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IN THE SUPREME COURT OF FLORIDA

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CASE NO. SC23-190
LOWER COURT CASE NO. 1990 CF 2795

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DONALD DAVID DILLBECK,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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ON APPEAL FROM THE CIRCUIT COURT
OF THE SECOND JUDICIAL CIRCUIT,
IN AND FOR LEON COUNTY, STATE OF FLORIDA

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# APPELLANT'S REPLY BRIEF
# EXECUTION SCHEDULED FOR
# FEBRUARY 23, 2023

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

## PRELIMINARY STATEMENT

The State has filed its answer to Mr. Dillbeck's initial brief, and this reply follows. The reply will address only the most salient points argued by the State. Mr. Dillbeck relies upon his initial brief in reply to any argument or authority argued by the State that is not specifically addressed in this reply.

## ARGUMENT IN REPLY

### I. THE CIRCUIT COURT ERRED IN RULING THAT MR. DILLBECK IS NOT ENTITLED TO EXEMPTION FROM EXECUTION UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS.

As with the circuit court's order, the State relies on erroneous principles to justify summary denial of Mr. Dillbeck's Eighth and Fourteenth Amendment claim that he is exempt from execution. Specifically, the State advances three misguided arguments: 1) that Mr. Dillbeck's categorical exemption claim was untimely raised; 2) that Mr. Dillbeck's exemption claim is meritless and rebutted by the record due to his IQ score; and 3) that Art. 1, § 17 of the Florida Constitution ("the conformity clause") prohibits the state courts from applying *Atkins*' Eighth Amendment protections to Mr. Dillbeck.[1]

[1] Although the State references its assertion in the circuit court that law-of-the-case doctrine procedurally bars "any claim related to the diagnosis of ND-PAE[,]" (AB at 5), and points out that the circuit court found Mr. Dillbeck "'procedurally barred from relitigation of his claim regarding ND-PAE[,]'" (AB at 15 (quoting PCR5 at 1036)), the State does not advance a *res judicata* argument here. As such, Mr. Dillbeck will rely on the arguments in his initial brief without further elaboration (*see* IB at 32-33, 36 n.13).

The State also, for the first time in Mr. Dillbeck's legal proceedings, bizarrely disputed that Mr. Dillbeck's impairments related to prenatal alcohol exposure were of childhood onset.

Mr. Dillbeck responds to each of these arguments as follows:

**A. Timeliness**

The State's contention that Mr. Dillbeck should have raised this claim by 2004 misunderstands the contours of Mr. Dillbeck's claim and disregards the scientific and sociolegal processes that gave rise to it. As Mr. Dillbeck explained in his initial brief, this claim, while most properly characterized as an *Atkins*[2] claim, requires one additional step that differentiates it from a claim that could have been brought in 2004. The claim is not that Mr. Dillbeck "has intellectual disability" *per se*, but that his ND-PAE is an intellectual disability-equivalent condition which entitles him to the same protections due to its unique indistinguishability from intellectual disability (*see* IB at 28, 37).

The diagnosis of ND-PAE did not even exist in 2004, let alone the medical consensus that "there are few disorders more related to ID (both in causing that disorder and resembling it functionally) than FASD"[3] (IB at 37)

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[2] *Atkins v. Virginia*, 536 U.S. at 304, 319 (2002).

[3] FASD is the umbrella term for disorders arising from prenatal alcohol exposure. ND-PAE is a specific diagnosis under this umbrella, which refers to the clinically significant central nervous system dysfunction arising from prenatal alcohol exposure.

and that according to the "DSM-5, ND-PAE is identical to ID except for confirmation of prenatal exposure to alcohol." (IB at 37). In his initial brief and in the circuit court, Mr. Dillbeck detailed the evolution of the medical consensus related to ND-PAE. His claim—that scientific understanding and evolving standards of decency have now, in 2023, reached a tipping point rendering him exempt from execution because he suffers from an ID-equivalent condition—is timely raised.

### B. Merits/ID-Equivalence

The State next argues that because "this Court has repeatedly and consistently refused to expand *Atkins* to other types of mental illnesses[,]" Mr. Dillbeck "may not rely on a diagnosis of ND-PAE to support his *Atkins* claim." (AB at 13). However, this again misses the point of the claim. Mr. Dillbeck is not arguing that this Court must expand *Atkins* to realms outside of intellectual disability (such as serious mental illness, brain damage, or other intellectual impairments) Rather, Mr. Dillbeck is arguing that because the medical community recognizes ND-PAE as uniquely indistinguishable from intellectual disability, he can be exempted from execution under the protections of *Atkins* without requiring meaningful expansion of those protections (IB at 18, 37-42). Thus, no precedent precludes this Court from

finding that Mr. Dillbeck is entitled to the constitutional protections articulated in *Atkins*.

The State's cited cases related to this Court's "repeated[] reject[ion] of "attempts to expand *Atkins*" to other mental conditions (AB at 24-25) are distinguishable from Mr. Dillbeck's. None of these cited cases involved a condition recognized by the medical community to be not only analogous to intellectual disability, but functionally identical to all three prongs according to the DSM-5 diagnostic criteria. And, the State itself notes that "*the particular diagnosis of ND-PAE…is a novel basis* for [*Atkins*] expansion." 2/13/23 Response to Motion to Stay the Execution at 3-4 (emphasis added).

Additionally, none of the State's arguments against ID-equivalency carry weight. *Hall v. Florida* requires that "in determining who qualifies" for *Atkins* protections, states must take into account "the medical community's opinions." 572 U.S. 701, 710, 723 (2014). And, the State's position that "[a] diagnosis of ND-PAE is not the functional equivalent of intellectual disability" (AB at 22) is belied by the views of the medical community.[4]

[4] The State's position again underscores the need for an evidentiary hearing to resolve factual disputes not conclusively rebutted by the state-court record. Mr. Dillbeck should have the opportunity to present the myriad expert evidence establishing that he suffers from an ID-equivalent condition.

First, the State's contention that Mr. Dillbeck's intellectual functioning is "perfectly normal" (AB at 26) is demonstrably incorrect. As the State itself recognizes, *Atkins* referred to the DSM in defining intellectual disability (AB at 26-27). Prong one of an intellectual disability diagnosis, as laid out in *Atkins*, requires a showing of significantly subaverage general intellectual functioning. What the State fails to acknowledge, however, is that general intellectual functioning is not exclusively measured by full-scale IQ scores. The medical community considers full-scale IQ scores to be an outmoded concept and the DSM-5 itself does not support tethering prong one to a specific IQ score (*see, e.g.*, PCR4 63, 89; PCR5 568-70, 621); *see also* Greenspan, S. & Novick Brown, N., *Diagnosing Intellectual Disability in People with FASD*, 40 Behav. Sci. Law 31, 37-38 (2021). According to the unrebutted expert reports Mr. Dillbeck has proffered related to his ND-PAE, Mr. Dillbeck *does* suffer from clinically significant intellectual impairment, and his impairments are consistent with intellectual disability (IB at 14; *see also* PCR4 70, 77, 84, 89-90; PCR5 453, 460, 467-68, 473).[5]

[5] As Mr. Dillbeck explained in the lower court, an evidentiary hearing would allow him to present expert testimony—including that of Dr. Connor and Dr. Sultan, whose documentation of full-scale IQ scores is emphasized by the State—to address any dispute over what those scores indicate related to Mr. Dillbeck's general intellectual functioning and ID-equivalency.

Second, the State's newly-raised assertion that Mr. Dillbeck fails to satisfy prong three (childhood onset) is inexplicable. Uncontested evidence dating back to 1991 establishes that Mr. Dillbeck was exposed to vast quantities of alcohol *in utero* when his biological mother, Audrey Hosey, drank 18-24 beers per day for the duration of her pregnancy (PCR4 84). Mr. Dillbeck's impairments are not only of childhood onset; they were set in motion even before his birth. *Id*. Indeed, the lifelong nature of Mr. Dillbeck's condition is apparent even from its name—Neurobehavioral Disorder *associated with Prenatal Alcohol Exposure*. The State's bizarre contention that Mr. Dillbeck's condition is not of childhood onset should be given no credit.[6]

### C. Florida's Eighth Amendment Conformity Clause

In the context of Eighth Amendment claims, states are expected to actively participate in bringing society closer to "the Nation we aspire to be[,]"

[6] Indeed, if this Court were to entertain the State's assertion that Mr. Dillbeck's condition is not of childhood onset, then it must find that the State has introduced a new factual dispute that was not presented to the lower court. To the extent the State now challenges the ID-equivalency of Mr. Dillbeck's ND-PAE as it pertains to childhood onset of the condition, this underscores Mr. Dillbeck's contention that a state-court evidentiary hearing was necessary to resolve factual disputes not conclusively rebutted by the state-court record. This Court should then enter a stay of execution and remand Mr. Dillbeck's case to the Leon County Circuit Court for additional fact-finding related to intellectual disability-equivalence on each disputed prong.

*Hall*, 572 U.S. at 708, by reflecting and advancing "the evolving standards of decency to mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 100 (1958).

Affirming the circuit court's reading of Florida's conformity clause, as the State urges (AB at 13, 22-24), would be an abdication of Florida's role in evolving standards of decency. Such an interpretation would signal that Florida will not consider constitutional challenges to an execution—no matter how meritorious those challenges and how reflective of current societal mores—unless explicitly instructed by the United States Supreme Court.

This violates *Trop* and the litany of cases bearing its legacy. *See, e.g., Hall*, 572 U.S. at 708 ("The Eighth Amendment's protection of dignity…[affirms] that the Nation's constant, unyielding purpose must be to transmit the Constitution so that its precepts and guarantees retain their meaning and force"); *Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008) ("Evolving standards of decency must embrace and express respect for the dignity of the person, and the punishment of criminals must conform to that rule"); *Gregg v. Georgia*, 428 U.S. 153, 171 (1976) ("the [Eighth] Amendment has been interpreted in a flexible and dynamic manner"); *Woodson v. North Carolina*, 428 U.S. 280, 288 (1976) ("Central to the application of the [Eighth] Amendment is a determination of contemporary standards regarding the

infliction of punishment"); *see also Weems v. United States.*, 217 U.S. 349, 373 (1910) ("Time works changes, brings into existence new conditions and purposes. Therefore [a constitutional principle], to be vital, must be capable of wider application than the mischief which gave it birth.").[7]

Further, even within this unconstitutionally restrictive reading of the conformity clause, this Court may recognize that *Atkins* bars Mr. Dillbeck's execution. As Mr. Dillbeck has explained, his current claim does not require expansion of the principles and protections articulated in *Atkins*; it only requires recognition that ND-PAE, identified by the medical community as a uniquely ID-equivalent condition, fits within the protections that *Atkins* has already established.

[7] The State contends that Florida's conformity clause is analogous to AEDPA's requirement that federal courts conducting 28 U.S.C. § 2254(d)(1) analysis must bind themselves to clearly established federal law as expressed by United States Supreme Court holdings. This analogy is not only misguided but illustrates the problem with the State's proposed application of Florida's conformity clause in this case. The purpose of § 2254(d)(1)'s limitation is deference to state determinations absent the high bar of showing objectively unreasonable action. In other words, the § 2254(d)(1) limitation assumes that states will follow federal constitutional law. The State's urged interpretation of the Florida conformity clause would violate that trust. Further, such a state standard would be as onerous as that articulated in AEDPA's highly deferential § 2254(d)(1) provision, and would render state-court processes inadequate to protect fundamental constitutional rights by foreclosing critical avenues for vindication of those rights.

### D. The Circuit Court's Summary Denial was Error

As shown above and in Mr. Dillbeck's initial brief, Mr. Dillbeck's claim that he is constitutionally entitled to categorical exemption from execution is timely, not subject to a procedural bar, and states a meritorious claim for relief that cannot be conclusively rebutted by the state-court record. Because of this, none of the State's cited cases related to summary denial apply, and the circuit court's summary denial of Mr. Dillbeck's successive postconviction motion was error. This Court should either find that Mr. Dillbeck is entitled to categorical exemption from execution under the constitutional protections articulated in *Atkins*; or, alternatively, should stay Mr. Dillbeck's execution and remand the case to the circuit court to conduct an evidentiary hearing.

## II. THE CIRCUIT COURT ERRED IN DENYING MR. DILLBECK'S CLAIM REGARDING THE NEWLY DISCOVERED EVIDENCE OF HIS MENTAL STATE DURING THE 1979 CRIME THAT FORMED THE BASIS FOR THE PRIOR FELONY AGGRAVATING CIRCUMSTANCE IN THIS CASE.

In his successive 3.851 motion, Mr. Dillbeck raised a claim of newly discovered evidence regarding his mental state during the 1979 crime and proceedings that formed the basis for the prior felony aggravating circumstance in this case (IB at 47-61). In its answer, the State argues that the claim is not timely and that both subclaims are not meritorious (AB at 29-43).

### A. The Issue was Timely Raised

The State argues that Mr. Dillbeck's claim has not been timely raised because some of the witnesses upon whom the claim is based were named in police reports and documents in 1979 (AB at 34-36, 39-41). The State does not argue that any of the information contained in their 2023 statements was disclosed anywhere in the 1979 statements, but that the claim should nonetheless be held untimely because the police reports contained "omissions" which are ostensibly different from "falsities" with respect to whether Mr. Dillbeck was on notice that those witnesses could provide beneficial testimony (AB at 40-41). The State, however, does not argue that anything in the police reports would have given Mr. Dillbeck reason to talk to those witnesses. Moreover, even if the State's argument that "omissions" are not "falsities" was correct, the State's diligence argument suffers from a glaring flaw: three of the six witnesses were not even listed in a police report or document from 1979.

The State argues that Mr. Dillbeck's claim should be found untimely based on *Mungin v. State*, 320 So. 3d 624, 626 (Fla. 2020), in which "this Court held that a claim of newly discovered evidence based on a new affidavit of a known witness, who testified at trial, regarding what he saw was untimely." (AB at 36). In actuality, *Mungin* supports Mr. Dillbeck's timeliness

argument. This Court found that Mungin was not diligent because the relevant witness was Mungin's close personal friend who visited Mungin in prison, had been in contact with the defense team on and off for two decades and spoke to a defense investigator "a dozen times" over a period of several months regarding the affidavit before he eventually signed it. *Id*. Mr. Dillbeck's claim stands in stark contrast to *Mungin*. Here, the witnesses were unknown and have not been visiting Mr. Dillbeck in prison, were only discovered within the last few weeks, and certainly did not testify at a trial.[8]

The State's reliance on *Rivera v. State*,187 So. 3d 822, 833-34 (Fla. 2015), is likewise misplaced. First, *Rivera* arrived in this Court after an evidentiary hearing from which the circuit court made findings based on testimony regarding diligence. *Id*. at 832.[9] Second, *Rivera* actually supports

[8] At most, three of the six third-party eyewitnesses in support of this claim were "known" because they were named in police reports. But the State does not attempt to argue that Mr. Dillbeck should have been on alert to interview them in light of anything contained in their 1979 statements.

[9] In fact, on the prior appeal in *Rivera*, this Court remanded the case based on the circuit court's failure to hold an evidentiary hearing on that claim. *Rivera v. State*, 995 So. 2d 191, 197 (Fla. 2008) ("Under our postconviction rules, we must accept Rivera's claims as true and direct an evidentiary hearing on their validity unless the record *conclusively* demonstrates that Rivera is not entitled to relief. . . . While there may be valid explanations to refute these allegations, the State has not demonstrated that those explanations are apparent on the face of the record. Accordingly, we find that Rivera's allegations are sufficient to require an evidentiary hearing[.]") (emphasis in original). Mr. Dillbeck should be afforded the same opportunity.

Mr. Dillbeck's argument regarding diligence. There, this Court found that the defendant was not diligent because the information Rivera relied upon as newly discovered was contained in documents that the prosecution had turned over to prior counsel. *See Rivera*, 187 So. 3d at 834 ("This constitutes competent, substantial evidence that supports the finding of the postconviction court that Rivera was in possession of the [jailhouse informant's] plea offer during his initial postconviction proceedings."). Neither the State nor the circuit court in this case has argued that the 2023 statements were contained in any police report or document handed over to Mr. Dillbeck's prior counsel.

Therefore, this Court should find that Mr. Dillbeck is entitled to an evidentiary hearing because the record does not conclusively demonstrate that Mr. Dillbeck was not diligent in raising this claim.

### B. The Newly Discovered Evidence Subclaim is Meritorious

As to the newly discovered evidence subclaim, the State argues that the new evidence would not result in a sentence less than death at a new trial because the testimony would be "inadmissible" during a penalty phase as "residual doubt evidence" and because the newly discovered evidence would not result in a lesser sentence at a new trial (AB at 41-43).

The State's argument regarding "residual doubt" is unavailing. First, the State made no mention or argument regarding this theory below in either its answer to Mr. Dillbeck's fourth successive 3.851 motion or at the *Huff* hearing,[10] rendering the argument waived. *See Bryant v. State*, 901 So. 2d 810, 822 (Fla. 2005). In any event, the argument is meritless. When the prosecution goes beyond presenting the fact of a prior felony conviction itself and presents underlying facts of the prior crime in support of the prior felony aggravating circumstance, the defense is entitled to present rebuttal evidence mitigating against the aggravated nature of the prior felony. *See, e.g.*, *Miller v. State*, 926 So. 2d 1243, 1252-53 (Fla. 2006) (endorsing the strategy of presenting the "facts of prior murder and the mental health issues that [the defendant] was experiencing at the time" to reduce the defendant's "culpability" for the prior murder); *see also Andrus v. Texas*, 140 S. Ct. 1875, 1885 (2020); *Rompilla v. Beard*, 545 U.S. 374 (2005).[11]

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[10] *Huff v. State*, 622 So. 2d 982 (Fla. 1993).

[11] Neither case the State relies upon for this argument (AB at 42-43 n.16) disputed the commonsense proposition that a defendant can mitigate the aggravated nature of a prior felony. *See Lukehart v. State*, 70 So. 3d 503, 513 (Fla. 2011) ("To the extent that Lukehart argues that counsel was ineffective for failing to mitigate the prior violent felony aggravator during the penalty phase, Lukehart's claim is without merit. As explained above, trial counsel conducted a reasonable investigation into the prior violent felony aggravator."); *Melton v. State*, 949 So. 2d 994, 1006 (Fla. 2006) (finding trial counsel was not deficient because "a review of the original record from Melton's penalty phase in the [capital] trial makes abundantly clear that

As to prejudice, the State fails to acknowledge that, even without this evidence, four jurors voted to spare Mr. Dillbeck's life. The prior felony aggravator was a central focus of the State's penalty phase case against Mr. Dillbeck, and trial counsel had little at hand to rebut the State's case. Thus, Mr. Dillbeck's capital jury essentially only heard the State's version of events. Equipped with the newly discovered evidence casting doubt on Mr. Dillbeck's capacity, sanity, and competency at the time of the prior crime, Mr. Dillbeck would probably receive a sentence less than death.

In addition, under *Jones v. State*, 709 So. 2d 512, 526 (Fla. 1998), a postconviction court "must consider the effect of the newly discovered evidence, in addition to all of the admissible evidence that could be introduced at a new trial, and conduct a cumulative analysis of all of 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, 1187-88 (Fla. 2014) (quoting *Swafford v. State*, 125 So. 3d 760, 776 (Fla. 2013). This includes evidence "that was previously excluded as procedurally barred or presented in another postconviction proceeding[.]". *Hildwin*, 141 So. 3d at 1184 (citing *Swafford*, 125 So. 3d at 775-76, and *Lightbourne v. State*, 742 So. 2d 238, 247 (Fla. 1999)). Thus, the evidence and

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defense counsel attacked the validity of the [prior] conviction in front of the jury").

understanding of Mr. Dillbeck's debilitating condition of ND-PAE would be placed before a jury in addition to all of the other compelling mitigation. Based upon the cumulative effect of this significant mitigation evidence and the newly discovered evidence concerning the prior felony aggravator, Mr. Dillbeck would probably receive a sentence less than death.

### C. Mr. Dillbeck Should be Given the Opportunity to Make the *Johnson* Subclaim Cognizable Because It is Meritorious

As to the subclaim that the prior-felony aggravator was invalid under *Johnson v. Mississippi*, 486 U.S. 578 (1988), the State argues that the subclaim should be denied because the prior felony has not yet been invalidated and because the error was not prejudicial under an incorrect standard of review for *Johnson* claims (AB at 37-39).

The State's argument that this Court "must" reweigh the aggravating circumstances in determining prejudice of an invalid prior-felony aggravating circumstance is based on a misunderstanding of *McKinney v. Arizona*, 140 S. Ct. 702 (2020), and *Clemons v. Mississippi*, 494 U.S. 738 (1990) (AB 38-39). In *Clemons*, the Supreme Court held that when an appellate court analyzes the prejudice of an invalid aggravating circumstance, the court is free to choose between either reweighing the aggravation and mitigation or conducting harmless-error review. *Clemons*, 494 U.S. at 754 ("Nothing in this opinion is intended to convey the impression that state appellate courts are

required to or necessarily should engage in reweighing or harmless-error analysis when errors have occurred in a capital sentencing proceeding. Our holding is only that such procedures are constitutionally permissible."). *McKinney* did not change this holding. There, the Supreme Court was simply reviewing the application of *Clemons* reweighing, which the defendant argued should not be applied to *Ring*/*Hurst*[12] claims. *McKinney*, 140 S. Ct. at 709.

This Court has long held that *Johnson* violations are subject to review for harmlessness beyond a reasonable doubt. *See*, *e.g.*, *Armstrong v. State*, 862 So. 2d 705, 718 (Fla. 2003); *Rivera v. Dugger*, 629 So. 2d 105, 109 (Fla. 1993). In this case, the error was not harmless beyond a reasonable doubt and Mr. Dillbeck should be given the opportunity to seek to invalidate the prior conviction, which was obtained despite his diminished capacity, insanity, and incompetency. Even if this Court adopted *Clemons* reweighing, the error was not harmless given that four jurors voted to spare Mr. Dillbeck's life even without this newly discovered evidence.

The State does not defend the circuit court's decision to bar the *Johnson* claim as premature while simultaneously barring Mr. Dillbeck from being given the chance to seek to invalidate the 1979 conviction with the

[12] *Ring v. Arizona*, 536 U.S. 584 (2002); *Hurst v. Florida*, 577 U.S. 92 (2016).

newly discovered evidence. Here, in light of the evidence establishing Mr. Dillbeck's diminished capacity, insanity, and incompetency at the time of the plea, there is a reasonable probability he would go to trial because there is exceedingly strong evidence that he would be likely to succeed in, at the very least, being acquitted of premeditated first degree murder. Mr. Dillbeck should have the time and opportunity to litigate the newly discovered evidence in the Lee County case itself.

### D. Conclusion

Therefore, based on the newly discovered evidence calling Mr. Dillbeck's mental state at the time of the 1979 crime and conviction into question, this Court should remand the case for an evidentiary hearing on the newly discovered evidence claim. Additionally, this Court should stay Mr. Dillbeck's execution to provide him with an opportunity to invalidate the prior conviction in order to make the *Johnson* claim cognizable.

## III. EXECUTING MR. DILLBECK AFTER A THREE-DECADE-LONG DELAY UNDER SOLITARY CONFINEMENT WOULD VIOLATE THE EIGHTH AMENDMENT.

The State addresses Mr. Dillbeck's argument that his execution violates the Eighth Amendment due to his prolonged incarceration on death row for thirty-one years with the "kitchen sink" approach, enumerating multiple bases for this Court to deny his claim, some of which were advanced

before the circuit court and others which were not and are therefore defaulted.

Initially, the State argues that Mr. Dillbeck's claim has no basis or support in the law (AB at 11, 44, 45, 49, 50-51). However, the State misunderstands Mr. Dillbeck's claim. More than twenty-five years ago, the United States Supreme Court denied certiorari review to Clarence Lackey. *Lackey v. Texas*, 514 U.S. 1045 (1995). Justice Stevens, joined by Justice Breyer, in respecting the denial of certiorari, recognized that Lackey had raised a novel and important question as to whether his lengthy time on death row—17 years—was cruel and unusual thereby violating the Eighth Amendment. *Id.*

Justice Stevens noted the underpinnings of Lackey's claim stemmed from philosophical justifications for the death penalty recognized in *Gregg v. Georgia*: retribution and deterrence. 428 U.S. 153, 183 (1976) ("[t]he sanction imposed cannot be so totally without penological justification that it results in the gratuitous infliction of suffering"). Moreover, Justice Stevens commented:

> It is arguable that neither ground retains any force for prisoners who have spent some 17 years under a sentence of death. Such a delay, if it ever occurred, certainly would have been rare in 1789, and thus the practice of the Framers would not justify a denial of petitioner's claim. Moreover, after such an extended

> time, the acceptable state interest in retribution has arguably been satisfied by the severe punishment already inflicted.

*Lackey*, 514 U.S. at 1045. Justice Stevens went on to note that a century before, the Court had recognized "when a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it." 514 U.S. at 1045 (quoting *In re Medley*, 134 U.S. 160 (1890)). Thus, the Court in *In re Medley* recognized the type of super-added punishment of lengthy delays that Justice Gorsuch discussed in *Bucklew v. Precythe*, 139 S. Ct. 1112, 1124 (2019).

Since *Lackey*, condemned inmates have challenged the prolonged length and/or delay awaiting execution. Indeed, the State cites to numerous opinions which have addressed the merits of such a claim (AB at 52-53). Mr. Dillbeck's *Lackey* claim is grounded in the *In re Medley—Gregg—Lackey—Bucklew* line of opinions. For Mr. Dillbeck's argument, he focused upon the length of time on death row, a decade of which he was either warrant eligible by law or his appeals had stalled due to the systematic failures of Florida's postconviction death penalty system (IB at 61, 68-69). Neither the specific facts nor legal arguments outlined by Mr. Dillbeck are addressed by the State.

Instead, the State argues generalities in urging this Court to affirm the denial of relief. The State asserts that any delay is wholly attributable to Mr. Dillbeck (AB at 11, 44, 46, 53-56), never acknowledging the indisputable fact that his appeals and clemency had been completed for a decade or that the lengthy delay awaiting execution was historically considered cruel and unusual. Thus, unlike in *Porter v. Singletary*, Mr. Dillbeck "has proffered" "evidence to establish that delays in his case have been attributable to negligence or deliberate action of the state." 49 F.3d 1483, 1485 (11th Cir. 1995).[13]

The State also raises arguments for the first time, including that Mr. Dillbeck waived his claim due to the federal litigation in *Davis et al. v. Dixon*, 3:17-cv-820 (M.D. Fla.)[14], and that Florida's conformity clause precludes

[13] In *Lackey*, Justice Stevens contemplated the notion that delay could be attributed to defendants: "There may well be constitutional significance to the reasons for the various delays that have occurred in petitioner's case." 514 U.S. at 1045. Here, there can be no doubt that, at a minimum, the past decade of delay was caused by the State's "negligence or deliberate [in]action". *Id*.

[14] The only reference to *Davis* in the State's Response to Mr. Dillbeck's Rule 3.851 motion related to the argument that Mr. Dillbeck had not been housed in "solitary confinement":

> It is not accurate to refer to the conditions on Florida's death row as "solitary confinement." There was a recent settlement of a class action lawsuit in federal court to allow more interactions between the death row inmates themselves, such as creating a Dayroom, increasing their access to materials for their tablets,

consideration of Mr. Dillbeck's claim. These arguments are defaulted. They were not raised in the response to Mr. Dillbeck's Rule 3.851 motion (PCR5 926-929); they were not included as bases for denying the claim in the State's proposed order and therefore they were not adopted by the circuit court when the proposed order was adopted verbatim. *See Cannady v. State*, 620 So. 2d 165, 170 (Fla. 1993) (the contemporaneous objection rule applies not just to criminal defendants, but to the State as well); *see also State v. Fleming*, 61 So. 3d 399, 401 n.3 (Fla. 2011) (noting that the State did not preserve an argument because it failed to make it in the district court); *Bryant v. State*, 901 So. 2d 810, 822 (Fla. 2005) (holding "In order to preserve an issue for appeal, the issue 'must be presented to the lower court and the specific legal argument or grounds to be argued on appeal must be part of the presentation.'", quoting *Archer v. State*, 613 So. 3d 446, 448 (Fla. 1993)).

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> increasing their access to telephones, improving conditions for outdoor exercise, etc. *Davis v. Dixon,* 3: I 7-CV-820-MMH-PDB, 2022 WL 1267602 (M.D. Fla. Apr. 28, 2022).

(PCR5 929). The issue of whether Mr. Dillbeck's housing constituted "solitary confinement" is entirely distinct from the current waiver argument and not at all relevant to Mr. Dillbeck's argument concerning the length of time he has spent awaiting execution.

However, if the State's arguments were not defaulted, they are meritless. As to whether Mr. Dillbeck waived his claim based upon the recent settlement agreement on the *conditions of his confinement*, in that litigation, Mr. Dillbeck was seeking to have the *conditions of his confinement* changed due to the fact that they violated the Eighth Amendment. Here, Mr. Dillbeck argues that his *execution* violates the Eighth Amendment due to *the length of time he has been incarcerated*. The two are entirely different claims with different remedies. Further, nothing in the settlement agreement in *Davis* releases or prohibits making in other cases the arguments made in *Davis*, nor does it bar relitigation of issues relevant to *Davis*. The settlement simply released the claim itself (*i.e.*, the claim to change Mr. Dillbeck's conditions of confinement because they constituted cruel and unusual punishment, in violation of the Eighth Amendment).

As to the conformity clause, as Mr. Dillbeck has explained, this provision applies only to claims that the United States Supreme Court has squarely decided on the merits. *See Howell v. State*, 133 So. 3d 511, 516 (Fla. 2014). As the Supreme Court has never squarely decided the issue of whether a prolonged delay on death row violates the Eighth Amendment, there is no on-point precedent to which the Florida courts must conform in this case.

Mr. Dillbeck submits that he is entitled to relief.

## CONCLUSION

Based upon his arguments, Mr. Dillbeck respectfully requests that this Court remand his case for an evidentiary hearing, vacate his sentence of death, and/or grant a stay of execution so that he can litigate his *Johnson v. Mississippi* claim in an effective manner.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

**I HEREBY CERTIFY** that a true and correct copy of the foregoing pleading has been furnished by electronic service to all counsel of record on this 14th day of February 2023.

## CERTIFICATION OF TYPE SIZE AND STYLE

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

/s/ Linda McDermott
Linda McDermott