No. _____

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

PETITION FOR A WRIT OF CERTIORARI

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

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CAPITAL CASE

QUESTIONS PRESENTED

Mr. Cole is currently facing execution in Florida while suffering from the effects of Parkinson's disease, a progressive neurological disorder. The state courts violated his Equal Protection and Due Process rights pursuant to the Fourteenth Amendment to the U.S. Constitution, by not allowing him to fully develop his claim with factual development. Accordingly, Mr. Cole raises the following issues:

1. Whether Florida courts violated Cole's Fourteenth Amendment Due Process and Equal Protection rights by failing to hold an evidentiary hearing on his as-applied challenge to lethal injection.
2. Whether the *Baze-Glossip* test violates Cole's Equal Protection and Due Process rights under the Fourteenth Amendment by requiring him to allege an alternative method of execution.
3. Whether 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).

LIST OF PARTIES

All parties appear in the caption of the case on the cover page. Petitioner, Loran Cole, a death-sentenced Florida prisoner, was the appellant in the Supreme Court of Florida. Respondent, State of Florida, was the appellee in the Supreme Court of Florida.

LIST OF RELATED CASES

Trial
Circuit Court of the Fifth Judicial Circuit, in and for Marion County, Florida
State of Florida v. Loran Cole; Case No. 94-CF-498
Judgment entered: Verdict on September 28, 1995. Guilty as charged for 1 count of First-Degree Murder, 2 counts of Armed Kidnapping, 2 counts of Armed Robbery and 2 counts of Armed Sexual Battery. Death sentence imposed on December 20, 1995.

Direct Appeal
Florida Supreme Court Case No. 87337
Cole v. State, 701 So. 2d 845 (Fla. 1997).
Judgment entered: September 18, 1997; Rehearing denied: October 29, 1997.

Denial of Certiorari
United States Supreme Court Case No. 97-7697
Cole v. Florida, 523 U.S. 1051 (1998).
Judgment entered: March 30, 1998; *cert denied*.

Denial of 3.850 Motion for Postconviction Relief
Circuit Court of the Fifth Judicial Circuit, in and for Marion County, Florida
State of Florida v. Loran Cole; Case No. 94-CF-498
Final Order Denying Defendant's Amended Motion to Vacate Judgments of Conviction and Sentence filed by the Honorable William T. Swigert, Circuit Judge, on May 24, 2000.
2000 WL 35820870 (Fla. 5th Cir. Ct. May 24, 2000).

Appeal of Denial of Postconviction Relief
Florida Supreme Court Case No. SC00-1388
Cole v. State, 841 So. 2d 409 (Fla. 2003).
Judgment entered: January 16, 2003; Rehearing denied: March 18, 2003.

Denial of State Habeas Corpus Relief
Florida Supreme Court Case No. SC01-192
Cole v. James V. Crosby, Jr., et al., 841 So. 2d 409 (Fla. 2003).
Judgment entered: January 16, 2003; Rehearing denied: March 18, 2003

Denial of 3.853 (DNA) Postconviction Relief
Circuit Court of the Fifth Judicial Circuit, in and for Marion County, Florida
Order Denying Defendant's Motion for Postconviction DNA
Testing and Directions to the Office of the Clerk of Court filed
by Circuit Judge William T. Swigert.
Judgment entered: November 3, 2003

Appeal of Denial of 3.853 (DNA) Postconviction Relief
Florida Supreme Court Case No. SC03-2204
Cole v. State, 895 So. 2d 398 (Fla. 2004).
Judgment entered: November 24, 2004; Rehearing denied: February 24, 2005

Denial of Federal Habeas Corpus Relief
U.S.D.C.- Middle District Case No. 5:05-cv-222-Oc-10GRJ
Cole v. James V. Crosby, Jr., Secretary, Fla. Dep't of Corr., 2006
WL 1169536 (M.D. Fla. May 3, 2006).
Judgment entered: May 3, 2006

Denial of Certificate of Appealability
U.S.D.C.- Middle District Case No. 5:05-cv-222-Oc-10GRJ
Cole v. James V. Crosby, Jr., Secretary, Fla. Dep't of Corr.,
2006 WL 1540302 (M.D. Fla. May 30, 2006).
Judgment entered: May 30, 2006

Denial of Certificate of Appealability
11th Circuit USCA Case No. 06-13090-P
Cole v. Secretary, Fla. Dep't of Corr., order filed July 31, 2007
(unpublished).
Judgment entered: July 31, 2007

Denial of Certiorari from United States Court of Appeals
Eleventh Circuit's Denial of Certificate of Appealability
United States Supreme Court Case No. 07-7353
Cole v. McDonough, 552 U.S. 1115 (2008).

Denial of First Successive Postconviction Motion-Dozier
Circuit Court of the Fifth Judicial Circuit, in and for Marion County, Florida
Order Denying Defendant's Successive Motion for
Postconviction Relief by Judge Hale R. Stancil.

Judgment entered: March 10, 2011

Appeal of Denial of First Successive Postconviction Motion
Florida Supreme Court Case No. SC11-773
Cole v. State, 83 So. 3d 706 (Fla. 2012)
Judgment entered: February 8, 2012

Denial of Second Successive Postconviction Motion-Dozier
Circuit Court of the Fifth Judicial Circuit, in and for Marion County, Florida
Order Denying Second Successive Motion to Vacate Conviction
and Sentence filed by the Honorable Hale R. Stancil, Circuit
Judgement entered: March 11, 2012.

Denial of Application for Leave to File a Second or Successive Federal Habeas Corpus Petition
11th Circuit USCA Case No. 12-11232-P
Judgment entered: March 20, 2012.

Appeal of Denial of Second Successive Postconviction Motion
Florida Supreme Court Case No. SC13-517
Cole v. State, 131 So. 3d 787 (Fla. 2013)
Judgment entered: December 17, 2013

Denial of Third Successive Postconviction Motion-*Hurst/Hitchcock*
Circuit Court of the Fifth Judicial Circuit, in and for Marion County, Florida
Order Denying Defendant's Third Successive Motion to Vacate
Death Sentence filed by the Honorable Willard Pope, Circuit Judge.
Judgment entered: March 20, 2017

Appeal of Denial of Third Successive Postconviction Motion
Florida Supreme Court Case No. SC17-737
Cole v. State, 234 So. 3d 644 (Fla. 2018)
Judgment entered: January 23, 2018

Denial of Certiorari-*Hurst/Hitchcock*
United States Supreme Court Case No. 17-8540
Cole v. Florida, 585 U.S. 1007 (2018)
Judgment entered: June 18, 2018

Denial of Motion for Stay of Proceedings and Execution
Circuit Court of the Fifth Judicial Circuit, in and for Marion County, Florida
Court Case No. 94-CF-498
Honorable Robert W. Hodges, Circuit Judge.

Judgment entered: August 5, 2024

Denial of Fourth Successive Postconviction Motion – After Signed Death Warrant
Marion County Circuit Court Case No. 94-CF-498
Order Denying Defendant's 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 and Order Denying the State's Motion for Medical and Inmate Records filed by the Honorable Robert W. Hodges, Circuit Judge.
Judgment entered: August 8, 2024

Appellant's Motion for Stay of Execution and Relinquishment of Jurisdiction to State Circuit Court
Florida Supreme Court
Cole v. State, ---So. 3d ---(Fla. 2024); Case Number: SC2024-1170
Judgment entered: August 23, 2024

Appeal from denial of postconviction motion
Florida Supreme Court
Cole v. State, ---So. 3d ---(Fla. 2024); Case Number: SC2024-1170
Judgment entered: August 23, 2024

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IN THE SUPREME COURT OF THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI

Loran Cole respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Florida.

OPINIONS BELOW

This is a petition regarding the errors of the Supreme Court of Florida in affirming the Circuit Court of the Fifth Judicial Circuit, in and for Marion County, Florida's ("state circuit court") Order Denying Defendant's 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. The opinion at issue is unreported and reproduced at Appendix A (hereinafter App. A).

JURISDICTION

The opinion of the Supreme Court of Florida was entered on August 23, 2024. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment provides: Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment provides: No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

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). This Court denied certiorari on March 30, 1998. *Cole v. Florida*, 523 U.S. 1051 (1998), thereby terminating direct-review proceedings.

The Florida Supreme 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).

The Florida Supreme 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, that 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 this Court that was denied on March 30, 1998. *Cole v. Florida*, 523 U.S. 1051 (1998).

During Cole's post-conviction litigation in *Cole v. State*, 841 So. 2d 409 (Fla. 2003), he was denied relief by the Florida Supreme 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), the Florida Supreme 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"). That 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 the Florida Supreme Court's decision in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), which interpreted *Hurst v. Florida*, 136 S. Ct. 616 (2016). The Florida Supreme 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. The death warrant was signed twenty-eight days after 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. Cole is a survivor of Dozier.

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, 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. Cole filed a timely appeal to the Florida Supreme Court, immediately followed by a Motion for Stay of Execution and Relinquishment of Jurisdiction to State Circuit Court. The Florida Supreme Court denied all relief, with an opinion rendered on August 23, 2024. This petition follows.

REASONS FOR GRANTING THE PETITION

[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).

I. Cole should not be subject to execution due to the unique symptoms of his Parkinson's disease and the unconstitutionality of the *Baze-Glossip*[2] standard as applied to Cole.

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. The Florida Supreme Court erred in affirming the denial of relief.

Timeliness

As an initial matter, Florida erred in stating that Cole's claim is time-barred. *See* App. A at 20-21. Cole's Parkinson's disease is a progressive neurological disorder, which means that his condition gets worse over time. It would be premature for Cole to raise this challenge before a death warrant is signed, because his condition is subject to deterioration and his claim would be unripe. *See Panetti v. Quarterman*,

[2] Cole raises an as-applied Eighth Amendment method-of-execution challenge under this Court's standards set forth in *Glossip v. Gross*, 576 U.S. 863 (2015) and *Baze v. Rees*, 553 U.S. 35 (2008). This petition will refer to that standard as *Baze-Glossip*.

551 U.S. 930, 943 (2007). Just as this Court understood that mental conditions can vary over time in considering insanity to be executed, the same logic applies to physical conditions that would prevent executions in accordance with Eighth Amendment principles. Further, in arbitrarily denying Cole an evidentiary hearing on this issue in violation of Cole's right to due process and equal protection, as other similarly situated defendants received evidentiary hearings, Florida has not asserted an adequate and independent state ground to foreclose this Court from considering relief. *See Hathorn v. Lovorn*, 457 U.S. 255, 263 (1982).

A. The Florida courts violated Cole's Fourteenth Amendment Due Process and Equal Protection rights by failing to hold an evidentiary hearing on his as-applied challenge to lethal injection.

The Florida courts violated Cole's right to due process and equal protection by treating his as-applied challenge to lethal injection differently than other Florida defendants raising similar claims. The Florida Supreme Court ("FSC") refused to relinquish jurisdiction for an evidentiary hearing on Cole's as-applied challenge, despite doing so in at least four other separate cases that were also under active death warrants.

In 2014, the 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). 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 opportunity for an evidentiary hearing as Howell, yet the FSC denied Cole that opportunity.

Again in 2014, 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 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 have been afforded the same opportunity for an evidentiary hearing as Henry, yet the FSC denied Cole that opportunity.

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.* 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.

Finally, 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.

Cole should have been afforded the same opportunity for an evidentiary hearing on his as-applied claim that the FSC gave to 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.

Equal Protection

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). Capital defendants have a fundamental right to due process and equal protection of the laws. When a state draws a distinction between those capital defendants who will receive the benefit of a constitutionally valid due process procedure pursuant to the Eighth Amendment, and those who will not, the state's justification for the distinction must satisfy strict scrutiny. The distinction made by the state courts in Florida cannot meet that standard. *See Dep't of Agriculture v. Moreno*, 413 U.S. 528, 538 (1973).

Cole appears to be only person, particularly in Florida, with an as-applied challenge to the lethal injection protocols and facing imminent execution, 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. Regarding the status of a class of one, this Court has stated:

> The Equal Protection Clause of the Fourteenth Amendment commands that no State shall "deny to any person within its jurisdiction the equal protection of the laws," which is essentially a direction that all persons similarly situated should be treated alike. *Plyler v. Doe,* 457 U.S. 202, 216, 102 S. Ct. 2382, 2394, 72 L.Ed.2d 786 (1982)."

City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985).

And also:

> Our cases have recognized successful equal protection claims brought by a "class of one," where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment. See *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441, 43 S. Ct. 190, 67 L. Ed. 340 (1923); *Allegheny Pittsburgh Coal Co. v. Commission of Webster Cty.*, 488 U.S. 336, 109 S. Ct. 633, 102 L.Ed.2d 688 (1989). In so doing, we have explained that "'[t]he purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether

> occasioned by express terms of a statute or by its improper execution through duly constituted agents.'" *Sioux City Bridge Co.*, supra, at 445, 43 S. Ct. 190 (quoting *Sunday Lake Iron Co. v. Township of Wakefield*, 247 U.S. 350, 352, 38 S. Ct. 495, 62 L. Ed. 1154 (1918)).

Vill. of Willowbrook v. Olech, 528 U.S. 562, 564 (2000). *See also Clubside, Inc. v. Valentin*, 468 F.3d 144, 159 (2d Cir. 2006) (requiring an "extremely high degree of similarity" between the plaintiff and those similarly situated).

Cole's imminent execution weighs on the equal protection scale as further disparity in treatment, not as dissimilarity. The unequal treatment Cole will receive if he is executed should lead this Court to consider his arguments on equal protection and fundamental fairness.

Due Process

Cole has not been afforded basic constitutional due process to prove his claim in state court. By analogy, this Court understood the necessity of due process in affording capital defendants protections when subjected to the death penalty in *Panetti*:

> Justice Powell's concurrence, which also addressed the question of procedure, offered a more limited holding. When there is no majority opinion, the narrower holding controls. See *Marks v. United States,* 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977). Under this rule Justice Powell's opinion constitutes "clearly established" law for purposes of § 2254 and sets the minimum procedures a State must provide to a prisoner raising a *Ford*-based competency claim.
>
> **[9]** Justice Powell's opinion states the relevant standard as follows. 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.*

Id. at 949-50. Cole should be afforded the same due process considerations, as his as-applied challenge implicates the constitutionality of his execution, similarly to a person with a mental condition that would forbid capital punishment. The fact that the FSC treated Cole differently by denying him an evidentiary hearing when other similarly situated defendants received such hearings, violates Cole's Fourteenth Amendment rights to Equal Protection and Due Process.

B. The *Baze-Glossip* test violates Cole's Equal Protection and Due Process rights under the Fourteenth Amendment by requiring him to allege an alternative method of execution.

To succeed on his Eighth Amendment method-of-execution claim, Cole is 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. This Court 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-Gossip* 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). This Court's 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 this Court 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.[3] 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 situated capital defendants who choose lethal gas would not have to meet.

C. 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).

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

[3] 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.

method of execution that entails a significantly less severe risk of pain. *See Asay v. State*, 224 So. 3d 695, 701 (Fla. 2017) (citing *Glossip*, 576 U.S. at 877 and *Baze*, 553 U.S. at 50, 61).

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.[4] 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

[4] 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 record on appeal that was before the FSC. However, the medical records that were filed as Appendix D can be found at the following pages of that record on appeal: SC/538-1053; 1070-1090. This petition will cite to the record on appeal page numbers when referencing Cole's medical records.

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 "l." 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 "l" 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.[5] 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.[6] Cole's claim is not untimely, and capital defendants under an active death warrant regularly raise as-applied claims that are not considered untimely and are afforded evidentiary hearings. *See supra* at pp. 7-10.

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

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[5] 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.

[6] Undersigned counsel is not arguing that capital defendants should be absolutely foreclosed from raising as-applied challenges to Florida's execution procedures prior to the signing of an active death warrant. However, such challenges 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.

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.[7] The procedures then explain that the team warden 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

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

execution despite his request for such records[8], it is impossible to confirm that 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 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

[8] 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 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.

exactly replicated prior to the execution.[9] 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 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.[10] 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.[11]

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[9] 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.

[10] *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/.

[11] 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

Even when an 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. 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). Even though the

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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 "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.

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.[12] At least five states authorize by statute execution by firing squad.[13] 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.[14] Cole will not face the risk of pain associated with

[12] *See supra* at note 3.

[13] 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.

[14] 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

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. This Court should grant Cole's petition.

CONCLUSION

For all of these reasons, this Court should grant the petition for a writ of certiorari; stay the execution and order further briefing; and/or vacate and remand this case to the Florida Supreme Court.

Respectfully submitted,

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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 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.

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