**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-351
Emergency Capital Case
Death Warrant Signed
Execution Scheduled for
February 13, 2025 at 6:00 p.m.

DEFENDANT'S SUCCESSIVE MOTION TO VACATE JUDGMENT OF CONVICTION AND SENTENCE OF DEATH PURSUANT TO FLORIDA RULE OF CRIMINAL PROCEDURE 3.851 AFTER A SIGNED DEATH WARRANT

James D. Ford**,** Defendant in the above-captioned action, respectfully moves this Court for an Order, pursuant to Fla. R. Crim. P. 3.851, vacating and setting aside the judgment of his death sentence imposed upon him by this Court.

(A) JUDGMENT AND SENTENCE UNDER ATTACK

Following a capital trial which occurred from February 22 to March 8 of 1999, James D. Ford, ("Ford") was convicted of two counts of first-degree murder, one count of sexual battery with a firearm and one count of child abuse in Charlotte County, Florida. From April 19 to 23, 1999, the trial court conducted a penalty phase before the same jury which had convicted Ford. That jury recommended death by an 11 to 1 vote on both counts of first-degree murder. R5l/4692. The trial court followed the jury's recommendation and imposed a death sentence on both counts. R53/4746-66. *See* Attachment A.

On appeal, the Florida Supreme Court ("FSC) affirmed Ford's convictions and sentences, despite finding that the trial judge erroneously refused to recognize and weigh a number of mitigating circumstances which were in fact established by Ford. *Ford v. State,* 802 So. 2d 1121,

1135-36 (Fla. 2001). The United States Supreme Court ("USSC") denied certiorari review on May 28, 2002. *Ford v. Florida,* 535 U.S. 1103 (2002). Ford filed a motion in the circuit court under Fla. R. Crim. P. 3.851. The court summarily denied the motion, and the FSC affirmed the denial. *Ford v. State,* 955 So. 2d 550 (Fla. 2007). Next, Ford filed a petition for a writ of habeas corpus in the United States District Court for the Middle District of Florida. The court dismissed the petition as untimely filed, and did not permit equitable tolling. *Ford v. Sec'y Department of Corrections,* 2009 WL 3028886 (M.D. Fla. 2009). The Eleventh Circuit Court of Appeals denied a certificate of appealability. *Ford v. Sec'y, Dep't of Corr.*, No. 09-14820, slip op. at *1 (11th Cir. Oct. 27, 2009); *see* 28 U.S.C. § 2253(c).

On November 4, 2009, Ford filed a petition for writ of certiorari in the USSC challenging the Eleventh Circuit's denial of a certificate of appealability. The USSC granted the petition, vacated the judgment, and remanded the case for further consideration in light of *Holland v. Florida*, 560 U.S. 631 (2010). *Ford v. McNeil*, 561 U.S. 1002 (2010). Once the case was remanded to the Eleventh Circuit, it was then remanded further back to district court for the limited purposes of conducting proceedings and analysis consistent with *Holland*. *Ford v. Sec'y, Dep't of Corr*., 614 F.3d 1241 (11th Cir. 2010). The Middle District ultimately determined that Ford was not entitled to equitable tolling. *Ford v. Sec'y, Dep't of Corr.*, No. 2:07- cv-333, 2012 WL 113523, at *10 (M.D. Fla. Jan. 13, 2012). On March 14, 2012, the Eleventh Circuit denied a certificate of appealability. *Ford v. Sec'y, Dep't of Corr.*, No. 09-14820, slip op. at *17 (11th Cir. Mar. 14, 2012).

The trial court found the following aggravators at trial:

> (1) the murder was committed in an especially heinous, atrocious, or cruel manner (HAC) (great weight)
> (2) the murder was committed in a cold, calculated, and premeditated fashion (CCP) (great weight)
> (3) the murder took place during the commission of a sexual battery (great weight)
> (4) Ford was previously convicted of another capital felony, i.e., the contemporaneous

murder (great weight)

Some statutory mitigation was found by the court:

(1) no significant history of prior criminal activity (proven, some weight)
(2) extreme mental or emotional disturbance (not proven, no weight)
(3) extreme duress (not proven, no weight)
(4) impaired capacity (not proven, no weight)
(5) the young mental age of the defendant (proven, very little weight).

As nonstatutory mitigation, the court found 17 points of mitigation.[1]

On direct appeal, Ford raised six issues:

(1) Whether the prosecutor made improper comments during closing argument in the guilt phase
(2) whether the prosecutor asked an improper question concerning "flesh" on the defendant's knife
(3) whether the indictment adequately charged Ford with child abuse
(4) whether the prosecutor made improper comments during closing argument in the penalty phase
(5) whether the evidence of CCP was sufficient to submit this aggravator to the jury and to support the finding of this aggravator
(6) whether the trial court properly considered all the mitigating evidence

The judgment and sentence for first degree murder in this case were affirmed on appeal by the

[1] The trial court addressed the following nonstatutory mitigating circumstances as they related to both murders and assigned each a degree of weight: (1) Ford was a devoted son (proven, very little weight); (2) Ford was a loyal friend (proven, very little weight); (3) Ford is learning disabled (proven, no weight); (4) mild organic brain impairment (not proven, no weight); (5) developmental age of fourteen (proven, no weight); (6) family history of alcoholism (this circumstance was proven but it is not mitigating vis-a-vis the death penalty in general, no weight); (7) chronic alcoholic (proven, very little weight); (8) diabetic (this circumstance was proven but it is not mitigating vis-a-vis the death penalty in general, no weight); (9) excellent jail record (proven, some weight); (10) engaged in self-improvement while in jail (proven, some weight); (11) the school system failed to help (proven, very little weight); (12) emotional impairment (not proven, no weight); (13) mentally impaired (not proven, no weight); (14) impaired capacity (not proven, no weight); (15) not a sociopath or a psychopath (this circumstance was proven but it is not mitigating vis-a-vis the death penalty in general, no weight); (16) not antisocial (this circumstance was proven but it is not mitigating vis-a-vis the death penalty in general, no weight); (17) the alternative sentence is life without parole (this circumstance was proven but it is not mitigating vis-a-vis the death penalty in general, no weight).

FSC on September 13, 2001. *Ford v. State*, , 802 So. 2d 1121 (Fla. 2001).

(B) PREVIOUS POST-CONVICTION CLAIMS AND DISPOSITION

Ford filed a successive Rule 3.851 motion in the circuit court on March 20, 2013, arguing ineffective assistance of postconviction counsel pursuant to *Martinez v. Ryan*, 566 U.S. 1 (2012) and *Trevino v. Thaler*, 569 U.S. 413 (2013), and challenging the lethal injection protocol as well as non-unanimous jury recommendations. The circuit court summarily denied relief on December 20, 2013. The FSC affirmed the denial of relief. *Ford v. State*, 168 So.3d 224 (Fla. 2015). Ford's subsequent petition to the USSC was denied on November 30, 2015. *Ford v. Florida*, 577 U.S. 1010 (2015).

The circuit court denied Ford's second successive 3.851 motion on March 9, 2017, which argued that Ford was entitled to relief pursuant to *Hurst v. State,* 202 So. 3d 40 (Fla. 2016). The FSC affirmed the denial of relief, *Ford v. State*, 237 So. 3d 904 (Fla. 2018), and a subsequent petition to the USSC was rejected at untimely.

The governor signed Ford's death warrant on Friday, January 10, 2025. Cole's execution is scheduled for February 13, 2025.

(C) REASON CLAIMS RAISED IN PRESENT MOTION WERE NOT RAISED IN FORMER MOTION

The issues that give rise to the current motion were not fully ripe until the signing of Ford's death warrant on January 10, 2025, the expert evaluation of Ford that occurred on January 16, 2025 regarding Claim One, and the recent USSC decision in *Erlinger v. United States*, 602 U.S. 821 (2024) for Claim Two. The issues raised in this motion are presented timely.

(D) NATURE OF RELIEF SOUGHT

1. Ford respectfully requests that he be granted leave to amend this motion, as necessary.

2. Ford respectfully requests that this Court grant an evidentiary hearing.

3. Ford respectfully requests that this Court grant a stay of execution.

4. Ford respectfully requests that this Court vacate his death sentence.

5. Any other relief that this Court may find appropriate.

(E) GROUNDS FOR POSTCONVICTION RELIEF

CLAIM ONE

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

It is beyond dispute that the Eighth Amendment's prohibition of "cruel and unusual punishments" is not a static command. *See Roper v. Simmons*, 543 U.S. 551, 589 (2005). Rather, because "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man," the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Roper*, 543 U.S. at 589 (internal citation omitted). "Because the death penalty is the most severe punishment, the Eighth Amendment applies to it with special force," and the USSC has relied on the evolving standards of decency within our society to slowly narrow the class of offenders who may be subject to the death penalty consistent with society's evolving understanding of human mental functioning and culpability. *See Roper*, 543 U.S. at 568 (2005); *see also Ford v. Wainwright*, 477 U.S. 399 (1986) (the Eighth Amendment prohibits the execution of the insane); *Thompson v. Oklahoma*, 487 U.S. 815 (1988) (the Eighth Amendment prohibits the execution of a person who was under 16 years of age at the time of the offense); *Atkins v. Virginia*, 536 U.S. 304, 306 (2002) (the Eighth Amendment prohibits the execution of intellectually disabled individuals); *Roper v. Simmons*, 543 U.S. 551 (2005) (the Eighth Amendment prohibits the execution of juvenile offenders under age 18). The class of

offenders subject to the death penalty should be narrowed again to preclude the execution of individuals with a mental and developmental age less than age 18. James Ford's mental and developmental age was less than age 18 at the time of the capital offense he was convicted of, and his execution should therefore be prohibited as cruel and unusual punishment under the federal Eighth Amendment, as applied to the states through the federal Fourteenth Amendment.

In *Roper v. Simmons,* the USSC held that the Eighth and Fourteenth Amendments forbid the imposition of the death penalty on offenders under the age of eighteen at the time of the crime. 543 U.S. 551 (2005). The *Roper* court discussed what it considered "three general differences between juveniles under 18 and adults" that diminish the culpability of juveniles and preclude classifying them among the worst offenders subject to the death penalty. *Id.* at 569. These three differences are: (1) they have a "'lack of maturity and an underdeveloped sense of responsibility'" that "'often result in impetuous and ill-considered actions and decisions'"; (2) they are "more vulnerable or susceptible to negative influences and outside pressures, including peer pressure"; and (3) their characters are "not as well formed" and their personalities "more transitory, less fixed" than those of adults. *Id.* at 570–71. As a result of these differences, the behavior of juveniles cannot be considered as morally reprehensible as that of adults for the same actions. *Id.* at 570. *Roper* concluded that "once the diminished culpability of juveniles is recognized," it is evident that the two penological justifications for the death penalty- retribution for and deterrence of capital crimes- applies to juveniles with lesser force than adults. *See id* at 571; *see also Atkins*, 536 U.S. at 319 (explaining that retribution and deterrence of capital crimes by prospective offenders are the two social purposes served by the death penalty).

It is clear from the *Roper* opinion that the USSC excluded juveniles from the death penalty based, at least in part, on the lesser mental and emotional functioning that often corresponds with

youth, and not only because they chronologically fall below age 18. The *Roper* exclusion was based on an analysis of the mental, developmental, and emotional attributes of juveniles as compared to adults, not a math equation calculating their years lived. *Roper's* reasons for the exclusion referred to juveniles' lack of maturity, vulnerability to peer pressure, and underdeveloped characters. The *Roper* court selected the chronological age of eighteen years old as the cut-off age at which a person could be eligible for the death penalty, because "a line must be drawn," and explained that "age of 18 is the point where society draws the line for many purposes between childhood and adulthood." *Id.* at 574. However, the *Roper* court also appeared to recognize that an individual's chronological age will not always correspond with their level of functioning, stating that "the qualities that distinguish juveniles from adults do not disappear when an individual turns 18. By the same token, some under 18 have already attained a level of maturity some adults will never reach." *Id.* at 574. Chronological age should not be the only question asked when determining exclusion from the death penalty under *Roper*, and Ford should fall under the *Roper* exclusion because his mental and developmental age was at most fourteen years old at the time of the offense.

Ford was thirty-six years old at the time the homicides occurred on April 6, 1997. However, his developmental age was much lower. Expert trial testimony from psychologist Dr. William Mosman, who evaluated Ford in 1999, indicated that Ford's mental and developmental age would have been closer to age fourteen when the homicides occurred. Dr. Mosman interviewed, observed, and evaluated Ford on two occasions and administered a variety of tests. R48/4282. There was no suggestion that Ford was malingering. R48/4285. Dr. Mosman also reviewed numerous records for his evaluation, including jail and medical records, school records, trial transcripts, crime scene photos, and autopsy photos. R48/4282-83. Dr. Mosman also reviewed the interview summaries of

about twenty lay witnesses, including schoolteachers, principals, friends, and family members of Ford, but did not specifically interview these individuals. R48/4284. Dr. Mosman opined that it was well within a reasonable doubt of clinical certainty that at the time the crime happened Ford was under the influence of extreme mental and also extreme emotional disturbance. R48/4286. Ford's capacity to appreciate the criminality of his conduct or conform his conduct was also substantially impaired when the crimes were committed. R48/4287.

Dr. Mosman opined that, based on Dr. Mosman's testing, Ford's mental and developmental age was about 14 years old. R48/4287. The testing has been consistent that Ford mentally functions from about 11 to 14 years of age. R48/4288. There is no clinical doubt that Ford has a history of being abused and neglected as a child. R48/4288. Dr. Mosman explained that there's clear evidence of a deprived and disadvantaged childhood, which can help us to understand Ford's emotional impairment. R48/4289. Dr. Mosman explained that Ford has a mental intellectual age of 11 to 14. R48/4289. Ford's emotional impairment is a different factor, and emotionally and developmentally Ford is probably in the area of about 9 years old. R48/4289. Dr. Mosman explained that when we look at Ford's entire history, there were systems that knew there were problems. R48/4290. Ford was known to be having troubles for years in school. R48/4290. Ford dealt with withdrawal, embarrassment, humiliation, depression, and drinking. R48/4290. None of the systems jumped in and helped Ford. R48/4290

Dr. Mosman explained that there are indicators for Ford of an inability to plan ahead because of his low intellectual functioning ("IQ"). R48/4295. Dr. Mosman said that in some areas Ford's scores reach into the mentally retarded area, and other areas are borderline. R48/4295. There were some indicators of financial irresponsibility in Ford not following through on his child support payments for two reasons- lack of income to some extent and an inability to handle

checking accounts and checkbooks. R48/4296. The women in Ford's life managed the money and the finances because Ford could not add. R48/4296. Dr. Mosman administered the Wechsler Adult Intelligence Scale- Revised Edition ("WAIS-R"), which Ford received a verbal IQ score of 87. R48/4300-01. That score is made up of about six or seven other scores within that, and there are scores that reach much lower than that. R48/4301. Dr. Mosman explained that although he was not opining that Ford was mentally retarded, his ability to reason sequentially, and organize and work things through methodically was at the "retarded level." R48/4301. Ford has learned through repetition, but he has rarely learned verbally. R48/4301. Ford's performance score on the WAIS-R was 94, which is the lower area of average. R48/4302. Ford has impairments and problems in all areas, with the verbal area being the most deficit. R48/4302.

Dr. Mosman also administered the Slosson Intelligence Test-Revised ("SIT-R"), which rendered a score of 94. R48/4302. Dr. Mosman explained that he liked to use this test because it can be used to measure how old the person is that he is working with, which explained Ford's developmental age of 14 years. R48/4302-03. Dr. Mosman explained that he could bring in a 14-year-old kid in seventh grade, and that person would get along, communication-wise, very well with Ford. R48/4303. There would be a pretty close match between the two, everything else being equal. R48/4303. Dr. Mosman also gave the Wide Range Achievement Test-Revised ("WRAT-R2") to Ford on January 18, 1999, which indicates Ford could read at about the fifth-grade level, which was the age equivalent to about an 11-year-old child. R48/4303. The WRAT-R2 also indicated that Ford's ability to spell in 1999 was the age equivalent of about a 10-year-old child and his ability to do mathematics was the age equivalent of about a 12-year-old child. R48/4303. Dr. Mosman also gave the Bender Gestault test, which indicates that Ford has some collateral damage in some areas of the brain, which could be an explanation for why Ford has learning

disabilities. R48/4304. Ford is also seriously learning disabled and has been all his life. R48/4305. Dr. Mosman also gave the Denman Verbal Memory Scale, and Ford came up with scores that he is seriously disabled in that area. R48/4305. He had scores of three and scores of six. R48/4305. The explanation for Ford's memory issues is that "he's got some minimal brain damage." R48/4306.

Dr. Mossman also administered the Tremel 18A and Tremel 18B- a connect-the-dot processing test, and Ford's scores on that test showed he was impaired, meaning he has very slow processing speed. R48/4306. Dr. Mosman explained that based on his review of Ford's DeSoto County public school records, Ford had school testing on IQ at age seven with a score of 65. R48/4309. However, Dr. Mosman explained that he did not think Ford was retarded, but that important areas of his brain functioning since age seven have been in the mentally retarded area. R48/4309. Ford was deeply embarrassed, humiliated, wanted to avoid school, and was not getting adequate support at home from his parents. R48/4310. Ford was a kid with brain damage and functioning in the retarded area who did not get the understanding he needed for academic development from home or school, which resulted in him dropping out. R48/4310.

Even at the age of 65, Ford's impairments in mental functioning persist, and an evidentiary hearing is needed to put forth expert testimony concerning Ford's current mental impairments. Neuropsychologist Dr. Hyman Eisenstein conducted preliminary neuropsychological testing of Ford on January 16, 2025, and is available to testify to the results of his testing and evaluation of Ford. Dr. Eisenstein's evaluation of Ford is not complete as of the filing of this motion, and a stay of execution is needed so that Dr. Eisenstein may conduct further evaluation and testing of Ford. With that being said, Ford's results on the preliminary testing that Dr. Eisenstein has been able to conduct so far show that Ford still suffers impairments in his mental functioning. For example, Dr.

Eisenstein administered the Delis Kaplan Executive Function System ("D-KEFS"), which is a neuropsychological test used to measure a variety of verbal and nonverbal executive functions for both children and adults. The D-KEFS consists of nine subtests, which includes the Trail Making Test. On the Visual Scanning portion of the Trail Making Test, Ford had a standard score of 4, which is the equivalent of an IQ of 70, placing Ford in the borderline range for intellectual functioning for that section.[2] On the Letter Sequencing portion of the Trail Making Test, Ford had a standard score of 3, which is the equivalent of an IQ of 65, placing Ford in the intellectually disabled range for that section.

As another example, Dr. Eisenstein administered the Wide Range Achievement Test- 5th Edition, the current version of the same test administered by Dr. Mosman in 1999. The Wide Range Achievement Test measures an individual's ability to read, comprehend sentences, spell, and solve math problems. While some of Ford's results showed improvement, he still scored at grade equivalents corresponding with individuals in elementary or high school. Ford's word reading on the test corresponded with a grade equivalent to tenth grade. Ford's spelling on the test corresponded with a grade equivalent to third grade. Ford's solving of math problems on the test corresponded with a grade equivalent to fourth grade. Ford's sentence comprehension on the test corresponded with a grade equivalent to tenth grade. Dr. Eisenstein is available to testify to the age equivalent that corresponds with each of these grades.

The jurisprudence of the USSC following its decisions in *Atkins* and *Roper* dictates that courts may not ignore the standards and practices of the relevant scientific and medical community

[2] Ford is not alleging that he is intellectually disabled under the standards set forth by *Atkins v. Virginia*, 536 U.S. 304, (2002), *Hall v. Florida,* 572 U.S. 701 (2014), or the medical diagnostic standards for intellectual disability. However, the available evidence indicates that his intellectual functioning in some areas is low enough to be the equivalent of the IQ of someone who is either intellectually disabled or borderline intellectually disabled.

in interpreting the contours of the Eighth Amendment, since the Amendment "'is not fastened to the obsolete.'" *See Hall v. Florida,* 572 U.S. 701, 708 (2014) (internal quotation omitted). In *Hall v. Florida*, the USSC relied heavily on the medical community's diagnostic standards for intellectual disability when the court rejected Florida's bright line rule that a person with an IQ score above 70 did not have an intellectual disability and was barred from presenting other related evidence. *See* 572 U.S. at 710-14. The *Hall* court explained that when determining who is intellectually disabled and therefore ineligible for execution under the Eighth Amendment, it is proper for courts to consult the medical community's opinions and found that Florida's bright line rule disregarded established medical practice. *Id.* at 710, 712.

Similarly, in *Moore v. Texas*, 581 U.S. 1 (2017), the USSC concluded that the Texas Court of Criminal Appeals erred when it rejected a finding that the defendant was intellectually disabled by applying judicially created non-clinical standards rather than medical diagnostic standards. The USSC then vacated the lower court's judgment, noting *Hall's* instruction that adjudications of intellectual disability should be "informed by the views of medical experts." *Moore*, 581 U.S at 5 (internal citations omitted). Similar to *Hall* and *Moore's* reliance on medical and scientific standards when determining which defendants were excluded from the death penalty under the Eighth Amendment by intellectual disability, courts should also look to the relevant scientific standards when determining whether defendants may be excluded from the death penalty under the Eighth Amendment due to their mental and developmental age.

Evidence from the practice of psychology lends support to the argument that courts should consider defendants' mental and developmental age when determining their level of culpability. Several modern psychological tests which are administered by experts in the field of psychology generate "age equivalency" scores, indicating that psychologists recognize that an individual's

level of functioning may render an age equivalent that is less than their chronological age in years. For example, the Second Edition of the Vineland Adaptive Behavioral Scales (Vineland II) tests the social adaptive functioning of people with intellectual disabilities and measures their performance along a spectrum of ages. *See* Michael Clemente, *A Reassessment of Common Law Protections for "Idiots"*, 124 Yale L.J. 2746, 2799 (2015) (citing Sara S. Sparrow, *Vineland Adaptive Behavior Scales*, *in* ENCYCLOPEDIA OF CLINICAL NEUROPSYCHOLOGY 2618, 2618-20 (Jeffrey S. Kreutzer et al. eds., 2011)). Similarly, the Fourth Edition of the Peabody Picture Vocabulary Test (PPVT-4), which measures listening and understanding of single-word vocabulary, provides age-based and grade-based standard scores. *See* Michael Clemente*, A Reassessment of Common Law Protections for "Idiots"*, 124 Yale L.J. 2746, 2799 (2015) (citing Nathan Henninger, *Peabody Picture Vocabulary Test*, *in* ENCYCLOPEDIA OF CLINICAL NEUROPSYCHOLOGY, 1889, 1889 (Jeffrey S. Kreutzer et al. eds., 2011)).

Further, the Wide Range Achievement Test ("WRAT") which measures reading and math comprehension, also provides age-based and grade-based scores, as evidenced by Dr. Mosman's trial testimony and can be further supported by Dr. Eisenstein's testimony at a future evidentiary hearing. *See supra* at pp. 9, 11. All of these psychological tests may render an age-equivalence score that is different than the individual's chronological age, and Ford's performance on the WRAT rendered age equivalents far lower than his actual chronological age. *See supra* at pp. 9, 11. The psychological testing performed on Ford demonstrates that he suffers from diminished mental capacity that places his mental age much lower than his chronological age. Ford's mental age is a far better indicator of his maturity – and his related moral culpability – than his chronological age, since it represents a more thorough understanding of his mental functioning:

> 'Mental age' as commonly understood is the chronological age equivalent of the person's highest level of mental capacity. That is, judging only from the person's

> cognitive and behavioral capacities, what age would we typically associate with this level of functioning? It is an incapacity to think or act on a higher level of functioning, not merely a failure to do so … Those whose mental age places them in the same cognitive-functional categories as minors may also be deemed simply morally lax, but to the extent their condition is shown to be a result of objective causes (such as organic condition, developmental deficits, and substance abuse), their non-compliance with adult norms is no more voluntary than the juvenile's. Thus, mental age is a condition which shares the identical incapacity for higher-level functioning as the other excuses: it is an involuntary (objective) condition deviating from the adult norm.

James Fife, *Mental Capacity, Minority, and Mental Age in Capital Sentencing: A Unified Theory of Culpability,* 28 Hamline L. Rev. 239, 261 (2005). This Court should consider that Ford's mental and developmental age at the time of the homicides was less than age 18 when determining if he is excluded from execution under *Roper v. Simmons.*

Finally, when discerning our society's evolving standards of decency, laws enacted by state legislatures provide the "clearest and most reliable objective evidence of contemporary values." *Roper*, 543 U.S. at 589 (internal quotation omitted). Statutes in at least four states- Florida, California, Texas, and Illinois- codify the need for protective services for adults who are chronologically age 18 or older, but their mental functioning renders them disabled or vulnerable. These statutes evidence our society's acknowledgment that an adult who is chronologically older than age 18 may need special consideration under the law due to mental conditions that affect how they function and further show our acknowledgment that not all chronological-age adults function as adults. For example, the intent of Florida's Adult Protective Services Act is "to establish a program of protective services for all vulnerable adults in need of them." Fla. Stat. § 415.101(2). The statute defines a "vulnerable adult" as "a person 18 years of age or older whose ability to perform the normal activities of daily living or to provide for his or her own care or protection is impaired due to a mental, emotional, sensory, long-term physical, or developmental disability or dysfunction, or brain damage, or the infirmities of aging." Fla. Stat. § 415.102(28). California,

Texas, and Illinois also have state statutes that establish the need for protective services for dependent or disabled adults who are age 18 or older but have limitations in their mental functioning. *See* Cal. Welf. & Inst. Code § 15600 and 15610.23; TX HUM RES § 48.001 and 48.002; 320 Ill. Comp. Stat. Ann. 20/3 and 20/2.

Ford is not alleging that he qualifies as a vulnerable or disabled adult under these specific statutes. However, these statues are important evidence of our society's acceptance that chronological age is not the only indication of human functioning, and certain adults will need special protection or consideration under the law because their mental impairments render their functioning less than what we expect of an adult. Although Ford's chronological age is above 18, his mental impairments render his functioning less than an adult, and he should therefore be provided special protection against the death penalty in the same way that individuals under age 18 are pursuant to *Roper v. Simmons.*

At the time of the offense for which Ford has been convicted and sentenced to death, his mental and developmental age was closer to that of a fourteen-year-old than a thirty-six-year-old. Ford's execution must therefore be barred as cruel and unusual punishment under the federal Eighth Amendment, federal Fourteenth Amendment, and *Roper v. Simmons.* Ford's execution is set for February 13, 2025, only twenty-six days away from the date of the filing of this motion. Under our society's evolving standards of decency, his execution must not take place. Undersigned counsel respectfully requests that this Court grant an evidentiary hearing on this claim so that expert testimony of Ford's mental functioning may be heard. Undersigned counsel also respectfully requests that this Court grant Ford a stay of execution because this claim is a substantial ground upon which relief might be granted and deserves to be fully addressed by this Court free from the constraints of an accelerated death warrant schedule. *See Chavez v. State*, 132

So. 3d 826, 832 (Fla. 2014) (internal citations omitted) (explaining that a stay of execution pending the disposition of a successive motion for postconviction relief is warranted when there are substantial grounds upon which relief might be granted).

As to Claim One, Ford requests an evidentiary hearing to present the testimony of all relevant witnesses. Ford also requests a stay of execution to provide adequate time to hold a full and fair evidentiary hearing. Ford also requests that this Court vacate his sentence of death.

CLAIM TWO

PUTTING FORD TO DEATH WOULD VIOLATE HIS FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION, CONSIDERING THE UNITED SUPREME COURT'S RECENT OPINION, *ERLINGER V. U.S.* 602 U.S. 821 (2024), ADDRESSING JUROR UNANIMITY IN FACT-FINDING REGARDING SENTENCING PROCEEDINGS.

A. Ford's Fifth Amendment Due Process Rights and Sixth Amendment Right to a Unanimous Jury, as Selectively Incorporated Though the Fourteenth Amendment, are Being Violated Considering *Erlinger v. U.S.*, 602 U.S. 821 (2024).

B. This New Consideration of Ford's Proceedings Further Establishes that his Death Sentence is Arbitrary and Capricious, in Violation of the Eighth Amendment

Ford's death sentences are contrary to *Hurst v. Florida*, 577 U.S. 92 (2016) and is in violation of Florida Statutes, section 921.141. He unequivocally asserts that based on *Hurst*, he was denied his right to a jury determination, proof beyond a reasonable doubt, and unanimity under the Sixth and Fourteenth Amendments. As a result of Florida's failure to remedy these violations, Ford's sentences violate the Eighth Amendment's bar against excessive, arbitrary, and capricious punishment and equal protection under the Fourteenth Amendment.

A. Ford's Fifth Amendment Due Process Rights and Sixth Amendment Right to a Unanimous Jury, as Selectively Incorporated Though the Fourteenth Amendment, are Being Violated, Considering *Erlinger v. U.S.*, 602 U.S. 821 (2024).

According to the USSC, under the Fifth and Sixth Amendments of the Constitution, "[o]nly a jury may find facts that increase the prescribed range of penalties to which a criminal defendant is exposed." *Erlinger v. United States*, 602 U.S. 821, 822 (2024) (internal quotation marks omitted). Because a factual finding that the defendant's predicate offenses "occurred on at least three separate occasions" has "the effect of increasing *both* the maximum and minimum sentences" he faces, such finding "must be resolved by a unanimous jury beyond a reasonable doubt (or freely admitted in a guilty plea). *Id.* at 822, 834. Though the *Erlinge*r analysis concerned the Armed Career Criminal Act ("ACCA"), it is essential to apply the holding to capital defendants such as Ford, who were denied unanimous jury recommendations of death. *Erlinger* further states:

> The Sixth Amendment promises that "[i]n all criminal prosecutions the accused" has "the right to a speedy and public trial, by an impartial jury." Inherent in that guarantee is an assurance that any guilty verdict will issue only from a unanimous jury. *Ramos v. Louisiana*, 590 U.S. 83, 93, 140 S.Ct. 1390, 206 L.Ed.2d 583. The Fifth Amendment further promises that the government may not deprive individuals of their liberty without "due process of law." It safeguards for criminal defendants well-established common-law protections, including the "ancient rule" that the government must prove to a jury every one of its charges beyond a reasonable doubt. Together, these Amendments place the jury at the heart of our criminal justice system and ensure a judge's power to punish is derived wholly from, and remains always controlled by, the jury and its verdict. *Blakely v. Washington*, 542 U.S. 296, 306, 124 S.Ct. 2531, 159 L.Ed.2d 403.
>
> The Court has repeatedly cautioned that trial and sentencing practices must remain within the guardrails provided by these two Amendments. Thus in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435, the Court held that a novel "sentencing enhancement" was unconstitutional because it violated the rule that only a jury may find "facts that increase the prescribed range of penalties to which a criminal defendant is exposed." *Id.,* at 490, 120 S.Ct. 2348. This principle applies when a judge seeks to issue a sentence that exceeds the *maximum* penalty authorized by a jury's findings as well as when a judge seeks to increase a defendant's *minimum* punishment. See, *e.g., Alleyne v. United States*, 570 U.S. 99, 111–113, 133 S.Ct. 2151, 186 L.Ed.2d 314. Pp. 1848 – 1851.

Id. at 822. Ford never had an actual jury during his sentencing proceedings, as rather his *advisory panel* recommended death by an 11 to 1 vote on both counts of first-degree murder. (R5l.

4692). The trial court followed the jury's recommendation and imposed a death sentence on both counts. (R53. 4746-66).

Prior to *Hurst v. Florida* and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), a person who elected to have a jury hear their penalty trial and who was then sentenced to death pursuant to Florida's death penalty sentencing scheme did not have a jury unanimously find beyond a reasonable doubt every element necessary for a death sentence. The instructions to the advisory panel only indicated they should consider aggravating circumstances found to have been proven beyond a reasonable doubt. However, no factual findings were ever made.

The USSC analyzed Florida's death sentencing scheme in *Hurst v. Florida* as one in which a jury renders only an advisory verdict without specifying the factual basis of its recommendation, while the judge evaluates the evidence of aggravation and mitigation and makes the ultimate sentencing determinations. *Hurst v. Florida,* at 620. The USSC stated, "Florida law required the judge to hold a separate hearing and determine whether sufficient aggravating circumstances existed to justify imposing the death penalty.... We hold this sentencing scheme unconstitutional. The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death." *Id.* at 619. The Court went on to find:

> Florida concedes that *Ring*[3] required a jury to find every fact necessary to render Hurst eligible for the death penalty. But Florida argues that when Hurst's sentencing jury recommended a death sentence, it "necessarily included a finding of an aggravating circumstance."… The State fails to appreciate the central and singular role the judge plays under Florida law….The State cannot now treat the advisory recommendation by the jury as the necessary factual finding that *Ring* requires.

[3] *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002).

Id. at 622. (Emphasis added). In *Hurst v. State*, the FSC addressed the pre-*Hurst* version of § 921.141, Fla. Stat. (2012) and identified the elements of the criminal offense, i.e., capital first-degree murder punishable by death:

> Thus, before a sentence of death may be considered by the trial court in Florida, the jury must find the existence of the aggravating factors proven beyond a reasonable doubt, that the aggravating factors are sufficient to impose death, and that the aggravating factors outweigh the mitigating circumstances.

Hurst v. State, 202 So. 3d at 53. (emphasis added). Because the statutorily defined facts were necessary to increase the range of punishment to include death, the Florida Supreme Court reiterated this Court's finding that proving them was necessary "to essentially convict a defendant of capital murder." *Id*. at 53-54. Proof of these facts define a higher degree of murder. Proof of these facts is necessary for a conviction. In contrast to pre-*Hurst* instructions, post-*Hurst* instructions required a jury to unanimously find the existence of any aggravating factor, as well as to "'unanimously find that the aggravating factors are sufficient for the imposition of death and unanimously find that the aggravating factors outweigh the mitigation before a sentence of death may be considered by the judge.'"[4]

While *Hurst v. State* makes clear the elements that must be proved in order for someone to be sentenced to death, Florida courts did not understand what was considered an element before *Hurst v. Florid and Hurst v. State*. In *Asay*[5], the Florida Supreme Court stated, "[Before *Hurst v. Florida*,] we did not treat the aggravators, the sufficiency of the aggravating circumstances, or the weighing of the aggravating circumstances against the mitigating circumstances as elements of the

[4] The FSC later decided *Poole v. State*, 297 So. 3d 487 (Fla. 2020) which overturned aspects of *Hurst v. State*. Ford acknowledges the *Poole* decision but rejects the notion that it should be applied to his case retroactively. Ford further preserves his issue, as the *Poole* decision should not apply to his unique circumstances.

[5] *Asay v. State*, 210 So. 3d 1, 15-16 (Fla. 2017).

crime that needed to be found by a jury to the same extent as other elements of the crime." This is significant, because identifying the facts or elements necessary to increase the authorized punishment is a matter of substantive law. *Alleyne v. United States*, 570 U.S. 99, 113-14 (2013).[6] Where the constitutional standard of proof beyond a reasonable doubt is at issue, a holding that overcomes a deficiency in the trial that impairs the operation of this standard would be given complete retroactive effect. *See, Ivan V. v. City of N.Y.*, 407 U.S. 203, 204–05, 92 S. Ct. 1951, 1952 (1972).[7] *See also*, *Powell v. Delaware*, 153 A.3d 69 (Del. 2016) (holding *Hurst* retroactive under Delaware's state *Teague*-like retroactivity doctrine and distinguishing *Summerlin* on the ground that *Summerlin* "only addressed the misallocation of fact-finding responsibility (judge versus jury) and not . . . the applicable burden of proof.").

Similarly, in *Fiore v. White*, 531 U.S. 225, 226 (2001), the USSC addressed the Due Process Clause in the context of the substantive law defining a criminal offense:

> We granted certiorari in part to decide when, or whether, the Federal Due Process Clause requires a State to apply a new interpretation of a state criminal statute retroactively to cases on collateral review.

Before resolving the issue, the USSC asked the Pennsylvania Supreme Court to explain the basis for its decision regarding the elements of the criminal offense for which Fiore had been convicted. The USSC asked whether the decision construing the criminal statute was a new interpretation or was it a straightforward reading of the statute. *Fiore v. White*, 531 U.S. at 226. The Pennsylvania Supreme Court explained that its earlier "ruling merely clarified the plain language of the statute."

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[6] *Alleyne v. United States*, 570 U.S. at 113-14 ("Defining facts that increase a mandatory statutory minimum to be part of the substantive offense enables the defendant to predict the legally applicable penalty from the face of the indictment.")

[7] *See also*, *Montgomery v. Louisiana*, 136 S. Ct. 718, 732 (2016); *Hankerson v. N. Carolina*, 432 U.S. 233, 240–41, 97 S. Ct. 2339, 2344, (1977).

Id. at 228. Accordingly, the USSC found that the state court's ruling dated back to the statute's enactment. It was the substantive law when the statute was enacted. The Court held:

> This Court's precedents make clear that Fiore's conviction and continued incarceration on this charge violate due process. We have held that the Due Process Clause of the Fourteenth Amendment forbids a State to convict a person of a crime without proving the elements of that crime beyond a reasonable doubt.

Id. at 228-29.[8] Because the Petitioner Mr. Fiore had not been found guilty of an essential element of the substantively defined criminal offense, his conviction was not constitutionally valid. The USSC granted him federal habeas relief. *Id*.

Ford had a mere advisory panel; it was in the trial court's discretion to determine whether death was an appropriate sentence. Ford's sentencing order fails to indicate that the highest standard of proof was used by the court to find this final important element. There is no way to know if the State met its burden to prove each element beyond a reasonable doubt where Ford's sentencing order does not indicate what standard was applied to the trial court's finding that the aggravators outweighed the mitigators. We only know that it had to give great weight to an advisory recommendation. Along with basic fundamental fairness, *See Mosley v. State*, 209 So. 3d 1248, 1274–75 (Fla. 2017), the *Erlinger* decision informs that Ford should have a new penalty phase proceeding. Ford's sentence violates his due process rights and right to a trial by a unanimous jury. Executing him would be an injustice.

B. This New Consideration of Ford's Proceedings Further Establishes that his Death Sentence is Arbitrary and Capricious, in Violation of the Eighth Amendment

During Ford's trial, this court rejected Ford's timely raised motion for a "mercy" instruction pursuant to *Henyard v. State*, 689 So. 2d 239 (Fla. 1996). (R50, 4559). Within one year of *Hurst v. Florida* and *Hurst v. State*, Ford filed a successive 3.851 motion for a new penalty phase

[8] *Fiore*, at 229, citing *Jackson,* 443 U. S., at 316; *In re Winship,* 397 U. S. 358, 364 (1970).

proceeding on January 12, 2017. The FSC affirmed the denial of relief by citing *Hitchcock v. State*, 226 So.3d 217, 2018 (Fla. 2017), which relied on *Asay.* In Ford's previous successive motion, Ford specifically challenged the lack of juror unanimity in his death recommendation. The FSC affirmed this court's summary denial of relief. *Ford v. State*, 168 So. 3d 224 (Fla. 2015). Ford has consistently attempted to litigate issues regarding the proper responsibility of jurors in capital sentencing. Fundamental fairness entitles him to relief.[9] However, because Ford's case became final during the denial of his petition for certiorari to the USSC on May 28, 2002, whereas *Ring v. Arizona*, 536 U.S. 584 (2002) was final on June 24, 2002, Ford is facing execution on February 13, 2025 because he missed Florida's arbitrary cutoff of *Hurst* relief by a **mere 27 days**.

The USSC issued *Apprendi* and *Ring*. In *Apprendi*, the Court held that in a non-capital case, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). The Court recognized that the principles supporting a jury trial,

> extend[] down centuries into the common law. "[T]o guard against a spirit of oppression and tyranny on the part of rulers," and "as the great bulwark of [our] civil and political liberties," 2 J. Story, Commentaries on the Constitution of the United States 540-541 (4th ed. 1873), trial by jury has been understood to require that "the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbours...."

Id. at 477 (citations omitted). Justice Scalia, in concurrence, added,

> It sketches an admirably fair and efficient scheme of criminal justice designed for a society that is prepared to leave criminal justice to the State. (Judges, it is sometimes necessary to remind ourselves, are part of the State-and an increasingly

[9] In *Mosley,* the Florida Supreme Court found two conditions that would qualify for retroactive application of *Hurst*: (1) prisoners whose death sentences became final on direct appeal after *Ring* was decided on June 24, 2002 and (2) prisoners who raised the issues presented in *Ring*. *Mosley*, at 1274-1275. *See also, James v. State*, 615 So.2d 668 (Fla. 1993).

> bureaucratic part of it, at that.). The founders of the American Republic were not prepared to leave it to the State, which is why the jury-trial guarantee was one of the least controversial provisions of the Bill of Rights. It has never been efficient; but it has always been free.

Id. at 498.

In *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428 (2002), the USSC held that "[c]apital defendants, no less than non-capital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." *Id.* at 589, 2432. Ford's case was final prior to *Ring*, but after *Apprendi* was decided. Thus, Ford's death sentence is even more arbitrary and constitutionally offensive than those capital litigants that fall in the pre-*Apprendi* cohort, as the government was on notice at least since *Apprendi*, and then later from *Ring*, that Florida's capital sentencing scheme was unconstitutional. In *Mosley*, the FSC recognized that "fundamental fairness alone may require the retroactive application of certain decisions involving the death penalty after the United States Supreme Court decides a case that changes our jurisprudence." *Mosley*, 209 So.3d at 1274–75. In this case, fundamental fairness requires Ford receiving a new penalty phase proceeding, as his case was final after the *Apprendi* decision.

Ford remains sentenced to death not because of where his case falls on the aggravation and mitigation continuum, but because of where his case falls on the calendar. Many individuals, for no other reason than their case became final after *Ring* have received new trials that follow the constitutional requirements of *Hurst v. Florida* and *Hurst v. State*. They will have received an actual sworn jury fully and constitutionally instructed on the jury's role as the ultimate decision maker. In such pre-*Poole* cases, the State also has had the burden of proving an aggravating factor unanimously, and that the aggravating factors outweigh the mitigating factors beyond a reasonable doubt.

"Death is different." *Woodson v. North Carolina*, 428 U.S. 208, 305 (1976). The USSC has made clear:

> Under the Eighth Amendment, the death penalty has been treated differently from all other punishments. [ ] Among the most important and consistent themes in this Court's death penalty jurisprudence is the need for special care and deliberation in decisions that may lead to the imposition of that sanction. The Court has accordingly imposed a series of unique substantive and procedural restrictions designed to ensure that capital punishment is not imposed without the serious and calm reflection that ought to precede any decision of such gravity and finality.

Thompson v. Oklahoma, 487 U.S. 815, 856 1988)(internal citations omitted). In *Furman v. Georgia*, 408 U.S. 238 (1972), the USSC found that the death penalty, as applied throughout the United States, violated the Eighth and Fourteenth Amendment's prohibition of cruel and unusual punishment. *Id***.** at 239–40. The Court did not find the death penalty itself was unconstitutional and later allowed the death penalty under narrow circumstances. See *Gregg v. Georgia,* 428 U.S. 153 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976), *et al*. *Furman* "recognize[d] that the penalty of death is different in kind from any other punishment imposed under our system of criminal justice. Because of the uniqueness of the death penalty, *Furman* held that it could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner." *Gregg,* 428 U.S. at 188.

The USSC has recognized the importance of a jury in meeting the commands of the Eighth Amendment. As stated in *Gregg v. Georgia*, 428 U.S. 153 "one of the most important functions any jury can perform in making . . . a selection (between life imprisonment and death for a defendant convicted in a capital case) is to maintain a link between contemporary community values and the penal system." *Id.* at 181–82, citing *Witherspoon v. Illinois*, 391 U.S. 510, 519 n. 15 (1968). A jury is "a significant and reliable objective index of contemporary values because it is so directly involved." *Id*. citing *Furman v. Georgia*, 408 U.S., at 439-440, (Powell, J.,

dissenting). Ford had no jury, just an advisory panel, and thus his death sentence had none of the Eighth Amendment reliability of a jury verdict.

A sentencer must consider "any relevant mitigating evidence," *Eddings v. Oklahoma*, 455 U.S. 104, 114 (1982); *Ford v. Dugger*, 481 U.S. 393 (1987). The majority opinion in *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) explained:

> [T]hat the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.

Id. at 605 (Emphasis and footnotes omitted).

To meet the requirements that the death penalty be limited to the most aggravated and least mitigated of murderers, the Supreme Court requires, "that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Gregg* at 189. In *Gregg*, the Court upheld Georgia's death penalty scheme and found:

> The basic concern of *Furman* centered on those defendants who were being condemned to death capriciously and arbitrarily. Under the procedures before the Court in that case, sentencing authorities were not directed to give attention to the nature or circumstances of the crime committed or to the character or record of the defendant. Left unguided, juries imposed the death sentence in a way that could only be called freakish. The new Georgia sentencing procedures, by contrast, focus the jury's attention on the particularized nature of the crime and the particularized characteristics of the individual defendant.

Id. at 206. Ford, unlike all post-*Hurst* defendants will have, had no jury to determine his death sentence in the guided manner necessary to avoid his being condemned to death in an arbitrary and capricious manner.

In Ford's case, the advisory panel was instructed that, although the court was required to

give great weight to its recommendation, the recommendation was only advisory. Had this been an actual jury trial, this would have been contrary to *Caldwell v. Mississippi*, 472 U.S. 320 (1985). In *Caldwell*, the Supreme Court stated and held that it,

> has always premised its capital punishment decisions on the assumption that a capital sentencing jury recognizes the gravity of its task and proceeds with the appropriate awareness of its 'truly awesome responsibility.' In this case, the State sought to minimize the jury's sense of responsibility for determining the appropriateness of death. Because we cannot say that this effort had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires. The sentence of death must therefore be vacated.

Id. at 341. Any reliance or argument based on the advisory recommendation in Ford's case is misplaced and fails to rise to the level of constitutional equivalence based on *Caldwell*. An advisory panel accurately instructed on its role in an unconstitutional death penalty scheme does not meet the Eighth Amendment requirements of *Caldwell*.

On remand in *Hurst v. State*, the FSC found that the right to a jury trial found in the United States Constitution required that all factual findings be made by the jury unanimously under the Florida Constitution. The Court found that the Eighth Amendment's evolving standards of decency and bar on arbitrary and capricious imposition of the death penalty require a unanimous jury fact-finding.

> [T]he the foundational precept of the Eighth Amendment calls for unanimity in any death recommendation that results in a sentence of death. That foundational precept is the principle that death is different. This means that the penalty may not be arbitrarily imposed, but must be reserved only for defendants convicted of the most aggravated and least mitigated of murders. Accordingly, any capital sentencing law must adequately perform a narrowing function in order to ensure that the death penalty is not being arbitrarily or capriciously imposed. *See Gregg*, 428 U.S. at 199, 96 S.Ct. 2909. The Supreme Court subsequently explained in *McCleskey v. Kemp* that "the Court has imposed a number of requirements on the capital sentencing process to ensure that capital sentencing decisions rest on the individualized inquiry contemplated in Gregg." *McCleskey v. Kemp*, 481 U.S. 279, 303, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987). This individualized sentencing implements the required narrowing function that also ensures that the death penalty is reserved for the most culpable of murderers and for the most aggravated of murders. If death is to be

> imposed, unanimous jury sentencing recommendations, when made in conjunction with the other critical findings unanimously found by the jury, provide the highest degree of reliability in meeting these constitutional requirements in the capital sentencing process.

Hurst v. State at 59–60. The Court cited to Eighth Amendment concerns finding that, "in addition to unanimously finding the *existence* of any aggravating factor, the jury must also unanimously find that the aggravating factors are *sufficient* for the imposition of death and unanimously find that the aggravating factors *outweigh* the mitigation before a sentence of death may be considered by the judge." *Id.* at 54. (Emphasis in original). "In addition to the requirements of unanimity that flow from the Sixth Amendment and from Florida's right to a trial by jury, we conclude that juror unanimity in any recommended verdict resulting in death sentence is required under the Eighth Amendment." *Id*. at 59.

The FSC went a step further than the United States Supreme Court did in *Hurst v. Florida* based on evolving standards of decency requiring unanimous jury recommendations for death sentences. "Requiring unanimous jury recommendations of death before the ultimate penalty may be imposed will ensure that in the view of the jury—a veritable microcosm of the community—the defendant committed the worst of murders with the least amount of mitigation. This is in accord with the goal that capital sentencing laws keep pace with 'evolving standards of decency.'" (internal citations omitted). *Hurst v. State,* at 60. The standards of decency have evolved such that Ford cannot be sentenced to death without a jury unanimously finding all of the facts necessary to subject him to death.

Ford was sentenced to death in violation of the Eighth Amendment. His death sentence was arbitrary and capricious because he was sentenced without a jury to ensure the reliability of his sentence. Any reliance on the non-unanimous advisory panel is misplaced and a violation of *Caldwell*. A recommendation of 11-1 should be inadequate under *Hurst v. State*. To subject Ford

to the death penalty based on Florida's previous unconstitutional system, is the very definition of arbitrary and capricious. As Justice Stewart stated in concurrence, "the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed." *Furman*, 408 U.S. at 310, 92 S. Ct. at 2763 (Potter, J, concurring).

Following *Hurst v. Florida* and *Hurst v. State*, Ford may not be subject to the death penalty. Ford was sentenced to death without the reliability of jury fact-finding and unanimity that the Eighth Amendment guarantees. His death sentence violates the Eighth and Fourteenth Amendments because his death sentence relies on random luck of where it falls on the calendar, which is the very definition of arbitrary.

Conclusion and Manifest Injustice

If this Court does not find *Hurst* retroactive to Ford's case, the law of the case is overcome because adhering to the law of the case would result in a manifest injustice. This Court explained in *State v. Owen*, 696 So.2d 715 (Fla. 1997):

> Generally, under the doctrine of the law of the case, "all questions of law which have been decided by the highest appellate court become the law of the case which must be followed in subsequent proceedings, both in the lower and appellate courts." *Brunner Enters., Inc. v. Department of Revenue,* 452 So.2d 550, 552 (Fla.1984). However, 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. *See Strazzulla v. Hendrick,* 177 So.2d 1, 3 (Fla.1965) (explaining underlying policy). 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. *Preston v. State,* 444 So.2d 939 (Fla.1984).
>
> An intervening decision by a higher court is one of the exceptional situations that this Court will consider when entertaining a request to modify the law of the case. *Brunner, 452 So.2d at 552; Strazzulla,* 177 So.2d at 4.

Id. at 720. On a basic level, the denial of relief based on *Hurst*, under the unique circumstances of Ford's case as articulated in Claim Two, is fundamentally unfair and a manifest injustice. Relief if proper.

CERTIFICATION OF COUNSEL

Pursuant to Fla. R. Crim. P. 3.851(e)(2)(A) and (e)(1)(F), undersigned counsel hereby certifies that the contents of this motion for postconviction relief have been discussed with Ford, that counsel has complied with Rule 4-1.4 of the Rules of Professional Conduct, and that this motion is filed in good faith.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that on this 18th day of January, 2025, WE electronically filed the foregoing with the Clerk of the Circuit 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 Court Judge, Twentieth Judicial Circuit, LSHarder@ca.cjis20.org; Christina Z. Pacheco, Senior Assistant Attorney General, Christina.Pacheco@myfloridalegal.com and, capapp@myfloridalegal.com; Stephen D. Ake, Senior Assistant Attorney General, stephen.ake@myfloridalegal.com,; Bianca Bentley, Assistant State Attorney, bbentley@sao20.org; James D. Ford DOC # 763722 Union Correctional Institution P.O. Box 1000 Raiford, FL 32083.

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**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-351
Emergency Capital Case
Death Warrant Signed
Execution Scheduled for
February 13, 2025 at 6:00 p.m.

DEFENDANT'S SUCCESSIVE MOTION TO VACATE JUDGMENT OF CONVICTION AND SENTENCE OF DEATH PURSUANT TO FLORIDA RULE OF CRIMINAL PROCEDURE 3.851 AFTER A SIGNED DEATH WARRANT

ATTACHMENT A

Judgment and Sentence for James Ford

_____PROBATION VIOLATOR

_____COMMUNITY CONTROL VIOLATOR

_____RETRIAL

_____RESENTENCE

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

DIVISION: FELONY

CASE NO. 97-351-F

STATE OF FLORIDA

VS

JAMES D. FORD
Defendant

Certified to be a true and correct copy of the original document on file in my office.
Witness my hand and official seal this 20th day of June, 2022
ROGER D. EATON,
Clerk of the Circuit Court
By: _____ Deputy Clerk

JUDGMENT

The Defendant, **JAMES D. FORD**, being personally before this Court represented by **PAUL SULLIVAN, PRIVATE**, Attorney of record, and the state represented by **ROBERT LEE, ASSISTANT STATE ATTORNEY**, and having

__XX__ been tried and found guilty by JURY of the following crime(s)

____ entered a plea of guilty to the following crime(s)

____ entered a plea of nolo contendere to the following crime(s)

Count	Crime	Offense Statute Numbers	Degree of Crime	OBTS Number
1	FIRST DEGREE MURDER	782.04	CAPITAL F	9018176
4	FIRST DEGREE MURDER	782.04	CAPITAL F	9018176
7	SEXUAL BATTERY W/FIREARM	794.011	LIFE F	9018176
9	CHILD ABUSE	827.03	THIRD F	9018176

__XX__ and no cause being shown why the defendant should not be adjudicated guilty, IT IS ORDERED THAT the defendant is hereby ADJUDICATED GUILTY of the above crime(s)

_____ and pursuant to Section 943.325 Florida Statutes having been convicted of attempts or offenses relating to Sexual Battery (ch 794) or Lewd and Lascivious conduct (ch 800) the Defendant shall be required to submit blood specimens.

_____ and good cause being shown: IT IS ORDERED THAT ADJUDICATION OF GUILT BE WITHHELD

Defendant: **JAMES D. FORD** 97-351-F OBTS 9018176

SENTENCE

(As to Count 1 & 4)

The defendant, being personally before this court, accompanied by the defendant's attorney of record, **PAUL SULLIVAN,** having been adjudicated herein, and the court having given the defendant an opportunity to be heard and to offer matters in mitigation of sentence, and to show cause why the defendant should not be sentenced as provided by law, and no cause being shown

(Check one if applicable.)

____and the Court having deferred imposition of sentence until

____and the Court having previously entered a judgment in this case on (date) now resentences the defendant

____and the Court having placed the defendant on **COMMUNITY CONTROL/PROBATION** and having subsequently revoked the defendant's **COMMUNITY CONTROL/PROBATION**

It is The Sentence of The Court that:

____The defendant pay a fine of $, pursuant to section 775.083, Florida Statutes, plus $ as the 5% surcharge required by section 960.25, Florida Statues.

__XX__The defendant is hereby committed to the custody of the Dept. of Corrections.

____The defendant is hereby committed to the custody of the Sheriff of Charlotte County, Florida

____The defendant is sentenced as a youthful offender in accordance with section 958.04 Florida, Statutes.

To be Imprisoned (check one; unmarked sections are inapplicable):

____For a term of natural life.

__XX__For a term of **DEATH**

____Said sentence is suspended

If "split" sentence, complete the appropriate paragraph.

____Placed on a period of
under the supervision of the Dept. of Corrections according to the terms and conditions of supervision set forth in a separate order entered herein.

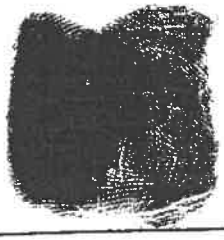
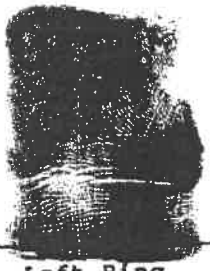
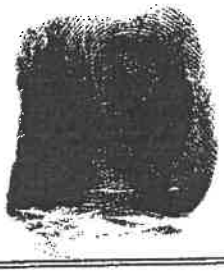
____However, after serving a period of _____ imprisonment in _____ the balance of the sentence shall be suspended and the defendant shall be placed on probation/community control for a period of _____ under supervision of the Dept. of Corrections according to the terms and conditions of probation/community control set forth in a separate order entered herein.

In the event, the defendant is ordered to serve additional split sentences, all incarceration portions shall be satisfied before the defendant begins service of the supervision terms.

State of Florida v. Case Number 97-351F

James Ford
Defendant

FINGERPRINTS OF DEFENDANT

1. Right Thumb	2. Right Index	3. Right Middle	4. Right Ring	5. Right Little
				
6. Left Thumb	**7. Left Index**	**8. Left Middle**	**9. Left Ring**	**10. Left Little**
				

Fingerprints taken by: Name Dfc. Forister Title Bailiff

I HEREBY CERTIFY that the above and foregoing are the fingerprints of the defendant, JAMES FORD, and that they were placed thereon by the defendant in my presence in open court this date.

DONE AND ORDERED in open court in Charlotte County, Florida, this 3 day of June, 1999.

Arthur Ellis
Judge

FILED IN OPEN COURT
6/3/99
DATE

Defendant: **JAMES D. FORT** 97-351-F OBTS 9018176

SENTENCE

(As to Count 7)

The defendant, being personally before this court, accompanied by the defendant's attorney of record, **PAUL SULLIVAN,** having been adjudicated herein, and the court having given the defendant an opportunity to be heard and to offer matters in mitigation of sentence, and to show cause why the defendant should not be sentenced as provided by law, and no cause being shown

(Check one if applicable.)

____and the Court having deferred imposition of sentence until

____and the Court having previously entered a judgment in this case on (date) now resentences the defendant

____and the Court having placed the defendant on **COMMUNITY CONTROL/PROBATION** and having subsequently revoked the defendant's **COMMUNITY CONTROL/PROBATION**

It is The Sentence of The Court that:

____The defendant pay a fine of $, pursuant to section 775.083, Florida Statutes, plus $ as the 5% surcharge required by section 960.25, Florida Statues.

__XX__The defendant is hereby committed to the custody of the Dept. of Corrections.

____The defendant is hereby committed to the custody of the Sheriff of Charlotte County, Florida

____The defendant is sentenced as a youthful offender in accordance with section 958.04 Florida, Statutes.

To be Imprisoned (check one; unmarked sections are inapplicable):

____For a term of natural life.

__XX__For a term of **NINETEEN POINT SEVENTY-NINE (19.79) YEARS**

____Said sentence is suspended

If "split" sentence, complete the appropriate paragraph.

____Placed on a period of
under the supervision of the Dept. of Corrections according to the terms and conditions of supervision set forth in a separate order entered herein.

____However, after serving a period of _____ imprisonment in _____ the balance of the sentence shall be suspended and the defendant shall be placed on probation/community control for a period of _____ under supervision of the Dept. of Corrections according to the terms and conditions of probation/community control set forth in a separate order entered herein.

In the event, the defendant is ordered to serve additional split sentences, all incarceration portions shall be satisfied before the defendant begins service of the supervision terms.

Defendant: **JAMES D. FORD** 97-351-F OBTS **9018176**

SENTENCE

(As to Count 9)

The defendant, being personally before this court, accompanied by the defendant's attorney of record, **PAUL SULLIVAN,** having been adjudicated herein, and the court having given the defendant an opportunity to be heard and to offer matters in mitigation of sentence, and to show cause why the defendant should not be sentenced as provided by law, and no cause being shown

(Check one if applicable.)

____and the Court having deferred imposition of sentence until

____and the Court having previously entered a judgment in this case on (date) now resentences the defendant

____and the Court having placed the defendant on **COMMUNITY CONTROL/PROBATION** and having subsequently revoked the defendant's **COMMUNITY CONTROL/PROBATION**

It is The Sentence of The Court that:

____The defendant pay a fine of $, pursuant to section 775.083, Florida Statutes, plus $ as the 5% surcharge required by section 960.25, Florida Statues.

__XX__The defendant is hereby committed to the custody of the Dept. of Corrections.

____The defendant is hereby committed to the custody of the Sheriff of Charlotte County, Florida

____The defendant is sentenced as a youthful offender in accordance with section 958.04 Florida, Statutes.

To be Imprisoned (check one; unmarked sections are inapplicable):

____For a term of natural life.

__XX__For a term of **FIVE (5) YEARS**

____Said sentence is suspended

If "split" sentence, complete the appropriate paragraph.

____Placed on a period of
under the supervision of the Dept. of Corrections according to the terms and conditions of supervision set forth in a separate order entered herein.

____However, after serving a period of _____ imprisonment in _____ the balance of the sentence shall be suspended and the defendant shall be placed on probation/community control for a period of _____ under supervision of the Dept. of Corrections according to the terms and conditions of probation/community control set forth in a separate order entered herein.

In the event, the defendant is ordered to serve additional split sentences, all incarceration portions shall be satisfied before the defendant begins service of the supervision terms.

Defendant: **JAMES D. FORD** CASE NO. **97-351-F**

SPECIAL PROVISIONS

(As to Counts 7)

By appropriate notation, the following provisions apply to the sentence imposed:

Mandatory/Minimum Provisions:

Firearm	**XX**	It is further ordered that the 3-year minimum imprisonment provisions of section 775.087(2), Florida Statutes, is hereby imposed for the sentence specified in this count.
Drug Trafficking	____	It is further ordered that the mandatory minimum imprisonment provisions of section 893.135 (1) Florida Statutes, is hereby imposed for the sentenced specified in this count.
Controlled Substance Within 1,000 Feet of School	____	It is further ordered that the 3-year minimum imprisonment provisions of section 893.13(1)(e)1, Florida Statutes is hereby imposed for the sentence specified in count four.
Habitual Felony Offender	____	The defendant is adjudicated a habitual felony offender and has been sentenced to an extended term in accordance with the provisions of section 775.084(4)(a), Florida Statutes. The requisite findings by the court are set forth in a separate order or stated on the record in open court.
Habitual Violent Felony Offender	____	The defendant is adjudicated a habitual violent felony offender and has been sentenced to an extended term in accordance with the provisions of section 775.084(4)(b), Florida Statutes. A minimum term of year(s) must be served prior to release. The requisite findings of the court are set forth in a separate order or stated on the record in open court.
Law Enforcement Protection Act	____	It is further ordered that the defendant shall serve a minimum of years before release in accordance with section 775.0823, Florida Statutes.
Capital Offense	____	It is further ordered that the defendant shall serve no less than 25 years in accordance with the provisions of section 775.082(1), Florida Statutes.
Short-Barreled Rifle, Shotgun, Machine Gun	____	It is further ordered that the 5-year minimum provisions of section 790.221(2), Florida Statutes, are hereby imposed for the sentence specified in this court.
Continuing Criminal Enterprise	____	It is further ordered that the 25-year minimum sentence provisions of section 893.20, Florida Statutes, are hereby imposed for the sentence specified in this count.

Other Provisions:

Retention of Jurisdiction	____	The court retains jurisdiction over the defendant pursuant to section 947.16(3), Florida Statutes (1983)
Jail Credit	**XX**	It is further ordered that the defendant shall be allowed a total of **778** days as credit for time incarcerated before imposition of this sentence.
Sentencing Upon revocation of supervision	____	Defendant is allowed credit for days county jail credit served between date of arrest as a violator and date of resentencing. The Department of Corrections shall apply original jail credit awarded and shall compute and apply credit for time served and unforfeited gain-time awarded during prior service of case number/count number .
Prison Credit	____	It is further ordered that the defendant be allowed credit for all time previously served on this count in the Dept. of Corrections prior to resentencing, AND UNFORFEITED GAIN-TIME AWARDED DURING PRIOR SERVICE.

Defendant: JAMES D. FORD CASE NO. 97-351-F

SPECIAL PROVISIONS

(As to Counts 9)

By appropriate notation, the following provisions apply to the sentence imposed:

Mandatory/Minimum Provisions:

Firearm	_____It is further ordered that the 3-year minimum imprisonment provisions of section 775.087(2), Florida Statutes, is hereby imposed for the sentence specified in this count.
Drug Trafficking	_____It is further ordered that the mandatory minimum imprisonment provisions of section 893.135 (1) Florida Statutes, is hereby imposed for the sentenced specified in this count.
Controlled Substance Within 1,000 Feet of School	_____It is further ordered that the 3-year minimum imprisonment provisions of section 893.13(1)(e)1, Florida Statutes is hereby imposed for the sentence specified in count four.
Habitual Felony Offender	_____The defendant is adjudicated a habitual felony offender and has been sentenced to an extended term in accordance with the provisions of section 775.084(4)(a), Florida Statutes. The requisite findings by the court are set forth in a separate order or stated on the record in open court.
Habitual Violent Felony Offender	_____The defendant is adjudicated a habitual violent felony offender and has been sentenced to an extended term in accordance with the provisions of section 775.084(4)(b), Florida Statutes. A minimum term of year(s) must be served prior to release. The requisite findings of the court are set forth in a separate order or stated on the record in open court.
Law Enforcement Protection Act	_____It is further ordered that the defendant shall serve a minimum of years before release in accordance with section 775.0823, Florida Statutes.
Capital Offense	_____It is further ordered that the defendant shall serve no less than 25 years in accordance with the provisions of section 775.082(1), Florida Statutes.
Short-Barreled Rifle, Shotgun, Machine Gun	_____It is further ordered that the 5-year minimum provisions of section 790.221(2), Florida Statutes, are hereby imposed for the sentence specified in this court.
Continuing Criminal Enterprise	_____It is further ordered that the 25-year minimum sentence provisions of section 893.20, Florida Statutes, are hereby imposed for the sentence specified in this count.

Other Provisions:

Retention of Jurisdiction	_____The court retains jurisdiction over the defendant pursuant to section 947.16(3), Florida Statutes (1983)
Jail Credit	XX It is further ordered that the defendant shall be allowed a total of 778 days as credit for time incarcerated before imposition of this sentence.
Sentencing Upon revocation of supervision	_____Defendant is allowed credit for days county jail credit served between date of arrest as a violator and date of resentencing. The Department of Corrections shall apply original jail credit awarded and shall compute and apply credit for time served and unforfeited gain-time awarded during prior service of case number/count number .
Prison Credit	_____It is further ordered that the defendant be allowed credit for all time previously served on this count in the Dept. of Corrections prior to resentencing, AND UNFORFEITED GAIN-TIME AWARDED DURING PRIOR SERVICE.

Defendant: **JAMES D. FORD** CASE NO. **97-351-F** OBTS **#9018176**

Other Provisions, continued

Consecutive/Concurrent as to other counts

__XX__It is further ordered that the sentence imposed for count(s) **9** shall run:
(check one)_____consecutive to__XX__concurrent with the sentence set forth in count __7__of this case, and to each other.

Consecutive/Concurrent to other Convictions

_____It is further ordered that the composite term as of all sentences imposed for the counts specified in this order shall run
(check one) _____ consecutive to _____concurrent with the following:

(check one)

_____any active sentence being served

_____specific sentence

In the event the above sentence is to the Department of Corrections, the Sheriff of **Charlotte** County, Florida, is hereby ordered and directed to deliver the defendant to the Department of Corrections at the facility designated by the department together with a copy of this judgment and sentence and any other documents specified by Florida Statute.

The defendant in open court was advised of the right to appeal from this sentence by filing notice of appeal within 30 days from this date with the clerk of this court and the defendant's right to the assistance of counsel in taking the appeal at the expense of the State on showing of indigency.

In imposing the above sentence, the court further recommends .

DONE AND ORDERED in open court at **Charlotte** County, Florida, this **3RD** day of **JUNE, 1999.**

HONORABLE CYNTHIA A. ELLIS