

**No. SC2025-1009**

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

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IN THE  
**Supreme Court of Florida**

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EDWARD JAMES ZAKRZEWSKI, II,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

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**REPLY BRIEF OF APPELLANT**

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## **PRELIMINARY STATEMENT**

This proceeding involves the appeal of the circuit court's denial of Appellant's successive motion for postconviction relief under Fla. R. Crim. P. 3.851. The State has filed its answer to Appellant's initial brief and this reply follows. This reply will address only the most salient points argued by the State. Appellant relies upon his initial brief in reply to any argument or authority argued by the State that is not specifically addressed in this reply.

## **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.

## **ARGUMENTS IN REPLY TO ISSUE I**

### **THE CIRCUIT COURT ERRED IN SUMMARILY DENYING APPELLANT'S CLAIM THAT HIS DEATH SENTENCES ARE UNCONSTITUTIONAL.**

The State argues that Appellant's claim is procedurally barred because "the sub-parts have either been raised and rejected more

than once, or should have been raised long before now.” Answer Brief at 26. However, “[t]his Court has long recognized that res judicata will not be invoked where it would defeat the ends of justice.” *State v. McBride*, 848 So. 2d 287, 291 (Fla. 2003).

Like the circuit court, the State contends that Appellant’s claims have previously been raised and rejected, and thus must be denied. Answer Brief at 26. Nonetheless, the law of the case “doctrine is not an absolute mandate.” *State v. Owen*, 696 So. 2d 715, 720 (Fla. 1997). *See Strazzulla v. Hendrick*, 177 So. 2d 1, 4 (Fla. 1965). This 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.” *State v. Akins*, 69 So. 3d 261, 268 (Fla. 2011). Allowing Appellant’s death sentences that resulted from judicial override and bare majority jury votes, both of which are unconstitutional today, would result in manifest injustice.

First, addressing the judicial override. The Supreme Court abolished judicial overrides in 2016. *Hurst v. Florida*, 577 U.S. 92 (2016). *See State v. Okafor*, 306 So. 3d 930, 934 (Fla. 2020) (holding there is an exception to the law of the case doctrine when “an intervening decision by a higher court contrary to the decision

reached on the former appeal.”). Moreover, the judicial override in Appellant’s case was improper. *See Ferry v. State*, 507 So. 2d 1373, 1376 (Fla. 1987) (holding an override is improper if there is a reasonable basis in the record to support the jury’s recommendation). There was ample mitigation in Appellant’s case which supported the jury’s recommendation for a life sentence, which included two statutory mitigators and fourteen nonstatutory mitigators. Furthermore, “the majority ... itself 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. So, the majority opinion has demonstrated a number of reasonable bases for the life recommendation.” *Zakrzewski v. State*, 717 So. 2d 488, 497 (Fla. 1998) (Anstead, J. concurring in part and dissenting in part with an opinion, in which Kogan, C.J., and Shaw, J., concur). In addition, three justices, Justice Anstead, Chief Justice Kogan, and Justice Shaw all concluded that a reasonable basis for the jury’s

recommendation for life existed. *Id.* at 496-98. In reversing the improper jury override in *Keen*, the Court acknowledged “while any of us might or might not have come to the same conclusion with regard to the imposition of a death sentence based upon the evidence presented in this case had we been jurors, that is not the legal standard by which we must evaluate the override of the jury’s recommendation.” *Keen v. State*, 775 So. 2d 263, 286 (Fla. 2000). Thus, Appellant’s death sentence as to count three in the indictment constitutes an injustice that should be remedied.

Second, the two bare majority votes by Appellant’s jury are unconstitutional and constitute manifest injustice. Despite Appellant raising and preserving a constitutional challenge of a bare majority vote, R. 195-96, he was denied *Hurst* relief due to an arbitrary cut-off date of June 24, 2002. *See Asay v. State*, 210 So. 3d 1, 30 (Fla. 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*<sup>1</sup>

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<sup>1</sup> *Ring v. Arizona*, 536 U.S. 584 (2002).

arrived.”). This Court should reconsider and correct the erroneous ruling.

## **ARGUMENTS IN REPLY TO ISSUE II**

### **THE CIRCUIT COURT ERRED IN SUMMARILY DENYING APPELLANT’S CLAIM THAT THE TIMING AND CIRCUMSTANCES SURROUNDING THE SIGNING OF APPELLANT’S DEATH WARRANT VIOLATES HIS CONSTITUTIONAL RIGHTS OF ACCESS TO COUNSEL, ACCESS TO THE COURTS, AND DUE PROCESS.**

Appellant has “a constitutional right of access to the courts that is adequate, effective and meaningful.” *Lewis v. Casey*, 518 U.S. 343, 346 (1996). Like recent death warrant cases, Appellant’s death warrant litigation was set on a truncated schedule. Appellant’s warrant was signed on July 1, 2025, and the execution scheduled for July 31, 2025, leaving a mere thirty days to investigate, raise, and litigate post-warrant claims. However, that was not the only issue present in the instant case. The State neglects to consider how all of the circumstances compounded to deny Appellant access to the courts and counsel at the most crucial time period of active death warrant litigation. Answer Brief at 37.

In addition to the expedited warrant schedule, Appellant’s death warrant was signed immediately before the four-day holiday

weekend, which involved the closure of state offices and agencies involved in Appellant's death warrant litigation at the most crucial part of Appellant's litigation. On top of that, Appellant's warrant was signed while another inmate, Mr. Bell, was on death watch. Mr. Bell's case was more litigious than many other cases in the same posture. *See Bell v. State*, No. SC2025-0891, 2025 WL 1874574, at \*3 (Fla. July 8, 2025). The added circumstances of state office closures due to a holiday and overlapping death warrants, restricted Appellant's access to his counsel during the most vital time of warrant litigation, the first week. 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.")

Finally, the State takes issue with the fact that Appellant has not brought any additional postconviction claims since January 2017. Answer Brief at 39. However, as explained numerous times in Appellant's successive motion, at the *Huff*<sup>2</sup> hearing, and in his Initial

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<sup>2</sup> *Huff v. State*, 622 So. 2d 982 (Fla. 1993).

Brief, it would have been impossible and futile to bring a claim that either was not yet ripe or that Appellant did not know to exist. PC. 352-398, 506-507, 511-512.

Appellant has been denied the meaningfulness and fundamental fairness essential to the concept of justice. To determine whether procedural due process requirements have been met, “[c]ourts ... consider the individualized facts of each case to determine whether the defendant has been accorded the process which the state and federal constitutions demand.” *Abdool v. Bondi*, 141 So. 3d 529, 544 (Fla. 2014). As stated at the *Huff* hearing on July 10, 2025, Appellant was unable to investigate, develop, and pursue claims due to his lack of access to both his counsel and the courts prior to his successive postconviction motion’s filing deadline, including Appellant’s claim of denial of his rights under the Equal Protection Clause related to his lack of a formal updated clemency review. PC. 508-511. Thus, this Court should grant a stay of execution to allow Appellant to adequately prepare and litigate his post-warrant claims.

### **ARGUMENTS IN REPLY TO ISSUE 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.**

The state misconstrues Appellant's argument in stating "[h]e argues Florida's clemency process is arbitrary and "effectively meaningless" because ... he has been denied equal protection where other capital defendants under a death warrant have had supplemental clemency proceedings and he has not." Answer Brief at 40. Appellant's argument is also that similarly situated inmates who have received an updated clemency review, have not all had their death warrants signed. Thus, Appellant did not know whether his initial clemency petition would be granted since it had not been denied in eighteen years, nor did he know if he was going to get an updated clemency review before his death warrant was signed. The receipt of 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.

In addition, the State incorrectly argues that Appellant’s claim is time-barred and procedurally barred because he “raised [it] on the eve of execution.” Answer Brief at 42. Until Appellant’s death warrant was signed, he “had no reason to challenge the State’s executive clemency process.” *Barwick v. Governor of Florida*, 66 F.4th 896, 902 (11th Cir. 2023). Like in Mr. Barwick’s case, Appellant did not receive notice of the clemency denial until he received his death warrant, and the letter denying clemency shortly thereafter. Appellant’s claim did not become ripe until the signing of his death warrant; thus, Appellant’s claim is timely.

Moreover, the failure to conduct a recent, updated clemency review, when similarly situated individuals have been afforded that opportunity, violates Appellant’s rights under the Equal Protection Clause. In asserting Appellant’s rights under the Equal Protection Clause have not been violated, the State merely cites cases where defendants raised due process violations relating to clemency review, and claimed Appellant is not entitled to relief. Answer Brief at 47-48. However, as SCOTUS noted in *Woodard*, the Court “ha[d] no occasion to decide” whether a defendant would be entitled to raise an equal protection claim in relation to clemency because the petitioner did

not raise such a claim. *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 276 n. 1. (1998).

Finally, Appellant has a continuing interest in his life until his death sentence is carried out. Since Appellant's clemency review in 2007, there has been a substantial change in law. Judicial overrides and bare majority jury votes are no longer constitutional. In *Woodard* Justice Stevens acknowledged:

“The interest in life that is at stake in this case warrants even greater protection than the interests in liberty at stake in those cases. For “death is a different kind of punishment from any other which may be imposed in this country. From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.”

*Id.* at 293–94. (Stevens, J., concurring in part and dissenting in part).

Engaging in the process of conducting updated clemency reviews and haphazardly selecting some, but not others for an updated review is unreasonable, and appears to be the result of an arbitrary and capricious decision. “[I]f a [s]tate 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.” *Id.* at 292.

#### **ARGUMENTS IN REPLY TO ISSUE IV**

#### **THE CIRCUIT COURT ABUSED ITS DISCRETION IN DENYING APPELLANT’S PUBLIC RECORDS DEMANDS, FURTHER, APPELLANT WAS DENIED HIS DUE PROCESS AND EQUAL PROTECTION RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.**

The State argues that Appellant failed to show how his public record requests related to a colorable claim for relief. Answer Brief at 52. These arguments misconstrue the record and applicable law.

“[A]ccess to public records is an essential ingredient in any meaningful postconviction review”—including under warrant. *Sims v. State*, 753 So. 2d 66, 71 n.10 (Fla. 2000) (Anstead, J., concurring). 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. Appellant explained in the records demands, and at the records hearing held on July 8, 2025, the necessity of these records in order to investigate and pursue multiple claims that Appellant has been denied his rights under the

United States Constitution, as well as the Florida Constitution. Yet, the circuit court denied each of the nine records demands filed on July 3, 2025. PC. 323-29. This was an abuse of discretion. Further, any assertions that the articulation of the colorable claims was conclusory, it is only to the extent that continued lack of disclosure of such records requested does not aid in facilitation of adding additional support for the constitutional claims. See Answer Brief at 53.

Finally, many of the issues and claims regarding Appellant's public records request did not become ripe until Governor DeSantis signed his death warrant. Accordingly, if filed previously, any requests for information regarding lethal injection protocol, clemency selection process, denial of clemency, or death warrant selection process would have been denied as not relevant to a pending proceeding, as any claim by an individual not under an active death warrant would not 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).

## **CONCLUSION**

Based on the foregoing arguments, Appellant respectfully requests that this Court remand his case for an evidentiary hearing; vacate his sentences of death; commute his three death sentences to life sentences without the possibility of parole; grant a stay of execution; 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 18th 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 Reply 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 complies with the word count (2,439 of 6,500 words).

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