**IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT,
IN AND FOR PINELLAS COUNTY, FLORIDA**

STATE OF FLORIDA,
Plaintiff,

v.

James Milton Dailey,
Defendant.
_____/

Case No. 1985-CF-007084
Emergency Capital Case
Death Warrant Signed
Execution Scheduled For
November 7, 2019, at 6:00 P.M.

MOTION TO VACATE JUDGMENT OF CONVICTION AND SENTENCE OF DEATH AFTER DEATH WARRANT SIGNED

The Defendant, James Milton Dailey, through undersigned counsel, files this *Motion to Vacate Judgment of Conviction and Sentence of Death after Death Warrant Signed* pursuant to Florida Rule of Criminal Procedure 3.851. The grounds for this motion are as follows:

All factual allegations and legal argument set forth in Dailey's previous postconviction motions and all evidence presented at any evidentiary hearing on the previous motions, along with all legal argument in the related appellate proceedings, are incorporated herein. Furthermore, Dailey respectfully requests leave to amend this motion. Dailey's execution warrant was signed on September 25, 2019, setting the date for his execution a mere 43 days later on November 7, 2019. The Florida Supreme Court subsequently set an expedited briefing schedule requiring all briefing to be completed by October 24, 2019. This truncated schedule compelled this Court to set extremely tight deadlines for discovery, the filing of a post-warrant 3.851 motion, and an evidentiary hearing. For these reasons, Mr. Dailey respectfully requests that he be given an opportunity to amend his motion should further evidence of his actual innocence or additional evidence of constitutional violations be found. *See* FLA. CONST. art. I, § 24; U.S. CONST. amend. XIV.

CITATIONS TO THE RECORD

Citations shall be as follows: The record on appeal from Dailey's first trial proceedings shall be referred to as "TR1" followed by the appropriate volume and page numbers. (volume:page). The record on appeal from Dailey's second trial proceedings shall be referred to as "TR2" followed by the appropriate volume and page numbers. (volume:page). All cites from the first postconviction record on appeal shall be referred to as "PC ROA" followed by the appropriate volume and page numbers. All cites from the postconviction record on appeal based on *Hurst*[1] shall be referred to as "R1" followed by the appropriate page numbers. All cites from the record on appeal in Case No. SC18-557 will be referred to as "R2" followed by the appropriate page number. All other references will be self-explanatory or otherwise explained herein.

A. THE JUDGMENT AND SENTENCE UNDER ATTACK AND THE NAME OF THE COURT THAT RENDERED THE SAME.

Mr. Dailey challenges his conviction and death sentence pursuant to Florida Rule of Criminal Procedure 3.851. The Circuit Court of the Sixth Judicial Circuit, Pinellas County, rendered the judgments of conviction and sentence under consideration. *See* Attachment A.

Mr. Dailey was tried by a jury and found guilty of first-degree murder on June 27, 1987. The jury unanimously recommended a sentence of death for the first-degree murder conviction on June 30, 1987. The trial court sentenced Mr. Dailey to death on August 7, 1987. On November 14, 1991, the Florida Supreme Court affirmed the conviction but vacated Mr. Dailey's death sentence, holding that the trial court improperly instructed the jury on and erroneously found two aggravating circumstances, namely that: (1) the crime was "cold, calculated, and premeditated;" and (2) the crime was committed to avoid arrest. *Dailey v. State*, 594 So. 2d 254, 259 (Fla. 1991). The Court held that neither aggravating circumstance applied. *Id*. It further held that the trial court

[1] *Hurst v. Florida*, 136 S. Ct. 616 (2016) and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016).

erred "in recogniz[ing] the presence of numerous mitigating circumstances, but then accord[ing] them no weight at all," and erroneously relied on evidence from the trial of Dailey's codefendant, which had not been introduced in any phase of Dailey's trial, and in so doing "deprived Dailey of the opportunity to rebut this proof." *Id.* On remand, the trial court, *without empaneling a new jury*, again sentenced Mr. Dailey to death and the Florida Supreme Court affirmed. *Dailey v. State*, 659 So. 2d 246 (Fla. 1995).

B. ISSUES RAISED ON APPEAL AND DISPOSITION THEREOF AND IN POSTCONVICTION.

The following issues were raised in Mr. Dailey's direct appeal:

1. The trial court erred by admitting evidence that the appellant exercised his right to an extradition hearing and by permitting the prosecutor to comment on that evidence during his opening argument (error, harmless);
2. The trial court committed *per se* reversible error by allowing the state to introduce into evidence a booking photograph of Dailey that was not provided to defense counsel during discovery, without holding a *Richardson* hearing (denied);
3. The trial court erred by admitting evidence based on out-of-court statements by the codefendant who did not testify at trial, thus violating Dailey's right to confrontation (denied);
4. The trial court erred in admitting the knife sheath as an exhibit, and accompanying evidence concerning its discovery, because the knife sheath was not connected to the appellant or to the crime and therefore was irrelevant and inadmissible (error, harmless);
5. The trial court erred by permitting the state to elicit hearsay statements of Detective Halliday concerning the jailhouse informants' reasons for coming forward, which fail under the recent fabrication exception (error, harmless);
6. The trial court erred by restricting defense counsel's cross-examination of Paul Skalnik about the nature of his past and pending felony charges for taking money from women under dishonest circumstances (error, harmless);
7. The trial court erred by instructing the jury over objection that the defendant need not have been present when the crime was committed to be guilty of first-degree murder (denied);
8. The trial court erred by failing to grant a mistrial when the prosecutor made two comments on the defendant's failure to testify during her closing argument (error, harmless);
9. The trial court erred in qualifying Detective Halliday as an expert in homicide investigation and sexual battery because his opinion was based on nothing more than common intelligence and speculation (denied);
10. The trial judge erred by finding three aggravating factors that were not supported by the evidence and by considering a nonstatutory aggravating factor in his discussion of possible mitigating factors (evidence did not support the finding that the murder was committed to prevent a lawful arrest or that it was committed in a cold, calculated, and premeditated

manner) (error);
11. The trial court erred by admitting into evidence a certified copy of Dailey's 1979 conviction for aggravated battery, including a notation that another charge had been dropped pursuant to a plea bargain (error, harmless);
12. The trial court erred by failing to consider statutory and nonstatutory mitigation presented by the defense (trial court erred by finding numerous mitigating factors but accorded them no weight); and
13. The trial judge erred by basing his sentencing in part on off-the-record information from the codefendant's trial, the codefendant's PSI, and the prosecutor's sentencing memorandum, thus violating the appellant's right to confront the witnesses (trial court erred in considering this evidence).

The following issues were raised on direct appeal after Mr. Dailey's re-sentencing:

1. The trial court erred by denying appellant's motion for a new penalty phase trial because the jury's death recommendation was based on invalid jury instructions on three of five aggravating factors (denied);
2. The trial court failed to find and weigh mitigating circumstances shown by the evidence and not refuted by the state (denied); and
3. The trial court violated appellant's constitutional right to due process by denying his motion to disqualify the sentencing judge because appellant had reasonable grounds to fear that the judge could not be impartial at resentencing (denied).

The following issues were raised in Mr. Dailey's Motion to Vacate Judgment and Sentence:

1. Dailey's counsel was prejudicially ineffective at guilt phase (denied);
2. Dailey's counsel was prejudicially ineffective at sentencing phase (denied);
3. Dailey was deprived of due process and equal protection because trial counsel failed to prepare a competent mental health professional in violation of *Ake v. Oklahoma* (denied);
4. State withheld exculpatory evidence (denied);
5. Newly discovered evidence (denied);
6. Prosecutorial misconduct for presenting misleading evidence and improper argument to the jury (denied);
7. State knowingly presented or failed to correct materially false testimony (denied);
8. Dailey's sentencing is disproportionate to codefendant's sentence (denied);
9. Trial court committed fundamental error by instructing the jury on HAC (denied);
10. Florida capital sentencing statute is unconstitutional (denied);
11. Jury instructions were incorrect and shifted burden to defense to prove death was inappropriate (denied);
12. Jury was misled by unconstitutional instructions that diluted their sense of responsibility (denied);
13. Rules prohibiting juror interviews are unconstitutional (denied);
14. Electrocution is cruel and/or unusual punishment (denied); and
15. Cumulative error (denied).

See Dailey v. State, 965 So. 2d. 38 (Fla. 2007).

The following issues were raised in Mr. Dailey's Writ of Habeas Corpus filed in the Florida Supreme Court:

1. Florida's statute is unconstitutional under *Ring* because it permits the State to indict a defendant without specifying whether it intends to prosecute under premeditated or felony murder theory (denied); and
2. Florida's death sentencing statute is unconstitutional under *Ring* (denied).

See Dailey v. State, 965 So. 2d. 38 (Fla. 2007).

The following issues were raised in Mr. Dailey's First Successive Motion to Vacate Judgment and Sentence:

1. Mr. Dailey's death sentence stands in violation of the Sixth Amendment under *Hurst v. Florida* and *Hurst v. State* and should be vacated (denied);
2. Mr. Dailey's death sentence stands in violation of the Eighth Amendment under *Hurst v. State* and should be vacated (denied); and
3. The denial of Mr. Dailey's prior postconviction claims must be reheard and determined under a constitutional framework (denied).

See Dailey v. State, 247 So. 3d 390 (2018).

The following issues were raised in Mr. Dailey's Second Successive Motion to Vacate Judgment and Sentence:

1. Newly Discovered testimonial evidence proves that Mr. Dailey is actually innocent;

    a. The April 20, 2017, affidavit of Jack Pearcy proves Mr. Dailey is innocent and that Jack Pearcy alone murdered Shelly Boggio.
    b. The May 9, 2017, affidavit of James Wright and the June 12, 2017, affidavit of Michael Frank Sorrentino constitute new evidence further undermining the reliability and validity of the snitch testimony at Mr. Dailey's original trial.
    c. Newly discovered evidence demonstrates that despite his testimony to the contrary, Paul Skalnik received a deal in exchange for testifying against Mr. Dailey. Further, his reputation in the community discredits his testimony.
    d. Newly discovered Indian Rocks Beach Police reports, including Oza Shaw's original police interview, prove that Mr. Dailey was not with Jack Pearcy when Shelly Boggio was killed.

2. The State violated the constitutional requirements of *Brady v. Maryland*[2] and *Giglio v. United States*[3] and its progeny, thus denying Mr. Dailey of his right to due process and a fair trial under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution; and

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

[3] *Giglio v. U.S.*, 405 U.S. 150 (1972).

3. Sentencing to death and executing someone who is actually innocent violates the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.

These claims were denied by the Florida Supreme Court on October 6, 2019. Mr. Dailey filed a motion for rehearing contemporaneously with the filing of this successive motion.

C. CLAIMS NOT RAISED IN PREVIOUS MOTIONS.

The claims raised in the instant motion were not cognizable during the prior proceedings; were not ripe for review; and/or cannot be raised or evaluated until the signing of the death warrant. Claim 2 raised in the present motion was not raised previously because the claim is based on newly discovered evidence. The evidence upon which Mr. Dailey is relying to raise the claims in this motion was unknown to the trial court, counsel, or Mr. Dailey at the time of his trial and the facts could not have been discovered through due diligence. *See* Fla. R. Crim. P. 3.851(d)(2)(A); *Robinson v. State*, 707 So.2d 688, 691 n.4 (Fla. 1998); *Jones v. State*, 591 So. 2d 911, 914-15 (Fla. 1991); *Hallman v. State*, 371 So. 2d 482, 485 (Fla. 1979). Further, claims 1, 3, and 4 were not raised previously because these issues became ripe once the death warrant was signed.

D. NATURE OF RELIEF SOUGHT.

1. Mr. Dailey requests that he be granted leave to amend as necessary.

2. Mr. Dailey requests that this Court vacate his conviction and death sentence.

3. Any other relief that this Court may find appropriate.

E. CLAIMS FOR WHICH AN EVIDENTIARY HEARING IS SOUGHT.

CLAIM 1

FLORIDA'S EXECUTION OF JAMES DAILEY WOULD BE SO ARBITRARY AS TO VIOLATE THE FIFTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A. Selecting for Execution a 73-Year-Old Vietnam Veteran with a Powerful, Pending Innocence Claim over More Than 100 Other Death-Eligible Defendants—and Compelling Him to Seek a "Fire Drill Review" by the Courts—Reveals an Opaque, Arbitrary, and Truncated Methodology Leading to an Absurd Result that Violates the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution and Corresponding Florida Provisions.

In contrast to states with an orderly process for determining who will be the next death-sentenced prisoner executed, the determination of who lives or dies in Florida is made by a single person. Granting the governor such unfettered discretion has in practice established an arbitrary selection process to determine who lives and dies. There are no limits to cabin executive discretion, there are no guidelines for the selection process, and the entire process is cloaked in secrecy. *C.f. Furman v. Georgia*, 408 U.S. 238, 309-10 (1972) (Stewart, J., concurring) ("These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders . . . many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed.").

The extreme arbitrariness of the process means that, inevitably, the resulting decisions and warrant announcements come as a complete surprise to defendants, who may learn of the warrant after decades on death row when corrections officers come to move them to death watch. Further, the execution timeline is so truncated (here, there are 43 days between the signing of the warrant and the execution, though Section 922.052(2)(b), Florida Statutes (2019) provides for up to 180 days to execute a death warrant) that defendants and counsel – no matter how diligent – are forced to submit the very sorts of last-minute pleadings that are discouraged by courts. Justice Pariente

spoke to this dilemma in her concurrence in *Jimenez v. Bondi*, 259 So. 3d 722, 726–27 (Fla. 2018), after Governor Scott signed a warrant on July 18, 2018, scheduling Jimenez's execution for 27 days later, on August 14, 2018:

> This extremely short warrant period created a fire drill approach to the review of Jimenez's claims. It was not until after the postconviction court denied Jimenez's sixth successive postconviction motion (filed on August 6, 2018) that this Court entered a stay of execution. . . . The postconviction court and Jimenez's attorneys were forced to race against the clock in reviewing and presenting all of Jimenez's claims, respectively. But for this Court entering a stay of execution as a result of Jimenez's second post-warrant appeal, this Court would have also had inadequate time to thoroughly review his claims. *Id*.
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> **Before an execution may proceed, this Court has the solemn obligation to carefully ensure that there are no constitutional bars to the execution and that the defendant's rights have been protected.** [S]ome claims, such as those challenging the execution method, cannot be raised or evaluated until the signing of the death warrant. At the least, defendants must have adequate time to investigate and raise and courts must have adequate time to properly review these warrant-based claims. **When the machinery of the State is used to execute someone, this Court must remain vigilant, even if claims arise at the last minute**.

Jimenez v. Bondi, 259 So. 3d 722, 726-27 (Fla. 2018) (Pariente, J., concurring) (emphases added) (citing another source; internal citations and quotation marks omitted). One cannot treat a system entirely susceptible to caprice and chaos as the presumptive "remedy for preventing miscarriages of justice" where "judicial process has been exhausted," much less in instances such as this one, where judicial process has simply been cut short. *Herrera v. Collins*, 506 U.S. 390, 411-12 (1993).

B. The Execution of An Innocent Person, Whose Death Warrant was Signed While the Case Remained Pending Before the Court, and For Whom Clemency is Foreclosed, is so Arbitrary as to Violate the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution and the Corresponding Provisions of the Florida Constitution.

1. James Dailey is Innocent of the Offense for Which he was Sentenced to Death.

For more than thirty years, Dailey has maintained his innocence of the killing of Shelly Boggio. There was no eyewitness to the murder, no physical evidence linking Dailey to the crime, and no testimony placing Dailey with the victim at the time or site of her death. The jury convicted

Dailey solely on circumstantial evidence bolstered by the unreliable testimony of three jailhouse informants. The totality of the evidence – including postconviction revelations undermining the State's case and multiple confessions of sole responsibility by Mr. Dailey's co-defendant – strongly supports Mr. Dailey's claim that he had nothing to do with Shelly Boggio's murder.

a. The Jailhouse Informant Testimony that Formed the Basis of the State's Case is Utterly Unworthy of Belief.

In early December 1986, just days after Pearcy's jury recommended a life sentence, not death, the State made it known to Dailey's fellow inmates that it was looking for help. Detective Halliday visited the jail where Dailey was incarcerated, took every inmate from Dailey's pod individually into a private room where a desk was covered with news articles about Dailey's case, and then asked each if he had any information to share regarding James Dailey. R2 12056-57, 12066, 12094-96, 12106-07, 12163-65, 12196, 12198.

As former inmate James Wright stated in a 2017 affidavit, the detective showed him the news articles, and asked him if Dailey had been talking about his case or if he had admitted to "anything." R2 12056-57. Wright testified that Dailey never spoke about his case, *except to say that he was innocent*. R2 12057. According to Wright, Dailey always denied any participation in the crime. *Id*. Inmate Michael Sorrentino also testified the detective brought him into a conference room with a desk covered with news articles about Dailey's case. R2 12106. The detective asked Sorrentino if "Jim ever talk (sic) about his case" to which Sorrentino responded "No." R2 12107. Sorrentino said he and Dailey interacted daily during the six to eight months that they were housed together, but Dailey never spoke about his case with Sorrentino or anyone else. R2 12103-05, 12110. Inmate Travis Smith testified that law enforcement showed him news articles about the crime and attempted to interview him about Dailey's case. R2 12094-96. Smith refused to answer their questions. R2 12094.

The detective's interrogation of the fifteen inmates pulled from Dailey's pod yielded nothing. Within a week, however, two other inmates, Pablo DeJesus and James Leitner, who both worked in the law library, came forward claiming Dailey had made inculpatory statements to them. Smith testified he saw Dailey go into the law library numerous times but never saw or heard him discussing his case with DeJesus and Leitner, or anyone else. R2 12081. Not only that, Smith said everyone knew it was unsafe to share details about one's case because other inmates were constantly seeking information to "try to help themselves" since the State Attorney's Office "used to offer funds and stuff for people to offer information about another person's case. It was common practice back in those days." R2 12088. As Wright, Smith, Sorrentino, and even Halliday testified, it was a "well-known fact" that the detective was looking for testimony against Dailey. TR1 9:618. Smith additionally testified he observed DeJesus and Leitner talking about Dailey's case, R2 12082, 12087, and "trying to collaborate a story together as to what they were going to say when they talked to the State Attorney." R2 12093. According to Smith, DeJesus and Leitner's story that Dailey confessed to them was "a plot that they had to try to get their sentence reduced. And the State Attorney reduced their sentence as a result of them, you know, fabricating their story." R2 12093.

The third informant who came forward to inculpate Dailey, Paul Skalnik, is a notorious snitch with an established history of pathological deception including at least twenty-five convictions for crimes of dishonesty. R2 1184-2938. The timing of Dailey's alleged confession to Skalnik completely undermines its credibility. Skalnik testified that, prior to ever speaking to Dailey, he had reached out to Halliday to offer information against Pearcy. TR1 9:1112, 1146. When Halliday told Skalnik his information against Pearcy was "of no use" because Pearcy had already been convicted, *id*. at 1190, Skalnik trained his guns on Dailey.

Skalnik claimed Dailey made incriminating statements while Dailey was standing at the bars of his cell as Skalnik passed by on his way to recreation. *Id*. at 1115. *See also* R2 8208. It strains credulity that Dailey would casually drop phrases like "the young girl kept staring at [me], screaming and would not die" during a fleeting, public interaction with Skalnik, an inmate he barely knew and who was held in an isolation cell. *Id*. at 1115. At his postconviction proceeding, Dailey testified that he knew Skalnik was in isolation, he knew inmates were not supposed to talk to inmates in isolation, and he knew Skalnik was an ex-police officer and "a snitch." PC ROA 3:324-25. In other words, Skalnik was the *last* person Dailey would speak to about his case.

The State relied extremely heavily upon the testimony of these three jailhouse informants. In her closing argument, prosecutor Beverly Andrews referenced their testimony at least a dozen times. Andrews 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 inflammatory testimony five additional times. TR1 10:1265; TR1 10:1266; TR1 10:1281; TR1 10:1285. Three times she reminded the jury: "Dailey [told] DeJesus and Leitner, I lost it" (TR1 10:1265); "I lost it. The defendant's comment to Leitner and DeJesus" (TR1 10:1281); and "[h]e said he lost it to two witnesses." TR1 10:1285.

Andrews asked the jury to believe these witnesses, whom she described as "thieves and drug dealers," TR1 10:1277, despite their criminal backgrounds. She insisted the jailhouse informants had been fully transparent about the State's interactions and agreements with them, stating, "Those men are still over there [in jail] and that's where they belong. They're not getting out of jail free." TR1 10:1278-79.

In fact, as a result of their plea agreements, neither Leitner nor DeJesus would serve a single additional day in jail above that required by the sentences they were already serving in

Colorado and Maryland respectively – the exact same outcome that would have resulted if their Florida charges had been dropped or simply never existed in the first place.[4] Meanwhile, two months after testifying against Dailey, Skalnik was released *on his own recognizance*, with no bond (R2 1652-53), despite having violated every period of release and supervision ever afforded him,[5] and despite facing very serious felony charges that mirrored his previous felony convictions.[6] In other words, Leitner, DeJesus, and Skalnik received exactly what prosecutor Beverly Andrews had promised the jury they would not: they "got out of jail free."

In her closing argument, prosecutor Andrews presented the jailhouse informants as morally superior inmates whose crimes were nonviolent. She urged the jury to credit their testimony because "there is a hierarchy over in that jail just like in life," where crimes against children are worse than "buying a stolen car" or "sale and possession of cocaine." TR1 10:1277-78. Dailey's

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[4] Though at Dailey's trial, Leitner conceded he had been given a five-year sentence to run concurrently with his Colorado sentence, he falsely testified that he had only two years remaining on his sentence in Colorado, implicitly suggesting that his plea deal would in fact mean three years of additional jail time for him. Similarly, while Dejesus acknowledged that the State had agreed to give him a seven-year sentence in return for his testimony, the jury was never told that the plea agreement included language that his sentence be *co-terminus* with his Maryland sentence. R2 6898. Nor does the fact that Leitner and DeJesus were impeached with other evidence at trial render this additional information immaterial. *See Turner v. United States*, 137 S. Ct. 1885, 1895 (2017) ("We of course do not suggest that impeachment evidence is immaterial with respect to a witness who has already been impeached with other evidence.").

[5] In fact, Detective Halliday wrote a letter to the parole board on Mr. Skalnik's behalf, stating that Mr. Skalnik had testified in excess of 30 criminal trials resulting in at least six defendants receiving the death penalty, and underscoring that "I have never done this for an inmate." He also placed a call to the Florida Parole Commission urging favorable consideration for Skalnik. *See* R2 84-87.

[6] At Mr. Dailey's trial, Skalnik testified that he was facing twenty years in prison and was not expecting any consideration from the State in return for his testimony. TR1 9:1108. In fact, even after he was released on his own recognizance *and absconded* – failing to appear for his own scheduled court date (R2 2755; 2821) – he was ultimately given a deal of five years, total, for four counts of grand theft and two counts of failure to appear. Skalnik was transferred to Texas to serve his sentence there, as he had specially requested, served five months, was released, and was never made to serve the remainder of his time. R2 11; 8192.

jury heard twice-convicted cocaine dealer DeJesus swear that he had come forward because "it was against my morals as a father, and a human and I said it was beginning to effect [sic] me." TR1 9:1106. What Dailey's jury did not hear was the true extent of the jailhouse informants' criminal backgrounds. They never heard, for instance, that Leitner initially had been charged with attempted murder and aggravated robbery in Colorado, R2 7245; 7247-48, but the charges were reduced when he offered himself as a jailhouse informant *there*. R2 7205-06. Leitner testified that he committed his crimes in Colorado while out on bond on his Florida charges, but the jury never heard that his absconding to Colorado was a violation of that bond, or that he committed yet another crime by failing to appear in court on his Florida charges. R2 7292; 7313.

When Skalnik took the stand at Dailey's trial, he tried to downplay his crimes, and testified his charges "were grand theft, counselor, not murder, not rape, no physical violence in my life." TR1 9:1158. That testimony was false. Dailey's jury never heard that Skalnik had been charged in 1982 with lewd and lascivious conduct involving a 12-year-old girl, a charge dismissed by prosecutors over the course of his cooperation in several cases. R2 2286-90. Moreover, Dailey's jury never heard the details of Skalnik's numerous previous crimes, all of which involved exploiting vulnerable individuals by being willing to say or promise anything, regardless of the truth of the matter.[7] R2 1184-2938. Significantly, Beverly Andrews, the same prosecutor who urged the jury again and again to accept Skalnik's testimony as reliable in convicting Dailey and sentencing him to death, later testified that she would not use Skalnik again because she could not in good faith put him on the stand believing he would give truthful testimony. R2 10283.

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[7] Note that the Florida Supreme Court did find that the trial court erred in refusing "to allow defense counsel to question [jailhouse informant Paul] Skalnik concerning the specifics of charges pending against him (which were admissible to show possible bias)." With the limited information available to it at the time, the Court deemed that error harmless. *Dailey v. State*, 594 So. 2d 254, 256 (Fla. 1986).

Not only did the jailhouse informants "get out of jail free," but contrary to the State's misrepresentations, they did so despite the fact that their records were far more serious than the prosecutor had represented. By the State's own reasoning, their testimony is unworthy of belief.

b. The Killer has Repeatedly Confessed to Being Solely Responsible for the Murder.

Over the past three decades, Jack Pearcy has admitted at least four times that he alone is responsible for the death of Shelly Boggio. While awaiting trial in the county jail in the mid-1980s, Pearcy told inmate Travis Smith that he was Dailey's codefendant but "he [Pearcy] committed the crime himself . . . [this] was his charge and his charge alone." R2 12099. Later, while incarcerated at Union Correctional Institution between 1992 and 1996, Pearcy told fellow inmate Juan Banda that "Mr. Dailey was innocent of the crime that he was sentenced to death row for." R2 12118-19. Pearcy reiterated his guilt and Dailey's innocence to Banda in a third confession at Jackson Correctional Institution in 2007. R2 12119-20. And on April 20, 2017, Pearcy executed a sworn affidavit in which he admitted that "James Dailey was not present when Shelly Boggio was killed. I alone am responsible for Shelly Boggio's death." R2 63-64.

c. The Totality of the Evidence Points to Jack Pearcy Having Killed the Victim Alone.

Unlike Dailey, Pearcy was a man with a history of violence, particularly against women. R2 9753-9923. Pearcy knew Shelly prior to the killing. R2 305; 11862-63. Multiple witnesses testified that on the night in question, Pearcy was seen dancing and flirting with Shelly. TR1 8:380-81; R2 11859. Pearcy could not take Shelly home to have sex with her because he lived with his pregnant girlfriend, Gayle Bailey, who was visibly angered by his flirtatious behavior. R2 293. Pearcy instead took Shelly to a secluded location, a favorite fishing spot, where her body was found. R2 9314-15. Moreover, Pearcy owned a knife consistent with the wounds on her body, and

told police where the knife's sheath could be found. R2 11803; 11809-11. Pearcy's friend, Oza Shaw, stated in his first police interview that Pearcy and Shelly had gone off alone that night, *without* Dailey, and that Pearcy had returned home several hours later, *by himself*. R2 91-95. Prosecutor Beverly Andrews, in her Application for Certificate Compelling Attendance of Witness at Pearcy's trial, described Shaw as "the only unbiased witness who can testify that Jack Pearcy was with the victim within hours of the murder." R2 4141. Deborah North, an acquaintance of Shelly's who worked at Hank's Seabreeze Bar, likewise testified that she had seen Shelly with *only one man* at Hank's shortly before the time of death. R2 11712. (Hank's was located approximately one mile from where the victim's body was discovered.). North testified that Shelly entered the bar looking for someone to help her and her male companion dig their car out of the sand. R2 11712. When North went outside, she saw only one man, not two, with Shelly. *Id.* Had another man been with Pearcy and Shelly, there would have been no need to seek help.

Pearcy's guilt is completely consonant with his behavior in the hours after the crime, as described consistently by Dailey. According to Dailey, Pearcy came into his bedroom in the wee hours of the morning, woke him, and told him he needed to talk to him. Pearcy drove him to the Belleaire Causeway and told Dailey he needed him gone because he and Gayle wanted to use Dailey's bedroom as a nursery. PC ROA 3:307-309. The baby was not due for another three months but Pearcy's hope, clearly, was that Dailey would leave the following morning and it would look like he had fled the scene of the crime. Pearcy also ensured that Dailey would return to the house with wet clothes, throwing a Frisbee into the water and having Dailey go retrieve it *Id.*; R2 9624. Pearcy knew that if Bailey and Shaw were later interviewed by police, they would testify that Dailey had come back to the house in the early dawn and with wet pants – exactly what transpired.

Despite his attempts to set Dailey up as his fall man, in the light of day and with a slightly clearer head, Pearcy apparently saw the flaws in this plan. Multiple people had seen him dancing and flirting with Shelly; multiple people (including Shaw, North, and the two men who helped push his car out of the sand at Hank's Seabreeze Bar) had seen him alone with her immediately before the murder; his knife, with his fingerprints on it, was wherever he had disposed of it and might yet be recovered. He had to get out of town. He announced to his housemates – Dailey, Shaw, and Bailey – that they were all leaving for Miami, and told everyone to pack. R2 11379. While in Miami, Pearcy and Gayle bought tickets to the Bahamas from the Steamship Travel Company. TR1 3:302-03. Dailey did not. In the interim, they stayed at a motel, where Pearcy registered under a false name – John Yates. R2 11155; 11524; 11787. Dailey stayed at the same motel but registered under his true name, suggesting he was not in flight and had nothing to hide. TR1 3:292-93 & 7:914; R2 10887. Moreover, after Pearcy was arrested for this crime and booked into the Pinellas County Jail, he tried to escape with another inmate and incurred yet more charges. R2 7821; 7837.

Pearcy's initial statement to police, in which he pinned the crime on Dailey, was a transparent attempt to shift the blame elsewhere. *See, e.g.*, TR1 3:331 (Even Detective John Halliday testified that Pearcy's statements basically consisted of "putting it off on Dailey."). In a sworn statement in 1993, Pearcy admitted that blaming Mr. Dailey was nothing more than: "…self-serving statement(s) to exonerate myself … At that time, [Dailey] wasn't even in custody. I was in custody and they were going to charge me and I was just trying to get around it, that's all, lay the blame somewhere else." R2 9625.

2. Governor DeSantis Signed Mr. Dailey's Death Warrant While The Florida Supreme Court Was Considering Mr. Dailey's Timely and Fully Briefed Appeal Containing a Newly Discovered Evidence/Actual Innocence Claim.

Mr. Dailey filed his Notice of Appeal on April 10, 2018. The Florida Supreme Court issued an Acknowledgment of New Case, on April 12, 2018, along with a new case number: SC18-557. On May 1, 2018, the Florida Supreme Court issued a briefing schedule in the case:

> The record having been received by the Court, the briefs in the above styled case are to be filed as follows: Appellant's brief is to be filed on or before June 11, 2018; appellee's brief shall be filed twenty days after filing of appellant's brief; and appellant's reply brief shall be filed twenty days after filing of appellee's brief.

In keeping with the Florida Supreme Court's order, the Initial Brief of Appellant was served on opposing counsel and filed in the Florida Supreme Court on June 11, 2018. The Answer Brief of the Appellee was served on counsel for Mr. Dailey and filed in the Florida Supreme Court on July 2, 2018. The Reply Brief of Appellant was served and filed on July 28, 2018. The Florida Supreme Court had yet to rule on the case that was submitted in full, consistent with its briefing order, when Governor DeSantis nevertheless signed the Death Warrant on September 25, 2019 – while the Florida Supreme Court was still considering Mr. Dailey's appeal, along with the compelling evidence of actual innocence included in the record before it.

The signing of Mr. Dailey's warrant was premature. The warrant states, "WHEREAS, it is anticipated that by the date set by this warrant, all further postconviction motions and petitions filed by JAMES DAILEY will have been denied and affirmed on appeal." *See* Attachment B. Despite the impossibility of knowing how and when the Florida Supreme Court will rule (especially where, as here, an appeal had been pending for fourteen months), the warrant explicitly *assumed* that the Court would deny substantive claims of actual innocence within 43 days; it also disregarded Mr. Dailey's right to file a writ of certiorari and/or to file another habeas petition in federal court. The Florida Supreme Court's subsequent opinion, released just one week later on

October 3, 2019, makes no mention of the fact that on September 25, 2019, the Governor signed a warrant for Mr. Dailey's execution. The Florida Supreme Court did not acknowledge the death warrant, let alone explain how the appeal came to be decided just eight days later. Mr. Dailey must be afforded the opportunity to argue his case in the courts, particularly where substantive and procedural due process rights are at issue and there is a powerful claim of actual innocence. That opportunity cannot simply be trampled by a standardless decision by the executive.

3. Mr. Dailey Has No Forum Beyond the Courts to Present His Compelling Evidence of Innocence Because the Avenue of Executive Clemency is Foreclosed.

The Florida Commission on Offender Review ("Commission") never had the opportunity to review the vast majority of the evidence of Mr. Dailey's innocence. Dailey's clemency interview with the Commission took place on September 10, 2015. Accordingly, the Commission did not hear any of the evidence discovered in 2017 and presented at Dailey's 2018 postconviction proceeding.[8] Based on the limited evidence it did hear, the Commission declined to recommend Dailey's case for a hearing by the Board of Executive Clemency.

Despite the narrowness of his clemency proceeding, Dailey is foreclosed from pursuing clemency again. Indeed, the Death Warrant explicitly states that "executive clemency for JAMES DAILEY, as authorized by Article IV, Section 8(a) of the Florida Constitution, was considered pursuant to the Rules of Executive Clemency, and it has been determined that executive clemency

[8] Mr. Dailey's clemency counsel also failed to present a significant amount of available evidence of actual innocence to the Clemency Board in his Brief and Memorandum of Law in Support of the Commutation of James Dailey's Sentence of Death. Undersigned counsel does not have access to documents received by the Clemency Board under Rules 15 and 16 of the Rules for Executive Clemency. Undersigned counsel is instead forced to rely solely on the Brief and Memorandum of Law in Support of the Commutation of James Dailey's Sentence of Death in order to glean what facts clemency counsel provided to the Clemency Board in support of Dailey's innocence.

is not appropriate." *See* Attachment B. Clemency therefore provides no avenue for relief.

In conclusion, absent the courts' intervention to correct the grave constitutional errors resulting from the conviction, continuing incarceration, and eventual execution of an innocent person – whose compelling case for innocence was never fully considered by the courts and for whom clemency provided no backstop to wrongful execution – will be executed on November 7, 2019. In his majority opinion in *Herrera v. Collins*, Chief Justice Rehnquist wrote that "the central purpose of any system of criminal justice is to convict the guilty and free the innocent." 506 U.S. 390, 398 (1993). Justice Blackmun put a finer point on it in dissent, observing that "[n]othing could be more contrary to contemporary standards of decency . . . than to execute a person who is actually innocent. . . . ***The execution of a person who can show that he is innocent comes perilously close to simple murder.***" *Herrera*, 506 U.S. 430-46 (emphasis added). This Court must exercise its constitutional obligation to issue a stay, review Mr. Dailey's substantial claims of actual innocence, and order a new trial.

CLAIM 2

NEWLY DISCOVERED TESTIMONIAL EVIDENCE PROVES THAT MR. DAILEY IS ACTUALLY INNOCENT. THE STATE'S WITHHOLDING OF THIS EXCULPATORY MATERIAL VIOLATED THE CONSTITUTIONAL REQUIREMENTS OF *BRADY V. MARYLAND* AND *GIGLIO V. UNITED STATES* AND ITS PROGENY, THUS DEPRIVING MR. DAILEY OF HIS RIGHT TO DUE PROCESS AND A FAIR TRIAL UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

A. Newly Discovered Evidence

Under Florida and federal law, there are two requirements needed for relief based on newly discovered evidence. First, the asserted facts must have been unknown by the trial court, by the party, or by counsel at the time of the trial, and it must appear that defendant or his counsel could not have known them by the use of diligence. *See Jones v. State*, 709 So. 2d 512 (Fla. 1998).

Second, the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial. *See id*. The *Jones* standard is also applicable where the issue is whether a life or death sentence should have been imposed. *Scott v. Dugger*, 604 So. 2d 465, 468 (Fla. 1992); s*ee also Jones v. State*, 591 So. 2d 911, 914-15 (Fla. 1991); *Robinson v. State*, 707 So. 2d 688, 691 n.4 (Fla. 1998); Fla. R. Crim. P. 3.851(d)(2)(A). When addressing this claim, this Court "must evaluate all the admissible newly discovered evidence at this hearing in conjunction with newly discovered evidence at the prior evidentiary hearing and then compare it with the evidence that was introduced at trial." *Jones v. State*, 709 So. 2d 512, 522 (Fla. 1998) (citing *Kyles v. Whitley*, 514 U.S. 419, 441 (1994)) (*Jones II*). Newly discovered evidence satisfies the second prong of the *Jones II* test if it "weakens the case against [the defendant] so as to give rise to a reasonable doubt as to his culpability." *Jones v. State*, 678 So. 2d 309, 315 (Fla. 1996). If the defendant is seeking to vacate a sentence, the second prong requires that the newly discovered evidence would probably yield a less severe sentence. *See Jones v. State*, 591 So. 2d 911, 915 (Fla. 1991).

The Due Process Clause of the Federal Constitution and the Eighth Amendment provide that when relevant evidence that would produce an acquittal has not been presented because it could not have been discovered, a capital defendant has a right to a new trial. Mr. Dailey raises two areas of newly discovered evidence; each one will be addressed in turn, though the Court must consider the totality of the evidence discussed below and in conjunction with the new evidence presented at the last evidentiary hearing when evaluating this claim.

1. New Evidence from the State Attorney's Office

James Slater worked as an Assistant State Attorney in Pinellas County, Florida. *See* Attachment C. In his capacity as a prosecutor, ASA Slater was assigned to this case and the resulting prosecution of Mr. Dailey's codefendant, Jack Pearcy. ASA Slater was called to the crime

scene on May 6, 1985, when the victim's body was discovered in the water in Indian Rocks Beach. On September 27, 2019, Mr. Slater told defense counsel that over the course of the prosecution law enforcement was aware that Pearcy admitted to attempting to have sexual intercourse with the victim, that Pearcy "could not perform," and that the victim teased Pearcy. This made Pearcy irate and he reacted by stabbing the victim. Mr. Slater is available to testify at an evidentiary hearing.

2. New Evidence from the Pinellas County Jail

Edward Coleman was incarcerated at the Pinellas County Jail with James Dailey and Jack Pearcy. Mr. Coleman was in the same jail pod as Dailey and Pearcy for a short period. During the time Coleman and Dailey were incarcerated together, Coleman never observed Dailey speak about his case to anyone. On September 29, 2019, Mr. Coleman told defense counsel that Detective Halliday came to the Pinellas County Jail and pulled Coleman out of the pod. Halliday questioned Coleman about Dailey and Pearcy. Mr. Coleman stated that Halliday told Coleman "to listen carefully and try to get information, and if I learned anything to let him know. Detective Halliday informed me that he would be back soon to see what I had learned." *See* Attachment D. Halliday returned a few days later, pulled Coleman out of his pod, and brought Coleman into a separate room with newspaper articles about this case. Detective Halliday informed Coleman that the case was high profile and there was pressure to get a conviction, so the State needed help. Detective Halliday directed Coleman to be looking for certain details about the case, specifically who was involved and what time the incident occurred. Detective Halliday promised to reduce the charges in Coleman's case if he was able to learn anything about James Dailey or Jack Pearcy's cases. Mr. Coleman is available to testify at an evidentiary hearing.

Former Corrections Officer David Howsare, who worked at the Pinellas County Jail during the mid-to-late-1980s, confirmed in an October 4, 2019, affidavit that he knew Jack Pearcy while

Pearcy was incarcerated there. *See* Attachment E. Officer Howsare stated that Pearcy was known by him and the other guards to be manipulative – of both the other inmates and jail staff. Officer Howsare stated that the guards used Pearcy as an example of inmate behavior to look out for; they knew to be cautious around him because he would engage in physical altercations or try to secure favors from them. Mr. Howsare is available to testify at an evidentiary hearing.

B. *Brady/Giglio* Evidence

The State violated Mr. Dailey's Due Process rights under *Brady* by withholding exculpatory evidence, and under *Giglio* by presenting false evidence at Mr. Dailey's original trial. The Supreme Court of the United States has held that both the withholding of exculpatory evidence from a criminal defendant by a prosecutor and the knowing use of false testimony violate the Due Process Clause of the Fourteenth Amendment. *See Brady v. Maryland*, 373 U.S. 83, 86 (1963) and *Giglio v. United States*, 405 U.S. 150, 153-55 (1972).

The Due Process Clause forbids official misrepresentations of fact and requires disclosure of evidence that probably could aid the defense to obtain a different outcome. *See, e.g.*, *Mooney v. Holohan*, 294 U.S. 103 (1935); *Pyle v. Kansas*, 317 U.S. 213 (1942); and *Miller v. Pate*, 386 U.S. 1 (1967). The failure of a prosecutor to correct the false testimony of a prosecution witness also violates Due Process. *Alcorta v. Texas*, 355 U.S. 28 (1957); *Napue v. Illinois*, 360 U.S. 264, 269 (1959) (noting that the Due Process prohibition against the State's knowing use of false testimony includes that which "goes to the credibility of the witness").

The Supreme Court of the United States extended the rule prohibiting misrepresentation to require disclosure of known exculpatory and impeachment evidence in the seminal case of *Brady v. Maryland*, 373 U.S. 83 (1963) (exculpatory material), and again in *Giglio v. United States*, 405 U.S. 150 (1972) (impeachment material). The *Brady* Court imposed upon prosecutors "an

affirmative duty to disclose evidence favorable to the defense," *Kyles v. Whitley*, 514 U.S. 419, 432 (1995), in part because allowing them to withhold evidence that could change the outcome of the trial "casts the prosecutor in the role of an architect of a proceeding that does not comport to the standards of justice . . ." *Brady*, 373 U.S. at 88.

In order to establish a *Brady* violation, a court must find that: (1) the evidence is favorable to the accused because it is exculpatory in guilt or sentencing; (2) that it was suppressed by the State willfully or inadvertently; and (3) that it is material. *Banks v. Dretke*, 540 U.S. 668, 691 (2004). Evidence that is favorable to the accused includes both exculpatory and impeachment evidence. *Id*.

First, the State withheld *Brady* evidence concerning co-defendant Pearcy's motive to murder the victim. Former ASA Slater is prepared to testify that law enforcement officials told him that Pearcy stabbed the victim because she teased him after he "could not perform." **The information obtained from ASA Slater provides for the first time a clear and direct motive for the murder, *a motive that was Pearcy's, and Pearcy's alone***.[9] This information is not only

[9] Relatedly, the State itself had made the argument, in its sentencing memorandum *in Pearcy's case*, that it was Pearcy – not Dailey – who had a motive to take the victim to an isolated location in its sentencing memorandum in Pearcy's case:

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

R2 10298. The State had made the same argument at the guilt phase of Pearcy's capital trial, an argument it conspicuously failed to make at Dailey's trial seven months later:

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

favorable evidence long suppressed by the State, but critical, damning evidence which supports what James Dailey has said all along (and what Jack Pearcy has acknowledged at least four times), namely that **Jack Pearcy, *not James Dailey,* killed the victim**.

Second, the State withheld *Giglio* evidence concerning Detective Halliday's conduct in interviewing inmates at the Pinellas County Jail. Mr. Coleman is prepared to testify that Detective Halliday told inmates that: (1) the State was looking for information against James Dailey; (2) the State's case was weak and, as a result, they were eager for certain key pieces of information in this high-profile murder; (3) the State was willing to offer plea deals in exchange for this information; and (4) Halliday brought newspapers into the Pinellas County Jail about this case and showed these articles to inmates.

The State's withholding of this evidence and its misrepresentation of key facts at trial violated Mr. Dailey's substantive due process rights. Any attempt by the State to say that this claim is untimely is error. *See Banks v. Dretke*, 540 U.S. 668, 696 (2004) ("The State here nevertheless urges, in effect, that 'the prosecution can lie and conceal and the prisoner still has the burden to … discover the evidence,' so long as the 'potential existence' of a prosecutorial misconduct claim might have been detected. *A rule thus declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process.*") (emphasis added) (internal citations omitted). Mr. Dailey has steadfastly asserted his innocence for over thirty-three years. Though substantial evidence of innocence has been unearthed, ***not once has it been disclosed by the State***. Yet, it is beyond dispute, the State has been in possession of exonerating information all along.

R2 11582.

In a weak circumstantial case such as this one, the State will bear a particularly high burden of proof at any new trial – i.e., all of the facts "must be inconsistent with innocence" and must "lead to a reasonable and moral certainty that [Dailey] and no one else committed the offense charged." *Dausch v. State*, 141 So. 3d 513, 517 (Fla. 2014); *Ballard v. State*, 923 So. 2d 475, 486 (Fla. 2006) (evidence must exclude "all other inferences" than guilt).

The flimsy circumstantial case against Mr. Dailey, bolstered by the testimony of unreliable jailhouse snitches, has been completely undermined by evidence unearthed in postconviction, and there remains no inculpatory evidence worthy of belief by any standard. Because there remains no credible evidence inconsistent with Mr. Dailey's innocence – an acquittal is at least "probable" under the *Jones* standard.

CLAIM 3

JAMES DAILEY HAS A CONSTITUTIONAL RIGHT TO HAVE HIS DESIGNATED LEGAL WITNESS BE ALLOWED ACCESS TO WRITING PAD AND PEN DURING HIS EXECUTION, TWO ATTORNEYS PRESENT DURING HIS EXECUTION, ATTORNEY ACCESS TO A PHONE DURING THE EXECUTION, AND A WITNESS OBSERVE THE INSERTION OF THE IV LINE THAT WILL BE USED TO ADMINISTER THE LETHAL DRUGS.

Mr. Dailey's execution is scheduled for 6:00 p.m. on November 7, 2019. Mr. Dailey specifically requests that: (1) Dailey's designated legal witness(es) be allowed access to a writing pad and pen during his execution; (2) Dailey's designated legal witness(es) be allowed access to a telephone before and during the execution process; (3) Dailey be afforded a second witness to his execution; and (4) one of Dailey's witnesses be allowed to view the IV insertion process. Based on Florida Department of Corrections ("DOC") precedent, Dailey anticipates the grant of his request for his designated witness to be allowed access to writing implements and the denial of all the other requests.

This Court should direct DOC to comply with Dailey's three remaining requests to: (1)

allow for a second witness to observe his execution; (2) allow at least one witness access to a telephone; and (3) allow at least one witness to observe the IV insertion process. Failure to do so would amount to a denial of due process and access to the courts, preventing Dailey and other similarly situated inmates, in the event of an execution gone wrong, from raising and proving Eighth Amendment challenges meant to stop the execution while there is still time to prevent wanton and unconstitutional torment. DOC's present approach denies defendants a "basic ingredient of due process" which is "an opportunity to be allowed to substantiate a claim before it is rejected." *See Ford v. Wainwright*, 477 U.S. 399, 414 (1986) (plurality opinion) (internal quotation marks omitted). In states where lethal injection executions have gone awry, steps have been taken to increase transparency and attorney access.[10]

To ensure adequate access to the courts, it is necessary to have at least two attorneys present at the viewing – one who can access a phone, and one who can continue to monitor the execution should phone access be necessary. By preventing witnessing counsel adequate phone access, or any phone access, during the execution, DOC's policy would violate Dailey's right of access to the courts. In the event that Dailey's execution were carried out in an unconstitutionally cruel and unusual manner, Dailey's lone attorney would need to exit the witness room and the prison facility in order to ask the courts to halt the unconstitutional execution. Doing so would leave Dailey

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[10] In Ohio, for example, DOC increased the number of witnesses to allow for two attorneys to be present, made a phone available just outside the witness room, required photos of the drug packages and provided after the execution, and instituted checklists and an incident command system. *See* https://files.deathpenaltyinfo.org/legacy/files/pdf/ExecutionProtocols/OhioProtocol10.07.2016.pdf. Further, in Arizona, after the botched execution of Joseph Wood in 2014, the State agreed to allow witnesses to the execution to see, via video, the prisoner being strapped to the gurney, and later, by court order, the witnesses now will hear the entire execution process and see the syringes being pushed via video. *See* https://www.latimes.com/opinion/opinion-la/la-ol-arizona-executions-midazolam-20161223-story.html.

without an attorney, and the inevitable delay in reaching an accessible phone would likely mean that Dailey would have been tortured to death before help could be reached. Further, by refusing to allow a member of the legal team to witness the IV insertion process, DOC is actively preventing Dailey from bringing an Eighth Amendment challenge that would arise after the execution process has begun but before the flow of lethal chemicals. Such a violation would serve as a basis for a stay of execution. If DOC has difficulty in achieving venous access, and it either takes an unusually long time with multiple attempts to locate a vein, and/or requires a painful cut-down procedure to be used, Dailey otherwise will have no way of communicating his pain and suffering to his counsel, in violation of both his Sixth and Eighth Amendment rights.[11]

Execution is a critical stage of the proceedings. The right to counsel and the right to be free from cruel and unusual punishment will be meaningless if Dailey's sole advocate present at the execution site has no ability to advise the courts if his execution is being carried out in a cruel and unusual manner.

Dailey is currently being housed in a cell directly across from the execution chamber. During the pendency of the warrant, Dailey has had access to a cordless landline telephone so that he may communicate with his lawyers and friends and family. It is therefore beyond dispute that a cordless telephone exists within the prison in close proximity to the execution chamber.

The state has no legitimate penological interest in preventing Dailey from having a second lawyer present. Having a second attorney present would permit one lawyer to observe the execution, even if it becomes necessary for the other attorney to seek help in the event of an unconstitutional execution.

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[11] Observation of venous access can be achieved without compromising the identity of the team members, such as viewing via a closed circuit television focused on the injection sites.

The history of lethal injection in Florida and elsewhere is replete with botched procedures leading to tortuous deaths. In 2006, the State of Florida tortured Angel Diaz to death when both IV lines were inserted all the way through the veins, causing the lethal drugs to pool into soft tissue.[12] In 2009, Ohio tortured Romell Broom when it unsuccessfully sought a suitable vein for over two hours.[13] In 2014, Oklahoma tortured Clayton Lockett to death. After an hour of seeking a suitable vein and ultimately inserting an IV into his groin, a supervising physician declared Mr. Lockett unconscious following the administration of the first sedative drug.[14] The next two drugs were administered, and three minutes later, Mr. Lockett attempted to raise his head, writhed in pain, and began to say that "something's wrong." It took 43 minutes for Mr. Lockett to die; a subsequent investigation determined that a failed IV line led to the botched execution.[15] On February 22, 2018, Alabama called off the execution of Doyle Hamm after two and a half hours of attempting to insert the IV line.[16] Mr. Hamm was left with 10-12 incisions, including a penetrated femoral artery and a punctured bladder. Allowing two attorney witnesses along with telephone access and the ability to witness the IV insertion is critical to ensuring a constitutional execution.

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[12] Adam Liptak & Terry Aguayo, *After Problem Execution, Governor Bush Suspends the Death Penalty in Florida, NEW YORK TIMES,* Dec. 16, 2006.

[13] Alan Johnson, *Effort to Kill Inmate Halted - 2 Hours of Needle Sticks Fail; Strickland Steps In, COLUMBUS DISPATCH,* Sept. 16, 2009.

[14] Bailey Elise McBride & Sean Murphy, *Oklahoma Inmate Dies after Execution is Botched, Associated Press*, Apr. 29, 2014, available at https://apnews.com/.

[15] Eric Eckholm, *One Execution Botched, Oklahoma Delays the Next, New York Times*, Apr. 29, 2014.

[16] Tracy Connor, *Lawyer Describes Aborted Execution Attempt for Doyle Lee Hamm as 'Torture,'* https://www.nbcnews.com/storyline/lethal-injection/lawyer-calls-aborted-... (Feb 25, 2018); Roger Cohen, Death Penalty Madness in Alabama, N.Y. Times, Feb. 27, 2018.

CLAIM 4

THE TOTALITY OF THE PUNISHMENT IMPOSED BY THE STATE VIOLATES THE EIGHTH AMENDMENT AND THE PRECEPTS OF *LACKEY*.

Dailey's incarceration on death row began after his initial sentencing on August 7, 1987, when Dailey was 41 years old. Though his death sentence was briefly vacated, he never left the custody of DOC, and on January 21, 1994, when he was 48 years old, he was resentenced to death. On November 7, 2019, the date of his scheduled execution, he will be 73 years old and will have spent over thirty years on death row. The unnecessary and gratuitous psychological pain caused by spending over 30 years on death row amounts to far more serious punishment than the death sentence imposed in August 1987, and rises to the level of cruel and unusual punishment under the Eighth Amendment and corresponding provision of the Florida Constitution. *See* U.S. CONST. amend. VIII and FLA. CONST. art. I, § 17. Confinement in a prison or isolation cell is a form of punishment subject to scrutiny under the Eighth Amendment. *See Hutto v. Finney*, 473 U.S. 678, 685 (1978). Moreover, "[t]hese facilities and procedures were not designed and should not be used to maintain prisoners for years and years." *Swafford v. State*, 679 So. 2d 736, 744, n.8 (Fla. 1996) (Wells, J., concurring in part and dissenting in part) (citations omitted).

Dailey has spent more than three decades confined to a six-by-nine-foot cell with a ceiling nine and one-half feet high, with no air conditioning despite being located in the center of Florida. Inmates are allowed in the yard two hours per week; otherwise they remain confined to the cell except for medical reasons, legal or media interviews, or rare visits on weekends. They are allowed to shower every other day.[17]

Twenty-four years ago, Justices Stevens and Breyer expressed concerns regarding the

[17] Florida Department of Corrections, The Daily Routine of Death Row Inmates, available at http://www.dc.state.fl.us/ci/deathrow.html (last visited April 28, 2019).

length of time prisoners spent on death row prior to execution:

> The cruelty of capital punishment lies not only in the execution itself and the pain incident thereto, but also in the dehumanizing effects of the lengthy imprisonment prior to execution during which the judicial and administrative procedures essential to due process of law are carried out. Penologists and medical experts agree that the process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture.

Lackey v. Texas, 514 U.S. 1045, at n.* (1995) (quoting *People v. Anderson*, 493 P.2d 894 (1972); *see also Furman v. Georgia*, 408 U.S. 238, 288-89 (1972) (Brennan, J., concurring) ("The prospect of pending execution exacts a frightful toll during the inevitable long wait between the imposition of sentence and the actual infliction of death."). During the thirty-two years Dailey has spent on death row, he has lived with the haunting uncertainty of not knowing when or if a death warrant would be signed. This additional punishment in the form of psychological torture constitutes cruel and unusual punishment under the Eighth Amendment, as it is a greater punishment than that which Dailey was sentenced to and that which the Eighth Amendment condones. In *Lackey*, Justice Stevens analyzed the merits of Lackey's argument regarding seventeen (17) years on death row, characterizing the claim as one of both "importance and novelty," but postponed consideration of the issue until it was addressed by other courts. *Lackey*, 5114 U.S. at 1045. Dailey has spent nearly twice that long on Florida's death row.

The issue has since been addressed by other courts and is ripe for review. In *Jones v. Chappell*, 31 F.Supp.3d 1050, 1053 (C.D. Cal. 2014), *rev'd sub nom. Jones v. Davis*, 806 F.3d 538 (9th Cir. 2015), the United States District Court for the Central District of California held the dysfunctional administration of California's death penalty system resulted in "an inordinate and unpredictable delay preceding" execution that violated the Eighth Amendment prohibition on cruel and unusual punishment. *See also Elledge v. Florida*, 525 U.S. 944 (1998) (Breyer, J., dissenting) (stating claim of Petitioner, who had spent 23 years on death row, "that the Constitution forbids

his execution after a delay of this length is a serious one."); *see Valle v. Florida*, 132 S. Ct. 1 (2011) (Breyer, J., dissenting) (stating he would consider Petitioner's claim that 33 years of incarceration on death row, more than twice the average of 15 years, violates the Constitution's prohibition on cruel and unusual punishment.). Such lengthy delays were not contemplated by the Framers of the Constitution. *See Lackey*, 514 U.S. 1045 (memorandum of Stevens, J., respecting denial of certiorari).

Lengthy delays, moreover, as Justice Stevens recognized in *Lackey*, deprive the death penalty of any deterrent or retributive effect it might have once had. *Lackey*, 514 U.S. 1045. Absent the societal interests of deterrence and retribution, the death penalty becomes "the pointless and needless extinction of life with only marginal contributions to any discernable social or public purpose. A penalty with such negligible returns to the State would be patently excessive and cruel and unusual punishment violative of the Eighth Amendment." *Furman*, 408 U.S. at 312.

Nor did Dailey somehow forfeit his Eighth Amendment rights by exercising his rights to appellate and collateral relief. *See Valle*, 132 S. Ct. at 2 ("One cannot realistically expect a defendant condemned to death to refrain from fighting for his life by seeking to use whatever procedures the law allows."). Nowhere is that more true than where, as here, a defendant has always maintained his innocence.

Dailey recognizes that the FSC has rejected this argument; but in reality the courts have reached a kind of doctrinal stalemate. The lower courts are waiting for guidance from the Supreme Court of the United States, while the Florida Supreme Court is waiting for the lower courts to address this issue. Dailey urges reconsideration of the decisions in *Jimenez v. State*, 265 So. 3d 462 (Fla. 2018); *Carroll v. State*, 114 So. 3d 883 (Fla. 2013), *Valle v. State*, 70 So. 3d 530 (Fla. 2011), and *Booker v. State*, 773 So. 2d 1079 (Fla. 2000).

An additional consideration in this case is that Dailey has been on death row long enough to see the very death penalty statute that *he was sentenced under* declared unconstitutional. At the time *Hurst* first came out, Dailey had the very realistic hope of certain relief, only to learn that his case was "too old" for relief based on what to any lay person is unquestionably a convoluted and confusing analysis regarding retroactivity. The time Dailey has spent on death row while the *Hurst* litigation has wound its way through the courts, and continues to wind its way through the courts, amounts to cruel and unusual punishment.

To illustrate how much time Dailey has spent incarcerated, when Dailey first arrived on death row in 1987, Ronald Reagan was President; a gallon of gas cost 89 cents; a stamp cost 22 cents; a Ford Mustang cost $7,452.00; and a movie theatre ticket cost $2.50.

In support of this claim, James Dailey, DC# 108509, incarcerated at Florida State Prison, 23916 NW 83rd Avenue, Raiford FL 32026, would be presented at an evidentiary hearing. This claim did not become ripe until the signing of the warrant.

(F) The Names, Addresses, and Telephone Numbers of All Witnesses Supporting the Claim Who Are Available To Testify At an Evidentiary Hearing.

Colin Kelly
12973 Telecom Parkway
Temple Terrace, FL 33637
813-558-1600

James Slater
7606 Cumberland Ct
Seminole, FL 33777
727-422-8588

Michael Maza
12973 Telecom Parkway
Temple Terrace, FL 33637
813-558-1600

Edward Coleman
8050 Taylor Road, Apt 1601
Riverdale, GA 30274
678-856-0310

Amanda Chin
12973 Telecom Parkway
Temple Terrace, FL 33637
813-558-1600

David Howsare
2369 Watrous Drive
Dunedin, FL 34698
727-420-3534

**And all witnesses called at Mr. Dailey's original trial

Documents

- All records on appeal from this case or co-defendant Jack Pearcy's case
- All attachments to this motion, including affidavits of witnesses
- The state and federal case law reporting the decisions in Mr. Dailey's case.

CONCLUSION AND RELIEF SOUGHT

Mr. Dailey requests the following relief, based on his *prima facie* allegations demonstrating his actual innocence and violations of his constitutional rights:

1. That he be allowed leave to amend this motion should new claims, facts, or legal precedent become available to counsel;
2. That he be granted an evidentiary hearing at a reasonable time; and
3. That his conviction and sentence of death be vacated.

CERTIFICATION PURSUANT TO FLA. R. CRIM. P. 3.851 (e)

Pursuant to Fla. R. Crim P. 3.851(e)(2)(A) and (e)(1)(F), the undersigned attorneys hereby verify that the contents of this motion have been discussed fully with Mr. Dailey, that Rule 4-1.4 of the Rules of Professional Conduct has been complied with, and that this motion is filed in good faith.

/s/ Chelsea R. Shirley
Chelsea R. Shirley
Florida Bar. No. 112901
Assistant CCRC - Middle Region
Shirley@ccmr.state.fl.us

/s/ Julissa R. Fontán
Julissa R. Fontán
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/s/ Kara R. Ottervanger
Kara R. Ottervanger
Florida Bar No. 0112110
Assistant Capital Collateral
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203-432-1179
laura.fernandez@yale.edu

/s/ Seth Miller
Seth Miller
Florida Bar No. 806471
Innocence Project of Florida, Inc.
1100 E Park Ave
Tallahassee, FL 32301-2651
smiller@floridainnocence.org

Counsel for Mr. Dailey

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing motion has been filed with Clerk for the 6th Judicial Circuit, Pinellas County, and served upon Assistant Attorney General Christina Pacheco (Christina.Pacheco@myfloridalegal.com and capapp@myfloridalegal.com); Assistant Attorney General Stephen Ake (Stephen.Ake@myfloridalegal.com); Assistant Attorney General Lisa Martin (Lisa.Martin@myfloridalegal.com); Assistant State Attorney Sara Macks (smacks@co.pinellas.fl.us); Assistant State Attorney Kristi Aussner (kaussner@co.pinellas.fl.us); The Honorable Pat Siracusa (CPizzuto@jud6.org); and the Florida Supreme Court (warrant@flcourts.org) on this 8th day of October 2019.

Respectfully submitted,

/s/ Chelsea R. Shirley
Chelsea R. Shirley
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Assistant CCRC - Middle Region
Shirley@ccmr.state.fl.us

/s/ Julissa R. Fontán
Julissa R. Fontán
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Counsel for Mr. Dailey

Attachment A

☐ PROBATION VIOLATOR
(Check if Applicable)

IN THE CIRCUIT COURT,
SIXTH JUDICIAL CIRCUIT,
IN AND FOR PINELLAS COUNTY, FLORIDA
DIVISION: FELONY

STATE OF FLORIDA

CASE NUMBER CRC 85-7084 CFANO-D

—VS—

James Hailey
Defendant
#416094

FILED
JUL 30 1987
[illegible]
Kaiy H[illegible]

JUDGMENT

The Defendant, James Hailey, being personally before this Court represented by Mark Andringa and James Herhardt, his attorney of record, and having:

(Check Applicable Provision)

☒ Been tried and found guilty of the following crime(s)
☐ Entered a plea of guilty to the following crime(s)
☐ Entered a plea of nolo contendere to the following crime(s)

COUNT	CRIME	OFFENSE STATUTE NUMBER(S)	DEGREE OF CRIME	CASE NUMBER
One	Murder in the first degree	782.04-1a	Capital	Crc85-7084

and no cause having been shown why the Defendant should not be adjudicated guilty, IT IS ORDERED THAT the Defendant is hereby ADJUDICATED GUILTY of the above crime(s).

****

The Defendant is hereby ordered to pay the sum of twenty dollars ($20.00) pursuant to F.S. 960.20 (Crimes Compensation Trust Fund). The Defendant is further ordered to pay the sum of three dollars ($3.00) as a court cost pursuant to F. S. 943.25(4).

☐ The Defendant is ordered to pay an additional sum of three dollars ($3.00) pursuant to F. S. (943.25(8). (This provision is optional; not applicable unless checked).

(Check if Applicable)

☐ The Defendant is further ordered to pay a fine in the sum of ______ pursuant to F. S. 775.0835. (This provision refers to the optional fine for the Crimes Compensation Trust Fund, and is not applicable unless checked and completed. Fines imposed as part of a sentence pursuant to F.S. 775.083 are to be recorded on the Sentence page(s)).

☐ The Court hereby imposes additional court costs in the sum of $ ______

CT CR 82 a (Rev. 11/7/86)

Imposition of Sentence Stayed and Withheld *(Check if Applicable)*

☐ The Court hereby stays and withholds the imposition of sentence as to count(s) _____ and places the Defendant on probation for a period of _____ under the supervision of the Department of Corrections (conditions of probation set forth in separate order.)

Sentence Deferred Until Later Date *(Check if Applicable)*

☒ The Court hereby defers imposition of sentence until August 7, 1987 (Date)

The Defendant in Open Court was advised of his right to appeal from this Judgement by filing notice of appeal with the Clerk of Court within thirty days following the date sentence is imposed or probation is ordered pursuant to this adjudication. The Defendant was also advised of his right to the assistance of counsel in taking said appeal at the expense of the State upon showing of indigency.

Thomas E. Penick Jr.
JUDGE

FINGERPRINTS OF DEFENDANT

1. R. Thumb	2. R. Index	3. R. Middle	4. R. Ring	5. R. Little
6. L. Thumb	7. L. Index	8. L. Middle	9. L. Ring	10. L. Little

Fingerprints taken by:

B. Johnson DEP. 2595
(Name and Title)

DONE AND ORDERED IN Open Court at Pinellas County, Florida, this 7th day of June A.D. 19 87. I HEREBY CERTIFY that the above and foregoing fingerprints are the fingerprints of the Defendant, Jessie Hinkley and that they were placed thereon by said Defendant in my presence in Open Court this day.

Thomas E. Penick Jr.
JUDGE

CT CR 82 b (Rev. 11/7/86)

D9jb

☐ PROBATION VIOLATOR
(Check if Applicable)

IN THE CIRCUIT COURT,
SIXTH JUDICIAL CIRCUIT,
IN AND FOR PINELLAS COUNTY, FLORIDA
DIVISION: FELONY

STATE OF FLORIDA

CASE NUMBER Crc85-7084CFANO-D

—VS—

James Dailey
Defendant
416094

7

JUDGMENT

The Defendant, James Dailey, being personally before this Court represented by Henry Andrenga, his attorney of record, and having:

(Check Applicable Provision)
- ☒ Been tried and found guilty of the following crime(s)
- ☐ Entered a plea of guilty to the following crime(s)
- ☐ Entered a plea of nolo contendere to the following crime(s)

COUNT	CRIME	OFFENSE STATUTE NUMBER(S)	DEGREE OF CRIME	CASE NUMBER
One	Murder in the first degree	782.04-1A	Capital	Crc85-7084

and no cause having been shown why the Defendant should not be adjudicated guilty, IT IS ORDERED THAT the Defendant is hereby ADJUDICATED GUILTY of the above crime(s).

****

The Defendant is hereby ordered to pay the sum of twenty dollars ($20.00) pursuant to F.S. 960.20 (Crimes Compensation Trust Fund). The Defendant is further ordered to pay the sum of three dollars ($3.00) as a court cost pursuant to F. S. 943.25(4).

☐ The Defendant is ordered to pay an additional sum of three dollars ($3.00) pursuant to F. S. (943.25(8). (This provision is optional; not applicable unless checked).

(Check if Applicable)

☐ The Defendant is further ordered to pay a fine in the sum of _____ pursuant to F. S. 775.0835.
(This provision refers to the optional fine for the Crimes Compensation Trust Fund, and is not applicable unless checked and completed. Fines imposed as part of a sentence pursuant to F.S. 775.083 are to be recorded on the Sentence page(s)).

☐ The Court hereby imposes additional court costs in the sum of $ _____

CT CR 82 a (Rev. 11/7/86)

D9jb

Imposition of Sentence Stayed and Withheld *(Check if Applicable)*

☐ The Court hereby stays and withholds the imposition of sentence as to count(s) _____ and places the Defendant on probation for a period of _____ under the supervision of the Department of Corrections (conditions of probation set forth in separate order.)

Sentence Deferred Until Later Date *(Check if Applicable)*

☐ The Court hereby defers imposition of sentence until _____ (Date)

The Defendant in Open Court was advised of his right to appeal from this Judgement by filing notice of appeal with the Clerk of Court within thirty days following the date sentence is imposed or probation is ordered pursuant to this adjudication. The Defendant was also advised of his right to the assistance of counsel in taking said appeal at the expense of the State upon showing of indigency.

JUDGE

FINGERPRINTS OF DEFENDANT

1. R. Thumb	2. R. Index	3. R. Middle	4. R. Ring	5. R. Little
6. L. Thumb	7. L. Index	8. L. Middle	9. L. Ring	10. L. Little

Fingerprints taken by:

R. Johnson DEP. 2595

(Name and Title)

DONE AND ORDERED IN Open Court at Pinellas County, Florida, this 7th day of August A.D., 1987. I HEREBY CERTIFY that the above and foregoing fingerprints are the fingerprints of the Defendant, James Bailey and that they were placed thereon by said Defendant in my presence in Open Court this day.

JUDGE

Page _____ of _____

CT CR 82 b (Rev. 11/7/86)

D9jh

Defendant James Bailey

Case Number CRC 85-7084CFANO-D

Consecutive/Concurrent (As to other convictions)

It is further ordered that the composite term of all sentences imposed for the counts specified in this order shall run ☐ consecutive to ☒ concurrent with (*check one*) the following:

☒ Any active sentence being served.

☐ Specific sentences: _____

In the event the above sentence is to the Department of Corrections, the Sheriff of Pinellas County, Florida is hereby ordered and directed to deliver the Defendant to the Department of Corrections together with a copy of this Judgment and Sentence.

The Defendant in Open Court was advised of his right to appeal from this Sentence by filing notice of appeal within thirty days from this date with the Clerk of this Court and the Defendant's right to the assistance of counsel in taking said appeal at the expense of the State upon showing of indigency.

In imposing the above sentence, the Court further recommends _____

☐ The Court hereby imposes court costs in the amount of $200.00 pursuant to F. S. 27.3455.

☒ The $200.00 court costs imposed under F. S. 27.3455 are hereby waived.

DONE AND ORDERED in Open Court at Pinellas County, Florida, this 7th day of August A.D., 19 87.

JUDGE

CT CR 82 d (Rev. 11/7/86)

DB/jb

Defendant James Dailey

Case Number CRC 85-7084CFANO-D

SENTENCE

(As to Count One)

The Defendant, being personally before this Court, accompanied by his attorney, Henry Ordunga, _____, and having been adjudicated guilty herein, and the Court having given the Defendant an opportunity to be heard and to offer matters in mitigation of sentence, and to show cause why he should not be sentenced as provided by law, and no cause being shown.

IT IS THE SENTENCE OF THE LAW that:

THE SENTENCE OF THE LAW AND THE JUDGMENT AND ORDER OF THIS COURT, that you, for the crime of Murder in the First Degree, for which you now stand convicted, shall be taken by the Sheriff of the County of Pinellas to the common jail of said County or the State Prison in the State of Florida and there securely kept until such time as the Governor of the State of Florida shall in and by his Warrant fix and appoint, at which time you shall be delivered by the Sheriff of said County to the Superintendent of the State Prison of the State of Florida, at the place of execution named in the Governor's Warrant as soon as may be after receipt by the Sheriff of the said County of the Death Warrant for you from the Governor of said State, at which time and place in said Warrant fixed and named, and within the walls of the permanent death chamber provided by law, you shall be, by the proper execution officer of the State Prison, electrocuted until you are dead. And may God have mercy on your soul.

Thereupon the defendant was remanded to the custody of the Sheriff.

7 August 1987

Credit for time served,to-wit: 541 DAYS.

Consecutive/Concurrent

It is further ordered that the sentence imposed for this count shall run [x] consecutive to [ ] concurrent with (check one) the sentence set forth in count _____ above.

Page _____ of _____

Lacked

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA IN AND FOR PINELLAS COUNTY

CRC 85-07084 CFANO-D

STATE OF FLORIDA)
)
VS.)
)
JAMES DAILEY)

416014

FINDINGS IN SUPPORT OF SENTENCE

THIS CAUSE CAME on before the Court for trial by Jury, and after deliberations, on the 27th day of June, 1987, the Jury rendered a verdict finding the Defendant, JAMES DAILEY, guilty of Murder in the First Degree for the murder of Shelly Boggio.

Thereafter, the Jury, after hearing additional matters, retired to consider an advisory sentence pursuant to Section 921.141(2), Florida Statutes (1985). On the 30th day of June, 1987, the Jury by a 12 to 0 majority returned and, in open Court, recommended that this Court impose the death penalty upon the Defendant, JAMES DAILEY.

In preparing to sentence Defendant, JAMES DAILEY, for first degree murder, this Court again carefully reviewed Section 921.141, Florida Statutes (1985) and many of the decisions of the Florida Supreme Court relating to sentencing for capital felonies (See Appendix). Additionally, this Court carefully reviewed the principles of the United States Constitution that constrain sentencing in capital cases. Furman v. Georgia, 408 U.S. 238, 33 L.Ed.2d 346, 92 S.Ct. 2726 (1972); Proffit v. Florida, 428 U.S. 242, 49 L.Ed.2d 913, 96 S.Ct. 2960 (1976); Dixon v. State, 283 So.2d 1 (Fla. 1973).

It should be noted that this Court presided over the trials of both defendants accused of the murder of Shelly Boggio. Accused of murdering Shelly Boggio were JAMES DAILEY, the Defendant herein, and Jack Pearcy. Both defendants were found guilty of Murder in the First Degree. However, the jury in the Jack Pearcy trial recommended life in prison for Jack Pearcy and this Court, independent of, but in agreement with the advisory recommendation returned by the jury, sentenced Jack Pearcy to life in prison.

This Court carefully considered the evidence presented at each trial, the sentencing phase of each trial and at each sentencing, the Sentencing Memoranda

filed, the arguments of all counsel, and the statement read into the record and placed in the file by the Defendant herein, JAMES DAILEY. The presentence investigation for each defendant was also considered.

Florida law only allows two choices in imposing sentences for capital felonies; i.e., life imprisonment with a mandatory minimum service of 25 years before being eligible for parole, or death. Sec. 775.082, Fla. Stat. (1985).

The Florida Legislature has also established guidelines to control and direct the exercise of the Court's discretion in selecting and imposing a proper sentence in capital cases. Section 921.141(5)(6), Florida Statutes (1985). Pursuant to these guidelines, the Court must consider and weigh certain specified aggravating and mitigating circumstances. The Court may also consider other mitigating circumstances, but not other aggravating circumstances. Elledge v. State, 346 So.2d 998 (Fla. 1977).

The Court may consider only such aggravating circumstances as are proved by the evidence beyond a reasonable doubt, but may consider any mitigating circumstance that it is reasonably convinced exists. State v. Dixon, 283 So.2d 1 (Fla. 1973).

In weighing these aggravating and mitigating circumstances, this Court is not to merely count the number of aggravating circumstances applicable and then mathematically compare the number to the number of mitigating circumstances found to apply. Rather, the Court is to exercise "... a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present." State v. Dixon, 283 So.2d 1, 10 (Fla. 1973); Lightbourne v. State, 438 So.2d 380 (Fla. 1983). "When one or more of the aggravating circumstances is found, death is presumed to be the proper sentence unless it or they are overridden by one or more of the mitigating circumstances..." State v. Dixon, 283 So.2d 1, 9 (Fla. 1973). See also, Proffitt v. Florida, 428 U.S. 242, 49 L.Ed. 2d 913, 96 S.Ct. 960 (1976).

After careful and independent* consideration, this Court finds the following aggravating circumstances to exist in this case: (*Tompkins v. State, 12 F.L.W. 44 (Fla. Jan. 12, 1987)).

II. AGGRAVATING CIRCUMSTANCES

A. THE DEFENDANT WAS PREVIOUSLY CONVICTED OF ANOTHER CAPITAL FELONY OR OF A FELONY INVOLVING THE USE OR THREAT OF VIOLENCE TO THE PERSON. (Sec. 921.141(5)(b), Fla. Stat. (1985)).

This aggravating factor was established beyond a reasonable doubt. The Defendant, JAMES DAILEY, was convicted in Pima County, Arizona, in 1979 for Aggravated Battery. During the sentencing phase, the State introduced a certified copy of this judgment and sentence. Two defense witnesses, Richard Dollar and Mary Kay Dollar, testified that JAMES DAILEY had corresponded with them in 1979 and admitted his conviction in Arizona of a violent offense. These witnesses testified that Defendant, JAMES DAILEY, had been involved in a bar fight, and he had armed himself with a pool cue. There is no reasonable doubt that this aggravating circumstance has been established. The documentary evidence and Defendant's admission establish it.

B. A CAPITAL FELONY WAS COMMITTED WHILE THE DEFENDANT WAS ENGAGED IN SEXUAL BATTERY OR ATTEMPTED SEXUAL BATTERY. (Sec. 921.141(5)(d), Fla. Stat. (1985)).

The evidence presented during all phases of this trial establishes beyond a reasonable doubt that the motive for taking the victim, Shelly Boggio, to the area adjacent to the Route 688 bridge was sexual battery. The victim's body was found completely nude floating in the Intercoastal Waterway. Her underwear was found on shore near areas of fresh blood. Shelly Boggio's jeans had been removed and thrown in the waterway. Potential physical evidence of an actual sexual battery upon Shelly Boggio was lost because her body had been floating in the waterway for an extended period of time. All of the evidence and testimony presented establishes beyond a reasonable doubt that Shelly Boggio at the very least was a victim of an attempted sexual battery. Her jeans would not have fallen off during a struggle, nor would have been removed if the only motive was murder.

C. THE CAPITAL FELONY WAS COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST OR EFFECTING AN ESCAPE FROM CUSTODY. (Sec. 921.141(5)(e), Fla. Stat. (1985)).

Shelly Boggio, the victim, knew and trusted the Defendant, JAMES DAILEY. Numerous witnesses had seen the Defendant together with the victim earlier on the evening of the murder. Witnesses, Oza Shaw and Gayle Bailey, specifically testified they saw the Defendant, JAMES DAILEY, with the victim for most of the night, and these witnesses saw the Defendant return home close to the time as the medical examiner, Dr. Joan Wood, would later establish as the time of death.

In order to establish this aggravating factor beyond a reasonable doubt, the State must establish more than the mere fact that the victim knew her

assailants. In Cooper v. State, 492 So.2d 1059 (Fla. 1986), the victim recognized the defendant even though the defendant was wearing a ski mask. The defendant, in the COOPER case, shot the victims and ran from the crime scene. When informed that one of the victims was alive and could possibly identify the defendant, he returned and shot this victim a second time. See also Meeks v. State, 339 So.2d 186 (Fla. 1976).

The instant case is similar to the COOPER case. The Defendant, JAMES DAILEY, knew that Shelly Boggio could identify him and accuse him of sexual battery or attempted sexual battery. The Defendant did more than just attempt to kill. The evidence establishes that the Defendant did everything possible to permanently silence her. Shelly Boggio, the victim herein, was viciously stabbed while on land. According to the testimony presented during the trial, Defendant, JAMES DAILEY, told persons later, "She would not die." "She would not go down." In addition to the stab wounds, there were other assaults upon Shelly Boggio's body. She was beaten about the face, she was choked, she was drug to the water and held under water until she drowned. Her nude body was left in the Intercoastal Waterway to either sink or float away so as to conceal the location of the struggle. Further, in order to either prevent or delay discovery of the crime, the victim's clothes were thrown into the waterway. The next day the Defendant, JAMES DAILEY, took flight from Pinellas County, first traveling to Miami and subsequently escaping to California until his arrest.

Clearly, this aggravating factor is established beyond a reasonable doubt.

D. THE CAPITAL FELONY WAS ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL. (Sec. 921.141(5)(h), Fla. Stat. (1985)).

The murder of Shelly Boggio was especially heinous, atrocious, and cruel. She was brutally stabbed as she fought frantically and continuously for her life. She suffered numerous "pricking" wounds on her breast and stomach. She was choked. She was thrown into the waterway and held under water until she drowned.

Dr. Joan Wood testified that Shelly Boggio suffered the most severe defensive stab wounds she has ever seen in her long career as a medical examiner. Paul Skalnick, a witness during the trial, testified that Defendant, JAMES DAILEY, told him, "No matter how many times I stabbed her, she would not die."

Dr. Wood indicated that the "pricking wounds" to the victim's breast and stomach area were caused by merely piercing the top layer of skin and occurred apart from the actual stab wounds which penetrated the victim's hands, abdomen,

and neck. These "pricking wounds" are consistent with injury and pain inflicted upon Shelly Boggio during the sexual battery or attempted sexual battery.

The ultimate cause of death was drowning. Dr. Wood made this determination by the chloride concentrations in the victim's heart. Significantly, after having suffered over 30 severe stab wounds, the victim remained alive. Notwithstanding the excruciating pain inflicted on the victim and her mental anguish suffered as she fought for her life, the Defendant threw her into the waterway and held her under the water until she drowned.

This aggravating circumstance is established beyond a reasonable doubt.

E. THE CAPITAL FELONY WAS A HOMICIDE AND WAS COMMITTED IN A COLD, CALCULATED, AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION. (Sec. 921.141(5)(i) , Fla. Stat. (1985)).

This aggravating factor was established beyond a reasonable doubt by the various types of multiple wounds inflicted on Shelly Boggio by the Defendant, JAMES DAILEY. The legal requirement of "heightened" premeditation was more than met in this case.

The victim was stabbed or cut 48 times. As stated above, Dr. Wood testified the defensive wounds were the most severe she had ever observed. Further, the victim bore "pricking wounds" which indicated torture. The victim was beaten in the face. The victim was choked. Ultimately, the Defendant had to drown the victim in order to cause death.

The Defendant by his own statement established his mental and physical determination to inflict wounds necessary to kill. "No matter how many times I stabbed her, she would not die."

The facts of this case sub judice are similar to numerous cases previously upheld by the Florida Supreme Court as establishing this aggravating factor. See Jent v. State, 408 So.2d 1024 (Fla. 1982); Herring v. State, 446 So.2d 1049 (Fla. 1984); Puiatti v. State, 495 So.2d 128 (Fla. 1986); Stano v. State, 473 So.2d 1282 (Fla. 1985); and Cooper v. State, 492 So.2d 1059 (Fla. 1986). It should be noted that the COOPER Court also established that this aggravating factor (Section 921.141(5)(i), Florida Statutes (1985)) can coexist with the aggravating circumstance of preventing a lawful arrest or effecting an escape from custody (Sec. 921.141(5)(e), Fla. Stat. (1985)).

In Nibert v. State, 12 F.L.W. 225 (Fla. May 7, 1987), it was held that a "stabbing frenzy" does not establish this aggravating factor. The Defendant, JAMES DAILEY, went beyond any "stabbing frenzy." In a cold, calculated, and

premeditated manner, he stabbed Shelly Boggio, he beat her, he choked her, and ultimately, he drowned her.

II. MITIGATING CIRCUMSTANCES

The Jury herein was instructed by the Court on four mitigating circumstances plus the catchall mitigating circumstances that the Jury could consider any other aspect of the Defendant's character. The other statutory mitigating circumstances were not presented to the Jury because they clearly and unequivocally do not apply in this case and were not requested under any circumstance by the Defendant.

A. THE CAPITAL FELONY WAS COMMITTED WHILE THE DEFENDANT WAS UNDER THE INFLUENCE OF EXTREME MENTAL OR EMOTIONAL DISTURBANCE. (Sec. 921.141(6)(b), Fla. Stat. (1985).

There was some evidence presented by the Defendant that in years past, he suffered from a drinking problem and that this problem was exacerbated by his Vietnam experiences. The evidence presented rose to a level no higher than bare allegations.

There was no evidence presented of any nature or kind which established an extreme mental or emotional disturbance of the Defendant which would mitigate against or outweigh the established aggravating circumstances.

B. THE DEFENDANT WAS AN ACCOMPLICE IN THE CAPITAL FELONY COMMITTED BY ANOTHER PERSON AND HIS PARTICIPATION WAS RELATIVELY MINOR. (Sec. 921.141(6)(d), Fla. Stat. (1985)).

Two defendants were indicted and convicted for the murder of Shelly Boggio. The evidence presented through all stages of both trials and especially this trial of Defendant, JAMES DAILEY, established beyond a reasonable doubt that JAMES DAILEY was the major participant in the stabbing, beating, choking, and drowning of Shelly Boggio. His participation was not minor, it was major.

JAMES DAILEY'S own statements to fellow inmates at the Pinellas County Jail establish him as the major participant in this murder. The Defendant admitted he stabbed the victim numerous times and felt frustration that "no matter how many times I stabbed her, she would not die." Witnesses presented corroborating evidence that JAMES DAILEY played the major role in the death of Shelly Boggio. Gayle Bailey and Oza Shaw testified that JAMES DAILEY returned home wearing wet pants and wearing no shoes. This is consistent with JAMES DAILEY having physically held the victim under water until she drowned.

C. THE DEFENDANT ACTED UNDER EXTREME DURESS OR UNDER THE SUBSTANTIAL DOMINATION OF ANOTHER PERSON. (Sec. 921.141(6)(e), Fla. Stat. (1985)).

There was absolutely no evidence presented during any phase of this trial which indicated domination by Jack Pearcy over JAMES DAILEY. Both defendants

transported the victim to the Route 688 bridge. The evidence clearly leads to the conclusion that the motive for taking Shelly Boggio to the parking spot by the Route 688 bridge was sexual battery. Further, the evidence establishes that this Defendant, JAMES DAILEY, stabbed, beat, choked, and drowned Shelly Boggio. There is no evidence that Jack Pearcy made or influenced or forced JAMES DAILEY into doing any of these acts.

D. THE CAPACITY OF THE DEFENDANT TO APPRECIATE THE CRIMINALITY OF HIS CONDUCT OR TO CONFORM HIS CONDUCT TO THE REQUIREMENTS OF LAW WAS SUBSTANTIALLY IMPAIRED. (Sec. 921.141(6)(f), Fla. Stat. (1985)).

There was no evidence presented in this trial that the Defendant, JAMES DAILEY, was substantially impaired by alcohol or drugs.

There was some evidence that the Defendant, JAMES DAILEY, had gone to a bar on the night of the murder. There is absolutely no evidence that JAMES DAILEY was intoxicated. There was testimony that JAMES DAILEY used marijuana on the night of the murder; however, there is no evidence that he was under the influence of anything to the extent that he was so substantially impaired that he could not appreciate the criminality of his conduct. Both Gayle Bailey and Oza Shaw saw JAMES DAILEY before the murder and after the murder. Neither witnesses indicated that the Defendant was under the influence of alcohol or drugs to the point where he was unable to control his conduct.

Defendant's ability to relate with clarity and specificity the events surrounding the murder of Shelly Boggio to inmates of the Pinellas County Jail establishes the fact that he was not under the influence to the extent that he was so substantially impaired that he could not appreciate the criminality of his conduct.

E. ANY OTHER ASPECT OF THE DEFENDANT'S CHARACTER OR RECORD.

This "general" mitigating factor received the majority of the evidence put on by the Defendant during the penalty phase. The Defendant was portrayed as having a normal youthful background and having saved two persons from drowning during a high school picnic. He was in the Air Force and served several temporary duty tours in Vietnam. While in the Air Force, he had been married and fathered a daughter. When his ex-wife remarried his former Air Force friend, he allowed this man to adopt his daughter.

For nearly the past 20 years, the Defendant has been a drifter going from city to city and job to job.

During the sentencing phase, the Defendant stated among other things that

he felt remorse for the victim and her family. It is impossible for this Court to know if he genuinely feels remorse for his victim or her family.

This Court does not consider any of the factors presented by the Defendant to mitigate this crime.

CONCLUSION

In concluding these findings, it is only appropriate that the issue of disparate sentences for co-defendants be discussed. The sentence of death for Defendant, JAMES DAILEY, is appropriate even in light of the previous jury recommendation and sentence of life imposed against the co-defendant, Jack Pearcy.

This Court has carefully considered and reviewed many cases discussing the issue of disparate sentences. Hoffman v. State, 474 So.2d 1178 (Fla. 1985); Demps v. State, 395 So.2d 501 (Fla. 1981), cert. den. 454 U.S. 933, 102 S.Ct. 430, 70 L.Ed.2d 239 (1981); Woods v. State, 490 So.2d 24 (Fla. 1986); and Marek v. State, 492 So.2d 1055 (Fla. 1986). Defendant, JAMES DAILEY, was clearly the dominating force behind the murder of Shelly Boggio.

After carefully weighing the aggravating and mitigating circumstances discussed above, and after comparing the circumstances of this case with the circumstances existing for other capital cases reviewed by the Florida Supreme Court and other appellate courts which are listed in the Appendix, and after carefully considering the Constitutional standards set forth in Furman v. Georgia, supra, and Proffitt v. Florida, supra, this Court makes its own reasoned independent judgment, Tompkins v. State, supra, that the statutory aggravating circumstances clearly outweigh the statutory mitigating circumstances, therefore, it is the judgment of this Court that JAMES DAILEY be put to death in the manner provided by Florida law for the first degree murder of Shelly Boggio.

DONE AND ORDERED in Chambers, Clearwater, Pinellas County, Florida, this 2nd day of September, 1987.

THOMAS E. PENICK, JR.
Circuit Court Judge

APPENDIX

Adams v. State, 341 So.2d 765 (Fla. 1976).

Agan v. State, 445 So.2d 326 (Fla. 1983).

Aldridge v. State, 351 So.3d 942 (Fla. 1977)

Alford v. State, 307 So.2d 433 (Fla. 1975).

Alvord v. State, 322 So.2d 533 (Fla. 1975), cert. den. 96 S.Ct. 3234, 428 U.S. 923, 49 L.Ed.2d 1226.

Amazon v. State, 487 So.2d 8 (Fla. 1986), cert. den. 107 S.Ct. 314, 93 L.Ed.2d 288.

Barclay v. State, 343 So.2d 1266 (Fla. 1977).

Barclay v. State, 362 So.2d 657 (Fla. 1978).

Breedlove v. State, 413 So.2d 1 (Fla. 1982).

Brown v. State, 367 So.2d 616 (Fla. 1979).

Buckrem v. State, 355 So.2d 111 (Fla. 1978).

Buford v. State, 403 So.2d 943 (Fla. 1981).

Burch v. State, 343 So.2d 831 (Fla. 1977).

Chambers v. State, 339 So.2d 204 (Fla. 1976).

Combs v. State, 403 So.2d 418 (Fla. 1981).

Cooper v. State, 336 So.2d 1133 (Fla. 1976).

Cooper v. State, 492 So.2d 1059 (Fla. 1986).

Darden v. State, 329 So.2d 287 (Fla. 1976), cert. den. 97 S.Ct. 1671, 430 U.S. 704, 51 L.Ed.2d 751.

Daugherty v. State, 419 So.2d 1067 (Fla. 1982).

Delop v. State, 446 So.2d 1242 (Fla. 1983).

Demps v. State, 395 So.2d 501 (Fla. 1981), cert. den. 454 U.S. 933, 102 S.Ct. 430, 70 L.Ed.2d 239 (1981).

Dobbert v. State, 328 So.2d 433 (Fla. 1976).

Dobbert v. State, 375 So.2d 833 (Fla. 1978).

Douglas v. State, 328 So.2d 18 (Fla. 1976).

Echols v. State, 484 So.2d 568 (Fla. 1985).

Elledge v. State, 346 So.3d 998 (Fla. 1977).

Fitzpatrick v. State, 437 So.2d 1072 (Fla. 1983).

Foster v. State, 369 So.2d 928 (Fla. 1979).

Funchess v. State, 341 So.2d 762 (Fla. 1976).

Furman v. Georgia, 408 U.S. 238, 33 L.Ed.2d 346, 92 S.Ct. 2726 (1972).

Gardner v. State, 313 So.2d 675 (Fla. 1975).

IN THE CIRCUIT COURT IN AND FOR PINELLAS COUNTY, FLORIDA
CRIMINAL DIVISION
CASE NO. CRC 85-07084 CFANO C

STATE OF FLORIDA :
:
vs. :
:
JAMES DAILEY, :
Defendant :

RESENTENCING ORDER

The defendant was tried before this court on June 23, 1987. The jury rendered a verdict on the 27th day of June, 1987, finding the defendant guilty of murder in the first degree. Thereafter, evidence in support of aggravating factors and mitigating factors was heard. The jury returned a twelve to zero verdict on June 30, 1987 and recommended that the defendant be sentenced to death in the electric chair. The court considered the evidence, the jury's recommended sentence, and the memoranda before sentencing the defendant. On the 2nd day of September, 1987, the court sentenced the defendant to death in the electric chair.

On the 22nd day of April, 1992, a Mandate from the Supreme Court of Florida affirming the conviction, reversing the sentence and remanding for resentencing of the defendant was filed in this court. The defendant, together with his attorney and the attorney for the state, appeared before the court on December 9, 1993 for oral testimony and oral resentencing argument. Written memoranda were presented to the court by both sides. The court took under advisement the testimony, oral arguments and memoranda and set final sentencing for this date, January 21, 1994.

This court, having heard the evidence presented in both the guilt phase and penalty phase, having had the benefit of legal memoranda and legal oral arguments both in favor and in opposition to the death penalty finds as follows:

A. AGGRAVATING FACTORS

1. The defendant was previously convicted of another felony involving the use or threat of violence to the person.

This aggravating factor was proved beyond a reasonable doubt. The defendant was convicted in Pima County, Arizona, in 1979 for aggravated battery. During the sentencing phase, the state introduced a certified copy of this judgment and sentence. Two defense witnesses, Richard Dollar and Mary Kay Dollar, testified the defendant had corresponded with them in 1979 and admitted his

conviction in Arizona of a violent offense. These witnesses testified the defendant had been involved in a bar fight, and he had armed himself with a billiard cue.

2. The capital felony was committed while the defendant was engaged in the commission of, or attempt to commit sexual battery.

The evidence presented during all phases of this trial established beyond a reasonable doubt that the motive for taking the victim, Shelly Boggio, to the area adjacent to the Route 688 bridge was sexual battery. The victim's body was found completely nude, floating in the intercoastal waterway. Her underwear was found on shore near areas of fresh blood. Shelly Boggio's jeans had been removed and thrown in the waterway. Potential physical evidence of an actual sexual battery upon Shelly Boggio was lost because her body had been floating in the waterway for an extended period of time. All of the evidence and testimony presented established beyond a reasonable doubt that Shelly Boggio at the very least was a victim of an attempted sexual battery.

3. The capital felony was especially heinous, atrocious and cruel.

Shelly Boggio, the victim, was brutally stabbed as she fought frantically and continuously for her life. In addition to the deep stab wounds, she suffered numerous "pricking wounds" on her breast and stomach. She was choked. She was dragged into the waterway and held under water until she drowned.

Dr. Joan Wood, the Medical Examiner, testified that Shelly Boggio suffered the most severe defensive stab wounds she had ever seen in her long career as a medical examiner. Paul Skalnick, a witness during the trial, testified the defendant told him, "No matter how many times I stabbed her, she would not die."

Dr. Wood indicated that the "pricking wounds" to the victim's breast and stomach area were caused by painful piercing of the top layer of skin and occurred apart from the actual stab wounds which penetrated the victim's hands, abdomen and neck. These tormenting "pricking wounds" caused pain and suffering to the victim, in addition to the stark terror of the sexual assault.

After being stripped nude, subjected to at least attempted sexual battery, tortured with numerous "prick wounds" and severely stabbed over thirty times the victim would not die. Even though suffering excruciating pain, she fought on only to die of drowning.

While still alive the defendant grabbed Shelly Boggio and threw her into the waterway. He choked her and held her head under water until she quit struggling and died. Due to the chloride

P2.

concentrations in the victim's heart the Medical Examiner confirmed death by drowning. This murder was indeed a conscienceless, pitiless crime which was unnecessarily tortuous to the victim. The aggravating factor that the capital felony was especially heinous, atrocious, or cruel has been proved beyond a reasonable doubt.

None of the other aggravating factors enumerated by statute are applicable to this case and no others were considered by this court during this resentencing phase.

No other factors, except as previously indicated in paragraphs 1 - 3 above, were considered in aggravation.

B. MITIGATING FACTORS

During the initial sentencing phase and the resentencing phase the defendant requested the court to consider the following mitigating circumstances:

1. The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

There was some evidence presented by the defendant that in years past, he suffered from a drinking problem and that this problem was exacerbated by his Air Force duty during the Viet Nam war. The evidence presented rose to a level no higher than bare allegations.

There was no evidence presented of any nature or kind which established an extreme mental or emotional disturbance of the defendant which would mitigate against or outweigh the established aggravating circumstances.

2. The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

The evidence presented through all stages of the trial established beyond a reasonable doubt that James Dailey was the major participant in the stabbing, beating, choking, and drowning of Shelly Boggio. His participation was not minor. It was major and the cause of her death. This mitigating factor does not exist.

James Dailey's own statements to fellow inmates at the Pinellas County Jail establish him as the major participant in this murder. The defendant admitted he stabbed the victim numerous times and felt frustration that "no matter how many times I stabbed her, she would not die". Witnesses presented corroborating evidence that James Dailey played the major role in the death of Shelly Boggio. Gail Bailey and Oza Shaw testified that James Dailey returned home wearing wet pants and wearing no shoes. This is consistent with

James Dailey having physically held the victim under water until she drowned.

3. The defendant acted under extreme duress or under the substantial domination of another person.

There is absolutely no evidence in the record of this trial which indicated that any person had domination over the defendant and caused him to commit the capital felony. The evidence proved beyond a reasonable doubt that the defendant stabbed, beat, choked, and drowned the victim. This mitigating factor does not exist.

4. The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

There was no evidence presented in this trial that the defendant was substantially impaired by alcohol or drugs.

There was some evidence that the defendant had gone to a bar on the night of the murder. There is absolutely no evidence that he was intoxicated. There was testimony that the defendant used marijuana on the night of the murder; however, there is no evidence that he was under the influence of anything to the extent that he was so substantially impaired that he could not appreciate the criminality of his conduct. Both Gayle Bailey and Oza Shaw saw the defendant before the murder and after the murder. Neither witness indicated that the defendant was under the influence of alcohol or drugs to the point where he was unable to control his conduct.

Defendant's ability to relate with clarity and specificity the events surrounding the murder of Shelly Boggio to inmates of the Pinellas County Jail established the fact that he was not under the influence to the extent that he was so substantially impaired that he could not appreciate the criminality of his conduct. Therefore, this mitigating factor does not exist.

NON-STATUTORY MITIGATING FACTORS

The defendant in his resentencing memorandum asks the court to consider the following non-statutory mitigating factors.

1. The defendant was in the service and was involved in two or three tours of duty in Viet Nam.

2. The incident occurred while the defendant was intoxicated and he developed a problem with alcohol as result of his military service in Viet Nam.

3. Evidence was presented that the co-defendant, Jack Pearcey, may actually have been the perpetrator of the homicide.

4. The defendant was good to his family, helpful around the home, and never showed signs of violence.

5. Other non-statutory mitigating factors would be the fact that he participated in saving the lives of two young people at an early age.

6. Because of the alcohol problem and the heavy drinking the night of the offense, evidence was presented that the crime for which the defendant is to be sentenced was committed while he was under the influence of extreme mental or emotional disturbance. This was supported by the fact that he had prior history of being admitted for treatment in regard to his alcohol problem. It is not necessary to show that the defendant is insane to qualify for this standard.

1. & 2.) The fact that the defendant served in the Air Force and saw duty in Viet Nam on three occasions is commendable. Thus, the court gave some weight to this non-statutory mitigating factor. However, the record is void of any creditable evidence that the defendant had an alcohol problem, let alone an alcohol problem directly attributable to battle stress or clinically labeled "Viet Nam Syndrome". Thus, this mitigating factor does not exist in this case.

3.) The defendant asserts that there was evidence presented that another person may have been the perpetrator of the homicide. The evidence presented in this trial does not support his assertion. The defendant's own statements, "No matter how many times I stabbed her she would not die", vitiate this claim. Additionally, as discussed in paragraph 3 of the statutory mitigating factors witnesses testified that the defendant returned home wearing wet pants and no shoes. The evidence proved beyond a reasonable doubt that the defendant caused the victim's death. The court considered this mitigating circumstance but gave it no weight.

4.) The fact that the defendant was good to his family and helpful around the home deserves recognition by the court. The defendant cared enough for his daughter to allow her to be adopted by his Air Force buddy when this friend married the defendant's ex-wife. These mitigating facts were given partial weight by this court. However, the statement "(the defendant)...never showed signs of violence" is a gross misstatement of fact. The statement may have been made to indicate 'no violence toward his family' but as discussed in paragraph 1 of the aggravating

factors, the defendant was convicted in 1979 in Pima County, Arizona for aggravated battery. Therefore, the court gave little weight to the 'non-violent' factor of this non-statutory mitigating circumstance.

5.) The court gave some weight to the mitigating factor that the defendant saved two young people from drowning when he was in high school. However, the saving of two people from drowning does not alleviate the seriousness or mitigate the subsequent criminal act of causing the death of a young person by drowning.

6.) Again the defendant asked this court to consider that the defendant was under the influence of extreme mental or emotional disturbance and suffering from an alcohol problem as both a statutory mitigating factor and a non-statutory mitigating circumstance. The crux of this non-statutory mitigating factor is that the defendant's use of alcohol resulting from his tours in Viet Nam and over a period of time has taken a toll on the defendant's mind and body. In this case the defendant has not shown these circumstances to exist. The witnesses who testified about the defendant's appearance and condition when he returned home the night of the capital felony did not describe him as being intoxicated, under the influence of any substance or suffering from any mental or emotional condition. Fellow inmates who testified at the defendant's trial testified that defendant's recollections of the circumstances on the night of the homicide were clear and detailed, not confused or unbelievable.

The court did give some weight to the fact that the defendant and the victim had been partying and visited some bars together on the night of the capital felony. However, the court does not give much weight to this non-statutory mitigating factor.

The court has very carefully considered and weighed the aggravating and mitigating circumstances found to exist in this case, being ever mindful that human life is at stake in the balance. The court finds, as did the jury, that the aggravating circumstances present in this case outweigh the mitigating circumstances present.

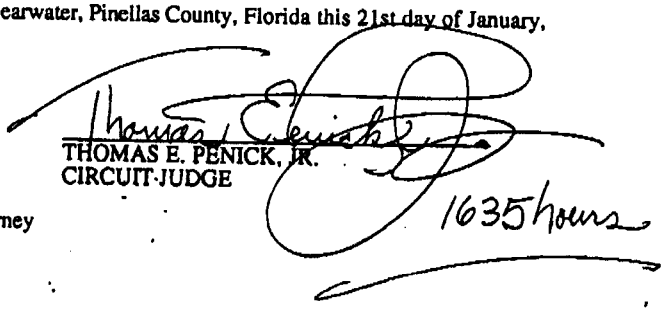
Accordingly, it is

ORDERED AND ADJUDGED that the defendant, James Dailey, is hereby sentenced to death for the murder of the victim, Shelly Boggio. The defendant is hereby committed to the

custody of the Department of Corrections of the State of Florida for execution of this sentence as provided by law.

May God have mercy on his soul.

DONE AND ORDERED in Clearwater, Pinellas County, Florida this 21st day of January, 1994.



THOMAS E. PENICK, JR.
CIRCUIT JUDGE

1635 hours

Copies furnished to:
Bernard J. McCabe, State Attorney
John E. Swisher, Esquire
James Dailey

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Attachment B

DEATH WARRANT
STATE OF FLORIDA

WHEREAS, JAMES DAILEY, on or about the 5th day of May, 1985, murdered Shelly Boggio; and

WHEREAS, JAMES DAILEY, on the 27th day of June, 1987, was found guilty of the crime of first degree murder, and on the 21st day of January, 1994, was sentenced to death for the murder of Shelly Boggio; and

WHEREAS, on the 25th day of May, 1995, the Supreme Court of Florida affirmed the death sentence of JAMES DAILEY, and the United States Supreme Court denied certiorari on the 22nd day of January, 1996; and

WHEREAS, on the 31st day of May, 2007, the Supreme Court of Florida affirmed the trial court order denying his Motion for Postconviction Relief and, on the same day, denied JAMES DAILEY's Petition for Writ of Habeas Corpus;

WHEREAS, on the 1st day of April, 2011, the United States District Court for the Middle District of Florida denied JAMES DAILEY's federal Petition for Writ of Habeas Corpus, the United States Court of Appeals for the Eleventh Circuit denied a certificate of appealability on the 19th day of July, 2012, and the United States Supreme Court denied certiorari on the 29th day of April, 2013; and

WHEREAS, it is anticipated that by the date set by this warrant, all further postconviction motions and petitions filed by JAMES DAILEY will have been denied and affirmed on appeal; and

WHEREAS, executive clemency for JAMES DAILEY, as authorized by Article IV, Section 8(a) of the Florida Constitution, was considered pursuant to the Rules of Executive Clemency, and it has been determined that executive clemency is not appropriate; and

WHEREAS, attached hereto is a certified copy of the record of the conviction and sentence pursuant to section 922.052, Florida Statutes.

NOW, THEREFORE, I, RON DESANTIS, as Governor of the State of Florida and pursuant to the authority and responsibility vested in me by the Constitution and Laws of

Florida, do hereby issue this warrant, directing the Warden of the Florida State Prison to cause the sentence of death to be executed upon JAMES DAILEY in accord with the provisions of the Laws of the State of Florida.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the Great Seal of the State of Florida to be affixed at Tallahassee, the Capital, this 25th day of September, 2019.

GOVERNOR

ATTEST:

SECRETARY OF STATE

2019 SEP 25 PM 3:37

Attachment C

**IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT,
IN AND FOR PINELLAS COUNTY, FLORIDA**

STATE OF FLORIDA,
Plaintiff,

v. **Case No. 1985-CF-007084**

James Dailey,
Defendant.

_____ /

STATE OF Florida)
) ss
COUNTY OF Pinellas)

Affidavit

I, James Slater, declare on this 27 day of Sept. 2019, and pursuant to 28 U.S.C. § 1746, that the foregoing is true and correct:

1. My name is James Slater and I am a retired attorney. I used to work for the Office of the State Attorney in Pinellas County, FL.

2. My Florida Bar number is 331716.

3. I used to work ~~on the~~ on homicide cases ~~division~~ at the Pinellas State Attorney's Office.

Initials of Affiant _____

State of Florida

vs.

James Milton Dailey

Case No: CR85-07084

Affidavit

4. While I worked at the State Attorney's office, I worked on the investigation of S.B.'s death and resulting prosecution of Jack Pearcy.

5. I was called to the crime scene where S.B.'s body was recovered.

6. I remember her body was found near Indian Rocks beach, floating in the water, and she was nude. I was told she had knife wounds.

7. Law enforcement told me that Pearcy attempted to have sex with the victim but that Pearcy couldn't perform. The victim began teasing Pearcy. Pearcy became irate and stabbed the victim.

Initials of Affiant

**IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT,
IN AND FOR PINELLAS COUNTY, FLORIDA**

STATE OF FLORIDA,
Plaintiff,

v. **Case No. 1985-CF-007084**

James Dailey,
Defendant.
_____ /

STATE OF FLORIDA)
) ss
COUNTY OF PINELLAS)

I certify that the statement made in pages 1 - 2 of ___ this affidavit is the truth.

_____ 09/27/2019
Signature **Date**

James L. Slater
Print Name

State of Florida
County of Pinellas

Sworn to (or affirmed) and subscribed before me this day of ~~27th~~ September 27, 2019
By James L. Slater who has produced a FL DL S436-452-56-147-0 as a form of identification.

_____ 9/27/21
Notary Public Signature My Commissioned Expires:
ned Expires:

COLIN L. KELLY
Commission # GG 146538
Expires September 27, 2021
Bonded Thru Troy Fain Insurance 800-385-7019

Attachment D

**IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT,
IN AND FOR PINELLAS COUNTY, FLORIDA**

STATE OF FLORIDA,
Plaintiff,

v. **Case No. 1985-CF-007084**

James Dailey,
Defendant.
_____ /

STATE OF GEORGIA

COUNTY OF Fulton

Affidavit of Edward Coleman

I, Edward Coleman, declare on this 30 day of September, 2019, and pursuant to 28 U.S.C. § 1746, that the foregoing is true and correct:

1. My name is Edward Coleman and I was incarcerated with James Dailey at the Pinellas County Jail. This was the first time I was incarcerated.
2. I was in the same pod as James Dailey and Jack Pearcy for a period of time. I specifically remember James Dailey because he looked out for me to me while we were incarcerated together.
3. James Dailey never talked to me about his case, nor did I ever witness Dailey talk to anyone about his case. No one talked about their cases while we were incarcerated.
4. I remember Detective John Halliday of the Pinellas County Sheriff's Office. He used to come to the pod door and asks inmates questions. He never did this to me, but I witnessed him question other inmates from my pod. Then at some point he started pulling people into private interview rooms.
5. One day Detective Halliday pulled me into a private interview room, and asked me questions specifically about James Dailey and Jack Pearcy. Detective Halliday wanted to know if Dailey or Pearcy talked about their cases with myself or anyone else. I informed him that Dailey did not talk about his case. I did not know if Jack Pearcy talked about his case.

6. Detective Halliday told me to listen carefully and try to get information, and if I learned anything to let him know. Detective Halliday informed me that he would be back soon to see what I had learned.
7. Detective Halliday pulled me out of the pod and into a separate room on another day. This time there was another male individual in the room but he did not speak, he just took notes. It was during this interview that Detective Halliday had newspapers with him.
8. The newspapers were about the case and I specifically remember seeing a picture of a courtroom in the paper. Detective Halliday informed me that Dailey's case was high profile and there was pressure to get a conviction, so they needed help.
9. Detective Halliday directed me to be looking for certain details about the case, specifically about what time the incident occurred and who was involved.
10. Detective Halliday promised to reduce the charges in my case if I was able to learn anything about James Dailey or Jack Pearcy's cases. I told them that I would not be able to help them because Dailey never spoke about his case to anyone. I do not know if Jack Pearcy did or did not.
11. On September 29, 2019, I was contacted by Investigator Colin Kelly from CCRC and asked to confirm whether I had information about James Dailey and/or Jack Pearcy. I told him the above information.
12. I am available to testify at the evidentiary hearing in this matter.

Edward Coleman Jr

Edward Coleman, Jr.

FURTHER AFFIANT SAYETH NAUGHT.

Edward Coleman, Jr.

Sworn and subscribed before me this 30th day of Sept. 2019, by ~~[illegible]~~ Edward Coleman, Jr. who is personally known to me or has produced the following identification: Fl. Drivers License

ELEANOR C HOPKINS NOTARY PUBLIC FULTON COUNTY, GEORGIA MY COMMISSION EXPIRES DECEMBER 8, 2020

Notary Public, State of Georgia

Attachment E

**IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT,
IN AND FOR PINELLAS COUNTY, FLORIDA**

STATE OF FLORIDA,
Plaintiff,

v. **Case No. 1985-CF-007084**

James Dailey,
Defendant.

_____ /

STATE OF Florida)
) ss
COUNTY OF Pinellas)

Affidavit

I, David Howser declare on this 4 day of October 2019, and pursuant to 28 U.S.C. § 1746, that the foregoing is true and correct:

1. I worked at the Pinellas County Jail when Jack Pearcy was incarcerated.

2. Jack Pearcy was very intelligent and very manipulative. He always tried to get the guards do favors for him.

3. Jack was always trying to help his own case.

Initials of Affiant DA

State of Florida

vs.

James Milton Dailey

Case No: CR85-07084

Affidavit

4. I never met James Dailey.

5. Jack Pearcy was always used as an example of what to look out for regarding inmate behavior.

6. The guards always had to be cautious around Jack Pearcy

7. He would constantly try to manipulate other inmates.

8. One time I saw Jack Peary get into a physical altercation with another inmate.

Initials of Affiant DH

**IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT,
IN AND FOR PINELLAS COUNTY, FLORIDA**

STATE OF FLORIDA,
Plaintiff,

v. **Case No. 1985-CF-007084**

James Dailey,
Defendant.
_____ /

STATE OF FLORIDA)
) ss
COUNTY OF PINELLAS)

I certify that the statement made in pages 1-2 of ___ this affidavit is the truth.

_____ 10/4/19
Signature **Date**

David Howsare
Print Name

State of Florida
County of Pinellas

Sworn to (or affirmed) and subscribed before me this day of October 4, 2019
By David Howsare who has produced a FL DL H260-173-67-026-0 as a form of identification.

_____ 09/27/21
Notary Public Signature My Commissioned Expires:
ned Expires:

COLIN L. KELLY
Commission # GG 146538
Expires September 27, 2021
Bonded Thru Troy Fain Insurance 800-385-7019