**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 FOR STAY OF EXECUTION TO ALLOW FOR A FULL AND FAIR DETERMINATION OF JAMES DAILEY'S ACTUAL INNOCENCE CLAIMS**

COMES NOW the Defendant, **James Milton Dailey**, by and through undersigned counsel, and moves this Court for a stay of his execution set for November 7, 2019. The Governor's warrant setting the execution date was untimely and imprudent given the procedural posture and substantial claims of innocence in Mr. Dailey's case.

Dailey's *Motion to Vacate Judgment of Conviction and Sentence of Death After Death Warrant Signed*, that is being filed contemporaneously with this Motion, provides substantial grounds for a stay. Mr. Dailey's Motion for Rehearing, that is being filed contemporaneously in the Florida Supreme Court, provides additional, independent, compelling grounds for a stay. Finally, Mr. Dailey will be filing a petition for certiorari in the United States Supreme Court and moving forward with a federal appeal. This crucial litigation, in state and federal court, will focus on the powerful evidence of Mr. Dailey's innocence, evidence which, as yet, no court has meaningfully considered, despite an imminent execution date.

*The Motion to Vacate Judgment of Conviction and Sentence of Death After Death Warrant Signed*, that is being filed contemporaneously in this court, includes *additional* evidence of

prosecutorial misconduct and actual innocence that has come to light since the signing of the death warrant, evidence that forms the basis for the motion pursuant to Florida Rule of Criminal Procedure 3.851. It presents a still more powerful case for innocence, marshalling "enough facts to show . . . that he might be entitled to relief under rule 3.850." *State v. Schaeffer*, 467 So. 2d 698, 699 (Fla. 1985). This provides this Court "a valid basis for exercising jurisdiction" and granting a stay of execution *and* an evidentiary hearing. *Id.* Given the seriousness of these issues, and the all-too-real possibility that an innocent man is to be put to death by the State of Florida, this Court should grant a stay of execution to allow Mr. Dailey to pursue all of his constitutionally allowable legal remedies on his claims of newly discovered evidence of actual innocence.

## INTRODUCTION

For more than thirty years, James Dailey has asserted his innocence. No physical evidence linked Dailey to the crime, and there was no eyewitness or forensic evidence implicating him. Dailey was convicted and sentenced to death on the basis of flimsy circumstantial evidence and by jailhouse informant testimony subsequently shown to be utterly unworthy of belief.

Jack Pearcy, Dailey's co-defendant, who is currently serving a life sentence for the same crime, is the sole person responsible for this horrific crime. Unlike Dailey, he has confessed, multiple times, to being solely responsible for the murder of Shelly Boggio. First, while in the county jail awaiting trial, Jack Pearcy told fellow inmate Travis Smith that he was Dailey's co-defendant but "he [Pearcy] committed the crime himself . . . [this] was his charge and his charge alone." R2 12099. Second, 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. Fourth,

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.

All the evidence, new and existing, strongly supports Pearcy's repeated confessions. As the State wrote in its sentencing memorandum when it asked the judge to reject the jury's recommendation of life, not death, in Pearcy's case, "[o]ther than his own self-serving statements, no evidence exists that Pearcy was not the main actor in this child's brutal murder." R2 10298. (emphasis in original). Indeed, no reliable evidence indicates that Dailey was involved in the murder at all. A stay is required to prevent the "quintessential miscarriage of justice," the execution of an innocent person. *Schlup v. Delo*, 513 U.S. 298, 324-25 (1995).

ARGUMENT

As grounds for his Motion, Mr. Dailey sets forth the following:

1. Mr. Dailey is under a sentence of death. He is currently scheduled to be executed on Thursday, November 7, 2019.

2. Prior to the signing of this death warrant, Dailey challenged the constitutionality of his death sentence based on *Hurst*[1] and the failure to apply *Hurst* retroactively to his case. These challenges were made in a successive postconviction motion, but were denied by the postconviction court and affirmed on direct appeal to the Florida Supreme Court. *See Dailey v. State*, 247 So. 3d 390 (Fla. 2018), *cert. denied*, 139 S. Ct. 947 (2019). In a concurring opinion, Justice Pariente noted that "Dailey's penalty phase jury considered invalid aggravating factors in recommending a sentence of death," and that after remand, his sentence of death was reviewed "by a single trial judge alone," concluding that the Florida Supreme Court had "turn[ed] a blind

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

eye to the quintessential *Hurst* error – a defendant, without waiver, sentenced to death by a trial judge alone without a jury's reliable, unanimous recommendation for death." *Id*. at 391-92.

3. Prior to the signing of this death warrant, Mr. Dailey appealed this Court's order denying his successive motion for postconviction relief based on newly discovered evidence of actual innocence filed pursuant to Florida Rule of Criminal Procedure 3.851.

4. Mr. Dailey raised the following issues in that appeal:

A. Newly Discovered testimonial evidence proves that Mr. Dailey is actually innocent:

i. The April 20, 2017, affidavit of Jack Pearcy proves Mr. Dailey is innocent and that Jack Pearcy alone murdered Shelly Boggio.

ii. 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.

iii. 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.

iv. 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.

B. The State violated the constitutional requirements of *Brady v. Maryland* and *Giglio v. United States* 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.

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

The Florida Supreme Court issued its opinion denying relief on October 3, 2019. As previously indicated, Mr. Dailey is filing a motion for rehearing contemporaneously with the filing of this successive motion.

5. Mr. Dailey is entitled to a stay so that this Court may meaningfully consider his contemporaneously filed *Motion to Vacate Judgment of Conviction and Sentence of Death After Death Warrant Signed*.

6. Significantly, Mr. Dailey has come into possession of still additional evidence corroborative of his innocence, including further *Brady* and *Giglio* violations, uncovered after the signing of the death warrant, evidence which forms the basis for his motion for postconviction relief under Florida Rule of Criminal Procedure 3.851. A stay of execution is necessary to allow this Court to review and assess this important evidence, outside of the impossible pressure of an imminent execution date.

7. Specifically, Mr. Dailey must be given time to marshal and present, and this Court must be given time to properly consider, the following:

i. The recent revelations of former ASA Slater that law enforcement officials told him that Pearcy attempted to have sexual intercourse with the victim but that Pearcy "could not perform." According to ASA Slater, the victim started teasing Pearcy, which made Pearcy irate. Pearcy proceeded to stab the victim in a fit of rage: a state of mind consonant with the ferocious and violent wounds suffered by the victim. The State violated *Brady* by failing to turn over these statements made by Pearcy to law enforcement. ASA Slater revealed these statements to defense counsel on September 27, 2019, and is prepared to testify to them. The statements clearly establish that Pearcy (and Pearcy alone) had a motive to murder the victim. The State was never able to establish a motive for Mr. Dailey.

ii. The recent revelations of Edward Coleman, who was incarcerated with Mr. Dailey prior to Mr. Dailey's trial, that Detective John Halliday had sought information from him regarding Mr. Dailey, had shown him news articles about the case, told him they needed help getting a conviction, and promised to reduce the charges in his own case if he could learn anything about Mr. Dailey's crime. Mr. Coleman signed an affidavit attesting to these claims on September 30, 2019, and is prepared to testify to them. These claims are consistent with those made by former inmates Michel Sorrentino and James Wright (claims which were introduced as evidence in the prior 3.851 motion) and provide further

substantiation that the State was willing to go to extreme and improper lengths to convict Mr. Dailey, including providing inmates with the information they would need to fabricate reasonably credible testimony against him. In lieu of any physical or eyewitness evidence (of which there was none), the State relied heavily on the testimony of jailhouse informants James Leitner, Pablo DeJesus, and Paul Skalnik to convict Mr. Dailey. Mr. Coleman, Mr. Sorrentino, and Mr. Wright's claims significantly undermine the jailhouse informant testimony which was critical to the State's case and give rise to a powerful *Giglio* claim.

iii. Former Corrections Officer David Howsare's memory of Jack Pearcy further corroborates ASA Slater's recollection of Jack Pearcy. Officer Howsare worked at the Pinellas County Jail and knew Pearcy while Pearcy was incarcerated there. Officer Howsare stated in his affidavit that Pearcy was known by him and the other guards to be manipulative – of both the other inmates and the guards. 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 a favor from them. This evidence tends to prove that Pearcy was the sort of person capable of "putting [his crime] off on someone else." TR1 3:331.

8. In *Johnson v. State*, 44 So. 3d 51, 53–54 (Fla. 2010), while under a warrant, the Florida Supreme Court reasoned:

> The Court has under consideration in this case an appeal of an order denying a successive postconviction motion following an evidentiary hearing…The Appellant has filed an application for stay of execution. Having considered the briefs of the parties and having reviewed the extensive record in this case and having heard oral argument on October 28, 2009, the Court hereby grants a stay of execution in order to consider the significant issues raised in Claim 1 of this appeal concerning prosecutorial misconduct. This stay is in effect pending further order of the Court.

Order of the Florida Supreme Court Granting Stay of Execution October 28, 2009. SC08-1213 *Paul Beasley Johnson v. State of Florida*. The Court went on to grant relief, reasoning that:

> This result is compelled by the applicable case law of both the United States Supreme Court and this Court. This case law is based on the principle that society's search for the truth is the polestar that guides all judicial inquiry, and when the State knowingly presents false testimony or misleading argument to the court, the State casts an impenetrable cloud over that polestar. The United States Supreme Court explained as follows: "[A] conviction obtained by the knowing use of perjured testimony is fundamentally unfair... [for it] involve[s] a corruption of the truth-seeking function of the trial process." *United States v. Agurs,* 427 U.S. 97, 103–04, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976). The rationale underlying this principle is timeless:

> [I]f a state has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured[,] [s]uch a contrivance by a State to procure the conviction and imprisonment of a defendant is ... inconsistent with the rudimentary demands of justice....
>
> *Mooney v. Holohan,* 294 U.S. 103, 112, 55 S.Ct. 340, 79 L.Ed. 791 (1935). "The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction [is] implicit in any concept of ordered liberty...." *Napue v. Illinois,* 360 U.S. 264, 269, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959). In other words, whenever the State seeks to obfuscate the truth-seeking function of a court by knowingly using false testimony or misleading argument, the integrity of the judicial proceeding is placed in jeopardy.

*Johnson v. State*, 44 So. 3d 51, 53–54 (Fla. 2010). The rationale underlying Mr. Johnson's stay applies with equal force here. Mr. Dailey has alleged, in his *Brady* and *Giglio* claims, that the State sought to obfuscate the truth-seeking function of the court, placing the integrity of the judicial proceedings in jeopardy. Those claims, along with his claim that he is actually innocent of the crime, merit a careful and thorough review that is entirely incompatible with the remarkably truncated proceedings occasioned by the signing of the death warrant.

9. Similarly, in (Marvin Edwin) *Johnson v. Singletary*, 647 So. 2d 106, 110-11 (Fla. 1994), the Florida Supreme Court issued a stay after Johnson submitted the affidavits of four individuals detailing how another man confessed to the murder and exonerated Johnson. In granting the stay, the Florida Supreme Court held:

> In making our decision today, we are influenced by the fact that there is not just one but several affidavits which refer to Pruitt's having confessed on more than one occasion. In addition, we have reexamined the transcript of the original trial and find that the State's case was based almost entirely upon the eyewitness testimony of Gary Summitt. While Summitt positively identified Johnson as the killer, there was no other evidence effectively tying him to the crime.

*Id*. at 111. Jack Pearcy likewise has confessed on four occasions to the murder. The facts of this case weigh more heavily in favor of the granting a stay than those in *Johnson*, where the confessions had to be considered in light of the word of the alleged eyewitness. Here, there was

no eyewitness, real or alleged. There was only the unreliable testimony of three jailhouse informants, which has been thoroughly discredited. The evidence shows that law enforcement pressured them to provide information regarding Dailey's case, that law enforcement provided them with newspaper articles detailing the crime, and that the State granted them substantial leniency in their own criminal cases in exchange for their testimony. Like *Johnson*, this Court should issue a stay.

10. Failing to issue a stay while there has yet to be a final ruling on whether Mr. Dailey is actually innocent would result in a manifest injustice and the execution of one who is actually innocent. 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. at 430-46 (emphasis added).

11. Accordingly, this Court should issue a stay, not simply so that it may meaningfully consider the new evidence put before it, but also so that: (1) the Florida Supreme Court may consider Mr. Dailey's Motion for Rehearing; and (2) the Supreme Court of the United States and the lower federal courts[2] may have an opportunity to rule on Mr. Dailey's claims of actual innocence.

12. Denying Mr. Dailey full and fair access to the courts—because the Governor

[2] Mr. Dailey is entitled to file another federal habeas petition based on newly discovered evidence of actual innocence. *See Panetti v. Quarterman*, 551 U.S. 930 (2007) (a claim that was not ripe at the time of the initial habeas petition is not a "second or successive" petition when presented within the time parameters set forth in § 2244(d)(1)).

prematurely signed his death warrant, would violate due process. As a result, this Court should issue a stay and allow Mr. Dailey the time necessary to fully litigate his claims. *See Johnson v. Singletary*, 618 So. 2d 731, 732 (Fla. 1993) (Kogan, J., dissenting) ("I dissent as to the request for a stay. At a minimum I would grant a stay of execution to be dissolved automatically upon the denial of certiorari or the issuance of a mandate in the action Johnson now is pursuing in the United States Supreme Court. I do not think any civilized society can countenance the possibility that persons might be executed while their appeals still are pending in the nation's highest court as has nearly occurred at times in the past.").

13. There is no claim more serious in the criminal law than that of an innocent person challenging a wrongful conviction ahead of a scheduled execution. The magnitude and complexity of the claims raised in the new petition, taken together with the compelling nature of the evidence already presented, mean that undersigned counsel unquestionably will require more time than that which was afforded in the scheduling order. While counsel has been laboring diligently under the existing time limits, more time is needed for counsel to fairly present and litigate Mr. Dailey's claims.

14. The extremely short period between the signing of the death warrant and the execution date gives rise to the very real danger that substantial claims and supporting evidence of actual innocence—some of which have arisen only *since* the warrant was signed—will be inadequately considered, or not considered at all. The courts must not take this kind of "fire drill" approach to Mr. Dailey's claims. In granting Jimenez a stay of execution, Justice Pariente wrote in a concurring opinion:

> 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*.
>
> **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. *See id.* ("[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) (emphasis added). Nowhere is this fire drill approach less appropriate than here, where there is substantial, bona fide evidence of innocence.

15. This Court has the authority to issue a stay of execution. Circuit courts "have the power to issue . . . all writs necessary or proper to the complete exercise of their jurisdiction." Art. V, 5, Fla. Const. Under their All Writs power, circuit courts have jurisdiction "to enter a stay of execution where the stay is filed with a motion for postconviction relief or where the application for stay itself shows grounds under which the defendant might be entitled to postconviction relief." *Amendments to Fla. Rule of Criminal Procedure 3.851(h)*, 828 So. 2d 999, 1001 (Fla. 2002). In describing the courts' inherent power to issue a stay of execution, Justice Pariente noted:

> As noted by the State in its response to the petition, this Court is still constitutionally entrusted with the duty to issue a stay of execution if there is a meritorious postconviction claim pending or, if at the time the warrant is signed, the defendant brings a successive postconviction challenge that casts doubt on his or her guilt, the integrity of the judicial process, or the validity of the death sentence imposed. *See Response to Emergency Petition for Extraordinary Relief* at 28, *Abdool v. Bondi*, No. SC13–1123 (Fla. July 18, 2013) **("[T]he inherent power of the judiciary to grant a stay of execution where necessary can protect any litigants from being denied adequate judicial review of a cognizable claim.** Therefore, facial invalidity of the statute is not demonstrated by speculation of a potential unconstitutional application of the Act**."). In my view, that remains the**

**essential fail-safe mechanism this Court may utilize when necessary to ensure that the ultimate punishment of the death penalty is inflicted in a manner that fully comports with the Constitution.**

*Abdool v. Bondi*, 141 So. 3d 529, 555-57 (Fla. 2014) (Pariente, J., concurring).

16. This Court is empowered to grant James Dailey a stay of execution in order to adjudicate his constitutional claims. As the Supreme Court of the United States held in *Barefoot v. Estelle*, 463 U.S. 880, 895 (1983), *superseded on other grounds by* 28 U.S.C. § 2253(c), a stay may be granted when there is "a reasonable probability that four members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari or the notation of probable jurisdiction; . . . a significant possibility of reversal of the lower court's decision; and . . . a likelihood that irreparable harm will result if that decision is not stayed." Further, a stay should be granted when necessary to "give non-frivolous claims of constitutional error the careful attention they deserve" and when a court cannot "resolve the merits [of a claim] before the scheduled date of execution to permit due consideration of the merits." *Id.* at 888-89. *See also Gregg v. Georgia*, 428 U.S. 153, 195 (1976) (plurality) ("[T]he further safeguard of meaningful appellate review is available to ensure that death sentences are not imposed capriciously or in a freakish manner."); *c.f. Woodson v. North Carolina*, 428 U.S. 280, 303 (1976) (plurality) (finding unconstitutional capital sentencing scheme where "there is no way . . . for the judiciary to check arbitrary and capricious exercise of that power through a review of death sentences").

## CONCLUSION

The Judiciary may not simply sidestep its responsibility to thoroughly review Mr. Dailey's substantial claims based on an arbitrary execution date set by the Executive, particularly where, as here, the courts are confronted with powerful evidence of the "quintessential miscarriage of justice," namely, the execution of an innocent person. *Schlup v. Delo*, 513 U.S. 298, 324-25

(1995). This Court has a legal obligation to consider the claims before it. Consistent with that duty, it should grant a stay of execution so that a full and fair evidentiary hearing, and full and fair appellate review, may be conducted in a reasonable manner. For these reasons, Mr. Dailey respectfully requests that this Court stay his scheduled execution.

## 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 Lisa Marin (lisa.martin@myfloridalegal.com); Assistant Attorney General Stephen Ake (stephen.ake@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
Florida Bar. No. 112901
Assistant CCRC - Middle Region
Shirley@ccmr.state.fl.us

**/s/ Julissa R. Fontán**
Julissa R. Fontán
Florida Bar. No. 32744
Assistant CCRC-Middle Region
Fontan@ccmr.state.fl.us

**/s/ Kara R. Ottervanger**
Kara R. Ottervanger
Florida Bar No. 0112110
Assistant Capital Collateral
Regional Counsel – Middle Region
12973 N. Telecom Parkway
Temple Terrace, FL
33637
813-558-1600
Ottervanger@ccmr.state.fl.us

**/s/ Laura Fernandez**
Laura Fernandez
Connecticut Bar No. 436110
127 Wall Street
New Haven, Connecticut 06511
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*