No. No.24-5389

IN THE

Supreme Court of the United States

LORAN COLE,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

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

AMENDED APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI PETITIONER'S BRIEF TO THE FLORIDA SUPREME COURT

THIS IS A CAPITAL CASE
WITH AN EXECUTION SCHEDULED FOR
THURSDAY, AUGUST 29, 2024, AT 6:00 P.M.

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APPENDIX A

***Cole v. State*, No. SC2024-1170, (Fla., August 23, 2024).**

Initial Brief of the Appellant, (See Pages 36-42)
***Cole v. State*, No. SC2024-1170**

Supreme Court of Florida

No. SC2024-1170

LORAN COLE,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

August 23, 2024

PER CURIAM.

Loran Cole is a prisoner under a sentence of death for whom a warrant has been signed and an execution set for August 29, 2024. He appeals the circuit court's orders summarily denying his fourth successive motion for postconviction relief filed under Florida Rule of Criminal Procedure 3.851 and denying his public records requests made under rule 3.852.[1] For the reasons that follow, we

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

affirm. We also deny Cole's motion to stay and his request for oral argument filed in this Court.

I

On February 18, 1994, Florida State University freshman John Edwards met his sister, then a senior at Eckerd College in St. Petersburg, for a weekend of camping in the Ocala National Forest.[2] *Cole v. State* (*Cole II*), 841 So. 2d 409, 413 (Fla. 2003). That evening, the Edwards siblings were discovered by Cole and his companion, William Paul. *Id.* Eventually, the four sat around the campfire, and at about 10:45 p.m., they decided to walk to a pond. *Cole v. State* (*Cole I*), 701 So. 2d 845, 848 (Fla. 1997). The four walked for a while but never found the pond. *Id.* Instead, John died that night from a slashed throat and three blows to the head, which fractured his skull. *Id.* at 849. The injury to the throat caused a loss of blood externally and internally into John's lungs. *Id.* After returning with John's sister to the campsite, Cole forced her to remove her clothes by threatening that unless she

2. We discussed the facts of this case in depth in *Cole v. State* (*Cole I*), 701 So. 2d 845, 848-49 (Fla. 1997), *cert. denied*, 523 U.S. 1051 (1998).

cooperated, she and John would be killed. *Id.* Cole then raped her. *Id.* Ultimately, Cole gagged John's sister, tied her to two trees, and left with Paul in her car. *Id.*

Cole was indicted on charges of first-degree murder, two counts of kidnapping with a weapon, two counts of robbery with a weapon, and two counts of sexual battery. *Id.* After a jury trial, Cole was found guilty of all counts in the indictment. *Id.* A penalty phase hearing was held, after which the jury unanimously recommended death. *Id.* Finding four aggravators,[3] no statutory mitigators, and two nonstatutory mitigators,[4] the trial court followed the jury's recommendation and sentenced Cole to death. *Id.* On direct appeal, this Court affirmed Cole's convictions and sentence of death, which became final when the United States

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3. Specifically, the trial court found the following aggravators: (1) Cole had previously been convicted of another felony; (2) the murder was committed during the course of a kidnapping; (3) the murder was committed for pecuniary gain; and (4) the murder was especially heinous, atrocious, or cruel. *Cole I*, 701 So. 2d at 849 n.1.

4. The trial court found and weighed the following nonstatutory mitigators: (1) Cole suffered from organic brain damage and mental illness (slight to moderate weight); (2) Cole suffered an abused and deprived childhood (slight weight). *Cole I*, 701 So. 2d at 849 n.2.

Supreme Court denied Cole's certiorari petition on March 30, 1998. *Cole v. Florida*, 523 U.S. 1051 (1998).

Cole has since unsuccessfully challenged his convictions and death sentence in both state and federal court. In 1998, Cole filed his first motion for postconviction relief, which the circuit court denied. *Cole II*, 841 So. 2d at 413. He then sought review in this Court[5] and soon thereafter separately sought habeas relief from this

5. In his rule 3.850 appeal, Cole argued that: (1) the trial court erred in denying Cole an evidentiary hearing on trial counsel's failure to (a) present evidence of Cole's extensive drug and alcohol abuse, (b) present evidence of childhood abuse, (c) object to prosecutorial misconduct during the penalty phase closing, (d) request an HAC limiting jury instruction, (e) introduce Paul's life sentence, (f) request co-counsel to assist with the penalty phase, and (g) object to hearsay testimony of Dan Jackson and Deputy Tammy Jicha; (2) trial counsel was ineffective for failing to request and argue two statutory mental mitigators; (3) trial counsel was ineffective for failing to have a competent neuropsychological evaluation performed on Cole; (4) Cole did not receive effective mental health assistance as required by *Ake v. Oklahoma*, 470 U.S. 68 (1985); (5) the trial court erred by excluding Dr. Dee's testimony during the evidentiary hearing; (6) after an evidentiary hearing, the trial court erred in not finding trial counsel ineffective during the guilt phase regarding trial counsel's (a) failure to conduct individual voir dire, (b) failure to utilize a peremptory challenge to remove juror Cutts, (c) failure to present Paul's testimony, (d) failure to contemporaneously object to the prosecutor's improper opening statement, (e) decision to only call John Thompson during Cole's case-in-chief, and (f) cumulative error as to this claim; (7) the trial court erred in refusing to allow a DNA test; (8) the trial court

Court.[6] *Id.* at 429. We affirmed the circuit court's denial of relief and denied his petition for writ of habeas corpus. *Id.* at 431.

Cole next sought DNA testing pursuant to Florida Rule of Criminal Procedure 3.853. *Cole v. State* (*Cole III*), 895 So. 2d 398, 400 (Fla. 2004). The circuit court denied the motion, and we affirmed. *Id.* at 403. Cole then sought relief in federal court, filing a habeas petition in 2005. *Cole v. Crosby*, No. 505CV222OC10GRJ, 2006 WL 1169536, at *2 (M.D. Fla. May 3, 2006). The federal

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considered nonstatutory aggravating circumstances; (9) the State withheld exculpatory information in violation of *Brady v. Maryland*, 373 U.S. 83 (1963); (10) Cole should be allowed to question jurors to determine if there was juror misconduct; (11) the trial court erred in failing to grant an evidentiary hearing on trial counsel's failure to litigate the unconstitutional nature of the aggravating circumstances; and (12) cumulative error exists. *Cole II*, 841 So. 2d at 414 n.3.

6. In his habeas petition, Cole argued that: (1) his appellate counsel was ineffective for appellate counsel's failure to argue that (a) Florida's death sentencing statute was unconstitutionally applied to him in light of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), (b) the trial court erred in denying Cole's motion for a statement of particulars regarding aggravating circumstances, and (c) a jury death recommendation must be unanimous; (2) the prosecutor's penalty phase closing argument constituted fundamental error; (3) Cole may be incompetent to be executed; (4) electrocution (a) remains the mandated mode of execution as the Death Penalty Reform Act of 2000 is unconstitutional, and (b) is cruel or unusual or both; and (5) lethal injection is cruel or unusual or both. *Cole II*, 841 So. 2d at 414 n.4.

district court denied relief and denied Cole's subsequent request for a certificate of appealability. *Id.* at *68; *Cole v. Crosby*, No. 5:05-CV-222-OC-10, 2006 WL 1540302, at *1 (M.D. Fla. May 30, 2006). Cole additionally sought a renewed application for certificate of appealability in the United States Court of Appeals for the Eleventh Circuit, which was denied in a one-page order in 2007. The United States Supreme Court denied certiorari review. *Cole v. McDonough*, 552 U.S. 1115 (2008).[7]

Thereafter, Cole filed his first and second successive motions for postconviction relief on similar grounds,[8] which the circuit court denied, and we affirmed. *Cole v. State* (*Cole IV*), 83 So. 3d 706 (Fla. 2012); *Cole v. State* (*Cole V*), 131 So. 3d 787 (Fla. 2013). We also affirmed the denial of Cole's third successive motion for

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7. Cole filed an application for leave to file a second federal habeas petition in the Eleventh Circuit, which was denied on March 20, 2012.

8. Cole's first successive motion argued that previously repressed memories had resurfaced about abuse he witnessed and suffered at the Arthur G. Dozier School for Boys and this newly discovered evidence demonstrated that trial counsel was ineffective during the penalty phase of Cole's trial. Cole's second successive postconviction motion reframed his memory suppression issue as one of newly discovered evidence.

postconviction relief that presented a *Hurst*[9] claim. *Cole v. State* (*Cole VI*), 234 So. 3d 644 (Fla. 2018). The United States Supreme Court denied certiorari review. *Cole v. Florida*, 585 U.S. 1007 (2018).

On July 29, 2024, Governor DeSantis issued a death warrant for the execution of Cole. The execution is scheduled for Thursday, August 29, 2024, at 6:00 p.m. As a result, Cole filed a demand for public records pertaining to lethal injection protocol directed to the Florida Department of Law Enforcement, the Florida Department of Corrections, and the Office of the Medical Examiner, District Eight. After receiving objections from all three entities, and after holding a hearing, the postconviction court entered an order denying Cole's requests.

Next, and timely under this Court's scheduling order, Cole filed his fourth successive motion for postconviction relief raising

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9. Cole sought relief under the United States Supreme Court's decision in *Hurst v. Florida*, 577 U.S. 92 (2016), and this Court's decision on remand in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), *receded from in part by State v. Poole*, 297 So. 3d 487 (Fla. 2020); *see also Gonzalez v. State*, 375 So. 3d 886, 887 (Fla. 2023) (acknowledging that the Legislature amended the death penalty statute to remove the juror unanimity requirement).

three claims: (1) that he is entitled to relief based upon newly discovered evidence regarding his treatment while he attended the Arthur G. Dozier School for Boys in 1984 (Dozier school); (2) that his Eighth Amendment rights were violated because his experience while an inmate in the Department of Corrections has been cruel and unusual; and (3) Florida's lethal injection procedures, as applied to him, are unconstitutional and constitute cruel and unusual punishment.

The postconviction court held a *Huff*[10] hearing on August 6, 2024, after which it determined that each of Cole's claims could be resolved based on a review of the record and as a matter of law. The postconviction court then entered an order denying Cole's claims as either untimely or procedurally barred, and as to claims 2 and 3, substantively on the merits.

On appeal, Cole asserts that the postconviction court erred by summarily denying his fourth successive postconviction motion and denying his requests for public records. We find no error and affirm.

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10. *Huff v. State*, 622 So. 2d 982 (Fla. 1993).

II

A

"Summary denial of a successive postconviction motion is appropriate '[i]f the motion, files, and records in the case conclusively show that the movant is entitled to no relief.' " *Bogle v. State*, 322 So. 3d 44, 46 (Fla. 2021) (alteration in original) (quoting Fla. R. Crim. P. 3.851(f)(5)(B)); *see also Parker v. State*, 904 So. 2d 370, 376 (Fla. 2005) ("As a general proposition, a defendant is entitled to an evidentiary hearing on any well-pled allegations in a motion for postconviction relief unless (1) the motion, files, and records in the case conclusively show that the prisoner is entitled to no relief, or (2) the motion or a particular claim is legally insufficient."). Also relevant to this appeal, postconviction claims in capital cases must generally be filed within one year after the judgment and sentence become final. Fla. R. Crim. P. 3.851(d)(1). And rule 3.851 prohibits, with certain exceptions, both untimely and repetitive claims. *See* Fla. R. Crim. P. 3.851(e)(2) (providing that "[a] claim raised in a successive motion shall be dismissed . . . 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)");

Hendrix v. State, 136 So. 3d 1122, 1125 (Fla. 2014) ("Claims raised and rejected in prior postconviction proceedings are procedurally barred from being relitigated in a successive motion."). The burden is on the defendant to establish a prima facie case, based upon a legally valid claim. *See Franqui v. State*, 59 So. 3d 82, 96 (Fla. 2011).

In reviewing a trial court's summary denial, "this Court must accept the defendant's allegations as true to the extent that they are not conclusively refuted by the record." *Tompkins v. State*, 994 So. 2d 1072, 1081 (Fla. 2008). However, mere conclusory allegations do not warrant an evidentiary hearing. *Anderson v. State*, 220 So. 3d 1133, 1142 (Fla. 2017); *see also LeCroy v. Dugger*, 727 So. 2d 236, 238 (Fla. 1998). We review the postconviction court's decision de novo. *See, e.g.*, *Marek v. State*, 8 So. 3d 1123, 1127 (Fla. 2009).

1

In his first argument on appeal, Cole argues that the trial court erred in denying his claim regarding his treatment while he attended the Dozier school. Appearing to recognize the impediment that rule 3.851's one-year time limit is to his claim, Cole argues that Florida has just recently acknowledged the mitigative atrocities

that occurred at the Dozier school by virtue of the Governor signing CS/HB 21, which became effective July 1, 2024.[11] *See* ch. 2024-254, Laws of Fla. (codified at § 16.63, Fla. Stat. (2024)). This recent acknowledgment, Cole submits, constitutes newly discovered evidence sufficient to overcome any procedural bars.

Because Cole is seeking to vacate his death sentence based on allegations of newly discovered evidence, Cole must establish "(1) that the newly discovered evidence was unknown by the trial court, by the party, or by counsel at the time of trial and it could not have been discovered through due diligence, and (2) that the evidence is of such a nature that it would probably . . . yield a less severe sentence on retrial." *Dillbeck v. State*, 357 So. 3d 94, 100 (Fla. 2023) (omission in original) (quoting *Dailey v. State*, 329 So. 3d 1280, 1285 (Fla. 2021)). We agree with the postconviction court that Cole cannot meet his burden.

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11. CS/HB 21 created the "Dozier School for Boys and Okeechobee School Victim Compensation Program" to compensate living persons who were confined to those schools. The designated recipients of the bill were restricted to those confined at Dozier from 1940 to 1975. Cole's motion alleges he was at Dozier from June 1, 1984, until November 14, 1984. He clarifies he is not seeking monetary compensation, but instead seeking a life sentence.

Although CS/HB 21 was recently enacted, it does not amount to newly discovered evidence. Indeed, we have routinely held that resolutions, consensus opinions, articles, research, and the like do not satisfy the standard. *Barwick v. State*, 361 So. 3d 785, 793 (Fla. 2023) (holding that an American Psychological Association (APA) resolution did not constitute newly discovered evidence sufficient to overcome the one-year time limitation for filing postconviction claims); *Rogers v. State*, 327 So. 3d 784, 788 (Fla. 2021) (numerous instances of childhood sexual abuse defendant allegedly experienced at Training Institute of Central Ohio (TICO) was not newly discovered evidence where articles discussing the abuse of juveniles at TICO could have been discovered by trial counsel well before the penalty phase); *Foster v. State*, 258 So. 3d 1248, 1253-54 (Fla. 2018) (rejecting new "objective indicia of consensus," national trends, and "recent actions by state legislatures" not geared to the relevant age group but allegedly showing an evolving standard of decency with regard to age and punishment); *HDC, LLC v. City of Ann Arbor*, 675 F.3d 608, 614-15 (6th Cir. 2012) (rejecting proffered evidence as newly discovered because it was publicly available beforehand).

The rationale underlying our decision in cases like *Barwick* applies with equal force to Cole's claim. Like the APA resolution in *Barwick*, CS/HB 21 expresses a public stance predicated on reports, data, and research that have been publicly available for years.[12] So, as the postconviction court noted, "[t]he harsh conditions at the Dozier School were exposed long ago." The State of Florida's decision to now compensate some of those individuals who attended the school does not revive Cole's previously denied postconviction claims.

Because CS/HB 21 does not constitute newly discovered evidence, the postconviction court also properly determined that Cole's claim is procedurally barred. Cole has twice before presented claims predicated on his treatment at the Dozier school to the circuit court and this Court. Specifically, Cole asserted in his first successive motion for postconviction relief that his trial counsel was

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12. For example, Cole's initial brief highlights an article from 2009 and a lawsuit filed in 1983 to support his allegations regarding treatment at the Dozier school. Ben Montgomery & Waveney Ann Moore, *A Roster of the Lost*, Tampa Bay Times (Dec. 7, 2009), https://www.tampabay.com/archive/2009/12/06/a-roster-of-the-lost/; *Bobby M. v. Chiles*, 907 F. Supp. 368, 369 (N.D. Fla. 1995).

ineffective for failing to present as mitigating evidence during the penalty phase of Cole's 1995 trial that he had suffered abuse while at the Dozier school. To overcome timeliness issues present even then, Cole alleged that this information was discovered in early 2009 after he suffered a mental breakdown from watching a documentary about the Dozier school. The circuit court ultimately rejected his claim, concluding that Cole's pre-sentence investigation report referenced his time at the Dozier school and thus refuted his claims that the evidence was unknown to Cole or his counsel. We affirmed. *See Cole IV*, 83 So. 3d at 706.

Cole next attempted to raise a claim based on his treatment at the Dozier school in his second successive motion for postconviction relief. That time, he characterized the claim as one of newly discovered evidence. The postconviction court again rejected the claim. We affirmed because the claim was "nearly undistinguishable from his claim in *Cole IV*." *Cole V*, 131 So. 3d at 787.

At its core, Cole's latest argument related to his time at the Dozier school is only another variation of his claims that were raised and rejected in his first and second successive motions for

postconviction relief. As a result, he is prohibited from raising this issue once more. *See Medina v. State*, 573 So. 2d 293, 295 (Fla. 1990) (citing *Quince v. State*, 477 So. 2d 535, 536 (Fla. 1985)) (holding it is inappropriate to use a new argument to relitigate a previously raised issue in a postconviction proceeding); *Barwick*, 361 So. 3d at 793 (observing that the petitioner was barred from using a different argument to relitigate the same issue). The postconviction court correctly concluded Cole's claim is procedurally barred.

2

In his second argument on appeal, Cole argues the postconviction court erred in denying his claim that his Eighth Amendment rights were violated because his experience while an inmate in the Department of Corrections constitutes cruel and unusual punishment. Specifically, Cole alleges among other things that over the last three decades he has "experienced neglect and mistreatment" because the Department of Corrections has "den[ied] him proper medical treatment, allow[ed] him to have access to illicit drugs, and then punish[ed] him with disciplinary reports" when Cole was found with the illicit drugs.

We agree with the postconviction court that Cole's claim is untimely. Cole's judgment and sentence became final in 1998. *Cole v. Florida*, 523 U.S. at 1051. Even so, Cole made no attempt to excuse his second claim's tardiness in the postconviction court. In fact, Cole failed to allege any specific date on which he claims he experienced "neglect and mistreatment" during his 30 years in the Department of Corrections other than to allege that he was "provided a 'laced' suspected cannabis joint" two years ago. So, it is clear this claim has been raised beyond the one-year time limitation of rule 3.851(d)(1).

On appeal, Cole attempts to excuse his failure to articulate any exception to the time bar in his postconviction motion, pointing to "time constraints under this expedited warrant." Cole says he "did not have time to provide the specific dates" to support his claim. Cole then cites in his initial brief a series of grievances he filed within the last two years, facts he did not allege in his motion nor present to the postconviction court below.[13] But we have

13. While Cole indicated in this motion that he would also be admitting numerous grievances he has written over the years "[a]t the evidentiary hearing," no evidentiary hearing occurred, nor was

repeatedly held that "[i]n order to preserve an issue for appellate review, the *specific* legal argument or ground upon which it is based must be presented to the trial court." *Kokal v. State*, 901 So. 2d 766, 778-79 (Fla. 2005) (alteration in original) (quoting *Bertolotti v. Dugger*, 514 So. 2d 1095, 1096 (Fla. 1987)) (noting that appellant could not rely on facts not in evidence on appeal of an order denying his motion for DNA testing because he failed to present in the trial court the specific legal argument he raised on appeal); *see also Ventura v. State*, 2 So. 3d 194, 196-97 (Fla. 2009) (citing *Hunter v. State*, 29 So. 3d 256 (Fla. 2008)) ("[T]here is no indication in the record that [Appellant] ever provided the postconviction court with any of the documents upon which his claim supposedly rests . . . . Pursuant to binding Florida precedent, the postconviction court summarily denied each of [Appellant's] claims."). There is no exception to this rule for expedited litigation. So, we reject Cole's argument.[14]

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one justified based on the allegations in Cole's fourth successive motion.

14. Cole briefly argues that he is making a claim based on newly discovered evidence under rule 3.851(d)(2)(A). This argument was also not presented in the postconviction court and is

Even were it timely though, Cole's claim would not provide a basis for relief. Cole appears to set forth a conditions-of-confinement claim, guided by *Estelle v. Gamble*, 429 U.S. 97 (1976), and its progeny. But Cole offers no authority to support the proposition that his claim, which would typically be presented in an action pursuant to 42 U.S.C. § 1983, serves as a valid basis to vacate a death sentence, nor does he attempt to explain how his claim would be cognizable under rule 3.851.[15]

To the extent Cole asserts a *Lackey* claim,[16] we likewise reject it based on our established precedent. *Orme v. State*, 361 So. 3d

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insufficiently briefed in this Court. It does not provide a basis for relief.

15. Indeed, at the *Huff* hearing, Cole's counsel recognized that a civil lawsuit is a proper vehicle for challenging the conditions of one's confinement, stating:

> One could always argue that it's a civil matter and that a person like Mr. Cole could file a civil lawsuit, but that does Mr. Cole no favors when he's up for execution in now 23 days and this is an Eighth Amendment issue because of conditions of confinement, particularly what happened to Mr. Cole regarding the abuse and depravation and not taking care of his health, that is specific to Mr. Cole's Eighth Amendment violations.

16. In *Lackey v. Texas*, 514 U.S. 1045 (1995), Justice Stevens wrote in a memorandum respecting the denial of certiorari that

842, 845 (Fla. 2023) (rejecting an argument that the "totality of the circumstances," including a 30-year delay between his offense and second resentencing, rendered the defendant's death sentence a violation of the Eighth Amendment); *Owen v. State*, 364 So. 3d 1017, 1027 (Fla. 2023) ("[T]his Court has consistently rejected such claims as 'facially invalid.' " (quoting *Orme*, 361 So. 3d at 845)).

We affirm the postconviction court as to this issue.

3

Next, Cole argues the postconviction court erred in denying his method-of-execution claim as untimely. On this point, Cole asserts an as-applied challenge to the constitutionality of Florida's lethal injection procedures, arguing that he suffers from Parkinson's disease which will make placing the intravenous lines necessary to carry out lethal injection "very difficult, needlessly painful, and

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lower courts could act as "laboratories" to evaluate whether executing a prisoner after many years on death row constitutes cruel and unusual punishment. *Id.* at 1422 (quoting *McCray v. New York*, 461 U.S. 961, 963 (1983)). This concept became known as a *Lackey* claim. *Johnson v. Bredesen*, 558 U.S. 1067, 1072 (2009) (Thomas, J., concurring) (quoting *id.* at 1069 (Stevens, J., respecting denial of certiorari)).

unreasonably dangerous," thereby constituting cruel and unusual punishment.

We reject Cole's argument. First, the postconviction court properly determined that Cole's argument is untimely. Cole alleged in his motion that he has suffered from Parkinson's disease since at least 2017. Even so, Cole failed to raise any argument related to the method of execution until after the Governor signed a death warrant. Identifying this potentially dispositive issue at the *Huff* hearing, the postconviction court questioned defense counsel as to the reason for the delay in Cole's claim. In response, counsel argued only that lethal injection protocols have changed, but counsel could not cite a specific change that would justify the delay.[17] Cole's arguments are therefore insufficient to overcome the time bar. *See Ferguson v. State*, 101 So. 3d 362, 365 (Fla. 2012)

17. THE COURT: Is there a change to the protocol that you can point me to that would make a difference as to not filing it in the past? I mean, there may be amendments to it, but how material are those amendments?

MR. SHAKOOR: Well, Judge, I can't say there's a change in the protocol, but what's unique to Mr. Cole is the fact that he has Parkinson's disease.

(rejecting an argument that a method-of-execution claim is not ripe until a death warrant is signed).

Regardless, Cole's claim is meritless. To challenge a method of execution under the Eighth Amendment's prohibition of cruel and unusual punishment, Cole must "(1) establish that the method of execution presents a substantial and imminent risk that is sure or very likely to cause serious illness and needless suffering and (2) identify a known and available alternative method of execution that entails a significantly less severe risk of pain." *Asay v. State*, 224 So. 3d 695, 701 (Fla. 2017) (citing *Glossip v. Gross*, 576 U.S. 863, 877 (2015)); *Bucklew v. Precythe*, 587 U.S. 119, 139-40 (2019) (reconfirming that anyone bringing a method-of-execution claim alleging the infliction of unconstitutionally cruel pain must meet the *Baze-Glossip* test).

In an effort to meet this standard, Cole alleges involuntary movements due to Parkinson's will make venous access more difficult or more painful. Even taking the allegations as presented in his motion for postconviction relief as true though, Cole's claim

fails as a matter of law.[18] We have already rejected challenges to the etomidate protocol based upon the possibility of involuntary movements. *See Asay*, 224 So. 3d at 701; *Long v. State*, 271 So. 3d 938, 944 (Fla. 2019) (crediting the trial court's finding that "[e]ven if Defendant had such a seizure, the lethal injection protocol requires that an inmate be restrained and the IV lines taped"). And we have repeatedly recognized that the Department of Corrections is entitled to the presumption that it will comply with the lethal injection protocol. *See, e.g.*, *Muhammad v. State*, 132 So. 3d 176, 203 (Fla. 2013) (citing *Valle v. State*, 70 So. 3d 530, 549 (Fla. 2011)). That protocol includes safeguards to ensure the condemned is unconscious throughout the execution. *Long*, 271 So. 3d at 945; *see also Cooey v. Strickland*, 589 F.3d 210, 225 (6th Cir. 2009) (risk

18. For this reason, we disagree with Cole that he was entitled to an evidentiary hearing on this claim. *Jimenez v. State*, 265 So. 3d 462, 475 (Fla. 2018) (citing *Hannon v. State*, 228 So. 3d 505, 508-09 (Fla. 2017)) (speculative and conclusory allegations that lethal injection protocols present substantial risk of serious harm are insufficient to warrant an evidentiary hearing). We likewise reject his unpreserved and inadequately briefed equal protection and due process arguments. Cole has received the process due to him, but he has failed to meet the various standards necessary to overcome summary denial.

of improper implementation of state's one-drug lethal injection protocol, which called for IV injection of thiopental sodium, did not render protocol cruel and unusual in violation of the Eighth Amendment). Moreover, "[b]eing pricked numerous times in the course of having an IV inserted is not cruel and unusual punishment, however uncomfortable it may be." *Schwab v. State*, 995 So. 2d 922, 927 (Fla. 2008); *see also Barber v. Governor of Ala.*, 73 F.4th 1306, 1319 (11th Cir. 2023) (finding death row inmate's arguments "fatal[ly] flaw[ed]" because they were "premised on the assumption that protracted efforts to obtain IV access" would cause an unconstitutional level of pain).

On the whole, Cole's allegations of potential problems with venous access are both speculative and legally insufficient. The postconviction court properly summarily denied the claim.

4

In his final argument on appeal, Cole contends the postconviction court erred in sustaining objections to and denying his various public records requests related to current lethal injection procedure and previous executions. We review this issue

for abuse of discretion, *Hannon v. State*, 228 So. 3d 505, 511 (Fla. 2017), and conclude none exists here.

Cole's public records requests were made pursuant to Florida Rule of Criminal Procedure 3.852(h) and (i), which permits counsel for a defendant subject to a death warrant to request the production of certain public records. Fla. R. Crim. Pro. 3.852(h)(3). But while the rule contemplates public records requests after a warrant has been signed, "this discovery tool is not intended to be a procedure authorizing a fishing expedition for records unrelated to a colorable claim for postconviction relief." *Asay*, 224 So. 3d at 700 (quoting *Sims v. State*, 753 So. 2d 66, 70 (Fla. 2000)). So, the rule also prescribes meaningful limitations to records requests:

> [R]ecords requests under Rule 3.852(h) are limited to "persons and agencies who were the recipients of a public records request at the time the defendant began his or her postconviction odyssey," . . . whereas, records requests under Rule 3.852(i) must "show how the requested records relate to a colorable claim for postconviction relief and good cause as to why the public records request was not made until after the death warrant was signed."

Dailey v. State, 283 So. 3d 782, 792 (Fla. 2019) (internal citations omitted) (quoting *Bowles v. State*, 276 So. 3d 791, 795 (Fla. 2019)).

Cole recognizes that existing precedent demonstrates his records requests do not relate to a colorable claim for postconviction relief. We agree that Cole's argument in this regard is foreclosed by precedent. *See, e.g.*, *id.* (concluding that denial of defendant's requests for records related to lethal injection protocol was not abuse of discretion because the constitutionality of Florida's current lethal injection protocol had been upheld, and the records therefore were unlikely to lead to a colorable claim for postconviction relief); *Asay*, 224 So. 3d at 700. And we reject Cole's argument to the extent he suggests we should recede from that precedent.

Likewise, we reject Cole's argument that denying him access to these records violates his rights to due process and access to the courts under the Eighth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution. *See Heath v. State*, 3 So. 3d 1017, 1029 n.8 (Fla. 2009) ("Vague and conclusory allegations on appeal are insufficient to warrant relief." (citing *Doorbal v. State*, 983 So. 2d 464, 484 (Fla. 2008))). The postconviction court did not abuse its discretion in denying Cole's request.

B

Because Cole is not entitled to relief, we deny his motion for stay of execution. *See Dillbeck*, 357 So. 3d at 103 ("[A] stay of execution on a successive motion for postconviction relief is warranted only where there are substantial grounds upon which relief might be granted." (quoting *Davis v. State*, 142 So. 3d 867, 873-74 (Fla. 2014))).

III

We affirm the summary denial of Cole's fourth successive motion for postconviction relief and the order denying Cole's public records requests. We also deny his motion for stay of execution. No oral argument is necessary, and no motion for rehearing will be considered by this Court. The mandate shall issue immediately.

It is so ordered.

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

An Appeal from the Circuit Court in and for Marion County,
Robert William Hodges, Judge
Case No. 421994CF000498CFAXXX

Eric Pinkard, Capital Collateral Regional Counsel, Ali A. Shakoor, Assistant Capital Collateral Regional Counsel, and Adrienne Joy Shepherd, Assistant Capital Collateral Regional Counsel, Middle Region, Temple Terrace, Florida,

for Appellant

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for Appellee

No. SC2024-1170

EXECUTION SCHEDULED FOR AUGUST 29, 2024 at 6:00 P.M.

IN THE

Supreme Court of Florida

LORAN COLE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT, IN AND FOR MARION COUNTY, FLORIDA
Lower Tribunal No.: 421994CF000498CFAXXX

INITIAL BRIEF OF THE APPELLANT

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TABLE OF CONTENTS

TABLE OF CONTENTS - *cont'd*

TABLE OF AUTHORITIES

Cases **Page(s)**

TABLE OF AUTHORITIES – *cont'd*

Cases **Page(s)**

TABLE OF AUTHORITIES – *cont'd*

Cases **Page(s)**

TABLE OF AUTHORITIES – *cont'd*

Cases **Page(s)**

TABLE OF AUTHORITIES – *cont'd*

Constitutional Provisions **Page(s)**

Statutory Provisions **Page(s)**

TABLE OF AUTHORITIES – *cont'd*

Statutory Provisions **Page(s)**

Rules **Page(s)**

Procedures **Pages(s)**

Articles **Page(s)**

TABLE OF AUTHORITIES – *cont'd*

Articles **Page(s)**

TABLE OF AUTHORITIES – *cont'd*

Articles **Page(s)**

REQUEST FOR ORAL ARGUMENT

Loran Cole ("Cole") 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 Cole lives or dies. This Court has not hesitated to allow argument in other capital cases 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 Cole.

PRELIMINARY STATEMENT REGARDING REFERENCES

References to the original trial record of the direct appeal of the trial in this case are of the form RV[volume]/[page].

References to the original postconviction hearing record on appeal are of the form V[volume]/[page].

References to the current record on appeal before this Court in Florida Supreme Court Case No.: SC2024-1170 are of the form SC/[page].

STATEMENT OF THE CASE AND FACTS

I. Procedural History

On December 21, 1995, the trial court imposed upon Cole a death sentence for first degree murder and life sentences for each of the remaining counts in his case. The jury's death recommendation was unanimous. The capital conviction and death sentence were affirmed on direct appeal. *Cole v. State*, 701 So. 2d 845 (Fla. 1997). The United States Supreme Court ("USSC") denied certiorari on March 30, 1998. *Cole v. Florida*, 523 U.S. 1051 (1998), thereby terminating direct-review proceedings.

This Court described the aggravating factors as follows:

> The trial court found the following aggravators: (1) Cole had previously been convicted of another felony; (2) the murder was committed during the course of a kidnapping; (3) the murder was committed for pecuniary gain; and (4) the murder was heinous, atrocious, or cruel.

Cole v. State, 701 So. 2d 845, 849 n. 1 (Fla. 1997).

This Court described the only mitigating factors considered by the trial court as follows:

> The trial court found and weighed the following nonstatutory mitigators: (1) Cole suffered from organic brain damage and mental illness, slight to moderate

weight; (2) Cole suffered an abused and deprived childhood, slight weight.

Id. at n. 2.

Cole raised the following claims on direct appeal:

> (1) whether the trial court abused its discretion in allowing a portion of Pam Edwards' testimony to be read back to the jury;
> (2) whether the trial court erred in conducting portions of the trial in the defendant's absence;
> (3) whether the jury's sentencing recommendation was tainted by improper victim-impact testimony;
> (4) whether the death penalty is proportionate;
> (5) whether the trial court erred in denying Cole's motion for mistrial after a witness referred to Cole's "history;"
> (6) whether the trial court erred in denying Cole's motion for change of venue;
> (7) whether the trial court erred in overruling Cole's objection to the introduction of several photographs;
> (8) whether the trial court erred in denying Cole's motion to suppress;
> (9) whether the trial court erred in admitting a stick purported to be the one carried by Paul;
> (10) whether the trial court erred in failing to adequately instruct the jury;
> (11) whether the trial court erred in denying Cole's pretrial motions not to allow the State to proceed on both premeditated and felony murder;
> (12) whether the trial court erred in imposing an order of restitution which included travel expenses for a State witness;
> (13) whether Cole's sentences on the noncapital offenses are illegal; and
> (14) whether section 921.141, Florida Statutes (1993), is constitutional

Cole v. State, 701 So. 2d 845 (Fla. 1997). However, this Court remanded the case for a new sentencing proceeding regarding Cole's noncapital felony sentences detailed in issue thirteen. Cole filed a Petition for a Writ of Certiorari to the USSC that was denied on March 30, 1998. *Cole v. Florida*, 523 U.S. 1051 (1998).

In Cole's post-conviction litigation in *Cole v. State*, 841 So. 2d 409 (Fla. 2003), he was denied relief by this Court on the following claims:

> (1) The trial court erred in denying Cole an evidentiary hearing on trial counsel's failure to (a) present evidence of Cole's extensive drug and alcohol abuse, (b) present evidence of childhood abuse, (c) object to prosecutorial misconduct during the penalty phase of closing, (d) request an HAC limiting jury instruction, (e) introduce Paul's life sentence, and (f) request co-counsel to assist with the penalty phase, and (g) object to hearsay testimony of Dan Jackson and Deputy Tammy Jicha.
> (2) Trial counsel was ineffective for failing to request and argue two statutory mental mitigators**.**
> (3) Trial counsel was ineffective for failing to have a competent neuropsychological evaluation performed on Cole.
> (4) Cole did not receive effective mental health assistance as required by Ake v. Oklahoma, 470 U.S. 68 (1985).
> (5) The trial court erred by excluding Dr. Dee's testimony during the evidentiary hearing.

(6) After an evidentiary hearing, the trial court erred in not finding trial counsel ineffective during the guilt phase regarding trial counsel's (a) failure to conduct individual voir dire, (b) failure to utilize a peremptory challenge to remove juror Cutts, c) failure to present Paul's testimony, (d) failure to contemporaneously object to the prosecutor's improper opening statement, (e) decision to only call John Thompson during Cole's case-in-chief, and (f) cumulative error as to this claim.
(7) The trial court erred in refusing to allow a DNA test.
(8) The trial court considered nonstatutory aggravating circumstances.
(9) The State withheld exculpatory information in violation of Brady v. Maryland, 373 U.S. 83 (1963).
(10) Cole should be allowed to question jurors to determine if there was juror misconduct.
(11) The trial court erred in failing to grant an evidentiary hearing on trial counsel's failure to litigate the unconstitutional nature of the aggravating circumstances.
(12) Cumulative error exists.

In *Cole v. State*, 83 So. 3d 706 (Fla. 2012), this Court denied Cole's sole claim that trial counsel was ineffective for not discovering the abuse Cole experienced and witnessed at the Arthur G. Dozier School for Boys ("Dozier"). This Court next denied a newly discovered evidence claim regarding Cole's suppressed memories from his experiences at Dozier. *Cole v. State*, 131 So. 3d 787 (Fla. 2013).

Cole filed his next successive motion for postconviction relief on January 9, 2017, in response to this Court's decision in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), which interpreted *Hurst v. Florida*,

136 S. Ct. 616 (2016). This Court affirmed his denial of relief. *Cole v. State*, 234 So. 3d 644 (Fla. 2018)

On July 29, 2024, Florida Governor Ron DeSantis issued a death warrant for Cole. Warden David Allen of Florida State Prison set the execution for August 29, 2024 at 6:00 P.M. A public records hearing was held on August 2, 2024, after which the state circuit court denied Cole's demand for additional records related to lethal injection, which Cole had requested pursuant to Florida Rule of Criminal Procedure 3.852 (h) and (i). Also on August 2, 2024, the State filed a motion for access to Cole's medical records over Cole's objection. On August 3, 2024, Cole filed his Successive Motion to Vacate Judgment of Conviction and Sentence of Death Pursuant to Florida Rule of Criminal Procedure 3.851 After a Signed Death Warrant ("Successive Motion"), and a Motion for Stay of Execution. The State responded to the Successive Motion on August 4, 2024. The state circuit court held a brief *Huff*[1] hearing on August 6, 2024,

[1] *Huff v. State*, 622 So. 2d 982 (Fla. 1993) (in death penalty postconviction case, judge must allow attorneys opportunity to appear before court and be heard on initial motion to vacate, set aside, or correct sentence, for purpose of determining whether evidentiary hearing is required and to hear legal argument relating to motion).

and denied an evidentiary hearing on each claim in an order rendered on August 8, 2024. ("Order"). The state circuit court also denied Cole's motion to stay and denied the State's motion for additional medical records as moot. This appeal follows.

II. Relevant Facts from the Trial

Trial counsel retained Dr. Robert Berland, a forensic psychologist who was initially hired by the local public defender's office to examine Cole for mental illness (V11, 1467-68). Though the results of Dr. Berland's tests were somewhat muddled because Cole allegedly did not answer the questions honestly, the results indicated mental illness and brain damage (RV 11 1452-53). Dr. Berland made other references to the fact that Cole had brain damage. (RV 11 1456, 1459, 1462, 1471, 1472).

During the penalty phase, Dr. Berland testified that Cole has "some kind of biologically determined mental illness that involves original paranoid thinking", a "psychotic mood disturbance" caused by a biological defect in the brain functioning, and delusional paranoid thinking (RV 16, 1452, 1456, 1462; *see also* 1459, 1462, 1471, 1472). No evidence was put forth at trial of Cole's attendance

at Dozier, therefore Cole's jury was never informed about his attendance there, let alone the severe abuse he experienced.

III. Relevant Facts from Prior Postconviction Proceedings

Cole's trial counsel, Don Gleason ("Gleason"), had never prepared or tried a capital penalty phase before Cole's case, which he managed without the assistance of co-counsel (V11, 1406-7). The public defender retained Dr. Berland, a psychologist, to work on Cole's case shortly after he was arrested and before Gleason took the case (V11, 1467-68). Gleason sent Dr. Berland 44 pounds of documents (V11, 1470-71). On a to-do list dated June 15, 1995, Gleason wrote that he needed to have Cole evaluated for brain damage (V11, 1432). Though he had trouble recalling his experiences with Dr. Bortnik, Gleason eventually hired Dr. Bortnik to evaluate Cole for brain damage (V11, 1433-34, 1438). Gleason sent Dr. Bortnik certain materials (V11, 1475). Gleason did not know what Dr. Bortnik did during the evaluation, but he had a note indicating a phone conversation with Dr. Bortnik which stated "neuropsychologically sound." (V11, 1435, 1478, 1501-2).

Regarding his failure to request the mental health statutory mental mitigation instructions, Gleason stated, "Well if the evidence

established something that would allow us and entitle us to a statutory mitigator, then that should have been done." (V11, 1514). "Well if the evidence didn't establish it, I can see an opportunity where I might want it, anyway. But the Court is not going to allow it, if the evidence doesn't establish it." (V11, 1514-15).

Though he was not on the limited witness list, the court allowed Cole to proffer Dr. Henry Dee's testimony to address the claim regarding counsel's failure to have an adequate neuropsychological evaluation of Cole (V11, 1523). The court accepted Dr. Dee, who is a neuropsychologist, as an expert (V11, 1529). Dr. Dee testified that a neuropsychological evaluation requires a battery of tests and an extensive interview (V11, 1529). Three of the tests consist of a number of smaller tests which are examined on comparable scales (V11, 1530-32). The Wechsler test alone takes at least one hour (V11, 1530-32). The battery of tests usually takes six to seven hours (V11, 1530-32). The interview part of the evaluation, during which Dr. Dee obtains medical and biographical information, takes at least an hour (V11, 1532). It is impossible to determine a person is neuropsychologically sound in only one hour (V11, 1532-33, 1541).

Dr. Dee evaluated Cole and found brain damage (V11, 1534-38). Cole was not malingering (V11, 1534-38). The brain damage resulted in cognitive impairment which caused Cole extreme mental disturbance at the time of the crime (V11, 1540). The brain damage caused impulse control problems which impaired Cole's ability to appreciate the criminality of his conduct at the time of the crime (V11, 1541). Had Dr. Dee worked on Cole's case before trial, he would have testified the same way at trial (V11, 1541).

SUMMARY OF ARGUMENT

ARGUMENT I: The enactment of CS/HB 21 – Dozier School for Boys and Okeechobee School Victim Compensation Program, which Governor DeSantis signed into law on June 21, 2024, with an effective date of July 1, 2024, serves as newly discovered evidence that Cole is entitled to a new penalty phase proceeding. The purpose of the bill is to compensate designated men with reparations, who were victims from Dozier while housed there between 1940 and 1975. Cole's jury was not told about the compelling mitigation that Cole was a student at Dozier, where he experienced rape and other horrific methods of abuse. If Cole's jury had known about the severe abuse that happen at Dozier, and Florida's willingness to acknowledge the

severe problems at Dozier to the extent that designated victims are entitled to reparations, there is a reasonable probability the newly discovered evidence would yield a less severe sentence. There is a reasonable probability a jury presented with the newly discovered information would recommend a sentence of life for Cole. The state circuit court erred by not holding an evidentiary hearing for factual development on this claim.

ARGUMENT II: Executing Cole would violate his Eighth Amendment rights under the United States Constitution and the corresponding provisions of the Florida Constitution. Cole has experienced years of neglect and mistreatment while in the custody of the Florida Department of Corrections. ("FDOC"). The needless and cruel subjugation to prolonged disciplinary restrictions, including the neglect and drug use, superadds to the length of time Cole has spent on death row. FDOC's treatment of Cole constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. The state circuit court erred by not holding an evidentiary hearing for factual development on this claim.

ARGUMENT III: Cole suffers from Parkinson's disease. Florida's current lethal injection procedures are unconstitutional as

specifically applied to Cole because executing Cole under those procedures will very likely cause him needless pain and suffering due to the unique symptoms that he experiences caused by his Parkinson's disease. The alternative method pleading requirement under the *Baze-Glossip* test violates Cole's Fourteenth Amendment rights to due process and equal protection. However, there are two other feasible alternative methods to lethal injection- lethal gas and firing squad- that will significantly reduce the substantial risk of severe pain that Cole faces if executed. The state circuit court erred by not holding an evidentiary hearing for factual development on this claim.

ARGUMENT IV: The state circuit court erred by denying Cole's demand under Fla. R. Crim. P. 3.852 for lethal injection records from the Florida Department of Corrections, which is responsible for adhering to Florida's lethal injection protocols. Cole has an *as-applied* Eighth Amendment challenge to the protocols pending before this Court in Argument III. Denying Cole agency records regarding the qualifications of personnel administering his execution, puts Cole at the risk of "cruel and unusual" pain and suffering, without

sufficient proof that the execution team is qualified to address Cole's Parkinson's disease, and the associated symptoms it entails.

STANDARD OF REVIEW

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

ARGUMENT

ARGUMENT I

THE STATE CIRCUIT COURT ERRED IN SUMMARILY DENYING COLE'S CLAIM THAT NEWLY DISCOVERED EVIDENCE PROVES COLE'S DEATH SENTENCE VIOLATES EVOLVING STANDARDS OF DECENCY, AND IS ARBITRARY, CAPRICIOUS AND EXCESSIVE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTIUTION, BECAUSE THE JURY WAS NEVER PRESENTED WITH PROFOUNDLY MEANINGFUL MITIGATION WHICH WOULD HAVE RESULTED IN A MAJORITY LIFE RECOMMENDATION.

The evidence upon which Cole relied to raise Claim One in his Successive Motion was unknown to the trial court, counsel, or Cole at the time of his trial, and the facts could not have been discovered through due diligence. *See* Fla. R. Crim. P. 3.851(d)(2)(A); *Robinson v. State*, 707 So. 2d 688, 691 n.4 (Fla. 1998): *Jones v. State*, 591 So. 2d 911, 914-15 (Fla. 1991); *Hallman v. State*, 371 So. 2d 482, 485 (Fla. 1979). Secondly, the newly discovered evidence would probably yield a less severe sentence. *Long v. State*, 271 So. 3d 938, 942 (Fla. 2019); *Walton v. State*, 246 So. 3d 246, 249 (Fla. 2018) (quoting *Swafford v. State*, 125 So. 3d 760, 767 (Fla. 2013). It is incumbent upon the defendant to establish the timeliness of a successive post-

conviction claim. *Rivera v. State*, 187 So. 3d 822, 832 (Fla. 2015).

Cole's claim is timely and based on the newly discovered evidence demonstrating the State of Florida's acknowledgment that designated survivors from the horror that was the Arthur G. Dozier School for Boys are entitled to reparations. On June 21, 2024, the governor signed CS/HB 21 – Dozier School for Boys and Okeechobee School Victim Compensation Program. The effective date was July 1, 2024.

Less than 30 days from the effective date of the Dozier bill, Florida signed a death warrant on a Dozier survivor. The State of Florida ("Florida") is complicit in the horrific and tragic mitigation that contributed to Cole's life choices, which resulted in his convictions and death sentence. Newly discovered evidence establishes Florida's acknowledgment of the mitigative atrocities that occurred at Dozier. If Cole's jury had known about the severe abuse that happen at Dozier, and Florida's willingness to acknowledge the severe problems at Dozier to the extent that designated victims are entitled to reparations, there is a reasonable probability the newly discovered evidence would yield a less severe sentence. There is a

reasonable probability a jury presented with the newly discovered information would recommend a sentence of life for Cole.

Dozier first opened on January 1, 1900, pursuant to a mandate from the Florida legislature. Dozier has always been a state-funded institution, meaning its employees were agents of the state, and any conduct by said employees would be considered state action. During the period while Cole was confined at Dozier, based on the Government Reorganization Act of 1969, the school was managed by the Division of Youth Services. It was under the umbrella of the Florida Department of Health and Rehabilitative Services (HRS). While Cole was at Dozier his safety and wellbeing was solely Florida's responsibility.

On June 21, 2024, the governor signed CS/HB 21 – Dozier School for Boys and Okeechobee School Victim Compensation Program, which became effective on July 1, 2024. The bill is summarized as follows:

> CS/CS/SB 24 creates the "Arthur G. Dozier School for Boys and Okeechobee School Victim Compensation Program," to compensate living persons who were confined to those schools.

The bill requires the Department of Legal Affairs (DLA) to accept, review, and approve or deny applications for the payment of compensation claims under the bill. Applications for compensation under this section must be submitted by December 31, 2024. An application must be made by a living person who was confined to the Dozier School for Boys or the Okeechobee School. The bill sets forth the requirements for the application. Once a person is compensated under this bill, they are ineligible for any further compensation related to the person's confinement at the Dozier School for Boys or the Okeechobee School.

The bill authorizes the Commissioner of Education to award a standard high school diploma to a person compensated under this program if they have not completed high school graduation requirements.

The bill appropriates $20 million in nonrecurring funds from the General Revenue Fund to the Department of Legal Affairs for the Dozier School for Boys and Okeechobee School Victim Compensation Program. This bill may have an indeterminate workload impact on the DLA associated with processing applications for compensation under this bill.

This act takes effect July 1, 2024.

…

The Arthur D. Dozier School for Boys

From 1900 to 2011, the state operated the Florida State Reform School in Marianna. In 1967, the name was changed to the Arthur G. Dozier School for Boys (Dozier School). Children were committed to the Dozier school for

> criminal offenses such as theft and murder, but the law was later amended to allow for children with minor offenses such as truancy to be committed.
>
> Additionally, many children who had not been charged with a crime were committed to the school as wards of the state and orphans.
>
> Beginning as early as 1901, there were reports of children being chained to walls in irons, brutal whippings, and peonage. In the first 13 years of operation, six state-led investigations took place. Those investigations found that children as young as five years old were being hired out for labor, unjustly beaten, and were without education or proper food and clothing. In 2005, former students of the Dozier School began to publish accounts of the abuse they experienced at the school. These stories prompted Governor Charlie Crist to direct the Florida Department of Law Enforcement (FDLE) to investigate the Dozier School and the deaths that were alleged and occurred at the school. In 2008, Governor Charlie Crist directed the FDLE to investigate 32 unmarked graves located on the property surrounding the school in response to complaints lodged by former students at the Dozier School. The former students of Dozier alleged that students who died as a result of abuse were buried at the school cemetery.

See SC/517-23 (The Florida Senate's Bill Analysis and Fiscal Impact Statement).[2] It is shocking and concerning that Florida is

[2] The appendix that was filed with Cole's August 3, 2024 Successive Motion is included in the record on appeal before this Court in FSC Case NO.: SC2024-1170. This initial brief will cite to the relevant

administering this year's first death warrant on a Dozier survivor, less than 30 days after the enactment of CS/HB 21.

Though the abuse and neglect at Dozier extended throughout the tenure of Dozier's existence, the designated recipients of the bill were restricted to those confined at Dozier from 1940-1975. Such a restriction limits the possible payout to a finite amount of living survivors, despite the documented abuse occurring well past 1975, and including Cole's period of confinement at the notorious facility. Cole is not seeking any type of monetary contribution. Cole is pleading for a life sentence, because of what Florida employees did to him while he was at Dozier. Considering how Florida has admitted to oppressing vulnerable youth at Dozier, the fact that Cole was a student there, let alone suffered horrific abuse while confined, changes the perception and impact of the mitigation his jury was presented. Cole was a student at Dozier in 1984. *See* SC/525-37. Again, the abuse at Dozier extended beyond 1975 and through the period of Cole's confinement.

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portions of that appendix using the record on appeal page numbers and in the form SC/[page].

Journalist Ben Montgomery has testified as an expert witness in Florida for criminal defendants about the years of abuse that happened at Dozier. Montgomery interviewed survivors and investigated the grounds at the facility. For example, Montgomery researched the Dozier class of 1988 in an article titled A Roster of The Lost. Montgomery, Ben *A Roster of the Lost*, The St. Petersburg Times (December 9, 2009). Montgomery discovered that 174 of the 180 boys who graduated in 1988 were subsequently rearrested. That 97% rate is indicative of how the facility failed boys like Cole, when they were supposed to rehabilitate him. Also, Montgomery noted that the abuse at Dozier continued into that "modern" era, as he interviewed one survivor: "Kids were raped, beaten and abused all the time," wrote William Mantle, 37, who is held in Tomoka Correctional Institution for stealing a car. "I've been to prison 3 times and … there isn't a prison I've been to that compares to Dozier." (Montgomery, A Roster of the Lost).

Just one year prior to Cole's admission into Dozier, the American Civil Liberties Union filed the infamous "Bobby M" lawsuit in 1983. The suit was filed in the U.S. District Court Northern District of Florida pursuant to 42 U.S.C. § 1983 and the Rehabilitation Act of

1973 (29 U.S.C. § 794). After years of litigation, the suit was finally settled with a consent decree in 1987 which set forth agreed reforms as described by the Civil Rights Litigation Clearing House as follows:

> Following several years of litigation and improvements to the Florida juvenile justice system, the parties entered into a Consent Decree to resolve all claims. The Consent Decree, which was approved by the District Court (Judge Maurice M. Paul) on July 7, 1987, set forth agreed reforms to be implemented in the following areas: assessment, evaluation and placement of juveniles; education; attorney client access; and prohibition of isolation. The Decree also incorporated previous orders that had been entered by the District Court, as follows:
> 1. provision of access to counsel (order on stipulated motion in 1987);
> 2. prohibition against hogtying and shackling to fixed objects, and regulating the use of mechanical restraints (orders dated February 1, 1983 and July 14, 1983);
> 3. closure of McPherson Training School (order dated August 6, 1985);
> 4. removal of females from training schools (order dated August 6, 1985);
> 5. removal of all children 13 years of age and under from training schools (order dated August 6, 1985); and
> 6. removal of all status offenders from training schools (order dated August 6, 1985).

Following entry of the Decree, the case was then administratively closed. Monitoring of the implementation process continued for years. *See* Bobby M. v. Chiles (Graham & Martinez) 4:83-cv-07003 (N.D. Fla.) | Civil Rights Litigation Clearinghouse.

Cole was at Dozier from June 1, 1984 until November 14, 1984. During that time period, he experienced rape and beatings. Shortly after he arrived at Dozier, Cole attempted to escape to safety. He was captured, and the staff punished him by breaking both his legs. He continued to suffer torturous treatment throughout his time at Dozier.

Cole estimates that he experienced beatings 2 to 3 times a week. Some beatings were for reasons like stealing food, trying to run away, and for such trivialities as walking on the wrong side of the sidewalk. While at Dozier, under the care and supervision of Florida, Cole was anally raped by a guard named D.J. Pittman. On another particularly traumatic occasion, a dog raped Cole, which was oversaw by a guard named "Randy." Shortly before Cole was released from Dozier, he had to clean up the remains of guts and brains from another child, who jumped off the roof of one of the cottages. Cole never received proper counseling and medicative care for the brutal trauma he experienced from Florida's staff. He carried trauma from the experiences with him throughout his adult life. Cole never saw a mental health professional about the state inflicted trauma until it was too late, after he was sentenced to Florida's death row.

While housed at the Union Correctional Institute, Cole was counseled by mental health professional, Jennifer Sagle, LMHC. Cole told Sagle about how he had suppressed his abusive experiences at Dozier and how he was damaged by the experience. Ms. Sagle counseled Cole for many years, and treated Cole for his depression, anxiety, and Post-Traumatic Stress Disorder ("PTSD"). Psychiatrist, Dr. Michael Maher, MD also evaluated Cole about his experiences at Dozier, his PTSD, and how the trauma impacted Cole's life choices and overall mental health.

In post-conviction, the late Dr. Henry Dee, a neuropsychologist, evaluated Cole and found brain damage (V11, 1534-38). Cole was not malingering (V11, 1534-38). The brain damage resulted in cognitive impairment which caused Cole extreme mental disturbance at the time of the crime (V11, 1540). The brain damage caused impulse control problems which impaired Cole's ability to appreciate the criminality of his conduct at the time of the crime (V11, 1541). Had Dr. Dee worked on Cole's case before trial, he would have testified the same way at trial (V11, 1541).

During Cole's trial, he was diagnosed with organic brain damage. *Cole v. State*, 701 So.2d 845, 850 (Fla. 1997), but there is no

evidence in the record that there was imaging done on his brain. Cole was still a juvenile with a developing brain when he was raped by Florida's staff at Dozier. Cole never had the benefit of a psychiatrist or neuropsychologist explaining how evidence is accumulating regarding the enduring effects of child abuse and related adverse experiences in childhood on brain function, and alterations in the multiple body systems that self-regulate and control responses to the environment.

Medical researchers have studied this issue. Martin H. Teicher and Jacqueline A. Samson, *Annual Research Review: Enduring Neurobiological Effects of Childhood Abuse and Neglect*, J Child Psychol Psychiatry, 57 (3) 241-266 (2016). Childhood maltreatment affects brain structure, function, and connectivity, which appears to be lifelong. Data has been indicating that childhood maltreatment is associated with decreased density of gray matter and white matter integrity within and between the regions of the ventral and dorsal prefrontal or flax, including the orbitofrontal and anterior cingulate cortices, hippocampus, insula, and striatum (Teicher, 2016).

Maltreatment is associated with reliable morphological alterations in the anterior cingulate, dorsolateral prefrontal and orbitofrontal cortex, corpus callosum, and adult hippocampus. Maltreatment is also associated with an enhanced amygdala response to emotional faces and diminished striatal response to anticipated rewards. The hippocampus is a crucial structure critically involved in forming and retrieving memories, including autobiographical memories. The hippocampus is one of the most prominent areas in the brain to reflect the potential effects of childhood maltreatment. There is compelling evidence that adults with maltreatment histories have smaller hippocampi than non-maltreated comparison subjects. The amygdala is a part of the brain that plays a key role in processing emotions. It is responsible for detecting and responding to threats and danger. The amygdala also encodes implicit emotional memories and detects and responds to salient stimuli such as facial expressions and potential threats. Structural or functional abnormalities in the amygdala have been observed in various psychiatric disorders. Trauma, especially childhood trauma, can lead to overactivity of the amygdala, resulting

in an individual reacting strongly to potential threats and/or reminders of trauma. (Teicher, 2016).

Cole was already victimized by sexual abuse and other violence prior to being violated again by Florida's staff at Dozier, while he was still a juvenile with a developing brain. *Cole v. State*, 841 So. 2d 409, 426 (Fla. 2003). Cole's jury never had the benefit of a mental health professional explaining how the severe abuse at Dozier could have possibly had an impact on his brain development and inability to regulate his emotions.

Cole's 30-year-old mitigation was insufficient. His jury knew little about the mitigation that explained his life choices, and most importantly the jury did now know how Florida failed in its responsibility to protect Cole when he was juvenile in the care and control of Florida. This Court considers evidence of child sexual abuse to be mitigating. *Larzelere v. State*, 979 So. 2d 195, 207 (Fla. 2008). The Dozier compensation bill indicates that Florida finally understands the traumatic and mitigative aspects of what happened to children at the notorious facility. Consideration of mitigation by the sentencer is at the heart of the constitutionality of the death penalty. This Court need only look to progeny from the USSC to see

the trajectory. 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 the law of Florida violate[d] the Eighth and Fourteenth Amendments. *Id.* at 244. The USSC found that Florida's new death penalty law passed constitutional scrutiny because:

> On their face these procedures, like those used in Georgia, appear to meet the constitutional deficiencies identified in Furman. The sentencing authority in Florida, the trial judge, is directed to weigh eight aggravating factors against seven mitigating factors to determine whether the death penalty shall be imposed. This determination requires the trial judge to focus on the circumstances of the crime and the character of the individual defendant. He must Inter alia, consider whether the defendant has a prior criminal record, whether the defendant acted under duress or under the influence of extreme mental or emotional disturbance, whether the defendant's role in the crime was that of a minor accomplice, and whether the defendant's youth argues in favor of a more lenient sentence than might otherwise be imposed. The trial judge must also determine whether the crime was committed in the course of one of several enumerated felonies, whether it was committed for pecuniary gain, whether it was committed to assist in an escape from custody or to prevent a lawful arrest, and whether the crime was especially heinous, atrocious, or cruel. To answer these questions, which are not unlike those considered by a Georgia sentencing jury, see *Gregg v. Georgia*, 428 U.S., at 197, 96 S.Ct., at 2936, the sentencing judge must focus on the individual circumstances of each homicide and each defendant.

Proffitt at 251–52. Because the trial court and the recommending jury were denied the mitigation that was extant in Cole's case, the recommending jury and the trial court never focused on the unique circumstances of Cole. His deprivation, mental illness, and trauma he suffered because of Dozier was never heard, thus falling to meet the bare requirements of *Proffitt*.

Woodson v. North Carolina, 428 U.S. 280 (1976), required that a death penalty scheme "allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death." *Id.* at 303. This did not happen in Cole's case. The Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, 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. *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). In *Eddings v. Oklahoma*, 455 U.S. 104 (1982) the USSC applied *Lockett*, stating that,

> the rule in *Lockett* followed from the earlier decisions of the Court and from the Court's insistence that capital punishment be imposed fairly, and with reasonable

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

Id. at 112.; s*ee also Hitchcock v. Dugger*, 481 U.S. 393 (1987) (advisory jury must consider non-statutory mitigation). An obvious thread through these cases is that the USSC has long recognized the need for an individualized sentencing that carefully considers all mitigation. Cole was denied these constitutional considerations at the time of trial. The Dozier compensation bill provides newly discovered evidence of mitigation under contemporary standards of decency.

The state circuit court erred in summarily denying this claim of newly discovered evidence. The court's reliance on *Barwick v. State*, 361 So. 3d 785 (Fla. 2023)*, Zack v. State,* 371 So. 3d 335 (Fla. 2023) and *Dillbeck v. State*, 357 So. 3d 94 (Fla. 2023) is misplaced. None of those cases speak to the novel issue of a state legislature providing

reparations to victims, due to mistreatment, abuse, and mitigation, caused by state employees. Florida's decision establishing the Dozier compensation bill speaks directly to the mitigation applicable to Cole. That mitigation was directly and explicitly caused by the same state that is now attempting to execute him. In fact, the "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." *Atkins v. Virginia*, 536 U.S. 304, 312 (2002). The presentation of such evidence of abuse is a very difficult proposition for a capital defendant in Cole's posture, as it is difficult for a jury to accept such horrific acts of human depravity – especially from state officers. The admission of the abuse via the compensations bill places the evaluation of the mitigation in a completely different light – removing any doubt as to its occurrence - and fundamentally alters the jury's weighing of the mitigating factors. There is a reasonable probability that the jury would have recommended a life sentence when presented with the full brunt of the now acknowledged severe abuse suffered by Cole at Dozier.

Senator Rosalind Osgood, one of the sponsors of CS/HB 21 stated the following: "I'm deeply sorry for what happened to you," … "I know that no amount of money or no words can take away your

pain, but I do want to tell you this morning that I love you. I love you. And I pray in the days to come that you will have at least a sense of peace and knowing that we care, and that we are doing the best we can to acknowledge that." *See* Perry, Mitch, *DeSantis Signs Bill that will Provide $20 million in Compensation to Dozier School for Boys Victims*, Florida Phoenix, (June 21, 2024, 2:45PM). Cole's jury was not aware of the pain that Florida caused him. Where is the love and care for Loran Cole, mere weeks after the enactment of the Dozier compensation bill? Cole does not want money. He wants to live the rest of his life with dignity, based on the recommendation of a jury that is fully aware of his unique mitigation. The Dozier compensation bill acknowledges that standards of decency have evolved regarding the lifelong damage caused to a child by sexual and physical abuse committed by state officials. Cole suffered such abuse. The Dozier bill is newly discovered evidence that standards of decency have evolved. Because the standards of decency have evolved, the execution of Loran Cole renders his death sentence a violation of the Eighth Amendment's prohibition against cruel and unusual punishment. Relief is proper.

ARGUMENT II

THE STATE CIRCUIT COURT ERRED IN SUMMARILY DENYING COLE'S CLAIM THAT A DEATH SENTENCE IN COLE'S CASE WOULD BE CONTRARY TO THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION DUE TO THE CRUEL AND UNUSUAL TREATMENT COLE HAS EXPERIENCED WHILE AN INMATE IN THE FLORIDA DEPARTMENT OF CORRECTIONS

Cole has been an inmate with the Florida Department of Correction ("FDOC") since his convictions and sentence. For three decades, Cole has experienced neglect and mistreatment. Florida has violated Cole's constitutional rights while in the state's custody and care. As discussed in the previous argument, Cole's death warrant was signed on him as a Dozier survivor, less than a month after the effective date of the Dozier compensation bill. The lower court's order cites the fact that Cole previously raised the Dozier issue under different theories in two prior successive motions. SC/1167-69. Moreover, undersigned counsel submitted a letter to the Florida Commission on Offender Review on May 10, 2023 on Cole's behalf, which detailed Cole's abusive experiences at Dozier perpetrated by the state. After everything Cole has gone through in thirty years in the FDOC, signing a death warrant on Cole as a Dozier survivor a few

short weeks after the enactment of the Dozier compensation bill is "cruel and unusual."

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The provision is applicable to the States through the Fourteenth Amendment. *Furman v. Georgia*, 408 U.S. 238, 239 (1972) (per curiam); *Robinson v. California*, 370 U.S. 660, 666–667 (1962); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 463 (1947) (plurality opinion). As the USSC explained in *Atkins v. Virginia*, 536 U.S. 304 (2002), the Eighth Amendment guarantees individuals the right not to be subjected to excessive sanctions. The right flows from the basic "'precept of justice that punishment for crime should be graduated and proportioned to [the] offense.'" *Atkins*, 536 U.S., at 311 (quoting *Weems v. United States*, 217 U.S. 349, 367 (1910)). By protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons.

Florida has offended Cole's dignity by denying him proper medical treatment, allowing him to have access to illicit drugs, and then punishing him with disciplinary reports for their own patently

ineffective security measures. Cole wants to testify in court about the neglect he experienced for years on Florida's death row in the Union Correctional Institution. His FDOC records are filled with multiple grievances written by Cole and disciplinary reports sanctioned against him for drug use. Fla. Admin. Code R. 33-602.2035 is the rule that governs the FDOC's inmate drug testing program. The reason there is such a rule is because of the negligence and ineffectiveness of the FDOC in allowing inmates to be exposed to illicit drugs.

Two years ago, Cole was provided a "laced" suspected cannabis joint by a correctional officer named Crosby. The joint turned out to be infected with Fentanyl. Cole has not physically or mentally felt the same since that day. Cole has also been self-medicating with a synthetic drug known as "K2," while in the care and control of FDOC custody. It is cruel and unusual to punish Cole by taking away his privileges and placing him in a restrictive isolating environment, when staff in the FDOC is responsible for allowing the illicit drugs to be in Cole's possession.

The state circuit court denied this claim, in part, as being untimely due to Cole's inability to articulate that his "neglect and

mistreatment" occurred within a year of submitting this claim. SC/1169-70. Due to time constraints under this expedited warrant, Cole did not have time to provide the specific dates that reflected FDOC's misconduct. Cole's claim is indeed based on newly discovered evidence under Fla. R. Crim. P. 3.851(d)(2)(A); *Robinson v. State*, 707 So. 2d 688, 691 n.4 (Fla. 1998): *Jones v. State*, 591 So. 2d 911, 914-15 (Fla. 1991); and *Hallman v. State*, 371 So. 2d 482, 485 (Fla. 1979). This newly discovered evidence should also yield a less severe sentence, as going forward with Cole's execution would violate his Eighth Amendment rights under the United States Constitution.

On December 23, 2023, Cole filed a grievance against the FDOC for placing him in confinement based on suspicion he was under the influence of illegal drugs. *See* Appendix A (December 2023 grievance). A little over a week later on January 2, 2024, Cole submitted a grievance based on the fact he was accused of being "high," despite an apparent negative urinalysis test. Cole further complained about not obtaining a medical assessment of physical condition, prior to being placed in disciplinary confinement. *See* Appendix A (January 2, 2024 grievance). On January 16, 2024, Cole filed a follow-up complaint to the previous grievance, explaining that he should have

received a medical examination concerning the severity of his medical condition. *See* Appendix A (January 16, 2024 grievance).

Earlier this year on April 16, 2024, Cole filed another grievance challenging allegations of illicit drug use, when the FDOC should have done a medical examination to determine the cause and severity of the observed symptoms. *See* Appendix A (April 16, 2024 grievance). Less than two weeks later on April 28, 2024, Cole filed another grievance to the FDOC complaining about being placed in a confinement cell for the April 16, 2024 matter, when the conditions he was exhibiting reflected a need for medical intervention. *See* Appendix A (April 28, 2024 grievance). On May 13, Cole filed a formal appeal, grieving the FDOC's failure to address his medical distress on April 16, 2024, as opposed to presuming he was high on illegal drugs. *See* Appendix A (May 13, 2024 grievance). Cole has been complaining about the "neglect and mistreatment" he received at the FDOC throughout this past year.

Cole has also been self-medicating for the severe tremors from his Parkinson's disease and is willing to testify about how the FDOC has not promptly responded properly to his fainting spells and overall declining health. The needless and cruel subjugation to prolonged

disciplinary restrictions, including the neglect and drug use, superadds to the length of time Cole has spent on death row. The treatment constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. The further addition of an execution at the end of this lengthy period of neglect and maltreatment compounds the cruelty and wanton infliction of unnecessary pain to Cole's punishment. Relief is proper.

ARGUMENT III

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

Florida's current lethal injection procedures are unconstitutional as specifically applied to Cole because executing Cole under those procedures will very likely cause him needless pain and suffering due to the symptoms that he experiences caused by his

Parkinson's disease. *Glossip v. Gross*, 576 U.S. 863 (2015); *Baze v. Rees*, 553 U.S. 35 (2008). There are two other feasible alternative methods to lethal injection- lethal gas and firing squad- that will significantly reduce the substantial risk of severe pain that Cole faces if executed. *See Glossip v. Gross*, 576 U.S. 863, 877 (2015) (citing *Baze v. Rees*, 553 U.S. 35, 52 (2008)).[3]

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

[3] Undersigned counsel only pleads an alternative method of execution in an abundance of caution to ensure that Cole's claim meets the current pleading requirements under *Glossip v. Gross*, 576 U.S. 863 (2015) and *Baze v. Rees*, 553 U.S. 35 (2008). The requirement that Cole choose an alternative method by which he will be killed is unreasonable and unconstitutional. *See infra* at pp. 57-61.

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

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

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

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

court held an evidentiary hearing during which both sides called medical experts to testify concerning Henry's unique medical conditions. *See id.* at 944. Cole should be afforded the same opportunity for an evidentiary hearing as Henry.

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

Finally, in 2015 this Court relinquished jurisdiction to the lower court to hold an evidentiary hearing on Jerry Correll's as-applied challenge to Florida's execution procedures based on his alleged brain damage and history of alcohol and substance use. *Correll v.*

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

Cole should be afforded the same opportunity for an evidentiary hearing on his as-applied claim that was given to Long, Howell, Henry, Davis, and Correll. These capital defendants were similarly situated to Cole in that they all raised as-applied challenges to Florida's execution procedures while under an active death warrant.

To treat Cole differently by denying him an evidentiary hearing when these defendants received one violates Cole's Fourteenth Amendment rights to Equal Protection and Due Process. With this being established, undersigned counsel now turns to the actual merits of Cole's as-applied challenge.[4] The state circuit court erred when finding that Cole's as-applied challenge is without merit. SC/1172.

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

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

695, 701 (Fla. 2017) (citing *Glossip*, 576 U.S. at 877 and *Baze*, 553 U.S. at 50, 61).

Cole suffers from Parkinson's disease, which causes him to experience significant symptoms. Parkinson's can cause a host of physical symptoms, including tremors, shaking, and involuntary movements of the body. There are multiple references to these symptoms in Cole's recent medical records that show that Cole has been experiencing these symptoms since as far back as 2017.[5] A September 2017 Request for Pre-Approval of Health Care Services notes "involuntary movements hands (bilaterally)" and references a Parkinson's diagnosis. SC/693. A September 2017 Radiology Request form again references a Parkinson's diagnosis. SC/733. An August 2017 Chronological Record of Health Care notes that Cole's hands and arms would not stop shaking and he "presents with both

[5] Cole's medical records ranging from 2017 to present were filed as Appendix D to Cole's August 3, 2024 Successive Motion and were continuously paginated in Appendix D with Bates Numbers in the lower far right corner of each page. The medical records appear somewhat out of order from the original Appendix D in the current record on appeal before this Court. However, the medical records that were filed as Appendix D can be found at the following pages of the record on appeal: SC/538-1053; 1070-1090. This brief will cite to the record on appeal page numbers when referencing Cole's medical records.

hands shaking without ceasing." SC/1087. A September 2018 Consultation Request/Consultant's Report describes Cole as a 52-year-old white male with involuntary tremors. SC/691. A December 17, 2018 Radiology Request Form notes "involuntary movements" and "altered mental state." SC/727. A January 2019 Chronological Record of Health Care references a tremor in Cole's hands and states that the "[t]remors appear more Parkinson's at this point." SC/761. An April 5, 2019 Periodic Screening Encounter indicates that Cole responded he was "still shaky." SC/600. Cole reports that he never received proper or appropriate health care for his Parkinson's from FDOC, and his Parkinson's symptoms have progressed far beyond what they were in 2017. Cole now experiences shaking in both of his arms from his neck to his fingertips and in his legs.

Cole's Parkinson's symptoms will make it impossible for Florida to safely and humanely carry out his execution because his involuntary body movements will affect the placement of the intravenous lines necessary to carry out an execution by lethal injection. The March 10, 2023 Florida FDOC lethal injection procedures describe the placement of the necessary venous lines as follows:

(h) Unless the team warden has previously determined to gain venous access through a central line, a designated team member will insert one intravenous (IV) line into each arm at the medial aspect of the antecubital fossa of the inmate and ensure that the saline drip is flowing freely. The team member will designate one IV line as the primary line and clearly identify it with the number "1." The team member will designate the other line as the secondary line and clearly identify it with the number "2." If venous access cannot be achieved in either or both of the arms, access will be secured at other appropriate sites until peripheral venous access is achieved at two separate locations, one identified as the primary injection site and the other identified as the secondary injection site.

(i) If peripheral venous access cannot be achieved, a designated team member will perform a central venous line placement, with or without a venous cut-down (wherein a vein is exposed surgically and a cannula is inserted), at one or more sites deemed appropriate by that team member. If two sites are accessed, each line will be identified with an “1" or a "2," depending on their identification as the primary and secondary lines.

See SC/1064.

The FDOC procedures explain that if peripheral venous access cannot be achieved, then a designated execution team member will perform a central venous line placement in order to gain the venous access necessary to complete the lethal injection. Undersigned counsel has hired anesthesiologist Dr. Joel Zivot, who is available and willing to testify to the substantial risk of needless pain and

suffering that Cole faces if executed by lethal injection due to the unique symptoms of his Parkinson's. Dr. Zivot is an associate professor and senior member of the Departments of Anesthesiology and Surgery at Emory University School of Medicine in Atlanta, Georgia. He is board certified in both anesthesiology and critical care medicine. Dr. Zivot has reviewed medical records for Cole and the FDOC lethal injection procedures and can opine that Cole suffers from significant and untreated Parkinson's disease that results in abnormal and involuntary muscle movements. Consequently, the attempt to place and secure two separate intravenous lines for the purpose of execution creates a substantial risk of illness and injury and a high likelihood of suffering. Dr. Zivot reviewed Cole's medical records and found several mentions that Cole suffers from Parkinson's disease. Parkinson's is a progressive neurological disorder which manifests as a classic symptomatic tetrad that includes a generalized involuntary tremor, generalized and specific rigidness of the body, and an impingement of fluid body movement that makes walking and other movements more difficult. Nonmotor symptoms of Secondary Parkinson's disease include cognitive dysfunction and a host of autonomic nervous system conditions,

including orthostasis. Cole suffers from significant involuntary tremors in his arms and legs. He also suffers from periodic blackouts that may be attributed to his Parkinson's disease. Cole is not currently receiving any treatment for his Parkinson's condition and is not taking any medication for the disease.

The FDOC lethal injection procedures require the placement of two separate intravenous catheters to provide a route of administration of the execution chemicals. Cole's untreated Parkinson's disease will make the placing of two intravenous catheters very difficult, needlessly painful, and unreasonably dangerous. As a direct consequence, he faces a substantial risk of illness by injury and needless suffering. When placing an intravenous line, each failed attempt creates a one-and-done for that vein. Each attempt is singularly painful, and the pain will only escalate with each successive attempt to place an intravenous line. Should FDOC fail to find a peripheral vein in Cole's arms or legs, the lethal injection protocol directs the placement of a central intravenous line. The skill needed to do this is beyond an average person capable of placing intravenous lines in the arms or legs. The central vein location includes the groin, the neck, and below the collarbone. In each of

these locations, the vein cannot be seen or felt but must be located by anatomical landmarks. In each of these locations, a large artery containing flowing blood under great pressure abuts against the vein. In the case of the neck and sub-collarbone location, an improperly placed needle can collapse the lung, causing a profound inability to breathe and the possibility of death by tension pneumothorax.

The FDOC procedures allow for a “cut down” to locate a vein in the central position. This procedure requires the use of anesthesia in the region, as it involves applying a sharp blade to the skin and subcutaneous tissue and making an opening sufficient to reveal the location of a vein. The FDOC procedures make no mention of anesthesia and do not further define precisely how this would be carried out. If FDOC can secure two separate and working intravenous sites, Cole will still have ongoing involuntary muscle movements, which can and will dislodge the catheters. To secure Cole's body and block muscle movements, an extremely high amount of forceful restraint will need to be applied. Such force would subject Cole to needless suffering, cruelty, and pain. A full and fair evidentiary hearing is necessary for Dr. Zivot to testify to the full effect of his opinions concerning the needless pain that Cole will

experience if executed by lethal injection. However, it is clear even from this brief summary that Florida cannot safely or humanely execute Cole via lethal injection because placing a venous line during the circumstances of an execution will cause him needless suffering.

The state circuit court found that this claim was untimely because Cole has experienced symptoms of Parkinson's since at least 2017, but Cole's as-applied challenge was not raised until after his death warrant was signed. SC/ 1171-72. Cole's as-applied challenge is not untimely and should not be barred merely because he raised it after his death warrant was signed. Cole's as-applied challenge to Florida's execution procedures would not have been one-hundred percent ripe for consideration until his death warrant was signed because there was no way for Cole to know which lethal injection procedures would be in place at the time of his execution since FDOC updates their procedures every two years. If Cole had raised an as-applied challenge in 2017 under the then-current FDOC procedures, he would still need to litigate the issue now, as the procedures update every two years. This is doubly true when you consider the fact that capital defendants do not know what changes will be made to

Florida's execution procedures beforehand and do not even know if there will be any changes at all until FDOC releases the procedures.

The promulgation of FDOC's execution procedures is shrouded in secrecy. Capital defendants have consistently been denied their persistent requests for access to records concerning the review process and promulgation of FDOC's procedures despite constant requests under Fla. R. Crim. P. 3.852 for such records.[6] Had Cole filed his as-applied claim back in 2017, seven years before his death warrant was signed and four separate FDOC procedure promulgations ago, his claim very likely would have been considered premature.[7] Cole's claim is not untimely, and capital defendants under an active death warrant regularly raise as-applied claims that

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[6] Cole requested records related to the review process that led to the promulgation of FDOC's current March 10, 2024 procedures under Fla. R. Crim. P. 3.852 in an August 1, 2024 Defendant's Demand for Public Records Pertaining to Lethal Injection [Florida Department of Corrections]. FDOC objected to the request, and the state circuit court denied the request for lethal injection records in an order rendered August 2, 2024.

[7] Undersigned counsel is not arguing that capital defendants should be absolutely foreclosed from raising as-applied challenges to Florida's execution procedures prior to the signing of an active death warrant. However, such challenges could be considered premature, considering that FDOC promulgates new execution procedures every two years and there is no way to know what changes may be made.

are not considered untimely and are afforded evidentiary hearings. *See supra* at pp.__.

Additionally, Parkinson's is a progressive illness and only an expert witness could state at what stage in the disease the risk of needless pain and suffering would manifest. The mere diagnosis of Parkinsons, without further evaluation of its stage and impact on Cole, would not have put counsel on notice to file a claim back in 2017. The state circuit court should have ordered an evidentiary hearing, which would have allowed Cole to present evidence on the viability and timeliness of his claim.

The issues caused by Cole's Parkinson's symptoms are further exasperated by the fact that it is unclear what qualifications the individuals attempting to achieve the venous access during his execution will possess. The FDOC procedures only state that the team warden will select the individuals responsible for achieving the peripheral venous access from among a long list of different medical professionals who would have different educational and professional qualifications.[8] The procedures then explain that the team warden

[8] The FDOC procedures list the following several different classes of professionals that the individuals responsible for peripheral venous

will select the individuals responsible for achieving central venous access from the following classes of professionals: "an advanced practice registered nurse licensed under Chapter 464, Florida Statutes; or, a physician or physician's assistant licensed under Chapter 458 or Chapter 459, Florida Statutes." *See* SC/1058. Once again, these are different medical professionals licensed under different statutes.

Since the FDOC procedures state that the "identities of any team members with medical qualifications shall be strictly confidential," and Cole has not been provided records of the qualifications of the members of the team assigned to his execution despite his request for such records[9], it is impossible to confirm that

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access may be chosen from: "a phlebotomist currently certified by the American Society for Clinical Pathology (ASCP), American Society of Phlebotomy Technicians (ASPT) or American Medical Technologists (AMT); a paramedic or emergency medical technician, certified under Chapter 401, Florida Statutes; a licensed practical nurse, a registered nurse, or an advanced practice registered nurse licensed under Chapter 464, Florida Statutes; or, a physician or physician's assistant licensed under Chapter 458 or Chapter 459, Florida Statutes." *See* SC/1058.

[9] Cole requested records under Fla. R. Crim. P. 3.852 "detailing the training, education, professional and/or education licensure, professional and/or educational certification, and professional experience," of the individuals assigned to place the intravenous lines

the individuals who will attempt intravenous access during Cole's execution are even medically qualified to insert an intravenous line at all. Additionally, as Dr. Zivot is available and willing to testify to at an evidentiary hearing, medical training does not teach physicians how to be executioners, and participation by a medical professional in an execution is an ethical violation of the practice of medicine. There is therefore no medial professional that actually could be qualified to place the intravenous line, as no medical training or education would teach how to do so in the context of an execution.

The state circuit court found that Cole's claim was speculative and insufficient to establish a substantial risk of needless suffering because he "failed to allege that medical personnel have previously had problems finding a vein in his arm or that he has previously suffered pain during the placement of an intravenous line." SC/1172. To require that Cole allege that he had previous issues with venous placement in a medical, non-execution setting in order to prove that

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during Cole's execution in an August 1, 2024 Defendant's Demand for Public Records Pertaining to Lethal Injection [Florida Department of Corrections]. FDOC objected to the request, and the state circuit court denied the request for lethal injection records in an order rendered August 2, 2024.

he will have the same issues during an execution is unreasonable and creates an impossible standard. An execution is not a medical setting, and venous access during an execution cannot be exactly replicated prior to the execution.[10] Further, Cole's non-consensual death by execution will cause him extreme anxiety that he would not experience in a medical setting. Dr. Zivot is available to testify at an evidentiary hearing that anxiety can actually make the symptoms of Parkinson's worse, which would make the placement of a venous line during Cole's execution far more difficult than during any medical setting.

Additionally, even assuming for the sake of argument that the individuals assigned to place Cole's intravenous lines during his execution could be considered "medically qualified" to do so, the establishment of intravenous access has shown to be extremely difficult or impossible in cases where the inmate was not suffering

[10] Past examples of venous access issues in common medical settings - for example, Cole consensually having his blood drawn by a phlebotomist for a blood test - can certainly support the argument that venous access would be an issue during the non-consensual and uncommon situation of death by execution. However, prior examples from previous medical settings should not be required for Cole to prove his as-applied claim.

the involuntary movements caused by Parkinson's. As one recent example, the 2022 lethal injection of Alabama inmate Joe Nathan James, Jr. lasted approximately three hours, and Alabama State officials later acknowledged that James' executioners had trouble establishing an intravenous line.[11] Dr. Zivot performed an autopsy on the body of Joe Nathan James, Jr. and can testify to the fact that he documented multiple bruises on James' arms and the unauthorized performance of a venous cut-down.[12] Even when an

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[11] *See* Ramon Antonio Vargas, *Alabama subjected prisoner to 'three hours of pain' during execution – report*, The Guardian (Aug. 15, 2022), https://www.theguardian.com/us-news/2022/aug/15/alabama-joe-nathan-james-jr-execution; *see also* Evan Mealins, *Joe Nathan James' execution delayed more than three hours by IV issues, ADOC says*, Montgomery Advertiser (July 29, 2022), https://www.montgomeryadvertiser.com/story/news/2022/07/29/joe-nathan-james-execution-alabama-delayed-iv-issues/10187322002/.

[12] Joe Nathan James is only one example of issues with venous access during executions by lethal injection, even when inmates did not suffer the involuntary movements caused by Parkinson's. In 2014, Oklahoma inmate Clayton Lockett died 43 minutes after the first lethal injection drug was administered. The execution delay was due to issues with establishing intravenous access. A doctor hit an artery instead of a vein when attempting to place a central line in Lockett's groin, and a paramedic involved in the execution told state officials that she was having difficulty inserting the needle even though Lockett was very cooperative. A report later issued by the Department of Public Safety on the execution concluded that

inmate is able to hold perfectly still, the placement of an intravenous line is still difficult. When an individual tremors and has involuntary movements, as is seen in Parkinson's disease and will be the case with Cole, the level of difficulty and danger rises significantly. Florida's lethal injection procedures place Cole at a substantial risk of needless pain and suffering due to the unique issue of attempting to place an intravenous line while Cole experiences the symptoms of Parkinson's. Florida therefore cannot constitutionally execute Cole.

"viability of the IV access point was the single greatest factor that contributed to the difficulty in administering the execution drugs." *See* Ariane de Vogue, *New documents reveal botched Oklahoma execution details*, CNN Politics (March 16, 2015), https://www.cnn.com/2015/03/16/politics/clayton-lockett-oklahoma-execution/index.html; *see also* Katie Fretland, *Scene at botched Oklahoma execution of Clayton Lockett was 'a bloody mess'*, The Guardian (Dec. 13, 2014), https://www.theguardian.com/world/2014/dec/13/botched-oklahoma-execution-clayton-lockett-bloody-mess.

In 2024, during the attempted lethal injection of Idaho inmate Thomas Creech, the execution attempt was abandoned because execution team members repeatedly failed to find a vein where they could establish an intravenous line, even though trying eight times and multiple sites in the arms, legs, hands, and feet. At some points they couldn't access a vein, and at others they had concerns about vein quality. *See* Rebecca Boone, *Idaho halts execution by lethal injection after 8 failed attempts to insert IV line*, U.S. News (Feb. 28, 2024), https://apnews.com/article/idaho-execution-creech-murders-serial-killer-91a12d78e9301adde77e6076dbd01dbb.

The state circuit court erred when finding that Cole did not meet the first factor of the *Baze-Glossip* test. SC/1172-73.

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

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

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

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

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

Due to these stringent and unconstitutional pleading requirements, capital defendants in different states will face different pleading requirements based on what alternative methods are available in their respective state. For example, specifically related to Cole, he identifies lethal gas as one of two alternatives to lethal injection that are authorized by other states and that do not involve any venous access to carry out. However, this method is not authorized by law in Florida. Under the *Baze-Glossip* test, as interpreted by the USSC in *Bucklew*, Cole must identify his chosen alternative methods as feasible alternatives that Florida "has refused

to adopt without a legitimate penological reason." *Bucklew,* 587 U.S. at 134.

Lethal gas has been authorized by statute in at least seven states- Alabama, Arizona, California, Missouri, Mississippi, Louisiana, and Oklahoma.[13] Defendants in these states may therefore choose lethal gas as their method if lethal injection would cause them needless suffering without having to meet the same burden as Cole to show that their state "has refused to adopt [lethal gas] without a legitimate penological reason," based only on the fact that their respective states have already authorized this method. This requirement obviously violates Cole's equal protection rights by forcing him to meet a pleading requirement that other similarly

[13] Alabama, Arizona, and California directly authorize lethal gas as an available method an inmate may voluntarily choose. *See* Ala. Code § 15-18-82.1; Ariz. Stat. § 13-757; Cal. Penal Code § 3604. Missouri and Mississippi directly authorize lethal gas as one available method, but the inmate is not allowed to choose which method he receives. *See* Mo. Stat. § 546.720; Miss. Code § 99-19-51. Recent updates to Louisiana's death penalty statute list "nitrogen hypoxia," a form of lethal gas, as a possible execution method. La. Stat. § 15:569. Oklahoma offers "nitrogen hypoxia" as a method if the default method of lethal injection is found to be unconstitutional or is unavailable. Okla. Stat. tit. 22, § 1014.

situated capital defendants who choose lethal gas would not have to meet.

Even though the alternative method pleading requirement is unconstitutional, undersigned counsel still identifies two alternative methods to meet facial sufficiency under the *Baze-Glossip* test. Two methods available in the United States- firing squad and lethal gas- are feasible methods that will significantly reduce the substantial risk of severe pain that Cole faces from lethal injection. While these two methods are not currently implemented in Florida, Cole is not limited to choosing among those methods presently authorized by Florida law, and he may point to a protocol in another state as a potentially viable option. *See Bucklew v. Precythe*, 587 U.S. 119, 139–40 (2019) ("An inmate seeking to identify an alternative method of execution is not limited to choosing among those presently authorized by a particular State's law … So, for example, a prisoner may point to a well-established protocol in another State as a potentially viable option."). At least seven states authorize by statute the lethal gas method of execution.[14] At least five states authorize by

[14] *See supra* at footnote 13.

statute execution by firing squad.[15] Execution by lethal gas or firing squad will significantly reduce the substantial risk of severe pain and needless suffering that Cole faces from lethal injection because these two methods do not implicate the same pain and suffering that lethal injection will cause.[16] Cole will not face the risk of pain associated

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[15] Those states are Mississippi, South Carolina, Utah, and Idaho. *See* Miss. Code § 99-19-51; S.C. Code § 24-3-530; Utah Code § 77-18-5.5; Idaho Code § 19-2716. Oklahoma offers firing squad as a method if other methods are found to be unconstitutional or unavailable. Okla. Stat. tit. 22, § 1014.

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

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

Cole's unconstitutional execution by lethal injection is currently scheduled for Thursday, August 29, 2024 at 6:00 p.m., only **sixteen days** from the filing date of this appellate brief. The risk that Cole will experience needless pain and suffering could not be more imminent or substantial. Undersigned counsel respectfully submits that this Court must relinquish jurisdiction so that an evidentiary hearing can be held on Cole's Eighth Amendment method-of-execution claim, so

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26, 1997), https://www.nytimes.com/1997/03/26/us/condemned-man-s-mask-bursts-into-flame-during-execution.html. Catching on fire while being executed constitutes a tortuous and unconstitutional death that Cole does not intend to choose.

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

The USSC explained in *Glossip* that "[b]ecause capital punishment is constitutional, there must be a constitutional means of carrying it out." 576 U.S. at 863. There is no constitutional way for Florida to carry out Cole's execution due to the unique symptoms of his Parkinson's disease. Relief is proper.

ARGUMENT IV

THE STATE CIRCUIT COURT ERRED IN DENYING COLE'S DEMAND FOR ADDITONAL RECORDS FROM THE FLORIDA DEPARTMENT OF CORRECTIONS PURSUANT TO FLORIDA RULE OF CRIMINAL PROCEDURE 3.852, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTIUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

As discussed in Argument III, Cole is challenging Florida's lethal injection procedures as unconstitutional as applied to him due to the unique symptoms of his Parkinson's disease. Denying Cole FDOC records regarding the qualifications of personnel administering his execution puts Cole at risk of "cruel and unusual" pain and suffering, in violation of his Eighth and Fourteenth Amendment rights. There is no sufficient proof that Cole's execution team will be qualified to address Cole's Parkinson's disease, and the associated symptoms it entails.

On August 1, 2024, Cole filed a demand for additional public records from FDOC, pursuant to Florida Rule of Criminal Procedure 3.852 (h) and (i). The FDOC filed an objection to the records request on August 2, 2024. The state circuit court erred in denying Cole these records, in an order submitted on August 2, 2024.

Florida's lethal injection process is secretive, and the procedure utilized to place the intravenous line is not subject to public viewing during an execution. When the curtain is raised to show the final execution procedures which will put Cole to death, the process that requires the execution team to puncture Cole's intravenous line through an accessible vein would have already taken place. Cole has no proof that the individuals responsible for accessing his intravenous lines are qualified to address his unique Parkinson's disease.

Cole's August 1, 2024 Fla. R. Crim. P. 3.852 records demand requested the following records from FDOC:

> (a) Records pertaining to Lethal Injection:
>
> (i) Public records concerning the review process which led to the promulgation of FDOC's March 10, 2023 lethal injection procedures, including, for example: copies of research or literature reviewed; minutes or notes of meetings; and records of communications, including emails, letters, and phone calls, between FDOC, the Office of the Governor, any other outside agencies, and medical experts. *See* Attachment A (FDOC lethal injection procedures promulgated on March 10, 2023).
>
> (ii) Public records showing how FDOC, or any personnel associated with FDOC, obtained etomidate, rocuronium bromide, and potassium acetate, including purchase orders, prescriptions, contracts,

invoices, bills, payments, emails, letters, or any other communication relating to the procurement of the lethal injection drugs from March 10, 2023 to the present.

(iii) Public records showing the name of the manufacturer and distributor of the etomidate, rocuronium bromide, and potassium acetate, including package insert information and/or manufacturer's instructions, the date of manufacture, and the shelf life of the three drugs, that FDOC has obtained from March 10, 2023 to present.

(iv) Public records, including logs or record books, regarding the storage, maintenance, use, disposal, and expiration dates of the etomidate, rocuronium bromide, and potassium acetate that FDOC has obtained from March 10, 2023 to the present.

(v) Public records, including logs or record books, clearly showing the date of manufacture, the expiration date, the batch number, and the storage conditions of the etomidate, rocuronium bromide, and potassium acetate that FDOC currently possesses.

(vi) Public records detailing the training, education, professional and/or educational licensure, professional and/or educational certification, and professional experience of the two executioners designated by the team warden to carry out the execution of Loran Cole. *See* Attachment A at page 2.

(vii) Public records detailing the training, education, professional and/or education licensure, professional and/or educational certification, and professional experience of the execution team member responsible for achieving and monitoring peripheral venous access during the execution of Loran Cole. *See* Attachment A at 3.

(viii) Public records detailing the training, education, professional and/or educational licensure, professional and/or educational certification, and professional experience of the execution team member responsible for achieving and monitoring central venous access during the execution of Loran Cole. *See* Attachment A at 3.

(ix) Public records detailing the training, education, professional and/or educational licensure, professional and/or educational certification, and professional experience of the execution team member responsible for examining Loran Cole to determine health issues prior to the execution. *See* Attachment A at 3.

(x) Public records relating to execution training exercises, including logs, checklists, sign-in sheets, photographs, and videos from March 10, 2023 to present.

(xi) Public records, including the required logs, notes, memoranda, letters, electronic mail, and facsimiles, and checklists relating to the executions by lethal injection of Louis Gaskin (DC# 75116), Darryl Barwick (DC# 092501), Duane Owen (DC# 101660), James Phillip Barnes (DC# 071551), and Michael Duane Zack III (DC# 124439).

(xii) Public records consisting of photographs and videos of the actual executions by lethal injection of Louis Gaskin (DC# 75116), Darryl Barwick (DC# 092501), Duane Owen (DC# 101660), James Phillip Barnes (DC# 071551), and Michael Duane Zack III (DC# 124439).

(xiii) Public records related to the training and experience of all individuals directly involved with the executions

> of Louis Gaskin (DC# 75116), Darryl Barwick (DC# 092501), Duane Owen (DC# 101660), James Phillip Barnes (DC# 071551), and Michael Duane Zack III (DC# 124439).

SC/358-60.

Undersigned counsel specifically discussed and clarified with the state circuit court the need to obtain records regarding the qualifications of the execution team, as the paramount and relevant records issue regarding Cole's timely demands. SC/1222-23; SC/1238-39. Cole is at risk of being put to death under a cloak of secrecy and with no proof that his executioners know how to address his unique medical condition.

A capital post-conviction defendant "bears the burden of demonstrating that the records sought [pursuant to Fla. R. Crim. P. 3.852] relate to a colorable claim for postconviction relief." *Branch v. State*, 236 So. 3d 981, 984 (Fla. 2018) (citing *Chavez v. State*, 132 So.3d 826, 829 (Fla. 2014) and *Mann v. State*, 112 So.3d 1158, 1163 (Fla. 2013)). A court may order the production of records if "the additional public records sought are either relevant to the subject matter of a proceeding under rule 3.851 or appear reasonably calculated to lead to the discovery of admissible evidence; and … the

additional records request is not overly broad or unduly burdensome." Fla. R. Crim. P. 3.852(i). The records that undersigned counsel requested from FDOC relate to colorable claims for postconviction relief that undersigned counsel was investigating at the time and is now currently litigating. Additionally, the records request is not overly broad or unduly burdensome, as undersigned counsel specified exactly what records were needed, particularly regarding the qualifications of Cole's executioners.

The requested records are necessary for Cole to prove that Florida's lethal injection procedures are unconstitutional as applied to Cole because the procedures violate the Eighth Amendment's prohibition against cruel and unusual punishment. *See Bucklew v. Precythe*, 139 S. Ct. 1112 (2019); *Glossip v. Gross*, 576 U.S. 863 (2015); *Baze v. Rees*, 553 U.S. 35 (2008). Undersigned counsel acknowledges this Court's current precedent finding that lethal injection records requests do not relate to a colorable claim for postconviction relief because this Court has upheld the constitutionality of Florida's "etomidate protocol" in *Asay v. State,* 224 So. 3d 695 (Fla. 2017) and subsequent opinions. However, undersigned counsel respectfully submits that this Court has not

had a full and fair opportunity to judge the constitutionality of Florida's lethal injection procedures, because previous capital defendants, including defendants under an active death warrant, have never been given access to records related to Florida's lethal injection procedures or the executions of individuals under these procedures. Capital defendants in Florida have never been able to thoroughly investigate and present claims challenging the constitutionality of lethal injection because Florida courts have consistently and pervasively denied them access to agency records related to lethal injection.

The requested records are necessary to prove that the current procedures are "very likely to cause serious illness and needless suffering," and there is a "substantial risk of serious harm" to Cole if the State of Florida executes him under the current method. *Glossip*, 576 U.S. at 877 (internal citations omitted). Again, the lethal injection records requests are not overly broad or unduly burdensome. The records requests have been specifically tailored to support a constitutional challenge to Florida's lethal injection procedures, as those procedures are specifically applied to Cole. Available evidence indicates that Cole suffers from Parkinson's disease that could affect

the successful placement of a peripheral or central venous line for the administration of the three execution drugs, thereby causing Cole needless suffering. The requested records related to the training and education of the execution team members designated to place the venous lines and examine Cole for heath conditions before Cole's execution specifically relate to this claim. Denying Cole access to these records violates his right to due process and access to the courts under the Eighth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution. Relief is proper.

CONCLUSION

Based on the foregoing arguments, Cole 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,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fla. R. App. P. 9.045, we hereby certify that the Initial Brief of the Appellant has been produced in Bookman Old Style 14-point font. Pursuant to Fla. R. App. P. 9.210(a)(2)(D), this brief is not subject to word count, and instead complies with the page limit as it does not exceed 75 pages.

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a copy of the PDF document of the foregoing has been transmitted to this Court using the Florida Courts E-Filing Portal which will send a notice of electronic filing to the following: The Honorable Robert W. Hodges, Circuit Court Judge, Marion County Judicial Center, 110 N. W. 1st Avenue, Ocala, Fl 34475, cmatthews@circuit5.org, Timothy Freeland and Rick Buchwalter, Assistant Attorney Generals, Office of the Attorney General, 3507 East Frontage Road, Suite 200, Tampa, Florida 33607, timothy.freeland@myfloridalegal.com, rick.buchwalter@myfloridalegal.com, stephanie.tesoro@myfloridalegal.com, paula.montlary@myfloridalegal.com, heather.davidson@myfloridalegal.com, capapp@myfloridalegal.com, Richard Buxman and Kenneth S. Nunnelley, Assistant State Attorneys, Marion County State Attorney's Office, 110 NW 1st Avenue, Suite 5000, Ocala, Florida 34475, rbuxham@sao5.org, knunnelley@sao5.org, chenry@sao5.org, thunt@sao5.org, eservicemarion@sao5.org, and to the Florida Supreme Court, warrant@flcourts.org; on this 13th day of August 2024.

WE HEREBY FURTHER CERTIFY that a copy of the foregoing has been mailed via United States Postal Service to Loran Cole, DOC# 335421, Florida State Prison, P.O. Box 800, Raiford, Florida 32083, on this 13th day of August 2024.

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