

**Case No. SC23-0531**  
**Lower Tribunal Case No. 1986-CF-940**  
**Execution Scheduled for May 3, 2023, at 6:00 P.M.**

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IN THE  
**Supreme Court of Florida**

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DARRYL BRYAN BARWICK,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

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**APPELLANT'S REPLY BRIEF**

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## ARGUMENT IN REPLY

### **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 BARWICK'S STATUTORY RIGHT TO EFFECTIVE POSTCONVICTION COUNSEL**

The State's argument that Mr. Barwick was not deprived of due process or the effective assistance of counsel is controverted by the circumstances of this accelerated warrant process.

Initially, the State, like the circuit court, begrudgingly allows for the fact that Mr. Barwick is entitled to a process with an attorney, but refuses to acknowledge that the process must be due, see *Evitts v. Lucey*, 469 U.S. 387, 393-94 (1985), and the attorney must meet specific qualifications, must provide quality representation, and must be effective. However, these truths are evident in the United States and Florida constitutions, law, statutes and rules. The United States Supreme Court has unequivocally held: "The fundamental requisite of due process of law is the opportunity to be heard.' The hearing must be at a meaningful time and in a meaningful manner.'" *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970) (citations omitted). A checklist approach to a death warrant proceeding is not sufficient to satisfy due process. *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)). In Mr. Barwick’s case, the time and manner in which he was given his “opportunity to be heard” was anything but meaningful.

Ignored by the State is the fact that within five days of the warrant being issued, Mr. Barwick’s counsel was required to find a way to comply with deadlines or seek continuances in several cases with imminent deadlines, file all of his public record requests, appear at a hearing to address the objections from multiple agencies on those requests, review thousands of pages of documents, including medical and inmate records and records disclosed by the Office of the State Attorney for the Fourteenth Judicial Circuit, attempt to retain experts, prepare background materials for them, arrange an evaluation with Mr. Barwick and consult with them, conduct research, and draft a Rule 3.851 motion. The State’s argument that Mr. Barwick’s representation by counsel since 1997 somehow alleviated the need for due process and effective counsel at this juncture demonstrates a fundamental misunderstanding about the concept of due process being meaningful. The death warrant proceedings in Mr. Barwick’s case lacked any indicia of meaningfulness.

In addition, the State’s refusal to acknowledge other factors concerning the timing of the death warrant to coincide with Holy week, Passover, and

Ramadan, as well as the dual warrants of Mr. Barwick and Mr. Gaskin shows a complete disregard for the seriousness of these proceedings. Most jarring is the State's dismissiveness concerning the fact that Ms. Sena, co-counsel for Mr. Barwick, was suffering from COVID-19 since the inception of the warrant. While counsel explained the fatigue and Ms. Sena's limitations due to her illness, the State continually urged the circuit court to forge ahead. See PCR3. 136, 138-40, 143-45, 440-41, 483-89, 493-501, 561-69, 577-79, 581-83, 593-96, 609-11. Notably, both lead and co-counsel of record for the State have requested extensions in several of CCRC-North's cases, citing the warrant litigation and medical fatigue as a basis.<sup>1</sup> The State's dismissal of Mr. Barwick's counsels' extenuating circumstances during the truncated

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<sup>1</sup> Indeed, this morning the State filed an unopposed motion for extension of time to respond to a successive Rule 3.851 Motion in Duval County case *State v. Kenneth Hartley*, wherein he commented that this case could not be "expediently reassigned" to another lawyer in his office because of his duties in this warrant case. Further, immediately prior to the issuance of Mr. Barwick's warrant, and again following the *Huff* hearing in Mr. Barwick's case, the State requested extensions of time to respond to the initial Rule 3.851 Motion in Duval County case *State v. Randall Deviney*, of which Ms. Sena is co-counsel of record. In this request for a second extension, the State indicated the underlying good cause to be the demands of the current warrant litigation and medication that causes fatigue. Understanding the demands of this compressed warrant litigation schedule, counsel at CCRC-North has repeatedly indicated they had no objection to the State's requests for extensions in these cases.

proceedings below, while making similar requests for additional time, illustrate the insincerity of the State's arguments to the circuit court.

The State's argument that Mr. Barwick is not entitled to the effective assistance of counsel is also unsupported. The State argues that there is no right to effective assistance of counsel in capital postconviction proceedings. AB. 25-37. But this position ignores the fact that courts are required to monitor the conduct of counsel in capital postconviction cases. § 27.711(12), Fla. Stat. And circuit courts are required to appoint highly experienced criminal defense lawyers to represent capital defendants at all phases of representation from trial to postconviction. Fla. R. Crim. P. 3.112(a) ("The purpose of these rules is to set minimum standards for attorneys in capital cases to help ensure that competent representation will be provided to capital defendants in all cases.").

The State also argues that the right to effective assistance of counsel discussed in *Spalding v. Duggar*, 526 So. 2d 71 (Fla. 1988) is meaningless. In *Spalding*, this Court held in no uncertain terms: "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." 526 So. 2d at 72. And, in the wake of *Spalding*, other courts have reiterated this Court's *holding*:

Thus, a criminal defendant is constitutionally entitled to representation at trial and on direct appeal and is statutorily entitled to counsel in all collateral relief proceedings when under a sentence of death. See *Spalding v. Dugger*, 526 So.2d 71, 72 (Fla.1988) (**holding 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”**). There is, however, no statutory entitlement to representation in collateral relief proceedings for defendants not under a sentence of death.

*Mann v. State*, 937 So. 2d 722, 727 (Fla. 3d DCA 2006) (emphasis added); see also *Whitfield v. Sec’y*, 2012 WL 19664242 (M.D. Fla. 2012) (granting equitable tolling relying on *Spalding* and finding: “CCRC counsels’ representation was far from effective”). And in *Peede v. State*, this Court specifically directed the trial court to “be certain that Peede receives effective representation.” 748 So. 2d 253, 256, n. 5 (Fla. 1999). See also *Scull v. State*, 569 So. 2d 1251, 1252 (Fla. 1990) (trial court’s hasty rescheduling of a capital resentencing trial violated due process, and holding, “Due process envisions a law that hears before it condemns, proceeds upon inquiry, and renders judgment only after proper consideration of issues advanced by adversarial parties.” (quotations omitted)).

There is no doubt that pursuant to Fla. Stat. §§ 27.7001 and 27.711 capital postconviction defendants are entitled to counsel. But, pursuant to the State’s argument, counsel is nothing more than an empty suit. This is not

what the Florida Legislature intended. In fact, this Court has recognized that “since the state of Florida enforces the death penalty, its primary obligation is to ensure that indigents are provided competent, effective counsel in capital cases,” *White v. Board of County Comm'rs*, 537 So. 2d 1376, 1379 (Fla.1989), and that “all capital cases by their very nature can be considered extraordinary and unusual.” *Id.* at 1378. Complementing the holding in *White*, this Court has recognized the crucial role of counsel at all levels of capital proceedings:

However, the basic requirement of due process in our adversarial legal system is that a defendant be represented in court, at every level, by an advocate who represents his client zealously within the bounds of the law. Every attorney in Florida has taken an oath to do so and we will not lightly forgive a breach of this professional duty in any case; in a case involving the death penalty it is the very foundation of justice.

*Wilson v. Wainwright*, 474 So. 2d 1162, 1164 (Fla.1985). Without a remedy, this due process right at the warrant stage to counsel is an empty shell.

Finally, the State misconstrues this Court’s decision in *Asay v. State*, 210 So. 3d 1 (2016). As this Court noted in *Asay*, at each proceeding, *Asay* was represented by counsel. *Id.* at 28. However, that did not prevent this Court from reviewing the specific factors that counsel argued denied *Asay* due process and caused his counsel to be ineffective. Specifically, this Court considered the late appointment of counsel and being unable to ensure that

the files and records were complete. *Id.* As to the late appointment of counsel, the State repeatedly urged this Court to affirm the denial of relief because “the problem of lack of state postconviction counsel was remedied in the trial court by the appointment of new registry counsel. Asay now has state postconviction counsel. Indeed, Asay now has three experienced capital litigators as registry counsel.” *Asay v. State*, Answer Brief p. 53 (Asay’s death warrant legal team “includes three highly-experienced capital litigators – Marty McClain, Linda McDermott, and John Abatecola.”). Likewise, as to the issue with the records, this Court held that “every state agency involved attempted to recreate the records.” *Asay*, 210 So. 3d at 28. And as mentioned in the Initial Brief, by the time this Court ruled on Asay’s claim, over eleven months had passed since new registry counsel was appointed.

Thus, contrary to the State’s argument, this Court fully considered the circumstances at issue. Here, Mr. Barwick has presented a set of circumstances that have denied him due process at this critical juncture in his proceedings. Due to the denial of due process in Mr. Barwick’s case, which includes his right to effective assistance of counsel, claims two and three were not fully developed. As explained in the motion and at the Huff hearing, three experts recommended further testing not previously available

and the opportunity to complete their evaluations. This Court should grant a brief stay and remand for Mr. Barwick to have a meaningful opportunity to investigate and prepare his Rule 3.851 motion.

## **II. THE DEATH PENALTY IS A CATEGORICALLY UNCONSTITUTIONAL PUNISHMENT FOR INDIVIDUALS WHO, LIKE MR. BARWICK, COMMITTED THEIR OFFENSES WHEN THEY WERE UNDER AGE TWENTY-ONE.**

In responding to Mr. Barwick’s claim that the logic of *Roper v. Simmons*, 543 U.S. 551 (2005), prohibits his execution, the State largely adopts the reasoning used by the circuit court to deny relief. Notably, the State does not—because it cannot—contest the substance of Mr. Barwick’s claim that there is now a scientific consensus establishing that late adolescents are neurobiologically and psychologically identical to juveniles for purposes of criminal sentencing. Instead, the State contends that the claim is procedurally barred; untimely; and meritless. In the process, the State misunderstands—or altogether ignores—many of the arguments Mr. Barwick presented in his brief to this Court explaining the errors in the circuit court’s ruling.

### **A. Procedural Bar**

The State first asserts that the claim is procedurally barred because “[a] version” of it was “raised and rejected” in Mr. Barwick’s prior proceedings and Mr. Barwick’s current claim could have been raised previously (AB at

40). But the State’s apparent understanding of what can be considered “a version” of a prior claim would, if applied to this claim, stretch the term beyond all meaning. And Mr. Barwick plainly could not have raised this claim before August 2022, because that was when the scientific consensus on which he relies was established.

None of the cases the State cites compel a different result, because **the current claim of a newly discovered scientific consensus** is not a “version” of a claim raised before but is, rather, an entirely new claim relying on the APA’s resolution from August 2022. As Mr. Barwick acknowledged, he previously raised a claim based, in part, on *Roper* : namely, that as a “brain damaged youthful offender” with “neuropsychological handicaps,” his “mental and emotional age” were under eighteen (Appendix to Order at 145, 146). It was, in essence, an as-applied argument that the proportionality principle underpinning *Roper* should be extended to someone like Mr. Barwick. The claim was not premised on scientific evidence that the execution of someone his age was categorically unconstitutional because, at that time, no such evidence existed—much less a universal consensus like the one that was signaled by the APA resolution. Mr. Barwick’s 2005 claim and his 2023 claim may both cite *Roper*, but the similarities end there. As such, the claim is not procedurally barred.

## B. Timeliness

Next, the State alleges that Mr. Barwick's claim is "untimely because it does not rely on newly discovered evidence as defined by this Court" (AB at 41). The State references several of this Court's decisions that purportedly support this point, see AB at 42, but omits a key distinction from Mr. Barwick's case: the scientific studies presented in those cases discussed **evidence that was previously available**, which was the critical fact that rendered those claims untimely. See, e.g., *Rutherford v. State*, 940 So. 2d 1112, 1116 (Fla. 2006) (rejecting American Bar Association report as untimely because it was "a compilation of **previously available** information related to Florida's death penalty system") (emphasis added); *Asay v. State*, 210 So. 3d 1, 23 (Fla. 2016) (rejecting scientific affidavit as untimely because the reports on which it was based were "itself **already rejected** as newly discovered evidence) (emphasis added); *Booker v. State*, 336 So. 3d 1177, 1182 n.5 (Fla. 2022) ("[N]ew reports or declarations from recently hired experts, that largely **rely on old information**, [do not] qualify as newly discovered evidence") (emphasis added).

By contrast, the APA resolution is not "old information" that was "previously available" and "already rejected" by this Court. While ongoing research and individual studies discussing adolescent brain development

were available prior to the August 2022 adoption of the resolution, the existence of a near-universal consensus—and its constitutional significance for adolescent criminal sentencing practices—was not. Many of the studies cited in the APA resolution were not published until 2022, further demonstrating the recency of this shift in the understanding of adolescent brain development. See, e.g., PCR3. 430-31 (bibliography of sources).

The centrality of the APA resolution to Mr. Barwick’s claim makes any comparison to the efforts of “[o]ther capital defendants” who “have been unsuccessfully raising [similar] claims for years” inapt (AB at 43). Unlike Mr. Barwick, none of those previous individuals were arguing the existence of a near-universal shift in scientific understanding of the adolescent brain. They could not, because no such shift had occurred yet. As the State notes, the defendant in *Branch* pointed to “an **emerging** consensus in the medical community” (AB at 43). But “emerging” does not mean established. That distinction is critical to the scientific process, which relies on an ongoing dialogue of research, studies, debate, and critique until a consensus is reached. 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.**”) (emphasis added).

The State remarks that the APA resolution “relie[d] on research between 2008 and 2022,” (AB at 44), apparently faulting the scientific process for its rigor. Tellingly, the State does not address Mr. Barwick’s explanation, using the examples of arson science and “shaken baby syndrome,” that the nature of scientific progress is necessarily gradual and incrementally builds on itself (IB at 39-45). The fact that the APA resolution “rel[ies] on years of research” is its strength, not the weakness the State posits.

The practical effect of the State’s rigid understanding of timeliness would be to short-circuit the scientific process, as well as likely lead to an increase in the workload of this Court and other courts. That is because defendants would seek to file newly-discovered-evidence claims every time there was an insignificant—and perhaps unreliable—scientific development, in order to protect their claim against a time-bar. Yet, as has been observed, “[c]ourts are not scientists,” *Actavis Elizabeth LLC v. U.S. Food & Drug Admin.*, 689 F.Supp.2d 174, 179 (D.D.C. 2010), and likely cannot answer for themselves critical questions regarding that evidence’s reliability, importance to a claim, or whether it has been accepted by the relevant scientific community. Allowing scientific organizations to determine for themselves when a consensus has been reached in their fields prevents endless litigation, saves

judicial resources, and provides a clearly established timeliness bar. The Court should follow that approach here and find this claim to be timely.

### **C. Conformity Clause**

The State asserts that Article I, § 17 of the Florida Constitution “provide[s] no greater protections than” the United States Supreme Court’s Eighth Amendment cases. This interpretation of the Conformity Clause—the text of which simply says that claims alleging cruel and unusual punishment “shall be construed in conformity with” United States Supreme Court decisions—not only effectively turns an important state constitutional provision into a legal nullity, but has troubling implications for individual constitutional rights.

As this Court has noted, “the federal Constitution generally sets the floor, not the ceiling, with regard to the extent of personal rights and freedoms afforded by the State of Florida.” *State v. Kelly*, 999 So. 2d 1029, 1042 (Fla. 2008). This is doubly true for the Eighth Amendment, which explicitly uses “evolving standards of decency” as the metric to determine when a punishment is cruel and unusual. *See Trop v. Dulles*, 356 U.S. 86, 100 (1958). However, under the State’s reading of Article I, § 17, the federal Constitution is both the floor *and* the ceiling, leaving no room for this evolution to occur—and, paradoxically, violating the purpose and spirit of the Eighth Amendment in the process.

Furthermore, requiring Florida’s Cruel and Unusual Punishments Clause to be interpreted in lockstep with the analogous federal provision has the curious effect of turning an entire state constitutional amendment into a “useless” redundancy. See *Edwards v. Thomas*, 229 So. 3d 277, 284 (Fla. 2017) (“[A] basic rule of statutory construction provides that the Legislature does not intend to enact useless provisions, and courts should avoid readings that would render part of a statute meaningless.”); see also *id.* at 283 (explaining that courts follow statutory-construction principles when interpreting constitutional provisions). Interpreting Article I, § 17 solely as a mirror-image to the federal Constitution is the epitome of a “useless” provision, because the Eighth Amendment already provides the minimum required guarantee against cruel and unusual punishments.

“[W]ithout the independent protective force of state law . . . the full realization of our liberties cannot be guaranteed.” *In re T.W.*, 551 So. 2d 1186, 1191 (Fla. 1999) (quoting William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 491 (1977)). This Court should reject the State’s efforts to stifle the development of state law, as well as the right of Florida’s citizens to be free from cruel and unusual punishment in all its forms.

## D. Merits

On the merits, the State posits that Mr. Barwick's claim fails because there is no "national consensus" against the practice of sentencing individuals under age twenty-one to death. In addition to being factually incorrect, the State's position, which is derived from the United States Supreme Court's methodology in determining the scope of rights under federal law, is logically tenuous when applied to a state court's decision-making process.

In discussing the various state laws around the country regarding adolescent capital sentencing, the State notes that there are "twenty-five active death penalty jurisdictions in the United States" (AB at 48). That statement alone contradicts the notion that there is a definitive consensus in favor of sentencing late adolescents to death. As the Supreme Court made clear in *Roper*, states that have "abandoned the death penalty altogether" were counted in "the national consensus against the death penalty for juveniles." *Roper*, 543 U.S. at 564. The State concedes that twenty-five states are **not** "active death penalty jurisdictions in the United States" and, therefore, have implicitly disapproved of the late-adolescent death penalty.

Moreover, a broader consensus *is* forming that twenty-one "is the point where society draws the line . . . between childhood and adulthood." *Roper*, 543 U.S. at 574. The State downplays the significance of many "inherently

dangerous activities” being limited to those over age twenty-one because other, non-dangerous activities such as voting are permitted for those over age eighteen (AB at 50 n.14). But this delineation is precisely in line with the scientific research on the late-adolescent brain, including the APA resolution. The developmental differences between late adolescents and adults are at their height in situations of “highly stressful and extremely arousing circumstances,” and are reduced when adolescents have time to “make careful/considered choices.” See PCR3. 428-29; see also *Nat’l Rifle Assoc. v. Bondi*, 61 F.4th 1317, 1320 (11th Cir. 2022) (upholding a Florida law “precluding those under 21 [] from buying firearms”).<sup>2</sup>

Even so, the determination of a national consensus has little relevance to a question of *state*, as compared to federal, law. A key component of federalism is that states are meant to be “experimental laboratories,” *Roth v. United States*, 354 U.S. 476, 505 (1957) (Harlan, J., concurring), while federal courts strive for “harmony and uniformity.” *Carnival Corp. v. Carlisle*, 953 So. 2d 461, 470 (Fla. 2007). The State’s suggestion that this Court look

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<sup>2</sup> Despite acknowledging that “society draws the line at 21” for “certain inherently dangerous activities,” the State says, without elaboration, that “18 is still considered the age of adulthood in the United States.” To the extent that the State disputes which age is considered to be the entry-point into adulthood for purposes of this claim, the Court should remand for an evidentiary hearing to develop the matter.

to whether there is a national consensus generated by *other* states cannot resolve whether *Florida* will continue to allow late adolescents to be sentenced to death. That can only be determined by the Court's own judgment in evaluating the evidence Mr. Barwick has presented regarding the newly available scientific consensus on adolescent brain development.

Because Mr. Barwick raised a meritorious claim that he is categorically exempt from execution, this Court should grant relief.

### **III. CATEGORICAL EXEMPTION IS WARRANTED DUE TO MR. BARWICK'S SEVERE NEUROPSYCHOLOGICAL DISORDER, LIFELONG COGNITIVE IMPAIRMENTS, AND LOW MENTAL AGE**

#### **A. This Court has the authority to draw upon evolving standards of decency and extend protection from execution under the Eighth Amendment where, as here, such protection is warranted**

##### **1. Florida's Conformity Clause must not constrain this Court's determination of whether Mr. Barwick's execution would violate the Eighth Amendment**

The State asserts that because of Florida's Conformity Clause, "[t]his Court is unable to provide greater protections than the Eighth Amendment under the Florida Constitution[.]" *Id.* at 57, and would "violate a categorical rule from the Supreme Court's Eighth Amendment jurisprudence by expanding it[.]" AB at 58. This argument relies on this Court's recent precedent—spanning only the past few years, despite the Conformity Clause

being adopted over 20 years ago<sup>3</sup>—that extension of Eighth Amendment exemption protections to any individual not explicitly mentioned in preexisting categories would “violate the Supreme Court’s precedent[.]”<sup>4</sup> AB at 58. Put more bluntly, the State’s position is that Florida’s Conformity Clause renders federal constitutional protections not only the floor, but the ceiling, of possible protections against cruel and unusual punishment. But such a limit conflicts with the Eighth Amendment itself.<sup>5</sup>

States are expected to actively participate in bringing society closer to “the Nation we aspire to be[.]” *Hall v. Florida*, 572 U.S. 701, 708 (2014), by reflecting and advancing “the evolving standards of decency to mark the progress of a maturing society.” *Trop v. Dulles*, 356 U.S. 86, 100 (1958).

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<sup>3</sup> Compare Art. I, § 17, Fla. Const. (relevant amended language approved via a legislatively referred constitutional amendment on the November 2022 ballot) with *Bowles v. State*, 276 So. 3d 791, 796 (Fla. 2019) (applying Conformity Clause precedent in the lethal injection context to claim of intellectual disability) and *Lawrence v. State*, 308 So. 3d 544, 548, 552 (Fla. 2020) (relying on Conformity Clause to recede from prior precedent and preclude comparative proportionality review).

<sup>4</sup> The State’s reliance on the *Kearse* opinion is misplaced. See AB at 58. *Kearse* was a federal habeas case constrained by AEDPA deference. There is a vast difference between an allegation that it would be unreasonable under the stringent AEDPA standards not to extend Eighth Amendment exemption protections to Mr. Barwick due to the particularities of his condition, and an allegation that this Court *should* extend those protections based on objective indicia of standards of decency warranting such protection in Mr. Barwick’s case.

<sup>5</sup> See Claim II, *supra* at 13 (discussing relationship between Art. I, § 17, Fla. Const. and the Eighth Amendment).

Foreclosing protection for individuals solely because they fall outside of the categories previously exempted by the United States Supreme Court violates *Trop* and its progeny. See, e.g., *Hall*, 572 U.S. at 708 (“The Eighth Amendment’s protection of dignity...[affirms] that the Nation’s constant, unyielding purpose must be to transmit the Constitution so that its precepts and guarantees retain their meaning and force”); *Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008) (“Evolving standards of decency must embrace and express respect for the dignity of the person, and the punishment of criminals must conform to that rule”); *Gregg v. Georgia*, 428 U.S. 153, 171 (1976) (“the [Eighth] Amendment has been interpreted in a flexible and dynamic manner”); *Woodson v. North Carolina*, 428 U.S. 280, 288 (1976) (“Central to the application of the [Eighth] Amendment is a determination of contemporary standards regarding the infliction of punishment”); see also *Weems v. United States*, 217 U.S. 349, 373 (1910) (“Time works changes, brings into existence new conditions and purposes. **Therefore [a constitutional principle], to be vital, must be capable of wider application than the mischief which gave it birth.**”) (emphasis added).

Limiting Eighth Amendment exemption relief only to individuals already covered by the United States Supreme Court’s explicit protection would effectively foreclose evolving standards of decency in Florida. “[C]onformity

with” the Eighth Amendment as articulated by United States Supreme Court jurisprudence—at least in the concept of exemptions from execution—requires a state court to be open to expanding protections as scientific and medical knowledge advance, as society itself matures and becomes closer to “the Nation we aspire to be.” See *Hall*, 572 U.S. at 708 (citing *Trop v. Dulles*, 356 U.S. 86, 101 (1958)). This flexibility is how the Eighth Amendment “draw[s] its meaning[.]” *Trop*, 356 U.S. 100, see also *Weems v. United States*, 217 U.S. 349, 378 (1910) (the Eighth Amendment “is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice.”).

Furthermore, in determining whether societal standards of decency have evolved to the point where certain categories of individuals warrant additional Eighth Amendment protections, the United States Supreme Court looks to the actions of individual states. See, e.g., *Atkins v. Virginia*, 536 U.S. 304, 315-16 (2002); *Roper*, 543 U.S. at 559-60, 565-66 (going so far as to tally the number of states that have embraced or abandoned a particular death penalty practice). Thus, although a state court is not *required* to offer more protection than the federal constitution guarantees, a state court withholding protections under the guise that it is *prohibited* from doing so by its own constitution abdicates its “critical role in advancing protections and

providing the [United States Supreme Court] with information that contributes to an understanding” of how constitutional protections should be applied. *Hall*, 572 U.S. at 719.

Under the State’s presented reading of Art. I, § 17, evolving standards of decency—the living breath of the Eighth Amendment—would be effectively stilled in Florida. To the extent this Court’s recent precedent supports such a reading, this Court should clarify and/or recede as necessary to ensure free-flow of the Eighth Amendment in Florida.

**2. This Court’s prior decisions declining to exempt other mentally ill individuals from execution do not require the same result here**

Contrary to the State’s assertion, Mr. Barwick’s claim does not automatically “fail[] under this Court’s precedent.” AB at 58. Although the State is correct that this Court has previously declined to expand *Atkins* protections to individuals without a specific diagnosis of intellectual disability, those prior decisions do not immovably bind this Court.

Science, and sociolegal standards, are continually evolving. As Mr. Barwick has explained, *supra*, at 12, progress is gradual and incrementally builds until it reaches a tipping point. Although the progress itself occurs over time, the precedential shift is more sudden. In other words, practices which for years were found to comport with the Eighth Amendment are one day

deemed unconstitutional by a Court presented with specific, compelling facts justifying the legal plunge. See, e.g., *Atkins*, 536 U.S. at 310-11 (drawing upon evolving standards to abrogate well-established precedent of *Penry v. Lynaugh*, 492 U.S. 302 (1989); *Roper*, 543 U.S. at 555-56 (doing the same in abrogating well-established precedent of *Stanford v. Kentucky*, 492 U.S. 361 (1989)).

This is where objective indicia of evolving standards of decency become relevant. The State argues that “[t]wo death penalty states hardly show a legislative consensus” against executing the severely mentally ill. AB at 61.<sup>6</sup> But the State misconstrues how state practice is calculated. Ohio and Kentucky, although significant in demonstrating evolving standards due to the seismic shift of passing exemption legislation, are not outliers in terms of their practice. Twenty-three states do not have the death penalty, and three states have imposed moratoriums on the death penalty.<sup>7</sup> Thus, these 26 states have rejected the practice of executing individuals with serious mental illness, bringing the count (with Kentucky and Ohio) to 28 states. Another 10

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<sup>6</sup> The State’s argument that, due to his specific neuropsychological diagnoses rather than a mood or schizophrenia spectrum disorder, “Barwick’s claim is not based on any of the Kentucky or Ohio categories [for exemption] anyway[,]” AB at 60-61, is a disputed fact and would be more appropriately addressed at an evidentiary hearing.

<sup>7</sup> <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state> (last accessed: April 21, 2023)

states, although retaining the death penalty in theory, have not executed anyone in the past five years.<sup>8</sup> This means that, in practice, **at least** 38 states have rejected the execution of seriously mentally ill individuals—more than twice as many as the 16 states *Penry* deemed insufficient to show a consensus. *Compare* AB at 61 with *Atkins*, 536 U.S. at 314-15 (detailing state practice at the time of *Penry* and *Atkins*).

Mr. Barwick has presented significant evidence demonstrating his severe neuropsychological disorder, lifelong cognitive impairments, and low mental age. This Court has the power to determine that these conditions render him exempt from execution under the Eighth Amendment.

#### **B. The State fails to engage with Barwick’s procedural arguments**

The State wholly fails to address Mr. Barwick’s argument that state procedural bars are inappropriate where an individual has raised an Eighth Amendment categorical exemption claim. *See* IB at 60-62.

Further, even assuming such a bar may apply, the State concedes that Mr. Barwick has diligently litigated the impact of his lifelong deficits. AB at 56 (“Barwick’s claim that the principles of *Atkins*, *Roper*, etcetera, exempt him from execution has been one of his chief claims throughout the decades”).

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<sup>8</sup><https://deathpenaltyinfo.org/executions/execution-database> (last accessed: April 21, 2023)

The State does not refute Mr. Barwick's contention that his prior attempts to obtain exemption from execution were impeded by then-nascent science; nor does the State refute the fact that Mr. Barwick's current claim rests not only on new studies, but new diagnoses that were not available during prior stages of his litigation. These facts, taken together, are sufficient to overcome any allegation of a procedural or time bar.

The State's cited cases do not change this analysis, because those cases either (a) did not involve the application of procedural bars to a categorical exemption claim; or (b) they are distinguishable as to diligence. For instance, in *Dillbeck*, the procedural and time bars depended on the fact that Dillbeck's exemption claim relied on the same underlying medical findings (including the same reports) that had already been presented and litigated years prior. 2023 WL 2027567 at 3. The bar of a *Roper* extension claim in *Branch* depended on Branch's failure to previously challenge adverse findings related to his age. 236 So. 3d at 986. And, *Simmons* similarly involved a failure to previously raise available exemption claims. 105 So. 3d at 511.

Here, however, Mr. Barwick has been attempting for decades to litigate the factual underpinnings and legal implications of his condition. These diligent attempts were constrained by the vastly limited scientific

understanding related to neuropsychology. Now that the field has evolved, Mr. Barwick has brought a claim relying on new information—including not only new reports but a new diagnosis that did not exist in the DSM during his prior proceedings. His claim is timely and not subject to any procedural bar.

### **C. The circuit court’s summary denial was error**

As shown above and in Mr. Barwick’s initial brief, Mr. Barwick’s claim that he should be categorically exempt from execution is timely, not subject to a procedural bar, and states a meritorious claim for relief that cannot be conclusively rebutted by the state-court record. Nothing the State has alleged or cited in its Answer changes that calculus,<sup>9</sup> and the circuit court’s summary denial of Mr. Barwick’s successive postconviction motion was error. This Court should either find that Mr. Barwick is entitled to categorical exemption from execution due to society’s evolved standards of decency related to the Eighth Amendment’s prohibition on cruel and unusual punishment; or, alternatively, should stay Mr. Barwick’s execution and remand the case to the circuit court to conduct an evidentiary hearing.

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<sup>9</sup> In fact, the State’s footnote denigrating Dr. Crown—a preeminent neuropsychological expert—underscores the need for an evidentiary hearing. See AB at 16 n.4. The State appears to be attempting to impeach the credibility of a defense witness, which is a factual dispute (presumably relevant to both the timeliness and underlying merits of Mr. Barwick’s exemption claim) and is appropriately resolved at an evidentiary hearing.

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 21st day of April, 2023.

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**CERTIFICATION OF TYPE SIZE AND STYLE**

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. 9.210 and 9.045.

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