IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR CHARLOTTE COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v.

JAMES D. FORD,

Defendant.
_____/

Case No. 97-CF-000351

ACTIVE DEATH WARRANT
Execution scheduled for
February 13, 2025 @ 6:00 p.m.

STATE'S RESPONSE TO DEFENDANT'S SUCCESSIVE MOTION FOR POSTCONVICTION RELIEF

COMES NOW Plaintiff, the State of Florida, by and through the undersigned counsel, and responds to Ford's successive motion for postconviction relief. For the reasons set forth below, the motion should be denied without an evidentiary hearing.

Background and Procedural History

On April 6, 1997, Defendant, James D. Ford, murdered Gregory and Kimberly Malnory, a husband and wife, in the presence of their 22-month-old daughter, Maranda. Ford was Gregory's coworker at a sod farm in Charlotte County and had accompanied the family on a fishing trip. According to the evidence presented at Ford's trial, Ford killed Gregory by shooting him with a shotgun (which disabled but

did not kill him), beating him in the head and face with a blunt-force object, and slitting his throat. *See Ford v. State*, 802 So. 2d 1121, 1125 (Fla. 2001). The evidence further showed that Ford inflicted numerous blunt-force injuries to Kimberly's head (one of which penetrated her skull), raped her, and finally executed her by putting the shotgun in her mouth and pulling the trigger. *Id.* at 1125-26. The baby, Maranda, was left alone at the scene of her parents' murder strapped into a car seat with the car doors open, where she was not discovered for more than 18 hours. She was eventually found with mosquito bites covering most of her body and her mother's blood on the front and back of her clothes. *Id.* at 1126.

Ford was convicted of sexual battery with a firearm, child abuse, and two counts of first-degree murder. *Id.* The jury recommended death on each murder count by an 11-to-1 vote, and the trial court followed the jury's recommendations on both counts. *Id.* at 1126-27. The Florida Supreme Court affirmed Ford's convictions and death sentences on direct appeal. *Id.* at 1127-36. Ford then filed a petition for writ of certiorari with the United States Supreme Court, which was denied. *See Ford v. Florida*, 535 U.S. 1103 (2002).

In 2003, Ford filed his first motion for postconviction relief

under Florida Rule of Criminal Procedure 3.851. The postconviction court denied that motion after an evidentiary hearing, and the Florida Supreme Court affirmed that decision on appeal. *See Ford v. State*, 955 So. 2d 550, 551-56 (Fla. 2007). Ford next, in 2007, filed a petition for writ of habeas corpus in federal district court, which was later dismissed as untimely. *See Ford v. Sec'y, Dep't of Corr.*, No. 2:07-cv-333, 2012 WL 113523 (M.D. Fla. Jan. 13, 2012). In 2013 and 2017, Ford filed his first and second successive rule 3.851 motions. Both successive motions were denied by the postconviction court, and the denials were affirmed on appeal by the Florida Supreme Court. *See Ford v. State*, 168 So. 3d 224 (Fla. 2015); *Ford v. State*, 237 So. 3d 904 (Fla. 2018).

On January 10, 2025, Governor Ron DeSantis signed Ford's death warrant, and Ford's execution is scheduled for February 13, 2025, at 6:00 p.m. On January 18, 2025, Ford filed his third successive rule 3.851 motion with the court, raising the following claims: 1) "Ford's death sentence is unconstitutional under *Roper v. Simmons,* 543 U.S. 551 (2005) and the Eighth and Fourteenth Amendments of the United States Constitution because he has a mental and developmental age below eighteen years old," and 2)

"Putting Ford to death would violate his Fifth, Sixth, Eighth, and Fourteenth Amendment rights under the United States Constitution, considering the United [States] Supreme Court's recent opinion, *Erlinger v. U.S.*, 602 U.S. 821 (2024), addressing juror unanimity in fact-finding regarding sentencing proceedings."

This Response follows.

SUMMARY DENIAL STANDARD

Successive postconviction motions, like the one filed here, are untimely unless one of the following circumstances exists:

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

Fla. R. Crim. P. 3.851(d)(2). Furthermore, claims which either were or could have been raised on appeal or in prior postconviction proceedings are not properly raised in a successive motion. *See King v. State*, 597 So. 2d 780, 782 (Fla. 1992) (holding that claims were barred because they could have been, should have been, or were raised in a prior proceeding).

Ford has the burden of showing his claims are timely. *See Mungin v. State*, 320 So. 3d 624, 626 (Fla. 2020) ("It is incumbent upon the defendant to establish the timeliness of a successive postconviction claim."). In the instant case, Ford made no effort to establish the timely filing of his successive motion. As will be outlined under each claim, Ford fails to meet any of the exceptions set forth in rule 3.851(d)(2). His motion is clearly untimely, and summary denial is warranted.

In addition to being untimely and procedurally barred, this Court should deny Ford's claims without an evidentiary hearing because they are meritless. The burden is on the defendant to establish a prima facie case based upon a legally valid claim. *See Franqui v. State*, 59 So. 3d 82, 96 (Fla. 2011); *Nixon v. State*, 932 So. 2d 1009, 1018 (Fla. 2006). Mere conclusory allegations are not sufficient to meet this burden. *See Foster v. State*, 132 So. 3d 40, 62 (Fla. 2013). A facially sufficient rule 3.851 motion requires alleging specific legal and factual grounds that demonstrate a cognizable claim for relief. If a defendant's conclusory allegations are not supported by a properly pled factual basis, the claim is facially insufficient and should be summarily denied. *See Davis v. State*, 875

So. 2d 359, 368 (Fla. 2003).

In sum, it is proper for a postconviction court to summarily deny postconviction claims that are untimely, not retroactive, procedurally barred, not cognizable, or meritless as a matter of law under controlling precedent. *See Mungin*, 320 So. 3d at 626; *see also Rodgers v. State*, 288 So. 3d 1038, 1039 (Fla. 2019) (affirming the summary denial of a successive postconviction claim as untimely); *Bogle v. State*, 288 So. 3d 1065, 1069 (Fla. 2019) (affirming the summary denial of a successive postconviction claim on non-retroactivity grounds); *Morris v. State*, 317 So. 3d 1054, 1071 (Fla. 2021) (stating a court may summarily deny a postconviction claim that is procedurally barred); *Mann v. State*, 112 So. 3d 1158, 1162 (Fla. 2013) (noting that because the claims were purely legal claims that were previously rejected by the Florida Supreme Court, the circuit court properly summarily denied relief). Summary denial is warranted in this case.

ARGUMENT

Ford's claims are untimely, procedurally barred, and without merit. Because neither of Ford's claims provide sufficient grounds to justify an evidentiary hearing, this Court should summarily deny the

instant motion as to all claims.

I. Ford's Claim That His Execution Is Barred By The Eighth And Fourteenth Amendments Under *Roper* Is Untimely Given That It Is Based On Testing Conducted In 1999, And The Claim Is Altogether Meritless Because Ford Was 36 When He Committed The Murders, So *Roper* Does Not Apply.

A. Ford's Claim is Untimely.

Ford alleges that although he was 36 years old when he committed the murders, his mental and developmental age was much lower. He claims that because his mental and developmental age was closer to a 14-year-old, the Eighth and Fourteenth Amendments require exempting him from execution.

In an effort to establish that point, Ford relies on an evaluation and testing conducted by Dr. Mosman in 1999. Motion at 7-10. Given that Ford has known the results of the testing for nearly 25 years, this claim is clearly untimely. *See, e.g., Cole v. State*, 392 So. 3d 1054, 1064 (Fla. 2024) (finding Cole's argument untimely when it was based on a diagnosis known to him since at least 2017, but the claim was not raised until after the Governor signed the death warrant in 2024); *Long v. State*, 271 So. 3d 938, 942 (Fla. 2019) (affirming the trial court's denial of a claim that Long "waited more than 30 years

and until after the issuance of his death warrant to first raise").

Indeed, Ford relied on the testing and presented the results as proposed mitigating evidence during his penalty phase in 1999. *See Ford*, 802 So. 2d at 1135 (affirming the trial court's determination that Ford's learning disability and developmental age of fourteen were not mitigating under the facts of the case given "extensive testimony" showing that Ford functions well as a mature adult). Ford's effort to recycle this evidence in an attempt to bar his impending execution is misguided and simply too late.

Even assuming that Ford could not have raised the legal basis of this claim until *Roper*[1] was issued in 2005, nothing excuses Ford's delay in waiting until the Governor signed his death warrant in 2025 to raise this claim. Ford makes no attempt to justify this dilatory claim. And it is further worth noting that Ford filed a successive motion and a second successive motion (both after *Roper* issued)

[1] While the crux of this claim is based on *Roper*, Ford also mentions *Atkins v. Virginia*, 536 U.S. 304 (2002), which predates *Roper*. He seems to have waived reliance on that case. Motion at 11 n.2. Nevertheless, to avoid redundancy, any separate *Atkins* claim (if that is what he is alleging and to the extent he has not waived it) or a hybrid *Roper/Atkins* claim will be analyzed under the later time period (2005) activated by the *Roper* decision.

raising other claims, including his non-unanimous jury recommendation that will be addressed in the second issue below, so this is not a case in which Ford sat silent.

For this claim to be timely raised, Ford was required to raise it within one year of *Roper,* which would be March 1, 2006. *See* Fla. R. Crim. P. 3.851(d)(2). Ford is more than 18 years late. As such, this claim must be summarily denied. *Cole*, 392 So. 3d at 1063 (affirming the summary denial of Cole's untimely claim); *Dailey v. State*, 283 So. 3d 782, 790 (Fla. 2019) (affirming the summary denial of a claim based on information known to Dailey "since at least 1999"); *Branch v. State*, 236 So. 3d 981, 986 (Fla. 2018) (finding Branch's extension-of-*Roper* claim waived for not having been previously raised).

To the extent that Ford's claim also relies upon recent testing by Dr. Eisenstein, that testing does not render this claim timely. Motion at 10. As outlined in Ford's motion, Dr. Eisenstein's testing allegedly corroborates the previous 1999 testing to show that "Ford still suffers from impairments in his mental functioning." Motion at 10. Ford makes no attempt to assert that this testing is "newly discovered evidence," and Florida precedent clearly rejects any such notion. *See Zack v. State,* 371 So. 3d 335, 346 (Fla. 2023) (where the

court has repeatedly held that new opinions based on a compilation or analysis of previously existing data are not newly discovered evidence); *Barwick v. State*, 361 So. 3d 785, 793 (Fla. 2023) (explaining that consensus opinions and research do not constitute newly discovered evidence).

Finally, as will be shown, Ford's claim is really one in which he seeks this Court's recognition of a new fundamental constitutional right that is not recognized in *Roper,* or *Atkins* for that matter. Because Ford wants this Court to expand the holdings of *Roper* and *Atkins* to him, even if this claim were timely raised after *Roper* issued, rule 3.851(d)(2) does not apply here because this claim is not based on a newly recognized fundamental constitutional right that has been held to apply retroactively. *Id.* Under every scenario, this claim is untimely raised. Accordingly, summary denial is warranted.

B. This Claim is Foreclosed by Binding Precedent.

Even if this claim were timely raised, Ford would not be entitled to an evidentiary hearing. At its core, this is a claim that *Roper*, which held that the Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed, should be extended to individuals over

the age of 18 who had a "mental and developmental age" of someone under the age of 18 when they committed the crime. Claims attempting to expand the scope of *Roper* have been squarely rejected by Florida courts. *See, e.g., Branch v. State*, 236 So. 3d 981, 985 (Fla. 2018) (affirming the summary denial of Branch's claim that he was ineligible for the death penalty because individuals who committed murder in their late teens and early twenties should be treated like juveniles under *Roper*); *Carroll v. State*, 114 So. 3d 883, 887 (Fla. 2013) (rejecting Carroll's invitation for the court to extend *Roper* and *Atkins* and noting that it has rejected similar claims on the merits in the past); *Barwick v. State,* 88 So. 3d 85, 106 (Fla. 2011) (rejecting claim that *Roper* should extend to Barwick, who was 19 when he committed the crimes, because his mental age was less than 18); and *Hill v. State*, 921 So. 2d 579, 584 (Fla. 2006) (finding *Roper* does not apply to Hill, who was 23 when he committed the crimes); *see also Sheppard v. State*, 338 So. 3d 803, 831 (Fla. 2022) (rejecting an argument that appellate counsel was ineffective for not raising claim that *Roper* extends to individuals under 21 because the claim is meritless).

As the Florida Supreme Court has acknowledged, Florida courts

lack authority to extend *Roper* given the conformity clause of the Florida Constitution requiring courts to interpret the ban on cruel and unusual punishment in conformity with decisions from the United States Supreme Court. *Barwick*, 361 So. 3d at 794 (explaining that the Supreme Court's interpretation of the Eighth Amendment is both the floor and the ceiling). The United States Supreme Court "has continued to identify eighteen as the critical age for purposes of Eighth Amendment jurisprudence." *Branch*, 236 So. 3d at 987.

Because the Supreme Court has interpreted the Eighth Amendment to bar execution to those whose chronological age (rather than mental age) was less than eighteen years at the time of the crimes, "this Court is bound by that interpretation and is precluded from interpreting Florida's prohibition against cruel and unusual punishment to exempt individuals eighteen or more years old from execution on the basis of their age at the time of their crimes." *Barwick*, 361 So. 3d at 794. As Ford concedes, he was in his thirties when he committed the murders in this case. Given that Ford was not under the age of eighteen when he committed the murders, *Roper* does not, and cannot, apply to him.

Ford's reliance on *Atkins v. Virginia*, 536 U.S. 304 (2002), to the

extent he did not waive it, Motion at 11 n.2, fares no better. In *Atkins*, the Supreme Court held that the Eighth Amendment prohibits the execution of intellectually disabled individuals. *Atkins,* 536 U.S. 304. Ford does not claim that he is intellectually disabled, and he further concedes that he does not qualify as a "vulnerable or disabled adult." Motion at 15. Notably, Ford waived his ineffective assistance of counsel claim during his postconviction proceedings that was based on intellectual disability because his counsel could not find any expert to opine that Ford was intellectually disabled. *Ford*, 955 So. 2d at 552 & n.4; PCR 259.[2] Ford's counsel further admitted that he had not suspected that Ford was intellectually disabled, but he had Ford evaluated anyway, and every doctor that tested him rendered evaluations refuting intellectual disability. *Ford*, 955 So. 2d at 552 & n.4; PCR 308-310. Thus, *Atkins* is inapplicable here because Ford is not intellectually disabled.

The Florida Supreme Court has "long held that the categorical bar of *Atkins* that shields the intellectually disabled from execution does not apply to individuals with other forms of mental illness or

[2] The reference to "PCR" pertains to the postconviction record for Ford's first rule 3.851 motion.

brain damage." *Zack*, 371 So. 3d at 347; *Barwick*, 361 So. 3d at 795; *see also Dillbeck v. State*, 357 So. 3d 94, 100 (Fla. 2023) (rejecting as meritless Dillbeck's assertion that his mental illness and neurological impairments caused him to experience the same deficits in reasoning, understanding and processing information, learning from experience, exercising good judgment, and controlling impulses as those experienced by the intellectually disabled).

Like the case in *Roper*, Florida's Eighth Amendment conformity clause prevents this Court from extending the Supreme Court's holding in *Atkins* to individuals with alleged mental deficiencies other than intellectual disability. *Barwick*, 361 So. 3d at 795. "Just as this Court lacks the authority to extend *Roper* to individuals over the age of seventeen, it also lacks the authority to extend *Atkins* to individuals who, like [Ford], are not intellectually disabled as provided in *Atkins*." *Barwick*, 361 So. 3d at 795. Because Ford is not intellectually disabled, this Court cannot apply *Atkins* to him. Thus, even if true, Ford's alleged "mental impairments" do not exempt him from execution.

This Court cannot interpret Florida's prohibition from cruel and unusual punishment to provide protection to Ford based on alleged

"mental impairments" that fall short of intellectual disability or based on Ford's lower "mental and developmental age" when he committed the crime in his thirties, because the Supreme Court has not afforded such protections under the Eighth Amendment. *Zack*, 371 So. 3d 348; *Barwick*, 361 So. 3d at 795. Similar requests from death-row inmates have been universally rejected by the Florida Supreme Court. *Id.; Dillbeck,* 357 So. 3d at 99-100; *Branch*, 236 So. 3d at 985; *Carroll*, 114 So. 3d at 887; *Hill*, 921 So. 2d at 584. For these reasons, this Court must deny Ford's request for a stay to further develop this untimely and meritless claim, and this Court should summarily deny this claim based on well-established legal precedent.

II. Ford's Jury Unanimity Claim is Procedurally Barred, Time-Barred, and Meritless Under Binding Florida Supreme Court and United States Supreme Court Precedent.

In his second claim, Ford argues that his death sentences are unconstitutional under *Hurst v. Florida*, 577 U.S. 92 (2016) ("*Hurst I*"), and *Erlinger v. United States*, 502 U.S. 821 (2024), based on his penalty-phase jury's non-unanimous, 11-to-1 recommendations in favor of the death penalty. This is Ford's third attempt to challenge his sentences based on the lack of unanimity in the jury's death recommendations. Ford raised the issue for the first time in his

amended first successive rule 3.851 motion that was filed in the postconviction court on November 11, 2013. The court summarily denied relief on December 20, 2013, and the Florida Supreme Court affirmed that decision on appeal. *See Ford*, 168 So. 3d at 224.

In affirming the summary denial of Ford's jury unanimity claim, the Florida Supreme Court held that the claim was both untimely and meritless. As to timeliness, the Florida Supreme Court observed that Ford had failed to meet any of the "specific exceptions" in rule 3.851(d)(2) to the general requirement that "a postconviction motion [may not be] filed more than one year after the judgment and sentence become final." *Id.* On the merits, the Florida Supreme Court first noted that it had "repeatedly rejected" challenges to its prior holdings "that nonunanimous jury recommendations of the death sentence are constitutional . . . ." *Id.* (citing *McLean v. State*, 147 So. 3d 504, 514 (Fla. 2014); *Kimbrough v. State*, 125 So. 3d 752, 754 (Fla. 2013); *Mann v. State*, 112 So. 3d 1158, 1162 (Fla. 2013)). Continuing, the Florida Supreme Court explained that there was no constitutional deficiency in Ford's death sentences in this specific case because, at his guilt phase, "the jury unanimously found that Ford committed another capital felony, the contemporaneous

murder, and the fact that both murders were committed during the commission of a sexual battery, satisfying the constitutional requirements." *Id.* (citing *Parker v. State*, 904 So. 2d 370, 383 (Fla. 2005); *Doorbal v. State*, 837 So. 2d 940, 963 (Fla. 2003)).

Ford raised the issue again in his second successive rule 3.851 motion, which he filed on January 12, 2017. In that motion, Ford argued that he was entitled to relief under *Hurst v. State*, 202 So. 3d 40 (Fla. 2016) ("*Hurst II*"), *overruled by State v. Poole*, 297 So. 3d 497 (Fla. 2020). In *Hurst II*, the Florida Supreme Court held, on remand from *Hurst I*, that a jury must "unanimously recommend a sentence of death." *Hurst II*, 202 So. 3d at 57-58. Importantly, however, the Florida Supreme Court subsequently held, in *Asay v. State*, 210 So. 3d 1, 15-22 (Fla. 2016), and *Hitchcock v. State*, 226 So. 3d 216, 216-17 (Fla. 2017), that *Hurst I* and *Hurst II* did not apply retroactively to any death sentence that became final before the United States Supreme Court issued its decision in *Ring v. Arizona*, 536 U.S. 584, 609 (2002) (finding Arizona's capital sentencing statute unconstitutional "to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty").

On March 9, 2017, the postconviction court summarily denied Ford's second successive rule 3.851 motion, holding that because his convictions and sentences became final before *Ring* was decided, *Hurst I* and *Hurst II* did not apply retroactively to his case. On appeal, the Florida Supreme Court approved that reasoning and affirmed the summary denial of postconviction relief. *See Ford*, 237 So. 3d at 905. Three years later, in *Poole*, the Florida Supreme Court receded from *Hurst II* "except to the extent it requires a jury unanimously to find the existence of a statutory aggravating circumstance beyond a reasonable doubt." *Poole*, 297 So. 3d at 507-08. In Poole's case, the Florida Supreme Court upheld Poole's death sentences, despite his jury's 11-to-1 recommendation in favor of death, because the same jury, during the guilt phase, had found Poole guilty of other crimes that satisfied the contemporaneous violent felony aggravator. *See id.* at 493, 508; *see also Herard v. State*, 390 So. 3d 610, 622-23 (Fla. 2024) (holding that Herard's other violent felony convictions reached by the jury during the guilt phase, including another first-degree murder conviction, "satisfied the [Sixth Amendment] requirement that a jury unanimously find a statutory aggravating circumstance beyond a reasonable doubt," and declining to recede from *Poole*)

(quoting *Poole*, 297 So. 3d at 508) (original alteration).

As the Florida Supreme Court has also observed, the United States Supreme Court's decision in *McKinney v. Arizona*, 589 U.S. 139 (2020), which was decided after *Poole*, "support[ed] [its] decision to recede from the additional requirements imposed by *Hurst* [*II*]." *Owen v. State*, 304 So. 3d 239, 242 (Fla. 2020). In *McKinney*, the United States Supreme Court explained:

> Under *Ring* and *Hurst* [*I*], a jury must find the aggravating circumstance that makes the defendant death eligible. But importantly, in a capital sentencing proceeding just as in an ordinary sentencing proceeding, a jury (as opposed to a judge) is not constitutionally required to weigh the aggravating and mitigating circumstances or to make the ultimate sentencing decision within the relevant sentencing range.

McKinney, 589 U.S. at 144.

Based on the foregoing, Ford's latest attempt to challenge his death sentences on jury unanimity grounds must fail for multiple reasons. Specifically, the claim must be summarily denied as: (1) procedurally barred, because the same claim was previously raised and rejected in prior rule 3.851 motions; (2) time-barred, because Ford fails to meet any exception to rule 3.851(d)'s requirement that postconviction claims must be raised within one year of the

conviction and sentences becoming final; and (3) meritless, because Ford's argument has been conclusively rejected by the Florida Supreme Court and the United States Supreme Court.

A. This Claim is Procedurally Barred and Untimely.

"Claims raised and rejected in prior postconviction proceedings are procedurally barred from being relitigated in a successive motion." *Reynolds v. State*, 373 So. 3d 1124, 1126 (Fla. 2023) (quoting *Hendrix v. State*, 136 So. 3d 1122, 1125 (Fla. 2014)); *see* Fla. R. Crim. P. 3.851(e)(2) ("A claim raised in a successive motion shall be dismissed if the trial court finds that it fails to allege new or different grounds for relief and the prior determination was on the merits . . . ."). This principle extends to attempts to raise variations of the same claim. *See Sireci v. State*, 773 So. 2d 34, 40 & n.10 (Fla. 2000) (finding claims barred and observing that even if a defendant "uses a different argument to relitigate the same issue, the claims remain procedurally barred"); *Mills v. State*, 684 So. 2d 801, 805 (Fla. 1996) (holding that a claim was barred where it was merely a "variation" of a prior postconviction claim). Claims that could have been raised on direct appeal or in prior postconviction motions, but were not, are also procedurally barred. *See Reynolds*, 373 So. 3d at

1126-27 (finding claim procedurally barred because it could have been raised in a prior postconviction motion); *Branch*, 236 So. 3d at 986 (finding claim procedurally barred because it could have been raised on direct appeal).

Here, Ford's claim that he is entitled to a unanimous jury finding in favor of the death penalty was raised and rejected in two previous motions for postconviction relief. In Ford's first successive rule 3.851 motion, the Florida Supreme Court rejected the argument as both untimely and meritless. On the merits, the Florida Supreme Court held that because Ford was contemporaneously convicted of other violent felonies during the guilt phase, the jury made the necessary findings to render him eligible for the death penalty, and his sentences were not unconstitutional. *See Ford*, 168 So. 3d at 244. Ford thereafter raised the same argument, this time relying on *Hurst II*, in his second successive rule 3.851 motion. Again, the Florida Supreme Court rejected the claim, finding that *Hurst II* did not apply retroactively to Ford's case because his death sentences became final before *Ring* was decided. *See Ford*, 237 So. 3d at 905.

Moreover, even if Ford's current claim could be considered a new claim, it would long since be time-barred. "Ford's sentences of

death became final on May 28, 2002." *Id.* Thus, any postconviction claims were due no later than May 28, 2003, unless one of the three exceptions in rule 3.851(d)(2) is satisfied. As the Florida Supreme Court concluded when Ford raised this claim in his first successive rule 3.851 motion, none of the exceptions are met. *See Ford*, 168 So. 3d at 224. Further, Ford makes no effort in his current motion to explain why a jury unanimity claim would be timely at this late date, when it could have easily been raised on direct appeal or in his first postconviction motion, which was timely filed in 2003.

To the extent Ford is attempting to overcome the procedural and time bars based on the United States Supreme Court's recent decision in *Erlinger*, his attempt fails. As Ford acknowledges, *Erlinger* only concerned the findings necessary to increase the length of a defendant's prison sentence under the federal Armed Career Criminal Act. *See Erlinger*, 602 U.S. at 825. *Erlinger* did not address capital sentencing at all, much less hold that a jury must unanimously determine that death is the appropriate punishment for a death sentence to be imposed. Quite simply, nothing in *Erlinger* disturbs the United States Supreme Court's prior capital sentencing jurisprudence, including its statement in *McKinney* that "a jury . . .

is not constitutionally required to weigh the aggravating and mitigating circumstances or to make the ultimate sentencing decision within the relevant sentencing range." *McKinney*, 589 U.S. at 144. And even if *Erlinger* were relevant to capital sentencing, it would not be retroactive to Ford's death sentences for the same reasons that *Hurst I* was found by the Florida Supreme Court to be non-retroactive. *See Asay*, 210 So. 3d at 15-22.

Consequently, Ford's jury unanimity claim must be summarily denied as both procedurally barred and untimely.

B. This Claim Must Be Rejected Under Binding Precedent.

However, even if this Court could reach the merits of Ford's claim, it would still fail under binding Florida Supreme Court and United States Supreme Court precedent. As explained above, the Florida Supreme Court receded in *Poole* from *Hurst II*'s holding that "the Eighth Amendment requires a unanimous jury recommendation of death." *Poole*, 297 So. 3d at 504. The Florida Supreme Court concluded, consistent with its pre-*Hurst II* case law, that "there is only one eligibility finding required: the existence of one or more statutory aggravating circumstances." *Id.* at 502-03. And it further held, as it has done in subsequent cases, that a defendant is lawfully

eligible for the death penalty when the jury, during the guilt phase, unanimously finds the defendant guilty of other crimes which satisfy the prior or contemporaneous violent felony aggravator. *Id.* at 508; *Herard,* 390 So. 3d at 622-23. *Poole*'s interpretation of *Hurst I* was then confirmed to be correct by the United States Supreme Court's decision in *McKinney*. *See McKinney*, 589 U.S. at 144; *see also Dillbeck v. State*, 357 So. 3d 94, 104 (Fla. 2023), *cert. denied*, *Dillbeck v. Florida*, 143 S. Ct. 856 (2023) ("[W]e are 'bound by Supreme Court precedents that construe the United States Constitution,' and the Supreme Court's precedent establishes that the Eighth Amendment does not require a unanimous jury recommendation of death.") (quoting *Poole*, 297 So. 3d at 504).

Ford briefly asserts that "the *Poole* decision should not apply to his unique circumstances," but he fails to elaborate or explain why *Poole* does not apply. Motion at 19 n.4. Regardless, it is clear from *Poole* and subsequent cases that Ford's death sentences were validly imposed. As the Florida Supreme Court concluded the first time Ford raised his jury unanimity claim, "at the guilt phase the jury unanimously found that Ford committed another capital felony, the contemporaneous murder, and the fact that both murders were

committed during the commission of a sexual battery, satisfying the constitutional requirements." *Ford*, 168 So. 3d at 224. Nothing more was required. Thus, Ford's claim necessarily fails on the merits, in addition to being procedurally barred and untimely.

CONCLUSION

Ford's claims are untimely, procedurally barred, and without merit. Accordingly, the State of Florida respectfully requests that this Court summarily deny Ford's successive motion for postconviction relief, deny his unsupported request for a stay of execution,[3] and deny his unfounded request to vacate his death sentence.

[3] Since Ford's claims are untimely, procedurally barred, and without merit—there are no substantial grounds for a stay of execution. *See Dillbeck,* 357 So. 3d at 103 (noting that a stay "requires substantial grounds" upon which relief might be granted) (citing *Davis v. State,* 142 So. 3d 867, 873-74 (Fla. 2014) and *Buenoano v. State*, 708 So. 2d 941, 951 (Fla. 1998)). Ford's convictions and death sentences have been final for years with his victims waiting for his sentence to be enforced. *See* Art. I, § 16(b)(10)b, Fla. Const. It is time for justice, not delay. *Gomez v. United States Dist. Court*, 503 U.S. 653, 654 (1992) (observing that "[e]quity must take into consideration the State's strong interest in proceeding with its judgment."); *see also Hill v. McDonough*, 464 F.3d 1256, 1259 (11th Cir. 2006) (refusing to grant a stay and discussing the strong equitable principles against a stay).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of January 2025, I electronically filed the foregoing with the Clerk of Court by using the Florida Courts E-Portal Filing System which will send a notice of electronic filing to the following: the Honorable Lisa S. Porter, Circuit

Judge, Charlotte County Justice Center, 350 E. Marion Avenue, Punta Gorda, Florida 33950, **lsharder@ca.cjis20.org**; Bianca Bentley, Assistant State Attorney, Lee County State Attorney's Office, 2000 Main Street, Floor 6, Fort Myers, Florida 33901, **bbentley@sao20.org**; Ali Shakoor and Adrienne Shepherd, Assistants CCRC-M, Capital Collateral Regional Counsel-Middle Region, 12973 No. Telecom Parkway, Temple Terrace, Florida 33637, **shakoor@ccmr.state.fl.us**, **shepherd@ccmr.state.fl.us**, **support@ccmr.state.fl.us**; and the Florida Supreme Court, **warrant@flcourts.org**.

/s/ Christina Z. Pacheco
Co-Counsel for State of Florida