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In the Supreme Court of Florida

ANTONIO LEBARON MELTON,

Appellant,

v.

CASE NO.: SC22-1394
CAPITAL CASE

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR CLAY COUNTY, FLORIDA

ANSWER BRIEF

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PRELIMINARY STATEMENT

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

STATEMENT REGARDING ORAL ARGUMENT

This Court typically does not conduct an oral argument in successive postconviction appeals and certainly should not do so in a case raising an issue that is untimely and meritless under controlling precedent, as the postconviction court found.

STATEMENT OF THE FACTS AND PROCEDURAL HISTORY

This is an appeal of a summary denial of a seventh successive postconviction motion in a capital case.

Facts of the crimes

On November 17, 1990, Melton and two co-perpetrators robbed and then shot a taxi cab driver. Melton was later convicted of armed robbery and felony murder for the murder of the taxi cab driver. *Melton v. State*, 304 So.3d 375 (Fla. 1st DCA 2020).

Then, less than two months later, on January 23, 1991, Melton and Lewis robbed a pawn shop and Melton shot the owner of the shop to death. *Melton v. State*, 638 So.2d 927 (Fla. 1994). Both Melton and Lewis were caught leaving the shop because the victim had managed to trigger the silent alarm before being shot to death. Melton had the murder weapon on him when he was arrested as he was coming out of the store.

Procedural history

Melton was convicted for the first-degree murder of the pawn shop owner and for armed robbery of the pawn shop. Melton was sentenced to death for the murder and to a life sentence for the robbery. The convictions for felony murder and armed robbery in the non-capital case were used as an aggravating factor in the capital case. *Melton v. State*, 638 So.2d 927, 929 (Fla. 1994) (noting the trial court found two aggravating factors including the prior violent felony aggravator based on the convictions for the first-degree murder and robbery of the taxi-cab driver); *Melton v. Att'y Gen. of Fla*, 769 Fed. Appx. 803, 805, n.1 (11th Cir. 2019) (noting that the judge in the capital case relied in part on Melton's conviction for the murder of taxi-cab driver Saylor to impose the death sentence for the murder of pawn-shop owner Carter). Melton was 17 years-old when they robbed and shot the taxi cab driver in the non-capital case but he was 18 years-old when he shot the pawn shop owner. *Melton v. Sec'y, Fla. Dep't of Corr.*, 778 F.3d 1234, 1235 (11th Cir. 2015).

The Florida Supreme Court affirmed the convictions and the death sentence in the capital case in the direct appeal; in the initial postconviction appeal; and in several successive postconviction appeals. *Melton v. State*, 638 So.2d 927, 930-31 (Fla. 1994) (direct appeal), *cert denied*, *Melton v. Florida*, 513 U.S. 971 (1994) (No. 94-5940); *Melton v. State*, 949 So.2d 994 (Fla. 2006) (affirming the denial of the initial postconviction motion), *cert. denied*, *Melton v. Florida*, 552 U.S. 843 (2007)(No. 06-11339); *Melton v. State*, 88 So.3d 146 (Fla. 2012) (No. SC11-973) (affirming the denial of a successive postconviction motion raising a claim of ineffectiveness for failing to present general background as mitigation based on *Porter v. McCollum*, 558 U.S. 30 (2009)); *Melton v. State*, 193 So.3d 881 (Fla. 2016) (affirming the denial of a successive postconviction motion raising a claim of newly discovered evidence; a claim based on *Giglio v. United States*, 405 U.S. 150 (1972); and a claim based on *Brady v. Maryland*, 373 U.S. 83 (1963)).

The Florida Supreme Court also denied Melton a new penalty phase based on *Hurst v. State*, 202 So.3d 40 (Fla. 2016). *See Melton v.*

State, 236 So.3d 234, 235 (Fla. 2018) (holding *Hurst v. State* did not apply retroactively to Melton), *cert. denied, Melton v. Florida*, 139 S.Ct. 192 (2018)(No. 17-9555).[1]

In 2018, the Florida Supreme Court denied his successive state habeas petition raising a claim of relative culpability based on *McCloud v. State*, 208 So.3d 668 (Fla. 2016), in *Melton v. Jones*, 2018 WL 566451 (Fla. Jan. 26, 2018) (SC17-2032), *cert. denied*, *Melton v. Florida*, 139 S.Ct. 154 (2018) (No. 17-9330).

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[1] The Florida Supreme Court partially receded from *Hurst v. State* in *State v. Poole*, 297 So.3d 487 (Fla. 2020), *cert. denied*, *Poole v. Florida*, 141 S.Ct. 1051 (2021) (No. 20-250). So, not only is any *Hurst* claim not retroactive but any *Hurst* claim would fail on the merits as well under the current law of *Poole*. Any *Hurst* claim would fail on the merits due to the prior violent felony aggravator. *Smith v. State*, 310 So.3d 366, 374 (Fla. 2020) (rejecting a *Hurst* claim on the merits, explaining the prior violent felony aggravating factor rendered Smith eligible for the death penalty thereby satisfying "the mandates of the United States and Florida Constitutions" citing *Poole*). And any claim based on *Hurst v. Florida*, 577 U.S. 92 (2016), would be rejected in federal habeas court both on retroactivity grounds and on the merits due to the *Almendarez-Torres* exception. *McKinney v. Arizona*, 140 S.Ct. 702, 708 (2020) ("*Ring* and *Hurst* do not apply retroactively" citing *Schriro v. Summerlin*, 542 U.S. 348, 358 (2004)); *Knight v. Fla. Dep't of Corr.*, 936 F.3d 1322 (11th Cir. 2019) (holding *Hurst v. Florida* is not retroactive); *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). Melton will not receive a new penalty phase based on *Hurst* in either state or federal court.

Federal habeas review

On May 31, 2013, the federal district court denied habeas relief in the capital case. *Melton v. Tucker*, 2013 WL 11326076 (N.D. Fla. May 31, 2013) (1:08-cv-34). The district court also denied a certificate of appealability (COA). *Melton v. Crews*, 2013 WL 11326077 (N.D. Fla. July 15, 2013). And the Eleventh Circuit denied a certificate of appealability from the district court's denial of federal habeas relief. *Melton v. Sec'y, Fla. Dep't of Corr.*, 778 F.3d 1234, 1237 (11th Cir. 2015) (denying any appeal), *cert. denied, Melton v. Jones*, 577 U.S. 926 (2015) (No. 15-5522).[2]

Procedural history of the current successive postconviction motion

On June 29, 2022, Melton, represented by Alice Copek of the Capital Collateral Regional Counsel - North (CCRC-N), filed a seventh successive postconviction motion in the capital case.

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[2] The Eleventh Circuit has also affirmed the denial of federal habeas relief in the non-capital case. *Melton v. Att'y. Gen. of Fla.*, 769 Fed.Appx. 803 (11th Cir. 2019), *cert. denied*, *Melton v. Inch*, 140 S.Ct. 885 (2020) (No. 19-6558).

On July 19, 2022, the State filed an answer to the seventh successive postconviction motion asserting the claim was not cognizable, was untimely, as well as meritless, as a matter of law, under the Florida Supreme Court's controlling precedent. (2022 Succ. PCA 99-114).

On August 3, 2022, the postconviction court held a case management conference, to allow counsel to make an oral presentation, commonly referred to as a *Huff* hearing.[3] (2022 Succ. PCA 115-140). During the *Huff* hearing, the court asked opposing counsel if the issue was litigated in federal court and the State offered to provide the state court with the federal case in which a related issue was litigated. (2022 Succ. PCA 124,127).

On August 4, 2022, CCRC-N filed supplemental authority of American Psychological Association's adoption of a resolution on

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[3] *Huff v. State*, 622 So.2d 982, 983 (Fla. 1993) (holding in initial postconviction proceedings in capital cases, the postconviction court must hold a hearing where legal argument can be presented before ruling on the motion); Fla. R. Crim. P. 3.851(f)(5)(B) ("At the case management conference, the trial court also shall determine whether an evidentiary hearing should be held and hear argument on any purely legal claims not based on disputed facts.").

August 3, 2022, advocating the prohibition on executing minors be extended to 21 year-olds. (2022 Succ. PCA 141-198).

On August 4, 2022, the State filed supplemental authority with the case of *Melton v. Sec'y, Fla. Dep't of Corr.*, 778 F.3d 1234 (11th Cir. 2015), where a related issue was litigated in federal court. (2022 Succ. PCA 199-210).

On August 17, 2022, the postconviction court summarily denied the seventh successive postconviction motion. (2022 Succ. PCA 213-19).

On September 1, 2022, CCRC-N filed a motion for rehearing arguing the claim should be considered timely and the line should be expanded to include those capital defendants under 21 years-old at the time of the murder citing *Matter of Monschke*, 482 P.3d 276, 325-26 (Wash. 2021). (2022 Succ. PCA 220-230). On September 16, 2022, the postconviction court denied rehearing. (2022 Succ. PCA 231-232).

This appeal follows.[4]

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[4] Melton's non-capital case is currently pending in this Court. *Melton v. State*, SC20-1539. That appeal was stayed as a tag case pending the decision in *Morgan v. State*, SC20-641. This Court, however, recently decided *Morgan* adversely to Melton's claim. Melton

will not receive a juvenile resentencing under *Morgan v. State*, ___ So.3d ___, 47 Fla. L. Weekly S273, 2022 WL 16641693 (Fla. Nov. 3, 2022). This Court issued an order to show cause why *Morgan* does not control in the non-capital appeal. The State filed two motions to dismiss the appeal, which are currently pending in that appeal. But because the issue in that appeal relates only to his sentence for one of the two convictions in the non-capital case, regardless of the outcome of the appeal, the pending litigation will not affect the capital case.

SUMMARY OF THE ARGUMENT

The postconviction court properly summarily denied the seventh successive postconviction motion. Melton asserts a claim of newly discovered evidence based on studies and articles regarding human brain development showing the human brain is not fully developed until a person is in their mid-twenties. Melton seeks to extend the holding of *Roper v. Simmons*, 543 U.S. 551 (2005), to capital defendants over 17 years-old. Melton was 18 years-old when he murdered the pawn shop owner that resulted in his death sentence and therefore, *Roper* does not apply to him. The successive claim is not cognizable as a newly discovered evidence claim because studies are not evidence. The claim is also untimely because the vast majority of the studies relied upon by the defense expert were published more than a year before the claim was filed in 2022. Alternatively, the successive claim is meritless under the controlling precedent of *Branch v. State*, 236 So.3d 981 (Fla. 2018), and *Foster v. State*, 258 So.3d 1248 (Fla. 2018). Furthermore, under Florida's constitutional conformity clause, this Court cannot expand *Roper* by drawing a different line than the

line drawn by the United States Supreme Court in *Roper*. For all these reasons, the postconviction court properly summarily denied the seventh successive postconviciton motion.

ARGUMENT

ISSUE I

WHETHER THE POSTCONVICTION COURT PROPERLY DETERMINED THE SEVENTH SUCCESSIVE POSTCONVICTION MOTION WAS NOT COGNIZABLE AS NEWLY DISCOVERED EVIDENCE CLAIM, UNTIMELY, AND MERITLESS UNDER CONTROLLING PRECEDENT AND THE STATE CONSTITUTION? (Restated)

Melton asserts a claim of newly discovered evidence based on studies and articles regarding brain development. He seeks to extend the holding of *Roper v. Simmons*, 543 U.S. 551 (2005), to capital defendants over 17 years-old. The successive claim is not cognizable as a newly discovered evidence claim because studies are not evidence. The claim is also untimely because most of the studies relied upon by the expert were published more than a year before the claim was filed in the trial court in 2022. Alternatively, the successive claim is meritless under the controlling precedent of *Branch v. State*, 236 So.3d 981 (Fla. 2018), and *Foster v. State*, 258 So.3d 1248 (Fla. 2018). Furthermore, under the state constitution's conformity clause, this Court cannot expand *Roper* by drawing a different line than the

United States Supreme Court did. The postconviction court properly summarily denied the seventh successive postconviciton motion.

The postconviction court's ruling

The state postconviction court summarily denied the seventh successive postconviction motion. (2022 Succ. PCR 213-219). The postconviction court denied the newly discovered evidence claim without an evidentiary hearing. (2022 Succ. PCR 213). The postconviction court recounted the procedural history of the case. (2022 Succ. PCR 213-15).

The postconviction court described the claim as a claim of newly discovered evidence demonstrating "that the death penalty is a categorically unconstitutional punishment for individuals who committed offenses when they were between the ages of 18 to 21" based on the "study of brain maturation over the past decade" showing "several aspects of brain development, including the brain regions that determine character, judgment, and decision-making, continue to develop until at least the age of 21 and that this view is

now widely accepted among neuroscientists and the legal community." (2022 Succ. PCR 215). The postconviction court explained the claim was based on *Roper v. Simmons*, 543 U.S. 551 (2005). *Id*. at 216. The postconviction court noted the claim was supported by a June 30, 2021 report from Dr. Laurence Steinberg, Ph.D., "summarizing the current scientific understanding of the brain development of individuals between the ages of 18 to 21." *Id*. at 215. The Steinberg report described a "growing consensus" based on studies of brain maturation conducted during the past decade concluding "that brain maturation continues into late adolescence." *Id*. at 216.

The postconviction court observed, however, that many of the studies in the report predated 2020 and went as far back as 2003. (2022 Succ. PCR 216). The postconviction court noted that this Court has "routinely rejected" new opinions and studies as being "newly discovered evidence" citing *Asay v. State*, 210 So.3d 1, 22-23 (Fla. 2016). *Id*. at 216. The postconviction court also concluded that obtaining a new expert and report based on information that has been available for years is not a proper basis for a claim of newly discovered

evidence citing *Booker v. State*, 336 So.3d 1177, 1181-82 (Fla. 2022), and *Howell v. State*, 145 So.3d 774, 775 (Fla. 2013). *Id.* at 216, 218.

The postconviction court also found the claim to be untimely because it was not filed "within one year of the date upon which the claim became discoverable through due diligence" citing *Dillbeck v. State*, 304 So.3d 286, 288 (Fla. 2020). (2022 Succ. PCR 216); *Id.* at 218.

The postconviction court noted the American Psychological Association's recent 2022 resolution supporting a bar on the execution of individuals under 21 at the time of the offense. (2022 Succ. PCR 217). The postconviction court noted, however, that the Florida Supreme Court had rejected a similar claim based on a similar resolution adopted by the American Bar Association in 2018 in the cases of *Foster v. State*, 258 So.3d 1248, 1253 (Fla. 2018), and *Branch v. State*, 236 So.3d 981, 986 n.5 (Fla. 2018). *Id.* at 217. The postconviction court also noted that a federal court had previously rejected Melton's claim that the Eighth Amendment prohibited his execution because he had an emotional and mental age of less than

eighteen years at the time of the Carter murder in *Melton v. Tucker*, 1:08CV34/RS, 2013 WL 11326076, at *56 (N.D. Fla. May 31, 2013). *Id.* at 217. The postconviction court additionally noted that the Eleventh Circuit had also rejected the claim based on "the bright line of 18 years of age drawn by *Roper*" in *Melton v. Sec'y, Fla. Dep't of Corr.*, 778 F.3d 1234, 1237 (11th Cir. 2015) (denying a motion to reconsider the denial of a certificate of appealability). *Id.* at 217.

The postconviction court also addressed the merits. (2022 Succ. PCR 218). The postconviction court concluded, regardless of whether the Steinberg report counted as newly discovered evidence and regardless of the untimeliness of the motion, the claim failed under *Roper*. (2022 Succ. PCR 218). *Id.* at 218. The postconviction court reasoned that *Roper* "establishes a bright line rule that the age of 18 is the age at which the individual is eligible for the death penalty." *Id.* at 218 citing *Roper*, 543 U.S. at 574. The postconviction court observed that arguments seeking the extension of *Roper* to those capital defendants over 17 had been "repeatedly rejected by the

Florida Supreme Court." *Id.* citing *Foster*, 258 So.3d at 1254 and *Branch*, 236 So.3d at 987.

The postconviction court noted that Florida courts "must construe the prohibition against cruel and unusual punishment in conformity with decisions of the United States Supreme Court." (2022 Succ. PCR 218 citing *Correll v. State*, 184 So.3d 478,489 (Fla. 2015), and *Farmer v. State*, 268 So.3d 1009, 1010 (Fla. 1st DCA 2019)).

The postconviction court summarily denied the successive postconviction motion raising a *Roper* claim. (2022 Succ. PCR 218).

Standard of review

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

Summary denials of successive postconviction claims

Opposing counsel insists that the postconviction counsel was required to conduct an evidentiary hearing. IB at 61. But it is proper for a postconviction court to summarily deny postconviction claims that are not not congizable, not retroactive, procedurally barred, untimely, or meritless under controlling precedent. *Bogle v. State*, 288 So.3d 1065, 1069 (Fla. 2019) (affirming the summary denial of a successive postconviction claim on non-retroactivity grounds), *cert. denied*, *Bogle v. Florida*, 141 S.Ct. 389 (2020); *Morris v. State*, 317 So.3d 1054, 1071 (Fla. 2021) (stating a court may summarily deny a postconviction claim that is procedurally barred citing *Matthews v. State*, 288 So.3d 1050, 1060 (Fla. 2019)); *Rodgers v. State*, 288 So.3d 1038, 1039 (Fla. 2019) (affirming a summary denial of a successive postconviction claim as untimely), *cert. denied*, *Rodgers v. Florida*, 141 S.Ct. 398 (2020); *Asay v. State*, 210 So.3d 1, 22–23 (Fla. 2016) (affirming the summary denial of a newly discovered evidence claim and observing that "merely obtaining a new expert to review the same records does not create newly discovered evidence" and noting that

new opinions or new research studies have routinely been rejected as newly discovered evidence citing *Henry v. State*, 125 So.3d 745, 750-51 (Fla. 2013)); *Mann v. State*, 112 So.3d 1158, 1162 (Fla. 2013) (noting because the claims were purely legal claims that have been previously rejected by this Court, the circuit court properly summarily denied relief).

The claim of newly discovered evidence is meritless under this Court's controlling precedent regarding what constitutes new discovered evidence as well as under this Court's controlling precedent of *Branch v. State*, 236 So.3d 981 (Fla. 2018), and *Foster v. State*, 258 So.3d 1248 (Fla. 2018). Therefore, the postconviction court properly summarily denied the seventh successive postconviction motion without conducting an evidentiary hearing.

Not cognizable

The successive postconviction claim is not cognizable as a newly discovered evidence claim because the studies in the expert's report

are not new evidence. Therefore, the 2021 report from Dr. Steinberg cannot support a claim of newly discovered evidence.

CCRC-N supported the claim raised in the seventh successive postconviction motion with a declaration from Laurence Steinberg, a developmental psychologist specializing in adolescence and a Professor at Temple University, who outlined the "current understanding of neurobiological and psychological development during adolescence." (Ex. A). Dr. Steinberg's declaration surveyed studies from the "past ten years" but also relied on published articles from as early as 2003 and 2004. (Ex. A at 4, n.4, 9 n.15). The declaration is dated June 30, 2021. (Ex. A at 21). While Professor Steinberg's declaration is dated June 30, 2021, the studies he surveyed are not of recent vintage. Professor Steinberg relied on some studies from as early as 2003 and 2004, in the declaration. Indeed, one footnote in the declaration relied on publications from the 1980s. (Ex. A at 17, n.41).

The Florida Supreme Court has repeatedly held, for more than a decade, that studies "do not qualify as newly discovered evidence."

Kimbrough v. State, 125 So.3d 752, 754 (Fla. 2013) (citing *Schwab v. State*, 969 So.2d 318, 325 (Fla. 2007), and *Rutherford v. State*, 940 So.2d 1112, 1117 (Fla. 2006)). Research studies are not recognized as newly discovered evidence. *Foster v. State*, 132 So.3d 40, 72 (Fla. 2013). In *Branch v. State*, 236 So.3d 981, 986 (Fla. 2018), this Court directly held that "scientific research with respect to brain development does not qualify as newly discovered evidence" citing the brain mapping case of *Morton v. State*, 995 So.2d 233, 245 (Fla. 2008). General studies are not "evidence" for purposes of newly discovered evidence restart provisions because they are not case specific.

Nor do new reports or declarations from recently hired experts, that largely rely on old information, qualify as newly discovered evidence. *Booker v. State*, 336 So.3d 1177, 1180, 1182 n.5 (Fla. 2022) (holding the report of a hired expert, who reviewed the evidence in the case and relied on old studies, did "not constitute newly discovered evidence" citing *Asay v. State*, 210 So.3d 1, 23 (Fla. 2016), and *Schwab v. State*, 969 So.2d 318, 325 (Fla. 2007)). "Merely obtaining a new expert to

review the same records does not create newly discovered evidence." *Asay*, 210 So.3d at 23.

Neither the studies nor the expert's report qualify as newly discovered evidence. This successive postconviction claim is not cognizable as a claim of newly discovered evidence.

Untimely

The postconviction court properly concluded the claim of newly discovered evidence was untimely. A trial court may summarily deny a postconviction claim on the basis that it is untimely because none of the exceptions to the time limit in the applicable rule of court apply. *Rogers v. State*, 327 So.3d 784, 787 (Fla. 2021) (citing Fla. R. Crim. P.3.851(d)(2)). Florida's rule of court governing postconviction motions in capital cases, Florida Rule of Criminal Procedure 3.851(d)(1), requires that such motions be filed within one year of the conviction and death sentence becoming final in the direct appeal. Fla. R. Crim. P. 3.851(d)(1)(B).

Any claim of newly discovered evidence must be filed within one year of the date the claim became *discoverable* through due diligence. *Dailey v. State*, 329 So.3d 1280, 1287 (Fla. 2021) (quoting *Rodgers v. State*, 288 So.3d 1038, 1039 (Fla. 2019), and *Jimenez v. State*, 997 So.2d 1056, 1064 (Fla. 2008); *Mungin v. State*, 320 So.3d 624, 625-26 (Fla. 2020) (citing *Reed v. State*, 116 So.3d 260, 264 (Fla. 2013)), *cert. denied*, *Mungin v. Florida*, 142 S.Ct. 908 (2022). And it is the defendant's burden to establish the timeliness of a successive postconviction claim. *Mungin*, 320 So.3d at 626 (citing *Rivera v. State*, 187 So.3d 822, 832 (Fla. 2015)).

Melton's death sentence became final when the United States Supreme Court denied review from the direct appeal, which was on November 1, 1994. *Melton v. Florida*, 513 U.S. 971 (1994); *Melton v. State*, 236 So.3d 234, 235 (Fla. 2018) (observing Melton's death sentence "became final in 1994"). Melton then had one year to timely file any postconviction motion which would be until November of 1995. The one year for Melton to timely file a postconviction motion expired in 1995 but the current successive postconviction motion was

not filed until 2022. The seventh successive postconviction motion is over two decades late.

There is an exception to the one-year time limit for postconviction claims that involve "facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence." *Dillbeck v. State*, 304 So.3d 286, 287 (Fla. 2020) (citing Fla. R. Crim. P. 3.851(d)(2)(A)), *cert. denied*, *Dillbeck v. Florida*, 141 S.Ct. 2733 (2021). But Melton cannot meet the requirements of the exception because the evidence of these articles and studies has been available for years. *Long v. State*, 271 So.3d 938, 942 (Fla. 2019) (concluding the evidence was not newly discovered because the postconviction motion referred to "research and studies much older than one year prior to the date that Long filed his motion"). Here, as in *Long*, the successive postconviction claim was untimely because the studies, upon which the claim was based, were "older than one year prior to the date that" Melton filed his

motion. As the postconviction court noted, the caselaw from 2014 and earlier referred to such studies.[5]

And hiring new experts to read old studies and then review the evidence in the case does not restart the clock. Timing the restart provision of rule 3.851(d)(2)(A) from the date of the defense expert's report or declaration puts control of the clock in the capital defense bar's hands. Allowing the capital defense bar to hire an expert at any time and then write a report and have the associated motion be considered timely would put control of the clock in the hands of the capital defense bar. The provision of the rule governing newly discovered evidence operates to restart a clock which often has expired years ago, if not decades ago, and any court should be wary of interpreting a provision that restarts a time frame in a manner that put control in one party's hands. And allowing defense counsel to control the restart provision in this manner would negate the diligence

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[5] Opposing counsel faults the postconviction court for not identifying the exact date on which a timely motion should have been filed. IB at 66, n.16. But it is counsel's burden to establish timeliness, not the courts. *Mungin*, 320 So.3d at 626 (citing *Rivera*, 187 So.3d at 832).

requirement which has been part of the Florida Supreme Court's test for claims of newly discovered evidence for over two decades. *Jones v. State*, 709 So.2d 512, 521 (Fla. 1998).

In *Dillbeck v. State*, 304 So.3d 286 (Fla. 2020), the Florida Supreme Court rejected an argument that a newly discovered evidence claim was timely based on the date of an evaluation by a new expert hired by postconviction counsel. Dillbeck raised a successive postconviction claim of newly discovered evidence of mitigation based on a "new" diagnosis from new mental health experts. *Dillbeck*, 304 So.3d at 287-88. The Florida Supreme Court noted the new diagnosis was included in the DSM-5, which had been published in 2013. *Id.* at 287-88. The Florida Supreme Court found that Dillbeck failed to exercise diligence by waiting until years after the publication of the new diagnosis to hire the new experts. *Id.* at 288. The Florida Supreme Court affirmed the trial court's denial of the claim as untimely. *Id.* at 288.

Here, as in *Dillbeck*, the successive claim is untimely. The studies relied in the successive motion and in the expert's declaration are from as long ago as 2003. As in *Dillbeck*, the fact that opposing

counsel hired a new expert to write a declaration in 2021 does not make the old information surveyed in the expert's report magically become new information and does not make the claim timely.

The successive postconviction claim of newly discovered evidence is untimely and therefore, was properly summarily denied.

Merits

Because there is directly on-point prior precedent from this Court rejecting this exact claim as well as a constitutional conformity clause precluding the requested relief of expanding *Roper*, the claim is meritless as a matter of law and therefore, was properly summarily denied.

This Court's controlling precedent

This type of claim, seeking to expand *Roper* based on similar studies regarding brain development, has been repeatedly rejected by this Court on the merits. In *Branch v. State*, 236 So.3d 981 (Fla. 2018), the Florida Supreme Court rejected a claim of newly discovered evidence based on recent studies and articles regarding brain

development of juveniles. The Florida Supreme Court refused to expand *Roper* to those capital defendants who were over 18 years-old when they committed the murder. Branch asserted that there was an emerging consensus in the medical community that the brain continues to develop through the mid-twenties, such that young adults are cognitively comparable to juveniles, and that this new consensus constituted newly discovered evidence. *Id.* at 984. Branch argued for an expansion of *Roper* based on newly discovered evidence of recent scientific research regarding the development of the human brain asserting that the Eighth Amendment mandates that capital defendants in their late teens and early twenties also be considered ineligible for the death penalty. *Id.* at 985.

The Florida Supreme Court, however, noted that *Roper* designated eighteen as the critical age for determining death eligibility and had recognized it as a categorical rule but had concluded that 18 years-old was "the line" at which "death eligibility ought to rest." *Branch*, 236 So.3d at 985 (quoting *Roper*, 543 U.S. at 574). The Florida Supreme Court stated that "scientific research with respect to brain

development does not qualify as newly discovered evidence." *Branch*, 236 So.3d at 986-87 (discussing *Morton v. State*, 995 So.2d 233, 245 (Fla. 2008), and *Davis v. State*, 142 So.3d 867 (Fla. 2014)). The Florida Supreme Court observed that the United States Supreme Court had continued to adhere to "eighteen as the critical age for purposes of Eighth Amendment jurisprudence." *Branch*, 236 So.3d at 987 (citing *Miller v. Alabama*, 567 U.S. 460, 465 (2012), and *Graham v. Florida*, 560 U.S. 48, 74-75 (2010)). The Florida Supreme Court reaffirmed its adherence to the United States Supreme Court's holding in *Roper*. *Id.* at 987. The Florida Supreme Court affirmed the trial court's summary denial of the newly discovered evidence claim. *Id.* at 987; *see also Foster v. State*, 258 So.3d 1248, 1253-54 (Fla. 2018) (rejecting a claim of newly discovered evidence based on brain development studies and articles and rejecting an assertion that the evolving standards of decency under the Eighth Amendment require an expansion of *Roper* to those over 18 years-old citing *Branch*). Under the controlling precedent of *Branch* and *Foster*, the claim is meritless.

Florida's constitutional conformity clause

The postconviction court noted that Florida courts "must construe the prohibition against cruel and unusual punishment in conformity with decisions of the United States Supreme Court." (2022 Succ. PCR 218 citing *Correll v. State*, 184 So.3d 478,489 (Fla. 2015), and *Farmer v. State*, 268 So.3d 1009, 1010 (Fla. 1st DCA 2019)). Florida's state constitution has a conformity clause regarding Eighth Amendment claims. Article I, section 17 of the Florida Constitution provides that 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." That provision requires that Florida courts adhere to United States Supreme Court precedent regarding the Eighth Amendment. *Lawrence v. State*, 308 So.3d 544, 548 (Fla. 2020) (holding the conformity clause of article I, section 17 of the Florida Constitution "forbids" proportionality review in capital cases because the United States Supreme Court has held that proportionality review in capital cases

is not required by the Eighth Amendment), *cert. denied*, *Lawrence v. Florida*, 142 S.Ct. 188 (2021).

Florida courts are not free to expand the holding of the United States Supreme Court in *Roper*. *Roper* was an Eighth Amendment case. *Roper*, 543 U.S. at 555-56 (stating the issue in the case was whether it was "permissible under the Eighth and Fourteenth Amendments" to execute a juvenile offender); *id.* at 560-66 (discussing the Eighth Amendment at length); *id.* at 568 (stating that a "majority of States have rejected the imposition of the death penalty on juvenile offenders under 18, and we now hold this is required by the Eighth Amendment"); *id.* at 575 (holding that "the death penalty cannot be imposed upon juvenile offenders"); *id.* at 578 ("The Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed"). And therefore, the state conformity provision applies.

The Fourth District Court recently refused to expand the holdings of *Graham v. Florida*, 560 U.S. 48 (2010), and *Miller v. Alabama*, 567 U.S. 460 (2012), from 17 year-olds to 21 year-olds citing Florida's state

conformity clause. *Dorsey v. State*, 315 So.3d 18, 19 (Fla. 4th DCA 2021).

The United States Supreme Court has directly held that the dividing line for the Eighth Amendment prohibition on death sentences based on age is capital defendants under 18 years-old, which ends the debate in Florida. This Court cannot draw a different line than the *Roper* Court did because that would violate the actual holding of *Roper*. Under the state constitution, this Court must follow *Roper*, not expand it.

Contrary to opposing counsel's reasoning regarding evolving standards of decency, while the standards and the Eighth Amendment may change over time, the holding of a particular case does not. The direct holding of *Roper* is defendants under 18 years-old may not be sentenced to death and that holding will never change. While *Roper* could be overruled in the future by the United States Supreme Court, *Roper* itself will never "evolve." Eighth Amendment jurisprudence may be dynamic but the actual holding of any particular case is not. IB at 66. *Roper*'s holding is fixed and forever set in stone. The age

limitation in Florida will remain under 18 years-old, unless, and until, the United States Supreme Court changes it.

The conformity clause prohibits any expansion of *Roper*.

The federal circuit courts' view of expanding *Roper*

In *United States v. Roof*, 10 F.4th 314, 378-80 (4th Cir. 2021), *cert. denied*, 143 S.Ct. 303 (2022) (No. 21-7234), the Fourth Circuit rejected an argument, in a capital case, that new studies regarding the human brain continuing to develop until the mid-20s has eroded the justification relied on by the United States Supreme Court in *Roper* for drawing the line for capital punishment at 18 years-old. The Fourth Circuit rejected that argument, reasoning that "*Roper*'s holding is a categorical ban" which they had "no authority" to expand.

In *United States v. Tsamaev*, 968 F.3d 24, 96-97 (1st Cir. 2020), the First Circuit, in the Boston Marathon bomber capital case, rejected the same argument. Tsamaev, relying studies and an American Bar Association resolution, argued that *Roper* should be expanded to those over 17 years-old. The First Circuit, however, noted *Roper*'s "square" holding that under 18 is the age at which the line for death eligibility

ought to rest. The First Circuit observed that whether *Roper* should be expanded "is for the Supreme Court to say," not for the federal circuit courts.

The United States Supreme Court has repeatedly stated that it is its "prerogative alone to overrule one of its precedents." *Bosse v. Oklahoma*, 137 S.Ct. 1, 2 (2016) (citing *United States v. Hatter*, 532 U.S. 557, 567 (2001), and *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989)). The "state courts and the other federal courts have a constitutional obligation to follow a precedent of this Court unless and until it is overruled" by the United States Supreme Court itself. *Ramos v. Louisiana*, 140 S.Ct. 1390, 1416, n.5 (2020). While, in the absence of the state conformity clause, this Court could create its own state law, but this Court could never expand *Roper* itself. Opposing counsel is asking this Court to do what is has no authority to do. Only the United States Supreme Court may overrule *Roper* itself.

Other States Supreme Courts' cases expanding *Roper*

Opposing counsel's reliance on *Matter of Monschke*, 482 P.3d 276, 325-26 (Wash. 2021), is misplaced. IB at 40. The Washington Supreme Court in *Monschke* expanded *Miller v. Alabama*, 567 U.S. 460 (2012), to prohibit mandatory life-without-parole sentences for defendants under 21 years-old, not just those under 18 years-old, as in *Miller*. The Washington Supreme Court used the logic of *Roper* and new studies on brain development of young adults as a basis for its holding. But its holding was based on the state constitution, not the federal constitution. *Monschke*, 482 P.3d at 278 (stating the "Washington State Constitution requires the court to exercise discretion at sentencing" based on age); *id.* at 279 n.6 (stating "in the context of juvenile sentencing," Washington's state constitution cruel punishment clause, article I, section 14, "provides greater protection than the Eighth Amendment."). But Washington does not have an Eighth Amendment conformity clause in its state constitution, unlike Florida.

Opposing counsel's reliance on *People v. Parks*, ___ N.W.2d ___, 2022 WL 3008548 (Mich. July 28, 2022), is equally misplaced for the

same reason. IB at 43. The Michigan Supreme Court in *Parks* expanded *Miller v. Alabama*'s prohibition on mandatory life-without-parole sentences to 18 year-olds. The Michigan Supreme Court rejected the claim based on the Eighth Amendment and explicitly based their decision on the state constitution. *Parks*, 2022 WL 3008548, at *5 (citing Michigan Constitution Const. 1963, art. 1, § 16). But again, Michigan Supreme Court did this as a matter of state constitutional law.

Both of these state supreme courts expanded the age as a matter of state constitutional law and they were free to do so because their respective state constitutions do not contain a conformity clause. But, as this Court has repeatedly observed, it is not free to create its own cruel and unusual jurisprudence as a matter of state constitutional law. Indeed, that is exactly what Florida's conformity clause was designed to prevent. Under Florida's constitution, this Court is not free to expand the age range. This Court cannot follow *Monschke* or *Parks* due to the state constitution's conformity clause.

Resolutions from professional organizations

Opposing counsel relies heavily on a recent resolution from the American Psychological Association advocating that the age of eligibility for a death sentence be raised to 21 years-old. But resolutions from professional organizations are not a proper source for Eighth Amendment law. The views of medical experts do not dictate Eighth Amendment law; rather it is the independent duty of the courts to do so. *Hall v. Florida*, 572 U.S. 701, 721 (2014). Clinicians determine clinical standards but judges, not clinicians, determine the content of the Eighth Amendment. *Moore v. Texas*, 581 U.S. 1 (2017) (Roberts, C.J., concurring).

Justice Alito, joined by Chief Justice Roberts, Justice Scalia, and Justice Thomas, has condemned using the views of professional organizations as part of an Eighth Amendment analysis. *Hall v. Florida*, 572 U.S. 701, 725, 730-31 (2014) (Alito, J., dissenting). Such organizations are "private groups," which at most "represent the views of a small professional elite" but what counts in any Eighth Amendment analysis of the "evolving standards of decency" are the standards of American society "as a whole," which "is to say, the

standards of the American people—not the standards of professional associations." *Hall*, 572 U.S. at 731. Justice Alito also pointed out that because the views of professional associations often change, tying Eighth Amendment law to those changing views will lead to instability in the law and would "fuel protracted litigation." *Id.* at 731-32; *see also United States v. Grant*, 9 F.4th 186, 201, 207 (3d Cir. 2021) (en banc) (Hardiman, J., concurring) (discussing Justice Alito's concerns regarding the evolving standards of decency).

Furthermore, many of these professional societies have been captured by ideologues, who are opposed to the death penalty and who do not represent the views of even a cross-section of the profession, much less of the American people. *Cf. Glossip v. Gross*, 576 U.S. 863, 869-70 (2015) (noting that lethal injection was designed to be a "quick and painless" means of execution but a practical obstacle soon emerged, "as anti-death-penalty advocates pressured pharmaceutical companies to refuse to supply the drugs" used in executions); *Jordan v. Comm'r, Miss. Dep't of Corr.*, 947 F.3d 1322, 1326 (11th Cir. 2020) (observing that lethal injection drugs have become

difficult to acquire because death penalty opponents "have vigorously lobbied drug manufacturers" to make the drugs unavailable for use in executions), *cert. denied*, *Jordan v. Ga. Dep't of Corr.*, 141 S.Ct. 251 (2020). The APA's resolution should not be any part of an Eighth Amendment analysis.

And the APA's resolution certainly does not control over the State's constitutional conformity clause or this Court's established precedent of *Branch* and *Foster*.

Furthermore, resolutions are not evidence for purpose of newly discovered evidence claims. If studies themselves do not constitute new evidence under this Court's caselaw, such resolutions certainly do not. The APA's resolution cannot be used to restart the clock for purposes of rule 3.851(d)(2)(A). The claim remains untimely regardless of any resolution.

Proportionality review

Opposing counsel also attacks Melton's death sentence on general proportionality grounds, arguing that Melton's age in combination with the murder not being "highly aggravated" and the additional

mitigation, renders his death sentence disproportionate. IB at 46.[14]

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[14] Opposing counsel refers to additional mitigation in a footnote. IB at 51, n.14. But opposing counsel does not identify that mitigation or make specific arguments regarding any particular mitigation in the initial brief. Rather, opposing counsel simply refers to the pleadings filed below. Such incorporation-by-reference is improper. *Wright v. State*, 19 So.3d 277, 297, n.19 (Fla. 2009) (stating that incorporation by reference is improper citing *Johnson v. State*, 660 So.2d 637, 645 (Fla. 1995)); *Northland Ins. Co. v. Stewart Title Guar. Co.*, 327 F.3d 448, 453 (6th Cir. 2003) (joining "the many circuits that have explicitly disallowed the incorporation by reference into appellate briefs of documents and pleadings filed in the district court"). Incorporation by reference undermines word or page limitations for briefs.

Nor can the State address arguments that were not made in the initial brief regarding any particular mitigation. The State is limited to a 25-page answer to successive postconvicton motions in the trial court under the rules of court. Fla. R. Crim. P. 3.851(e)(2). In light of that page limitation, the State often presents best arguments and explores those arguments in depth instead of fully countering every argument made by opposing counsel in the trial court. Opposing counsel is attempting to force the State to address every argument made below instead of focusing on its most powerful arguments in its limited space by stating that the State did not dispute the mitigation below. The State must use its limited space below to raise defenses such as timeliness and diligence which are typically not addressed by CCRC in the successive motion, despite their having the burden. Furthermore, on appeal, while the State has additional pages to more fully answer but the State declines to engage in daisy chain appellate practice that requires it to refer to arguments only made below. Therefore, the State will not address the additional mitigation.

This Court, however, recently abolished proportionality review of death sentences. *Lawrence v. State*, 308 So.3d 544, 550-52 (Fla. 2020), *cert. denied*, 142 S.Ct. 188 (2021). *Lawrence* precludes this entire proportionality argument.

Furthermore, even if proportionality review still existed, this claim would be barred by the law-of-the-case doctrine. The law-of-the-case doctrine bars reconsideration of those legal issues that were actually considered and decided in a former appeal. *Fla. Dep't of Transp. v. Juliano*, 801 So.2d 101, 107 (Fla. 2001). And the law-of-the-case doctrine, which is designed to prevent relitigation of the same issues, applies to postconviction proceedings. *McManus v. State*, 177 So.3d 1046, 1047 (Fla. 1st DCA 2015) (citing *State v. McBride*, 848 So.2d 287, 290-91 (Fla. 2003); *Zeigler v. State*, 116 So.3d 255, 258 (Fla. 2013). The law-of-the-case doctrine also applies regardless of whether a party employs different arguments when reraising the same claim. *Sireci v. State*, 773 So.2d 34, 40-41 (Fla. 2000) (finding claims procedurally barred and observing that even if a defendant uses a different argument to relitigate the same issue, the claim remains procedurally

barred"); *Mills v. State*, 684 So.2d 801, 805 (Fla. 1996) (concluding a claim was barred where it was merely a variation of another prior postconviction claim).

This Court concluded that Melton's sentence was proportional in the direct appeal. *Melton v. State*, 638 So.2d 927, 930-31 (Fla. 1994) (concluding Melton's death sentence was proportionate to other Florida capital cases). Melton may not raise a disproportional claim for a second time. *Covington v. State*, 348 So.3d 456, 480 (Fla. 2022) (concluding a renewed proportionality claim was procedurally barred because the proportionality of the death sentence was raised and decided on direct appeal). This repeat proportionality claim is barred by the law-of-the-case doctrine.

On the merits, the State disagrees with the characterization of this murder as not being "highly aggravated" in light of the presence of the prior violent felony aggravating factor. That aggravator was based on a prior murder that occurred only a couple of months before this murder which was very similar factually to the capital murder. Not only does this Court's view the prior violent felony aggravator as a

serious aggravator but it also views that aggravator as particular weighty when the prior conviction is a prior murder and especially when the murders are similar. *Bevel v. State*, 983 So.2d 505, 524 (Fla. 2008) (stating that "the prior violent felony conviction aggravator is one of the 'most weighty' in Florida's sentencing scheme" quoting *Sireci v. Moore*, 825 So.2d 882, 887 (Fla.2002); *Ferrell v. State*, 680 So.2d 390, 391 (Fla. 1996) (finding single aggravating factor of prior violent felony "weighty" where factor was based on prior second-degree murder conviction bearing many similarities to the capital murder).

Opposing counsel argues that there is a problem with prior violent felony aggravator—namely, that Melton was 17 years-old at the time of the prior murder. But both this Court and the Eleventh Circuit have already rejected that particular attack on this aggravator. *Melton v. State*, 949 So.2d 994, 1020 (Fla. 2006) (rejecting, in the initial habeas petition, a claim that *Roper* precludes use of a conviction committed when a minor as the basis for the prior violent felony aggravator citing *England v. State*, 940 So.2d 389 (Fla.2006)); *Melton v. Sec'y, Fla. Dep't of Corr.*, 778 F.3d 1234, 1237 (11th Cir. 2015) (denying

a certificate of appealability on the issue of whether *Roper* precludes use of a conviction committed when a minor as the basis for the prior violent felony aggravator). Opposing counsel may not rely on an argument that has been previously rejected by this Court to attack the validity of that aggravator. Contrary to opposing counsel's assertion, this was a "highly aggravated" murder.

Additionally, Melton was the actual triggerman in the capital case by his own admission. Melton testified in front of the jury that he was the triggerman. *Melton v. State*, 949 So.2d 994, 1012 (Fla. 2006) ("Melton testified to the jury that he was the triggerman"); *Melton v. State*, 949 So.2d 994, 1012 (Fla. 2006) (rejecting a claim of newly discovered evidence of relative culpability claiming that Melton was not the triggerman concluding that he was the actual triggerman based on Melton's own testimony during his guilt phase admitting to being the shooter); *Melton v. Jones*, 2018 WL 566451 (Fla. Jan. 26, 2018) (SC17-2032) (denying a successive habeas petition raising a renewed relative culpability claim based on *McCloud v. State*, 208 So.3d 668 (Fla. 2016)). And the evidence supported Melton's admission of being

the triggerman. Because the victim managed to reach the silent alarm before dying, Melton was caught just coming out of the pawn shop with the murder weapon on him. *cf. Melton v. State*, 638 So.2d 927, 929 (Fla. 1994) (stating that the "evidence is clear that Melton held a .38–caliber gun on Carter and fired the fatal shot").

And, contrary to opposing counsel's assertion that the capital murder was an "impulsive act" committed under "hot circumstances," Melton knew from his own personal experience that armed robberies can end in dead human beings from the prior murder. But he ignored that recent experience and repeated that same illegal conduct a mere few weeks later. Melton is a recidivist armed robber and murderer.

Melton's death sentence is proportionate, just as this Court concluded in the direct appeal.

In sum, the newly discovered evidence claim based on studies regarding human brain development is not cognizable; untimely because many of the studies were published over a year before the postconviction motion was filed; and meritless under this Court's controlling precedent of *Branch* and *Foster*.

The postconviction court properly summarily denied the Eighth Amendment claim.[15]

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[15] Opposing counsel also raises a disparate treatment claim based on a combination of race and age relying on an upcoming article in the Journal of Pediatric Neuropsychology. IB at 32, 35-38 citing Craig Haney, *Roper and Race: The Nature and Effects of Death Penalty Exclusions for Juveniles and the "Late Adolescent Class*."

The equal protection claim, however, was not ruled on by the postconviction court and therefore, it is not properly before the Court. This Court's precedent is clear that to be preserved, the issue or legal argument must be raised and ruled on by the trial court. *Ritchie v. State*, 344 So.3d 369, 378 (Fla. 2022) (quoting *Rhodes v. State*, 986 So.2d 501, 513 (Fla. 2008)). This equal protection claim is not properly before this Court and should not be entertained.

Alternatively, the equal protection claim is meritless under *McCleskey v. Kemp*, 481 U.S. 279 (1987). A capital defendant "cannot prove a constitutional violation by demonstrating that other defendants who may be similarly situated did *not* receive the death penalty." *McCleskey*, 481 U.S. at 306-07. Under *McCleskey*, a capital defendant in Florida would have to show both the judge and the jury intentionally discriminated in deciding to sentence him to death based on his race. *Id*. at 294 (noting the ultimate decision to impose the death penalty in Georgia is made by a petit jury, not the prosecutor). Statistical proof, if relied on, must present a "stark" pattern to be the sole proof of discriminatory intent and it is the "rare" case where a statistical pattern of disparate impact demonstrates a constitutional violation. *McCleskey*, 481 U.S. at 293 & n.12. A single, currently unpublished, article does not suffice even to show a pattern, much less an intentional equal protection violation, especially not when the study seems to depend on age in addition to race. Age, in general, is not a protected class, or, least not, when the group is young adults. *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 83 (2000) (providing only for rational basis review of age classifications); *see also United States v. Madison*, 337 F. Supp. 3d 1186, 1199 (M.D. Fla. 2018) (rejecting an

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

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equal protection claim in a Federal Death Penalty Act prosecution explaining that under *McCleskey*, a capital defendant must prove that the decisionmakers in his case acted with discriminatory purpose, merely "pointing to bare statistical discrepancies doesn't do the trick")

Furthermore, regardless of any study, it was not Melton's race that led to his death sentence. The basis of his death sentence was his being involved in another robbery where the victim was murdered just a couple of months before this murder. It was the presence of the prior violent felony aggravator and that aggravator being particularly weighty because it was based on a prior murder that was similar to the capital murder which resulted in his death sentence. *Ferrell v. State*, 680 So.2d 390, 391 (Fla. 1996) (finding single aggravating factor of prior violent felony "weighty" where factor was based on prior second-degree murder conviction bearing many similarities to the capital murder). Melton is a recidivist murderer. Melton also was the actual triggerman in the capital case. *Melton v. Jones*, 2018 WL 566451 (Fla. Jan. 26, 2018) (rejecting a renewed relative culpability claim, noting that "Melton testified to the jury that he was the triggerman" quoting *Melton v. State*, 949 So.2d 994, 1012 (Fla. 2006)); *Melton v. State*, 638 So.2d 927, 929 (Fla. 1994) (stating that the "evidence is clear that Melton held a .38–caliber gun on Carter and fired the fatal shot"). It was these facts that were the basis of his death sentence, not race.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF FONT AND TYPE SIZE

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

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF has been furnished via the e-portal to **ALICE B. COPEK**, Assistant Capital Collateral Regional Counsel — Northern Region, 1004DeSoto Park Dr., Tallahassee, FL 32301-4555; phone: (850)487-0922 ext 129; email:alice.copek@ccrc-north.org and **DREW A. SENA**, Assistant Capital Collateral Regional Counsel — Northern Region, 1004DeSoto Park Dr., Tallahassee, FL 32301-4555; phone: (850)487-0922; email: Drew.Sena@ccrc-north.org this 9th day of January, 2023.

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