IN THE SUPREME COURT OF FLORIDA
CASE NO. SC05-1512

JAMES M. DAILEY,
Appellant,
v.
STATE OF FLORIDA
Appellee.

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

INITIAL BRIEF OF APPELLANT

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REQUEST FOR ORAL ARGUMENT

Mr. Dailey has been sentenced to death. A full opportunity to air the issues through oral argument is appropriate in this case, given the seriousness of the claims involved and the gravity of the penalty. Mr. Dailey, through counsel, accordingly urges that the Court permit oral argument.

STATEMENT OF THE CASE AND FACTS

Statement of the Case

Mr. Dailey was found guilty of Murder in the First Degree and sentenced to death August 7, 1987. The trial was held in the Sixth Judicial Circuit before the Honorable Thomas E. Penick, Jr., in Pinellas County, Florida.

This Court affirmed Mr. Dailey's conviction but remanded the case for re-sentencing. *Dailey v. State*, 594 So.2d 254 (Fla. 1991). Mr. Dailey was again sentenced to death and this Court affirmed the new sentence. *Dailey v. State*, 659 So.2d 246, 20 Fla. L. Weekly S241 (Fla. 1995), *cert. denied*, 516 U.S. 1095 (1996).

Mr. Dailey filed his initial Motion to Vacate Judgments of Conviction and Sentence With Special Request for Leave to Amend on April 1 , 1997. On November 12, 1999, Mr. Dailey filed his Amended Motion to Vacate Judgments of

Conviction and Sentence, and the State responded pursuant to an order to show cause.

At the *Huff* hearing, the Court ruled that Mr. Dailey was entitled to an evidentiary hearing on grounds I, II, III, IV, V, VI, and VII, reserving the right to address the remaining eight claims if, during the evidentiary hearing on the first seven claims, any information should be presented that would warrant further inquiry.

Subsequently, at the request of the Chief Judge of the Sixth Judicial Circuit, this Court assigned Circuit Judge Jack Espinosa, Jr., from Hillsborough County, to preside over the post-conviction proceeding because Mr. Dailey's defense attorney at trial had become a judge, creating a conflict of interest with the judges of the Sixth Judicial Circuit.

On November 19, 2001, a new *Huff* hearing was held before Judge Espinosa, who ordered an evidentiary hearing on the grounds originally set for hearing and adding grounds VIII and XV, and denying the remaining claims.

Evidentiary hearings were held on March 19, 2003, November 7, 2003, December 11, 2003, June 29, 2004, and November 5, 2004. The circuit court judge denied all claims which had been set for hearing, in the order now on appeal to this Court.

Statement of the Facts [1]

In order for this Court to properly assess whether Mr. Dailey is entitled to relief on his 3.850 claims, it is necessary to evaluate the quality of the evidence introduced by the state at Mr. Dailey's trial. Only then can this Court conduct a de-novo review of the testimony and documentary evidence introduced at the evidentiary hearings to determine whether the lower court erred in denying Mr. Dailey's 3.850 motion, with amendments.

The Facts Introduced at Mr. Dailey's Trial:

On May 6, 1985, at approximately 8:30 a.m., the body of Shelley Boggio was discovered in an inter coastal waterway in the Indian Rocks Beach area. (1987 ROA 759-66). Members of the Indian Rocks Beach Police Department and then the Pinellas County Sheriff's Office were called to the scene. Blue jeans, black panties, two woman's shirts, a tank top, and jewelry(earrings and a ring) were taken into evidence. (1987 ROA 771) A knife sheath was later found in the waterway by divers. (1987 ROA 811) (This Court in the first direct appeal, 594 So.2d at 257, determined the knife sheath should not have been admitted into evidence as there was an insufficient link between the sheath and the homicide).

[1] The record from the prior proceedings is referenced throughout this brief. The prior proceedings were all appealed to this Court, and counsel understands that the records from those prior proceedings remain available to this Court. The defendant respectfully urges the Court to take judicial notice of its own records to the extent the prior records below are necessary to support any claim herein.

Medical Examiner Joan Wood was also called to the scene on May 6, 1985. (1987 ROA 846). She testified at trial that the woman had not been dead for 12 hours and placed the range of the time of death between 1:30 A.m. and 3:30 a.m. (1987 ROA 849) The cause of death was choking, stabbing, cutting, and ultimately drowning. (1987 ROA 851). No sperm were located in the vaginal area. (1987 ROA 871). She stated there was vomit found at the scene which did not match Shelley Boggio's stomach content. (ROA. 879). No trauma was indicated in the vaginal area. (1987 ROA 884). Ms. Wood could not state whether there was one or two persons involved in the homicide. Based on the physical evidence, the homicide could have been committed by one person. (1987 ROA 890)

Crime scene technician Deborah Steeger found no hairs inconsistent with the victims. (1987 ROA 932). Mary Cortiz, a serologist, received anal swabs, vaginal swabs, oral swabs, and vaginal washing's and all were negative for the presence of semen. (1987 ROA 942) None of the clothing evidence from the scene had any physical evidence linking anyone to the homicide.

As the above citations from the record establish, there was no physical evidence at the scene to link James Dailey to the murder of Shelley Boggio. No hair, no blood, no semen, no DNA, no footprints, no murder weapon, and no fingerprints. Because there was no physical evidence linking Mr. Dailey to the homicide, the State had to rely upon eyewitness testimony as to Shelley Boggio's whereabouts the day and evening before the homicide in order to establish Mr.

Dailey's presence with the victim and opportunity to commit the homicide. As will be demonstrated below, a careful review of the testimony of the state's witnesses (free from the highly inaccurate arguments of the state in closing), reveals the state failed to do so.

Three people testified at Mr. Dailey's trial concerning the whereabouts of Shelley Boggio on May 5, 1985, the day prior to the discovery of the body. Those witnesses were Stacey Boggio, Oza Shaw, and Gayle Bailey. Jack Pearcy was called as a witness but asserted his Fifth Amendment privilege.

STACEY BOGGIO:

Stacey Boggio testified that she was with her sister, Shelley Boggio, on May 5, 1985. She and Shelley went to the beach with Stephanie Forsythe and returned home around 3:00 P.m. (1987 ROA 897). About suppertime, the three of them were hitchhiking near the Twisted Tree when they were picked up by a white Toyota car driven by Jack Pearcy. (1987 ROA 898). Also in the car were Oza Shaw and James Dailey. (1987 ROA 899). The six of them (Jack Pearcy, Oza Shaw, James Dailey, Shelley Bogio, Stacey Boggio, and Stephanie Forsyth) went to the Driftwood Bar and the Quarterback. The girls could not get in because they had no ID. (1987 ROA 900). All six of them went to Jack Pearcy's house around 7:00 p.m. (1987 ROA 901). Gayle Bailey (Jack Pearcy's girlfriend) was at the house. They smoked some pot and watched an Alfred Hitchcock movie for 20 minutes. (1987 ROA 901). Around 7:30 P.m. Jack Pearcy, Gayle Bailey, James

Dailey, Stephanie Forsyth, Stacey Boggio and Shelley Boggio left the house, leaving Oza Shaw behind. (1987 ROA 901). They left in Jack Pearcy's white Toyota car and they dropped Stephanie Forsyth and Stacey Boggio off at Stephanie Forsyth's house. Stacey did not see Shelley Boggio again after being dropped of at Stephanie's house.

GAYLE BAILEY:

Gayle Bailey testified that in May of 1985 she lived in a house in Seminole with Jack Pearcy (her boyfriend), and Jack Pearcy. (1987 ROA 952). Oza Shaw (a friend of Jack Pearcy) was visiting from Kansas. (1987 ROA 953). Jack pearcy and Gayle Bailey had their own bedroom. James Dailey had his own bedroom. Oza Shaw slept on the couch during his visit. (1987 ROA 953). On the morning of May 5, 1985, Jack Pearcy, Gayle bailey and Oza Shaw went to the flea market, came back and picked up James Dailey, and they all went to the beach. They all returned to the house in Seminole, where Gayle cooked supper. After eating, Jack Pearcy, Oza Shaw, and James Dailey left the residence. They were gone a few hours and then returned with three woman (Shelley Boggio, Stacey Boggio, Stehpanie Forsythe). Gayle Bailey loaned Shelley Boggio her ID. Then Jack Pearcy, Gayle Bailey, Shelley Boggio, Stephanie Forsythe and James Dailey left and dropped off Stephanie Forsythe and Stacey Boggio at Stephanie Forsythe's house. Oza Shaw stayed behind. (R. 953-957) Gayle Bailey further testified that after dropping Stacey Boggio and Stephanie Forsythe off at Stephanie's house, Jack Pearcy,

Gayle Bailey, Shelley Boggio, and James Dailey all went to Jerry's Rock Disco for about one hour. Shelley Boggio and Jack Pearcy danced together. (1987 ROA 957). After Jerry's Rock Disco, Jack Pearcy, Gayle bailey, Shelley Boggio, and James Dailey returned to the house in Seminole. (R. 958). Gayle bailey went to the bathroom, and when she came out they were gone, except Oza Shaw stayed on the couch. (R. 958) She did not see who got in the car at that time, but could only state they were gone. She stated she did not know whether James Dailey was in his bedroom when she came out of the bathroom. (1987 ROA 972) Most importantly, **Gayle Bailey did not testify that she saw James Dailey leave at that time with Jack Pearcy and Shelley Boggio**. (The prosecutor later inaccurately argued in closing that Bailey saw James Dailey leave at that time). However, she did offer some confusing testimony as to whether Jack Pearcy returned to the house later:

> Q. Do you know if Jack came back one other time?
> A. No, I don't know that for a fact.
>
> Q. You didn't see that?
> A. No sir, Jack and James came back once, they left together and then they came back again.
> A. I said, are you coming back home and staying or what? Yes, I am coming back home, and then they were gone, both of them together, and then they came back.
>
> Q. Did you see James Dailey come back a time before he eventually show up?
> A. He was in the back bedroom.
>
> Q. When was this?
> A. I don't know when it was.

Q. Next time?
A. Then they were gone and they both went back together again.

(1987 ROA 978, 982)

Gayle Bailey went on to testify that at approximately 2:00 a.m. to 3:00 a.m., Jack Pearcy and James Dailey returned to the residence in Seminole. (1987 ROA 959). She stated that Jack Pearcy was wearing the same clothes she had seen him in earlier, and James Dailey had on only jeans that were wet to the butt and he was carrying a bundle. (1987 ROA 960).

The next morning, Gayle Bailey went to the doctor's office in Jack Pearcy's white Toyota car. (1987 ROA 962) She found an earring in the car. (R. 962). Later that morning, Jack Pearcy, James Dailey, and Oza Shaw left to do laundry, and returned after a few hours. Upon there return everyone was packing their clothes and they drove down to Miami and checked into a hotel. James Dailey left the next day. (1987 ROA 962).

OZA SHAW:

Oza Shaw testified that he had known James Dailey for one month, and Jack Pearcy for five years. (1987 ROA 994). He was staying as a guest in the residence in Seminole with Jack Pearcy, Gayle Bailey, and James Dailey. (1987 ROA 995). Jack Pearcy and Gayle Bailey shared a bedroom, James Dailey had his own bedroom, and Oza Shaw slept on the couch.

Oza Shaw further testified that on May 5, 1985, at about three, four, or five p.m., he went riding with Jack Pearcy and James Dailey and they picked up three girls who were hitchhiking. After they drove around drinking they went back to the house in Seminole. The three girls then left with Jack Pearcy, Gayle Bailey, and James Dailey. Oza Shaw laid on the couch and passed out. When he woke up **Jack Pearcy** was leaving with the girl. He asked **Pearcy** for a ride to the telephone. He got in the car with **Jack Pearcy** and the girl and they took him to the telephone and dropped him off. He stated he was on the phone for about one hour. (It is now known through phone record introduced at the evidentiary hearing that Mr. Shaw placed one call at 10:16 p.m. on May 5, 1985, lasting 13 minutes, a second call at 12:15 a.m. lasting 26 minutes, and that he also called his girlfriend, Betty Mingis). Mr. Shaw was specifically questioned about who was in the car during the ride to the telephone.

> Q. When you stated that the girl, Shelley, and **Jack** left the house, where was James Dailey?
> A. When they gave me a ride to the phone?
> Q. Right.
> A. **I didn't see him**.
>
> Q. Do you know where the girl and **Pearcy** were going when they left the house to give you a ride home?
> A. No, I didn't.
>
> Q. Do you know if they went back to the house at that time?
> A. No, I don't.

ROA 999 (*emphasis added*)

Oza Shaw then testified that he was later awakened while sleeping on the couch and saw Jack Pearcy and James Dailey return to the house. James Dailey's pants were wet. (1987 ROA 998). The next day **Jack Pearcy** told Oza Shaw they were going for a ride for a couple of days, and to gather his clothes. Before they left, they did the laundry, and Oza Shaw washed the car. (R. 1000). They (Jack Pearcy, Gayle Bailey, Oza Shaw, and James Dailey) then went down to Miami to a hotel. The next day, James Dailey left. (1987 ROA 1001).

STATE'S CIRCUMSTANTIAL CASE:

The testimony of Oza Shaw, Gayle Bailey, and Stacey Boggio left the State with a purely circumstantial case. No physical evidence put James Dailey at the scene at the time of the murder, which was estimated by the Medical Examiner to be between 1:30 and 3:30 a.m. No DNA evidence, no fingerprint evidence, no blood evidence, no hair evidence, and no murder weapon. The State's sole evidence against James Dailey was that he had returned in the early morning hours with Jack Pearcy and his pants were wet.

However, there was a huge hole in the State's case; no one testified that James Dailey left with Shelley Boggio and Jack Pearcy when they left to drop Oza Shaw off at the telephone. Gayle Bailey testified that when she, along with Jack

Pearcy, Shelley Boggio, and James Dailey, returned from Jerry's Disco she went to the bathroom and everyone was gone except Oza Shaw. She did not see who got in the car to leave and she specifically testified she didn't know whether James Dailey was in his bedroom at that time. Furthermore, Oza Shaw specifically testified that when he awakened from the couch, he saw **Jack Pearcy** leaving with the girl, and he got a ride to the telephone with **Jack Pearcy** and Shelley Boggio **and James Dailey was not in the car**. Therefore, **Jack Pearcy** was alone with Shelley Boggio, without Mr. Dailey being present, and he had ample opportunity to commit the homicide **alone** without any participation at all from James Dailey.

Since it uncontroverted that James Dailey was not with Jack Pearcy and Shelley Boggio when they dropped Oza Shaw off to use the phone, there is really no other place he could have been except in his room back at the residence (since, if he was in the living room or kitchen he would have been seen by Gayle Bailey). The State could not dispute this reasonable hypothesis of innocence.

It has long been the law in the State of Florida that when the State relies upon purely circumstantial evidence to convict an accused, it has always been required that such evidence must not only be consistent with the defendant's guilt but it must also be inconsistent with any reasonable hypothesis of innocence. This principal of law was ably stated by the Florida Supreme Court as early as 1956 in *Davis v. State*, 90 So.2d 629 (Fla. 1956):

> Evidence which produces nothing stronger than a suspicion, even though it would tend to justify the

> suspicion that the defendant committed the crime, it is not sufficient to sustain conviction. It is the actual exclusion of the hypothesis of innocence which clothes circumstantial evidence with the force sufficient to convict. Circumstantial evidence which leaves uncertain several hypothesis, any one of which may be sound and some of which may be entirely consistent with innocense, is not adequate to sustain a verdict of guilty. Even though the circumstantial evidence is sufficient to suggest a probability of guilt, it is not thereby adequate to support a conviction if it is likewise consistent with a reasonable hypothesis of innocense. So it is in the instant case we find implicit in the circumstantial evidence offered for conviction a possibility of innocense which is equally as strong as the possibility of guilt.

90 So.2d at 631. *See also Head v. State,* 62 So.2d 41 (Fla. 1952); *Mayo v. State,* 71 So.2d 41 (Fla. 1954); *Luscomb v. State*, 660 So.2d 1099 (Fla. 1995); *State v. Law*, 559 So.2d 187 (Fla. 1989); *McArthur v. State*, 351 So.2d 972 (Fla. 1977); *Jaramillo v. State*, 417 So.2d 257 (Fla. 1982).

It is clear that based upon the laws of the State of Florida at the time of Mr. Dailey's conviction, that based only on the testimony of the witnesses as to Shelley Boggio's whereabouts on May 5, 1985, and the lack of any physical evidence whatsoever linking James Dailey to the homicide, the State could not obtain a conviction against Mr. Dailey without more evidence. It is apparent that leading up to Mr. Dailey's trial the State recognized the deficiencies in their case and grew desperate to find evidence that would take Mr. Dailey's case out of one based upon circumstantial evidence. To avoid losing the case to a judgment of acquittal, the State sent Detective Halliday to "troll for snitches" at the Pinellas County Jail to

try and find an inmate to testify against James Dailey. As James Dailey's trial approached, Detective Halliday cleaned out the pod at the Pinellas County jail in a desperate attempt to find a snitch to testify against Mr. Dailey. Ultimately, the State had to rely upon the most notorious snitch in the history of Pinellas County, Paul Skalnik, to get by a Judgment of Acquittal, which would have been granted based on the extremely weak circumstantial evidence case the state had developed, in order to obtain a murder conviction against James Dailey. This was a dubious strategy which, as will be demonstrated later in this argument, blew up in the State's face when Mr. Skalnik turned on the State shortly after Mr. Dailey's trial and was proven to be an absolute liar devoid of an ounce of credibility during the evidentiary hearing .

THE THREE SNITCHES:

(A) Snitch number one : The incredible Paul Skalnik

The evidence at Mr. Dailey's establishes that Paul Skalnik became involved in the Boggio murder case in early 1987 when he approached Detective Halliday about information he allegedly got from **Jack Pearcy** while in the Pinellas County Jail. (1987 ROA 1190). Only the fact that Mr. Pearcy's trial was over prevented Mr. Skalnik from testifying against him. Skalnik's alleged conversation with

Pearcy in early 1987 does establish that he had knowledge of information about the Boggio murder before he ever allegedly spoke with James Dailey.

Skalnik went on to "testify" that he had pending charges of violation of parole and two counts of grand theft, maximum penalty of 20 years.(the facts and circumstances of his recent and pending criminal charges were not brought before the jury on cross-examination, an error noted by this Court). (1987 ROA 1107). Skalnik was specifically asked about whether he had been offered anything in exchange for his testimony:

> Q. And has anyone from the Pinellas County Jail offered you anything or a break on your sentence in order to induce you to testify here today?
> A. No, Ma'am, they have not.
>
> Q. Has anyone from law enforcement at all offered you - - that includes the State Attorney's Office - - anything to induce you to testify here today?
> A. No ma'am, they have not.

(R. 1108) (as will be demonstrated later, these are answers Mr. Skalnik would later vigorously change in sworn motions to the court and in and least one letter to the Governor of the State of Florida).

Skalnik also "testified" concerning whether he had read any newspaper articles or television reports of the charges pending against Pearcy and Dailey:

> Q. Prior to your meeting or after you met Dailey and Pearcy, did you ever read any newspaper articles or see anything on t.v. about the charges pending against them?
> A. No ma'am. I don't get a newspaper and the situation I'm in, I seldom, if ever, get to see a t.v. set.

(R. 1110).

Skalnik initially "testified" that he had been placed in isolation because of testifying and because he was a former police officer. (1987 ROA 1109). He then stated later in his testimony that most of the individuals in upper G (the unit where he and Dailey were housed) knew him as a "private investigator" working with criminal lawyers. He told other inmates he was embezzling and was caught out of the country and had to be placed in isolation due to an escape risk. (1987 ROA 1114).

Skalnik went on to "testify" about the conversations he said he had with James Dailey. He stated the first conversation took place the last part of April, or the first part of May. He claimed that James Dailey told him "Pearcy had done more than he said," "he had stabbed her too". (1987 ROA 1114). The second conversation happened early in the morning, three, four, five days later. (1987 ROA 1114). Skalnik then "testified" that Dailey stood at the doorway to his cell and stated that he and Pearcy had been together in a car, it involved a young teen aged girl, and he did not know her age. That Mr. Pearcy had actually held the girl under. The young girl kept staring at him, screaming and would not die. He stabbed her and threw the knife away. (1987 ROA 1114).

Skalnik's "testimony" became the centerpiece of the State's case. The emphasis on Skalnik started in opening statement:

> In May of 1987, James Dailey was still in the Pinellas County Jail. At his trial date approached, he sought out advice from another inmate. He spoke to this inmate

> regarding the ramifications of speaking to inmates. Could inmates testimony be used against him? Is it admissible? Mr. Dailey later discussed the events of May 5th and May 6th with this other inmate. And he made the following statement to him. First of all he said. "The girl was only 14 but looked a lot older." Next, he said, "Pearcy helped stab her and held her under." Most importantly he said, "No matter how many times I stabbed her, she wouldn't shut up. She just stared at me. No matter how many times I stabbed her, she would not shut up."....
> Are these people in jail credible when they say this 14 year old girl looked older? Are they credible when they say James Dailey admitted stabbing the girl countless times?

1987 ROA 754-755.

At Mr. Dailey's trial the State also presented testimony from Detective Halliday specifically designed to enhance snitch Skalnik's credibility to the jury:

> Q. Has Skalnik supplied information on any other cases that you have worked?
> A. Yes, he has.
>
> Q. Any pending cases?
> A. One such case-
>
> Q. Without saying what Mr. Skalnik indicated, what has been the result of his information?
> A. **Extremely positive results**.

(1987 ROA 1187)

The State went on to improperly vouch for Mr. Skalnik's credibility (as well as the other two snitches) in closing argument as follows:

> Skalnik is a thief, he admitted that as I have already said. But I want you to remember what Detective Halliday said about the other information that he has gotten from this man. It has proven to be reliable. He has

> told him where critical evidence in another murder case was evidence that they didn't know existed because the Defendants had told them they had thrown away the ski mask until Skalnik told them exactly where it was based upon a conversation he had. A weapon that was thrown away in another murder case. **And that Detective Halliday, after having conversations with Mr. Skalnik and knowing him for years, considered him to be reliable enough to bring him to the State Attorney's Office with the information he has provided.**
>
> **You heard Detective Halliday's experience and what unit he is with and the types of crimes he investigates. If these men are cons, they would not con Detective Halliday**.

(1987 ROA 1283). Such arguments vouching for the credibility of a witness are blatantly improper; *see Paul v. State*, 790 So.2d 508 (Fla. 5th DCA 2001); *May v. State*, 600 So.2d 1266 (Fla. 5th DCA 1992); *Jorlett v. State*, 766 So.2d 1226 (Fla. 5th DCA 2000); *Williams v. State*, 747 So.2d 474 (Fla. 5th DCA 1999); *Rhue v. State*, 693 So.2d 567 (Fla. 2nd DCA 1996); *J.H.C. v. State*, 642 So.2d 601 (Fla. 2nd DCA 1994); *Hitchcock v. State*, 636 So.2d 572 (Fla. 4th DCA 1994). These improper vouching remarks by the Prosecutor will be addressed further in IAC claims, as trial counsel failed to object to them, and in prosecutorial misconduct. They are inserted here to demonstrate the degree of reliance by the State on Mr. Skalnik in order to obtain a conviction. The lead prosecutor on the Dailey case, Beverly Andringa, testified at the evidentiary hearing that these comments were improper. Post conviction Record on Appeal ("PC-ROA") 388.

The above testimony and arguments of counsel (some blatantly improper) establishes that the State relied heavily on Mr. Skalnik to obtain a murder conviction against Mr. Dailey.

THE OTHER TWO SNITCHES: **James Leitner and Pablo Dejesus**

James Leitner testified at Mr. Dailey's trial that he was awaiting charges in the Pinellas County Jail on conspiracy to traffic in cocaine. (1987 ROA 1013). He had been convicted in Colorado of Second Degree Kidnaping and First Degree Assault. (1987 ROA 1013). He faced a maximum sentence of 15-30 years on his pending charges. (1987 ROA 1013) . He became familiar with the Boggio homicide when Jack Pearcy started coming to the law library. (1987 ROA 1018). Dailey started to come to the library and asked if he could pass messages to Pearcy. (1987 ROA 1058). He also testified that later Mr. Dailey gave him a letter to give to Mr. Pearcy that he was not going to take the stand and if Jack got a retrial, if he can get an appeal, that he would come back and tell them what really happened. (1987 ROA 1066). Leitner stated that Pablo DeJesus was in the library and looked over at Mr. Dailey and said, "Why did you have to kill her? Why didn't you knock her out? She was only 14 years old. You can knock her out." Dailey then looked at Pablo and said, "I just lost it". (1987 ROA 1066).

Pablo DeJesus testified at Mr. Dailey's trial that he had pending cocaine trafficking charges pending while he was in the Pinellas County Jail. (1987 ROA 1084). He was asked by Jack Pearcy to deliver a note to Mr. Dailey. (1987 ROA

1086). Dejesus said that Dailey told him that he was going to beat the case and then come back and tell the truth that he was the one who killed the girl. (1987 ROA 1095) This was said to Mr. Leitner. (1987 ROA 1095).

The testimony of Leitner and Dejesus as to what James Dailey allegedly said to them is significantly inconsistent. Leitner says Mr. Dailey was responding to questions by Dejesus when he said "I just lost it". Dejusus does not testify about any questions he asked Mr. Dailey and Mr. Dailey was allegedly talking to Mr. Leitner when he said he would come back later and testify for Pearcy that he killed the girl.

Furthermore, the testimony of Leitner and Dejesus did not provide any unique information about the homicide. Only "I lost it" according to Leitner and "I will help out Pearcy and say I did it" to Dejesus. The only detail was that a girl had been killed, which was well known in the public domain

The sum total of the evidence against James Dailey was extremely weak. The circumstantial evidence case based upon the testimony of Gayle Bailey, Oza Shaw, and Stacey Boggio could not overcome the reasonable hypothesis of innocence: that Jack Pearcy was alone with Shelley Boggio after dropping Oza Shaw at the telephone, and Jack Pearcy had ample opportunity to commit the homicide without any assistance from Mr. Dailey. No physical evidence linked Mr. Dailey to the homicide. In order to obtain a conviction, the State had to rely primarily on the "testimony" of Paul Skalnik.

This Court should also keep in context the numerous instances of error already found by this Court in Mr. Dailey's direct appeal. In *Dailey v. State*, 594 So.2d 254 (Fla. 1992), this Court found the following guilt phase errors: (1) The prosecutor improperly commented on Mr. Dailey's right to remain silent by stating " Detective Halliday will indicate to you he had to go out there because Mr. Dailey was fighting extradition to come back to Florida." 594 So.2d at 255; (2) The knife sheath was improperly admitted into evidence as it was not sufficiently linked to the homicide; (3) The state's use of Detective Halliday to testify as to the inmates statement to him as to why they came forward in the case. *Id.*; (4) The refusal of the trial court to allow the defense counsel to question inmate Skalnik concerning the specifics of the charges pending against him. *Id*. (5) The prosecutor made impermissible comments on Mr. Dailey's right to remain silent by stating:

> **Now, there are only three people who know exactly what happened on that loop area...Shelley Boggio and she is dead; Jack Pearcy and he is not available to testify; and the Defendant.** So, when the defense stands up here, as they have already and I imagine Mr. Andringa will when he gets up to rebut, and says, where's the evidence, where's the eyewitness, use your common sense. Murderers of young girls don't sexually assault and commit a crime of murder with an audience.
> The prosecutor also made the following statement:
> Fingernails. You didn't hear anything about the length of Mr. Dailey's fingernails. No, because he left Pinellas County, went to Miami, where he stayed less that 24 hours and we arrest him months later in the state of California. **Only he knows the length of his fingernails.**

594 So.2d at 256-57.

The numerous instances of error already found by this Court are important to Mr. Dailey's 3.850 motion because in many of the claims this Court has to assess prejudice to Mr. Dailey. The process of evaluating prejudice involves an overall assessment of the strength or weakness of the State's case, and the fairness of the proceeding. These numerous errors are important in assessing the overall fairness of Mr. Dailey's trial and must be considered cumulatively with many of his claims.

EVIDENTIARY HEARING FACTS:

Following the *Huff* hearing granting Mr. Dailey an evidentiary hearing on several of the claims contained in his 3.850 motion, the following evidence and testimony was presented to the lower court:

JAMES DAILEY

Mr. Dailey testified that in May 1985 he was living in a two bedroom home in a subdivision in Seminole, Florida. (PC-ROA 297) He stayed in one bedroom and Jack Pearcy and his girlfriend – Gayle Bailey- had the other bedroom. (PC-ROA 298) There was a living room, dining room, garage, and a screened in porch. (PC-ROA 298) Mr. Dailey explained that Jack Pearcy was a friend he had met in Olathe, Kansas, and he had known him for about five years. (PC-ROA 298) Gayle Bailey was Mr. Pearcy's girlfriend and she was pregnant when they all decided to move to Florida. (PC-ROA 298)

During the period of May 5-6 of 1985, Oza Shaw was also staying at the house in Seminole. (PC-ROA 299) He slept on the couch. (PC-ROA 300) On May

5, 1985, Mr. Dailey, Mr. Shaw and Mr. Pearcy got up at 8:45-9:45 in the morning to go shopping, and drink some beer and wine coolers. (PC-ROA 300) They drove in Gayle Bailey's car, a white Toyota 2-door. (PC-ROA 300) Mr. Pearcy was driving the car. (PC-ROA 301) At about 3:45 p.m., as they were driving the white Toyota, they saw Shelly Boggio, Stacey Boggio, and Stephanie Forsythe walking alongside the road, and Stephanie waived them over. (PC-ROA 301) Mr. Pearcy pulled the car over and the three girls got in, with Stacey Boggio in the front seat between Mr. Pearcy and Oza Shaw, and Shelly Boggio and Stephanie got in the back seat with Mr. Dailey. (PC-ROA 301) The girls stated that they had just ripped these guys off, they were supposed to give them some reefer, but instead took their money and ran off. (PC-ROA 302) Stacey Boggio then stated she knew where she could get some reefer, so they drove to that place and then back to the home in Seminole. (PC-ROA 302) Mr. Dailey previously knew Shelly Boggio from a mutual acquaintance named Mark, who was trying to get some reefer for Mr. Dailey and Mr. Pearcy on prior occasions. (PC-ROA 304). Mr. Dailey had also seen Shelly Boggio on the beach and she had colored his hair for him. (PC-ROA 304)

After arriving at the house in Seminole at around 5:30 PM they rolled up a couple of more joints and drank some more beer. (PC-ROA 304) Stacey Boggio and Stephanie Forsythe wanted to go somewhere else, and Shelly Boggio wanted to go to a particular bar. (PC-ROA 304) Shelly Boggio had tried to get into the bar

earlier but was denied due to her age. (PC-ROA 304) Gayle Bailey then gave Shelly Boggio one of her two identification cards so Shelly could get in the bar. (PC-ROA 304) Mr. Dailey, Mr. Pearcy, Shelly Boggio, and Gayle Bailey then went to Jerry's Rock Disco Bar. (PC-ROA 305) Mr. Pearcy and Gayle Bailey went into the bar first, then Mr. Dailey and Shelly Boggio entered, with Shelly using Gayle Bailey's identification. (PC-ROA 305) They were all drinking at the bar, and Mr. Dailey asked Shelly Boggio to dance but she said no. (PC-ROA 305) Mr. Dailey then went and danced with another girl, and then Mr. Pearcy started dancing with Shelley. (PC-ROA 306)

As Mr. Pearcy was dancing with Shelly Boggio, Mr. Dailey sat down with Gayle Bailey, who was upset then with Mr. Pearcy. (PC-ROA 306) Then Mr. Dailey, Mr. Pearcy, Gail Bailey and Shelly Boggio left the bar and returned to the house in Seminole. (PC-ROA 306) Oza Shaw was sleeping on the couch when they returned (PC-ROA 306) Gayle Bailey went in the bathroom and Mr. Dailey went into the kitchen and Oza Shaw said he wanted a ride to a nearby phone booth so he could place a call to Olathe, Kansas. (PC-ROA 306)

At that point Mr. Pearcy, Oza Shaw, and Shelly Boggio left the residence. (PC-ROA 306) Mr. Dailey did not go with them and stayed back at the house. (PC-ROA 306) Gayle Bailey came back to Mr. Dailey's bedroom and asked where Jack Pearcy had gone, and became very upset when Mr. Dailey informed her he had left with Oza and Shelly Boggio. (PC-ROA 306) Mr. Dailey then went to bed. When

Shelly Boggio left with Jack Pearcy and Oza Shaw that was the last time Mr. Dailey ever saw her. (PC-ROA 306)

In the early morning hours of May 6, 1985, at about 2:45 a.m., Jack Pearcy came to Mr. Dailey's bedroom and said he had a couple of joints and a beer and said he wanted to talk to Mr. Dailey. (PC-ROA 306, 307) Mr. Dailey put on a pair of jeans and a pullover shirt and got a six pack of beer from the fridge and left with Mr. Pearcy. (PC-ROA 307) It was not unusual for them to go out that late in the evening. (PC-ROA 307) They got in the car and drove to Bellaire Causeway. (PC-ROA 308) They parked the car on the lagoon side of the causeway and smoked a joint and drank beer, and then got a Frisbee out of the car and began playing with it. (PC-ROA 308)

Mr. Dailey threw the Frisbee up and it landed in the water. (PC-ROA 308) He went into the water behind some trees in knee deep water in order to urinate. (PC-ROA 308) They smoked another joint and drank some more beer. (PC-ROA 308) Mr. Pearcy then told Mr. Dailey that Gayle Bailey wanted him to leave the residence so they could turn his bedroom into a nursery. (PC-ROA 308) Mr. Dailey said that was ok because he was going to move to Tuscan Arizona. (PC-ROA 308) Mr. Dailey and Mr. Pearcy then went back to the residence in Seminole at about 3:30 a.m. (PC-ROA 308) When Mr. Dailey was speaking to Mr. Pearcy down by the lagoon earlier that morning his eyes "looked like they were on cocaine". (PC-ROA 309)

Mr. Dailey then went to bed, and in the morning Mr. Pearcy stated he wanted to go to Miami. (PC-ROA 308) Mr. Dailey explained that it was not unusual for the group to travel on short notice and they had previously driven to Orlando, Daytona Beach, and even Kansas on the spur of the moment. Therefore, the fact that Mr. Pearcy suddenly wanted to go to Miami did not seem unusual to Mr. Dailey. (PC-ROA 310).

Before leaving for Miami, Mr. Dailey and Mr. Pearcy went to a nearby laundry that also had a car wash. (PC-ROA 310) Mr. Dailey did the laundry and Mr. Pearcy and Gayle Bailey washed the car. (PC-ROA 310) Then the four of them (Mr. Shaw went along to catch a flight back to Kansas from Miami) went down to Miami and checked into the Kant Hotel. (PC-ROA 310) Jack Pearcy and Gayle Bailey got a room, and Mr. Dailey and Oza Shaw got a room. (PC-ROA 310) The next day Mr. Dailey got a bus ticket and took off for Tucsan, Arizona. (PC-ROA 311) Mr. Dailey had friends in Arizona and was introduced to a person who had a cabinet remodeling job in California and Mr. Dailey went with him to California to work. (PC-ROA 311) The first time he heard about the death of Shelly Boggio was while he was in California. (PC-ROA 312)

Mr. Dailey was arrested on November 6, 1985 and transported back to the Pinellas County Jail in February of 1986. (PC-ROA 313) He became aware by reviewing depositions provided by his attorney that inmate Paul Skalnik had alleged that Mr. Dailey had spoken to him about the murder in the last week of

April, first week of May. (PC-ROA 318, 319) Mr. Dailey explained he was on the upper G wing, and Mr. Skalnik was housed on the end near the entryway. (PC-ROA 320)(Defense Exhibit # 1) Mr. Skalnik was in a one man isolation cell. (PC-ROA 320) Other inmates within the Pinellas County Jail were not supposed to communicate with inmates in an isolation cell. (PC-ROA 323)

Mr. Dailey stated he never discussed his case with Mr. Skalnik. (PC-ROA 324) Mr. Dailey was careful not to discuss his case with anyone because his attorney had advised him not to. (PC-ROA 324) Mr. Dailey was also aware that the police had been through several pods trying to get inmates to testify against him. (PC-ROA 324) Mr. Dailey said he especially would not talk to Mr. Skalnik because he knew that he was a snitch and an ex police officer. (PC-ROA 324) Mr. Dailey informed his attorney that he knew Mr. Skalnik was a snitch. (PC-ROA 326)

Mr. Dailey acknowledged he had met Pablo Dejesus and James Leitner in the Pinellas County Jail. (PC-ROA 326) He never told James Leitner, while responding to a question from Pablo Dejesus about why he killed the girl, "that he just lost it" (PC-ROA 326)

Mr. Dailey did not testify because his attorney told him not to because the attorney did not like the part of his testimony that he got his pants wet playing with a Frisbee and going into the water to retrieve it. (PC-ROA 329) Mr. Dailey's counsel told him he wanted to "save" his testimony when the case came back for a

re-trial. (PC-ROA 329) Mr. Dailey's attorney told him he felt the re-trial would occur in less than two years. (PC-ROA 329) Mr. Dailey based his decision not to testify on the advice of his attorney and from family members telling him to follow the advice of his attorney. (PC-ROA 329) Mr. Dailey also requested that his attorney obtain phone records confirming the time and date Mr. Shaw made the phone calls back to Kansas because it would contradict Gayle Bailey's testimony. (PC-ROA 331)

On cross examination, Mr. Dailey admitted to having one prior felony conviction. (PC-ROA 332) He further stated that in a note to Mr. Pearcy he had indicated he wasn't going to testify. (PC-ROA 333) He further acknowledged that the decision not to testify was announced in open court. (PC-ROA 333)

OZA SHAW

Mr. Shaw testified that he resides in Kansas, and back in May 1985 he visited Florida to spend time with his friend, Jack Percy. (PC-ROA 335) He had known Mr. Pearcy at that time for about a year and a half. (PC-ROA 335) He stayed at a house in Seminole, Florida with James Dailey, Jack Pearcy and Gayle Bailey. (PC-ROA 335) He understood that Gayle was Jack Pearcy's girlfriend. (PC-ROA 335) Mr. Pearcy and Gayle Bailey had one bedroom, and Mr. Dailey had the other. (PC-ROA 336) Mr. Shaw did not know Mr. Dailey very well. (PC-ROA 336)

In the morning of My 5, 1985, Mr. Shaw went drinking with Jack Pearcy and James Dailey in Gayle Bailey's car. (PC-ROA 336) They drove along the beach area and three girls waived them down and got into the car. (PC-ROA 337) They all visited some bars but the girls were having trouble getting in due to their age. (PC-ROA 338) During the driving, Mr. Shaw noticed Shelly Boggio was expressing an interest in Mr. Pearcy. (PC-ROA 338) They drove to the house in Seminole and Mr. Shaw laid down on the couch. (PC-ROA 339) He fell asleep. (PC-ROA 339)

At some point Mr. Pearcy, James Dailey, Shelly Boggio and Gayle Bailey came back to the house. (PC-ROA 339) Around 12:00 AM Mr. Shaw asked Mr. Pearcy to give him a ride to a phone booth. (PC-ROA 340) Mr. Shaw then left with Mr. Pearcy and Shelly Boggio to go to the phone booth. (PC-ROA 340) Mr. Dailey did not go with them. (PC-ROA 340) The phone records were admitted into evidence as Defense Exhibit #2 and revealed that Mr. Shaw called Betty Mingis at 12:16 Am and talked for 26 minutes. (PC-ROA 341)

Mr. Pearcy and Shelly Boggio were alone in the car, and Mr. Shaw told them to go on without him (PC-ROA 341) Mr. Shaw told Betty Mingis over the phone that Jack was in the car with a girl. (PC-ROA 342) Mr. Shaw also attempted to call his ex wife but couldn't get through, then he walked back to the house. (PC-ROA 342) When he got back to the house Gayle Bailey asked him where Jack was, and wanted to know why he was doing this to her. (PC-ROA 342) Mr. Shaw

then fell asleep on the couch and was awakened by Jack Pearcy coming through the door. (PC-ROA 343.

Mr. Pearcy went straight to Mr. Dailey's bedroom. (PC-ROA 343) Thereafter Mr. Pearcy and Mr. Dailey left the house together. (PC-ROA 343) When Mr. Pearcy came back through the door and went straight to Mr. Dailey's bedroom neither Mr. Dailey or Shelly Boggio was with him. (PC-ROA 344) Gayle Bailey was sitting in a rocking chair at that time. (PC-ROA 344) After Mr. Pearcy, alone, went back to get Mr. Dailey, and Mr. Pearcy and Mr. Dailey left together, approximately one hour passed and they returned. (PC-ROA 344) At that time Mr. Dailey had wet pants in the inseam. (PC-ROA 344)

Mr. Shaw explained that he was not asked at the time of Mr. Dailey's trial whether Mr. Pearcy returned alone, without Shelly Boggio with him and went back to get Mr. Dailey from his bedroom. (PC-ROA 345) On cross examination, Mr. Shaw acknowledged that he had stated to Detective Halliday that when he returned to the house after making the phone call he only saw Gail Bailey in the residence. (PC-ROA 346) He also stated in his previous deposition that he did not look in Mr. Dailey's bedroom when he returned home from making the phone calls. (PC-ROA 348)

Mr. Shaw said he wasn't asked about Mr. Pearcy coming back and getting Mr. Dailey out of the bedroom. (PC-ROA 349) Mr. Shaw explained that a CCRC investigator had come to see him and he told her that there was something that

never came out at trial - that Mr. Pearcy had returned to the residence in Seminole, alone, and had gotten Mr. Dailey out of his bedroom. (PC-ROA 353) Mr. Shaw stated he was upset at the time of Mr. Dailey's trial due to being incarcerated and now that he is free and has been on the same job for 15 years he felt something was wrong and he needed to correct it. (PC-ROA 356)

DETECTIVE HALLIDAY:

Detective Halliday stated he was the lead detective in Mr. Dailey's case. (PC-ROA 361) He stated he had not reviewed any materials prior to his evidentiary hearing testimony (PC-ROA 361) He stated that he "could have" gone to the Pinellas County Jail in an attempt to locate inmates who would testify against Mr. Dailey. (PC-ROA 362) He stated that was normal investigative technique. (PC-ROA 362) He admitted that one technique in assessing the credibility of a jailhouse informant would be evaluating whether the information relayed had appeared in the public domain. (PC-ROA 364) (*emphasis added*) He further admitted to the possibility that if information from a jailhouse informant was readily reported in the news media and public domain, and contained no unique details, that would diminish the credibility of the witness. (PC-ROA 365) Another measure of credibility would be a specific time and place of a conversation so it could be verified that the jailhouse informant had the opportunity to hear the alleged statements. (PC-ROA 369)

He recalled that in the first alleged statement from Mr. Dailey to Mr. Skalnik he said that Pearcy had done a lot more than he had said. (PC-ROA 369) In the second statement Mr. Dailey allegedly said that he and Pearcy were in a car with a young teenage girl, did not know her name, and that Mr. Pearcy had actually held the girl under the water but she kept staring at him screaming and she would not die and then he stabbed her and threw the knife away. (PC-ROA 370) Detective Halliday admitted that a January 10, 1987, newspaper article had information about the case, specifically that Pearcy had been convicted and Dailey had been charged with stabbing and drowning a young girl. (PC-ROA 373) (Defense Exhibit #3) He also admitted the fact that Mr. Pearcy had been convicted and Mr. Dailey had been charged with the stabbing and drowning of Shelly Boggio appeared in a November 26, 1986, article in the St. Petersburg Times. (PC-ROA 373)(Defense exhibit # 4) Detective Halliday admitted that a November 20, 1986, newspaper article had "similar information to what Mr. Skalnik related". (PC-ROA 374)

BEVERLY ANDRINGA:

Mrs. Andringa (she was Beverly Andrews at the time of Mr. Dailey's trial but subsequently married Mr. Dailey's defense counsel – Henry Andringa) testified she was the Assistant State Attorney who tried Mr. Dailey's case. (PC-ROA 381) She stated the decision to call Mr. Skalnik as a witness was probably a joint decision between her and Prosecutor Heyman. (PC-ROA 383) She said one of the

methods of evaluating inmate testimony would be to determine whether or not they could have gotten their information from other sources such as newspapers. (PC-ROA 384) If the information was available in the public domain it would be a factor in minimizing or decreasing the credibility of a jailhouse witness. (PC-ROA 384) She did not recall whether Detective Halliday had ever communicated to her an opinion as to Mr. Skalnik's truthfulness. (PC-ROA 385)

Mrs. Andringa was questioned about a statement she made to the jury during Mr. Dailey's trial where she argued "And Detective Halliday, after conversations with Skalnik, and knowing him for years, considered him reliable enough with information he has provided. You heard Detective Halliday's experience and type of crimes he investigated of these two minor cons that would not con Detective Halliday". (PC-ROA 386) She expressed surprise at those remarks she made at Mr. Dailey's trial, which she characterized as "commenting on the credibility of a witness which I view to be pretty much the jury's prevue" (PC-ROA 388) (emphasis added).

CCRC counsel then showed Mrs. Andringa a Motion to Dismiss for Prosecutorial Misconduct (Defense Exhibit #6) filed by Paul Skalnik in which he stated that he was an agent for the state back in 1985 and he was coached in his testimony – alleged facts were supplied, instructions given, and answers were supplied to refute any assertions that an agreement for a deal was made by the state. He further stated that certain Assistant State Attorneys knew of the potential

questionability of his "confessions" and that an agreement for leniency for Mr. Skalnik existed and listed Beverly Andrews as a Prosecutor with knowledge of the undisclosed deal. (PC-ROA 394).

At the instant evidentiary hearing, the lower court would not allow testimony from Mrs. Andringa concerning whether her opinion about Mr. Skalnik had changed since he filed the allegations against her (meaning changed since she admittedly improperly bolstered the credibility of Mr. Skalnik at trial). (PC-ROA 395-396) The lower court did allow a proffering of Mrs. Andringa's deposition where she stated her changed opinion of Mr. Skalnik's credibility as follows:

> Q. All right. Well, let me ask you to assume you're evaluating Mr. Skalnik to call as a witness in a case after 1988 and after he made these allegations, I think you had testified earlier as to your general procedure for analyzing whether someone is – whether you would call a person to testify who is a jailhouse witness as to whether or not they're truthful, would be whether they testified truthfully in the past or not, **based upon these allegations would you call Mr. Skalnik to testify after 1988?**
> A. No
> Q. And would that be because **you could not in good faith put him on believing he would give truthful testimony?**
> **A. Yes.**

This proffer was presented by CCRC counsel to establish a claim of newly discovered evidence that Mr. Skalnik is not trustworthy, to stand in stark contrast to the blatant vouching for Mr. Skalnik done by Mrs. Andringa at Mr. Dailey's trial.

On December 11, 2003, Counsel for Mr. Dailey filed a Motion to Amend the 3.850 motion to include a claim of newly discovered evidence that Mr. Skalnik is not credible. The lower court failed to rule on either the motion to amend or the substance of the claim that newly discovered evidence demonstrates the lack of credibility of the witness primarily responsible for Mr. Dailey's conviction and sentence – Paul Skalnik.

HENRY ANDRINGA:

Mr. Andringa testified that he is currently a county judge in Pinellas County. He said he and his partner James Denhart represented Mr. Dailey at his 1987 trial. (PC-ROA 399) They had no specific investigator (PC-ROA 400) His general strategy for dealing with Skalnik was to cast some doubt on his credibility by suggesting he had something to gain from his testimony. (PC-ROA 402) He did not use any newspaper articles to impeach Mr. Skalnik, and could not articulate any strategic reason for failing to do so. (PC-ROA 404) He recalled Oza Shaw had stated he made a phone call to his girlfriend, and could not recollect a strategic reason for not using the phone records at Mr. Dailey's trial. (PC-ROA 406-07) He could not recall if the records would have impeached Gail Bailey's testimony. (PC-ROA 407)

As for the discussion of whether or not to call Mr. Dailey, he stated he didn't believe Mr. Dailey's story about how his pants got wet playing Frisbee would have

credibility with the jury. (PC-ROA 409) He also felt that Jack Pearcy or one of the jail house informants might change their testimony and give Mr. Dailey a new trial. (PC-ROA 409) He stated that **in his legal opinion, without the testimony of Mr. Skalnik, Mr. Leitner, and Mr. Dejesus, the other evidence against Mr. Dailey would have resulted in a judgment of acquittal.** (PC-ROA 411) (emphasis added).

PAUL SKALNIK:

Mr. Skalnik testified that he was incarcerated and awaiting charges in Massachusetts at the time he testified at the evidentiary hearing. (PC-ROA 425) At the time of his testimony at Mr. Dailey's trial he was incarcerated in the Pinellas County Jail. (PC-ROA 425) Mr. Skalnik stated he took notes of his conversations with Mr. Dailey and gave them to either Detective Halliday or the jail detective. (no such notes were ever produced during the discovery process of the original proceeding or during the post conviction proceedings) The notes were in Mr. Skalnik's own handwriting and he refreshed his recollection by referring to them prior to testifying at the 1987 trial. (PC-ROA 427)

At the time Mr. Skalnik testified at Mr. Dailey's trial in 1987 he had pending charges for two grand theft cases. (PC-ROA 431) The substance of the pending charges was that Mr. Skalnik had convinced a woman to give him $35,000.00 to allow him to purchase an automobile at a discount rate. (PC-ROA 434) (Defense

Exhibit # 8) Mr. Skalnik put $5000 down on the car which he kept in his name and absconded with the rest of the money. (PC-ROA 434) The other Grand Theft charge involved obtaining $25,000.00 from another woman for the purchase of land Mr. Skalnik never owned. (PC-ROA 434) That Grand Theft charge was also pending at the time Mr. Skalnik testified in Mr. Dailey's case. (PC-ROA 436) There was also a parole violation charge against Mr. Skalnik at the time he testified for four grand theft charges from Florida where he had served his prison sentence in Arizona after his life had been threatened in the Florida Prison System. (PC-ROA 436) One of the cases Mr. Skalnik was on parole for involved a 1982 case in which he fraudulently obtained $4,000.00 from a victim to start a Florida law practice when he represented himself as an attorney from Texas who was going to take the Florida Bar and set up shop. (PC-ROA 439) (Defense Exhibit # 10)

Skalnik also testified that he feared for his life if sent to prison in Florida at he time he testified against Mr. Dailey, as he had already been sent to serve previous Florida prison sentences in Arizona for that reason. (PC-ROA 441) The State of Florida previously wrote a letter on his behalf to have his prison sentence served in Arizona. (PC-ROA 444) Prior to ever testifying in Mr. Dailey's case, in May of 1987, Mr. Skalnik sent a letter to Judge Case stating "feel free to contact Detective John Halliday of the Pinellas County Sheriff's Office. He can substantiate all I said and tell you of my recent and current assistance. (PC-ROA 450) Mr. Skalnik admitted this was an attempt to curry favor with the judge. (PC-

ROA 450) (Defense Exhibit # 12) Mr. Skalnik also wrote a letter to Judge Case stating he had testified against more than 30 inmates. (PC-ROA 455) (Defense Exhibit # 13)

Mr. Skalnik stated he never got a deal to testify against Mr. Dailey and claimed he could not recall ever saying he did after Mr. Dailey's trial. (PC-ROA 455, 456) He admitted signing the August 7, 1988, Motion to Dismiss for Prosecutorial Misconduct and writing the August 8, 1988, statement which accompanied the motion. (PC-ROA 457) Mr. Skalnik claimed he signed the motion to dismiss for prosecutorial misconduct but never read it until years later. (PC-ROA 457) He said that the motion was based on attorney Mark Evan's enthusiasm and desire to help other defendants. (PC-ROA 457) He said the allegations contained within the motion to dismiss for prosecutorial misconduct were "made up" by attorney Evans. (PC-ROA 459) He stated he "could have" spoken to someone at the St. Petersburg Times but Mr. Evans gave more of an interview than he did. (PC-ROA 459) He did not tell the person who did the interview that he had not read the motion. (PC-ROA 461)

Mr. Skalnik then changed his testimony about not having read the contents of the motion by stating that Mark Evans had told him to say what was in the motion. (PC-ROA 461) (the motion also contains a handwritten statement from Mr. Skalnik, adopting the contents of the motion he supposedly never read) Mr. Skalnik said he did file some pro-se motions that Mr. Evans didn't file. (PC-ROA

462). He said he did so out of frustration and fear. (PC-ROA 467) Mr. Skalnik claimed that after he testified in the Dailey case he was inundated with nine volt batteries, feces, and death threats. (PC-ROA 463) Mr. Skalnik stated he filed things in anger and admitted to engaging in "angry falses [sic - probably "angry falshoods"]" with the court. (PC-ROA 463)

Mr. Skalnik admitted signing and filing Defense exhibit #15, a pro-se motion for discharge. (PC-ROA 464) He didn't know if he drafted it himself or whether Mark Evans drafted it, and could offer no explanation as to why an attorney would file a pro-se motion. (PC-ROA 465). He stated there was no notary at the Pinellas County Jail. (PC-ROA 465) In Defense Exhibit # 15 Mr. Skalnik stated he was repeatedly told by the Pinellas County State Attorney's Office he would be "taken care of" when Mr. Dailey's trial was over with the understanding he would receive no more than 3 ½ -4 ½ years. (PC-ROA 466) At the evidentiary hearing, Mr. Skalnik stated they (the Pinellas County State Attorney's Office) never stipulated as to a year but did say he would be "taken care of" after the Dailey trial. (PC-ROA 466-467)(emphasis added)

Mr. Skalnik then admitted he doubted Mark Evans drafted Defense Exhibit #15. (PC-ROA 467) He stated he made the falsehoods out of anger and frustration. (PC-ROA 468) Mr. Skalnik admitted that when he filed Defense Exhibit # 15, Mr. Evans was no longer his attorney. (PC-ROA 470) Mr. Skalnik admitted to writing a letter to then Governor Bob Graham on August 18, 1988, where he stated "I have

never received a plea bargain deal from the State after all my testimony even though they promised me such a deal". (PC-ROA 473)

Mr. Skalnik said he did not have access to a television in the Pinellas County Jail. (PC-ROA 473) Mr. Skalnik admitted to receiving a ROR on his pending charges after testifying in Mr. Dailey's case because his life was in danger. (PC-ROA 476) The ROR occurred two days after he testified in Mr. Dailey's case. (PC-ROA 477) (Defense Exhibit # 18) He stated he "didn't know" whether the State assisted him in the ROR (PC-ROA 477)

Mr. Skalnik admitted to signing Defense Exhibit #20, filed December 18, 1988 entitled "Motion for Humane Sentencing", (PC-ROA 479) In that motion Mr. Skalnik stated "regardless of the assistance given by the defendant to the Pinellas County State Attorney's Office to obtain felony convictions in over 30 cases, placing 8 men on death row, Mr. Mensch (A Pinellas County Assistant State Attorney at that time) insists no "deal" ever existed with the defendant." (Defense Exhibit # 20, paragraph 3) Mr. Skalnik further insisted in that motion that he had four contracts out on his life in the Florida Prison System. (PC-ROA 479) He compared himself to a political prisoner in the USSR and complained about the United States government making "deals" with Yassir Arafat but were sending him (Mr. Skalnik) to be killed in the Florida Prison System. (Defense Exhibit 20, paragraph 12) Mr. Skalnik also admitted to signing Defense Exhibit # 21 entitled "Addendum to Request for Judge to Disqualify Herself for Prejudice and

Impropriety" on January 14, 1989 where Mr. Skalnik stated "Just as quickly as the Pinellas County State Attorney's Office mobilized and called in all prospective witnesses being subpoenaed by previous counsel Mark Evans, who was going to demonstrate the State Attorney's Office lack of performance on previous plea negotiations and their vindictiveness toward the defendant did the State Attorney's Office begin delaying tactics to encumber the defendant's ability to defend himself and retain Mr. Evans as counsel". (Defense Exhibit #21)(*emphasis added*) Mr. Skalnik also claimed that there was a $50,000.00 contract on his life and that Judge Luten and the State Attorney should split the money. (Defense Exhibit # 21 at paragraph 20)

Mr. Skalnik denied reading newspapers in the Pinellas County Jail – then he admitted drafting Defense Exhibit 23 in which he referred to local newspaper articles. (PC-ROA484) He also admitted to referring to newspaper articles in the Motion to Dismiss for Prosecutorial Misconduct (Defense Exhibit # 6) He denied, however, that he ever read the referenced article. (PC-ROA 484) He further admitted failing to appear on his charges after the ROR and going to Texas to "turn himself in". (PC-ROA 484) He did this so he could serve his prison sentence in Texas, not Florida, where he feared for his life. (PC-ROA 486) Mr. Skalnik then stated he will say he got a deal as long as he is not testifying in court:

Q. So you are liable at any point in time to tell anybody the State had given you a deal as long as it is not in court?

A. If I am not under oath in court that possibility could exist.

(PC-ROA 486)

Mr. Skalnik also admitted to writing Defense Exhibit # 27 on June 29, 1999, in which he stated in his own hand "Realistically, I probably possess information which would assist numerous individuals in perfecting their appeals, the question remains would my assistance result in benefitting them, while terminating my life". (Defense Exhibit #27)

On cross examination, Mr. Skalnik stated he told someone from the St. Petersburg Times that he didn't intentionally lie in any of the trials. (PC-ROA 496) He said he had been a police officer and learned how to testify at the academy. (PC-ROA 496) Skalnik testified that he would have told Counsel for CCRC , Jeff Hazen, anything because Hazen offered to help him with personal matters. (PC-ROA 497) He stated he took notes of his conversations with Mr. Dailey and gave them to Detective Halliday, but hasn't seen them since. (PC-ROA 498) He said when he said that he would be "taken care of" the meaning of that would depend on the "influx [sic] of somebody's voice." (PC-ROA 499) He said he thought "taken care of" meant that cases would be resolved after testimony. (PC-ROA 500) He said he told the truth in Mr. Dailey's trial (PC-ROA 502) He said that Mark Evans "had an agenda" and didn't believe in death penalty cases. (PC-ROA 501) On redirect, Mr. Skalnik acknowledged that Mark Evans is now deceased. (PC-ROA 505)

MARK JOURNEY:

Mr. Journey testified that he is currently an attorney in Miami and back in August of 1988 he was a reporter with the St. Petersburg Times, where he worked for seven years. (PC-ROA 506) He recalled the August 9, 1988 Article published in the Saint Petersburg Times concerning Mr. Skalnik. (PC-ROA 507)(Defense Exhibit # 14) He interviewed Mr. Skalink before the article was published and Mr. Skalnik did not relate to him at that time that he had not read to Motion. (PC-ROA 507) From his discussion with Mr. Skalnik, he seemed to have knowledge of the content of the Motion to Dismiss (PC-ROA 507) Mr. Skalnik also expressed doubts about the truthfulness of his testimony. (PC-ROA 511)

JEFF HAZEN:

Mr. Hazen testified he represented Mr. Dailey during 1998 until 2001, as an attorney with CCRC-Middle. (PC-ROA 513) He interviewed Mr. Skalnik in Dalhart Correctional Institute in Dalhart, Texas. (PC-ROA 513) In regards to Mr. Skalnik's statement concerning any deal he may have gotten to testify in the Dailey matter, Mr. Hazen stated "He stated to me that he had talked to Ms. Andrews who was the prosecutor on the case and he had asked her essentially whether or not he would be taken care of in terms of the charges on his own case that he would be treated fairly and given a deal for his testimony. She apparently was unwilling to give him any promise like that. At a later point he talked to Detective Halliday and

he asked – he told Detective Halliday that Ms. Andrews was unwilling to make a promise to him regarding the charges and at that time Detective Halliday stated to him she can't do that legally, ethically she can't express that to you. But I can promise you that you are going to be taken care of. She can't tell you that but you will be taken care of on your charges for your testimony against Mr. Dailey. (PC-ROA 516) (*emphasis added*)

DETECTIVE JOHN HALLIDAY:

Detective Halliday was recalled and testified that he did not remember whether Mr. Skalnik had told him he took notes of his conversations with Mr. Dailey. (PC-ROA 520) He did not remember whether Mr. Skalnik gave him any notes of his alleged conversations with Mr. Dailey. (PC-ROA 520) He stated had notes been given to him by Mr. Skalnik, he would have definitely turned them over to the State Attorney's Office, and then they would have been turned over to the defense attorney. (PC-ROA 521)

JAMES DENHART:

Mr. Denhart stated he was appointed to represent Mr. Dailey at his trial. (PC-ROA 527) He explained that Mr. Andringa did most of the discovery and depositions, while he was present for the trial and cross examined some of the witnesses. (PC-ROA 527) In a letter written to Mr. Dailey on June 26, 1992, Mr.

Denhart acknowledged he had no contact with Mr. Dailey prior to the trial week. (Defense Exhibit # 28) He stated his overall strategy for dealing with Mr. Skalnik was to try and discredit his testimony. (PC-ROA 529) He could not recall any strategic reasons for not cross examining Mr. Skalnik about the facts and circumstances of his pending charges. (PC-ROA 529) He also could not recall when Mr. Skalnik went on the State's witness list. (PC-ROA 530) He did not talk to Mr. Dailey until the week of the trial. (PC-ROA 531)

JACK PEARCY:

Jack Pearcy was called by the defense at the evidentiary hearing. (PC-ROA 536) However, he asserted his Fifth Amendment Privilege and refused to testify. (PC-ROA 537) At that point the defense introduced as Court Exhibit Two a previous statement by Jack Pearcy, in which he answered questions as follows:

> Q. Is that last part of that correct, that when Gayle went to the bathroom, she came out, you, Jim and Shelley were gone?
> A. No. I had left with Shelley, and Jim, I don't know where he was. He could have been in his bedroom or wherever. And when Shelley and I left. Oza asked me to drop him off to make a phone call to his ex-wife, Rose, in Kansas and the three of us left and dropped Oza off a couple of blocks from the house at a quick trip type store.
>
> Q. And when you say the three of you left, who were the three that you're talking about?
> A. Shelley, myself, and Oza.
>
> Q. Okay. Do you know where Jim was at that time?

A. He could have been in the kitchen, his bedroom, I guess he wasn't in the bathroom because Gayle was in there, but I'm not specific on where he was.

Q. All right. Do you recall when you returned to the house?
A. Approximately an hour, ninety minutes later, something like that.

Q. Okay. When you returned to the house, what happened?
A. I went in, Got Jim up. He was in his bedroom. I told him. 'Come on, Let's go smoke a couple joints, drink a beer or something." he said all right. We got up and left.

Q. Okay. Was Shelley with you at that time?
A. No Shelley was no longer with me.

Q. Okay. I believe both Gayle and Oza testified that Jim's pants were wet. Do you have any idea how his pants got wet?
A. Yeah. **We went to Bellair Causeway after I picked him up and was playing frisbee and he ended up going out in the water. When he went in the water, he went out there and then he was still staying out there while we were playing frisbee.** We drank beer; we smoked a couple of joints.

Q. Mr. Pearcy, did you make a statement after your arrest to law enforcement or a representative of the state attorney's office in Pinellas County?
A. Yes,. At one time, along with my lawyer, Koch, we set up - - he set up for us to meet with the state attorney at that time and give a statement, which I did give a statement, and all the facts are the same except for in my statement, I said Shelley was present in the car when I came back and picked Jim up, which she wasn't, and I said Jim her and I left and then I said - - made a statement as to what Jim had done, exonerating myself, which all of it, it was just a self-serving statement to exonerate myself.

Q. So, you made that statement to help yourself out?

> A. Right. At that time, Jim wasn't even in custody and they were going to charge me and I was trying to get around it, that's all, lay the blame somewhere else.

March 19, 1993, sworn statement of Jack Pearcy (admitted into evidence at evidentiary hearing as Court Exhibit # 2).

MARK GINAN:

Mr. Ginan testified he is currently employed at the Pinellas County Jail and had been working there for 18 years. (PC-ROA 566) He stated as long as he had been working there, there had always been a typewriter in the law library. (PC-ROA 567) There has also always been a notary available for the inmates, and the notary would actually watch the inmate sign the document before notarizing. (PC-ROA 567) He recognized the name Lee Glover as being a notary who worked at the Pinellas County Jail. (PC-ROA 568) (Mr. Glover notarized several of Mr. Skalnik's motions) The defense moved Defense Exhibit # 29 into evidence which showed Mr. Skalnik's movements while on G-Wing in the Pinellas County Jail. (PC-ROA 570) Mr. Ginan also testified that inmates in the isolation cells would have access to television and the law library where the typewriter was located. (PC-ROA 570)

SUMMARY OF THE ARGUMENT

I. Prosecutorial misconduct fatally tainted the trial. The state's argument in closing that the presumption of innocence had been eliminated at that stage of the trial was a gross misstatement of the law which fatally destroyed the presumption of innocence which the Constitution guarantees at every stage of the guilt phase. The state improperly vouched for the credibility of its snitches. The state argued facts to the jury which were not correct, to cure the fatal deficiencies in the state's case. The state knew the facts it argued were false because it had the documentation directly refuting its argument. The cumulative effect of the misconduct, including additional matters already determined to be improper, rendered the trial fatally tainted.

II. The state either committed egregious *Giglio* violations when it allowed lying snitch Paul Skalnik to testify falsely, or the lies by Mr. Skalnik stand as newly discovered evidence which likewise compel a new trial.

III. Newly discovered evidence from eyewitnesses during the period of the murder exonerate Mr. Dailey.

IV. Trial counsel was ineffective for failing to impeach a key witness with telephone records refuting the impact of her testimony. Counsel was ineffective for failing to impeach snitch Skalnik with the facts of his pending charges. Counsel was ineffective for failing to impeach Skalnik with evidence of his access

to newspapers and on other matters. Counsel was ineffective for failing to have Mr. Dailey testify.

ARGUMENT

STANDARD OF REVIEW

The issues raised herein are substantially questions of law subject to de novo review. To the extent that any matters can be considered to be questions of fact, under the principles set forth by this Court in *Stephens v. State*, 748 So.2d 1028 (Fla. 1999), a mixed question of law and fact requires de-novo review. Further, to the extent the post-conviction court is silent, this Court should conduct a de novo review.

ISSUE I

THE LOWER COURT ERRED IN DENYING MR. DAILEY'S CLAIM THAT HE WAS DENIED HIS FUNDAMENTAL RIGHT TO A FAIR TRIAL, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, DUE TO PROSECUTORIAL MISCONDUCT, WHICH RENDERED THE OUTCOME OF HIS TRIAL UNRELIABLE. THE STATE ENCOURAGED AND PRESENTED MISLEADING EVIDENCE AND ARGUMENT TO THE JURY

This claim is contained in Claim VI of the Amended Motion to Vacate Judgment of Conviction and Sentence. It is also alleged In Claim I (A) in terms of ineffective assistance of counsel for failing to object to numerous instances of prosecutorial misconduct.

The lower court ruled as follows:

> Mr. Dailey failed to present any evidence on this ground at the evidentiary hearing. The question of when to object is a strategic decision that is in the sound discretion of the attorney, and should not normally be questioned by a court if the attorney's actions could be considered reasonably competent counsel. Peterka v. State, 890 So.2d 219, 233 (Fla. 1999). Furthermore, Mr. Dailey has mischaracterized the prosecutor's statements as an improper comment on his constitutional right to the presumption of innocence. In fact, these comments appear to be nothing more than an attempt to argue the State had met its evidentiary burden. Ruiz v. State, 743 So.2d 1, 4 (Fla. 1999) (The assistance permitted included counsel's right to state his contention as to the conclusions that the jury should draw from the evidence. *Quoting* United States v. Morris, 506 F.2d 396, 401 (5th Cir. 1978)) Therefore, the prosecutor's statement were not prejudicial, and Mr. Dailey has not established ineffective assistance of counsel.

(PC-ROA 143).

The lower court erred in finding that Mr. Dailey had not introduced any evidence at the evidentiary hearing on this claim. This claim is contained squarely within the record. No reasonably competent counsel would fail to object to a prosecutor blatantly commenting on the elimination of presumption of innocence during closing argument. Also, contrary to the holding of the lower court, these comments are clear and unambiguous comment on the presumption of innocence and cannot be reasonably characterized as a mere comment that the State has met its burden.

The case law cited by the lower court does not support the denial. None of the cases permit the prosecutor to comment on the presumption of innocence under the guise of arguing the state has met its burden. The cases cited actually support Mr. Dailey's contention that the comments were improper.

There were several other significant instances of prosecutorial misconduct in addition to those found by this Court in *Dailey*.

During her closing argument in the guilt phase of Mr. Dailey's trial, the prosecutor intentionally commented upon and misstated the presumption of innocence afforded to Mr. Dailey by the constitution:

> Remember, as Mr. Denhardt asked you to remember, the presumption of innocence. The presumption of innocence that all citizens are afforded under the Constitution of the United states. All criminals are afforded, all murderers are afforded. **It's gone right now. It no longer applies. The shield has been removed.**

(R. 1262) (emphasis added). This remark by the prosecutor was a blatant misstatement of law and an impermissible comment on the fundamental right of the presumption of innocence.

In *Mahorney v Wallman*, 917 F.2d 469 (10th Cir. 1990), the Tenth Circuit Court of Appeals addressed a similar comment by a prosecutor directed at the defendant's fundamental right to the presumption of innocence. In that case, the prosecutor stated the following in closing argument:

> I submit to you, under the law and the evidence, that we are in a little different position today than we were when we first started this trial and it was your duty to at that time, under the laws of this land, as you were being selected as jurors, to actively in your minds presume that man over there not to be guilty of the offense of rape in the first degree, but, you know, things have changed since that time. **I submit to you at this time, under the law and the evidence, that the presumption of innocense has been removed, that that presumption has been removed by evidence and he is standing**

> **before you now guilty. The presumption is not there anymore.**

917 F.2d at 469.

The above remarks by the prosecutor in the *Mahorney* case are virtually identical to those made by the prosecutor in the closing argument in Mr. Dailey's case. In *Mahorney*, the Court found the comment to be improper and stated:

> We consider the prosecutions comments impermissible because they undermined two fundamental principals of aspects of the presumption of innocence, namely that the presumption (1) remains with the accused throughout every stage of the trial, including , most importantly, the jury's deliberations, and (2) is extinguished only upon the *jury's* determination that guilt has been established beyond a a reasonable doubt. *See generally United States V. Baxton*, 877 F.2d 556, 562 (7th Cir. 1989); *United States v. Jorge*, 865 F.2d 6, 10 (1st Cir. 1989); *United States V. Walker*, 861 F.2d 810, 813-814 (5th Cir. 1988); *Nelson v. Scully*, 672 F.2d 206, 269 (2d Cir. 1982); *Dotson v. United states*, 23 F.2d 401, 403 (4th Cir. 1928).

Id at FN 2.

Most importantly, *Mahorney* was initially a state court rape conviction and Habeas relief was granted in Federal Court based upon this comment. In doing so the Tenth Circuit found the decision in *Donnelly v. DeChrisoforo*, 416 U.S. 637 (1974) (holding that improper prosecutorial comment will not warrant habeas relief unless the conduct complained of "made petitioner's trial so fundamentally unfair as to deny him due process") did not bar recovery because the comments by the prosecutor so prejudiced a specific right as to amount to a denial of that right. *Id.*

Thus, one of the exception in *Donnelley* allowed relief because there had been a denial of the right to the presumption of innocence by the prosecutor. The Court stated "Since the essence of the error in the prosecutor's comments here was that they conveyed to the jury the idea that the presumption had been eliminated from the case prior to deliberation, we conclude that the petitioner's rights were affirmatively denied within the meaning of *Donnelley.*" *Id.* At 473. What the Court was saying is that the comments of the prosecutor denied the petitioner in that case a fundamental right - the presumption of innocence.

The prosecutor in Mr. Dailey's case made identical remarks and thus denied Mr. Dailey his fundamental right to the presumption of innocence before deliberations. The only difference is that Mr. Dailey's counsel did not object and preserve the issue for direct appeal. However, fundamental error can be raised at any time. Also, the failure of Mr. Dailey's counsel to object and move for a mistrial was ineffective assistance of counsel as he failed to protect his clients fundamental right to the presumption of innocence throughout every stage of the trial, including the jury's deliberations. This was ineffective assistance of counsel and sufficiently undermines confidence in the verdict reached under the *Strickland* standard. As will be demonstrated later, this improper comment by the prosecutor must be assessed cumulatively with all the other instances of prosecutorial misconduct found in the direct appeal and other claims in the 3.850 motion. (A cumulative analysis is provided at the end of this claim)

. The prosecuting attorney in Mr. Dailey's case also improperly vouched for the credibility of snitch Paul Skalnik during closing argument as follows:

> Skalnik is a thief, he admitted that as I have already said. But I want you to remember what Detective Halliday said about the other information that he has gotten from this man. It has proven to be reliable. He has told him where critical evidence in another murder case was evidence that they didn't know existed because the Defendants had told them they had thrown away the ski mask until Skalnik told them exactly where it was based upon a conversation he had. A weapon that was thrown away in another murder case. **And that Detective Halliday, after having conversations with Mr. Skalnik and knowing him for years, considered him to be reliable enough to bring him to the State Attorney's Office with the information he has provided.**
>
> **You heard Detective Halliday's experience and what unit he is with and the types of crimes he investigates. If these men are cons, they would not con Detective Halliday.**

(1987 ROA 1283)

A long line of cases from the state of Florida state that this type of argument from a prosecuting attorney is improper vouching for the credibility of a State's witness. See *May v. State* , 600 So.2d 1266 (Fla. 5th DCA 1992) (improper vouching occurs when prosecution places the prestige of government behind witness or indicates that information not presented to jury supports witnesses testimony); *Blackburn v. State*, 447 So.2d 424 (Fla. 5th DCA 1984); *Jorlett v. State*, 766 So.2d 1226 (Fla. 2000) (improper vouching in closing argument where prosecutor stated that officer was "our public servant" and was "sworn to protect"

and that officer has "come in here and she has taken an oath"); *Williams v. State*, 747 So.2d 474 (Fla. 5th DCA 1999)(improper closing argument where prosecutor vouched for credibility of a police officer); *Feller v. State*, 637 So.2d 911 (Fla. 1994) (psychologist's opinion that victim was telling the truth warranted reversal of sexual battery conviction); *Kruse v. State*, 483 So.2d 1383 (Fla. 4th DCA 1986); *United States v. Dennis*, 786 F.2d 1029 (11th Cir. 1986).

The prejudice of the improper vouching argument made by the prosecutor must be made cumulatively with all other instances of misconduct in Mr. Dailey's case under *Ruiz v. State*, 743 So.2d 1 (Fla. 1999). A cumulative analysis appears at the end of this argument. However, singularly this improper argument was highly prejudicial.

The state made Mr. Skalnik the centerpiece of their case. His credibility was crucial. The comments by the prosecutor are especially prejudicial because they vouch for Mr Skalnik, Mr. Leitner, Mr. Dejesus (the "these men" referred to in the prosecutors argument) and Detective Halliday's credibility. Mr. Dailey's trial counsel failed to object to these improper vouching remarks. That is ineffective assistance of counsel. In *Rhue v. State*, 693 So.2d 567 (Fla. 2nd DCA 1997), the Second District Court of Appeals granted relief on an ineffective assistance of counsel claim for failing to object to the state's improper vouching for the credibility of a child sexual battery victim. In the *Rhue* case, the prosecutor made the following remarks in closing:

> Dr. Crum's opinion was that he had no reason to believe that the child victim wasn't telling the truth. Dr. Crum does this all the time. He gets up here and testifies in Court. He testifies or he tells the State attorney's Office – he has testified that he has informed the State Attorney's Office on pervious occasions when he believed a child was not telling the truth. It did not happen in this case; he did not tell the State attorney's office that. Quite to the contrary, he said he believed the child was telling the truth. That's what his job is. He went to all those schools. He has all that experience with working with children; that's his job.
> Trial counsel did not object to these arguments.

693 So.2d at 568.

In finding ineffective assistance of counsel the *Rhue* court stated " Because the child victims credibility was the determinative issue at trial, trial counsel should have objected to testimony and comments vouching for his credibility. Given the significance of the issue, we must conclude there is a reasonable probability that, but for trial counsel's omissions, the outcome in the proceedings would have been different." *Id*. at 569.

The comments by the prosecutor in Mr. Dailey's case are even more egregious because they vouched for Detective Halliday based on the fact he was a police officer, and then asked the jury to find the "three snitches" credible because Detective Halliday thought they were credible , and he "could not be conned" by them. At the evidentiary hearing even Beverly Andringa, the lead prosecutor in the Dailey cases, rightly questioned the above comments, her own words at Mr. Dailey's trial, as violating the jury's purview to evaluate credibility (PC-ROA

388) As in the *Rhue* case, Mr Dailey is entitled to a new trial because his counsel failed to object to the improper vouching remarks of the prosecutor. The lower court denied the vouching claim as follows:

> Mr. Dailey contends that this argument by the prosecutor was an improper attempt to bolster the testimony of Paul Skalnik, James Leitner, and Pablo Dejesus, which the prosecutor knew to be not credible. Mr. Dailey argues that in making such an argument, the prosecutor was attempting to insulate this suspect testimony by cloaking it with Detective Halliday's seal of approval. Since the trial counsel failed to object to this argument, Mr. Dailey argues he was deprived of his right to effective assistance of counsel and his right to a fair trial. The prosecutor plays a special role in our criminal justice system, and as a result, any statements of personal belief by the prosecutor as to the reliability of any particular witnesses or evidence could fairly prejudice the defendant. Myers v. State, 788 So.2d 1112, 1114 (Fla. 2d DCA 2001) Improper bolstering of witness testimony occurs when the prosecutor attempts to improve the witnesses credibility by putting the weight of the Government behind the witnesses testimony. Hutchinson v. State, 882 So.2d 943, 953 (Fla. 2004). It is therefore impermissible for a prosecutor to argue that a police officer should be believed simply because he is a police officer. Garrette v. State, 501 So.2d 1376, 1379 (Fla. 1987) In the instant case, it does not appear the prosecuting attorney engaged in any improper bolstering of witness testimony.. Instead, it appears the prosecutor simply outlined evidence introduced during trial which demonstrates the witnesses reliability. There does not appear to be any instance where the prosecutor attempted to endorse or stand behind any of the witnesses. Furthermore, Mr. Dailey failed to introduce any evidence at the hearings on this issue. Therefore, Mr. Dailey has failed to demonstrate that his counsel's conduct was deficient and that prejudice resulted."

(PC-ROA 147-48).

The lower court erred in denying this claim. The clear meaning of the prosecutor's comments was blatant bolstering of the testimony of the snitches. The argument clearly provides an endorsement of the witnesses by the lead detective in

the case, and in the words **of the prosecutor** who made the argument, **invaded the purview of the jury in assessing credibility**. Furthermore, the claim is contained in the record. There can be no strategic reason for failing to object to bolstering essential state witnesses. Therefore, no additional evidence needed to be presented at the evidentiary hearing below.

The prosecutor also made a blatant misstatement of fact regarding when Oza Shaw went to use the phone the evening of May 5, 1985 as follows:

> Let's go over that conflict again because I do think it's important. The girls meet up with the men hitchhiking. The three girls. They get in the car. They go around for awhile, try to get in some bars, drink for awhile, go to the house. When they go to the house, Oza Shaw then goes to the phone. He is taken to the phone by Jack Pearcy and the victim, Shelley Boggio. He is on the phone to his ex. He is having marital problems. That's why he is here. Ex-wife, his girlfriend, inviting one or the other to come down to Florida to visit with him. An he says he is on the phone for at least an hour, probably more. During that period of time, the remaining people in the house, Stephanie, Stacey, Shelley Boggio, Gayle Bailey, Pearcy, and Dailey hop in the car and go out. Stephanie and Stacey are taken home. That leaves in very consistent with Stacey's testimony and Gayle bailey's testimony.

(1987 ROA 1273)

This argument by the prosecutor was blatantly false. No one ever testified that Oza Shaw was brought to the phone while Stephanie Forsythe and Stacey Boggio were at the residence in Seminole. Quite to the contrary, Oza Shaw testified that when Stephanie and Stacey were dropped off , he stayed back at the residence and slept on the couch. Jack Pearcy, Gayle bailey, Shelley Boggio and

Mr. Dailey then returned (after Stephanie and Stacey had been dropped off and Jack Pearcy, Gayle bailey, Shelley Boggio and James Dailey had gone to Jerry's Rock Disco). Then Jack Pearcy was leaving with Shelley Boggio and Oza Shaw asked for a ride to use the telephone (Mr. Dailey was not in the car and Mr. Pearcy left alone with Shelley Boggio). Stacey Boggio testified that she and Stephanie were dropped off at Stephanie's house at 7:30 P.m. She did not testify that Oza, Shelley, and Jack Pearcy left for Oza to use the phone while she was still at the residence in Seminole. The prosecutor's argument was false, and designed to fill the huge hole in the State's case, that when Oza Shaw went to use the phone, only Jack Pearcy and Shelley Boggio and not James Dailey, were in the car and Pearcy had ample opportunity to commit the homicide without any assistance from Mr. Dailey.

Furthermore, the prosecutor knew at the time she made this false argument that Oza Shaw could not have made the phone calls before Stephanie Forsythe and Stacey Boggio were dropped off (which was 7:30 p.m according to Stacey Boggio's testimony) because she had in her possession the billing records which showed two call were made from the phone booth to Olathe Kansas at 10: 16 P.m. and the on May 6, 1985 at 12:16 P.m. **She knew that this was the period of time that Jack Pearcy was alone with Shelley Boggio and could have committed the murder alone.** However, she chose to falsely argue to the jury that the phone call

took place more than four hours earlier before Stephanie and Stacey had even been dropped off at Stephanie's house. This was prosecutorial misconduct.

The lower court did not address this claim of prosecutorial misconduct in the order denying 3.850 relief.

THE CUMULATIVE EFFECT OF ALL THE PROSECUTORIAL MISCONDUCT

Florida law is clear that in assessing the prejudice associated with several different instances of prosecutorial misconduct due to improper arguments, both objected to and unobjected to instances of misconduct must be viewed cumulatively. (See *Cochran v. State*, 711 So.2d 1159 (Fla. 4th DCA 1998); *Brooks v. State*, 762 So.2d 879 (Fla. 2000); *Ruiz.*

Therefore, all the instances of misconduct found by this Court on direct appeal must be combined with the instances of prosecutorial misconduct raised in Mr. Dailey's 3.850 motion. The cumulative totality of the prosecutorial misconduct is as follows:

1. The prosecutor improperly commented on Mr. Dailey's right to remain silent by eliciting testimony that Mr. Dailey was fighting extradition. (Found in the direct appeal).

2. The prosecutor improperly admitted a knife sheath which was not linked to the homicide.

3. The state improperly elicited testimony from Detective Halliday as to the reasons the inmates came forward to testify in the case.

4. The prosecutor made impermissible comments on Mr. Dailey's right to remain silent by stating :

> **Now, there are only three people who know exactly what happened on that loop area...Shelley Boggio and she is dead; Jack Pearcy and he is not available to testify; and the Defendant.** So, when the defense stands up here, as they have already and I imagine Mr. Andringa will when he gets up to rebut, and says, where's the evidence, where's the eyewitness, use your common sense. Murderers of young girls don't sexually assault and commit a crime of murder with an audience.
> The prosecutor also made the following statement:
> Fingernails. You didn't hear anything about the length of Mr. Dailey's fingernails. No, because he left Pinellas County, went to Miami, where he stayed less that 24 hours and we arrest him months later in the state of California. **Only he knows the length of his fingernails.**

1987 ROA 256-257.

5. The prosecutor intentionally commented upon and misstated the presumption of innocence afforded to Mr. Dailey by the constitution by stating:

> I submit to you, under the law and the evidence, that we are in a little different position today than we were when we first started this trial and it was your duty to at that time, under the laws of this land, as you were being selected as jurors, to actively in your minds presume that man over there not to be guilty of the offense of rape in the first degree, but, you know, things have changed since that time. **I submit to you at this time, under the law and the evidence, that the presumption of innocense has been removed, that that presumption has been removed by evidence and he is standing**

> **before you now guilty. The presumption is not there anymore.**

1987 ROA 469.

6. The prosecuting attorney improperly vouched for the credibility of several witnesses by stating in closing argument :

> Skalnik is a thief, he admitted that as I have already said. But I want you to remember what Detective Halliday said about the other information that he has gotten from this man. It has proven to be reliable. He has told him where critical evidence in another murder case was evidence that they didn't know existed because the Defendants had told them they had thrown away the ski mask until Skalnik told them exactly where it was based upon a conversation he had. A weapon that was thrown away in another murder case. **And that Detective Halliday, after having conversations with Mr. Skalnik and knowing him for years, considered him to be reliable enough to bring him to the State Attorney's Office with the information he has provided.**
>
> **You heard Detective Halliday's experience and what unit he is with and the types of crimes he investigates. If these men are cons, they would not con Detective Halliday.**

7. The prosecutor knowingly presented false argument concerning when Oza Shaw used the phone on May 5, 1985 as follows:

> Let's go over that conflict again because I do think it's important. The girls meet up with the men hitchhiking. The three girls. They get in the car. They go around for awhile, try to get in some bars, drink for awhile, go to the house. When they go to the house, Oza Shaw then goes to the phone. He is taken to the phone by Jack Pearcy and the victim, Shelley Boggio. He is on the phone to his ex. He is having marital problems. That's why he is here. Ex-wife, his girlfriend, inviting one or the other to come

> down to Florida to visit with him. An he says he is on the phone for at least an hour, probably more. During that period of time, the remaining people in the house, Stephanie, Stacey, Shelley Boggio, Gayle Bailey, Pearcy, and Dailey hop in the car and go out. Stephanie and Stacey are taken home. That leaves in very consistent with Stacey's testimony and Gayle bailey's testimony.

(1987 ROA 1273)

The cumulative effect of all these seven significant instances of improper arguments and conduct of the prosecuting attorney prejudiced Mr. Dailey. Here the improprieties in the prosecutor's arguments, if not sufficient individually, reached the critical mass of fundamental error, reaching down into the validity of the trial itself to the extent a verdict of guilty could not have been achieved without the assistance of these errors. See *Brooks, Cochran, Ruiz*. Counsel's failure to protect his client from several of these instances of prosecutorial misconduct, by failing to timely object, was ineffective assistance of counsel under *Strickland*. Mr. Dailey is entitled to a new trial.

The lower court failed to conduct a cumulative analysis of the prosecutorial misconduct and instead addressed the claims in piecemeal fashion contrary to the case law cited above. Thus, the lower court erred in denying Mr. Dailey relief.

ISSUE II

THE LOWER COURT ERRED IN DENYING MR. DAILEY'S CLAIM THAT HE IS ENTITLED TO A NEW TRIAL EITHER BECAUSE THE STATE VIOLATED THE MANDATES OF *GIGLIO* AND KNOWINGLY PUT FORTH FALSE TESTIMONY FROM PAUL SKALNIK OR NEWLY DISCOVERED EVIDENCE ESTABLISHES THAT PAUL SKALNIK IS AN INCREDIBLE LIAR AND HIS TESTIMONY CANNOT SUSTAIN MR. DAILEY'S CONVICTION.

This argument is presented in the alternative as between Claim VII (the *Giglio* claim regarding false testimony from Paul Skalnik) and Claim V (newly discovered evidence that the State views Paul Skalnik as an incredible witness).

Claim VII: The *Giglio* claim involving the testimony of Paul Skalnik:

In order to prove the *Giglio* aspect of Claim VII concerning the state's knowing use of false testimony from Paul Skalnik, Mr. Dailey would have to establish that the State knowingly put on false testimony concerning whether Mr. Skalnik had a "deal" to testify against Mr. Dailey. The *Giglio* standard was addressed by this court recently in *Guzman v. State*, 868 So.2d 498 (Fla. 2004):

> The only disputed issue with respect to Guzman's *Giglio* claim is the third prong, which requires a finding that the false testimony presented at trial was material. *See Ventura,* 794 So.2d at 562. Guzman asserts that the post-conviction court applied the wrong standard in deciding the materiality prong of his *Giglio* claim. In its order denying Guzman's rule 3.850 motion, the post-conviction court articulated the *Giglio* standard of materiality as:
>
> > Under *Giglio,* a statement is material if "there is a reasonable probability that the false evidence may have affected the judgment of the jury." [*Ventura v. State*, 794

> So.2d 553, 563 (Fla.2001)] (quoting *Routly [v. State],* 590 So.2d [397, 400 (Fla.1991).]) "In analyzing this issue ... courts must focus on whether the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id.* (quoting *White v. State,* 729 So.2d 909, 913 (Fla.1999)).

Order Denying Claims IIC(1), IIE(1), IIE(4), etc. at 12. After evaluating the State's $500 payment to Cronin in light of the other evidence presented at trial, the post-conviction court concluded that "there is not a reasonable probability that the false evidence would put the whole case in such a different light as to undermine confidence in the verdict." *Id.* at 13.

The post-conviction court stated and applied the *Giglio* standard of materiality from our decisions in *Ventura v. State,* 794 So.2d 553 (Fla.2001) , *White v. State,* 729 So.2d 909, 913 (Fla.1999) , and *Routly v. State,* 590 So.2d 397 (Fla.1991). Having reviewed these decisions, as well as our other *Giglio* and *Brady* decisions, we conclude that our precedent in this area has lacked clarity, resulting in some confusion and improper merging of the *Giglio* and *Brady* materiality standards. For example, in *Rose v. State,* 774 So.2d 629, 635 (Fla.2000), we said: "The standard for determining whether false testimony is 'material' under *Giglio* is the same as the standard for determining whether the State withheld 'material' in violation of *Brady.*" In reliance on *Rose,* the trial court's order that we approved in *Trepal* erroneously stated that in addressing a *Giglio* claim "[t]he materiality prong is the same as that used in *Brady.*" *Trepal v. State,* 846 So.2d 405, 425 (Fla.2003). We recede from *Rose* and *Trepal* to the extent they stand for the incorrect legal principle that the "materiality" prongs of *Brady* and *Giglio* are the same. We now clarify the two standards and the important distinction between them.

The *Brady* standard of materiality applies where the prosecutor fails to disclose favorable evidence to the defense. *See Brady v. Maryland,* 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Under *Brady,* the undisclosed evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *United States v. Bagley,* 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). A criminal defendant alleging a *Brady* violation bears the burden to show prejudice, i.e., to

show a reasonable probability that the undisclosed evidence would have produced a different verdict. *Strickler v. Greene*, 527 U.S. 263, 281 n. 20, 289, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999).

By contrast to an allegation of suppression of evidence under *Brady*, a *Giglio* claim is based on the prosecutor's knowing presentation at trial of false testimony against the defendant. *See Giglio*, 405 U.S. at 154-55, 92 S.Ct. 763. Under *Giglio*, where the prosecutor knowingly uses perjured testimony, or fails to correct what the prosecutor later learns is false testimony, the false evidence is material "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *United States v. Agurs*, 427 U.S. 97, 103, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976). Justice Blackmun observed in *Bagley* that the test "may as easily be stated as a materiality standard under which the fact that testimony is perjured is considered material unless failure to disclose it would be harmless beyond a reasonable doubt." 473 U.S. at 679-80, 105 S.Ct. 3375. The State, as the beneficiary of the *Giglio* violation, bears the burden to prove that the presentation of false testimony at trial was harmless beyond a reasonable doubt. *Id.* at 680 n. 9, 105 S.Ct. 3375 (stating that "this Court's precedents indicate that the standard of review applicable to the knowing use of perjured testimony is equivalent to the *Chapman [v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)] harmless-error standard").

Thus, while materiality is a component of both a *Giglio* and a *Brady* claim, the *Giglio* standard of materiality is more defense friendly. The *Giglio* standard reflects a heightened judicial concern, and correspondingly heightened judicial scrutiny, where perjured testimony is used to convict a defendant. *See Bagley*, 473 U.S. at 682, 105 S.Ct. 3375 (explaining that the defense-friendly standard of materiality is justified because the knowing use of perjured testimony involves prosecutorial misconduct and "a corruption of the truth-seeking function of the trial process") (citing *Agurs*, 427 U.S. at 104, 96 S.Ct. 2392). Under *Giglio*, once a defendant has established that the prosecutor knowingly presented false testimony at trial, the State bears the burden to show that the false evidence was not material.

In Guzman's case, the post-conviction court's resolution of the *Giglio* claim does not sufficiently reflect the standard appropriate to a *Giglio* claim. In its order, the court did not state that there was no reasonable likelihood that the false evidence regarding the $500 payment to Cronin could have affected the court's judgment as

> factfinder. Nor did the court find that the State had demonstrated that the false evidence was harmless beyond a reasonable doubt. Because of this lack of findings critical to a *Giglio* analysis, we cannot determine that the court adequately distinguished the *Giglio* standard from the *Brady* standard when considering and ultimately deciding the *Giglio* claim. We therefore remand this claim to the trial court for reconsideration and for clarification of its ruling on the materiality prong of Guzman's *Giglio* claim. To reiterate, the proper question under *Giglio* is whether there is any reasonable likelihood that the false testimony could have affected the court's judgment as the factfinder in this case. If there is any reasonable likelihood that the false testimony could have affected the judgment, a new trial is required. The State bears the burden of proving that the presentation of the false testimony was harmless beyond a reasonable doubt.

Guzman, 868 So.2d at 505-08 (footnotes deleted).

Earlier in this brief Mr. Skalnik's trial testimony is referenced wherein he denied he was promised anything to testify against Mr. Dailey. At the evidentiary hearing, numerous documents were introduced in which Mr. Skalnik alleged he had a deal with the state, and various state attorney's had coached him in his testimony in Mr. Dailey's case, as well as several other defendant's. These documents include the following:

DEFENSE EXHIBIT NUMBER 6, THE AUGUST 7, 1988 MOTION TO DISMISS FOR PROSECUTORIAL MISCONDUCT :

In this Motion, signed by Mr. Skalnik he alleged to the Court that he was coached in his testimony in the Dailey case and he had been supplied instructions and given answers to refute any assertions that any agreement or deal was made by the State, in a successful effort to convince juries that Mr. Skalnik was at all times telling the truth and leading jurors to believe that he was acting alone, and had

actually heard all these "confessions" and had no agreement with the State for a reward for his testimony. Mr. Skalnik also alleged in the motion he signed that several prosecuting attorney's. including Beverly Andrews, Glenn Martin, Bruce Bartlett, Robert Lewis, Douglas Crow, Alan Geesey, Bruce Young, Bruce Boyer, Jim Hellickson, Mike Pieri, and Jack Scalera all knew of the "potential questionability" of the confessions Mr. Skalnik had allegedly heard. SKALNIK testified his testimony deceived various juries on over 50 cases. Mr. Skalnik stated in the motion that he would recant his testimony because he understood what the State had him do was wrong.

Along with the typewritten Motion to Dismiss for prosecutorial misconduct is a handwritten statement from Mr. Skalnik, also bearing the date of August 8, 1988 where Mr. Skalnik alleges the State Attorney's Office had lied to him and the public about the manner in which it had been presenting numerous cases and that the State had not "kept it's word" after he testified.

•DEFENSE EXHIBIT # 19, THE AUGUST 7, 1988 MOTION TO RECUSE THE STATE ATTORNEY'S OFFICE FROM PROSECUTING THE DEFENDANT BASED UPON MISCONDUCT :

A Motion signed by Mr. Skalnik in which he again alleges he was coached in his testimony against Mr. Dailey and others and was supplied the alleged facts, given instructions as to answers in order to refute any assertions that any agreement for a deal was made by the State in an effort to convince juries that Mr.

Skalnik was at all times telling the truth and "leading the juries to believe" that Mr. Skalnik was acting alone, and had actually heard all the "Confessions" and had no agreement with the State for a reward for his testimony. His Motion reiterated that the State had knowledge of the "potential questionability" of said confessions.

•Exhibit 15, PRO-SE MOTION FOR DISCHARGE

In this Pro-se Motion, Mr. Skalnik stated in paragraph six that he had been told repeatedly by the State that the Pinellas County State Attorney's Office would "take care of his charges" when the Dailey trial was finished.

•EXHIBIT 20 REQUEST FOR JUDGE TO DISQUALIFY HERSELF FOR PREJUDICE AND IMPROPRIETY:

In this Pro-Se Motion filed by Mr. Skalnik, he references the previous "lack of performance on plea agreements" from the State Attorney's Office.

•EXHIBIT 23 AUGUST 20, 1988 LETTER TO JUDGE LUTEN

In this handwritten letter from Mr. Skalnik, he states that "Judge Luten" I've never gotten a so-called deal from the State even though promises were made.

•EXHIBIT 18 AUGUST 18, 1988 LETTER TO GOVERNOR MARTINEZ

In this handwritten letter by Mr. Skalnik he tells the Governor that "I've never received a "plea bargain" from the state after all my testimony, even though they had promised me such deals they never complied.

Obviously, if the above statements by Mr. Skalnik contained in the various documents are true, the State has committed a blatant *Giglio* violation by allowing

Mr. Skalnik to testify at Mr. Dailey's trial that he had not been promised or offered anything in exchange for his testimony. At the evidentiary hearing, Mr. Skalnik offered a series of bizarre and incredible explanations as to the allegations that he had a deal with the state which are contained in these documents. His explanations can be summarized as follows:

1. He "never read" exhibit 6, the August 8, 1988 Motion for Prosecutorial Conduct until years later. (PC-ROA 456-458).

This is one in a series of outrageous lies Mr. Skalnik told directly to the post-conviction Court concerning these documents. The Motion is signed twice by Mr. Skalnik and notarized by Jail Deputy Lee Glover. Along with the Motion to Dismiss was a handwritten statement from Mr. Skalnik which alleges the State Attorney's Office had lied to him and the public about the manner in which it had been presenting numerous cases and that the State had not "kept it's word" after he testified. Furthermore, in paragraph 8 of Exhibit 20, the Motion to Disqualify Judge Luten, Mr. Skalnik references that his previous counsel, Mark Evans, was going to demonstrate the State Attorney's Office use of the defendant, and lack of performance on previous plea negotiations.

Mr. Skalnik's lie to the lower court concerning whether he had "never read" the Motion to Dismiss for Prosecutorial Misconduct is also established through the testimony of Mark Journey, who stated he wrote a newspaper article dated August

9, 1988, concerning the Motion for Prosecutorial Misconduct. (PC-ROA 506). He interviewed Mr. Skalnik prior to publishing the article and stated Mr. Skalnik had knowledge about it's content because he discussed it with him. (PC-ROA 506).

2. Attorney Mark Evans " made up" the allegations in Exhibits 6 and 19 and Mr. Skalnik did not provide the information contained in the Motion.

This outrageous lie is against a lawyer, who, conveniently for Mr. Skalnik, has passed away and cannot defend himself against these spurious allegations. The idea that a member of the bar would totally fabricate detailed and serious allegations about the Office of the state Attorney subordinating perjury is absurd on its face. Mr. Skalnik even went so far at the evidentiary hearing to allege that Mr. Evans drafted his pro-se Motions also! (Even after Mr. Evans no longer represented Mr. Skalnik and he had other counsel!) (PC-ROA 468, 470). Mr. Skalnik also stated Mr. Evans coached him to write to Governor Martinez! (PC-ROA 473) Thankfully, there is ample evidence in the record to expose Mr. Skalnik's outrageous lies. The most direct evidence of the falsity of Skalnik's claim is the numerous handwritten letters and motions he filed in which he alleged he had a deal with the State, on his own, independent of Marc Evans. (Exhibit 15, 18, 20, and 23 listed above)

3. He only made up allegations against the State because he was "frustrated and angry" (PC-ROA 482).

Of course this is totally inconsistent with Mr. Skalnik's other explanations for how these allegations that he had a deal with the state got into the above referenced documents and exhibits. But, when confronted with allegations in his own handwriting at the evidentiary hearing, Mr. Skalnik tried this lie. (PC-ROA 463). According to Mr. Skalnik's testimony at the evidentiary hearing, the State never offered him any deals. If this is true, then what did Mr. Skalnik have to be frustrated and angry about vis-a-vis the State?

The evidentiary hearing revels that Mr. Skalnik never provided an adequate explanation concerning the multiple instances of allegations that he had a deal with the State for his testimony against Mr. Dailey. All of the explanations given by Mr. Skalnik ring false. The only reasonable explanation is that Mr. Skalnik did have a deal with the State in exchange for his testimony against Mr. Dailey. Since that is the case, the State committed a *Giglio* violation for allowing Mr. Skalnik to falsely testify at the trial that he was not offered anything to testify against Mr. Dailey. (James : I Am going to go through the judges order and point out where he failed to address these aspects of Skalnik's testimony)

Furthermore, Mr. Skalnik repeatedly testified he was told by the State that he would be "taken care of" by the state after he testified against Mr. Dailey. (PC-ROA 466). Although the state tried to minimize this by stating the meaning of this depends on the flux of the voice of the prosecutor the fact remains that the words

"take care of" mean more than just merely that Mr. Skalnik would be sentenced after Mr. Dailey. The jury had the right to assess Mr. Skalnik's testimony in light of the State telling him he would be "taken care of". The state putting Mr. Skalnik on to state he had no promise or deal whatsoever for his testimony was therefore false and misleading.

The lower court erred in denying this claim by merely stating in conclusory language that because Mr. Skalnik testified at the evidentiary hearing that his testimony against MR. Dailey was truthful, and he wasn't promised anything, that this negated Mr. Dailey's *Giglio* claims. (PC-ROA 175) The lower court did not address the statement by Skalnik that he was told he would be "taken care of" nor does the order address the volume of evidence that Mr. Skalnik had stated, in his own motions or handwriting, that he had a deal to testify against Mr. Dailey. Apparently the lower court reached the dubious conclusion that the one ray of truthfulness coming form Mr. Skalnik was when he testified against Mr. Dailey and entirely ignored the other evidence which revealed Mr. Skalnik had a deal.

NEWLY DISCOVERED EVIDENCE THAT THE STATE VIEWS PAUL SKALNIK AS NOT A CREDIBLE WITNESS

As argued earlier in this closing argument, the prosecuting attorney in Mr. Dailey's case improperly vouched for the credibility of Paul Skalnik in closing argument. Since Mr. Dailey's trial, the states opinion about Mr. Skalnik has

drastically changed. Beverly Andringa stated the following concerning Mr. Skalnik's credibility in her deposition of March 13, 2003:

> Q. All right. Well, let me ask you to assume your evaluating Mr. Skalnik to call as a witness in a case after 1988 and after he has made these allegations, I think you had testified earlier as to your general procedure for analyzing whether someone is - - whether you would call a person to testify who is a jailhouse witness as to whether or not they're truthful, would be whether they testified truthfully in the past or not, based upon these what you've testified to are false allegations, would you call Mr. Skalnik to testify after 1988.
> A. No
>
> Q. And would that be because you could not in good faith put him on believing that he would give truthful testimony?
> A. Yes.

PC-ROA 395-396 (proffered testimony at evidentiary hearing)

In *Jones v. State*, 591 So.2d 911(Fla. 1991), this Court established the standard for newly discovered evidence in post conviction cases. This Court stated that in order to provide relief on grounds of newly discovered evidence, such evidence must be of such quality that it would probably produce acquittal on retrial. *Id*. at 915. To qualify as "newly discovered evidence" for post-conviction relief purposes, asserted facts must have been unknown by trial court, by party, or by counsel at time of trial, and it must appear that defendant or his counsel could not have known them by use of diligence. *Id*.

The newly discovered evidence concerning Mr. Skalnik's lack of credibility meets both criteria under *Jones.* The State's opinion, as exhibited by the lead prosecutor in the Dailey case, that Mr. Skalnik could not be called anymore as a witness due to lack of credibility because of the allegations he made against the State could not have been discovered at the time of Mr. Dailey's trial. This newly discovered evidence would probably produce an acquittal at retrial because the state would either have to inform a new jury that Mr. Skalnik was <u>not</u> a credible witness, or proceed to trial without there star witness. Without Mr. Skalnik's testimony, there would probably be an acquittal on retrial. As noted earlier in this Brief, the lower court failed to rule on Mr. Dailey's timely filed amendment to include acclaim for newly discovered evidence of Mr. Skalnik not being a credible witness.

ISSUE III

THE LOWER COURT ERRED IN DENYING MR. DAILEY"S CLAIM THAT NEWLY DISCOVERED EVIDENCE FROM OZA SHAW AND JACK PEARCY ENTITLES MR. DAILEY TO A NEW TRIAL " \l 3

This Claim is contained in Claim V of the Amended Motion to Vacate Judgement and Sentence.

Oza Shaw testified at the evidentiary hearing that after getting a ride to the phone booth by Jack Pearcy and Shelley Boggio (and not James Dailey) he called his wife in Olathe Kansas on May 6, 1985 at 12:15 a.m. (PC-ROA 341). (he was shown and verified the phone records, defense exhibit number 2, which showed when this call was made) When he walked back to the house Gayle bailey was sitting in a rocking chair waiting for Mr. Pearcy to come home. (Tr. 52). After falling asleep on the couch for about an hour and a half, Mr. Shaw was awakened to Jack Pearcy coming in the door. (PC-ROA 344). Mr. Pearcy went straight to Mr. Dailey's bedroom and Jack Pearcy and Mr. Dailey left again. (PC-ROA 344). Mr. Shaw did not see Shelley Boggio at that time. (PC-ROA 344). About an hour later Mr. Dailey and Jack Pearcy returned to the residence.

The newly discovered evidence from Mr. Shaw is of great significance in Mr. Dailey's case. Mr. Shaw's new recanted testimony establishes conclusively that Jack Pearcy was alone with Shelley Boggio for at least two and one half hours

in the late evening and early morning hours of May, 5th and 6th of 1985. This is because the last phone call phone call started at 12:16, which took 26 minutes, Oza had to walk home, calm down Gayle Bailey and sleep for about one hour and a half. His testimony conclusively proves, contrary to the state's theory used to convict Mr. Dailey, that Mr. Dailey remained in his bedroom when Jack Pearcy left with Shelley Boggio and Oza Shaw that evening, and did not see Jack Pearcy again until several hours later when he returned to the residence alone, without Shelley Boggio. This newly discovered evidence would probably result in a acquittal on retrial. This testimony is corroborated by the phone records, the March 19, 1993 statement from Jack Pearcy, and Mr. Dailey's testimony at the evidentiary hearing. Therefore, Mr. Dailey is entitled to relief under the *Jones* standard.

The lower court erred in finding that Mr. Shaw's testimony is of "questionable value, and the changes in his testimony are not significant". (PC-ROA 179) To the contrary, Mr. Shaw's new testimony exonerates Mr. Dailey because it places him at home in his bedroom while Mr. Pearcy, was driving around with Shelly Boggio.

The March 19, 1993 statement of Jack Pearcy is also "newly discovered evidence" as Mr. Pearcy refused to testify at Mr. Dailey's trial. He also refused to testify at the evidentiary hearing. His statements is , therefore, a statement against

interest by an unavailable witness and falls within one of the exceptions to the hearsay evidence rule. Mr. Pearcy stated at the sworn deposition:

> Q. Is that last part of that correct, that when Gayle went to the bathroom, she came out, you, Jim and Shelley were gone?
> A. No. I had left with Shelley, and Jim, I don't know where he was. He could have been in his bedroom or wherever. And when Shelley and I left. Oza asked me to drop him off to make a phone call to his ex-wife, Rose, in Kansas and the three of us left and dropped Oza off a couple of blocks from the house at a quick trip type store.
>
> Q. And when you say the three of you left, who were the three that you're talking about?
> A. Shelley, myself, and Oza.
>
> Q. Okay. Do you know where Jim was at that time?
> A. He could have been in the kitchen, his bedroom, I guess he wasn't in the bathroom because Gayle was in there, but I'm not specific on where he was.
>
> Q. All right. Do you recall when you returned to the house?
> A. Approximately an hour, ninety minutes later, something like that.
>
> Q. Okay. When you returned to the house, what happened?
> A. I went in, Got Jim up. He was in his bedroom. I told him. 'Come on, Let's go smoke a couple joints, drink a beer or something." he said all right. We got up and left.
>
> Q. Okay. Was Shelley with you at that time?
> A. No Shelley was no longer with me.

> Q. Okay. I believe both Gayle and Oza testified that Jim's pants were wet. Do you have any idea how his pants got wet?
> A. Yeah. We went to Bellair Causeway after I picked him up and was playing frisbee and he ended up going out in the water. When he went in the water, he went out there and then he was still staying out there while we were playing frisbee. We drank beer; we smoked a couple of joints.
>
> Q. Mr. Pearcy, did you make a statement after your arrest to law enforcement or a representative of the state attorney's office in Pinellas County?
> A. Yes,. At one time, along with my lawyer, Koch, we set up - - he set up for us to meet with the state attorney at that time and give a statement, which I did give a statement, and all the facts are the same except fo in my statement, I said Shelley was present in the car when I came back and picked Jim up, which she wasn't, and I said Jim her and I left and then I said - - made a statement as to what Jim had done, exonerating myself, which all of it, it was just a self-serving statement to exonerate myself.
>
> Q. So, you made that statement to help yourself out?
> A. Right. At that time, Jim wasn't even in custody and they were going to charge me and I was trying to get around it, that's all, lay the blame somewhere else.

March 19, 1993 sworn statement of Jack Pearcy (admitted into evidence at evidentiary hearing)

The testimony of Jack Pearcy contained in the 1993 statement qualifies as newly discovered evidence under the *Jones* standard. It is fully corroborated by Oza Shaw's testimony, the phone records, and Mr. Dailey's testimony. Unlike the

State's unclear and inconsistent presentation at trial, the newly discovered evidence from Oza Shaw and Jack Pearcy fits with the other evidence in the case and establishes that Mr. Dailey is innocent of the murder of Shelley Boggio.

The lower court erred in finding Mr. Pearcy's statement did not qualify as a statement against interest. Mr. Pearcy admits to leaving the residence alone, with Shelly Boggio, and returning later to the residence without her. This implicates him in her murder, alone, and is clearly against his interest. Furthermore, he states he made up the allegations that MR. Dailey participated in the murder, and this is against his interest. Lastly, the contents of this statement are verified by the testimony of Oza Shaw, the phone records, as well as Mr. Dailey's evidentiary hearing testimony. It is the kind of information that would likely cause an acquittal on re-trial.

ISSUE IV

MR. DAILEY'S COUNSEL WERE INEFFECTIVE FOR FAILING TO USE PHONE RECORDS TO IMPEACH GAYLE BAILEY, FAILING TO CROSS EXAMINE MR. SKALNIK ABOUT THE FACTS AND CIRCUMSTANCES OF HIS PENDING CHARGES, IN FAILING TO USE NEWSPAPER ARTICLES TO IMPEACH MR. SKALNIK AND IN FAILING TO CALL MR. DAILEY TO TESTIFY

As outlined earlier in the statement of the facts introduced at evidentiary hearing, Mr. Andringa did not consider using the phone records, which showed Oza Shaw placing a 24 minute call to Olathe Kansas at 12:16 a.m. on May 6, 1985. This was a critical failure because Gayle Bailey testified Oza Shaw never left with Mr. PEarcy and Shelly Boggio. This would have undermined her credibility. Since she was the only witness who even touched upon Mr. Dailey leaving with Mr. Pearcy (although she did not check Mr. Dailey's bedroom) use of the phone records would have been very beneficial to Mr. Dailey. Failure to use the records was ineffective assistance of counsel.

The record of the evidentiary hearing also indicates that neither attorney Andringa or Denhart used newspaper articles to impeach Mr. Skalnik . This would have provided valuable impeachment as both Detective Halliday and Beverly Andringa stated that one method of diminishing the credibility of a snitch is to establish whether the information they relayed about the offense was contained in the public domain. (PC-ROA 364, 365, 384). Defense exhibit # 3 and # 4 clearly

demonstrate that all the information Mr. Skalnik, Mr. Leitner, and Mr. Dejesus testified about was contained in the public domain. Failure to utilize these articles, which were readily available, constitutes ineffective assistance of counsel under the *Strickland* standard.

Counsel were also ineffective for failing to call Mr. Dailey to testify. Mr. Dailey provided excellent testimony at the evidentiary hearing and his testimony fits very well with other evidence presented in the case. Defense counsel Andringa advised Mr. Dailey not to testify under the false premise that he would be getting a new trial. (PC-ROA 329, 409) This is not a legitimate reason not to call Mr. Dailey and reveals a lack of competent counsel advising Mr. Dailey about his constitutional right to testify. Counsel was ineffective for failing to call Mr. Dailey.

The lower court erred in denying Mr. Dailey's ineffectiveness claims on the above grounds. This Court should apply the necessary cumulative analysis of these ineffectiveness claims and grant relief.

CONCLUSION

For the multiple reasons explained herein, this Court should order the trial court to vacate the original judgment and order a new trial or dispense any other legal or equitable relief necessary to correct the errors addressed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this INITIAL BRIEF OF APPELLANT has been furnished by U.S. Mail to Carol M. Dittmar on this March 20, 2006.

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I HEREBY CERTIFY that this brief complies with the font requirements of Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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