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

AMENDED
REPLY BRIEF OF APPELLANT

ERIC C. PINKARD
ASSISTANT CCRC-MIDDLE
FLORIDA BAR NUMBER 0651443
OFFICE OF THE CAPITAL
COLLATERAL REGIONAL COUNSEL
3801 CORPOREX PARK DRIVE
SUITE 210
TAMPA, FL 33609-1004
(813) 740-3544

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MR. DAILEY'S CLAIMS OF PROSECUTORIAL MISCONDUCT ARE NOT PROCEDURALLY BARRED.

The State argues that Mr. Dailey's additional claims of prosecutorial misconduct are procedurally barred because they are based upon the trial record and could have been raised on direct appeal. Answer Brief at 13, 14. The State cites Jones v. State, Spencer v. State, and Lamarca v. State in support of this argument. The State's reliance on these cases is misguided, as they are inapplicable to the facts of this case. The precedent relevant to Mr. Dailey's case establishes that Mr. Dailey's prosecutorial misconduct claims are not procedurally barred. The key factor in determining procedural barred is the meaning of the phrase "could have been raised on direct appeal." It is well settled Florida Law that in order for an issue to be raised on direct appeal it must be preserved by timely objection at trial. In Lawrence v. State, 831 So.2d 121 (Fla. 2002), this Court stated that the issue of defense counsel's failure seek appointment of co-counsel could not be raised on direct appeal because counsel had not preserved the issue by requesting co-counsel and had not objected to proceeding without co-counsel. In Mr. Dailey's case, counsel had not raised a contemporaneous objection to the prosecuting attorney's following misconduct:

The prosecutor intentionally commented upon and misstated the presumption of innocence afforded to Mr. Dailey by the United States Constitution

by stating in closing argument:

> 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 now. It's gone. It no longer applies. The shield has to be removed.

1987 ROA1280.

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.**

1987 ROA 1283.

The prosecutor knowingly falsely argued 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 it very consistent with Stacey's testimony and Gayle Bailey's testimony.

1987 ROA 1273.

Because of the lack of objection, this prosecutorial misconduct could not have been raised on direct appeal – the State's procedural bar argument is pure double talk. The State would have leapt at the opportunity to argue procedural bar had Mr. Dailey attempted to raise this claim in the direct appeal. Following the State's argument, Mr. Dailey would have no forum for appellate review of these claims of prosecutorial misconduct because he is barred on direct appeal, barred in State Habeas, and barred in post-conviction from raising them. If this is true, Florida's appellate and post-conviction system is fundamentally flawed and does not satisfy the procedural safeguards of Greg v. Georgia and violates the Due Process clause of the United States Constitution.

The reason Mr. Dailey combines the instances of prosecutorial misconduct from the direct appeal with the instant claims is because the cumulative effect doctrine requires this Court to assess the totality of prosecutorial misconduct.

Mr. Dailey is merely asking this Court to assess the **totality** of the prosecutorial misconduct in this case, which the lower court avoided. The actions

of the prosecution – misstating evidence, commenting on Mr. Dailey's right to remain silent, commenting on the presumption of innocence, commenting on Mr. Dailey's exercise of his right to challenge extradition, and vouching for the credibility of the three snitches by invoking the opinion of Detective Halliday – cumulatively prejudiced Mr. Dailey. The State's misconduct permeated the trial. The State's procedural bar "shell game" cannot prevent this Court from reaching the prosecutorial misconduct to grant Mr. Dailey a new trial.

MR. DAILEY'S CLAIMS ESTABLISH INEFFECTIVE ASSISTANCE UNDER STRICKLAND

The State contends the lower court properly denied the claim that defense counsel was ineffective for failing to object when the prosecutor vouched for the credibility of the snitch witnesses because:

1. The claim is procedurally barred.
2. Mr. Dailey failed to present any evidence on the claim.
3. The comment by the prosecuting attorney, "if these men [the three snitches] were cons they would not con Detective Halliday," was legally permitted rehabilitation of the witnesses. Answer Brief at 43-44.

This claim is not procedurally barred – it was not cognizable on direct appeal because of the lack of contemporaneous objection.

The State's argument that Mr. Dailey did not present any evidence of this claim at the evidentiary hearing is false. At the evidentiary hearing, Mr. Dailey presented the testimony of defense counsel James Denhart, the attorney responsible

for cross-examining Paul Skalnik:

> Q. And do you have any recollection of what your overall strategy was as far as cross-examining Mr. Skalnik?
> A. At this point I am not sure what you mean overall strategy. I believe we tried to discredit Mr. Skalnik's testimony. Hopefully, the jury would not believe his testimony.
> Q. And did you research what Mr. Skalnik's pending charges were at the time, the nature of them?
> A. I don't recall what I did along those lines and what my partner would have done. I don't recall what his charges were.
> Q. Did you contemplate going into Mr. Dailey's case cross-examining Mr. Skalnik about the circumstances of his pending charges to expose his bias to the jury?
> A. I honestly don't recall. I haven't read the testimony. I don't recall whether I cross examined him concerning his current charges or his past charges, or, what, if anything he hoped to gain by testifying. I couldn't tell you at this time.
> Q. It would be fair to say you don't have a lot of recollection about what was going through your mind leading into the cross-examination of Mr. Skalnik as you sit here today because you haven't reviewed those things?
> A. I recall I read all his depositions and I discussed everything with Mr. Andringa as far as what all pre-trial facts were and prepared the cross examination questions, but I don't recall individual questions and answers or reasons for them, no.
> Q. Or any specific strategy decision to get into certain areas or not get into certain areas.
> A. I couldn't tell you at this time, no.
> Q. Mr. Skalnik I believe was listed as a witness in May of 1987 and the trial went forth in June of 1987. Is that your general recollection that he was a late witness on the state's witness list?
> A. I have no recollection of when he was listed as a witness. I don't have my file and I have not had it for a long time. I don't know when he went on the witness list. I couldn't assist you in that.

PC-R 528-530

Prosecuting attorney Beverly Andrews/Andringa testified at the evidentiary hearing concerning her closing argument to the jury as follows:

Q. That argument you made to the jury you say "and Detective Halliday, after conversation with Skalnik, and known him for years, consider him reliable enough with information he has provided. You heard Detective Halliday's experience and types of crimes he investigated of those two minor cons that would not con Detective Halliday" would you have communicated that to the jury if you had not discussed with Detective Halliday his opinion concerning Mr. Skalnik and his veracity?

A. I don't remember what came out in trial. I am hoping that was a comment after the defense had attacked Skalnik and I don't know if that's first or last close. I can't put that in context just reading that part since I haven't read any of the trial transcripts. I don't know how his testimony came out, and what cross examination questions were asked of him. I can't say that would have been a conversation I would have had with Detective Halliday outside the presence of what happened in the courtroom.

Q. When you say you hoped that it was in response to something the defense did, why did you say you hoped that?

A. I am certainly commenting on the credibility of a witness which I consider to be pretty much the jury's purview.

PC-R 386, 387

Defense attorney Henry Andringa testified regarding the three snitches, and the defense strategy associated with them, as follows:

Q. What was your opinion on the relative importance of Mr. Skalnik as a witness in this case?

A. I thought he was important that his corroboration of two other witnesses who indicated statements were made. I thought his statement was particularly important as to the possible penalty phase because it was so damning.

Q. Why did you view it as so damaging?

A. My recollection of that statement was "I kept stabbing her and she kept looking at me" I believe was the nature of what he said. There had been other witnesses to show but that obviously was going to prejudice Mr. Dailey in the eyes of the jury beyond just the guilt phase.

PC-R 401.

Defense counsel Andringa also testified about the impact of all three

snitches as follows:

> **Q. Without Mr. Skalnik, Mr. Lightner and Mr. DeJesus' testimony could this have survived a motion for judgment of acquittal in your opinion?**
>
> **A. Legally I would say no.**

PC-R 411

This was evidence introduced at the evidentiary hearing addressing the claim for failing to object to the improper vouching for the three snitches in closing argument. Counsel Denhart testified he had virtually no recollection of strategic decisions in the Dailey case as he had not reviewed his file prior to testifying. Mr. Dailey cannot be blamed for not presenting a strategic reason for failing to object to the improper vouching when defense counsel could not remember any strategic decisions. It would have been futile to ask counsel specific reasons for failing to object when he testified he had no recollection about any decisions involving Mr. Skalnik, other than to attack his credibility.

Prosecutor Beverly Andrews/Andringa specifically conceded that her closing argument invaded the jury's purview in assessing witness credibility. Neither the lower court's order nor the State's Answer Brief addresses Mrs. Andringa's admission at the evidentiary hearing that her comment was improper.

Furthermore, this Court will look to the record alone to determine whether there was a strategic decision concerning failure of defense counsel to object. Rutherford v. Moore, 774 So.2d 637, 648 (Fla. 2000); Zakrzewski v. State, 866

So.2d 688 (Fla. 2004); Chandler v. State, 848 So.2d 1031, 1045 (Fla. 2001) ("the decision not to object is fraught with danger because it might cause an otherwise appealable issue to be considered procedurally barred").

A review of the record and the testimony of counsel reveals no legitimate strategic decision can be associated with the failure of the defense to object to the bolstering of the three snitches. Mr. Andringa testified that the testimony of the three snitches was essential to obtaining a conviction and death sentence, and that he did not believe the state could have gotten past a judgment of acquittal absent their testimony. Mr. Denhart recalled a general strategic decision to attack the testimony of Mr. Skalnik.

The record reveals the defense attempted to attack the credibility of the three snitches, Mr. Skalnik in particular. Given the essential nature of the testimony of the three snitches, and the defense strategy of attempting to attack their credibility in the trial, there can be no strategic decision to allow the prosecutor to negate the defense's efforts by failing to object to the blatant and admittedly improper vouching.

The last reason asserted by the State in support of the lower court's denial of this claim – it was legally permissible rehabilitation of a witness when the prosecutor argued that "if these men were cons they would not con Detective Halliday" – is also incorrect.

First, the State's partial excerpt of the improper statement does not give it adequate context for evaluation. The prosecutor improperly argued 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 provided, and "you heard Detective Halliday's experience and what unit he is with and the types of crimes he investigates. If these men were cons they would not con Detective Halliday." The meaning of the prosecutor's comments is clear – because Detective Halliday, with his years of experience in working these types of cases and prior dealings with Mr. Skalnik, believed the testimony of the snitches, the jury should believe them too.

Contrary to the State's argument, the cases cited by Mr. Dailey concerning improper prosecutorial remarks are directly on point and controlling in this case. 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). It does not matter whether the above cases are from direct appeal or post-conviction – the legal principals are applicable to the facts of Mr. Dailey's case.

Furthermore, Caballero v. State, 851 So.2d 655, 660 (Fla. 2003), does not

stand for the State's proposition that the state's vouching was permitted rehabilitation of the witness. The Caballero case involved an alleged comment on the defendant's right to remain silent:

> In his first claim, Caballero asserts that the prosecutor impermissibly commented during closing arguments on Caballero's exercising his right to remain silent. During closing arguments, defense counsel had argued that Caballero did not want to kill O'Neill. The prosecutor's closing statement rebutted this argument, saying, "You can tell ··· what a man intends by what he does not by what he desires. What does he do? According to the [defendant's] statement, uncontradicted, what does he do?" Caballero objected to the prosecutor's reference to the evidence as uncontradicted, contending this shifted the burden of proof to Caballero. The trial court overruled Caballero's objection to the prosecutor's statement and denied Caballero's motion for a mistrial.
>
> Caballero argues that the prosecutor's statement was an impermissible comment on his right to remain silent, and that the prosecutor's statement improperly shifted the burden of proof to the defense. We disagree. A defendant has the constitutional right to decline to testify against himself in a criminal proceeding; therefore, "any comment on, or which is fairly susceptible of being interpreted as referring to, a defendant's failure to testify is error and is strongly discouraged." *Rodriguez v. State*, 753 So.2d 29, 37 (Fla.2000) (quoting *State v. Marshall*, 476 So.2d 150, 153 (Fla.1985)). However, it is permissible for the State to emphasize uncontradicted evidence for the narrow purpose of rebutting a defense argument since the defense has invited the response. *See id.* at 38-39 (citing *Barwick v. State*, 660 So.2d 685, 694 (Fla.1995); *Dufour v. State*, 495 So.2d 154, 160 (Fla.1986)). Here, the State emphasized the evidence of Caballero's actions for the purpose of countering the defense argument that Caballero did not want to kill O'Neill. The defense's argument invited the State's response. In this context, the prosecutor's statement directed the jury's attention to the evidence of Caballero's actions in contrast to his professed desire, rather than to Caballero's failure to testify.
>
> Further, even if one were to interpret the prosecutor's statement as a comment on the defendant's failure to testify, Caballero would not be entitled to relief. Erroneous comments require reversal only where there is a reasonable possibility that the error affected the verdict. *Rodriguez*, 753 So.2d at 39. In this case, Caballero's voluntary, detailed confession to the

> crime was substantiated by physical evidence, including fingerprint and DNA evidence. Based on this evidence supporting the verdict, the asserted error was harmless beyond a reasonable doubt. Caballero is not entitled to relief on this claim.

851 So.2d at 660.

This language shows Caballero is inapplicable to Mr. Dailey's claim of prosecutorial misconduct for improper vouching. It is not the law of the State of Florida that the State may improperly vouch for the credibility of snitch witnesses merely because the defense challenges their credibility. The defense attacks credibility in virtually every case with snitch testimony. The state may use only legally permissible methods of rehabilitation of a witnesses' testimony.

The State's attempt to distinguish Ruiz v. State , 743 So.2d 1 (Fla. 1999) and Rhue v. State, 693 So.2d 567 (Fla. 2d DCA 1997), also fails. Both cases are directly on point and demonstrate Mr. Dailey is entitled to relief for trial counsel's failure to object to the improper vouching.

As to Mr. Dailey's claim of ineffective assistance of counsel for failing to object when the prosecutor stated in closing argument that the presumption of innocence was now gone, that it no longer applied, and that the "shield had been removed," the State contends the lower court properly denied the claims because:

> 1. The claim is procedurally barred as a matter which could have been raised on direct appeal.
> 2. Mr. Dailey failed to present any evidence at the evidentiary hearing on the claim, and thus failed to meet his burden under Strickland.
> 3. The comments by the prosecutor are nothing more than an attempt

by the State to argue that its evidentiary burden had been met. (*See* Answer Brief at 39).

As to the procedural bar argument, Mr. Dailey relies on his previously stated position that there is no procedural bar for failure to raise an issue on direct appeal when the issue was not preserved by contemporaneous objection.

As to the second argument, Mr. Dailey relies upon the previously cited Rutherford, Zakrzewski and Chandler cases for the proposition that this Court may look to the record for the context of the comments, as well as the actions of defense counsel throughout the trial to determine whether any strategic decision could explain the failure to object to the improper comments. The defendant may use the record to overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy" under Strickland. Based on the record in this case, in the context of when the argument about the presumption of innocence was made, counsel was ineffective for not objecting.

The State is further incorrect in stating that the remarks were nothing more than an attempt to argue that its evidentiary burden was met. As stated in the Initial Brief, such comments are deemed fundamental error, as follows:

This remark by the prosecutor was a blatant misstatement of law and an impermissible comment on the fundamental right to 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 argued the following in closing:

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

> We consider the prosecution's 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 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).

917 F.2d at 469, n. 2.

Mahorney arose from a state court rape conviction. 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 improper prosecutorial comment will not warrant habeas relief unless the conduct "made petitioner's trial so fundamentally unfair as to deny him due process") did not bar relief 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 exceptions in Donnelley allowed relief because the prosecutor had deprived the defendant of the right to the presumption of innocence. 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." 917 F.2d 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 Mahorney decision is critically important because it directly refutes the State's contention that the prosecutor was merely arguing that the State's evidentiary burden had been met. Mahorney characterizes such comment as fundamental error. There can never be a strategic decision to allow fundamental error. Further, contrary to the assertions of State, fundamental error cannot be cured by subsequent jury instructions.

MR. DAILEY'S GIGLIO AND NEWLY DISCOVERED EVIDENCE CLAIMS BASED ON INMATE PAUL SKALNIK R COMPEL RELIEF.

The lower court's denial of Mr. Dailey's Giglio and Brady claims related to whether inmate Paul Skalnik was offered leniency or had an agreement with the state in exchange for his testimony is based on the fundamentally flawed finding that Mr. Skalnik testified he had reached no agreement with the state for his testimony. In the Answer Brief the State argued that "at the evidentiary hearing Mr. Skalnik testified that his testimony at Mr. Dailey's trial was truthful, and he provided an explanation for several statements he made to the contrary after Mr. Dailey's trial." Answer Brief at 60, 61.

Lest there by any misunderstanding, the State is asking this Court to sustain Mr. Dailey's conviction and death sentence based on the credibility of Mr. Skalnik's testimony at the evidentiary hearing . However, that testimony reveals that Mr. Skalnik is possessed of not a shred of credibility and nothing he said should be a basis for this Court to deny relief.

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 Skalnik said he refreshed his recollection by reviewing 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 in two grand theft cases. (PC-ROA 431) In one case, Mr. Skalnik convinced a woman to give him $35,000.00 to purchase an automobile at a discount rate. (PC-ROA 434) (Defense Exhibit # 8) Mr. Skalnik put $5000 down on the car, but he titled it 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 to purchase land Mr. Skalnik never owned. (PC-ROA 434) Skalnik also faced parole violations in four other Florida grand theft cases. He had served the prison portion of the sentences for those cases 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 was a 1982 case in which he fraudulently obtained $4,000.00 to start a Florida law practice by misrepresenting 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 the

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) In May 1987, prior to ever testifying in Mr. Dailey's case, 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)

At the evidentiary hearing, Skalnik initially testified that he never got a deal to testify against Mr. Dailey and claimed he could not recall ever saying he had a deal at any time after Mr. Dailey's trial. (PC-ROA 455, 456) However, Skalnik 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 but never read it until years later. (PC-ROA 457) He said the motion was based on attorney Mark Evan's enthusiasm and desire to help other defendants. (PC-ROA 457) He said the allegations in the Motion 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 reporter that he had not read the motion. (PC-ROA 461)

Mr. Skalnik then contradicted his testimony about not having read the contents of the motion by testifying 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 admitted he filed 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 claimed he filed things in anger and admitted to engaging in "angry falses [sic - probably "angry falsehoods"]" with the court. (PC-ROA 463)

Skalnik admitted signing and filing a pro-se motion for discharge, Defense Exhibit #15. (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 falsely stated there was no notary at the Pinellas County Jail. (PC-ROA 465)

In the Pro Se Motion for Discharge, Mr. Skalnik alleged he was repeatedly told by the Pinellas County State Attorney's Office <u>he would be "taken care of</u>" when Mr. Dailey's trial was over with the understanding he would receive no more

than 3 ½ to 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 the Pro Se Motion for Discharge, Defense Exhibit #15.(PC-ROA 467) He admitted he made the falsehoods out of anger and frustration. (PC-ROA 68) Skalnik had to admit that when he, Skalnik, 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 falsely testified that he did not have access to a television in the Pinellas County Jail. (PC-ROA 473) Mr. Skalnik admitted to receiving a ROR, release without bond, on all 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 the time) insists no "deal" ever existed with the defendant." (Defense Exhibit # 20)

Mr. Skalnik further insisted in that motion that there were 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 sending him (Mr. Skalnik) to be killed in the Florida Prison System. (Defense Exhibit 20, paragraph 12)

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 there was a $50,000.00 contract on his life and

Judge Luten and the State Attorney should split the money. (Defense Exhibit # 21 at paragraph 20) Mr. Skalnik falsely denied reading newspapers in the Pinellas County Jail – then admitted drafting Defense Exhibit 23 in which he referred to local newspaper articles. (PC-ROA484) He also admitted referring to newspaper articles in the Motion to Dismiss for Prosecutorial Misconduct (Defense Exhibit # 6) He denied that he ever read the referenced article. (PC-ROA 484)

Skalnik admitted that after he was released without bond two days after testifying against Mr. Dailey, he absconded and went to Texas to "turn himself in." (PC-ROA 484) He claimed he did this so he could serve his sentence in Texas, not Florida, where he feared for his life. (PC-ROA 486)

Mr. Skalnik then stated that **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 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 CCRC collateral counsel Jeff Hazen anything because Hazen offered to help him with personal matters. (PC-ROA 497) He confirmed 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)

Numerous documents were introduced at the evidentiary hearing in which Mr. Skalnik alleged that he had a deal with the state, and that various state attorneys had coached him in his testimony in Mr. Dailey's case, as well as several other cases. These documents include the following:

Defense Exhibit6, the August 7, 1988 Motion to Dismiss for Prosecutorial Misconduct :

In this Motion, signed by Mr. Skalnik, he alleged that he was coached in his

testimony in the Dailey case and that he had been given instructions and answers to refute any assertions that any agreement or deal was made by the State, in a successful effort to convince jurors 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 his signed motion that several prosecuting attorneys. 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 admitted his testimony deceived juries on over 50 cases. Skalnik stated in the motion that he would recant his testimony because he understood what the State had him do was wrong.

Accompanying the typewritten Motion to Dismiss for Prosecutorial Misconduct is a handwritten statement from Mr. Skalnik, also bearing the date of August 8, 1988, in which Mr. Skalnik alleges the State Attorney's Office lied to him and the public about the manner in which it had been presenting numerous cases and that the State had not "kept its 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 :

In this Motion signed by Mr. Skalnik, 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 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

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, Mr. Skalnik 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 Mr. Skalnik's claims are true, the State committed a blatant Giglio violation by allowing Mr. Skalnik to testify 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 for the claims in these documents that he had a deal with the state:

1. He "never read" exhibit 6, the August 8, 1988 Motion to Dismiss 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. The Motion is **signed twice** by Mr. Skalnik and **notarized** by Jail Deputy Lee Glover. Along with the Motion to Dismiss was Skalnik's handwritten statement claiming 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 the Motion to Disqualify Judge Luten, Exhibit 20 ¶ 8, Skalnik claims his previous counsel, Mark Evans, was going to demonstrate the State Attorney's use of the defendant and failure to perform on previous plea negotiations.

Mr. Skalnik's lie in the evidentiary hearing that he"never read" the Motion to Dismiss for Prosecutorial Misconduct is also established through the testimony of journalist Mark Journey, who stated he wrote an August 9, 1988, newspaper

article about 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 Evans " made up" the allegations in Exhibits 6 and 19 and 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 fabricate detailed and serious allegations about the Office of the State Attorney suborning 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 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 Skalnik's lies are 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. (Exhibits 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 the 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 refuting his claims of ignorance, Skalnik tried this lie. (PC-ROA 463). According to 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?

Mr. Skalnik never gave an adequate explanation at the evidentiary hearing concerning the multiple allegations that he had a deal with the State for his testimony against Mr. Dailey. All of the contradictory 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.

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 prosecutor's inflection, 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's promise that he would be "taken care of". The state's elicitation at trial that

Mr. Skalnik had no promise or deal whatsoever for his testimony was therefore false and misleading.

The lower court erred in denying this claim with mere conclusory language that the Giglio claims were defeated because Mr. Skalnik testified at the evidentiary hearing that his testimony against Mr. Dailey was truthful, and that the State had not promised anything. (PC-ROA 175) The lower court did not address Skalnik's claims that he was told he would be "taken care of" nor does the order address the volume of evidence that Mr. Skalnik claimed, in his own motions and handwriting, that he had a deal to testify against Mr. Dailey.

Apparently the lower court reached the dubious conclusion that one ray of truthfulness pierces Mr. Skalnik's web of lies was when he testified against Mr. Dailey and entirely ignored the other evidence which revealed Mr. Skalnik had a deal.

The State is incorrect that State's post-conviction exhibits did not refute Skalnik's in-court testimony that he received no deal from the state in exchange for his testimony. As the above testimony reflects, Skalnik is the one who refutes Skalnik. His disclaimers are not credible.

Moreover, Mrs. Andringa testimony that she did not consider Mr. Skalnik to be a credible witness after the 1988 motions and would never again call him as a witness is not merely an attorney's "immaterial after-the-fact impression of a

witness based upon his subsequent false out-of-court false allegations" as stated on page 63 of the Answer Brief. Mrs. Andringa's impression that Mr. Skalnik is no longer a credible witness is highly important – it is newly discovered evidence which directly contradicts her vouching for Mr. Skalnik's credibility at trial. This newly discovered evidence would likely result in an acquittal at re-trial. If Mrs. Andringa would admit to the jury Mr. Skalnik is not credible, rather than improperly bolster his credibility as occurred at trial, Mr. Dailey would likely obtain an acquittal.

As correctly stated by the State in the Answer Brief, the lower court allowed Mr. Dailey to Amend Claim V of his postconviction motion to include a claim for newly discovered evidence based upon Mrs. Andringa's changed opinion about Mr. Skalnik's credibility, then never ruled on the amendment. The State argues that because the lower court denied the Brady claim, Mr. Dailey cannot prevail under a newly discovered evidence claim. This argument is nonsensical because the lower court never assessed the materiality prong of Brady. Instead, the post-conviction judge found no Brady violation occurred. Mr. Dailey's claim of newly discovered evidence based upon Mrs. Andringa's changed opinion about the credibility of Mr. Skalnik cannot be precluded by a materiality finding which never occurred. Due to the essential nature of Mr. Skalnik's testimony, and the state's strong reliance on it to obtain a conviction and death sentence against Mr. Dailey, the changed opinion

of Mrs. Andringa amounts to newly discovered evidence requiring a new trial.

THE LOWER COURT INCORRECTLY DENIED MR. DAILEY"S CLAIMS FOR RELIEF BASED UPON THE NEWLY DISCOVERED EVIDENCE FROM OZA SHAW AND JACK PEARCY

The State argues several points that were not relied upon by the lower court in denying the Oza Shaw claim. The lower court found that Mr. Shaw's evidentiary hearing testimony was not a significant change from his earlier testimony, and therefore not a recantation. The lower court also stated that Mr. Shaw's present ability to remember would not be better than when he testified at trial. However, Mr. Shaw's testimony clearly reveals he recanted:

Shaw testified at the evidentiary hearing that after getting a ride to the phone booth with 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 when Jack Pearcy came in the door alone. (PC-ROA 344). Mr. Pearcy went straight to Mr. Dailey's bedroom and Pearcy left with Mr. Dailey. (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.

Contrary to the finding of the lower court, this newly discovered evidence from Mr. Shaw is of great significance in Mr. Dailey's case. Mr. Shaw's new 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 Shaw's phone call started at 12:16 a.m., and lasted 26 minutes, Shaw ten walked home, calmed down Gayle Bailey, and slept 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 Shaw 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.

The lower court failed to consider that this newly discovered evidence is corroborated by the phone records, Jack Pearcy's March 19, 1993, statement, and Mr. Dailey's testimony at the evidentiary hearing. The corroborating evidence overcomes any concerns about the time between Mr. Shaw's trial testimony and his recantation. The lower court's failure to address the corroborating evidence of Mr. Shaw's recantation renders the Jones analysis incomplete and flawed, and this Court is left to conduct a de novo review of this newly discovered evidence. Contrary to the State's arguments, which purport to impute reasons for the denial

that were never asserted in the written order, 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 Mr. Dailey at home in his bedroom while Mr. Pearcy was driving around with Shelly Boggio.

As to the newly discovered evidence claim involving Jack Pearcy, the State erroneously asserts this claim is procedurally barred because it was not raised within two years of Mr. Pearcy's 1993 statement. However, this argument is without merit – Mr. Dailey's conviction and sentence were not final in 1993 because he had a new penalty phase. Mr. Dailey's 3.850 motion was timely filed within one year of his conviction and sentence becoming final. As such the newly discovered evidence claim was timely filed.

Furthermore, the primary reason the lower court denied this claim is that the post conviction judge did not view Mr. Pearcy's 1993 statement to be a statement against interest. The record refutes this finding as 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 [Dailey] 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).

Contrary to the State's arguments, Jack Pearcy's testimony contained in the 1993 statement qualifies as newly discovered evidence under the Jones standard. The lower court erred in finding Mr. Pearcy's statement did not qualify as a statement against interest. Mr. Pearcy admits leaving the residence alone, with Shelly Boggio, and returning later 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. At the time Mr. Pearcy made the statement he was challenging his conviction for the murder, so it is clearly against his interest. Therefore, the State's allegation it was not against his penal interest because the statute of limitations had run for perjury is nonsensical.

Lastly, the contents of this statement are corroborated by Oza Shaw, the phone records, and Mr. Dailey's evidentiary hearing testimony. As in the case of the testimony of Oza Shaw, the lower court did not properly assess corroboration of the testimony, and, therefore, did not undertake a comprehensive Jones analysis. Contrary to the assertions of the State, the statement from Mr. Pearcy is the kind of information that would likely cause an acquittal on retrial.

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 REPLY BRIEF OF APPELLANT has been furnished by U.S. Mail to Carol M. Dittmar on this September 5, 2006.

CERTIFICATE OF COMPLIANCE

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

ERIC C. PINKARD
Assistant CCRC-Middle
Florida Bar Number 360541
Office of the Capital
Collateral Regional Counsel
3801 Corporex Park Drive
Suite 210
Tampa, Fl 33609-1004
(813) 740-3544
Counsel for Appellant

Copies furnished to:

Carol M. Dittmar
Assistant Attorney General
Office of the Attorney General
3507 E. Frontage Rd.
Ste. 200
Tampa, FL 33607-1793

James Hellickson
Assistant State Attorney
Office of the State Attorney
14250 49th Street North
Clearwater, Florida 3762-2800

James Dailey
DOC# 108509; P6213S
Union Correctional Institution
7819 NW 228th Street
Raiford, Florida 32026