IN THE SUPREME COURT OF FLORIDA

CASE NO. SC 18-557

JAMES MILTON DAILEY

Appellant

v.

STATE OF FLORIDA

Appellee

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

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

This is an appeal of the circuit court's denial of James Dailey's successive motion for postconviction relief. The underlying successive motion for postconviction relief is primarily predicated on newly discovered evidence and two *Giglio*[1] violations. In particular, it is based on evidence and affidavits which impeach the testimony of several State witnesses during Mr. Dailey's original trial. The newly discovered evidence establishes that James Dailey is innocent of first degree murder. Dailey's co-defendant, Jack Pearcy, alone killed S.B.

Unlike James Dailey, Jack Pearcy was a man with a history of violence, particularly violence against women. R2 9753-9923. Pearcy knew the victim prior to the killing (she and her father regularly sold him marijuana). R2 305, 11862-63. Multiple witnesses testified that on the night in question, Pearcy was seen dancing and flirting with the victim. TR1 8:380-81; R2 11859. Pearcy could not take the victim home to have sex with her because he lived with his pregnant girlfriend, who was already, on that night, visibly angered by his flirtatious behavior. R2 293. He needed to take S.B. to a secluded location, and he did: a favorite fishing spot. R2 9314-15. It was this place where the victim's body was found. Pearcy had multiple possible incentives to murder the victim: either she resisted his advances or he wanted to silence her so he did not have to face the anger of his girlfriend, her father (who had

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

already told him to stay away from her, R2 11863), or law enforcement. Pearcy was the one who owned a knife consistent with the wounds on the victim's body, and it was Pearcy who told police where the knife's sheath could be found. R2 11803, 11809-11. Pearcy's own friend, Oza Shaw, stated in his very first interview with police that Pearcy and the victim had gone off alone that night, *without* Dailey, and that Pearcy had returned home several hours later, *by himself*. R2 91-95. Deborah North, an acquaintance of the victim and employee of Hank's Seabreeze Bar, likewise testified that she had seen the victim with *only one man* at the bar shortly before the time of death. R2 11712. The medical examiner's testimony likewise suggested that only one person committed the crime. R2 11874-75. And the evidence established that, on the morning after the murder, it was Pearcy who insisted that he, his girlfriend, Dailey, and Shaw leave town (R211379); Pearcy who used an alias when registering at a motel, R2 11155, 11524, 11787) (while Dailey used his true name (TR1 3:292-93; 7:914; R2 10887)); Pearcy who bought tickets for a cruise to get out of the country (TR1 3:302-03); and Pearcy who was acting nervous and strange (TR1 3:313).

In contrast, there was no eyewitness, forensic, or circumstantial evidence implicating Dailey. Dailey was arrested only because Pearcy, in a series of self-serving statements, attempted to shift the blame for the crime from himself to the friend who had been with him and the victim much earlier in the night. TR1 3:331; R2 9625.

The murder was gruesome and the State was under intense pressure to obtain the death penalty against the two men it elected to charge. This pressure only intensified after Pearcy's jury recommended life, not death. But the State was aware that it did not have sufficient evidence to secure even a conviction against Dailey, let alone a death sentence. The week after Pearcy's jury dealt the State a devastating blow by recommending a life sentence, not death, the State made it known to Dailey's fellow inmates that it was looking for help.

During that week, Detective John Halliday came to the jail where Dailey was incarcerated, pulled every inmate from Dailey's pod, took each individually into a private room where a desk was covered with news articles about Dailey's case, and asked each if he had any information to share regarding James Dailey. R2 12056-57, 12066, 12094-96, 12106-07, 12163-65, 12196, 12198. Though the interrogation of these fifteen inmates yielded nothing, within a week two other inmates came forward claiming Dailey had made inculpatory statements to them. In exchange for their testimony – testimony critical to Dailey's conviction – they received consideration in their own cases from the State Attorney's Office by way of plea deals. TR1 8:1014, 9:1082; R2 9899-9955. A third informant came forward a little later, himself a notorious snitch with an established history of pathological deception. The prosecutor from Dailey's trial would later testify during postconviction that she would never use this witness again because she could not, in good faith, put him on the stand believing

that he would give truthful testimony. R2 10283. The testimony of these three men became the linchpin of the State's case, even though none of their statements possessed any independent indicia of reliability.

The most recent evidentiary hearing establishes conclusively that the testimony of these three men was fabricated. At the hearing, two witnesses with no motive to lie testified that Pearcy had told them each, independently and years apart, that he – Jack Pearcy – bore sole responsibility for the crime. R2 12099, 12118-19, 12121. The defense also introduced an affidavit signed by Pearcy in which he acknowledged that he had committed the murder alone. Had all of this evidence been presented at trial, a jury could not have found Dailey guilty beyond a reasonable doubt, much less recommended the ultimate sanction.

PRELIMINARY STATEMENT

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

followed by the appropriate page numbers. All cites from this record on appeal will be referred to as "R2" followed by the appropriate page number(s). All other references will be self-explanatory or otherwise explained herein. All emphases are supplied unless otherwise noted.

REQUEST FOR ORAL ARGUMENT

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

STANDARD OF REVIEW

"When the trial court rules on a newly discovered evidence claim after an evidentiary hearing, [this Court] review[s] the trial court's findings on questions of fact, the credibility of witnesses, and the weight of the evidence for competent, substantial evidence." *Green v. State*, 975 So. 2d 1090, 1100 (Fla. 2008). However, when the order on appeal contains no factual findings, including on the credibility of witnesses, this Court's review is *de novo*. *See Gino Vitiello, M.D., P.A. v. Genovese Joblove & Battista, P.A.*, 123 So. 3d 1185, 1187 (Fla. 4th DCA 2013); *Coultas v. State*, 955 So. 2d 64, 66 (Fla. 4th DCA 2007); *Osterback v. Agwunobi*, 873 So. 2d

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

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Statement of the Case and of the Facts

Procedural History:

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

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

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

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

Dailey filed a successive motion to vacate his death sentence in the circuit court based on *Hurst v. Florida*, 136 S. Ct. 616 (2016), and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). R1 4-52. The circuit court denied Dailey's motion. R1 191-98. Dailey filed a timely appeal on June 7, 2017. R1 206-07. That appeal remains pending with this Court. *See Dailey v. State*, Case No. SC17-1073.

On June 21, 2017, Dailey filed a second successive motion to vacate his judgment and sentence based on newly discovered evidence of actual innocence. R2 12-36. That same day, Dailey filed a Motion to Relinquish Jurisdiction with this Court, which was granted on September 14, 2017. A case management conference was held on November 5, 2017. The lower court granted an evidentiary hearing on claims I(A) and I(B). R2 931-1024. The evidentiary hearing took place on January 3, 2018. A records hearing was held on January 18, 2018. A final order denying all claims was issued on March 20, 2018. R2 8872-9183.

Summary of Testimony from the January 2018 Evidentiary Hearing:

James Wright

Wright testified that he was incarcerated in the county jail with Dailey prior to Dailey's trial. R2 12055. Wright had trouble speaking at the evidentiary hearing and

had to whisper due to his tracheotomy. *Id*.

According to Wright, while he was in the county jail, a detective, whose name he could not recall, came to speak with Wright about Dailey's case and met with him in a room inside the jail. R2 12056. The detective brought newspaper articles about Dailey's case which he showed Wright during their meeting. R2 12056-57, 12066. Wright testified that he was "aware of the kind of case Mr. Dailey had" because he received the newspaper while in the jail and there was "extensive media coverage" of Dailey's case, and he told this to the detective. R2 12055-56, 12067.

The detective wanted to know if Dailey had been talking about his case or if he had admitted to "anything." R2 12057. Wright testified that Dailey never spoke about his case, except to say that he was innocent. *Id*. According to Wright, Dailey always denied any participation in the crime. *Id*.

Wright met with members of Dailey's current legal team on May 9, 2017. R2 12058. Based on that conversation, an affidavit was prepared and signed by Wright. R2 12058-59. Wright dictated the contents of the affidavit to defense counsel so she could prepare it in his presence. R2 12062-63, 12072. His affidavit was received into evidence as Defense Exhibit 1. R2 12060.

Wright did not testify at the prior postconviction hearing. R2 12069. Wright testified that he had never spoken to Andringa (trial counsel), Eric Pinkard (prior postconviction counsel), or David Gemmer (prior postconviction counsel). R2 12070-

72. He was never subpoenaed to testify in the 2003 postconviction hearing. R2 12071.

Travis Smith

Smith testified that he met Dailey when the two were incarcerated together in the county jail in the mid-1980s. R2 12076. Smith testified that there was "extensive coverage" of Dailey's case on television and in the newspapers. R2 12077. He recalled that the local news aired Dailey's case "quite a few times," showing photos of the crime scene, including pictures of Indian Rocks Beach, the water, and rocks. R2 12078, 12095-96.

Smith testified that he also knew Pablo DeJesus and James Leitner, two jailhouse informants who testified for the State against Dailey, from this same period in the county jail. R2 12078. DeJesus and Leitner worked in the law library in the county jail, assisting other inmates with legal research. R2 12080. Smith witnessed Dailey go into the law library several times, but never saw Dailey discuss his case with DeJesus or Leitner, or anyone else. R2 12081. According to Smith, it was common knowledge in the jail that it was unsafe to share the details of one's case because other inmates were constantly seeking information to "try to help themselves" – including DeJesus and Leitner. *Id*. Inmates did this because, at that time, the State Attorney's Office "used to offer funds and stuff for people to offer information about another person's case. It was common practice back in those days." R2 12088.

Smith did, however, observe DeJesus and Leitner discussing Dailey's case. R2

12082, 12087. Smith stated that DeJesus and Leitner "were trying to collaborate a story together as to what they were going to say when they talked to the State Attorney." R2 12093. Smith reiterated that he never observed Dailey speaking to either DeJesus or Leitner. R2 12088-89.

Smith testified that he knew DeJesus and Leitner's story that Dailey confessed to them was not true. R2 12093. "[It] was a plot that they had to try to get their sentence reduced. And the State Attorney reduced their sentence as a result of them, you know, fabricating their story." *Id*.

During this same period, while Smith was at the county jail, Smith testified that two police officers pulled him from his cell, took him into a separate room, and attempted to interview him about Dailey's case. R2 12094-96. Smith refused to answer their questions. R2 12094. The officers had newspaper articles with them about Dailey's case and showed these articles to Smith. R2 12095-96.

Smith also met Jack Pearcy while at the county jail. R2 12096-97. Pearcy knew Smith because Smith had worked in the law library. R2 12099. Pearcy told Smith that he was Dailey's co-defendant. *Id*. Pearcy told Smith that "he committed the crime himself and that he did it." *Id*. Pearcy said "that was his charge and his charge alone." *Id*.

Michael Sorrentino

Michael Sorrentino is an electrician. R2 12103. He testified that he was

incarcerated at the county jail between 1985 and 1987, and that for part of that time he was housed in the same pod as Dailey. *Id*. According to Sorrentino, he and Dailey interacted on a daily basis during the six to eight months that they were housed together, but during this time Dailey never spoke about his case to Sorrentino, and Sorrentino never witnessed Dailey speak about his case with anyone else. R2 12103-05, 12110.

Sorrentino testified that there were televisions in the pod that Sorrentino and Dailey shared, that they were sometimes tuned to the news, and that Dailey's case was featured on the television news and in the newspaper. R2 12105-06.

Sorrentino testified that, during this time period, a detective came to the jail and brought the inmates out of the pod one by one. R2 12106. The detective brought Sorrentino into a conference room containing a desk covered in at least six to eight newspaper articles about Dailey's case. *Id*. The detective then asked Sorrentino if "Jim ever talk [sic] about his case" to which Sorrentino responded, "No." R2 12107.

Sorrentino testified that this interaction – looking at all of the newspaper articles and being asked if Dailey talked about his case – made Sorrentino uneasy: "It just seemed not correct." *Id*. Accordingly, he told the investigator, "I really hope you guys aren't doing something like this with my case," R2 12108 (proffer), meaning, he hoped that investigators were not "bringing people in and hav[ing] them look at newspaper articles with details about the case" (*id.*), because "[c]learly there were

newspaper articles in front of me, had I wanted to say something or fabricate something all the tools were there to give them whatever they might be looking for." R2 12109 (proffer).

Sorrentino was contacted by current defense counsel in May 2017. *Id*. Prior to that time, no one had contacted him on Dailey's behalf. R2 12110-11. Sorrentino was not aware that he had been listed as a defense witness in 2003. R2 12111. Sorrentino was never contacted by any lawyer in 2003 about Dailey's case. *Id*. Current defense counsel was the first attorney to contact Sorrentino about Dailey's case. *Id*. Sorrentino testified that had an attorney contacted him before that, Sorrentino would have spoken about the case. *Id*.

Juan Banda

Banda testified that he first met Jack Pearcy in 1985 at the Pinellas County Jail, and then encountered him again at Union Correctional Institution ("UCI") in the early 1990s. R2 12117-18. Banda testified that when he spoke to Pearcy at UCI, sometime between 1992 and 1996, Pearcy told him that "Mr. Dailey was innocent of the crime that he was sentenced to death row for." R2 12118-19.

Banda testified that he did not see Pearcy again until 2007, when the two encountered each other in the law library at Jackson Correctional Institution. R2 12119-20. Pearcy came into the law library, where Banda was working, looking for material on re-entry. R2 12120. During their conversation, Banda asked about Dailey.

Id. Pearcy said Dailey was still on death row. R2 12121. Banda asked how that could be since Dailey was innocent. *Id*. Pearcy repeated once more that Dailey was innocent of the crime for which he had been sentenced to death. *Id*.

Banda has not spoken to Jack Pearcy since the conversation at Jackson Correctional Institution in 2007. *Id.* Banda did not communicate with Pearcy while they were at the county jail prior to the evidentiary hearing in 2018. *Id*.

No one from Dailey's defense team ever spoke to Banda prior to the summer of 2017. R2 12121.

Jack Pearcy

Jack Pearcy is Dailey's co-defendant. R2 12130. He currently resides at Sumter Institution. R2 12129. At the evidentiary hearing, Pearcy admitted signing an affidavit (Defense Exhibit 5), acknowledged that he signed under penalty of perjury, and identified his signature on the affidavit itself. R2 12130-31. The affidavit states, in part, that "James Dailey was not present when [S.B.] was killed. I alone am responsible for [S.B.'s] death." R2 63-64.

When Pearcy was asked if the statements in the affidavit are true, he responded, "No." R2 12137. When asked to identify which statements were not true, Pearcy stated, "I'm not sure. There's quite a few lines on there." *Id.* After being directed by the court to read the affidavit, Pearcy stated "I agree with [lines] 1 and 2, and I take the Fifth Amendment from that point forward." R2 12139. Counsel then went line by

line, asking if each statement was true, but Pearcy's only response, repeated again and again, was, "Fifth Amendment." R2 12140-41. The lower court informed Pearcy that he could not invoke the Fifth Amendment privilege against self-incrimination, since he already had been convicted of the crime described in the affidavit, and ordered Pearcy to answer counsel's questions. R2 12141-45. Pearcy nevertheless refused to answer. R2 12145.

On cross examination by the State, Pearcy admitted that he signed Defense Exhibit No. 5 on April 20, 2017. R2 12148. The affidavit was provided to Pearcy. R2 12149. The day he signed the affidavit was the first time he met with a female lawyer, but Pearcy previously had met with other defense team members. *Id*.

On redirect, Pearcy testified that since signing the affidavit, he has spoken to the State and members of his family, including his mother, stepfather, son, daughter-in-law, sister, and niece. R2 12145-46. His mother and stepfather were present at the hearing. *Id.*

Lisa Bort

Ms. Bort is an attorney with the Capital Collateral Regional Counsel – Middle Region. R2 12153-54. She is also a notary. R2 12154. Ms. Bort accompanied attorney Chelsea Shirley to Sumter Correctional Institution in her capacity as a notary. *Id*. There was no one else present during the visit with Pearcy. R2 12154.

During the visit, Pearcy asked counsel if she had anything for him to sign. R2

12156. Counsel handed Pearcy the affidavit (Defense Exhibit No. 5) and Pearcy read each page, taking his time, and using a piece of paper to cover the lines below so he could read one line at a time. R2 12156-57. He did not ask any questions while reading and made no changes. *Id*. Once Pearcy finished reading the affidavit, he asked for a pen. *Id*. Pearcy was not tearful and did not appear hesitant. R2 12158.

Ms. Bort testified that she is legally prohibited from notarizing a document signed by an individual who has been threatened or is under obvious duress, or by an individual who is obviously mentally unstable or does not appear to understand its contents. R2 12158. By signing and notarizing Defense Exhibit No. 5, Ms. Bort attested that she did not have any such concerns with Pearcy. *Id*.

Neither Ms. Bort nor Ms. Shirley threatened Pearcy, nor did they promise him anything in exchange for his signature. R2 12159.

Testimony of State's Witness: *John Halliday*

From 1976 to 1987, Halliday worked at the Pinellas County Sheriff's Office, where he served as the lead detective in the investigation of S.B.'s murder. R2 12162-63. The Medical Examiner's Office contacted him and asked him to assist the Indian Rocks Beach Police Department at the crime scene. *Id*. He was involved in the arrests of Dailey and Pearcy. *Id*.

Halliday testified that, in connection with the murder investigation, he had gone to the Pinellas County Jail to interview inmates. R2 12163-64. The interviews took place

in a room inside the jail. R2 12164. The inmates were brought in "singularly in a room by themselves with another detective." R2 12165. Halliday talked to a number of inmates about this case. *Id*.

On direct examination by the State, Halliday acknowledged, without hesitation, that he spoke with "inmates Travis Smith, Michael Sorrentino, Alexander Walker and James B. Wright." R2 12165, 12167-71. When questioned about each interview, as well as its location, Halliday likewise responded without hesitation. R2 12167-71. Halliday denied bringing newspapers into any of the interviews. R2 12167. The only detail that Halliday was unable to recall, on direct examination, was which detective was in the room with him for each of these interviews. *Id*.

On cross examination by defense counsel, Halliday's memory appeared to fail. He could not recall the number of people at the crime scene, even after being shown the police report he authored, which individually listed each person present. R2 12174.

Halliday conceded that Pearcy was convicted on November 23, 1986, and that the State had sought the death penalty, but that the jury had recommended a life sentence on November 25, 1986. R2 12180-81.

According to Halliday, he could not recall if any jailhouse witnesses[2] had come

[2] During the hearing, the court inquired into the use of the term "informant" as opposed to "witness." Dailey takes the position that the inmates in this case, James Leitner, Pablo DeJesus, and Paul Skalnik, were "textbook" jailhouse informants. *See, e.g.*, Fla. R. Crim. P. 3.220; *In re Amend. To Rule of Crim. Proc. 3.220*, 140 So. 3d 538, 539 (Fla. 2014) ("[R]ule 3.220 should be amended to include more detailed disclosure

forward in James Dailey's case prior to December 1986. R2 12182. Halliday's trial testimony from Dailey's case was read into the record, confirming that no witnesses came forward in Dailey's case until December 1986. R2 12189. The lower court took judicial notice of that testimony. R2 12190.

Ultimately, with the lower court's intervention,[3] Halliday also acknowledged that his visit to the Pinellas County Jail, the visit central to the evidentiary hearing, took place on December 4, 1986, just days after Jack Pearcy's jury recommended a life sentence. R2 12190-91, 12194.

Halliday was asked if he had gone to the jail to find witnesses. R2 12195. He stated, "That's an investigation." *Id*. He was then asked if he pulled fifteen people out of the pod. *Id*. He answered, "I don't have a specific recollection of it." *Id*. Halliday acknowledged to previously testifying that he interviewed fifteen inmates – after being confronted with that testimony. R2 12196, 12198. Halliday also acknowledged previously testifying that some inmates had refused to speak with him, again after his

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requirements with respect to informant witnesses, because informant witnesses are not currently specifically treated under the rule and they constitute the basis for many wrongful convictions."); *Guzman v. State*, 868 So. 2d 498 (Fla. 2003). *See also* Alexandra Natapoff, *Snitching: The Institutional and Communal Consequences*, 73 U. Cin. L. Rev 645 (2004); *Incentivized Informants*, Innocence Project (last visited Feb. 2018) https://www.innocenceproject.org/causes/incentivized-informants/.

[3] Court: The attorney is telling you there's a document that says it's 12/4/86. Do you have any reason to question the date?
Witness: No, I do not, Your Honor.
R2 12194.

prior testimony was read aloud. R2 12200. Although Halliday pulled nearly every inmate in Dailey's pod, not one reported that Dailey had made any statements about his case. R2 12207-08.

When Halliday was asked whether his visit to the jail "made it a well-known fact that he was looking for witnesses," he responded "I don't know whether it was a well-known fact or not." R2 12200. Halliday's trial testimony (TR1 9:618) was read into the record:

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

R2 12200.

According to Halliday, he could not so much as recall a witness by the name of DeJesus and did not know whether or not he testified against Dailey. R2 12215. Halliday claimed to remember "the name" Paul Skalnik but could not remember if Skalnik told him he met Dailey. R2 12222-23. Halliday denied knowing Skalnik well but remembered he was "a jailhouse inmate." *Id*. Halliday admitted that he worked with Skalnik on other cases, and mentioned, *sua sponte*, that Skalnik was an ex-police officer. R2 12224.

SUMMARY OF ARGUMENT

For more than thirty years, Dailey consistently has maintained his innocence. The State's case against Dailey included no physical evidence or eyewitness testimony. It

relied instead on the testimony of three jailhouse informants. Pursuant to *Jones v. State*, 709 So. 2d 512 (Fla. 1998) (*Jones III*), this Court must imagine a new trial in which Dailey might be convicted beyond a reasonable doubt based on the testimony of these informants, now that their credibility has been thoroughly discredited – so much so that the prosecutor *who tried this case* has admitted she has no good faith basis to believe that one could testify truthfully at all. When the unreliable jailhouse informant testimony is weighed against the hair evidence found in S.B.'s hand excluding Dailey, the exculpatory affidavit of Jack Pearcy that he alone killed S.B., Pearcy's confessions to Travis Smith and Juan Banda that Dailey is "innocent," Oza Shaw's corroborating testimony that Pearcy alone left with S.B. after dropping Shaw off at the phone booth – testimony corroborated by telephone records, Betty Mingus's testimony, and IRBP police reports – and Deborah North's testimony that she saw S.B. alone with only one man, not two, near the crime scene, no good faith basis exists to contend that an acquittal is not probable. The lower court erred in concluding otherwise.

ARGUMENT

ARGUMENT I: The lower court erred in denying Claim I of Dailey's successive motion that newly discovered testimonial evidence proves Dailey's actual innocence.

Under Florida and federal law, there are two requirements for relief based on newly discovered evidence. First, the asserted facts must have been unknown by the trial

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

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

barred, and did not consider [the testimony of a third witness] from a prior proceeding. *The trial court cannot consider each piece of evidence in a vacuum, but must look at the total picture of all the evidence when making its decision*.").

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

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

A. The lower court erred in denying Claim I(A) that newly discovered evidence proves Jack Pearcy alone murdered S.B.

1. Jack Pearcy's affidavit is admissible evidence.

In denying this claim, the lower court held that Pearcy's affidavit does not qualify as a third party admission of guilt and is inadmissible hearsay which does not fall

under any exception. R2 8879-80. This is error and subject to *de novo* review. *Browne v. State*, 132 So. 3d 312, 316 (Fla. 4th DCA 2014); *Powell v. State*, 99 So. 3d 570, 573 (Fla. 1st DCA 2012).

a. Jack Pearcy's affidavit is a third-party admission of guilt.

Jack Pearcy's affidavit constitutes a third-party admission of guilt under *Chambers v. Mississippi*, 410 U.S. 284 (1973), and *Holmes v. South Carolina*, 547 U.S. 319 (2006). In his affidavit, Pearcy testified, "James Dailey was not present when S.B. was killed. I alone am responsible for S.B.'s death." R2 9599-9600. This is an unambiguous admission of guilt.

All of the evidence suggests that Pearcy knowingly, willingly, and voluntarily signed the affidavit. The notary testified that Pearcy read each page of the affidavit, took his time, and used a piece of paper to cover the lines below so he could read each page one line at time. R2 12156-58. Pearcy did not ask any questions while reading the affidavit, and did not ask to make any changes. R2 12157. Once Pearcy finished reading the affidavit, he asked for a pen. *Id*. Pearcy was not under duress and appeared to understand the contents of the affidavit. R2 12158.

Neither the notary nor defense counsel threatened or coerced Pearcy to sign the affidavit, nor did they promise him anything in exchange for his signature. R2 12159. Any suggestion that Pearcy, who is thirty years older and four inches taller than both attorneys, was somehow intimidated or coerced, does not merit this Court's

consideration.[4]

The lower court misapplied the test in *Bearden v. State*, 161 So. 3d 1257 (Fla. 2015) in concluding that Pearcy's affidavit is not admissible under *Chambers*. R2 8881. The court considered four factors: (1) whether the confession or statement was made spontaneously to a close acquaintance shortly after the crime occurred; (2) whether the confession or statement is corroborated by some other evidence in the case; (3) whether the confession or statement was self-incriminatory and unquestionably against interest; and (4) whether, in the event there is any question about the truthfulness of the out-of-court confession or statement, the declarant is available for cross-examination. *Id*. However, as this Court has made clear, there is no "immutable checklist of four requirements. Instead, the primary consideration in determining admissibility is whether the statement bears sufficient indicia of reliability." *Bearden*, 161 So. 3d at 1265, n.3.

The veracity and reliability of Pearcy's affidavit was corroborated by two additional witnesses: Travis Smith and Juan Banda. The consistency of these prior statements – made spontaneously to different individuals, over many years – is additional evidence that the contents of the affidavit are not a newly invented version of events, created under duress, but rather the truth. In the affidavit, Pearcy takes full

[4] Ms. Bort testified that she is thirty years old and five-feet, three inches tall, and Ms. Shirley is twenty-eight years old and five-feet, four inches tall. R2 12158-59. In contrast, Pearcy is sixty-two years old and five-feet, eight inches tall. R2 12129-30.

responsibility for the murder, adding that James Dailey *was not present* when S.B. was killed. Similarly, in the mid-1980s, shortly after the crime occurred, Pearcy told Travis Smith, that he "committed the crime himself," and that the charge was "his charge and his alone." R2 12099. In Pearcy's first statement to Juan Banda, made in the early 1990s, Pearcy said that Dailey "was innocent of the charge he had been committed to death row for." R2 12119. In his second statement to Banda, made in 2007, Pearcy again said that Dailey was innocent. R2 12121. All of these statements stand for one basic claim: Pearcy is guilty and Dailey is not. "The State's proof at trial excluded the theory that [anyone besides Dailey and Pearcy participated in, or witnessed, the killing of S.B]. To the extent that [Pearcy's] sworn confession tended to incriminate him, it tended also to exculpate [Dailey.]." *Chambers*, 410 U.S. at 297. Lastly, as discussed below, Pearcy's affidavit was self-incriminatory and against his interest.

As a result, there was sufficient evidence to conclude that Pearcy's affidavit bears sufficient indicia of reliability to be admitted as evidence. The lower court erred in excluding Pearcy's affidavit as a third-party admission of guilt. Excluding Pearcy's affidavit also violates Dailey's right to due process. *See Bearden*, 161 So. 3d at 1264 ("[I]n *Chambers*, the United States Supreme Court concluded that the exclusion of hearsay regarding a third party's confessions to a crime violated the defendant's constitutional right to due process – the state's rules of evidence notwithstanding.").

b. Jack Pearcy's affidavit is a declaration against penal interest.

Second, Pearcy's affidavit is admissible as a declaration against penal interest. In order to satisfy this hearsay exception, the declarant must be unavailable as a witness. Since Pearcy invoked his Fifth Amendment right to remain silent (R2 12140-41), and refused to testify despite repeated orders by the lower court (R2 12141-45), he is unavailable as a witness. *See Garcia v. State*, 816 So. 2d 554, 564 (Fla. 2002) (co-defendant who invoked his Fifth Amendment right at defendant's subsequent trial was unavailable); *see also* Section 90.804(1)(b), Florida Statutes (stating that a declarant is unavailable as a witness if the declarant, "[p]ersists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so.").

Pearcy's statements are also clearly "contrary to the declarant's pecuniary or proprietary interest or [tend] to subject the declarant to liability or to render invalid a claim by the declarant against another, so that a person in the declarant's position would not have made the statement unless he or she believed it to be true." § 90.804(2)(c), Fla. Stat. (2017). Pearcy's admission that he alone committed the crime puts him in jeopardy of a perjury charge since it flatly contradicts prior sworn statements. *See* R2 9301. The State conceded as much when: (1) prior to the evidentiary hearing, the State requested Pearcy be appointed counsel to advise him as to the consequences of his testimony, a request which the lower court denied; and (2) during the evidentiary hearing, the State renewed this request, which the court again

denied. R2 12143. The lower court erred in concluding that Pearcy's affidavit is not contrary to his interests and does not expose Pearcy to any liability. R2 8880. *See also* § 837.021(2), Fla. Stat. (2017) ("Whoever, in one or more official proceedings that relate to the prosecution of a capital felony, willfully makes two or more material statements under oath which contradict each other, commits a felony of the second degree.").

Furthermore, the lower court erred in concluding that Pearcy's "potential for a perjury charge" (R2 8880) is not so significant that Pearcy would not have made the statement if it were not true. All of the evidence points to the contrary. Pearcy is eligible for parole. R2 12150. The State strongly implied before and during the evidentiary hearing that perjury charges would be forthcoming if Pearcy testified consistently with the contents of his affidavit that he alone killed S.B., and the State twice requested that Pearcy be provided independent counsel to explain this to him. Had Pearcy testified consistently with the contents of the affidavit and the State charged Pearcy with perjury in a capital case, any chance at parole would be eviscerated. The lower court's conclusion that this punishment is "not significant" lacks merit. As the United States Supreme Court made clear "life without parole . . . deprives the convict of the most basic liberties without giving hope of restoration." *Graham v. Florida*, 560 U.S. 48, 69-70 (2010). This sentence "means 'denial of hope.'" *Id*. at 70 (internal citations omitted).

Thus, Jack Pearcy's affidavit is admissible as a third-party admission of guilt under *Chambers v. Mississippi*, and is also admissible as a statement against penal interest. The lower court erred in concluding to the contrary.

2. The lower court erred in finding Travis Smith's testimony inadmissible.

The lower court held that Travis Smith's testimony is inadmissible hearsay. R2 8881. The lower court made no credibility findings.

Smith testified that he met Jack Pearcy while incarcerated at the county jail, where Pearcy told him he was Dailey's co-defendant and that "he committed the crime himself and that he did it." R2 12096-97, 12099. Pearcy said "that was his charge and his charge alone." R2 12099. These statements constitute third party admissions of guilt. Therefore, under *Chambers* and this Court's precedent, Smith's testimony is admissible as substantive evidence.

In *Chambers*, the United States Supreme Court held that a trial court erred by excluding, on hearsay grounds, the testimony of three witnesses that another person had admitted to committing the murder for which the defendant was convicted. 410 U.S. at 301-02. This Court subsequently held that a trial court erred when it excluded a witness's five out-of-court confessions to four different people because those statements were admissible as substantive evidence under *Chambers*. *Aguirre-Jarquin v. State*, 202 So. 3d 785, 793-94 (Fla. 2016). All four witnesses were allowed to testify to the out-of-court statements. *Id.* at 792. This Court found their testimony

admissible and considered it as substantive evidence when analyzing Aguirre-Jarquin's newly discovered evidence claim. *Id*. at 794.

Smith's testimony also bears on the veracity of Pearcy's newly discovered affidavit. The lower court therefore erred in failing to consider it when evaluating the weight of the other newly discovered evidence. Irrespective of whether Smith's testimony is procedurally barred, this Court has held "in considering the effect of the newly discovered evidence, we consider all of the admissible evidence that could be introduced at a new trial … a trial court *must even consider* testimony that was previously excluded as *procedurally barred* or presented in another proceeding in determining if there is a probability of an acquittal." *Swafford v. State,* 125 So. 3d 760, 775-76 (Fla. 2013). The lower court should have treated Smith's testimony as admissible evidence and evaluated it when considering Dailey's newly discovered evidence claim, and in failing to do so, erred.

3. The lower court erred in finding Juan Banda's testimony and affidavit inadmissible.

The lower court held that Juan Banda's testimony that Pearcy told him Dailey is innocent is inadmissible hearsay. R2 8881. This was error. *Chambers* leaves no room for doubt that "where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." 410 U.S. at 302. Likewise, in *Holmes*, 547 U.S. at 331, the United States Supreme Court held that the state's rules of evidence violated the "criminal

defendant's right to have 'a meaningful opportunity to present a complete defense.'" (internal citation omitted). In *Holmes*, the defendant's efforts to introduce the testimony of several witnesses that another man, Jimmy White, had either acknowledged the defendant was "innocent" *or* had actually admitted to committing the crime were initially denied based on the state's evidence code. *Id*. at 323. The Supreme Court held that due process required that the testimony be admitted.

This Court has embraced this important principle, repeatedly holding that Florida's evidence code cannot be used to bar evidence of third-party guilt. *See, e.g.*, *Bearden v. State*, 161 So. 3d 1257 (Fla. 2015) and *Aguirre-Jarquin v. State*, 202 So. 3d 785 (Fla. 2016). This Court has likewise held that third-party confessions are "properly considered in analyzing the cumulative effect of the newly discovered evidence." *Aguirre-Jarquin*, 202 So. 3d at 794.

The State's theory of the crime has always been that Dailey and Pearcy killed S.B. At no time has the State ever alleged that another person aided, abetted, or participated in the death of S.B. Therefore, Pearcy's admissions to two different people that Dailey is completely innocent of this crime necessarily implicates Pearcy. As a result, Pearcy's statements to Banda that Dailey is innocent constitute third-party admissions of guilt and are precisely the type of testimony that the United States Supreme Court has held cannot be excluded based on a state's rules of evidence. Dailey's right to present a meaningful and complete defense must not unreasonably be restricted by the

evidence code – particularly in a capital case where he has always maintained his innocence.

The State also raised a hearsay objection to Banda's affidavit. R2 12123. Because Banda's affidavit constitutes evidence of third-party guilt, it cannot be excluded as hearsay under *Chambers* and *Holmes*.

Lastly, assuming *arguendo* that Banda's testimony is not evidence of third-party guilt, Pearcy's statement to Banda is admissible as a declaration against penal interest. In order to satisfy this hearsay exception, the declarant (in this case, Jack Pearcy) must be unavailable as a witness. As described *supra*, see pp 8-9, 20, Pearcy's relentless invocation of his Fifth Amendment privilege at the evidentiary hearing, despite repeated court orders to answer (R2 12139-40), rendered him unavailable. *See Garcia v. State*, 816 So. 2d 554, 564 (Fla. 2002); *see also* § 90.804(1)(b), Florida Statutes.

Pearcy's statements are also clearly statements against interest. § 90.80(2)(c), Fla. Stat. (2017). Pearcy's admission that Dailey is innocent puts him in jeopardy of a perjury charge since it is contrary to other statements he has made under oath. *See* R2 9301. The State itself conceded the potential for liability when, in advance of the hearing and during the evidentiary hearing, the State requested that Pearcy be specially appointed counsel to advise him concerning the potential consequences of his testimony, and renewed this request during the evidentiary hearing. R2 12143. *See also supra* Claim A(1) at 20-21. Pearcy's acknowledgment of Dailey's innocence

amounts to an admission that Pearcy alone committed the crime, and as such is against Pearcy's interest.

As a result, Banda's testimony is separately admissible as a hearsay exception because Pearcy's admissions constitute statements against interest. The lower court erred in excluding this evidence.

Conclusion

The lower court erred in concluding that Dailey "failed to provide any admissible evidence to prove his claim" that Pearcy is solely responsible for S.B.'s death. R2 8882. Dailey introduced four separate substantive items of evidence to prove this claim – Jack Pearcy's affidavit, Travis Smith's testimony, Juan Banda's testimony, and Banda's affidavit. The lower court's conclusion is error and subject to *de novo* review. *See Browne v. State*, 132 So. 3d 312, 316 (Fla. 4th DCA 2014) and *Powell v. State*, 99 So. 3d 570, 573 (Fla. 1st DCA 2012).

B. The lower court erred in denying Claim I(B) that newly discovered evidence impeaches the informant testimony at Dailey's capital trial and proves that the State actively sought out snitches to testify against Dailey at trial.

1. James Wright & Michael Sorrentino's testimony is admissible.

The lower court found that James Wright and Michael Sorrentino were not newly discovered witnesses because they were known to prior postconviction counsel. R2 8883-84.

To the extent that the facts and information contained in Wright and Sorrentino's

testimony could have been discovered by prior postconviction counsel, prior postconviction counsel was ineffective and Dailey is entitled to relief under *Martinez v. Ryan*, 566 U.S. 1 (2012) and *Trevino v. Thaler*, 569 U.S. 413 (2013). Dailey could not have asserted ineffective assistance of postconviction counsel as "cause" for his failure to diligently develop his procedurally barred claims or his failure to file a timely appeal previously because he was represented by the same attorney in prior state and federal postconviction appeals. This is the type of fundamental injustice that the *Martinez* Court found compelling enough to recognize as an exception excusing a procedural default. *Martinez*, 566 U.S. at 9. *See also McQuiggin v. Perkins*, 569 U.S. 383 (2013).

Even assuming Wright and Sorrentino's testimony is procedurally barred, the lower court was still required to consider it when evaluating the weight of the other newly discovered evidence. As this Court has made clear, "in considering the effect of the newly discovered evidence, we consider all of the admissible evidence that could be introduced at a new trial … a trial court *must even consider* testimony that was previously excluded as *procedurally barred* or presented in another proceeding in determining if there is a probability of an acquittal." *Swafford v. State*, 125 So. 3d 760, 775-76 (Fla. 2013). Since Wright and Sorrentino's testimony is directly relevant to Dailey's newly discovered evidence claim, and also necessary to evaluate whether a new trial would probably result in acquittal, the lower court should have accepted it

as evidence.

Second, the lower court erroneously found that even if Wright and Sorrentino's testimony was newly discovered, their testimony was not relevant to "any material issue at trial because neither man testified that they saw any snitches who testified in this trial be called into the interview room." R2 8885. This finding is not supported by competent substantial evidence. The purpose of Wright and Sorrentino's testimony was to reveal the gravely unreliable nature of the jailhouse informant testimony introduced at Dailey's trial.

In the thirteen months between Dailey's arrest and Pearcy's conviction, not a single inmate came forward with information implicating Dailey in S.B.'s murder. TR1 9:1191. It was only after Pearcy was given a life sentence (not the death penalty urged by the State), and after Detective Halliday interviewed at least 15 inmates at the jail, specifically to "find witnesses against [Dailey]," (TR1 9:1191), that Leitner and DeJesus suddenly emerged with information allegedly implicating the one defendant against whom the State still had a chance of achieving a death sentence in this notorious case.

James Wright, Travis Smith, and Michael Sorrentino all testified that when they were questioned about Dailey's case, they were shown newspaper articles regarding Dailey's case (R2 12056-57, 12094-95, 12106-07), and that they were already familiar with the circumstances surrounding Dailey's case because it had been covered

extensively in the media. (R2 12056, 12065, 12077, 12095-96, 12105-06). Michael Sorrentino specifically noted, "had I wanted to say something or fabricate something all the tools were there to give them whatever they might be looking for." R2 12109, proffer. Smith testified that everyone knew that the State Attorney's Office "used to offer funds and stuff for people to offer information about another person's case. It was common practice back in those days." R2 12088. Witnesses Wright, Smith, and Sorrentino had absolutely nothing to gain by testifying on behalf of Dailey and were extremely credible in their reporting of the events from the jail.

By pulling everyone from the pod and making it a well-known fact that he was looking for witnesses against James Dailey, Halliday in effect chummed the waters of the Pinellas County Jail. He then got exactly what he wanted, informants who "rush[ed] to testify … like sharks to blood."[5]

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[5] H. Patrick Furman, *Wrongful Convictions and the Accuracy of the Criminal Justice System*, 32 Colo. Law. 11, 21 (2003) ("Jailhouse informants comprise the most deceitful and deceptive groups of witnesses known to frequent the courts. The more notorious the case, the greater the number of prospective informants. They rush to testify like vultures to rotting flesh or sharks to blood. They are smooth and convincing liars. Whether they will seek favors from the authorities, attention or notoriety they are in every instance completely unreliable. It will be seen how frequently they have been a major factor in the conviction of innocent people and how much they tend to corrupt the administration of justice. Usually their presence as witnesses signals the end of any hope of providing a fair trial.") (internal citations omitted). *See also* Rep't of the 1989-1990 Los Angeles Grand Jury at 10-12, 31 ("The myriad benefits and favored treatment which are potentially available to informants are compelling incentives for them to offer testimony and also a strong motivation to fabricate, when necessary, in order to provide such testimony. . . . The more sophisticated may attribute their willingness to testify . . . to other motives, such as their repugnance

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

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

The testimony of James Wright, Travis Smith, and Michael Sorrentino established that, following Halliday's visit to the jail, there was reason for inmates to believe that they could obtain some benefit by testifying against James Dailey. By Halliday's own admission at Dailey's trial, his visit to the jail made it a well-known fact that he was looking for informants to testify against Dailey.[6] It was common knowledge at the

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toward the particular crime charged . . . . Nevertheless, in the vast majority of cases it is a benefit, real or perceived, . . . that motivates the cooperation. . . . [I]nformants … have demonstrated [an] astonishing ability to discover information about crime in order to concoct a confession by another inmate.").

[6] At Dailey's capital trial, Halliday testified:

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

time that the State would offer deals in exchange for testimony. R2 12088. DeJesus and Leitner apparently saw an opportunity to help themselves, at Dailey's expense. And sure enough, both DeJesus and Leitner testified that they first obtained incriminating statements from Dailey in December – the very same month that Halliday made it known that he was looking for informants. This was also after DeJesus and Leitner had already spoken to Jack Pearcy about the case. TR1 8:1017-19 & 9:1085-86.

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

A: At that time, yes.
TR1 9:1194.

The testimony of DeJesus and Leitner, which was central to the State's case against Dailey, when considered in light of Wright and Sorrentino's testimony, is unworthy of belief. Wright and Sorrentino's testimony so "weakens the case against [the defendant] so as to give rise to a reasonable doubt as to his culpability." *Jones II*, 678 So. 2d at 315.

Third, the lower court failed to make any findings regarding whether Sorrentino's testimony was admissible evidence. At the evidentiary hearing, defense counsel proffered that Sorrentino told the detective, "I really hope you guys aren't doing something like this with my case," (R2 12108, proffer), meaning, he hoped that police were not, "bringing people in and hav[ing] them look at newspaper articles with details about the case." *Id*. Sorrentino explained that "[c]learly there were newspaper articles in front of me, had I wanted to say something or fabricate something all the tools were there to give them whatever they might be looking for." R2 12109, proffer.

This testimony is admissible evidence. A lay witness may testify about what he perceived in the form of an inference and opinion when:

> (1) the witness cannot readily, and with equal accuracy and adequacy, communicate what he or she has perceived to the trier of fact without testifying in terms of inferences or opinions and the witness's use of inferences or opinions will not mislead the trier of fact to the prejudice of the objecting party; and (2) the opinions and inferences do not require a special knowledge, skill, experience, or training.

§ 90.701(1), Fla. Stat. (2017). "Section 90.701(1) recognizes that the use of opinion and inference is necessary and helpful when the witness cannot otherwise

communicate accurately and fully what he or she perceived." 1 Erhardt's Florida Evidence 797 (2017). Additionally, Section 90.803(3), Florida Statutes, excludes from hearsay:

> a statement of the declarant's then-existing state of mind, emotion, or physical sensation, including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health, when such evidence is offered to: prove the declarant's state of mind, emotion, or physical sensation at that time or at any other time when such state is an issue in the action.

The declarant's availability is immaterial under this provision. § 90.803, Fla. Stat. (2017).

Sorrentino's testimony is therefore admissible both as lay witness opinion and as a statement of then-existing mental, emotional, or physical condition. There was no way for Sorrentino to communicate how he felt and what he perceived other than by giving his opinion. Second, the statement that he hoped officers were not doing the same thing in his case, and his testimony that anyone could fabricate a story against Dailey based upon the newspaper articles provided by the detectives, was a statement pertinent to his then-existing state of mind, namely his belief that detectives were looking for inmates to testify falsely against Dailey. Whether or not the detectives were actively, improperly soliciting testimony against Dailey, however unreliable, by showing them newspaper articles, is an essential issue that this Court must decide. The Florida Supreme Court has held that the law provides an "exception for evidence of the state of mind of the maker of the statements when such state of mind is relevant

to an issue at trial." *Brooks v. State*, 787 So. 2d 765, 770 (Fla. 2001).

As a result, this Court should accept the proffer regarding Sorrentino as evidence because it constitutes an admissible lay witness opinion and satisfies the hearsay exception permitting testimony regarding then-existing state of mind.

2. The lower court erred in concluding "that there is no reasonable probability" that Wright and Sorrentino's testimony would produce an acquittal.

The lower court misapprehended, and incorrectly applied, the *Jones* standard, concluding that Wright and Sorrentino's testimony is "weak such that there is no reasonable probability that it would produce an acquittal upon retrial" without weighing the totality of the evidence in Dailey's case. R2 8885. The court erred in weighing Wright and Sorrentino's evidence in a vacuum.

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

The lower court did not conduct the required cumulative analysis. Instead, it

reviewed Wright and Sorrentino's testimony in isolation, completely apart from the other corroborating evidence, and concluded that it would not produce an acquittal at retrial. This is error and subject to *de novo* review by this Court.

3. Travis Smith's testimony is admissible evidence.

The lower court failed to make any findings regarding Travis Smith's testimony as it relates to Claim I(B). Smith testified that while he was at the county jail, at least two police officers pulled him from his cell, interviewed him about Dailey's case, and showed him newspaper articles regarding the case. R2 12094-96. The inevitable conclusion from this testimony is that the officers were seeking inmates to testify against Dailey, even if that meant providing those inmates with the details required to make such testimony convincing.

Additionally, Smith testified that he knew Pablo DeJesus and James Leitner, but that he never witnessed Dailey discuss his case with either of the two. R2 12078-79, 12081. Smith testified that he did observe DeJesus and Leitner discussing Dailey's case: "They were trying to collaborate a story together as to what they were going to say when they talked to the State Attorney." R2 12087, 12093. Smith's eyewitness account supports the conclusion that DeJesus and Leitner's testimony – testimony critical to Dailey's conviction – was fabricated for the purpose of receiving consideration in their own cases, which the State Attorney's Office later provided by way of plea deals. TR1 8:1014; 9:1082.

Smith testified that the local news aired stories about Dailey's case "quite a few times," even showing pictures of Indian Rocks Beach, the water, and rocks. R2 12078, 12095-96. Clearly, the three jailhouse informants could have obtained the details of the crime from newspapers or television; Dailey was not the only possible source of this information.[7] Smith's testimony powerfully undermines the jailhouse informant testimony central to Dailey's conviction and as such is critical to Dailey's newly discovered evidence claim. *See* R2 19.

The lower court erred in failing to address Smith's testimony as it relates to the informant testimony at trial. His testimony was newly discovered and the lower court was required to weigh and evaluate it under the *Jones* standard. Since the record is devoid of any factual or legal findings regarding Smith's testimony, the lower court decision cannot be based on competent and substantial evidence.

The State filed a motion in limine to exclude the testimony of Travis Smith on December 29, 2017. R2 8035. The State urged that the lower court had only granted an evidentiary hearing as to the affidavits of Michael Sorrentino and James Wright for Claim I(B) and that Smith's testimony was not relevant to Claim I(A). *Id.* The State made the same argument at the evidentiary hearing. R2 12049-50. However, Smith

[7] "No prosecution should occur based solely upon uncorroborated jailhouse informant testimony." *Achieving Justice: Freeing the Innocent, Convicting the Guilty - Report of the ABA Criminal Justice Section's Ad Hoc Innocence Committee to Ensure the Integrity of the Criminal Process,* 37 Sw. U. L. Rev. 763, 916 (2008).

was properly and timely disclosed as a witness to the State in July 2017, along with an affidavit of his proposed testimony. R2 891-98. The substance of Smith's testimony was also argued at the case management conference, specifically regarding Claim I(B). R2 11981-82. The State was therefore on notice as to the substance and relevance of Smith's testimony for at least six months.

At the evidentiary hearing, the State also objected to Smith's testimony on the grounds that it was not newly discovered evidence. R2 12073. To the extent that the facts and information contained in Smith's testimony could have been discovered by prior postconviction counsel, prior postconviction counsel was ineffective and Dailey is entitled to relief under *Martinez v. Ryan*, 566 U.S. 1 (2012) and *Trevino v. Thaler*, 569 U.S. 413 (2013). Irrespective of whether Smith's testimony is procedurally barred, it must be considered when evaluating the weight of the other newly discovered evidence. *See* full discussion *supra* at page 26-27. Since Smith's testimony is directly relevant to Dailey's newly discovered evidence claim, and must be considered in determining whether a new trial probably would result in an acquittal, Smith's testimony should have been admitted as evidence. The lower court's failure to address his testimony was error.

C. The lower court erred in denying an evidentiary hearing on Claim I(C) that newly discovered evidence demonstrates that despite his testimony to the contrary, Paul Skalnik received a deal, and his reputation in the community discredits his testimony.

The lower court concluded that evidence related to Paul Skalnik's plea deal and

his reputation for dishonesty "could have been discovered earlier using due diligence." R2 8887. The lower court incorrectly held that the State objected to attorney Richard Watts's testimony because the "lack of an affidavit from Mr. Watts prevents him from being treated as a newly discovered witness." R2 8886.

First, the State objected to the defense arguing the substance of Watts's testimony at the case management conference because, allegedly, the substance of his testimony was not included in the successive postconviction motion – not because there was no affidavit filed. R2 11987. As pointed out by defense counsel, the substance of Watts's testimony was in fact discussed in Dailey's successive motion. R2 11988. The State then conceded its error. *Id*. Nothing in the rules of criminal procedure requires that an affidavit be filed with a newly discovered evidence claim. *See* Florida Rule of Criminal Procedure 3.851(e)(2)(c).

Further, as argued at the case management conference, Richard Watts is a newly discovered witness and was unknown to Dailey or his counsel prior to 2017. R2 11990. The lower court erred in prohibiting Dailey from calling him as a witness at the evidentiary hearing.

Second, to the extent that the facts and information regarding Skalnik's plea deal and reputation for dishonesty could have been discovered earlier by prior postconviction counsel, prior postconviction counsel was ineffective and Dailey is entitled to relief under *Martinez v. Ryan*, 566 U.S. 1 (2012) and *Trevino v. Thaler*, 569

U.S. 413 (2013). *See also McQuiggin v. Perkins*, 569 U.S. 383 (2013). Even assuming the evidence is procedurally barred, the lower court was still required to consider it when evaluating the weight of the other newly discovered evidence. *See* full discussion *supra* at page 26-27. The evidence related to Skalnik's plea deal and reputation for dishonesty is directly relevant to Claim I(B), and this evidence is necessary in order to evaluate whether a new trial probably would result in an acquittal.

Lastly, because the lower court denied an evidentiary hearing on Claim I(C), this Court must accept as true the defendant's factual allegations, to the extent they are not refuted by the record. *Nordelo v. State*, 93 So. 3d 178, 186 (Fla. 2012). The factual allegations regarding Skalnik's reputation for dishonesty, both within the Pinellas County Jail and the Arizona Department of Corrections, the undisclosed and lenient plea deals he received in exchange for his trial testimony, along with the testimony of attorney Richard Watts, must therefore be accepted as true. This is precisely the kind of evidence this Court has found relevant to the assessment of jailhouse informant testimony, in light of the fact that "informant witnesses . . . constitute the basis for many wrongful convictions." *In re Amend. To Rule of Crim. Proc. 3.220,* 140 So. 3d 538, 539 (Fla. 2014). This evidence should have been considered in weighing the probability of an acquittal with respect to other newly discovered evidence. The lower court erred in failing to consider it. "A postconviction court must even consider

testimony that was previously excluded as procedurally barred or presented in another postconviction proceeding in determining if there is a probability of an acquittal." *Hildwin v. State*, 141 So. 3d 1178, 1184 (Fla. 2014). *See also Swafford v. State*, 125 So. 3d 760, 776 (Fla. 2013). In this capital case, where the defendant has always maintained his innocence, the refusal to consider evidence powerfully undermining the jailhouse informant testimony essential to his conviction and death sentence, cannot withstand scrutiny.

D. The lower court erred in denying an evidentiary hearing on Claim I(D) that newly discovered evidence proves Dailey was not with Pearcy when S.B. was killed.

Current postconviction counsel uncovered numerous police reports authored by Detective Terry Buchaus of the Indian Rocks Beach Police ("IRBP"), who co-investigated the death of S.B. with the Pinellas County Sheriff's Office. According to the IRBP reports, Oza Shaw told the investigating officers that Pearcy, Dailey, Gayle Bailey, and S.B. returned to the apartment after going out. Pearcy and S.B. then gave Shaw a ride to a telephone booth; Dailey was not with them. When Shaw returned home, Gayle was in the living room. Shaw fell asleep but was awakened when Pearcy returned home, alone, *without S.B.* Pearcy went into Dailey's room and the two then left the house. This contemporaneous version of events badly undermines the State's theory of the case and was never heard by Dailey's jury.

The lower court erroneously concluded that these police reports were previously

raised "in the context of a *Brady*[8] claim, which counsel abandoned at the evidentiary hearing on Defendant's initial postconviction motion." R2 8888. This is flatly incorrect and belied by the record.

Dailey's initial successive motion included a *different Brady* claim regarding the State's failure to turn over *handwritten notes* taken by IRBP Detective *Charles Flesher*. PC ROA 1:60-62. Those notes pertain to witness interviews from Hank's Seabreeze Bar. *Id*. at 60. In contrast, the substance of this claim involves *typed police reports* written by *Detective Terry Buchaus*, who was the lead investigator in Dailey's case. The two claims (typed Buchaus reports/handwritten Fletcher notes) are entirely distinct. In conflating them to deny an evidentiary hearing, the lower court clearly erred.

To the extent that these police reports could have been discovered previously by prior postconviction counsel, prior postconviction counsel was ineffective and Dailey is entitled to relief under *Martinez v. Ryan*, 566 U.S. 1 (2012) and *Trevino v. Thaler*, 569 U.S. 413 (2013). Regardless of whether this evidence is procedurally barred, it is still relevant when evaluating the weight of the other newly discovered evidence in this case.

E. The lower court erred in failing to conduct a cumulative analysis of Dailey's newly discovered evidence of innocence claim.

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

The lower court erred by concluding that "a cumulative analysis does not seem necessary" after evaluating only Claims I(A) and (B). First, the lower court was required to conduct an analysis after evaluating *all* of the newly discovered evidence – including subparts (C) and (D) – not just the first two subclaims. Second, in determining whether the newly discovered evidence compels a new trial, the lower court was required to "consider all newly discovered evidence which would be admissible," "evaluat[ing] the weight of both the newly discovered evidence and the evidence which was introduced at the trial." *Jones III*, 709 So. 2d at 521 (citations omitted); *Swafford*, 125 So. 3d at 775-76. The lower court was also required to conduct a cumulative analysis of all the evidence from both the trial and prior postconviction proceedings so as to consider the "total picture" including "all the circumstances of the case." *Swafford* at 776 (citations omitted); *see also Hildwin v. State*, 141 So. 3d at 1184. All of the facts and circumstances of the case include evidence that was previously excluded as procedurally barred. *Id*.

Had the lower court looked at the total picture of Dailey's case, including the exculpatory testimony of Jack Pearcy, Travis Smith, and Juan Banda, taken together with the exculpatory hair evidence, it would have found that it differs dramatically from the picture presented to Dailey's jury in 1987. When the raft of exculpatory evidence is considered alongside the evidence that the jailhouse informant testimony in Dailey's case – the only actual evidence of guilt – was profoundly unreliable, there

is unquestionably a probability of acquittal under the *Jones* and *Swafford* standards. The lower court's failure to consider the totality of the evidence was error. A full assessment of the totality of the evidence follows.

Jack Pearcy's Admissions

Jack Pearcy's affidavit, coupled with the exculpatory testimony of Travis Smith and Juan Banda establishes, in and of itself, reasonable doubt.

Jack Pearcy killing S.B. alone also fits with a review of the evidence. First, prior to S.B.'s murder, Pearcy had a significant history of violence, specifically, violence against women. R2 9753-9923. Pearcy's Kansas criminal court file includes arrests for battery, terroristic threats, rape and assault. Detective Joseph Pruett, a detective in Olathe, Kansas who interviewed Pearcy following S.B.'s murder, and who was very familiar with his criminal history, R2 11652-53, testified that Pearcy previously was arrested for sexually assaulting his former girlfriend, the same victim of both of Pearcy's terroristic threat charges. *Id*. at 11953, 11656-58. Furthermore, prior to S.B.'s murder, Pearcy had been indicted in another capital case, this one involving a Missouri murder-for-hire case; Pearcy evaded prosecution by becoming a State's witness against the man who hired him. *See State v. Stith*, 660 S.W.2d 419 (Mo. Ct. App. 1983) and *State v. Danforth*, 654 S.W.2d 912 (Mo. Ct. App. 1983).

Second, the victim and Pearcy knew each other prior to the night of the murder. R2 11862-63. Pearcy acknowledged that he had known S.B. for a couple of months

and had been to her house before. *Id*. at 11863; State's Exhibit No. 2 at 31:10-23. S.B.'s father had warned Pearcy that Pearcy was too old to be hanging around his daughter. R2 11863. Gayle Bailey, Pearcy's girlfriend, testified that she and Pearcy had known S.B. because S.B. and her father had sold them marijuana. R2 305 ("that was where we got our smoke from, was from [S.B.] and her father"). Indeed, at Pearcy's trial, the State emphasized during its closing argument that Pearcy had known S.B. prior to the murder, and that was the reason she trusted him enough to get in the car in the first place. R2 11505. The evidence also establishes that it was Pearcy who was hitting on S.B. and her sister all night – not Dailey. R2 11859.

Third, it was Jack Pearcy who had the means, motive, and opportunity to kill S.B. He was the one familiar with the secluded location where S.B. was killed; he used to fish there. R2 9314-15. Pearcy even drew a diagram of the location for the State Attorney during his sworn statement which prosecutors attached as Exhibit No. 1. Pearcy also owned a roofing knife consistent with the stab wounds. R2 10437-38. Gayle Bailey testified in her deposition that Pearcy kept this knife in a sheath in the car. R2 296-97. Pearcy told detectives that the knife, along with its sheath, had been thrown in the Walsingham Reservoir, where the sheath was ultimately recovered. R2 11803, 11809-11. Though Pearcy claimed that it was Dailey who threw the knife and sheath into the reservoir, Detective Buchaus, who was present with Pearcy at the reservoir when Pearcy showed law enforcement how the disposal of the weapon

supposedly occurred, testified that "from his location, from the way the knife was thrown, Pearcy could not have seen Dailey do it . . . it just wouldn't be right." *Id.* at 11804. In other words, Pearcy owned the knife, had access to it in the car he was driving *with S.B.* on the night in question, and was the only one who knew what happened to the knife following the murder. Pearcy's story about how Dailey supposedly disposed of it, moreover, was deemed not credible by law enforcement. R2 11804.

Pearcy also had a motive to kill S.B. while he was alone with her. All of the evidence suggests that Pearcy wanted to have sex with S.B. and murdered her in a rage because she either resisted his advances or because he did not want to face the consequences of having sex with a fourteen-year-old: the legal implications; the fury of his pregnant, jealous girlfriend; the anger of S.B.'s father, who had already warned him to stay away from his daughter.

On the night of the murder, Pearcy brought three underage females, including S.B., to the home he shared with his pregnant girlfriend (Gayle Bailey) and smoked marijuana with them. TR1 8:955. Pearcy then took S.B. to a bar – instructing Gayle to loan S.B. her Kansas I.D. so S.B. would be allowed into the bar (TR1 8:967) – then danced with S.B. in front of Gayle. TR1 8:380-81. This series of events made Gayle irate (R2 293), giving Pearcy a clear reason to take S.B. someplace other than his home to satisfy his sexual urges. The State itself made this argument in its sentencing

memorandum[9] in Pearcy's case:

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

R2 10298. The State repeated this argument at the guilt phase of Pearcy's capital trial:

> James Dailey had his own room. He had a door that shut. He could have brought that girl back to his own room. Then why in the world would he take her to some deserted point under a bridge?

R2 11582. As the State urged Pearcy's jury, it was Pearcy, and Pearcy alone, who had reason to take her to an isolated spot to have his way with her.

Finally, Jack Pearcy had the opportunity to murder S.B.; two separate witnesses testified to seeing Pearcy alone with S.B. on the night of the murder. Oza Shaw's original statement to law enforcement was unambiguous: James Dailey did *not* leave the house with Pearcy and S.B. According to the IRBP reports, Oza Shaw stated that Pearcy and S.B. gave Shaw a ride to the telephone booth to call his girlfriend and wife in Kansas. Shaw definitively stated that Dailey was not with them. Halliday also confirmed that Shaw said only Pearcy and S.B. went down to the phone booth with him. TR1 3:320. This testimony is further corroborated by the Southwestern Bell

[9] Counsel for Dailey is forced to rely on the sentencing memorandum because Pearcy's penalty phase hearing was never transcribed. Dailey has never had an opportunity to review it – despite the fact that there is evidence that the State urged inconsistent theories regarding participation, motive, and culpability when it urged Pearcy's jury to recommend death.

Telephone records, which confirm a call was placed at 12:15 a.m. from St. Petersburg, Florida to Olathe, Kansas on May 6, 1985 – the night S.B. was killed. *See* R2 10290. Betty Mingus, Shaw's girlfriend, also corroborated this phone conversation in her deposition. R2 11904. She testified that while speaking to Shaw on the phone, she heard honking. *Id*. Mingus asked what the noise was and Shaw responded that it was "Jack and a girl waiting for me to get off the phone." *Id*. She heard Shaw tell them to "go on" without him while he finished his conversation with Mingus. *Id*. Shaw then walked home.

Deborah Lynn North, an employee of Hank's Seabreeze Bar and an acquaintance of S.B., similarly placed S.B. alone with Pearcy that night. North testified that sometime after midnight (presumably after dropping Shaw off at the telephone booth), S.B. entered Hank's looking for someone to help get her car out of the sand. R2 11712. North followed S.B. outside and saw the car stuck in the sand. *Id*. North testified that S.B. was with one man, not two. *Id*.

Pearcy's own sworn statement, made shortly after the crime, confirms that he was the man with S.B. *See* R2 9301. Pearcy testified that he and S.B. went – *without* Dailey – to "some bar called Hank's" and "the car was stuck when we went back out." *Id*. R2 9312-13. *See also* State's Exhibit No. 2 at 36:50-39:00. He said that it was hard for him to get the car out by himself, and he tried to get some help but people laughed at him. R2 11146. Pearcy later confirmed this sequence of events in another sworn

statement in 1993, noting that he was alone with S.B. for approximately one and a half hours. R2 9621.

Furthermore, in Shaw's initial statement to police – on May 22, 1985, just seventeen days after the murder, when events were freshest in Shaw's mind – he stated that, after speaking on the phone to his girlfriend and then his wife, he returned to the house where he "layed [sic] back on the couch and talked to Gayle." R2 91-95. Shaw stated that "sometime between, Jack [Pearcy] came back to the house and picked up Jimmy [Dailey], but [Shaw] didn't see the girl with them." R2 94. In a sworn statement Pearcy made in 1993, he confirmed Shaw's version of events, saying he returned to the house an hour to ninety minutes after departing with S.B. and Shaw (and depositing Shaw at the telephone booth), that "*[S.B.] was no longer with me*," and that he went into Dailey's bedroom, woke him up, and asked him to go with him to "smoke a couple of joints, drink a beer or something." R2 9621-22. The obvious implication is that S.B. was already dead.

Thus, all of the evidence indicates that Pearcy drove S.B. to numerous bars before taking her to his favorite secluded fishing spot where he ultimately killed her with his roofing knife. Had Dailey wanted to have sex with this intoxicated victim, as the State itself repeatedly reminded jurors in its case against Jack Pearcy, he easily could have taken her into his private bedroom and closed the door, since she was already in the house. Nor does it make sense that Pearcy would have driven back home from Hank's

to pick up Dailey before driving back to the beach to have sex with S.B., when Pearcy was already alone with her. What does make sense is that Pearcy intentionally left without Dailey because he wanted to have sex with S.B. out of sight from his irate, pregnant girlfriend, and that he then murdered her either because she resisted him or because he did not want anyone (Gayle, S.B.'s father, law enforcement) to learn of the encounter.

A single perpetrator also fits with the evidence at the crime scene, namely that S.B.'s body showed signs of being dragged. R2 11874-75. In her deposition, the medical examiner testified:

> There were multiple drag marks on her back and it appeared that she had been dragged on her back, at least over the rocks, presumably over the grass and the rocks to the water, and there was a path through the grass where it was pushed down that you could see what appeared to be the path through which she was dragged . . . looking at the drag marks I would say she was being dragged by the feet . . .

Id. at 11874-75; 11888. Had both Dailey and Pearcy participated in the murder, they could have carried the body without dragging it. The drag marks suggest that, to the contrary, one perpetrator dragged S.B. to the water by her feet.

Finally, Pearcy's actions after the murder, together with his statement to law enforcement, demonstrate consciousness of guilt. After the murder, Pearcy told everyone to pack because they were all leaving for Miami. R2 11379. Pearcy registered at a motel under a false name – John Yates. R2 11155, 11524, 11787. Dailey registered under his true name. TR1 3:292-93 & 7:914; R2 10887. While in Miami,

Pearcy and Gayle bought tickets to the Bahamas on the Steamship Travel Company. TR1 3:302-03.

Betty Mingus stayed with Gayle Bailey and Pearcy for a short time in Miami. TR1 3:313. She reported that Pearcy "seemed weird" and that "Jack seemed to be real afraid of something. He seemed to be very nervous." *Id.*

After his arrest, Pearcy was given a polygraph examination by the Pinellas County Sheriff's Office. TR1 3:331. During the polygraph, Pearcy claimed that he had little to no role in the killing of S.B. TR1 8:331-32. The results of the polygraph showed deception. *Id*. When confronted with the results, Pearcy asked for an attorney or a priest. TR1 8:335. Pearcy also admitted to disposing of the shoes he had worn on the night of the murder – in Colorado – prior to being arrested. TR1 3:312; R2 11137, 11156.

This evidence corroborates Dailey's version of events from that night. Dailey testified at a prior postconviction evidentiary hearing on March 19, 2003. PC ROA 3:297-333. Dailey testified he was living with Jack Pearcy and Gayle Bailey in Seminole, FL in May 1985. *Id*. at 297-99. Pearcy and Gayle shared a room, and Dailey had his own bedroom. *Id*. at 299. Shaw was staying with them. *Id*. Dailey, Pearcy, Gayle, and S.B. went to a bar. *Id*. at 304-05. Pearcy danced with S.B., which infuriated Gayle. *Id*. at 305. Afterwards, they went home. *Id*. at 306. Gayle went into the bathroom, and Pearcy, S.B. and Shaw left to take Shaw to the phone booth. *Id*. Dailey

went into his room. *Id*. Dailey was later awakened by Pearcy who told Dailey to get dressed because he needed to talk to him. *Id*. at 307. Pearcy and Dailey drove to the Bellaire Causeway and pulled off on the lagoon side of the bridge. *Id*. at 308. Once there, Pearcy told Dailey that Gayle wanted Dailey gone so she could turn his bedroom into a nursery for the baby. *Id*. at 308-09. During the conversation, the two drank beer and played Frisbee. *Id.* At one point, the Frisbee went into the water and Dailey went out to get it. *Id.* Pearcy confirmed that he returned home alone, picked up Dailey, drove to the Bellaire Causeway to play Frisbee with Dailey, and that Dailey went into the water to retrieve the Frisbee. R2 9624.

This explains why Gayle and Shaw noticed Dailey's pants were wet. TR1 8:960, 998. Though neither Gayle nor Shaw specifically noticed whether Pearcy's clothes were wet, this is reasonable because Pearcy was wearing a black shirt and black pants. R2 11376. In contrast, Dailey had on jeans. TR1 8:960. Pearcy's all-black outfit would likewise explain why no one noticed whether or not Pearcy had any blood on him or on his clothes.

Pearcy's initial statements to law enforcement, in which he claimed that Dailey was responsible for S.B.'s death, were nothing more than self-serving explanations and ill-disguised attempts to shift the blame from himself to Dailey. *See, e.g.*, TR1 3:331 (Halliday testified that Pearcy's statements basically consisted of "putting if off on Dailey."). In his 1993 sworn statement, Pearcy admitted when he told the police

that S.B. was in the car when he returned to the house to pick up Dailey, that it was nothing more than:

> self-serving statement(s) to exonerate myself … At that time, Jim wasn't even in custody. I was in custody and they were going to charge me and I was just trying to get around it, that's all, lay the blame somewhere else.

R2 9625.

This Court must consider the newly discovered evidence of Pearcy's affidavit and his confessions to Juan Banda and Travis Smith, taken together with the evidence discussed above and the other evidence that would be admissible at a retrial, in analyzing the probability of a present-day conviction and death sentence by a unanimous jury. The State did not have a scintilla of physical evidence implicating Dailey. In fact, the only physical evidence – the hair found in the victim's hand – conclusively *excluded* Dailey. Taken together, the confession of Jack Pearcy, coupled with the exculpatory testimony of Travis Smith, Juan Banda, Oza Shaw, Betty Mingus, and Deborah North, would almost certainly produce an acquittal on retrial. All of this testimony supports the proposition that Dailey is innocent.

Unreliable Jailhouse Informant Testimony

Though Dailey was arrested in November 1986, no one came forward with information against him until December 1987. Not coincidentally, the sudden emergence of jailhouse informants was preceded by Halliday's interrogation of all the inmates who shared Dailey's pod. The timing of the interviews – one week after the

State failed to secure the death penalty against Jack Pearcy – coupled with the fact that Halliday improperly and conspicuously displayed, to his interview subjects, news articles regarding Dailey's case (R2 12056-57, 12066, 12095-96, 12106), made it abundantly clear that the State would be highly receptive to any inmate who wanted to come forward with "information" helpful to the State. The strong implication was that the State would not interrogate too deeply the source of the supposed "information" (as Michael Sorrentino testified, "had I wanted to . . . fabricate something all the tools were right there to give them whatever they might be looking for"). R2 12109 (proffer).

Within a few days of Halliday's visit to the jail, DeJesus and Leitner came forward saying that Dailey had confessed to them, their stories vague enough that they could not be corroborated. Nevertheless, at Dailey's trial, DeJesus and Leitner were held up as models of moral authority by the State and later rewarded with lenient sentences for their own pending crimes. TR1 8:1014; TR1 9:1082; R2 9899-9955.

In the absence of any physical or forensic evidence implicating Dailey, Leitner and DeJesus's testimony was critical but completely untrustworthy. First, the testimony of Sorrentino, Wright, and Smith established that the details of Dailey's case were widely known throughout the jail due to the extensive media coverage surrounding it. R2 12056, 12065, 12077, 12095-96, 12105-06. Second, the fact that Halliday directly exposed inmates to news articles about the murder, as attested to by Sorrentino,

Wright, and Smith, meant that inmates had additional opportunity to learn details of the crime. R2 12056-57, 12094-96, 12106-07. Third, Leitner and DeJesus both had a motive to lie: they were hoping for leniency in their own cases, which they received. Fourth, Leitner and DeJesus's claims had no independent indicia of reliability. And, finally, fifth, Travis Smith, who, thirty years after Dailey's trial had absolutely no incentive to lie about the events surrounding it, testified that he personally witnessed DeJesus and Leitner collaborating to invent a narrative that would help the State with Dailey's case – and concomitantly benefit themselves. R2 12082, 12087, 12093.

John Halliday's testimony on this issue at the recent evidentiary hearing is not credible. At the hearing, Halliday was able to recall details of this long-ago case on direct examination. However, on cross examination by defense counsel, Halliday's ability to recall facts about the case suddenly seemed substantially impaired. Moreover, his memory was incapable of being refreshed, even as to core facts about the investigation, and even when presented with documents he had authored setting forth those facts.[10] His selective memory undermines his entire recent testimony, and,

[10] The second question Halliday was asked by defense counsel was whether "there were nearly a dozen people [at the scene] by the time [he] arrived." R2 12172. Halliday indicated that he could not recall. After being shown a copy of his police report, which listed twelve individuals present, Halliday testified that, "[i]t looks like six people that are police." *Id*. Even after the court intervened, Halliday resisted giving a direct response to this straightforward question:

> The Court: Detective, just read over your police report, and then after the question that's been asked, does that assist you in refreshing your recollection.
> The Witness: Yes. It looks like six people that are the police.

in particular, renders not credible his testimony that he did not bring newspaper articles to the jail or show them to inmates.

On direct examination, when Halliday was asked whether he had interviewed inmates at the Pinellas County Jail during the course of his investigation of James Dailey, he responded that he had. R2 12164. He was able to recall specifically where he had interviewed these inmates (in the Detention Investigation Unit), and able to describe, in detail, where this room was located in the jail. *Id*. He also specifically recalled speaking individually to inmates Travis Smith, James Wright, and Michael Sorrentino, individuals he met a single time some thirty years ago. R2 12166. He was able to recall that when he interviewed each of these inmates, he did not bring any newspapers with him or show any of them any articles. R2 12168-70. When questioned on direct examination, at no time did Halliday indicate that he could not recall, or reference the length of time between the investigation and the present-day hearing.

However, when cross examination began, Halliday's demeanor and ability to recall

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The Court: So the answer is it does help you refresh your recollection?
The Witness: Yes.
The Court: All right.
By [counsel for Dailey]:
Q: Your recollection is refreshed, and you would agree with me there were nearly a dozen people there in total.
A: Yeah, but not police.
R2 12174.

shifted abruptly. He claimed not to be able to recall whether any jailhouse inmates had come forward with information about Dailey prior to his December 4, 1986, visit to the jail, saying defensively "[i]t [has] been 30 years." R2 12182, 12184.[11] Though Halliday was able to recall, on direct examination, that he had interviewed Smith, Wright, and Sorrentino specifically, on cross examination, he could not recall how many inmates he had interviewed in total. R2 12195 ("I don't have a specific recollection of it"). When shown his previous testimony stating he had interviewed fifteen inmates, Halliday responded grudgingly, "If the paperwork says I did, I did." R2 12198. Rather than respond directly to defense counsel's questions about the nature of these interviews, Halliday attempted to deflect, taking issue with the phrasing of defense counsel's questions. R2 12201 ("I didn't *pull* anybody out of a pod . . . People were brought to me"). Halliday claimed not to recall whether any of the inmates he interviewed made any statements incriminating Dailey. R2 12202 ("I

[11] In Halliday's trial testimony in this matter, he stated:

Q: Now as – nothing had come forward until late 1986, is that correct?
A: Yes.
Q: From the time of Dailey's arrest in November of 1985, until the end of December of 1986, 13 months later; is that correct?
A: Are we talking no one came forward? I don't quite understand.
Q: You had been over to the jail to go through the jail to try to find witnesses against him?
A: Yes, I did.
Q: And there were none, were they?
A: No.

TR1 9:1191.

don't recall that at this time."). When presented with his pre-trial deposition, in which he testified that *none* of the inmates he interviewed had implicated Dailey, Halliday again responded with reluctance, "[I]f it's in the testimony, I assume I said it." R2 12208.

Halliday also denied knowing the State's star witness Paul Skalnik well, and only after being pressed by defense counsel acknowledged having worked with him on other cases. R2 12223-24. Halliday denied being familiar with Skalnik's criminal history, (R2 12224) ("Not fully, no. I don't recall"), though the record shows that he had, in the past, forcefully advocated for Skalnik's release with the Florida Parole and Probation Commission, both in writing and by way of telephone calls.[12]

Curiously, the *only* facts about the case that Halliday seemed capable of remembering clearly were the interviews of James Wright, Travis Smith, Michael Sorrentino, and Travis Walker, individuals he met a single time some thirty years ago. Halliday's seemingly selective memory significantly undermines his credibility, and

[12] In November 1984, Halliday wrote the Florida Parole Commission seeking Skalnik's release from Arizona custody. *See* R2 84-87 ("*I have never done this for an inmate during my ten (10) years in law enforcement*. . . . It is at this time I feel he is truly sincere in that he has learned his lesson. Nonetheless he has spent quite a considerable time in prison for the nonviolent crime committed."). Halliday also called the Florida Parole Commission asking for Skalnik to be released. *Id*. ("Mr. Halliday would like the Commission to know the subject has been of great assistance to the Sheriff's Office in that he testified in 33 felony cases and as a result of his testimony 5 people were sent to death row. He wanted the Commission to know of his interest in the subject and should they have any questions, please call him.").

this Court should not give credence to his assertion that he did not, in fact, bring or show newspaper articles regarding the Dailey case to inmates during the course of his investigation.

Paul Skalnik was the third jailhouse informant called by the State to testify at Dailey's capital trial. TR1 9:1107-28, 1145-64. Skalnik's testimony was both devastating and inflammatory: he testified that Dailey had told him "the young girl kept staring at him, screaming and would not die." *Id*. at 1115-16.

The timing of Dailey's alleged confession to Paul Skalnik, coupled with the recent testimony of James Wright, Travis Smith, and Michael Sorrentino, completely undermines its credibility. Skalnik testified that, prior to ever speaking to Dailey, he had reached out to Detective Halliday in order to offer information against Jack Pearcy. TR1 9:1112, 1146. Halliday told Skalnik his information against Pearcy was "of no use" because Pearcy had already been convicted. *Id*. at 1190. However, as Wright, Smith, Sorrentino, and even Halliday testified, it was a "well-known fact" that, after Pearcy's conviction and sentencing, Halliday was still looking for testimony against Dailey. *Id*. at 618. It was only *after* Halliday had told Skalnik that his information against Pearcy was worthless, and *after* Halliday had pulled more than a dozen inmates from Dailey's pod, openly seeking information against him, that Dailey allegedly confessed to Skalnik – perfect timing.

The supposed circumstances surrounding Dailey's alleged confession to Skalnik

also undermine its credibility. Skalnik claimed Dailey made incriminating statements while standing at the bars of his cell, as Skalnik passed by on his way to recreation. *Id*. at 1115. *See also* R2 8208. It strains credulity to think that Dailey would casually mention phrases like "the young girl kept staring at [me], screaming and would not die"[13] in the course of a fleeting, public interaction with an inmate with whom Dailey was barely familiar. Additionally, Skalnik himself acknowledged that he was in an isolation cell. *Id*. at 1115. Dailey testified at his postconviction proceeding that he was aware Skalnik was in isolation, that he knew inmates were not supposed to talk to inmates in isolation, and that he was further aware that Skalnik was an ex-police officer and "a snitch." PC ROA 3:324-25. In other words, Skalnik was the *last* person Dailey would to speak about his case. Finally, Dailey testified that by the time Skalnik claimed this supposed confession was made (April or May 1987), Dailey was already aware that James Leitner and Pablo DeJesus were testifying against him. Given that Dailey knew that two inmates already claimed to have evidence against him, it is even more improbable that Dailey would have had any kind of conversation about his case with an inmate with whom he had no relationship – and of whose reputation he was aware, particularly the drive-by confession described by Skalnik.

Skalnik has made a career out of conning vulnerable victims and has been

[13] Skalnik testified that these were indeed the words Dailey used during one of their brief interactions. TR1 9:1115.

convicted at least twenty-five times of crimes of dishonesty. Skalnik's adult history of one scam after the next started in 1976 with his first conviction of grand larceny by fraud and obtaining property by worthless check.[14] Over the course of the past forty years, Skalnik has pled guilty to count after count of grand larceny,[15] misdemeanor theft,[16] forgery,[17] and passing bad checks.[18] In addition, he has been charged with bigamy,[19] and convicted of the unauthorized practice of law.[20] He also pled guilty to multiple counts of violation of probation,[21] bail jumping,[22] failure to appear,[23] possession of a firearm as a felon,[24] and failure to register as a sex offender.[25] As these convictions show, he consistently relied on dissembling and deception for his own ends, and his word that he would appear in court when called, or adhere to the terms of his probation, like his word that he was single or a lawyer or had a one-of-a-kind business opportunity, was meaningless.

Skalnik's propensity to seek out and exploit vulnerable victims extended beyond

[14] *See* R2 10017.
[15] *See* R2 10017-21; 9955-10016; 10229-59.
[16] *See* R2 10022-32; 10220-28; 10229-59.
[17] *See* R2 10229-259.
[18] *See* R2 10017-21 and 10229-59.
[19] *See* R2 10033-10219.
[20] *See* R2 10229-59.
[21] *See* R2 9955-10016.
[22] *See* R2 10220-28.
[23] *See* R2 9955-10016.
[24] *See* R2 10260-67.
[25] *See* R2 10229-59; 10260-67.

financial cons to the sexual assault of children. In 1982, he was charged with lewd and lascivious conduct with a child under 14 in Pinellas County, Florida. *See* R2 89-90. In 1991, he pled nolo contendere to a charge of child sexual assault. *See* R2 10033-10219.

Skalnik's extensive criminal history demonstrates that he is driven by the desire for self-aggrandizement, self-enrichment, and self-satisfaction, no matter who is victimized in the process. This pattern of behavior was clearly replicated during his time in jail, when he was willing to say anything against anyone – regardless of the truth of the matter – if he believed so doing would benefit himself.

Multiple corrections staff who encountered Skalnik over the course of his incarceration found him to be treacherous, vindictive, and conniving. One official, Lieutenant McInnes, wrote in a 1988 memo that Skalnik "had given false statements about some of the corrections staff to have them removed on the wing he was housed on just because these officers did not cater to his desires." *See* R2 72-76. Skalnik's complaints were found to have "no substance." *Id*. Following an investigation, the Arizona Offender Administration Service concluded that "any officer who tries to be firm and enforce the rules with Skalnik becomes an object or person for him to inform on with these false allegations," adding that, "[this] report should . . . reveal [Skalnik's] manipulative methods." R2 78-79.

Skalnik's behavior while incarcerated precisely mirrored his behavior when not

incarcerated: he was willing to say anything, regardless of the truth of the matter, and regardless of whom it might harm, if he believed that doing so would benefit him. This consistent, documented pattern of behavior strongly supports the conclusion that Skalnik's testimony against Dailey is false, and reflects his willingness to say whatever he thought the State wanted to hear if he believed he would be rewarded for it, particularly in a case like Dailey's, where the State made it clear it was very ready to listen.

At Dailey's trial, Skalnik testified he had two grand theft charges and a violation of parole charge pending. *Id*. at 1107. Skalnik already had five or six felony convictions in Florida alone. TR1 9:1107, 1121. In an attempt to minimize his criminal history at Dailey's trial, Skalnik told the jury, in response to the question "How bad were your charges?." "They were grand theft, counselor, not murder, not rape, no physical violence in my life." TR1 9:1158. Both Skalnik and the State were conspicuously silent regarding the 1982 charge brought against Skalnik for lewd and lascivious conduct involving a 12-year-old victim, a charge dismissed over the course of his cooperation with Pinellas prosecutors. This omission was necessary to the State's strategy, which was to convince the jury that Skalnik, DeJesus, and Leitner – all of whom were facing serious charges – would be willing to testify against Dailey because they considered themselves "morally better." TR1 10:1277-78. Had Dailey's jurors learned the true extent of Skalnik's pathological deception and criminal

exploitation of vulnerable victims, it is difficult to imagine them crediting his blockbuster testimony.

Following his testimony in Dailey's trial, Skalnik pled guilty to his pending charges: four counts of grand theft and two counts of failure to appear. R2 9955-10016. Although Skalnik testified at Dailey's trial that "I got no deal and didn't ask for a deal" in exchange for his testimony (TR1 9:1159), the State agreed to five years imprisonment on each count, to run concurrently rather than consecutively, with no habitual felony offender status or other sentencing enhancements. Additionally, the State agreed to Skalnik's request to serve his time in Texas, where he was immediately paroled and released from custody, and never served his five-year sentence.

In his 1984 letter to the Florida Parole and Probation Commission, Detective Halliday stated that Skalnik had testified in excess of thirty (30) criminal trials, resulting in at least six inmates receiving the death penalty by 1984. R2 84-87. At Dailey's trial, Skalnik claimed that he only testified in six to eight criminal trials. TR1 9:1108. In either case, there is no question but that Skalnik was all too familiar with the system and the benefits he could receive in exchange for his testimony. His testimony to the contrary at Dailey's trial significantly, and improperly, bolstered his credibility.

Beverly Andrews Andringa was the prosecutor at the original trials of both James Dailey and Jack Pearcy. R2 10270-72. At Dailey's postconviction hearing in 2003,

Ms. Andringa testified that she would never use Skalnik as a witness again because she could not, in good faith, put him on the stand believing that he would give truthful testimony. R2 10283. This testimony, from an individual with a strong incentive to argue in favor of the credibility of her key witness, must be given strong consideration by this Court.

Of the three informants, Skalnik is the only one who provided testimony with any sort of "details." As a result, the most damaging testimony against Dailey was also by far the least reliable. James Dailey's jury never learned this, and this Court held it was error. *Dailey v. State*, 594 So. 2d 254, 256 n.2 (Fla. 1991). Instead, jurors listened as Skalnik testified that he was altogether unaware that inmates could even receive deals for coming forward with information against their fellow inmates.[26] The former police officer and longtime informant's feigned naiveté is belied by his remarkable record of cooperation, a record the State was well aware of when it elicited this testimony. This Court must consider all of this evidence, along with the fact that Dailey's original jury never heard it before reaching its verdict, when determining the probability of acquittal at retrial. No capital murder conviction should depend on Paul Skalnik's testimony.

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[26] Defense Counsel: "[I]t's pretty common knowledge over in Pinellas County Jail, that if you testify you get a deal?"
Skalnik: "I am an example to prove that's not common knowledge. I am sorry. I differ with you."
TR1 9:1158-59.

Taken together, the newly discovered evidence, coupled with all of the evidence which could be introduced at a new trial, discussed above, proves that Dailey is actually innocent. The new evidence, along with the other evidence developed on postconviction review, the weight of the newly discovered evidence, the evidence introduced at the trial, and all evidence which could be introduced at a new trial establishes reasonable doubt upon reasonable doubt upon reasonable doubt as to Dailey's guilt. This Court must also consider that it found numerous errors in Dailey's original trial. *See Dailey v. State*, 594 So. 2d 254 (Fla. 1991). Although it deemed the errors "harmless" at that time, *id*. at 258, there is no possibility that these errors, considered together with the powerful evidence of Dailey's innocence, could be deemed harmless today. The lack of evidence against Dailey, along with the overwhelming evidence of Pearcy's sole responsibility for this crime, make it, at a minimum, probable that Dailey would be acquitted and/or, at the very least, given a life sentence.

James Dailey is innocent. Jack Pearcy confessed to being solely responsible for S.B.'s death. New evidence completely discredits the jailhouse informant testimony: James Wright, Travis Smith, and Michael Sorrentino all testified that the State was so motivated in this case to find people willing to testify from the jail, that they not only pulled everyone out of the pod, but also brought newspaper articles about the crime and put them before them. Their testimony, the testimony of Banda and Smith

regarding Pearcy's admission of sole responsibility for the crime, Pearcy's affidavit, and all of the evidence presented at the hearings on the Initial Successive Motion in 2003-2004, establishes that Dailey probably would be acquitted at a retrial. No reasonable jury could find guilt beyond a reasonable doubt or unanimously vote to impose a sentence of death. It is a violation of due process and every other protection provided to the innocent in the state and federal constitutions to impose a death sentence based on this uniquely unreliable jailhouse informant testimony.

In the end, in a circumstantial case such as this one, the State will bear a particularly high burden of proof at any new trial – *i.e.* that all of the facts "must be inconsistent with innocence" and must "lead to a reasonable and moral certainty that [Dailey] and no one else committed the offense charged. It is not sufficient that the facts create a strong probability of, and be consistent with, guilt. They must be inconsistent with innocence." *Dausch v. State*, 141 So. 3d 513, 517 (Fla. 2014) (internal citations omitted); *Ballard v. State*, 923 So. 2d 475, 486 (Fla. 2006) (evidence must exclude "all other inferences" than guilt).

ARGUMENT II: The Lower Court Erred In Denying Dailey's Claim That The State Violated The Constitutional Requirements Of *Brady v. Maryland* And *Giglio v. United States* And Its Progeny, Thus Denying Dailey His Right To Due Process And A Fair Trial Under The Fifth, Sixth, Eighth, And Fourteenth Amendments To The United States Constitution And The Corresponding Provisions Of The Florida Constitution.

The State violated Dailey's due process rights under *Giglio v. United States*, 405 U.S. 150 (1972), by presenting false evidence at Dailey's original trial and

postconviction evidentiary hearing. The Supreme Court has held that both the withholding of exculpatory evidence from a criminal defendant by a prosecutor and the knowing use of false testimony violate the Due Process Clause of the Fourteenth Amendment. *See Brady v. Maryland*, 373 U.S. 83, 86 (1963) and *Giglio*, 405 U.S. at 153-55.

The lower court concluded that this claim was untimely and dismissed it. The court found that the facts regarding Skalnik's criminal history and his reputation for dishonesty were either known at the time of trial or could have been discovered easily afterward via public records requests. R2 8889. The court also held that the IRBP reports were known to Dailey because prior counsel abandoned a *Brady* claim related to these reports. *Id*. These holdings are unfounded.

The first *Giglio* violation occurred during Dailey's trial when Paul Skalnik significantly understated his criminal history under oath. *See* R2 8186-94. The State failed to correct his testimony. In particular, neither Skalnik nor the State mentioned Skalnik's charge of lewd and lascivious conduct on a child under 14 years of age, even though the same state attorney's office filed those charges against Skalnik.

The State later compounded this error by arguing during closing that the "three prisoners that were brought on from the Pinellas County Jail are thieves and drug dealers," urging the jury to credit their testimony because "there is a hierarchy over in that jail just like in life," where crimes against children are worse than "buying stolen

cars"[27] or "sale and possession of cocaine." TR1 10:1277-78. Arguing that Skalnik's crimes were limited to non-violent property offenses, while simultaneously suggesting that the victims of his crimes were not children, amounted to outright deception by the State. R2 88-90. The State capitalized on this deception by urging the lay jury to credit Skalnik's testimony, assuring jurors that Skalnik's criminal history ranked him somewhere higher on the jail hierarchy, and that his testimony was therefore worthier of belief. Dailey's jurors never learned that the source of the trial's most sensational evidence was not only a con man but a pedophile, a fact that, by the State's own logic, would rank him at the bottom of any jailhouse moral hierarchy.

The second *Giglio* violation occurred during the testimony of Oza Shaw at Dailey's postconviction evidentiary hearing in 2003. At this hearing, Shaw testified that on the night in question, Jack Pearcy and S.B., without James Dailey, had given him a ride to the telephone booth. (PC ROA 3:339-40). Shaw testified that when he returned home after making his phone call, Gayle Bailey was in the living room. PC ROA 3:343. Shaw testified that he fell asleep but then awoke when Pearcy returned home, alone, *without S.B. Id*. According to Shaw, Pearcy went into Dailey's room and the two left the house. *Id*.

[27] Even the suggestion that Skalnik's crimes were limited to buying stolen cars was deceptive. This Court explicitly held that it was error for the trial court to prevent Dailey's defense counsel from going into the specifics of Skalnik's pending charges, "which were admissible to show possible bias." *Dailey v. State*, 594 So. 2d 254, 256 (Fla. 1991).

During cross examination, the State appeared to impeach Shaw, suggesting that Shaw's testimony regarding Pearcy's returning home alone without S.B. and picking up Dailey, was a recent fabrication. PC ROA 3:345-52. However, in Shaw's *initial* interview, conducted just three weeks after the murder, Shaw provided an identical version of events. R2 91-95, 332-38. From the very beginning of the case, the State had access to the IRBP reports which contained this account.

The testimony elicited by the State on cross examination, which created the impression that Shaw had recently fabricated his testimony of Pearcy returning alone to the house, was false; the prosecutor knew the testimony he was eliciting was false; and the statement was material to Dailey's guilt. By misrepresenting Shaw's original statement to law enforcement and implying that his testimony was fabricated for the purpose of the evidentiary hearing, the State misrepresented material facts to the court and committed a *Giglio* violation.

The extraordinary prejudice resulting from the State's conduct is evidenced by the circuit court's order denying Dailey's initial motion to vacate. The court held, "Mr. Shaw's new testimony is of questionable value . . . it would seem most likely that his memory in the time closer to the actual events would be more reliable than nearly twenty years later." PC ROA 2:179-80. This easily satisfies the materiality prong because the false testimony elicited by the State unquestionably altered the judgment of the finder of fact, though Shaw's testimony at the evidentiary hearing did in fact

more accurately reflect what he originally told law enforcement than his original trial testimony.

The lower court's reliance on the State's claim that these violations are untimely is error. *See Banks v. Dretke*, 540 U.S. 668, 696 (2004) ("'the prosecution can lie and conceal and the prisoner still has the burden to…discover the evidence,' so long as the 'potential existence' of a prosecutorial misconduct claim might have been detected. A rule thus declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process.") (internal citations omitted). A claim alleging the denial of Dailey's substantive due process rights – like a *Giglio* violation – may be raised at any time, including for the first time in a motion for postconviction relief. *Johnson v. State*, 128 So. 3d 155, 157 (Fla. 2nd DCA 2013). *See also Hughes v. State*, 22 So. 3d 132, 136 (Fla. 2d DCA 2009) (quoting *Haliburton v. State*, 7 So. 3d 601, 605-06 (Fla. 4th DCA 2009)).

> Moreover, the supreme court has held that "a conviction obtained by the knowing use of perjured testimony is fundamentally unfair…[for it] involve[s] a corruption of the truth-seeking function of the trial process"… The State's use of perjured testimony to secure a conviction could amount to the denial of a defendant's substantive due process rights.

Johnson, 128 So. 3d at 156-57 (internal citations omitted). Since this claim alleges a violation of Dailey's substantive due process rights that would otherwise be cognizable under Fl. R. Crim. P. 3.851, the lower court was required to consider the claim on its merits.

Finally, the State's and lower court's repeated reliance on the prior *Brady* claim raised in earlier postconviction motions is simply incorrect. Dailey's initial successive motion contained a *Brady* claim regarding the State's failure to turn over handwritten notes taken by IRBP Detective Charles Flesher. PC ROA 1:60-62. In contrast, the substance of *this* claim involves typed police reports written by Detective Terry Buchaus. The witness interviews from Hank's Seabreeze Bar do not appear anywhere in the IRBP reports referenced in this claim. This is a distinct claim and the lower court's repeated failure to recognize this is error.

ARGUMENT III: The lower court erred in denying Dailey's request to judicially notice certain records in violation of Section 90.202, Florida Statutes.

On January 18, 2018, the lower court held a hearing following the defense's request to take judicial notice of relevant records. R2 12257. In an order dated January 19, 2018, the court granted the request in part and denied it in part. R2 8115-21. Specifically, the lower court denied the defense's request to take judicial notice of: Jack Pearcy's Kansas and Colorado court files; Pablo DeJesus' Pinellas County court files; James Leitner's Pinellas County and Colorado court files; Paul Skalnik's court files; and Beverly Andrews Andringa's deposition. R2 8117. This was error.

First, all of the listed records are items which are proper for judicial notice. *See* § 90.202(6), Fla. Stat. (2017). The next issue, then, is whether these records are admissible. Under the Florida evidence code, prior criminal convictions are admissible as impeachment evidence. § 90.610, Fla. Stat. (2017). The prior criminal

convictions of Pearcy, DeJesus, Leitner, and Skalnik are relevant and admissible evidence which could be introduced at a new trial. The lower court was required to weigh this evidence when considering the cumulative effect of the newly discovered evidence in this case. "[T]he postconviction court must consider the effect of the newly discovered evidence, in addition to all of the admissible evidence *that could be introduced at a new trial*…" *Hildwin v. State*, 141 So. 3d 1178, 1187 (Fla. 2014). "The trial court cannot consider each piece of evidence in a vacuum, but must look at the total picture of all the evidence when making its decision." *Lightbourne v. State*, 742 So. 2d 238, 247 (Fla. 1999).

Second, because the lower court must consider testimony that was "presented in another postconviction proceeding in determining if there is a probability of an acquittal," *Hildwin*, 141 So. 3d at 1184, it should have considered the 2003 deposition of Beverly Andrews Andringa, the prosecutor at the trials of both James Dailey and Jack Pearcy. Andringa's deposition is directly relevant to Dailey's claim regarding the unreliability of the critical testimony of state witness Paul Skalnik. Andringa testified that she would never use Skalnik as a witness again, because she could not in good faith put him on the stand believing that he would give truthful testimony. R2 10283. This testimony, given by an officer of the court responsible for Dailey's conviction and death sentence, is remarkably damaging to the State's case. Given that Paul Skalnik provided the most dramatic, inflammatory testimony in a case where there

was absolutely no physical or forensic evidence (apart from evidence *excluding* Dailey), the discrediting of this testimony, by itself, establishes reasonable doubt.

Since all of the above records are properly subject to judicial notice, relevant and admissible, the lower court should have taken judicial notice of them and considered them as evidence when analyzing the cumulative effect of all of the evidence under *Jones v. State*, 709 So. 2d 512 (Fla. 1998). The court's failure to do so was error.

ARGUMENT IV: Sentencing To Death And Executing Someone Who Is Actually Innocent Violates The Fifth, Eighth, And Fourteenth Amendments To The United States Constitution And The Corresponding Provisions Of The Florida Constitution.

The Eighth Amendment prohibits cruel and unusual punishment. In a concurring opinion, Justice O'Connor concluded that "executing the innocent is inconsistent with the Constitution," "contrary to the contemporary standards of decency," "shocking to the conscience," and "offensive to a principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Herrera v. Collins*, 506 U.S. 390, 419 (1993) (O'Connor, and Kennedy, J.J., concurring) (internal quotations and citations omitted). Justice O'Connor concluded that "the execution of a legally and factually innocent person would be a constitutionally intolerable event." *Id*. In light of the compelling evidence of Dailey's innocence, allowing Dailey to be sentenced to death and executed would violate his rights under the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution.

The Florida Constitution also provides Dailey with the right to be free from cruel

and unusual punishment. The Florida Constitution specifically provides that "[t]he prohibition against cruel or unusual punishment, and the prohibition against cruel and unusual punishment, shall be construed in conformity with decisions of the United States Supreme Court which interpret the prohibition against cruel and unusual punishment provided in the Eighth Amendment to the United States Constitution." Art I, §17, Fla. Const.

Dailey recognizes that this Court has rejected the claim that Florida's failure to recognize a freestanding actual innocence claim violates the Eighth Amendment. *Tompkins v. State*, 994 So. 2d. 1072, 1089 (Fla. 2008) (citing *Rutherford v. State*, 940 So. 2d 1112, 1117 (Fla. 2006)). However, Dailey maintains that these cases were wrongly decided and violate the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution.

The Eighth Amendment has been construed by the United States Supreme Court to require that punishment for crimes comport with "the evolving standards of decency that mark the progress of a maturing society." *Roper v. Simmons*, 543 U.S. 551, 561 (2005) (quoting *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958) (plurality opinion)). "Society changes. Knowledge accumulates. We learn, sometimes, from our mistakes. Punishments that did not seem cruel and unusual at one time may, in the light of reason and experience, be found cruel and unusual at a later time. . . . Standards of decency have evolved since 1980. They will never stop doing so." *Graham v.*

Florida, 560 U.S. 48, 85 (2010) (Stevens, J., concurring).

In *Baze v. Rees*, 553 U.S. 35 (2008), Justice Stevens explained that one of his greatest concerns about the continuing constitutionality of the death penalty was the possibility of executing an innocent person.

> Whether or not any innocent defendants have actually been executed, abundant evidence accumulated in recent years has resulted in the exoneration of an unacceptable number of defendants found guilty of capital offenses . . . The risk of executing innocent defendants can be entirely eliminated by treating any penalty more severe than life imprisonment without the possibility of parole as constitutionally excessive.

Id. at 85-86 (Stevens, J., concurring) (internal citations omitted).

Because Dailey is actually innocent, permitting his death sentence to stand and allowing his execution to go forward would be fundamentally at odds with the "evolving standards of decency that mark the progress of a maturing society." While not conceding that Dailey had a constitutionally fair trial with constitutionally effective counsel, even if he had, upholding his death sentence and executing him would violate the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.

CONCLUSION AND RELIEF SOUGHT

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

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been electronically filed with the Clerk of the Florida Supreme Court, and electronically delivered to Christina Pacheco, Assistant Attorney General, capapp@myfloridalegal.com and christina.pacheco@myfloridalegal.com, on this 11th day of June, 2018.

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CERTIFICATE OF COMPLIANCE

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

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