IN THE SUPREME COURT OF FLORIDA

CASE NO. SC 22-700
LOWER COURT CASE NO. 081992CF0004510001XX

JACK R. SLINEY
Appellant,

v.

STATE OF FLORIDA
Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT, IN AND FOR CHARLOTTE COUNTY, STATE OF FLORIDA

AMENDED INITIAL BRIEF OF APPELLANT[1]

HEATHER A. FORGÉT
Assistant CCRC
Florida Bar No. 0032402

JULISSA R. FONTÁN
Assistant CCRC
Florida Bar No. 0032744

NICHOLAS M. BEDY
Assistant CCRC
Florida Bar No. 1035895
Capital Collateral Regional Counsel – Middle Region
12973 N. Telecom Pkwy,
Temple Terrace, FL 33637
(813)558-1600

[1] Amended only as to order of initial pages and not the contents of the brief. The body of the brief remains unchanged.

TABLE OF CONTENTS

Page

INDEX TO APPENDICES

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

Other Authorities

STANDARD OF REVIEW

This proceeding involves the appeal of the circuit court's summary denial of Mr. Sliney's successive motion for postconviction relief based upon newly discovered evidence. Mr. Sliney sought an evidentiary hearing pursuant to Fla. R. Crim. P. 3.851 for all claims requiring a factual determination.

When the circuit court denies claims under Section 3.851 of the Florida Statutes without an evidentiary hearing, this Court reviews the circuit court's decision *de novo*, accepting the movant's factual allegations as true to the extent they are not refuted by the record, and affirming the ruling only if the record conclusively shows the movant is entitled to no relief. *See Tompkins v. State*, 994 So. 2d 1072, 1081 (Fla. 2008); *see also State v. Coney*, 845 So. 2d 120, 137 (Fla. 2003); *Rolling v. State*, 944 So. 2d 176, 179 (Fla. 2006).

PRELIMINARY STATEMENT

Appellant Jack Sliney will be referred to as "Appellant" or "Mr. Sliney" and the Appellee State of Florida will be referred to as "State." Citations to Mr. Sliney's record on direct appeal will be designated as: "TR" followed by the appropriate volume and page numbers. Citations to the supplemental record on appeal from Mr. Sliney's trial shall be designated: "TRS," followed by the volume and page numbers. The initial post-conviction record on appeal shall be referred to as "PCR" followed by the appropriate volume and page numbers. The first successive postconviction record created in 2017 (Florida Supreme Court case SC17-1074) will be designated "SPCR1," followed by the appropriate volume and page number. The successive postconviction record on appeal *here*, as **filed by the Clerk in 2022**, will be designated as "SPCR2" followed by the appropriate volume and page number. All other references will be self-explanatory or otherwise explained herein.

REQUEST FOR ORAL ARGUMENT

Jack Sliney is a prisoner under sentence of death. The resolution of issues involved in this action will determine whether he may live or die. This Court has historically not hesitated to allow oral argument in other capital cases in a similar posture. *Huff v. State*, 622 So.2d 982, 983 (Fla. 1993). A

full opportunity to air the issues through oral argument would be appropriate in this case, given the seriousness of the claims at issue and the stakes involved. Mr. Sliney, through counsel, respectfully requests this Court grant oral argument.

INTRODUCTION

> "It was then that Hook bit him. Not the pain of this but its unfairness was what dazed Peter. It made him quite helpless. He could only stare, horrified. Every child is affected thus the first time he is treated unfairly. All he thinks he has a right to when he comes to you to be yours is fairness. After you have been unfair to him he will love you again, but will never afterwards be quite the same boy. No one ever gets over the first unfairness; no one except Peter. He often met it, but he always forgot it. I suppose that was the real difference between him and all the rest.
> So when he met it now it was like the first time; and he could just stare, helpless. Twice the iron hand clawed him."

J.M. Barrie, *Peter Pan*[2]

In 1992, Jack Sliney was 19 years old and taking out the trash after work when he looked up to see his future codefendant, Keith Wittemen,[3] sleeping in the bushes. (TR. 11:1137.) Appellant learned through his friend, Wittemen's sister, that Keith Wittemen was kicked out of their parents' home because he quit school and had nowhere else to live. *Id.* Appellant invited the homeless Wittemen to share his own room at his parents' house. (*Id.* at 1138.) Mere months later, Mr. Sliney is indicted along with Mr. Wittemen for a robbery-turned-homicide that resulted in the tragic death of Mr. George Blumberg [hereinafter "victim"].[4] After two separate prosecutions and trials

---

[2] J.M. BARRIE, PETER PAN (Henry Holt and Co. ed., 2003)(1911).
[3] Various court documents over the years have portrayed alternate spellings of this codefendant's name. For simplicity here, we will conform all references to the most recent spelling used in court filings: "Wittemen."
[4] (TR. 1:3-5.)

seeking justice for Mr. Blumberg's killing, Mr. Sliney received a death sentence, while Mr. Wittemen was granted a life sentence with the possibility of parole after 25 years.[5]

Mr. Sliney is still under a sentence of death in 2022. To frame his current appeal to this Court, he presents these points of note:

> "When the law punishes by death, it risks its own sudden descent into brutality, transgressing the constitutional commitment to decency and restraint."

*Kennedy v. Louisiana,*554 U.S. 407, 420, 128 S.Ct. 2641, 171 L.Ed.2d 525 (2008).

> "Capital punishment must be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution."

Roper v. Simmons, 543 U.S. 551, 568, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005) (citations omitted).

The death penalty is categorically barred for certain groups of offenders if a national consensus develops against executing the particular group, and if capital punishment fails to serve the purposes of punishment, namely retribution or deterrence. *See, e.g.*, *Roper,* 543 U.S. at 560.(death penalty categorically barred for offenders under 18 years); *Atkins v. Virginia,* 536 U.S. 304, 311, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002) (death penalty categorically barred for intellectually disabled offenders); *Kennedy*, 128 S.Ct.

[5] *See Wittemen v. State*, 310 So. 3d 1037, 1039–40 (Fla. 2d DCA 2020).

at 2650-51 (death penalty categorically barred for offenses not involving homicide); *see also, Gregg v. Georgia,* 428 U.S. 153 (1976)(the death penalty is said to serve two purposes, retribution and deterrence).

STATEMENT OF THE CASE

Procedural History

Nineteen-year-old Jack Sliney and his co-defendant were each charged by indictment dated September 3, 1992, with one count of first-degree premeditated murder, one count of felony murder, and one count of robbery based on the events that occurred on June 18, 1992. (TR. 1:3-5.) Mr. Sliney's trial began on September 27, 1993, and concluded on October 1, 1993, when a jury found Mr. Sliney guilty on all counts, and by a bare majority, voted seven-to-five to submit an advisory opinion of death to the trial court.[6] Mr. Sliney's counsel was discharged after the trial, and the public defender was appointed with approximately 30 days remaining before the penalty phase started. (TR. 3:169.) The public defender motioned for a continuance to adequately prepare for the penalty phase, explaining to the court that the defense received the 1359-page trial transcript on October 18, 1993, yet would need to review and prepare a death penalty defense strategy by November 4, 1993. (TR. 1:174-75.) The public defender also moved for the appointment of a mitigation specialist. *Id.* Both motions were denied.

[6] Mr. Sliney's codefendant, Keith Wittemen, was 17, prosecuted separately, and received a life sentence. Wittemen is now awaiting resentencing due to an intervening change of law regarding juvenile sentencing. *See* *Wittemen v. State*, 310 So. 3d 1037, 1039–40 (Fla. 2d DCA 2020) for full explanation.

(TR. 1 at 179.) The penalty phase was completed in one day. (TR. 3:373-449.) Defense counsel presented the testimony of seven witnesses. *Id.* The presentation took less than one hour and takes up less than 30 pages in the transcript. (TR. 1:181-86.); (TR. 3: 373-449.) The jury returned an advisory death sentence by a slight majority of seven-to-five after approximately one hour of deliberation. (TR. 1:185-86.) The Court conducted another hearing on December 10, 1993, where defense counsel asked the Court to consider letters in support of Mr. Sliney, but the defense presented no in-person witness testimony. (TRS. 1:1-24.) Mr. Sliney also made an oral statement and the State presented victim impact testimony. *Id.* Defense counsel later filed a Memorandum in Support of Life, barely five pages in length, without description of the evidentiary support presented at trial/penalty phases or case law or argument to assist the court in weighing the mitigators.(TR. 2: 207-12.)

Because the jury only returned an advisory recommendation for death, the Circuit Court of the Twentieth Judicial Circuit, Charlotte County, acted as sole factfinder and found aggravating and mitigating factors and weighed them without the benefit of individual factual determination by each juror and the circuit court sentenced Mr. Sliney to death on February 14, 1994. (TR.

2: 221-228.) [7] The trial court sentenced Mr. Sliney to life for the robbery conviction. When the court sentenced Appellant to death for the murder conviction, the trial judge found two statutory mitigating factors,[8]

[7] The death sentence on then 19-year-old Jack Sliney was imposed after a seven-to-five jury recommendation pursuant to a capital sentencing scheme ruled to be unconstitutional by the United States Supreme Court in *Hurst v. Florida*, 136 S. Ct. 616 (2016), and by this Court in *Hurst v State*, 202 So. 3d 40 (Fla. 2016). But for the date of his crime, Mr. Sliney would be one of the many death row prisoners in Florida who have been granted new penalty phase proceedings. *See Hitchcock v. State*, 226 So. 3d 216 (Fla. 2017); *Asay v. State*, 210 So. 3d 1 (Fla. 2016); *Ring v. Arizona*, 536 U.S. 584 (2002). Although this Court later receded from *Hurst*, Mr. Sliney did not receive *any* jury findings on his aggravators, still making his sentence unconstitutional, but for the timing. *See State v. Poole,* 297 So. 3d 487, 507 (Fla. 2020)(receding from *Hurst* "except to the extent it requires a jury unanimously to find the existence of a statutory aggravating circumstance beyond a reasonable doubt."); *Compare Sliney v. State*, 235 So. 3d 310 (Fla. 2018)(holding that *Hurst v. State*, 202 So.3d 40, which required a jury to unanimously find that aggravating factors were sufficient to impose death, did not apply retroactively to defendant's death sentence). *With Hojan v. State*, 212 So. 3d 982 (Fla. 2017)(vacating death sentence after finding error in permitting judge to find facts necessary to impose sentence of death was not harmless; jury recommended a sentence of death by a vote of nine to three).

[8] The statutory mitigating factors were: Appellant had no significant history of prior criminal activity; and, Appellant was at a youthful age at the time the crime was committed.

six non-statutory mitigators,[9] and two aggravating factors.[10] *Id.*

On direct appeal, this Court affirmed Mr. Sliney's convictions and sentences of death in a four-to-three decision. *Sliney v. State*, 699 So.2d 662 (Fla. 1997). Three dissenting justices of this Court found Mr. Sliney's sentence to be disproportionate and would have reduced Mr. Sliney's death sentence to life with the possibility of parole after 25 years, to run concurrent with his life sentence for the robbery. *Id.* at 664. The United States Supreme Court denied certiorari on February 23, 1998. *Sliney v. Florida*, 118 S.Ct. 1079 (1998).

Mr. Sliney timely filed a *pro se* Motion to Vacate Judgments of Conviction and Sentence on February 16, 1999. On March 19, 1999, Thomas Ostrander was appointed to represent Mr. Sliney in post-conviction. Counsel subsequently amended the motion. The circuit court held an evidentiary hearing on April 29, 2002. On June 19, 2003, Appellant filed a

---

[9] The non-statutory mitigating factors the court considered were that Appellant: was a good prisoner (accorded some weight); was polite and mild-mannered (accorded little weight); was a good neighbor (accorded little weight); was a caring person (accorded little weight); had a good school record (accorded little weight); was gainfully employed (accorded little weight).

[10] The two aggravating factors the court considered were that Appellant: committed the murder while engaged in or was an accomplice in the commission of a robbery; and the murder was committed for the purpose of avoiding or preventing a lawful arrest.

motion to amend his 3.850 Motion to allege a claim regarding a conflict of interest with his trial lawyer, who had previously represented Detective Sisk in a civil matter when Sisk was a key prosecution trial witness who had interrogated Mr. Sliney during the murder investigation. (PCR. 4: 625-648.) Counsel also represented Detective Sisk's son in a divorce proceeding prior to Mr. Sliney's trial. *Id.* at 644. Trial counsel had failed to disclose this information to Mr. Sliney. The Court held a supplemental evidentiary hearing on this claim on December 2, 2003. As noted by this Court on appeal, at that supplemental hearing, post-conviction counsel Ostrander failed to call Detective Sisk, and failed to put on any evidence as to what trial counsel "should have done in cross examination that was not done." *Sliney v. State*, 944 So. 2d, 270, 280 (Fla. 2006). The circuit court ultimately denied Mr. Sliney's initial 3.850 motion on December 14, 2004. (PCR. 7: 933-1209.) This Court affirmed the denial of relief. *Sliney v. State*, 944 So. 2d, 270 (Fla. 2006).

To ensure he complied with his federal habeas deadline, Mr. Sliney timely filed a *pro se* federal habeas petition in the United States District Court, Middle District, Fort Myers Division. *Sliney v. Secretary, Florida Department of Corrections*, 2:06-cv-670-36SPC. (Doc. 1). Mr. Ostrander was subsequently appointed to represent him in his federal habeas

proceedings. (Doc. 9). Mr. Sliney raised six grounds in his federal habeas petition.[11] Four of the grounds were found to be procedurally defaulted due to appellate counsel's failure to raise them during the post-conviction appeal. (Doc. 27). Mr. Sliney's Petition was denied on September 24, 2010. (Doc. 27). He was denied a Certificate of Appealability (COA). (Doc. 27). Counsel filed a Notice of Appeal and an untimely application for a COA to the Eleventh Circuit, which was denied by a single judge on December 21, 2010. Counsel did not seek reconsideration of the COA from a three-judge panel nor did counsel file a Petition for Writ of Certiorari in the United States Supreme Court. Mr. Ostrander effectively ended his representation with Mr. Sliney in December of 2010, asserting that there was nothing more that could be done on his case. Mr. Sliney repeatedly sought to contact Mr. Ostrander, whom he had not seen since the evidentiary hearings took place in the circuit

[11] Mr. Sliney raised the following six grounds for relief: (1) trial counsel was ineffective for failing to investigate, develop, and present a defense of voluntary intoxication based on Petitioner's alcohol and steroid use; (2) trial counsel was ineffective for failing to investigate, develop, and present evidence of compelling statutory and nonstatutory mitigating factors regarding Petitioner's alcohol and steroid use; (3) the trial court unconstitutionally shifted the burden of proof in its instructions to the jury at sentencing; (4) trial counsel was ineffective for failing to properly examine the jury during *voir dire;* (5) trial counsel was ineffective for failing to move for a change of venue; and (6) the defendant was denied a fair trial due to the cumulative effect of the errors made in his trial. *Sliney v. Sec'y, DOC*, 2010 WL 3768373, at 5 (M.D. Fla. Sept. 24, 2010).

court.[12] Mr. Sliney filed multiple motions to discharge Mr. Ostrander and sought to have counsel from Capital Collateral Regional Counsel – Middle Region (CCRC-M) appointed. The circuit court denied Mr. Sliney's Motion to Discharge Counsel on May 23, 2014. (SPCR1. 1:86-88.) The circuit court noted in the Order, though did not take testimony or evidence at the hearing, that while the performance of appellate counsel (Sara Dyehouse) may have been ineffective, Mr. Ostrander was not ineffective for relying on her to handle the appeal.[13] Subsequently, on August 18, 2016, this Court suspended Mr. Ostrander from the practice of law when he represented another client in federal court similarly to his representation of Mr. Sliney.[14]

---

[12] According to Mr. Sliney, undersigned counsel's visit to Mr. Sliney was Mr. Sliney's first legal visit in 14 years. Because counsel still has not received complete records, counsel cannot verify this but has no reason to dispute this fact, which is supported by Mr. Ostrander's late 2010/early 2011 letter to Sliney.

[13] It is worth noting here that Mr. Ostrander's prior disciplinary history included findings of similar misconduct and neglect toward other clients. (*See* Order of Public Reprimand, Feb. 17, 2000, *Florida Bar v. Ostrander*, SC96103. *See* App._Attach. A., and another Public Reprimand- shortly after this motion to discharge was decided- on June 19, 2014. He was also suspended indefinitely from the 11th Circuit Court of Appeals and for 60 days by the Florida courts in 2016, automatically reinstated November 18, 2016, but remained ineligible to practice due to delinquencies of costs, continuing legal education, membership fees and proof of restitution to his former client. *See generally* App. Attach. A.

[14] *See* Conditional Plea For Consent J., ¶ 7(A)(SPCR1. 1:37-38.) wherein Ostrander consented to the Florida Bar's grounds for discipline including Ostrander's failure to perform duties to his client in federal court, such as

On the same day, the circuit court reconsidered and granted Mr. Sliney's Motion to Discharge Mr. Ostrander.[15] Since that time, counsel has tried to obtain records on Mr. Sliney's case, including the files from Mr. Ostrander. Mr. Ostrander never replied to counsel's multiple phone calls or emails, and a certified letter was returned to sender. Ultimately, undersigned counsel never received a response from Mr. Ostrander and never received his files, despite the court order directing Mr. Ostrander to provide them. Mr. Ostrander's suspension was automatically reinstated November 18, 2016, but he remained ineligible to practice due to delinquencies of costs, continuing legal education, membership fees and proof of restitution.[16]

Postconviction counsel had to build Mr. Sliney's case from "scratch." Despite this setback, Mr. Sliney filed his most recent Successive Motion to Vacate Judgment and Sentence under Section 3.851 of the Florida Statutes

---

failure to comport himself to court orders directing him to file court documents, arguably similar to behavior Ostrander exhibited during Mr. Sliney's representation. Dissimilarly to Mr. Sliney's trial court, the Circuit Court of Appeals, 11th Circuit took immediate action, suspending Ostrander indefinitely from the 11th Circuit, to which the Florida Bar issued its own disciplinary action and this Court ordered a suspension of Ostrander's Florida license to practice law. *See generally supra* notes 12, 13 and *infra* note 15 and accompanying text; (SPCR1. 1:23-43.)

[15] Mot. to Sub. Counsel and Appoint Capital Collateral Regional Counsel (CCRC-M), filed on August 26, 2016. (SPCR1. 1:29-32.)

[16] *See App. Attach.* A, *see also* notes 12, 13, 14, *supra*, and accompanying text.

on January 14, 2022. (SPCR2. 1:003-103.) Mr. Sliney raised two claims for relief and sought evidentiary hearings on both claims to offer proof that he should be ineligible for the death penalty under the protections of the United States and Florida Constitutions. *Id.* The first claim outlines newly discovered evidence that lessens the Appellant's culpability making it unconstitutional to sentence him to death. *Id.* The second claim is Appellant's death sentence is unconstitutional because it is excessive and the newly discovered flies against the national consensus which holds older adolescents (18-21) less culpable, and not deserving of the death penalty, thus violating the Eighth Amendment's ban on cruel and unusual punishment.

The circuit court substantially ruled in its Order that the Mr. Sliney asserted "purely legal arguments," and, in the court's opinion, a hearing was not required on the Successive Motion to Vacate Judgment and Sentence. (SPCR2. 1:134.) The defendant moved for a re-hearing on April 8, 2022. (SPCR2. 1:140.) The trial court ruled that the Motion for Rehearing contained no additional points of fact or law that the court overlooked or misapprehended and denied the Motion for Rehearing. (SPCR2. 1:153.) On May 23, 2022, the defendant timely filed his Notice of Appeal and this Court accepted jurisdiction. (SPCR2. 1:155-56.)

STATEMENT OF FACTS RELEVANT TO THIS APPEAL

Pre-trial and Trial

On or about June 28, 1992, Charlotte County Sheriff's Office detained and questioned Mr. Sliney (TR. 2 at 46.) about the murder of Mr. Blumberg, a pawnshop owner, who was killed during a robbery ten days earlier. (TR. 1:3-5.) Appellant graduated from high school 22 days before the incident in question, was 19 years old, and received a scholarship to go to college. (TR. 11 at 1108.)

The victim's wife reported seeing jewelry cases "askew," on the day she found her husband's body on the floor in the shop. (TR. 8:676.) The medical examiner testified that the victim sustained multiple injuries, including broken bones, head lacerations, and stab wounds, which contributed to his cause of death. (TR. 9:773-74.) The medical examiner opined the stab wounds were caused by scissors, and other injuries appeared to be consistent with various items found laying about the shop, such as a hammer and a camera lens (TR. 9:763-64.), but also could have been caused by "a heavy object or a boot (TR. 9:771-72.)." The trial court did not find the "cold, calculated and premeditated" aggravator applicable in this case. (SPCR2. 1 at 127)(stating "none of the other factors enumerated

by statute is applicable to this case and no others have been considered by this court."); *See* FLA. STAT. § 921.141(6)(i).

Once detained by law enforcement, Mr. Sliney gave statements, both written and verbal and he was arrested soon thereafter. (Mot. to Suppress, TR. 2: 46-47.) Appellant made admissions to involvement in crimes inside the pawnshop, but counsel later argued the "confession" was involuntary due to Appellant's insufficient *Miranda* warnings,[17] intoxication, and mental "duress" or his "emotional state." (TR. 2:251-52.) Defense trial counsel filed a motion *in limine* to suppress Appellant's statements. (TR. 1:46-47, 52-54, 249-372.) The court denied Defendant's Motion to Suppress. (TR. 1 at 55.) The statements were later published to the jury during trial.

Youthful Age As a Mitigator

The trial court found that, at 19 years old, Mr. Sliney was an adult, not a juvenile and "no evidence was submitted that [Mr. Sliney's] emotional age was different than his actual age." (Sentencing Order, SPCR. 1 at 127, ¶3.) Appellant's attorney Mark Cooper later testified during the initial postconviction evidentiary hearing that the approach at the penalty phase was to portray Sliney as a "good, clean-cut kid." *Sliney*, 944 So. 2d at 284

[17] The Appellant never signed the written Miranda waiver. *See generally Miranda v. Arizona*, 384 U.S. 436, 492 (1966).

(internal citations omitted). However, no expert testimony was presented during trial or sentencing to explain the brain development of 19-year-olds, or to specifically portray this Appellant as youthful.[18] The defense did enter a photo of Appellant wearing his high school football jersey into evidence. (Def's Trial Ex. B, at I.)

SUMMARY OF ARGUMENT

The trial court erred in denying evidentiary hearings on all Appellant's claims because they were not "purely legal arguments," but instead required expert presentation of the scientific facts in dispute to decide the claims.

Whether the AAIDD Manual[19] included newly discovered evidence of a scientific professional consensus on the age of brain development is an issue of fact that neither the court nor the parties have the scientific expertise to address without an evidentiary hearing. Mr. Sliney's new evidence claim is timely because prior evidence in his possession (such as the reports cited in the circuit court order),[20] or as it already existed in the record, did not develop the legal significance to bar his death sentence until the leading

[18] Sentencing Order, SPCR. 1 at 127, ¶3.
[19] *Intellectual Disability: Definition, Classification, and Systems of Supports* AM. ASS'N OF INTELL. & DEVELOPMENTAL DISABILITIES (12th ed. 2021) [*hereinafter* "AAIDD" or "AAIDD Manual" or "Manual"].
[20] (SPCR2. 1:132-39.)

manual for brain development within the scientific community confirmed the existence of a new scientific consensus on January 14, 2021, raising the age of adolescent brain development to 22 years old.

Mr. Sliney's new evidence claims cannot be procedurally barred as previously litigated without an evidentiary hearing to compare the evidence as originally presented at trial with the newly discovered evidence. The nature of the newly discovered evidence claim is that it is new- and therefore could not have been presented in prior direct or collateral appeals. These facts are in dispute and require a hearing.

The trial court erred because it cannot determine if Sliney's claim qualifies as "newly discovered evidence" without an evidentiary hearing and specific expert testimony to provide the proper weight to the factfinder.

The circuit court erred by summarily denying Appellant's claim that Florida's death penalty scheme violates the Eighth Amendment by disregarding evolving standards of decency, standing in contrast to legislative intent across the country, and overlooking a "national consensus" against executing individuals who were 18-21 years old at the time of the offense. Without presentation of evidence and argument from the parties, the court was unable to determine the current standard and national consensus. Also, on appeal, this Court is unable to weigh the merits of Mr.

Sliney's claim or affirm the circuit court's denial of relief without fully developed facts in the record.

Therefore, if this Court does not grant Mr. Sliney's petition for relief, the Court should remand the matter to the circuit court for an evidentiary hearing on all claims in Mr. Sliney's Successive Motion for Post Conviction Relief (SPCR2. 1:3-103)(filed Jan. 14, 2022).

SUMMARY OF ARGUMENT

I. **THE TRIAL COURT ERRED BECAUSE IT WAS REQUIRED TO HAVE AN EVIDENTIARY HEARING BECAUSE THE NEWLY DISCOVERED EVIDENCE INVOLVED FACTS IN DISPUTE AND THE RECORD DID NOT CONCLUSIVELY BAR RELIEF.**

A) Mr. Sliney's newly discovered evidence claim cannot be time-barred without an evidentiary hearing and should be remanded to the circuit court for an evidentiary hearing.

i. Mr. Sliney's claim is timely because the new evidence makes the claim cognizable and, therefore, not discoverable until the change to the AAIDD Manual was published January 14, 2021.

At the core of Mr. Sliney's first claim is the argument that the January 14, 2021 pronouncement by the American Association of Intellectual and Developmental Disabilities Manual ("AAIDD" or "AAIDD Manual" or "Manual"), stating that the human brain is not developed until the age of 22, is new evidence representing a scientific consensus that new methods of testing and studying brain development have proven that "older

adolescents" (18-22 years old) have no scientific difference between the brains of older juveniles (17 or younger). Specifically, late adolescents, such as Mr. Sliney at the time of his crime (19), exhibit the exact same deficiencies identified in *Roper v. Simmons* to exclude juveniles from the narrowed class of persons to be eligible for the death penalty because, regardless of whether the crime committed may qualify as the "worst of the worst,"[21] juveniles have undeveloped brains, lowering their culpability[22] so as to make the death penalty disproportionate, excessive, and cruel and unusual punishment, which is proscribed by the Eighth Amendment, and incorporated against the states by the Fourteenth Amendment.[23]

Mr. Sliney requested a hearing on this claim to present evidence, not just about the existence of the new AAIDD scientific consensus, but to provide the expert testimony required to assist the court in understanding the

---

[21] See, *e.g., Roper* v. *Simmons,* 543 U. S. 551, 568 (2005) ("Capital punishment must be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution' " (quoting *Atkins* v. *Virginia,* 536 U. S. 304, 319 (2002)))

[22] The conclusion of lesser culpability (for juveniles) was based upon three primary findings by the *Roper* court: First, juveniles possess a lack of maturity and an underdeveloped sense of responsibility; second, adolescents who are involved in the criminal justice system are more vulnerable/susceptible to negative influences, such as peer pressure and other outside pressures; and third, the character of adolescents is not as fully formed as that of adults. *Roper v. Simmons* (543 U.S. 551, 2005).

[23] Amend. VIII, U.S. Const.; Amend. XIV, U.S. Const.

specific scientific advancements that went into this new pronouncement, drawing a new line that proves the late adolescent's brain is undeveloped. In addition, Mr. Sliney indicated he would present expert testimony as to why his claim was not cognizable until this scientific consensus was pronounced in 2021. (SPCR2. 1:003-103; 165-87.)

Notably, a newly discovered evidence claim is one of the recognized exceptions to the one-year time limit to file a postconviction claim under Rule 3.851. *See* Fla. R. Crim. P. 3.851(d)(2)(A). Mr. Sliney did file this claim within one year of the AAIDD publication date.[24]

Despite this, the circuit court denied Mr. Sliney's first claim without an evidentiary hearing. The court held:

> [T]he motion is untimely, and procedurally barred. Further, the change to the manual, even supported by the expert reports attached to the motion, would not constitute newly discovered evidence. The Court is bound by the decisions of the U.S. Supreme Court and the Florida Supreme Court rejecting this type of claim. The change to the manual is not specific to Defendant. While the expert reports attached to the motion are specific to Defendant's background, the motion was not filed within one year of those reports. The reports merely provide greater detail to mitigating factors already presented during the penalty phase.[25]

The Florida Rule of Criminal Procedure permits the summary denial of

[24] *See* Mot. for Post Conviction Relief-Successive Mot. to Vacate Death Sentence, filed January 14, 2022. (SPCR2. 1:003-103.)
[25] *See* Final Order Den. Def's Successive Mot. (SPCR2. 1:137, ¶8.)

a successive motion for postconviction relief without an evidentiary hearing "[i]f the motion, files, and records in the case conclusively show that the movant is entitled to no relief." Fla. R. Crim. P. 3.851(f)(5)(B). Mr. Sliney respectfully submits that the complete record including his Motion and arguments at the CMC does not conclusively establish that he is not entitled to relief. *Id.*; (SPCR2. 1:165-87.) Therefore, Mr. Sliney is entitled to an evidentiary hearing on this claim.

For example, in reviewing the court's order, while Appellant cannot be certain because the circuit court did not specify by titling the reports in question, it appears that the court considered "expert reports"[26] that were exhibits to Mr. Sliney's Successive Motion for background information instead be part of its review of his "newly discovered evidence." While Appellant will not dispute that the reports were authored more than one year before the filing date of this Successive Motion, the reports are not the newly discovered evidence brought forth by his claim.[27] The reports were included with the Motion for general background but not required to prove his claim. Therefore, this is not a reason to deny a hearing based on "reports."

---

[26] *See* Final Order Den. Def's Successive Mot. (SPCR2. 1:137,¶8.) *See generally* (SPCR2. 1:53-85)(generally the "reports" attached to the motion underlying this appeal.)

[27] *See also* Mot. for Reh'g, (SPCR2. 1:140-52.)

Additionally, the Manual need not be "specific" to Mr. Sliney when he was indisputably 19 years old at the time of the crime for which he was convicted and received the death penalty. (SPCR2 1:127, ¶3.) In theory, that is all he would need to prove should the court find 18-22 year-olds to be categorically excluded from the narrow class of persons eligible for the death penalty.

Furthermore, as to the court's statement, "The reports merely provide greater detail to mitigating factors already presented during the penalty phase,"[28] Appellant would dispute this assertion because the trial court specifically denied a motion for appointment of a mitigation specialist or similar expert for the penalty phase. Therefore, these reports are different types of evidence than that presented at sentencing hearings. Regardless, Appellant finds the court's identified support for its ruling here to be irrelevant, and incorrect, because the reports are not the subject of this underlying claim, which is that new evidence shows he qualifies as a member of a class of persons excluded from punishment by the death penalty. That is not mitigation evidence, that is a categorical bar. Therefore, the correct remedy for the trial court's mistaken ruling is to remand this case back to the circuit court for an evidentiary hearing and full and fair determination of the merits of Appellant's claim.

[28] (SPCR2. 1:137-38.)

It would also be incorrect if the court were referring to the State's argument that the "manual" is not "specific" to Mr. Sliney because the AAIDD Manual "was published . . . citing those studies in the context of assessing [i]ntellectual [d]isability (SPCR2.1:119.)," and that the AAIID "has no application to his case because he has an average IQ and he is not asserting intellectual disability bars his death sentence. " (*Id.* at 115-16.)

The fact that Mr. Sliney is not intellectually disabled is of no relevance to his claim. As argued at the CMC,[29] the science behind a diagnosis of intellectual disability and juvenile brain development is the same. The Manual provides practitioners with the test to diagnose intellectual disability. The test has three prongs—significant limitations in intellectual functioning, significant limitations in adaptive behavior, and those limitations must have originated during the development period understood, now, as before the age of 22. Because intellectual disability is what is known as a *neurodevelopmental* disorder, the science and scientific conclusions behind the establishment of the "timing" factor behind determining the end of the brain development period in the third prong is the same for intellectually disabled persons or those of average intelligence. A person's brain *develops* at the same rate, but what exactly it develops into, a high IQ or lower IQ,

[29] (SPCR2. 1:165-87.)(Transcript of proceeding held on March 7, 2022.)

does not affect the time it takes to get there.[30] Case in point, the Court in *Roper* Court adopted the framework used in *Atkins v. Virginia,* 536 U.S. 304, 312-14 (2002), a mental disability case, to address the extension of the categorical bar to the execution of juveniles from the age of 16 to 18.[31]

ii. Mr. Sliney's claim is not procedurally barred because although "age" was a mitigator at sentencing, the instant claim is based on new evidence that was not discoverable prior to January 14, 2021.

The state argues that age was mitigator at sentencing and because this issue was not raised on appeal or in his previous postconviction motions, it is procedurally barred. The trial court agreed with the State's position and summarily denied Mr. Sliney's first claim as procedurally barred.

---

[30] *Intellectual Disability: Definition, Classification, and Systems of Supports*, 1, at 13, AM. ASS'N OF INTELL. & DEVELOPMENTAL DISABILITIES (12th ed. 2021).

[31] *Roper v.* Simmons, 543 U.S. 551 (2005). *See also Atkins v. Virginia*, 536 U.S. at 318, 320(holding that a sentence of death is a categorically disproportionate punishment for offenders with intellectual disability because of their diminished culpability. In reaching this conclusion, the Court identified specific deficiencies shared by people with intellectual disability that reduce their culpability as a class, regardless of their crimes: "they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others," "they often act on impulse rather than pursuant to a premeditated plan," and "in group settings they are followers rather than leaders." *Id.* at 318. These deficiencies so diminish the culpability of those with intellectual disability that the death penalty's two penological purposes—retribution and deterrence—are not served by their execution. *Id.* at 318–20).

Contrary to the state's argument, Mr. Sliney is not claiming a reweighing of the age mitigator in his case. Therefore, the cases cited by the State and repeated in the circuit court's order on this point are irrelevant, and the trial judge erred by assuming the State's position on this issue.

Should this Court find some merit in the State's argument and expect a counterargument, Mr. Sliney will admit it is technically true that age was a mitigator at his sentencing and the trial judge ultimately made a finding assigning it "little" weight as a mitigator. (TR. 2:221-28; SPCR2. 1:224, ¶3.) However, Appellant would disagree that proper evidence was ever submitted for the court to weigh his age mitigator at sentencing (or other related psychological/physical health mitigators) and this was loosely related to the subject of two of his prior postconviction claims for ineffective assistance of his trial counsel for failure to investigate mitigation or present mitigation.[32]

To illustrate this point, if needed, Mr. Sliney submits that after the trial and guilty verdict, but before the penalty phase, the defense filed a

[32] *See Sliney v. Sec'y, DOC*, 2010 WL 3768373, at 5 (M.D. Fla. Sept. 24, 2010)(listing claims as plead: "(1) trial counsel was ineffective for failing to investigate, develop, and present a defense of voluntary intoxication based on Petitioner's alcohol and steroid use; (2) trial counsel was ineffective for failing to investigate, develop, and present evidence of compelling statutory and nonstatutory mitigating factors regarding Petitioner's alcohol and steroid use . . . "); *See also* (PCR. 1:110-151.)(submitting the exact same claims in state postconviction).

sentencing memorandum that included one line referencing age as a mitigator: "Age of Jack Sliney at the time of the crime." This short sentence was inserted within a list of eight other non-statutory mitigators following a blanket statement alleging all nine mitigators had been "proven to a 'reasonably established by the evidence standard.'"[33] (TR. 2 at 211.) The memorandum was submitted without supporting evidence, arguments, or case law on age as a mitigating circumstance. (TR. 2:207-12.)

The sentencing order also contained confirmation that the defense did not properly present age as a mitigator:

> At the time the murder was committed, the Defendant was 19 years old. He was an adult, not a juvenile. *No evidence was presented that his emotional age was different than his actual age* . . . The Defendant's youthful age at the time of the crime is a mitigating factor, but accorded little weight by this [c]ourt.

(SPCR2 1:127, ¶3.)(emphasis added).

As for the State's assertion that Sliney "did not challenge [this finding] either on direct appeal or at his previously filed motions for postconviction relief,"[34] undersigned counsel must respectfully point out a circular logic in this assertion: if Mr. Sliney could challenge anything during the prior postconviction matters decades ago, this claim would not now be based on

[33] The original document did not cite to a source for the internal quotation here. (TR. 2:211.)
[34] (SPCR2. 1:117.)

new evidence because the evidence that Mr. Sliney would present about brain development here did not exist. If the State still believes that evidence regarding brain development was the same in the 1990s or early 2000s, during Mr. Sliney's previous appeals, that is why a hearing is required.

Both parties maintain a factual issue in dispute, a hearing is required, and the trial court was incorrect in ruling in the State's favor on the issue of a procedural bar to Mr. Sliney's claim. Because Mr. Sliney's claim here is based on newly discovered evidence, entertaining the state's analysis that it is procedurally barred, is incorrect. By the very nature of the claim, it would have been impossible for it to be raised during prior collateral and direct appeals, as the newly discovered evidence being plead here was discovered on January 14, 2021.[35]

As such, Mr. Sliney's claims are not procedurally barred and This Court should not affirm the circuit court's opinion, but instead remand this matter for an evidentiary hearing.

B) The circuit court erred in summarily denying the claim because expert testimony is required to determine if the new (2021) scientific consensus presented by Mr. Sliney qualifies under the prevailing legal standards of "new evidence."

[35] A pronouncement was released to the public that experts agreed, and a scientific consensus had been reached that brain development continues until age 22 when the AAIDD Manual was published on January 14, 2021.

This Court in *Martin v. State*, outlined the current three-part-test for a defendant to present a claim on newly discovered evidence:

> In *Jones* itself, the postconviction claimant maintained that he was innocent of the crime of conviction, and he alleged that newly discovered evidence proved his innocence and established the true killer's identity. 709 So. 2d at 521. This Court held that "in order to be considered newly discovered, the evidence 'must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known [of it] by the use of diligence.' " *Id.* (alteration in original) (quoting *Torres-Arboleda v. Dugger*, 636 So. 2d 1321, 1324-25 (Fla. 1994). Turning to prejudice, we held that "the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial." *Id.* We added that trial courts must " 'consider all newly discovered evidence which would be admissible' at trial and then evaluate the 'weight of both the newly discovered evidence and the evidence which was introduced at the trial.' " *Id.* (quoting *Jones v. State*, 591 So. 2d 911, 916 (Fla. 1991)). Hence the familiar three-part inquiry that Florida courts have since used to determine the merits of standalone newly discovered evidence claims.

322 So. 3d 25, 37 (Fla. 2021), *reh'g denied,* SC18-896, 2021 WL 3286798 (Fla. Aug. 2, 2021).

The circuit court here adopted the State's argument "as a matter of law," that "brain mapping studies existed at the time of the *Roper* decision," and that because the *Roper* decision factored in such studies and reports, and the United States Supreme Court "nonetheless drew a line at 18 years old," that precludes Appellant from being entitled to a hearing to present his evidence. (SPCR2. 1:137.) With due respect to the court and State, the

implication that the same studies and reports that exist today in 2022 (or 2021 when this underlying motion was first filed) *also* existed in 2005 when *Roper* was decided, is patently false. It is not a matter of law, but of fact. It is clear that the State is mistaken about the new evidence Appellant is attempting to present and this garners even more support for why an evidentiary hearing is required. In order to frame the type of evidence that now exists and did not exist at the time of *Roper,* consider an important general observation: the age group of late adolescents (18-22) whom we are discussing here was not a "defined" group such that was even considered by scientists until very recently. For example, scientific studies would *either* test children (up to age 17), *or* adults, 18 or older. Those 18-year-olds could have their brain data grouped together with 50-year-olds, for example, and the data would not be sorted or analyzed separately to reveal scientific significance for a group of older adolescents. Eventually, scientists realized that when specifically testing and reviewing the brains of 18-20-year-olds, for example, and comparing the data with 16-17-year-olds, there are *no significant differences*.[36] This is absolutely new evidence, and not just some

[36]There is no neuroscientific bright line regarding brain development that indicates the brains of 18- to 20-year-olds differ in any substantive way from those of 17-year-olds. *e.g.*, ERIN D. BIGLER, *Charting Brain Development in Graphs, Diagrams, and Figures From Childhood, Adolescence, to Early*

old study or "brain mapping." Developmental neuroscience, including research on both the structure and function of brain development, can now establish that significant maturation of the brain continues through at least age 20, especially in the key anatomical regions of brain systems implicated in the evaluation of behavioral options, making decisions about behavior, meaningfully considering the consequences of acting and not acting in a particular way, the ability to consider behavior rationally and act deliberately in stressful or highly charged emotional environments, and in the development of personality and what is popularly known as character.[37] The *Roper* court recognized that in younger adolescents, "character" is not fully formed but because the defendant in *Roper* was 17, the Court was not looking at the similar lack of character formation to those who may be older than 18. *Roper v. Simmons* (543 U.S. 551, 2005). However, the new

---

Adulthood: Neuroimaging Implications for Neuropsychology, 27-54 (*J. PEDIATRIC NEUROPSYCH*. May 2021);
B.J. CASEY, *et. al.*, *Making the Sentencing Case:*
Psychological and Neuroscientific Evidence for Expanding the Age of Youthful Offenders 321–43 (*ANN. REV*. CRIM., JAN. 2022), https://www.annualreviews.org/doi/10.1146/annurev-criminol-030920-113250.

[37] *See e.g.,* Robert J. McCaffrey & Cecil R. Reynolds, *Neuroscience and Death as a Penalty for Late Adolescents* 3-8 (J. PEDIATRIC NEUROPSYCH., April 2021); B.J. CASEY, *et. al.*, *Making the Sentencing Case: Psychological and Neuroscientific Evidence for Expanding the Age of Youthful Offenders* 321–43 (*ANN. REV*. CRIM., JAN. 2022).

scientific consensus among experts supports this to now be equally true of older adolescents (18-21). Case in point, the trial court found Appellant had no significant prior criminal history (SPCR2. 1 at 224.) and was "a good prisoner, respectful, and followed directions and was not the subject of any disciplinary referrals or reprimands while in custody awaiting trial (SPCR2. 1 at 226.)." Mr. Sliney is still a good prisoner some 30 years since and not one disciplinary incident appears on his prison record.[38] This is just an example that speaks to the science that executing older adolescents who acted uncharacteristically compared to the rest of their lifetime serves no penological purpose.[39] Science shows that persons in the class of 18-22 have brains with no significant difference to juvenile brains and are not "transfixed" in character or personality because their brain chemistry will further develop their personality. The worst thing they did on their worst day is not a sign of their permanent character. Such scientific evidence needs to be presented at a hearing so the court can make an informed decision about

[38] App. Attach. C, Inmate Disciplinary Record as of 7/29/22.

[39] The United States Supreme Court has identified two primary penological justifications for the death penalty: "retribution and deterrence of capital crimes of prospective offenders." *Gregg*, 428 U.S. at 184. "Unless the imposition of the death penalty on a [young offender] measurably contributes to one or both of these goals, it is nothing more than the purposeless and needless imposition of pain and suffering, and hence an unconstitutional punishment." *Atkins*, 536 U.S. at 319 (internal quotations and citations omitted).

culpability of older adolescents such as Mr. Sliney and whether they can be a member of the narrow class of death eligible persons under the Constitution.

The State argued that that this Court rejected arguments made by the defendant in *Morton v. State*[40] "similar" to Appellant's claims because in 2008 this Court rejected a 19-year-old defendant's claim based upon "so-called" brain mapping studies. (SPCR2. 1 at 116.)

The State appears to again misunderstand the newly discovered evidence Mr. Sliney is alleging. *Morton* dealt with lethal injection being a cruel and unusual form of punishment due to new research.[41] This Court in 2008 held that a doctor's letter describing the pain inflicted by lethal injection, was based on old data from the 1950's. (*Id.*) But whether a form of execution is "too painful" is not the subject of Mr. Sliney's claim. Instead, Appellant's claim goes to whether the insufficient culpability of an entire class to which he is a member categorically bars him from a death sentence.

Additionally, recent medical studies, reports, and articles—not available at the time of trial—have been held to constitute newly discovered evidence. *See Vega v. State*, 288 So.3d 1252, 1275 (Fla. 2020), (citing *Clark v. State*,

[40] *See Morton v. State*, 995 So.2d 233 (Fla. 2008).
[41] *Morton*, 995 So.2d 233.

995 So. 2d 1112, 1113 (Fla. 2d DCA 2008)). Similarly, case specific studies that cast doubt on critical state evidence can also constitute newly discovered evidence, *Id*., (citing *Wyatt v. State*, 71 So. 3d 86, 99-100 (Fla. 2011)).

Additionally, the circuit court's order cites two cases as support for its denial of an evidentiary hearing for Mr. Sliney because this Court rejected "similar claims"[42] attempting to extend "*Roper* defendants" over age 18.[43]

In *Deviney v. State*, 322 So.3d 563, 573 (Fla. 2021), Mr. Deviney argued that it was impermissible under the Eighth Amendment to execute an offender older than 17 but younger than 21 at the time of the crime. He contended the death penalty was a disproportionate punishment for such offenders. *Id.* In support of his argument, Deviney asserted new evidence comprised of (1) objective indicia point to an emerging national consensus against the death penalty for offenders under 21, (2) differences in maturity, responsibility, and overall development diminish the culpability of those under 21 relative to those over 21, and (3) the reasoning of *Roper v. Simmons*, 543 U.S. 551 (2005), applies to all offenders under 21. *Id.*

---

[42] Appellant does not agree they are similar claims due to his newly discovered evidence, but this is the exact language of the court's order. (SPCR2. 1:137.)

[43] *See supra* note 41 and accompanying text.

Mr. Foster made almost identical arguments except that he urged his court to reconsider previous rulings because he was 18 at the time of the offense underlying his death sentence. (*Foster v. State*, 258 So.3d 1248, (Fla. 2018). Foster presented scientific articles dated 2016, 2017, and highlighted a national trend against juries sentencing young adult offenders to death and executive officials' nonaction in carrying out the execution of those already sentenced as support for a prohibition of the death penalty for defendants under age 21 at the time of their crimes.[44]

Specifically, both *Deviney* and *Foster* cited by this circuit court's order (SPCR2 1:137) to support the denial of an evidentiary hearing on Mr. Sliney's claim, may seem "similar" in that they both relied on a 2018 American Bar Association ("ABA") resolution which recommended that the death penalty be prohibited as to defendants twenty-one years of age and younger at the time of their crimes. [45]

However, there is one very important distinction between Mr. Sliney's case *here* and *Deviney* and *Foster*. [46] Mr. Deviney filed his initial brief on

---

[44] *Foster* at 1253.

[45] AM. BAR ASSOC., Resolution 111, Report at 6-7. The ABA Report accompanying Resolution 111, makes the clear observation that penological justifications for death penalty find the weakest argument when individuals are aged 21 years or younger.

[46] *See e.g., Deviney v. State*, 322 So.3d 563, 573 (Fla. 2021); *Foster v. State*, 258 So.3d 1248, (Fla. 2018).

June 26, 2018, and *Foster* was ultimately decided in 2018 *before* the AAIDD published its results of the scientific consensus in 2021. Therefore, *Deviney*, *Foster*, and other cases decided similarly are distinguished from Mr. Sliney's case, in essence, because those defendants relied heavily on the 2018 ABA report to qualify as new evidence, as well as articles and proof of national trends that are outdated now. Such evidence was not relied upon by Appellant, and he is well-aware of the line of cases that did not accept the ABA report as new evidence.[47]

However, as to Mr. Sliney's case, this Court does not have the benefit of expert testimony or explanation of the current scientific consensus and what new technology and studies comprised the final pronouncement since it was published on January 14, 2021.

To illustrate this point, consider this Court's decision to include the same quote from *Branch v. State* in each opinion denying defendants their respective successive postconviction claims in *Deviney* and *Foster*:

> Finally, the United States Supreme Court has continued to identify eighteen as the critical age for purposes of Eighth Amendment jurisprudence. *See Miller v. Alabama*, 567 U.S. 460, 465, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012) (prohibiting mandatory sentences of life without parole for homicide offenders who committed their crimes before the age of eighteen); *Graham v. Florida*, 560 U.S. 48,

[47] *Deviney v. State*, 322 So.3d 563, 573 (Fla. 2021); *Foster v. State*, 258 So.3d 1248, (Fla. 2018). *See also Branch v. State*, 236 So.3d 981 (Fla. 2018).

> 74-75, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010) (prohibiting sentences of life without parole for nonhomicide offenders who committed their crimes before the age of eighteen). Therefore, unless the United States Supreme Court determines that the age of ineligibility for the death penalty should be extended, we will continue to adhere to *Roper*. [48]

Mr. Sliney would point out that if this Court finds it useful to look to the United States Supreme Court for its analysis of juvenile offenders (under 18) and their prohibited sentencing, it should not ignore the U.S. Supreme Court's analysis of the juvenile line of cases relevant with the Eighth Amendment, which necessarily requires presentation of evidence for a court to determine multiple factors other than age to determine current standards of decency, science, and a national consensus.

Mr. Sliney would argue that when taken together the United States Supreme Court's rationale in *Roper, Graham, Miller,* and other cases such as *Montgomery* emphasized the psychological and emotional characteristics of youth.[49] The incomplete brain development of youthful offenders led the

---

[48] *See e.g.*, *Deviney v. State*, 322 So.3d 563, 573 (Fla. 2021); *Foster v. State*, 258 So. 3d 1248, 1254 (Fla. 2018)(quoting *Branch v. State*, 236 So. 3d 981, 987 (Fla. 2018).

[49] Lower courts have applied these holdings expansively. For instance, the Fourth Circuit determined that although *Miller* and *Montgomery* invalidated mandatory LWOR schemes for juvenile offenders, the logic of those decisions applies to any case in which a juvenile homicide offender received an LWOR sentence, even if that sentence was not mandatory. *Malvo v. Mathena*, 893 F.3d 265, 273 (4th Cir. 2018).

Court to recognize that while "[a]n offender's age is relevant to the Eighth Amendment," *Graham*, 560 U.S. at 76, consideration of age alone will not satisfy the Eighth Amendment's mandate. *See Montgomery,* 136 S. Ct. at 734 (holding that a sentencer must consider not only age but also whether the crime reflects "unfortunate yet transient immaturity"). Rather than tie its holdings to chronological age, the United States Supreme Court has repeatedly employed a holistic approach that focuses on the distinctive attributes of youth. *See Miller,* 567 U.S. at 477 (rejecting mandatory sentences that fail to account for circumstances of youth such as home environment and peer pressure).

Should this Court continue to affirm these lower court summary denials without evidentiary hearings, "*unless* the United States Supreme Court determines that the age of ineligibility for the death penalty should be extended,"[50] instead of following the *Roper* and *Atkins* frameworks based on a holistic approach compiling current brain evidence and objective indicia and national trends to make a decision, the Court is missing an opportunity for Florida courts to hear new evidence and weigh it appropriately and

[50] *See Foster v. State*, 258 So. 3d 1248, 1254 (Fla. 2018)(quoting *Branch v. State*, 236 So. 3d 981, 987 (Fla. 2018)(emphasis added); *See* full quote, *supra* note 47 and accompanying text and discussion.

according to the very same United States Supreme Court rulings under *Roper,* or *Miller,* or *Graham,*[51] to which it claims to "adhere."

Consider, alternatively, the recent approach of the Massachusetts Supreme Judicial Court ("SJC"), refusing to reconsider past precedent on cases like Appellant's, without first compiling an updated record reflecting the latest advances in scientific research on adolescent brain development and its impact on behavior. Two cases were pending review by SJC after full evidentiary hearings presenting the same evidence Mr. Sliney is requesting the right to present here. The SJC remanded both cases to the lower court for a full review and assigned Judge Robert L. Ullmann to, "consider and address whether the imposition of a mandatory sentence of life without the possibility of parole for ... those convicted of murder in the first degree who were eighteen to twenty-one at the time of the crime violates article 26 of the Massachusetts Declaration of Rights."[52]

---

[51] *See Miller v. Alabama*, 567 U.S. 460, 465, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012) (prohibiting mandatory sentences of life without parole for homicide offenders who committed their crimes before the age of eighteen); *Graham v. Florida*, 560 U.S. 48, 74-75, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010) (prohibiting sentences of life without parole for nonhomicide offenders who committed their crimes before the age of eighteen).

[52] *See* App. Attach. C. *Commonwealth v. Mattis, Suffolk (Mass.) Superior Ct.*, Case No. 1184CR11291, July 20, 2022.

Article 26 of the Massachusetts Declaration of Rights ("article 26") is effectively the state's constitutional equivalent to the Eight Amendment's Constitutional ban on "cruel or unusual punishments."[53]

Notably, the SJC Order described the facts and sentencing outcomes from one test case as nearly identical to the circumstances here with Mr. Sliney and his codefendant Mr. Wittemen:

> In *Commonwealth v. Watt, 484 Massachusetts*, 742 (2020), the court affirmed the convictions of murder in the first degree of the defendant Sheldon Mattis and his codefendant Nyasani Watt. Watt, who turned eighteen years old ten days after the date of the crimes, was sentenced to life with the possibility of parole. Mattis, who turned eighteen years old eight months before the date of the crimes, was sentenced to life without the possibility of parole. On appeal, citing research that shows the same developmental traits that exist for those under the age of eighteen apply to those between eighteen and twenty-two, Mattis claimed that his sentence is unconstitutional and should be for any individual under the age of twenty-two.[54]

The SJC noted that since its decision in *Diatchenko v. District Attorney for the Suffolk Dist, 466 Mass*. 655 (2013), "it likely is time for us to revisit the boundary between defendants who are seventeen years old and thus shielded from the most severe sentence of life without the possibility of parole, and those who are eighteen years old and therefore exposed to it."

---

[53] *See supra* note 51 at 1-2.

[54] *Order*, Online Docket Entry #128, Massachusetts Supreme Court (https://www.ma-appellatecourts.org/docket/SJC-11693)(last accessed on August 9, 2022).

Watt, 484 Mass. at 756. To that end, the court remanded the *Mattis* case to the Superior Court "for development of the record with regard to research on brain development after the age of seventeen." *Id.* On remand, the Superior Court judge hearing the matter (Roach, J.) conducted roughly two-months of evidentiary hearings “at which two volumes of evidence were admitted”[55] in concert with experts’ explanations on the current scientific understanding of brain development after the age of seventeen. *Id.* at 1.

Judge Ullmann reviewed the records of the prior evidentiary hearings and held limited additional hearings to reach the conclusion mandatory juvenile sentencing schemes for life without parole are also prohibited by Article 26[56] for 18-20-year-old defendants[57]

To clarify, after in-depth evidentiary hearings, the court concluded the same prohibitions against cruel and unusual punishments for those under 18 as issued by United States Supreme Court—as in *Miller v. Alabama,* and cited by the Florida Supreme Court to support its ruling in *Branch v. State, (see supra* p. 32-33 and note 47)-— should apply to those 18-20 at the time

[55] *See* App. Attach. C. *Commonwealth v. Mattis, Suffolk (Mass.) Superior Ct.*, Case No. 1184CR11291, 7, July 20, 2022.
[56] *See supra,* note 51 and accompanying discussion.
[57] *See* App. Attach. C. *Commonwealth v. Mattis, Suffolk (Mass.) Superior Ct.*, Case No. 1184CR11291, July 20, 2022.

of their offense. The court rationalized, “life-without-parole” is “strikingly similar . . . to the death penalty,” and based on its record of “brain science and social science,” mandatory life-without-parole schemes for those 18-20 at the time of their crimes is “based on mismatches between the culpability of a class of offenders and the severity of the penalty,” and constitutes cruel or unusual punishment under the state constitution. *Commonwealth,* Case No. 1184CR11291 at 31, 32(quoting *Diatchenko v. District Attorney for the Suffolk Dist, 466 Mass*. 655 (2013).; *See* App. Attach. C.

Mr. Sliney argues that scientific evidence on late adolescent brain development is not unique within state lines, therefore, this example from Massachusetts is illustrative as applied to Appellant’s case here. When a full and fair hearing allows parties to present relevant evidence as required and utilized in the *Roper* and *Atkins* opinions, the respective class of death eligible persons would be narrowed as the Constitution intended. The evidence outlined in Appellant’s successive postconviction motion and appeal here reveals similar types of evidence heard by the Massachusetts court. *Commonwealth,* Case No. 1184CR11291 at 7.

Regardless of the types of evidence Appellant offers to present at an evidentiary hearing, he need not list it all here. As the record does not contain anything that conclusively bars Mr. Sliney from relief, this claim should be

remanded to circuit court for an evidentiary hearing to develop the record for a full and fair analysis of the claim.

II. THE TRIAL COURT ERRED BECAUSE AN EVIDENTIARY HEARING IS REQUIRED TO DETERMINE IF MR. SLINEY'S DEATH SENTENCE IS DISPROPORTIONATE AND BARRED UNDER THE EIGHTH AMENDMENT TO THE U.S. CONSTITUTION.

A) Mr. Sliney's claim that his death sentence is disproportionate and cruel and unusual is not procedurally barred until the court weighs current expert testimony and new evidence to compare it with evidence previously submitted to the court.

The lower court here did not specifically state that Mr. Sliney's Claim II (his death sentence is a disproportionate punishment due to newly discovered evidence establishing that a person's brain does not stop developing until reaching the age of 22, a new scientific consensus reached by the scientific community) is procedurally barred. However, directly before holding this claim was "DENIED," the court's order stated: "The State argued that this claim is procedurally barred." (SPCR2. at 138.) Therefore, Mr. Sliney will outline argument here to describe why the trial court erred if it found this claim to be procedurally barred.

At the core of Mr. Sliney's second claim is the argument that since the United States Supreme Court issued *Roper v. Simons*, seventeen years ago, our societal consensus has moved away from accepting the death penalty

as a proper punishment for nineteen-year-old offenders. 543 U.S. 551 (2005).

Mr. Sliney requested a hearing on this claim to present evidence, not just about the existence of the new AAIDD scientific consensus, but to provide the expert testimony required to assist the court in understanding the specific scientific advancements that have informed our society and can be presented and evidenced in objective statistics regarding our nation's death penalty practice, which coincides with the new science and draws a new line that proves society also finds late and older adolescents' brains are undeveloped and not sufficiently culpable to be death eligible. In addition, Mr. Sliney indicated he would present expert testimony as to why his claim was not cognizable until this scientific consensus was pronounced in 2021. This necessarily requires a hearing to present proof of a societal consensus holding late and older adolescents (of Appellant's age at the time of his offense) less culpable and not likely to be executed for crimes as indicated by legislative trends and corresponding executive (non)action, rarely executing persons under 22 at the age of their crime. (SPCR2. 1:003-103,165-87.) In other words, although there has been a constant emerging national legal trend exhibiting a consensus that older adolescents should be treated more similarly to juveniles than to adults, without the scientific

pronouncement from the AAIDD in 2021, Mr. Sliney was unable to bring a cognizable claim under the *Roper* test.[58]

Newly discovered evidence is one of the recognized exceptions to the one-year time limit to file a postconviction claim under Rule 3.851. *See* Fla. R. Crim. P. 3.851(d)(2)(A). Mr. Sliney did file this claim within one year of the AAIDD publication date.[59] Therefore, his claim is timely and this Court should not affirm the circuit court's ruling on this claim, but rather should remand to the circuit court for a hearing.

B) The circuit court erred because a hearing was required for the court to properly weigh Mr. Sliney's culpability in light of current national trends and objective indicia to decide if his death sentence is "cruel and unusual."

The circuit court's order here described Mr. Sliney's arguments as follows:

> As to Claim II, Defendant argued that there is a national consensus against imposing the death penalty where the defendant was a young adult at the time of the offense. Defendant argued that 23 states prohibit the death penalty, and of the 27 states that permit the death penalty, 12 have not executed anyone under 22 years old in over 17 years. Defendant believes Florida's death sentencing scheme allowing for the death penalty for defendants who were young adults at the time of the offense violates evolving standards of decency, and does not reflect legislative intent across the country.
>
> Defendant further argued that the Court should find the death penalty disproportionate in this case because it serves no

[58] *See also supra* note 21.

[59] *See* Mot. for Post Conviction Relief-Successive Mot. to Vacate Death Sentence, filed January 14, 2022. (SPCR2. 1:003-103.)

> penological justification and violates the Eighth Amendment. Defendant argued that he is not among the worst of the worst, was immature at the time of the offense, and that immaturity resulted in diminished capacity which should preclude the death penalty.

(SPCR2. 1:137.) The Court then summarily denied Mr. Sliney's claim on the following basis:

> The Florida Supreme Court held that courts are prohibited from conducting a proportionality review. *Lawrence v. State*, 308 So.3d 544 (Fla. 2020). Further, the death penalty has not been abolished in Florida, and remains in effect. This Court is bound by the decisions of the U.S. Supreme Court and Florida Supreme Court that a capital defendant who is 18 years old or older is subject to the death penalty, regardless of any decisions made by other states and regardless of any alleged "national consensus."

Id. Respectfully, Mr. Sliney submits that by applying *Lawrence v. State* to his case, the court mischaracterized the argument raised by Mr. Sliney's second claim.

As stated in Mr. Sliney's Motion, punishment is "cruel and unusual" if there is either a general societal consensus against its imposition or if its imposition affronts "the basic concept of human dignity at the core of the Amendment" because it is disproportionate to the offender's moral culpability. *Gregg v. Georgia*, 428 U.S. 153, 182 (1976). Mr. Sliney's second claim is based solely on the idea of societal consensus. To establish societal consensus, Mr. Sliney must meet the two prongs of the "evolving standards of decency" test, which are: (1) whether a "national consensus" supports a

categorical prohibition on a given punishment, *Atkins v. Virginia,* 536 U.S. 304, 312-14 (2002), and (2) the Court's own judgment as to whether the application of the punishment to a specific group is appropriate. As for the first prong, it is now illegal to execute older adolescents in twenty-three states, the District of Columbia, and the five United States territories, because the death penalty has been abolished in these jurisdictions.[60] At the time *Roper* was issued, only twelve states prohibited the death penalty. *Roper*, 543 U.S. at 579. The *Roper* Court examined the legislative changes regarding age that had occurred throughout the states as a reflection of evolving standards of decency – for example the minimum age to vote, perform jury service, and marry without permission. *Roper*, 543 U.S. at 579-87.

Similarly, since *Roper*, many states and the federal government have made changes in various areas of law to reflect how scientific progress influences the understanding of maturity level of individuals as older adolescents. There are currently more than 3,000 laws and government regulations restricting the behavior and actions of persons under the age of

[60] See *Facts about the Death Penalty*, Death Penalty Information Center (2022), at https://documents.deathpenaltyinfo.org/pdf/FactSheet.pdf.

21 years in force in the United States[61] prohibiting those under age 21 from engaging in such diverse activities as: legalized purchases of alcoholic beverages, legalized purchases of marijuana, legalized purchases of tobacco products (19 states); obtaining work as a Federal Marshall, FBI agent, or armed Treasury agent; to engage in blasting or the use of explosives, including operating a fireworks display; to obtain a license to carry a concealed handgun; to obtain a credit card without a cosigner; to act as a foster parent; to serve in the State legislature (32 states); to obtain various professional licenses; nine states require all persons under 21 to wear a helmet when riding a motorcycle; as examples among the more than 3,000 such laws.[62]

Over time, the United States Supreme Court's analysis moved from focusing only on the worst of the worst crimes to a dual mandate requiring only an offender committing the worst of the worst crime while possessing the extreme culpability deserving of the most serious punishment. *See also Roper v. Simmons,* 543 U.S. 551, 568-575 (2005) (discussing the second prong of the test as the Court's duty to narrow the category of defendants

---

[61] ALEX MEGGITT, *Trends in Laws Governing the Behavior of Late Adolescents up to Age 21 350 Since Roper*. J. PEDIATRIC NEUROPSYCH.*,* April, 2021, at *7,* 74-87.

[62] *See supra* note 60.

to which the application of the death penalty is appropriate, not in terms of proportionality of the punishment). The Constitution requires that the entire class of youthful offenders be protected because:

> Youthful offenders not only share signature culpability-diminishing characteristics but further share capacity for maturation and change (*Roper v. Simmons* at 571; *Graham v. Florida* at 68). Given the severity and irrevocability of the death penalty, however, a youthful offender sentenced to death will never be afforded opportunity to demonstrate capacity to and/or fact of change.[63]

Roper found there was no process to ensure that the mitigating force of youth was not overshadowed by the brutality of the crime, so, a categorical exemption was necessary. *Id.* And, the risk was too great that a youthful person would receive the death penalty despite insufficient culpability. *Id.* This is confirmed by post-*Roper* categorical exemption cases: *Kennedy v. Louisiana*, 554 U.S. 407, 421 (2008), and *Graham v. Florida*, 560 U.S. 48, 61-62 (*2011*). Ultimately, a:

> case-by-case approach does not, with sufficient accuracy, distinguish those with sufficient culpability from those but experiencing the transient attributes of youth. *Graham v. Florida* at 77. In capital cases, therefore, failure to hold strictly to the Roper analytical framework using current objective indicia and science as to the class as a whole not only clouds the issue and analytical framework, but cedes categorical protection, opening the door to the admission of the most heinous crime- and individual-specific evidence—exactly the kind of evidence Roper deemed to present constitutionally intolerable risk.[64]

---

[63] Karen A. Steele, *The Law, the Science, and the Logic of Ending the Teenage Death Penalty*, J. PEDIATRIC NEUROPSYCH., April, 2021, at 9, 16.
[64] *See supra* note 62.

Therefore, Mr. Sliney was never asking the court to do a proportionality review such that may be "prohibited"[65] under *Lawrence v. State*, 308 So. 3d 544 (Fla. 2020). He is not asking to submit individual-specific evidence for his claims to show he is a member of a protected class. Instead, Appellant is asking the court to hear new evidence that would confirm the insufficient culpability for his class of offenders, aged 18-22, to receive the death penalty.

Mr. Sliney submits that there are no penological justifications to impose the death penalty on older adolescents, who did not have the same level of culpability as an adult at the time of the crime, as the current science on brain development indicates. Specifically, neither deterrence nor retribution is achieved by imposing the death penalty on defendants like Mr. Sliney because their neurological characteristics limit their ability to regulate their behavior in the way that a normal adult could. The Court characterized the latest as a proportionality argument. However, instead, the purpose of this argument is to establish that, as a class, older adolescents lack the same criminal culpability as adults. Therefore, this is a categorical bar argument aimed at satisfying the second prong of the evolving standards of decency test, rather than a proportionality one. Therefore, *Lawrence* should not be

[65] Appellant is quoting the court's terminology here. *See* Final Order Den. Def's Successive 3.851 Mot., (SPCR. 1:137.).

the reason that Appellant is denied relief here. *Lawrence*, 308 So.3d 544.

Mr. Sliney, however, acknowledges that the second prong of the evolving standards of decency appears to allow the courts to take into consideration various factors, including possibly the proportionality of the punishment. To this extent, Mr. Sliney submits that *Lawrence* only forecloses the review of proportionality between Mr. Sliney's case and other unrelated cases[66] but does not prevent the Court from looking at his codefendant's case. In a separate trial, Mr. Sliney's seventeen-year-old codefendant, Keith Wittemen, was found guilty of first-degree pre-mediated murder, first-degree felony murder, and robbery with a deadly weapon. Mr. Wittemen received a life sentence without the possibility of parole for 25 years, while Mr. Sliney received the death penalty for the same crimes. A comparative analysis of the punishment received by both defendants is still possible.

---

[66] Mr. Sliney's direct appeal reached this Court in 1997(*Sliney v. State*, 699 So.2d 662 (Fla. 1997)), before *Lawrence* did away with such proportionality reviews. It is worth noting that after the jury's bare majority seven-to-five *advisory* opinion recommending death, this supreme court barely affirmed the conviction with three Justices dissenting, citing disproportionality. Chief Justice Kogan delivered the dissenting opinion, rejecting the majority's conclusion as it was based on a comparison of cases involving an additional aggravator (heinous, atrocious, cruel), not factually found by the trial court in Mr. Sliney's case. The Chief Justice disagreed with the majority's use of such cases as a means to improperly qualify the "brutality" of Mr. Sliney's crime to justify his death sentence as proportional. *See generally Lawrence*, 308 So. 3d 544. *See also supra*, p. 4.

Consider also that during Mr. Sliney's trial, George Morris Davis III, cellmate to Wittemen at the time in Charlotte County jail, testified that after a dispute about trading shoes for cigarettes, Wittemen told an elderly inmate to "Shut your fucking mouth or I'll kill you like I did the other old bastard." (TR. 11:1051.) Mr. Davis eventually admitted on cross-examination that Wittemen did not exactly name Mr. Blumberg, the victim in this case. *Id.* However, when the prosecutor first asked the question, "Mr. Davis, 'You don't actually know the name of the old bastard that Keith Wittemen was referring to, do you?'" Mr. Davis simply replied: "George Blumberg." *Id.*

More importantly, Mr. Wittemen is currently awaiting resentencing in light of the United States Supreme Court's decision in *Miller v. Alabama*, 567 U.S. 460 (2012) (prohibiting mandatory sentences of life without parole for homicide offenders who committed their crimes before the age of eighteen) and *Atwell v. State*, 197 So. 3d 1040 (Fla. 2016) (holding that Florida's parole system does not provide the individualized sentencing consideration required by *Miller*).[67] In other words, despite the new scientific consensus

[67]When Mr. Wittemen moved pursuant to rule 3.850 to vacate his sentence in light of the *Miller* and *Atwell* line of juvenile sentencing cases, the trial court granted the motion and ordered the defendant be resentenced. The State did not appeal the orders granting resentencing or timely move for rehearing. Rather, years later while the defendant was awaiting resentencing, the State moved for reconsideration based on a change in the

establishing no functional differentiation between the brain development of a juvenile like Mr. Wittemen, and that of an older adolescent like Mr. Sliney, only Mr. Wittemen received the benefit of his youth. *Lawrence* does not prevent the Court from considering such differentiation in treatment of codefendants in determining whether the application of the death penalty to Mr. Sliney is appropriate.

The Florida Rule of Criminal Procedure permits the summary denial of a successive motion for postconviction relief without an evidentiary hearing "[i]f the motion, files, and records in the case conclusively show that the movant is entitled to no relief." Fla. R. Crim. P. 3.851(f)(5)(B). Mr. Sliney's Motion properly established that at the time of the crime, he suffered from the same level of diminished culpability as the *Roper* defendants. Mr. Sliney further provided evidence of scientific consensus regarding brain development that supports his claim. Mr. Sliney should not be prevented from developing his claims further at an evidentiary hearing. The contrary approach by the circuit court only increases the risk of executing an offender

---

law under *State v. Michel*, 257 So. 3d 3 (Fla. 2018). The trial court granted the motion for reconsideration, rescinded the prior order granting relief, and denied the defendant's motion for post-conviction relief. The appellate court found that the trial court lacked jurisdiction to rescind the original orders granting relief and remanded for resentencing. *See Wittemen v. State*, 310 So. 3d 1037, 1039–40 (Fla. 2d DCA 2020).

that lacks sufficient culpability to be considered the worst of the worst. Equally important, the circuit court's approach is contrary to the lessons delivered by the United States Supreme Court decision in *Hall v. Florida*, stating that "where a scientific consensus supports a defendant's lesser culpability a person facing the death penalty must have a fair opportunity to show that the Constitution prohibits his execution." *Hall v. Florida*, 572 U.S. 701, 724 (2017).

Therefore, Mr. Sliney is entitled to an evidentiary hearing on this claim and asks this Court to remand this issue to the circuit court.

C) The circuit court erred by denying his claim without an evidentiary hearing or reasoned analysis when Mr. Sliney's death sentence involves a violation of his constitutional protections against "cruel and unusual punishment," because stare decisis should be overcome by this case.

In its Final Order Denying Defendant's Successive 3.851 Motion, the circuit court summarily denied Mr. Sliney's claim that newly discovered evidence bars his death sentence because, "The [c]ourt is bound by the decisions of the [United States] Supreme Court and the Florida Supreme Court rejecting this type of claim." (SPCR2. 1:132-39.)

While the lower court's order did not expound its reasoning beyond the finding that it is "bound" to reject this claim nor specifically cite to the

conformity clause of the Florida Constitution,[68] Mr. Sliney wants to be clear for the record that he understands the conformity clause would seem to prevent a Florida court from announcing a new rule apart from prior United States Supreme Court decisions that interpret the prohibition against cruel and unusual punishment. However, Appellant pleads this claim based on existing constitutional principles and is not merely seeking an "extension" of existing United States Supreme Court decisions when he asks to be heard by Florida courts to present newly discovered evidence that will establish that he is outside the class of individuals who may be subjected to the death penalty under existing case law. Mr. Sliney is longer subject to the death penalty because it is excessive and cruel and unusual under the Eighth Amendment. Most importantly, assuming arguendo the trial court is unable to ultimately grant relief on his claim, that would not correlate to a limitation of his right to an evidentiary hearing under Fla. R. Crim. P. 3.851, nor should

[68] *See* SPCR2. 1:132-39.; *See also* Art. I, § 17, Fla. Const. ("The prohibition against cruel or unusual punishment, and the prohibition against cruel and unusual punishment, shall be construed in conformity with decisions of the United States Supreme Court which interpret the prohibition against cruel and unusual punishment provided in the Eighth Amendment to the United States Constitution. Any method of execution shall be allowed, unless prohibited by the United States Constitution. . . A sentence of death shall not be reduced on the basis that a method of execution is invalid. In any case in which an execution method is declared invalid, the death sentence shall remain in force until the sentence can be lawfully executed by any valid method. This section shall apply retroactively.").

it bar further development of the record for higher courts to review upon appeal. In fact, if a court were to restrict him from being heard for such a reason, that would effectively impede upon his other constitutional rights such as the right to due process under the United States Constitution incorporated to the states by the Fourteenth Amendment and the corresponding provisions of the Florida Constitution. *See* Amends. V, XIV, U.S. Const.; Art. I, § 9, Fla. Const.

Because the United States Constitution is the "supreme legal document,"[69] Florida does not have the right to supersede fundamental constitutional rights in other areas by using the conformity clause of the Florida Constitution to restrict fairness and due process to its citizens.

United States Supreme Court Justice Clarence Thomas explains the relation to judicial precedent and the supreme power of the U.S. Constitution in his concurring opinion in *Gamble v. United States*, where the defendant sought to overturn longstanding precedent involving the Double Jeopardy clause of the Fifth Amendment,[70]

---

[69] *Gamble v. U.S.*, 139 S. Ct. 1960, 1985 (2019) (Thomas, J., concurring).

[70] The defendant challenged (and the United States Supreme Court upheld) the longstanding precedent that the dual sovereignty clause recognizes that under Double Jeopardy, that no person may be twice put in jeopardy "for the same offence," a State may prosecute a defendant under state law even if the federal government has prosecuted him for the same conduct under a

> The "judicial [p]ower" must be understood in light of "the Constitution's status as the supreme legal document" over "lesser sources of law." Lawson, The Constitutional Case Against Precedent, 17 Harv. J. L. & Pub. Pol'y 29-30 (1994). This status necessarily limits "the power of a court to give legal effect to prior judicial decisions" that articulate demonstrably erroneous interpretations of the Constitution because those prior decisions cannot take precedence over the Constitution itself. *Ibid.* Put differently, because the Constitution is supreme over other sources of law, it requires us to privilege its text over our own precedents when the two are in conflict. I am aware of no legitimate reason why a court may privilege a demonstrably erroneous interpretation of the Constitution over the Constitution itself.

139 S. Ct. 1960, 1985 (2019) (Thomas, J., concurring).

Indeed, the United States Supreme Court overturned its own precedent in in *Roper v. Simmons*, 543 U.S. 551 (2005), by raising the age of death eligibility from 16 to 18 years old, and the process by which it was accomplished is central to Appellant's argument here. Consider, only fifteen years earlier in *Stanford v. Kentucky*, 492 U.S. 361, 380 (1989), the United States Supreme Court rejected the very same argument, holding, "[w]e discern neither a historical nor a modern societal consensus forbidding the imposition of capital punishment on any person who murders at 16 or 17 years of age."

---

federal statute, or the reverse may happen. 139 S. Ct. 1960 (2019); Amend. V, U.S. Const.

Appellant argues that the key difference in the *Roper* decision versus previous decisions on the same issue of age of death eligibility, hinges on exactly what he is requesting here: an evidentiary hearing. Leading up to the *Roper* decision, the evidentiary hearings produced sufficient facts for the record, such as current science and history of societal trends fifteen years after the *Stanford* Court's ruling. *Id.*

Additionally, and as support for Mr. Sliney's argument here that progress should not yield to precedent when it comes to the interpretation of the Constitution, consider that, in prior decisions, determining the minimum age of death eligibility now at 18, a landmark case was required before the Court protected all persons younger than 16 from facing execution after a murder conviction.

It took until 1988 before the United States Supreme Court drew a bright-line rule prohibiting execution for those convicted of a murder committed before the age of 16. In *Thompson v. Oklahoma,* the Court looked to the history of the Court's interpretation of the cruel and unusual punishment clause and found a common theme:

> "The authors of the Eighth Amendment drafted a categorical prohibition against the infliction of cruel and unusual punishments, but they made no attempt to define the contours of that category. They delegated that task to future generations of judges who have been guided by the "evolving standards of decency that mark the progress of a maturing society."

487 U.S. 815, 821 (1988)(quoting *Trop v. Dulles,* 356 U.S. 86, 101, 78 S.Ct. 590, 598, 2 L.Ed.2d 630 (1958) (plurality opinion) (Warren, C.J.)).

One need not imagine the shock that modern citizens feel when they learn about George Stinney, Jr., a 14-year-old African- American who was put to death by electric chair in South Carolina, 1944-amidst the Jim Crow-era, after it took a jury of white men ten minutes to decide on his death sentence and 70 years for the courts to exonerate him.[71] One can be confident to say now there would be no disagreement with the courts or your average citizen that, this execution of a non-culpable child without due process, is not a precedent that should have ever been retained. Instead, we look back as a society with collective shame at such an interpretation of

[71] Lindsey Bever, *It Took 10 Minutes to Convict 14-year- old Geoge Stinney,,Jr. It Took 70 Years After his Execution to Exonerate Him,* WASH. POST (Dec. 18, 2014), https://www.washingtonpost.com/news/morning-mix/wp/2014/12/18/the-rush-job-conviction-of-14-year-old-george-stinney -exonerated-70-years-after-execution/)(last visited Aug. 8, 2022).; *See* Order Vacating J., *South Carolina v. Stinney* (S.C. Cir. Ct. Dec. 17, 2014); *See also* Brief for Def./Petitioner as et al. Amici Curiae at 9-14, *South Carolina v Stinney* (Feb. 21, 2014) (citing Stinney Trial Record, McLeod Notes; Stinney Hearing Stipulated Documents, Ruffner aff.; A.C. Bozard Statement; Stinney Filed Stipulations and Consent Order, ¶2). Because no formal case or trial transcript exists of the adjudication of Stinney in 1944, the recitation of the facts comes from the amicus brief.

the Eighth and Fourteenth Amendments that would allow a state to (lawfully) execute a child that young, and without due process.[72]

And what is not often said aloud, but we as a society shudder to think about, is of the number of persons during the years and decades who were executed before these landmark cases could "expound"[73] interpretations of constitutional protections that would now render those executions unlawful. In the context of the Eighth Amendment, recent advancements in neuroscience and societal and legislative trends must be presented by experts in the field for a full and fair hearing to assist the decision-makers in weighing the evidence to decide what is considered "cruel and unusual." Without full factual development in the record for the higher courts to analyze, we only delay alignment of our legal rights with well-settled jurisprudence dating more than a century ago that cruel and unusual punishment must reflect our "evolving standards of decency." *Weems v. United States*, 217 U.S. 349, 30 S.Ct. 544, 54 L.Ed. 793 (1910). Otherwise:

> There would be little need for judges-and certainly no office for a philosophy of judging-if the boundaries of every constitutional provision were self-evident. They are not.... [I]t is the task of the

[72] *See* Amends. V, VI, XIV U.S. Const.

[73] Therefore, judicial discretion is not the power to "alter" the law; it is the duty to correctly "expound" it. *Gamble v. United States*, 139 S. Ct. 1960, 1982 (2019)(quoting Letter from J. Madison to N. Trist (Dec. 1831), in The Writings of James Madison 477 (G. Hunt ed. 1910) (Writings of Madison)).

> judge in this generation to discern how the framers' values, defined in the context of the world they knew, apply to the world we know. The world changes in which unchanging values find their application....
>
> "We must never hesitate to apply old values to new circumstances.... The important thing, the ultimate consideration, is the constitutional freedom that is given into our keeping. A judge who refuses to see new threats to an established constitutional value, and hence provides a crabbed interpretation that robs a provision of its full, fair and reasonable meaning, fails in his judicial duty."

Ollman v. Evans, 242 U.S. App. D.C. 301, 326-327, 750 F.2d 970, 995-996 (1984) (en banc) (Bork, J., concurring).

Bearing upon this sentiment, the United States Supreme Court has altered precedent when the "old values" (*Id.*) toward capital punishment no longer reflect our society and its idea of jurisprudence. This can be traced backward from *Weems*[74] all the way forward to when the 2005 *Roper* Court noted that "[t]he prohibition against 'cruel and unusual punishments,' like other expansive language in the Constitution, must be interpreted according to its text, by considering history, tradition, and precedent, and with the due regard for its purpose and function in the constitutional design." *Roper,* 543 U.S. 551 at 560.

---

[74] *Weems v. U.S.*, 217 U.S. 349, 30 S.Ct. 544, 54 L.Ed. 793 (1910)(holding that a sentence of 15 years of hard, enchained labor, plus deprivation of various civil rights and perpetual state surveillance, constituted "cruel and unusual punishment").

Just as Florida's conformity clause intends for its Court to follow the United States Supreme Court's lead on decisions regarding cruel and unusual punishment, so too does this Court dutifully follow the Highest Court's lead by examining its own precedent for erroneous conclusions and make what it feels to be the right decision, even if that means overturning established case law.

Consider *Bush v. State*, 295 So. 3d 179 (Fla. 2020), where this Court abandoned the "circumstantial evidence rule" *Id.* at 201. "For more than one hundred years, this Court . . . applied a more stringent standard of review in reviewing convictions supported only by circumstantial evidence." *Id.* at 216, (Labarga, J., concurring in part and dissenting in part).

So too, in capital cases, this Court has altered its own precedent. In *State v. Poole*, 297 So. 3d 487 (Fla. 2020), this Court "recede[d] from *Hurst v. State* except to the extent that it held that a jury must unanimously find the existence of a statutory aggravating circumstance beyond a reasonable doubt" and "reverse[d] the portion of the trial court's order setting aside Poole's sentence." *Id.* 491. Regarding *stare decisis*, this Court went on to state:

> While this Court has consistently acknowledged the importance of *stare decisis*, it has been willing to correct its mistakes. In a recent discussion of *stare decisis*, we said:

> *Stare decisis* provides stability to the law and to the society governed by that law. Yet *stare decisis* does not command blind allegiance to precedent. "Perpetuating an error in legal thinking under the guise of stare decisis serves no one well and only undermines the integrity and credibility of the court."

Shepard v. State, 259 So. 3d 701, 707 (Fla. 2018) (quoting *State v. Gray*, 654 So. 2d 552, 554 (Fla. 1995)). Similarly, we have stated that "[t]he doctrine of stare decisis bends ... where there has been an error in legal analysis." *Puryear v. State*, 810 So. 2d 901, 905 (Fla. 2002). And elsewhere we have said that we will abandon a decision that is "unsound in principle." *Robertson v. State*, 143 So. 3d 907, 910 (Fla. 2014) (quoting *Brown v. Nagelhout*, 84 So. 3d 304, 309 (Fla. 2012)).

> It is no small matter for one Court to conclude that a predecessor Court has clearly erred. The later Court must approach precedent presuming that the earlier Court faithfully and competently carried out its duty. A conclusion that the earlier Court erred must be based on a searching inquiry, conducted with minds open to the possibility of reasonable differences of opinion. "[T]here is room for honest disagreement, even as we endeavor to find the correct answer." *Gamble v. United States*, –– U.S. ——, 139 S. Ct. 1960, 1986, 204 L.Ed.2d 322 (2019) (Thomas, J., concurring).

In *Phillips v. State*, 299 So. 3d 1013 (Fla. 2020) this Court receded from *Walls v. State*, 213 So. 3d 340 (Fla. 2016). *Id.* at 1022. This Court relied on the language reproduced from *Poole*,[75] *supra*, then went on to state:

> We cannot escape the conclusion that this Court in *Walls* clearly erred in concluding that *Hall* applies retroactively. We say that based on our review of *Hall*, our state's judicial precedents

[75] *Poole*, 297 So. 3d at 47.

regarding retroactivity, and the decisions of federal habeas courts concluding that *Hall* does not apply retroactively. Based on its incorrect legal analysis, this Court used *Hall*—which merely created a limited procedural rule for determining intellectual disability that should have had limited practical effect on the administration of the death penalty in our state—to undermine the finality of numerous criminal judgments. As in *Poole*, "[u]nder these circumstances, it would be unreasonable for us not to recede from [*Walls*'] erroneous holdings." *Id.* § 48.

"[O]nce we have chosen to reassess a precedent and have come to the conclusion that it is clearly erroneous, the proper question becomes whether there is a valid reason why not to recede from that precedent. ... The critical consideration ordinarily will be reliance." *Id.* But:

> reliance interests are "at their acme in cases involving property and contract rights." *Payne v. Tennessee*, 501 U.S. 808, 828 [111 S.Ct. 2597, 115 L.Ed.2d 720] (1991). And reliance interests are lowest in cases—like this one—"involving procedural and evidentiary rules." *Id.*; see also *Alleyne* [*v. United States*], 570 U.S. [99] at 119 [133 S.Ct. 2151, 186 L.Ed.2d 314 (2013)] (Sotomayor, J., concurring) ("[W]hen procedural rules are at issue that do not govern primary conduct and do not implicate the reliance interests of private parties, the force of *stare decisis* is reduced.").

Id.

As the expectant potential beneficiary of the erroneous decision in *Walls*, Phillips has no concrete reliance interest; he has in no way changed his position in reliance on *Walls*. In this postconviction context, Phillips's interest as an expectant potential beneficiary of *Walls* is set against all the interests that support maintaining the finality of Phillips's judgment. The surviving victims, society-at-large, and the State all have a weighty interest in not having Phillips's death sentence set aside for the relitigation of his claim of intellectual disability based on *Hall*'s evolutionary refinement in the law.

> Thus, we conclude that we should not continue to apply the erroneous reasoning of *Walls*. And because *Hall* does not apply retroactively, it does not entitle Phillips to a reconsideration of whether he meets the first prong of the intellectual disability standard.

Id. 1023–24.

Or put in another way, consider the "alternate universe" that would exist if other courts did not "reassess a precedent and . . . come to the conclusion that . . . is clearly erroneous," as this Court does, but instead remain bound by erroneous precedent, in the "defense of criminal procedure" or to protect the State from costs imposed by abrogating a case of bad precedent:

> [A] trial judge alone could still decide the critical facts necessary to sentence a defendant to death. *Walton v. Arizona*, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990), overruled by *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). An officer would still be able to search a car upon the arrest of any one of its recent occupants. *New York v. Belton*, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981), holding limited by *Arizona v. Gant*, 556 U.S. 332, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009). And States could still deprive a defendant of the right to confront her accuser so long as the incriminating statement was "reliable." *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), abrogated by *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). *The Constitution demands more than the continued use of flawed criminal procedures—all because the Court fears the consequences of changing course*.[76]

---

[76] *Ramos v. Louisiana*, 140 S. Ct. 1390, 1410 (2020)(Sotomayor, J.,concurring)(emphasis added)(holding the Sixth Amendment right to a jury trial, as incorporated against the States by way of the Fourteenth

Additionally, in *Lawrence v. State*, 308 So. 3d 544 (Fla. 2020), this Court overruled years of precedent and its own Rule of Appellate Procedure 9.142(a)(5) to hold that comparative proportionality is no longer required to be conducted by this Court. *Id.* at 549. This Court explained why "[the] precedent is erroneous and must yield to our constitution." *Id.* at 548.

Mr. Sliney argues that the fundamental reasoning behind each U.S. Supreme Court landmark decision defining cruel and unusual punishment is similar, that the text of the cruel and unusual punishment clause must be read to reflect the evolving standards of decency, so although a precedent may eventually shift by the changing a mere number of the age for death eligibility, the integrity of the constitutional design is not threatened by requiring adherence to that fundamental principle. This necessarily requires a fully developed factual record of current scientific evidence, objective indicia, and national trends not previously available in order for a court to make a full and fair finding of whether Mr. Sliney's death sentence is unlawful.

Amendment, requires a unanimous verdict to convict a defendant of a serious offense)(*abrogating Apodaca v. Oregon*, 406 U.S. 404, 92 S.Ct. 1628, 32 L.Ed.2d 184, and *Johnson v. Louisiana*, 406 U.S. 356, 92 S.Ct. 1620, 32 L.Ed.2d 152); *See also* Amends. VI, XIV, U.S. Const.

Therefore, the circuit court erred in holding that it could neither hear nor ultimately decide Mr. Sliney's claim that his death sentence is disproportionate and unconstitutional because it is "bound by the decisions of the [United States] Supreme Court and Florida Supreme Court precedent (SPCR2. 1:138-39.)," because *stare decisis* does not prevent this Court from granting Mr. Sliney relief because it can be overcome in this case. Recently, this Court has been more than willing to set aside long-standing precedent to apply what this Court found was a correct standard of law. Reaching the correct application of the law has been of paramount importance to this Court.

To the extent there is case law that would seem to prevent relief, such as *Roper*, a bright-line rule that defendants must be younger than 18 to be ineligible for the death penalty, that rule was created based on the evidence and standards as they were in 2005. Just as the *Roper* Court required a full evidentiary hearing to fairly judge the current trends and standards in light of the Eighth Amendment's proscription of cruel and unusual punishment before overturning its own precedent from 15 years earlier, so too should this Court require an evidentiary hearing on Mr. Sliney's claim for a fair review in the light of the evidence of evolving standards as they are in 2022. In other words, when we know better, we do better:

> Look at the facts of the world. You see a continual and progressive triumph of the right. I do not pretend to understand the moral universe, the arc is a long one, my eye reaches but little ways. I cannot calculate the curve and complete the figure by the experience of sight; I can divine it by conscience. But from what I see I am sure it bends towards justice.

THEODORE PARKER, *Of Justice and the Conscience* 84-5 (Crosby, Nichols and Co., Boston Ed.,1853).

Without sufficient facts in evidence or legal analysis in the circuit court's order, this Court is unable to judge the merits of the underlying claim to affirm Mr. Sliney's denial of relief. As the record is not complete such that Mr. Sliney is conclusively not entitled to relief on this issue, as would be required under Florida Statute 3.851, he respectfully requests This Court remand the matter to the circuit court for an evidentiary hearing.

CONCLUSION AND RELIEF SOUGHT

Based on the forgoing, the lower court improperly denied Mr. Sliney relief on his 3.851 motion. This Court should remand to the circuit court for an evidentiary hearing or vacate Mr. Sliney's sentence and remand the case for a new trial, or for other such relief as the Court deems proper.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been electronically filed with the Clerk of the Florida Supreme Court, and electronically delivered to Honorable Donald H. Mason, jgibbs@ca.cjis20.org; Assistant Attorney General Scott Browne, scott.browne@myfloridalegal.com and capapp@myfloridalegal.com; and Assistant State Attorney Cynthia Ross, cross@sao.cjis20.org and ServiceSAO-CH@sao.cjis20.org, and mailed via U.S.P.S. to Jack Sliney, DOC #305288, Union Correctional Institution on this 16th day of August, 2022.

/s/ Heather A. Forgét
Heather A. Forgét
Florida Bar No. 0032402
Assistant Capital Collateral Counsel
Capital Collateral Counsel - Middle
12973 N. Telecom Pkwy
Tampa, FL 33637
813-558-1600
Forget@ccmr.state.fl.us
support@ccmr.state.fl.us

/s/ Julissa R. Fontán
Julissa R. Fontán
Florida Bar No. 0032744
Assistant Capital Collateral Counsel
Capital Collateral Counsel - Middle
12973 N. Telecom Pkwy
Tampa, FL 33637
813-558-1600
Fontan@ccmr.state.fl.us

/s/ Nicholas M. Bedy
Nicholas M. Bedy
Florida Bar No. 1035895
Assistant Capital Collateral Counsel
Capital Collateral Counsel - Middle
12973 N. Telecom Pkwy
Tampa, FL 33637
813-558-1600
Bedy@ccmr.state.fl.us

Counsel for Appellant

CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Initial Brief of Appellant, was generated in Arial 14-point font, pursuant to Fla. R. App. P. 9.045.

/s/ Heather A. Forgét
Heather A. Forgét
Florida Bar No. 32402
Assistant Capital Collateral Counsel
Capital Collateral Counsel - Middle

forget@ccmr.state.fl.us