DOCKET NO. 24-5389

CAPITAL CASE

IN THE UNITED STATES SUPREME COURT

LORAN COLE,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

EXECUTION SCHEDULED
August 29, 2024, at 6:00 p.m.

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

[Capital Case]

In 1994 John Edwards and his sister P.E. were camping in the Ocala National Forest when they had the misfortune of meeting Loran Cole. Within a few hours of meeting Cole, P.E. was in handcuffs and John Edwards was lying dead nearby, his skull crushed and throat cut. Over the years Cole has challenged his judgment and sentence multiple times; it was not until after Florida scheduled his execution for August 29, 2024, that Cole decided for the first time to challenge Florida's lethal injection protocol by claiming that he suffers from Parkinson's-like involuntary tremors. The Florida Supreme Court affirmed the circuit court's finding that Cole's present challenge is untimely (he has known that he suffers from involuntary tremors for at least seven years). Cole's untimely challenge gives rise to the following questions:

1. Whether a prisoner who presents an "as applied" challenge to lethal injection has a constitutional right to an evidentiary hearing in all cases, particularly where his challenge is untimely?
2. Whether this Court should recede from the *Baze-Glossip* rule that requires a prisoner who challenges an existing lethal injection protocol to allege an available alternative method of execution?
3. Whether Cole's untimely challenge to Florida's method of execution requires this Court to assess at the last minute whether a medical condition he has known about for over seven years will violate *Glossip* and *Baze*?

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The decision of the Florida Supreme Court is reported at *Cole v. State*, Case No. SC2024-1170, 2024 WL 3909057 (Fla. August 23, 2024).

STATEMENT OF JURISDICTION

Petitioner asserts that this Court's jurisdiction is based upon 28 U.S.C. § 1257. Respondent agrees that the statutory provision sets out the scope of this Court's certiorari jurisdiction. However, this case is inappropriate for the exercise of this Court's discretionary jurisdiction because the Florida Supreme Court's decision does not implicate an important or unsettled question of federal law, nor does it conflict with another state court of last resort, a United States court of appeals, or any relevant decisions of this Court. Sup. Ct. R. 10. Additionally, the Florida Supreme Court's opinion is based on adequate and independent state grounds.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent accepts Petitioner's statement regarding the applicable constitutional and statutory provisions involved.

STATEMENT OF THE CASE AND FACTS

Petitioner, Loran Cole, is in the custody of the Florida Department of Corrections under a lawful sentence of death. The following statement of facts is drawn from the Florida Supreme Court's opinion on the direct appeal of Cole's convictions and sentences, *Cole v. State*, 701 So. 2d 845 (Fla. 1997). In 1994 P.E., a senior at Eckerd College and her brother, John Edwards, were camping in the Ocala National Forest when they had the misfortune of encountering Loran Cole and his

co-defendant. Within a few hours of meeting Cole, P.E. was handcuffed, and John Edwards was beaten and, eventually, his throat cut. P.E. could hear her brother gasping for breath as he died. Cole later raped P.E. more than once while her brother's dead body lay nearby in a shallow grave.

The Florida Supreme Court affirmed the conviction and resulting death sentence. *Cole, id.* The United States Supreme Court denied certiorari review on March 30, 1998. *Cole v. Florida*, 523 U.S. 1051 (1998).

The trial court's denial of Cole's first postconviction challenge following an evidentiary hearing was affirmed on appeal, as was his state court petition for habeas relief. *Cole v. State*, 841 So. 2d 409 (Fla. 2003); *Cole v. James V. Crosby, Jr., et al.*, 841 So. 2d 409 (Fla. 2003).

Cole next sought permission for DNA testing pursuant to Fla. R. Crim. P. 3.853. The Florida Supreme Court affirmed the lower court's denial of this claim. *Cole v. State*, 895 So. 2d 308 (Fla. 2004).

Cole then filed a petition seeking habeas corpus relief in the United States District Court, Middle District of Florida. His petition was untimely, however, and the Middle District accordingly dismissed it. The motion seeking certificate of appealability was denied. *Cole v. Crosby*, No. 05-cv-222, 2006 WL 1169536 (M.D. Fla. May 3, 2006), certificate of appealability denied, 2006 WL 1540302 (M.D. Fla. May 30, 2006), certificate of appealability denied, No. 06-13090 (11th Cir. July 31, 2007). The United States Supreme Court denied Cole's petition seeking certiorari review. *Cole v. McDonough*, 552 U.S. 1115 (2008).

Over the next few years Cole filed three successive Rule 3.851 motions, all of which were denied and affirmed on appeal by the Florida Supreme Court. *Cole v. State*, 83 So. 3d 706 (Fla. 2012), *Cole v. State*, 131 So. 3d 787 (Fla. 2013), *Cole v. State*, 234 So. 3d 644 (Fla. 2018). Certiorari review of the latter was denied by the United States Supreme Court. *Cole v. Florida*, 585 U.S. 1007 (2018).

On July 29, 2024, Governor Ron DeSantis signed Cole's death warrant. Execution is scheduled for August 29, 2024 at 6:00 p.m.

Cole then filed another successive postconviction motion alleging, among other things, that he has, for at least seven years, suffered from involuntary tremors which he identified as Parkinson's disease. The trial court found the claim untimely and the Florida Supreme Court agreed.

On August 24, 2024, Cole filed a petition for writ of certiorari in this Court from the Florida Supreme Court's opinion affirming the postconviction court's denial of his most recent successive postconviction motion. This is the State's brief in opposition.

REASONS FOR DENYING THE WRIT

The Florida Supreme Court correctly determined that petitioner was not entitled to relief on his untimely "as applied" challenge to Florida's lethal injection protocol based on long-known symptoms of Parkinson's disease.

There are several reasons why this Court should decline certiorari review. First, the Florida Supreme Court specifically found that Cole's challenge to Florida's lethal injection protocol was untimely and therefore barred under well-established Florida law, stating:

> [T]he 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. Cole's arguments are therefore insufficient to overcome the time bar. *See Ferguson v. State*, 101 So. 3d 362, 365 (Fla. 2012).

Cole v. State, ___ So. 3d ___, 2024 WL 3909057, *7 (Fla. Aug. 23, 2024).

Florida requires all motions for postconviction relief to be filed within a year after the judgment and sentence become final. Fla. R. Crim. P. 3.851(d)(1). Any motion filed after that point must be dismissed unless the motion alleges:

> (A) the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence, or
>
> (B) the fundamental constitutional right asserted was not established within the period provided for in subdivision (d)(l) and has been held to apply retroactively, or
>
> (C) postconviction counsel, through neglect, failed to file the motion.

Fla. R. Crim. P. 3.851(d)(2)(A)-(C). Florida capital defendants generally have one year from the date either of the first two exceptions are triggered to bring successive claims or else the claims will be untimely. *See Pittman v. State*, 337 So. 3d 776, 777 (Fla. 2022); *Jimenez v. State*, 997 So. 2d 1056, 1064 (Fla. 2008). After the initial postconviction motion is filed, capital postconviction litigants must rely on an exception and timely file their claims or be barred by Fla. R. Crim. P. 3.851(d)(1). This rule is well established in Florida and routinely followed.

This Court has repeatedly recognized that where a state court judgment rests on non-federal grounds which provide an adequate basis for the ruling independent of the federal grounds, "our jurisdiction fails." *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935); *Michigan v. Long*, 463 U.S. 1032, 1038 (1983); *see also Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969) (reaffirming that this Court has no jurisdiction to review a state court decision on certiorari review unless a federal question was raised and decided in the state court below); *Street v. New York*, 394 U.S. 576, 581-82 (1969). If a state court's decision is based on separate state law, this Court "of course, will not undertake to review the decision." *Florida v. Powell*, 559 U.S. 50, 57 (2010). The Florida Supreme Court found the claim raised by Cole untimely and barred from review in Cole's successive motion for postconviction relief. For that reason alone, certiorari review should be denied.

A. The Florida Supreme Court properly rejected Cole's untimely Parkinson's claim

Cole's as-applied challenge rests on his assertion that he suffers from involuntary tremors caused by Parkinson's disease. However, symptoms of Cole's Parkinson's have been known to him for at least seven years and Florida's current lethal-injection protocol has been in effect since 2017. While Cole argues that the issue was not ripe until his death warrant was signed (Petition at p. 6), he provides no authority to support this proposition. Death row inmates routinely raise lethal injection challenges before the signing of their death warrant in Florida. *See, e.g., Ventura v. State*, 2 So. 3d 194, 196 (Fla. 2009) (raising a newly discovered evidence claim challenging Florida's lethal injection protocol after Angel Diaz's execution and before the Governor signed a death warrant for Ventura); *Muhammad v. State*, 132 So. 3d 176, 186–87 (Fla. 2013) (explaining how Muhammad filed a successive motion challenging Florida's lethal injection procedure in effect at that time (prior to the Governor signing his death warrant) and then he subsequently filed another successive motion after his death warrant was signed challenging the revised lethal injection procedure that recently included the use of midazolam). The correct application of Florida's time-bar is a matter of Florida law on which the Florida Supreme Court, rather than this Court, has the final say.

Application of such time bars is not unusual and are necessary to discourage dilatory tactics. *See McNair v. Allen*, 515 F.3d 1168, 1174 (11th Cir.2008) (applying Florida's four-year statute of limitations to bar 1983 lethal injection challenge),

Henyard v. Sec'y, Dept. of Corr., 543 F.3d 644, 647 (11th Cir. 2008) (same). Yet Cole, who has known about his medical condition for at least seven years, waited until after his scheduled execution to initiate, or even investigate a challenge to Florida's protocol. *See Grayson v. Allen*, 491 F.3d 1318, 1326 (11th Cir. 2007) (Discussing denial of a stay on equitable grounds for unreasonable delay, noting that "If Grayson truly had intended to challenge Alabama's lethal injection protocol, he would not have deliberately waited to file suit until a decision on the merits would be impossible without entry of a stay or an expedited litigation schedule."). There is no conflict among state or federal courts on application of a time bar like the one cited by the court below under well-established Florida law. Accordingly, certiorari should be denied.[1] *See Bartlett v. Stephenson*, 535 U.S. 1301, 1304 (2002) (issues with few, if any, ramifications beyond the present case do not satisfy any of the criteria for exercise of certiorari jurisdiction).

To the extent that Cole suggests that he has been denied due process, this claim fails for the same reason. Cole's decision to wait until after his execution was scheduled to advance this spurious claim is the primary reason why Florida courts rejected it; this is not a denial of due process but the proper application of a time bar which Cole is well aware applies to him. Cole has received all the process to which he is due.

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[1] Florida's limitation on successive postconviction motions is similar to, but more generous than, the federal standard for successive habeas corpus applications. 28 U.S.C.A. § 2244(b)(2)(A)(B)(i)("the factual predicate for the claim could not have been discovered previously through the exercise of due diligence . . ").

In alternately addressing the merits of Petitioner's claims, the Florida Supreme Court extensively addressed the facts surrounding Petitioner's belated claims and applied this Court's well-established precedent. Opposing counsel fails to cite any federal circuit case or state supreme court case that conflicts with the Florida Supreme Court's decision in this case. The fact-specific decision below is well supported by the record before the lower court and offers no basis for certiorari review. *See United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant certiorari to review evidence and discuss specific facts."). Certiorari review of this claim is not warranted.

B. The Baze[2]-*Glossip*[3] Equal Protection and Due Process claim

Cole next contends that this Court's jurisprudence requiring him to identify a readily available alternative violates his constitutional rights to equal protection and due process. This claim, however, was rejected by the Florida Supreme Court as inadequately preserved and briefed. The court said:

> 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.

Cole v. State, SC2024-1170, 2024 WL 3909057, at *8, fn18 (Fla. Aug. 23, 2024).

A claim that was insufficiently developed below does not usually merit certiorari review, particularly when dilatorily pursued as in this case. Regardless, Cole fails to allege a viable equal protection claim based upon his individual medical

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[2] *Baze v. Rees*, 553 U.S. 35 (2008).

[3] *Glossip v. Gross*, 578 U.S. 863 (2015).

condition.

Addressing a similar claim, the Ninth Circuit soundly rejected the suggestion that a defendant's "personal medical condition" rendered him subject to an equal protection violation because the claim was non-specific and vague. *Creech v. Tewalt*, 84 F.4th 777, 794–95 (9th Cir. 2023) (An inmate alleging only the possibility "of a less favorable outcome" due to defendant's unique physical condition was insufficient to state an equal protection claim.). Here, Cole's argument fares no better. The mere possibility that implementation of Florida's protocol in Cole's case might require more effort on the part of the staff fails to establish a violation of Cole's right to equal protection.

To the extent that Cole claims that Florida's decision not to hold an evidentiary hearing on his as-applied claim violates his right to equal protection under the Fourteenth Amendment, the State notes that Cole has failed to establish that Florida is treating him disparately from other similarly situated persons. *Price v. Commissioner, Department of Corrections*, 920 F.3d 1317 (11th Cir. 2019). Florida is not required by law to afford an evidentiary hearing in every case where an "as-applied" challenge has been made, and Cole has not established that he is being given disparate treatment in comparison to other similarly situated defendants. To the contrary, while Cole cites five previous cases where an evidentiary hearing was held, none of them is similarly situated to Cole. Each case involved a defendant with quite different and unique medical conditions, none of which included

Parkinson's or a claim related to involuntary tremors.[4] It is also noteworthy that Cole contends that involuntary movement at the time of execution will subject him to unnecessary pain, despite the fact (as previously noted) that Florida's protocol includes the use of restraints the purpose of which is to limit movement, whether voluntary or no, by the condemned prisoner.

Cole has failed to establish that Florida's decision not to grant him an evidentiary hearing under the facts of his case violates equal protection. When a defendant's assertion of discrimination is not based on membership in a suspect class, as here, he must also make allegations to show that he qualifies as a "class of one." *See Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). To establish such a class of one, a defendant must allege that he was "intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment. *Id.* "To be 'similarly situated,' the comparators must be prima facie identical in all relevant respects." *Grider v. City of Auburn, Ala.*, 618 F.3d 1240, 1264 (11th Cir. 2010) (quotation and emphasis omitted). All of Florida's death sentenced prisoners are subject to the same rules of criminal procedure, and, since Cole's allegations and supporting evidence for an alleged Eighth Amendment

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[4] Bobby Joe Long allegedly suffered from epilepsy. *Long v. State*, 271 So. 3d 938 (Fla. 2019). Howell because of brain damage, alleged that use of midazolam would result in a paradoxical side effect and fail to render him sufficiently unconscious. *Howell v. State*, 133 So. 3d 511 (Fla. 2014). Henry suffered from hypertension and coronary artery disease. *Henry v. State*, 134 So. 3d 938 (Fla. 2014). Davis suffered from Porphyria. *Davis v. State*, 142 So. 3d 867 (Fla. 2014). Correll suffered from brain damage, alcoholism and substance abuse. *Correll v. State*, 184 So. 3d 478 (Fla. 2015).

violation differs from the other prisoners he cites, there can be no equal protection violation.

Assuming for a moment that Cole has set forth a facially sufficient claim, he fails to satisfy the second requirement of *Glossip*, which requires he "identify an alternative that is feasible, readily implemented, and in fact significantly reduces a substantial risk of severe pain." *Glossip*, 578 U.S. at 877. Cole initially argues that he should not have to plead or prove an available alternative for his execution. However, that is the state of Eighth Amendment law articulated by this Court. An attack on the settled precedent of this Court does not merit certiorari review. Moreover, this Court need not answer that question because Cole failed to show a substantial likelihood of needless pain or suffering. The Florida Supreme Court did not even address Cole's challenge to the requirement that he identify a readily available alternative. Therefore, even without the exigent circumstances of a warrant, this claim presents no basis for certiorari review. *See Rice v. Sioux City Mem'l Park Cemetery*, 349 U.S. 70, 74 (1955) (stating that certiorari should not be granted when the issue is only academic).

Without any specificity, Cole alleges that his alternative method includes lethal gas. His support for this portion of his claim is a general reference to other states' methods of execution – or proposed methods of execution. (Petition at 15). This does not satisfy his burden of identifying a readily available alternative, however. Cole is required to show that the state could carry out his proposed alternative method "relatively easily and reasonably quickly." *Bucklew v. Precythe*,

587 U.S. 119, 141 (2019) (internal quotations omitted). Florida has no procedures in place to implement lethal gas. Nor does Cole explain how such procedures could be implemented in a reasonable period of time. The only alternative by statute is the electric chair – which Cole omits discussing entirely, even though use of this constitutional alternative clearly avoids any concerns Cole might have regarding veinous access. Florida's available alternative to lethal injection is the electric chair. *See* § 922.105, Fla. Stat. (2024). In the unlikely event a court finds lethal injection unconstitutional, the alternative is electrocution.[5]

To satisfy the second prong of *Glossip*, the inmate cannot merely suggest the availability of other means of execution, rather, the inmate must establish that the method is truly available to Florida. *See Zink v. Lombardi*, 783 F.3d 1089, 1103 (8th Cir. 2015) (determining condemned inmate's complaint was dismissed properly because "[t]he second amended complaint include[d] no factual matter that even hint[ed] how the State - drawing on feasible and readily implemented alternatives – could modify its lethal-injection protocol to reduce significantly the alleged substantial risk of severe pain."). *Correll v. State*, 184 So. 3d 478, 490 (Fla.), *cert. denied,* 577 U.S. 948 2015) (rejecting defendant's claims that Florida can obtain

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[5] Florida permits execution by electrocution if the lethal injection protocol is deemed unconstitutional. § 922.105(3), Fla. Stat. (2024). Execution by electrocution has never been deemed unconstitutional by this Court. *See Bucklew*, 587 U.S. at 141. And the Florida Supreme Court has expressly held that execution by electrocution does not violate the Eighth Amendment. *Jones v. State*, 701 So. 2d 76, 80 (Fla. 1997); *Provenzano v. Moore*, 744 So. 2d 413 (Fla. 1999).

pentobarbital from other states or that it could license a compounding pharmacy to make it).

Cole's claims in state court failed to set forth a valid Eighth Amendment challenge under this Court's well-established precedent. The lower court's rejection of this claim does not conflict with a decision of this Court or any other court. Consequently, there is nothing in the instant Petition that would warrant certiorari review on these already litigated issues.

C. Florida's Lethal Injection Protocol meets the *Baze-Glossip* test

Finally, Cole contends that involuntary tremors caused by Parkinson's disease will interfere with FDOC's application of Florida's lethal injection protocol. Initially, it is important to note that the Florida Supreme Court found this claim untimely, as the record established that Cole has been aware of his medical condition for at least seven years. Cole's suggestion that he could not have advanced this claim because he had no way of knowing which protocol Florida would use until the death warrant was signed was similarly rejected, as Florida's present protocol has not materially changed in the past seven years. *See Cole v. State*, 2024 WL 3909057, *7 (Fla. Aug. 23, 2024).

The Florida Supreme Court also rejected it on the merits, saying:

> In an effort to meet [the *Baze-Glossip* test], 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. 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").

Id. at *8.

The Court concluded by finding that Cole's allegations of potential problems with venous access are both speculative and legally insufficient. Finally, Cole's complaints regarding Florida's Department of Corrections ability to follow its own protocol is similarly speculative and not worthy of consideration.

Cole's allegations of potential problems with venous access are both speculative and legally insufficient. First, as recognized by the lower court, Cole has not demonstrated any substantial and imminent risk that is sure or very likely to cause serious illness and needless suffering. This standard imposes a "heavy burden" upon the inmate to show that lethal injection procedures violate the Eighth Amendment. *Baze v. Rees*, 553 U.S. 35, 53 (2008). Notably, Cole does not assert that his involuntary tremors will interfere with the drugs employed in Florida's protocol. The use of etomidate was thoroughly litigated in state court in *Asay v. State* (*Asay VI*), 224 So. 3d 695, 705 (Fla. 2017). In *Asay*, four expert witnesses testified in detail during an evidentiary hearing about the known effects of etomidate, how it was used in the protocol, and how it has been used in medical practice. *Asay VI*, 224 So. 3d at 701. In affirming the circuit court's denial of the claim, the Florida Supreme Court found that the use of etomidate as the primary drug in the execution protocol was constitutional. *Id.* at 701-02.

Cole alleges that because he suffers from involuntary tremors, venous access will be more difficult or more painful. Cole provides no support for this assertion. Moreover, this claim fails as a matter of established law. The inmate is restrained by DOC during lethal injection, and he will not be thrashing about as suggested by collateral counsel. *See* March 10, 2023, Protocol, line (10)(f) (PCR 311)[6]. Cole's challenge fails on the merits because courts have long rejected similar Eighth Amendment claims. In *Baze*, 553 U.S. at 55, the Court held that problems related to IV lines did not establish a sufficiently substantial risk of harm to meet the requirements of an Eighth Amendment claim. Cole's citation of an expert, Dr. Joel Zivot, to speculatively assert Cole will suffer pain or discomfort during IV access does not overcome this well-established precedent.

Likewise, the Eleventh Circuit has squarely rejected Eighth Amendment claims that repeated IV access attempts can constitute superadded pain and present a "substantial risk of harm." *See Barber v. Governor of Alabama*, 73 F.4th 1306, 1318 (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); *Nance v. Comm'r, Georgia Dep't of Corr.*, 59 F.4th 1149, 1157 (11th Cir. 2023) (rejecting claim that state technicians would subject death row inmate to an unconstitutional level of pain by repeatedly pricking him with a needle due to his weak veins). There is no

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[6] The postconviction record on appeal in the Florida Supreme Court is designated as PCR.

conflict among state and federal courts on this issue. Cole's lethal injection challenge is little more than an attack on settled precedent and does not warrant certiorari review, particularly when he was dilatory in bringing this claim. *Bucklew,* 587 U.S. at 151. (Courts "can and should protect settled state judgments from undue interference by invoking their equitable powers to dismiss or curtail suits that are pursued in a dilatory fashion or based on speculative theories."). Certiorari review is inappropriate here. Sup. Ct. R. 10(c) (listing conflict with this Court as a consideration in the decision to grant review). *See also Bartlett v. Stephenson, supra.*

To be clear, Cole "faces an exceedingly high bar" because this Court "has yet to hold that a state's method of execution qualifies as cruel and unusual." *Barr v. Lee,* 591 U.S. 979, 980 (2020) (cleaned up) (quoting *Bucklew* v. *Precythe,* 587 U. S. 119, 133 (2019)). Cole's vague challenges to the lethal injection protocol and the training of medical personnel have long been rejected. The Eighth Amendment does not require "the avoidance of all risk of pain" in any method of execution. *Bucklew,* 587 U.S. at 134. How the Eighth Amendment applies to methods of execution "tells us that the [it] does not guarantee a prisoner a painless death—something that, of course, isn't guaranteed to many people, including most victims of capital crimes." *Id.* (citing *Glossip,* 135 S. Ct. at 2732–33).

Indeed, Cole's argument does not account for the fact that the protocol has procedures in place to effectively address any complications - however unlikely - that may arise during lethal injection. The protocol established by Florida

Department of Corrections (FDOC) requires that the execution team and executioners be trained in possible contingencies that may occur, such as etomidate not rendering the inmate unconscious, or the inmate experiencing an unanticipated medical emergency.[7]

The bottom line is this case would be uncertworthy under normal circumstances, much less on the eve of an execution. The decision below properly stated and applied all governing federal principles, is based primarily on state law grounds, does not implicate an important or unsettled question of federal law, does not conflict with another state court of last resort or a United States Court of Appeals, and does not conflict with any decision of this Court. Accordingly, this Court should deny Cole's certiorari petition.

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[7] Notably, the protocol does call for an assessment of the inmate's medical condition. *See Grossman v. State*, 5 So. 3d 668 (Table) (Fla. 2009) (noting that Florida's execution protocol does "take into consideration the individual physical attributes of each inmate and provide for individualized procedures").

Respectfully submitted,

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