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IN THE SUPREME COURT OF FLORIDA

LORAN K. COLE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

_____/

CASE No. SC2024-1170
L.T. No. 94-CF-498
DEATH WARRANT SIGNED
Execution Scheduled for
August 29, 2024 at 6:00 p.m.

ON APPEAL FROM THE FIFTH JUDICIAL CIRCUIT COURT IN AND FOR MARION COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

PRELIMINARY STATEMENT

Citations to the record on direct appeal (SC1960-87337) will be referred to as "DAR" followed by the appropriate page number. Citations to the instant successive postconviction record on appeal (SC2024-1170) will be referred to as "PCR" followed by the appropriate page number.

Appellant labels his issues as (a) - (d). Appellee has re-named them as I - IV.

STATEMENT REGARDING ORAL ARGUMENT

The State respectfully submits that oral argument is not necessary on this appeal of the summary denial of Cole's fourth successive motion for postconviction relief because argument will not materially aid the decisional process.

STATEMENT OF THE CASE AND FACTS

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, Florida State freshman 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.

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

In his first postconviction challenge Cole initially raised thirty-three claims. He subsequently amended his motion to raise an additional eleven. The court held an evidentiary hearing and

ultimately denied relief as to all claims. Cole raised a total of twelve claims on appeal and also filed a writ of habeas corpus that raised five claims in the Florida Supreme Court. The lower court's denial of postconviction relief was affirmed, and Cole's habeas petition was denied. *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 lower court held an evidentiary hearing but denied the claim. The Florida Supreme Court affirmed. *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, raising twenty-five claims. 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, *Cole v. Sec'y, Fla. Dep't of Corr.*, No. 06-13090 (11th Cir. Feb. 26, 2007). The United States Supreme

Court denied Cole's petition seeking certiorari review. *Cole v. McDonough*, 552 U.S. 1115 (2008).

Cole filed three successive Rule 3.851 motions over the next six years in which he twice sought relief based on his experiences at the Dozier School for Boys. *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). His Dozier claims were deemed untimely both times.

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

On August 1, 2024, the postconviction court filed its Trial Court Scheduling Order. On that same date, Cole filed his Defendant's Demand For Public Records Pertaining to Lethal Injection directed to the Florida Department of Law Enforcement ("FDLE"), Florida Department of Corrections ("FDOC") and the Office of the Medical Examiner, District Eight ("MEO8"). All three recipients of Cole's public records demands filed objections to Cole's demands, and a hearing was held on August 2, 2024. The court entered an order that day denying Cole's public records requests.

The State filed its Motion for Medical and Inmate Records that same date.

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. The State filed its response on August 4, 2024.

A *Huff*[1] hearing was held on August 6, 2024, and the postconviction court entered its Order on Case Management Conference and Order Vacating Order to Transport on that same date. On August 8, 2024, the postconviction court entered its Order Denying Defendant's Successive Motion to Vacate Judgment of Conviction and Sentence of Death Pursuant to Florida Rule of Criminal Procedure 3.851. The court denied as moot the State's motion for access to Cole's medical and inmate records (PCR 1174).

Cole filed his Notice of Appeal on August 9, 2024 and his Initial Brief on August 14, 2024, to which this Answer Brief responds.

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[1] *Huff v. State*, 622 So. 2d 982 (Fla. 1994).

SUMMARY OF THE ARGUMENTS

ISSUE I:

Cole's claim that evidence of his mistreatment at Dozier Boy's School is untimely, is not newly discovered evidence and, in any event, would not have rendered probable a different outcome had it been introduced at trial.

ISSUE II:

Cole's claim that conditions of his confinement violate his Eighth Amendment rights is untimely and fails to raise a challenge to his judgment and sentence.

ISSUE III:

Cole's challenge to the lethal injection protocol issue untimely and legally insufficient to warrant a hearing. Cole's speculative assertions regarding his Parkinson's-like condition making venous access more difficult or more painful fail as a matter of law.

ISSUE IV:

The lower court properly denied Cole's requests for additional public records because none of the records sought were likely to provide support for a colorable claim of relief.

ARGUMENT

Stay Standard

Florida's current stay of execution standard requires showing "there are substantial grounds upon which relief might be granted." *Dillbeck v. State*, 357 So. 3d 94, 103 (Fla. 2023). Florida has utilized this same standard for over twenty-five years. *See Buenoano v. State*, 708 So. 2d 941, 951 (Fla. 1998), *citing Bowersox v. Williams*, 517 U.S. 345 (1996) and *Barefoot v. Estelle*, 463 U.S. 880 (1983)).

In addition, the United States Supreme Court had pointed out that courts should be especially wary of stay requests filed for the purpose of reviewing postconviction motions filed at the eleventh hour. *Bucklew v. Precythe*, 587 U.S. 119, 150 (2019) ("Last-minute stays should be the extreme exception, not the norm, and the last-minute nature of an application *that could have been brought earlier*, or an applicant's attempt at manipulation, may be grounds for denial of a stay.") (cleaned up) (emphasis added).

Summary Denial Standard

A postconviction court may summarily deny a postconviction claim that is conclusively rebutted by the existing record. Fla. R.

Crim. P. 3.851(f)(5)(B). It is also proper for a postconviction court to summarily deny postconviction claims that are untimely, not retroactive, procedurally barred, not cognizable, or meritless as a matter of law under controlling precedent. *Mungin v. State*, 320 So. 3d 624, 626 (Fla. 2020); *Rodgers v. State*, 288 So. 3d 1038, 1039 (Fla. 2019) (affirming a summary denial of a successive postconviction claim as untimely), *cert. denied*, *Rodgers v. Florida*, 141 S. Ct. 398 (2020); *Bogle v. State*, 288 So. 3d 1065, 1069 (Fla. 2019) (affirming the summary denial of a successive postconviction claim on non-retroactivity grounds), *cert. denied*, *Bogle v. Florida*, 141 S. Ct. 389 (2020).

The burden is on the defendant to establish a prima facie case, based upon a legally valid claim. *See Franqui v. State*, 59 So. 3d 82, 96 (Fla. 2011); *Nixon v. State*, 932 So. 2d 1009, 1018 (Fla. 2006). Mere conclusory allegations are not sufficient to meet this burden. *Foster v. State*, 132 So. 3d 40, 62 (Fla. 2013). A facially sufficient 3.851 motion requires alleging specific legal and factual grounds that demonstrate a cognizable claim for relief. If a defendant's conclusory allegations are not supported by a properly pled factual

basis, the claim is facially insufficient and should be summarily denied. *See Davis v. State*, 875 So. 2d 359, 368 (Fla. 2003).

Successive motions for postconviction relief based on newly discovered evidence must allege the facts upon which the claim was based "were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence," and that there is good cause for failing to raise the claim in a prior motion. Fla. R. Crim. P. 3.851(d)(2)(A), (e)(2). If this Court finds the evidence undergirding a newly discovered evidence claim was previously discoverable, or there is no good cause for failing to assert the claim earlier, it must dismiss the claim under Florida law. *Id.* Cole has the burden of showing his claims are timely. *Mungin*, 320 So. 3d at 626 ("It is incumbent upon the defendant to establish the timeliness of a successive postconviction claim.").

Timeliness Standard

Any motion to vacate a judgment of conviction and sentence of death is required to be filed by the defendant within one year after the judgment and sentence become final. Fla. R. Crim. P. 3.851(d)(1). For the purposes of this rule, a judgment is final, either

(1) on the expiration of the time permitted to file in the United States Supreme Court a petition for writ of certiorari seeking review of the Supreme Court of Florida decision affirming a judgment and sentence of death (90 days after the opinion becomes final) or (2) on the disposition of the petition for writ of certiorari by the United States Supreme Court, if filed. Fla. R. Crim. P. 3.851(d)(1). Under Rule 3.851, a postconviction motion filed beyond the time limitation provided in subdivision (d)(1) may only be filed or considered if it alleges either, (1) 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; (2) the fundamental constitutional right asserted was not established within the period provided for in subdivision (d)(1) and has been held to apply retroactively; or (3) postconviction counsel, through neglect, failed to file the motion. Fla. R. Crim. P. 3.851(d)(2).

When a defendant seeks a postconviction remedy one or more years beyond the date on which the judgment and sentence become final and alleges that the late filing of the claim is permitted because there exists newly discovered evidence as described in Rule

3.851(d)(2)(A), the motion must be filed within one year of the date upon which the claim became discoverable through due diligence. *Jimenez v. State*, 997 So. 2d 1056, 1064 (Fla. 2008). The movant bears the burden of demonstrating that the alleged newly discovered evidence qualifies for this exception. Fla. R. Crim. P. 3.851(d)(2)(A); *See Dillbeck v. State*, 357 So. 3d 94, 101 (Fla. 2023).

ISSUE I

THE DOZIER CLAIM

Cole claims that there exists newly discovered evidence concerning his mistreatment while he attended the Arthur G. Dozier School for Boys ("Dozier") from June 1, 1984, to November 14, 1984. He raises this issue for the third time, contending that the four and a half months he spent at Dozier would result in a life sentence if evidence regarding his treatment at Dozier had been admitted into evidence. Notably, Cole was not even at Dozier during the time frame the Bill covers. The alleged newly discovered evidence consists of "Florida's acknowledgment of the mitigative atrocities that occurred at the Dozier." (IB at 14, PCR 1235). However, this claim is untimely, is procedurally barred, and is meritless because the evidence could have been discovered earlier with due diligence and is not likely to result in a different sentence if the jury heard it at retrial.

A. Newly Discovered Evidence Standard

A defendant cannot prevail on a claim based on newly discovered evidence unless the defendant can show that (1) the

evidence was unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known of it by the use of diligence, and (2) the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial. *Jones v. State*, 709 So. 2d 512, 521 (Fla. 1998). To reach this conclusion, the trial court is required to "consider all newly discovered evidence which would be admissible" at trial and then evaluate the "weight of both the newly discovered evidence and the evidence which was introduced at the trial. *Id.*

In considering the second prong, the trial court should initially consider whether the evidence would have been admissible at trial or whether there would have been any evidentiary bars to its admissibility. *See Johnson v. Singletary*, 647 So. 2d 106, 110–11 (Fla. 1994); *cf. Bain v. State*, 691 So. 2d 508, 509 (Fla. 5th DCA 1997). Once this is determined, an evaluation of the weight to be accorded the evidence includes whether the evidence goes to the merits of the case or whether it constitutes impeachment evidence. *See Williamson v. Dugger*, 651 So. 2d 84, 89 (Fla. 1994). The trial

court should also determine whether the evidence is cumulative to other evidence in the case. *See State v. Spaziano*, 692 So. 2d 174, 177 (Fla. 1997); *Williamson*, 651 So. 2d at 89. The trial court should further consider the materiality and relevance of the evidence and any inconsistencies in the newly discovered evidence.

B. The Claim is Untimely

Rule 3.851 requires, with few exceptions, that any motion to vacate judgment of conviction and sentence of death be filed by the defendant within one year after the judgment and sentence become final. Fla. R. Crim. P. 3.851(d)(1). Cole's judgment and sentence were finalized on March 30, 1998, when the United States Supreme Court denied his petition for certiorari. *Cole v. Florida*, 523 U.S. 1051 (1998); Fla. R. Crim. P. 3.851(d)(1)(B) (judgment becomes final "on the disposition of the petition for writ of certiorari by the United States Supreme Court"). Therefore, this claim is being filed long after the one-year deadline.

Cole contends that the claim is timely because it is based on newly discovered evidence. However, he bears the burden of demonstrating that the evidence alleged to be newly discovered

qualifies for this exception. Fla. R. Crim. P. 3.851(d)(2)(A); *See Dillbeck v. State*, 357 So. 3d 94, 100 (Fla. 2023) (Fla. 2021). At a minimum, this requires Cole to demonstrate that even though this information may not have been discoverable within one year of his judgment and sentence being finalized, the motion was filed within one year of the date upon which the evidence supporting the claim became discoverable through due diligence. *Jimenez v. State*, 997 So. 2d 1056, 1064 (Fla. 2008). Cole is unable to do so. While he contends that his present claim is based on a new law signed by Governor DeSantis on June 21, 2024 ("Dozier Bill"), the Dozier Bill is merely window dressing for Cole to once again argue that he was denied a fair penalty phase because no mitigation was presented about his alleged mistreatment while attending Dozier. This argument is hardly new.

Over a dozen years ago, Cole first sought postconviction relief based on evidence of his alleged mistreatment while attending Dozier. *See Cole v. State,* 83 So. 3d 706 (Fla. 2012) (affirming summary denial of his claim of ineffective assistance of counsel for failure to present evidence of his allegedly repressed memories

about abuse he witnessed and suffered at the Dozier School for Boys). Just one year later, the Court again affirmed summary denial of a "new" postconviction claim of Cole's based on evidence of his mistreatment while attending Dozier. *Cole v. State*, 131 So. 3d 787 (Fla. 2013) ("Because we find that Cole's claim here is nearly undistinguishable from his claim in *Cole IV*, we find that his claim is procedurally barred and was properly denied by the postconviction court."). Thus, Cole's claim about evidence of his mistreatment while attending Dozier is not newly discovered.[2]

Cole attempts to distinguish the instant claim regarding Dozier from his previously barred Dozier claims by arguing that the 2024 Dozier Bill is newly discovered evidence establishing "Florida's acknowledgment of the mitigative atrocities that occurred at Dozier." (IB at 14). However, the postconviction court correctly found that the Dozier Bill, which merely acknowledges the mistreatment of those who attended Dozier and provides for

[2] The orders on both his first and second successive postconviction motions highlight the fact that Cole's presentence investigation notes that Cole stated that he received his GED while attending Dozier, which his mother confirmed. (PCR 258; 277).

compensation for a particular class of those who attended, is not newly discovered evidence. (PCR 1168-69). *See Dillbeck v. State,* 357 So. 3d 94 (Fla.), *cert. denied, Dillbeck v. Florida*, 143 S. Ct. 856 (2023) ("alleged newly emerged medical and scientific consensus" is not newly discovered evidence; the claim is procedurally barred); *Barwick v. State*, 361 So. 3d 785, 793 (Fla.), *cert. denied, Barwick v. Florida*, 143 S. Ct. 2452 (2023) ("This Court has routinely held that resolutions, consensus opinions, articles, research, and the like, do not constitute newly discovered evidence."); *Zack v. State*, 371 So. 3d 335 (Fla.), *cert denied, Zack v. Florida*, 144 S. Ct. 274 (2000) ("new scientific consensus" found in articles is not newly discovered evidence).

In *Zack*, the defendant argued for an extension of *Atkins*[3] to encompass cases involving Fetal Alcohol Syndrome ("FAS"). He argued that "new scientific consensus" found in several articles now recognized FAS as being equivalent to an intellectual disability. The Court rejected Zack's argument that the "new scientific consensus" is newly discovered evidence. "This Court has repeatedly held that

[3] *Atkins v. Virginia*, 536 U.S. 304 (2002).

[n]ew opinions or research studies based on a compilation or analysis of previously existing data and scientific information' are not generally considered newly discovered evidence." *Zack*, 371 So. 3d at 346 (internal quotations deleted), *citing Dillbeck v. State*, 357 So. 3d at 99 (quoting *Henry v. State*, 125 So. 3d 745, 750 (Fla. 2013) (noting that "*Dillbeck* cites a 2021 article for the proposition that the medical and scientific community view ND-PAE as equivalent to intellectual disability, and that article in turn relies on older sources")).

Furthermore, the Court pointed out that the facts upon which Zack's intellectual disability claim was predicated had long been known to him and his attorneys. "He relies on this twenty-year-old-plus information to now claim he should be deemed intellectually disabled and, thus, categorically exempt from execution under *Atkins*. But Zack raises no newly discovered evidence on this point." *Zack*, 371 So. 3d at 345. As a result, the Court affirmed the lower court's ruling that the postconviction motion was untimely.

In *Barwick*, the defendant asserted that "[n]ewly discovered evidence of a definitive consensus regarding adolescent brain

development demonstrates that the death penalty is a categorically unconstitutional punishment for individuals who committed their offenses when they were between the ages of 18 to 21." *Id.* at 791-92. As the Court explained:

> The American Psychological Association (APA) resolution appears to be the association's official or public stance that the death penalty should be banned in cases where the offender was under twenty-one years of age at the time of the capital offense. The resolution cites approximately fifty sources in support of this position, including articles published in psychology journals, law reviews, by universities, and by at least one of each of the following: a "nonprofit think tank," a "research and advocacy center," a federal agency, and a news outlet. It also cites reports, books, online registries, and meta-analyses. Thus, *it is fair to say that the APA's resolution is based on a compilation of studies, research, data, and reports, published between 1992 and 2022 and relying on data from as early as 1977, and therefore does not constitute newly discovered evidence under rule 3.851(d)(2)(A).*

Barwick, 361 So. 3d at 793.

Cole's newest Dozier claim is virtually identical to the nature of the claims that the Court rejected just last year in *Zack* and *Barwick*. Like the newly discovered evidence claims in *Zack* and *Barwick* – (1) that several articles found a "new scientific consensus" that FAS is the equivalent to an intellectual disability

and that (2) the American Psychological Association ("APA") passed a resolution that the death penalty should be banned in cases where the offender was under twenty-one years of age at the time of the capital offense, the Dozier Bill's "acknowledgment of the mitigative atrocities that occurred at the Dozier School for Boys" is not newly discovered evidence. Rather, it is (1) *a resolution* that acknowledges what happened at Dozier and provides a right to compensation for certain of its victims that (2) is *based on a compilation of earlier reports and investigations,* as Cole concedes. (IB at 17; PCR 518-19). Therefore, the postconviction court correctly found that the new legislation is not "newly discovered evidence," but a compilation of evidence, much of which has been available since Cole's trial, the rest of which has been available for *far more* than one year. (PCR 1168-69). Cole merely seeks to use it to provide a means to argue about his alleged treatment at Dozier and the potential mental health problems such treatment can cause. (IB at 21-25). However, neither his alleged treatment at Dozier or the potential mental health problems resulting from it are newly discovered, and Cole's alleged treatment while attending Dozier has

twice been barred by this Court. Because Cole filed this claim more than one year after this evidence was discovered or should have been discovered with due diligence, this Court should affirm the lower court's denial of this claim.

C. The Claim is Procedurally Barred

Furthermore, just as this Court has found Cole's previous two Dozier claims were procedurally barred, his current claim is procedurally barred, as well.[4] Like the claim raised in *Cole V*, this present claim is "nearly undistinguishable from his claim in *Cole IV*." *Cole v. State (Cole V),* 131 So. 3d 787 at 787 (Fla. 2013). At their core, all three of the claims Cole has raised about his time at Dozier are identical: that a jury would have recommended a life sentence had it heard mitigation evidence about what happened to him when he attended Dozier. This latest claim is merely an attempt to recast his past claims about his alleged treatment at Dozier as a new claim. *See Barwick*, 361 So. 3d at 792–93.

[4] Because this Court has previously affirmed the summary denial of his prior Dozier claims, the Court's decisions also have a res judicata effect on this current Dozier claim.

Similarly, in *Zack*, the Court noted that Zack had repeatedly raised some variation of the claim he raised in his final postconviction motion about FAS being the functional equivalent of an intellectual disability under *Atkins* and the Eighth Amendment. *Zack*, 371 So. 3d at 346. However, the Court expressly addressed the impropriety of raising as a new claim that is merely a variation of one previously made. "This Court recently reiterated in *Barwick* that using a different argument to relitigate the same issue ... is inappropriate." *Zack*, 371 So. 3d at 347. (internal quotation marks omitted). The Court pointed out that "[A]t its core," Zack was raising "the same claim he's repeatedly raised since 2002." *Zack*, 371 So. 3d at 347. The Court concluded that the postconviction court "did not err in concluding that this claim is procedurally barred." *Id*.

Like the defendants in *Barwick* and *Zack*, Cole is attempting to litigate the same issue in this postconviction motion that he raised in two previous postconviction motions – that he would likely not be sentenced to death on retrial if evidence of his treatment at Dozier was admitted. Therefore, the postconviction court correctly concluded that just as the defendants' postconviction claims in

Barwick and *Zack*, Cole "is attempting to relitigate the same issue he raised in two prior motions" using a different argument. (PCR 1169). Moreover, to the extent that there is any distinction that can be drawn between this claim and the earlier claims, Cole still could have filed his claim at the time he filed his last postconviction motion. Thus, the postconviction court correctly found this claim is barred. (PCR 267-82).

D. The Claim is Meritless

Cole further claims that had the jury known about the abuse that occurred at Dozier and the State of Florida's acknowledgement of said abuse, "there is a *reasonable probability* the newly discovered evidence would yield a less severe sentence. There is a *reasonable probability* a jury presented with the newly discovered information would recommend a sentence of life for Cole." (IB at 1415). Unsurprisingly, Cole cites no case in support of this standard of review. The likely reason is because this is not the proper standard of review for newly discovered evidence. The proper standard of review is the standard that the Court announced in *Jones*, 709 So. 2d at 521.

In order for a defendant to prevail on a claim of newly discovered evidence, the defendant must prove both that (1) the evidence was not known by him, his counsel, or the trial court at the time of the trial and could not have been known by the use of due diligence, and (2) that the evidence must be of such a nature that it would probably produce an acquittal on retrial or would probably result in a sentence less severe than death. *Jones*, 709 So. 2d at 521, *Davis v. State*, 26 So. 3d 519, 524 (Fla. 2009). Cole is unable to demonstrate either.

First, evidence of Cole's treatment at Dozier was clearly known to him and his counsel over a dozen years ago when Cole first sought postconviction relief based on evidence of his alleged mistreatment while attending Dozier. As previously argued, this Court has already twice addressed Cole's arguments that his treatment at Dozier should have been argued as mitigation. *See Cole v. State*, (*Cole IV*) 83 So. 3d 706 (Fla. 2012) (affirming summary denial of his claim of ineffective assistance of counsel for failure to present evidence of his allegedly repressed memories about abuse he witnessed and suffered at the Dozier School for Boys); *Cole v.*

State, 131 So. 3d 787 (Fla. 2013) ("Because we find that Cole's claim here is nearly undistinguishable from his claim in *Cole IV*, we find that his claim is procedurally barred and was properly denied by the postconviction court.").

Moreover, the postconviction court that reviewed Cole's September 20, 2010 postconviction claim specifically referred to page 8 of the pre-sentence investigation, "Educational History," which stated that Cole was aware that he attended Dozier because he informed them that he obtained his GED while attending it. Therefore, Cole cannot meet the first prong of *Jones*.

Nor would this evidence probably result in a life sentence instead of a death sentence. This Court determined in *Jones* that when a prior evidentiary hearing has been conducted, "the trial court is required to 'consider all newly discovered evidence which would be admissible' at trial and then evaluate the 'weight of both the newly discovered evidence and the evidence which was introduced at the trial'" in determining whether the evidence would probably produce a different result on retrial. *Jones,* 709 So. 2d at 521–22.

This case is a highly aggravated murder in which the trial court sentenced Cole to death upon finding four aggravators. These aggravators included convictions for prior felonies (the concurrent charges in this case); committing the murder in the course of his kidnapping of both Edwards and his sister, P.E.; committing the murder so he could rob them; and committing the murder in a heinous, atrocious, and cruel manner ("HAC"). This Court has long held that HAC is among the "most serious" of the statutory aggravators. *Buzia v. State*, 926 So. 2d 1203, 1216 (Fla. 2006).

According to the sentencing order, the trial court determined that Cole beat Edwards "severely in the head" and P.E. "could hear her brother's grunts and moans." (DAR 915-16). The blunt trauma wounds to the head were determined to be a cause of death, in part. (DAR 916). Cole slashed Edwards' throat and left him to choke to death on his own blood for several minutes during which P.E. could hear her brother gagging to death. (DAR 916). In addition, Cole twice raped Edwards' sister, P.E., even as the life drained from her brother. The jury recommended 12-0 that Cole be sentenced to death. (DAR 793).

Moreover, the trial court weighed these aggravators against its finding of two non-statutory mitigators, (1) Cole suffered from organic brain damage and mental illness, and (2) Cole suffered an abused and deprived childhood. Dr. Berland, a forensic psychologist testified that Cole suffered from mental illness and psychosis, but that due to Cole's attempt to manipulate the results by lying and exaggerating his responses, Dr. Berland was unable to determine the severity of either condition. In addition, Dr. Berland concluded that Cole was above average intelligence and that any brain damage affecting his IQ would only decrease the score to a normal finding.

The trial court found that Cole was not delusional or controlled by hallucinations. Moreover, the trial court stated in its sentencing order that Cole presented multiple witnesses to establish his abused and deprived childhood. Therefore, the trial court considered Cole's childhood abuse as mitigation, as well as the evidence presented concerning his mental health and made a finding that evidence was presented to prove both mitigators and weighed them accordingly. Cole has not established that a jury

would *probably* have imposed a lesser sentence had this evidence been introduced at trial.

ISSUE II

THE CONDITIONS OF CONFINEMENT CLAIM

Here, Cole complains that the State of Florida has offended his dignity by denying proper medical treatment, allowing Cole access to illicit drugs, and punishing him with disciplinary reports when Cole was found to be in possession of illicit drugs. Those drugs, Cole alleges, include Cannabis, a marijuana cigarette allegedly laced with Fentanyl, and a drug identified by Cole merely as "K2." The lower court's summary denial should be affirmed.

A. Timeliness and Procedural Bar

Florida Rule of Criminal Procedure 3.851(d) requires that, subject to certain exceptions, a motion to vacate judgment of conviction and sentence of death shall be filed by the defendant within one year after the judgment and sentence become final. Besides setting time limits for filing motions to vacate judgments of conviction and sentence, Rule 3.851 additionally distinguishes between initial and successive motions, setting forth more restrictive page limits and establishing more rigorous pleading requirements for successive motions. *See* Fla. R. Crim. P.

3.851(e)(2).

Cole's conviction and death sentence became final in 1998 following denial of his petition for writ of certiorari in the United States Supreme Court. *Gaskin v. State*, 218 So. 3d 399, 401 (Fla. 2017). In the time between finality of his death sentence and the instant Motion, Cole has filed multiple postconviction motions seeking relief alleging dozens of claims but has never once complained about the conditions of his confinement. Most notably, Cole fails to allege any specific dates on which the alleged abuse occurred other than to assert that he was given a marijuana cigarette laced with Fentanyl two years ago (PCR 487). While Cole's claim regarding failure to provide adequate medical care may arguably be viewed as an ongoing event, to the extent that such a claim even raises a viable challenge to his death sentence, it is clearly untimely because Rule 3.851(e)(2) precludes any claim filed outside the one-year time limit unless it meets one of the exceptions. Cole should have raised this claim when the alleged abuse began, not after the Governor has signed his death warrant. Cole does not even attempt to explain why the instant claim is

timely. It is not.

Even if his claim were timely, his claim is irrelevant because it is not a challenge to the validity of his conviction and sentence. To establish a viable postconviction claim, Cole must show that had trial counsel presented the newly discovered evidence at trial, there is a reasonable probability of a different outcome. *Jones v. State*, 591 So. 2d 911 (Fla. 1991). Clearly, even if the conditions he would eventually allegedly suffer during his confinement on death row were known to counsel, it would not be admissible nor would it rise to the level of materiality mandated under the *Jones* test.

Cole may abhor his alleged mistreatment during his confinement on death row, but this type of claim has no place in a postconviction motion challenging the validity of his judgment and sentence. His challenge to the conditions of his confinement is a civil matter between Cole and those authorities responsible for incarcerating him.

As for Cole's assertion that his confinement violates the Eighth Amendment, this Court has consistently rejected similar claims that prolonged incarceration amounts to cruel and unusual

punishment. Such claims are facially invalid, particularly where at least part of the alleged constitutional violation is a result of the defendant's own actions. *Lucas v. State*, 841 So. 2d 380, 389 (Fla. 2003); *Orme v. State*, 361 So. 3d 842 (Fla. 2023). Cole's claim consists largely of vague assertions of inadequate medical treatment and illicit drug use, the latter of which, the State notes, Cole could have easily avoided had he decided to just say no. The lower court's summary denial of this claim should be affirmed.

ISSUE III

THE LETHAL INJECTION CLAIM

In this issue, Cole raises an Eighth Amendment challenge to Florida's lethal injection procedure. Cole specifically argues that Florida's lethal injection procedure is unconstitutional as applied to him due to his asserted diagnosis of Parkinson's disease. Cole was dilatory in waiting until now to raise this claim, and therefore, the postconviction court correctly denied it as untimely.

Even if the claim had been timely raised, Cole's constitutional claim, nevertheless, fails. Cole has not demonstrated that Florida's lethal injection protocol — as applied to him — violates the Eighth Amendment of the United States Constitution. The lower court's summary denial of this claim should be affirmed.

A. Cole's Claim Is Untimely

The Honorable Robert W. Hodges found this claim untimely based upon well-established law. Indeed, there is no factual controversy on the question of timeliness. The court stated below:

> The Court finds Defendant's claim to be untimely. As stated above, Defendant has suffered from Parkinson's disease for the last seven to ten years. Defendant has

> been aware of the symptoms of his disease, including, inter alia, involuntary body movements, for the last seven to ten years, yet Defendant failed to raise the instant claim until a death warrant was signed. The Court notes that Defendant filed his third successive motion for post-conviction relief on January 9, 2017. However, Defendant failed to raise the instant claim in that motion even though, according to his timeline, he was already suffering from Parkinson's disease. This Court questioned Defendant's counsel regarding the delay in raising the instant claim at the *Huff* hearing and Counsel claimed the lethal injection protocols have changed. However, Counsel cited to no such change that could justify the delay in raising the instant claim. Accordingly, the Court finds that the newly discovered evidence exception to the requirement that Defendant file a motion within one year does not apply and this claim is untimely.

(PCR 1171-72).

Cole has long known of his claimed symptoms of Parkinson's disease. Cole's motion acknowledged this fact and cited a 2017 request for services for alleged symptoms of Parkinson's. (PCR 489). There is no reason in law or fact for Cole to wait years to raise this claim now under an active death warrant. The lower court properly denied this claim because it is untimely and dilatory.

In *Dillbeck v. State*, 304 So. 3d 286, 288 (Fla. 2020), this Court affirmed the dismissal of Dillbeck's untimely claim under an active

warrant, reasoning that Dillbeck and his counsel knew that Dillbeck had brain damage related to fetal alcohol exposure even before he was sentenced, and because the new diagnosis of ND-PAE was first recognized in 2013, it could have been discovered by the exercise of due diligence as early as 2013. "Dillbeck and his counsel failed to exercise diligence by waiting until 2018 to pursue evaluation, testing, and a diagnosis of ND-PAE." Thus, the trial court did not err in dismissing Dillbeck's motion as untimely." *Id*. *See also Zack v. State*, 371 So. 3d 335, 345 (Fla. 2023), *cert. denied sub nom.*, *Zack v. Florida*, 144 S. Ct. 274 (2023) (finding claim that fetal alcohol syndrome and low IQ barred defendant's execution time bar because defendant had long known of these conditions prior to filing his successive motion under an active death warrant).

The situation is no different here. Cole has known of his symptoms of Parkinson's disease for more than seven years. The Florida Rules of Criminal Procedure have strict time limitations for when a motion and successive motion for postconviction relief can be filed. Fla. R. Crim. P. 3.851(d). Those limitations should be strictly enforced, particularly when a defendant deliberately waits

until after a warrant is signed to make his challenge. The clear intent of this claim is to delay Cole's execution in a case that has already been litigated over the course of thirty years. *See Woods v. Comm'r, Ala. Dep't of Corr.*, 951 F.3d 1288, 1293 (11th Cir. 2020) ("The Supreme Court has unanimously instructed the lower federal courts on multiple occasions that we must apply a strong equitable presumption against the grant of a stay where a claim could have been brought at such time as to allow consideration of the merits without requiring entry of a stay.") (quotations omitted)).

As outlined above, an allegation associated with Cole's alleged Parkinson's as related to Florida's three-drug protocol is based on facts that have been known to Cole and his attorney for years. Thus, the contention that Parkinson's could potentially interfere with the lethal injection process should have been researched and raised well prior to Cole's death warrant.[5]

[5]Federal courts have long recognized that lethal injection challenges are subject to time limitations. *See e.g. McNair v. Allen*, 515 F.3d 1168, 1178 (11th Cir. 2008) (applying applicable state statute of limitations to lethal injection challenge in federal court under Section 1983).

There is no provision in Florida law that supports waiting until a death warrant is signed to litigate an Eighth Amendment lethal injection claim. Cole fails to credibly or adequately explain how the facts on which his claim is based were unknown to him or his attorney and could not have been ascertained by the exercise of due diligence. Indeed, symptoms of Cole's Parkinson's have been known to counsel and Cole for seven years. Florida's current lethal-injection protocol has been in effect since 2017. Obviously, Cole's general complaints about training of lethal injection personnel, placement of venous access and potential cut down procedures - while meritless under precedent - could have been raised years earlier. *See generally Lightbourne v. McCollum*, 969 So. 2d 326 (Fla. 2007) (rejecting broad-based challenges to Florida's protocol); *Valle v. State*, 70 So. 3d 530, 545 (Fla. 2011) (same).

Cole attempts to excuse his untimely claim by asserting that Florida's protocol changes every two years. (IB at 49). Cole provides no factual support for that statement. That is simply not true. Florida's protocol is essentially the same as the one this Court addressed and approved in *Asay v. State*, 224 So. 3d 695, 705 (Fla.

2017). Cole was clearly dilatory in waiting until now to raise this claim. *Ferguson v. State*, 101 So. 3d 362, 365 (Fla. 2012) (agreeing with the lower court that a lethal injection challenge was time barred because "Ferguson has not based his claim on facts that occurred during a recent execution . . ."") (citing and contrasting *Schwab v. State*, 969 So. 2d 318, 321 (Fla. 2007)). Pursuant to Florida Rule of Criminal Procedure 3.851(e)(2), a claim that fails to meet the time limitations exceptions "shall be dismissed" by the trial court. For all these reasons, the postconviction court's dismissal of the motion should be affirmed.

B. Cole's Motion Does Not Set Forth A Valid Eighth Amendment Claim.

Even if Cole's claim had been timely raised, he would not be entitled to relief because this claim is meritless. Cole cannot successfully challenge his method of execution unless: (1) he establishes that it presents a substantial and imminent risk that is sure or very likely to cause serious illness and needless suffering, and (2) he also identifies a known and available alternative method of execution that entails a significantly less severe risk of pain.

Asay, 224 So. 3d at 701 (citing *Glossip v. Gross*, 576 U.S. 863, 877 (2015)); *Baze v. Rees*, 553 U.S. 35 (2008). Cole's motion failed to establish these required elements.

The lower court examined the merits of Cole's claim and found it insufficient and speculative, stating, in part:

> The placement of an intravenous line in a patient with body movements is neither unique nor rare in the medical field. Defendant acknowledges in his Motion that restraints can secure a person's body and block muscle movements. The Department of Corrections' lethal injection protocols include restraints, which could be used to block muscle movements. Additionally, if an intravenous line cannot be placed, the protocols allow for the placement of a central line, with or without a venous cut-down. This protocol has previously been found to be constitutional in *Asay v. State*, 224 So. 3d 695 (Fla. 2017). Thus, even if Defendant could establish that he has tremors or body movement, he cannot "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."

(PCR 1173).

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*, 553 U.S. at 53. Notably, Cole does not assert that Parkinson's disease will interfere with the drugs employed in Florida's protocol. The use of etomidate was thoroughly litigated in state court in *Asay,* 224 So. 3d at 705. 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*, 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. Notably, the records from the FDOC do not provide any indication that the current execution protocol will cause serious illness and needless suffering. A July 17, 2019, Risk Assessment for the Use of Chemical Restraint Agents and Electronic Immobilization Devices provides that there is "No Known Medical Risk Factor(s)" for either chemical restraint agents or electronic immobilization devices. (PCR 572).

Cole alleges that Parkinson's will make venous access more difficult or more painful. Cole provides no support for this assertion

and the few medical records shared by Cole-notably-reflect no difficulty in drawing blood for routine screenings. Thus, the medical records Cole cites provide no support for an 'as applied' claim.

Moreover, this claim fails as a matter of established law. The inmate is restrained by FDOC during lethal injection, and he will not be thrashing about as suggested by collateral counsel. (Motion at PCR 490-491. See March 10, 2023 Protocol, line (10)(f) at PCR 311). This Court has rejected challenges to the etomidate protocol based upon the possibility of an inmate's 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.").

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.

In *Schwab v. State*, 995 So. 2d 922 (Fla. 2008), this Court affirmed the denial of the defendant's lethal injection challenges and adopted the postconviction court's order that stated, "Being pricked numerous times in the course of having an IV inserted is not cruel and unusual punishment, however uncomfortable it may be." *Schwab*, 995 So. 2d at 926–27. Notably, the FDOC does provide an individualized assessment of the inmate prior to the execution. *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").

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).

Similarly, Cole's vague challenges to the lethal injection protocol and the training of medical personnel have long been rejected. *See Lightbourne v. McCollum*, 969 So. 2d 326 (Fla. 2007) and *Valle v. State*, 70 So. 3d 530, 545 (Fla. 2011). So, too, has the possibility of an accident or mistake during the lethal injection process.[6] 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

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[6] As the United States Supreme Court has recognized, the Eighth Amendment does not require "the avoidance of all risk of pain" in any method of execution. *Bucklew v. Precythe*, 587 U.S. 119, 134 (2019). 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*, 576 U.S. at 868-69).

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.

Significantly, this Court has repeatedly emphasized that the FDOC is entitled to the presumption that it will comply with the lethal injection protocol, "and the protocol includes safeguards to ensure the condemned is unconscious throughout the execution." *Long v. State*, 271 So. 3d 938, 945 (Fla. 2019); *see also Muhammad v. State*, 132 So. 3d 176, 203 (Fla. 2013). As such, Cole has not presented any argument to overcome the strong presumption that the FDOC will comply with the protocol that has already been approved. Nor does Cole's citation in his motion to reported problems in other states' so-called 'botched' executions under different protocols support his claim here.

Florida addressed contingencies relating to venous access following the execution of Angel Diaz on December 13, 2006. This execution prompted substantial changes to Florida's lethal injection protocol. *See generally Lightbourne v. McCollum*, 969 So. 2d 326 (Fla. 2007). In *Lightbourne*, this Court upheld the then-existing

lethal injection protocols against a number of challenges following a thirteen-day postconviction evidentiary hearing. As the court noted, following the Diaz execution, "the executive branch under the direction of the Governor and the DOC instituted an extensive and comprehensive review of the problem and proposed solutions," *id.* at 344, and ultimately revised the protocols to address concerns with the qualifications and training of the execution team members, assessing venous access and ensuring the inmate's unconsciousness, and challenges to the lethal injection drugs. Since the *Lightbourne* decision, Florida has executed some forty murderers by lethal injection without any similar complications. See Florida Dept. of Corrections' Execution List at http://www.dc.state.fl.us/oth/deathrow/execlist.html (last accessed August 4, 2024).

To be clear, Cole's claim "faces an exceedingly high bar" because the Supreme 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). And, this Court has "repeatedly affirmed"

summary denial to challenges to the etomidate protocol. *Long v. State*, 271 So. 3d 938, 945–46 (Fla. 2019) (citing *Jimenez v. State*, 265 So. 3d 462, 474 (Fla. 2018) and *Hannon v. State*, 228 So. 3d 505, 508-09 (Fla. 2017).

Cole seems to suggest that merely invoking the term "as applied" entitles him to an evidentiary hearing and a stay of execution. He cites prior 'as applied' challenges wherein Florida defendants were provided evidentiary hearings. (Appellant's Brief at 39). However, those cases all stand or fall on the factual allegations contained in the motions and their respective conditions--all of which are vastly different than what Cole has alleged here. Notably, Cole has **not** alleged that a medication he is taking would interfere with any of Florida's lethal injection drugs. Indeed, he acknowledges he is not taking medication for his alleged Parkinson's or Parkinson's-like symptoms. (IB at 47). His "as applied" allegations of potential problems with venous access are far too speculative and legally insufficient to require an evidentiary hearing.

Finally, it is well-established that no lethal chemicals are injected until the death-row inmate is unconscious, as confirmed by

the tiered consciousness check, which includes noxious stimuli.[7] The possibility of an inmate passing such a test and remaining conscious during injection of the second and third drugs is so very remote that it could not possibly meet the standard under *Baze*, *Glossip*, and *Bucklew*; *see also Schwab v. State*, 995 So. 2d 922, 930 (Fla. 2008) (detailing the steps of the consciousness check, which included a shake and shout and eyeball tap); *Valle v. Singer*, 655 F.3d 1223, 1233 (11th Cir. 2011) (noting that under Florida's protocol, a consciousness check is required and "the execution cannot proceed until the individual is rendered unconscious").

Cole cannot show that because of his alleged Parkinson's the use of etomidate as part of his lethal injection protocol would cause him needless suffering in violation of the Eighth Amendment. Cole's claim is founded upon speculation and cannot satisfy the "sure or very likely" standard that is required to show entitlement to relief.[8]

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[7] *See Howell v. State*, 133 So. 3d 511, 522 (Fla. 2014) (noting that Florida's consciousness checks which include a painful pinch of the trapezius "will ensure that Howell is unable to perceive any noxious stimuli").

[8] In *Barr v. Lee*, 591 U.S. 979, 980 (2020), the Court vacated an injunction for prisoners challenging a lethal injection protocol using

This claim was properly denied under well-established law and was far too speculative to warrant a hearing. *See Jimenez*, 265 So. 3d at 475 (affirming summary denial of a challenge to the etomidate protocol noting that the defendant's "speculative and conclusory allegations" did not warrant a hearing). This Court should affirm summary denial of this claim.

C. Cole's Proposed Alternatives

Assuming for a moment Cole has set forth a facially sufficient claim, Cole fails to satisfy the second requirement of *Glossip*, which

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pentobarbital, noting the very high bar for a prisoner to successfully challenge a method of execution. The court stated, in part:

> Vacatur of that injunction is appropriate because, among other reasons, the plaintiffs have not established that they are likely to succeed on the merits of their Eighth Amendment claim. That claim faces an exceedingly high bar. "This Court has yet to hold that a State's method of execution qualifies as cruel and unusual." *Bucklew v. Precythe*, 587 U. S. ——, ——, 139 S. Ct. 1112, 1124, 203 L.Ed.2d 521 (2019). For good reason—"[f]ar from seeking to superadd terror, pain, or disgrace to their executions, the States have often sought more nearly the opposite," developing new methods, such as lethal injection, thought to be less painful and more humane than traditional methods, like hanging, that have been uniformly regarded as constitutional for centuries.

requires he "identify an alternative that is feasible, readily implemented, and in fact significantly reduces a substantial risk of severe pain." *Glossip*, 576 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 the Supreme Court. And, with a conformity clause on the Eighth Amendment, that is clearly the law in Florida.[9]

Without any specificity, Cole alleges that his alternative methods are lethal gas and firing squad. His support for this portion of his claim is a general reference to other states' methods of execution – or proposed methods of execution. (Appellant's Brief at 55). This does not satisfy his burden of identifying a readily available alternative. Cole is required to show that the state could carry out his proposed alternative method "relatively easily and

[9]*See Lawrence v. State*, 308 So. 3d 544, 548 (Fla. 2020) ("The conformity clause of article I, section 17 of the Florida Constitution provides that "[t]he prohibition against cruel or unusual punishment, and the prohibition against cruel and unusual punishment, shall be construed in conformity with decisions of the United States Supreme Court which interpret the prohibition against cruel and unusual punishment provided in the Eighth Amendment to the United States Constitution.").

reasonably quickly." *Bucklew*, 587 U.S. at 141 (internal quotations omitted). There are no procedures in place in Florida to implement firing squad or lethal gas. Nor does Cole explain how these methods could be implemented in a reasonable period of time. The only alternative by statute is the electric chair – which Cole claims is not adequate or constitutional. *See* § 922.105, Fla. Stat. (2024). Cole's cryptic argument to the contrary, in the unlikely event a court finds lethal injection unconstitutional, the alternative is electrocution.[10]

Cole also has not provided any reasons to show how his proposed methods result in a "clear and considerable" difference in reducing pain compared to the use of etomidate within a three-drug protocol. *Bucklew*, 587 U.S. at 141. Cole has failed to meet his burden under *Glossip*, *Baze,* and *Bucklew*. For all these reasons, the lower court's resolution of Cole's as-applied Eighth Amendment challenge must be affirmed.

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[10] 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 the United States Supreme Court. *See Bucklew*, 587 U.S. at 141. And this 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).

ISSUE IV

PUBLIC RECORDS

Following the signing of his death warrant, defense counsel sought additional public records pursuant to Florida Rule of Criminal Procedure 3.852(h) from the Florida Department of Corrections (FDOC), Florida Department of Law Enforcement (FDLE), and the Eighth District Medical Examiner's Office (MEO8) (PCR 332-356, 357-382, 383-389). After conducting a hearing on Cole's public records requests (PCR 1211-1228), the postconviction court sustained the objections from the agencies and denied Cole's requests (PCR 439-441).[11] The State submits that the lower court acted in its sound discretion in denying Cole's requests because Cole was unable to show that his requests were relevant, not overly broad or that the information sought would likely to lead to discoverable evidence. *See Hannon v. State*, 228 So. 3d 505, 511 (Fla. 2017) (noting that this Court reviews rulings on public records for abuse of discretion).

[11] The trial court granted Cole's request to the FDOC for his medical and inmate records.

As this Court has long emphasized, public records requests made after a death warrant has been signed are supposed to be used to receive updates of previously discovered information and not to conduct eleventh-hour fishing expeditions. *Sims v. State*, 753 So. 2d 66 (Fla. 2000). Moreover, this Court has held that a defendant who believes he may have a basis to raise a claim in a successive motion need not await the signing of a death warrant to seek records. *Tompkins v. State*, 872 So. 2d 230, 243-44 (Fla. 2003) ("Thus, a defendant must show how the requested records relate to a colorable claim for postconviction relief *and good cause as to why the public records request was not made until after the death warrant was signed*.") (emphasis added). In fact, this Court has long recognized that claims that are based on the production of public records that could have been requested earlier are barred. *Zeigler v. State*, 632 So. 2d 48, 50 (Fla. 1993).

To the extent Cole urges a due process argument on the limitations placed on his access to records in this case, such an argument is without merit. This Court has expressly upheld the validity of this rule. *Wyatt v. State*, 71 So. 3d 86, 110-11 (Fla. 2011)

(rejecting constitutional challenge to rule 3.852). As noted in *Wyatt*, reasonable restrictions on the access to public records do not offend the constitution. *Id.* The rule was promulgated to provide a remedy to the inordinate delay occasioned by securing public records for purposes of capital postconviction litigation and is reasonably tailored to accomplish its purposes. Moreover, this Court has repeatedly held that where a defendant who delays in requesting public records until after the death warrant has been signed, must show good cause explaining why the request was not made earlier. *See, e.g.*, *Hannon v. State*, 228 So. 3d 505, 511 (Fla. 2017); *Asay v. State*, 224 So. 3d 695, 700 (Fla 2017). All of the records denied by the lower court could have been requested prior to the signing of the present warrant, and Cole has not made the slightest effort to explain why he waited until the last minute to seek records that obviously have been in existence for years. *See Hannon*, 228 So. 3d at 512 ("Hannon waited until a death warrant was signed and requested these voluminous records despite the truncated period for his postconviction motion. In the past, we have not condoned eleventh hour attempts to delay the execution with records

requests, and we will not begin now.") (quotations omitted).

Florida Rule of Criminal Procedure 3.852(i) makes it clear that it is the defendant's burden to establish his request is not unduly burdensome or overbroad, and that it would relate to either a pending claim or to a colorable postconviction claim before a court may order the records disclosed. The defendant's burden is not met by a theoretical exercise of positing unlikely scenarios where the records could possibly or conceivably be relevant to a postconviction claim. Since the records requests at issue here were so tenuous in their possible relation to any viable claim, the lower court did not abuse its discretion in denying those requests.

Cole filed expansive requests for "additional" public records in the court below, seeking, *inter alia*, records pertaining to prior executions in Florida, records relating to personnel, the procedures and drugs used in Florida's lethal injection protocol, and Cole's medical records while incarcerated. Pursuant to Rule 3.852(i), a defendant must establish that "the additional public records are either relevant to the subject matter of the postconviction proceeding or are reasonably calculated to lead to the discovery of

admissible evidence." As Cole failed to establish the existence of a colorable claim, the court below properly denied these records.

Cole alleges that the court erred in denying his requests. Of note, however, rule 3.852(h)(3) applies to a request for the production of public records from an "agency from which collateral counsel has previously requested public records." In this case, Cole never established that he had previously requested public records from the FDOC, FDLE or the ME08, thus, his request was not properly made pursuant to Rule 3.852(h). Additionally, rule 3.852(j) authorizes the trial court to deny the disclosure of *any* records, especially when counsel has failed to establish under rule 3.852(i)(1)(C) that the records are "either relevant to the subject matter of the postconviction proceeding or are reasonably calculated to lead to the discovery of admissible evidence."

In this case, Cole did not explain how his requests were relevant to a colorable claim for postconviction relief other than vaguely claiming the records would be relevant to a claim "that execution by Florida's lethal injection procedures constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth

Amendments to the U.S. Constitution and corresponding provisions of the Florida Constitution." However, as it relates to the records request for autopsy records from past executions, this Court has repeatedly affirmed denials of similar public records demands. *See e.g., Branch v. State*, 236 So. 3d 981, 985 (Fla. 2018) (explaining that autopsy records are not likely to lead to a colorable claim because they "would not establish when the inmates became unconscious or whether they experienced pain during their executions"); *Hannon v. State*, 228 So. 3d 505, 512 (Fla. 2017) (finding that the court properly denied Hannon's request for records of the last eight executions); *Correll v. State*, 184 So. 3d 478, 492 (Fla. 2015) (concluding that the public records request for the autopsy records of twenty-one inmates was unlikely to lead to a colorable claim); *Chavez v. State*, 132 So. 3d 826, 830 (Fla. 2014) (concluding that the public records request for the autopsy records of two executed inmates was properly denied because the autopsy records would not establish when the inmates became unconscious or whether they experienced pain during their executions); *Muhammad v. State*, 132 So. 3d 176, 203 (Fla. 2013) (affirming the

trial court's denial of public records request for the autopsy records of an executed inmate because the defendant did not explain "how autopsy photographs and reports concerning [the inmate] could disclose at what point [the inmate] was rendered unconscious or whether he experienced pain").

Likewise, the postconviction court acted within its sound discretion in denying Cole's request for records relating to Florida's lethal injection process made to FDOC and FDLE. Requests to these agencies sought records relating to personnel on the execution team as well as documentation regarding the drugs used in the protocol; and documentation as to the logs of the observers from FDLE and the FDOC in prior executions. The lower court denied all of Cole's requests, with the exception of Cole's relevant medical and inmate records from the FDOC which, it should be noted, were provided by FDOC without objection by the State.

The court acted within its sound discretion in denying the requested records as it is well settled that records regarding lethal injection are unlikely to lead to a colorable claim once "the challenge to the constitutionality of lethal injection as currently

administered in Florida has been fully considered and rejected by the Court." *Walton v. State*, 3 So. 3d 1000, 1013-14 (Fla. 2009). The constitutionality of the current lethal injection protocol was fully considered and rejected by this Court in *Asay v. State*, 224 So. 3d 695, 700-702 (Fla. 2017), and most recently, *Jimenez v. State*, 265 So. 3d 462 (Fla. 2018) (explaining that because the current lethal injection protocol was fully considered and approved in *Asay*, production of records relating to lethal injection are unlikely to lead to a colorable claim for relief). Since the lower court's ruling is in accord with this Court's precedent in *Asay*, *Hannon*, and *Jimenez*, it cannot be said the court abused its discretion in denying Cole's records requests in this case. The requested records in this case represent little more than a last-minute fishing expedition with little chance of yielding any useful information for a legitimate Eighth Amendment challenge. Accordingly, the lower court's ruling should be affirmed.

CONCLUSION

The State respectfully requests that this Honorable Court affirm the lower court's order denying Cole's fourth successive

motion for postconviction relief.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of August, 2024, I electronically filed the foregoing with the Clerk of the Court by using the e-filing portal system which will send a notice of electronic filing to the following: Ali A. Shakoor and Adrienne Joy Shepherd, Assistants CCRC-Middle, Capital Collateral Regional Counsel-Middle, 12973 North Telecom Parkway, Temple Terrace, Florida 33677, **shakoor@ccmr.state.fl.us, shepherd@ccmr.state.fl.us, support@ccmr.state.fl.us**; and to the Florida Supreme Court, **warrant@flcourts.org.**

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 14-point Bookman Old Style in compliance with Fla. R. App. P. 9.045. Pursuant to Fla. R. App. P. 9.210(a)(2)(D), this brief is not subject to word count, but instead complies with the page limit as it does not exceed 75 pages.

/s/ Timothy A. Freeland
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