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

REPLY BRIEF OF THE APPELLANT

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PRELIMINARY STATEMENT

Appellant, Glen Edward Rogers ("Rogers"), offers the following reply to the Answer Brief of Appellee ("Answer"). Rogers will not reply to every issue and argument raised by the State and will only address the most salient points. Rogers expressly does not abandon any issue not specifically replied to herein and relies upon his Initial Brief of the Appellant ("IB") in reply to any argument or authority not specifically addressed.

References to the current, post-warrant record on appeal are in the form SC/ [page number].

Page references to the Initial Brief are designated with IB at [page number]. Page references to the Answer Brief are designated with AB at [page number].

All other references will be self-explanatory or otherwise explained.

GENERAL ARGUMENT IN REPLY

This Court must review these claims under the proper lens. Rogers is not only sentenced to death. His death warrant has been signed, and an execution date has been set. "[E]xecution is the most irremediable and unfathomable of penalties. . . death is different."

Ford v. Wainwright, 477 U.S. 399, 411 (1986) (citing *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)). The instant case is literally a matter of life or death, because once the State has executed Rogers, he will not have any recourse. Accordingly, this Court must exercise its duty to carefully review cases and prevent an injustice. When post-warrant litigation calls upon this Court to correct past wrongs in circumstances where a death sentence was upheld based on the denial of constitutional rights, this Court can and should intervene.

In the AB at page 8, and later referenced in a footnote on page 30, the State takes issue with Rogers' April 30, 2025 Appendix to Appellant Brief containing documents that were not submitted to the circuit court. The State cites to *Ramsey v. State*, 259 So. 3d 132, 133 (Fla. 4th DCA 2018). First of all, this Court should not be persuaded by a case that lacks any type of controlling authority and comes from an entirely different circuit than Rogers' case. As this Court is well aware, Rogers is litigating under extremely expedited proceedings. Under the exigencies of an active death warrant context, this Court may accept the appendix to appellate briefs irrespective of whether the exact same documents were attached to the Fla. R. Crim. P. 3.851

successive motion on appeal.

Despite the fact that Rogers' death warrant was signed on April 15, 2025 during Holy Week, Rogers still diligently contacted multiple experts, somehow managed to retain two, and timely filed his successive pleadings. Both Dr. Joel Zivot and Dr. Bryanna Fox were thoroughly cited in the successive motion and the substance of their findings was further explained during the case management conference below. SC/625, SC/630-31. Due to the exigent circumstance of receiving the warrant during Holy Week—a week that means a lot to some folks based on their faith and family bonds—Rogers did what he could do; retain experts and present their findings. With more time, after the end of the **Easter** holiday, Rogers managed to secure the thorough written findings of Dr. Fox and Dr. Zivot, respectively. *See* Appendix C and D in IB.

The State similarly challenges the appendix as it pertains to Judge Sisco's Order granting Terance Valentine conflict-free counsel, Appendix A in IB, after the Order itself was thoroughly referenced and discussed during the case management conference below. SC/608-609, SC/615 and SC/620. This Court should not be persuaded that the State has been prejudiced in any way. In fact, the

State is not even alleging prejudice. AB at 8. Tellingly, the State did not file a motion to strike the IB. The AB was timely filed on May 2, 2025, approximately 11-12 minutes after noon. The AB was not due until 3:00 P.M. The AB contains only 40 pages. Three assistant attorneys general signed on the AB as "Respectfully Submitted." AB at 40. Yet, the State alleges that it did not file a formal motion to strike, "given the time restraints of the instant death warrant proceedings." AB at 8. However, that assertion strains credulity considering the brevity of their argument, and their use of available time and resources. The State did not file a formal motion to strike, and they cite no controlling authority in support of its position. The IB before this Court contains issues and arguments preserved below, and nothing in the appendix is a surprise based on the proceedings presented in circuit court. Rogers has been diligent, "given the time restraints of the instant death warrant proceedings." Rogers' appendix is properly before this Court.

REPLY REGARDING STAY

Along with the filing of the AB, the State also filed an Appellee's Response to Rogers' Motion for Stay of Execution. This Court should grant a stay, and remand to the circuit court. A stay and

relinquishment of jurisdiction in these proceedings is required, so that defense expert Dr. Zivot can testify at an evidentiary hearing regarding his findings. Rogers has a unique and serious blood disorder called Porphyria. A full evidentiary hearing is necessary for Dr. Zivot to further opine that the etomidate protocol will cause Rogers unconstitutional pain and suffering during his execution. Crucially, a stay is also needed because Rogers is entitled to conflict-free counsel so that Rogers can litigate claims that Capital Collateral Reginal Counsel ("CCRC-M') cannot ethically or legally pursue. At the very least, this Court should remand to the circuit court so that Rogers and his private attorney, Dan Sikes, can testify under oath about Rogers' claims against CCRC-M. On Friday, May 2, 2025, Rogers filed a pleading in federal district court seeking emergency relief on this issue. A stay is appropriate during these distinct proceedings.

A stay of execution is appropriate "when there are 'substantial grounds upon which relief might be granted.'" *Chavez v. State*, 132 So. 3d 826, 832 (Fla. 2014) (quoting *Buenoano v. State*, 708 So. 2d 941, 951 (Fla. 1998)). This Court may enter a limited stay to meaningfully consider complex legal claims even if, on first

appearance, the possibility of relief appears remote. *See King v. Moore*, 824 So. 2d 127, 128 (Fla. 2002) (Harding, J., concurring) (agreeing with the issuance of a stay due to the "possibility" of merit, despite prior actions by the United States Supreme Court "seemingly send[ing] a clear message" that no relief was due). This Reply Brief is due a mere **ten days** prior to Rogers' scheduled execution, which is clearly an insufficient time period to resolve these complex legal issues.

REPLY TO ARGUMENT I

CCRC-M has an active and ongoing conflict of interest with Rogers. Rogers' case is very distinct, and this Court should reverse based on the circuit court abusing its discretion in denying relief for Rogers' Claim 1. *Weaver v. State*, 894 So. 2d 178, 187 (Fla. 2004). The cases cited in the AB are plainly distinguishable from Rogers' circumstances. In *Howell v. State*, 109 So. 3d 763 (Fla. 2013), the defendant raised the conflict issue while litigating under a death warrant, based on the fact that his collateral counsel shared an office with previous counsel who withdrew due to time barring Howell on a federal deadline. *Id.* Unlike Rogers, Howell had not cutoff communication with his postconviction relevant counsel over three

years prior to the death warrant and spent several years litigating issues against the same collateral counsel in federal court, prior to the warrant being signed.

Unlike Howell, Rogers has made allegations against CCRC-M in his federal pleadings, of which Rogers alleged*: "Rogers has attempted to raise issues regarding the failure of his assigned counsel 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."*[1] SC/552-53. These ongoing allegations are clearly different from the *Howell* case. Nor could granting Rogers relief be a template for future delay tactics. AB at 16. Rogers' is a unique situation, featuring years of ongoing federal litigation before the warrant was signed, in conjunction with severed contact. These circumstances would be hard to duplicate, and this Court's guidance can analyze Rogers' distinct cause for relief versus theoretical future capital claims that are not up to par.

[1] See Amended Verified Complaint Pursuant to 42 U.S.C. § 1983 For Declaratory Judgment, Nominal Damages, Injunctive Relief, and Writ of Mandamus, Case 3:22-cv-00574-TJC-LLL, filed August 15, 2022.

Nor has Rogers been dilatory in raising this argument. AB at 16-17. Rogers/CCRC-M has had no reason to file a successor nor litigate any issues in circuit court since this Court affirmed the denial of Rogers' last successive postconviction motion. *Rogers v. State*, 327 So. 3d 784 (Fla. 2021). The same year as that denial, Rogers ceased contact with CCRC-M. If Rogers had wanted to file a successive motion in circuit court at any point in the past several years, the conflict issue would have been ripe for circuit court review. Rogers did not sign a death warrant on himself. A simple PACER search by those individuals contributing to the decision to sign Rogers' death warrant would have revealed Rogers' federal litigation against CCRC-M. The only reason Rogers is currently litigating a fourth successive motion as provided by the scheduling order of this Court, is because he is litigating for his life under an active death warrant.

Braddy v. State, 219 So. 3d 803, 816-819 (Fla. 2017), is even more distinguishable, as the actual CCRC for the South Region, Neil A. Dupree, alleged a conflict based on the fact that he was a supervising state attorney for the circuit where Braddy entered his guilty plea. *Id.* at 816. There was no past nor pending federal allegations in *Braddy* regarding the conduct and supervision of CCRC

– South during their representation of Braddy. Importantly, CCRC Dupree never stated that his ability to represent Braddy would be impaired based on his prior position. *Id.* at 817. In the case at bar, CCRC-M has continued to explain how the ongoing litigation in federal court, and Rogers' desired post-warrant litigation strategy does indeed impair our ability to represent Rogers due to our adverse interests. The State's reliance on *Remeta v. State*, 707 So. 2d 719 (Fla. 1998) is also misplaced, as that case involved CCRC – South making a claim of conflict based on the legal rhetorical fallout, following CCRC-South's failed attempt to intervene in a federal action. *Id.* at 719-20. CCRC-M is not attempting to intervene in anything federally. Rather, we are the *subject* of ongoing federal litigation, having adverse positions and a conflict of interests to Rogers' federal claims against us.

Regarding Rogers' due process rights, the AB at 20-21 quotes *Barwick v. State*, 361 So. 2d 785, 790 (Fla. 2003) in stating that Rogers was provided "notice and an opportunity to be heard on a matter before it is decided." *Id.* By abusing its discretion in denying Rogers conflict counsel, the circuit court is denying Rogers' due process rights pursuant to the Florida Constitution and federal

Constitution. *See* IB at 19-20. Rogers' federal due process rights are violated, because as Florida provides a system for the appointment of postconviction counsel, the system must provide due process. *See Skinner v. Switzer*, 562 U.S. 521, 531-34 (2011) (finding a due process violation for Skinner, based on Texas not providing a challenge to DNA testing under 42 U.S.C. § 1983). Because Rogers is permitted postconviction counsel pursuant to Florida law, arbitrary interferences with his ability to access the courts with conflict-free counsel violates Rogers's due process rights.

The State's swift treatment of the Terance Valentine situation, AB at 20-21, does not contradict the clear disparate treatment of two defendants who appeared before the exact same circuit Judge Sisco. There is a reason Valentine's case was very "involved and complex," and the two defendants are not necessarily [in] the same situation." AB at 20-21, citing Judge Sisco at SC/615. It is because of the permitted conduct of Terance Valentine. In the 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 in IB at 1. Indeed, a substitution of conflict-free counsel should be granted for Rogers in the "interests of justice." *Christeson v. Roper*,

574 U.S. 373, 377 (2015). Importantly, *Christeson* at 378 also cites *Maples v. Thomas*, 565 U.S. 266, 285-86, n. 8 (2012), "significant conflict of interest" arises when an attorney's "interest in avoiding damage to [his] own reputation" is at odds with his client's "strongest argument—*i.e.,* that his attorneys had abandoned him." CCRC-M is in the position of avoiding damage to our own representation, because our position is at odds with Rogers' litigation strategy under his death warrant.

Rogers thoroughly explained the privilege allotted to Valentine in the IB at 19-24, in contrast to how Judge Sisco has determined Rogers' claim. Defendant Valentine was granted conflict-free counsel by the same Judge Sisco, 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 in IB 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 in IB 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 in IB at 4. Valentine was not done alleging conflicts and taking advantage of the system. 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 in IB 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. As Florida permits postconviction counsel for capital defendants, 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 has not abused the postconviction

process, having been represented by CCRC-M for the entirety of his postconviction proceedings. Subsequent to being appointed as conflict-free counsel, Attorney Parmer filed two successive postconviction motions for Valentine in circuit court. This Court affirmed the denial of relief for both. *Valentine v. State*, 296 So. 3d 375 (Fla. 2020); *Valentine v. State*, 339 So. 3d 311 (Fla. 2022). Rogers was only litigating a successive motion in circuit court because of the exigencies of this Court's death warrant schedule. Now, Rogers must have the same rights and privileges as Judge Sisco granted Valentine.

Rogers has a constitutional right to litigate his conviction and sentence with conflict-free counsel. He wants to challenge the quality of his postconviction representation, among other issues regarding the performance and monitoring of CCRC-M. Rogers and undersigned counsel have adverse positions. Rogers is permitted to challenge controlling precedent regarding this issue. If a capital defendant, under an active death warrant or otherwise, is disallowed from challenging adverse authority, virtually no claims would be permitted for capital defendants to litigate. Our adversarial criminal justice system demands more. Relief is proper.

REPLY TO ARGUMENT II

Rogers has alleged compelling newly discovered evidence to warrant relief by this Court. The circuit court and the AB rely on the time limitation and procedural bar components of Fla. R. Crim P. 3.851 to deny review of this claim. First of all, contrary to the arguments in the AB at 27-28, Roger's challenge of the procedural bar is properly before this Court. The circuit court rejected that CS/CS/HB 1283 was newly discovered evidence, and its analysis in relying on a perceived procedural bar created an appellate issue for this Court's review. SC/656-59.

Regarding the timeliness and procural bar components of Rule 3.851, this Court must reconsider how those dictates are applied in the post-warrant context. This difference in circumstances is at least implicitly acknowledged by the fact that Florida Rule of Criminal Procedure 3.851 includes a separate section specifically for "After Death Warrant Signed." Fla. R. Crim. P. 3.851(h). This section acknowledges that the post-warrant context is different, for example stating that "[p]roceedings after a death warrant has been issued shall take precedence over all other cases" for the purpose of scheduling. Fla. R. Crim. P. 3.851(h)(2). The current procedural rules under which Rogers must now litigate his final effort to preserve his

life do not go far enough in acknowledging how different the post-warrant context is, and they are unconstitutional when applied to Rogers in his current warrant litigation. Rogers' Eighth Amendment claim is timely and should be considered by this Court. To the extent this Court may rely on *Ford v. State*, 402 So. 3d 973, 977-78 (Fla. 2025) to deny relief on this issue, that decision should plainly be reconsidered.

The AB's reliance on *Cole v. State*, 392 So. 3d 1054 (Fla. 2024) in denying this claim is misplaced. In *Cole*, Appellant alleged CS/HB 21 – Dozier School for Boys and Okeechobee School Victim Compensation Program was newly discovered evidence which would probably yield a less severe sentence in a new penalty phase proceeding, because if Cole's jury in a new penalty phase proceeding was made aware of the fact that Florida itself helped cause the debilitating mitigating factors that explain Cole's crimes, such a jury would probably recommend a life sentence. Regarding Rogers, CS/CS/HB 1283 is clearly based on the concepts of crime and punishment, and importantly, capital punishment. CS/CS/HB 1283 - Capital Human Trafficking of Vulnerable Persons for Sexual Exploitation, 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." Rogers was a vulnerable person who was raped, sexually exploited, and trafficked while he was young child with a developing brain.

If this Court believes *Cole* is controlling on this issue, this Court should reconsider the precedent. This Court has been more than willing to set aside precedent, to instead apply what this Court found was a correct standard of law. Reaching the correct application of the law has been of paramount importance for this Court. It is no less important here based on the injustice that Rogers has suffered.

In *State v. Maisonet-Maldonado*, 308 So. 3d 63 (Fla. 2020), this Court receded from cases which had held that double jeopardy principles preclude more than one conviction that is predicated on a victim's death per victim. In *Roughton v. State*, 185 So. 3d 1207 (Fla.

2016), this Court receded from precedent which had set out principles for double jeopardy analysis.

In *State v. Poole*, 297 So. 3d 487 (Fla. 2020), this Court receded from *Hurst v. State,* 220 So. 3d 304 (Fla. 2016), except to the extent that it held that a jury must unanimously find the existence of a statutory aggravating circumstance beyond a reasonable doubt and reversed the portion of the trial court's order setting aside Poole's sentence. *Id.* at 491.

In *Bush v. State*, 295 So. 3d 179 (Fla. 2020) this Court abandoned the "circumstantial evidence rule" *Id.* at 201. "For more than one hundred years, this Court . . . applied a more stringent standard of review in reviewing convictions supported only by circumstantial evidence." *Id.* at 216, (Labarga, J concurring in part and dissenting in part). In *Phillips v. State*, 299 So. 3d 1013 (Fla. 2020) this Court receded from *Walls v. State*, 213 So. 3d 340 (Fla. 2016). *Id.* at 1022. This Court relied on the language from *Poole*. *Id.* 1023–24.

In *Lawrence v. State*, 308 So. 3d 544 (Fla. 2020), this Court overruled years of precedent and its own Rule of Appellate Procedure 9.142(a)(5) to hold that comparative proportionality is no longer

required to be conducted by this Court. *Id.* at 549. This Court explained that "[the] precedent is erroneous and must yield to our constitution." *Id.* at 548. If overcoming stare decisis was correct in those cases to reach a just outcome, it should be no less available to Rogers.

Particularly in *Phillips*, by receding from *Walls*, this Court rejected the finding of *Hall v. Florida*, 572 U.S. 701 (2014) retroactive to Florida's capital litigants. That decision made it more difficult for intellectually disabled capital defendants to challenge the constitutionality of their sentence, merely based on where their case falls on a calendar. This Court exercised its power and authority to conduct a constitutional analysis, with the result potentially making it easier for intellectually disabled capital litigants to be executed. Precedent was no hinderance to this Court receding from controlling authority. Clearly, this Court can use its ability for analysis to recede from any precedent that denies relief to a sexually abused and exploited capital defendant like Rogers. New evidence establishes that Florida clearly takes the safety and wellbeing of sexually exploited and trafficked children seriously. Rogers' case provides tragic and compelling mitigation which warrants relief. It all comes

down to this Court's discretion and review in upholding constitutional principles. Relief is proper.

REPLY TO ARGUMENT III

As an initial matter, the State asserts that "Rogers improperly attached an affidavit from Dr. Zivot to his Initial Brief. Despite the affidavit being prepared on April 18, 2025, prior to the filing of Rogers' successive motion, Rogers did not attach it to his motion and it is therefore not part of the record on appeal." AB at 30, note 8. The State's assertions are incorrect. Rogers did not improperly attach Dr. Zivot's affidavit to his April 30, 2025 Initial Brief of Appellant and Dr. Zivot's substantively identical findings were considered by the lower court and are in the record on appeal.

Dr. Zivot's affidavit is originally dated April 18, 2025, and his findings in that affidavit were incorporated into the April 20, 2025 successive Rule 3.851 motion. However, due to the extreme time constraints of litigating a warrant deadline during the Easter holiday, undersigned counsel was not able to secure Dr. Zivot's final signed and notarized affidavit until April 26, 2025.[2] Despite these extreme

[2] The due date for Rogers' successive Rule 3.851 motion was Easter Sunday, April 20, 2025. Rogers' death warrant was signed on April

time constraints, Dr. Zivot's findings were still incorporated into the Rule 3.851 motion and were properly submitted to the lower court for consideration. The findings alleged in the Rule 3.851 motion and in the record on appeal are substantively identical to the findings that Dr. Zivot eventually signed and notarized in his affidavit and are further identical word for word in nearly the entire affidavit. *Compare* SC/461-63, 467 *with* Appendix D in IB at paragraphs 7-14. There is no prejudice to the State if this Court considers Dr. Zivot's substantively identical findings that were already considered by the circuit court.

Further, this Court has previously considered additional evidence submitted during an appeal in the active warrant context that was not previously submitted to the circuit court, During active warrant litigation in *Davis v. State*, this Court explained that

> Davis appealed the circuit court's order, arguing that the circuit court erred in summarily denying his three claims, and also filed a motion for stay of execution. ***Along with his motion for stay of execution, Davis attached an affidavit, which he had not produced during the circuit court proceedings, alleging that he suffers***

15, 2025. Including the day the warrant was signed, undersigned counsel therefore only had six days from the signing of the warrant to the Rule 3.851 deadline, including two weekend days and Easter Sunday.

> ***from the medical condition porphyria,*** and that the use of midazolam hydrochloride as the first drug of Florida's lethal injection protocol, as applied to him, is unconstitutional. Specifically, the affidavit of Dr. Joel Zivot stated that it is his expert medical opinion "that a substantial risk exists that, during the execution, Mr. Davis will suffer from extreme or excruciating pain as a result of abdominal pain, tachycardia, hypertension, nausea, and vomiting."

Davis v. State, 142 So. 3d 867, 870 (Fla. 2014) (emphasis added). This Court further explained that "[b]ased on the allegations in [Dr. Zivot's] affidavit and our constitutional obligation to ensure that the method of lethal injection in this state comports with the Eighth Amendment, we relinquished jurisdiction to the circuit court." *Id.* at 870. This Court clearly considered Davis's new allegations related to his Porphyria raised for the first time in an affidavit submitted during his appeal important and timely enough to relinquish jurisdiction so the lower court could address those allegations. This Court should therefore have no issue considering Dr. Zivot's opinions concerning Rogers' Porphyria, which are substantively identical to those already submitted to the lower court and are now simply being reiterated in his formalized affidavit during this appeal.

The State cites Fla. R. Crim. P. 3.851(d)(2)(A) to argue that Rogers' as-applied challenge to lethal injection based on his

Porphyria diagnosis is untimely because Rogers has known about his Porphyria diagnosis for decades. AB at 30-31. As thoroughly outlined in the IB, 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. IB at 63-67. Denying Rogers the opportunity to fully litigate his as - applied challenge to lethal injection based on an unconstitutionally stringent procedural bar when his execution by lethal injection is imminently scheduled violates his due process rights under both the federal and Florida Constitution. *See* IB at 64-67.

The fact that Rogers has known about his Porphyria diagnosis for decades cannot and should not preclude him from litigating the constitutionality of his execution by lethal injection because there is no way that he could have reasonably known which execution procedures would apply to him until his active 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* IB at 59.

Even though, as the State points out, the current February 18, 2025 and previous March 10, 2023 Florida Department of Corrections lethal injection protocols are materially similar, there was still no way for Rogers to know which protocols would actually apply to him until his active death warrant was signed. *See* AB at 31.

To require that Rogers and all Florida capital defendants file a method-of-execution claim the moment that they develop a physical health condition that may interact with lethal injection does not take into account the fact that certain medical conditions can fluctuate over time and that Florida currently issues new lethal injection protocols every two years with no previous notice as to whether the protocols will show substantive change until they are issued.

The State cites to this Court's opinions in *Cole v. State* and *Tanzi v. State,* finding that those defendants' as-applied claims were untimely when raised in the active warrant context because those

defendants' medical conditions were present in some form prior to their death warrant being signed. *See* AB at 32-33 (citing *Cole v. State*, 392 So. 3d 1054 (Fla. 2024) and *Tanzi v. State*, No. SC2025-0371, 2025 WL 971568 (Fla. Apr. 1, 2025)). Rogers acknowledges the current state of the law concerning this matter. Rogers respectfully submits that requiring that capital defendants must raise method-of-execution claims prior to the signing of their active death warrants simply because they have a medical condition that may at some point affect their potential execution many years in the future forces those defendants to potentially raise claims that are unripe, premature, and could result in repeated, piecemeal litigation.

Contrary to the State's assertions on the merits of his as-applied challenge, Rogers has raised a valid and legitimate method-of-execution claim because the interaction of Florida's administration of etomidate with Rogers' Porphyria will cause him to have a painful Porphyria attack, resulting in needless pain and suffering. *See* IB at 67-79; *Glossip v. Gross*, 576 U.S. 863 (2015); *Baze v. Rees*, 553 U.S. 35 (2008). The State argues that Rogers' claim is meritless because it fails to "explain how his speculative cascade of events overcomes the well-established fact that the first injection of etomidate will

render him unconscious likely within one minute." AB at 36 (citing *Asay v. State*, 224 So. 3d 695, 701 (Fla. 2017) ("Intravenous injection of etomidate produces hypnosis characterized by a rapid onset of action, usually within one minute.").

Notably, Asay was not raising an as-applied challenge to the etomidate protocol based on any Porphyria diagnosis, and his case was decided after a full and fair evidentiary hearing where his defense expert was allowed to testify concerning his challenge to the etomidate protocol. *See Asay*, 224 So. 3d at 701. *Asay's* discussion of the potential hypnotic effect of etomidate in a case factually distinct from Rogers' case should not be substituted for the qualified expert testimony of Dr. Zivot concerning the unique interaction of etomidate and Rogers' Porphyria. Rogers has established that he cannot be constitutionally executed in Florida due to his Porphyria diagnosis. Relief is proper.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of May, 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, Florida State Prison, P.O. Box 500, Raiford, FL 32083.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fla. R. App. P. 9.045, I hereby certify that the Reply Brief of the Appellant has been produced in Bookman Old Style 14-point font. Pursuant to Fla. R. App. P. 9.210(a)(2)(D), this brief is not subject to word count and instead complies with the page limit as it does not exceed 25 pages.

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