IN THE SUPREME COURT OF FLORIDA

CASE NO. SC2025-0371

EXECUTION SCHEDULED FOR APRIL 8, 2025 AT 6:00 PM

MICHAEL TANZI,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE SIXTEENTH JUDICIAL CIRCUIT, MONROE COUNTY, FLORIDA

LOWER CASE NO. 2000-CF-573-K

INITIAL BRIEF OF APPELLANT

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MARCH 24, 2025

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Constitutional Provisions

PRELIMINARY STATEMENT AND CITATIONS TO RECORD

Mr. Tanzi is before this Court on appeal of the circuit court's summary denial of his successive motion for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.851. The filing of the motion was prompted by the Governor's signing of a death warrant on March 10, 2025.

The following symbols will be used to designate references to the record in this appeal: "(R. ___)" -- record on direct appeal to this Court; "(T. ___)" -- trial transcripts on direct appeal to this Court; "(PCR. Vol. ___, ___)" – postconviction record on appeal to this Court, Case No SC10-807; "(PCR-2. ___)" – successive postconviction record on appeal to this Court, Case No: SC17-1640; "(PCR-3. ___)" – current successive postconviction record on appeal to this Court (under warrant). Additional citations will be self-explanatory.

REQUEST FOR ORAL ARGUMENT

Mr. Tanzi has been sentenced to death and is scheduled to be executed on April 8, 2025. The resolution of the issues in this action will determine whether he lives or dies. This Court has readily granted oral argument in other capital cases in similar procedural postures. *See Asay v. State*, 224 So. 3d 695, 699 (Fla. 2017) (staying

Asay's execution after holding oral argument). A full opportunity to air the issues presented through oral argument is necessary here, given the seriousness of the claims involved. Mr. Tanzi, through counsel, accordingly urges that the Court permit oral argument.

STATEMENT OF THE CASE AND FACTS

a. Trial Proceedings

The Circuit Court for the Sixteenth Judicial Circuit, in and for Monroe County, Florida, entered the final judgments of conviction and sentence of death at issue. Mr. Tanzi was indicted for the first-degree murder of Janet Acosta on May 16, 2000. (R. 13-14). An amended information was filed on March 26, 2002, charging Mr. Tanzi with carjacking with a weapon, kidnapping to facilitate a felony with a weapon, armed robbery with a deadly weapon, and two counts of sexual battery with a deadly weapon. (R. 299-301).

Initially, Mr. Tanzi pleaded not guilty to all charges. (R. 22). However, both of Mr. Tanzi's trial counsel believed his best chance to avoid the death penalty was to plead guilty and waive a jury for the penalty phase proceeding. (R. 2340-42, 2408). They told Mr. Tanzi that the judge had a reputation as a fair sentencer. (R. 2407). The two were so sure, they advised him of this course of action for at least two months. (R. 2264, 2420).

On January 31, 2003, Mr. Tanzi entered an *Alford*[1] plea to the counts of first-degree murder, carjacking, kidnapping, and armed robbery. Although Mr. Tanzi was under the assumption he would be able to waive a jury for the penalty phase proceeding, during the plea colloquy, the judge announced that Mr. Tanzi would have a penalty phase jury. Following a lunch break, Mr. Tanzi sought to waive the penalty phase jury. (R. 1921). Noting that the decision of sentence was "momentous," the court refused to accept Mr. Tanzi's waiver.[2] (R. 1925-26).

Mr. Tanzi maintained his plea of not guilty to the two sexual battery charges and elected to be tried in Miami-Dade County where the offenses were alleged to have occurred. After the two sexual battery charges were severed, the State elected not to prosecute them. (R. 1803).

At the penalty phase, counsel presented Linda Sanford, a

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[1] *North Carolina v. Alford*, 400 U.S. 25 (1970) (allowing criminal defendants to enter guilty pleas in which they agree to be convicted and sentenced to the charged offense but not admit guilt).

[2] Acting *pro se*, Mr. Tanzi attempted to withdraw his guilty plea. (R. 2044). The trial court inquired into Mr. Tanzi's relationship with his trial attorneys, but did not rule on the *pro se* motion. (R. 2044).

forensic social worker who had evaluated Mr. Tanzi as a child for admission to the Chamberlain School, a residential therapeutic institution in Massachusetts, and supervised his treatment there, (T. 1076, 1080, 1100); William Vicary, M.D., a California forensic psychiatrist who found that Mr. Tanzi suffered from several mental health disorders, (T. 1143); and Alan Raphael, Ph.D., a Florida forensic psychologist who diagnosed Mr. Tanzi with eleven disorders spanning all five diagnostic categories. (T. 1260, 1299).

The jury recommended Mr. Tanzi be sentenced to death by a vote of 12-to-0. (R. 1820-24). On March 14, 2003, the trial court conducted a *Spencer*[3] hearing. (R. 2214-34). On April 11, 2003, the trial court entered its order sentencing Mr. Tanzi to death for the murder of Janet Acosta and to consecutive life sentences for each count of carjacking, kidnapping and robbery. (R. 1804-32).

The trial court found seven aggravating factors: (1) the murder was committed by a person previously convicted of a felony and under sentence of imprisonment or on felony probation (great weight); (2) the murder was committed during the commission of a

[3] *Spencer v. State*, 615 So. 2d 688 (Fla. 1993).

kidnapping (great weight); (3) the murder was committed during the commission of two sexual batteries (great weight); (4) the crime was committed for the purpose of avoiding arrest (great weight); (5) the murder was committed for pecuniary gain (great weight); (6) the murder was especially heinous, atrocious, or cruel ("utmost" weight); and (7) the murder was committed in a cold, calculated, and premeditated manner (great weight). (R. at 1804-32).

In mitigation, the court found: (1) Mr. Tanzi suffered from Axis II personality disorders (some weight); (2) Mr. Tanzi was institutionalized as a youth (some weight); (3) Mr. Tanzi's behavior benefited from psychotropic medications (some weight); (4) Mr. Tanzi lost his father at a young age (some weight); (5) Mr. Tanzi was sexually abused as a child (some weight); (6) Mr. Tanzi twice attempted to join the military (some weight); (7) Mr. Tanzi cooperated with law enforcement (some weight); (8) Mr. Tanzi assists other inmates by writing letters and he enjoys reading (some weight); (9) Mr. Tanzi's family has a loving relationship with him (some weight); and (10) Mr. Tanzi has a history of substance abuse (found, but given no weight). (R. at 1804-32).

b. Direct Appeal

On direct appeal, this Court determined that the trial court had improperly doubled the murder in the course of a felony aggravator:

> Therefore, the trial court in this case should have found one murder in the course of a felony aggravator based upon the multiple felonies of kidnapping and sexual battery and weighed the aggravator accordingly.

Tanzi v. State, 964 So. 2d 106, 117 (Fla. 2007). However, the Court determined that the doubling error was harmless. *Id*. The Court also perfunctorily rejected Mr. Tanzi's claim that Florida's death sentencing scheme was unconstitutional under *Ring v. Arizona*, 536 U.S. 584 (2002). *Id.* at 112 n.2. Mr. Tanzi sought certiorari, which was denied. *Tanzi v. Florida*, 552 U.S. 1195 (2008).

c. Postconviction Proceedings

Mr. Tanzi timely filed his initial motion for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.851 and sought public records pursuant to Rule 3.852. After an evidentiary hearing, (PCR-T. 1-433), the circuit court denied all relief. (PCR. 511-520). Mr. Tanzi appealed and petitioned this Court for a writ of habeas corpus. This Court affirmed the denial of postconviction relief and further denied habeas corpus relief. *Tanzi v. State*, 94 So. 3d 482 (Fla. 2012).

Mr. Tanzi filed a petition for writ of habeas corpus in the United States District Court for the Southern District of Florida. The district court denied the petition and the Eleventh Circuit Court of Appeals affirmed. *Tanzi v. Sec'y, Fla. Dep't of Corr.*, 772 F.3d 644 (11th Cir. 2014), *cert. denied*, 577 U.S. 865 (2015).

Following the United States Supreme Court's decision in *Hurst v. Florida*, 577 U.S. 92 (2016), and this Court's decisions in *Perry v. State*, 210 So. 3d 630 (Fla. 2016), *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), and *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016), Mr. Tanzi filed a successive motion for postconviction relief, alleging that his death sentence was unconstitutional under the Sixth and Eighth Amendments. (PCR-2. 1). Mr. Tanzi also alleged that these developments in the law required the court to revisit his previous postconviction claims under *Strickland v. Washington*, 466 U.S. 668 (1984), and *Brady v. Maryland*, 373 U.S. 83 (1963), to determine if, in light of *Hurst v. State* and *Hurst v. Florida*, confidence in the outcome was undermined. (PCR-2. 19).

Despite Mr. Tanzi's jury having never made any findings of fact in aggravation, the circuit court denied the claim finding that the unanimous advisory recommendation from the jury rendered any

Hurst error harmless. On appeal, this Court once again found constitutional error occurred but deemed it harmless. *Tanzi v. State*, 251 So. 3d 805 (Fla. 2018), *cert. denied*, 586 U.S. 1004 (2018).

d. Proceedings Pursuant to Death Warrant

On Monday, March 10, 2025, Governor Ron DeSantis signed Mr. Tanzi's death warrant and scheduled his execution for April 8 at 6:00 p.m. The Office of Executive Clemency issued a letter stating that the Governor denied clemency and that the death warrant "concludes the clemency process." (PCR-3. 656).

The same day, this Court issued a scheduling Order requiring that all circuit court proceedings be expedited and concluded by Wednesday, March 19th, at 3:00 p.m. (PCR-3. 658). Thus, Mr. Tanzi had less than 9 days to litigate his claims in circuit court. *See* (PCR-3. 658). Despite this extremely tight timeframe, the circuit court waited nearly 48 hours before holding a case management conference at 4:00 p.m. on Wednesday, March 12. (PCR-3. 98). The court issued a scheduling order after this conference at 8:46 p.m. (PCR-3. 328).

Given the urgency of the timeframes involved, Mr. Tanzi filed his public records demands pursuant to Rule 3.852(h) and (i) before the case management conference. Mr. Tanzi filed demands pursuant

to 3.852(h)(3) to the: Office of the State Attorney, 16th Circuit (SAO-16), Office of the Medical Examiner, 16th District (MEO-16), Monroe County Sheriff's Office (MCSO), Miami-Dade Sheriff's Office (formerly the Miami-Dade Police Department) (Miami-Dade SO), Florida Department of Law Enforcement (FDLE), City of Miami Police Department (City of Miami PD), and Key West Police Department (KWPD). *See* (PCR-3. 225-90). He filed demands pursuant to Rule 3.852(i) to the: Office of the Attorney General (AG), FDLE, Florida Department of Corrections (DOC), the Office of the Medical Examiner, 8th District (MEO-8), the Executive Office of the Governor (EOG), and the Florida Commission on Offender Review (FCOR). *See* (PCR-3. 291-322).

The circuit court ordered all agencies to file any objections to Mr. Tanzi's demands by 2:00 p.m. on Thursday, March 13, or provide the records to counsel. (PCR-3. 324). The court heard argument on the objections at 4:00 p.m. the same day, just two hours after the final objection was filed. (PCR-3. 753-817). The court issued an order granting all agency objections and denying Mr. Tanzi's demands at

7:59 p.m. that night.[4] (PCR-3. 818). Notwithstanding the objections, four agencies agreed to provide records, which were due by Friday, March 14, at noon. Over defense counsel's objection to the expedited schedule, the circuit court ordered Mr. Tanzi to file his successive Rule 3.851 motion at noon on Saturday, March 15—24 hours after public records were to be produced and less than 72 hours after the court's status conference.

Mr. Tanzi timely filed his successive Rule 3.851 motion on March 15, asserting three claims: (1) the expedited warrant process violates his right to due process and an opportunity to be meaningfully heard in violation of the Fifth and Fourteenth Amendments to the United States Constitution; (2) the execution of Mr. Tanzi using DOC's current lethal injection protocol will result in cruel and unusual punishment to Mr. Tanzi due to his medical

[4] All but one agency filed objections. At the public records hearing, KWPD withdrew its objections and provided records, noting that records had not been previously turned over. (PCR-3. 783). City of Miami PD indicated all records had been produced except for some emails they agreed to turn over. (PCR-3. 786-87). MCSO agreed to turn over all records not previously produced that were not subject to its prior objections. (PCR-3. 788). The court determined there were no objections to rule on for these three agencies. (PCR-3. 553-54).

conditions and body size in violation of the Eighth Amendment to the United States Constitution; and (3) the unfettered power of the Governor to choose who shall live or die and to set the warrant litigation timeframe is violative of due process and the Eighth Amendment to the United States Constitution in that it allows the Governor to circumvent due process and create an arbitrary system essentially vetoing the Eighth Amendment's constitutional protections. (PCR-3. 582).

Immediately thereafter, Mr. Tanzi filed four additional motions relevant to these proceedings.

Mr. Tanzi filed a motion to compel outstanding public records from KWPD, which will be addressed further in Argument 2. (PCR-3. 697).

Mr. Tanzi filed a motion to be transported to have an MRI conducted of his lumbar spine and lower cervical spine in support of Claim 2 of his successive Rule 3.851 motion, to which he attached the report of Dr. Charles Howard and an order for the imaging. (PCR-3. 707).

Noting the extremely short warrant period, he filed a motion for stay of execution in order for the court to have time to conduct a full

and fair hearing. (PCR-3. 691).

Mr. Tanzi also filed a motion for the court to determine the relevancy of DOC medical records. (PCR-3. 701). At the status hearing held March 12, the State requested that DOC be ordered to release Mr. Tanzi's medical records upon his filing of any medical or mental health claim. (PCR-3 504-05). Mr. Tanzi's counsel had objected. The lower court granted the State's request but noted in its written order that DOC was only to turn over records "relevant to the specific claim(s)." (PCR-3 329).

In Claim 2 of his motion, Mr. Tanzi asserted that the Eighth Amendment prohibited his execution using the current lethal injection protocol due to his medical conditions. (PCR-3. 593). Mr. Tanzi filed the motion to determine the relevancy of his DOC records to ensure that his mental health records were not included in the disclosure to the State. (PCR-3. 701). Undersigned counsel learned that DOC had already released Mr. Tanzi's entire medical file to the State about 15 minutes after he filed his successive motion and moments before he filed his motion to determine relevancy. Mr. Tanzi subsequently moved the circuit court for an order requiring DOC to show cause as to why it should not be held in contempt for violating

the court order and disseminating the records without any determination of their relevancy. (PCR-3. 748).

KWPD responded shortly after Mr. Tanzi filed his motion to compel. (PCR-3. 745). DOC responded just before 9:00 p.m. the same night. (PCR-3. 818). The State responded to Mr. Tanzi's motion to transport and motion to stay on Sunday, March 16, in the afternoon. (PCR-3. 836).

Just before the 9:00 a.m. deadline on Monday, March 17, the State filed its Answer to Mr. Tanzi's successive Rule 3.851 motion. The circuit court held a case management conference (*Huff*[5] hearing) on Mr. Tanzi's motion two hours later. The court allowed defense counsel to address a few discrepancies in the State's and agencies' responses to his additional motions but refused to hear argument, noting that the additional motions were not included in the scheduling order. The court issued an order denying an evidentiary hearing at 2:45 p.m. that afternoon and orders denying all of Mr. Tanzi's pending motions, except the successive Rule 3.851 motion, later that afternoon.

[5] *Huff v. State*, 622 So. 2d 982 (Fla. 1993).

On March 19, the circuit court summarily denied relief. As to Claim 2, challenging the current lethal injection protocol as likely to result in an execution that inflicts cruel and unusual punishment, the court determined Mr. Tanzi's claim failed because he "has not shown that his alleged obesity and related health effects would cause him needless suffering in violation of the Eighth Amendment" and that his "claims are speculative." (PCR-3. 966). Mr. Tanzi had informed the court that due to the expedited warrant proceeding, he was unable to have an expert conduct an evaluation of his medical status prior to the court's scheduled date and time to rule on whether he was entitled to evidentiary development and the date and time of the court's anticipated evidentiary hearing date. (PCR-3. 925). The soonest Mr. Tanzi's expert was able to conduct an in-person evaluation was at 9:00 a.m. on Wednesday, March 19, the day the court was scheduled to issue its final order on Mr. Tanzi's successive motion and conclude postconviction proceedings.

Dr. Joel Zivot, an associate professor and a senior member of the Departments of Anesthesiology and Surgery at Emory University School of Medicine, conducted an evaluation of Mr. Tanzi's heart and lungs, including a transthoracic ultrasound examination of his heart.

He further conducted a neurologic assessment, including tests of strength, balance, deep tendon reflexes, and vibration sense. (PCR-3. 1013).

Following the evaluation, Mr. Tanzi filed a motion for rehearing addressing the court's concerns and attaching an affidavit from Dr. Zivot. (PCR-3. 971).

An experienced anesthesiologist and critical care medical doctor, Dr. Zivot explained in detail what the current lethal injection protocol requires and how Mr. Tanzi's current physical condition "presents a substantial and imminent risk that is sure or very likely to cause illness and needless suffering." (PCR-3. 1014). Dr. Zivot opined that because Mr. Tanzi has a "history of chronic and unremitting sciatic pain," the protocol's requirement that he lie flat on a gurney, with no modifications for body positioning, will cause "needless suffering, cruelty, and pain" (PCR-3. 1017). Dr. Zivot further addressed concerns that the chemicals used in the lethal injection procedure to kill Mr. Tanzi present a very likelihood of needless suffering in and of themselves and further explained that attempting to obtain venous access to administer the drugs poses an additional challenge, also likely to cause needless pain and suffering.

(PCR-3. 1013-19) ("As a consequence of his obesity, the placing of two intravenous catheters will be very difficult, needlessly painful, and unreasonably dangerous.").

Dr. Zivot explained that the chemicals in the protocol are administered in "toxic" doses. The first drug, etomidate, is prepared in a solution using propylene glycol and is administered in a dose at least 10x that which is normally administered. The additive becomes toxic "when the dose exceeds 23 mg/kg of body weight," or in Mr. Tanzi's case, 3818 mg. However, using the dosage administered in the execution, the amount is 18x the toxic dose at more than 70,000 mg. By increasing the dose at such a rate, the propylene glycol additive becomes "highly alkaline" akin to "strong commercial bleach." (PCR-3. 1018). Dr. Zivot opined that this puts Mr. Tanzi at a high risk of suffering an epileptic seizure upon receipt of the etomidate, which is also likely to cause "caustic and bloody destruction" of Mr. Tanzi's lungs as they fill with "bloody froth" causing him to drown "in one's own blood." (PCR-3. 1018-19). And as Dr. Zivot explains, this torture will be invisible to witnesses because DOC will administer a paralytic called rocuronium bromide after the etomidate. (PCR-3. 1018).

Mr. Tanzi filed the motion for rehearing and affidavit at 11:46 p.m. on March 19. He filed a corrected affidavit of Dr. Zivot the following morning at 9:10 a.m. The circuit court denied Mr. Tanzi's motion for rehearing 32 minutes later.

In accordance with this Court's scheduling order, Mr. Tanzi filed a Notice of Appeal and his Petition for a Writ of Habeas Corpus on March 20, 2025. This appeal follows.

SUMMARY OF THE ARGUMENTS

1. Mr. Tanzi was denied full and fair postconviction proceedings in violation of his right to due process under the United States and Florida constitutions. These warrant proceedings are so truncated that they preclude any meaningful hearing on claims that Mr. Tanzi could not have raised before the Governor signed his death warrant. This Court limited the proceedings below to less than nine days. The lower court, in turn, required Mr. Tanzi to *inter alia* file his Rule 3.851 motion less than 72 hours after the initial case management conference and argue his claims at a *Huff* hearing within 2 hours of receiving the State's answer. Concurrently, the lower court denied Mr. Tanzi any meaningful opportunity to investigate the facts or access the records needed to prove his claims

while relying on plainly incorrect conclusions of law. At base, the lower court took the accelerated nature of these proceedings as license to suspend any procedural regularity and render Mr. Tanzi's due process rights meaningless.

2. Mr. Tanzi's counsel is obligated to seek and obtain every public record in existence in this case, and the failure of counsel to do so will result in a procedural default. Florida Rule of Criminal Procedure 3.852 provides for the production of public records after a warrant is signed. Mr. Tanzi filed demands for public records to several state agencies pursuant to Florida Rule of Criminal Procedure 3.852(h)(3) and (i). The circuit court sustained every agency objection and denied access to additional public records to which Mr. Tanzi is entitled.

Mr. Tanzi was denied access to files and records to which all other individuals are able to routinely obtain, depriving him of his rights to due process and equal protection guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.

Access to public records is critical to meaningful postconviction review. Records produced under warrant in other cases have led to

the discovery of exculpatory evidence, claims for postconviction relief, and stays of execution. The lower court's rote denial of access to the public records in Mr. Tanzi's case renders Rule 3.852(h)(3) a hollow exercise on an execution check-list.

3. Mr. Tanzi is a 48-year-old morbidly obese man suffering from several unresolved medical conditions including, *inter alia*, severe chronic sciatica (compression of the nerve from the lower back down the back of the leg), neurological compromise due to cervical (neck) and lumbar spine abnormalities, fatty liver resulting in elevated liver enzymes, hyperlipidemia, uncontrolled hypertension, and Gastroesophageal reflux disease (GERD) which is reported as severe if he lies down. These uncontrolled, but treatable, medical conditions compromise the lethal injection process and Florida's ability to carry out Mr. Tanzi's execution in a manner consistent with the Eighth Amendment.

Mr. Tanzi's claim is timely and not procedurally barred. While Mr. Tanzi has suffered from these health conditions for years, these conditions are mutable and treatable, especially if he were provided proper medical care. Mr. Tanzi had no way to know what health conditions he would have if and when the Governor chose to sign his

death warrant.

Mr. Tanzi has proposed two alternative methods of execution which are feasible, can be readily implemented, and significantly reduce the substantial risk of severe pain Mr. Tanzi faces under the existing lethal injection procedure.

4. The Governor's authority to determine the timing of death warrants and the length of warrant litigation unconstitutionally empowers him to control the availability and reliability of judicial relief from his own unconstitutional conduct. The lower court's ruling that Mr. Tanzi's Eighth Amendment challenge the Governor's power is procedurally barred and meritless is error.

Notwithstanding the Governor's power to sign execution warrants, the process is still subject to constitutional scrutiny. The Eighth Amendment requires there to be a principled way to distinguish between who is executed by a state and who is not and how much time they are afforded to investigate and present their claims under warrant. Throughout this warrant litigation process, both have allowed the Governor's whim to preempt the United States Constitution, the Florida Constitution, and the Florida Rules of

Criminal Procedure. The court's abdication violates article II, section 3 of the Florida Constitution and the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, as applied to Mr. Tanzi and facially.

Mr. Tanzi timely filed his challenge once he faced imminent injury, thus rendering the claim ripe and meriting judicial intervention.

STANDARD OF REVIEW

The claims presented in this appeal are constitutional issues involving questions of law and fact. Because Mr. Tanzi was denied an evidentiary hearing by the circuit court, this Court must accept the factual allegations presented in both the motion and this appeal as true to the extent they are not conclusively refuted by the record. The circuit court's legal analysis is subject to de novo review by the Court. *See Ornelas v. U.S.*, 517 U.S. 690 (1996); *Stephens v. State*, 748 So. 2d 1028 (Fla. 1999).

ARGUMENT I

MR. TANZI WAS DENIED FULL AND FAIR POSTCONVICTION PROCEEDINGS IN VIOLATION OF HIS CONSTITUTIONAL RIGHT TO DUE PROCESS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

The lower court erred in summarily denying Mr. Tanzi's claim that he is being denied full and fair postconviction proceedings in violation of the Due Process Clause of the Fourteenth Amendment and Article I, Section 9, of the Florida Constitution. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985) (noting "an essential principle of due process is that a deprivation of life . . . 'be preceded by notice and opportunity for **hearing appropriate to the nature of the case**'") (quoting *Mullane v. Cent. Hannover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)) (emphasis added). In Claim 1 of his successive Rule 3.851 motion, Mr. Tanzi argued that the warrant period and its constituent proceedings are so truncated that they preclude a meaningful hearing on *any* of his claims. (PCR-3. 587-90). This Court's scheduling order providing less than 9 days for circuit court proceedings coupled with the circuit court's extremely

expedited schedule prevented Mr. Tanzi from having any meaningful process or opportunity to fully investigate and present his claims.

In denying the asserted due process claim, the lower court failed to engage at all with the constitutional inadequacies of the process and instead concluded Mr. Tanzi needs no process because his underlying claims are procedurally barred or without merit. However, the court declined to hold a hearing or hear any evidence in support of those claims. The lower court's findings and conclusions fail to comport with the United States Supreme Court's and this Court's precedent and Mr. Tanzi's Fourteenth Amendment Due Process Rights.

The Due Process Clause of the Fourteenth Amendment guarantees that "no State shall . . . deprive any person of life, liberty, or property without due process of law." Amend. XIV, U.S. Const. Likewise, "one of the basic tenets of Florida law is the requirement that all proceedings affecting life, liberty, or property must be conducted according to due process." *Scull v. State*, 569 So. 2d 1251, 1252 (Fla. 1990) (citing Art. 1, § 9, Fla. Const.). "Whether acting through its judiciary or through its legislature, a state may not deprive a person of all existing remedies for the enforcement of a

right, which the state has no power to destroy, unless there is, or was, afforded to him *some real opportunity to protect it*." *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 682 (1930) (emphasis added). "At a minimum," due process "require[s] that deprivation[s] of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Armstrong v. Manzo*, 380 U.S. 545, 550 (1965) (quoting *Mullane*, 339 U.S at 313). As the United States Supreme Court held in *Mathews v. Eldridge*, "the fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner." 424 U.S. 319, 333 (1976) (quoting *Armstrong*, 380 U.S. at 553).

Nowhere can these principles be more important than in a capital case, where the Supreme Court has repeatedly emphasized the need for a heightened degree of reliability. *See, e.g., Woodson v. North Carolina*, 428 U.S. 280, 305 (1976); *see also Loudermill*, 470 U.S. at 542 (quoting *Mullane*, 339 U.S. at 313) (reiterating that the due process requirements of notice and opportunity must be "appropriate to the nature of the case").

a. The Unreasonably Expedited Warrant Period and its Constituent Proceedings Resulted in the Unconstitutional Denial of Right to Access Public Records.

Mr. Tanzi promptly sought public records pursuant Rule 3.852(h)(3) and (i), in advance of the circuit court's first status hearing—less than 48 hours from the signing of the death warrant. Over Mr. Tanzi's specific objections to portions of the court's compressed schedule, the circuit court entered a scheduling order that virtually guaranteed Mr. Tanzi would not have adequate time to request records or prepare for the public records hearing. As a result, Mr. Tanzi was denied due process and his "constitutional right as a citizen to access public records." *Sims v. State*, 753 So. 2d 66, 72 (Fla. 2000) (Anstead, J., concurring). Two hours after Mr. Tanzi filed his public records demands, the court held the 4:00 p.m. status hearing, at which it ordered all objections be filed by 2:00 p.m. the following day and scheduled argument on the objections at 4:00 p.m.

As is clear from the record, 2 hours to prepare for the hearing was wholly insufficient, and the unnecessarily expedited schedule rendered Mr. Tanzi's requests and constitutional right to records meaningless. Mr. Tanzi was not given adequate time to prepare and

was hamstrung by agencies that objected to turning over records without understanding the history of the records in this case. At the records hearing, the court accepted each agency's unsworn representations about the records even when those representations were contradicted by the record.

The circuit court denied this portion of the claim finding that Mr. Tanzi "failed to demonstrate what colorable claim relates to any of his broad public records demands" and "failed to demonstrate why he waited until the death warrant was issued to begin seeking these records." (PCR-3. 962). The court's analysis fails to separate Mr. Tanzi's Rule 3.852(h)(3) demands from his (i) demands and instead dismisses the due process violations as moot because he could not meet the standards to get the records in the first place. In doing so, the court conflates the requirements of Rule 3.852(h)(3) and (i) and misstates this Court's precedent.

At the outset, Rule 3.852(i) demands require a showing that the records "relate to a colorable claim . . . and good cause as to why the public records request was not made until after the death warrant was signed." *Cole v. State*, 392 So. 3d 1054, 1066 (Fla. 2024) (quoting *Dailey v. State*, 283 So. 3d 782, 792 (Fla. 2019)). In contrast,

Subsection (h)(3) does not have that same requirement because its restriction to "persons and agencies who were the recipients of a public records request at the time the defendant began his or her postconviction odyssey" is itself a safeguard against fishing expeditions for records. *Cole*, 392 So. 3d at 1066; *see also Dailey*, 283 So. 3d 782.

Moreover, the lower court's reliance on *Tompkins v. State*, 872 So. 2d 230 (Fla. 2003) is misplaced. *Tompkins* concerned the timeliness of filing Rule 3.852(h)(3) demands under warrant when the defendant never made any previous demands under Rule 3.852 at all. This Court determined that Mr. Tompkins could have filed Rule 3.852(i) demands at any time prior to the warrant to all of the agencies involved in his case. *Tompkins*, however, is inapplicable here where Mr. Tanzi made Rule 3.852 (g) and (i) demands prior to the signing of the warrant to all of the agencies from whom he requested records from under warrant pursuant to 3.852(h)(3). Mr. Tanzi's demands pursuant to Rule 3.852(h)(3) were timely and proper, and because he had previously requested records from the identified agencies, they were narrowly tailored.

b. The Unreasonably Expedited Warrant Period and its Constituent Proceedings Resulted in the Unconstitutional Denial of Meaningful Opportunity to Investigate and Present Claims.

The timeframe further precluded Mr. Tanzi from investigating and collecting the evidence he would need substantiate his claims at an evidentiary hearing. Mr. Tanzi sought to enforce *inter alia* his federal right to be free from the infliction of cruel and unusual punishment by raising an as-applied method-of-execution challenge. (PCR-3. 593-604). This required two fact-intensive showings: (1) whether "the method presents a risk that is 'sure or very likely to cause serious illness and needless suffering," *Glossip v. Gross*, 576 U.S. 863, 877 (2015), and (2) whether there is "a feasible and readily implemented alternative method of execution that would significantly reduce a substantial risk of severe pain . . . that the State has refused to adopt without a legitimate penological reason." *Bucklew v. Precythe*, 587 U.S. 119, 134 (2019). Both depend on Mr. Tanzi's physical health at or near the time of his planned execution. Nevertheless, sticking to its scheduling order, the circuit court required Mr. Tanzi to file his successive Rule 3.851 motion before he could be physically examined by his own doctor despite counsel's

immediate efforts. This left Mr. Tanzi entirely dependent on medical records produced by the Florida Department of Corrections—the entity tasked with killing him.

This forced reliance on records produced by the agency charged executing Mr. Tanzi violated the minimum requirements of due process. *See Ford v. Wainwright*, 477 U.S. 399, 424 (1986) (Powell, J. concurring); *Panetti v. Quarterman*, 551 U.S. 930, 949 (2007) (finding Justice Powell's opinion controlling). In *Ford*, "the determination of sanity 'appear[ed] to have been made *solely* on the basis of the examinations performed by state-appointed psychiatrists.'" *Panetti*, 551 U.S. at 949 (quoting *Ford*, 477 U.S. at 424). Here, because Mr. Tanzi was required to file his successive Rule 3.851 motion before he could be examined by his expert, evaluations of his physical health are, likewise, solely based on examination performed by the State. As Justice Powell observed in *Ford*, "such a procedure invites arbitrariness and error by preventing the affected parties from offering contrary medical evidence or even from explaining the inadequacies of the State's examinations. It does not, therefore, comport with due process." 477 U.S. at 424.

The circuit court offered no substantive analysis of this issue,

noting only "the Defendant's request for an extension of the post-warrant proceedings for a physical examination is not timely." (PCR-2. 961). To be clear, Mr. Tanzi did not need an extension of "the post-warrant proceedings" to be examined. He needed an adjustment of the scheduling order.

Either way, the circuit court started from the faulty premise that Mr. Tanzi "was aware that he had become death eligible when his conviction and sentence became final in 2015." (PCR-2. 961). Adopting the State's arguments, the circuit court incorrectly found that Mr. Tanzi knew he was warrant eligible after his federal habeas proceedings ended in 2015. This finding is premised on a misunderstanding of the Florida postconviction process. Pursuant to section 922.052, Florida Statutes, Mr. Tanzi did not become eligible for a death warrant, and therefore was not aware of his eligibility, until the Governor simultaneously signed his death warrant and denied clemency. *Cf. Barwick v. DeSantis*, 66 F.4th 896, 902 (11th Cir. 2023).

What is more, the circuit court suggested that Mr. Tanzi should have sought a physical examination ten years ago to determine the pain he is likely to suffer when executed today. The circuit court's

ready acceptance of this absurd result evinces the broader theme of these proceedings—the lack of "any indicia of meaningfulness." *Barwick v. State*, 361 So. 3d 785, 796 (Fla. 2023) (Labarga, J. concurring); *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 164 (1951) (Frankfurter, J. concurring) (quoting *Palko v. Connecticut*, 302 U.S. 319, 327 (1937)) ("The hearing, moreover, must be a real one, not a sham or a pretense."). This particular argument is addressed further below in Argument 3.

The lower court's findings in denying Mr. Tanzi's challenges to the unreasonably expedited warrant period and scheduling orders further fail to account for the practical impossibilities they create. Securing an expert that has the time, availability, and qualifications needed for a specific issue in a capital case is tedious and time-consuming under normal circumstances. Even then, the expert must be processed as a vendor on the case. Within 48 hours of the signing of this warrant, Mr. Tanzi managed to identify *two* qualified experts available to render an opinion in his case. Both were available to review medical records and consult with counsel, but neither could reconfigure their lives, including personal and professional obligations, and travel to Florida State Prison (FSP) overnight.

While the court may expect counsel to work around the clock in order to meet the rigorous deadlines imposed, neither counsel nor experts have unfettered ability to meet with or speak with capital defendants on Florida' death row. Even under warrant, FSP allows experts to meet with clients only on weekdays during specific hours. Additionally, scheduling these visits is not as simple as picking up the phone or sending an email and informing the prison about the defense team's plan. Visits must be scheduled by submitting an official request 24 hours in advance, visitors must submit credentials for approval by DOC in Tallahassee, and scheduling, ultimately, depends on the availability of facilities. Even when moving as quickly as possible, procedures and protocols create delay throughout the process.

In its insistence on keeping the schedule, the lower court also refused to hear argument on the four motions Mr. Tanzi filed in support of his postconviction motion. The court did allow counsel to briefly address factual discrepancies in the State's and agencies' responses to the motions, but would not hear argument because the motions were "not included in the scheduling order in any way, and so there's no commitment time-wise other than everything has to be

done by tomorrow." (PCR-3. 931). Notably, the lower court issued its order denying all relief 6 hours before this Court's deadline to complete postconviction proceedings.

The Governor, the lower court, and this Court have so truncated this warrant litigation process and its constituent parts such that Mr. Tanzi's execution is being treated as a foregone conclusion.[6]

The circuit court's summary denial of this claim relied on an unreasonable extension of this Court's decision in *Barwick v. State*, 361 So. 3d 785 (Fla. 2023). *See* (PCR-3. 961-62). The court cited *Barwick* for the proposition "that a compressed 30-day postconviction litigation schedule regarding an execution warrant did not violate an inmate's procedural due process rights." (PCR-3. 961) (citing *Barwick*, 361 So. 3d at 790). This proposition cannot be

[6] This is further evidenced by the lower court's dismissal of counsel's concerns about the scheduling of the evidentiary hearing. The court indicated it intended to rule by 3:00 p.m. on Monday, March 17, on whether an evidentiary hearing would occur, and then set the evidentiary hearing for Tuesday, March 18 at 9:00 a.m., in Key West. (PCR-3. 499). After counsel expressed concerns, the court pushed the hearing back to noon. (PCR-3. 501). Notwithstanding the difficulty in securing counsel's travel and an expert, counsel informed the court of the tremendous difficulty in transporting Mr. Tanzi from FSP to Key West, over 500 miles, on such short notice. *See* (PCR-3. 500).

squared with *Barwick* and is foreclosed by precedent.

Barwick held that neither ineffective assistance of collateral counsel nor case-specific "circumstances that happened to coincide with the beginning of the warrant period" deprived Mr. Barwick of notice or hearing. 361 So. 3d at 789-90. *Barwick* did not blanketly approve 30-day warrant periods as the circuit court suggested. Rather, this Court affirmed the summary denial of a "consolidated claim" that "assert[ed] that due process depends on the effective assistance of counsel, and that the accelerated warrant schedule and other attendant circumstances made it impossible for Barwick to be provided with effective assistance of postconviction counsel." *Id.* at 789.

Mr. Barwick argued that his postconviction counsel could not provide effective assistance "due to certain circumstances that happened to coincide with the beginning of the warrant period." *Id.* at 789. Naturally, this claim depended on the existence of a right to effective assistance of postconviction counsel. *Id.* at 789-90. Finding no such right existed, this Court held "a claim of ineffective assistance of postconviction counsel does not provide a valid basis for relief." *Id.* at 791. Thus, even if Mr. Barwick's postconviction

counsel was ineffective, that fact alone would not show that he was denied fair notice or hearing. *See Id.* at 789-91. Accordingly, this Court affirmed because Mr. Barwick "ha[d] not identified any matter on which he was denied notice or an opportunity to be heard before it was decided." *Id.*

Barwick said nothing about the 30-day warrant period *per se*. It addressed "the accelerated warrant schedule *and other attendant circumstances*," *i.e.*, "certain circumstances that *happened to coincide* with . . . the warrant period, such as the occurrence of Holy Week, Passover, and Ramadan; co-counsel being ill; and the presence of another inmate on Death Watch." *Id.* at 789 (emphasis added). These circumstances merely coincided with Mr. Barwick's warrant litigation and were relevant only insofar as they impacted collateral counsel's effectiveness. In contrast, the circumstances giving rise to Mr. Tanzi's claim are the direct result of the truncated warrant period and its division into constituent parts.

The lower court further determined that Mr. Tanzi's challenges to the warrant period and scheduling orders were "facially insufficient because they are conclusory, and they do not establish a prima facie case based upon a legally valid claim." (PCR-3. 963). The

court's findings fail to consider that Mr. Tanzi right to due process is indeed a constitutional right, and the violation of his due process right to a full and fair capital proceeding is a cognizable claim. "When a procedural error reaches the level of a due process violation, it becomes a matter of substance." *Huff v. State*, 622 So. 2d 982, 984 (Fla. 1993).

ARGUMENT II

THE LOWER COURT ABUSED ITS DISCRETION IN DENYING MR. TANZI ACCESS TO PUBLIC RECORDS IN VIOLATION OF THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

Counsel for Mr. Tanzi has the duty to seek and obtain every public record in existence in this case, as the failure of collateral counsel to do so will result in a procedural default assessed against his client. *Porter v. State*, 653 So. 2d 375 (Fla. 1995). However, a concomitant obligation rests with the State to furnish the requested materials. *Ventura v. State*, 673 So. 2d 479 (Fla. 1996). This Court has held that when the State's failure to disclose public records results in a capital postconviction litigant's inability to fully plead

claims for relief, the State is estopped from claiming that the postconviction motion should be denied or dismissed. *Id.* at 481 ("The State cannot fail to furnish relevant information and then argue that the claim need not be heard on its merits because of an asserted procedural default that was caused by the State's failure to act.").

Following the signing of his death warrant, Mr. Tanzi filed demands for public records to several state agencies pursuant to Florida Rule of Criminal Procedure 3.852(h)(3) and (i). Two hours after receiving each agency's response, the circuit court held a hearing and sustained all agency objections. Mr. Tanzi submits that the lower court erred in denying him access to the files and records in his case to which all other individuals are able to routinely obtain and that he is being deprived of his rights to due process and equal protection guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.

Article I, section 24, of the Florida Constitution codifies the fundamental right of access to public records for "[e]very person"—"regardless of whether that access is sought by a death row inmate, a disinterested citizen or a member of the media." Art. I, § 24(a), Fla.

Const; *Sims*, 753 So. 3d at 71 (Fla. 2000) (Anstead, J., concurring). While this "'self-executing' right to open records is enforced through the Public Records Law, chapter 119 of the Florida Statutes" for all other citizens, *Rhea v. Dist. Bd. Trs. of Santa Fe College*, 109 So. 3d 851, 855 (Fla. 1st DCA 2013), this Court promulgated Florida Rule of Criminal Procedure 3.852 to govern the production of public records for capital postconviction defendants. Fla. R. Crim. P. 3.852(a).

Rule 3.852, however, "was never intended to, and, indeed, [can]not, diminish a citizen's constitutional right to access to public records." *In re Amends. to Fla. R. Crim. P.–Cap. Postconviction Recs. Prod.,* 683 So. 2d 475, 477 (Fla. 1996) (Anstead, J., specially concurring); *Sims*, 753 So. 3d at 71-72 (Anstead, J., concurring) ("We need to be very careful that we not end up with an outcome where a death-sentenced defendant, whose life may literally be affected, is barred from enforcing his constitutional right as a citizen to access to public records that any other citizen could routinely access."). Rather, it was designed "to promote the prompt and efficient processing of capital cases in a fair, just, and constitutionally sound manner." *In re Amends. to Fla. R. Crim. P. 3.851, 3.852, et. seq.*, 797

So. 2d 1213, 1216 (Fla. 2001).

"[A]ccess to public records is an essential ingredient in any meaningful postconviction review," *Sims*, 753 So. 3d at 71 n.10 (Anstead, J., concurring), and in safeguarding a death-sentenced individual's due process rights under both the federal and state constitutions. *See Evitts v. Lucey*, 469 U.S. 387, 401 (1985). The setting of an execution date does not vitiate these fundamental rights, as "[t]he language of section 119.19 and of rule 3.852 clearly provides for the production of public records *after* the governor has signed a death warrant." *Sims*, 753 So. 3d at 70.

a. The lower court erred in denying Mr. Tanzi's demands for public records pursuant to Rule 3.852(h)(3).

Rule 3.852(h)(3) provides that:

> Within 10 days of the signing of a defendant's death warrant, collateral counsel may request the production of public records from a person or agency from which collateral counsel has previously requested public records. A person or agency shall copy, index, and deliver to the repository any public record:
>
> (A) that was not previously the subject of an objection;
> (B) that was received or produced since the previous request; **or**
> (C) that was, **for any reason**, not produced previously.

Fla. R. Crim. P. 3.852(h)(3) (emphasis added).

In accordance with this provision, Mr. Tanzi timely sought records pursuant to Rule 3.852(h)(3) from the City of Miami PD; KWPD; MCSO; Miami-Dade SO; SAO-16; MEO-16; and FDLE. Mr. Tanzi previously sought records from each of these agencies pursuant to Rule 3.852(g) and (i) during his initial postconviction proceedings. As such, his Rule 3.852(3) demands specifically requested the production of:

> [A]ny written or media (audio, video, and/or images) files, records, reports, letters, memoranda, notes, drafts and/or electronic mail in the possession or control of [each] agency relating to the investigation of MICHAEL A. TANZI, a.k.a. John Tanzi, W/M, DOB 02/27/77, SSN [redacted]9175 and/or the death of JANET ACOSTA, **that were received or produced by [each] agency since Mr. Tanzi's previous request . . . and/or any documents that were, for any reason, not produced previously**.

(PCR-3. 225-90) (emphasis added). Mr. Tanzi was not on a fishing expedition. He was simply asking for the production of any records not previously produced and to which he is entitled.

City of Miami PD did not object to Mr. Tanzi's demand and produced several emails with attachments to counsel. While KWPD

initially objected "in an abundance of caution," the agency withdrew its objection at the hearing and likewise produced records (1,493 pages).[7] (PCR-3. 781-82). Miami-Dade SO also produced records to

[7] The circumstances surrounding KWPD's conflicting responses to Mr. Tanzi's demand and subsequent records production illustrate the detrimental impact of the compressed warrant period. *See* Argument 1, *supra*. Mr. Tanzi filed his demand to KWPD on March 12, 2025. After receiving the demand, counsel for KWPD filed an affidavit from its records clerk on March 13, 2025, at 11:59 a.m. stating that "a diligent search [had] been conducted for public records 'relating to the investigation of Michael A. Tanzi . . . that were received or produced by [the] agency since Mr. Tanzi's previous request' on November 15, 2008, and no such records have been found." (PCR-3. 364-66).

Barely an hour later, KWPD filed a Notice of Compliance and Objection to Mr. Tanzi's Rule 3.852(h)(3) demand alleging that Mr. Tanzi's records request was overbroad and vague, lacked relevance, failed to demonstrate that the records were not previously obtained or available at the Capital Postconviction Records Repository, and failed to comply with the procedural requirements of Rule 3.852(g). (PCR-3. 452-55). However, approximately 90 minutes later, counsel for KWPD emailed undersigned counsel stating that the agency was in the process of gathering personnel and internal affairs files for KWPD personnel listed in Mr. Tanzi's 2008 demand and that KWPD would produce the records in its possession. KWPD counsel noted that these records were discovered after looking into the matter further and produce the internal affairs files about 20 minutes later. At the public records hearing that immediately followed, KWPD withdrew its objections based on the discovery of records not previously produced. (PCR-3. 781-82).

When the Court's deadline to produce records by noon the following day passed and undersigned counsel had yet to receive the remaining personnel files, counsel emailed KWPD at 1:30 p.m. and asked for a status update on the outstanding records. Counsel received no response. Counsel waited another day and, on Saturday

counsel (176 pages) but filed an objection "in an abundance of caution, frankly," concerning the production of any records for which the agency's prior objections were sustained. (PCR-3. 787). The lower court, however, found that there was "no objection to rule on" for MCSO when it issued the Order memorializing its rulings on Mr.

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at 12:20 p.m., filed a motion to compel the outstanding records. (PCR-3. 697-700). Fifteen minutes later, KWPD counsel responded to undersigned counsel's email from the day before noting that due to the age of the records, they are not stored at KWPD; however, she had contacted KWPD's archives in Tampa to see if the records still existed. KWPD counsel then filed a response to the motion to compel at 1:08 p.m. claiming that the agency had no responsive records and that Mr. Tanzi's claims of records being withheld were "unfounded and unsupported by any evidence." (PCR-3. 745). KWPD counsel failed to acknowledge that she told Mr. Tanzi's counsel that the records existed and that she was searching for them. Then, at 1:21 p.m., KWPD filed a Notice of Compliance certifying that "after conducting a diligent search, there are no other responsive public records in [KWPD's] possession . . . ." (PCR-3. 705-06).

At the *Huff* hearing held Monday, March 17, at 11 a.m., undersigned counsel was not permitted to argue the motion to compel but did attempt to inform the court of the sequence of events that precipitated its filing. Four hours later, at 3:09 p.m., counsel received an email from KWPD with 1,488 pages of records previously undisclosed. The agency promptly filed an amended response to the Mr. Tanzi's motion to compel acknowledging that it had just turned over additional records; however, the agency doubled down and claimed its prior notice of compliance was accurate because the records were stored off site so the agency was "not in possession" of the records." (PCR-3. 885-89) Ten minutes later, the court entered an order denying Mr. Tanzi's motion to compel. (PCR-3. 893-97).

Tanzi's demands. (PCR-3. 554). Mr. Tanzi submits that the lower court erred in denying the remainder of his demands filed under this provision.

Miami-Dade Sheriff's Office

Miami-Dade SO objected to Mr. Tanzi's Rule 3.852(h)(3) demand, contending that it was vague, overbroad, unduly burdensome, and unrelated to a colorable claim for postconviction relief. (PCR-3. 456-60). Miami-Dade SO further represented that "[t]o the extent that the Defendant demands additional records that are solely related to the previous request made in 2008, the [Miami-Dade SO] has made a diligent search of its records and has determined that no records exist." (PCR-3. 459). At the public records hearing, Miami-Dade SO conceded that it did not "have any records . . . indicating that the Miami-Dade Sheriff's Office, at that time, the Miami-Dade Police Department, filed any objection to the first demand that was issued in 2008," but it also did not have "any record of an order for the Miami-Dade Police Department to produce any records." (PCR-3. 783). Nonetheless, Miami-Dade SO reiterated that it conducted a diligent search and has no responsive records since "[w]e were not the investigating or arresting agency in this case, and

we would have nothing that would respond to that in terms of investigation." (PCR-3. 783). While the lower court directed Miami-Dade SO to file a Notice of Compliance certifying the absence of any records related to the investigation of Mr. Tanzi, the court sustained Miami-Dade SO's specific objection to producing its retention, storage, or collection policies, finding that Mr. Tanzi's demand was overbroad and unrelated to a colorable postconviction claim. (PCR-3. 553-54). Mr. Tanzi submits that the lower court's ruling in this regard was error, as Mr. Tanzi now has no way of knowing whether any records related to his case may have been destroyed since his original 2008 request.

Office of the State Attorney

The State objected to Mr. Tanzi's demand on the same grounds as Miami-Dade SO and specifically to Mr. Tanzi's request for any documents that were, for any reason, not produced previously.[8]

[8] Two minutes before filing its objection, the State emailed undersigned counsel a stating: "Our office has reviewed the request for records (see attached). The only new record located in our office was a communication between us and the Commission on Offender Review in May 2023 (also attached). We have not located any further new records related to this case file." Attached to this correspondence was a single email from FCOR Investigator Karyn Roth to the SAO-16 where Ms. Roth inquired about the number of boxes the SAO-16

(PCR-3. 446-51). At the hearing, the State restated these objections but advised that it "did a review" and "that [a]ny documents that we still have left have been long turned over. It doesn't appear that we have any documents that would fall under the very broad net that they've cast." (PCR-3. 790-91). However, the State added that it "object[ed] to any kind of provision that would require us to somehow go through everything and either create these documents or find these documents at this late date." (PCR-3. 791). The lower court sustained the State's objection, finding that the records requested were overly broad and unrelated to a colorable claim. (PCR-3. 554). Denying Mr. Tanzi's demand on these grounds was error.

As counsel noted at the hearing, the language Mr. Tanzi used in his demand is intended to cover all forms of a "public record" as defined in the statute to ensure that all responsive records fall within the demand's scope. *See* § 119.011(12), Fla. Stat. (2018); *see also Porter*, 653 So. 2d 375 (holding that collateral counsel must obtain every public record in existence regarding a capital case or face

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had for her to review as part of Mr. Tanzi's clemency proceedings. This one-sided communication suggests that more records exist but are being improperly withheld from production.

procedural default). Counsel is not privy to what records the State has in its possession that were not previously subject to an objection or were, for whatever reason, not previously disclosed, and the State should be able to discern what records may fall within this category based on its prior submission to the Capital Postconviction Records Repository. The State is the lead prosecuting entity in Mr. Tanzi's case and history has shown that records produced in post-warrant proceedings have led to a panoply of colorable claims cognizable in a Rule 3.851 proceedings. *See, e.g.*, *Jimenez v. State*, 265 So. 3d 462, 470-71 (Fla. 2018) (addressing newly discovered evidence claims that resulted from 81 pages of handwritten material produced post-warrant that were absent from the agency's original production at the Repository and not previously disclosed to counsel); *see also State v. Mills*, 788 So. 2d 249, 250-51 (Fla. 2001) (affirming sentencing relief where records produced under warrant constituted newly discovered evidence of an ex parte communication and resulted in a stay of execution).

District 16 Medical Examiner's Office

MEO-16's objection to Mr. Tanzi's demand concerned the production of any documents that were, for any reason, not produced

previously, and the agency further "renew[ed] all objections previously raised to [Mr. Tanzi's] 2008 Demand."[9] (PCR-3. 426-36). MEO-16 pointed to the circuit court's April 15, 2009 Order as evidence that its prior objections to certain records Mr. Tanzi sought in 2008 were sustained. (PCR-3. 430). MEO-16 restated this position at the hearing but noted that after conducing a "diligent search," it would be producing "a handful of documents that are mainly property receipts, some correspondence relating to court pleadings from collateral counsel." (PCR-3. 763-64). MEO-16 did not object to producing supplemental records related to the investigation in this case; rather it was objecting to the "catchall at the end of the Defendant's request about producing any and all documents that were not produced in the previous request for any reason whatsoever." (PCR-3. 767).

Mr. Tanzi argued that the postconviction record belies any indication of an objection to his 2008 demand by MEO-16. Counsel

[9] Mr. Tanzi filed his original demand to MEO-16 pursuant to Rule 3.852(i) because the State failed to properly notice MEO-16 when this Court affirmed Mr. Tanzi's convictions and sentences as required by Rule 3.852(d)(2).

pointed to personal interactions he had with the MEO-16 representative at the time where there was an agreement to produce the records Mr. Tanzi sought. (PCR-3. 764-65). The transcript from the March 30, 2009 public records hearing in this case reflects counsel's representations of his own dealings with MEO-16 and how the circuit court refused to address the status of MEO-16's production and degree of compliance—despite the agency's presence at the hearing—because it deemed Mr. Tanzi's Rule 3.851(i) demand untimely. (PCR. Vol. 3, 32-33). Mr. Tanzi maintains that the circuit court's understanding of Rule 3.852(i) was blatantly wrong, (PCR. 273-75), and that its April 8, 2009 Order denying his demand as untimely was not a ruling sustaining any objections lodged by MEO-16.[10] The lower court erred in sustaining MEO-16's objection to producing any records that were, for any reason, not previously

[10] MEO-16's reliance upon Mr. Tanzi's April 9, 2009 Objection to Proposed Order on Defendant's Request for Additional Public Records Pursuant to Fla. R. Crim. P. 3.852(i) as further evidence of its own objections to the original demand is additionally misplaced. That pleading addressed the State's proposed order concerning the requirements of Rule 3.852(i) and what ultimately became the court's misguided ruling denying his Rule 3.852(i) demands to the Florida Department of Health, MEO-16, and Miami-Dade PD as untimely. (PCR. 276-77).

produced and in finding that the records Mr. Tanzi "seeks . . . were not previously produced because the agency's objections were sustained." (PCR-3. 552-53).

Florida Department of Law Enforcement

FDLE objected to Mr. Tanzi's demand to produce records pursuant to Rule 3.852(h)(3) on the grounds that the records sought were unrelated to a colorable claim for postconviction relief and that Mr. Tanzi's demand was vague, overbroad, and unduly burdensome. (PCR-3. 398-405). FDLE further argued that while its objections to Mr. Tanzi's 2008 demand were overruled as a consequence of its failure to appear at the March 30, 2009 public records hearing, the agency should not now be required to produce the records at issue. FDLE acknowledged this "somewhat unusual" history and that it was "renewing essentially [its] original objections." (PCR-3. 770, 772). FDLE thereafter rationalized that the records were a fishing expedition since Mr. Tanzi never moved to compel the records before his warrant was signed. The lower court agreed and denied Mr. Tanzi's demand as "akin to an untimely motion to compel records not previously pursued by the defendant." (PCR-3. 553).

As Mr. Tanzi averred at the hearing, FDLE had the burden to

produce records as required by the circuit court's April 8, 2009 Order. (PCR. Vol. 2, 269-70). FDLE cannot now flip the script and use Mr. Tanzi as a scapegoat for its inaction and failure to comply. While FDLE did object to Mr. Tanzi's original request, that objection was expressly overruled. Contrary to the lower court's assertion at the hearing, it is irrelevant that the objection was overruled for nonappearance. (PCR-3. 776). Rule 3.852(h)(3)(a)'s exemption for records "previously the subject of an objection" does not obviate FDLE's obligation to comply with Mr. Tanzi's demand. To hold that simply lodging an objection precludes the production of records under Rule 3.852(h)(3) in its entirety would foster a perverse system where agencies could simply object to a demand during initial postconviction proceedings to minimize production under warrant at a later date. *See Sims*, 753 So. 2d at 70 (noting that public records requests under Rule 3.852(h)(3) are "intended [to be] an update of information previously received or requested" because "hold[ing] otherwise would foster a procedure in which defendant's make only a partial public records request during initial postconviction proceedings and hold in abeyance other requests until such time as a warrant is signed"). "Such is neither the spirit nor intent of the

public records law." *Id.* The public records Mr. Tanzi sought in his demand are expressly contemplated by Rule 3.852(h)(3)(c) as records "that [were], for any reason, not produced previously." The lower court abused its discretion in denying Mr. Tanzi access to these materials, which are relevant to the subject matter of his postconviction proceeding or reasonably calculated to lead to the discovery of admissible evidence. Fla. R. Crim. P. 3.852(k).

The plain language of Rule 3.852(h)(3) is clear: a capital postconviction defendant is entitled to request the production of public records from any person or agency from whom collateral counsel previously requested public records. *See Dailey*, 283 So. 3d at 792 (reiterating that records requests under Rule 3.852(h) are limited to 'persons and agencies who were the recipients of a public records request at the time the defendant began his or her postconviction odyssey'" quoting *Sims*, 753 So. 2d at 70). To that end, the person or agency at issue "shall" produce "any public record: (a) that was not previously the subject of an objection; (b) that was received or produced since the previous request; **or** (c) that was, for any reason, not produced previously." Fla. R. Crim. P. 3.852(h)(3) (emphasis added). Mr. Tanzi's demands filed in accordance with this

provision were part of a focused investigation into [a] legitimate area of inquiry" and not "an eleventh hour attempt to delay [his] execution." *Sims*, 753 So. 2d at 68.

Records produced under warrant have led to the discovery of exculpatory evidence, claims for postconviction relief, and stays of execution. *See*, *e.g.*, *Jimenez*, 265 So. 3d at 470-71; *see also Mills*, 788 So. 2d at 250-51. The lower court's rote denial of access to the public records Mr. Tanzi seeks rendered Rule 3.852(h)(3) a hollow exercise on an execution check-list.

b. The lower court erred in denying Mr. Tanzi's demands for public records concerning Florida's lethal injection procedures pursuant to Rule 3.852(i).

Rule 3.852(i) provides a "fail-safe mechanism for counsel to seek the production of additional records" once a death warrant is signed. *Sims*, 753 So. 2d at 71 (Anstead, J., concurring). To obtain public records under this provision, collateral counsel must file an affidavit in the trial court that "attests . . . [he] has made a timely and diligent search of the records repository"; that "identifies with specificity those public records not at the records repository"; and that establishes that the additional public records are either relevant to the subject matter of the postconviction proceeding or are reasonably

calculated to the lead to the discovery of admissible evidence." Fla. R. Crim. P. 3.852(i)(1). While Rule 3.852(i) demands may be filed at any time during postconviction proceedings, this Court has held that an individual facing imminent execution must "'show how the requested records relate to a colorable claim for postconviction relief and good cause as to why the public records request was not made until after the death warrant was signed.'" *Dailey*, 283 So. 3d at 792 (quoting *Asay v. State*, 224 So. 3d 695, 700 (Fla. 2017)). As Mr. Tanzi addresses in Argument 3, Rule 3.852(i) demands for records relating to Florida's lethal injection process satisfy this standard because the issues were not ripe until his execution date was set.

Less than 48 hours after his execution was set, Mr. Tanzi's filed Rule 3.852(i) demands to DOC, FDLE, and MEO-8 seeking public records related to Florida's lethal injection procedure, including, *inter alia*, records concerning the review process that led to the current three-drug protocol; the sourcing, manufacturing, storage, and expiration information for each drug; the training, education, licensure, and/or professional experience of the two members of Mr. Tanzi's execution team; and records from the recent executions of Louis Gaskin, Darryl Barwick, Duane Owen, James Barnes, Michael

Zack, James Ford, and Loran Cole using the current protocol. Each agency objected to Mr. Tanzi's demand, asserting that the records he seeks are unrelated to a colorable claim for postconviction relief and are exempt from disclosure. The lower court erred in sustaining DOC, FDLE and MEO-8's objections to Mr. Tanzi's demands, and Mr. Tanzi has been resultingly deprived of his right to a full and fair postconviction proceeding in contravention of his rights under the Eighth and Fourteenth Amendments and the corresponding provisions of the Florida Constitution.

As discussed in Argument 3 of this Brief, Mr. Tanzi is challenging the constitutionality of Florida's lethal injection procedures as applied to him. Mr. Tanzi is morbidly obese and suffers from severe chronic sciatica; neurological compromise due to cervical and lumbar spine abnormalities; and uncontrolled medical conditions, including fatty liver resulting in elevated liver enzymes, hyperlipidemia, uncontrolled hypertension, and gastroesophageal reflux disease (GERD), which is reported as severe if he lies down. Mr. Tanzi verily believes that his impending execution will violate the Eighth Amendment's proscription against cruel and unusual punishment. The requested records are necessary for Mr. Tanzi to

prove that Florida's lethal injection procedures are unconstitutional as applied to him as a unique individual.[11] *See Bucklew*, 587 U.S. 119; *Glossip I*, 576 U.S. 863; *Baze v. Rees*, 553 U.S. 35 (2008).

Undersigned counsel acknowledges this Court's precedent finding that lethal injection records requests do not relate to a colorable claim for postconviction relief after this Court upheld the constitutionality of the current protocol in *Asay*, 224 So. 3d 695. Undersigned counsel further acknowledges that this Court most recently reiterated this stance in *Cole*, 392 So. 3d at 1066. Notwithstanding the series of case law stemming from *Asay*, Mr. Tanzi urges this Court to reconsider its carte blanche rejection of any subsequent adversarial testing of Florida's lethal injection procedures.[12]

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[11] The requested records specifically relate to DOC's current lethal injection procedures promulgated on February 18, 2025, and the nearly identical procedures in place as of March 10, 2023. Both use the three-drug "etomidate protocol," which includes etomidate, rocuronium bromide, and potassium acetate.

[12] This Court has shown an increased willingness to revisit and abandon established precedent in recent years. *See, e.g.*, *Phillips v. State*, 299 So. 3d 1013 (Fla. 2020) (reversing this Court's decision in *Walls v. State*, 213 So. 3d 340 (Fla. 2016), and finding that *Hall v. Florida*, 572 U.S. 701 (2014), is not a development of fundamental significance and therefore not retroactive to capital defendants in

The specific records requested in Mr. Tanzi's demands are paramount to proving that the current procedures are "very likely to cause serious illness and suffering" and pose a "substantial risk of serious harm" if the State of Florida executes him using the current method. *Glossip*, 576 U.S. at 877 (internal citations omitted). Mr. Tanzi's requests for these materials were not overly broad or unduly burdensome, and they were specifically tailored to support an as-applied challenge to Florida's lethal injection procedures.

The requested records concerning the training and education of

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postconviction proceedings); *State v. Poole*, 297 So. 3d 487 (Fla. 2020) (receding from this Court's decision in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), and holding that the Eighth Amendment and the Florida Constitution do not require a jury to unanimously find beyond a reasonable doubt that specific aggravating circumstances were proven; that the aggravating circumstances are sufficient to impose the death penalty; and that the aggravating circumstances outweigh the mitigating circumstances, "except to the extent it requires a jury unanimously find the existence of a statutory aggravating circumstance beyond a reasonable doubt"); *Bush v. State*, 295 So. 3d 179 (Fla. 2020) (abandoning the established "special standard for circumstantial evidence cases" to determine the legal sufficiency of the evidence to support a conviction because it is "likely to cloud the judgment of an appellate court"); *Lawrence v. State*, 308 So. 3d 544 (Fla. 2020) (receding from this Court's longstanding precedent as upheld in *Yacob v. State*, 135 So. 3d 529 (Fla. 2014), and *Rogers v. State*, 285 So. 3d 872 (Fla. 2019), and removing the requirement that death sentences undergo comparative proportionality review).

the execution team members designated to insert the intravenous lines in Mr. Tanzi additionally relate to his claim at issue in Argument 3. Incontrovertible evidence from Mr. Tanzi's DOC medical records establishes his morbidly obese body composition, which could complicate the placement of a peripheral or central venous line for the administration of the three execution drugs.[13] Evidence further demonstrates that Mr. Tanzi suffers from severe physical impairments and that he will experience excruciating pain due to his untreated neurological injuries.[14] Each of these conditions puts Mr. Tanzi at risk for needless suffering and "death by torture," (PCR-3.

[13] As explained in Dr. Zivot's affidavit, "the placing of two intravenous catheters will be very difficult, needlessly painful, and unreasonably dangerous" due to Mr. Tanzi's obesity. (PCR-3. 1015).

[14] As discussed in Argument 1, Mr. Tanzi filed a Motion for Transport for MRI so that he could undergo imaging of his lower cervical spine to identify the exact cause of neurological deficit and of his lumbar spine to identify the exact location of neurological compromise. (PCR-3. 707-44). The lower court denied Mr. Tanzi's motion as untimely and "not related to any substantive Eighth Amendment lethal injection challenge made in [his] successive motion for postconviction relief." (PCR-3. 898-902). The lower court's denial of Mr. Tanzi's motion deprived him of the opportunity to present additional, demonstrative evidence that Florida's lethal injection procedures are "very likely to cause serious illness and suffering" and pose a "substantial risk of serious harm." *Glossip*, 576 U.S. at 877.

1019), and information about the individuals tasked with killing him should not be shrouded in secrecy. Records concerning the sourcing, manufacturing, storage, and expiration information for each drug in the lethal cocktail crafted to kill Mr. Tanzi are equally germane to this claim. Because Florida's protocols do not offer any modifications for an individual with Mr. Tanzi's body size and medical impairments, Mr. Tanzi is entitled to any additional information DOC has with respect to how the execution team will handle any foreseeable issues and concerns.

While this Court has held that "DOC is entitled to a presumption that it will properly perform its duties while carrying out an execution," *Long v. State*, 271 So. 938, 946 (Fla. 2019) (quoting *Hannon v. State*, 228 So. 3d 505, 509 (Fla. 2017), that process is not immune from Eighth Amendment scrutiny. To hold otherwise runs afoul of any semblance of a system of checks and balances and runs equally roughshod over Mr. Tanzi's constitutional rights.

"[E]xecution is the most irremediable and unfathomable of penalties." *Ford*, 477 U.S. at 411. Thus, the need for absolute transparency is at its apex when the State "tinker[s] with the machinery of death." *Callins v. Collins*, 510 U.S. 1141, 1130 (1994)

(Blackmun, J., dissenting). Mr. Tanzi "must [be given] a fair opportunity to show that the Constitution prohibits his execution." *Hall*, 572 U.S. at 724 (2014). The circuit court erred in denying Mr. Tanzi access to the materials that he needed to do so and its rulings are antithetical to "[o]ur system of open government [that] is a valued and intrinsic part of the heritage of our state." Florida Office of the Attorney General, Government-in-the-Sunshine Manual, p. xii (2025 ed., Vol 47). Mr. Tanzi requests that this Court reverse the lower court's denial of records and remand for further proceedings.

ARGUMENT III

THE CIRCUIT COURT ERRED IN SUMMARILY DENYING MR. TANZI'S CLAIM THAT FLORIDA'S LETHAL INJECTION PROCEDURES RAISE A SUBSTANTIAL RISK THAT MR. TANZI WILL NEEDLESSLY SUFFER SEVERE PAIN, CONSTITUTING CRUEL AND UNUSUAL PUNISHMENT, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

The Eighth Amendment prohibits the infliction of "cruel and unusual punishments," and due to Mr. Tanzi's multitude of unresolved medical conditions, Florida's lethal injection procedures

raise a substantial risk that Mr. Tanzi will needlessly suffer severe pain.

a. Facts Giving Rise To Claim For Relief

On February 18, 2025, DOC issued its Execution By Lethal Injection Procedures, outlining the methods DOC intends to use to kill Mr. Tanzi. On March 10, 2025, Governor DeSantis signed Mr. Tanzi's death warrant and DOC scheduled his execution for April 8, 2025. This Court and the circuit court issued scheduling orders requiring that these warrant proceedings be expedited. Department of Corrections produced Mr. Tanzi's medical records to undersigned counsel on March 12, 2025. Counsel promptly provided Mr. Tanzi's medical records to medical professionals to access Mr. Tanzi's current medical condition and the risks posed to him by the February, 2025 protocols.

Charles Howard, MD, MMM, a retired Medical Officer from the Federal Bureau of Prisons (BOP) who served twenty years, conducted a review of Mr. Tanzi's DOC medical records relating to standard of care and his condition while waiting for execution. (PCR-3. 683). Dr. Howard produced a report indicating that Mr. Tanzi suffers from numerous medical conditions, including "severe chronic sciatica

(compression of the nerve from the lower back down the back of the leg), neurological compromise due to cervical (neck and lumbar spine abnormalities, morbid obesity (380 lbs), fatty liver resulting in elevated liver enzymes, hyperlipidemia, uncontrolled hypertension, and Gastroesophageal reflux disease (GERD) which is reported as severe if he lies down." (PCR-3. 684).

Dr. Howard explained that DOC provided minimal treatment of Mr. Tanzi's conditions. Since August 2023, Mr. Tanzi's blood pressure at every medical evaluation has been clinically high, ranging 140-179/89-96. Despite the grossly elevated blood pressure, most of the encounters would indicate "blood pressure stable" and nothing would be done to address Mr. Tanzi's uncontrolled hypertension.

Mr. Tanzi has been complaining of back and leg pain since at least November of 2009 and was seen by medical providers many times each year since then. Mr. Tanzi was treated only with pain medications, mostly over the counter medications such as Tylenol, Motrin and Ibuprofen. (PCR-3. 664). In 2018, Mr. Tanzi began complaining of a sudden sharp pain from his neck, down is left arm to his thumb and forefinger, consistent with a cervical (neck) nerve compression which went largely untreated.

In August, 2023, DOC medical personnel performed X-rays. DOC medical records show that the first four Cervical spine vertebrae were visualized and reported as normal, but “the balance of the vertebrae could not be seen and further studies should be undertaken to see the lower cervical spine, the area causing the arm loss of function.” (PCR-3. 723). As to the lumbar spine x-ray, medical reported "intervertebral disc spaces narrowed. If symptoms chronic or persist, consider MRI." (PCR-3. 723). No further studies of Mr. Tanzi's neck nor an MRI of his lumber spine were ever ordered or performed to determine the cause of his symptoms. (PCR-3. 723). Therefore, Mr. Tanzi has been suffering from a problem, possibly requiring surgical intervention, that should have been resolved years ago with proper medical care.

Dr. Howard concluded:

> In my professional opinion, of 48 years as a licensed physician, 23 of which are in Correctional Medicine, the following issues need to be addressed:
>
> 1. MRI Imaging of lower Cervical spine with and without contrast to identify exact cause of neurological deficit.
>
> 2. MRI imaging of the Lumbar spine with and without contrast to identify exact location of

> neurological compromise.
>
> 3. Neurosurgical or Back Orthopedic consultation thereafter to determine appropriate surgical approach to treat the conditions delineated by MRI imaging.
>
> Furthermore, Mr. Tanzi's very large size (380 lbs), his back, leg, and foot pain, worsened by staying still, and especially by lying on his back for possibly an extended period of time, is very likely to result in severe pain.

(PCR-3. 724). Based on Dr. Howard's findings, counsel immediately filed a motion to transport Mr. Tanzi for an MRI. The circuit court denied the motion to transport. (PCR-3. 898).

Dr. Joel Zivot, an associate professor and a senior member of the Departments of Anesthesiology and Surgery at Emory University School of Medicine[15], reviewed Mr. Tanzi's Department of Corrections medical records and performed an in-person medical examination at Florida State Prison on March 19, 2025. Dr. Zivot prepared an

[15]Dr. Zivot is also the former fellowship director for training in Critical Care Medicine for the Department of Anesthesiology. He holds board certification in Anesthesiology from the Royal College of Physicians and Surgeons of Canada and The American Board of Anesthesiology and is board-certified in Critical Care Medicine by the American Board of Anesthesiology. (PCR-3. 976, 1013).

affidavit summarizing his findings.[16]

Dr. Zivot's examination included an evaluation of Mr. Tanzi's heart and lungs and a transthoracic ultrasound examination of his heart. Dr. Zivot also conducted a neurologic assessment, including tests of strength, balance, deep tendon reflexes, and vibration sense. Dr. Zivot concluded that under the existing lethal injection protocols, Mr. Tanzi's chronic and severe sciatica and cervical injury will be of great concern:

> Mr. Tanzi will have to hold very still while lying flat on his back. Any excess body movement risks dislodging the catheters. To secure Mr. Tanzi's body from movement, an extremely high amount of forceful restraint will need to be applied. By history, Mr. Tanzi has no body position that relieves his significant sciatic nerve pain. As a result, he has adopted an

[16] Due to the exigencies of litigating under a death warrant, Dr. Zivot was unable to complete his evaluation of Mr. Tanzi before the circuit court denied Mr. Tanzi's successive motion for postconviction relief on March 19, 2025. Dr. Zivot examined Mr. Tanzi that morning and produced his affidavit in haste late that evening, which Mr. Tanzi attached to his Motion for Rehearing. PCR-3. 971. As noted above, Dr. Zivot produced a corrected affidavit which was filed the following morning. (PCR-3. 1013). The circuit court acknowledged Dr. Zivot's corrected affidavit but denied rehearing, finding that "its Order Denying Defendant's Successive Motion to Vacate Judgment of Conviction and Sentence entered on March 19, 2025, adequately addressed Defendant's rule 3.851 Motion and no rehearing is warranted." (PCR-3. 1020).

> accommodation of continuous body movement in an attempt to reduce pain. Forceful restraint and a supine posture expose him to needless suffering, cruelty, and pain.

(PCR-3. 1017-18).

Because Mr. Tanzi is "severely obese," Mr. Zivot further opined that being in this position and suffering "severe sciatic nerve pain," would require DOC "to torture him simply to establish and maintain two working intravenous sites. (PCR-3. 1017-18).

Dr. Zivot further explained how the three-drug protocol would cause additional complications, warning that the dosage of the etomidate in a person of Mr. Tanzi's size and weight is likely to cause excruciating sensation of burning from the inside. He explained that this is due to the propylene glycol chemical used to create the solution that will ultimately be injected into Mr. Tanzi:

> A 20 mg solution of commercially prepared etomidate contains 7.2 *grams* of propylene glycol. This corresponds to a concentration of 36.4% w/v. The pH of the solution is highly alkaline and is approximately 9-10. As a comparison, the pH of a pentobarbital solution is 9-11, and that of a strong commercial bleach is 11-13.

(PCR-3. 1018). He further explains that as the solution dose is increased, it becomes toxic. The scientific research suggests "the

propylene glycol may be toxic when the dose exceeds 23 mg/kg of body weight" (PCR-3. 1018). Dr. Zivot explains that based on the calculation of the dose of the etomidate included in the protocol and Mr. Tanzi's weight, the propylene glycol becomes toxic at approximately 3818 mg; however, Mr. Tanzi will be injected with 70,200 mg of the solution, "18x the toxic amount." (PCR-3. 1018).

Moreover, the enormous dose of etomidate, and corresponding propylene glycol, puts Mr. Tanzi at an "extremely high risk" for epileptic seizure. However, as Dr. Zivot notes, because the second drug in the protocol—rocuronium bromide—is a paralytic, the "outward manifestation of his seizure" will be blocked.

> Though the seizure may not be outwardly observed, Mr. Tanzi will observe the neurologic consequence of a severe seizure and the ensuing brain damage that occurs when a seizure is not treated.

(PCR-3. 1018).

In Claim 2 of his successive motion to vacate, Mr. Tanzi alleged that Florida's current lethal injection procedures are unconstitutional as applied to him because executing him under those procedures will very likely cause him needless pain and suffering due to his numerous health conditions. *See Glossip*, 576

U.S. at 876; *Baze*, 553 U.S. 35.[17] He also filed a motion to transport for MRI in order to further assess the severity of his medical conditions. (PCR-3. 898). The court denied the motion to transport and summarily denied Mr. Tanzi's lethal injection claim as untimely, barred, and without merit. (PCR-3. 957-70).

b. Mr. Tanzi's As Applied Challenge Is Timely.

The circuit court denied Mr. Tanzi's claims, finding that he "has not alleged any facts to show that this claim is timely." (PCR-3. 964). Relying on this Court's decision in *Cole*, the circuit court found that Mr. Tanzi "has long known of his medical conditions, heavy weight and asserted back issues." (PCR-3. 964). The court further found that "Difficulty in achieving venous access is based on sheer speculation and does not set forth a valid Eighth Amendment claim. *See Cole*, 392 So. 3d at 1065 (finding Cole's allegations of potential problems with venous access speculative and legally insufficient)."

[17] In his initial Rule 3.851 motion filed in February, 2009, Mr. Tanzi raised a constitutional challenge to Florida's then-existing lethal injection protocol—a very different protocol than the current one. (PCR. 51-72) The circuit court summarily denied the claim on its merits. (PCR. 216-17) On appeal, this Court affirmed the summary denial of this claim also on its merits. *Tanzi v. State*, 94 So. 3d 482, 494 (Fla. 2012).

(PCR-3. 965-966). The circuit court's reliance on *Cole* was error.

In *Cole*, the defendant alleged that his execution by lethal injection would violate the Eighth Amendment because he suffered from Parkinson's disease, a progressive degenerative disease with no cure. This Court found Cole's claim untimely because Cole knew he had Parkinson's disease for several years and failed to raise any method of execution argument until after the Governor had signed a death warrant.

The circuit court failed to recognize that unlike Mr. Cole's Parkinson's Disease, Mr. Tanzi's health conditions are mutable, treatable, and, especially if provided proper medical care, his health could improve. Unlike Mr. Cole, Mr. Tanzi had no way to know what his health condition might be when the Governor chose to sign his warrant. There was no telling when the Governor might sign Mr. Tanzi's death warrant. Indeed, the Governor could have chosen from scores of other condemned inmates and Mr. Tanzi's death warrant might not have been signed for decades. Unlike Mr. Cole, who suffered from an incurable and progressive disease, Mr. Tanzi suffers from conditions that are treatable and, with proper medical care, can remiss.

Mr. Tanzi's health condition is not of his own making. (PCR-3. 1017). Death row inmates are confined to a 6' x 9' for much of their time, and exercise is difficult. This is especially so for someone of Mr. Tanzi's size who suffers from sciatic and cervical pain.

Moreover, Department of Corrections never provided the care that Mr. Tanzi required. Dr. Howard explained Mr. Tanzi's blood pressure clinically high for years yet DOC medical staff dismissed it as "blood pressure stable." Nothing was done to address Mr. Tanzi's uncontrolled hypertension. (PCR-3. 723). Similarly, Mr. Tanzi has been complaining of back and leg pain since at least November of 2009 and was seen by medical providers many times each year since then. Yet, he was treated only with pain medications, like Tylenol, Motrin, and Ibuprofen. (PCR-3. 723). His symptoms of cervical nerve compression went largely untreated. When X-rays were finally ordered, they imaged only the first 4 cervical vertebrae, which appeared normal, and noted that "further studies should be undertaken to see the lower cervical spine, the area causing the arm loss of function." (PCR-3. 723). Further X-rays were never conducted. Dr. Howard noted that a lumbar spine X-ray indicated that "If symptoms chronic or persist, consider MRI." (PCR-3. 723). Mr.

Tanzi's symptoms persisted but no MRI was ever performed.

Ironically, the agency that is responsible for ensuring that Mr. Tanzi experience "a humane and dignified death," (PCR-3. 667), is the very agency that, through negligence, has failed to provide the level of care necessary to prevent his needless pain and suffering.

c. Executing Mr. Tanzi Using The Existing Lethal Injection Protocol Creates A Substantial And Imminent Risk Of Serious Illness And Needless Suffering.

Mr. Tanzi is a 48-year-old morbidly obese[18] man suffering from several unresolved medical conditions including, *inter alia*, severe chronic sciatica (compression of the nerve from the lower back down the back of the leg), neurological compromise due to cervical (neck) and lumbar spine abnormalities, fatty liver resulting in elevated liver enzymes, hyperlipidemia, uncontrolled hypertension, and Gastroesophageal reflux disease (GERD) which is reported as severe if he lies down. *See* (PCR-3. 723). These uncontrolled medical conditions will unconstitutionally compromise the lethal injection

[18] Recent DOC records indicate that Mr. Tanzi is 6'3" tall and weighs in excess of 368 pounds. Records indicate he weighed 383 lbs. weeks before the death warrant was signed.

process, *id.*, and Florida's ability to carry out Mr. Tanzi's execution in a manner consistent with the Eighth Amendment.

The existing protocols for lethal injection do not contemplate the execution of someone with obesity and uncontrolled medical conditions, like Mr. Tanzi's, that are likely to complicate the lethal injection process. Executing Mr. Tanzi using the existing protocols is likely to cause serious illness and needless suffering.

Due to sciatica and cervical disease, Mr. Tanzi is unable to lay flat without experiencing intense pain. The circuit court dismissed this because, "as the United States Supreme Court has recognized, the Eighth Amendment does not require "the avoidance of all risk of pain" in any method of execution. *Bucklew*, 587 U.S.[at 134]." (PCR-3. 966). The court overlooks that the sciatic and cervical pain Mr. Tanzi will endure is not merely pain incident to the lethal injection procedure. Sciatic pain is intense. In Mr. Tanzi's case, it is chronic, debilitating, and unrelenting.

The lethal injection protocol provides that "(e) Designated members of the execution team will assist the inmate, if necessary, in positioning himself/herself onto the execution gurney in the execution chamber" before securing restraining straps. (PCR-3. 347).

The protocol says nothing about how the inmate is positioned or whether the gurney may be adjusted to accommodate an inmate of Mr. Tanzi's size and who is unable to lie flat without experiencing severe pain. The protocol does not provide for the repositioning of the inmate to accommodate medical conditions. Restraints will render him unable to assume any position that would lessen his pain. The administration of rocuronium will paralyze him but there is nothing in protocols for managing the severe pain he is likely to experience while secured in a flat, supine position for an unknown duration.[19]

In addition, DOC has not yet dealt with the concerns Mr. Tanzi raises with respect to his obesity. Due to his body mass, the first drug, etomidate, very likely, will not keep Mr. Tanzi in a deep state of sedation for the duration of his execution. The volume of distribution (the ratio of the amount of drug in a body to the concentration of the drug measured in blood, plasma, and un-bound in interstitial fluid) of etomidate in someone of Mr. Tanzi's size creates a significant risk

[19] Because the Circuit court denied an evidentiary hearing, this Court must accept the factual allegations presented in Mr. Tanzi's motion and in this appeal as true to the extent that they are not conclusively refuted by the record. *Ventura v. State*, 2 So. 3d 194, 197-98 (Fla. 2009).

that he will not be fully sedated before the subsequent drugs take effect. The existing procedures utilize a *one size fits none* approach that does not allow for modification of dosage. There is a significant risk that Mr. Tanzi will be paralyzed but aware when the sodium acetate is injected, creating the sensation of being burned from the inside. Mr. Tanzi's will likely suffer pulmonary edema, creating a sensation of suffocation and drowning. Mr. Tanzi's obesity, acid reflux, and sleep apnea create a substantial risk that, if sedated while on his back, he will suffer from reflux and aspiration of vomit.

Mr. Tanzi's obesity will make it impossible for Florida to humanely carry out his execution using the existing procedure because his because it will compromise placement of the intravenous lines. The February 18, 2025 DOC lethal injection procedures provide for intravenous access by several means, all of which are likely to result in harm. The existing protocols call for "a designated team member to insert one intravenous (IV) line into each arm at the medial aspect of the antecubital fossa of the inmate." (PCR-3. 347). It is well understood that obesity complicates the placement of intravenous lines axially. "Peripheral venous cannulation, one of the most common technical procedures in Emergency Medicine, may

prove challenging, even to experienced Emergency Department staff."[20] Fat accumulation at the site of the vein makes veins harder to see, palpate, and examine for suitability of intravenous access. Mr. Tanzi has a history of inaccessible veins in his arms and, for years, medical staff have needed to access his veins through the back of his hands due to this condition.

Because the execution team is unlikely to achieve venous access in either arm, the team will likely attempt to secure access "at other appropriate sites."[21] (PCR-3. 347). DOC protocols provide that if peripheral venous access cannot be achieved, then a designated execution team member will perform a central venous line placement

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[20] Mustapha Sebbane, M.D., Ph.D. et al., Predicting Peripheral Venous Access Difficulty in the Emergency Department Using Body Mass Index and a Clinical Evaluation of Venous Accessibility, 44 J. Emergency Med. 299 (2013).

[21] The existing lethal injection procedures require the placement of two separate intravenous catheters to provide a route of administration of the execution chemicals, essentially doubling the risk of complications that are already common to obese individuals. When placing an intravenous line, each attempt is singularly painful. The pain increases with each successive attempt. Consequently, the attempt to place and secure two separate intravenous lines for the purpose of execution creates a substantial risk of and injury and a high likelihood of needless suffering.

in order to gain the venous access. Unfortunately, central line placement in the obese also presents significant difficulties, including inability to find a suitable vein and place the line, and the requirement of extended-length needles to assist with cannulation.

The skill needed to place a central line is beyond the skill needed to place intravenous lines in the arms or legs. The central vein location includes the groin, the neck, and below the collarbone. In each of these locations, a large artery containing flowing blood under great pressure abuts against the vein, which cannot be seen or felt but must be located by anatomical landmarks. As to the neck and sub-collarbone location, an improperly placed needle can collapse the lung, causing a profound inability to breathe and the possibility of death by tension pneumothorax. These complications create a substantial risk that Mr. Tanzi will suffer injury, illness and needless pain and suffering.

The DOC procedures allow for a "cut down" to locate a vein in the central position. This procedure requires the use of anesthesia in the region, as it involves applying a sharp blade to the skin and subcutaneous tissue and making an opening sufficient to reveal the location of a vein. The DOC procedures make no mention of

anesthesia and do not further define precisely how this would be carried out. Even if DOC is able to secure two separate and working intravenous sites, Mr. Tanzi's sciatic condition will make it impossible for him to lie still in supine position, creating additional risk that the catheters will dislodge, further subjecting Mr. Tanzi to needless suffering, cruelty, and pain.

It is unclear what qualifications the person attempting to achieve the venous access will possess. The DOC procedures only state that the team warden will select the team members responsible for achieving the peripheral venous access from the following classes of professionals:

> [A] phlebotomist currently certified by: the American Society for Clinical Pathology (ASCP), American Society of Phlebotomy Technicians (ASRT) or American Medical Technologists (AMT).; a paramedic or emergency medical technician, certified under Chapter 401, Florida Statutes; a licensed practical nurse, a registered nurse, or an advanced practice registered nurse licensed under Chapter 464, Florida Statutes; or, a physician or physician's assistant licensed under Chapter 458 or Chapter 459, Florida Statutes.

(PCR-3. 341). The procedures then explain that the team warden will select the team members responsible for achieving central venous

access from the following classes of professionals: "an advanced practice registered nurse licensed under Chapter 464, Florida Statutes; or, a physician or physician's assistant licensed under Chapter 458 or Chapter 459, Florida Statutes." (PCR-3. 341).

Because the "identities of any team members with medical qualifications shall be strictly confidential," and Mr. Tanzi has not been provided records of the qualifications of the members of the team assigned to his execution despite his request for such records[22], it is impossible to confirm that the individuals who will attempt intravenous access during Mr. Tanzi's execution are even medically qualified to insert an intravenous line at all. Medical training does not teach physicians how to be executioners, and participation by a medical professional in an execution is an ethical violation of the practice of medicine. There is therefore no medial professional that actually could be qualified to place the intravenous line, as no

[22] Undersigned counsel timely requested records from several state agencies pursuant to Fla. R. Crim. P. 3.852 pertaining to the promulgation and utilization of DOC's lethal injection protocols, including training, education, licensure, and experience of the individuals assigned to place the intravenous lines. The agencies and Court have denied access to any records related to lethal injection. *See* (PCR-3. 296-302; 552).

medical training or education would teach how to do so in the context of an execution.

Even assuming for the sake of argument that the execution team members assigned to place Mr. Tanzi's intravenous lines could be considered "medically qualified" to do so, the establishment of intravenous access has shown to be extremely difficult or impossible even in cases where the inmate is not obese. For example, the 2022 lethal injection of Alabama inmate Joe Nathan James, Jr. lasted approximately three hours, and Alabama State officials later acknowledged that James' executioners had trouble establishing an intravenous line.[23]

In 2014, Oklahoma inmate Clayton Lockett died 43 minutes after the first lethal injection drug was administered. The execution delay was due to issues with establishing intravenous access. A

[23] *See* Ramon Antonio Vargas, Alabama subjected prisoner to 'three hours of pain' during execution - report, The Guardian (Aug. 15, 2022), https://www.theguardian.com/us- news/2022/aug/15/alabama-joe-nathan-james-jr-execution; see also Evan Mealins, Joe Nathan James' execution delayed more than three hours by IV issues, ADOC says, Montgomery Advertiser (July 29, 2022), https://www.montgomeryadvertiser.com/story/news/2022/07/29/joe-nathan-james-execution-alabama-delayed-iv-issues/10187322002/.

doctor hit an artery instead of a vein when attempting to place a central line in Lockett's groin, and a paramedic involved in the execution told state officials that she was having difficulty inserting the needle even though Lockett was very cooperative. A report later issued by the Department of Public Safety on the execution concluded that "viability of the IV access point was the single greatest factor that contributed to the difficulty in administering the execution drugs."[24]

In 2024, during the attempted lethal injection of Idaho inmate Thomas Creech, the execution attempt was abandoned because execution team members repeatedly failed to find a vein where they could establish an intravenous line, even though trying eight times and multiple sites in the arms, legs, hands, and feet. At some points they couldn't access a vein, and at others they had concerns about

[24] *See* Ariane de Vogue, New documents reveal botched Oklahoma execution details, CNN Politics (March 16, 2015), https://www.cnn.com/2015/03/16/politics/clayton-lockett-oklahoma-execution/index.html. *See also* Katie Fretland, Scene at botched Oklahoma execution of Clayton Lockett was 'a bloody mess', The Guardian (Dec. 13, 2014), https://www.theguardian.com/world/2014/dec/13/botched-oklahoma-execution-clayton-lockett-bloody-mess.

vein quality.[25]

These macabre debacles demonstrate that, even when the inmate is otherwise healthy, the placement of an intravenous line is difficult. These procedures are even more difficult and unreliable in an obese individual suffering from significant pain. Florida's lethal injection procedures place Mr. Tanzi at a substantial risk of needless pain and suffering, as he is prepared to establish at an evidentiary hearing.

d. Alternate Methods of Execution

To succeed on his Eighth Amendment method-of-execution claim, Mr. Tanzi is required to identify an alternative to lethal injection that is "feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain." *Glossip*, 576 U.S. at 877 (quoting *Baze*, 533 U.S. at 52).

Undersigned counsel only pleads such an alternative to ensure that Mr. Tanzi's claim is sufficiently pled under *Glossip* and *Baze*.

[25] Rebecca Boone, Idaho halts execution by lethal injection after 8 failed attempts to insert IV line, U.S. News (Feb. 28, 2024, 7:22 p.m.), https://apnews.comlarticle/idaho-execution-creech-murders-serial-killer-91al 2d78e9301adde77e6076dbd01dbb.

This requirement is morally and ethically repugnant, impossible to meet, and violative of Mr. Tanzi's right to due process under the Fourteenth Amendment. No reliable information exists from which to draw the required comparison because there is no way to determine the amount of pain human beings experience in the State's execution chamber. Obviously, those who have already experienced this pain cannot self-report and the State shrouds their experiences and autopsies in complete secrecy. So, Mr. Tanzi is forced to choose how he would prefer to die with nothing more than conjecture to guide his choice and Mr. Tanzi's counsel can do nothing to help.

Because Mr. Tanzi must identify an alternative method, in Mr. Tanzi's successive motion, undersigned counsel submits that two methods available in the United States—firing squad and lethal gas—are feasible and will significantly reduce the substantial risk of severe pain that Mr. Tanzi faces from lethal injection. However, the circuit court found that Mr. Tanzi had failed to identify a suitable alternative to Florida's existing protocol because he did "not explain how these methods could be implemented in a reasonable time." (PCR-3. 966). This was error.

In *Bucklew*, the United States Supreme Court considered

whether the defendant's proposed alternate method, nitrogen hypoxia, could be "readily implemented." 587 U.S. at 141 (citing *Glossip*, 576 U.S. at 877). The Court explained that Mr. Bucklew's proposed alternate "must be sufficiently detailed to permit a finding that the State could carry it out 'relatively easily and reasonably quickly'." *Id.* (citing *McGehee v. Hutchinson*, 854 F.3d 488, 493 (8th Cir. 2017); *Arthur v. Commissioner, Ala. Dept. of Corrections*, 840 F.3d 1268, 1300 (11th Cir. 2016)). However, Mr. Bucklew "presented no evidence on essential questions like how nitrogen gas should be administered (using a gas chamber, a tent, a hood, a mask, or some other delivery device); in what concentration (pure nitrogen or some mixture of gases); how quickly and for how long it should be introduced; or how the State might ensure the safety of the execution team, including protecting them against the risk of gas leaks." *Bucklew*, 587 U.S. at 141–42. The Supreme Court concluded that, "Instead of presenting the State with a readily implemented alternative method, Mr. Bucklew (and the principal dissent) point to reports from correctional authorities in other States indicating that additional study is needed to develop a protocol for execution by nitrogen hypoxia." *Id.*

Unlike the unstudied and unimplemented alternative method considered in *Bucklew*, Mr. Tanzi's alternative methods are already used in several states. Five states currently have procedures authorize lethal gas as a method of execution.[26] Four states directly authorize execution by firing squad.[27] There is no reason why Florida could not adopt similar procedures within a reasonable time.

Moreover, while firing squad and lethal gas are not currently implemented in Florida, Mr. Tanzi is not limited to choosing among those methods presently authorized by Florida law, and he may point to a protocol in another state as a potentially viable option. *See Bucklew*, 587 U.S. at 139-40 ("An inmate seeking to identify an alternative method of execution is not limited to choosing among those presently authorized by a particular State's law . . . So, for

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[26] Alabama, Arizona, and California directly authorize lethal gas as an available method an inmate may voluntarily choose. *See* Ala. Code § 15-18-82.1; Ariz. Rev. Stat. Ann. § 13-757 (2009); Cal. Penal Code § 3604 (2017). Missouri and Mississippi directly authorize lethal gas as an available method, but the inmate is not allowed to choose which method is used. Mo. Ann. Stat. § 546.720 (2007); Miss. Code Ann. § 99-19-51 (2022).

[27] Mississippi, South Carolina, Utah, and Idaho. Miss. Code Ann. § 99-19-51 (2022); S.C. Code Ann. § 24-3-530 (2021); Utah Code Ann. § 77-18-5.5 (2021); Idaho Code Ann. § 19-2716 (2023).

example, a prisoner may point to a well-established protocol in another State as a potentially viable option.").

Execution by lethal gas or firing squad will significantly reduce the substantial risk of severe pain and needless suffering that Mr. Tanzi faces from lethal injection because these two methods do not implicate the same pain and suffering that lethal injection will cause.[28] Mr. Tanzi will not face the risk of pain associated with lethal injection that would be caused by attempting to gain intravenous

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[28] Undersigned counsel acknowledges that Florida statute authorizes execution by electrocution, however that method is not being offered as an alternative because that method is unreliable at best and has shown to be tortuous during past executions. Florida's electric chair has not been used for an execution since 1999, and there is no way for Mr. Tanzi to assess if the chair functions properly prior to his execution because death-sentenced inmates are regularly denied their Rule 3.852 requests for records related to DOC's execution procedures.

The use of Florida's electric chair has resulted in ghastly spectacles, including inmates who caught fire. *See* Report: Maintenance Workers Switched Sponge for Execution, South Florida Sun Sentinel (originally published May 9, 1990), https://www.sun-sentinel.com/1990/05/09/report-maintenance-workers-switched-sponge-for-execution; The Associated Press, Condemned Man's Mask Bursts Into Flame During Execution, The New York Times (March 26, 1997), https://www.nytimes.com/1997/03/26/us/condemned-man-s-mask- bursts-into-jlame-during-execution.html.

access while he is restrained flat on a gurney.

e. Mr. Tanzi Is Entitled To An Evidentiary Hearing Because The Files And Records Do Not Conclusively Show That He Is Not Entitled To Relief.

The circuit court determined that "an evidentiary hearing is not necessary because the claims can be resolved based on a review of the record and as a matter of law." (PCR-3. 881). Mr. Tanzi's execution by lethal injection is currently scheduled for April 8, 2025 at 6:00 p.m. The risk that Mr. Tanzi will experience needless pain and suffering could not be more imminent or substantial. Mr. Tanzi is entitled to an evidentiary hearing on this claim that his execution under the February 18, 2025 lethal injection protocols violates the Eighth Amendment.

At an evidentiary hearing, Mr. Tanzi would present evidence establishing that his execution under the current lethal injection procedures violates the Eighth Amendment. Mr. Tanzi is entitled to an evidentiary hearing because the files and records fail to show conclusively that Mr. Tanzi is entitled to no relief. *See Lemon v. State*, 498 So. 2d 923 (Fla. 1986) (citing *State v. Crews*, 477 So. 2d 984 (Fla. 1984)); *Callaghan v. State*, 461 So. 2d 1354 (Fla. 1984)). Florida Rule of Criminal Procedure 3.851(f)(5)(B) requires that an evidentiary

hearing be held on successive postconviction motions where claims require a factual determination. This claim requires a factual determination. Accordingly, counsel requests that an evidentiary hearing be held on Mr. Tanzi claims, after which the relief sought herein should be granted.

Undersigned counsel respectfully requests that this Court grant Mr. Tanzi a stay of execution because his Eighth Amendment method-of-execution claim is a substantial ground upon which relief might be granted and deserves to be fully addressed by this Court free from the constraints of an accelerated death warrant schedule. A stay of execution pending the disposition of a successive motion for postconviction relief is warranted when there are substantial grounds upon which relief might be granted. *See Chavez v. State*, 32 So. 3d 826, 832 (Fla. 2014).

ARGUMENT IV

THE GOVERNOR'S AUTHORITY TO DETERMINE THE TIMING OF DEATH WARRANTS AND THE LENGTH OF WARRANT LITIGATION UNCONSTITUTIONALLY EMPOWERS HIM TO CONTROL THE AVAILABILITY AND RELIABILITY OF JUDICIAL RELIEF FROM HIS OWN UNCONSTITUTIONAL CONDUCT.

Mr. Tanzi asserted below that the Governor's unfettered power to choose who is to die and when they are to die creates an arbitrary system of unchecked power, violative of the Eighth Amendment. The lower court determined Mr. Tanzi's claim was both procedurally barred and meritless. For the reasons below, Mr. Tanzi asserts the lower court's denial is error.

The United States Supreme Court has repeatedly "held that the Eighth Amendment requires increased reliability of the process by which capital punishment may be imposed." *Herrera v. Collins*, 506 U.S. 390 (1993); *McKoy v. North Carolina*, 494 U.S. 433 (1990); *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality). Contrary to this Court's finding in *Hannon v. State*, 228 So. 3d 505, 509 (Fla. 2017), the "function" of the Eighth Amendment is not fulfilled "by the time that a defendant

is warrant eligible." Indeed, both the imposition of a death sentence *and* the process of carrying out an execution must withstand constitutional scrutiny.

> If the Constitution renders the fact *or timing* of his execution contingent upon establishment of a further fact . . . "then that fact must be determined with the high regard for truth that befits a decision affecting the life or death of a human being."

Herrera, 506 U.S. at 405-06 (quoting *Ford*, 477 U.S. at 411).

The Supreme Court has held that factual determinations related to the constitutionality of a person's execution are "properly considered in proximity to the execution." *Id.* at 406 (noting competency to be executed determination is more reliable near time of execution whereas guilt or innocence determination becomes less reliable). In other words, whether the carrying out of a death sentence violates the Eighth Amendment depends on the facts existing after a death warrant is signed and the determination of these facts requires *increased reliability*.

Despite this requirement, Florida vests the Governor with unbridled authority not only to sign death warrants but also to set the date of execution, all of which is done under a veil of secrecy and

without any governing standards as to how the Governor should exercise his warrant signing power. The inescapable corollary to this authority is that the Governor controls how much process is available to make these critical factual determinations *if any*. The result is unchecked power—an absolute veto, in absolute secrecy—over the Eighth Amendment.

The Governor's absolute discretion to decide who lives and who dies must be compared with the standards and limits placed upon a sentencing judge's decision to impose a death sentence. The Governor's decision to sign a death warrant is just as necessary to in carrying out a death sentence as the sentencing judge's decision to sign his name to a document imposing the death sentence. In Florida, no death sentence can be imposed unless the judge signs the sentencing order imposing a sentence of death. Similarly, no individual who receives a sentence of death will in fact be executed until the Governor exercises his discretion to sign a death warrant. The Eighth Amendment requires there to be a principled way to distinguish between who is executed by a state and who is not and how much time they are afforded to investigate and present their claims under warrant.

Here, the circuit court and this Court have yielded entirely to the Governor. Section 922.052, Florida Statutes, sets a maximum 180-day warrant period, yet here, the Governor afforded Mr. Tanzi less than a sixth of that time. Mr. Tanzi alerted the lower court to his concerns about the unnecessarily expedited and difficult schedule, which were dismissed. Throughout this warrant litigation process, both have allowed the Governor's whim to preempt the United States Constitution, the Florida Constitution, and the Florida Rules of Criminal Procedure. The court's abdication violates Article II, Section 3 of the Florida Constitution and the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, as applied to Mr. Tanzi and facially.

In declining to find any constitutional infirmity with the process, the lower court cites *Goode v. Wainwright*, 448 So. 2d 999 (Fla. 1984) for the proposition that the "Governor has always had the exclusive discretion in setting execution dates." Yet, in the court's own parenthetical of *Goode*, it acknowledges that "the execution of the death sentence can be stayed only by the governor or '*incident to*

appeal.'"[29] (PCR-3. 967) (emphasis added). The courts *do* have a role in the warrant litigation process, and indeed, have the power to stay proceedings and even grant relief, thereby rendering the Governor's signing of a death warrant null and void.

This Court has declined to address the Governor's unbridled discretion in determining who shall die and when, noting that such an inquiry "triggers separation of powers concerns." *Valle v. State*, 70 So. 3d 530 (Fla. 2011). This Court should revisit its precedent. Whether to grant clemency is discretionary. Whether to follow the Constitution in carrying out a death sentence is not. The Eighth Amendment still applies, even though the Governor sits in a different branch of government.

The separation of powers distinction is further undermined by

[29] The court's reliance is misplaced here. In *Goode*, this Court addressed due process challenges to the Governor's process in assessing a capital defendant's sanity to be executed. The Court determined the Governor did not abuse his authority in declining to issue a stay or in following the statutory procedures enumerated at the time to determine sanity. The lower court fails to recognize that two years later, the United States Supreme Court decided *Ford v. Wainwright*, holding that a capital defendant is entitled to a judicial review of a governor's decision that the prison is competent to be executed. 477 U.S. 399 (1986).

the fact that the Governor seeks the counsel of the Attorney General when choosing which condemned defendants will be executed. The office that prosecutes the case through postconviction proceedings sits on the clemency review board and then assists Governor in carrying out of the sentence. This structure frustrates the constitutional framework and the very purpose of the separation of powers.

The lower court's finding that Mr. Tanzi should have raised this claim prior is at odds with the requirements set forth in Article III of the United States Constitution requiring that a claim for relief be an actual controversy meriting judicial intervention.

In Florida courts, three requirements "constitute the 'irreducible constitutional minimum' for standing," under which the plaintiff must demonstrate "an 'injury in fact,' which is 'concrete,' 'distinct and palpable,' and 'actual or imminent.'" *Pet Supermarket, Inc. v. Eldridge*, 360 So. 3d 1201, 1205 (Fla. 3d DCA 2023). To establish standing to obtain injunctive relief, a plaintiff must show that "he is under threat of suffering' an injury in fact that is concrete and particularized." *Summers v. Earth Island Inst.*, 555. U.S. 488 (2009). The threat "must be actual and imminent, not conjectural or

hypothetical." *Id.* at 493.

Mr. Tanzi had neither standing nor a ripe challenge to the Governor's unfettered and arbitrary powers in deciding who shall die and when because he was not suffering an actual or imminent harm. Mr. Tanzi's claim was timely and proper.

CONCLUSION AND RELIEF SOUGHT

Based upon the foregoing and the record, Mr. Tanzi respectfully urges this Court to reverse the lower court, stay his execution, and remand to the circuit court for a full and fair opportunity to be heard at an evidentiary hearing, and grant such other relief as the Court deems just and proper.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND FONT

Counsel certifies that this Initial Brief is produced in Bookman Old Style 14-point font in compliance with the requirements of Florida Rules of Appellate Procedure 9.210. Counsel further certifies that this brief contains 18,905 words.

/s/ Paul Kalil
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by electronic service using the State of Florida E-Filing Portal, to the following this 24th day of March, 2025.

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