Case No. SC2025-0585
Lower Court No. 1995-CF-15314

In the Supreme Court of Florida

GLEN EDWARD ROGERS,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

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

DEATH WARRANT SIGNED
Execution Scheduled for May 15, 2025, at 6:00 p.m.

ANSWER BRIEF OF APPELLEE

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STATEMENT REGARDING ORAL ARGUMENT

The State respectfully submits that oral argument is not necessary on the appeal from the denial of Rogers' fourth successive motion to vacate judgment of conviction and sentence of death. The claims raised in this successive motion for postconviction relief were denied because they were untimely, procedurally barred, or meritless as a matter of established Florida law. Accordingly, oral argument will not materially aid the decisional process.

STATEMENT OF THE CASE AND FACTS

On November 4, 1995, Appellant, Glen Edward Rogers, arrived at a motel in Tampa, Florida. The next day around 11:00 a.m., he visited the Showtown Bar, where he met the victim in this case, Tina Marie Cribbs. *Rogers v. State*, 783 So. 2d 980, 985-86 (Fla. 2001).[1] Rogers bought drinks for Cribbs and her group of friends and eventually asked Cribbs, the only single woman in her group, to give him "a ride." *Id.* at 985. Rogers and Cribbs went to his motel room where Rogers brutally stabbed her to death. That evening, Rogers went to the motel clerk, paid for an extra night, and requested a "Do Not Disturb" sign. *Id.* The motel did not have one, so Rogers handwrote a sign and placed it on his motel room door before leaving

[1] Rogers had just arrived in Florida after committing other similar murders. *See People v. Rogers*, 304 P.3d 124 (Cal. 2013) (affirming Rogers' death sentence for the murder of Sandra Gallagher), *cert. denied*, 571 U.S. 1206 (2014). On September 29, 1995, Rogers picked up Sandra Gallagher at a California bar and strangled her to death several hours later, burning her body in the passenger compartment of her truck. *Id.* at 129-33. Rogers fled to Mississippi, where he murdered Linda Price in late October. *Id.* at 138-39. He then fled to Louisiana, where he met Andy Lou Sutton at a bar on November 2, 1995. Rogers spent the night with Sutton and left the following day, telling her he would return. *Id.* at 133-34. From there, he traveled to Tampa, where he murdered Cribbs. A few days later, Rogers, driving Cribbs' car, returned to Sutton's apartment in Louisiana. That night, Rogers stabbed Sutton to death. *Id.* at 134-37.

in Cribbs' vehicle early the next morning. *Id.* Cribbs' body was discovered on Tuesday, November 7, 1995, when a cleaning person went into the motel room and found her body in the bathtub. *Id.* at 986. Cribbs had been stabbed twice; once to the chest and once to the buttocks. *Id.*

On the afternoon of November 6, 1995, maintenance workers at an Interstate 10 rest area near Tallahassee found Cribbs' wallet in the trash. Two latent fingerprints belonging to Rogers were located inside the wallet. *Id.* at 986. Fingerprints lifted from the motel room also matched Rogers' fingerprints. *Id.*

Rogers was eventually apprehended in Kentucky a week after Cribbs' murder. Law enforcement officers spotted Rogers driving Cribbs' car and a high-speed chase ensued. *Id.* During the pursuit, Rogers pelted the officers' car with beer cans and plowed through a roadblock before eventually being forced off the road and arrested. *Id.* When questioned by Kentucky law enforcement officers, Rogers claimed that "a girl," whom he could not describe, had loaned him the car and he had left her, alive, in a motel room and never planned on returning. When the officers told Rogers they just wanted the truth, Rogers replied, "I can't tell you the truth." *Id.*

At a jury trial in Hillsborough County, Florida, Rogers was convicted of first-degree murder, armed robbery, and grand theft of a motor vehicle. *Id.* at 985-87. At the conclusion of the penalty phase proceedings, the jury unanimously recommended the death penalty. The trial court accepted the jury's recommendation and sentenced Rogers to death.[2] *Id.* at 987. This Court affirmed Rogers' convictions and death sentence on direct appeal. *Id.* at 988-1004.

Rogers subsequently filed a motion for postconviction relief in the circuit court under Florida Rule of Criminal Procedure 3.851,

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[2] The trial court found two aggravating circumstances: (1) that the murder was committed for pecuniary gain; and (2) that the murder was heinous, atrocious, or cruel (HAC). The trial court found one statutory mitigating circumstance—that Rogers' capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired (some weight). The trial court also found the following nonstatutory mitigating circumstances: (1) Rogers had a childhood deprived of love, affection or moral guidance and lacked a moral upbringing of good family values (slight weight); (2) Rogers' father was an alcoholic who physically abused Rogers' mother in the presence of Rogers and his siblings (slight weight); (3) Rogers was introduced to controlled substances at a young age and encouraged by his older brother to participate in burglaries (slight weight); (4) Rogers had been lawfully and gainfully employed at various times in his adult life (slight weight); (5) Rogers was solely responsible for the care of his two children at one time in his adult life (slight weight); and (6) Rogers had been drinking alcohol for a few hours on the day he came into contact with the victim (little weight).

which was denied after an evidentiary hearing. *See Rogers v. State*, 957 So. 2d 538, 543-44 (Fla. 2007). Rogers appealed that decision and simultaneously petitioned this Court for a writ of habeas corpus. *Id.* at 544. This Court affirmed the denial of postconviction relief and denied Rogers' habeas petition. *Id.* at 545-56.

Next, Rogers filed a petition for writ of habeas corpus in the United States District Court, Middle District of Florida. The district court denied the petition in 2010, and Rogers' efforts to seek further review from the Eleventh Circuit Court of Appeals and the United States Supreme Court were rejected. *See Rogers v. Sec'y, Dep't of Corr.*, No. 8:07-cv-1365, 2010 WL 668261 (M.D. Fla. Feb. 19, 2010), *certificate of appealability denied*, No. 10-11246, slip op. (11th Cir. June 11, 2010), *cert. denied*, 562 U.S. 1149 (2011).

Since that time, Rogers has filed numerous successive motions for postconviction relief in state circuit court. The postconviction court summarily denied all of Rogers' successive motions, and this Court affirmed each of those decisions on appeal. *See Rogers v. State*, 97 So. 3d 824 (Fla. 2012); *Rogers v. State*, 235 So. 3d 306 (Fla. 2018); *Rogers v. State*, 327 So. 3d 784 (Fla. 2021).

On April 15, 2025, Governor Ron DeSantis signed Rogers' death warrant setting his execution for May 15, 2025, at 6:00 p.m. In response, this Court entered a scheduling order directing that any proceedings in the trial court be concluded by Friday, April 25, 2025. (4PCR:124-25).[3]

The lower court conducted a status hearing on April 17, 2025. (4PCR:549-74). At that hearing, Rogers' collateral counsel orally moved to withdraw from the case, alleging that an actual conflict exists between Rogers and Capital Collateral Regional Counsel—Middle Region ("CCRC-M") based on Rogers' dissatisfaction with CCRC-M's past performance and Rogers' desire to raise future claims challenging the quality of their representation.[4] (4PCR:552-56).

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[3] Citations to the instant record on appeal following the denial of Rogers' fourth successive postconviction motion will be cited as "4PCR" followed by the appropriate page number.

[4] In 2022, Rogers and two other capital inmates filed a federal lawsuit against the Chief Justice of this Court arguing that the Court's "rules and policies prohibiting them from filing pro se pleadings" challenging the quality and performance of their state collateral counsel violated their federal constitutional right to due process. *Sweet v. Chief Justice of Fla. Sup. Ct.*, No. 23-13025, 2025 WL 915740, at *1-2 (11th Cir. Mar. 26, 2025). On March 26, 2025, the Eleventh Circuit affirmed the federal district court's dismissal of the case for lack of jurisdiction. *Id.* at *2-5.

Rogers, addressing the lower court by Zoom, briefly detailed his complaints against CCRC-M arising from their failure to timely file pleadings in the past. (4PCR:560-61). The State argued in response that Rogers had no constitutional right to the effective assistance of postconviction counsel, and Rogers failed to establish that any conflict currently exists. (4PCR:556-57). The lower court orally denied CCRC-M's motion to withdraw and subsequently entered a written order memorializing its decision. (4PCR:512-16, 559).

On April 20, 2025, Rogers filed his fourth successive rule 3.851 motion, raising three claims: (1) CCRC-M is representing him under an active conflict of interest; (2) a "newly discovered evidence" claim regarding childhood abuse; and (3) an as-applied challenge to Florida's lethal injection procedures based on his diagnosis of porphyria. (4PCR:444-70). The State filed its response on April 21, 2025, arguing that Rogers' claims should be summarily denied. (4PCR:517-41).

The postconviction court held a *Huff*[5] hearing on April 21, 2025, and afterward ruled that an evidentiary hearing was not required.

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

(4PCR:599-642). On April 25, 2025, the court issued a final order denying Rogers' successive motion and CCRC-M's motion to withdraw and appoint conflict-free counsel. (4PCR:643-69).

This appeal follows. On April 30, 2025, Appellant filed his Initial Brief with this Court and improperly submitted an appendix containing numerous items never submitted to the lower court. Additionally, Appellant's Initial Brief contains significant discussion of these appendix documents when addressing each of his enumerated claims. *See* Initial Brief of Appellant at 20-24, 39-47, 68-73; *see Ramsay v. State*, 259 So. 3d 132, 133 (Fla. 4th DCA 2018) (stating that "reliance on non-record information is wholly improper"). Normally, Appellee would move to strike Appellant's Initial Brief and Appendix, but given the time constraints of the instant death warrant proceedings, the State will forego filing a formal motion to strike and simply request that this Court strike the appendix and note in its forthcoming opinion that these documents were not properly presented to the circuit court and cannot form the basis of any relief.

SUMMARY OF THE ARGUMENT

Claim I: The postconviction court acted within its sound discretion in denying CCRC-M's untimely motion to withdraw and have substitute counsel appointed. Despite being aware of Rogers' complaints against CCRC-M for years, CCRC-M waited until after the governor signed a death warrant in his case to bring the alleged conflict to the court's attention. In addition to properly finding the request dilatory, the postconviction court also correctly found that there was no actual conflict of interest as Rogers' complaints do not create an actual conflict of interest.

Claim II: The postconviction court properly summarily denied Rogers' alleged newly discovered evidence claim regarding his childhood sexual abuse as this claim was untimely, procedurally barred, and without merit. Rogers raised an identical "newly discovered evidence" claim in a prior successive postconviction motion which was summarily denied by the lower court, and that decision was affirmed by this Court. *See Rogers v. State*, 327 So. 3d 784 (Fla. 2021). Thus, as the lower court correctly found, Rogers' attempt to relitigate the claim was unavailing.

Claim III: The postconviction court properly summarily denied

Rogers' as-applied constitutional challenge to Florida's method of execution. Rogers has been aware of his porphyria diagnosis for decades and failed to timely raise his claim. In addition to being untimely, Rogers' claim was meritless as his speculative assertions regarding his porphyria condition making the process more painful to him fail as a matter of law. Furthermore, Rogers failed to carry his burden of identifying a known and available alternative method of execution that entails a significantly less severe risk of pain.

STANDARD OF REVIEW

"Summary denial of a successive postconviction motion is appropriate if the motion, files, and records in the case conclusively show that the movant is entitled to no relief." *Cole v. State*, 392 So. 3d 1054, 1060 (Fla. 2024), *cert. denied*, 145 S. Ct. 109 (2024) (internal quotations omitted). A postconviction court may properly deny claims that are untimely, not retroactive, procedurally barred, not cognizable, or meritless as a matter of law under controlling precedent. *See, e.g.*, *Mungin v. State*, 320 So. 3d 624, 626 (Fla. 2020) (affirming summary denial of claims raised in successive postconviction motion as untimely); *Morris v. State*, 317 So. 3d 1054, 1071 (Fla. 2021) (stating that a court may summarily deny a postconviction claim that is procedurally barred); *Mann v. State*, 112 So. 3d 1158, 1162 (Fla. 2013) (holding that because defendant's postconviction claims were "purely legal claims that have been previously rejected by this Court, the circuit court properly summarily denied relief").

With respect to timeliness, "postconviction claims in capital cases must generally be filed within one year after the judgment and sentence become final." *Cole*, 392 So. 3d at 1061 (citing Fla. R. Crim.

P. 3.851(e)(2)). A claim filed outside the one-year period is untimely unless one of the following circumstances exists:

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

Fla. R. Crim. P. 3.851(d)(2). "It is incumbent upon the defendant to establish the timeliness of a successive postconviction claim." *Mungin*, 320 So. 3d at 624. When a claim relies on purported newly discovered evidence, the defendant bears the burden to establish "that the newly discovered evidence was unknown by the trial court, by the party, or by counsel at the time of trial and it could not have been discovered through due diligence." *Cole*, 392 So. 3d at 1061 (quoting *Dillbeck v. State*, 357 So. 3d 94, 100 (Fla. 2023)).

"In reviewing a trial court's summary denial, 'this Court must accept the defendant's allegations as true to the extent that they are not conclusively refuted by the record.'" *Id.* (quoting *Tompkins v. State*, 994 So. 2d 1072, 1081 (Fla. 2008)). "However, mere conclusory

allegations do not warrant an evidentiary hearing." *Id.* (citing *Anderson v. State*, 220 So. 3d 1133, 1142 (Fla. 2017); *LeCroy v. Dugger*, 727 So. 2d 236, 238 (Fla. 1998)). On appeal from the summary denial of a successive postconviction motion, this Court "review[s] the postconviction court's decision de novo." *Id.* (citing *Marek v. State*, 8 So. 3d 1123, 1127 (Fla. 2009)).

ARGUMENT

CLAIM I

THE POSTCONVICTION COURT ACTED WITHIN ITS SOUND DISCRETION IN DENYING COLLATERAL COUNSEL'S UNTIMELY MOTION TO WITHDRAW AND TO APPOINT CONFLICT-FREE COUNSEL.

At the first hearing in the circuit court following the governor's signing of Rogers' death warrant, Rogers' collateral counsel, Ali Shakoor of CCRC-M, orally moved to withdraw and sought the appointment of conflict-free counsel. The postconviction court heard argument from counsel and Rogers, and orally denied the request. (4PCR:552-61). The court subsequently issued a written order confirming the ruling. (4PCR:512-16). Thereafter, Rogers' counsel filed a fourth successive motion for postconviction relief and, once again, sought to withdraw. (4PCR:451-55). After hearing additional argument at the case management conference, the court reaffirmed its ruling denying the motion to withdraw and found the request untimely and meritless as there is no actual or active conflict of interest. (4PCR:605-22, 646-53).

"A court's decision involving withdrawal or discharge of counsel is subject to review for abuse of discretion." *Weaver v. State*, 894 So.

2d 178, 187 (Fla. 2004). Here, the court acted within its sound discretion in denying Rogers' untimely request to withdraw. In addition to being untimely, the court properly found that there was no actual conflict of interest.

Collateral counsel asserted that CCRC-M has an actual conflict of interest because Rogers has expressed dissatisfaction with CCRC-M's past performance and competence and Rogers now wants to pursue claims that counsel cannot ethically raise at this time. Collateral counsel acknowledged that he has been aware of Rogers' complaints for years,[6] but claimed that he had no reason to raise the claim because he did not have any pending litigation in state court.

In denying this claim, the lower court found that "CCRC-M's and Defendant's request for the appointment of conflict-free counsel at this late stage is dilatory and untimely." (4PCR:649). As collateral counsel acknowledged, he has been aware of Rogers' complaints

[6] Rogers cut off all communication with CCRC-M in 2021 and, along with two other capital defendants, filed a civil action in federal court pursuant to under 42 U.S.C. § 1983. *See Sweet, 2025 WL 915740, at *2-5* (affirming the district court's dismissal of a section 1983 action filed by three capital inmates against the Florida Supreme Court's Chief Justice based on a challenge to Florida's rules and procedures governing the performance of collateral counsel).

regarding CCRC-M's performance for years, but counsel failed to alert the court to this alleged conflict until *after* the governor signed Rogers' death warrant. In *Howell v. State*, 109 So. 3d 763, 772 (Fla. 2013), the defendant was under an active death warrant and complained about his collateral counsel's prior representation and sought substitute counsel. This Court noted that Howell's complaints were nothing more than speculative attempts to raise an assertion of ineffective assistance of postconviction counsel claim at the last minute, and pointed out that "[i]f this Court were to allow the last minute substitution of counsel to create a situation in which the entire case could be relitigated at the time the death warrant was signed, . . . this could become a standard delay tactic in any death warrant case." *Id.* at 775.

As the lower court properly found, Rogers and CCRC-M were dilatory in raising this alleged conflict until *after* the governor signed a death warrant. Even if Rogers' conflict claim was timely, he failed to establish that CCRC-M has an actual conflict of interest. Section 27.703(1), Florida Statutes, governs conflict of collateral counsel and the substitution of counsel. The statute states, in pertinent part:

If, at any time during the representation of a person, the

> capital collateral regional counsel alleges that the continued representation of that person creates an *actual* conflict of interest, the sentencing court shall, upon determining that an actual conflict exists, designate another regional counsel. . . . *An actual conflict of interest exists when an attorney actively represents conflicting interests. A possible, speculative, or merely hypothetical conflict is insufficient to support an allegation that an actual conflict of interest exists*.

§ 27.703(1), Fla. Stat. (2025) (emphasis added); *see also* Fla. R. Crim. P. 3.851(b)(6) (stating that the "only basis for a defendant who has been sentenced to death to seek to discharge postconviction counsel in state court must be pursuant to statute due to an actual conflict of interest").

Here, CCRC-M claimed a conflict based on Rogers' participation in an unrelated federal civil action under 42 U.S.C. § 1983 challenging Florida's rules and procedures governing the performance of collateral counsel, and counsel further alleged that Rogers "currently wants CCRC-M to litigate claims in his pending rule 3.851 motion against the past performance and competence of CCRC-M." (4PCR:647). Obviously, as the lower court correctly noted, collateral counsel cannot litigate claims in state court based on allegations of ineffective assistance of postconviction counsel as

those claims are not legally cognizable.[7] *See generally Kokal v. State*, 901 So. 2d 766, 777 (Fla. 2005) (finding that both the Florida Supreme Court and the United States Supreme Court have repeatedly held that capital defendants do not have a constitutional right to postconviction counsel) (citing *Pennsylvania v. Finley*, 481 U.S. 551 (1987)); *Barwick v. State*, 361 So. 3d 785, 790-91 (Fla. 2023) (finding no statutory right to effective assistance of postconviction counsel based on section 27.711, Florida Statutes, governing the monitoring of collateral counsel's performance); *Howell*, 109 So. 3d at 774 ("[T]his Court has repeatedly held that claims of ineffective assistance of postconviction counsel are not cognizable.").

As the postconviction court correctly found, Rogers' complaints with CCRC-M over their prior representation are insufficient to establish an active conflict of interest. CCRC-M cannot litigate in state court claims based on alleged ineffective assistance of counsel and thus, cannot establish that they are "actively representing

[7] Although Rogers references his Sixth Amendment right to counsel in his brief, it is well established that the Sixth Amendment right to counsel is tied only to "critical stages of the prosecution" and does not apply in the postconviction context. *See Arbeleaz v. State*, 898 So. 2d 25, 42 (Fla. 2005).

conflicting interests" as required by section 27.703(1).

Similarly, the fact that Rogers was involved in an unrelated federal civil case does not give rise to an actual conflict of interest with CCRC-M. The Eleventh Circuit Court of Appeals affirmed the dismissal of the federal civil suit, and although Rogers' civil federal attorney indicated a desire to subsequently amend his complaint, that does not mean that CCRC-M is laboring under a conflict. Any future speculative claims in federal court do not amount to an actual conflict of interest for Rogers' current collateral counsel. *See Howell*, 109 So. 3d at 771-75 (affirming the postconviction court's refusal to discharge appointed collateral counsel following the signing of a death warrant as no conflict was established because "any claims that may arise in federal court proceedings . . . have not yet been raised and are not before this Court"); *Braddy v. State*, 219 So. 3d 803, 816-19 (Fla. 2017) (finding the defendant failed to show that CCRC "actively represented conflicting interests and that the conflict adversely affected counsel's performance" in Braddy's postconviction proceedings to justify the withdrawal of counsel); *Remeta v. State*, 707 So. 2d 719, 719-20 (Fla. 1998) (rejecting CCRC's claim of a conflict after the defendant attempted to intervene in a federal section

1983 proceeding); *see also* § 27.703(1), Fla. Stat. (2025) ("A possible, speculative, or merely hypothetical conflict is insufficient to support an allegation that an actual conflict of interest exists.").

In his brief, Rogers further argues that the postconviction court violated his due process and equal protection rights by denying his motion to withdraw. These assertions are meritless and unavailing. The postconviction court's adverse rulings do not amount to a deprivation of Rogers' constitutional rights. Rogers has been afforded the due process he is entitled to at this stage of the proceedings, and he has failed to establish that he is being denied equal protection of the law. *See Barwick v. State*, 361 So. 3d 785, 790 (Fla. 2023) (noting that due process "requires that a defendant be given notice and an opportunity to be heard on a matter before it is decided"); *Asay v. State*, 210 So. 3d 1, 28 (Fla. 2016) (denying defendant's equal protection argument as he failed to show how he was treated differently from similarly situated defendants). The fact that Judge Sisco allowed CCRC to withdraw in the unrelated Terence Valentine capital case in 2017 does not mean the two defendants were "equal." As Judge Sisco noted at the case management conference, every capital case is different, and Valentine's case was very "involved and

complex," and the two defendants are "not necessarily [in] the same situation." (4PCR:615).

In sum, Rogers has failed to demonstrate any abuse of the lower court's discretion in denying CCRC-M's motion to withdraw. Because CCRC-M's request to discharge counsel and to appoint conflict-free counsel was untimely and meritless, this Court should affirm the lower court's denial of this claim.

CLAIM II

THE POSTCONVICTION COURT PROPERLY SUMMARILY DENIED ROGERS' ALLEGED NEWLY DISCOVERED EVIDENCE CLAIM REGARDING CHILDHOOD SEXUAL ABUSE AS THIS CLAIM WAS UNTIMELY, PROCEDURALLY BARRED, AND WITHOUT MERIT.

In his second postconviction claim, Rogers alleged that he had "newly discovered evidence" of childhood sexual abuse and human trafficking. While reluctantly recognizing that he had previously raised this identical claim in a prior successive postconviction pleading, *see Rogers v. State*, 327 So. 3d 784 (Fla. 2021), Rogers nevertheless claimed that it was timely because there was proposed legislation in the Florida Legislature dealing with human trafficking. *See* CS/CS/HB 1283: Capital Human Trafficking of Vulnerable Persons for Sexual Exploitation (filed in the House on February 27, 2025). The lower court summarily denied Rogers' claim as time barred, procedurally barred, and meritless. The record clearly supports the lower court's ruling.

In order to timely raise a newly discovered evidence claim under Florida Rule of Criminal Procedure 3.851(d)(2), Rogers must show that the "facts on which the claim is predicated were unknown to the

movant or the movant's attorney and could not have been ascertained by the exercise of due diligence." Fla. R. Crim. P. 3.851(d)(2); *see also Jones v. State*, 709 So. 2d 512, 521 (Fla. 1998). In the instant claim, Rogers repeated the same factual allegations contained in his *third* successive postconviction motion filed on August 24, 2020, and stressed that he "is a survivor of horrific child sexual abuse which also involved human trafficking as he was 'pimped out' for money by his older brother and other predators in his community." (4PCR:455).

As both the lower court and this Court have previously noted, Rogers' allegation of childhood abuse do not constitute "newly discovered evidence." *See Rogers,* 327 So. 3d at 786-88 (affirming the summary denial of Rogers' third successive postconviction motion because Rogers failed to meet the newly discovered evidence test set forth in *Jones* requiring Rogers to establish that: (1) the evidence was unknown by the trial court, the party, or counsel at the time of trial, and it could not have been discovered with due diligence; and (2) the evidence must be of such a nature that it would probably produce an acquittal on retrial or a life sentence).

As this Court noted in its prior decision, "the evidence of [Rogers'] childhood sexual abuse did not amount to newly discovered

evidence under prong one of the *Jones* test." *Id.* at 787-88. This Court explained:

> In the motion itself, Rogers alleged that three of his brothers had knowledge that he was repeatedly abused over the course of several years in Hamilton, Ohio and at TICO. The record on direct appeal demonstrates that trial counsel knew of Rogers' six siblings, including the three siblings mentioned in Rogers' motion. Thus, trial counsel knew of the individuals whom Rogers now alleges had knowledge of the abuse or at least knowledge of the allegations of abuse. And, as such, trial counsel could have asked them whether Rogers had been sexually abused as a child. In fact, Rogers has offered no explanation–here or below–why trial counsel or postconviction counsel could not have obtained this information years before through at least two of the brothers. *See Dailey v. State*, 46 Fla. L. Weekly S276, S278 (Fla. Sept. 23, 2021).
>
> To the extent that Rogers separately suggests that evidence of rampant juvenile abuse at TICO is also newly discovered, he is wrong. In the motion, Rogers relied on articles about TICO which were published well before his penalty phase. Those articles–discussing the abuse of juveniles at TICO—could have been discovered by trial counsel and, as a consequence, do not meet prong one of the *Jones* test.
>
> In sum, Rogers' alleged childhood sexual abuse and the systemic sexual abuse experienced by others at TICO do not constitute newly discovered evidence. Accordingly, the circuit court properly denied the motion on that basis.

Id. at 788. Obviously, the claims related to Rogers' childhood abuse are not newly discovered evidence and the lower court properly denied the claim on that basis alone.

Furthermore, it is well-established that "[c]laims raised and rejected in prior postconviction proceedings are procedurally barred from being relitigated in a successive motion." *Reynolds v. State*, 373 So. 3d 1124, 1126 (Fla. 2023) (quoting *Hendrix v. State*, 136 So. 3d 1122, 1125 (Fla. 2014)); *see also* Fla. R. Crim. P. 3.851(e)(2) ("A claim raised in a successive motion shall be dismissed if the trial court finds that it fails to allege new or different grounds for relief and the prior determination was on the merits . . . ."). This principle extends to attempts to raise variations of an earlier claim. *See Sireci v. State*, 773 So. 2d 34, 40 & n.10 (Fla. 2000) (observing that even if a defendant "uses a different argument to relitigate the same issue, the claims remain procedurally barred"); *Mills v. State*, 684 So. 2d 801, 805 (Fla. 1996) (holding that a claim was procedurally barred where it was merely a "variation" of a prior postconviction claim).

As the postconviction court correctly noted when Rogers attempted to raise essentially the same claim in the instant death warrant proceedings, his claim is nothing more than a variation of

his previously-rejected claim and is therefore procedurally barred. *See, e.g., Gill v. State*, No. SC2024-0443, 2025 WL 33192, at *1 (Fla. Jan. 6, 2025) (holding that claims raised and rejected in an earlier postconviction proceeding were procedurally barred). And even if the claim were not procedurally barred, it is meritless for the same reasons that were stated by this Court in the previous postconviction proceeding. *See Rogers*, 327 So. 3d at 787-88.

Lastly, the lower court properly rejected Rogers' attempt to evade the procedural bar and untimeliness of his claim by alleging that it is timely based on proposed legislation in the Florida House of Representatives. Rogers asserted that this claim "was not ripe until the recent movement of CS/CS/HB 1283: Capital Human Trafficking of Vulnerable Persons for Sexual Exploitation, originally filed on February 27, 2025." (4PCR:450). However, it is axiomatic that *proposed* legislation carries no force of law. *See* Art. III, §§ 7-9, Fla. Const. (setting out the procedures required for the enactment of laws, including passage by a majority vote in each house of the legislature, approval by the governor or by two-thirds of each house of the legislature over the governor's veto, and the effective date of enacted legislation). Additionally, as this Court recently noted in the similar

case of *Cole v. State*, 392 So. 3d 1054, 1061 (Fla. 2024), *cert. denied*, 145 S. Ct. 109 (2024), even the enactment of new legislation is not "newly discovered evidence." This Court stated in that case, "[a]lthough CS/HB 21 was recently enacted, it does not amount to newly discovered evidence. Indeed, we have routinely held that resolutions, consensus opinions, articles, research, and the like do not satisfy the standard." *Id.* As the lower court properly noted here, the proposed bill CS/CS/HB 1283 is not newly discovered evidence under Florida law and cannot serve to revive Rogers' previously rejected postconviction claim that he was the victim of childhood sexual abuse and human trafficking. (4PCR:659).

To the extent Rogers' challenges the constitutionality of rule 3.851's time limitations, his argument is barred as he failed to raise this argument below and cannot raise it now for the first time on appeal. This Court has long recognized that for an argument to be cognizable on appeal, it must first be presented to the lower court. *Steinhorst v. State*, 412 So. 2d 332, 338 (Fla. 1982); *see also Deparvine v. State*, 146 So. 3d 1071, 1094 (Fla. 2014) (issue not raised in postconviction motion was not preserved for appellate review); *Wickham v. State*, 124 So. 3d 841, 853-56 (Fla. 2013)

(various appellate claims not raised in postconviction motion were unpreserved). Even if this claim were preserved, this Court has previously rejected Rogers' contention. *See Ford v. State*, 402 So. 3d 973, 977-78 (Fla. 2025) (noting that the defendant's request to find rule 3.851 inapplicable to defendants under an active death warrant is without any legal support). Because the record clearly supports the postconviction court's finding that the instant claim is untimely, procedurally barred, and without merit, this Court should affirm the court's summary denial of this claim.

CLAIM III

THE POSTCONVICTION COURT CORRECTLY FOUND THAT ROGERS' AS-APPLIED CONSTITUTIONAL CHALLENGE TO FLORIDA'S METHOD OF EXECUTION WAS UNTIMELY AND MERITLESS AS A MATTER OF LAW.

In his final postconviction claim, Rogers raised an Eighth Amendment challenge to Florida's lethal injection procedure and asserted that Florida's method of execution is unconstitutional as applied to him due to his porphyria diagnosis. As the lower court properly found, Rogers was dilatory in waiting until a death warrant was signed to raise this claim as he has known of his porphyria diagnosis for decades. Additionally, even if the claim had been timely raised, the court correctly found that Rogers failed to demonstrate that Florida's lethal injection protocol-as applied to him-violates the Eighth Amendment of the United States Constitution.

In his fourth successive postconviction motion, Rogers alleged that Florida's lethal injection procedures were unconstitutional as applied to him because of his porphyria diagnosis. Rogers alleged that his retained expert, Dr. Joel Zivot, had reviewed Rogers' medical records and could "opine generally" that Rogers suffers from porphyria; a genetic metabolic disorder that can lead to neurological

problems, skin photosensitivity, and liver dysfunction." (4PCR:461). Based on his consultation with Dr. Zivot following his preliminary review, collateral counsel alleged that Florida's lethal injection procedures may place Rogers at "a substantial risk of needless pain and suffering because he will experience a [p]orphyria attack in response to the administration of an extremely high dose of etomidate." (4PCR:461-63).[8]

A. Untimeliness of Rogers' Claim.

As previously noted, Florida Rule of Criminal Procedure 3.851(d)(2)(A) prohibits the filing of a successive postconviction motion based on newly discovered evidence unless "the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence." Fla. R. Crim. P. 3.851(d)(2)(A). Additionally, it is the defendant's burden to establish the timeliness of a successive

[8] As previously noted on pages 8-9, *supra*, Rogers improperly attached an affidavit from Dr. Zivot to his Initial Brief. Despite the affidavit being prepared on April 18, 2025, prior to the filing of Rogers' successive motion, Rogers did not attach it to his motion and it is therefore not part of the record on appeal.

postconviction claim. *See Mungin v. State*, 320 So. 3d 624, 626 (Fla. 2020).

In the instant case, Rogers has been aware of his porphyria diagnosis for decades. At his penalty phase proceedings in 1997, Rogers presented extensive testimony from Drs. Robert Berland and Michael Maher about his porphyria diagnosis. *See Rogers v. State*, 783 So. 2d 980, 995-96 (Fla. 2001) (discussing Drs. Berland's and Maher's penalty phase testimony regarding Rogers' porphyria diagnosis). Dr. Berland testified that Rogers had displayed symptoms of the disease since the age of 12 or 13 but was not formally diagnosed until the age of 24. (DAR V22:2727-28).[9]

Rogers attempted to evade the untimeliness of his claim by alleging that Dr. Zivot based his opinion on the newest lethal injection protocol dated February 18, 2025. However, as the lower court properly found, Rogers' collateral counsel acknowledged that Florida's lethal injection protocol "is not materially different than the previous March 2023 protocol or the protocol that has been in effect since 2017." (4PCR:662-63). The lower court further noted that

[9] The citation "DAR" refers to the record in Rogers' direct appeal, No. SC1960-91384, with the relevant volume number.

Rogers had filed a third successive postconviction motion on August 24, 2020, and could have, but did not, raise the instant challenge at that time. (4PCR:663).

This Court has recently affirmed the summary denial of as-applied constitutional challenges to Florida's lethal injection protocol in two similar death warrant cases. *See Cole v. State*, 392 So. 3d 1054 (Fla. 2024); *Tanzi v. State,* No. SC2025-0371, 2025 WL 971568 (Fla. Apr. 1, 2025), *cert. denied*, No. 24-6932, 2025 WL 1037494 (U.S. Apr. 8, 2025). In *Cole*, this Court rejected a claim that an as-applied challenge only became ripe when a death warrant was signed. This Court stated:

> We reject Cole's argument. First, the postconviction court properly determined that Cole's argument is untimely. Cole alleged in his motion that he has suffered from Parkinson's disease since at least 2017. Even so, Cole failed to raise any argument related to the method of execution until after the Governor signed a death warrant. Identifying this potentially dispositive issue at the *Huff* hearing, the postconviction court questioned defense counsel as to the reason for the delay in Cole's claim. In response, counsel argued only that lethal injection protocols have changed, but counsel could not cite a specific change that would justify the delay. Cole's arguments are therefore insufficient to overcome the time bar. *See Ferguson v. State*, 101 So. 3d 362, 365 (Fla. 2012) (rejecting an argument that a method-of-execution claim is not ripe until a death warrant is signed).

Cole, 392 So. 3d at 1064.

Similarly, this Court recently affirmed the summary denial of an as-applied challenge even where the claim was supported by an expert affidavit; something lacking in Rogers' motion. In *Tanzi*, this Court had little trouble affirming the summary denial of a similar claim. This Court stated:

> Florida Rule of Criminal Procedure 3.851(d)(1) requires that "[a]ny motion to vacate judgment of conviction and sentence of death shall be filed by the defendant within 1 year after the judgment and sentence become final." The circuit court found that Tanzi's medical conditions were present as early as November 2009. Tanzi does not dispute this finding, and he filed his motion well after the one-year deadline. Tanzi does not suggest that any exceptions apply in this case. *See* Fla. R. Crim. P. 3.851(d)(2)(A)-(C). So Tanzi's claim is untimely.

Tanzi, 2025 WL 971568, at *3 (footnote omitted); *see also Dillbeck v. State*, 304 So. 3d 286, 288 (Fla. 2020) (affirming the dismissal of Dillbeck's untimely claim under an active warrant, reasoning that Dillbeck and his counsel knew that Dillbeck had brain damage related to fetal alcohol exposure even before he was sentenced, and because the new diagnosis of ND-PAE was first recognized in 2013, it could have been discovered by the exercise of due diligence as early as 2013); *Zack v. State*, 371 So. 3d 335, 345 (Fla. 2023) (finding that

the defendant's claim about fetal alcohol syndrome and low IQ being a barrier to his execution was time barred because the defendant had long known of these conditions prior to filing his successive motion under an active death warrant).

The lower court properly followed this Court's precedent in *Cole* and *Tanzi* and found Rogers' lethal injection claim untimely. Rogers has known of his porphyria diagnosis for almost forty years and waited until after the governor signed his death warrant to raise a challenge based on his condition. Because Rogers' claim is clearly untimely under established law, this Court should affirm the postconviction court's summary denial of this claim.

B. Rogers' Claim is Meritless.

In addition to finding Rogers' lethal injection constitutional challenge untimely, the postconviction court further found the claim meritless as a matter of law. As the lower court correctly held, Rogers failed to establish the necessary two requirements for a successful constitutional method of execution challenge: (1) that Florida's method of execution presents a substantial and imminent risk that is sure or very likely to cause serious illness and needless suffering; and (2) a known and available alternative method of execution that

entails a significantly less severe risk of pain. (4PCR:664-67); *see Asay v. State (Asay VI)*, 224 So. 3d 695, 701 (Fla. 2017) (citing *Glossip v. Gross*, 576 U.S. 863, 877 (2015); *Baze v. Rees*, 553 U.S. 35, 50, 61 (2008)).

This Court recently affirmed the summary denial of a similarly speculative lethal injection constitutional challenge in *Tanzi v. State*, *supra*. As this Court noted, under the first prong of the *Glossip/Baze* test, "the question is not merely whether any pain is inflicted, for the Eighth Amendment does not demand the avoidance of all risk of pain in carrying out executions. . . . Rather, the Eighth Amendment does not come into play unless the risk of pain associated with the State's method is substantial when compared to a known and available alternative." *Tanzi*, 2025 WL 971568, at *4 (citations and internal quotes omitted). This Court held that Tanzi could not make that required showing as Florida's lethal injection protocol, including the etomidate protocol, has been repeatedly upheld. *Id.*; *see, e.g., Asay VI*, 224 So. 3d at 700-02 (rejecting a constitutional challenge to Florida's "adoption of etomidate as the first drug in the lethal injection protocol"); *Cole*, 392 So. 3d at 1064-65 (noting that the "etomidate protocol . . . includes safeguards to ensure the condemned

is unconscious throughout the execution"); *Grossman v. State*, 5 So. 3d 668, 668 (Fla. 2009) (affirming the denial of a capital defendant's claim that "his obesity will put him at risk of a difficult, painful and botched execution" since "the DOC execution procedures . . . do take into consideration the individual physical attributes of each inmate and provide for individualized procedures in light of any health concerns such as obesity").

In his motion, Rogers' counsel speculated that the first drug administered, etomidate, could induce a porphyria attack and create a substantial risk that Rogers will suffer from extreme and excruciating abdominal pain, tachycardia, hypertension, nausea, vomiting, and seizures. Notably, however, Rogers fails to explain how his speculative cascade of events overcomes the well-established fact that the first injection of etomidate will render him unconscious likely within one minute. *See Asay VI*, 224 So. 3d 701 ("Intravenous injection of etomidate produces hypnosis characterized by a rapid onset of action, usually within one minute.") (quoting package insert); *see also Davis v. State*, 142 So. 3d 867, 872 (Fla. 2014) (stating that Davis could not carry his burden of proof for an as-applied lethal injection claim "because Dr. Zivot failed to demonstrate that the

injection of midazolam, as the first drug in the lethal injection protocol, would not render Davis unconscious and insensate prior to him experiencing any possible symptoms of a porphyria attack."). Thus, as the lower court properly found, Rogers' method of execution challenge failed as a matter of law.

Challenges to the constitutionality of Florida's lethal injection protocol as currently administered have been fully considered and repeatedly rejected by this Court. *Asay VI*, 224 So. 3d at 700-02 (holding that use of etomidate as the first drug in Florida's lethal injection protocol did not violate the Eighth Amendment because it did not create a substantial risk of serious harm); *Long v. State*, 271 So. 3d 938, 943-46 (Fla. 2019) ("Since approving the current lethal injection protocol in *Asay VI*, we have repeatedly affirmed the summary denial of challenges to the protocol, including challenges to the use of etomidate as the first drug in the protocol.").

As the lower court noted, Rogers has not demonstrated any substantial and imminent risk that is sure or very likely to cause serious illness and needless suffering. This standard imposes a "heavy burden" upon the inmate to show that lethal injection procedures violate the Eighth Amendment, *Baze*, 553 U.S. at 53, and

Rogers failed to demonstrate such a risk. None of the speculative assertions offered by counsel based on his consultation with Dr. Zivot overcomes the well-litigated protocol from the FDOC. *See Long*, 271 So. 3d at 944 (noting that the State's expert testified that "the massive dose of 200 milligrams of etomidate would produce such a deep state of . . . unconsciousness that it would eliminate any possible seizure activity, and render a person . . . unaware of noxious stimuli"). Rogers failed to show that the implementation of Florida's current lethal injection protocol would violate his Eighth Amendment rights. He did not come close to meeting his heavy burden of showing Florida's protocol is "sure or very likely" to cause serious harm and needless suffering. *Asay VI*, 224 So. 3d at 701.

In addition to failing to meet the first requirement of the *Glossip/Baze* test, the lower court also correctly found that Rogers failed to identify a known and available alternative method of execution that entails a significantly less severe risk of pain. Rogers proposed two alternatives to lethal injection in his motion, lethal gas or firing squad, but failed to establish that either alternative was feasible, could be implemented in a reasonable time, and significantly reduced a substantial risk of severe pain as required by

Glossip/Baze. *See Baze*, 553 U.S. at 52 (noting that "the alternative procedure must be feasible, readily implemented, and in fact significantly reduce a substantial risk of severe pain"). As this Court recently noted in *Tanzi* when the defendant proposed the same two alternatives, "Tanzi has not shown how either of his two proposed alternate methods, lethal gas and the firing squad, could be 'readily implemented,' or in fact significantly reduces the substantial risk of severe pain, given the physical conditions he describes." *Tanzi*, 2025 WL 971568, at *4. Thus, because Rogers' as-applied challenge was untimely and meritless as a matter of law, this Court should affirm the lower court's summary denial of his claim.

CONCLUSION

The State of Florida respectfully requests that this Honorable Court affirm the lower court's order denying Rogers' successive motion for postconviction relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of May 2025, I electronically filed the foregoing with the Clerk of Court by using the Florida Courts E-Portal Filing System which will send a notice of electronic filing to the following: Ali Shakoor and Adrienne Shepherd, Assistants CCRC-M, Capital Collateral Regional Counsel-Middle Region, 12973 North Telecom Parkway, Temple Terrace, Florida 33637, **shakoor@ccmr.state.fl.us**, **shepherd@ccmr.state.fl.us**, **support@ccmr.state.fl.us**; and the Florida Supreme Court, Kendall Canova, Capital Appeals Clerk, 500 South Duval Street, Tallahassee, Florida 32399, **warrant@flcourts.org**.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 14-point Bookman Old Style in compliance with Fla. R. App. P. 9.045(b), and that the word count is 8,458 words in compliance with Fla. R. App. P. 9.100(j).

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