

ACTIVE WARRANT CASE No. SC23-531
EXECUTION SCHEDULED FOR MAY 3, 2023, AT 6:00 P.M.

In the
Florida Supreme Court

DARRYL BARWICK,

APPELLANT,

v.

STATE OF FLORIDA,

APPELLEE.

ON APPEAL FROM THE CIRCUIT COURT OF THE FOURTEENTH JUDICIAL
CIRCUIT IN AND FOR BAY COUNTY, FLORIDA

APPELLEE'S ANSWER BRIEF

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INTRODUCTION

Darryl Barwick raped M.D. at knifepoint in 1983. M.D. identified Barwick, and he pleaded guilty to sexual battery and burglary as a result. Less than eighty days after his release from prison, Barwick saw Rebecca Wendt sunbathing outside. He armed himself with a knife and gloves and followed her into her apartment.

Barwick stabbed Rebecca thirty-seven times, left defensive wounds on her hands, and later confessed to his family that he killed her because she saw his face. The State tied Barwick to the murder by his recorded confession, a semen stain, a witness who saw him go toward Rebecca's apartment and leave her apartment not long after, and shoeprints found in the apartment and outside. Barwick's jury convicted him of first-degree murder and unanimously recommended death. The sentencing court agreed. Barwick's conviction and death sentence have remained intact over thirty years.

Barwick's execution is scheduled for May 3, 2023. He appeals the circuit court's summary denial of his successive 3.851 motion in a last-minute attempt to deprive his victims of justice on the eve of his execution. This Court should affirm and bring true finality to the victims, the State of Florida, and Darryl Barwick.

STATEMENT REGARDING ORAL ARGUMENT

The State opposes Barwick's oral argument request. The issues on appeal are straightforward, and it is against this Court's policy to grant oral argument in successive capital appeal cases. See Fla. S. Ct. Internal Op. Proc. II.A.3.(a) (Successive capital postconviction appeals are treated "in the same manner as" cases "in which review is granted without oral argument."). This Court did not hold oral argument in the recent warrant appeals of Donald Dillbeck and Louis Gaskin. It should not hold oral argument for Barwick either.

CITATIONS

The single volume record below will be referred to as "R." and then the PDF page number, i.e., "(R:1.)." The direct-appeal record will be cited as DA followed by the volume and page number, i.e., (DA1:1.) The initial postconviction record will be cited as PCR followed by the volume and page number, i.e., (PCR1:1.) All other citations will be self-explanatory.

STATEMENT OF THE CASE AND FACTS

I. STATEMENT OF THE CASE

A grand jury indicted Barwick for first-degree murder, burglary while armed/with battery, attempted sexual battery, and armed

robbery. (DA11:241-42.) At his operative trial,¹ a jury found him guilty as charged and unanimously recommended death by a 12-0 vote. (DA21:602-04; DA25:960-63.) The court sentenced Barwick to die. (DA16:1281-86, 1306-07.)

This Court affirmed Barwick's direct appeal, the denial of his first postconviction motion, and the denial of his successive postconviction. *Barwick v. State*, 660 So. 2d 685, 690 (Fla. 1995) (direct appeal); *Barwick v. State*, 88 So. 3d 85, 93 & n.11 (Fla. 2011) (initial postconviction); *Barwick v. State*, 237 So. 3d 927, 928 (Fla. 2018) (successive postconviction raising claims under *Hurst v. State*, 202 So. 3d 40 (Fla. 2016)) It also denied Barwick's timely original habeas petition. *Barwick*, 88 So. 3d at 105-111.

Barwick's convictions and capital sentence withstood scrutiny in federal court as well. *Barwick v. Crews*, No. 5:12CV00159-RH, 2014 WL 1057088, at *1 (N.D. Fla. Mar. 19, 2014); *Barwick v. Sec'y, Fla. Dep't of Corr.*, 794 F.3d 1239, 1242 & n.3 (11th Cir. 2015).

Barwick's execution is scheduled for May 3, 2023. He timely

¹ Barwick's convictions and capital sentence from his first trial were reversed by this Court, and his second trial ended in a mistrial. See *Barwick v. Sec'y, Fla. Dep't of Corr.*, 794 F.3d 1239, 1242 & n.2, n.3 (11th Cir. 2015).

filed his post-warrant successive 3.851 motion, which the circuit court summarily denied. Barwick now seeks reversal from this Court.

II. STATEMENT OF THE FACTS

A. Guilt-Phase Evidence

The State tied Barwick to Rebecca Wendt's murder and the rest of the charges through his recorded confession, a semen stain, a witness who saw him go toward Rebecca's apartment and leave her apartment not long after, shoeprints found in the apartment and outside, and the fact that Rebecca's bottoms were pulled down in the back when she was found. (DASupp6:310-38; DA18:232-38, 256, 265-66, 272-73, 276-80; DA19:418-20.) Barwick's jury convicted him as charged in 65 minutes. (DA21:602-04.)

B. Penalty-Phase Evidence

The State provided evidence that Barwick pled guilty to a violent sexual battery and burglary in 1983 in support of the prior violent felony aggravator, and that Barwick confessed he killed the victim because she saw his face and he did not want to go back to prison in support of the avoid arrest aggravator.² (DA22:609-622, 630, 634.)

² Barwick murdered Rebecca 78 days after being released from prison for the prior sexual battery and burglary. (See DA24:808.)

Otherwise, the State rested on its guilt-phase evidence. (DA22:634.)

The mitigation presentation focused on the abusive situation Barwick grew up in and Dr. Walker's diagnosis of intermittent explosive disorder. (DA22:636-61; DA23:724-36; DA24:815-28, 856-61; DA25:872-88.) Barwick employed a strategy where he placed a significant amount of negative expert testimony before the jury to build credibility with them while also blaming the State for releasing Barwick from prison instead of having him committed for his sexual issues. (DA22:672, 674; DA25:939-45, 949, 952-54.)

The jury unanimously recommended death after deliberating for 15 minutes. (DA25:960-63.) The circuit court followed the jury's recommendation after finding six aggravators: (1) prior violent felony (proven by the sexual assault and burglary convictions related to M.D); (2) murder committed during the course of a felony (proven by jury's verdict convicting Barwick of attempted sexual battery); (3) avoid arrest (proven by the defendant's confession to his family that he killed the victim because she saw his face and he did not want to go back to prison); (4) murder committed for pecuniary gain (proven by defendant's confession that he was trying to rob the victim and went through her wallet); (5) heinous, atrocious, or cruel (HAC)

(proven by the number of stab wound, defensive wounds, and evidence Rebecca fought for her life for several minutes); (6) cold, calculated, and premeditated (CCP) (proven by evidence the defendant selected his victim, planned the crime by arming himself with gloves, a knife, and a mask).³ (DA16:1281-86, 1306-07.)

C. Relevant Direct Appeal Issue

Barwick argued on direct appeal that his capital sentence was disproportionate to the murder because he “did not plan the murder. Barwick, suffering from mental and emotional impairment, lost control in a panic reaction to the stress of the circumstances.” *Barwick v. State*, SC60-80446, Brief of Appellant filed July 7, 1994, at 69. Barwick further argued that his personality disorder with schizoid characteristics, mental disorders, the physical and emotional abuse he suffered at his father’s hands, rendered his capital sentence disproportionate. (*Id.* at 70.)

This Court found Barwick’s capital sentence proportionate after considering the significant, valid aggravators. *Barwick*, 660 So. 2d at

³ This Court later struck the CCP aggravator but affirmed Barwick’s sentence and left all other aggravators intact. *Barwick v. State*, 660 So. 2d 685, 697 (Fla. 1995).

697. Barwick did not pursue this issue in his petition for certiorari before the United States Supreme Court. *See Barwick v. Florida*, No. 95- 6964, petition filed December 4,1995 at 2.

D. Relevant Initial Postconviction Issues

Barwick's operative amended initial 3.851 motion raised two relevant claims: (1) an exemption-from-execution claim under *Atkins v. Virginia*, 536 U.S. 304 (2002) (R:728-31) and (2) an exemption-from-execution claim that *Roper v. Simmons*, 543 U.S. 551 (2005) should be extended to him since he was a "brain damaged youthful offender" (R:816-825).

Barwick's exemption-from-execution claim under *Atkins* asserted his IQ was under 75, he functioned at a subaverage intelligence level, he had poor grades in school, he significantly underachieved in his classes, he was an extremely slow learner, he had poor communication skills, he had poor personal and self-care skills, he had a significant lack of maturity, and these deficits were all present while Barwick was a juvenile. (R:728-30.) Barwick argued the State could not legally execute him under *Atkins*. (R:731.)

The circuit court summarily denied Barwick's *Atkins'* exemption-from-execution claim as procedurally barred and

meritless because the record showed Barwick's IQ was between 90-103. (R:831-32.) Barwick raised a variant of this claim in his habeas petition instead of on appeal. *Barwick v. State*, 88 So. 3d 85, 93 n.11 & n.12, 105 (Fla. 2011) (noting Barwick claimed that as "as a brain-damaged, mentally retarded person with a mental and emotional age less than eighteen years, Barwick's execution would be unconstitutional"). This Court summarily rejected the intellectual disability portion of this claim without comment. *See id.* at 105-11.

Barwick's extension-of-*Roper* claim asserted his capital sentence violated the evolving standards of decency and *Roper* because of his low mental age, brain damage, neurological handicaps, and youth. (R:816-25.) Barwick explicitly argued that the rationale of *Roper* applied equally to him in light of his deficits, and that his capital sentence was not proportional under the Eighth Amendment. (R:816-25.)

The circuit court declined to extend *Roper* to Barwick and summarily denied this claim. (R:833.) Barwick raised this claim in his habeas petition instead of on appeal. *Barwick*, 88 So. 3d at 93 n.11 & n.12, 105. This Court held the argument was procedurally barred because Barwick improperly raised it in a habeas petition

instead of on appeal from the denial of the claim. *Barwick*, 88 So. 3d at 106. Alternatively, this Court refused to extend *Roper*'s prohibition to Barwick, who was 19½ years old when he murdered Rebecca. *Id.*

Barwick next advanced his extension-of-*Roper* claim before the Eleventh Circuit, arguing “he presented expert psychological evidence at his post-conviction proceeding that his mental functioning was equivalent to that of an ordinary 11-to-13-year-old person, and his intellectual functioning equivalent to that of an ordinary 12-to-14-year-old person” and was no different from the individuals the Supreme Court exempted from execution in *Roper*. *Barwick*, 794 F.3d at 1257.

The Eleventh Circuit adopted the district court's rationale in rejecting this claim:

In *Roper*, the United States Supreme Court Case drew a bright line—age 18. The Court squarely held that executing a defendant for committing a crime before age 18 is always unconstitutional, no matter how mature the defendant. A reasonable application of *Roper* is that the bright line works the other way, too—executing an individual for committing a crime after age 18 is not, just because of age, unconstitutional. Mental or emotional age may be a mitigating factor, but it does not necessarily preclude the death penalty.

Barwick, 794 F.3d at 1258–59.

E. Expert Analyses of Barwick

Eight experts have testified about Barwick's mental state, disorders, etc., over the years and come to various conclusions.

Dr. Annis examined Barwick six months after the murder and determined that he had an average IQ, was not suffering from any major affective disorder, was not schizophrenic, was not insane during the murder, suffered from no mental defect or disease, was not psychotic, was not bipolar, did not suffer from delusional ideation, had symptoms that potentially signaled organic brain damage, and was uninterested in treatment while in prison. (DA23:674-724.)

Dr. Loiry examined Barwick in October 1990 and found nothing of psychological significance. (DA23:737-41.)

Dr. McLarin examined Barwick six months after Rebecca's murder and determined he had a full-scale IQ score of 103, would exaggerate his issues at times, was not psychotic but there was some evidence of brain dysfunction, had antisocial personality disorder, and did not have bipolar disorder. (DA23:742-769.)

James Beller examined Barwick six months after Rebecca's murder and determined he had a fairly serious left temporal lobe

deficit that most likely manifested in a learning disability (DA24:778-81), had a less-serious right temporal lobe brain impairment, (DA24:781), had significant memory problems and a severe learning disability in language processing, was a psychopathic sexual deviant and there was evidence of psychopathic performance from his middle school testing, was not insane during the murder, had some schizoid behavioral traits, and was obsessive compulsive. (DA24:774-803.) Beller explained that deficits on both sides of Barwick's brain would not cause behavioral problems greater than a learning disability. (DA24:778-82).

Dr. Warriner examined Barwick when he was thirteen, again in 1983 after the sexual battery of M.D., and again in 1986 after Rebecca's murder. Dr. Warriner determined Barwick was a dangerous, psychopathic sexual deviant, that Barwick's psychopathic sexual deviancy would escalate into increasing amounts of violence in sexual crimes, that Barwick had normal psychological functioning, the chance of Barwick reoffending was incredibly high. (DA24:831-46.)

Dr. Hord examined Barwick in 1986 and determined he was not insane during the murder, had a low-average verbal IQ of 90, had

some schizoid components, was very disturbed and unstable, and had anxiety when it came to male authority figures and sexuality. (DA24:848-52.)

Dr. Walker examined Barwick in June 1992 and determined he suffered from intermittent explosive disorder, manic bipolar disorder, and obsessive-compulsive disorder, had poor impulse control, blacked out after “some blows” between him and the victim and was unable to stop himself, once Barwick wanted to have sex with someone it would be very hard for him to stop himself. (DA25:872-88.) Dr. Walker also noted that dissociative episodes were common with abuse victims like Barwick, abuse victims often identify with their abuser, and mixing pain with sexual gratification is often a sign of an abused individual. (DA25:881.)

Dr. Eisenstein, a neuropsychologist who examined Barwick in 2000 and 2002, testified during Barwick’s initial postconviction proceedings in 2006. (PCR22:2967, 2977-79, 2982-83, 2989.) Regarding Barwick’s mental state, IQ, and diagnoses, Dr. Eisenstein testified: (1) Barwick was not intellectually disabled, had a full-scale IQ score of 96 in 2000, two full-scale IQ scores of 103 in 1986, and a verbal IQ score of 79 when he was 13 (PCR22:2991-92, 3028); (2) the

difference between Barwick's verbal and performance IQ scores was clinically significant and raises concerns about neurological impairment and organic brain abnormalities (PCR22:2992-94); (3) Barwick spelled at a fourth grade level, had the arithmetic skills of a seventh grader, was unable to read until the tenth grade, had learning disabilities, and had poor academic performance in school (PCR22:2994-95, 3048-49); (4) Barwick had a "left brain impairment" and a pattern of neurological deficits (PCR22:2999-3001, 3015, 3039-44); (5) Barwick demonstrated inflexible "thinking processes" consistent with brain damage to his frontal lobe (PCR22:3006-07, 3056-59); (6) Barwick had no memory of the first twelve years of his life (PCR22:3022-23); (7) Barwick's IQ at age four was tested at a 16 because of his speech difficulty and the examiners could not evaluate him, but he did "much better approximately six months later" (PCR22:3036); (8) Barwick had intermittent explosive disorder (PCR22:3049-54); (9) Barwick's lack of disciplinary history in the department of corrections records went against an antisocial personality disorder diagnosis (PCR22:3055); (10) Barwick had a mental age of between 11 and 14 (PCR22:3063-64); (11) Barwick's intellectual deficiencies and brain damage made him react differently

from his siblings. (PCR22:3068.)

Dr. Eisenstein also mentioned several aspects of Barwick's family life, including: (1) the emotional and physical abuse Barwick suffered from his father (PCR22:3018-25, 3031-34; (2) that his mother was on birth control and did not know she was pregnant until the third trimester and fell down the stairs at one point (PCR22:3019-20); (3) Barwick saw his father rape his mother and be abusive to her (PCR22:3025-26); (4) Barwick and a sister discovered pornography as children, began to act it out, and were beaten for that (PCR22:3077-78); (5) Barwick was the scapegoat in the family as the youngest (PCR22:3046).

F. Barwick's State-Provided Postconviction Counsel History

Barwick was initially represented by the Capital Collateral Representative in 1997. (R:877-78.) John Jackson of the Capital Collateral Regional Counsel – Northern Region (CCRC-N) represented starting in December 1998. (R:879-80.) D. Todd Doss was appointed as Barwick's registry counsel in July 2003. (R:882-83.) The court allowed Mr. Doss to withdraw in September 2012 and ordered him to transfer the "records and files in the above-styled cause" to Barwick's new postconviction counsel, Linda McDermott. (R:884-85.) The court

granted Ms. McDermott's motion to withdraw as state postconviction counsel in March 2020 and appointed CCRC-N to represent Barwick. (R:886-87.) CCRC-N counsel Karin Moore and Drew Sena represented Barwick below. (E.g., R:888.) Former state postconviction counsel Ms. McDermott now represents Barwick in federal court and actively communicates with CCRC-N. (E.g., R:612.)

G. Post-Warrant 3.851 Motion and Motion to Stay/Amend

Barwick filed his post-warrant 3.851 motion on April 8, 2023 raising three (really five) claims: (1) the truncated warrant schedule violated his right to due process and effective assistance of postconviction counsel; (2) *Roper's* prohibition should be extended to those under 21 (including him); and (3) the principles in the United States Supreme Court's exemption-from-execution cases apply to him, and it would violate the equal protection clause not to extend those decisions to him. (R:438-62.) Barwick also filed a motion to stay his execution and for leave to amend it with an unspecified claim. (R:483-89.)

H. Post-Warrant 3.851 Appendix

Barwick provided an appendix with several exhibits along with his successive 3.851 motion. (R:383-437.) The first relevant

attachment was a declaration by Dr. Crown⁴ that Barwick (1) had organic brain damage on both sides and the front of his brain; (2) was unable to engage in language-based critical thinking based on his brain damage; (3) had essentially no memories from before 10; (4) was unable to read until the tenth grade; (5) had adaptive deficits that rendered him socially inept, unable to engage in sound judgment, and unable to understand facial expressions and tone; (6) had a mental age of between 11 at 13 at the time of his trial; (7) suffered from parental abuse; (8) was utilized as the family scapegoat since he was the youngest; (9) Barwick probably had a neurodevelopmental cognitive disorder in his adolescence; (10) there are new technologies that have only become accepted in the “past two or three years” that could provide additional insight into Barwick’s impairments. (R:391-94.)

Barwick next attached a declaration from Dr. Holmes finding: (1) Barwick had a significant speech and language delay that led to

⁴ Dr. Crown’s work in death penalty cases is quite familiar to courts in the Eleventh Circuit. *See Tharpe v. Warden*, 834 F.3d 1323, 1330 n.10 (11th Cir. 2016) (collecting death penalty cases where Dr. Crown provided information and noting both this Court and the Eleventh Circuit had previously found his work unconvincing).

academic and social difficulties beginning at age 4; (2) there was a clinically significant difference between Barwick's intelligence and learning; (3) Barwick lacked social awareness and the ability to read emotional/facial expressions; (4) Dr. Eisenstein's 2000 testing found definitive left and right brain impairment, a language impairment, memory deficits, and rigidity of thought; (5) the penalty-phase testimony that Barwick did not suffer from a mental disorder/disease was not surprising given the technology available at the time; (6) there is a strong likelihood that Barwick has a global neurodevelopmental disorder that was not diagnosable at the time of trial; (7) personality disorders can only be diagnosed if the pattern of conduct is not better explained by a another mental disorder; (8) Barwick likely has a neurodevelopmental disorder instead of a personality disorder; (9) structured settings generally help individuals with neurodevelopmental disorders and Barwick's lack of disciplinary issues indicate he has such a disorder; (10) Barwick's likely neurodevelopmental disorder is a major mental illness. (R:398-400.)

Barwick attached a declaration from Dr. Steinberg stating: (1) over the "past two decades" there is significant scientific evidence

that individuals under 21 engage in riskier behavior with less thought about the future; (2) developmental science does not support the bright-line cutoff in criminal law deeming 18-year-olds adults. (R:406-25.)

In a similar vein, Barwick attached an August 2022 American Psychological Association (APA) Resolution against sentencing first-degree murderers under 21 to death. This resolution relied on sources published between 2008 and 2022. (R:427-31.)

Finally, Barwick attached an affidavit detailing Barwick's lack of disciplinary violations and accomplishments while in prison. (R:433-36.)

Barwick also filed a motion to stay his execution and for leave to amend it with an unspecified claim. (R:483-89.)

I. *Huff* Hearing

The lower court held a *Huff*⁵ hearing on the post-warrant 3.851 motion, and the leave to amend and stay requests. (R:556-618.)

J. Orders Denying Relief

The postconviction court entered an order denying Barwick

⁵ *Huff v. State*, 622 So. 2d 982 (Fla. 1993).

leave to amend and a stay of execution on April 10, 2023, and another order summarily denying Barwick's post-warrant 3.851 motion on April 13, 2023. (R: 543-45, 619-33.)

Barwick timely appealed to this Court.

SUMMARY OF THE ARGUMENT

Issue I: Due Process/Effective Postconviction Counsel Right

The postconviction court correctly rejected Barwick's claim that the thirty-day warrant schedule denies him due process. Barwick has been represented by state-paid postconviction counsel since 1997 and has been on notice of his warrant eligibility since 2016. Barwick has not identified any time he has been without counsel or deprived notice and an opportunity to be heard. This Court found no due process violation in more compelling circumstances than these. Barwick's due process claim was properly, summarily denied.

Likewise, the circuit court correctly rejected Barwick's claim that the short schedule violated his statutory right to effective postconviction counsel. Barwick has no right to *effective* postconviction counsel under a legion of holdings from this Court and the plain text of several Florida statutes. Moreover, the State provided Barwick with postconviction counsel for decades to litigate whatever issues he desires. This claim was properly, summarily denied.

Issue II: *Roper* Extension to Individuals Under 21

The postconviction court correctly rejected Barwick's attempt to expand the Supreme Court's decision in *Roper* to individuals under 21 for four reasons. First, this claim is procedurally barred since it was previously rejected by this Court. Second, this claim is untimely since it does not rely on newly discovered evidence. The APA resolution—Barwick's sole proffered new "evidence"—is categorically not newly discovered *evidence*. Third, this Court has continually refused to expand *Roper*, and lacks authority to do so under a conformity clause in the Florida Constitution. And fourth, there is no reason to extend *Roper* to individuals under 21.

Issue III: Exemption from Execution due to Psychological Disorders, Cognitive Impairments, and Mental Age.

The postconviction court correctly rejected Barwick's claim that his disorders, impairments, and low mental age exempt him from execution for four reasons. First, this claim is procedurally barred because this Court decided it (or a variation of it) during the initial postconviction appeal. To the extent the claim is different, it is barred because it could have been raised before now. Second, the claim is untimely because it is based on facts long-known to Barwick and no

newly discovered evidence. Third, the claim is meritless. This Court has repeatedly rejected attempts to expand the Supreme Court's exemption-from-execution decisions beyond their specific confines and lacks authority to do so. Fourth, there is no reason to extend the Supreme Court's exemption-from-execution cases to Barwick.

This Court should affirm on all issues.

STANDARD OF REVIEW

This Court reviews the summary denial of a post-warrant 3.851 motion de novo. *Dillbeck v. State*, No. SC23-190, 2023 WL 2027567, at *2 (Fla. Feb. 16, 2023) *cert. denied*, *Dillbeck v. Florida*, 143 S. Ct. 856 (2023). It is proper for a postconviction court to summarily deny postconviction claims that are untimely, not retroactive, procedurally barred, not cognizable, or meritless as a matter of law. *Mungin v. State*, 320 So. 3d 624, 626 (Fla. 2020) (affirming summary denial of an untimely claim); *Bogle v. State*, 288 So. 3d 1065, 1069 (Fla. 2019) (affirming summary denial of a successive postconviction claim on non-retroactivity grounds); *Morris v. State*, 317 So. 3d 1054, 1071 (Fla. 2021) (holding a court may summarily deny a procedurally barred claim); *Mann v. State*, 112 So. 3d 1158, 1162 (Fla. 2013) (holding the circuit court properly summarily denied relief on purely legal claims). This standard of review applies to all of Barwick's claims on appeal.

ARGUMENT

Seventy-eight days after being released from prison for a violent sexual battery and armed burglary, Darryl Barwick armed himself with a knife from his home and murdered Rebecca Wendt in her apartment on March 31, 1986, by stabbing her about thirty-seven times. He told his family that he was trying to rob her and killed her because she saw his face and he did not want to go back to prison. Governor Ron DeSantis signed Barwick's death warrant on April 3, 2023. Barwick's execution is scheduled for May 3, 2023.

Barwick appeals to this Court raising three issues surrounding the lower court's summary denial of his three post-warrant 3.851 claims. The State will address each of Barwick's issues in turn, but none of them warrant relief. The simple truth is that Barwick has been living on borrowed time for decades with his victims paying the price and waiting for justice. *See* Art. I, § 16(b)(10)b., Fla. Const. There is no more time left for Barwick to borrow. It is time for justice, not delay.

I. THE POSTCONVICTION COURT CORRECTLY, SUMMARILY REJECTED BARWICK'S DUE PROCESS AND RIGHT TO EFFECTIVE POSTCONVICTION COUNSEL CLAIMS.

Issues & Ruling Below

Barwick's first issue contests the lower court's summary denial of his due process and right to effective postconviction counsel claims based on the 30-day warrant schedule. The circuit court summarily denied this claim for the following reasons: (1) Barwick received due process; (2) Barwick has no right to effective postconviction counsel and (3) Barwick has received better than effective representation in this warrant proceeding. (R:623-26.)

Merits

Barwick seeks reversal of the lower court's order summarily denying his claims that the 30-day warrant schedule violated two separate rights: (1) his state and federal constitutional right to due process and (2) his statutory right to effective postconviction counsel.

It is worth noting at the outset that both of Barwick's first claims emphasize the perceived unfairness in the situation he finds himself because he murdered Rebecca by stabbing her thirty-seven times almost forty years ago. But while Barwick has had decades to prepare for this moment, his victims have had to wait decades for justice.

Their rights are no less important than Barwick's under our Constitution, which requires protection of the victims' rights in "a manner no less vigorous than protections afforded to criminal defendants," and gives victims the right "proceedings free from unreasonable delay, and to a prompt and final conclusion of the case and any related postjudgment proceedings." Art. I, § 16(b)(10)b., Fla. Const.

Barwick's dual claims about the 30-day warrant schedule were properly summarily denied considering the decades he has had to litigate his case while the victims awaited the justice and finality they are entitled to under our Constitution.

For analytical clarity, the State will analyze the merits of Barwick's first issue in two parts. The State will first explain why Barwick's due process rights were not violated by the 30-day warrant schedule, and then why his nonexistent right to effective postconviction counsel did not warrant relief below.

A. Barwick's Due Process Claims Are Legally Meritless Because He Has Never Been Denied Notice or an Opportunity to Be Heard and Been Continuously Represented by State-Paid Counsel since 1997.

The due process provisions of the federal and Florida Constitution provide that the State may not “deprive any person of “life, liberty, or property, without due process of law.” U.S. Const. amend. XIV, § 1; Art. I, § 9, Fla. Const. “The essence of due process is that fair notice and a reasonable opportunity to be heard must be given to interested parties before judgment is rendered.” *Scull v. State*, 569 So. 2d 1251, 1252 (Fla. 1990). The United States Supreme Court has explicitly held that due process does not even require states to provide capital defendants with postconviction counsel. See *Pennsylvania v. Finley*, 481 U.S. 551, 555-58 (1987) (holding neither due process nor meaningful access to courts require states to provide postconviction counsel); *Murray v. Giarratano*, 492 U.S. 1, 7-10 (1989) (extending *Finley*'s holding to capital defendants).

Even a short time to prepare does not necessarily violate due process. *Lindsey v. Normet*, 405 U.S. 56, 64-69 (1972) (holding requirement to proceed to civil trial in six days after complaint's service and limitation on triable issues did not violate due process);

Ungar v. Sarafite, 376 U.S. 575, 581, 588-91 (1964) (holding a criminal contempt trial did not violate due process despite the fact the defendant had only five days to prepare); *Avery v. Alabama*, 308 U.S. 444, 447-53 (1940) (capital defendant convicted and sentenced to death was not denied due process/his right to counsel despite counsel having only three days to prepare for trial).⁶ *Cf. Powell v. Alabama*, 287 U.S. 45, 53-73 (1932) (holding several capital defendants' due process rights were violated by the court appointing all members of the Alabama bar to defend them and later, the day of trial, appointing a lawyer from Tennessee to defend them).

This Court recently held that a capital defendant who lacked postconviction counsel for ten years, and initially lacked counsel when his warrant was signed, was not denied due process because he was represented by counsel at each postconviction stage. *Asay v. State*, 210 So. 3d 1, 27-29 (Fla. 2016).⁷

⁶ The Supreme Court later cited *Avery* for the premise that “*not every denial of a request for more time that violates due process.*” See *Ungar*, 376 U.S. at 589 (emphasis added). But the State notes that *Avery*'s due process holding is not clear from the face of the opinion.

⁷ In *Asay*, for reasons unrelated to the lack of counsel until after the warrant was signed, this Court stayed a warrant case for less than ten months. See *id.* at 29 (lifting a stay entered March 2, 2016, on

Asay argued his due process rights were violated because he had lacked postconviction counsel for the preceding ten years and only obtained counsel after his death warrant was signed. *Id.* This Court noted first that due process requires notice and an opportunity to be heard. *Id.* at 27. The Court then found Asay never identified any proceeding where he was denied notice and an opportunity to be heard, and instead seemed to suggest a due process right to have postconviction counsel “actively investigate his case for the preceding ten years and continuously bring forth new arguments.” *Id.* at 27-28.

This Court ultimately held Asay received due process because he was “represented by counsel at every stage of his postconviction proceedings.” *Id.* at 28. That was true even when his death warrant was signed because the trial court immediately “appointed new registry counsel” to represent Asay during the warrant. *Id.* Thus, this Court held “his due process argument” failed. *Id.*

Barwick’s claim that the truncated warrant schedule violates due process fails as a matter of law and was correctly summarily

December 22, 2016). The stay was granted to deal with a claim that *Hurst v. Florida*, 136 S. Ct. 616 (2016) affected Asay’s sentence. See SC16-233, motion for stay filed February 15, 2016, and order granting stay issued March 2, 2016.

denied. The correct analysis must begin with the fact that federal due process did not even require the State to provide Barwick with postconviction counsel. *See Murray*, 492 U.S. 1, 7-10. It is therefore impossible for federal due process to require *effective* counsel, a step beyond providing counsel to begin with.

The State of Florida has gone well beyond the minimal requirements of postconviction due process by providing Barwick with continuous postconviction representation since 1997. (R:877-888.) *See* § 27.711(7), Fla. Stat. (requiring an “attorney who withdraws” from representing a capital defendant to “deliver all files, notes, documents, and research to the successor attorney within 15 days after notice from the successor attorney”). CCRC-N has been representing Barwick for over three years and has been able to speak with former state postconviction (and present federal habeas) counsel Linda McDermott. (R:612, 884-888.) The State also provided Barwick with notice of his death-warrant eligibility in 2016. *See* SC60-80446, notice filed April 28, 2016.⁸ Barwick has had about twenty-six years

⁸ *See* § 922.052, Fla. Stat.; Fla. R. Crim. P. 3.851(j).

with state-paid postconviction counsel to prepare for this warrant. Not thirty days. Barwick was not deprived federal due process.

For the same reasons, he was not denied due process under the Florida Constitution. *See Asay*, 210 So. 3d at 27-29 (rejecting a due process claim even though the defendant lacked postconviction counsel for ten years because the defendant had counsel at every stage of the postconviction process and counsel was appointed immediately after the death warrant was signed).

In short, under both Florida and federal law, Barwick suffered no due process violation. By providing postconviction counsel since 1997, and notice of his warrant eligibility since 2016, the State has provided Barwick significantly more than due process. Barwick can hardly claim his due process rights were violated by the 30-day warrant schedule when he had decades more time to prepare than our Constitution currently envisions for the completion of *all* postconviction proceedings. *See Fla. Const. art. I, § 16(b)(10)b.* (“All state-level appeals and collateral attacks on any judgment must be complete . . . within five years from the date of appeal in capital cases.”). This Court should affirm. *See Mann*, 112 So. 3d at 1161-63,

B. Barwick's Statutory Right to *Effective Assistance of Postconviction Counsel* Was Not Violated Because He has No Such Right under Florida Law.

While capital defendants have no constitutional right to postconviction counsel at all, *Murray v. Giaratano*, 492 U.S. 1, 7-10 (1989), the Florida Legislature has graciously provided capital defendants with a *statutory* right to postconviction counsel as part of its effort to reduce delays in capital cases, § 27.7001, Fla. Stat. But the Legislature explicitly qualified this right to ensure capital defendants cannot use it to delay their cases in violation of the Legislature's intent. § 27.7002(1), Fla. Stat. (capital defendants may not "challenge in any form or manner the adequacy of the collateral representation provided"); § 27.711(10), Fla. Stat. ("An action taken by an attorney who represents a capital defendant in postconviction capital collateral proceedings may not be the basis for a claim of ineffective assistance of counsel.").

This Court has repeatedly, recently, and without exception held that "ineffective assistance of postconviction counsel" claims are not viable "under rule 3.851." *E.g.*, *Sweet v. State*, 293 So. 3d 448, 453 (Fla. 2020); *Zack v. State*, 911 So. 2d 1190, 1203 (Fla. 2005).

Indeed, this Court rejected a much more persuasive version of Barwick's right-to-effective-postconviction-counsel claim in *Asay*. *Asay* argued the appointment of postconviction counsel *after his warrant was signed* and lack of records violated his right to effective postconviction counsel. *Asay*, 210 So. 3d at 28. This Court rejected the right-to-effective-postconviction-counsel claim based on its long-standing holdings that defendants are not entitled to the effective assistance of collateral counsel. *Id.* at 28. This Court also disagreed that *Spalding v. Dugger*, 526 So. 2d 71, 72 (Fla. 1988) created a right to effective postconviction counsel in Florida. Instead, all *Spalding* required was that "a defendant be represented by an attorney during postconviction proceedings." *Id.* at 28 (citing *Spalding*, 526 So. 2d at 72). This Court finally held that the lack of available records did not alter its analysis because the agencies provided the defendant with all available records. *Id.* at 28-29.

Like *Asay*, Barwick substantially overreads this Court's opinion in *Spalding* to support his effective-assistance claim. In *Spalding*, the Office of the Capital Collateral Representative (CCR) was representing five individuals under active death warrants. *Spalding*, 526 So. 2d at 71. Four other active death warrants were also pending, meaning

there were nine simultaneous death warrants. *Id.* The head of CCR *argued* he was unable to provide his clients with “postconviction due process” because his budget was completely depleted. *Id.* at 72. CCR asked this Court to enter stays of execution unless funds were allocated from elsewhere. *Id.*

This Court ultimately held it lacked authority to grant relief, and that CCR’s arguments had to be “individually addressed by the trial court in each case.” *Id.* at 73. Before reaching this holding, however, the Court made a dictum statement about capital defendants having a statutory right to “effective legal representation.” *Id.* at 72. The Court also noted that the Fourth Circuit—in a case reversed by the Supreme Court a year after *Spalding* issued—had held states were constitutionally required to provide postconviction counsel. *Id.* at 72 (citing *Giarratano v. Murray*, 847 F.2d 1118, 1121 (4th Cir. 1988), *rev’d*, *Murray v. Giarratano*, 492 U.S. 1, 7-10 (1989).)

The statement about “effective” postconviction counsel and notation about the Fourth Circuit’s later-overruled holding are nothing more than nonbinding dictum, if even that. *See Puryear v. State*, 810 So. 2d 901, 905 (Fla. 2002) (holding a comment by this

Court was not “necessary for the holding and constituted dicta”). As the Supreme Court explained long ago:

It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they [go] beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.

Myers v. United States, 272 U.S. 52, 142 (1926) (quoting *Cohens v. Virginia*, 19 U.S. 264, 399-400 (1821).)

The statement about effective postconviction counsel and notation about the Fourth Circuit’s incorrect decision were not necessary to this Court’s holding that it lacked the power to adjudicate the dispute in the first instance. *Spalding*, 526 So. 2d at 71-73. The statement and citation were, at absolute most, nonbinding dictum that cannot be deemed remotely persuasive since the Supreme Court later overruled the Fourth Circuit, and the statement about effective representation has been countermanded by an express holding from this Court. See *Asay*, 210 So. 3d at 28 (citing

Spalding, 526 So. 2d at 72); *Puryear*, 810 So. 2d at 905 (holdings control over dictum).

This Court’s decision in *Peede v. State*, 748 So. 2d 253, 256 (Fla. 1999) does not help Barwick either. There, in footnote 5, this Court expressed concerns about the representation afforded to Peede and asked the trial court to ensure the defendant received “effective representation” on remand. *Id.* at 256 n.5. This Court did not grant any relief in *Peede* on the basis of counsel’s ineffectiveness, and its expression of concern fits exactly within the statutory parameters. *Id.* (citing the prior version of § 27.711(12) Fla. Stat., which requires courts to monitor postconviction counsel). In other words, the statement about “effective” representation in *Peede* was simply dictum, as this Court’s decision in *Asay* later made clear.

Putting precedent/dictum aside for a moment, this Court has made clear that when it is “bound to a higher legal authority,” including a “statute,” it must apply “the law correctly to the case” before it. *State v. Poole*, 297 So. 3d 487, 507 (Fla. 2020). The Florida Legislature has taken great pains to ensure capital defendants may not utilize their statutory right to counsel to thwart the Legislature’s intent to reduce capital-case delays. See §§ 27.7001, 27.7002(1),

27.711(10), Fla. Stats. Holding capital postconviction defendants have an enforceable right to effective representation would be contrary to the text of at least two statutes and the legislative intent embodied in a third. See §§ 27.7001, 27.7002(1), 27.711(10), Fla. Stats. This Court is obligated to enforce the Legislature's prohibition on Barwick utilizing his right to postconviction counsel to delay this case further.

Barwick's right-to-*effective*-postconviction-counsel claim fails as a matter of law. His claim was properly summarily denied without a stay or evidentiary hearing, and this Court should affirm.

II. THE POSTCONVICTION COURT CORRECTLY, SUMMARILY DENIED BARWICK'S CLAIM SEEKING TO EXPAND THE PROHIBITION ON EXECUTING INDIVIDUALS WHO COMMIT FIRST-DEGREE MURDER WHILE UNDER 18 TO UNDER 21.

Issue & Ruling Below

Barwick's next issue contests the lower court's summary denial of his claim he was exempt from execution under an extension of the current Eighth Amendment prohibition on the execution of individuals who were under 18 years old when they committed first-degree murder to individuals under 21 years old. *Cf. Roper*, 543 U.S. at 578-79 (holding the Eighth Amendment prohibits the execution of defendants who committed a first-degree murder while under 18).

The circuit court summarily denied this claim as: (1) procedurally barred since the claim was previously raised and rejected; (2) untimely since the resolution Barwick relied on did not constitute newly discovered evidence; and (3) meritless since Barwick was over 18 years old when he killed Rebecca. (R:627-28.)

Merits

Barwick was 19½ years old when he murdered Rebecca. *Barwick*, 88 So. 3d at 106. The circuit court correctly, summarily rejected Barwick's attempt to expand the categorical exemption from *Roper* to him for four reasons. First, this issue is procedurally barred because this Court addressed and rejected it while deciding Barwick's first habeas petition. Second, it is untimely since Barwick offers no true newly discovered evidence in support of it. Third, this Court has repeatedly rejected attempts to expand *Roper* and is powerless to do so under the Florida Constitution. Finally, *Roper's* analysis does not support extending its categorical prohibition on the death penalty for first-degree murders under 18 to under 21.

A. Barwick's Extension-of-Roper Claim Is Procedurally Barred Because It Was Previously Raised and Rejected by This Court.

Barwick's extension-of-*Roper* claim is procedurally barred because it was previously raised and rejected. Procedural bars apply even to exemption-from-execution claims. *Dillbeck v. State*, No. SC23-190, 2023 WL 2027567, at *3 (Fla. Feb. 16, 2023) (holding this Court's precedent "flatly refutes Dillbeck's contention that no time limits apply to categorical exemption claims"), *cert. denied*, *Dillbeck v. Florida*, 143 S. Ct. 856 (2023); *Branch v. State*, 236 So. 3d 981, 986 (Fla. 2018) (holding an extension-of-*Roper* claim was procedurally barred in an active warrant case because it could have been raised previously). Capital defendants are procedurally barred from litigating claims that could have been, or were, previously decided against them. *See Branch*, 236 So. 3d at 986; *Hendrix v. State*, 136 So. 3d 1122, 1124-25 (Fla. 2014) ("A successive postconviction motion may not be used to relitigate a claim that has been raised and rejected on direct appeal" or "in prior postconviction proceedings."). This procedural bar extends to variations of the same claim. *Sireci v. State*, 773 So. 2d 34, 40-41 & n.10 (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) (holding a claim was barred where it was merely a variation of a prior postconviction claim).

A version of Barwick's claim that *Roper* should be extended to him was raised and rejected by the postconviction court, this Court, and the Eleventh Circuit. Barwick first unsuccessfully raised this in his amended initial 3.851 motion filed April 8, 2005. (R:672, 816-825, 829, 833.) He then elected not to appeal the circuit court's denial of the claim on appeal and instead raised it before this Court as part of a habeas petition. *See Barwick*, 88 So. 3d at 105-06. This Court rejected the claim as both procedurally barred since it should have been raised on appeal instead of a habeas petition, and meritless since Barwick was "nineteen and one-half years old when he committed the murder." *Id.* The Eleventh Circuit rejected Barwick's argument that *Roper* applied to him too. *Barwick*, 794 F.3d at 1257.

Since this Court already decided *Roper* does not extend to Barwick's case, the issue is procedurally barred by the law-of-the-case doctrine. It does not matter that Barwick did not have the APA resolution over a decade ago because scientific studies do not

surmount procedural bars. *Dillbeck*, 2023 WL 2027567, at *2-3. Indeed, this Court also held an extension-of-*Roper* claim procedurally barred when it was a variation of a much more attenuated claim. *Branch*, 236 So. 3d at 985 (holding an extension-of-*Roper* claim procedurally barred because the defendant failed to challenge the sentencing court's finding that his age was not mitigating and did not argue his ineligibility under *Roper* at any other point).

Barwick's post-warrant claim that *Roper* should be extended to individuals under 21 (including him) is procedurally barred since that issue was previously raised and rejected by this Court or, at minimum, could have been. This Court should affirm the circuit court's summary denial of this claim as procedurally barred.

B. Barwick's Extension-of-*Roper* Claim Is Untimely Because It Rests on no Newly Discovered Evidence as Defined by this Court.

Barwick's extension-of-*Roper* claim is also untimely because it does not rely on newly discovered evidence as defined by this Court.

Generally, postconviction claims in capital cases are untimely if filed more than a year after the judgment and sentence became final. For an otherwise untimely claim to be considered timely as newly discovered evidence, it must be filed within a year of the date the claim became discoverable through due diligence.

Mungin v. State, 320 So. 3d 624, 625–26 (Fla. 2020) (citing Fla. R. Crim. P. 3.851(d) and *Reed v. State*, 116 So. 3d 260, 264 (Fla. 2013))

This Court has routinely held that resolutions, consensus, opinions, articles, research, and the like, are categorically not facts upon which a claim can be based under Rule 3.851(d)(2)(B). *Booker v. State*, 336 So. 3d 1177, 1182 n.5 (Fla. 2022) (holding new expert opinions are not newly discovered evidence); *Foster v. State*, 258 So. 3d 1248, 1253 (Fla. 2018) (rejecting—in part—as untimely an extension-of-*Roper* claim that relied on a 2018 American Bar Resolution recommending individuals under 21 be exempt from the death penalty and other scientific research); *Branch*, 236 So. 3d at 984-87 (rejecting—in part—as untimely an extension-of-*Roper* claim that relied on new scientific research, scientific consensus, and international consensus); *Morton v. State*, 995 So. 2d 233, 245–46 (Fla. 2008) (rejecting the argument that brain imaging studies of young adults constituted newly discovered evidence when used to claim that the Eighth Amendment prohibits execution of an individual over the age of 18); *Schwab v. State*, 969 So. 2d 318, 325 (Fla. 2007) (holding that “new opinions” and “research studies” are not newly discovered evidence); *Rutherford v. State*, 940 So. 2d 1112,

1117 (Fla. 2006) (holding American Bar Association report published in 2006 was not newly discovered evidence because it was “a compilation of previously available information related to Florida’s death penalty system”).

Other capital defendants have been unsuccessfully raising extension-of-*Roper* claims for years. *E.g.*, *Hill v. State*, 921 So. 2d 579, 584 (Fla. 2006) (rejecting an extension-of-*Roper* claim and holding “*Roper* only prohibits the execution of those defendants whose *chronological* age is below eighteen”) (emphasis in original); *Sheppard v. State*, 338 So. 3d 803, 831 (Fla. 2022) (rejecting an argument that appellate counsel was ineffective for not raising an extension-of-*Roper* to under 21 because the claim is meritless).

Barwick argues that this Court’s decision in *Branch* is distinguishable because he now relies on the APA resolution that was not previously available. But Branch relied on—among other things—“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 this consensus constitutes newly discovered evidence.” *Branch*, 236 So. 3d at 984. This Court still found his extension-of-*Roper* claim untimely. *Id.* at

986-87.

Barwick’s extension-of-*Roper* claim is untimely under Rule 3.851(d). The only “evidence” Barwick relies on to start the newly discovered clock is an August 2022 resolution from the APA that first-degree murderers under 21-years-old should not be executed. This resolution relies on research between 2008 and 2022. (R:427-31.)

A resolution from the APA relying on years of research is categorically not newly discovered evidence. *See, e.g., Branch*, 236 So. 3d at 984-87 (rejecting—in part—as untimely an extension-of-*Roper* claim that relied on new scientific research, scientific consensus, and international consensus). The only real fact upon which Barwick’s extension-of-*Roper* claim is actually based is his age at the time of the murder, and that fact is certainly not newly discovered. This Court should affirm the circuit court’s summary rejection of this extension-of-*Roper* claim as untimely.

C. This Court has Continually Rejected Extension-of-*Roper* Claims and Lacks Authority to Extend *Roper* under the Florida Constitution.

This Court is unable to provide greater protections than the Eighth Amendment under the Florida Constitution and routinely rejects extension-of-*Roper* claims on the merits.

The Florida Constitution requires this Court to construe its “prohibition against cruel and unusual punishment,” 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.” Art. I, § 17, Fla. Const. At minimum, this conformity clause requires this Court to adhere to all directly on-point United States Supreme Court Eighth Amendment cases and provide no greater protections than those cases. *See, e.g., Lawrence v. State*, 308 So. 3d 544, 548-52 (Fla. 2020); *see also Soca v. State*, 673 So. 2d 24, 27 (Fla. 1996).

The Supreme Court in *Roper* drew a categorical line exempting those who commit murder while under 18 from the death penalty and permitting those over 18 to be executed. *Roper*, 543 U.S. at 574; *Kearse v. Sec’y, Fla. Dep’t of Corr.*, No. 15-15228, 2022 WL 3661526, at *26 (11th Cir. Aug. 25, 2022) (Luck, J.) (“Moving the *Roper* line to eighteen years and a few months does not extend the categorical rule; it violates it.”). This Court has consistently adhered to *Roper*’s bright-line rule and rejected any attempt to expand it. *E.g., Sheppard*, 338 So. 3d at 831; *Foster*, 258 So. 3d at 1253; *Branch*, 236 So. 3d at 984-87; *Barwick*, 88 So. 3d at 105-06; *Hill*, 921 So. 2d at 584.

Barwick's extension-of-*Roper* claim conclusively fails at two legal points. First, this Court cannot violate the bright line the Supreme Court drew in *Roper* by extending it to Barwick, who was over 18 when he killed Rebecca. See Art. I, § 17, Fla. Const. *Kearse*, 2022 WL 3661526, at *26. Second, this Court has, correctly, long refused to extend *Roper* beyond its holding. *E.g.*, *Branch*, 236 So. 3d at 987 (“[U]nless the United States Supreme Court determines that the age of ineligibility for the death penalty should be extended, we will continue to adhere to *Roper*.”). This Court should affirm for both reasons.

D. *Roper*'s Evolving Standards of Decency Analysis Does not Support Exempting All First-Degree Murderers Under 21 from the Death Penalty.

A detailed look at the Supreme Court's Eighth Amendment jurisprudence and *Roper*'s logic shows why Barwick's extension-of-*Roper* claim legally fails in any court. The Supreme Court's Eighth Amendment exemption-from-execution cases based on the evolving standards of decency require a court to undertake two analytical steps: (1) determining whether there is clear and reliable national consensus evinced by state and federal legislatures against a punishment on a class of individuals; and (2) the Court's own

judgment on whether there is reason to disagree with the national consensus. *Atkins v. Virginia*, 536 U.S. 304, 312-17 (2002). Societal consensus evinced by legislatures is entitled to “great weight” but not necessarily dispositive. *Graham v. Florida*, 560 U.S. 48, 67 (2010).

Roper applied this analysis and held individuals who committed first-degree murder while under 18 were exempt from the death penalty. The Court first noted that 30 states (including states that did not have capital punishment) legislatively, or by judicial decision, precluded capital punishment for such offenders and went on to note that even in the remaining 20 states the execution of such offenders was rare. *Roper*, 543 U.S. at 564-67. The Court therefore found that there was societal consensus against executing offenders who committed first-degree murder while juveniles. *Id.*

The Court then moved on to the next step and held there was no reason to disagree with this consensus. *Id.* at 569. As part of this analysis, the Court noted that juveniles are more likely to have an underdeveloped sense of responsibility than an adult, were more vulnerable to negative influences, and that the character of juveniles is generally not as well-formed as an adult. *Id.* at 569. The Supreme Court then drew a categorical line that individuals who committed

first-degree murder while under 18 cannot be executed. *Id.* at 574.

But the Court noted:

Drawing the line at 18 years of age is subject, of course, to the objections always raised against categorical rules. The qualities that distinguish juveniles from adults do not disappear when an individual turns 18. . . . The age of 18 is the point where society draws the line for many purposes between childhood and adulthood. It is, we conclude, the age at which the line for death eligibility ought to rest.

Id.

Barwick's extension-of-*Roper* claim conclusively fails the first prong of the evolving-standards-of-decency test. Of the twenty-five active death penalty jurisdictions in the United States, fifteen explicitly permit the execution of first-degree murderers over 18 years old,⁹ nine have no statutory age limit,¹⁰ and one permits the

⁹ [18 U.S.C. § 3591\(a\)](#) (permitting the death penalty for first-degree murderers over 18); [Ala. Code § 13A-6-2\(c\)](#) (same); [Ariz. Rev. Stat. § 13-751\(A\)1](#) (same); [Ark. Code § 5-4-602\(3\)\(C\)](#) (same); [Ind. Code § 35-50-2-3\(b\)\(1\)](#) (same); [Kan. Stat. § 21-6618](#) (same); [Mo. Stat. § 565.020\(2\)](#) (same); [Mont. Code § 45-5-102\(2\)](#) (same); [Nev. Stat. § 176.025](#) (same); [N.C. Stat. § 14-17\(a\)](#) (same); [Ohio Rev. Code § 2929.02\(A\)](#) (same); [S.D. Code § 23A-27A-42](#) (same); [Tex. Code § 8.07\(c\)](#) (same); [Utah Code § 76-3-206\(2\)\(a\)](#) (same); [Wyo. Stat. § 6-2-101\(b\)](#) (same).

¹⁰ [§ 921.141, Fla. Stat.](#) (containing no age limit on death-eligibility and therefore defaulting to *Roper*'s constitutionally imposed limit); [Ga. Code § 17-10-31](#) (same); [Idaho Code § 18-4004](#) (same); [La. Stat.](#)

execution of first-degree murderers over sixteen.¹¹ An additional three jurisdictions statutorily permit the execution of first-degree murderers over 18,¹² but have death-penalty moratoria in place for various reasons. The fact that none of the twenty-eight death-penalty jurisdictions have raised the age of death-eligibility from 18 to 21 shows there is a consensus that the age of death-eligibility should be left exactly where *Roper* set it. That consensus is entitled to “great weight.” *Graham*, 560 U.S. at 67.¹³

Barwick’s extension-of-*Roper* claim also fails the second prong

[§ 14:30\(C\)\(1\)](#) (same); [Miss. Code § 99-19-101](#) (same); [Neb. Stat. § 29-2519](#) (same); [Okla. Stat. § 701.9](#) (same); [S.C. Code § 16-3-20](#) (same); [Tenn. Code § 39-13-204](#) (same).

¹¹ [Ky. Rev. Stat. § 640.040\(1\)](#) (permitting execution of first-degree murderers over 16). *But see Campbell v. Com.*, No. 2009-SC-000489-MR, 2011 WL 1642028, at *12 (Ky. Apr. 21, 2011) (acknowledging *Roper*’s holding in another context).

¹² [Cal. Penal Code § 190.5\(a\)](#) (permitting the death penalty for first-degree murderers over 18); [Ore. Rev. Stat. § 137.707\(2\)](#) (same); [18 Pa. Cons. Stat. §§ 1102\(a\)](#) (same).

¹³ Even if a court were to determine there was no consensus *in favor* of executing first-degree murderers under 21, the statutes cited above show there is certainly no consensus *against* doing so. The conclusion that executing first-degree murderers who killed while between 18 and 21 does not violate the evolving-standards-of-decency remains the same in light of the second prong of the analysis.

of the evolving-standards-of-decency test because it relies on information the Supreme Court already accounted for in *Roper*. Barwick essentially argues there is not that much difference between a 17-year-old and a 20-year-old. But the Supreme Court, while acknowledging the “qualities that distinguish juveniles from adults do not disappear when an individual turns 18,” nonetheless held that 18 was “the age at which the line death-eligibility ought to rest,” particularly because 18 “is the point where society draws the line for many purposes between childhood and adulthood.” *Roper*, 543 U.S. at 574.¹⁴

Roper’s evolving standards-of-decency analysis does not support moving the exemption-from-execution line from under 18 to under 21. The legislative consensus is clear that 18 (rather than 21) is the appropriate age for death-eligibility, and the reason Barwick gives to disagree with that consensus—evidence that individuals under 21 are not that different from individuals under 18—was

¹⁴ Barwick notes there are certain inherently dangerous activities where society draws the line at 21 (alcohol, tobacco, etc.) but the societal indicia *Roper* relied on were voting, serving on juries and marrying without parental consent. *Roper*, 543 U.S. at 569. 18 is still considered the age of adulthood in the United States.

already accounted for by the Supreme Court in *Roper* itself. Barwick's exemption-from-execution claim fails at this, and every other conceivable, point. This Court should affirm this issue.

III. THE POSTCONVICTION COURT CORRECTLY, SUMMARILY DENIED BARWICK'S CLAIM THAT HE WAS EXEMPT FROM EXECUTION UNDER THE PRINCIPLES ESTABLISHED IN *ATKINS* AND *ROPER*.

Issue & Ruling Below

Barwick's final substantive issue contests the lower court's summary denial of his claim that the principles of the Supreme Court's exemption-from-execution cases (particularly *Atkins* and *Roper*) apply equally to him and should exempt him from execution as well. The circuit court summarily denied this claim as (1) procedurally barred; (2) untimely; and (3) meritless. (R:630.)

Merits

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. The United States Supreme Court has interpreted the Eighth Amendment to categorically prohibit the execution of: (1) the intellectually disabled under *Atkins v. Virginia*, 536 U.S. 304, 311 (2002); (2) individuals who commit murder while before the age of 18 under *Roper*, 543 U.S.

at 574; and (3) individuals incompetent to be executed under *Ford v. Wainwright*, 477 U.S. 399, 418 (1986).

The record conclusively demonstrates Barwick falls into none of these categories. He has an average IQ and is not intellectually disabled.¹⁵ He was not under 18 when he murdered Rebecca.¹⁶ And he has never claimed to be incompetent to be executed. At its core, Barwick’s argument is that, even though he does not meet the exemptions recognized by these cases individually, his multiple issues collectively lessen his moral culpability to the point that he, too, should be exempt from execution under the “spirit” of these cases. He is wrong. *See Ramos v. Louisiana*, 140 S. Ct. 1390, 1424 (2020) (Thomas, J., concurring in the judgment) (“Close enough is for

¹⁵ Numerous experts have evaluated Barwick over the years and not one has found he is intellectually disabled as required for a valid *Atkins* claim. (DA23:678 (finding Barwick’s “intellectual functioning was in the average normal range”); DA23:711 (finding Barwick was of “average intelligence”); DA23:747 (finding Barwick’s IQ is 103); DA23:756 (finding Barwick’s scored average on an IQ test); DA24:781 (finding Barwick was “of overall I.Q. average”); DA24:850-51 (finding Barwick had an average IQ and was not “borderline or retarded”); PCR22:2991-92 (Barwick’s postconviction expert testifying Barwick had a full scale IQ score of 96 in 2000 and a verbal score of 78 when he was 13 years old).

¹⁶ *See Barwick*, 88 So. 3d at 106.

horseshoes and hand grenades, not constitutional interpretation.”).

The circuit court correctly rejected this claim for four reasons. First, this issue is procedurally barred because this Court addressed it (or a variation of it) and rejected it long before now. Second, it is untimely since Barwick offers no true newly discovered evidence in support of it. Third, this Court has repeatedly rejected attempts to expand the Supreme Court’s exemption-from-execution cases, and is powerless to do so under the Florida Constitution. Finally, there is no reason to extend these cases to Barwick.

A. Barwick’s Exemption-from-Execution Claim Is Procedurally Barred Because It Was Either Raised and Rejected in His Initial Postconviction Appeal or Could Have Been Raised Earlier.

Barwick’s exemption-from-execution claim is procedurally barred because it (or a variation of it) was previously raised and rejected, or because it could have been litigated earlier. Exemption-from-execution claims that were previously decided, and variations of such claims, may not be resurrected once a warrant is signed. *Dillbeck v. State*, No. SC23-190, 2023 WL 2027567, at *2-3 (Fla. Feb. 16, 2023) (rejecting an exemption-from-execution claim in part because it was previously litigated); *Sireci v. State*, 773 So. 2d 34, 40-

41 & n.10 (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) (holding a claim was barred where it was merely a variation of a prior postconviction claim). Exemption-from-execution claims that *could have been litigated* pre-warrant are also procedurally barred even if they were not in fact litigated. See *Branch v. State*, 236 So. 3d 981, 986 (Fla. 2018) (holding an extension-of-*Roper* claim was procedurally barred in an active warrant case because it could have been raised previously); *Simmons v. State*, 105 So. 3d 475, 511 (Fla. 2012) (rejecting as procedurally barred a claim, based on *Roper* and *Atkins*, that the defendant was exempt from execution based on mental illness and neuropsychological deficits because it could have been raised on appeal or in earlier postconviction motions).

Barwick's exemption-from-execution claim, or a variation thereof, was raised and rejected previously. On direct appeal, Barwick argued his capital sentence was disproportionate due to his mental and emotional impairments, personality disorder with schizoid characteristics, mental disorders, and the physical and

emotional abuse he suffered at his father's hands. *Barwick v. State*, SC60-80446, Brief of Appellant filed July 7, 1994, at 69-70.

Barwick next raised two exemption-from-execution claims under *Atkins* and *Roper* in his initial 3.851 motion. (R:728-31, 816-825). The *Atkins*-exemption claim argued he was exempt from execution because his IQ was under 75, he functioned at a subaverage intelligence level, he had poor grades in school, he significantly underachieved in his classes, he was an extremely slow learner, he had poor communication skills, he had poor personal and self-care skills, he had a significant lack of maturity, and these deficits were all present while Barwick was a juvenile. (R:728-31.) The *Roper*-exemption claim argued he was exempt from execution because of his low mental age, brain damage, neurological handicaps, and youth. (R:816-25.)

The postconviction court summarily rejected both claims back in 2003 and 2005 respectively. (R:831-34.) Barwick did not appeal these denials and instead tried to present these issues to this Court in a habeas petition. See *Barwick v. State*, 88 So. 3d 85, 93 n.11 & n.12, 105 (Fla. 2011). This Court rejected the *Atkins* claim without comment and the *Roper* claim as improperly raised in a habeas

petition and meritless. *See id.* at 105-11. The Eleventh Circuit also rejected Barwick’s exemption claim based on “his mental functioning” being “equivalent to that of an ordinary 11-to-13-year-old person, and his intellectual functioning equivalent to that of an ordinary 12-to-14-year-old person.” *Barwick*, 794 F.3d at 1257.

As Barwick’s litigation history shows, this exemption-from-execution claim is clearly procedurally barred. Barwick’s claim that the principles of *Atkins*, *Roper*, etcetera, exempt him from execution has been one of his chief claims throughout the decades of his stay on death row and been rejected by every court to analyze it. He is procedurally barred from relitigating it on the eve of his execution. Indeed, he is procedurally barred from relitigating it even if this Court determines it was not previously raised because it clearly could have been. *See Branch*, 236 So. 3d at 986. This Court should affirm.

B. Barwick’s Exemption-from-Execution Claim Is Untimely Because It Rests on no Newly Discovered Evidence as Defined by this Court.

Barwick’s exemption-from-execution claim is also untimely under Rule 3.851(d). As discussed more thoroughly in Issue II.B, *supra*, new resolutions and expert opinions are not newly discovered evidence. *E.g.*, *Booker v. State*, 336 So. 3d 1177, 1182 n.5 (Fla. 2022)

(holding new expert opinions are not newly discovered evidence); *Foster v. State*, 258 So. 3d 1248, 1253 (Fla. 2018) (rejecting—in part—as untimely an extension-of-*Roper* claim that relied on a 2018 American Bar Resolution recommending individuals under 21 be exempt from the death penalty and other scientific research); *Branch*, 236 So. 3d at 984-87 (rejecting—in part—as untimely an extension-of-*Roper* claim that relied on new scientific research, scientific consensus, and international consensus).

Barwick’s exemption-from-execution claim is untimely. He has known about his brain damage, low mental age, and neurological disorders for well over a decade and cannot now use them on the eve of his execution. (DA24:778-81; PCR22:2992-95, 2999-3001, 3006-07, 3015, 3036, 3039-44, 3056-59, 3063-64.) Any claim related to this long-known information is therefore untimely. This Court should therefore affirm. *See Dillbeck*, 2023 WL 2027567, at *3-4.

C. This Court has Continually Declined to Extend the Supreme Court’s Exemption-from-Execution caselaw and Lacks Authority to do so under the Florida Constitution.

This Court is unable to provide greater protections than the Eighth Amendment under the Florida Constitution and routinely

rejected extension-of-*Roper* claims on the merits. Barwick's claim that his severe neurological disorders, brain damage, and low mental age exempt him from execution should therefore be denied on the merits for two reasons.

First, this Court lacks authority to violate a categorical rule from the Supreme Court's Eighth Amendment jurisprudence by expanding it. See Art. I, § 17, Fla. Const.; *Lawrence v. State*, 308 So. 3d 544, 548-552 (Fla. 2020); *Kearse v. Sec'y, Fla. Dep't of Corr.*, No. 15-15228, 2022 WL 3661526, at *26 (11th Cir. Aug. 25, 2022) (Luck, J.) (broadening categorical rules "does not extend the categorical rule; it violates it"). The Supreme Court has drawn categorical lines exempting certain classes from executing while permitting the executions of all other individuals. Barwick does not fall into any of the exempt classes, so it would violate the Supreme Court's precedent to extend an exemption to him. This Court should therefore affirm based on its limited authority under the Florida Constitution based on the explicit lines drawn by the Supreme Court. See Art. I, § 17, Fla. Const.

Second, Barwick's claim fails under this Court's precedent. Low mental age, neurological disorders, and brain damage do not exempt

an individual from execution. *See, e.g., Dillbeck*, 2023 WL 2027567 at *2-3 (refusing to expand *Atkins* to include a neurodevelopmental disorder); *Carroll v. State*, 114 So. 3d 883, 886-87 (Fla. 2013) (rejecting an argument that *Atkins* should be expanded to include severe brain damage and mental limitations); *Simmons v. State*, 105 So. 3d 475, 510-11 (Fla. 2012) (rejecting an argument that *Atkins* should be expanded to include mental illness and neuropsychological deficits); *Barwick*, 88 So. 3d at 106 (refusing to extend *Roper*'s exemption to Barwick despite his low mental age, brain damage, and mental capacity); *Connor v. State*, 979 So. 2d 852, 867 (Fla. 2007) (rejecting a claim where the defendant suffered from mental and psychological disorders such as organic brain damage, frontal lobe damage, micrographia, and stuttering, on grounds that these conditions were different from mental retardation).¹⁷ For both

¹⁷ *See also Gordon v. State*, 350 So. 3d 25, 37 (Fla. 2022) (refusing to expand *Atkins* to include traumatic brain injury); *Newberry v. State*, 288 So. 3d 1040, 1050 (Fla. 2019) (rejecting an argument that *Atkins* should be expanded to include other intellectual impairments); *Muhammad v. State*, 132 So. 3d 176, 207 & n.21 (Fla. 2013) (rejecting an argument that *Atkins* should be expanded to include schizophrenia and paranoia); *Johnston v. State*, 27 So. 3d 11, 26-27 (Fla. 2010) (rejecting an argument that *Atkins* should be expanded to include traumatic brain injury); *Connor v. State*, 979 So. 2d 852, 867 (Fla. 2007) (rejecting an argument that *Atkins* should be expanded to

reasons, this Court should affirm.

D. There Is no Reason to Extend the Supreme Court's Exemption-from-Execution Caselaw.

Barwick's exemption-from-execution claim also fails the evolving-standards-of-decency framework laid out by the Supreme Court. Only two death penalty states (Kentucky and Ohio) have sought to exempt individuals with certain mental illness from the death penalty. See Ky. Rev. Stat. § 532.140 (*prospectively* exempting individuals with a "serious mental illness" after July 14, 2022, from the death penalty); Ky. Rev. Stat. § 532.130 (defining serious mental illness as schizophrenia, schizoaffective disorder, bipolar disorder, or delusional disorder); Ohio Rev. Code § 2929.025 (exempting individuals with schizophrenia, schizoaffective disorder, bipolar disorder, and delusional disorder from the death penalty in certain circumstances). It does not appear any death penalty jurisdiction has a death-penalty exemption for neurological disorders generally, low mental age, or brain damage.

include paranoid schizophrenia, organic brain damage, and frontal lobe damage); *Hill v. State*, 921 So. 2d 579, 584 (Fla. 2006) (holding *Roper* applies only to chronological, not mental, age).

Barwick's claim therefore fails the evolving standards of decency test. Two death penalty states hardly show a legislative consensus. *Atkins v. Virginia*, 536 U.S. 304, 314 (2002) (noting the prior decision in *Penry v. Lynaugh*, 492 U.S. 302, 334, (1989) held two states adopting exemptions for the intellectually disabled, coupled with all states that abolished the death penalty, was insufficient to show a consensus). And Barwick's claim is not based on any of the Kentucky or Ohio categories anyway. (See R:449-61.)

Barwick provides no reason for any court to jump ahead and, without any form of legislative consensus, arbitrarily preempt states from imposing the death penalty based on nothing in the text or history of the Eighth Amendment. *See Miller v. Alabama*, 567 U.S. 460, 510-11 (2012) (Alito, J., dissenting) (noting the philosophical basis for the evolving-standards-of-decency test was "problematic from the start" but, at least, it is an objective test when based on the views of state legislatures and Congress); *United States v. Fell*, No. 5:01-CR-12-01, 2016 WL 11550800, at *5-7 (D. Vt. Nov. 7, 2016) (holding the Eighth Amendment permitted the government to seek the death penalty despite the defendants neurological disorder).

There is no persuasive reason to categorically hold the Eighth

Amendment exempts individuals with brain damage, low mental age, and/or neurological disorders from execution. *Moore v. Texas*, 581 U.S. 1 (2017) (explaining that Eighth Amendment jurisprudence, while informed by the medical community's standards, does not adhere "to everything stated in the latest medical guide."); *Hall v. Florida*, 572 U.S. 701, 721 (2014) (stating that while the Court does not disregard the views of medical experts, experts "do not dictate" the Court's decision). There is also the inherent problem of trying to accurately diagnosis and quantify the effect of nebulous concepts like mental age and neurological disorders. See *Matter of Monschke*, 197 Wash. 2d 305, 325, 482 P.3d 276, 286 (2021) (recognizing current research "does not currently allow us to move from" determining the brain of an 18-year-old is not categorically different from a juvenile "to measuring the neurobiological maturity of an individual adolescent because there is too much variability within age groups and across development. Indeed, we do not currently have accurate behavioral measures of maturity."). The varying, and often conflicting, conclusions reached by the experts evaluating Barwick over the years demonstrate the inherent difficulty in diagnosing disorders that are not inherently linked to cold, hard, numbers like

IQ scores. This Court should affirm.

CONCLUSION

Over three decades ago, the State proved Barwick cruelly murdered Rebecca in 1986, and that his heinous actions warranted death. Barwick's convictions and capital sentence have remained undisturbed for over thirty years, and his last 3.851 motion offers no reason to let him escape from his long-final death sentence on the eve of its execution.

The Eleventh Circuit's observation in another capital case is equally applicable here. There "must come a time, even when so irreversible a penalty as that of death has been imposed upon a particular defendant, that the legal issues in the case have been sufficiently litigated and re-litigated so that the law must be allowed to run its course." *See Lambrix v. Sec'y, Fla. Dep't of Corr.*, 851 F.3d 1158, 1173 (11th Cir. 2017).

For Barwick, it is time for litigation to end. This Court should affirm all issues raised on appeal and allow true finality for the State of Florida, victims, and Darryl Barwick. It is time for justice, not delay.

Respectfully submitted and certified,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of April 2023, I electronically filed the foregoing with the Clerk of the Court by using the Florida Courts E-Portal Filing System which will send a notice of electronic filing to the following: Karin Moore and Drew Sena, Assistants CRC-North, 1004 DeSoto Park Drive, Tallahassee, Florida 32301, karin.moore@ccrc-north.org, drew.sena@ccrc-north.org.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 14-point Bookman Old Style, in compliance with Fla. R. App. P. 9.045.

/s/ Jason W. Rodriguez
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