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In the Supreme Court of Florida

EXECUTION SCHEDULED FOR
TUESDAY, OCTOBER 3, 2023, at 6:00 p.m.

MICHAEL DUANE ZACK, III,
Appellant,

v.

CASE NO.: SC2023-1233
ACTIVE WARRANT CAPITAL CASE

STATE OF FLORIDA,
Appellee.
_____/

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

ANSWER BRIEF

ASHLEY MOODY
ATTORNEY GENERAL OF FLORIDA

CHARMAINE M. MILLSAPS
SENIOR ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0989134
OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL, PL-01
TALLAHASSEE, FL 32399-1050
(850) 414-3300
primary email:
capapp@myfloridalegal.com
secondary email:
charmaine.millsaps@myfloridalegal.com

JASON W. RODRIGUEZ
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 125285
OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL, PL-01
TALLAHASSEE, FL 32399-1050
(850) 414-3300
primary email:
capapp@myfloridalegal.com
secondary email:
jason.rodriguez@myfloridalegal.com

Counsel for the State

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PRELIMINARY STATEMENT

The record on appeal will be referred to as "2023 3rd Succ. PCR" followed by the appropriate page number. Appellant, MICHAEL D. ZACK, the defendant in the trial court, will be referred to as appellant, the defendant, or by his proper name. The initials "IB" refers to the initial brief, followed by the appropriate page number. All double underlined emphasis is supplied.

STATEMENT REGARDING ORAL ARGUMENT

This Court typically does not conduct an oral argument in successive postconviction appeals. Fla. S. Ct. Internal Op. Proc. II.A.3.(a) (stating that successive capital postconviction appeals are treated in the same manner as cases in which "review is granted without oral argument."). And this Court certainly should not depart from that standard policy in an active warrant case raising issues that are untimely, procedurally barred, and meritless as a matter of law under this Court's recent controlling precedent of *Dillbeck v. State*, 357

So.3d 94 (Fla. 2023), *cert. denied*, *Dillbeck v. Florida*, 143 S.Ct. 856 (2023).

STATEMENT OF THE FACTS AND PROCEDURAL HISTORY

This is an appeal of a summary denial of a third successive postconviction motion in a capital case with an active warrant.

Facts of the crimes

Zack committed two murders as part of a "nine-day crime spree" that began on June 4, 1996. *Zack v. State*, 753 So.2d 9, 13-14 (Fla. 2000); *see also Zack v. State*, 911 So.2d 1190, 1195 (Fla. 2005). On June 12, 1996, Zack met Laura Rosillo at a bar in Okaloosa Island, Florida. Zack drove her in the red Honda he had stolen a few days earlier in Tallahassee. Zack attacked Laura while they were in the Honda. Zack then pulled her out of the car, kicked her repeatedly, and beat her head against one of the tire rims. He then strangled her to death. He dragged her body behind a sand dune, kicked dirt over her face, and left. *Zack*, 753 So.2d at 13. When her body was found, her tube top was torn and hanging off her hips and her pants were pulled down around her right ankle. (T. II 392-93); *Zack*, 753 So.2d at

13. Laura Rosillo's blood was found inside the stolen red Honda and on the outside of the Honda on the rear passenger-side tire. (T. III 410-19; IV 675-76).

Zack then drove to Pensacola in the stolen Honda. On the afternoon of June 13, 1996, at Dirty Joe's bar in Pensacola Beach, Zack met Ravonne Smith, who worked at the bar. *Zack*, 753 So.2d at 13-14. Around 8 p.m., Zack and Smith left the bar and went to her house. Immediately upon entering the house, Zack hit the victim with a beer bottle causing her blood to spray on a love seat in the living room and on the interior of the door frame. (T. II 317). She ran down the hall to the master bedroom leaving a trail of blood. (T. II 373). Zack pursued Smith to the master bedroom and sexually assaulted her. She managed to escape to the guest bedroom. But Zack pursued her and beat her head against the wooden floor of the bedroom. Zack went to the kitchen where he got an oyster knife, returned to the guest bedroom, and stabbed her in the chest four times with the knife. Zack returned to the master bedroom, stealing a television, a VCR, and her purse. He placed the stolen items in Smith's car, a black Plymouth

Conquest. Zack drove her stolen Conquest to the location where he had parked the stolen red Honda, close to Dirty Joe's bar. Zack removed the Honda's license plate and took it with him. He then returned to Panama City in Smith's stolen car. There, he attempted to pawn the victim's TV and VCR at the "No Fuss Pawn and Loan Company." (T. IV 628). The pawn shop owners asked for identification and told Zack they had to check the merchandise. Zack fled the store. The store's two surveillance cameras captured Zack attempting to pawn the stolen property on videotape. (T. IV 629). Zack abandoned Smith's car. Zack was apprehended sometime later hiding in an empty house.

Zack's fingerprint was found on the stolen TV and his fingerprint and palm print were found on the stolen VCR. (T. IV 722). Zack's fingerprints were also located on numerous items found in Smith's stolen car. (T. IV 708-711).

Zack confessed to the murder of Smith to Investigator Vecker of the Bay County Sheriff's Office and Investigator Henry of the Escambia County Sheriff's Office. (T. IV 745 - V 816; T. V 911-980). Zack

claimed, that after they had consensual sex, Smith had made a comment about his mother's murder which enraged him and he attacked her. He contended the fight with her began in the hallway, not immediately upon entering the house. Zack asserted that he had armed himself with the knife in self-defense, believing Smith was attempting to get a gun from the guest bedroom.

Procedural history of the case

On June 25, 1996, Zack was indicted for the first-degree murder of Ravonne Smith, as well as for robbery with a deadly weapon and sexual battery with a weapon. Zack was represented at the September 1997 trial and October 1997 penalty phase by Assistant Public Defender Elton Killiam. Assistant State Attorney James R. Murray prosecuted the case. Judge Joseph Tarbuck presided.

During the guilt phase, the State introduced the murder of Laura Rosillo, which occurred the day before the capital murder of Ravonne Smith, as evidence. *See generally Campbell v. State*, 271 So.3d 914, 932 (Fla. 2018) (explaining the admissibility of evidence of uncharged crimes falls into two categories: (1) similar fact evidence, also known

as *Williams* rule evidence,[1] and (2) dissimilar fact evidence, which is inextricably intertwined with the charged crime). The State's theory of prosecution was that Zack was a serial rapist and murderer.

The State presented DNA evidence. Both the Polymerase Chain Reaction (PCR) and the Restriction Fragment Length Polymorphism (RFLP) methods of DNA testing were used to test numerous items. Timothy McClure, a laboratory analyst with the Florida Department of Law Enforcement (FDLE), testified. (T. IV 656-690). McClure conducted PCR DNA testing. A vaginal swab of victim Smith matched Zack's DNA profile at six markers. (T. IV 671-73). Zack's DNA type occurs in one in 18,700 of the Caucasian population. (T. IV 673). FDLE analyst McClure testified that both victims' blood were on the white boxer shorts. (T. IV 679). FDLE laboratory analyst Karen Barnes also testified regarding her DNA testing. (T. IV 691-701). FDLE analyst Barnes conducted RFLP DNA analysis. (T. IV 693). FDLE analyst Barnes testified that the DNA on the jeans was the defendant's type at one in 6 billion of the Caucasian population. (T. IV

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[1] *Williams v. State*, 110 So.2d 654 (Fla. 1959).

699). The DNA on the boxer shorts matched victim Smith's DNA profile at three markers and at one in 93,000 Caucasians. (T. IV 699). The DNA evidence established that Zack was the perpetrator of both murders.

One of the defense theories was that the murder was a mutual combat situation. Zack himself testified at the guilt phase in support of that defense and also testified as to his background. (T. VI 1086-1167).

The defense also presented a type of diminished capacity defense during the guilt phase arguing that Zack suffered from fetal alcohol syndrome (FAS) and posttraumatic stress disorder (PTSD) and thus, could not form the intent to commit premeditated murder. The defense presented numerous lay witnesses in support of the diminished capacity defense including Zack's sister who killed their mother with an ax. (T. VI 1055-1077, 1067). Dr. Michael S. Maher, a psychiatrist, testified in general regarding the effects of FAS and PTSD. (T. VI 1167- T. VII 1246). Dr. Maher's opinion was that a person who suffers from both FAS and PTSD would be unable to form

the premeditated intent required of first-degree murder. (T. VI 1205-06). In rebuttal to the defense theory that Zack could not form premeditation, the State presented Dr. Harry McClaren. (T. VII 1250-1308). Dr. McClaren testified that Zack's actions during the nine-day crime spree were purposeful and planned. (T. VII 1281). Dr. McClaren noted that Zack was placed in a mental hospital in Louisiana for a conduct disorder, not FAS or PTSD. (T. VII 1304).

On September 15, 1997, the jury convicted Zack as charged.

Penalty phase/*Spencer*/sentencing

On October 14-17, 1997, the penalty phase was held. The State presented Zack's Oklahoma probation officer, Donald Steeley, who testified that Zack was on probation in Oklahoma and fled from the state in violation of his probation. (T. IX 1619-23). The State presented victim impact testimony from victim Smith's mother, Yvonne Kennedy, and her two brothers, Timothy Kennedy and Ralph Kennedy. (T. IX 1623-1635). The State rested. (T. IX 1635).

The defense presented numerous family and friends to testify regarding Zack's background including possible abuse by his step-

father, Anthony Midkiff, and the murder of his mother by his sister. (T. IX 1635-1821); *Zack v. Sec'y, Fla. Dep't of Corr.*, 721 Fed. Appx. 918, 919-20 (11th Cir. 2018) (describing some of the lay mitigation evidence presented at the penalty phase).

The defense also presented several mental health experts to testify that Zack suffered from fetal alcohol syndrome (FAS) and posttraumatic stress disorder (PTSD). Dr. William E. Spence, Jr., a forensic psychologist, testified for the defense at the penalty phase. (T. X 1822-1841). Dr. Spence diagnosed Zack with PTSD. (T. X 1830, 1841). Zack, however, told Dr. Spence that he witnessed his step-sister murdering his mother, despite Zack's own testimony at trial that he was in a mental hospital and a stipulation that he was over 100 miles away at the time of his mother's murder. (T. VI 1101; T. X. 1830).

Dr. James D. Larson, a forensic psychologist, also testified in mitigation. (T. X 1847-1884). Dr. Larson evaluated Zack, reviewed the records of several prior psychological evaluations, and spoke with family members and friends. (T. X 1853, 1860). Dr. Larson diagnosed

Zack with PTSD due to his mother's murder and the childhood abuse. (T. X 1862). Dr. Larson testified that Zack's IQ score on the Wechsler Intelligence Scale was 84, which is in the "low average range." (T. X 1854, 1868-69). Dr. Larson, however, also testified that Zack's IQ score from a Wechsler Intelligence Scale for Children, administered when he was about 12 years old, "reflected an IQ of 92." (T. X 1866-67). Zack's performance score was 104 and his verbal score was 84. (T. X 1867). Dr. Larson thought the 20-point discrepancy between the performance score and the verbal score was a sign of possible brain impairment. (T. X 1867).

Dr. Barry Crown, a forensic psychologist, also testified in mitigation. (T. X 1884-1926). He evaluated Zack for approximately seven hours. (T. X 1891). Dr. Crown also diagnosed Zack with PTSD and FAS. (T. X 1907, 1909). Dr. Crown testified both mental mitigators applied. (T. X 1909-1910).

Dr. Michael S. Maher, a psychiatrist, testified again in the penalty phase regarding FAS and PTSD. (T. X 1927-1967). Dr. Maher, after his guilt phase testimony, evaluated Zack for three hours. (T. X 1928).

Dr. Maher diagnosed Zack with PTSD and FAS. (T. X 1929,1932, 1937). Dr. Maher relied on Dr. Larson's testing. (T. X 1961).

In rebuttal, the State presented Dr. Eric Mings, a psychologist. (T. XI 1972-2014). Dr. Mings evaluated Zack along with Dr. McClaren. (T. XI 1977). Dr. Mings testified that Zack has a full scale IQ of 86 which is in the range of "low average." (T. XI 1986,1987).

The State also presented Dr. Harry McClaren, a forensic psychologist, who had testified in the guilt phase, in rebuttal at the penalty phase. (T. XI 2015-2047). Dr. McClaren, after his guilt phase testimony, had evaluated Zack for seven or eight hours, along with Dr. Mings. (T. XI 2015-16). Dr. McClaren diagnosed Zack as having a personality disorder with prominent antisocial features. (T. XI 2022). Dr. McClaren testified that Zack had anger directed toward women. (T. XI 2024, 2027-2032). Dr. McClaren testified that the statutory mental mitigators did not apply and that Zack's actions around the time of the murder were purposeful, not spontaneous. (T. XI 2033).

The State also presented Candice Fletcher, Zack's former girlfriend and mother of his child, in rebuttal to the step-father's abuse. She

testified that Zack still lived with his step-father when they first met and that it was his step-father that cut contact with Zack because Zack stole from him. (T. XI 2048-54).

The penalty phase jury recommended a sentence of death by a vote of eleven to one.

On November 10, 1997, the trial court conducted a *Spencer* hearing to allow the defense to present any additional mitigation. *Spencer v. State*, 615 So.2d 688 (Fla. 1993).

On November 24, 1997, the trial court sentenced Zack to death on Count I. The trial court found six aggravating circumstances: 1) under a sentence of felony probation; 2) felony murder; 3) avoid arrest; 4) pecuniary gain; 5) heinous, atrocious, and cruel (HAC); and 6) cold, calculated, and premeditated (CCP).[2] The trial court found four mitigating circumstances which were entitled to little weight: 1) the defendant committed the crime while under an extreme mental or

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[2] The Florida Supreme Court struck both the under-sentence-of-felony-probation aggravator and the avoid-arrest aggravator on appeal. So, four aggravating factors remain: 1) the felony murder aggravator based on a robbery, sexual battery, or burglary; 2) pecuniary gain; 3) HAC; and 4) CCP.

emotional disturbance; 2) the defendant was acting under extreme duress; 3) the defendant lacked the capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law; and 4) nonstatutory mitigating factors of remorse, voluntary confession, and good conduct while incarcerated. Zack's age of 27 years old was not considered a mitigating factor. *Zack,* 753 So.2d at 12-13.

Direct appeal

In the direct appeal, Zack raised 12 issues: (1) the court erred in admitting *Williams* rule evidence; (2) the court erred in denying a motion for judgment of acquittal on the sexual battery charge; (3) the trial court erred in denying the motion for judgment of acquittal on the robbery charge; (4) the trial court erred in instructing the jury on felony murder based upon a burglary; (5) the sentencing order failed to consider all of the mitigating evidence presented; (6) the trial court erred in finding that the murder was committed to avoid or prevent a lawful arrest; (7) the trial court erred in finding that the murder was committed in a cold, calculated and premeditated manner; (8) the trial

court erred in using victim impact evidence; (9) the trial court erred in admitting the rebuttal evidence from Candice Fletcher; (10) the trial court erred by failing to give Zack's proposed instruction on the role of sympathy; (11) the trial court erred in retroactively applying the aggravating factor of a murder committed while on felony probation; and (12) the trial court erred in refusing to admit a family photo during the penalty phase. *Zack v. State*, 753 So.2d 9, 16, n.5 (Fla. 2000); *see also Zack v. State*, 228 So.3d 41, 44–45, n.2 (Fla. 2017). The Florida Supreme Court rejected the challenge to the admissibility of the Rosillo murder in the guilt phase concluding it was "relevant" to establish "Zack's motive, intent, modus operandi and the entire context from which this murder arose." *Zack*, 753 So.2d at 16. The Florida Supreme Court observed the evidence showed that Zack "found his victims at bars, befriended them, gained their trust or sympathy, and thereafter committed some criminal act on or against them." *Id.* at 17. The Florida Supreme Court struck both the "avoid arrest" aggravator and the "under sentence of felony probation" aggravator on appeal. *Id.* at 20, 24-25. The "under sentence of felony

probation" aggravator was stricken on ex post facto grounds. *Id.* at 24-25. On January 6, 2000, the Florida Supreme Court affirmed the convictions and death sentence. *Zack*, 753 So.2d at 26.

Zack filed a petition for writ of certiorari in the United States Supreme Court raising a claim that the admission of victim impact evidence violated the Eighth Amendment and due process. On October 2, 2000, the United States Supreme Court denied review. *Zack v. Florida*, 531 U.S. 858 (2000) (No. 99-10062).

Initial state postconviction proceedings

On July 11, 2001, registry counsel R. Glenn Arnold was appointed as state postconviction counsel. *Zack v. State*, SC60-92089. On December 26, 2001, registry counsel Arnold filed a motion for an extension of time to file the initial postconviction motion in the Florida Supreme Court due to his late appointment. *Id.* The Florida Supreme Court granted the extension until May 13, 2002. On May 10, 2002, Zack, represented by registry counsel Arnold, filed an initial Rule 3.851 motion for postconviction relief. On July 3, 2002, Judge Linda

Nobles was assigned to preside over the case in postconviction and has been the presiding judge since that time.

After the postconviction motion was filed, on June 20, 2002, the United States Supreme Court held it was a violation of the Eighth Amendment to execute an intellectually disabled defendant in *Atkins v. Virginia*, 536 U.S. 304 (2002). On August 22, 2002, postconviction counsel Arnold moved to amend his pending Rule 3.851 motion to add an *Atkins* claim and, on September 10, 2002, the postconviction court granted the motion to amend with an *Atkins* claim. On October 21, 2002, Zack filed an amended initial postconviction motion raising six claims, including an *Atkins* claim.

On January 27, 2003, the state postconviction court held a *Huff* hearing. *Huff v. State*, 622 So.2d 982 (Fla.1993). On May 14, 2003, the state postconviction court held an evidentiary hearing on claims 1, 3, and 5. Claim 1 was a claim of ineffectiveness of trial counsel for failing to request a *Frye* hearing regarding the DNA evidence. *Frye v. United States*, 293 F. 1013 (D.C. Cir.1923). Claim 3 was a claim of ineffectiveness of trial counsel for failing to prepare Zack to testify at

the guilt phase and failing to warn him about the perils of cross-examination. Claim 5 was a claim of ineffectiveness of trial counsel for admitting the murder was a brutal crime in his closing argument.

Two witnesses testified at the 2003 evidentiary hearing: (1) Assistant Public Defender Elton Killam, defense counsel at trial and (2) Zack, himself. (EH 6-85; 87-119). On July 14, 2003, the postconviction court denied the initial amended postconviction motion. The postconviction court made a credibility finding regarding claim 3 accepting A.P.D. Killam's testimony that he prepared Zack to testify and discussed cross-examination with Zack. *Zack v. State*, 911 So.2d 1190, 1199 (Fla. 2005). The postconviction court summarily denied the *Atkins* claim based on the existing record of Zack's various IQ scores which included a score of 92 as a minor. At trial, Zack's IQ was established as 84 or 86 by the defense experts. Dr. Larson, during his penalty phase testimony, referred to a score from a Wechsler Intelligence Scale for Children, administered when Zack was about 12 years old, that "reflected an IQ of 92." (T. X 1866-67). And in the postconviction proceedings, a neuropsychological

evaluation prepared by Brett Turner, Ph.D. for registry counsel Arnold also referred to an IQ test, performed in 1980 when Zack was eleven or twelve years old, showing his full scale IQ score of 92. The defense postconviction expert Turner performed his own WAIS-III IQ test in 2002, which produced a IQ score of 79.

Zack appealed the denial of his initial postconviction motion to the Florida Supreme Court. *Zack v. State*, 911 So.2d 1190 (Fla. 2005) (SC03-1374). On December 18, 2003, state postconviction counsel Arnold withdrew as state postconviction appellate counsel and retained counsel Linda McDermott replaced him as state postconviction counsel.

Zack raised seven issues in his postconviction appeal: (1) trial counsel was ineffective for failing to challenge the DNA testimony presented by the State; (2) that counsel was ineffective because he failed to prepare Zack to testify at trial; (3) that counsel was ineffective because he made prejudicial remarks to the jury in the opening statement and closing argument; (4) that the trial court erred in summarily denying claims raised in his motion for postconviction

relief involving Zack's right to a hearing under *Frye v. United States*, 293 F. 1013 (D.C. Cir.1923); (5) the constitutionality of Florida's death penalty statute in the wake of *Atkins v. Virginia*, 536 U.S. 304 (2002); (6) that Florida's capital sentencing scheme is unconstitutional under *Ring v. Arizona*, 536 U.S. 584 (2002); and (7) that collateral counsel Arnold was ineffective. *Zack*, 911 So.2d at 1197.

Regarding the intellectual disability claim, the Florida Supreme Court observed that the "evidence in this case shows Zack's lowest IQ score to be 79." *Zack*, 911 So.2d at 1201. The Florida Supreme Court noted that Zack did "not dispute" the facts in the record regarding his IQ scores but instead argued that the Florida Supreme Court should reconsider its proportionality review conducted in the direct appeal based on Zack's "brain damage and his mental age" including his low IQ scores. *Id.* at 1201-02. The Florida Supreme Court noted that during the initial postconviction proceedings, Zack's postconviction counsel offered "no new or different evidence" regarding his intellectual disabilities. *Zack*, 911 So.2d at 1202. The Florida Supreme Court, however, noted that any claim of intellectual

disability falls "under Florida Rule of Criminal Procedure 3.203 and should be addressed pursuant to the procedures set forth in that rule." *Id.* at 1202. The Florida Supreme Court also rejected the claim of ineffective assistance of postconviction counsel as being not cognizable because there is no Sixth Amendment right to state postconviction counsel. *Id.* at 1203.

On November 30, 2005, during the initial postconviction appeal in the Florida Supreme Court, pro bono counsel Linda McDermott filed a motion to relinquish jurisdiction to the trial court to allow him to raise an intellectual disability claim under Rule 3.203, adopted by this Court in 2004. *Zack v. State*, SC03-1374; *see also Amendments to Fla. Rules of Crim. Proc. & Fla. Rules of App. Proc.*, 875 So.2d 563, 571 (Fla. 2004). On March 9, 2004, the Florida Supreme Court denied the motion without prejudice to file a Rule 3.203 motion in the trial court within 60 days once the appellate proceedings in the Florida Supreme Court were completed.

Successive state postconviction proceedings

On November 29, 2004, while the postconviction appeal was still pending in the Florida Supreme Court, Zack filed a Rule 3.203 motion raising an intellectual disability claim.[3] On January 12, 2005, the state postconviction court summarily denied relief. A copy of that order was filed in the Florida Supreme Court on January 18, 2005. *Zack v. State*, SC03-1374.

On March 18, 2005, Zack filed an appeal of the denial of his Rule 3.203 motion. *Zack v. State*, 982 So.2d 1179 (Fla. 2007) (SC05-963). Following full briefing on the intellectual disability claim, on September 20, 2007, the Florida Supreme Court summarily affirmed the denial of the Rule 3.203 motion raising the intellectual disability claim.

On October 13, 2014, Linda McDermott filed a motion to withdraw as state postconviction counsel. On January 26, 2015, the state

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[3] State postconviction counsel McDermott raised the *Atkins* intellectual disability claim in a successive Rule 3.851 postconviction motion but such claims are only properly raised under Rule 3.203. *Williams v. State*, 232 So.3d 933, 939 (Fla. 2017) (noting the rule that the specific provision controls over a more general provision). The State, therefore, refers to the motion as a Rule 3.203 motion.

postconviction court granted the motion to withdraw and appointed Capital Collateral Regional Counsel – Northern Region (CCRC-N), as state postconviction counsel.

On May 26, 2015, Zack, represented by Dawn Macready of CCRC-N, filed a successive postconviction motion raising claims regarding intellectual disability based on *Hall v. Florida*, 572 U.S. 701 (2014), in the state trial court. Zack argued, based on his history of significant difference between his verbal IQ scores and his performance IQ scores, his IQ scores may not be indicative of his true abilities and that *Hall* should be given a "more expansive interpretation" to cover such types of IQ scores. On June 9, 2015, the State filed an answer to the successive postconviction motion. On July 2, 2015, the postconviction court held a *Huff* hearing on the successive postconviction motion. On July 8, 2015, the postconviction court summarily denied the successive postconviction motion. The trial court noted that as part of the successive postconviction proceedings, Dr. Eisenstien determined that Zack had an IQ score of 80. (Succ. PC Vol. II 222). The trial court noted the various IQ scores as 79, 80, 84,

86, and 92, with the lowest score being 79. (Succ. PC Vol. II 222). The trial court refused to expand *Hall* because "*Hall* squarely holds" that only individuals with IQ scores "between 70 and 75 or lower" are entitled to present additional evidence in support of a claim of intellectual disability at an evidentiary hearing. (Succ. PC Vol. II 223). The postconviction court reasoned that the United States Supreme Court in *Hall* never implied that a capital defendant with a higher IQ score would be allowed "to make up the difference" with other evidence of other types of deficiencies. (Succ. PC Vol. II 223). The trial court concluded that Zack's IQ scores did "not place him within the range of concern" expressed by the *Hall* Court. (Succ. PC Vol. II 223).

On June 15, 2017, the Florida Supreme Court affirmed the summary denial of the successive postconviction motion raising an intellectual disability claim based on *Hall*. *Zack v. State*, 228 So.3d 41 (Fla. 2017) (SC15-1756). Zack argued that under *Hall* he was entitled to a full evidentiary hearing exploring all three prongs of the statutory test for intellectual disability. The Florida Supreme Court stated that *Hall* only requires the trial court to conduct an evidentiary hearing, if

a defendant's IQ scores first falls within the statistical error of measurement (SEM). *Id.* at 47. The Florida Supreme Court found that the trial court's determination that Zack did not satisfy the significantly subaverage intellectual functioning prong was "supported by competent, substantial evidence" because all of his IQ scores—92, 84, 86, 79, and 80—were "well outside the standard error of measurement (SEM)." *Id.* at 47; *id.* at 48 (Canady, J., concurring) (stating that "Zack's IQ scores justify the denial of his intellectual disability claim").

On March 12, 2018, Zack, represented by CCRC-N, filed a petition for writ of certiorari in the United States Supreme Court raising two claims based on *Hall v. Florida* and one claim based on *Hurst*. On June 18, 2018, the United States Supreme Court denied review. *Zack v. Florida*, 138 S.Ct. 2653 (2018) (No. 17-8134).

On January 11, 2017, Zack, represented by Dawn Macready and Stacy Biggart of CCRC-N, filed a second successive postconviction motion raising five claims based on *Hurst v. Florida*, 577 U.S. 92 (2016) (*Hurst v. Florida*), and *Hurst v. State*, 202 So.3d 40 (Fla. 2016)

(*Hurst v. State*), in the state postconviction court. The postconviction court summarily denied all of the *Hurst* claims concluding that *Hurst* did not apply retroactively to Zack under Florida Supreme Court precedent because his sentence was final before *Ring v. Arizona*, 536 U.S. 584 (2002), was decided.

On October 14, 2018, the Florida Supreme Court affirmed the postconviction court's summary denial of the second successive motion. *Zack v. State*, 2018 WL 4784204 (Fla. Oct. 4, 2018) (No. SC18-243). The Florida Supreme Court concluded, as "a matter of law," Zack was not entitled to any *Hurst* relief. *Id.* at *2 (citing *Hitchcock v. State*, 226 So.3d 216, 217 (Fla. 2017), and *Asay v. State*, 210 So.3d 1, 22 (Fla. 2016)). The Florida Supreme Court affirmed the postconviction court's order summarily denying the second successive postconviction motion.

On February 15, 2019, Zack filed a petition for writ of certiorari raising an Eighth Amendment attack on the Florida Supreme Court's holding regarding the partial retroactivity of *Hurst*. On April 29, 2019,

the United States Supreme Court denied review. *Zack v. Florida*, 139 S.Ct. 1622 (2019) (No. 18-8052).

State habeas petitions

On February 12, 2004, Zack, represented pro bono by registry counsel Linda McDermott, filed a state habeas petition along with the initial postconviction appeal. *Zack v. Crosby*, SC04-201. The state habeas petition raised six issues: (1) appellate counsel was ineffective for failing to raise a claim regarding the State's racially motivated peremptory challenge during jury selection; (2) appellate counsel should have argued that the prosecutor made impermissible argument to the jury including calling the defendant a liar and "send a message to the community"; (3) that the State introduced nonstatutory aggravating factors; (4) that appellate counsel was ineffective for failing to raise a claim on appeal regarding prejudicial and gruesome crime scene photos; (5) that the trial court erred in admitting evidence of other crimes; and (6) that appellate counsel was ineffective in failing to raise on appeal the claim that the trial court erroneously admitted irrelevant and prejudicial evidence. *Zack*, 911

So.2d at 1203. The Florida Supreme Court denied the first state habeas petition. *Id.* at 1203-1211.

On March 4, 2005, Zack filed a successive state habeas petition in the Florida Supreme Court raising a Confrontation Clause claim based on *Crawford v. Washington*, 541 U.S. 36 (2004). He argued that the prosecutor's questioning of Dr. McClaren during the penalty phase regarding Zack's "anger directed toward women" was a confrontation clause violation. (T. 2025). But, as the prosecutor pointed out in response to defense counsel's objection, the declarant, Candice Fletcher, was going to testify. Defense counsel then changed the basis of his objection from a confrontation clause violation to relevance.[4] Candice Fletcher, Zack's former girlfriend and mother of his child, testified. (T. 2054). On October 6, 2005, the Florida Supreme Court denied the successive state habeas petition citing *Chandler v. Crosby*,

[4] There is no confrontation clause violation if the witness who made the hearsay statements testifies at trial. *Crawford*, 541 U.S. at 59, n.9 (citing *California v. Green*, 399 U.S. 149, 162 (1970)); *Perez v. State*, 536 So.2d 206, 209 (Fla. 1988) (observing that if the child testifies, the defendant has been afforded an opportunity to confront citing *California v. Green*).

916 So.2d 728 (Fla. 2005). *Zack v. Crosby*, 918 So.2d 240 (Fla. 2005) (No. SC05-378).

On June 21, 2016, Zack, represented by CCRC-N, filed a second successive state habeas petition in the Florida Supreme Court raising a claim based on *Hurst v. Florida*, 577 U.S. 92 (2016) (*Hurst v. Florida*), and *Hurst v. State*, 202 So.3d 40 (Fla. 2016) (*Hurst v. State*), asserting that the jury must make a specific factual finding regarding the existence of each mitigating and aggravating circumstance. In June 15, 2017, the Florida Supreme Court denied the state habeas petition concluding that *Hurst* did not apply retroactively to Zack because his death sentence was final in 2000 before *Ring v. Arizona* was decided in 2002. *Zack v. Jones*, 228 So.3d 41, 47-48 (Fla. 2017) (SC16–1090), *cert. denied*, *Zack v. Florida*, 138 S.Ct. 2653 (2018) (No. 17-8134).

Federal habeas litigation

On September 28, 2005, Zack represented by C.J.A. counsel Linda McDermott, filed a § 2254 petition in the Northern District of Florida raising nine claims including an *Atkins* intellectual disability claim. *Zack v. Crosby*, 3:05-cv-369-RH (N.D. Fla) (Doc. #1); *see also Zack v.*

Crosby, 607 F.Supp.2d 1291 (N.D. Fla. 2008). Zack also filed a motion to stay the federal proceedings with the habeas petition to exhaust two claims in state court: (1) a *Crawford* confrontation clause claim and (2) an *Atkins* intellectual disability claim. (Doc. #3). On March 20, 2008, after exhausting both claims in state court, Zack filed an amended habeas petition. (Doc. #20). On May 19, 2008, the Secretary filed a motion to dismiss eight of the nine claims in the amended petition as untimely. (Doc. #23). The Secretary conceded that one claim in the amended petition, the *Atkins* intellectual disability claim, was timely and should be addressed on the merits. On November 17, 2008, the district court granted the motion to dismiss finding the claims in the habeas petition to be untimely except for the *Atkins* claim. (Doc. # 33). The district court explained that the habeas one-year statute of limitations had expired on October 2, 2001, and at that time there was no properly filed motion for relief pending in state court. *Zack*, 607 F.Supp.2d at 1293. The district court explained that state postconviction counsel, R. Glenn Arnold, who was appointed a couple of months before the federal deadline

would expire, moved for an extension of time in the Florida Supreme Court to file the state postconviction motion but had not moved for an extension until after the federal habeas deadline of October 2, 2011, had already passed. (Doc. #33 at 3).[5]

On March 26, 2009, following briefing on the *Atkins* intellectual disability claim, the district court denied the one claim on the merits. *Zack*, 3:05-cv-369-RH (N.D. Fla)(Doc. #36). The district court concluded that the state courts' rejection of Zack's intellectual disability claim "was not based on an unreasonable determination of the facts as established by the record." *Id.* at 9. The district court noted that Zack's "own expert, Dr. Larson, testified that Mr. Zack's IQ was 84 based on the Wechsler Intelligence Scale." *Id.* at 10. The district court also noted that Dr. Larson also reviewed Zack's score from the Wechsler Intelligence Scale for Children that was administered when he was about 12 years old which "reflected an IQ of 92." *Id.* (citing R. at 1865-67). The district court noted that the

[5] State postconviction counsel moving for an extension earlier would not have tolled the federal habeas deadline under Eleventh Circuit precedent. *Howell v. Crosby*, 415 F.3d 1250, 1251 (11th Cir. 2005).

State's expert, Dr. Ming, testified that Zack's IQ was 86 but determined that the improvement was due to the practice effect. *Id.* (citing R. at 1978-79, 1986). The district court additionally noted that during the state postconviction proceedings, his IQ score was 79. *Id.* The district court noted that in an effort to overcome the fact that "all" of his IQ scores exceeded the threshold for intellectual disability, Zack relied on his "learning disabilities, fetal alcohol syndrome, and other mental disorders" but the district court rejected any reliance on these "plus factors" when the IQ scores are "well above" the statutory threshold. *Id.* at 10-11. The district court thought that both the state trial court's and the Florida Supreme Court's conclusion that an evidentiary hearing on the intellectual disability claim "would serve no purpose" in light of such IQ scores was a reasonable one. *Id.* at 11 (citing *Zack v. State*, No. SC05-963 (Sept. 20, 2007) (unpublished)). The district court stated that "four Wechsler Intelligence Scale tests have uniformly concluded" that Zack's IQ is "significantly above" the threshold for intellectual disability and that the record demonstrates "without genuine dispute" that Zack's "IQ is at least 79." *Id.* at 11,12.

Because Zack "proffered no evidence that his IQ is as low as 75," he was not entitled to relief on his *Atkins* claim. *Id*. at 12. The district court also rejected the request for an evidentiary hearing in federal court finding that it would "serve no purpose." *Id*. The district court observed that a federal habeas court is not required to hold an evidentiary hearing if the record refutes the petitioner's factual allegations. *Id*. at 12 (quoting *Schriro v. Landrigan*, 550 U.S. 465, 474 (2007)). And then the district court stated that the record developed at trial refuted the allegation of intellectual disability because Zack's own two experts concluded that his IQ was either 84 or 79. *Id*. at 12.

On appeal, a panel of the Eleventh Circuit originally reversed. *Zack v. Tucker*, 666 F.3d 1265 (11th Cir. 2012). The Eleventh Circuit panel felt constrained by their existing precedent of *Walker v. Crosby*, 341 F.3d 1240 (11th Cir. 2003), and ruled that the timeliness of a habeas petition is determined for the petition as a whole rather than on a claim-by-claim basis.

The Eleventh Circuit then granted en banc review to determine if the Court should overrule its precedent of *Walker v. Crosby*, 341 F.3d

1240 (11th Cir. 2003). The Eleventh Circuit en banc concluded, based on the text and structure of the statute, Supreme Court precedent, decisions of other sister circuits, and Congressional intent, that the federal statute of limitations requires a claim-by-claim approach to determine timeliness. *Zack v. Tucker*, 704 F.3d 917, 918 (11th Cir. 2013) (en banc). The en banc Court overruled *Walker* and affirmed the district court's dismissal of the eight claims as untimely.

On October 7, 2013, the United States Supreme Court denied review of the Eleventh Circuit's en banc opinion finding eight of the claims raised in the initial habeas petition to be untimely. *Zack v. Crews*, 571 U.S. 863 (2013) (No. 12-10693).

On August 25, 2014, Zack filed the Rule 60(b)(6) motion seeking to reopen his closed federal habeas proceedings on the basis of the en banc decision in *Zack v. Tucker*, 704 F.3d 917 (11th Cir. 2013)(en banc), arguing that he was entitled to equitable tolling based on a combination of *Holland v. Florida*, 560 U.S. 631 (2010), and *Martinez v. Ryan*, 566 U.S. 1 (2012). (Doc. #56). The Secretary filed a response to the Rule 60(b)(6) motion asserting (1) the motion to reopen was

untimely because it was filed over a year after the en banc decision was issued on January 9, 2013, and many years after *Holland* or *Martinez* were decided; (2) a mere change in the law is not a sufficient reason to reopen a closed habeas case under both Supreme Court precedent of *Gonzalez v. Crosby*, 545 U.S. 524 (2005), and Eleventh Circuit precedent of *Lugo v. Sec'y, Fla. Dep't. of Corr.*, 750 F.3d 1198 (11th Cir. 2014), and *Howell v. Sec'y, Fla. Dep't of Corr.*, 730 F.3d 1257, 1260-61 (11th Cir. 2013); (3) the district court had, in fact, determined the timeliness of Zack's petition on a claim-by-claim basis in its original order; and (4) the outcome would remain the same because every untimely claim in the petition would remain untimely under *Howell v. Crosby*, 415 F.3d 1250, 1251 (11th Cir. 2005). (Doc. #57). On September 4, 2014, the district court denied the Rule 60(b)(6) motion to reopen. (Doc. #58). The district court observed that the "law evolves constantly" and therefore, it is not an "extraordinary circumstance" warranting relief under Rule 60(b)(6). *Id.* at 2 (citing *Gonzalez*, 545 U.S. at 536-37).

The Eleventh Circuit issued a certificate of appealability (COA) on two questions related to equitable tolling. *Zack v. Sec'y, Fla. Dep't of Corr.*, 721 Fed. Appx. 918, 922 (11th Cir. 2018) (No. 14-14998).[6] The Eleventh Circuit held that the district court did not abuse its discretion in denying the Rule 60(b)(6) motion. *Id.* at 926.

On October 9, 2018, the United States Supreme Court denied review of the Eleventh Circuit's decision affirming the denial of the Rule 60(b)(6) motion to reopen. *Zack v. Jones*, 139 S.Ct. 322 (2018) (No. 17-9549).

Procedural history of the current warrant litigation

On August 28, 2023, Zack, represented by state postconviction counsel Capital Collateral Regional Counsel - Northern Region (CCRC-

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[6] The two certified questions were: (1) In light of *Holland v. Florida*, 560 U.S. 631 (2010), did the district court abuse its discretion in denying Zack's Rule 60(b)(6) motion without determining whether Zack's mental impairment and the timing of the appointment of collateral counsel, collectively, amount to extraordinary circumstances, and (2) Did the district court abuse its discretion in denying Zack an evidentiary hearing, under *Hunter v. Ferrell*, 587 F.3d 1304, 1309-10 (11th Cir. 2009), to further investigation and factual development and proceedings to determine whether a causal connection exists between Zack's mental impairment and the timing of the appointment of collateral counsel, collectively and the untimely filing of his petition for relief under 28 U.S.C. § 2254.

N), filed a third successive postconviction motion raising two claims. (2023 3rd Succ. PCR at 261-84). The two claims were: (1) an Eighth Amendment claim seeking to expand *Atkins v. Virginia*, 536 U.S. 304 (2002), which prohibits the execution of intellectually disabled capital defendants, to include Fetal Alcohol Syndrome (FAS), arguing a diagnosis of FAS is the functional equivalent of intellectual disability; and (2) a claim the Eighth Amendment requires unanimous jury sentencing in capital cases.

On the same day, August 28, 2023, Zack also filed a motion for a stay of execution in the state trial court. (2023 3rd Succ. PCR at 255-60).

On August 29, 2023, the State filed its answer to the third successive postconviction motion asserting that both claims should be summarily denied. (2023 3rd Succ. PCR at 432-56). Regarding claim 1, the State asserted the claim was untimely, procedurally barred, and meritless as a matter of law under the controlling Florida Supreme Court case of *Dillbeck v. State*, 357 So.3d 94, 100 (Fla. 2023), *cert. denied*, *Dillbeck v. Florida*, 143 S.Ct. 856 (2023). As a

straight *Atkins* claim, the intellectual disability claim was conclusively rebutted by the record, untimely, procedurally barred, and meritless under the statutory test for intellectual disability. Regarding claim 2, the State asserted that the claim was untimely, procedurally barred, and meritless as a matter of law under the controlling Florida Supreme Court case of *Dillbeck v. State*, 357 So.3d 94, 104 (Fla. 2023). The State asserted that neither of the claims warranted an evidentiary hearing and both should be summarily denied.

On the same day, August 29, 2023, the State filed a response to the motion for a stay of the execution. (2023 3rd Succ. PCR at 457-66).

On August 31, 2023, the postconviction court conducted a case management conference, commonly referred to as a *Huff* hearing, at which the court hearing the arguments of counsel regarding if any of the successive postconviction claims required further factual development. (2023 3rd Succ. PCR at 546-64). After the arguments of counsel, the postconviction court orally announced the ruling summarily denying both claims. Later that same day, on August 31,

2023, the postconviction court also entered a written order summarily denying the third successive postconviction motion. (2023 3rd Succ. PCR at 478-84).

This appeal follows.

SUMMARY OF THE ARGUMENT

ISSUE I

Zack raises an Eighth Amendment claim seeking to expand *Atkins v. Virginia*, 536 U.S. 304 (2002), to include a diagnosis of Fetal Alcohol Syndrome (FAS), arguing that it is the functional equivalent of intellectual disability. The expansion-of-*Atkins* claim is procedurally barred, untimely, and meritless as a matter of law under this Court's long-standing precedent. *Atkins* is limited to intellectual disability. Florida courts are prohibited from expanding *Atkins* to include other diagnoses under the State constitution's conformity clause regarding Eighth Amendment claims, as this Court recently explained in *Barwick v. State*, 361 So.3d 785, 791-95 (Fla. 2023), *cert. denied*, *Barwick v. Florida*, 143 S.Ct. 2452 (2023). This Court has repeatedly

and consistently refused to expand *Atkins* to other types of diagnoses or conditions, including in this Court's recent decision in *Dillbeck v. State*, 357 So.3d 94 (Fla. 2023), *cert. denied*, *Dillbeck v. Florida*, 143 S.Ct. 856 (2023). Therefore, Zack may not rely on a diagnosis of FAS to support his *Atkins* claim. The postconviction court properly summarily denied the expansion-of-*Atkins* claim.

ISSUE II

Zack asserts the Eighth Amendment requires unanimous jury sentencing in capital cases. But it is the Sixth Amendment that governs claims regarding a jury's role, not the Eighth Amendment. Alternatively, even viewed as an Eighth Amendment claim, the claim is untimely, procedurally barred, and meritless as a matter of law under *Spaziano v. Florida*, 468 U.S. 447, 465 (1984). This Court recently rejected this same jury sentencing argument in *Dillbeck v. State*, 357 So.3d 94, 104 (Fla. 2023). The postconviction court properly summarily denied this Eighth Amendment jury sentencing claim.

ARGUMENT

ISSUE I

WHETHER THE POSTCONVICTION COURT PROPERLY SUMMARILY DENIED THE EIGHTH AMENDMENT CLAIM SEEKING TO EXPAND *ATKINS V. VIRGINIA*, 536 U.S. 304 (2002), TO INCLUDE FETAL ALCOHOL SYNDROME? (Restated)

Zack asserts the Eighth Amendment precludes his execution because his diagnosis of Fetal Alcohol Syndrome (FAS) is the equivalent to intellectual disability under *Atkins v. Virginia*, 536 U.S. 304 (2002). IB at 18. The expansion-of-*Atkins* claim is procedurally barred, untimely, and meritless as a matter of law under this Court's long-standing precedent. As the postconviction court properly found, expansion-of-*Atkins* claim is procedurally barred because Zack raised this same expansion-of-*Atkins* claim based on his diagnosis of FAS previously. Moreover, as the postconviction court properly found, the expansion-of-*Atkins* claim is untimely because it was raised nearly twenty years late. Alternatively, as the postconviction court properly concluded, the expansion-of-*Atkins* claim is meritless as a matter of law under this Court's long-standing precedent, including the recent warrant case of *Dillbeck v. State*, 357 So.3d 94, 100 (Fla. 2023), *cert.*

denied, *Dillbeck v. Florida*, 143 S.Ct. 856 (2023). And the state's constitutional conformity clause prohibits Florida courts from expanding the scope of *Atkins*, as this Court recently explained in *Barwick v. State*, 361 So.3d 785, 791-95 (Fla. 2023), *cert. denied*, *Barwick v. Florida*, 143 S.Ct. 2452 (2023). The postconviction court properly summarily denied the expansion-of-*Atkins* claim.

Standard of review

The standard of review of a summary denial of a successive postconviction motion is de novo. *Owen v. State*, 364 So.3d 1017, 1022 (Fla. 2023), *cert. denied*, *Owen v. Florida*, 143 S.Ct. 2633 (2023); *Dillbeck v. State*, 357 So.3d 94, 98 (Fla. 2023) (explaining, in an active warrant case, that because the lower court denied the successive postconviction claims without an evidentiary hearing, the Florida Supreme Court's review is de novo citing *Bowles v. State*, 276 So.3d 791, 794 (Fla. 2019)), *cert. denied*, *Dillbeck v. Florida*, 143 S.Ct. 856 (2023) (No. 22-6819)).[7]

[7] In the interest of brevity, the State will not repeat the standard of review or the standard for summary denials for successive postconviction claims for each issue because the same standard governs both issues.

Summary denials of successive postconviction claims

A successive postconviction claim may be summarily denied if it is conclusively rebutted by the existing record. Fla. R. Crim. P. 3.851(f)(5)(B). But being conclusively rebutted by the record is not the sole ground for summarily denying a successive postconviction claim under this Court's caselaw. Rather, successive postconviction claims are properly summarily denied on the grounds of being not retroactive, untimely, procedurally barred, legally insufficient, meritless as a matter of law under controlling precedent, or for not being cognizable at all.[8]

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[8] *Bogle v. State*, 288 So.3d 1065, 1069 (Fla. 2019) (affirming the summary denial of a successive postconviction claim on nonretroactivity grounds); *Owen v. State*, 364 So.3d 1017, 1023 (Fla. 2023) (holding, in an active warrant case, that the lower court properly summarily denied the successive postconviction claim as untimely citing Fla. R. Crim. P. 3.851(e)(2)); *Dailey v. State*, 329 So.3d 1280, 1287 (Fla. 2021) (affirming the summary denial of a successive postconviction claim as untimely), *cert. denied*, *Dailey v. Florida*, 143 S.Ct. 272 (2022); *Owen v. State*, 364 So.3d 1017, 1025 (Fla. 2023) (stating, in an active warrant case, that the lower court may properly summarily deny a postconviction claim that is procedurally barred citing *Matthews v. State*, 288 So.3d 1050, 1060 (Fla. 2019); *Gaskin v. State*, 361 So.3d 300, 306 (Fla. 2023) (holding, in an active warrant case, that the lower court properly summarily denied a successive postconviction claim regarding omitted mitigation as being procedurally barred because a similar claim was raised in the initial

Zack's expansion-of-*Atkins* claim is procedurally barred, untimely and meritless as a matter of law under this Court's long-standing precedent. Therefore, the postconviction court properly summarily denied the expansion-of-*Atkins* claim.

Opposing counsel insists that if the State disputes that Zack is exempt from execution under *Atkins*, the dispute is "factual in nature" which "necessitates an evidentiary hearing." IB at 25, n.5. The State, however, is arguing that *Atkins* is limited to a diagnosis of intellectual

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postconviction motion), *cert. denied*, *Gaskin v. Florida*, 143 S.Ct. 1102 (2023); *Hutchinson v. State*, 343 So.3d 50, 53 (Fla. 2022) (affirming the summary denial of a successive postconviction claim of newly discovered evidence as being "legally insufficient" because the claim did not meet the legal test of *Jones v. State*, 709 So.2d 512 (Fla. 1998)), *cert. denied*, *Hutchinson v. Florida*, 143 S.Ct. 601 (2023); *Morris v. State*, 317 So.3d 1054, 1071 (Fla. 2021) (affirming the summary denial of a successive postconviction claim of a violation of *Brady v. Maryland*, 373 U.S. 83 (1963), as being "legally insufficient" because the claim did not meet the legal test to establish a *Brady* violation); *Mann v. State*, 112 So.3d 1158, 1162 (Fla. 2013) (affirming the summary denial of a postconviction claim that was a purely legal claim which was meritless under the controlling precedent); *Zack v. State*, 2018 WL 4784204 (Fla. Oct. 4, 2018) (affirming the summary denial of a successive postconviction claim as being meritless as a "matter of law" under the controlling Florida Supreme Court precedent); *Sweet v. State*, 293 So.3d 448, 453 (Fla. 2020) (affirming the summary denial of a successive postconviction claim because claims of ineffectiveness of postconviction counsel are not cognizable), *cert. denied*, *Sweet v. Florida*, 141 S. Ct. 909 (2020).

disability, as ***a matter of law***, under this Court's long-standing precedent. This is not a factual dispute; it is a legal dispute. And it is perfectly proper for a trial court to summarily deny a postconviction claim, without an evidentiary hearing, based on this Court's controlling precedent. *Hutchinson*, 343 So.3d at 53; *Morris*, 317 So.3d at 1071; *Mann*, 112 So.3d at 1162.

The postconviction court's ruling

The postconviction court summarily denied the expansion-of-*Atkins* claim. (2023 3rd Succ. PCR at 479-82). The postconviction court summarily denied the claim as procedurally barred, untimely, and meritless as a matter of law.

The postconviction court found the claim to be procedurally barred because it had been raised previously in 2002, again in 2004, once again in 2015, and yet again in 2017. (2023 3rd Succ. PCR at 480-81 citing *Barwick v. State*, 361 So.3d 785, 794-95 (Fla. 2023)).

The postconviction court also found the claim to be untimely because the new consensus regarding FAS does "not constitute newly discovered evidence." (2023 3rd Succ. PCR at 481-82 citing *Barwick*,

361 So.3d at 793). The lower court also observed that studies and compilations generally are not considered newly discovered evidence either. *Id.* at 481 (citing *Dillbeck v. State*, 357 So.3d 94, 99 (Fla. 2023), and *Henry v. State*, 125 So.3d 745, 750 (Fla. 2013)). The lower court noted that the consensus, relied on by the defense, had existed "at least since 2021." *Id.* at 481. The postconviction court explained that to be timely, a postconviction claim had to be filed "within one year of the date upon which the claim became discoverable through due diligence." *Id.* at 481 (citing *Dillbeck v. State*, 304 So.3d 286, 288 (Fla. 2020)). But Zack's claim was not raised by 2022, and therefore, was untimely.

The postconviction court additionally concluded that the expansion-of-*Atkins* claim was "without merit." (2023 3rd Succ. PCR at 482). The lower court noted that Florida statutes and rules of court define intellectual disability and observed that Zack does not even claim to be intellectually disabled under either the statute or the rule. *Id.* at 482 citing § 921.137, Fla. Stat. (2022), and Fla. R. Crim. P. 3.203(b)). Instead, Zack was seeking to expand *Atkins* to include a

diagnosis of FAS. But, as the lower court observed, Florida Supreme Court precedent held that the "categorical" bar of *Atkins* does not apply to "other forms of mental illness or brain damage." *Id.* (citing *Dillbeck*, 357 So.3d at 100 and *Lawrence v. State*, 969 So.3d 294, 300 n.9 (Fla. 2007)). The postconviction court also noted that under the State's conformity clause, a Florida court "may not expand *Atkins* to apply to a diagnosis of FAS." *Id.* at 482 (citing *Barwick*, 361 So.3d at 795 and Fla. Const. art. 1, § 17).

Procedural bar

The expansion-of-*Atkins* claim is procedurally barred by the law-of-the-case doctrine. A capital defendant may not reraise the same claim that was previously rejected by this Court. *Gaskin v. State*, 361 So.3d 300, 306 (Fla. 2023) (holding, in an active warrant case, that the lower court properly summarily denied a successive postconviction claim as being procedurally barred because a similar claim was raised in the initial postconviction motion), *cert. denied*, *Gaskin v. Florida*, 143 S.Ct. 1102 (2023). Procedurally barred claims are properly summarily denied. *Owen*, 364 So.3d at 1025 (stating a

lower court may properly summarily deny a postconviction claim that is procedurally barred citing *Matthews*, 288 So.3d at 1060).

Zack previously raised an expansion-of-*Atkins* claim in a Rule 3.203 motion filed in the trial court in 2004. In the appeal of the summary denial of his 3.203 motion in this Court, Zack asserted that he fell into the "same category" as *Atkins* based on his diagnosis of FAS and brain damage. This Court affirmed the trial court's denial of the claim in an unpublished opinion. *Zack v. State*, 982 So.2d 1179 (Fla. 2007) (SC05-963). Zack may not raise the same expansion-of-*Atkins* claim based on his FAS diagnosis for a second time.

Opposing counsel seems to be arguing that neither time limitations nor procedural bars apply to categorical exemption claims. IB at 19. This Court has rejected the contention that procedural bars do not apply to categorical exemption claims. "Procedural bars do apply" to such claims. *Barwick v. State*, 361 So.3d 785, 795 (Fla. 2023), *cert. denied*, *Barwick v. Florida*, 143 S.Ct. 2452 (2023); *cf. In re Hill*, 715 F.3d 284, 299 (11th Cir. 2013) (refusing to authorizing the filing of a

successive habeas petition raising an *Atkins* claim where the claim had been raised in the first habeas petition under the statutory prohibition of 28 U.S.C. § 2244(b)(1), after carefully considering the dissent's view that categorical exemption claims cannot be barred).[9] As the postconviction court properly found, the expansion-of-*Atkins* claim is procedurally barred.

Untimely

The expansion-of-*Atkins* claim is also untimely. To sustain a trial court's summary denial of a postconviction claim, this Court need "only" agree that the claim is untimely. *Sliney v. State*, 362 So.3d 186, 188 (Fla. 2023).

This Court recently explained, in an active warrant case, raising a similar expansion-of-*Atkins* claim, that, if the claim is not a newly discovered evidence claim, then the postconviction claim is untimely. *Dillbeck v. State*, 357 So.3d 94, 99 (Fla. 2023). This Court explained that postconviction claims must be filed within one year of the conviction and sentence becoming final unless the claim is based on

[9] Hill was executed in 2015.

newly discovered evidence or a newly recognized fundamental constitutional right that has been held to apply retroactively. *Id*. at 99 (citing *Carroll v. State*, 114 So.3d 883, 886 (Fla. 2013); Fla. R. Crim. P. 3.851(d)(1)(A)-(B); and Fla. R. Crim. P. 3.851(d)(2)(A)-(B)). Otherwise, the postconviction claim is untimely.

Zack's convictions and death sentence became final in October of 2000, when the United States Supreme Court denied review of his direct appeal. *Zack v. Florida*, 531 U.S. 858 (2000). To be timely, any postconviction claim normally had to be filed by October of 2001. Fla. R. Crim P. 3.851(d)(1). But Florida, by rule of court, in the wake of the *Atkins* decision, allowed capital defendants to raise *Atkins* claims until November 30, 2004. *Amendments to Fla. R. Crim. P. & Fla. R. App. P.*, 875 So.2d 563 (Fla. 2004). So, at the latest, any expansion-of-*Atkins* claim had to be raised by November of 2004. But this expansion-of-*Atkins* claim is being raised in 2023, nearly 20 years late.

Opposing counsel relies on a new "scientific consensus" regarding FAS to restart the one-year time period to timely file a successive postconviction claim. But this Court has found a new scientific

consensus to be an "unpersuasive" reason to restart the clock for purposes of timely filing successive postconviction claims. *Sliney v. State*, 362 So.3d 186, 189 (Fla. 2023) (affirming the summary denial of a successive postconviction Eighth Amendment claim seeking to expand *Roper v. Simmons*, 543 U.S. 551 (2005), based on a new scientific consensus regarding brain development as untimely). Sliney filed his successive postconviction Eighth Amendment claim in 2022 seeking to expand *Roper* to 21 year-olds, relying on the release of the American Association of Intellectual and Developmental Disabilities (AAIDD) manual, updated in 2021, showing a "new" scientific consensus. This Court, however, found the expansion-of-*Roper* claim to be untimely because similar facts had "long been available." *Id.* at 189. This Court also rejected the notion that a new study or new publication can be invoked to restart the clock to timely file a successive postconviction claim. This Court explained that if the court were to accept such an argument regarding the timeliness of a claim, every new study or publication could be invoked to restart the clock for timely filing a successive postconviction claims, which "would be

at odds with the finality interests" served by having a time limitation on successive postconviction claims in rule 3.851. *Id*. at 189.

The reason this Court created an exception to the time limit on postconviction claims was to permit claims relying on new facts discovered after the trial, the direct appeal, or the initial postconviction proceedings, that would result in an acquittal at a retrial or would result in a life sentence at a new penalty phase, to be raised. *See generally Calhoun v. State*, __ So.3d ___, ___, 48 Fla. L. Weekly S139, 2023 WL 4359490, *2 (Fla. July 6, 2023) (discussing the newly discovered evidence test of *Jones v. State*, 709 So.2d 512, 521 (Fla. 1998), and explaining that the newly discovered evidence must weaken the case against the defendant to the point it gives rise to a reasonable doubt as to his guilt). The exception is for new facts that raise the specter of innocence of the crime or of the penalty. But that reasoning requires that the new facts actually be related to the particular case. A new consensus among the psychological community is not case-specific or related to the facts of the particular case. Courts should not restart time limitations based on abstract,

unrelated concepts such as a new consensus, new manuals, or resolutions from professional organizations. Such events have little connection to innocence.

Opposing counsel seems to be arguing that neither time limitations nor procedural bars apply to categorical exemption claims. IB at 19. But this Court has "flatly" rejected the contention that time limitations cannot be applied to categorical exemption claims. *Dillbeck*, 357 So.3d at 100 (relying on *Carroll*, 114 So.3d at 886); *cf. In re Hill*, 715 F.3d 284, 299 (11th Cir. 2013) (refusing to authorizing the filing of a successive habeas petition raising an *Atkins* claim where the claim had been raised in the first habeas petition under the statutory prohibition of 28 U.S.C. § 2244(b)(1), after carefully considering the dissent's view that categorical exemption claims cannot be barred).[10] As the postconviction court properly found, the expansion-of-*Atkins* claim is untimely.

[10] Hill was executed in 2015.

Merits

The expansion-of-*Atkins* claim is meritless as a matter of law under this Court's long-standing precedent.

The state constitution's conformity clause

Zack seeks to expand *Atkins* from intellectual disability to include a diagnosis of Fetal Alcohol Syndrome (FAS). But the state constitutional conformity clause precludes such a course. Fla. Const. art. I, § 17; *Lawrence v. State*, 308 So.3d 544 548 (Fla. 2020) (discussing Florida's conformity clause regarding the Eighth Amendment). This Court must follow *Atkins*, not some variation of it. When the United States Supreme Court establishes a categorical rule, expanding the category violates that rule. *Kearse v. Sec'y, Fla. Dep't of Corr.*, 2022 WL 3661526, at *26 (11th Cir. Aug. 25, 2022) (citing *Barwick v. Sec'y, Fla. Dep't of Corr.*, 794 F.3d 1239, 1257-59 (11th Cir. 2015)). A Florida court may not expand *Atkins* beyond a diagnosis of intellectual disability under the state constitution.

In *Barwick v. State*, 361 So.3d 785, 791-95 (Fla. 2023), *cert. denied*, *Barwick v. Florida*, 143 S.Ct. 2452 (2023), this Court relied on the state constitutional conformity clause to reject two Eighth Amendment

claims. First, Barwick argued that the prohibition on executing defendants who were minors at the time of the crime, established in *Roper v. Simmons*, 543 U.S. 551 (2005), should be expanded to include defendants under 22 years of age based on a new resolution from a professional organization regarding adolescent brain development. *Id.* at 791-92. This Court determined that it lacked the authority to expand *Roper* under the conformity clause, explaining that a holding of the United States Supreme Court in an Eighth Amendment case is "both the floor and the ceiling." *Barwick*, 361 So.3d at 794 (citing article I, section 17 of the Florida Constitution). Second, Barwick argued that *Atkins* should be expanded based on his "trifecta of vulnerabilities" of a severe neuropsychological disorder, cognitive impairments, and low mental age. *Id.* at 794. This Court relied, in part, on the state constitutional conformity clause to reject the expansion-of-*Atkins* claim, again concluding it lacked authority to expand *Atkins* to include other types of disabilities. *Id.* at 795. *Barwick* controls.

This Court's precedent refusing to expand *Atkins*

This Court has repeatedly rejected attempts to expand *Atkins* over the years. This Court, starting in 2007 and continuing to the present day, has refused to consider *Atkins* claims based on any other diagnosis than intellectual disability. *Lawrence v. State*, 969 So.2d 294, 300 n.9 (Fla. 2007) (rejecting an argument that *Atkins* should be expanded to include mental illness); *Barwick v. State*, 361 So.3d 785, 795 (Fla. 2023) (rejecting an argument that *Atkins* should be expanded to include severe neuropsychological disorders, cognitive impairments, and low mental age).[14]

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[14] *Dillbeck v. State*, 357 So.3d 94, 98-100 (Fla. 2023) (rejecting an argument that *Atkins* should be expanded to include a fetal alcohol spectrum disorder called neurodevelopmental disorder associated with prenatal alcohol exposure (ND-PAE)); *Gordon v. State*, 350 So.3d 25, 37 (Fla. 2022) (rejecting an argument that *Atkins* should be expanded to include schizoaffective disorder and PTSD from severe childhood abuse citing *McCoy v. State*, 132 So.3d 756, 775 (Fla. 2013)); *Newberry v. State*, 288 So.3d 1040, 1050 (Fla. 2019) (rejecting an argument that *Atkins* should be expanded to include other intellectual impairments); *Muhammad v. State*, 132 So.3d 176, 207 & n.21 (Fla. 2013) (rejecting an argument that *Atkins* should be expanded to include schizophrenia and paranoia); *Carroll v. State*, 114 So.3d 883, 886-87 (Fla. 2013) (rejecting an argument that *Atkins* should be expanded to include severe brain damage and mental limitations); *Simmons v. State*, 105 So.3d 475, 510-11 (Fla. 2012) (rejecting an argument that *Atkins* should be expanded to include

This Court recently rejected a similar Eighth Amendment claim attempting to expand *Atkins* based on a type of Fetal Alcohol Syndrome (FAS), in an active warrant case. In *Dillbeck v. State*, 357 So.3d 94, 98-100 (Fla. 2023), *cert. denied*, *Dillbeck v. Florida*, 143 S.Ct. 856 (2023), this Court addressed an Eighth Amendment claim regarding a new diagnosis of a fetal alcohol spectrum disorder, namely, neurodevelopmental disorder associated with prenatal alcohol exposure (ND-PAE). Dillbeck argued that his new diagnosis of ND-PAE was the equivalent of intellectual disability for purposes of *Atkins*. *Id*. at 98. This Court found the expansion-of-*Atkins* claim to be both "untimely and procedurally barred" as well as "meritless." *Id*. This Court found the claim to be meritless based on its well-established precedent holding the "categorical bar of *Atkins*" only shields the intellectually disabled. The categorical bar "does not apply to individuals with other forms of mental illness or brain damage." *Id*.

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mental illness and neuropsychological deficits); *Johnston v. State*, 27 So.3d 11, 26-27 (Fla. 2010) (rejecting an argument that *Atkins* should be expanded to include traumatic brain injury); *Connor v. State*, 979 So.2d 852, 867 (Fla. 2007) (rejecting an argument that *Atkins* should be expanded to include paranoid schizophrenia, organic brain damage, and frontal lobe damage).

at 100 (citing *Gordon v. State*, 350 So.3d 25, 37 (Fla. 2022)). This Court in *Dillbeck* concluded the expansion-of-*Atkins* claim was time barred, procedurally barred, and without merit. *Id.* This Court then affirmed the postconviction court's summary denial of the expansion-of-*Atkins* claim. *Dillbeck* controls.

There is another reason to limit the prohibition established in *Atkins* to intellectual disability. A diagnosis of intellectual disability is mainly objective, depending as it does on IQ scores for two of the three prongs of the statutory test for intellectual disability. § 921.137(1), Fla. Stat. (2022); *cf. Atkins*, 536 U.S. at 308 n.3 (using definitions from the American Association on Mental Retardation (AAMR) and the American Psychiatric Association as examples). IQ tests are objective, by and large, and result in numerical scores. IQ tests are standardized and are used for other purposes and in other fields, such as the military. But other types of diagnoses are highly subjective. Expanding *Atkins* to other types of disabilities would result in highly subjective battles of the experts.

The claim is meritless as a matter of law under this Court's long-standing precedent including *Dillbeck*. Under this Court's unbroken precedent, *Atkins* is limited to intellectual disability. As the postconviction court properly concluded, the expansion-of-*Atkins* claim is meritless as a matter of law under this Court's precedent.

Not intellectually disabled

Any straight claim of intellectual disability is conclusively rebutted by the existing record, untimely, procedurally barred, and meritless on two prongs of the three prongs of the statutory test for intellectual disability.

As a straight *Atkins* claim, the claim of intellectual disability is conclusively rebutted by the existing record. Fla. R. Crim. P. 3.851(f)(5)(B). The record contains five IQ scores: 79, 80, 84, 86, and 92. *Zack v. State*, 228 So.3d 41, 47 (Fla. 2017) (listing all the IQ scores). None of these scores qualify even for an evidentiary hearing under *Moore v. Texas*, 581 U.S. 1 (2017). The existing record totally rebuts any *Atkins* claim. *See also Zack v. Crosby*, 3:05-cv-369-RH (N.D. Fla) (Doc. #36) (rejecting an *Atkins* claim in the federal habeas litigation based on these scores).

As a straight *Atkins* claim, the claim of intellectual disability is untimely. Fla. R. Crim. P. 3.203. Under the rule, any *Atkins* claim had to be filed by November of 2004. *Amendments to Fla. R. Crim. P. & Fla. R. App. P.*, 875 So.2d 563 (Fla. 2004). And while Zack filed such a motion in 2004, he raised an expansion-of-*Atkins* claim in that litigation, not a straight *Atkins* claim. Any straight *Atkins* claim is now untimely.

Any *Atkins* claim is also procedurally barred. Zack previously raised a straight claim of intellectual disability in the wake of *Hall v. Florida*, in 2015, which this Court rejected, concluding that because "there are no scores in his history below 75, it is unlikely that he would ever be able to satisfy the significantly subaverage intellectual functioning prong." *Zack*, 228 So.3d at 47.

Any *Atkins* claim is meritless on two of the three prongs of Florida's statutory test for intellectual disability. § 921.137(1), Fla. Stat. (2022). It was established at both the 1997 penalty phase and in the initial postconviction proceedings that Zack's IQ, when he was 11 or 12 years old, was 92, which is low normal. As the Pennsylvania Supreme

Court has explained, the onset prong is often the most reliable evidence of intellectual ability because it is generated at a time before the capital defendant has a "powerful incentive to malinger and to slant evidence" regarding his intellectual abilities. *Commonwealth v. Hackett*, 99 A.3d 11, 33 (Penn. 2014). On the third prong alone, Zack fails the statutory test for intellectual disability.[15]

Zack also fails the first prong of significantly subaverage intellectual functioning because the average of his four adult IQ scores is over 82. Zack's four adult IQ scores of 84, 86, 79, and 80, are all outside of the SEM. *Zack*, 228 So.3d at 47. Not a single one of

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[15] As this Court has repeatedly held, the failure on any one prong of the three prongs of the statutory test for intellectual disability means the claim of intellectual disability fails. *Haliburton v. State*, 331 So.3d 640, 646 (Fla. 2021) (stating that if the defendant fails to prove any one of the three components of the statutory test for intellectual disability, the defendant will not be found to be intellectually disabled), *cert. denied*, *Haliburton v. Florida*, 143 S.Ct. 231 (2022) (No. 22-5093); *Nixon v. State*, 327 So.3d 780, 782 (Fla. 2021) (quoting *Haliburton*, 331 So.3d at 646), *cert. denied*, *Nixon v. Florida*, 142 S.Ct. 2836 (2022) (No. 21-1173).

The Eleventh Circuit has also denied a claim of intellectual disability based solely on the onset prong. *Raulerson v. Warden*, 928 F.3d 987, 1008 (11th Cir. 2019) (resolving an intellectual disability claim based solely on the third prong), *cert. denied*, 140 S.Ct. 2568 (2020) (No. 19-941).

his adult IQ scores, adjusted for the SEM, as required by *Hall*, would qualify as indicting even the possibility of subpar intellectual functioning. Zack fails two of the three prongs of the statutory test. He is not intellectually disabled.

Any *Atkins* claim is conclusively rebutted by the state court record, untimely, procedurally barred, and meritless on two prongs.

The postconviction court properly summarily denied the expansion-of-*Atkins* claim.[16]

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[16] Opposing counsel for the first time on appeal seems to be raising an equal protection challenge to *Atkins*. IB at 30. While opposing counsel referred in passing to equal protection in the successive postconviction motion filed below, the equal protection claim was not properly presented in the trial court under the applicable rule of court. The rule governing postconviction motions in capital cases requires each claim or subclaim "be separately pled and shall be sequentially numbered beginning with claim number 1." Fla. R. Crim. P. 3.851(e)(1); Fla. R. Crim. P. 3.851(e)(2)(A)(requiring successive postconviction motions met "all of the pleading requirements of an initial motion under subdivision (e)(1)"); Fla. R. Crim. P. 3.851(h)(5) (providing: "All motions filed after a death warrant is issued shall be considered successive motions and subject to the content requirement of subdivision (e)(2) of this rule). The equal protection claim was not separately pled or sequentially numbered in the lower court. Below, the argument regarding equal protection was raised in two paragraphs under the subheading: "C. This consensus renders Mr. Zack's imminent execution unconstitutional" (2023 3rd Succ. PCR at 272-73, 270). One may not raise a Fourteenth Amendment claim inside an Eighth Amendment claim. A claim based

on an entirely different constitutional provision must be separately pled and clearly numbered with an arabic number, such as claim 2.

Neither the postconviction court nor the State read these two paragraphs as raising a separate equal protection challenge. Indeed, the likelihood of a court overlooking a claim that is raised within an entirely different claim is exactly why trial court judges handling capital cases proposed this amendment to the rule in the first place. *In re Amendments to Fla. R. Jud. Admin.; Fla. R. Crim. P.; and Fla. R. App.P.– Capital Postconviction Rules*, 148 So.3d 1171 (Fla. 2014) (SC13–2381). The equal protection claim was not properly raised below and therefore, should not be entertained by this Court on appeal. This Court addressing such claims, despite not being properly separately pled and numbered below, simply encourages the capital defense bar to ignore the rules of court, as they have often done in the past. *Brown v. State*, 304 So.3d 243, 256, n.4 (Fla. 2020) (citing *Brown v. State*, No. SC16-358, 2016 WL 3474843 (Fla. June 24, 2016)).

Alternatively, the equal protection challenge to *Atkins* is untimely, procedurally barred, and meritless as a matter of law. Any such equal protection attack on *Atkins* had to be raised in a Rule 3.203 motion filed in November of 2004 to be timely. *Zack v. State*, 982 So.2d 1179 (Fla. 2007) (SC05-963). While Zack filed a Rule 3.203 motion in 2004, he did not raise an equal protection claim in that litigation. The claim is procedurally barred for the same reason. Any equal protection claim should have been raised in the 2004 motion but was not. Claims are supposed to be raised at the first opportunity, not at the last opportunity, such as in warrant litigation.

The equal protection challenge to *Atkins* is baseless. Capital defendants are not a suspect class or an intermediate class. *Jackson v. State*, 213 So.3d 754, 770 (Fla. 2017)("criminal defendants are not generally considered a suspect class, not even those sentenced to death" citing *Crump v. State*, 654 So.2d 545, 547 (Fla. 1995)); *Dickerson v. Latessa*, 872 F.2d 1116, 1119 (1st Cir. 1989) (citing *Williams v. Lynaugh*, 814 F.2d 205, 208 (5th Cir. 1987)). They are in the class due to their own conduct, not due to any immutable characteristic. So, only rational basis review applies. Even assuming

equal protection analysis applies to judicial decisions rather than being limited to statutes, regulations, and the like, *Atkins* survives rational basis review. It is perfectly rational for the courts to limit Eighth Amendment categorical exemptions on executions to more objective criteria, such as to age, as in *Roper*, or to intellectual disability, which often depends on objective IQ scores, as in *Atkins*. Moreover, this Court has previously rejected arguments that equal protection requires the expansion of *Atkins* to the mentally ill due to their equally reduced culpability. *Lawrence v. State*, 969 So.2d 294, 300 n.9 (Fla. 2007).

ISSUE II

WHETHER THE POSTCONVICTION COURT PROPERLY SUMMARILY DENIED THE EIGHTH AMENDMENT CLAIM THAT JURY SENTENCING IS REQUIRED IN CAPITAL CASES? (Restated)

Zack asserts the Eighth Amendment requires unanimous jury sentencing in capital cases. IB at 33. But it is the Sixth Amendment that governs claims regarding a jury's role, not the Eighth Amendment. Alternatively, even viewed as an Eighth Amendment claim, the claim is untimely, procedurally barred, and meritless as a matter of law under *Spaziano v. Florida*, 468 U.S. 447, 465 (1984). This Court recently rejected this same jury sentencing claim in *Dillbeck v. State*, 357 So.3d 94, 104 (Fla. 2023). The postconviction court properly summarily denied this Eighth Amendment jury sentencing claim.

The postconviction court's ruling

The postconviction court summarily denied this claim. (2023 3rd Succ. PCR at 482). The postconviction court found this claim to be both "untimely and procedurally barred." *Id.* at 482. On the merits, the postconviction court concluded "a unanimous jury

recommendation is not required under the Eighth Amendment" citing *Id.* (citing *Dillbeck v. State*, 357 So.3d 94, 104 (Fla. 2023)).

Untimely

The Eighth Amendment jury sentencing claim is untimely. To sustain a trial court's summary denial of a postconviction claim, this Court need "only" agree that the claim is untimely. *Sliney v. State*, 362 So.3d 186, 188 (Fla. 2023) (affirming the summary denial of successive postconviction Eighth Amendment claim). This Court explained that the general rule is that a motion seeking relief under rule 3.851 must be filed "within 1 year after the judgment and sentence become final" under Florida Rule of Criminal Procedure 3.851(d)(1), but there is an exception to the limit limitation under 3.851(d)(2)(A), if "the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence." *Id.* at 188. But any such claim "must be filed within one year of the date such facts become discoverable through due diligence." *Id.* at 188-89 (citing *Jimenez v. State*, 997 So.2d 1056, 1064 (Fla. 2008)); *see also Martin v.*

State, 322 So.3d 25, 34 (Fla. 2021) (quoting *Byrd v. State*, 14 So.3d 921, 924 (Fla. 2009)).

Zack's convictions and death sentence became final in October of 2000, when the United States Supreme Court denied review of his direct appeal. *Zack v. Florida*, 531 U.S. 858 (2000). Most of the states opposing counsel relies on to establish a national consensus for purposes of *Trop v. Dulles*, 356 U.S. 86 (1958), have had unanimous jury sentencing in capital cases for decades. IB at 37-41 (observing that most of the 28 states that authorize the death penalty require jury sentencing in capital cases and a unanimous jury vote). Other state's death penalty statutes are not a fundamental constitutional right under 3.851(d)(2)(B). And other states' capital procedures are not "facts" for purposes of 3.851(d)(2)(A). But, even if viewed as facts, these other states' capital procedures were discoverable years ago and certainly much earlier than after the warrant was signed. The postconviction court properly summarily denied the Eighth Amendment jury sentencing claim as untimely.

Procedural bar

The Eighth Amendment jury sentencing claim is procedurally barred. Claims that should have been raised in the direct appeal, but were not, are procedurally barred in postconviction litigation and certainly are barred in successive postconviction litigation. *Martin v. State*, 311 So.3d 778, 811 (Fla. 2020) (explaining that claims that should have been raised on direct appeal and were not are procedurally barred in postconviction proceedings citing *Jennings v. State*, 123 So.3d 1101, 1121-22 (Fla. 2013)).

As this Court recently explained, in an active warrant case, rejecting a habeas claim that the Eighth Amendment requires jury sentencing and unanimity, such a claim is really an attack on the United States Supreme Court's holding in *Spaziano v. Florida*, 468 U.S. 447, 465 (1984). *Dillbeck*, 357 So.3d at 104 (citing *State v. Poole*, 297 So.3d 487, 504 (Fla. 2020)). But any attack on *Spaziano* could have, and should have, been raised by Zack in his direct appeal but was not. *Zack v. State*, 753 So.2d 9, 16, n.5 (Fla. 2000) (listing issues

raised in the direct appeal); *see also Zack v. State*, 228 So.3d 41, 44-45, n.2 (Fla. 2017).

Claims that are procedurally barred should be summarily denied including in an active warrant case. *Owen v. State*, 364 So.3d 1017, 1025 (Fla. 2023) (stating, in an active warrant case, that the lower court may properly summarily deny a postconviction claim that is procedurally barred citing *Matthews v. State*, 288 So.3d 1050, 1060 (Fla. 2019)). The postconviction court properly summarily denied the Eighth Amendment jury sentencing claim as procedurally barred.

Merits

Jury sentencing is not required by the Sixth Amendment or the Eighth Amendment.

Sixth Amendment versus Eighth Amendment

The Eighth Amendment prohibits cruel and unusual punishment; it does not address jury involvement at capital sentencing. The Eighth Amendment does not speak to questions regarding what role a jury must play in capital sentencing or what findings a penalty phase jury must make regarding the death sentence. *State v. Trail*, 981 N.W.2d 269, 310 (Neb. 2022) (rejecting a claim the Eighth Amendment

requires jury sentencing in capital cases and observing that the Eighth Amendment was not even "pertinent" to the issue of whether a panel of judges may make the ultimate sentencing decision in a capital case). It is the Sixth Amendment that applies to those types of questions. *Graham v. Connor*, 490 U.S. 386, 395 (1989) (explaining that when a particular constitutional amendment provides an explicit textual source of constitutional protection against conduct, then that specific amendment governs); *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 843 (1998) (stating that a general constitutional provision applies only if the issue is not covered by a more specific constitutional provision); *Hand v. Scott*, 888 F.3d 1206, 1212 (11th Cir. 2018) (stating, in a reenfranchisement case, the specific language of the Fourteenth Amendment controls over the First Amendment's more general terms); *Cruz v. State*, ___ So.3d ___, 48 Fla. L. Weekly S140, 2023 WL 4359497 at *6 (Fla. July 6, 2023) (refusing to apply the due process clause to an Eighth Amendment issue quoting *Yacob v. State*, 136 So.3d 539, 562 (Fla. 2014) (Canady, J., dissenting)). Issues related to the jury and the juries' role in sentencing are Sixth

Amendment issues, not Eighth Amendment issues. Zack may not turn a Sixth Amendment claim into an Eighth Amendment claim.

As a Sixth Amendment claim, it is meritless under the United States Supreme Court's recent decision in *McKinney v. Arizona*, 140 S.Ct. 702, 708 (2020), and this Court's recent decision in *State v. Poole*, 297 So.3d 487 (Fla. 2020). The United States Supreme Court has addressed the matter of a jury's role in capital cases recently as a Sixth Amendment right-to-a-jury trial issue. The United States Supreme Court stated, "States that leave the ultimate life-or-death decision to the judge may continue to do so." *McKinney v. Arizona*, 140 S.Ct. 702, 708 (2020). The only function a capital jury is constitutionally required to make regarding a death sentence is to find, beyond a reasonable doubt, one specific aggravating factor. *McKinney*, 140 S.Ct. at 707 ("a jury must find the aggravating circumstance that makes the defendant death eligible," but that a jury "is not constitutionally required to weigh the aggravating and mitigating circumstances or to make the ultimate sentencing decision"). A penalty phase jury constitutionally is ***not*** required to

make any additional findings beyond the finding of one aggravator. The United States Supreme Court has held that jury sentencing in capital cases is not constitutionally required at all, much less unanimous jury sentencing.

This Court has also repeatedly held that any additional determinations beyond one aggravator are not required to be found by the penalty phase jury. *See e.g., Rogers v. State*, 285 So.3d 872, 886 (Fla. 2019) (holding that "the sufficiency and weight of the aggravating factors and the final recommendation of death" are not elements and "are not subject to the beyond a reasonable doubt standard of proof"); *Mosley v. State*, 349 So.3d 861, 870 (Fla. 2022) (explaining that sufficiency and weight of aggravating factors in a capital case are not elements that must be determined by the jury beyond a reasonable doubt), *cert. denied*, *Mosley v. Florida*, 143 S.Ct. 1028 (2023). None of those additional determinations, whether factual or not, are elements that must be found by the penalty phase jury beyond a reasonable doubt. It is the single aggravator that is the sole element of the greater offense of capital murder. *Sattazahn v. Pennsylvania*, 537 U.S.

101, 111 (2003) (plurality); *State v. Poole*, 297 So.3d at 502 (quoting this passage from *Sattazahn*); *Ring v. Arizona*, 536 U.S. 584, 609 (2002) (holding it is the finding of an aggravating circumstance that makes a defendant eligible for the death penalty and it is that one aggravating circumstance that operates "as the functional equivalent of an element of a greater offense"). Any additional findings and the final determination of the sentence in a capital case may constitutionally be performed by a judge. The only unanimous finding a capital jury must make is the finding of one specific aggravating factor. *State v. Poole*, 297 So.3d at 502-03 (holding that under Florida law, "there is only one eligibility finding required: the existence of one or more statutory aggravating circumstances"); *McKinney*, 140 S.Ct. at 708.

Opposing counsel's reliance on *Ramos v. Louisiana*, 140 S.Ct. 1390 (2020), is misplaced. This argument confuses elements and with sentencing. As Justice Scalia explained in *Sattazahn*, the only element of the greater crime of capital murder is an aggravator and it is that one aggravator and only that one aggravator that a capital jury

is required to find, as explained both by this Court in *State v. Poole* and the United States Supreme Court in *McKinney*. Jury sentencing in capital cases is not constitutionally required.

This Court's most recent precedent on jury sentencing

This Court recently rejected this exact jury sentencing claim recently in an active warrant case. In *Dillbeck v. State*, 357 So.3d 94, 104 (Fla. 2023), this Court rejected a habeas claim asserting that the Eighth Amendment required a unanimous jury recommendation of death. Dillbeck argued, much like Zack does, that the Eighth Amendment mandates unanimous jury sentencing in capital cases relying on the concept of the evolving standard of decency established in *Trop v. Dulles*, 356 U.S. 86 (1958). But this Court noted that the United States Supreme Court had rejected the argument that the Eighth Amendment requires a unanimous jury recommendation of death in *Spaziano v. Florida*, 468 U.S. 447, 465 (1984). *Dillbeck*, 357 So.3d at 104. This Court explained that that part of *Spaziano* was "still good law" and therefore, *Spaziano* was controlling authority to Florida courts under the state constitution's conformity clause regarding Eighth Amendment matters. *Id.* at 104 (citing *State v. Poole*,

297 So.3d 487, 504 (Fla. 2020); *see also* Fla. Const. art. I, § 17. This Court ruled that *Spaziano* required Florida courts deny the Eighth Amendment jury sentencing claim.

Historical practice

Opposing counsel mistakenly claims that jury sentencing in capital cases was the norm at the time of the founding. IB. at 42. It was not. At the time the Eighth Amendment was adopted in 1791, and for more than a century afterwards, the jury determined the defendant's guilt of a capital crime, and, then, the judge imposed a mandatory death sentence. *Woodson v. North Carolina*, 428 U.S. 280, 289 (1976) (noting at the time "the Eighth Amendment was adopted in 1791, the States uniformly followed the common-law practice of making death the exclusive and mandatory sentence for certain specified offenses" and holding mandatory death sentences were unconstitutional); *see also Roberts v. Louisiana,* 428 U.S. 325 (1976) (holding a mandatory death sentence statute was unconstitutional even under a narrower definition of first-degree murder). Mandatory death sentences were common until after *Furman v. Georgia*, 408 U.S. 238 (1972). The original understanding of the Eighth Amendment lends no support to

an argument that jury sentencing in capital cases is required, given the "uniform" practice of automatic and mandatory death sentences, imposed by judges alone, at the time of the adoption of the Eighth Amendment. Jury sentencing in capital cases was not the historical practice.

The postconviction court properly summarily denied the Eighth Amendment jury sentencing claim as untimely, procedurally barred, and meritless as a matter of law under *Dillbeck*, *McKinney*, and *State v. Poole*.

Accordingly, this Court should affirm the postconviction court's summary denial of the third successive postconviction motion.

CONCLUSION

The State respectfully requests that this Honorable Court affirm the postconviction court's summary denial of the third successive postconviction motion.

Respectfully submitted,

ASHLEY MOODY
ATTORNEY GENERAL OF FLORIDA

/s/ *Charmaine Millsaps*
CHARMAINE M. MILLSAPS
SENIOR ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0989134
OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL, PL-01
TALLAHASSEE, FL 32399-1050
(850) 414-3300
COUNSEL FOR THE STATE
primary email:
capapp@myfloridalegal.com
secondary email:
charmaine.millsaps@myfloridalegal.com

/s/ *Jason W. Rodriguez*
JASON W. RODRIGUEZ
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 125285
OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL, PL-01
TALLAHASSEE, FL 32399-1050
(850) 414-3300
primary email:
capapp@myfloridalegal.com
secondary email:
jason.rodriguez@myfloridalegal.com

COUNSEL FOR THE STATE

CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was generated using Bookman Old Style 14-point font and is less than 75 pages, as ordered by this Court in this successive capital postconviction appeal.

/s/ *Charmaine Millsaps*
Charmaine M. Millsaps
Attorney for the State of Florida

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF has been furnished via the e-portal to **DAWN MACREADY** Capital Collateral Regional Counsel-North, 1004 DeSoto Park Dr., Tallahassee, FL 32301-4555; phone: 850-487-0922; email: Dawn.Macready@ccrc-north.org; **STACY R. BIGGART**, Special Counsel for Capital Collateral Regional Counsel-North, 3495 SW 106th St., Gainesville, FL 32608-9173; phone: 850-459-2226; email: stacybiggart@gmail.com this 13th day of September, 2023.

/s/ *Charmaine Millsaps*
Charmaine M. Millsaps
Attorney for the State of Florida