No. SC2025-1009

EXECUTION SCHEDULED FOR JULY 31, 2025 at 6:00 P.M.

IN THE

Supreme Court of Florida

EDWARD JAMES ZAKRZEWSKI, II,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT, IN AND FOR OKALOOSA COUNTY, FLORIDA
Lower Tribunal No. 1994-CF-1283

INITIAL BRIEF OF APPELLANT

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REQUEST FOR ORAL ARGUMENT

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

CITATIONS TO THE RECORD

Citations shall be as follows: The abbreviation "R." refers to the first three volumes of the record on direct appeal to the Florida Supreme Court (SC60-88367). "T." refers to the penalty phase trial transcript in volumes four through ten of the record on appeal. "PC." refers to the record on appeal from this appeal (SC25-1009). All other references will be self-explanatory or otherwise explained herein.

PROCEDURAL HISTORY

Appellant, Edward Zakrzewski, pled guilty to three counts of first-degree murder on March 19, 1996. R. 241-42; T. 442-51. After conducting a penalty phase trial, the jury voted 7-5, 7-5, and 6-6 on counts 1-3 respectively. R. 263-64; T. 1274-80. Although the jury voted for life imprisonment without possibility of parole on the third count, on April 19, 1996, the trial court overrode the jury's vote for life, and sentenced Appellant to death on all three counts. R. 1028-51; 1274-80. This Court affirmed on direct appeal. *Zakrzewski v. State*, 717 So. 2d 488 (Fla. 1998), *cert denied*, *Zakrzewski v. Florida*, 525 U.S. 1126 (1999).

Appellant filed an initial motion for state postconviction relief which was denied after an evidentiary hearing. *Zakrzewski v. State*, 866 So. 2d 688, 689 (Fla. 2003). On appeal, he raised four issues, including that his death sentences were unconstitutional under *Apprendi v. New Jersey*, 530 U.S. 466, 482 (2000) and *Ring v. Arizona*, 536 U.S. 584, 584 (2002). *Id.* This Court affirmed. *Id.* at 697.

In February 2004, Appellant filed a petition for a writ of habeas corpus, which was denied and affirmed on appeal by the Eleventh

Circuit Court of Appeals. *Zakrzewski v. McDonough*, 455 F.3d 1254 (11th Cir. 2006).

Appellant filed a Federal Rule of Civil Procedure 60(b) motion to reopen proceedings on his habeas petition. The motion was denied as a successive habeas petition and Appellant appealed. The Eleventh Circuit Court of Appeals reversed and remanded, instructing the district court to consider the merits of the motion. *Zakrzewski v. McDonough*, 490 F.3d 1264 (11th Cir. 2007). On remand, the district court denied the 60(b) motion, *Zakrzewski v. McDonough*, 2007 WL 2827735 (N.D. Fla. Sept. 26, 2007), and the Eleventh Circuit affirmed. *Zakrzewski v. McNeil*, 573 F.3d 1210 (11th Cir. 2009), *cert denied*, *Zakrzewski v. McNeil*, 560 U.S. 956 (2010).

In 2009, Appellant filed a successive motion in state court, which was summarily denied, and affirmed on appeal. *Zakrzewski v. State*, 13 So. 3d 1057 (Fla. 2009) (unpublished). Another in 2010, which was also summarily denied and affirmed on appeal. *Zakrzewski v. State*, 115 So. 3d 1004 (Fla. 2012) (unpublished). In March 2013, Appellant filed a third successive postconviction motion. The trial court summarily denied his claims and this Court affirmed. *Zakrzewski v. State*, 147 So. 3d 531 (Fla. 2014)

(unpublished), *cert denied, Zakrzewski v. Florida*, 575 U.S. 918 (2015).

On May 2, 2016, Appellant 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, etc.,* 221 So. 3d 1159 (Fla. 2017).

In January 2017, Appellant filed a fourth successive postconviction motion based on *Hurst*, which was summarily denied. On appeal, this Court affirmed summary denial of the motion, concluding that the Court's prior denial of his habeas petition raising similar claims served as a procedural bar. *Zakrzewski v. State*, 254 So. 3d 324 (Fla. 2018), *cert denied, Zakrzewski v. Florida*, 587 U.S. 988 (2019).

On July 1, 2025, Governor Ron DeSantis signed a death warrant for Appellant. PC. 37-66. His execution is scheduled for July 31, 2025. On July 9, 2025, Appellant filed a successive motion under Fla. R. Crim. P. 3.851 after death warrant signed. PC. 352-98. The State filed an answer on July 10, 2025. PC. 465-88. The circuit court held a case management conference on July 10, 2025 (PC. 502-19) and on the same day denied Appellant's request for an evidentiary

hearing (PC. 499-501). On July 14, 2025, the circuit court denied Appellant's successive motion. PC. 520-32. This appeal follows.

STATEMENT OF FACTS RELEVANT TO THIS APPEAL

A. Trial Court Proceedings.

Appellant was remorseful and took responsibility for the crime by pleading guilty to three counts of first-degree murder on March 19, 1996. R. 241-42; T. 442-51. Following the penalty phase trial, the jury voted 7-5 for a death sentence on the first two counts, and on the third count, the jury voted for life imprisonment without possibility of parole. R. 263-64; T. 1274-80. Notably, prior to his 1996 trial, Appellant raised and preserved the argument that a bare majority vote for a death sentence was unconstitutional. R. 195-96.

An extensive amount of mitigation was found in Appellant's case, including two weighty statutory mitigators: 1) no significant prior criminal history, and 2) the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance. *Zakrzewski*, 717 So. 2d at 497. Weight was also given to fourteen nonstatutory mitigating factors. *Id.* at 494. The nonstatutory mitigation found by the trial court included factors that

related to Appellant taking responsibility, such as he turned himself in; pled guilty; and showed severe grief and remorse. *Id.* at 491.

Additional mitigation found by the trial court supported the fact that the offense was completely out of character for Appellant, such as: he served in an exemplary manner in the United States Air Force; he was under great stress due to work, college, child care, housework, and lack of sleep; he was a loving husband and father until the offense; was on the Dean's List in his third year of college; he is a patient and humble man; and he is an exceptionally hard worker. *Id.* Other mitigating circumstances included that Appellant: was raised without his natural father in his home; had a lack of prior domestic relationships; received little religious upbringing, but has embraced faith since the offense. *Id.* Conversely, a minimal number of aggravators were found. *Id.* at 494.

Nonetheless, although the jury voted for life imprisonment without the possibility of parole on the third count, on April 19, 1996, the trial court overrode the jury's vote for life, and sentenced Appellant to death on all three counts. R. 1028-51; 1274-80.

B. Relevant Appeals.

Appellant raised nine claims on direct appeal:

> (1) the trial court erred by finding HAC; (2) the trial court erred by finding CCP; (3) the death sentence is not proportionately warranted 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 nonstatutory mitigating factors.

Zakrzewski, 717 So. 2d at 492. Although this Court affirmed on direct appeal, three Justices noted the issues with upholding the jury override. *Id.* at 496-98.

> The majority has not considered the facts in a light most favorable to the recommendation of the jury, as we are required to do, or acknowledged the unchallenged reasonable basis in the record supporting the jury's vote as to Anna's death. Further, the majority has ignored not only the evidence and inferences therefrom that would support the jury's recommendation, but has also ignored the fact that ***even the jury vote recommending death was by a slim seven to five margin, one vote away from a life recommendation*** for the appellant. Hence, the majority, in direct violation of the law and our decision in *Tedder* has substituted its subjective analysis of the facts for the views of the sworn and death-qualified jurors, who

> not only could have had reasonable but differing views as to whether death was appropriate, but *did* have those views and openly expressed them. The majority has apparently concluded that because its members would not have extended mercy, the views of the twelve citizens sitting on this jury extending mercy will be ignored.

Zakrzewski, 717 So. 2d at 497 (Anstead, J., concurring in part and dissenting in part with an opinion, in which Kogan, C.J., and Shaw, J., concur) (first emphasis added).

Appellant has continuously challenged the constitutionality of Florida's death penalty scheme. On appeal from the denial of his initial motion for state postconviction relief, he raised four issues, including that his death sentences were unconstitutional under *Apprendi v. New Jersey*, 530 U.S. 466, 482 (2000) and *Ring v. Arizona*, 536 U.S. 584, 584 (2002). *Zakrzewski v. State*, 866 So. 2d at 689. This Court affirmed. *Id*. at 697.

Next, in 2016, Appellant sought habeas relief under *Hurst v. Florida*, 577 U.S. 92 (2016) and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), but the petition was denied. *Zakrzewski,* 221 So. 3d 1159. In 2017, Appellant's successive postconviction motion based on *Hurst* was summarily denied. On appeal, this Court affirmed and held that Appellant was procedurally barred. *Zakrzewski*, 254 So. 3d at 324.

C. Timing and Conditions of Death Warrant Litigation.

Although Appellant went through the clemency process approximately ***eighteen*** years ago, on the evening of July 1, 2025, Governor DeSantis signed a death warrant for Appellant, and set his execution for 6:00 p.m. on July 31, 2025. PC. 37-66. After learning Appellant's death warrant was signed, undersigned counsel immediately made efforts to secure a legal visit, because once an inmate is transported to death watch at Florida State Prison ("FSP"), Florida Department of Corrections ("DOC") confiscates the inmate's tablet and e-mail access, leaving the inmate at the mercy of counsel scheduling legal visits and calls in order to access the courts. When Appellant arrived at FSP, another inmate, Michael Bell, was already on death watch due to his execution being scheduled for July 15, 2025.[1]

Due to the thirty-day warrant period, which led to this Court's expedited briefing schedule, the circuit court was required to expedite

[1] In 2023, prior to the Governor signing overlapping death warrants, Justice Labarga was already "extremely concerned by the recent pace of death warrants and the speed with which the parties and involved entities must carry out their respective duties." *Barwick v. State*, 361 So. 3d 785, 796 (Fla. 2023) (Labarga, J., concurring).

all proceedings at that level as well. PC. 33-34. On July 2, 2025, the circuit court held a case management conference, setting deadlines for Appellant's litigation of the death warrant in circuit court. PC. 104-08, 405-64. The circuit court's order required Appellant to file his public record requests by 3:00 p.m. on July 3, 2025, and his successive postconviction motion by 2:00 p.m. on July 9, 2025. PC. 104-08.

Therefore, Appellant's public records demands to state agencies were due on a day that the Governor closed state offices in advance of the Independence Day weekend. Further, even without a four-day holiday weekend, the compressed schedule would have only allowed a maximum of eight days to investigate, pursue, discuss, and draft legal claims prior to the deadline to file the successive postconviction motion.

Appellant had to work around Mr. Bell's legal visits and legal calls since there is only one phone on death watch and one room designated for legal visits. Further, FSP is on lockdown on the days of executions, therefore Appellant loses another day of access to counsel, experts, and the courts when warrant time periods overlap.

Despite the substantial hardships to Appellant's access to counsel and the courts, he filed his successive Rule 3.851 motion for postconviction relief on July 9, 2025, with as many claims as he could pursue due to the time constraints. PC. 352-98. The circuit court summarily denied Appellant's motion on Monday, July 14, 2025. PC. 520-32.

SUMMARY OF THE ARGUMENT

The circuit court erred when it summarily denied Appellant's Rule 3.851 motion. First, the circuit court erred in denying Appellant's claim that the execution of an individual whose jury vote would make him ineligible for the death penalty today, is arbitrary and unconstitutional. Second, the circuit court erred in denying Appellant's claim that Appellant was deprived of meaningful access to counsel and the courts due to the condensed deadlines; the most critical part of the post-warrant investigation and litigation occurring during a four-day holiday weekend, and overlapping Appellant's warrant with Mr. Bell's warrant created further access issues.

Third, the circuit court erred in denying that Florida's clemency process is unconstitutional and has deprived Appellant of his due process and equal protection rights under the United States

Constitution and the corresponding provisions of the Florida Constitution. Most concerning is the fact that Appellant did not receive an updated clemency review while other similarly situated inmates have. Finally, the circuit court erred in denying Appellant's public records requests, even though the records would have aided in proving Appellant's constitutional violations, including that Florida's clemency process is unconstitutional.

The circuit court's summary dismissal of these serious constitutional claims was erroneous. Finality does not require the execution of Appellant. The interests of finality and justice would be achieved in Appellant's case by this Court finding his death sentences unconstitutional and remanding for the circuit court to impose life sentences without the possibility of parole.

STANDARD OF REVIEW

Because the circuit court denied postconviction relief without an evidentiary hearing, this Court must accept the factual allegations presented in Appellant's motion and in this appeal as true to the extent that they are not conclusively refuted by the record. *Ventura v. State*, 2 So. 3d 194, 197-98 (Fla. 2009). Further, this Court "review[s] the trial court's application of the law to the facts *de novo*."

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

ARGUMENT I

THE CIRCUIT COURT ERRED IN SUMMARILY DENYING APPELLANT'S CLAIM THAT APPELLANT'S DEATH SENTENCES ARE UNCONSTITUTIONAL BECAUSE HIS JURY VOTES MAKE HIM INELIGIBLE FOR THE DEATH PENALTY TODAY.

Following the penalty phase of his trial, Appellant received two jury recommendations of 7-5, and one recommendation of 6-6. R. 263-64; T. 1274-80. If a jury returned those votes today, Appellant would be completely ineligible for a death sentence and instead, it would be mandatory to sentence him to life in prison without the possibility of parole. *See* § 921.141(2)(c), Fla. Stat. (emphasis added) ("If at least eight jurors determine that the defendant should be sentenced to death, the jury's recommendation to the court must be a sentence of death. ***If fewer than eight jurors determine that the defendant should be sentenced to death, the jury's recommendation to the court must be a sentence of life imprisonment without the possibility of parole***.") Appellant

submits that the trial court erred in denying his claim that his death sentences are unconstitutional. His death sentences are arbitrarily and capriciously imposed and in violation of the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.

A. Failing to Grant Appellant Relief Violates his Eighth Amendment Rights.

The circuit court erred in finding that Appellant's constitutional claims were untimely, procedurally barred, and meritless. PC. 523-26. One clear concern of the Justices *in Furman v. Georgia*, 408 U.S. 238 (1972), was the possible discriminatory application of the death penalty. Justice Douglas concluded that the capital statutes before him were "pregnant with discrimination," *id.* at 257, and thus ran directly counter to "the desire for equality . . . reflected in the ban against 'cruel and unusual punishments' contained in the Eighth Amendment." *Id.* at 255. These observations illuminate the holding of *Furman*, reaffirmed by the Supreme Court of the United States ("SCOTUS") in *Gregg* and subsequent cases, that the death penalty may "not be imposed under sentencing procedures that create [] a substantial risk that it [will] . . . be inflicted in an arbitrary and

capricious manner." *Gregg v. Georgia*, 428 U.S. 153, 188 (1976); *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980); *Zant v. Stephens*, 456 U.S. 410, 413 (1982) (per curiam).

The "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). However, the litany of issues associated with Appellant's death sentences highlight that the death penalty has not been fairly and equally applied to his case.

Remarkably, Florida's capital sentencing scheme was such an outlier over the years, that even prior to his 1996 trial, Appellant raised and preserved the argument that a bare majority vote for a death sentence was unconstitutional. R. 195-96. After being sentenced, Appellant also timely raised and preserved similar arguments under *Apprendi* and *Ring*. Justice Lewis opined that "those defendants who challenged Florida's unconstitutional sentencing scheme based on the substantive matters addressed in *Hurst* are entitled to consideration of that constitutional challenge." *Asay v. State*, 210 So. 3d 1, 31 (Fla. 2016) (Lewis, J., concurring). Further, Justice Pariente also recognized that "pre-*Ring* defendants

whose sentences were the product of the ***clearly unconstitutional judicial override***" still "warrant relief under *Hurst*". *Zakrzewski v. Jones*, 221 So. 3d 1159, 1162 (Fla. 2017) (Pariente, J., concurring) (emphasis added). Despite raising and preserving these arguments every step of the way, Appellant was barred from receiving *Hurst* relief solely because his sentence became final in 1999, merely years prior to the 2002 date where this Court decided to arbitrarily draw the line.

Appellant timely raised claims related to Florida's unconstitutional capital sentencing scheme at every chance and fully preserved the issues in his case related to his unconstitutional jury votes. Accordingly, as detailed further below, Appellant asserts that his case was decided wrong previously and manifest injustice would result from letting his unconstitutional death sentences stand when so many other individuals on Florida's death row either received *Hurst* relief or were never sentenced to death based on a bare majority vote and a jury override.

B. Evolving Standards of Decency.

As SCOTUS has repeatedly held, "the Eighth Amendment 'must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.'" *Furman v. Georgia*, 408 U.S. 238,

242 (1972) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)). The justifications cited for the death penalty no longer support the existence of capital punishment, because "capital punishment is excessive when . . . it does not fulfill two distinct social purposes served by the death penalty: retribution and deterrence of capital crimes." *See, e.g., Kennedy v. Louisiana*, 554 U.S. 407, 441 (2008) (noting decision was consistent with justifications); *Gregg*, 428 U.S. at 173, 183, 187 (joint opinion of Stewart, Powell, and Stevens, JJ.). There is no meaningful evidence that the death penalty deters violent crime when compared with life imprisonment without parole.

a. A Bare Majority Vote is Unconstitutional.

While nearly all states that utilize the death penalty require a unanimous jury vote in order to sentence a defendant to death, only two states do not: Florida and Alabama. However, even in Alabama at least ***ten*** jurors have to vote for death before a judge can impose a death sentence. *See* Ala. Code § 13A-5-46(f) ("The decision of the jury to recommend a sentence of death must be based on a vote of at least 10 jurors"). Florida not only does not require a unanimous jury recommendation, but Florida currently only requires ***eight*** jurors to recommend a death sentence, the lowest threshold in the country.

Even still, this 8-4 margin, requires one more juror to vote for a death sentence than the 7-5 bare majority votes that Appellant received.

b. A Jury Override is Also Unconstitutional.

Worse yet, on the third count, Appellant should have received a life sentence back in 1996, because the jury voted 6-6 for a sentence of life in prison. Instead, the trial judge overrode the jury's life recommendation. *See Tedder v. State*, 322 So. 2d 908 (Fla. 1975), *abrogated by Hurst v. Florida*, 577 U.S. 92 (2016). That is ***two*** less jurors than what would be required to receive a death sentence today, and arguably unconstitutionally imposed even at the time that Appellant was sentenced. *See supra* pp. 7-8.

At the time of Appellant's trial, a jury override could be applied in limited circumstances in Florida, where "[i]n order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." *Tedder v. State*, 322 So. 2d 908, 910 (Fla. 1975), *abrogated by Hurst v. Florida*, 577 U.S. 92 (2016). Appellant's trial judge cited the *Tedder* standard in his sentencing order, but he appeared to be improperly applying the law, because this case contained a plethora of mitigation and there were

many sound reasons to recommend a life sentence. R. 1049-51. To wit, six of the twelve jury members weighed the evidence presented and differed in opinion. Each member of the jury was polled and each juror answered in the affirmative on the record that "as to Count III did at least six jurors vote in favor of a life sentence?" T. 1277-80. These reasonable people took their duty as a juror seriously and clearly considered the differing evidence regarding aggravators for each count.

A jury "override is improper if there is a reasonable basis in the record to support the jury's recommendation." *Esty v. State*, 642 So. 2d 1074, 1080 (Fla. 1994). As detailed above, the record in Appellant's case is replete with mitigation that outweighed the aggravators, including two weighty statutory mitigators: 1) no significant prior criminal history and 2) the capital felony was committed while the Defendant was under the influence of extreme mental or emotional disturbance. In addition, fourteen nonstatutory mitigators were found and given varying degrees of weight. *Zakrzewski*, 717 So. 2d at 497. Just because the trial judge substituted his own judgment for that of the jury and he would not have granted mercy on the third count, does not mean that no

reasonable person would have.[2] Which is further illustrated by the jury vote of 6-6 being just one vote off from the other counts. As in *Esty*, the "jury override [in Appellant's case] was improper because the jurors could have relied on these factors established in the record to recommend a life sentence in this case." *Esty*, 642 So. 2d at 1080.

Finally, in the sentencing order, the trial judge's reasoning for overruling the life recommendation for the third count was, because that victim was the last to die, she must have been aware of her impending death.[3] PC. 63. Thus, he could not see how the jury could

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[2] Although the circuit court seems to suggest that only the majority of this Court on direct appeal were reasonable because they "conclude[d] that 'no reasonable person could differ' as to the appropriateness of the death penalty for the murder of Anna" (PC. 524-25; *id.* at 494), Appellant submits that not only were the other three Justices and six jurors reasonable, but their viewpoints illustrated how the standards of decency were already evolving, even in Florida.

[3] On direct appeal, Justice Anstead dissected this flawed reasoning and found that even the direct appeal "majority opinion has demonstrated ***a number of reasonable bases for the life recommendation***." *Zakrzewski*, 717 So. 2d 488, 498 (Anstead, J., concurring in part and dissenting in part) (emphasis added). "However, beyond the consistency inference, the reference to the 'compelling' facts of Anna's murder is perplexing because the majority opinion notes that while 'Edward realized what his father was doing,' *id.* at 477, '[t]he evidence was in conflict as to whether Anna was aware of her impending death.' *Id.* Hence, in addition to the unprecedented mitigation presented, the majority has itself

recommend a life sentence for her while simultaneously recommending death for the first two counts. PC. 64. Conversely, under today's standard in Florida, the 7-5 jury recommendation for the first two counts ***would have been a mandatory life sentence*** and the judge would have had absolutely no excuse as to why an override was needed because the votes for each count would have ***all*** mandated a life sentence without the possibility of parole.

Notably, Appellant's jury override sentence was already suspect even on direct appeal. *Zakrzewski*, 717 So. 2d at 497 (Anstead, J., concurring in part and dissenting in part with an opinion, in which Kogan, C.J., and Shaw, J., concur). Even in 1998, ***three*** Justices found that Appellant's jury override sentence was "in direct violation of the law." *Id*. As the controversial practice of the jury override declined enough to already give three Justices pause even just two years after Appellant's jury override, the evolving standards of

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identified another substantial basis for the jury's recommendation by pointing out that ***the jury could have reasonably concluded, because the evidence was in conflict, that Anna was not aware of her impending death.*** In that event, for example, the jury would also not have found the HAC aggravator for Anna's death since that aggravator requires a finding of consciousness of impending death." *Id*. at 497-98 (emphasis added).

decency made jury overrides less and less prevalent. By 2016, Justice Alito noted that "[n]o Florida trial court has overruled a jury's recommendation of a life sentence for more than 15 years." *Hurst v. Florida*, 577 U.S. 92, 105 (2016) (Alito J., dissenting).

Even at the time of Appellant's trial, judicial overrides were without a doubt becoming an extremely rare occurrence. In fact, Appellant is the last individual out of only three capital defendants on Florida's death row whose case has been subject to a judicial override. After Appellant's trial judge overrode his jury vote for a life sentence, this Court has "not affirmed a judicial override on direct appeal since" it affirmed Appellant's case. *Zakrzewski v. Jones*, 221 So. 3d 1159, 1162 (2017). The practice of jury override stopped completely by 2000, and was later fully abolished by *Hurst* in 2016. *See also Blakely v. Washington*, 542 U.S. 296, 304 (2004) (internal citation omitted) ("When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts which the law makes essential to the punishment," "the judge exceeds his proper authority"). It is plain that the standards of decency have evolved over the years and as a result, Appellant's jury override sentence must be overturned.

C. Allowing Appellant's Unconstitutional Death Sentences to Stand Would Result in Manifest Injustice.

In denying Appellant's claim that his death sentences were unconstitutional, the circuit court held that the claim was procedurally barred because Appellant had previously raised claims related to the *Tedder* override and *Hurst* on appeal. PC. 525. However, this Court is not barred by the law of the case doctrine. This Court has previously held that "[w]e may change the law of the case at any time before we lose jurisdiction of a cause and will never hesitate to do so if we become convinced, as we are in this instance, that our original pronouncement of the law was erroneous and such ruling resulted in manifest injustice." *Strazzulla v. Hendrick*, 177 So. 2d 1, 3 (Fla. 1965); *see also State v. Akins*, 69 So. 3d 261, 268 (2011) (holding "an appellate court has the power to reconsider and correct an erroneous ruling that has become the law of the case where a prior ruling would result in manifest injustice").

Appellant asserts that his death sentences are unconstitutional because he received jury votes of 7-5, 7-5, and 6-6, on counts 1-3 respectively. None of the three counts received the minimum requirement of eight votes for death that is currently in effect

pursuant to Section 921.141 of the Florida Statutes. Consequently, all three of Appellant's death sentences are currently illegal in Florida, which requires the ***lowest*** threshold of votes of any state in the Nation for a judge to impose a death sentence, ***and*** in every state in which the death penalty can be imposed.

Moreover, but for the arbitrary cutoff date of June 24, 2002, Appellant would have received *Hurst* relief. Instead, his sentences became final in 1999 and his request for *Hurst* relief was denied, despite him raising and preserving the constitutionality of a bare majority vote for a death sentence pre-trial and on direct appeal. R. 195-96. *See Asay v. State*, 210 So. 3d 1, 30 (2016) (Lewis, J., concurring) (arguing the Court should "entertain *Hurst* claims for those defendants [like Appellant,] who properly presented and preserved the substance of the issue, even before *Ring* arrived."). Thus, allowing Appellant's unconstitutional death sentences to stand would result in manifest injustice.

a. Manifest Injustice Can Overcome Procedural Bars.

In denying Appellant's claim, the circuit court erred in placing undue emphasis on procedural bars. PC. 525. The lower court completely disregarded that the law of the case "doctrine is not an

absolute mandate" and this Court has "the power to reconsider and correct erroneous rulings." *State v. Owen*, 696 So. 2d 715, 720 (Fla. 1997). The lower court seems to ignore the fact that if this Court reconsidered and corrected an erroneous ruling, the claim must have been previously raised and ruled upon.

Justice Labarga acknowledged this Court's power to correct such errors in *Marshall*:

> Although his sentence admittedly became final prior to the issuance of *Ring*, 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). Marshall's death sentence, which was based upon a judicial override, constitutes an injustice that should be remedied.

Marshall v. Jones, 226 So. 3d 211 (Fla. 2017) (Labarga, C.J., dissenting). Although Appellant, unlike Mr. Marshall, is not on death row solely due to the trial judge overriding his life sentence, his sentence is still uniquely paired with two death sentences that were the product of a bare majority vote, which would no longer be upheld in ***any*** state in the country if issued today. *See supra* pp. 16-22.

Failure to recognize, reconsider, and correct the fact that Appellant's sentences are unconstitutional would result in a manifest injustice. Reliance on the prior decisions in his case are unreliable, outdated, and erroneous. Appellant submits that it is appropriate for this Court to remand for the circuit court to impose three life sentences. But, as a minimum, this Court should remand for the circuit court to properly consider and analyze Appellant's claim of manifest injustice.

b. Intervening Changes in Law also Support Departure from the Law of the Case Doctrine.

One exception to the law of the case doctrine "allows departure from the law of the case when there has been 'an intervening decision by a higher court contrary to the decision reached on the former appeal.'" *State v. Okafor*, 306 So. 3d 930, 934 (Fla. 2020) (quoting *Strazzulla v. Hendrick*, 177 So. 2d 1, 4 (Fla. 1965)). The intervening changes in law by SCOTUS in *Hurst v. Florida*, 577 U.S. 92 (2016), and then the 2023 revision to the statute which required at least eight votes to receive a death sentence, show that failure to receive even ***eight*** votes for death on any of his counts, requires the imposition of life sentences. *See* § 921.141, Fla. Stat. (2023). At the

very least, this manifest injustice should be remedied and Appellant's death sentences should be vacated.

D. Converting Appellant's Death Sentences to Life Sentences is the Appropriate Remedy and Promotes Finality.

There are only two sentences in Florida for first-degree murder: life in prison without the possibility of parole, and a death sentence. To further the interests of justice and finality, when a death sentence is found to be unconstitutional, it must be commuted to a life sentence. § 775.082, Fla. Stat.; *see also Asay*, 210 So. 3d at 40-41 (Perry, J., dissenting).[4] No justice is served or retributive or deterrent effect gained[5] by executing an individual after nearly three decades on death row, especially not an individual such as Appellant who the

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[4] "As I explained fully in *Hurst v. State*, 202 So. 3d 40, 75-76 (Fla. 2016), there is no compelling reason that the plain language of section 775.082(2), Florida Statutes, does not apply to this case. Because his death sentence is unconstitutional, Asay is entitled to the remedy that the Legislature has specified: ***the sentencing court must vacate his death sentence and sentence him to life in prison***. *See* § 775.082(2), Fla. Stat. (2015)." (emphasis added).

[5] "*Gregg* instructs that capital punishment is excessive when it is grossly out of proportion to the crime or it does not fulfill the two distinct social purposes served by the death penalty: retribution and deterrence of capital crimes." *Kennedy*, 554 U.S. at 441 (citing *Gregg*, 428 U.S. at 173, 183, 187).

DOC observed has adjusted exceptionally well to his conditions. This is further evidenced by the fact that he has only received one DR in the past ten years, for a minimal, nonviolent infraction.[6]

Whereas, the State in *Okafor* was requesting this Court to enact an unconstitutional judicial override to reinstate the defendant's death sentence and deprive him of his constitutional interest in his life, without Due Process. *Okafor*, 306 So. 3d at 933-45. In the instant case, the opposite is requested. Consequently, this Court should correct its prior erroneous rulings against Appellant. Here, the interest of finality based in the law of the case doctrine would actually be ***promoted*** by imposing a constitutional sentence of life in prison upon Appellant. *See Owen*, 696 So. 2d at 720 (citing *Strazzulla,* 177 So. 2d at 3) ("the doctrine is not an absolute mandate, but rather a self-imposed restraint that courts abide by to promote finality and efficiency in the judicial process and prevent relitigation of the same issue in a case.").

[6] He may have received less than one DR in a longer period than ten years, however only the last ten years of DOC records were produced to counsel due to the time constraints created by the active death warrant.

Appellant has already taken accountability for the crimes and pled guilty. Therefore, if he was resentenced to life in prison without the possibility of parole, he would have nothing to appeal, nothing to litigate, and true finality would be achieved in this case. *See Witt v. State*, 387 So. 2d 922, 926 (Fla. 1980) ("we must balance the interests of fairness and uniformity for [the defendant] against the interests of decisional finality").

E. This Claim is Timely Because it was not Ripe Until Appellant's Death Warrant was Signed.

The circuit court erred in finding this claim untimely. PC. 524. This claim only became ripe upon the signing of Appellant's death warrant. He has already spent twenty-nine years on death row and is sixty years old. He went through clemency eighteen years ago. Until his death warrant was signed there was no indication that he would not continue to live out the rest of his days in prison on Florida's death row until passing away naturally. If Appellant's death warrant had never been signed in his natural life, then he would have no injury to complain of and nothing to litigate.[7] In essence, Appellant

[7] Albeit, Appellant would have died naturally on death row instead of in general population, but he would have spent his entire life in prison without being executed by the State of Florida.

would have received exactly what sentence he was entitled to based upon his constitutional rights and his jury votes: a life sentence in prison. Consequently, there was no reason to litigate this issue previously.

F. Conclusion

It is imperative to note that, today, if a Florida jury (or any other jury in this country) came back with ***any*** of the votes that Appellant received at trial, he would receive a life sentence without the possibility of parole on ***all*** counts. It is clear that Appellant is being deprived of the rights he is entitled to under the Equal Protection Clause and the Fifth, Eighth, and Fourteenth Amendments.

Accordingly, this Court should reconsider its prior rulings and find that Appellant's death sentences are unconstitutional, result in a manifest injustice, and should be converted to three life sentences. § 775.082 (2), Fla. Stat. The State of Florida does not need to execute Appellant to achieve finality; sentencing Appellant to life imprisonment without the possibility of parole would truly create finality in this case. At the very least, this Court should remand the case for a new penalty phase replete with at least the minimal constitutional protections Florida currently has in place.

ARGUMENT II

THE CIRCUIT COURT ERRED IN SUMMARILY DENYING APPELLANT'S CLAIM THAT THE TIMING OF HIS DEATH WARRANT BEING SIGNED, AND THE CIRCUMSTANCES SURROUNDING IT, VIOLATES HIS CONSTITUTIONAL RIGHTS TO ACCESS TO COUNSEL, ACCESS TO THE COURTS, AND DUE PROCESS.

A. Appellant was Deprived of His Constitutional Rights to Access to Counsel and Courts and Right to Due Process.

The Supreme Court of the United States has held that "the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with [ ] adequate assistance from persons trained in the law." *Lewis v. Casey*, 518 U.S. 343, 346 (1996) (quoting *Bounds v. Smith,* 430 U.S. 817, 818 (1977)). Appellant has "a constitutional right of access to the courts that is adequate, effective and meaningful." *Id.* Appellant has been denied meaningful access to the court which hindered his efforts to pursue legal claims. *Lewis v. Casey*, 518 U.S. at 351. Therefore, the circuit court erred in finding that Appellant "fail[ed] to demonstrate that he did not have meaningful access to the courts or counsel." PC. 527.

The right to due process entails "notice and opportunity for hearing appropriate to the nature of the case." *Cleveland Bd. of Ed.*

v. Loudermill, 470 U.S. 532, 542 (1985) (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)). "[F]undamental fairness is the hallmark of the procedural protections afforded by the Due Process Clause." *Ford v. Wainwright*, 477 U.S. 399, 424 (1986) (Powell, J., concurring in part and in the judgment).

Conversely, Appellant submits that he has been deprived of the critical component of due process—fundamental fairness and meaningful or real opportunity to be heard. Importantly, as this Court explained:

> The basic due process guarantee of the Florida Constitution provides that "[n]o person shall be deprived of life, liberty or property without due process of law." Art. I, § 9, Fla. Const. The Fifth Amendment to the United States Constitution guarantees the same. As the Florida Supreme Court explained in *Department of Law Enforcement v. Real Property,* 588 So. 2d 957, 960 (Fla. 1991), "**[p]rocedural due process serves as a vehicle to ensure fair treatment through the proper administration of justice where substantive rights are at issue." Procedural due process requires both fair notice and a real opportunity to be heard.** *See id.* As the United States Supreme Court explained, the notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice must be of such nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance." *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 314, 70 S. Ct. 652, 94 L. Ed. 865 (1950) (citations

> omitted). **Further the opportunity to be heard must be "at a meaningful time and in a meaningful manner."** *Mathews v. Eldridge,* 424 U.S. 319, 333, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976); *accord Fuentes v. Shevin,* 407 U.S. 67, 80, 92 S. Ct. 1983, 32 L. Ed. 2d 556 (1972) (stating that procedural due process under the Fourteenth Amendment of the United States Constitution guarantees notice and an opportunity to be heard at a meaningful time and in a meaningful manner).
>
> The specific parameters of the notice and the opportunity to be heard required by procedural due process are not evaluated by fixed rules of law, but rather by the requirements of the particular proceeding. *See Gilbert v. Homar,* 520 U.S. 924, 117 S. Ct. 1807, 138 L. Ed. 2d 120 (1997); *see also Mullane,* 339 U.S. at 313, 70 S. Ct. 652 (stating that notice and opportunity for hearing need only be appropriate to the nature of the case). As the Supreme Court has explained, due process, "unlike some legal rules, is not a technical concept with a fixed content unrelated to time, place and circumstances." *Cafeteria & Restaurant Workers Union, Local 473, AFL-CIO v. McElroy,* 367 U.S. 886, 895, 81 S. Ct. 1743, 6 L. Ed. 2d 1230 (1961). Instead, "due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer,* 408 U.S. 471, 481, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972).

Key Citizens for Gov., Inc. v. Florida Keys Aqueduct Auth., 795 So. 2d 940, 948 (Fla. 2001) (emphasis added).

Appellant does not simply assert that a particular number of days from the warrant signing to the scheduled execution violates due process. Rather, he has been denied the meaningfulness and fundamental fairness required due to the specific circumstances

present in his particular case, which are detailed further below. *See Abdool v. Bondi*, 141 So. 3d 529, 544 (Fla. 2014) ("there is no single test which applies to determine whether the requirements of procedural due process have been met. Courts instead consider the individualized facts of each case to determine whether the defendant has been accorded the process which the state and federal constitutions demand.").

B. The Specific Facts and Circumstances of Appellant's Case Illustrate he was Deprived of his Constitutional Rights.

Due to the Governor's thirty-day warrant period,[8] which led to this Court's expedited briefing schedule, the lower court had to expedite all proceedings at its level as well. Accordingly, in order to fit everything in so that Appellant could at least have some semblance of due process, the successive motion under Rule 3.851 was due at 2:00 p.m. on Wednesday, July 9, 2025. As all of Appellant's legal claims are required to be raised in his successive postconviction motion under Rule 3.851 in order to preserve the issues for appeal,

[8] "I feel compelled to again express my concerns about the extremely short time frame for this case and other recent death warrant cases." *Bell v. State*, No. SC2025-0891, 2025 WL 1874574, at *17 (Fla. July 8, 2025) (Labarga, J., concurring).

and because undersigned counsel must certify that she has discussed the contents of the successive motion with Appellant pursuant to Rule 3.851(e)(1)(F), this dictates that the most crucial time for Appellant to have access to counsel was prior to the filing of the successive motion on July 9th.

Between the time that the warrant was signed on July 1st and the time that the successive motion was due on July 9th, Appellant had difficulties almost daily in trying to access counsel and the courts. In addition to the time constraints associated with the expedited deadlines under warrant and a four-day holiday weekend occurring during the most critical part of the litigation, more issues arose that deprived Appellant of his rights due to Mr. Bell also being on death watch at the same time as him. It is the combination of these factors which resulted in the denial of the fundamental fairness of the proceedings that violates due process. *Lisenba v. People of State of California*, 314 U.S. 219, 236 (1941) ("denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice.")

a. The Most Critical Portion of Warrant Litigation Occurred During the First Eight Days, Which Included a Four-Day Holiday Weekend.

Next, additional issues arose because the Governor closed state offices on July 3, 2025, in addition to the regular office closures on July 4th, to create a four-day holiday weekend for Independence Day. *See* Press Release, Governor Ron DeSantis, Governor Ron DeSantis Announces State Employees Will Receive an Extra Day Off for July 4th Weekend (June 23, 2025), https://www.flgov.com/eog/news/press/2025/governor-ron-desantis-announces-state-employees-will-receive-extra-day-july-4th. As the Governor made this announcement on June 23, 2025 and signed Appellant's death warrant on July 1, 2025, it was apparent that Appellant's warrant litigation would be negatively affected by the closures of state offices. Again, the first week of warrant litigation is the most crucial time of warrant litigation, as warrant claims must be developed, investigated, and pled within that first week to be included in the circuit court pleadings or they will be forever barred. Moreover, by signing Appellant's warrant on July 1st, it was evident that it would cause difficulties with access for Appellant, as well as create added complications with all of the state agencies who must

litigate the warrant and public records demands during this time period.

Undersigned counsel was at least able to get a half hour phone call with Appellant on July 3rd, however it took much of that time just to relay the contents of the circuit court's scheduling order of filing deadlines that was promulgated at the hearing the prior afternoon. PC. 104-08. As DOC took Appellant's tablet from him upon warrant signing, there was no way to send him a copy of the order electronically. Further, due to the holiday weekend, there was no U.S. Mail on Friday, July 4th and per usual, no mail on Sunday, July 6th. Therefore, in order to properly inform Appellant of the timeline and due dates set by the circuit court on the evening of July 2, 2025, the only way to tell him all of the applicable due dates was by phone, that day. As there were a considerable number of deadlines that had to be communicated, there was not time for any meaningful discussion of legal claims, thus shortly after the conclusion of the legal call on July 3rd, another legal call and a visit had to be requested via email to FSP.

Even without a holiday weekend, that is less than eight days to investigate, pursue, and discuss legal claims with Appellant.

However, due to Independence Day, Appellant had no access to counsel or the courts from July 4-6, 2025 and, as detailed further above, arguably no meaningful access to counsel on July 3rd, due to only having a half hour phone call which had to be utilized to communicate deadlines. This left Appellant with approximately three days of the eight to pursue legal claims with counsel in order to ensure access to the courts.

b. Additional Constitutional Issues Arose Due to Mr. Bell Being on Death Watch Simultaneously.

Once the warrant was signed, undersigned counsel could not gain any access or communication with Appellant until the morning of July 2, 2025. However, since Mr. Bell was also on death watch, undersigned counsel had to schedule around his legal visits and had to select a shorter legal visit on July 2nd which was at a different time than requested. Counsel was told that there is only one room available for legal visits at FSP, therefore, counsel cannot schedule a legal visit with Appellant if Mr. Bell already has a visit scheduled. Legal phone calls are limited to merely thirty minutes. Similarly, a legal call with Appellant cannot be scheduled when Mr. Bell has a telephone call scheduled. This may not create as much of an issue in

some cases, for instance, if an inmate waived his post-warrant appeals. The opposite was true here. Mr. Bell was raising many important fact-based claims such as newly discovered evidence and violations of *Brady* and *Giglio* which required much more access to his attorneys and the courts than some other inmates. *See Bell v. State*, No. SC2025-0891, 2025 WL 1874574, at *3 (Fla. July 8, 2025). Unlike many individuals under an active death warrant, Mr. Bell was even granted a post-warrant evidentiary hearing. *Bell*, No. SC2025-0891, 2025 WL 1874574, at *3.

Moreover, these overlapping death warrants create additional issues throughout the duration of the warrant period. For example, while litigating another recent warrant, neither counsel nor its experts could access their client on death watch on April 8, 2025 due to FSP being on lockdown for another individual's execution. Accordingly, as Mr. Bell's execution was scheduled for July 15, 2025, FSP was on lockdown and a legal visit with Appellant could not be scheduled. This left Appellant without access to the courts for yet another day during this extremely short thirty-day period.

The morning of July 6th, after diligently working on researching legal claims for Appellant's successive motion under Fla. R. Crim. P.

3.851 throughout the holiday weekend, undersigned counsel became conscious of the need for a legal visit with Appellant to properly research and develop legal claims in order to protect his constitutional rights. At that point, a legal visit was requested for Monday, July 7th. As of the morning of July 7th, no response or approval of the legal visit had been received (or for the legal call and visit requested on July 3rd).

Upon calling FSP that morning, the visit was almost declined due to the fact that Mr. Bell also had a legal visit on July 7th. As mentioned above, FSP only has one room that the death watch inmates can utilize for legal visits. Only upon undersigned counsel explaining in detail[9] why the legal visit could ***only*** be completed on Monday, July 7th, was another room found to use to provide

[9] Due to counsel's need to attend and present argument at a hearing in front of the circuit court on the morning of Tuesday, July 8th, undersigned counsel could not schedule a legal visit for Tuesday morning. In addition, counsel could not confer with Appellant that afternoon because the remainder of Tuesday was necessary for continuing to investigate and draft claims for the successive motion. The following day, Wednesday, July 9th, was too late to schedule a legal visit to pursue additional legal claims because counsel had to have all legal claims investigated, pursued, and drafted by Wednesday morning in order to discuss the contents of the motion with Appellant prior to the 2:00 p.m. filing deadline so that a certification pursuant to Rule 3.851(e)(1)(F) could be included.

Appellant with a legal visit. Even still, as stated at the second case management conference, not all claims were able to be investigated, developed, and pursued due to the lack of access prior to the successive motion's due date. PC. 508-11.

C. Conclusion

Appellant's lack of meaningful access to courts and counsel during the most critical time period of warrant litigation hindered counsel from fully investigating and presenting his post-warrant claims for relief. This Court has long recognized that "postconviction remedies are subject to the more flexible standards of due process announced in the Fifth Amendment, Constitution of the United States." *Steele v. Kehoe*, 747 So. 2d 931, 934 (Fla. 1999). Thus, at a minimum, in order to protect Appellant's constitutional rights, this Court should grant a stay of execution for a reasonable time so that he can fully and adequately participate in the preparation of legal claims for his post-warrant successive motion under Rule 3.851 without the issues and constraints associated with a truncated timeline, as well as having two individuals on death watch simultaneously.

ARGUMENT III

THE CIRCUIT COURT ERRED IN SUMMARILY DENYING APPELLANT'S CLAIM THAT HIS CONSTITUTIONAL RIGHTS WERE VIOLATED BY SIGNING HIS DEATH WARRANT WITHOUT CONDUCTING A RECENT, UPDATED CLEMENCY REVIEW, WHICH OTHER SIMILARLY SITUATED INMATES HAVE BEEN AFFORDED

Appellant has been on Florida's death row since 1996 as a result of a bare majority jury vote and a jury override. After state and federal postconviction review ended in Appellant's case, his clemency process was initiated in approximately 2007, ***eighteen*** years ago. His clemency presentation to the Florida Commission on Offender Review and a final clemency report would have been submitted as required by the rules on clemency, effectively marking the end of the clemency proceeding in Appellant's case.[10] Since then, Appellant has never formally been given the opportunity to supplement or update his

[10] "The final report shall be forwarded to all members of the Clemency Board within 120 days of the commencement of the investigation, unless the time period is extended by the Governor." Fla. R. Exec. Clem. 15(D).

clemency presentation. He also has not been appointed another clemency counsel recently or had a recent clemency interview.[11]

During this time, there have been myriad advances in science, medicine, and the law, completely changing the question of whether a grant of mercy would be appropriate in this case. The reasoning behind an updated round of clemency review prior to the signing of a death warrant is obvious. People grow, change, and mature over time. Standards of decency evolve. *See Trop v. Dulles*, 356 U.S. at 101 ("the evolving standards of decency [ ] mark the progress of a maturing society"). An individual may have additional factors to demonstrate they are even more deserving of clemency than they were a generation ago. Despite this, the denial of clemency in the

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[11] In its answer to Appellant's successive postconviction motion, the Office of the Attorney General invited Appellant to submit clemency materials and noted they confirmed the Florida Commission on Offender Review would consider additional clemency submissions. PC. 485-86. As a result, undersigned counsel submitted additional documents petitioning for clemency on July 15, 2025. However, Appellant submits that this does not resolve the constitutional issues due to the fact that he was not appointed a clemency attorney to investigate and submit materials in support of clemency, and although requested in his clemency petition, as of the time of this filing, Appellant has not received any indication that he will receive any clemency interview other than the one conducted eighteen years ago.

instant case was based on a clemency process that ended years ago, violating Appellant's rights under the Fifth, Eighth, and Fourteenth Amendments, and corresponding provisions of the Florida Constitution.

A. The Circuit Court Erred in Finding that Appellant's Claims were Time-Barred.

Appellant's claims only became ripe after Appellant's death warrant was signed on July 1, 2025. Appellant was not aware that he was not being afforded an opportunity to undergo a recent, updated clemency review, like other similarly situated inmates, until his death warrant was signed and almost simultaneously, he received a letter notifying him that clemency was denied. The death warrant itself, paired with Appellant's clemency denial letter, was the only evidence and notification Appellant received to inform him that he would not undergo an updated clemency review before the State of Florida set his execution date. If he had raised this claim previously, it would have been denied, because at that point Appellant did not know whether he would receive another updated clemency review like others were afforded, and he also did not know whether clemency was going to be denied. Thus, Appellant's claim would have been

premature if it was brought at any time prior to the signing of his death warrant. Accordingly, the circuit court erred in finding Appellant's claim time barred. PC. 529.

B. Florida's Clemency and Warrant Signing Process is Arbitrary and violates his Rights Under the Fifth, Eighth, and Fourteenth Amendments, including Due Process, and Equal Protection, and Corresponding Provisions of the Florida Constitution.

a. Florida's Clemency Scheme as Applied to Appellant, Violates his Rights to Due Process.

Under the Fourteenth Amendment, Appellant has the right to due process in his clemency proceeding. *See Ohio Adult Parole Authority, et al. v. Woodard*, 523 U.S. 272 (1998). As a majority of SCOTUS recognized in *Woodard*, Appellant has a continuing interest in his life until his death sentence is carried out. *Id.* at 288 (plurality) ("A prisoner under a death sentence remains a living person and consequently has an interest in his life"); *id.* at 291-92. Therefore, when the clemency process is rendered effectively meaningless, as it was here, Florida's death penalty scheme is rendered constitutionally defective. In *Woodard*, SCOTUS gave two examples of clemency proceedings that would violate due process: "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.

Here, because Appellant's clemency proceeding occurred nearly two decades before his death warrant was signed without any opportunity for Appellant to be heard or provide an updated clemency application, he was effectively arbitrarily denied access to the clemency process. "The heart of executive clemency" is to allow the executive "to consider a wide range of factors not comprehended by earlier judicial proceedings and sentencing determinations." *Id.* at 280-81. As such, clemency is the "fail safe in our criminal justice system." *Harbison v. Bell*, 556 U.S. 180, 192 (2009). In order to fulfill the "failsafe" function, a condemned inmate must be able to present information that could form the basis of a grant of mercy, such as life history, cognitive impairments, or information lessening the culpability of his crime. *Id.* at 194; *see also Matthews v. White*, 807 F.3d 756, 763 (6th Cir. 2015); *Sanborn v. Parker*, 2011 WL 6152849, at *1 (W.D. Ky. Dec. 12, 2011). Conversely, a clemency decision based on a nearly two-decade old clemency report cannot include information that has come to light since the report was made or take

into consideration any evolving standards of decency, essentially disregarding Appellant's clemency review.

In contrast to states with an orderly clemency process and a method for determining whose death warrant will be signed next, the determination of who lives or dies in Florida is made by a single person for any reason, even a discriminatory reason, or no reason at all. Granting the Governor such unfettered discretion has in practice established an arbitrary selection process to determine who lives and dies. *C.f. Furman v. Georgia*, 408 U.S. 238, 309-10 (1972) (Stewart, J., concurring) ("These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders . . . many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed."). Here, it appears there was a process of updating clemency reviews and arbitrarily selecting who would receive a clemency review and when. *Woodard*, 523 U.S. at 292 ("Our cases also support the conclusion that if a State adopts a clemency procedure as an integral part of its system for finally determining whether to deprive a person of life, that procedure must comport with

the Due Process Clause.") Not following the same process in Appellant's case is unreasonable, not fundamentally fair, and appears to be the result of an arbitrary and capricious decision. As such, Appellant's clemency review does not comport with due process.

b. Failing to Conduct a Recent, Updated Clemency Review Violates Appellant's Rights Under the Equal Protection Clause.

Worse yet, similarly situated individuals on Florida's death row who have completed clemency review over a decade ago, have received an updated, second round of clemency review. Appellant inexplicably received no such opportunity. This Court has previously 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*, No. SC2025-0794, 2025 WL 1692284, at *9 (Fla. June 17, 2025). Nonetheless, it appears that the same situation Justice Stevens proposed in *Woodard* as a potential claim that would not be exempt from judicial review is explicitly present in Appellant's case. "[T]here are equally valid reasons for concluding that these proceedings are not entirely exempt from judicial review. I think, for example, that ***no***

one would contend that a Governor could ignore the commands of the Equal Protection Clause and use race, religion, or political affiliation as a standard for granting or denying clemency" *Woodard*, 523 U.S. at 292 (Stevens, J., concurring in part and dissenting in part) (emphasis added). In *Woodard*, Justice Rehnquist noted that "Justice S[tevens] in dissent says that a defendant would be entitled to raise an equal protection claim in connection with a clemency decision." *Id.* at 276 n. 1. However, as Justice Rehnquist pointed out, the respondent in *Woodard* did not raise such a claim, "therefore [SCOTUS] ha[d] no occasion to decide that question." *Id.* In contrast, Appellant is raising that issue here because Appellant's decades old clemency review, and lack of update thereof, violates his rights under the Equal Protection Clause.

C. Appellant Has Unique Issues in His Case Which Merit Clemency.

SCOTUS has repeatedly recognized the centralized importance clemency plays in capital cases. *Harbison*, 556 U.S. at 192; *Herrera v. Collins*, 506 U.S. 390, 411-12 (1993). Given the stakes for a condemned defendant, clemency is a particularly vital safeguard to prevent against a miscarriage of justice. *See Mickey v. Davis*, 2018

WL 3659298, at *4 (N.D. Cal. Aug. 2, 2018). To execute Appellant after effectively shutting him out of the clemency process for almost twenty years renders his sentence cruel and unusual under the Eighth Amendment given that the denial of clemency was arbitrarily based on a stale clemency report. The extreme arbitrariness of this process means that, inevitably, the resulting clemency denial and warrant come as a complete surprise to individuals like Appellant, who only learn clemency has been denied when, after decades on death row, (and in Appellant's case, almost two decades since his clemency review), corrections officers come to read them the warrant and move them to death watch. One cannot treat a system entirely susceptible to caprice and chaos as the presumptive "remedy for preventing miscarriages of justice" where "judicial process has been exhausted," much less in instances such as this one, where judicial process has simply been cut short. *Herrera v. Collins*, 506 U.S. at 411-12.

The effective denial of clemency in this case was damning for Appellant. Since his clemency proceedings ended, he has tried repeatedly to no avail to present his claims in court, only to be shutout by procedural bars and arbitrary rulings at every turn,

including this one. PC. 527-31. His claims were based on the kind of compelling information that clemency – the failsafe of the criminal justice system – is designed to receive. For example, this Court denied his *Hurst* claim despite his unreliable death sentences based on the bare majority jury votes of 7-5, 7-5, and 6-6 jury override. *Zakrzewski v. Jones, etc.*, 221 So. 3d 1159 (Fla. 2017), *Zakrzewski v. State*, 254 So. 3d 324 (Fla. 2018), *cert denied*, *Zakrzewski v. Florida*, 587 U.S. 988 (2019). Appellant's situation is even more alarming because the trial judge overrode the jury's vote for a life sentence on count three. R. 1028-51. Notably, in 2017, Justice Pariente detailed that Appellant was ***one of only three*** defendants at the time, who received a death sentence as a result of a judicial override, despite SCOTUS's decision in *Hurst* overruling the cases this Court relied on to uphold judicial overrides. *Zakrzewski*, 221 So. 3d at 1162. Granting clemency for Appellant would have been one way to ensure he was not subject to an unconstitutional death sentence.

D. The Circuit Court's Denial of Access to Records Related to Clemency Violates Appellant's Constitutional Rights.

After a hearing on July 8th (PC. 330-51), Appellant's records requests related to clemency were denied by the circuit court. PC.

323-29; *see also* Argument IV. The circuit court faulted Appellant for failing to show good cause for not requesting the records before his death warrant was signed. PC. 325-27. This Court cannot elevate state procedural interests over human life, over due process of the law, and over the Constitution itself.[12]

The refusal of these requests amounts to a denial of due process and access to the courts preventing Appellant and other similarly situated inmates from raising and proving the claim that Florida's clemency process violates the Eighth and Fourteenth Amendments. The refusal of these requests denies Appellant a fair opportunity to protect his Eighth Amendment rights because it deprives him of the necessary information and access to challenge whether the process is arbitrary and unconstitutional. Further, the denial of these records requests impedes Appellant's ability to prove that he is receiving discriminatory treatment opposed to other similarly situated inmates in violation of the Equal Protection Clause. Consequently, Appellant is being denied a "basic ingredient of due process – an opportunity to

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[12] *See* Reinhardt, Stephen, *The Anatomy of an Execution: Fairness vs. "Process,"* New York University Law Review, May 1999, Vol. 74, Number 2, at 346, 351-52, *discussing Calderon v. Thompson*, 523 U.S. 538 (1998).

be allowed to substantiate a claim before it is rejected." *See Ford v. Wainwright*, 477 U.S. 399 (1986) (plurality opinion) (internal quotation marks omitted).

Appellant believes that records exist that show that he has been treated differently than other individuals on death row with similar crimes. PC. 511-12, 515. Clemency records would show that other death row inmates who received clemency under another administration over a decade ago, have received a more recent, updated round of clemency under the DeSantis administration. PC. 511-12. Accordingly, the records would support a colorable claim that Appellant's rights under the United States Constitution were violated.

However, due to the circuit court's denial of his public records requests, Appellant lacked the capability to attach records and information necessary to present more specific and detailed evidence regarding the constitutional violations raised in his motion under 3.851. PC. 323-29. The issue is twofold. First, the circuit court has effectively denied his demand for public records related to his postconviction claim because clemency and the warrant selection process have been found to be confidential under Florida law. §

14.28, Fla. Stat.; *see also Gudinas v. State*, No. SC2025-0794, 2025 WL 1692284, at *9 (Fla. June 17, 2025). Second, the time constraints placed upon Appellant due to the expedited warrant schedule and holiday weekend hindered his ability to investigate and procure the data himself. These issues have effectively prevented Appellant from substantiating claims of constitutional violations related to Florida's clemency process.

E. Conclusion

In sum, multiple other similarly situated inmates with similar facts in their cases, who underwent the clemency process around the same time period of Appellant were provided a more recent opportunity to undergo an updated clemency review. However, Appellant was denied the chance to do so.

This arbitrary process and specific discrimination are a violation of the Fifth, Eighth, and Fourteenth Amendments. This Court should issue a stay so Appellant can be treated the same as all the other similarly situated individuals who received recent clemency; and also reverse the circuit court's denial of Appellant's demand for records, so that Appellant can amend his claim to add detailed evidence in support.

ARGUMENT IV

THE CIRCUIT COURT ABUSED ITS DISCRETION IN DENYING APPELLANT ACCESS TO PUBLIC RECORDS REQUESTED FROM STATE AGENCIES, FURTHER, AS TO RECORDS THAT WOULD BE AVAILABLE TO OTHER INDIVIDUALS UNDER CHAPTER 119 OF THE FLORIDA STATUTES, APPELLANT HAS BEEN DENIED HIS DUE PROCESS AND EQUAL PROTECTION RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION

Appellant timely requested public records directly related to his pending death warrant from various state agencies[13] pursuant to Florida Rule of Criminal Procedure 3.852(i) ("the Rule") on July 3, 2025. In denying **every single records request** to which the agencies objected, the circuit court held that Appellant failed to meet his burden under rule 3.852(i). PC. 323-29. The circuit court also held "[a] defendant must show how the records relate to a colorable claim for postconviction relief and good cause as to why the records request was not made until after the death warrant was signed." PC. 323-29.

13 Appellant filed records demands to the State Attorney's Office, the Florida Department of Law Enforcement, the Florida Department of Corrections, the Office of Medical Examiner for the Eighth District, the Florida Commission on Offender Review, the Okaloosa County Sheriff's Office, the Okaloosa County Clerk of Court, the Office of the Attorney General, and the Office of the Governor.

Further, in regards to the clemency records requested from the Office of the Governor and the Florida Commission on Offender Review, the circuit court denied the requests, stating "such records are confidential." PC. 325-26, 327.

Appellant asserts that each of his demands were related to the subject matter of his postconviction claims and/or were reasonably calculated to lead to the discovery of admissible evidence corroborating claims raised therein. The circuit court erred in holding otherwise. Appellant clearly explained in each records demand, and again at the records hearing held on July 8, 2025, the precise reason for each request and articulated clearly to the court what the anticipated nature of admissible evidence to be discovered was. PC. 330-51. Nevertheless, the circuit court denied each of the nine records demands filed on July 3, 2025. PC. 323-29. The circuit court abused its discretion in denying Appellant's public records requests. *See Muhammad v. State*, 132 So. 3d 176, 200 (Fla. 2013) (citing *Dennis v. State,* 109 So. 3d 680, 698 (Fla. 2012)) ("This Court has held that denial of public records requests are reviewed under the abuse of discretion standard.")

A. The Requested Records Only Became Ripe for A Postconviction Claim Upon the Signing of Appellant's Warrant.

First, as detailed further in Argument III above, Appellant's requests regarding clemency records were not ripe until Appellant's death warrant was signed, signifying that he was not being afforded an opportunity to undergo an updated round of clemency like other similarly situated inmates. After Appellant's death warrant was signed on July 1, 2025, Appellant received a letter from the Office of Executive Clemency, notifying him that his petition for clemency had been denied. Thus, Appellant timely and diligently requested all public records related to clemency in his requests filed two days later, on July 3, 2025.

Further, the circuit court erred in finding that Appellant's public records demands to the various state agencies should have been filed prior to the signing of his death warrant. Appellant clearly explained to the circuit court at the records hearing precisely why the demands were not made until after the warrant was signed. PC. 338, 341, 344-46. Until Appellant's death warrant was signed, his colorable claims were not yet ripe.

Specifically, under Rule 3.852(i), the subsection that governs requests for additional public records from an agency in a capital postconviction case, the Defendant must assert that the public records sought are "either relevant to the subject matter of the postconviction proceeding or are reasonably calculated to lead to the discovery of admissible evidence." Fla. R. Crim. P. 3.852(i)(1)(C). Accordingly, if Appellant had attempted to file these records requests previously, any requests for information regarding the lethal injection protocol, clemency selection process, death warrant selection process, or denial of clemency would have been denied by the circuit court for not being relevant to a pending proceeding; as any such claim by an individual not under an active death warrant would not yet be ripe. *See Rigterink v. State*, 66 So. 3d 866, 897–98 (Fla. 2011) (because the Governor has not yet signed his death warrant, the lethal injection claim is not ripe).

B. It is Unconstitutional for the Circuit Court to Deny Appellant Access to Public Records that Other Individuals Can Access.

Additionally, due to Appellant's status as a capital postconviction defendant, he belongs to a unique class of individuals prohibited from obtaining public records pursuant to the broad "Sunshine laws"

Florida has enacted under Chapter 119 of the Florida Statutes. *See* Fla. R. Crim. P. 3.852(a)(1). Instead, as a death-sentenced individual, Appellant 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. *See* Fla. R. Crim. P. 3.852(c)(1); (g)(3).

To the extent that Rule 3.852 prohibits Appellant from obtaining public records to which he would otherwise be entitled under Chapter 119 if he did not reside on death row (which encompasses all of Appellants records requests that do not relate to clemency), Appellant asserts that the Rule violates his Equal Protection and Due Process Rights under the Fourteenth Amendment of the United States Constitution and the corresponding provisions of the Florida Constitution.

Postconviction litigation is governed by principles of due process. *Easter v. Endell*, 37 F.3d 1343 (8th Cir. 1994); *Holland v. State*, 503 So. 2d 1250 (Fla. 1987). Appellant has been denied due process and access to public records, *i.e.* records that any other natural person or corporation in the world is entitled to view.

Appellant has a need for these records that the rest of the public does not have: they are relevant to and necessary for the presentation of his constitutional challenge to his conviction and sentence, his unequal treatment under Florida's clemency process, as well as to Florida's lethal injection protocol. *See e.g., Glossip v. Gross*, 575 U.S. 960 (2015).

C. Conclusion

Appellant must be given a fair opportunity to show that his death sentences are unconstitutional and his execution will violate the Eighth and Fourteenth Amendments of the United States Constitution and the corresponding provisions of the Florida Constitution. *Hall v. Florida*, 572 U.S. 701, 724 (2014) ("The death penalty is the gravest sentence our society may impose. Persons facing that most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution."). For Appellant to have that fair opportunity, he must be provided the records requested from the Florida Department of Law Enforcement, the Florida Department of Corrections, the Office of Medical Examiner for the Eighth District, the Florida Commission on Offender Review, the Office of the Attorney General, and the Office of the Governor, the

Okaloosa County Sheriff's Office, and the Okaloosa County Clerk of Court. Appellant asks that the Court reverse the circuit court's denial of Appellant's demand for records and remand with instructions to grant access to the requested records.

CONCLUSION

Based on the foregoing arguments, Appellant respectfully requests that this Court: grant a stay of execution; vacate his sentences of death; remand his case for an evidentiary hearing and further consideration of his claims; find his three death sentences unconstitutional and remand for imposition of three life sentences without the possibility of parole; and/or grant any other relief it deems appropriate.

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 by electronic service to all counsel of record on this 16th day of July, 2025.

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CERTIFICATION OF TYPE SIZE AND STYLE

Pursuant to Fla. R. App. P. 9.045, I hereby certify that the Initial Brief of the Appellant has been produced in Bookman Old Style 14-point font. Pursuant to Fla. R. App. P. 9.210(a)(2)(D), this brief complied with the word count (12,593 of 20,000).

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