

Case No. SC23-0531
Lower Tribunal Case No. 1986-CF-940

IN THE
Supreme Court of Florida

DARRYL BRYAN BARWICK,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

APPELLANT'S INITIAL BRIEF

EXECUTION SCHEDULED FOR
MAY 3, 2023 at 6:00 P.M.

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REQUEST FOR ORAL ARGUMENT

Mr. Barwick, an individual with a severe neuropsychological disorder, lifelong cognitive impairments, and low mental age, is facing an imminent execution date of May 3, 2023 for a crime he committed when he was only 19 years old. Oral argument is appropriate here given the constitutional questions raised in this appeal. This Court has previously held oral argument at this procedural posture. See, e.g., *Asay v. State*, 22 So. 3d 695, 698-99 (Fla. 2017) (referencing this Court’s order entering a stay of execution after holding appellate oral argument). Here, the weight of the significant issues to be considered, and the fact that this is a capital case with an imminent execution, favor granting Mr. Barwick’s counsel the opportunity to orally address the Court. Accordingly, Mr. Barwick respectfully requests that the Court permit oral argument in this case.

STATEMENT OF THE CASE AND FACTS¹

I. PROCEDURAL HISTORY

¹ Citations in this brief are as follows: References to record on direct appeal of Mr. Barwick’s case are designated as “R. ___” for the record, and “TR. ___” for the trial transcript. References to the record of Mr. Barwick’s evidentiary hearing related to his initial postconviction proceeding are designated as “EH. ___”. References to the record of Mr. Barwick’s second successive postconviction proceedings following the issuance of the warrant, and filed with this Court on April 14, 2023, are designated as “PCR3. ___”. All other references are self-explanatory or otherwise explained herewith.

On April 28, 1986, Mr. Barwick was indicted for first degree murder and related offenses. R. 241-42. Mr. Barwick was tried and found guilty as charged. R. 652-53. The trial court, following the jury's 9-3 recommendation, sentenced Mr. Barwick to death. R. 654. On direct appeal, this Court reversed and remanded for a new trial. *Barwick v. State*, 547 So. 2d 612 (Fla. 1989).²

Mr. Barwick's second trial resulted in a mistrial. R. 1183. A new trial commenced on July 6, 1992. The jury found Mr. Barwick guilty as charged and recommended a sentence of death by a vote of 12-0. R. 1236-38.³ The trial court sentenced Mr. Barwick to death. R. 1293-99.

On direct appeal, this Court affirmed. *Barwick v. State*, 660 So. 2d 685 (Fla. 1995). Certiorari was denied on January 22, 1996. *Barwick v. Florida*, 516 U.S. 1097 (1996).

On March 17, 1997, Mr. Barwick filed a postconviction motion. The circuit court denied relief on August 28, 2007. Mr. Barwick appealed, and

² In reversing, this Court found that the State had violated *State v. Neil*, 457 So. 2d 481 (Fla. 1984).

³ The trial court found the following aggravating circumstances: prior violent felony based on a 1983 conviction for sexual battery and burglary; attempted sexual battery; avoiding arrest; pecuniary gain; heinous, atrocious or cruel (HAC); and cold, calculated and premeditated (CCP). R. 1281-86.

filed a petition for writ of habeas corpus. This Court denied all relief. *Barwick v. State*, 88 So. 3d 85 (Fla. 2011).

On May 25, 2012, Mr. Barwick filed a federal habeas petition in the Northern District of Florida. The petition was denied. After an appeal, the Eleventh Circuit affirmed. *Barwick v. Sec’y*, 794 F.3d 1239 (11th Cir. 2015).

On December 15, 2016, Mr. Barwick filed a successive motion for relief based on *Hurst v. Florida*, 577 U.S. 92 (2016). The circuit court denied the motion and this Court affirmed. *Barwick v. State*, 237 So. 3d 927 (Fla. 2018). Certiorari was denied on October 1, 2018. *Barwick v. Florida*, 139 S. Ct. 258 (2018).

On February 17, 2020, the State filed with the circuit court a “Motion for Clarification and Appointment of New State Postconviction Counsel.” PCR3. 49-57. Mr. Barwick’s prior Registry Counsel subsequently filed a motion to withdraw. PCR3. 58-59. On March 16, 2020, CCRC-North was appointed to represent Mr. Barwick. PCR3. 60-61.

II. DEATH WARRANT PROCEEDINGS

On Monday, April 3, 2023, without prior notice to Mr. Barwick or his counsel, Governor Ron DeSantis signed the death warrant and scheduled Mr. Barwick’s execution for 6:00 p.m. on May 3, 2023. PCR3. 151-156. The thirty-day warrant period began during Holy week, the beginning of the

Passover observance, in the midst of Ramadan, and while co-counsel was suffering from COVID-19. PCR3. 66-67, 111-115, 121-125, 139, 440, 483-489, 561-71.

A case management conference was set for the following day, Tuesday, April 4, 2023. PCR3. 64-65. Within hours of the case management conference, the State filed a proposed scheduling order with an extremely compressed schedule. PCR3. 68-78. At the hearing, the Court largely adopted the State's proposed order. PCR3. 147, 111-15, 121-125, 575. Pursuant to the order, and over Mr. Barwick's objection, he was required to file his Rule 3.851 motion by 4:00 p.m. on Saturday, April 8. PCR3. 138-40. Thus, during the holiest of weeks in the entire calendar year, Mr. Barwick's counsel was required to investigate, develop and draft a motion to vacate with an impending execution date in less than five days. PCR3. 139.

Also, pursuant to the circuit court's compressed scheduling order, Mr. Barwick was required to file all additional public records requests on Wednesday, April 5, 2023. PCR3. 121-22, 183-217. A hearing on Mr. Barwick's public records request was held the following day, Thursday, April 6, 2023. PCR3. 372-75, 502-42. The circuit court denied all requests to which the agencies objected. PCR3. 376-82.

On Saturday, April 8, 2023, Mr. Barwick timely filed his Rule 3.851 motion for postconviction relief. PCR3. 438-62, 383-437.

On Easter Sunday, April 9, 2023, Mr. Barwick filed an emergency motion for stay of execution, postponement of all proceedings, and leave to amend his motion for postconviction relief. PCR3. 483-89.

On Monday, April 10, 2023, a *Huff*⁴ hearing was held on Mr. Barwick's motion for stay and leave to amend as well as his Rule 3.851 postconviction motion. PCR3. 556-618. That same day, the court issued a written order denying Mr. Barwick's motion for stay and leave to amend. PCR3. 543-545.

On Thursday, April 13, 2023, the circuit court summarily denied Mr. Barwick's Rule 3.851 motion. PCR3. 619-33.

On Friday, April 14, 2023 Mr. Barwick timely filed a notice of appeal as to the circuit court's summary dismissal of his motion for postconviction relief. PCR3. 954-55. This appeal follows.

SUMMARY OF ARGUMENT

ARGUMENT I: Mr. Barwick was deprived due process and the effective assistance of counsel since the issuance of his death warrant thirteen days ago. After learning that his death warrant had been signed and his execution scheduled for just thirty days later, Mr. Barwick's counsel was

⁴ *Huff v. State*, 622 So. 2d 982 (Fla. 1993).

required to file records requests, investigate and prepare a Rule 3.851 motion, and appear before the circuit court in just five days. Counsel's efforts were further hamstrung by co-counsel's illness with COVID-19 and the timing of the warrant during Holy week and the observance of Passover. Mr. Barwick's counsel notified the circuit court at every opportunity of the obstacles and burdens impacting Mr. Barwick's representation and warrant litigation. The circuit court erred in failing to grant a brief stay to ensure that Mr. Barwick receives the quality representation and due process to which he is entitled.

ARGUMENT II: The August 2022 resolution adopted by the American Psychological Association which calls for a prohibition on death sentences for individuals who were under the age of twenty-one when they committed their offenses, like Mr. Barwick, constitutes newly discovered evidence. Specifically, the resolution makes clear that a definitive consensus concerning the research and data demonstrating the process of brain development in the late adolescent stage is indistinguishable from that of juveniles. Due to this new consensus, Mr. Barwick's execution is categorically barred under the Eighth Amendment of the United States Constitution and Article 1, § 17 of the Florida Constitution.

ARGUMENT III: Executing individuals with severe, lifelong, immutable mental illness, like Mr. Barwick violates the Eighth Amendment. The circuit court erred in summarily denying Mr. Barwick’s claim that he is exempt from execution under the Eighth and Fourteenth Amendment as procedurally barred, untimely, and meritless. This Court should reverse and remand.

STANDARD OF REVIEW

Because the circuit court denied postconviction relief without an evidentiary hearing, this Court must accept the factual allegations presented in Mr. Barwick’s motion and in this appeal as true to the extent they are not conclusively refuted by the record. *Ventura v. State*, 2 So. 3d 194, 197-98 (Fla. 2009). Further, this Court “review[s] the trial court’s application of the law to the facts *de novo*.” *Green v. State*, 975 So. 2d 1090, 1100 (Fla. 2008). A postconviction court’s decision whether to grant an evidentiary hearing is likewise subject to *de novo* review. *Rose v. State*, 985 So. 2d 500, 505 (Fla. 2008).

ARGUMENT

I. THE ACCELERATED DEATH WARRANT PERIOD AND SPECIFIC CIRCUMSTANCES SURROUNDING MR. BARWICK’S DEATH WARRANT LITIGATION VIOLATE DUE PROCESS OF LAW UNDER THE UNITED STATES AND FLORIDA CONSTITUTIONS AND MR. BARWICK’S STATUTORY RIGHT TO EFFECTIVE POSTCONVICTION COUNSEL

In *Holden v. Hardy*, 169 U.S. 366, 389, 18 S.Ct. 383, 387, 42 L.Ed. 780, the necessity of being heard is described as among the ‘immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard.’ And Mr. Justice Field, in an earlier case, *Galpin v. Page*, 18 Wall. 350, 368, 369, 21 L.Ed. 959, said that the rule that no one shall be personally bound until he has his day in court was as old as the law, and it meant that he must be cited to appear and afforded an opportunity to be heard. ‘Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and never can be upheld where justice is justly administered.’

Powell v. Alabama, 287 U.S. 45, 68 (1932).

Central to this principle of justice is the basic tenet that due process requires more than a pretext. After all, “fundamental fairness is [its] hallmark[.]” *Ford v. Wainwright*, 477 U.S. 399, 424 (1986) (Powell, J., concurring in part and in the judgment). Thus, a “checklist” approach to the holding of a hearing and notifying a party thereof is not sufficient to satisfy due process—the right must mean something. See *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (“The fundamental requirement of due process is the opportunity to be heard ‘**at a meaningful time and in a meaningful manner.**’”) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)) (emphasis added).

Nowhere can these principles be more important than in a capital case, where the United States Supreme Court has repeatedly emphasized the need for a heightened degree of reliability. See, e.g., *Woodson v. North*

Carolina, 428 U.S. 280, 305 (1976); see also *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 542 (1985) (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)) (due process requirements of notice and opportunity must be “**appropriate to the nature of the case.**”).

Mr. Barwick has alleged that the extraordinarily compressed warrant litigation schedule—taken together with specific circumstances impeding his ability to fully and fairly litigate his death warrant—violated his due process right to a meaningful opportunity to be heard. The circuit court relied on four findings to summarily deny this claim: (1) that the scheduling orders, “however ‘compressed,’” are in compliance with applicable procedural law related to the issuance and execution of a death warrant; (2) that Mr. Barwick never alleged he went without counsel, notice, or the opportunity to be heard during postconviction proceedings; (3) that there is no right to effective assistance of collateral counsel; and (4) that defense counsel provided “the most effective representation possible—quality representation, to be sure—in light of the circumstances presented at this stage of the proceedings in the present case[.]” PCR3. 626. These findings fundamentally miss the point of Mr. Barwick’s due process claim, and fail to engage with Mr. Barwick’s specific allegations regarding the impediments to meaningful litigation of his death warrant. The lower court’s summary denial was error.

A. Relevant background to the issue

1. CCRC-N's representation of Mr. Barwick

On March 16, 2020, the Capital Collateral Regional Counsel-North (CCRC-N) was appointed to represent Mr. Barwick following Registry Counsel's motion to withdraw. PCR3. 60-61. CCRC-N's appointment coincided with the global COVID-19 pandemic which cataclysmically impacted the judicial system, causing lengthy delays in proceedings. As a result of the pandemic, newly appointed postconviction counsel was unable to meet with Mr. Barwick for over a year due to policies and procedures implemented by the Florida Department of Corrections and CCRC-N, and in compliance with state and federal guidelines to reduce the spread of the deadly virus. PCR3. 569. Communication with Mr. Barwick during that year was limited to correspondence and telephone calls. PCR3. 569.

The pandemic slowed the transmission of the thousands of pages of records from the multiple judicial proceedings in Mr. Barwick's case, including two complete trial and penalty proceedings, a mistrial proceeding, and two postconviction proceedings. As counsel received records, efforts were made to review them. However, counsel's efforts to effectively represent Mr. Barwick have been continuously hampered by severe understaffing and turnover at the CCRC-N office.

In addition to Mr. Barwick's case, undersigned counsel, Karin Moore, has at all times been assigned to at least five cases. At one point, counsel's caseload tripled to the point that she was representing fifteen capital postconviction defendants. PCR3. 568. At the time Mr. Barwick's death warrant issued on April 3, 2023, counsel was representing eleven death-sentenced clients, seven of whom are warrant eligible. PCR3. 567-568. Counsel was facing four imminent deadlines for other clients.⁵ Indeed, much of the first day the warrant issued was spent trying to obtain extensions for deadlines that could be moved and trying to complete or arrange for assistance on deadlines that could not be moved without waiving important state and federal claims. PCR3. 567-68.

Further, from the inception of the warrant litigation, co-counsel for Mr. Barwick has suffered from symptomatic COVID-19. While laboring to diligently assist under the compressed schedule, her health deteriorated and symptoms exacerbated. PCR3. 484-85. Co-counsel has experienced intermittent fevers, severe fatigue, congestion, brain fog, and body aches.

⁵ Counsel's closing argument in *State v. Bright* was due on April 5, 2023. Counsel's certiorari reply in *Russ v. Florida* was due in the Supreme Court of the United States on April 10, 2023. Counsel's time sensitive newly discovered evidence claim in *State v. Hartley* was due on April 7, 2023 and counsel's reply brief in *State v. Damren* was due on April 17, 2023. See PCR3. 567, 568.

PCR3. 440, 484, 575. Due to her illness, inability to come into the office, and inability to appear in person for hearings and legal visits with Mr. Barwick, her work on Mr. Barwick's case has been limited. See PCR3. 440, 483-89, 561, 577.

No other attorney at CCRC-N is familiar with Mr. Barwick's case or has been assigned to assist with the warrant litigation; nor would this be feasible given CCRC-N's aforementioned understaffing. See PCR3. 567-69, 610-11.

Prior to the death warrant issuing, counsel was investigating a claim based on the American Psychological Association's Resolution that individuals under the age of 21, like Mr. Barwick, must be exempt from execution under the same rationale explained by the United States Supreme Court in *Roper v. Simmons*, 543 U.S. 551 (2005). The resolution was adopted in August 2022, based on the consensus reached in the scientific community related to brain development in individuals between the age of 18 and 21. PCR3. 580. Accordingly, based on the date the resolution passed, Mr. Barwick had until August 2023, to file any successive post-conviction motion related to the newly-reached scientific consensus. PCR3. 570, 611-12.

Counsel was also investigating whether developments in legislation throughout the country exempting severely mentally ill individuals from

execution impacted Mr. Barwick due to the fact that his records documented multiple mental health issues, including experiencing severe trauma as a child and adolescent. However, at the time of the issuance of the warrant, counsel had not completed this investigation nor had an opportunity to retain an appropriate mental health expert and arrange an evaluation for Mr. Barwick.

2. Other circumstances related to Mr. Barwick's death warrant litigation

On April 3, 2023, Governor DeSantis signed a death warrant for Mr. Barwick, scheduling his execution for May 3, 2023. PCR3. 66-67, 155-63. Again, the scant thirty-day warrant period began during Holy week, the beginning of Passover observance, and in the midst of Ramadan.

At the time Mr. Barwick's warrant issued, Louis Gaskin's death warrant was pending and his execution was scheduled for April 12, 2023. This was the first time in many years that two death warrants were being litigated at the same time in this state, and the first time since Governor DeSantis took office. PCR3. 562. Logistical problems due to the dual warrants quickly arose, including having difficulty scheduling a mental health expert to meet with Mr. Barwick due to conflicts with the room where meetings occur while inmates are under death watch. PCR3. 562. Counsel was advised that the room was unavailable because it was being used by Mr. Gaskin. PCR3. 575.

On Tuesday, April 4, 2023, this Court issued an expedited scheduling order requiring that all proceedings in the circuit court be completed by April 13, 2023. PCR3. 66-67.

That same day, and shortly before the case management conference, the State filed a proposed scheduling order with an extremely compressed schedule, including a deadline of Saturday, April 8, 2023 at 4:00 p.m. (EDT) for Mr. Barwick to file his successive Rule 3.851 motion. PCR3. 68-78. At the case management conference, counsel objected to the short filing deadline, citing the accelerated warrant period, the massive record for Mr. Barwick's prior proceedings, the short period that her office had been appointed as postconviction counsel which coincided with the start of the global COVID-19 pandemic, the fact that the religious holidays were likely to cause scheduling difficulties and conflicts for counsel to prepare the Rule 3.851 motion, and that it was a short week because many state agencies were closed for Good Friday, including the Fourteenth Judicial Circuit. PCR3. 138-39. Undersigned's objections were overruled, PCR3. 145, and the circuit court adopted the State's proposed schedule. PCR3. 111-15, 121-25.

In addition, the circuit court set a deadline of Wednesday, April 5, 2023, for the filing of records demands pursuant to Florida Rule of Criminal Procedure 3.852(h)(3)—just two days after the issuance of the warrant.

PCR3. 122. This was so despite the fact that the rule itself provides counsel up to ten days after the warrant is issued to request additional records. See Fla. R. Crim P. 3.852(h)(3).⁶ PCR3. 575, 577, 610.

Mr. Barwick complied with the court's schedule and timely filed ten records requests to eight agencies on April 5, 2023. PCR3. 183-217. Objections were due to be filed the same day as the hearing on the public records requests, which occurred on the afternoon of Thursday, April 6, 2023. PCR3. 122, 502-42. At the hearing, the circuit court denied all demands that had not previously been agreed to by the parties, PCR3. 376-82, even though the requests Mr. Barwick made under the (h)(3) provision of the rule requires that an update be provided.⁷ PCR3. 77, 533, 575, 577, 610; see e.g., PCR3. 516-20. Indeed, under the circumstances described above, not only did the circuit court's adoption of the State's proposed order severely truncate the already compressed 10-day period for filing public

⁶ Because the court overruled counsel's objection to the 5-day period for filing Mr. Barwick's Rule 3.851 motion for postconviction relief, counsel was left with little choice but to agree to the single day turnaround to submit all public records requests on April 5, and prepare for the public records hearing less than four hours after receiving all agency objections the following day.

⁷ See Fla. R. Crim. P. 3.852(h)(3) ("A person or agency shall copy, index, and deliver to the repository any public record" meeting the requirements of subsections (A)-(C), including updated records and records not previously disclosed).

records requests contemplated by this Court when it adopted Fla. R. Crim. P. 3.852(h)(3), but the denial of those records requests violates Mr. Barwick's rights under the Florida Constitution. Art. I, § 24(a), Fla. Const.; Fla. Stat. § 119.01 et seq. See PCR3. 510, 533.

As to the public records that were disclosed: The Office of the State Attorney for the Fourteenth Judicial Circuit (SAO) complied with Mr. Barwick's request and produced 643 documents (6,833 pages) that were picked up in Bay County at 5:00 p.m. EDT on April 5, 2023. The records were produced in such a way that each record had to be opened one at a time, causing the review of the records to be extremely time consuming and laborious. Counsel was unable to complete the review until the night before the Rule 3.851 motion was due. PCR3. 577. With less than three days to review the records under the pressure of also having to investigate other issues, prepare for a public records hearing, and draft Mr. Barwick's Rule 3.851 motion, counsel had little opportunity to complete their review of the records. Counsel alerted the circuit court to the issue at the April 6 hearing. PCR3. 577-78.

In addition, though Mr. Barwick had previously requested his medical and psychological records long before his death warrant was signed, the Department of Corrections (DOC) did not disclose the majority of the

requested records until over six months later, and most were disclosed *after* the warrant was signed. PCR3. 536-39. Specifically, DOC’s first disclosure of records was provided on November 7, 2022 (587 pages). Then, after the warrant was signed, the bulk of the previously requested records were not provided until April 4 (2,455 pages) and April 5, 2023 (148 pages). The April 4th disclosure of records—that undersigned counsel had requested six months prior—was made available to counsel less than an hour before the April 4th hearing, which was the day before Mr. Barwick’s deadline to submit all additional public records requests, and less than 48 hours before the hearing on said requests. The records totaled over 2,455 pages and are relevant to Mr. Barwick’s mental status, mental health issues, and recent medical issues which counsel had wanted to investigate in relation to an “as applied” challenge to the current lethal injection protocol. PCR3. 536-39. Mr. Barwick’s medical issues have been ongoing for the past few years, which had prompted undersigned counsel’s September, 2022, request for his medical records.⁸ PCR3. 536-39.

⁸ To the extent the Court could not find good cause to grant Mr. Barwick’s requests based on opposing counsel and agency counsel arguments that defense counsel was not diligent in requesting Mr. Barwick’s records until after the warrant was signed, this is not supported by the record. Mr. Barwick had previously requested his medical and psychological records, long before his death warrant was signed. PCR3. 537-38. Due to the expedited 5-day filing deadline and lack of access to the bulk of Mr. Barwick’s DOC records

Mr. Barwick's Rule 3.851 motion was filed on April 8, 2023, only five days after the death warrant was issued. PCR3. 438-62. In the motion and at the *Huff* hearing held two days later, counsel explained the extraordinary difficulties attendant with filing the motion within five days of the warrant and during the high holy days. See PCR3. 575-76. For example, counsel described the difficulty in securing a mental health expert to evaluate Mr. Barwick and consult on mental health issues for a client who has suffered from brain damage since before he was born and experienced relentless, severe trauma in his childhood. PCR3. 438, 562, 568. Dr. Hyman Eisenstein, who had evaluated Mr. Barwick in the past and in relation to the 2021 clemency proceeding, quickly reviewed his file and believed there were additional, previously unavailable tests that should be conducted but due to Passover could not be available until April 10, two days after the deadline for filing the Rule 3.851 motion. Ultimately, due to an unforeseen cancellation in his schedule, Dr. Barry Crown agreed to conduct an evaluation, but his

counsel that had requested over six months prior to the warrant, it was not feasibly possible to retain an expert qualified to review these records and provide the necessary consultation on Mr. Barwick's physical and mental health conditions specifically as it relates to an as applied challenge to the lethal injection protocol. The experts counsel was able to retain in the limited 5-day time period, Dr. Crown and Dr. Holmes, did not have an opportunity to fully review those records prior to the filing deadline and would not have been able to speak to an as applied lethal injection claim in the context of the Department's protocol and Mr. Barwick's medical conditions.

window of time was narrow, allowing only for a Thursday afternoon evaluation on April 6, 2023, just two days before Mr. Barwick's filing deadline. Dr. Crown provided a declaration the day before the Rule 3.851 was due. When it initially appeared that the Department of Corrections could not accommodate Dr. Crown's schedule due to a conflict at the prison, Dr. Heather Holmes was asked to consult about Mr. Barwick's mental health issues. Dr. Holmes could not find time for an evaluation but was able to review some records on Friday, April 7, and produced a declaration. Both Dr. Crown and Dr. Holmes were quite clear: their evaluations were incomplete due to the time constraints imposed and there was more that should be done in relation to mental health issues.

B. Analysis of Mr. Barwick's claim

1. Mr. Barwick is entitled to due process, which depends on the effective assistance of counsel

It is indisputable that Mr. Barwick is entitled to due process and the effective assistance of counsel. The issuance of his death warrant surely increases the constitutional and statutory rights to which he is entitled. This Court has explained as much in *Key Citizens for Gov., Inc. v. Florida Keys Aqueduct Auth.*, 795 So. 2d 940 (Fla. 2001):

The basic due process guarantee of the Florida Constitution provides that "[n]o person shall be deprived of life, liberty or property without due process of law." Art. I, § 9, Fla. Const. The

Fifth Amendment to the United States Constitution guarantees the same. As the Florida Supreme Court explained in *Department of Law Enforcement v. Real Property*, 588 So.2d 957, 960 (Fla. 1991), “[p]rocedural due process serves as a vehicle to ensure fair treatment through the proper administration of justice where substantive rights are at issue.” Procedural due process requires both fair notice and a real opportunity to be heard. See *id.* As the United States Supreme Court explained, the notice must be “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice must be of such nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance.” *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950) (citations omitted). Further the opportunity to be heard must be “at a meaningful time and in a meaningful manner.” *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976); accord *Fuentes v. Shevin*, 407 U.S. 67, 80, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972) (stating that procedural due process under the Fourteenth Amendment of the United States Constitution guarantees notice and an opportunity to be heard at a meaningful time and in a meaningful manner).

The specific parameters of the notice and the opportunity to be heard required by procedural due process are not evaluated by fixed rules of law, but rather by the requirements of the particular proceeding. See *Gilbert v. Homar*, 520 U.S. 924, 117 S.Ct. 1807, 138 L.Ed.2d 120 (1997); see also *Mullane*, 339 U.S. at 313, 70 S.Ct. 652 (stating that notice and opportunity for hearing need only be appropriate to the nature of the case). As the Supreme Court has explained, due process, “unlike some legal rules, is not a technical concept with a fixed content unrelated to time, place and circumstances.” *Cafeteria & Restaurant Workers Union, Local 473, AFL-CIO v. McElroy*, 367 U.S. 886, 895, 81 S.Ct. 1743, 6 L.Ed.2d 1230 (1961). Instead, “due process is flexible and calls for such procedural protections as the particular situation demands.” *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972).

Emphasis added. Here, the accelerated warrant period along with other attendant factors deprived Mr. Barwick of his right to due process and meaningful postconviction proceedings under warrant.

The right to due process entails “notice and opportunity for hearing appropriate to the nature of the case.” *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 542 (1985), quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). “[F]undamental fairness is the hallmark of the procedural protections afforded by the Due Process Clause.” *Ford v. Wainwright*, 477 U.S. 399, 424 (1986) (Powell, J., concurring in part and in the judgment).

Additionally, the accelerated warrant schedule and attendant circumstances in Mr. Barwick’s case made it impossible to provide effective assistance of counsel to Mr. Barwick. See *Spalding v. Dugger*, 526 So.2d 71, 72 (Fla. 1988); see also Fla. Stat. §27.711(12) (2023) (“The court shall monitor the performance of assigned counsel to ensure that the capital defendant is receiving quality representation.”). In *Spalding*, this Court recognized that Florida capital postconviction defendants are statutorily entitled to effective legal representation. And in *Arbelaez v. Butterworth*, 738 So. 2d 326 (Fla. 1999), this Court acknowledged it has a “constitutional responsibility to ensure that the death penalty is administered in a fair,

consistent, and reliable manner...”). Under the circumstances, it was simply not possible for Mr. Barwick’s counsel to render the effective representation required by *Spalding*. And while counsel attempted to investigate and develop issues for Mr. Barwick, the time parameters made it impossible for counsel to do more than scratch the surface.

Likewise, as a result of the compressed warrant schedule and office resource/staffing issues, Mr. Barwick’s counsel failed to comply with her responsibilities as outlined by ABA Guideline 10.15.1:

(B): If an execution date is set, post-conviction counsel should immediately take all appropriate steps to secure a stay of execution and pursue those efforts through all available fora.

(C) **Post-conviction counsel should seek to litigate all issues**, whether or not previously presented, that are arguably meritorious under the standards applicable to high quality capital defense representation, **including challenges to any overly restrictive procedural rules**. Counsel should make every professionally appropriate effort to present issues in a manner that will preserve them for subsequent review.

See ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases 10.15.1(B) and (C), at 1079 (2003).

In addition, to Mr. Barwick’s statutory right to effective postconviction counsel, the basic tenet of due process requires that in an adversarial system is that an accused be zealously represented at “every level”; in a death penalty case such representation is the “very foundation of justice”. *Wilson*

v. Wainwright, 474 So. 2d 1162, 1164 (Fla. 1985). Here, the circumstances surrounding the litigation schedule in Mr. Barwick’s case deprived him of due process, fundamental fairness and his right to effective counsel. Counsel was unable to provide the “guiding hand of counsel” that Mr. Barwick needs at this most critical step of his capital representation. See *Powell v. Alabama*, 287 U.S. 45, 68-69.

2. The circuit court’s order

The circuit court erred as a matter of fact and law. Initially, in denying Mr. Barwick’s request for a stay, the court referenced the Timely Justice Act, noting that the Governor complied with the time frames set forth in the Act for scheduling an execution. PCR3. 623. See Fla. Stat. Sec. 922.052(2)(b) (2022). However, overlooked by the court is that the statute permits the governor to direct the execution of the sentence within 180 days of the issuance of the warrant. *Id.* Under the circuit court’s reasoning, the issuance of the warrant and the scheduling of the execution, is not a violation of due process because the thirty-day warrant period falls within the time set forth in the statute. Yet, the same could be said for one day, or two days. Surely, due process would be violated if an execution were scheduled within one day of the issuance of the warrant even though it falls within the 180-day time period set forth in the statute.

Moreover, due process concerns often relate to the specific circumstances in a case. Here, Mr. Barwick specifically outlined the facts that accompanied the accelerated warrant period, including the other obligations of his counsel,⁹ co-counsel's illness with COVID-19, deadlines during the week of Easter and Passover and the resultant problems consulting with experts and witnesses, scheduling conflicts at the prison related to the dual warrants, and the fact that counsel had almost no time to investigate and prepare Mr. Barwick's Rule 3.851 motion. Under the circumstances in Mr. Barwick's case, the circuit court erred in denying a brief stay so that Mr. Barwick's rights to due process and the effective assistance of counsel were not violated.

Additionally, the circuit court's order relies extensively on *Asay v. State*, 210 So. 3d 1 (Fla. 2016). However, a review of *Asay* demonstrates that—contrary to the circuit court's order, it is simply not instructive to Mr. Barwick's case. In *Asay's* case, a death warrant issued on January 8, 2016 and an

⁹ In Florida, a postconviction defendant and his or her counsel have no notice or warning that a death warrant may issue and an execution will be scheduled. This system creates overwhelmingly difficult burdens on counsel as well as other state officials, all of whom must drop everything to try and accommodate the accelerated schedule of death warrant litigation. Providing notice and reasonable time frames for death warrant litigation provides a meaningful opportunity to be heard.

execution was scheduled sixty-eight days later, on March 17, 2016.¹⁰ Asay claimed his right to due process was violated because he was unrepresented by state postconviction counsel when his warrant was signed. *Asay v. State*, 210 So. 3d 1, 27 (Fla. 2016). However, because the trial court appointed new registry counsel upon the signing of the warrant and this Court issued a lengthy stay, it is distinguishable from the circumstances with respect to the central issue of fair notice and reasonable opportunity to be heard. *Asay v. State*, 210 So. 3d 1, 28, 5 n.1 (Fla. 2016). To be sure, the key distinction between Mr. Asay's case and Mr. Barwick's circumstances is that Mr. Asay obtained a lengthy stay and delay of his execution. *Asay v. State*, 210 So. 3d 1, 5 n.1 (Fla. 2016). By the time this Court denied Mr. Asay's claim—on December 22, 2016—it was nearly a year since the warrant had issued. *Id.* Then, the governor delayed rescheduling his execution for another seven months. Therefore, any due process violation that accompanied the issuance of the warrant had been mooted by the lengthy stay and delay that occurred in his case.

Finally, as to the circuit court's other basis for denying Mr. Barwick's request for a stay, Mr. Barwick does not dispute that he has been

¹⁰ See *Asay v. Sec'y, Florida Dep't of Corr.*, 3:16-CV-43-J-32JRK, 2017 WL 3251526, at *1, n.1 (M.D. Fla. July 31, 2017).

represented by counsel since 1997. However, the circuit court's holding that Mr. Barwick was not entitled to the effective assistance of counsel throughout his postconviction proceedings, including during death warrant litigation, is legally erroneous. Indeed, this Court has recognized that the basic requirement of due process in an adversarial system is that an accused be zealously represented at "every level"; in a death penalty case such representation is the "very foundation of justice". *Wilson v. Wainwright*, 474 So. 2d 1162, 1164 (Fla. 1985).

Thirty-five years ago, this Court held:

We recognize that, under section 27.702, each defendant under sentence of death is entitled, as a statutory right, to effective legal representation by the capital collateral representative in all collateral relief proceedings. This statutory right was established to alleviate problems in obtaining counsel to represent Florida's death-sentenced prisoners in collateral relief proceedings. Although the United States Supreme Court, in *Pennsylvania v. Finley*, 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987), and *Ross v. Moffitt*, 417 U.S. 600, 94 S.Ct. 2437, 41 L.Ed.2d 341 (1974), held there is no absolute constitutional right to counsel in collateral relief proceedings, it did recognize that the circumstances of a particular case might require appointment of counsel. *Id. Accord Graham v. State*, 372 So.2d 1363 (Fla.1979). The legislature established this statutory right, not only in recognition of the appropriateness for all death-sentenced prisoners to have counsel in collateral relief proceedings, but also to avoid the attendant problems of determining the need to appoint counsel and the utilization of volunteer counsel, including the resulting delays in that process.

Spalding v. Duggar, 526 So. 2d 71, 72 (Fla. 1988) (emphasis added). *Spalding* arose in the context of several death warrants being issued which caused severe budgetary constraints on the Capital Collateral Representative (CCR) and made it impossible to represent the petitioners in their death warrant litigation. *Id.* Thus, this Court unequivocally recognized that a capital postconviction defendant was entitled to the effective assistance of counsel. Since *Spalding*, this Court has reiterated and enforced such a right.

And, like this Court, the Florida Legislature has promised “capital defendant[s] quality representation” in state postconviction proceedings. Fla. Stat. § 27.711 (12). Sec. 27.711(12) imposes upon the Florida state courts a duty to monitor collateral counsel’s performance and ensure that “quality representation” is provided:

The court shall monitor the performance of assigned counsel to ensure that the capital defendant is receiving quality representation. The court shall also receive and evaluate allegations that are made regarding the performance of assigned counsel. The Comptroller, the Department of Legal Affairs, the executive director, or any interested person may advise the court of any circumstance that could affect the quality of representation, including, but not limited to, false or fraudulent billing, misconduct, failure to meet continuing legal education requirements, solicitation to receive compensation from the capital defendant, or failure to file appropriate motions in a timely manner.

Based upon this Court's obligation to ensure due process and the effective assistance of counsel in capital postconviction proceedings, time and again, this Court has taken steps to ensure that capital postconviction defendants were being effectively represented.

In *Peede v. State*, 748 So. 2d 253 (Fla. 1999), this Court made clear that ineffective representation at any level of the capital punishment process would not be tolerated. In its opinion, this Court felt "constrained to comment on the representation afforded Peede in these proceedings [appeal from summary denial of motion for postconviction relief]," which included criticism of the length, lack of thoroughness, and conclusory nature of the initial brief, and reminded counsel of "the ethical obligation to provide coherent and competent representation, especially in death penalty cases, and we urge the trial court, upon remand, to be certain that Peede receives effective representation." *Peede* at 256, n. 5.

Thus, the circuit court's determination that Mr. Barwick is not entitled to the effective assistance of counsel is legally erroneous. Here, despite Florida's guarantee of "quality representation," and Mr. Barwick's statutory right to effective assistance of counsel, Mr. Barwick is being deprived of his rights in the instant case. Mr. Barwick should be provided a brief stay of

execution with a remand to the circuit court for death warrant proceedings accompanied by due process and the effective assistance of counsel.

In summary, the compressed 5 day filing deadline upon receiving notice of the issuance of Mr. Barwick's warrant occurred over the religious holidays, resulting in a lack of access to experts and additional testing. It occurred while lead counsel had numerous impending deadlines that could not be continued or rescheduled, and while co-counsel has been out sick with COVID-19. It occurred while counsel had not yet received the bulk of Mr. Barwick's medical records from DOC, which counsel had requested over 6 months earlier. In light of these circumstances, undersigned counsel was not afforded an adequate opportunity to prepare and litigate a comprehensive and complete motion for postconviction relief in this warrant litigation, arguably the most important juncture of the postconviction process. As a result, Mr. Barwick has not had the necessary due notice and opportunity to be heard prior to his execution currently scheduled for May 3, 2023.

In light of the foregoing, Mr. Barwick's execution should be stayed and his counsel be afforded a reasonable time *under reasonable circumstances* to investigate and present Mr. Barwick's claims. Accordingly, Mr. Barwick requests this Court stay his execution, reverse the circuit court's order and

remand the case for corrective action to be taken prior to ruling on the appeal, including an opportunity to amend the underlying motion for postconviction relief, or, alternatively, remand the cause for an evidentiary on his existing claims.

II. THE CIRCUIT COURT ERRED IN DENYING MR. BARWICK'S CLAIM THAT THE DEATH PENALTY IS A CATEGORICALLY UNCONSTITUTIONAL PUNISHMENT FOR INDIVIDUALS WHO, LIKE MR. BARWICK, COMMITTED THEIR OFFENSES WHEN THEY WERE UNDER AGE TWENTY-ONE.

A. Relevant background to the claim

Mr. Barwick was just nineteen years old when he committed the capital crime for which he is now scheduled to be executed. In 2005, the United States Supreme Court decided *Roper v. Simmons*, 543 U.S. 551 (2005), holding that the Eighth Amendment to the United States Constitution categorically prohibited the execution of individuals who were juveniles under the age of eighteen when they committed their capital crimes.¹¹ In so doing, the Court overturned its then-recent precedent, *Stanford v. Kentucky*, which had previously determined that the age under which executions were

¹¹ Consistent with the neurobiological terminology, in this brief Mr. Barwick will refer to individuals under age 18 as “juveniles.” Individuals between the ages of 18 through 20 will be referred to as “adolescents” or “late adolescents.” Individuals over age 21 will be referred to as “adults.” See PCR3. 445 (defining the three developmental stages of adolescence).

unconstitutional was sixteen. 492 U.S. 361, 380 (1989) (declining to prohibit executions for sixteen- and seventeen-year-old juveniles); see also *Thompson v. Oklahoma*, 487 U.S. 815 (1988) (prohibiting execution of those under age sixteen).

Roper stressed that a juvenile defendant could never be considered the worst of the worst under the Eighth Amendment proportionality principle—and that that held true even when the crime was particularly gruesome. See generally *Roper*, 543 U.S. at 555-57 (describing the *Roper* petitioner’s murder, which involved several juveniles kidnapping and tying up a woman with duct tape and throwing her off a bridge so that she could not identify them, and the petitioner bragging that he had killed her and that he would get away with it because he was a minor). In so holding, the Court outlined three key differences between juvenile and adult behavior: (1) juveniles were more likely to engage in “impetuous and ill-considered actions and decisions” owing to their “lack of maturity and [] underdeveloped sense of responsibility”; (2) juveniles “are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure”; (3) the “personality traits of juveniles are more transitory” and therefore, “the impetuosity and recklessness that may dominate in younger years can subside” as they mature. *Id.* at 569-70.

As a result of these differences, the Court found that neither of the primary penological justifications for capital punishment, retribution and deterrence, supported imposing the death penalty on juveniles. On the one hand, the retributive aspect was disproportionate because “the law’s most severe punishment is imposed on one whose culpability or blameworthiness is diminished . . . by reason of youth and immaturity.” *Id.* at 571. As for deterrence, the Court questioned “whether the death penalty [had] a significant or even measurable deterrent effect on juveniles,” which was “of special concern because the same characteristics that render juveniles less culpable than adults suggest . . . that juveniles will be less susceptible to deterrence.” *Id.*

The *Roper* holding was not the product of any particular single piece of scientific evidence that, on its own, demonstrated that the logic of *Stanford* and *Thompson* applied equally to those between sixteen and eighteen years old. Already by the late 1980s, a significant body of neurobiological and scientific research discussing the multifaceted developmental distinctions between juveniles and adults had accrued. The *Roper* Court acknowledged that “[i]n *Thompson*, a plurality of the Court recognized” that juveniles under sixteen were categorically less criminally culpable than older individuals due to these developmental differences but concluded that “the same reasoning

[of *Thompson*] applies to all juvenile offenders under 18.” *Roper*, 543 U.S. at 570-71. Essentially, that is, the *Roper* Court looked at much of the same underlying scientific research that existed at the time of *Thompson* and *Stanford* and drew different—broader—conclusions from it than the *Stanford* Court had.

What compelled *Roper*’s holding was not an individual study, or an overnight shift in the scientific understanding of when and how the juvenile brain transitions into adulthood. Rather, it was based on the steady accrual of **years**—even decades—of scientific research which, when considered cumulatively, signaled a universal consensus that sixteen- and seventeen-year-olds were neurobiologically and psychologically indistinguishable from younger juveniles and should be afforded the same constitutional protections. *Id.* at 574 (“To the extent *Stanford* was based on review of the objective indicia of consensus that obtained in 1989, it suffices to note that those indicia have changed.”).

Given this background, *Roper*’s holding implicitly contemplates the possibility that future scientific research will continue to develop and coalesce around a different age under which executions are categorically prohibited. Any other conclusion ignores the reality of the scientific process, which necessarily occurs over a lengthy span of time and relies on multiple

researchers performing interrelated studies until a consensual tipping point is reached. Within the context of adolescent brain development, such a consensus definitively was reached in August 2022 when the American Psychological Association (hereinafter “APA”) overwhelmingly passed a resolution calling for a prohibition on death sentences for individuals who were under the age of twenty-one when they committed their offenses. The APA resolution furnished the basis for Mr. Barwick’s newly-discovered-evidence claim that his execution is categorically barred under the Eighth Amendment of the United States Constitution and Article 1, § 17 of the Florida Constitution.

In his motion, Mr. Barwick explained the significance of the APA resolution as newly discovered evidence of a consensus supporting a prohibition on the execution of individuals who, like him, were under age twenty-one when they committed their capital offenses. In its resolution, the APA explained that, although *Roper’s* core holding regarding juvenile immaturity continued to be supported by the scientific data, **“there is no neuroscientific bright line regarding brain development that indicates the brains of 18-to-20-year-olds differ in any substantive way from those of 17-year olds.”** See PCR3. 427 (emphasis added). That is because continuing research into developmental neuroscience has established that

significant maturation of the brain continues through at least age twenty, especially in the key brain systems implicated in a person's capacity to evaluate behavioral options, make rational decisions about behavior, meaningfully consider the consequences of acting and not acting in a particular way, and to act deliberately in stressful or highly charged emotional environments. See PCR3. 428.

As a result, “the same youthful and immature characteristics that apply” to juveniles “are similarly present in [late adolescents], rendering them less culpable and less susceptible to any deterrent value of the death penalty.” See PCR3. 427. In fact, scientific research has shown that in certain situations the “fundamental differences” in maturity the Supreme Court noted between juveniles and adults may be particularly heightened in late adolescence—**making those individuals, as a class, especially vulnerable and most in need of constitutional safeguards** that account for their developmental deficiencies in criminal sentencing. However, once an individual reaches full adulthood in the early to mid-20s, “normal and expected improvements in self-control, resistance to peer pressure, and [thinking about the future], which occur in most individuals, are related to desistance from crime during the late adolescent and young adult years.” See PCR3. 420.

The APA resolution went on to describe how this neurobiological reality has increasingly been reflected in the social, legal, and political spheres. For example, in 2021 the manual published by the American Association of Intellectual and Developmental Disabilities “increased the age of onset criterion for the diagnosis of intellectual disability . . . from age 18 to age 22.” See PCR3. 427-28. Additionally, there are a wide variety of laws in many states restricting the behavior of individuals under twenty-one, particularly issues implicating “decision-making in highly stressful and extremely arousing circumstances,” while such restrictions are frequently absent in “other matters that need not [] be made, and typically are not made, rashly in emotionally volatile circumstances.” See PCR3. 428-29. This distinction tracks the scientific understanding of the developmental limitations of the late-adolescent brain and was critical to the United States Supreme Court’s holding in *Roper* that individuals under age eighteen cannot constitutionally be sentenced to death under the Eighth Amendment.

The APA resolution concluded that “determining whether the nature of the crimes committed by members of the late adolescent class and the level of culpability that should be ascribed to them truly constitutes the ‘worst of the worst’ is inherently unreliable” and “predictions about their rehabilitation potential and likely future actions are equally unreliable.” See PCR3. 428.

This parallels the underlying rationale for the Supreme Court’s holding in *Roper*, which recognized that a categorical ban on juvenile death sentences was necessary because “the differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability.” *Roper*, 543 U.S. at 572-73. In light of this newly discovered evidence that *Roper*’s categorical ban applies to individuals under age 21, Mr. Barwick argued that his death sentence—imposed for a crime he committed when he was 19—is invalid.

The circuit court gave three reasons for denying this claim: (1) it was procedurally barred because Mr. Barwick “could have (and did) raise the claim on appeal or in a prior postconviction motion”; (2) it was untimely because the research Mr. Barwick pointed to “does not qualify as newly discovered evidence”; and (3) it was meritless “because the record is clear that [Mr. Barwick] was nineteen years old” when he committed the crime and, therefore, *Roper* does not apply to him. PCR3. 626-28. The circuit court’s first finding rests on a misreading of the record, and the latter two are erroneous under the law.

B. Mr. Barwick could not have raised this claim prior to the passage of the APA resolution in August 2022

The circuit court found the claim to be procedurally barred and untimely because, in its view, Mr. Barwick “could have (and did) raise the claim” before. PCR3. 627. Specifically, the court points to Mr. Barwick’s initial postconviction motion and his habeas proceedings in this Court, which began in 2005 and concluded in 2011 with this Court’s opinion denying relief. See PCR3. 627, 632. Although Mr. Barwick has previously raised claims that cited language from *Roper*, his 2023 claim, which is grounded in neurobiological and psychological developments that categorically apply to late adolescents, is substantially different from the claim he raised in 2005, which argued that his “mental and emotional age” rendered him functionally equivalent to someone under the age of eighteen. See PCR3. 816.

As Mr. Barwick explained below, the passage of the APA’s resolution in August 2022 signaled that what had previously been a debate within the scientific community crystallized into an established consensus, owing to the APA’s prominence, its standing in the psychological community, and its role in shaping legal policies affecting juvenile sentencing. See PCR3. 446. In addition to being “the leading scientific and professional organization representing psychology in the United States,” the APA’s amicus briefs in other juvenile-sentencing cases, including *Graham v. Florida*, 560 U.S. 48 (2010), and *Miller v. Alabama*, 567 U.S. 460 (2012), have provided critical

data used by the United States Supreme Court to support its holdings in those opinions. See *Graham*, 560 U.S. at 68 (referencing the APA’s amicus brief); *Miller*, 567 U.S. at 472 n.5 (citing the APA’s amicus brief for the proposition that “the science and social science supporting *Roper*’s and *Graham*’s conclusions have become even stronger”). The APA’s endorsement of a particular policy statement, such as the resolution it adopted calling for an end to the late-adolescent death penalty, is therefore extraordinarily significant and only came after years of research and debate within the relevant scientific communities. It is for that reason that Mr. Barwick presented the APA’s August 2022 resolution as newly discovered evidence.

Mr. Barwick could not have raised this newly-discovered-evidence claim before August 2022, because the APA resolution—and the consensus shift that it embodied—did not exist prior to that time. Although individual studies were published over the years which ultimately contributed to that consensus, a single study, by itself, does not form a consensus. That only occurred recently and was cemented by the APA’s resolution calling for an end to the late-adolescent death penalty. The circuit court’s contrary finding fails to recognize the necessarily gradual timeframe over which the scientific process occurs.

Scientific understanding does not change overnight. The nature of scientific progress—and why scientific evidence is important and reliable to courts—is incremental. Each new step builds on the previous one until, gradually, a new understanding is reached that may lead to entirely different conclusions than the starting point of the original research. Two recent examples demonstrate this paradigm.

First, arson science. As one federal court described, “there has been a revolution in fire science” that took place over two decades. There was not one specific flashpoint that caused this “revolution.” Rather, “[i]n **the past twenty years**, the analytical paradigm in arson investigations has shifted in profound and dramatic ways.” *Han Tak Lee v. Tennis*, 2014 WL 3894306 at *3 (M.D. Penn. June 13, 2014) (emphasis added). These incremental shifts in the understanding of many separate foundational premises in arson science collectively led to “extraordinary developments” that “undermined the validity of the past science and art in [that] field.” *Id.* As a result of these developments, the defendant in *Han Tak Lee* was granted habeas relief and later exonerated.¹²

¹² “Han’s Story,” Pennsylvania Innocence Project, <https://painnocence.org/HanTakLee?locale=en>

That only happened through the steady accumulation of scientific research that universally pointed in a single direction regarding a new understanding of how fires started and behaved. The first study—the one presented at the beginning of that twenty-year period—may have been the first “new” study in a strictly literal sense, but its reliability and validity would have been rightly questioned by scientists and the courts. *Cf. Stevens v. State*, 419 So. 2d 1058, 1063 (Fla. 1982) (“A court should admit evidence of scientific tests and experiments only if the reliability of the results [is] widely recognized and accepted among scientists.”). It was only through a continued chain of scientific research, occurring over decades and steadily building off of what came before it that the old understanding of arson science was “thoroughly debunked.” *Han Tak Lee*, 2014 WL 3894306 at *3.

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

A recent decision by the Georgia Supreme Court is an instructive example. There, a defendant convicted of murdering an infant through “SBS” moved for a new trial on the basis of “an expert affidavit, various academic

journal articles, and position papers by the American Academy of Pediatrics.” *Smith v. State*, 882 S.E.2d. 300, 304 (Ga. 2022). His motion described “a major shift in the medical community’s thinking [which] **began in 2006** when the National Association of Medical Examiners [changed its view on the viability of the SBS diagnosis].” *Id.* (emphasis added). Once one organization took that initial step, “[t]he medical community increasingly began to accept [the viewpoint of the first organization].” *Id.* In **2009**, a second professional organization published a position paper expressing similar doubts on the reliability of the SBS diagnosis. *Id.*

The *Smith* defendant also cited other, more recent scientific articles that drew on these ongoing developments, including a **2018** consensus statement published by multiple professional organizations and a **2020** journal article. *Id.* The defendant argued that “the modern medical literature recognizes [the uncertainties of an SBS diagnosis].” *Id.* All told, the scientific evidence in the defendant’s postconviction motion for a new trial spanned **at least 14 years**. The Georgia trial court denied the motion in part because the expert opinions on which the defendant relied “ha[d] been available since the 1990s and [were] available at the time of [his] trial,” and so, in the trial court’s view, were not newly discovered evidence. *Id.* at 306.

In reversing the trial court and remanding for an evidentiary hearing, the Georgia Supreme Court explained that, while some of the underlying facts that were being presented as newly discovered may have been generally available in the 1990s, by the time of the postconviction motion they were bolstered by “the backdrop of the post-trial scientific developments” that subsequently occurred. *Id.* at 310. Those developments “may make [the scientific conclusions] more credible than a hypothetical, similar [scientific] opinion that might have been offered” previously, such as in the 1990s when the first studies discussing SBS were published. *Id.*

Han Tak Lee and *Smith* demonstrate the circuit court’s flawed analysis in determining that Mr. Barwick could have raised this claim prior to August 2022. The scientific process is just that: a process. At some point, a consensus will likely be reached, but many separate studies and years or even decades of research and debate are required to obtain that consensus. As the Sixth Circuit Court of Appeals explained:

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

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

That same pattern has played out in the realm of adolescent brain development. Indeed, both *Roper* itself and the Supreme Court’s post-*Roper* precedent support the incremental view of scientific progress outlined above. Throughout its opinion, the *Roper* Court cited sources discussing the differences between juveniles and adults that spanned from as recently as 2005 to as far back as 1968. *See Roper*, 543 U.S. at 570 (2005) (citing a 1968 source for “[t]he third broad difference” between juveniles and adults). That one source did not singlehandedly compel the Supreme Court to hold that the juvenile death penalty was unconstitutional. Rather, it was the compilation of multiple studies, spanning decades and addressing various facets of the difference between juveniles and adults, that cumulatively did so. *See, e.g., id.* at 566, 569, 573 (citing sources from 1976, 1992, 1994, 1997, 1999, 2000, 2003).

Similarly, while scientific research in the realm of adolescent brain development has been ongoing for many years, it is the steady accumulation of such research, cumulatively and over time, that generated a consensus—

and the APA’s August 2022 resolution cemented that consensus within the neurobiological and psychological scientific communities. As such, Mr. Barwick timely raised this claim.¹³

C. Mr. Barwick raised a cognizable claim of newly discovered evidence based on the APA resolution

The circuit court next found that the claim was “untimely because scientific research with respect to brain development does not qualify as newly discovered evidence,” citing *Branch v. State*, 236 So. 3d 981 (Fla. 2018). PCR3. 628. However, *Branch* did not involve a claim based on the APA resolution as newly discovered evidence and, as such, the analysis there does not prevent this Court from deciding Mr. Barwick’s claim on the merits.

In *Branch*, the defendant raised a newly-discovered-evidence claim largely premised on a then-recent 2018 resolution passed by the American Bar Association calling for a prohibition on death sentences for individuals

¹³ The centrality of the APA resolution to Mr. Barwick’s claim also refutes the circuit court’s finding that Mr. Barwick “raised this claim—or a version thereof” in his prior legal proceedings. PCR3. 627. True, Mr. Barwick litigated claims using the logic of *Roper* to argue that his “mental and emotional age” were under eighteen. See PCR3. 627. But his 2023 claim is based on a new understanding of adolescent brain development that he did not previously litigate (and which he could not) because that understanding did not exist until 2022—long after the conclusion of the postconviction proceedings cited by the circuit court.

who were under the age of twenty-two when they committed their offenses. *Branch*, 236 So. 3d at 985 n.5. In rejecting the claim, this Court repeatedly noted that “new research studies [are not] newly discovered evidence **if based on previously available data.**” *Id.* at 986 (internal quotation marks omitted) (emphasis added). Comparing the rationales of the APA and the ABA resolutions demonstrates why the APA’s is of greater constitutional relevance, even though both organizations expressed support for the same policy goal.

The 2018 ABA resolution discussed several reasons for endorsing a ban on the death penalty for individuals under age twenty-two. The first one listed is the United States Supreme Court’s preference, as expressed in its recent decisions, for greater latitude and individualized sentencing for juveniles. See American Bar Association, Resolution (2018) at 4.¹⁴ Others include legislative developments in adolescent sentencing, *id.* at 8; and the limited penological value of incarcerating individuals under age twenty-two, *id.* at 11. The scientific understanding of adolescent brain development is mentioned only briefly. *Id.* at 6. The ABA resolution synthesized various strands of the then-ongoing conversation regarding the appropriateness of

¹⁴https://www.americanbar.org/content/dam/aba/administrative/death_penalty_representation/2018_my_111.pdf

sentencing late adolescents to death, but did not provide an independent analysis of the issue.

By contrast, the APA resolution exclusively focused on the psychological and neurobiological realities of late adolescents—the APA’s subject matter of expertise. The APA resolution did not merely reflect an ongoing debate that is happening among others, but actively inserted its own perspective into the conversation. As Mr. Barwick noted above, given the weight that the United States Supreme Court has given to the APA’s policy positions in the past, this is significant.

Additionally, unlike the ABA resolution, the APA resolution highlighted the core concern at the heart of *Roper* and its progeny: whether society’s standards of decency have evolved to the point that executing individuals who were under age twenty-one at the time of their offense would violate the Eighth Amendment. *Roper*, 543 U.S. at 561 (quoting *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958) (plurality opinion)). As the Supreme Court has long recognized, “the words of the [Eighth] Amendment are not precise, and [] their scope is not static.” *Trop*, 356 U.S. at 100-01. The APA resolution indicates that executing an individual who was under age twenty-one is not only questionable—it is flat-out unconstitutional, because “there is no neuroscientific bright line regarding brain development that indicates the

brains of 18-to-20 year-olds differ in any substantive way from those of 17 year-olds.” See PCR3. 427. Notably, the three studies cited by the APA to support that point in its resolution came from 2021 and 2022, reflecting the recency of this breakthrough in understanding the adolescent brain. It is not equivalent to the “previously available data” at issue in *Branch*.

As this Court has long recognized, scientific studies can be considered newly discovered evidence, as long as the conclusions presented in those studies are truly new. See, e.g., *Hill v. State*, 921 So. 2d 579, 582 (Fla. 2006) (analyzing on the merits a newly-discovered-evidence claim that “present[ed] new scientific evidence that Florida’s procedure for carrying out lethal injection” was possibly unconstitutional). The scientific consensus reflected by the APA’s resolution was not known until August 2022, and therefore was not “previously available data.” To the extent that it is disputed whether a consensus exists or, if it does, when it could have reasonably been discovered by Mr. Barwick, this Court should remand for an evidentiary hearing so that Mr. Barwick can fully litigate these difficult factual questions.

D. Mr. Barwick’s claim regarding his categorical exemption from being executed is meritorious

Finally, the circuit court denied Mr. Barwick’s claim on the merits “because the record is clear that [he] was nineteen years old” when he committed the capital offense, and therefore, in the court’s view, “[Mr.

Barwick's] age at the time of the offense does not exempt him from execution" under *Roper*. PCR3. 628. Yet *Roper's* holding is far broader, and more elastic, than the circuit court acknowledged in its order.

As discussed above, *Roper* itself was an extension of the Supreme Court's prior precedent holding that individuals over the age of fifteen could be sentenced to death. See *Stanford v. Kentucky*, 492 U.S. 361 (1989). To explain its holding, the *Roper* 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. By the same token, some under 18 have already attained a level of maturity some adults will never reach. For the reasons we have discussed, however, a line must be drawn. The plurality opinion in *Thompson* drew the line at 16. **In the intervening years the Thompson plurality's conclusion that offenders under 16 may not be executed has not been challenged. The logic of *Thompson* extends to those who are under 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.

Roper, 543 U.S. at 574 (emphasis added). The circuit court apparently placed great weight on the *Roper* Court's observation that "a line must be drawn," without contextualizing that the crucial question the Court was considering is not *whether* a line must be drawn but *where* it should be drawn. To that end, the Supreme Court noted that eighteen was an appropriate age to draw the line *at that time* because, broadly speaking,

those under age eighteen are more similar to those under sixteen than they are to adults, and because eighteen marks the societal transition point from childhood to adulthood—or at least it did in 2005, when *Roper* was decided.

Precisely the same point can now be made with respect to individuals under age twenty-one. As detailed in Mr. Barwick’s motion, in many circumstances individuals under age twenty-one share more similarities with those under age eighteen than they do with adults. See PCR3. 408-09. Furthermore, the APA resolution lists numerous activities that are either banned or heavily restricted for individuals under age twenty-one, including purchasing alcohol and (in many states) tobacco products; working as a Federal Marshall or FBI agent; and obtaining a credit card without a cosigner. See PCR3. 428-29. While eighteen may have been the demarcation point between childhood and adulthood in 2005, in 2023 the age has shifted to twenty-one. As a result, there is no longer any distinction between the language and rationale the Supreme Court used in *Roper*, and what Mr. Barwick is asking this Court to do here: recognize that the “rule” expressed in *Roper* is a broad standard meant to evolve as societal norms change.

Indeed, courts across the country are recognizing this fact. In March 2021, Washington became the first state to extend *Miller’s* prohibition on mandatory life-without-parole sentences for juvenile homicide offenders to

individuals under age twenty-one. *Matter of Monschke*, 482 P.3d 276, 325-26 (Wash. 2021) (finding that “no meaningful neurological bright line exists between” individuals under age eighteen and those under age twenty-one and that courts must be free to “determine which individual defendants merit leniency [on account of their youth]”).

In July 2022, Massachusetts joined Washington in extending *Miller’s* holding for a similar reason. In *Commonwealth v. Robinson*, a Massachusetts Superior Court judge held that *Miller* applies to individuals under age twenty-one. No. 0084CR10975 (Mass. July 20, 2022). In so holding, the court acknowledged that the United States Supreme Court’s precedents did not explicitly compel that result, but that fact was “not dispositive,” in part because “the [state] [c]ourt [did] not assume those decisions are fixed in stone, and their conclusions may change as the science changes.” *Robinson*, No. 0084CR10975 at 23. As in the Washington decision, the Massachusetts Superior Court emphasized that sentencing courts must be free to use their discretion to make individualized, fact-based judgments on the appropriate sentences.

These recent decisions reflect the fact that *Roper* is not—and was never meant to be—the be-all and end-all of the conversation regarding adolescent sentencing. *Roper* set the minimum age for a death sentence at

eighteen because, based on the scientific understanding available *at that time*, that was the appropriate place to draw the line. But, as Mr. Barwick has previously noted, the *Roper* opinion contemplates future adjustments to the constitutional cutoff based on new scientific developments, just as *Roper* was itself an advancement from the line the Court had previously drawn in *Stanford* sixteen years earlier. *Roper*, 543 U.S. at 555-56. The APA resolution shows that the time to make that adjustment is now.

E. Conclusion

Mr. Barwick presented newly discovered evidence that his death sentence is categorically prohibited under the now nearly universally accepted proposition that adolescents under age twenty-one are neurobiologically and psychologically similar to, and should be treated like, juveniles. That evidence was timely and disturbed the foundation on which his death sentence is based. In light of the foregoing arguments, Mr. Barwick requests this Court stay his execution, reverse the circuit court, and grant sentencing relief, or, alternatively, remand the cause for an evidentiary hearing on this claim.

III. THE CIRCUIT COURT ERRED IN SUMMARILY DENYING MR. BARWICK'S CLAIM THAT HE SHOULD BE EXEMPT FROM EXECUTION UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS DUE TO HIS SEVERE NEUROPSYCHOLOGICAL DISORDER, LIFELONG COGNITIVE IMPAIRMENTS, AND LOW MENTAL AGE.

A. Relevant background

The Eighth Amendment, the essence of which is “nothing less than the dignity of man,” *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958)), “must draw its meaning from the evolving standards of decency to mark the progress of a maturing society.” *Id.* at 100. In the context of the death penalty, those standards revolve around the premise that capital punishment must serve a retributive and deterrent function. *Gregg v. Georgia*, 428 U.S. 153, 183 (1976). Thus, the punishment must be appropriate in light of not only the circumstances of an offense, but the character of the offender. *Id.* at 189; *see also Graham v. Florida*, 560 U.S. 48, 60-61 (2010); *Ford v. Wainwright* (discussing, in the context of a prohibition on executing the insane, the lack of retributive and deterrent value served by such an execution). Where society views a particular class of individuals as “categorically less culpable than the average criminal[,]” *Atkins v. Virginia*, 536 U.S. 304, 314-15 (2002), the Eighth Amendment prohibits such an execution.

Since Mr. Barwick was sentenced to death, there have been multiple jurisprudential recognitions of society's evolving standards related to who is

entitled to exemption from the ultimate punishment. For instance, in 2002, the United States Supreme Court categorically exempted individuals with intellectual disability from execution, recognizing the emergence of a consensus that such individuals possess a “lesser culpability” that “surely does not merit that form of retribution.” *Id.* at 319-20. Three years later, the Supreme Court applied the same rationale in categorically exempting from execution individuals who were juveniles at the time of their crime. *Roper v. Simmons*, 543 U.S. 551 (2005). Now, for the same reasons as in *Atkins* and *Roper*, another consensus has emerged: that executing individuals with severe, lifelong, immutable mental illness violates the Eighth Amendment.

Simultaneously to this sociolegal progress, great scientific advancement has occurred, which has transformed understanding in the fields of neuropsychology, adaptive deficits, and juvenile maturation. See, e.g., PCR3. 392 (detailing the slow progression of advancement in neuropsychology from the mid-1940s until the past 10 years, when the field began to develop rapidly); *id.* at P393 (detailing advancements in the field of juvenile brain maturation); Claim II, *supra* (same).

As a result of these two evolutions (social and scientific) it is now clear that Mr. Barwick—who suffers from a lifelong severe mental illness (neurodevelopmental/neurocognitive disorder) accompanied by immutable

cognitive deficits and low mental age—possesses a similarly lessened moral culpability to the individuals contemplated under the Supreme Court’s prior categorical exemption jurisprudence. His condition warrants the same protection from the ultimate punishment, because (1) his execution would serve no legitimate retributive or deterrent purpose, and (2) there is no meaningful distinction between Mr. Barwick’s reduced culpability on account of his neuropsychological disorder and the reduced culpability of individuals with indistinguishable deficits owing to an intellectual disability diagnosis or juvenile status.¹⁵

Thus, under the Eighth Amendment’s prohibition on cruel and unusual punishment, and the Fourteenth Amendment’s equal protection clause, Mr. Barwick is entitled to the same categorical protections extended in *Atkins* and *Roper* because his “disabilities in the areas of reasoning, judgment, and control of [his] impulses” means that he “d[id] not act with the level of moral culpability that characterizes the most serious adult criminal conduct.” *Atkins*, 536 U.S. at 306. His widespread brain damage and

¹⁵ See, e.g., RONALD D. ROTUNDA AND JOHN E. NOWACK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE, 3 Treatise on Const. L. §18.2(a), 300 (4th ed. 2007) (generally describing Equal Protection Clause classification analysis); see also Nita A. Farahany, *Cruel and Unusual Punishments*, Vol. 86 Wash. U. Law. Rev. 859 at 904-13 (2009) (suggesting that withholding *Atkins* and *Roper* protections from individuals with indistinguishable deficits violates equal protection).

neurodevelopmental/neurocognitive disorder impedes development of the requisite level of culpability to justify imposition of the death penalty.

In evaluating such a claim, a court should consider both (a) objective indicia of society's standards (such as legislation and state practice); and (b) "the standards elaborated by controlling precedents and by the Court's own understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose[.]" *Graham*, 560 U.S. at 61 (quoting *Kennedy v. Louisiana*, 554 U.S. 407, 421 (2008)). But the circuit court below considered neither in Mr. Barwick's case. Rather than looking to the letter and spirit of the law in determining whether the Eighth and Fourteenth Amendments warrant Mr. Barwick's exemption from execution due to his lifelong deficits, the circuit court bypassed those critical inquiries.

In summarily denying relief, the lower court made three findings: (1) that a procedural bar applied because "this claim—or a version thereof" had previously been raised and denied (PCR3. 630); (2) that the claim was untimely because scientific research related to brain development "does not qualify as newly discovered evidence" and "at least a portion of the information relied upon" was known at the time of the 2021 clemency proceedings (*id.*); and (3) the claim was meritless because "the Defendant

has consistently demonstrated average mental functioning” (*id.*). Each of these findings is erroneous.

B. Considerations for this Court’s review

1. This Court’s review must be informed by relevant medical and sociolegal standards

Although Eighth Amendment jurisprudence generally permits states to develop their own procedures for determining which capital defendants are categorically exempt from execution, 536 U.S. at 317, the Supreme Court has instructed that these determinations must be informed by the views of the scientific community. *Hall v. Florida*, 572 U.S. 701, 710, 723 (2014). These views “constantly evolve as the scientific community’s understanding grows.” *Bourgeois v. Watson*, 141 S. Ct. 507, 508-09 (2020) (Sotomayor, J., dissenting from denial of certiorari) (citing *Moore v. Texas*, 581 U.S. 1, 20-21 (2017)). And, the medical and scientific community recognizes that categorical protection from execution should also apply to “disabilities very similar to [intellectual disability] in their impact on intellectual and adaptive functioning[.]” such as traumatic brain injuries and what is now known as neurocognitive disorder.¹⁶

¹⁶ ABA Task Force on Mental Disability and the Death Penalty, *Recommendation and Report on the Death Penalty and Persons with Mental Disabilities*, 30 Mental & Physical L.Rep. 668, 669-70 (2006); Barger, *Avoiding Atkins v. Virginia: How States are Circumventing Both the Letter*

Evolving medical principles and societal standards do not tether Eighth Amendment exemption determinations to a superficial numbers game, such as IQ or chronological age. In *Hall v. Florida*, the United States Supreme Court recognized the medical community’s increasing disfavor of rigid IQ cutoffs, finding that such a practice “conflicts with the logic of *Atkins* and the Eighth Amendment.” 572 U.S. 701, 720-21 (2014). And, the scientific community’s evolving understanding of juvenile brain maturation has resulted in a progressive expansion of the chronological age cutoff. See Claim II, *supra*.

Additionally, in surveying objective indicia of societal standards as established through legislation and state practice, specific numbers provide less guidance than overall trends. For instance, prior to 2021, although a handful of states had contemplated categorical exemptions for individuals with serious mental illness, no death penalty-retaining states had passed a law banning such executions (<https://deathpenaltyinfo.org/news/ohio-passes-bill-to-bar-death-penalty-for-people-with-severe-mental-illness>).

Now, just over two years later, two states in which the death penalty is authorized have banned the execution of individuals with serious mental

and the Spirit of the Court’s Mandate, 13 Berkeley J. Crim. L. 215, 233 (2008).

illness (<https://deathpenaltyinfo.org/news/kentucky-becomes-second-state-to-bar-imposing-death-penalty-on-those-diagnosed-as-seriously-mentally-ill>). And, there are increased efforts to introduce similar legislation in other states (<https://deathpenaltyinfo.org/facts-and-research/recent-legislative-activity>). Thus, while numbers can inform a determination, they are not determinative in and of themselves.

2. This Court’s prior rulings declining to extend categorical protections do not preclude a finding that Mr. Barwick’s execution would be unconstitutional

In its order denying relief, the circuit court discusses, at length, this Court’s prior caselaw “consistently declin[ing] to extend the holding of *Atkins* to individuals outside of the specific class in that opinion[.]”. PCR3. 629. However, it bears mention that the lower court did not actually rely upon that caselaw when determining the merits of this claim. *Compare* PCR3. 629 (discussion), *with id.* at PCR3. 630 (finding the claim meritless based on its belief that “the record reflects that the Defendant has consistently demonstrated average mental functioning[.]”).

Furthermore, this Court is not bound by its prior rulings, because—unlike in the instant case—none of the cases cited in the lower court’s order presented this Court with objective indicia of a societal consensus against

executing the seriously mentally ill as reflected by state legislative practice.¹⁷ See, e.g., *Graham*, 560 U.S. at 61 (“In the cases adopting categorical rules the Court...first considers ‘objective indicia of society’s standards, as expressed in legislative enactments and state practice’ to determine whether there is a national consensus against the sentencing practice at issue”) (citing *Roper*, 543 U.S. at 572); *Miller v. Alabama*, 567 U.S. 460, 482 (2012) (same); *Kennedy*, 554 U.S. at 421 (same).

C. The lower court erred in finding Mr. Barwick’s claim procedurally and time-barred

1. Procedural bars are inappropriate when determining claims of categorical exemption from execution

“The Eighth Amendment prohibits certain punishments as a categorical matter.” *Hall v. Florida*, 572 U.S. 701, 708 (2014). Categorical bans exist to protect both the individual as well as the interests of society. See, e.g., *Ford*

¹⁷ *Lawrence v. State*, 969 So. 2d 294 (Fla. 2007), and *Carroll v. State*, 114 So. 3d 883 (Fla. 2013), predate even *Hall*’s mandate that categorical exemption determinations be informed by the views of the medical and scientific community. The initial brief in *Gordon v. State*, 350 So. 3d 24 (Fla. 2022) was submitted to this Court prior to any death penalty-retaining state enacting a law exempting the seriously mentally ill from execution, and no supplemental briefing was conducted on this point. And, *Dillbeck v. State*, 2023 WL 2027567 (Fla. Feb. 16, 2023), centered around an argument that Dillbeck’s ND-PAE was intellectual disability-equivalent and thus warranted protection under the existing *Atkins* framework. Unlike in Mr. Barwick’s case, the courts in *Dillbeck* were never presented with objective indicia (via state practice) of a societal consensus against executing the seriously mentally ill.

v. Wainwright, 477 U.S. 399, 409-10 (1986) (finding Eighth Amendment-based categorical exemption not only protects the death-exempt individual but also protects “the dignity of society itself from the barbarity of exacting mindless vengeance[.]”).

No state-law waiver provision can stand in the way of this important constitutional function. Death-sentenced individuals “must have a fair opportunity to show that the Constitution prohibits their execution.” *Hall*, 572 U.S. at 724. Just as it would unquestionably be unconstitutional for the State to invoke timeliness or *res judicata* as justification to execute individuals subject to other categorical exemptions or exclusions, *see, e.g., Roper v. Simmons*, 543 U.S. 551 (2005) (juveniles); *Kennedy v. Louisiana*, 554 U.S. 407 (2008) (individuals without a murder conviction), so too would it be unconstitutional to execute Mr. Barwick on the grounds that he failed to raise his claim at the “appropriate” procedural time or was “right too soon” by attempting to litigate before the consensus was reached. *See Sawyer v. Whitley*, 505 U.S. 333 (1992) (courts may hear otherwise-defaulted claims where petitioner can show “by clear and convincing evidence that, but for a constitutional error,” he would not be eligible for the death penalty); *Dretke v. Haley*, 541 U.S. 386, 393 (2004) (reiterating the principles articulated in *Sawyer*); *McKay v. United States*, 657 F.3d 1190, 1196 (11th Cir. 2011) (“[A]

movant's procedural default is excused if he can show that he is actually innocent...in the capital sentencing context, of the sentence itself.”).

Because Mr. Barwick's condition—the product of a trifecta of vulnerabilities, renders him categorically exempt from execution under the Eighth and Fourteenth Amendments, no procedural or time bar stands in the way of merits review.

2. Even if categorical exemption claims may be subject to a procedural or time bar, no such bar is applicable in Mr. Barwick's case

The circuit court's order simultaneously (1) weaponizes Mr. Barwick's good faith attempts to litigate his deficits at each stage of his legal process to the extent possible based on then-current scientific understanding, PCR3. 630 (finding a procedural bar because Mr. Barwick raised this claim “or a version thereof” in postconviction and habeas proceedings); and (2) penalizes him for not raising this exact iteration of his claim—based on a newly-emerged consensus against executing the seriously mentally ill, coupled with a new scientific understanding related to his disorders—prior to the establishment of objective indicia establishing that consensus. *Id.* (finding the claim untimely because it did not constitute newly discovered evidence and some information related to Mr. Barwick's deficits was known in 2021).

These alternative bases for denying relief are mutually exclusive and misunderstand the claim currently at issue: that the *combined effect* of a new societal consensus against executing the severely mentally ill and new scientific understanding demonstrating that Mr. Barwick is seriously mentally ill—the totality of which was unavailable during Mr. Barwick’s prior legal proceedings and 2021 clemency proceedings—warrant his exemption from execution.

a. The claim Mr. Barwick has raised is not simple relitigation

In finding this claim procedurally barred, the court focused on Mr. Barwick’s prior efforts to litigate his longstanding deficits throughout his prior legal proceedings. Specifically, the circuit court pointed to Grounds V and XXII of Mr. Barwick’s 2005 postconviction motion, and Ground I of Mr. Barwick’s 2008 state habeas petition. PCR3. 630. Ground V of the postconviction motion was a straight-up *Atkins* claim alleging that Mr. Barwick was intellectually disabled. Ground XXII was a claim that Mr. Barwick qualified for exemption under *Roper* due to his brain damage creating a low mental age. Ground I of the state habeas petition argued that Mr. Barwick’s brain damage, mental impairment, and emotional age of less than eighteen years would render his execution violative of the Eighth Amendment.

Mr. Barwick recognizes this Court's precedent stating that successive postconviction motions are not to be used to relitigate claims that have already been raised and rejected on direct appeal or in prior postconviction proceedings. See PCR3. 630 (citing *Hendrix v. State*, 136 So. 3d 1122, 1124-25 (Fla. 2014)). However, there is a fundamental difference between Mr. Barwick's litigation related to his deficits and the type of successive relitigation decried in *Hendrix*.

Mr. Barwick's litigation related to categorical exemption on account of his serious mental illness—unlike the claims of ineffective assistance of counsel, judicial bias, and prosecutorial misconduct in *Hendrix*—was constrained by the lack of scientific knowledge at the time of his 2005 postconviction proceedings and 2008 state habeas proceedings.

That “variations [of]” this claim have been litigated in various contexts throughout Mr. Barwick's prior proceedings is illustrative of the incremental nature of scientific progress, which has only now yielded a consensus that execution of individuals with severe, lifelong, immutable mental illness violates the Eighth Amendment. When Mr. Barwick presciently presented the 2005 and 2008 claims, medical and societal standards had not yet evolved to that consensual point, and his claims were accordingly denied. Upholding the circuit court's erroneous finding of a procedural bar would not only

encourage litigants to avoid raising claims at the earliest conceivable opportunity, it would punish Mr. Barwick for being “right too soon”. This Court should reverse.

b. Mr. Barwick has been diligent in raising this issue

As the circuit court implicitly recognized in finding that “this claim—or a version thereof” had previously been raised, PCR3. 630, Mr. Barwick has been attempting to litigate his deficits throughout his legal proceedings since the time of his arrest in 1986. However, the nature and extent of this litigation was previously constrained by then-limited scientific understanding of Mr. Barwick’s condition. As Dr. Crown explained:

The field of neuropsychology has evolved since the close of World War II with little progress until the last ten years. Because of this, even the most current version of the Diagnostic and Statistical Manual of Mental Disorders (DSM-5-TR) has limited information and diagnostic labeling for organic brain damage and neuropsychological impairments other than dementia...

Prior expert testimony in Mr. Barwick’s case lacked the knowledge base of current neuropsychological research findings and test accessibility.

PCR3. 392-93. This led to unreliable conclusions that prevented the adjudicating courts from recognizing that Mr. Barwick was seriously mentally ill, and prevented Mr. Barwick from being able to properly combat those misconceptions at an earlier time:

At the time of the penalty phase, Dr. Annis opined that Mr. Barwick did not suffer from a mental disorder or mental disease...

Unfortunately, many neurodevelopmental disorders were not known or not well-defined regarding their symptom presentation at the time of Mr. Barwick's trial. This group of disorders is typically diagnosed in childhood or adolescence; however, there was nothing within the reviewed records indicating that he was diagnosed. This is due to the lack of knowledge about many of these disorders at that time. The advancement of research, diagnostic tools and brain imaging have led to better understanding of these disorders and better diagnostic guidance that was not available at the time of the trial.

See PCR3. 398-99.

Mr. Barwick's most recent penalty phase took place over 30 years ago, and the conclusions presented there were reached approximately 35 years ago. Although Mr. Barwick presented some evidence of neuropsychological impairment during his 2005-2006 postconviction proceedings, Dr. Crown's report makes clear that this evidence was still the incomplete product of a nascent field.

Although Mr. Barwick's condition has not changed, the science surrounding it has. Mr. Barwick cannot be faulted for the fact that his litigation progressed faster than science. He has been diligent, and is entitled to merits review of his exemption claim that draws upon the knowledge available today.

Additionally, Mr. Barwick’s assertions of timeliness are unrebutted by the record. The circuit court below did not address Mr. Barwick’s factual allegations related to timeliness—including but not limited to the limits of prior scientific understanding regarding neuropsychological illness. This dispute required resolution via an evidentiary hearing. This Court should reverse the circuit court’s summary denial and remand for such a hearing.

D. The circuit court incorrectly found that Mr. Barwick is of average mental functioning

Relying on evaluations from 1992 and earlier, the circuit court denied relief on the merits of Mr. Barwick’s Eighth Amendment claim, finding that he “has consistently demonstrated average mental functioning[.]” PCR3. 630. This is patently incorrect, and ignores the wealth of evidence Mr. Barwick presented which (1) demonstrates his vastly impaired mental functioning; and (2) undermines the antiquated and professionally unreliable mental health determinations presented at Mr. Barwick’s trial.¹⁸

1. Mr. Barwick’s mental functioning is, and always has been, grossly impaired

¹⁸ The circuit court’s inaccurate findings regarding Mr. Barwick’s mental health illustrate the unacceptable “risk ‘that the death penalty will be imposed in spite of factors which may call for a less severe penalty[.]’” discussed in *Atkins*. 536 U.S. at 320 (citing *Lockett v. Ohio*, 438 U.S. 586, 605 (1978)). See also *Roper*, 543 U.S. 551, 573 (2005) (discussing the need for a categorical exemption to assuage unacceptable risk that aggravating facts would overpower mitigating evidence); *Atkins*, 536 U.S. at 320-21 (same).

Mr. Barwick was physically abused before he left his mother's womb. EH. 53-54. Transparent about wishing to abort the unborn Mr. Barwick, Ima Jean Barwick was on birth control pills for the duration of Mr. Barwick's gestation, received no prenatal care, and experienced a late-term fall down the stairs that was believed to be an intentional attempt to terminate her pregnancy. *Id.* The *in utero* trauma severely damaged Mr. Barwick's brain even before he took his first breath. *See id.*; *see also* PCR3. 391. As a result, a serious mental illness—neurodevelopmental/neurocognitive disorder—has pervaded Mr. Barwick's life. *See* PCR3. 392, 398-400.

Neurodevelopmental disorders occur during the developmental period—often manifesting by the time a child reaches school age—and are characterized by developmental deficits or differences in brain processes that produce “impairments of personal, social, academic, or occupational functioning ranging from “limitations of learning or control of executive functions to global impairments of social skills or intellectual disability.” DSM-5-TR at 35.¹⁹

¹⁹ Because the science regarding neuropsychological conditions was nascent at the time of Mr. Barwick's childhood, adolescence, and prior litigation, his neurocognitive disorder was not diagnosed prior to the conclusion of the developmental period (recognized as occurring sometime in the 20s). Thus, although it is clear Mr. Barwick's symptoms began in the developmental period, the most proper diagnosis to attach at age 56 is a cognitive disorder rather than a developmental disorder. *See* PCR3. 392.

In Mr. Barwick's case, the disorder had already manifested by the age of four. He was deemed to have a significant speech and language delay, which led to academic and social difficulties from the age of four, and was so profound that his believed IQ at that age was a mere 16. This had a catastrophic impact on Mr. Barwick's mental functioning:

Mr. Barwick's brain damage rendered him unable to engage in language-based critical thinking...[I]t resulted in a lack of intellectual efficiency (in laymen's terms, "being able to use the brain you've got"), which put simply means Mr. Barwick's functional abilities are far below his IQ score...

Additional, Mr. Barwick suffers from adaptive functioning deficits, creating difficulty integrating information coming into his brain and rendering him socially inept; unable to reason or exercise sound judgment; unable to read and understand facial expressions and tone of voice. This meant that despite Mr. Barwick's empathy and efforts, he was unable to comprehend whether someone was angry, happy, or sad, and adjust his behavior accordingly. He is concrete and does not have the ability to engage in abstract reasoning. He is impaired in the areas responsible for understanding time and controlling emotional responses.

Whereas "dementia is the customary term for disorders [in this realm] that usually affect older adults, the term *neurocognitive disorder* is widely used and often preferred for conditions affecting younger individuals, such as impairment secondary to traumatic brain injury[.]" DSM-5-TR at 667 (emphasis in original). As with Mr. Barwick's corollary childhood/adolescent condition (neurodevelopmental disorder), neurocognitive disorders impair functioning across multiple realms, including attention; executive function (planning, decision-making, responding to feedback, error correction, overriding habits, inhibition, and mental flexibility); learning; memory; language; perception; and social cognition (recognition of emotions and ability to consider another person's mental state). *Id.* at 669-71.

PCR3. 391-92. These adaptive deficits meant Mr. Barwick's clinically-measured functioning was at the level of an individual with intellectual disability:

Each psychologist that evaluated him, pre-trial as well as post-conviction, obtained test scores that were commensurate from early childhood until 2006 when he was last tested. They all show a statistically and clinically significant difference between Mr. Barwick's intelligence (ability) and his achievement (learning). In fact, the difference was 2 standard deviations, which is clinically quite substantial.

See PCR3. 398.

And, even more devastating than intellectual disability (the effects of which are stable over time), Mr. Barwick's deficits became more pronounced with the passage of time:

Mr. Barwick's deficits were further exacerbated with the onset of puberty. This is because the tertiary area of the brain (the area of the frontal lobe nearest the forehead) does not begin to develop until after the adolescent growth spurt. The tertiary area is also the most susceptible to injury, and due to Mr. Barwick's organic damage did not develop. Thus, Mr. Barwick's impairments became more pronounced as he entered his teenaged years, manifesting in increased impulsivity.

PCR3. 392. Importantly, this was beyond Mr. Barwick's control, as a byproduct to prenatal and postnatal injury.

Throughout his childhood, he received such intense beatings from his father that he lost consciousness on "at least" several occasions. EH. 54; see *also* TR. 727-28 (Ira Barwick acknowledging "tearing" Mr. Barwick up

with two-by-fours or anything he could get his hands on, to the point of knocking Mr. Barwick unconscious). One of these occasions occurred while Mr. Barwick was assisting his father at a job site but proved less capable than his brothers due to his cognitive and developmental deficits. EH. 67-68. Mr. Barwick's father—wielding a three-foot piece of lumber with protruding rebar—initially struck Mr. Barwick on the left side of his head, then after Mr. Barwick fell to the ground unconscious, struck him again in the back of his head. See, e.g., EH. 52-55; TR. 653. On another occasion, Mr. Barwick was knocked unconscious when his father punched him, knocking him down into a rocking chair as he fell to the floor. TR. 653. On still another occasion, Mr. Barwick's skull was so badly bruised that his father took him on vacation for several days to recover from the infliction. EH. 55.

Adding to Mr. Barwick's head trauma, he suffered additional head injuries and apparent concussions as a wrestler and footballer throughout middle and high school. This coincided with the onset of puberty, at which point the tertiary area of the brain (the frontal lobe nearest the forehead, which is the portion of the brain most susceptible to injury) begins to develop.

These physical insults to Mr. Barwick's brain further impacted his adaptive functioning:

Well, he's considered to be odd. He was considered to be somewhat asocial. He had difficulties relating to others. He was

considered to be a little different. Um, again the words that the father depict showed off all of these deficiencies, again with that kernel of truth, are indicative of the difficulties that he had socially relating, vocationally being able to function, and academically and intellectually being able to either process or deal with information in a different manner.

EH. 74-75. By the time of his pretrial evaluations at the chronological age of 19, he had a mental age between 11 and 13. See PCR3. 398.

2. The circuit court's erroneous factual finding illustrates that Mr. Barwick's impairments render him vulnerable throughout the capital legal context in the same manner as individuals subject to other Eighth Amendment exemptions

Like other individuals with intellectual disability and other conditions resulting in categorical exemption from the death penalty, Mr. Barwick's deficits made him particularly vulnerable within the criminal justice system. He had social oddities and difficulties beginning as early as the age of four, inabilities to read emotional and facial expressions in others, and inabilities to understand how others view him that is unusual even compared to other justice-involved individuals. PCR3. 398. Similarly, his brain-based inability to recall anything in his life before at least the age of ten was very unusual, even among trauma survivors. *Id.* at 391. Because Mr. Barwick could not integrate information coming into his brain, he became socially inept. Despite his empathy and efforts, he was unable to comprehend the emotions and social cues (such as tone of voice) of those around him and to adjust his

behavior accordingly. *Id.* Even during Mr. Barwick’s clemency interview, he was unable to act in his own interests due to his communication difficulty and “inability to understand the ramifications of his admission[s] as well as the social expectations of this interview.” *Id.* at 400.

These vulnerabilities underscore the need for Mr. Barwick’s categorical exemption from execution because:

the risk “that the death penalty will be imposed in spite of factors which may call for a less severe penalty,” ... is enhanced ... by the lesser ability of [such defendants] to make a persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors....[They] may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes.

Atkins, 536 U.S. at 320 (citing *Lockett v. Ohio*, 438 U.S. 586, 605 (1978)).

This risk was realized in Mr. Barwick’s state court record, where multiple experts—due to their lack of understanding of neuropsychology and the nascent scientific understanding in the field of neuropsychology available at that time—misdiagnosed him using terms that are highly damaging in a capital sentencing context, such as “psychopathic sexual deviant” and “antisocial personality disorder.”²⁰

²⁰ See, e.g., TR. 689 (Dr. Annis discussing antisocial personality disorder); TR. 748, 753-54 (Dr. McLaren stating that despite evidence of a degree of brain dysfunction and learning disability, his primary diagnosis was of antisocial personality disorder); TR. 767, 780-81 (Dr. Beller “diagnosing” Mr.

The circuit court's reliance on these diagnoses in denying Mr. Barwick's current claim further emphasizes this unacceptable risk. See PCR3. 630 n.15. The circuit court was presented with—and ignored—evidence that Mr. Barwick's neurodevelopmental/neurocognitive disorder precludes a personality disorder diagnosis:

Individuals with global neurodevelopmental disorders often exhibit difficulties in various realms—social, emotional, behavioral, and cognitive domains. These all appear present in records reviewed for Mr. Barwick. He had been afforded several different diagnoses—language disorder, learning disability, depression, schizoid personality and antisocial personality. However, when examined in totality, it is likely that his deficits are all symptoms of a more global diagnostic category—neurodevelopmental disorder. Further, the Diagnostic and Statistical Manual, 5th edition, Text Revision (2022) states that an individual is precluded from a diagnosis of a personality disorder if “The enduring pattern is not better explained as a manifestation or consequence of another mental disorder.” A neurodevelopmental disorder, because it impacts so many realms, would likely better explain the symptoms used to diagnose a personality disorder.

PCR3. 399. Yet, as is warned against in other categorical exemption cases, these symptoms were viewed by Mr. Barwick's factfinders—even today, in

Barwick as a psychopathic sexual deviant despite finding that Mr. Barwick suffered serious brain damage and had a learning disability since birth, and despite the fact that “psychopathic sexual deviant” is not a DSM diagnosis); TR. 831-840 (Dr. Warriner calling Mr. Barwick a “psychopathic sexual deviant” who could pass for normal and not be rehabilitated); TR. 880 (Dr. Walker stating that Mr. Barwick was a “sexual deviant” who enjoyed forcing sexual attention on women).

the face of dramatic evidence to the contrary—as aggravating, not mitigating.²¹ Mr. Barwick’s categorical exemption from execution is necessary to ameliorate this pervasive and unacceptable misunderstanding of his symptoms.

E. Conclusion

The circuit court erred as a matter of fact and law in summarily denying Mr. Barwick’s claim that his execution would violate the Eighth and Fourteenth Amendment based on his severe, lifelong, immutable mental illness. This Court should remand to the circuit court for further proceedings in accordance with federal constitutional protections, including an evidentiary hearing on the merits and timeliness of this claim.

CONCLUSION

In light of the foregoing arguments, Mr. Barwick requests this Court stay his execution scheduled for May 3, 2023, reverse the circuit court’s decision, and grant sentencing relief, or, alternatively, remand the cause for an evidentiary hearing on the merits.

²¹ See also *Barwick v. State*, 660 So. 2d 685, 680-90, 697 (Fla. 1995) (detailing trial court’s finding of six statutory mitigators including an erroneous finding that the murder was committed in a cold, calculated, and premeditated manner, and rejection of all statutory and nonstatutory mitigators).

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 18th day of April, 2023.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the size and style of type used in this Initial Brief is 14-point Arial, and complies with the font, spacing, and page requirements under Fla R. App. P. 9.045(a)(2)(D) and 9.045.

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