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

APPENDIX TO THE 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.

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APPENDIX A

Rogers v. State SC2025-0585 (Fla., May 8, 2025)

Supreme Court of Florida

No. SC2025-0585

GLEN EDWARD ROGERS,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

May 8, 2025

PER CURIAM.

Glen Edward Rogers murdered Tina Marie Cribbs in Hillsborough County in 1995. On April 15, 2025, Governor Ron DeSantis signed Rogers' death warrant, scheduling his execution for May 15, 2025. Rogers sought relief, filing his fourth successive postconviction motion in the circuit court raising three claims: (1) he was unconstitutionally deprived of the right to challenge his conviction and sentence due to Capital Collateral Regional Counsel – Middle Region (CCRC-M) representing him under a conflict of interest; (2) newly discovered evidence of his childhood sexual

abuse and trafficking establishes significant mitigation that would result in a life sentence on remand; and (3) Florida's lethal injection procedures as applied to him are cruel and unusual due to his porphyria diagnosis. The postconviction court summarily denied Rogers' claims as untimely, procedurally barred, and/or meritless which Rogers now appeals.[1] We agree and affirm. We also deny Rogers' motion for stay of execution and request for oral argument filed in this Court.

I. Background

As recounted in Rogers' direct appeal, *Rogers v. State* (*Rogers I*), 783 So. 2d 980 (Fla. 2001), Rogers arrived by cab at a motel in Tampa on November 4, 1995, telling the clerk that he was a truck driver whose truck had broken down. He booked in for two nights, then visited the Showtown Bar the next day, where he met the victim, Cribbs. He eventually asked Cribbs to give him "a ride," and she agreed. Later that evening, Rogers went to the motel clerk, paid for an extra night, and requested no cleaning for the next day.

1. We have jurisdiction. *See* art. V, § 3(b)(1), Fla. Const.

The next morning, the motel clerk saw Rogers leave in what was later established as Cribbs' vehicle. Later that afternoon, maintenance workers at a rest area off Interstate-10 near Tallahassee found Cribbs' wallet. There were two latent fingerprints inside matching Rogers.

A day later, a cleaning person at the Tampa motel went to Rogers' room and noticed a handwritten "Do Not Disturb" sign. After entering the room, the cleaner discovered Cribbs' body in the bathtub. Cribbs had been stabbed once in the chest and once in the buttocks. The State's forensic pathologist later testified that the stab wounds were L-shaped wounds, indicating that the perpetrator had inserted a very long knife, then after an interval, twisted the instrument to a perfect 90-degree angle, then pulled it out. These stab wounds were both deliberate and fatal, slicing through major arteries that caused Cribbs to bleed out.[2] She was stabbed with her clothing on and was conscious.

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2. Testimony at trial revealed that the wound to the chest measured eight-and-a-half inches in length and cut through the large-caliber pulmonary arteries, veins, and one of the large terminal bronchi (airway to the lower lung). The wound proceeded to cut along the back of the chest wall between ribs eight and nine.

In addition to these injuries, Cribbs had several bruises and abrasions and a shallow wound to her left arm that appeared to be a defensive wound. Other physical evidence collected from the motel room also pointed to Rogers, as detailed in *Rogers I*, 783 So. 2d 980.

After law enforcement apprehended Rogers in Kentucky, the State of Florida charged him with first-degree murder, armed robbery, and grand theft of a motor vehicle. *Id.* at 985-86. Following trial, the jury found Rogers guilty as charged on all three offenses. *Id.* at 987.

Rogers' penalty phase proceeding and subsequent postconviction history were briefly summarized in our opinion affirming Rogers' last postconviction appeal in 2021:

> At the ensuing penalty phase, Rogers called a number of witnesses, including two experts—Dr. Michael Maher (a psychiatrist) and Dr. Robert Berland (a forensic psychologist). [*Rogers I*, 783 So. 2d] at 995-96. Each

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The direction of the wound went backward, slightly to the right and upward.

The other stab wound, to the buttock, measured nine-and-a-half inches in length. It went through the muscles and fat, through the sciatic notch of the pelvis and incised and cut through a portion of the right internal iliac artery (a large-caliber vessel that feeds the right leg). The wound continued up into the abdomen and penetrated tissue near the intestines.

> opined that Rogers suffers from brain damage and mental-health issues, including a rare genetic mental disorder called porphyria. *Id.* [Porphyria is a disease that "impacts the central nervous system and can cause psychosis and strokes." *Id.* at 995.] Rogers also presented the testimony of Claude Rogers, one of his older brothers.
>
> After the presentation of mitigating evidence, the penalty-phase jury unanimously recommended a sentence of death. *Id.* at 987. Accepting that recommendation, the trial court sentenced Rogers to death. *Id.*
>
> Rogers appealed, but this Court affirmed in all respects. *Id.* at 1004. Since that time, Rogers has sought postconviction relief both in state and federal court—obtaining no relief in either forum. *See Rogers v. State* [(*Rogers II*)], 957 So. 2d 538, 556 (Fla. 2007) (affirming denial of initial postconviction motion and denying habeas petition)[3]; *Rogers v. Sec'y, Dep't of Corr.*, No. 8:07-CV-1365-T-30TGW, 2010 WL 668261 (M.D. Fla. Feb. 19, 2010) (denying federal habeas relief); *Rogers v. State* [(*Rogers III*)], 97 So. 3d 824 (Fla. 2012) (affirming summary denial of first successive postconviction motion); *Rogers v. State* [(*Rogers IV*)], 235 So. 3d 306 (Fla. 2018) (affirming summary denial of second successive postconviction motion).

Rogers v. State (*Rogers V*), 327 So. 3d 784, 786 (Fla. 2021).

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3. In *Rogers II*, we denied Rogers' habeas claim that he may be incompetent at the time of execution, noting that it would not be ripe for review until a death warrant had been issued. 957 So. 2d at 556 (citing *Griffin v. State*, 866 So. 2d 1, 21-22 (Fla. 2003)). At this time, Rogers has not challenged his competency to be executed.

In *Rogers V*, we affirmed the denial of Rogers' third successive postconviction motion raising a claim of newly discovered evidence concerning several instances of childhood sexual abuse he allegedly experienced over the course of several years in Hamilton, Ohio, and at the Training Institute of Central Ohio (TICO). *Id.* Rogers asserted that his memories of the abuse had been repressed until 2019, when he discussed his case history in detail with clemency counsel and a psychological criminologist, Dr. Bryanna Fox. *Id.* He also pointed to existing articles about the rampant abuse at TICO. *Id.* at 788. We agreed with the postconviction court's finding that this evidence could have been discovered with due diligence as his family members were aware of the alleged sexual abuse, and articles about TICO were available. *Id.* at 787-88.

In 2021, Rogers joined a federal suit raising a 42 U.S.C. § 1983 claim with other inmates against the Chief Justice of the Florida Supreme Court, in his official capacity, asserting that section 27.711(12), Florida Statutes, contains "a state-created right to advise the Florida Supreme Court about the quality of their capital collateral regional counsel" and that the "court's rules and policies prohibiting them from filing pro se pleadings violated the

procedural component of the Due Process Clause." *See Sweet v. Chief Just. of Fla. Sup. Ct.*, No. 23-13025, 2025 WL 915740, at *1 (11th Cir. Mar. 26, 2025). The district court dismissed the federal complaint, and the Eleventh Circuit Court of Appeals affirmed. *Id.* at *4-5. At this time, there is no petition for review pending in the United States Supreme Court.

As stated earlier, on April 15, 2025, Governor DeSantis issued a death warrant for the execution of Rogers, scheduling it for Thursday, May 15, 2025, at 6:00 p.m. On April 20, 2025, Rogers filed his fourth successive postconviction motion raising three claims, which the postconviction court summarily denied as untimely, procedurally barred, or meritless.

On appeal, Rogers asserts the postconviction court erred in summarily denying each of his three claims. We find no error and affirm.

II. Analysis

We review the circuit court's summary denial of a Florida Rule of Criminal Procedure 3.851 motion de novo, "accepting the movant's factual allegations as true to the extent they are not refuted by the record, and affirming the ruling if the record

conclusively shows that the movant is entitled to no relief." *Zack v. State*, 371 So. 3d 335, 344 (Fla. 2023) (quoting *Owen v. State*, 364 So. 3d 1017, 1022-23 (Fla. 2023)).

Summary denial of a successive rule 3.851 motion is appropriate if "the motion, files, and records in the case conclusively show that the movant is entitled to no relief." *Id.* (quoting *Owen*, 364 So. 3d at 1022). A postconviction court may also appropriately summarily dismiss untimely or procedurally barred claims under the rule, too. *Id.* (citing Fla. R. Crim. P. 3.851(e)(2)).

With limited exceptions, rule 3.851(d)(1) imposes a one-year time limitation on any motion to vacate a final judgment and sentence of death. Relevant here is an exception to this one-year limitation, when "the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence." Fla. R. Crim. P. 3.851(d)(2)(A).

A. Rogers' Rule 3.851 Conflict-of-Counsel Claim

Rogers claims the postconviction court erred by summarily denying his rule 3.851 claim that his constitutional rights are

violated by the denial of CCRC-M's motion to withdraw based on an actual, active conflict of interest. Rogers challenged the quality of CCRC's statewide representation in federal court[4] and now wants to litigate claims against CCRC-M's past performance and competence in state court, which are claims CCRC-M cannot ethically raise. CCRC-M asserted in its motion to withdraw that due to the pendency of federal litigation, Rogers had not communicated with CCRC-M from July 2021 until the day after his death warrant was signed.

The postconviction court denied both CCRC-M's motion to withdraw[5] and the subsequent claim raised in Rogers' fourth successive postconviction motion as both procedurally barred and meritless. We agree.[6]

---

4. Rogers says that his federal claims did not argue ineffective assistance of counsel but requested that "the Florida Supreme Court establish the appropriate procedures required by the Legislature."

5. CCRC-M initially moved to withdraw at the scheduling conference, just two days after the warrant was signed. That motion was denied, and Rogers reraised the claim in his fourth successive postconviction motion.

6. On May 2, 2025, in anticipation of seeking further federal review, Rogers filed a motion in federal district court for the

As to the procedural bar,[7] although Rogers ceased communication with CCRC-M in July 2021 and had no pending state court litigation at the time the federal complaint was filed, CCRC-M still represented Rogers and could have filed a motion seeking withdrawal but did not. As we have said, in an active warrant case, a postconviction claim that could have been raised in a prior proceeding is procedurally barred. *See Barwick v. State*, 361 So. 3d 785, 795 (Fla. 2023). And given the procedural bar, we are leery that CCRC-M's motion to withdraw is a delay tactic. *See Howell v. State*, 109 So. 3d 763, 775 (Fla. 2013) ("If this Court were to allow the last[-]minute substitution of counsel to create a

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appointment of conflict-free counsel. On May 6, 2025, finding the motion to be premature "[b]ecause neither a motion, under Rule 60(b) Federal Rules of Civil Procedure, nor a Section 2254 petition is pending," the district court deferred ruling on Rogers' motion and permitted him the opportunity to file an amended motion. *See Rogers v. Sec'y, Dep't of Corr.*, No. 8:07-cv-1365-MSS-TGW (M.D. Fla. May 6, 2025).

7. The postconviction court also found the requests to withdraw to be untimely, which we treat as subsumed within the procedural bar. While strict time limitations apply to Rogers' rule 3.851 claim, counsel's earlier motion to withdraw is only untimely because it could have been raised sooner but was not. To the extent CCRC-M is renewing its earlier motion to withdraw in the postconviction motion, we review it for an abuse of discretion.

situation in which the entire case could be relitigated at the time the death warrant was signed . . . this could become a standard delay tactic in any death warrant case.").

Furthermore, this claim is without merit, first, because there is no actual conflict with CCRC-M's representation based on the federal litigation. Because the federal litigation challenged the "court's rules and policies prohibiting [him] from filing pro se pleadings" on due process grounds, *see Sweet*, 2025 WL 915740, at *1, and did not contest the ability of CCRC-M to represent Rogers' interests in state court, we agree with the postconviction court's conclusion that there was no actual conflict.

Second, there is no actual conflict with CCRC-M based on Rogers' desire to now litigate claims against the past performance and competence of CCRC-M because such attacks are not permissible. Section 27.703(1), Florida Statutes, permits a sentencing court to determine if an "actual conflict" exists and, if so, first requires the appointment of a different regional counsel (CCRC); if the sentencing court determines the other region has an "actual conflict," then it may appoint non-CCRC counsel. An "actual conflict" in the postconviction context generally involves

counsel's representation of a co-defendant or co-defendants[8] or counsel's connection to the defendant's case at trial.[9] Such an "actual conflict" is the *only* basis for moving to discharge *postconviction* counsel in a capital case. *See* Fla. R. Crim. P. 3.851(b)(6).

Here, Rogers has not demonstrated that CCRC-M has an *actual* conflict. Rather, his desire to litigate CCRC-M's past performance and competence are claims of ineffective assistance of postconviction counsel, to which he acknowledges he has no constitutional right in Florida. *See Zack v. State*, 911 So. 2d 1190, 1203 (Fla. 2005). Additionally, chapter 27 specifically disavows providing a statutory right to raise ineffective assistance claims.

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8. *See, e.g.*, *Barclay v. Wainwright*, 444 So. 2d 956, 958 (Fla. 1984) ("Conflict-of-interest cases usually arise at the trial level, but, being caused by one attorney representing two or more clients, can arise at any level of the judicial process. In general, an attorney has an ethical obligation to avoid conflicts of interest and should advise the court when one arises.").

9. *See, e.g.*, *Braddy v. State*, 219 So. 3d 803, 817-18 (Fla. 2017) (affirming sentencing court's denial of CCRC's motion to withdraw where Braddy's CCRC counsel supervised the prosecutor at Braddy's trial and, thus, had an actual conflict of interest; however, counsel did not recall Braddy's case and never suggested he could not fairly represent him).

§ 27.7002(1), Fla. Stat. ("This chapter does not create any right on behalf of any person, provided counsel pursuant to any provision of this chapter, to challenge in any form or manner the adequacy of the collateral representation provided."); *Barwick*, 361 So. 3d at 791. Therefore, we agree with the postconviction court that Rogers has not raised an "actual conflict" with CCRC-M that necessitates the appointment of another region of CCRC, which is the initial remedy allowed by section 27.703(1).

We likewise reject Rogers' invitation to adopt a rule similar to the one adopted by the U.S. Supreme Court in *Martinez v. Ryan*, 566 U.S. 1 (2012) (ineffective assistance of state postconviction counsel can provide cause to forgive a procedural default for claims of ineffective assistance of trial counsel where the state requires such claims to be raised in the initial postconviction review proceeding). As we recently reiterated in *Hutchinson v. State*, "[w]e have . . . consistently recognized that *Martinez* applies solely in federal courts." 50 Fla. L. Weekly S71, S74, 2025 WL 1198037, at *6-7 (Fla. Apr. 25, 2025) (citing *Dailey v. State*, 279 So. 3d 1208, 1215 (Fla. 2019)), *cert. denied*, No. 24-7087, 2025 WL 1261217 (U.S. May 1, 2025). "What's more, *Martinez* only applied to a

certain type of defaulted claim—one that asserts ineffective assistance of *trial* counsel." *Id.* at S74, 2025 WL 1198037, at *7 (emphasis added) (citing *Davila v. Davis*, 582 U.S. 521, 530 (2017)).

Rogers also argues that he is being unfairly treated because Terance Valentine was granted conflict-free counsel by the same postconviction court for similar reasons and that order was upheld in *State v. Valentine*, No. SC17–629, 2017 WL 4160942 (Fla. Sept. 20, 2017). However, *Valentine* is distinguishable because the case presented in a different procedural posture, under a petition for review by the State of a *nonfinal* order, *see id.*; Fla. R. App. P. 9.142(c) (Petitions Seeking Review of Nonfinal Orders in Death Penalty Postconviction Proceedings), and the bar for obtaining relief in that posture is much higher than it is on appeal, *see Trepal v. State*, 754 So. 2d 702, 707 (Fla. 2000) (explaining that to obtain review on the merits of a nonfinal postconviction order the appellant must show *both* the order (1) failed to conform to the essential requirements of law *and* (2) could cause irreparable injury that cannot be remedied on appeal). That standard is not applicable here, to a final order. Notably, in a plenary appellate posture, we generally review an order denying counsel's motion to withdraw

under the highly deferential abuse of discretion standard. *See Weaver v. State*, 894 So. 2d 178, 187 (Fla. 2004) ("A [trial] court's decision involving withdrawal or discharge of counsel is subject to review for abuse of discretion."). Here, however, Rogers benefits from the de novo standard of review applicable to summary denials. *See Zack*, 371 So. 3d. at 344. Yet, we find no legal error in the postconviction court's ruling.

Because Rogers' claim that CCRC-M should have been permitted to withdraw is both procedurally barred and meritless, we find no error in the postconviction court's order.

B. Newly Discovered Evidence of Childhood Sexual Abuse

Rogers claims the postconviction court erred in denying his newly discovered evidence claim based on his history of childhood sexual abuse as procedurally barred because the claim is not identical to the one he raised in *Rogers V* and, thus, was not known to Rogers or his counsel. Though his claim is still based on his allegations that he was trafficked and sexually abused as a child in Hamilton, Ohio, and abused at TICO, *see Rogers V*, 327 So. 3d at 786, he asserts that his current claim is based on "new evidence" from the Florida Legislature reflecting "the conscience of Florida's

citizens in protecting children from the manner of abuse that Rogers suffered as a child" as the Legislature nears passage of Florida Bill number CS/CS/SB 1804, entitled "Capital Human Trafficking of Vulnerable Persons for Sexual Exploitation."[10] Rogers asserts that on remand, armed with the Legislature's new policy and various studies concerning child sex trafficking, he would receive a less severe sentence because his "highly mitigated case would result in a properly informed jury recommending a life sentence."

We find no merit to Rogers' argument and affirm the postconviction court's order. To prevail on a newly discovered evidence claim and avoid the one-year time limitation of rule 3.851(d)(1), Rogers had to show that the evidence was: "[1] unknown by the trial court, by the party, or by counsel at the time of trial and it could not have been discovered through due diligence, and . . . [2] is of such a nature that it would probably . . . yield a less severe sentence on retrial." *Cole v. State*, 392 So. 3d 1054,

10. Florida CS/CS/HB 1283 was laid on the table on April 30, 2025, and the Senate version, Florida CS/CS/SB 1804, was passed by both houses and enrolled. *See* Fla. CS/CS/SB 1804 (2025).

1061 (Fla.) (second omission in original) (quoting *Dillbeck v. State*, 357 So. 3d 94, 100 (Fla. 2023)), *cert. denied*, 145 S. Ct. 109 (2024).

As noted by the postconviction court, we said in *Cole* that newly enacted legislation did not constitute "newly discovered evidence." *Id.* ("Although CS/HB 21 was recently enacted, it does not amount to newly discovered evidence."). In *Cole*, we also rejected the proposition that new articles and scholarship constitute "newly discovered evidence," citing to *Rogers V* among other cases for that very proposition. *Id.* at 1061-62 ("Indeed, we have routinely held that resolutions, consensus opinions, articles, research, and the like do not satisfy the [newly discovered evidence] standard." (citing *Barwick*, 361 So. 3d at 793)); *see Barwick*, 361 So. 3d at 793 (holding that an American Psychological Association (APA) resolution did not constitute newly discovered evidence sufficient to overcome the one-year time limitation for filing postconviction claims); *Rogers V*, 327 So. 3d at 788 (numerous instances of childhood sexual abuse defendant allegedly experienced at [TICO] was not newly discovered evidence where articles discussing the abuse of juveniles at TICO could have been discovered by trial counsel well before the penalty phase).

Thus, we agree with the postconviction court's conclusion that, having failed to identify any new evidence, Rogers cannot avoid the one-year time limitation of rule 3.851(d)(1). We further agree with the postconviction court that Rogers' current claim is a variation of the claim he raised in *Rogers V* and is procedurally barred for that reason.

Further still, Rogers' claim is meritless because, as we stated in *Rogers V*, "trial counsel could have discovered the alleged evidence of abuse if due diligence had been exercised." 327 So. 3d at 788. "Rogers alleged that three of his brothers had knowledge that he was repeatedly abused over the course of several years in Hamilton, Ohio[,] and at TICO," and "that trial counsel knew of Rogers' . . . three siblings mentioned in Rogers' motion. . . . [A]s such, trial counsel could have asked them whether Rogers had been sexually abused as a child." *Id.*

To the extent Rogers challenges the constitutionality of rule 3.851(d)(1)'s time limitations as applied to him, a defendant under an active warrant, his argument is unpreserved because he failed to raise it below. *State v. Poole*, 297 So. 3d 487, 494 (Fla. 2020) ("In order to preserve an issue for appeal, the issue must be presented

to the lower court and the *specific legal argument* or grounds to be argued on appeal must be part of that presentation." (cleaned up)). We also recently rejected this claim on the merits in *Ford v. State*, 402 So. 3d 973, 977 (Fla.), *cert. denied*, 145 S. Ct. 1161 (2025), which held that Ford's request to find rule 3.851(d) inapplicable to defendants under an active death warrant was without any legal support. As we observed in *Ford*, "the Legislature provided 'that all terms and conditions of direct appeal and collateral review be strictly enforced, including the application of procedural bars, to ensure that all claims of error are raised and resolved at the first opportunity.' " *Id.* (quoting § 924.051(8), Fla. Stat.). Strict procedural bars apply because "[t]he litigation of a successive motion for postconviction relief filed by a defendant under an active death warrant is collateral review." *Id.* at 977-78.

Thus, we find no error in the postconviction court's conclusion that this claim is untimely, procedurally barred, and without merit.

C. Method-of-Execution Challenge to Lethal Injection Protocol

Rogers claims the postconviction court erred in summarily denying his method-of-execution claim, arguing that Florida's lethal injection protocol is cruel and unusual punishment under the

Eighth Amendment as applied to him due to the substantial risk those procedures will cause him needless suffering due to his porphyria diagnosis. Rogers argues that his expert, Dr. Joel Zivot, reviewed Rogers' medical records and would have opined at an evidentiary hearing that: (1) Rogers suffers from porphyria; and (2) "Florida's lethal injection procedures place Rogers at a substantial risk of needless pain and suffering because he will experience a [p]orphyria attack in response to the administration of an extremely high dose of etomidate."[11] Rogers also claimed that execution by firing squad or gas chamber would be a less painful method. The postconviction court summarily denied this claim, finding it untimely and meritless. We agree.[12]

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11. The State objects to Rogers' appendix to his Initial Brief that contains an affidavit from Dr. Zivot. The top of the affidavit shows it was prepared on April 18, 2025, before Rogers filed his successive postconviction motion, but the signature block indicates Dr. Zivot signed the document on April 26, 2025, after the postconviction court issued its order summarily denying relief. It appears from the record on appeal that Rogers did not file this affidavit below, though he did detail at length in his postconviction motion what Dr. Zivot would testify to based on his preliminary evaluation of Rogers. Regardless, because the affidavit is not part of the record on appeal, we sustain the State's objection to it.

12. At the outset, Rogers argues that this Court's decisions in *Long v. State*, 271 So. 3d 938 (Fla. 2019), *Correll v. State*, 184 So.

As for timeliness, Rogers argues that the facts underlying his method-of-execution challenge based on his porphyria diagnosis meet the exception in rule 3.851(d)(2)(A) that "the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence." He also argues that he could not raise this claim sooner because he could not know what execution procedures would be in place until his death warrant was signed.

We disagree. We have generally held that method-of-execution claims are procedurally barred unless the method itself changes or new facts about the current method arise during a prior execution. *See Schwab v. State*, 969 So. 2d 318, 321 (Fla. 2007) (holding that Schwab's method-of-execution claim was not procedurally barred because it was "based primarily upon facts that occurred during a recent execution" that "did not exist when lethal injection was first

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3d 478 (Fla. 2015), *Henry v. State*, 134 So. 3d 938 (Fla. 2014), *Howell v. State*, 133 So. 3d 511 (Fla. 2014), and *Davis v. State*, 142 So. 3d 867 (Fla. 2014), require relinquishment of jurisdiction to the circuit court with instructions to hold an evidentiary hearing on his as-applied claim and a stay to afford time to conduct a full and fair hearing. These decisions in no way stand for that legal proposition.

authorized"). Rogers argues neither exception. Instead, as the postconviction court found, he acknowledged below that Florida's lethal injection protocol "is not materially different than the previous March 2023 protocol or the protocol that has been in effect since 2017." Also, as the lower court found, Rogers could have but did not raise this claim in a prior motion.

Further, this Court has recently rejected the argument that a method-of-execution challenge only became ripe when a death warrant was signed. *See Cole*, 392 So. 3d at 1064 (affirming the circuit court's denial for untimeliness because the defendant "failed to raise any argument related to the method of execution until after the Governor signed a death warrant"). And we very recently affirmed the denial of a similar method-of-execution challenge as untimely made after the signing of a death warrant. *See Tanzi v. State*, 50 Fla. L. Weekly S59, S60-61, 2025 WL 971568, at *4 (Fla. Apr. 1, 2025) (affirming the circuit court's denial of an untimely as-applied challenge because the defendant's medical conditions were present well over a decade before the signing of the death warrant), *cert. denied*, No. 24-6932, 2025 WL 1037494 (U.S. Apr. 8, 2025). Rogers' claim is similarly untimely.

We also agree with the postconviction court that Rogers' claim is meritless. As already noted, successfully challenging a method of execution requires that a defendant "(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 (2) identify a known and available alternative method of execution that entails a significantly less severe risk of pain." *Asay v. State*, 224 So. 3d 695, 701 (Fla. 2017) (citing *Glossip v. Gross*, 576 U.S. 863, 877 (2015)). Under the first prong, the question is not merely whether any pain is inflicted, for "the Eighth Amendment 'does not demand the avoidance of all risk of pain in carrying out executions.' " *Bucklew v. Precythe*, 587 U.S. 119, 134 (2019) (quoting *Baze v. Rees*, 553 U.S. 35, 47 (2008)). Rather, the Eighth Amendment "come[s] into play" when "the risk of pain associated with the State's method is 'substantial when compared to a known and available alternative.' " *Id.* (quoting *Glossip*, 576 U.S. at 878).

We agree with the postconviction court that Rogers cannot satisfy the first prong. Rogers speculates that when etomidate is administered, the drug *could* induce a porphyria attack and create a substantial risk that Rogers will suffer from extreme and

excruciating abdominal pain, tachycardia, hypertension, nausea, vomiting, and seizures. But this Court has repeatedly upheld Florida's lethal injection protocol, including the etomidate protocol. *See Tanzi*, 50 Fla. L. Weekly at S61, 2025 WL 971568, at *4 (upholding Florida's etomidate protocol); *Cole*, 392 So. 3d at 1065 (noting that the "etomidate protocol . . . includes safeguards to ensure the condemned is unconscious throughout the execution"); *Long*, 271 So. 3d at 945-46 ("[W]e have repeatedly affirmed the summary denial of challenges . . . to the use of etomidate as the first drug in the protocol."). And Rogers does not explain how his speculative porphyria attack overcomes the well-established fact that the administration of etomidate will render him unconscious likely within one minute. *See Asay*, 224 So. 3d at 701 ("Intravenous injection of etomidate produces hypnosis characterized by a rapid onset of action, usually within one minute." (quoting the drug insert for etomidate)); *see also Davis*, 142 So. 3d at 872 (affirming the denial of an as-applied lethal injection claim "because Dr. Zivot failed to demonstrate that the injection of midazolam, as the first drug in the lethal injection

protocol, would not render Davis unconscious and insensate prior to him experiencing any possible symptoms of a porphyria attack").

Even if Rogers could satisfy the first prong, we agree with the postconviction court that he has failed under the second prong to "identify a known and available alternative method of execution that entails a significantly less severe risk of pain." *Asay*, 224 So. 3d at 701 (citing *Glossip*, 576 U.S. at 877). In *Tanzi*, we recently rejected Rogers' two proposed alternatives, lethal gas or firing squad, because Tanzi failed to show "how either of his two proposed alternate methods . . . could be 'readily implemented,' or in fact significantly reduce[] the substantial risk of severe pain, given the physical conditions he describes.' " 50 Fla. L. Weekly at S61, 2025 WL 971568, at *4.[13] Rogers, likewise, fails to make this showing.

Accordingly, we affirm the postconviction court's summary denial of Rogers' method-of-execution claim.

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13. Rogers also argues that the second prong of this test, as outlined in *Glossip*, is morally repugnant, impossible to realistically meet, and violative of his due process and equal protection rights. However, this Court has no authority to overrule Supreme Court authority. *See generally Poole*, 297 So. 3d at 507 ("In a case where we are bound by a higher legal authority—whether it be a constitutional provision, a statute, or a decision of the Supreme Court—our job is to apply that law correctly to the case before us.").

III. Conclusion

We affirm the summary denial of Rogers' fourth successive motion for postconviction relief. We also deny his motion for stay of execution and request for oral argument. No petition for rehearing will be entertained by this Court. The mandate shall issue immediately.

It is so ordered.

MUÑIZ, C.J., and CANADY, LABARGA, COURIEL, GROSSHANS, FRANCIS, and SASSO, JJ., concur.

An Appeal from the Circuit Court in and for Hillsborough County,
Michelle Sisco, Judge
Case No. 291995CF015314000AHC

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for Appellant

James Uthmeier, Attorney General, Tallahassee, Florida, Christina Z. Pacheco, Senior Assistant Attorney General, Stephen D. Ake, Senior Assistant Attorney General, and Jonathan S. Tannen, Assistant Attorney General, Tampa, Florida,

for Appellee

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

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

THIS IS A CAPITAL CASE
WITH AN EXECUTION SCHEDULED FOR
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APPENDIX B

Argument III of Initial Brief

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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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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

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[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

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[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

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[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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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

APPENDIX TO THE 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.

APPENDIX C

Dr. Joel Zivot Affidavit

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APPENDIX C

Dr. Joel Zivot Affidavit

AFFIDAVIT OF JOEL ZIVOT, M.D., FRCP(C), MA, JM

April 18, 2025

1. I am an associate professor and senior member of the Departments of Anesthesiology and Surgery, Emory University School of Medicine, in Atlanta, Georgia. I am the former Medical Director of the Cardiothoracic Intensive Care Unit at Emory University Hospital. I am also the former fellowship director for training in Critical Care Medicine. I hold board certification in Anesthesiology from the Royal College of Physicians and Surgeons of Canada and the American Board of Anesthesiology. I am board-certified in Critical Care Medicine from the American Board of Anesthesiology. I have an MA in bioethics and a Master of Law (JM).

2. I have practiced anesthesiology and critical care medicine for 30 years, during which time I have personally performed or supervised the care of over 50,000 patients.

3. I hold a medical license from the states of Georgia and have held unrestricted medical licenses in Ohio, the District of Columbia, Michigan, and the Canadian provinces of Ontario and Manitoba. I also have a license to prescribe narcotics and other controlled substances from the US Drug Enforcement Administration (DEA).

4. I have been consulting with attorneys for Florida death row prisoner Glen Rogers regarding Mr. Rogers medical condition and the risks attendant to executing him by lethal injection.

5. I became involved in Mr. Rogers case at the request of his attorneys. I agreed to do a preliminary review of his medical records so that I could provide an affidavit that would allow the attorneys to seek sufficient time to enable a proper evaluation of the risks posed to Mr. Rogers if executed according to Florida's lethal injection protocol.

6. My opinion is based on the review of three documents supplied to me by attorneys for Mr. Rogers. One document is entitled "Rogers Medical Records" and is a 498-page pdf. The second document, called "Rogers Medical Records Index, " is a 6-page pdf. The third document is entitled "Florida Department of Corrections: Execution by lethal injection procedures." This is accompanied by a letter dated February 18, 2025, and signed by Secretary Ricky Dixon. It attests to the readiness of the Florida Department of Corrections to execute by lethal injection.

7. From the documents I reviewed, I observed that Mr. Glen 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 the history, Mr. 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.

8. 7. Porphyrin is an organic compound found in the body. An example of a porphyrin is Heme, the precursor for hemoglobin, the iron-containing oxygen transport compound

found within every red blood cell in the human body. Heme is also the precursor for other critically essential compounds, such as cytochromes, which are critical in creating the fuel that drives all cellular function. 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 the case of Mr. Rogers, by the chemicals used in the lethal injection protocol.

9. 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 attack.

10. A review of the Florida lethal execution protocol involves the sequential intravenous delivery of three drugs to a person to kill by execution. 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 (used for the control of pain). Neither of the subsequent drugs used in the protocol is 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.

11. Studies have shown that etomidate can induce Porphyria attacks in susceptible individuals. In the Florida execution protocol, the amount of etomidate given is up to 10 times the amount that might be injected in a clinical setting. The consequence of this massive quantity 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 Mr. Rogers will experience.

12. In the past, the Florida lethal injection protocol has used midazolam as the first drug in a three-drug protocol. Midazolam is a drug classified as a benzodiazepine. Studies have shown that benzodiazepines can induce porphyria attacks. Midazolam significantly increased porphyrin accumulation, even when midazolam was injected in low concentrations. When Florida used midazolam for past executions, the amount of midazolam given was 100 to 200 times the amount that might be given in a clinical setting. The consequence of this massive quantity on porphyrin accumulation and the ensuing negative symptoms would be profound.

13. Pentobarbital and sodium thiopental (sodium pentothal) are drugs classified as barbiturates. 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. Due to the risk of inducing attacks, barbiturates are contraindicated in a medical setting in individuals with porphyria. In a medical setting, lower doses of barbiturates are used. Even in these lower dosage ranges, barbiturates are avoided in individuals with porphyria. In the setting of lethal injection, the dosage of barbiturates is much higher than in a clinical setting. In this circumstance, the impact on individuals with porphyria would be profound and torturous.

14. Based on my review of Mr. Rogers medical record, it is my opinion that a substantial risk exists that, during the execution, Mr. Rogers will suffer from extreme and excruciating abdominal pain, tachycardia, hypertension, nausea, vomiting, and seizures.

15. I hold the opinions in this affidavit to a reasonable degree of medical certainty. Should additional information become available later, I reserve the opportunity to update or add to the opinions stated in this affidavit.

Signed this 26th day of April, 2025

Joel B. Zivot, MD, FRCP(C), MA, JM

PERSIA WALLS
NOTARY PUBLIC
GWINNETT COUNTY, GEORGIA
MY COMMISSION EXPIRES MAY 19, 2028