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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC23-220

DONALD DAVID DILLBECK,

Petitioner,

v.

RICKY D. DIXON,

Secretary, Florida Department of Corrections,
Respondent.

PETITIONER'S HABEAS REPLY

EXECUTION SCHEDULED FOR
FEBRUARY 23, 2023

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PRELIMINARY STATEMENT

The State has filed its response to Mr. Dillbeck's petition for writ of habeas corpus, and this reply follows. The reply will address only the most salient points argued by the State. Mr. Dillbeck relies upon his petition in reply to any argument or authority argued by the State that is not specifically addressed in this reply.

RESPONSE TO ABUSE OF THE WRIT ARGUMENT

As an initial matter, the State claims that Mr. Dillbeck's petition for writ of habeas corpus should be dismissed as an untimely "abuse of the writ" because "habeas petitions are not provided for in the applicable rule of court governing warrant litigation," citing Rule 3.851(h) (Response at 3). But that subsection does not discuss, or reference, habeas corpus petitions. The State's contention that the rule "envisions all warrant claims be raised in the one authorized motion filed in the trial court" and that therefore Mr. Dillbeck's petition "violates the established procedures governing warrant litigation" is entirely without support. *Id.*

Indeed, this Court's handling of habeas corpus petitions in the same posture as Mr. Dillbeck's case directly contradicts the State's argument. This Court regularly considers claims contained within successive habeas petitions after a death warrant has been signed. *See, e.g.*, *Dailey v. State*,

283 So. 3d 782, 793-94 (Fla. 2019); *Bowles v. State*, 276 So. 3d 791, 796 (Fla. 2019); *Jimenez v. Jones*, 261 So. 3d 502 (Fla. 2018); *Branch v. State*, 236 So. 3d 981, 988-89 (Fla. 2018).[1] Critically, although the Court has found that individual *claims* within a successive habeas corpus petition were procedurally barred, that is distinct from the State's contention that the *petition* itself is barred. And, as Mr. Dillbeck discussed in his petition and further addresses below, he has raised substantial claims of constitutional violations that this Court has the ability to remedy through its equitable powers. He has also explained why any procedural bars to merits review of these claims can and should be lifted.

The State's related complaint that Mr. Dillbeck's successive habeas petition is a "transparent attempt" to bypass the page limits of successive postconviction motions is especially ironic given that the State itself evaded the page limit in the circuit court. Without so much as requesting the circuit court's authorization, the State filed a 26-page memorandum of law entitled

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[1] This Court also routinely considers successive habeas petitions in non-death warrant cases. *See*, *e.g.*, *Walton v. State*, 246 So. 3d 246 (Fla. 2018); *Melton v. Jones*, No. SC17-2032, 2018 WL 566451 (Fla. Jan. 26, 2018); *Hamilton v. Jones*, No. SC16-984, 2017 WL 836807 (Fla. Mar. 3, 2017); *Jones v. Jones*, No. SC16-607, 2017 WL 1034410 (Fla. Mar. 17, 2017); *Marshall v. Jones*, 226 So. 3d 211 (Fla. 2017);*Chandler v. Crosby*, 916 So. 2d 728 (Fla. 2005); *Zack v. Crosby*, 918 So. 2d 240 (Fla. 2005).

"Facts of the Crime and Procedural History" on January 25, 2023 (PCR5 40). Subsequently, the procedural history in the State's response to Mr. Dillbeck's 3.851 motion amounted to one sentence: "The State rests on the facts and procedural history filed with this Court on January 25, 2023 (Filing#165421133), subject to any supplementations in the argument section." (PCR5 906). The State's memorandum of law clearly constituted an unauthorized filing of an extra 24 pages in blatantly circumventing the 25-page limitation as laid out in Fla. R. Crim P. 3.851(e)(3)(B).[2]

The State's actions here amount to an attempt to create an uneven playing field. "No truly objective tribunal can compel one side in a legal bout to abide by the Marquis of Queensberry's rules, while the other fights ungloved." *Dillbeck v. State*, 643 So. 2d 1027, 1030 (Fla. 1994). The Court should deny the State's request to dismiss Mr. Dillbeck's habeas petition and decide his claims on the merits.

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[2] This is not the first time the State has engaged in these tactics. In *State v. Bowles*, the State filed a document entitled "Facts of the Crime and Procedural History" that was 15 pages in length. 1994-CF-12188, (June 14, 2019). In its answer to Bowles' 3.851 motion, the State include a mere footnote stating, "The State filed a summary of the facts and procedural history with this Court on June 14, 2019." *State v. Bowles*, 1994-CF-12188, (July 3, 2019) at 1.

ARGUMENT IN REPLY

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

In the first claim in his habeas petition, Mr. Dillbeck raised the claim that his death sentence violates the Eighth Amendment under both the evolving standards of decency and the original understanding of the Eighth Amendment because he was sentenced to death despite four jurors voting to spare his life. In its response, the State argues that this claim is not timely raised, misconstrues this claim as a Sixth Amendment issue under *Hurst v. Florida*, 577 U.S. 92 (2016), and disputes the historic practice regarding jury sentencing.

As an initial matter, this claim is timely raised. The State argues that Mr. Dillbeck could have raised this claim at two prior points: on direct appeal and based on a single Justice's concurrence in *Hurst v. Florida*, 577 U.S. 92 (2016) (Response at 9-10). Mr. Dillbeck's claim is premised on the evolving standards of decency. As such, given that his argument relates to the accumulation of a consensus that only began in the wake of *Hurst*, Mr. Dillbeck could not have raised this claim before then. Moreover, a single Justice's concurring opinion obviously cannot form the basis for the evolving standards of decency. If anything, that only one Justice held such an opinion

in *Hurst* supports Mr. Dillbeck's argument that the standards of decency have only now evolved to require a unanimous capital sentencing jury.

Turning to the merits, the State appears to argue that this is not a cognizable claim because Mr. Dillbeck did not raise it under the Sixth Amendment. The State then argues that the claim should be denied because, under *Hurst v. Florida*, 577 U.S. 92 (2016), the Sixth Amendment only requires that a jury determine whether a defendant is death eligible (Response at 12-13). But nowhere in Mr. Dillbeck's claim did he even mention *Hurst*. Thus, the State's strawman argument should be disregarded. Moreover, there is no merit to the State's argument that because one provision of an amendment applies (*i.e.* the Sixth Amendment jury right) to a procedure such as capital sentencing, that preempts the application of any other constitutional amendment to that procedure.[3] In doing so, the State also seems to argue that the Eighth Amendment does not apply to capital trials (Response at 12), but the United States Supreme Court has long held that sentencing procedures must comport with the Eighth Amendment. *See*,

[3] For example, the Sixth Amendment requires that juries be unanimous for a finding of guilt, *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020), while the Due Process Clause of the Fourteenth Amendment requires that the jury's determination of guilt be found beyond a reasonable doubt, *In re Winship*, 397 U.S. 358 (1970).

e.g., *Jones v. Mississippi*, 141 S. Ct. 1307 (2021); *Beck v. Alabama*, 447 U.S. 625 (1980); *Gardner v. Florida*, 430 U.S. 349 (1977).

Turning to the merits of the evolving standards of decency, although the State disputes the application of this test as a general matter, the State does not dispute Mr. Dillbeck's argument that unanimous capital jury sentencing has achieved a consensus under the current standards of society. As Mr. Dillbeck laid out in his habeas petition, 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. To the extent that the State argues that the evolving standards of decency is an improper measuring stick, the State relies solely on non-precedential concurrences or dissents by Supreme Court Justices (Response at 15-16). This Court is not free to ignore binding United States Supreme Court precedent.

And as to Mr. Dillbeck's originalist argument, the State disputes the application of the historical practice of jury sentencing based on a

misunderstanding that because sentences were often mandatory, juries only determined guilt (Response at 13-14). As Mr. Dillbeck made clear in his habeas petition, 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). Although it is certainly true that many serious crimes mandated capital punishment, it was widely understood that the jury had nullification power if the jury believed a death sentence would be too harsh. *See Woodson v. North Carolina*, 428 U.S. 280, 289-90 (1976). "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." Richa Bijlani, *More than Just a Factfinder: The Right to Unanimous Jury Sentencing in Capital Cases*, 120 MICH. L. R. 1499, 1523-25 (2022) ("the question of 'appropriate punishment' was not only at issue in those unified proceedings but was often the principal issue faced by the jury"). Therefore, the State is incorrect to argue that there was no historic capital jury sentencing practice.

The State cites *Woodson v. North Carolina*, 428 U.S. 280 (1976) for the proposition that because sentences were mandatory upon a finding of guilt, juries had no historic role in sentencing (Response at 14). But *Woodson* actually supports Mr. Dillbeck's argument. As *Woodson* lays out, capital juries played a central role in the development of criminal law based on the practice of "sanction nullification." As *Woodson* notes, because juries frequently engaged in sanction nullification, criminal statutes were tailored to add what are now seen as fundamental pillars which allow a jury to convict a defendant while sparing him from the death penalty. *See id.* at 289-90 (noting that, in response to jurors' unfavorable reaction to "the harshness of mandatory death sentences," jurisdictions created defenses such as justifiable homicide and limited the class of crimes that were punishable by death). Thus, the capital jury has historically played a vital role in limiting the application of the death penalty to those who are truly the most culpable and deserving in the eyes of society.

Therefore, Mr. Dillbeck's death sentence violates the Eighth Amendment under both the evolving standards of decency and the original understanding because four jurors voted to spare his life.

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

Regarding Mr. Dillbeck's facial challenge to the HAC aggravator, the State first argues that the claim is procedurally barred and dilatory (Response at 19-20). Mr. Dillbeck acknowledged the potential timeliness issues with this claim in his petition and argued that this Court could review the claim under the fundamental-error doctrine because the erroneous application of the HAC aggravator "'has affected the proceedings to such an extent it equates to a violation of [his] right to due process of law.'" (Petition at 21) (quoting *Jaimes v. State*, 51 So. 3d 445, 448 (Fla. 2010)). And fundamental errors may be raised at any stage of proceedings. *See id.* (quoting *Tucker v. State*, 459 So. 2d 306, 307 (Fla. 1984)). The State does not respond to Mr. Dillbeck's argument that the fundamental-error doctrine applies here and serves to lift any procedural bar on this Court's consideration of the claim.

Similarly, the State alleges that Mr. Dillbeck was "dilatory" in raising the claim because, in its view, he "waited more than a decade after the two main cases he relies upon [in his argument] were decided to raise this challenge to the HAC aggravator." (Response at 20). This misunderstands the claim. Mr. Dillbeck argues that the wide variety of situations in which this Court has

upheld the HAC aggravator demonstrates that it is unconstitutionally vague, overbroad, and fails to serve any narrowing function (*See generally* Petition at 17-22). His argument depends upon the *steady accumulation* of cases broadly applying HAC—and thereby cumulatively eroding its constitutionally mandated narrowing function—rather than on "two main cases" as the State suggests. As such, Mr. Dillbeck was not dilatory in raising this claim.

Finally, the State mischaracterizes Mr. Dillbeck's argument in two key respects. First, the State discusses HAC's application to "gunshot murders," (Response at 21-22), but overlooks Mr. Dillbeck's point that the breadth of situations where the HAC aggravator has been upheld—including stabbings, gunshot murders, and strangulations—renders it functionally meaningless as a narrowing aggravator under Florida law (*see* Petition at 19-21). The issue is not that HAC can be applied to more than one type of murder; it is that HAC can be applied to virtually *all* murders, making nearly every first-degree murder death eligible in contravention of *Furman* and the Eighth Amendment.

Second, the State concludes by saying that "none of these concerns about the HAC aggravator even apply to [Mr. Dillbeck's] case." (Response at 23). But Mr. Dillbeck raised a challenge to the *facial validity* of the aggravator, not an as-applied challenge. To succeed on a facial challenge to

the HAC aggravator, Mr. Dillbeck need only show that “the overbreadth of [the] statute [is] not only real, but substantial as well, judged in relation to [its] plainly legitimate sweep.” *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973); *see also Sult v. State*, 906 So. 2d 1013 (Fla. 2005) (invalidating statute on grounds of facial overbreadth, vagueness, and being violative of due process). Mr. Dillbeck has met that standard here.

The United States Supreme Court has already cautioned that the HAC aggravator can be unconstitutional if it is not carefully limited. *See Maynard v. Cartwright*, 486 U.S. 356, 363-64 (1988). Though the Court affirmed Florida’s HAC instruction in 1976 in *Proffitt v. Florida*, 428 U.S. 242 (1976), subsequent decisions broadly applying HAC have undermined that holding, and its potential to be applied to virtually all first-degree murders in Florida casts serious doubt on its continued viability as a constitutional aggravator. This Court should therefore decide Mr. Dillbeck’s claim on the merits and hold that the HAC aggravator is facially invalid.

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

Mr. Dillbeck has several brief points in response to the State’s discussion of the effecting-escape aggravator.

First, the State argues at length why it believes this claim to be procedurally barred (*see* Response at 25-27). Yet it overlooks the fact that Mr. Dillbeck addressed this potential issue in his petition by explaining that this Court has the power to lift any procedural hurdles in order to avoid a manifest injustice (Petition at 24-26). The State's argument is non-responsive to that point.[4]

Second, the State claims that "[t]he escape aggravator is not limited in the same manner as the avoid arrest aggravator." (Response at 28-29). But the State's arbitrary division of the aggravator into two separate components is not supported by this Court's decisions, which routinely discuss the aggravator as a unified whole with a limited scope when the victim is not a law-enforcement officer. *See, e.g.*, *Herzog v. State*, 439 So. 2d 1372, 1378-79 (Fla. 1983) ("As we have previously held, this aggravating circumstance

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[4] It should be noted that the State makes assertions regarding this claim that squarely contradict each other. First, the State says that Mr. Dillbeck's claim is procedurally barred because he had previously raised sufficiency-of-the-evidence challenges to this aggravator on direct appeal and in his first successive postconviction motion (Response at 27). But the State then says that Mr. Dillbeck "raised this claim for the first time" in his habeas petition. *Id.* at 28. These statements cannot both be true.
To be clear, Mr. Dillbeck recognizes that he has challenged the effecting-escape aggravator before. That is why he argued that this Court should address the claim under its manifest-injustice precedent. If anything, Mr. Dillbeck's two previous efforts to litigate this claim demonstrate his diligence in pursuing it. *Contra id.* at 27-28.

is applicable primarily in the situation where defendant **kills a law enforcement officer** in an effort to avoid arrest **or effect escape**.") (emphasis added). Because the victim here was not a law enforcement officer, Mr. Dillbeck's primary motivation in committing murder must have been to eliminate witnesses—a scenario that is contradicted by the facts. *Trease v. State*, 768 So. 2d 1050, 1056 (Fla. 2000); *Jackson v. State*, 502 So. 2d 409 (Fla. 1986); (*see also* Petition at 22-23).

As the State notes, Mr. Dillbeck "testified that he was not going to let anything get in the way of his escape. [Mr.] Dillbeck's entire purpose for carjacking the victim's car and threatening her with a knife, . . . was to further his escape from prison." (Response at 30). That may explain why Mr. Dillbeck *carjacked* the victim, but killing her actively frustrated his escape plan because he no longer had anyone to drive the getaway car for him. It makes no sense for someone who "was not going to let anything get in the way of his escape" to deliberately kill his only means of effecting that escape, and Mr. Dillbeck's trial testimony reflects as much (*see* Petition at 22-23) (citing trial testimony explaining that Mr. Dillbeck "went off" and panicked when the victim grabbed him).

Finally, the State argues that any error from this invalid aggravator was harmless due to the other aggravating factors present in Mr. Dillbeck's case

(Response at 30-31). Mr. Dillbeck has already explained, both here and in his initial brief and reply, why the HAC and prior-violent-felony aggravators are invalid in his case—both of which the State acknowledges "are particularly strong aggravators" under this Court's precedent. *Id.* at 31. Once these three improper aggravators are removed from the equation, the already weak case for a death sentence against Mr. Dillbeck becomes unsustainable.

Furthermore, the question is not one of sheer numbers. Rather, it is whether the removal of these aggravators, within the context of Mr. Dillbeck's case when viewed in its entirety, shifts the balance towards a life sentence. Here, that answer is undoubtedly yes. Already at the time of trial, fully one-third of Mr. Dillbeck's jury voted for a life sentence, and if his proceedings had occurred only a few years later, he likely would have received sentencing relief under *Hurst*. Additionally, Mr. Dillbeck was found to have committed the murder while substantially impaired—a particularly weighty statutory mitigator. *Cf. Offord v. State*, 959 So. 2d 187, 191, 192 (Fla. 2007). Now, Mr. Dillbeck has presented evidence raising troubling substantive and procedural issues with his death sentence, including that he is categorically ineligible to be executed, that his execution after several-decades-long solitary confinement would be cruel and unusual punishment, and that three

of the aggravators used to justify a death sentence were invalid. In light of all of these circumstances, the erroneous application of the effecting-escape aggravator was not harmless error.

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 14th day of February 2023.

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/s/ Linda McDermott
Linda McDermott