

IN THE SUPREME COURT OF FLORIDA

**CASE NO. SC2026-0112
L.T. No. 1989-CF-3026**

RONALD HEATH,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

**ON APPEAL FROM THE CIRCUIT COURT
OF THE EIGHTH JUDICIAL CIRCUIT,
IN AND FOR ALACHUA COUNTY, STATE OF FLORIDA**

INITIAL BRIEF OF APPELLANT

**ACTIVE WARRANT CAPITAL CASE
EXECUTION SCHEDULED FOR
FEBRUARY 10, 2026, at 6:00 P.M.**

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REQUEST FOR ORAL ARGUMENT

Appellant requests oral argument in this death-warrant appeal, which raises serious issues concerning his upcoming execution, including newly disclosed records, never before presented to this Court, showing Florida’s recent, dangerous maladministration of its own lethal injection protocol. This Court has granted oral argument in other cases in a similar posture. *See, e.g., Asay v. State*, 224 So. 3d 695, 699 (Fla. 2017) (staying execution after oral argument).

STATEMENT OF THE CASE AND FACTS

I. Introduction

Florida plans to execute Ronald Heath on February 10, 2026—its twentieth execution in the last twelve months—despite documented evidence that the Florida Department of Corrections (“FDOC”) cannot maintain the unprecedented pace of executions while competently applying its own lethal injection protocol.

In November 2025, Frank Walls, the most recently executed Florida prisoner, initiated a federal lawsuit based on alarming records showing that, over the course of the unprecedented number of Florida executions in 2025, corrections officials either willfully or negligently deviated from their written three-drug protocol on

numerous occasions. The evidence shows that, over the past year, execution officials in Florida increasingly shunned their own lethal injection protocol, instead barreling forward through executions, using lower dosages of drugs than required, expired drugs, and unauthorized drugs:

5/1/25		10-2025		-12	277
5/15/25		10-2025		-12	265
6/12/25		10-2025		-7	258

Preparation of only 7 x 20ml vials of potassium acetate on June 12, 2025, a date corresponding to the execution of Anthony Wainwright (and representative of the FDOC's disorganization with their record keeping on the day of executions) despite the protocol requiring the preparation of 480 milliequivalents (12 x 20ml vials). PC-R3. 490.

6/12/25		JUN 2025		-10	530
6/12/25		3/2026		-10	520
6/25/25		3/2026		-10	510
7/16/25		3/2026		-20	490

Preparation of only 10 x 10ml vials of rocuronium bromide on June 25, 2025, a date corresponding to the June 24, 2025, execution of Thomas Gudinas. The execution protocol calls for 20 x 10 ml vials. PC-R3. 492.

DRUG NAME Lidocaine Hcl 1% 10ml PACKAGE SIZE 25 x 10ml

NDCH# [REDACTED]

DATE	INVOICE NAME/#	LOT #	EXP. DATE	RECEIVED/USED (+/-)	BALANCE
1-3-2025	[REDACTED]	[REDACTED]	Sep 2026	+25	25
3/20/25	[REDACTED]	[REDACTED]	Sep 2026	-2	23
4-08-25	[REDACTED]	[REDACTED]	Sep 2026	-2	21

Administration of lidocaine for the executions of Edward James and Michael Tanzi. Lidocaine is not called for in the execution protocol. PC-R3. 512.

8/19/25		1/31/2025	-10	290
8/29/25		1/31/2025	-10	280
9/17/25		1/31/2025	-10	270
9/30/25		1/31/2025	-10	260

Withdrawal of etomidate that expired January 31, 2025, during the August and September executions of Victor Jones, David Pittman, Curtis Windom, and Kayle Bates. PC-R3. 510

The records support Heath’s grave concerns raised below that Florida’s current approach to the litigation protocol places him at severe risk of imminent danger. Yet, no court has intervened, and FDOC has refused to explain the disparities at every turn.

In the circuit court, Heath presented the FDOC logs, as well as a declaration from the expert in the *Walls* litigation in support of his claim that FDOC’s maladministration puts him at a substantial and imminent risk of suffering an impermissibly painful execution. Heath sought further evidentiary support of his claim and filed demands for records and communications pertaining to Florida’s lethal injection protocol—all of which were perfunctorily denied.

This Court should reverse and remand Heath’s case to the circuit court for discovery and an evidentiary hearing so that, among

other things, FDOC may demonstrate whether it is capable of administering its protocol consistent with the Eighth Amendment.

II. Factual and procedural background

A. Underlying criminal proceedings

In 1989, Heath and his co-defendant—his brother Kenneth Heath—were indicted in Alachua County for murder and robbery-related charges. R. 23. 2.¹ Kenneth was offered a plea deal to testify against his brother in exchange for a life sentence with a mandatory minimum of 25 years in prison. T. 959-65. At the conclusion of Heath’s trial, the jury found him guilty of felony murder. R. 313-17, 452; T. 2158-61, 2450.² Following a penalty phase, an advisory jury recommended a death sentence by a vote of 10 to 2, which the court

¹ Citations in this brief are as follows: The abbreviation “R. _” refers to the record on appeal for Defendant’s direct appeal to the Florida Supreme Court (SC70-77234). “T. _” refers to the separately paginated trial transcript. “PC-R. _” refers to the record on appeal for Defendant’s postconviction appeal that was voluntarily dismissed (SC03-1964). “PC-R1. _” refers to the record on appeal for Defendant’s initial postconviction appeal (SC07-771). “PC-R2. _” refers to the record on appeal for Defendant’s successive postconviction appeal (SC17-1808). The abbreviation “PC-R3. _” refers to the present record on appeal. All other references are self-explanatory or otherwise explained herewith.

² The jury acquitted Heath on two counts, and the court granted him a judgment of acquittal on several counts. R. 310-17.

imposed after finding and weighing two³ aggravating circumstances and three mitigating factors. R. 427, 452-71; T. 2385.⁴

This Court affirmed Heath’s conviction and sentence, *Heath v. State*, 648 So. 2d 660 (Fla. 1994), and upheld the denial of his initial and first successive motion for postconviction relief, *see Heath v. State*, 3 So. 3d 1017 (Fla. 2009) (initial Rule 3.851 appeal); *see also Heath v. State*, 237 So. 3d 931 (Fla. 2018) (affirming the denial of *Hurst* relief). The federal courts denied federal habeas relief. *See Heath v. Sec’y, Fla. Dep’t of Corrs.*, 717 F.3d 1202 (11th Cir. 2013).

B. Clemency and publication of lethal injection records

In June 2025, the Florida Commission on Offender Review (“FCOR”) initiated its clemency investigation for Heath, and appointed clemency counsel. Heath’s clemency interview took place

³ The trial court declined to find the heinous, atrocious, or cruel aggravating factor. R. 460.

⁴ The aggravating circumstances were: (1) Heath was previously convicted of second-degree murder; and (2) the capital felony was committed during the commission of an armed robbery. R. 458-59. The court found the statutory mitigating factor that Heath was under the influence of extreme mental or emotional disturbance based upon his drug and alcohol consumption. R. 460-62. The court found the nonstatutory mitigation that: (1) Heath demonstrated good character in prison; and (2) Kenneth received a life sentence. R. 465, 466-68.

on October 24, 2025, and clemency counsel presumably thereafter submitted a memorandum in support of clemency.

While Heath was awaiting a clemency determination, Frank Walls initiated his 42 U.S.C. § 1983 action against FDOC alleging, among other claims, that the department was consistently violating its lethal injection protocol. *Walls v. Dixon*, No. 4:25-cv-0488, ECF 1 (N.D. Fla. Nov. 26, 2025). Walls presented FDOC's internal execution drug usage logs revealing the alarming errors in the implementation of Florida's execution protocol, including the administration of expired drugs, the incorrect dosages of drugs, and drugs not authorized by the protocol entirely. Although Walls was denied relief because the courts found the medical aspect of his particular as-applied challenge was untimely and unrelated to the maladministration of the protocol, *Walls v. Sec'y, Dep't of Corrs.*, 161 F.4th 1281, 1285-86 (11th Cir. 2025), the evidence presented in that litigation raises grave concerns that Heath is at serious risk of an impermissibly painful execution.

C. Death warrant and records denials

On January 9, 2026, Governor DeSantis signed a warrant for Heath's execution, scheduling it for February 10, 2026. PC-R3. 126.

In the circuit court, Heath filed demands for public records pursuant to Florida Rule of Criminal Procedure 3.852(h)(3) and (i). PC-R3. 228-82. As relevant to this appeal, Heath requested two primary categories of public records.⁵

First, in light of the concerning execution logs from *Walls*, Heath requested records and communications specifically tailored to the maladministration of the protocol in multiple executions., PC-R3. 256-61, 277-81. He further requested records pertaining to the autopsies from executions that coincided with the maladministration of the protocol and/or where the media reported irregularities with their execution. Thus, Heath requested autopsy reports for Edward James, Michael Tanzi, Anthony Wainwright, Thomas Gudinas, Michael Bell, Curtis Windom, David Pittman, Victor Jones, Bryan Jennings, Mark Gerald, and Frank Walls, as well as the autopsy protocols in effect at the time of each autopsy, PC-R3. 249-53.⁶

⁵ These demands were directed to state agencies including the Florida Department of Corrections (FDOC); the Florida Department of Law Enforcement (FDLE); the District 8 Medical Examiner's Office (MEO8); and the Florida Commission on Offender Review (FCOR).

⁶ When a protocol is being administered haphazardly, autopsies can be illuminating. This is proven in the case of Richard Djerf, who was executed by Arizona in October 2025. The results of that autopsy

Second, with respect to his executive clemency proceedings, Heath requested all records and communications pertaining to the State's executive clemency process, and the clemency investigation, interview, and denial for Heath. PC-R3. 228-31, 263-67, 269-71.

The agencies objected, arguing that Heath was not entitled to any lethal injection records because his requests were untimely, overly broad, unduly burdensome, and did not relate to any colorable postconviction claim. PC-R3. 283-89, 303-19, 320-29. As to the clemency records, FCOR argued that all records relating to executive clemency are secret, even from the appellant himself.

The circuit court held a hearing on the public records demands on January 14, 2026, at which the demands were orally and summarily denied. PC-R3. 658-78. The circuit court issued written orders denying Heath's public records demands on January 15, 2026. PC-R3. 395-418.

proved that executioners failed to properly set a vein, "with one needle failing to puncture a vein and leaving fluid in the surrounding tissue." Kiera Riley, *Execution Protocol Under Scrutiny After Inmate's Autopsy Report*, ARIZONA CAPITOL TIMES (Jan. 16, 2026).

D. Rule 3.851 motion

Heath filed a successive Rule 3.851 motion in the circuit court on January 20, 2026, raising four claims. PC-R3. 437-62. A *Huff* hearing was held on January 21, 2026. PC-R3. 645-57. The same day, the circuit court issued a written order summarily denying Heath's Rule 3.851 claims in their entirety. PC-R3. 588-602. This appeal follows.⁷

SUMMARY OF ARGUMENT

The circuit court inappropriately brushed aside records showing that Florida is not following its own lethal injection protocol, including administering expired drugs, lower dosages of drugs than required, and unauthorized drugs altogether. The State too has refused to explain the records, conduct any review of its lethal injection practices, or determine whether these errors contributed to the anomalous execution of Bryan Jennings, who labored for 20 minutes before dying, manifesting outward signs of distress despite

⁷ On January 23, 2025, Heath also filed a petition for writ of habeas corpus in this Court. *Heath v. Sec'y, Dep't of Corrs.*, No. SC2026-0113 (Fla. Jan. 23, 2025). This Court ordered Respondent to file a Response to the petition by 5:00 p.m., Tuesday, January 27, 2026. Heath's Reply is due at 2:00 p.m., Wednesday, January 28, 2026.

Florida's use of a paralytic, which generally masks most outward signs of distress. This Court should address these disturbing records.

Heath's execution also raises other constitutional concerns that call for reversal, and remand to the circuit for further development, including the denial of all records of Heath's clemency proceedings; the refusal to review his Eighth Amendment claim regarding his traumatic childhood incarceration experiences; and his non-unanimous jury recommendation. Heath's execution should be stayed and his claims addressed on the merits.

ARGUMENT

This Court reviews the summary denial below *de novo*. *Walton v. State*, 3 So. 3d 1000, 1005 (Fla. 2009). To uphold the circuit court's summary denial, Heath's claims must be legally insufficient, refuted by the record, or should have been previously raised. *Parker v. State*, 89 So 3d 844, 855 (Fla. 2011) (quoting *Gore v. State*, 24 So. 3d 1, 11 (Fla. 2009)). Where the circuit court does not hold a hearing, this Court must "accept[] the movant's factual allegations as true to the extent they are not refuted by the record." *Walton*, 3 So. 3d at 1005.

The circuit court erred in summarily denying Heath's claims, which were legally sufficient, supported by the available record,

accompanied by valid demands for further information, and could not have been raised previously. Indeed, accepting Heath's factual allegations as true, as is required in this posture, his execution would violate the United States and Florida Constitutions. Summary denial was inappropriate. For the reasons below, and in Heath's accompanying stay motion, this Court should reverse the order below, stay Heath's scheduled execution, and remand for further factual development of his claims.

I. Florida's reckless maladministration of its own lethal injection protocol violates the Florida Constitution and the Eighth Amendment, and the lower court's decision to block any further investigation violated the Fourteenth Amendment

The Florida Department of Corrections ("FDOC") has routinely committed errors involving crucial and delicate phases of the execution process, including the administration of inaccurate (and lower) dosages of drugs than required, the administration of expired drugs, and the preparation of unauthorized drugs altogether. The evidence supporting Heath's claim is unrefuted. In other states, similar errors have led to pauses in executions for investigation to avoid Eighth Amendment concerns of cruel and unusual punishment. Absent FDOC's independent accountability and

cooperation, this Court must intervene to ensure Heath's execution is carried out in a manner consistent with the Eighth Amendment.

On November 26, 2025, Frank Walls, the most recent inmate executed in Florida, initiated a federal lawsuit supported by internal FDOC records showing that FDOC's ability to competently carry out its lethal injection protocol is rife with error. *Walls*, No. 4:25-cv-0488, ECF 1 (N.D. Fla. Nov. 26, 2025). While Walls was ultimately denied relief because the courts found the medical aspect of his as-applied challenge untimely, *see Walls*, 161 F.4th 1281 at 1285-86, the evidence presented in that case—FDOC's internal execution drug usage logs—raises grave concerns that Heath is at a serious risk of an incompetently performed and impermissibly painful execution.

Neither the Governor, the Attorney General, nor FDOC have taken any apparent action to remedy the alarming errors exposed in *Walls*. And, while Florida touts its ability to execute prisoners without any external indications of distress due to the use of a paralytic drug in its protocol, it cannot be said that, because of the lack of outward signs of distress, Walls or any of the other inmates executed by Florida since the documented errors began felt an unconstitutional level of pain. *See* PC-R3. 472. Rather, as Heath averred, the

unrefuted records and evidence places Heath in imminent danger of needless pain and suffering. *Glossip v. Gross*, 576 U.S. 863, 877 (2015) (quoting *Baze v. Rees*, 553 U.S. 35, 50 (2008)).

A. The available records reflecting maladministration of the protocol

The FDOC execution drug logs published in *Walls* expose FDOC's reckless and negligent approach to following its own lethal injection protocol. Dr. Joel Zivot, M.D., the defense expert in *Walls*, reviewed the FDOC logs and provided a declaration on behalf of Heath that considered the severe risks posed to inmates by FDOC's documented errors during executions. PC-R3. 481-84. From over 30 years of medical expertise, spanning the treatment of over 50,000 patients, Dr. Zivot states that "[i]t is critical to properly monitor the storage of drugs, when they are being dispensed, and in what quantity." PC-R3. 481. In light of FDOC's repeated failure to show that care, Dr. Zivot found that "[FDOC] refuses to adapt to known pharmacological principles and rejects the lessons drawn from its own successive failures. What is currently concerning me is that FDOC is clearly approaching its execution method in a negligent manner." PC-R3. 482.

The FDOC records reveal that the department is unable to maintain its own standards in keeping with the unprecedented pace of executions in this state. FDOC has been documenting the removal of execution drugs on an ad hoc basis, typically not keeping track of the drugs used during an execution until after the process has taken place. This indicates that FDOC's drug supply records are inaccurate—therefore, during an execution, there is no way of knowing the source or quantity of the drug being administered. For example, FDOC executed Michael Bell on July 15, 2025. Yet, the corresponding inventory log shows that FDOC did not document the removal of etomidate for Bell's execution at all. Thus, the source and quantity of that drug is unknown because the removal of it from FDOC's supply was never documented.

These errors are not anomalous. FDOC also failed to record the removal of rocuronium bromide or potassium acetate until the day after Bell's execution, July 16, 2025. PC-R3. 490, 492. FDOC also noted that they removed all three drugs used during Thomas Gudinas's execution on June 25, 2025, despite this occurring on June 24, 2025. PC-R3. 489-90, 92. And during the execution of Anthony Wainwright, FDOC recorded the removal of etomidate,

rocuronium bromide, and potassium acetate on June 12, 2025, despite the execution taking place on June 10, 2025. PC-R3. 489-90, 92.

Additionally, FDOC documented the use of inaccurate dosages of drugs during multiple executions. On June 25, 2025, a date seemingly corresponding⁸ to Thomas Gudinas’s execution on June 24, 2025, the inventory logs show 10 x 10ml vials of rocuronium bromide were removed (1000mg), suggesting that FDOC only prepared half of the required second drug, in violation of the protocol which requires 2000mg, administered through 20 x 10ml vials. PC-R3. 492.

6/12/25	[REDACTED]	JUN 2025	-10	530
6/12/25	[REDACTED]	3/2026	-10	520
6/25/25	[REDACTED]	3/2026	-10	510
7/16/25	[REDACTED]	3/2026	-20	490

⁸ The records do not specify the corresponding execution with each entry of drug removal. While the State below attacked Heath’s reliance on the drug logs for lack of specificity, this only further exacerbates the secrecy and denial of public records. Any uncertainty regarding the purpose of the removal of execution drugs on particular dates merely confirms the need for further development and an evidentiary hearing. Further, it must be noted that the redactions were made by FDOC, and therefore any attacks on the credibility of the redacted records are disingenuous. FDOC has the records in its possession and could answer many of the questions raised by this litigation, but has refused to do so.

And again, on June 12, 2025, a date seemingly corresponding to Anthony Wainwright’s June 10, 2025, execution, records show that 7 vials of potassium acetate were removed from FDOC’s inventory. This suggests that FDOC prepared only 280 milliequivalents of potassium acetate in violation of the protocol, which requires 480 milliequivalents (12 x 20ml vials). PC-R3. 490; *see also* PC-R3. 492.

5/1/25		10-2025		-12	277
5/15/25		10-2025		-12	265
6/12/25		10-2025		-7	258

According to Dr. Zivot, “[w]henver pharmaceuticals are being administered, timing, quantity, and quality of the drug matter. These errors are significant and also contribute to the substantial likelihood of a drawn-out, torturous death.” PC-R3. 483. These errors have particular significance to future executions because, according to Dr. Zivot, “[w]hen administering drugs to any person, regardless of the purpose, it is critical to understand the chemical properties of the drug and understand how the drug will work. It is clear to me, upon review of how Florida has approached its lethal injection protocol during the recent 2025 executions, that FDOC does not have this understanding.” PC-R3. 482.

At times, FDOC implements a four-drug protocol beyond what is authorized in the current method. The logs show that during the executions of Edward James and Michael Tanzi, FDOC administered lidocaine, a drug not called for in the protocol. This again indicates a level of improvisation and unpredictability beyond what is authorized by the protocol, warranting judicial intervention. PC-R3. 512.

DRUG NAME	Lidocaine Hcl 1% 10ml			PACKAGE SIZE	25 x 10ml	
NDCH	[REDACTED]					
DATE	INVOICE NAME/#	LOT #	EXP. DATE	MER	RECEIVED/USED (+/-)	BALANCE
1-3-2025	[REDACTED]	[REDACTED]	Sep 2026	[REDACTED]	+25	25
3/20/25	[REDACTED]	[REDACTED]	Sep 2026	[REDACTED]	-2	23
4-08-25	[REDACTED]	[REDACTED]	Sep 2026	[REDACTED]	-2	21

The use of lidocaine is particularly problematic because the addition of any unauthorized drug could result in unprecedented complications. As Dr. Zivot observed:

The FDOC protocol does not allow for ad hoc substitutions, and the lack of transparency creates unreasonable and serious risks. Therefore, the purpose of this drug can only be surmised... We have no way of knowing how this drug was used. Regardless, lidocaine is a drug with associated adverse effects, including allergy and toxicity, and there is a substantial likelihood that, through mistakes and delays, its usage could contribute to a torturous execution.

PC-R3. 482-83.

Lastly, FDOC recorded the administration of etomidate with an expiration date of January 31, 2025, during the executions of Victor

Jones on September 30, 2025; David Pittman on September 17, 2025; Curtis Windom on August 28, 2025; and Kayle Bates on August 19, 2025. PC-R3. 510. This violated the protocol. PC-R3. 470.

8/19/25		1/31/2025	-10	290
8/29/25		1/31/2025	-10	280
9/17/25		1/31/2025	-10	270
9/30/25		1/31/2025	-10	260

- (6) **Purchase and Maintenance of Lethal Chemicals:** A designated execution team member will purchase, and at all times ensure a sufficient supply of, the chemicals to be used in the lethal injection process. The designated team member will ensure that the lethal chemicals have not reached or surpassed their expiration dates. The lethal chemicals will be stored securely at all times as required by state and federal law. The FDLE agent in charge of monitoring the preparation of the chemicals shall confirm that all lethal chemicals are correct and current.

Administering expired lethal injection drugs during an execution is extremely dangerous because “the expiration date guarantees that a drug will retain its full potency and safety when stored as directed.” PC-R3. 483. According to Dr. Zivot, it is “unknown” whether an expired drug will work as intended by FDOC during a lethal injection execution given the unpredictable chemical properties of those drugs, leaving each execution carried out with those chemicals completely up to chance. PC-R3. 483. As Dr. Zivot concludes, “[a]dministering expired drugs to a prisoner during a lethal injection execution could also result in a drawn-out, torturous execution. At the very least, this sloppy practice identifies serious

gaps in the lethal injection protocol.” PC-R3. 483. Heath has presented uncontroverted evidence through the logs and Dr. Zivot’s declaration which support his claim under the law and therefore is entitled to an evidentiary hearing.

B. The lower court’s refusal to order FDOC to comply with Heath’s demand for discovery has impermissibly impeded further investigation into the documented protocol issues

On January 13, 2025, Heath submitted public records requests pursuant to Rule 3.852(i) to FDOC, the Florida Department of Law Enforcement (“FDLE”), and the Office of the Medical Examiner, District Eight (“ME8”) to further investigate the concerns raised in the drug logs at issue in *Walls*. PC-R3. 249-54, 256-62, 277-82. The demands were directed to the appropriate agency recipients and properly served pursuant to Fla. R. Crim. P. 3.852(i). But the next day, the court summarily sustained the agencies’ objections, resulting in almost no records being provided, and not a single record in response to Heath’s inquiries into Florida’s maladministration of its lethal injection protocol. This substantially limited Heath’s ability to fully present his claim.

A defendant is entitled to public records after a death warrant is signed if he “show[s] how the requested records relate to a colorable claim for postconviction relief and good cause as to why the public records request was not made until after a death warrant was signed.” *Tompkins v. State*, 872 So. 2d 230, 244 (Fla. 2003). Heath did so by identifying the records he was seeking, specifically determining they had not been previously disclosed, and establishing relevance by linking the requests to a colorable claim—the one described herein. Indeed, all of the records specifically concerned FDOC’s ability to carry out, and regulate, its own execution method.

1. Heath’s demands supported a colorable claim

Pursuant to this Court’s instruction in *Tompkins*, Heath raised a colorable claim in his requests for public records, which were perfunctorily denied by the circuit court. *Id.* In sustaining the agencies’ objections, the court misapplied the standard and ignored the plausible basis supporting Heath’s claim. Indeed, a “colorable” claim is a “plausible claim that may reasonably be asserted, given the facts presented and the current law (or a reasonable and logical extension or modification of the current law).” *Colorable Claim*, *Black’s Law Dictionary* (12th ed. 2024). To obtain records in this

context, Heath's underlying claim needed only to be plausible. The claim must have been strong enough to have a reasonable chance of being valid if the legal basis is generally correct and the facts can be proven in court. *See, e.g., Guerrier v. Garland*, 18 F.4th 304 (9th Cir. 2021); *Kenoyer v. Barnhart*, 49 F. App'x 173 (9th Cir. 2002).

To succeed on an underlying lethal injection challenge, Heath must show that the FDOC's negligence creates "a substantial risk of serious harm, an objectively intolerable risk of harm that prevents prison officials from pleading that they were subjectively blameless for purposes of the Eighth Amendment." *Pardo v. State*, 108 So. 3d 558, 562 (Fla. 2012) (quoting *Baze v. Rees*, 553 U.S. 35, 50 (2008)) (emphasis added); *see also Farmer v. Brennan*, 511 U.S. 825, 842, 846 & n.9 (1994). Heath's records requests were narrowly tailored to support such an assertion. Further, the requests were supported by dozens of pages proving FDOC's negligence and indifference to the risk of harm that maladministration could create.

The lower court completely overlooked the substantive basis for both the pertinent public records requests and the underlying lethal injection claim, finding that Heath's claim was "speculative and conclusory." PC-R3. 13. Yet, contrary to the lower court's finding,

Heath is not asserting a speculative challenge to the FDOC's implementation of their protocol, but rather, is seeking merits review on the underlying, and uncontroverted, errors that appear in the FDOC records exposed in *Walls*.

This case is different from instances where this Court has denied relief on a lethal injection issue without evidentiary development. Heath's claim is supported by documented evidence and does not require speculation. For example, in *Cole v. State*, 392 So. 3d 1054, 1065 (Fla. 2024), this Court considered a challenge raising potential issues with venous access due to the appellant's medical condition, alleging that "involuntary movements due to Parkinson's [disease] will make venous access more difficult or more painful...." This Court found the argument speculative, citing the safeguards in place throughout the execution and applying the "presumption that [FDOC] will comply with the lethal injection protocol." *Id.* And in *Hannon v. State*, the appellant's underlying claim concerned records demonstrating that FDOC possessed expired etomidate. *Hannon*, 228 So. 3d 505 (Fla. 2017). Yet, Heath's claim goes beyond the claim in *Hannon*, as the relevant records here document FDOC's *administration* of expired etomidate. Heath is

therefore not asking this Court to make a presumption that FDOC will not follow its own protocol. Heath has shown that it has not.

2. Heath's claim was timely brought in the aftermath of an anomalous execution

Method of execution claims, including allegations of reckless administration, ripen when new facts about the current method arise during a prior execution. *Schwab v. State*, 969 So. 2d 318, 321 (Fla. 2007) (“As this Court has held before, when an inmate presents an Eighth Amendment claim which is based primarily on facts that occurred during a recent execution, the claim is not procedurally barred.”). Because Heath’s claim concerns the maladministration of Florida’s lethal injection protocol, rather than the protocol as written, it is timely under *Schwab*. Furthermore, maladministration of the protocol has led to visible, and troubling, effects during a recent execution.

While many of the effects of the documented errors in the FDOC records are impossible to discern given the protocol’s usage of a paralytic drug to mask any external signs of distress, the November 13, 2025, execution of Bryan Jennings was anomalous, and these issues can be explained by the errors documented in the FDOC

records. Jennings's execution was 20 minutes long, with movement occurring well after the paralyzing drug would have purportedly been administered. According to Dr. Zivot:

The media's description of the movement suggests, at a minimum, a problem with the protocol's administration. This movement could be explained by an issue with the drug potency, dosage, or other unexplained issue. Regardless, it is an indicator of distress, and it is my conclusion that Mr. Jennings suffered a drawn-out, torturous execution that resulted in needless suffering.

PC-R3. 482. Coupled with the fact that the logs denote administering both expired drugs with questionable chemical properties, and improper dosages of certain drugs, there is a substantial likelihood that FDOC's maladministration led to a botched execution of Jennings, which even Florida's use of a powerful paralytic could not fully mask.

Jennings's execution, the longest in 2025, occurred shortly after the records (which span through September 30, 2025) were disclosed. In fact, of the executions carried out in Florida since the adoption of etomidate as the first drug, the two most drawn-out executions were Michael Bell,⁹ executed on July 15, 2025, and

⁹ As described above, the errors plaguing the Bell execution include a failure to properly record the removal of all three of the execution

Jennings, executed on November 13, 2025. It follows that Jennings’s execution was plagued by the same errors in administration, but absent the pertinent records, what exactly went wrong is unknown.

3. Further evidentiary development is necessary

This Court should remand to the circuit court with instructions to grant Heath’s demands for public records and hold an evidentiary hearing on his lethal injection claim. This Court’s precedent demonstrates that adjudication of these claims requires an evidentiary hearing, and this Court has relinquished jurisdiction on multiple occasions to ensure similar claims have that benefit. See *Valle v. State*, 70 So. 3d 525 (Fla. 2011) (relinquishing jurisdiction and remanding for a hearing because the appellant had “raised a factual dispute, not conclusively refuted” regarding the efficacy of a drug); see also *Howell v. State*, 133 So. 3d 511, 515 (Fla. 2014); *Henry v. State*, 134 So. 3d 938, 943 (Fla. 2014); *Davis v. State*, 142 So. 3d 867, 870 (Fla. 2014); *Correll v. State*, 184 So. 3d 478, 483 (Fla. 2015). Other circuit courts have granted evidentiary hearings outright when

drugs in a timely manner, including a failure to document the usage of etomidate at all, raising serious concerns about the dosage and quality of the first drug when executing Bell.

presented with similar facts. *Long v. State*, 271 So. 3d 938 (Fla. 2019). Due process requires that Heath be afforded the same opportunity.

Indeed, among the prior cases where this Court has relinquished jurisdiction for further factual development, Heath's stands out as it is supported by more information beyond general claims to the lethal injection challenge itself. Heath's claim is narrowly tailored, and the related records requests were as well. For example, this Court in *Howell v. State* considered broader challenges to Florida's adoption of a revised lethal injection protocol and the usage of a three-drug protocol with a paralytic. *Howell*, 133 So. 3d at 515. Similarly, the underlying claim in *Henry v. State* was an as-applied challenge as well as a broader challenge to the use of midazolam. 134 So. 3d at 948-49. And the cases of *Davis v. State* and *Correll v. State* concerned as-applied challenges combined with challenges to the usage of midazolam more generally. *See Davis*, 142 So. 3d at 870; *Correll*, 184 So. 3d at 487. In each instance, this Court relinquished jurisdiction for an evidentiary hearing.

D. To the extent they are applicable, Heath has otherwise satisfied both prongs of *Baze*

To the extent he must satisfy *Glossip* and *Asay v. State*, 224 So. 3d 695, 701 (Fla. 2017), Heath can establish that (1) Florida's documented reckless application of the protocol presents a substantial and imminent risk that is sure or very likely to cause Heath serious illness and needless suffering; and (2) a known and available alternative method of execution entails a significantly less severe risk of pain than Florida's current maladministration.

While Heath's challenge is not a traditional facial allegation against the execution protocol itself, but rather to FDOC's troubling approach to carrying it out, it stems from the same principles animating *Glossip* and *Asay* because the numerous and repeated errors in the FDOC records establish the likelihood of repeated mistakes given the volume and timespan where maladministration occurred. Furthermore, the records demonstrate a glaring lack of accountability and internal review within FDOC, which increases the likelihood that these errors will continue absent judicial intervention.

The Supreme Court has outlined what is required to establish a successful Eighth Amendment method-of-execution claim. *Glossip*,

576 U.S. at 877. In challenges pertaining to maladministration of execution protocols, the Court has noted that an “isolated mishap alone does not give rise to an Eighth Amendment violation,” but that repeated mishaps, including “a series of abortive attempts” would be different. *Baze*, 553 U.S. at 50 (quoting *State of La. ex rel. Francis v. Resweber*, 329 U.S. 459, 471 (1947) (Frankfurter, J., concurring)).

While even the underlying facts in *Baze* concerned a challenge pertaining to the potential of maladministration, that case nonetheless was a challenge to the broader protocol itself and the margin of error existing within it. *Baze*, 553 U.S. at 51 (rejecting the argument that a state must adopt a one-drug protocol to minimize the potential risks present in a three-drug protocol). Heath’s case is wholly different in that the claim is supported by records showing no less than nine different errors, affecting multiple different stages of an execution, over just six months, and with no intervention or demonstrated accountability from FDOC.

1. Heath proffered a known and available alternative

Heath identified “a known and available alternative method of execution that entails a lesser risk of pain.” *Glossip*, 576 U.S. at 867. Because Heath is challenging the *administration* of Florida’s

execution protocol specifically, the natural alternative is a version of the protocol that has been subjected to internal review, and the errors raised herein rectified. *See, e.g., Gissendaner v. Comm., Ga. Dep't. of Corr.*, 803 F. 3d 565, 581 (11th Cir. 2015) (Jordan, J., dissenting) (“If a state merely has to fix a correctable problem to eliminate an as-applied challenge, there is no need for a prisoner to allege (or show) that a different alternative method is available to the state.”) (citing *Bucklew v. Lombardi*, 783 F.3d 1120, 1129 (8th Cir. 2015)).

Primarily, the rational alternative to Heath’s claim would be for Florida to pause executions, conduct an independent and transparent review of FDOC’s lethal injection practices, document and explain the errors that have plagued recent applications of the lethal injection protocol, and provide additional training and reform as necessary before resuming executions using the current protocol.

Other jurisdictions have taken similar oversights seriously. In Oklahoma, after a series of mistakes in drug procurement, storage, and preparation came to light, a grand jury was convened to investigate the state’s adherence to its own protocol, particularly its record keeping requirements. The grand jury found that, among other violations, the state had “failed to inventory the execution drugs

as mandated by state purchasing requirements,” which led to the state’s ultimate usage of the wrong drug in the lethal injection of Charles Warner in 2014. Interim Report No. 14 at 2, *In the Matter of the Multicounty Grand Jury, State of Okla.*, Nos. SCAD 2014-70, GJ 2014-1 (May 19, 2016). The grand jury also found that “[i]t is unacceptable for the Governor’s General Counsel to so flippantly and recklessly disregard the written protocol.” *Id.* at 100. Following these findings, the state attorney general acknowledged that “a number of individuals responsible for carrying out the execution process were careless, cavalier and in some circumstances dismissive” of the protocol. Mark Berman, *Oklahoma lethal injection process muddled by ‘inexcusable failure,’ grand jury finds*, THE WASHINGTON POST, <https://www.washingtonpost.com/news/postnation/wp/2016/05/19/oklahoma-grand-jury-says-lethal-injection-process-muddled-by-inexcusable-failure> (May 19, 2016). In light of these discoveries, the grand jury made several recommendations for changes to be made to how executions were carried out, and executions were paused.

Similarly, in Tennessee, an independent reviewer found that the state had deviated from its own protocol on multiple occasions, and that Tennessee had no internal system for accountability or “internal

policies to ensure the Protocol is followed.” See Butler Snow LLP, *Tenn. Lethal Injection Protocol Investigation: Rep. and Findings* at 36 (Dec. 13, 2022). After these findings, Tennessee temporarily paused executions while the state worked on an overhaul of its “tunnel vision, result oriented lens.” Butler Snow LLP at 39.

And, although the paralytic drug generally masks outward expressions of pain, there is a near guarantee that these errors will repeat and cause pain. Other courts have noted such concerns. In California, when confronted with numerous issues regarding the implementation of the state’s lethal injection protocol, including inconsistent and unreliable record keeping, one federal court noted such issues were “likely to recur with considerable frequency,” *Morales v. Tilton*, 465 F. Supp. 2d 972, 975 (N.D. Cal. 2006), warranting judicial intervention. That court found, “[i]n light of the substantial questions raised by the records of previous executions, Defendants’ actions and failures to act have resulted in undue and unnecessary risk of an Eighth Amendment violation.” *Id.* at 981.

If, after independent review and monitoring, Florida is unable to competently carry out a lethal injection protocol, the State could adopt another alternative. As Heath proffered in the circuit court, the

firing squad is an obvious alternative. Execution by firing squad does not involve unnecessary lingering or wanton infliction of pain and suffering in conformity with Florida’s stated objective in its three-drug protocol. When performed properly, the firing squad will eliminate the substantial risk currently presented by a lethal injection execution. Other states have recently turned to the method.

Of the six firing-squad executions that have taken place since 1976, three occurred last year. DEATH PENALTY INFORMATION CENTER, *Execution Database, available at* <https://deathpenaltyinfo.org/facts-and-research/data/executions> . The most recent firing squad execution occurred on November 14, 2025. *Id.* The firing squad is currently authorized in five states. Kevin Fixler, Idaho plans for firing squad executions—aiming to keep prison staff from rifles. IDAHO STATESMAN, <https://www.idahostatesman.com/news/local/crime/article311893632.html> (Sept. 2, 2025). Effective July 2026, firing squad will be the primary method in the state of Idaho. *Id.*¹⁰ It is clearly a reasonable and readily available alternative.

¹⁰ A plaintiff in a method-of-execution case “may point to a well-established protocol in another State as a potentially viable option.” *Bucklew v. Precythe*, 587 U.S. 119, 140 (2019). Even where an alternative requires a change in state law which “may require some

Furthermore, FDOC could identify qualified personnel to carry out an execution by firing squad. FDOC regularly contracts with vendors to purchase firearms, ammunition, and fund appropriate training. See Florida Department of Financial Services, Florida Accountability Contract Tracking System (FACTS).

Moreover, effective July 1, 2025, the State of Florida modified its methods of execution statute, permitting a sentence of death to be carried out by “[any] method not deemed unconstitutional.” Fla. Stat. § 922.105(3). This allows Florida to implement a firing squad, a method which has not been deemed unconstitutional by the United States Supreme Court. This method would avoid the superaddition of pain that would accompany the current approach to the lethal injection protocol as Heath would not be exposed to inaccurate dosages, or expired versions of, lethal pharmaceuticals.

more time and effort than changing any agency protocol,” the “incidental delay” required to make the change does not render the alternative “unavailable” for purposes of the Eighth Amendment standard.” *Nance v. Ward*, 597 U.S. 159, 170 (2022).

II. Florida’s extreme clemency secrecy rules impermissibly blocked Heath from knowing whether federal due process was complied with in his case

Less than three years ago, the United States Court of Appeals for the Eleventh Circuit recognized that Florida’s clemency process must meet the minimum requirements of federal due process in a particular case. *Barwick v. Gov. of Fla.*, 66 F.4th 896, 902 (11th Cir. 2023) (citing *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272 (1998)). The Eleventh Circuit also recognized that a claim that Florida’s clemency process violated due process ripens with the signing of a death warrant, given Florida’s practice of issuing the death warrant and denying clemency simultaneously. *Id.* Until that time, according to the Eleventh Circuit, a Florida death row prisoner “ha[s] no reason to challenge the State’s executive clemency process.” *Id.* (rejecting State’s undue-delay arguments). The federal appeals court’s ruling on this issue—as a matter of federal due process law—is binding on both federal and state courts, including this Court.

Accordingly, Heath would be entitled to now raise a timely claim that the denial of executive clemency in his case violated federal due process if the facts supported it. However, Florida’s extreme clemency secrecy rules impermissibly impede Heath from knowing if due

process was followed in his case. The Florida Commission on Offender Review (“FCOR”) will not even allow a capital defendant to obtain the transcript from his *own* clemency interview, or any materials submitted by the attorney the board appointed as his “clemency counsel.” And while Heath attempted to obtain records through a Rule 3.852(i) request, FCOR objected to disclosing anything at all, and the circuit court sustained that objection.

This situation in itself violates Heath’s rights to procedural due process and access to the courts. *See, e.g., Lankford v. Idaho*, 500 U.S. 110, 126 (1991) (explaining that “fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights.”). It cannot be the case that a federal constitutional claim may be available to Heath, but that Florida’s executive branch is allowed to block any such claim by denying him all access to any records relating to his own clemency proceeding. Heath has no means of determining what standards, if any, guided the clemency decision, or whether they were followed in his case. If Florida officials are not reviewing the individual characteristics of Heath’s case, or are indeed “flipp[ing] a coin to determine whether to grant clemency,” *Barwick*, 66 F.4th at 902, Heath will never be able to discover it due to the

state's extreme, blanket clemency secrecy rules. The State's only answer to its total secrecy rules amounts to, essentially, "trust us."

There are already ample reasons, even in the limited information available, to believe that Florida's clemency process is not compliant with due process. Executive clemency has not been granted to a death row prisoner in Florida in over 40 years, which is statistically implausible given the rates of clemency grants in other states over the same time period.¹¹ Florida refuses to allow capital

¹¹ Whereas Arkansas, Texas, Georgia, Alabama, and Oklahoma—states that continue to play a key role in the uptick in executions nationwide—all have granted clemency at least once in the last 12 years, Florida remains an outlier, leading in executions, and anchoring in clemency grants. This is especially salient given that, as explained further in Heath's petition for a writ of habeas corpus, Heath's co-defendant brother received a life sentence for the same crime, a fact that commonly animates the grant of clemency in other states. For instance, Arkansas granted clemency to Jason McGehee in 2017, and noted that a contributing factor to her decision was "the disparity in sentence given to Mr. McGehee compared to the sentences of his co-defendants." Jacob Kauffman, *Arkansas Governor Grants Clemency to Death Row Inmate, Sets Execution for Another*, NPR (Aug. 25, 2017, 11:58 AM), <https://www.ualrpublicradio.org/2017-08-25/arkansas-governor-grants-clemency-to-death-row-inmate-sets-execution-for-another>. In 2018, Texas commuted Thomas Whitaker's death sentence based, in part, on the fact that the actual triggerman received a life sentence. *Governor Abbot Commutes Death Sentence Of Thomas Bartlett Whitaker*, OFFICE OF THE TEXAS GOVERNOR (Feb. 22, 2018) <https://gov.texas.gov/news/post/governor-abbott-commutes-death-sentence-of-thomas-bartlett-whitaker>. And in 2014, Georgia

defendants or their attorneys access to a single shred of paper about even their own clemency proceeding. Florida appoints “clemency counsel” with no knowledge of the case and pays them \$10,000 to speak to the client once, attend the clemency interview, and submit something written to the board, which is secret even from the client himself.¹² See Fla. Stat. § 940.031(2); Fla. R. Exec. Clem. 15(A) (“[A]ll records and documents generated and fathered in the clemency

commuted Tommy Waldrip’s death sentence. Though the Governor did not state the reasons for the clemency grant, a highlight of Waldrip’s clemency proceedings was that his sentence was disproportionate to his co-defendants who both received life sentences. Tommy Lee Waldrip, ABA (June 5, 2020), https://www.americanbar.org/groups/committees/death_penalty_representation/publications/success-stories/success-stories-archive/tommy-lee-waldrip/. More recently, in 2025, Oklahoma commuted Tremane Wood’s death sentence, stating “[t]his action reflects the same punishment [Wood’s] brother received for their murder of an innocent young man”. Oklahoma Governor Kevin Stitt Grants Clemency to Tremane Wood, DEATH PENALTY INFORMATION CENTER (Nov. 17, 2025), <https://deathpenaltyinfo.org/oklahoma-governor-kevin-stitt-grants-clemency-to-tremane-wood>.

¹² As Heath noted in the circuit court, there are also legitimate questions as to whether the clemency process was fair in his particular case, including the speed at which clemency was denied, simultaneously with the issuance of a warrant, as well as influence from politicians and family members of victims other than the victim in this case. PC-R3. 449. After denying Heath’s demands for any records about his clemency process, the circuit court dismissed these indications as speculation and conjecture. PC-R3. 610.

process . . . are confidential and shall not be made available to any person except members of the Clemency Board and their staff.”).

FCOR and the Clemency Board maintain a list of private counsel for clemency appointments, but wholly preclude capital collateral counsel from engaging in clemency representation. *See Fla. Stat. § 940.031(1); Fla. Stat. § 27.711(11)* (“An attorney appointed under s. 27.710 to represent a capital defendant may not represent the capital defendant during . . . a proceeding commenced under Chapter 940 [Executive Clemency][.]”). Where capital collateral counsel must meet rigorous minimum requirements to undergo representation, *see Fla. Stat. § 27.704(1)*, clemency counsel need not have any capital litigation experience or any familiarity with criminal defense generally to be appointed. And because clemency is an executive function, and “[n]o specific procedures are mandated,” *Johnston v. State*, 27 So. 3d 11, 24-25 (Fla. 2010), clemency counsel need only comply with their three bare minimum duties—contact the client, attend the clemency interview, and submit *anything* on the client’s behalf—to receive the flat \$10,000 fee as compensation.

The circuit court relied on this Court’s precedent stating that the Governor has broad discretion in selecting which death warrant

to sign, PC-R3. 592, which is completely beside the point. As the Eleventh Circuit explained, the import of the simultaneous issuance of a death warrant and clemency denial is that a federal due process claim based on the clemency denial ripens with the death warrant. This only underscores that Heath's clemency claim would be timely— if Florida did not shroud the denial in total secrecy. The circuit court also relied on this Court's cases stating that Florida's established clemency proceedings do not violate the Florida or United States Constitutions. PC-R3. 593 (citing, *e.g.*, *Gudinas v. State*, 412 So. 3d 701, 717 (Fla. 2025)). But this Court should reconsider that precedent because it cannot reasonably make that determination. Because all records are secret, neither this Court nor Heath can know whether Florida's established process is constitutionally valid.

For the circuit court to deny Heath access to any records of his own clemency proceeding, and then fault Heath for offering “nothing more than speculation and conjecture,” is not consistent with federal due process. By denying Heath access to any and all clemency records, Florida has made it impossible for Heath to evaluate whether his denial complied with *Barwick* and *Woodard*. As with the denial of

lethal injection records, this violates procedural due process. See *Arbelaez v. Butterworth*, 738 So. 2d 326, 326-27 (Fla. 1999).

III. The circuit court wrongly denied Heath's claim that his death sentence violates the Eighth Amendment because his youth incarceration stunted his brain development

In 1978, Heath pleaded guilty to second degree murder and was sentenced to 30 years in an adult prison. T. 2252. He was only 16 years old at the time. While serving his sentence, Heath was transferred between at least 9 different adult prisons, jails, and work camps. He experienced substantial trauma during this period. He was subjected to several instances of sexual violence, including gang rape and rape by another inmate at knifepoint.¹³

Owing to his age and stature, Heath was at a high risk of victimization in an adult prison. After he was released, and prior to

¹³ Dr. Akinsulure-Smith explained, “[a]t DeSoto Correction Institution he was since raped several times since 12/78. He claimed that his body has been violated and he was forced to do things that he did not like to do.” PC-R3. 531. Heath reported “sexual contact with another inmate who had a lesion on his penis. Later he began to have trouble with his rectum, bleeding, etc., for which he was hospitalized for about three months and in October he underwent surgery for venereal warts...he also had hemorrhoids.” *Id.* And in 1982 Heath “was sent to Polk CI for a two-month period of time following his allegation of rape.” *Id.*

the death of Mr. Sheridan, Heath carried these traumatic experiences with him and was deeply impacted by them.

Yet, the jury and judge that sentenced Heath to death did not hear anything about those experiences. All the jury heard was misleading testimony from Heath's mother that he "seemed to adjust to it, surprisingly, and was able to survive it." T. 2253. Heath's mother hinted that he "had some problems in the beginning adjusting," but did not specify what those problems were. T. 2255. Heath's father similarly testified that Heath "seemed to get along pretty well most of the time." T. 2270. Because nothing about the myriad traumas Heath endured during his first incarceration was introduced at trial, his capital sentencing judge and jury were not able to consider it as mitigation.

Though Heath was chronologically older than 25, his psychological age was stunted beginning at age 16 due to his traumatic youth incarceration. Accordingly, Heath exhibited a lack of maturity, susceptibility to negative influence, and transient personality at the time of the crime that is characteristic of youth behavior. *Cf. Roper v. Simmons*, 543 U.S. 551, 569-70 (2005) (adhering to the Eighth Amendment's ban against "cruel and

unusual” punishment and creating a categorical exemption from execution for offenders who were under 18 at the time of their offense because they are immature, more susceptible to negative influence than adults, and have a transient personality). As Heath argued, his execution would violate the same underlying Eighth Amendment principles as in *Roper*, as “[c]apital punishment must be limited to those offenders who commit ‘a narrow category of the most serious crimes’ and whose extreme culpability makes them ‘most deserving of execution.’” *Roper*, 543 U.S. at 568 (quoting *Atkins v. Virginia*, 536 U.S. 304, 319 (2002)).

The circuit court refused to review the merits of Heath’s claim for two reasons. First, the circuit court found that Heath’s claim was not based on newly discovered evidence because “consensus opinions, articles, research, and the like, do not constitute newly discovered evidence.” PC-R3. 594 (quoting *Barwick v. State*, 361 So. 3d 785, 793 (Fla. 2023)). Second, the circuit court ruled that the Florida Constitution’s “Conformity Clause” prevents Florida’s state courts from extending the Eighth Amendment’s protections above the floor set by United States Supreme Court precedent. *Id.* at 595. Those rulings are wrong and should be reversed.

A. The circuit court’s newly discovered evidence ruling was wrong—new evidence shows that Heath’s youth incarceration stalled his brain development, undermining his ability to mature and self-control

In late 2025, Dr. Akinsulure-Smith concluded that Heath’s experience as an adolescent in an adult prison resulted in severe, lifelong developmental and health consequences. Dr. Akinsulure-Smith subsequently provided Heath’s counsel with a review of recent research in the field of adolescent psychology that drove her assessment of Heath. PC-R3. 548.

Psychological findings during Heath’s first sentence reinforce that his brain development was stunted: “his paranoid mentations are mostly due to his immature emotions and weak mind . . . he has no moral judgment . . . he lacks insight,” PC-R3. 558, “[t]est findings indicate Heath is an impulsive person who often acts before considering the consequences of his behavior,” PC-R3. 529, and “[h]e may also be an impulsive individual who has difficulty accepting responsibility for his actions,” *id.*

Though not known by the psychological community at that time, Heath’s immature emotions, impulsivity, and lack of insight were signals that his brain development had been stunted while

incarcerated. PC-R3. 528. It is now clear that, beginning at age 16, Heath's brain development was stalled due to his particularly traumatic incarceration, which ultimately slowed his maturation. Research now demonstrates that youth incarceration in adult prisons during the critical developmental phase has a negative impact on critical areas of adolescent development. *Id. See also, Long-Term Mental Health & Mortality; Neurodevelopment & Social Functioning; and Criminogenic Effects and Recidivism. Id.*

For Heath, each day was an act of survival as a youth in an adult prison. As Dr. Akinsulure-Smith reported, "during key developmental years, he struggled with a range of severe and relentless sociocultural hardships, including being forced to survive in unstable and toxic environments rife with brutally oppressive physical, emotional, sexual, and verbal abuse." PC-R3. 547-48. To survive in these conditions, Dr. Akinsulure-Smith concluded that Heath's development was stunted, giving rise to "impaired reasoning, and poor decision-making skills leading to poor judgment." *Id.*

The circuit court cited to a string of this Court's cases denying newly discovered evidence claims because "resolutions, consensus opinions, articles, research, and the like, do not constitute newly

discovered evidence.” *Id.* at 594 (quoting *Barwick*, 361 So. 3d at 793) (citations omitted). But this is both incorrect and reductive of Heath’s claim.

Although the circuit court was correct that this Court “has routinely held that resolutions, consensus opinions, articles, research, and the like, do not constitute newly discovered evidence,” *id.*, it wrongly characterized the basis for Heath’s newly discovered evidence, which is highly distinguishable from the cases it relied on.

For instance, the movants in *Branch v. State*, 236 So. 3d 981 (Fla. 2018), and *Foster v. State*, 258 So. 3d 1248 (Fla. 2018), cited to years-old articles and studies that detailed the specific vulnerability to impulsivity and risk-taking that is characteristic of individuals between eighteen and twenty-one.¹⁴ *Foster* additionally cited to an American Bar Association resolution and an assertion that “recent actions by state legislatures support[ed] the prohibition of death sentences” to those under age twenty-two—but conceded that “no state [had] passed a law specifically geared toward that age group.”

¹⁴ *Schwab v. State*, 969 So. 2d 318 (Fla. 2007), involved a similar finding that new scientific articles regarding brain anatomy and sexual offending did not, in and of themselves, constitute newly discovered evidence.

Id. at 1253. Similar to *Foster*, the movant in *Barwick* relied on a resolution from the American Psychological Association which “appear[ed] to be the association’s official or public stance that the death penalty should be banned in cases where the offender was under twenty-one years of age at the time of the capital offense.” *Barwick*, 361 So. 3d at 793.

Unlike these cases, Heath did not rely upon a restatement or collection of old evidence, or a professional association’s resolution on *Roper*. Instead, Heath’s claim of newly discovered evidence is based on a specific new expert report establishing the existence of a scientific tipping point revealing the true impact of adolescent incarceration on juvenile brain development.

The circuit court offered no explanation for why Dr. Akinsulure-Smith’s report did not constitute newly discovered evidence; indeed, the court offered no insight into its justifications other than citing to a string of legal precedent. PC-R3. 594-95. The court seemed to imply that because Dr. Akinsulure-Smith’s expert report referenced multiple studies between 2023-2025 to support its proposition, it was the kind of restatement or resolution relied upon in *Barwick*.

Heath's newly discovered evidence is closer to the evidence that the *Roper* petitioner presented to the Supreme Court—and the Supreme Court itself relied on in crafting *Roper's* categorical exemption—than *Barwick*. In *Roper*, the petitioner did not rely on one expert report or scientific study but on the consensus of neuroscience and psychology in the year 2005, which included references to individual reports as far back as 1992. *See Roper*, 543 U.S. at 569 (citing Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 DEVELOPMENTAL REV. 339 (1992)). This is precisely the kind of consensus reported by Dr. Akinsulure-Smith.

B. The circuit court wrongly declined to analyze Heath's claim under the Eighth Amendment

The circuit court wrongly declined to analyze Heath's claim under the Eighth Amendment. When the United States Supreme Court held that the Eighth Amendment forbids the imposition of the death penalty on adolescents in *Roper*, it recognized that the Eighth Amendment prohibits execution for a category of young defendants whose brains are insufficiently developed because such a punishment was too unusual and lacking in penological justification, as evidence by the morals and neuroscience of 2005. *Roper*, 543 U.S.

at 574-75. In the twenty years since *Roper*, science has evolved to recognize that traumatic youth experiences such as adolescent incarceration have long-term adverse effects on the development of that youth's brain. PC-R3. 548.

On a macro level, a review of objective indicia of society's standards of decency demonstrates that an even stronger national consensus against the death penalty as a whole exists today than there was against the juvenile death penalty in 2005. *See Roper*, 543 U.S. at 564 (finding a national consensus against the juvenile death penalty because "30 states prohibit the juvenile death penalty, comprising 12 that have rejected the death penalty altogether and 18 that maintain it but, by express provision or judicial interpretation, exclude juveniles from its reach."). Today a majority of American jurisdictions—34—have abolished, enacted a moratorium upon, or abandoned the death penalty as a matter of practice for all criminal defendants, including late adolescents. DEATH PENALTY INFORMATION CENTER, <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state> (last visited January 26, 2026). Twenty-three states and the District of Columbia have outright abolished the death penalty. *Id.* Governors of California, Pennsylvania, Oregon, and Ohio have

imposed moratoriums on the imposition of the death penalty. Of the jurisdictions with the death penalty, the following have not carried out an execution in decades: Kansas, Nebraska, Nevada, New Hampshire, Pennsylvania, Wyoming, and the U.S. military. DEATH PENALTY INFORMATION CENTER, *Execution Database*, available at <https://deathpenaltyinfo.org/facts-and-research/data/executions>. This rejection of the death penalty entirely encompasses a rejection of the execution of late adolescents.

Currently, sociolegal trends indicate an acknowledgment that late adolescents under 25 years of age continue to exhibit traits shared by adolescents under 18. Car rental companies typically require a renter to be at least twenty-one and employ surcharges for those aged twenty-one to twenty-five.¹⁵ In an effort to prevent unauthorized house parties, Airbnb began prohibiting people under twenty-five from renting entire homes locally.¹⁶ Citing high

¹⁵ See Christopher Elliot, *Car Rental Age Restrictions Can Be Complicated. Here's What to Know*, THE WASHINGTON POST (Jan.18, 2023),<https://www.washingtonpost.com/travel/tips/car-rental-age-restrictions>.

¹⁶ See Lucas Manfredi, *Airbnb Blocks Home Bookings for Some Guests Under 25 to Crack Down on Unauthorized Parties*, FOX BUS. (July 2, 2020, 7:16 PM), <https://www.foxbusiness.com/lifestyle/airbnb->

insurance costs, Uber mandated that California drivers be at least twenty-five-years old.¹⁷ Eligibility to be a member of the U.S. House of Representatives includes a requirement that one is at least 25 years old. U.S. Const., art. II, § 2, cl. 2. Under the Uniform Transfers to Minors Act, some states, including Florida, allow custodianships for minors to continue until age 25 rather than 18 or 21.¹⁸

In denying this claim, the circuit court said the “categorical bar of *Atkins* that shields the intellectually disabled from execution does not apply to individuals with other forms of mental illness or brain damage.” PC-R3. 596 (quoting *Zack v. State*, 371 So. 3d 335, 347-48 (Fla. 2023); (citing *Gordon v. State*, 350 So. 3d 25, 37 (Fla. 2022)) (“For the purposes of the Eighth Amendment, the existence of

restricts-home-bookings-for-some-25-and-under-guests-to-crack-down-on-unauthorized-parties.

¹⁷ See *Uber Raises the Minimum Age for Most California Drivers to 25, Saying Insurance Costs Are Too High*, ASSOCIATED PRESS (Aug. 24, 2023), <https://apnews.com/article/uber-age-restriction-drivers-35ac187d3c8cb982cc1e352032efafc5>.

¹⁸ See UGMA/UTMA age of majority by state, CAPITAL GROUP, <https://www.capitalgroup.com/advisor/account-resource-center/ugma-utma/age-of-majority.html>.

traumatic brain injury does not reduce an individual’s culpability to the extent they become immune from capital punishment.”).

This narrow view of Heath’s Eighth Amendment claim reduces the most critical aspect of it—that Heath’s stalled brain development rendered his psychological age younger than his chronological age such that he was “categorically less culpable than the average criminal” at the time of the crime. *Atkins*, 536 U.S. at 316. Dr. Akinsulure-Smith found that Heath’s experience as an adolescent in an adult prison resulted in severe, lifelong developmental and health consequences. Dr. Akinsulure-Smith’s 2025 evaluation confirmed that Heath’s consistent traumatic experiences during a critical period of adolescent brain development permanently altered his neurological pathways, stunting his brain development beginning at just 16. PC-R3. 548-50. The science of today tells us that, just as in *Roper*, Heath’s underdeveloped brain rendered him less culpable.

C. The circuit court wrongly ignored Heath’s argument that his claim cannot be procedurally barred consistent with the Eighth Amendment

The circuit court wrongly ignored Heath’s argument that, as with *Atkins* and *Roper* claims, his Eighth Amendment claim cannot be impeded by state procedural barriers because it is a categorical

exemption guaranteed by the federal Constitution. And, where the federal Constitution and state law conflict, state law must always yield. *See Reynolds v. Sims*, 377 U.S. 533, 584 (1964) (“When there is an unavoidable conflict between the Federal and State [law], the Supremacy Clause of course controls.”).

If a person is facing execution in violation of the Eighth Amendment, it would be unjust to refuse any final review of their substantive claim on procedural grounds. *See Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008) (explaining that capital punishment must be limited to a narrow category of offenders because punishment by death risks the laws sudden descent into brutality and recognizing that the procedural bars in *Roper* and *Atkins* were applied because the offenders have a diminished personal responsibility for the crime). This Court should address the merits of Heath’s claim.

D. The circuit court’s reliance on the Conformity Clause—and this Court’s Conformity clause precedent—contravene the Eighth Amendment

The circuit court’s reliance on the Conformity Clause to bypass the substantive Eighth Amendment issue itself calls for reversal, and for this Court to abandon its Conformity Clause precedent. The

Conformity Clause, as interpreted by this Court, violates bedrock Eighth Amendment principles.

Quoting *Barwick*, the circuit court said it “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.” 361 So. 3d at 794. In *Barwick*, this Court rejected a death-sentenced prisoner’s *Roper* extension argument because it found that the Conformity Clause means that “the Supreme Court’s interpretation of the Eighth Amendment is both the floor and ceiling for protection from cruel and unusual punishment in Florida,” and Florida courts may not provide any further protections than those the Supreme Court has explicitly enumerated. 361 So. 3d at 794.

Although Florida’s Eighth Amendment Conformity Clause—the only clause of its kind in any state constitution—purports to require Florida to decide Eighth Amendment claims “in conformity with decisions of the United States Supreme Court which interpret the prohibitions against cruel and unusual punishment,” in reality it violates the Eighth Amendment rights of all who attempt to litigate under its yoke. Fla. Const. art. I, § 17. The Conformity Clause

prevents development of Eighth Amendment jurisprudence in the manner mandated by Supreme Court case law.

By construing the Conformity Clause as requiring Florida courts to treat the Supreme Court’s Eighth Amendment decisions as both the “floor” and “ceiling” of protections against cruel and unusual punishment, this Court’s Conformity Clause precedent wholly repudiates a critical aspect of Eighth Amendment determinations: consideration of ever-evolving societal, legal, and scientific standards. Indeed, this Court itself first recognized the Conformity Clause’s stifling effect on the Eighth Amendment—a constitutional amendment whose body of law relies on developing case law to ensure the rights guaranteed therein are in tune with society’s evolving standards of decency—twenty-five years ago when this Court overturned the original proposed amendment to the Florida Constitution that sought to create a conformity clause. See *Armstrong v. Harris*, 773 So. 2d 7, 18 (Fla. 2000) (noting that although Florida’s system of constitutional government was “grounded on a principle of ‘robust individualism’” and often provided greater freedom from “governmental intrusion” than federal law, the conformity clause would “nullify a longstanding constitutional

principle that applies to all criminal punishments, not just the death penalty;” the confusing amendment could trick a Floridian into voting in favor of “protecting constitutional rights when in fact the citizen was doing *the exact opposite*”) (emphasis in original).

In the ensuing years since Florida’s singular Conformity Clause ultimately became part of its state constitution, it has been increasingly utilized to force Florida courts to opt out of critical Eighth Amendment analyses, including judicial determinations related to evolving standards of decency. *See, e.g., Gudinas*, 412 So. 3d at 713 (rejecting *Roper* and *Atkins* extension arguments, explaining that the Conformity Clause forbids the Florida Supreme Court from interpreting the Florida Constitution); *Bowles v. State*, 276 So. 3d 791, 796 (Fla. 2019) (relying on the conformity clause to refuse any consideration of whether the national death penalty trends warranted exemption from execution under the Eighth Amendment); *Lawrence v. State*, 308 So. 3d 544, 545 (Fla. 2020) (relying on the Conformity Clause to eliminate Eighth Amendment proportionality review); *Hart v. State*, 246 So. 3d 417, 420-21 (Fla. 4th DCA 2018) (relying on the Conformity Clause in a non-capital context to refuse to consider whether a juvenile sentence violated

Graham v. Florida, 560 U.S. 48 (2010)); see also *Covington v. State*, 348 So. 3d 456, 479-80 (Fla. 2022) (relying in part on Conformity Clause to refuse to consider whether defendant’s alleged insanity at the time of the crime rendered his death sentence cruel and unusual); *Allen v. State*, 322 So. 3d 589, 602 (Fla. 2021) (seemingly implying that the Conformity Clause may justify limiting a mitigation presentation in certain cases involving waiver).

Paradoxically, Florida’s purported “conformity” with the Eighth Amendment actually violates it. Supreme Court precedent makes clear that the Eighth Amendment is “not static” and “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.” *Trop v. Dulles*, 356 U.S. 86, 101 (1958). And, to determine whether society’s evolving standards of decency prohibit a challenged punishment, the Supreme Court looks to trends in the development of state laws. See, e.g., *Atkins*, 536 U.S. at 314-318 (evaluating different state law to determine whether the Eighth Amendment forbids the execution of the intellectually disabled). Thus, state courts must necessarily develop that law and engage in analyzing Eighth Amendment challenges under the framework provided by the Supreme Court.

Yet Florida courts, as demonstrated by the litany of examples above, deem themselves unable to engage in any kind of analysis of Eighth Amendment claims at all, due to the Conformity Clause's vast restrictions on independent court determinations. The circuit court below is no exception; without engaging in the merits of Heath's Eighth Amendment claim, the court summarily held that it was precluded from "interpret[ing] Florida's prohibition against cruel and unusual punishment to provide protection that the Supreme Court has decided is not afforded by the Eighth Amendment." PC-R3. 595.

The Conformity Clause, far from strict adherence to the Constitution, actually conflicts with Eighth Amendment precedent and must yield under the Supremacy Clause. *See Reynolds*, 377 U.S. at 584. Florida's use of the Conformity Clause to bind itself to the Supreme Court's case law has resulted in Florida acting as a flawed "final arbiter[] of important issues under the federal constitution[.]" *Minnesota v. National Tea Co.*, 309 U.S. 551, 557 (1940).

Finally, the Florida legislature's recent changes to its death penalty statutes demonstrate that Florida no longer has any interest in appearing to conform to Supreme Court Eighth Amendment jurisprudence. This recent legislation not only confirms that the

Conformity Clause is unworkable and unconstitutional but also obsolete in the eyes of the very legislative body that created it.

In 2023, Florida did away with its jury unanimity requirement for the death penalty, permitting courts to impose death when a mere eight out of twelve jurors concur – despite, of course, the constitution requiring jury unanimity in all felony convictions. Fla. Stat. § 921.141(2)(a)(2); *Ramos v. Louisiana*, 590 U.S. 83, 111 (2020). In 2025, Florida authorized the use of the death penalty against defendants convicted of sexual battery on a child under the age of 12, despite unequivocal Supreme Court precedent holding that the imposition of the death penalty for the rape of a child where the crime did not result, and was not intended to result, in the death of the victim violates the Eighth Amendment. *Kennedy*, 554 U.S. at 413. Florida also authorized the imposition of the death penalty for human trafficking of vulnerable persons for sexual exploitation. Fla. Stat. § 921.1427 (2025). Neither of these crimes result in death, meaning that these statutes are exactly the kind of punishment that the Supreme Court has recognized the Eighth Amendment forbids. *Kennedy*, 554 U.S. at 438.

Additionally, Florida passed a mandatory death penalty statute, requiring death sentences for defendants who are “an unauthorized alien and who is convicted or adjudicated guilty of capital felony to a sentence of death,” without considering any individualized sentencing factors. Fla. Stat. § 921.1426 (2025). There is no question the Eighth Amendment forbids mandatory death penalty statutes. *Woodson v. North Carolina*, 428 U.S. 280, 304-305 (1976).

The Conformity Clause would, ostensibly, render the above statutes unconstitutional in Florida, but the legislature passed the statutes without so much as a passing reference to the Conformity Clause.¹⁹ Because Florida’s legislative branch no longer treats the Eighth Amendment as the constitutional floor of capital defendants’ rights, this Court should revisit the Conformity Clause and declare it unconstitutional. And, because Heath presents a timely Eighth

¹⁹ Tellingly, during the January 28, 2025, Senate Special Session B discussion of mandatory death penalty for “unauthorized aliens,” then-Senator Randy Fine explicitly stated: “In fact in this legislature, we have chosen to pass things that we knew were unconstitutional at the time that we passed them because we believed that the Supreme Court would change their mind[.]” Senate Special Session B, THE FLORIDA CHANNEL at 34:40-34:48 <https://thefloridachannel.org/videos/1-28-25-senate-special-session-b/> (Jan. 28, 2025).

Amendment claim not adequately analyzed on the merits below, this is an ideal opportunity to revisit Conformity Clause precedent.

IV. The circuit court erred in denying Heath’s claim that his death sentence violates the Eighth Amendment because his sentencing verdict was not unanimous

For nearly 400 years before our Nation’s founding, unanimity has been recognized as a required component of criminal jury verdicts. *See Apodaca v. Oregon*, 406 U.S. 404, 407-08 (1972) (plurality opinion) (“Like the requirement that juries consist of 12 men, the requirement of unanimity arose during the Middle Ages and had become an accepted feature of the common-law jury by the 18th century”); *see also Ramos*, 590 U.S. at 90 (“The requirement of juror unanimity emerged in 14th Century England and was soon accepted as a vital right protected by the common law.”). Yet, absent this Court’s intervention, Heath will be executed despite two jurors recommending a life sentence. R. 427, 452-71; T. 2385.

A. Background and ruling below

Heath’s penalty phase was conducted under Florida’s previous sentencing statute. Under the statute, his advisory jury²⁰ was

²⁰ The jury was instructed that its recommendation was “advisory in nature,” “not binding,” and that “[f]inal decision as to what

required to determine “whether sufficient aggravating circumstances exist to outweigh any mitigating circumstances found to exist.” R. 423; T. 2363, 2365. Thus, the 10-2 recommendation indicates that Heath’s jury did not unanimously find all of the necessary factors to impose a death sentence.

After his death warrant was signed, Heath asserted in the circuit court that in light of evolving standards of decency—as reflected by the Supreme Court’s understanding of the Eighth Amendment at the time of the founding, and further reinforced by evolving societal values as reflected by state practices—he is not in the class of offenders who were found by a unanimous jury to be among those culpable enough to deserve a death sentence.²¹

In denying Heath’s claim that his non-unanimous death sentence violates the Eighth Amendment, the circuit court made two

punishment shall be imposed rests solely with the judge” R. 421; see also T. 2361.

²¹ *Cf. Witherspoon v. Illinois*, 391 U.S. 510, 520 n.15 (1968) (the decision by a jury to sentence a defendant to death maintains the “link between contemporary community values and the penal system—a link without which the determination of punishment would hardly reflect the evolving standards of decency that mark the progress of a maturing society.”) (internal quotation omitted).

findings: (1) the claim is procedurally barred because similar claims were raised in Heath's prior postconviction proceedings pursuant to *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), which does not apply retroactively to Heath's death sentence; and (2) the claim is meritless. PC-R3. 598-99. Those rulings were legally and factually erroneous.

B. Heath's Eighth Amendment claim is not a re-litigation of prior postconviction claims, and thus is not subject to any procedural bar

The circuit court ruled that this claim is procedurally barred because it was "raised before in both of Defendant's prior postconviction proceedings." PC-R3. 597. But this misunderstands the contours of the present claim, confuses it for a distinguishable *Hurst* claim raised in Heath's 2017 proceedings and wholly unrelated claims raised in his 2005 proceedings, and indeed misapprehends the holding of *Hurst v. State*.

First, in Heath's 2005 postconviction motion, he challenged the constitutionality of his jury's non-binding sentencing recommendation and failure to specify the aggravating factors found pursuant to *Apprendi v. New Jersey*, 530 U.S. 466 (2000), *Ring v. Arizona*, 536 U.S. 584 (2002), and *Blakely v. Washington*, 542 U.S. 296 (2004). PC-R1. 122-23. The 2005 claim neither invoked the

Eighth Amendment nor alleged that his non-unanimous jury verdict offends the evolving standards of decency such that it amounts to a categorical bar to his execution. Thus, the circuit courts equating his present claim to his 2005 claim is legally erroneous.

The present claim, in contrast, alleges that non-unanimous jury verdicts do not comport with the evolving standards of decency; thus, executing someone whose death sentence was imposed by a non-unanimous jury constitutes cruel and unusual punishment under the Eighth Amendment. In fact, Heath's present claim pleaded in his under-warrant Rule 3.851 motion contained not a single reference to *Hurst*²² *v. Florida* or *Hurst v. State*. And as Heath is not seeking the retroactive application of either opinion to his death sentence, the circuit court's determination that his claim is meritless based on *Hurst v. State* not applying retroactively is inconsequential.

Further, even if the circuit court's determination that this claim is barred was based on a correct understanding of the past and

²² The circuit court's order only cited *Hurst v. State* in furtherance of its holding that the claim is a re-litigation of past claims and is thus procedurally barred. PC-R3. 597-99. For the sake of clarity, Heath argues that neither *Hurst* opinions serve as a bar to this Court determining the merits of his claim.

present claims being raised and constitutional rights being violated, an Eighth Amendment claim that Heath is categorically exempt from execution must not be subject to a procedural bar.

Finally, the circuit court's purported reliance on this Court's precedent disposing of claims challenging non-unanimous verdicts under the Eighth Amendment, PC-R3. 598-99, is not dispositive. Florida's Conformity Clause precludes state courts from examining the evolution of society's standards of decency in the context of the Eighth Amendment. The Clause conflicts with the commands of binding federal law, and thus cannot be invoked as a barrier to analyzing the prohibitions of the Eighth Amendment.

C. Heath's death sentence violates evolving standards of decency as reflected by the Supreme Court's understanding of the Eighth Amendment at the time of the founding

The Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop*, 356 U.S. at 100. In determining whether the death penalty may be imposed despite a non-unanimous sentencing verdict, the guiding principle requires courts to survey: (a) the United States Supreme Court's own understanding and interpretation, and

the Eighth Amendment’s text, history, meaning, and purpose; and (b) objective indicia of societal consensus as expressed in legislative enactments and state practices. *See Graham*, 560 U.S. at 62; *Kennedy*, 554 U.S. at 420; *Roper*, 543 U.S. at 563.

“[T]he Constitution’s guarantees cannot mean less today than they did the day they were adopted.” *United States v. Haymond*, 588 U.S. 634, 642 (2019); *see also Cunningham v. Florida*, 144 S. Ct. 1287, 1288 (2024) (Gorsuch, J., dissenting from the denial of certiorari) (“our cases have insisted, repeatedly, that the right to trial by jury should mean no less today, and afford no fewer protections for individual liberty, than it did at the Nation’s founding.”). The Framers of the Constitution broadly sought to preserve for future generations the right to unanimous 12-member juries in criminal cases. *See Cunningham*, 144 S. Ct. at 1287-88 (Gorsuch, J., dissenting from the denial of certiorari) (encouraging the Court to grant certiorari “to ensure no government in this country may send a person to prison without the unanimous assent of 12 of his peers.”).

In the capital context, Blackstone explained, it was understood that “no man should be called to answer to the king for any capital crime unless . . . 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 his equals.” Janet C. Hoeffel, *Death Beyond a Reasonable Doubt*, 70 ARK. L. REV. 267, 271 (2017) (quoting 4 William Blackstone, *Commentaries on the Law of England* 343 (4th ed., Oxford, Clarendon Press 1770)).

At common law, the determination of whether a defendant should be sentenced to death belonged to the jury. By the time the Bill of Rights was adopted, the jury’s right to determine whether the death penalty was applied “was unquestioned.” Welsh S. White, *Fact-Finding and the Death Penalty: The Scope of a Capital Defendant’s Right to Jury Trial*, 65 NOTRE DAME L. REV. 1, 10-11 (1989).

Given the number of crimes that mandated capital punishment, the determination of whether to find the defendant guilty and whether to spare his life was frequently the same. Hence, it was widely understood that the jury had nullification power if it believed a death sentence would be too harsh. *See Woodson*, 428 U.S. at 289-290. This practice, known as “sanction nullification,” was widely recognized. Thomas Andrew Green, *Verdict According to Conscience: Perspectives on the English Criminal Trial Jury, 1200-1800*, 97 (1985). Thus, although “under this capital punishment scheme, there was

no bifurcation between guilt and sentencing,” “common law juries necessarily engaged in ‘de facto sentencing’ when deciding whether the defendant was guilty as well as the degree of guilt.” Richa Bijlani, *More than Just a Factfinder: The Right to Unanimous Jury Sentencing in Capital Cases*, 120 MICH. L. R. 1499, 1523, 1525 (2022).

Part and parcel of the jury’s determination that a defendant should be sentenced to death were the corresponding protections that the jury’s verdict be unanimous and beyond a reasonable doubt. See Hoeffel, *supra*, at 275-79 (noting the creation of the beyond a reasonable doubt standard was based on the “morality of punishment” in capital cases, rather than fact finding). This was in contrast to less serious crimes in which judges could determine sentences and were not bound to making findings beyond a reasonable doubt. See John G. Douglass, *Confronting Death: Sixth Amendment Rights at Capital Sentencing*, 105 COLUM. L. REV. 1967 (2005) (“judges exercised sentencing discretion in choosing among [non-capital] punishments and in fixing terms of imprisonment, and . . . they exercised that discretion in sentencing proceedings that lacked the formality of jury trials”).

In *Ramos*, in the Sixth Amendment context, the United States Supreme Court catalogued the centuries-long history of jury unanimity when defendants were charged with “serious” crimes:

The requirement of juror unanimity emerged in 14th century England and was soon accepted as a vital right protected by the common law. As Blackstone explained, no person could be found guilty of a serious crime unless “the truth of every accusation...should...be confirmed by the unanimous suffrage of twelve of his equals and neighbors, indifferently chosen, and superior to all suspicion.”²³ A “*verdict, taken from eleven, was no verdict*” at all.²⁴

Ramos, 590 U.S. at 90 (emphasis added) (footnote omitted). *Ramos* acknowledged that the early American states either widely accepted the unanimity requirement by codifying it in their constitutions or preserving the right to a jury trial generally. *Id.* at 90-91. By the time the Sixth Amendment was ratified in 1791, the unanimity requirement had been in effect for nearly 400 years. *Id.* at 91.

Although the well-established requirement of juror unanimity has traditionally been explored in the Sixth Amendment context, it is just as applicable to jury verdicts in the Eighth Amendment context.

²³ 4 W. Blackstone, *Commentaries on the Laws of England* 343 (1769).

²⁴ J. Thayer, *Evidence at the Common Law* 88-89, n.4 (quoting *Anonymous Case*, 41 Lib. Assisarum 11 (1367)).

As the Supreme Court noted in *Ramos*, a unanimous jury has been required to convict a defendant of a serious offense throughout common law. *Id.* at 87-93. The Court recognized that the right to a jury is “fundamental to the American scheme of justice.” *Id.* at 93. If it is unacceptable to subject a defendant to the possibility of facing more than six months in prison based on a less than unanimous jury vote, clearly it is unacceptable to sentence him to death.

Further, the Supreme Court has never held that a unanimous jury verdict applies solely at the guilt phase of a trial. Rather, the requirement was implicitly applied to jury trials broadly, which in the capital context includes both guilt and sentencing phases. Common law understanding supports this broad applicability, as capital trials were not bifurcated at common law.²⁵

²⁵ See *Gregg v. Georgia*, 428 U.S. 153 (1976) (holding that Georgia’s new statutory requirement of bifurcated capital proceedings in which the penalty phase involved identifying and weighing aggravation and mitigation resolved the constitutionality concerns expressed in *Furman v. Georgia*, 408, U.S. 238 (1972), that the death penalty not be imposed in an arbitrary and capricious manner). Thus, a bifurcated proceeding that requires unanimity to convict, but not to identify and weigh aggravators against mitigators, and then subsequently impose a death sentence is inherently arbitrary, capricious, and violative of the Eighth Amendment.

D. Societal consensus, particularly as reflected by state practice, overwhelmingly repudiates non-unanimous sentencing verdicts

The Supreme Court has traditionally looked at three indicators of societal consensus: First, the current state and federal sentencing laws because legislatures “are constituted to respond to the will and consequently the moral values of the people.” *Atkins*, 536 U.S. at 322–23. As such, legislation is “the clearest and most reliable objective evidence of contemporary values.” *Id.* at 322–23. Second, the Court examines actual sentencing practices. *See, e.g., Graham*, 560 U.S. at 62 (“Here, an examination of actual sentencing practices in jurisdictions where the sentence in question is permitted by statute discloses a consensus against its use.”). Third, “[s]tatistics about the number of executions may inform the consideration whether capital punishment . . . is regarded as unacceptable in our society.” *Kennedy*, 554 U.S. at 433. Therefore, in evaluating Heath’s Eighth Amendment claim, this Court must look to the contemporary consensus regarding jury unanimity in capital sentencing.

Twenty-seven states and the federal government authorize the death penalty. Of those, four—Montana, Nebraska, Indiana and Missouri—allow a judge to make the final sentencing determination

absent a unanimous verdict. Montana's capital sentencing scheme allows the jury to find whether aggravators and mitigators exist and rests the sentencing determination with a single judge. Mont. Code. Ann. § 46-18-301. Still, Montana has not sentenced anyone to death since 1992, nearly *thirty-four* years ago, has not executed anyone since 2006, and has only two people on its death row.²⁶ And in January 2025, its legislature rejected a bill that would have resumed executions.²⁷ Nebraska, similarly, allows the jury to find whether aggravators exist, and rests the sentencing determination with a three-judge panel. Neb. Rev. Stat. Ann. § 29-2521. Nebraska has only sentenced four²⁸ people to death in the last nineteen years and has

²⁶ Jonathon Ambarian, *Montana House narrowly rejects bill intended to allow death penalty to resume*, KTVH (Jan. 30, 2025, 10:34 PM), <https://www.ktvh.com/news/montana-house-narrowly-rejects-bill-intended-to-allow-death-penalty-to-resume#:~:text=In%202021%2C%20the%20bill%20fell,William%20Gollehon%2C%20sentenced%20in%201992.>

²⁷ *Id.*

²⁸ Bill Schammert, *Here are Nebraska's 11 death row inmates and their crimes*, KETV (May 7, 2024, 11:57 AM), [https://www.ketv.com/article/nebraska-death-row-inmates-crimes/46938630.](https://www.ketv.com/article/nebraska-death-row-inmates-crimes/46938630)

only executed four people since the death penalty was held constitutional by the Supreme Court in 1976.²⁹

Indiana and Missouri consider a non-unanimous sentencing verdict to be a hung jury in which case the judge retains the sentencing determination. Ind. Code Ann. § 35-50-2-9; Mo. Ann. Stat. § 565.030. In Indiana, where five men are awaiting execution, only one person was sentenced to death in the last twenty-seven years after the jury could not reach a unanimous decision, and he is no longer on death row.³⁰ In Missouri, the two persons who were sentenced to death in the last decade received non-unanimous jury votes, one of whom had their sentence vacated on direct appeal and was sentenced to life.³¹ To put this in perspective, Florida has

²⁹ DEATH PENALTY INFORMATION CENTER, <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/nebraska> (last visited January 22, 2026).

³⁰ See *Wilkes v. State*, 917 N.E.2d 675, 693 (Ind. 2009); Indianapolis Star, *Here's who's on Indiana's death row after the execution of Joseph Corcoran*, IndyStar (Dec. 18, 2024, 12:36PM) <https://www.indystar.com/story/news/local/2024/12/18/whos-on-indianas-death-row-after-the-execution-of-joseph-corcoran/77066289007/>

³¹ *Missouri Supreme Court Grants New Sentencing Trial to Man Who Was Sentenced to Death Despite 11 Jurors' Votes for Life*, DEATH PENALTY INFORMATION CENTER (April 11, 2019),

sentenced more³² people to death by means of a non-unanimous jury verdict since receding from unanimity in 2023 than Nebraska and Montana combined have sentenced anyone in the last *18 years*, and Missouri and Indiana combined in the last roughly *quarter century*.

<https://deathpenaltyinfo.org/news/missouri-supreme-court-grants-new-sentencing-trial-to-man-who-was-sentenced-to-death-despite-11-jurors-votes-for-life>).

³² *Michael Jackson*: 8-4 verdict, No. 2005-cf-010263 (Duval Cty., Aug. 11, 2023); *Joseph Zieler*: 10-2 verdict, No. 2016-cf-000455 (Lee Cty., May 24, 2023); *Bessman Okafor*: 9-3 verdict, No. 2012-cf-014950 (Orange Cty., June 24, 2024); *Julio Rivera*: 8-4 verdict, No. 2019-cf-103051 (Volusia Cty. July 11, 2024); *Michael Hunt*: 10-2 verdict, No. 2019-cf-002281 (Bay Cty. Jan. 19, 2024); *Marcelle Waldon*: 11-1 verdict, No. 2020-cf-008751 (Polk Cty. Jan. 8, 2026); *Howard Ault*: 9-3 verdict, No. 1996-cf-021248 (Broward Cty., June 11, 2024); *Patrick McDowell*: 11-1 verdict, No. 2021-cf-000725 (Nassau Cty., April 25, 2024); *Markas Fishburne*: 10-2 verdict, No. 2918-cf-012831 (Duval Cty., June 13, 2024); *Wade Wilson*: 9-3, 10-2 verdict, No. 2019-cf-000568 (Lee Cty., June 25, 2024); *Zephen Xaver*: 9-3 verdict, No. 2019-cf-000113 (Highlands Cty., Dec. 16, 2024); *Eriese Tisdale*: 9-3 verdict, No. 2013-cf-000608 (St. Lucie Cty., Sept. 18, 2024); *Robert Bailey*: 9-3 verdict, No. 2005-cf-001093 (Bay Cty., Oct. 25, 2024); *Guerry Hertz*: 10-2 verdict, No. 1997-cf-000214 (Wakulla Cty., Feb. 13, 2025); *Ryan Cole*: 10-2 verdict, No. 2019-cf-001877 (Charlotte Cty., May 15, 2025); *Shelby Neal*: 11-1, 11-1, 11-1 verdict, No. 2019-cf-000140 (Pinellas Cty., date); *Marcelle Waldon*: 11-1, 11-1 verdict, 2020-cf-008751 (Polk County, Jan. 8, 2026); *Donovan Faison*: 11-1, 11-1 verdict, 2023-cf-002223 (Seminole County, Dec. 9, 2025); *Jose Soto-Escalera*: 8-4, 8-4 verdict, 2018-cf-002614 (St. Lucie County, Oct. 10, 2025); *Gerald Murray*: 11-1 verdict, 1992-cf-003708 (Duval County, Aug. 26, 2025); *Shelby Neal*: 11-1, 11-1, 11-1 verdict, 2019-cf-000140 (Pinellas County, July 25, 2025).

Alabama and Florida expressly allow for juror non-unanimity in capital sentencing proceedings. See Fla. Stat. § 921.141; Ala. Code § 13A-5-46. Where Alabama requires a minimum of ten jurors to concur, as of 2023, Florida has the lowest threshold in the country allowing for the imposition of death where only eight jurors concur.

Florida continues to defy societal consensus repudiating non-unanimous death verdicts, as well as capital punishment entirely. In 2025, while “public support remained at a low point, executions ticket upward,” Florida was responsible for 40 percent of the executions nationwide.”³³ Of the 27 individuals executed last year nationwide, 13 had a non-unanimous sentencing verdict, nine of which were executed in Florida. See PC-R3. 560-61.

Nationwide, states repudiate non-unanimous verdicts in capital sentencing. Since 2015, 260 executions have occurred nationwide, but only 37 of those individuals were executed after being sentenced

³³ Juliana Kim, *Executions nearly double in 2025 due to dramatic rise in Florida*, NPR (Dec. 15, 2025, 2:58 PM), <https://www.npr.org/2025/12/15/nx-s1-5645011/death-penalty-2025-report-florida-executions>.

by a non-unanimous jury or mandatory judge panel³⁴—all of which were sentenced in Florida, Alabama, and Missouri. See PC-R3. 560-61. The raw numbers overwhelmingly demonstrate societal consensus to eliminate non-unanimous jury verdicts, further supporting Heath’s argument that his death sentence violates the Eighth Amendment. This Court should hold that Heath’s death sentence violates the Eighth Amendment because it is the byproduct of a non-unanimous jury verdict.

CONCLUSION

For the reasons above and in Heath’s separately filed motion for a stay of execution, this Court should stay his execution, reverse the circuit court, and remand for further proceedings.

³⁴ Amber McLaughlin’s jury rejected three of four aggravators proposed by the State and failed to unanimously vote for death resulting in a hung jury. *Missouri Set to Execute Amber McLaughlin on January 3 in First U.S. Execution of a Transgender Person*, DEATH PENALTY INFORMATION CENTER (Mar. 14, 2025), <https://deathpenaltyinfo.org/missouri-set-to-execute-amber-mclaughlin-on-january-3-in-first-u-s-execution-of-a-transgender-person>. The trial judge imposed a death sentence after relying on the aggravators rejected by the jury. *Id.* Her death sentence was vacated by the federal district court but reinstated on appeal. *McLaughlin v. Precythe*, 9 F.4th 819, 826 (8th Cir. 2021).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing pleading has been furnished via electronic service to all counsel of record, on this 26th day of January 2026.

/s/ Sonya Rudenstine

Sonya Rudenstine

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief was generated in Bookman Old Style 14-point font, is not proportionately spaced, and complies with the requirements of Florida Rule of Appellate Procedure 9.210(a)(2) because it meets the word and page limit requirements.

/s/ Sonya Rudenstine

Sonya Rudenstine