

**IN THE SUPREME COURT OF FLORIDA
CASE NO. SC20-1863**

GLEN EDWARD ROGERS,
Appellant,
vs.
STATE OF FLORIDA,
Appellee.

**ON APPEAL FROM THE CIRCUIT COURT OF THE THIRTEENTH
JUDICIAL CIRCUIT IN AND FOR HILLSBOROUGH COUNTY, FL
Lower Tribunal No. 291995CF015314000AHC**

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REQUEST FOR ORAL ARGUMENT

The resolution of the issues involved in this action could determine whether Mr. Rogers lives or dies. 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 penalty that the State seeks to impose on Mr. Rogers.

JURISDICTIONAL STATEMENT

This is a timely appeal of a capital case from the trial court's final order denying Third Successive Motion to Vacate Judgment of Conviction and Sentence of Death. This Court has plenary jurisdiction over death penalty cases. Fla. Const. Art. V. § 3(b)(1).

PRELIMINARY STATEMENT ABOUT THE RECORD

References to the current record on appeal pertaining to this narrow issue are in the form (Sup. R. 123). Glen Rogers is referred to as "Appellant" or "Mr. Rogers." The Office of the Capital Collateral Regional Counsel - Middle Region, representing the appellant, is referred to as "CCRC-M." All other abbreviations are self-explanatory and clear.

STATEMENT OF THE CASE AND FACTS

On December 13, 1995, a Hillsborough County grand jury indicted Appellant, for first-degree murder, armed robbery, and auto theft. Specifically, Mr. Rogers was charged with the November 5, 1995 murder of Tina Marie Cribbs, and the theft of her purse and/or car keys and jewelry, and with the theft of her car. Mr. Rogers was taken into custody on November 13, 1995, near Richmond, Kentucky, and was extradited to Florida on May 1, 1996.

Mr. Rogers was tried by a jury from April 28 through May 9, 1997, Circuit Court Judge Diana M. Allen, presiding. He was found guilty as charged. Following the penalty phase, the jury recommended death. Prior to sentencing, Mr. Rogers filed a Motion for New Trial, based on a newly discovered witness. Hearings on the motion were held on June 13, 1997, and all day on June 20, 1997. The court denied the motion. Mr. Rogers was sentenced to death on July 11, 1997. The court filed its Sentencing Order the same date.

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's 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, 987 (Fla. 2001). Mr. Rogers filed a notice of appeal on August 8, 1997. On direct appeal, Rogers raised ten claims claiming the trial court erred in ruling on the following matters:

- (1) the trial court erred in failing to grant a judgment of acquittal on the first-degree murder charge because the State failed to present sufficient evidence to support either premeditated or felony murder;
- (2) the evidence does not support the pecuniary gain or HAC aggravators;

- (3) the trial court erred by failing to find applicable the mitigating circumstance that the “capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance,” § 921.141, Fla. Stat. (1995), and to give both statutory mental mitigating circumstances great or significant weight;
- (4) the trial court erred by failing to consider and appropriately weigh all mitigating circumstances in accordance with *Campbell v. State*, 571 So. 2d 415 (Fla. 1990);
- (5) the trial court erred in denying the defense’s motion to have a Positron Emission Tomography Scan (“PET-Scan”) performed on Rogers prior to trial;
- (6) the trial court committed reversible error by failing to grant Rogers’ motion for a mistrial after witnesses testified during the penalty phase regarding Rogers’ prior criminal misdemeanor conviction in California;
- (7) the trial court committed reversible error by failing to declare a mistrial based on improper prosecutorial argument during the penalty phase closing argument;
- (8) the trial court erred by denying the defense’s motion to disqualify the Hillsborough County State Attorney’s Office;
- (9) the trial court erred by denying a defense motion for a new trial based on newly discovered evidence; and
- (10) the imposition of the death penalty is disproportionate in this case.

Id. at 987 n.2. The judgment of guilt and sentence of death were affirmed by this Court on direct appeal. *Id.* at 1004. The Mandate was returned on March 1, 2001.

A motion to vacate judgment of conviction and sentence with special request for leave to amend was filed on September 28, 2001. On July 18, 2002, the appellant’s Amended 3.851 Motion for

Postconviction Relief was filed. On October 17, 2003, a case management hearing was held. After the case management hearing on October 17, 2003, the court ordered that: “Defendant is entitled to an evidentiary hearing on claims I(A), I(B), I(C), I(E) in part, IV(A) and VIII and that claims I(E) in part, II, III, IV(B), VI, and VII of Defendant’s Motion are hereby DENIED. The Court will reserve ruling on claim I(D).” An evidentiary hearing was set for June 18, 2004 and August 6, 2004.

On June 4, 2004, postconviction counsel filed a motion to reconsider claim II or in the alternative to proffer evidence. The court considered the motion and proffer through testimony at the initial evidentiary hearing on June 18, 2004. The court subsequently entered an order on August 3, 2004 denying the motion to reconsider claim II or in the alternative to proffer evidence. The order specifically directed that “Defendant may not appeal until a final Order has been issued on Defendant’s Amended 3.851 Motion for Postconviction Relief.”

On March 7, 2005, the circuit court issued an Order Denying Amended 3.851 Motion for Postconviction Relief. Appellant filed a notice of appeal in a timely manner. This Court affirmed the lower

court, and Mr. Rogers was denied relief on the following postconviction claims:

- (1) whether the circuit court erred in denying Rogers' claim that counsel was ineffective during the guilt phase for failing to develop an alternative suspect;
- (2) whether the circuit court erred in concluding that although the impropriety of the FBI lab was newly discovered evidence, the outcome of a new trial would not have been different;
- (3) whether the circuit court erred in denying an evidentiary hearing on Rogers' claim that counsel was ineffective during the guilt phase for failing to object to improper prosecutorial comments during closing argument;
- (4) whether the circuit court erred in denying Rogers' claim that counsel was ineffective during the penalty phase for failing to object to improper prosecutorial comments during closing argument; and
- (5) whether, cumulatively, the combination of "procedural and substantive errors," which appellate counsel failed to effectively litigate on appeal, deprived Rogers of a fundamentally fair trial.

Rogers v. State, 957 So. 2d 538, 544 n.6 (Fla. 2007). Mr. Rogers also filed a State Habeas Petition, alleging the following claims:

- (1) whether appellate counsel was ineffective for failing to argue that the Florida death sentencing statute as applied violates the United States Constitution under *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002);
- (2) whether section 921.141(5), Florida Statutes (2005), is facially vague and overbroad in violation of the Eighth and Fourteenth Amendments, whether such unconstitutionality is reversible error because the jury did

not receive adequate guidance in violation of the Eighth and Fourteenth Amendments, whether Rogers' death sentence is premised on fundamental error which must be corrected, and whether trial counsel was ineffective for failing to litigate these issues;

(3) whether, cumulatively, the combination of procedural and substantive errors deprived Rogers of a fundamentally fair trial and whether appellate counsel was ineffective for failing to litigate these issues on appeal; and

(4) whether Rogers' Eighth Amendment right against cruel and unusual punishment will be violated as he may be incompetent at the time of execution.

Id. at 544 n.7. This Court also rejected these claims. *Id.* at 541. On August 3, 2007, Mr. Rogers filed a Petition for Writ of Habeas Corpus in federal court. On July 25, 2008, Mr. Rogers filed a Motion to Hold Proceedings in Abeyance Pending State Court Ruling on Petitioner's Amended Motion to Vacate Judgments of Conviction and Sentences with Special Request for Leave to Amend. The motion was denied. On February 19, 2010, the Petition for Writ of Habeas Corpus was denied by the United States District Court – Middle District of Florida (“district court”).

On March 16, 2010, an Application for Certificate of Appealability was filed in the district court. On March 29, 2010, a Renewed Application for Certificate of Appealability was filed in the Eleventh Circuit Court of Appeals (“11th Circuit”). On June 11, 2010,

the Renewed Application for Certificate of Appealability was denied by the 11th Circuit. Mr. Rogers's Motion to Reconsider, Vacate, or Modify Order Denying Motion for Certificate of Appealability was denied by the 11th Circuit on July 29, 2010. Mr. Rogers subsequently filed a Petition for Writ of Certiorari, which the United States Supreme Court denied on January 10, 2011.

On June 3, 2011, Mr. Rogers filed his first Successive Motion for Postconviction Relief, which was denied by the circuit court without a hearing on September 15, 2011. This Court affirmed the denial of relief on July 13, 2012. *Rogers v. State*, 97 So. 3d 824 (Fla. 2012).

The 11th Circuit denied Mr. Rogers's Application for Leave to File a Second or Successive Habeas Corpus Petition pursuant to 28 U.S.C. §2244(b) on September 6, 2012. On January 9, 2017, Mr. Rogers filed a Second Successive Motion to Vacate Judgment and Sentence, which was denied by the circuit court on April 3, 2017. This Court affirmed the denial of relief on appeal. *See Rogers v. State*, 235 So. 3d 306 (Fla. 2018).

Recent Procedural History Directly Relevant to These Proceedings

On August 24, 2020, Appellant filed Defendant's Third Successive Motion to Vacate Judgment of Conviction and Sentence of Death with an attached appendix. Sup. R. 124-80. The State filed its response on September 14, 2020. Sup. R. 181-201. The circuit court held a case management conference on October 13, 2020. Sup. R. 217-40. On November 23, 2020, the circuit court denied the motion without ever holding an evidentiary hearing. Sup. R. 202-10. This timely appeal follows.

STANDARD OF REVIEW

Under the principles set forth by this Court in *Stephens v. State*, 748 So. 2d 1028 (Fla. 1999), this claim is a mixed question of law and fact requiring de novo review with deference to the factual findings by the lower court.

SUMMARY OF THE ARGUMENT

Newly discovered evidence establishes that Appellant's prior trial court and jury were never apprised of the childhood sexual abuse he suffered. Mr. Rogers had previously repressed the memories of sexual abuse until preparing for clemency proceedings in the fall

of 2019. This Court's precedent provides for the circuit court to consider the particular "sinister" form of childhood abuse Mr. Rogers suffered, as his post-traumatic stress disorder ("PTSD") contributed to his memories being repressed.

The evidence upon which Mr. Rogers is relying to raise this claim was unknown to the trial court, counsel, or Mr. Rogers at the time of his trial and the facts could not have been discovered through due diligence. *See Fla. R. Crim. P. 3.851(d)(2)(A)*. The circuit court erred in dismissing Mr. Rogers's Third Successive Motion to Vacate Judgment of Conviction and Sentence. The circuit court issued its denial without ever holding an evidentiary hearing, which is contrary to this Court's clearly established law. This Court should order a remand to the circuit court, with instructions to conduct an evidentiary hearing on Mr. Rogers's claim for relief.

ARGUMENT

THE CIRCUIT COURT ERRED BY FAILING TO CONDUCT AN EVIDENTIARY HEARING AND IN DENYING MR. ROGERS'S CLAIM OF NEWLY DISCOVERED EVIDENCE OF CHILDHOOD SEXUAL ABUSE. IN DENYING THE CLAIM WITHOUT AN EVIDENTIARY HEARING, THE CIRCUIT COURT ERRED IN VIOLATION OF CLEARLY ESTABLISHED FLORIDA LAW. THE ERROR ALSO VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. THE NEWLY DISCOVERED EVIDENCE WOULD PROBABLY YIELD A LESS SEVERE SENTENCE.

Regarding the lower court's error, the circuit court's analysis denying relief is reproduced in its entirety, here:

Rule 3.851 prohibits the filing of a motion for postconviction relief more than one year after the judgment and sentence become final unless "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." Fla. R. Crim. P. 3.851(d)(2)(A) (2020). In order to prevail on such a newly discovered evidence claim, "the defendant must satisfy a two-prong test: first, the evidence was not at the time of trial known by the trial court, by the party, or by counsel, and the defendant or his counsel could not have known of it by the use of due diligence; and second, the newly discovered evidence must be of such a nature that it would probably produce an acquittal on retrial." *Bogle v. State*, 288 So. 3d 1065, 1068-69 (Fla. 2019) (citing *Duckett v. State*, 231 So. 3d 393, 399 (Fla. 2017) and *Jones v. State*, 709 So. 2d 512, 521 (Fla. 1998)). "If the defendant is seeking to vacate a sentence, the second prong requires that the newly discovered evidence would probably yield a

less severe sentence.” *Henryard v. State*, 992 So. 2d 120, 125 (Fla. 2008).

After reviewing Defendant’s motion, the State’s response, the arguments of counsel during the October 13, 2020, case management conference, as well as the court file, and the record, the Court finds the State’s response is persuasive and agrees that Defendant’s allegations do not constitute newly discovered evidence and are procedurally barred. First, Defendant is the main source of his allegations. Although Defendant alleges he could not have raised his claim earlier as his memories were repressed and cites to *Hearndon* to excuse the time bar, the Court finds *Hearndon* does not afford Defendant any relief. The *Hearndon* court found “application of the delayed discovery doctrine to childhood sexual abuse claims is fair given the nature of the alleged tortious conduct and its effect on victims, and is consistent with our application of the doctrine to tort cases generally...” *Hearndon*, 767 So. 2d at 1186. As the State argues, Defendant’s repressed memories do not “serve as a gateway to raising a successive postconviction claim decades after” his judgment and sentence became final. The holding in *Hearndon* provides victims with civil recourse, and the Court declines to extend or read *Hearndon* as providing an avenue for capital postconviction defendants successively seeking relief years and even decades after a judgment and sentence as well as postconviction proceedings have become final.

Additionally, the Court finds Defendant’s allegations could have been discovered with due diligence where, according to the allegations in his motion, 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.

Finally, the Court notes that during the October 13, 2020, case management conference, postconviction counsel did not argue that he was unaware of any books or “documentaries” about Defendant, but essentially argued only that the salacious nature of those portrayals would not have been put him on notice of the sexual abuse allegations. Based on the foregoing, the Court finds the instant allegations could have been discovered by Defendant or his counsel with due diligence and do not constitute newly discovered evidence.

Because Defendant’s allegations do not qualify as newly discovered evidence and Defendant does not allege any of the other exceptions to the time limitations set forth in rule 3.851, his motion is untimely and procedurally barred. *See Fla. R. Crim. P. 3.851(d) (2020)*. **No relief is warranted on Defendant’s third successive motion.**

Sup. R. 207-09. In its findings, the lower court skipped a crucial step.

The circuit court immediately jumped to analyzing the merits of Mr.

Rogers’s claims. The circuit court erred and offered no analysis in

context with Appellant merely asking for an evidentiary hearing to prove his allegations and claim for relief. The error by the lower court violated Appellant's rights under the Eighth Amendment and Due Process Clause of the Fourteenth Amendment to the United States Constitution, the corresponding provisions of Florida's Constitution, and clearly established Florida law pertaining to evidentiary hearings in postconviction proceedings.

The evidence upon which Mr. Rogers was relying to raise this claim was unknown to the circuit court, counsel, or Mr. Rogers at the time of his trial and the facts could not have been discovered through due diligence. *See Fla. R. Crim. P. 3.851(d)(2)(A); Robinson v. State*, 707 So. 2d 688, 691 n.4 (Fla. 1998); *Jones v. State*, 591 So. 2d 911, 914-15 (Fla. 1991); *Hallman v. State*, 371 So. 2d 482, 485 (Fla. 1979). Secondly, the newly discovered evidence would probably yield a less severe sentence. *Long v. State*, 271 So. 3d 938, 942 (Fla. 2019); *Walton v. State*, 246 So. 3d 246, 249 (Fla. 2018) (quoting *Swafford v. State*, 125 So. 3d 760, 767 (Fla. 2013)).

This Court has encouraged trial courts "to liberally allow" evidentiary hearings on Rule 3.851 motions. *Amendments to Fla. Rules of Criminal Procedure 3.851, 3.852, & 3.993 & Fla. Rule of*

Judicial Admin. 2.050, 797 So. 2d 1213, 1219–20 (Fla. 2001); *Davis v. State*, 26 So. 3d 519, 526 (Fla. 2009) (“[T]his Court is guided by the principle that courts are encouraged to liberally view the allegations to allow evidentiary hearings on timely raised claims that commonly require a hearing.”). A court may summarily deny a newly discovered evidence motion without an evidentiary hearing “*only if* ‘the motion, files, and records in the case conclusively show that the movant is entitled to no relief.’” *McLin v. State*, 827 So. 2d 948, 954 (Fla. 2002) (internal citations omitted) (emphasis added); Fla. R. Crim. P. 3.851(f)(5)(B).

“In evaluating the legal sufficiency of a motion based on newly discovered evidence, the court must accept the allegations as true for the purpose of determining whether the alleged facts, if true, would ‘render the judgment vulnerable to collateral attack.’” *Nordelo v. State*, 93 So. 3d 178, 184 (Fla. 2012) (internal citations omitted). The court must then engage in a two-step process. “[T]he court must first determine whether the motion is facially sufficient, i.e., whether it sets out a cognizable claim for relief based upon the legal and factual grounds asserted.” *Spera v. State*, 971 So.2d 754, 758 (Fla. 2007) (internal quotations and citations omitted). Next, if “the trial court

deems the motion (or the particular claims within it) facially sufficient” the court must “review the record for evidence refuting the claim.” *Id.* at 758 (internal citations omitted). Unless the record “conclusively” refutes the claim, an evidentiary hearing is required. *McLin*, 827 So. 2d at 955.

It is incumbent upon the defendant to establish the timeliness of a successive postconviction claim. *Rivera v. State*, 187 So. 3d 822, 832 (Fla. 2015). The substance of the claim giving rise to this current action originated when repressed memories were uncovered while Mr. Rogers was preparing for his clemency proceeding during the fall of 2019. This began with Mr. Rogers’s visit with University of South Florida associate criminology professor, Dr. Bryanna Fox, Ph.D., at Union Correctional Institution on September 5, 2019, which is the earliest possible operative date for the claim of newly discovered evidence. Mr. Rogers also discussed some of the facts on December 2, 2019 with psychiatrist, Dr. Michael Maher, M.D. Details about some of the abuse were later corroborated via a witness statement during an interview with Mr. Rogers’s older brother, Clay Rogers (“Clay”), on February 26, 2020, which was the proposed operative date for Appellant’s newly discovered evidence claim. Undersigned

counsel, Ali Shakoor, and investigator, Ed DeBerri, were present for the digitally voice recorded interview on February 26, 2020. Clay suffered a traumatic heart attack several days after providing the statement, then tragically lapsed into a coma and passed away at the UF Health Shands Hospital in Gainesville, Florida on March 28, 2020. By filing his successive motion on August 24, 2020, Appellant filed well within one year of either September 5, 2019 or February 26, 2020.

Appellant provided a clear, detailed history about the substance of the newly discovered evidence for the lower court. As a child, Mr. Rogers was failed by parental and state authorities who were tasked with providing for his safety and well-being. Instead, and while Mr. Rogers's brain was still developing, he was subjected to a series of mental and emotional traumas. Glen Rogers is a survivor of child sexual abuse. Had the jury heard of this substantial mitigation at trial, the jury would not have recommended a death sentence, but would have instead recommended the less severe sentence of life imprisonment.

Mr. Rogers was pimped out to child pornographers in his hometown when he was between 10 and 13 years old and was

victimized by other known pedophiles in the community. Mr. Rogers was incarcerated as a youth at institutions in Ohio under the umbrella of the Ohio Youth Commission (“OYC”). One of those institutions was the Training Institution of Central Ohio (“TICO”), which was located at 2130 W. Broad Street, Columbus, Ohio 43223, where Mr. Rogers was first placed by the State in November of 1975 when he was only 13 years old. Mr. Rogers was repeatedly sexually abused at this facility and witnessed other atrocities. The original trial record is bereft of any references to the highly mitigating evidence of Mr. Rogers being sexually victimized as a child. The abuses at TICO are like the evil that occurred at the long-shuttered Dozier School for Boys in Okeechobee, Florida, which has been documented in countless books and articles as a foul stain on Florida’s reputation, due to the horrors there which included beatings, rape, and murder.¹

¹ Ben Montgomery and Wavney Ann Moore, *They Went to the Dozier School for Boys Damaged. They came out destroyed: Read the classic Tampa Bay Times story that exposed a dark chapter of Florida’s history*, Tampa Bay Times (August 18, 2019), <https://www.tampabay.com/investigations/2019/08/18/they-went-to-the-dozier-school-for-boys-damaged-they-came-out-destroyed/>; Carol Marbin Miller, *A Painful Reunion at School of Horror*, Miami Herald (July 11, 2018 08:01 AM, Updated April 12,

Mr. Rogers began recalling this information while preparing for his clemency proceeding last fall, which required Mr. Rogers to discuss his personal history with clemency counsel, criminologist Dr. Bryanna Fox, and others. A detailed discussion of Mr. Rogers's case history triggered the unveiling of repressed memories in Mr. Rogers that no court, and most importantly, no jury, ever learned about. Had the jury been aware of the PTSD Mr. Rogers suffers from and the previously repressed childhood sexual abuse, statutory and non-statutory mental mitigation would have been established.

In *Hearndon v. Graham*, 767 So. 2d 1179, 1181 (Fla. 2000), the following rephrased certified question was addressed by this Court:

WHERE A PLAINTIFF IN A TORT ACTION BASED ON CHILDHOOD SEXUAL ABUSE ALLEGES THAT SHE SUFFERED FROM TRAUMATIC AMNESIA CAUSED BY THE ABUSE, DOES THE DELAYED DISCOVERY DOCTRINE POSTPONE ACCRUAL OF THE CAUSE OF ACTION?

“We answer the rephrased question in the affirmative and reverse the district court’s decision.” *Id.* In answering this question, this Court

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<https://www.miamiherald.com/news/state/article214677760.html>

relied on the dissent of J. Jorgenson in *Lindabury v. Lindabury*, 552

So. 2d 1117 (Fla. 3d DCA 1989). *Hearndon* states as follows:

Nevertheless, we recognize that the acceptance of theories supporting memory loss of childhood sexual abuse is a disputed area of psychological study. It is debated whether such memory loss actually occurs or whether plaintiffs are coached into believing that such abuse occurred by suggestions posed by psychologists. For example, one law journal article advocated the application of the delayed discovery doctrine in the case of childhood sexual abuse based on the view that:

The classic psychological responses to incest trauma are numbing, denial, and amnesia. During the assaults the incest victim typically learns to shut off pain by 'diss[as]ociating' achieving 'altered states of consciousness ... as if looking on from a distance at the child suffering the abuse.' To the extent that this defense mechanism is insufficient, the victim may partially or fully repress her memory of the assaults and the suffering associated with them: 'Many, if not most, survivors of child sexual abuse develop amnesia that is so complete that they simply do not remember that they were abused at all; or ... they minimize or deny the effects of the abuse so completely that they cannot associate it with any later consequences.' Many victims of incest abuse exhibit signs of Post-Traumatic Stress Disorder ("PTSD"), a condition characterized by avoidance and denial that is associated with survivors of acute traumatic events such as prisoners of war and concentration camp victims. Like others suffering from PTSD, incest victims frequently experience flashbacks and nightmares well into their adulthood.

Id. at 1182-83 (quoting Jocelyn B. Lamm, *Easing Access to the Courts for Incest Victims: Toward an Equitable Application of the Delayed Discovery Rule*, 100 Yale L.J. 2189, 2194 (1991)). If granted an evidentiary hearing by this Court, Mr. Rogers will present lay testimony about the sexual abuse he experienced as a child and expert testimony explaining how he repressed such traumatic memories over the years.

The *Hearndon* court went on to hold:

Reasons in favor of application of the doctrine in the case of childhood sexual abuse are as follows. First, it is widely recognized that the shock and confusion resultant from childhood molestation, often coupled with authoritative adult demands and threats for secrecy, may lead a child to deny or suppress such abuse from his or her consciousness. *See Ault*, 637 N.E.2d at 872 (citing *Evans*, 265 Cal. Rptr. at 606, 608). Second, the doctrine is well established when applied, for example, in cases involving breach of implied warranty or medical malpractice; it would seem patently unfair to deny its use to victims of a uniquely sinister form of abuse. Accordingly, application of the delayed discovery doctrine to childhood sexual abuse claims is fair given the nature of the alleged tortious conduct and its effect on victims, and is consistent with our application of the doctrine to tort cases generally; thus, we hold that the doctrine is applicable to childhood sexual abuse cases.

Id. at 1186 (footnotes omitted). Mr. Rogers’s experiences are clearly indicative of childhood sexual abuse. His subsequent conduct of initial denial of the effects of the abuse, triggers, and flashbacks are exactly the kind of conduct addressed in *Hearndon*.

Ultimately, the *Hearndon* court went on to hold:

We therefore hold that the delayed discovery doctrine applies to the accrual of the instant cause of action based on a claim of childhood sexual abuse accompanied by traumatic amnesia-keeping in mind that by our decision petitioner survives respondent’s motion to dismiss. However, our decision does not pass on the factual development of the issue that will be addressed at trial. We hereby answer the rephrased certified question in the affirmative, quash the district court’s decision below, and remand the case for proceedings consistent with this opinion.

Id. (footnote omitted). Mr. Rogers is not asking this Court to pass on the factual development of the issue. He is asking this Court to remand for an evidentiary hearing so the factual issues can be fully presented. This Court, in *Robinson v. State*, 913 So. 2d 514, 520 (Fla. 2005) held that:

‘[A] defendant is entitled to an evidentiary hearing on a postconviction relief motion unless (1) the motion, files, and records in the case conclusively show that the prisoner is entitled to no relief, or (2) the motion or a particular claim is legally insufficient.’ *Freeman v. State*, 761 So. 2d 1055, 1061 (Fla. 2000). ‘[W]here the motion

lacks sufficient factual allegations, or where alleged facts do not render the judgment vulnerable to collateral attack, the motion may be summarily denied.’ *Ragsdale v. State*, 720 So. 2d 203, 207 (Fla. 1998) (citing *Steinhorst v. State*, 498 So. 2d 414 (Fla. 1986)). However, in cases where there has been no evidentiary hearing, this Court must accept ‘the defendant’s factual allegations to the extent that they are not refuted by the record.’ *Peede v. State*, 748 So. 2d 253, 257 (Fla. 1999). In other words, this Court ‘must examine each claim to determine whether or not the claim is refuted by the record.’ *Atwater v. State*, 788 So. 2d 223, 229 (Fla. 2001).

It cannot be conclusively shown from the motion, files, and records in this case that Mr. Rogers is entitled to no relief, nor can it be said that Mr. Rogers’s motion was legally insufficient. Mr. Rogers’s life is literally at stake, and his trial record lacks a complete history of the mitigating circumstances that entitle him to a life sentence.

Repressed memories of childhood sexual abuse are something Mr. Rogers shares with many sexual abuse victims in the forever ongoing and horrific Catholic Church scandal, which has resulted in convictions and settlements for countless victims. Grown men had spent decades silently struggling with their guilt and shame for something that was no fault of their own. Again, adults who were entrusted with caring for young boys abused their authority and forever impacted the future lives of the victims. When discussing the

legal aspects about the ongoing scandal, media has reported on victims' repressed memories of sexual abuse.² Mr. Rogers is a victim and a survivor of childhood sexual abuse. Similar to how civil plaintiffs have overcome previous procedural bars in bringing forth claims for relief because of later uncovered repressed memories, no procedural obstacles should bar Mr. Rogers from seeking collateral relief at this juncture.

The circuit court summarily rejected application of *Hearndon* in this case without taking the time to listen to expert testimony during an evidentiary hearing. Sup. R. 208. Dr. Fox, from a forensic psychology perspective, and Dr. Maher, as a psychiatrist, are willing and able to discuss the effects of childhood sexual abuse on the psyche, particularly as it applies to Mr. Rogers. Child sexual abuse is particularly "sinister," and the trauma is highly significant. The mitigation is weighty. Importantly, this Court has never decided that *Hearndon* is inapplicable in a capital postconviction posture. The circuit court's refusal to consider *Hearndon* in the context of capital

² Seth Stern, 'Repressed Memory' Key to Lawsuits, The Christian Science Monitor, (May 9, 2002), <https://www.csmonitor.com/2002/0509/p01s01-usju.html>.

postconviction proceedings is misguided without the benefit of evaluating expert testimony about the effect childhood sexual abuse has on a developing mind and the impact on future behavior.

Sexual Abuse & Exploitation in Appellant's Childhood Community

Glen Rogers was repeatedly sexually abused while growing up as a child in Hamilton, Ohio. Mr. Rogers's family life has been documented concerning some of the abuse and deprivation he experienced as a child, but nothing about sexual abuse has ever been revealed until now. Mr. Rogers was sexualized at a young age by spending time in a neighborhood brothel, which he refers to as a "cathouse." At an age when Mr. Rogers should have been getting accustomed to holding hands and experiencing a first kiss with an age-appropriate child, he was instead surrounded by explicit sexual activity and sexually taken advantage of by older woman. When Mr. Rogers was about 10 years old, there was a woman who lived on Park Avenue in Hamilton, Ohio who invited him in for a soda as he walked by her house one day. After that first meeting, he spent many nights at this woman's home being statutorily raped. The abuse ended when he went to her home one day and saw another boy named Mark

Brockman, who was there in his place. Feeling betrayed, a distraught and confused young Mr. Rogers tore up the woman's house and never went to see her again. Again, Appellant was a mere 10 years old.

There was a notorious child molester in the early 1970s Hamilton, Ohio community named Robert Liddil ("Liddil"). Mr. Rogers was only 11 when Liddil first molested him. Appellant was walking by Liddil's Rider Radio store one day, which was located at 23 High Street, in Hamilton, Ohio, when Liddil offered young Mr. Rogers a job sweeping up. This became a regular arrangement of Appellant receiving \$4.00 each time he swept, and Liddil eventually asked Mr. Rogers to clean his private home. Liddil was engaging in perverted "grooming" techniques on Mr. Rogers and eventually began performing sex acts on him. Mr. Rogers's older brother, Craig Rogers, recalls Liddil showing an intense interest in young Mr. Rogers by giving him gifts and showing up at the Rogers family home looking for him if he missed work. When Mr. Rogers was reluctant or protested predatory advances, Liddil would remind Mr. Rogers about how allegedly generous he had been and guilted him into acquiescing to the abuse. Nobody was around or willing to protect Mr. Rogers, even though the owner of a barbershop who shared a building with

Liddil did once catch him in a very compromising position with Mr. Rogers. Liddil was a mentor to young boys at the local YMCA and molested some of them. Liddil would invite Mr. Rogers to secret masturbation sessions in dark rooms with other underage boys and Liddil. As a child, Mr. Rogers was interviewed as part of the criminal investigation into Robert Liddil's actions with young children, but Appellant denied being sexually abused by Liddil. Appellant was scared because Liddil had once told Mr. Rogers that he could murder him any time he wanted to while Mr. Rogers and Liddil were alone on a boat. Mr. Rogers also lacked a functional family environment to support him at home. The abuse did not end until Mr. Rogers returned to Hamilton after one of his stints in a juvenile correctional facility and Liddil decided he was "too old." On February 19, 1976, Robert Liddil entered a guilty plea to a charge of "sexual imposition," in another case not directly related to Mr. Rogers. *See State of Ohio v. Robert Liddil*, CR76-02-0058, Butler County, Ohio (February 19, 1976).

Clay, a brother over four years older than Mr. Rogers, took advantage of Mr. Rogers's tragic knowledge of sex by trafficking him to obtain drug money when Mr. Rogers was between 10 and 12 years

old. Clay sacrificed young Mr. Rogers to two older women in their mid-twenties that Clay had known around town, Carla Taggert (“Carla”) and Vanessa Auer (“Vanessa”). Clay witnessed both Carla and Vanessa having sex with Mr. Rogers during that period, which was not “sex,” but rather two older adult women raping a vulnerable young child. Gary Rogers (“Gary”), another older brother to Mr. Rogers, recalls Carla as an adult neighbor with a small child, who had a reputation for abusing young boys in her home; among them was the underaged Appellant and his brother Clay. Gary also knew of Carla to hang out with a woman named “Vanessa.” Gary managed to avoid the dangerous predatory circles that Mr. Rogers and Clay fell victim to during that time.

Carla and Vanessa not only raped young Mr. Rogers, but they offered him to other men in the community who produced child pornography, including a notorious child pornographer who went by the name of “Bear.” Bear would make 12-year-old Mr. Rogers engage in sexual acts and take pictures of him. Bear was trading in child pornography, so he would take nude pictures of children (including Mr. Rogers) for underground child porn magazines. Bear would touch Mr. Rogers sexually as he positioned him for photographs. These acts

of sexual abuse for child pornography with Bear happened several times. Mr. Rogers recalls being pimped out to at least three older men by Vanessa and Carla. He was pressured to sacrifice himself for drug money and out of fear of angering his brother Clay. Vanessa and Carla would sometimes find ways to get Mr. Rogers's penis erect for the child pornographers taking photos. In the aftermath of the abuse, Mr. Rogers described to Dr. Fox feelings of being "humiliated, nasty and dirty."

Another older man who would sexually molest Mr. Rogers was a newspaper reporter who lived in a big white house on the corner of Park Avenue and Eaton Road in Hamilton, Ohio; there used to be a school across the street, but it has since been torn down. Mr. Rogers would do small jobs and yard work at the reporter's house, and Clay would accompany him on occasion. The reporter once "felt Clay up," after inviting him in for some fresh lemonade. This predatory reporter would show Mr. Rogers X-rated movies and sexually molest him. Another older man who would molest Mr. Rogers and other kids in his community drove a fancy convertible and was named Paul Lee Sedowski.

Appellant was sexually taken advantage of and raped as a

young child growing up in Hamilton, Ohio. As his brother Craig can testify, Hamilton, Ohio was infested with child predators. His unstable home life and the climate of the times made Mr. Rogers incapable of protecting himself from predatory adults. Mr. Rogers's family and the local community failed him. It is no wonder that he began a life of crime at such a young age and was eventually sentenced to juvenile correctional facilities, where he was further victimized.

Appellant's Sexual Abuse and Exploitation at Juvenile Correctional Facilities

Clay became aware of another time Appellant was being sexually abused by adults when he picked a young Mr. Rogers up from TICO during one of his multiple trips to the notorious juvenile correctional institution. Once, when Clay collected young Mr. Rogers from TICO and helped him gather his things, among his bag of belongings was a note that Mr. Rogers said came from one of the guards, which read, **"Get it up, keep it ready, I'll be right back."** It is obvious what the disgusting note was referring to, and Mr. Rogers was one of many boys victimized by the adult male predatory staff at TICO. Older brother Gary recalls a conversation at the family

home sometime around 1975 where, in the presence of both Clay and Gary, Appellant discussed his anger about being sexually abused while being held in an Ohio juvenile correctional facility. Another brother, Craig, recalls another incident where Mr. Rogers mentioned something inappropriate happening from a guard while he was incarcerated as a juvenile at a facility in Ohio.

Before it was shut down in the mid-1990s, TICO was known as one of the most notoriously brutal institutions in Ohio, if not the entire nation. An important article about the institution provides some description of the environment during the period when Mr. Rogers was housed there. See Lindsay M. Hayes and Robert Johnson, *Confining Wayward Youths: Notes on the Correctional Management of Juvenile Delinquents*, *Juvenile and Family Court Journal* (November 1981). Sup. R. 163. Among the compelling details mentioned in the article:

Ohio is a state “deeply committed to institutionalization.” The article reports that “youths committed to Ohio’s training schools remained there an average of 272 days in 1977, as opposed to the national average of 184 days.” Additionally, “Ohio’s juvenile court commitments to training schools were shown to be 59 percent greater than that reported in the national sample.” Sup. R. 164.

“Deprived of their liberty, stripped of worldly possessions, denied access to heterosexual relationships, divested of autonomy and compelled to associate with other deviants, incarcerated youths find that imprisonment entails substantial suffering and punishment, however much that confinement may have been softened in this modern era by an accent on treatment, humanitarianism and reform.” Sup. R. 164.

“In arriving at TICO . . . one must first drive through the grounds of the state hospital for the mentally ill . . . When finally arriving at TICO, one has passed by the state mental hospital, three OYC institutions and approximately 500 incarcerated youths. Thus, TICO, the last facility in this institutional complex, is figuratively and literally an end-of-the-line institution.” Sup. R. 165.

“Built in 1961, TICO is a rambling, one-story, faded yellow structure with wings (euphemistically called cottages) angling away from the central admissions area.” Sup. R. 165.

“The physical and social environment in TICO’s cottages are unlike that of any family. These cottages, housing 25 youths each, have heavy screens over the windows in what is called the program area and bars over the windows in each youth’s room. Each cottage is monitored by a social worker and several youth leaders who spend most of their time in small, glass-enclosed offices adjacent to the program area. Youths, in fact, are under supervision at all times of the day. Unless in the final stages of his stay, a youth must be accompanied by a staff member at all times.” Sup. R. 166.

“In addition to military-style gray uniforms worn by the youths, each cottage is assigned colored T-shirts that must be worn by the youths when outside the cottage.” Sup. R. 166.

“Formal labeling (classification) is a salient feature of staff assessment of youths confined in TICO. Staff members also use a number of informal labels, including ‘punk,’ ‘sickie,’ and ‘pussy.’ Staff members often make bets on a youth’s future adjustment after release, frequently in the youth’s presence. Worse, staff sometimes use labels to communicate a youth’s sexually exploitable status to the other residents, thereby inadvertently precipitating sexual attacks.” Sup. R. 167.

“Sexual exploitation is disturbingly commonplace, with blacks pressuring whites in most of the encounters. . . . If any weaknesses are shown, the newcomers are immediately abused by others.” Sup. R. 167.

“In the summer of 1978, we administered a social climate survey to a random sample of 40 TICO residents. The results attest to the picture of TICO traced by Bartollas and his colleagues. Asked to comment on the statement, ‘Students here never try to take advantage of each other,’ 38 out of 40 (95 percent) youths sampled “disagreed,” indicating that exploitation was prevalent at TICO. . . . Finally, when youths were asked to describe a key incident of institutional life, fear ranked second behind feelings of personal powerlessness as a key aspect of institutional living at TICO.” Sup. R. 167-68.

“Youths at TICO must wear identical clothes, share common haircuts, act deferentially toward staff, request permission to perform minute and trivial acts, accept routine body searches and adhere to trivial rules.” Sup. R. 169.

“[T]he use of new therapeutic technologies, specifically the I-level system at TICO, did not fulfill helping profession ideals. Instead of preventing exploitation, the I-level system categorized youths into small residential units that served to strengthen delinquent subcultures and promote ostracism and exploitation.” Sup. R. 169.

Keep in mind that Appellant was 13 years old when he was placed in this oppressive environment in November of 1975. He was also a white boy housed with many older black youths born under Jim Crow and victimized by institutional racism and often direct racial violence. Misguided and angry older black youths sometimes sought revenge against systemic racial oppression by lashing out against more vulnerable white residents like Mr. Rogers, who not only experienced severe violence but also witnessed it. Like the atrocities at Dozier, there are also dead bodies buried on the grounds at TICO. One night, Mr. Rogers was awakened by a staff member and forced to dig a hole in the yard at TICO where the body of a black boy was subsequently placed. The Hayes and Johnson study relies heavily on the work of Dr. Clemens Bartollas, Ph.D., who was a social worker and cottage director at TICO during the early 1970s. Dr. Bartollas is the author of countless articles and books on his experiences at TICO and about juvenile victimization in correctional institutions in general. In 1976, he authored *Juvenile Victimization: The Institutional Paradox*, Halstead Press (January 1, 1976), which was liberally cited in the Hayes and Johnson study. Sup. R. 163. Dr. Bartollas is an

expert witness on Mr. Rogers's behalf and submitted a report after reviewing some of the case history. Sup. R. 173-77. Dr. Bartollas states the following about TICO in the 1970s:

Before I resigned in May 1973 to take a teaching position in North Carolina, I had been able to use my Wing Director's position to reduce the levels of violence that staff directed to residents. In 1970, an example of the staff's violence towards residents was expressed in "instant therapy" (where staff members hit residents with a punch to the face). Residents were also hit with pool sticks by staff members, beaten up by staff and thrown in their rooms for 21 day restrictions, and staff failed to protect youths who were experiencing on-going sexual victimization.

I made clear my objections to the staff's brutal treatment of residents. If it took place in one of my four cottages, I could pursue disciplinary action against the staff member. I was also appointed head of the Major Incidents Committee in which I would investigate all incidents in which a resident was injured by an altercation with a staff member. This further reduced violent incidents in the institution.

In the 1970s, TICO became increasingly violent. Inmates were more violent toward other residents and more violence was expressed in staff and inmate relations.

During the crafting of *Juvenile Victimization: The Institutional Paradox*, residents on many occasions told me, "This place is a jungle and only the strong survive." This became more true during the 1970s and even more so during the 1980s. Rudy Davis, director of recreation at TICO from late in the 1960s to the end of the 1980s, reported the following to me in an interview during the twenty-five year study of TICO (1963-1988):

TICO became more violent in the 1970s and even more so in the 1980s. We just did not have the control of the residents that we did in the 1960s. Back in the day, we

were all excited to go to work. After work, we used to sit on the hoods of cars and talk about treating kids.

This place became so violent during the late 1970s that while the institution was watching a movie one resident snuck out, went to the nurse's office and nearly killed the nurse by raping and assaulting her. She never returned to work. (emphasis added).

At the same time, one security staff member said, "I am glad to be retiring. The place was getting too dangerous." A social worker added, "I don't know what happened, but it got more dangerous. I just stayed in my cottage and tried to stay low key." Significantly, he was the social worker at Imperial Cottage, which was where Glen Rogers was placed during his stays at TICO.

Our research showed what affected increased levels of violence was that the key staff leaders in the cottages were aging. As my colleagues and I found during the victimization study, these staff leaders (usually designated as Assistant Cottage Directors) were protective of residents and kept the other six line-staff in the cottage in line, which minimized the levels of staff brutality toward residents. In other words, the institution had fewer controls against rogue staff.

A further contributor toward the violence was the literal demise of treatment at TICO. In 1972, soon after Harrington became superintendent, the institutional structure was changed. The social worker had previously been cottage director, making both treatment and security decisions in the cottage. Security staff now were delegated to be the chief decision makers on all aspects of institutional life.

With their reduced status and authority, social workers and wing directors became demoralized and, as a result, the training school became more and more security oriented.

Sup. R. 174-75. Regarding the "rogue staff," Mr. Rogers experienced the worst type of abuse perpetrated by men who were supposed to

guide and protect him. Sexualized abuse often involved making the boys strip naked. Activities the children were forced to perform in the nude included: standing on a box on the hallway, walking down the halls, scrubbing the floors, and cleaning latrines. While at TICO, Mr. Rogers was placed in a building called the Imperial Cottage and was routinely locked in a small room called the “Attitude Adjustment,” where he was kicked and punched by staff and subsequently placed in solitary confinement until the bruising and other injuries healed.

However, sexual abuse is what destroyed the rest of Mr. Rogers’s self-esteem and hope for a meaningful future, as a staff member named Percy L. Jackson (“Jackson”) raped him on numerous different occasions. Jackson was a correctional officer who oversaw the Imperial Cottage and was a particularly notorious predator. He was accused by other TICO residents of abuse and rape, before being suspended and indicted, but the criminal charges were dropped, and Jackson was later hired back at TICO. However, Jackson was never investigated for what he did to Appellant, as Mr. Rogers kept the secrets and harbored the shame. Jackson started the “grooming” by buying Mr. Rogers sodas, displaying a special interest in him, and taking nude pictures of the child. Jackson found

secluded areas on the TICO campus to rape Mr. Rogers, such as along the fence line of the property, the unoccupied computer lab, and the employee lounge when it was empty.

Jackson would also sign young Mr. Rogers out of camp under a false pretense and took him to his private residence to rape him on two different occasions. Mr. Rogers recalls Jackson's residence as being a red-bricked single-family home. He can describe the interior of Jackson's home with the living room presenting itself upon entering the front door and Jackson's bedroom where the rapes took place was down the hallway on the right. He remembers seeing a framed photograph of a young black man in a military uniform. Mr. Rogers vividly recalls Jackson's physical appearance as being approximately 5'8", black with light-brown skin and a thin grey moustache. Mr. Rogers can remember the feeling of Jackson's tickling whiskers kissing his face and the complaints of "dooky" on his penis after he had raped Mr. Rogers anally in the bed at Jackson's own private residence. After all the deprivations he suffered in life, it is distressing to consider what was going through young Mr. Rogers's mind while he was face-down on his wing director's bed and being raped. After the second time Mr. Rogers was raped at Jackson's

home, he attempted to escape by running out of the house and hiding out, but he was located by TICO staff and returned to the campus. Mr. Rogers was then tortured and forced to endure difficult physical labor for his remaining duration at TICO, but Jackson never raped him again. Dr. Bartollas knew the sexual predatory culture created by staff at TICO, writing in part:

If ongoing physical abuse from staff and fellow residents was not bad enough, what is totally outrageous is the sexual exploitation Rogers received, especially at TICO.

A little history may be helpful here. Our victimization study identified thirteen types of victimization, including three types of sexual victimization. We recognized staff brutality but most of the sexual exploitation was between residents. In my fourth year of working at TICO, John Hall, who was the social worker in the orientation cottage, came to my office one day and reported conversations he had with two of the residents. They said that two staff members, Percy Jackson and Abdullah Talib were sexually violating students in the orientation cottage. Upon further investigation, we discovered that a female psychologist from Fairfield School for Boys, the feeder institution to TICO, would contact Jackson and Talib informing them which youths coming to TICO were vulnerable to sexual exploitation.

The State Patrol was called in. Jackson and Talib were suspended without pay and were eventually released from employment. On three or four occasions, in the middle of the night, someone called my home number and informed me that if I continued to be involved in the case, I would be killed. Jackson was eventually reinstated and

all back pay was returned to him. By then, I was no longer working for the institution.

Glen Rogers reports how Percy Jackson raped him and a lot of other residents. He also reported how Jackson and helper(s) handcuffed several youths and took them to his house, where residents were sexually accosted over and over before they were returned to the institution. Glen Rogers reports being one of the boys signed out of the institution and taken to Jackson's home to be raped.

Jackson, who got away with it before, perhaps was so embolden that he was willing to be much more daring this time. Nevertheless, it would seem that Rogers is right in his statement that sexual violation of TICO residents was taking place more than ever before.

Sup. R. 176-77. Officials in Ohio failed to protect Mr. Rogers and are partially responsible for him eventually becoming a capital defendant. No jury or court has ever heard about TICO and what it did to Mr. Rogers. Mr. Rogers is a victim of Ohio's failure to protect vulnerable children held in their custody. Like Dozier here in Florida, TICO was a state-funded facility that had a legal duty to protect young boys. Like Dozier, TICO failed miserably before sending out damaged and dispirited young men to unleash their vengeance on communities at large. If Mr. Rogers's jury ever heard any of this compelling mitigation, it is probable they would have recommended a sentence less severe than death. As Dr. Bartollas opined: "There is

no way the state of Ohio did not fail this youth (Glen), and this certainly should contribute to a mitigation of sentence.” Sup. R. 177.

The foregoing allegations of sexual abuse satisfied the pleading requirements of a newly discovered evidence claim, pursuant to Fla. R. Crim. P. 3.851. The circuit court erred in making determinations of the facts without the benefit of an evidentiary hearing. The circuit court wrote *“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.”* Sup. R. 208-09. That passage from the circuit court’s order tersely conflates separate allegations from Mr. Rogers’s successive motion. If the circuit court would hold an evidentiary hearing pursuant to the law, it would be established that Clay’s testimony could not have been previously obtained, even with due diligence. Clay’s unavailability is just one factor, in addition and besides the fact that Appellant’s memories had been repressed until the fall of 2019, regarding the mitigating aspect of any abuse allegations. Clay battled addictions and lived a life of crime throughout his adult life. He did not testify

in Appellant's trial for the case at bar, nor his trial in California, because he consistently remained on the run from "the law."

While making the incorrect assumption that the abuse allegations could have been discovered from other family members with "due diligence," the circuit court wrote:

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 Taggart'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.

Sup. R. 209. The circuit court should have held an evidentiary hearing to ascertain whether the information could have been discovered with due diligence. Again, Mr. Rogers's memories regarding the sexual abuse were repressed until the fall of 2019, so nothing would trigger counsel to seek out family members regarding Appellant's allegations prior to that period. The circuit court did not

allow for an evidentiary record to establish when the brothers Gary and Craig recalled the abuse, nor whether they were willing and able to testify about the sexual abuse claims at an earlier date.

Just before concluding the written order denying relief, the circuit court wrote: *Finally, the Court notes that during the October 13, 2020, case management conference, postconviction counsel did not argue that he was unaware of any books or “documentaries” about Defendant, but essentially argued only that the salacious nature of the portrayal would not have been put him on notice of the sexual abuse allegations.* Sup. R. 209. Here the circuit court is demonstrating why it is so important to have an evidentiary hearing pursuant to this Court’s precedent, as the circuit court’s order simply misstates facts. First, there is only one documentary at issue, which was the 2012 documentary, *My Brother the Serial Killer*, so the circuit court’s reference to a plural form is curious. Also, the word “salacious” does not appear anywhere in the October 13, 2020 transcript of the case management conference.

Regarding the documentary, of which Clay was the subject, again, Clay was on the run and was previously unwilling to assist in mitigation investigations on Appellant’s behalf prior to 2020. The

sensationalized nature of the documentary was demonstrated by the allegation that Appellant was the true murderer of Nicole Brown Simpson and Ronald Goldman, not O.J. Simpson as widely presumed. At the case management conference, undersigned counsel offered the filmmaker, David Monaghan, as an additional witness for any future evidentiary hearing to assist the court in ascertaining the due diligence requirement as it relates to this issue. The same issue applies to the two books referenced by the lower court and the State. The books describe some matters that have nothing to do with Appellant's specific, detailed, allegations of abuse.

An evidentiary hearing is required before the lower court can make findings about timeliness and due diligence. This Court has held that evidentiary hearings are typically required for newly discovered evidence claims. *See Nordelo*, 93 So. 3d at 185; *Davis*, 26 So. 3d at 526; *Jones*, 591 So. 2d at 911, 916 (“On the face of the pleadings, we cannot determine whether some of the evidence can properly be said to be newly discovered. Moreover, we cannot fully evaluate the quality of the evidence which demonstrably meets the definition of newly discovered evidence. Therefore, we believe it necessary to have an evidentiary hearing on the claims that are based

upon newly discovered evidence.”). Denial of a newly discovered evidence claim on the merits, without an evidentiary hearing, is only permitted if: (1) the factual allegations presented in the postconviction motion are “conclusively refuted” by the record or otherwise “inherently incredible,” *Davis*, 26 So. 3d at 526, *Peede v. State*, 748 So. 2d 253, 257 (Fla.1999); or (2) even if true, those facts are “obviously immaterial to the verdict and sentence,” *Nordelo*, 93 So. 3d at 184, *Davis*, 26 So. 3d at 526.

The trial court erred in skipping the crucially important step of overseeing an evidentiary hearing for Appellant’s clearly facially sufficient claims, prior to addressing timeliness and due diligence. The lower court’s order contains errors in its determination of the facts and in how it interprets the law. The total error is an affront to this Court’s precedent, as well as Appellant’s Eighth Amendment and due process rights under the United States Constitution. If provided an evidentiary hearing, Appellant is prepared to demonstrate that his newly discovered evidence was raised timely; within one year of his memories being unrepressed and corroborated. An evidentiary hearing would further demonstrate that the newly discovered evidence would probably have yielded a less severe sentence had the

jury heard the evidence at trial. Under the current state of the law requiring a unanimous jury recommendation, the newly discovered evidence of this horrific and mitigating sexual abuse would compel any new penalty phase jury to recommend a sentence of “life without the possibility of parole.” But first things first, Mr. Rogers is entitled to an evidentiary hearing for his claim of newly discovered evidence.

CONCLUSION AND RELIEF SOUGHT

The lower court erred in denying Appellant’s claim of newly discovered evidence, without first conducting an evidentiary hearing to properly evaluate and weigh the evidence. This Court should remand with an order for the circuit court to hold an evidentiary hearing consistent with the law. Relief is proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the Initial Brief has been furnished via electronic transmission to Senior Assistant Attorney General Stephen Ake, stephen.ake@myfloridalegal.com, and CapApp@myfloridalegal.com; and by U.S. Mail to Glen Rogers, DOC #124400, Union Correctional Institution, P.O. Box 1000, Raiford, Florida 32083, on this 12th day of February, 2021.

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I **hereby certify** that the foregoing Initial Brief was generated in Bookman Old Style 14-point font, pursuant to Fla. R. App. P. 9.045.

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