

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

STATE OF FLORIDA,

CASE NO.: CRC85-07084CFANO

UCN: 521985CF00708XXXXNO

v.

DIVISION: T

JAMES DAILEY,

Person ID: 416094, Defendant. _____/

**ORDER DISMISSING DEFENDANT'S THIRD SUCCESSIVE MOTION TO VACATE
JUDGMENT OF CONVICTION AND SENTENCE OF DEATH AFTER DEATH
WARRANT SIGNED;
ORDER DISMISSING DEFENDANT'S MOTION TO TAKE A DEPOSITION TO
PERPETUATE THE TESTIMONY OF JACK PEARCY;
DIRECTIONS TO CLERK**

THIS CAUSE came before the Court upon Defendant's Third Successive Motion to Vacate Judgment of Conviction and Sentence of Death after Death Warrant Signed, and Defendant's Motion to Take a Deposition to Perpetuate the Testimony of Jack Percy, both filed July 31, 2020. Having heard the arguments of the counsel and considered the motion, response, reply, relevant portions of the record, and applicable law, the Court finds as follows:

Procedural History

On June 27, 1987, a jury found Defendant guilty of the first-degree murder of fourteen-year-old Shelly Boggio. After a penalty phase, the jury unanimously recommended death. On August 7, 1987, the Court sentenced Defendant to death. The Florida Supreme Court affirmed Defendant's conviction on direct appeal, but struck two of the five aggravating circumstances and remanded for resentencing. *Dailey v. State*, 594 So. 2d 254 (Fla. 1991) (hereinafter, *Dailey I*).¹ On January 21, 1994, the Court resentenced Defendant to death. Defendant's sentence was affirmed on appeal. *Dailey v. State*, 659 So. 2d 246 (Fla. 1995) (hereinafter, *Dailey II*). The mandate issued on or about September 22, 1995. On or about November 21, 1995, the United States Supreme Court denied Defendant's petition for writ of certiorari. *Dailey v. Florida*, 516 U.S. 1095 (1996). Defendant subsequently filed collateral motions for relief in state and federal court, each of which was dismissed or denied. *See Dailey v. State*, 279 So. 3d 1208 (Fla. 2019) (hereinafter, *Dailey V*); *Dailey v. State*, 247 So. 3d 390 (Fla. 2018) (hereinafter, *Dailey IV*); *Dailey v. State*, 965 So. 2d 38

¹ The evidence introduced at the guilt and penalty phases of trial is summarized in the appellate opinion.

(Fla. 2007) (hereinafter, *Dailey III*). See also *In re Dailey*, 949 F.3d 553 (11th Cir. 2020); *Dailey v. Sec'y, Fla. Dep't of Corr.*, 2011 WL 1230812 (M.D. Fla. Apr. 1, 2011), *amended in part, vacated in part*, 2012 WL 1069224, at *1 (M.D. Fla. Mar. 29, 2012) (amending opinion to include the denial of an additional claim of ineffective assistance of counsel and denying motion for certificate of appealability to the Eleventh Circuit Court of Appeals); *Dailey v. Sec'y, Fla. Dep't of Corr.*, 2008 WL 4470016 (M.D. Fla. Sept. 30, 2008).

On September 22, 2019, Governor Ron DeSantis signed a death warrant for Defendant. Defendant filed his first Motion to Vacate Judgment of Conviction and Sentence of Death after Death Warrant Signed on October 8, 2019. After a hearing, the Court entered a final order denying, in part, and dismissing, in part, Defendant's motion, on October 16, 2019. On October 23, 2019, the Middle District of Florida granted a limited stay of Defendant's execution until December 30, 2019. The Florida Supreme Court affirmed this Court's order on November 12, 2019. See *Dailey v. State*, 283 So. 3d 782 (Fla. 2019) (hereinafter, *Dailey VI*). As of the date of this order, the Governor has not signed a new warrant or set a new execution date.

On December 27, 2019, Defendant filed a Second Successive Motion to Vacate Judgment of Conviction and Sentence of Death after Death Warrant Signed. The Court granted an evidentiary hearing on claim 1(A) of that motion, which claimed that a written declaration was newly discovered evidence that showed that Jack Percy confessed to committing the murder by himself. The Court permitted a deposition of Mr. Percy prior to the hearing. At the evidentiary hearing, Mr. Percy refused to testify, but Defendant attempted to argue that portions of Mr. Percy's deposition were newly discovered evidence. The Court ultimately denied or dismissed all the claims in Defendant's second successive motion, and as to Mr. Percy's deposition, found that it was not admissible but that claims based on the deposition outside of those raised in Defendant's written motion were not properly before the Court at that time. Defendant appealed, and the appeal is pending before the Florida Supreme Court as case number SC20-934.

On July 31, 2020, Defendant filed the instant Third Successive Motion to Vacate Judgment of Conviction and Sentence of Death after Death Warrant Signed, along with a Motion to or for Stay and Hold in Abeyance and a Motion to Take Deposition to Perpetuate Testimony. The Court granted Defendant's motion to stay pending the Florida Supreme Court either relinquishing jurisdiction or resolving Defendant's pending appeal. The Florida Supreme Court did relinquish jurisdiction on August 21, 2020. The State then filed its response and motion to dismiss on August

24, 2020. At a previously scheduled status check on August 25, 2020, the Court permitted Defendant to file an additional memorandum on the motion, which Defendant did on August 31, 2020. The Court held a case management conference on the postconviction motion and the motion to perpetuate on September 10, 2020.

Third Successive Motion

As in Defendant's previous motion, this motion asserts a claim of newly discovered evidence. Because this claim was not filed within one year of the date the judgment became final, it is timely only if an exception is present. A claim based on facts that were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence is timely if filed within one year of the date the facts were discovered or could have been discovered with due diligence. Fla. R. Crim. P. 3.851(d).

Defendant's motion argued that this motion was timely because, in his February 2020 deposition, Mr. Percy admitted for the first time that he went out drinking alone with the victim immediately after dropping off Oza Shaw at a phone booth. (Ex. A: February 25, 2020 Deposition of Jack Edward Percy, Jr., 61–67.) Defendant acknowledges, in a footnote, that Mr. Percy previously "referenced a solo outing with [Ms.] Boggio" in a statement to police on June 19, 1985. (Ex. B: June 19, 1985 Sworn Statement of Jack Edward Percy, Jr., 10–11.) However, Defendant alleges that Mr. Percy was previously unavailable and Defendant exercised due diligence in attempting to obtain evidence from Mr. Percy. In its motion to dismiss and response, the State argued that the motion was not timely because the deposition testimony simply reiterates Mr. Percy's previous statements. In addition to the 1985 statement, the State also relies upon a 1993 sworn statement where Mr. Percy also referenced being alone with the victim after dropping off Mr. Shaw. (Ex. C: March 19, 1993 Sworn Statement of Jack Pearcey [sic], Jr., 6.) Although Defendant indicated his primary argument was that the claim was timely based on the fact that Mr. Percy was previously unavailable, he also argued at the evidentiary hearing that the deposition was the first time Mr. Percy indicated the "solo outing" was immediately after he dropped off Mr. Shaw, which Defendant claims establishes a timeline that refutes his involvement in the murder. Defendant indicates that linking this independent outing to the phone call by Mr. Shaw allowed them to compare Mr. Percy's timeline to phone records indicating the time when Mr. Shaw placed his call.

The Court agrees with the State that this claim is untimely. First, it is clear that this information was discoverable more than one year ago. In Mr. Percy's 1985 statement, he clearly states that "just [redacted] and I left. Jimmy D. [Defendant] stayed there and Oza and Gail." (Ex. B at 10.) He continued to testify that they went to a bar called Hank's to drink. (Ex. B at 10–11.) He elaborated in a 1993 statement taken by Defendant's attorney that when he left with the victim, Mr. Shaw asked Mr. Percy to drop him off to make a phone call to his ex-wife. (Ex. C at 6.) Mr. Percy indicated that he, the victim, and Mr. Shaw left without Defendant, and he returned to the house about an hour or ninety minutes later. (*Id.*) All of the aspects of Mr. Percy's 2020 deposition that Defendant claims are new are contained in these two statements: that Mr. Percy and the victim were alone, that they went out for a time after dropping off Mr. Shaw, and that Defendant was not there. In fact, Mr. Percy testified that his 2020 testimony that he went to Treasure Island after dropping Mr. Shaw off at the pay phone was based on what he said in the 1985 statement. Mr. Percy repeatedly indicated that his 1985 statement was the truth, or that he did not remember the truth better than in his 1985 statement. (Ex. A at 60–62, 69.) Counsel for Defendant produced the statement and he referred to it throughout while questioning Mr. Percy. (Ex. A at 60.) When counsel asked Mr. Percy where he went after the pay phone, Mr. Percy indicated, "It says there at TI Island, I guess, Treasure Island, and had a drink." (Ex. A at 66.) In Mr. Percy's own words, his "new" testimony² is in fact based on what it "says there" in the 1985 statement. Accordingly, this information was already discoverable by Defendant by at least 1993.

Although Defendant claims that Mr. Percy's deposition testimony is the first evidence allowing him to construct the timeline set out in his motion, the timeline is largely based on information that was already available to Defendant. Defendant could have argued for the same timeline using other evidence, Mr. Percy's prior statements, or both. In the timeline, Defendant asserts that Mr. Percy's statement is the first evidence establishing three facts: (1) that Mr. Percy and the victim arrived at Hank's at 1:40 a.m.; (2) that Mr. Percy and the victim were alone at that time; and (3) that Mr. Percy was the individual seen by Deborah North when the car got stuck in the sand. These facts are not truly derived from Mr. Percy's deposition testimony. Mr. Percy's

² The Court notes that the State has argued that Defendant has not identified specific statements from the deposition that qualify as new. Based on the written pleadings and oral arguments, Defendant appears to be referring to testimony indicating that Mr. Percy's outing with the victim where Defendant was not present happened after he dropped Mr. Shaw off at the pay phone. To the extent that this is not the testimony Defendant claims is newly discovered evidence, the Court agrees with the State that Defendant's claim is vague.

February 2020 deposition in no way establishes that Mr. Percy and the victim arrived at Hank's at 1:40 a.m. Mr. Percy testified in the deposition that he went out to Treasure Island for a drink after dropping Mr. Shaw off at the pay phone, which he claims happened prior to 11:30 p.m. (Ex. A at 66.) To the extent Defendant is relying on Mr. Percy's testimony that he went out for an hour or two following dropping Mr. Shaw off, he already testified in 1993 that he and the victim were out for an hour to ninety minutes. (Ex. C at 6.) Mr. Percy's testimony that he was alone with the victim is definitely not new—he testified as much in both his 1985 and 1993 statements. (Ex. B at 10–11; Ex. C at 6.) Defendant's assertion that Mr. Percy was the individual seen by Deborah North appears to be a conclusion drawn from her testimony and Mr. Percy's statement that he was alone with the victim at Hank's. As noted above, Mr. Percy already made this statement previously. Further, Mr. Percy said in his 1985 statement that the car got stuck when they tried to leave Hank's—which would be consistent with Ms. North seeing him with the victim. (Ex. B at 11.) In his more recent deposition, however, he testified that he did not remember the car being stuck in the sand. (Ex. A at 67.) Accordingly, his first statement is actually stronger evidence for this proposition than his deposition was. All three of these asserted facts—and the remainder of the timeline—could have been argued based on Mr. Percy's prior statements or the other evidence in this case.

Defendant also contends, in what he has advanced as his primary argument, that this claim is timely because he could not have previously obtained Mr. Percy's testimony "in admissible form." However, Defendant has not obtained Mr. Percy's testimony in an admissible form. Defendant has cited a number of cases for the proposition that a defendant may bring a newly discovered evidence claim based on evidence that was known but previously unavailable. The majority of the cases Defendant cites deal with the situation where a witness was previously unavailable, but then agreed to testify favorably to the defendant.³ That is not the situation in this case. Here, Mr. Percy has continuously been unavailable to testify in court proceedings, but has at times been willing to testify for a statement or deposition. Mr. Percy emphatically stated in

³ See *Hunter v. State*, 29 So. 3d 256, 262–263 (Fla. 2008); *Mills v. State*, 225 So. 3d 420, 420 (Fla. 5th DCA 2017); *Jones v. State*, 106 So. 3d 88, 89 (Fla. 3d DCA 2013); *Wilson v. State*, 188 So. 3d 82, 85 (Fla. 3d DCA 2008); *Barrow v. State*, 940 So. 2d 1235, 1236 (Fla. 5th DCA 2006); *Brantley v. State*, 912 So. 2d 342, 342–343 (Fla. 3d DCA 2005); *Totta v. State*, 740 So. 2d 57, 58 (Fla. 4th DCA 1999); *Kendrick v. State*, 708 So. 2d 1011, 1012 (Fla. 4th DCA 1998) (all cited in Defendant's motion). A minority of these cases also deal with situations where the trial court relied on the faulty argument that, if the defendant was aware of his own innocence, he or she could discover evidence of that innocence.

both his 2020 deposition and at the previous evidentiary hearing that he would not testify “in court or anywhere else.” (Ex. A at 141–143.) Defendant has alleged nothing to suggest that has changed. Defendant contends that Mr. Percy may be willing to testify at a deposition to perpetuate testimony. This argument is speculation that goes against Mr. Percy’s statements at both the prior deposition and the evidentiary hearing. Defendant is not entitled to an evidentiary hearing based solely on speculation that he can obtain an admissible form of statements he has been aware of for over fifteen years. This motion is untimely and is therefore dismissed.

Motion to Take a Deposition to Perpetuate Testimony

Defendant has also requested to conduct a deposition to perpetuate Mr. Percy’s testimony. As the purpose of this deposition would be to prepare for an evidentiary hearing on the motion that is dismissed in this order, this motion to perpetuate is moot. The motion is therefore dismissed. However, in an abundance of caution, the Court finds that Defendant would not be entitled to take such a deposition at this time regardless. In *Riechmann v. State*, 966 So. 2d 298, 309–311 (Fla. 2007), a postconviction defendant moved to take a deposition to perpetuate the testimony of a witness living in Dubai. The State objected, among other reasons, because the parties did not know the witness’s location. The trial court denied the motion without prejudice should the witness later be located. The Florida Supreme Court affirmed and noted that the trial court did not abuse its discretion in denying the motion due to the fact that counsel did not know where the witness was located. The instant motion to perpetuate testimony is similarly speculative. Counsel does not know that, should the Court allow this deposition and the parties attend, Mr. Percy will even be willing to testify. This Court has already conducted multiple evidentiary hearings to allow Defendant an opportunity to present Mr. Percy’s testimony, and he has refused to give it, despite the efforts of the Court. While the Court is sympathetic to the fact that Mr. Percy is outside of Defendant’s control, Defendant is not entitled to yet another proceeding on speculation that Mr. Percy will behave differently this time.

Accordingly, it is,

ORDERED AND ADJUDGED that Defendant's Third Successive Motion to Vacate Judgment of Conviction and Sentence of Death after Death Warrant Signed and Defendant's Motion to Take a Deposition to Perpetuate the Testimony of Jack Pearcy are hereby **DISMISSED**.

THE CLERK OF THE CIRCUIT COURT IS HEREBY DIRECTED to promptly serve a copy of this order, along with a certificate of service, upon the parties listed at the end of this order as required by Florida Rule of Criminal Procedure 3.851(f)(5)(F).

DONE AND ORDERED in Chambers in Clearwater, Pinellas County, Florida, this ____ day of September, 2020. A true and correct copy of this order has been furnished to the parties listed below.

SIGNED

SEP 21 2020

Pat Siracusa, Circuit Judge

PAT SIRACUSA
CIRCUIT JUDGE

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IN THE CIRCUIT COURT, SIXTH
JUDICIAL CIRCUIT, IN AND FOR
PINELLAS COUNTY, FLORIDA
CASE NO.: 1985-CF-007084

STATE OF FLORIDA,
Plaintiff,

vs.

JAMES MILTON DAILEY,
Defendant.

DEPOSITION OF: JACK EDWARD PEARCY, JR.
DATE: TUESDAY, FEBRUARY 25, 2020
TIME: 9:30 A.M. - 12:16 P.M.
PLACE: SUMTER CORRECTIONAL INSTITUTION
9544 COUNTY ROAD 476-B
BUSHNELL, FLORIDA 33513
STENOGRAPHICALLY
REPORTED BY: BETH BUNN, RPR

EXHIBIT

A

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I N D E X

TESTIMONY OF JACK EDWARD PEARCY, JR.

DIRECT EXAMINATION BY MR. Dubin.....	04
CERTIFICATE OF OATH.....	145
CERTIFICATE OF DEPOSITION TRANSCRIPT.....	146

INDEX OF EXHIBITS

DEFENDANT'S EXHIBITS

EXHIBIT 1 DECLARATION.....	09
EXHIBIT 2 SWORN STATEMENT.....	30
EXHIBIT 3 DEPOSITION TRANSCRIPT.....	60
EXHIBIT 4 COMPLAINT.....	78
EXHIBIT 5 NOTICE TO APPEAR.....	80
EXHIBIT 6 DEPOSITION TRANSCRIPT.....	87
EXHIBIT 7 AFFIDAVIT.....	104

S T I P U L A T I O N S

It is hereby stipulated and agreed by and
between the counsel for the respective parties and
the deponent that the reading and signing of the
deposition transcript be reserved.

1 Q. Maybe it was to someone else; is that
2 possible?

3 A. It could have been one of the other teams.

4 Q. All right. But you never -- you told me
5 -- I told you, every time I met with you, right,
6 certainly on the 18th --

7 A. You wanted the truth.

8 Q. Right. And I understand what you're
9 saying now. But on the 18th, when you signed this,
10 under penalty of perjury --

11 A. Yeah.

12 Q. -- you told me -- when I told you I wanted
13 the truth, you signed this, correct?

14 A. Correct.

15 Q. All right. Now, the second time we met, I
16 still told you I wanted the truth, and you still
17 told me that James had nothing to do with it and
18 that you did it; the second time we met, correct?

19 A. Probably. I might not have said that, but
20 I didn't say the opposite of that, put it that way.

21 Q. All right. So, if now you are saying
22 James Dailey did it -- now you're saying he did
23 again?

24 A. Yeah.

25 Q. Okay.

1 A. Same as my original statement. That's
2 what happened that night.

3 Q. So let's -- let's go through what James
4 Dailey did, if you say he did it.

5 A. I already did it. I -- it's all in that
6 statement, exactly what happened that night and
7 what I seen and what went on. That's all you got
8 to do is refer to that original statement 35 years
9 ago when it was fresh in my mind -- or 34 years and
10 10 months, whatever it is.

11 Q. So let me get this straight, just so I'm
12 clear. Here's the statement. You have it in front
13 of you.

14 MR. DUBIN: I'm going to mark it as
15 Exhibit 3. This is Mr. Pearcy's '85 statement,
16 so we don't have to keep on going back and
17 forth on what you said and when you said it.

18 We're going to get to the bottom of this
19 once and for all. Fair?

20 THE COURT REPORTER: Give me one minute.

21 (Whereupon, Exhibit Number 3 was marked
22 for identification.)

23 MR. DUBIN: You good?

24 THE COURT REPORTER: Yes, sir. Thanks.

25 BY MR. DUBIN:

1 Q. All right. So just so you get that last
2 question: So that we can get to the bottom of this
3 once and for all; is that fair?

4 A. Correct.

5 Q. Okay. And I'll refer you to where I am in
6 your statement.

7 A. Can I go ahead and read through it first?

8 Q. Yeah, sure.

9 A. That way I'll be able to --

10 Q. You know what --

11 A. -- know where you're going --

12 Q. -- Jack, take your time.

13 You going to read the whole thing?

14 A. I'll go through it pretty quick.

15 Q. Okay. You can take your time.

16 A. The Mash Bar, they got a period behind
17 every -- every letter, so it's got to be something
18 else is the name.

19 Q. Maybe it's an acronym. Maybe it stands
20 for something. I don't know.

21 A. All right.

22 Q. All right. So let me -- now that you have
23 the statement -- and if you need to refer back to
24 it, we can. What you said in 1985, which you say
25 is the truth, right?

1 A. (Shaking head yes.)

2 Q. Is that at some point Shelly Boggio --
3 you're at -- at Hank's with Shelly, right?

4 A. (Shaking head yes.)

5 Q. And then she says, Let's go back and get
6 -- or actually you're at Quarterdeck -- I'm
7 confusing myself. Did James go with you to Hank's?

8 A. I don't know.

9 Q. Okay. Well, when you picked him back up,
10 okay, didn't you, Shelly, and him go back to
11 Hank's?

12 A. I don't even know where Hank's is, so I
13 don't know.

14 Q. Okay. And you said that at the time that
15 you dropped Oza Shaw off at the pay phone, that was
16 earlier in the night, right? That was before you
17 had come back to pick up Jimmy, right?

18 A. Right.

19 Q. All right. And the time that you go to
20 pick up Jimmy -- if you go to Page 13, and just
21 read Page 13. Do you see where it says on Page 13
22 that you, Jimmy, and Shelly left around 11?

23 A. Where's the page numbers? I don't have no
24 page numbers on here.

25 MR. EDELMAN: Me neither.

1 BY MR. DUBIN:

2 Q. All right. Let me get -- let me -- let me
3 direct you to it. So I'll count them out. Bear
4 with me a moment, sir. Here you go. So I'm going
5 to tell you to count out one, two --

6 A. I'm on 13 right now.

7 Q. -- three, four, five, six --

8 MR. EDELMAN: He's on 13.

9 BY MR. DUBIN:

10 Q. All right. So does it start, at the top,
11 the question is: *Did you stop at a bar on -- okay.*

12 Keep going. This is the Page I'm looking
13 for.

14 A. Page 6 is, *I danced.*

15 Q. At the top?

16 A. You say it starts at what?

17 Q. *Did you stop at a bar -- okay.*

18 A. Yeah, that's Page 7 I'm on.

19 Q. All right.

20 I'm sorry. Keep going.

21 Answer: *So, then we went back to the*
22 *house, and I asked Jimmy D if he wanted to go. All*
23 *right. Yeah, he wanted to go out. So, then Jimmy*
24 *D and Shelly and myself left. This is 11:00 or*
25 *11:30.*

1 A. Uh-huh.

2 Q. All right? Does that refresh your memory
3 that that was the time that you left with them?

4 A. (Shaking head yes.)

5 Q. Okay. So it was earlier in the night that
6 Oza Shaw was dropped off at the pay phone, you
7 said? And then Oza, what, walked back home?

8 A. It was two blocks from the house.

9 Q. All right. So was it -- when you picked
10 him up, this is 11:00 or 11:30, where do you guys
11 go next?

12 A. I don't know. It even says there I don't
13 remember. We may have went to the bar and had a
14 drink or something.

15 Q. Okay. All right. Thank you. So go back
16 -- go back one, two pages. And the top of the page
17 is the one that you said, *I danced*. See where it
18 says, *I danced once with --*

19 A. Uh-huh.

20 Q. All right. So why don't you read that --

21 A. I just read it.

22 Q. Okay.

23 A. What's the question?

24 Q. Hold on one second. Okay. So I'm just
25 trying to make sure that -- is this when -- see

1 where it says, Okay. So, just take it slow again.
2 When you left Jerry's, where did you go?

3 Answer: Then we went -- we might have
4 stopped at the Mash Bar again, and then we went
5 back to the house.

6 What time was it when you left Jerry's?
7 Between 10:00 and 11:00.

8 Okay. All right. So you got back to the
9 house. What did you do when you got there? This
10 is your residence again?

11 Answer: Mm-hmm. Probably had a drink.

12 Okay. So right after this that you take
13 Oza Shaw to the pay phone, he goes to the pay
14 phone, makes his call, you leave with Shelly, and
15 then you eventually come back and get Jim later,
16 right?

17 A. I see what it says, but when we left is
18 when I dropped Oza off at the -- at the QuikTrip or
19 whatever.

20 Q. Got it.

21 A. We didn't leave and come back and leave
22 and come back again.

23 Q. So -- all right. So when -- when was that
24 then? Just as best as you recall from your
25 statement.

1 A. You're talking about what time?

2 Q. It was -- so was -- now, was James with
3 you when you dropped --

4 A. No.

5 Q. -- Oza Shaw off at the pay phone?

6 A. No.

7 Q. That was before you had come back and got
8 Jim, correct?

9 A. Right.

10 Q. Okay. So it was some time prior -- it was
11 some time prior to 11:30, correct? Because you
12 said you got Jim around 11:00, 11:30?

13 A. I guess.

14 Q. Okay. All right. So after -- just so I
15 have it clear: After you drop Oza off at the pay
16 phone, you just testified James is not with you,
17 right?

18 A. Correct.

19 Q. All right. What -- where did you and
20 Shelly go after the pay phone?

21 A. All right. It says there at TI Island, I
22 guess, Treasure Island, and had a drink.

23 Q. Okay. And James is not with you, correct?

24 A. (Shaking head no.)

25 Q. So what happens next? How does he end up

1 getting back with you?

2 A. We went back to the house.

3 Q. Okay. And what -- so after TI Island, you
4 go right back to the house?

5 A. It says there we got stuck, but I don't
6 remember getting stuck. I see that I made the
7 statement, but right now I have no recollection of
8 digging the car out.

9 Q. All right.

10 A. None whatsoever.

11 Q. So when -- and I don't -- I certainly
12 don't want to -- don't want to, like, walk through
13 something that is unpleasant, I think, for
14 everyone. But that -- the -- the place where
15 Shelly is killed, had you fished there before?

16 A. Uh-huh.

17 Q. Yes?

18 A. Yes.

19 Q. It's a river kind of?

20 A. It's the Intracoastal.

21 Q. Okay. So it's not as wide as -- it's not
22 as wide as the ocean. It gets narrow in places
23 there, correct, on the Intracoastal?

24 A. It's probably about 70-, 80-foot wide
25 there.

1 Q. And --

2 A. It's pretty wide in that area.

3 Q. And you were fish -- what were you fishing
4 for?

5 A. Whatever. I'm not a salt-water fisherman,
6 so...

7 Q. Whatever bit?

8 A. I think we caught a flounder there and a
9 couple oddball fish we didn't know the names of.

10 Q. And did you fish there alone ever? Or
11 only with Jimmy?

12 A. No, with Jimmy and -- and Gayle went down
13 there with us before, too.

14 Q. Okay. I want to be -- before I move off
15 of this, I just want to be completely sure and put
16 this to bed: James Dailey was not with you when
17 you dropped Oza Shaw off at that pay phone, right?
18 That's -- that's what you say?

19 A. You're correct. He wasn't with me when I
20 dropped Oza at the phone.

21 Q. Okay. And when you dropped Oza at the
22 phone, how long, based on your statement or your
23 own recollection, how long were you with Shelly
24 before going back to pick up Jim? You said that
25 you went out to at least one other bar.

1 A. Yeah.

2 Q. In your statement, I think it says two.

3 A. Maybe an hour.

4 Q. Another hour?

5 A. Half-hour, hour.

6 Q. Okay. Could it have been longer?

7 A. I doubt it. It doesn't take long to go
8 have a drink somewhere.

9 Q. Okay. And what does Shelly say to you at
10 that point?

11 A. I don't remember what --

12 Q. She didn't tell you why she wanted --
13 wanted to go get Jim?

14 A. Maybe to party. I don't really remember.
15 It's 35 years. I mean, that's why I wanted to read
16 that because then is when stuff is fresh in my
17 mind. That's why I -- I didn't remember getting
18 stuck, and I still have no recollection of it even
19 with reading that.

20 Q. Okay. Do you have any recollection of why
21 you went back to go back and get Jim?

22 A. I guess see if he wanted to party some
23 more.

24 Q. Were you doing cocaine that night?

25 A. Yeah.

1 Q. Was Shelly doing it?

2 A. I don't think so. I don't remember her
3 doing it.

4 Q. All right. Now, at some point, when James
5 -- when you say James is killing Shelly Boggio,
6 you're -- you're where?

7 A. I was in the car when it started.

8 Q. Okay. And did you ever grab him -- grab
9 onto him?

10 A. I think I kind of tried to.

11 Q. All right.

12 A. I fell over the bank.

13 Q. Did you make contact with him?

14 A. I'm sure I did if I tried to grab him.

15 Q. Did he tell you why he did it?

16 A. All's he ever said as to why he did it, I
17 don't know, I -- I just snapped. I don't know what
18 happened.

19 Q. And you -- you were in the car drinking a
20 wine cooler and you were totally -- I mean, were
21 you with it? Were you out of it?

22 A. I was well lit.

23 Q. But you could hear what was going on
24 enough to go over there and to try to interfere?

25 A. At one point, like I said, I don't know if

1 Would you drive the car?

2 A. Yeah, I drove it.

3 Q. Did Gayle drive the car?

4 A. Yep, Gayle drove it, too.

5 Q. Did James used to take the car out?

6 A. No, because James was a drunk.

7 Q. Okay. And did it have back seats in that
8 car?

9 A. Uh-huh.

10 Q. That's a tiny car though, right?

11 A. Yeah, it's fairly small.

12 Q. Okay.

13 A. I mean, you can ride five, two in the
14 front and three in the back, but anymore it'd be
15 too crowded.

16 Q. When you and -- when you dropped Oza Shaw
17 off at the pay phone, that pay phone, you said, was
18 about two blocks from the house?

19 A. Uh-huh.

20 Q. All right. And you and Shelly went and
21 had drinks. Do you remember what bar you went to
22 to have drinks?

23 A. I have no idea.

24 Q. Okay. And, at that point, it was just you
25 and her because Oza was at the pay phone, correct?

1 A. Correct.

2 MR. DUBIN: Okay. All right. I don't
3 have anything else.

4 MR. MARTIN: State has no questions.

5 MR. DUBIN: Okay.

6 THE COURT REPORTER: Read or waive?

7 MR. DUBIN: I'm sorry?

8 THE COURT REPORTER: Read or waive?

9 THE WITNESS: If they call me down to
10 court, I'll just take the Fifth Amendment.
11 Everything you needed, I reckon you got today,
12 that's why you had the deposition. So you
13 can't -- you've got all the questions asked and
14 answered from me. So from this point on, I'll
15 just take the Fifth Amendment.

16 BY MR. DUBIN:

17 Q. Well, you know that the Florida Supreme
18 Court ruled in 2017 that --

19 A. Yeah.

20 Q. Were you aware of that?

21 A. They could -- they could give me some more
22 years and it really doesn't affect me. They give
23 me time for not answering -- for not giving a
24 deposition and testifying in Jimmy's trial when I
25 was still facing my direct appeal days. 528 days

1 in violation of the Gordon G. Liddy Law; they did
2 it twice.

3 They did a deposition in the courtroom.
4 The State asked questions. I took the Fifth.
5 Penick ordered me to answer her questions, found me
6 in contempt of court when I took the Fifth again;
7 gave me 528 days, which was the maximum. Then for
8 his actual trial, they took the jury out and
9 brought me in. We did the same thing again, and he
10 did it again. Then my lawyers at the time filed
11 and said he's still -- he didn't testify in his own
12 trial. He's still facing it, and it didn't matter.
13 BY MR. DUBIN:

14 Q. You know that you have right -- have you
15 ever been told that the Supreme Court ruled in 2017
16 that you have no right to waive the Fifth -- I mean
17 to plead the Fifth?

18 A. No, I wasn't aware of that.

19 Q. Okay. Would you like to see a copy of
20 that ruling?

21 A. They still can't tell me what I can and
22 can't do.

23 Q. Okay. Do you think this is all just a big
24 game, Mr. Pearcy?

25 A. No. It's not a big game. But I just said

1 I answered -- and this, like he said, we've been
2 here more than two hours. I answered every
3 question you asked, so there's no reason for me to
4 say anything else in court or anywhere else. I
5 figured you got everything you need. You can save
6 your money on transporting me just to hear me say
7 the Fifth.

8 Q. Okay. Well, I'm going to leave that to
9 the judge. That's up to the judge.

10 A. Okay. That's why I wanted it on the
11 record. The judge is going to see this to make his
12 decision. No, I'm not -- I have nothing to say,
13 nothing more to say. I done answered all your
14 questions.

15 Q. You just had plenty to say for the last
16 three hours, sir. So --

17 A. But I'm saying I did that so you'd already
18 -- we'd be done with, period, it's over. From now
19 on, I don't have nothing else on the subject. I
20 answered all your questions you asked.

21 Q. Okay. We're all done.

22 THE COURT REPORTER: In the event this is
23 typed up and made into a booklet form, like you
24 just read, do you want to proofread it for my
25 accuracy? Or do you want to waive that right?

1 THE WITNESS: I'll waive that right.

2 THE COURT REPORTER: Very good.

3 THE WITNESS: Okay. And --

4 MR. DUBIN: So, like I said -- let me just
5 get back on the record.

6 THE COURT REPORTER: Okay.

7 MR. DUBIN: Like I said, you have --
8 you're going to have the opportunity -- I think
9 you just waived the right to do it, but you do
10 have the right to --

11 THE WITNESS: I don't believe she's biased
12 and put something that wasn't said on the
13 record, if that's, you know --

14 MR. DUBIN: Okay.

15 THE WITNESS: -- I don't doubt she did it
16 as accurate as -- she might have made a little
17 mistake, but I don't see her changing none of
18 the major facts, so...

19 MR. DUBIN: Okay. Thank you.
20
21
22
23
24
25

STATE ATTORNEY'S INVESTIGATION

STATEMENT OF:

JACK EDWARD PEARCY, JR.

DATE:

June 19, 1985.

PLACE:

Room B200,
State Attorney's Office,
Criminal Court Complex,
Clearwater, Florida.

REPORTED BY:

Karen S. Tomczak, RPR, CP, CM,
Deputy Official Court Reporter.
Notary Public,
State of Florida at large.

PRESENT:

MR. JAMES SLATER,
Assistant State Attorney,
Attorney for State of Florida.

RECEIVED
(2)

JUN 25 1985 8:43

State Attorney's Office
Sixth Judicial Circuit

MR. WAYNE SHIPP,
Assistant Public Defender,
Attorney for Witness.

Tampa Bay
KANABAY

EXHIBIT **B**

LA

KANABAY & KANABAY

Official Court and Shorthand Reporters

000427

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150 FIFTH STREET NORTH
ST. PETERSBURG, FL 33701

CRIMINAL COURTHOUSE
5100 144th AVENUE NORTH
CLEARWATER, FL 33520

[illegible]

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I N D E X

<u>WITNESS:</u>	<u>EXAMINATION</u>	<u>PAGE NO.</u>
JACK EDWARD PEARCY, JR. . .	Direct	2
	Cross.	37
	Redirect	38
	Recross.	39

I N D E X

<u>EXHIBIT NO.</u>	<u>DESCRIPTION</u>	<u>PAGE NO.</u>
1	Diagram.	14

JACK EDWARD PEARCY, JR.,

the witness herein, being first duly sworn, was examined
and testified as follows: --

DIRECT EXAMINATION

BY MR. SLATER:

Q Please state your name.

A Jack Edward Percy, Jr.

Q And what is your date of birth?

A May 13th, '55.

Q And presently where are you staying?

A Incarcerated at the Pinellas County Jail.

Q Okay. Mr. Percy, my understanding is that we
have already been speaking to you for some time this
afternoon and that we started this conversation with your
willingness to talk to us. You wanted to come over and
tell us what you knew about this incident?

A Yes.

Q Correct? Okay. And this involves a young lady's
body being found out by the Indian Rocks Bridge. Okay.
Your attorney is present here during this conversation that
we are having, and again I want to just tell you again that
any time if you feel that you have a question about what
I'm asking you, you have a question about what your response
should be, don't hesitate to just stop the proceedings and
we'll leave and allow you as much time as you want to talk to

1 A I dropped them off at the apartment before I
2 went back over to the house for to see about
3 getting the ID.

4 Q So, that was between not getting into Jerry's
5 and going to your residence?

6 A It was before not getting into Jerry's.

7 Q That you dropped the other two girls off?

8 A Yeah. That was like six in the evening, seven
9 in the evening, or it was still daylight.

10 Q So, at this time Jimmy Dailey, yourself, Gail,
11 and are all going out to Jerry's again?

12 A Yes.

13 Q Okay. What happened when you got to Jerry's?

14 A We went in and had a few drinks. We left there
15 at 10:30 or something like that, 10 -- between 10 and 11
16 or something, and went back and dropped Gail off and Jimmy D.
17 stayed home and and I went in, and then I was going
18 to take her and drop her off, and Gail and I was going to ride
19 along the beach or something when I got back, and I think she
20 may have been in the bathroom getting ready to go later.

21 Q Let me back you up again. When you were at Jerry's,
22 what did you all do while you were in there? Did you dance?

23 A We danced a couple of dances, drank Tequila Sunrise
24 and probably beers also.

Q Who did you dance with?

1 A I danced I think once with Gail and once with

2
3 Q Did you notice whether Jimmy Dailey had danced
4 with anyone?

5 A I think he did, but I don't -- you know, I
6 didn't pay attention. I remember he danced one time right
7 in front of the table with a couple of girls, but I don't
8 know if he necessarily danced with them or just went out
9 there dancing because there was maybe six or eight girls
10 that went out to dance by themselves or with each other,
11 and I think he got down there and danced with them.

12 Q Okay. So, just take it slow again. When you left
13 Jerry's, where did you go?

14 A Then we went -- we might have stopped at that
15 M.A.S.H. Bar again, and then we went back to the house.

16 Q What time was it when you left Jerry's?

17 A Between 10 and 11.

18 Q Okay. All right. Okay. So, you got back to the
19 house. What did you do when you got there? This is your
20 residence again, right?

21 A Mm-hmm. Probably went in and had a drink. I don't
22 know if we smoked anymore or not. And then, like I said,
23 just and I left. Jimmy D. stayed there and Oza
24 and Gail. And we went down to TI Island and went in some
25 bar called Hank's and had a beer or whatever or a drink. I

1 think I had a drink and she had a beer.

2 And the car was stuck when we went back out.

3 So, I went and asked about help and they said there was
4 a shovel at the bar next door. That other people got
5 stuck there. They thought it was funny.

6 So, I got the shovel and dug it out over and
7 over, and I kept trying to back out and it wouldn't back
8 out and it would dig back in. So, finally I told her to
9 get somebody to push us out. She went in and did that
10 while I was still digging. She came back and said, you
11 know, she couldn't get anybody, and I still couldn't get
12 it dug out.

13 So, I took the shovel back and went to go into
14 the bar to get somebody and a couple of guys were walking
15 out right at that time and I told them, "Could you give
16 me a hand?" So, they come over and helped push the car
17 out, and then we headed back up, and I think we stopped
18 in to the Quarterdeck and they wouldn't let in
19 because her and the owner had some trouble over her being
20 in there in the past few weeks, and so then --

21 Q Is that on Indian Rocks Beach?

22 A No. It's on Madeira Beach. It's right by the
23 Thunderbird right by the light. And then -- anyway, then
24 I was wanting to go home. She still wanted to party. So,
25 she said, "Get Jimmy D. and see if he wants to go."

1 Q Did you stop at a bar on -- okay. I'm sorry.
2 Keep going.

3 A So, then we went back to the house, and I asked
4 Jimmy D. if he wanted to go. Yeah, he wanted to go out.
5 So, then Jimmy D. and and myself left. This is
6 11 or 11:30 when we headed back out by the time we was
7 up there.

8 We went down towards the Beach Place, went in,
9 and had a beer, maybe a drink. I'm not sure. I think I
10 might have had another Tequila Sunrise in there. And then
11 we got ready to leave there and Jimmy said pull down where
12 I used to go fishing, which is pretty close to the Beach
13 Place or the Beach Pub, whatever it is. So, I pulled down
14 there.

15 Q Okay. Describe that for me. Where exactly is
16 that?

17 A It's where 688 and Wine Garden comes across the
18 causeway. It's right before you hit 19 or whatever it is,
19 the road that runs right along the beach, and there's a
20 causeway right there going over the intercoastal waterway.

21 Q The Indian Rocks Bridge that goes right over to
22 Indian Rocks Beach?

23 A Yeah, I guess.

24 Q Okay. And that's where you used to do some
25 fishing?

1 IN THE CIRCUIT COURT OF THE
2 SIXTH JUDICIAL CIRCUIT, IN AND
3 FOR PINELLAS COUNTY, FLORIDA.

4 CASE NO. CRC85-07084-CF-A

5 STATE OF FLORIDA

6 vs.

7 JAMES DAILEY,

8 Defendant.
9

ORIGINAL

10 SWORN STATEMENT

11 of

12 JACK PEARCEY, JR.
13

14 Taken on March 19, 1993, at Florida State
15 Prison, Starke, Florida, commencing at
16 approximately 11:10 a.m.

17 Present was Brent D. Armstrong, Esquire,
18 Druhill Professional Center, 611 East Druid Road,
19 Ste. 308, Clearwater, Florida 34616.
20

21
22
23 JOHNS, STEPHENSON & ASSOCIATES
24 Court Reporters
25 116 NE Third Avenue
Gainesville, FL 32601
(904) 373-7778

EXHIBIT C

1 the trial. Gayle said she had testified at Pearcey's
2 trial and continued to visit him in prison occasionally.

3 "Gayle testified that on May 5th, 1986, she,
4 Pearcey, Jim Dailey and Dwaine Shaw went to the beach,
5 returning about five or six that evening. After dinner,
6 the three men left for a few hours, returning with three
7 women. They rolled and smoked a joint. Gayle
8 reluctantly loaned Shelly Boggio her identification card
9 and they all went out with the exception of Dwaine Shaw.
10 They dropped off the two girls, but Shelly remained
11 riding in the back seat with Dailey.

12 "They went to Jerry's Rock Disco and stayed
13 about an hour. Shelly declined to dance with Jim but
14 danced once with Jack with Gayle's permission. They
15 returned home late, probably about midnight. Shaw was
16 still there.

17 "When they went in the house, Shelly slumped in
18 the chair as though she were drunk or something. Gayle
19 went to the bathroom and, when she came out, Jack, Jim
20 and Shelly were gone. Shaw was still on the couch.
21 Gayle did not look in Dailey's bedroom to see if he was
22 there. She was angry because Jack brought the girls
23 home, danced with Shelly and left without her to take
24 Shelly home."

25 Okay, I'm going to stop reading from the brief

1 and ask you about those several sentences that I just
2 read. Is the last part of that correct, that when Gayle
3 went to the bathroom, she came out, you, Jim and Shelly
4 were gone?

5 A No. I had left with Shelly, and Jim, I don't
6 know where he was. He could have been in his bedroom or
7 wherever. And when Shelly and I left, Oza asked me to
8 drop him off to make a phone call to his ex-wife, Rose,
9 in Kansas and the three of us left and I dropped Oza off
10 a couple blocks from the house at a quick trip type
11 store.

12 Q And when you say the three of you left, who
13 were the three that you're talking about?

14 A Shelly, myself and Oza.

15 Q Okay. Do you know where Jim was at that time?

16 A Could have been in the kitchen, his bedroom. I
17 guess he wasn't in the bathroom because Gayle was in
18 there, but I'm not specific on where he was.

19 Q All right. Do you recall when you returned to
20 the house?

21 A Approximately an hour, ninety minutes later,
22 something like that.

23 Q Okay. When you returned to the house, what
24 happened?

25 A I went in, got Jim up. He was in his bedroom.

1 I told him, "Come on, let's go smoke a couple joints,
2 drink a beer or something." He said all right. We got
3 up and left.

4 Q Okay. Was Shelly with you at that time?

5 A No, Shelly was no longer with me.

6 Q She wasn't out in the car, waiting in the car
7 or anything like that?

8 A No.

9 Q Okay. So, you had left with Shelly, then
10 returned about an hour later without Shelly?

11 A Right.

12 Q Went into the house, got Jim. You and Jim then
13 left?

14 A Yeah, went to Bellair Causeway.

15 Q Approximately how long were you and Jim gone?

16 A An hour.

17 Q An hour? So, you returned to your house
18 approximately when?

19 A Two o'clock.

20 Q Did you see anybody when you returned? Was
21 anybody up, Oza, Gayle --

22 A Oza and Gayle were in the living room.

23 Q Okay, reading from the same brief, this is on
24 page six, "Oza Dwaine Shaw testified that he was
25 presently incarcerated. He recalled that on May 5, 1986,