IN THE SUPREME COURT OF FLORIDA

CASE NO. SC23-190
LOWER COURT CASE NO. 1990 CF 2795

DONALD DAVID DILLBECK,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE SECOND JUDICIAL CIRCUIT,
IN AND FOR LEON COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT
EXECUTION SCHEDULED FOR
FEBRUARY 23, 2023

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REQUEST FOR ORAL ARGUMENT

Mr. Dillbeck respectfully requests oral argument pursuant to Fla. R. App. P. 9.320, and also files a separate motion for oral argument with this brief.

STATEMENT OF THE CASE AND FACTS[1]

I. PROCEDURAL HISTORY

On February 26, 1991, Mr. Dillbeck was convicted of first-degree murder, armed robbery, and armed burglary. The jury recommended death by a vote of 8-4, and the trial court sentenced Mr. Dillbeck to death on March 15, 1991. On direct appeal, this Court affirmed Mr. Dillbeck's convictions and sentence. *Dillbeck v. State*, 643 So. 2d 1027 (Fla. 1994). Certiorari was denied on March 20, 1995. *Dillbeck v. Florida*, 514 U.S. 1022 (1995).

On April 23, 1997, Mr. Dillbeck filed a motion for postconviction relief which

[1] Citations in this brief are as follows: References to the direct appeal record of Mr. Dillbeck's trial are designated as "R. __". References to the record of Mr. Dillbeck's postconviction proceedings are designated as "PCR __". References to the record of Mr. Dillbeck's first successive postconviction proceedings are designated as "PCR2 __". References to the record of Mr. Dillbeck's second successive postconviction proceedings are designated as "PCR3 __". References to the record of Mr. Dillbeck's third successive postconviction proceedings are designated as "PCR4 __". References to the record of Mr. Dillbeck's fourth successive postconviction proceedings are designated as "PCR5 __". (from the initial submission of February 1, 2023) References to the supplemental record of Mr. Dillbeck's fourth successive postconviction proceedings are designated as "S-PCR5 __". All other references are self-explanatory or otherwise explained herewith.

primarily concerned ineffective assistance of counsel claims (PCR. 27-62). The motion was denied on September 3, 2002 (PCR. 753-54). Mr. Dillbeck appealed to this Court, and he also filed a petition for writ of habeas corpus. On August 26, 2004, this Court affirmed the denial of one ground and denied the petition but remanded for findings on the remaining claims. *Dillbeck v. State*, 882 So. 2d 969 (Fla. 2004). On remand, the circuit court denied the motion, and this Court affirmed. *Dillbeck v. State*, 964 So. 2d 95 (Fla. 2007).

On September 7, 2007, Mr. Dillbeck filed a federal habeas corpus petition in the Northern District of Florida. The petition was denied, *Dillbeck v. McNeil,* 2010 WL 3958639 (N.D. Fla., Oct. 7, 2010), and the Eleventh Circuit did not issue a certificate of appealability. Certiorari was denied on October 3, 2011. *Dillbeck v. Tucker*, 565 U.S. 862 (2011).

On March 28, 2014, Mr. Dillbeck filed a successive motion for postconviction relief alleging ineffective assistance of counsel. The circuit court denied the motion on June 5, 2014, and this Court affirmed on April 16, 2015. *Dillbeck v. State,* 168 So. 3d 224 (Fla. 2015).

On April 11, 2016, Mr. Dillbeck filed a second successive motion for postconviction relief based on *Hurst v. Florida,* 136 S. Ct. 616 (2016) (PCR3 127-49). The circuit court denied the motion and this Court affirmed. *Dillbeck v. State*, 234 So. 3d 558 (Fla. 2018). Certiorari was denied on October 1, 2018. *Dillbeck*

v. Florida, 139 S. Ct. 162 (2018).

Mr. Dillbeck filed a third successive motion for postconviction relief on May 9, 2019, alleging newly discovered evidence based on a diagnosis of Neurodevelopmental Disorder associated with Prenatal Alcohol Exposure (ND-PAE) (PCR4 4-28). The circuit court denied the motion on January 30, 2020, and this Court affirmed on September 3, 2020. *Dillbeck v. State*, 304 So. 3d 286 (Fla. 2020). Certiorari was denied on June 7, 2021. *Dillbeck v. Florida*, 141 S. Ct. 2733 (2021).

On January 23, 2023, the Governor signed a death warrant for Mr. Dillbeck, with a scheduled execution date of February 23, 2023, at 6:00 p.m.

Mr. Dillbeck filed a fourth successive motion for postconviction relief on January 30, 2023 (PCR5 326-51). Following a case management conference held on February 1, 2023, the circuit court denied relief on February 2, 2023 (PCR5 1031-51). This appeal follows.

II. RELEVANT FACTS FROM THE TRIAL

At trial, there was no meaningful dispute[2] about the facts of the offense. While serving a sentence for a murder Mr. Dillbeck committed when he was fifteen,

[2] Mr. Dillbeck's "testimony . . . mirrored counsel's strategy of conceding guilt to felony murder but contesting a finding of premeditation." *Dillbeck*, 882 So. 2d at 975. Counsel attempted to present evidence that the effects of Mr.

> he walked away from a public function he and other inmates were catering[, . . .] walked to Tallahassee, bought a paring knife, and attempted to hijack a car and driver from a shopping mall parking lot[.] Faye Vann, who was seated in the car, resisted and Dillbeck stabbed her several times, killing her. Dillbeck attempted to flee in the car, crashed, and was arrested shortly thereafter.

Dillbeck v. State, 643 So. 2d 1027, 1028 (Fla. 1994).

Mr. Dillbeck presented extensive evidence at the penalty phase, which included the following mitigation:

A. Mr. Dillbeck's Childhood and Descent into Drug Misuse

Cindy Commorato, Mr. Dillbeck's sister, testified that the siblings grew up with their birth mother, Audrey Hosey, until their removal into the foster care system when Donald was approximately four and a half years old and Cindy was seven and a half years old (R. 2249). Their biological father had left the home after a conflict with Audrey when Cindy was five and Donald was two (R. 2253).

Audrey was a violent alcoholic with severe mental illness who physically and sexually abused the children (R. 2251, 2253-54). She was preoccupied with genitals and engaged in prostitution, exposing her children

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Dillbeck's prenatal alcohol exposure rendered him unable to form the requisite *mens rea* for premeditated murder, but the trial court refused to allow it. On direct appeal, this Court found the trial court's exclusion of fetal alcohol evidence to be error, but held it harmless. *Dillbeck*, 643 So. 2d at 1029-30.

to the men coming in and out of their house (R. 2254). Before the children were taken by the foster system, Audrey would not even let them look out the windows (R. 2251). She forced Cindy and Donald to "pray" and would beat them if they stopped mumbling words (R. 2251).

Cindy described the next-door neighbors as occasionally trying to shelter her from Audrey (R. 2251-52). Mary Lee, one of the neighbors, testified to Audrey's constant drinking and neglect of her children, including her failing to feed or watch her kids (R. 2414-16).

Cindy described young Donald as "very slow" and unable to learn basic skills such as tying his shoes (R. 2252). He was frequently mocked for his slowness, including by the children's foster family (R. 2252-53). Eventually, Cindy was adopted by a family who would not take Donald; he was later adopted by the Dillbecks when he was six (R. 2249-50).

Cindy and Donald's biological father, Donald Hosey, testified that his wife seemed happy and only drank a little when pregnant with Cindy, but that it was an "entirely different case" during her pregnancy with Donald (R. 2261). Audrey drank eighteen to twenty-four cans of beer per day, every day, throughout those nine months (R. 2261). He described life after Donald's birth as "hell"—Audrey stopped paying rent or buying food, and instead used all of the family's money for whiskey or beer (R. 2261-62). When Donald

Hosey stopped giving her money, she began going out and became increasingly violent (R. 2262-63). Donald Hosey left the family, fearing for his life, after Audrey assaulted him in a particularly bizarre manner, wielding a butcher knife (R. 2263). Of leaving his children with Audrey, Donald Hosey stated, “I’m going to carry this until the day I die that I didn’t carry my children with me.” (R. 2264).

Mr. Dillbeck himself also testified about this time in his life, after apologizing and expressing remorse for his actions (R. 2272-73). He recounted his mother’s drinking (“all the time”) and the beatings she inflicted with an electric cord for “anything, or nothing” (R. 2287-88). He described incidents in which Audrey stuffed cotton in the children’s mouths and left them overnight, taped, so they could not spit the cotton out (R. 2288). Mr. Dillbeck described his separation from Cindy, stating that her adoptive family “didn’t want me…When they separated me from my sister, that was it…I just couldn’t handle it no more.” (R. 2285).

Mr. Dillbeck’s adoptive parents also testified. Ada Dillbeck recounted her adoption of Donald when he was six (R. 2551-52). Donald was a slow learner with a reading disability (R. 2552). He was so afraid that he would be taken away again that he was afraid to leave her side (R. 2554-55). Donald did not like to talk about his biological mother due to a pervasive fear that it

would hurt Ada (R. 2555). However, Ada knew certain details, such as Audrey putting a ladder on top of Donald and walking on it, and forcing him to eat chicken bones (R. 2555-56). Both of the Dillbecks testified to their great love for their son, including Charles Dillbeck's testimony that the family had moved from Indiana to Florida after Mr. Dillbeck was imprisoned as a result of the 1979 shooting, just so they could see him every week (R. 2544-45). Charles Dillbeck stated that he "would trade places" with his son if he could (R. 2549). Mr. Dillbeck also described his parents as "very loving" but explained that at the time he "couldn't accept it." (R. 2286).

Ada testified that Donald started using drugs when he was thirteen and had never been violent or aggressive until the Indiana stabbing from which he fled (R. 2553). Mr. Dillbeck described his poor school performance, and recounted beginning to use drugs at age thirteen (R. 2286, 2279). Cindy recounted being horrified by her brother's drug use when he was approximately fifteen, which ultimately led her to cut off contact with him (R. 2247-48).

B. Expert Testimony about Mr. Dillbeck's Conditions

The defense presented expert testimony about the effects of Mr. Dillbeck's mother's drinking while pregnant. Dr. Ione Thomas, a physician and geneticist with expertise on fetal alcohol syndrome, described the

physical symptoms of prenatal alcohol exposure (R. 1690-91).[3] He explained that fetal alcohol effects results when a syndrome cannot be proven but there is evidence of in-utero exposure, such that a person can end up with normal intelligence but show "significant" abnormalities in neurobehavioral testing (R. 1690-92). Persons with that condition sometimes have diminished intelligence, impulsivity, difficulty in controlling reactions to circumstances, poor decision making, and difficulty in school (R. 1696-98). Dr. Thomas examined Mr. Dillbeck and referred the case to Dr. Frank Wood, who concluded that Mr. Dillbeck suffers from fetal alcohol effects (R. 1693-96).

Dr. Wood, a neuropsychologist, testified about the results of his examination of Mr. Dillbeck (R. 2433-34). He described Mr. Dillbeck as having a disorder on the schizophrenia spectrum and noted a pattern of cognitive deficiencies and congenital illness that made him vulnerable to psychotic episodes (R. 2434, 2453). Dr. Wood described Mr. Dillbeck's memory as being impaired—in the first percentile—which is an indication of permanent brain damage (R. 2439-40). Such symptoms would be expected with fetal alcohol effects (R. 2445-46). Dr. Wood concluded that Mr. Dillbeck's brain did not effectively process or understand what occurs in

[3] Dr. Thomas' testimony was presented to the jury at the penalty phase through use of a videotaped deposition (R. 2492-93).

interpersonal or social situations, particularly intense or fast-moving scenarios (R. 2452).

Dr. Robert Berland, a forensic psychologist, administered numerous tests on Mr. Dillbeck in jail (R. 2343-45). He also reviewed Audrey Hosey's medical records (R. 2379). Dr. Berland testified that Mr. Dillbeck was brain damaged with a significant discrepancy ("split") in his IQ score (R. 2366-69). He noted moderate psychotic disturbances and recounted Mr. Dillbeck's auditory, visual, and olfactory hallucinations (R. 2375-76). He described Mr. Dillbeck as having paranoid perceptions and mild hypomania coupled with depressive disturbance (R. 2410-11). Dr. Berland reported that when Mr. Dillbeck used "speed," it made him wild, and that he becomes agitated and prone to blowing up when he is deprived of sleep (R. 2457-58). Given Mr. Dillbeck's impairments, he is likely to misperceive, think things are happening that are not, and struggle with an inability to control his reactions or reason through situations in the way a non-psychotic person would (R. 2390-91). As to the 1990 murder, Dr. Berland concluded that Mr. Dillbeck likely misjudged circumstances and that the stressors, specifically lack of sleep, impacted his reasoning and judgment (R. 2391-93).

C. Mr. Dillbeck's Prison Experience

The defense presented multiple witnesses testifying to Mr. Dillbeck's good conduct at various institutions in which he was housed (Quincy Vocational Center, Sumter Correctional Institute, and Leon County Jail); his having only had two or three disciplinary reports; and his generally being a good inmate who got along well with others (R. 2419-20; 2423-28; 2500-01; 2520-43). The defense also presented evidence that Sumter Correctional Institute was known for having the most violent of young offenders and for having frequent assaults, robberies, and rapes (R. 2488-89; 2512-18). Mr. Dillbeck himself testified to being raped several times while in prison, and that the way he got it to stop was by—at approximately sixteen years of age—entering into an arrangement where he performed sexual favors for a thirty-year-old man in exchange for protection (R. 2280-81).

D. Mr. Dillbeck's Prior Conviction

A key feature of the State's case and argument in support of a death sentence was Mr. Dillbeck's prior conviction for fatally shooting Lee County Sheriff's Deputy Dwight Lynn Hall. Mr. Dillbeck was fifteen years old at the time of the shooting.

The State presented four witnesses in relation to the crime: Deputy State Attorney Marshall King Hall, Colonel Don Schmitt and Major Tom

Wallace from the Lee County Sherriff's Department, and Dr. Wallace Graves, the medical examiner who performed the autopsy on Deputy Hall. Throughout its presentation, the State introduced the plea colloquy with Mr. Dillbeck (R. 2191), statements that Mr. Dillbeck made to Colonel Schmitt (R. 2207-2208), testimony about the search for the weapon and the fact that Mr. Dillbeck had originally misinformed law enforcement as to its whereabouts (R. 2212), and the State concluded its presentation with testimony about the autopsy of Deputy Hall, including introducing photographs (R. 2233-2244). Significantly, during Colonel Schmitt's testimony, he told the jury that he had informed Mr. Dillbeck that Deputy Hall had died from his injuries and that Mr. Dillbeck had "no reaction" (R. 2208-2209). Based upon the evidence, the State argued that the jury should assign the aggravator great weight (R. 2702).

III. THE TRIAL COURT'S SENTENCING ORDER

Mr. Dillbeck asserted numerous nonstatutory mitigating factors, which the trial court rejected or gave low weight. The court noted that (1) abused childhood "does not weigh heavily as a mitigating circumstance" (R. 3168); (2) fetal alcohol effects were established, "but the Court is not persuaded that this impacted the Defendant's actions to any substantial degree" (R. 3169); (3) mental illness was "not of such significance as to weigh heavily as

a non-statutory mitigating circumstance" (R. 3169); (4) amenability to treatment was not entitled to any substantial weight (R. 3169-70); (5) substantial mental or emotional disturbance was "rejected as a separate non-statutory mitigating circumstance" (R. 3170); (6) diminished capacity was already considered as a statutory mitigator (R. 3170); (7) incarceration in a violent prison at an unusually early age was established, but "[t]he Court does not view this factor as having any substantial mitigating weight" (R. 3170-71); (9) [sic] good prison record "is of no practical mitigation" (R. 3171); (10) loving family was worthy of "only slight mitigation" (R. 3171); and (11) remorse was not given any substantial weight (R. 3171).

The trial court's sentencing order addressed the fetal alcohol effect evidence as follows:

> The existence of the condition known as fetal alcohol effect was established by the testimony; however, the impression given to the court by those who testified about it was that the conclusions reached by them were tenuous and made in the early stages of their research so that while the physical effects of fetal alcohol syndrome are well documented, the extent of the mental effects of the fetal alcohol effect can vary widely and sufficient testing has not been developed to document the degree of disability. The stated conclusion was that there was a lack of impulse control, but the Court is not persuaded that this impacted the Defendant's actions to any substantial degree.

(R. 3169). The court found the evidence insufficient to establish the statutory mental health mitigator based on extreme mental disturbance, and also declined to give it weight as a non-statutory mitigating factor:

> All mental health professionals who testified agreed that there was a mental disorder of some type although they differed as to what it was and the degree to which it controlled the Defendant's actions. The Court is reasonably convinced that the Defendant suffers from some mental disorder as all must who commit acts of this violent nature, but the Court finds that it is not of such significance as to weigh heavily as a non-statutory mitigating circumstance.

(R. 3169).

IV. RELEVANT FACTS FROM PRIOR POSTCONVICTION PROCEEDINGS

On May 10, 2018, during the course of Mr. Dillbeck's Lee County litigation pursuant to *Atwell v. State*, 197 So. 3d 1040 (Fla. 2016) (limiting juvenile life sentences), *overruled by State v. Michel*, 257 So. 3d 3, 4 (Fla. 2018), Mr. Dillbeck was evaluated by Dr. Faye Sultan, who noted indications of a fetal alcohol spectrum disorder ("FASD"). Consistent with standard diagnostic practices related to FASDs, Mr. Dillbeck then underwent a multidisciplinary evaluation conducted by preeminent experts in the field of FASDs, including Dr. Natalie Novick Brown, a clinical psychologist; Dr. Paul Connor, a neuropsychologist; and Dr. Richard Adler, a medical doctor. Additionally, Dr. Wes Center prepared a report based on quantitative

electroencephalogram (qEEG) brain mapping, and Dr. Sultan provided additional life history information based upon her evaluation. Final reports from the experts were issued on May 1, 2019, concluding that Mr. Dillbeck meets the diagnostic criteria for Neurodevelopmental Disorder associated with Prenatal Alcohol Exposure (ND-PAE) (*See*, *e.g.*, PCR4 84).

Falling under the umbrella of FASDs, ND-PAE is a specific form of central nervous system dysfunction resulting from *in utero* alcohol exposure. Diagnosis requires the presence of seven factors: 1) "more than minimal"[4] exposure to alcohol during gestation; 2) at least one manifestation of impaired neurocognitive functioning; 3) at least one self-regulation impairment; 4) at least two adaptive impairments; 5) childhood onset; 6) clinically significant distress or impairment in social, occupational, or other important areas of functioning; and 7) the disorder is not better explained by other causes (PCR4 84-85).

Mr. Dillbeck not only met, but "exceed[ed,] diagnostic requirements for ND-PAE" (PCR4 84): 1) his mother's consumption of 18-24 beers every day for the duration of her pregnancy was over 40 times the monthly threshold for "more than minimal" gestational exposure; 2) he suffered from four

[4] "More than minimal" alcohol exposure is defined as gestational consumption of more than 13 drinks per month, or more than 2 drinks consumed during a single occasion (PCR5 448).

neurocognitive impairments (intellectual/IQ discrepancies, academic achievement, verbal learning/memory, and visuospatial construction); 3) his self-regulation was impaired in the realm of executive functioning; 4) he presented with three adaptive impairments (socialization, daily living skills, and communication); 5) the impairments were of childhood onset, as evidenced by early childhood speech, language, and learning deficits; 6) the impairment was clinically significant and caused five secondary disabilities (school disruption, mental health problems, substance abuse, trouble with the law, and confinement); and 7) brain mapping and an examination of Mr. Dillbeck's life history ruled out other causes of the dysfunction. *Id*.

Results of qEEG testing indicated widespread and profound neurological damage throughout Mr. Dillbeck's brain, with particular abnormality in the portions of the brain most responsible for regulating planning, mood, judgment, behavior, impulse control, and intentionality (PCR4 83, 150, 156-57, 165). These results showed Mr. Dillbeck to be developmentally disabled and biologically predisposed to overreact to stress (PCR4. 34). Neuropsychological testing also revealed more pronounced deficiencies in abstract and unstructured situations, indicating that Mr. Dillbeck functions better in controlled settings, such as prison, than in the broader community where less structure exists (PCR4 77-78).

Additionally, Mr. Dillbeck's scores on various measures were "consistent with intellectual disability." (PCR4 70, 77, 84, 90). Dr. Novick Brown noted that the DSM-5 "recognizes the predictive relationship between executive functioning and adaptive behavior in its criteria for intellectual disability[,]" (PCR4 63), and that individuals with ND-PAE who have average to borderline IQs "are no different functionally than those with intellectual disability (ID) because their adaptive functioning typically falls approximately 2 standard deviations below full-scale IQ." (PCR4 89).

Based on these findings, Mr. Dillbeck moved for postconviction relief under Fla. R. Crim. P. 3.851. He based his claim on newly discovered evidence of mitigation, specifically the new ND-PAE diagnosis and results of previously unavailable neuropsychological testing and brain scanning (PCR4 20-27). Despite the State's concession that it would be an "extraordinar[ily] high standard" to expect a capital litigator to be aware of every possible diagnosis as soon as it is published (PCR4 353), the trial court summarily denied Mr. Dillbeck's motion on the State's asserted untimeliness grounds (PCR4 353-54). Alternatively, the trial court found that because certain information related to prenatal alcohol exposure had been presented at Mr. Dillbeck's penalty phase and referenced in the sentencing order, new evidence related to ND-PAE would not have changed the outcome (PCR4

374). This Court affirmed the denial on time-bar grounds. *Dillbeck*, 304 So. 3d at 287-88.

V. RELEVANT FACTS FROM CURRENT POSTCONVICTION PROCEEDINGS

A. New Medical Consensus Regarding ND-PAE as an Intellectual Disability-Equivalent Condition

Although Mr. Dillbeck's ND-PAE is a lifelong condition and accordingly has not changed, the medical and scientific understanding related to ND-PAE *has* changed. As Mr. Dillbeck's trial counsel, Randolph Murrell, explained, at the time of trial in 1991, "medical and scientific understanding of the cognitive and behavioral effects of fetal alcohol exposure was not nearly as advanced" as it is today, and to the best of Mr. Murrell's knowledge, "there were no clinically accepted studies equating this condition to intellectual disability." (PCR5 757). Now, well after Mr. Dillbeck's trial and other prior legal proceedings, there exists a medical consensus that ND-PAE "is well-deserving of being considered a developmental disability under the rubric 'ID-equivalence.'" (PCR5 621).

ND-PAE was first categorized in the 2013 DSM-5, "in a section of the manual called 'Conditions for Further Study,' which laid out proposed criteria for conditions where future research was encouraged to potentially establish diagnoses." (PCR5 566). Over the next several years, "despite the

'proposed' status of ND-PAE and its diagnostic criteria, researchers in the United States and beyond slowly began using the condition and its guidelines[.]" (PCR5 567). It was not until 2018/2019 that ND-PAE criteria "had become widely accepted by FASD professionals in the forensic [and] the research and clinical fields." (PCR5 567).

Prior to this general acceptance in 2018/2019, "all that attorneys or forensic experts in non-FASD fields could have been expected to know about ND-PAE was DSM-5's view that the condition was not yet available as an accepted mental health diagnosis." (PCR5 567). Indeed, any attorney keeping up with the newest DSM publications would have been advised by "the text itself" that "ND-PAE was not officially recognized and could not be used for clinical purposes." (PCR5 567).

By 2021, "[d]espite DSM-5's odd bifurcation…diagnosing ND-PAE for the CNS dysfunction in FASD ha[d] become the standard of practice in the mental health field." (PCR5 612). FASDs and ID are now considered "tied for severity" by preeminent experts in the field, although FASDs may "even exceed[] complexity scores for ID[.]" (PCR5 613).

Now, the medical community recognizes that ND-PAE "is brain-based, manifests congenitally or in early childhood, is of lifelong duration, and in terms of its definitional elements, has an incompetence pattern and risk-

based support needs that are essentially identical" to ID (PCR5 621). It is "a logical candidate for Intellectual Disability Equivalence" for three primary reasons:

> (a) it stems directly from brain impairment at birth; (b) people with ND-PAE have adaptive deficits and support needs not only similar but identical with those seen in intellectual disability, and (c) despite significantly deficient adaptive functioning, most individuals with ND-PAE have full-scale IQ scores that are too high to qualify for an intellectual disability diagnosis. As such, people with ND-PAE are among the most victimized by the current practice of rigid adherence to full-scale IQ cutoffs.

(PCR5 568).

Whereas IQ cutoffs used to be *de rigueur* in determining which individuals were deserving of categorical protections, the medical community now urges against "falling into a conventional trap of relying on a full-scale IQ or some other arbitrary indicator of a single dimension of impairment, one that does not translate adequately" in capturing the extent of ND-PAE's disability (PCR5 621). Importantly, because "IQ scores of those with ND-PAE reflect performance in highly structured test settings with considerable examiner guidance, such scores do not reflect how brain damage in affected persons manifests in everyday behavior in the unstructured real world." (PCR5 568).

The extent of disability is profound. Individuals with ND-PAE "often are unable to improve adaptive functioning over time and frequently cannot live

independently in society as adults" because their adaptive behavior becomes "increasingly delayed…as age related societal expectations increase, resulting in adaptive behavior that diminishes over time[.]" (PCR5 618).

Ultimately, "a growing consensus has emerged in the fields of both intellectual disability and ND-PAE that it is executive function capacity and not IQ that directly affects every day adaptive functioning in persons with [ND-PAE]." (PCR5 569). Now,

> the medical and scientific communities have shifted from a numbers-based approach to a clinical presentation-based conceptualization in the definition and diagnosis of intellectual disability. The brain pathology that makes intellectual disability just that—a disability—manifests in complex and variegated manners that cannot be captured by a test score with limited content validity. This pathology occurs in equal manner and force in individuals with ND-PAE, whose functioning in the world cannot be meaningfully distinguished from intellectual disability.

(PCR5 570).

B. Newly Discovered Evidence Regarding Mr. Dillbeck's 1979 Conviction

Counsel's warrant investigation has uncovered newly discovered evidence that completely upends the version of events Mr. Dillbeck's capital jury heard regarding his 1979 conviction. Counsel has obtained previously unknown information from third-party witnesses cataloging Mr. Dillbeck's bizarre behavior at the time of the 1979 crime. These witnesses—Robert Schienle, Karen

Haubert, Jon and Carol Herbster, Linda Kuntz, and Carl Krieg—either gave statements to law enforcement in 1979 that indicated nothing with respect to Mr. Dillbeck's bizarre behavior or were not interviewed by law enforcement at all.

After committing an impulsive stabbing in Indiana, fifteen-year-old Donald fled to Florida.[5] He drove three days straight with almost no sleep (PCR5 778). By that time, Donald had been supplied and used drugs, including amphetamines, for about three years (PCR5 776). By the time he arrived in Fort Myers Beach, he was acting bizarrely. Robert Schienle provided new information in 2023 shining a light on this behavior (PCR5 788).[6] Donald had an interaction with Schienle, just a couple of hours before the shooting, that made Schienle feel very uneasy and that something was not right with Donald. Donald's behavior was abnormal and he appeared paranoid. Donald appeared disheveled and homeless. *Id.*

Donald's bizarre behavior continued after the crime. The shooting occurred sometime around midnight on April 10, 1979. Although several witnesses had spotted him, instead of fleeing or hiding, Donald repeatedly returned to the car and spent the night sitting nearby in the water. In the morning, he walked out of the water and was immediately arrested. Several witnesses—

[5] Mr. Dillbeck was never convicted of a crime based on this incident.
[6] Schienle gave a statement to law enforcement in 1979 that included none of this information (PCR5 790-803).

including Karen Haubert, and Jon and Carol Herbster—have confirmed for the first time that they witnessed the bizarre sight of Donald walking out of the ocean covered in seaweed *(*PCR5 805-17). This behavior was bizarre enough that it stuck with the witnesses for 40 years. The new statements are consistent with Deputy Joe Thompson's 1979 statement, describing Donald as appearing "bewildered" when he was arrested (PCR5 821).

Linda Kunz also provided a 2023 statement describing Donald's behavior, which was "like nothing [she] had seen before or since. To [her], his behavior did not seem to be related to either drugs or alcohol." (PCR5 830).[7] Donald "looked like he had a break from reality. He didn't seem to know what was going on." *Id*. Donald's arm was "limp like a noodle" and the gun was just swinging around. *Id*. Donald was going around in circles and swaying back and forth before he finally walked into the ocean. Donald's behavior did not strike her as being "goal oriented" and it appeared as though he could not focus*. Id.*

Carl Scott Krieg, a childhood friend of Donald's from Indiana, further contextualized Donald's bizarre behavior and believed that he was acting on "pure adrenaline" when he fled Indiana (PCR 828-29).[8] Donald always "seemed

[7] In 1979, Kunz gave a statement to law enforcement saying that Donald was pacing hard and that he looked messed up (PCR5 830, 832-37). But the interview contained no other new details from her 2023 statement.
[8] Krieg did not give a statement to law enforcement in the Lee County case.

different, like there was something mentally wrong with him." *Id*. Krieg was aware that Donald used amphetamines. *Id*. As someone who knew Donald at the time, Krieg was shocked that he would shoot someone because Donald could not fight. Krieg often saw Donald get beaten up at school. Donald would get punched repeatedly in the face until his face was bleeding, but he never said a word or tried to fight back. He just took it. He didn't know how to stick up for himself. *Id*.

In light of the new witness statements, the case was evaluated in 2023 by Dr. Barry Crown and Dr. Jethro Toomer (PCR5 774-82, 784-86). As they note, Mr. Dillbeck was born brain-damaged to a severely mentally ill mother who drank eighteen to twenty-four beers every day during her pregnancy and profoundly abused and neglected him for the first several years of his life (PCR5 775, 785). By age thirteen, Mr. Dillbeck was abusing amphetamines, marijuana, and aerosol products (PCR5 776). Additionally, Mr. Dillbeck has been diagnosed with FASD and a schizophrenic spectrum disorder (PCR5. 775-76). He has long suffered from psychotic symptoms, including hallucinations and delusions (PCR5. 776).

In light of these longstanding symptoms and the newly discovered evidence, Dr. Crown and Dr. Toomer have each expressed grave concerns regarding Mr. Dillbeck's mental state at the time of the 1979 crime and at the time of his associated guilty plea (PCR5 775-79, 785-86). In particular, Dr. Crown

has concluded that in light of numerous red flags—including: (1) Mr. Dillbeck's general lack of capacity in light of his age at the time of the crime, lifelong brain damage, and struggles with mental illness; (2) the sudden flight from Indiana; (3) the lack of sleep for several preceding days; (4) his bizarre behavior before and after the shooting; and, (5) that Mr. Dillbeck's trial attorney filed a suggestion of incompetency and suggestion of insanity during his first week of representing Mr. Dillbeck, meaning he apparently had reason to doubt Mr. Dillbeck's competency and sanity at that time—there is a "serious doubt that [Mr. Dillbeck] was able to understand the nature and quality of his actions or their consequences and there is a serious doubt that he was capable of distinguishing right from wrong at the time of the shooting." (PCR5 778). Likewise, in light of these red flags and the fact that Mr. Dillbeck was never examined for competency, both Dr. Crown and Dr. Toomer have strong doubts that Mr. Dillbeck was competent when he pleaded guilty to premeditated first degree murder (PCR5 776-77, 786).

Additionally, Mr. Dillbeck presented newly discovered evidence below calling the plea colloquy in the 1979 case into doubt. During the plea colloquy, Mr. Dillbeck's attorney had him make representations on the record to bolster the apparent validity of the plea. Among these was the representation that Mr. Dillbeck "discussed the facts of the case with Assistant Public Defender,

Eugenie Gollup." (S-PCR 1164). Gollup, who was not in the courtroom during the plea, has now confirmed that the representation was false (S-PCR 1168). To Gollup, it seems that Mr. Dillbeck answered yes "because he did not want to contradict Mr. Midgley." *Id*. This new evidence calls into question the other representations made during the colloquy and supports Dr. Crown's findings that already cast doubt on the colloquy. In particular, Dr. Crown noted that it "appears that Mr. Dillbeck had been primed to say 'yes' during his plea colloquy. The records I reviewed indicate that Mr. Dillbeck's lawyers and family members compelled him to enter the guilty plea, and while this was likely well-intentioned due to the fact that he was facing the death penalty at age fifteen-sixteen, I suspect Mr. Dillbeck did not have the functional agency to make a reasoned decision regarding his decision to plead." (PCR5 777).

SUMMARY OF ARGUMENT

ARGUMENT I: Mr. Dillbeck's uncontested diagnosis of ND-PAE renders him categorically exempt from execution under the Eighth and Fourteenth Amendments. Mr. Dillbeck presented unrebutted evidence of a new medical consensus recognizing ND-PAE as an intellectual disability-equivalent condition warranting the same protections established in *Atkins* and its progeny. He asserted two bases for timeliness: 1) that because the claim involves a categorical bar to his execution, it is not waivable or subject to

procedural bar; and, alternatively, 2) that the claim could not have been raised earlier. The trial court erred by summarily denying Mr. Dillbeck's exemption claim without addressing the important constitutional arguments, and without holding an evidentiary hearing related to timeliness or the underlying merits.

ARGUMENT II: Mr. Dillbeck presented newly discovered evidence relating to the shooting of Deputy Hall when he was fifteen years old. Mr. Dillbeck was diligent. Some of the witnesses who provided statements in 2023 were not named in any police report or discovery disclosure in 1979. As to those witnesses who previously provided statements, there was no indication that they possessed information relevant to Mr. Dillbeck's mental state at the time of the crime. Based upon the 2023 statements and the experts' opinions based upon those statements, Mr. Dillbeck's established mental health conditions, and the clear evidence that Mr. Dillbeck's plea was tainted by information now known to be false, the circumstances surrounding the prior violent felony conviction are undermined. Because the prior felony was a feature of the State's case in urging the jury to recommend a death sentence for Mr. Dillbeck, the new evidence, combined with all of the compelling mitigation, would probably result in a life sentence.

ARGUMENT III: Under the Eighth Amendment, Mr. Dillbeck's prolonged incarceration precludes his execution.

STANDARD OF REVIEW

Because the circuit court denied postconviction relief without an evidentiary hearing, this Court must accept the factual allegations presented in Mr. Dillbeck's motion and in this appeal as true to the extent they are not conclusively refuted by the record. *Ventura v. State*, 2 So. 3d 194, 197-98 (Fla. 2009). Further, this Court "review[s] the trial court's application of the law to the facts *de novo*." *Green v. State*, 975 So. 2d 1090, 1100 (Fla. 2008). A postconviction court's decision whether to grant an evidentiary hearing is likewise subject to *de novo* review. *Rose v. State*, 985 So. 2d 500, 505 (Fla. 2008).

ARGUMENT

I. THE CIRCUIT COURT ERRED IN RULING THAT MR. DILLBECK IS NOT ENTITLED TO EXEMPTION FROM EXECUTION UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS.

A. Background and Ruling Below

There exists no dispute that Mr. Dillbeck suffers from Neurobehavioral Disorder associated with Prenatal Alcohol Exposure ("ND-PAE"). His biological mother, Audrey Hosey, drank between 18 and 24 beers per day, every day, for the duration of her pregnancy with Mr. Dillbeck (PCR5 448).

Far exceeding the diagnostic threshold of "more than minimal" consumption, *id*., Ms. Hosey's gestational alcohol use caused clinically significant impairment in Mr. Dillbeck's cognitive and adaptive functioning, which manifested in childhood and spans the neurocognitive, self-regulative, and adaptive realms.[9]

A three-pronged assessment by leading experts in the field of fetal alcohol spectrum disorders confirms that Mr. Dillbeck satisfies the clinical criteria for ND-PAE.[10] Multiple sources corroborate the expert opinions, and "*there is no explanation other than ND-PAE that adequately explains [Mr. Dillbeck's] lifelong functioning.*" (PCR5 470) (emphasis added).

[9] (PCR5 467-68, 470). Noted impairments include four neurocognitive impairments (intellectual functioning, academic achievement, verbal learning and memory, and visuospatial construction); self-regulation impairment with regard to executive functioning; three adaptive impairments (socialization, daily living skills, and communication); and numerous secondary disabilities (school disruption, mental health problems, substance abuse, trouble with the law, and confinement) (PCR5 467-68).

[10] Consistent with best medical practices, ND-PAE is properly diagnosed after a multidisciplinary assessment conducted by a neuropsychologist (here, Dr. Paul Connor), medical doctor (Dr. Richard Adler), and psychologist (Dr. Natalie Novick Brown). A diagnosis requires verified prenatal alcohol exposure and deficits manifesting in childhood that span the neurocognitive, self-regulatory, and adaptive realms (*See* PCR5 446-48, 467-68). The detailed findings of Drs. Connor, Adler, and Novick Brown are available at PCR5 415-570, and further corroborated by Drs. Wesley Center and Faye Sultan (*See also* PCR5 572-93) (Report of Dr. Sultan).

In *Atkins v. Virginia*, the United States Supreme Court held that the Eighth Amendment prohibits the execution of individuals with intellectual disability, instructing that "the lesser culpability of the mentally retarded offender surely does not merit that form of retribution." 536 U.S. at 304, 319 (2002). As a result of the cognitive and adaptive impairments caused by Mr. Dillbeck's ND-PAE, a condition recognized by the medical community as intellectual disability ("ID")-equivalent, Mr. Dillbeck embodies the lessened culpability described in *Atkins*:

> *[T]he mental defect in FASD makes ND-PAE equivalent to ID* in terms of the very same factors that compelled the Court in *Atkins* to categorically exempt defendants with ID from the death penalty…*[T]here is no empirical difference between FASD and ID* in terms of impaired capacity to reason and control impulses or in terms of impaired capacity to successfully navigate the adjudication process. In other words, *ID and FASD are equivalent with respect to every metric established by the Supreme Court for diminished responsibility*.

(PCR5 769) (emphasis added). Mr. Dillbeck's execution would be disproportionate to his culpability and would violate the Eighth Amendment prohibition on cruel and unusual punishment.

Furthermore, excluding Mr. Dillbeck from the group of persons constitutionally protected from execution by the Eighth Amendment would violate the Equal Protection Clause of the Fourteenth Amendment. In terms of promoting a legitimate governmental end (here, delineating who is subject

to, or exempt from, execution) there is no meaningful distinction between Mr. Dillbeck's reduced capacity—on account of ND-PAE—and individuals with functionally identical symptoms owing to an ID diagnosis.[11]

Mr. Dillbeck has consistently litigated the issue of his prenatal alcohol exposure (and resulting condition) to the fullest extent allowed by ever-evolving legal standards and medical knowledge. He presented it as mitigation at his 1991 trial, where the court found that although Mr. Dillbeck's fetal alcohol exposure was the "most compelling evidence of mitigating circumstances[,]" in his case (R. 3172), the science regarding its effects was not established enough to warrant a sentence less than death:

> [T]he impression given to the Court by those who testified about [Mr. Dillbeck's fetal alcohol exposure] was that *the conclusions reached by them were tenuous and made in the early stages of their research so that while the physical effects of fetal alcohol syndrome are well documented, the extent of the mental effects of the fetal alcohol effect can vary widely and sufficient testing has not been developed to document the degree of disability*. The stated conclusion was that there is a lack of impulse control, but the Court is not persuaded that this impacted the Defendant's actions to any substantial degree.

(R. 3169) (emphasis added).

[11] *See* RONALD D. ROTUNDA AND JOHN E. NOWACK, 3 TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE §18.2(a), 300 (4th ed. 2007) (describing Equal Protection Clause classification analysis); (*see also* PCR5 355) (withholding *Atkins* protections from individuals with ID-equivalent deficits violates equal protection).

When, in 2018-2019, the precise diagnosis of Mr. Dillbeck's condition (ND-PAE) was established via general acceptance by the medical community, Mr. Dillbeck promptly litigated its impact under the only legal mechanism then available to him: newly discovered evidence pursuant to Fla. R. Crim. P. 3.851 (*See generally* PCR5 673-98); (*see also* PCR5 707) ("Mr. Dillbeck was so seriously affected in the womb [by prenatal alcohol exposure] that he has always functioned as a person with an intellectual disability"); *id*. at 709 ("the experts say…that this is a new illness that could not have been known about at the time of trial"). Despite uncontested evidence that Mr. Dillbeck suffers from ND-PAE, this Court denied relief on timeliness grounds.[12]

Now in 2023, Mr. Dillbeck asserts that society's evolving standards of decency, in conjunction with advances in medical knowledge, have changed the legal landscape and given rise to a newly available claim—grounded in the Eighth and Fourteenth Amendments—that ND-PAE is an ID-equivalent

[12] The circuit court's order denying Mr. Dillbeck's 2019 motion related to ND-PAE, and this Court's order affirming, relied on an assumption that ND-PAE became an official diagnosis once the DSM-5 was published in 2013, and that because Mr. Dillbeck's trial counsel knew he had been exposed to alcohol *in utero*, diligence required raising it by 2014 at the latest (*See* PCR5 730-31, 751). These findings and the resultant rulings are undermined by Dr. Novick Brown's 2023 sworn statement (*See* PCR5 567).

condition and Mr. Dillbeck is exempt from execution under the protections articulated in *Atkins*.

In denying this categorical exemption claim, the circuit court made four findings: (1) that because Mr. Dillbeck had, in 2019, raised a newly-discovered evidence claim related to ND-PAE as mitigation, his current claim is procedurally barred under *res judicata*; (2) that his claim of categorical exemption from execution was untimely raised; (3) that his exemption claim is meritless due to his IQ score; and (4) that the circuit court is prohibited from applying *Atkins*' Eighth Amendment protections to Mr. Dillbeck due to Art. 1, § 17 of the Florida Constitution (PCR5 1035-37). Each of these findings is legally and/or factually erroneous.

B. No Procedural Bar Applies

i. Mr. Dillbeck's exemption claim is not relitigation of his 2019 newly discovered evidence claim

The circuit court erred in a definitional sense by parsing Mr. Dillbeck's categorical exemption claim into two separate parts: 1) a claim of additional newly discovered evidence related to ND-PAE; and 2) a claim that Mr. Dillbeck has intellectual disability (PCR5 1035-36). Whether taken together or separately, neither of these framings accurately reflects the constitutional issue currently before this Court. *Rather, the present claim is that scientific understanding and evolving standards of decency have now, in 2023,*

reached a sociolegal tipping point which renders Mr. Dillbeck exempt from execution because he suffers from an ID-equivalent condition (ND-PAE). Although this claim involves a newly emerged consensus and discusses the applicability of *Atkins* protections to Mr. Dillbeck's condition, it is neither a newly discovered evidence claim, nor an IQ-based exemption claim that could have been raised in the years following *Atkins*.

That issues related to Mr. Dillbeck's condition have been litigated in various contexts throughout his prior proceedings is illustrative of the incremental nature of scientific progress, which has only now yielded a consensus regarding ND-PAE as an ID-equivalent condition warranting exemption from execution. When Mr. Dillbeck presented the 2019 claim related to ND-PAE, medical and societal standards had not yet evolved to that consensual point. As such, Mr. Dillbeck presented his claim via the only legal mechanism available to him in 2019: newly discovered mitigation evidence pursuant to Fla. R. Crim. P. 3.851. Mr. Dillbeck's current claim of categorical exemption from execution is legally distinct from the 2019 claim.

The circuit court's finding that Mr. Dillbeck's categorical exemption claim is procedurally barred via *res judicata* not only misunderstands the contours of the present constitutional claim, it punishes Mr. Dillbeck for his past diligence. This was error.

ii. Claims of categorical exemption from execution must not be foreclosed from review by a procedural bar

"The Eighth Amendment prohibits certain punishments as a categorical matter." *Hall*, 572 U.S. at 708. Categorical bans exist to protect both the individual as well as the interests of society. *See, e.g.*, *Ford v. Wainwright*, 477 U.S. 399, 409-10 (1986) (Eighth Amendment-based categorical exemption protects not only the death-exempt individual but "the dignity of society itself from the barbarity of exacting mindless vengeance[.]").

No state-law waiver provision can trump this constitutional prohibition, and death-sentenced individuals "must have a fair opportunity to show that the Constitution prohibits their execution." *Hall*, 572 U.S. at 724. Just as it would be unconstitutional for the State to invoke the failure to timely raise an Eighth Amendment challenge as justification to execute individuals subject to other categorical exemptions or exclusions, *see, e.g.*, *Roper v. Simmons*, 543 U.S. 551 (2005); *Kennedy v. Louisiana*, 554 U.S. 407 (2008), so too would it be unconstitutional to execute an individual subject to *Atkins* protection on the grounds that he failed to raise his claim at the "appropriate" procedural time. *See Sawyer v. Whitley*, 505 U.S. 333 (1992) (courts may hear an otherwise-defaulted claim upon requisite showing of ineligibility for the death penalty); *Dretke v. Haley*, 541 U.S. 386, 393 (2004) (same); *McKay v. United States*, 657 F.3d 1190, 1196 (11th Cir. 2011) (procedural default

excused upon showing of actual innocence of capital sentence). Because Mr. Dillbeck's disability renders him categorically exempt from execution, no procedural or time bar applies, and merits review is appropriate.

iii. Mr. Dillbeck timely raised this claim

Notwithstanding Mr. Dillbeck's assertion that his categorical exemption claim may not be subject to a procedural bar, such a finding is not necessary for Mr. Dillbeck to prevail because he has timely raised this claim.

As Mr. Dillbeck explained above, he has been attempting to litigate the factual underpinnings and legal implications of his condition since his trial in 1991, but he has been constrained by the previously limited understanding regarding ND-PAE and its ID-equivalence.

ND-PAE is a unique condition which falls under the category of Fetal Alcohol Spectrum Disorders ("FASDs"). "Although the term 'FASD' is not controversial, there is evolving clarity in how the conditions under the umbrella are defined." Jerrod M. Brown, et al., *Fetal Alcohol Spectrum Disorders (FASD) and competency to stand trial (CST)*, 52 Intl. J. L. & Psychiatry 19, 20 (2017). While, as the circuit court found, ND-PAE was included in the 2013 DSM-5, it was included only as a proposed, unofficial set of criteria in the "Conditions for Further Study" section and was

considered a "work in progress" rather than a clinically accepted diagnosis (PCR5 567). As medical experts explained in 2017:

> DSM currently allows for a clinical diagnosis of [ND-PAE] although diagnostic criteria for the condition are found in a section of the Manual designated "Conditions for Further Study." *Despite empirical support for DSM-5's diagnostic criteria (Kable et al., 2016), this rather confusing bifurcation of the diagnosis and diagnostic criteria leaves ND-PAE largely unidentified in the general population[.]*

Brown, et al. at 20 (emphasis added). Although preeminent experts in the field began advocating for diagnostic use of ND-PAE in the years following publication of the DSM-5, the process of clinical acceptance of the condition occurred over a substantial period of time, culminating in its general recognition among medical professionals in 2018/2019 (PCR5 566-67); *see also* Brown et al. at 21-22 (advocating in 2017 for diagnostic acceptance of ND-PAE due to emerging use in clinical settings). Prior to 2018/2019, the criteria for ND-PAE were not "widely accepted by FASD professionals in the forensic as well as the research and clinical fields." (PCR5 567).[13]

[13] This Court's 2020 order affirming denial of Mr. Dillbeck's third successive motion related to ND-PAE relied on the now-debunked assumption that ND-PAE became an official diagnosis with the 2013 publication of the DSM-5 (*See* PCR5 751, 567). To the extent this Court feels it necessary for adjudication of Mr. Dillbeck's current claim, this Court is free to revisit its prior time-bar of the newly discovered evidence claim. *See*, *e.g., State v. Akins*, 69 So. 3d 261, 268 (Fla. 2011) (notwithstanding *res judicata*, appellate courts may reconsider and correct prior rulings in exceptional cases where reliance on the previous decision would result in manifest injustice).

In other words, there was no earlier medical or scientific basis for raising ND-PAE as an ID-equivalent condition subject to categorical exemption from execution. Now that both scientific and constitutional principles have reached a consensual tipping point establishing such a basis, Mr. Dillbeck is entitled to holistic review of his categorical exemption claim with the benefit of that evolution. The circuit court's imposition of a time-bar was error.

C. Notwithstanding IQ, Mr. Dillbeck Falls Within the Class of Persons Protected by Atkins and Its Progeny

i. Courts determining Atkins exemption claims must be informed by opinions of the medical community

Although *Atkins* generally permits states to develop their own procedures for determining which capital defendants are categorically exempt from execution, 536 U.S. at 317, its progeny mandate that "in determining who qualifies[,]" states must take into account "the medical community's opinions." *Hall*, 572 U.S. at 710, 723. Although the "legal determination" is "distinct from a medical diagnosis…it is informed by the medical community's diagnostic framework." *Id*. at 721. Importantly, "the medical standards used to assess that disability constantly evolve as the scientific community's understanding grows." *Bourgeois v. Watson*, 141 S.

Ct. 507, 508-09 (2020) (Sotomayor, J., dissenting from denial of certiorari) (citing *Moore v. Texas*, 581 U.S. 1, 20-21 (2017)).

ii. The medical community recognizes ND-PAE as an intellectual disability-equivalent condition

The circuit court correctly pointed out that this Court has declined to extend *Atkins* protections to non-ID conditions such as brain damage and mental illness (PCR5 1037). However, the circuit court erred in ending its inquiry there without looking to medical standards as *Hall* requires. Unlike other conditions this Court has rejected as ineligible for *Atkins* protections, the medical community recognizes the unique cognitive, practical, and social impairments inherent to ND-PAE as indistinguishable from those of ID (*see* PCR5 624) ("there are few disorders more related to ID (both in causing that disorder and resembling it functionally) than FASD".); (PCR5 569) ("people with ND-PAE have adaptive deficits and support needs not only similar to but *identical with* those seen in intellectual disability"); (PCR5 762) (ND-PAE is "more severe than ID"). Although "mean IQs for specific FASD diagnosis fall[] in the borderline to average ranges," Brown et. al at 22, ND-PAE is not simply analogous to ID, but uniquely indistinguishable from it:

> As defined in DSM-5, ND-PAE is identical to ID except for confirmation of prenatal exposure to alcohol. In DSM-5, both ND-PAE and ID include "deficient intellectual functions," which are defined almost exclusively as executive rather than IQ impairments: "deficits in general mental abilities, such as

> reasoning, problem solving, planning, abstract thinking, judgment, academic learning, and learning from experience"….Both conditions also involve significant adaptive dysfunction, which is defined in ID….In ID, diagnostic criteria require one or more adaptive deficits across multiple environments such as home, school, work, and community; in ND-PAE, two or more adaptive deficits are required. In both conditions, cognitive and adaptive impairments must manifest during the developmental period.

Id. at 21 (citing DSM-5). In evaluating whether Mr. Dillbeck should be exempt from execution due to the profound effects of his ND-PAE, evolving medical principles and constitutional standards of decency do not support tethering such a determination to a specific IQ score. In the context of ID, the *Hall* Court recognized the medical community's increasing disfavor of rigid IQ cutoffs, finding that such a practice "conflicts with the logic of *Atkins* and the Eighth Amendment." 572 U.S. at 720-21. Whereas individuals with ID (but not ND-PAE) have IQ scores which tend to accurately reflect their level of intellectual and adaptive functioning, clinicians and researchers have unambiguously found that the IQ scores of someone with ND-PAE *do not* accurately reflect that individual's full range of deficits.

> Put more bluntly, a defendant with FASD whose full-scale IQ is 100 may function adaptively like someone with an IQ of 70. The significant discrepancy between IQ and adaptive functioning is a hallmark characteristic in FASD. Moreover, studies have found that adaptive deficits in children with FASD become more pronounced over the developmental years due to slow brain development in childhood, particularly in the frontal lobes. Thus, adult defendants with FASD are neurologically as well as

> adaptively equivalent to children. For example, research has found that adults with FASD function adaptively like seven year olds regardless of IQ.

Brown et. al at 23 (citations omitted); (*see also* PCR5 568). This means that adaptive deficits are *more severe* in ND-PAE than in ID, where adaptive deficits are roughly on par with IQ. *Id*.

In fact, the medical and scientific community now considers full-scale IQ scores to be "an outmoded concept" that "does not begin to capture the extent of someone's intellectual abilities or impairments." (PCR5 569); Greenspan, S. & Novick Brown, N., *Diagnosing Intellectual Disability in People with FASD*, 40 Behav. Sci. Law 31, 37 (2021). The DSM-5 itself recognizes that "when an individual has very deficient adaptive functioning, then one should be able to use executive functioning deficits to satisfy prong one [of ID diagnostic criteria], even when full-scale IQ is above the usual ceiling." *Id*. at 38.

As a result of this new understanding, leading experts in the field have shifted away from numbers-based determinations and toward a clinical presentation-based "ID-equivalency" model (PCR5 569-70). Under this model, services, supports, and protections are implemented for individuals who, due to specific conditions involving cognitive impairment and adaptive deficits, clearly operate within the functional equivalence of ID despite IQ

scores outside the previously demarcated range (PCR5 567-68, 629-54). Examples of ID-equivalent conditions—notwithstanding IQ score—include Down Syndrome, Fragile X Syndrome, and ND-PAE (PCR5 570).

iii. The legal rationale of Atkins applies in full force to individuals with ND-PAE

Mr. Dillbeck's ND-PAE exemplifies the legal and moral reasoning of *Atkins*. Individuals with "disabilities in the areas of reasoning, judgment, and control of their impulses…do not act with the level of moral culpability that characterizes the most serious adult criminal conduct." *Atkins*, 536 U.S. at 306. ND-PAE causes widespread brain dysfunction that impairs executive functioning and impedes development of the requisite level of culpability to justify imposition of the death penalty. This dysfunction is of a different origin, breadth, and impact than other, non-ID-equivalent forms of brain damage or serious mental illness.

As with ID, individuals with ND-PAE "bear no responsibility for their disorder," and the condition "explains both *cause and effect* regarding thinking and behavior in criminal acts." (PCR5 768). The hallmark cognitive and behavioral impairments cause poor memory, misunderstanding of cause-and-effect, and trouble interpreting concepts; this leads to making the same mistake multiple times, which frequently leads to trouble with the law and vulnerability within the legal setting (such as panicking during

encounters with police or falsely claiming to understand legal rights) (PCR5 656-57).

In capital cases with a defendant suffering from ND-PAE, as with ID and other conditions requiring categorical exemption from execution,

> the risk "that the death penalty will be imposed in spite of factors which may call for a less severe penalty," … is enhanced…by the lesser ability of [these defendants] to make a persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors….[They] may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted lack of remorse for their crimes.

Atkins, 536 U.S. at 320 (citing *Lockett v. Ohio*, 438 U.S. 586, 605 (1978)) (emphasis added). Indeed, as with other categorically-exempt conditions, the characteristics inherent to ND-PAE are often mistakenly viewed as aggravating rather than mitigating.[14] This unacceptable risk is apparent from Mr. Dillbeck's trial, where—although defense counsel attempted to contextualize Mr. Dillbeck's condition to the extent possible under then-limited scientific understanding of fetal alcohol effects—the trial court's imposition of death relied on misconceptions regarding the condition:

[14] *See Roper*, 543 U.S. at 573 (finding an unacceptable risk that aggravating facts of a crime would overpower age-based mitigation and "[in] some cases a defendant's youth may even be counted against him."); *Atkins*, 536 U.S. at 320-21 ("reliance on mental retardation as a mitigating factor can be a two-edged sword").

> The most compelling evidence of mitigating circumstances is with regard to the fetal alcohol effect which resulted in Defendant's borderline normal intelligence level and Defendant's lack of impulse control. When Defendant's borderline normal intelligence level is considered with other evidence it simply becomes insignificant in the overall picture. The Defendant's ability to play chess, to accumulate 12 hours of college credits, to perform work so that a supervisor will describe him as "one of the best inmates I'd ever worked" and to formulate a plan for escape which took years to implement far outweigh any mitigating effect of his low intelligence level.
>
> The claim of a lack of impulse control does not stand when considering Defendant's exemplary record of only two disciplinary reports in eleven years of incarceration, a large portion of which was spent in the most violent institution in the state corrections system. Surely, if Defendant had any difficulty in controlling his impulses his prison record would be substantially different.

(R. 3172). *But c.f. Moore*, 581 U.S. at 16 ("Clinicians, however, caution against reliance on adaptive strengths developed 'in a controlled setting,' as a prison surely is.") (quoting DSM-5 at 38).[15]

As the *Atkins* Court recognized, categorical exemption is necessary to protect against—or, in Mr. Dillbeck's case, to remedy—these unacceptable risks.

iv. Mr. Dillbeck was entitled to an evidentiary hearing in the

[15] Contrary to the trial court's finding, ND-PAE, like ID, is consistent with a minimal prison disciplinary history. *See Atkins*, 536 U.S. at 318 ("in group settings [individuals with ID] are followers rather than leaders."); (PCR5 456) (Mr. Dillbeck's "behavior tended to improve significantly in direct proportion to the amount of structure and guidance in his environment – a tendency that is commonly observed in FASD.").

circuit court

As Mr. Dillbeck has laid out above, the record before the circuit court contained factual allegations related to timeliness and the underlying merits of his constitutional claim. These facts, taken as true, entitle Mr. Dillbeck to relief from his death sentence and have not been conclusively refuted on the face of the state court record.

It was error for the circuit court to flout *Hall*'s reminder that "intellectual disability is a condition, not a number[,]" 572 U.S. at 723; to ignore evidence that Mr. Dillbeck's lifelong adaptive impairments were all "consistent with intellectual disability[,]" (PCR5 453, 460, 473); and to summarily deny this claim without holding an evidentiary hearing to resolve the disputed facts. *See* Fla. R. Crim. P. 3.851(f)(5)(B).

D. Florida State Courts Are Authorized to Apply Eighth and Fourteenth Amendment Protections to Mr. Dillbeck

The circuit court's fourth and final error was in its interpretation of Art. 1, § 17, of the Florida State Constitution. This provision, known as "the Conformity Clause," states that

> [t]he prohibition against cruel or unusual punishment, and the prohibition against cruel and unusual punishment, shall be construed in conformity with decisions of the United States Supreme Court which interpret the prohibition against cruel and unusual punishment provided in the Eighth Amendment to the United States Constitution.

Id. The circuit court ruled that this provision precludes Florida state courts from applying *Atkins*' Eighth Amendment protections to Mr. Dillbeck because it "may not expand" the holdings in seminal Eighth Amendment cases and "[w]hen the United States Supreme Court establishes a categorical rule, expanding the category violates that rule." (PCR5 1036). This ruling cannot stand.

First and most straightforwardly, this provision applies only to claims that the United States Supreme Court has squarely decided on the merits. *See Howell v. State*, 133 So. 3d 511, 516 (Fla. 2014). As the United States Supreme Court has never squarely decided the issue of whether individuals with ND-PAE qualify for exemption under *Atkins*, there is no on-point precedent to which the Florida courts must conform in this case.

Second, and more insidious, is that to uphold the circuit court's reading of this provision would effectively foreclose evolving standards of decency in Florida. "[C]onformity with" the Eighth Amendment as articulated by United States Supreme Court jurisprudence—at least in the context of categorical exemptions from execution—requires a state court to be open to expanding protections as scientific and medical knowledge advance, and as society itself matures and becomes closer to "the Nation we aspire to be." *See Hall*, 572 U.S. at 708 (citing *Trop v. Dulles*, 356 U.S. 86, 101 (1958)). This

flexibility is how the Eighth Amendment "draw[s] its meaning[.]" *Trop*, 356 U.S. at 100; *see also Weems v. United States*, 217 U.S. 349, 378 (1910) (the Eighth Amendment "is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice.").

Furthermore, in determining whether societal standards of decency have evolved to the point of warranting additional Eighth Amendment protections, the United States Supreme Court looks to the actions of individual states. *See, e.g.*, *Atkins*, 536 U.S. at 315-16; *Roper*, 543 U.S. at 559-60, 565-66 (going so far as to tally the number of states that have embraced or abandoned a particular death penalty practice). Thus, although a state court is not *required* to offer more protection than the federal constitution guarantees, a state court operating under the belief that it is *prohibited* from doing so abdicates its "critical role in advancing protections and providing the [United States Supreme Court] with information that contributes to an understanding" of how constitutional protections should be applied. *Hall*, 572 U.S. at 719.

Under the circuit court's restrictive reading of Art. 1, § 17, evolving standards of decency—the living breath of the Eighth Amendment—would be effectively stilled in Florida. This reading, and the resultant foreclosure of relief in Mr. Dillbeck's case, was error.

E. Conclusion

The circuit court erred as a matter of fact and law in summarily denying Mr. Dillbeck's claim that he suffers from an ID-equivalent condition, and his execution would thus violate equal protection and result in disproportionate, cruel and unusual punishment without legitimate retributive or deterrent effect. This Court should remand to the circuit court for further proceedings in accordance with federal constitutional protections.

II. THE CIRCUIT COURT ERRED IN DENYING MR. DILLBECK'S CLAIM REGARDING THE NEWLY DISCOVERED EVIDENCE OF HIS MENTAL STATE DURING THE 1979 CRIME THAT FORMED THE BASIS FOR THE PRIOR FELONY AGGRAVATING CIRCUMSTANCE IN THIS CASE.

Mr. Dillbeck raised a claim below of newly discovered evidence regarding his mental state during the 1979 crime and proceedings that formed the basis for the prior violent felony aggravating circumstance in this case.

A central focus of the State's penalty phase case against Mr. Dillbeck related to his prior first-degree murder conviction in Lee County, Florida (*See*, *e.g.*, R. 2702) (arguing the prior felony aggravator should be given great weight because "[h]e pled guilty to premeditated murder because he committed premeditated murder."). Mr. Dillbeck's capital jury heard the State's version of his prior felony; namely, that in 1979, fifteen-year-old Donald Dillbeck fled

Indiana in a stolen car and ended up in Fort Myers Beach, Florida. While sleeping in the car in a beachfront parking lot, he was awakened by a Sheriff's deputy. After being asked to exit the vehicle, Mr. Dillbeck ran, but was tackled after about twenty feet. A struggle ensued, during which Mr. Dillbeck pulled the gun out of the deputy's holster and fired two fatal shots. He was arrested nearby the next morning (R. 2206-09). The Leon County jury heard that Mr. Dillbeck pleaded guilty to first-degree premeditated murder (R. 2187).

As laid out above, the newly discovered evidence completely upends the version of events that Mr. Dillbeck's capital jury heard. The newly discovered third-party witnesses catalog Mr. Dillbeck's bizarre behavior around the time of the crime. Before the crime, he had fled the state of Indiana and driven three days straight without sleep. By fifteen, Mr. Dillbeck—who suffered from fetal alcohol damage, was on the schizophrenia spectrum, and who suffered from delusions and hallucinations—was already a long-time drug user. In the hours before the crime, he appeared "paranoid" and his actions were "abnormal." (PCR5 788). He looked disheveled and homeless. *Id*.

After the crime, Mr. Dillbeck stayed around the crime scene and even spent the night sitting in the water. In the morning, he emerged covered in seaweed (PCR5 805-07). He "looked like he had a break from reality" and that he "didn't seem to know what was going on." (PCR5 830). His arm was "limp like

a noodle" and the gun was just swinging around. *Id*. He was going around in circles and swaying back and forth before he finally walked into the ocean. He was not "goal oriented" and he did not appear as though he could focus. *Id*.

As to Mr. Dillbeck's 1979 plea colloquy, an assistant public defender has now pointed out a misrepresentation that was made during the plea by Mr. Dillbeck's trial attorney in an apparent effort to bolster the facial validity of the guilty plea (S-PCR 1162-65, 1168).

In light of the 2023 witness statements and Mr. Dillbeck's lifelong struggles with brain damage and mental illness, the case was evaluated by Dr. Crown and Dr. Toomer. Both doctors have each expressed grave concerns regarding Mr. Dillbeck's mental state at the time of the 1979 crime and at the time of his associated guilty plea, and concerns that Mr. Dillbeck was suffering from diminished capacity, if not insanity at the time of the crime, and that he was not competent to plead guilty (PCR5 774-86).

Based on this evidence which undermines the State's case related to the prior violent felony aggravating circumstance, Mr. Dillbeck raised two subclaims: First, that the newly discovered evidence would probably result in a lesser sentence at a new trial because the new evidence diminishes the aggravated nature of Mr. Dillbeck's prior felony conviction while bolstering the mitigation in this case; and second, Mr. Dillbeck's rights under the Eighth and

Fourteenth Amendments were violated because the newly discovered evidence establishes that the aggravator was invalid given that Mr. Dillbeck's capacity was diminished during the crime, he was insane at the time of the prior crime, and he was incompetent to stand trial when he pleaded guilty. *See Johnson v. Mississippi*, 486 U.S. 578 (1988).

Along with the successive 3.851 Motion, Mr. Dillbeck moved to stay his execution (PCR5 845-52). Mr. Dillbeck noted that staying the execution would allow him time to fully litigate the invalidity of his plea and conviction in the Lee County case through a motion for postconviction relief under Fla. R. Crim. P. 3.850 based on the substantial concerns regarding his capacity, sanity, and competency in that case.

The circuit court denied the claim (PCR5 1038-48). First, the circuit court found the newly discovered evidence to be untimely because the witnesses that formed the basis for the claim existed in 1979, and even though the police statements gave no indication that these witnesses could provide testimony regarding Mr. Dillbeck's bizarre behavior, the police statements only contained "omissions," which are not "falsities," and therefore Mr. Dillbeck was not diligent in pursuing these witnesses (PCR5 1040). The circuit court also denied each subclaim on the merits, noting that

Subclaim 1 was not yet cognizable because the prior conviction had not been invalidated. The circuit court also denied the motion to stay the execution.

A. The Circuit Court Erred in Finding the Claim Was Not Timely Raised

The circuit court erred in finding Mr. Dillbeck's claim was untimely. First, the circuit court found that the witnesses "have always been available to testify to the things they witnessed in 1979." (PCR5 1039). Despite the fact that the police reports detailing witness statements gave no indication of the content of their 2023 statements, the circuit court found that because the police reports contained "omissions," rather than "falsities," this Court's holding in *Waterhouse v. State*, 82 So. 3d 84 (Fla. 2012), was "clearly inapplicable to these facts." (PCR5 1040). Second, the circuit court noted that "Dillbeck was there in 1979 and knew all the facts he now relies on." *Id*. In making this finding, the circuit court misconstrued Mr. Dillbeck's argument as being that Mr. Dillbeck "could not remember what occurred in 1979[.]" (PCR5 1041-42).

The circuit court's finding that the claim was untimely because the police reports—which neither the State nor the circuit court argued would have given Mr. Dillbeck reason to talk to those witnesses—contained "omissions" rather than "falsities" was erroneous. The question is whether Mr. Dillbeck's counsel would have had reason to talk to each of the

witnesses. Because none of the 2023 information was contained in the reports, there was no reason to talk to the witnesses. *Waterhouse*, 82 So. 3d at 104 ("[R]equiring collateral counsel to verify every detail and contact every witness in a police report—even where the police report indicates that the witness has no useful information—would place an . . . onerous burden on collateral counsel, with little chance of discovering helpful or useful information."). Moreover, in making such a finding, the circuit court overlooked the fact that three of the five newly discovered witnesses—including Krieg, Haubert, and Carol Herbster—were not even interviewed by law enforcement in 1979, meaning their names were not contained in any 1979 report or document (PCR5 805, 807). "Due diligence" does not require a litigant "to exhaust every imaginable option, but rather to make reasonable efforts." *Aron v. United States*, 291 F.3d 708, 712 (11th Cir. 2002).

Second, the circuit court's findings that the claim was untimely because "Mr. Dillbeck was there" and the finding that Mr. Dillbeck cannot argue he does not remember the 1979 case misses the mark. As an initial matter, Mr. Dillbeck did not argue that he cannot remember the 1979 crime. His argument is that he was not previously aware of these newly discovered witnesses of his mental state at the time of the 1979 case. Likewise, the circuit court's finding that "Mr. Dillbeck was present" misconstrues his

argument. In 1979, Mr. Dillbeck was a mentally ill, brain damaged, schizotypal fifteen-year-old boy suffering from amphetamine withdrawal and brain damage—and he was suffering from diminished capacity, if not insanity, at the time of the crime and was not competent when he pleaded guilty.

Mr. Dillbeck was unaware, until the discovery in 2023 of the new witnesses, that there were third-party eyewitnesses who could document the bizarre behavior that sheds a light on his mental state at that time. In turn, the 2023 statements of these witnesses formed the previously unavailable findings of Dr. Crown and Dr. Toomer, who could not have made their conclusions regarding Mr. Dillbeck's mental state without the 2023 statements. Courts have previously found newly discovered evidence claims to be timely despite a defendant's ostensible "knowledge" when the defendant could not have previously raised the claim. *See*, *e.g.*, *Hunter v. State*, 29 So. 3d 256, 262-63 (Fla. 2008) ("While the court's observation may be correct in the sense that those specific facts were within Hunter's knowledge [including "the sequence of events at the crime scene"], the circuit court erred in finding that Hunter's entire claim failed to meet the first prong of *Jones*" because it was based on newly available statements); *Burns v. State*, 858 So. 2d 1229, 1230 (Fla. 1st DCA 2003) (finding that evidence could not have been obtained earlier with due diligence because "even though the appellant knew at trial that the

codefendant was lying, the appellant could not have gotten the codefendant to admit that he was lying earlier").

B. The Circuit Court Erred in Denying the Newly Discovered Evidence Subclaim

The circuit court erred in finding that the newly discovered evidence would not result in Mr. Dillbeck receiving a lesser sentence at a new trial. Had the new evidence of Mr. Dillbeck's impairments been presented at trial, less weight would have been applied to the aggravating circumstance of his prior violent felony. Taken together with the additional mitigating evidence of diminished capacity, insanity, and incompetency, it is likely that Mr. Dillbeck would have received a sentence less than death. *See Marek v. State*, 14 So. 3d 985, 990 (Fla. 2009); *cf*. *Andrus v. Texas*, 140 S. Ct. 1875, 1885 (2020) (innocence of prior conviction should have been presented in subsequent capital case even though the prior conviction was still valid); *Rompilla v. Beard*, 545 U.S. 374 (2005) (counsel has duty to use evidence undercutting the aggravating nature of a prior felony conviction).

In light of the newly discovered evidence, it is clear that Mr. Dillbeck did not commit premeditated first-degree murder in the 1979 shooting. As this Court recognized in his capital case, that Mr. Dillbeck suffers from fetal brain damage means that he has a valid defense of diminished capacity to first degree premeditated murder. *Dillbeck*, 643 So. 2d at 1029; *see also T.E.B. v. State*, 338

So. 3d 290, 293 (Fla. 4th DCA 2022) (noting that although diminished capacity is generally not a defense, there is a narrow exception for "commonly understood conditions that are beyond one's control").[16] As noted above, given that Mr. Dillbeck had minimal capacity in the best of times, in light of the newly discovered evidence of his bizarre behaviors and red flags, Dr. Crown and Dr. Toomer would be able to testify that the shooting occurred while Mr. Dillbeck suffered from diminished capacity (PCR5 774-86).

Even if the new evidence did not rise to the level of diminished capacity, newly discovered evidence creates a strong doubt that Mr. Dillbeck committed premeditated murder. *Green v. State*, 715 So. 2d 940, 944 (Fla. 1998). Instead, in light of the newly discovered evidence, the prior conviction resembles, at most, the kind of crime that has been found to be second degree murder or manslaughter. *See*, *e.g.*, *Coolen v. State*, 696 So. 2d 738, 741-42 (Fla. 1997); *Sandhaus v. State*, 200 So. 3d 112, 116 (Fla. 5th DCA 2016); *Poole v. State*, 30 So. 3d 696, 699 (Fla. 2d DCA 2010); *Gibbs v. State*, 904 So. 2d 432, 435 (Fla. 4th DCA 2005).

Moreover, this evidence also establishes a clear doubt that Mr. Dillbeck

[16] On direct appeal, this Court found error in not allowing Mr. Dillbeck to present a diminished capacity defense at the capital trial but found it harmless because he was found guilty of felony murder. *Dillbeck*, 643 So. 2d at 1029. In the 1979 case, Mr. Dillbeck was not convicted of felony murder, or even another felony.

was sane at the time of the 1979 crime. *See Patton v. State*, 878 So. 2d 368, 375 (Fla. 2004). In light of the new evidence discovered and advances in science and medicine, Mr. Dillbeck can show that there is a "serious doubt that he was able to understand the nature and quality of his actions or their consequences and there is a serious doubt that he was capable of distinguishing right from wrong at the time of the shooting." (PCR5 778).

The newly discovered evidence also casts strong doubt as to whether Mr. Dillbeck was competent during his 1979 guilty plea, which was made only about 60 days after the crime. *See Dusky v. United States*, 362 U.S. 402, 402 (1960). As noted above, both Dr. Crown and Dr. Toomer have grave doubts as to Mr. Dillbeck's competency at the time he pleaded guilty in the 1979 case (PCR5 776-78, 785-86). This is particularly important given the prosecution's reliance on the fact that Mr. Dillbeck pleaded guilty to committing premeditated murder, going as far as admitting the plea colloquy into evidence at the capital trial (R. 2190-91). Any weight the circuit court placed on the plea colloquy was erroneous. As the newly discovered evidence shows, it appears that inaccurate representations were made during the colloquy to bolster its validity (S-PCR 1162-65, 1168). And, as Dr. Crown has noted, it "appears that Mr. Dillbeck had been primed to say 'yes' during his plea colloquy" in a misguided attempt to get a sixteen-year-old out from under the death penalty (PCR5 777).

Although the sentencing judge found other aggravating circumstances, the prior felony aggravator was the predominant feature of the State's penalty-phase case. The State relied heavily upon both the existence of Mr. Dillbeck's prior conviction and the underlying facts. Newly discovered evidence has come to light establishing that Mr. Dillbeck was suffering from diminished capacity, if not insanity, at the time of the crime and was not competent when he pleaded guilty. Given that four jurors voted for life without this newly discovered evidence, and because it both lessens the aggravation and increases the mitigation in this case, Mr. Dillbeck would probably receive a less severe sentence at a new trial. *Cf*. *Porter v. McCollum*, 558 U.S. 30, 42 (2009) ("Had the judge and jury been able to place Porter's life history on the mitigating side of the scale, and appropriately reduced the ballast on the aggravating side of the scale, there is clearly a reasonable probability that the jury—and sentencing judge—would have struck a different balance[.]") (internal quotation omitted).

C. The Circuit Court Erred in Denying the Johnson Subclaim Without Giving Mr. Dillbeck the Opportunity to Invalidate the Prior Conviction

On January 23, 2023, the governor signed Mr. Dillbeck's death warrant, setting his execution date for only 31 days later. The new evidence was discovered and pleaded in the successive 3.851 motion below in the span of a week. Resultingly, Mr. Dillbeck sought a stay from the circuit court

so that he would have the opportunity to seek to have the prior conviction invalidated. The circuit court, however, denied the *Johnson* subclaim because Mr. Dillbeck's prior conviction has not been invalidated (PCR5 1042). The circuit court's finding may be correct as a matter of law, but the reason the prior conviction has not been invalidated is that Mr. Dillbeck has not had the opportunity to seek to have the conviction invalidated based on the 2023 newly discovered evidence.[17]

The circuit court's denial of this claim also rested on the adoption of the State's unfounded argument that a guilty plea can never be challenged (PCR5 1043-44) ("By entering a plea to First Degree Murder in 1979, Dillbeck waived his right to investigate the case and go to trial. Where a specific sentence is imposed pursuant to a plea agreement, that agreement cannot be circumvented."). A negotiated plea can contain provisions in which a defendant affirmatively agrees to waive certain rights, such as appeals and future challenges to the plea. But the State has pointed to none in this case

[17] In denying Mr. Dillbeck's stay motion, the circuit court essentially adopted verbatim the State's proposed order, which included the finding that Mr. Dillbeck should be denied the opportunity to litigate the newly discovered evidence in the Lee County case itself because the victim in that case, and his surviving family, have "an enormous interest" in Mr. Dillbeck's execution. *Compare* (PCR5 1050-51), *with* (PCR5 1062). Mr. Dillbeck submits that in light of the character of the newly discovered evidence and the stakes at issue, it is more than reasonable to impose a brief stay so that he can fully litigate his claim.

(because there were none), and therefore Mr. Dillbeck is not barred from challenging his conviction by the fact that he entered into a plea. *Long v. State*, 183 So. 3d 342, 346 (Fla. 2016).

In *Long*, this Court set forth the standard under which newly discovered evidence can lead to the vacatur of a guilty plea:

> [The] defendant must demonstrate a reasonable probability that, but for the newly discovered evidence, the defendant would not have pleaded guilty and would have insisted on going to trial. In determining whether a reasonable probability exists that the defendant would have insisted on going to trial, a court should consider the totality of the circumstances surrounding the plea, including such factors as whether a particular defense was likely to succeed at trial, the colloquy between the defendant and the trial court at the time of the plea, and the difference between the sentence imposed under the plea and the maximum possible sentence the defendant faced at a trial.

Id. at 346 (cleaned up). Here, in light of the evidence establishing Mr. Dillbeck's diminished capacity, insanity, and incompetency at the time of the plea, there is a reasonable probability he would go to trial because there is exceedingly strong evidence that he would be likely to succeed in, at the very least, being acquitted of premeditated first degree murder. Mr. Dillbeck should have the time and opportunity to litigate the newly discovered evidence through a Fla. R. Crim. P. 3.850 motion in the Lee County case itself.

Moreover, barring Mr. Dillbeck from invalidating the prior conviction was particularly prejudicial. *Johnson* claims are evaluated under the *Chapman* standard,[18] which means the State has the burden to prove the error was harmless beyond a reasonable doubt. *Armstrong v. State*, 862 So. 2d 705, 718 (Fla. 2003) ("Given the nature of the crime underlying the vacated conviction—a sexual offense upon a child—and the detailed testimony given by the young victim of that crime at Armstrong's penalty phase, we cannot say that the consideration of Armstrong's prior felony conviction of indecent assault and battery on a child of the age of fourteen constituted harmless error beyond a reasonable doubt."); *Rivera v. Dugger*, 629 So. 2d 105, 109 (Fla. 1993). The error was not harmless beyond a reasonable doubt and Mr. Dillbeck should be given the opportunity to seek to invalidate the prior conviction, which was obtained despite his diminished capacity, insanity, and incompetency.

D. Conclusion

Based on the newly discovered evidence calling Mr. Dillbeck's mental state at the time of the 1979 crime and conviction into question, this Court should remand the case for an evidentiary hearing on the newly discovered evidence claim. Alternatively, this Court should stay Mr. Dillbeck's execution

[18] *Chapman v. California*, 386 U.S. 18 (1967).

to provide him with an opportunity to invalidate the prior conviction in order to make the *Johnson* claim cognizable.

III. EXECUTING MR. DILLBECK AFTER A THREE-DECADE-LONG DELAY UNDER SOLITARY CONFINEMENT WOULD VIOLATE THE EIGHTH AMENDMENT.

Mr. Dillbeck's execution would violate the Cruel and Unusual Punishments Clause of the Eighth Amendment because of the unconstitutional "superaddition," *Bucklew v. Precythe*, 139 S. Ct. 1112, 1124 (2019), of three decades of delay under unjustly harsh, prolonged solitary confinement, including his last decade of languishing with no legal impediment to a warrant.

A. Relevant Background

Mr. Dillbeck was sentenced to death in 1991. His routine postconviction review ended twenty years later, upon the denial of federal habeas. *Dillbeck v. Tucker*, 565 U.S. 862 (2011) (denying certiorari). The Governor began clemency proceedings in 2012 and clemency investigations, by all appearances, ended after his 2013 committee interview and psychological evaluation. There stood no impediment to the setting of a warrant. To the contrary, in 2013 the Governor signed a directive for executions to be set within thirty days of the certified completion of federal review, absent a grant of clemency. *See* Fla. Stat. § 922.052(2).

Until last year's class-action settlement with the State, Mr. Dillbeck lived for three decades "in solitary confinement [under] severely harsh long-term conditions." *See Davis et al. v. Dixon*, 3:17-cv-820, ECF No. 72 at 29 (M.D. Fla. 2019) (noting allegations and denying motion to dismiss). Pursuant to FDC Rule 33-601.830(1), he was deprived "'basic human contact' in a confined space [to] 'languish alone in cramped, concrete, windowless cells, often for twenty-four hours a day, for years on end.'" *Id*. at 2-3 (noting the plausible allegations about conditions).[19]

B. Argument

Executing Mr. Dillbeck after needless and superadded delay violates the Cruel and Unusual Punishments Clause of the Eighth Amendment, as originally understood at the Founding.

As an initial point, Mr. Dillbeck's death sentence was augmented with prolonged solitary confinement in violation of the original understanding of the Cruel and Unusual Punishments clause. Professor John Stinneford, whose historical research the Supreme Court has embraced, explained that long-term isolation is prototypical "unusual" punishment—unheard of at the Founding, attempted but quickly aborted in the next century, and resurrected

[19] The settlement was reached after the federal court's conclusion that Florida's prolonged solitary confinement on death row stated a viable Eighth Amendment claim. *Id*. at 30.

only with Mr. Dillbeck's generation of prisoners. Stinneford, *Experimental Punishments*, 95 NOTRE DAME L. REV. 39, 65-66, 71-72 (2019); *see Bucklew*, 139 S. Ct. at 1123 (quoting Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739, 1745 (2008)).

A punishment is "unusual" if it has "long fallen out of use," *Bucklew*, 139 S. Ct. at 1123, or if it runs "contrary to longstanding usage or custom," *Edmo v. Corizon, Inc.*, 949 F.3d 489, 507 (9th Cir. 2020) (Bumatay, J., dissenting) (citing Stinneford, *Original Meaning, supra,* at 1770-71, 1814). Under this original understanding, "long-term" isolation such as Mr. Dillbeck's is a quintessentially "unusual" punishment: "[I]t never achieved universal reception" at any point, let alone "over a period of numerous generations," and had long been abandoned generations before Mr. Dillbeck's incarceration. Stinneford, *supra*, *Experimental Punishments*, at 45 & 77.[20]

[20] Prolonged solitary confinement was "little known prior to the experiment in Walnut-Street Penitentiary, in Philadelphia, in 1787." *In re Medley*, 134 U.S. 160, 167-68 (1890). But no inmate at Walnut Street spent anywhere close to a decade—let alone multiple decades—in solitary. Shapiro, *Solitary Confinement in the Young Republic*, 133 HARV. L. REV. 542, 567-68 (2019) (noting concerns for prisoners in solitary for sixteen months). After the Founding, only a few states tried to impose it. Stinneford, *Experimental Punishments, supra*, at 60-62. All but one gave up after a year or two because the effects were so grisly. *Id*.; *see Medley*, 134 U.S. at 168 (long-term solitary "was found to be too severe" by 1850 or 1860). By the time prolonged solitary was revived with Mr. Dillbeck's generation of prisoners, it

A punishment is "cruel" when it is "unjustly harsh," Stinneford, *The Original Meaning of 'Cruel'*, 105 GEO. L.J. 441, 463-66 (2017). This can be shown when it "superadd[s]" "terror, pain, or disgrace" to an otherwise-constitutional sentence. *Bucklew*, 139 S. Ct. at 1124. More than a century ago, the Supreme Court described four weeks of solitary confinement as adding such pain, terror, and disgrace to a death sentence. *See Medley*, 134 U.S. at 170. Befitting of *Bucklew*'s embrace of the Eighth Amendment right against superadded punishment, the Founding generation viewed solitary as "an additional punishment of such a severe kind that it is spoken of . . . as 'a further terror and peculiar mark of infamy' to be added to the punishment of death." *Id*. (discussing 25 George II, c. 37);[21] *see Davis v. Ayala*, 576 U.S.

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had thus "long fallen out of use." *Bucklew*, 139 S. Ct. at 1123; Stinneford, *Experimental Punishments, supra,* at 64-65; Terry Kupers, SOLITARY: THE INSIDE STORY OF SUPERMAX ISOLATION & HOW WE CAN ABOLISH IT 25 (2017). This fits the understanding of "unusual" at the Founding. Stinneford, *Original Meaning, supra,* at 1770-71 ("more than one hundred years" sufficient to qualify as "long disused").

[21] Prison administrators who experimented with the first solitary-confinement regime wrote that "the prospect of long solitary confinement . . . would, to many minds, prove more terrible than even an execution." A 1788 newspaper reported that condemned prisoners "considered solitude 'infinitely worse than the most agonizing death.'" Shapiro, *supra*, at 555 (quoting The Society, Established in Philadelphia, for Alleviating the Miseries of Public Prisons, EXTRACTS & REMARKS ON THE SUBJECT OF PUNISHMENT & REFORMATION OF CRIMINALS 4 (1790)); *id*. at 558-59 (noting that Duke of La Rochefoucauld in 1796 wrote of death as less cruel than "that most dreaded of all punishments, solitary confinement").

257, 287 (2015) (Kennedy, J., concurring) (noting the "recogni[tion] that, even for prisoners sentenced to death, solitary confinement bears a further terror and peculiar mark of infamy.").

The prolonged delay Mr. Dillbeck suffered in such conditions violates the Eighth Amendment. His execution—even after only his first two decades on death row, during normal review proceedings (1991-2011)—may be cruel and unusual punishment. *See Lackey v. Texas*, 514 U.S. 1045 (1995) (Stevens, J., respecting denial of certiorari) (a 17-year pre-execution delay likely violates the Eighth Amendment, in accordance with evolving-standards precedent, because it appears "totally without penological justification").

The Supreme Court has yet to examine the constitutionality of such extended pre-execution delays. *See, e.g.*, *Jordan v. Mississippi*, 138 S. Ct. 2567, 2568 (2018) (Breyer, J., dissenting) (collecting cases). As the circuit court notes, this Court has summarily rejected such challenges (PCR5 1050) (citing *Lambrix v. State*, 217 So. 3d 977, 988 (Fla. 2017) (citing cases and stating that the prisoner is responsible for delay by pursuing legal remedies); *see also Thompson v. Sec'y, Fla. Dep't of Corr.*, 517 F.3d 1279, 1283 (11th Cir. 2008) (noting an absence of favorable precedent and asserting an interest in "meticulous" enforcement of constitutional safeguards); *Buntion v. Lumpkin*, 982 F.3d 945, 953 (5th Cir. 2020) (similar).

But those challenges are distinct from Mr. Dillbeck's. They have not examined "the original and historical understanding of the Eighth Amendment"—a doctrinal basis the Supreme Court only recently endorsed in the 2019 *Bucklew* decision. *See* 139 S. Ct. at 122; *cf. United States v. Jones*, 565 U.S. 400, 407 n.3 (2012) (reaffirming the original meaning of "Search" as another doctrinal basis for a Fourth Amendment claim to the existing expectation-of-privacy precedent).

Nor have those prior challenges honed in on the *particularly inexplicable* delay as there is here: an added decade of warrant-eligibility, under grueling confinement, after the conclusion of federal habeas review when new litigation could not stall an execution warrant. *See* Fla. Stat. § 922.052 (2013); *cf. Calderon v. Thompson,* 523 U.S. 538, 556 (1998) (noting the expectation that a state will promptly schedule an execution after receipt of the "mandate denying federal habeas relief" in a capital case).

Apart from Justice Stevens's reasoning in *Lackey*, Mr. Dillbeck's subjugation to needless pre-execution delay violates the originally understood Cruel and Unusual Punishments clause. *See generally* Leon, Bucklew v. Precythe'*s Return to the Original Meaning of "Unusual": Prohibiting Extensive Delays on Death Row*, 68 CLEV. ST. L. REV. 485 (2020). Although "[t]he Constitution allows capital punishment," the Eighth

Amendment forbids "punishments in which 'terror, pain, or disgrace [were] superadded' to the penalty of death." *Bucklew*, 139 S. Ct. at 1122-23 (quoting 4 W. Blackstone, Commentaries on the Laws of England 370 (1769)).

Consistent with the "'long usage' in Anglo-American law" principle endorsed in *Bucklew*, pre-execution delays violate the Eighth Amendment. *See Leon*, *supra*, at 506 (concluding that the modern prisoners' "time awaiting execution on death row [compared to] eighteenth-century prisoners (186 months instead of 9.4 months)" is "punishment" and is contrary to "long usage"). The framers "employed Beccaria's immediate-punishment principle when drafting legislation and conducting judicial proceedings in the capital punishment context." *Id*. at 494-96. His influential views opposed sovereign-induced delays to "spare[] the criminal the cruel and superfluous torment of uncertainty" and "suggested that it is ruthless to force a prisoner to endure extended and 'painful anxiety.'" *Id*. at 494 (quoting Beccaria, AN ESSAY ON CRIMES AND PUNISHMENTS WITH A COMMENTARY ATTRIBUTED TO M. DE VOLTAIRE 75 (1778)).[22] "[C]ontemporary delays—under *Bucklew v.*

[22] Beccaria particularly influenced Blackstone's commentaries, which were foundational to Justice Gorsuch's endorsement of the "superadd[ition]" principle. *See* Bessler, *A Century in the Making: The Glorious Revolution, the American Revolution, and the Origins of the U.S. Constitution's Eighth Amendment*, 27 WM. & MARY BILL RTS. J. 989, 1069 & n.513 (2019); *Bucklew*, 139 S. Ct. at 1122-23 (quoting Blackstone, *supra*, at 370).

Precythe's apparent adoption of Stinneford's interpretation—are 'unusual' under the Eighth Amendment because such delays did not enjoy long usage in the eighteenth-century common law." *Id*. at 514. Such delays, especially under the "unjustly harsh" conditions Mr. Dillbeck had to bear are plainly "cruel" too. *See "Waiting on Death": Nathan Dunlap and the Cruel Effect of Uncertainty,* 106 GEO L.J. 871 (2018) (concluding that such delays are "cruel" as Stinneford defines the term).

In adopting the State's flawed reasoning in its Order, the circuit court also suggests that Mr. Dillbeck bore responsibility for the delay in his case because he "exercise[ed] his appellate rights" and relies on Justice Thomas' concurrence in a decade old denial of certiorari (PCR5 1050) (citing *Johnson v. Bredesen*, 558 U.S. 1067 (2009) (Thomas, J., concurring) (arguing that seeking postconviction review vitiates concerns about delay)).

However, contrary to the circuit court's order, Mr. Dillbeck's pursuit of postconviction relief does not undermine the Eighth Amendment claim. A significant part of the confinement during Mr. Dillbeck's pursuit of routine postconviction and habeas review (1991-2011) is attributable to the State, not to him. "The complexity of the capital punishment system, combined with a lack of resources, often pushes the appeals process from a few years to a few decades." Leon*, supra*, at 507. Mr. Dillbeck's case was exemplary of the

systemic problems, as it required delay pending reorganization of Florida's postconviction representation system. *See In re Amend. to Fla. Rules of Crim. P. – R. 3.852*, 700 So. 2d 680 (Fla. 1997) (listing Mr. Dillbeck's case as one of many needing additional delay due to systemic shortcomings). And after 2011—upon completion of the initial review—no successive motions could have stalled an execution warrant and further prolonged his solitary confinement.[23]

Furthermore, the circuit court's reliance on Justice Thomas' comment in his 2009 concurrence in *Johnson* overlooks the longstanding understanding that "[t]he denial of a writ of certiorari imports no expression of opinion upon the merits of the case," *United States v. Carver*, 260 U.S. 482, 490 (1923), and much less so the concurrence to the denial of a writ of certiorari.

[23] Likewise, the circuit court overlooked the fact that litigation after the end of federal habeas review does not delay an execution warrant. Fla. Stat. § 922.052(2); *Abdool v. Bondi*, 141 So. 3d 529, 538 (Fla. 2014). Indeed, the Governor's last two warrants were signed on inmates (James Dailey and Gary Bowles) with ongoing litigation. On the other hand, this Court has affirmed many Rule 3.851(i) postconviction waivers, yet only one "volunteer" defendant has been executed since 2005 in Florida. *See* NAACP-LDF, "Death Row U.S.A." at 8-38 (Spring 2022) (listing ten modern-era Florida executions of prisoners who "gave up their appeals").

Contrary to the circuit court's determination, this Court should vacate Mr. Dillbeck's sentence to prevent an unconstitutional execution superadded with lengthy delay.

CONCLUSION

Based upon his arguments, Mr. Dillbeck respectfully requests that this Court remand his case for an evidentiary hearing, vacate his sentence of death, and/or grant a stay of execution so that he can litigate his *Johnson v. Mississippi* claim in an effective manner.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing pleading has been furnished by electronic service to all counsel of record on this 10th day of February 2023.

CERTIFICATION OF TYPE SIZE AND STYLE

This is to certify that the Initial Brief of Appellant has been reproduced in a 14-point Ariel type, a font that is not proportionately spaced.

/s/ Linda McDermott
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