No. SC2025-0585

EXECUTION SCHEDULED FOR MAY 15, 2025 at 6:00 PM

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
Lower Tribunal No.: 291995CF015314000AHC

INITIAL BRIEF OF THE APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Case **Page(s)**

Other Authorities **Page(s)**

REQUEST FOR ORAL ARGUMENT

Glen Edward Rogers ("Rogers") 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 Rogers lives or dies. This Court has allowed argument in another capital case 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 Rogers.

PRELIMINARY STATEMENT REGARDING REFERENCES

References to the current record on appeal before this Court in Florida Supreme Court Case No.: SC2025-0585 are of the form SC/[page].

STATEMENT OF THE CASE AND FACTS

On December 13, 1995, a Hillsborough County grand jury indicted Rogers for first-degree murder, armed robbery, and auto theft. Rogers was tried by a jury from April 28 through May 9, 1997, Circuit Court Judge Diana M. Allen presiding. Rogers was found

guilty as charged. Following the penalty phase, the jury recommended death. Prior to sentencing, Rogers filed a Motion for New Trial, based on a newly discovered witness. Hearings on the motion were held on June 13, 1997, and all day on June 20, 1997. The court denied the motion. Rogers was sentenced to death on July 11, 1997. The court filed its Sentencing Order the same date.

The trial court found two aggravating circumstances:

> (1) that the murder was committed for pecuniary gain; and (2) that the murder was heinous, atrocious, or cruel ("HAC").

The court found one statutory mitigating circumstance - that Rogers's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired (some weight). The court also found the following nonstatutory mitigating circumstances:

> (1) Rogers had a childhood deprived of love, affection or moral guidance and lacked a moral upbringing of good family values (slight weight);
> (2) Rogers' father was an alcoholic who physically abused Rogers' mother in the presence of Rogers and his siblings (slight weight);
> (3) Rogers was introduced to controlled substances at a young age and encouraged by his older brother to participate in burglaries (slight weight);
> (4) Rogers has been lawfully and gainfully employed at

> various times in his adult life (slight weight);
> (5) Rogers was solely responsible for the care of his two children at one time in his adult life (slight weight); and
> (6) Rogers had been drinking alcohol for a few hours on the day he came into contact with the victim (little weight).

Rogers v. State, 783 So. 2d 980, 987 (Fla. 2001). Rogers filed a notice of appeal on August 8, 1997. On direct appeal, Rogers raised ten claims claiming the trial court erred in ruling on the following matters:

> (1) the trial court erred in failing to grant a judgment of acquittal on the first-degree murder charge because the State failed to present sufficient evidence to support either premeditated or felony murder;
> (2) the evidence does not support the pecuniary gain or HAC aggravators;
> (3) the trial court erred by failing to find applicable the mitigating circumstance that the "capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance," § 921.141, Fla. Stat. (1995), and to give both statutory mental mitigating circumstances great or significant weight;
> (4) the trial court erred by failing to consider and appropriately weigh all mitigating circumstances in accordance with *Campbell v. State,* 571 So. 2d 415 (Fla. 1990);
> (5) the trial court erred in denying the defense's motion to have a Positron Emission Tomography Scan ("PET-Scan") performed on Rogers prior to trial;
> (6) the trial court committed reversible error by failing to grant Rogers' motion for a mistrial after witnesses testified during the penalty phase regarding Rogers' prior criminal misdemeanor conviction in California;
> (7) the trial court committed reversible error by failing to

> declare a mistrial based on improper prosecutorial argument during the penalty phase closing argument;
> (8) the trial court erred by denying the defense's motion to disqualify the Hillsborough County State Attorney's Office;
> (9) the trial court erred by denying a defense motion for a new trial based on newly discovered evidence; and
> (10) the imposition of the death penalty is disproportionate in this case.

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

A motion to vacate judgment of conviction and sentence with special request for leave to amend was filed on September 28, 2001. On July 18, 2002, Rogers' Amended 3.851 Motion for Postconviction Relief was filed. On October 17, 2003, a case management hearing was held. After the case management hearing on October 17, 2003, the court ordered that: "Defendant is entitled to an evidentiary hearing on claims I(A), I(B), I(C), I(E) in part, IV(A) and VIII and that claims I(E) in part, II, III, IV(B), VI, and VII of Defendant's Motion are hereby DENIED. The Court will reserve ruling on claim I(D)." An evidentiary hearing was set for June 18, 2004 and August 6, 2004.

On June 4, 2004, postconviction counsel filed a motion to reconsider claim II or in the alternative to proffer evidence. The court

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

On March 7, 2005, the circuit court issued an Order Denying Amended 3.851 Motion for Postconviction Relief. Rogers filed a notice of appeal in a timely manner. This Court affirmed the lower court. Rogers was denied relief on the following postconviction claims:

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

> and substantive errors," which appellate counsel failed to effectively litigate on appeal, deprived Rogers of a fundamentally fair trial.

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

> (1) whether appellate counsel was ineffective for failing to argue that the Florida death sentencing statute as applied violates the United States Constitution under *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and *Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002);
> (2) whether section 921.141(5), Florida Statutes (2005), is facially vague and overbroad in violation of the Eighth and Fourteenth Amendments, whether such unconstitutionality is reversible error because the jury did not receive adequate guidance in violation of the Eighth and Fourteenth Amendments, whether Rogers' death sentence is premised on fundamental error which must be corrected, and whether trial counsel was ineffective for failing to litigate these issues;
> (3) whether, cumulatively, the combination of procedural and substantive errors deprived Rogers of a fundamentally fair trial and whether appellate counsel was ineffective for failing to litigate these issues on appeal; and
> (4) whether Rogers' Eighth Amendment right against cruel and unusual punishment will be violated as he may be incompetent at the time of execution.

Id. at 544 n.7. This Court also rejected these claims. *Id.* at 541. On August 3, 2007, Rogers filed a Petition for Writ of Habeas Corpus in federal court. On July 25, 2008, Rogers filed a Motion to Hold Proceedings in Abeyance Pending State Court Ruling on Petitioner's

Amended Motion to Vacate Judgments of Conviction and Sentences with Special Request for Leave to Amend. The motion was denied. On February 19, 2010, the Petition for Writ of Habeas Corpus was denied by the United States District Court – Middle District of Florida ("district court").

On March 16, 2010, an Application for Certificate of Appealability was filed in the district court. On March 29, 2010, a Renewed Application for Certificate of Appealability was filed in the Eleventh Circuit Court of Appeals ("11th Circuit"). On June 11, 2010, the Renewed Application for Certificate of Appealability was denied by the 11th Circuit. Rogers's Motion to Reconsider, Vacate, or Modify Order Denying Motion for Certificate of Appealability was denied by the 11th Circuit on July 29, 2010. Rogers subsequently filed a Petition for Writ of Certiorari, which the United States Supreme Court denied on January 10, 2011.

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

The 11th Circuit denied Rogers's Application for Leave to File a

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

On August 24, 2020, Rogers filed Defendant's Third Successive Motion to Vacate Judgment of Conviction and Sentence of Death with an attached appendix. The State filed its response on September 14, 2020. The circuit court held a case management conference on October 13, 2020. On November 23, 2020, the circuit court denied the motion without holding an evidentiary hearing. This Court affirmed the denial of relief. *See Rogers v. State*, 327 So. 3d 784 (Fla. 2021).

Rogers subsequently ceased communication with Capital Collateral Regional Counsel ("CCRC-M") and refused visits since July 28, 2021, until the signing of the active death warrant. During that interim time, Rogers was represented in federal court by Attorney Charles Daniel Sikes ("Attorney Sikes"). On August 15, 2022, Rogers filed an Amended Verified Complaint Pursuant to 42 U.S.C.A § 1983

For Declaratory Judgment, Nominal Damages, Injunctive Relief, and Writ of Mandamus. On May 23, 2022, Rogers filed a Notice to the Court/No Hearing Required in circuit court, in which he appeared to attach an unfiled and unsigned draft of his federal pleading. The federal district court dismissed the complaint on August 15, 2023. After a timely appeal to the U.S. Court of Appeals for the Eleventh Circuit, that court affirmed the denial of relief on March 26, 2025. Rogers and Attorney Sikes still intend to litigate Rogers' issues in federal court and pursue relief. Attorney Sikes is awaiting a mandate, based on his assertion to the circuit court on April 17, 2025. The governor signed Rogers' death warrant on April 15, 2025.

At a status hearing on April 17, 2025, the circuit court orally denied an *ore tenus* motion for CCRC-M to withdraw and have conflict-free counsel appointed. On April 21, 2025, the circuit court subsequently filed an Order Memorializing Order Ruling Denying Defendant's/Capital Collateral Regional Counsel's Motion to Withdraw and for Appointment of Conflict-Free Counsel. On that same April 21, 2025 date and following an April 18, 2025 hearing regarding Rogers' demands for additional public records, the circuit court issued an Order Memorializing Oral Ruling Sustaining

Objections to Defendant's Demands for Additional Public Records.

On April 20, 2025, Rogers timely filed his Defendant's Successive Motion to Vacate Judgment of Conviction and Sentence of Death, and for CCRC-Middle to Withdraw, For the Appointment of Conflict-Free Counsel. The State timely filed its response the next day on April 21, 2025. The circuit court held a case management conference on April 22, 2025. The next day, on April 23, 2025, the circuit court issued its Order on Case Management Conference, in which it held that no evidentiary hearing would be held on any of Rogers' successive claims for relief. The circuit court issued its order summarily denying all relief on April 25, 2025. This appeal follows.

STANDARD OF REVIEW

Because the circuit court denied postconviction relief without an evidentiary hearing, this Court must accept the factual allegations presented in Rogers' 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).

SUMMARY OF THE ARGUMENT

ARGUMENT I: The lower court erred in finding that CCRC-M does not have an active conflict of interest in representing Rogers during these proceedings. Rogers has been litigating in federal court challenging CCRC-M's representation of him based on alleged failure to "*timely file appropriate motions and provide quality representation,*" at least since filing an amended complaint under 42 U.S.C.A § 1983 on August 15, 2022.

Rogers ceased communication with CCRC-M since July of 2021. There has been no reason for Rogers to litigate in circuit court until the signing of his death warrant. Rogers' litigation strategy for his active death warrant involves challenging CCRC-M's representation of him, similar to how Rogers and Attorney Sikes have been doing in federal court for the past several years. Rogers is being treated differently than a similarly situated capital defendant in which the same circuit court appointed conflict-free counsel. Rogers and CCRC-M have adverse interests and conflict-free counsel in appropriate.

ARGUMENT II: Newly discovered evidence provided by the Florida legislature representing this state's constituents proves that Rogers' case is not among the most aggravated and least mitigated. There has been a renewed focus on protecting children from child abuse and exploitation in Florida. Specifically, it may soon be a capital crime in this state to engage in the trafficking of children for sexual exploitation. Rogers was sexually trafficked as a vulnerable child, which is extremely weighty mitigating evidence. If a jury of Rogers' peers heard the extent and type of abuse he experienced, they would recommend a sentence of life without parole. Using a procedural bar to prevent Rogers from litigating these claims violates his constitutional rights to individualized sentencing.

ARGUMENT III: Rogers suffers from Porphyria. Florida's current lethal injection procedures are unconstitutional as specifically applied to Rogers because executing Rogers under those procedures will very likely cause him needless pain and suffering due to the interaction of Florida's first lethal injection drug etomidate with Rogers' Porphyria. The alternative method pleading requirement under the *Baze-Glossip* test violates Rogers' Fifth and Fourteenth Amendment rights to due process and equal protection. However,

there are two other feasible alternative methods to lethal injection- lethal gas and firing squad- that will significantly reduce the substantial risk of severe pain that Rogers faces if executed. The circuit court erred by not holding an evidentiary hearing for factual development on this claim.

ARGUMENT I

THE CIRCUIT COURT ERRED IN SUMMARILY DENYING ROGERS' CLAIM THAT ROGERS' SIXTH AMENDMENT RIGHT TO COUNSEL, AND DUE PROCESS AND EQUAL PROTECTION RIGHTS PURSUANT TO THE FOURTEENTH AMENDMENT ARE BEING VIOLATED, AS HE WAS DEPRIVED THE RIGHT TO CHALLENGE HIS CONVICTION AND SENTENCE DUE TO CCRC-M REPRESENTING HIM UNDER AN ACTIVE CONFLICT OF INTEREST

The lower court's error:

The circuit court errored by misconstruing that Rogers is arguing for proposed ineffective assistance of counsel claims. SC/651-52. Rogers was not delayed in raising the conflict issue in circuit court after the death warrant was signed. SC/649. Rogers' case is clearly distinguishable from the cases relied on by the circuit court where the alleged conflict was solely based on past conduct, as opposed to adverse interests for ongoing death warrant litigation strategy. SC/649-50. Rogers' case could not create a precedent for

delay tactics, as his proceedings have a unique set of facts. SC/649. Rogers is indeed being disparately treated in relation to past capital defendant, Terance Valentine, who successfully moved for a conflict-of-interest withdrawal before the same circuit court. SC/653.

Undersigned counsel respectfully requests that this Court reverse the lower court's determination of Rogers' Argument I and relinquish jurisdiction to the lower court so that an evidentiary hearing on this claim may be held. *See Booker v. State*, 969 So. 2d 186, 195 (Fla. 2007)

Conflict of Interest and the Sixth Amendment

Irrespective of the fact that Rogers does not have a federal constitutional right to effective postconviction counsel, *Barbour v. Haley*, 471 F.3d 1222, 1227 (11th Cir. 2006), Florida provides counsel to capital defendants in the collateral posture. Therefore, it is axiomatic that Rogers' postconviction counsel be free to effectively represent him free of conflicts and adverse interests. CCRC-M has a conflict of interest in our representation of Rogers, and conflict-free counsel should be appointed to pursue the claims in which CCRC-M cannot ethically pursue. Fla. Stat. § 27.703 (1) states that "[i]f, 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." Rogers alleged such a conflict at a status hearing before the circuit court on April 17, 2025, but the circuit court denied Rogers' concerns as an "ore tenus" motion. The circuit court misconstrued that Rogers wants to allege a claim based on "ineffective assistance of postconviction counsel." That is not the case. Rogers is not alleging "ineffective assistance of postconviction counsel," but the actual conflict is based on the fact that Rogers currently wants CCRC-M to pursue and litigate claims against the past performance and competence of CCRC-M. Rogers is not alleging whether he has received effective assistance of counsel but is requesting that the Florida Supreme Court establish the appropriate procedures required by the Florida Legislature.

Rogers is alleging that this Court is turning a blind eye to the legislative mandate that "interested persons," such as a person under a sentence of death, should be allowed to raise quality of representation claims and whether CCRC-M has failed to timely file

appropriate motions before the courts under Section 27.711(12), Florida Statutes. Rogers has a right to litigate these and similar issues under his active death warrant.

CCRC-M is unable to ethically raise the claims that Rogers wants to pursue. At the April 17, 2025 status hearing, undersigned counsel specifically read into the record allegations Rogers has made against CCRC-M in his federal pleadings, of which Rogers alleged*: "Rogers has attempted to raise issues regarding the failure of his assigned CCRC to timely file appropriate motions and provide quality representation but has been irreparably harmed by the failure of the Florida Supreme Court to provide him his procedural due process rights established by the Florida legislature."* SC/552-53.[1] The Sixth Amendment to the United States Constitution guarantees "a criminal defendant the right to effective assistance of counsel which includes the right to counsel who is unimpaired by conflicting loyalties." *Duncan v. Alabama*, 881 F. 2d 1013, 1016 (11th Cir. 1989).

[1] *See* Amended Verified Complaint Pursuant to 42 U.S.C.A § 1983 For Declaratory Judgment, Nominal Damages, Injunctive Relief, and Writ of Mandamus, Case 3:22-cv-00574-TJC-LLL.

In this case, an "actual conflict" of interest occurs when a lawyer has "inconsistent interests." *Freund v. Butterworth*, 165 F.3d 839, 859 (11th Cir. 1999) (internal citation omitted). It is obvious that CCRC-M cannot simultaneously represent Rogers' interests in his state postconviction proceedings, while there is active litigation in his federal postconviction proceedings challenging CCRC-M's ability to represent Rogers' interests in state court. Such a situation surely violates Rogers' right under the Sixth Amendment to conflict-free counsel. As will be further discussed below, it is also a due process violation since it prevents Rogers from litigating his desired claims regarding CCRC-M's representation of him.

CCRC-M also must withdraw from Rogers' case under the Rules Regulating the Florida Bar. Rule 4-1.7 of the Rules Regulating the Florida Bar provides, in relevant part, that a lawyer must not represent a client if "there is a substantial risk that the representation of [that client] will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a **personal interest of the lawyer**." FL ST BAR Rule 4-1.7 (a) (2). The comment to Rule 4-1.7 further states that

> Loyalty to a client is also impaired when a lawyer cannot consider, recommend, or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client. Subdivision (a)(2) addresses such situations. A possible conflict does not itself preclude the representation. The critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client. Consideration should be given to whether the client wishes to accommodate the other interest involved.

FL ST BAR Rule 4-1.7. CCRC-M's representation is prohibited because Rogers' challenge of CCRC-M's representation in federal court, and desired litigation in state court, will require CCRC-M to take adverse positions to Rogers.[2] Even if Rogers' allegations were limited to federal court, the undersigned and CCRC-M as a whole can hardly be expected to zealously represent Rogers in court while the

[2] Rogers has allegations against CCRC-M regarding the litigation of a prior PET scan, along with a host of other issues related to CCRC-M allegedly not providing "quality representation" or "timely filing appropriate motions." An evidentiary hearing would be proper to allow Rogers and Attorney Sikes to specifically explain their unique and esoteric positions, but the relevant point, is that CCRC-M is on the defense, and has adverse interests regarding Rogers' desired litigation strategy.

professionalism of both are under attack in federal court. CCRC-M would be unable to unbiasedly investigate its own conduct in court and provide zealous representation on any issue that may implicate the reputation, skill, and professionalism of the office. Further, under Rule 4-1.6 of the Rules Regulating the Florida Bar, a lawyer may withdraw from representing a client if "the client insists upon taking action that the lawyer considers repugnant, imprudent, *or with which the lawyer has a fundamental disagreement*." FL ST BAR Rule 4-1.16 (b) (2) (emphasis added). Rogers seeks to raise claims for postconviction relief that CCRC-M has a fundamental disagreement with and has declined to pursue.

Due Process

Rogers is entitled to due process of law, as established by the Fourteenth Amendment to the United States Constitution and the corresponding provision of Florida's Constitution. Similar to his due process right, Rogers also has an explicit right under the Florida constitution to access the courts because "[t]he courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay." Art. 1 § 21, Fla. Const. By not allowing Rogers to litigate claims regarding CCRC-M's

representation under his death warrant and denying that CCRC-M has an active conflict, the lower court is denying Rogers' access to the courts.

Equal Protection

Rogers has a right to have his claims against CCRC-M investigated by conflict-free outside counsel, pursuant to *Martinez v. Ryan*, 566 U.S. 1 (2012). Again, Rogers is also litigating in federal court. Moreover, if unsuccessful during these state court proceedings, Rogers has the right to file a petition for writ of certiorari to the United States Supreme Court ("USSC"). Undersigned counsel has a conflict of interest in litigating claims regarding whether CCRC-M defaulted any of Rogers' claims in state court. Rogers should receive the same consideration of a capital defendant's rights as the identical circuit court judge found in a case involving a capital defendant named Terance Valentine back in 2017. *See State v. Valentine*, 2017 WL 4160942 (September 20, 2017). After the lower court appointed conflict-free private counsel, Marie-Louise Samuels Parmer, in place of CCRC-M based on motions submitted by defendant Valentine, Appendix A, the State filed an interlocutory review of the circuit court's decision by filing The State's Petition for

Review of Non-Final Order. *See* Appendix B**.** This Court denied the State's petition. *See State v. Valentine*, 2017 WL 4160942 (September 20, 2017). Rogers has been represented by CCRC-M since the conclusion of the direct review of his judgment and sentence. Rogers has ceased communication with CCRC-M from July of 2021, until the day after the signing of this active death warrant. During that interim period, Roger was represented by Attorney Sikes in federal court, specifically challenging the competence and supervision of CCRC-M counsel. Rogers did not have a reason to litigate in circuit court to apprise that court of the need to address an actual conflict, until the signing of the active death warrant required successive state court litigation. Rogers notified the lower court during the earliest opportunity to address this conflict issue under these expedited proceedings, making himself available for the aborted hearing on April 16, 2025, and the actual hearing on this matter which occurred on April 17, 2025.

Defendant Valentine was granted conflict-free counsel by the same circuit court judge, despite the fact that Valentine had arguably abused the postconviction process in asserting conflict after conflict.

In 1999, based on a purported conflict with CCRC-M, the circuit court provided Valentine with a private attorney named Nick J. Sinardi. *See* Appendix B at 3. Then in 2006, based on alleged "irreconcilable differences" between Valentine and Sinardi, Valentine was appointed a different private attorney named Daniel F. Daley. *See* Appendix B at 4. On August 7, 2007, Attorney Daley withdrew based on an alleged conflict, and CCRC-M was reappointed to represent Valentine. *See* Appendix B at 4. Valentine was not done alleging conflicts. On March 16, 2017, after extensive litigation at both the state and federal level, the same specific circuit court currently being appealed, Judge Michelle Sisco, appointed private counsel Marie-Samuels Parmer to represent Valentine in place of CCRC-M after the court ordered "CCRC-M has a conflict and is hereby discharged." *See* Appendix B at 4-7. Again, despite the number of attorneys Valentine went through based on various claims of dissatisfaction, this Court upheld Judge Sisco's order certifying a conflict. *State v. Valentine*, 2017 WL 4160942 (September 20, 2017).

Rogers' equal protection rights are also being violated, as his case is being treated differently from Valentine for no discernable reason. The circuit court violated Rogers' fundamental right to

counsel and his equal protection rights. Distinctions in state criminal laws that impinge upon fundamental rights must be strictly scrutinized. *See, e.g., Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942); *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964); *Eisenstadt v. Baird*, 405 U.S. 438, 447 (1972).). Rogers does not need to be a member of a "protected class" to raise this issue. Regarding the status of a class of one, the USSC has stated:

> The Equal Protection Clause of the Fourteenth Amendment commands that no State shall "deny to any person within its jurisdiction the equal protection of the laws," which is essentially a direction that all persons similarly situated should be treated alike. *Plyler v. Doe,* 457 U.S. 202, 216, 102 S. Ct. 2382, 2394, 72 L.Ed.2d 786 (1982)."

City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985).

And also:

> Our cases have recognized successful equal protection claims brought by a "class of one," where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment. See *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441, 43 S. Ct. 190, 67 L. Ed. 340 (1923); *Allegheny Pittsburgh Coal Co. v. Commission of Webster Cty.*, 488 U.S. 336, 109 S. Ct. 633, 102 L.Ed.2d 688 (1989). In so doing, we have explained that "'[t]he purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary

> discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents.'" *Sioux City Bridge Co.*, supra, at 445, 43 S. Ct. 190 (quoting *Sunday Lake Iron Co. v. Township of Wakefield*, 247 U.S. 350, 352, 38 S. Ct. 495, 62 L. Ed. 1154 (1918)).

Vill. of Willowbrook v. Olech, 528 U.S. 562, 564 (2000). Unlike Valentine, Rogers has not abused the postconviction process regarding his representation. Rogers is entitled to the same rights as the late Terance Valentine was afforded by Judge Sisco and sanctioned by this Court. Rogers is under an active death warrant and has a right to litigate for his life based on claims challenging his judgment and sentence by conflict-free counsel.

In its order appointing conflict-free counsel for Terance Valentine, Judge Sisco wrote in part that her decision was based on the "interest of justice." Appendix A at 1. Indeed, under the federal standard, substitution of conflict-free counsel should be granted for Rogers in the "interests of justice." *Christeson v. Roper*, 574 U.S. 373, 377 (2015). Rogers respectfully requests a stay of his proceedings, and the appointment of conflict-free private counsel. Relief is proper.

ARGUMENT II

THE CIRCUIT COURT ERRED IN SUMMARILY DENYING ROGERS' CLAIM THAT NEWLY DISCOVERED EVIDENCE ESTABLISHES THAT ROGERS' RIGHTS PURSUANT TO THE EIGHTH AMENDMENT AND DUE PROCESS RIGHTS UNDER THE FOURTEENTH AMENDMENT ARE BEING VIOLATED, AS HIS CASE IS NOT AMONG THE MOST AGGRAVATED AND LEAST MITIGATED.

The lower court's error:

The circuit court errored by finding that this claim is procedurally barred. SC/656-57. This claim is not identical to the issues raised in Rogers' last successive motion. SC/657-59. CS/CS/HB 1283: Capital Human Trafficking of Vulnerable Persons for Sexual Exploitation is about crime and punishment, as opposed to a settlement compensation agreement, and is thus distinguishable from this Court's precedent denying relief. SC/658. Rogers should be permitted to provide his entire story of mitigation for his factfinders.

Newly Discovered Evidence and Procedural Bar

The evidence upon which Rogers relies on raising this claim was unknown to the circuit court, counsel, or Rogers at the time of his trial and the facts could not have been discovered through due diligence. *See* Fla. R. Crim. P. 3.851(d)(2)(A); *Robinson v. State*, 707

So. 2d 688, 691 n.4 (Fla. 1998); *Jones v. State*, 591 So. 2d 911, 914-15 (Fla. 1991). Secondly, the newly discovered evidence would probably yield a less severe sentence. *Long v. State*, 271 So. 3d 938, 942 (Fla. 2019); *Walton v. State*, 246 So. 3d 246, 249 (Fla. 2018) (quoting *Swafford v. State*, 125 So. 3d 760, 767 (Fla. 2013). A court may summarily deny a newly discovered evidence motion without an evidentiary hearing "*only if* 'the motion, files, and records in the case conclusively show that the movant is entitled to no relief.'" *McLin v. State*, 827 So. 2d 948, 954 (Fla. 2002) (internal citations omitted) (emphasis added); Fla. R. Crim. P. 3.851(f)(5)(B).

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

deems the motion (or the particular claims within it) facially sufficient" the court must "review the record for evidence refuting the claim." *Id.* at 758 (internal citations omitted). Unless the record "conclusively" refutes the claim, an evidentiary hearing is required. *McLin*, 827 So. 2d at 955. It cannot be conclusively shown from the motion, files, and records in this case that Rogers is entitled to no relief, nor can it be said that Rogers's motion was legally insufficient.

It is incumbent upon the defendant to establish the timeliness of a successive postconviction claim. *Rivera v. State*, 187 So. 3d 822, 832 (Fla. 2015). The substance of the claim giving rise to this current action is based on modern understanding of the detrimental effects on the victims of child human trafficking and sexual exploitation. A present-day consideration of Rogers' case proves that it is not among the most aggravated and least mitigated. The Florida legislature submitted CS/CS/HB 1283: Capital Human Trafficking of Vulnerable Persons for Sexual Exploitation on February 27, 2025, which states: "*Capital Human Trafficking of Vulnerable Persons for Sexual Exploitation; Prohibits person 18 years of age or older from knowingly initiating, organizing, planning, financing, directing, managing, or supervising venture that has subjected child younger*

than 12, or person who is mentally defective or mentally incapacitated to human trafficking for sexual exploitation; requires state to give specified notice if it intends to seek death penalty; provides for imposition of sentence of life imprisonment or death." Young Rogers was a vulnerable person who was raped, sexually exploited, and trafficked while he was young child with a developing brain.

Rogers's life is literally at stake, and his trial record lacks a complete history of the mitigating circumstances that entitle him to a life sentence. To the extent that Rule 3.851 (d)(2) is being used as a bar to relief, Rogers does not allege that Fla. R. Crim. P. 3.851(d)(2) is unconstitutional when applied to successive motions filed outside of the warrant context. However, the signing of an active death warrant and the scheduling of an actual execution date renders the circumstances of any successive postconviction motion filed during a warrant different enough to necessitate a more lenient approach to which claims may be raised and litigated. A Florida inmate's death sentence does not automatically mean that particular inmate will be executed by the State of Florida or even receive a signed death warrant at all. Many Florida inmates have sat on death row for years after receiving their death sentence without ever receiving a signed

death warrant, and they finally died due to natural causes.[3]

Fla. R. Crim. P 3.851(h) outlines the procedure for postconviction litigation after a death warrant is signed, stating that "[a]ll motions filed after a death warrant is issued shall be considered successive motions and subject to the content requirement of subdivision (e)(2) of this rule." Fla. R. Crim. P. 3.851(e)(2) states that

> A motion filed under this rule is successive if a state court has previously ruled on a postconviction motion challenging the same judgment and sentence. 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; or, if new and different grounds are alleged, the trial court finds that the failure to assert those grounds in a prior motion constituted an abuse of the procedure; or, if the trial court finds there was no good cause for failing to assert those grounds in a prior motion; or, if the trial court finds the claim fails to meet the time limitation exceptions set forth in subdivision (d)(2)(A), (d)(2)(B), or (d)(2)(C).

The restrictive text of Fla. R. Crim. P. 3.851(d)(2) enumerating only three narrow circumstances where a successive motion may be

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[3] A non-exhaustive list of these inmates includes: Margaret Allen, DOC #699575; Richard Lynch, DOC #E08942; Franklin Floyd, DOC #R30302; Steven Evans, DOC #330290; Guy Gamble, DOC #123096; Joseph Smith, DOC #899500; Charles Finney, DOC #516349; Donald Dufour, DOC #061222; Anthony Washington, DOC #075465; Lloyd Chase Allen, DOC #890793. Many more inmates that are still living have remained on Florida's death row for years, some even decades, without ever receiving a signed active death warrant.

considered violates both the federal and Florida constitutions when applied in the active warrant context because the rule effectively cuts off substantial avenues for relief that a capital defendant facing an actual execution date could attempt to raise. The rule, when applied during an active warrant like Rogers' current case, effectively violates Rogers' federal Fourteenth Amendment Due Process rights, federal Eighth Amendment right to a narrowly tailored individualized sentencing determination, and federal Sixth Amendment right to effective assistance of counsel. The rule also violates Rogers' Florida constitutional rights: to due process; against cruel and unusual punishment; and to access the courts. Art. I § 9, 17, 21., Fla. Const.

A post-warrant defendant is not, and should not, be treated as a successive capital litigant in a *non-warrant* posture. Almost immediately after a warrant is signed, the defendant is transferred from the Union Correctional Institution ("UCI") to the Florida State Prison ("FSP"). He loses possession of his tablet and easier access to the prison library. Unlike a typical successive postconviction motion, a post-warrant capital defendant has a finite—approximately a month-- period of time to research and raise claims. A post-warrant capital litigant should therefore be treated differently when it comes

to successive litigation. This Court should use Rogers' case as an opportunity to find Fla. R. Crim. P. 3.851(d)(2) inapplicable to capital defendants litigating under an active death warrant.

Sexual Abuse & Exploitation in Rogers' Childhood Community

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

and confused young Rogers tore up the woman's house and never went to see her again. Again, Rogers was a mere ten years old.

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

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

Clay, a brother over four years older than Rogers, took advantage of Rogers's tragic knowledge of sex by trafficking him to obtain drug money when Rogers was between ten and twelve years old. Clay sacrificed young Rogers to two older women in their mid-twenties that Clay had known around town, Carla Taggert ("Carla")

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

Carla and Vanessa not only raped young Rogers, but they offered him to other men in the community who produced child pornography, including a notorious child pornographer who went by the name of "Bear." Bear would make 12-year-old Rogers engage in sexual acts and take pictures of him. Bear was trading in child pornography, so he would take nude pictures of children (including Rogers) for underground child porn magazines. Bear would touch Rogers sexually as he positioned him for photographs. These acts of sexual abuse for child pornography with Bear happened several times. Rogers recalls being sexually trafficked to at least three older

men by Vanessa and Carla. He was pressured to sacrifice himself for drug money and out of fear of angering his brother Clay. Vanessa and Carla would sometimes find ways to get Rogers's penis erect for the child pornographers taking photos.

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

Indeed, Rogers was sexually taken advantage of and raped as a young child growing up in Hamilton, Ohio. As his brother Craig can testify, Hamilton, Ohio was infested with child predators. His unstable home life and the climate of the times made Rogers incapable of protecting himself from predatory adults. Rogers's family and the local community failed him. It is no wonder that he began a

life of crime at such a young age and was eventually sentenced to juvenile correctional facilities, where he was further victimized.

Rogers' Sexual Abuse and Exploitation at Juvenile Correctional Facilities

Clay became aware of another time Rogers was being sexually abused by adults when he picked a young Rogers up from the Training Institute of Central Ohio ("TICO") during one of his multiple trips to the notorious juvenile correctional institution. Once, when Clay collected young Rogers from TICO and helped him gather his things, among his bag of belongings was a note that Rogers said came from one of the guards, which read, **"Get it up, keep it ready, I'll be right back."** It is obvious what the disgusting note was referring to, and Rogers was one of many young men victimized by the adult male predatory staff at TICO. Older brother Gary recalls a conversation at the family home sometime around 1975 where, in the presence of both Clay and Gary, Rogers discussed his anger about being sexually abused while being held in an Ohio juvenile correctional facility. Another brother, Craig, recalls another incident where Rogers mentioned something inappropriate happening from a guard while he was incarcerated as a juvenile at a facility in Ohio.

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

However, sexual abuse is what destroyed Rogers' sense of self-worth and hope for a meaningful future, as a staff member named Percy L. Jackson ("Jackson") raped him on numerous different occasions. Jackson was a correctional officer who oversaw the Imperial Cottage and was a particularly notorious predator. He was accused by other TICO residents of abuse and rape, before being suspended and indicted, but the criminal charges were dropped, and Jackson was later hired back at TICO. However, Jackson was never investigated for what he did to Rogers, as Rogers kept the secrets and harbored the shame. Jackson started the "grooming" by buying

Rogers sodas, displaying a special interest in him, and taking nude pictures of him as a child. Jackson found secluded areas on the TICO campus to rape Rogers, such as along the fence line of the property, the unoccupied computer lab, and the employee lounge when it was empty.

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

his wing director's bed and being raped. After the second time Rogers was raped at Jackson's home, he attempted to escape by running out of the house and hiding out, but he was located by TICO staff and returned to the campus. Rogers was then tortured and forced to endure difficult physical labor for his remaining duration at TICO, but Jackson never raped him again.

No jury or court has ever heard about TICO and what it did to Rogers. Rogers is a victim of Ohio's failure to protect vulnerable children held in their custody. TICO was a state-funded facility that had a legal duty to protect young boys. TICO failed miserably, often sending out damaged and dispirited young men to unleash their vengeance on communities at large. If Rogers' jury ever heard any of this compelling mitigation, it is probable they would have recommended a sentence less severe than death.

Effects on Rogers' Personal Development

Rogers was interviewed by Dr. Bryanna Fox regarding the childhood sexual abuse and exploitation he experienced. Dr. Fox is a Professor in the Department of Criminology, Courtesy Professor in the Department of Psychology and Mental Health, Law & Policy, and Faculty Affiliate in the Florida Mental Health Institute at the

University of South Florida (USF) in Tampa. She is also the founder and Co-Director of the USF Center for Justice Research & Policy, as well as a former Special Agent in the Federal Bureau of Investigation (FBI). She earned her Ph.D. in psychological criminology from the University of Cambridge in England and served as a Research Fellow in the FBI's Behavioral Science Unit. Dr. Fox is also the author on the landmark 2015 study establishing the link between adverse childhood experiences [ACEs] and increased risk of serious, violent, and chronic offending, as well as the specific linkage between childhood sexual victimization and increased risk of sexual and violent offending) and is considered a leading expert on this topic in the field. After interviewing Rogers regarding the child sexual abuse, he suffered, as well as reviewing corroborating material, Dr. Fox prepared a report regarding her assessment of Rogers, in which she explained her findings as follows. *See* Appendix C:

A. Summary of Research on Childhood Sexual Abuse and Future Violence

> In brief, childhood sexual abuse is one of the most devastating and impactful forms of trauma, particularly if it is repetitive, chronic, and spans multiple domains such as family, caregivers, and authority figures- as Mr. Rogers experienced. The outcomes strongly associated with childhood sexual abuse are discussed in further detail to

follow, however, it is important to stress early and often how damaging and life altering the trauma associated which childhood sexual abuse is on the development, psyche, health, and behavioral outcomes for these victims (see *Fox et al., 2015; Muniz et al., 2019; Miley et al., 2020*).

Specifically, research on the relationship between childhood sexual abuse and future offending is well established, with studies consistently indicating that youth who are victimized are at higher risk of offending in adolescence and adulthood *(Broidy, Daday, Crandall, Klar, & Jost, 2006; Jennings, Higgins, Tewksbury, Gover, & Piquero, 2010; Klevens, Duque, & Ramírez, 2002; Lauritsen & Laub, 2007; Maldonado, Molina, Jennings, Tobler, Piquero, & Canino, 2010; Mustaine & Tewksbury, 2000; Schreck, Stewart, & Osgood, 2008; Schreck, Wright, & Miller, 2002)*. Specifically, research indicates that childhood victimization significantly raises the risk of future violent, sexual, and prolific offending (*Cops & Pleysier, 2014; McGloin et al., 2011; Posick, 2013; Silver et al., 2011)*. Felson and Lane (2009) found that sexual and physical abuse significantly increased the risk of committing future sexual offenses and violent crime. Fox (2017) found that sexual victimization was one of a number of traits distinguishing sexual offenders from non-sexual offenders. Fox et al. (2015) found that those who experienced physical abuse in childhood were 58% more likely to become serious, violent, and chronic offenders. This empirical overlap between victimization and offending, known as the victim-offender overlap, is so consistent that it has been referred to as one of the few "facts" in criminology *(Gottfredson, 1981; Jennings, Piquero, & Reingle, 2012; Maxfield, 1987; Reiss & Roth, 1994).*

B. <u>Causal Mechanisms Linking Childhood Sexual Abuse and Future Violence</u>

The causal link between early trauma and antisocial

behavior and violence is widely studied. Research in this area shows that childhood sexual abuse (CSA) affects the biological and psychological development of the victimized child by causing neural impairment disrupting the regulatory processes central to maintaining their normal wellbeing *(Cicchetti & Rogosch, 2012).* For instance, research suggests that traumatizing events, such as sexual victimization as a child, may cause chromosome damage *(Shalev et al., 2013)* and functional changes to the developing brain *(Anda, Butchart, Felitti, & Brown, 2010; Cicchetti, 2013; Danese & McEwen, 2012; Teicher et al., 2003).*

CSA also leads to a heightened neural state triggering the brain to excrete adrenal steroids, growth hormones, amino acids, and other stress mediating chemicals known as the allostatic response (i.e. fight or flight) *(Garland, Boettiger, & Howard, 2011).* While these stress-managing chemicals may be beneficial when produced in short, confined bursts, a prolonged chemical response resulting from chronic stress such as ongoing childhood abuse, called an allostatic load, may result in permanent chemical elevations and other destructive physiological and behavioral responses *(Cicchetti & Toth, 2005).* As a result of these neurological and psychological changes, the victimized child is prone to violence in a number of ways. First, CSA leads to physiological changes resulting from the allostatic overload, which may cause extreme, and potentially violent, reactions to even trivial stimuli. This is because the body has a dysregulation of the hypothalamic-pituitary-adrenal (HPA) axis, leading to chronic hyperarousal. Chronic hyperarousal is a state of heightened physiological and psychological tension. It's characterized by symptoms such as hypervigilance and exaggerated startle response, heightened sensitivity to perceived threats, impulsivity, and difficulty in modulating emotions. Combined with unresolved anger, this can result in explosive outbursts or violent acts with minimal provocation.

Indeed, the higher inclination toward violence could result from problems with affect regulation among sexually abused children. Specifically, abused children experience difficulties recognizing, expressing, and understanding their emotions *(Toth, Harris, Goodman, & Cicchetti, 2011).* These children exhibit more aggressive and reactive behavior and are more predisposed to detect angry emotional expressions. A study by Howes et al (2000) also indicated that abusive families also have more difficulty regulating anger in their children. These effects can produce dramatic changes on the emotional development of the child, which likely underlie the heightened risk of future violent behavior. Consequently, youth who experience CSA, particularly male victims, may be more likely to engage in violent or criminal behavior, particularly as the trauma is more likely to be untreated.

Second, youth who are victims of CSA often suffer extreme depression, anxiety, and other mental health issues due to the CSA, which often results in maladaptive coping mechanisms. Maladaptive coping mechanisms are ways of dealing with stress, emotions, or difficult situations that may provide short-term relief but are ultimately harmful or unhelpful in the long run. This outcome is due to the substantial trauma that CSA causes, coupled lack of reporting/awareness of the victimization by caregivers, leading to lack of treatment, unprocessed trauma, and development of coping strategies in unhelpful and sometimes harmful ways. For instance, research indicates that CSA typically results in self-injury, substance misuse, risky sexual behaviors, and aggression, which in turn increases the risk of violence and other externalizing behavior. To cope, many CSA victims turn to drugs or alcohol to numb their nervous system. Unfortunately, substance use lowers inhibitions and can amplify aggressive behavior, especially when combined with trauma triggers.

The significant and devastating effects of childhood sexual abuse have been clearly and incontrovertibly established in the scientific literature including medicine, psychology, public health, criminology, and more. The number and severity of negative outcomes associated with traumatic experiences are staggering. According to the American Psychological Association's Presidential Task Force on Violence and the Family (1996), abused children are significantly more likely to display a host of detrimental developmental outcomes in childhood through adulthood including violence and criminal behavior. Most relevant to the present case are two of the Task Force's final conclusions:

1. Childhood trauma and abuse can seriously affect a person's physical and intellectual development, and can lead to difficulties in self-control.
2. Abused and maltreated children are more likely than non-abused children to be arrested for delinquency, adult criminal behavior, and violent criminal behavior.

Indeed, as documented earlier in this report, considerable research has shown that childhood trauma significantly raises the risk of future antisocial outcomes, most notably including violence and criminal behavior (*Fox et al., 2015; Reavis et al., 2013*).

Specifically, research funded by the U.S. Department of Justice on the long-term implications of abuse for over 1,000 children found that those who were abused and/or neglected as children were 480% more likely to be arrested as juveniles, 200% more likely to be arrested as adults, and 310% more likely to commit a violent crime in adulthood, compared to those who were not abused or neglected in childhood (*English, Widom, & Brandford, 2001*).

Similarly, **results of a large meta-analysis**, or a study of all available research on a topic, show that adult male sexual offenders were more than **300% as likely to have**

been sexually abused in childhood compared to non-sexual offenders (see *Reavis et al., 2010*), and **sexual abuse significantly raises the risk** of general involvement in the justice system (*Cavaiola & Schiff, 1988*), and **future sexual and violent offending** (*Fox, 2017; Fox et al., 2015*).

In a recent study on the increased risk of violence and sexual offending among all adolescents referred to the Florida Department of Juvenile Justice (FDJJ), it was found that youth who experience physical and sexual abuse in childhood have a significantly higher risk of engaging in these analogous illegal acts in adolescence, compared to any other type of offending behavior, even after controlling for all other major criminogenic, psychological, and demographic risk factors (Miley et al., 2020).

Specifically, it was found that those who experienced physical abuse as children had the highest risk, out of any youth referred to FDJJ for a delinquent offense, of engaging in violent offenses themselves later in adolescence (Miley et al., 2020). This finding is consistent with prior studies on forensic samples (*Cuevas, Wolff, & Baglivio, 2019; DeLisi et al., 2017; Trulson, Haerle, Caudill, & DeLisi, 2016*). A potential explanation for this finding is that these youth are learning to deal with conflict through violence, in ways that were modeled to them, and are therefore engaging in the same maladaptive behaviors in their own life.

Miley and colleagues (2020) also found that youth who experienced sexual abuse in childhood had the highest risk of committing future sex-related offenses, but were also at higher risk of committing future violence. This result may be reflective of the fact that the experience of sexual abuse at a young age can potentially normalize the behavior for the victim, increasing the chance that they may later imitate the behavior themselves. These new findings echo the results of prior research conducted on

the overall effects of childhood abuse and trauma on antisocial behavior using a wide variety of samples from community members and incarcerated offenders.
This is critically important to the current case, as it suggests that negative and traumatic experiences in childhood are not only frightening and harmful to youth, but they also systematically increase the risk of victimized children engaging in violent and criminal behavior in the future.

However, it is prudent to note that not all children who are victimized will commit crimes or violence later in life: research has also found that certain youth may develop resilience through their victimization experience. For example, while some sexually abused children will later victimize others, not all children exposed to such experiences do this *(Brownlie, 2001; Gilligan, 2000*).

Importantly, research indicates that several intervening factors and protective variables may disrupt the victim-offender overlap if present. These factors include parental supervision and bonds to the community (Berg, Stewart, Schreck, & Simons, 2012), victim-offender relationships (*Zimmerman, Farrell, & Posick, 2017*) and underlying rationality/offender decision-making processes (*Averdijk, Van Gelder, Eisner, & Ribeaud, 2016*).

Although no risk factor can perfectly predict an individual's future behavior, the overwhelming body of research indicates that childhood sexual abuse and victimization substantially increase the risk of the most severe forms of antisocial behavior including violence and sexual offending.

In this case, it appears that Mr. Glen Rogers experienced severe and repetitive sexual abuse in childhood and is at considerably higher risk of violence and aggression. While it is impossible to predict the behavior of any person with perfect accuracy, given the overwhelming rate and severity

> of abuse that Mr. Rogers has experienced, and the known correlates of these victimization experiences established by decades of scientific research, these experiences should be emphatically be considered a mitigating factor in this case.

Appendix C at 7-10. Based on the type and extent of sexual abuse Rogers experienced, particularly without the support of intervening parental guidance and protective community bonds, Rogers' crimes are highly mitigated. Also, a prior Positron Emission Tomography (PET) scan from 1999 indicates that Rogers suffers from brain damage. *Rogers v. State*, 97 So. 3d 824 (Fla. 2012). Dr. Fox can further explain her research and findings at an evidentiary hearing. CS/CS/HB 1283: Capital Human Trafficking of Vulnerable Persons for Sexual Exploitation reflects the conscious of Florida's citizens in protecting children from the manner of abuse that Rogers suffered as a child. This newly discovered evidence would yield a less severe sentence, as Rogers' highly mitigated case would result in a properly informed jury recommending a life sentence.

The USSC has made clear that the consideration of mitigation by the sentencer is at the heart of the constitutionality of the death penalty. In *Proffitt v. Florida*, 428 U.S. 242 (1976), the USSC considered whether the imposition of the sentence of death for the

crime of murder under Florida law violated the Eighth and Fourteenth Amendments. *Id.* at 244. The USSC found that Florida's new death penalty law passed constitutional scrutiny because "the sentencing judge must focus on the individual circumstances of each homicide and each defendant. *Id.* at 252. The unique and extensive sexual abuse that Rogers suffered as a child was not heard and fully considered by the trial court, thus failing to meet the requirements of *Proffitt*.

The USSC developed even more principles to ensure that the death penalty was not exacted on those who did not meet the requirements of the Constitution. *Woodson v. North Carolina*, 428 U.S. 280 (1976), required that a death penalty scheme "allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death." *Id.* at 303. This did not occur in Rogers' case, as he currently has weighty mitigation, but the time limitations of warrant litigation, and the procedural bar, is preventing the final factfinder from evaluating Rogers' mitigation, before lethal injection is "imposed upon him." Then came a litany of cases that required

consideration of mitigation. In *Lockett v. Ohio*, 438 U.S. 586 (1978) the USSC "conclude[d] that the Eighth and Fourteenth Amendments require that the sentencer … not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Id.* at 604.

In *Eddings v. Oklahoma*, 455 U.S. 104 (1982) the USSC applied *Lockett*, stating that,

> the rule in *Lockett* followed from the earlier decisions of the Court and from the Court's insistence that capital punishment be imposed fairly, and with reasonable consistency, or not at all. By requiring that the sentencer be permitted to focus "on the characteristics of the person who committed the crime," *Gregg v. Georgia, supra*, at 197, 96 S.Ct., at 2936, the rule in *Lockett* recognizes that "justice … requires … that there be taken into account the circumstances of the offense together with the character and propensities of the offender." *Pennsylvania v. Ashe*, 302 U.S. 51, 55, 58 S.Ct. 59, 60, 82 L.Ed. 43 (1937). By holding that the sentencer in capital cases must be permitted to consider any relevant mitigating factor, the rule in *Lockett* recognizes that a consistency produced by ignoring individual differences is a false consistency.

Id. at 112. A clear understanding of these cases demonstrates that the USSC has long recognized the need for an individualized sentencing that carefully considers *all* mitigation. Glen Rogers' tragic childhood of sexual abuse and exploitation is weighty mitigating

evidence that a factfinder needs to fully evaluate. Rogers was a victim of human trafficking for the purposes of sexual exploitation while he was a mere child. The sexual abuse he experienced was vile, extensive, and mitigating in establishing that Rogers' case is not among the most aggravated and least mitigated. Relief is proper.

ARGUMENT III

THE CIRCUIT COURT ERRED IN SUMMARILY DENYING ROGERS' CLAIM THAT FLORIDA'S LETHAL INJECTION PROCEDURES AS APPLIED TO ROGERS ARE UNCONSTITUTIONAL AND CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION. FLORIDA'S LETHAL INJECTION PROCEDURES PRESENT A SUBSTANTIAL AND IMMINENT RISK THAT IS VERY LIKELY TO CAUSE ROGERS NEEDLESS SUFFERING UNDER *GLOSSIP v. GROSS*, 576 U.S. 863 (2015) AND *BAZE v. REES*, 553 U.S. 35 (2008).

Florida's current lethal injection procedures are unconstitutional as specifically applied to Rogers because there is a substantial and imminent risk that executing Rogers under those procedures will very likely cause him needless pain and suffering due to his diagnosis of Porphyria. *Glossip v. Gross*, 576 U.S. 863 (2015); *Baze v. Rees*, 553 U.S. 35 (2008). Florida's use of the drug etomidate

in the three-drug lethal injection protocol will likely cause Rogers needless pain and suffering when administered, causing Rogers to experience an etomidate-induced Porphyria attack. There are two other feasible alternative methods to lethal injection- lethal gas and firing squad- that will significantly reduce the substantial risk of severe pain that Rogers faces if executed. *See Glossip v. Gross*, 576 U.S. 863, 877 (2015) (citing *Baze v. Rees*, 553 U.S. 35, 52 (2008)).[4]

As an initial matter, undersigned counsel submits that this Court must relinquish jurisdiction to the circuit court with instructions to hold an evidentiary hearing on Rogers' as-applied claim related to his Porphyria diagnosis and must also grant a stay of execution so that there is enough time to hold a full and fair evidentiary hearing. This Court's prior precedent proves that as-applied challenges to the constitutionality of Florida's execution procedures should be decided after a full and fair evidentiary hearing in the lower court. This Court's prior opinions show that these important and unique claims have regularly received evidentiary

[4] Undersigned counsel only pleads an alternative method of execution in an abundance of caution to ensure that Rogers' current motion is facially sufficient under *Glossip v. Gross*, 576 U.S. 863 (2015) and *Baze v. Rees*, 553 U.S. 35 (2008). *See infra* at pp. 73-79.

hearings in the circuit court, and this Court has relinquished jurisdiction more than once so that an evidentiary hearing may be held. Based on this Court's prior precedent, the circuit court erred when summarily denying Rogers' as-applied claim without first holding an evidentiary hearing.

In 2019, while under an active death warrant, Bobby Joe Long filed an as-applied constitutional challenge to Florida's lethal injection procedures. *See Long v. State*, 271 So. 3d 938 (Fla. 2019). Long argued that his traumatic brain injury and temporal lobe epilepsy rendered Florida's use of etomidate in his execution unconstitutional under the Eighth Amendment. *Id.* at 943. The lower court held an evidentiary hearing on the claim without the need for this Court to relinquish jurisdiction. *See id.* at 944. This Court affirmed the lower court's rejection of Long's as-applied challenge. *See id.* at 945. However, this Court was able to make that determination based on the testimony of competing expert witnesses since Long was allowed an evidentiary hearing. Rogers should be afforded the same opportunity.

This Court has relinquished jurisdiction to the lower court in at least **four** separate cases under active death warrants so that evidentiary hearings could be held on those defendants' as applied challenges to Florida's execution procedures. In 2014, this Court relinquished jurisdiction to the lower court to hold an evidentiary hearing on Paul Howell's as-applied challenge to Florida's previous use of midazolam in executions, explaining that "because Howell raised factual as-applied challenges and relied on new evidence not yet considered by this Court … this Court relinquished jurisdiction for an evidentiary hearing." *Howell v. State*, 133 So. 3d 511, 515 (Fla. 2014). Rogers raises a factual as-applied challenge based on evidence of his Porphyria diagnosis that has not been considered by this Court previously. Rogers should be afforded the same opportunity for an evidentiary hearing as Howell.

Again in 2014, this Court relinquished jurisdiction to the lower court to hold an evidentiary hearing on Robert Henry's as-applied challenge to Florida's lethal injection protocol related to his hypertension, high cholesterol level, and coronary artery disease. *Henry v. State*, 134 So. 3d 938, 943 (Fla. 2014). The circuit court held an evidentiary hearing during which both sides called medical

experts to testify concerning Henry's unique medical conditions. *See id.* at 944. Rogers should be afforded the same opportunity for an evidentiary hearing as Henry.

A third time in 2014, this Court relinquished jurisdiction to the lower court to hold an evidentiary hearing on Eddie Wayne Davis's as-applied challenge to Florida's execution procedures based on his diagnosis of Porphyria. *Davis v. State*, 142 So. 3d 867, 870 (Fla. 2014). This Court explained that this Court relinquished jurisdiction based, in part, on the "constitutional obligation to ensure that the method of lethal injection in this state comports with the Eighth Amendment." *Id.* This Court has the same constitutional obligation in Rogers' case that was recognized by this Court in Davis's case, and Rogers should be afforded the same opportunity for an evidentiary hearing as Davis. Notably, Rogers raises an as-applied challenge to Florida's lethal injection procedures based on the same diagnosis of Porphyria that Davis raised in 2014.

Davis raised an as-applied challenge based on the interaction between his Porphyria and Florida's previous use of midazolam as the first drug in the lethal injection protocol. *Davis*, 142 So. 3d at 871. This Court eventually affirmed the lower court's denial of Davis's

as-applied challenge, but only after this Court had previously relinquished jurisdiction to the lower court so that an evidentiary hearing could be held on the claim. *Id.* at 870. An evidentiary hearing was held where Davis's qualified expert testified concerning the effect that Florida's use of midazolam could have on Davis, considering his Porphyria diagnosis. This Court determined Davis's as-applied challenge based on a complete picture following expert testimony concerning Porphyria, and Rogers requests that he be given the same benefit of an evidentiary hearing concerning his Porphyria diagnosis that this Court previously gave to Davis.

As discussed in greater detail below, Rogers has retained anesthesiologist Dr. Joel Zivot to opine on the interaction of Florida's current use of the drug etomidate with his Porphyria. Dr. Zivot's general opinions and expected testimony were presented to the circuit court in Roger's April 20, 2025 Fla. R. Crim. P. 3.851 Motion. *See* SC/461-63. The circuit court erroneously failed to hold an evidentiary hearing so that Dr. Zivot's full testimony could be presented. Dr. Zivot's signed and notarized affidavit detailing his opinions in Rogers' case is available at Appendix D.

Finally, in 2015 this Court relinquished jurisdiction to the lower court to hold an evidentiary hearing on Jerry Correll's as-applied challenge to Florida's execution procedures based on his alleged brain damage and history of alcohol and substance use. *Correll v. State*, 184 So. 3d 478, 483 (Fla. 2015). Prior to the evidentiary hearing, this Court granted Correll's motion for stay of proceedings and stay of execution which was filed with his appeal of the lower court's summary denial of his claims, which subsequently allowed for enough time to hold the evidentiary hearing on Correll's as-applied challenge. *See id.* at 482. An evidentiary hearing with multiple witnesses was subsequently held on Correll's as-applied claim. *Id.* at 484. Same as Correll, Rogers is also contemporaneously filing with this appeal a motion to stay his proceedings and execution so that a full and fair evidentiary hearing may be held on his as-applied challenge to Florida's execution procedures. Rogers should be afforded the same opportunity as Correll for an evidentiary hearing, and he must be granted a stay of execution so that a full and fair evidentiary hearing can be conducted.

Rogers should be afforded the same opportunity for an evidentiary hearing on his as-applied claim that was given to Long,

Howell, Henry, Davis, and Correll. These capital defendants were similarly situated to Rogers in that they all raised as-applied challenges to Florida's execution procedures while under an active death warrant. To treat Rogers differently by denying him an evidentiary hearing when these defendants received one violates Rogers' Fourteenth Amendment rights to Equal Protection and Due Process. With this being established, undersigned counsel now turns to the actual merits of Rogers' as-applied challenge.[5] The circuit court erred when finding that Rogers' as-applied challenge is both procedurally barred and without merit. *See* SC/660-67.

Before reaching the actual merits of Rogers' as-applied challenge, the circuit court finds that Rogers' claim related to lethal injection is untimely and procedurally barred under Fla. R. Crim. P. 3.851(d)(2)(A) because Rogers has known about his Porphyria diagnosis since his 1997 trial. *See* SC/661-64. The circuit court explains that "Rule 3.851 prohibits the filing of a motion for

[5] If this Court chooses not to relinquish jurisdiction for an evidentiary hearing, then this Court must accept the factual allegations presented in Rogers' 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).

postconviction relief more than one year after the judgment and sentence become final unless "the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence." SC/661-62 (citing Fla. R. Crim. P. 3.851(d)(2)(A)). The circuit court's reliance on Rule 3.851(d)(2) to find that Rogers is procedurally barred from raising his as-applied challenge is incorrect and highlights the need for this Court to reconsider the constitutionality of Rule 3.851(d)(2) when applied in the active warrant context.

First, the facts underlying Rogers' as-applied challenge to lethal injection based on his Porphyria diagnosis could not fully be known until after his active death warrant was signed, because there was no way for Rogers to know which execution procedures would be in place when and if his death warrant was signed. Rogers was sentenced to death in 1997, and the mandate was issued in his case in 2001. Roger has sat on death row for **twenty-eight** years since his 1997 death sentence facing the possibility of an eventual death warrant and execution. At the time that Rogers was originally sentenced to death in 1997, lethal injection was not even an option for execution in Florida, as the first execution by lethal injection in the state would

not take place until 2000. *See Florida's First Lethal Injection,* CBS NEWS (originally published February 23, 2000), https://www.cbsnews.com/news/floridas-first-lethal-injection/.

Since then, Florida's lethal injection protocols have changed, including a switch from midazolam to etomidate as the first drug in the three-drug cocktail in 2017. The Florida Department of Corrections has also regularly issued updated lethal injection procedures every two years since at least 2019- issuing them on February 27, 2019, May 6, 2021, March 10, 2023, and February 18, 2025 respectively. It was impossible for Rogers to know if these procedures would show a change to the lethal injection protocols until they were issued and also impossible for him to know which protocols would apply to his own execution until his death warrant was signed. Notably, the most recent February 18, 2025 procedures were issued less than a year before the filing of the April 20, 2025 successive Rule 3.851 motion triggered by Rogers' April 15, 2025 death warrant. Rogers' as-applied challenge therefore does fall within the one-year requirement under Fla. R. Crim. P. 3.851(d)(2).

The circuit court points to the fact that the February 18, 2025 and March 10, 2023 lethal injection procedures are not materially

different from one another or from the etomidate protocol that took effect in 2017. SC/662-63. However, this should not bar Rogers from raising an as-applied challenge to lethal injection now that he has an actual active death warrant that has been signed. Even if Rogers had raised an as-applied challenge starting in 2017 when Florida's protocol switched from midazolam to etomidate, it was impossible for Rogers to know which procedures he would actually be executed under or if they would eventually change from etomidate to another drug. If Rogers had raised his as-applied challenge prior to the signing of his active death warrant, the claim would have been premature and not fully ripe for consideration.[6]

The circuit court cites to this Court's recent opinions in *Cole v. State*[7] and *Tanzi v. State*[8] finding that those defendants were

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[6] Undersigned counsel is not arguing that capital defendants should be absolutely foreclosed from raising as-applied challenges to Florida's execution procedures prior to the signing of an active death warrant. However, such challenges are premature, considering that the Florida Department of Corrections promulgates new execution procedures every two years and there is no way to know what changes may be made or which procedures an inmate will actually be executed under until a warrant is signed.

[7] *Cole v. State*, 392 So. 3d 1054 (Fla. 2024).

[8] *Tanzi v. State*, No. SC2025-0371, (Fla. Apr. 1, 2025).

procedurally barred from raising as-applied challenges to lethal injection because they had known of their relevant medical conditions prior to their active death warrants, but did not raise an as-applied challenge until their warrants were signed. SC/663. Undersigned counsel acknowledges this Court's prior adverse rulings. Undersigned counsel respectfully submits that Cole's, Tanzi's, and Rogers' cases all represent the constitutional issues that arise when Rule 3.851(d)(2) is applied in the active warrant context, and respectfully requests that this Court reconsider the issue.[9]

As currently interpreted, Fla. R. Crim. P. 3.851(d)(2) is unconstitutional when applied to successive motions filed in the post-death-warrant context. Rogers does not allege that Fla. R. Crim.

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[9] Undersigned counsel acknowledges that this Court recently considered the issue of the constitutionality of applying Fla. R. Crim. P. 3.851(d)(2) in the active death warrant context in *Ford v. State* and found that Rule 3.851(d)(2) was not unconstitutionally applied to Ford's successive motion for postconviction relief filed after his death warrant was signed. *See Ford v. State*, 402 So. 3d 973, 978 (Fla. 2025). Undersigned counsel acknowledges that this Court's recent *Ford* opinion is directly adverse to the arguments now raised in Rogers' appeal concerning the constitutionality of Rule 3.851(d)(2) when applied to active warrant cases. Undersigned counsel raises these arguments with the good faith belief that the application of Rule 3.851(d)(2) to active warrant cases continues to raise serious constitutional concerns.

P. 3.851(d)(2) is unconstitutional when applied to successive motions filed outside of the warrant context. However, the signing of an active death warrant and the scheduling of an actual execution date renders the circumstances of any successive postconviction motion filed during a warrant different enough to necessitate a more lenient approach to which claims may be raised and litigated. A Florida inmate's death sentence does not automatically mean that particular inmate will be executed by the State of Florida or even receive a signed death warrant at all. Many Florida inmates have sat on death row for years after receiving their death sentence without ever receiving a signed death warrant, and they finally died due to natural causes.[10] Rogers himself has sat on death row for **twenty-eight** years since his 1997 death sentence before his active death warrant was finally signed in 2025.

Fla. R. Crim. P 3.851(h) outlines the procedure for

[10] A non-exhaustive list of these inmates includes: Margaret Allen, DOC #699575; Richard Lynch, DOC #E08942; Franklin Floyd, DOC #R30302; Steven Evans, DOC #330290; Guy Gamble, DOC #123096; Joseph Smith, DOC #899500; Charles Finney, DOC #516349; Donald Dufour, DOC #061222; Anthony Washington, DOC #075465; Lloyd Chase Allen, DOC #890793. Many more inmates that are still living have remained on Florida's death row for years, some even decades, without ever receiving a signed active death warrant.

postconviction litigation after a death warrant is signed, stating that "[a]ll motions filed after a death warrant is issued shall be considered successive motions and subject to the content requirement of subdivision (e)(2) of this rule." Fla. R. Crim. P. 3.851(e)(2) states that

> A motion filed under this rule is successive if a state court has previously ruled on a postconviction motion challenging the same judgment and sentence. 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; or, if new and different grounds are alleged, the trial court finds that the failure to assert those grounds in a prior motion constituted an abuse of the procedure; or, if the trial court finds there was no good cause for failing to assert those grounds in a prior motion; or, if the trial court finds the claim fails to meet the time limitation exceptions set forth in subdivision (d)(2)(A), (d)(2)(B), or (d)(2)(C).

The restrictive text of Fla. R. Crim. P. 3.851(d)(2) enumerating only three narrow circumstances where a successive motion may be considered violates both the federal and Florida constitutions when applied in the active warrant context because the rule effectively cuts off substantial avenues for relief that a capital defendant facing an actual execution date could attempt to raise. The rule, when applied during an active warrant like Rogers' current case, effectively violates

Rogers' Due Process rights under the federal Fourteenth Amendment and corresponding provisions of the Florida Constitution.

A post-warrant defendant is not, and should not, be treated as a successive capital litigant in a *non-warrant* posture. Almost immediately after a warrant is signed, the defendant is transferred from the Union Correctional Institution ("UCI") to Florida State Prison. He loses possession of his tablet and easier access to the UCI library. Unlike a typical successive postconviction motion, a post-warrant capital defendant has a finite- approximately a month-period of time to research and raise claims. A post-warrant capital litigant should therefore be treated differently when it comes to successive litigation. This Court should use Rogers' case as an opportunity to find Fla. R. Crim. P. 3.851(d)(2) inapplicable to capital defendants litigating under an active death warrant.

Rogers is entitled to due process of law, as established by the Fourteenth Amendment to the United States Constitution and the corresponding provision of Florida's Constitution. Similar to his due process right, Rogers also has an explicit right under the Florida Constitution to access the courts because "[t]he courts shall be open to every person for redress of any injury, and justice shall be

administered without sale, denial or delay." Art. 1 § 21, Fla. Const. Rogers is effectively being denied his due process rights and right to access the Florida courts, because of the unyielding requirements of Fla. R. Crim. P. 3.851(d)(2).[11]

"Due process requires that a defendant be given notice and an opportunity to be heard on a matter before it is decided." *Barwick v. State*, 361 So. 3d 785, 790 (Fla. 2023) (quoting *Asay v. State*, 210 So. 3d 1, 27 (Fla. 2016)). "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

Applying the stringent requirements of Rule 3.851(d)(2) to the active warrant context will prevent capital defendants from being heard in a meaningful manner if the continued effect of the rule is to procedurally bar them from raising nearly all claims for relief during

[11] While this initial brief focuses specifically on the stringent requirements of Fla. R. Crim. P. 3.851(d)(2) because that was the rule cited in the April 25, 2025 denial order, Fla. R. Crim. P. 3.851(e) also appears to violate the same set of constitutional rights as Rule 3.851(d)(2) when applied in the warrant context because that provision of the rule also severely restricts the avenues of relief that a capital defendant may raise during an active death warrant to the point of foreclosing substantial avenues of relief in practice.

their last opportunity to litigate for their very life. Rogers' fundamental due process right to be heard in a meaningful manner will not be honored if he is denied relief on his valid as-applied challenge to lethal injection based on Rule 3.851(d)(2)'s unconstitutionally stringent requirements when applied in the active warrant context. This due process violation is exasperated by the fact that the lower court further denied Rogers an opportunity to be heard in a meaningful manner on his as-applied claim by denying him an evidentiary hearing.

This Court's scheduling order issued on April 15, 2025 setting out Rogers' state court proceedings pursuant to the warrant serves no legitimate purpose if his proceedings are based on the unyielding strict interpretation of Fla. R. Crim. P. 3.851(d)(2). The state court proceedings following the signing of an active death warrant are no more than "for show" if Rogers and similarly situated capital defendants in the post-warrant context are barred from raising claims at the very *last* opportunity to save their life. Without a reexamination of the flexibility of Fla. R. Crim. P. 3.851(d)(2), litigating Rogers' motion is akin to just "going through the motions," as Rogers has no realistic fair opportunity for his day in court. Florida

capital defendants' right to due process and the opportunity to be heard in a meaningful manner will not be honored if Rule 3.851(d)(2) continues to be applied in the active death warrant context. Rogers' as-applied claim should not be procedurally barred.

The Eighth Amendment, which is made applicable to the States through the Fourteenth Amendment, prohibits the infliction of "cruel and unusual punishments." *Glossip v. Gross*, 576 U.S. 863, 876 (2015). To succeed on an Eighth Amendment method-of-execution claim, Rogers must: (1) establish that the method of execution presents a substantial and imminent risk that is sure or very likely to cause serious illness and needless suffering, and also (2) identify a known and available alternative method of execution that entails a significantly less severe risk of pain. *See Asay v. State*, 224 So. 3d 695, 701 (Fla. 2017) (citing *Glossip*, 576 U.S. at 877 and *Baze*, 553 U.S. at 50, 61).

Rogers has a diagnosis of Porphyria, which is a group of genetic metabolic disorders that cause a buildup of toxic porphyrin precursors in the body, which can lead to a range of symptoms, including neurological problems, skin photosensitivity, and liver dysfunction. Individuals with Porphyria can also experience what

are called Porphyria attacks when they are exposed to certain medicines, including the drug etomidate. Porphyria attacks result in extremely painful and life-threatening symptoms, including severe abdominal pain, seizures, hallucinations, anxiety, paranoia, and an accelerated heart rate. The likely Porphyria attack that Rogers will experience when he is exposed to etomidate will make it impossible for Florida to safely and humanely carry out his execution. The current February 18, 2025 Florida Department of Corrections lethal injection procedures dictate the administration of a three-drug cocktail, beginning with the administration of two hundred milligrams (200 mg) of etomidate. *See* Appendix E at 10-11.

Undersigned counsel has hired anesthesiologist Dr. Joel Zivot, who is available and willing to testify to the substantial risk of needless pain and suffering that Rogers faces if executed by lethal injection due to the interaction of etomidate and Rogers' Porphyria. Dr. Zivot's signed and notarized affidavit of his opinions can be found at Appendix D. The following is a recitation of Dr. Zivot's opinions and expected testimony that were presented to the lower court.

Dr. Zivot is an associate professor and senior member of the Departments of Anesthesiology and Surgery at Emory University

School of Medicine in Atlanta, Georgia. Dr. Zivot holds board certification in Anesthesiology from the Royal College of Physicians and Surgeons of Canada and the American Board of Anesthesiology. He is board-certified in Critical Care Medicine from the American Board of Anesthesiology. Dr. Zivot has practiced anesthesiology and critical care medicine for thirty years, during which time he has personally performed or supervised the care of over 50,000 patients.

Dr. Zivot reviewed Rogers' medical records and Florida's lethal injection procedures, and he can opine generally to the following. Based on his records review, Dr. Zivot observed that Rogers is a 62-year-old man who suffers from Porphyria, a group of genetic metabolic disorders that cause liver and bone lesions due to the buildup of toxic porphyrin precursors. The specific genetic defect in Porphyria results in a deficiency of the enzyme responsible for synthesizing heme. The buildup of porphyrin precursors in the liver can lead to a range of symptoms, including neurological problems, skin photosensitivity, and liver dysfunction. Based on his medical history, Rogers likely suffers from acute hepatic Porphyria based on the accumulation of the porphyrin precursors in his liver. This

accumulation has resulted in liver damage, including cirrhosis, liver fibrosis, and possibly liver cancer.

Porphyrin is an organic compound found in the body. An example of a porphyrin is heme, the precursor for hemoglobin, which is the iron-containing oxygen transport compound found within every red blood cell in the human body. The metabolic pathway from heme to hemoglobin and other compounds is a complex and highly enzymatically regulated series of steps. Breaks in these regulatory steps can result in the accumulation of porphyrin, which is toxic to the body in several ways. Regulatory breaks can be induced by exposure to various medicines that might be given to a person as a treatment for a medical condition, or in Rogers' case, by the chemicals used in Florida's lethal injection protocol.

The broken heme regulation in Porphyria is associated with a series of clinical findings that can be life-threatening. These findings include severe abdominal pain, seizures, hallucinations, anxiety, paranoia, and an accelerated heart rate. It is critically important to understand that chemically induced Porphyria is not idiosyncratic. Exposure to the chemical that breaks the regulatory pathway will

lead to Porphyria attacks, and the greater the dose of the chemical, the more severe the Porphyria attack will be.

Florida's lethal injection procedures involve the sequential intravenous delivery of three drugs. The first drug is etomidate, followed by rocuronium bromide, and then potassium acetate. Etomidate is a non-barbiturate sedative hypnotic drug used in anesthesiology practice in several different situations. Etomidate metabolism is primarily hepatic, which means it will accumulate rapidly in the liver. Etomidate is not classically considered an analgesic, which is a medicine used for the control of pain. Further, neither of the subsequent drugs used in Florida's lethal injection procedures are analgesic. Rocuronium bromide is a rapidly acting paralyzing drug and will paralyze any individual, in this case the prisoner, making it impossible to communicate to observers that pain is occurring. Potassium acetate is a drug that regulates the contraction of the heart. In large doses, potassium acetate is painful when injected and will cause the heart to cease functioning.

Studies have shown that etomidate can induce Porphyria attacks in susceptible individuals. In the Florida lethal injection procedures, the amount of etomidate administered to the inmate is

up to **ten times** the amount that might be injected in a clinical setting. The consequence of this massive quantity of etomidate on porphyrin accumulation and the ensuing negative symptoms would be profound. As rocuronium bromide is injected after etomidate, the subsequent paralysis will mask the severe and terrifying pain and other adverse effects from the etomidate-induced Porphyria attack that Rogers will experience. Based on his review of Rogers' medical records, Dr. Zivot opines that a substantial risk exists that Rogers will suffer from extreme and excruciating abdominal pain, tachycardia, hypertension, nausea, vomiting, and seizures when he is exposed to etomidate during his execution by lethal injection.

It is clear from Dr. Zivot's preliminary evaluation of Rogers' medical history that Florida's lethal injection procedures place Rogers at a substantial risk of needless pain and suffering because he will experience a Porphyria attack in response to the administration of an extremely high dose of etomidate. Even more troubling is the fact that because Rogers will be administered the paralytic rocuronium bromide directly after etomidate, the ensuing paralysis of his body will likely prevent him from exhibiting any

external signs of his physical anguish. Florida therefore cannot constitutionally execute Rogers.

To succeed on his Eighth Amendment method-of-execution claim, Rogers is also required to identify a method of execution other than lethal injection that is "feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain." *Glossip*, 576 U.S. at 877 (quoting *Baze*, 533 U.S. at 52). The requirement under current federal jurisprudence that Rogers choose another less-painful method of execution since he cannot constitutionally be executed by lethal injection is morally repugnant, impossible to realistically meet, and violates Rogers' Fourteenth Amendment rights to Due Process and Equal Protection and also his Fifth Amendment right to Due Process.

The alternative method requirement of the *Baze-Glossip* test violates capital defendants' Fifth and Fourteenth Amendment due process rights because there is no guaranteed or scientific way to prove that any alternative method will cause significantly less pain than other methods available in the United States. There exists no way to legally, humanely, or ethically test any alternative method of execution to determine if it will cause less pain compared to another.

Specific to Rogers, there exists no legal or scientific way to test any alternative method of execution on an individual with Porphyria prior to Rogers' execution to determine what level of pain they may suffer. Rogers, and all capital defendants facing execution, are therefore forced to choose an alternative method without actually knowing if it will cause less pain and suffering. The United States Supreme Court ("USSC") has promulgated a standard that cannot actually be met, and undersigned counsel maintains that Rogers should not be subject to execution in the first place.

Additionally, the alternative method requirement of the *Baze-Gossip* test violates capital defendants' Fifth Amendment due process rights and Fourteenth Amendment equal protection rights because different states have different execution methods directly authorized by statute, thereby causing similarly situated capital defendants to essentially face different pleading requirements based on what state they are located in. While a capital defendant is not limited to choosing among those methods presently authorized by the state he resides in, and he may point to a protocol in another state as a potentially viable option, his proposal still must identify a feasible alternative that his respective state "has refused to adopt without a

legitimate penological reason." *Bucklew v. Precythe*, 587 U.S. 119, 134 (2019) (internal citations omitted). USSC precedent also requires that a capital defendant attempting to identify an alternative method for his as-applied challenge must show that his proposed alternative method is not just theoretically feasible but also readily implemented, meaning that the "proposal must be sufficiently detailed to permit a finding that the State could carry it out relatively easily and reasonably quickly." *Bucklew v. Precythe*, 587 U.S. 119, 141 (2019) (internal quotations omitted) (internal citations omitted).

Due to these stringent and unconstitutional pleading requirements, capital defendants in different states will face different pleading requirements based on what alternative methods are authorized by their respective state's statute. For example, specifically related to Rogers, he identifies lethal gas as one of two alternatives to lethal injection that is authorized by other states and that does not involve the administration of etomidate to carry out. However, this method is not explicitly authorized by law in Florida, as Florida statute only directly authorizes lethal injection or electrocution as the two enumerated options. *See* § 922.105(1), Fla. Stat. Under the *Baze-Glossip* test, as interpreted by the USSC in

Bucklew, Rogers must identify his chosen alternative methods as feasible alternatives that Florida "has refused to adopt without a legitimate penological reason." *Bucklew,* 587 U.S. at 134.

At least six states- Alabama, Arizona, California, Missouri, Mississippi, and Louisiana- directly authorize lethal gas by statute as an available method of execution. *See* Ala. Code § 15-18-82.1; Ariz. Stat. § 13-757; Cal. Penal Code § 3604; Mo. Stat. § 546.720; Miss. Code § 99-19-51; La. Stat. Ann. § 15:569. Additionally, Arkansas recently passed an act to amend the method of execution to include lethal gas. *See* AR LEGIS 302 (2025), 2025 Arkansas Laws Act 302 (H.B. 1489). Defendants in these states may therefore choose lethal gas as their method if lethal injection would cause them needless suffering without having to meet the same burden as Rogers to show that their state "has refused to adopt [lethal gas] without a legitimate penological reason," based only on the fact that their respective states have already authorized this method. This requirement violates Rogers' equal protection rights by forcing him to meet a pleading requirement that other similarly situated capital defendants who choose lethal gas would not have to meet.

Even though the alternative method pleading requirement is unconstitutional, undersigned counsel still identifies two alternative methods to meet facial sufficiency under the *Baze-Glossip* test. Two methods available in the United States- firing squad and lethal gas- are feasible methods that will significantly reduce the substantial risk of severe pain that Rogers faces from lethal injection. While these two methods are not currently implemented in Florida, Rogers is not limited to choosing among those methods presently authorized by Florida law, and he may point to a protocol in another state as a potentially viable option. *See Bucklew v. Precythe*, 587 U.S. 119, 139–40 (2019) ("An inmate seeking to identify an alternative method of execution is not limited to choosing among those presently authorized by a particular State's law … So, for example, a prisoner may point to a well-established protocol in another State as a potentially viable option."). At least six states directly authorize by statute the lethal gas method of execution. *See supra* at p. 76. At least three states directly authorize by statute execution by firing squad.[12] Execution by lethal gas or firing squad will significantly reduce the

[12] Those states are Mississippi, South Carolina, and Idaho. *See* Miss. Code § 99-19-51; S.C. Code § 24-3-530; Idaho Code § 19-2716.

substantial risk of severe pain and needless suffering that Rogers faces from lethal injection because these two methods do not implicate the same pain and suffering that lethal injection will cause.[13][14] Rogers will not face the risk of pain associated with lethal

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[13] While undersigned counsel acknowledges that Florida statute authorizes execution by electrocution, that method is not being offered as an alternative method for Rogers because that method is unreliable at best and has shown to be tortuous during past executions. Florida's electric chair has not been used for an execution since 1999, and there is no way for Rogers to assess if the chair functions properly prior to his execution because death-sentenced inmates are regularly denied their Fla. R. Crim. P. 3.852 requests for records related to FDOC's execution procedures. Rogers has been denied access to records related to FDOC's lethal injection procedures, and he cannot assume that his case will be any different if he opts for the electric chair. Additionally, inmates that have been executed via Florida's electric chair have caught on fire. Flames shot out from the hood on Jesse Tafero's face during his 1990 execution by Florida's electric chair. *See Report: Maintenance Workers Switched Sponge for Execution*, South Florida Sun Sentinel (originally published May 9, 1990), https://www.sun-sentinel.com/1990/05/09/report-maintenance-workers-switched-sponge-for-execution/. The mask covering Pedro Medina's face during his 1997 execution by Florida's electric chair burst into flames during his execution. *See* The Associated Press, *Condemned Man's Mask Bursts Into Flame During Execution*, The New York Times (March 26, 1997), https://www.nytimes.com/1997/03/26/us/condemned-man-s-mask-bursts-into-flame-during-execution.html. Catching on fire while being executed constitutes a tortuous and unconstitutional death that Rogers does not intend to choose.

[14] Additionally, subjecting Rogers to lethal injection by substituting one of the other drugs used in other states for etomidate will still subject Rogers to needless pain and suffering in violation of the

injection that would be caused by his exposure to etomidate while having Porphyria. There can be no legitimate penological purpose for Florida's failure to adopt these methods when multiple other states have authorized them by statute. With all this being said, undersigned counsel maintains that Rogers should not be forced to choose an alternative method in the first place, and his execution is unconstitutional full-stop because he has proven that he cannot be safely or humanely executed in Florida.

Rogers' unconstitutional execution by lethal injection is currently scheduled for Thursday, May 15, 2025 at 6:00 p.m., only fifteen days from the filing date of this appellate brief. The risk that Rogers will experience needless pain and suffering could not be more

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Eighth Amendment. The drugs midazolam and pentobarbital have been listed as used for lethal injection in other states. However, as Dr. Zivot has also opined to, these drugs have also been found to cause Porphyria attacks similar to etomidate. Midazolam is a drug classified as a benzodiazepine. Studies have shown that benzodiazepines can induce Porphyria attacks. Pentobarbital is classified as a barbiturate. Drugs in this class are well known to increase the activity of enzymes in porphyrin synthesis, potentially leading to a buildup of porphyrin precursors and triggering a Porphyria attack. There is simply no humane way to execute Rogers via lethal injection due to his Porphyria.

imminent or substantial. Undersigned counsel respectfully submits that this Court must relinquish jurisdiction so that an evidentiary hearing can be held on Rogers' Eighth Amendment method-of-execution claim, so that that this claim may be decided based on complete expert testimony detailing the risks that Rogers faces. Undersigned counsel also respectfully submits that this Court must grant Rogers a stay of execution because his Eighth Amendment method-of-execution claim is a substantial ground upon which relief might be granted and deserves to be fully addressed at an evidentiary hearing that is free from the constraints of an accelerated death warrant schedule. *See Chavez v. State*, 132 So. 3d 826, 832 (Fla. 2014) (internal citations omitted) (explaining that a stay of execution pending the disposition of a successive motion for postconviction relief is warranted when there are substantial grounds upon which relief might be granted); *see also Correll v. State*, 184 So. 3d 478, 482 (Fla. 2015) (granting a stay of execution prior to evidentiary hearing on capital defendant's as-applied challenge to Florida's execution procedures).

The USSC explained in *Glossip* that "[b]ecause capital punishment is constitutional, there must be a constitutional means

of carrying it out." 576 U.S. at 863. There is no constitutional way for Florida to carry out Rogers' execution due the interaction between his Porphyria diagnosis and Florida's use of etomidate. Relief is proper.

CONCLUSION AND RELIEF SOUGHT

Based on the foregoing arguments, Rogers respectfully requests that this Court grant a stay of execution; appoint conflict-free counsel; remand his case for an evidentiary hearing on all claims; vacate his sentence of death; and/or grant any other relief this Court deems appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that on this 30th day of April, 2025, I electronically filed the foregoing with the Clerk of the Circuit Court by using the Florida Courts e-portal filing system which will send a notice of electronic filing to the following: Honorable Christopher C. Sabella, Chief Judge, christina.novia@fljud13.org; the Honorable Michelle Sisco, Circuit Judge, diazcra@fljud13.org; Attorney Dan Sikes, dan.sikes30@gmail.com; John Terry, Assistant State Attorney, terry_j@sao13th.com; mailprocessingstaff@sao13th.com; Stephen Ake, Assistant Attorney General, Stephen.Ake@myfloridalegal.com; Jonathan Tannen, Assistant Attorney General, Jonathan.Tannen@myfloridalegal.com; Christina Pacheco, Assistant Attorney General, Christina.Pacheco@myfloridalegal.com: Scott Browne, Assistant Attorney General, Scott.Browne@myfloridalegal.com:Heather.Davidson@myfloridalegal.com;Stephanie.Tesoro@myfloridalegal.com;Paula.Montlary@myfloridalegal.com Capapp@myfloridalegal.com and the Florida Supreme Court, Kendall Canova, Capital Appeals Clerk, 500 South Duval Street, Tallahassee, Florida 32399, warrant@flcourts.org. WE further certify that the forgoing document was provided to Glen Rogers,

DOC#124400, Union Correctional Institution, P.O. Box 1000, Raiford, FL 32083.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fla. R. App. P. 9.045, we hereby certify that the Initial Brief of the Appellant has been produced in Bookman Old Style 14-point font. This brief complies with the requirements of Fla. R. App. P. 9.210(a)(2)(D), as it has approximately 17, 294 words of the allowed 20,000.

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