

No.24-5389

IN THE SUPREME COURT OF THE UNITED STATES

**LORAN COLE,
PETITIONER,**

VS.

**STATE OF FLORIDA,
RESPONDENT.**

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

REPLY TO BRIEF IN OPPOSITION TO CERTIORARI

**THIS IS A CAPITAL CASE
WITH AN EXECUTION SCHEDULED FOR
THURSDAY, AUGUST 29, 2024, AT 6:00 PM**

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PRELIMINARY STATEMENT

Petitioner, Loran Cole, offers the following reply to the Brief in Opposition from the Respondent (“BIO”). Cole will not reply to every issue and argument raised by Florida and will only address specific points. Cole expressly does not abandon any issue not specifically replied to herein and relies upon his Petition for a Writ of Certiorari (“Petition”) in reply to any argument or authority not specifically addressed. This reply will focus on Florida violating Cole’s 14th Amendment rights to due process and equal protection, by denying him an evidentiary hearing for his as-applied challenge to Florida’s lethal injection protocols.

RESPONSE TO STATE’S REASONS FOR DENYING THE WRIT

Florida violated Cole’s rights to due process and equal protection pursuant to the 14th Amendment of the United States Constitution, by failing to hold an evidentiary hearing for his as-applied challenge to his execution by lethal injection. The BIO does not negate the fact that Cole is being treated differently than past similarly situated capital litigants who raised an as-applied challenge to Florida’s lethal injection protocols; those defendants received evidentiary hearings to provide factual development for their claims. Petition at 7-9.

In *Panetti v. Quarterman*, 551 U.S. 930, 949-50 (2007), this Court opined on what minimum due process safeguards are required for a capital defendant challenging his sentence under the Eighth Amendment, to be qualify for execution based on a mental condition. This Court cited directly to *Ford v. Wainwright*, 477 U.S. 399 (1986), in opining that Texas’s state-court competency proceedings were

inadequate to provide 8th Amendment protections to capital litigants claiming to be “insane,” and therefore not subject to execution:

Once a prisoner seeking a stay of execution has made “a substantial threshold showing of insanity,” the protection afforded by procedural due process includes a “fair hearing” in accord with fundamental fairness. *Ford*, 477 U.S., at 426, 424, 106 S.Ct. 2595 (opinion concurring in part and concurring in judgment) (internal quotation marks omitted). This protection means a prisoner must be accorded an “opportunity to be heard,” *id.*, at 424, 106 S.Ct. 2595 (internal quotation marks omitted), though “a constitutionally acceptable procedure may be far less formal than a trial,” *id.*, at 427, 106 S.Ct. 2595. As an example of why the state procedures on review in *Ford* were deficient, Justice Powell explained, the determination of sanity “appear[ed] to have been made *solely* on the basis of the examinations performed by state-appointed psychiatrists.” *Id.*, at 424, 106 S.Ct. 2595. “Such a procedure invites arbitrariness and error by preventing the affected parties from offering contrary medical evidence or even from explaining the inadequacies of the State’s examinations.” *Ibid.*

Justice Powell did not set forth “the precise limits that due process imposes in this area.” *Id.*, at 427, 106 S.Ct. 2595. He observed that a State “should have substantial leeway to determine what process best balances the various interests at stake” once it has met the “basic requirements” required by due process. *Ibid.* These basic requirements include an opportunity to submit “evidence and argument from the prisoner’s counsel, including expert psychiatric evidence that may differ from the State’s own psychiatric examination.” *Ibid.*

Panetti at 949-50. In granting Panetti relief, this Court specifically stated:

The procedures the state court provided petitioner were so deficient that they cannot be reconciled with any reasonable interpretation of the *Ford* rule. It is uncontested that petitioner made a substantial showing of incompetency. It is also evident from the record, however, that the state court reached its competency determination without holding a hearing or providing petitioner with an adequate opportunity to provide his own expert evidence. Moreover, there is a strong argument that the court violated state law by failing to provide a competency hearing.

Id. at 932. Cole’s trial court reached a determination of his as-applied claim without holding an evidentiary hearing, nor providing Cole an adequate opportunity to provide his own expert’s testimony. Similar to a capital litigant who is claiming that he is constitutionally ineligible for execution under the Eighth Amendment based on a *mental condition*, Cole’s as-applied challenge alleges that his *medical condition* places him in a class of people who may not experience lethal injection under the Eighth Amendment.

Cole also made a “substantial threshold showing” of his medical condition in his successive pleading for this claim. The Eighth 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 needs to: (1) establish that the method of execution presents a substantial and imminent risk that is sure or very likely to cause serious illness and needless suffering, and also (2) identify a known and available alternative method of execution that entails a significantly less severe risk of pain. *See Asay v. State*, 224 So. 3d 695, 701 (Fla. 2017) (citing *Glossip*, 576 U.S. at 877 and *Baze*, 553 U.S. 35, 50, 61 (2008)).

Cole suffers from Parkinson’s disease, a **progressive** neurological disorder 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 which show that Cole has been experiencing these symptoms since as far back as 2017. 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 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 the Florida Department of Corrections (“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 rigidity 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. Dr. Zivot can testify about how the progressive nature of Cole's Parkinson's disease means Cole's condition has worsened over the years. Cole

made a timely request for an evidentiary hearing. Florida failed to conduct such a hearing for Cole, in violation of his Fourteenth Amendment rights to due process and equal protection. Florida has treated past similarly situated capital litigants in an active death warrant posture differently than Cole, to his detriment.

In 2014, the Florida Supreme Court (“FSC”) 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). The FSC particularly rejected the lower court’s summary denial of the claim in stating that an evidentiary hearing was unnecessary, based on Howell’s claims being “speculative in nature.” *Id.* After the relinquishment, the trial court held a two-day hearing and “carefully considered the testimony submitted.” *Id.* at 519. Like Howell, Cole raised a factual as-applied challenge based on evidence of his Parkinson’s disease that had not been considered by the FSC previously. Cole should have been afforded the same relinquishment for an evidentiary hearing as Howell, yet the FSC denied Cole that opportunity. Denying Cole the same rights as Howell, who was also under an active death warrant, violates Cole’s due process and equal protection rights.

Also in 2014, and during an active death warrant, the FSC 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 FSC relinquished jurisdiction following Henry’s appeal of the circuit court’s summary denial of his initial as-applied challenge during active death warrant successive proceedings. Based on the FSC’s order, the state circuit court held an evidentiary hearing during which both sides called medical experts to testify concerning Henry’s unique medical condition. *See id.* at 944. Denying Cole the same rights as Henry, who was also under an active death warrant, violates Cole’s due process and equal protection rights.

A third time in 2014, the FSC relinquished jurisdiction to the lower court to hold an evidentiary hearing on Eddie Wayne Davis’s as-applied challenge to Florida’s execution procedures based on his diagnosis of porphyria. *Davis v. State*, 142 So. 3d 867, 870 (Fla. 2014). The FSC explained that the court relinquished jurisdiction based, in part, on the “constitutional obligation to ensure that the method of lethal injection in this state comports with the Eighth Amendment.” *Id.* Specifically, the FSC appeared to understand the due process implications of fully litigating an as-applied challenge, along with the necessity to treat Florida’s capital litigants equally:

Along with his motion for stay of execution, Davis attached an affidavit, which he had not produced during the circuit court proceedings, alleging that he suffers from the medical condition porphyria, and that the use of midazolam hydrochloride as the first drug of Florida’s lethal injection protocol, as applied to him, is unconstitutional. Specifically, the affidavit of Dr. Joel Zivot stated that it is his expert medical opinion “that a substantial risk exists that, during the execution, Mr. Davis will suffer from extreme or excruciating pain as a result of abdominal pain, tachycardia, hypertension, nausea, and vomiting.” ***Based on the allegations in the affidavit and our constitutional obligation to ensure that the method of lethal injection in this state comports with the Eighth Amendment, we relinquished jurisdiction to the***

circuit court, consistent with our prior decisions in Howell v. State, 133 So.3d 511, 515 (Fla.), cert. denied, — U.S. —, 134 S.Ct. 1376, 188 L.Ed.2d 372 (2014), and Henry v. State, 134 So.3d 938, 944 (Fla.), cert. denied, — U.S. —, 134 S.Ct. 1536, 188 L.Ed.2d 466 (2014), to permit the parties and the circuit court to address the allegations in Dr. Zivot’s affidavit, as related to Davis’ as-applied challenge. See Davis v. State, No. SC14–1178 (Fla.Sup.Ct. order filed June 26, 2014). After holding a hearing and taking testimony, the circuit court ultimately denied Davis’ claim.

Id (emphasis added). Despite the fact Davis provided belatedly attached findings from the same Dr. Zivot, which had not been considered by Davis’s circuit court, the FSC still relinquished jurisdiction to make sure the method of execution in the state comported with the Eighth Amendment as applied to Davis. The FSC had the same constitutional obligation in Cole’s case that was recognized by the FSC in Davis’s case, and Cole should have been afforded the same opportunity for an evidentiary hearing as Davis. The FSC denied Cole the opportunity. Denying Cole the same rights as Davis, who was also under an active death warrant, violates Cole’s due process and equal protection rights.

In 2015 the FSC relinquished jurisdiction to the lower court to hold an evidentiary hearing on Jerry Correll’s as-applied challenge to Florida’s execution procedures based on his alleged brain damage and history of alcohol and substance use. *Correll v. State*, 184 So. 3d 478, 483 (Fla. 2015). Prior to the evidentiary hearing, the FSC 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 also filed a motion to stay his proceedings and execution with his appeal to the FSC so that a full and fair evidentiary hearing could be held on his as-applied challenge to Florida's execution procedures. Cole should have been afforded the same opportunity as Correll for an evidentiary hearing and should have been granted a stay of execution so that a full and fair evidentiary hearing could be conducted. The FSC denied Cole that opportunity. Denying Cole the same rights as Correll, who was also under an active death warrant, violates Cole's due process and equal protection rights.

Cole raises the four aforementioned Florida state cases to highlight Florida's blatant failure to follow its own precedent in protecting capital litigants' constitutional rights after a signed death warrant. Moreover, Florida's practice in those cases, in contrast to its treatment of Cole, demonstrates the need for this Court's review, as Florida is not invoking its procedural rule "evenhandedly to all similar claims," and the procedural rule should have been "strictly or regularly followed." *See Hathorn v. Lovorn*, 457 U.S. 255, 263 (1982), *citing Barr v. City of Columbia*, 378 U.S. 146, 149 (1964), and *Johnson v. State*, 486 U.S. 578, 587 (1988). Florida cannot assert an adequate and independent state ground foreclosing this Court's intervention. Rather, Cole has proven to be an outlier as compared to similarly postured capital defendants.

Cole is literally being deprived of his life, without "due process of law." Moreover, Cole's equal protection rights are being infringed upon and distinctions in

state criminal laws that impinge upon fundamental rights must be strictly scrutinized. *See, e.g., Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942); *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964); *Eisenstadt v. Baird*, 405 U.S. 438, 447 (1972). Cole appears to be Florida's only capital litigant who has had an as-applied challenge to the lethal injection protocols under an active death warrant, without the benefit of an evidentiary hearing for the trial court to make findings of fact regarding his medical condition and the unconstitutional risks Cole's execution will cause him to suffer. Cole is simply requesting a stay of execution and the right to present his findings in an evidentiary hearing, just like past same situated litigants. Cole is facing grave suffering, and his execution is imminent. Cole respectfully pleads for this Court's intervention to protect his sacred rights under the United States Constitution.

CONCLUSION

The petition for writ of certiorari should be granted.

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