so only to explain that such proceedings "are heard and disposed of by courts with criminal jurisdiction." *Darling v. State*, 45 So. 3d 444, 450 (Fla. 2010) (quoting *State ex rel. Butterworth v. Kenny*, 714 So. 2d 404, 409-10 (Fla. 1998)).

are governed by the Civil Rules, not the Criminal Rules.[25] Indeed, this Court has specifically (and consistently) held that the Criminal Rules *do not* apply to depositions conducted in postconviction proceedings. *See Riechmann v. State*, 966 So. 2d 298, 310 (Fla. 2007) ("Of course, rule 3.190([i]) applies to trials, not to postconviction proceedings . . . ."); *see also Hayward v. State*, 183 So. 3d 286, 322 n.13 (Fla. 2015); *Hurst*, 18 So. 3d at 1007.[26]

Although a motion to perpetuate testimony is a prerequisite for the admission of a pretrial deposition conducted in a criminal matter pursuant to the Criminal Rules,[27] no such motion is required for a deposition taken

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[25] *See Carter*, 706 So. 2d at 875 (applying Civil Rules); *State v. White*, 470 So. 2d 1377, 1378 (Fla. 1985) (same); *Jackson*, 452 So. 2d at 536-37 (same); *see also Green v. State*, 280 So. 2d 701, 702 (Fla. 4th DCA 1973) ("A proceeding under [Criminal] Rule 3.850 . . . must be litigated in accordance with rules governing civil procedure . . . except where those rules are inconsistent with the specific provisions of [Criminal] Rule 3.850. . . .").

[26] The framework and plain language of the Criminal Rules governing pretrial depositions demonstrates that these Rules do not apply to postconviction depositions. *See* Fla. R. Crim. P. 3.190(i)(1) ("*After the filing of an indictment or information* on which defendant is to be tried . . . .") (emphasis added); Fla. R. Crim. P. 3.220(h)(1) ("*At any time after the filing of the charging document* . . . .") (emphasis added).

[27] *See, e.g.*, *Rodriguez*, 609 So. 2d at 499; *Jones v. State*, 189 So. 3d 853, 854 (Fla. 4th DCA 2015). This Court has held that "discovery depositions" conducted pursuant to the Criminal Rules are not admissible as substantive evidence because Criminal Rule 3.220(h) expressly "allows discovery depositions to be used by any party [only] for the purpose of contradicting or impeaching the testimony of the deponent as a witness but makes no provision for their use as substantive evidence." *Rodriguez*, 609

pursuant to the Civil Rules. Rather, under the Civil Rules, testimony obtained during a civil deposition is admissible as substantive evidence so long as it satisfies the requirements of the Evidence Code. *See* Fla. R. Civ. P. 1.330(a)(1) ("Any deposition may be used by any party . . . for any purpose permitted by the Florida Evidence Code.").[28]

In its May 29 Order, the circuit court failed to recognize that whether the Pearcy Deposition was conducted "in compliance with law" under the Evidence Code must be determined by reference to the Civil Rules. Instead, the circuit court inexplicably treated the Pearcy Deposition as a defective deposition to perpetuate pursuant to Criminal Rule 3.190(i) and misinterpreted this Court's precedents "reviewing orders denying depositions to perpetuate testimony in postconviction" as mandating a motion to perpetuate as a precondition to the admissibility of a postconviction deposition. *See* R4 1461-62. In doing so, the circuit court committed

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So. 2d at 498-99; *see also State v. Green*, 667 So. 2d 756, 759-60 (Fla. 1995).

[28] *See also State, Dep't of Health & Rehab. Servs. v. Bennett*, 416 So. 2d 1223, 1223–24 (Fla. 3d DCA 1982) ("Unlike the rule of criminal procedure which permits the use of discovery depositions only 'for the purpose of contradicting or impeaching the testimony of the deponent as a witness,' the comparable rule of civil procedure permits a witness's discovery deposition to be used for any purpose . . . .") (internal citations omitted); *Dinter v. Brewer*, 420 So. 2d 932, 934 (Fla. Dist. Ct. App. 1982) ("Exceptions to the rule excluding depositions as hearsay are found . . . in the rules of evidence.").

reversible error. *See Bearden*, 161 So. 3d at 1263.

First, there was no basis for the circuit court to treat the Pearcy Deposition as a defective deposition to perpetuate testimony. As the circuit court recognized, Dailey never "indicate[d] to the [circuit court] that the deposition was to perpetuate testimony." R4 1462; *see also* R4 2019. It was not. At the time Dailey requested leave to conduct the Pearcy Deposition (to which the State consented) during the February 20, 2020 case management conference, R4 1859-60, Pearcy had demonstrated willingness to appear and testify in court, R4 18. Accordingly, Dailey did not file a motion to perpetuate prior to the Pearcy Deposition because the Deposition was not intended—or required—to be a deposition to perpetuate testimony.[29]

Second, the precedents relied upon by the circuit court in support of its

[29] As the State conceded below, Dailey was not entitled to take a deposition to perpetuate Pearcy's testimony prior to the Pearcy Deposition. *See* R4 2005. As the circuit court held, any motion to perpetuate in postconviction must satisfy the requirements of Criminal Rule 3.190(i). R4 1462. Because at the time Dailey requested leave to conduct a deposition, Pearcy had indicated willingness to appear and testify in court, R4 18, Pearcy was not "unable to attend or . . . prevented from attending . . . [the] hearing." Fla. R. Crim. P. 3.190(i). It was not until after Dailey obtained leave to conduct the deposition that Pearcy indicated that he would not testify in open court. *See* R4 407, 441-43. And it was not until Pearcy rendered himself an unavailable witness by refusing to testify at the March 5 evidentiary hearing, R4 2018-19, that the Pearcy Deposition became admissible as former testimony under the Evidence Code.

conclusion that compliance with Criminal Rule 3.190(i) is a prerequisite to admission of a postconviction deposition say no such thing.[30] In those cases, this Court simply made clear that: (1) discovery in postconviction proceedings "lies within the substantial discretion of the trial court"; and (2) when reviewing a trial court's denial of a postconviction motion to perpetuate under an abuse of discretion standard, this Court analyzes whether the motion substantially complied with Criminal Rule 3.190(i). *See*, *e.g.*, *Hurst*, 18 So. 3d at 1007. Those precedents lend no support to the circuit court's holding that the Pearcy Deposition was inadmissible under the former testimony hearsay exception. *See State v. Du Bose*, 128 So. 4, 4 (Fla. 1930) ("No decision is authority on any question not raised and considered, although it may be involved in the facts of the case.").

Research indicates that no Florida court, including this Court, has ever held that a motion to perpetuate is a prerequisite to the admission of a civil deposition at a criminal trial. Persuasive authority from federal courts[31]

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[30] In each case, the trial court had denied a motion to perpetuate testimony (and, as a result, no deposition had occurred). *See Hurst*, 18 So. 3d at 1007 (no deposition taken following trial court's denial of motion to perpetuate testimony); *Riechmann*, 966 So. 2d at 310 (same); *Cherry v. State*, 781 So. 2d 1040, 1054 (Fla. 2000) (same).

[31] *See Yisrael v. State*, 993 So. 2d 952, 957 n.7 (Fla. 2008) ("The Federal Rules of Evidence may provide persuasive authority for interpreting the counterpart provisions of the Florida Evidence Code."); *see also Pino v. Bank*

interpreting substantially similar federal procedural and evidentiary provisions[32] demonstrates that civil depositions are admissible at criminal trials without regard to the strictures applicable to criminal depositions. Specifically, federal courts, including the United States Court of Appeals for the Eleventh Circuit, have held that, although a motion to perpetuate is a prerequisite to the admission of pretrial depositions conducted in criminal proceedings pursuant to the Federal Rules of Criminal Procedure, no such requirement applies to depositions conducted in civil proceedings pursuant to the Federal Rules of Civil Procedure, which are admissible at criminal trials. *See United States v. Handley*, 763 F.2d 1401, 1404 (11th Cir. 1985) (vacating district court's suppression order and holding that the civil deposition was admissible at criminal trial as "authorized" by the Federal

of New York, 121 So. 3d 23, 43 (Fla. 2013) (interpreting Florida procedural rule in light of substantially similar counterpart federal procedural rule); *Morris v. State*, 789 So. 2d 1032, 1038 (Fla. 1st DCA 2001) (Florida courts can be guided by counterpart federal procedural rules).

[32] The "former testimony" hearsay exception in the Federal Rules of Evidence is substantially the same as in the Evidence Code. *Compare* Fed. R. Evid. 804(b)(1), *with* Fla. Stat. § 90.804(2)(a). Moreover, like Criminal Rule 3.190(i), the Federal Rules of Criminal Procedure prescribe the method for perpetuating deposition testimony for use at a subsequent criminal trial. *See* Fed. R. Crim. P. 15(a)-(b). Similarly, like Civil Rule 1.330, the Federal Rules of Civil Procedure generally permit the use of civil depositions if the requirements of the Federal Rules of Evidence are satisfied. *See* Fed. R. Civ. P. 32.

Rules of Evidence because Federal Rule of Criminal Procedure 15 only "controls the taking and use of depositions during the pendency of a criminal proceeding" and "*does not bar the admission of depositions legally taken in previous civil . . . proceedings*") (emphasis added).[33]

In sum, because the Pearcy Deposition was taken in connection with postconviction proceedings, which are civil in nature, its admissibility must be determined by reference to the Civil Rules. Unlike the Criminal Rules, a motion to perpetuate testimony is not a prerequisite to the admission of a civil deposition conducted pursuant to the Civil Rules. Accordingly, the only remaining issue is whether the Pearcy Deposition was conducted "in compliance with" the Civil Rules. *See* Fla. Stat. § 90.804(2)(a). Under the Civil Rules, a party need only (i) obtain leave of the court to conduct the deposition (where, as here, the deposition is "taken of a person confined in prison"); (ii) provide the adverse party (in this case, the State) notice of the deposition; (iii) place the witness under oath; and (iv) record the deposition

[33] *See also United States v. Sklena*, 692 F.3d 725, 730-33 (7th Cir. 2012) (testimony obtained during prior civil deposition was admissible at criminal trial); *United States v. McDonald*, 837 F.2d 1287, 1292-93 (5th Cir. 1988) (civil depositions are admissible in criminal proceedings so long as the requirements of the former testimony hearsay exception are otherwise satisfied); *see also United States v. Gibson*, 84 F. Supp. 2d 784, 786 (S.D.W. Va. 2000) (former testimony from civil deposition admissible at criminal trial under former testimony hearsay exception).

stenographically. Fla. R. Civ. P. 1.310. All these requirements were satisfied. Accordingly, this Court should vacate the circuit court's exclusion of the Pearcy Deposition and find that the Pearcy Deposition was conducted "in compliance with law." *See* Fla. Stat. § 90.804(2)(a).

(2) *The State Had the Motive and Opportunity to Develop Pearcy's Deposition Testimony.*

The State had the motive and a full and fair opportunity to develop Pearcy's testimony at the Pearcy Deposition. The motive requirement of the Evidence Code is satisfied where the issues that were the subject of the former testimony "are similar to those in the case at hand." *See, e.g.*, *Thompson v. State*, 619 So. 2d 261, 265 (Fla. 1993). Because the issues that were the subject of the Pearcy Deposition were the same issues that were the subject of the March 5, 2020 evidentiary hearing, the State possessed the requisite motive (and opportunity) to cross-examine Pearcy at the Pearcy Deposition. *See* Fla. Stat. § 90.804(2)(a).

In its May 29, 2020 Order, the circuit court held that the State had "little motive to cross-examine Pearcy" at the Pearcy Deposition because: (1) the Pearcy Deposition was a pre-trial "discovery deposition" conducted pursuant to the Criminal Rules; and (2) "the State had no notice that the deposition might be used as substantive evidence." R4 1463. The circuit court erred on both grounds.

As an initial matter, the Pearcy Deposition was conducted pursuant to the Civil Rules, *not* the Criminal Rules. *See supra* Argument IV.A.1. While the plain language of the Criminal Rules makes clear that criminal discovery depositions are not admissible as substantive evidence, *see supra* note 27, the Civil Rules contain no similar provisions, *see supra* Argument IV.A.1. For this reason, the *post hoc* justifications this Court has offered to explain why the plain language of the Criminal Rules bar the admission of pretrial criminal discovery depositions do not apply to the Pearcy Deposition.[34]

Moreover, contrary to the circuit court's reasoning, the motive requirement does not implicate the opposing party's subjective view of the deposition, its purpose, or its potential uses. Accordingly, even assuming the State was unaware that the Pearcy Deposition would later become admissible as former testimony when Pearcy refused to testify at the March 5, 2020 evidentiary hearing, the State's subjective understanding of the law

[34] There is no legal basis to apply provisions of the Criminal Rules to a deposition conducted pursuant to the Civil Rules. Nor would such application otherwise be warranted here. First, because Dailey, not the State, offered the Pearcy Deposition into evidence, the Confrontation Clause of the Sixth Amendment is not implicated. *Cf. State v. Lopez*, 974 So. 2d 340, 347-50 (Fla. 2008). Second, the Pearcy Deposition was not an exploratory pretrial fact-gathering exercise aimed at "uncovering other evidence or revealing other witnesses." *Id*. at 349. Finally, the State was not ignorant of the fact that the deposition likely represented its *only* opportunity to develop Pearcy's testimony. *Cf*. *Leighty v. State*, 981 So. 2d 484, 494 (Fla. 4th DCA 2008).

is irrelevant to the question of admissibility. *See Johns-Manville Sales Corp. v. Janssens*, 463 So. 2d 242, 261 (Fla. 1st DCA 1984) (a party's "professed inability to foresee the various uses to which [a] deposition might be put in future cases is . . . not a valid objection to use under the former testimony rule").[35] Neither the Evidence Code nor the Civil Rules contain any requirement that a party seeking to offer former testimony into evidence demonstrate that it provided notice of that intention to the opposing party *prior to* obtaining that former testimony. Indeed, any such requirement would render the former testimony exception a nullity: the very purpose of the exception is to provide for the admission of the former testimony of a witness who *later* becomes unavailable. *See* Fla. Stat. § 90.804(2)(a).

All that is required for purposes of the motive requirement is that the issues that were the subject of the former testimony be "similar to those in the case at hand." *Thompson*, 619 So. 2d at 265. Here, given the nature of Pearcy's testimony and the relationship and closeness in time between the Deposition and the evidentiary hearing, the State's motive at the Pearcy deposition—namely, "to discredit [Pearcy's] testimony and show it to be not

[35] Even if subjective knowledge were relevant, the State's knowledge that the Pearcy Deposition likely represented its only opportunity—the first in 35 years—to cross-examine Pearcy only makes it more certain that the State had the requisite motive. *See* R4 1410.

worthy of belief," *Garcia v. State*, 816 So. 2d 554, 565 (Fla. 2002)—was not merely similar to its motive at the hearing, it was identical. *Wyatt v. State*, 183 So. 3d 1081, 1082-85 (Fla. 4th DCA 2015) (admitting exculpatory testimony from a prior civil forfeiture proceeding); *see also Roussonicolos v. State*, 59 So. 3d 238, 243 (Fla. 4th DCA 2011) (admitting testimony of accomplice at a pretrial bond hearing where the State's motive at both the trial and the bond hearing was to challenge the witness's credibility).

Finally, although the circuit court did not reach the issue, it is clear that the State had a full and fair opportunity to cross-examine Pearcy at the Pearcy Deposition. R4 1411-13. The State's informed decision not to cross-examine Pearcy at his deposition is of no import. *See* Fla. Stat. § 90.804, Editor's Note 2(a) ("If the testimony is offered against the same party . . . no unfairness is apparent in requiring him to accept his own prior conduct on cross-examination *or decision not to cross examine*.") (emphasis added). "[A]ll that is required is that the party have an *opportunity* at the prior proceeding to cross-examine the witness." *Thompson v. State*, 619 So. 2d at 265; *see also Moscatiello v. State*, 247 So. 3d 11, 18 (Fla. 4th DCA 2018); *Roussonicolos*, 59 So. 3d at 243.

Accordingly, because the State had the motive and a full and fair opportunity to develop Pearcy's testimony at the Pearcy Deposition, this

Court should vacate the circuit court's exclusion of the Pearcy Deposition as substantive evidence.

B. The Pearcy Deposition Is Otherwise Admissible Under *Chambers* and Progeny Because It Is Vital to Dailey's Constitutional Right to Present a Complete Defense.

The circuit court failed to address Dailey's alternative argument that the newly discovered evidence of innocence from the Pearcy Deposition is otherwise admissible under *Chambers* and its progeny as its exclusion would improperly deprive Dailey of his constitutional right to due process. "[W]here constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." *Chambers*, 410 U.S. at 302. A criminal defendant has a constitutional right to "a meaningful opportunity to present a complete defense," and "[t]his right is abridged by evidence rules that infring[e] upon a weighty interest of the accused and are arbitrary or disproportionate to the purposes they are designed to serve." *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006) (citations and internal quotation marks omitted). Thus, the Constitution "prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote." *Holmes*, 547 U.S. at 326; *see also Aguirre-Jarquin v. State*, 202 So. 3d 785 (Fla. 2016); *Bearden*, 161 So. 3d 1257.

As an initial matter, the circuit court's exclusion of Pearcy's exculpatory testimony[36] on the basis of inapplicable case law interpreting the Criminal Rules not only was arbitrary and disproportionate, but it served no legitimate purpose. *See Holmes*, 547 U.S. at 326. The *Chambers* Court held that the "strict" invocation of two state rules—Mississippi's "voucher" rule (which barred impeachment of one's own witness) and hearsay rule (which lacked an applicable hearsay exception)—both of which indisputably applied to the evidence the defendant sought to introduce, unconstitutionally "thwarted" the defendant's "attempt to present [a] portion of his defense." *Chambers*, 410 U.S. at 289. Here, the relevant state rules permit the admission of the Pearcy Deposition, *see supra* Argument IV.A, and yet the circuit court nevertheless infringed on Dailey's weighty interest in presenting evidence central to his claim of innocence by misinterpreting and misapplying those rules. Given that *Chambers* and its progeny stand for the proposition that constitutional rights supersede otherwise applicable evidentiary and procedural rules, there can be no doubt that the Constitution prevents the arbitrary and disproportionate application of inapplicable rules that would serve to infringe

[36] During Pearcy's February 2020 Deposition, Pearcy admitted, for the first time, that he went out drinking alone with S.B. on the night she was murdered *immediately after* dropping his friend, Oza Shaw, at a phone booth. Pearcy's February 2020 Deposition. R4 366, 368-69, 435-36, 440-41; *see infra* Argument V.

those same rights. *See, e.g.*, *Macauley v. State*, 2020 WL 2892591, at *7 (Fla. 3d DCA June 3, 2020) (*Chambers* mandates admission of exculpatory testimony obtained during non-perpetuated discovery deposition conducted pursuant to Criminal Rules).

Moreover, even if the Court finds that Pearcy's critical new testimony does not qualify under any available hearsay exception, the testimony is nevertheless admissible under *Chambers*. Although *Chambers* evaluated the admissibility of a hearsay statement in light of four factors, those four factors do not constitute "an immutable checklist . . . . Instead, the primary consideration in determining admissibility is whether the statement bears sufficient indicia of *reliability*." *Bearden*, 161 So. 3d at 1265 n.3 (internal quotations and citations omitted). Here, the exculpatory testimony from the Pearcy Deposition is admissible because it bears "persuasive assurances of trustworthiness" and is "critical to [Dailey's] defense." *See Chambers*, 410 U.S. at 302; *see also Bearden*, 161 So. 3d at 1264-65; *Macauley*, 2020 WL 2892591, at *7.

First, as detailed herein, *see infra* Argument V, the reliability of Pearcy's exculpatory testimony is confirmed by the extensive corroborative evidence in the record, including the testimony of multiple witnesses and incontrovertible phone records. *See Chambers*, 410 U.S. at 298-300 (citing

independent corroboration as a key factor in assessing the reliability of out-of-court statements); *see also Bearden*, 161 So. 3d at 1264 (same); *Garcia*, 816 So. 2d at 565 (to bar prior recorded exculpatory testimony "critical to assessing [defendant's] guilt" "is to apply the hearsay rule 'mechanistically to defeat the ends of justice'") (quoting *Chambers*, 410 U.S. at 302).

Second, Pearcy's exculpatory testimony—provided in the context of a court-sanctioned deposition conducted (and transcribed) in the presence of the State—"was 'spontaneous' in the sense that it does not bear indicia of coercion." *Macauley*, 2020 WL 2892591, at *6.

Third, Pearcy's exculpatory testimony is self-incriminatory and against interest[37] because the timeline that follows from Pearcy's testimony—a timeline that is corroborated by the testimony of multiple witnesses as well as by hard evidence in the form of phone records—establishes that Dailey

[37] Although Pearcy has already been convicted of this crime, he remains eligible for parole. Dailey recognizes that this Court previously affirmed the circuit court's holding that a prior sworn written confession signed by Pearcy did not satisfy the "declaration against interest" hearsay exception set forth in the Evidence Code because Pearcy "had already been convicted of the crime." *Dailey V*, 279 So. 3d at 1213. Dailey respectfully submits that this Court's strict application of the declaration against interest hearsay exception in this context itself amounts to the application of "the hearsay rule . . . mechanistically to defeat the ends of justice." *Chambers*, 410 U.S. at 302. In any event, this Court has made clear that exculpatory hearsay statements are admissible under *Chambers* even if they do not constitute declarations against interest under the Evidence Code. *Bearden*, 161 So. 3d at 1264-67.

could not have been present at the time and place of S.B.'s death. In other words, Pearcy alone killed S.B.

Fourth, the State did not dispute the veracity of Pearcy's exculpatory testimony in the proceedings below, R4 2430-31, and, in any event, the State had a full and fair opportunity to cross-examine Pearcy regarding the veracity of his sworn deposition testimony. *See supra* Argument IV.A.2; *Chambers*, 410 U.S. at 298.[38] That the State chose not to cross-examine Pearcy does not impact the reliability of his testimony. Indeed, the State's decision to forgo cross-examination, likely informed by the abundance of corroborative record evidence and its (mistaken) belief that "[n]one of [this information] is new," R4 2037, suggests that the State did not cross-examine Pearcy on this new critical admission precisely because it believed his testimony was true.

At bottom, *Chambers* amounts to a constitutional failsafe, one that prevents gross miscarriages of justice based on evidentiary technicalities. Pearcy's testimony that his solo trip with S.B. began immediately after he dropped his friend Shaw at a phone booth is exactly the kind of evidence found admissible in *Chambers*: a statement that, considered in light of all the other available evidence, is both reliable and vitally important to Dailey's

[38] This distinguishes the Pearcy Deposition from the written confession this Court previously declared inadmissible under *Chambers*. *Dailey V*, 279 So. 3d at 1214 (noting that Pearcy was "unavailable for cross-examination").

defense. *Chambers* is clear that the Due Process Clause supersedes any evidentiary or procedural rule in this case. *See* 410 U.S. at 302.

ARGUMENT V. The Exculpatory Evidence from the Pearcy Deposition Constitutes Newly Discovered Evidence Under Rule 3.851.

The exculpatory sworn testimony Pearcy provided at the Pearcy Deposition—that he and S.B. went out drinking by themselves *immediately after* dropping Shaw at a phone booth, R4 366, 368-69, 435-36, 440-41—constitutes newly discovered evidence because it (1) represents the very first time Dailey obtained—or could have obtained—this crucial exculpatory evidence in admissible form; and (2) establishes that Dailey could not have been present at the time and place of S.B.'s death, when viewed in light of other admissible evidence. In its September 21 Order, the circuit court erred in summarily denying this claim as untimely and failing to reach the merits of the claim.[39]

[39] Dailey initially raised this claim in connection with his Second Successive Motion. In its May 29 Order, the circuit court declared the Pearcy Deposition inadmissible and otherwise refused to consider the exculpatory portions of the Deposition, basing its refusal on an exceedingly narrow reading of the newly discovered evidence claim presented in Dailey's Second Successive Motion. *Compare* R4 1459, *with* R4 8-34. Without conceding the inadmissibility of the Deposition, and in light of the circuit court's concerns, Dailey raised a claim based on the Pearcy Deposition in his Third Successive Motion. *See supra* pp. 3-4.

A. Dailey's Newly Discovered Evidence Claim Based on the Exculpatory Evidence from Pearcy's Deposition Was Timely.

In its September 21, 2020 Order, the circuit court denied Dailey's newly discovered evidence claim, without an evidentiary hearing, as untimely, reasoning that: (1) Dailey was previously aware of the critical exculpatory information Pearcy provided at his Deposition; and (2) Dailey failed to present that information to the circuit court in admissible form (given the circuit court's prior holding that the Pearcy Deposition was inadmissible) and was "not entitled to an evidentiary hearing based solely on speculation that he can obtain an admissible form of [these] statements . . . ." R4 2457-2459. Both findings constitute reversible errors of law subject to *de novo* review.

First, in relying on Dailey's supposed prior awareness of the substance of Pearcy's critical testimony, the circuit court disregarded controlling law establishing that the timeliness inquiry of Rule 3.851 is focused on when the defendant discovers or could have discovered the relevant exculpatory information *in admissible form*. *See Taylor*, 260 So. 3d at 160 (newly discovered evidence claim is timely where evidence was "previously unavailable" to the defendant based on a witness's "previous unwillingness to testify"); *Archer v. State*, 934 So. 2d 1187, 1194-95 (Fla. 2006) (testimony constituted newly discovered evidence where "the record contain[ed] no evidence upon which to conclude that [the defendant] could have

established" the relevant facts at trial).[40] Because the circuit court denied this claim as untimely without an evidentiary hearing, the issue before this Court is whether Dailey's allegations of due diligence with respect to obtaining Pearcy's testimony are "conclusively refuted" by the record. *See, e.g.*, *Nordelo*, 93 So. 3d at 187-88 (quashing summary denial where motion alleged the witness previously refused to testify); *Swafford v. State*, 679 So. 2d 736, 739 (Fla. 1996) (holding that allegation that counsel was unable to locate a witness was facially sufficient for the purpose of demonstrating due diligence); *Davis*, 26 So. 3d at 528-29 (same).

Dailey easily satisfies this threshold due diligence requirement. Over the course of the past three decades, Dailey has repeatedly attempted to secure Pearcy's testimony in court. But each time Pearcy has been called to testify under oath in open court, he has refused to do so, in defiance of court

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[40] *See also Davis*, 26 So. 3d at 528 ("Regardless of the time span from the time of trial to the discovery of the new testimony, [exculpatory] testimony cannot be 'discovered' until the witness *chooses* to [testify]."); *Hunter*, 29 So. 3d at 262-63 (newly discovered evidence timeliness prong facially satisfied where, although the "specific facts were within [the defendant's] knowledge," the witness previously refused to testify); *Wilson v. State*, 188 So. 3d 82, 85 (Fla. 3d DCA 2016) ("[I]t is the discovery of the *existence of admissible evidence*" that renders such evidence "newly-discovered."); *Totta v. State*, 740 So. 2d 57, 58 (Fla. 4th DCA 1999) (refusing to draw a "distinction between newly discovered evidence that was unknown at the time of the trial, and evidence that was known to the defense at the time of trial but unavailable because of the co-defendant's refusal to testify").

orders and despite being informed that he may not invoke the Fifth Amendment privilege.[41] Accordingly, because Dailey's due diligence allegations with respect to obtaining admissible testimonial evidence from Pearcy are not "conclusively refuted" by the record, an evidentiary hearing was required. *See Nordelo*, 93 So. 3d at 186-87.[42]

Second, the circuit court's alternative ground for dismissing Dailey's claim as untimely—that Dailey failed to present Pearcy's critical testimony in admissible form—was similarly erroneous. At the pleading stage, prior to an evidentiary hearing, Dailey was only required to show that the newly discovered information "would be admissible at trial" if Pearcy testified to it pursuant to Dailey's contemporaneously filed Motion to Perpetuate. *See*, *e.g.*, *Merritt v. State*, 68 So. 3d 936, 939-40 (Fla. 3d DCA 2011) (reversing

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41 *See* TR1 8:987-89; PC ROA 4:537; R2 12140-42, 12144-45; R4 1967-2019.

42 Even assuming Pearcy's prior statements contained information identical to the information Pearcy provided at his Deposition (they did not, *see infra* Argument V.B), neither of those statements were previously admissible in these proceedings. This Court previously held that Pearcy's 1993 statement, R2 9616-26, was inadmissible. *Dailey v. State*, 965 So. 2d 38, 45-46 (Fla. 2007). And Pearcy's self-serving 1985 statement, R2 8511-12, in which he implicated Dailey in the murder, was likewise inadmissible. *See Dailey V*, 279 So. 3d at 1213-14 (holding that statements not "unquestionably against interest" are not admissible); *see also Brooks v. State*, 787 So. 2d 765, 776-77 (Fla. 2001) (holding that co-defendant's "predominantly self-serving" narrative was an "attempt[] to shift blame" and, therefore, lacked "guarantees of trustworthiness").

trial court's summary denial of Rule 3.851 motion on admissibility grounds, finding that the issue was whether the affiants' testimony "would be admissible if offered at a new trial," which could only be determined after an evidentiary hearing); *see also infra* Argument VI. Moreover, even if admissible evidence were required at the pleading stage, the circuit court failed to recognize that the Pearcy Deposition is itself admissible as substantive evidence. *See supra* Argument IV.

B. Pearcy's Admission Regarding the Timing of His Solo Outing with the Victim Was New and Is Critical to Dailey's Innocence Claim.

The circuit court's finding that Dailey's claim based on Pearcy's testimony was untimely rested not only on erroneous legal conclusions, *see supra* Argument V.A, but also on the circuit court's erroneous findings of fact. In his Third Successive Motion, Dailey alleged that the critical portions of Pearcy's testimony were essential to the unfolding of a timeline that established Dailey could not have been present at the time and place of the victim's death. In deeming this claim untimely, the circuit court relied in part on its finding that Pearcy's recent admission was not new and that the entirety of the timeline "could have been argued based on Pearcy's prior statements or the other evidence in this case." R4 2458.

The circuit court failed to recognize, first, that Pearcy's statement at the Deposition is substantively different than any he has made before, and, second, why that difference is significant: The admission serves as a linchpin that allows for the unfurling of a timeline that no longer relies on guesswork or supposition. Specifically, in his Deposition, Pearcy acknowledged that he and the victim had dropped his friend Shaw at a phone booth and thereafter proceeded to Hank's Seabreeze Bar. R4 366, 368-69, 435-36, 440-41. In Pearcy's 1985 statement, he had admitted going alone with the victim to Hank's Seabreeze Bar, but he claimed that this trip took place before midnight (well before the window of time in which the murder occurred) and he made no mention of taking Shaw to the pay phone. R4 1573. In his 1993 statement, he had acknowledged dropping Shaw at the phone and thereafter being alone with the victim for an hour to an hour and a half, but he made no mention of a visit to Hank's Seabreeze Bar. R4 610.

These details are critical. Witness Deborah North, an acquaintance of the victim who also worked at Hank's Seabreeze Bar, testified that she had seen the victim with at least one man on the night of the murder, but she was uncertain of the timing. R4 875-76. Her testimony does not disprove Pearcy's 1985 claim that his visit to Hank's with the victim occurred earlier in the evening—nor does it eliminate the possibility that Dailey was present at the

time and place of the murder. Because Pearcy's 1993 statement specifies only that he and the victim were alone—not that the two went to Hank's after dropping Shaw at the phone booth—it does not disprove that the trip to Hank's occurred earlier in the evening. Thus, nothing previously in the record allowed for any independent verification that Pearcy was, in fact, alone with the victim (*i.e.*, without Dailey) during the relevant window of time.

But the admission made by Pearcy over the course of the Deposition provides the necessary, and, until now unavailable, link. Phone records entered into evidence in 2003 prove that Pearcy and the victim dropped Shaw at the phone booth at 1:15 a.m. EST. R2 10290. Shaw testified multiple times that Pearcy and the victim waited for him a few moments before driving away. TR1 8:1005, PC ROA 3:341, R2 93. Pearcy's new testimony that he and the victim then went to Hank's Seabreeze Bar, a nine-mile drive from the phone booth, establishes that North saw the victim no earlier than 1:40 a.m. It also establishes that the individual seen by North with the victim was in fact Pearcy, and that the victim was the *only* person with Pearcy at this time, a point about which North had been uncertain. Although North's testimony and Pearcy's 1985 statement might have been sufficient to establish that Pearcy was at one time alone with the victim at Hank's, they were not sufficient to establish that Pearcy was alone with the victim at

Hank's *within the window of the victim's death*. Nor would the addition of the phone records, in 2003, have been sufficient to establish this critical fact. The necessary link, proving that the trip to Hank's took place right after Shaw placed his call, was missing until now. Accordingly, even if the circuit court's finding that the critical portions of the Pearcy Deposition were not new was a legally sufficient ground upon which to summarily deny Dailey's claim, (it was not, *see supra* Argument V.A), the circuit court's factual finding that Pearcy provided no new information during the Deposition is erroneous as Dailey's allegations are not are not conclusively refuted by the record. *See Nordelo*, 93 So. 3d at 187 (quashing summary denial where district court "failed to accept the factual allegations of the motion" and made an improper "factual finding").

C. Pearcy's Admission Likely Would Produce an Acquittal on Retrial Or, at the Very Least, Result in a Lesser Sentence.

Pearcy's recent admission—specifically, his acknowledgment that his solo outing with the victim to Hank's Seabreeze Bar took place immediately after dropping off Shaw at a pay phone—is critical to Dailey's claim of innocence. As described in Argument V.B, *supra*, and in Argument VII, *infra*, this admission is the missing link in a timeline that necessarily excludes Dailey from involvement in the murder. As such, Dailey has clearly established that Pearcy's admission constitutes newly discovered evidence

pursuant to *Jones* and Rule 3.851, which, when considered with all other evidence that would be admissible at retrial, entitles Dailey to a reversal of his conviction and grant of a new trial. At a minimum, Pearcy's testimony, which would be admissible at resentencing even if the Court deemed it inadmissible at retrial,[43] warrants the vacatur of Dailey's death sentence. *Swafford v. State*, 125 So. 3d 760, 778-79 (Fla. 2013).

ARGUMENT VI. The Circuit Court Erred in Denying Dailey's Motion to Perpetuate Jack Pearcy's Testimony.

In light of its erroneous refusal to admit the Pearcy Deposition into evidence, the circuit court abused its discretion when it denied Dailey's subsequent Motion to Perpetuate Pearcy's testimony and thereby deprived him of the opportunity to obtain exculpatory evidence in admissible form. In its May 29 Order, the circuit held that "the same" requirements of Criminal Rule 3.190(i) apply to postconviction motions to perpetuate testimony. *See* R4 1461-62. Criminal Rule 3.190(i)(1) provides that a court should grant a motion for leave to take a deposition to perpetuate testimony when: (1) the

[43] *See* Fla. Stat. § 921.141(1) ("Any such evidence that the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence . . . ."); *Mullens v. State*, 197 So. 3d 16, 26 (Fla. 2016); *Downs v. State*, 572 So. 2d 895, 899 (Fla. 1990) ("A defendant has the right in the penalty phase of a capital trial to present any evidence that is relevant to, among other things, the nature and circumstances of the offense.").

motion is "verified or supported by the affidavits of credible persons"; (2) the motion is timely; (3) the witness is unavailable to testify in court; (4) the witness's testimony is material to the question of guilt; and (5) it is necessary to take the deposition in order to prevent a "failure of justice." Because Dailey satisfied each of these requirements, the circuit court's denial of the Motion was error. *See Hurst*, 18 So. 3d at 1007 (holding that circuit court erred in denying defendant's motion to perpetuate testimony where that "motion was in proper form and was relevant to [defendant's] claim of newly discovered evidence, and . . . counsel had no other way to secure [the witness's] testimony").

Specifically, Dailey's Motion to Perpetuate was supported by an affidavit of Dailey's counsel. R4 2182-85. The Motion—which was filed contemporaneously with his Third Successive Motion—was timely because it was filed more than "10 days before the trial date," Fla. R. Crim. P. 3.190(i)(1), and well in advance of any potential evidentiary hearing. Pearcy was clearly unavailable following his refusal to testify at the March 5, 2020 evidentiary hearing. *See supra* note 23. His anticipated testimony (specifically, the admission from his Deposition regarding the timing of his outing with the victim) was not only material but vital to Dailey's claim of innocence. *See supra* Argument V and *infra* Argument VII.

Finally, a deposition to perpetuate Jack Pearcy's testimony was necessary to prevent the "*quintessential* miscarriage of justice": the execution of an innocent man. *Schlup v. Delo*, 513 U.S. 298, 324-25 (1995) (emphasis added). Dailey had no means other than a perpetuated deposition of securing Pearcy's testimony in admissible form, as proven by his dogged but failed attempts to induce Pearcy to testify in open court. *See supra* note 41. Thus far, every court has examined each newly offered piece of evidence individually and without context. Had Pearcy's statement become admissible, however, it would have qualified as newly discovered evidence, *see supra* Argument V, triggering a cumulative examination of the complete evidence of Dailey's innocence—something no court has undertaken to date.

Despite having found in its May 29 Order that "the same" requirements of Criminal Rule 3.190(i) apply to postconviction motions to perpetuate testimony, in its September 21 Order, the circuit court did not find that Dailey had failed to meet any of the requirements of Criminal Rule 3.190(i). Instead, the circuit court denied the Motion as "moot" and "speculative." Both holdings are erroneous.

First, in finding that the Motion was "moot," the circuit court erroneously relied on its erroneous denial of Dailey's newly discovered evidence claim as untimely. R4 2459. In other words, the circuit court held that the claim was

untimely because the statement at issue was inadmissible, while simultaneously holding that Dailey was not entitled to an opportunity to obtain the statement in admissible form because the claim was untimely. R4 2458-59.[44] In any event, because Dailey's claim based on Pearcy's exculpatory testimony was timely, *see supra* Argument V.A-B, his Motion to Perpetuate was not "moot."

Second, in denying Dailey's Motion on the basis that it was "speculative," the circuit court erroneously relied upon *Riechmann v. State*, 966 So. 2d 298 (Fla. 2007). R4 2459. But *Reichmann* is inapposite. There, this Court affirmed the circuit court's denial of a motion to perpetuate the testimony of a witness who was a "fugitive from U.S. authorities" where, unlike here: (i) the motion "was neither under oath nor accompanied by sworn affidavits"; (ii) the motion was untimely (filed "the day before the evidentiary hearing was scheduled to conclude"); and (iii) the location of the

[44] The Motion to Perpetuate followed the circuit court's May 29 Order, in which the circuit court declared the Pearcy Deposition inadmissible and refused to consider Dailey's newly discovered evidence claim based on Pearcy's exculpatory testimony. R4 1459. Accordingly, by denying the Motion as "moot" on timeliness grounds, the circuit court left Dailey in a procedural catch-22: in possession of an exculpatory statement but both too late and too early to raise a claim based on that statement. Too late because he did not reference the statement in his initial claim, a claim asserted prior to obtaining the statement; and too early because he had not obtained the statement in admissible form, a form the circuit court denied him the opportunity to obtain.

witness was unknown. *See Riechmann*, 966 So. 2d at 210-11. Even assuming the witness were located in Dubai (where the witness was believed to be), this Court found that the motion presented "a speculative scenario . . . fraught with concerns of reliability." *Id.* at 211 ("Not only would the defense attorney be traveling to a country with which the United States has no extradition treaty in an attempt to find a convicted felon and depose him with no enforceable oath, but at the time the request was ripe there was only a three-day window of opportunity, with a state attorney presumably on standby via phone in the United States.").

None of the concerns this Court noted in *Riechmann* are present here. As discussed *supra*, Dailey's Motion was properly supported by affidavits, timely, and otherwise satisfied each of the requirements of Criminal Rule 3.190(i)(1). Nevertheless, relying on *Riechmann*, the circuit court erroneously held that Dailey's Motion was "speculative" on grounds that Dailey's counsel "does not know that . . . Mr. Pearcy will even be willing to testify." R4 2469. As an initial matter, this is not the law. While the prospective witness must be unavailable to testify in court, the law does not require that a party seeking to take a deposition to perpetuate certify that the prospective witness will in fact testify on the day of the deposition. *See* Fla. R. Crim. P. 3.190(i)(1). Nor could counsel competently make such a

certification with respect to any non-party witness like Pearcy who, as the circuit court noted, "is outside [Dailey's] control." R4 2459. Moreover, even assuming such a requirement did exist, there is substantial reason in this case to believe that Pearcy would testify at a perpetuated deposition. Although, as the circuit court correctly noted, R4 2469, Pearcy has repeatedly refused to testify at evidentiary hearings in open court and in the presence of his family, every time defense counsel has spoken with him in prison, including at the Deposition at which the State was present, he has spoken willingly and at length. He offered a sworn statement to defense counsel, in the presence of a court reporter, in 1993, R2 9616-26; he signed an affidavit in 2017 after speaking to defense counsel, R2 9599-600; he signed another declaration in 2019, again after speaking to defense counsel, R4 64; and he gave a lengthy deposition in 2020, R4 301-504. When not under his family's watchful eye, it is clear that he is willing to speak.

In finding that Dailey "is not entitled to yet another proceeding on speculation that Pearcy will behave differently this time," R4 2459, the circuit court not only failed to take note of the historical reasons to believe that Pearcy will, in fact, speak at a perpetuated deposition, it failed to weigh the minimal potential cost of granting the motion against its potential benefit. Instead, by foreclosing any meaningful avenue to establish innocence, the

court risked the most profound and irreversible injustice. *See, e.g.*, *Herrera v. Collins*, 506 U.S. 390, 446 (1993) (Blackman, J., dissenting) ("The execution of a person who can show that he is innocent comes perilously close to simple murder.").

ARGUMENT VII. The Circuit Court Erred in Refusing to Conduct a Cumulative Analysis of the Evidence.

The circuit court held that it was not required to conduct a cumulative analysis of the evidence, given its findings that Dailey had failed to present any admissible newly discovered evidence. R4 1458. However, because, as demonstrated *supra*, the circuit court erred in dismissing Dailey's claims with respect to ASA Heyman's 2020 admission, Pearcy's 2019 Declaration, and the Pearcy Deposition, it likewise erred in failing to conduct a cumulative analysis. Had the circuit court in fact engaged in such an analysis, it would have concluded that a reversal of conviction or, at a minimum, a vacatur of Dailey's death sentence was required.

At Dailey's trial, the State's theory of conviction—which relied on muddled and inconsistent circumstantial evidence and the testimony of unreliable jailhouse informants—was based largely on a sequence of events that does not match the facts now established in the record. The State told the jury that Dailey and Pearcy left Pearcy's house with the victim, took her to a secluded spot and murdered her, and then returned home. TR1 6:749-

50. In fact, no person has ever testified to seeing Dailey leave the house with Pearcy and the victim that night. Further, evidence uncovered in postconviction proceedings—including previously undisclosed police reports, R2 94, telephone records, R2 10290, and additional witness testimony, PC ROA 3:358-59—has confirmed what Pearcy's friend Oza Shaw testified to at trial, TR1 8:105, 8:997, specifically, *he*, not Dailey, was the person who left the house with Pearcy and the victim, and he saw Pearcy and S.B. drive away together when he was in the phone booth, talking to his girlfriend. Pearcy's recent admission, R4 368-69, 440-41, considered together with statements Shaw has made again and again (to police mere weeks after the crime, R2 94, as well as in postconviction, PC ROA 3:340, 3:343), testimony from other witnesses that night, R2 11710, and phone records, R2 10290, establishes the true sequence of events that night.

After Pearcy and the victim left Shaw at the phone booth, they drove to Hank's Seabreeze Bar. R4 368-69, 440-41. From there they proceeded to Pearcy's favorite fishing spot, where, after the victim laughed at the inebriated Pearcy for being unable to sexually perform, he flew into a rage and killed her. R3 561. He returned home *alone*, R2 94; PC ROA 3:343, after the window of time during which the murder had occurred, according to the medical examiner, TR1 7:850. Perhaps seeking an alibi, R4 399, Pearcy

dragged Dailey out of bed, R2 94; PC ROA 3:343, and to the beach.

The State's theory of the case been thoroughly debunked. Moreover, evidence uncovered in postconviction proceedings makes clear that the three jailhouse informants upon whom the State relied were utterly unreliable. Multiple disinterested witnesses who shared Dailey's pod at the Pinellas County Jail have testified that law enforcement officials made it known that they were looking for information against Dailey and would reward anyone who offered such information. R2 12056-57, 12094-96, 12106-09; R4 66-67. They testified that law enforcement officials went so far as to show them news articles about the crime: articles that provided "all the tools . . . to give them whatever they might be looking for." R2 12019. The three jailhouse informants who eventually came forward never offered any information that was not readily known in the media or that was independently verifiable. All three had extensive criminal histories. *See* Arguments I and II, *supra*; *see also* R2 6744-7204, 7205-50. All three had experience "snitching"; in fact, one of them, Paul Skalnik, has been described by the New York Times Magazine as "one of the most prolific jailhouse informants in U.S. history." Colloff, *supra* note 18. All three had learned firsthand the benefits they could reap from such behavior, and all three were richly rewarded for testifying against Dailey. *See supra* Arguments I and II;

see also R2 1652-53, 6744-7204, R2 7205-50. Viewed in context, their testimony, singly and collectively, is worthless.

Pearcy is the individual who had a sexual interest in the victim. R2 11863; TR1 8:957, 8:968. Pearcy is the individual who had a pregnant girlfriend at home and needed to find another place to take the victim. R2 10298, 11582. Pearcy is the individual with a history of violence against women. R2 9753-923. Pearcy is the individual who tried to escape detection following the murder by using an alias, R2 11524, 11787, and throwing away the shoes that he had been wearing on the night in question some 2,000 miles away—in Colorado. R2 8537, 11156. Pearcy is the individual who dodged a previous murder charge by shifting the blame to a so-called friend. *See State v. Stith*, 660 S.W.2d 419 (Mo. Ct. App. 1983); *State v. Danforth*, 654 S.W.2d 912 (Mo. Ct. App. 1983). And Pearcy is the individual who has confessed at least six separate times, over the past thirty years, that he alone committed S.B.'s murder. R2 9599-600, 9616-26, 12098-99, 12119-21; R4 64.

An evaluation of the above evidence, together with the errors found by this Court on direct appeal, compels the conclusion that this evidence would probably produce an acquittal at trial, or at the very least, a less severe sentence. The State's case against Dailey relied solely on circumstantial

evidence which no longer withstands scrutiny. Without the testimony of its jailhouse informants, which has been shown to be grossly unreliable, the State has no case left at all. In addition, Dailey could and would present the evidence set forth throughout this pleading, through records and witness testimony at an evidentiary hearing, to establish his innocence. As noted above, in order to assess a newly discovered evidence claim, this Court must consider all the evidence presented, both at trial and in postconviction proceedings. Juxtaposing the lack of evidence against Dailey with evidence eviscerating the credibility of the jailhouse informants and the new evidence inculpating Pearcy, it is probable that if a jury heard this evidence Dailey would be acquitted or, at the very least, be given a life sentence.

Because the State's already-tenuous theory has been fatally undermined—and because there remains no credible evidence inconsistent with Dailey's innocence—an acquittal is "probable" under the *Jones* standard, as is a sentence less than death.

CONCLUSION AND RELIEF SOUGHT

Based on the foregoing, the circuit court erred in denying James Dailey relief on his successive motions. This Court should order that his conviction and sentence 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 the Clerk for the 6th Judicial Circuit, Pinellas County, and served upon Assistant Attorney General Christina Pacheco (Christina.Pacheco@myfloridalegal.com and capapp@myfloridalegal.com) Assistant Attorney General Timothy Freeland (Timonthy.Freeland@myfloridalegal.com) on this 13th day of January, 2021.

Respectfully submitted by counsel for Mr. Dailey,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing was generated in Arial 14 point font and otherwise formatted in compliance with Florida Rules of Appellate Procedure 9.045 and 9.210.

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