IN THE SUPREME COURT OF FLORIDA

CASE NO. SC23-___

DONALD DAVID DILLBECK,

Petitioner,

v.

RICKY D. DIXON,

Secretary, Florida Department of Corrections,
Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

EXECUTION SCHEDULED FOR
FEBRUARY 23, 2023

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JURISDICTIONAL STATEMENT

Petitioner Donald David Dillbeck was sentenced to death on March 15, 1991. This is an original action under Florida Rule of Appellate Procedure 9.100(a). Article I, Section 13 of the Florida Constitution provides: "The writ of habeas corpus shall be grantable of right, freely and without cost." This Court has jurisdiction. Article V, Section 3(b)(1), Florida Constitution.

Where a trial has resulted in "incongruous and manifestly unfair results," an appellate court has the "inherent authority to grant a writ of habeas corpus." *Stephens v. State*, 974 So. 2d 455, 457 (Fla. 2d DCA 2008). The ends of justice call on this Court to grant the relief sought in Mr. Dillbeck's case because his petition presents claims involving fundamental state and federal constitutional errors, including violations of the Eighth Amendment. This Court's exercise of its habeas corpus jurisdiction and of its authority to correct constitutional error is warranted in Mr. Dillbeck's case.

STATEMENT OF THE CASE AND FACTS[1]

Mr. Dillbeck was convicted of first-degree murder, armed robbery, and burglary for the death of Faye Vann in 1990. *Dillbeck v. State*, 643 So. 2d 1027, 1028 (Fla. 1994). A non-unanimous advisory jury recommended a death sentence by an 8-4 vote. *Id.* The trial judge followed that recommendation and imposed a death sentence for the murder count, and consecutive life terms for the other two charges. *Id.* In so doing, the judge found five aggravating circumstances, including that Mr. Dillbeck committed the murder "to avoid arrest or effect escape," and that the murder was "especially heinous, atrocious, or cruel" (HAC). *Id.* at n.1. The judge also found as statutory mitigation that Mr. Dillbeck had committed the murder while substantially impaired, as well as several non-statutory mitigators which were accorded little weight. *Id.* at n.2.

This Court affirmed Mr. Dillbeck's sentence on direct appeal, *id.* at 1031, and the United States Supreme Court denied certiorari. *Dillbeck v. Florida*, 514 U.S. 1022 (1995). Among other issues, his direct appeal challenged the application of the effecting-escape and HAC aggravators,

[1] A fuller recitation of the facts and procedural history is set out in Mr. Dillbeck's Initial Brief in this Court appealing the trial court's summary denial of his motion for postconviction relief under Rule 3.851, which is filed simultaneously with this petition. *See Dillbeck v. State*, SC23-190.

which this Court summarily denied without discussion. *See Dillbeck*, 643 So. 2d at 1031 n.6.

In 1997, Mr. Dillbeck filed a motion for postconviction relief which challenged, among other errors, the HAC aggravator. The trial court denied the motion. He appealed that denial to this Court and also filed a petition for writ of habeas corpus. In 2004, this Court denied the habeas corpus petition, but remanded Mr. Dillbeck's postconviction motion for findings on all but one claim. *See Dillbeck v. State*, 882 So. 2d 969 (Fla. 2004). The remand order included the HAC-aggravator challenge. *Id.* at 972 n.9. On remand, the circuit court denied relief on the remaining grounds, and this Court affirmed. *Dillbeck v. State*, 964 So. 2d 95 (Fla. 2007).

Mr. Dillbeck filed a successive postconviction motion in 2014. Among other issues, Mr. Dillbeck argued that the effecting-escape aggravator was invalid in his case because the State had not shown that "the primary motive for the killing was witness elimination." The trial court denied relief, and on appeal this Court ruled that the claim was procedurally barred. *Dillbeck v. State*, 168 So. 3d 224 (Fla. 2015).

Mr. Dillbeck filed subsequent postconviction motions in 2016 and 2019, which the trial court denied and this Court affirmed. *See Dillbeck v. State*, 234 So. 3d 558 (Fla. 2018); *Dillbeck v. State*, 304 So. 3d 286 (Fla. 2020).

On January 23, 2023, Governor Ron DeSantis signed a warrant for Mr. Dillbeck's execution, scheduled for February 23, 2023. Mr. Dillbeck filed a postconviction motion in the Second Judicial Circuit Court in and For Leon County on January 30, 2023. The trial court denied the motion on February 2, 2023. Mr. Dillbeck now files his petition for writ of habeas corpus together with the Initial Brief appealing the denial of his postconviction motion.

GROUNDS FOR HABEAS CORPUS RELIEF

I. MR. DILLBECK'S EXECUTION WOULD VIOLATE THE EIGHTH AMENDMENT BECAUSE FOUR JURORS VOTED TO SPARE HIS LIFE.

At Mr. Dillbeck's trial, the jury voted to recommend a sentence of death by a vote of 8-4 before he was sentenced to death by the trial judge (T. 3089). In light of the evolving standards of decency—including (1) the consensus in statutes, sentencing, and executions in favor of unanimous jury death sentences and (2) the Supreme Court's recognition that a jury vote must be unanimous to convict a defendant of a "serious offense"—he is no longer in the class of offenders who was found by a unanimous jury to be among those culpable enough to deserve a sentence of death. *Cf*. *Witherspoon v. Illinois*, 391 U.S. 510, 520 n.15 (1968) (the decision by a jury to sentence a defendant to death maintains the "link between contemporary community values and the penal system—a link without which the determination of

punishment would hardly reflect the evolving standards of decency that mark the progress of a maturing society.") (internal quotation omitted). Additionally, allowing a defendant to be executed despite a non-unanimous jury vote violates the common understanding at the time of the founding that sentences of death must be based upon a unanimous jury. Therefore, Mr. Dillbeck's execution would violate the Eighth Amendment.

A. Florida's Capital Sentencing Statute at the Time Four Jurors Voted to Spare Mr. Dillbeck's Life

After Mr. Dillbeck was convicted in this case, his penalty phase was conducted under Florida's previous sentencing statute. Under the statute, the jury rendered an advisory verdict, and the judge made the ultimate sentencing determination. The sentencing judge was required to give the jury's recommendation great weight and could not override a majority vote for life. In making the recommendation, the jury was required to find (1) whether at least one aggravating factor was present in the case, (2) whether sufficient aggravating factors exist, (3) whether the aggravating factors outweigh the mitigating factors, and (4) whether the defendant should be sentenced to life or death (R. 2442-47). Although the jury was not required to specify how individual jurors voted on each question, the jury ultimately

recommended a sentence of death by an 8-4 vote, meaning that four jurors found that at least one of the four findings was not proven by the State.

B. The Evolving Standards of Decency

Sentencing procedures that have been repudiated as a result of the "evolving standards of decency that mark the progress of a maturing society" violate the Eighth Amendment. *Atkins v. Virginia*, 536 U.S. 304, 312 (2002). Under this inquiry, when a capital sentencing procedure is called into question, a court is required to review the current understanding and administration of that procedure. When the capital sentencing procedure used by a state is out of touch with the contemporary consensus, the procedure fails this test and has been rendered unconstitutional.

For example, in *Beck v. Alabama*, 447 U.S. 625, 635 (1980), the Supreme Court held that Alabama's requirement that disallowed jury instructions for lesser-included offenses in death penalty cases was unconstitutional. In doing so, the Supreme Court surveyed the land and noted that Alabama's procedure was "unique in American criminal law," given that no other state or federal jurisdiction had a similar procedure. *Id*. The Supreme Court also noted that the procedure was otherwise out of step with Alabama law given that "for all noncapital crimes Alabama itself gives

the defendant a right to such instructions under appropriate circumstances." *Id*. at 636-37.[2]

In conducting such a survey, the Supreme Court has traditionally looked to three indicators of societal consensus. First, courts look at the current state and federal sentencing laws because Legislatures "are constituted to respond to the will and consequently the moral values of the people." *Atkins*, 536 U.S. at 322-23. As such, legislation is "the clearest and most reliable objective evidence of contemporary values." *Id*. at 322-23. Second, courts are also to examine actual sentencing practices. *See*, *e.g.*, *Graham v. Florida*, 560 U.S. 48, 62 (2010) ("Here, an examination of actual sentencing practices in jurisdictions where the sentence in question is permitted by statute discloses a consensus against its use."). Third, in addition to sentencing practices, "[s]tatistics about the number of executions may inform the consideration whether capital punishment . . . is regarded as unacceptable in our society." *Kennedy v. Louisiana*, 554 U.S. 407, 433 (2008).

[2] Although not a capital case, also instructive is the Supreme Court's recent opinion in *Jones v. Mississippi*, 141 S. Ct. 1307, 1321 (2021) declining to hold that a written finding of "permanent incorrigibility" in juvenile sentencing cases is required by the Eighth Amendment after looking to the "historical or contemporary sentencing practice in the states."

Therefore, this Court must look to the contemporary consensus regarding jury unanimity in capital sentencing. Two states—Montana and Nebraska—have limited jury involvement in capital sentencing, resting the sentencing determination with a judge (Montana) or judges (Nebraska).[3] Indiana and Missouri consider a non-unanimous sentencing jury to be a hung jury and allow a judge to sentence a defendant to death in the event of a hung jury.[4] And Alabama allows a defendant to be sentenced to death based on the non-unanimous vote of a jury.[5] Alabama does, however, require a minimum jury vote of 10-2,[6] meaning someone in Mr. Dillbeck's position could not be sentenced to death. And, most concerningly, Mr. Dillbeck could not be sentenced to death in Florida today.[7] In sum, of the 28 states that currently authorize the death penalty and the federal government, only five

[3] In both states, the jury is only asked to find whether aggravating factors exist, and the ultimate sentencing decision is left to a judge in Montana and a panel of judges in Nebraska. Mont. Code Ann. § 46-18-301; Neb. Rev. Stat. Ann. § 29-2521.
[4] Ind. Code Ann. § 35-50-2-9; Mo. Ann. Stat. § 565.030.
[5] Ala. Code § 13A-5-46. Alabama allowed a judge to override a jury's life recommendation until 2017. Ala. Code § 13A-5-47.
[6] § 13A-5-46.
[7] § 921.141, Fla. Stat.

jurisdictions currently authorize a defendant to be sentenced to death without a unanimous vote from the jury.[8]

The contemporaneous sentencing practices of the states show that the non-unanimous jury has been widely repudiated. In Missouri, two of the three defendants who have been sentenced to death in the last decade received non-unanimous jury votes, one of whom had their sentence vacated on direct appeal and was resentenced to life.[9] In Indiana, where no one has been sentenced to death in the last nine years, only one death sentence has been handed down in the last 27 years after the jury could not reach a unanimous decision.[10] Nebraska has only sentenced three defendants to death in the last thirteen years.[11] Montana has not handed down a death sentence since 1996.[12] So, while these states may authorize death sentences based on non-

[8] In Ohio, a defendant may elect to be sentenced by a judge or panel of judges in lieu of a unanimous jury. *See* Ohio Rev. Code Ann. § 2929.022.

[9] Missouri Supreme Court Grants New Sentencing Trial to Man Who Was Sentenced to Death Despite 11 Jurors' Votes for Life, Death Penalty Information Center, April 11, 2019 (available at: https://deathpenaltyinfo.org/news/missouri-supreme-court-grants-new-sentencing-trial-to-man-who-was-sentenced-to-death-despite-11-jurors-votes-for-life).

[10] *Wilkes v. State*, 917 N.E.2d 675, 693 (Ind. 2009).

[11] *The 12 Inmates of Nebraska's Death Row*, KHGI-TV, June 30, 2021 (available at: https://nebraska.tv/news/local/the-12-inmates-of-nebraskas-death-row).

[12] Richa Bijlani, *More than Just a Factfinder: The Right to Unanimous Jury Sentencing in Capital Cases*, 120 MICH. L. R. 1499, 1514 (2022).

unanimous juries, in practice, these states either effectively do not sentence defendants to death at all, or at least do not do so without a unanimous jury.

The non-unanimous capital jury has also been repudiated by the overwhelming consensus not to execute defendants sentenced to death by less than unanimous juries. Since Florida changed its sentencing statute in 2016, 141 executions have taken place nationwide, but only 17 of those defendants were executed after being sentenced by a non-unanimous jury or mandatory judge panel. *See* Appendix 1. Of those, 12 defendants were executed in Alabama. *Id*.[13] As a result, only 3.9% of those executed outside of Alabama since 2016 were not sentenced by a unanimous jury, not including those who elected to waive a jury. *See* App. 1. In Florida, since the

[13] In addition to being the only state with a non-unanimous capital jury sentencing statute, Alabama remains a clear outlier in sentencing and executions. Of Alabama's 14 executions since 2016, only two were based on a unanimous jury recommendation. *See* App. 2; *see also Woodward v. Alabama*, 134 S. Ct. 405, 407 (2013) (Sotomayor, J., dissenting from denial of certiorari) (noting that, of the 27 life-to-death jury overrides since 2000, "26 of [them] were by Alabama judges."). Alabama has also called off three executions during this time because they were botched. The inmates in these cases were all sentenced to death despite non-unanimous juries. *See Smith v. State*, 160 So. 3d 40, 41–42 (Ala. Crim. App. 2010) ("By a vote of 11 to 1, the jury recommended that Smith be sentenced to life imprisonment without the possibility of parole. The trial court overrode the jury's recommendation and sentenced Smith to death."); *Hamm v. Allen*, No. 5:06-CV-00945-KOB, 2013 WL 1282129, at *3 (N.D. Ala. Mar. 27, 2013) (11-1 jury recommendation); *Miller v. State*, 913 So. 2d 1148, 1151 (Ala. Crim. App. 2004) (10-2 jury recommendation).

unanimous jury requirement became law, only three defendants who were sentenced by non-unanimous juries have been executed, and, until Mr. Dillbeck's execution date was set, none in approximately five years. *See* App. 2.

Notably, of the five states that still allow a defendant to be sentenced to death based on a non-unanimous jury, Indiana's last execution was in 2009, Montana's last execution occurred in 2006, and Nebraska committed an execution in 2018, its only one since 1997.[14] Missouri has only committed two executions of defendants who were not sentenced to death based on a unanimous jury in the last two decades.[15]

Statistics among those states, besides Alabama, who have executed a defendant during this time based on a non-unanimous jury show that even these states have mostly repudiated this practice. These states have executed a combined 12 defendants who were not sentenced based on a non-unanimous jury determination, more than double the five defendants

[14] Death Penalty Information Center, Execution Database (available at: https://deathpenaltyinfo.org/executions/execution-database).
[15] See App. 2; Michael J. Essma, *DEAD-Locked: Evaluating Judge-Imposed Death Sentences: Under Missouri's Death Penalty Statute*, 85 MO. L. REV. (2020).

executed during this time based on a non-unanimous jury determination. *See* App. 2.

In total, only four states have executed a defendant who was sentenced after the jury was not unanimous during this time—Alabama, Florida, Missouri, and Nebraska—not including defendants who waived a jury. *Id*. The practice is thus "truly unusual." *Atkins*, 536 U.S. at 316 (calling the practice of executing the intellectually disabled "truly unusual" after noting that among the states that regularly execute and had no prohibition against the practice, only five states had actually executed a defendant with an IQ less than 70 since other states began prohibiting the practice). In fact, because only five states carried out such executions, the Supreme Court declared in *Atkins* there was a "national consensus" against executing the intellectually disabled. *Id*. In that regard there is an even stronger consensus here.

This survey shows that the non-unanimous capital jury has been widely repudiated. Few jurisdictions still allow death sentences without a unanimous jury. And of those that do, with the exception of Alabama, exceedingly few defendants are sentenced to death or executed based on non-unanimous jury votes. Stunningly, since Florida changed its sentencing statute in 2016, less than 4% of executions have been based on non-unanimous jury

sentences, verdicts, or recommendations outside of Alabama, which remains an extreme outlier. *See* App. 1.

Also relevant to the consensus is the Supreme Court's recent decision requiring a unanimous jury vote to convict a defendant of a "serious offense" under the Sixth Amendment. *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020).[16] As the Supreme Court noted, a unanimous jury has been required to convict a defendant of a serious offense essentially uniformly throughout common law and contemporaneously in all but two states. *Id*. at 1394-97. As such, the Supreme Court recognized that the right to a jury is "fundamental to the American scheme of justice." *Id*. at 1397.

The Supreme Court's recent recognition that a unanimous jury is required to convict a defendant of a serious crime—*i.e.* that a unanimous jury vote is required to subject a defendant to the mere possibility of facing more than six months in prison—is clearly relevant to the current standards of decency. If it is unacceptable to subject a defendant to the possibility of facing over six months in prison based on a less than unanimous jury vote,

[16] "Serious offenses" are those defined as those with a minimum potential punishment of more than six months in prison. *See Cheff v. Schnackenberg*, 384 U.S. 373 (1966).

clearly, as shown by the survey above, society has now recognized it is unacceptable to sentence him to death.

C. At the Founding, Capital Sentences Required Unanimous Juries

Mr. Dillbeck's execution violates the Eighth Amendment because capital sentencing was understood to require a unanimous jury verdict at the time of the Founding. "[T]he Constitution's guarantees cannot mean less today than they did the day they were adopted." *United States v. Haymond*, 139 S. Ct. 2369, 2376 (2019). In addition to the evolving standards of decency, the Supreme Court has also looked to the original understanding as an additional guide to the proper scope of the Eighth Amendment. *See*, *e.g.*, *Beck*, 447 U.S. at 633-35; *Woodson v. North Carolina*, 428 U.S. 280, 289 (1976). This is because, at the Founding, the Constitution permitted the death penalty only "so long as proper procedures are followed." *Bucklew v. Precythe*, 139 S. Ct. 1112, 1122 (2019).

At common law, the determination of whether a defendant should be sentenced to death belonged to the jury. As Blackstone explained, it was understood that "no man should be called to answer to the king for any capital crime, unless . . . the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be

confirmed by the unanimous suffrage of twelve of his equals." Janet C. Hoeffel, *Death Beyond a Reasonable Doubt*, 70 Ark. L. Rev. 267, 271 (2017) (quoting 4 William Blackstone, Commentaries on the Law of England 343 (4th ed., Oxford, Clarendon Press 1770)). By the time the Bill of Rights was adopted, the jury's right to determine whether a defendant should face the death penalty "was unquestioned." Welsh S. White, *Fact-Finding and the Death Penalty: The Scope of a Capital Defendant's Right to Jury Trial*, 65 NOTRE DAME L. REV. 1, 10-11 (1989).

Given the number of crimes that mandated capital punishment, the determination of whether to find the defendant guilty and whether to spare his life was frequently the same. In such cases, it was widely understood that the jury had nullification power if the jury believed a death sentence would be too harsh. *See Woodson*, 428 U.S. at 289–290. This practice, known as "sanction nullification," was widely recognized. Thomas Andrew Green, *Verdict According to Conscience: Perspectives on the English Criminal Trial Jury 1200-1800*, 97 (1985) (noting the practice of "sanction nullification" as distinct from complete nullification). Thus, although "under this capital punishment scheme, there was no bifurcation between guilt and sentencing," "common law juries necessarily engaged in 'de facto sentencing' when deciding whether the defendant was guilty as well as the degree of guilt."

Bijlani, *supra*, at 1523-25 ("the question of 'appropriate punishment' was not only at issue in those unified proceedings but was often the principal issue faced by the jury").

Part and parcel of the jury's determination that a defendant should be sentenced to death were the corresponding protections that the jury's verdict should be unanimous and beyond a reasonable doubt. *See* Hoeffel, *supra*, at 275-79 (noting the creation of the beyond a reasonable doubt standard was based on the "morality of punishment" in capital cases, rather than fact finding); *Ramos*, 140 S. Ct. at 1395-97 (cataloging the centuries long history of jury unanimity when defendants were charged with "serious" crimes). This was in contrast to less serious crimes in which judges could determine sentences and were not bound to making findings beyond a reasonable doubt. *See* John G. Douglass, *Confronting Death: Sixth Amendment Rights at Capital Sentencing*, 105 COLUM. L. REV. 1967 (2005) ("judges exercised sentencing discretion in choosing among [non-capital] punishments and in fixing terms of imprisonment, and . . . they exercised that discretion in sentencing proceedings that lacked the formality of jury trials").

Therefore, as originally understood at the time of the Founding, the public understanding was that the determination of whether to sentence a

defendant to death belonged to a jury, which was required to make the determination unanimously and beyond a reasonable doubt.

D. Conclusion

Based on the evolving standards of decency and the common understanding of capital sentencing at the Founding, this Court should hold that Mr. Dillbeck's death sentence violates the Eighth Amendment because he was sentenced to death despite four jurors recommending he be sentenced to life.

II. THE HAC AGGRAVATOR IS FACIALLY INVALID BECAUSE IT FAILS TO SERVE ITS CONSTITUTIONALLY REQUIRED NARROWING FUNCTION.

Aggravating circumstances, such as HAC, are meant to narrow the class of individuals eligible for a death sentence and ensure that death sentences are meted out in a consistent manner. *Zant v. Stephens*, 462 U.S. 862, 876 (1983). That is because the foundation of the modern death penalty is that it cannot be "wantonly and [] freakishly imposed." *Furman v. Georgia*, 408 U.S. 238, 310 (1972) (Stewart, J., concurring). If an aggravator could potentially apply to *any* murder, is vague, or is inappropriately applied, then it is unconstitutional and invalid, and undermines the foundation on which a death sentence is based.

Under Florida law, the HAC aggravator is meant for murders that are "especially heinous, atrocious, or cruel." 921.141(h) Fla. Stat.[17] The United States Supreme Court has already suggested that "the HAC aggravator, when not narrowed by a *proper* limiting instruction, is unconstitutional, and that neither the jury nor the trial judge may weigh the invalid aggravator." *Jennings v. McDonough*, 490 F.3d 1230, 1248 (11th Cir. 2007) (citing *Espinosa v. Florida*, 505 U.S. 1079, 1081-82 (1992)) (emphasis added). And in Florida, "the presence of an invalid aggravating factor in the weighing calculus renders a death sentence unconstitutional under the Eighth Amendment, and the sentence may not automatically be affirmed merely because 'other valid aggravating factors exist.'" *Jennings*, 490 F.3d at 1249 (citing *Sochor*, 504 U.S. at 532).

The instruction applied by Mr. Dillbeck's trial judge did not cure the unconstitutional vagueness and over-breadth of the words "heinous, atrocious, or cruel," which by themselves are unconstitutionally vague. *See Maynard v. Cartwright*, 486 U.S. 356, 365 (1988). Instead, the Florida instruction applied to Mr. Dillbeck merely substituted one set of unconstitutionally vague terms for another, and did no more to channel

[17] Mr. Dillbeck was sentenced under the substantively similar 1989 statute.

sentencing discretion than the original terms that the Supreme Court invalidated in *Maynard*. As applied in Florida, this aggravating factor is still vague, overbroad, and invalid under the United States Constitution.

Constitutional challenges to the HAC aggravator were denied by the United States Supreme Court in *Proffitt v. Florida*, 428 U.S. 242, 253 (1976). The Court found that the aggravator adequately channeled sentencing discretion and served its required narrowing function. However, this decision regarding the constitutionality of the HAC aggravator has subsequently been undermined by the unprincipled manner in which it has been applied in the wake of *Proffitt*.[18]

For example, HAC has been established when the manner of death is by multiple stab wounds, *Jackson v. State*, 180 So. 3d 938, 960-61 (Fla. 2015), or by a single stab wound where the victim experienced pain and fear and was aware of his impending death, *Cox v. State*, 819 So. 2d 705 (Fla.

[18] A similar situation has occurred within the context of whether a judge, rather than a jury, may find the aggravating circumstances to sentence an individual to death. The United States Supreme Court initially upheld such a system in *Hildwin v. Florida*, 490 U.S. 638 (1989). The Court later overruled its holding in *Ring v. Arizona*, 536 U.S. 584 (2002), which was subsequently applied to Florida's death-penalty scheme in *Hurst v. Florida*, 577 U.S. 92 (2016). Thus, the fact that other HAC instructions have been invalidated by *Maynard*, when considered together with Florida's broad interpretation of the HAC aggravator after the Court's *Proffitt* decision, calls into question the constitutionality of Florida's instruction.

2002), or didn't die immediately and was conscious for several minutes. *Cummings-El v. State*, 684 So. 2d 729, 731 (Fla. 1996). HAC applies regardless of whether the defendant intended to inflict prolonged suffering on the victim. *Guzman v. State*, 721 So. 2d 1155 (Fla. 1998). If the victim suffers any fear or emotional strain prior to death, HAC can be applied to support a death sentence. *Swafford v. State*, 533 So. 2d 270, 277 (Fla. 1988). Thus, virtually all first-degree murders by stabbing will be death eligible through the HAC aggravator.

HAC also applies to deaths by strangulation. *McWatters v. State*, 36 So. 3d 613 (Fla. 2010). The requisite fear, anxiety, and knowledge of impending death are inferred, even if the victim is rendered unconscious within 20 to 30 seconds. Thus, most murders by strangulation will be death eligible.

The general rule is that HAC does not apply to gunshot deaths. *Martin v. State*, 151 So. 3d 1184 (Fla. 2014). However, the exceptions to this rule now functionally swallow it. For example, HAC has been upheld where the victim suffered multiple gunshots and defensive wounds and did not die instantly. *Id.* at 1193-94. Even a "quick death" by gunshot warrants HAC if the victim suffered fear or emotional strain during the events leading up to the gunshot. *McGirth v. State*, 48 So. 3d 777, 795 (Fla. 2010); *see also*

Hudson v. State, 992 So. 2d 96, 115 (Fla. 2008) (applying HAC to instantaneous death by single gunshot).

As all of these examples demonstrate, the HAC aggravator could be applied to virtually *all* first-degree murders under its broadly construed definition. This effectively nullifies any narrowing function that the aggravator purports to fulfill, rendering it invalid under *Furman* and the Eighth Amendment. As such, the application of this invalid aggravator to Mr. Dillbeck's case was fundamental error.

Fundamental error occurs when the error "has affected the proceedings to such an extent it equates to a violation of the defendant's right to due process of law." *Jaimes v. State*, 51 So. 3d 445, 448 (Fla. 2010). It is "axiomatic" that "fundamental error may be raised at any time, 'before trial, after trial, on appeal, or by habeas corpus.'" *Tucker v. State*, 459 So. 2d 306, 307 (Fla. 1984) (quoting *State v. Gray*, 435 So. 2d 816, 818 (Fla. 1983)). Even before discussing the aggravators in his case, Mr. Dillbeck's death sentence and the process through which it was obtained have already been shown to contain myriad substantive and procedural constitutional errors that warrant sentencing relief. The application of the facially invalid HAC aggravator casts further doubt on the validity of Mr. Dillbeck's sentence. Given the circumstances of Mr. Dillbeck's case, this Court should examine

this claim under fundamental error and find that the HAC aggravator is facially invalid due to its overbreadth.

III. THERE IS INSUFFICIENT EVIDENCE TO SUPPORT A FINDING OF THE EFFECTING-ESCAPE AGGRAVATOR IN MR. DILLBECK'S CASE, RENDERING ITS APPLICATION INVALID.

The effecting-escape aggravator is similarly invalid, because there was insufficient evidence to support its application in Mr. Dillbeck's case. This aggravator is meant to apply in cases where the murder "was committed for the purpose of . . . effecting an escape from custody." 921.141(e) Fla. Stat. As Mr. Dillbeck argued in his 2014 postconviction motion, when the murder victim is not a law-enforcement officer, this aggravating circumstance only applies if the State proves beyond a reasonable doubt that the sole or primary motive was the elimination of a witness to avoid detection. *McLean v. State*, 29 So. 3d 1045 (Fla. 2010). Proof of that intention must be very strong. *Armstrong v. State*, 399 So. 2d 953 (Fla. 1981).

Yet here, the evidence was wholly insufficient to establish that intent. The victim was not a law enforcement officer, and Mr. Dillbeck testified that his plan was to take the victim with him so that she could drive the car, as he had forgotten how to drive (T. 1979-80). He then said that he only stabbed the victim after she grabbed him and bit him (T. 1981). Specifically, Mr. Dillbeck recounted that he did not plan ahead of time to kill the victim, but

only stabbed her after she grabbed him by the hair and bit him, at which point he panicked and "went off." (T. 1981). This testimony disproves the motive requirement for the escape aggravator and was not rebutted by the State.

The trial court reasoned that the death occurred during Mr. Dillbeck's attempt to obtain transportation, and that the need for transportation was part of his plan to effect escape. However, the mere fact that a death occurs during a crime is insufficient to invoke the effecting-escape aggravator; the requisite proof of intent to avoid arrest or detection must be very strong and show that the desire to eliminate a witness was the sole or dominant motive for the killing and not merely one of several possible motives. *Trease v. State*, 768 So. 2d 1050, 1056 (Fla. 2000); *Jackson v. State*, 502 So. 2d 409 (Fla. 1986). "[Going] off" on a victim suddenly or instinctively because she resists the robbery, does not satisfy the requirements of the effecting-escape aggravator because there is no proof that Mr. Dillbeck planned to eliminate the victim here. *Cook v. State*, 542 So. 2d 964 (Fla. 1989). Indeed, killing the victim was flatly inconsistent with Mr. Dillbeck's escape plan, because he needed her to drive the car. If his plan was to have the victim drive him out of danger to a position of relative safety, then killing her thwarted rather than effected that plan.

In affirming the use of the aggravator, this Court reasoned that Mr. Dillbeck was in the process of escaping when he killed the victim, and so the aggravator applied. Neither trial nor appellate counsel argued that the evidence was insufficient to prove the witness-elimination motive, and the issue was never litigated. However, this Court can exercise jurisdiction to reconsider its previous decision on this invalid aggravator under the manifest-injustice doctrine.

This Court has explained that a procedural bar premised upon *res adjudicata* may be overcome in order to avoid manifest injustice:

> The State contends that the law of the case doctrine and collateral estoppel barred the Second District from addressing this claim below. We disagree. **Under Florida law, appellate courts have "the power to reconsider and correct erroneous rulings [made in earlier appeals] in exceptional circumstances and where reliance on the previous decision would result in manifest injustice."** *Muehleman v. State*, 3 So. 3d 1149, 1165 (Fla. 2009) (alteration in original) (recognizing this Court's authority to revisit a prior ruling if that ruling was erroneous) (quoting *Parker v. State*, 873 So. 2d 270, 278 (Fla. 2004)); *see State v. J.P.*, 907 So. 2d 1101, 1121 (Fla. 2004) (same); *Parker v. State*, 873 So. 2d 270, 278 (Fla. 2004) (same); *see also Fla. Dep't of Transp. v. Juliano*, 801 So. 2d 101, 106 (Fla. 2001) ("[A]n appellate court has the power to reconsider and correct an erroneous ruling that has become the law of the case where a prior ruling would result in a 'manifest injustice.'" (quoting *Strazzulla v. Hendrick*, 177 So. 2d 1, 3 (Fla. 1965).

State v. Akins, 69 So. 3d 261, 268 (Fla. 2011) (emphasis added). And in *Strazzulla v. Hendrick*, this Court stated:

> [I]nsofar as [our] earlier decisions may be construed as holding that an appellate court in this state is wholly without authority to reconsider and reverse a previous ruling that is 'the law of the case', we hereby expressly recede [from them].

177 So. 2d 1, 3-4 (Fla. 1965). This Court stressed that reconsideration of previous adjudications of a claim should be done solely "in unusual circumstances and for the most cogent reasons—and always, of course, only where 'manifest injustice' will result from a strict and rigid adherence to the rule [typically barring such reconsideration]." *Id.*; *see also Muehleman v. State*, 3 So. 3d 1149, 1165 (Fla. 2009).

The Court's acknowledgment of this power accords with the equitable principles that are inherent in the American court system. For example, in *Holland v. Florida*, the United States Supreme Court described how it "followed a tradition in which courts of equity have sought to relieve hardships which, from time to time, arise from a hard and fast adherence to more absolute legal rules." 560 U.S. 631, 649-50 (2010) (internal quotation marks omitted). Equitable procedures give courts the "flexibility . . . to meet new situations . . . [and] to accord all the relief necessary to correct . . . particular injustices." *Id.* (cleaned up).

Mr. Dillbeck's case presents precisely the sort of situation where equitable principles are warranted. A constellation of errors occurred in Mr.

Dillbeck's capital proceedings, which are discussed both in his petition and the simultaneously filed Initial Brief. Mr. Dillbeck was sentenced to death despite his categorical exemption from execution under the Eighth Amendment, and even though his sentencing proceedings were riddled with errors, including the State's reliance on the flawed HAC and effecting-escape aggravators to justify Mr. Dillbeck's sentence. Individually and collectively, these errors prove that this Court's "original pronouncement of the law [in Mr. Dillbeck's prior appeals] was erroneous and such ruling[s] resulted in manifest injustice." *Beverly Beach Properties v. Nelson*, 68 So. 2d 604 (Fla. 1953). Mr. Dillbeck respectfully requests that this Court utilize its equitable powers to rectify these substantive and procedural injustices, reconsider its prior decision and find that the effecting-escape aggravator was invalidly applied in Mr. Dillbeck's case, and grant appropriate relief.

CONCLUSION AND RELIEF SOUGHT

This Court should grant Mr. Dillbeck's petition for habeas corpus, stay his execution, and grant appropriate relief.

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 Petition for Writ of Habeas Corpus has been reproduced in a 14-point Ariel type, a font that is not proportionately spaced.

/s/ Linda McDermott
Linda McDermott

APPENDIX

Appendix 1: Data Regarding Executions Since January 1, 2016

BASIS FOR EXECUTION	TOTAL	PERCENTAGE
Total executions	141	
Executions not based on non-unanimous jury or statute mandating judge sentencing	124	87.94% of total executions
Executions based on non-unanimous jury or statute mandating judge sentencing	17	12.06% of total executions
Executions based on non-unanimous jury or mandatory judge sentencing excluding Alabama	5	3.90% of total executions excluding Alabama (5 of 128); 29.41% of executions based on non-unanimous juries (5 of 17)
Executions based on non-unanimous jury in Alabama	12	70.59% of executions based on non-unanimous juries (12 of 17); 85.71% of executions in Alabama (12 of 14)

Appendix 2: All Executions since January 1, 2016[1]

YEAR	DEFENDANT	STATE	UNANIMOUS JURY STATUTE	BASIS FOR SENTENCE
2023	Leonard Taylor	MO	N	12-0 jury vote[2]
2023	Wesley Ruiz	TX	Y	
2023	Scott Eizember	OK	Y	
2023	Robert Fratta	TX	Y	
2023	Amber McLaughlin	MO	N	Jury deadlock, judge-imposed sentence[3]
2022	Thomas Loden	MS	Y	
2022	Kevin Johnson	MO	N	12-0 jury vote[4]
2022	Richard Fairchild	OK	Y	
2022	Murray Hooper	AZ	Y	
2022	Stephen Barbee	TX	Y	
2022	Tracy Beatty	TX	Y	
2022	Benjamin Cole	OK	Y	
2022	John Ramirez	TX	Y	
2022	James Coddington	OK	Y	

[1] Data collected from Death Penalty Information Center, Execution Database (available at: https://deathpenaltyinfo.org/executions/execution-database).
[2] *State v. Taylor*, 298 S.W.3d 482, 489 (Mo. 2009).
[3] *McLaughlin v. State*, 378 S.W.3d 328, 336 (Mo. 2012).
[4] *State v. Johnson*, 284 S.W.3d 561, 567 (Mo. 2009).

2022	Kosoul Chanthakoummane	TX	Y	
2022	Joe James Jr.	AL	N	12-0 jury vote[5]
2022	Frank Atwood	AZ	Y	
2022	Clarence Dixon	AZ	Y	
2022	Carman Deck	MO	N	12-0 jury vote[6]
2022	Carl Buntion	TX	Y	
2022	Gilbert Postelle	OK	Y	
2022	Donald Grant	OK	Y	
2022	Matthew Reeves	AL	N	10-2 jury vote[7]
2021	Lisa Montgomery	FED	Y	
2021	Corey Johnson	FED	Y	
2021	Dustin Higgs	FED	Y	
2021	Quintin Jones	TX	Y	
2021	John Hummel	TX	Y	
2021	Rick Rhoades	TX	Y	
2021	Ernest Johnson	MO	N	12-0 jury vote[8]
2021	Willie Smith III	AL	N	10-2 jury vote[9]
2021	John Grant	OK	Y	
2021	David Cox Sr.	MS	Y	
2021	Bigler Stouffer Jr.	OK	Y	
2020	John Gardner	TX	Y	
2020	Donnie Lance	GA	Y	
2020	Abel Ochoa	TX	Y	
2020	Nicholas Sutton	TN	Y	
2020	Nathaniel Woods	AL	N	10-2 jury vote[10]
2020	Walter Barton	MO	N	12-0 jury vote[11]
2020	Billy Wardlow	TX	Y	
2020	Daniel Lee	FED	Y	
2020	Wesley Purkey	FED	Y	
2020	Dustin Honken	FED	Y	
2020	Lezmond Mitchell	FED	Y	
2020	Keith Nelson	FED	Y	
2020	William LeCroy Jr.	FED	Y	
2020	Christopher Vialva	FED	Y	
2020	Orlando Hall	FED	Y	
2020	Brandon Bernard	FED	Y	

[5] *Ex parte James*, 61 So. 3d 352, 353 (Ala. 2009).
[6] *State v. Deck*, 303 S.W.3d 527, 533 (Mo. 2010).
[7] *Reeves v. State*, 226 So. 3d 711, 718 (Ala. Crim. App. 2016).
[8] *State v. Johnson*, 244 S.W.3d 144, 149 (Mo. 2008).
[9] *Smith v. State*, 838 So. 2d 413, 421 (Ala. Crim. App. 2002).
[10] *Woods v. State*, 13 So. 3d 1, 5 (Ala. Crim. App. 2007).
[11] *State v. Barton*, 240 S.W.3d 693, 700 (Mo. 2007).

2020	Alfred Bourgeois	FED	Y	
2019	Travis Runnels	TX	Y	
2019	Lee Hall	TN	Y	
2019	Ray Cromartie	GA	Y	
2019	Justen Hall	TX	Y	
2019	Charles Rhines	SD	Y	
2019	Russell Bucklew	MO	N	12-0 jury vote[12]
2019	Robert Sparks	TX	Y	
2019	Mark Soliz	TX	Y	
2019	Billy Cutsinger	TX	Y	
2019	Gary Bowles	FL	N	12-0 jury vote[13]
2019	Larry Swearingen	TX	Y	
2019	Stephen West	TN	Y	
2019	Marion Wilson Jr.	GA	Y	
2019	Christopher Price	AL	N	10-2 jury vote[14]
2019	Bobby Joe Long	FL	N	12-0 jury vote[15]
2019	Michael Samra	AL	N	12-0 jury vote[16]
2019	Donnie Johnson	TN	Y	
2019	Scotty Morrow	GA	Y	
2019	John King	TX	Y	
2019	Billie Coble	TX	Y	
2019	Domineque Ray	AL	N	11-1 jury vote[17]
2019	Robert Jennings	TX	Y	
2018	Jose Jimenez	FL	N	12-0 jury vote[18]
2018	Alvin Braziel Jr.	TX	Y	
2018	David Miller	TN	Y	
2018	Joseph Garcia	TX	Y	
2018	Robert Ramos	TX	Y	
2018	Edmund Zagorski	TN	Y	
2018	Robert Berget	SD	Y	
2018	Daniel Acker	TX	Y	
2018	Troy Clark	TX	Y	
2018	Carey Moore	NE	N	Sentenced by panel of judges[19]
2018	Billy Irick	TN	Y	
2018	Robert Van Hook	OH	Y	

[12] *State v. Bucklew*, 973 S.W.2d 83, 86 (Mo. 1998).
[13] *Bowles v. State*, 276 So. 3d 791, 793 (Fla. 2019).
[14] *Ex parte Price*, 725 So. 2d 1063, 1065 (Ala. 1998).
[15] *Long v. State*, 271 So. 3d 938, 940 (Fla. 2019).
[16] *Samra v. State*, 771 So. 2d 1108, 1111 (Ala. Crim. App. 1999).
[17] *Ray v. State*, 80 So. 3d 965, 969 (Ala. Crim. App. 2011).
[18] *Jimenez v. State*, 265 So. 3d 462, 469 (Fla. 2018).
[19] *State v. Moore*, 272 Neb. 71, 73 (2006).

2018	Christopher Young	TX	Y	
2018	Danny Bible	TX	Y	
2018	Juan Castillo	TX	Y	
2018	Robert Butts Jr.	GA	Y	
2018	Erick Davila	TX	Y	
2018	Walter Moody Jr.	AL	N	11-1 jury vote[20]
2018	Rosendo Rodriguez	TX	Y	
2018	Michael Eggers	AL	N	11-1 jury vote[21]
2018	Carlton Gary	GA	Y	
2018	Eric Branch	FL	N	10-2 jury vote[22]
2018	John Battaglia	TX	Y	
2018	William Rayford	TX	Y	
2018	Anthony Shore	TX	Y	
2017	Patrick Hannon	FL	N	12-0 jury vote[23]
2017	Ruben Cardenas	TX	Y	
2017	Torrey McNabb	AL	N	10-2 jury vote[24]
2017	Robert Pruett	TX	Y	
2017	Michael Lambrix	FL	N	8-4 and 10-2 jury votes[25]
2017	Gary Otte	OH	Y	
2017	Mark Asay	FL	N	9-3 jury vote[26]
2017	TaiChin Preyor	TX	Y	
2017	Ronald Phillips	OH	Y	
2017	William Morva	VA	Y	
2017	Robert Melson	AL	N	10-2 jury vote[27]
2017	Thomas Arthur	AL	N	11-1 jury vote[28]
2017	J.W. Ledford Jr.	GA	Y	
2017	Kenneth Williams	AR	Y	
2017	Jack Jones Jr.	AR	Y	
2017	Marcel Williams	AR	Y	
2017	Ledell Lee	AR	Y	
2017	James Bigby	TX	Y	
2017	Rolando Ruiz	TX	Y	
2017	Mark Christeson	MO	N	12-0 jury vote[29]

[20] *Moody v. State*, 888 So. 2d 532, 540 (Ala. Crim. App. 2003).
[21] *Eggers v. State*, 914 So. 2d 883, 888 (Ala. Crim. App. 2004).
[22] *Branch v. State*, 236 So. 3d 981, 983 (Fla. 2018).
[23] *Hannon v. State*, 228 So. 3d 505, 507 (Fla. 2017).
[24] *McNabb v. State*, 887 So. 2d 929, 939 (Ala. Crim. App. 2001).
[25] *Lambrix v. State*, 217 So. 3d 977, 990 (Fla. 2017) (Pariente, J., concurring).
[26] *Asay v. State*, 210 So. 3d 1, 7 (Fla. 2016).
[27] *Melson v. State*, 775 So. 2d 857, 863 (Ala. Crim. App. 1999).
[28] *Ex parte Arthur*, 711 So. 2d 1097, 1098 (Ala. 1997).
[29] *State v. Christeson*, 50 S.W.3d 251, 260 (Mo. 2001).

2017	Terry Edwards	TX	Y	
2017	Ricky Gray	VA	Y	
2017	Christopher Wilkins	TX	Y	
2016	Ronald Smith Jr.	AL	N	5-7 jury vote, judge override[30]
2016	William Sallie	GA	Y	
2016	Steven Spears	GA	Y	
2016	Gregory Lawler	GA	Y	
2016	Barney Fuller Jr.	TX	Y	
2016	John Conner	GA	Y	
2016	Earl Forrest	MO	N	12-0 jury vote[31]
2016	Daniel Lucas	GA	Y	
2016	Kenneth Fults	GA	Y	
2016	Pablo Vasquez	TX	Y	
2016	Joshua Bishop	GA	Y	
2016	Adam Ward	TX	Y	
2016	Coy Westbrook	TX	Y	
2016	Travis Hittson	GA	Y	
2016	Gustavo Garcia	TX	Y	
2016	Brandon Jones	GA	Y	
2016	James Freeman	TX	Y	
2016	Christopher Brooks	AL	N	11-1 jury vote[32]
2016	Richard Masterson	TX	Y	
2016	Oscar Bolin Jr.	FL	N	jury waiver[33]

[30] *Smith v. State*, 756 So. 2d 892, 904 (Ala. Crim. App. 1997).
[31] *State v. Forrest*, 183 S.W.3d 218, 223 (Mo. 2006).
[32] *Brooks v. State*, 929 So. 2d 491, 494 (Ala. Crim. App. 2005).
[33] *Bolin v. State*, 869 So. 2d 1196, 1199 (Fla. 2004).