

**FSC No. SC2025-0517**

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

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IN THE  
**Supreme Court of Florida**

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JEFFREY HUTCHINSON,  
Appellant,  
v.

STATE OF FLORIDA,  
Appellee.

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**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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**REPLY BRIEF OF APPELLANT**

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## **PRELIMINARY STATEMENT**

This proceeding involves the appeal of the circuit court's denial of Appellant's successive motion for postconviction relief under Fla. R. Crim. P. 3.851. The State has filed its answer to Appellant's initial brief and this reply follows. This reply will address only the most salient points argued by the State. Appellant relies upon his initial brief in reply to any argument or authority argued by the State that is not specifically addressed in this reply.

## **CITATIONS TO THE RECORD**

The abbreviation "R." refers to the first eighteen 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 second successive postconviction appeal to the Florida Supreme Court (SC17-1229). "PCR3" refers to the record on appeal from the third successive postconviction appeal to the Florida Supreme Court (SC21-0018). "PCR4" refers to the record on appeal from the fourth successive 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.

**ARGUMENTS IN REPLY TO ISSUE I**

**THE LOWER COURT DENIED APPELLANT 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.**

The State argues that Appellant failed to show how his requests related to a colorable claim for relief and/or good cause for the “belated” demands. Answer Brief at 33. These arguments misconstrue the record and applicable law.

*The finding below was error.*

“[A]ccess to public records is an essential ingredient in any meaningful postconviction review”—including under warrant. *Sims v. State*, 753 So. 2d 66, 71 n.10 (Fla. 2000) (Anstead, J., concurring). 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. 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.

Second, the State completely ignored the fact that Appellant did not have any reason to know of or request records related to Tracy Cobb until after her online public comments. *See* Initial Brief at 24-25. Thus, Appellant timely and diligently requested all public records related to her involvement in this case.

Finally, many of the issues and claims regarding Appellant's public records request did not become ripe until Governor DeSantis signed his death warrant. 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).

**ARGUMENTS IN REPLY TO ISSUE II**

**THE CIRCUIT COURT ERRED IN DENYING APPELLANT’S MOTION TO STAY.**

The State argues that the circuit court is not authorized to enter a stay, and alternatively, that there were no substantial grounds raised which would warrant relief. Answer Brief at 38. The State’s position is legally incorrect.

*The circuit court’s authority.*

Circuit courts have the authority to issue a stay of execution. Specifically, they “have the power to issue . . . all writs necessary or proper to the complete exercise of their jurisdiction.” Art. V, 5, Fla. Const. Under their All Writs power, circuit courts have jurisdiction “to enter a stay of execution where the stay is filed with a motion for postconviction relief or where the application for stay itself shows grounds under which the defendant might be entitled to postconviction relief.” *Amendments to Fla. Rule of Criminal Procedure 3.851(h)*, 828 So. 2d 999, 1001 (Fla. 2002). In describing the courts’ inherent power to issue a stay of execution, Justice Pariente noted:

As noted by the State in its response to the petition, this Court is still constitutionally entrusted with the duty to issue a stay of execution if there is a meritorious postconviction claim pending or, if at the time the warrant is signed, the defendant brings a successive postconviction challenge that casts doubt on his or her guilt, the integrity of the judicial process, or the validity of the death sentence imposed. See *Response to Emergency Petition for Extraordinary Relief* at 28, *Abdool v. Bondi*, No. SC13-1123 (Fla. July 18, 2013) (“**[T]he inherent power of the judiciary to grant a stay of execution where necessary can protect any litigants from being denied adequate judicial review of a cognizable claim.** Therefore, facial invalidity of the statute is not demonstrated by speculation of a potential unconstitutional application of the Act.”). **In my view, that remains the essential fail-safe mechanism this Court may utilize when necessary to ensure that the ultimate punishment of the death penalty is inflicted in a manner that fully comports with the Constitution.**

*Abdool v. Bondi*, 141 So. 3d 529, 555-57 (Fla. 2014) (Pariante, J., concurring) (emphasis added). Though no statute may give circuit courts that right, the Florida Constitution certainly does. And, to the extent that a statute conflicts with express or implied mandates of the constitution, the statute must fall. *Notami Hosp. of Florida, Inc. v. Bowen*, 927 So. 2d 139, 142 (Fla. 1st DCA 2006), *aff’d sub nom. Florida Hosp. Waterman, Inc. v. Buster*, 984 So. 2d 478 (Fla. 2008).

### *Substantial Grounds for Relief*

Appellant has alleged substantial grounds for relief exist in both his third and fourth successive motions for postconviction relief. 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. And, Appellant's claims alleged in his fourth successive motion deserve equal attention and review. 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.

### ARGUMENTS IN REPLY TO ISSUE III

**APPELLANT 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.**

“[D]ue process,’ unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.” *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895 (1961) (quoting *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring) (first alteration in original). Rather, it is “flexible and calls for such procedural protections as the particular situation demands.” *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). Whether, and to what extent, procedural protections are due depends on “the extent to which an individual will be ‘condemned to suffer grievous loss.’” *Goldberg v. Kelly*, 397 U.S. 254, 263 (1970) (quoting *Joint Anti-Fascist Refugee Committee*, 341 U.S. at 168 (Frankfurter, J., concurring)). Here, the state seeks to impose the ultimate punishment and one cannot think of a more grievous loss than the loss of one’s life.

The State incorrectly recounts Appellant's claim (Answer Brief at 50) as well the holdings in the cases that the lower court relied upon (*see e.g.*, Answer Brief at 58). For example, the State completely fails to mention that this case is not at all similar to *Bolin v. State*, 184 So. 3d 492 (Fla. 2015). In *Bolin*, though Bolin 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 where Appellant's successive motion was hastily denied *without an evidentiary hearing and thus there is no record for this Court's review.*

The State also completely misconstrues Appellant's claim regarding the judicial reassignment which took place after the warrant was signed. Appellant did not argue he was entitled to a particular judge or to a certain process for the reassignment of judges. Nor did Appellant argue that Judge Oberliesen should have been the judge for the duration of his case. What he did argue, was

that he was entitled to have Judge Oberliesen rule on the issue of whether he was entitled to an evidentiary hearing, or he should have been allowed a case management conference in front of Judge Clark. But the complete denial of any opportunity to address Judge Clark's specific concerns violated due process. Appellant may not have a right to one particular judge, however, 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.))<sup>1</sup>. The mere fact that judges may or may not be reassigned to cases to handle the warrant litigation, is not relevant to the issue at hand.

Next, the State incorrectly asserts that Appellant "never identifie[d] exactly what significant advantage is gained by the State" when it has advance notice that a warrant will be signed. Answer

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<sup>1</sup> Further, the State misquoted the holding of this case and left this essential line out of its summary. PCR5 176; *compare* Answer Brief at 60.

Brief at 65. Appellant specifically addressed this point. Initial Brief at 40. Due to their advanced knowledge, the Attorney General's Office was able to file 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. Appellant was caught completely by surprise and had no time to respond to the unauthorized motion. Nor does the State ever deny that it had advanced warning of an impending death warrant in this case. 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"). Second, it completely ignores the *disadvantage* the lack equal of notice had on Appellant, his case, his experts, and counsel.

Additionally, simply because Appellant has completed his initial postconviction proceedings and clemency interview is irrelevant. Appellant had no control over the lapse of time between his litigation

and the signing of his death warrant. Likewise, he had no say in how long the warrant period would be, when his execution would be scheduled, or how truncated the filing dates would be in this Court's scheduling order.

Appellant's counsel was not notified of clemency counsel's appointment. Unlike the State, Appellant had no way to know about the behind-the-scenes activities, secretive clemency process, or extent of the investigation that was being undertaken into his case and his background. As portrayed by its immediate and coordinated multi-agency litigation, the only party here with any advance knowledge of this death warrant or the denial of clemency, was the State.

Finally, the State's arguments misconstrue Appellant's access to mental health experts claim. Due to the compressed warrant timeline and execution scheduled, Appellant was denied the raw materials with which to build his defense and to sufficiently plead his successive postconviction motion. *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.’”). The State attempts to fault Appellant for not pleading any mental health claims while also denying him the opportunity to raise them by denying him access to his experts. This cannot stand.

#### **ARGUMENTS IN REPLY TO ISSUE 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.**

The State failed to respond to Appellant’s arbitrary and capricious claim. 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.

Appellant does not dispute the Governor’s authority to choose who lives and who dies. His argument is simply that there must be *some* criteria used in the selection process. 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.

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.

### **ARGUMENTS IN REPLY TO ISSUE 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.**

The State’s argument that Appellant is somehow at fault for the “many years on death row [ ] due to [his] own actions of ‘continually challenging’ [his] convictions and sentences” is not persuasive or accurate. Answer Brief at 87. Appellant had no control over when the

Governor would choose to begin clemency proceedings. Similarly, he had no control over if or how soon the Governor would choose to sign his warrant once clemency proceedings concluded. As evidenced by the procedural history of this case, the fact that Appellant had a successive motion pending in the circuit court did nothing to stop his warrant from being signed. The State cannot simultaneously argue that a pending successive motion does not preclude a warrant while also arguing that Appellant is at fault for stalling any potential warrant by filing a successive motion.

As Justice Breyer explained in *Glossip v. Gross*, 576 U.S. 863, 924-26 (2015), while the delays in capital cases are often necessary to pass constitutional muster, they do not change the fact that defendants suffer in a cruel and unusual way, including being kept in solitary confinement 22 hours or more per day, which can cause anxiety, panic, rage, loss of control, paranoia, hallucinations, and self-mutilation, and physical changes in EEG patterns consistent with stupor and delirium. (Breyer, J., joined by Ginsburg, J., dissenting).

Finally, Appellant had no control over the length of time it took to uncover all of the new evidence in his case that he has attempted

to present to the courts, nor did he have control over the procedural hurdles the courts and the State have used to hinder the proper presentation of his case. Appellant should not be forced to choose between competing constitutional rights: the right to raise newly discovered evidence claims and the right to be free of cruel and unusual punishment, per the Eighth Amendment.

### **ARGUMENTS IN REPLY TO ISSUE 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.**

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.

Denying Appellant's simple request, including allowing witnessing counsel 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 Constitution and corresponding provisions of the Florida Constitution. Here, as noted in Justice Sotomayor's dissent in *Arthur v. Dunn*:

the State has no legitimate reason—penological or otherwise—to prohibit [a prisoner's] counsel from possessing a phone during the execution, particularly in light of the demonstrated risk that [the lethal injection drug] will fail. To permit access to a telephone would impose no cost or burden on the State.

581 U.S. 1002 (2017) (Sotomayor, J., dissenting) (internal citation and quotation omitted).

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 21st day of April 2025.

/s/ CHELSEA SHIRLEY  
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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 complies with the word count (3,489 words) and page limit as it does not exceed 25 pages.

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