In the Supreme Court of Florida

EXECUTION SCHEDULED FOR
FEBRUARY 23, 2023, at 6:00 p.m.

DONALD DAVID DILLBECK,
Appellant,

v.

CASE NO.: SC23-190
ACTIVE WARRANT CAPITAL CASE

STATE OF FLORIDA,
Appellee.
_____/

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

ANSWER BRIEF

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PRELIMINARY STATEMENT

The record on appeal will be referred to as "2023 4th Succ. PCR" followed by the appropriate page number. Appellant, DONALD DAVID DILLBECK, the defendant in the trial court, will be referred to as appellant, the defendant, or by his proper name. The initials "IB" refers to the initial brief, followed by the appropriate page number. All double underlined emphasis is supplied.

STATEMENT REGARDING ORAL ARGUMENT

This Court typically does not conduct an oral argument in successive postconviction appeals and certainly should not do so in this case which raises issues that are variously not cognizable at all, untimely, conclusively rebutted by the existing record, or meritless as a matter of law under controlling precedent.

STATEMENT OF THE FACTS AND PROCEDURAL HISTORY

This is an appeal of a summary denial of a fourth successive postconviction motion in a capital case with an active warrant.

Facts of the crimes

In March of 1979, in Indiana, Dillbeck broke into a Chevolet Blazer parked in a driveway to steal the CB radio. (T. XV 2275, T. XVI 2574). When the owner of the Blazer, Mr. Reeder, came out of his house and attempted to stop Dillbeck, Dillbeck stabbed the victim in the heart. (T. XVI 2581). Knowing that the police were looking for him, Dillbeck stole a car and fled to Florida. (T. XV 2276). On April 11, 1979, in a park in Ft. Myers Beach, Lee County Deputy Sheriff Hall approached Dillbeck, who was sitting in the stolen car. When the deputy attempted to search Dillbeck, Dillbeck hit the deputy and ran away. (T. XV 2276-78). The deputy pursued and tackled Dillbeck. During the struggle, Dillbeck stole the deputy's gun and shot the deputy twice — once in the face and once in the back — killing the deputy with his own gun. (T. XV 2278, 2195). Dillbeck, who was 15 years old at the

time of the murder, entered a plea to the first-degree murder of the deputy and, on June 6, 1979, was sentenced to life with parole. (T.XIV 2190-91, 2188).

Over a decade later, on June 22, 1990, Dillbeck was on a prison work-detail catering an event in Quincy, Florida. He fled and walked for two days to Tallahassee, Florida. Once in Tallahassee, on June 24, 1990, Dillbeck bought a paring knife at Publix on his way to the Tallahassee Mall. (T. XIII 1989-1990). Dillbeck had forgotten how to drive during the years he spent in prison, so, he intended to steal a car at the Mall and to kidnap the owner of the car at knife point to force the owner to drive him to Orlando to further his escape. (T. XIII1991). Dillbeck knew a former prison inmate who had moved near Orlando after being released from prison. *Dillbeck v. State*, 643 So.2d 1027, 1030, n.5 (Fla. 1994). Dillbeck approached the victim, Faye Vann, who was sitting in her late model car, while her children were shopping because she looked like an easy victim, according to Dillbeck's own trial testimony. (T. XIII 2001). When she refused to drive, pulled his hair, bit his hand, and honked the horn of her car,

Dillbeck stabbed her repeatedly with the knife. Dillbeck stabbed her 20 or 25 times. (T. XIII 1991-92). Dillbeck stabbing her resulted in her suffering a severed windpipe causing the victim to actually drown in her own blood. The mall's security guards then chased him. The police caught Dillbeck shortly thereafter a mile or two from the Mall, across Monroe Street. Dillbeck's fingerprint in the victim's blood was found on the inside of the victim's car on the driver's side window. (T. XII 1865, 1869).

Procedural history of the current warrant litigation

After the public records litigation, on Monday, January 30, 2023, Dillbeck, represented by state postconviction counsel Baya Harrison III and the Capital Habeas Unit of the Office of the Public Defender of the Northern District of Florida (CHU-N), filed a fourth successive postconviction motion in the postconviction court raising four claims. (2023 4th Succ. PCR at 326-351). The four claims were: (1) a claim of newly discovered evidence of a diagnosis of Neurodevelopmental Disorder associated with Prenatal Alcohol Exposure (ND-PAE),

asserting that this new diagnosis is the functional equivalent of intellectual disability which, under the reasoning of *Atkins v. Virginia*, 536 U.S. 304 (2002), prohibits his execution; (2) a claim of newly discovered evidence of Dillbeck's mental condition in 1979, at the time of murder of Deputy Hall, which was used in the capital case to establish the prior violent felony aggravating factor; (3) a claim that his due process rights regarding clemency proceedings were violated when he was denied the opportunity to supplement his presentation during the clemency update; and (4) a claim that his three decades spent on death row violate the Eighth Amendment prohibition on cruel and unusual punishment. On the same day, January 30, 2023, Dillbeck also filed a motion for a stay of execution. (2023 4th Succ. PCR at 845-52).

On January 31, 2023, the State filed its answer to the fourth successive postconviction motion asserting that all four claims should be summarily denied. (2023 4th Succ. PCR at 905-76). Regarding claim 1, the State asserted any claim related to the diagnosis of ND-PAE was procedurally barred by the law-of-the-case doctrine

citing *Dillbeck v. State*, 304 So.3d 286 (Fla. 2020), as well as untimely for the same reason given by the Florida Supreme Court in *Dillbeck*. As a straight *Atkins* claim, the claim was untimely, conclusively rebutted by the record, and meritless. Regarding claim 2, the State asserted that the claim was untimely and not even cognizable. Regarding claims 3 and 4, the State asserted that both claims were meritess as a matter of law under controlling Florida Supreme Court precedent. The State asserted that none of the four claims warranted an evidentiary hearing. On February 1, 2023, the State filed a response to the motion for a stay of the execution. (2023 4th Succ. PCR at 977-89).

On February 1, 2023, the postconviction court conducted a case management conference, commonly referred to as a *Huff* hearing, at which the court hearing the arguments of counsel regarding if any of the four claims required further factual development at an evidentiary hearing.

On February 2, 2023, the postcionviction court entered an order summarily denying the fourth successive postconviction motion. (2023 4th Succ. PCR at 1031-52).

This appeal follows.

SUMMARY OF THE ARGUMENT

ISSUE I

Dillbeck raises an Eighth Amendment claim based on *Atkins v. Virginia*, 536 U.S. 304 (2002), supported by a diagnosis of Neurodevelopmental Disorder associated with Prenatal Alcohol Exposure (ND-PAE). IB at 27. *Atkins*, however, is limited to claims of intellectual disability. Florida courts are prohibited from expanding *Atkins* to include other mental conditions, under the State constitution's conformity clause regarding Eighth Amendment claims. Furthermore, this Court has repeatedly and consistently refused to expand *Atkins* to other types of mental illnesses. Therefore, Dillbeck may not rely on a diagnosis of ND-PAE to support his *Atkins* claim. Any claim of intellectual disability is untimely, conclusively rebutted by the existing record by his own expert's testimony at the penalty phase. The *Atkins* claim is meritless under the text of the intellectual disability statute and this Court's precedent. Dillbeck fails both the first prong of significantly subaverage intellectual functioning and the third prong of onset as a minor of Florida's statutory test for

intellectual disability. The postconviction court properly summarily denied the *Atkins* claim.

ISSUE II

Dillbeck asserts two subclaims regarding the prior violent felony aggravating factor: (1) a claim based on *Johnson v. Mississippi*, 486 U.S. 578 (1988), and (2) a claim of newly discovered evidence regarding witnesses to Dillbeck's mental state at the time of the 1979 murder. Dillbeck's prior conviction for the 1979 first-degree murder of Deputy Hall, which he entered a negotiated guilty plea to avoid the death penalty, was used to establish the prior violent felony aggravating factor in this capital case. The *Johnson v. Mississippi* claim is not cognizable under this Court's precedent because the prior murder conviction has not actually been vacated. Furthermore, even if the prior conviction was vacated at some future date, the death sentence in this case would remain valid. As the postconviction counsel properly determined, following the reasoning of *McKinney v. Arizona*, 140 S.Ct. 702 (2020), the four remaining aggravators, including the

heinous, atrocious, and cruel (HAC) aggravator, make a death sentence the appropriate punishment, regardless of the prior violent felony aggravator.

Dillbeck also raises a subclaim of newly discovered evidence regarding his mental state in 1979 at the time of the murder of Deputy Hall based on recent affidavits from witnesses, many of whom were known in 1979. He seeks to mitigate the weight that would be given to the prior violent felony aggravator with testimony about his odd behavior around the time of his murder of Deputy Hall. The claim of newly discovered evidence of mitigation of the prior violent felony aggravator is both untimely and meritless. None of Dillbeck's counsel over the years, including the CHU-N, were diligent in seeking out these witnesses at any time over the last three decades. Even if these witnesses had been presented at the 1991 penalty phase, their testimony would not have mitigated the weight of the prior violent felony aggravating factor to the point that it would have resulted in a life sentence instead of a death sentence. The postconviction court properly summarily denied this claim.

ISSUE III

Dillbeck asserts a claim that his over thirty-one years on death row, coupled with "solitary confinement" on Florida's death row, violates the Eighth Amendment and precludes his execution. Such claims are often referred to as *Lackey* claims because they stem from a dissenting opinion from the denial of certiorari in *Lackey v. Texas*, 514 U.S. 1045 (1995). There is, however, no support in the law for such a claim. Neither the United States Supreme Court nor this Court has ever granted relief on a *Lackey* claim. Moreover, delays in executions are not at all "unusual" as required by the text of the Eighth Amendment. As this Court has observed, the source of much of the delay in executions is capital defendants availing themselves of the numerous opportunities to challenge their convictions and sentence by appeals, successive postconviction motions, as well as federal habeas review. So, the delays are often attributable to the capital defendant's own actions. The postconviction court properly summarily denied the *Lackey* claim as meritless as a matter of law.

For all these reasons, the postconviction court properly summarily denied the fourth successive postconviction motion.

ARGUMENT

ISSUE I

WHETHER THE POSTCONVICTION COURT PROPERLY SUMMARILY DENIED THE EIGHTH AMENDMENT CLAIM SEEKING TO EXPAND *ATKINS V. VIRGINIA*, 536 U.S. 304 (2002), TO INCLUDE OTHER MENTAL CONDITIONS, WHICH, AS A CLAIM OF INTELLECTUAL DISABILITY, IS CONCLUSIVELY REBUTTED BY THE RECORD, UNTIMELY, AND MERITLESS? (Restated)

Dillbeck raises an Eighth Amendment claim based on *Atkins v. Virginia*, 536 U.S. 304 (2002), supported by a diagnosis of Neurodevelopmental Disorder associated with Prenatal Alcohol Exposure (ND-PAE). IB at 27. *Atkins*, however, is limited to claims of intellectual disability. Florida courts are prohibited from expanding *Atkins* to include other mental conditions, under the State constitution's conformity clause regarding Eighth Amendment claims. Furthermore, this Court has repeatedly and consistently refused to expand *Atkins* to other types of mental illnesses. Therefore, Dillbeck may not rely on a diagnosis of ND-PAE to support his *Atkins* claim. Any claim of intellectual disability is untimely, conclusively rebutted by the existing record by his own expert's testimony at the penalty

phase. The *Atkins* claim is meritless under the text of the intellectual disability statute and this Court's precedent. Dillbeck fails both the first prong of significantly subaverage intellectual functioning and the third prong of onset as a minor of Florida's statutory test for intellectual disability. The postconviction court properly summarily denied the *Atkins* claim.

Standard of review[1]

The standard of review of a summary denial of a successive postconviction motion is *de novo*. *Bogle v. State*, 322 So.3d 44, 46 (Fla. 2021) (stating this Court reviews the postconviction court's decision to summarily deny a successive postconviction motion *de novo* citing *Duckett v. State*, 231 So.3d 393, 398 (Fla. 2017)); *Sweet v. State*, 293 So.3d 448, 451 (Fla. 2020) (citing *Long v. State*, 183 So.3d 342, 344 (Fla. 2016)), *cert. denied*, *Sweet v. Florida*, 141 S.Ct. 909 (2020).

[1] Because the postconviction court summarily denied all four claims, the same standard of review governs all the claims. So, in the interest of brevity, the State will not repeat the same standard of review for each issue.

The postconviction court's ruling

The state postconviction court summarily denied the *Atkins* claim. (2023 4th Succ. PCR at 1034-37). The lower court invoked the law-of-the-case doctrine noting that both the trial court and this Court had previously dismissed a claim of newly discovered evidence regarding the diagnosis of Neurodevelopmental Disorder associated with Prenatal Alcohol Exposure (ND-PAE), to be untimely. *Id.* at 1035 citing *Dillbeck v. State*, 304 So.3d 286, 288 (Fla. 2020). The postconviction court again found the claim to be untimely because it was not filed in 2014. *Id.* at 1035. The postconviction court also concluded that Dillbeck was "procedurally barred from re-litigation of his claim regarding ND-PAE." *Id.* at 1036.

The postconviction court declined "to expand *Atkins* to include other mental conditions, such as ND-PAE." *Id.* at 1036. The postconviction court noted that, under the state constitutional conformity clause regarding the Eighth Amendment, it was "required to follow United States Supreme Court Eighth Amendment jurisprudence and may not expand those holdings." *Id.* at 1036 citing

Fla. Const. art. 1, § 17. The lower court explained that when the United States Supreme Court establishes a categorical rule, expanding the category violates that rule. *Id.* at 1036 citing *Kearse v. Sec'y, Fla. Dep't of Corr.*, 2022 WL 3661526, at *26 (11th Cir. Aug. 25, 2022), and *Barwick v. Sec'y, Fla. Dep't of Corr.*, 794 F.3d 1239, 1257-59 (11th Cir. 2015). The court observed that the Florida Supreme Court has repeatedly refused to expand *Atkins* to other types of mental conditions and illness. *Id.* at 1037 citing *Gordon v. State*, 350 So.3d 25, 37 (Fla. 2022). The postconviction court ruled that "*Atkins* is limited to claims of intellectual disability and therefore the evidence of ND-PAE will not be considered." *Id.* at 1037.

The postconviction court found the *Atkins* claim to be untimely because, under Florida Rule of Criminal Procedure 3.203, any *Atkins* claim had to be raised in 2004, but was being raised for the first time in 2023. *Id.* at 1037 citing *Bowles v. State*, 276 So.3d 791, 793-94 (Fla. 2019) (citing *Harvey v. State*, 260 So.3d 906, 907 (Fla. 2018), *Blanco v. State*, 249 So.3d 536, 537 (Fla. 2018), and *Rodriguez v. State*, 250 So.3d

616 (Fla. 2016)). The lower court found the claim was being raised nearly two decades too late. *Id.* at 1037.

Alternatively, the postconviction court found the *Atkins* claim as a claim of intellectual disability to be meritless. *Id.* at 1037. The postconviction court found that "the record establishes that Dillbeck has normal intellectual functioning," noting that one of his own mental health experts, Dr. Berland, testified that Dillbeck's IQ score on the WAIS test was 98 to 100, which is average. *Id.* at 1037.

The postconviction court concluded that the claim of intellectual disability was untimely and "conclusively rebutted on the merits by the existing record." *Id.* at 1037.

Summary denials of successive postconviction claims

A court may summarily deny a postconviction claim that is conclusively rebutted by the existing record. Fla. R. Crim. P. 3.851(f)(5)(B). It is also proper for a postconviction court to summarily deny postconviction claims that are not cognizable, not retroactive, procedurally barred, untimely, or meritless under controlling

precedent. *Valentine v. State*, 339 So.3d 311, 313 (Fla. 2022) (stating a postconviction court may summarily deny a claim that is legally insufficient or refuted by the record citing *McDonald v. State*, 296 So.3d 382, 383 n.2 (Fla. 2020)), *cert. denied*, *Valentine v. Florida*, 143 S.Ct. 378 (2022); *Bogle v. State*, 288 So.3d 1065, 1069 (Fla. 2019) (affirming the summary denial of a successive postconviction claim on non-retroactivity grounds), *cert. denied*, *Bogle v. Florida*, 141 S.Ct. 389 (2020); *Morris v. State*, 317 So.3d 1054, 1071 (Fla. 2021) (stating a court may summarily deny a postconviction claim that is procedurally barred citing *Matthews v. State*, 288 So.3d 1050, 1060 (Fla. 2019)); *Rodgers v. State*, 288 So.3d 1038, 1039 (Fla. 2019) (affirming a summary denial of a successive postconviction claim as untimely), *cert. denied*, *Rodgers v. Florida*, 141 S.Ct. 398 (2020); *Dailey v. State*, 329 So.3d 1280, 1287 (Fla. 2021) (affirming the summarily denial of a successive postconviction claim as untimely), *cert. denied*, *Dailey v. Florida*, 143 S.Ct. 272 (2022); *Mann v. State*, 112 So.3d 1158, 1162 (Fla. 2013) (noting because the claims were purely legal claims that have

been previously rejected by this Court, the circuit court properly summarily denied relief).

The *Atkins* claim, as a claim of intellectual disability, is untimely, conclusively rebutted by the existing record, as well as meritless under the statute and this Court's precedent. Fla. R. Crim. P. 3.851(f)(5)(B) (providing that postconviction claims that are conclusively rebutted by the record may be summarily denied); *Rodgers*, 288 So.3d at 1039 (stating that postconviction claims that are untimely may be summarily denied); *Dailey*, 329 So.3d at 1287 (same); *Mann*, 112 So.3d at 1162 (stating that postconviction claims that are meritless as a matter of law under this Court's precedent may be summarily denied). Therefore, the postconviction court properly summarily denied the *Atkins* claim.

Untimely

As the postconviction court found, the *Atkins* claim, as a claim of intellectual disability, is untimely. Fla. R. Crim. P. 3.203. Under the text of the rule of court governing intellectual disability as a bar to the

death penalty, rule 3.203, as it existed at the time, Dillbeck was required to raise any claim of intellectual disability by Tuesday, November 30, 2004. *Amendments to Fla. Rules of Criminal Procedure & Fla. Rules of Appellate Procedure*, 875 So.2d 563 (Fla. 2004). But Dillbeck did not raise this claim until 2023 and on the eve of the execution. The claim is being raised nearly 20 years late.

This Court has rejected claims of intellectual disability as being untimely because they were not timely filed, as required by rule 3.203, including in warrant cases. *Bowles v. State*, 276 So.3d 791, 793-94 (Fla. 2019) (denying a claim of intellectual disability in an active warrant case citing *Harvey v. State*, 260 So.3d 906, 907 (Fla. 2018), *Blanco v. State*, 249 So.3d 536, 537 (Fla. 2018), and *Rodriguez v. State*, 250 So.3d 616 (Fla. 2016)). The *Atkins* claim, as a claim of intellectual disability, is untimely.

Conclusively rebutted by the existing record

The *Atkins* claim, as a claim of intellectual disability, is conclusively rebutted by the existing record. Fla. R. Crim. P. 3.851(f)(5)(B). At the

penalty phase, the defense presented Dr. Berland, a board certified forensic pathologist, to testify. (T. XV 2336). Dr. Berland testified that he administered the WAIS IQ test to Dillbeck. (T. XV 2406, 2345). Dr. Berland testified that Dillbeck's IQ was 98 to 100, which is average. (T. XV 2406).

Moreover, there are additional IQ scores in the state court records as well as the 98-100 score from the penalty phase. Dillbeck's IQ scores includes a score of 100 and a score of 93, as a minor.[2] And, a recent IQ score from April of 2019, on the WAIS-IV, given when Dillbeck was approximately 57 years-old, was 99.[3] The *Atkins* claim,

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[2] Dr. Faye E. Sultan of Northpoint Psychological Associates in Davidson, North Carolina, who is a psychologist, wrote a report, dated May 1, 2019, as part of the third successive postconviction litigation in state court. Dr. Sultan, using school records from Anderson Public School System in Indiana, noted that Dillbeck's full scale IQ was 100. (ROA 3rd Succ. PC appeal in the Florida Supreme Court, No. 20-178, Att. C at 8). And, a Florida Department of Correction's psychological evaluation dated June 13, 1979, referred to in the attachments in the third successive postconviction motion, listed Dillbeck's IQ as 93. (ROA 3rd Succ. PC appeal in the Florida Supreme Court, No. 20-178, Att. C at 3).

[3] Dr. Paul Connor was consulted by another defense expert as part of the third successive postconviction litigation in state court. Dr. Paul Connor's report showed Dillbeck's full scale IQ on a WAIS-IV test, given in April of 2019, to be 99. (ROA 3rd Succ. PC appeal in the

as a claim of intellectual disability, is conclusively rebutted by the existing record.

Merits

A diagnosis of ND-PAE is not the functional equivalent of intellectual disability, and therefore, *Atkins v. Virginia*, 536 U.S. 304 (2002), does not apply. The *Atkins* claim, as a claim of intellectual disability, is meritless. Dillbeck's various IQ scores over the years establish he has perfectly normal intellectual functioning. Dillbeck is not intellectually disabled.

The state constitution's conformity clause

Dillbeck seeks to expand *Atkins* to include other types of mental diagnoses, such as ND-PAE. But the state constitutional conformity clause precludes such a course. Fla. Const. art. 1, § 17. This Court must follow *Atkins*, not play a variation of it. *Lawrence v. State*, 308 So.3d 544 548 (Fla. 2020) (discussing the Florida's conformity clause

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Florida Supreme Court, No. 20-178, App. B at 70-75).

regarding the Eighth Amendment); *see also Dorsey v. State*, 315 So.3d 18, 19 (Fla. 4th DCA 2021) (refusing to expand the holdings of *Graham v. Florida*, 560 U.S. 48 (2010), and *Miller v. Alabama*, 567 U.S. 460 (2012), from 17 year-olds to 21 year-olds citing Florida's state conformity clause). When the United States Supreme Court establishes a categorical rule, expanding the category violates that rule. *Kearse v. Sec'y, Fla. Dep't of Corr.*, 2022 WL 3661526, at *26 (11th Cir. Aug. 25, 2022) (citing *Barwick v. Sec'y, Fla. Dep't of Corr.*, 794 F.3d

1239, 1257-59 (11th Cir. 2015)).[14] A Florida court may not expand *Atkins* beyond intellectual disability under the state constitution.

This Court's precedent refusing to expand *Atkins*

This Court has repeatedly rejected attempts to expand *Atkins* over the years. This Court, starting in 2007, and as recently as 2022, has refused to consider *Atkins* claims based on any other mental condition. *Lawrence v. State*, 969 So.2d 294, 300 n.9 (Fla. 2007) (rejecting an

[14] There is an analogy between the Florida's conformity clause and the Antiterrorism and Effective Death Penalty Act (AEDPA). Federal habeas courts are limited to applying Supreme Court precedent under the statute. 28 U.S.C. § 2254(d)(1). The federal circuit courts may not create new law or rely on their own circuit precedent to grant relief in habeas cases. *Parker v. Matthews*, 567 U.S. 37, 48 (2012) (noting that circuit precedent does not constitute "clearly established Federal law, as determined by the Supreme Court" under the statute); *Glebe v. Frost*, 574 U.S. 21, 24 (2014); *Lucas v. Warden, Ga. Diagnostic & Classification Prison*, 771 F.3d 785, 805, n.5 (11th Cir. 2014) (refusing to consider the Eleventh Circuit's own precedents and those of other circuits in the analysis because § 2254(d) "forbids this practice"). And the lower federal courts are also limited to the actual holdings of United States Supreme Court caselaw under the AEDPA. *Gavin v. Comm'r, Ala. Dep't of Corr.*, 40 F.4th 1247, 1262 (11th Cir. 2022) (explaining that the phrase "clearly established Federal law" in the statute means "the holdings, as opposed to the dicta" of the Supreme Court citing *Williams v. Taylor*, 529 U.S. 362, 412 (2000)).

argument that *Atkins* should be expanded to include mental illness); *Gordon v. State*, 350 So.3d 25, 37 (Fla. 2022) (rejecting an argument that *Atkins* should be expanded to include schizoaffective disorder and PTSD from severe childhood abuse citing *McCoy v. State*, 132 So.3d 756, 775 (Fla. 2013)).[15] Under this Court's unbroken precedent, *Atkins* is limited to claims of intellectual disability. Dillbeck's *Atkins* claim based on ND-PAE is not a valid Eighth Amendment claim.

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[15] *Newberry v. State*, 288 So.3d 1040, 1050 (Fla. 2019) (rejecting an argument that *Atkins* should be expanded to include other intellectual impairments); *Muhammad v. State*, 132 So.3d 176, 207 & n.21 (Fla. 2013) (rejecting an argument that *Atkins* should be expanded to include schizophrenia and paranoia); *Carroll v. State*, 114 So.3d 883, 886-87 (Fla. 2013) (rejecting an argument that *Atkins* should be expanded to include severe brain damage and mental limitations); *Simmons v. State*, 105 So.3d 475, 510-11 (Fla. 2012) (rejecting an argument that *Atkins* should be expanded to include mental illness and neuropsychological deficits); *Johnston v. State*, 27 So.3d 11, 26-27 (Fla. 2010) (rejecting an argument that *Atkins* should be expanded to include traumatic brain injury); *Connor v. State*, 979 So.2d 852, 867 (Fla. 2007) (rejecting an argument that *Atkins* should be expanded to include paranoid schizophrenia, organic brain damage, and frontal lobe damage).

Not intellectually disabled

Any claim of intellectual disability is meritless. Dillbeck is not intellectually disabled. The existing record establishes that Dillbeck has normal intellectual functioning.

Again, at the penalty phase, the defense presented Dr. Berland, a board certified forensic pathologist, to testify. (T. XV 2336). Dr. Berland testified that Dillbeck's IQ was 98 to 100, which is average. (T. XV 2406). The additional IQ scores in the state court records include an IQ score of 100 and a IQ score of 93, when Dillbeck was a minor. And, a recent IQ score from when Dillbeck was middle-aged was an IQ score of 99. Dillbeck's intellectual functioning, from his childhood to middle age, has repeatedly and consistently been established to be perfectly normal.

Dillbeck necessarily fails both the first prong of significantly subaverage intellectual functioning and the third prong of onset as a minor under Florida's statutory test for intellectual disability. § 921.137(1), Fla. Stat. (2022); Fla. R. Crim. P. 3.203(b); *Atkins*, 536 U.S. at 308 n.3 (reciting the definition of intellectual disability in the American Psychiatric Association's Diagnostic and Statistical Manual

of Mental Disorders (DSM-IV), published in 2000, as being characterized by significantly subaverage general intellectual functioning, accompanied by significant limitations in adaptive functioning, and onset of the condition must occur before age 18 years). As this Court has repeatedly held, the failure on any one prong of the three prongs of the statutory test for intellectual disability means the claim of intellectual disability fails. *Haliburton v. State*, 331 So.3d 640, 646 (Fla. 2021) (stating that if the defendant fails to prove any one of the three components of the statutory test for intellectual disability, the defendant will not be found to be intellectually disabled), *cert. denied*, *Haliburton v. Florida*, 143 S.Ct. 231 (2022) (No. 22-5093); *Nixon v. State*, 327 So.3d 780, 782 (Fla. 2021) (quoting *Haliburton v. State*, 331 So.3d 640, 646 (Fla. 2021)), *cert. denied*, *Nixon v. Florida*, 142 S.Ct. 2836 (2022) (No. 21-1173); *see also Raulerson v. Warden*, 928 F.3d 987, 1008 (11th Cir. 2019) (resolving an intellectual disability claim based solely on the third prong), *cert. denied*, 140 S.Ct. 2568 (2020) (No. 19-941). Dillbeck fails two of three prongs of the statutory test. Dillbeck is not intellectually disabled.

The *Atkins* claim is untimely, conclusively rebutted by the state court record, and totally meritless. The postconviction court properly summarily denied the *Atkins* claim.

ISSUE II

WHETHER THE POSTCONVICTION COURT PROPERLY SUMMARILY DENIED THE CLAIM BASED ON *JOHNSON V. MISSISSIPPI*, 486 U.S. 578 (1988), REGARDING THE PRIOR CONVICTION USED AS AN AGGRAVATING FACTOR IN THE CAPITAL CASE AND THE CLAIM OF NEWLY DISCOVERED EVIDENCE OF DILLBECK'S MENTAL STATE AT THE TIME OF THE MURDER OF DEPUTY HALL IN 1979? (Restated)

Dillbeck asserts two subclaims regarding the prior violent felony aggravating factor: (1) a claim based on *Johnson v. Mississippi*, 486 U.S. 578 (1988), and (2) a claim of newly discovered evidence regarding witnesses to Dillbeck's mental state at the time of the 1979 murder. Dillbeck's prior conviction for the 1979 first-degree murder of Deputy Hall, which he entered a negotiated guilty plea to avoid the death penalty, was used to establish the prior violent felony aggravating factor in this capital case. The *Johnson v. Mississippi* claim is not cognizable under this Court's precedent because the prior murder conviction has not actually been vacated. Furthermore, even if the prior conviction was vacated at some future date, the death sentence in this case would remain valid. As the postconviction counsel properly determined, following the reasoning of *McKinney v. Arizona*,

140 S.Ct. 702 (2020), the four remaining aggravators, including the heinous, atrocious, and cruel (HAC) aggravator, make a death sentence the appropriate punishment, regardless of the prior violent felony aggravator.

Dillbeck also raises a subclaim of newly discovered evidence regarding his mental state in 1979 at the time of the murder of Deputy Hall based on recent affidavits from witnesses, many of whom were known in 1979. He seeks to mitigate the weight that would be given to the prior violent felony aggravator with testimony about his odd behavior around the time of his murder of Deputy Hall. The claim of newly discovered evidence of mitigation of the prior violent felony aggravator is both untimely and meritless. None of Dillbeck's counsel over the years, including the CHU-N, were diligent in seeking out these witnesses at any time over the last three decades. Even if these witnesses had been presented at the 1991 penalty phase, their testimony would not have mitigated the weight of the prior violent felony aggravating factor to the point that it would have resulted in a

life sentence instead of a death sentence. The postconviction court properly summarily denied this claim.

The postconviction court's ruling

The postconviction court summarily denied this claim. (2023 4th Succ. PCR at 1038-48). The postconviction court found both subclaims to be untimely. *Id.* at 1038. The lower court noted that claims filed outside the one-year time limit in the rule are untimely unless they "could not have been ascertained by the exercise of due diligence." *Id.* at 1038 citing Fla. R. Crim. P 3.851(d)(2)(A). The lower court found the claim to be decades late because these witnesses were "always" available to testify. *Id.* at 1038. The lower court distinguished *Waterhouse v. State*, 82 So.3d 84, 90, 102-104 (Fla. 2012), by observing that "omissions are not falsities" and relying on *Rivera v. State*, 187 So.3d 822, 833-34 (Fla. 2015), instead. *Id.* at 1039-41. The postconviction court concluded that Dillbeck had not established good cause for waiting until the warrant was signed to raise this claim of newly discovered evidence. *Id.* at 1042.

The lower court then address the *Johnson v. Mississippi* claim concluding that it was not cognizable because the prior conviction had not been vacated. (2023 4th Succ. PCR at 1042 citing cases). The postconviction counsel then determined, based on *McKinney v. Arizona*, 140 S.Ct. 702 (2020), that, even without the prior violent felony aggravator, the death sentence was valid based on the four remaining aggravators. *Id.* at 1042-43. The lower court focused on the heinous, atrocious, and cruel (HAC) aggravator, observing that it is one of the most serious aggravators. *Id.* at 1043 citing cases.

The postconviction court then addressed the newly discovered evidence of mitigation of the prior violent felony aggravator based on witnesses that could testify as to Dillbeck's odd behavior at the time of the murder of Deputy Hall in 1979. (2023 4th Succ. PCR at 1046-48). The lower court explained that a claim of newly discovered evidence requires (1) admissible evidence that could not have been discovered earlier with due diligence and (2) the new evidence would probably produce a life sentence. *Id.* at 1046 citing cases. The court concluded Dillbeck was not diligent. *Id.* at 1046, 1048. The

postconviction court also concluded that the new evidence mitigating the prior violent felony aggravator would not result in a life sentence due to the five aggravators. *Id.* at 1046. Indeed, the lower court concluded that the new evidence would "barely alter" the balance of the aggravation and mitigation. *Id.* at 1047. The court focused on the HAC aggravator concluding that that one aggravator "alone" would be sufficient. *Id.* at 1047.

The postconviction court summarily denied the claim. *Id.* at 1048.

Summary denials of successive postconviction claims

A postconviction court may summarily deny a successive postconviction claim because it is not cognizable or is untimely. *Valentine*, 339 So.3d at 313 (stating that a postconviction claim that is "legally insufficient" may be summarily denied citing *McDonald*, 296 So.3d at 383 n.2); *Rodgers*, 288 So.3d at 1039 (Fla. 2019) (stating that a postconviction claim that is untimely may be summarily denied); *Dailey*, 329 So.3d at 1287 (same).

Untimely/lack of diligence

The subclaim regarding newly discovered evidence of Dillbeck's mental state in 1979 when he murdered Deputy Hall based on new affidavits from various witnesses, many of whom were known in 1979, is untimely.

Dillbeck's death sentence became final on March 21, 1995. *Dillbeck v. State*, 234 So.3d 558, 559 (Fla. 2018) (noting that Dillbeck's sentence of death became final in 1995 citing *Dillbeck v. Florida*, 514 U.S. 1022 (1995)). To be timely, any postconviction claim had to be filed within one year of that date, which would have been Tuesday, March 21, 1995. Fla. R. Crim. P. 3.851(d)(1).

Florida's rule of criminal procedure, Rule 3.851(d)(2)(A), provides:

> No motion shall be filed or considered pursuant to this rule if filed beyond the time limitation provided in subdivision (d)(1) unless it alleges:
>
> > (A) the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence

"Claims of newly discovered evidence must be brought within a year of the date the evidence was or could have been discovered through

due diligence." *Martin v. State*, 322 So.3d 25, 34 (Fla. 2021) (quoting *Byrd v. State*, 14 So.3d 921, 924 (Fla. 2009)).

But neither Dillbeck nor his numerous counsel over the last thirty plus years was diligent. Dillbeck has had since before his penalty phase in 1991 to interview the known witnesses that gave statements about the 1979 murder of Deputy Hall and to discover the other witnesses to "mitigate" the weight that would be given to the prior violent felony aggravator. His trial counsel for the 1991 penalty phase, Randy Murrell could have spoken to and presented these witnesses at the penalty phase, if he thought they would be able to "mitigate" the prior violent felony aggravator. His numerous postconviction counsel over the next three decades could have done so as well, in the initial postconviction proceedings or in the numerous successive postconviction proceedings. Furthermore, the CHU-N has had since their appointment as federal habeas counsel in 2016 to interview the known witnesses and to discover the unknown witnesses. Neither penalty phase counsel, postconviction counsel, nor CHU-N have been diligent in attempting to obtain the affidavits from

the witnesses to his behavior around the time of the prior murder in 1979. Instead, the CHU-N waited until 2023 to interview the known witnesses and to locate the new witnesses.

In *Mungin v. State*, 320 So.3d 624 (Fla. 2020), this Court held that a claim of newly discovered evidence based on a new affidavit of a known witness, who testified at trial, regarding what he saw was untimely. *Id.* at 626. The claim was untimely because there was "no explanation" as to why the information in the affidavit "could not have been ascertained long ago by the exercise of due diligence." *Id.* As in *Mungin*, there was "no explanation" as to why the information in the affidavits of known witnesses "could not have been ascertained long ago by the exercise of due diligence." There was also "no explanation" as to why the unknown witnesses were not located earlier. The "newly" discovered evidence of mitigation of the prior violent felony is untimely.

Merits

The *Johnson v. Mississippi* claim is not cognizable under this Court's precedent because the prior murder conviction has not been vacated. And, even if the prior conviction for the first-degree murder of Deputy Hall was ever vacated, it would not effect his death sentence in this capital case due to the presence of four other aggravators including the HAC aggravator. The subclaim regarding newly discovered evidence of mitigation regarding Dillbeck's mental state in 1979 at the time of the murder of the deputy would not result in a life sentence. Even if these witnesses were presented at a new penalty phase, the prior violent felony aggravator would still be present in addition to the four other aggravators. At most, the testimony of these witnesses would marginally decrease the weight given to the prior violent felony aggravator.

Johnson v. Mississippi claim is not cognizable

The Eighth Amendment requires reexamination of a death sentence based, even in part, on a vacated conviction. *Johnson v. Mississippi*,

486 U.S. 578, 584 (1988). The *Johnson v. Mississippi* claim is not cognizable under this Court's precedent because the 1979 conviction has not actually been vacated. *Wickham v. State*, 124 So.3d 841, 864 (Fla. 2013); *Johnson v. State*, 104 So.3d 1010, 1025 (Fla. 2012) (citing *Lukehart v. State*, 70 So.3d 503, 513 (Fla. 2011)). Unless and until the 1979 first-degree murder conviction for the murder of Deputy Hall is officially vacated by a judge in the Twentieth Judicial Circuit, this simply is not a valid *Johnson v. Mississippi* claim. The *Johnson v. Mississippi* claim is not cognizable.

Even if the prior conviction was vacated at some future date, the death sentence in this case would remain valid. As the postconviction counsel properly determined, following the reasoning of *McKinney v. Arizona*, 140 S.Ct. 702 (2020), the four remaining aggravators, including the heinous, atrocious, and cruel (HAC) aggravator, make a death sentence the appropriate punishment for this murder, regardless of the prior violent felony aggravator. The postconviction court focused on the remaining HAC aggravator which was given great weight by the trial court. The evidence supporting the HAC aggravator

was that Dillbeck stabbed the victim 20-25 times, including in her neck, causing her to drown in her own blood. (2023 4th Succ. PCR at n.7) (quoting the medical examiner's testimony at trial). A victim drowning in her own blood is indisputably heinous, atrocious, and cruel and the HAC aggravator would be given significant weight based on those facts. Regardless of the prior violent felony aggravator, Dillbeck's death sentence remains valid.

Newly discovered witnesses to the 1979 murder

Dillbeck asserts a claim of newly discovered evidence regarding these witnesses' testimony to "mitigate" the weight that would be given to the prior violent felony aggravator.

The test for newly discovered evidence, established by this Court in *Jones v. State*, 709 So.2d 512 (Fla. 1998), requires that: (1) the evidence be unknown at the time of the trial and not discoverable with diligence; and (2) the evidence would be likely to result in a life sentence at any new penalty phase. *Matthews v. State*, 288 So.3d 1050, 1058 (Fla. 2019) ("the evidence must have been unknown by the trial court, by the party, or by counsel at the time of trial . . ."); *Bogle v.*

State, 213 So.3d 833, 850 (Fla. 2017) (stating that the "If the defendant is seeking to vacate a sentence, the second prong requires that the newly discovered evidence would probably yield a less severe sentence" quoting *Marek v. State*, 14 So.3d 985, 990 (Fla. 2009)). The defendant must meet both prongs of the test. *Matthews*, 288 So.3d at 1058.

The claim of newly discovered evidence of mitigation fails both parts of the *Jones* test. As explained in the untimely section previously, Dillbeck was not diligent. Opposing counsel's reliance on *Waterhouse v. State*, 82 So.3d 84, 90, 102-104 (Fla. 2012), as support for the argument that Dillbeck is not required to establish diligence, is misplaced. *Waterhouse* involved a police report that stated a witness did not remember when the defendant or the victim left a lounge. *Id.* at 90. But the witness later said that the police report, which defense counsel relied on, did not accurately reflect his statement to the police. This Court reasoned that diligence is not required if defense counsel relied on an inaccurate police report. But that holding depended on inaccuracies being present in the reports. *Rivera v. State*,

187 So.3d 822, 833-34 (Fla. 2015) (distinguishing *Waterhouse* on the basis that the reports did not contain incorrect information). Here, opposing counsel points only to omissions in the known witnesses' statements to the deputies, not to misrepresentations or inaccuracies in their statements. So, *Rivera*, not *Waterhouse*, controls and requires that Dillbeck establish diligence. But he was not diligent in speaking with the known witnesses or in locating the unknown witnesses before the warrant was signed.

Nor would these witnesses' testimony result in a life sentence. Even if these witnesses were presented at a penalty phase to lessen the weight that was given to the prior violent felony aggravator, it would not result in a life sentence. At most, the testimony of these witnesses would marginally decrease the weight given to the prior violent felony aggravator. But the prior violent felony aggravator would still be present in addition to the four other aggravators. This would still be a five aggravator case. Indeed, as the postconviction court concluded, the HAC aggravator alone, given the facts of the case, would result in a death sentence.

While opposing counsel argues that the prior violent felony aggravator was the focus of the penalty phase, it was actually the HAC aggravator that the prosecutor stressed. As the postconviction court noted, the prosecutor argued that the HAC aggravator was the "heaviest" of the five aggravators. (2023 4th Succ. PCR at 1043 citing T. Vol. XVI 2704-08). In the words of the postconviction court, the new evidence would "barely alter" the balance of the aggravation and mitigation. (2023 4th Succ. PCR at 1047). The newly discovered evidence regarding the prior violent felony aggravator would not result in a life sentence.[16]

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[16] While Dillbeck may assert a claim of newly discovered evidence regarding these witnesses' testimony to "mitigate" the weight the prior violent felony aggravator should be given, he may not relitigate his guilt of the 1979 prior conviction at a penalty phase. To the extent that Dillbeck is asserting that these new witnesses could be called to establish to Dillbeck's penalty phase jury that he lacked the required mental state to form the premeditation required for first-degree murder, such a claim amounts to a residual or lingering doubt defense. But this Court does not recognize residual doubt as to aggravators. *Lukehart v. State*, 70 So.3d 503, 513 (Fla. 2011) ("Florida does not recognize residual doubt, much less residual doubt as to the aggravators" citing *Melton v. State*, 949 So.2d 994, 1005 (Fla.2007)); *Melton v. State*, 949 So.2d 994, 1005-06 (Fla. 2007) (explaining that a capital defendant "may not relitigate" a prior conviction in the capital case proceedings and that a valid prior conviction may be "properly invoked as an aggravator" in the capital case). Dillbeck would not be

The postconviction court properly summarily denied both the *Johnson v. Mississippi* claim and the newly discovered evidence of mitigation of the prior violent felony aggravator claim.

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permitted to contest his guilt of the 1979 prior conviction at the penalty phase of the capital case. Dillbeck can mitigate the prior conviction to lessen the weight of the aggravator, but he may not "rebut" prior conviction under Florida law. *Lukehart*, 70 So.3d at 513; *Melton*, 949 So.2d at 1005. Even in states that permit residual doubt as a defense, is it is doubtful those states allow residual doubt as to an aggravator because it literally becomes a trial within a trial (or more accurately a trial within a penalty phase). Any arguments made by opposing counsel regarding premeditation for first-degree murder or the validity of the 1979 prior conviction should be ignored by this Court. They are improper residual doubt arguments.

The reports of Dr. Crown and Dr. Toomer should also be ignored for the same reason. Their reports are designed to "rebut" the prior conviction by attacking its validity and the voluntariness of the plea but none of the experts' lingering doubt testimony would be admissible at a penalty phase. *Jones* itself requires that the new evidence supporting a claim of newly discovered evidence be admissible. *Jones*, 709 So.2d at 521. The experts' testimony is not admissible because it is residual doubt testimony. Only the testimony of the witnesses themselves would be admissible at a penalty phase in Florida and their testimony would be limited to testimony that lessen the weight of the prior violent felony aggravator.

ISSUE III

WHETHER THE POSTCONVICTION COURT PROPERLY SUMMARILY DENIED THE CLAIM THAT SPENDING OVER THREE DECADES ON DEATH ROW VIOLATES THE EIGHTH AMENDMENT? (Restated)

Dillbeck asserts a claim that his over thirty-one years on death row, coupled with "solitary confinement" on Florida's death row, violates the Eighth Amendment and precludes his execution. IB at 61. Such claims are often referred to as *Lackey* claims because they stem from a dissenting opinion from the denial of certiorari in *Lackey v. Texas*, 514 U.S. 1045 (1995). There is, however, no support in the law for such a claim. Neither the United States Supreme Court nor this Court has ever granted relief on a *Lackey* claim. Moreover, delays in executions are not at all "unusual" as required by the text of the Eighth Amendment. As this Court has observed, the source of much of the delay in executions is capital defendants availing themselves of the numerous opportunities to challenge their convictions and sentence by appeals, successive postconviction motions, as well as federal habeas review. So, the delays are often attributable to the capital defendant's own actions. The postconviction court properly

summarily denied the *Lackey* claim as meritless as a matter of law.

The postconviction court's ruling

The state postconviction court summarily denied the *Lackey* claim. (2023 4th Succ. PCR 1049-50). The postconviction court noted that this Court has consistently rejected *Lackey* claims including most recently in *Long v. State*, 271 So.3d 938, 946 (Fla. 2019). *Id.* at 1049. The lower court also noted that this Court had stated that "no federal or state court has accepted the argument that a prolonged stay on death row constitutes cruel and unusual punishment." *Id.* at 1050 citing *Booker v. State*, 969 So.2d 186, 200 (Fla. 2007), and *Knight v. State*, 746 So.2d 423, 437 (Fla.1998). The postconviction court noted that opposing counsel admitted that this Court has consistently rejected *Lackey* claims. *Id.* at 1050 citing *Lambrix v. State*, 217 So.3d 977, 988 (Fla. 2017). The lower court rejected opposing counsel's attempts to distinguish this Court's firmly-established precedent by relying on the "original meaning" of the "cruel and unusual punishment" provision of the Eighth Amendment as including a

prohibition on solitary confinement. *Id*. at 1050. The lower court concluded that Florida's conditions of confinement on death row "do not amount" to solitary confinement citing *In re Medley*, 134 U.S. 160, 167-68 (1890). *Id*. at 1049, n.12.

The lower court noted that, while Dillbeck had the option of exercising his right to appellate and postconviction review of his conviction and death sentence, he "should not benefit" by having his sentence reduced to life "from the delay required" to review his case, based on his own litigation. *Id*. at 1050.

The postconviction court observed that "the appropriate remedy" for a claim that prolonged solitary confinement violates the Eighth Amendment is to challenge the conditions of the confinement, "not to vacate a death sentence." *Id*. at 1050. And, to extent the prior conditions on death row violated the Eighth Amendment, Dillbeck "received all the remedy he was entitled to in the recent settlement." *Id*. at 1050 citing *Davis v. Dixon*, No. 3:17-CV-820, 2022 WL 1267602 (M.D. Fla. Apr. 28, 2022).

Summary denials of successive postconviction claims

A postconviction counsel may summarily deny a successive postconviction claim because it is not cognizable or is meritless as a matter of law. *Mann*, 112 So.3d at 1162 (stating that postconviction claims that are meritless as a matter of law under this Court's precedent may be summarily denied). The *Lackey* claim is both not cognizable under the state constitution and meritless as a matter of law under this Court's precedent. Therefore, the state postconviction court properly summarily denied this claim.

Waiver

The "solitary confinement" aspect of the claim is waived. Dillbeck, as a member of the class, recently entered into a settlement agreement regarding the conditions of confinement on Florida's death row with the Department of Corrections. *See Davis v. Dixon*, 3:17-cv-820 (M.D. Fla April 27, 2022) (Doc. # 148-1— settlement agreement); (definition section of agreement defining "Death Row Inmates" as referring "to all current and future inmates (regardless of gender) imprisoned on Death Row in the State of Florida"); (Doc. # 148-1 at

¶ 63 of the agreement defining the class).[17] As part of that settlement, Dillbeck was "barred and precluded from prosecuting any claims, causes of action or requests" regarding the prior conditions on death row that were asserted in the federal civil litigation. (Doc. # 148-1 at ¶ 78 release provision of the agreement).[18] Dillbeck waived any claim based on the prior conditions on death row amounting to

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[17] This Court may take judicial notice of federal district court records. § 90.202, Fla. Stat. (2022) (providing "a court may take judicial notice of the following matters" including "Official actions of the legislative, executive, and judicial departments of the United States and of any state, territory, or jurisdiction of the United States" and "(6) Records of any court of this state or of any court of record of the United States or of any state, territory, or jurisdiction of the United States.")

[18] The release provision of the settlement provides:

> All claims asserted in the Amended Complaint shall be finally and fully settled and released, subject to the terms and conditions of this Agreement, which the Parties enter into freely, voluntarily, knowingly, and with the advice of counsel. Plaintiffs and class members hereby release Defendants in their official capacities from, and are barred and precluded from prosecuting any claims, causes of action or requests that have been asserted in this litigation, provided that in no event shall this release be deemed to release or otherwise affect in any way any claim regarding any act, incident, or event that occurs after the termination of the Court's retained jurisdiction.

"solitary confinement" and may not rely on those conditions as part of his *Lackey* claim.

Merits

A *Lackey* claim is not a recognized Eighth Amendment claim. Indeed, no court has ever recognized such a claim, much less granted the relief of reducing a death sentence to a life sentence on the basis of the number of years spent on death row. Dillbeck improperly mixes a claim based on the years he spent on death row with a condition of confinement claim regarding "solitary confinement" on death row. But, under the state constitution's conformity clause governing cruel and unusual punishment issues, this Court may not expand the United States Supreme Court's traditional definition of solitary confinement. Moreover, as the postconviction court concluded, Dillbeck has already received the only appropriate remedy for his condition of confinement challenge to Florida's death row.

Cruel and unusual punishment

A punishment must be both "cruel and unusual" to violate the Eighth Amendment. U.S. Const. amend. VIII. A delay in carrying out a death sentence is difficult to view as a form of "punishment." But even if viewed as punishment, it certainly is not "unusual." Decades long delays in executions are unfortunately all too common these days. *Glossip v. Gross*, 576 U.S. 863, 898 (2015) (Scalia, J., concurring) (noting that by 2014, it takes an average of 18 years to carry out a death sentence due to the "proliferation of labyrinthine restrictions on capital punishment" ironically due in part to caselaw relying on the Eighth Amendment). Delays in executions are not "unusual" punishment under the text of the Eighth Amendment.

Not a recognized claim

This is not a recognized Eighth Amendment claim. As Justice Thomas has observed, there simply is no constitutional support for a *Lackey* claim. *Johnson v. Bredesen*, 558 U.S. 1067 (2009) (Thomas, J., concurring in the denial of certiorari); *see also Thompson v. Sec'y for Dep't of Corr.*, 517 F.3d 1279, 1283-84 (11th Cir. 2008) (noting "the

total absence of Supreme Court precedent that a prolonged stay on death row violates the Eighth Amendment"). In this Court's view, the sheer number of years spent on death row is not a violation of the Eighth Amendment. *Gore v. State*, 964 So.2d 1257, 1276 (Fla. 2007). This Court has repeatedly observed that "no federal or state court has accepted the argument that a prolonged stay on death row constitutes cruel and unusual punishment." *Booker v. State*, 969 So.2d 186, 200 (Fla. 2007); *Knight v. State*, 746 So.2d 423, 437 (Fla. 1998).

The federal appellate courts routinely deny *Lackey* claims. *Thompson v. Sec'y for Dep't of Corr.*, 517 F.3d 1279, 1283-84 (11th Cir. 2008) (concluding that execution following 31 years spent on death row "is not in itself a constitutional violation" citing other circuit cases). Indeed, the federal circuits will not even entertain the issue on appeal. *Creech v. Richardson*, ___ F.4th ___, ___, 2023 WL 1785707, at *18 (9th Cir. Feb. 6, 2023) (denying a certificate of appealability on a *Lackey* claim and noting that "neither the Supreme Court nor the Ninth Circuit has ever held that the duration of a death row inmate's confinement prior to execution amounts to cruel and unusual

punishment"); *Buntion v. Lumpkin*, 982 F.3d 945, 954-53 (5th Cir. 2020) (denying a certificate of appealability on a *Lackey* claim and observing that the Fifth Circuit, "like Justice Thomas" was "unaware of any support in the American constitutional tradition or in the Supreme Court's precedent" for such a claim). A *Lackey* claim is not a recognized legal claim in federal or Florida courts.

This Court's solid precedent

This Court has consistently rejected *Lackey* claims including most recently in *Long v. State*, 271 So.3d 938, 946 (Fla. 2019) (SC19-726). This Court in *Long* affirmed a trial court's summary denial of a claim that the more than 30 years the defendant had spent on death row violated the Eighth Amendment citing *Gore v. State*, 91 So.3d 769, 780-81 (Fla. 2012).[19] And this Court has rejected such claims in

[19] *Valle v. State*, 70 So.3d 530, 552 (Fla. 2011) (rejecting a *Lackey* claim in a case where the defendant was on death row for 33 years); *Gore v. State*, 91 So.3d 769, 780-81 (Fla. 2012) (rejecting a *Lackey* claim in a case where the defendant was on death row for over 28 years); *Ferguson v. State*, 101 So.3d 362, 366-67 (Fla. 2012) (rejecting a *Lackey* claim in a case where the defendant was on death row for 30 years); *Muhammad v. State*, 132 So.3d 176, 206-07 (Fla. 2013) (rejecting a *Lackey* claim in a case where the defendant was on death row for over 30

cases involving a similar number of years to the 31 years that Dillbeck as spent on death row. *Valle*, 70 So.3d at 552; *Lambrix*, 217 So.3d at 988. Opposing counsel provides no reason for this Court to depart from its existing and long-standing precedent refusing to recognize *Lackey* claims.

Defendants are the source of the delays

Dillbeck is seeking to have his death sentence reduced to life based on his own conduct. This Court has explained that capital defendants are not permitted to contend that their punishment has been unconstitutionally prolonged because the delay in carrying out the sentence which is, in large part, due to their "own actions" in challenging their convictions and sentences. *Lambrix*, 217 So.3d at

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years); *Correll v. State*, 184 So.3d 478, 486 (Fla. 2015) (rejecting a *Lackey* claim in a case where the defendant was on death row for 29 years); *Lambrix v. State*, 217 So.3d 977, 988 (Fla. 2017) (rejecting a *Lackey* claim in a case where the defendant was on death row for over 31 years); *Branch v. State*, 236 So.3d 981, 988 (Fla. 2018) (rejecting a *Lackey* claim in a case where the defendant was on death row for nearly 24 years), *cert. denied*, *Branch v. Florida*, 138 S.Ct. 1164 (2018); *Jimenez v. State*, 265 So.3d 462, 475 (Fla. 2018) (rejecting a *Lackey* claim in a case where the defendant was on death row for over 23 years), *cert. denied*, *Jimenez v. Florida*, 139 S.Ct. 659 (2018).

988; *Valle*, 70 So.3d at 552. Justice Thomas made the same point. He stated that there is no support in the American constitutional tradition or in the Court's precedent "for the proposition that a defendant can avail himself of the panoply of appellate and collateral procedures and then complain when his execution is delayed." *Knight v. Florida*, 528 U.S. 990 (1999) (Thomas, J., concurring from the denial of certiorari).

Dillbeck has been on death row since March of 1991. While Dillbeck has spent over 31 years on death row, he has been litigating his convictions and sentence in both state and federal court for the majority of that time, including filing numerous successive postconviction motions in the capital case as well as postconviction motions in the noncapital case used as an aggravator. Dillbeck also filed for a stay of execution. *Stafford v. Ward*, 59 F.3d 1025, 1028. n.5 (10th Cir. 1995) (denying a *Lackey* claim, in part, because the defendant filed for a stay of execution); *see also Porter v. Singletary*, 49 F.3d 1483, 1485 (11th Cir. 1995) (denying a *Lackey* claim where the

petitioner did not establish that the delays in his execution were due to deliberate actions of the state).

When a capital defendant refuses to challenge the conviction and sentence by waiving postconviction proceedings, their executions do not take decades. A good example of this is John Blackwelder, whose conviction and death sentence were affirmed by the Florida Supreme Court on direct appeal in July of 2003 and who then waived all other proceedings. *Blackwelder v. State*, 851 So.2d 650 (Fla. 2003). He was executed in May of 2004. Blackwelder spent less than one year on death row after his death sentence was affirmed by the Florida Supreme Court because he did not challenge his conviction or sentence other than in the mandatory direct appeal.

It is odd to argue that delays in the execution largely caused by litigation initiated by the capital defendant himself and his zealous attorneys should result in his death sentence being reduced to a life sentence due to the time all the litigation he filed took. As one court observed, the standard practice at common law was that executions were carried out swiftly after sentencing, including sometimes at dawn

the next day without any review of the trial. *McKenzie v. Day*, 57 F.3d 1461, 1467 (9th Cir. 1995). But these days, in contrast, the Ninth Circuit observed, courts provide death row inmates with ample opportunities to contest their trials and sentence to prevent errors. *McKenzie*, 57 F.3d at 1467. But the Ninth Circuit observed how odd it would be to "conclude that delays caused by satisfying the Eighth Amendment themselves violate it." *Id.* at 1467. The Eighth Amendment does not operate in that bizarre manner.

The United States Supreme Court has refused to employ equitable remedies when the party asking for relief was the one responsible for the delay. *Menominee Indian Tribe of Wisconsin v. United States*, 577 U.S. 250, 255, 257 (2016) (affirming the denial of the Tribe's request for equitable tolling because equitable tolling is not available "when a litigant was responsible for its own delay"). As Justice Scalia once observed, using the delays in capital cases as a reason to reduce a death sentence to a life sentence, or to abolish the death penalty altogether, is reminiscent of a man being sentenced for murdering his parents, who pleads for mercy on the ground that he

is an orphan. *Glossip v. Gross*, 576 U.S. 863, 898 (2015) (Scalia, J., concurring). Dillbeck himself is the main source of the delay and therefore, he may not raise an Eighth Amendment claim seeking to reduce his sentence to life based largely on his own conduct.

The state conformity clause and solitary confinement

Opposing counsel is attempting to obtain relief based on the historical view that solitary confinement, especially if it includes sensory deprivation, may be cruel and unusual punishment without meeting the traditional definition of that term. But Florida's conformity clause prevents that avenue. Under the state constitution's conformity clause governing cruel and unusual punishment issues, a Florida court cannot expand the United States Supreme Court's definition of solitary confinement. Fla. Const. art. 1, § 17; *Lawrence v. State*, 308 So.3d 544 548 (Fla. 2020) (discussing the Florida's constitutional conformity clause regarding Eighth Amendment claims).

Traditionally, "solitary confinement" is defined by the United States Supreme Court as "*complete* isolation of the prisoner from all human

society" and confinement in a cell such that the prisoner has "*no* direct *intercourse* with or *sight* of any human being." *In re Medley*, 134 U.S. 160, 167-68 (1890). Florida's death row is not "solitary confinement" under that traditional definition. Brandon Vines, *Decency Comes Full Circle: The Constitutional Demand to End Permanent Solitary Confinement on Death Row*, 55 COLUM. J.L. & SOC. PROBS. 591, 620-02 & n.147 & n.148 (2022) (referring to Florida's death row as "non-Solitary" and stating that, by contrast, eleven states and the federal government have even more restrictive death rows than Florida's); *Davis v. Dixon*, 2022 WL 1267602, *3 (M.D. Fla. Apr. 28, 2022) (describing the conditions on Florida's death row currently after the settlement and, by implication, the previously conditions as well when referring to *increasing* access to materials for their tablets and *increasing* their access to telephones).

The conditions on Florida's death row did not at any time since 1991, when Dillbeck arrived on death row, amount to "solitary" confinement that would be considered cruel and unusual under the traditional definition. Because Dillbeck cannot meet the traditional definition of solitary confinement, any Eighth Amendment claim based

on the conditions of his confinement on death row necessarily fails, and he may not rely on it, even in part, as support for the *Lackey* claim.

Not the appropriate vehicle or remedy

The appropriate vehicle for raising a condition of confinement complaint is a civil action seeking to change the conditions on death row. And the appropriate remedy, if the conditions on death row are determined to violate the Eighth Amendment, is to change those conditions, not to vacate a perfectly valid death sentence. A capital inmate having his sentence reduced to life as the remedy for substandard prison conditions is both a non-sequitur and an "over" solution. The remedy of reducing the death sentence to a life sentence does not solve the problems of the prison conditions and it vacates a perfectly valid and legal sentence for a reason that does not relate to the sentence.

As the postconviction court noted, Dillbeck already received the only appropriate remedy for his condition of confinement complaints regarding Florida's death row from the recent settlement of the federal

§ 1983 lawsuit. Vacating his death sentence as an additional remedy would be a complete non-sequitur and an unwarranted windfall. *Bucklew v. Precythe*, 139 S.Ct. 1112, 1134 (2019) (characterizing the long delays that now "typically" occur between the time an offender is sentenced to death and his execution as "excessive" but noting the proper remedy is for courts to "police carefully" against "unjustified" delays, including "last-minute stays" of executions).

The state postconviciton properly summarily denied the *Lackey* claim.

Accordingly, this Court should affirm the postconviction court's summary denial of the fourth successive postconviction motion.

CONCLUSION

The State respectfully requests that this Honorable Court affirm the postconviction court's summary denial of the fourth successive postconviction motion.

Respectfully submitted,

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CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was generated using Bookman Old Style 14-point font and is less than 75 pages, as ordered by this Court in this successive capital postconviction appeal.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF has been furnished via the e-portal to BAYA HARRISON III, P.O. Box 102, 736 Silver Lake Rd, Monticello, FL 32345, phone: 850-997-8469; email: bayalaw@aol.com and LINDA McDERMOTT, Chief, Capital Habeas Unit of the Office of the Federal Public Defender of the Northern District of Florida, 227 N. Bronough Street, Suite 4200, Tallahassee, FL 33301; phone: (850) 942-8818; email: Linda_Mcdermott@fd.org this 13th day of February, 2023.

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