IN THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT,
IN AND FOR ESCAMBIA COUNTY,
FLORIDA

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

PROCEEDINGS IN TRIAL COURT MUST BE COMPLETED
BY FRIDAY, SEPTEMBER 1, 2023, at 5:00 p.m. EST

STATE OF FLORIDA,

Plaintiff,

v. CASE NO. 1996-CF-2517-A
CAPITAL CASE

MICHAEL DUANE ZACK, III,

Defendant.
_____/

STATE'S ANSWER TO THIRD SUCCESSIVE POSTCONVICTION MOTION

On August 28, 2023, Zack, represented by state postconviction counsel, Capital Collateral Regional Counsel - Northern Region (CCRC-N), filed a third successive postconviction motion in this active warrant case. The successive postconviction motion raises two claims: (1) Zack asserts the Eighth Amendment precludes his execution because his Fetal Alcohol Syndrome is the equivalent to intellectual disability under *Atkins v. Virginia*, 536 U.S. 304 (2002); and (2) a claim the Eighth Amendment requires unanimous jury sentencing in capital cases. The Florida Supreme Court recently affirmed a summary denial of the first claim in *Dillbeck v. State*, 357 So.3d 94 (Fla. 2023), *cert. denied*, *Dillbeck v. Florida*, 143

S.Ct. 856 (2023). The *Dillbeck* court also rejected the second claim raised in the current postconviction motion as a habeas claim. *Id.* at 104. *Dillbeck* controls. Both successive postconviction claims should be summarily denied.

Facts of the crimes and procedural history

On August 24, 2023, the State provided this court with an extensive description of the facts of this nine-day crime spree involving two murders detailing the evidence against Zack, which includes DNA, fingerprints, and a confession. The State also provided a full procedural history of this case in both state and federal court.[1]

[1] Opposing counsel refers to the current successive postconviction motion as a fifth successive postconviction motion, while the State considers it to be a third successive postconviction motion. The State refers to the Rule 3.203 motion filed in 2004 as a Rule 3.203 motion, not as a successive Rule 3.851 postconviction motion and does not count that motion as being one of the successive postconviction motions. See State's facts of the crimes and procedural history at 15. Opposing counsel refers to the Rule 3.203 motion as a Rule 3.850 motion and counts that motion as a successive postconviction motion and seems to count it as a second successive postconviction motion. 3rd Succ PC motion at 4. The State considers the 2015 successive postconviction motion raising a claim based on *Hall v. Florida* to be the first successive postconviction motion, while opposing counsel labels it as a third successive postconviction motion. See State's facts of the crimes and procedural history at 16. While opposing counsel and counsel for the State disagree regarding the proper labels, there are no omitted proceedings in either party's procedural history of the case. The parties agree on what pleadings Zack has previously filed, just not on how to number those prior proceedings.

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 properly summarily denying a successive postconviction claim under the Florida Supreme 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 not cognizable at all.[2] This court can and should summarily deny any successive

[2] *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 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

postconviction claim that is not retroactive, is untimely, procedurally barred, legally insufficient, meritless as a matter of law under controlling precedent, or not cognizable, as well as being conclusively rebutted by the existing record.

Claim 1 – *Atkins* and Fetal Alcohol Syndrome

Zack asserts a claim of intellectual disability based on *Atkins v. Virginia*, 536 U.S. 304 (2002), combined with a diagnosis of Fetal Alcohol Syndrome (FAS). He argues the Eighth Amendment precludes his execution because his Fetal Alcohol Syndrome is the equivalent to intellectual disability under *Atkins*. 3rd Succ. PC Motion at 5. The successive postconviction claims are, both individually or in combination, untimely. The successive postconviction claims are also both procedurally barred. Zack has repeatedly raised this same claim of intellectual disability in both this Court and the Florida Supreme Court over the years including a prior attempt to expand *Atkins*. Alternatively, on the merits, Zack fails both the first and third prongs of the statutory test for intellectual disability. Adding a diagnosis of Fetal Alcohol Syndrome (FAS) does not change that analysis. The Florida Supreme Court recently denied a similar claim as untimely,

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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).

procedurally barred, and meritless in the active warrant case of *Dillbeck v. State*, 357 So.3d 94, 98-100 (Fla. 2023), *cert. denied*, *Dillbeck v. Florida*, 143 S.Ct. 856 (2023). The *Atkins* claim should be summarily denied as conclusively rebutted by the record, untimely, procedurally barred, and meritless on two prongs of the statutory test for intellectual disability. And the FAS claim should be summarily denied as untimely, procedurally barred, and meritless as a matter of law under *Dillbeck*. Florida courts are not free to expand *Atkins* to include a diagnosis of FAS under the state constitutional conformity clause regarding the Eighth Amendment. Art. I § 17, Fla. Const.

Conclusively rebutted by the record

As an *Atkins* claim, the claim is conclusively rebutted by the record. Fla. R. Crim. P. 3.851(f)(5)(B). As the Florida Supreme Court has noted, all of Zack's IQ scores—92, 84, 86, 79, and 80—are outside of the statistical error of measurement (SEM). *Zack v. State*, 228 So. 3d 41, 47 (Fla. 2017). The Florida Supreme Court concluded, based on these IQ scores, that Zack could not satisfy the first prong of the statutory test for intellectual disability. *Id.* at 47. Furthermore, the IQ score of 92 is a IQ score from when Zack was a young teenager. So, the record also conclusively rebuts any claim of intellectual disability on the third prong of onset as a minor, as well as on the first prong of significant subaverage intellectual functioning. The *Atkins* claim is conclusively rebutted by the record on two of the three prongs.

Untimely

Both the *Atkins* claim and the expansion of *Atkins* claim are untimely. The Florida Supreme 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 claim is untimely. *Dillbeck v. State*, 357 So.3d 94, 99 (Fla. 2023), *cert. denied*, *Dillbeck v. Florida*, 143 S.Ct. 856 (2023). The Florida Supreme Court explained that postconviction claims must be filed within one year from when the conviction and sentence become final unless the claim is based on newly discovered evidence or a newly recognized fundamental constitutional right that has been held to apply retroactively. *Dillbeck*, 357 So.3d at 99 (citing *Carroll v. State*, 114 So.3d 883, 886 (Fla. 2013), and Fla. R. Crim. P. 3.851(d)(1)(A)-(B); 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 had to be filed by October of 2001. Fla. R. Crim P. 3.851(d)(1). But the *Atkins* claim and the expansion of *Atkins* claims are being raised in August of 2023. Starting the one year from when *Atkins* was decided in June of 2002, any *Atkins* claim or expansion of *Atkins* claim had to be filed by June of 2003, to be timely. Florida by rule allowed capital defendants to raise *Atkins* claims until November 30, 2004. *Amendments to Fla. Rules of Criminal Procedure & Fla. Rules of Appellate Procedure*, 875 So.2d 563 (Fla. 2004). So, at the latest, these Eighth Amendments

Atkins-based claims had to be raised by November of 2004. But both claims are 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. 3rd Succ. PC motion at 6-8,10. But the Florida Supreme 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). Moreover, the Florida Supreme Court has repeatedly held that new opinions or research studies based on a compilation or analysis of previously existing data and scientific information are not generally considered newly discovered evidence. *Dillbeck*, 357 So.3d at 99 (citing *Henry v. State*, 125 So.3d 745, 750 (Fla. 2013)). And the Florida Supreme Court has "flatly" rejected the contention that no time limits apply to categorical exemption claims. *Dillbeck*, 357 So.3d at 100 (citing *Carroll*). Both the *Atkins* claim and the FAS claim are untimely.

Procedurally barred

Both the *Atkins* claim and the expansion of *Atkins* claim are additionally procedurally barred by the law-of-the-case doctrine. A capital defendant may not reraise the same claim that was previously rejected. *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 has repeatedly raised this same claim of intellectual disability in both this Court and the Florida Supreme Court throughout the years. He raised an *Atkins* claim in the initial postconviction proceedings. On appeal, the Florida Supreme Court rejected the *Atkins* claim noting the evidence "shows Zack's lowest IQ score to be 79." *Zack v. State*, 911 So.2d 1190, 1201-02 (Fla. 2005). He then raised an expansion of *Atkins* claim in a Rule 3.203 motion filed in the trial court in 2004. In that appeal, Zack asserted that he fell into the "same category" as *Atkins* based on his diagnosis of FAS and brain damage. The Florida Supreme Court affirmed in an unpublished opinion. *Zack v. State*, 982 So.2d 1179 (Fla. 2007) (SC05-963). He then raised the intellectual disability claim yet again in a successive postconviction motion filed in the trial court in 2015 in the wake of *Hall v. Florida,* 572 U.S. 701 (2014). The Florida Supreme Court affirmed once again stating all of Zack's IQ scores—92, 84, 86, 79, and 80—were outside of the statistical error of measurement (SEM) and noted that regardless of what other evidence he would present at an evidentiary hearing, that other evidence could

"not cure Zack's inability to satisfy the first" prong. *Zack v. State*, 228 So. 3d 41, 47 (Fla. 2017).

Zack may not raise the same claim of intellectual disability for a third time. Nor may he raise his expansion-of-*Atkins* claim based on his FAS diagnosis for a second time. Both the *Atkins* claim and the FAS claim are procedurally barred.

Merits

Alternatively, the *Atkins* claim fails on two of the three separate prongs of the statutory test for intellectual disability.

Statutory test for intellectual disability

Florida has a statutory definition of intellectual disability for capital cases. The "Imposition of the death sentence upon an intellectually disabled defendant prohibited" statute, section 921.137(1), Florida Statute (2022), provides:

> As used in this section, the term "intellectually disabled" or "intellectual disability" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18. The term "significantly subaverage general intellectual functioning," for the purpose of this section, means performance that is two or more standard deviations from the mean score on a standardized intelligence test specified in the rules of the Agency for Persons with Disabilities. The term "adaptive behavior," for the purpose of this definition, means the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community. The Agency for Persons with Disabilities shall adopt rules to specify the standardized intelligence tests as provided in this subsection.

Florida's statutory definition of intellectual disability was derived from the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM-IV), which was a standard clinical definition in 2001 when the statute was first adopted by the Florida legislature, before *Atkins* had even been decided. *Atkins*, 536 U.S. at 308 n.3 (reciting the definition of intellectual disability in the DSM-IV published in 2000).

Under the statute, a claim of intellectual disability requires the defendant to establish three prongs: 1) significantly subaverage general intellectual functioning; 2) concurrent deficits in adaptive behavior; ***and*** 3) manifestation of the condition before age eighteen. § 921.137(1), Fla. Stat. (2022); *see also* Fla. R. Crim. P. 3.203(b); *Franqui v. State*, 301 So.3d 152, 154 (Fla. 2020); *Salazar v. State*, 188 So.3d 799, 811 (Fla. 2016). 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. *Nixon v. State*, 327 So.3d 780, 782 (Fla. 2021), *cert. denied*, *Nixon v. Florida*, 142 S.Ct. 2836 (2022) (No. 21-1173); *see also Foster v. State*, 260 So.3d 174, 179 n.7 (Fla. 2018) (explaining that this Court has "clarified" that "a failure to prove any one prong of the intellectual disability test is a failure to prove the claim").[3]

Furthermore, the standard of proof for a claim of intellectual disability in Florida is "clear and convincing" evidence, under the text of the statute. The

[3] The Eleventh Circuit has also resolved an intellectual disability claim based solely on the third prong. *Raulerson v. Warden*, 928 F.3d 987, 1008 (11th Cir. 2019).

Florida Supreme Court, however, has not definitively addressed the issue of the standard of proof. *Haliburton v. State*, 331 So.3d 640, 650, 652 (Fla. 2021) (defining clear and convincing evidence and concluding the defense expert's testimony regarding the second prong did "not rise to the level of clear and convincing evidence" but declining to address the constitutional attack on that standard of proof because the claim failed under either standard); *Wright v. State*, 256 So.3d 766, 771 (Fla. 2018) ("a defendant must make this showing by clear and convincing evidence" citing § 921.137(4)); *but cf.* Fla. R. Crim. P. 3.203(e) (not providing any particular standard of proof). Zack cannot begin to meet that statutorily-required standard of proof and certainly not with an IQ score of 92 as a minor.

First prong of significantly subaverage intellectual functioning

Zack 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. Indeed, not a single one of his adult IQ scores, adjusted for the SEM, as required by *Hall*, would qualify as indicting even the possibility of subpar intellectual functioning. Not a single one of his adjusted adult IQ scores would even entitle him to an evidentiary hearing on his intellectual disability claim, much less preclude his execution. The *Atkins* claim fails on the first prong alone. As the Florida Supreme Court has already explained, regardless of what other evidence

he could present at an evidentiary hearing regarding the other two prongs, that other evidence could "not cure Zack's inability to satisfy the first" prong. *Id*. at 47.

Third prong of onset

Zack also fails the third prong of onset because he was not intellectually disabled as a minor. It was established both at 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. And the third prong is the most reliable evidence of a capital defendant's true intellectual ability. 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, which he has after *Atkins*. *Commonwealth v. Hackett*, 99 A.3d 11, 33 (Penn. 2014). The Fifth Circuit has also observed that a capital defendant's IQ scores as a minor are more reliable than other evidence. *Woods v. Quarterman*, 493 F.3d 580, 587 (5th Cir. 2007). Based on the onset prong alone, the *Atkins* claim is frivolous.

Fetal Alcohol Syndrome and *Dillbeck*

The Florida Supreme Court recently rejected an Eighth Amendment claim 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), the Florida Supreme 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 under *Atkins*. *Id.* at 98. The Florida Supreme Court found the claim to be both "untimely and procedurally barred" as well as "meritless." *Id.* The Court found the claim to be meritless based on their established precedent holding that "the categorical bar of *Atkins*" only shields the intellectually disabled capital defendants from execution. It "does not apply to individuals with other forms of mental illness or brain damage." *Id.* at 100 (citing *Gordon v. State*, 350 So. 3d 25, 37 (Fla. 2022)). The Florida Supreme Court in *Dillbeck* concluded the expansion of *Atkins* claim was time barred, procedurally barred, and without merit. *Id.* The Florida Supreme Court affirmed the postconviction court's summary denial of the expansion of *Atkins* claim.

Dillbeck controls. Zack, like Dillbeck, is attempting to expand *Atkins* from intellectual disability to include other types of conditions, such as FAS and ND-PAE. But the Florida Supreme Court directly and definitively rejected any attempt to expand *Atkins* beyond intellectual disability in *Dillbeck*. The claim is meritless as a matter of law under *Dillbeck*.

The state constitution and the expansion of *Atkins*

Zack seeks to expand *Atkins* to include other types of diagnoses, arguing

that other types of diagnoses, such as Fetal Alcohol Syndrome (FAS), are the functional equivalent of intellectual disability, and also give rise to a categorical bar to his execution, as does *Atkins*. But the state constitutional conformity clause regarding the Eighth Amendment precludes such a course. Fla. Const. art. 1, § 17. This Court must follow *Atkins*, not a variation of it. *Lawrence v. State*, 308 So.3d 544 548 (Fla. 2020) (discussing the Florida's constitution's Eighth Amendment conformity clause). 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 intellectual disability under the state constitution.

The Florida Supreme Court has repeatedly refused to expand *Atkins* to include other types of diagnoses. *Dillbeck v. State*, 357 So.3d 94, 100 (Fla. 2023) (rejecting an argument that *Atkins* should be expanded to include neurodevelopmental disorder associated with prenatal alcohol exposure (ND-PAE), citing *Gordon v. State*, 350 So.3d 25, 37 (Fla. 2022)).[4] Under the Florida Supreme

[4] *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.*

Court's unbroken precedent, *Atkins* is limited to claims of intellectual disability.

Zack's Eighth Amendment claim based on a diagnosis of FAS is not a valid Eighth Amendment claim and does not preclude his execution.

In sum, the *Atkins* claim is conclusively rebutted by the record, untimely, procedurally barred because it has been raised repeatedly previously, and meritless on two separate prongs. The FAS claim is untimely, procedurally barred because it has been raised previously, and meritless as a matter of law under *Dillbeck*. A diagnosis of FAS does not preclude a capital defendant's execution under existing Eighth Amendment precedent. Under the state's conformity clause, Florida courts are not free to expand *Atkins* to include a diagnosis of Fetal Alcohol Syndrome.

Both Eighth Amendment claims should be summarily denied.

Claim 2 – Eighth Amendment and jury sentencing

Zack next asserts that the Eighth Amendment requires jury sentencing in capital cases and that the jury's death sentence must be unanimous under *Ramos*

State, 105 So.3d 475, 510-11 (Fla. 2012) (rejecting an argument that Atkins should be expanded to include 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); *Lawrence v. State*, 969 So.2d 294, 300 n.9 (Fla. 2007) (rejecting an argument that *Atkins* should be expanded to include mental illness).

v. Louisiana, 140 S.Ct. 1390 (2020). 3rd Succ. PC Motion at 17. The Eighth Amendment jury sentencing claim should be summarily denied as untimely, procedurally barred, and meritless as a matter of law under *Dillbeck v. State*, 357 So.3d 94, 104 (Fla. 2023), *cert. denied*, *Dillbeck v. Florida*, 143 S.Ct. 856 (2023), and *McKinney v. Arizona*, 140 S.Ct. 702 (2020).

Untimely

To sustain a trial court's summary denial of a postconviction claim, the Florida Supreme Court needs only to 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). The Florida Supreme Court explained 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)). Sliney filed the Eighth Amendment claim in 2022 relying on the release of an updated AAIDD manual in 2021 allegedly showing a "new" scientific consensus. The Florida Supreme Court, however, found that claim to be untimely because similar facts

had "long been available" well before 2021. The Florida Supreme Court rejected the notion that every new study or publication can be invoked to restart the clock for timely filing a successive rule 3.851 motion. *Id*. at 189. The Florida Supreme Court found a new "scientific consensus" to be an "unpersuasive" reason to restart the clock for purposes of timely filing successive postconviction claims and affirmed the summary denial of the claim as untimely.

Here, 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. 3rd succ. Motion at 19-20 (stating most of the 28 states that authorize the death penalty require jury sentencing in capital cases and a unanimous jury vote). Other states' capital procedures are law, not unknown "facts" for purposes of 3.851(d)(2)(A). And even if viewed as facts, these other states' capital procedures were discoverable through due diligence years ago, including at the time of the direct appeal, and certainly much earlier than after a warrant was signed.

Claims that are untimely should be summarily denied including in a warrant case. *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)). The Eighth Amendment jury sentencing claim should be summarily denied as

untimely.

Procedurally barred

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 the Florida Supreme 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 in the 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 a 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 Eighth Amendment

jury sentencing claim should be summarily denied as procedurally barred.

Merits

Jury sentencing is not required by the 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). Zack may not turn a Sixth Amendment claim into an Eighth Amendment claim.

The Florida Supreme Court recently rejected this exact claim. In *Dillbeck v. State*, 357 So.3d 94, 104 (Fla. 2023), the Florida Supreme Court, in an active warrant case, 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). The Florida Supreme Court noted that the United States Supreme Court had rejected this exact argument that the Eighth Amendment requires a unanimous jury recommendation of death in *Spaziano v. Florida*, 468 U.S. 447, 465 (1984). *Id.* at 104. The Florida Supreme Court noted 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. The Florida Supreme Court ruled that *Spaziano* required the court to deny the Eighth Amendment claim.

Furthermore, since *Spaziano*, the United States Supreme Court has also addressed the matter recently as a Sixth Amendment right-to-a-jury trial issue. As the United States Supreme Court recently 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 United States Supreme Court has held that jury sentencing in capital cases is not constitutionally required at all, much

less unanimous jury sentencing.

Opposing counsel's reliance on *Ramos v. Louisiana* is misplaced. Jury sentencing is not constitutionally required. As the United States Supreme Court recently explained, 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 v. Arizona*, 140 S.Ct. 702, 707 (2020) (holding, under the Sixth Amendment right-to-a-jury-trial, "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, such as any additional aggravators, sufficiency of the aggravators, or weigh the aggravation against the mitigation, much less to make the ultimate sentencing determination. The Florida Supreme Court has also repeatedly held that these additional determinations 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 determined by the 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); *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"). All those additional findings and the final determination of the sentence may all constitutionally be performed by a judge.

Opposing counsel relies on the evolving-standards-of-decency test, established by *Trop v. Dulles*, 356 U.S. 86 (1958), to argue that jury unanimity is now the norm in capital sentencing. 3rd Succ. PC Motion at 18. The problem with that argument, of course, is *McKinney v. Arizona*, 140 S.Ct. 702 (2020). The United States Supreme Court just three years ago, held that "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 within the relevant sentencing range." *McKinney*, 140 S.Ct. at 707. The Florida Supreme Court has repeatedly stated that a jury is not constitutionally required to make the ultimate sentencing decision quoting *McKinney*. *See, e.g.*, *Boyd v. State*, 291 So.3d 900, 901 (Fla. 2020) (stating a jury is not constitutionally required to make the ultimate sentencing decision quoting *McKinney*); *Lott v. State*, 303 So.3d 165, 166 (Fla.

2020) (same); *Craven v. State*, 310 So.3d 891, 902 (Fla. 2020) (same).[5] The Nebraska Supreme Court has rejected an Eighth Amendment jury sentencing claim based on the evolving standards of decency and *Trop*, relying on the United States Supreme Court's decision in *McKinney*. *State v. Trail*, 981 N.W.2d 269, 309 (Neb. 2022) (rejected a similar claim that sentencing by a three-judge panel rather than by a jury in capital cases violates the Eighth Amendment). The Eighth Amendment evolving standards do not require jury sentencing in capital cases when the more pertinent Sixth Amendment does not.

And even if one day the United States Supreme Court adopted the view that the Eighth Amendment requires unanimous jury sentencing in capital cases and overruled *Spaziano*, that new case would not apply retroactively to Zack under the reasoning of *Edwards v. Vannoy*, 141 S.Ct. 1547 (2021).

Opposing counsel mistakenly claims that jury sentencing in capital cases was the norm at the time of the founding. 3rd Succ. PC Motion at 21. 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"

[5] Florida's death penalty statute at the time of these decisions did, however, require the penalty phase jury make a unanimous death recommendation.

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 Eighth Amendment jury sentencing claim should be summarily denied as untimely, procedurally barred, and meritless as a matter of law under *Dillbeck* and *McKinney*.

Accordingly, the third successive postconviction motion should be summarily denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing FACTS OF THE CRIME AND PROCEDURAL HISTORY has been furnished by email via the e-portal to **DAWN MACREADY** Capital Collateral Regional Counsel-North, 1004 Desota 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 29th day of August, 2023.

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