No. _____

IN THE

Supreme Court of the United States

GLEN EDWARD ROGERS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Florida

PETITION FOR A WRIT OF CERTIORARI

THIS IS A CAPITAL CASE
WITH AN EXECUTION SCHEDULED FOR
THURSDAY, MAY 15, 2025, AT 6:00 P.M.

ALI A. SHAKOOR*
FLORIDA BAR NO.: 0669830
EMAIL: SHAKOOR@CCMR.STATE.FL.US

ADRIENNE JOY SHEPHERD
FLORIDA BAR NO.: 1000532
EMAIL: SHEPHERD@CCMR.STATE.FL.US

LAW OFFICE OF THE CAPITAL COLLATERAL
REGIONAL COUNSEL - MIDDLE REGION
12973 NORTH TELECOM PARKWAY
TEMPLE TERRACE, FLORIDA 33637
PHONE: (813) 558-1600
SECONDARY EMAIL: SUPPORT@CCMR.STATE.FL.US

**Counsel of Record*

CAPITAL CASE

QUESTIONS PRESENTED

Glen Edward Rogers is currently facing execution in Florida while suffering from the effects of Porphyria disease, a blood disorder. The state courts violated Rogers' Due Process and Equal Protection rights pursuant to the Fourteenth Amendment to the United States Constitution, by not allowing him to fully develop the facts at an evidentiary hearing on his as-applied challenge to Florida's lethal injection procedures raised under *Glossip v. Gross*, 576 U.S. 863 (2015) and *Baze v. Rees*, 553 U.S. 35 (2008). Accordingly, Rogers raises the following issues:

1. Whether Florida's successive pleading requirements under Florida Rule of Criminal Procedure 3.851(d) violate a capital defendant's due process rights, when applied in a post-warrant context.
2. Whether Florida courts violated Rogers' Fourteenth Amendment Due Process and Equal Protection rights by failing to hold an evidentiary hearing on his as-applied challenge to lethal injection.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page. Petitioner, Glen Edward Rogers, a death-sentenced Florida prisoner, was the appellant in the Supreme Court of Florida. Respondent, State of Florida, was the appellee in the Supreme Court of Florida.

LIST OF RELATED CASES

Trial
Circuit Court of the Thirteenth Judicial Circuit, in and for Hillsborough County, Florida
State of Florida v. Glen Edward Rogers; Case No. 95-CF-15314
Verdict entered: May 7, 1997. Guilty as charged with 1 count of First-Degree Murder, 1 count of Armed Robbery and 1 count of Grand Theft of a Motor Vehicle. Death sentence imposed on July 11, 1997

Direct Appeal
Florida Supreme Court Case No. SC1960-91384
Rogers v. State, 783 So. 2d 980 (Fla. 2001).
Judgment entered: March 1, 2001; Rehearing denied: April 21, 2001

Appeal of Denial of State Habeas Corpus Relief (Extradition)
Florida Supreme Court Case No. SC1960-92137
Rogers v. State, 717 So. 2d 460 (Fla. 1998).
Judgment entered: May 14, 1998; Rehearing denied: September 10, 1998

Denial of 3.851 Motion for Postconviction Relief
Hillsborough County Circuit Court Case No. 1995-CF-15314
Order Denying Amended 3.851 Motion for Postconviction
Relief filed by Judge Rex Barbas on March 8, 2005

Appeal of Denial of Postconviction Relief and State Petition for Habeas Corpus
Florida Supreme Court Case Nos. SC2005-732 & SC2005-1730
Rogers v. State, 957 So. 2d 538 (Fla. 2007).
Judgment entered: January 18, 2007; Rehearing denied: March 24, 2007

Denial of Stay of Federal Habeas Corpus Proceedings
U.S.D.C.-Middle District Case No. 8:07-cv-1365-T-TGW

Doc. 22
Filing # 221149393 E-Filed 04/16/2025 12:50:51 PM
Rogers v. McNeil, 2008 WL 5210922 (M.D. Fla. Dec. 11, 2008) (unpublished).

Denial of Federal Habeas Relief and Certificate of Appealability
U.S.D.C.-Middle District Case No. 8:07-cv-1365-T-TGW
Docs. 25 and 31
Rogers v. Sec'y, Dept. of Corr., et al., 2010 WL 668261 (M.D. Fla. Feb. 19, 2010) (unpublished)

Eleventh Circuit Court of Appeals Denial of COA
11th Circuit USCA Case No. 10-11246-P
Rogers v. Sec'y, Fla. Dep't of Corr., et al., No. 10-11246, slip op. (11th Cir. June 11, 2010)

Denial of Certiorari
United States Supreme Court Case No. 10-7259
Rogers v. McNeil, 562 U.S. 1149 (2011).
Denial entered: January 10, 2011

Denial of Successive Postconviction Motion
Hillsborough County Circuit Court Case No. 1995-CF-15314
Final Order Denying Defendant's Successive Motion for Postconviction Relief by Judge Susan Sexton on Sept. 15, 2011.

Appeal of Denial of Successive Postconviction Motion
Florida Supreme Court Case No. SC2011-2150
Rogers v. State, 97 So. 3d 824 (Fla. 2012).
Judgment entered: July 13, 2012

Denial of Application to File Second or Successive Habeas Corpus Petition
11th Circuit USCA Case No. 12-14137-P
In re: Glen Edward Rogers, Sept. 6, 2012

Denial of Second Successive Postconviction Motion-*Hurst*
Hillsborough County Circuit Court Case No. 1995-CF-15314
Order Denying Defendant's Second Successive Motion to Vacate Death Sentence by Judge Michelle Sisco on March 30, 2017

Appeal of Denial of Second Successive Postconviction Motion-*Hurst*

Florida Supreme Court Case No. SC2017-945
Rogers v. State, 235 So. 3d 306 (Fla. 2018)
Judgment entered: January 30, 2018

Denial of Third Successive Postconviction Motion
Hillsborough County Circuit Court Case No. 1995-CF-15314
Order Denying Third Successive Motion to Vacate Judgment of Conviction and Sentence of Death by Judge Michelle Sisco on November 23, 2020.

Appeal of Denial of Third Successive Postconviction Motion
Florida Supreme Court Case No. SC2020-1863
Rogers v. State, 327 So. 3d 784 (Fla. 2021)
Judgment entered: October 21, 2021

Denial of Fourth Successive Postconviction Motion – After Signed Death Warrant
Hillsborough County Circuit Court Case No. 1995-CF-15314
Final Order Denying Defendant's Successive Motion to Vacate Judgments of Conviction and
Sentence of Death, and for CCRC-Middle to Withdraw, and for the Appointment of Conflict-Free Counsel, filed by the Honorable Michelle Sisco, Circuit Judge.
Judgment entered: April 25, 2025

Appellant's Motion for Stay of Execution and Relinquishment of Jurisdiction to State Circuit Court
Florida Supreme Court
Rogers v. State, ---So. 3d ---(Fla. 2025); Case Number: SC2025-0585
Judgment entered: May 8, 2025

Appeal from denial of postconviction motion
Florida Supreme Court
Rogers v. State, ---So. 3d ---(Fla. 2025); Case Number: SC2025-0585
Judgment entered: May 8, 2025

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IN THE SUPREME COURT OF THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI

Glen Edward Rogers ("Rogers") respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Florida.

OPINIONS BELOW

This is a petition regarding the errors of the Supreme Court of Florida in affirming the Circuit Court of the Thirteenth Judicial Circuit, in and for Hillsborough County, Florida's order denying Defendant's Successive Motion to Vacate Judgments of Conviction and Sentence of Death, and for CCRC-Middle to Withdraw, and for the Appointment of Conflict-Free Counsel. The opinion at issue is unreported and reproduced at Appendix A.

JURISDICTION

The opinion of the Supreme Court of Florida was entered on May 8, 2025. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment provides: Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment provides: No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

I. Procedural History

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. 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's father was an alcoholic who physically abused Rogers's 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's motion for a mistrial after witnesses testified during the penalty phase regarding Rogers's 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 the Florida Supreme 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's

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. The Florida Supreme Court affirmed the lower court. Rogers was denied relief on the following postconviction claims:

> (1) whether the circuit court erred in denying Rogers's 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's 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's 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's 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's 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. The Florida Supreme 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.

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. The Florida Supreme 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. The Florida Supreme 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. The Florida Supreme Court affirmed the denial of relief. *See Rogers v. State*, 327 So. 3d 784 (Fla. 2021).

The governor of Florida signed Rogers's 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/undersigned counsel to withdraw and have conflict-free counsel appointed. On April 21, 2025, the circuit court subsequently filed an Order Memorializing Order Ruling 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's 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 Easter Sunday, 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's successive claims for relief. The circuit court issued its order summarily denying all relief on April 25, 2025. The Florida Supreme Court denied all relief, with an opinion rendered on May 8, 2025. See Appendix A. This petition follows.

REASONS FOR GRANTING THE PETITION

Timeliness and Due Process

Florida erred in stating that Rogers's claim is time-barred. *See* Appendix A at 20-22. Rogers's Porphyria disease is a complicated blood disorder, which has negatively affected his liver, causing it to likely worsen over time. In Rogers's case, his liver has been negatively affected. It would be premature for Rogers to raise this challenge before a death warrant is signed, because his condition can cause liver deterioration and his claims would be unripe. *See Panetti v. Quarterman*, 551 U.S. 930, 943 (2007). Just as this Court understood that mental conditions can vary over time in considering insanity to be executed, the same logic applies to physical conditions that would prevent executions in accordance with Eighth Amendment principles.

Before reaching the actual merits of Rogers's as-applied challenge, the Florida state circuit court found that Rogers's 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. The Florida Supreme Court upheld the circuit court's finding that Rogers's claim based on his Porphyria was untimely. *See* Appendix A at 20-22. Florida'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 unconstitutionality of Rule 3.851(d)(2) when applied in the active warrant context.

First, the facts underlying Rogers's 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. Rogers 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's April 15, 2025 death warrant. Rogers's as-applied challenge therefore does fall within the one-year requirement under Florida's Fla. R. Crim. P. 3.851(d)(2).

Both the Florida state circuit court and the Florida Supreme Court point 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. Appendix A at 22. 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.

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. 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 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.[1] 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 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 the United States Constitution when applied in the active warrant context because the

[1] 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.

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's current case, effectively violates Rogers's Due Process rights under the Fourteenth Amendment.

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 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 find Fla. R. Crim. P. 3.851(d)(2) unconstitutional 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. "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 Florida 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 their last opportunity to litigate for their very life. Rogers's 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 Florida further denied Rogers an opportunity to be heard in a meaningful manner on his as-applied claim by denying him an evidentiary hearing.

Further, in arbitrarily denying Rogers an evidentiary hearing on this issue in violation of Rogers's right to due process and equal protection, as other similarly situated defendants received evidentiary hearings, Florida has not asserted an adequate and independent state ground to foreclose this Court from considering relief. *See Hathorn v. Lovorn*, 457 U.S. 255, 263 (1982). As the next section demonstrates, the procedural bar on Rogers has not always been strictly or regularly followed in Florida.

The Florida courts violated Rogers's Eighth Amendment rights and Fourteenth Amendment Due Process and Equal Protection rights by failing to hold an evidentiary hearing on his as-applied challenge to lethal injection.

The Florida courts violated Rogers's right to due process and equal protection by treating his as-applied challenge to lethal injection differently than other post-warrant Florida defendants raising similar claims. The Florida Supreme Court

refused to relinquish jurisdiction for an evidentiary hearing on Rogers's as-applied challenge, despite doing so in several other separate cases that were also under active death warrants. Rogers has the same constitutional right to present his expert testimony while under an active death warrant.

Shortly after the warrant was signed, Rogers 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 Florida's administration of the drug etomidate and Rogers's Porphyria.

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's medical records and Florida's lethal injection procedures, and he can opine at an evidentiary hearing on remand. Dr. Zivot's affidavit of findings related to Roger's Porphyria disease is attached as Appendix C. If properly granted an evidentiary hearing, Dr. Zivot will further opine about why Roger's disease prevents him from being executed in a constitutional manner. *See* Appendix B.

Rogers should have the right to present his expert's testimony at an evidentiary hearing like past similarly situated capital defendants. In 2014, the Florida Supreme 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 the Florida Supreme Court … the Florida Supreme Court relinquished jurisdiction for an evidentiary hearing." *Howell v. State*, 133 So. 3d 511, 515 (Fla. 2014). Rogers raised a factual as-applied challenge based on evidence of his Porphyria disease that had not been considered by the Florida Supreme Court previously. Rogers should have been afforded the same opportunity for an evidentiary hearing as Howell, yet Florida denied Rogers that opportunity.

Again in 2014, the Florida Supreme 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 state 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 have been afforded the same opportunity for an evidentiary hearing as Henry, yet the FSC denied Rogers that opportunity.

A third time in 2014, the Florida Supreme 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). The Florida Supreme Court explained that the 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.* Florida had the same constitutional obligation in Rogers's case that was recognized by the court in Davis's case, and Rogers should have been afforded the same opportunity for an evidentiary hearing as Davis. Florida denied Rogers the opportunity. The disparate treatment is more apparent considering that Rogers has Porphyria like Davis. Rogers being older than Davis, 62 versus 45, along with the ailments described by Dr. Zivot in Appendix C, increases the likelihood that Rogers's uninterrupted execution would be unconstitutional.

Finally, in 2015 the Florida Supreme 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, the Florida Supreme 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 also filed a motion to stay his proceedings and execution with his appeal to the Florida Supreme Court so that a

full and fair evidentiary hearing could be held on his as-applied challenge to Florida's execution procedures. Rogers should have been afforded the same opportunity as Correll for an evidentiary hearing and should have been granted a stay of execution so that a full and fair evidentiary hearing could be conducted. Florida denied Rogers that opportunity.

Rogers should have been afforded the same opportunity for an evidentiary hearing on his as-applied claim that Florida gave Howell, Henry, Davis, and Correll. Those 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. Rogers only brings up those Florida state cases to highlight the fact that Florida's procedural bar has not always been strictly and regularly followed. It also demonstrates that Florida has denied Rogers's equal protection rights under the Fourteenth Amendment.

Equal Protection

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). Capital defendants have a fundamental right to due process and equal protection of the laws. When a state draws a distinction between those capital defendants who will receive the benefit of a constitutionally valid due process procedure pursuant to the Eighth Amendment, and those who will not, the state's justification for the distinction must satisfy strict scrutiny. The distinction made by

the state courts in Florida cannot meet that standard. *See Dep't of Agriculture v. Moreno*, 413 U.S. 528, 538 (1973).

Regarding the status of a class of one, this Court 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). *See also Clubside, Inc. v. Valentin*, 468 F.3d 144, 159 (2d Cir. 2006) (requiring an "extremely high degree of similarity" between the plaintiff and those similarly situated).

Florida courts have similarly violated Rogers's constitutional rights. Rogers is being treated differently from similarly situated capital litigants under a death warrant. The unequal treatment Rogers would receive if he were executed would further violate Rogers's rights to equal protection and fundamental fairness.

Analogous to *Panetti*

Rogers has not been afforded basic constitutional due process to prove his claim in state court. By analogy, this Court understood the necessity of due process in affording capital defendants' protections when subjected to the death penalty in *Panetti v. Quarterman*, 551 U.S. 930 (2007).:

> Justice Powell's concurrence, which also addressed the question of procedure, offered a more limited holding. When there is no majority opinion, the narrower holding controls. See *Marks v. United States,* 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977). Under this rule Justice Powell's opinion constitutes "clearly established" law for purposes of § 2254 and sets the minimum procedures a State must provide to a prisoner raising a *Ford*-based competency claim.
>
> **[9]** Justice Powell's opinion states the relevant standard as follows. Once a prisoner seeking a stay of execution has made "a substantial threshold showing of insanity," the protection afforded by procedural due process includes a "fair hearing" in accord with fundamental fairness. *Ford,* 477 U.S., at 426, 424, 106 S.Ct. 2595 (opinion concurring in part and concurring in judgment) (internal quotation marks omitted). This protection means a prisoner must be accorded an "opportunity to be heard," *id*., at 424, 106 S.Ct. 2595 (internal quotation marks omitted), though "a constitutionally acceptable procedure may be far less formal than a trial," *id.,* at 427, 106 S.Ct. 2595. As an example of why the state procedures on review in *Ford* were deficient, Justice Powell explained, the determination of sanity "appear[ed] to have been made *solely* on the basis of the examinations performed by state-appointed psychiatrists." *Id.,* at 424, 106 S.Ct. 2595. "Such a procedure invites arbitrariness and error by preventing the affected parties from offering contrary medical evidence or even from explaining the inadequacies of the State's examinations." *Ibid.*
>
> Justice Powell did not set forth "the precise limits that due process imposes in this area." *Id*., at 427, 106 S.Ct. 2595. He observed that a State "should have substantial leeway to determine what process best balances the various interests at stake" once it has met the "basic requirements" required by due process. *Ibid*. These basic requirements include an opportunity to submit "evidence and argument from the prisoner's counsel, including expert psychiatric evidence that may differ

from the State's own psychiatric examination." *Ibid.*

Id. at 949-50. Rogers should be afforded the same due process considerations, as his as-applied challenge implicates the constitutionality of his execution, similarly to a person with a mental condition that would forbid capital punishment. This Court clearly appreciates the need for testimonial evidence when assessing whether a person is too mentally insane to be executed. *Panetti* simply reaffirms that *Ford v. Wainwright*, 477 U.S. 399, 424-27 (1986) demands minimum due process requirements to fully protect a capital defendant's rights. Now, almost forty years later, Florida is still violating the rights of capital defendants when it comes to allowing them to present execution-related claims. Just as this Court had to intervene and correct Florida's unconstitutional practices in *Ford*, Rogers asks this court to grant this writ. Florida is still denying capital defendants their basic due process when it comes to challenging the constitutionality of their execution under the Eighth Amendment.

Evidentiary Hearings in Other Circuits

Other jurisdictions have provided evidentiary hearings for capital defendants challenging the constitutionality of their executions. On the other hand, some jurisdictions have indeed denied their capital defendants the right to evidentiary hearings like Florida. However, here, Rogers argues about Florida's unconstitutional neglect on this issue. More specifically Rogers pleads for this Court's intervention, while under an active death warrant. In this section, whether terms like "trial" are being used, or the courts simply reference the recorded testimony, the relevant issue

is that Rogers has been denied the same right to present expert testimony as similarly situated capital defendants.[2]

In *State v. Webb*, 252 Conn. 128 (2000), the Supreme Court of Connecticut affirmed the denial of relief, but only following a remand by the same court, so that an evidentiary hearing could be held for Webb to challenge the constitutionality of his execution. *Id.* at 130, 132-33, 142-44. Rogers is not asking this Court to decide the merits of his issue. Rather he is simply asking for an evidentiary hearing to present his expert testimony.

Petitioners in *Cooey v. Strickland*, 589 F.3d 210 (6th Cir. 2009) received the benefit of an evidentiary hearing as Ohio litigants, prior to the federal district court denying their relief. *Id.* at 216-218, 231. *Cooey* being a federal district court case should peak the attention of this Court. The extensive record presented to the court for review in *Cooey* highlights what basic due process Rogers is requesting, simply litigating a need to present the testimony of Dr. Zivot at an evidentiary hearing.

This very Court decided *McGehee v. Hutchinson*, 581 U.S. 933 (2017), an Arkansas case in 2017 where the federal district court in Arkansas held a four-day hearing on the lethal injection protocol issue: "After a four-day evidentiary hearing at which seventeen witnesses testified and volumes of evidence were introduced, the District Court issued an exhaustive 101-page opinion enjoining petitioners'

[2] Though this section will focus on how other jurisdictions have provided the right to present expert testimony in a recorded hearing, Rogers incorporates the legal argument pertaining to due process and equal protection cited above, in relation to this section about other jurisdictions' treatment of this overall issue.

executions. The court found that Arkansas' current lethal-injection protocol posed a substantial risk of severe pain and that petitioners had identified available alternative methods of execution. The Eighth Circuit reversed these findings in a six-page opinion." *Id.;* (See Justice Sotomayors dissenting from denial of application for stay and denial of certiorari). Again, Rogers only has one witness at this time, Dr. Joel Zivot. Nothing close to a 17-witness evidentiary hearing is even being contemplated. Although this Court denied certiorari for the Petitioners, it is important to note that that Petitioners' home state of Arkansas held a substantive evidentiary hearing regarding the issue.

In *Abdur'Rahman v. Parker*, 558 S.W.3d 606, 612 (2018), the Supreme Court of Tennessee reviewed the record after the trial court allowed a ten-day "trial" related to the lethal injection protocols, after Tennessee changed the lethal injection protocol the same year. Litigants alleged they discovered the change on the eve of trial. *Id.* at 617. Also, the defendants in *Abdur* were under set execution dates similar to a warrant situation. *Id.* at 611-12, 617.

Another district court, this time in Oklahoma, also reviewed the findings of a testimonial record regarding the constitutionality of lethal injection protocols. *Glossip v. Chandler*, No. CIV-14-0665-F, 2022 WL 1997194 (W.D. Okla. June 6, 2022). Ultimately, the court denied the defendants' request for relief regarding the constitutionality of the protocols, but a trial was conducted where witnesses were presented; the trial included experts as well as witnesses of other executions that had occurred that same year. *Id.* Rogers does not desire to offer lay witnesses, nor

litigate the issue of other Florida executions at this juncture. He wants fundamental fairness and due process.

Lastly, recently in South Carolina, the state stopped using the lethal injection method due to not having the drugs available and moved to electrocution and firing squad instead. Still, a challenge was made to the constitutionality of these methods due to Eighth Amendment violations involved in such methods. Just last year, in *Owens v. Stirling*, 443 S.C. 246 (2024), reh'g denied (Aug. 16, 2024), the South Carolina Supreme Court issued an opinion based on reviewing the record, after the lower court had allowed a hearing where expert testimony was presented on the issue. *Id.* at 264, 273-278, 285. Rogers similarly requests an evidentiary hearing to prove his claims challenging the constitutionality of his execution.

The way these other jurisdictions have treated issues regarding the access to and right to an evidentiary hearing for capital defendants challenging their executions under the Eighth Amendment, shows that Rogers's case is the proper vehicle to resolve the questions presented. The jurisdictions represent various regions of the country, at both the state and federal level. Rogers merely seeks a true opportunity to be heard, pursuant to his protections under the Eighth Amendment and Fourteeth Amendment to the United States Constitution. For all the reasons argued in this petition, Rogers respectfully requests this Court grant the writ.

CONCLUSION

This Court should grant the petition for a writ of certiorari; stay the execution and order further briefing; and/or vacate and remand this case to the Florida Supreme Court.

Respectfully submitted,

/s/ Ali A. Shakoor
Ali A. Shakoor*
**Counsel of Record*
Assistant CCRC
Florida Bar Number: 0669830
Email: shakoor@ccmr.state.fl.us

/s/ Adrienne Joy Shepherd
Adrienne Joy Shepherd
Assistant CCRC
Florida Bar Number: 1000532
Email: shepherd@ccmr.state.fl.us

Law Office of the Capital Collateral
Regional Counsel - Middle Region
12973 N. Telecom Parkway
Temple Terrace, Florida 33637
Tel: (813) 558-1600
Fax: (813) 558-1601
Secondary Email: support@ccmr.state.fl.us

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