No. _____

IN THE

Supreme Court of the United States

DARRYL BRYAN BARWICK,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Florida

INDEX OF APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

THIS IS A CAPITAL CASE WITH AN EXECUTION SCHEDULED FOR WEDNESDAY, MAY 3, 2023, AT 6:00 P.M.

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APPENDIX A

Supreme Court of Florida

No. SC2023-0531

DARRYL B. BARWICK,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

April 28, 2023

PER CURIAM.

Darryl B. Barwick, a prisoner under sentence of death for whom a warrant has been signed and an execution set for May 3, 2023, appeals the circuit court's orders summarily denying his second successive motion for postconviction relief, which was filed under Florida Rule of Criminal Procedure 3.851; denying his motion for a stay of execution; and sustaining objections to his public records requests, which were made under rule 3.852. We have jurisdiction. *See* art. V, § 3(b)(1), Fla. Const. For the reasons that follow, we affirm.

I. BACKGROUND

On March 31, 1986, after observing the victim sunbathing at her Panama City apartment complex, Barwick returned to his home to retrieve a knife and walked back to the apartment complex. He followed the victim into her apartment, stabbed her thirty-seven times, wrapped her in a comforter, and left her body in the bathroom for her sister to find when she returned to their shared apartment that evening. Bloody fingerprints were found on the victim's purse and wallet, and her bathing suit had been displaced. Semen was found on the comforter wrapped around her body, and it was determined that Barwick was included within the two percent of the population who could have left the stain. Barwick was arrested and confessed to law enforcement and multiple family members. *Barwick v. State*, 660 So. 2d 685, 688-89 (Fla. 1995).

Barwick was indicted on charges of first-degree murder, armed burglary, attempted sexual battery, and armed robbery. He was initially found guilty as charged and subsequently sentenced to death for the murder in 1987, but the convictions and sentences

were vacated due to a *Neil* violation during jury selection.[1] *Id.* at 689. At his retrial in 1992, the jury again found Barwick guilty as charged and unanimously recommended a sentence of death. The trial court found that the following aggravators had been established beyond a reasonable doubt: (1) previous convictions for the violent felonies of sexual battery with force likely to cause death or great bodily harm and burglary of a dwelling with an assault; (2) the murder was committed during an attempted sexual battery; (3) the murder was committed to avoid arrest; (4) the murder was committed for pecuniary gain; (5) the murder was especially heinous, atrocious, or cruel; and (6) the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral justification. The trial court found that each potential mitigator proposed by Barwick was either not established by the

1. Barwick had objected to the State's use of peremptory challenges to excuse three black jurors, and the trial court incorrectly believed that Barwick had no standing to make an objection under *State v. Neil*, 457 So. 2d 481 (Fla. 1984)—which prohibits the use of peremptory challenges on prospective jurors based solely on their race—due to the fact that both he and the victim were white. *See Barwick v. State*, 547 So. 2d 612, 612 (Fla. 1989).

evidence or was not a significant mitigating circumstance. The trial court followed the jury's recommendation of a sentence of death for the murder and also sentenced Barwick to life for armed burglary with a battery, thirty years for attempted sexual battery, and life for armed robbery. *Id.* at 689-90.

On appeal after retrial, this Court concluded that although the trial court erred in applying the cold, calculated, and premeditated aggravator, the error was harmless beyond a reasonable doubt, and Barwick's convictions and sentences were affirmed. *Id.* at 696-97. The convictions and sentences became final when the United States Supreme Court denied certiorari in 1996. *Barwick v. Florida*, 516 U.S. 1097 (1996).

In the decades since, Barwick has unsuccessfully challenged his convictions and sentences in state and federal court. *See Barwick v. State*, 88 So. 3d 85 (Fla. 2011) (affirming the denial of Barwick's initial motion for postconviction relief and denying his state habeas petition); *Barwick v. Crews*, 5:12cv00159-RH, 2014 WL 1057088 (N.D. Fla. Mar. 19, 2014) (denying Barwick's federal habeas petition); *Barwick v. Sec'y, Fla. Dept. of Corr.*, 794 F.3d 1239 (11th Cir. 2015) (affirming the denial of Barwick's federal habeas

petition); *Barwick v. State*, 237 So. 3d 927 (Fla. 2018) (affirming the denial of Barwick's first successive motion for postconviction relief).

Governor Ron DeSantis signed Barwick's death warrant on April 3, 2023. Barwick then filed a second successive motion for postconviction relief under rule 3.851, raising three claims: (1) the scheduling of Barwick's execution and warrant litigation violates his right to due process under the Fifth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution and deprives him of the effective assistance of postconviction counsel; (2) newly discovered evidence shows that the death penalty is a categorically unconstitutional punishment for individuals who were under age twenty-one when they committed their capital offenses; and (3) because of his severe neuropsychological disorder, lifelong cognitive impairments, and low mental age, executing Barwick would violate the Eighth and Fourteenth Amendments to the United States Constitution. The circuit court summarily denied all three claims, as well as Barwick's motion for a stay and certain requests for public records. This appeal followed.

II. ANALYSIS

A. Due Process, Effective Assistance of Postconviction Counsel, Stay of Execution, and Public Records

In his first issue on appeal, Barwick claims primarily that the compressed warrant litigation schedule resulted in the denial of his rights to due process and the effective assistance of postconviction counsel. He addresses these claims as a single issue, asserting that due process depends on the effective assistance of counsel, and that the accelerated warrant schedule and other attendant circumstances made it impossible for Barwick to be provided with effective assistance of postconviction counsel.

The circuit court summarily denied this consolidated claim, finding that Barwick was not denied due process because he did not allege that he was ever denied notice or an opportunity to be heard and that he was not denied effective assistance of postconviction counsel because he has no right to effective assistance of postconviction counsel. We agree that summary denial of this claim was proper.

Barwick has made it abundantly clear in his pleadings filed in both the circuit court and this Court that the post-warrant litigation

in this case has been very arduous for his counsel due to certain circumstances that happened to coincide with the beginning of the warrant period, such as the occurrence of Holy Week, Passover, and Ramadan; co-counsel being ill; and the presence of another inmate on Death Watch.[2] Indeed, post-warrant litigation is arduous, even without such circumstances. Yet none of the obstacles identified by Barwick resulted in a denial of due process.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV. The Florida Constitution similarly provides that "[n]o person shall be deprived of life, liberty or property without due process of law." Art. I, § 9, Fla. Const. "Due process requires that a defendant be given notice and an opportunity to be heard on a matter before it is decided." *Asay v. State*, 210 So. 3d 1, 27 (Fla. 2016) (citing *Huff v. State*, 622 So. 2d 982, 982 (Fla. 1993)). But as the circuit court recognized in summarily denying this claim,

2. "Death Watch" is a designated area of Florida State Prison where death row inmates under an active death warrant are housed.

Barwick has not identified any matter on which he was denied notice or an opportunity to be heard before it was decided. We have previously denied a due process claim raised in the death warrant context on this basis. *See id.* at 27-28 (rejecting due process claim where capital defendant under a death warrant failed to state when he was denied notice or an opportunity to be heard at any stage of his postconviction proceedings). Because Barwick has failed to state when he was denied notice or an opportunity to be heard, his due process claim fails.

Barwick also alleges that the thirty-day warrant period and the difficult attendant circumstances identified by Barwick made it impossible for postconviction counsel to provide effective assistance, thereby violating what he claims is his "statutory right to effective postconviction counsel." Under Florida law, individuals sentenced to death are entitled to the appointment of capital postconviction counsel for the purpose of pursuing any collateral attacks on their convictions and sentences. *See* § 27.702(1), Fla. Stat. (2022) ("The capital collateral regional counsel shall represent each person convicted and sentenced to death in this state for the sole purpose of instituting and prosecuting collateral actions

challenging the legality of the judgment and sentence imposed . . ."). Barwick argues that along with the entitlement to counsel, section 27.711(12), Florida Statutes (2022), establishes a "statutory right to effective postconviction counsel."

Section 27.711(12) provides:

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

§ 27.711(12), Fla. Stat. But Barwick ignores other provisions within chapter 27 that make it clear that the "quality representation" referenced in section 27.711(12) does not create a right to effective assistance of postconviction counsel. Section 27.711(10) plainly states that "[a]n action taken by an attorney who represents a capital defendant in postconviction capital collateral proceedings may not be the basis for a claim of ineffective assistance of counsel." § 27.711(10), Fla. Stat. (2022). Section 27.7002(1) states

that capital defendants may not "challenge in any form or manner the adequacy of the collateral representation provided," and section 27.7002(2) provides that the "sole method of assuring adequacy of representation provided shall be in accordance with the provisions of s[ection] 27.711(12)," i.e., court monitoring. §§ 27.7002(1), (2), Fla. Stat. (2022). The fact that these provisions of chapter 27 expressly prohibit capital defendants from raising claims of ineffective assistance of postconviction counsel or otherwise challenging the adequacy of their postconviction representation forecloses any argument that section 27.711(12) creates a right to effective postconviction counsel.

Despite the plain language of these statutes, Barwick argues that this Court recognized the right to effective assistance of capital postconviction counsel when it stated in *Spalding v. Dugger*, 526 So. 2d 71, 72 (Fla. 1988), that "under section 27.702, each defendant under sentence of death is entitled, as a statutory right, to effective legal representation by the capital collateral representative in all collateral relief proceedings." But in *Asay*, we clarified that "*Spalding* only requires that a defendant be represented by an attorney during postconviction proceedings."

210 So. 3d at 28. And none of the cases cited by Barwick in support of what he claims to be *Spalding*'s "holding" compel a different conclusion.

We have also specifically held that "[u]nder Florida and federal law, a defendant has no constitutional right to effective collateral counsel." *Zack v. State*, 911 So. 2d 1190, 1203 (Fla. 2005). Further, the United States Supreme Court has "refused to extend a due process requirement for effective collateral counsel to situations where a state, like Florida, has opted to afford collateral counsel to indigent inmates." *Id.* (citing *Pennsylvania v. Finley*, 481 U.S. 551 (1987)). Thus, a claim of ineffective assistance of postconviction counsel does not provide a valid basis for relief.

Within this first issue on appeal, Barwick also challenges the circuit court's denial of his motion for a stay of execution. We agree with the circuit court that Barwick did not establish any substantial grounds upon which relief might be granted if a stay had been ordered. As a result, his motion was properly denied. *See Dillbeck v. State*, 357 So. 3d 94, 103 (Fla.) (" '[A] stay of execution on a successive motion for postconviction relief is warranted only where there are substantial grounds upon which relief might be granted.'

") (quoting *Davis v. State*, 142 So. 3d 867, 873-74 (Fla. 2014)), *cert. denied*, 143 S. Ct. 856 (2023).

Finally, to the extent that Barwick has also raised a claim that the circuit court erred in denying his access to certain public records under rule 3.852(h)(3), it is insufficiently pleaded because he has not identified which updated records he was denied. Thus, Barwick is not entitled to relief regarding his public records requests. *See Heath v. State*, 3 So. 3d 1017, 1029 n.8 (Fla. 2009) ("Vague and conclusory allegations on appeal are insufficient to warrant relief.").

After consideration of each of the arguments raised in this issue, we find no error in the circuit court's summary denial of Claim 1 of Barwick's second successive motion for postconviction relief.

B. Newly Discovered Evidence/Extension of *Roper*

In his second issue on appeal, Barwick argues that the circuit court erred in denying Claim 2 of his second successive postconviction motion, in which he argued that he is categorically exempt from execution because he was under the age of twenty-one when he committed his capital offense. Barwick asserts that

"[n]ewly discovered evidence of a definitive consensus regarding adolescent brain development demonstrates that the death penalty is a categorically unconstitutional punishment for individuals who committed their offenses when they were between the ages of 18 to 21." At its core, this is a claim that *Roper v. Simmons*, 543 U.S. 551, 578 (2005)—which held that "[t]he Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed"—should be extended to individuals who were under the age of twenty-one at the time their capital offenses were committed.

The "definitive consensus" to which Barwick refers is reflected in an August 2022 "resolution" from the American Psychological Association (APA).[3] In short, the resolution states that "based upon the rationale of the *Roper* decision and currently available science, APA concludes the same prohibitions that have been applied to application of the penalty of death for persons who commit a serious crime at ages 17 and younger should apply to persons ages

3. *APA RESOLUTION on the Imposition of Death as a Penalty for Persons Aged 18 Through 20, Also Known As the Late Adolescent Class*, American Psychological Association (August 2022), https://www.apa.org/about/policy/resolution-death-penalty.pdf.

18 through 20," because "there is no neuroscientific bright line regarding brain development that indicates the brains of 18- to 20-year-olds differ in any substantive way from those of 17-year-olds." The circuit court summarily denied this claim as procedurally barred, untimely, and without merit.

The circuit court was correct in concluding that this claim is procedurally barred because it is a variation of claims that were raised in prior proceedings. In Claim 22 of his initial postconviction proceedings, Barwick argued that because he suffers from brain damage and a mental and emotional age of less than eighteen years, his execution would offend the evolving standards of decency, serve no legitimate penological goal, and violate the Eighth and Fourteenth Amendments under *Roper*. He argued that his "neuropsychological impairments and his youth warrant consideration" and that he "lacks the requisite 'highly culpable mental state' " for capital punishment. In denying relief, the postconviction court recognized this claim as a *Roper*-extension claim and declined to "extend the holding in *Roper*."

Similarly, in Argument 1 of his petition for a writ of habeas corpus, filed in this Court in 2008, Barwick argued that due to his

brain damage, mental impairment, and mental and emotional age of less than eighteen years, his execution would offend the evolving standards of decency of a civilized society, serve no legitimate penological goal, and violate the Eighth and Fourteenth Amendments under *Roper*. He further argued that capital punishment should not be imposed where a defendant, like himself, lacks the requisite "highly culpable mental state." *See Barwick*, 88 So. 3d at 106 (rejecting habeas claim that because Barwick's mental age is less than eighteen due to brain damage and mental capacity, his execution is unconstitutional under *Roper*).

These initial postconviction and state habeas claims both asserted that although Barwick was nineteen when he committed the murder, *Roper*'s categorical ban on executing juveniles should be extended to him because he had a "mental and emotional age of less than eighteen years" at the time of the murder. The argument at the core of the instant claim is similarly that the mental and emotional age of eighteen- to twenty-year-olds cannot be distinguished reliably from that of sixteen- to seventeen-year-olds, and *Roper* should therefore extend to individuals who, like Barwick,

were eighteen to twenty years old when they committed their capital murders.

There is no doubt that Barwick is attempting to relitigate the same issue—that *Roper* should extend to him—that he has raised in two prior proceedings, now disguised as a claim of newly discovered evidence. Barwick acknowledges in his second successive motion that he previously "has raised the factual basis of [this] claim." Barwick is admittedly using "a different argument to relitigate the same issue," which is inappropriate. *Medina v. State*, 573 So. 2d 293, 295 (Fla. 1990). The circuit court was correct in denying this claim as procedurally barred because versions of it were raised in prior proceedings.

The circuit court also denied this claim as untimely because the APA resolution does not constitute newly discovered evidence such that it creates an exception to the one-year time limitation for filing postconviction claims. *See* Fla. R. Crim. P. 3.851(d)(1) (requiring that "[a]ny motion to vacate judgment of conviction and sentence of death shall be filed by the defendant within 1 year after the judgment and sentence become final"); Fla. R. Crim. P. 3.851(d)(2)(A) (creating an exception to the one-year time limitation

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").

The APA resolution appears to be the association's official or public stance that the death penalty should be banned in cases where the offender was under twenty-one years of age at the time of the capital offense. The resolution cites approximately fifty sources in support of this position, including articles published in psychology journals, law reviews, by universities, and by at least one of each of the following: a "nonprofit think tank," a "research and advocacy center," a federal agency, and a news outlet. It also cites reports, books, online registries, and meta-analyses. Thus, it is fair to say that the APA's resolution is based on a compilation of studies, research, data, and reports, published between 1992 and 2022 and relying on data from as early as 1977, and therefore does not constitute newly discovered evidence under rule 3.851(d)(2)(A).

This Court has routinely held that resolutions, consensus opinions, articles, research, and the like, do not constitute newly discovered evidence. *See, e.g.*, *Foster v. State*, 258 So. 3d 1248, 1253 (Fla. 2018) (rejecting as untimely an extension-of-*Roper* claim

relying on scientific research and a 2018 American Bar Association (ABA) resolution recommending individuals under twenty-two be exempt from execution, because they do not qualify as newly discovered evidence); *Branch v. State*, 236 So. 3d 981, 984-87 (Fla. 2018) (rejecting as untimely an extension-of-*Roper* claim that relied on new scientific research, scientific consensus, international consensus, and the 2018 ABA resolution, because they do not qualify as newly discovered evidence); *Schwab v. State*, 969 So. 2d 318, 325 (Fla. 2007) (holding that "new opinions" and "research studies" are not newly discovered evidence); *Rutherford v. State*, 940 So. 2d 1112, 1117 (Fla. 2006) (holding that a 2006 ABA report was not newly discovered evidence because it was "a compilation of previously available information"). Because the August 2022 APA resolution does not qualify as newly discovered evidence, this claim was properly summarily denied as untimely.

This claim is also without merit because this Court lacks the authority to extend *Roper*. The conformity clause of article I, section 17 of the Florida Constitution provides that "[t]he prohibition against cruel or unusual punishment, and the prohibition against cruel and unusual punishment, shall be

construed in conformity with decisions of the United States Supreme Court which interpret the prohibition against cruel and unusual punishment provided in the Eighth Amendment to the United States Constitution." This means that the Supreme Court's interpretation of the Eighth Amendment is both the floor and the ceiling for protection from cruel and unusual punishment in Florida, and this Court cannot interpret Florida's prohibition against cruel and unusual punishment to provide protection that the Supreme Court has decided is not afforded by the Eighth Amendment.

Because the Supreme Court has interpreted the Eighth Amendment to limit the exemption from execution to those whose chronological age was less than eighteen years at the time of their crimes, this Court is bound by that interpretation and is precluded from interpreting Florida's prohibition against cruel and unusual punishment to exempt individuals eighteen or more years old from execution on the basis of their age at the time of their crimes. This Court simply does not have the authority to extend *Roper* to Barwick based on his age of nineteen at the time of the murder. Accordingly, Barwick is not entitled to relief.

C. Extension of *Atkins*

Barwick's final claim on appeal is that the circuit court erred in denying Claim 3 of his second successive postconviction motion, in which he argued that there is no meaningful distinction between his reduced moral culpability on account of his "trifecta of vulnerabilities"—severe neuropsychological disorder, immutable cognitive impairments, and low mental age at the time of the murder—and that of individuals with indistinguishable deficits due to intellectual disability, and therefore his execution, like that of an intellectually disabled person or a juvenile, would violate the Eighth and Fourteenth Amendments. In short, Barwick asserts that even though he is not intellectually disabled, he is entitled to the same protection under *Atkins v. Virginia*, 536 U.S. 304 (2002), which held that the Eighth Amendment prohibits execution of the intellectually disabled. The circuit court also framed this as an "extension-of-*Atkins*" claim and denied it as procedurally barred, untimely, and without merit.

We agree that this claim is procedurally barred because it, or a variation of it, has been raised in a prior proceeding. In Claim 5 of his initial motion for postconviction relief, Barwick argued that

because he is intellectually disabled, his execution would violate the Eighth and Fourteenth Amendments under *Atkins*. *See Barwick*, 88 So. 3d at 92 n.6 (identifying as Claim 5 of Barwick's initial postconviction proceedings that "Barwick is ineligible for the death penalty pursuant to *Atkins v. Virginia*, 536 U.S. 304 (2002), and section 921.1[3]7, Florida Statutes (2010), because he is [intellectually disabled]").

Similarly, as explained in Issue 2, Claim 22 in Barwick's initial postconviction proceedings was that because he suffers from neuropsychological impairments, a mental and emotional age of less than eighteen years, and lacks the requisite highly culpable mental state his execution would violate the Eighth and Fourteenth Amendments. And in Argument 1 of his state habeas petition, Barwick also argued that his execution would violate the Eighth and Fourteenth Amendments, due to his brain damage, mental impairment, mental and emotional age of less than eighteen years, and lack of the requisite highly culpable mental state.

At their core, all three of the aforementioned prior claims and the instant claim on appeal have posited that Barwick should be exempt from execution due to his mental deficiencies. Thus, the

instant claim is a variation of claims that were raised in prior proceedings, and as such, is procedurally barred.

Even if this claim had not been raised in a prior proceeding, it is still procedurally barred because it could have been raised previously. *See Branch*, 236 So. 3d at 986 (holding that an extension-of-*Roper* claim was procedurally barred in an active warrant case because it could have been raised previously); *Simmons v. State*, 105 So. 3d 475, 511 (Fla. 2012) (rejecting as procedurally barred a claim, based on *Roper* and *Atkins*, that the defendant was exempt from execution based on mental illness and neuropsychological deficits because it could have been raised in prior proceedings).

This claim was also properly denied as untimely. Barwick asserts that the circuit court erred in denying this claim as untimely, because, according to Barwick, procedural bars do not apply to claims of categorical exemption from execution. Barwick is wrong. Procedural bars do apply to exemption-from-execution claims. *See Dillbeck*, 357 So. 3d at 100 (holding that this Court's precedent "flatly refutes Dillbeck's contention that no time limits apply to categorical exemption claims").

Finally, even if it were not procedurally barred or untimely, this claim is without merit. As we have very recently reiterated, "the categorical bar of *Atkins* that shields the intellectually disabled from execution does not apply to individuals with other forms of mental illness or brain damage." *Id.*; *see also Carroll v. State*, 114 So. 3d 883, 887 (Fla. 2013) (rejecting as untimely, procedurally barred, and meritless, claim that the protections of *Atkins* and *Roper* should be extended to defendant who is less culpable as a result of mental illness); *Simmons*, 105 So. 3d at 511 (holding claim that persons with mental illness must be treated similarly to those with intellectual disability due to reduced culpability to be without merit); *Lawrence v. State*, 969 So. 2d 294, 300 n.9 (Fla. 2007) (rejecting assertion that the Equal Protection Clause requires extension of *Atkins* to the mentally ill due to their reduced culpability).

This claim is also meritless because, like Barwick's *Roper*-extension claim, under the Eighth Amendment conformity clause in article I, section 17 of the Florida Constitution, this Court must interpret Florida's prohibition against cruel and unusual punishment in conformity with decisions of the Supreme Court,

which has limited the categorical ban announced in *Atkins* so that individuals with mental deficiencies other than intellectual disability are outside the scope of that ban. Just as this Court lacks the authority to extend *Roper* to individuals over the age of seventeen, it also lacks the authority to extend *Atkins* to individuals who, like Barwick, are not intellectually disabled as provided in *Atkins*. Thus, Barwick's "trifecta of vulnerabilities" does not exempt him from execution.

III. CONCLUSION

For the reasons stated above, we affirm the circuit court's order summarily denying the second successive postconviction motion and its orders sustaining the objections to the public records requests and denying a stay of execution.

No motion for rehearing will be entertained by this Court. The mandate shall issue immediately.

It is so ordered.

MUÑIZ, C.J., and CANADY, COURIEL, GROSSHANS, and FRANCIS, JJ., concur.
LABARGA, J., concurs in result with an opinion.

LABARGA, J., concurring in result.

As the majority observes, "post-warrant litigation is arduous," *see* majority op. at 7, and a death warrant by its very nature requires expedited proceedings. However, these solemn proceedings ultimately involve carrying out a sentence of death for the most aggravated and least mitigated of murders and must still ensure due process of law. I am extremely concerned by the recent pace of death warrants and the speed with which the parties and involved entities must carry out their respective duties.

Barwick has raised concerns about the accelerated timetable and argues that "[t]he death warrant proceedings in [his] case lacked any indicia of meaningfulness." While I agree that Barwick's claims are not entitled to relief under this Court's precedent, I nonetheless caution that even in this final stage of capital proceedings, a meaningful process must be ensured.

An Appeal from the Circuit Court in and for Bay County,
Christopher N. Patterson, Judge
Case No. 031986CF000940XXAXMX

Robert Friedman, Capital Collateral Regional Counsel, Karin L. Moore, Assistant Capital Collateral Regional Counsel, and Drew A. Sena, Assistant Capital Collateral Regional Counsel, Northern Region, Tallahassee, Florida,

for Appellant

Ashley Moody, Attorney General, Jason W. Rodriguez, Assistant Attorney General, and Steven Edward Woods, Assistant Attorney General, Tallahassee, Florida,

for Appellee

APPENDIX B

Filing # 170925153 E-Filed 04/13/2023 11:29:03 AM

IN THE CIRCUIT COURT
FOURTEENTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA
IN AND FOR BAY COUNTY

CASE NO.: 86-0940-CFMA

ACTIVE WARRANT CAPITAL CASE
EXECUTION SCHEDULED FOR MAY 3, 2023

STATE OF FLORIDA,

Plaintiff,

vs.

DARRYL BRYAN BARWICK,

Defendant.

ORDER DENYING SUCCESSIVE MOTION FOR POSTCONVICTION RELIEF

THIS MATTER came before the Court on the Defendant's Successive Motion for Postconviction Relief pursuant to Florida Rule of Criminal Procedure 3.851 filed on April 8, 2023. Having considered said Motion, the State's Response, arguments presented by the parties at the Huff hearing, court file and records, and being otherwise fully advised, this Court finds as follows:

Facts & Procedural History

The Florida Supreme Court has previously summarized the underlying facts of the present case:

> On the morning of March 31, 1986, Michael Ann Wendt left her apartment in Panama City to travel to Fort Walton Beach. Rebecca Wendt, Michael Ann's sister and roommate, remained at the apartment complex and lay outside sunbathing until approximately 11:45 a.m. Another resident of the complex who was also outside sunbathing observed a man walking around the complex at about 12:30 p.m. The witness indicated that she saw the man walk toward the Wendts' apartment and later walk from the Wendts' apartment into the woods. She subsequently identified that man as [nineteen-year-old] Darryl Barwick.
>
> On the evening of March 31, Michael Ann returned to the apartment and found Rebecca's body in the bathroom wrapped in a comforter. Investigators called to the scene observed bloody footprints at various places throughout the apartment and bloody fingerprints on the victim's purse and wallet. Rebecca's bathing suit had been displaced, and she had been stabbed numerous times. An autopsy revealed that she sustained thirty-seven stab wounds on her upper body as well as a number of defensive wounds on her hands. The medical examiner concluded that the potentially life-threatening wounds were those to the neck, chest, and abdomen and that death would have occurred within three to ten minutes of the first stab wound. The examiner found no evidence of sexual contact with the victim, but a crime

> laboratory analyst found a semen stain on the comforter wrapped around the victim's body. After conducting tests on the semen and Barwick's blood, the analyst determined that Barwick was within two percent of the population who could have left the stain.
>
> When initially questioned by investigators, Barwick denied any involvement in Rebecca's murder. However, following his arrest on April 15, 1986, he confessed to committing the crime. He said that after observing Rebecca sunbathing, he returned to his home, parked his car, got a knife from his house, and walked back to the apartment complex where he had previously observed Rebecca. After walking past her three times, he followed her into her apartment. Barwick claimed he only intended to steal something, but when Rebecca resisted, he lost control and stabbed her. According to Barwick, he continued to stab Rebecca as the two struggled and fell to the floor.

Barwick v. State, 660 So. 2d 685, 688–89 (Fla. 1995) (footnote omitted). On April 28, 1986, the Defendant was indicted for Murder in the First Degree (Count I), Burglary While Armed/With Battery (Count II), Attempted Sexual Battery (Count III), and Armed Robbery (Count IV). (Ex. A.) On November 24, 1986, at the conclusion of the guilt phase portion of the trial, the Defendant was found guilty as charged as to each count. (Ex. B.) Following the penalty phase portion of the trial, the jury returned a recommendation of death by a vote of nine to three. (Ex. C.) On January 30, 1987, the Court sentenced the Defendant to death based upon its finding that the four aggravating circumstances[1] were sufficient to impose such a sentence, particularly in the absence of any mitigating circumstances[2]. (Ex. D.) As to the remaining offenses, the Court imposed the following consecutive sentences: as to Count II, life in prison; as to Count III, fifteen years in prison; and as to Count IV, life in prison. (Ex. E.) On appeal, the Florida Supreme Court reversed the convictions and sentences and remanded for a new trial due to a constitutional error that occurred during jury selection. Barwick v. State, 547 So. 2d 612 (Fla. 1989).

The Defendant's second trial commenced on June 22, 1992, but the Court was forced to declare a mistrial two days later. See Barwick, 660 So. 2d at 689. At the conclusion of the Defendant's third trial on July 9, 1992, the Defendant was again found guilty as charged as to each count. (Ex. F.) Following the penalty phase portion of the trial, the jury returned a recommendation of death by a vote of twelve to zero. (Ex. G.) On August 11, 1992, the Court sentenced the

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[1] The Court found that the following aggravating circumstances were proven beyond a reasonable doubt: (1) the Defendant was previously convicted of a felony involving the use or threat of violence to the person; (2) the capital felony was committed while the Defendant was engaged in the commission of or an attempt to commit, or flight after committing, or attempting to commit, a robbery, attempted sexual battery, and a burglary; (3) the capital felony was committed for the purpose of avoiding or preventing a lawful arrest; and (4) the capital felony was especially heinous, atrocious, or cruel.

[2] The Court specifically noted the following with regard to possible mitigating circumstances: (1) the capital felony was not committed while the Defendant was under the influence of extreme mental or emotional disturbance; (2) the capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was not substantially impaired; and (3) the age of the Defendant at the time of the crime was not a mitigating circumstance in that his background, both in an out of prison, indicated that he was not of tender age but was an adult and was fully capable of understanding his crimes.

Defendant to death based upon its finding that the six aggravating circumstances[3] outweighed the two applicable statutory mitigating circumstances[4]. (Ex. H.) As to the remaining offenses, the Court imposed the following consecutive sentences: as to Count II, life in prison; as to Count III, thirty years in prison; and as to Count IV, life in prison. (Ex. I.) The Defendant's convictions and sentences were affirmed on appeal. Barwick, 660 So. 2d at 688.

In his initial Motion to Vacate Judgment of Conviction and Sentence, the Defendant raised twenty-three grounds for relief[5]. (Ex. J.) The Defendant's Motion was denied in its entirety. (Exs. K–M.) The denial was affirmed on appeal, and the Defendant's corresponding habeas petition[6] was denied. Barwick, 88 So. 3d at 111. In his first Successive Motion to Vacate Death

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[3] The Court found that the following aggravating circumstances were proven beyond a reasonable doubt: (1) the Defendant was previously convicted of another capital felony or a felony involving the use or threat of violence to the person; (2) the capital felony was committed while the Defendant was engaged in the commission of or an attempt to commit any robbery, burglary, sexual battery, or kidnapping or flight after committing any such offense; (3) the capital felony was committed for the purpose of avoiding or preventing a lawful arrest; (4) the capital felony was committed for pecuniary gain; (5) the capital felony was especially heinous, atrocious, or cruel; and (6) the capital felony was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

[4] The Court made the following findings regarding statutory mitigating circumstances: (1) while there was evidence that the Defendant was mentally disturbed at the time of the offense, he was not suffering from extreme mental or emotional disturbance at the time of the murder, and the relevant statutory mitigating circumstance was therefore not significant; (2) there was insufficient evidence to suggest that the Defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; and (3) the Defendant's relatively young age, to the extent that it could be considered a mitigating circumstance, was of little consequence. The Court considered and rejected the following non-statutory mitigating circumstances: (1) the abuse suffered by the Defendant as a child; and (2) the Defendant's mental or emotional disturbance or impaired capacity to conform his conduct.

[5] The Defendant raised the following twenty-three grounds for relief: (1) trial counsel was ineffective for failing to adequately cross-examine State witness Suzanne Capers; (2) the prosecutor committed misconduct by violating Brady and/or Giglio rules; (3) trial counsel was ineffective for failing to investigate and prepare mitigating evidence, adequately prepare and utilize mental health experts, ensure that the Defendant received adequate mental health assistance, and adequately challenge the State's penalty phase evidence; (4) the trial was fraught with harmful procedural and substantive errors; (5) his death sentence is unconstitutional under Atkins because he is mentally retarded; (6) his death sentence is unconstitutional under Ring because it was not decided by a unanimous jury and beyond a reasonable doubt following a finding of mental retardation; (7) his death sentence is unconstitutional under Ring because he was denied the right to a trial by jury of the essential elements of the crime of first-degree murder; (8) his death sentence is invalid because the indictment was faulty; (9) his rights under the Sixth Amendment were violated because counsel had a conflict of interest; (10) the county's jury qualification scheme was unconstitutional because the proceedings were conducted outside of the presence of the Defendant and his counsel; (11) trial counsel was ineffective for failing to argue against the "avoid arrest" aggravating factor and the jury's receipt of instructions as to this aggravator; (12) postconviction counsel was ineffective for failing to ensure the record on appeal was complete; (13) the comments and instructions provided to the penalty phase jury were misleading; (14) the prosecutor made improper arguments, and trial counsel was ineffective for failing to properly object thereto; (15) the trial court committed fundamental error by improperly doubling two aggravating factors; (16) trial counsel was ineffective for failing to object to improper instructions to the penalty phase jury that shifted to the Defendant the burden to establish that a sentence of death was inappropriate; (17) the Florida Supreme Court erred in failing to remand the case to the trial court for resentencing after striking an aggravating factor; (18) trial counsel was improperly prevented from interviewing jurors; (19) Florida's capital sentencing statute is unconstitutional because it is arbitrary, capricious, and violative of the prohibition against cruel and unusual punishment; (20) the Defendant is innocent; (21) the use of lethal injection as a method of execution is unconstitutional; (22) the death penalty constitutes cruel and unusual punishment in the present case because the Defendant is a brain damaged youthful offender; and (23) the use of the Defendant's prior juvenile conviction as an aggravating circumstance violates the Eighth Amendment.

[6] In his habeas petition, the Defendant raised the following nine claims for relief:

Sentence, the Defendant raised five grounds for relief[7]. (Ex. N.) The Defendant's Motion was denied in its entirety. (Ex. O.) The denial was affirmed on appeal, and his subsequent Petition for Writ of Certiorari to the United States Supreme Court was denied. Barwick v. State, 237 So. 3d 927 (Fla. 2018); Barwick v. Florida, 139 S. Ct. 258 (2018).

On April 3, 2023, Florida Governor Ron DeSantis signed the Defendant's death warrant, directing that he be executed on May 3, 2023. On April 4, 2023, the Florida Supreme Court entered an order directing that this Court complete its death warrant proceedings no later than 3:00 p.m. (ET) / 2:00 p.m. (CT) on Thursday, April 13, 2023. Pursuant to this Court's Amended Scheduling Order, the Defendant filed his second Successive Motion for Postconviction Relief on April 8, 2023; the State filed its Response on April 9, 2023. Following a Huff[8] hearing on April 10, 2023, the Court determined that an evidentiary hearing was not required in the present case. This Order follows.

Applicable Procedural Law

A defendant sentenced to death is permitted to file a successive motion for collateral relief outside of the standard one-year time limitation if the claims therein are based on newly discovered evidence. See Fla. R. Crim. P. 3.851(d), (e)(2). Such motions filed after a death warrant has been signed are addressed in an expedited manner. See Fla. R. Crim. P. 3.851(h). Untimely successive postconviction claims may be denied. See Rodgers v. State, 288 So. 3d 1038, 1039 (Fla. 2019). Summary denial is appropriate where successive postconviction claims are refuted by the record. See Fla. R. Crim. P. 3.851(f)(5)(B). Likewise, summary denial of purely legal claims is appropriate where such claims are without merit under controlling precedent. See Mann v. State, 112 So. 3d 1158, 1162–63 (Fla. 2013).

> (1) as a brain-damaged, mentally retarded person with a mental and emotional age less than eighteen years, Barwick's execution would be unconstitutional; (2) use of a prior conviction involving an offense that occurred before Barwick was eighteen years old violates the federal constitution pursuant to *Roper v. Simmons,* 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005); (3) direct appeal counsel's failure to argue against the "avoid arrest" aggravator constituted ineffective assistance; (4) direct appeal counsel rendered ineffective assistance having failed to raise the issue of omissions in the record; (5) counsel's failure to argue on direct appeal that the jury was misled during the penalty phase by improper comments and instructions was ineffective assistance; (6) ineffective assistance of direct appeal counsel based upon counsel's failure to argue that the prosecutor presented to the jury at sentencing impermissible matters for consideration; (7) the "during the commission of a felony" aggravating circumstance operates as an impermissible automatic aggravator; (8) appellate counsel on direct appeal rendered ineffective assistance having failed to argue that the penalty phase jury instructions improperly shifted the burden of proof to the defendant; and (9) the Court erred in failing to remand the case to the trial court for resentencing, having struck an aggravating circumstance.
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> Barwick v. State, 88 So. 3d 85, 105–06 (Fla. 2011).

[7] The Defendant raised the following five grounds for relief: (1) his death sentence is unconstitutional under Hurst v. Florida; (2) his death sentence is unconstitutional under Hurst v. State; (3) the failure to apply Hurst v. Florida violates the Eighth Amendment; (4) the decisions in Hurst v. State and Perry v. State would likely result in a jury finding that a sentence of life in prison is appropriate if a new penalty phase were conducted; and (5) Chapter 2017-1 must be retroactively applied to preclude the imposition of a sentence of death absent a jury's unanimous recommendation.

[8] Huff v. State, 622 So. 2d 982 (Fla. 1993).

Analysis

Ground 1: Lack of Due Process and Effective Assistance of Postconviction Counsel

In Ground 1, the Defendant claims that his rights to due process and effective assistance of counsel have been violated by the Court's "compressed scheduling order." He argues that the thirty-day warrant period makes it impossible for defense counsel to provide the effective representation expected of them for several reasons: (1) the period includes holy week, Passover, and Ramadan, during which some religious persons are limited in (or entirely prevented from) rendering necessary assistance; (2) second chair counsel currently has the coronavirus, which—in addition to impacting her ability to perform to the levels expected of her due to feeling extremely ill—limits her from providing the in-person assistance that she would normally provide; (3) securing mental health experts to conduct a complete evaluation of the Defendant during the compressed schedule that included holy week and other important religious holidays proved impossible; and (4) counsel was unable to review the voluminous records that were disclosed to them in the short amount of time provided. For these reasons, the Defendant claims that his counsel is forced to render ineffective assistance, as they cannot possibly litigate all issues when provided only five days to file a motion for collateral relief. The Defendant relies heavily on the opinion in Spalding v. Duggar, 526 So. 2d 71 (Fla. 1988), in support of his claim regarding his right to effective assistance of counsel.

In its Response, the State argues that the Defendant's claim should be summarily denied as without merit. First, the State claims that the due process argument must fail because the Defendant has been provided counsel, notice, and an opportunity to be heard as required by law. The State further notes that the Defendant has been represented by postconviction counsel since 1997, has been aware since his sentence was imposed in 1992 that he faces execution, and has been warrant eligible since 2017, thereby giving his attorneys sufficient time to prepare for this phase of the proceedings in the present case. Second, citing Asay v. State, 210 So. 3d 1 (Fla. 2016), the State contends that the ineffective assistance of counsel argument must fail because the Defendant does not have a right to effective assistance of postconviction counsel.

Since 2013, the Florida Legislature has made clear its intent "to reduce delays in capital cases and to ensure that all appeals and postconviction actions in capital cases are resolved as soon as possible after the date a sentence of death is imposed in the circuit court." § 924.055, Fla. Stat. (2022). In furtherance of this intent, the Legislature requires that the Governor issue a death warrant within thirty days after receiving notification that a defendant sentenced to death has exhausted his allowed state and federal collateral challenges, provided that the executive clemency process has concluded at the time of such notification. See § 922.052(2)(b), Fla. Stat. (2022). In the death warrant, the Governor must "direct[] the warden to execute the sentence within 180 days, at a time designated in the warrant." Id. Importantly, notwithstanding this legislative intent, a defendant sentenced to death is entitled to due process throughout all stages of the proceedings, including after a death warrant is signed. See, e.g., Art. I, § 9, Fla. Const.; Amend. V, U.S. Const.; Bolin v. State, 184 So. 3d 492, 503 (Fla. 2015) (concluding that defendant's due process rights were not violated when death warrant was signed before the conclusion of his collateral proceedings). "'The essence of due process is that fair notice and a reasonable opportunity to be heard must be given to interested parties before judgment is rendered.'" Huff, 622 So. 2d at 983 (quoting Scull v. State, 569 So. 2d 1251, 1252 (Fla. 1990)).

Separate from a clear right to due process is a defendant's right to effective representation of counsel. The United States Supreme Court has firmly established not only a defendant's right to counsel but also a right to effective trial counsel. Gideon v. Wainwright, 372 U.S. 335, 342–43 (1963) (confirming that an accused's right to counsel is a fundamental right that "is made obligatory upon the States by the Fourteenth Amendment"); Reece v. Georgia, 350 U.S. 85, 90 (1955) ("The effective assistance of counsel [in a state prosecution] is a constitutional requirement of due process which no member of the Union may disregard."). However, a defendant does not have a right to the effective assistance of collateral counsel. See Zack v. State, 911 So. 2d 1190, 1203 (Fla. 2005) ("Under Florida and federal law, a defendant has no constitutional right to effective collateral counsel. This Court has stated that 'claims of ineffective assistance of postconviction counsel do not present a valid basis for relief.'"); see also § 27.7002, Fla. Stat. (2022) ("This chapter does not create any right on behalf of any person, provided counsel pursuant to any provision of this chapter, to challenge in any form or manner the adequacy of the collateral representation provided. . . . With respect to counsel appointed to represent defendants in collateral proceedings pursuant to ss. 27.710 and 27.711, the sole method of assuring adequacy of representation provided shall be in accordance with the provisions of s. 27.711(12)."); § 27.711(10), Fla. Stat. (2022) ("An action taken by an attorney who represents a capital defendant in postconviction capital collateral proceedings may not be the basis for a claim of ineffective assistance of counsel."); Gore v. State, 91 So. 3d 769, 778 (Fla. 2012) (holding that recent jurisprudence from the United States Supreme Court did not create an "independent cause of action for ineffective assistance of collateral counsel in our state courts system").

The Florida Supreme Court's opinion in Asay v. State is particularly instructive as to the Defendant's claim in Ground 1. On January 8, 2016, the Governor signed a death warrant for defendant Mark Asay. Asay, 210 So. 3d at 10. At that time, defendant Asay was not represented by counsel and had not had the benefit of any such representation for approximately ten years prior to the signing of the warrant; as such, counsel was immediately appointed upon the issuance of the warrant. Id. at 27. The Florida Supreme Court stayed defendant Asay's execution on March 2, 2016. Id. at 6 n.1. One of the claims raised in defendant Asay's second successive motion for postconviction relief was that his "due process and equal protection rights were violated because he did not have state counsel at the time the Governor signed his death warrant and for the previous 10 years"; this claim was denied by the trial court. Id. at 10. On appeal of the denial of his motion, defendant Asay argued that he "was denied due process, equal protection, and his right to effective collateral representation under Spalding v. Dugger, 526 So.2d 71 (Fla. 1988), when his death warrant was signed while no registry counsel was in place and had not been in place for over a decade." Id. In denying this claim, the Florida Supreme Court stated:

> Due process requires that a defendant be given notice and an opportunity to be heard on a matter before it is decided. Huff, 622 So.2d at 983. While Asay argues that his lack of registry counsel violated his right to due process, he fails to state when he was denied notice or opportunity to be heard at any stage of his postconviction proceedings. Asay appears to suggest that postconviction counsel was required to actively investigate his case for the preceding ten years and continuously bring forth new arguments. However, this is not mandated by section 27.710, Florida Statutes. Instead, counsel is only required to represent the defendant

"until the sentence is reversed, reduced, or carried out or until released by order of the trial court." § 27.710(4), Fla. Stat.

Here, Asay was represented by counsel at every stage of his postconviction proceedings. Steve Kissinger represented Asay during the initial postconviction proceedings, and Dale Westling represented Asay during the successive postconviction proceedings. In 2005, Mr. Westling filed a motion to withdraw when the case moved from state court to federal court. The trial court granted the motion. In federal court, at least two attorneys represented Asay at various stages of the proceedings. When the death warrant was signed in January of 2016, the trial court appointed new registry counsel. At no point was Asay not represented by counsel. Furthermore, Asay had notice of each postconviction proceeding and the opportunity to have counsel argue his claims before the court. Thus, his due process argument fails.

. . . .

Finally, Asay argues that the late appointment of registry counsel and the lack of records rendered counsel's assistance ineffective and violated his right to due process. Asay cites Spalding in support of his claim. However, Spalding only requires that a defendant be represented by an attorney during postconviction proceedings. Id. at 72. Therefore, Spalding does not entitle Asay to the relief he requests. To the extent that Asay is instead attempting to argue ineffective assistance of counsel, this Court has repeatedly held that defendants are not entitled to effective assistance of collateral counsel. See Gore v. State, 91 So.3d 769, 778 (Fla. 2012) (explaining that there is no independent cause of action for ineffective assistance of collateral counsel in Florida); Zack v. State, 911 So.2d 1190, 1203 (Fla. 2005) ("Under Florida and federal law, a defendant has no constitutional right to effective collateral counsel.").

Furthermore, the lack of records does not amount to a due process violation. This is a pre-repository case, so the documents from the initial postconviction proceedings in state court were not archived. However, the Office of the Attorney General copied the entire appellate record in state court including the direct appeal, the initial postconviction proceedings, and the successive postconviction proceedings. The Department of Corrections provided counsel with Asay's entire medical record, as well as the entire inmate file. The State Attorney's Office provided counsel with its entire file, which included many of the original public records requests made during the initial postconviction proceedings. Additionally, the Florida Department of Law Enforcement and the Jacksonville Sheriff's Office provided counsel with all the materials they had. Every state agency involved attempted to recreate the records.

However, even if some records have been permanently lost or destroyed, the loss or destruction of files does not necessarily amount to a due process violation. See, e.g., Jones v. State, 928 So.2d 1178, 1192 (Fla. 2006) (rejecting a due process challenge to the capital collateral proceedings where trial counsel's files were destroyed in a fire). Additionally, Asay's counsel does not identify what

> records were not available, or what particular argument he is prevented from making due to a lack of records. Consequently, we deny relief as to this issue.

Id. at 27–29. Upon affirming the denial of defendant Asay's motion, the Florida Supreme Court lifted the nearly ten-month stay it had previously imposed.

The Court finds that Ground 1 is due to be summarily denied. The scheduling orders in effect in the present case, however "compressed," comply with the applicable law governing the procedures related to the issuance and execution of a death warrant. The Defendant fails to allege that he was ever denied notice or opportunity to be heard at any stage of his postconviction proceedings. Additionally, he does not allege that he has not been represented by counsel at any stage of the postconviction proceedings. Certainly, any such claim (had it been made) would be without merit, as the record reflects that the Defendant has been consistently represented by postconviction counsel since 1997. (Ex. P.) Furthermore, the Defendant's challenge to the effectiveness of his counsel does not warrant relief, as he does not have a right to effective assistance of collateral postconviction counsel. Importantly, lest there be any doubt, this Court finds that defense counsel has provided the most effective representation possible—quality representation, to be sure—in light of the circumstances presented at this stage of the proceedings in the present case, which are certainly deserving of the utmost respect. See § 27.711(12), Fla. Stat. (2022). Accordingly, Ground 1 is due to be denied.

Ground 2: Extension of Roper

In Ground 2, the Defendant claims that he is not eligible for execution based on newly discovered evidence that capital punishment is unconstitutional for individuals who commit a homicide offense when they are under the age of twenty-one. In support of his claim, the Defendant argues that post-Roper science regarding adolescent brain development suggests that the same considerations articulated in Roper regarding juveniles under age eighteen are equally applicable to late adolescents under age twenty-one, therefore making the death penalty unconstitutional in the present case because the Defendant was nineteen at the time of his offense. More specifically, the Defendant claims that research now shows that the brain of a late adolescent is fully developed with regard to sensation- and reward-seeking but is not fully developed with regard to self-control, thereby making such an individual more inclined to use the pleasure-seeking part of the brain without a fully developed ability to control his impulsivity. The Defendant relies on the August 2022 Resolution[9] of the American Psychological Association (APA) in positing that his claim of newly discovered evidence is timely filed.

In its Response, the State argues that the Defendant's claim should be summarily denied as procedurally barred, untimely, and without merit. First, the State claims that Ground 2 is procedurally barred because a version of this claim was previously raised and rejected. Second, the State claims that Ground 2 is untimely because the APA Resolution is based on scientific research that was available long before the Resolution was issued (as demonstrated by other defendants having previously raised a similar claim) and because the true "fact" upon which the

[9] This Resolution indicates that because brain maturation continues until an individual is twenty years old, there is no reason that an eighteen- to twenty-year-old should be treated any differently than a seventeen-year-old with regard to eligibility for the death penalty.

Defendant's claim is based—that he was nineteen when he murdered the victim—has been known to the Defendant since the date of the murder. Finally, the State argues that Ground 2 is "legally meritless under a legion of unbroken Florida Supreme Court precedent refusing to extend Roper to individuals who committed first-degree murder while over 18."

In 2005, the United States Supreme Court held that the Eighth and Fourteenth Amendments bar capital punishment for juvenile offenders who commit a capital crime when they are between fifteen and eighteen years of age. Roper v. Simmons, 543 U.S. 551, 555–56, 574 (2005) ("The qualities that distinguish juveniles from adults do not disappear when an individual turns 18. . . . [H]owever, a line must be drawn. . . . The age of 18 is the point where society draws the line for many purposes between childhood and adulthood. It is, we conclude, the age at which the line for death eligibility ought to rest."). In the nearly two decades since this momentous decision, the U.S. Supreme Court has not extended the categorical bar against the death penalty addressed in Roper to individuals over the age of seventeen. Importantly, the Florida Supreme Court has consistently declined to extend the holding of Roper to individuals outside of the specific class identified in that opinion, instead routinely finding that such claims are both untimely and procedurally barred. See, e.g., Deviney v. State, 322 So. 3d 563, 573 (Fla. 2021) (rejecting eighteen-year-old defendant's claim that the eighteen-year cutoff established in Roper should be extended to individuals under twenty-one years of age); Foster v. State, 258 So. 3d 1248, 1253 (Fla. 2018) (citing Branch v. State, 236 So. 3d 981 (Fla. 2018) (rejecting eighteen-year-old defendant's claim that the eighteen-year cutoff established in Roper should be extended in light of research suggesting that "young people in their late teens and early twenties lack the cognitive development that is necessary to be eligible for the death penalty")). In fact, during the habeas proceedings in the present case, the Florida Supreme Court specifically addressed the application of Roper to this Defendant:

> [T]he Court has expressly rejected the argument that Roper extends beyond the Supreme Court's pronouncement that the execution of an individual who was younger than eighteen at the time of the murder violates the eighth amendment. Moreover, the Court has previously denied relief on each of the specific claims raised by Barwick. Here, Barwick was nineteen and one-half years old when he committed the murder. Accordingly, we deny relief upon these claims.

Barwick, 88 So. 3d at 106.

The Court finds that Ground 2 is due to be summarily denied. First, the Defendant's claim must be denied as procedurally barred because he could have (and did) raise the claim on appeal or in a prior postconviction motion. See Hendrix v. State, 136 So. 3d 1122, 1124–25 (Fla. 2014) ("A successive postconviction motion may not be used to relitigate a claim that has been raised and rejected on direct appeal[] . . . [or] in prior postconviction proceedings[.]"). In his initial Motion to Vacate Judgment of Conviction and Sentence, the Defendant raised this claim—or a version thereof—in Ground 22, which was denied.[10] (Exs. J, L.) As previously noted, in his related habeas proceedings before the Florida Supreme Court, he raised this claim—or a version thereof—

[10] In Ground 22, the Defendant alleged that "the execution of Daryl Brian Barwick, a brain damaged youthful offender, would constitute cruel and unusual punishment under the Constitutions of the State of Florida and the United States." (Ex. J.) In denying this claim, the trial court explicitly declined to extend the holding of Roper. (Ex. L.)

in Ground 1, which was denied.[11] Barwick, 88 So. 3d at 106. Second, the claim must be denied as untimely because "scientific research with respect to brain development does not qualify as newly discovered evidence." See Branch, 236 So. 3d at 986; see also Hairston v. State, 472 P.3d 44, 49 (Id. 2020) (rejecting defendant's extension-of-Roper claim that was based on "a report of Dr. [Laurence] Steinberg[12], which argues that there is a new emerging consensus that many aspects of psychological and neurobiological immaturity characteristic of early adolescents and middle adolescents are also characteristics of late adolescents aged nineteen and twenty" and based on "the American Bar Association House of Delegate's recently passed Resolution 111, which advocates 'each jurisdiction that imposes capital punishment to prohibit the imposition of a death sentence on or execution of any individual who was 21 years old or younger at the time of the offense'" (footnote added)). Finally, the claim must be denied as without merit because the record is clear that the Defendant was nineteen years old when he murdered the victim, and the aforementioned longstanding legal precedent confirms that his age at the time of the offense does not exempt him from execution. See Roper, 543 U.S. at 574. For each of these reasons, Ground 2 is due to be denied.

Ground 3: Extension of Atkins

In Ground 3, the Defendant claims that he is ineligible for execution because he suffers from a severe neuropsychological disorder, lifelong cognitive impairments, and a low mental age, the combination of which make the death penalty an unconstitutional punishment in the present case. He argues that under the Eighth Amendment, the death penalty may only be imposed after consideration of the circumstances of the offense, the character of the offender, and the evolving standards of decency of a maturing society. He posits that his combined mental health issues place him in a category of persons less culpable than the average criminal and, thus, ineligible for state-sanctioned execution. Emphasizing the importance of the spirit of the law rather than just its text, the Defendant asserts that "[t]he trifecta of vulnerabilities caused by [his mental health issues] are equivalent to the criteria recognized" by the United States Supreme Court as exempting an otherwise eligible individual from capital punishment based on the Eighth Amendment's prohibition against cruel and unusual punishment. He also argues that the Fourteenth Amendment prohibits the implementation of the death penalty because there is no real distinction between his diminished culpability and that of an intellectually disabled or juvenile individual.

In its Response, the State argues that the Defendant's claim should be summarily denied as procedurally barred, untimely, and without merit. First, the State claims that Ground 3 is procedurally barred because the Defendant previously raised a version of this claim in his initial Motion to Vacate Judgment of Conviction and Sentence and could have raised the claim prior to the death warrant proceedings. Second, the State claims that Ground 3 is untimely because it is

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[11] In Ground 1, the Defendant alleged that his execution would be unconstitutional because he is "a brain-damaged, mentally retarded person[.]" Barwick, 88 So. 3d at 93 n.12. In denying relief on this claim, the Florida Supreme Court noted that the claim was procedurally barred but also reasserted its longstanding policy of expressly declining to extend Roper to individuals who were over the age of seventeen when they committed a homicide offense. Barwick, 88 So. 3d at 106. Furthermore, the Court specifically noted that it "ha[d] previously denied relief on each of the specific claims raised by Barwick." Id.

[12] The record reflects that the Defendant was aware of Dr. Steinberg's professional opinions at the time of his executive clemency proceedings in 2021. (Ex. Q.)

based on "long-known findings" that do not constitute newly discovered evidence. Finally, the State argues that Ground 3 is without merit because the Defendant is not an individual who is exempt from execution under Atkins, Roper, or Ford.

In 2002, the United States Supreme Court held that the Eighth Amendment's prohibition on cruel and unusual punishment acts as a bar to the government-sanctioned execution of intellectually disabled persons. Atkins v. Virginia, 536 U.S. 304, 306–07, 321 (2002) ("Construing and applying the Eighth Amendment in the light of our 'evolving standards of decency,' we therefore conclude that such punishment is excessive and that the Constitution 'places a substantive restriction on the State's power to take the life' of a[n] [intellectually disabled] offender.'"). In the two decades since this opinion was issued, the High Court has not extended the categorical bar against the death penalty addressed in Atkins to individuals with other mental health issues. Notably, the Florida Supreme Court has consistently declined to extend the holding of Atkins to individuals outside of the specific class identified in that opinion, instead routinely finding that such claims are both untimely and procedurally barred. See, e.g., Gordon v. State, 350 So. 3d 25, 37 (Fla. 2022) ("We have previously held that the Eighth Amendment's prohibition of cruel and unusual punishment does not require a categorical bar against the execution of persons who suffer from any form of mental illness or brain damage. . . . Yet we have held that, for purposes of the Eighth Amendment, the existence of traumatic brain injury does not reduce an individual's culpability to the extent they become immune from capital punishment."); Carroll v. State, 114 So. 3d 883, 886–87 (Fla. 2013) (rejecting as procedurally barred, untimely, and without merit defendant's claim that his mental illness placed him in the class of persons protected by Atkins and Roper); Lawrence v. State, 969 So. 2d 294, 300 n.9 (Fla. 2007) (rejecting defendant's claim that the Equal Protection Clause requires that the holding of Atkins be extended to mentally ill individuals because such persons have reduce culpability).

Notably, within the past sixty days, the Florida Supreme Court ruled on a substantially similar claim in the case of defendant Donald Dillbeck, who was executed on February 23, 2023. Following the signing of his death warrant, defendant Dillbeck argued in a Successive Motion for Postconviction Relief that his Neurobehavioral Disorder Associated with Prenatal Alcohol Exposure (ND-PAE) diagnosis, which is "akin to intellectual disability," caused him to be "possessed of the same vulnerabilities as individuals with intellectual disability" and therefore exempted him from qualification for capital punishment. See Fourth Successive Motion for Postconviction Relief at 3–11, State v. Dillbeck, No. 1990-CF-2795 (Fla. 2d Cir. Ct. Feb. 2, 2023). Following a Huff hearing at which it was determined that an evidentiary hearing was not needed, the trial court summarily denied defendant Dillbeck's claim as untimely, procedurally barred, and without merit, specifically declining to extend the U.S. Supreme Court's holding in Atkins to the Defendant's mental health condition. See Order Denying Defendant's Fourth Successive Motion for Postconviction Relief and Motion for Stay of Execution at 4–7, State v. Dillbeck, No. 1990-CF-2795 (Fla. 2d Cir. Ct. Feb. 2, 2023). Unsurprisingly, the Florida Supreme Court affirmed the summary denial of this claim, noting that it has "long held that the categorial bar of Atkins that shields the intellectually disabled from execution does not apply to individuals with other forms of mental illness or brain damage" and specifically rejecting the claim that "'his mental illness and neurological impairments . . . cause him to experience the same deficits in reasoning, understanding and processing information, learning from experience, exercising good judgment and controlling impulses as those experienced' by the intellectually disabled." Dillbeck v. State,

No. SC23-190, No. SC23-220, 2023 WL 2027567, at *4 (Fla. Feb. 16, 2023) (quoting Johnston v. State, 27 So. 3d 11, 26 (Fla. 2010)).

The Court finds that Ground 3 is due to be summarily denied. First, the Defendant's claim must be denied as procedurally barred because he could have (and did) raise the claim on appeal or in a prior postconviction motion. See Hendrix, 136 So. 3d at 1124–25 ("A successive postconviction motion may not be used to relitigate a claim that has been raised and rejected on direct appeal[] . . . [or] in prior postconviction proceedings[.]"). In his initial Motion to Vacate Judgment of Conviction and Sentence, the Defendant raised this claim—or a version thereof—in Grounds 5 and 22, both of which were denied.[13] (Exs. J–L.) In his related habeas proceedings before the Florida Supreme Court, he raised this claim—or a version thereof—in Ground 1, which was denied.[14] Barwick, 88 So. 3d at 106; Barwick v. Sec'y, Fla. Dep't of Corrs., 794 F.3d 1239, 1258–59 (11th Cir. 2015) (approving of the district court's denial of Defendant's claim because "'[t]he United States Supreme Court has not extended Roper to mental or emotional age.'"). Second, the claim must be denied as untimely because "scientific research with respect to brain development does not qualify as newly discovered evidence." See Branch, 236 So. 3d at 986. Additionally, at least a portion of the information relied upon in support of the Defendant's claim was known to the Defendant at the time of his executive clemency proceedings in 2021. (Ex. Q.) Finally, the claim must be denied as without merit because the record reflects that the Defendant has consistently demonstrated average mental functioning in spite of his alleged mental deficits and/or impairments.[15] (Exs. R–S). For each of these reasons, Ground 3 is due to be denied.

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[13] In Ground 5, the Defendant alleged, "The State is dis-entitled from executing Mr. Barwick, a mentally retarded individual, because executions of mentally retarded individuals violate the Eighth and Fourteenth Amendments to the United States Constitution[,] Atkins v. Virginia and Fla. Stat. 921.177." (Ex. J.) In denying this claim, the trial court declined to extend the holding of Atkins to the Defendant, who does not qualify as "mentally retarded." (Ex. K.) In Ground 22, the Defendant alleged, "The execution of Daryl Brian Barwick, a brain damaged youthful offender, would constitute cruel and unusual punishment under the Constitutions of the State of Florida and the United States." (Ex. J.) In denying this claim, the trial court explicitly declined to extend the holding of Roper to the Defendant, who was nineteen at the time of the murder. (Ex. L.)

[14] In Ground 1, the Defendant alleged that his execution would be unconstitutional because he is "a brain-damaged, mentally retarded person[.]" Barwick, 88 So. 3d at 93 n.12. In denying relief on this claim, the Florida Supreme Court noted that the claim was procedurally barred but also reasserted its longstanding policy of expressly declining to extend Roper to individuals who were over the age of seventeen when they committed a homicide offense. Barwick, 88 So. 3d at 106. Furthermore, the Court specifically noted that it "ha[d] previously denied relief on each of the specific claims raised by Barwick." Id.

[15] During the operative penalty phase proceeding, the jury heard the following relevant evidence: (1) the Defendant's psychological testing in 1986 indicated that his "[i]ntellectual functioning was in the average, normal range"; (2) one examiner who evaluated the Defendant in 1986 did not conclude "that he suffered a major affective disorder or that he was schizophrenic," that he "was insane as we understand it under the law," that he "suffer[ed] from any mental defect[,]" or that he "suffer[ed] from any mental disease"; (3) a second examiner who evaluated the Defendant in 1986 concluded that "he was not psychotic, of average intelligence, and there was some evidence that he had a degree of brain disfunction which may have shown itself in the form of learning disabilities in school"; (4) the Defendant suffered from anti-social personality disorder; (5) a third examiner who evaluated the Defendant in 1986 diagnosed him as a psychopathic sexual deviant with dissociative behavior and concluded that he "exhibited a rather serious left temporal lobe deficit that is most probably a learning disability that he was born with"; (6) an examiner who evaluated the Defendant in 1980 and again in 1983 diagnosed him as an "extraordinarily dangerous" psychopathic sexual deviant whose likelihood of reoffending was "[v]ery high"; (7) an examiner who evaluated the Defendant in 1992 diagnosed him with Intermittent Explosive Disorder; and (8) none of the examiners found the Defendant to be legally insane. (Ex. R at 679, 684, 688, 705, 711, 747–48, 750, 752–53, 756, 780–81, 784–87, 793, 795–96, 834, 836, 840, 844, 850–

Therefore, it is

ORDERED AND ADJUDGED that the Defendant's Successive Motion for Postconviction Relief is hereby **DENIED.** Pursuant to the Florida Supreme Court's Order entered April 4, 2023, any notice of appeal shall be filed by 9:00 a.m. (ET) on Friday, April 14, 2023.

DONE AND ORDERED in chambers, Bay County, Florida, this 13th day of April 2023.

CHRISTOPHER N. PATTERSON
CIRCUIT JUDGE

51, 874, 877, 884.) At the evidentiary hearing on his initial Motion to Vacate Judgment of Conviction and Sentence, the Court received the following relevant evidence: (1) between the ages of 13 and 33, the Defendant completed several IQ tests, never scoring below a 79 on any segment and never receiving a full scale score below 96 ("an average IQ"), although his verbal IQ scores were consistently much lower than his performance IQ scores; (2) the consistent difference between the types of scores is significant because it suggests "some neurological or neuropsychological impairment, some organicity, some questions of brain abnormality"; (3) the Defendant received very low scores on an academic performance test, which was consistent with his actual academic performance and suggested that he suffers from "a long-standing learning disability, long-standing academic problems, long-standing difficulty with encoding verbal information in standardized forms of writing, . . . of reading, of comprehension"; (4) when the Defendant was 33 years old, he repeatedly received very low scores on tests designed to assess left-brain function, suggesting that he had a mental age of 12 to 14 years; (5) the Defendant completed testing that suggested he had brain damage consistent with frontal lobe impairment; (6) testing conducted in 1986 indicated that the Defendant experienced "unsettled emotionality and . . . was schizoid in his adjustment patterns[,]" suggesting "there's something there that is off, may not be to the level of psychosis"; (7) the Defendant's IQ score prevents him from being considered mentally retarded (now classified as "intellectually disabled"); (8) the testing completed by the Defendant "indicate[s] that there was something definitely abnormal" about his brain functioning; (9) the Defendant meets the diagnostic criteria for Intermittent Explosive Disorder; and (10) at least one evaluator opined that the Defendant was functioning with a mental age of 11 to 14 at the time of the offense. (Ex. S at 25–28, 30–31, 40, 48, 72–74, 83, 97.)