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

REPLY BRIEF OF APPELLANT

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

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PRELIMINARY STATEMENT

Citation to the record will be the same as Mr. Sliney's Initial Brief (IB. at "page number"). Mr. Sliney relies on the arguments made therein and uses this Reply Brief only to respond to the State's most concerning factual and legal misapprehensions listed in its Answer Brief (AB. at "page number").

STATEMENT REQUESTING ORAL ARGUMENT

Mr. Sliney respectfully disagrees with the State's response (AB. at *v*) that oral argument is not necessary on this appeal of the denial his post-conviction relief. Specifically, oral argument is needed to advise this Court regarding the intricate scientific and factual misapprehensions and disagreements contained below, in the State's written responses and oral argument at the Case Management Conference, as well as the trial court's failure to fairly evaluate the legal arguments supporting Mr. Sliney's claims. Accordingly, Mr. Sliney requests oral argument to present this Appeal fully and fairly to this Court.

SUMMARY OF REPLY ARGUMENT

The State's argument is legally unsound in the manner which it attempts to affix a *per se* rule that denial of a claim in one case is immutably controlling of the outcome of similar claims in other cases, regardless of the different factual records in each. Such an argument glaringly ignores the Eighth Amendment requirement for individualized sentencing determinations

in capital cases, *see Lockett v. Ohio*, 438 U.S. 586, 605 (1978); *see also Proffit v. Florida*, 428 U.S. 242, 258 (1976), and this Court's requirement to review capital cases and the factual record below to ensure the death penalty is not being unconstitutionally applied arbitrarily, capriciously, or to a class of persons with lesser culpability than meets the threshold for a death sentence. The State's response clearly misapprehends the evidence Mr. Sliney will present to support his claim by continually referring to "brain mapping studies" (AB at 12.) or using incorrect terminology to trigger the Court to conclude this is the same request for an "extension of *Roper*." (AB. at 14, 18.). *See Roper v. Simmons*, 543 U.S. 551 (2005)(death penalty categorically barred for offenders under 18 years). Mr. Sliney has repeatedly corrected this minimization and mischaracterization of the new evidence supporting his facially and legally sufficient claim that his death sentence is disproportionate and should be vacated. The State also misapprehends Mr. Sliney's second claim insisting he is trying to reweigh mitigators or aggravators for his death sentence when, instead, he is presenting new evidence proving he is a member of a class of persons (aged 18-21) with lessened culpability. Therefore, it is cruel and unusual to subject him to the death penalty under the Eighth and Fourteenth Amendments to the United States Constitution. Amend. VIII, U.S. Const.; Amend. XIV, U.S. Const. The

State has clearly shown an evidentiary hearing is required to resolve the factual issues because these claims cannot be resolved on purely legal arguments and the record does not conclusively bar relief. Fla. R. Crim. P. 3.851(f)(5)(B). Mr. Sliney respectfully requests this court reverse the summary denial and remand for an evidentiary hearing on his claims to develop the factual record to obtain relief or for later appellate review.

ARGUMENT

ISSUE I

MR. SLINEY'S SUCCESSIVE MOTION FOR POSTCONVICTION RELIEF WAS IMPROPERLY DENIED WITHOUT A HEARING BECAUSE IT WAS TIMELY, NOT PROCEDURALLY BARRED, AND WITH MERIT.

A. Mr. Sliney's Newly Discovered Evidence Claim is Timely and is Not Procedurally Barred.

i. The Motion is Timely.

The State avers that *Hunter v. State,* 29 So. 3d 256 (Fla. 2008) supports its argument that Mr. Sliney's new evidence claim is time-barred. Mr. Sliney's new evidence claim is timely for reasons outlined in previous filings and is distinguished from *Hunter. Id.* In *Hunter*, this Court rejected a claim for which the moving papers provided no explanation whatsoever why the claim was presented in a successive post-conviction motion in 2005 when the claims appeared to be part of a claim initially raised in 1999 post-conviction proceedings. *Id.* at 266-67. The Court gave counsel an opportunity to explain

the claim's timeliness and he demurred, saying that prior post-conviction counsel would be available to testify about the facts and circumstances at a later hearing. *Id.* at 267. Moreover, although this Court's opinion does not go into further detail, the lower court's order in *Hunter* reveals the circuit court was able to conclude from the record the key document upon which the claim was based was in the actual possession of post-conviction counsel at the very least since 2004 or possibly many years and previously presented to that court. *Id.* In sum, the absence of any explanation from *Hunter*'s counsel, combined with affirmative support for counsel's earlier knowledge of the evidence, established the untimeliness of Hunter's claims. *Id.*

Those facts are contrary to Mr. Sliney's new evidence claims here. The AAIDD-12[1] was not in counsel's "possession" prior to January, 2021. The AAIDD-12 defines the human developmental period as "before the individual attains 22."[2] Prior publications of the AAIDD Manual defined the

[1] *Intellectual Disability: Definition, Classification, and Systems of Supports* Am. Ass'n of Intell. & Developmental Disabilities (12th ed. 2021) [*hereinafter* "AAIDD-12" or "AAIDD-12 Manual"].

[2] *Id.* at 120-21(*defining* the developmental period by integrating "four approaches" 1) etiological or biomedical, social, behavioral, or educational risk factors, 2) functional, 3) cultural, "which emphasizes social factors and social roles; and 4) administrative, which establishes the age-of-onset in reference to eligibility for services and supports).

developmental period as before age 18.[3] Various scientific conclusions experts used to confirm this new consensus operationally defining the brain's "developmental period" were not available – therefore, counsel could not "produce" this evidence despite due diligence prior to 2021.*See infra*, p.18.

The State also uses *Morton v. State*, 995 So. 2d 233 (Fla. 2008) to support the summary denial of Mr. Sliney's claims. Mr. Sliney will simply point out: a) regardless of whether that case stands for *Diaz* rejecting old studies on lethal injection or Morton's 2004 "brain mapping study," *Morton* is irrelevant as it is a 2008 decision, based on reports from 4+ years earlier, while here we are in 2022 with new evidence; and b) it appears that no matter how many times Mr. Sliney reminds the State he is *not* using "so called brain mapping studies" as his new evidence here, it does not seem to allay the State's circular argument.[4] The State also uses *Dilbeck v. State*, 304 So. 3d 286 (Fla. 2020) disparately to Mr. Sliney's new evidence claim here. *Dilbeck* involved a "new defense expert citing a new revision in the [DSM-5]," (AB. at 17), more than *five years after it was published in 2013. Id.* Mr. Sliney proposed experts to testify to the AAIDD-12 revision, published within one year of the filing date

[3] *See Intellectual Disability: Definition, Classification, and Systems of Supports Am. Ass'n of Intell. & Developmental Disabilities (11th ed. 2010)* [*hereinafter "AAIDD-11"*].

[4] *See also* detailed discussion *infra*, pp. 12-15.

for this successive postconviction claim, which is also the basis of his exception to the timeliness bar per Fla. R. Crim. P. 3.851(d)(2). This claim is timely and should be remanded for a hearing.

ii. Mr. Sliney's New Evidence Claim is Not Procedurally Barred

This new evidence Mr. Sliney will present at an evidentiary hearing would support a categorical bar- something which was impossible to do at the time of trial or prior postconviction proceedings because science and societal standards of decency had not yet evolved to support such a claim.

The analysis of the State's use of *Branch v. State*[5] to support a procedural bar for Mr. Sliney's claim is of particular importance here where the factual record and procedural posture in which this claim is being presented is different than in Mr. Branch's appeal to this Court. Mr. Branch filed his claim after a death warrant had been signed. Mr. Sliney is not raising this claim following the signing of a death warrant. Mr. Sliney has been steadfast that the impetus behind raising this claim in his postconviction proceedings is based upon the newly emergent consensus within the scientific community as published in the AAIDD-12 in 2021 and the development of recent case law and objective indicia supporting a national consensus under 'evolving standards of decency.'[6] Mr. Sliney has been both

[5] 236 So. 3d 981 (Fla. 2018).
[6] *See Trop v. Dulles*, 356 U.S. 86, 101 (1958)(plurality).

diligent in the manner which he has raised this claim and in the manner which he has advanced it at the appropriate time under Fla. R. Crim. P. 3.851(d)(2). Unlike the circumstances in *Branch*, this is not a scenario where it could be implied that Mr. Sliney has been dilatory or waited until the last minute in his postconviction appeals to litigate this issue.

The State also cites *Carroll v. State*, 114 So. 3d 883 (Fla. 2013) to support the summary denial of Mr. Sliney's claims based on a procedural bar. (AB. at 17-18). However, unlike Mr. Sliney's request for a hearing to present new science on brain development for late adolescents that emerged in 2021, this Court decided Mr. Carroll had evidence all along of a mental illness that may have made him less culpable, or belonging to a class of persons for which the death penalty is prohibited as under *Atkins* or *Roper*.[7] This Court found, "Carroll's claim is based on evidence of his mental illness that was presented either at trial in 1992 or at the 1997 evidentiary hearing on his initial postconviction motion." *Carroll* at 886. Mr. Sliney's Sentencing Order held, "no evidence" of his "emotional or mental age" was presented as a factor to lessen culpability. (IB. at 21; TR. 2:221-28; SPCR2. 1:224, ¶3.) No expert testimony is in the record regarding scientific or

[7] *See Roper*, 543 U.S. 551; *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).

medical evidence of brain development for the class of persons 18-22 years old, nor specifically that 19-year-old Mr. Sliney is part of that class, which lacks any scientific difference to juveniles under 18 deemed categorically to manifest lesser culpability than warrants the death penalty. Therefore, it is not procedurally barred because it was not previously litigated.

Instead, Mr. Sliney's claim is based on current scientific research and additional objective indicia establishing a national consensus as to how society at large views emerging (late or older)[8] adolescents. As the American Psychological Association published in August, 2022:

> [D]evelopmental neuroscience, including research on both the structure and function of brain development, establishes that significant maturation of the brain continues through at least age

[8] The State questions the terminology "late adolescent" (AB at 19, n.6), seeming to suggest because prior court opinions do not define the scientific term, it is "curious" and "irrelevant." However, a court's prior recitation of scientific terms is not required for Mr. Sliney to present his evidence. For example, an aardvark is still an aardvark by scientific consensus whether or not a judge classifies an aardvark into its genus/species in a written court opinion. The State's response is a good example of why expert testimony is needed to assist the State and court in evaluating these claims.

For now, it may be helpful to note this Court (*Deviney v. State*, 322 So.2d 563(Fla. 2021)), described "late adolescents" as those aged 18-21, however, scientists now define "late adolescents" as those aged 18-20. *See* App. Attach. A*. APA Resolution on the Imposition of Death as a Penalty for Persons Aged 18 Through 20, Also Known As the Late Adolescent Class*. AMER. PSYCHOLOGICAL ASS'N. (Aug., 2022).; *See also generally* IB (*citing* scientific articles to educate the Court and State on evolution of scientific terminology including "late adolescent" as relevant to Mr. Sliney's claims).

> 20,[9] especially in the key brain systems implicated in a person's capacity to evaluate behavioral options, make rational decisions about behavior, meaningfully consider the consequences of acting and not acting in a particular way, and to act deliberately in stressful or highly charged emotional environments, as well as continued development of personality traits (e.g., emotional stability and conscientiousness) and what is popularly known as "character[.]"[10]

Additionally, Mr. Sliney's claim relies upon evidence of a national consensus which has emerged in the legal community in support of that science as demonstrated in recent cases such as *Commonwealth v. Mattis, Suffolk (Mass.) Superior Ct.*, Case No. 1184CR11291, 7, July 20, 2022, *Commonwealth v. Bredhold*, No. 14-CR-161,[11] and *Matter of Monschke,* 197

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[9] *See e.g.*, IB. at 26 and accompanying notes; GUR, R. C. (2021). *Development of brain behavior integration systems related to criminal culpability from childhood to young adulthood: Does it stop at 18 years?* 55-65.(J. PEDIATRIC NEUROPSYCHOLOGY*,* April, 2022) (1https://doi.org/10.1007/s40817-021-00101-1).

[10] *See* App. Attach. A, p.*2.; See also supra* note 9 and accompanying text.

[11] After hearing substantial scientific evidence, the trial court concluded that a scientific consensus has emerged that the brains of older adolescents (i.e., individuals aged 18-20) suffered from the same psychological and neurological deficiencies as juvenile offenders. Based on this finding, and a finding that a national consensus had emerged against its use on older adolescents, the trial court declared Kentucky's death penalty statute unconstitutional for individuals who were under 21 at the time of their offense. *See Commonwealth v. Bredhold*, 599 S.W.3d 409 (Ky. 2020), *cert. denied sub nom. Diaz v. Kentucky*, 141 S.Ct 1233 (2021)(*vacating* the trial court's orders that declare Kentucky's death penalty statute unconstitutional insofar as it permits capital punishment for a defendant under twenty-one (21) years of age at the time of his offense because the defendants lacked standing, "Although the Commonwealth noticed its intent to seek the death penalty as to all three Appellees, at the point their motions were heard by the circuit court (and even now), the cases remained untried and no jury had recommended the death penalty").

Wash. 2d 305, 321, 482 P.3d 276, 284 (2021) (science of neurodevelopment recognizes no meaningful distinction between juveniles and late adolescents).[12] *See* App. Attach. B. This emergence of evolving standards within the scientific and legal community and additional objective indicia of a national consensus supports Mr. Sliney's timely filing of his successive motion for postconviction relief under Fla. R. Crim. Pro. 3.851(d)(2). Unlike the scenarios in *Branch* and *Carroll*, this evidence was not "readily available" to counsel by other means at the time of the trial such that counsel could have discovered it and presented to Mr. Sliney's jury or earlier postconviction stages. Thus, his claims are not procedurally barred and Mr. Sliney is entitled to a hearing.

iii. Mr. Sliney's claims have merit based on newly discovered evidence and the court should hold an evidentiary hearing to fully and fairly weigh the evidence to determine if his death sentence should be vacated.

In contrast to factual scenarios in *Davis* and *Branch*, Mr. Sliney's claims are based upon information which Florida courts have recently recognized

[12] *See also* App. Attach. A, *APA Resolution*, p.1, published August, 2022:

> WHEREAS [American Psychological Association] concludes, based on the *current state* of the psychological and related developmental sciences . . . 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 (emphasis added).

can constitute newly discovered evidence. In *Vega v. State,* the court found a medical expert report stating the forensic medical community opinion had changed with respect to whether the victim's injuries could have been accidental was likely to produce an acquittal on retrial or weaken case against defendant so as to give rise to a reasonable doubt as to his culpability, as would support a finding that the report was newly discovered evidence and could support a motion for postconviction relief on felony murder and child abuse charges arising out of a child's death. 288 So. 3d 1252, 1275 (Fla. 2020). The reports, studies, research, and objective indicia upon which Mr. Sliney relies were not previously in existence because the *medical opinion has recently changed* similar to the new evidence accepted in *Vega*. *Id. Cf. Johnson v. State*, 27 So. 3d 11, 20-21 (Fla. 2010). They are also not merely a "compilation of previously available information" related to the development and cognitive functioning of adolescents aged 18-21 years old. *Cf. Rutherford v. State*, 940 So. 2d 1112, 1117 (Fla. 2006).

Mr. Sliney articulated in his motion that he is "relying on *advanced imaging techniques*," used by AAIDD-12 to reach its scientific consensus that critical areas of the human brain needed to think like an adult, are not developed until the early 20's. (SPRC2:1:10-11.) Despite this clear recitation of his proposed evidence, Mr. Sliney, through counsel, is forced to repeatedly

correct the State in its misapprehension that he intends to produce the same "brain-mapping studies" courts have seen before.[13] During the Case Management Conference, defense counsel explained that the AAIDD-12 pronounced in 2021 the human brain is not mature until the age of 22 and "there is not [sic] neurological difference between a 19-year-old criminal defendant, like Mr. Sliney, and a defendant under the age of 18 who is protected from execution because both possess diminished culpability." (SPCR2:1:172). The State still responded, "the Florida Supreme Court addressed . . . the *very types of brain mapping studies that the defendant now relies on*" in 2008, and "if the claim like this was time barred in 2008, it's most certainly time barred in 2022." *Id.* at 181(emphasis added). Defense counsel corrected the State again saying, "[T]he State is missing the point . . . we are using the new pronouncement, the new cutoff age for brain development as the new evidence in this claim." *Id.* at 183. The Motion for Rehearing reiterated, "[Mr. Sliney] is not simply arguing vaguely the conclusion of the mapping-brain studies available in the past," but "[i]nstead, Mr. Sliney argues that the scientific community *finally drew a line, based on science, as to the age at which the human brain stops developing.*"

[13] The State repeats this incorrect assumption no less than five times in its Answer. Repeating false facts does not make them true. *See* AB. at 12, 14, 15, 16, 18.

(SPCR2:1:142)(emphasis in original). Yet the State still minimizes it as "brain mapping studies . . . cited in the context of assessing Intellectual Disability (AB. at 12)."[14] available prior to the AAIDD Manual's pronouncement *drawing a line for brain development at 22*.[15] Curiously, the State's Answer Brief cites an "old" study from 2009 to support its (apparent) argument that Mr. Sliney's new evidence from 2021-2022 holds similar medical opinions or unreliability.[16] An evidentiary hearing is required if the State persists in mischaracterizing the proposed new evidence after Mr. Sliney provided transparent explanations in multiple motions, oral argument, and numerous citations to the AAIDD and expert studies defining terms such as "late adolescent."[17]

Also, "[i]n determining the impact of newly discovered evidence, the court must conduct a cumulative analysis of all the evidence so that there is a total picture of the case and all the circumstances of the case." *Hildwin v. State*, 141 So. 3d 1178, 1184 (Fla. 2014). Therefore, Mr. Sliney is entitled to an evidentiary hearing on whether his newly discovered evidence "impacts"

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[14] *See* SPCR. at 183("[T]he State is missing the point. We are not arguing, we are not using the status [intellectual disability] as the basis for our claim, we are using the new pronouncement, the new cutoff age for brain development as the new evidence for this claim.").
[15] AAIDD-12 at 32.
[16] *See* AB at 14, n. 5.
[17] *See* AB at 19, n. 6. *See also supra,* nn. 8, 14, and accompanying text.

the second prong of the *Jones* standard[18] in such a way that the "newly discovered evidence would probably yield a less severe sentence." *Jones v. State,* 709 So.2d 512, 521 (Fla.1998).

Finally, the State contends the trial court properly denied the claim on the merits based on *Branch* because, "research studies on the brain's development are not 'new,' as the United States Supreme Court was well aware of this information at the time of the Roper decision and nevertheless, drew a bright-line at the age of 18 for death eligibility." (AB. at 19). This argument, however, is flawed. Rather than address the Eighth Amendment argument and the science relied upon by Mr. Sliney, the State advances the position that this Court's decision in *Branch*, and its reliance upon the United States Supreme Court's 2005 decision in *Roper*, renders any consideration of further advances in both science and the law irrelevant. Such a rationale is contrary to the Eighth Amendment and "evolving standards of decency." (IB. at 55-56; SPCR2. 1:147-48). United States Supreme Court jurisprudence restricts courts from disregarding established medical practice in favor of outdated or "layperson" stereotypes. *See Moore v. Texas*, 139 S.

[18] *See discussion* SPCR2. 1:12-13. *See also Jones v. State*, 709 So. 2d 512, 521 (Fla. 1998) (*holding* newly discovered evidence satisfies the second prong of the *Jones* test if it "weakens the case against [the defendant] so as to give rise to a reasonable doubt as to his culpability." *Id.* at 526 (quoting *Jones v. State*, 678 So. 2d 309, 315 (Fla. 1996)).

Ct. 666 (2019), vacating and reversing the lower court for ignoring AAIDD-11 pronouncement on unacceptable evidence to diagnose a medical condition:

> *Compare Ex parte Moore II*, 548 S.W.3d at 570–571 (finding evidence that Moore "had a girlfriend" and a job as tending to show he lacks intellectual disability), *with* AAIDD–11, at 151 (criticizing the "incorrect stereotypes" that persons with intellectual disability "never have friends, jobs, spouses, or children").

So, too, this Court should follow the AAIDD-12 when deciding which evidence is acceptable to decide Mr. Sliney's claim.

Conformity with Eighth Amendment jurisprudence also requires a court to consider the relevant scientific consensus when determining whether a punishment is excessive. *Hall v. Florida*, 134 S. Ct. 1986 (2014); *Moore v. Texas*, 137 S. Ct. 1039 (2017); *Moore v. Texas*, 139 S. Ct. 666 (2019).

The State's position is also flawed in the manner which it ignores the fact that the *Roper* Court set 18 as a constitutional bright line for death eligibility because it "is the point where society draws the line for many purposes between childhood and adulthood." *Roper* at 125. In other words, the "age of majority." Yet, the United States' "age of majority" was largely set at 21, until it changed to 18 "for reasons quite unrelated to capacity." VIVIAN E. HAMILTON, *Adulthood in Law and Culture*, 91 TULANE L. REV. 55, 57 (2016). Twenty-one was the "near universal" age of majority in the United States

from its founding until 1942 when "wartime needs prompted Congress to lower the age of conscription from [21 to 18], a change that would eventually lead to the lowering of the age of majority generally." *Id.* at 64.

The *Roper* Court also limited review to brain development of people under the age of eighteen because Mr. Roper was 17, and the Court lacked jurisdiction to review newly emergent scientific research dealing with the brain development in those aged 18-22.[19] As Mr. Sliney pled, this is not a claim based on the same science used to support *Roper,* but *current* science.[20] The new evidence consists of a bright line *now* drawn for the "developmental period" of the human brain by scientific researchers and made public by the publication of the AAIDD on January 15, 2021 by explaining that developmental disabilities must, ". . . originate *during the developmental period, which is defined operationally as before the individual attains age 22*."[21] The AAIDD-12 specifies this is a brand new consensus on the operational definition of the "developmental period" because in the past:

> [T]here has been less consistency on the operational definition of the age at which the developmental period ends. The minor historical inconsistency is due, in large part, to the multiple perspectives on development and the developmental period. For example, from an etiological perspective, development is

[19] *See e.g.,* IB. at 26-27 and accompanying notes 36-37.
[20] *See* IB. at note 61 and accompanying text. *See also* App. Attach. A, *APA Resolution*, p.1, published August 4, 2022.
[21] AAIDD-12 at 13 (emphasis added).

> influenced by biomedical, social, behavioral, or educational risk factors. . . From a functional perspective, development focuses on the trajectory of adaptive behavior and intellectual functioning. From a cultural perspective, development is influenced by social factors and societal roles related to social and family interactions, educational involvement, career development, and assuming adult roles. . .[22]

The scientific authors weighed the multiple approaches to decide, "In this 12th edition of the AAIDD Manual, consistency is achieved by adopting the age of onset criterion as 'before the individual attains the age of 22." *Id.* This newly emergent consistency *i.e.,* consensus in science could not have been part of the United States Supreme Court's analysis in *Roper* (or part of Mr. Sliney's postconviction procedural history) as it did not exist prior to January 15, 2021, yet the AAIDD decision is based on a similar rationale to *Roper*[23] and therefore the courts should follow the AAIDD pronouncement.

This Court should take the opportunity presented by Mr. Sliney's case to meaningfully consider its Eighth Amendment jurisprudence and continued viability of the application of the death penalty to those persons (18-21) society has deemed in need of added protections based on evidence of legislative actions and other indicia of national consensus. (*See* IB at 42-43).

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[22] AAIDD-12 at 32.

[23] The *Roper* Court weighed similar factors to reach its conclusion back in 2005, but this AAIDD-12 pronouncement is based on current science as of 2021. *Compare* SPRC2. 1:147-48; IB at 15, n. 21, *with* AAIDD-12 at 32.

It should adhere to the Eighth Amendment requirement that medical science must not be ignored and take a holistic approach to evaluate the newly emergent evidence. *See e.g., Hall v. Florida*, 134 S. Ct. 1986 (2014); *Moore I*, 137 S. Ct. 1039 (2017); *Moore II*, 139 S. Ct. 666 (2019). This Court should provide individuals facing death, especially those such as Mr. Sliney who were 19 years old at the time of their crime, a fair opportunity to show the Constitution prohibits [his] execution. *Hall*, at 2001. A fair opportunity here is only possible if experts can testify. Therefore, Mr. Sliney requests this Court reverse the trial court's summary denial of his claims and remand this matter for an evidentiary hearing.

ISSUE II

MR. SLINEY'S CLAIM THAT THE DEATH PENALTY IS DISPROPORTIONATE UNDER THE EIGHTH AMENDMENT BECAUSE 18-21-YEAR-OLDS, AS A CLASS, LACK REQUISITE CULPABILITY WAS IMPROPERLY DENIED WITHOUT A HEARING BECAUSE IT WAS TIMELY, NOT PROCEDURALLY BARRED, AND WITH MERIT.

Mr. Sliney's claim that he is a member of a class of persons who should not be subject to the death penalty is timely, not procedurally barred, and with merit because it is based on a newly emergent scientific consensus and current national standards of decency unavailable prior to January 15, 2021. The State responds, "[Mr.] Sliney argues that he should have received a new

proportionality review based upon his age at the time he chose[24] to brutally murder the victim for financial gain." (AB. at 22.) The State contends this claim is procedurally barred from review here because, "[Mr. Sliney's] direct appeal sentence was reviewed for proportionality some 25 years ago." *Id.* In support, the State cites *Schoenwetter v. State*, 46 So. 3d 535, 561-62 (Fla. 2010)(dismissing defendant's claim as procedurally barred because it asked the Court to reweigh the aggravating and mitigating circumstances surrounding his death sentence in light of the United States Supreme Court's decision in *Roper*). *Id.* The State still misapprehends the claim as pled in Mr. Sliney's original Def's Successive 3.851 Mot., Mot. for Reh'g, and IB here. Mr. Sliney has been emphatically clear his claim does not rely on reweighing any mitigators or aggravators underlying his death sentence.[25] Mr. Sliney has repeatedly explained his claim here is that his death sentence is excessive, violating his protections under the United States Constitution (and Fourteenth Amendment applying it to the States), because recent science

[24] Mr. Sliney objects to this characterization. Neither jury nor trial court decided beyond a reasonable doubt that the killing for which he is convicted here was "pre-meditated." *See* IB, nn. 6-9.

[25] *See* IB at 21("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."). *See also* SPCR2.1:144, n. 1 and accompanying text.

and evolving standards of decency have established a general societal consensus against its imposition because it is disproportionate to the offender's moral culpability. *Gregg v. Georgia*, 428 U.S. 153, 182 (1976).

The State is also incorrectly claiming, "[Mr. Sliney] fails to explain the procedural mechanism for such proportionality review." AB at 22. On the contrary, Mr. Sliney has been transparent that his claim requires him to establish a societal consensus against his punishment as excessive.[26] To establish this consensus, Mr. Sliney must meet two prongs of the "evolving standards of decency" test as laid out by United States Supreme Court jurisprudence. *Id.* Mr. Sliney has proffered examples of the scientific and expert testimony he would use to establish the first prong of this constitutional test, that a national consensus supports a categorical prohibition of his punishment under the framework of *Atkins v. Virginia* at 312-14, and the court's own judgment after hearing the evidence that the application of the punishment to a specific group is inappropriate. The purpose of presenting new evidence on this claim is not to "expand" the class of persons "prohibited" from the death penalty as the State and trial court are parroting (AB at 22-23, nn. 9-10; SPCR2. at 138), but instead to *narrow* the category of defendants to which the death penalty can be applied, consistent

[26] *See e.g.*, Def's Successive 3.851 Mot., SPCR2. 1:147-48; IB at 41-45.

with the United States Supreme Court's procedural mechanism outlined in and *Atkins* and *Roper at* 568-75. While the science has changed since *Atkins* and *Roper*, the procedural mechanisms as outlined in those cases have not changed significantly, other than to be *more* supportive of Mr. Sliney's claim here. To illustrate, consider the recent line of cases regarding juvenile offenders. *See Miller v. Alabama*, 567 U.S. 460, 465, (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 (2010) (prohibiting sentences of life without parole for nonhomicide offenders who committed their crimes before the age of eighteen). While this Court (and trial court) previously used a 2005 *Roper* "cut off" at 18 years old to justify denials for new evidence claims because it could "enlarge" the class of persons protected from punishment by death for their crimes,[27] consider an alternative view. With each decision protecting a class from certain types of punishment under the Eighth Amendment's cruel and unusual punishment clause, the United States Supreme Court continues to use the same general *procedure* to do so. An evidence-based, holistic evaluation of the medical, social, and legislative factors is required. *Id.*

[27] IB at 31-32 (quoting *Branch v. State*, 236 So. 3d 981 (Fla. 2018)).

To illustrate error in the State's argument "lumping together" proportionality, consider an analysis of more recent United States Supreme Court cases decided under the Eighth Amendment:

> According to *Graham*, the United States Supreme Court's cases addressing the proportionality of sentences fall within two general classifications." *Graham*, 130 S. Ct. at 2021. In the first class of cases, the Court considers whether a "*particular defendant's sentence*," *id*. at 2022 (emphasis added), is disproportionate to that defendant's crime, taking into consideration "all of the circumstances of the case," *id*. at 2021. In the second class of cases, the Court considers a challenge, not to a single sentence, but to "a particular type of sentence as it applies to an entire class of offenders who have committed a range of crimes." *Id*. at 2022-23. For this latter class of cases, in which the Court considers whether to impose a "categorical bar" to a type of punishment practice, the appropriate approach is to employ both objective indicia analysis and independent judgment. *Id*. The distinction described in *Graham* is not based on the difference between substantive and procedural rules, but rather between challenges to individual sentences and challenges to a *type* of punishment practice as applied to a *class* of offenders. [28]

Mr. Sliney has been clear his claim follows this latter class of cases in determining whether to impose a "categorical bar" on whether his punishment is excessive, arbitrary, or capricious. Thus, the lower court erred in its summary denial of his claims because the court was required to review Mr. Sliney's evidence to perform "objective indicia analysis" and independent

[28] IAN P. FARRELL, *Abandoning Objective Indicia*, 303, *(*YALE L.J. ONLINE Vol. 122, 2013)(http://yalelawjournal.org/forum/abandoning-objective-indicia).

judgment on whether his *type* of punishment should be applied to his *class* of offenders (18-21). *Id.*

The State opines Mr. Sliney employed a "cryptic attempt" to raise comparative culpability with his minor codefendant. (AB. at 24, n.11). Mr. Sliney respectfully replies, "relative" culpability analysis is still required. While this Court acknowledged it receded from comparative proportionality, *i.e., Lawrence v. State* (AB. at 24,n.11), this Court said no such thing regarding relative proportionality. *See Cruz v. State*, 320 So. 3d 695, 723 (Fla. 2021). Also, without conceding any measure of Mr. Sliney's culpability, it is true that,"in a death case involving equally culpable codefendants the death sentence of one codefendant is subject to collateral review under rule 3.850 when another codefendant subsequently receives a life sentence." *Scott v. Dugger*, 604 So. 2d 465, 469 (Fla. 1992). While the trial court weighed mitigating evidence of Mr. Sliney's codefendant's life sentence in 1993 (TR. 2:221-28), his codefendant will be resentenced in 2022 possibly with new facts, mitigating evidence, yet an assuredly different outcome due to an intervening change of law. It stands to reason, depending on factors not yet determined, Mr. Sliney could be entitled to a new proportionality review. More importantly, it is relevant and polite to inform this Court on the happenings in this case while it is on appeal. (*See App. Attach.* C, Wittemen

Court Minutes.) Mr. Sliney understands his request for a new proportionality review of his sentence may not yet be ripe -- and to be clear, he does not waive any such claim, nor the ability to supplement the record at this Court's request or file a new claim if legally appropriate. Also, *Hannon v. State*, 228 So. 3d 505 (Fla. 2017), does not foreclose this option as it is distinguishable procedurally (it has not been more than one year since codefendant's resentencing) and factually (culpability was measured between three accomplices). *Id.*

As for the Conformity Clause, Mr. Sliney sees it differently than the State. All courts in this nation are required to "narrow" persons and crimes subject to the death penalty (IB at 15, n.21), instead of getting stuck on whether they are "allowed" to "enlarge" the class of protected persons past prior decisions (*See e.g., Roper*). Consider:

> When the Court has imposed a bar to punishment, it has framed its holding narrowly, carefully distinguishing the set of practices to which the ban applies from the broader set of practices not affected by the holding. But when the Court has later confronted a punishment of the kind distinguished in a prior case, it has routinely construed the prior decision as not ruling that only the punishments banned by the prior holding are cruel and unusual. Justice Kagan's treatment of Graham is a case in point. The Miller Court acknowledged that "Graham's flat ban on life without parole applied only to nonhomicide crimes, and the Court took care to distinguish those offenses from murder, based on both moral culpability and consequential harm." But the majority in Miller argued that none of what Graham had said about child offenders—"about their distinctive (and transitory) mental traits and environmental

vulnerabilities"—was limited to nonhomicide offenses. Those factors applied equally to juveniles convicted of homicide. [29]

In other words, "Graham's holding was expressly limited to juvenile nonhomicide cases, [but] Graham's rationale also supported a ban encompassing juvenile homicide offenders." *Id.* Compare Mr. Sliney's claim now- where Florida courts interpreted *Roper* as expressly limiting protection to defendants under 18. The same "rationale" consistently used by the Highest Court to further narrow the class of persons subject to the death penalty now supports Mr. Sliney's presentation of evidence to protect his class including 19-year-old offenders. Mr. Sliney posits Florida courts would still be within the directive of Florida's Conformity Clause to follow the consistent *rationale* of the United States Supreme Court by conducting an evidentiary hearing before deciding Mr. Sliney's constitutional protections under the Eighth Amendment.

CONCLUSION

WHEREFORE, Mr. Sliney, through undersigned counsel, respectfully requests this Florida Supreme Court reverse the trial court's summary denial of his successive postconviction claims and remand for evidentiary hearing or other such relief as this Court deems proper.

[29] *See Supra*, note 28.

Respectfully Submitted,

ERIC PINKARD
CAPITAL COLLATERAL
REGIONAL COUNSEL

/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 Mr. Sliney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of September, 2022, I electronically filed the foregoing with the Clerk of Court by using the Florida Courts E-Portal Filing System which will send a notice of electronic filing to the following: Honorable Donald H. Mason, jbibbs@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@saw.cjis20.org, and mailed via USPS to Jack R. Sliney, DOC #305288, Union Correctional Institution on this 26th day of September, 2022.

/s/ Heather A. Forgét

COUNSEL FOR APPELLANT

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 14-point Arial, and the page count is 25 pages in compliance with Fla. R. App. P. 9.045 and Supreme Court of Florida's July 5, 2022 Order.

/s/ Heather A. Forgét

COUNSEL FOR APPELLANT