

IN THE SUPREME COURT OF FLORIDA

**CASE NO. SC22-1394
LOWER COURT CASE NO. 1991CF00373**

ANTONIO LEBARON MELTON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

**ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT,
IN AND FOR ESCAMBIA COUNTY, STATE OF FLORIDA**

REPLY BRIEF OF APPELLANT

**ALICE B. COPEK
Assistant CCRC-North
Florida Bar No. 25475
DREW A. SENA
Assistant CCRC-North
Florida Bar No. 1023218
Office of the Capital Collateral
Regional Counsel – Northern
1004 DeSoto Park Drive
Tallahassee, FL 32301
(850) 487-0922
Alice.Copek@ccrc-north.org
Drew.Sena@ccrc-north.org
COUNSEL FOR APPELLANT**

RECEIVED, 01/30/2023 01:41:22 PM, Clerk, Supreme Court

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ARGUMENT IN REPLY 1

I. Introduction..... 1

II. Argument..... 2

 A. Cognizability and timeliness..... 2

 B. Merits 15

 C. The Conformity Clause 22

CONCLUSION 23

CERTIFICATE OF SERVICE 25

CERTIFICATION OF TYPE SIZE AND STYLE 25

TABLE OF AUTHORITIES

<u>Cases</u>	Page(s)
<i>Asay v. State</i> , 210 So. 3d 1 (Fla. 2016)	4
<i>Atkins v. Virginia</i> , 536 U.S. 304 (2002)	18
<i>Barker v. Wingo</i> , 407 U.S. 514 (1972)	22
<i>Booker v. State</i> , 336 So. 3d 1177 (Fla. 2022)	5, 6
<i>Branch v. State</i> , 236 So. 3d 981 (Fla. 2018)	15, 16, 17
<i>Dillbeck v. State</i> , 304 So. 3d 286 (Fla. 2020)	13, 14
<i>Flick v. Warren</i> , 465 F. App'x 461 (6th Cir. 2012)	10
<i>Foster v. State</i> , 258 So. 3d 1248 (Fla. 2018)	17
<i>Graham v. Florida</i> , 560 U.S. 48 (2010)	12
<i>Hall v. Florida</i> , 572 U.S. 701 (2014)	19
<i>Han Tak Lee v. Tennis</i> , 2014 WL 3894306 (M.D. Penn. June 13, 2014)	7, 10
<i>Hill v. State</i> , 921 So. 2d 579 (Fla. 2006)	2, 3
<i>Lawrence v. State</i> , 308 So. 3d 544 (Fla. 2020)	20
<i>Lockyer v. Andrade</i> , 538 U.S. 63 (2003)	20
<i>Miller v. Alabama</i> , 567 U.S. 460 (2012)	12
<i>Montgomery v. Louisiana</i> , 577 U.S. 190 (2016)	12
<i>Moore v. Texas</i> , 581 U.S. 1 (2017)	18
<i>Oklahoma v. Castro-Huerta</i> , 142 S. Ct. 2486 (2022)	22
<i>Roper v. Simmons</i> , 543 U.S. 551 (2005)	passim
<i>Rutherford v. State</i> , 940 So. 2d 1112 (Fla. 2006)	3, 4

<i>Sims v. State</i> , 754 So. 2d 657 (Fla. 2000)	2, 3
<i>Smith v. State</i> , --- S.E. 2d. ---, 2022 WL 17813596 (Ga. Dec. 20, 2022)	8, 9, 10, 14, 20
<i>Stanford v. Kentucky</i> , 492 U.S. 361 (1989)	13
<i>State v. Howard</i> , 2003 WL 1906410 (Ct. App. Ohio Apr. 21, 2003)	10
<i>Urbin v. State</i> , 714 So. 2d 411 (Fla. 1998).....	17
<u>Rules</u>	
Fla. R. Crim. P. 3.851(B)	20

ARGUMENT IN REPLY

NEWLY DISCOVERED SCIENTIFIC EVIDENCE ESTABLISHES THAT THE DEATH PENALTY IS A CATEGORICALLY UNCONSTITUTIONAL PUNISHMENT FOR INDIVIDUALS, LIKE MR. MELTON, WHO COMMITTED THEIR OFFENSES WHEN THEY WERE BETWEEN THE AGES OF EIGHTEEN TO TWENTY-ONE.

I. Introduction

The State asserts that Mr. Melton's newly-discovered-evidence claim is untimely, meritless, and that the Constitutional Conformity Clause bars relief. In arguing these points, the State blatantly misrepresents Mr. Melton's legal arguments and uses inflammatory language to describe Mr. Melton and the American Psychological Association. *See, e.g.*, Answer Brief (AB) at 23-24, 38-39, 40 n.14, 45, 46-47 n.15. To the extent that the State raises disputed issues of fact for the first time here, this Court should remand to the circuit court for an evidentiary hearing on the claim. Mr. Melton will respond to the substantive points below. As for the State's rhetoric, Mr. Melton suggests that such distortions of law and fact should not be tolerated by this Court. Nor do they obscure the meritorious nature of Mr. Melton's claim.

II. Argument

A. Cognizability and timeliness

The State contends that Mr. Melton's claim is "not cognizable as a newly discovered evidence claim because studies are not evidence" under this Court's decisions (AB at 20-21). Yet the Court's precedent contradicts this blanket assertion, because this Court *has* addressed claims on the merits that involved studies as evidence. The cases the State cites holding otherwise do not involve the type of newly presented, case-specific evidence that Mr. Melton submitted to support his claim that the state and federal constitutions prohibit his death sentence.

This Court's decision in *Hill v. State* involved a newly-discovered-evidence claim of scientific research that was considered on the merits. 921 So. 2d 579 (Fla. 2006). In *Hill*, the defendant proffered "a research letter published in . . . *The Lancet*," which "present[ed] new scientific evidence that Florida's procedure for carrying out lethal injection may subject the inmate to unnecessary pain." *Id.* at 582. The defendant "ultimately assert[ed] that the information in [the] study [was] new information" that was not available when the Court held, in *Sims v. State*, 754 So. 2d 657 (Fla.

2000), that lethal injection was constitutional. In deciding the claim in *Hill*, this Court considered the study on the merits, as a cognizable newly-discovered-evidence claim. *Id.* at 582-83. The Court explained that the “study . . . [did] not sufficiently call into question [the] holding in *Sims*,” because it did not use any data from Florida and, ultimately, was inconclusive on whether lethal injection even was unconstitutional. *Id.* Critically, this Court did *not* hold that the defendant’s claim was not cognizable as newly discovered evidence; rather, the newly discovered evidence presented to the Court did not warrant relief. That is to say, this Court treated it identically to any other newly-discovered-evidence claim.

The cases the State cites for its contention that studies are not evidence differ from *Hill*—and from the evidence Mr. Melton presented—because the research they discuss **was not, in fact, newly discovered evidence**, but instead were new reports based on already known scientific principles. For example, in *Rutherford v. State*, this Court rejected a newly-discovered-evidence claim predicated on a report by the American Bar Association (ABA) “evaluating Florida’s death penalty system.” 940 So. 2d 1112, 1116 (Fla. 2006). The ABA’s report “analyze[d] Florida’s death penalty laws,

procedures and practices, and highlight[ed] areas in which . . . Florida “[fell] short in the effort to afford every capital defendant fair and accurate procedures.” *Id.* at 1117. The Court found that the report was not newly discovered evidence because it was “a compilation of **previously available** information related to Florida’s death penalty system and consist[ed] of legal analysis and recommendations for reform, many of which [were] directed to the executive and legislative branches.” *Id.* (emphasis added).

Similarly, in *Asay v. State*, the defendant presented an affidavit based on “reports from 2008 and 2009 [that] show[ed] ballistics testimony in [his] case was misleading.” 210 So. 3d 1, 23 (Fla. 2016). This Court explained that the affidavit was not newly discovered evidence because the report on which it was based “was itself already rejected as newly discovered evidence” and was merely a new report reciting previously established scientific conclusions. *Id.* at 23.

However, the Steinberg report and the APA resolution that Mr. Melton presented vastly differ from the ABA report offered in *Rutherford* and the affidavit in *Asay*. First, Mr. Melton is not raising a broad challenge to Florida’s death penalty system as a whole. Rather, he is challenging one specific component of it: the minimum

age at which someone can be sentenced to death. His argument is that under the neuroscience of adolescent brain development, and on the facts of *his specific case*, his death sentence is invalid. That is not the same as a generalized challenge to Florida's death-penalty scheme. Second, the evidence Mr. Melton presented **was not previously available**. As discussed further below, the **consensus** in the neuroscientific community that says that late adolescents are neurobiologically more similar to juveniles than to adults is new. Although individual studies were published over the years that ultimately contributed to that consensus, a single study, by itself, does not create a consensus. That only occurred recently and was signaled by the APA's August 2022 resolution calling for an end to the late-adolescent death penalty. Therefore, Mr. Melton raised a cognizable claim of newly discovered evidence.

The State also cites *Booker v. State* for the commonsense proposition that "new reports or declarations from recently hired experts, that largely rely on old information, [do not] qualify as newly discovered evidence" (AB at 21) (citing 336 So. 3d 1177, 1182 n.5 (Fla. 2022)). That may be so, but that is not what Mr. Melton presented to support his claim. The report at issue in *Booker* noted

that its conclusion “has been recognized since the dawn of the [relevant scientific field].” *Booker*, 336 So. 3d at 1181-82. In other words, the evidence that the defendant was relying on was **previously available**. That is not the case for Mr. Melton’s evidence regarding adolescent brain development. The Steinberg report discussed a recently emerging consensus that continued to build on itself, solidify, and which was ultimately cemented with the adoption of the APA resolution in August 2022. While ongoing research and individual studies may have been previously available, the fact of the near-universal scientific consensus was not. This is reflected in the fact that many of the studies cited by the Steinberg report and the APA resolution were published in 2021 and 2022. *See, e.g.*, ROA. 83 at fn.25, 149-52 (bibliography).

The State cherry-picks individual sources from the Steinberg report in order to call it untimely because it “relied on some studies from as early as 2003 and 2004 Indeed, one footnote in the declaration relied on publications from the 1980s” (AB at 20). But this statement misunderstands how scientific progress occurs.

Scientific understanding does not change overnight. The nature of scientific progress—and what makes such evidence so important

and reliable—is incremental. Each new step builds on the previous one until, gradually, a new understanding is reached that may lead to entirely different conclusions than the starting point of the original research. Two examples demonstrate this pattern.

First, arson science. As one federal court described, “there has been a revolution in fire science” that took place **over two decades**. There was not one specific flashpoint that caused this “revolution.” Rather, “[i]n the past twenty years, the analytical paradigm in arson investigations has **shifted** in profound and dramatic ways.” *Han Tak Lee v. Tennis*, 2014 WL 3894306 at *3 (M.D. Penn. June 13, 2014). These incremental shifts in the understanding of many separate foundational premises in arson science collectively led to “extraordinary developments” that “undermined the validity of the past science and art in [that] field.” *Id.* The defendant in *Han Tak Lee* was granted habeas relief and later exonerated.¹

How did that happen? Through the steady accumulation of scientific research in the field that universally pointed in a single direction regarding a new understanding of how fires started and

¹ “Han’s Story,” Pennsylvania Innocence Project, <https://painnocence.org/HanTakLee?locale=en>

behaved. The first study—the one presented at the beginning of that twenty-year period—may have been the first “new” study in a strictly literal sense, but its reliability and validity would have been rightly questioned by scientists and the courts. It was only through the continued chain of scientific research that steadily built off of what came before it that the old understanding of arson science was “thoroughly debunked.” *Id.*

A similar consensus-shift has occurred in the understanding of the cause of death now known as abusive head trauma, which had previously been called “shaken baby syndrome” (SBS), and postconviction motions bringing claims of newly discovered evidence based on this shift have been successfully raised in courts across the country.

A recent decision by the Georgia Supreme Court is an instructive example. There, a defendant convicted of murdering his infant through SBS moved for a new trial on the basis of “an expert affidavit, various academic journal articles, and position papers by the American Academy of Pediatrics.” *Smith v. State*, --- S.E. 2d. ---, 2022 WL 17813596 at *3 (Ga. Dec. 20, 2022). His motion described “a major shift in the medical community’s thinking [which] **began in**

2006 when the National Association of Medical Examiners [changed its view on the viability of the SBS diagnosis].” *Id.* at *3 (emphasis added). Once one organization took that initial step, “[t]he medical community increasingly began to accept [the viewpoint of that organization].” *Id.* In **2009**, a second professional organization published a position paper expressing similar doubts on the reliability of the SBS diagnosis. *Id.*

The *Smith* defendant also cited multiple more recent scientific articles that drew on these ongoing developments, including a **2018** consensus statement published by multiple professional organizations and a **2020** journal article. *Id.* The defendant argued that “the modern medical literature recognizes [the uncertainties of an SBS diagnosis].” *Id.* All told, the evidence in the defendant’s postconviction motion for a new trial spanned at least **14 years**. The Georgia trial court denied the motion in part because the expert opinions on which the defendant relied “ha[d] been available since the 1990s and [were] available at the time of [his] trial,” and so, in the trial court’s view, were not newly discovered evidence. *Id.* at *5.

In reversing the trial court and remanding for an evidentiary hearing, the Georgia Supreme Court explained that, while some of

the knowledge that was being presented as newly discovered may have been generally available in the 1990s, by the time of the postconviction motion it was bolstered by “the backdrop of the post-trial scientific developments” that subsequently occurred. *Id.* at *8. Those developments “may make [the scientific conclusions] more credible than a hypothetical, similar [scientific] opinion that might have been offered” previously, such as in the 1990s when the first studies discussing SBS were published. *Id.*

Han Tak Lee and *Smith* demonstrate the flaws in the State’s rigid approach to defining newly discovered scientific evidence. The scientific process is just that: a *process*. At some point, a consensus will likely be reached, but many separate studies and years or even decades of research and debate are required to obtain that consensus. As the Sixth Circuit explained:

After surveying the scientific research on the issue, the [trial] court found that, while **some scientists** . . . had begun to question [SBS] by the time of [the defendant’s] trial **[w]hat controversy there was [] represented the minority view.** In the end, [challenging an SBS diagnosis at the time of the defendant’s trial] likely would have failed to unseat **the prevailing scientific consensus.**

Flick v. Warren, 465 F. App'x 461, 465 (6th Cir. 2012) (emphasis added); cf. *State v. Howard*, 2003 WL 1906410 at *2 (Ct. App. Ohio Apr. 21, 2003) (“[The medical expert] acknowledged that **there was some debate [about SBS] but that there was much more a consensus than there was a debate.**”).

That same pattern has played out in the realm of adolescent brain development. As Mr. Melton explained, although the neuroscientific research has been ongoing, the passage of the APA's resolution in August 2022 signaled that what had previously been a *debate* crystallized into an established *consensus*, owing to the APA's prominence, its standing in the psychological community, and its role in shaping legal policies affecting juvenile sentencing, including at the United States Supreme Court. See Initial Brief (IB) at 7-9.

Indeed, both *Roper* itself and the Supreme Court's post-*Roper* precedent support this incremental view of the scientific process here. Throughout its opinion, the *Roper* Court cited sources discussing the differences between juveniles and adults that spanned from as recently as 2005 to as far back as **1968**. See *Roper v. Simmons*, 543 U.S. 551, 570 (2005) (citing a 1968 source for “[t]he third broad difference” between juveniles and adults). That one

source did not singlehandedly compel the Supreme Court to hold that the juvenile death penalty was unconstitutional. Rather, it was the compilation of multiple studies, spanning decades and addressing various facets of the difference between juveniles and adults, that **cumulatively** did so. *See also, e.g., Id.* at 566, 569, 573 (citing sources from 1976, 1992, 1994, 1997, 1999, 2000, 2003).

Similarly, the Supreme Court's post-*Roper* precedent expanding criminal-sentencing protections for juveniles continues to develop, and significant cases safeguarding individualized sentencing were decided over a decade-long period. *See Graham v. Florida*, 560 U.S. 48 (2010) (life-without-parole sentences for juvenile nonhomicide offenses unconstitutional); *Miller v. Alabama*, 567 U.S. 460 (2012) (mandatory life-without-parole sentences for juvenile homicide unconstitutional); *Montgomery v. Louisiana*, 577 U.S. 190 (2016) (holding *Miller* applies retroactively on collateral review). This reflects the fact that *Roper* is not—and was never meant to be—the be-all and end-all of the conversation regarding juvenile sentencing, as the State so posits. *See* AB at 32 (“*Roper*’s holding is fixed and forever set in stone.”). As Mr. Melton argued, *Roper* set the minimum age for a death sentence at 18 because, **based on the scientific**

understanding available at that time, that was the appropriate place to draw the line. IB at 69-70. But the *Roper* opinion contemplates future adjustments to the constitutional cutoff on the basis of new scientific developments, just as *Roper* was itself an advancement from the line of 16 that the Court had previously drawn. *Roper*, 543 U.S. at 555-56 (citing *Stanford v. Kentucky*, 492 U.S. 361 (1989)). As the APA resolution shows, the time to make that adjustment is now.

Because the evidence Mr. Melton used to support his newly discovered evidence claim was not previously available, the State's argument under *Dillbeck* regarding his supposed lack of diligence necessarily fails, AB at 26. In *Dillbeck v. State*, the defendant presented as newly discovered evidence "reports written . . . by three doctors, one of whom diagnosed him with . . . a diagnosis that was first recognized" in 2013. 304 So. 3d 286, 287 (Fla. 2020). The defendant argued that he could not have raised the claim until 2018, the date on which the doctor who diagnosed him performed her evaluation. *Id.* at 288. This Court held that the defendant did not exercise diligence because the diagnosis could have been discovered

within a year of 2013, when it was first recognized as a diagnosable condition. *Id.*

Dillbeck involved a situation where the scientific understanding *did* shift: a new diagnosable condition emerged in 2013, and this Court held that **the clock started running from the date that the diagnosis was recognized**, even though the defendant and his counsel were aware of the facts underlying the diagnosis “even before he was sentenced in 1991.” *Id.* The diligence issue was not related to whether and when a new scientific consensus had occurred; instead, it arose because the defendant waited until five years after the diagnosis had been established to conduct the appropriate testing.

By contrast, the APA resolution was passed on August 3, 2022, and Mr. Melton filed it as supplemental authority in the circuit court the next day (ROA. at 141). There is assuredly no diligence problem here, and to the extent this Court believes Mr. Melton’s diligence is an open question, the Court should remand for an evidentiary hearing to resolve it. *Cf. Smith*, 2022 WL 17813596 at *9 (“Although [the defendant’s postconviction] motion indicates that a shift in the medical community’s understanding of abusive head trauma . . . began in 2006, it also alleges developments after that date. . . . [W]e

cannot say as a matter of law that [the defendant's] pleadings are insufficient to even obtain a hearing on [the diligence] point.”).

Because the evidence Mr. Melton presented to support his newly-discovered-evidence claim is cognizable, and he raised the claim in a timely and diligent fashion, this Court should reverse the circuit court.

B. Merits

On the merits, the State urges this Court to reject the claim because claims “based on similar studies regarding brain development [have] been repeatedly rejected” (AB at 27). Yet the cases the State cites are markedly different from Mr. Melton's, both in terms of the nature of the evidence those defendants presented and on their specific factual circumstances.

In *Branch v. State*, the defendant presented “scientific research [regarding] development of the human brain, . . . the evolution of state and international law,” and heavily relied on the then-recent adoption of a resolution by the American Bar Association (ABA) calling for the minimum age of death-eligibility to be raised from 18 to 21. 236 So. 3d 981, 985, 985 n.5 (Fla. 2018). As Mr. Melton discussed in his brief, the APA's resolution is of greater constitutional significance

than the ABA's, even though both proposals shared the same policy goal. Unlike the ABA, whose proposal merely summarized the then-current state of the ongoing scientific debate, the APA actively inserted itself into that debate, and its adoption of the August 2022 resolution reflected the cementing of a consensus that, at the time of the ABA's resolution in 2018, was still being formed. *See* IB at 62-66. Therefore, the Court's conclusions regarding the cognizability of the evidence in *Branch* are inapplicable here.

Nor did the circumstances of that defendant lend themselves as easily to an as-applied challenge, as Mr. Melton raised in addition to his facial challenge, *see* IB at 46-61. The murder in *Branch* was highly aggravated: the victim's "nude body was found . . . beaten, stomped, sexually assaulted and strangled. She bore numerous bruises and lacerations, both eyes were swollen shut, and a wooden stick was broken off in her vagina." *Branch*, 236 So. 3d at 983. Unlike in Mr. Melton's case, the "heinous, atrocious, or cruel" aggravator was established. *Id.* at 983 n.1. And the *Branch* defendant's age was less mitigating, because he was nearly twenty-two years old at the time of the murder. *Id.* at 984. Mr. Melton's newly discovered evidence establishes that the constitutional cutoff is *under* age 21,

and Mr. Melton himself was only 18 years and 25 days old at the time of his offense, making him the youngest person on Florida’s death row when ranked by that metric. Therefore, Mr. Melton’s age is a significantly weightier mitigating factor than it was in *Branch*, because of his proximity to the age under which the death penalty is currently constitutionally barred. *See Urbin v. State*, 714 So. 2d 411, 418 (Fla. 1998).²

The State’s attempted comparison to *Foster v. State*, 258 So. 3d 1248 (Fla. 2018), suffers from the same issues. There, the defendant’s claim was “very similar” to the one raised in *Branch*, and

² The State criticizes Mr. Melton for “refer[ing] to additional mitigation in a footnote” that he “does not identify or make specific arguments regarding” (AB at 40 n.14). This is flatly inaccurate. As the State points out, Mr. Melton noted that in his postconviction motion he discussed all available mitigation that could be presented at a resentencing hearing, and that the State did not contest the substance of this mitigation in its answer to the postconviction motion (IB at 51 n.14).

However, Mr. Melton **discussed this mitigation again**, later in the same section of his initial brief that the State cites. *See* IB at 51-60 (discussing the cumulative materiality of all mitigating evidence presented at Mr. Melton’s trial and subsequent postconviction proceedings). Inexplicably, the State blames Mr. Melton for “daisy chain appellate practice” on the grounds that he never presented those arguments, when in fact he has raised them twice and the State has refused to address them either in the circuit court or before this Court.

“cit[ed] some of the same research,” including “articles from 2016, 2017, and earlier,” “objective indicia of consensus,” and the then-recent ABA resolution. *Id.* at 1253. Again, however, the defendant did not present newly discovered evidence of the same magnitude and constitutional significance as the APA’s 2022 resolution, and so the State’s analogy is inapt.

Recognizing the importance of the APA resolution to Mr. Melton’s claim, and unable to critique the substance of the resolution itself, the State responds that “[t]he views of medical experts do not dictate Eighth Amendment law; rather it is the independent duty of the courts to do so. Clinicians determine clinical standards but judges, not clinicians, determine the content of the Eighth Amendment” (AB at 37). Mr. Melton agrees that it is the courts’ prerogative to define the scope of the Eighth Amendment. But, while clinicians and scientists do not determine the legal rules and standards governing Eighth Amendment claims, they are entirely appropriate reference points for courts to look to in determining the contours of the Eighth Amendment. *See, e.g., Roper*, 543 U.S. at 569 (referring to “scientific and sociological studies”); *Moore v. Texas*, 581 U.S. 1, 15 (2017) (reversing state court because its determination of

intellectual-disability claim “deviated from prevailing clinical standards”); *Atkins v. Virginia*, 536 U.S. 304, 318 (2002) (referring to “clinical definitions” to formulate the test for determining intellectual disability).

The State next resorts to baseless criticisms of the APA, implying that it has “been captured by ideologues [sic] 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.” (AB at 38). The State provides no relevant citation for this idea because there is none. The APA is “the leading scientific and professional organization representing psychology in the United States; with more than 133,000 [members]” (ROA. at 143). Far from being a discredited group of “ideologues,” its research has been widely cited, including by the Supreme Court in *Roper*. See 543 U.S. at 569, 572.³

³ The State further tries to downplay the significance of the APA by contrasting this “professional organization” with “the standards of American society ‘as a whole.’” (AB at 37-38) (quoting *Hall v. Florida*, 572 U.S. 701, 731 (2014) (Alito, J., dissenting)). But as Mr. Melton pointed out, the two standards dovetail when it comes to drawing the line between juveniles and adults, and therefore any supposed distinction is irrelevant. Many commonplace societal markers of adulthood that had previously been reserved for those over 18, are

The State’s speculative assertions are unsupported by the facts. However, as the State is apparently contending for the first time before this Court that the APA is not credible, the Court should remand for an evidentiary hearing for further development of the matter. *Cf. Smith*, 2022 WL 17813596 at *9 (“To the extent that the State challenges the credibility of the [defendant’s affidavit] and his supporting expert . . . the place for that is an evidentiary hearing.”); *see also* Fla. R. Crim. P. 3.851(B) (governing evidentiary hearings for successive postconviction motions) and (A)(ii) (a hearing is not necessary when the claim **“is not based on disputed facts”**).

Finally, the State misrepresents the core of Mr. Melton’s claim as being based on state-law proportionality review, which this Court receded from in *Lawrence v. State*, 308 So. 3d 544 (Fla. 2020). But Mr. Melton was not arguing that, under state law, his death sentence is disproportionate compared to other capital defendants. Instead, his claim was based on his constitutional right to be free from arbitrary, capricious, and disproportionate punishment, which is at the heart of the Eighth Amendment. *See Lockyer v. Andrade*, 538 U.S.

now shifting to those over 21. *See* IB at 14; ROA. at 146 (APA resolution listing various activities restricted to those over age 21).

63, 72 (2003) (discussing the “gross disproportionality” principle inherent in the Eighth Amendment). This Court’s decision to end comparative-proportionality review of death sentences under state law did not abrogate its separate obligation to ensure that sentences are not disproportionate under federal law. The State’s proportionality arguments are essentially non-responsive to Mr. Melton’s argument that his death sentence is disproportionate **under the Eighth Amendment**. Compare IB at 46-61, with AB at 39-45.⁴

Because Mr. Melton raised a meritorious claim that his death sentence is invalid under the Eighth Amendment, this Court should grant relief. To the extent this Court finds that there are disputed factual questions regarding the credibility of the APA or any other

⁴ In making its state-law proportionality argument, the State says that “[Mr.] Melton knew from his own personal experience that armed robberies can end in dead human beings from the prior [non-capital] murder. But he ignored that recent experience and repeated that same illegal conduct a mere few weeks later.” AB at 45. Besides the fact that Mr. Melton disputes his involvement in the non-capital murder, the State’s description proves the very point Mr. Melton’s newly discovered evidence discusses. As a 17 and 18-year-old teenager whose brain was still developing and who was, at that time, neurobiologically closer to a juvenile than to an adult, he was susceptible to committing “impulsive act[s] motivated by the prospect of an immediate reward” and unlikely to learn from his actions—at least not within such a short time span and while his brain was still developing (ROA. at 91).

component of Mr. Melton’s claim, it should remand for an evidentiary hearing to allow the circuit court to address those issues in the first instance.

C. The Conformity Clause

In his initial brief, Mr. Melton discussed why the circuit court erroneously held that his claim was barred by the Constitutional Conformity Clause. *See* IB at 69-70. The State does not respond to Mr. Melton’s first point, that the Conformity Clause “applies only to claims that the Supreme Court has squarely decided on the merits” and that here “there is no on-point precedent to which this Court may conform” (IB at 69).

Regarding Mr. Melton’s second argument, that *Roper* is “meant to be read as an expansive inquiry into whether a sentence is disproportionate” (IB at 69-70), the State argues that “Eighth Amendment jurisprudence may be dynamic but the actual holding of any particular case is not.” (AB at 32). But that is not true. The Supreme Court frequently announces complex, multi-factored standards for lower courts to use in determining case outcomes. *See, e.g., Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2501 (2022) (three-factor balancing test); *Barker v. Wingo*, 407 U.S. 514, 530 (1972)

(four-factor balancing test). The holdings of such cases are fixed, insofar as the Court has set out a particular list of factors to be considered, but the balancing tests they prescribe are meant to be applied across a wide variety of situations, with the result varying based on case-specific circumstances. As Mr. Melton explained, that is precisely how the Supreme Court envisioned *Roper's* elastic holding to operate. Under the particular circumstances of Mr. Melton's capital case, *Roper* certainly encompasses his claim that the Eighth Amendment prohibits the execution of someone who, like him, committed his crime a mere 25 days beyond the constitutional cutoff.

CONCLUSION

Mr. Melton presented newly discovered evidence regarding the now nearly universally accepted proposition that individuals under age 21 are more similar to, and should be treated like, juveniles. That evidence was timely, cognizable, and disturbed the foundation on which his death sentence is based. Mr. Melton's claim challenges his death sentence as prohibited under the Eighth Amendment, both categorically and as applied to him, which necessarily warrants sentencing relief. At a minimum, the newly discovered evidence of

adolescent neurobiology, when combined with Mr. Melton's extensive mitigation evidence, would probably yield a less severe sentence at a new penalty phase.

In light of the foregoing arguments, Mr. Melton requests this Court reverse the circuit court and grant sentencing relief or, alternatively, remand the cause for an evidentiary hearing on the claim.

Respectfully submitted,

/s/ Alice B. Copek

ALICE B. COPEK
Assistant CCRC-North
Florida Bar No. 25475

/s/ Drew A. Sena

DREW A. SENA
Assistant CCRC-North
Florida Bar No. 1023218

**Office of the Capital Collateral
Regional Counsel – Northern
1004 DeSoto Park Drive
Tallahassee, FL 32301
(850) 487-0922
Alice.Copek@ccrc-north.org
Drew.Sena@ccrc-north.org**

Attorneys for Mr. Melton

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing pleading has been furnished by electronic service to all counsel of record on this 30th day of January, 2023.

CERTIFICATION OF TYPE SIZE AND STYLE

This is to certify that the Reply Brief of Appellant has been reproduced in a 14-point Bookman Old Style type, a font that is not proportionately spaced.

/s/ Alice B. Copek
ALICE B. COPEK