Filing # 204976070 E-Filed 08/19/2024 09:17:04 AM

No. SC2024-1170

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

IN THE

Supreme Court of Florida

LORAN COLE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

REPLY BRIEF OF THE APPELLANT

Ali A. Shakoor
Florida Bar Number 0669830
Email: shakoor@ccmr.state.fl.us

Adrienne Joy Shepherd
Florida Bar Number 1000532
Email: shepherd@ccmr.state.fl.us

Law Office of The Capital Collateral
Regional Counsel - Middle Region
12973 North Telecom Parkway
Temple Terrace, Florida 33637
Telephone: (813) 558-1600
Fax: (813) 558-1601
Secondary Email: support@ccmr.state.fl.us

Counsel for Appellant

TABLE OF CONTENTS

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

PRELIMINARY STATEMENT 1

ARGUMENT IN REPLY 1

REPLY TO STATEMENT REGARDING ORAL ARGUMENT 2

REPLY TO STAY STANDARD 3

REPLY TO ARGUMENT I 4

REPLY TO ARGUMENT II 11

REPLY TO ARGUMENT III 13

CONCLUSION 23

CERTIFICATE OF COMPLIANCE 25

CERTIFICATE OF SERVICE 26

TABLE OF AUTHORITIES

Cases **Page(s)**

Asay v. State,
224 So. 3d 695 (Fla. 2017) 3

Atkins v. Virginia,
536 U.S. 304 (2002) 11

Barber v. Governor of Alabama,
73 F.4th 1306 (11th Cir. 2023)..19

Barwick v. State,
361 So. 3d 785 (Fla. 2023) 9, 10

Baze v. Rees,
553 U.S. 35 (2008) 17, 21, 22, 23

Buenoano v. State
708 So. 2d 941 (Fla. 1998)..4

Chavez v. State,
132 So. 3d 826 (Fla. 2014) 4

Cole v. Florida,
523 U.S. 1051 (1998)..8

Cole v. State,
83 So. 3d 706 (Fla. 2012) 9

Cole v. State,
131 So. 3d 787 (Fla. 2013) 9

Correll v. State,
184 So. 3d 478 (Fla. 2015) 14

Davis v. State,
142 So. 3d 867 (Fla. 2014) 14

Cases **Page(s)**

Dillbeck v. State,
304 So. 3d 286 (Fla. 2020)....................15-16

Dillbeck v. State,
357 So. 3d 94 (Fla. 2023)....................9-10, 16

Ford v. Wainwright
477 U.S. 399 (1986)....................1-2

Glossip v. Gross,
576 U.S. 863 (2015)....................17, 21, 22, 23

Henry v. State,
134 So. 3d 938 (Fla. 2014)....................14

Howell v. State,
133 So. 3d 511 (Fla. 2014)....................14

King v. Moore
824 So. 2d 127, 128 (Fla. 2002)....................4

Long v. State,
271 So. 3d 938 (Fla. 2019)....................2-3, 4, 14

Nance v. Comm'r, Georgia Dep't of Corr.,
59 F.4th 1149 (11th Cir. 2023)....................19

Schwab v. State,
995 So. 2d 922 (Fla. 2008)....................19

Swafford v. State,
125 So. 3d 760 (Fla. 2013)....................4

Ventura v. State,
2 So. 3d 194 (Fla. 2009)....................18

Cases **Page(s)**

Walton v. State,
246 So. 3d 246 (Fla. 2018) 4

Weems v. United States,
217 U.S. 349 (1910) 11

Woodson v. North Carolina,
428 U.S. 280 (1976) 2

Zack v. State,
371 So. 3d 335 (Fla. 2023) ....*passim*

Constitutional Provisions **Page(s)**

U.S. Const. amend. VIII.. 11, 18, 20, 23

U.S. Const. amend. XIV... 11, 15, 21, 22

Statutory Provisions **Page(s)**

42 U.S.C. § 1983..6

Rehabilitation Act of 1973 (29 U.S.C. § 794)...................................6

Procedures **Page(s)**

Florida Department of Corrections Execution by Lethal Injection Procedures...13, 20

Other Authorities **Page(s)**

Kim Chandler, *Alabama executes a man with nitrogen gas, the first time the new method has been used*, A. P. News (Jan. 26, 2024), https://apnews.com/article/nitrogen-execution-death-penalty-alabama-699896815486f019f804a8afb7032900.........................22

Other Authorities **Page(s)**

Montgomery, Ben *A Roster of the Lost*, The St. Petersburg Times (December 9, 2009)..7

Youth Law Center - https://www.ylc.org/resource/bobby-m-v-martinez-consent-decreee/..6-7

PRELIMINARY STATEMENT

Appellant, Loran Cole, offers the following reply to the Answer Brief of Appellee ("Answer"). Cole will not reply to every issue and argument raised by the State and will only address the most salient points. Cole expressly does not abandon any issue not specifically replied to herein and relies upon his Initial Brief of the Appellant ("Initial Brief") in reply to any argument or authority not specifically addressed.

References to the current, post-warrant record on appeal are in the form SC/ [page number].

Page references to the Initial Brief are designated with IB at [page number]. Page references to the Answer Brief are designated with AB at [page number].

All other references will be self-explanatory or otherwise explained.

ARGUMENT IN REPLY

This Court must review these claims under the proper lens. Cole is not only sentenced to death. His death warrant has been signed and an execution date has been set. "[E]xecution is the most irremediable and unfathomable of penalties. . . death is different."

Ford v. Wainwright, 477 U.S. 399, 411 (1986) (citing *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)). The instant case is literally a matter of life or death, because once the State has executed Cole, he will not have any recourse. Accordingly, this Court must exercise its duty to carefully review cases and prevent manifest injustice. When post-warrant litigation calls upon this Court to correct past wrongs in circumstances where a death sentence was upheld based on the denial of constitutional rights, this Court can and should intervene.

REPLY TO STATEMENT REGARDING ORAL ARUGMENT

On page ix of the Answer, the State opines that oral "argument will not materially aid the decisional process." Cole firmly disagrees and respectfully requests oral argument for these complex issues. Argument I of the initial brief raises an issue of first impression for this Court, as it pertains to a newly signed Florida law providing an avenue for relief based on the newly discovered evidence standard. Argument III involves an as-applied challenge to Florida's lethal injection protocols, an issue this Court has not considered since *Long v. State*, 271 So. 3d 938 (Fla. 2019). *Long* was also a case that followed an evidentiary hearing in the state circuit court. *Id.* at 943-

44. As will be further explored in the Reply to Argument III, Cole's right to an evidentiary hearing is an issue the State could not effectively rebut in its Answer.

Moreover, this Court has not hesitated to allow argument in other capital cases in a similar procedural posture. *See Asay v. State*, 224 So. 3d 695, 699 (Fla. 2017) (where this Court stayed Asay's execution after holding an oral argument). *Asay* is a case where the defendant made a general facial challenge to Florida's lethal injection protocol. Not only did this Court grant oral argument, but it should also be noted that this Court also had the benefit of reviewing an evidentiary hearing record from Asay's state circuit court. *Id.* at 700-02. An oral argument is necessary for a thorough consideration of these issues.

REPLY TO STAY STANDARD

As the previous section makes clear, oral argument is necessary in this case for a full and fair consideration of Cole's case. Thus, a stay in these proceedings is required. As articulated in the previous section as to *Asay* and *Long* and will be further developed in the Reply to Argument III below, Cole has a right to an evidentiary hearing on due process and equal protection grounds. A stay of execution is

appropriate "when there are 'substantial grounds upon which relief might be granted.'" *Chavez v. State*, 132 So. 3d 826, 832 (Fla. 2014) (quoting *Buenoano v. State*, 708 So. 2d 941, 951 (Fla. 1998)). This Court may enter a limited stay to meaningfully consider complex legal claims even if, on first appearance, the possibility of relief appears remote. *See King v. Moore*, 824 So. 2d 127, 128 (Fla. 2002) (Harding, J., concurring) (agreeing with the issuance of a stay due to the "possibility" of merit, despite prior actions by the United States Supreme Court "seemingly send[ing] a clear message" that no relief was due). This Reply Brief is due a mere **ten days** prior to Cole's scheduled execution, which is clearly an insufficient time period to resolve these complex issues.

REPLY TO ARGUMENT I

CS/HB 21 – Dozier School for Boys and Okeechobee School Victim Compensation Program is indeed newly discovered evidence which would probably yield a less severe sentence in a new penalty phase proceeding. *Long v. State*, 271 So. 3d 938, 942 (Fla. 2019); *Walton v. State*, 246 So. 3d 246, 249 (Fla. 2018) (quoting *Swafford v. State*, 125 So. 3d 760, 767 (Fla. 2013). If Cole's jury in a new penalty

phase proceeding is made aware of the fact that Florida itself helped cause the debilitating mitigating factors that explain Cole's crimes, that jury would probably recommend a life sentence.

The admission of the abuse via the Dozier compensation bill places the evaluation of the mitigation in a completely different light – removing any doubt as to its occurrence -and fundamentally alters the jury's weighing of the mitigating factors. There is a reasonable probability that the jury would recommend a life sentence if presented with the full brunt of the now acknowledged severe abuse suffered by Cole at Dozier. A new penalty phase would indeed yield a sentence "less severe" than death. *Id.*

The State initially attempts to challenge Cole's position by opining: "Notably, Cole was not even at Dozier during the time frame the Bill covers." AB at 12. Indeed, CS/HB 21 explicitly aims to compensate "living persons" who were confined at Dozier or the Okeechobee School between 1940 and 1975 and "who were subjected to mental, physical, or sexual abuse perpetrated by school personnel." The new law does not even pretend to insist those were the *only* years in which vulnerable boys we subjected to the horrors of Dozier. What that timeframe and language does accomplish, is to

restrict the $20 million in allotted compensation to a finite amount of "living persons." That is arguably a financial consideration by the state of Florida, not an insistence that boys at the infamous institution only experienced mental, physical, and sexual abuse from 1940 to 1975.

As Cole argued in his Initial Brief, the abuse occurred throughout Dozier's existence and most specifically during the period Cole was at Dozier. On January 2, 1983, juveniles filed a class action lawsuit in U.S. District Court Northern District of Florida pursuant to 42 U.S.C. § 1983 and the Rehabilitation Act of 1973 (29 U.S.C. § 794), challenging their conditions of confinement at juvenile facilities in Florida. Dozier was one of those institutions being challenged. The suit was finally settled with a consent decree in 1987 which is summarized by the Youth Law Center as follows:

> Bobby M. v. Martinez, a federal class action, was brought on behalf of the 1,000 children confined at the Florida state training schools at Marianna, Ocala, and Okeechobee. The action challenged policies, practices, and conditions in the institutions—including 'hogtying' children with handcuffs and ankle cuffs, serious overcrowding, unsanitary living conditions, inadequate supervision and training of staff, medical care, and education—as well as the incarceration of children for long periods of time for minor offenses. In July, 1986, state

> officials agreed to a landmark settlement that included closing one of the training schools, reducing the population in the other two to a maximum of 100 children each (compared to a total population of 1,000 prior to this lawsuit), ending barbaric disciplinary practices, and bringing the training schools up to nationally recognized standards for care of children and training of staff.

See Youth Law Center, https://www.ylc.org/resource/bobby-m-v-martinez-consent-decreee/.

Also, as discussed on page 19 of the Initial Brief, a journalist who researched the "class of 1988" at Dozier noted that the abuse at Dozier continued into that "modern" era, as he interviewed one survivor: "Kids were raped, beaten and abused all the time," wrote William Mantle, 37, who is held in Tomoka Correctional Institution for stealing a car. "I've been to prison 3 times and ... there isn't a prison I've been to that compares to Dozier." Montgomery, Ben *A Roster of the Lost*, The St. Petersburg Times (December 9, 2009).

Cole was at Dozier from June 1, 1984 until November 14, 1984; the physical and psychological abuse, which included rape and forced bestiality, was described on page 21 of the Initial Brief. Clearly, the abuse continued after 1975 and included Cole's period of confinement. But Cole is not seeking any of the $20 million in reparations for survivors, so the 1940-1975 period is irrelevant in

that context. The significance of the Dozier compensation bill is Florida's public acknowledgment of the abuse, and the long-term damage inflicted upon survivors of Dozier.

This claim of newly discovered evidence is timely. The governor signed CS/HB 21 into law on June 21, 2024. The effective date was July 1, 2024. Cole filed his successive motion on August 3, 2024. The timeliness is displayed by filing the claim within one month of the enactment of the newly discovered evidence. It is metaphysically impossible for Cole to have raised this claim within one year of the United States Supreme Court's ("USSC") decision denying his petition for certiorari on March 30, 1998, *Cole v. State*, 523 U.S. 1051 (1998), because it took another 26 years for Florida to admit wrongdoing and provide reparations to survivors of Dozier.

The crux of the newly discovered evidence issue is the acknowledgement and payment by Florida to survivors who were victimized by Florida. It is not relevant that Cole merely attended Dozier and received his GED at the institution. *See* AB at 25 (referencing a section in Cole's pre-sentence investigation labeled "Educational History"). Cole's jury had no knowledge that Florida is admitting that survivors are entitled to be compensated for the severe

mitigation caused by Florida's staff.

The State's focus on Cole's prior successive pleadings regarding Dozier misses the point. AB at 14-16, 21, 24-25. Those past successive motions were not based on the novel issue of Florida itself now acknowledging its complicity in the trauma caused to Dozier survivors. Rather, those pleadings focused on the abuse that Cole experienced, which he had long repressed. *Cole v. State*, 83 So. 3d 706 (Fla. 2012) and *Cole v. State*, 131 So. 3d 787 (Fla. 2013). The Dozier compensation bill is the newly discovered evidence, not the fact that Cole suffered "mistreatment while attending Dozier." AB at 16. On pages 22-25 of the Initial Brief, Cole discusses how the trauma inflicted by Florida staff at Dozier caused him post-traumatic stress disorder (PTSD) and potential brain damage because it is relevant to explain Cole's crimes.

This is likely an issue of first impression for this Court. The State's reliance on *Barwick v. State*, 361 So. 3d 785 (Fla. 2023), *Zack v. State,* 371 So. 3d 335 (Fla. 2023), and *Dillbeck v. State*, 357 So. 3d 94 (Fla. 2023) is misplaced. Dillbeck was attempting to raise a newly discovered evidence claim based on being constitutionally exempt from execution, because of a scientific and medical consensus that

his prenatal exposure to alcohol created a mental condition equivalent to "intellectual disability." *Dillbeck*, 357 So. 3d at 98-100. Zack had a similar claim. *Zack*, 371 So. 3d at 345-49. Cole is requesting a new penalty phase proceeding based on newly discovered evidence; he is not claiming he is exempt from execution based on any alleged intellectual disability.

Moreover, the individuals responsible for the "scientific and medical consensus" in *Dillbeck* and *Zack*, were not responsible for causing the defendants' mitigation. Similarly, the American Psychological Association, of which the defendant in *Barwick* was relying for a claim of newly discovered evidence to extend *Roper v. Simmons*, 543 U.S. 551 (2005) to capital defendants under the age of twenty-one, was not responsible for Barwick's trauma nor his death sentence. *Barwick*, 361 So. 3d at 791-94.

The Dozier compensation bill acknowledges that standards of decency have evolved regarding the lifelong trauma caused to a child who survives sexual and physical abuse committed by state officials. Cole suffered severe abuse from Florida's staff at Dozier. Florida is responsible for the trauma and mitigation Cole suffered at Dozier. The Dozier compensation bill is newly discovered evidence that

standards of decency have evolved. Because the standards of decency have evolved, the execution of Loran Cole renders his death sentence a violation of the Eighth Amendment's prohibition against cruel and unusual punishment. Relief is proper.

REPLY TO ARGUMENT II

This may be an issue of first impression for this Court, and Cole requests an evidentiary hearing to make a factual record for his Eighth Amendment claim. As the USSC explained in *Atkins v. Virginia*, 536 U.S. 304 (2002), the Eighth Amendment guarantees individuals the right not to be subjected to excessive sanctions. The right flows from the basic "'precept of justice that punishment for crime should be graduated and proportioned to [the] offense.'" *Atkins*, 536 U.S., at 311 (quoting *Weems v. United States*, 217 U.S. 349, 367 (1910).

The needless and cruel subjugation to prolonged disciplinary restrictions, including the medical neglect and drug use, superadds to the length of time Cole has spent on death row. The treatment constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. The further addition of an execution

at the end of this lengthy period of neglect and maltreatment, compounds the cruelty and wanton infliction of unnecessary pain to Cole's punishment. Cole's grievances attached as Appendix A to his Initial Brief establishes the fact that Cole's claim is timely and based on neglect that occurred within the past year.

Regarding the circumstances of Cole's use of illicit drugs while on death row, the State opines that "…Cole could have easily avoided had he decided to just say no." AB at 32. The State's use of a catchphrase slogan from the Ronald Reagan presidential administration nearly forty years ago, is a distraction from the care and responsibility the Florida Department of Corrections ("FDOC") owes to mentally ill and self-medicating defendants like Cole. FDOC staff at Florida's death row have failed to keep Cole safe from dangerous drugs and some have also supplied Cole with the illegal substances. Similar to Florida's responsibility for Dozier, Florida is again complicit with Cole's self-destructive and law-breaking behavior because FDOC has failed to meet their responsibility to provide Cole with basic protection and care. Relief is proper.

REPLY TO ARGUMENT III

The State argues that Cole was dilatory in waiting until now to raise his as-applied challenge to Florida's lethal injection procedures because Cole has been aware of his Parkison's disease since 2017, and the state circuit court therefore correctly denied the claim as untimely. AB at 33-38. Cole's as-applied challenge is not untimely. The claim would not have been one-hundred percent ripe for consideration until Cole's 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 promulgates procedures every two years. IB at 49. FDOC has promulgated execution procedures for lethal injection **four times** since Cole's medical records began to reference Parkinson's disease in 2017.[1] Cole's as-applied challenge very-likely would have been considered premature if he had raised it back in 2017.

---

[1] FDOC promulgated execution procedures for lethal injection in 2017, 2019, 2021, and 2023. Each year's procedures supersede the previous procedures. *See* SC/1056 – FDOC Execution by Lethal Injection Procedures ("This procedure supersedes the Florida Department of Corrections *Execution by Lethal Injection Procedures* dated May 6, 2021.").

Further, capital defendants regularly raise as-applied challenges to Florida's execution procedures while under an active death warrant and receive evidentiary hearings on those claims. At least five defendants under an active Florida death warrant have raised and litigated an as-applied challenge to lethal injection in recent years. Those defendants' claims were not considered untimely. IB at 38-41. *See Long v. State*, 271 So. 3d 938 (Fla. 2019); *Howell v. State*, 133 So. 3d 511 (Fla. 2014); *Henry v. State*, 134 So. 3d 938 (Fla. 2014); *Davis v. State*, 142 So. 3d 867 (Fla. 2014); *Correll v. State*, 184 So. 3d 478 (Fla. 2015). This Court has clearly recognized that as-applied challenges to Florida's execution procedures are unique claims that may require litigation during an active death warrant, because this Court has relinquished jurisdiction to the lower court to hold an evidentiary hearing on as-applied challenges during **four** active death warrants.[2] Cole is a similarly-situated capital defendant who should be treated no different than capital defendants Long, Howell, Henry, Davis, or Correll. Denying Cole an evidentiary hearing on his as-applied challenge to lethal injection during his active

[2] *See Howell*, 133 So. 3d at 515; *Henry*, 134 So. 3d at 943; *Davis,* 142 So. 3d at 870; *Correll*, 184 So. 3d at 483.

warrant litigation violates Cole's Fourteenth Amendment rights to Due Process and Equal Protection.

The State cites this Court's recent opinions in *Dillbeck v. State*, 304 So. 3d 286 (Fla. 2020) and *Zack v. State*, 371 So. 3d 335 (Fa. 2023) to support their argument that Cole's as-applied challenge was properly denied as untimely because the defendants' claims in those two cases were found to be untimely. AB at 34-35. These two opinions were decided on this Court's precedent concerning the timeliness of intellectual disability claims, and they cannot be construed to deny Cole the ability to litigate an as-applied challenge to the manner in which Florida intends to execute him.

The *Dillbeck* opinion the State cites to was rendered years before Dillbeck's active death warrant and eventual execution. Dillbeck raised a newly discovered evidence claim alleging that new evidence of brain damage and an associated diagnosis of Neurodevelopmental Disorder associated with Prenatal Alcohol Exposure ("ND-PAE") explained his criminal conduct and would produce a life sentence at retrial. *Dillbeck*, 304 So. 3d at 287. This Court affirmed the lower court's dismissal of the claim as untimely because "Dillbeck and his counsel knew that Dillbeck had brain damage related to fetal alcohol

exposure even before he was sentenced in 1991." *Id.* at 288. This Court did eventually find the claim to be untimely under an active death warrant when Dillbeck again attempted to litigate his diagnosis of ND-PAE in 2023. However, Dillbeck did not raise that claim in the context of an as-applied challenge to Florida's execution procedures. *See Dillbeck v. State*, 357 So. 3d 94 (Fla. 2023). Dillbeck argued that his diagnosis of ND-PAE was equivalent to an intellectual disability, which would have exempted him from execution. *Id.* at 98. This Court found the claim to be untimely because an intellectual disability claim that is based on newly discovered evidence must be filed within one year of the date upon which the claim became discoverable through due diligence. *Id.* at 99 (internal citation omitted). Dillbeck's claim had nothing to do with an as-applied challenge to lethal injection.

The State also cites to this Court's finding in *Zack v. State* that Zack's claim during an active death warrant that his Fetal Alcohol Syndrome was the equivalent of an intellectual disability barring his execution was untimely. AB at 35; 371 So. 3d 335 (Fla. 2023). However, Zack's claim was also found to be untimely under this Court's precedent that intellectual disability claims based on newly

discovered evidence must be filed within one year of the date upon which the evidence supporting the claim was discovered. *Id.* at 345. Zack's claim related to his Fetal Alcohol Syndrome had nothing to do with an as-applied challenge to lethal injection. The State asserts that Cole's situation is no different from Dillbeck or Zack's. AB at 35. However, Cole asserts an as-applied challenge to lethal injection during his active death warrant, whereas Dillbeck and Zack were raising claims of intellectual disability barring their execution.

The State also argues that Cole's as-applied challenge is not entitled to relief because the claim is meritless. AB at 38. The State asserts that Cole has failed to meet the required elements of *Glossip v. Gross*, 576 U.S. 863, 877 (2015) and *Baze v. Rees*, 553 U.S. 35 (2008). AB at 39. Undersigned counsel submits as an initial matter that it would be difficult for any defendant to completely establish the elements of the *Baze-Glossip* test without a full and fair evidentiary hearing. Regardless, Cole has met the requirements of the *Baze-Glossip* test when considering the evidence currently before this Court.[3] As fully detailed in the Initial Brief, particularly the opinions

---

[3] If this Court chooses not to relinquish jurisdiction for an evidentiary

of anesthesiologist Dr. Joel Zivot, there is an imminent risk that Cole will experience needless suffering during an execution by lethal injection due to the unique symptoms of his Parkinson's disease. IB at 42-57.

The State argues that Cole's medical records provide no support for his as-applied challenge because they do not show difficulty in drawing blood during routine screenings. AB at 41. An execution is not a "routine screening" in a medical setting. There is no way to one-to-one compare attempting intravenous access during a medical setting like a blood draw to attempting intravenous access during an execution. *See* IB at 53-54. Regardless, Dr. Zivot has opined at length to the issues that very well could occur if intravenous access is attempted during Cole's scheduled execution. IB at 45-49.

The State argues that Cole's claim fails on the merits because courts have rejected similar Eighth Amendment claims raising issues with intravenous access. AB at 41-42. The State points to this Court's

---

hearing, then this Court must accept the factual allegations presented in Cole's motion and in this appeal as true to the extent that they are not conclusively refuted by the record. *Ventura v. State*, 2 So. 3d 194, 197-98 (Fla. 2009).

finding in *Schwab v. State*, 995 So. 2d 922 (Fla. 2008) that "being pricked numerous times in the course of having an IV inserted is not cruel and unusual punishment, however uncomfortable it may be."[4] AB at 42, citing *Schwab*, 995 So. 2d at 926–27). Undersigned counsel acknowledges this precedent, but still submits that the pain and needless suffering Cole faces is far greater than the pain that could be caused by multiple attempts to access his peripheral veins in his arms or legs.

Cole also faces a severe risk of injury and needless suffering if FDOC staff attempts to place a central line with a venous cut-down because of his Parkinson's symptoms. As Dr. Zivot has opined- the skill needed to place a central line 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

---

[4] The State also cites to the Eleventh Circuit Court of Appeal opinions in *Barber v. Governor of Alabama*, 73 F.4th 1306, 1319 (11th Cir. 2023) and *Nance v. Comm'r, Georgia Dep't of Corr.,* 59 F.4th 1149, 1157 (11th Cir. 2023), where the Eleventh Circuit found that protracted efforts to obtain intravenous access by repeatedly being pricked with a needle would not give rise to an unconstitutional level of pain.

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. IB at 47-48. Cole not only faces numerous needle “pricks” as FDOC staff attempt to gain venous access. Cole faces the very likely possibility that FDOC staff will need to perform the quasi-surgical procedure of a venous cut-down while Cole is fully conscious and with no localized anesthesia for the procedure. This absolutely violates the Eighth Amendment’s prohibition against cruel and unusual punishment.

The State further argues that Cole has failed to meet the second requirement of the *Baze-Glossip* test, which requires that he identify an alternative method of execution that is "feasible, readily implemented, and in fact significantly reduces a substantial risk of severe pain." AB at 48-49 (citing *Glossip*, 576 U.S. at 877). As an initial matter, undersigned counsel asserts that the alternative method requirement of the *Baze-Glossip* test is unconstitutional under the Fourteenth Amendment rights to Due Process and Equal Protection. IB at 57-61. Undersigned counsel acknowledges, as the State points out, that the alternative method requirement is the current federal and Florida standard. AB at 49. It should not be.

The State's own argument as to why Cole has failed to meet the impossible-to-meet alternative method requirement highlights both the equal protection and due process issues the requirement raises. As an example, the State points to the fact that there are no procedures in place in Florida to implement lethal gas, and Cole has failed to explain how that alternative can be implemented in a reasonable amount of time. AB at 50. However, there are procedures in place to implement lethal gas in Alabama, and the state carried out the execution of Eugene Smith via nitrogen gas in January of

2024.[5] The fact that an Alabama capital defendant need not meet the same pleading requirement under *Baze-Glossip* that Cole must meet because Alabama has readily-implemented procedures for utilizing lethal gas while Florida does not clearly violates the Fourteenth Amendment right to equal protection.

The State further asserts that Cole has not provided any reasons to show his proposed alternative methods will result in a "clear and considerable" difference in reducing pain. AB at 50. This argument further highlights how the alternative method requirement violates the Fourteenth Amendment right to due process. There is no guaranteed way to prove that any alternative method available in the United States will cause significantly less pain because there is no way to legally, humanely, or ethically test an alternative method of execution to determine if it will cause less pain compared to another. IB at 57-58. The USSC has, quite simply, promulgated a standard which cannot actually be met, which probably explains why that

---

[5] *See* Kim Chandler, *Alabama executes a man with nitrogen gas, the first time the new method has been used*, A. P. News (Jan. 26, 2024), https://apnews.com/article/nitrogen-execution-death-penalty-alabama-699896815486f019f804a8afb7032900.

court has never granted relief on an Eighth Amendment as-applied challenge.

Cole's execution by Florida's lethal injection procedures must be found to be unconstitutional full-stop because the procedures place him at imminent risk of needless suffering due to the unique symptoms of his Parkinson's disease. Cole should not be required to meet the unconstitutional alternative method requirement of the *Baze-Glossip* test. Relief is proper.

CONCLUSION

Based on the foregoing arguments, Cole respectfully requests that this Court remand his case for an evidentiary hearing; vacate his sentence of death; grant a stay of execution; and/or grant any other relief it deems appropriate.

Respectfully submitted,

/s/ Ali Shakoor
Ali Shakoor
Assistant CCRC
Florida Bar Number 0669830
Email: shakoor@ccmr.state.fl.us

/s/ Adrienne Joy Shepherd
Adrienne Joy Shepherd
Assistant CCRC
Florida Bar Number 1000532
Email: shepherd@ccmr.state.fl.us

The Law Office of the Capital Collateral
Regional Counsel - Middle Region
12973 North Telecom Parkway
Temple Terrace, Florida 33637
Tel: (813) 558-1600
Fax: (813) 558-1601
Secondary Email: support@ccmr.state.fl.us

Counsel for Loran Cole

CERTIFICATE OF COMPLIANCE

Pursuant to Fla. R. App. P. 9.045, we hereby certify that the Initial Brief of the Appellant has been produced in Bookman Old Style 14-point font. Pursuant to Fla. R. App. P. 9.210(a)(2)(D), this brief is not subject to word count, and instead complies with the page limit as it does not exceed 25 pages.

/s/ Ali A. Shakoor
Ali A. Shakoor
Florida Bar No. 0669830
Assistant CCRC
Email: shakoor@ccmr.state.fl.us

/s/ Adrienne Joy Shepherd
Adrienne Joy Shepherd
Florida Bar No. 1000532
Assistant CCRC
Email: shepherd@ccmr.state.fl.us

The Law Office of the Capital Collateral Regional Counsel- Middle Region
12973 Telecom Parkway North
Temple Terrace, Florida 33637
Tel: 813-558-1600
Fax: 813-558-1601
Second email: support@ccmr.state.fl.us

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a copy of the PDF document of the foregoing has been transmitted to this Court using the Florida Courts E-Filing Portal which will send a notice of electronic filing to the following: The Honorable Robert W. Hodges, Circuit Court Judge, Marion County Judicial Center, 110 N. W. 1st Avenue, Ocala, Fl 34475, cmatthews@circuit5.org, Timothy Freeland and Rick Buchwalter, Assistant Attorney Generals, Office of the Attorney General, 3507 East Frontage Road, Suite 200, Tampa, Florida 33607, timothy.freeland@myfloridalegal.com, rick.buchwalter@myfloridalegal.com, stephanie.tesoro@myfloridalegal.com, paula.montlary@myfloridalegal.com, heather.davidson@myfloridalegal.com, capapp@myfloridalegal.com, Richard Buxman and Kenneth S. Nunnelley, Assistant State Attorneys, Marion County State Attorney's Office, 110 NW 1st Avenue, Suite 5000, Ocala, Florida 34475, rbuxham@sao5.org, knunnelley@sao5.org, chenry@sao5.org, thunt@sao5.org, eservicemarion@sao5.org, and to the Florida Supreme Court, warrant@flcourts.org; on this 19th day of August 2024.

WE HEREBY FURTHER CERTIFY that a copy of the foregoing has been mailed via United States Postal Service to Loran Cole, DOC# 335421, Florida State Prison, P.O. Box 800, Raiford, Florida 32083, on this 19th day of August 2024.

/s/ Ali A. Shakoor
Ali A. Shakoor
Florida Bar No. 0669830
Assistant CCRC
Email: shakoor@ccmr.state.fl.us

/s/ Adrienne Joy Shepherd
Adrienne Joy Shepherd
Florida Bar No. 1000532
Assistant CCRC
Email: shepherd@ccmr.state.fl.us

The Law Office of the Capital Collateral Regional Counsel- Middle Region
12973 Telecom Parkway North
Temple Terrace, Florida 33637
Tel: 813-558-1600
Fax: 813-558-1601
Second email: support@ccmr.state.fl.us