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IN THE SUPREME COURT OF THE STATE OF FLORIDA

Case No.: SC20-1036

Lower Tribunal Case No.: 591993CF3237AOOOXX

EDWARD JAMES,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE EIGHTEENTH JUDICIAL CIRCUIT
IN AND FOR SEMINOLE COUNTY
STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This is an appeal from the circuit court's summary denial of Appellant's successive motion for post-conviction relief filed pursuant to Fla. R. Crim P. 3.851(e)(2).

The first three volumes of the thirteen-volume record on appeal from the trial below, comprising the pleadings, court notices, status conferences and motions hearings, will be referenced as "RP" followed by the volume and page number: (RP1:1). Transcripts from the penalty phase comprising jury selection, the trial, the *Spencer* hearing, and the sentencing hearing before the trial court will be referenced as "T" followed by the volume and page number: (T1:1). The record on the initial post-conviction proceedings will be referenced as "PCR1" followed by the page number: (PCR1:1). Finally, the record from this successive post-conviction proceeding will be referenced as "PCR2" followed by the page number: (PCR2:1).

The child victim and her sister who was a witness at the proceedings below will be referred to by their initials, T. N. and WN, respectively.

Edward James will be referred to as either Mr. James or Appellant throughout.

REQUEST FOR ORAL ARGUMENT

Edward James has been sentenced to death. Resolution of the issues presented will determine whether he lives or dies. This Court has allowed oral argument in other capital cases in a similar posture. A full opportunity to address the issues

through oral argument would be appropriate, given the seriousness of the claims presented and the stakes involved. Appellant, through counsel, respectfully requests this Court to hear oral argument in this cause.

STANDARD OF REVIEW

Where the circuit court denies 3.851 claims without an evidentiary hearing, this Court reviews the circuit court's decision de novo, accepting the movant's factual allegations as true to the extent they are not refuted by the record, and affirming the ruling only if the record conclusively shows the movant is entitled to no relief. *Howell v. State*, 109 So. 2d 763, 777 (Fla. 2013).

STATEMENT OF THE CASE AND FACTS

In October, 1993, a Seminole County grand jury returned an indictment charging Appellant, Edward James, with two counts of first-degree murder, one count of aggravated child abuse, one count of attempted sexual battery, one count of kidnapping, one count of grand theft, and one count of grand theft of an automobile.

On April 6, 1995, Appellant entered a plea of guilty to all counts pursuant to a written plea negotiation that contained no agreement as to the sentences or any other benefit to Appellant. The State sought the death penalty on both murder counts.

The penalty phase was tried before a jury over several days in May and June, 1995 and on June 5, 1995, the jury returned advisory verdicts recommending a sentence of death on both first-degree murder counts by a vote of 11-1.

On June 29, 1995, after the advisory verdicts were rendered, defense counsel moved for appointment of a mental health expert to examine Appellant's mental status. RP3: 498-99. A hearing was held on July 12, 1995 pursuant to *Spencer v. State,* 615 So. 2d 688 (Fla. 1993), before the circuit court and the court subsequently sentenced Appellant to death on both murder counts on August 18, 1995, finding in aggravation that (1) both murders were heinous, atrocious and cruel; (2) James was contemporaneously convicted of another violent felony; and (3) each murder was convicted during the course of a felony.

In mitigation, the trial court found that James' ability to appreciate the criminality of his conduct or conform his conduct was substantially impaired due to his drug and alcohol use at the time of the murders and that he was under moderate mental or emotional disturbance at the time of the offenses. He gave those statutory mitigators significant weight. The trial court gave substantial weight to Appellant's cooperation with the police and some weight to various acts of kindness to friends and his good conduct in jail.

Appellant's convictions and death sentences were affirmed by this Court in April 1997. *James v. State*, 695 So. 2d 1229 (Fla. 1997).

Appellant filed a motion for post-conviction relief in May 1998 and amended it in November 2001 and again in September 2002. However, he then filed a *pro se* motion to waive his post-conviction proceedings in March 2003. After a hearing held in April 2003, pursuant to *Durocher v. Singletary*, 623 So. 2d 482 (Fla. 1993), the trial court entered an order granting Appellant's motion, allowing him to withdraw his motion and discharging counsel. (PCR1: 493-95).

In November 2005, Appellant contacted counsel with Capital Collateral Regional Counsel, Middle Division (CCRC-M) and asked counsel to reinstate his post-conviction motion and reappoint CCRC-M to represent him. That motion was denied by the circuit court after another *Durocher* hearing. (PCR1: 522-26).

This Court allowed Appellant to appeal the circuit court's ruling and reappointed CCRC-M for the sole purpose of representing him in that appeal, and subsequently affirmed the circuit court's order refusing to reinstate the post-conviction proceedings and reappoint counsel. *James v. State*, 974 So. 2d 365 (Fla. 2008).

On December 18, 2018, the Capital Habeas Unit ("CHU") of the Federal Public Defender's Office, Northern District of Florida, filed a habeas corpus petition on behalf of Mr. James pursuant to 18 U.S.C.A. § 2254 that raised numerous claims for relief. (PCR2: 41-272). Among other claims, the CHU alleged that Appellant was not competent to plead guilty or waive post-conviction proceedings and related ineffective assistance of counsel claims against trial counsel and CCRC-M for not investigating and raising the competency issues. On February 4, 2019, the district court entered an order staying the proceedings in federal court pending exhaustion of the claims in state court. (Order, 6:18-cv-00993-PGB-KRS, Doc. 25.)

CCRC-M filed a motion for reappointment in the circuit court on January 19, 2019 and an amended motion for reappointment with a request to appoint CCRC-N because of a conflict of interest on January 31, 2019. CCRC-M cited as its conflict the CHU's allegation in the §2254 petition that CCRC-M rendered ineffective assistance of counsel for its failure to investigate and challenge Appellant's competence to plead guilty and waive the initial post-conviction

proceedings. (PCR2: 272-74). The motion and amended motion for appointment of counsel were unopposed by the State. On February 11, 2019, the circuit court entered a motion appointing CCRC-M. (PCR2: 275). At that time, Appellant had not been represented by counsel in state court since 2003 except for the limited appearance of CCRC-M to represent him in the appeal of the denial of his request for reinstatement of his post-conviction proceedings and reappointment of post-conviction counsel from 2005 through 2007.

On November 14, 2019, Appellant, through undersigned counsel, filed a successive motion for post-conviction relief raising five claims that: (1) trial counsel was constitutionally ineffective under *Strickland v. Washington*, 466 U.S. 668 (1984), for their failure to competently investigate the case before the guilty pleas and penalty phase jury trial, prepare a defense, and challenge the state's case; (2) trial counsel was ineffective for their failure to investigate the competence *vel non* of Appellant to enter pleas and waive his right to a jury trial at the guilt phase and to stand trial at the penalty phase, thereby rendering the proceedings unreliable under the federal and Florida Constitutions; (3) Appellant was incompetent at the time of his waiver of initial post-conviction proceedings; (4) Appellant's death sentences imposed by a court after non-unanimous jury recommendations violated the Sixth and Eighth Amendments to the United States Constitution and Article I, §§ 9 and 17 of the Florida Constitution, under the United States Supreme Court decision in *Hurst*

v. Florida, 577 U.S. 92 (2016); and (5) the combination of procedural and substantive errors set forth in the successive motion deprived Appellant of a fundamentally fair trial and post-conviction process guaranteed him under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, §§ 9 and 17 of the Florida Constitution.

Appellant alleged all attorney errors violated the Fifth, Sixth, Eighth, or Fourteenth Amendments to the United States Constitution and his corresponding rights under Article I, §§ 9 and 17 of the Florida Constitution, rendering the results of the proceedings unreliable.

The State filed a response on November 27, 2020 and argued that all claims were time-barred, procedurally barred, and without merit. (PCR2: 414-40).

On March 17, 2020, without having held a case management hearing required by Rule 3.851(5)(B), Fla. R. Crim. P., the circuit court entered an order dismissing Appellant's successive motion. (PCR2: 481-514). The circuit court ruled that Appellant had given no reason for the seventeen-year delay in challenging his competency to proceed to plead guilty to all charges, stand trial in the penalty phase, and waive his initial post-conviction proceedings, and found those claims untimely. (PCR2: 481-82). The circuit court denied Appellant's claim for relief under *Hurst v. Florida, supra,* under the reasoning of *Hitchcock v. State*, 226 So. 2d 216 (2017). (PCR2: 482-83).

Appellant filed an unopposed motion for rehearing on March 27, 2020, citing the failure of the circuit court to hold a case management hearing as required by Rule 3.851(5)(B), Fla. R. Crim. P. (PCR2: 516-17). That motion was granted by the circuit court on April 13, 2020. (PCR2: 557-58). On May 7, 2020, the case management hearing was held via Microsoft Team video-conference. (PCR2: 564-67, 661-708). The circuit court heard argument from counsel and took the matter under advisement. (PCR2: 661-708). On June 8, 2020, the circuit court entered an order dismissing Appellant's successive motion again, finding that all claims related to his incompetence to proceed were time-barred and his *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), claim was barred under *Hitchcock, supra,* and *State v. Poole,* 297 So. 3d 487 (Fla. 2020).

Appellant filed his timely notice of appeal on July 7, 2020.

Appellant relies upon this Court's direct appeal opinion for the statement of facts. *James v. State*, 695 So. 2d 1229 (Fla. 1997).

SUMMARY OF ARGUMENT

Appellant has been on Florida's death row for more than twenty-five years. He has been without state court counsel for nearly sixteen of those years, and without federal counsel until August 2018. Appellant filed his successive state court motion for post-conviction relief in November 2019 and alleged his trial counsel was ineffective for failing to investigate or present available defenses and, most

importantly, for failing to investigate and raise the issue of his competency to proceed in the trial proceedings below. Appellant was allowed to plead guilty to two counts of capital murder and other felonies that operated as *de facto* "aggravators" and stand trial before a jury for his life despite obvious red flags to trial counsel that Appellant had significant memory issues (he pled no contest to charges he had no recollection of committing), had been abusing alcohol and dangerous drugs persistently since he was fourteen, and had imbibed or ingested copious amounts of alcohol and LSD on the night of the offenses and for the two months preceding the offenses.

Appellant specifically claimed that his trial counsel was ineffective for failing to raise an intoxication defense, for urging him to plead guilty to all counts, including two capital murder counts and other violent felonies that operated as automatic aggravating circumstances, for failing to ensure the sober presence of a defense witness at the penalty phase who could have testified to the large amount of LSD he observed the Appellant take on the night of the offenses, for failing to investigate Appellant's competence to plead and stand trial for his life before a jury, and for his initial post-conviction lawyers' failure to raise the issue of his competence to waive post-conviction proceedings.

Appellant also challenges his denial of relief pursuant to *Hurst v. Florida* and the constitutionality of this Court's rulings granting only partial retroactivity under that decision.

Finally, Appellant argues that the sheer number of errors committed in his case render his convictions and death sentences unreliable under the federal and Florida constitution.

ARGUMENT I

TRIAL COUNSEL FAILED TO ADEQUATELY INVESTIGATE AND PREPARE A DEFENSE OR CHALLENGE THE STATE'S CASE AND ENCOURAGED APPELLANT TO PLEAD GUILTY TO ALL CHARGES. AS A RESULT, THE CONVICTIONS AND DEATH SENTENCES ARE UNRELIABLE UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

Mr. James was denied effective assistance of counsel at the guilt and penalty phases of his capital trial, in violation of his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and his corresponding rights under Article I, §§ 9 and 17 of the Florida Constitution. Had the circuit court granted an evidentiary hearing on Appellant's successive motion because of the existence of disputed facts, Appellant could have presented witnesses who would have offered evidence supporting an intoxication defense, proved Mr. James' ingestion of large amounts of LSD on the night of the offenses, and challenged the

conduct of trial counsel for its failure to investigate and raise competency concerns at the trial and initial post-conviction proceedings.

1. Trial counsel failed to adequately investigate defenses to the charges and aggravating circumstances.

Intoxication defense. In his initial visit with Mr. James, defense counsel Gary Anderson discussed raising a defense of "voluntary intoxication" and encouraged Mr. James to neither cut his hair nor shave so that his hair could be tested for the presence of drugs. (PCR 2: 323-27). Mr. James had advised him that he was under the influence of excessive amounts of drugs and alcohol at the time of the offenses and lacked memory of some specific conduct he was accused of. (*Id.*). More than six months later, counsel told Mr. James that his office could not locate an expert to conduct the testing and advised Mr. James he could cut his hair and shave. (*Id.*). Any defense of voluntary intoxication was abandoned and waived upon Mr. James' pleas to the crimes upon the advice of trial counsel.

Trial counsel also failed to ensure that a key witness to Mr. James' intoxication and drug use on the night of the offenses, Jere Pearson, appeared at trial in a sober state. Counsel made no arrangements to provide transportation for Mr. Pearson, who was transported to court by Tim Dick, the son of victim Betty Dick and the uncle of victim T. N. The trial court observed Mr. Pearson's intoxicated state, excused the jury, and required Mr. Pearson to submit to a breathalyzer test before permitting him to testify. (T. 561-567). The breath test results proved Mr.

Pearson's intoxication and the trial court ruled he could not testify that day. (T. 590). Counsel refused an offer by the trial court to have Mr. Pearson testify the next day. (T. 565). The tape recording of a discovery deposition of Mr. Pearson was offered at the suggestion of trial counsel by stipulation instead. (T. 591).

This failure to ensure this key witness was sober for his testimony was critical as Mr. Pearson was the only witness who could testify that Mr. James used LSD on the night of the offenses. In an offer of testimony to prove Mr. James was under the influence of extreme mental or emotional disturbances, a statutory mitigator, counsel presented testimony from an expert about the synergistic effect of the ingestion of alcohol and LSD. (T. 532). The court declined to find the existence of this mitigator, ruling that there was "no competent evidence that the defendant ingested the LSD." (T. 533). The failure to ensure the presence of Mr. Pearson in a sober state was deficient conduct and the prejudice was substantial. Indeed, Justice Anstead in his concurring opinion, expressed his "concern that the effects of LSD (Lysergic acid diethylamide) and alcohol intoxication may provide the only rational explanation for the defendant's bizarre and horrific conduct in this case, and that the trial courts must be alert in considering and evaluating evidence of the use of such drugs in cases like this." *James,* 695 So. 2d at 1238. Justice Anstead added, "Thus notwithstanding the legal integrity of the trial court's findings, LSD intoxication appears to be the only logical explanation for these crimes. . ." (*Id.*).

Investigation of alternate suspect. Had counsel adequately investigated the case, they would have learned that the victim's son, Tim Dick, had discussed with others his anger with his mother, Betty Dick, at her decision to move to Pennsylvania and sell her home in Casselberry. Mr. Dick had lived with his mother off and on and was chronically unemployed.

Counsel would have also learned that W. N., the only witness to the murder of Betty Dick, made statements to Nicole Angel, Tim Dick's girlfriend, Lisa Neuner, Tim Dick's sister (and mother of T. N. and daughter of Betty Dick), and Sandra Dichiara, a neighbor of Betty Dick's, and others at the scene before the police arrived that "Uncle Timmy told me Eddie did it." W. N. advised Nicole Angel and the police that Mr. James told her that Tim Dick told him to commit the murders. (PCR2: 371-73). Nicole Angel acknowledged W. N.'s statement in her own statement to the police in the days following the murders. (*Id.*). Counsel could have raised concerns with the jury that Tim Dick encouraged Mr. James to commit the crimes from those statements and others. For example, had counsel interviewed Keith McCauley, who was mentioned in Tim Dick's statement to the police, they would have learned critical information that could have been helpful to guilt and penalty phase issues. (PCR2: 403-11). Mr. McCauley, a friend of Ms. Dick and Appellant, was one of the first persons on the scene the morning the murders were discovered. (*Id.* at 6.). He came at the request of Tim Dick. Mr. McCauley heard Tim Dick make a

veiled threat against his mother in the days preceding her murder. *Id.* at 8. Mr. McCauley knew from Ms. Dick and Tim Dick that she was kicking Mr. Dick out of her home and cutting him off financially. (*Id*). Mr. McCauley helped Ms. Dick pack her car and move jewelry from her home into her car for her move. (*Id.* at 4). Mr. McCauley had observed Tim Dick stealing from his mother and bullying her. (*Id.* at 5). He also observed Tim Dick encourage Mr. James to drink excessively on the night of the murders. Mr. McCauley was never interviewed by defense counsel or the police. (*Id.* at 8-9).

Sandra Dichiara was outside Betty Dick's house after the murders and heard W. N. make the statement that "Uncle Timmy told me Eddie did it" and did not see the murders. (PCR2: 413-14). She was never interviewed by law enforcement or defense counsel prior to 2018.

Trial counsel's advice to plead to all charges. Trial counsel, Mr. Anderson, and his co-counsel, James Figgatt, encouraged Mr. James to plead to all charges without any offer of life sentences in exchange for those pleas. Neither attorney advised Mr. James that his pleas to the murders, sexual offenses, and kidnapping of the second child could be used as aggravating circumstances at the penalty phase, and, indeed, were argued to the jury and found as aggravators by the trial court. (PCR: 993-998, 1087-95.) Had Mr. James known that, he would have exercised his right to a jury trial in the guilt phase.

Conclusion. Counsel performed deficiently with respect to their investigation, and as a result of their professionally unreasonable investigation induced Mr. James to waive his right to a jury trial at the guilt/innocence phase. Had defense counsel conducted a professionally reasonable investigation, Mr. James would not have entered guilty and nolo contendere pleas. Properly prepared trial counsel could have presented a myriad of defenses for Mr. James, including voluntary intoxication and an alternative suspect. Put differently, had trial counsel performed adequately, there is a reasonable probability that Mr. James would not have been convicted and sentenced to death. Further, if counsel had investigated red flags that Mr. James, as discussed in Argument II, *infra*, was not competent prior to his plea and at the time of his penalty phase, Mr. James would not have been found competent to waive a panoply of rights including that of a jury trial. Incompetence to proceed is an absolute bar against prosecution.

ARGUMENT II

MR. JAMES WAS DENIED HIS PROCEDURAL AND SUBSTANTIVE FEDERAL CONSTITUTIONAL RIGHTS AS THEY PERTAINED TO HIS INCOMPETENCY AT THE TIME OF HIS PLEAS, WAIVERS, PENALTY PHASE AND SENTENCING. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO PROPERLY INVESTIGATE AND RAISE THE ISSUE OF MR. JAMES' COMPETENCY.

The circuit court ruled that claims raised in Appellant's successive motion related to his incompetence to plead guilty to all counts, stand trial in the penalty

phase, and waive his initial post-conviction proceedings were time-barred. (PCR2: 570-574). The problem with that is that Appellant would have had to have filed his own motions to declare himself incompetent when it was the duty of trial counsel and initial post-conviction counsel to thoroughly investigate and challenge Appellant's competence to proceed. Incompetence to proceed is an absolute bar to proceeding in any criminal case, especially a double capital murder case. The circuit court blames Appellant for not raising the issue of his own incompetence during the initial post-conviction proceedings or within one year thereafter. (PCR2: 570-603). Appellant cannot be blamed for not challenging his own competence while he was permitted to represent himself in post-conviction proceedings. Moreover, undersigned counsel could not have raised the competency issues before her appointment on February 11, 2019. Undersigned counsel filed the successive motion on November 14, 2019, nine months after her agency's appointment and less than a year after the CHU filed the §2254 petition on December 18, 2018.

Despite having a long history of substance abuse and clear signs of mental illness and impaired memory, no reasonable assessment was made into Mr. James' competency before he was allowed to waive his rights to a guilt/innocence jury trial. Mr. James' obvious depression, his admitted extensive drug and alcohol dependence, and his memory gaps evinced in his statements to the Kern County

Sheriff's Office were red flags that should have compelled competent trial counsel to investigate his competency to plead or proceed to trial.

The criminal trial of an incompetent defendant violates due process. *Drope v. Missouri*, 420 U.S. 162, 171 (1975). This due process right cannot be waived. *Pate v. Robinson,* 383 U.S. 375, 384 (1966).

> [A] person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial. . . . [T]he prohibition is fundamental to an adversary system of justice.

Drope, 420 U.S. at 171-72. The test for assessing a defendant's competency is whether he "ha[d] sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he ha[d] a rational as well as factual understanding of the proceedings against him." *Dusky v. United States*, 362 U.S. 402, 402 (1960).

Mr. James, "raising a substantive claim of incompetency, . . . must demonstrate . . . his incompetency by a preponderance of the evidence." *James v. Singletary*, 957 F.2d 1562, 1571 (11th Cir. 1992). It is "inherent[ly] difficult[]" for a court to make a retrospective, or nunc pro tunc, determination of a defendant's competence; thus, when a defendant establishes by a preponderance of the evidence that he was in fact incompetent when he waived his rights, the court must vacate the sentence and order new proceedings. *Drope*, 420 U.S. at 184.

In addition to being incompetent to be tried at his penalty phase and sentencing, Mr. James was also incompetent when he waived a panoply of constitutional rights. A waiver of constitutional rights that is not knowing, intelligent, and voluntary is void and violates due process. *Boykin v. Alabama,* 395 U.S. 238, 243-44 (1969).

Based on Mr. James' history of substance abuse, memory impairment, head injuries, and trauma and mental illness, there is a bona fide question as to his competency at the time of his trial. At the time of Mr. James' plea, penalty phase, and sentencing proceedings, no competency evaluations were conducted, and no competency hearing was held. Trial counsel did not request—and the trial court did not sua sponte order—a competency evaluation or competency hearing.

Trial counsel was objectively deficient for failing to raise this issue and prejudice is presumed as incompetent defendants may not be proceeded against.

Counsel has "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Strickland*, 466 U.S. at 668. *Strickland* requires a defendant to establish unreasonable, deficient attorney performance, and prejudice resulting from that deficient performance. Counsel's highest duty is the duty to investigate and prepare. Where, as here, counsel unreasonably fails to investigate and prepare, the defendant is denied a fair adversarial testing process and the proceedings results are rendered unreliable. *See*,

e.g. *Kimmelman v. Morrison*, 477 U.S. 365, 384-388 (1986) (failure to request discovery based on mistaken belief state obligated to hand over evidence); *Henderson v. Sargent*, 926 F.2d 706 (8th Cir. 1991) (failure to conduct pretrial investigation was deficient performance); *Chambers v. Armontrout,* 907 F.2d 825 (8th Cir. 1990) (en banc) (failure to interview potential self-defense witness was deficient performance); *Nixon v. Newsome*, 888 F.2d 112 (11th Cir. 1989) (failure to obtain transcripts of witness's testimony at co-defendant's trial was deficient assistance); and *Code v. Montgomery*, 799 F.2d 1481, 1483 (11th Cir. 1986) (failure to interview potential alibi witness was deficient performance). Also, trial counsel cannot be found to have made a strategic decision when he failed to fully investigate. *Strickland* at 690-691; *Wiggins v. Smith*, 539 U.S. 510, 527 (2003) (a reviewing court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further."); and *Henry v. State*, 862 So. 2d 679, 685 (Fla. 2003) ("A reasonable strategic decision is based on informed judgment.").

Had the circuit court granted an evidentiary hearing on Appellant's motion, Appellant would have presented evidence of his incompetence through expert witnesses and witnesses who knew and observed him over the years, months and days preceding the offenses who could have offered evidence of his drug and alcohol dependency and use at all material times, his memory losses, his mental health

issues, and his likely incompetence at the time of his guilty pleas, jury trial at the penalty phase and subsequent waiver of his initial post-conviction proceedings.

ARGUMENT III

APPELLANT WAS INCOMPETENT AT THE TIME OF HIS STATE POSTCONVICTION WAIVER AND WAS INCOMPETENT TO WAIVE HIS RIGHTS AT THAT PROCEEDING.

Mr. James' death sentence violates the federal and Florida Constitutions because he was not competent to waive his state collateral review rights. Mr. James was not competent to plead or waive his postconviction rights. *See infra* Argument II. Due to Mr. James' continued incompetency during the state post-conviction waivers, his continued confinement on death row violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the federal constitution and the corresponding provisions of Article I, §§ 9 and 17 of the Florida Constitution .

Even if Mr. James had been competent at the time of his trial, too much time had passed to rely on a competency determination from multiple years prior. *See Drope*, 420 U.S. at 181; *Bishop v. United States*, 350 U.S. 961 (1956). A competency finding, had one had been made if the issue had been raised by trial counsel, would have been stale for purposes of determining Mr. James' competence at the time of his waiver of post-conviction counsel and post-conviction proceedings years later.

Mr. James was not actually competent to waive his post-conviction proceedings. In addition to the impairments Mr. James had at trial, he was under stressors related to being incarcerated under a death sentence, isolated from family and other sources of emotional support, and his solitary confinement on death row.

ARGUMENT IV

MR. JAMES' DEATH SENTENCES VIOLATE HIS RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS, AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION UNDER *HURST v. FLORIDA*.

On January 12, 2016, the United States Supreme Court rendered its decision in *Hurst v. Florida*, 572 U.S. 92 (2016), and found that Florida's capital sentencing statute is unconstitutional. *Id.* at 619. The Court ruled that "[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough." *Id.* The *Hurst* opinion identified the statutorily defined facts that must be found under Florida law before a death sentence may be imposed. *Id.* at 622. Under Florida's statute, a death sentence is not authorized unless a finding of these statutorily defined facts after a unanimous verdict finding the defendant guilty of first-degree murder has been returned. The additional statutorily defined facts required to authorize the imposition of a death sentence are 1) the existence of "sufficient aggravating circumstances" and 2) the absence of "sufficient mitigating circumstances to outweigh the aggravating circumstances." *See* § 921.141(3); *Hurst*, 136 U.S. at 92.

Despite this Court's decisions in *Asay v. State,* 224 So. 3d 695 (Fla. 2017), *Hitchcock, supra,* and recently in *Poole, supra,* declining to extend *Hurst* retroactivity to cases that were final before the decision in *Ring v. Arizona*, 536 U.S. 534 (2002), *Hurst* should be retroactive to Appellant's case under *Witt v. State*, 387 So. 2d 922 (Fla. 1980) and under federal retroactivity principles. A certiorari petition was filed in the United States Supreme Court in the *Poole* case on August 28, 2020, and the brief in opposition by the State is not due until November 30, 2020. This Court may wish to reserve ruling in this case to see if the Supreme Court accepts certiorari in the *Poole* case that raises federal constitutional questions about this Court's *Hurst v. State* doctrine limiting the retroactivity of *Hurst v. Florida.*

Under *Witt*, Florida courts apply holdings favorable to criminal defendants retroactively provided that the decisions (1) emanate from the United States Supreme Court, (2) are constitutional in nature, and (3) constitute "a development of fundamental significance." *Id. Hurst* satisfies the first two *Witt* retroactivity factors—(1) it is a decision of the United States Supreme Court, and (2) its holding is constitutional in nature: The Sixth Amendment forbids a capital-sentencing scheme that requires judges, as opposed to juries, to conduct the fact finding that subjects a defendant to a death sentence. *Hurst* also satisfies the third *Witt* factor because it "constitutes a development of fundamental significance," *i.e.*, it is a change in the law which is "of sufficient magnitude to necessitate retroactive

application as ascertained by the three-fold test of the United States Supreme Court decisions in *Stovall v. Denno*, 388 U.S. 293 (1967), and *Linkletter v. Walker*, 381 U.S. 618 (1965)." *Falcon v. State*, 162 So. 3d 954, 961 (Fla. 2015) (quoting *Witt*, 387 So. 2d at 929) (internal brackets omitted).

Although Florida courts follow *Witt*, *Hurst* is also retroactive under the federal approach of *Teague v. Lane*, 489 U.S. 288 (1989). *See Montgomery v. Louisiana*, 136 S. Ct. 718, 728 (2016) (*Teague* "requires the retroactive application of new substantive and watershed procedural rules in federal habeas proceedings."). *Hurst* is retroactive under *Teague* notwithstanding *Schiro v. Summerlin*, 542 U.S. 348 (2004), which held *Ring* not retroactive in an Arizona case evaluated under *Teague*. Although *Hurst* was based on the reasoning of *Ring*, the two cases are not interchangeable because of the fundamental differences between the Arizona capital sentencing scheme at issue in *Ring* and the Florida death penalty statute invalidated by the more robust *Hurst*. In *Hurst* itself, the Supreme Court overruled its prior cases that formed the basis for the Florida Supreme Court's ruling that *Ring* was non-retroactive. *See Hurst*, 136 U.S. at 92 (overruling *Hildwin* and *Spaziano*). It should also be noted that the Supreme Court's early reticence to hold *Ring* retroactive under *Teague* may be eroding, as highlighted by the recent decision in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), where the United States Supreme Court approved

retroactive application of a new rule prohibiting mandatory life sentences for juveniles.

The *Hurst* error in this case is not harmless because *Hurst* error is structural. Florida courts should hold that *Hurst* errors are structural because they represent a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Arizona v. Fulminante*, 499 U.S. 279, 307-09 (1991) (distinguishing between "structural defects in the constitution of the trial mechanism," which are not subject to harmless error review, and errors that occur "during the presentation of the case to the jury, which may be quantitatively assessed in the context of other evidence presented."). *Hurst* errors invariably "infect the entire trial process." *Brecht v. Abrahamson*, 507 U.S. 619, 630 (1993). For Florida courts to hold otherwise would "deprive defendants of the basic protections without which a [death penalty] trial cannot reliably serve its function as a vehicle for determination" of whether the elements necessary for a death sentence exist. *Neder v. United States*, 527 U.S. 1, 9 (1999).

Appellant's death sentence is also entitled to relief post-*Hurst* because his jury was misled as to its role, evolving standards of decency require unanimous verdicts, and counsel would have tried the case differently had the jury been required to make the "sufficiency" and "insufficiency" findings of fact. The jury's consideration of the evidence in Appellant's case may well have been different had the jury been

required to conduct the fact finding, instead of making only an "advisory" recommendation for a sentence of death or life imprisonment. *See Caldwell v. Mississippi*, 472 U.S. 320, 328-29 (1985). Further, during Mr. James' penalty phase more than twenty-four years ago, the jury recommended the death penalty by a vote of 11-1. The Eighth Amendment considerations of the "evolving standards that mark the progress of a maturing society" dictate that a unanimous vote by a jury that conducts fact finding is required to sentence a person to death. *Atkins v. Virginia*, 536 U.S. 304, 312 (2002). Capital penalty phase proceedings do not occur in a vacuum and a defense counsel's entire approach to presentation of evidence would have been different had the jury, as opposed to the judge, been required to make the "sufficiency" and "insufficiency" findings. A hearing is appropriate to evaluate the effect of the statute invalidated by *Hurst* on counsel's development of challenges to aggravation, mitigation, and defense penalty-phase theories at the sentencing.

ARGUMENT V

CUMULATIVELY, THE COMBINATION OF PROCEDURAL AND SUBSTANTIVE ERRORS DEPRIVED MR. JAMES OF A FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND HIS CORRESPONDING RIGHTS UNDER THE FLORIDA CONSTITUTION.

Mr. James did not receive the fundamentally fair trial to which he was entitled under the Sixth, Eighth, and Fourteenth Amendments. The sheer number of errors

in his guilt and penalty phases, when considered as a whole, virtually dictated the sentence of death. While there are means for addressing each individual error, addressing these errors on an individual basis will not afford adequate safeguards required by the Constitution against an improperly imposed death sentence. Repeated instances of ineffective assistance of counsel significantly tainted Mr. James' guilt and penalty phases. These errors cannot be harmless.

Under Florida case law, the cumulative effect of these errors denied Mr. James' his fundamental rights under the United States and Florida Constitutions. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986). A series of errors may accumulate a very real prejudicial effect. The burden remains on the State to prove beyond a reasonable doubt that the individual and cumulative efforts did not affect the verdict and/or sentence. *Chapman v. California*, 386 U.S. 18 (1967).

The flaws in the system which convicted Appellant of murder and sentenced him to death are many and require a new determination of his competence to proceed and a new trial, if he may be proceeded against.

CONCLUSION AND RELIEF SOUGHT

Based on the foregoing, the circuit court improperly summarily dismissed Appellant's successive motion. This Court should order that these proceedings be remanded for an evidentiary hearing on all claims raised in Appellant's successive motion.

CERTIFICATE OF COUNSEL

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic service to Patrick Bobek, (Patrick.Bobek@myfloridalegal.com and cappapp@myfloridalegal.com); Stewart Stone, Asst. State Attorney (SStone@sa18.org) and by U.S. Mail to Edward James, DOC # 969121, Union Correctional Institution, P. O. Box 1000, Raiford, FL 32026 on this date, October 9, 2020.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing initial brief of Appellant was generated in Times New Roman 14-point font, pursuant to Fla. R. App. P. 9.100 and 9.210.

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