

No. SC2025-0280

EXECUTION SCHEDULED FOR MARCH 20, 2025, at 6:00 P.M.

IN THE
Supreme Court of Florida

EDWARD T. JAMES,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

*On Appeal from the Circuit Court, Eighteenth
Judicial Circuit, in and for Seminole County, Florida
Lower Tribunal No. 1993-CF-3237*

INITIAL BRIEF OF APPELLANT

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REQUEST FOR ORAL ARGUMENT

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

PRELIMINARY STATEMENT

The following symbols will be used to designate references to the record: “T” refers to the transcript of trial proceedings; “R” refers to the record on direct appeal to this Court; “PCR” refers to the record on appeal from the first postconviction proceeding; “PCR-W” refers to the record on appeal from the recent motion for postconviction relief following the signing of the death warrant. All other record references will be self-explanatory.

STATEMENT OF THE CASE AND FACTS

I. Procedural History

In October 1993, James was indicted for two counts of first-degree murder, one count of aggravated child abuse, one count of attempted sexual battery, one count of kidnapping, one count of grand theft, and one count of grand theft of an automobile.

On April 6, 1995, James pled guilty to all counts pursuant to a written plea negotiation that contained no agreement as to the sentences or any other benefit to James. The State sought the death penalty on both counts of murder.

James' penalty phase was conducted before a jury over several days in May and June of 1995. On June 5, 1995, the jury returned advisory verdicts recommending a sentence of death on both first-degree murder counts by a vote of 11 to 1. Following these advisory verdicts, defense counsel moved for appointment of a mental health expert. A hearing was held on July 12, 1995, pursuant to *Spencer v. State*, 615 So. 2d 688 (Fla. 1993). Subsequently, on August 18, 1995, the court sentenced James to death on both murder counts. The court found the following aggravators: (1) both murders were heinous, atrocious, and cruel; (2) James was contemporaneously convicted of another violent felony; and (3) each murder

was convicted during the course of a felony. In considering James' mitigation, the court found that James' ability to appreciate the criminality of his conduct or conform his conduct was substantially impaired due to his drug and alcohol use at the time of the murders and that he was under moderate mental or emotional disturbance at the time of the offenses, and gave those statutory mitigators significant weight. The court also gave substantial weight to James' cooperation with police and some weight to various acts of kindness to friends and for his good conduct in the jail.

James raised the following claims on direct appeal:

Claim I: The trial court erred by failing to grant a mistrial when the prosecutor impermissibly urged the jury to consider James' use and possession of illegal drugs as nonstatutory aggravators and argued that James was legally sane.

Claim II: The standard jury instruction for heinous, atrocious or cruel was unconstitutionally vague and overbroad and relieved the State of the burden of proving its elements.

Claim III: The trial court erred in finding the murder of the child victim was heinous, atrocious or cruel.

Claim IV: The trial court erred in giving the State's requested "prior violent felony" aggravator instruction and by refusing to instruct the jury on each nonstatutory mitigating factor supported by the evidence or, alternatively, that no instructions as to specific mitigating circumstances be given.

Claim V: The trial court erred in rejecting as a statutory mitigating circumstance that James was under extreme mental or emotional disturbance after it incorrectly weighed the credibility of a key defense witness.

Claim VI: James' death sentences were disproportionate and constituted cruel and unusual punishment.

This Court affirmed James' judgment of conviction and sentence. *James v. State*, 695 So. 2d 1229 (Fla. 1997). James filed a petition for writ of certiorari with the United States Supreme Court, that was denied on December 1, 1997. *James v. Florida*, 522 U.S. 1000 (1997).

Capital Collateral Regional Counsel – Middle Region (“CCRC-M”) was appointed to represent James in state postconviction proceedings. See *James v. State*, 974 So. 2d 365, 366 (Fla. 2008). On May 27, 1998, James, filed his first motion for postconviction relief in state court pursuant to Fla. R. Crim. P. 3.850. The following “boilerplate” claims were raised while he continued to litigate discovery motions:

Claim I: CCRC-M was unable to investigate claims because of the suspension of Rule 3.852.

Claim II: General ineffective assistance of counsel claim, *Brady* violations, and prosecutorial misconduct claim.

Claim III: The convictions were unreliable.

Claim IV: *Brady* violations.

Claim V: Ineffective assistance of counsel during plea negotiations.

Claim VI: Prosecutorial misconduct for misstating the law and facts.

Claim VII: Ineffective assistance of counsel for failure to conduct pre-trial investigation.

Claim VIII: Guilt and penalty phase ineffective assistance of counsel for failure to provide mental health experts with critical information.

Claim IX: *Ake* violation for counsel's failure to obtain funds for experts.

Claim X: Ineffective assistance of counsel for failure to challenge aggravating circumstances, present mitigation and preserve Eighth Amendment error.

Claim XI: James was innocent of the murders.

Claim XII: James was innocent of the death penalty.

Claim XIII: Defendant was absent from critical trial proceedings.

Claim XIV: The death penalty violates the Fifth, Sixth, Eighth, and Fourteenth Amendments.

Claim XV: The jury received inadequate guidance concerning the aggravating circumstances.

Claim XVI: The death sentences were fundamentally unfair and unreliable due to the introduction of evidence of nonstatutory aggravators and it was ineffective assistance of counsel not to object to that evidence and argument.

Claim XVII: It was ineffective assistance of counsel not to object to vague and overbroad instructions on aggravating circumstances.

Claim XVIII: Electrocutation is cruel and unusual.

Claim XIX: Florida's death penalty is cruel and unusual.

Claim XX: James was denied a fair trial due to unfair publicity and counsel was ineffective for not moving to change venue.

Claim XXI: The trial court's failure to consider mitigating evidence violated the Eighth Amendment.

Claim XXII: The sentencing order does not reflect an independent weighing of evidence or a reasoned judgment.

Claim XXIII: Trial counsel failed to preserve error for review and James was denied a proper appeal as a result.

Claim XXIV: James' death sentences were predicated upon automatic aggravating circumstances.

On November 1, 2001, CCRC-M filed a first amended Rule 3.850

motion that alleged the following claims:

Claim I: Trial counsel committed *Strickland* error, generally.

Claim II: Trial counsel was ineffective in the guilt phase for abandoning an intoxication defense and for failing to fully inform James of the consequences of his pleas to two aggravating circumstances.

Claim III: Trial counsel retained experts who were not qualified to evaluate James on drug and alcohol impairment and counsel was ineffective for failing to provide them with proper assistance or evidence.

Claim IV: Trial counsel was ineffective at the guilt and penalty phases for failing to provide experts with background materials, failing to investigate James' chronic alcohol and drug abuse, failing to provide

sufficient evidence to one expert who would now testify that James suffered from post-traumatic stress disorder and was under the influence of extreme mental or emotional disturbance at the time of the crimes, failing to investigate the effects of James' stabbing in 1990, failure to provide experts with sufficient information, failing to investigate James' competence to proceed, and failing to conduct a thorough investigation of James' family history.

Claim V: Trial counsel was ineffective at the penalty phase for failing to challenge whether the child victim was murdered during a sexual battery as experts would challenge medical examiner's testimony at trial that the child was alive at the time of the sexual battery.

Claim VI: Trial counsel was ineffective for allowing James to plead to the sexual battery count against Betty Dick and for failing to retain a forensic pathologist to challenge the forensic evidence and testimony regarding that charge.

Claim VII: Trial counsel was ineffective for not transporting a defense witness to trial to testify to James' use of LSD on the night of the murders.

Claim VIII: Trial counsel was ineffective for failing to work closely with and prepare its mental health experts for their testimony at the penalty phase.

Claim IX: Trial counsel was ineffective for failing to challenge Florida's lethal injection protocol.

Claim X: Florida's death penalty scheme is arbitrary and capricious under the Eighth Amendment.

Claim XI: Trial counsel was ineffective for failing to object to burden shifting on proof of aggravating factors.

Claim XII: The sheer number and types of errors by trial counsel rendered James' trial unreliable and the errors were not harmless.

On September 16, 2002, CCRC-M filed a "third amended 3.850 motion"¹ that alleged the following claims:

Claim I: Restated Claim II from the first amended motion and added that James would have gone to trial had counsel fully advised him on consequences of pleas in the penalty phase and added that James

¹ This was technically the second amended motion, but because it was the third postconviction motion, it was mislabeled as the third amended motion.

rearranging of Ms. Dick's clothing was insufficient evidence of a sexual battery.

Claim II: Restated Claims III-V from the first amended motion and added that trial counsel rendered their experts incompetent by failing to provide them with necessary and vital information to inform the experts' opinions and resulting testimony.

Claim III: Trial counsel was ineffective at the guilt and penalty phases for failing to challenge the medical examiner's testimony that the child victim was alive when she was sexually battered, failing to get the only witness to James' use of LSD to court sober, which resulted in the trial court rejecting the statutory mitigator of James being under the influence of an extreme emotional or mental disturbance.

Claim IV: Trial counsel was ineffective for failing to challenge the State's evidence that the adult victim was sexually battered and for allowing James to plead to that charge that allowed the State to argue that conduct as an aggravator.

Claim V: Restated Claim IX from the first amended motion that Florida's lethal injection protocol violates the Eighth Amendment.

Claim VI: Trial counsel was ineffective for failing to develop mitigation with expert in pharmacology and failing to provide that expert with information that James ingested LSD.

Claim VII: Restated claims the Florida's lethal injection protocol violates the Eighth and Fourteenth Amendments.

Claim VIII: Restated Claim X from the first amended motion that Florida's death penalty is arbitrary and capricious.

Claim IX: Restated Claim XI from the first amended motion that trial counsel was ineffective for not objecting to shifting of burden of proof on whether mitigation outweighed aggravators.

Claim X: Restated Claim XII from the first amended motion alleging cumulative error.

A *Huff* hearing was held on February 22, 2002, and the circuit court entered an order on March 5, 2002, scheduling an evidentiary hearing on claims four, five, and eight of the second amended 3.850 motion and denied a hearing on all other claims. (PCR 348-50).

On March 10, 2003, prior to the scheduled evidentiary hearing, James filed a *pro se* notice of voluntary dismissal of the postconviction proceedings. (PCR 473-74). The circuit court held a hearing pursuant to *Durocher v. Singletary*, 623 So. 2d 482, 485 (Fla. 1993), to determine whether James was competent to waive postconviction proceedings and discharge his counsel. (PCR 493-95). On April 22, 2003, the circuit court entered an order allowing James to withdraw his postconviction motion, cancelling the evidentiary hearing, and discharging counsel. *James*, 974 So. 2d at 366. The circuit court's order advised James that he had the right to appeal the ruling to the Florida Supreme Court and that the time for filing a federal habeas petition could be affected by the dismissal of the postconviction proceedings. Neither CCRC-M nor James filed an appeal or a federal habeas petition.

On November 17, 2005, CCRC-M filed a motion requesting their reappointment and resumption of James' postconviction proceedings. A handwritten letter from James requesting reinstatement of counsel and the postconviction proceedings was attached to CCRC-M's motion. (PCR 441-47). On January 12, 2006, a hearing was held on James' request. The circuit court issued an order denying the request on January 17, 2006. (PCR 522-26). James appealed the circuit court's order, and on February 20, 2008, this

Court affirmed the circuit court's order. *James v. State*, 974 So. 2d 365 (Fla. 2008).

On August 10, 2018, the Capital Habeas Unit ("CHU") of the Office of the Federal Public Defender for the Northern District of Florida was appointed to represent James under 18 U.S.C. § 3599. The CHU filed a federal habeas petition on December 18, 2018, raising fifteen claims, including claims for ineffective assistance of trial counsel at the guilt and penalty phases; ineffective assistance of appellate counsel; claims challenging James' competence to enter his guilty pleas, and to be executed; a claim for relief under *Hurst v. Florida*, 136 S. Ct. 616 (2016), and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016); and an actual innocence claim.

On January 19, 2019, CCRC-M filed a motion for reappointment in the circuit court, followed by an amended motion on January 31, 2019, alleging a conflict of interest and requesting the appointment of CCRC-N. The motions were unopposed and CCRC-N was appointed by the circuit court to represent James on February 8, 2019.

On November 14, 2019, CCRC-N filed a third successive motion for postconviction relief that alleged the following claims:

Claim I: Ineffective assistance of trial counsel at the guilt and penalty phases for failing to adequately investigate and prepare a defense or challenge the State's case and for encouraging James to plead to all charges.

Claim II: Ineffective assistance of trial counsel for failing to investigate and raise the issue of James' competency at the time of his pleas, waivers, penalty phase, and sentencing.

Claim III: James was incompetent at the time of his state postconviction waiver and was incompetent to waive his rights at that proceeding.

Claim IV: James' death sentence violates his rights under the Sixth and Fourteenth Amendments and corresponding provisions of the Florida Constitution.

Claim V: Cumulatively, the combination of procedural and substantive errors deprived James of a fundamentally fair trial.

Following a *Huff* hearing, the circuit court summarily denied James' claims. On July 8, 2021, this Court affirmed the circuit court's denial. *James v. State*, 323 So. 3d 158 (Fla. 2021), cert. denied, 142 S. Ct. 1678 (2022).

On December 5, 2022, James filed an amended petition for writ of habeas corpus in federal district court. The court denied the habeas petition, as well as a certificate of appealability on September 6, 2024. *James v. Sec'y Dept. of Corr., et al.*, 6:18-cv-00993-WWB-RMN. James filed a notice of appeal, and on February 3, 2025, the United States Court of Appeals for the Eleventh Circuit issued an order denying James' motion for certificate of appealability. *James v. Sec'y, Dept. of Corr., et al.*, 24-14162.

On February 18, 2025, Governor DeSantis signed a death warrant for James' execution scheduled for March 20, 2025.

Following the warrant, James filed a motion for postconviction relief pursuant to Fla. R. Crim. P. 3.851 on February 23, 2025. The following claims were raised:

Claim I: Based on the totality of circumstances, executing James after thirty years in solitary confinement on death row violates the Eighth Amendment's prohibition against cruel and unusual punishment.

Claim II: Results of the 2023 brain scans, which were not previously available to James, demonstrate that his execution would violate the Eighth and Fourteenth Amendments.

Claim III: James' execution would violate the Eighth Amendment because one juror voted to spare his life.

Following a *Huff* hearing on February 24, 2025, the circuit court summarily denied these claims from the bench, finding that they could be resolved without an evidentiary hearing. The circuit court also denied James' motion for a stay of execution, as well as his motion for further brain scans.

Also, on February 24, 2025, James filed a motion for reconsideration and motion for an emergency stay in the Eleventh Circuit, as well as an emergency motion to amend the habeas petition, or alternatively, for relief from judgment pursuant to Rule 60(b) in federal district court. All motions were denied on February 27, 2025.

The circuit court issued its orders denying James' claims and his accompanying motions on February 26, 2027. This timely appeal follows.

II. Facts Relevant to this Appeal

A. James' cognitive decline was set in motion during childhood, when his biological father introduced him to drugs and alcohol.

James' biological father introduced him to drugs and alcohol when he was still a child. James began using alcohol between the ages of 10 and 13; marijuana and PCP at age 11; cocaine and speed between the ages of 14 or 15; and acid and LSD between the ages of 12 and 16. James used inhalants as a child, which included sniffing hair spray, glue, and solvents. He also experimented with methamphetamines (such as speed and crank), opiates (such as heroin), depressants (such as quaaludes, Dilaudid, and Valium) and psilocybin (mushrooms) throughout adulthood. According to James, he "smoked, sniffed, and injected drugs." (PCR-W 579, 586, 1033).

James reported extremely high levels of daily use, often for extended periods of time, for alcohol, marijuana, cocaine, and LSD. His maximum daily intake included 2 liters of 80 proof alcohol (equivalent to approximately 45 shots of liquor), 7 to 8 grams of marijuana per day, high levels of cocaine during repeated binges, and daily use of LSD (3 to 4 doses at a time) in his teens. (PCR-W 1033).

James' drug and alcohol consumption increased upon returning from his short stint in the military in 1980 and was a constant presence in his life.

(PCR-W 1033). Around the time of the crimes in 1993, James was heavily using methamphetamines, depressants, cocaine, marijuana, and alcohol. (PCR-W 1033).

It is unlikely that James' brain was ever *not* under the influence of substances, or had any significant respite from drug and alcohol exposure. (PCR-W 1033).

In 1995, a substance abuse evaluation of James revealed findings that were consistent with Substance Abuse Disorder (SUD). (PCR-W 1033). These findings included preoccupation with drugs, loss of control, physical tolerance, and cognitive impairments. (PCR-W 1033). When coupled with his father's own SUD, it is likely that James inherited a genetic predisposition to neurochemical instabilities. (PCR-W 1032). Additionally, James' maternal and paternal grandfathers were both alcoholics, further contributing to his increased risk for SUD based on genetic factors. (PCR-W 754).

Individuals, like James, having first degree relatives with SUDs have a 4 to 6-fold increase risk, when compared to the general public, of developing a compulsive disorder. This type of compulsive disorder may manifest as: experimentation and substance use at an early age; rapid loss of control and subsequent compulsive substance use; and/or experiencing significant consequences of drug and alcohol use. James has experienced all of these

throughout his life. (PCR-W 1032-33). He began using drugs as a child, after having been introduced to them by his own father; his heavy drug use, especially as an adolescent, is consistent with compulsive substance use; and he has certainly experienced significant negative outcomes associated with his substance abuse. (PCR-W 1033). These three factors are consistent with severe substance abuse and dependence that would, in ordinary circumstances, necessitated in-patient residential treatment. James never received any type of treatment for his SUD. These factors also suggest an increased probability of a genetic predisposition to addiction due to his family history. (PCR-W 1032-33).

Multiple substances abused by James are associated with brain toxicity and neuronal damage. Inhalants are particularly toxic to brain cells, and damage neurons at the cellular and molecular level. (PCR-W 1033). Their administration via the respiratory pathway often contributes to acute oxygen deprivation and hypoxia. This is particularly dangerous to brain cells. Inhalant damage can occur in several brain regions, including the prefrontal cortex (associated with executive function and impulse control), limbic system (emotional regulation and short-term memory), temporal lobe (language), and cerebellum (motor coordination). (PCR-W 1034).

Furthermore, James used these neurotoxic substances during critical periods of brain development. Neuroscientific literature is very clear on the effects of psychoactive substances on adolescent brain development, particularly the inhalants, cannabinoids (including marijuana), psychostimulants (such as methamphetamine and cocaine), and alcohol. (PCR-W 1034). Endogenous cannabinoid receptors are critical for normal brain cell maturation and prefrontal cortex development. Overstimulation of these receptors may interfere with essential development processes in the frontal cortex. Methamphetamine, cocaine, inhalants and high levels of alcohol can be directly toxic to brain cells, particularly in those regions that are rapidly developing during adolescence. The normal maturation of the prefrontal cortex is essential to impulse control, decision making, and normal cognition throughout the lifespan and occurs extensively during adolescence and early adulthood. Moreover, polysubstance abuse, or using more than one substance such as drinking while also using drugs, is a known factor that is associated with loss of brain volume. James had a broad exposure to polysubstance abuse. He would use drugs and, on top of that, drink excessively. (PCR-W 607). Given this, there is no doubt that the effects of chronic substance abuse during critical periods of brain development and

continually during adulthood have significantly contributed to James' cognitive decline.

B. James' early cognitive decline was exacerbated by multiple head injuries beginning in early adolescence.

In 1975, when James was 14 years old, he stole a car that the owner had left the keys in. He was driving at very high speeds of up to 85 miles per hour when he crashed into a police car and rolled over multiple times. (PCR-W 585). He suffered a concussion, skull fracture, loss of consciousness, and post-traumatic amnesia. (PCR-W 607). He later woke up in the hospital. (PCR-W 585). He was also hit in the back of the head while on a boat when he was 14 years old. He suffered a concussion and was taken to the hospital, but released shortly thereafter without having received any treatment. (PCR-W 579). From the ages of 15 to 16, James and his friends were engaged in "head butting" which involved banging your head against the refrigerator until the door fell off. (PCR-W 585). At age 16, James was the passenger in a car that was totaled in an accident. He bumped his head, was groggy, and had headaches afterwards. *Id.* At age 17, James was hit hard in the back of his head by someone using a large branch. He was also hit in the back of the head by someone swinging battery cables during a fight, which resulted in him blacking out. *Id.*

James continued to endure head injuries into adulthood. Throughout the years, he has been involved in many fights and suffered multiple injuries to the head (including being hit on the head with a baseball bat and a two-by-four), many of which caused a loss of consciousness. (PCR-W 757). During his time in the Army, he was also involved in many bar fights on weekends. (PCR-W 579, 585).

Around the age of 23, James was tubing with friends in a lake when he was ejected from the inner tube at high speed. He hit his head on the water and lost consciousness. Someone nearby saved him from drowning. (PCR-W 757).

In 1985, he was racing his car on a gravel road and drove into a pine tree, totaling the car. He suffered a brief loss of consciousness and felt dazed and confused. (PCR-W 585). In 1991, he was involved in a fight wherein he was stabbed 9 times and hospitalized for approximately one to two weeks with injuries to his face and arm, a collapsed lung, and perforated intestines, which required abdominal surgery. In the end, he received 28 stitches and 195 staples to close his wounds. (PCR-W 579, 585).

James' numerous head injuries all meet the clinical criteria for traumatic brain injury. (PCR-W 607). Repetitive types of traumatic brain injury (TBI), such as the ones sustained by James, are more likely than not

associated with some degree of brain volume loss and potentially accelerated aging effects. (PCR-W 608). A TBI is magnified if the injuries are repetitive. (PCR-W 608). Repetitive head injuries that occur while the brain is still developing further disrupt inhibitory control over behavior. (PCR-W 608). TBI can cause structural harm to the brain, which is exactly what may have occurred here based on anecdotal reports of James' life history. (PCR-W 608). James' history of untreated traumatic head injuries could explain his current cognitive decline. (PCR-W 581). Repeated head trauma is a known risk factor for brain changes associated with neurocognitive impairments and dementia. (PCR-W 1034).

C. Multiple adverse developmental factors continued to worsen James' cognitive decline throughout his lifetime.

James' background reveals the presence of multiple toxic formative influences or adverse developmental factors, which can be grouped into five categories: transgenerational, neurodevelopmental, family/parenting, community, and disturbed trajectory. (PCR-W 753).

Among James' transgenerational factors, he was exposed to transgenerational family distress and a predisposition to substance abuse. (PCR-W 753). James' father was largely absent from his early life. James' mother would often disappear for months at a time. (PCR-W 753). While his father's drug and alcohol abuse has already been noted *supra*, his mother's

mental health was also of concern. (PCR-W 753). James eventually went to live with his father when he was around 12 years old, only for his father to introduce James to drugs and then abandon him again. (PCR-W 754-55). In addition to James' father using drugs, he was also selling drugs, and enlisted 13-year-old James to help him. James remembers his father would throw a big duffle bag on the table and have James pack drugs along with other men who worked for him. There was an understanding that James could keep whatever drugs fell on the floor. (PCR-W 755).

James' neurodevelopmental factors include: maternal stress; drug abuse beginning in childhood; head injuries; poor academic performance; impaired cognitive functions; and exposure to traumatic events. (PCR-W 754). Some of these have already been discussed *supra*. When James was around age 14 or 15 after his car accident, he began to notice certain cognitive deficits. (PCR-W 757). He would forget people's names and how to complete certain tasks. He would sometimes stop talking mid-sentence, stare into space, and wander off. (PCR-W 757). Some experts have opined that these cognitive deficits were probably the result of organic brain damage, head injuries, and drug abuse. (PCR-W 757). Neuropsychological testing has revealed a significant decline in cognitive skills and impaired executive functions over time, leading to the conclusion that James has a

neurodegenerative disorder marked by a significant decrease over time. (PCR-W 758).

James' family and parenting factors include multiple forms of abuse and abandonment, as well as poverty and housing instability. (PCR-W 759). When James was about 11 years old, he and his mother moved to Florida where they lived in an old wooden shed and had little money. (PCR-W 759). James remembers that the water coming out of the faucets was brown, that they received food stamps, and at times, their only food was potatoes. (PCR-W 759).

James was subjected to harsh physical discipline by both his mother and his stepfather. They would hit him with belts and bare hands. His father would also hit him with thorny raspberry tree twigs, cables, and other objects. (PCR-W 760). In addition, James exposed to the domestic violence between his mother and stepfather. (PCR-W 760). On one occasion, his stepfather pushed his mother so hard that she flew across the room. This prompted James to grab a BB gun and point it at his stepfather, saying "don't hurt my mother." (PCR-W 761).

Studies show that neglect can cause more harm to a young child's development than overt physical abuse, including subsequent cognitive delays, impairments in executive functioning, and disruptions of the body's

stress response. This persistent activation of stress response systems can weaken developing brain architecture and lead to mental health problems. (PCR-W 761). James never received affection from any of his caregivers. He described his childhood home as: “We were not really a family. We were more like a group of individuals living under the same roof. There was no cooperation or affection.” (PCR-W 762). His mother would only hug him on his birthday or other special occasions. His father was cold and distant. His mother acknowledged that she saw James as a burden and did not have much contact with him. (PCR-W 762). She once told him “I’m glad I had you first because I got out all my mistakes with you.” (PCR-W 763).

Community factors that James experienced included alienation and rejection by his peers. (PCR-W 763). James was bullied and beaten at the schools he attended because his hair was almost white. Children would mock him by calling him Santa Claus and Snow White. (PCR-W 763). Being bullied eroded his already low self-esteem and prevented him from establishing positive friendships. (PCR-W 763). He also frequently moved schools which only made the situation worse. When his father made him part of his drug-selling crew, James went from being bullied to being the cool kid overnight. (PCR-W 763). James was then able to befriend older kids who accepted him and provided him with harder drugs. (PCR-W 763). There was

a lack of community support, protection, and guidance. James recounted that a teacher once compared him to Cyrano de Bergerac, telling James that he could still accomplish things in life despite being unattractive. (PCR-W 764). James was hurt by this comment because the teacher implied that he was unattractive, made him into an “other,” and judged him based on his skin pigment. (PCR-W 764).

James was also exposed to disturbed trajectory factors, which are conditions or events that derail individuals from healthy developmental pathways. (PCR-W 764). For James, these factors included: social and emotional disturbance beginning in childhood; deficient coping and functioning difficulties; leaving school after the 10th grade; being discharged from the Army; and deficient early interventions. (PCR-W 764). James frequently struggled with depression, exhibiting a sense of sadness, loneliness, and worthlessness from an early age. He indicated that he sometimes felt abandoned and worthless and did not want to burden others. (PCR-W 765).

As an alternative to these aforementioned adverse developmental factors, James’ background can also be analyzed through the lens of the Adverse Childhood Experiences (ACE) model. (PCR-W 771). The ACE study revealed that each childhood adversity significantly increased an

individual's risk for medical and mental disturbances even decades later. Individuals with 4 ACEs or more showed a notably higher risk for a range of medical and mental disorders. James has at least 7 out of 10 ACEs: psychological abuse; physical abuse; psychological neglect; physical neglect; parents' divorce; witnessing domestic violence; and living with a caregiver who abused alcohol or other drugs. (PCR-W 771).

Clinical literature has shown that these factors identified as neurodevelopmental factors, as well as the ACE factors, alter the trajectory of the brain. (PCR-W 607). The regions of the brain that form the limbic system (emotional brain) as well as memory and executive control regions of the brain, are particularly vulnerable to physical and emotional abuse, where maltreatment literally alters brain development in these regions. (PCR-W 607). These are the last regions of the brain to mature in the process from adolescence to adulthood. Accordingly, if ACE factors occur at critical time periods in brain development, this can alter the trajectory of the developing brain. (PCR-W 607). In James' case, all of the adverse influences that were occurring in his brain occurred at critical time periods in brain development. (PCR-W 607).

- D. Already suffering from a dementing process, a near-fatal heart attack in 2023 deprived James' brain of oxygen and has contributed to further cognitive decline.**

On January 11, 2023, while at Union Correctional Institution, James was found unresponsive in cardiac arrest. It is unknown how long he was down prior to being resuscitated. CPR was initiated and continued for 20 minutes before his pulse returned. (PCR-W 595). He was intubated and defibrillated twice in the field. James was comatose upon arrival to the emergency room. He had received sedation with ketamine and was paralyzed with rocuronium in the field. He was admitted, had a stent placed in his right coronary artery, and transferred to the intensive care unit, where he remained sedated. (PCR-W 595). He suffered biventricular cardiogenic shock, hypoxemic respiratory failure, and multiple rib fractures associated with chest compressions. (PCR-W 595). He remained in the hospital for five days until he was discharged back to the prison. (PCR-W 595).

The length of unwitnessed unconsciousness is a crucial factor in assessing the likelihood of long-term brain injury. Given that the underlying cause was a heart attack, it is certain that James experienced inadequate or absent cerebral blood flow for an undetermined period. Research indicates that even 5 minutes of hypoxia (low levels of oxygen) can result in irreversible ischemic damage and lasting cognitive impairment. (PCR-W 777).

Prior to his discharge from the hospital, James underwent neurological testing which included a CT scan and EEGs. (PCR-W 595). These diagnostic

tests support that James suffered from acute hypoxic-ischemic encephalopathy (acute brain injury) due to the absence of a pulse for 20 minutes and low oxygen levels, which could have worsened his longstanding cognitive decline. (PCR-W 606).

Moreover, the findings from the CT suggest underlying cortical atrophy and may indicate an ongoing neurodegenerative process. (PCR-W 778-79). The chronic brain atrophy, as suggested by the CT reports, particularly in the frontal and parietal lobes, is associated with various forms of dementia and is expected to impact cognition, language, and potentially memory. (PCR-W 779).

Finally, neuropsychological testing performed both before and after James' heart attack corroborate his cognitive decline. Specifically, there has been a significant decline of cognitive skills over time. This is demonstrated in fluid reasoning, both verbal and visual, areas of academic functioning, and memory skills. (PCR-W 592). Executive functioning, such as complex information processing, judgment, and reasoning, as well as decision making skills, were all below expectation when James was examined. (PCR-W 592). The symptomatology appears to stem from brain injury. (PCR-W 592).

When James was asked what changes he has noticed in his functioning since his heart attack, he stated that he gets frustrated since he

is unable to do things he did before. He stated “I’m already lost,” “It disappears on me,” and “I don’t have no clue,” when presented with higher order tasks. (PCR-W 884). At times, during the evaluation, James seemed to be somewhere else, blanking out for short periods of time. (PCR-W 884). The neuropsychological evaluation performed after his heart attack revealed a clear and significant decline in his cognitive mental abilities, and an insidious and progressive dementia process taking place. (PCR-W 884).

SUMMARY OF ARGUMENT

ARGUMENT I: The totality of circumstances in James’ case, including his thirty years on death row, violates the Eighth Amendment’s prohibition against cruel and unusual punishment. James urges this Court to consider his cognitive decline, his physical and mental deterioration following a near-fatal heart attack, his victimization by other inmates, his lack of basic human contact, and his history prior to being on death row including repeated head traumas and extensive drug and alcohol abuse, all of which have exacerbated his current condition and render his execution in violation of the Eighth Amendment’s cruel and unusual punishment clause.

ARGUMENT II: Newly discovered evidence of James’ 2023 brain scans following his near-fatal heart attack demonstrate that his execution would

violate the Eighth and Fourteenth Amendments. Despite James' diligence, these scans were only made available to him just prior to Governor DeSantis signing his death warrant. Preliminary reviews of these scans revealed evidence of James' brain dysfunction that is relevant to the type of individualized sentencing required by the Eighth and Fourteenth Amendments.

ARGUMENT III: This claim is not a relitigation of a *Hurst* claim. In fact, nowhere in James' motion for postconviction relief following the signing of his death warrant does he mention *Hurst*. Rather, this claim alleges that non-unanimous jury verdicts do not comport with the evolving standards of decency; and executing someone whose death sentence was imposed by a non-unanimous jury constitutes cruel and unusual punishment under the *Eighth Amendment*. The State of Florida is an extreme outlier among the states that still apply the death penalty for executing people with non-unanimous jury recommendations. James urges this Court to re-examine the compelling data of the evolving standards of decency across the United States and hold that his execution is prohibited by the Eighth Amendment because one juror voted to spare his life.

STANDARD OF REVIEW

Because the circuit court denied postconviction relief without an evidentiary hearing, this Court must accept the factual allegations presented in James' motion and in this appeal as true to the extent they are not conclusively refuted by the record. *Ventura v. State*, 2 So. 3d 194, 197-98 (Fla. 2009). Further, this Court "review[s] the trial court's application of the law to the facts *de novo*." *Green v. State*, 975 So. 2d 1090, 1100 (Fla. 2008). A postconviction court's decision whether to grant an evidentiary hearing is likewise subject to *de novo* review. *Rose v. State*, 985 So. 2d 500, 505 (Fla. 2008).

ARGUMENT

- I. **The circuit court erred in denying James' claim that based on the totality of circumstances, executing James after thirty years in solitary confinement on death row would violate the Eighth Amendment's prohibition against cruel and unusual punishment.**
 - A. **James' Eighth Amendment claim is timely.**

In denying this claim, the circuit found this claim to be untimely because James' condition has been known, evaluated, and reported for many years. (PCR-W 894). This finding misconstrues James' claim, which urges this Court to consider the totality of his current circumstances to find that his execution would violate the Eighth Amendment. His claim is timely because his circumstances have recently changed, including his recent near-fatal

heart attack and the resulting exacerbation to his cognitive decline. Therefore, this claim could not have been brought until now.

B. James has not previously raised this claim.

The circuit court also held that this claim is procedurally barred because James previously litigated this issue in his “First and Third Amended Motions to Vacate Convictions of Judgment and Sentence.” (PCR-W 895). The circuit court erred in making this finding.

The court reasoned that James made *similar* claims regarding his competency, drug and alcohol abuse, and developmental, clinical, and mental health issues in his first postconviction motion. (PCR-W 895). This is inaccurate, as those claims referred to by the court were ineffective assistance of counsel claims. *See James*, 974 So. 2d 365. This is not an ineffective assistance of counsel claim, nor is it a claim raising James’ competency, which had been raised in prior motions.

The court further found that James also raised similar claims in his third amended motion to vacate. This is also inaccurate. These claims were also ineffective assistance of counsel claims and claims that James was incompetent at the time of his postconviction waiver. *See James*, 323 So. 3d 158. Again, that is not the issue being raised now.

Since James has never before raised this claim involving the totality of his current circumstances and his execution violating the Eighth Amendment's prohibition against cruel and unusual punishment because of those circumstances, there is no procedural bar.

C. The circuit court erred in finding James' claim meritless.

The circuit court found that this claim lacks merit because this Court has repeatedly rejected similar claims regarding a defendant's lengthy stay on death row. (PCR-W 896). However, this claim is not merely involving James' length of stay in solitary confinement on death row, nor is it a conditions of confinement claim. Rather, James' claim encompasses the totality of his current circumstances and urges this Court to look beyond merely his time in on death row and consider his mental and physical decline, his early dementia, the attacks he has suffered from other inmates (PCR-W 813-43), and other relevant circumstances.

James' physical and mental health have rapidly deteriorated following a near fatal heart attack he experienced in January of 2023. At the time of his heart attack, James was already experiencing cognitive decline, which was then exacerbated by prolonged oxygen deprivation from the cardiac event. James has, for years, suffered from a dementing process that has been assessed by several mental health professionals. He has experienced

both short and long-term memory loss, difficulty recalling words, and a disorganized thought process. Such deficits are a product of repeated head traumas, extensive prior drug and alcohol use, and a recent near-fatal heart attack.

James has been evaluated by several experts over the years concerning his cognitive decline. Dr. Julie Kessel, M.D., a board-certified neurologist who evaluated James in September of 2018, noted that James has “difficulty finding words and frequently lost his train of thought in the middle of a sentence.” (PCR-W 574). She noted “gaps in his memory” as well as “severe headaches over the years, with continuation into the present” and suggested that such deficits “appear to be longstanding, possibly the result of organic brain damage, his history of head injuries, and his extensive prior alcohol and drug abuse.” (PCR-W 574). In addition to James’ cognitive decline, Dr. Kessel opined that James “may have a longstanding, undiagnosed seizure disorder” where his observable, occasional facial tics present as “petit mal generalized seizures.” (PCR-W 575).

Dr. Eddy Regnier, MSW, MA, Ph.D., a forensic psychologist, evaluated James in December of 2018 for cognitive impairments, and observed the same short and long-term memory problems and struggles with word recall. (PCR-W 578). Similarly, Dr. Hyman Eisenstein, Ph.D., ABN, a

neuropsychologist evaluated James and administered several tests to determine his psychological and neuropsychological functioning. Dr. Eisenstein concluded that James suffers from a significant decline of cognitive skills over time as well as possible neurodegenerative disorder due to repeated head trauma and substance abuse. (PCR-W 592).

James' ongoing cognitive decline came to a head on January 11, 2023, when he was found in his cell unresponsive and blue in color. It is unknown how long he went without oxygen before he was found. Three rounds of shocks were delivered via an automated external defibrillator followed by four rounds of compressions over a near thirty-minute period. James was then transported to the hospital where lifesaving measures were taken, and he was intubated. Overall, he suffered significant oxygen deprivation, multiple rib fractures associated with chest compressions, and placement of a cardiac stent. James was in the hospital for four days receiving treatment for the cardiac event. Such an event has led to a steep decline in James' cognitive functioning as well as the obvious worsening of his physical health.

Each manifestation described by Drs. Kessel, Regnier, and Eisenstein in their reports including word recall and short and long-term memory issues appeared to be exacerbated by the cardiac event. Vascular neurologist, Dr. Lucia Rivera Lara, MD, MPH, after reviewing his medical records, opined as

to how the cardiac event may have impacted James' cognitive decline. Dr. Rivera Lara noted that James has pre-existing cognitive decline resulting from repeated head trauma, concussions, and substance abuse. She concluded that James suffered a mild hypoxic-ischemic encephalopathy (HIE), a brain injury, "due to the absence of a pulse for 20 minutes and low oxygen levels, which could have worsened his longstanding cognitive decline." (PCR-W 596). Because James has pre-existing cognitive impairment, the resulting brain injury may be more difficult to recover from. Thus, Dr. Rivera Lara recommended James undergo further cognitive testing, specifically a battery of neurocognitive tests. (PCR-W 596).

Dr. Hyman Eisenstein, who is familiar with James' functioning mere months before his heart attack, conducted an evaluation on December 10, 2024, to more precisely assess James' cognitive functioning. He found that, as compared to the results from 2022, James had "several areas of significant decline," Specifically:

Executive functioning scores declined, and there was an increase in perseveration and lack of mental flexibility. Visual spatial graphic skills in both immediate and half hour delay conditions declined by over fifty percent from previous test scores. Motor speed declined by over three standard deviations, severely impaired, requiring much more time to complete a task.

It is evident that James' cardiac arrest and lack of oxygen have resulted in residual brain behavior deficits. However, because of constraints in my own schedule as well as availability at the

prison, my assessment may not have captured the full extent of James' cognitive decline. It is my recommendation that a more comprehensive neuropsychological evaluation be conducted to further compare present functioning to baseline pre-cardiac arrest levels, and to determine if an even greater decline is present than what my December 10, 2024, assessment detected.

(PCR-W 599-600). Following his near-fatal heart attack, computed tomography ("CT") brain imaging was performed on James on January 11, 2023. These scans were reviewed by Dr. Erin David Bigler, Ph.D., a board-certified clinical neuropsychologist and expert in neuroimaging. As to the need for such scans, Dr. Bigler opined that a "mild prominence of the sulci and ventricles in a frontoparietal dominance" as noted by the radiologist, is an indication of volume reduction in the brain which is often an indicator of cerebral atrophy. (PCR-W 603). In other words, this is an indication of brain damage. Critically, Dr. Bigler noted that this observation sulcal prominence and ventricular enlargement has to reflect the chronic state of James' brain before the cardiac event, i.e., this brain damage predated James' cardiac arrest, possibly by many years.

Dr. Bigler also explained how the ACE factors and prior traumatic brain injury ("TBI") found by Dr. Castillo relate to the 2023 CT scans:

[A]ll of Dr. Castillo's opinions predate the cardiac arrest and associated sequelae. Of particular importance for looking at James from a neuropsychological standpoint are the issues that Dr. Castillo indicates as "transgenerational family distress as

affecting neurodevelopmental factors in James' brain development." Such factors have been demonstrated in the clinical literature, especially with advanced neuroimaging methods involving magnetic resonance imaging (MRI) and various types of functional neuroimaging clinical studies. This is what is referred to as Adverse Childhood Experiences (ACEs) where these influences alter the trajectory of brain development. As outlined in Dr. Castillo's report, there was not only an early drug abuse that was fostered by James' father, but it included things like inhalant abuse, which is particularly damaging to the developing brain, and those early experiences in the developing brain alter the course of brain development, especially those regions that govern social-emotional development, which sets the stage for early-onset polysubstance abuse. It appears that James had a very broad exposure to polysubstance abuse, which on top of the drugs, he would drink excessively. **History of polysubstance abuse is a known factor that may be associated with loss of brain volume.**

...

Dr. Castillo also points out multiple head injuries. There apparently was an accident when James was 15 years of age and he experienced loss of consciousness. It also was apparently reported in the hospital records that he was diagnosed with a concussion and skull fracture and from a mental status standpoint, had some level of post-traumatic amnesia. These are all well-defined clinical standards that indicate, without question, that James met criteria for having sustained a mild traumatic brain injury. This apparently occurred again when he was older, 23 years of age, in some type of a tubing accident, also associated with loss of consciousness and there was another instance of his being hit with a baseball bat, battery cable and a 2 x 4. Likewise, there was this incident where James was in a fight and sustained stab wounds with hospitalization and treatment. **What is important from the standpoint of traumatic brain injury, especially repetitive types of traumatic brain injury, is that it is more likely than not to be associated with some degree of brain volume loss and potentially accelerated aging effects. Accordingly, given this history, this may be a major factor in what was**

observed in the 2023 CT scan that demonstrated volume loss especially within in a frontoparietal distribution.

(PCR-W 607-08) (emphasis added). In conclusion, Dr. Bigler noted:

Polysubstance abuse, chronic depression/mood dysregulation disorders, multiple head injuries and prior hypoxic-ischemic brain injury are all risk factors for later in life dementing illnesses, including progressive deterioration in brain function and Alzheimer’s disease. History of multiple head injuries is a known factor that may accelerate the normal aging process in the brain.

(PCR-W 609) (emphasis added).

In addition to Dr. Bigler, James’ 2023 CT scans were also reviewed by Dr. Abhi Kapuria, M.D., who is board-certified in both Neurology and Clinical Neurophysiology. In addition to concurring with Dr. Bigler’s findings, Dr. Kapuria noted:

The length of unwitnessed unconsciousness, often referred to as downtime, is a crucial factor in assessing the likelihood of long-term brain injury. Given that the underlying cause was ventricular fibrillation, it is certain that the patient experienced inadequate or absent cerebral blood flow for an undetermined period. Research indicates that even five minutes of hypoxia can result in irreversible ischemic damage and lasting cognitive impairment.

(PCR-W 483) (emphasis added). **He also noted that James’ presentation upon arrival at the emergency department “indicates a profound coma, with no immediate signs of neurological recovery.”** (PCR-W 484). The patient remained in this state for two days before showing initial

improvements in cognition. **Although not universal, it is more probable that someone who suffers such a severe change in mentation is likely to live with some degree of long-term cognitive impairment.** *Id.* (emphasis added). While still in the hospital, James received an occupational therapy (“OT”) assessment on January 15, 2023, which noted “persistent functional impairments, including difficulties in grooming, bathing, dressing, and significant disorientation to time. He was noted to incorrectly identify the date as January 18, further raising concerns about residual cognitive dysfunction.” *Id.*

With regard to the CT scans, Dr. Kapuria noted that the findings of a mild prominence of the sulci and ventricles with frontoparietal predominance suggest underlying cortical atrophy and may indicate an ongoing neurodegenerative process. (PCR-W 484-85). In addition, he opined:

Chronic brain atrophy, as suggested by the CT reports, particularly in the frontal and parietal lobes, is associated with various forms of dementia and is expected to impact cognition, language, and potentially memory. The presence of these findings on imaging further supports the likelihood of underlying neurodegenerative disease contributing to this patient’s cognitive decline.

(PCR-W 485) (emphasis added). As to James’ pre-existing and progressive cognitive decline, Dr. Kapuria noted that “[p]rior neuropsychological evaluations provide substantial evidence of a longstanding cognitive disorder

that predates his cardiac arrest.” *Id.* And that “[t]hese findings strongly suggest a progressive neurodegenerative condition, which was likely exacerbated by the hypoxic-ischemic injury sustained during cardiac arrest.” *Id.* Further, “James’ history of recurrent TBI, a skull fracture at age 14, substance abuse, and a possible undiagnosed seizure disorder all contribute to a vulnerable neurological state, making him more susceptible to long-term damage from an anoxic event.” (PCR-W 486). As to the impact of hypoxic-ischemic brain injury on cognitive functioning, Dr. Kapuria opined:

The duration of cerebral hypoxia in James’ case is sufficient to cause permanent neurological impairment. Studies have demonstrated that prolonged hypoxia exceeding 5-10 minutes can lead to irreversible neuronal damage, particularly in the hippocampus, basal ganglia, and cortical regions responsible for executive function and memory. Given that Mr. James experienced at least 20 minutes without effective cerebral blood flow, the likelihood of exacerbating his pre-existing cognitive impairment is extremely high.

Id. (emphasis added).

On February 20th through 21st, 2025, Dr. Eisenstein was able to do a complete evaluation, which he was previously unable to do in December of 2024 due to time constraints. Dr. Eisenstein found a significant mental decline and noted signs of early dementia. (PCR-W 884).

James recognizes prior rulings by this Court rejecting the argument that a lengthy stay on death row amounts to cruel and unusual punishment.

See, e.g., *Dillbeck v. State*, 357 So. 3d 94, 103 (Fla. Feb. 16, 2023) (quoting *Booker v. State*, 969 So. 2d 186, 200 (Fla. 2007)). However, James' claim does not simply rely on the length of his death row stay. Rather, this claim argues that the totality of his circumstances – including his rapidly declining mental and physical health during that period – render his execution unconstitutional in violation of the Eighth Amendment's prohibition against cruel and unusual punishment.

II. The circuit court erred in denying James' claim that new evidence of brain scans demonstrates that his execution would violate the Eighth and Fourteenth Amendments.

The circuit court erred by finding that: (1) this claim is untimely; (2) the results of the recent brain scans are not newly discovered evidence; and (3) James cannot establish that this evidence would likely yield a less severe sentence. (PCR-W 901).

A. James' claim is timely.

In denying this claim, the circuit court held that it was untimely because "it is unclear why counsel did not actually receive the results until two years" after the scans were performed. (PCR-W 901). This finding seems to ignore the explanation from James as to why he was unable to obtain the results of the scans sooner. As stated in James' motion for postconviction relief after his death warrant was signed, his attorneys made multiple and repeated

attempts over the course of almost two years to obtain these records and imaging results. Additionally, James listed the witnesses, pursuant to Fla. R. Crim. P. 3.851(e)(2)(C) that would be able to testify in support of this claim. One of those witnesses was Nels Roderwald, the investigator for James' federal counsel, who would testify as to his efforts to obtain these records and establish due diligence for this claim. If the circuit court had additional questions as to whether James was entitled to relief on this claim, it should have held an evidentiary hearing on the matter where James could have called witness and introduced evidence to support this claim.

It is important to note that the federal district court in James' case explicitly "consider[ed] the present motion as a timely motion for relief from a final judgment under Rule 60(b)(2)." *James v. Sec'y, Fla. Dep't of Corrs.*, Case No. 6:18-cv-993, ECF No. 101 at 7 (N.D. Fla.). This is significant because Fed. R. Civ. P. 60(b)(2) is reserved for: "newly discovered evidence that, with reasonable diligence, could not have been discovered in time to [seek relief under Rule 59]." In James' case, that would have been 28 days after September 6, 2024, when his federal habeas petition was denied. This necessarily means the district court accepted that the brain scans could not have been discovered with reasonable diligence before at least early

October of 2024. Since James' motion for postconviction relief after the signing of the warrant was filed well within one year of that, it is indeed timely.

B. The CT scan results are newly discovered evidence.

The court held that the scans do not constitute newly discovered evidence because James' "cognitive decline and mental deterioration existed for many years," "the facts upon which this claim is based were well known to the defendant and his counsel," and this claim could have been pursued years before his death warrant was signed. (PCR-W 901).

This finding by the court overlooks that these recent brain scans following James' heart attack provided new evidence of his mental decline *since* his recent heart attack, which could not have been known prior to the heart attack itself. In Argument I, James asserts that his recent near-fatal heart attack, among other things, has exacerbated his cognitive decline. Had the Florida Department of Corrections and/or the treating hospital turned over these records to James and his counsel in a timely fashion, James would have been able to take a more in-depth look at his cognitive functioning which would include further testing.

Due to the extremely compressed warrant period, James simultaneously filed a motion for stay and a motion for further neuroimaging with his motion for postconviction relief following the signing of his death

warrant. (PCR-W 445). These additional scans were recommended by defense, particularly experts who opined following James' heart attack.

Multiple experts have concluded that additional neuroimaging scans are needed to support their diagnoses of his brain impairments. Based upon expert opinion and consultation, counsel for James reasonably believes that he suffers from neurological impairments that would be mitigating.

Neuropsychologist Dr. Hyman Eisenstein, Ph.D., conducted three examinations of James. He concluded that James presents with a neurodegenerative disorder, marked by significant decline over time. He stated that neurodiagnostic brain scans would further support his findings. (PCR-W 884).

Board Certified Psychiatrist, Dr. Julie Kessel, M.D., examined James and notable cognitive impairments. She suggested that in order for her to more fully, precisely, and meaningfully evaluate James' cognitive function, he would need to undergo further testing to include functional imaging studies of his brain such as a PET or SPECT scan to show blood flow as a function of his thought processes, as well as an atomic imaging study such as a CT or MRI scan to show the underlying structure integrity of his brain matter. She further recommended an EEG to help identify areas of the brain

that may show abnormal electrical activity such as seizure activity. (PCR-W 466).

Dr. Eddy Regnier, Ph.D., a Licensed Psychologist evaluated James and stated that he presented with multiple red flags for a cognitive impairment, such as dementia. He recommended that James should undergo an MRI to determine if his brain shows signs of cerebral atrophy related to brain injury. (PCR-W 471).

Dr. Erin David Bigler, Ph.D., Clinical Neuropsychologist, reviewed James' CT brain imaging that was performed following his near-fatal heart attack. He stated that additional neuroimaging and neuropsychological updates would be necessary to fully address James' current status. Dr. Bigler suggested that MRI results would clearly help resolve the issues of underlying brain damage that are not fully captured in the CT imaging. He also suggested that an MRI could be compared to the 2023 baseline CT, which could determine the rate of brain volume loss. This could also help corroborate the level of cognitive impairment James has experienced. (PCR-W 481).

Dr. Abhi Kapuria, M.D., Board Certified in Neurology and Clinical Neurophysiology, reviewed the 2023 scans which followed James' heart attack. He opined that James likely had cognitive deficits that were

significantly worsened following his cardiac arrest due to prolonged cerebral hypoxia. He stated that given the complexity of James' cognitive and neurological history, additional testing is medically necessary to further characterize the extent of his brain injury. He suggested a Brain MRI (without contrast) to assess for chronic ischemic changes, or other injury not well visualized on CT; an FDG-PET Scan to evaluate for metabolic dysfunction indicative of neurodegenerative processes or hypometabolism in brain regions affected by anoxic injury; and a routine 20-minute EEG to identify potential underlying seizure activity and to re-evaluate the baseline alpha theta range activity now further from the initial injury. (PCR-W 486-87).

James again, along with the filing of his initial brief, requests this Court grant a stay of execution (PCR-W 440) so that James may further develop this claim without the time constraints of the warrant period, and provide James with the opportunity to demonstrate that his execution would violate the Eighth and Fourteenth Amendments.

C. The CT scan results would likely yield a less severe sentence at a new penalty phase.

Finally, the circuit court found that even if the CT scan results constituted newly discovered evidence, the Defendant cannot establish that such evidence would likely yield a less severe sentence at a new penalty phase. (PCR-W 901). This finding by the circuit court ignores that the results of the

CT scans constitute significant new evidence relevant to “the type of individualized consideration ... required by the Eighth and Fourteenth Amendments in capital cases[.]” *Eddings v. Oklahoma*, 455 U.S. 104, 105 (1982) (quoting *Lockett v. Ohio*, 438 U.S. 586, 606 (1978)); see also *Enmund v. Florida*, 458 U.S. 782, 798 (1982) (the individualized sentencing required by the Eighth Amendment must consider “the validity of capital punishment” in light of the “relevant facets of character and record of the individual offender”); *Woodson v. North Carolina*, 428 U.S. 280 (1978).²

III. The circuit court erred in denying James’ claim that his death sentences violate the Eighth Amendment because his sentencing jury was not unanimous.

From well before our Nation’s Founding, unanimity has been recognized as a required component of criminal jury verdicts. See *Apodaca v. Oregon*, 406 U.S. 404, 407-08 (1972) (plurality opinion) (White J., Burger C.J., Blackmun J., Rehnquist J., joining) (“Like the requirement that juries consist of 12 men, the requirement of unanimity arose during the Middle Ages and had become an accepted feature of the common-law jury by the 18th century”); see also *Johnson v. Louisiana*, 406 U.S. 366, 369 (1972)

² Such individual circumstances need not have a causal connection to the crime. See, e.g., *Tennard v. Dretke*, 542 U.S. 274, 285-87, 289 (2004) (rejecting a requirement that “an individual must establish a nexus between [their] mental capacity and the crime” in order for such mitigating evidence to be considered).

(Powell, J., concurring) (“In an unbroken line of cases reaching back into the late 1800's, the Justices of this Court have recognized, virtually without dissent, that unanimity is one of the indispensable features of federal jury trial.”). Yet, James faces execution as the result of a non-unanimous jury verdict. (T 1076). This violates his rights under the Eighth Amendment.

A. Background and ruling below

James’ penalty phase was conducted under Florida’s previous sentencing statute. Under the statute, his advisory jury³ was required to find the presence of one or more aggravating factors sufficient to justify the death penalty; to determine whether the aggravating factor(s) outweighed the mitigating factors; and to determine whether the sentence should be life imprisonment or death (T 1058-59, 1061-68). Thus, the 11-1 recommendation means James’ jurors did not unanimously find all of the necessary factors for a death sentence.

After his death warrant was signed, James asserted in the circuit court that in light of evolving standards of decency—as reflected by common understanding at the time of the Founding, and further reinforced by current

³ The jury was repeatedly instructed that its role was advisory, and that although its recommendation would be accorded great weight by the trial judge, it was ultimately “the judge’s job to determine what a proper sentence would be[.]” (T 1070).

state consensus and recent United States Supreme Court precedent—he is not in the class of offenders who were found by a unanimous jury to be among those culpable enough to deserve a death sentence.⁴

In denying James' claim that his non-unanimous death sentence violates the Eighth Amendment, the circuit court made three findings: 1) the claim is procedurally barred because a similar claim was raised in James' 2019 successive Rule 3.851 motion; 2) the claim is untimely because James has known about his sentencing verdict since 1995; and 3) the claim is meritless because the court is bound by Supreme Court precedent establishing that unanimity is not a requirement of the Eighth Amendment. (PCR-W 902-03). Each of these findings is legally and/or factually erroneous.

B. James' Eighth Amendment claim is not a relitigation of his 2019 *Hurst* claim, and thus is not subject to any procedural bar.

The circuit court ruled that this claim was procedurally barred because James “raised a similar claim that his death sentence was unconstitutional under *Hurst v. Florida*...which held that the Eighth Amendment required a

⁴ *Cf. Witherspoon v. Illinois*, 391 U.S. 510, 520 n.15 (1968) (the decision by a jury to sentence a defendant to death maintains the “link between contemporary community values and the penal system—a link without which the determination of punishment would hardly reflect the evolving standards of decency that mark the progress of a maturing society.”) (internal quotation omitted).

unanimous jury recommendation of death.” (PCR-W 902). This ruling misunderstands the contours of the claim at bar, confuses it for a distinguishable *Hurst* claim raised in James’ 2019 successive 3.851 motion, and indeed misapprehends the holding of *Hurst*.

Contrary to the circuit court’s finding, *Hurst* was not an Eighth Amendment case—rather, it struck down Florida’s prior capital sentencing scheme under which an advisory jury recommended a sentence, and the judge made the critical findings needed to impose death as this violated the *Sixth Amendment* right to a jury trial.⁵ In keeping with this context, James challenged his death sentences in his 2019 Rule 3.851 motion under the Sixth Amendment. And the bulk of the claim pertained to the retroactivity of *Hurst* under both state and federal approaches. See *Witt v. State*, 387 So. 2d 922 (Fla. 1980); *Teague v. Lane*, 489 U.S. 288 (1989).

The present claim, in contrast, alleges that non-unanimous jury verdicts do not comport with the evolving standards of decency; thus, executing someone whose death sentence was imposed by a non-

⁵ *Hurst*, 577 U.S. at 94 (“We hold this sentencing scheme unconstitutional. The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a death sentence. A jury’s mere recommendation is not enough.”); see also *id.* at 97 (“We granted certiorari to resolve whether Florida’s capital sentencing scheme violates the Sixth Amendment in light of *Ring*. [] We hold that it does, and reverse.”) (internal quotations omitted).

unanimous jury constitutes cruel and unusual punishment under the *Eighth Amendment*. In fact, the claim in James' under-warrant successive 3.851 motion contained not a single reference to *Hurst*.

Further, even if the circuit court's finding that this claim is barred was based on a correct understanding of the past and present claims being raised and constitutional rights being violated, an Eighth Amendment claim that James is categorically exempt from execution must not be subject to a procedural bar.

C. James' Eighth Amendment claim is timely.

In finding this claim untimely, the lower court relied solely on the fact that James "has clearly known about the jury's non-unanimous recommendation since his 1995 penalty phase" but did not raise it on direct appeal (PCR-W 902). But this overlooks the fact that James' Eighth Amendment nonunanimity claim is premised upon the accumulation of a consensus that only began in the wake of *Hurst*—nearly two decades after James' direct appeal was decided. James could not have raised this claim before then.

Further, the lower court's ruling that James should have raised this claim earlier appears to be premised on the same misunderstanding of the claim's contours as led to the lower court's erroneous procedural bar ruling. Unlike a Sixth Amendment *Hurst* claim, the viability of an Eighth Amendment

evolving standards of decency claim turns on a) objective indicia of societal consensus as expressed in legislative enactments and state practices; and b) the United States Supreme Court's own understanding and interpretation, and the Eighth Amendment's text, history, meaning, and purpose. See, e.g., *Graham v. Florida*, 560 U.S. 48, 62 (2010); *Kennedy v. Louisiana*, 554 U.S. 407, 420; *Roper v. Simmons*, 543 U.S. 551, 563 (2005). In other words, while historical understanding is highly relevant to a determination of whether imposition of James' death sentences comports with the Eighth Amendment, such a determination relies on an evaluation of **present standards** as evidenced by **current state practice**. Thus, this claim became ripe when Governor DeSantis signed James' execution warrant on February 18, 2025. The claim is timely raised.

D. The circuit court erred in finding James' Eighth Amendment claim meritless.

The circuit court erred in finding James' claim meritless, because both surveys of both historical understandings and current state practice demonstrate that execution of an individual sentenced by a non-unanimous jury would constitute cruel and unusual punishment. Additionally, the circuit court's purported reliance on this Court's precedent fails to take into account the evolution of state practice in recent years, and abdicates its own duties under the federal Constitution.

1. James' death sentences violate evolving standards of decency as reflected by overwhelming state practice and consistent with the Framers' intent.

The Eighth Amendment “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.” *Trop v. Dulles*, 356 U.S. 86, 100 (1958). In determining whether the death penalty may be imposed despite a non-unanimous sentencing verdict, the guiding principle requires courts to survey: a) the United States Supreme Court’s own understanding and interpretation, and the Eighth Amendment’s text, history, meaning, and purpose; and b) objective indicia of societal consensus as expressed in legislative enactments and state practices. See *Graham v. Florida*, 560 U.S. 48, 62 (2010); *Kennedy v. Louisiana*, 554 U.S. 407, 420; *Roper v. Simmons*, 543 U.S. 551, 563 (2005).

a. At the Founding, capital sentences required unanimous juries.

“[T]he Constitution’s guarantees cannot mean less today than they did the day they were adopted.” *United States v. Haymond*, 139 S. Ct. 369, 2376 (2019); see also *Cunningham v. Florida*, 144 S. Ct. 1287, 1288 (2024) (Gorsuch, J., dissenting from the denial of certiorari) (“our cases have insisted, repeatedly, that the right to trial by jury should mean no less today, and afford no fewer protections for individual liberty, than it did at the Nation’s founding.”). One factor in determining the proper scope of the Eighth

Amendment is a review of the United States Supreme Court's own understanding and interpretation of the text, history, meaning, and purpose of the Eighth Amendment and unanimous jury verdicts. See, e.g., *Beck v. Alabama*, 447 U.S. 625, 633-35 (1980); *Woodson v. North Carolina*, 428 U.S. 280, 289 (1976). Here, such a review indicates that James' execution would violate the Eighth Amendment because unanimity has been an essential component of criminal jury trials since our Nation's Founding.

The Framers of the Constitution broadly sought to preserve for future generations the right to unanimous 12-member juries in criminal cases. See *Cunningham*, 144 S. Ct. at 1287-88 (Gorsuch, J., dissenting from the denial of certiorari) (encouraging the Court to grant certiorari "to ensure no government in this country may send a person to prison without the unanimous assent of 12 of his peers.").

At the Founding, the Constitution permitted the death penalty only "so long as proper procedures are followed." *Bucklew v. Precythe*, 139 S. Ct. 1112, 1122 (2019). In the capital sentencing context, this was understood to require a unanimous jury verdict. At common law, the determination of whether a defendant should be sentenced to death belonged to the jury. As Blackstone explained, it was understood that "no man should be called to answer to the king for any capital crime unless . . . 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 his equals.” Janet C. Hoefel, *Death Beyond a Reasonable Doubt*, 70 Ark. L. Rev. 267, 271 (2017) (quoting 4 William Blackstone, *Commentaries on the Law of England* 343 (4th ed., Oxford, Clarendon Press 1770)). By the time the Bill of Rights was adopted, the jury’s right to determine whether a defendant should face the death penalty “was unquestioned.” Welsh S. White, *Fact-Finding and the Death Penalty: The Scope of a Capital Defendant’s Right to Jury Trial*, 65 NOTRE DAME L. REV. 1, 10-11 (1989).

Given the number of crimes that mandated capital punishment, the determination of whether to find the defendant guilty and whether to spare his life was frequently the same. In such cases, it was widely understood that the jury had nullification power if it believed a death sentence would be too harsh. See *Woodson*, 428 U.S. at 289-290. This practice, known as “sanction nullification,” was widely recognized. Thomas Andrew Green, *Verdict According to Conscience: Perspectives on the English Criminal Trial Jury 1200-1800*, 97 (1985) (noting the practice of “sanction nullification” as distinct from complete nullification). Thus, although “under this capital punishment scheme, there was no bifurcation between guilt and sentencing,” “common law juries necessarily engaged in ‘de facto sentencing’ when

deciding whether the defendant was guilty as well as the degree of guilt.” Richa Bijlani, *More than Just a Factfinder: The Right to Unanimous Jury Sentencing in Capital Cases*, 120 MICH. L. R. 1499, 1523, 1525 (2022) (“the question of ‘appropriate punishment’ was not only at issue in those unified proceedings but was often the principal issue faced by the jury”).

Part and parcel of the jury’s determination that a defendant should be sentenced to death were the corresponding protections that the jury’s verdict be unanimous and beyond a reasonable doubt. See Hoeffel, *supra*, at 275-79 (noting the creation of the beyond a reasonable doubt standard was based on the “morality of punishment” in capital cases, rather than fact finding). This was in contrast to less serious crimes in which judges could determine sentences and were not bound to making findings beyond a reasonable doubt. See John G. Douglass, *Confronting Death: Sixth Amendment Rights at Capital Sentencing*, 105 COLUM. L. REV. 1967 (2005) (“judges exercised sentencing discretion in choosing among [non-capital] punishments and in fixing terms of imprisonment, and . . . they exercised that discretion in sentencing proceedings that lacked the formality of jury trials”).

In *Ramos v. Louisiana*, 590 U.S. 83 (2020), in the Sixth Amendment context, the United States Supreme Court catalogued the centuries-long

history of jury unanimity when defendants were charged with “serious” crimes:

The requirement of juror unanimity emerged in 14th century England and was soon accepted as a vital right protected by the common law. As Blackstone explained, no person could be found guilty of a serious crime unless “the truth of every accusation...should...be confirmed by the unanimous suffrage of twelve of his equals and neighbors, indifferently chosen, and superior to all suspicion.”⁶ **A “verdict, taken from eleven, was no verdict” at all.**⁷

Ramos, 590 U.S. at 90 (emphasis added) (footnote omitted).

The *Ramos* Court acknowledged that the early American states either also widely accepted the unanimity requirement by explicitly codifying it in their early constitutions or preserving the right to a jury trial generally. *Id.* at 90-91. By the time the Sixth Amendment was ratified in 1791, the unanimity requirement had been in effect for nearly 400 years. *Id.* at 91. And the Court acknowledged the consistency of this requirement in its own opinions. See *id.* at 92; *Thompson v. Utah*, 170 U.S. 343, 351 (1896)⁸ (recognizing a defendant’s “constitutional right to demand that his liberty should not be taken from him except by the joint action of the court and the unanimous verdict of a jury of twelve persons.”); *Andres v. U.S.*, 333 U.S. 740, 748

⁶ 4 W. Blackstone, *Commentaries on the Laws of England* 343 (1769).

⁷ J. Thayer, *Evidence at the Common Law* 88-89, n.4 (quoting *Anonymous Case*, 41 Lib. Assisarum 11 (1367)).

⁸ Abrogated on other grounds by *Collins v. Youngblood*, 497 U.S. 37 (1990).

(1948) (upholding circuit court's interpretation of a federal statute to require jury unanimity as to both guilt and punishment and reasoning that such requirement "is more consonant with the general humanitarian purpose of the statute and the history of the Anglo-American jury system.").

Although the well-established requirement of juror unanimity has traditionally been explored in the Sixth Amendment context, it is just as applicable to jury verdicts in the context of determining whether a punishment comports with the Eighth Amendment. As the Supreme Court noted in *Ramos*, a unanimous jury has been required to convict a defendant of a serious offense essentially uniformly throughout common law and contemporaneously among the vast majority of states. *Id.* at 87-93. As such, the Supreme Court recognized that the right to a jury is "fundamental to the American scheme of justice." *Id.* at 93. If it is unacceptable to subject a defendant to the possibility of facing more than six months in prison based on a less than unanimous jury vote, clearly it is unacceptable to sentence him to death.

Further, the Supreme Court has never held that a unanimous jury verdict applies solely at the guilt phase of a trial. Rather, the requirement was implicitly applied to jury trials broadly, which in the capital context includes

both guilt and sentencing phases. Common law understanding supports this broad applicability, as capital trials were not bifurcated at common law.⁹

Therefore, as originally understood at the time of the Founding, the public understanding was that the determination of whether to sentence a defendant to death belonged to a jury, which was required to make the determination unanimously and beyond a reasonable doubt.

b. Societal consensus, particularly as reflected by state practice, overwhelmingly repudiates non-unanimous sentencing verdicts.

The Supreme Court has traditionally looked to three indicators of societal consensus. First, the current state and federal sentencing laws because legislatures “are constituted to respond to the will and consequently the moral values of the people.” *Atkins v. Virginia*, 536 U.S. 304, 322–23 (2002). As such, legislation is “the clearest and most reliable objective evidence of contemporary values.” *Id.* at 322–23. Second, the Court examines actual sentencing practices. *See, e.g., Graham v. Florida*, 560

⁹ *See Gregg v. Georgia*, 428 U.S. 153 (1976) (holding that Georgia’s new statutory requirement of bifurcated capital proceedings in which the penalty phase involved identifying and weighing aggravation and mitigation resolved the constitutionality concerns expressed in *Furman v. Georgia*, 408, U.S. 238 (1972), that the death penalty not be imposed in an arbitrary and capricious manner). Thus, a bifurcated proceeding that requires unanimity to convict, but not to identify and weigh aggravators against mitigators, and then subsequently impose a death sentence is inherently arbitrary, capricious, and violative of the Eighth Amendment.

U.S. 48, 62 (2010) (“Here, an examination of actual sentencing practices in jurisdictions where the sentence in question is permitted by statute discloses a consensus against its use.”). Third, in addition to sentencing practices, “[s]tatistics about the number of executions may inform the consideration whether capital punishment . . . is regarded as unacceptable in our society.” *Kennedy v. Louisiana*, 554 U.S. 407, 433 (2008). Therefore, in evaluating James’ Eighth Amendment claim, this Court must look to the contemporary consensus regarding jury unanimity in capital sentencing.

Twenty-seven states and the federal government retain the death penalty, and four¹⁰ of those twenty-seven states are currently under a gubernatorial moratorium. Of those twenty-eight death penalty jurisdictions, only *six* currently allow the death penalty to be imposed without a unanimous jury verdict. Montana’s capital sentencing scheme allows the jury to find whether aggravators and mitigators exist and rests the sentencing determination with a single judge. Mont. Code. Ann. § 46-18-301. Still, Montana has not sentenced anyone to death since 1992, nearly *thirty-three*

¹⁰ California entered a moratorium on March 13, 2019; Ohio entered a moratorium on December 8, 2020; Oregon commuted the death sentences of the 17 people on death row in 2022; and Pennsylvania entered a moratorium in 2023; Death Penalty Information Center, <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state> (last visited Feb. 27, 2025).

years ago, has not executed anyone since 2006, and has only two people on its death row.¹¹ And in January 2025, its legislature rejected a bill that would have resumed executions.¹² Nebraska, similarly, allows the jury to find whether aggravators exist, and rests the sentencing determination with a three-judge panel. Neb. Rev. Stat. Ann. § 29-2521. Nebraska has only sentenced four¹³ people to death in the last eighteen years and has only executed four people since the death penalty was held constitutional by the Supreme Court in 1976.¹⁴ To put this in perspective, Florida has sentenced more¹⁵ people to death by means of a non-unanimous jury verdict in the last

¹¹ Jonathon Ambarian, *Montana House narrowly rejects bill intended to allow death penalty to resume*, KTVH (Jan. 30, 2025, 10:34 PM), <https://www.ktvh.com/news/montana-house-narrowly-rejects-bill-intended-to-allow-death-penalty-to-resume#:~:text=In%202021%2C%20the%20bill%20fell,William%20Golleho n%2C%20sentenced%20in%201992.>

¹² *Id.*

¹³ Bill Schammert, *Here are Nebraska's 11 death row inmates and their crimes*, KETV (May 7, 2024, 11:57 AM), <https://www.ketv.com/article/nebraska-death-row-inmates-crimes/46938630>

¹⁴ Death Penalty Information Center, <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/nebraska> (last visited February 28, 2025).

¹⁵ Robert Bailey: 9-3 verdict. Case No. 2005-cf-001093 (Bay County, Oct. 25, 2024); Eriese Tisdale: 9-3 verdict. Case No. 2013-cf-000608 (St. Lucie County, Sept. 18, 2024); Ysrael Granda: 8-4 verdict (Miami Dade County, June 27, 2024); Zephen Allen Xavier: 9-3 verdict. Case No. 2019-cf-000113 (Highlands County, June 26, 2024); Wade Wilson: 9-3 and 10-2 verdicts (Lee County, June 25, 2024)

eight months than Nebraska and Montana combined have sentenced anyone in the last eighteen years.

Indiana and Missouri consider a non-unanimous sentencing verdict to be a hung jury in which case the judge retains the sentencing determination. Ind. Code Ann. § 35-50-2-9; Mo. Ann. Stat. § 565.030. In Indiana, where only seven people are awaiting execution, only one person was sentenced to death in the last twenty-seven years after the jury could not reach a unanimous decision, and he is no longer on death row.¹⁶ In Missouri, the two persons who were sentenced to death in the last decade received non-unanimous jury votes, one of whom had their sentence vacated on direct appeal and was sentenced to life.¹⁷ Hence, compared to Missouri and Indiana's combined *two* non-unanimous verdicts in the last roughly quarter

¹⁶ See *Wilkes v. State*, 917 N.E.2d 675, 693 (Ind. 2009); Indianapolis Star, *Here's who's on Indiana's death row after the execution of Joseph Corcoran*, IndyStar (Dec. 18, 2024, 12:36PM) <https://www.indystar.com/story/news/local/2024/12/18/whos-on-indianas-death-row-after-the-execution-of-joseph-corcoran/77066289007/>

¹⁷ *Missouri Supreme Court Grants New Sentencing Trial to Man Who Was Sentenced to Death Despite 11 Jurors' Votes for Life*, Death Penalty Information Center (April 11, 2019), <https://deathpenaltyinfo.org/news/missouri-supreme-court-grants-new-sentencing-trial-to-man-who-was-sentenced-to-death-despite-11-jurors-votes-for-life>).

century, Florida has sentenced approximately 166¹⁸ people to death by non-unanimous jury verdicts in the last twenty-three¹⁹ years.

That leaves Alabama, the only death penalty jurisdiction similar to Florida that expressly allows a jury to recommend a sentence of death by a vote of at least ten jurors. Ala. Code § 13A-5-46. Thus, while Indiana, Missouri, Montana and Nebraska's capital sentencing schemes technically allow for a death sentence to be imposed by means other than a unanimous jury verdict, in practice, Alabama and Florida are the only jurisdictions that expressly allow for juror non-unanimity in capital sentencing proceedings. And Florida has the lowest threshold in the country, requiring only 8-4 jurors to vote for death demonstrating that it is a clear outlier from the vast majority of jurisdictions that have overwhelmingly repudiated non-unanimous verdicts in capital sentencing proceedings.

¹⁸ This includes individuals who were sentenced to death as well as those whose convictions and non-unanimous death sentences were final after post-*Ring v. Arizona*, 536 U.S. 584 (2002). Death Penalty Information Center, <https://deathpenaltyinfo.org/stories/florida-prisoners-sentenced-to-death-after-non-unanimous-jury-recommendations-whose-convictions-became-final-after-ring> (last visited February 28, 2024).

¹⁹ Specifically, June 24, 2002, was selected because this was when the Supreme Court issued *Ring*, which is the date this Court identified as its cutoff for those eligible for resentencing relief under *Hurst v. Florida*, 577 U.S. 92 (2016). See *Asay v. State*, 210 So. 3d 1, 22 (Fla. 2016).

Finally, this consensus for juror unanimity is also demonstrated by states' reluctance to execute those sentenced to death by a non-unanimous jury. Since 2015, 205 executions have occurred nationwide, but only 26 of those defendants were executed after being sentenced by a non-unanimous jury or mandatory judge panel²⁰—all of which were sentenced in Florida, Alabama, and Missouri. The raw numbers overwhelmingly demonstrate societal consensus to eliminate non-unanimous jury verdicts, further supporting Mr. James' argument that his death sentences violate the Eighth Amendment.

2. The federal constitution empowers this Court to recognize an Eighth Amendment right that is not specifically enumerated in United States Supreme Court holdings.

The circuit court's only merit-based reason for denying this claim was that the state courts "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

²⁰ Amber McLaughlin's jury rejected three of four aggravators proposed by the State and failed to unanimously vote for death resulting in a hung jury. <https://deathpenaltyinfo.org/missouri-set-to-execute-amber-mclaughlin-on-january-3-in-first-u-s-execution-of-a-transgender-person>. The trial judge imposed a death sentence after relying on the aggravators rejected by the jury. *Id.* Her death sentence was vacated by the federal district court but reinstated on appeal. *McLaughlin v. Precythe*, 9 F.4th 819, 826 (8th Cir. 2021).

recommendation of death.” (PCR-W 903) (quoting *Zack v. State*, 371 So. 3d 335, 350 (Fla. 2023), and *Dillbeck v. State*, 357 So. 3d 94, 104 (Fla. 2023)).²¹

In other words, the lower court ruled that because James’ claim would involve the recognition of an Eighth Amendment right not already enumerated **verbatim** by the United States Supreme Court, the claim must fail.

This ruling appears to rely on Florida’s “Conformity Clause,” the text of which states that claims regarding “the prohibition against cruel and unusual punishment[] shall be construed in conformity with decisions of the United States Supreme Court which interpret the prohibition against cruel and unusual punishment provided in the Eighth Amendment to the United States Constitution.” Art. 1, § 17, Fla. Const.

Mr. James recognizes that this Court’s recent precedent specifies that:

[T]he Supreme Court’s interpretation of the Eighth Amendment is both the floor and the ceiling for protection from cruel and unusual punishment in Florida, and this Court cannot interpret Florida’s prohibition against cruel and unusual punishment to provide protection that the Supreme Court has decided is not afforded by the Eighth Amendment.

²¹ The Court’s reference to *Ford v. State*, No. SC2025-0100, 2025 WL 428394 at *5 (Fla. Feb. 7, 2025), is misplaced. (PCR-W 903). Ford specifically attempted to raise a *Hurst* claim under warrant. As previously laid out above, Mr. James is not raising a *Hurst* claim.

Barwick v. State, 361 So. 3d 785, 794 (Fla. 2023); *Ford*, 2025 WL 428394 at

*4. However, James submits that he is still entitled to relief for two reasons.

First, the Conformity Clause applies only to claims that the United States Supreme Court has squarely decided on the merits. See *Howell v. State*, 133 So. 3d 511, 516 (Fla. 2014). Notwithstanding historical decisions demonstrating historical practice requiring unanimity, the United States Supreme Court has not explicitly decided the issue of whether the execution of non-unanimously sentenced defendants comports with the Eighth Amendment. Thus, there is no on-point precedent to which the Florida courts must conform in this case.

Second, to the extent that this Court’s precedent prohibits a state from providing more protections than are explicitly called for in United States Supreme Court holdings, this Court should revisit that precedent because it effectively forecloses evolving standards of decency in Florida. “[C]onformity with” the Eighth Amendment—as it pertains to determinations of whether an individual should be exempted from execution—requires a state court’s freedom to expand protections as society matures and becomes closer to “the Nation we aspire to be.” See *Hall v. Florida*, 572 U.S. 701, 708 (2014) (citing *Trop*, 356 U.S. at 101)). This flexibility is how the Eighth Amendment “draw[s] its meaning[.]” *Trop*, 356 U.S. at 100; see also *Weems v. United*

States, 217 U.S. 349, 378 (1910) (the Eighth Amendment “is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice.”); *Cunningham*, 144 S. Ct. at 1287-88 (Gorsuch, J., dissenting from the denial of certiorari) (“If we will not presently shoulder the burden...[people in affected States] have the power to do so.”).

Furthermore, in determining whether societal standards of decency have evolved to the point of warranting additional Eighth Amendment protections, the Supreme Court looks to the actions of individual states. See, e.g., *Atkins*, 536 U.S. at 315-16; *Roper*, 543 U.S. at 559-60, 565-66 (tallying number of states that have embraced or abandoned a particular death penalty practice). Thus, although a state court is not required to offer more protection than the federal constitution guarantees, a state court asserting its prohibition from doing so abdicates its “critical role in advancing protections and providing the [United States Supreme Court] with information that contributes to an understanding” of how constitutional protections should be applied. *Hall*, 572 U.S. at 719.

The circuit court’s order relied on this Court’s unconstitutionally restrictive application of Art. I, § 17. This Court should revisit its recent precedent regarding the Conformity Clause, and grant relief to James on this claim.

E. Conclusion

Evolving standards of decency, as demonstrated by widespread state practices, both reflect and reinforce the common understanding of capital sentencing at our Nation's Founding. This Court should hold that James' death sentences violate the Eighth Amendment because they are the byproduct of a non-unanimous jury verdict.

CONCLUSION AND RELIEF SOUGHT

James respectfully requests that this Honorable Court remand his case for an evidentiary hearing, vacate his sentence of death and/or grant a stay of execution.

Respectfully submitted,

/s/ Dawn B. Macready

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via electronic service to all counsel of record, on this 5th day of March, 2025.

/s/ Dawn B. Macready
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CERTIFICATE OF COMPLIANCE

This is to certify that the Initial Brief of Appellant was generated in Arial 14-point font and is not proportionately spaced.

/s/ Dawn B. Macready
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