IN THE SUPREME COURT OF FLORIDA

GLEN EDWARD ROGERS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

CASE NO. SC20-1863
L.T. NO. 95-CF-015314
DEATH PENALTY CASE

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRTEENTH JUDICIAL CIRCUIT,
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

The facts of this case are recited in this Court's opinion on the direct appeal of Rogers' convictions and sentences:

> Rogers was convicted of first-degree murder, armed robbery, and grand theft of a motor vehicle and sentenced to death for the brutal stabbing of Tina Marie Cribbs in a Tampa motel room. Cribbs was last seen alive leaving the Showtown Bar in Tampa with Rogers on Sunday, November 5, 1995. A bartender testified that Rogers arrived at the bar around 11 a.m. Cribbs and three female friends arrived a few hours later. Rogers purchased the women a round of drinks and introduced himself to several bar patrons as "Randy." Rogers informed Cribbs and her friends that he had no interest in married women or women with boyfriends. Rogers asked Cribbs, the only single woman of the group, for "a ride" and she agreed. Upon leaving the bar with Rogers, Cribbs told one of her friends that she would be back in fifteen or twenty minutes to meet her mother. When Cribbs' mother, Mary Dicke, arrived twenty minutes later to meet her daughter as they had planned, Cribbs had not yet returned. Dicke waited for her daughter at the bar for nearly an hour and a half. Then Dicke began paging Cribbs, but received no response despite thirty pages. According to Dicke, it was unusual for her daughter not to return her calls. The next morning, Cribbs did not show up for work.
>
> A motel clerk testified that Rogers had arrived at the motel by cab on Saturday, November 4, 1995. Rogers told the motel clerk that he was a truck driver whose truck had broken down. At that time, Rogers paid for a two-night stay. A desk clerk testified that Rogers returned to the motel office on Sunday evening, November 5, 1995. Shortly before Rogers entered the motel office, the clerk

had observed Rogers with two suitcases near his motel room. According to the clerk, it appeared as if Rogers was packing a white Ford Festiva automobile. Rogers then entered the motel office, paid for an additional night's stay at the motel, informed the clerk that he did not want anyone going into his room, and requested a "Do Not Disturb" sign. When the clerk informed Rogers that the motel did not have such signs, Rogers requested that the clerk leave a note for the cleaning crew not to enter and clean his room. The next morning, at approximately 9 a.m., the clerk saw Rogers leaving the motel alone in the same white automobile. The evidence at trial established that the white vehicle belonged to Cribbs.

On Tuesday, November 7, 1995, a cleaning person at the motel went into the room that Rogers had rented. The cleaning person noticed a handwritten "Do Not Disturb" sign hanging on the doorknob. [footnote 1] She testified that she had observed the same sign hanging on the door on Monday morning and thus did not enter the room to clean it. Upon entering the room on Tuesday, the cleaning person found Cribbs' body in the bathroom. Cribbs was found lying on her back in the bathtub. She was clothed, wearing a damp T-shirt, underwear, and socks. On the bathroom floor, authorities found a damp pile of clothes and bloodstained towels. A pager and black wristwatch were lying at Cribbs' feet in the bathtub. Although Cribbs' mother testified that her daughter habitually wore a sapphire and diamond square ring and a gold heart-shaped watch, no such jewelry was recovered from Cribbs' body.

> [footnote 1: The State and the defense stipulated that "Glen Rogers is the person who wrote the 'do not disturb' sign" and further agreed that Rogers was the person who filled out the motel registration card that was presented into evidence by the State.]

The State's forensic pathologist estimated that Cribbs could have been dead for one to three days before she was found. He testified that Cribbs died as a result of two stabs wounds, one to the chest and one to the buttocks. In addition to these injuries, Cribbs had several bruises and abrasions, and a shallow wound to her left arm, which the pathologist believed was a defensive wound. The evidence showed that Cribbs had been wearing her clothing when she was stabbed.

A senior forensic serologist with the Florida Department of Law Enforcement ("FDLE") also testified for the State. He found no evidence of semen in Cribbs' body. An FBI agent who was an expert in the field of forensic serology also testified that the blue jean shorts and T-shirts found in the motel bathroom tested positive for blood. In addition, a biological forensic examiner for the DNA unit of the FBI testified that neither Cribbs nor Rogers could be excluded as a contributor to the blood stains on the jean shorts. He also stated that Rogers was a potential contributor to the DNA samples found on a T-shirt recovered from Cribbs' vehicle.

The State established through the testimony of maintenance workers that Cribbs' wallet was found early in the afternoon of Monday, November 6, 1995, at a rest area on Interstate-10 ("I-10") near Tallahassee, Florida. A crime lab analysis revealed that two latent fingerprints belonging to Rogers were inside the wallet. Fingerprints lifted from the motel room also matched Rogers' fingerprints.

Rogers was eventually apprehended in Kentucky on November 13, 1995, a week after Cribbs was murdered. After being informed that Rogers was in the area, Detective Robert Stephens saw Rogers driving a white Ford Festiva and requested back-up. A high speed chase

ensued, and during this pursuit, Rogers threw beer cans at the pursuing officers as he tried to elude them. Authorities set up a roadblock and successfully forced Rogers off the roadway.

A subsequent inventory of Cribbs' vehicle revealed a substantial amount of food, a cooler, a duffel bag, a comforter, two pillows, Mississippi and Florida license plates, a key to the motel room where Cribbs' body was found, and a bloodstained T-shirt. A small smear on the inside driver's door tested positive for blood. Police also found a pair of blue jeans, which contained blood.

During an interview with Kentucky Police, Rogers claimed that "a girl," whom he could not describe, loaned him the vehicle. Rogers stated that he met the "girl" in a bar and brought her to his motel room. After dropping the "girl" off at the motel, Rogers left to get some beer and cigarettes. According to Rogers, the "girl" was alive when he left and Rogers claimed that he never returned, or intended to return, to the motel. This statement contradicted the testimony of the motel desk clerk, who testified that he saw Rogers leaving the motel on Monday morning. When the investigating officer stated that he just wanted Rogers to tell the truth, Rogers replied, "I can't tell you the truth."

In his defense, Rogers attempted to establish that someone else was the perpetrator of Cribbs' murder. First, the defense introduced the testimony of Tampa police officers who stated that the surrounding area of the motel was a high crime area and that many of the residents of that motel and the motel located across the street had criminal records. The defense established that the Tampa Police did not investigate any of these individuals as potential suspects in the murder. According to the defense, this supported the defense's theory that the Tampa police "rushed to judgment" in

this case.

Second, the defense called another highway maintenance worker who testified that Cribbs' wallet was not recovered on Monday afternoon, but that it was found around 10:30 a.m. According to the defense, the time the wallet was found was crucial because if Rogers had left the Tampa area at 9 a.m., as the motel desk clerk testified, he could not have disposed of the wallet at the highway rest stop near Tallahassee any earlier than 1 p.m.

Finally, the defense also called several expert witnesses, including Dr. John Feegel, a forensic pathologist, consulting medical examiner and practicing attorney. Doctor Feegel estimated that Cribbs died approximately twenty-nine or thirty hours before she was found. Contrary to the State expert's estimate, Dr. Feegel opined that it was unlikely that Cribbs had been dead for forty-eight hours before her body was discovered.

Rogers was convicted on all charges and, at the conclusion of the penalty-phase proceedings, the jury unanimously recommended the death penalty. The trial court accepted the jury's recommendation and sentenced Rogers to death. The trial court found two aggravating circumstances: (1) that the murder was committed for pecuniary gain; and (2) that the murder was heinous, atrocious, or cruel ("HAC"). The court found one statutory mitigating circumstance--that Rogers' capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired (some weight). The court also found the following nonstatutory mitigating circumstances: (1) Rogers had a childhood deprived of love, affection or moral guidance and lacked a moral upbringing of good family values (slight weight); (2) Rogers' father was an alcoholic who physically abused Rogers' mother in the presence of Rogers and his siblings

> (slight weight); (3) Rogers was introduced to controlled substances at a young age and encouraged by his older brother to participate in burglaries (slight weight); (4) Rogers has been lawfully and gainfully employed at various times in his adult life (slight weight); (5) Rogers was solely responsible for the care of his two children at one time in his adult life (slight weight); and (6) Rogers had been drinking alcohol for a few hours on the day he came into contact with the victim (little weight).

Rogers v. State, 783 So. 2d 980, 985-87 (Fla. 2001) (affirming Rogers' convictions and sentence).[1]

On September 28, 2001, Rogers filed a motion for postconviction relief in circuit court pursuant to Florida Rule of Criminal Procedure 3.850, and subsequently filed an amended motion on July 18, 2002, raising seven claims for relief. On June 18, 2004, and August 6, 2004, the circuit court conducted an evidentiary hearing on Rogers' postconviction motion. Subsequently, the court entered an order denying postconviction relief. Rogers appealed the denial of postconviction relief to this Court. In addition to the appeal of the denial of his postconviction motion, Rogers also simultaneously filed a Petition for Writ of

[1] Rogers did not file a petition for writ of certiorari to the United States Supreme Court following this Court's affirmance of his conviction.

Habeas Corpus alleging ineffective assistance of appellate counsel. In a consolidated opinion, this Court denied all relief. See Rogers v. State, 957 So. 2d 538 (Fla. 2007).

Following the denial of relief in the state courts, Rogers filed a petition for writ of habeas corpus in the United States District Court, Middle District of Florida. On February 19, 2010, the district court issued an order denying the petition for writ of habeas corpus, and the Eleventh Circuit Court of Appeals denied an appeal. Rogers filed a petition for writ of certiorari with the United States Supreme Court, which was denied on January 10, 2011. Rogers v. McNeil, Sec'y, Fla. Dep't of Corr., 562 U.S. 1149 (2011).

On June 3, 2011, Rogers filed in circuit court his first successive motion for postconviction relief raising two claims; including an alleged newly discovered evidence claim. The court summarily denied Rogers' motion, and this Court affirmed the lower court's ruling. Rogers v. State, 97 So. 3d 824 (Fla. 2012).

On January 9, 2017, Rogers filed a second successive postconviction motion pursuant to Florida Rule of Criminal Procedure 3.851 requesting relief in light of changes in Florida law

following the decisions in Hurst v. Florida, 136 S. Ct. 616 (2016), and Hurst v. State, 202 So. 3d 40 (Fla. 2016). The postconviction court summarily denied relief and this Court affirmed. Rogers v. State, 235 So. 3d 306 (Fla. 2018).

On August 24, 2020, Rogers filed the instant successive postconviction motion pursuant to Florida Rule of Criminal Procedure 3.851 alleging that "repressed memories were uncovered when Mr. Rogers was preparing for his clemency proceeding" of sexual abuse suffered by Rogers that would have "probably inspired the jury to recommend a sentence less severe than death." (R.124-80). The State responded to the motion (R.181-201), and after conducting a case management conference (R.217-40), the postconviction court summarily denied Rogers' motion as his claim was not based on newly discovered evidence and was untimely and procedurally barred. (R.202-10). This appeal follows.

SUMMARY OF THE ARGUMENT

The postconviction court properly summarily denied Rogers' third successive postconviction motion based on alleged newly discovered evidence. As the postconviction court correctly noted, Rogers' allegations do not constitute "newly discovered evidence" as Rogers himself was the primary source of the information regarding the allegations of sexual abuse and thus, this information was known and available at the time of trial. Rogers, relying on this Court's decision in Hearndon v. Graham, 767 So. 2d 1179 (Fla. 2000), claimed that he could not have raised this claim previously as he had "repressed" the memories of the sexual abuse, but the lower court properly rejected this argument as the delayed discovery rule created by this Court in Hearndon is inapplicable to capital postconviction proceedings.[2]

[2] As will be discussed further infra, this Court has recently noted the "shaky foundation" of the Hearndon rule and has consistently limited this delayed discovery rule to a very specific set of facts involving intentional tort cases brought by an alleged sexual abuse victim against the perpetrator. See R.R. v. New Life Community Church of CMA, Inc., 303 So. 3d 916 (Fla. 2020) (declining to address the continued validity of Hearndon, and recognizing the expressly limited nature of its holding).

Additionally, the postconviction court correctly found that his claim was untimely under Florida Rule of Criminal Procedure 3.851(d) because the record clearly establishes that Rogers' allegations could have been discovered by his counsel with due diligence. As the record clearly demonstrates, numerous members of Rogers' family members were aware of the alleged sexual abuse. Furthermore, Rogers' counsel could have learned of the sexual abuse with due diligence at the time of trial, or a number of years ago when Rogers' case was in the national news after the publication of a documentary claiming that Rogers was responsible for the murders of Nicole Brown Simpson and Ron Goldman.

Finally, even if Rogers' claim was based on newly discovered evidence, he cannot establish that the evidence is of such a nature that it would probably produce a life sentence. When viewing the alleged newly discovered evidence against the totality of the evidence in the record, including the existing aggravation at the time of trial, and the additional aggravation stemming from Rogers' subsequent murder conviction, it is clear that the evidence of alleged sexual abuse would not probably produce a life sentence.

Accordingly, this Court should affirm the postconviction court's summary denial of Rogers' third successive postconviction motion.

ARGUMENT

THE POSTCONVICTION COURT PROPERLY SUMMARILY DENIED ROGERS' SUCCESSIVE POSTCONVICTION CLAIM AS UNTIMELY AND PROCEDURALLY BARRED AS HIS CLAIM WAS NOT BASED ON "NEWLY DISCOVERED EVIDENCE."

Rogers filed a third successive postconviction motion and claimed that "newly discovered evidence" of alleged sexual abuse had only recently been discovered by Rogers because he had repressed the memories of the abuse and only recently discovered these memories during his preparations for the clemency process. After conducting a case management conference, reviewing the pleadings and the entire record, the postconviction court summarily denied Rogers' motion as untimely and procedurally barred because the evidence was not newly discovered evidence. The State submits that the court properly summarily denied the motion because the record clearly demonstrates that Rogers is not entitled to postconviction relief based on his allegations of newly discovered evidence.

Pursuant to Florida Rule of Criminal Procedure 3.851, a motion for postconviction relief must be filed within one year after

the judgment and sentence are finalized. Fla. R. Crim. P. 3.851(d). If this time period expires, a motion filed thereafter is procedurally barred unless it alleges:

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

Fla. R. Crim. P. 3.851(d)(2) (emphasis added); Jimenez v. State, 997 So. 2d 1056, 1064 (Fla. 2008).

Rule 3.851(f)(5)(B) permits the summary denial of a successive motion "[i]f the motion, files, and records in the case conclusively show that the movant is entitled to no relief." Fla. R. Crim. P. 3.851(f)(5)(B); see also Long v. State, 183 So. 3d 342, 344-45 (Fla. 2016). The burden is on the defendant to establish a legally sufficient claim. Duckett v. State, 148 So. 3d 1163, 1168 (Fla. 2014). In the instant case, the record clearly supports the postconviction court's finding that Rogers' motion was untimely and

procedurally barred as a matter of law. Accordingly, this Court should affirm the denial of relief.[3]

Rogers erroneously claims in his Initial Brief that the postconviction court erred in summarily denying his claim because the court "skipped a crucial step" and "immediately jumped to analyzing the merits of Mr. Rogers's claims." Initial Brief at 13. Contrary to Appellant's claims, the postconviction court properly analyzed Rogers' newly discovered evidence claim under the controlling authority of Jones v. State, 591 So. 2d 911, 915 (Fla. 1991), and determined that the record conclusively refuted his claim that the evidence was "newly discovered." Accordingly, the court denied Rogers an evidentiary hearing and summarily denied relief.

It is well established that in order to be entitled to postconviction relief based on newly discovered evidence, the

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[3] As this Court stated in Long, "[b]ecause a court's decision whether to grant an evidentiary hearing on a rule 3.851 motion is ultimately based on written materials before the court, its ruling is tantamount to a pure question of law, subject to de novo review." Long, 183 So. 3d at 344 (citing State v. Coney, 845 So. 2d 120, 137 (Fla. 2003) (holding that "pure questions of law" that are discernable from the record "are subject to de novo review")).

defendant must establish two requirements: (1) the asserted facts must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known them by the use of diligence; and (2) the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial. Jones v. State, 591 So. 2d 911, 915 (Fla. 1991). When arguing that the newly discovered evidence is relevant to vacating a death sentence, as in the instant case, the defendant must establish that it is likely that he would have obtained a lesser sentence. Henyard v. State, 992 So. 2d 120, 125-26 (Fla. 2008).

In the instant case, Rogers claimed in his successive motion that "the substance" of his newly discovered evidence regarding sexual abuse committed on him during childhood could not have previously been raised because Rogers had "repressed" these memories and had only "uncovered" them when speaking with a criminology professor on September 5, 2019, while preparing for his clemency proceedings. Rogers further stated that he "also discussed some of the facts" with psychiatrist Dr. Michael Maher, and alleged

that these facts were further corroborated by Rogers' older brother, Clay Rogers. Rogers subsequently claimed that a "detailed discussion of Mr. Rogers's case history triggered the unveiling of repressed memories in Mr. Rogers" that no court or jury ever heard. (R.129-32).

As the postconviction court correctly found based on the record in this case, Rogers' newly discovered evidence claim was untimely and procedurally barred. As to the first prong of Jones, the evidence is not "newly discovered" because Rogers is the primary source of the evidence. As this Court has recognized, information which is within the personal knowledge of the defendant cannot form the basis of a newly discovered evidence claim by reason of later recollection. See Hunter v. State, 29 So. 3d 256, 262 (Fla. 2008) (noting that defendant failed to satisfy the first prong of Jones as the evidence was within the defendant's knowledge); Torres-Arboleda v. Dugger, 636 So. 2d 1321, 1324-25 (Fla. 1994) (rejecting newly discovered alibi evidence claim because defendant was aware of the alibi evidence); see also Cole v. State, 83 So. 3d 706 (Fla. 2012) (unpublished) (affirming summary denial of a

successive postconviction motion based on a newly discovered evidence claim of "repressed memories" of abuse suffered at Dozier School for Boys). Accordingly, because Rogers is the primary source of the alleged newly discovered evidence, this ends the inquiry as a matter of law and requires this Court to affirm the lower court's finding that Rogers failed to meet the first prong of the Jones analysis.

Rogers argues that this clear procedural bar is inapplicable to his case because the evidence of his memories of the sexual abuse was repressed and he could not have possibly raised this claim any earlier because these memories were only recently triggered when he was discussing the details of his case during the clemency process. Rogers argues that this Court's decision in Hearndon v. Graham, 767 So. 2d 1179 (Fla. 2000), involving the delayed discovery doctrine in civil lawsuits, precludes a finding that he could have raised this claim previously. The postconviction court properly rejected this argument and declined to extend the rule announced in Hearndon to the capital postconviction context.

In Hearndon, the plaintiff filed a civil complaint against her stepfather for injuries suffered as a child from sexual abuse, but the complaint was dismissed because the cause of action was beyond the four-year statute of limitations. Id. at 1181. The plaintiff argued that the court should apply the doctrine of delayed discovery to adult survivors of childhood sexual abuse because of "traumatic amnesia." Id. While recognizing that "the acceptance of theories supporting memory loss of childhood sexual abuse is a disputed area of psychological study," this Court nevertheless allowed the doctrine to apply to the accrual of the cause of action in civil actions. Id. at 1186.

As this Court has recently recognized, however, the decision in Hearndon is based on a "shaky foundation." R.R. v. New Life Community Church of CMA, Inc., 303 So. 3d 916, 924-25 (Fla. 2020). Although this Court did not decide the continued validity of Hearndon, it noted that its holding was extremely limited and only applicable in cases involving an intentional tort brought against the alleged perpetrator of the abuse. Id.

The policy rationale guiding this Court in Hearndon to allow the delayed discovery doctrine to apply so a plaintiff could file a civil tort action beyond the statute of limitations is not applicable in the capital postconviction context. In capital postconviction proceedings, the interests of finality and victim rights are paramount.[4] Rogers' case has been final for almost twenty years and he allegedly only recently recalled these "repressed memories" despite having sat through two separate penalty phases where lay witnesses and mental health experts detailed his abusive childhood.[5] As the postconviction court properly found, Rogers' alleged repressed memories should not serve as "an avenue for

[4] Tina Marie Cribbs' family members have a constitutional right for Rogers' proceedings to be free from unreasonable delay, and they also have a right to a prompt and final conclusion of his postjudgment proceedings. Art. 1, § 16(b)(10), Fla. Const. These rights are to be "protected by law in a manner no less vigorous than protections afforded to criminal defendants." Art. 1, § 16(b), Fla. Const.

[5] Following his conviction and sentence of death in Florida, Rogers was tried and convicted of first-degree murder and sentenced to death in California. See People v. Rogers, 304 P.3d 124 (Cal. 2013). Thus, Rogers has been involved in numerous discussions regarding his abusive childhood as he was evaluated by multiple mental health experts prior to the 1997 penalty phase in the instant case and, prior to the penalty phase in his California murder case.

capital postconviction defendants [to] successfully seek[] relief years and even decades after a judgment and sentence as well as postconviction proceedings have become final." (R.208).

As a matter of law, this Court should find that that Rogers' claim of newly discovered evidence is insufficient under Jones when he is the primary source of the information. However, even if Rogers' memories of the alleged sexual abuse were "repressed" and previously undiscoverable by him, his claim was still untimely and procedurally barred because, as the postconviction court properly noted, the information could have easily been discovered by Rogers' counsel with the exercise of due diligence. By his own admissions in his successive motion, numerous family members have known of the alleged sexual abuse for decades. As the postconviction court correctly noted:

> Defendant's family members were well aware of the sexual abuse alleged by Defendant. As Defendant alleges in his motion, his brother, Clay, was involved with, witnessed, and had knowledge of some of the sexual abusers as well as the sexual abuse allegations, and Clay saw the note from the TICO guard. Defendant's brother Gary "managed to avoid the dangerous predatory circles that Mr. Rogers and Clay fell victim to," but was aware of neighbor Carla Taggert's "reputation for abusing young boys in her home." Defendant further contends that his

> brother Craig was aware that a known child molester had an "intense interest in young Mr. Rogers" and would testify that "Hamilton, Ohio was infested with child predators." Defendant also avers in his motion that brother Gary recalls a conversation with Defendant and Clay where Defendant "discussed his anger about being sexually abused while being held in an Ohio juvenile correctional facility," and Craig recalls another conversation where Defendant "mentioned something inappropriate happening from a guard" while Defendant was incarcerated in an Ohio juvenile correctional facility.

(R.208-09).

In addition to the numerous family members that had this information at the time of trial, there is no question that defense counsel could have obtained this information, at the latest, in 2012 with due diligence given that the information was contained in a highly-publicized documentary on Appellant, which was narrated by his older brother, Clay Rogers.[6] In a documentary entitled, "My Brother the Serial Killer," which aired on Investigation Discovery,

[6] See, e.g., "Documentary: Serial Killer, not O.J., killed Simpson and Goldman," https://www.cnn.com/2012/11/20/justice/o-j-simpson-film-claim/index.html (CNN coverage); "Documentary claims serial killer murdered Nicole Simpson, Ron Goldman," https://www.foxnews.com/entertainment/documentary-claims-serial-killer-murdered-nicole-simpson-ron-goldman (FOX News); "What if O.J. didn't do it? Film suggests serial killer – not Simpson – murdered Brown, Goldman," https://news.yahoo.com/blogs/lookout/oj-innocent-glen-rogers-murder-nicole-194119077.html (Yahoo news).

Clay Rogers claimed that Appellant committed the murders of O.J. Simpson's wife, Nicole Brown Simpson, and her friend, Ron Goldman. In this 2012 documentary, Clay Rogers acknowledged that he had been aware of the sexual abuse allegations involving Appellant from Rogers' time as a youth at the Training Institution of Central Ohio (TICO).[7] Clay Rogers repeated, verbatim, one of the allegations contained in Rogers' successive motion when he stated that he picked up Appellant at TICO and saw a note from a guard stating, "Get it up, keep it ready, I'll be right back." In addition to the documentary, a former Ohio news reporter, John Eckberg, wrote two books on Rogers and discussed the fact that Rogers worked as a "young male prostitute" at truck stops and was sexually abused by guards at TICO.[8]

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[7] See "My Brother the Serial Killer," https://www.youtube.com/watch?reload=9&v=e76cKma7ZA4 (approximately at the 10:40 mark of the documentary).

[8] Eckberg wrote two books, "Road Dog: Justice Denied: The Bloody Trail of Glen Rogers, (2002)" and "O.J. Simpson & Glen Rogers: The Juice, Road Dog & Murder on Bundy Drive (2018)." On a 2018 podcast, Eckberg discussed Rogers' case extensively and referenced his sexual abuse history. See The Serial Killer Podcast, "Glen Rogers AKA the Casanova Killer," Sept. 2, 2018 (beginning at approximately 35:45).

Based on the information in Rogers' own motion, as well as information contained in the above-referenced materials, it is clear that TICO was well-known for incidents of guards involved in sexually abusing the youth. The fact that Rogers may have allegedly suffered sexual abuse while at TICO, or elsewhere, was information that was easily discoverable by Rogers' counsel with due diligence. Given the fact that the record, files, and motion clearly established that this evidence was known by Rogers, numerous family members, reporters, and the general public, Rogers failed to meet the first prong of Jones because this was information that was available to defense counsel with the exercise of due diligence. See Glock v. Moore, 776 So. 2d 243, 250-51 (Fla. 2001) (stating that the defendant could not establish that a racial profiling claim was based on newly discovered evidence because the issue had been known for years as evidenced by reported caselaw).

Lastly, although not addressed by the postconviction court given Rogers' failure to establish the first prong of the Jones newly discovered evidence standard, the State submits that this Court should affirm the summary denial based on its de novo review given

Rogers' inability to establish that the alleged sexual abuse would have probably produced a life sentence. See Jones, 591 So. 2d at 916. When evaluating whether the defendant can meet the second prong of Jones, this Court must review all the admissible evidence, including evidence that was not available at the time of the penalty phase. Id.; Bogle v. State, 288 So. 3d 1065, 1069 (Fla. 2019) (stating that "[a] court applying the second prong of [the Jones] test must evaluate the importance of the newly discovered evidence in the broader context of any admissible evidence that could be introduced at a new trial").

In the instant case, the jury unanimously recommended a death sentence for Rogers based on the heinous murder of Tina Marie Cribbs. See Rogers v. State, 783 So. 2d 980 (Fla. 2010) (finding that the evidence supported the two aggravating circumstances that the murder was committed in a heinous, atrocious, or cruel manner (HAC) and was motivated, at least in part, by pecuniary gain). The jury was aware of a plethora of mitigating evidence, including evidence related to Rogers' deprived

and abusive childhood, but nevertheless unanimously voted for the death penalty.

While the State submits that Rogers is unable to establish that the sexual abuse evidence would probably produce a life sentence given this evidence, it is even more clear that he cannot meet this standard when this Court looks at all the available evidence. Subsequent to Rogers' Florida murder conviction, Rogers was convicted in California of first-degree murder and arson of property. People v. Rogers, 304 P.3d 124 (Cal. 2013). As the California Supreme Court's opinion details, Rogers brutally murdered Sandra Gallagher and then set her body on fire shortly before crossing the United States and murdering Tina Marie Cribbs.

In the instant case, the jury was aware of Rogers' deprived childhood, including his physically abusive father, and the alleged newly discovered evidence of childhood sexual abuse would not have probably resulted in a lesser sentence given the substantial aggravation presented to the jury. See Brown v. State, 304 So. 3d 243, 276-77 (Fla. 2020) (noting that the test is not whether the newly discovered evidence *might* result in a lesser sentence, but

rather, whether it *would probably* result in a life sentence). Furthermore, given the fact that Rogers would now have, at least, an additional aggravating circumstance involving yet another brutal murder conviction,[9] this Court should find that Rogers cannot establish that evidence of childhood sexual abuse would have probably resulted in a life sentence. Accordingly, the State requests that this Court affirm the lower court's summary denial of Rogers' third successive motion for postconviction relief.

[9] The prosecution in the California murder case presented evidence of Rogers' involvement in other uncharged murders at his penalty phase. See Rogers, 304 P.3d at 128-37.

CONCLUSION

In conclusion, Appellee respectfully requests that this Honorable Court affirm the postconviction court's order denying Rogers' third successive motion for postconviction relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of February, 2021, I electronically filed the foregoing with the Clerk of the Court by using the Florida Courts E-Portal Filing System which will send a notice of electronic filing to the following: Ali A. Shakoor, Assistant CCRC, Lisa Marie Bort, Assistant CCRC and Adrienne Joy Shepherd, Assistant CCRC, The Law Office of the Capital Collateral Regional Counsel, Middle Region, 12973 North Telecom Parkway, Temple Terrace, Florida 33637-0907 at **shakoor@ccmr.state.fl.us**, **bort@ccmr.state.fl.us**, **shepherd@ccmr.state.fl.us** and **support@ccmr.state.fl.us**.

/s/ Stephen D. Ake
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CERTIFICATE OF FONT AND WORD COUNT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 14-point Bookman Old Style, and word count: 5,962, is in compliance with Fla. R. App. P. 9.045.

/s/ Stephen D. Ake
COUNSEL FOR APPELLEE