

I No. SC2025-0517

EXECUTION SCHEDULED FOR MAY 1, 2025 at 6:00 P.M.

IN THE
Supreme Court of Florida

JEFFREY HUTCHINSON,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

**ON APPEAL FROM THE CIRCUIT COURT OF THE FIRST
JUDICIAL CIRCUIT, IN AND FOR OKALOOSA COUNTY, FLORIDA
Lower Tribunal No. 1998-CF-1382**

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REQUEST FOR ORAL ARGUMENT

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

CITATIONS TO THE RECORD

Citations shall be as follows: The abbreviation “R.” refers to the first eighteen (18) volumes of the record on direct appeal to the Florida Supreme Court (SC01-0500). “T.” refers to the separately paginated trial transcript in volumes nineteen through thirty-two of the record on appeal. “PCR1” refers to the record on appeal from the initial state postconviction appeal to the Florida Supreme Court (SC08-0099). “PCR2” refers to the record on appeal from the successive state postconviction appeal to the Florida Supreme Court

(SC17-1229). “PCR3” refers to the record on appeal from the successive state postconviction appeal to the Florida Supreme Court (SC21-0018). “PCR4” refers to the record on appeal from the successive state postconviction appeal to the Florida Supreme Court (SC25-0497). “PCR5” refers to the record on appeal from this appeal (SC25-0517). All other references will be self-explanatory or otherwise explained herein.

PROCEDURAL HISTORY

Appellant Jeffrey Hutchinson was indicted on four counts of first-degree murder on October 5, 1998, for the death of Renee Flaherty and her three children. R. 24-27. In 2001, a jury found Appellant guilty on four counts of first-degree murder. R. 2296-99. Following the advice of counsel, Appellant waived his right to a jury trial during penalty phase and presented mitigation evidence directly to the trial judge. R. 2307-16. The trial court sentenced Appellant to life for one of the murders and death for the remaining three. R. 2632-33. This Court affirmed on direct appeal. *Hutchinson v. State*, 882 So. 2d 943 (Fla. 2004). Defense counsel did not seek certiorari in the United States Supreme Court.

In 2005, Appellant filed a motion for state postconviction relief. PCR1 1-71. After learning that his attorneys had missed his federal habeas deadline by not filing the state motion within one year, Appellant requested to proceed pro se and filed several pleadings which were stricken by the circuit court. PCR1 256-335, 344-427, 430-574. In 2007, the circuit court granted defense counsel's motion to withdraw and appointed new registry counsel. PCR1 672-74. Defense counsel filed an amended postconviction motion, which was denied after an evidentiary hearing. PCR1 677-750, 1077-1105.¹ This Court affirmed the denial of relief. *Hutchinson v. State*, 17 So. 3d 696 (Fla. 2009).

In 2009, Appellant filed a pro se petition for federal habeas relief. *Hutchinson v. State of Florida*, 5:09-cv-00253-MCR-EMT. The district court appointed federal habeas counsel who filed an amended petition, but ultimately dismissed the petition as untimely. *Hutchinson v. Florida*, 677 F.3d 1097 (11th Cir. 2012), *cert denied Hutchinson v. Florida*, 568 U.S. 947 (2012).

¹ Appellant raised the following claims in his postconviction motion: (1) IAC at guilt phase; (2) IAC at the penalty phase; (3) cumulative error; and (4) shackling error.

In 2011, Appellant filed a pro se motion for postconviction relief related to DNA testing. *See Hutchinson v. State*, SC11-2301. The circuit court denied the motion and this Court dismissed Appellant's appeal due to it being an unauthorized impermissible pro se filing. *Hutchinson v. State*, 2012 WL 521209 (Fla. 2012).

In 2013, Appellant filed a pro se successive postconviction motion, which was dismissed by the circuit court.² *Hutchinson v. State*, SC13-1005. This Court struck his pro se notice of appeal and dismissed. *Hutchinson v. State*, 133 So. 3d 526 (2014). Also in 2013, Appellant filed a pro se successive petition for a writ of habeas corpus in federal district court relying on *Martinez v. Ryan*, 566 U.S. 1 (2012). *Hutchinson v. Cannon*, 3:13-cv-00128-MW. The federal district court dismissed the petition without prejudice for lack of jurisdiction. *Id.*

In 2017, Appellant filed a successive motion based on *Hurst v. Florida*, 577 U.S. 92 (2016) and *Hurst v. State*, 202 So. 3d 40 (Fla.

² Appellant raised three claims: (1) his murder convictions are unreliable due to IAC; (2) the state failed to disclose certain evidence in its possession or control that was material and exculpatory in nature, and knowingly elicited certain false testimony and made certain arguments based on that false testimony at trial; and (3) shackling error.

2016). PCR2 46-66. The circuit court summarily denied the motion. PCR2 158-74. This Court affirmed the denial of relief. *Hutchinson v. State*, 2018 WL 1975448 (Fla. April 26, 2018), *cert denied*, *Hutchinson v. Florida*, 586 U.S. 897 (2018).

In 2020, Appellant filed a second successive motion asserting the State violated *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (2012). PCR3 58-85. The circuit court denied the motion (PCR3 305-714), and this Court affirmed. *Hutchinson v. State*, 343 So. 3d 50 (Fla. 2022), *cert. denied*, *Hutchinson v. Florida*, 143 S. Ct. 601 (2022).

On January 15, 2025, Appellant filed a third successive motion based on newly discovered evidence related to his brain damage and mental health which would have resulted in an acquittal of first-degree murder and/or a life sentence. PCR4 152-309. The State filed an answer on January 21, 2025. PCR4 313-36. The circuit court held a case management conference on March 6, 2025. PCR4 832-56. The successive motion was denied on April 4, 2025. PCR4 1080-1116. Appellant filed a motion for rehearing on April 5, 2025, and the State filed a response the same day. PCR4 1164-79. The circuit court

denied Appellant's motion for rehearing on April 8, 2025. PCR4 1185-91.

On March 31, 2025, Governor Ron DeSantis signed a death warrant for Appellant. PCR4 671-696. His execution is scheduled for May 1, 2025. On April 7, 2025, Appellant filed a fourth successive motion, raising four claims. PCR5 57-170. The State filed an answer on April 8, 2025. PCR5 171-197. The circuit court held a case management conference on April 9, 2025 (PCR5 199-231) and on the same day denied Appellant's request for an evidentiary hearing (PCR5 229-31). On April 11, 2025, the circuit court denied Appellant's successive motion. PCR5 241-255. This appeal follows.

STATEMENT OF FACTS RELEVANT TO THIS APPEAL

A. Pre-trial History.

Appellant had a relatively normal childhood, though it was riddled with head injuries, including multiple instances of loss of consciousness. He had a loving family with a mother, father, brothers, and sister who all testified on his behalf. T. 2402, 2421-28, 2434-42, 2453, 2452-58, 2459-63. Growing up, Appellant suffered from Attention Deficit Hyperactivity Disorder resulting in

concentration difficulty and hyperactivity, for which he took Ritalin. T. 2405, 2410, 2422.

After graduating from high school, he worked as a security guard and received special commendations, including employee of the quarter and year. T. 2404. Appellant joined the Army becoming qualified as a paratrooper and Army Ranger. T. 2382. He fought in Desert Storm (T. 2423) and was near an enemy ammunition/chemical site at Nasiriya and Khamisiyah that was destroyed (T. 2451). He was discharged under honorable conditions. T. 2383-84.

After returning from the war, his family noticed Appellant had changed. R. 1252. He became depressed, had memory problems, was physically ill, vomited blood, had blood in his urine and stool, and lost his hair. T. 2423, 2434, 2436, 2456; R. 1196, 1252. Appellant also claimed he had accumulated secret knowledge related to the distribution of chemical and biological weapons. R. 1256.

Appellant grew paranoid and became convinced he was being surveilled. For example, he refused to let his family return home to their apartment for three days because Appellant was convinced he

was being watched. R. 1258-59. He moved to Florida and held no steady job. T. 2442.

B. Crime & Trial Court Proceedings.

On the night of the murders of his girlfriend and her three children, Appellant had to be helped to the police car by officers, one escort on each arm, and appeared “hazy...maybe not real coherent.” T. 777. He was transported to the jail (T. 1172), where he stated that officers “needed to catch the person that had come into the house,” (R. 3313). Appellant further stated, “he was sitting in the home and that two subjects come through the door wearing a ski mask, come through the front door wearing black ski masks.” R. 3318. The intruders had shotguns, he tried to fight them off, but they hit him over the head with the butt of the shotgun. R. 3318-19. He further stated the intruders were from Quantico and they harmed his family because he knew information about chemical and biological weapons that were sold to Iraq. R. 3319, 3385-86.

Pretrial, the defense filed a “Motion for Medical Testing” requesting an: EEG, EMG, MRI, blood samples, blood oximetry, and lung spirometry. R. 54-56. They also filed a Notice of Intent to Rely on Insanity Defense (R. 699-700), but because Appellant refused to

meet with the State's mental health experts, trial counsel revoked the notice (R. 711-13). Appellant also repeatedly tried to fire his trial attorneys and filed a motion to recuse the trial court. R. 740, 745-46, 857-58, 869-70, 1118, 1279-81; *see also* R. 1837-64, 1897-1934. Trial counsel ultimately filed a motion to withdraw citing Appellant's distrust of counsel and his "persistent belief that his legal team will not advocate the defense he has selected." R. 768-69.

On December 13, 2000, trial counsel, concerned about Appellant's mental health, filed a motion for competency determination. R. 1792-95. In the motion, counsel cited evidence of Appellant's "unabated paranoia regarding the defense team", "misstatements of factual matters", "paranoia regarding the Court", and "apparently delusional statements, behavior, and actions...belief in a government conspiracy against him." *Id.* Further, at a hearing on December 29, 2000, Appellant expressed concern that the two court appointed experts had already been "bought off" and their testimony was "paid" for prior to the experts ever seeing him. R. 3107.

A competency hearing was held on January 5, 2001. Dr. Vincence Dillon diagnosed Appellant with bipolar disorder and found "grandiosity, paranoia, and delusions severely hinder[ed]" Appellant's

ability to testify relevantly. R. 2316-18. Appellant also expressed conspiracy theories and paranoia against the trial court. R. 2318. Appellant admitted to “memory deficits about his actions on the night in question.” R. 2317. Dr. Dillon testified that “at times [he] wondered about Appellant’s reality testing.” R. 3147. Appellant was “illogical, pressured, mistrustful, expansive.” R. 3172. Ultimately, Dr. Dillon found Appellant “not competent to proceed.” R. 3141.

Dr. James Larson opined Appellant did not suffer from a psychotic disorder and was competent to proceed. R. 3190-91. The trial court found Appellant competent to proceed. R. 3247.

At the start of the penalty phase, trial counsel filed a motion to waive the jury’s sentencing recommendation. T. 2308. Counsel had advised Appellant to waive a jury based on counsel’s determination that “we would not get a majority [of the jury] to vote for life.” PCR2 88. Appellant waived a jury based solely on counsel’s advice. PCR2 93. Counsel presented mitigation evidence to the court, including: Appellant’s lack of prior criminal history, his decorated service in

Desert Storm, and his “possible” diagnosis of Gulf War Illness³ (“GWI”).

Three mental health professionals testified. Dr. Dillon diagnosed Appellant with bipolar disorder which was made worse by the amount of alcohol he had drunk. T. 2374-77. Dr. Dillon concluded two statutory mitigators—under the influence of an extreme mental or emotional disturbance, and his ability to appreciate the criminality of his conduct was substantially impaired—possibly applied. T. 2387, 2392, 2398. Drs. Larson and Harry McClaren disagreed with the diagnosis and applicability of the two mitigators. T. 2484, 2486, 2516-17. Dr. McClaren agreed, however, that Appellant possibly had brain damage. T. 2497. Appellant told Dr. McClaren “the people that did this were people who were sent by the government to silence him because he knew military secrets.” T. 2491. Dr. Larson acknowledged childhood hyperactivity is often a precursor of bipolar disorder. T. 2524. Dr. McClaren and

³ The term “Gulf War Syndrome” was used at trial while the current medical term is “Gulf War Illness.” This pleading uses the term “Gulf War Illness” for the sake of consistency.

Dr. Larson diagnosed Appellant with narcissism with some anti-social features. T. 2503, 2517.

The deposition of Dr. William Baumzweiger was admitted. T. 2550-51. Dr. Baumzweiger diagnosed Appellant as suffering from GWI, however, the understanding at that time was that GWI manifested solely through “physical symptoms” and did not relate to any “mental or emotional disorder.” R. 2711; *see also* T. 2535 (Dr. Larson testifying that GWI primarily manifests in physical symptoms, not psychological).

C. Appellant’s Mild Neurocognitive Disorder, Brain Damage, and Gulf War Illness Due to His Military Service in the Gulf War.

Appellant was evaluated by Dr. Cynthia He and Dr. Mikel Matto four times in the fall of 2024. PCR4 186. They also reviewed an extensive amount of Appellant’s military and medical records. PCR4 188-89. Dr. He and Dr. Matto diagnosed Appellant with Mild Neurocognitive Disorder⁴ due to traumatic brain injury (“TBI”), from

⁴ As defined in the DSM-5-TR, a Mild Neurocognitive Disorder includes “evidence of modest cognitive decline from a previous level of performance in one or more cognitive domains (complex attention, executive function, learning and memory, language, perceptual-motor, or social cognition),” with deficits that “do not interfere with capacity for independence in everyday activities (i.e., complex

blast overpressure injuries sustained during military service. PCR4 187.

The evidence indicates after Appellant returned from deployment in 1991, and particularly between 1992 and 1997, he had intrusive memories of traumatic experiences from deployment, flashbacks and nightmares, sleep disturbance, hypervigilance, irritability, angry outbursts, and he felt more socially reserved. PCR4 209. He avoided crowds and avoided violent movies. PCR4 209. He had paranoia, tactile hallucinations, and olfactory hallucinations. PCR4 209. He also had tinnitus, decreased concentration and focus, balance problems, migraines, muscle twitches, nausea and vomiting, rashes, and hair loss. PCR4 209. His medical records indicate that between 1991-1994 he had numerous medical visits for musculoskeletal problems, diarrhea, skin problems, and he was diagnosed with hearing loss. PCR4 209. He used cigarettes and tobacco to feel more mellow, focused, and able to concentrate. PCR4 209.

instrumental activities of daily living such as paying bills or managing medications are preserved, but greater effort, compensatory strategies, or accommodation may be required).” PCR5 147-48.

As a result, Dr. He and Dr. Matto concluded that Appellant suffered from Posttraumatic Stress Disorder (“PTSD”) and Mild Neurocognitive Disorder resulting from numerous instances of blast overpressure injuries from his time in the military. PCR4 187, 227. In most of these instances, he felt shock waves move through his body, and he often experienced tinnitus afterward. PCR4 227. He also experienced a direct head impact during static line jumping. PCR4 227. Dr. He and Dr. Matto explained that “[e]ven without a penetrating injury, blast exposure can cause lasting brain injury with psychological and neurocognitive symptoms. Repeated blast exposures during the Middle East conflicts have been associated with development of memory and balance impairments, headaches, irritability, poor sleep, depression, mood swings, anxiety, and paranoia.” PCR4 229. Critically, Appellant’s TBI exacerbated his PTSD symptoms including: mood changes (including depression), anxiety, irritability, disinhibition of aggressive behaviors, sleep disturbance, fatigue, paranoia, and cognitive impairment. PCR4 230.

In addition, Dr. Robert Haley, who has extensively studied GWI and the relationship between GWI and sarin gas, concluded Appellant suffered from GWI which began during his deployment to

the war and continued for decades. PCR4 292. GWI is a “chronic, often disabling condition afflicting military veterans who were deployed to the Middle East during the 1991 Persian Gulf War.” PCR4 287.

During the war, Appellant was “located in the Four Corners Area, bounded by Kuwait, Saudi Arabia, and Iraq, basically in Iraqi-held area in the center of the conflict zone.” PCR4 296. Appellant was repeatedly exposed to “low-level sarin from the fallout produced by U.S. and Coalition bombing of Iraqi production and storage facilities, which hit his position first.” PCR4 296. Sarin nerve gas is colorless, odorless and tasteless, and enters the body rapidly through skin, respiration and ingestion. PCR4 298.

GWI affects vital organs such as the brain and nervous system. PCR4 287, 290. GWI “generally interferes with the function of virtually every organ of the body,” including the brain, nervous system, skin, and muscles. PCR4 290. In the brain, it interferes with memory and concentration, and causes depression and personality changes, including impaired anger management. PCR4 290. GWI causes “symptoms related to mood change, including mood swings, aggression, unusual irritability, unusual anger, outbursts of anger

and frequent rage...” PCR4 296. Dr. Haley noted veterans suffering from GWI “have brain dysfunction in the prefrontal cortex areas of the brain” which primarily affects executive functioning. PCR4 297. Additionally, GWI causes significant changes to the amygdala which is known to cause aggressive tendencies. PCR4 297.

Appellant’s family indicated when he returned from the war, Appellant had clearly undergone a change in personality, including severe irritability and attacks of loss of control of temper. PCR4 297. Additionally, Appellant suffered from daily headaches and multiple body pains. PCR4 297. Dr. Haley indicated excessive irritability and anger management problems are characteristics of GWI that were caused by Appellant’s chemical exposures during the war. PCR4 297. Moreover, the damage to the frontal cortex and amygdala further compromised Appellant’s difficulty in controlling strong impulses. PCR4 298.

D. Timing and Litigation of the Death Warrant.

On March 31, 2025, Governor DeSantis signed a death warrant for Appellant, without notice to Appellant or his counsel, and set his execution for 6:00 p.m. on May 1, 2025. PCR4 671-696. Appellant’s counsel was not served with the warrant until hours later, as it was

improperly served on counsel at the Capital Collateral Regional Counsel Middle's Office, who had never represented Appellant in any of his postconviction proceedings.

On March 31st, Appellant's third successive postconviction motion based on newly discovered evidence of 1) a mild neurocognitive disorder due to traumatic brain injury, including numerous instances of blast overpressure injuries sustained during Appellant's military service and, 2) GWI which affects vital organs such as the brain and nervous system, causing mood swings, aggression, irritability, unusual anger, outbursts of anger, and frequent rage; was still pending before the Honorable David Oberliesen. The Attorney General acknowledged the pending litigation in his letter outlining the procedural history of Appellant's case. PCR4 674. ("The third successive postconviction motion remains pending in the state postconviction court as of this date.").

On April 1, 2025, Appellant filed a motion for stay, highlighting the serious and complex legal issues raised in Appellant's then pending 3.851 motion based on newly discovered evidence of Appellant's mental health stemming from his service in the Gulf War. PCR4 715-23. That same day, the case was re-assigned to the

Honorable Lacey Powell Clark, who had never presided over Appellant's case prior to the signing of the death warrant. PCR4 711. The State filed a proposed scheduling order, extremely compressing the litigation schedule, proposing that Appellant's Rule 3.851 motion be filed a mere seven days after the death warrant was signed. PCR4 699-710. That afternoon, the circuit court held a case management conference, setting deadlines for the litigation of the death warrant in circuit court. PCR4 739-40. The circuit court's order required Appellant to file his public record requests by April 2, 2025, and successive postconviction motion by April 7, 2025. PCR4 746-50. The case management conference was scheduled for April 9, 2025, and the evidentiary hearing was scheduled for April 11, 2025, if necessary. PCR4 746-50.

After learning his death warrant was signed, Appellant immediately made efforts to secure mental health experts to conduct an evaluation and assist with any potential warrant litigation. However, due to the delayed notice and compressed schedule, the earliest any expert could evaluate Appellant was Monday, April 7, 2025, the same day Appellant's Rule 3.851 motion was due. Appellant arranged for his expert to meet with him that day, however,

a “supercharged” storm hit the Florida panhandle (where the expert resides), and the expert had to reschedule. PCR5 100-104. The expert could not set his evaluation for April 8, 2025, because Florida State Prison was on “lockdown” due to the execution of Michael Tanzi. Further, the expert’s next available date was on Friday, April 11, 2025, the same day the circuit court issued its order on Appellant’s 3.851 motion and proceedings were set to conclude in the circuit court. Likewise, the other expert Appellant secured to assist him could not evaluate Appellant until Thursday, April 10, 2025, well after the Rule 3.851 motion was due, and after the case management conference was held, counsel’s only opportunity to be heard on the necessity of an evidentiary hearing on Appellant’s claims.

Despite the substantial hinderance to Appellant’s post-warrant litigation, he filed his successive Rule 3.851 motion for postconviction relief on April 7, 2025.⁵ PCR5 57-170. The circuit

⁵ Appellant raised four claims: 1) the timing and specific litigation context of the death warrant violates State and Federal Due Process, 2) Appellant’s execution would be so arbitrary as to violate the Fifth, Eighth, and Fourteenth Amendments and the corresponding provisions of the Florida Constitution, 3) Executing Appellant after 24 years on death row coupled with conditions of solitary confinement and Appellant’s combat-related injuries violates the Eighth and Fourteenth Amendments, and 4) Appellant has a

court summarily denied Appellant's motion on Friday, April 11, 2025.
PCR5 241-55.

E. The State and Other Nonparties' Advanced Notice of the Death Warrant.

The State and other nonparties were notified of Appellant's impending death warrant long before he or his counsel was notified. On Friday, March 21, 2025, the day after the execution of Edward James, an apparent member of the victims' family posted on Facebook that Appellant's warrant would be signed next and that "nothing absolutely nothing will stop it." PCR5 95-95. Appellant's death warrant was signed 10 days later. PCR4 671-696. Although the information was clearly accurate as to the timing of the warrant, no notice was similarly provided to Appellant or his counsel. The State has *never* denied the accuracy of this allegation – that it and various nonparties were alerted of an impending death warrant prior to the Governor signing one at least ten days before Appellant or his counsel were notified of the warrant.

constitutional right to have access to the courts in the event his execution proceeds.

SUMMARY OF THE ARGUMENT

The circuit court erred when it summarily denied Appellant's Rule 3.851 motion. First, the circuit court erred in denying Appellant's public records requests. Second, the circuit court erred in denying Appellant's motion for stay. Third, the circuit court erred in holding Appellant has not been deprived of his due process and equal protection rights under the United States Constitution and the corresponding provisions of the Florida Constitution. Fourth, the circuit court erred in denying Appellant's claim that his execution would violate the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution, specifically, that the lack of guidelines or process governing the warrant selection process in Florida is arbitrary and capricious, and that his execution after more than twenty years on Florida's death row is cruel and unusual. Finally, the circuit court erred in denying his claim regarding his right to access the courts in the event his execution proceeds. The circuit court's summary dismissal of these serious constitutional claims was error. This Court should vacate the circuit court's order and grant relief on Appellant's claims.

STANDARD OF REVIEW

Because the circuit court denied postconviction relief without an evidentiary hearing, this Court must accept the factual allegations presented in Appellant'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). Further, this Court "review[s] the trial court's application of the law to the facts *de novo*." *Green v. State*, 975 So. 2d 1090, 1100 (Fla. 2008). A postconviction court's decision whether to grant an evidentiary hearing is likewise subject to *de novo* review. *Rose v. State*, 985 So. 2d 500, 505 (Fla. 2008).

ARGUMENT I

APPELLANT HAS BEEN DENIED HIS DUE PROCESS AND EQUAL PROTECTION RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION, AS ACCESS TO THE FILES AND PUBLIC RECORDS PERTAINING TO HIS CASE – IN THE POSSESSION OF VARIOUS STATE AGENCIES – WHICH SIMILARLY SITUATED INDIVIDUALS ARE ABLE TO ACCESS, HAVE BEEN WITHHELD FROM HIM IN VIOLATION OF CHAPTER 119 FLA. STAT. AND FLA. R. CRIM. P. 3.852.

Appellant timely requested public records directly related to his pending death warrant from various state agencies⁶ pursuant to Florida Rule of Criminal Procedure 3.852 (h) and (i) (“the Rule”) on April 2, 2025. In denying **every single records request** to which the agencies objected, the circuit court held that Appellant could not request records under rule 3.852(h) because the mandate affirming his conviction and sentence of death was issued in 2004, and Appellant failed to meet his burden under rule 3.852(i). PCR4 1036-

⁶ Appellant filed records demands to the State Attorney’s Office, the Florida Department of Law Enforcement, the Florida Department of Corrections (“DOC”), the Office of Medical Examiner for the Eighth District, the Florida Commission on Offender Review, the Okaloosa County Sheriff’s Office, the Crestview Police Department, the Niceville Police Department, the Office of the Attorney General, and the Office of the Governor.

42. The circuit court also held “[a] defendant must show how the records relate to a colorable claim for postconviction relief and good cause as to why the records request was not made until after the death warrant was signed.” PCR4 1037. Further, in regards to the clemency records requested from the Office of the Governor and the Florida Commission on Offender Review, the circuit court denied the requests, stating “such records are confidential.” PCR4 1038-40.

Appellant asserts that each of his demands were related to the subject matter of his postconviction claims and/or were reasonably calculated to lead to the discovery of admissible evidence corroborating claims raised therein. The circuit court erred in holding otherwise. Appellant clearly explained in each records demand, and again at the records hearing held on April 4, 2025, the precise reason for each request and articulated clearly to the court what the anticipated nature of admissible evidence to be discovered was. Nevertheless, the circuit court denied each of the eleven records demands filed on April 2, 2025. PCR4 1036-42. This was error.

First, Appellant’s request regarding emails or other communication with the victims’ family was not ripe until Appellant had some reason to believe that such communication was actually

happening. As argued at the case management conference, Appellant did not know that Tracy Cobb existed until her publicly posted comments regarding this case. Appellant timely and diligently requested all public records related to her involvement in this case.

Further, the circuit court erred in finding that Appellant's records demands to the various agencies should have been filed prior to the signing of his death warrant. Appellant clearly explained to the circuit court at the records hearing precisely why the demands were not made until after the warrant was signed.

Specifically, under Rule 3.852(i), the subsection that governs requests for additional public records from an agency in a capital postconviction case, the Defendant must assert that the public records sought are "relevant to the subject matter of a proceeding under rule 3.851, or appear reasonably calculated to lead to the discovery of admissible evidence." Fla. R. Crim. P. 3.852(i)(1)(C). Accordingly, if filed previously, any requests for information regarding lethal injection protocol, clemency selection process, death warrant selection process, execution chamber access documents, or denial of clemency would have been denied as not relevant to a pending proceeding, as any claim by an individual not under an

active death warrant would not be ripe. *See Rigterink v. State*, 66 So. 3d 866, 897–98 (Fla. 2011) (because the Governor has not yet signed his death warrant, the lethal injection claim is not ripe).

Additionally, unlike every other natural person or corporation in the world, Appellant belongs to a unique class of individuals⁷ prohibited from obtaining public records pursuant to the broad “Sunshine laws” Florida has enacted under Chapter 119, Florida Statutes. Instead, as a death-sentenced individual, Appellant is required to engage in an impossible endeavor of requesting records from various state agencies at precisely the correct time, and his requests are subject to the objections of the agencies, unlike requests made pursuant to Chapter 119. *See Fla. R. Crim. P. 3.852 (c)(1); (g)(3)*.

To the extent that Rule 3.852 prohibits Appellant from obtaining public records to which he would otherwise be entitled, Appellant asserts that the Rule violates his Equal Protection and Due Process Rights under the Fourteenth Amendment of the United

⁷ That is, all death-sentenced individuals in the State of Florida. *See Fla. R. Crim. P. 3.852(a)(1)* (“This rule is applicable only to the production of public records for capital postconviction defendants ...”).

States Constitution and the corresponding provisions of the Florida Constitution.

Postconviction litigation is governed by principles of due process. *Easter v. Endell*, 37 F.3d 1343 (8th Cir. 1994); *Holland v. State*, 503 So. 2d 1250 (Fla. 1987). Appellant has been denied due process and access to public records, *i.e.* records that any other natural person or corporation in the world is entitled to view. Appellant has a need for these records that the rest of the public does not have: they are relevant to and necessary for the presentation of his constitutional challenge to his conviction and sentence, as well as to Florida's lethal injection protocol. *See e.g., Glossip v. Gross*, 575 U.S. 960 (2015).

Appellant must be given a fair opportunity to show that his execution will violate the Eighth and Fourteenth Amendments of the United States Constitution and the corresponding provisions of the Florida Constitution. *Hall v. Florida*, 572 U.S. 701, 724 (2014) (“The death penalty is the gravest sentence our society may impose. Persons facing that most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution.”). For Appellant to have that fair opportunity, he must be

provided the records requested from the Florida Department of Law Enforcement, the Florida Department of Corrections, the Office of Medical Examiner for the Eighth District, the Florida Commission on Offender Review, the Office of the Attorney General, and the Office of the Governor.

ARGUMENT II

THE CIRCUIT COURT ERRED IN DENYING APPELLANT’S MOTION TO STAY EXECUTION DUE TO PENDING SERIOUS AND COMPLEX LITIGATION OF NEWLY DISCOVERED EVIDENCE CLAIMS.

A stay of execution is appropriate “when there are ‘substantial grounds upon which relief might be granted.’” *Chavez v. State*, 132 So. 3d 826, 832 (Fla. 2014) (quoting *Buenoano v. State*, 708 So. 2d 941, 951 (Fla. 1998)). Stays are particularly appropriate where, as in Appellant’s case, a warrant is set on a short timeframe. *See Jimenez v. State*, No. SC18-1321 (Fla. Aug. 10, 2018) (granting stay of execution on a 27-day warrant and modifying *nunc pro tunc* the expedited post-warrant scheduling order, without making any findings of substantiality on any issue); *see also Jimenez v. State*, 265 So. 3d 462, 493 (Fla. 2018) (Pariente, J., concurring) (explaining that the “extremely short warrant period” meant that “[t]he postconviction

court and Jimenez’s attorneys were forced to race against the clock in reviewing and presenting all of Jimenez’s claims, respectively” and that without a stay there would be “inadequate time to thoroughly review his claims.”).

This Court may enter a limited stay to meaningfully consider complex legal claims even if, on first appearance, the possibility of relief appears remote. *See King v. Moore*, 824 So. 2d 127, 128 (Fla. 2002) (Harding, J., concurring) (agreeing with the issuance of a stay due to the “possibility” of merit, despite prior actions by the United States Supreme Court “seemingly send[ing] a clear message” that no relief was due).

Appellant is a decorated combat veteran of the Gulf War whose brain and body were damaged by his service to his country, and the new scientific evidence presented in his third successive post-conviction motion deserves meaningful consideration by the circuit court and this Court as the information directly impacts the validity of his capital convictions and death sentences. The circuit court itself acknowledged the need for time and consideration at the March 6, 2025, case management conference. Appellant’s case presents important constitutional issues which deserve to be fully addressed

by both the circuit court and this Court free from the constraints of a warrant.

Accordingly, a stay of execution would ensure a meaningful process and make certain that Appellant is not denied due process.

As the majority observes, “post-warrant litigation is arduous,” *see* majority op. at 7, and a death warrant by its very nature requires expedited proceedings. However, these solemn proceedings ultimately involve carrying out a sentence of death for the most aggravated and least mitigated of murders and must still ensure due process of law. I am extremely concerned by the recent pace of death warrants and the speed with which the parties and involved entities must carry out their respective duties.

Barwick has raised concerns about the accelerated timetable and argues that “[t]he death warrant proceedings in [his] case lacked any indicia of meaningfulness.” While I agree that Barwick’s claims are not entitled to relief under this Court’s precedent, I nonetheless caution that even in this final stage of capital proceedings, a meaningful process must be ensured.

Barwick v. State, 361 So. 3d 785, 796 (Fla. 2023) (Labarga, J., concurring), *cert. denied sub nom. Barwick v. Florida*, 143 S. Ct. 2452 (2023). Here, unlike in *Barwick*, Appellant’s motion was diligently filed prior to the signing of the warrant, with the expectation that it would receive meaningful judicial review. *See Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (holding “[t]he fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and

in a meaningful manner.”). Beyond just requiring expedited underwarrant litigation, this case involves the attempt to smother already pending litigation that was only in the early stages of review. The issues present in Appellant’s case require review that is not truncated by the exigencies of an imminent execution.

ARGUMENT III

THE CIRCUIT COURT ERRED IN SUMMARILY DENYING APPELLANT’S CLAIM THAT THE TIMING AND LITIGATION CONTEXT OF THE DEATH WARRANT IN APPELLANT’S CASE VIOLATES STATE AND FEDERAL DUE PROCESS.

A. Legal Authority.

The right to due process entails “notice and opportunity for hearing appropriate to the nature of the case.” *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 542 (1985) (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)). “[F]undamental fairness is the hallmark of the procedural protections afforded by the Due Process Clause.” *Ford v. Wainwright*, 477 U.S. 399, 424 (1986) (Powell, J., concurring in part and in the judgment). This Court recently reaffirmed a capital postconviction defendant’s right to due process in *Tanzi v. State*, -- So. 3d -- 2025 WL 971568 *2 (Fla. 2025). However, in *Tanzi*, this Court held that Tanzi failed to demonstrate

how the “compressed warrant litigation schedule” denied him due process. *Id.*

Conversely, Appellant submits that he has been deprived of the critical component of due process—fundamental fairness and meaningful or real opportunity to be heard. Importantly, as this Court explained in *Key Citizens for Gov., Inc. v. Florida Keys Aqueduct Auth.*, 795 So. 2d 940, 948 (Fla. 2001) (emphasis added):

The basic due process guarantee of the Florida Constitution provides that “[n]o person shall be deprived of life, liberty or property without due process of law.” Art. I, § 9, Fla. Const. The Fifth Amendment to the United States Constitution guarantees the same. As the Florida Supreme Court explained in *Department of Law Enforcement v. Real Property*, 588 So. 2d 957, 960 (Fla. 1991), “[p]rocedural due process serves as a vehicle to ensure fair treatment through the proper administration of justice where substantive rights are at issue.” Procedural due process requires both fair notice and a real opportunity to be heard. *See id.* As the United States Supreme Court explained, the notice must be “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice must be of such nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance.” *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 94 L. Ed. 865 (1950) (citations omitted). Further the opportunity to be heard must be “at a meaningful time and in a meaningful manner.” *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976); accord *Fuentes v. Shevin*, 407 U.S. 67,

80, 92 S. Ct. 1983, 32 L. Ed. 2d 556 (1972) (stating that procedural due process under the Fourteenth Amendment of the United States Constitution guarantees notice and an opportunity to be heard at a meaningful time and in a meaningful manner).

The specific parameters of the notice and the opportunity to be heard required by procedural due process are not evaluated by fixed rules of law, but rather by the requirements of the particular proceeding. See *Gilbert v. Homar*, 520 U.S. 924, 117 S. Ct. 1807, 138 L. Ed. 2d 120 (1997); see also *Mullane*, 339 U.S. at 313, 70 S. Ct. 652 (stating that notice and opportunity for hearing need only be appropriate to the nature of the case). As the Supreme Court has explained, due process, “unlike some legal rules, is not a technical concept with a fixed content unrelated to time, place and circumstances.” *Cafeteria & Restaurant Workers Union, Local 473, AFL-CIO v. McElroy*, 367 U.S. 886, 895, 81 S. Ct. 1743, 6 L. Ed. 2d 1230 (1961). Instead, “due process is flexible and calls for such procedural protections as the particular situation demands.” *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972).

Appellant does not simply assert that a particular number of days from the warrant signing to the execution violates due process. Rather, he has been denied the meaningfulness and fundamental fairness required due to the circumstances present in his case. See *Abdool v. Bondi*, 141 So. 3d 529, 544 (Fla. 2014) (“there is no single test which applies to determine whether the requirements of procedural due process have been met. Courts instead consider the individualized facts of each case to determine whether the defendant

has been accorded the process which the state and federal constitutions demand.”).

B. Specific Facts & Circumstances of This Case.

Appellant has been deprived of due process of law, also encompassing the right to effective assistance of counsel, right to the assistance of mental health experts, and the right to a fair and impartial tribunal based upon the circumstances surrounding his impending execution, including but not limited to: the truncated consideration of the complex and fact-intensive Rule 3.851 motion pending at the time of the warrant signing; the substitution of the judge presiding over the Rule 3.851 motion who had heard argument and indicated he needed some time to review the record and evaluate the necessity of an evidentiary hearing; and a myriad of additional issues which have hindered Appellant’s postconviction counsel from fully investigating and presenting his post-warrant claims for relief. It is the combination of these factors which resulted in the denial of the fundamental fairness of the proceedings that violates due process. *Lisenba v. People of State of California*, 314 U.S. 219, 236 (1941) (“denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice.”)

1. The pending successive motion.

Appellant's death warrant was signed with full knowledge of the pending litigation and constricted meaningful consideration of his allegations. Indeed, at the case management conference that was held on March 6, 2025, Judge Oberliesen indicated that he needed some time to review the record and evaluate the necessity of an evidentiary hearing. PCR4 853-55. After the warrant was signed, another judge, even less familiar with the lengthy and complicated issues in Appellant's case, was forced to consider the motion in an oppressive and inadequate timeframe to the detriment of Appellant's constitutional rights. PCR4 711. Indeed, where one judge indicated that time was necessary to evaluate the need for an evidentiary hearing *prior to the warrant signing*, another judge denied Appellant's motion within three days of being assigned and no previous familiarity with the facts and issues in his case, *after the warrant signing*. The circuit court's denial, did not take Appellant's allegations of diligence as true and did not permit Appellant an opportunity to address any concerns that the circuit court had because no opportunity was provided to him. The lack of notice and opportunity to be heard as to the circuit court's concerns violates due process.

This Court “has recognized that postconviction proceedings must comport with due process.” *Roberts v. State*, 840 So. 2d 962, 971 (Fla. 2002).

Though Appellant may not have a right to one particular judge, once a specific judge is assigned to his case and hears arguments, any manipulation by the State to remove that judge and insert a different one does violate due process. “The Supreme Court has recognized that ‘judges are not fungible.’” *United States v. Pearson*, 203 F.3d 1243, 1255–56 (10th Cir. 2000) (quoting *Laird v. Tatum*, 409 U.S. 824, 834 (1972) (Rehnquist, J.)). Judges may place emphasis on different legal issues or pieces of evidence. *Id.* at 1256. Their temperaments and decisions are shaped by their individual background and experience. *Id.* Appellant was not afforded any opportunity to address the specific concerns or issues raised by the judge who ultimately issued the order denying him relief, which violates due process.

Further, this Court has recognized: “[h]aste has no place in proceedings in which a person may be sentenced to death.” *Scull v. State*, 569 So. 2d 1251, 1252 (Fla. 1990). Indeed, in Appellant’s case, the stakes are even greater as the stakes at issue relate to his

imminent execution. The hasty and inadequate review of Appellant's pending motion, resulting in the summary denial of his claims, violates his constitutional right to due process.

The hasty denial and lack of an evidentiary hearing has further truncated appellate review which in turn violates due process. Contrary to the State's arguments below, this case is not at all similar to *Bolin v. State*, 184 So. 3d 492 (Fla. 2015). In *Bolin*, though he had a pending successive motion at the time the Governor signed his warrant, the circuit court had already held an evidentiary hearing and denied Bolin's claims. *Id.* at 503. The only thing pending at the time the warrant was signed was Bolin's motion for rehearing. *Id.* Thus, Bolin had an adequate and full review of his claims at the circuit court level *and* there was a complete record for this Court's review. That is not the case here.

Likewise, the circuit court erred in relying on *Marek v. State*, 8 So. 3d 1123 (Fla. 2009). In *Marek*, the defendant's successive postconviction motion was filed in May 2007 and his death warrant was not signed until April 2009 – *a full two years later*. Unlike in Appellant's case, the circuit court in *Marek* had ample time to review and consider Marek's postconviction claims – nearly two years.

Further, as mentioned *supra*, Appellant's argument is not simply that his due process rights were violated due to Governor DeSantis signing his death warrant while his postconviction motion was pending, but also that his case was reassigned to a new judge the day after the death warrant was signed, which deprived him of a real opportunity to be heard and forced the circuit court to consider the motion in an oppressive and inadequate timeframe to the detriment of Appellant's constitutional rights.

Lastly, the circuit court relied on *King v. State*, 808 So. 2d 1237 (Fla. 2002) in finding that Appellant's due process rights were not violated because it was a successive postconviction motion pending and not his initial postconviction motion. The circuit court failed to consider the historical and legal context at the time King's case was pending. And, the circuit court also ignored that shortly after this Court's opinion on January 16, 2002, King was granted a stay by the United States Supreme Court. *King v. Florida*, 534 U.S. 1118 (2002). He was also granted a stay in July 2002 by this Court, and provided with significantly more time to litigate than Appellant, because King's stay of execution did not terminate until late November 2002. *King v. State*, 831 So. 2d 143 (Fla. 2002).

2. Unfair litigation advantage & notice

The Governor provided an unfair litigation advantage by informing nonparties of the upcoming warrant in advance, while keeping it a secret from Appellant and his counsel. On Friday, March 21, 2025, the day after Edward James's execution, an apparent member of the victims' family posted on Facebook that Appellant's warrant would be signed next and that "nothing absolutely nothing will stop it." PCR4 722-23. Although the information was clearly accurate as to the timing of the warrant, no notice was provided to Appellant or his counsel. The State does not deny this fact. The circuit court held that Appellant is not entitled to advance notice and failed to cite any authority to support the claim. PCR5 248. However, Appellant has not asserted that he should have received advance notice of his death warrant, but that he should have received the *same notice* as the State and other nonparties who were notified of Appellant's death warrant at least a full *10 days* before it was signed.

And, when a death warrant was officially signed 10 days later, the Governor's Office also failed to serve it upon any of Appellant's appointed state or federal counsel who have represented him for years—instead, it was delivered to attorneys who have *never* been on

the case, delaying notice to his actual counsel by hours. PCR4 671. Again, this fact is not in dispute.

In the meantime, the Attorney General's Office filed a 22-page unauthorized brief in the circuit court urging the immediate denial of Appellant's pending motion less than two hours after the warrant was signed. PCR4 647-70. As argued below, this implies that the State also had foreknowledge of the warrant while Appellant did not. And, again, this fact has not been disputed by the State.

While the Governor, Attorney General, and members of the victims' family clearly knew that Appellant's death warrant was imminent, Appellant was kept completely in the dark, and was forced to defend against the State's argument for the abrupt dismissal of his then-pending claims while attempting to fully investigate and prepare under-warrant pleadings, including a Rule 3.851 motion. This surprise and gamesmanship create an unlevel playing field, violating due process. *See Dillbeck v. State*, 643 So. 2d 1027, 1030 (Fla. 1994) ("No truly objective tribunal can compel one side in a legal bout to abide by the Marquis of Queensberry's rules, while the other fights ungloved."); *see also Berger v. United States*, 295 U.S. 78, 88 (1935) (A government attorney "is the representative not of an ordinary party

to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all”).

3. The compressed warrant period resulted in an inadequate investigation and review of Appellant’s claims.

Despite the compressed timeline, Appellant, who suffers from a myriad of mental health issues largely related to his service to his country, made efforts to secure experts to assist with any potential litigation. The earliest any mental health expert could evaluate Appellant was Monday, April 7, 2025—the same day his Rule 3.851 motion was due. However, due to a “supercharged” storm that hit the Florida panhandle (where the expert resides), PCR5 100-03, the expert had to cancel his visit. On April 8, 2025, Florida State Prison was on “complete lockdown” due to Michael Tanzi’s execution and the expert was prohibited from visiting Appellant. As a result, the expert had to move his evaluation to the afternoon of Friday, April 11, 2025. Likewise, a second expert could not meet with Appellant until Thursday, April 10, 2025, *after* the deadline for filing his Rule 3.851 motion. Appellant’s lack of access to mental health experts is but another example of how he was denied due process and a fundamentally fair proceeding. *See McWilliams v. Dunn*, 582 U.S.

183, 186 (2017) (“Our decision in *Ake v. Oklahoma*, 470 U.S. 68 (1985), clearly established that...the State must provide an indigent defendant with access to a mental health expert who is sufficiently available to the defense and independent from the prosecution to effectively ‘assist in evaluation, preparation, and presentation of the defense.’”). Again, it bears repeating that Appellant was notified of the warrant and pending execution *at least ten days* after the victims’ family and the State. Postconviction counsel simply cannot adequately represent Appellant under the circumstances. *See Wilson v. Wainwright*, 474 So. 2d 1162, 1164 (Fla. 1985) (holding the basic requirement of due process in an adversarial system is that an accused be zealously represented at “every level”; in a death penalty case such representation is the “very foundation of justice”).

ARGUMENT IV

THE CIRCUIT COURT ERRED IN SUMMARILY DENYING APPELLANT'S CLAIM THAT FLORIDA'S EXECUTION OF APPELLANT WOULD BE SO ARBITRARY AS TO VIOLATE THE FIFTH, EIGHTH, AND FOURTEENTH AMENDMENTS AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

A. Choosing and executing Appellant reveals how arbitrary and truncated Florida's execution process is in violation of the Fifth, Eighth, and Fourteenth Amendments.

Florida's utter lack of any method, criteria, or procedure in determining whom to execute is arbitrary and capricious leading to an absurd result that violates the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution. In denying Appellant's claim, the circuit court held that the Governor's absolute discretion to sign death warrants has routinely been upheld by this Court. PCR5 249-50. This is not, however, what Appellant argued below. Appellant never argued that because the Governor has some discretion the system is *per se* arbitrary and capricious. Appellant does not dispute that if the Governor or other decision-making body⁸

⁸ For example, in Tennessee, the state supreme court sets execution dates. See, e.g., Tennessee:

had some criteria, the Governor or other body would be free to choose from among any of the defendants who fit the criteria. Appellant's argument is simply that there must be *some* criteria. As argued previously, other states have an orderly process for identifying the next death-sentenced defendant to be executed. The difference here, and the basis of Appellant's argument, is that Florida's Governor has no criteria, procedure, or guidelines in place for selecting who lives and who dies.

The extreme arbitrariness that results from this process without procedure means that the resulting decisions and warrant announcements come as a complete surprise to defendants, who may learn of the warrant after decades on death row when corrections officers come to move them to death watch. Further, the execution timeline is so truncated (here, there are 31 days between the signing of the warrant and the execution, though Section 922.052(2)(b), Florida Statutes (2019) provides for up to 180 days to execute a death warrant) that defendants and counsel – no matter how diligent – are forced to submit last-minute pleadings discouraged by courts.

<http://www.tncourts.gov/news/2018/11/16/supreme-court-setexecution-dates>.

Granting the Governor unfettered discretion has, in practice, led to a completely arbitrary process for determining who lives and who dies. There are no limits to cabin executive discretion, there are no guidelines for the selection process, and the entire process is cloaked in secrecy. *C.f. Furman v. Georgia*, 408 U.S. 238, 309-10 (1972) (Stewart, J., concurring) (“These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders . . . many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed.”).

One cannot treat a system entirely susceptible to caprice and chaos as the presumptive “remedy for preventing miscarriages of justice” where “judicial process has been exhausted,” much less in instances such as this one, where judicial process has simply been cut short. *Herrera v. Collins*, 506 U.S. 390, 411-12 (1993). This Court cannot elevate state procedural interests over human life, over due process of the law, and over the Constitution itself.⁹

⁹ See Reinhardt, Stephen, *The Anatomy of an Execution: Fairness vs.*

B. Executing Appellant, who has severe brain damage and unheard mitigation, is so arbitrary as to violate the Fifth, Eighth, and Fourteenth Amendments.

Sergeant Jeffrey Glenn Hutchinson is a decorated soldier who heroically served his country during the Gulf War. When he returned from the war, he began to vomit blood and experience nightmares, memory loss, outbursts, and paranoia. These alarming symptoms caused Appellant and his family to become worried and confused. He sought medical treatment, but the doctors dismissed his symptoms. Decades after his capital trial, however, experts now attribute these symptoms to Gulf War Illness (GWI), which recent research shows was caused by exposure to sarin gas during Operations Desert Storm and Desert Shield. The judge who sentenced Appellant to death heard scant evidence about his illness and its substantial impacts on his physical and mental well-being. Nor did the court hear about his traumatic brain injury as the result of blast exposures, or his post-traumatic stress disorder (PTSD) due to witnessing atrocities of war.

Process,” New York University Law Review, May 1999, Vol. 74, Number 2, at 346, 351-52, discussing *Calderon v. Thompson*, 523 U.S. 538 (1998).

In sum, this evidence supports Appellant's defense at trial and gives rise to reasonable doubt that his jury would have found him guilty of first-degree murder. It is also inherently mitigating and directly tied to Appellant's actions. When combined with other weighty mitigating circumstances already present, there is a probable chance that Appellant would have been found guilty of second-degree murder and/or received a life sentence. The failure of any court to adequately hear and weigh this mitigation evidence is so arbitrary as to violate the Fifth, Sixth, Eighth, and Fourteenth Amendments.

One clear concern of both the concurring and dissenting Justices in *Furman v. Georgia*, 408 U.S. 238 (1972), was the possible discriminatory application of the death penalty. Justice Douglas concluded that the capital statutes before him were "pregnant with discrimination," *id.* at 257, and thus ran directly counter to "the desire for equality . . . reflected in the ban against 'cruel and unusual punishments' contained in the Eighth Amendment." *Id.* at 255. These observations illuminate the holding of *Furman*, reaffirmed by the Court in *Gregg* and subsequent cases, that the death penalty may "not be imposed under sentencing procedures that create [] a

substantial risk that it [will] . . . be inflicted in an arbitrary and capricious manner.” *Gregg v. Georgia*, 428 U.S. 153, 188 (1976); *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980); *Zant v. Stephens*, 456 U.S. 410, 413 (1982) (per curiam).

Absent the courts’ intervention, there is no other forum to correct the grave constitutional errors resulting from the execution of a brain damaged veteran on May 1, 2025. This Court should exercise its constitutional obligation to issue a stay, review Appellant’s substantial claims of mitigation and brain damage, and order a new trial.

ARGUMENT V

THE CIRCUIT COURT ERRED IN SUMMARILY DENYING APPELLANT’S CLAIM THAT EXECUTING APPELLANT AFTER 24 YEARS ON DEATH ROW IN NEAR TOTAL SOLITARY CONFINEMENT WHILE SUFFERING FROM COMBAT-RELATED INJURIES VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS.

In denying this claim, the circuit court found it to be meritless because this Court has repeatedly rejected arguments that a prolonged stay on death row constitutes cruel and unusual punishment. However, Appellant’s claim is more complex in that his twenty-four years on death row in near solitary confinement, coupled

with his suffering from combat-related injuries, is cruel and unusual punishment.

Appellant's execution would violate the Eighth and Fourteenth Amendment. Appellant represents a small percentage of the population on death row—a veteran that deployed to an active combat zone. Despite his contribution to the safety of our country, impending death during the Gulf War, physical and mental deterioration stemming from his service, the State of Florida has scheduled an execution in violation of the Eighth and Fourteenth Amendments.

Appellant is aware of this Court's decision in *Dillbeck v. State*, stating that “no federal or state court has accepted the argument that a prolonged stay on death row constitutes cruel and unusual punishment.” 357 So. 3d 94, 103 (Fla. 2023) (quoting *Booker v. State*, 969 So. 2d 186, 200 (Fla. 2007)). However, Appellant's claim does not simply rely on the length of his stay on death row. This claim hinges on the added, unnecessary punishment to an Army veteran who faced inexplicable trauma overseas serving his country. His life-long confinement while suffering from ailments he developed in combat are beyond cruel and unusual.

Confinement in a prison or isolation cell is a form of punishment subject to scrutiny under the Eighth Amendment. See *Hutto v. Finney*, 437 U.S. 678, 685 (1978). “These facilities and procedures were not designed and should not be used to maintain prisoners for years and years.” *Swafford v. State*, 679 So. 2d 736, 744, n.8 (Fla. 1996) (Wells, J., concurring in part and dissenting in part) (citations omitted). Appellant has spent more than two decades confined to a six-by-nine-foot cell with a ceiling nine and one-half feet high, with no air conditioning despite being located in the center of Florida, rampant with heat, humidity, and unprecedented weather events.

Until the recent class action settlement on confinement, Appellant was housed “in solitary confinement under ‘severely harsh long-term condition’” where he was deprived of “‘basic human contact’ in a confined space [to] ‘languish alone in cramped, concrete, windowless cells, often for twenty-four hours a day, for years on end.’” FDC Rule 33-601.830(1); *Davis, et al. v. Inch*, 3:17-cv-820, ECF No. 72 at 29 (M.D. Fla. 2019) (noting the plausible allegations about conditions). The already painful reality of death row confinement was compounded by social isolation. Such long-term isolation is the prototypical “unusual” punishment, unheard of when the

Constitution was written, attempted but abandoned in the following centuries. *Stinneford, Experimental Punishments*, 95 NOTRE DAME L. REV. 39, 65-66, 71-71 (2019); *see also Bucklew v. Precythe*, 587 U.S. 119, 130 (2019).

Additionally, a punishment is cruel and unusual if it is incompatible with “the evolving standards of decency that mark the progress of a maturing society.” *Estelle v. Gamble*, 429 U.S. 97, 103 (1976) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)). Standards of decency continue to evolve in the United States, but especially for veterans in Florida. Governor DeSantis set a goal for Florida to be the most military and veteran friendly state in the nation and to continue to set the standard in America in supporting those who have sacrificed to preserve our freedom.

Unlike others on death row, Appellant’s sentence and confinement conditions were heightened by his PTSD symptoms, a neurocognitive disorder due to multiple traumatic brain injuries, including injuries sustained from blast overpressure during his service in the Gulf War (PCR4 186-232), and organic brain damage from exposure to toxic chemicals during his deployment overseas (PCR4 287-303). After his deployment, Appellant had intrusive

memories of traumatic experiences from the Highway of Death in the Gulf War, flashbacks and nightmares, sleep disturbance, hypervigilance, irritability, and angry outbursts. He had paranoia, tactile hallucinations, and olfactory hallucinations. He also had migraines, muscle twitches, nausea and vomited blood, rashes, and hair loss. There is also a direct link between Appellant's military service and his blast overpressure injuries that caused cognitive, communication, hearing problems, headaches, anxiety, delirium/dementia, post-traumatic stress disorder, post-concussive syndrome, tinnitus, fatigue, and migraines. Still to this day, Appellant experiences anxiety and negative thoughts related to his military experiences.

When these severe mental and physical health disabilities are combined with living under the haunting uncertainty of not knowing when or if a death warrant would be signed, the added psychological torture to an already fragile mind, violates the Eighth Amendment. It is a greater punishment than that which Appellant was sentenced to and that which the Eighth Amendment condones. Not knowing when you will be selected for death has kept Appellant in a cycle of

hypervigilance and stress, similar to his war time experience overseas, for over twenty-years.

While acceptance of lengthy stays in solitary confinement, and execution thereafter, may be the current state of the law in Florida, the standards of decency continue to evolve. Although courts have not ruled yet that protracted stays on death row are cruel and unusual punishment, the fact is being recognized within the courts. In 2015, Justice Kennedy stated in a concurrence that “the human toll wrought by extended terms of isolation long has been understood, and questioned, by writers and commentators.” *Davis v. Ayala*, 576 U.S. 257, 287 (2015) (Kennedy, J., concurring). Justice Kennedy noted the United States Supreme Court “recognized that, even for prisoners sentenced to death, solitary confinement bears ‘a further terror and peculiar mark of infamy.’” *Id.* (quoting *In re Medley*, 134 U.S. 160, 170 (1890)); *see also Jordan v. Mississippi*, 585 U.S. 1039 (2018) (J. Breyer, dissenting from denial of certiorari); *Dunn v. Madison*, 138 S. Ct. 9, 13 (2017) (Breyer, J., joining Ginsberg, J., and Sotomayor, J., concurring) (“And we may well have to consider the ways in which lengthy periods of imprisonment between death sentence and execution can deepen the cruelty of the death penalty

while at the same time undermining its penological rationale.”). Further, as the public becomes more aware of the conditions of confinement, and the results of the research permeate the courts, the Eighth Amendment standards of decency will continue to evolve.

Appellant urges this Court to reconsider its prior decisions in *Jimenez v. State*, 265 So. 3d 462 (Fla. 2018); *Carroll v. State*, 114 So. 3d 883 (Fla. 2013); *Valle v. State*, 70 So. 3d 530 (Fla. 2011); and *Booker v. State*, 773 So. 2d 1079 (Fla. 2000). This Court should look at the totality of the circumstances; Appellant’s prolonged stay on death row, the conditions during that stay, and how both factors exacerbated his injuries from his service in the Gulf War. The needless, cruel subjugation to prolonged solitary confinement while suffering from combat-related injuries, superadded to the length of time Appellant has spent on death row, constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.

ARGUMENT VI

THE CIRCUIT COURT ERRED IN SUMMARILY DENYING APPELLANT'S CLAIM THAT APPELLANT HAS A CONSTITUTIONAL RIGHT TO HAVE ACCESS TO THE COURTS IN THE EVENT HIS EXECUTION PROCEEDS.

In his postconviction motion filed after the death warrant was signed, Appellant made specific requests of and for defense witnesses to his execution. Appellant requested that: (1) Appellant's designated legal witness(es) be allowed access to writing materials during his execution; (2) Appellant's designated legal witness(es) be allowed access to a telephone before and during the execution process; (3) Appellant be afforded a second witness to his execution; and (4) one of Appellant's witnesses be allowed to view the IV insertion process.

These requests have been denied by the circuit court. The refusal of these requests amounts to a denial of due process and access to the courts preventing Appellant and other similarly situated inmates from raising and proving the claim that Florida's execution procedures violate the Eighth Amendment. The refusal of these requests denies Appellant a fair opportunity to protect his Eighth Amendment rights because it deprives him of the necessary information and access to challenge whether his execution is

constitutional. As such, he is being denied a “basic ingredient of due process – an opportunity to be allowed to substantiate a claim before it is rejected.” *See Ford v. Wainwright*, 477 U.S. 399 (1986) (plurality opinion) (internal quotation marks omitted).

Execution is a critical stage of the proceedings. The right to counsel and the right to be free from cruel and unusual punishment will be meaningless if Appellant’s sole legal advocate present at the execution has no ability to advise the courts if his execution is being carried out in a cruel and unusual manner.

In other states where lethal injection executions have gone awry, those states have taken steps to increase transparency and attorney access.¹⁰ This should be done in Florida. Further, to ensure

¹⁰ In Ohio, for example, DOC increased the number of witnesses to allow for two attorneys to be present, made a phone available just outside the witness room, required photos of the drug packages provided after the execution, and instituted checklists and an incident command system. *See* [https://files.deathpenaltyinfo.org/legacy/files/pdf/ExecutionProtocols/OhioProtocol 10.07.2016.pdf](https://files.deathpenaltyinfo.org/legacy/files/pdf/ExecutionProtocols/OhioProtocol%2010.07.2016.pdf). Further, in Arizona, after the botched execution of Joseph Wood in 2014, the State agreed to allow witnesses to the execution to see, via video, the prisoner being strapped to the gurney, and later, by court order, the witnesses now will hear the entire execution process and see the syringes being pushed via video. *See* <https://www.latimes.com/opinion/opinion-la/la-ol-arizonaexecutionsmidazolam-20161223-story.html>. Lastly,

adequate access to the courts, it is necessary to have at least two attorneys present at the viewing – one who can access a phone, and one who can continue to monitor the execution should phone access be necessary. Preventing witnessing counsel from adequate phone access – indeed, any phone access – during the execution, violates Appellant’s right of access to the courts. By refusing to allow a member of Appellant’s legal team to witness the IV insertion process, DOC is actively preventing Appellant from bringing an Eighth Amendment challenge that would arise after the execution process has begun, yet prior to the flow of lethal chemicals that will cause death. Such a violation would serve as a basis for a stay of execution and necessitates phone access. If DOC has difficulty in achieving venous access, and it either takes an unusually long time with multiple attempts to locate a vein, and/or requires a painful cut-down procedure to be used, Appellant will have no way of communicating his pain and suffering to his counsel, in violation of both the Sixth and Eighth Amendment to the United States

in Alabama, the defendant is allowed up to six witnesses to view the execution. See <https://files.deathpenaltyinfo.org/documents/AL-Execution-Protocol-April2019.pdf>.

Constitution and corresponding provisions of the Florida Constitution.

The circuit court faulted Appellant for failing to raise a constitutional claim. That is error. Appellant clearly alleged that he is being denied access to counsel and the courts to bring claims, including an Eighth Amendment challenge which would arise after the execution process has begun.

This Court has the authority to review counsel's access, or other's access, to Appellant once inside the execution chamber. For example, the United States Supreme Court granted a stay of execution in *Murphy v. Collier*, 587 U.S. 901 (2019) specifically to allow the lower court to address Texas's rule forbidding religious advisors from any denominations other than Christianity or Islam to be present either in the execution room or in the adjacent viewing room. Clearly, when a defendant's constitutional rights are at stake, the courts are empowered to review a state's execution practices.

CONCLUSION

Based on the foregoing arguments, Appellant respectfully requests that this Court remand his case for an evidentiary hearing; vacate his sentences of death; grant a stay of execution; and/or grant any other relief it deems appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing pleading has been furnished by electronic service to all counsel of record on this 15th day of April 2025.

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CERTIFICATION OF TYPE SIZE AND STYLE

Pursuant to Fla. R. App. P. 9.045, I hereby certify that the Initial Brief of the Appellant has been produced in Bookman Old Style 14-point font. Pursuant to Fla. R. App. P. 9.210(a)(2)(D), this brief complied with the word count (11,326), and page limit as it does not exceed 75 pages.

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