Case No. SC25-1009
Lower Court No. 1994-CF-01283

In the Supreme Court of Florida

EDWARD J. ZAKRZEWSKI, *Appellant*,

v.

STATE OF FLORIDA, *Appellee*.

ON APPEAL FROM THE FIRST JUDICIAL CIRCUIT,
IN AND FOR OKALOOSA COUNTY, FLORIDA

DEATH WARRANT SIGNED
Execution Scheduled for July 31, 2025 at 6:00p.m. ET

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Citations to the records on appeal are as follows: (1) the direct appeal record (Case No. 88,367) is referred to as DAR, followed by Volume and page number(s)[1]; (2) the 2000 initial postconviction motion record on appeal (SC02-1734) is referred to as PCR-2000, followed by Volume and page number(s); the current warrant litigation record on appeal (SC25-1009) is referred to as PCR-2025, followed by the page number(s).

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is not necessary in this appeal from the lower court's summary denial of Appellant's fifth successive motion to vacate judgment and sentence. The lower court denied the successive motion because the claims were untimely, procedurally barred, and meritless as a matter of established Florida law, based on this Court's precedent.

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[1] The direct appeal record contains 10 volumes (Volumes I-X). Volumes I-III, titled "Transcript of Record," contain the documentary record and pre-trial transcripts of proceedings. Volumes IV- X are titled "Court Reporter's Transcript of Record" and contain the penalty phase transcripts. However, Volumes IV-X also reference a second set of volume numbers, i.e. Volumes IV - X are also designated as Volumes I – VII. The citations to the penalty phase transcripts will be referred to by the originally designated Volume Numbers IV-X.

STATEMENT OF THE FACTS AND PROCEDURAL HISTORY

In 1994, Edward J. Zakrzewski was a husband to Sylvia and father to two young children, Edward Zakrzewski, age 7 and Anna, age 5. On June 9, 1994, he brutally murdered his family with a crowbar (Sylvia) and machete (Edward and Anna), which he purchased and sharpened earlier that day. Zakrzewski pleaded guilty to the murders and was sentenced to death for all three following a full penalty phase.

I. Facts of the Crimes.[2]

For some time prior to the murders, Zakrzewski and Sylvia experienced marital problems and discussed divorce. Twice, Zakrzewski told his neighbor that he would rather kill his wife and the two children than lose them through divorce. *Zakrzewski v. State*, 717 So. 2d 488, 490 (Fla. 1998).

On June 9, 1994, the morning of the murders, Zakrzewski's son, Edward, called him at work and told him that his mother intended to file divorce papers that day. During his lunch break,

[2] Zakrzewski recounted the details of the murders in his penalty phase testimony. *See* DAR Vol. VIII at 974-1000; Vol. IX at 1002-1103.

Zakrzewski purchased a machete and sharpened it. He then returned to work, and completed his daily routine. *Id.*

That evening, Zakrzewski arrived home before his wife and children and hid the machete in the bathroom. After his family arrived home, Zakrzewski approached Sylvia, who was sitting alone in the living room. He struck her head with the crowbar, at least two times. The penalty phase testimony established that Sylvia may have been rendered unconscious as a result of being struck with the crowbar, but that did not kill her. Zakrzewski dragged Sylvia into the bedroom, where he hit her again and strangled her with a rope. *Id.*

Zakrzewski called his son into the bathroom to brush his teeth. As Edward was brushing his teeth, Zakrzewski retrieved the machete hidden behind the door. Edward saw his father with the machete in the mirror and realizing what his father was doing, Edward put his hand up and tried to block the blow with his arm, causing injury to his wrist. Zakrzewski struck Edward hard, causing severe head, neck, and back injuries, and resulted in Edward's death. Zakrzewski then put his son's body in the bathtub. *Id.* at 490-91.

Still holding the machete, Zakrzewski called Anna into the bathroom. As Anna was entering the bathroom, Zakrzewski struck

his daughter in the neck with the machete, draped her body over the bathtub, and continued to strike the child with the machete until she was dead. The State's blood spatter expert testified that the patterns showed Anna was kneeling over the bathtub when she was struck by the machete. Cuts were found on Anna's right hand and elbow, consistent with defensive wounds. *Id.* at 491.

Finally, Zakrzewski dragged his wife from the bedroom, into the bathroom. Not sure if Sylvia was dead, Zakrzewski hit her with the machete and she died from blunt force and sharp force injuries. *Id.*

The next day, Zakrzewski drove to Orlando and then flew to Hawaii where he changed his name and lived with a family at their compound. Zakrzewski turned himself into local authorities four months later after he was recognized by his hosts in an episode of the "Unsolved Mysteries" television show. DAR Vol. VIII at 895. *Zakrzewski*, 717 So. 2d at 491; DAR Vol. VIII at 888-96.

II. Convictions and Death Sentences.

Zakrzewski was charged with three counts of first-degree murder of his wife and two young children. DAR Vol. I at 15-16A. He withdrew the prior not guilty plea and pleaded guilty after a

comprehensive colloquy on March 19, 1996.[3] DAR Vol. II at 241-45; DAR Vol. III. at 441-51.

At the penalty phase, Zakrzewski presented 15 mitigation witnesses, including two mental health experts to support two statutory mitigating circumstances that (1) he had no significant prior criminal history and (2) the murders were committed while the defendant was under the influence of extreme mental or emotional disturbance. The witnesses were also presented to support 24 non-statutory mitigators. *See* DAR Vols. IV-X.

The State presented evidence to support three aggravating factors: (1) the defendant was previously convicted of other capital offenses (the contemporaneous murders); (2) the murders were committed in a cold, calculated, and premeditated manner without pretense of legal or moral justification (CCP); and (3) the murders were committed in an especially heinous, atrocious, or cruel manner (HAC). *Zakrzewski v. State*, 717 So. 2d 488, 491 (Fla. 1998).

The jury recommended Zakrzewski be sentenced to death for

[3] Two years prior to Zakrzewski's guilty plea, the defense moved for and the trial court granted appointment of Dr. James Larson to evaluate him for competency to stand trial in December 1994. DAR Vol. I at 20-25; DAR Vol. VIII at 816-19.

Sylvia and Edward's murders by a seven to five vote. The jury recommended life imprisonment for Anna's murder. *Zakrzewski*, 717 So. 2d at 491. The trial court entered its sentencing order and found that the State proved all three aggravating circumstances beyond a reasonable doubt for each of the three murders and gave significant weight to both of Zakrzewski's statutory mitigators. *Id.* The trial court also considered the 24 non-statutory mitigators, giving them weight as follows: that Zakrzewski: (1) turned himself in (little weight); (2) pleaded guilty (little weight); (3) was an exceptionally hard worker (significant weight); (4) was on the Dean's List in his third year of college (significant weight); (5) served in an exemplary manner in the United States Air Force (significant weight); (6) showed severe grief and remorse (substantial weight); (7) was a loving husband and father until the offense (substantial weight); (8) was under great stress due to work, college, child care, housework, and lack of sleep (little weight); (9) was a patient and humble man (little weight); (10) was raised without his natural father in his home (little weight); (11) lacked prior domestic relationships (little weight); (12) had a passive role in his marriage, in a union dominated by his wife (no weight); (13) received little religious upbringing (little weight); (14) embraced

the Christian faith (little weight); (15) was a hyperactive child and prescribed Ritalin (no weight); (16) had a long term adjustment disorder (no weight); (17) suffered a major depressive episode (no weight); (18) had potential for rehabilitation (no weight); (19) exhibited good behavior while hiding for an extended period of time under an assumed name (slight weight); (20) was a loving and good son (no weight); (21) was intelligent (no weight); (22) was well thought of by friends, neighbors, and co-workers (no weight); (23) was impaired by alcohol at the time of the offense (no weight); and (24) was not a psychopath (no weight). DAR Vol II at 310-20; *Zakrzewski v. State*, 1996 WL 34578426 (Fla. Cir. Ct. 1996); *Zakrzewski*, 717 So. 2d at 491, n. 1.

Finding that the aggravating circumstances outweighed the mitigating factors for all three of the murders, the trial court followed the jury's recommendation of death for the murders of Sylvia and Edward. However, the trial court overrode the jury's life recommendation for Anna's murder and imposed a death sentence as well. *Zakrzewski*, 717 So. 2d at 491; DAR Vol. II at 321-331.

III. Direct Appeal: *Zakrzewski v. State*, 717 So. 2d 488 (Fla. 1998) (SC88,367).

Zakrzewski raised nine issues on direct appeal.[4] This Court found: (1) the HAC aggravator was appropriate to Edward and Anna's murders and error as to Sylvia's murder, but was harmless beyond a reasonable doubt; (2) the CCP aggravator was appropriate; (3) Zakrzewski's death sentence was not disproportionate; (4) the trial court did not err a) overriding the jury's life recommendation for Anna's murder, applying *Tedder v. State*, 322 So. 2d 908 (Fla. 1975); b) admitting victim photographs; c) allowing the State's mental health expert witness testimony regarding Friedrich Nietzsche and Christianity, which was relevant to statutory and non-statutory mitigation; d) failing to instruct the jury that Zakrzewski's ability to understand the criminality of his conduct was substantially

[4] (1) The trial court erred by finding HAC; (2) the trial court erred by finding CCP because he was under extreme emotional distress at the time of the murders; (3) the death sentence is not proportionate in this case; (4) the trial court erred in overriding the jury's recommendation of life for Anna; (5) the trial court allowed prejudicial photographs of the victims to be admitted into evidence; (6) the trial court permitted State's mental health expert to testify about Nietzsche and his views on Christianity; (7) the trial court permitted the State's mental health expert to testify, when the testimony did not rebut the testimony of Zakrzewski's mental health expert; (8) the trial court failed to instruct the jury that Zakrzewski's ability to understand his conduct was substantially impaired; and (9) the trial court failed to instruct the jury on each of Zakrzewski's non-statutory mitigating factors. *Id.* at 492.

impaired; and e) failing to instruct the jury on each of the 24 non-statutory mitigating factors. *Zakrzewski*, 717 So. 2d at 492-95. This Court affirmed Zakrzewski's convictions and three death sentences. *Id.* at 495.

Zakrzewski's conviction and death sentences became final in 1999 when the United States Supreme Court denied his petition for writ of certiorari on January 25, 1999. *Zakrzewski v. Florida*, 525 U.S. 1126 (1999).

IV. Initial and Successive State Postconviction Proceedings.

A. Initial Postconviction Motion to Vacate Judgement and Sentence: *Zakrzewski v. State*, 866 So. 2d 688 (Fla. 2003) (SC02-1734).

Represented by registry counsel D. Reed Ammon in January 2000, Zakrzewski filed his initial postconviction motion to vacate judgment and sentence under Fla. R. Crim. P. 3.851. However, Baya Harrison was later appointed as registry counsel and filed an amended postconviction motion on June 28, 2001. The amended motion raised five claims: (1) trial counsel were ineffective for failing to move to suppress evidence seized from his home; (2) Zakrzewski's guilty pleas were involuntary; (3) Zakrzewski was denied a fair penalty phase before a panel of impartial jurors; (4) trial counsel were

ineffective for failing to object to the State's improper closing argument; and (5) Florida's death penalty statute is unconstitutional under *Apprendi v. New Jersey*, 530 U.S. 466 (2000). *Zakrzewski v. State*, 866 So. 2d 688, 691-92 (Fla. 2003). Following an evidentiary hearing, the trial court denied the motion, which this Court affirmed on appeal. *Id.* Zakrzewski did not seek certiorari review by the United States Supreme Court.

B. First Successive Postconviction Motion: *Zakrzewski v. State*, 13 So. 3d 1057 (Fla. 2009) (SC-08-0059).

In 2009, represented by registry counsel Martin McClain, Zakrzewski filed a first successive postconviction motion, raising two claims that: (1) Florida's lethal injection protocol violated the Eighth Amendment to the United States Constitution; and (2) newly discovered evidence consisting of a 2006 American Bar Association Report demonstrates that his conviction and sentence constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. The trial court summarily denied the motion and this Court affirmed the denial on appeal. *Zakrzewski v. State*, 13 So. 3d 1057 (Fla. 2009). Zakrzewski did not seek certiorari review by the United States Supreme Court.

C. Second Successive Postconviction Motion: *Zakrzewski v. State*, 115 So. 3d 1004 (Fla. 2012) (SC11-1896).

In November 2010, registry counsel McClain filed a second successive postconviction motion raising two claims: (1) Zakrzewski's conviction and death sentence violated the First, Sixth, and Eighth Amendments under *Porter v. McCollum,* 558 U.S. 30 (2009); and (2) the circuit court erred in denying his motion to amend the postconviction motion in light of adoption of new lethal injection protocols and denying an evidentiary hearing. This Court affirmed the summary denial of the successive motion. *Zakrzewski v. State*, 115 So. 3d 1004 (Fla. 2012). Zakrzewski did not seek certiorari review by the United States Supreme Court.

D. Third Successive Postconviction Motion: *Zakrzewski v. State*, 147 So. 3d 531 (Fla. 2014) (SC13-1825).

Registry counsel McClain filed Zakrzewski's third successive postconviction motion in March 2013. The motion claimed the State's penalty phase expert Dr. McClaren gave false and misleading testimony regarding Zakrzewski's beliefs in principles espoused by Nietzsche, violating *Brady* and *Giglio*.[5] The claim alleged the State

[5] *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*,

falsely portrayed that Zakrzewski was preoccupied with Nietzsche's writings regarding narcissistic superman-type philosophy. The trial court summarily denied the claim as untimely and procedurally barred since the issue was addressed in the direct appeal. This Court affirmed the motion's summary denial. *Zakrzewski v. State*, 147 So. 3d 531 (Fla. 2014), *cert. denied, Zakrzewski v. Florida*. 575 U.S. 2015.

E. Original Petition for Writ of Habeas Corpus: *Zakrzewski v. State*, 221 So. 3d 1159 (Fla. 2017) (SC16-0729).

On May 2, 2016, Zakrzewski filed a state petition for writ of habeas corpus seeking relief under *Hurst v. Florida*, 577 U.S. 92 (2016) and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). The petition was denied. *Zakrzewski v. Jones*, 221 So. 3d 1159 (Fla. 2017), *reh'g den.*, *Zakrzewski v. Jones*, 2017 WL 3027224 (Fla. July 18, 2017).

F. Fourth Successive Postconviction Motion: *Zakrzewski v. State*, 254 So. 3d 324 (Fla. 2018) (SC18-0646).

In January 2017, Zakrzewski, represented by registry counsel McClain, filed a fourth successive postconviction motion based on *Hurst v. Florida* and *Hurst v. State*, which was summarily denied. On appeal, this Court affirmed summary denial of the motion,

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405 U.S. 150 (1972).

concluding that the Court's prior denial of his habeas petition raising similar claims served as a procedural bar. This Court also cautioned Zakrzewski that a rehearing motion would be stricken. *Zakrzewski v. State*, 254 So. 3d 324 (Fla. 2018), *cert. denied*, 587 U.S. 988 (2019).[6]

V. Federal Petition for Writ of Habeas Corpus: *Zakrzewski v. McDonough*, 455 F.3d 1254 (11th Cir. 2006); *Zakrzewski v. McDonough*, 490 F.3d 1264 (11th Cir. 2007); *Zakrzewski v. McNeill*, 573 F.3d 1210 (11th Cir. 2009) (3:04-cv-66-RV).

On February 23, 2004, John W. Nall, assisted by Baya Harrison, Esquire, filed a petition for writ of habeas corpus under 28 U.S.C. § 2254 in the Northern District of Florida on Zakrzewski's behalf raising six grounds for relief.[7] *Zakrzewski v. Crosby, et. al.*,

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[6] Mr. McClain died on March 7, 2022 and Dawn Macready, Capital Collateral Regional Counsel–Northern Region substituted and appeared as state postconviction counsel on June 30, 2022.

[7] (1) Fifth, Sixth, and Fourteenth Amendment claims for denial of due process of law and a fair trial because the State was permitted to present expert testimony about his allegedly anti-Christian beliefs; (2) a Sixth Amendment claim for ineffective assistance of counsel due to trial counsel's failure to object to penalty phase closing arguments made by the prosecutor; (3) a Sixth Amendment challenge to Florida's death penalty statute based on *Apprendi v. New Jersey* and *Ring v. Arizona*, *supra*; (4) an Eighth Amendment claim that the death penalty is disproportionate as applied to him, violating his rights to equal protection under the law and subjecting him to cruel and unusual punishment; (5) a Sixth Amendment claim for ineffective assistance of counsel due to trial counsel's failure to file a motion to suppress; and (6) Fifth and Sixth Amendment claims of denial of a

3:04-cv-00066 (N.D. Fla. Feb. 23, 2004). The District Court denied the habeas petition on September 30, 2004 and granted a certificate of appealability on two issues: (1) whether trial counsel was ineffective for failure to object to statements made by the prosecutor in closing argument regarding Nietzsche, and (2) whether trial counsel was ineffective for failure to file a motion to suppress evidence contained in the house which constituted the murder scene. Doc #30-2 and 38. Mr. Nall moved to withdraw as counsel a second time on November 10, 2004, which the district court granted (Docs. #41, 42, and 49).

Registry counsel McClain was appointed to represent Zakrzewski in the Eleventh Circuit appeal. The Eleventh Circuit found that trial counsel's failure to object to the prosecutor's closing arguments was not deficient performance and the warrantless search of Zakrzewski's house was justified by exigent circumstances. *Zakrzewski v. McDonough*, 455 F.3d 1254 (11th Cir. 2006).

Zakrzewski filed a Federal Rule of Civil Procedure 60(b) motion to reopen the federal habeas proceedings and alleged that state

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fair trial due to the admission of graphic crime scene photographs into evidence in the sentencing phase.

registry counsel Harrison and appointed federal habeas counsel Nall perpetrated fraud on him and the federal court. The motion was dismissed as a successive habeas petition, but reversed by the Eleventh Circuit and remanded for reconsideration on the merits. *Zakrzewski v. McDonough*, 490 F.3d 1264 (11th Cir. 2007).

On remand, the district court denied Zakrzewski's Rule 60(b) motion. *Zakrzewski v. McDonough*, 2007 WL 2827735 (N.D. Fla. Sept. 26, 2007). The district court granted a certificate of appealability on the question of whether Petitioner's Rule 60(b) motion alleged facts sufficient to constitute fraud upon the court. *Zakrzewski v. McDonough*, 2008 WL 150050 (N.D. Fla. Jan. 14, 2008). On appeal, the Eleventh Circuit found the district court did not abuse its discretion denying Zakrzewski's Rule 60(b) motion. *Zakrzewski v. McNeil*, 573 F.3d 1210 (11th Cir. 2009), *cert. denied*, 560 U.S. 956 (2010).

VI. Warrant Proceedings.

On July 1, 2025, Governor Ron DeSantis signed a death warrant, scheduling Zakrzewski's execution for July 31, 2025 at 6:00 p.m. ET. This Court ordered that all trial court proceedings be completed no later than July 14, 2025 at 11:00 a.m. E.T. *Zakrzewski*

v. State, 1960-88367 (June 11, 1998). Proceedings below were held before the Honorable Lacey Powell Clark, Circuit Court Judge.

On July 3, 2025, Zakrzewski filed Fla. R. Crim. P. 3.852(i) demands for additional public records on: (1) the Executive Office of the Governor (EOG); (2) Florida Commission on Offender Review (FCOR); (3) Office of the Attorney General (AGO); (4) Okaloosa County Clerk of Court (OC Clerk); (5) Okaloosa County Sheriff's Office (OCSO); (6) State Attorney's Office (SAO); (7) Florida Department of Law Enforcement (FDLE); (8) Florida Department of Corrections (FDOC); and (9) District Eight Medical Examiner's Office (8th ME). PCR-2025 at 109-215. All of the agencies objected. *Id.* at 216-313, 316-29. After the public records hearing and considering the agency objections, and arguments of the parties, Judge Powell sustained all of the objections and denied the demands. *Id.* at 323-29.

Zakrzewski filed his fifth successive postconviction motion on July 9, 2025 and raised three claims:

CLAIM ONE: Zakrzewski has been deprived of rights under the Equal Protection Clause and the Fifth, Eighth, and Fourteenth Amendments. He argued that (1) the trial court's jury override on a life sentence recommendation for Anna's murder and imposition of a

death sentence was improper; (2) he should be sentenced to life imprisonment under Florida's current death penalty sentencing scheme due to the 7-5 jury recommendation; (3) the law of the case doctrine should not apply, based on changes in the law under *Hurst v. Florida*; and (4) his death sentences constitute manifest injustice. PCR-2025 at 355-62.

CLAIM TWO: Signing the death warrant prior to a holiday weekend, the compressed warrant litigation period, and that another death row inmate was simultaneously under an active death warrant, violates his due process right and right to access to the courts and counsel under the Fifth, Sixth and Fourteenth Amendments. He argued his ability to conduct a full investigation and presentation of successive postconviction claims was hindered. *Id.* at 362-67.

CLAIM THREE: Signing the death warrant without a recent or updated clemency review was arbitrary and violated his rights under the Equal Protection Clause and the Fifth, Eighth, and Fourteenth Amendments, as well as corresponding provisions of the Florida Constitution. He argued that because other death row inmates have had subsequent clemency review and his 2007 clemency proceeding has had no update, he has been arbitrarily denied access to the

clemency process. *Id.* at 367-72.

The State filed its answer on July 10, 2025 and argued all claims should be summarily denied and were procedurally barred, not cognizable, untimely, and meritless as a matter of law under controlling precedent. *Id.* at 465-88. Following the *Huff*[8] hearing, the lower court determined that an evidentiary hearing was unnecessary. *Id.* at 499-519. Appellant also filed a Motion for Stay of Execution, to which the State responded on July 10, 2025. *Id.* at 399-404, respectively. On July 14, 2025, the lower court summarily denied relief on all postconviction claims and denied Appellant's Motion for Stay. *Id.* at 520-34.

Zakrzewski appeals (1) the lower court's order summarily denying his fifth successive postconviction motion; and (2) denial of the Fla. R. Crim. P. 3.852 demands for public records.

SUMMARY OF ARGUMENT

ISSUE I: Zakrzewski's claim that his 1996 death sentences are unconstitutional is untimely and procedurally barred. It is also meritless as *Hurst v. Florida* is not retroactive and his 7-5 jury

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

recommendation for a death sentence was statutorily authorized at the time.

ISSUE II: The 30-day warrant litigation period does not result in any due process violation and does not deny Appellant meaningful access to the courts. Zakrzewski has not demonstrated how he was hindered to conduct an investigation or fully litigate successive claims.

ISSUE III: Florida's clemency process and the Governor's authority to issue death warrants has not violated Appellant's due process or equal protection rights.

ISSUE IV: The lower court did not abuse its discretion denying Appellant's Fla. R. Crim. P. 3.852(i) demands for additional public records. Zakrzewski's arguments are meritless and abjectly fail to demonstrate the postconviction court's abuse of discretion finding that all of the demands were (1) overly broad and unduly burdensome; (2) constituted prohibited fishing expeditions for records not related to a colorable successive postconviction claim for relief; and (3) were confidential and exempt, not subject to disclosure.

SUMMARY DENIAL AND STANDARDS OF REVIEW[9]

[9] The postconviction court summarily denied all of Zakrzewski's claims, subject to *de novo* review. The State therefore does not restate

A lower court's summary denial of a successive postconviction motion is appropriate if "the motions, files, and records in the case conclusively show that the movant is entitled to no relief." *Wainwright v. State*, 2025 WL 1561151, *3 (Fla. June 3, 2025), *cert. denied*, 2025 WL 1621505 (U.S. June 9, 2025); *see also* Fla. R. Crim. P. 3.851(f)(5)(B) and (h)(6). Successive postconviction motions must be filed within one year after the judgment and sentence has become final, unless one of the following exists:

> (A) the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence, or
>
> (B) the fundamental constitutional right asserted was not established within the period provided for in subdivision (d)(1) and has been held to apply retroactively, or
>
> (C) postconviction counsel, through neglect, failed to file the motion.

Rule 3.851(d)(1) and (d)(2). If one of the foregoing is not established, the motion is untimely and may be summarily denied. *See Dillbeck v. State*, 357 So. 3d 94, 101 (Fla. 2023), *cert. denied*, 143 S. Ct. 856 (2023). It is incumbent on Zakrzewski to establish the timeliness of

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the standard of review for each issue raised.

his successive postconviction motion. *See Dillbeck*, 357 So. 3d at 101 (quoting *Mungin v. State*, 320 So. 3d 624, 626 (Fla. 2020)).

Claims that were or should have been raised on direct appeal or in a prior postconviction motion are not proper and may be summarily denied as procedurally barred. *See Gudinas v. State*, 2025 WL 1692284, *4 (Fla. June 17, 2025) *cert. denied*, 2025 WL 1739159 (U.S. June 24, 2025) (citing *Rogers v. State*, 2025 WL 1341642, at *3 (Fla. May 8, 2025) ("[I]n an active [death] warrant case, a postconviction claim that could have been raised in a prior proceeding is procedurally barred.")); *Bogle v. State*, 288 So. 3d 1065, 1069 (Fla. 2019) (affirming summary denial of successive postconviction claim on non-retroactivity grounds); *Mann v. State*, 112 So. 3d 1158, 1162 (Fla. 2013) (holding that because defendant's postconviction claims were "purely legal claims that have been previously rejected by this Court, the circuit court properly summarily denied relief"). Further, using a different argument to relitigate the same issue is inappropriate. *Zack v. State*, 371 So. 3d 335, 346-47 (Fla. 2023). The movant also bears the burden to establish a prima facie case based on a legally valid claim and mere conclusory allegations are insufficient. *See Wainwright*, 2025 WL

1561151 at *3 (quoting *Franqui v. State*, 59 So. 3d 82, 96 (Fla. 2011)).

When reviewing a lower court's summary denial, "this Court must accept the defendant's allegations as true to the extent that they are not conclusively refuted by the record." *Id.* (quoting *Tompkins v. State*, 994 So. 2d 1072, 1081 (Fla. 2008)). Its review is *de novo*. *Hutchinson v. State*, 2025 WL 1198037, *3 (Fla. Apr. 25, 2025) (citing *Cole v. State*, 392 So. 3d 1054, 1060-31 (Fla. 2024), *cert. denied*, 145 S. Ct. 109 (2024)), *cert. denied*, 145 S. Ct. 1980 (2025).

This Court reviews lower court rulings on Fla. R. Crim. P. 3.852 public records demands for an abuse of discretion. *Gudinas v. State*, 2025 WL 1692284, *8 (Fla. June 17, 2025) (citing *Muhammad v. State*, 132 So. 3d 176, 200 (Fla. 2013)).

ARGUMENT

ISSUE I: The postconviction court properly summarily denied Zakrzewski's claim that his 1996 death sentences are unconstitutional under section 921.141, Fla. Stat. or *Hurst v. Florida*, 577 U.S. 92 (2016). [Restated]

Zakrzewski claims that the postconviction court improperly denied his challenges to his death sentences based on: (1) the trial court's override of the jury's life sentence recommendation for Anna's murder and imposing a death sentence was improper, even in light

of *Tedder v. State*, 322 So. 2d 908 (Fla. 1975); (2) the two death sentences for his wife and son were based on the jury's 7-5 recommendations, he should be sentenced to life imprisonment under Florida's current death penalty sentencing statute; (3) the law of the case doctrine should not apply, based on changes in the law under *Hurst v. Florida*, 577 U.S. 92 (2016); and (4) his death sentences constitute manifest injustice. IB at 13-30.

Zakrzewski's challenge brought on the eve of his execution is little more than repackaging of decades of litigation in an amalgamated claim. As such, it was properly denied by the postconviction court as untimely, procedurally barred, and meritless where aspects of the claim have been rejected by this Court.

Lower Court Order

The lower court denied this claim and subclaims, as untimely, procedurally barred, and meritless. PCR-2025 at 523-26. The court found: (1) the entire claim was untimely because Zakrzewski's convictions and death sentences "became final decades ago," in 1999 and he failed to establish one of the exceptions to Rule 3.851's exceptions; (2) the subclaim attacking the trial court's override of the jury's life sentence recommendation for Anna's murder was

procedurally barred because it was raised and rejected on direct appeal. *Id.* at 525; (3) the subclaim that his death sentences are unlawful in light of *Hurst v. Florida* was previously raised and rejected, and it too was procedurally barred. *Id.*; and (4) his attempt to differentiate the current claim from those previously raised, Zakrzewski's Eighth Amendment "evolving standards of decency" argument has been rejected, citing *James v. State*, 404 So. 3d 317, 324 (Fla. 2025) (rejecting non-unanimous jury recommendation claim based on Eighth Amendment grounds, when previously raised on *Hurst* grounds) and *Zack v. State*, 371 So. 3d 335, 347 (Fla. 2023) (holding that using a different argument to relitigate the same issue is not appropriate).

Finally, the postconviction court found that to the extent that Zakrzewski claimed that "he has been subject to cruel and unusual punishment due to the fact that he has been on Florida's death row," the claim was meritless. *Id.* at 526 (citing *Valle v. State*, 70 So. 3d 530, 552 (Fla. 2011) ("[N]o federal or state court has accepted the argument that a prolonged stay on death row constitutes cruel and unusual punishment.") (quotation omitted); *Carroll v. State*, 114 So. 3d 883, 889 (Fla. 2013); *James*, 404 So. 3d at 325.

Untimely

As the postconviction court definitively found, Zakrzewski's convictions and death sentences "became final decades ago," when the United States Supreme Court denied his petition for writ of certiorari on January 25, 1999. *Zakrzewski v. Florida*, 525 U.S. 1126 (1999). He failed to establish any exception to the one-year limitation per Rule 3.851. PCR-2025 at 524. *See also Rogers v. State*, 2025 WL 1341642 at n.7 (Fla. May 8, 2025) (treating untimely motion as "subsumed within the procedural bar . . . because it could have been raised sooner but was not.")

Procedurally Barred

Claims raised after a death warrant has been signed are procedurally barred if they have or could have been raised in a prior proceeding. *Gudinas v. State*, 2025 WL 1692284, *6 (Fla. June 17, 2025) (citing *Rogers*, 2025 WL 1341642 at *4 (holding "in an active warrant case, a postconviction claim that could have been raised in a prior proceeding is procedurally barred")). Further, using a different argument to relitigate the same issue is inappropriate. *Zack*, 371 So. 3d at 346-47 (citing *Barwick v. State*, 361 So. 3d 785, 793 (Fla. 2023) (affirming the circuit court's denial of postconviction claim as

procedurally barred when capital defendant attempted to relitigate the same issue and "disguise" a *Roper* claim previously raised, as one for newly discovered evidence)).

Zakrzewski has challenged the constitutionality of his death sentences multiple times over the past 30 years. He unsuccessfully asserted various arguments based on the trial court's jury override of the jury's life recommendation and 7-5 jury sentencing recommendation. He does so again on the eve of his execution and has merely re-packaged the claims that have been raised and rejected based on the law at the time. This claim is procedurally barred as the sub-parts have either been raised and rejected more than once, or should have been raised long before now.

Zakrzewski first raised the 7-5 "bare majority" jury recommendation claim by moving to declare § 921.141(3), Fla. Stat. unconstitutional prior to his penalty phase. DAR Vol. I at 195-96. The direct appeal record indicates that the trial court orally denied this motion. DAR Vol. III at 427-441. However, Zakrzewski waived appellate review.

On direct appeal, Zakrzewski challenged the trial court's override of the jury's life sentence for Anna's murder. This Court

rejected the claim and affirmed based on *Tedder*'s test. *Zakrzewski*, 717 So. 2d at 494. This Court concluded that "'no reasonable person could differ' as to the appropriateness of the death penalty for the murder of Anna. Accordingly, we find that the trial court did not err in overriding the jury's recommendation of life for the murder of Anna." *Id.*

In 2016, Zakrzewski sought relief under *Hurst v. Florida* and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016) in a state petition for writ of habeas corpus. *Zakrzewski v. Jones, etc.*, 221 So. 3d 1159 (Fla. 2017). This Court denied the petition and affirmed his three death sentences because *Asay v. State*, 210 So. 3d 1 (2016), "held that *Hurst* does not apply retroactively to death sentences that were final before the United States Supreme Court decided *Ring*." *Id.* at 1159 (citing *Marshall v. State*, 226 So. 3d 211 (Fla. 2017) (denying a habeas petition challenging the constitutionality of a death sentence based on a judicial override)).

Lastly, Zakrzewski sought *Hurst v. Florida* relief again in a fourth successive postconviction motion, which was summarily denied. This Court affirmed the trial court's summary denial and cautioned Zakrzewski that a rehearing motion would be stricken.

Zakrzewski v. State, 254 So. 3d 324 (Fla. 2018), *cert. denied*, 587 U.S. 988 (2019).

Zakrzewski simply reasserts a version of each of the foregoing claims that if his sentencing jury voted today, 29 years later, he would be "completely ineligible for a death sentence," referencing the most recent amendment to § 921.141(2)(c), Fla. Stat. allowing for at least eight jurors to recommend a death sentence. IB at 13.

Merits

Zakrzewski argues that his death sentences are unconstitutional for two main reasons: (1) the trial court's override of the life sentence recommendation for Anna's murder; and (2) and had the jury's death sentence recommendations for his wife and son's murders been made today, he would have been ineligible for a death sentence under the current version of section 921.141, Florida Statutes. To overcome the procedural bars, he also argues that his death sentences are a manifest injustice. Id. at 23. These amalgamated and re-cycled arguments are no more than Zakrzewski's re-litigation of previously raised claims and a failed attempt to circumvent the procedural bar.

Judicial Override

Zakrzewski claims that the trial court's override of the jury's life sentence recommendation for Anna's murder was unconstitutional. IB. at 18. This issue was raised and reviewed by this Court on direct appeal. This Court rejected the claim and affirmed based on *Tedder*'s test stating,

> . . . the facts suggesting the sentence of death for all three of these murders are clear and convincing, and as to Anna, even more compelling. We note that the trial judge found the same aggravating and mitigating circumstances applied to the murders of both Edward and Anna.

Zakrzewski, 717 So. 2d at 494. This Court concluded that "'no reasonable person could differ' as to the appropriateness of the death penalty for the murder of Anna. Accordingly, we find that the trial court did not err in overriding the jury's recommendation of life for the murder of Anna." *Id.*

Despite the lengthy discussion, Zakrzewski merely attacks the trial court's sentencing order, re-weighs the aggravation and mitigation. IB at 18-22. He simply re-argues a claim which was adjudicated decades ago. In neither his latest successive postconviction motion, nor in this appeal, has Zakrzewski offered any persuasive authority or error below for this Court to reconsider its *Tedder* analysis, findings, or decision affirming the trial court's

override.

In *Ford*, this Court recently rejected the argument that unless a jury unanimously determines that the aggravating facts are sufficient and outweigh the mitigation, under the evolving standards of decency, a capital defendant cannot be sentenced to death. *Ford*, 402 So. 3d at 982-83.

Hurst v. Florida

Zakrzewski also challenges the two death sentences for his wife and son, which were based on the jury recommendations of 7-5. IB at 17. He points to *Hurst v. Florida*, 577 U.S. 92 (2016), as an issue to revisit. *Zakrzewski v. Jones*, 221 So. 3d 1159 (Fla. 2017) (holding *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), did not apply retroactively to Zakrzewski, citing *Asay v. State*, 210 So. 3d 1, 27 (Fla. 2016)). Not only is *Hurst v. Florida* not retroactive, it says nothing about a jury's recommendation of death, much less anything about the number of jurors required to render a death recommendation. *Hurst v. Florida* concerned the necessity for explicit jury findings on eligibility for a death sentence.

In *McKinney v. Arizona*, 589 U.S. 139 (2020), the United States Supreme Court subsequently clarified that in order to sentence one

to death, the Sixth Amendment required a jury to find a single aggravating factor. The *McKinney* Court explained, that under *Ring v. Arizona*, 536 U.S. 584 (2002) and *Hurst v. Florida*, "a jury must find *the* aggravating circumstance that make the defendant death eligible." (emphasis added). *Id.* at 144. The Court went on to state that "*Ring* and *Hurst* do not apply retroactively on collateral review." *Id.* at 145.

Further, the unanimity requirement of *Ramos v. Louisiana*, 590 U.S. 83 (2020) only applies to the finding of an aggravator, not the recommendation itself. Therefore, there is no constitutional requirement that a jury recommendation is required to impose a death sentence. *See McKinney*, 589 U.S. at 145 ("States that leave the ultimate life-or-death decision to the judge may continue to do so.")

It is the version of the statute in effect on the date of Zakrzewski's 1996 penalty phase that applies. *Dobbert v. Florida*, 432 U.S. 282 (1977); *State v. Lobato*, 394 So. 3d 1219, 1223 (Fla. 6th DCA 2024) (holding the death penalty statute in effect at the time of the penalty phase applies to the jury's recommendation, citing *Dobbert*). The version of Florida's death penalty statute in effect at the time of

Zakrzewski's penalty phase provided for jury recommendations based on seven votes. Death sentences based on a simple majority were statutorily authorized in 1996. *See Thompson v. State*, 648 So. 2d 692, 698 (Fla. 1994) (stating a jury is allowed to recommend death on a simple majority vote, citing *Brown v. State*, 565 So. 2d 304, 308 (Fla. 1990)). Hence, this claim is meritless and the postconviction court's summary denial should be affirmed.

Manifest Injustice

To overcome the procedural bars of prior ruling and decisions issued over nearly three decades ago, Zakrzewski argues that allowing three death sentences for murdering his wife and two small children to stand, would result in manifest injustice. IB at 23-25. The State understands that this Court has "the power to reconsider and correct erroneous rulings in exceptional circumstances and where reliance on the previous decision would result in manifest injustice, notwithstanding that such rulings have become the law of the case" *State v. Owen*, 696 So.2d 715, 720 (Fla. 1997). However, Zakrzewski has not presented or shown that exceptional circumstances which warrant relief as manifest injustice.

Although this Court has not specifically defined what facts and

circumstances constitute a manifest injustice, there is sufficient guidance. Just as Zakrzewski attempts to re-litigate procedurally barred claims through a manifest injustice claim, this Court recently rejected a similar tactic. In *James v. State*, 404 So. 3d 317 (Fla. 2025), this Court declined to review a prior postconviction claim which had been denied as untimely. This Court rejected the defendant's argument that "a failure to reconsider his timeliness rulings amounts to manifest injustice." *Id.* at 328 (citing *Williams v. State*, 316 So. 2d 267, 274 (Fla. 1975) (stating a defendant has the burden of proving manifest injustice and that "[i]n other words, clear prejudice must be shown")). *See also Parilla v. Crews*, 1:14-cv-20679, 2015 WL 136393, *12 (S.D. Fla. Jan. 9, 2025) (mentioning *Williams* and further observing, the "United States Supreme Court has equated manifest injustice to a defendant proving actual innocence") (citations omitted).[10]

Additionally in *Ford v. State*, 402 So. 3d 973 (Fla. 2025), an

[10] Federal courts require defendants seeking to employ manifest injustice to excuse delay in pursuing federal habeas relief to show that no reasonable juror would have found him guilty, or where a defendant is challenging his sentence, that no reasonable juror would have voted in favor of death. *See Schlup v. Delo*, 513 U.S. 298 (1995).

active death warrant case, this Court rejected a manifest injustice argument based on a non-unanimous jury recommendation claim which was untimely, procedurally barred, and meritless. *Id.* at 982-83. *see also*, *Dillbeck v. State*, 357 So. 3d 94, 105 (Fla. 2023) (rejecting a habeas claim which was procedurally barred where the petitioner argued manifest injustice would result).

Zakrzewski points to the 2023 amendment to the death penalty statute permitted a jury recommendation based on an 8-4 vote. IB at 17-18. However, an amendment to a statute is not an "intervening decision by a higher court "for purposes of the manifest injustice exception. The manifest injustice exception does not extend to statutory changes because they are not judicial decisions. Statutory amendments have a different analytical framework based on mainly ex post facto concerns. The 2023 amendment to Florida's death penalty statute does not apply to Zakrzewski.

Moreover, contrary to Zakrzewski's conclusory allegations throughout his Initial Brief, he has had the benefit of and access to state and federal courts to pursue these claims and the opportunity to seek appellate review. Where claims were not previously raised or appeals not taken, Zakrzewski cannot be permitted to come to this

Court under an active warrant to litigate time-barred, procedurally barred, or meritless issues. *See* § 27.7001, Fla. Stat. (providing postconviction counsel for death-sentenced inmates "so that collateral" challenges "may be commenced in a timely manner and so as to assure the people of this state that the judgments of its courts may be regarded with the finality to which they are entitled in the interests of justice").

Citing *Beiro v. State*, 289 So. 3d 511, 511–12 (Fla. 3d DCA 2019), the Third District Court of Appeal noted that although the concept of manifest injustice is "extremely limited," the "mere incantation of the words 'manifest injustice' does not make it so." *Jones v. State*, 401 So. 3d 401 (Fla. DCA 3rd 2024). This is precisely what Zakrzewski has done, merely invoke the concept.

The manifest injustice exception does not apply to Zakrzewski at all. All time limitations and procedural bars remain in place as required by § 924.051(8), Fla. Stat. (2024). Moreover, his guilty pleas to all three murders, his personal testimony and account of the planning leading up to the murders, and the graphic descriptions of murdering his family with a machete forestall any argument that the well-deserved death sentences and execution constitute a manifest

injustice.

ISSUE II: The compressed warrant litigation schedule does not violate Zakrzewski's constitutional rights of access to the courts or counsel. [Restated]

Zakrzewski claimed that the Governor should not have signed the death warrant days prior to the Independence Day observation, when State offices were closed on July 3 and 4, 2025, and while inmate Michael Bell's warrant litigation was active and overlapping. IB at 31, 34-40. He argues that the 30-day warrant schedule deprived him of notice and denied him the opportunity to be heard in violation of his due process rights and access to the courts and counsel. *Id.* at 31-32. This claim is meritless, has been consistently rejected by this Court, and the postconviction court's summary denial should be affirmed.

Lower Court Order

The postconviction court summarily denied this claim finding:

> Due process requires that a defendant be given notice and an opportunity to be heard on a matter before it is decided." *Asay v. State*, 210 So. 3d 1, 27 (Fla. 2016). Defendant's motion does not demonstrate that his due process rights have been violated. *See Tanzi v. State*, 407 So. 3d 385, 391 (Fla. 2025), cert. denied sub nom, *Tanzi v. Dixon*, 145 S. Ct. 1914 (2025); *Barwick v. State*, 361 So. 3d 785, 789 (Fla. 2023). Further, although Defendant claims that the warrant circumstances have caused

> "difficulties" concerning access to counsel, the motion demonstrates that despite the difficulties, Defendant has had access and communications with counsel on July 2, 3, 7, and 9. Therefore, the motion fails to demonstrate that he did not have meaningful access to the courts or counsel. Further, to any extent that Defendant claims that the circumstances result in ineffective assistance of counsel, "a claim of ineffective assistance of postconviction counsel does not provide a valid basis for relief." See Barwick, 361 So. 3d at 791. As to Defendant's request for a stay of execution, he fails to establish substantial grounds upon which relief might be granted.

PCR-2025 at 527.

Merits

This Court has consistently rejected meritless claims by capital defendants under active death warrants, that the compressed litigation schedule violates their due process rights. *Bell v. State*, 2025 WL 1874574, *17 (Fla. July 8, 2025) (citing *Tanzi v. State*, 407 So. 3d 385, 393 (Fla. 2025)); *Hutchinson v. State*, 2025 WL 1198037, *4 (citing *Tanzi* and *Barwick*).

This Court stated in *Hutchinson*, "although the warrant period in this case was admittedly short and the record lengthy, Hutchinson has been able to raise numerous postconviction claims and advance arguments to support them." *Hutchinson*, 2025 WL 1198037, *4. In the accompanying footnote, this Court noted that "[b]ased on our own assessment of the record, we reject Hutchinson's premise that he

"was not afforded any opportunity to address the specific concerns or issues raised by the judge who ultimately issued the order denying him relief." *Id.* at n.6.

In *Barwick*, the Court held that a 30-day warrant litigation schedule, which included religious days of Holy Week, Passover, and Ramadan did not violate either the Fourteenth Amendment's Due Process Clause or Art. I, § 9 of the Florida Constitution. *Barwick*, 361 So. 3d at 789-90. This Court agreed with the trial court that Barwick did not identify any matter on which he was "denied notice or an opportunity to be heard before it was decided." *Id.* at 790. Zakrzewski's Motion, like Hutchinson and Barwick, failed to specifically allege (1) what access he was denied; (2) what notice he was denied; or (3) what opportunity to be heard that he was denied to bring forth a claim or argument.

As to access to courts and counsel, Zakrzewski generically complains that counsel had limited access to him due to the holiday weekend. IB at 36-38. He also complains that inmate Bell's warrant litigation impeded access to the Florida State Prison. *Id.* at 38-41. However, Zakrzewski makes no factual allegation how this hindered postconviction counsel or impeded his access to the courts. Instead,

he merely offers non-specific and conclusory statements that postconviction counsel's ability to "properly research and develop legal claims" was hindered. *Id.* at 15. This portion of the claim is meritless as well. *See Hutchinson*, 2025 WL 1198037 at *6 (citing *Dailey v. State*, 283 So. 3d 782, 791 (Fla. 2019); *Long v. State*, 271 So. 3d 938, 946 (Fla. 2019)).

Zakrzewski has been represented by experienced postconviction counsel for decades and has had ample opportunity to investigate and bring additional successive postconviction claims, but has not done so since his fourth successive Rule 3.851 motion in January 2017. *See Zakrzewski v. State*, 254 So. 3d 324 (Fla. 2018), *cert. denied*, 587 U.S. 988 (2019). In fact, current postconviction counsel has represented Zakrzewski for the past three years, since 2022, but has not pursued additional successive claims. Therefore, the postconviction Court's summary denial of this claim should be affirmed.

ISSUE III: Florida's clemency process and the Governor's authority to sign Zakrzewski's death warrant is not arbitrary and does not violate constitutional due process rights or the Equal Protection Clause. [Restated]

Zakrzewski claims that signing his death warrant without a

compulsory update to his 2007 clemency proceedings violates the United States Constitution's Equal Protection and Due Process Clauses. IB at 42. He argues that Florida's clemency process is arbitrary and "effectively meaningless" because (1) he has never been given the opportunity to supplement or update his clemency presentation; (2) a "myriad advances in science, medicine, and the law completely chang[ed] whether a grant of mercy would be appropriate" in his case; and (3) he has been denied equal protection where other capital defendants under a death warrant have had supplemental clemency proceedings and he has not.

Lower Court Order

The lower court summarily denied Zakrzewski's clemency claim and found: (1) the claim was untimely because Zakrzewski failed to demonstrate that this claim fit within one of the exceptions to the one-year time limit to file a successive postconviction motion required by Fla. R. Crim. P. 3.851(d)(2); (2) Zakrzewski's reliance on "advances in science, medicine, and the law was conclusory," citing *Cole v. State*, 392 So. 3d 1054, 1061 (Fla. 2024); and (3) Zakrzewski's clemency claim did not demonstrate a basis for relief as a due process

or equal protection violation. (citations omitted).[11] PCR-2025 at 527-31.

Untimely

The postconviction court correctly determined that this successive postconviction claim was time-barred per Fla. R. Crim. P. 3.851(d)(2). PCR-2025 at 529. Zakrzewski's fifth successive postconviction motion was filed decades beyond the one-year time limit to file a motion to vacate judgment and sentence. In so doing, he failed to meet one of the three exceptions to the one-year requirement. This Court may affirm the lower court's denial of the claim as untimely on this basis alone.

Procedurally Barred

Although the postconviction court did not deny the claim as procedurally barred, it is nonetheless applicable. In accordance with Fla. R. Crim. P. 3.851, Zakrzewski could have raised a claim that the Governor could not constitutionally sign a death warrant without

[11] The postconviction court noted that this claim was insufficiently pleaded in accordance with Fla. R. Crim. P. 3.851(e)(1), (e)(2), and (h)(5), where Zakrzewski invoked three different sources of law, with three different analytical frameworks. However, the court nonetheless considered and ruled on the substance of the claim, despite the pleading deficiencies. PCR-2025 at 477-48; 528-29.

conducting a clemency update in a prior proceeding at any time over the past decades. *E.g.*, *Gudinas v. State*, 2025 WL 1692284, *6 (Fla. June 17, 2025). It is therefore procedurally barred when raised on the eve of execution. *Cf. Ferguson v. State*, 101 So. 3d 362, 366 (Fla. 2012) (holding a clemency-related claim was untimely raised after a warrant was signed when the defendant had spent "thirty (30) years on death row" and could have raised the claim earlier).

That is particularly true since Florida's Rules of Executive Clemency have long provided that cases "investigated under previous administrations may be reinvestigated *at the Governor's discretion*." Fla. R. Exec. Clemency 15.C. (emphasis added). It is disturbing that, apparently "no attempt was made by" state postconviction counsel "to request the Governor to exercise his authority" to reinvestigate Zakrzewski's case "before resorting to the courts." *Cf. Parole Comm'n v. Lockett*, 620 So. 2d 153, 158 (Fla. 1993).

No Due Process Violation

This Court has acknowledged that Florida's clemency process "derives solely from the Florida Constitution and we have recognized that the people of the State of Florida have vested 'sole, unrestricted, unlimited discretion exclusively in the executive in exercising this act

of grace.'" *Muhammad v. State*, 132 So. 3d 176, 198-99 (Fla. 2013) (quoting *Carroll v. State*, 114 So. 3d 883, 888-89). Recently, this Court held that "Florida's established clemency proceedings and the Governor's absolute discretion to issue death warrants do not violate the Florida or United States Constitutions." *Gudinas v. State*, 2025 WL 1692284, *9 (Fla. June 17, 2025) (citing *Bolin v. State*, 184 So. 3d 492, 503 (Fla. 2015) (rejecting claim that Governor's discretion to select an inmate for execution is unconstitutional); *Wheeler v. State*, 124 So. 3d 865, 890 (Fla. 2013) (rejecting claim that because there are no meaningful standards that constrain the Governor's absolute discretion in determining which death warrant to sign, Florida's capital sentencing scheme violates the Eighth Amendment).

Zakrzewski's claim that he has been denied due process regarding additional clemency proceedings is meritless. Neither State law, nor the United State Constitution's Due Process Clause require additional clemency procedures prior to the Governor's decision to sign his death warrant. *Barwick v. Governor of Florida*, 66 F.4th 896, 903 (11th Cir. 2023) (quoting *Ohio Adult Parole Authority, et. al. v. Woodard*, 523 U.S. 272, 289 (1998) (O'Connor, J. concurring)). Zakrzewski's due process interest in clemency proceedings

"necessitates only that 'some *minimal* procedural safeguards apply.'" *Barwick*, 66 F.4th at 902 (quoting *Ohio Adult Parole Authority, et. al. v. Woodward*, 523 U.S. 272, 289 (1998) (O'Connor, J. concurring)). (emphasis in original).

In *Woodard*, Justice O'Connor stated that "judicial intervention might, for example, be warranted in the face of a scheme whereby a state official flipped a coin to determine whether to grant clemency, or in a case where the State arbitrarily denied a prisoner any access to its clemency process." *Id.* at 289. Woodard only had three-days' notice of the clemency interview and ten-days' notice of the clemency hearing; his counsel was excluded from the interview and was allowed to participate in the proceedings only at the discretion of the clemency board chairman; and Woodard was not permitted to testify or submit documentary evidence at the hearing. *Id.* at 289-90. Even so, Justice O'Connor concluded that Woodard did not suffer a due process violation from Ohio's clemency process even though the State official virtually "flipped a coin to determine whether to grant clemency." *Id.* at 290. Citing *Woodard*, the Eleventh Circuit stated that the minimal due process standard means the State's clemency process may "not be wholly arbitrary, capricious or based upon

whim, for example, flipping a coin." *Parker v. State Bd. of Pardons & Paroles*, 275 F.3d 1032, 1036-37 (11th Cir. 2001).

Compared to Woodward's case, Zakrzewski has no leg to stand on to support his complaints about Florida clemency process. Unlike Woodard, Zakrzewski received a full clemency proceeding in 2007 and (1) was appointed clemency counsel; and (2) participated in and testified at the clemency hearing. Even now, Zakrzewski, his clemency counsel, state postconviction counsel, or federal habeas counsel have been able to submit any evidence or documentation to Florida Office of Executive Clemency at any time from 2007, to the date his death warrant was signed, and afterward. Therefore, there is no due process violation under *Woodward*.

In *Mann v. Palmer*, 713 F.3d 1306 (11th Cir. 2013), the Eleventh Circuit rejected a due process challenge to Florida's clemency process, where prior to signing a death warrant in 2013, the Governor conducted an internal clemency update from a full hearing held in 1985. The Eleventh Circuit rejected the due process claim even though prior to signing the death warrant, the Governor's office did not provide the capital defendant with notice of the update or an opportunity to be heard.

The *Mann* majority relied on Justice O'Connor's concurring opinion in *Woodard* as establishing the "minimal [due process] protections for death-row inmates in the clemency process." *Id.* at 1316. During the 1985 clemency proceeding, Mann was appointed counsel, provided notice of the proceeding, and given the opportunity to participate and be heard. *Id.* at 1316-17. The majority also noted that "Florida law did not obligate the Governor to grant Mann a second clemency hearing before he signed Mann's current death warrant." *Id.* (citing *Gore v. State*, 91 So. 3d 769, 779–80 (Fla. 2012)).

The *Mann* Court concluded that because the Governor had conducted a full clemency hearing before the warrant was signed, Mann had not shown any due process violation. *Id.* at 1316. *See also Tanzi v. DeSantis*, 2025 WL 1006585 (N.D. Fla. Apr. 3, 2025) (rejecting a minimal due process challenge to Florida's clemency process where the first clemency proceeding was conducted in 2023, but death row inmate was not informed that clemency was denied until 2025 when the death warranted was signed, noting that Tanzi was permitted to present any additional mitigating evidence during that time); *Zack v. Governor of Fla,*, 2023 WL 6376654 (11th Cir. Sep. 23, 2023) (noting "no provision in the Clemency Rules" prevented an

inmate "from providing supplemental materials if he believed they would bolster his clemency application.").

Zakrzewski still had an alternative means to achieve the same result, that being a updated or second clemency proceeding. He or his counsel may submit additional materials in support of clemency. *See Bowles v. DeSantis*, 934 F.3d 1230, 1233, 1236-37, 1246 (11th Cir. 2019) (observing that the Florida Clemency Commission and Board invited capital defendant's counsel three times to submit materials and stated that "[a]ny party is welcome to submit any materials in support of inmate Bowles' request for clemency, which will be given full consideration"). Zakrzewski is free to do the same, rendering his claim meritless.

Equal Protection Clause

Contrary to Zakrzewski's argument, death warrants have been signed in numerous other cases where significant time had passed between the first full clemency proceeding and death warrant, and where no additional proceedings took place. *See Mann v. Palmer*, 713 F.3d 1306, 1316-17 (11th Cir. 2013); *Dailey v. State*, 283 So. 3d 782, 787-88 (Fla. 2019); *Gore v. State*, 91 So. 3d 769, 778-79 (Fla. 2012); *Johnston v. State*, 27 So. 3d 11, 24-26 (Fla. 2010); *Grossman v. State*,

29 So. 3d 1034, 1044 (Fla. 2010). *See also, Zack v. Governor of Fla*, 2023 WL 6376654 (11th Cir. Sep. 23, 2023) (unpublished).

The lower court properly denied Zakrzewski's postconviction clemency claim as untimely, procedurally barred, and meritless.

ISSUE IV: The postconviction court did not abuse its discretion denying Florida Rule of Criminal Procedure, Rule 3.852(i) demands for public records. [Restated]

Zakrzewski claims that the postconviction court abused its discretion denying Fla. R. Crim. P. 3.852(i) public record demands to nine agencies, for a wide variety of records, including records related to clemency proceedings. IB at 55-56. He also claims that the Rule is unconstitutional and violates the Due Process and Equal Protection Clauses. *Id.* at 58-59. Zakrzewski generically argues and conclusory asserts that were he not a capital defendant, he would otherwise be entitled to public records as would other individuals. *Id.* Regarding the clemency records, Zakrzewski argues that the requests and "his colorable claims were not yet ripe" until his death warrant was signed. *Id.* at 57.

These arguments are meritless and in no way demonstrate that the postconviction court abused its discretion. Zakrzewski's Equal Protection and Due Process challenge is equally meritless as

constitutional challenges to Rule 3.852 have been soundly rejected by this Court. Therefore, the postconviction court's denial of all of Zakrzewski's public records demands should be affirmed and the constitutional challenge to the rule rejected, once again.

Lower Court Order

Following a hearing on Zakrzewski's Fla. R. Crim. P. 3.852(i) public records demands, the lower court sustained all the agencies' objections. PCR-2025 at 323-29. The trial court's detailed order denied the individual demands on numerous grounds, but predominately that Zakrzewski failed to meet his burden under Rule 3.852(i) in that the demands were prohibited fishing expeditions, unrelated to colorable claims for relief and overly broad "any and all" requests. *Id.* The trial court cited for example, *Tanzi v.* State, 407 So. 3d 385, 39 (Fla. 2025); *Mills v. State*, 786 So. 2d 547, 552 (Fla. 2001); *Tompkins v. State*, 872 So. 2d 230, 244 (Fla. 2003) ("A defendant must show 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 the death warrant was signed."); *Sims v. State*, 753 So. 2d 66, 70 (Fla. 2000) ("[T]his discovery tool is not intended to be a procedure authorizing a fishing expedition for

records unrelated to a colorable claim for postconviction relief."); *Dailey v. State*, 283 So. 3d 782, 792 (Fla. 2019); and *Asay v. State*, 224 So. 3d 695, 700 (Fla. 2017).

The postconviction court denied the demands for records pertaining to Florida's lethal injection protocols because Zakrzewski (1) did not show good cause why he waited until after the death warrant was signed to request the records; and (2) he acknowledged that "the current precedent finding the lethal injection records do not relate to a colorable claim for relief," citing *Tanzi*, 407 So. 3d at 391; *Dailey*, 283 So. 3d at 792. PCR-2025 at 324-26.

Regarding the clemency records, the postconviction court denied those demands as unrelated to a colorable claim for relief, and noted that this Court has determined that claims challenging clemency proceedings are meritless, the records are confidential, and the court had no authority to disclose them. PCR-2025 at 324-27 (citing *Gudinas v. State*, 2025 WL 1692284, *9 (Fla. June 17, 2025); *Muhammad v. State*, 132 So. 3d 176, 203-04 (Fla. 2013); and *Chavez v. State*, 132 So. 3d 826, 829 (Fla. 2014) (stating Rule 16 protects "all records in the clemency process [as] confidential")).

Merits

Zakrzewski attacks the public records issue on three fronts: (1) a general argument that the lower court abused its discretion denying all of the Rule 3.852(i) demands, IB at 56; (2) his entitlement to clemency records, IB at 57-58; and (3) a challenge to the constitutionality of Fla. R. Crim. P. 3.852 as violative of due process and equal protection clauses. IB at 58-60. His arguments fail as discussed below.

As to Zakrzewski's general complaint that the postconviction court abused its discretion denying the demands, he offers no specific finding that was unreasonable or an erroneous application of this Court's precedent. Instead, he merely cites to the *entire* public records hearing transcript.

Rule 3.852(i)(2) provides that this Court may order production of "additional public records only upon finding *each* of the following":

> (A) collateral counsel has made a timely and diligent search of the records repository;
>
> (B) collateral counsel's affidavit identifies, with specificity those additional public records that are not at the records repository;
>
> (C) the additional public records sought are either relevant to the subject matter of a proceeding under rule 3.851, or appear reasonably calculated to lead to the discovery of admissible evidence; and

(D) the additional public records request is not overly broad or unduly burdensome.

Rule 3.852(i)(2)(A)-(D). On the face of the demands, arguments of the parties, and as demonstrated in its order, the postconviction court's findings accurately reflected Rule 3.852(i)'s requirements.

Most glaringly, Zakrzewski failed to establish any of the records related to a colorable claim for relief, as required by sub-section (C). The demands themselves were devoid of specific or colorable claims (as discussed, a postconviction claim related to clemency is meritless). Zakrzewski states that he "clearly explained in each records demand, and again at the records hearing . . . the precise reason for each request and articulated clearly to the court what the anticipated nature of admissible evidence to be discovered was." IB at 56.

Merely citing to the entire public records hearing transcript is not sufficient to overcome the lower court's "broad discretion in handling post-warrant records requests." *Hutchinson v. State*, 2025 WL 1198037, *3 (Fla. Apr. 25, 2025) *cert. denied,* 145 S. Ct. 1980 (2025) (citations omitted). This Court went on to state, "the rationale provided by the circuit court comports with our warrant-related

precedent and was reasonable based on the facts and circumstances of this case." *Id.*

Notably, Zakrzewski's records demands are virtually identical to those in *Hutchinson*. As such this Court's comment that although "Hutchinson claims that his requests met the appropriate legal standards, his assertions are conclusory," is apropos here. *Id.* at n.5. Zakrzewski fails to articulate one colorable claim overlooked by the postconviction court, rendering denial of a demand an abuse of discretion.

Clemency Records

As to the clemency records, they are first and foremost confidential and exempt in accordance with section 14.28, Florida Statutes, and the Rules of Executive Clemency, Rule 16.[12] In addition to those cases cited in the postconviction court's order, a

[12] Section 14.28, Florida Statutes clearly states, "all records developed or received by any state entity pursuant to a Board of Executive Clemency investigation shall be confidential and exempt from the provisions of s. 119.07(1) and s. 24(a), Art. 1 of the State Constitution." Such records may only "be released upon the approval of the Governor." *Id.* Similarly, Rule 16 of the Rules of Executive Clemency provides that "all records and documents generated and gathered in the clemency process . . . are confidential and shall not be made available for inspection."

postconviction claim based on clemency records is not cognizable.

This Court's recent warrant decision in *Gudinas* reiterated that "records relating to the clemency process are exempt from disclosure" in accordance with Section 14.28, Florida Statutes (2024) and Rule 16, Florida Rules of Executive Clemency. *Gudinas*, 2025 WL 1692284 at *9. This Court also held that the trial court did not abuse its discretion in determining that the demand was not related to a colorable claim for relief and was an overly broad and unduly burdensome fishing expedition. *Id.* (citing *Cole v. State*, 392 So. 3d 1054, 1065-66 (Fla. 2024) and *Dailey*, 283 So. 3d at 792). *See also*, *Mann v. State*, 112 So. 3d 1158, 1163 (Fla. 2013) (holding records requested in active warrant litigation to support claim regarding Governor's selection for death warrants were not relevant to a colorable claim, and such a claim is not cognizable). Zakrzewski has presented no new argument or basis for this Court to overturn well-settled case law and established statute and rules governing the Governor's clemency authority.

Constitutional Challenge to Rule 3.852

Zakrzewski asserts that he is in a unique class of persons not otherwise entitled to public records access under Florida Statutes,

Chapter 119, Florida's Public Records Act, as is the general public. *Id.* at 58-59. With this, the State agrees. Zakrzewski is in a unique class of persons, capital defendants on death row, to which Rule 3.852 applies. There is no basis to find that any due process or equal protection violation exists by applying the rule.

Zakrzewski's challenge to the rule is comprised chiefly of a complaint that he "is required to engage in a nearly impossible endeavor of requesting records from various state agencies at precisely the correct time, and his requests are then subject to the objections of the agencies, unlike requests made pursuant to Chapter 119." This specious assertion is little more than histrionics.[13] He fails to provide any authority to support the rule is unconstitutional or his rights have been violated.

This Court has repeatedly rejected constitutional challenges to Rule 3.852 as violative of the Equal Protection Clauses. *See Tanzi*,

[13] Zakrzewski ignores aspects of Chapter 119 public records requests which would hinder, more than help. For example, any Chapter 119 public records requests would be processed in the order received with no special accommodation to expedite the request and may take months to fulfill. He would also be required to pay for any responsive records. Had Zakrzewski made public records requests for the extensive and voluminous records sought in the demands, the invoice would be significant.

407 So. 3d at 391 (holding the circuit court did not abuse its discretion denying Rule 3.852 demand and no due process violation occurred); *Dailey*, 283 So. 3d at 792-93 (holding that restrictions in Rule 3.852 are "reasonable in the context of postconviction claims") (citing *Wyatt v. State*, 71 So. 3d 86, 111(Fla. 2011); *Howell v. State*, 133 So. 3d 511, 515-16 (Fla. 2014)).

Recognizing that "death is different," this Court long sought "the timely and orderly administration of capital case proceedings" and was mindful of its "primary responsibility … to ensure that the death penalty is fairly administered in accordance with the rule of law and both the United States and Florida Constitutions." *Allen v. Butterworth*, 756 So. 2d 52, 59 (Fla. 2000). This Court "engaged in exhaustive efforts to balance the concerns of fairness and justice with the need for finality in postconviction proceedings in death penalty cases." *Amendments to Florida Rule of Criminal Procedure 3.851, 3.852, et. seq.*, 797 So. 2d 1213 (Fla. 2001).

Rule 3.852 was promulgated in 1996 to provide orderly procedures and govern the process of public records requests in capital postconviction proceedings. *See generally Braddy v. State*, 219 So. 3d 803, 819-20 (Fla. 2017); *In re Amendment to Florida Rules*

of Criminal Procedure–Capital Postconviction Public Records Production, 673 So. 2d 483 (Fla. 1996). Rule 3.852 provides the sole mechanism for capital defendants to obtain public records from an agency at different stages of postconviction proceedings to investigate claims under a Rule 3.851 motion to vacate judgement and sentence. *See Braddy*, 219 So. 3d at 819 ("Rule 3.852 governs the procedure to obtain public records for use in capital postconviction litigation.").

One of the essential components of a "balanced capital postconviction system" is that "postconviction counsel must have timely access to all information concerning the defendant's case, especially public records from investigating and prosecuting agencies." *Amendments to Florida Rules of Criminal Procedure,* 797 So. 2d at 1215. This Court described the new Rule 3.852 as "discovery on behalf of capital postconviction defendants of public records under chapter 119, Florida Statutes (1995), relating to proceedings for relief pursuant to Florida Rules of criminal Procedure 3.850 and 3.851."*In re Amendment to Florida Rules of Criminal Procedure – Capital Postconviction Public Records Production*, 683 So. 2d 475 (Fla. 1996).

This Court also addressed concerns that Rule 3.852 would

"unconstitutionally limit a capital postconviction defendant's right to production of public records" in accordance with the Florida Constitution and Chapter 119, concluding "that the rule does not invade those constitutional and statutory rights." *Id.* at 476. In so doing, the Court stated,

> This rule is a carefully tailored discovery rule for public records production ancillary to rule 3.850 and 3.851 proceedings. . . The rule does not affect, expand, or limit the production of public records for any purposes other than use in a 3.850 or 3.851 proceeding. This is a rule of procedure which directs the use of the courts' power to require, regulate, or prohibit the production of public records for these postconviction capital proceeds. We also note specifically that the rule is not a rule of evidence.

Allen, 756 So. 2d at 65. In 2000, this Court further observed that

> . . . postconviction counsel must be afforded the opportunity to begin an investigation immediately upon appointment. A large part of this investigation will center around various public records in the possession of the law enforcement offices that investigated the case and the state attorney's office that tried the case. This Court has recognized that "chapter 119 grants a substantive right to Florida citizens," on which the Legislature "has the prerogative to place reasonable restrictions."

Allen, 756 So. 2d at 65.

Further, records are available to capital defendants upon the issuance of a direct appeal mandate, as records relating to a capital defendant's case are automatically required to be delivered to the

Capital Postconviction Public Records Repository by agencies involved in the investigation or prosecution of a capital defendant's case. *See* Section 27.7081(6) and (7). Demands for public records in addition to those at the Repository may be made under different subsections, at various stages during the postconviction proceedings.

Rule 3.852 is clearly rooted in and "based on the broad public records production authorized under chapter 119." *Amendments to Florida Rules of Criminal Procedure*, 797 So. 2d at 1217. This is even more true given Rule 3.852's evolution, coupled with § 27.7081's enactment (formerly § 119.19, Fla. Stat.) and this Court's commentary since 1996. *See e.g. Braddy*, 219 So. 3d at 820 (finding the trial court did not abuse its discretion declining to release public records claimed exempt by Miami-Dade State Attorney's Office and submitted to the Repository under seal and stating, "not all materials are 'public records' within the meaning of chapter 119, Florida Statutes.").

This Court therefore limited the scope of additional public records production when it approved Fla. R. Crim. P. Rule 3.852(k)(l). Rule 3.852(k) limits production to those records "not privileged or immune from production and are either relevant to the subject

matter of the proceeding under rule 3.851 or are reasonably calculated to lead to the discovery of admissible evidence." The purpose of Rule 3.852 is not to grant access to unrelated or protected documents. *Twilegar v. State*, 175 So. 3d 242, 250 (Fla. 2015). *See also Dennis v. State,* 109 So. 3d 680, 699 (Fla. 2012).

Given the intensive efforts in crafting Rule 3.852, coupled with the cognizance to protect a capital defendant's rights, Zakrzewski has not provided this Court with any basis to find due process or equal protection violations where his public records demands were denied.

CONCLUSION

Appellee, the State of Florida, respectfully requests that this Court affirm the trial court's summary denial of Appellant's successive postconviction motion and order denying public records demands.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of July, 2025, I electronically filed the foregoing with the Clerk of the Court via the Florida Courts E-Portal Filing System, which will send a notice of electronic filing to the following: Lisa M. Fusaro, Assistant Capital Collateral Regional Counsel – North, **Lisa.Fusaro@ccrc-north.org**; Alicia A. Hampton, Assistant Capital Collateral Regional Counsel – North, **Alicia.Hampton@ccrc-north.org**; and the Florida Supreme Court Clerk, **warrant@flcourts.org**, **canovak@flcourts.org**.

CERTIFICATE OF FONT AND WORD LIMIT COMPLIANCE

1. This document complies with the word limits of Fla. R. App. P. 9.210 and Fla. R. App. P. 9.045 because, excluding the parts of the document exempted by Fla. R. App. P. 9.045(e), this document contains 12,546 words.

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