No. SC2025-0794

EXECUTION SCHEDULED FOR JUNE 24, 2025 at 6:00 P.M.

IN THE
SUPREME COURT OF FLORIDA

THOMAS GUDINAS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT, IN AND FOR ORANGE COUNTY, FLORIDA
Lower Tribunal No.:481994CF007132000AOX

INITIAL BRIEF OF THE APPELLANT

Ali A. Shakoor
Florida Bar Number 0669830
Email: shakoor@ccmr.state.fl.us

Adrienne Joy Shepherd
Florida Bar Number 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
Telephone: (813) 558-1600
Fax: (813) 558-1601
Second Email: support@ccmr.state.fl.us

Counsel for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Case **Page(s)**

Other Authorities

Articles and Websites

REQUEST FOR ORAL ARGUMENT

Thomas Gudinas ("Gudinas") respectfully requests oral argument pursuant to Florida Rule of Appellate Procedure 9.320. The resolution of the issues involved in this action will determine whether Gudinas lives or dies. This Court has allowed argument in another capital case in a similar procedural posture. *See Asay v. State*, 224 So. 3d 695, 699 (Fla. 2017) (where this Court stayed Asay's execution after holding an oral argument). A full opportunity to air the issues through oral argument is appropriate in this case because of the seriousness of the claims at issue and the ultimate penalty that the State seeks to impose on Gudinas.

PRELIMINARY STATEMENT REGARDING REFERENCES

References to the current record on appeal before this Court in Florida Supreme Court Case No.: SC2025-0794 are of the form SC/[page].

STATEMENT OF THE CASE AND FACTS

Thomas Gudinas ("Gudinas") challenges his conviction and death sentence pursuant to Florida Rule of Criminal Procedure 3.851. The Circuit Court of the Ninth Judicial Circuit, Orange County, rendered the judgments of conviction and sentence of death

under consideration. On July 15, 1994, an Orange County grand jury indicted Gudinas of first-degree murder, two counts of sexual battery, attempted sexual battery, and attempted burglary with an assault. Gudinas was tried for the May 24, 1994 crimes on May 1 - 4, 1995 and was found guilty of all counts. The penalty phase commenced on May 8, 1995. The trial court excluded the State's proffer of victim impact evidence and heard such testimony and evidence outside the presence of the jury. The State introduced three prior convictions and rested. After a penalty phase conducted on May 8-10, 1995, the jury recommended death by a vote of ten to two. On June 16, 1995, the trial court sentenced Gudinas to death.

The trial court found the following Aggravators at sentencing:

> (1) Mr. Gudinas had been convicted during the commission of a prior violent felony, § 921.141 (5) (b), Fla. Stat. (1995);
> (2) the murder was committed during the commission of a sexual battery, § 921.141 (5)(d); and (3) the murder was especially heinous, atrocious, or cruel, § 921.141 (5) (h).

The trial court found the following Mitigators at sentencing:

The court found one statutory mitigator:

> Mr. Gudinas committed the murder while under the influence of an extreme mental or emotional disturbance, § 921.141 (6) (b).

The court found twelve nonstatutory mitigating factors and accorded them very little weight:

> (1) Mr. Gudinas had consumed cannabis and alcohol the evening of the homicide;
> (2) Mr. Gudinas had the capacity to be rehabilitated;
> (3) Mr. Gudinas's behavior at trial was acceptable;
> (4) defendant had an IQ of 85;
> (5) Mr. Gudinas was religious and believed in God;
> (6) Mr. Gudinas 's father dressed as a transvestite;
> (7) Mr. Gudinas suffered from personality disorders;
> (8) Mr. Gudinas was developmentally impaired as a child;
> (9) Mr. Gudinas was a caring son to his mother;
> (10) Mr. Gudinas was an abused child;
> (11) Mr. Gudinas suffered from attention deficit disorder as a child; and
> (12) Mr. Gudinas was diagnosed as sexually disturbed as a child.

On direct appeal, Gudinas raised twelve claims concerning how the court erred in ruling on the following matters, which this Court described as follows:

> (1) the trial court erred in denying Gudinas' motion to sever counts I and II from the remaining charges;
> (2) the trial court erred in conducting several pretrial hearings without Gudinas present;
> (3) the trial court erred in not granting Gudinas' motion for judgment of acquittal for the attempted sexual battery of Rachelle Smith;
> (4) the trial court failed to conduct an adequate inquiry after Gudinas complained about lead counsel;
> (5) the trial court erred in overruling Gudinas' objections and allowing graphic slides into evidence;
> (6) the trial court erred in allowing the State to bolster a witness's testimony with a hearsay statement;
> (7) the introduction of collateral evidence denied Gudinas

his constitutional right to a fair trial;
(8) the trial court erred in denying Gudinas' motion in limine;
(9) the trial court erred in restricting Gudinas' presentation of evidence;
(10) the jury's advisory sentence was unconstitutionally tainted by improper prosecutorial argument and improper instructions;
(11) the trial court erred in finding the heinous, atrocious, or cruel aggravating circumstance; and
(12) the trial court erred in its consideration of the mitigating evidence.

The judgment and sentence for first degree murder in this case were affirmed on direct appeal by this Court on April 10, 1997. *Gudinas v. State*, 693 So. 2d 953 (Fla. 1997). The United States Supreme Court ("USSC") denied certiorari on October 20, 1997. *Gudinas v. State of Florida*, 522 U.S. 936 (1997).

Gudinas filed a postconviction motion pursuant to Florida Rule of Criminal Procedure 3.850 on June 5, 1998. An evidentiary hearing was held on December 17, 1999. On March 20, 2000, the postconviction court entered an order denying Gudinas relief on all grounds. Gudinas appealed the order denying him relief. On March 28, 2002, this Court denied Gudinas relief on all grounds. *Gudinas v. State*, 816 So. 2d 1095 (Fla. 2002).

On October 14, 2002, Gudinas filed a successive postconviction motion, challenging his death sentence in light of the USSC's decision in *Ring v. Arizona* and his habitual violent felony offender ("HVFO") sentences under *Apprendi v. New Jersey.* On January 7, 2003, the postconviction court denied relief. This Court affirmed the denial of relief on May 13, 2004. Gudinas filed his initial petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. His amended petition was denied on September 30, 2010. Gudinas was granted a certificate of appealability on one claim. The United States Court of Appeals for the Eleventh Circuit denied relief on July 28, 2011. A petition for writ of certiorari was denied by the USSC on March 5, 2012. This Court affirmed the denial of Gudinas' next successive motion. *Gudinas v. State*, 235 So. 3d 303 (Fla. 2018). Governor Ron DeSantis signed Gudinas's active death warrant on May 23, 2025. The circuit court denied Gudinas's successive motion on June 5, 2025. This appeal follows. His execution is scheduled for June 24, 2025 at 6:00 p.m.

STANDARD OF REVIEW

Because the circuit court denied postconviction relief without an evidentiary hearing, this Court must accept the factual allegations

presented in Gudinas's motion and in this appeal as true to the extent that they are not conclusively refuted by the record. *Ventura v. State*, 2 So. 3d 194, 197-98 (Fla. 2009). Further, this Court "review[s] the trial court's application of the law to the facts *de novo*." *Green v. State*, 975 So. 2d 1090, 1100 (Fla. 2008). A postconviction court's decision whether to grant an evidentiary hearing is likewise subject to de novo review. *Rose v. State*, 985 So. 2d 500, 505 (Fla. 2008).

SUMMARY OF THE ARGUMENT

ARGUMENT I: The circuit court erred by summarily denying Gudinas's claim that his execution would violate *Atkins v. Virginia*, 536 U.S. 304 (2002) and *Roper v. Simmons*, 543 U.S. 551 (2005). Gudinas has suffered from severe mental illnesses and disorders his entire life. Gudinas's impairments were in place at the time of the crimes, and he was incapable of conforming his behavior to the requirements of the law. Gudinas also has organic brain damage and is a survivor of childhood sexual abuse. Based on the evolving standards of decency that mark the progress of a maturing society,

it would be a violation of the Eighth Amendment to execute Gudinas considering his mental deficiencies and vulnerabilities.

ARGUMENT II: Art. I, § 17 of the Florida State Constitution, otherwise known as "the conformity clause," is foreclosing Gudinas's access to the courts and his ability to make new law. Gudinas raises a valid and substantial argument in Argument I that his execution should be categorically excluded. The conformity clause violates the Fourteenth Amendment due process rights and Eighth Amendment rights of Florida's defendants. This Court's intervention is required to end this continued abdication of judicial responsibility.

ARGUMENT III: Gudinas has been on Florida's death row for thirty years and has exhausted most avenues towards relief, under a strict interpretation of Florida law. 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.

ARGUMENT IV: The lower court abused its discretion in denying Gudinas's demand for public records from the Executive Office of the Governor. ("EOG"). Gudinas raised colorable claims for relief and merely seeks records based on the irregular circumstances surrounding the signing of his death warrant. Gudinas is also willing to streamline his request on remand to address his specific constitutional issues.

ARGUMENT I

THE CIRCUIT COURT ERRED IN SUMMARILY DENYING GUDINAS'S CLAIM THAT HIS LIFELONG MENTAL ILLNESSES PLACE HIM OUTSIDE OF THE CLASS OF INDIVIDUALS WHO SHOULD BE PUT TO DEATH. HIS MENTAL DISORDERS WERE CAUSED BY CIRCUMSTANCES BEYOND HIS CONTROL AND EXECUTING HIM WILL BE VIOLATIVE OF THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION

The crux of Gudinas's claim is that he is entitled to an evidentiary hearing to prove that "evolving standards of decency that mark the progress of a maturing society," establishes the he should be outside of the class of individuals subject to capital punishment. Gudinas has a right to make a record to prove his claim. The newly discovered evidence is an evaluation conducted by Dr. Hyman

Eisenstein, a neuropsychologist who evaluated Gudinas at Florida State Prison on May 29, 2025. The evidence is timely in that Gudinas had no reason to have a new mental health evaluation until the commencement of his clemency proceedings, and most specifically, the signing of the death warrant. Dr. Eisenstein's May 30, 2025 report is included in the appendix to this brief. *See* Appendix A. Gudinas's claim is not merely about how a jury would address the new information on retrial. SC/329-30. Rather, Gudinas has one opportunity to make a record at the circuit level for this Court's review, regarding overturning precedent and forced adherence to this State's "conformity clause." *See* Argument II. Gudinas's new evidence of brain impairment should be evaluated at an evidentiary hearing. It is premature and misplaced for the circuit court to rely on Dr. Upson's decades-old findings, without comparing them to sworn testimony from Dr. Eisenstein. SC/327-30. As Gudinas argued at the case management conference, Dr. Eisenstein's evaluation and new findings regarding brain impairment could also provide statutory mitigation pursuant to Florida Statute § 921.141 (7) (f). SC/314.

Gudinas has been tragically, mentally ill his entire life. His

mental disorders may have been factors he was born with, so in many ways his condition is based on genetics. Gudinas never received the interventions that he needed to properly medicate, evaluate, counsel, and protect himself and society from his extensive mitigation. Severe childhood physical and sexual abuse only exasperated Gudinas's violent life choices. Gudinas's death sentence is unconstitutional because evolving standards of decency have reached the point where someone suffering from the severe mental deficits that Gudinas does cannot constitutionally be sentenced to death.[1] Gudinas's impairments were in place at the time of the crime, and he was incapable of conforming his behavior to the requirements of the law. Similar to how the USSC has found and interpreted categorical exemption for juveniles and defendants with intellectual disability, individuals such as Gudinas, who have disorders and impairments to no fault of their own, should be similarly categorically exempted. Among the mitigators found by the trial court, Gudinas suffered from personality disorders, was developmentally impaired as a child, and

[1] *See* Kentucky and Ohio as two states that have passed bills exempting individuals with statutorily defined mental illnesses from the death penalty. https://deathpenaltyinfo.org/disability-pride-month-series-serious-mental-illness-exemptions-and-legislation.

was labeled a "sexually disturbed child." This thirty-year-old mitigation must be reconsidered under a modern lens of understanding.

A recent expert evaluation by Dr. Hyman Eisenstein has updated information to support the fact that Gudinas should be deemed outside the class of those subjected to execution, based on new findings that include brain impairment. Appendix A. Moreover, Dr. Eisenstein finds that Gudinas's age at the time of crime, a little over twenty, is similar to USSC precedent barring juveniles from execution, based on developmental literature and neuroscience research which states that there was a lack of maturity, an undeveloped sense of responsibility, increased vulnerability and susceptibility to outside negative influences in a person that was not fully formed at this age. Based on evolving standards of decency, and the same type of analysis in support of findings from USSC precedent, Gudinas's mental disorders and impairments bar him from being executed pursuant to the United States Constitution.

The USSC barred the execution of the intellectually disabled and the execution of juveniles in *Atkins v. Virginia*, 536 U.S. 304

(2002) and *Roper v. Simmons*, 543 U.S. 551 (2005). Both cases cited to evolving standards of decency in today's society as the main factors justifying the categorical exclusion of the intellectually disabled and juveniles from the death penalty. In *Atkins* and *Roper*, the USSC reaffirmed the necessity of referring to the evolving standards of decency that mark the progress of a maturing society to determine which punishments are so disproportionate as to be cruel and unusual. The USSC outlined the similarities between its analysis of the constitutionality of executing juvenile offenders and the constitutionality of executing the intellectually disabled.

Prior to 2002, the USSC had refused to categorically exempt intellectually disabled persons from capital punishment. *Penry v. Lynaugh*, 492 U.S. 302 (1989). However, in *Atkins v. Virginia*, 536 U.S. 304 (2002), the USSC held that standards of decency had evolved in the 13 years since *Penry* and that a national consensus had formed against such executions, demonstrating that the execution of the intellectual disabled is cruel and unusual punishment. *Atkins*, 536 U.S. at 307. The majority opinion found significant that 30 states prohibit the juvenile death penalty, including 12 that have rejected the death penalty altogether. The

USSC counted the states with no death penalty, pointing out that a State's decision to bar the death penalty altogether of necessity demonstrates a judgment that the death penalty is inappropriate for all offenders, including juveniles.

In ruling that juvenile offenders cannot with reliability be classified as among the worst offenders, the *Roper* court found it significant that juveniles are vulnerable to influence and susceptible to immature and irresponsible behavior. Considering Gudinas's severe mental illness and disorders, neither retribution nor deterrence provides adequate justification for imposing the death penalty. Justice Kennedy, writing for the majority, said: "Retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity." *Roper,* 543 U.S. at 571. Gudinas's culpability and blameworthiness are diminished in this case. Gudinas's sentence of death violates the Eighth and Fourteenth Amendments prohibiting cruel and unusual punishment, as well as the arbitrary and capricious imposition of the ultimate penalty as applied.

Evolving standards of decency prevent the execution of

Gudinas. The USSC has long recognized that:

> The prohibition against cruel and unusual punishments, like other expansive language in the Constitution, must be interpreted according to its text, by considering history, tradition, and precedent, and with due regard for its purpose and function in the constitutional design. To implement this framework we have established the propriety and affirmed the necessity of referring to the evolving standards of decency that mark the progress of a maturing society to determine which punishments are so disproportionate as to be cruel and unusual. *Trop v. Dulles*, 356 U.S. 86, 100B101, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958) (plurality opinion).

Roper v. Simmons, 543 U.S. 551, 560-61(2005). Indeed:

> Capital punishment must be limited to those offenders who commit a narrow category of the most serious crimes and whose extreme culpability makes them Athe most deserving of execution. *Atkins*, supra, at 319, 122 S.Ct. 2242. This principle is implemented throughout the capital sentencing process. States must give narrow and precise definition to the aggravating factors that can result in a capital sentence. *Godfrey v. Georgia*, 446 U.S. 420, 428B429 (1980) (plurality opinion). In any capital case a defendant has wide latitude to raise as a mitigating factor Aany aspect of [his or her] character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion); *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *see also Johnson v. Texas*, 509 U.S. 350, 359B362 (1993) (summarizing the Court's jurisprudence after *Furman v. Georgia*, 408 U.S. 238 (1972) (*per curiam*), with respect to a sentencer's consideration of aggravating and mitigating factors). There are a number of crimes that beyond question are severe in absolute terms, yet the death penalty may not be imposed for their commission. *Coker*

> *v. Georgia*, 433 U.S. 584 (1977) (rape of an adult woman); *Enmund v. Florida*, 458 U.S. 782(1982) (felony murder where defendant did not kill, attempt to kill, or intend to kill). The death penalty may not be imposed on certain classes of offenders, such as juveniles under 16, the insane, and the mentally retarded, no matter how heinous the crime. *Thompson v. Oklahoma*, *supra*; *Ford v. Wainwright*, 477 U.S. 399(1986); *Atkins*, supra. These rules vindicate the underlying principle that the death penalty is reserved for a narrow category of crimes and offenders.

Id. 568-69.

In *Atkins v. Virginia*, 536 U.S. 304 (2002), the USSC found that the execution of the intellectual disabled violated the Eighth Amendment's prohibition of cruel and unusual punishment based on evolving standards of decency. *Id.* at 306-307. The USSC was careful to distinguish between the criminal responsibility of the intellectual disabled and the prohibition of their execution:

> Those mentally retarded persons who meet the law's requirements for criminal responsibility should be tried and punished when they commit crimes. Because of their disabilities in areas of reasoning, judgment, and control of their impulses, however, they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct. Moreover, their impairments can jeopardize the reliability and fairness of capital proceedings against mentally retarded defendants. Presumably for these reasons, in the 13 years since we decided *Penry* v. *Lynaugh*, 492 U.S. 302, 106 L. Ed. 2d 256, 109 S. Ct. 2934 (1989), the American public, legislators, scholars, and judges have deliberated over the

> question whether the death penalty should ever be imposed on a mentally retarded criminal. The consensus rejected in those deliberations informs our answer to the question presented by this case: whether such executions are "cruel and unusual punishments" prohibited by the Eighth Amendment to the Federal Constitution.

Id.

Atkins presented expert testimony that he was "mildly mentally retarded." *Id.* at 308. Atkins's expert psychologist reached this conclusion "based on interviews with people who knew Atkins, a review of school and court records, and the administration of a standard intelligence test which indicated that Atkins had a full-scale IQ test of 59." *Id.* The USSC noted that Atkins's credibility at trial was damaged because of "its substantial inconsistency with the statement he gave to the police upon his arrest." *Id.* at 308, N2.

At the resentencing, the State presented testimony from their own rebuttal expert. *Id.* at 309. The State's expert expressed an opinion that Atkins "was not mentally retarded, but rather was of 'average intelligence, at least,' and diagnosable as having antisocial personality disorder." *Id.* The State's expert reviewed Atkins school records, interviewed correctional staff, and asked Atkins questions taken from a "1972 version of the Wechsler Memory Scale." *Id.*

Atkins argued on state appeal "that he is mentally retarded and thus cannot be sentenced to death." *Id.* at 310 (citation omitted). The majority rejected this claim. Two Justices on the USSC dissented and "rejected [the State's expert]'s opinion that Atkins possesses average intelligence as 'incredulous as a matter of law,' and concluded that 'the imposition of the sentence of death upon a criminal defendant who has the mental age of a child between the ages of 9 and 12 is excessive.'" *Id.* The dissenters found that "'it [wa]s indefensible to conclude that individuals who are mentally retarded are not to some degree less culpable for their criminal acts. By definition, such individuals have substantial limitations not shared by the general population. A moral and civilized society diminishes itself if its system of justice does not afford recognition and consideration of those limitations in a meaningful way.'" *Id.* (citations omitted).

The USSC explained the evolving standards of decency regarding the execution of intellectually disabled. *Id.* at 313-14. The USSC found it determinative that despite the legislative popularity of "anti-crime legislation," overwhelmingly, states had prohibited the execution of the intellectually disabled by statute. Moreover, states that had the death penalty and did not regularly use it, and states that had no

death penalty, showed the consensus against executing the intellectually disabled. This:

> provide[d] powerful evidence that today our society views the execution of mentally retarded persons (and the complete absence of States passing legislation reinstating the power to conduct such executions) provides powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal. Mentally retarded offenders as categorically less culpable than the average criminal.

Id. at 315-316. The USSC found:

> This consensus unquestionably reflects widespread judgment about the relative culpability of mentally retarded offenders, and the relationship between mental retardation and the penological purposes served by the death penalty. Additionally, it suggests that some characteristics of mental retardation undermine the strength of the procedural protections that our capital jurisprudence steadfastly guards.

Id. at 317.

The USSC found that neither of the two permissible bases for capital punishment, deterrence, and retribution, were measurably contributed to by the execution of the intellectually disabled. *Id.* at 319. The USSC concluded:

> Our independent evaluation of the issue reveals no reason to disagree with the judgment of "the legislatures that have recently addressed the matter" and concluded that death is not a suitable punishment for a mentally retarded criminal. We are not persuaded that the execution of mentally

> retarded criminals will measurably advance the deterrent or the retributive purpose of the death penalty. Construing and applying the Eighth Amendment in the light of our "evolving standards of decency," we therefore conclude that such punishment is excessive and that the Constitution "places a substantive restriction on the State's power to take the life" of a mentally retarded offender."

Id. at. 321.

The USSC found that death may not be imposed on a certain class of individuals because of "evolving standards of decency." *See Roper*, 536 U.S. at 589; citing *Trop v. Dulles*, 356 U.S. 86, 100-101, (1958); *Atkins*, 536 U.S. at 311-12; citing *Trop* at 100-101. In the case of the execution of the "insane" which are those who are incompetent to be *executed,* the standard of decency did not have to evolve because as *Ford v. Wainwright*, 477 U.S. 399 (1984) makes clear, such standards predate the Constitution. *Id*. at 406-410.

Evolving standards of decency have rendered the execution of Gudinas constitutionally impermissible. Deterrence and retribution are not served with Gudinas's execution. People suffering from the level of mental illness Gudinas did at the time of offense are incapable of being deterred by the death penalty. It is hardly a fair retribution if Gudinas had little capacity at the time of offense to act rationally and avoid the conduct. Like the intellectually disabled, Gudinas's

mental illness affected his ability to rationally make decisions regarding his crime. Some evidence of Gudinas's mental impairment was presented during the penalty phase of his trial, and more later during the evidentiary hearing for his first Rule 3.851 motion for relief. The mitigation needs to be reevaluated under modern scientific understandings. Moreover, if provided an evidentiary hearing, neuropsychologist Dr. Hyman Eisenstein can provide new perspective on Gudinas's mental health that a factfinder should consider. Appendix A.

Dr. Eisenstein evaluated Gudinas at Florida State Prison for an entire day on May 30, 2025. Dr. Eisenstein also reviewed various background records for Gudinas and conducted a phone interview with Gudinas's mother, Karen Goldwaithe. Dr. Eisenstein's May 30, 2025 evaluation was an initial evaluation conducted under the extreme time constraints set forth by the Florida governor's thirty-two-day death warrant and this Court's resulting May 23, 2025 scheduling order. More time is needed so that Dr. Eisenstein can conduct a complete evaluation of Gudinas's mental deficits. So far, Dr. Eisenstein can opine generally to the following at an evidentiary hearing based on his preliminary evaluation of Gudinas's case.

Gudinas was born to Karen (Goldthwaite) and Thomas Gudinas Sr. on a Tacoma, Washington Army base. Gudinas's mother reported having Toxemia prior to his birth and seizures during the delivery. Goldthwaite reported that after Gudinas's birth he had too much "blood" in his brain, and the doctors had to drain the excess fluid from his head. She also reported additional medical problems in his first six months of life.

The family moved to Massachusetts when Gudinas was very young. His parents divorced and he was shuttled between his parents and other family members. Gudinas attended public school and was brought to the attention of school staff due to problematic behavior and academic difficulties early on. Gudinas reported a history of physical abuse at the hands of his father, mother, stepfather, and others. He reported a history of sexual abuse from the time he was very young. He was a victim of severe emotional abuse throughout his childhood. Although therapy and treatment were repeatedly recommended by all those who evaluated Gudinas, there was little treatment provided. Gudinas was sent from program to program and many different placements, but no long-term residential treatment was provided to him.

From his evaluation, Dr. Eisenstein noted that Gudinas is very concrete and simplistic in his thinking. During the evaluation, many concepts needed additional explanation and repetition so Gudinas could understand them. Gudinas readily discussed and presented his elaborate fixed delusion regarding numerical equivalents of letter and word combinations and what they mean to him. Appendix B. Gudinas was cooperative during testing, and his test results are considered to be a valid indication of his present functioning. Gudinas's performance on the Test of Memory Malingering indicated he was making sincere effort and rules against malingering.

Dr. Eisenstein administered the Kaufman Functional Academic Skills Test, a measure of academic skills that are used on an everyday basis. On the Arithmetic subtest he obtained a Standard Score of 78, 7th percentile, which is well below average. Gudinas was able to tell time, count change, and solve simple problems. However, when the problems involved fractions, division, or more complex multiplication, he was unable to figure out the correct answer. On the Reading subtest, Gudinas obtained a Standard Score of 78, 7th percentile, which is well below average. Gudinas was able to read and recognize common signs, follow commands, and understand basic

instructions. However, when he had to read more extensively, figure out abbreviations, or greater comprehension was involved, Gudinas was unable to complete the task.

Dr. Eisenstein also assessed Gudinas's executive functioning, which is the processes responsible for guiding, directing, and managing cognitive, emotional, and behavioral functions. Dr. Eisenstein administered the Wisconsin Card Sorting Test and the Delis Kaplan Executive Function System. The Wisconsin Card Sorting Test is a measure which assesses the ability to form abstract concepts and to utilize feedback. Gudinas had great difficulty with this test. He was only able to complete two categories in the mildly impaired range, and he committed 68 perseverative errors, which indicates severely impaired range of functioning. Gudinas was unable to utilize feedback to try and solve the problem, going back over and over again to an approach that he was told was incorrect.

The Delis Kaplan Executive Function System Trail Making Test, a measure of one's ability to scan, sequence numbers and letters, and switch between numbers and letters, was also administered. Gudinas's visual scanning was in the borderline range and his Number-Letter Switching on the test was severely impaired. When

Gudinas had to attend to two different stimuli at the same time, switching between numbers and letters, he was lost, performing in the severely impaired range. Judgment, reasoning, planning, and decision making are all regulated by executive functioning or frontal lobe abilities. Gudinas demonstrated significant impairment in these areas. This points to frontal lobe dysfunction.

From his evaluation, Dr. Eisenstein concluded the following. Gudinas has a history of extreme physical, sexual, and emotional abuse, which has caused him to suffer from trauma his entire life. Gudinas's cognitive functioning was in the Low Average to Borderline range. Gudinas's executive functioning was severely impaired. He presented with significant brain impairment and frontal lobe dysfunction.[2]

Gudinas has a long history of major mental illness continuing to this date. At the present time he is paranoid, suspicious, and has

---

[2] If granted a stay, Gudinas would have time to pursue brain imaging based on Dr. Eisenstein's evaluation and request further analysis. Mental health experts have researched the effects of childhood abuse on brain development: Teicher, Martin et. al., 19, September 2016. The effects of childhood maltreatment on brain structure, function, and connectivity.
https://www.nature.com/articles/nrn.2016.111.

fixed delusions. Regarding Gudinas's fixed delusions, he requests a decoding expert to analyze the vast conspiracies of which he believes has impacted his case. Appendix B. Gudinas's writings demonstrate a truly mentally ill individual who does not understand his current circumstances. Executing the mentally disturbed Gudinas would serve no purpose beyond base vengeance. Dr. Eisenstein further found Gudinas has a long history of institutionalization beginning at a young age, with failure to provide adequate psychological and psychiatric treatment. Dr. Eisenstein's findings also require a reexamination of *Roper*, as Gudinas was twenty years old at the time of the commission of the offense - developmental literature and neuroscience research states that there was a lack of maturity, an undeveloped sense of responsibility, increased vulnerability, and susceptibility to outside negative influences in a person that was not fully formed at this age.

Dr. Eisenstein's testimony could also provide a modern scientific perspective on some of the mitigation presented previously. Gudinas had severe mental impairments at the time of the tragic crimes. Some of that was litigated in federal court, creating an outdated understanding of mitigating circumstances. *Gudinas v.*

McNeil, 2010 WL 3835776 (M.D. Fla. 2010):

> Gudinas' mother testified that she had a difficult pregnancy and delivery with Gudinas and that he had some health problems during the first six months of life. She also testified that he had extreme temper tantrums as a small boy, although he was never violent toward others. His teacher reported that he was hyperactive at school, sometimes throwing chairs and acting up. Mrs. Goldthwaite had Gudinas evaluated at Boston University when he was six. Thereafter, she sought help from the Massachusetts Division of Youth Services. Over the next several years, Gudinas had 105 different placements through that agency. Mrs. Goldthwaite was advised that Gudinas should be placed in a long-term residential program, but she was never able to accomplish this [FN 6]. Because of his treatment in numerous facilities, Gudinas only completed his formal education through the fourth grade, although he eventually attained his GED. He also was diagnosed as having a low IQ. Finally, Gudinas' mother testified that he began drinking alcohol while a juvenile, smoked marijuana, and had used cocaine and LSD.

Id. at 51. The fact that Gudinas's mental problems started in infancy, and throughout his childhood is mitigating in the manner of *Roper* and *Atkins*. Dr. Upson's testimonial record shows that Gudinas never really had a chance at a normal life:

> Dr. James Upson, a clinical neuropsychologist, testified for Gudinas. He concluded that Gudinas was seriously emotionally disturbed at the time of the murder and that the "symbolism" of the crime indicated that he was "quite pathological in his psychological dysfunction." Dr. Upson testified that Gudinas has an IQ of 85, in the low-average range. Testing revealed that Gudinas has very strong

> underlying emotional deficiencies. Dr. Upson explained that this type of person has a higher degree of impulsivity, sexual confusion and conflict, bizarre ideations, and manipulative behavior, tends to be physically abusive, and has the capacity to be violent. He noted that these behaviors escalate when the person is either threatened or loses control. Dr. Upson felt that Gudinas would probably be a danger to others in the future unless he was properly treated and that the murder was consistent with the behavior of a person with his psychological makeup.

Id. at 52. Gudinas has never been properly treated for his severe mental impairments. His severe mental unwellness is mitigating to the extent that executing him would be a violation of his constitutional rights. Like the justices who decided *Roper* and *Atkins*, this Court can consider the tragic record of Gudinas's life-long mental impairments, consider evolving standards of decency, and start the process of changing the law in Florida to protect people like Gudinas. That process starts with a remand for an evidentiary hearing.

Gudinas's execution is set for June 24, 2025, only sixteen days away from the date of the filing of this brief. Under our society's evolving standards of decency, his execution must not take place. Gudinas respectfully requests that this Court remand for an evidentiary hearing on this claim so that expert testimony of

Gudinas's mental impairments may be heard. Gudinas also respectfully requests that this Court grant him a stay of execution because this claim is a substantial ground upon which relief might be granted and deserves to be fully addressed by this Court 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).

Gudinas is fully aware of the contrary precedent regarding the extension of the *Roper* and *Atkin*s holdings. Gudinas needs to make a complete evidentiary record for this Court's review. The expedited warrant period, which includes the death warrant being signed the Friday before the Memorial Day holiday weekend, further distinguishes Gudinas's circumstances from precedent. Gudinas does understand precedent regarding this Court's adherence to the procedural bar and Florida's "conformity clause" as an initial bar to relief. Gudinas addresses those issues in Arguments II and III.

ARGUMENT II

THE CIRCUIT COURT ERRED IN DENYING GUDINAS'S CLAIM THAT FLORIDA'S USE OF ITS UNIQUE AND OBSTRUCTIVE "CONFORMITY CLAUSE" IS UNCONSTITUTIONAL. THE AMENDMENT IMPROPERLY VIOLATES GUDINAS'S FOURTEENTH AMENDMENT DUE PROCESS RIGHTS AND HIS EIGHTH AMENDMENT RIGHT TO A TRUE MERITS-BASED EVALUATION OF HIS CLAIMS, PREMISED ON THE EVOLVING STANDARDS OF DECENCY THAT MARK THE PROGRESS OF A MATURING SOCIETY.

Florida is seceding from its duty to interpret the Constitution of the United States to protect its citizens and litigants. Florida is foreclosing Gudinas's access to the courts and his ability to make new law. Gudinas raises a valid and substantial argument in Argument I that evolving standards of decency dictate that his execution should be categorically excluded under the same principles the USSC pronounced in *Roper* and *Atkins* due to his severe mental impairments. However, Florida courts have consistently foreclosed consideration of similar claims arguing evolving standards of decency by relying on Florida's unique, obstructive, and unconstitutional conformity clause found in Art. I, § 17 of the Florida Constitution. Florida's conformity clause will continue to foreclose consideration of such claims absent judicial intervention.

The circuit court cites to *Carroll v. State*, 114 So. 3d 883, 886

(Fla. 2013) to find that "any challenge to the conformity clause should be raised on appeal or in the initial Rule 3.851 motion, not in a successive postconviction motion." SC/332-333. While *Carroll v. State* does discuss an evolving standards of decency claim raised pursuant to *Roper* and *Atkins*, the opinion makes no mention or discussion of the conformity clause. *See Carroll*, 114 So. 3d at 886-887. Further, it was not possible for Gudinas to raise a claim challenging Florida's conformity clause during his direct appeal, because the amendment was not added to the Constitution until after the general election took place in 1998. *See Armstrong v. Harris*, 773 So. 2d 7, 9–10 (Fla. 2000) (noting that the amendment was approved in the general election on November 3, 1998). Gudinas's direct appeal concluded in 1997. *See Gudinas v. State*, 522 U.S. 936 (1997); *Gudinas v. State*, 693 So. 2d 953 (Fla. 1997).

Further still, Gudinas could not have challenged the conformity clause in his initial postconviction motion filed for relief filed on June 5, 1998, because the amendment would not pass until five months later. Gudinas's initial postconviction proceedings concluded in 2002. *See Gudinas v. State*, 816 So. 2d 1095 (Fla. 2002). However, the fact that the conformity clause was in place during part of

Gudinas's initial postconviction proceedings does not foreclose consideration of the argument now. The final and current form of the conformity clause was not added to the Florida constitution until 2002, making it even more unrealistic for Gudinas to have challenged the amendment during his initial postconviction proceedings. The amendment would be overturned once in 2000 by this Court before its final adoption in 2002 after this Court found that the 1998 election ballot on the amendment had been misleading to voters. *See Armstrong*, 773 So. 2d at 17.

Gudinas's Argument II is also raised in conjunction with his evolving standards of decency claim in Argument I because this Court in recent years has relied on the conformity clause to deny similar claims, including during active death warrants. *See Ford v. State*, 402 So. 3d 973, 979 (Fla. 2025); *Barwick v. State*, 361 So. 3d 785, 795 (Fla. 2023). Gudinas could not realistically know in 1998 how Florida courts would utilize the amendment to potentially foreclose an evolving standards of decency claim that he would raise decades later following the signing of his active death warrant. Gudinas could not have reasonably known how science, societal standards, and his own

mental health would evolve over the **twenty-seven years** from when his initial postconviction proceedings commenced in 1998 to the signing of his death warrant in 2025. Gudinas's current challenge to the conformity clause truly became ripe for review when the argument became relevant to his evolving standards of decency claim based on his current severe mental impairments. Raising the claim before would have been premature, and it is appropriately considered now in conjunction with Argument I.

The Eighth Amendment is unique among constitutional principles, in that it inherently "draw[s] its meaning" through active state participation as it pertains to evolving standards of decency. *Trop v. Dulles*, 356 U.S. 86, 101 (1958). Its basic concept is "nothing less than the dignity of man[,]" standing to assure that a state's "power to punish…be exercised within the limits of civilized standards." *Id.* at 100. In accordance with its lofty purpose, Eighth Amendment principles as articulated through the USSC's jurisprudence presuppose that states will actively work to bring society closer to "the Nation we aspire to be[,]" *Hall v. Florida*, 572 U.S. 701, 708 (2014), by reflecting and advancing "the evolving standards of decency to mark the progress of a maturing society."

Trop, 356 U.S. at 101; *see also id.* at 100 (the USSC remarking that the reason it had not previously defined "cruel and unusual" or given "precise content to the Eighth Amendment" was that the United States functioned as an "enlightened democracy"). State participation in facilitating evolving standards of decency ensures that the Eighth Amendment "is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice." *Weems v. United States*, 217 U.S. 349, 378 (1910). Florida's unique conformity clause serves as an abdication of that responsibility.

Art. I, § 17 of the Florida State Constitution, otherwise known as "the conformity clause," states:

> The prohibition against cruel or unusual punishment, and the prohibition against cruel and unusual punishment, shall be construed in conformity with decisions of the United States Supreme Court which interpret the prohibition against cruel and unusual punishment provided in the Eighth Amendment to the United States Constitution … This section shall apply retroactively.

Strict adherence to the clause has proven to be unconstitutional in application. Since Florida's conformity clause—the only one of its kind—became part of the Florida constitution, the Florida courts have cited its purported restriction, and have increasingly relied upon it to opt out of critical Eighth Amendment analyses, including

judicial determinations related to evolving standards of decency. *See, e.g., Ford v. State*, 402 So. 3d 973, 979 (Fla. 2025) (relying in part on the conformity clause to reject argument that categorical exclusion from death penalty under *Roper* should be extended to defendants whose mental or developmental age was less than age eighteen at the time of capital offense); *Barwick v. State*, 361 So. 3d 785, 793-94 (Fla. 2023) (citing the conformity clause to find that court lacked the authority to extend *Roper* categorical exclusion to defendant who was under the age of twenty-one when he committed the capital offense); *Covington v. State,* 348 So. 3d 456, 479-480 (Fla. 2022) (relying in part on conformity clause to refuse to consider whether defendant's alleged insanity at the time of the crime rendered his death sentence cruel and unusual); *Allen v. State*, 322 So. 3d 589, 602 (Fla. 2021) (seemingly implying that the conformity clause may justify limiting a mitigation presentation in certain cases involving waiver); *Lawrence v. State*, 308 So. 3d 544, 545 (Fla. 2020) (relying on the conformity clause to eliminate Eighth Amendment proportionality review); *Bowles v. State*, 276 So. 3d 791, 796 (Fla. 2019) (relying on the conformity clause to refuse any consideration of whether national death penalty trends warranted exemption from execution under the

Eighth Amendment); *Hart v. State*, 246 So. 3d 417, 420-21 (Fla. 4th DCA 2018) (Florida appellate court relying on the conformity clause in a non-capital context to refuse to consider whether a juvenile sentence violated *Graham v. Florida*, 560 U.S. 48 (2010)). Judicial intervention is required to end this practice and protect the due process and Eighth Amendment rights of Florida's defendants.

Continued adherence to the conformity clause denies Florida capital defendants their Fourteenth amendment due process rights. Florida litigants like Gudinas must be provided the opportunity to challenge the state of the law. Indeed, Florida's misguided self-limitation forestalls "one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *Chandler v. Florida*, 449 U.S. 560, 579 (1981) (quoting *New State Ice Co. v. Leibmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)). Florida is preventing capital litigants from moving as Donald P. Roper once did in Missouri's state court system. The reason *Roper v. Simmons* exists, is because one zealous and creative capital defendant decided to be unburdened by the state of capital jurisprudence at that time as applied to juveniles

and moved to formally challenge the precedent of *Stanford v. Kentucky*, 492 U.S. 361 (1989) in Missouri state courts. If Missouri had a "conformity clause" similar to Florida's in place, this country could still be executing people who committed their crimes while under eighteen years of age. Fortunately, Missouri protected the due process and Eighth Amendment rights of its citizens and did not shield behind a "conformity clause." Currently, there is no state-recognized avenue to effect Eighth Amendment progress in the Florida state courts.

The opportunity to be heard is a fundamental requirement of due process. *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (internal quotation omitted). This is an opportunity which must be granted at a meaningful time and in a meaningful manner. *Armstrong*, 380 U.S. at 552. At a minimum, due process requires that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case**.** *Id.* at 550. The USSC has recognized that "execution is the most irremediable and unfathomable of penalties; that death is different." *Ford v. Wainwright*, 477 U.S. 399, 411 (1986) (citing *Woodson v. North Carolina,* 428 U.S. 280, 305 (1976)). Florida must not be permitted

to foreclose Gudinas the opportunity to fully litigate his evolving standards of decency claim, by relying on an arbitrary and unconstitutional "conformity clause."

The USSC has long supported the use of state action to provide greater protection than the federal constitution. *See, e.g., Oregon v. Hass*, 420 U.S. 714, 719 (1975) ("a State is free *as a matter of its own law* to impose [greater protections for individual citizens] than those the Court holds to be necessary upon federal constitutional standards") (emphasis in original); *Cooper v. State of Cal.*, 386 U.S. 58, 62 (1967) ("Our holding, of course, does not affect the State's power to impose [greater protections on individual rights] than required by the Federal Constitution if it chooses to do so"); *Brigham City v. Stuart*, 547 U.S. 398, 409 (2006) (Stevens, J., concurring) ("Federal interests are not offended when a single State elects to provide greater protection for its citizens than the Federal Constitution requires.").

Indeed, Florida has utilized state action to provide greater protection than the federal constitution to victims of crime in Florida by amending the Florida constitution in 1988 to include a provision

for the rights of crime victims in Florida. *See* Art. I, § 16, Fla. Const. The commentary to the 1988 amendment explains that the provision

> was added to give constitutional recognition to the rights of crime victims, including the next of kin of a homicide victim … The impetus for this amendment came from a movement for a victims' rights amendment to the United States Constitution, recommended in 1982 by the President's Task Force on Victims of Crime … Florida was the first state to have a victims' rights clause in its constitution.

See William A. Buzzett and Deborah K. Kearney, *Commentary* (1988 Amendment), Art. I, § 16, Fla. Const. Florida considered the growing recognition of the need for concrete protections for crime victims and "evolved" to formally recognize those rights in the Florida constitution, even though no such amendment exists in the federal constitution. Florida clearly recognizes its own ability to grant its citizens constitutional protections above those afforded by the federal government and has done so for crime victims. At the same time, Florida inexplicably limits its state courts' ability to grant greater Eighth Amendment protections to capital defendants based on evolving standards of decency. This practice must end, or capital defendants will continue to be prevented from meaningfully challenging their death sentences in the state courts based on

evolving standards in science, medicine, and societal attitudes towards the death penalty. Relief is proper.

ARGUMENT III

THE CIRCUIT COURT ERRED IN DENYING GUDINAS'S CLAIM THAT APPLYING THE PROCEDURAL BAR IN FLORIDA RULE OF CRIMINAL PROCEDURE 3.851(d)(2) TO GUDINAS'S CLAIM ONE WOULD VIOLATE GUDINAS'S FOURTEENTH AMENDMENT DUE PROCESS RIGHTS, HIS EIGHTH AMENDMENT RIGHT TO A TRUE MERITS-BASED EVALUATION OF HIS CLAIMS, PREMISED ON THE EVOLVING STANDARDS OF DECENCY THAT MARK THE PROGRESS OF A MATURING SOCIETY, AND HIS SIXTH AMENDMENT RIGHT TO COUNSEL

Florida capital defendants have consistently been denied the ability to thoroughly litigate claims during their active death warrants due to Florida's oppressive and unconstitutional procedural bar under Fla. R. Crim. P. 3.851(d)(2). Gudinas argued in Claim Three of his May 31, 2025 successive Rule 3.851 motion that Fla. R. Crim. P. 3.851(d)(2) is unconstitutional when applied to successive motions filed in the post-death-warrant context. SC/236. Gudinas specifically stated that he was not alleging that Fla. R. Crim. P. 3.851(d)(2) is unconstitutional when applied to successive motions filed outside of the warrant context. SC/236. The circuit court found that Gudinas "could have and should have raised this argument previously."

SC/334. However, this argument would not have been truly ripe for judicial review until after Gudinas's death warrant was signed, as Gudinas is only arguing that Rule 3.851(d)(2) is unconstitutional when applied in the active death warrant context, and he therefore could not suffer the constitutional violation until his death warrant was signed and he was forced to litigate that warrant under the rule's strict dictates. *See State v. Oakley,* 515 So. 2d 1012 (Fla. 4th DCA 1987) (holding that defendant's pretrial challenge to a burden-shifting statute was not ripe "because prior to actual application of the alleged burden-shifting statute at trial, there can be no constitutional violation").

Although Gudinas received a death sentence in 1995, it was not a foregone conclusion that he would ever receive an active death warrant or be attempting to litigate in the post-warrant context under the strict dictates of Rule 3.851(d)(2). Like many inmates on death row, Gudinas could have lived the rest of his natural life and died of natural causes without ever facing an imminent execution. It would have been premature for Gudinas to raise a challenge to Rule 3.851(d)(2)'s application in the post-warrant context when there was no way for him to know if he would ever actually have to litigate a

warrant under that rule. Capital defendants realistically cannot and should not be expected to anticipate and preemptively litigate every possible future legal or factual issue that may arise in their case. While perhaps this argument could have been raised in previous litigation, Gudinas should not be penalized for waiting to challenge the constitutionality of Rule 3.851(d)(2) until the issue was truly ripe for review.

The circuit court also notes that this claim was recently rejected by this Court in *Ford v. State*, 402 So. 3d 973 (Fla. 2025). SC/334. 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. 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 Gudinas's 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.

Florida Rule of Criminal Procedure 3.851(d)(2) specifically reads:

> (2) No motion shall be filed or considered pursuant to this rule if filed beyond the time limitation provided in subdivision (d)(1) unless it alleges:
>
> (A) the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence, or
>
> (B) the fundamental constitutional right asserted was not established within the period provided for in subdivision (d)(1) and has been held to apply retroactively, or
>
> (C) postconviction counsel, through neglect, failed to file the motion

Id.

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. Gudinas does not allege that Fla. R. Crim. P. 3.851(d)(2) is unconstitutional when applied to successive motions filed outside of the warrant context. However, the signing of an active death warrant and the scheduling of an actual execution date renders the circumstances of any successive postconviction motion filed during a warrant different enough to necessitate a more

lenient approach to which claims may be raised and litigated. A Florida inmate's death sentence does not automatically mean that particular inmate will be executed by the State of Florida or even receive a signed death warrant at all. Many Florida inmates have sat on death row for years after receiving their death sentence without ever receiving a signed death warrant, and they finally died due to natural causes.[3] Gudinas himself has sat on death row for **thirty years** since his 1995 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

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

> 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 Gudinas's current case, effectively violates Gudinas's federal Fourteenth Amendment Due Process rights, federal Eighth Amendment right to a narrowly tailored individualized sentencing determination, and federal Sixth Amendment right to effective assistance of counsel. The rule also violates Gudinas's Florida constitutional rights: to due process; against cruel and unusual punishment; and to access the courts. Art. I § 9, 17, 21., Fla. Const.

A post-warrant defendant is not, and should not, be treated as a successive capital litigant in a *non-warrant* posture. Almost immediately after a warrant is signed, the defendant is transferred from the Union Correctional Institution ("UCI") to 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 Gudinas's case as an opportunity to find Fla. R. Crim. P. 3.851(d)(2) inapplicable to capital defendants litigating under an active death warrant.

Gudinas 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, Gudinas 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. Gudinas 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).[4]

"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 their last opportunity to litigate for their very life. Gudinas's fundamental due process right to be heard in a meaningful manner

[4] 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.

will not be honored if he is denied relief on his valid Eighth Amendment claim in Argument I 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 also denied Gudinas an opportunity to be heard in a meaningful manner by denying him an evidentiary hearing on his evolving standards of decency claim.

This Court's scheduling order issued on May 23, 2025 setting out state court proceedings pursuant to the warrant, serves no legitimate purpose if the proceedings are based on the strict unyielding interpretation of Fla. R. Crim. P. 3.851(d)(2). The state court proceedings are no more than "business as usual" if Gudinas 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 Gudinas's motion is akin to just "going through the motions," as Gudinas has no realistic fair opportunity for his day in court.

Fla. R. Crim. P. 3.851(d)(2), as currently interpreted and utilized, also violates Gudinas's Eighth Amendment right to narrowly

tailored individualized sentencing. Florida's use of the procedural bar in the death warrant context prevents Gudinas from presenting that his case is not among the most aggravated and least mitigated. *State v. Dixon*, 283 So. 2d 1, 7 (Fla. 1973). The newly discovered evidence of Gudinas's mental impairments and a reconsideration of the thirty-year-old mitigation warrant an evidentiary hearing.

The USSC has made clear that the consideration of mitigation by the sentencer is at the heart of the constitutionality of the death penalty. In *Proffitt v. Florida*, 428 U.S. 242 (1976), the USSC considered whether the imposition of the sentence of death for the crime of murder under Florida law violated the Eighth and Fourteenth Amendments. *Id.* at 244. The USSC found that Florida's new death penalty law passed constitutional scrutiny because "the sentencing judge must focus on the individual circumstances of each homicide and each defendant. *Id.* at 252. The unique mental impairments that Gudinas has suffered throughout his life were not completely heard and fully considered by the trial court, thus failing to meet the requirements of *Proffitt*.

The USSC developed even more principles to ensure that the death penalty was not exacted on those who did not meet the

requirements of the Constitution. *Woodson v. North Carolina*, 428 U.S. 280 (1976), required that a death penalty scheme "allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death." *Id.* at 303. This will not occur in Gudinas's case if Rule 3.851(d)(2)'s stringent procedural bar prevents this Court from considering Gudinas's current weighty mitigation before his death sentence is "impos[ed] upon him" via lethal injection. Then came a litany of cases that required consideration of mitigation. In *Lockett v. Ohio*, 438 U.S. 586 (1978) the USSC "conclude[d] that the Eighth and Fourteenth Amendments require that the sentencer … not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Id.* at 604.

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

> the rule in *Lockett* followed from the earlier decisions of the Court and from the Court's insistence that capital punishment be imposed fairly, and with reasonable consistency, or not at all. By requiring that the sentencer be permitted to focus "on the characteristics of the person

> who committed the crime," … the rule in *Lockett* recognizes that "justice … requires … that there be taken into account the circumstances of the offense together with the character and propensities of the offender." … By holding that the sentencer in capital cases must be permitted to consider any relevant mitigating factor, the rule in *Lockett* recognizes that a consistency produced by ignoring individual differences is a false consistency.

Id. at 112 (internal quotations omitted). A clear understanding of these cases demonstrates that the USSC has long recognized the need for an individualized sentencing that carefully considers *all* mitigation. Because of Rule 3.851(d)(2)'s oppressive procedural bar, Gudinas is being denied this one last opportunity to provide the state court a complete understanding of all the mitigation that informs Gudinas's life choices and weighs against his execution.

Gudinas's Sixth Amendment right to effective counsel is also being violated, as Fla. R. Crim. P. 3.851(d)(2)'s application in the warrant litigation context precludes undersigned counsel from substantially litigating on Gudinas's behalf. As all viable claims at the death warrant stage are subjected to Florida's procedural bar, Gudinas is essentially being denied any representation at all during his active death warrant unless his case meets one of the three very narrow claims for relief enumerated in Rule 3.851(d)(2). Gudinas has

a constitutional right to counsel under the federal Sixth Amendment as applied to the states through the Fourteenth Amendment, which includes the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 684-86 (1984); *Gideon v. Wainwright*, 372 U.S. 335 (1963).

Although undersigned counsel has proudly and diligently represented Gudinas, the procedural bar of Fla. R. Crim. P. 3.851(d)(2) and the time-limitations of Gudinas's thirty-two day warrant practically preclude Gudinas from receiving any real counsel under the Sixth Amendment. Undersigned counsel maintains that it is not best practice for counsel for a capital defendant to file an *Anders*[5] brief as the final state pleading on behalf of a capital client when that client is under an active death warrant. "Death is different," and all viable avenues of relief should be fully assessed before the State exercises the ultimate sanction by executing a Florida capital defendant like Gudinas. However, unless Florida reconsiders the application of Fla. R. Crim. P. 3.851(d)(2) in the death warrant context, any narrow reading of the statute will basically

[5] *Anders v. California*, 386 U.S. 738 (1967).

preclude Gudinas from receiving relief.

Undersigned counsel has the skills and tools to assist capital defendants at the warrant stage, but without a reconsideration of the application of Fla. R. Crim. P. 3.851(d)(2) during an active death warrant, Gudinas and all Florida capital defendants who receive an active death warrant, are not provided a foundation for counsel to build upon. Gudinas's case is an appropriate time to protect the rights of all Florida capital defendants and make effective use of judicial time and resources. Fla. R. Crim. P. 3.851(d)(2) must be reconsidered. Relief is proper.

ARGUMENT IV

THE CIRCUIT COURT ABUSED ITS DISCRETION IN DENYING GUDINAS'S DEMAND FOR PUBLIC RECORDS FROM THE EXECUTIVE OFFICE OF THE GOVERNOR, IN VIOLATION OF GUDINAS'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

This Court reviews rulings based on public records requests pursuant to Florida Rule of Criminal Procedure 3.852 for abuse of discretion. *Hannon v. State*, 228 So. 3d 505, 511 (Fla. 2017). Due to the irregular factors surrounding the signing of Gudinas's May 23, 2025 death warrant, Gudinas made a demand pursuant to Florida

Rule of Criminal Procedure 3.852(h)(3) and (i) to the Executive Office of the Governor ("EOG"). For the reasons below, Gudinas asserts that the circuit court's denial was error and an abuse of discretion. The records requested were as follows:

> a. Copies of all emails, correspondence, and recorded communications, regardless of form, between Governor Ron DeSantis and/or any current or former employee of the Governor's Office, and the Florida Parole Commission and/or Office of Executive Clemency that relates in any way whatsoever to Thomas Gudinas (DOB 02/27/1974; DC# 379799);
> b. Copies of all correspondence and recorded communications, regardless of form, between Governor Ron DeSantis and/or any current or former employee of the Governor's Office, and/or any current or former employee of the Office of the Attorney General that relates in any way whatsoever to Thomas Gudinas (DOB 02/27/1974; DC# 379799);
> c. All emails, policies, procedures, internal memoranda, or other documents (or a statement indicating lack of same) outlining the criteria and selection process for inmates to receive executive clemency, including but not limited to how an inmate is selected for consideration of clemency, when an inmate is eligible for consideration, and any other pertinent information regarding the selection process and criteria;
> d. All policies, procedures, internal memoranda, or other documents (or a statement indicating lack of same) outlining the criteria for determining how to grant executive clemency, including but not limited to, what factors are considered in determining whether to grant clemency, how much weight should be given to each factor, and any other pertinent information regarding the process;

e. The number of individuals presently on death row who have been selected for clemency review, as well as the number of individuals whose clemency review has been completed;

f. All emails, policies, procedures, internal memoranda, or other documents outlining the criteria and selection process for inmates to receive a death warrant, including but not limited to how an inmate is selected for a warrant, when an inmate is eligible for a warrant, what factors are considered in determining whether to issue a warrant, and any other pertinent information regarding the process;

g. Any email, document, record, list, or other memoranda naming individuals currently on Florida's Death Row who have had complete or partial clemency investigations or whose cases have resulted in clemency, pursuant to the authority prescribed in Article IV, Section 8(a) of the Florida Constitution and Rule 15 of the Rules for Executive Clemency. This request does not seek documents generated in any particular individual's clemency investigation, but only records indicating the existence of such an investigation and/or clemency determination;

h. Any email, document, record, list, or other memoranda indicating, for those individuals to whom clemency was denied, the date of the denial of clemency by the Governor and Clemency Board. This request does not seek documents generated in any particular individual's clemency investigation, but only records indicating that a clemency determination has been made; and

i. Any letters, emails, notices, or other written correspondence, regardless of form, received by the Office of the Governor from the Florida Supreme Court notifying the Governor of the names of individuals sentenced to death who are eligible for a death warrant, between January 1, 2023 and the present.[6]

---

[6] As counsel clarified at the hearing, all demands to the EOG are limited to the time periods from January 1, 2023 onward. SC/211-12.

SC/139-41. As counsel explained at the hearing, Gudinas is also willing to further streamline his demand requests in an effort to protect his constitutional rights. SC/201. As argued below, the requested records relate to colorable claims for relief, as they are relevant to the subject matter of the pending postconviction proceeding and are reasonably calculated to lead to the discovery of admissible evidence. Such records may contain, or, through further investigation may lead to the discovery of, evidence that Gudinas's death warrant was submitted in violation of his rights under the Eighth and Fourteenth Amendments, including his rights to substantive and procedural due process related to the death penalty being administered in a fair, consistent, and reliable manner. (see *Arbelaez v. Butterworth*, 738 So. 2d 326 (Fla. 1999)); his right to competent mental health assistance (*see Ake v. Oklahoma*, 470 U.S. 68 (1985)); and his right to fundamental fairness, which is the hallmark of procedural protections afforded by the Due Process Clause. (see *Ford v. Wainwright*, 477 U.S. 399, 424 (1986)). Specifically, the colorable claims for relief include:

> 1. Whether, and to what extent Gudinas's Eighth Amendment and due process rights pursuant to the

> Fourteeth Amendment are being violated due to irregular and unique circumstances in which his death warrant was signed.
> 2. Whether and to what extent Gudinas's Eighth Amendment and equal rights pursuant to the Fourteeth Amendment are being violated due to irregular and unique circumstances in which his death warrant was signed. SC/206-08.
> 3. Whether Florida's lack of criteria in determining or procedure in determining whom to execute is arbitrary and capricious leading to an absurd result that violates the Eighth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.

Gudinas is not making any allegations, and nor is he merely speculating about the Governor's actions, as the circuit order opined. SC/188. Rather, Gudinas is respectfully meeting his pleading requirement for the records that are the subject of his demand, based on the specific factual basis argued on May 29, 2025 and further articulated below. The court also erred in opining that Gudinas should have raised his claim prior to the signing of the warrant. SC/190. Though Gudinas argues for an exception to the requirements of Rule 3.852 (h)(3) due to the unusual fact pattern giving rise to his death warrant, he is clearly timely under subsection (i) of the rule. The signing of the warrant gives rise to the claim itself, as will be clearly detailed in the fact pattern below. There was no

reason at all to demand these records until Gudinas's death warrant was signed, as his challenge is specific to his circumstances.

A Fact Pattern Distinguished from Precedent

Gudinas is aware of precedent that "generally," based on separations of powers, Florida courts do not "second-guess" the clemency considerations of the executive branch. *Lambrix v. State*, 217 So. 3d 970, 990 (Fla. 2017). As counsel argued at the hearing below, the precedent does have qualifying language, *See Valle v. State,* 70 So. 3d 530, 552 (Fla. 2011), "proceed carefully in addressing claims regarding separation of powers." Indeed, a true holding that the Governor has "unfettered discretion" in death warrant selection, *Gore v. State*, 91 So. 3d 769, 779 (Fla. 2012), and that his actions may not be "second-guessed, *See Carroll v. State*, 114 So. 3d 883, 888 (Fla. 2013), would be an abdication of authority. No citizen, including the chief executive of a state, is immune from following the United States Constitution. *See American Federation of State, County, and Municipal Employees Council 79 v. Rick Scott*, 717 F. 3d 851, 875-80 (11th Cir. 2013) (rejecting the Governor's executive order mandating the drug-testing of all state employees, in part on Fourth Amendment grounds); *see also In re Bush,* 164 Wash. 2d 697, 700

(Wash. 2008) (finding a 14th Amendment non substantive, procedural due process violation when the Washington Governor revoked Bush's conditional sentence commutation, without providing an opportunity to be heard). Moreover, Article II, Section 5 of the Florida Constitution requires the Governor support, protect, and defend the Constitution and Government of the United States.

These specific proceedings require this Court's intervention, due to the irregular nature regarding the manner of which Gudinas's death warrant was submitted. Despite the number of capital postconviction attorneys practicing in Florida, and the amount of post clemency warrant eligible men on death row, one of Gudinas's undersigned counsel under this warrant, Attorney Ali Shakoor, is litigating his fourth separate death warrant since July 29, 2024; that is four separate death warrants for the same specific undersigned counsel, in less than a year.[7] The irregularity is further established by the fact that Gudinas's counsel of record, Attorney Ali Shakoor,

[7] See Loran Cole, DC #335421 (Executed August 29, 2024); James Ford, DC #763722 (Executed February 13, 2025); Glen Rogers, DC #124400 (Executed May 15, 2025) and Thomas Gudinas, DC #379799 (Warrant Signed May 23, 2025).

has been served by the executive branch on **three** death warrant cases, of which Attorney Shakoor was never counsel of record.[8]

Moreover, the peculiar nature of Gudinas's clemency proceeding and warrant selection is demonstrated by the fact that his clemency interview occurred on April 4, 2025, followed by the death warrant being submitted less than two months later on May 23, 2025. The requested records will establish to what extent these irregular and concerning factors violated Gudinas's rights to a fundamentally fair clemency process.

Attorney Shakoor is one of fourteen attorneys that work for Capital Collateral Regional Counsel-Middle Region. Capital Collateral Regional Counsel-North Region has four lead attorneys and three second chairs. Capital Collateral Regional Counsel-South Region has five lead qualified attorneys. As of August 14, 2024, the Justice Administrative Commission website lists thirty-five attorneys on the Capital Collateral Attorney Registry. Based on this data, Attorney Shakoor is one of sixty-one attorneys practicing capital

[8] *See* Michael Tanzi, DC #K04389 (Served on March 10, 2025); Jeffrey Glenn Hutchinson, DC #124849 (Served on March 31, 2025); Anthony Floyd Wainwright, DC #123847 (Served on May 9, 2025).

postconviction law in this state. The Florida Department of Corrections website currently lists 271 people on Florida's death row. The specific number of people who have gone through clemency is unknown and is one of the subjects of Gudinas's records demand. A recent article from the Tallahassee Democrat opines that about 100 inmates are eligible for execution, "including seven added to the list this year." Call, James Gov. DeSantis Nears Record as Florida Ramps up Executions in 2025 (2025, May 30). *The Tallahassee Democrat* https://www.tallahassee.com/story/news/local/state/2025/05/30/gov-desantis-signs-7-death-warrants-in-3-months-amid-trump-pivot/83902655007/. Considering the number of death eligible inmates and practicing capital collateral attorneys, it defies statistical probability for Thomas Gudinas to be Attorney Shakoor's fourth death warrant in less than one year. Additional scrutiny is required.

The peculiarity of Gudinas's death warrant is further highlighted by the fact that Attorney Shakoor was served on three separate death warrants for clients he does not represent. SC/205-06. Again, Attorney Shakoor is just one of approximately sixty-one lead counsel practicing capital postconviction in Florida; a mere

lawyer, Attorney Shakoor is not the appointed head of any CCRC and nor does he have the authority to assign anyone to work on a death warrant. Still, Attorney Shakoor was served by counsel for the Governor, Attorney Zachary Loyed, on the following cases: *Michael Tanzi, DC #K04389 (Served on March 10, 2025); Jeffrey Glenn Hutchinson, DC #124849 (Served on March 31, 2025); Anthony Floyd Wainwright, DC #123847 (Served on May 9, 2025).* Attorney Shakoor further explained at the May 29, 2025 hearing that serving him in error inhibits the already expedited process for the proper attorneys and clients, who should be properly served. SC/206, 209. The information regarding who represents individuals on death row is public accessible on the Internet. The focus on Attorney Shakoor, one of approximately sixty-one practicing postconviction attorneys, is peculiar and concerning.

Another concerning aspect of Gudinas being Attorney Shakoor's fourth death warrant since July 29, 2024, is that Gudinas had his clemency interview on April 4, 2025. The fact that Gudinas received a death warrant while represented by Attorney Shakoor on May 23, 2025, less than two months after his clemency interview, proves him to be an outlier compared to other death warrants. Gudinas receiving

a death warrant while being an Attorney Shakoor client is unique and peculiar under these circumstances.

The Fourteenth Amendment

Gudinas has a due process right to a fair and legitimate clemency process. The clemency process is the "fail safe" in our criminal justice system. *Harbison v. Bell*, 129 S. Ct. 1481, 1490 (2009). Clemency proceedings are part of the total death penalty procedural scheme in this state. *Remeta v. State*, 559 So. 2d 1132, 1135 (Fla. 1990). Gudinas had a right to substantive and procedural due process related to the death penalty being administered in a fair, consistent, and reliable manner. *Arbelaez v. Butterworth*, 738 So. 2d 326 (Fla. 1999).

Fairness also requires that Gudinas is not treated disparately to similarly situated defendants, even based on who represents him. SC/206-08. The level of scrutiny under an equal protection clause analysis would depend on the reasons for the disparate treatment, but Florida does not even have a rational basis for Gudinas being Attorney Shakoor's fourth death warrant since July 29, 2024. It defies statistical probability.

As argued at the May 29, 2025 hearing, it would be naïve and irresponsible to not make a record and request more evidence at this juncture. SC/206, Tellingly, undersigned counsel has not requested these EOG records for the previous three death warrants litigated since July 29, 2024. SC/207-08. However, now we must protect Gudinas's constitutional rights based on his timely filed demand for additional records. The time has come for judicial intervention.

Eighth Amendment

Gudinas does not argue that because the Governor has some discretion the system is *per se* arbitrary and capricious. Gudinas does not dispute that if the Governor or other decision-making body[9] had some criteria, the Governor or other body would be free to choose from among any of the defendants who fit the criteria. Gudinas argues there must be *some* criteria. Florida's Governor has no criteria, procedure, or guidelines in place for selecting who lives and who dies. Granting the Governor unfettered discretion has, in practice, led to a completely arbitrary process for determining who

[9] For example, in Tennessee, the state supreme court sets execution dates. *See, e.g.*, Tennessee http://www.tncourts.gov/news/2018/11/16/supreme-court-sets-execution-dates.

lives and who dies. There are no articulated limits to the executive discretion, there are no guidelines for the selection process, and the entire process is cloaked in secrecy. *C.f. Furman v. Georgia*, 408 U.S. 238, 309-10 (1972) (Stewart, J., concurring) ("These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders . . . many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed.")

The USSC has repeatedly "held that the Eighth Amendment requires increased reliability of the process by which capital punishment may be imposed." *Herrera v. Collins*, 506 U.S. 390 (1993); *McKoy v. North Carolina*, 494 U.S. 433 (1990); *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality). The imposition of a death sentence *and* the process of carrying out an execution must withstand constitutional scrutiny.

> If the Constitution renders the fact *or timing* of his execution contingent upon establishment of a further fact . . . "then that fact must be determined with the high regard for truth that befits a decision affecting the life or death of a human being."

Herrera, 506 U.S. at 405-06 (quoting *Ford*, 477 U.S. at 411). The USSC has held that factual determinations related to the constitutionality of a person's execution are "properly considered in proximity to the execution." *Id.* at 406 (noting competency to be executed determination is more reliable near time of execution whereas guilt or innocence determination becomes less reliable). In other words, whether the carrying out of a death sentence violates the Eighth Amendment depends on the facts existing after a death warrant is signed and the determination of these facts requires *increased reliability*.

Despite this requirement, Florida vests the Governor with unbridled authority not only to sign death warrants but also to set the date of execution, all of which is done under a veil of secrecy and without any governing standards as to how the Governor should exercise his warrant signing power. The inescapable corollary to this authority is that the Governor controls how much process is available to make these critical factual determinations *if any*. The result is unchecked power—an absolute veto, in absolute secrecy—over the Eighth Amendment.

The Governor's absolute discretion to decide who lives and who dies must be compared with the standards and limits placed upon a sentencing judge's decision to impose a death sentence. The Governor's decision to sign a death warrant is just as necessary to carrying out a death sentence as the sentencing judge's decision to sign his name to a document imposing the death sentence. In Florida, no death sentence can be imposed unless the judge signs the sentencing order imposing a sentence of death. Similarly, no individual who receives a sentence of death will in fact be executed until the Governor exercises his discretion to sign a death warrant. The Eighth Amendment requires there to be a principled way to distinguish between who is executed by a state and who is not and how much time they are afforded to investigate and present their claims under warrant.

Here, the circuit court and this Court have yielded entirely to the Governor. Section 922.052, Florida Statutes, sets a maximum 180-day warrant period, yet here, the Governor afforded Gudinas only thirty-two days to litigate his warrant. Gudinas alerted the circuit court to his need for the EOG records under the unnecessarily expedited and difficult warrant schedule, which were denied. The

court's abdication violates the separation of powers articulated in Article II, Section 3 of the Florida Constitution and, the Eighth and Fourteenth Amendments to the United States Constitution, as applied to Gudinas.

This Court has declined to address the Governor's unbridled discretion in determining who shall die and when, noting that such an inquiry "triggers separation of powers concerns." *Valle v. State*, 70 So. 3d 530 (Fla. 2011). This Court should revisit its precedent. There must be some form of test, whereas varying factors are determined. It is well past time. The Governor's power is not absolute. The United States Constitution still controls. Whether to grant clemency is discretionary. Whether to follow the Constitution in carrying out a death sentence is not. The Eighth Amendment still applies, even though the Governor sits in a different branch of government.

Gudinas, who has been severely mentally ill his entire life, was quietly serving his time on death row, until he had the misfortune of being Attorney Ali Shakoor's 4th death warrant since July 29, 2024. Despite the number of death eligible defendants, and the approximately sixty-one lead postconviction attorneys in Florida, the Governor chose Gudinas just after his very recent April 4, 2025

clemency interview. Gudinas is merely requesting records from the EOG to investigate to what extent his constitutional rights have been violated. The demand can even be streamlined to a fixed time-period and terms more specific to Gudinas. This Court has the authority to remand and set the parameters for review. This is a unique and peculiar case of which precedent does not provide sufficient guidance. Relief is proper.

CONCLUSION AND RELIEF SOUGHT

Based on the foregoing arguments, Gudinas respectfully requests that this Court grant a stay of execution; 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,

/s/ Ali A. Shakoor
Ali A. Shakoor
Florida Bar No. 0669830
Assistant CCRC
Email: shakoor@ccmr.state.fl.us

/s/ Adrienne Joy Shepherd
Adrienne Joy Shepherd
Florida Bar No. 1000532
Assistant CCRC
Email: shepherd@ccmr.state.fl.us

The Law Office of the Capital Collateral Regional Counsel- Middle Region
12973 Telecom Parkway North
Temple Terrace, Florida 33637
Tel: 813-558-1600
Fax: 813-558-1601
Second email: support@ccmr.state.fl.us

Counsel for Thomas Gudinas

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that on this 8th day of June, 2025, WE electronically filed the foregoing Initial Brief by using the Florida Courts E-Filing Portal which will send a notice of electronic filing to the following: The Honorable John E. Jordan at Division 16, 16orange@ninthcircuit.org; Assistant State Attorneys Kenneth Nunnelley, at knunnelley@sao9.org; William Jay, at WJay@sao9.org; Assistant Attorneys General Leslie Campbell at Leslie.Campbell@myfloridalegal.com, capapp@myfloridalegal.com, Lisa-Marie Lerner, Lisamarie.Lerner@myfloridalegal.com; Julie Meyer, Julie.Meyer@myfloridalegal.com capapp@myfloridalegal.com, and the Florida Supreme Court, at warrant@flcourts.org.

/s/ Ali A. Shakoor
Ali A. Shakoor
Florida Bar No. 0669830
Assistant CCRC
Email: shakoor@ccmr.state.fl.us

/s/ Adrienne Joy Shepherd

Adrienne Joy Shepherd
Florida Bar No. 1000532
Assistant CCRC
Email: shepherd@ccmr.state.fl.us

The Law Office of the Capital Collateral Regional Counsel- Middle Region
12973 Telecom Parkway North
Temple Terrace, Florida 33637
Tel: 813-558-1600
Fax: 813-558-1601
Second email: support@ccmr.state.fl.us
Counsel for Thomas Gudinas

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 contains less than 75 pages.

/s/ Ali A. Shakoor
Ali A. Shakoor
Florida Bar No. 0669830
Assistant CCRC
Email: shakoor@ccmr.state.fl.us

/s/ Adrienne Joy Shepherd
Adrienne Joy Shepherd
Florida Bar No. 1000532
Assistant CCRC
Email: shepherd@ccmr.state.fl.us

The Law Office of the Capital Collateral Regional Counsel- Middle Region
12973 Telecom Parkway North
Temple Terrace, Florida 33637
Tel: 813-558-1600
Fax: 813-558-1601
Second email: support@ccmr.state.fl.us
Counsel for Thomas Gudinas