No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

James Milton Dailey,

Petitioner,

v.

State of Florida,

Respondent.

On Petition for a Writ of Certiorari to the
Supreme Court of Florida

PETITION FOR A WRIT OF CERTIORARI

THIS IS A CAPITAL CASE

CHELSEA R. SHIRLEY
Counsel of Record
KARA R. OTTERVANGER
JULISSA R. FONTÁN
Capital Collateral Regional Counsel
Middle Region
12973 N. Telecom Parkway
Temple Terrace, Florida 33637
Tel.: (813) 558-1600
E-Mail: shirley@ccmr.state.fl.us

LAURA FERNANDEZ
127 Wall Street
New Haven, Connecticut 06511

CYD OPPENHEIMER
155 West Rock Ave.
New Haven, Connecticut 06515

SETH MILLER
Innocence Project of Florida, Inc.
1100 E Park Ave
Tallahassee, Florida 32301-2651

CAPITAL CASE

QUESTION PRESENTED

Since being convicted of murder and sentenced to death in 1987, Petitioner James Dailey has steadfastly maintained his innocence. No eyewitness, physical, or forensic evidence connected him to the crime. The State's case at trial hinged almost entirely on the testimony of jailhouse informants—none of whom surfaced until after a jury had already rejected a death sentence for Dailey's separately-tried codefendant, and the lead detective had combed Dailey's jail pod looking for new potential witnesses.

Recently, new evidence has been uncovered that not only critically undermines the jailhouse informant testimony against Dailey at trial, but also affirmatively points to Dailey's innocence. This new evidence includes a sworn confession by Dailey's codefendant, who is serving a life sentence with the possibility of parole, to being the sole perpetrator, thereby absolving Dailey of any involvement.

In the state postconviction proceedings below, Dailey sought relief based on his codefendant's 2017 confession. But the trial court and the Florida Supreme Court refused to permit any consideration of the confession as a matter of state hearsay law, notwithstanding this Court's decision in *Chambers v. Mississippi*, 410 U.S. 284 (1973), which compels courts to admit reliable and material third-party statements, even if they would otherwise be barred on hearsay grounds.

Applying its own four-factor test for the analysis of *Chambers* claims, the Florida Supreme Court held that the codefendant's confession was properly deemed inadmissible under *Chambers*, "regardless of any corroborating evidence" that was or could be presented, because the confession was too recent, not spontaneous, and because the codefendant (who remains eligible for parole) invoked the Fifth Amendment when questioned about the murder in open court.

Unless this Court intervenes, Dailey will face execution without any court having considered his codefendant's confession to being the sole perpetrator. The Florida Supreme Court's decision presents the following federal constitutional question for the Court's review:

> Was the Florida Supreme Court's analysis of *Chambers v. Mississippi*, 410 U.S. 284 (1973), employing a factor-based approach that has been embraced by some courts but rejected by most others, unconstitutional?

NOTICE OF RELATED CASES

Per Supreme Court Rule 14.1(b)(iii), these are the related cases:

Underlying Trial:
Circuit Court of Pinellas County, Florida
State of Florida v. James Milton Dailey, 1985-CF-007084
Judgment Entered: August 7, 1987

Direct Appeal:
Florida Supreme Court
Dailey v. State, 594 So. 2d 254 (Fla. 1991) (reversed death sentence)
Judgment Entered: November 14, 1991

Resentencing Proceeding:
Circuit Court of Pinellas County, FL
State of Florida v. James Milton Dailey, 1985-CF-007084
Judgment Entered: January 21, 1994

Second Direct Appeal:
Florida Supreme Court
Dailey v. State, 659 So. 2d 246 (Fla. 1995)
Judgment Entered: May 25, 1995

Supreme Court of the United States
Dailey v. Florida, 516 U.S. 1095 (1996)
Judgment Entered: January 22, 1996

First Postconviction Proceedings:
Circuit Court of Pinellas County, Florida
State of Florida v. James Milton Dailey, 1985-CF-007084
Judgment Entered: July 14, 2005

Florida Supreme Court
Dailey v. State, 965 So. 2d 38 (Fla. 2007)
Judgment Entered: May 31, 2007

United States District Court for the Middle District of Florida
Dailey v. Florida Department of Corrections, No. 8:07-cv-01897 (M.D. Fla. Apr. 1, 2011), *as amended* Mar. 29, 2012
Judgment Entered: April 1, 2011

United States Court of Appeals for the Eleventh Circuit
Dailey v. Florida Department of Corrections, No. 12-12222-P (11th Cir. July 19, 2012)
Judgment Entered: July 19, 2012

Supreme Court of the United States
Dailey v. Crews, 569 U.S. 961 (2013)
Judgment Entered: April 29, 2013

Second Postconviction Proceeding:
Circuit Court of Pinellas County, Florida
State of Florida v. James Milton Dailey, 1985-CF-007084
Judgment Entered: April 12, 2017

Florida Supreme Court
Dailey v. State, 247 So. 3d 390 (Fla. 2018)
Judgment Entered: June 26, 2018

Supreme Court of the United States
Dailey v. Florida, 139 S. Ct. 947 (2019)
Judgment Entered: January 22, 2019

Third Postconviction Proceeding:
Circuit Court of Pinellas County, Florida
State of Florida v. James Milton Dailey, 1985-CF-007084
Judgment Entered: March 20, 2018

Florida Supreme Court
Dailey v. State, 279 So. 3d 1208 (Fla. 2019), *rhrg denied*, SC18-557, 2019 WL 5152446 (Fla. Oct. 14, 2019)
Judgment Entered: October 3, 2019

Supreme Court of the United States
Current Petition
Judgment Entered:

First Successive Motion After Death Warrant Signed:
Circuit Court of Pinellas County, Florida
State of Florida v. James Milton Dailey, 1985-CF-007084
Judgment Entered: October 16, 2019

Florida Supreme Court
Dailey v. State, -- So. 3d --, 2019 WL 5883509 (Fla. Nov. 12, 2019)
Judgment Entered: November 12, 2019
Cert Due: February 10, 2020

United States District Court for the Middle District of Florida
Dailey v. Secretary, Florida Department of Corrections, No. 8:19-cv-02956 (M.D. Fla. Dec. 5, 2019)
Judgment Entered: December 5, 2019
Dailey v. Florida Department of Corrections, No. 8:07-cv-01897 (M.D. Fla. Dec. 10, 2019)
Judgment Entered: December 10, 2019

United States Court of Appeals for the Eleventh Circuit
Dailey v. Secretary, Florida Department of Corrections, No. 19-15147 (11th Cir.) (filed Dec. 27, 2019)
Judgment Entered: pending
In re: James M. Dailey, No. 19-15145 (11th Cir.) (filed Dec. 30, 2019)
Judgment Entered: pending

Second Successive Motion After Death Warrant Signed:
Circuit Court of Pinellas County, Florida
State of Florida v. James Milton Dailey, 1985-CF-007084
Filed: December 27, 2019
Judgment Entered: *pending*

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DECISIONS BELOW

The decision of the Florida Supreme Court is reported at 279 So. 3d 1208 (Fla. 2019), and is reprinted in the Appendix (App.) 1a. The Florida Supreme Court order denying Dailey's motion for rehearing is unpublished, but reprinted at App. 19a. The trial court's order denying postconviction relief is also unpublished, but reprinted at App. 20a.[1]

JURISDICTION

The judgment of the Florida Supreme Court was entered on October 3, 2019. App. 1a. The Florida Supreme Court denied rehearing on October 14, 2019. App. 19a. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment provides, in relevant part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

I. Trial Proceedings and Evidence

On May 5, 1985, Dailey's codefendant, Jack Pearcy, picked up fourteen-year-old Shelly Boggio in his car. Boggio was hitchhiking with her twin sister Stacey and friend Stephanie. Pearcy, who had known Boggio for a while,[2] was driving from the beach with his housemate Dailey and

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[1] Citations to non-appendix material are as follows: "TR1" refers to the trial record on appeal; "PC ROA" refers to the record on appeal from the denial of Dailey's initial state postconviction motion; "R2" refers to the record on appeal in the proceedings below from the denial of Dailey's successive postconviction motion.

[2] In a pretrial deposition, Stacey testified that Pearcy had previously visited her and Shelly Boggio at home, but that their father had answered the door and scolded Pearcy for trying to hang around a 14-year-old. R2 11862-63. Pearcy's girlfriend, Gayle Bailey, testified at a pretrial deposition that Boggio and her father used to sell them marijuana. R2 305. These details about

his friend Dwaine "Oza" Shaw, who was visiting from Kansas. TR1 7:907-08. The group went to a bar, and later to Pearcy's house, where they met up with Pearcy's girlfriend, Gayle Bailey, and together drank and smoked marijuana. TR1 7:901-02. Next, the group went out again without Shaw, who remained at Pearcy's house. TR1 8:955-56. Pearcy, Bailey, Boggio, and Dailey dropped off Stacey and Stephanie, TR1 7:905-06, and proceeded to another bar. At that bar, Boggio asked Pearcy to show her around and then danced with him, which upset Bailey. TR1 8:967-68. Pearcy, Bailey, Dailey, and Boggio returned to Pearcy's home sometime after midnight. TR1 8:957, 968-69, 975.

At trial, conflicting evidence was presented about what happened next. Gayle Bailey testified that she went to the bathroom, and after coming out she saw that Pearcy, Dailey, and Boggio were gone, while Shaw remained on the sofa. TR1 8:958, 971-72, 977, 983-84. Bailey was upset about Pearcy abruptly leaving her at home and going out with Boggio. TR1 8: 969-70, 976. Contrary to Bailey's account, however, Shaw testified that when Bailey was in the bathroom, Boggio and Pearcy left together without Dailey, and Shaw asked them for a ride to a nearby phone booth. TR1 8:997, 999, 1004-05, 1007. Shaw testified he was at the phone for at least one hour. TR1 8:1005. He then walked home and spoke with Bailey, who was in the living room and still upset about Pearcy having left. Shaw then fell asleep on the sofa. TR1 8:998.

Bailey and Shaw both testified that sometime later, in the early morning hours, they saw Dailey and Pearcy come into the house together and that Dailey's pants were wet. TR1 8:958-60, 982-83. Later in the morning, Pearcy made arrangements for all four of them (Pearcy, Bailey, Shaw, and Dailey) to go to Miami. TR1 8:979. According to Shaw, Pearcy's decision to go to

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Boggio's connection to Pearcy were not elicited at the trial. Boggio's friend Stephanie testified at Pearcy's separate trial that Boggio got in the car because she knew Pearcy. R2 10349-50.

Miami was completely unexpected. TR1 8:1000. In Miami, the four checked into a motel. Dailey signed his real name, TR1 7:920, but Pearcy used an alias. TR1 8:979-80, 7:914.

Police officers found Boggio's body that same morning in the water near Indian Rocks Beach. The medical examiner said she was stabbed and strangled, and ultimately died by drowning between approximately 1:30 a.m. and 3:30 a.m. TR1 7:850, 870. The medical examiner found marks indicating that she had been dragged by the feet, consistent with a single person dragging her along the ground and causing abrasions to the upper back and shoulder area. TR1 7:889-92.[3] There were no eyewitnesses to Boggio's killing and no physical evidence placed Dailey with her at the time or place of her death; the prosecutor conceded as much in closing argument. TR1 10:1267-68 (noting that there was no "physical evidence," "no fingerprints," and "no hair or fibers").[4]

The prosecution's case described above was capped by the testimony of three jailhouse informants—James Leitner, Pablo DeJesus, and Paul Skalnik—who claimed that Dailey had confessed to committing the murder. Leitner testified that Dailey told him, "I'm the one that did it," and when asked why, Dailey responded, "Man, I just lost it." TR1 9:1066-67. DeJesus similarly testified that Dailey said to him that he was "the one that killed the girl." TR1 9:1095. Skalnik offered the most inflammatory testimony, claiming that Dailey had told him that "the young girl

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[3] At Jack Pearcy's trial the medical examiner also testified to a reasonable degree of medical certainty that Boggio was dragged by her feet. R2 10467-68.

[4] In fact, contrary to the State's argument, an FBI hair analysis report issued four months before trial concluded that short and severed hairs were found in the victim's hand, and that those hairs "could not be associated" with Dailey. R2 99-100. After the issuance of Dailey's death warrant in September 2019, the trial prosecutor remarked to the press, "It was a circumstantial case, it's not like there was an upstanding citizen eyewitness to the case . . . [s]o speculation is all we have as to what happened." J. Thalji, *Pinellas girl, 14, lived a short, hard life. Her killer is set to die*, Tampa Bay Times (Sept. 27, 2019).

kept staring at [me], screaming and would not die." TR1 9:1116. None of the jailhouse informants provided additional information about the manner, motive, or circumstances of the killing. During her closing, the prosecutor referenced the informants' graphic testimony at least a dozen times.[5]

The prosecutor assured Dailey's jury that the jailhouse informants were being fully transparent about the agreements the State had made in exchange for their testimony, stressing that "[t]hose men are still over there [in jail] and that's where they belong. They're not getting out of jail free. They were each honest with you about what they expect or hope to receive." TR1 10:1278-79. "They were telling the truth," the prosecutor told the jury. TR1 10:1280. "I am asking you to believe them," she said. TR1 10:1277-78. "[T]here is no reason why you shouldn't." *Id*. The prosecutor also argued that there was a "hierarchy over in that jail just like in life," and that the nature of the jailhouse informants' own crimes, when juxtaposed with a crime against a child, made their testimony more worthy of belief. TR1 10:1277-78.

Jack Pearcy was tried separately and prior to Dailey. His jury found him guilty but recommended a life sentence with the possibility of parole after 25 years. Dailey's jury found him guilty and recommended death. The trial judge sentenced Dailey to death on August 7, 1987.

The Florida Supreme Court affirmed Dailey's conviction but vacated his death sentence and remanded due to the trial court's erroneous jury instructions regarding aggravating factors, along with its failure to consider any mitigating evidence. *Dailey v. State*, 594 So. 2d 254, 259

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[5] The prosecutor asked the jury to remember "Mr. Skalnik's testimony, she wouldn't die, she kept screaming, she wouldn't die." TR1 10:1257. She repeated this testimony moments later: "Dailey tells Skalnik, she wouldn't die. She kept screaming. She kept staring at me." TR1 10:1265. Then a third time: "We know he said she wouldn't die." TR1 10:1266. Then a fourth time: "She kept screaming, she wouldn't die." TR1 10:1281. And a fifth time: "The child wouldn't die." TR1 10:1285. And a sixth time: "Stared at him and she wouldn't die." *Id*. She reminded the jury: "Dailey [told] Dejesus and Leitner, I lost it." TR1 10:1265. She reiterated this twice: "I lost it. The defendant's comment to Leitner and Dejesus." TR1 10:1281. "He said he lost it to two witnesses." TR1 10:1285.

(Fla. 1991) (*Dailey I*). The court also found numerous guilt phase errors, but deemed them harmless on the record before it. It found that the prosecutor "impermissibly highlighted [Dailey's] decision not to testify;" introduced "evidence of a knife sheath (which was insufficiently linked to either the crime or [Dailey]);" and elicited "the hearsay statements of Detective Halliday concerning the [jailhouse informants'] reasons for coming forward;" and that the trial court erred in refusing "to allow defense counsel to question [informant Paul] Skalnik concerning the specifics of charges pending against him (which were admissible to show possible bias)." *Id*. at 256 n. 2.

On remand, the trial court, sitting without a jury, re-imposed a death sentence, which the Florida Supreme Court affirmed. *Dailey v. State*, 659 So. 2d 246 (Fla. 1995) (*Dailey II*).

II. Postconviction Proceedings, Evidence, and Decision Below

Dailey's various attempts to obtain state postconviction and federal habeas relief have been unsuccessful. The Florida Supreme Court affirmed the denial of Dailey's initial state postconviction motion and accompanying state habeas petition in 2007. *Dailey v. State*, 965 So. 2d 38, 41 (Fla. 2007) (*Dailey III*). The Florida Supreme Court subsequently affirmed the denial of his motion seeking relief under *Hurst v. Florida*, 136 S. Ct. 616 (2016). *Dailey v. State*, 247 So. 3d 390, 391 (Fla. 2018) (*Dailey IV*). The United States District Court for the Middle District of Florida denied a federal writ of habeas corpus under 28 U.S.C. § 2254. *Dailey v. Sec'y, Fla. Dep't of Corrs.*, No. 8:07-cv-1897, 2011 WL 1230812, at *32 (M.D. Fla. April 1, 2011).

In 2017, Dailey filed a second successive state postconviction motion based on, *inter alia*, codefendant Pearcy's 2017 sworn confession to being the sole perpetrator of the crime for which Dailey is currently set to be executed. His motion was denied. On October 3, 2019, the Florida Supreme Court affirmed this denial, holding that Pearcy's confession could not be considered under state evidentiary rules regarding hearsay. *Dailey v. State*, 279 So. 3d 1208, 1213 (Fla. 2019) (*Dailey V*). In response to Dailey's argument that the United States Constitution required

consideration of the confession under *Chambers v. Mississippi*, 410 U.S. 284 (1973), the Florida Supreme Court ruled that *Chambers* was inapplicable because, "regardless of any corroborating evidence" of the Pearcy confession to which Dailey could point, the confession failed under four specific criteria set forth in *Bearden v. State*, 161 So. 3d 1257, 1265 (Fla. 2015), which the Florida Supreme Court had adopted for its analysis of federal *Chambers* arguments. *Id.* at 1214.

A central focus of the question presented in this petition is the Florida Supreme Court's application of its four-factor test at the expense of an individualized review of the record in Dailey's case in light of the principles of reliability and trustworthiness articulated in *Chambers*. The below subsections of this petition detail what an individualized review of the record would have revealed, including significant exculpatory evidence which was never presented to Dailey's jury and which corroborates Pearcy's 2017 confession. The evidence in the record falls into three general categories: (1) evidence proving that Jack Pearcy was alone with Boggio during the exact timeframe of her death and that he was the last known person to be seen with her alive; (2) Jack Pearcy's four statements exculpating Dailey from all involvement in the crime; and (3) robust impeachment of the jailhouse informant testimony that implicated Dailey in Pearcy's crime after Pearcy was convicted, including evidence illustrating the lengths to which law enforcement went in order to procure informant testimony immediately after Pearcy's jury refused to recommend the death penalty.

A. Evidence Establishing Jack Pearcy Was Alone With Boggio in the Early Morning Hours Before Her Death, and Was the Last Known Person to Be Seen With Her Alive

At trial, a key building block of the State's case was the testimony of Gayle Bailey, who intimated that Pearcy and Dailey left together with Boggio after midnight, and then later returned without her. The Florida Supreme Court credited this account, even though it was contradicted by

Oza Shaw, who testified that Pearcy and Boggio left alone and gave him (Shaw) a ride to a nearby payphone. *Dailey I*, 594 So. 2d at 255 (crediting Bailey's testimony as establishing that "Boggio left in the car with Dailey and Pearcy"). But the record evidence now shows that Bailey's testimony was not accurate. In fact, at some point after 1:15 a.m. on May 6, Pearcy and Boggio dropped Shaw off at a phone booth and proceeded on a solo outing—a lengthy one by all accounts—during the very timeframe of her death.

1. Oza Shaw's 2003 hearing testimony and corresponding *Giglio* claim

During his initial state postconviction proceeding, Dailey presented evidence showing that Pearcy went out alone with Boggio in the early morning hours within the established window of her death. At this proceeding, Oza Shaw testified that Pearcy and Boggio left together, without Dailey, but agreed to give Shaw a ride to a nearby phone booth. R2 417-18. After he finished using the payphone, Shaw walked home and spoke with Bailey, who was sitting in a rocking chair complaining about how Pearcy had left with Boggio. Shaw then fell asleep on the couch. R2 420-21. Shaw testified that about an hour or an hour and a half later Pearcy returned home, now alone (without Boggio). R2 421. Pearcy walked to Dailey's room and then left again, this time with Dailey. R2 421.

The State cross-examined Shaw about why he did not testify to the key scene—Pearcy returning home alone after having been out with Boggio—at Dailey's trial. R2 424-430. Although Shaw explained that he was simply never asked about that detail, R2 422-23, the State insinuated that Shaw's account was a recantation not worthy of belief. R2 425-34 (cross-examination), PC ROA Supp. 1:128 (state's written closing argument). The trial court and the Florida Supreme Court agreed and found that Shaw's testimony about seeing Pearcy come home alone (after having just spent time with Boggio around the time of her death) to be an "unreliable" post-trial recantation.

Dailey III, 965 So. 2d at 46.

But in the 2017 proceedings below, Dailey presented a report from the Indian Rocks Beach Police which documented how Shaw had actually given the same account right after the crime in a tape-recorded interview to law enforcement. Shaw told detectives that Pearcy and Boggio left together after dropping him off at a nearby phone booth and, later, in the early hours of the morning, Pearcy returned home without Boggio and only then went to retrieve Dailey from his room. R2 93-94. Dailey took the position that the State violated *Giglio v. United States*, 405 U.S. 150 (1972), when it argued that Shaw's previous testimony was a post-trial fabrication, since the State knew that Shaw had given the same account from the very beginning to the lead investigative officer on this case. App. 165a-166a, 309a-310a. The Florida Supreme Court, while no longer disputing the validity of Shaw's testimony, denied relief on the grounds that the State's conduct failed to establish a cognizable *Giglio* violation, since the testimony of Oza Shaw itself was not false, reasoning that the State's false advocacy through impeachment questions did not state a *Giglio* violation. App. 16a.

2. Other evidence establishing Jack Pearcy's solo outing with Boggio after midnight

Besides Oza Shaw's trial and postconviction testimony, the record from the proceedings below reveals additional evidence confirming that, contrary to any inference from Gayle Bailey's trial testimony, Jack Pearcy and Shelly Boggio were out alone during the very timeframe when the medical examiner determined that she died, while Dailey remained at home.

Oza Shaw's girlfriend, Betty Mingus, testified to speaking on the phone with Shaw and hearing him contemporaneously narrate what was happening while he was at the phone booth. He said Pearcy was with a "girl" in a car next to him, and that they were actively trying to get him off the phone. R2 11903. Mingus later heard a car honking in the background, and relayed Shaw's

present sense impression by noting: "oh, that's Jack [Pearcy] and a girl waiting for me to get off the phone." At that time she heard Shaw direct them to "go on without me," and Pearcy and Boggio drove away. R2 11904. Telephone records introduced at the initial postconviction proceeding established that this was a 26-minute phone call placed at 1:15 a.m. EST from St. Petersburg, Florida, to Mingus's home phone in Olathe, Kansas. R2 419, 436, 10290, 11712; PC ROA 3:358 (testimony of Betty Mingus about receiving the call to her number); 3:341 (state's stipulation to the admission of records); PC ROA Supp. Vol. 1:100 (state's closing argument, acknowledging that the call was placed locally at 1:15 a.m. eastern time and lasted through 1:41 a.m.), 2:231 (same point made in the defense sur-reply).

The record also provides glimpses of what happened after Pearcy drove Boggio away from the payphone at some point after the 1:15 a.m. call. Deborah Lynn North was an acquaintance of Boggio's who worked at Hank's Sea Breeze Bar. North recalled seeing Boggio and one man some time between midnight and 1:45 a.m. R2 11710, 11712-13. According to North, Boggio entered the bar seeking help because their car had become stuck in the sand. R2 11712. She recalled Boggio's male companion digging the car out with a shovel before bystanders helped free them. R2 11713. North estimated that Boggio and her companion remained outside of Hank's for roughly an hour. North is the last known person to have seen Boggio alive.

Pearcy himself confirmed during a post-arrest statement that he was the individual in the stuck car. Pearcy admitted going out alone with Boggio and recounted how his car became mired in sand:

> [After returning home from Jerry's], just [Boggio] and I left. [Dailey] stayed [home] . . . And we went . . . in some bar called Hank's and had a beer . . . And the car was stuck when we went back out. So, I went and asked about help and they said there was a shovel at the bar next door . . . So, I got the shovel and dug it out over and over, and I kept trying to go back out and it wouldn't back out and it would dig back in. So, finally, I told her to get somebody to push us out. She went in and

> did that while I was still digging . . . [A] couple of guys were walking out right at that time and I told them, "could you give me a hand?" So they came over and helped push the car out.

R2 9312-13. In this statement, made in the presence of his counsel, Pearcy also falsely claimed that this misadventure with Boggio occurred well *before* midnight, contrary to what Mingus's phone records as well as the accounts of Gayle Bailey, Deborah North, and Oza Shaw prove. Pearcy said he and Boggio had returned home at 11:00 p.m. or 11:30 p.m., R2 9313-14, because, according to him, Boggio had wanted to hang out with Dailey. R2 9313. Pearcy said that he next picked up Dailey and drove the car with Dailey and Boggio in the back seat when it appeared that they were "necking." R2 9314-15. Pearcy said that after pulling into his favorite fishing spot, he unexpectedly looked and saw Dailey inexplicably making motions with his right arm, stabbing Boggio as she laid face down. R2 9316-19.[6]

In a sworn statement in 1993, Pearcy disavowed implicating Dailey, and explained that his first statement was set up by his attorney when "Jim wasn't even 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 9624. In that 1993 statement, Pearcy reaffirmed that he (Pearcy) left with Boggio alone, dropped off Shaw at a nearby phone booth, and remained out for about an hour or 90 minutes before coming home. R2 9621. Pearcy admitted to fabricating that Boggio was still with him when he came home to get Dailey. R2 9624, 9612. However, he never explained how it came about that she was "no

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[6] This was the only time Pearcy implicated Dailey to law enforcement. The record reveals, however, that Pearcy owned a roofing knife consistent with the stab wounds. R2 10437-38. Although Pearcy initially stated that the knife belonged to Dailey, Gayle Bailey explained that Pearcy kept his knife in a sheath in the car. R2 296-97. Pearcy also told detectives that the knife and its sheath were thrown in the Walsingham Reservoir, where the sheath was recovered. R2 11803, 11809-11. Though Pearcy claimed it was Dailey who threw the knife and sheath, Detective Buchaus, who was present with Pearcy when Pearcy showed how the disposal 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." R2 11804.

longer with [him]" when he returned home, and he did not take responsibility for killing her. In 2003, Dailey subpoenaed Pearcy to testify about this account during initial postconviction proceedings, but Pearcy refused to provide any answers, citing the Fifth Amendment privilege against self-incrimination. PC ROA 3:118.

In sum, the postconviction evidence reveals two sources that confirm Pearcy and Boggio were alone for at least a 60-90 minute period during the two-hour window of her death.[7]

B. Jack Pearcy's Four Admissions to Committing the Crime Alone and Exculpating Dailey

Pearcy has on at least four occasions admitted to being solely responsible for Boggio's death or otherwise affirmed Dailey's innocence. In the 2017 postconviction proceedings below, Dailey sought evidentiary consideration of these statements, despite them being hearsay, pursuant to *Chambers v. Mississippi*, 410 U.S. 284 (1973).

1. Statements proffered in the current postconviction proceeding below

As early as the mid-1980s, shortly after the crime occurred, Pearcy told Travis Smith, a fellow inmate in the county jail, that he "committed the crime himself and that he did it." App. 408a. Smith testified at the evidentiary hearing below that Pearcy discussed the case with him while he (Smith) worked in the jail law library and Pearcy asked for his input. Pearcy told Smith that investigators "think [Dailey] was with me or whatever" but that was not true and the charge was actually "his charge and his charge alone." App. 408a. Even though Smith testified at a live hearing, no factfinder has ever assessed his credibility. The postconviction court deemed his

[7] A conservative estimate places Pearcy's return home at 3:20 a.m. at the earliest. Mingus's phone records document their call lasting through 1:41 a.m. R2 10290. Shaw next spoke with his wife for about 20 minutes and walked home (perhaps another 10-15 minutes, placing the time at 2:10 a.m.), R2 93, chatted with Gayle Bailey, R2 94, and fell asleep for about an hour or an hour and a half.

account of Pearcy's incriminating statement inadmissible hearsay despite *Chambers*, App. 29a, and the Florida Supreme Court below neglected to address this issue, *see* App. 1a-16a, even after being asked to clarify. App. 76a-77a (motion for rehearing and clarification).

On two separate occasions Pearcy told another inmate, Juan Banda, that Dailey was wrongly on death row and in fact innocent. App. 413a-416a. Banda, who first met Pearcy after his arrest in 1985, spoke with him at Union Correctional Institution sometime between 1992 and 1996. At that time Pearcy told him that Dailey "was innocent of the crime that he was sentenced to death for." App. 413a-414a. In 2007, Banda encountered Pearcy yet again, this time in the law library of another prison. Banda asked about Dailey's fate. Pearcy repeated that Dailey was innocent. App. 414a-415a. As with Travis Smith, no court has assessed the merits or credibility of Banda's testimony, since the trial court ruled his account of Pearcy's statements was inadmissible hearsay despite *Chambers*, App. 29a, and the Florida Supreme Court neglected to address this issue in its opinion below, App 1a-16a, even after being asked to clarify. App. 76a-77a (motion for rehearing and clarification).

Finally, the proceedings below also included Pearcy's 2017 sworn affidavit, executed in the presence of a notary. App. 343a-344a. The affidavit recounts what happened on the night of Boggio's death and states that "James Dailey was not present when [Boggio] was killed. I alone am responsible for [Boggio]'s death." App. 343a-344a. When Pearcy was called to testify at the evidentiary hearing below, he initially stated that portions of the affidavit were not true, but was "not sure" which ones. App. 366a. When questioned about the affidavit line by line, Pearcy refused to answer and insisted on invoking a Fifth Amendment privilege. App. 368a-370a. The State took the position that it would be against Pearcy's interest to repeat his confession in open court, and asked the court to advise him accordingly:

> MR. MARTIN: Judge, I think in fairness to Mr. Percy [sic], you need to explain to him and ask him about his Federal Court and make sure that he's exhausted all his State, exhausted his Federal, and then he's still eligible for parole. Any statement made by him in the course of today could be used against him at future parole hearings, and inquire whether he wants an attorney to discuss that and with all those in mind, do you wish to --

App. 372a. The trial court complied and explained to Pearcy the repercussions he would face by answering questions. App. 373a. Pearcy refused to answer any questions, except to confirm his name and custody status. App. 374a. However, he did explain that his refusal came after meeting with a prosecutor and with his family, App. 374a-375a, elaborating that:

> [S]ince [Dailey's counsel] came back to see me after the affidavit, I spoke with all my family and they told me I needed to do what I thought was right, but that I needed to not make a rash decision since my parole just got denied for seven years and think about what I was doing. That's what they advised me.

App. 374a-376a.[8] The notary who observed Pearcy execute the affidavit testified that he read it slowly and carefully and used a piece of paper to guide himself line by line. R2 12156. Pearcy asked for the pen when he was ready to sign, R2 12156, and he was not hesitant, threatened, or induced. R2 12157-58. The State did not cross-examine the notary's account of how the affidavit was executed.

2. The Florida courts' refusal to consider Pearcy's statements despite this Court's decision in *Chambers*

Dailey sought consideration of Pearcy's statements under Florida's newly discovered evidence law, which considers evidence that would be "admissible at a trial" but was not

[8] Despite having warned Pearcy of potential "repercussions" from incriminating himself, the trial court nevertheless ordered that he testify. App. 373a. Pearcy refused to comply. *Id*. This was not the first time that Pearcy sought to invoke the Fifth Amendment when called to testify. In 2003, when Dailey called him during the evidentiary hearing in his first postconviction proceeding, Pearcy also invoked the Fifth Amendment due to concerns about how his answers could affect his own case. PC ROA 3:118. And before that, when Pearcy was called at Dailey's trial, he likewise invoked the Fifth Amendment; he continued to refuse to testify though he was found in contempt. TR1 8:987.

previously presented despite diligence. *See Jones v. State*, 709 So. 2d 512, 521 (Fla. 1998). Dailey urged that all four statements—made spontaneously to Travis Smith and to Juan Banda (twice), as well as his 2017 affidavit—would be admissible at trial under *Chambers*, even if hearsay, as a matter of federal constitutional law. R2 8144, 8151-57.

The postconviction court refused to consider any of the statements, ruling them inadmissible under state hearsay law and finding *Chambers* inapplicable by applying a test recently adopted by the Florida Supreme Court in *Bearden v. State*, 161 So. 3d 1257, 1265 (Fla. 2015). In ruling on Dailey's *Chambers* argument, the trial court applied a four-factor test that assessed whether: "(1) the confession or statement was made spontaneously to a close acquaintance shortly after the crime occurred; (2) the confession or statement is corroborated by some other evidence in the case; (3) the confession or statement was self-incriminatory and unquestionably against interest; and (4) if there is any question about the truthfulness of the out-of-court confession or statement, the declarant must be available for cross-examination.'" App. 29a (quoting *Bearden*, 161 So. 3d at 1265). The court found that Pearcy's 2017 affidavit failed each of the four factors. *Id*. The court also found that Pearcy's prior statements to Banda and Smith were "inadmissible hearsay statements" under state evidentiary rules, but it did not engage in the federal *Chambers* analysis as Dailey had urged. *Id*.

Dailey next asked the Florida Supreme Court to reverse and hold that Pearcy's statements must be considered under *Chambers* as reliable hearsay evidence material to his defense. App. 113a-122a. The Florida Supreme Court, like the trial court, invoked the four-factor *Bearden* test as the relevant standard. However, the court declined to consider the second *Bearden* factor—whether the confession was corroborated by other evidence in the case—and instead held Pearcy's statement inadmissible under *Chambers* because it did not satisfy the other three factors. The

Florida Supreme Court acknowledged Dailey's argument that significant evidence in the case corroborated Pearcy's confession, but held that the confession was inadmissible "regardless of any corroborating evidence." App. 7a.[9] The court explained:

> The first factor is not satisfied; the affidavit was executed more than thirty years after the murder, not shortly after the crime occurred. The affidavit similarly fails to meet the third factor. Pearcy's statement in the affidavit that he alone killed Boggio is not unquestionably against his interest. Pearcy had already been tried, convicted, and sentenced for Boggio's murder at the time the affidavit was executed. Finally, questions about the truthfulness of the affidavit arose when Pearcy testified that its contents were false. But Pearcy's persistent invocation of the Fifth Amendment caused him to be unavailable for cross-examination.

App. 7a-8a. Also like the trial court, the Florida Supreme Court did not rule on (or even acknowledge) Dailey's separate arguments that *Chambers* required consideration of Pearcy's prior spontaneous statements to fellow inmates Juan Banda and Travis Smith in the 1980s, 1990s, and 2007.

Dailey sought rehearing, arguing that the Florida Supreme Court's application of the four-factor test contravened this Court's precedent in *Chambers* and *Green v. Georgia*, 442 U.S. 95, 97 (1979). App. 45a-46a, 70a-76a. He argued that Pearcy's 2017 affidavit would be admitted at trial under a proper *Chambers* analysis because it was exceptionally reliable in light of the circumstances under which it was made (including Pearcy's refusal to repeat it on Fifth Amendment grounds), as well as in light of the physical and circumstantial evidence corroborating Pearcy's claim that he was the sole perpetrator of this crime. App. 48a-66a.[10] On October 14, 2019,

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[9] On September 25, 2019, after Dailey's appeal had been pending for over a year, and without any prior notice to him, the Governor of Florida set an execution date for November 7, 2019. The execution warrant explicitly stated that it anticipated that Dailey's ongoing innocence litigation would conclude shortly and relief would be denied. Eight days later, without acknowledging the recently-issued death warrant, the Florida Supreme Court denied relief.

[10] Dailey also sought clarification as to the Florida Supreme Court's refusal to acknowledge his argument that Pearcy's other prior confessions to inmates Banda and Smith must also be admitted under *Chambers*. App. 43a, 76a-77a.

the Florida Supreme Court denied the rehearing motion without addressing any of Dailey's federal constitutional arguments. App. 19a.

C. Evidence Discrediting Jailhouse Informant Testimony

Finally, Dailey's postconviction proceedings revealed new evidence discrediting the linchpin jailhouse informant testimony—testimony that Dailey's jury heard without any meaningful impeachment. The new impeachment was robust and multifaceted. It revealed that Paul Skalnik had an immense propensity for dishonesty and had lied about his criminal history; that Skalnik had a secret deal (or, at least, an expectation of such a deal) that he denied after being coached by the prosecution to do so; and that Pablo DeJesus and James Leitner had colluded in an effort to come up with incriminating testimony. The proceedings also revealed that the so-called evidence these witnesses provided was procured under exceptionally suspicious circumstances. Specifically, the jailhouse informants came forward thirteen months into Dailey's pretrial detention, and only after the lead detective pulled all the inmates from Dailey's pod and interviewed them in a small room with newspaper articles showing the details of the crime: a manner that in effect broadcast to the entire jail that the detective was looking for witnesses against Dailey.

1. Paul Skalnik

At trial, jailhouse informant Paul Skalnik unequivocally denied being offered or otherwise expecting any favorable treatment in exchange for his testimony, instead insisting that he simply came forward because it was the right thing to do. TR1 9:1108, 1157. Skalnik presented himself as a former police officer turned petty thief. TR1 9:1117-18, 1155-56. He denied ever committing "rape [or] physical violence in my life." TR1 9:1158. The prosecutor urged in closing that Skalnik

should be believed because he was a mere "thief" and that the detective had known him for years and viewed him as credible.[11] TR1 10:1283.

In the initial postconviction proceeding, Dailey uncovered that Skalnik had actually written numerous letters and filed at least one verified motion in his own case complaining about the State not keeping its promises and alleging that they supplied his answers and coached his testimony. PC ROA 6:866-67 (verified motion signed by Skalnik, filed through counsel one year after Dailey's death sentence, alleging that prosecutor Beverly Andrews "knew" about "questionability" of confessions by Skalnik and "coached" him to deny the existence of a "leniency" agreement that would "destroy [his] credibility" if revealed); 6:870 (notarized affidavit eighteen months after Dailey's death sentence complaining about prosecutors, in a separate case, not making good on their agreement after coaching Skalnik how to answer questions); 6:872-77 (handwritten letter to a judge in a pending case, one year after Dailey's death sentence, complaining that the prosecution has not kept their word and that Skalnik was seeking to "come forward and expose the corruption that exists in Pinellas county"); 878-81 (handwritten letter to Dailey's prosecutor Bob Heyman five days before testifying in Dailey's trial).

Skalnik was summoned in 2003 from a Massachusetts prison to testify about these letters. PC ROA 4:425. Skalnik claimed to have no recollection of seeking any benefit from his testimony, suggesting instead that his attorney at the time may have tried to arrange such benefits without his knowledge. PC ROA 4:444. He also claimed not to remember the letters asking for benefits, though he did concede that he wrote "tons of stuff" and "some crazy things," PC ROA 4:446-47, and that his handwriting and signatures were authentic. PC ROA 4:449-50, 456. According to Skalnik, he

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[11] In her closing argument, Beverly Andrews vouched for the jailhouse informants as follows: "You heard Detective Halliday's experience . . . . If those men are cons, they would not con Detective Halliday." TR1 10:1283.

could not recall whether he had ever alleged to have received a deal in Dailey's case. PC ROA 4:455-56. When shown the verified motion filed by his former counsel (and signed by Skalnik) noting his agreement and explaining how and why his testimony was coached, PC ROA 6:866-67, Skalnik responded by denying ever reading the motion before signing his name on the verification. PC ROA 4:457-58. He also denied ever characterizing his prior testimony as a "lie" to his lawyer as his motion alleged. PC ROA 4:458-60. The Florida Supreme Court nevertheless found that Skalnik's claimed lack of memory, along with his denials during the 2003 evidentiary hearing, sufficiently defeated Dailey's *Giglio* claim alleging that Skalnik had testified falsely. *See Dailey III*, 965 So. 2d at 45.

The trial prosecutor Beverly Andrews testified during a 2003 evidentiary hearing that she did not recall her involvement in deciding whether Skalnik should testify. PC ROA 3:383. She said she typically made such decisions based upon an informant's history of truthfulness and the informant's access to alternate sources of case information, but she had no memory as to these factors in Dailey's trial. PC ROA 3:384-88. In a hearsay proffer, Dailey lodged Andrews's March 2003 deposition, in which she testified that she would never call Skalnik as a witness again due to his lack of credibility. PC ROA 3:397-98.

Dailey's initial postconviction proceedings also revealed the details of many of Skalnik's prior convictions and pending charges, which the Florida Supreme Court on direct appeal agreed that Dailey should have been allowed to explore. Those details showed that, contrary to the State's representations to the jury, Skalnik was not a mere "thief," but instead a compulsive con man whose countless charges involved elaborate scams defrauding innocent victims, including the elderly and widowed. PC ROA 4:434-441 (testimony); 2:211-213 (summarizing the charges).

In the 2017 postconviction proceeding below, Dailey presented further evidence that Skalnik was not only a professional con man but also a child rapist. Despite Skalnik insisting to Dailey's jury that he had never had charges of "rape [or] physical violence in [his] life," TR1 9:1158, the State never corrected or otherwise disclosed the fact that its own office had charged him in 1982 for fondling, exposing himself, and penetrating the vagina of a twelve-year-old victim.[12] R2 21, 30, 90 (probable cause finding), 2286 (charging document). Dailey raised this impeachment by means of a *Giglio* claim, which the Florida Supreme Court denied below, ruling that any such false testimony about Skalnik's prior rape would not have been material. App 14a-15a.

2. Pablo DeJesus and James Leitner

In his initial postconviction proceeding, Dailey alleged that another inmate, Travis Smith, overheard as Leitner and DeJesus discussed plans to testify against Dailey. PC ROA 1:25. Dailey also alleged that Leitner, for his part, admitted that his testimony about Dailey's confession was "fabricated and false." PC ROA 1:60. The trial court granted an evidentiary hearing on these matters, PC ROA 2:230, 250, but denied relief after first postconviction counsel failed to present supporting evidence. PC ROA 155, 178.

In the 2017 proceedings below, Travis Smith testified that he was a paralegal at the jail law library where inmates Leitner and DeJesus also both worked. R2 12079-80. Smith never saw Dailey discuss his case and explained that the two of them were known "to try to help themselves." R2 12081. He never saw Dailey speak to Leitner and DeJesus. R2 12088-89. Smith did notice, however, that DeJesus and Leitner privately discussed Dailey's case with each other in the law

[12] It stands to reason that the prosecutor's theme in closing, that there was a "hierarchy over in that jail" where "some crimes are worse than others" would have been badly undercut had the jury known the full extent of Skalnik's criminal history.

library. R2 12082. The two of them talked about different elements of his case and tried to piece together a story. R2 12087. He characterized them as "plot[ting]" to get information over to the state attorney. R2 12092-93.

3. Detective Halliday's search for jailhouse informants after Pearcy's jury recommended life

In his initial postconviction proceeding in 2003, Dailey alleged that law enforcement had gone to extraordinary lengths to find informants against him. Specifically, he alleged that Detective John Halliday began a concerted recruitment strategy after Jack Pearcy's jury refused to recommend the death penalty. The very next week, on December 4, 1986, Detective Halliday pulled every inmate from Dailey's pod, showed them newspaper clippings about the murder of Boggio, and asked each about information on Dailey. PC ROA 2:230-31 (granting hearing); PC ROA Supp. 2: 172-173. But because first postconviction counsel did not present any supporting evidence on this point, the court deemed the claim waived.

In the 2017 proceedings below, Dailey presented testimony from three of the witnesses who were named in the initial proceedings but were never called. James Wright testified that while in jail around the time of Dailey's trial, a detective pulled him into a room, showed him newspaper articles, and asked if Dailey had spoken about his case. R2 12056-57. Wright testified that Dailey had never spoken about his case, except to say he was innocent. R2 12057. Travis Smith testified that Dailey's case was well known in the jail due to widespread news coverage. R2 12076-78. He recalled when an officer and a prosecutor pulled him into a small room to ask about Dailey's case. R2 12094-95. The two interviewers showed him newspaper clippings of the crime. R2 12095-96.

Michael Sorrentino testified that he and Dailey were in the same pod and had interacted on a daily basis. R2 12104-05. Despite six to eight months of daily contact, Sorrentino had never heard Dailey discuss his case with anyone. R2 12110. Sorrentino explained that the case was

frequently in the news. R2 12105-06. Then, at one point, an investigator came to the jail and started bringing inmates to a room with a desk covered in newspapers. Sorrentino believed that he was the second or third inmate brought there. R2 12106. The investigators asked him if "Jim ever talk[ed] about his case" and Sorrentino told them, "No." R2 12107. This questioning made Sorrentino uneasy because, in light of the newspaper articles spread out before him, it seemed clear that the investigators were inviting inmates to fabricate information. R2 12107-09.

The State called Detective Halliday, who confirmed that he had gone to the jail and pulled inmates into a room, one by one, alongside another detective or officer present. R2 12164-67. He specifically recalled pulling Sorrentino, Wright, and Smith, but he denied bringing in newspaper clippings. R2 12167-71. On cross-examination, after significant hesitation and claims of lack of memory, Halliday ultimately agreed that no jailhouse informant had come forward until after his visit to the jail, and that his visit had occurred just after Pearcy's jury refused a death sentence. R2 12181, 12888-89. Halliday began looking for informants on December 4, 1986, which was thirteen months after Dailey's arrest and just one week after Pearcy's trial. R2 12888-94. Halliday also admitted to having interviewed fifteen inmates in total after Pearcy's trial, R2 12195-98, and said that he had requested to talk to others, but that they had refused to be interviewed. R2 12195-99. After claiming lack of memory, Halliday was shown his own prior testimony acknowledging that, as a result of his seriatim interviews in Dailey's pod, he expected word to spread throughout the jail about the fact that he was seeking out inmates with incriminating information on Dailey. R2 12199-201. Not one of the fifteen inmates whom Halliday interviewed relayed any incriminating statements from Dailey. R2 12206-08. Yet the record showed that all three jailhouse informants who ultimately came forward with Dailey's putative confessions did so only after Halliday's visit in December of 1986, and all three claimed that Dailey made these incriminating statements some

time after Halliday's visit. R2 12210-22.

Neither the trial court nor the Florida Supreme Court considered any of this impeachment evidence on its merits, finding instead that Dailey could have presented the testimony in his initial collateral proceeding. App. 8a-10a (testimony of Wright, Sorrentino, and Smith as to Detective Halliday pulling inmates from Dailey's pod after Pearcy's life verdict and showing newspaper clippings and impeachment of DeJesus and Leitner); App. 10a-11a (Skalnik's insistence on having a deal that the State breached).[13]

REASONS FOR GRANTING THE WRIT

This Court should grant a writ of certiorari to decide whether the Florida Supreme Court's application of its four-factor test for the analysis of *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973), violated the United States Constitution in Dailey's case.

The total evidence now in the record bears little resemblance to the misleading picture presented to Dailey's jury before it convicted and sentenced him to death. This record—punctuated by codefendant Pearcy's multiple confessions, all of which the Florida Supreme Court has refused to consider—strongly suggests that Dailey had nothing to do with the murder. Instead, the totality of the evidence corroborates Pearcy's 2017 affidavit in which he states that he alone went out with Boggio and then killed her, and that Dailey was not involved. But the state courts have refused to even consider Pearcy's confession, the most affirmative evidence of Dailey's innocence, based on

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[13] After the conclusion of the proceedings below and under an execution warrant, Dailey filed a new successive postconviction motion based on an affidavit of another inmate, Edward Coleman, who also alleged that "Detective John Halliday pulled him into a private interview room on two separate occasions" and asked "if Dailey or Pearcy discussed their cases with other inmates" and also "instructed him 'to listen carefully and try to get information[.]'" *Dailey v. State*, SC19-1780, 2019 WL 5883509, at *4 (Fla. Nov. 12, 2019). Coleman alleged that on the second occasion, Halliday brought in newspaper articles and asked him "to look for specific details about the case, and promised to reduce his charges if he shared any information." *Id*. The trial court and the Florida Supreme Court summarily denied the claim as "untimely." *Id*.

a misapplication of federal constitutional law. This Court should intervene to prevent Dailey's wrongful execution, and to resolve an important federal question that is dividing the lower courts.

In its decision below, the Florida Supreme Court refused to consider Pearcy's confession despite this Court's ruling in *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973), which requires state evidentiary rules to give way under the Due Process Clause where the accused presents reliable third-party hearsay that is material to the defense. The Florida Supreme Court reached its conclusion by applying a four-factor test it devised for the federal *Chambers* analysis. Applying the test adopted in *Bearden v. State*, 161 So. 3d 1257, 1265 (Fla. 2015), the Florida Supreme Court held that Pearcy's confession was properly barred as unreliable under *Chambers* "regardless of any corroborating evidence" in the record, because the confession was too recent, not spontaneous, and because Pearcy (who is still eligible for parole) sought to invoke the Fifth Amendment when questioned about the murder in open court. App. 7a; *Dailey V*, 279 So. 3d at 1214. The Florida Supreme Court also refused to consider Pearcy's other exculpatory hearsay, without any explanation, despite Dailey's contention that *Chambers* required each of Pearcy's confessions to be admitted.

This Court should grant a writ of certiorari to decide whether the Florida Supreme Court's four-factor test for the analysis of *Chambers* arguments, an approach that has been embraced by some courts but rejected by most others, contravenes the United States Constitution, particularly as applied in Dailey's case. Without this Court's intervention, the Florida Supreme Court will continue violating *Chambers* through the application of its four-factor test, leading to the exclusion of critical third-party statements without any regard for corroboration.

A. Under *Chambers*, the Due Process Clause Requires Courts to Consider Exculpatory Hearsay, Even If Inadmissible Under State Evidentiary Rules, When the Evidence Is Sufficiently Reliable and Material to the Defense

A criminal defendant has a federal constitutional right to present evidence, otherwise barred by state evidentiary rules, such as a hearsay statement by a third party, if it is reliable and material to the defense. *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). This due process right also implicates the broader constitutional right of the accused to present a complete defense. *See Crane v. Kentucky*, 476 U.S. 683, 684 (1986); *Chambers*, 410 U.S. at 302 ("Few rights are more fundamental than that of an accused to present witnesses in his own defense."). State evidentiary restrictions must give way to this federal constitutional right where they "infringe upon a weighty interest of the accused and are arbitrary or disproportionate to the purposes they are designed to serve." *United States v. Scheffer*, 523 U.S. 303, 308 (1998).

In *Chambers*, this Court found that the United States Constitution was violated when a state court refused to consider evidence of a third party's confessions on hearsay grounds, even though the confessions "bore persuasive assurances of trustworthiness" and were "critical to the [petitioner's] defense." *Id.* at 302. In so holding, this Court did not set forth any particular test for ascertaining the reliability of proffered evidence. Instead, the Court engaged in a fact-specific analysis of all relevant circumstances to conclude that "the hearsay statements involved in this case were originally made and subsequently offered at trial under circumstances that provided considerable assurance of their reliability." *Id*. at 300. In particular, the Court noted that the hearsay statements at issue were "corroborated by some other evidence in the case," and were made under other circumstances that, on the whole, rendered them sufficiently reliable. *Id*. at 300-01. This Court discussed the fact-specific "corroborat[ion] by some other evidence," and explained that the statements were consistent with "the testimony of an eyewitness to the shooting, the testimony that [the declarant] was seen with a gun immediately after the shooting, and proof of his prior

ownership of a .22-caliber revolver and subsequent purchase of a new weapon[, and t]he sheer number of independent confessions [that] provided additional corroboration for each." *Id*.

In *Green v. Georgia*, 442 U.S. 95, 97 (1979), this Court again applied *Chambers* to hold that a state court was compelled to admit a codefendant's statement despite the hearsay rule. In that case, the evidence was a statement of the codefendant that the petitioner was out on an errand at the time the victim was killed. *Id*. In so holding, this Court reaffirmed that otherwise-inadmissible hearsay must be considered if it is "highly relevant to a critical issue . . . and substantial reasons exist[] to assume its reliability." *Id*. at 97 (citations omitted). As in *Chambers*, this Court assessed the proffered evidence in light of all of the circumstances, without delineating any particular test or list of factors for determining if "substantial reasons exist[]" to "assume" the reliability of proffered hearsay. *Id*.

And in more recent years, this Court has acknowledged that *Chambers* applies to evidence in a capital mitigation case developed in postconviction proceedings just as it applies to evidence regarding guilt of the underlying offense. *See Sears v. Upton*, 561 U.S. 945, 950 (2010) (under *Chambers* and *Green*, "reliable hearsay evidence that is relevant to a capital defendant's mitigation defense should not be excluded by rote application of a state hearsay rule"); *see also Fry v. Pliler*, 551 U.S. 112, 124 (2007) (Stevens, J., concurring in part) (endorsing the lower court's finding that a witness's testimony about "overhear[ing] statements by [the alternate suspect] that he had committed a double murder" must be admitted under *Chambers* even though it lacked foundation under a state evidentiary rule).[14]

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[14] Courts routinely apply *Chambers* to assess hearsay admissibility irrespective of whether the statement was initially offered at the original trial or, as here, if it was first uncovered and presented during postconviction proceedings. *See, e.g.*, *Sears*, 561 U.S. at 950 & n. 6 (holding statements uncovered in postconviction proceedings as part of an ineffective assistance of counsel claim should be analyzed under *Chambers* and *Green*); *see also Commonwealth v. Drayton*, 96

Finally, aside from policing applications of the hearsay rule, this Court has relied on *Chambers* to vindicate the right to present a defense against other evidentiary restrictions. *See, e.g.*, *Holmes v. South Carolina*, 547 U.S. 319, 329 (2006) (rule restricting evidence of third-party culpability if the prosecution's case is strong); *Rock v. Arkansas*, 483 U.S. 44, 55 (1987) (rule restricting a defendant's presentation of hypnotically-refreshed testimony); *Crane*, 476 U.S. at 689-90 (rule restricting a defendant's explanation of the circumstances under which a voluntary confession was obtained). As the Seventh Circuit has remarked in a recent opinion granting federal habeas relief, "*Chambers* was not a one-and-done opinion from the Supreme Court. To the contrary, the rule requiring state evidentiary rules to yield to the defendant's fundamental due-process right to present a defense has arisen in many later cases." *Kubsch v. Neal*, 838 F.3d 845, 855-56 (7th Cir. 2016) (en banc), *cert. denied* 137 S. Ct. 2161 (2017).

B. The Florida Supreme Court Misapplied *Chambers* By Analyzing the Codefendant's Hearsay Confession Under a Four-Factor Test That Disregarded Corroborating Evidence

The Florida Supreme Court's (and the state postconviction court's) *Chambers* application in this case looks nothing like the inquiry this Court has repeatedly applied. In this case, Dailey argued that Pearcy's multiple statements—taking responsibility for killing Boggio and exculpating Dailey from involvement—were reliable and material to a trial defense under *Chambers* and must thus be considered in deciding whether to grant relief under Florida's newly-discovered evidence

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N.E.3d 163, 166 (Mass. 2018); *Aguirre-Jarquin v. State*, 202 So. 3d 785, 792 (Fla. 2016); *McWhorter v. State*, 142 So. 3d 1195, 1257 (Ala. Crim. App. 2011); *State v. Bunyan*, 154 N.J. 261, 270-71 (N.J. 1998); *Perry v. Norris*, 879 F. Supp. 1503, 1536 (E.D. Ark. 1995); *Timberlake v. State*, 271 S.E.2d 792, 796 (Ga. 1980). Even states that otherwise interpret *Chambers* narrowly have applied it to statements introduced in postconviction proceedings. *See*, *e.g.*, *State v. Scheidell*, 897 N.W.2d 67 (Wis. 2017); *People v. Deacon*, 96 A.D.3d 965, 968 (N.Y. 2012); *State v. Stewart*, 313 S.W.3d 661, 666 (Mo. 2010); *People v. Cunningham*, 642 N.E.2d 781, 785 (Ill. 1994).

law. App. 48a-66a (argument in motion for rehearing), App. 114a-123a (argument on appeal to the Florida Supreme Court), R2 8144, 8151-57 (argument to the state postconviction court). In rejecting these federal constitutional arguments, the state courts below applied a state-created four-factor admissibility test, derived from the Florida Supreme Court's earlier opinion in *Bearden v. State*, 161 So. 3d 1257, 1265 (Fla. 2015), which purported to explicate the requirements of *Chambers*. App. 7a-9a (opinion below), 29a (trial court opinion). *Accord*, *e.g.*, *Payton v. State*, 239 So. 3d 129, 132 (Fla. 1st DCA 2018), rev. denied, SC18-640 (Fla. 2018) (denying *Chambers* claim because the proffered statement failed the "four-factor test for [its] admission").

In *Bearden*, the Florida Supreme Court resolved a split between lower state courts by setting forth this four-part admissibility test for considering third-party hearsay statements under *Chambers*. Despite previously outright rejecting *Chambers* as generally inapplicable, *see Gudinas v. State*, 693 So. 2d 953, 965 (Fla. 1997) (stating that *Chambers* "was limited to its facts due to the peculiarities of Mississippi evidence law"), the court now held that *Chambers* allows consideration of otherwise-inadmissible hearsay, provided it satisfies a four-factor inquiry into whether:

> (1) the confession or statement was made spontaneously to a close acquaintance shortly after the crime occurred;
> (2) the confession or statement is corroborated by some other evidence in the case;
> (3) the confession or statement was self-incriminatory and unquestionably against interest; and
> (4) if there is any question about the truthfulness of the out-of-court confession or statement, the declarant must be available for cross-examination.

Bearden, 161 So. 3d at 1265 (numbering in original, line breaks added, citing *Chambers*, 410 U.S. at 300-01). This list of factors appears to be derived from this Court's case-specific analysis of the hearsay statement in *Chambers* itself, *see* 410 U.S. at 300-01, even though nothing in this Court's opinion suggested that those particular features should be transposed into generally-applicable criteria for admissibility in every case. Indeed, this Court's later application of *Chambers* did not

contain the specific features of the *Chambers* confession. *See*, *Green*, 442 U.S. at 97 (holding that the "perhaps most important" reason Green's codefendant's confession was admissible was that the State considered it reliable enough to "base a sentence of death upon it" against the codefendant in his own trial).

A rigid factor-based approach, by its very nature, risks excluding critical and well-corroborated evidence for arbitrary reasons unrelated to reliability, as was done by the Florida Supreme Court's application of *Chambers* in this case. As one Florida court has acknowledged, the present four-factor test makes it difficult to assess reliability of sworn statements (since those were not made spontaneously), or statements whose declarant is unavailable. *Gardner v. State*, 194 So. 3d 385, 389 (Fla. 2d DCA 2016) (analyzing each *Bearden* factor seriatim despite "recogniz[ing] that it is an awkward fit" to apply the test to assess admissibility of a hearsay statement in the form of a "discovery deposition of an unavailable witness"). For example, a sworn statement of an unavailable witness might appear reliable in light of strong corroboration (factor two), yet it may still be excluded simply because it was not made "close in time" to the crime (factor one). Further, since the truth of any such statement will be "questionable"—given that a State's case for guilt will have survived an acquittal motion or a sufficiency review will necessarily cast doubt on exculpatory hearsay—any *Chambers* evidence under Florida's test could be excluded merely due to "questions about [its] truthfulness" (factor four). *Cf. Holmes*, 547 U.S. at 330 (relying on *Chambers* to strike down a state rule restricting third-party culpability evidence if the prosecution's case appears sufficiently strong). Likewise, requiring that a statement be "unquestionably" against a declarant's penal interest (factor three) may result in the exclusion of a swath of otherwise reliable and corroborated evidence where the declarant is already serving a sentence and thus the impact of further incrimination is not "unquestionable," or if a statement

appears reliable having been made despite the declarant's reputational or economic (but not penal) interest.

This Court need not look further than this case to see how Florida's approach contravenes *Chambers*. Dailey argued that Pearcy's 2017 affidavit was critical evidence for his defense and would be admissible at a trial because it was reliable due to extensive corroboration, the multiplicity of other confessions, and in light of the circumstances under which it was made. But the Florida Supreme Court held the affidavit inadmissible "regardless of any corroboration," simply because it was not made spontaneously after the crime (factor one), it was not "unquestionably" against Pearcy's interest (factor three) as he was already serving time for the crime despite the possibility of parole, and because its "truthfulness" was questioned though Pearcy refused to answer any specific questions at a live hearing on Fifth Amendment grounds (factor four). App 7a-8a.[15] Tellingly, after reciting the four factors, the Florida Supreme Court did not even refer in its conclusion to the issues upon which *Chambers* turns: a statement's overall reliability and materiality.

In short, by its operation and design, the four-factor test as applied below is contrary to the holistic, totality-of-circumstances analysis employed in *Chambers* and *Green*, and is inconsistent with this Court's directive for assessing reliability of hearsay in related contexts. *Cf. Illinois v. Gates*, 462 U.S. 213, 234 (1983) (endorsing "a totality-of-the-circumstances analysis, which

[15] Although Dailey presented a *Chambers* argument to seek admission of four different statements in the 2017 proceedings, the Florida Supreme Court inexplicably analyzed just the single 2017 affidavit under *Chambers*. It never addressed Dailey's argument that Pearcy's other statements—spontaneously made to Travis Smith while in county jail before trial and to Juan Banda while in two state prisons in the 1990s and in 2007—must also be considered and admitted under *Chambers*. Dailey sought clarification after this peculiar failure to adjudicate, App. 43a, 76a-77a, but that request was summarily denied, App. 19a.

permits a balanced assessment of the relative weights of all the various indicia of reliability (and unreliability)" over a multi-prong test, which fosters an "excessively technical dissection" and gives undue weight to "isolated issues that cannot sensibly be divorced from the other facts"). Certiorari is thus necessary to review whether the Florida Supreme Court's approach to *Chambers* admissibility, as exemplified by this case, contravenes this Court's long-standing precedent.

C. The Florida Supreme Court's Factor-Based Approach Conflicts With How Other State and Federal Courts Apply *Chambers*

Certiorari review is also appropriate to resolve the divergent approaches to *Chambers* among lower courts. The overwhelming majority of federal appellate courts and state courts of last resort analyze *Chambers* admissibility in a manner that conflicts with the multifactor test used in Florida and employed to deny relief below. This Court should provide further guidance to reduce the current disparities in the federal constitutional rights afforded to Florida litigants under *Chambers*.

Ten federal circuit courts agree that, contrary to the approach used in Florida, third-party hearsay must be admitted whenever it is sufficiently material and reliable under the circumstances, without relying on any mechanical or rigid multi-prong admissibility test.[16] Their rules are often

[16] *See Hodge v. Mendonsa*, 739 F.3d 34, 42 (1st Cir. 2013) (holding that *Chambers* requires admission of hearsay statements made under circumstances that provide assurance of reliability, including corroboration); *Bowman v. Racette*, 661 F. App'x 56, 59 (2d Cir. 2016) (under *Chambers* an otherwise "correct application of state evidentiary rules can violate due process where the excluded evidence bore indicia of reliability and where exclusion prevents the defendant from mounting an effective defense."); *Staruh v. Superintendent*, 827 F.3d 251, 260-62 (3d Cir. 2016) (*Chambers* "stands for the proposition that a criminal defendant has a due process right to have clearly exculpatory evidence presented to the jury, at least when there is no strong countervailing systemic interest that justifies its exclusion"); *Huffington v. Nuth*, 140 F.3d 572, 584 (4th Cir. 1998) (*Chambers* requires admission of third-party confessions if critical and reliable even if otherwise excludable on the basis of state evidentiary rules); *Turpin v. Kassulke*, 26 F.3d 1392, 1396 (6th Cir. 1994) (*Chambers* requires the admission of critical, exculpatory, and trustworthy evidence); *Kubsch v. Neal*, 838 F.3d 845, 858 (7th Cir. 2016) (*Chambers* requires admission of evidence if "reliable and trustworthy" and "essential" to the defense); *Cudjo v. Ayers*, 698 F.3d

stated slightly differently but the fundamental principle remains the same: a statement that is material to the defense must be admitted if it is reliable in light of all relevant circumstances. And, unlike the Florida Supreme Court, none of the circuit courts have disregarded the importance of corroborating evidence when applying *Chambers* to assess reliability. Indeed, as the Seventh Circuit has explicitly stated, "[a] refusal to consider corroborating circumstances," *Kubsch*, *supra*, 838 F.3d at 858, as the Florida Supreme Court explicitly did in this case, App. 7a, contravenes *Chambers*.

Two federal circuit courts disagree with this proposition. The Eighth Circuit has endorsed a multifactor test based on the specific facts of *Chambers* that is similar to the one now used by Florida. *See Skillicorn v. Luebbers*, 475 F.3d 965, 971 (8th Cir. 2007). That court has held that the Missouri Supreme Court "appear[ed] to have correctly applied" *Chambers* by limiting the analysis to the "indicators of reliability delineated in *Chambers*." *Id*. The underlying test endorsed by the Eighth Circuit assesses whether: (1) "the statement is truly against the penal interest of the speaker," (2) the statement "was corroborated by numerous pieces of evidence," and (3) the statement was "made spontaneously to a close acquaintance shortly after the murder had occurred." *Id.* at 970-71; *see also State v. Smulls,* 935 S.W.2d 9, 21 (Mo. 1996). The Fifth Circuit is the only circuit to question whether *Chambers* and *Green* are limited to their facts. *See Little v. Johnson*, 162 F.3d 855, 860 (5th Cir. 1998). ("[A]s this court has twice recognized, *Chambers* and

752, 762-66 (9th Cir. 2012) (9th Cir. 2016) (under *Chambers* a state court may not prohibit a defendant from presenting directly exculpatory evidence when the evidence is essential to the defendant's case and bears sufficient indicia of reliability); *Hancock v. Trammell*, 798 F.3d 1002, 1027 (10th Cir. 2015) (*Chambers* can require the admission of otherwise inadmissible evidence if it is reliable and exclusion would significantly undermine the fundamental elements of the defense); *Pittman v. Secretary*, 871 F.3d 1231, 1247-49 (11th Cir. 2017) (*Chambers* requires "constitutional override" of a hearsay rule where the "hearsay statement [i]s sufficiently trustworthy and reliable"); *United States v. North*, 910 F.2d 843, 908-09 (D.C. Cir. 1990) (reviewing the exclusion of hearsay evidence for indicia of materiality and reliability).

Green stand for the limited proposition that certain egregious evidentiary errors may be redressed by the due process clause"). However, assuming that *Chambers* applies beyond its facts, even the Fifth Circuit is in accord with other federal courts that the proper assessment of trustworthiness proceeds by considering all relevant circumstances. *See id*.

As to state courts, a survey of decisions attached in the appendix to this Petition reveals that the overwhelming majority of states apply *Chambers* without narrowing its reliability inquiry through prerequisites or enumerated factors, or otherwise have codified residual hearsay exceptions that obviate the need for defendants to invoke the *Chambers* safety-valve. *See* App. 420a-422a. Specifically, twenty-five states have affirmed that *Chambers* only requires an overall assessment of materiality and reliability, and that such an inquiry must take into account other evidence in the record that would tend to corroborate the hearsay. Twenty-nine states have codified residual hearsay exceptions, similar to Rule 807 of the Federal Rules of Evidence, that satisfy *Chambers* by providing a statutory catch-all for admissibility of hearsay that is material, trustworthy, and the admission of which "will best serve the purposes of these rules and the interests of justice." *See United States v. Mitrovic*, 890 F.3d 1217, 1222 (11th Cir. 2018) (noting that the residual hearsay exception serves as a catch-all safety valve that satisfies and subsumes the *Chambers* constitutional right); *Demby v. State*, 695 A.2d 1152, 1156–57 (Del. 1997) (noting that the residual hearsay exception avoids "a mechanistic application of the hearsay rule that concerned the Supreme Court in *Chambers* and *Green*"). Thus, through a proper application of *Chambers* (or by means of a state residual hearsay exception that provides the same or greater protection), thirty-nine states provide defendants an avenue through which an otherwise-

inadmissible third-party confession can be presented if it is reliable and material based on all relevant circumstances, including corroboration.[17]

Of the remaining states, only ten, including Florida, have interpreted *Chambers* as requiring specific factors or otherwise imposing a prerequisite to a statement's admissibility. App. 420a-422a. These states disagree with the majority of jurisdictions which have held that *Chambers* requires a third-party confession to be admitted, notwithstanding state evidentiary rules, if it is material and reliable. Ohio and Pennsylvania, like Florida, have devised four-factor tests from the specific facts of *Chambers*. *See State v. Sumlin*, 630 N.E.2d 681, 685 (Ohio 1994); *Com. v. Bracero*, 528 A.2d 936, 940 (Pa. 1987). Missouri applies a similar three-factor test that also appears to have been lifted from the case-specific features of the confession at issue in *Chambers* itself. *See Smulls,* 935 S.W.2d at 21. Similarly, in Illinois, a statement may be admitted if it is accompanied by sufficient indicia of reliability, but only if the statement satisfies the prerequisite condition that it be against the declarant's interest. *See People v. Rice*, 651 N.E.2d 1083, 1087 (Ill. 1995) ("Under *Chambers*, the statement at issue *must* be against the declarant's interest, *and* the statement must be accompanied by sufficient indicia of reliability to be admitted"); *cf. id*. at 1088 (Harrison, J., dissenting) (protesting that "[t]he question to be considered in judging the admissibility of a declaration is simply whether the declaration was made under circumstances that provide 'considerable assurance' of its reliability by objective indicia of trustworthiness").

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[17] Some states in the majority use multifactor tests similar to that of Florida to analyze the admissibility of statements against penal interest. *See*, *e.g.*, *State v. Lopez*, 757 A.2d 542, 546 (Conn. 2000) (using a four-factor test based on the specific facts of *Chambers* to assess the admissibility of a statement against penal interest). However, because these states have also established catchall safety valves for material and reliable hearsay, these states meet the constitutional demand of *Chambers*. *See*, *e.g.*, Conn. Code Evid. § 8-9 (allowing for the admission of otherwise inadmissible evidence if it is "reasonably necessary" and sufficiently reliable).

Regardless of the test these states employ, the fatal defect is always the same: material and reliable hearsay is unconstitutionally restricted in a way that it would not be in other jurisdictions.

In addition to the need to remedy the Florida Supreme Court's federal constitutional error in Petitioner's case, certiorari review is appropriate in light of lower courts' varying applications of the constitutional holding of *Chambers* nationally. Despite this Court having repeatedly reaffirmed *Chambers* over the past decades, the Court has yet to provide specific guidance regarding how to assess the reliability of third-party-confession evidence that would otherwise be excludable by local evidentiary rules. This Court should grant review and bring Florida and other outlier jurisdictions into conformity with this Court's precedent, and require that courts nationwide conduct a holistic review of the evidence in the case, especially corroboration evidence, when assessing a third-party confession's overall reliability under *Chambers*.[18]

[18] Granting review would also allow this Court to harmonize other creative approaches to *Chambers* that have been applied in the lower courts. For example, the Seventh Circuit has used a proxy inquiry that assesses reliability by asking whether the proffered hearsay would be good enough for a prosecutor to use if the declarant were on trial. *Lee v. McCaughtry*, 933 F.2d 536, 537 (7th Cir. 1991) (Easterbrook, J.) ("How reliable must hearsay be to fit the *Chambers* approach? We concluded . . . that if a confession is sturdy enough for the state to use in its own case—if it is the sort of evidence that prosecutors regularly use against defendants—then defendants are entitled to use it for their own purposes") (citing *Rivera v. Director*, 915 F.2d 280, 282 (7th Cir.1990) (Posner, J.)). The Seventh and Ninth Circuits as well as the Tennessee Supreme Court have endorsed a balancing inquiry for admissibility that weighs the relative importance of a statement against the state's interest in exclusion. *Harris v. Thompson*, 698 F.3d 609, 633 (7th Cir. 2012) ("we should apply a balancing test, weighing the value of the excluded evidence to the criminal defendant against the state's legitimate interests in the criminal trial process that are implicated by the exclusion"); *Chia v. Cambra*, 360 F.3d 997, 1003, 1004-08 (9th Cir. 2004) (granting habeas relief for unreasonable application of *Chambers* after weighing "the importance of the evidence" for the defense "against the state's interest in exclusion"), cert. denied 544 U.S. 919 (2005); *Mordick v. Valenzuela*, 17-56373, 2019 WL 2642952, at *2 (9th Cir. June 27, 2019) reh'g en banc denied (Aug. 16, 2019) (granting habeas relief due to the state court's failure to admit hearsay that was "critical" and "fundamental to [the] defense"); *State v. Brown*, 29 S.W.3d 427, 433–34 (Tenn. 2000) (in addition to reliability, assessing whether evidence is "critical to the defense" against "the interest supporting exclusion of the evidence[.]").

D. Under a Correct Reliability Analysis That Considered Corroboration, Jack Pearcy's Repeated Confessions Would Be Admitted and Would Result in Mr. Dailey Securing a New Trial

Under a proper *Chambers* analysis untethered from rigid factors and that considered corroboration, Pearcy's multiple confessions would be deemed material and sufficiently reliable. Pearcy's statements are corroborated by "other evidence in the case," *Chambers*, 410 U.S. at 300-01, that strongly points to him as the sole perpetrator of Boggio's murder, and they are reliable in light of their multiplicity and the circumstances under which they were made, and under which Pearcy refused to talk about them in open court. Further, when admitted and reviewed under Florida's newly-discovered evidence law, the statements would be sufficient to grant Dailey a new trial because their import would be assessed in light of *all* other evidence offered at trial and in postconviction proceedings, irrespective of other procedural bars.

1. Pearcy's multiple confessions bear strong indicia of reliability for *Chambers* purposes

Pearcy's confessions are reliable because they are corroborated by other evidence in the case that puts him alone with Boggio during the exact timeframe when she was killed. Contrary to the State's theory at trial, the evidence presented in collateral proceedings overwhelmingly demonstrates that, consistent with Pearcy's 2017 affidavit and with the implication of his prior confessions, Pearcy took Boggio out for a significant period of time and was with her alone during the exact timeframe when the medical examiner said she died. He then returned home without her. This is established by the accounts of Oza Shaw, Betty Mingus, Deborah North, the telephone records admitted into evidence in collateral proceedings, and even confirmed in pertinent part by Pearcy's initial self-serving statement, made after his arrest, wherein he tried to shift blame to Dailey. On the whole, this evidence shows Pearcy spent approximately two hours with Boggio alone after leaving Dailey back at the house and dropping off Shaw at a payphone at 1:15 a.m.,

before he returned home by himself, without her. See App. 50a-54a (discussing record material in motion for rehearing below); see also *supra* 7-12 (discussing these facts in statement of the case).

Pearcy's statements are likewise corroborated by the physical evidence, as presented at both Dailey's and Pearcy's trials, showing that Boggio was dragged by her feet in a manner consistent with a single assailant acting alone. TR1 7:889-92 (trial proceedings); R2 11874-75, 11888 (medical examiner deposition); 10467-68 (testimony at Pearcy's trial). If Dailey—who is 6'2" tall—was present when Boggio was being killed, he (or he and Pearcy together) could have carried the 120-pound Boggio. The dragging in the manner described by the medical examiner is simply more consistent with the scenario wherein Pearcy—who is only 5'8" tall—had to resort to dragging Boggio by her feet to the water. Likewise, the stab wound evidence was consistent with one knife being used, meaning that only one assailant was stabbing unless multiple assailants, improbably, took turns stabbing her with the same knife. R2 11886. In this respect, Pearcy's statement is further corroborated by the fact that he owned a knife consistent with the wounds on Boggio's body. App. 55a-56a & n. 2.

Pearcy also had a unique motive not shared by Dailey as revealed by his preexisting relationship with Boggio and his persistent courting of her on the evening of her death, sometimes in front of his own irate girlfriend. *See* App. 56a-57a (discussing testimony from Pearcy's and Dailey's trials as well as deposition testimony). And after the murder, it was Pearcy and not Dailey who demonstrated consciousness of guilt by first abruptly deciding that everyone at his house would be going to Miami, and then by providing an alias when registering at the motel the next night, while Dailey gave his real name when registering his own room. App. 54a (discussing record and deposition testimony). Additionally, Pearcy's unremitting criminal history, stretching back to his days as a juvenile, includes domestic and sexual violence against women, and also reveals his

ability to cover his tracks from the law as he did when he agreed to act as a paid hitman in a botched murder-for-hire plot. App. 57a (discussing Pearcy's criminal history and involvement in two prior capital murder prosecutions from Missouri). Meanwhile Dailey, though he was nine years older than Pearcy, had no criminal history except a single conviction arising from a bar fight for which he served 90 days in jail, and was, moreover, a decorated Vietnam veteran. TR1 11:1360-62, 11:1376.

The timing and circumstances under which Pearcy made his statements, on the whole, also point to their reliability. In total, Pearcy has outright implicated himself and/or exculpated Dailey on at least four occasions documented in the record (and one additional time, again, in December 2019[19]): (1) before trial in county jail to Travis Smith; (2) in a mid-1990's statement to Juan Banda at Union Correctional Institution; (3) in a 2007 statement to Juan Banda at Jackson Correctional Institution; and (4) in 2017 to Dailey's legal team in a sworn affidavit. Some of these statements were spontaneous while others were sworn. The varying circumstances under which he made such statements, as well as their sheer multiplicity, provide strong indicia of reliability.

Lastly, to the extent that self-interest is relevant to reliability, the record makes clear that Pearcy was in fact very concerned about the impact of his statements on his own case and parole prospects. At the evidentiary hearing below, Pearcy explained that he was seeking to plead the Fifth Amendment because he was torn between "do[ing] what I thought was right" and his interest in obtaining parole. App. 60a-61a. Likewise, the reliability of the statements is bolstered by the fact that Pearcy had previously invoked the Fifth Amendment, also in response to Dailey's legal

[19] On December 18, 2019, after the judgment in this case and thus outside of the current record, Jack Pearcy signed yet another sworn declaration stating that "James Dailey was back at the house when I drove Shelly Boggio to the place where I ultimately killed her." On December 27, 2019, Dailey filed a successive postconviction motion that is currently pending in the state trial court seeking relief based on the new confession.

team's attempt to show that he killed Boggio alone. App. 60a-61a, PC ROA 3:118. The very invocation of the Fifth Amendment, under these circumstances, provides indicia of reliability because it logically shows that the underlying accusation that he has avoided addressing in court—that he alone killed Boggio—is probably true. *See Mitchell v. United States*, 526 U.S. 314, 332 (1999) (Scalia, J., dissenting) (explaining that a Fifth Amendment invocation is naturally "evidence of acquiescence" as to the issue the witness refuses to address) (citation omitted); *see also id*. ("If I ask my son whether he saw a movie I had forbidden him to watch, and he remains silent, the import of his silence is clear."). Accordingly, under a proper *Chambers* reliability inquiry, a postconviction judge would view Pearcy's repeated refusals to testify on purported Fifth Amendment grounds as further evidence of reliability. *See Reasonover v. Washington*, 60 F. Supp. 2d 937, 960-61 (E.D. Mo. 1999) (explaining the propriety of drawing an adverse logical inference from a postconviction witness's Fifth Amendment invocation under such circumstances).

2. Consideration of Pearcy's statements will likely result in Dailey obtaining a new trial

If any of Pearcy's multiple statements were deemed admissible under *Chambers*, Dailey would receive a new trial under Florida's postconviction scheme. Pearcy's statements were proffered to the courts below as part of a claim under Florida's newly discovered evidence law. Under state law, whenever newly discovered evidence is presented that would be admissible at a trial, the reviewing court next considers its materiality through a "cumulative analysis of *all* the evidence so that there is a total picture of the case and all the circumstances of the case." *Swafford v. State*, 125 So. 3d 760, 775-76 (Fla. 2013) (emphasis added). Critically, "a postconviction 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 [at a retrial]." *Hildwin v. State,* 141 So.3d 1178, 1184 (Fla. 2014) (citing *Swafford*, 125 So. 3d at 776 and *Lightbourne v.*

State, 742 So.2d 238, 247 (Fla.1999)). Thus, the impact of any of Pearcy's confessions will be judged not against the trial record—though that evidence against Dailey was notably weak of itself—but against the full evidentiary picture now available to the postconviction court including the evidence never previously presented and evidence "previously excluded as procedurally barred." *Hildwin*, 141 So.3d at 1184. This "total picture," *Swafford*, 125 So. 3d at 776, would thus include the multifaceted discrediting of jailhouse informants individually and of Detective Halliday's informant-recruitment efforts generally, *see supra* 17-23, despite this evidence previously having been deemed procedurally barred. Likewise, the full picture would include evidence shedding further light on Pearcy's motivation, Pearcy's consciousness of guilt, and Pearcy's presence at Hank's Sea Breeze bar alone with Boggio in the morning hours coterminous with the time of her death—all critically important evidence that Dailey's jury was never able to consider.

Because the current evidentiary picture has eviscerated the jailhouse informant evidence[20] and the otherwise-threadbare circumstantial case against Dailey, it is highly probable that a reviewing court would find that Pearcy's confessions, viewed against the backdrop of the entire record, would likely result in a favorable outcome for Dailey.

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[20] Paul Skalnik has recently been publicly exposed as a con man and professional snitch who "may be one of the most prolific jailhouse informants in U.S. history." Colloff, P., *False Witness: How this Con Man's Wild Testimony Sent Dozens to Jail, and 4 to Death Row,* The New York Times Magazine (Dec. 4, 2019) https://www.nytimes.com/2019/12/04/magazine/jailhouse-informant.html. As discussed *supra*, his testimony was critical to Dailey's conviction and death sentence in 1987.

CONCLUSION

This Court should grant a writ of certiorari to review the decision below.

Respectfully submitted,

__/S/ Chelsea R. Shirley_____

CHELSEA R. SHIRLEY
Counsel of Record
KARA R. OTTERVANGER
JULISSA R. FONTÁN
Capital Collateral Regional Counsel
Middle Region
12973 N. Telecom Parkway
Temple Terrace, Florida 33637
Tel.: (813) 558-1600
E-Mail: shirley@ccmr.state.fl.us

LAURA FERNANDEZ
127 Wall Street
New Haven, Connecticut 06511

CYD OPPENHEIMER
155 West Rock Ave.
New Haven, Connecticut 06515

SETH MILLER
Innocence Project of Florida, Inc.
1100 E Park Ave
Tallahassee, Florida 32301-2651

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