No. _____

IN THE

Supreme Court of the United States

JAMES D. FORD,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

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

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

THIS IS A CAPITAL CASE
WITH AN EXECUTION SCHEDULED FOR
THURSDAY, FEBRUARY 13, 2025 AT 6:00 P.M.

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APPENDIX A

***Ford v. State*, No. SC2025-0110, (Fla., February 7, 2025).**

Supreme Court of Florida

No. SC2025-0110

JAMES D. FORD,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

February 7, 2025

PER CURIAM.

James D. Ford, a prisoner under sentence of death for whom a warrant has been signed and an execution set for February 13, 2025, appeals the circuit court's order summarily denying his third successive motion for postconviction relief, which was filed under Florida Rule of Criminal Procedure 3.851. We have jurisdiction. *See* art. V, § 3(b)(1), Fla. Const. For the reasons below, we affirm.

I. BACKGROUND

On April 6, 1997, Ford brutally murdered Greg Malnory and his wife, Kimberly, at the South Florida Sod Farm, where Ford and

Greg were coworkers. The three had planned to go fishing that afternoon at the sod farm. Greg was shot in the back of the head, execution style, with a single-shot rifle. He had also been hit in the head and face at least seven times with a blunt instrument, consistent with an axe. His throat was slit nearly from ear to ear, so deeply that underlying muscle tissue was exposed. The physical evidence led to the inescapable conclusion that Greg was first shot in the head, but only disabled by the bullet, resulting in Ford savagely beating him to death and slitting his throat while Greg was on his back in the middle of a field.

Kimberly suffered nine blunt force injuries to her head, one of which fractured and penetrated her skull. Ford raped Kimberly and stuck the barrel of his rifle in her mouth before firing through her palate. Defensive wounds on the backs of Kimberly's arms indicated that she put up a struggle.

Near the bodies, in an isolated, wooded area of the vast sod farm, the Malnorys' twenty-two-month-old daughter was found strapped in her car seat in the Malnorys' truck, with the doors wide open. The little girl had been exposed to the elements overnight

and for more than eighteen hours. She was covered in mosquito bites and her mother's blood, dehydrated, and flushed with heat.

An abundance of physical evidence, including multiple DNA matches and the murder weapons, as well as eyewitness testimony, provided overwhelming proof that Ford was responsible for the murders and the rape. He was convicted of two counts of first-degree murder, sexual battery with a firearm, and child abuse. *Ford v. State*, 802 So. 2d 1121, 1125-27, 1131 (Fla. 2001).

At the penalty phase, Ford presented more than two dozen witnesses, including two mental health professionals. But the jury recommended death for each murder by a vote of eleven to one. The trial court ultimately sentenced Ford to death for each murder based on four aggravating circumstances,[1] two statutory mitigating

---

1. The court found that the following aggravating circumstances had been proven beyond a reasonable doubt for both murders and assigned each a degree of weight: (1) the murder was committed in an especially heinous, atrocious, or cruel manner (HAC) (great weight); (2) the murder was committed in a cold, calculated, and premeditated fashion (CCP) (great weight); (3) the murder took place during the commission of a sexual battery (great weight); and (4) Ford previously was convicted of another capital felony, i.e., the contemporaneous murder (great weight).

circumstances,[2] and thirteen "nonstatutory" mitigating circumstances.[3] *Id.* at 1126-27 & nn.1-3. This Court affirmed Ford's convictions and sentences on direct appeal. *Id.* at 1136. The convictions and sentences became final when the United States Supreme Court denied certiorari review in 2002. *Ford v. Florida*, 535 U.S. 1103 (2002).

In the decades since, Ford has unsuccessfully challenged his convictions and sentences in state and federal court. *See Ford v. State*, 955 So. 2d 550 (Fla. 2007) (affirming denial of Ford's initial motion for postconviction relief); *Ford v. Sec'y, Dep't of Corr.*, No.

---

2. The court found two statutory mitigating circumstances established as to both murders: (1) no significant history of prior criminal activity (some weight); and (2) the young mental age of the defendant (very little weight).

3. The court found the following "nonstatutory" mitigating circumstances established as to both murders: (1) Ford was a devoted son (very little weight); (2) Ford was a loyal friend (very little weight); (3) Ford is learning disabled (no weight); (4) developmental age of fourteen (no weight); (5) family history of alcoholism (no weight); (6) chronic alcoholic (very little weight); (7) diabetic (no weight); (8) excellent jail record (some weight); (9) engaged in self-improvement while in jail (some weight); (10) the school system failed to help (very little weight); (11) not a sociopath or a psychopath (no weight); (12) not antisocial (no weight); and (13) the alternative sentence is life without parole (no weight).

2:07-cv-333-FtM-99SPC, 2009 WL 3028886 (M.D. Fla. Sept. 17, 2009) (dismissing as untimely his federal habeas petition, filed under 28 U.S.C. § 2254); *Ford v. McNeil*, 561 U.S. 1002 (2010) (granting certiorari review and remanding the denial of a certificate of appealability, vacating, and remanding for further consideration in light of *Holland v. Florida*, 560 U.S. 631 (2010)); *Ford v. Sec'y, Fla. Dep't of Corr.*, No. 2:07-cv-333-FtM-36SPC, 2012 WL 113523 (M.D. Fla. Jan. 13, 2012) (concluding after remand that Ford was not entitled to equitable tolling for his federal habeas petition under *Holland*); *Ford v. State*, 168 So. 3d 224 (Fla. 2015) (table) (affirming denial of Ford's first successive motion for postconviction relief and denying his request to file a belated state petition for a writ of habeas corpus); *Ford v. State*, 237 So. 3d 904 (Fla. 2018) (affirming denial of Ford's second successive motion for postconviction relief and denying his petition for a writ of habeas corpus).

Governor Ron DeSantis signed Ford's death warrant on January 10, 2025. Ford then filed a third successive motion for postconviction relief under rule 3.851, raising two claims: (1) Ford's death sentence is unconstitutional under *Roper v. Simmons*, 543 U.S. 551 (2005), and the Eighth and Fourteenth Amendments

because his mental and developmental age is below eighteen; and (2) executing Ford would violate his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments in light of *Erlinger v. United States*, 602 U.S. 821 (2024). The circuit court summarily denied both claims. This appeal follows.

II. ANALYSIS

Ford raised only two claims in his third successive motion, but he comes to this Court with three. We address each in turn to explain why no relief is warranted.

A. Applicability of rule 3.851(d)(2)

Ford claims for the first time on appeal from the denial of his third successive motion that application of Florida Rule of Criminal Procedure 3.851(d)(2) is unconstitutional when applied during litigation under an active death warrant because it violates his right to due process under the Fourteenth Amendment and the Florida Constitution; his federal Eighth Amendment right to narrowly tailored individualized sentencing and his Florida constitutional right against cruel and unusual punishment; his federal Sixth Amendment right to effective counsel; and his Florida constitutional right to access the courts.

Rule 3.851 limits the filing of a motion for postconviction relief to within one year of the date the defendant's conviction and sentence become final, unless it alleges one of the following exceptions set forth in subdivision (d)(2):

> (A) 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, or
>
> (B) the fundamental constitutional right asserted was not established within the period provided for in subdivision (d)(1) and has been held to apply retroactively, or
>
> (C) postconviction counsel, through neglect, failed to file the motion.

By asking this Court to find that this subdivision is inapplicable to defendants under an active death warrant, Ford is asking this Court to allow defendants upon the scheduling of an execution date to be permitted to litigate anew any claim that was (and likely those that should have been) raised previously and to receive a ruling on the merits of those claims. Ford's position is without any legal support. In crafting the terms and conditions that govern criminal appeals and collateral review, the Legislature provided "that all terms and conditions of direct appeal and collateral review be strictly enforced, including the application of

procedural bars, to ensure that all claims of error are raised and resolved at the first opportunity." § 924.051(8), Fla. Stat. The litigation of a successive motion for postconviction relief filed by a defendant under an active death warrant is collateral review. If the Legislature intended to suspend procedural bars for claims raised by defendants under active death warrants, it could have done so. *See Cason v. Fla. Dep't of Mgmt. Servs.*, 944 So. 2d 306, 315 (Fla. 2006) ("[T]he Legislature 'knows how to' accomplish what it has omitted in the statute in question.").

Ford's claim that the procedural bars applied to his claims result in a denial of due process is conclusory. "Due process requires that a defendant be given notice and an opportunity to be heard on a matter before it is decided." *Barwick v. State*, 361 So. 3d 785, 790 (Fla.) (quoting *Asay v. State*, 210 So. 3d 1, 27 (Fla. 2016)), *cert. denied*, 143 S. Ct. 2452 (2023). Ford does not allege that he was denied notice and an opportunity to be heard. He is simply objecting to the fact that he does not have the opportunity to be reheard.

Ford also claims that procedural bars effectively deny him access to courts and the right to counsel and subject him to cruel

and unusual punishment. The fact that Ford is not permitted to relitigate issues now does not violate his access to the courts to litigate valid claims in accordance with the procedural rules of this state. The fact that counsel cannot relitigate claims that have already been raised does not deprive him of the right to counsel, who was free to raise appropriate claims. And the application of procedural bars after the signing of his death warrant did not prevent Ford from attempting to show that his case is not among the most aggravated and least mitigated at the appropriate time (or times) and through the appropriate channels, nor did it deprive Ford of an individualized sentencing or otherwise violate the Eighth Amendment or article 1, section 17 of the Florida Constitution. Rule 3.851(d)(2) was not unconstitutionally applied to Ford's third successive motion for postconviction relief. And Ford presents no authorities that support his argument on this point.

B. Extension of *Roper*

Ford argues that the circuit court erred in summarily denying Ford's claim that because he has a mental and developmental age below eighteen years, his death sentence is unconstitutional under *Roper v. Simmons*, 543 U.S. 551 (2005), and the Eighth and

Fourteenth Amendments. Because this claim is untimely and meritless, summary denial was proper.

This claim was filed in Ford's January 18, 2025, third successive motion for postconviction relief, nearly twenty-three years after his convictions and sentences became final. And even assuming that Ford could not have raised the legal basis of this claim until *Roper* was issued in 2005, his claim is still nearly two decades too late. Ford does not allege that any of the exceptions in rule 3.851(d)(2) apply to this claim.[4,5] Thus, this claim was properly denied as untimely.

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4. Although the circuit court believed that Ford was raising a newly discovered evidence claim based on the results of the neuropsychological testing done by Dr. Hyman Eisenstein on January 16, 2025, Ford stated more than once during the case management conference that this was not a newly discovered evidence claim.

5. Ford alleged in his third successive motion that this claim was timely raised because it was "not fully ripe until the signing of Ford's death warrant on January 10, 2025, [and] the expert evaluation of Ford that occurred on January 16, 2025." But Ford has not explained in the circuit court or this Court why the claim was not previously "ripe." The signing of the warrant has nothing to do with whether Ford is eligible for execution based on his mental age, which has remained stable for the last twenty-five years. Nor does he explain why the January 16, 2025, evaluation was not done until the warrant was signed or why its results were necessary to

Moreover, this Court has repeatedly rejected the argument that *Roper*'s holding that the execution of an individual who was younger than eighteen years at the time of the murder(s) violates the Eighth Amendment should be extended to defendants whose mental or developmental age was less than eighteen at the time of their offenses. *E.g.*, *Barwick v. State*, 88 So. 3d 85, 106 (Fla. 2011) (rejecting claim that *Roper* should extend to Barwick, who was nineteen when he committed the crimes, because his mental age was less than eighteen); *Stephens v. State*, 975 So. 2d 405, 427 (Fla. 2007) (rejecting claim that *Roper* and the Eighth Amendment barred execution of defendant who had a mental and emotional age of less than eighteen years because his chronological age at the time of his crimes was twenty-three); *Hill v. State*, 921 So. 2d 579, 584 (Fla. 2006) (rejecting an extension-of-*Roper* claim and holding "*Roper* only prohibits the execution of those defendants whose *chronological* age is below eighteen"). And because Ford was thirty-six at the time of the murders, it is impossible for him to

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raise this claim that is based on information that has been known to Ford for over twenty-five years.

demonstrate that he falls within the ages of exemption, rendering his claim facially insufficient and therefore properly summarily denied. *See Morton v. State*, 995 So. 2d 233, 245 (Fla. 2008) ("Because it is impossible for Morton to demonstrate that he falls within the ages of exemption, his claim is facially insufficient and it was proper for the court to deny Morton a hearing on this claim.").

We have also explained that such claims are

> 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.

Barwick, 361 So. 3d at 794 (alteration in original).

Ford is not entitled to relief on this claim.

C. *Erlinger*

Ford argues that the circuit court erred in denying his claim that executing him would violate his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments in light of the United States Supreme Court's decision in *Erlinger v. United States*, 602 U.S. 821 (2024). Under this claim, he had raised two subclaims: (i) Ford's Fifth Amendment due process rights and Sixth Amendment right to a unanimous jury, as selectively incorporated through the Fourteenth Amendment, are being violated, considering *Erlinger*; and (ii) this new consideration of Ford's proceedings further establishes that his death sentence is arbitrary and capricious, in violation of the Eighth Amendment. Ford conceded that this claim could be resolved without an evidentiary hearing, and it was summarily denied as untimely, procedurally barred, and meritless.

As the circuit court noted, the first sentences Ford wrote under this claim in his third successive motion were:

> Ford's death sentences are contrary to *Hurst v. Florida*, 577 U.S. 92 (2016)[,] and is [sic] in violation of Florida Statutes, section 921.141. He unequivocally asserts that based on *Hurst*, he was denied his right to a jury determination, proof beyond a reasonable doubt, and unanimity under the Sixth and Fourteenth Amendments. As a result of Florida's failure to remedy these violations, Ford's sentences violate the Eighth Amendment's bar against excessive, arbitrary, and capricious punishment and equal protection under the Fourteenth Amendment.

Erlinger was not mentioned, and the "unequivocal[] assert[ion]" that Ford "was denied his right to a jury determination" "based on *Hurst*" identified this as essentially a *Hurst* claim.

On appeal, Ford modified the opening sentence to this claim so that it mentions *Erlinger*. It now reads: "The *Erlinger* . . . decision is a reminder that Ford's death sentences are contrary to *Hurst v. Florida*, 577 U.S. 92 (2016)[,] and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016)."[6] But this change only confirms that this is a *Hurst*

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6. In *Hurst*, the United States Supreme Court held that Florida's capital sentencing scheme was unconstitutional because it "required the judge alone to find the existence of an aggravating circumstance." 577 U.S. at 103. On remand from *Hurst*, this Court held in *Hurst v. State* that "before a sentence of death may be considered by the trial court in Florida, the jury must find the existence of the aggravating factors proven beyond a reasonable doubt, that the aggravating factors are sufficient to impose death, and that the aggravating factors outweigh the mitigating circumstances." 202 So. 3d at 53. This Court then determined

claim, as the allegation is that his sentences are contrary to *Hurst,* not *Erlinger.* Ford has also forgotten to include the very important subsequent history of *Hurst v. State*, in which "we recede[d] from *Hurst v. State* except to the extent it requires a jury unanimously to find the existence of a statutory aggravating circumstance beyond a reasonable doubt." *State v. Poole*, 297 So. 3d 487, 507 (Fla. 2020).

Erlinger does not apply to this case. It involved the federal Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(1), which imposes enhanced, lengthy, mandatory minimum prison terms on certain defendants who have committed three violent felonies or serious drug offenses on separate occasions. *Erlinger*, 602 U.S. at 825. The question presented in *Erlinger* was "whether a judge may decide that a defendant's past offenses were committed on separate occasions under a preponderance-of-the-evidence standard, or whether the Fifth and Sixth Amendments require a unanimous jury

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that *Hurst* does not apply retroactively to cases in which the death sentence became final before the issuance of *Ring v. Arizona*, 536 U.S. 584 (2002), *Asay*, 210 So. 3d at 22, nor does *Hurst v. State*, *Hitchcock v. State*, 226 So. 3d 216, 217 (Fla. 2017). Four years after deciding *Hurst v. State*, this Court "recede[d] from *Hurst v. State* except to the extent it requires a jury unanimously to find the existence of a statutory aggravating circumstance." *State v. Poole*, 297 So. 3d 487, 507 (Fla. 2020).

to make that determination beyond a reasonable doubt." *Id.* The Court concluded that a jury must resolve the "ACCA's occasions inquiry unanimously and beyond a reasonable doubt." *Id.* at 835. But *Erlinger* was a direct-appeal case—not a postconviction case like Ford's—and it involved required jury findings regarding an element. Based on these fundamental distinctions, it is clear that *Erlinger* provides no support for vacating Ford's death sentences.

Based on his opening sentence to this claim on appeal that *Erlinger* is a reminder that Ford's death sentences are contrary to *Hurst* and *Hurst v. State*, we agree with the circuit court that this claim is properly interpreted as a *Hurst* claim. Referencing both his first and second successive motions for postconviction relief, Ford admits that he "has consistently attempted to litigate issues regarding the proper responsibility of jurors in capital sentencing." He also admits that in his first successive motion, he "specifically challenged the lack of juror unanimity in his death recommendation." *See Ford*, 168 So. 3d at 224 (affirming summary denial of claim "challenging this Court's general jurisprudence that nonunanimous jury recommendations of the death sentence are constitutional"). In his second successive motion for postconviction

relief, filed in 2017, Ford argued at length that he was entitled to relief under *Hurst* and *Hurst v. State*. His claims were again summarily denied and affirmed on appeal. *Ford*, 237 So. 3d at 905. As this Court has held that neither *Hurst* nor *Hurst v. State* apply retroactively to Ford's case, this claim was properly denied as procedurally barred and meritless.

Even if not procedurally barred and even if *Hurst* did apply retroactively to Ford, he would still not be entitled to relief. Ford complains that the instructions to his jury "only indicated they should consider aggravating circumstances found to have been proven beyond a reasonable doubt," but "no factual findings were ever made." To the contrary, by convicting Ford of the contemporaneous murder and sexual battery with a firearm of Kimberly Malnory at the guilt phase, the jury found beyond a reasonable doubt the aggravator that "[t]he defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person," § 921.141(5)(b), Fla. Stat. (1997). This Court decided a decade ago that those findings "satisfy[] the constitutional requirements." *Ford*, 168 So. 3d at 224 ("Thus, at the guilt phase the jury unanimously found that Ford

committed another capital felony, the contemporaneous murder, and the fact that both murders were committed during the commission of a sexual battery, satisfying the constitutional requirements."). We reject Ford's claim that he "never had an actual jury during his sentencing proceedings" and his categorization of his penalty phase jury as not "an actual jury" but merely an "advisory panel."

Ford also argues that his sentencing order does not specify the standard of proof the court used to find that the aggravating factors outweighed the mitigating circumstances. This Court has squarely rejected arguments that whether the aggravating factors outweighed the mitigating circumstances is a determination that must be made beyond a reasonable doubt. *See Rogers v. State*, 285 So. 3d 872, 885-86 (Fla. 2019) (holding that determinations of whether the aggravating factors were sufficient to justify the death penalty and whether those factors outweighed the mitigating circumstances are not subject to the beyond a reasonable doubt standard of proof); *Davidson v. State*, 323 So. 3d 1241, 1247 (Fla. 2021); *Craft v. State*, 312 So. 3d 45, 57 (Fla. 2020); *Santiago-Gonzalez v. State*, 301 So.

3d 157, 177 (Fla. 2020); *Bright v. State*, 299 So. 3d 985, 998 (Fla. 2020); *Doty v. State*, 313 So. 3d 573, 577 (Fla. 2020).

Ford's second subclaim focuses on the allegation that his sentence is arbitrary and capricious, in violation of the Eighth Amendment. He argues that his sentence is arbitrary because he missed the cutoff to have *Hurst* applied retroactively to his sentences by only twenty-seven days. But, as explained above, even if a *Hurst* claim were not procedurally barred and *Hurst* applied to Ford, he would not be entitled to relief, because his jury also found him guilty of the contemporaneous murder and sexual battery, which satisfies the constitutional requirement that a jury unanimously find the existence of an aggravating factor beyond a reasonable doubt.

Ford also continues to claim that he did not have a jury at his penalty phase but only an advisory panel, "unlike all post-*Hurst* defendants" who have "an actual sworn jury" to avoid being "condemned to death in an arbitrary and capricious manner." Ford did have an actual sworn jury at his penalty phase. It was the same actual sworn jury that found him guilty of the

contemporaneous murder and sexual battery during the guilt phase.

If Ford is presenting an actual argument[7] that the instructions to his jury that its sentencing recommendation was only advisory are contrary to *Caldwell v. Mississippi*, 472 U.S. 320 (1985), it is both untimely and meritless. This Court has already rejected such an argument in *Allen v. State*, 322 So. 3d 589, 597 (Fla. 2021).

Ford's final argument that under the evolving standards of decency, he cannot be sentenced to death unless a jury unanimously determines that the aggravating factors are sufficient for the imposition of death and that they outweigh the mitigation is procedurally barred, untimely, and meritless. Ford relies on *Hurst v. State* in making this argument. But as explained above, we have "recede[d] from *Hurst v. State* except to the extent it requires a jury unanimously to find the existence of a statutory aggravating

---

7. Ford phrased this argument hypothetically: "[T]he advisory panel was instructed that, although the court was required to give great weight to its recommendation, the recommendation was only advisory. *Had this been* an actual jury trial, this *would have been* contrary to *Caldwell v. Mississippi*, 472 U.S. 320 (1985) . . . ." (Emphasis added.)

circumstance beyond a reasonable doubt." *Poole*, 297 So. 3d at 507. And we have repeatedly declined invitations to reconsider *Poole*. *E.g.*, *Herard v. State*, 390 So. 3d 610, 623 (Fla. 2024); *Wells v. State*, 364 So. 3d 1005, 1014-15 (Fla.), *cert. denied*, 144 S. Ct. 385 (2023); *McKenzie v. State*, 333 So. 3d 1098, 1105-06 (Fla. 2022); *Davidson*, 323 So. 3d at 1248. And the Supreme Court's decision in *McKinney v. Arizona*, 589 U.S. 139, 144 (2020), confirms that our decision in *Poole* was correct. *See id.* ("Under *Ring* and *Hurst*, a jury must find the aggravating circumstance that makes the defendant death eligible. But importantly, in a capital sentencing proceeding just as in an ordinary sentencing proceeding, a jury (as opposed to a judge) is not constitutionally required to weigh the aggravating and mitigating circumstances or to make the ultimate sentencing decision within the relevant sentencing range."). Since *Poole* was not wrongly decided, Ford's argument that his execution will result in a manifest injustice is devoid of merit.

III. CONCLUSION

For the reasons stated, we affirm the circuit court's order summarily denying Ford's third successive motion for postconviction relief.

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

It is so ordered.

MUÑIZ, C.J., and CANADY, LABARGA, COURIEL, GROSSHANS, FRANCIS, and SASSO, JJ., concur.

An Appeal from the Circuit Court in and for Charlotte County,
Lisa Spader Porter, Judge
Case No. 081997CF0003510001XX

Eric Pinkard, Capital Collateral Regional Counsel, Ali Shakoor, Assistant Capital Collateral Regional Counsel, and Adrienne Joy Shepherd, Assistant Capital Collateral Regional Counsel, Middle Region, Temple Terrace, Florida,

for Appellant

John M. Guard, Acting Attorney General, Tallahassee, Florida, and Christina Z. Pacheco, Senior Assistant Attorney General, Stephen D. Ake, Senior Assistant Attorney General, and Jonathan S. Tannen, Assistant Attorney General, Tampa, Florida,

for Appellee

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THURSDAY, FEBRUARY 13, 2025, AT 6:00 P.M.

APPENDIX B

January 23, 2025 Order Denying Defendant's Successive Motion to Vacate Judgment of Conviction and Sentence of Death Pursuant to Florida Rule of Criminal Procedure 3.851 After a Signed Death Warrant.

Filing # 215195957 E-Filed 01/23/2025 02:48:19 PM

IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR CHARLOTTE COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

vs. Case No. 97-000351-CF

JAMES DENNIS FORD, ACTIVE DEATH WARRANT
Execution scheduled for
Defendant. February 13, 2025 at 6:00 p.m.

_____/

ORDER DENYING DEFENDANT'S SUCCESSIVE MOTION TO VACATE JUDGMENT OF CONVICTION AND SENTENCE OF DEATH PURSUANT TO FLORIDA RULE OF CRIMINAL PROCEDURE 3.851 AFTER A SIGNED DEATH WARRANT

THIS CAUSE comes before the Court on Defendant's Successive Motion to Vacate Judgment of Conviction and Sentence of Death Pursuant to Florida Rule of Criminal Procedure 3.851 after a Signed Death Warrant, filed on January 19, 2025, and the State's response filed on January 20, 2025. A *Huff*[1] hearing was held on January 21, 2025, after which this Court entered an order determining that all of Defendant's claims for relief could be resolved by a review of the record and prevailing case law. *See attached transcript.* The Court has considered Defendant's motion and the State's response, reviewed the record, and is duly advised in the premises. For the reasons stated below, the Court finds that Defendant is not entitled to any relief.

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

FACTS OF THE CASE

In its opinion affirming Defendant's convictions and death sentences, the Florida Supreme Court described the facts of the case as follows:

> James ("Jimbo") Dennis Ford and Greg Malnory were co-workers at the South Florida Sod Farm in Charlotte County. On Sunday morning, April 6, 1997, Ford made plans to go fishing later that day with Greg and his wife Kim on the sod farm. The relevant facts are set forth in the trial court's sentencing order:
>
> In the early afternoon of April 7, 1997, an employee of the South Florida Sod Farm made a gruesome discovery on the grounds of the 7,000 acre farm located in a remote area of Charlotte County. At the scene of these crimes, authorities found the pickup truck owned by Greg and Kim Malnory in the middle of a field. Some distance away, they found the body of Greg Malnory. He had been shot in the head from behind by what was later determined to be a .22 caliber rifle.
>
> The shooting evidently occurred somewhere in the vicinity of the crime scene, perhaps between the Malnorys' truck and a nearby pond. Greg then apparently staggered out into the middle of the field, followed by the Defendant.
>
> The Defendant then inflicted at least seven blunt force injuries to the head and face of Greg Malnory with what has been described by the medical examiner as a blunt instrument consistent with an axe. Greg was found lying on his back in the middle of the field with his throat slit nearly from ear to ear, so deeply that underlying muscle tissue was exposed. The massive amount of blood found on Greg Malnory's chest and shirt lead [sic] to the inescapable conclusion that Greg was first shot in the head, that the bullet only disabled him, and that the Defendant then savagely killed him by beating him to death and slitting his throat while Greg was lying on his back

in the middle of the field.

The body of Kimberly Malnory was found near the truck. Evidence revealed the existence of nine blunt force injuries to her head, one of which fractured and penetrated her skull. Defensive wounds were found on the backs of Kim's arms indicating that she put up a struggle. There was also evidence of two oval discolorations on the superficial tissues on the inside of Kimberly Malnory's thighs which were suggestive of thumb prints. These marks were made by the Defendant while Kimberly Malnory was alive.

DNA testing revealed the presence of the Defendant's semen inside Kimberly Malnory and on her shirt. The single piece bathing suit that Kimberly Malnory was wearing under her shirt at the time of the killings had been sliced clean through the crotch as if with a sharp knife. Before raping Kimberly Malnory, the Defendant took the weapon he had used to shoot Gregory Malnory, a .22 caliber single-shot, bolt-action rifle named "old Betsy," and reloaded it with another bullet. A cast of Kimberly Malnory's pallet [sic] revealed that the Defendant then stuck the end of the barrel of the rifle inside Kimberly Malnory's mouth and pulled the trigger.

Authorities also discovered the Malnorys' 22 month old baby girl, Maranda, in the car seat inside the Malnorys' truck. The baby had been strapped inside the vehicle for well over 18 hours with the doors wide open, exposed to the elements overnight and for much of the next day. Little Maranda was found with mosquito bites over most of her body and her mother's blood over both the front and back of her clothes and on her shoe....

Although the evidence is in some dispute as to the exact series of events which occurred at the sod farm on the afternoon of April 6, 1997, it is not necessary for the Court to determine the precise sequence by which these horrible crimes were committed....

> Suffice it to say that the Court is convinced that Gregory Malnory was initially shot in the head by the Defendant at an angle slightly from behind. The Defendant may have then hit Kimberly Malnory in order to disable her. At some point the Defendant realized that Greg was not yet dead, and then the Defendant followed him out into the middle of the field where he bludgeoned him and slit his throat.
>
> While the Defendant was completing the killing of Gregory Malnory, Kimberly Malnory did what she could to save Maranda. This explains the presence of her blood on the baby. Upon his return to the pickup truck, the Defendant then raped Kimberly Malnory, brutally beat her and executed her with his rifle.

State v. Ford, 802 So. 2d 1121, 1125-1126 (2001)

PROCEDURAL HISTORY

Defendant was tried and convicted of two counts of first degree murder, one count of sexual battery with a firearm, and one count of child abuse. After the penalty phase, the jury recommended a death sentence by a vote of eleven-to-one. On June 3, 1999, the predecessor judge sentenced Defendant to death on the two counts of first degree murder, and to a term of years on the remaining counts. The Court found the following aggravators: (1) the murders were committed in an especially heinous, atrocious, or cruel manner (great weight); (2) the murders were committed in a cold, calculated, and premeditated fashion (great weight); (3) the murder took place during the commission of a sexual battery (great weight); and (4) Ford previously was convicted of another capital felony, i.e.,

the contemporaneous murder (great weight). The Court addressed the following statutory mitigators: (1) no significant history of prior criminal activity (proven, some weight); (2) extreme mental or emotional disturbance (not proven, no weight); (3) acted under extreme duress (not proven, no weight); (4) impaired capacity (not proven, no weight); and (5) the young mental age of Ford (proven, very little weight). The Court addressed the following non-statutory mitigators: (1) Ford was a devoted son (proven, very little weight); (2) Ford was a loyal friend (proven, very little weight); (3) Ford is learning disabled (proven, no weight); (4) mild organic brain impairment (not proven, no weight); (5) Ford's developmental age of fourteen (proven, no weight); (6) family history of alcoholism (proven, but does not serve as mitigating in consideration of a potential death sentence, no weight); (7) Ford's chronic alcoholism (proven, very little weight); (8) Ford's diabetes (proven, but does not serve as mitigating in consideration of a potential death sentence, no weight); (9) Ford's excellent jail record and jail conduct (proven, some weight); (10) Ford's self-improvement while in jail (proven, some weight); (11) lack of intervention by the school system (proven, very little weight); (12) emotional impairment (not proven, no weight); (13) mental impairment (not proven, no weight); (14) ability to conform conduct was impaired (not proven, no weight); (15) Ford is not a sociopath or a psychopath (proven, but does not serve as mitigating in consideration of a potential death sentence, no weight); (16) Ford is not antisocial (proven, but does not serve as mitigating in consideration of a potential death sentence, no

weight); (17) the alternative sentence of life without parole (proven, but does not serve as mitigating in consideration of a potential death sentence, no weight).

Defendant appealed and the Florida Supreme Court affirmed Defendant's convictions and sentences. *Ford v. State*, 802 So. 2d 1121 (2001).[2] The United States Supreme Court denied Defendant's Petition for Writ of Certiorari on May 28, 2002. *Ford v. Florida*, 535 U.S. 1103 (2002).

On May 28, 2003, Defendant filed his first motion for postconviction relief. An evidentiary hearing was held on May 12, 2004, at which time one claim was waived and abandoned by Defendant. The Court conducted a lengthy colloquy with Defendant and determined that Defendant's waiver was knowingly and intelligently made with full knowledge of all facts germane to such a decision. The Court denied all remaining claims by order rendered July 14, 2004. Defendant appealed the denial and filed a Petition for Writ of Habeas Corpus in the Florida Supreme Court. The Florida Supreme Court affirmed the trial court's denial of Defendant's postconviction motion and denied relief on the habeas petition. *Ford v. State*, 955 So. 2d 550 (Fla. 2007).

On June 11, 2007, Defendant filed a Petition for Writ of Habeas Corpus in the United States Middle District. The District Court dismissed the petition as untimely on September 17, 2009.

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[2] As it relates to five of the non-statutory mitigating factors, the Florida Supreme Court disagreed with the trial court's finding that they are not mitigating in nature. However, the Florida Supreme Court declined to determine whether those factors may or may not be mitigating under the facts in the case at hand because any error would be harmless. *Ford*, 802 So. 2d at 1135-1136.

Ford v. Sec'y, Fla. Dep't of Corr., 2009 WL 3028886 (M.D. Fla. Sept. 17, 2009). Ford appealed to the United States Court of Appeals for the Eleventh Circuit, which denied a certificate of appealability on October 27, 2009. Defendant then filed a Petition for Writ of Certiorari in the United States Supreme Court on November 4, 2009. The Court granted certiorari review, vacated, and remanded for further consideration in light of *Holland v. Florida*, 560 U.S. 631 (2010). *Ford v. McNeil*, 561 U.S. 1002 (2010). The Eleventh Circuit remanded to the district court for the limited purpose of addressing equitable tolling pursuant to *Holland*. *Ford v. Sec'y, Fla. Dep't. of Corr.*, 614 F.3d 1241 (11th Cir. 2010). On January 13, 2012, the district court determined that Defendant was not entitled to equitable tolling for his federal habeas petition. *Ford v. Sec'y, Fla. Dep't. of Corr.*, 2012 WL 113523 (M.D. Fla. Jan. 13, 2012).

On March 20, 2013, Defendant filed a successive motion for postconviction relief, and on November 4, 2013, he filed a motion to amend to add claims. The motion to amend was granted and the successive motion for postconviction relief was denied by order rendered December 20, 2013. Defendant appealed the denial and filed a Petition for Writ of Habeas Corpus in the Florida Supreme Court. The Florida Supreme Court affirmed the trial court's denial of Defendant's successive postconviction motion and denied relief on the habeas petition. *Ford v. State*, 168 So. 3d 224 (Fla. 2015). The United States Supreme Court denied certiorari review on November 30, 2015. *Ford v. State*, 577 U.S. 1010 (2015).

On January 12, 2017, Defendant filed a second successive postconviction motion pursuant to *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), which was denied by order rendered March 9, 2017. Defendant appealed the denial and filed a Petition for Writ of Habeas Corpus in the Florida Supreme Court. The Florida Supreme Court affirmed the denial of the second successive postconviction motion and denied relief on the habeas petition. *Ford v. State*, 237 So. 3d 904 (Fla. 2018).

On January 10, 2025, the Governor of the State of Florida issued a Death Warrant to carry out the sentence of death imposed on Defendant. The execution is scheduled for Thursday, February 13, 2025, at 6:00 p.m.

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 only if:

> (A) 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, or
>
> (B) the fundamental constitutional right asserted was not established within the period provided for in subdivision (d)(1) and has been held to apply retroactively, or
>
> (C) postconviction counsel, through neglect, failed to file the motion.

Fla. R. Crim. P. 3.851(d)(2).

Even if an exception exists, successive postconviction claims may still be denied as untimely if there is a delay in raising those claims. *See Rodgers v. State*, 288 So. 3d 1038, 1039 (Fla. 2019) (to be considered timely filed as newly discovered evidence, the motion must be filed within one year of the date upon which the claim became discoverable through due diligence). Claims which either were or could have been raised on appeal or in prior postconviction proceedings are not properly raised in a successive motion. *See King v. State*, 597 So. 2d 780, 782 (Fla. 1992) (holding that claims were barred because they could have been, should have been, or were raised in a prior proceeding). 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, 1162–1163 (Fla. 2013) (because Mann raised purely legal claims that have been previously rejected, the circuit court properly summarily denied relief).

In this case, the Court has found that Defendant's claims are untimely, procedurally barred, and without merit, and, therefore, an evidentiary hearing is not necessary.[3]

[3] Defendant requested an evidentiary hearing as to Claim 1 only. At the hearing held on January 21, 2025, counsel for Defendant conceded that Claim 2 is a legal issue and, therefore, did not require an evidentiary hearing.

CLAIMS FOR RELIEF

Defendant raises two (2) claims for relief.

CLAIM ONE:

Ford's Death Sentence is Unconstitutional under *Roper v. Simmons*, 543 U.S. 551 (2005) and the Eighth and Fourteenth Amendments of the United States Constitution because he has a Mental and Developmental Age below Eighteen Years Old

Defendant cites to *Roper v. Simmons*, 543 U.S. 551 (2005), in which the United States Supreme Court held that the execution of individuals who were under eighteen (18) years of age at the time of their capital crimes is prohibited by the Eighth Amendment (prohibition against cruel and unusual punishment) which is applicable to the States through the Fourteenth Amendment.[4] Without further citation to additional case law, Defendant urges that "[t]he class of offenders subject to the death penalty ***should be narrowed again*** to preclude the execution of individuals with a mental and developmental age less than age 18." (emphasis added).

Defendant asserts that this claim was not previously raised and was not ripe until the signing of Defendant's death warrant due to "the expert evaluation of Defendant that occurred on January 16, 2025." The trial court disagrees and finds that this claim is untimely, was previously raised and explicitly abandoned by

[4] In *Roper*, the defendant was seventeen (17) years old at the time the capital murder was committed. *Roper*, 543 U.S. at 556.

Defendant, and asserts no facts that can be considered "newly discovered."

As admitted by Defendant and supported by the record, Defendant was thirty-six (36) years old on the date the capital murders were committed. *See attached Booking Report.* Expert testimony was presented during trial by Dr. Mosman who evaluated Ford in 1999, and it is this testimony on which Defendant extensively relies in asserting that Defendant had the mental and developmental age of a fourteen (14) year old. In fact, the trial court agreed and explicitly found in its Sentencing Order rendered June 3, 1999, that it was proven that Defendant's developmental age was fourteen (14) years old. *See attached Sentencing Order.* Accordingly, this is an undisputed fact going back to 1999 and is not "newly discovered." *Ford v. State*, 802 So. 2d at 1135 (affirming trial court's finding that Defendant's learning disability and developmental age of fourteen were not mitigating under the facts in the case based on extensive testimony showing that Defendant functions well as a mature adult); *See Long v. State*, 271 So. 3d 938 (Fla. 2019) (claim raised after thirty years and only after the issuance of the death warrant is not timely where defendant clearly was aware of his traumatic brain injury and temporal lobe epilepsy since the 1989 penalty phase).

It is further undisputed that Dr. Mosman did not find Defendant to be "mentally retarded" or intellectually disabled[5], and,

[5] Effective July 1, 2013, the term "mental retardation" was replaced with the term "intellectual disability" throughout the entire body of the laws of Florida. *Ch. 2013-162, Laws of Florida.*

in fact, Defendant has never been identified as intellectually disabled. In Defendant's original postconviction motion filed May 28, 2003, Defendant asserted that trial counsel was ineffective in that counsel "failed to sufficiently present evidence from Dr. Mosman and Dr. Greer to support the fact that Defendant's chronological age withstanding, that his mental age at the time of the crime was 14 years of age," and, therefore, trial counsel "should have argued that the Death Penalty was not legally appropriate due to the Defendant's mental retardation." However, during the hearing on Defendant's original postconviction motion held on May 12, 2004, at which Defendant was present, Defendant's postconviction counsel admitted that counsel was unable to secure an expert who would testify that Defendant was or could be classified as "mentally retarded," and, therefore, abandoned this claim. The trial court conducted a colloquy with Defendant, at which time Defendant agreed that this claim should be abandoned, that Defendant had sufficient time to discuss this with counsel, and that no one had forced Defendant to abandon this claim. Defendant testified as follows:

> THE DEFENDANT: . . . And the deal when we went to trial, when I went and seen all the doctors to start with, I wasn't found mentally retarded, nor did think I was at that time. (Transcript of May 12, 2004, p.12, l.13-16)

After testimony had been offered on the remaining claims, the Court conducted a second colloquy with Defendant to further ensure that his abandonment of this claim was done knowingly and voluntarily.

(Transcript of May 12, 2004, p.96, l.6 through p.102, l.5). *See attached Order Denying Motion for Postconviction Relief,* with attached transcript.

In Defendant's first successive postconviction motion filed by Defendant's successor postconviction counsel, counsel asserted that the predecessor postconviction counsel was ineffective for abandoning the claim that Defendant was intellectually disabled, and successor postconviction counsel asserted that he had discovered other areas of mental health mitigation that were not raised at trial or in the initial postconviction motion. Successor postconviction counsel had retained Lisa McDermott, a licensed mental health counselor, and Dr. Robert H. Ouaou, Ph.D., a clinical and neuropsychology expert, for the purpose of further exploring Defendant's mental disabilities and impairments, and urging the trial court to grant an evidentiary hearing. *See attached Successive Motion to Vacate Judgments of Conviction and Sentences.* The trial court found that this claim was untimely, and did not qualify for any of the exceptions to the time limits of rule 3.851. *See attached Order Granting Motion to Amend, and Denying Successive 3.851 Motion.*

Defendant's current claim is again trying to raise Defendant's mental disabilities or deficiencies, while still admitting that Defendant does not qualify as a vulnerable or disabled adult and "is not alleging that he is intellectually disabled under the standards set forth by *Atkins v. Virginia,* 536 U.S. 304 (2002), *Hall v. Florida,* 572 U.S. 701 (2014), or the medical diagnostic standards for

intellectual disability." Counsel for Defendant also admitted during oral arguments held on January 21, 2025, that Defendant was not raising any competency issue. Rather, Defendant is casting his intellectual deficiencies in a slightly different context by now arguing that the prohibition against imposing the death penalty on persons under the age of eighteen (18) years old "should be narrowed," to also apply to persons who are older than eighteen (18), but with a mental or developmental age of less than eighteen (18). Without Defendant having cited to any supporting case law that may have recently emerged and that already "narrows" the 2005 *Roper* opinion in the manner suggested by Defendant, this Court is unable to find any exception to the time limits established by rule 3.851 or any cause for this claim not being raised until after the issuance of the death warrant.[6]

As the basis for raising this successive claim, Defendant asserts as "newly discovered evidence" the evaluation of Defendant by Dr. Hyman Eisenstein on January 16, 2025, which preliminarily shows that Defendant still suffers impairments in his mental functioning. However, any such testimony from Dr. Eisenstein for the proposition that Defendant has a mental and developmental age of less than eighteen (18) would simply be cumulative or

[6] In fact, the Florida Supreme Court has already rejected a similar claim arguing "for an expansion of *Roper* on the basis that newly discovered evidence – in the form of scientific research with respect to development of the human brain, as well as the evolution of state and international law – mandates that individuals who committed murder in their late teens and early twenties be treated like juveniles," by finding that the trial court properly denied this claim without an evidentiary hearing. *Branch v. State,* 236 So. 3d 981 (Fla. 2018). And, even more recently, the Florida Supreme Court rejected another claim arguing that *Roper* should be extended to individuals who were under the age of twenty-one (21) at the time their capital offenses were committed. *Barwick v. State*, 361 So. 3d 785 (Fla. 2023). *See also Carroll v. State*, 114 So. 3d 883, 887 (Fla. 2013); *Hill v. State*, 921 So. 2d 579, 584 (Fla. 2006).

corroborative since Dr. Mosman already testified as such in 1999, plus it has been undisputed since Defendant's original sentencing that Defendant had a developmental age of fourteen (14). The argument that the death penalty is unconstitutional as applied to persons with a mental and developmental age of less than eighteen (18) is a legal issue, not a factual issue, for which Defendant has provided no supporting case law.

During oral arguments held on January 21, 2025, counsel for Defendant raised a "newly discovered" argument not developed or elaborated upon in the written motion, arguing that the issuance of the death warrant *itself* constituted a "newly discovered" circumstance that should cause this claim to be considered as having been timely filed. This argument is rejected not only because it was not further discussed or supported by law in the written motion and/or the hearing, but also because it is untenable.

This claim is untimely, procedurally barred, and without merit.

CLAIM TWO:

Putting Ford to Death Would Violate his Fifth, Sixth, Eighth, and Fourteenth Amendment Rights under the United States Constitution, considering the United [States] Supreme Court's Recent Opinion, *Erlinger v. U.S.*, 602 U.S. 821 (2024), Addressing Juror Unanimity in Fact-Finding Regarding Sentencing Proceedings

Defendant raises two subclaims:

A. Ford's Fifth Amendment Due Process Rights and Sixth Amendment Right to a Unanimous Jury, as Selectively Incorporated Th[r]ough the Fourteenth Amendment, are Being Violated Considering *Erlinger v. U.S.*, 602 U.S. 821 (2024).

B. This New Consideration of Ford's Proceedings Further Establishes that his Death Sentence is Arbitrary and Capricious, in Violation of the Eighth Amendment.

Even though Defendant asserts the recent issuance of *Erlinger v. U.S.*, 602 U.S. 821 (2024), as being the "newly discovered" basis for bringing these untimely claims attacking the jury's non-unanimous eleven-to-one recommendation in favor of the death penalty, Defendant's initial argument and first sentence under this claim is that "Ford's death sentences are contrary to *Hurst v. Florida*, 577 U.S. 92 (2016) and is in violation of Florida Statutes, section 921.141."

The claim that Defendant's death sentences are contrary to *Hurst* has already been raised by Defendant and rejected by the trial court. *See attached Successive Motion to Vacate Judgments of Conviction and Sentences, and Alternatively Motion to Correct Illegal Sentences*, and *Final Order Denying Defendant's Successive 3.851*

Motion. The trial court's denial was affirmed on appeal, and this claim has been consistently rejected by the Florida Supreme Court. *Ford v. State*, 237 So. 3d 904 (Fla. 2018) (*Hurst* does not apply retroactively to Ford's sentences of death); *See Gaskin v. State*, 361 So. 3d 300 (Fla. 2023) (Gaskin's claim that he is entitled to relief pursuant to *Hurst* is procedurally barred, as it was raised and addressed in Gaskin's first and second successive motions for postconviction relief); *Dillbeck v. State*, 234 So. 3d 558 (Fla. 2018) (*Hurst* does not apply retroactively to Dillbeck's sentence of death following a jury recommendation for death by a vote of eight-to-four); *Zack v. State*, 228 So. 3d 41 (Fla. 2017) (*Hurst* does not apply retroactively to cases that were final before *Ring* was decided); *Hitchcock v. State*, 226 So. 3d 216 (Fla. 2017) (*Hurst* does not apply retroactively to defendants whose death sentences were final when the U.S. Supreme Court decided *Ring v. Arizona*); *Asay v. State*, 210 So. 3d 1 (Fla. 2016) (*Hurst*, holding that the Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death, does not apply retroactively to a defendant whose murder conviction and death sentence was final at the time of the U.S. Supreme Court's holding in *Ring v. Arizona*).[7]

[7] Though not necessarily applicable in the case at bar since *Hurst* does not apply retroactively to Defendant in the first place, it should be noted that the Florida Supreme Court partially receded from *Hurst* in 2020, by finding that it is the existence of one or more aggravating circumstances that a jury must unanimously find beyond a reasonable doubt before the trial court can sentence a defendant to death; the jury's sentence recommendation of death need not be unanimous. *State v. Poole*, 297 So. 3d 487 (Fla. 2020). In addressing Defendant's pre-*Hurst* claim challenging the non-unanimous jury recommendation of death in his amended first successive motion for postconviction relief, the Florida Supreme Court rejected Defendant's claim finding that "at the guilt phase the jury unanimously found that Ford committed another capital felony, the contemporaneous murder, and the fact that both murders were committed during the commission of a sexual battery, satisfying the constitutional requirements." *Ford v. State*, 168 So. 3d 224 (Fla. 2015).

To the extent that Defendant's argument relies upon the recent *Erlinger* opinion as being "newly discovered" so as to create a basis for raising this claim beyond the time limit established by rule 3.851, it is important to note that Defendant dedicates exactly one (1) single page of this entire argument to *Erlinger*. Defendant then proceeds for the next eleven (11) pages to argue *Hurst*, never again citing or referencing back to *Erlinger*, except for a single conclusory and unsupported final statement on page twenty-one (21) at the end of subclaim A, stating that "the *Erlinger* decision informs that Ford should have a new penalty phase proceeding." Under subclaim B, *Erlinger* is not cited or referenced at all. To the extent that *Erlinger* did not involve a capital case in which the death penalty may be imposed, and contributes nothing of any significance, substance, or merit to Defendant's claim or argument, the Court necessarily concludes that Defendant is simply attempting to re-argue *Hurst* under the guise of there being "newly discovered" case law, vis-à-vis, *Erlinger*.

As admitted by Defendant on the single page dedicated to *Erlinger*, page seventeen (17), *Erlinger* involved an analysis of the federal Armed Career Criminal Act (ACCA), which provides for an enhanced sentence when the defendant has three or more qualifying conviction for offenses committed "on separate occasions." In ruling that the determination as to whether the predicate offenses were committed "on separate occasions" was to be made by a unanimous jury beyond a reasonable doubt, the United States Supreme Court also expressly limited its ruling as

follows:

> "While recognizing Mr. Erlinger was entitled to have a jury resolve the ACCA's occasions inquiry unanimously and beyond a reasonable doubt, ***we decide no more than that.***"

Erlinger, 602 U.S. at 1852 (emphasis added).

In addition, *Erlinger* and the line of cases that *Erlinger* followed involved "enhanced sentences," or sentences that exceed the maximum penalty authorized or that increase the minimum penalty allowed. To the contrary, the sentence of death for a person who is convicted of a capital felony is not an "enhanced sentence" in the same manner in which a sentence under the ACCA is an enhanced sentence. Under §775.082(1), Fla. Stat. (1995), death was, in fact, already the maximum penalty authorized:

> "A person who has been convicted of a capital felony shall be punished by death if the proceeding held to determine sentence according to the procedure set forth in s. 921.141 results in findings by the court that such person shall be punished by death, otherwise such person shall be punished by life imprisonment and shall be ineligible for parole."

This is true whether applying the current version of §775.082(1) or the version in effect at the time Defendant committed the offenses of capital murder. It becomes obvious by the arguments made by Defendant in the current successive motion that the strongest case in support of Defendant's argument is *Hurst*, which involves a capital case and to which the opinion in *Erlinger* contributes nothing. Though Defendant vehemently disagrees, it has been determined by the Florida Supreme Court that *Hurst* does not apply

retroactively to Defendant's sentence, and Defendant has presented no "newly discovered" case law that would change that finding.

The United States Supreme Court in *Erlinger* made no finding that its ruling would apply retroactively, and Defendant makes no argument in the current successive motion that *Erlinger* should be applied retroactively. The Florida Supreme Court issued an opinion in *State v. Johnson*, 122 So. 3d 856 (Fla. 2013), finding that the United States Supreme Court rules regarding sentencing enhancements announced in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Blakley v. Washington*, 542 U.S. 296 (2004), do not apply retroactively. It is this line of cases to which *Erlinger*, and its limited scope, has relevance. Accordingly, even if found to be applicable in some manner to Florida's capital sentencing scheme, it is unlikely that *Erlinger* would be found to apply retroactively to sentences already final at the time *Erlinger* was decided.

To the extent that Defendant is arguing under subclaim B that Defendant's sentence is "arbitrary and capricious," and implying that this is "newly discovered" based on the "new consideration" of *Erlinger*, this is belied by the fact that *Erlinger* is not cited once under subclaim B. Defendant does, however, cite to *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Furman v. Georgia*, 408 U.S. 238 (1972), as well as *Hurst* and *Ring*, all of which were already cited extensively by Defendant, along with the argument that Florida's capital sentencing scheme is arbitrarily applied, in Defendant's second successive motion for postconviction relief. Accordingly, this claim was previously raised and denied. *See*

attached Successive Motion to Vacate Judgments of Conviction and Sentences, and Alternatively Motion to Correct Illegal Sentences, and *Final Order Denying Defendant's Successive 3.851 Motion; Ford v. State*, 237 So. 3d 904 (Fla. 2018).

In any event, the Florida Supreme Court has already rejected claims arguing that Florida's capital sentencing scheme is unconstitutional on its face or as applied for failure to prevent the "arbitrary and capricious" imposition of the death penalty. In *Deparvine v. State*, 146 So. 3d 1071 (Fla. 2014), the Florida Supreme Court held that this claim raised in a postconviction motion is procedurally barred because it should have and could have been raised on direct appeal. *Deparvine*, 146 So. 3d at 1107. *See also Cox v. State*, 390 So. 3d 1189 (Fla. 2024) (The arguments that Florida's death penalty scheme risks the arbitrary and capricious application of the death penalty in violation of the Eighth and Fourteenth Amendments to the United States Constitution are "well-worn, and this Court has repeatedly rejected them"); *Lawrence v. State*, 308 So. 3d 544 (Fla. 2020) (Florida's death penalty statute comports with due process, complies with federal and statutory constitutional requirements regarding death-eligibility, and provides adequate safeguards against the arbitrary and capricious imposition of the death penalty).

This claim, including subclaims A and B, is untimely, procedurally barred, and without merit.

Accordingly, having found that both Claims One and Two are untimely, procedurally barred, and without merit, it is

ORDERED AND ADJUDGED that

1. Defendant's Successive Motion to Vacate Judgment of Conviction and Sentence of Death Pursuant to Florida Rule of Criminal Procedure 3.851 After a Signed Death Warrant is **DENIED**.

2. Defendant's request for a stay of execution incorporated into Defendant's successive motion is **DENIED**.

3. The Clerk of Charlotte County shall electronically transmit a copy of this order to the Clerk of the Florida Supreme Court immediately, and shall electronically transmit the Record on Appeal to the Clerk of the Florida Supreme Court immediately, but no later than Monday, January 27, 2025, 3:00 p.m., as directed by the Florida Supreme Court in its order issued January 10, 2025.

Defendant may appeal this decision to the Florida Supreme Court by filing a notice of appeal by 9:00 a.m., Monday, January 27, 2025, as detailed in the Florida Supreme Court's order issued on January 10, 2025.

DONE AND ORDERED in Chambers in Punta Gorda, Charlotte County, on the date affixed to the below signature.

01/23/2025 14:27:46
97000351F
Lisa S. Porter, Circuit Court Judge 7moKAZ96 97000351F
01/23/2025 14:27:46

Electronic Service List:
Florida Supreme Court <warrant@flcourts.org>
Adrienne Shepherd <Shepherd@ccmr.state.fl.us>,
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Charlotte eFile Account <cha-efiling@ca.cjis20.org>
Charlotte County Sheriff's Office <JailClassification@ccsofl.net>
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No. _____

IN THE

Supreme Court of the United States

JAMES D. FORD,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

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

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

THIS IS A CAPITAL CASE
WITH AN EXECUTION SCHEDULED FOR
THURSDAY, FEBRUARY 13, 2025, AT 6:00 P.M.

APPENDIX C

January 29, 2025 Initial Brief of the Appellant.

Filing # 215612334 E-Filed 01/29/2025 02:52:14 PM

No. SC2025-0110

EXECUTION SCHEDULED FOR FEBRUARY 13, 2025 at 6:00 PM

IN THE

Supreme Court of Florida

JAMES D. FORD,

Appellant,

v.

STATE OF FLORIDA,1

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT, IN AND FOR CHARLOTTE COUNTY, FLORIDA
Lower Tribunal No.: 081997CF0003510001XX

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REQUEST FOR ORAL ARGUMENT

James Ford ("Ford") respectfully requests oral argument pursuant to Florida Rule of Appellate Procedure 9.320. The resolution of the issues involved in this action will determine whether Ford lives or dies. This Court has not hesitated to allow argument in other capital cases in a similar procedural posture. *See Asay v. State*, 224 So. 3d 695, 699 (Fla. 2017) (where this Court stayed Asay's execution after holding an oral argument). A full opportunity to air the issues through oral argument is appropriate in this case because of the seriousness of the claims at issue and the ultimate penalty that the State seeks to impose on Ford.

PRELIMINARY STATEMENT REGARDING REFERENCES

References to the record of the direct appeal of the trial in this case are of the form R[volume]/[page].

References to the current record on appeal before this Court in Florida Supreme Court Case No.: SC2025-0110 are of the form SC/[page].

STATEMENT OF THE CASE AND FACTS

I. Procedural History

Following a capital trial which occurred from February 22 to March 8 of 1999, James D. Ford, ("Ford") was convicted of two counts of first-degree murder, one count of sexual battery with a firearm and one count of child abuse in Charlotte County, Florida. From April 19 to 23, 1999, the trial court conducted a penalty phase proceeding before the same jury which had convicted Ford. That jury recommended death by an 11 to 1 vote on both counts of first-degree murder. R51/4692. The trial court followed the jury's recommendation and imposed a death sentence on both counts. R53/4746-66.

The trial court found the following aggravators at trial:

> (1) the murder was committed in an especially heinous, atrocious, or cruel manner (HAC) (great weight)
> (2) the murder was committed in a cold, calculated, and premeditated fashion (CCP) (great weight)
> (3) the murder took place during the commission of a sexual battery (great weight)
> (4) Ford was previously convicted of another capital felony, i.e., the contemporaneous murder (great weight)

Some statutory mitigation was found by the trial court:

> (1) no significant history of prior criminal activity (proven, some weight)

(2) extreme mental or emotional disturbance (not proven, no weight)
(3) extreme duress (not proven, no weight)
(4) impaired capacity (not proven, no weight)
(5) the young mental age of the defendant (proven, very little weight).

As nonstatutory mitigation, the trial court found 17 points of mitigation.[1]

On direct appeal, Ford raised six issues:

(1) Whether the prosecutor made improper comments

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[1] The trial court addressed the following nonstatutory mitigating circumstances as they related to both murders and assigned each a degree of weight: (1) Ford was a devoted son (proven, very little weight); (2) Ford was a loyal friend (proven, very little weight); (3) Ford is learning disabled (proven, no weight); (4) mild organic brain impairment (not proven, no weight); (5) developmental age of fourteen (proven, no weight); (6) family history of alcoholism (this circumstance was proven but it is not mitigating vis-a-vis the death penalty in general, no weight); (7) chronic alcoholic (proven, very little weight); (8) diabetic (this circumstance was proven but it is not mitigating vis-a-vis the death penalty in general, no weight); (9) excellent jail record (proven, some weight); (10) engaged in self-improvement while in jail (proven, some weight); (11) the school system failed to help (proven, very little weight); (12) emotional impairment (not proven, no weight); (13) mentally impaired (not proven, no weight); (14) impaired capacity (not proven, no weight); (15) not a sociopath or a psychopath (this circumstance was proven but it is not mitigating vis-a-vis the death penalty in general, no weight); (16) not antisocial (this circumstance was proven but it is not mitigating vis-a-vis the death penalty in general, no weight); (17) the alternative sentence is life without parole (this circumstance was proven but it is not mitigating vis-a-vis the death penalty in general, no weight).

during closing argument in the guilt phase
(2) whether the prosecutor asked an improper question concerning "flesh" on the defendant's knife
(3) whether the indictment adequately charged Ford with child abuse
(4) whether the prosecutor made improper comments during closing argument in the penalty phase
(5) whether the evidence of CCP was sufficient to submit this aggravator to the jury and to support the finding of this aggravator
(6) whether the trial court properly considered all the mitigating evidence

On appeal, the Florida Supreme Court ("FSC) affirmed Ford's convictions and sentences, despite finding that the trial judge erroneously refused to recognize and weigh a number of mitigating circumstances which were in fact established by Ford. *Ford v. State,* 802 So. 2d 1121, 1135-36 (Fla. 2001). The United States Supreme Court ("USSC") denied certiorari review on May 28, 2002. *Ford v. Florida,* 535 U.S. 1103 (2002). Ford filed a motion with the state circuit court under Fla. R. Crim. P. 3.851. The court summarily denied the motion, and the FSC affirmed the denial. *Ford v. State,* 955 So. 2d 550 (Fla. 2007). Next, Ford filed a petition for a writ of habeas corpus in the United States District Court for the Middle District of Florida ("district court"). The district court dismissed the petition as untimely filed, and did not permit equitable tolling. *Ford*

v. Sec'y Department of Corrections, 2009 WL 3028886 (M.D. Fla. 2009). The Eleventh Circuit Court of Appeals ("Eleventh Circuit") denied a certificate of appealability. *Ford v. Sec'y, Dep't of Corr.*, No. 09-14820, slip op. at *1 (11th Cir. Oct. 27, 2009); *see* 28 U.S.C. § 2253(c).

On November 4, 2009, Ford filed a petition for writ of certiorari in the USSC challenging the Eleventh Circuit's denial of a certificate of appealability. The USSC granted the petition, vacated the judgment, and remanded the case for further consideration in light of *Holland v. Florida*, 560 U.S. 631 (2010). *Ford v. McNeil*, 561 U.S. 1002 (2010). Once the case was remanded to the Eleventh Circuit, it was then remanded further back to the district court for the limited purposes of conducting proceedings and analysis consistent with *Holland*. *Ford v. Sec'y, Dep't of Corr.*, 614 F.3d 1241 (11th Cir. 2010). The district court ultimately determined that Ford was not entitled to equitable tolling. *Ford v. Sec'y, Dep't of Corr.*, No. 2:07- cv-333, 2012 WL 113523, at *10 (M.D. Fla. Jan. 13, 2012). On March 14, 2012, the Eleventh Circuit denied a certificate of appealability. *Ford v. Sec'y, Dep't of Corr.*, No. 09-14820, slip op. at *17 (11th Cir. Mar. 14, 2012).

Ford filed a successive Fla. R. Crim. P. 3.851 motion in the state circuit court on March 20, 2013, arguing ineffective assistance of postconviction counsel pursuant to *Martinez v. Ryan*, 566 U.S. 1 (2012) and *Trevino v. Thaler*, 569 U.S. 413 (2013), and challenging the lethal injection protocol as well as non-unanimous jury recommendations. The state circuit court summarily denied relief on December 20, 2013. The FSC affirmed the denial of relief. *Ford v. State*, 168 So.3d 224 (Fla. 2015). Ford's subsequent petition to the USSC was denied on November 30, 2015. *Ford v. Florida*, 577 U.S. 1010 (2015).

The state circuit court denied Ford's second successive Rule 3.851 motion on March 9, 2017, which argued that Ford was entitled to relief pursuant to *Hurst v. State,* 202 So. 3d 40 (Fla. 2016). The FSC affirmed the denial of relief, *Ford v. State*, 237 So. 3d 904 (Fla. 2018), and a subsequent petition to the USSC was rejected as untimely.

The governor signed Ford's death warrant on Friday, January 10, 2025. Ford's execution is scheduled for February 13, 2025. The state circuit court summarily denied Ford's entire successive Rule

3.851 motion for postconviction relief on January 23, 2025. This timely appeal follows.

SUMMARY OF ARGUMENT

ARGUMENT I: The lower court erred in summarily denying Ford's claims as procedurally barred and otherwise untimely. Ford, while under the procedural and time limitation confines of an active death warrant, informed the state circuit court and the State about the timeliness of his claims in the current successive Rule 3.851 motion at issue under the section titled:

"(C) REASON CLAIMS RAISED IN PRESENT MOTION WERE NOT RAISED IN FORMER MOTION." SC/254.

Specifically, Ford made it clear that Claim One of his successive motion was triggered by the signing of the death warrant and defense expert Dr. Hyman Eisenstein's January 16, 2025 evaluation of Ford at the Florida State Prison ("FSP"), whereas Claim Two was not ripe until the USSC decision in *Erlinger v. United States*, 602 U.S. 821 (2024). SC/254.

The state circuit court erred by relying on a narrow interpretation of Fla. R. Crim. P. 3.851(d)(2), which arbitrarily interferes with Ford's ability to raise claims for relief at the death

warrant stage of postconviction proceedings. In addition to rejecting the lower court's restrictive interpretation of Rule 3.851(d)(2), this Court should overturn prior State precedent regarding successive pleadings at the warrant stage. As currently interpreted at the death warrant stage of a capital defendant's proceedings, Rule 3.851(d)(2) violates Ford's Fourteenth Amendment due process rights, Eighth Amendment right to narrowly tailored individualized sentencing, and Sixth Amendment right to effective assistance of counsel.

ARGUMENT II: The state circuit court erred in summarily denying Ford's claim that his execution would violate *Roper v. Simmons*, 543 U.S. 551 (2005). Ford has the mental and developmental age of a fourteen-year-old based on the assessment of mental health experts who have evaluated him. Neuropsychological testing also indicates that Ford has organic brain impairment. Ford further has a current diagnosis of Autism Spectrum Disorder. Defense expert Dr. Hyman Eisenstein has evaluated Ford twice since Ford's death warrant was signed and administered tests and obtained results not previously presented in the lower court. Dr. Eisenstein has also conducted phone interviews with members of Ford's family, which have informed some of his opinions in diagnosing Ford. Based on the

evolving standards of decency that mark the progress of a maturing society, it would be a violation of the Eighth Amendment to execute Ford considering his mental impairments.

ARGUMENT III: The state circuit court erred in summarily denying Ford's claim his death sentence and pending execution would violate Ford's Fourteenth Amendment due process rights, his Sixth Amendment right to a unanimous jury, and Eighth Amendment rights under the United States Constitution. The recent USSC decision *Erlinger v. United States*, 602 U.S. 821 (2024), serves as a reminder that Ford's nonunanimous advisory panel recommendation is unconstitutional. Moreover, denying Ford the retroactive benefit of relief pursuant *Hurst v. Florida*, 577 U.S. 92 (2016) and *Hurst v. State,* 202 So. 3d 40 (Fla. 2016) is arbitrary and capricious. It would be a manifest injustice to deny Ford relief.

STANDARD OF REVIEW

Because the state circuit court denied postconviction relief without an evidentiary hearing, this Court must accept the factual allegations presented in Ford's motion and in this appeal as true to the extent that they are not conclusively refuted by the record. *Ventura v. State*, 2 So. 3d 194, 197-98 (Fla. 2009). Further, this Court

"review[s] the trial court's application of the law to the facts *de novo*." *Green v. State*, 975 So. 2d 1090, 1100 (Fla. 2008). A postconviction court's decision whether to grant an evidentiary hearing is likewise subject to de novo review. *Rose v. State*, 985 So. 2d 500, 505 (Fla. 2008).

ARGUMENT

ARGUMENT I

THE STATE CIRCUIT COURT ERRED IN SUMMARILY DENYING FORD'S TWO SUCCESSIVE CLAIMS, BASED ON THE COURT'S APPLICATION OF FLA. R. CRIM. P. 3.851(d)(2), WHICH IS UNCONSITUTIONAL WHEN APPLIED DURING WARRANT LITIGATION. THIS COURT MUST RECONSIDER ITS PRECEDENT REGARDING SUCCESSIVE POSTCONVICTION LITIGATION AT THE DEATH WARRANT STAGE, AS THE CURRENT PROCESS VIOLATES FORD'S FEDERAL FOURTEENTH AMENDMENT DUE PROCESS RIGHTS; HIS FEDERAL EIGHTH AMENDMENT RIGHT TO NARROWLY TAILORED INDIVIDUALIZED SENTENCING; HIS FEDERAL SIXTH AMENDMENT RIGHT TO EFFECTIVE COUNSEL; HIS FLORIDA CONSTITUTIONAL RIGHT TO DUE PROCESS; HIS FLORIDA CONSTITUTIONAL RIGHT AGAINST CRUEL AND UNUSUAL PUNISHMENT; AND HIS FLORIDA CONSTITUTIONAL RIGHT TO ACCESS THE COURTS.

Governor DeSantis signed Ford's death warrant on January 10, 2025, with an execution set for February 13, 2025. Undersigned counsel was served with a copy of the death warrant, tasked with the job of serving as Ford's collateral counsel during his warrant

litigation. On January 18, 2025, Ford timely filed and served his Defendant's Successive Motion to Vacate Judgment of Conviction and Sentence of Death Pursuant to Florida Rule of Criminal Procedure 3.851 After a Signed Death Warrant. ("Motion"). SC/251. The motion had two claims, delineated as follows:

CLAIM ONE

> **FORD'S DEATH SENTENCE IS UNCONSTITUTIONAL UNDER *ROPER V. SIMMONS*, 543 U.S. 551 (2005) AND THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION BECAUSE HE HAS A MENTAL AND DEVELOPMENTAL AGE BELOW EIGHTEEN YEARS OLD.**

SC/255. And,

CLAIM TWO

> **PUTTING FORD TO DEATH WOULD VIOLATE HIS FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION, CONSIDERING THE UNITED SUPREME COURT'S RECENT OPINION, *ERLINGER V. U.S.* 602 U.S. 821 (2024), ADDRESSING JUROR UNANIMITY IN FACT-FINDING REGARDING SENTENCING PROCEEDINGS.**

A. Ford's Fifth Amendment Due Process Rights and Sixth Amendment Right to a Unanimous Jury, as Selectively Incorporated Though the Fourteenth Amendment, are Being Violated Considering *Erlinger v. U.S.*, 602 U.S. 821 (2024).

B. This New Consideration of Ford's Proceedings Further Establishes that his Death Sentence is Arbitrary and Capricious, in Violation of the Eighth Amendment

SC/266. Pursuant to the requirements of his successive motion, Ford detailed why his two claims could not have been raised in a prior proceeding. SC/254. Ford explained that Claim One was initiated by the signing of the death warrant and defense expert Dr. Hyman Eisenstein's January 16, 2025 evaluation of Ford at the Florida State Prison ("FSP"), whereas Claim Two was not ripe until the USSC decision, *Erlinger v. United States*, 602 U.S. 821 (2024). SC/254. The State filed its response on January 20, 2025. SC/290. The State specifically relied on Fla. R. Crim. P. 3.851(d)(2) while arguing that Ford's claims should be summarily denied. SC/293-95.

On January 23, 2025, the state circuit court formerly filed its Order Denying Defendant's Successive Motion To Vacate Judgment Of Conviction And Sentence Of Death Pursuant To Florida Rule Of Criminal Procedure 3.851 After A Signed Death Warrant. ("Order"). SC/355-76. While summarily denying Ford's claims, the state circuit court made references to Ford's alleged failure to comply with the successive pleading requirements of Fla. R. Crim. P. 3.851(d)(2), which specifically reads:

> (2) No motion shall be filed or considered pursuant to this rule if filed beyond the time limitation provided in subdivision (d)(1) unless it alleges:
>
> (A) 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, or
>
> (B) the fundamental constitutional right asserted was not established within the period provided for in subdivision (d)(1) and has been held to apply retroactively, or
>
> (C) postconviction counsel, through neglect, failed to file the motion

Id. Regarding Claim One, the state circuit court found in relevant part that Ford's claim "was untimely, was previously raised, and explicitly abandoned by Ford, and asserts no new facts that can be considered "newly discovered."' SC/364-65. After misreading Ford's claim as one involving intellectual disability, SC/366-67, the court found that Ford offered no supporting case law that "narrows" *Roper v. Simmons*, 543 U.S. 551 (2005) in the manner suggested by Ford, and that the court was unable to find any "exception to the time limits established by rule 3.851 or any cause for this claim being raised until after the issuance of the death warrant." SC/368. The state circuit court further opined that Claim One was "untimely, procedurally barred, and without merit." SC/369.

In denying Claim Two, the state circuit court relied on Fla. R. Crim. P. 3.851(d)(2) in opining *Erlinger* was not "newly discovered evidence." SC/370-72. The state circuit court further found that the findings from *Erlinger* could not be held retroactively to Ford's case. SC/372-74. Regarding the arbitrary and capricious argument on Ford's unconstitutional sentence/execution, the court found it previously raised and denied. SC/374. The court ultimately found Claim Two to be untimely, procedurally barred, and without merit. SC/375. The court's findings are wholly restrictive and are based on the unconstitutionally narrow language of Fla. R. Crim. P. 3.851(d)(2). As currently interpreted, Fla. R. Crim. P. 3.851(d)(2) is unconstitutional when applied to successive motions filed in the post-death-warrant context.

Ford does not allege that Fla. R. Crim. P. 3.851(d)(2) is unconstitutional when applied to successive motions filed outside of the warrant context. However, the signing of an active death warrant and the scheduling of an actual execution date renders the circumstances of any successive postconviction motion filed during a warrant different enough to necessitate a more lenient approach to which claims may be raised and litigated. A Florida inmate's death

sentence does not automatically mean that particular inmate will be executed by the State of Florida or even receive a signed death warrant at all. Many Florida inmates have sat on death row for years after receiving their death sentence without ever receiving a signed death warrant, and they finally died due to natural causes.[2]

Fla. R. Crim. P 3.851(h) outlines the procedure for postconviction litigation after a death warrant is signed, stating that "[a]ll motions filed after a death warrant is issued shall be considered successive motions and subject to the content requirement of subdivision (e)(2) of this rule." Fla. R. Crim. P. 3.851(e)(2) states that

> A motion filed under this rule is successive if a state court has previously ruled on a postconviction motion challenging the same judgment and sentence. A claim raised in a successive motion shall be dismissed if the trial court finds that it fails to allege new or different grounds for relief and the prior determination was on the merits; or, if new and different grounds are alleged, the trial court finds that the failure to assert those grounds in a prior motion constituted an abuse of the procedure; or, if the trial court finds there was no good cause for failing to

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[2] A non-exhaustive list of these inmates includes: Margaret Allen, DOC #699575; Richard Lynch, DOC #E08942; Franklin Floyd, DOC #R30302; Steven Evans, DOC #330290; Guy Gamble, DOC #123096; Joseph Smith, DOC #899500; Charles Finney, DOC #516349; Donald Dufour, DOC #061222; Anthony Washington, DOC #075465; Lloyd Chase Allen, DOC #890793. Many more inmates that are still living have remained on Florida's death row for years, some even decades, without ever receiving a signed active death warrant.

> assert those grounds in a prior motion; or, if the trial court finds the claim fails to meet the time limitation exceptions set forth in subdivision (d)(2)(A), (d)(2)(B), or (d)(2)(C).

The restrictive text of Fla. R. Crim. P. 3.851(d)(2) enumerating only three narrow circumstances where a successive motion may be considered violates both the federal and Florida constitutions when applied in the active warrant context because the rule effectively cuts off substantial avenues for relief that a capital defendant facing an actual execution date could attempt to raise. The rule, when applied during an active warrant like Ford's current case, effectively violates Ford's federal Fourteenth Amendment Due Process rights, federal Eighth Amendment right to a narrowly tailored individualized sentencing determination, and federal Sixth Amendment right to effective assistance of counsel. The rule also violates Ford's Florida constitutional rights: to due process; against cruel and unusual punishment; and to access the courts. Art. I § 9, 17, 21., Fla. Const.

A post-warrant defendant is not, and should not, be treated as a successive capital litigant in a *non-warrant* posture. Almost immediately after a warrant is signed, the defendant is transferred from the Union Correctional Institution ("UCI") to the FSP. He loses possession of his tablet and easier access to the UCI library. Unlike

a typical successive postconviction motion, a post-warrant capital defendant has a finite—approximately a month-- period of time to research and raise claims. A post-warrant capital litigant should therefore be treated differently when it comes to successive litigation. This Court should use Ford's case as an opportunity to find Fla. R. Crim. P. 3.851(d)(2) inapplicable to capital defendants litigating under an active death warrant.

Due Process

Ford is entitled to due process of law, as established by the Fourteenth Amendment to the United States Constitution and the corresponding provision of Florida's Constitution. Similar to his due process right, Ford also has an explicit right under the Florida constitution to access the courts because "[t]he courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay." Art. 1 § 21, Fla. Const. Ford is effectively being denied his due process rights and right to access the Florida courts, because of the unyielding requirements of Fla. R. Crim. P. 3.851(d)(2).[3] Ford has been on death row since June

[3] While this initial brief focuses specifically on the stringent requirements of Fla. R. Crim. P. 3.851(d)(2) because that was the

11, 1999, and he is currently litigating his third successive Rule 3.851 motion. Like most post-warrant defendants, as articulated in the post-warrant cases relied on by the state circuit court and the State, defendants at this posture are met with a procedural bar to relief. Reliance on such a procedural bar to a defendant who understandably spent decades exhausting claims for relief, has the effect of denying Ford access to the Florida courts in any reasonable sense.

This Court's scheduling order issued on January 10, 2024 setting out state court proceedings pursuant to the warrant, serves no legitimate purpose if the "proceedings" are based on the unyielding strict interpretation of Fla. R. Crim. P. 3.851(d)(2). The state court proceedings are no more than "for show" if Ford and similarly situated capital defendants in the post-warrant context are barred from raising claims at the very *last* opportunity to save their

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lower court's focus in the January 23, 2025 denial order, Fla. R. Crim. P. 3.851(e) also appears to violate the same set of constitutional rights as Rule 3.851(d)(2) when applied in the warrant context because that provision of the rule also severely restricts the avenues of relief that a capital defendant may raise during an active death warrant to the point of foreclosing substantial avenues of relief in practice.

life. Without a reexamination of the flexibility of Fla. R. Crim. P. 3.851(d)(2), litigating Ford's motion is akin to just "going through the motions," as Ford has no realistic fair opportunity for his day in court.

Eighth Amendment and Individualized Sentencing

Fla. R. Crim. P. 3.851(d)(2), as currently interpreted and utilized, violates Ford's Eighth Amendment right to narrowly tailored individualized sentencing. Florida's use of the procedural bar in the death warrant context prevents Ford from presenting that his case is not among the most aggravated and least mitigated. *State v. Dixon*, 283 So. 2d 1, 7 (Fla. 1973). The newly discovered facts and evidence of Ford's mental impairments, along with the guidance of the *Erlinger* decision, show that Ford should have the benefit of a new penalty phase proceeding. *See infra* at pp. 38-42.

The USSC has made clear that the consideration of mitigation by the sentencer is at the heart of the constitutionality of the death penalty. In *Proffitt v. Florida*, 428 U.S. 242 (1976), the USSC considered whether the imposition of the sentence of death for the crime of murder under Florida law violated the Eighth and Fourteenth Amendments. *Id.* at 244. The USSC found that Florida's

new death penalty law passed constitutional scrutiny because "the sentencing judge must focus on the individual circumstances of each homicide and each defendant. *Id.* at 252. The unique mental impairments that Ford has suffered throughout his life were not completely heard and fully considered by the trial court, thus failing to meet the requirements of *Proffitt*.

The USSC developed even more principles to ensure that the death penalty was not exacted on those who did not meet the requirements of the Constitution. *Woodson v. North Carolina*, 428 U.S. 280 (1976), required that a death penalty scheme "allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death." *Id.* at 303. This did not occur in Ford's case, as he currently has weighty mitigation, but the time limitations of warrant litigation, and the procedural bar, is preventing the final factfinder from evaluating Ford's mitigation, before lethal injection is "imposed upon him." Then came a litany of cases that required consideration of mitigation. In *Lockett v. Ohio*, 438 U.S. 586 (1978) the USSC "conclude[d] that the Eighth and Fourteenth Amendments require that the sentencer ... not be precluded from considering, as

a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Id.* at 604.

In *Eddings v. Oklahoma*, 455 U.S. 104 (1982) the USSC applied *Lockett*, stating that,

> the rule in *Lockett* followed from the earlier decisions of the Court and from the Court's insistence that capital punishment be imposed fairly, and with reasonable consistency, or not at all. By requiring that the sentencer be permitted to focus "on the characteristics of the person who committed the crime," *Gregg v. Georgia, supra*, at 197, 96 S.Ct., at 2936, the rule in *Lockett* recognizes that "justice ... requires ... that there be taken into account the circumstances of the offense together with the character and propensities of the offender." *Pennsylvania v. Ashe*, 302 U.S. 51, 55, 58 S.Ct. 59, 60, 82 L.Ed. 43 (1937). By holding that the sentencer in capital cases must be permitted to consider any relevant mitigating factor, the rule in *Lockett* recognizes that a consistency produced by ignoring individual differences is a false consistency.

Id. at 112. A clear understanding of these cases demonstrates that the USSC has long recognized the need for an individualized sentencing that carefully considers *all* mitigation. Because of the oppressive procedural bar, Ford is being denied this one last opportunity to provide the state court a complete understanding of all the mitigation that informs Ford's life choices. He has been denied a stay for Dr. Eisenstein to complete his assessments and report. As

was fully detailed in Ford's Motion, there is substantial and compelling mitigation that weighs against Ford's death sentence that the trial court never heard. Ford should be granted an evidentiary hearing on Claim One and a full reconsideration of the sentencing scheme afflicted upon him under Claim Two.

Sixth Amendment

Ford's Sixth Amendment right to effective counsel is being violated, as Fla. R. Crim. P. 3.851(d)(2) in the warrant litigation context precludes undersigned counsel from substantially litigating on Ford's behalf. As all viable claims at the death warrant stage are subjected to Florida's procedural bar, Ford is essentially being denied any representation at all during his active death warrant unless his case meets one of the three very narrow claims for relief. Ford has a constitutional right to counsel under the federal Sixth Amendment as applied to the states through the Fourteenth Amendment, which includes the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 684-86 (1984); *Gideon v. Wainwright*, 372 U.S. 335 (1963). The right to effective counsel also applies to Ford's collateral proceedings. *Martinez v. Ryan*, 566 U.S. 1 (2012).

Although undersigned counsel has proudly, diligently, and

ethically represented Ford, the procedural bar of Fla. R. Crim. P. 3.851(d)(2) and the time-limitations of Ford's 33-day warrant practically preclude Ford from receiving the effective assistance of counsel under the Sixth Amendment. Undersigned counsel maintains that it is not best practice for counsel for a capital defendant to file an *Anders*[4] brief as the final state pleading on behalf of a capital client when that client is under an active death warrant. "Death is different," and all viable avenues of relief should be fully assessed before the State exercises the ultimate sanction by executing a Florida capital defendant like Ford. Indeed, Ford has viable claims which have been preserved for this Court's review. However, unless this Court reconsiders the application of Fla. R. Crim. P. 3.851(d)(2) in the death warrant context, any narrow reading of the statute will basically preclude Ford from receiving relief.

Postconviction counsel has the skills and tools to assist capital defendants at the warrant stage, but without a reconsideration of the application of Fla. R. Crim. P. 3.851(d)(2) during an active death warrant, Ford and all Florida capital defendants who receive an active

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[4] *Anders v. California*, 386 U.S. 738 (1967).

death warrant, are not provided a canvass for counsel to truly assist them. Ford's case is an appropriate time to protect the rights of all Florida capital defendants and make effective use of judicial time and resources. Fla. R. Crim. P. 3.851(d)(2) must be reconsidered, and relief is proper.

ARGUMENT II

THE STATE CIRCUIT COURT ERRED IN SUMMARILY DENYING FORD'S CLAIM THAT HIS DEATH SENTENCE IS UNCONSTITUTIONAL UNDER *ROPER V. SIMMONS*, 543 U.S. 551 (2005) AND THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION BECAUSE HE HAS A MENTAL AND DEVELOPMENTAL AGE BELOW EIGHTEEN YEARS OLD.

Ford argued in Claim One of his January 18, 2025 Rule 3.851 motion that his death sentence was unconstitutional under the USSC's underlying reasoning in *Roper v. Simmons*, 543 U.S. 551 (2005) because he has a mental and developmental age of below eighteen years old. SC/255-66. The state circuit court erred in summarily denying Ford's Claim One without holding an evidentiary hearing. SC/364-69. Relief is proper.

It is beyond dispute that the Eighth Amendment's prohibition of "cruel and unusual punishments" is not a static command. *See*

Roper v. Simmons, 543 U.S. 551, 589 (2005). Rather, because "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man," the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Roper*, 543 U.S. at 589 (internal citation omitted). "Because the death penalty is the most severe punishment, the Eighth Amendment applies to it with special force," and the USSC has relied on the evolving standards of decency within our society to slowly narrow the class of offenders who may be subject to the death penalty consistent with society's evolving understanding of human mental functioning and culpability.[5] The class of offenders subject to the death penalty should be narrowed again to preclude the execution of individuals with a mental and developmental age less than age 18. James Ford's mental and developmental age was less

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[5] *See Roper*, 543 U.S. at 568 (2005); *see also Ford v. Wainwright*, 477 U.S. 399 (1986) (the Eighth Amendment prohibits the execution of the insane); *Thompson v. Oklahoma*, 487 U.S. 815 (1988) (the Eighth Amendment prohibits the execution of a person who was under 16 years of age at the time of the offense); *Atkins v. Virginia*, 536 U.S. 304, 306 (2002) (the Eighth Amendment prohibits the execution of intellectually disabled individuals); *Roper v. Simmons*, 543 U.S. 551 (2005) (the Eighth Amendment prohibits the execution of juvenile offenders under age 18).

than age 18 at the time of the capital offense he was convicted of, and his execution should therefore be prohibited as cruel and unusual punishment under the federal Eighth Amendment, as applied to the states through the federal Fourteenth Amendment.

The lower court erroneously found that Ford's Claim One was untimely, previously raised and explicitly abandoned by Ford, and asserted no facts that can be considered "newly discovered." SC/364-65. The lower court found that the "undisputed" fact that Ford's mental and developmental age is fourteen years old is not newly discovered because it was supported both by expert testimony at Ford's 1999 trial from defense expert Dr. William Mosman and the trial court's 1999 sentencing order finding it was proven that Ford's developmental age was fourteen years old. SC/365.

Ford does not dispute that there is historical evidence from his 1999 trial that was acknowledged by the trial court that he had a developmental age of fourteen. However, Ford acknowledged two new current circumstances in his Rule 3.851 motion that gave rise to his current claim under *Roper v. Simmons*- the signing of Ford's January 10, 2025 active death warrant and defense expert Dr. Hyman Eisenstein's preliminary January 16, 2025 evaluation of Ford's

current mental impairments following the signing of the death warrant. SC/254, 260-61. These issues were further raised and argued at the January 21, 2025 *Huff*[6] hearing. SC/385-87.

Undersigned counsel acknowledged at the *Huff* hearing that while the January 10, 2025 death warrant was a new circumstance giving rise to Ford's Claim One, that fact did not rise to the level of a newly discovered evidence claim because Ford already had a death sentence. SC/384-85. Undersigned counsel subsequently argued that there was some new evidence that needed to be put before the lower court at an evidentiary hearing based on the results of Dr. Eisenstein's preliminary January 16, 2025 evaluation of Ford confirming that he still suffers impairments in his mental functioning. SC/386-87. Undersigned counsel further requested a stay of execution in both the Rule 3.851 motion and at the *Huff* hearing so that Dr. Eisenstein could complete his evaluation. SC/260-61; 388-89. The fact that one of the reasons the lower court denied Ford's *Roper* claim was because it asserted no "newly discovered" facts highlights the impossible position that the stringent

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

requirements of Fla. R. Crim. P. 3.851(d)(2) place Ford under when applied during his active death warrant. As the lower court acknowledged, there is "undisputed" historical evidence from Ford's trial that his mental and developmental age is below age 18. Ford should at the very least be able to raise this argument in order to access the courts and litigate for the preservation of his life one final time now that his active death warrant has been signed. Ford has been denied that opportunity by Rule 3.851(d)(2)'s unconstitutional procedural bar. The continued application of this procedural bar in Ford's case does not honor this Court's consistent recognition that "death is different," especially since Ford's state-imposed death is now scheduled to occur only fifteen days from the filing of this brief.[7]

The lower court also erroneously found that Ford's *Roper* claim was previously abandoned by Ford because he waived pursuing a

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[7] *See Robertson v. State*, 143 So. 3d 907, 912 (Fla. 2014) (internal citations omitted) (Florida jurisprudence "begin[s] with the premise that death is different."); *Ocha v. State*, 826 So. 2d 956, 964 (Fla. 2002) ("This Court has long adhered to the idea that [i]n the field of criminal law, there is no doubt that 'death is different.' "); *Swafford v. State*, 679 So. 2d 736, 740 (Fla. 1996) (internal citations omitted) ("[O]ur jurisprudence also embraces the concept that 'death is different' and affords a correspondingly greater degree of scrutiny to capital proceedings.").

claim related to mental retardation[8]/ intellectual disability in his prior postconviction proceedings. SC/365-67. Ford did not waive the current *Roper* claim raising his mental and developmental age of fourteen years old when he previously waived pursuing a claim of intellectual disability because the two conditions are not necessarily identical and do not always occur at the same time. While these two mental states certainly can occur at the same time in an individual, they do not jointly occur for Ford. As Dr. Mosman explained in his 1999 trial testimony, Ford's mental and developmental age was about age fourteen based on Dr. Mosman's testing, but he did not qualify as mentally retarded. *See infra* at pp. 34-38. If given the opportunity at an evidentiary hearing, Dr. Eisenstein can also opine that while Ford still currently has a developmental age less than age eighteen based on recent testing, he does not currently have a diagnosis of intellectual disability.

Further, intellectual disability is a condition that is diagnosed based on three very specific medical diagnostic criteria and legal

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[8] "Intellectual disability" has since replaced "mental retardation" as the appropriate term for the condition. Fla. Stat. § 921.137(9).

criteria specifically enumerated for the condition and is specifically codified in Florida law as its own categorical exclusion from the death penalty.[9] While a mental and developmental age of fourteen can certainly overlap with intellectual disability, the two conditions are simply not identical for Ford. It is clear that Ford was only waiving a specific claim of intellectual disability under the medical and legal

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[9] The AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS FIFTH EDITION TEXT REVISION (2022) ("DSM-5-TR") explains at page 38 that the three following criteria must be met to be diagnosed with intellectual disability: (1) "Deficits in intellectual functions, such as reasoning, problem solving, planning, abstract thinking, judgment, academic learning, and learning from experience, confirmed by both clinical assessment and individualized, standardized intelligence testing," (2) "Deficits in adaptive functioning that result in failure to meet developmental and sociocultural standards for personal independence and social responsibility." and (3) "Onset of intellectual and adaptive deficits during the developmental period." This definition is mirrored by the AMERICAN ASSOCIATION ON INTELLECTUAL AND DEVELOPMENTAL DISABILITIES, INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS (12th ed. 2021) ("AAIDD-12") at page 13: "[Intellectual disability] is characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. This disability originates during the developmental period, which is defined operationally as before the individual attains age 22."; *see also* Fla. Stat. § 921.137 ("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.").

criteria, and not any and all claims related to his mental and developmental age of fourteen years old.

In *Roper v. Simmons,* the USSC held that the Eighth and Fourteenth Amendments forbid the imposition of the death penalty on offenders under the age of eighteen at the time of the crime. 543 U.S. 551 (2005). The *Roper* court discussed what it considered "three general differences between juveniles under 18 and adults" that diminish the culpability of juveniles and preclude classifying them among the worst offenders subject to the death penalty. *Id.* at 569. These three differences are: (1) they have a "'lack of maturity and an underdeveloped sense of responsibility'" that "'often result in impetuous and ill-considered actions and decisions'"; (2) they are "more vulnerable or susceptible to negative influences and outside pressures, including peer pressure"; and (3) their characters are "not as well formed" and their personalities "more transitory, less fixed" than those of adults. *Id.* at 570–71. As a result of these differences, the behavior of juveniles cannot be considered as morally reprehensible as that of adults for the same actions. *Id.* at 570. *Roper* concluded that "once the diminished culpability of juveniles is recognized," it is evident that the two penological justifications for the

death penalty- retribution for and deterrence of capital crimes- applies to juveniles with lesser force than adults. *See id* at 571; *see also Atkins*, 536 U.S. at 319 (explaining that retribution and deterrence of capital crimes by prospective offenders are the two social purposes served by the death penalty).

It is clear from the *Roper* opinion that the USSC excluded juveniles from the death penalty based, at least in part, on the lesser mental and emotional functioning that often corresponds with youth, and not only because they chronologically fall below age 18. The *Roper* exclusion was based on an analysis of the mental, developmental, and emotional attributes of juveniles as compared to adults, not a math equation calculating their years lived. *Roper's* reasons for the exclusion referred to juveniles' lack of maturity, vulnerability to peer pressure, and underdeveloped characters. The *Roper* court selected the chronological age of eighteen years old as the cut-off age at which a person could be eligible for the death penalty, because "a line must be drawn," and explained that "age of 18 is the point where society draws the line for many purposes between childhood and adulthood." *Id.* at 574. However, the *Roper* court also appeared to recognize that an individual's chronological

age will not always correspond with their level of functioning, stating that "the qualities that distinguish juveniles from adults do not disappear when an individual turns 18. By the same token, some under 18 have already attained a level of maturity some adults will never reach." *Id.* at 574. Chronological age should not be the only question asked when determining exclusion from the death penalty under *Roper*, and Ford should fall under the *Roper* exclusion because his mental and developmental age was at most fourteen years old at the time of the offense.

Ford was thirty-six years old at the time the homicides occurred on April 6, 1997. However, his developmental age was much lower. Expert trial testimony from psychologist Dr. William Mosman, who evaluated Ford in 1999, indicated that Ford's mental and developmental age would have been closer to age fourteen when the homicides occurred. Dr. Mosman interviewed, observed, and evaluated Ford on two occasions and administered a variety of tests. R48/4282. There was no suggestion that Ford was malingering. R48/4285. Dr. Mosman also reviewed numerous records for his evaluation, including jail and medical records, school records, trial transcripts, crime scene photos, and autopsy photos. R48/4282-83.

Dr. Mosman also reviewed the interview summaries of about twenty lay witnesses, including schoolteachers, principals, friends, and family members of Ford, but did not specifically interview these individuals. R48/4284. Dr. Mosman opined that it was well within a reasonable doubt of clinical certainty that at the time the crime happened Ford was under the influence of extreme mental and also extreme emotional disturbance. R48/4286. Ford's capacity to appreciate the criminality of his conduct or conform his conduct was also substantially impaired when the crimes were committed. R48/4287.

Dr. Mosman opined that, based on Dr. Mosman's testing, Ford's mental and developmental age was about 14 years old. R48/4287. The testing has been consistent that Ford mentally functions from about 11 to 14 years of age. R48/4288. There is no clinical doubt that Ford has a history of being abused and neglected as a child. R48/4288. Dr. Mosman explained that there's clear evidence of a deprived and disadvantaged childhood, which can help us to understand Ford's emotional impairment. R48/4289. Dr. Mosman explained that Ford has a mental intellectual age of 11 to 14. R48/4289. Ford's emotional impairment is a different factor, and

emotionally and developmentally Ford is probably in the area of about 9 years old. R48/4289. Dr. Mosman explained that when we look at Ford's entire history, there were systems that knew there were problems. R48/4290. Ford was known to be having troubles for years in school. R48/4290. Ford dealt with withdrawal, embarrassment, humiliation, depression, and drinking. R48/4290. None of the systems jumped in and helped Ford. R48/4290

Dr. Mosman explained that there are indicators for Ford of an inability to plan ahead because of his low intellectual functioning ("IQ"). R48/4295. Dr. Mosman said that in some areas Ford's scores reach into the mentally retarded area, and other areas are borderline. R48/4295. There were some indicators of financial irresponsibility in Ford not following through on his child support payments for two reasons- lack of income to some extent and an inability to handle checking accounts and checkbooks. R48/4296. The women in Ford's life managed the money and the finances because Ford could not add. R48/4296. Dr. Mosman administered the Wechsler Adult Intelligence Scale- Revised Edition ("WAIS-R"), which Ford received a verbal IQ score of 87. R48/4300-01. That score is made up of about six or seven other scores within that, and there are scores that reach

much lower than that. R48/4301. Dr. Mosman explained that although he was not opining that Ford was mentally retarded, his ability to reason sequentially, and organize and work things through methodically was at the "retarded level." R48/4301. Ford has learned through repetition, but he has rarely learned verbally. R48/4301. Ford's performance score on the WAIS-R was 94, which is the lower area of average. R48/4302. Ford has impairments and problems in all areas, with the verbal area being the most deficit. R48/4302.

Dr. Mosman also administered the Slosson Intelligence Test-Revised ("SIT-R"), which rendered a score of 94. R48/4302. Dr. Mosman explained that he liked to use this test because it can be used to measure how old the person is that he is working with, which explained Ford's developmental age of 14 years. R48/4302-03. Dr. Mosman explained that he could bring in a 14-year-old kid in seventh grade, and that person would get along, communication-wise, very well with Ford. R48/4303. There would be a pretty close match between the two, everything else being equal. R48/4303. Dr. Mosman also gave the Wide Range Achievement Test-Revised ("WRAT-R2") to Ford on January 18, 1999, which indicates Ford could read at about the fifth-grade level, which was the age equivalent to about an 11-

year-old child. R48/4303. The WRAT-R2 also indicated that Ford's ability to spell in 1999 was the age equivalent of about a 10-year-old child and his ability to do mathematics was the age equivalent of about a 12-year-old child. R48/4303.

Dr. Mosman also gave the Bender Gestault test, which indicates that Ford has some collateral damage in some areas of the brain, which could be an explanation for why Ford has learning disabilities. R48/4304. Ford is also seriously learning disabled and has been all his life. R48/4305. Dr. Mosman also gave the Denman Verbal Memory Scale, and Ford came up with scores that he is seriously disabled in that area. R48/4305. He had scores of three and scores of six. R48/4305. The explanation for Ford's memory issues is that "he's got some minimal brain damage." R48/4306.

Dr. Mossman also administered the Tremel 18A and Tremel 18B- a connect-the-dot processing test, and Ford's scores on that test showed he was impaired, meaning he has very slow processing speed. R48/4306. Dr. Mosman explained that based on his review of Ford's DeSoto County public school records, Ford had school testing on IQ at age seven with a score of 65. R48/4309. However, Dr. Mosman explained that he did not think Ford was retarded, but that important

areas of his brain functioning since age seven have been in the mentally retarded area. R48/4309. Ford was deeply embarrassed, humiliated, wanted to avoid school, and was not getting adequate support at home from his parents. R48/4310. Ford was a kid with brain damage and functioning in the retarded area who did not get the understanding he needed for academic development from home or school, which resulted in him dropping out. R48/4310.

Even at the age of 65, Ford's impairments in mental functioning persist, and an evidentiary hearing is needed to put forth expert testimony concerning Ford's current mental impairments. Neuropsychologist Dr. Hyman Eisenstein conducted neuropsychological testing of Ford on January 16 and 27, 2025, and he is available to testify to the results of his testing and evaluation of Ford. Due to the extreme time constraints caused by the arbitrary warrant timeframe set by the governor, the lower court could only consider the results of Dr. Eisenstein's preliminary evaluation of Ford on January 16th, and was not apprised of the full evaluation results because the court denied Ford's request for a stay.

In the January 18, 2025 motion, Ford alleged the following from Dr. Eisenstein's preliminary evaluation. *See* SC/260-61. Dr.

Eisenstein administered the Delis Kaplan Executive Function System ("D-KEFS"), which is a neuropsychological test used to measure a variety of verbal and nonverbal executive functions for both children and adults. The D-KEFS consists of nine subtests, which includes the Trail Making Test. On the Visual Scanning portion of the Trail Making Test, Ford had a standard score of 4, which is the equivalent of an IQ of 70, placing Ford in the borderline range for intellectual functioning for that section.[10] On the Letter Sequencing portion of the Trail Making Test, Ford had a standard score of 3, which is the equivalent of an IQ of 65, placing Ford in the intellectually disabled range for that section.

As another example of Ford's current impairments, Dr. Eisenstein administered the Wide Range Achievement Test- 5th Edition, the current version of the same test administered by Dr. Mosman in 1999. The Wide Range Achievement Test measures an

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[10] Ford is not alleging that he is intellectually disabled under the standards set forth by *Atkins v. Virginia*, 536 U.S. 304, (2002), *Hall v. Florida,* 572 U.S. 701 (2014), or the medical diagnostic standards for intellectual disability. However, the available evidence indicates that his intellectual functioning in some areas is low enough to be the equivalent of the IQ of someone who is either intellectually disabled or borderline intellectually disabled.

individual's ability to read, comprehend sentences, spell, and solve math problems. While some of Ford's results showed improvement, he still scored at grade equivalents corresponding with individuals in elementary or high school. Ford's word reading on the test corresponded with a grade equivalent to tenth grade. Ford's spelling on the test corresponded with a grade equivalent to third grade. Ford's solving of math problems on the test corresponded with a grade equivalent to fourth grade. Ford's sentence comprehension on the test corresponded with a grade equivalent to tenth grade.

Since the January 21, 2025 *Huff* hearing, Dr. Eisenstein was able to conduct further evaluation of Ford's mental impairments by evaluating him a second time, administering additional tests, and interviewing members of Ford's family. This additional testing provides both corroborating and completely new evidence than the trial court heard in 1999. Based on his further evaluation, Dr. Eisenstein can opine to the fact that Ford's performance on the Shipley Institute of Living Scale, which measured Ford's language and abstraction skills, rendered results showing that his age-equivalent is far lower than his chronological age. Ford scored the age-equivalent of 15.1 years on the vocabulary section and 12 years

on the abstraction section. Ford's total on the test rendered an age-equivalent of 13.3 years. Ford is currently 65 years old.

Dr. Eisenstein is further available to opine that additional neuropsychological testing he was able to administer after the January 21, 2025 *Huff* hearing indicates Ford has organic brain impairment/ brain damage based on his impaired test performance. Ford performed in the moderately to severely impaired range on the Tactual Performance Test, a sub-test of the Halstead–Reitan Neuropsychological Test, which assesses the condition and functioning of the brain. Ford also performed in the moderately impaired range on the Wisconsin Card Sorting Test and the mildly to moderately impaired range on the Texas Functional Living Scale. All of these tests indicate that Ford has some level of organic brain impairment, and Dr. Eisenstein suggests that imaging be conducted of Ford's brain to confirm the brain damage he likely suffers.

Finally, Dr. Eisenstein is available to opine that Ford meets the diagnostic criteria for Autism Spectrum Disorder based on Dr. Eisenstein's evaluation of Ford and his interviews with Ford's family members. The diagnostic understanding of autism has evolved over the past twenty-six years since Dr. Mosman first evaluated Ford in

1999, and Dr. Mosman did not render an autism diagnosis for Ford at trial. Ford's current diagnosis of Autism Spectrum Disorder therefore qualifies as newly discovered evidence that can surmount Fla. R. Crim. P. 3.851(d)(2)'s stringent procedural bar, and could have been considered by the lower court if a stay had been properly granted.

The jurisprudence of the USSC following its decisions in *Atkins* and *Roper* dictates that courts may not ignore the standards and practices of the relevant scientific and medical community in interpreting the contours of the Eighth Amendment, since the Amendment "'is not fastened to the obsolete.'" *See Hall v. Florida,* 572 U.S. 701, 708 (2014) (internal quotation omitted). In *Hall v. Florida,* the USSC relied heavily on the medical community's diagnostic standards for intellectual disability when the court rejected Florida's bright line rule that a person with an IQ score above 70 did not have an intellectual disability and was barred from presenting other related evidence. *See* 572 U.S. at 710-14. The *Hall* court explained that when determining who is intellectually disabled and therefore ineligible for execution under the Eighth Amendment, it is proper for courts to consult the medical community's opinions and found that

Florida's bright line rule disregarded established medical practice. *Id.* at 710, 712.

Similarly, in *Moore v. Texas*, 581 U.S. 1 (2017), the USSC concluded that the Texas Court of Criminal Appeals erred when it rejected a finding that the defendant was intellectually disabled by applying judicially created non-clinical standards rather than medical diagnostic standards. The USSC then vacated the lower court's judgment, noting *Hall's* instruction that adjudications of intellectual disability should be "informed by the views of medical experts." *Moore*, 581 U.S at 5 (internal citations omitted). Similar to *Hall* and *Moore's* reliance on medical and scientific standards when determining which defendants were excluded from the death penalty under the Eighth Amendment by intellectual disability, courts should also look to the relevant scientific standards when determining whether defendants may be excluded from the death penalty under the Eighth Amendment due to their mental and developmental age.

Evidence from the practice of psychology lends support to the argument that courts should consider defendants' mental and developmental age when determining their level of culpability. Several modern psychological tests which are administered by

experts in the field of psychology generate "age equivalency" scores, indicating that psychologists recognize that an individual's level of functioning may render an age equivalent that is less than their chronological age in years. For example, the Second Edition of the Vineland Adaptive Behavioral Scales (Vineland II) tests the social adaptive functioning of people with intellectual disabilities and measures their performance along a spectrum of ages. *See* Michael Clemente, *A Reassessment of Common Law Protections for "Idiots"*, 124 Yale L.J. 2746, 2799 (2015) (citing Sara S. Sparrow, *Vineland Adaptive Behavior Scales, in* ENCYCLOPEDIA OF CLINICAL NEUROPSYCHOLOGY 2618, 2618-20 (Jeffrey S. Kreutzer et al. eds., 2011)). Similarly, the Fourth Edition of the Peabody Picture Vocabulary Test (PPVT-4), which measures listening and understanding of single-word vocabulary, provides age-based and grade-based standard scores. *See* Michael Clemente, *A Reassessment of Common Law Protections for "Idiots"*, 124 Yale L.J. 2746, 2799 (2015) (citing Nathan Henninger, *Peabody Picture Vocabulary Test, in* Encyclopedia of Clinical Neuropsychology, 1889, 1889 (Jeffrey S. Kreutzer et al. eds., 2011)).

Further, the Shipley Institute of Living Scale, which Dr.

Eisenstein administered to Ford during his active death warrant, provides age-equivalent scores based on testing of an individual's language and abstraction skills. *See supra* at pp. 40-41. All of these psychological tests may render an age-equivalence score that is different than the individual's chronological age, and Ford's performance on the Shipley Institute of Living Scale rendered age equivalents far lower than his actual chronological age. *See supra* at pp. 40-41. The psychological testing performed on Ford demonstrates that he suffers from diminished mental capacity that places his mental age much lower than his chronological age. Ford's mental age is a far better indicator of his maturity – and his related moral culpability – than his chronological age, since it represents a more thorough understanding of his mental functioning:

> 'Mental age' as commonly understood is the chronological age equivalent of the person's highest level of mental capacity. That is, judging only from the person's cognitive and behavioral capacities, what age would we typically associate with this level of functioning? It is an incapacity to think or act on a higher level of functioning, not merely a failure to do so ... Those whose mental age places them in the same cognitive-functional categories as minors may also be deemed simply morally lax, but to the extent their condition is shown to be a result of objective causes (such as organic condition, developmental deficits, and substance abuse), their non-compliance with adult norms is no more voluntary than the juvenile's. Thus, mental age

> is a condition which shares the identical incapacity for higher-level functioning as the other excuses: it is an involuntary (objective) condition deviating from the adult norm.

James Fife, *Mental Capacity, Minority, and Mental Age in Capital Sentencing: A Unified Theory of Culpability,* 28 Hamline L. Rev. 239, 261 (2005). This Court should consider that Ford's mental and developmental age at the time of the homicides was less than age 18 when determining if he is excluded from execution under *Roper v. Simmons.*

Finally, when discerning our society's evolving standards of decency, laws enacted by state legislatures provide the "clearest and most reliable objective evidence of contemporary values." *Roper*, 543 U.S. at 589 (internal quotation omitted). Statutes in at least four states- Florida, California, Texas, and Illinois- codify the need for protective services for adults who are chronologically age 18 or older, but their mental functioning renders them disabled or vulnerable. These statutes evidence our society's acknowledgment that an adult who is chronologically older than age 18 may need special consideration under the law due to mental conditions that affect how they function and further show our acknowledgment that not all

chronological-age adults function as adults. For example, the intent of Florida's Adult Protective Services Act is "to establish a program of protective services for all vulnerable adults in need of them." Fla. Stat. § 415.101(2). The statute defines a "vulnerable adult" as "a person 18 years of age or older whose ability to perform the normal activities of daily living or to provide for his or her own care or protection is impaired due to a mental, emotional, sensory, long-term physical, or developmental disability or dysfunction, or brain damage, or the infirmities of aging." Fla. Stat. § 415.102(28). California, Texas, and Illinois also have state statutes that establish the need for protective services for dependent or disabled adults who are age 18 or older but have limitations in their mental functioning. *See* Cal. Welf. & Inst. Code § 15600 and 15610.23; TX HUM RES § 48.001 and 48.002; 320 Ill. Comp. Stat. Ann. 20/3 and 20/2.

Ford is not alleging that he qualifies as a vulnerable or disabled adult under these specific statutes. However, these statues are important evidence of our society's acceptance that chronological age is not the only indication of human functioning, and certain adults will need special protection or consideration under the law because their mental impairments render their functioning less than what we

expect of an adult. Although Ford's chronological age is above 18, his mental impairments render his functioning less than an adult, and he should therefore be provided special protection against the death penalty in the same way that individuals under age 18 are pursuant to *Roper v. Simmons.*

At the time of the offense for which Ford has been convicted and sentenced to death, his mental and developmental age was closer to that of a fourteen-year-old than a thirty-six-year-old. Ford's execution must therefore be barred as cruel and unusual punishment under the federal Eighth Amendment, federal Fourteenth Amendment, and *Roper v. Simmons*. Ford's execution is set for February 13, 2025, only fifteen days away from the date of the filing of this brief. Under our society's evolving standards of decency, his execution must not take place. Undersigned counsel respectfully requests that this Court reverse the lower court's determination of Ford's Claim One and relinquish jurisdiction to the lower court so that an evidentiary hearing on this claim may be held.

Undersigned counsel also respectfully requests that this Court grant Ford a stay of execution because this claim is a substantial ground upon which relief might be granted and deserves to be fully

addressed by this Court free from the constraints of an accelerated death warrant schedule. *See Chavez v. State*, 132 So. 3d 826, 832 (Fla. 2014) (internal citations omitted) (explaining that a stay of execution pending the disposition of a successive motion for postconviction relief is warranted when there are substantial grounds upon which relief might be granted). Relief is proper.

ARGUMENT III

PUTTING FORD TO DEATH WOULD BE A MANIFEST INJUSTICE AND VIOLATE HIS FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION, CONSIDERING THE UNITED SUPREME COURT'S RECENT OPINION, *ERLINGER V. U.S.* 602 U.S. 821 (2024), ADDRESSING JUROR UNANIMITY IN FACT-FINDING REGARDING SENTENCING PROCEEDINGS. FAILING TO PROVIDE FORD RELIEF WOULD RESULT IN A MANIFEST INJUSTICE.

A. Ford's Fifth Amendment Due Process Rights and Sixth Amendment Right to a Unanimous Jury, as Selectively Incorporated Though the Fourteenth Amendment, are Being Violated Considering *Erlinger v. U.S.*, 602 U.S. 821 (2024). Failing to provide Ford relief would result in a manifest injustice.

B. This New Consideration of Ford's Proceedings Further Establishes that his Death Sentence is Arbitrary and Capricious, in Violation of the Eighth Amendment. Failing to provide Ford relief would result in a manifest injustice.

The *Erlinger v. U.S.*, 602 U.S. 821 (2004) decision is a reminder that Ford's death sentences are contrary to *Hurst v. Florida*, 577 U.S.

92 (2016) and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). Ford should have received the benefit of *Hurst* relief in his prior successive litigation at this Court. *See Ford v. State*, 237 So. 3d 904 (Fla. 2018). He unequivocally asserts that based on *Hurst*, he was denied his right to a jury determination, proof beyond a reasonable doubt, and unanimity under the Sixth and Fourteenth Amendments. As a result of Florida's failure to remedy these violations, Ford's sentences violate the Eighth Amendment's bar against excessive, arbitrary, and capricious punishment and equal protection under the Fourteenth Amendment.

Manifest Injustice

If this Court does not find *Hurst* retroactive to Ford's case, the law of the case is overcome because adhering to the law of the case would result in a manifest injustice. This Court explained in *State v. Owen*, 696 So.2d 715 (Fla. 1997):

> Generally, under the doctrine of the law of the case, "all questions of law which have been decided by the highest appellate court become the law of the case which must be followed in subsequent proceedings, both in the lower and appellate courts." *Brunner Enters., Inc. v. Department of Revenue,* 452 So.2d 550, 552 (Fla.1984). However, the doctrine is not an absolute mandate, but rather a self-imposed restraint that courts abide by to promote finality and efficiency in the judicial process and prevent

> relitigation of the same issue in a case. *See Strazzulla v. Hendrick,* 177 So.2d 1, 3 (Fla.1965) (explaining underlying policy). This Court has the power to reconsider and correct erroneous rulings in exceptional circumstances and where reliance on the previous decision would result in manifest injustice, notwithstanding that such rulings have become the law of the case. *Preston v. State,* 444 So.2d 939 (Fla.1984).
>
> An intervening decision by a higher court is one of the exceptional situations that this Court will consider when entertaining a request to modify the law of the case. *Brunner, 452 So.2d at 552; Strazzulla,* 177 So.2d at 4.

Id. at 720. On a basic level, the denial of relief based on *Hurst*, under the unique circumstances of Ford's case and the guidance from *Erlinger*, is fundamentally unfair and a manifest injustice.

This Court has a duty to remedy the *manifest injustice* in Mr. Ford's case. Regarding a state habeas petition before this Court, then Chief Justice Anstead's special concurrence in *Baker v. State,* 878 So. 2d 1236 (Fla. 2004), joined by Justice Pariente and Justice Lewis, is instructive:

> I write separately to sound a note of caution and reminder that in our attempts to efficiently regulate a system for addressing postconviction claims we must constantly keep in mind that we are dealing with the writ of habeas corpus, the Great Writ, which is expressly set out in Florida's Constitution. That writ is enshrined in our Constitution to be used as a means to correct manifest injustices and its availability for use when all other remedies have been

> exhausted has served our society well over many centuries. This Court will, of course, remain alert to claims of manifest injustice, as will all Florida courts. As we reaffirmed in *Harvard v. Singletary*, 733 So. 2d 1020, 1024 (Fla. 1999), "we will continue to be vigilant to ensure that no fundamental injustices occur."
>
> We must also be mindful of the concerns expressed by Justice Overton in *Harvard*:
>
> > Habeas corpus jurisdiction is basic to our legal heritage. It is so basic that the authors of our habeas corpus jurisdiction made it unique with regard to this Court because it states that habeas corpus jurisdiction may not only be exercised by the entire Court, but it may also be exercised by a single justice. It is the only jurisdictional provision that gives authority to an individual justice. The provision also takes particular care to address the problem of resolving substantial issues of fact, a concern of the majority, by allowing the Court or any justice to make the writ returnable to "any circuit judge."
>
> *Id.* at 1025 (Overton, Senior Justice, dissenting). With these concerns in mind, I concur with the basic premise of the majority opinion that postconviction claims that would ordinarily be subject to the strictures of rule 3.850 in the trial courts are not relieved of those strictures by filing the same claims in this Court.

Baker, 878 So. 2d at 1246. In this successive 3.851 appeal under an active warrant, Ford asks this Court to exercise jurisdiction under the Court's inherent power to grant relief, and the guarantees of the Florida and United States Constitutions. This Court should provide a remedy for this manifest injustice. Considering the *Erlinger*

decision, along with Ford's pending execution in about 2-weeks' time, this is indeed an "exceptional circumstance" in which this Court should not rely on the prior rulings adverse to Ford. *Greene v. Massey*, 384 So. 2d 24, 28 (1980) and *Henry v. State*, 649 So. 2d 1361, 1364 (Fla. 1995). Lastly, in light of *Erlinger*, this Court should reconsider its prior decisions in *Asay v. State*, 210 So. 3d 1, (Fla. 2017) and its progeny relied on by the lower court. SC371. Similarly, though it should not be retroactively applicable to Ford's case, this Court should also overturn its decision in *State v. Poole*, 297 So. 3d 487 (Fla. 2020). The circuit court also relied on this Court's precedent in denying this claim, SC/371, 375, which this Court has the power to reconsider in doing justice and protecting the constitutional rights of capital defendants like Ford. Relief is proper.

A. Ford's Fifth Amendment Due Process Rights and Sixth Amendment Right to a Unanimous Jury, as Selectively Incorporated Though the Fourteenth Amendment, are Being Violated, Considering *Erlinger v. U.S.*, 602 U.S. 821 (2024).

According to the USSC, under the Fifth and Sixth Amendments of the Constitution, "[o]nly a jury may find facts that increase the prescribed range of penalties to which a criminal defendant is exposed." *Erlinger v. United States*, 602 U.S. 821, 822 (2024) (internal

quotation marks omitted). Because a factual finding that the defendant's predicate offenses "occurred on at least three separate occasions" has "the effect of increasing *both* the maximum and minimum sentences" he faces, such finding "must be resolved by a unanimous jury beyond a reasonable doubt (or freely admitted in a guilty plea). *Id.* at 822, 834. Though the *Erlinger* analysis concerned the Armed Career Criminal Act ("ACCA"), it is essential to apply the holding to capital defendants such as Ford, who were denied unanimous jury recommendations of death. *Erlinger* further states:

> The Sixth Amendment promises that "[i]n all criminal prosecutions the accused" has "the right to a speedy and public trial, by an impartial jury." Inherent in that guarantee is an assurance that any guilty verdict will issue only from a unanimous jury. *Ramos v. Louisiana*, 590 U.S. 83, 93, 140 S.Ct. 1390, 206 L.Ed.2d 583. The Fifth Amendment further promises that the government may not deprive individuals of their liberty without "due process of law." It safeguards for criminal defendants well-established common-law protections, including the "ancient rule" that the government must prove to a jury every one of its charges beyond a reasonable doubt. Together, these Amendments place the jury at the heart of our criminal justice system and ensure a judge's power to punish is derived wholly from, and remains always controlled by, the jury and its verdict. *Blakely v. Washington*, 542 U.S. 296, 306, 124 S.Ct. 2531, 159 L.Ed.2d 403.
>
> The Court has repeatedly cautioned that trial and sentencing practices must remain within the guardrails

> provided by these two Amendments. Thus in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435, the Court held that a novel "sentencing enhancement" was unconstitutional because it violated the rule that only a jury may find "facts that increase the prescribed range of penalties to which a criminal defendant is exposed." *Id.*, at 490, 120 S.Ct. 2348. This principle applies when a judge seeks to issue a sentence that exceeds the *maximum* penalty authorized by a jury's findings as well as when a judge seeks to increase a defendant's *minimum* punishment. See, *e.g., Alleyne v. United States*, 570 U.S. 99, 111–113, 133 S.Ct. 2151, 186 L.Ed.2d 314. Pp. 1848 – 1851.

Id. at 822. Ford never had an actual jury during his sentencing proceedings, as rather his *advisory panel* recommended death by an 11 to 1 vote on both counts of first-degree murder. (R51/4692). The trial court followed the jury's recommendation and imposed a death sentence on both counts. (R53/4746-66). Ford is also not asking for exact retroactive application of *Erlinger* to Ford's case as the facts are dissimilar, and rule 3.851 (D) (2) as argued in Issue One, supra. Rather, the *Erlinger* decision is a clear reminder of the necessity of Florida to reconsider its own laws regarding juror fact-finding and the need for a unanimous jury recommendation for death. True, *Erlinger* does not involve a "capital case in which the death penalty may be imposed." SC/372. Ford does, however, vehemently disagree with the circuit

court's finding that *Erlinger* contributes nothing of any significance, substance, or merit to Ford's claims or arguments. SC/372. The monumental *Ring v. Arizona*, 536 U.S. 584 (2002), extended the non-capital *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) to capital jurisprudence. It would be short-cited and ignoring precedent, to not also seek guidance from non-capital cases when a life is at stake. Ford's death sentence violates *Apprendi/Ring*, as well as *Erlinger*. His basic Sixth, Eighth, and Fourteenth amendment rights are being violated.

Prior to *Hurst v. Florida* and *Hurst v. State*, a person who elected to have a jury hear their penalty trial and who was then sentenced to death pursuant to Florida's death penalty sentencing scheme did not have a jury unanimously find beyond a reasonable doubt every element necessary for a death sentence. The instructions to the advisory panel only indicated they should consider aggravating circumstances found to have been proven beyond a reasonable doubt. However, no factual findings were ever made.

The USSC analyzed Florida's death sentencing scheme in *Hurst v. Florida* as one in which a jury renders only an advisory verdict without specifying the factual basis of its recommendation, while the

judge evaluates the evidence of aggravation and mitigation and makes the ultimate sentencing determinations. *Hurst v. Florida,* at 620. The USSC stated, "Florida law required the judge to hold a separate hearing and determine whether sufficient aggravating circumstances existed to justify imposing the death penalty.... We hold this sentencing scheme unconstitutional. The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death." *Id.* at 619. The Court went on to find:

> Florida concedes that *Ring*[11] required a jury to find every fact necessary to render Hurst eligible for the death penalty. But Florida argues that when Hurst's sentencing jury recommended a death sentence, it "necessarily included a finding of an aggravating circumstance."... The State fails to appreciate the central and singular role the judge plays under Florida law....The State cannot now treat the advisory recommendation by the jury as the necessary factual finding that *Ring* requires.

Id. at 622. (Emphasis added). In *Hurst v. State*, the FSC addressed the pre-*Hurst* version of § 921.141, Fla. Stat. (2012) and identified the elements of the criminal offense, i.e., capital first-degree murder punishable by death:

> Thus, before a sentence of death may be considered by the trial court in Florida, the jury must find the existence of

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[11] *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002).

> the aggravating factors proven beyond a reasonable doubt, that the aggravating factors are sufficient to impose death, and that the aggravating factors outweigh the mitigating circumstances.

Hurst v. State, 202 So. 3d at 53. (emphasis added). Because the statutorily defined facts were necessary to increase the range of punishment to include death, the Florida Supreme Court reiterated the USSC's finding that proving them was necessary "to essentially convict a defendant of capital murder." *Id.* at 53-54. Proof of these facts define a higher degree of murder. Proof of these facts is necessary for a conviction. In contrast to pre-*Hurst* instructions, post-*Hurst* instructions required a jury to unanimously find the existence of any aggravating factor, as well as to "'unanimously find that the aggravating factors are sufficient for the imposition of death and unanimously find that the aggravating factors outweigh the mitigation before a sentence of death may be considered by the judge.'"[12]

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[12] The Florida Supreme Court later decided *Poole v. State*, 297 So. 3d 487 (Fla. 2020) which overturned aspects of *Hurst v. State*. Ford acknowledges the *Poole* decision but rejects the notion that it should be applied to his case retroactively. Ford further preserves his issue, as the *Poole* decision should not apply to his unique circumstances.

While *Hurst v. State* makes clear the elements that must be proved in order for someone to be sentenced to death, Florida courts did not understand what was considered an element before *Hurst v. Florida and Hurst v. State.* In *Asay*[13], the FSC stated, "[Before *Hurst v. Florida,*] we did not treat the aggravators, the sufficiency of the aggravating circumstances, or the weighing of the aggravating circumstances against the mitigating circumstances as elements of the crime that needed to be found by a jury to the same extent as other elements of the crime." This is significant, because identifying the facts or elements necessary to increase the authorized punishment is a matter of substantive law. *Alleyne v. United States*, 570 U.S. 99, 113-14 (2013).[14] Where the constitutional standard of proof beyond a reasonable doubt is at issue, a holding that overcomes a deficiency in the trial that impairs the operation of this standard would be given complete retroactive effect. *See, Ivan V. v. City of N.Y.*,

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[13] *Asay v. State*, 210 So. 3d 1, 15-16 (Fla. 2017).

[14] *Alleyne v. United States*, 570 U.S. at 113-14 ("Defining facts that increase a mandatory statutory minimum to be part of the substantive offense enables the defendant to predict the legally applicable penalty from the face of the indictment.")

407 U.S. 203, 204–05, 92 S. Ct. 1951, 1952 (1972).[15] *See also*, *Powell v. Delaware*, 153 A.3d 69 (Del. 2016) (holding *Hurst* retroactive under Delaware's state *Teague*-like retroactivity doctrine and distinguishing *Summerlin* on the ground that *Summerlin* "only addressed the misallocation of fact-finding responsibility (judge versus jury) and not . . . the applicable burden of proof.").

Similarly, in *Fiore v. White*, 531 U.S. 225 (2001), the USSC addressed the Due Process Clause in the context of the substantive law defining a criminal offense:

> We granted certiorari in part to decide when, or whether, the Federal Due Process Clause requires a State to apply a new interpretation of a state criminal statute retroactively to cases on collateral review.

Id. at 226. Before resolving the issue, the USSC asked the Pennsylvania Supreme Court to explain the basis for its decision regarding the elements of the criminal offense for which Fiore had been convicted. The USSC asked whether the decision construing the criminal statute was a new interpretation or was it a straightforward reading of the statute. *Fiore v. White*, 531 U.S. at 226. The

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[15] *See also*, *Montgomery v. Louisiana*, 136 S. Ct. 718, 732 (2016); *Hankerson v. N. Carolina*, 432 U.S. 233, 240–41, 97 S. Ct. 2339, 2344, (1977).

Pennsylvania Supreme Court explained that its earlier "ruling merely clarified the plain language of the statute." *Id.* at 228. Accordingly, the USSC found that the state court's ruling dated back to the statute's enactment. It was the substantive law when the statute was enacted. The Court held:

> This Court's precedents make clear that Fiore's conviction and continued incarceration on this charge violate due process. We have held that the Due Process Clause of the Fourteenth Amendment forbids a State to convict a person of a crime without proving the elements of that crime beyond a reasonable doubt.

Id. at 228-29.[16] (emphasis added). Because the Petitioner Mr. Fiore had not been found guilty of an essential element of the substantively defined criminal offense, his conviction was not constitutionally valid. The USSC granted him federal habeas relief. *Id.*

Ford had a nonunanimous advisory panel; it was in the trial court's discretion to determine whether death was an appropriate sentence. Ford's sentencing order fails to indicate that the highest standard of proof was used by the court to find this final important element. There is no way to know if the State met its burden to prove

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[16] *Fiore*, at 229, citing *Jackson,* 443 U. S., at 316; *In re Winship,* 397 U. S. 358, 364 (1970).

each element beyond a reasonable doubt where Ford's sentencing order does not indicate what standard was applied to the trial court's finding that the aggravators outweighed the mitigators. We only know that it had to give great weight to an advisory recommendation. Along with basic fundamental fairness, *See Mosley v. State*, 209 So. 3d 1248, 1274–75 (Fla. 2017), the *Erlinger* decision informs that Ford should have a new penalty phase proceeding. Ford's sentence violates his due process rights and right to a trial by a unanimous jury. Executing him would be an injustice.

B. This New Consideration of Ford's Proceedings Further Establishes that his Death Sentence is Arbitrary and Capricious, in Violation of the Eighth Amendment

Though the circuit court must have missed this point, SC/372, the *Erlinger* decision is indeed the "new consideration," which points to Ford's Eighth Amendment rights being violated. Moreover, the *Erlinger* decision cites to *Ramos v. Louisiana*, 590 U.S. 83, 93 (2020), concerning the constitutional requirement of a unanimous jury finding of guilt for a serious offense. It would be beyond illogical to opine that unanimity is required for a guilty verdict, but something less than unanimous is permitted for a jury to recommend that the

government may execute/kill a fellow human being. This court can address this disconnect right now, by granting Ford relief.

During Ford's trial, this court rejected Ford's timely raised motion for a "mercy" instruction pursuant to *Henyard v. State*, 689 So. 2d 239 (Fla. 1996). (R50/4559). Within one year of *Hurst v. Florida* and *Hurst v. State*, Ford filed a successive 3.851 motion for a new penalty phase proceeding on January 12, 2017. The FSC affirmed the denial of relief by citing *Hitchcock v. State*, 226 So.3d 217, 2018 (Fla. 2017), which relied on *Asay*. In Ford's previous successive motion, Ford specifically challenged the lack of juror unanimity in his death recommendation. This Court affirmed the summary denial of relief. *Ford v. State*, 168 So. 3d 224 (Fla. 2015). Ford has consistently attempted to litigate issues regarding the proper responsibility of jurors in capital sentencing. Fundamental fairness entitles him to relief.[17] However, because Ford's case became final at the denial of his petition for certiorari to the USSC on May

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[17] In *Mosley,* the Florida Supreme Court found two conditions that would qualify for retroactive application of *Hurst*: (1) prisoners whose death sentences became final on direct appeal after *Ring* was decided on June 24, 2002 and (2) prisoners who raised the issues presented in *Ring*. *Mosley*, at 1274-1275. *See also, James v. State*, 615 So.2d 668 (Fla. 1993).

28, 2002, whereas *Ring v. Arizona*, 536 U.S. 584 (2002) was final on June 24, 2002, Ford is facing execution on February 13, 2025 because he missed Florida's arbitrary cutoff of *Hurst* relief by a **mere 27 days**.

The USSC issued *Apprendi* and *Ring*. In *Apprendi*, the Court held that in a non-capital case, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490. The Court recognized that the principles supporting a jury trial,

> extend[] down centuries into the common law. "[T]o guard against a spirit of oppression and tyranny on the part of rulers," and "as the great bulwark of [our] civil and political liberties," 2 J. Story, Commentaries on the Constitution of the United States 540-541 (4th ed. 1873), trial by jury has been understood to require that "the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbours...."

Id. at 477 (citations omitted). Justice Scalia, in concurrence, added,

> It sketches an admirably fair and efficient scheme of criminal justice designed for a society that is prepared to leave criminal justice to the State. (Judges, it is sometimes necessary to remind ourselves, are part of the State-and an increasingly bureaucratic part of it, at that.). The founders of the American Republic were not prepared to

> leave it to the State, which is why the jury-trial guarantee was one of the least controversial provisions of the Bill of Rights. It has never been efficient; but it has always been free.

Id. at 498.

In *Ring v. Arizona*, 536 U.S. 584,122 S.Ct. 2428 (2002), the Court held that "[c]apital defendants, no less than non-capital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." Id. at 589, 2432. Ford's case was final prior to *Ring*, but after *Apprendi* was decided. Thus, Ford's death sentence is even more arbitrary and constitutionally offensive than those capital litigants that fall in the pre-*Apprendi* cohort, as Florida was on notice at least since *Apprendi*, and then later from *Ring*, that Florida's capital sentencing scheme was unconstitutional. In *Mosley*, the FSC recognized that "fundamental fairness alone may require the retroactive application of certain decisions involving the death penalty after the United States Supreme Court decides a case that changes our jurisprudence." *Mosley*, 209 So.3d at 1274–75. In this case, fundamental fairness requires Ford receiving a new penalty phase proceeding, as his case was final after the *Apprendi* decision.

Ford remains sentenced to death not because of where his case falls on the aggravation and mitigation continuum, but because of where his case falls on the calendar. Many individuals, for no other reason than their case became final after *Ring,* have received new trials that follow the constitutional requirements of *Hurst v. Florida* and *Hurst v. State.* They will have received an actual sworn jury, fully and constitutionally instructed on the jury's role as the ultimate decision maker. In pre-*Poole* cases, the State also had the burden of proving aggravating factors for a unanimous jury recommendation, and that the aggravating factors outweigh the mitigating factors beyond a reasonable doubt.

"Death is different." *Woodson v. North Carolina*, 428 U.S. 208, 305 (1976). The United States Supreme Court has made clear:

> Under the Eighth Amendment, the death penalty has been treated differently from all other punishments. [ ] Among the most important and consistent themes in this Court's death penalty jurisprudence is the need for special care and deliberation in decisions that may lead to the imposition of that sanction. The Court has accordingly imposed a series of unique substantive and procedural restrictions designed to ensure that capital punishment is not imposed without the serious and calm reflection that ought to precede any decision of such gravity and finality.

Thompson v. Oklahoma, 487 U.S. 815, 856 1988)(internal citations

omitted). In *Furman*, the USSC found that the death penalty, as applied throughout the United States, violated the Eighth and Fourteenth Amendment's prohibition of cruel and unusual punishment. *Id.* at 239–40. The Court did not find the death penalty itself was unconstitutional and later allowed the death penalty under narrow circumstances. See *Gregg v. Georgia,* 428 U.S. 153 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976), *et al. Furman* "recognize[d] that the penalty of death is different in kind from any other punishment imposed under our system of criminal justice. Because of the uniqueness of the death penalty, *Furman* held that it could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner." *Gregg,* 428 U.S. at 188.

The USSC has recognized the importance of a jury in meeting the commands of the Eighth Amendment. As stated in *Gregg v. Georgia*, 428 U.S. 153 "one of the most important functions any jury can perform in making . . . a selection (between life imprisonment and death for a defendant convicted in a capital case) is to maintain a link between contemporary community values and the penal system." *Id.* at 181–82, citing *Witherspoon v. Illinois*, 391 U.S. 510,

519 n. 15 (1968). A jury is "a significant and reliable objective index of contemporary values because it is so directly involved." *Id.* citing *Furman v. Georgia*, 408 U.S., at 439-440, (Powell, J., dissenting). Ford had no jury, just an advisory panel, and thus his death sentence had none of the Eighth Amendment reliability of a jury verdict.

A sentencer must consider "any relevant mitigating evidence," *Eddings v. Oklahoma*, 455 U.S. 104, 114 (1982); *Ford v. Dugger*, 481 U.S. 393 (1987). The majority opinion in *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) explained:

> [T]hat the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.

Id. at 605 (Emphasis and footnotes omitted).

To meet the requirements that the death penalty be limited to the most aggravated and least mitigated of murderers, the Supreme Court requires, "that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and

capricious action." *Gregg* at 189. In *Gregg*, the Court upheld Georgia's death penalty scheme and found:

> The basic concern of *Furman* centered on those defendants who were being condemned to death capriciously and arbitrarily. Under the procedures before the Court in that case, sentencing authorities were not directed to give attention to the nature or circumstances of the crime committed or to the character or record of the defendant. Left unguided, juries imposed the death sentence in a way that could only be called freakish. The new Georgia sentencing procedures, by contrast, focus the jury's attention on the particularized nature of the crime and the particularized characteristics of the individual defendant.

Id. at 206. Ford, unlike all post-*Hurst* defendants will have, had no jury to determine his death sentence in the guided manner necessary to avoid his being condemned to death in an arbitrary and capricious manner.

In Ford's case, the advisory panel was instructed that, although the court was required to give great weight to its recommendation, the recommendation was only advisory. Had this been an actual jury trial, this would have been contrary to *Caldwell v. Mississippi*, 472 U.S. 320 (1985). In *Caldwell*, the Supreme Court stated and held that it,

> has always premised its capital punishment decisions on the assumption that a capital sentencing jury recognizes the gravity of its task and proceeds with the appropriate

> awareness of its 'truly awesome responsibility.' In this case, the State sought to minimize the jury's sense of responsibility for determining the appropriateness of death. Because we cannot say that this effort had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires. The sentence of death must therefore be vacated.

Id. at 341. Any reliance or argument based on the advisory recommendation in Ford's case is misplaced and fails to rise to the level of constitutional equivalence based on *Caldwell.* An advisory panel accurately instructed on its role in an unconstitutional death penalty scheme does not meet the Eighth Amendment requirements of *Caldwell.*

On remand in *Hurst v. State*, this Court found that the right to a jury trial found in the United States Constitution required that all factual findings be made by the jury unanimously under the Florida Constitution. The Court found that the Eighth Amendment's evolving standards of decency and bar on arbitrary and capricious imposition of the death penalty require a unanimous jury fact-finding.

> [T]he the foundational precept of the Eighth Amendment calls for unanimity in any death recommendation that results in a sentence of death. That foundational precept is the principle that death is different. This means that the penalty may not be arbitrarily imposed, but must be reserved only for defendants convicted of the most aggravated and least mitigated of murders. Accordingly,

> any capital sentencing law must adequately perform a narrowing function in order to ensure that the death penalty is not being arbitrarily or capriciously imposed. *See Gregg*, 428 U.S. at 199, 96 S.Ct. 2909. The Supreme Court subsequently explained in *McCleskey v. Kemp* that "the Court has imposed a number of requirements on the capital sentencing process to ensure that capital sentencing decisions rest on the individualized inquiry contemplated in Gregg." *McCleskey v. Kemp*, 481 U.S. 279, 303, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987). This individualized sentencing implements the required narrowing function that also ensures that the death penalty is reserved for the most culpable of murderers and for the most aggravated of murders. If death is to be imposed, unanimous jury sentencing recommendations, when made in conjunction with the other critical findings unanimously found by the jury, provide the highest degree of reliability in meeting these constitutional requirements in the capital sentencing process.

Hurst v. State at 59–60. This Court cited to Eighth Amendment concerns finding that, "in addition to unanimously finding the *existence* of any aggravating factor, the jury must also unanimously find that the aggravating factors are *sufficient* for the imposition of death and unanimously find that the aggravating factors *outweigh* the mitigation before a sentence of death may be considered by the judge." *Id.* at 54. (Emphasis in original). "In addition to the requirements of unanimity that flow from the Sixth Amendment and from Florida's right to a trial by jury, we conclude that juror unanimity in any recommended verdict resulting in death sentence

is required under the Eighth Amendment." *Id.* at 59.

This Court went a step further than the United States Supreme Court did in *Hurst v. Florida* based on evolving standards of decency requiring unanimous jury recommendations for death sentences. "Requiring unanimous jury recommendations of death before the ultimate penalty may be imposed will ensure that in the view of the jury—a veritable microcosm of the community—the defendant committed the worst of murders with the least amount of mitigation. This is in accord with the goal that capital sentencing laws keep pace with 'evolving standards of decency.'" (internal citations omitted). *Hurst v. State,* at 60. The standards of decency have evolved such that Ford cannot be sentenced to death without a jury unanimously finding all of the facts necessary to subject him to death.

Ford was sentenced to death in violation of the Eighth Amendment. His death sentence was arbitrary and capricious because he was sentenced without a jury to ensure the reliability of his sentence. Any reliance on the non-unanimous advisory panel is misplaced and a violation of *Caldwell.* A recommendation of 11-1 should be inadequate under *Hurst v. State.* To subject Ford to the death penalty based on Florida's previous unconstitutional system,

is the very definition of arbitrary and capricious. As Justice Stewart stated in concurrence, "the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed." *Furman*, 408 U.S. at 310, 92 S. Ct. at 2763 (Potter, J, concurring).

Following *Hurst v. Florida* and *Hurst v. State*, Ford should not be exposed to execution on February 13, 2025. Ford was sentenced to death without the reliability of jury fact-finding and unanimity that the Eighth Amendment guarantees. His death sentence violates the Eighth and Fourteenth Amendments because his death sentence relies on random luck of where it falls on the calendar, which is the very definition of arbitrary. Guided by *Erlinger*, the need for basic fundamental fairness, and with the ability to correct past improper decisions, this court should avoid the manifest injustice of allowing Ford to proceed to execution. Relief is proper.

CONCLUSION

Based on the foregoing arguments, Ford respectfully requests that this Court grant a stay of execution, remand his case for an

evidentiary hearing on all claims; vacate his sentence of death, and/or grant any other relief this Court deems appropriate.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fla. R. App. P. 9.045, we hereby certify that the Initial Brief of the Appellant has been produced in Bookman Old Style 14-point font. This brief complies with the requirements of Fla. R. App. P. 9.210(a)(2)(D), as it does not exceed 75 pages.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of January, 2025, I electronically filed the foregoing with the Clerk of the Circuit Court by using the Florida Courts e-portal filing system which will send a notice of electronic filing to the following: The Honorable Lisa S. Porter, Circuit Court Judge, Twentieth Judicial Circuit, LSHarder@ca.cjis20.org; Christina Z. Pacheco, Senior Assistant Attorney General, Christina.Pacheco@myfloridalegal.com and, capapp@myfloridalegal.com; Stephen D. Ake, Senior Assistant Attorney General, stephen.ake@myfloridalegal.com,; Bianca Bentley, Assistant State Attorney, bbentley@sao20.org; Florida Supreme Court, warrant@flcourts.org; James D. Ford DOC # 763722 Union Correctional Institution P.O. Box 1000 Raiford, FL 32083.

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