No. SC2026-0574

In the Supreme Court of Florida

JAMES ERNEST HITCHCOCK ,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

ANSWER BRIEF ON THE MERITS

On Appeal from the Circuit Court of the Ninth Judicial Circuit in and for Orange County, Florida
L.T. No. 1976-CF-1942

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ORAL ARGUMENT OBJECTION

The State opposes Hitchcock's request for oral argument. The issues on appeal are straightforward, and it is against this Court's policy to grant oral argument in successive capital appeal cases. *See* Fla. S. Ct. Internal Op. Proc. II.A.3(a) (Successive capital postconviction appeals are treated "in the same manner as" cases "in which review is granted without oral argument.").

CASE AND FACTS AND PROCEDURAL HISTORY

The facts of this case are recited in this Court's opinion on the direct appeal of Hitchcock's conviction and sentence, *Hitchcock v. State*, 413 So. 2d 731 (Fla. 1982):

> Unemployed, ill, and with no place to live, Hitchcock moved in with his brother Richard and Richard's family two to three weeks before the murder. On the evening of the murder, appellant watched television with Richard and his family until around 11:00 p.m. He then left the house and went into Winter Garden where he spent several hours drinking beer and smoking marijuana with friends.
>
> According to a statement Hitchcock made after his arrest, he returned around 2:30 a.m. and entered the house through a dining room window. He went into the victim's bedroom and had sexual intercourse with her. Afterwards, she said that she was hurt and was going to tell her mother. When she started to yell because he would not let her leave the bedroom, Hitchcock choked her and carried her outside. The girl still refused to be quiet so

> appellant choked and beat her until she was quiet and pushed her body into some bushes. He then returned to the house, showered, and went to bed.
>
> At trial Hitchcock repudiated his prior statement. He testified that the victim let him into the house and consented to having intercourse. Following this activity, his brother Richard entered the bedroom, dragged the girl outside, and began choking her. She was dead by the time appellant got Richard away from her. When Richard told him that he hadn't meant to kill her, Hitchcock told him to go back inside and that he, the appellant, would cover up for his brother. According to Hitchcock, he gave his prior statement only because he was trying to protect Richard.

On direct appeal, Hitchcock raised the following claims:

> (1) whether the trial judge improperly precluded the defense from presenting evidence corroborating the defense theory, his cross examination of witnesses, and his explanation of his "false" confession;
>
> (2) the trial judge's communication with the jury during deliberations;
>
> (3) the exemption of mothers with young children from the jury panel, and
>
> (4) the sufficiency of the evidence.

The Florida Supreme Court affirmed Hitchcock's conviction as well as his death sentence. *See id.*

The Court also affirmed the denial of an early motion for postconviction relief. *See Hitchcock v. State*, 432 So. 2d 42 (Fla.

1983)[1]. In later federal habeas corpus proceedings, however, the United States Supreme Court granted certiorari and vacated Hitchcock's death sentence because the jury was instructed not to, and the sentencing judge refused to, consider evidence of nonstatutory mitigating circumstances. *See Hitchcock v. Dugger*, 481 U.S. 393 (1987). Upon remand, Hitchcock was again sentenced to death, which was affirmed on appeal. *See Hitchcock v. State*, 578 So. 2d 685 (Fla. 1990). But the United States Supreme Court again granted certiorari and remanded for reconsideration in light of *Espinosa v. Florida*, 505 U.S. 1079 (1992). *See Hitchcock v. Florida*, 505 U.S. 1215 (1992). This Court subsequently vacated Hitchcock's death sentence and directed the trial court to conduct a new penalty proceeding. *Hitchcock v. State*, 614 So. 2d 483 (Fla. 1993).

Hitchcock was again sentenced to the death penalty, but this Court struck it because evidence portraying Hitchcock as a pedophile was erroneously made a feature of the proceeding. *Hitchcock v. State,* 673 So. 2d 859 (Fla. 1996). Finally, Hitchcock was again sentenced

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[1] Hitchcock raised two penalty phase claims of ineffective penalty phase counsel and constitutionality of Florida's death penalty, both rejected by this Court. Even if the claims had merit, they were rendered moot by his subsequent resentencing.

to the death penalty for the fourth time. In so doing, the trial court found four aggravators, including (1) the crime was committed by a person under sentence of imprisonment (parole); (2) the crime was committed during commission of the felony of sexual battery; (3) the crime was committed for the purpose of avoiding arrest; and (4) the crime was especially heinous, atrocious, or cruel (HAC). As mitigation, the sentencing court found one statutory mitigating factor, Hitchcock's age (twenty). As to non-statutory mitigation, the court assigned very little weight to six circumstances surrounding the instant crime, some weight to nine circumstances concerning Hitchcock's background, and some weight to eight circumstances concerning Hitchcock's positive character traits.

On appeal Hitchcock argued:

> (1) the trial court erred in permitting the State to put into evidence a three-page narrative report concerning results of a psychological test;
>
> (2) the trial court erred in overruling the defense objection to the State's closing argument as to Hitchcock's mitigation evidence;
>
> (3) the trial court erred in overruling the defense objection to the State's argument as to a defense expert witness;
>
> (4) fundamental error occurred in the State's final argument to the jury;

(5) resentencing is required because the judge in Hitchcock's new trial was removed from the bench during an investigation of bribery charges, and it was error for a substitute judge to rule on Hitchcock's motion for resentencing;

(6) the trial court erred in instructing upon, allowing the State to argue, and finding the aggravating circumstance of avoiding or preventing arrest;

(7) the trial court erred in denying Hitchcock's constitutional challenges to the sentence of imprisonment and felony-murder aggravating circumstances as applied;

(8) the State failed to prove the felony-murder aggravating circumstance based on the underlying felony of rape or sexual battery, and this aggravating circumstance is unconstitutional;

(9) the trial court erred in using the HAC aggravating circumstance and in giving an unconstitutional instruction as to HAC;

(10) the trial court erred in refusing to instruct the jury as to improper doubling of aggravating circumstances;

(11) the trial court erred in considering both the felony-murder and avoid-arrest aggravating circumstances;

(12) the trial court's findings as to mitigation were deficient;

(13) Hitchcock's death sentence is disproportionate;

(14) the trial court erred in permitting testimony showing that his appellate attorney had represented Hitchcock on clemency;

(15) the trial court erred in denying relief based on newly discovered evidence without considering corroborating evidence and circumstances;

(16) the trial court (a substitute judge) erred in ruling on

and denying Hitchcock's motion for a new sentencing proceeding;

(17) the trial court erred in excluding from evidence and refusing to consider the State's prior offer of a life sentence; and

(18) conducting Hitchcock's sentencing proceeding many years after his crime was unconstitutional.

This Court denied relief as to all claims and affirmed his death sentence. *Hitchcock v. State,* 755 So. 2d 638 (Fla. 2000), *cert. denied,* 531 U.S. 1040 (2000).

Hitchcock next unsuccessfully sought postconviction DNA testing pursuant to Fla. R. Crim. P. 3.853, denial of which was affirmed on appeal. *Hitchcock v. State*, 866 So. 2d 23 (Fla. 2004).

Hitchcock's second Rule 3.851 postconviction claims were as follows:

(1) resentencing counsel was ineffective for failing to object to the testimony of Debra Lynn Driggers;

(2) guilt-phase counsel and resentencing counsel were ineffective for failing to object to testimony and argument that the victim was a virgin at the time of the offense;

(3) guilt-phase counsel was ineffective for failing to spend adequate time preparing for trial and thus opened the door to negative character evidence about Hitchcock and for failing to admit evidence implicating Richard Hitchcock in the murder;

(4) resentencing counsel was ineffective for failing to recall Dr. Toomer to explain the Minnesota Multiphasic

Personality Inventory (MMPI) narrative report introduced by the State;

(5) resentencing counsel was ineffective for failing to have Hitchcock evaluated for neuropsychological impairment;

(6) resentencing counsel was ineffective for failing to fully develop available statutory and nonstatutory mitigating evidence;

(7) the State violated Hitchcock's constitutional rights by destroying exculpatory physical evidence;

(8) the trial court's instructions diminished the jury's role in sentencing in violation of *Caldwell v. Mississippi,* 472 U.S. 320, 105 S. Ct. 2633, 86 L.Ed.2d 231 (1985), and counsel was ineffective for not objecting to the instructions;

(9) newly discovered evidence demonstrated that Richard Hitchcock committed the murder;

(10) the State failed to disclose the deficiencies of hair analyst Diana Bass and then knowingly presented the analyst's incompetent and false testimony, guilt-phase counsel was ineffective for failing to challenge the admissibility of Bass's testimony, and this newly discovered evidence of Bass's incompetence undermined Hitchcock's conviction;

(11) resentencing counsel was ineffective for failing to object to the court's felony-murder instruction and for failing to request a jury instruction on the elements of sexual battery;

(12) Hitchcock's constitutional rights were violated because he was not present at the bench conference when peremptory challenges were exercised, trial counsel was ineffective for failing to ensure that Hitchcock was present during all critical stages of the proceedings, and the trial court erred by not ensuring that the transcript was complete;

> (13) Florida's capital sentencing scheme is unconstitutional as applied to Hitchcock.

Hitchcock asserted ineffectiveness of appellate counsel by counsel's failure to argue that he was unconstitutionally deprived of notice that he could be convicted under a theory of felony murder and that he was unconstitutionally deprived of a unanimous verdict identifying whether the jury found him guilty of felony murder or premeditated murder. Hitchcock also advanced a claim that Florida's sentencing scheme is unconstitutional pursuant to *Ring*[2] and *Apprendi*[3] along with asserting that he may be incompetent by the time of his execution. This Court affirmed the lower court's denial of his postconviction claims as well as his challenge to appellate counsel's effectiveness. *Hitchcock v. State*, 991 So. 2d 337 (Fla. 2008).

Hitchcock's petition for writ of habeas corpus in the United States Middle District raised the following claims:

> Ground I: The prosecution's closing argument in the fourth resentencing proceeding unfairly denigrated evidence of mitigation presented by Hitchcock and contained numerous factual inaccuracies.
>
> Ground II: The trial court improperly applied and evaluated the aggravating and mitigating factors.

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[2] *Ring v. Arizona*, 536 U.S. 584 (2002).
[3] *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

> Ground III: Hitchcock's death sentence is not proportional, penalty phase evidence was improperly admitted, and some of his mitigation was improperly excluded.
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> Ground IV: Defense counsel should have objected to improper testimony from the victim's sister.
>
> Ground V: Defense counsel was ineffective for failing to present mental health mitigation evidence.
>
> Ground VI: Appellate counsel was ineffective in failing to raise a *Caldwell* claim on direct appeal.
>
> Ground VII: Counsel ineffectively failed to object to the sexual battery aggravator, failed to request an instruction outlining the elements of sexual battery, and appellate counsel was ineffective in failing to assert this claim on appeal.

The Eleventh Circuit affirmed the Middle District's denial of relief. *Hitchcock v. Crews*, 745 F. 3d 476 (11th Cir. 2014), *cert. denied*, 574 U.S. 939 (2014).

Successive Postconviction Proceedings Under Warrant

On March 30, 2026, Governor Ron DeSantis signed a death warrant for the execution of Hitchcock and his execution is scheduled to occur on April 30, 2026, at 6:00 p.m. As a result, this Court issued a scheduling order requiring that all proceedings in the circuit court be concluded by April 13, 2026. (R. 115).[4]

On April 1, 2026, pursuant to the circuit court's separate scheduling order, Hitchcock filed demands for additional public records directed to the Florida Department of Corrections (FDOC) and the Florida Department of Law Enforcement (FDLE). (R. 145, 180). Both state agencies filed written objections on April 2, 2026 (R 306, 316), and after conducting a hearing, the circuit court sustained FDOC's and FDLE's objections. (R. 338, 341).

Hitchcock filed his successive motion for postconviction relief on April 7, 2026, raising four claims: (1) denial of access to public records related to the alleged maladministration of the lethal injection protocols is violative of the Eighth Amendment, (2) an actual innocence claim, (3) unreliable hair evidence was improperly adduced

[4] "R" citations are to the record from Hitchcock's active death warrant proceedings in the circuit court.

at trial to exclude Richard Hitchcock as the actual perpetrator; and (4) DNA evidence would corroborate Hitchcock's claim of actual innocence. In addition, Hitchcock also requested a stay of execution. (R. 378-404). The State filed a response on April 8, 2026. (R. 498-522). After conducting a case management hearing on April 9, 2026, the circuit court issued an order summarily denying Hitchcock's successive motion for postconviction relief and also denying his request for a stay of execution on April 13, 2026. (R. 592-610). This appeal follows.

SUMMARY OF THE ARGUMENT

Hitchcock's public records argument is meritless because he fails to demonstrate how the trial court abused its discretion when it refused to grant his public records demands of the FDOC and FDLE. The postconviction court properly summarily denied Hitchcock's method-of-execution claim based on the alleged maladministration of Florida's lethal injection protocol by the FDOC. As the postconviction court properly found, Hitchcock's claim based on heavily redacted documents was entirely speculative and conclusory and failed to establish that Florida's method of execution presents a substantial and imminent risk that is sure or very likely to cause

serious illness and needless suffering. This Court recently rejected the identical allegations of alleged maladministration in *Heath v. State*, 426 So. 3d 1253 (Fla. 2026), *cert. denied*, No. 25-6746, 2026 WL 363902 (U.S. Feb. 10, 2026), and *Trotter v. State*, 428 So. 3d 68 (Fla. 2026), *cert. denied*, 146 S. Ct. 755 (2026) and Hitchcock has offered no compelling reasons to reconsider this Court's recent precedent. Additionally, Hitchcock made no attempt to identify a known and available alternative method of execution that entails a significantly less severe risk of pain; a pleading failure, which standing alone, is sufficient to affirm the lower court's summary denial of his claim.

In his second claim, Hitchcock alleged his execution would be the unconstitutional execution of an innocent man and would violate the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution under *Herrera v. Collins*, 506 U.S. 390, 417 (1993), as well as the corresponding provisions of the Florida Constitution. The postconviction court properly found Hitchcock's claim procedurally barred and not cognizable in postconviction proceedings.

As to Hitchcock's third and fourth claims, the lower court found that this Court previously addressed them and Hitchcock was

therefore procedurally barred from raising either claim in a successive postconviction motion. The State notes that Hitchcock has elected not to seek review of either of these claims.

STANDARD OF REVIEW

"Summary denial of a successive postconviction motion is appropriate if the motion, files, and records in the case conclusively show that the movant is entitled to no relief." *Cole v. State*, 392 So. 3d 1054, 1060 (Fla.), *cert. denied*, 145 S. Ct. 109 (2024) (internal quotations omitted). A postconviction court may properly deny claims that are untimely, not retroactive, procedurally barred, not cognizable, or meritless as a matter of law under controlling precedent. *See, e.g.*, *Mungin v. State*, 320 So. 3d 624, 626 (Fla. 2020) (affirming summary denial of claims raised in successive postconviction motion as untimely); *Morris v. State*, 317 So. 3d 1054, 1071 (Fla. 2021) (stating that a court may summarily deny a postconviction claim that is procedurally barred); *Mann v. State*, 112 So. 3d 1158, 1162 (Fla. 2013) (holding that because defendant's postconviction claims were "purely legal claims that have been previously rejected by this Court, the circuit court properly summarily denied relief").

With respect to timeliness, "postconviction claims in capital cases must generally be filed within one year after the judgment and sentence become final." *Cole*, 392 So. 3d at 1061 (citing Fla. R. Crim. P. 3.851(e)(2)). A claim filed outside the one-year period is untimely unless one of the following circumstances exists:

> (A) the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence, or
>
> (B) the fundamental constitutional right asserted was not established within the period provided for in subdivision (d)(1) and has been held to apply retroactively, or
>
> (C) postconviction counsel, through neglect, failed to file the motion.

Fla. R. Crim. P. 3.851(d)(2). "It is incumbent upon the defendant to establish the timeliness of a successive postconviction claim." *Mungin*, 320 So. 3d at 624.

"In reviewing a trial court's summary denial, 'this Court must accept the defendant's allegations as true to the extent that they are not conclusively refuted by the record.'" *Id.* (quoting *Tompkins v. State*, 994 So. 2d 1072, 1081 (Fla. 2008)). "However, mere conclusory allegations do not warrant an evidentiary hearing." *Id.* (citing *Anderson v. State*, 220 So. 3d 1133, 1142 (Fla. 2017); *LeCroy v.*

Dugger, 727 So. 2d 236, 238 (Fla. 1998)). On appeal from the summary denial of a successive postconviction motion, this Court "review[s] the postconviction court's decision de novo." *Id.* (citing *Marek v. State*, 8 So. 3d 1123, 1127 (Fla. 2009)).

ARGUMENT

ISSUE I

The postconviction court did not abuse its discretion in denying Hitchcock's demands for additional records from the Florida Department of Corrections and the Florida Department of Law Enforcement.

The trial court did not abuse its discretion by refusing to grant Hitchcock's public records demands from the FDOC and FDLE. Hitchcock failed to demonstrate why any of the records he sought were related to a colorable claim. Hitchcock contends that denial of his request for additional public records violates equal protection and is based on what he claims to be a "manufactured" burden, i.e., that his demands must be related to a colorable claim. The lower court properly denied Hitchcock's demands.

Initially, Hitchcock's weak assertion that neither rule nor statute mandates that he establish his demands be related to a "colorable claim" is spurious. This requirement is based on this Court's interpretation and application of Rule 3.852 and Section 27.7081, Florida Statutes. This Court has consistently required that such demands identify a colorable claim; so-called "fishing expeditions" are thus precluded by this requirement. *Muhammad v.* State, 132 So. 3d 176, 200 (Fla. 2013). See *Valle v. State*, 70 So. 3d

530, 548 (Fla. 2011) ("Valle has failed to establish how the production of such records relates to a colorable Eighth Amendment challenge.") Hitchcock cannot demonstrate the trial court erred, let alone that it abused its discretion in denying his demands.[5] *Tanzi v. State*, 407 So. 3d 385, 391 (Fla. 2025), *cert. denied,* 145 S. Ct. 1914 (2025) (denial of records requests subject to abuse of discretion standard of review on appeal) (citing *Cole v. State*, 392 So. 3d 1054, 1065 (Fla. 2024)). *See also*, *Willacy v. State*, No. SC2026-0519, 2026 WL 1021168 (Fla. April 15, 2026).

A. No abuse of Discretion Has Been Shown

Hitchcock sought numerous records predicated on heavily redacted documents apparently disclosed in unrelated litigation (the "Walls" records). He relied upon those records to speculate that the FDOC may not follow its protocol in his execution. Both FDLE and FDOC submitted detailed responses opposing disclosure of

[5]Of course, this is a highly deferential review of the postconviction court's ruling on records requests. *See Muhammad*, 132 So. 3d at 200 (noting "[d]iscretion is abused only when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable person would take the view adopted by the trial court.'") (quoting *State v. Coney*, 845 So. 2d 120, 137 (Fla. 2003).

additional records. (R. 305-315, 316-336). Florida has a detailed lethal injection protocol that specifies the drugs used, and the amounts with specific directions that a team member check the expiration dates of the drugs before they are used in an execution. (R. 330). Nothing in the heavily redacted general inventory records cited by Hitchcock pierces the presumption that the FDOC follows its protocol. This Court has consistently rejected the various constitutional arguments made by defendants based upon the same records Hitchcock relies upon here. *See Willacy v. State*, No. SC2026-0519, 2026 WL 1021168, at *6 (Fla. Apr. 15, 2026) ("Moreover, we have repeatedly rejected arguments that denials of requests under rule 3.852 for public records regarding Florida's administration of its lethal injection protocol or speculative interagency communications violate the right of access to courts, due process, or equal protection.") (string cites omitted).

Challenges to the constitutionality of Florida's lethal injection protocol as currently administered have been fully considered and repeatedly rejected by this Court. *Asay v. State*, 224 So. 3d 695 (Fla. 2017) (holding that use of etomidate as the first drug in Florida's lethal injection protocol did not violate the Eighth Amendment

because it did not create a substantial risk of serious harm); *Long v. State*, 271 So. 3d 938, 943-46 (Fla. 2019) ("Since approving the current lethal injection protocol in *Asay VI*, we have repeatedly affirmed the summary denial of challenges to the protocol, including challenges to the use of etomidate as the first drug in the protocol."). And, this Court has repeatedly and consistently upheld lethal injection records denials under the current protocol. *See Cole v. State*, 392 So. 3d 1054, 1065 (Fla.), *cert. denied*, 145 S. Ct. 109 (2024); *Tanzi v. State*, 407 So. 3d 385, 391 (Fla.), *cert. denied*, 145 S. Ct. 1914 (2025); *Heath v. State*, 426 So. 3d 1253, 1264 (2006), *cert. denied*, No. 25-6746, 2026 WL 363902 (U.S. Feb. 10, 2026). The postconviction court did not abuse its broad discretion in rejecting Hitchcock's demand for additional records.

B. Due Process, Equal Protection and Access to Records

Hitchcock's contention that the postconviction court's denial of his demands for lethal injection records violated his Fourteenth Amendment right to due process is meritless. *See generally Abdool v. Bondi*, 141 So. 3d 529, 544 (Fla. 2014) ("To assess whether a violation of due process has occurred, we must first decide whether the complaining party has been deprived of a constitutionally protected

liberty or property interest"). The United States Supreme Court has long rejected the notion of a constitutional right to discovery founded on access to the courts or due process. *Lewis v. Casey*, 518 U.S. 343, 354 (1996) (rejecting a constitutional claim that "the State must enable the prisoner to *discover* grievances, and to *litigate effectively* once in court") (emphasis in original); *Gray v. Netherland*, 518 U.S. 152, 168 (1996) (noting the Supreme Court's repeated admonitions that due process has "little to say regarding the amount of discovery which the parties must be afforded" and that there is "no general constitutional right to discovery" even for criminal defendants at trial). *See also Wellons v. Comm'r, Ga. Dep't of Corr.*, 754 F.3d 1260, 1267 (11th Cir. 2014) (relying on *Lewis* to reject a due process right to lethal injection discovery and collecting cases).

Hitchcock's allegations are speculative and insufficient to warrant relief. Hitchcock argues that he was denied due process by the State's refusal to provide additional records. However, the lower court rejected his public records requests, relying upon settled precedent in sustaining both state agency's objections. (R. 341-346, 601). Moreover, any attempt to challenge the constitutionality of Florida's well-established rules governing public records in

postconviction fails as a matter of well-established law. *See Randolph v. State*, 422 So. 3d 166, 172 (Fla. 2025), *cert. denied,* 146 S. Ct. 819 (2025) (noting that the court has frequently and consistently rejected constitutional challenges to Florida's governing rules for public records production) (string citations omitted); *Cole*, 392 So. 3d at 1066 (rejecting claim that "denying him access to these (lethal injection) records violates his rights to due process and access to the courts under the Eighth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.") (citation omitted).

Similarly, Hitchcock's assertion of a potential equal protection violation does not alleviate or cure his failure to establish a risk of substantial harm under the Eighth Amendment. A prisoner lodging a method-of-execution claim "faces an exceedingly high bar." *See Barr v. Lee*, 591 U.S. 979, 980 (2020) (per curiam). His allegations come nowhere near the mark. Hitchcock's equal protection claim is frivolous.

Hitchcock's equal protection claim, based on his status as a convicted murderer, suggests that he is improperly treated differently from the general public who has broader access to public records

than capital defendants. He contends that he, unlike any other seeker of public records, is required to demonstrate that he has made his own search, that his requests are relevant, and that his requests are not overbroad or burdensome. However, Hitchcock, unlike any other member of the public who seeks public records, is given an attorney to obtain them, a special central repository to store them, and is not charged for them. His equal protection challenge fails because Hitchcock and the ordinary citizen seeking public records are not similarly situated. *Duncan v. Moore*, 754 So. 2d 708 (Fla. 2000).

Moreover, Hitchcock is being treated exactly the same as other death-sentenced inmates under the etomidate protocol. He is not subject to a new or changed protocol. In *Ferguson v. Warden, Florida State Prison*, 493 Fed. Appx. 22, 25–26 (11th Cir. 2012) (unpublished) the court rejected a similar equal protection challenge:

> Ferguson fails to assert that any of the alleged deficiencies will result in disparate treatment from other death row inmates. Under Florida's 2012 protocol, all death row inmates facing execution will be subject to the same sequence of drugs, the same procedures, and the same safeguards in the execution process. Ferguson has presented no evidence to substantiate his claims of disparate treatment.

Id. See also King v. State, 51 Fla. L. Weekly S71 (Fla. Mar. 10, 2026) ("More fundamentally, because King has not asserted a colorable claim for relief regarding any constitutionally redressable disparate treatment, we find no error in the circuit court's decision to deny his demand for [lethal injection] records or his motion to vacate his judgment and sentence).

Hitchcock will receive the same drugs, in the same sequence with the same consciousness check as other inmates. As noted, his allegations fall far short of establishing any deviations in the past, much less one that will be "sure" or "very likely" applicable to him in the future. *See generally DeYoung v. Owens*, 646 F.3d 1319, 1328 (11th Cir. 2011) (rejecting inmate's equal protection claim based upon the assertion that Georgia deviates from its protocol because inmate failed to show a substantial likelihood of success in the underlying action to support a stay of execution).

Hitchcock's reliance on Justice Sotomayor's discussion of a similar public records demand in *Trotter v. Florida*, 146 S. Ct. 755 (2026) does not further his claim here. It has no precedential value. No other Justice of the United States Supreme Court joined Justice Sotomayor's concurrence in the denial of a stay of execution and in

the denial of certiorari for Mr. Trotter whose execution was carried out on February 24, 2026. In fact, Justice Sotomayor agreed that Trotter did not "show that Florida's administration of its lethal-injection protocol is 'sure or very likely to cause serious and needless suffering' as the Court's Eighth Amendment precedents require." *Id.*

Hitchcock had no due process right to demand sensitive and confidential lethal injection records in search of a claim.[6] And for the reasons argued by the State below, Hitchcock did not present a colorable method-of-execution claim. *See* Fla. R. Crim. P. 3.852(k) (limiting the scope of production of public records under any sub-section of rule 3.852 to those that are "either relevant to the subject matter of the proceedings under rule 3.851 or are reasonably

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[6]Hitchcock's fishing expedition for lethal injection records has no foundation in due process or the Eighth Amendment. *See Jones v. Comm'r, Georgia Dept. of Corr.*, 812 F.3d 923, 925 (11th Cir. 2016) (Circuit judges, Marcus, Carnes, Tjoflat, Hull, Pryor (William) (statement on the denial of rehearing en banc):

> By insisting that he has a right to discovery in the absence of presenting a well-pleaded complaint, Jones travels on the novel idea that the law will (or should) allow discovery first, and only then require him to meet the standards prescribed by the Supreme Court in *Baze v. Rees*, 553 U.S. 35, 50, 52, 128 S. Ct. 1520, 170 L. Ed. 2d 420 (2008) (plurality opinion), and *Glossip v. Gross,* —— U.S. ——, 135 S. Ct. 2726, 2737, 192 L. Ed. 2d 761 (2015).

calculated to lead to the discovery of admissible evidence"). Therefore, the postconviction court did not abuse its discretion when it denied Hitchcock's demand for lethal injection records. *E.g.*, *Tanzi*, 407 So. 3d at 391 (applying the abuse of discretion standard to the denial of a demand for additional records and concluding that the postconviction court did not abuse its discretion or violate due process in denying a demand for such records because the records did not relate to a colorable claim). This Court should affirm.

C. Hitchcock's Speculative Eighth Amendment Claim

Hitchcock contends that Florida will fail to follow its detailed lethal injection protocol which will result in a violation of Hitchcock's right to be free of cruel and unusual punishment under the Eighth Amendment. However, no matter how he tries to spin it, Hitchcock relies on the same records that were soundly rejected by this Court as a basis for Eighth Amendment challenges in two recent cases under death warrant. *Trotter v. State*, 428 So. 3d 68, 73 (Fla. 2026), *cert. denied*, 146 S. Ct. 755 (2026); *Heath v. State*, 426 So. 3d 1253, 1264 (Fla. 2026), *cert. denied,* No. 25-6746, 2026 WL 363902 (U.S. Feb. 10, 2026). His slightly different spin on the same speculative factual basis does not make his claim any stronger. He cites the same

expert affidavit which this Court rejected as the basis for an Eighth Amendment claim in *Trotter*. Dr. Buffington, as cited in Hitchcock's motion, opined that FDOC needs better record keeping having "an organized, accurate and effective tracking model to ensure that the correct substances, as approved within the FDOC, have been properly acquired and that product dating and aging are being tracked for substances that are awaiting future executions." (R. 487-495).

Hitchcock relies upon the "Walls" records to support these allegations. (R. 445-486). However, none of these pages in the appendix contain any executed defendant's name or indicate that the drugs were used during any execution. They simply contain lines for "drug name," "package size," and "NDC#," and columns for "date," "invoice name/#," "Lot #," "Exp. Date," "MFR," "Received/Used (+/-)," and "balance." The "Received/Used (+/-)" column contains numbers with either the + or - symbol.

An Eighth Amendment method-of-execution claim requires the defendant to "(1) establish that the method of execution presents a substantial and imminent risk that is sure or very likely to cause serious illness and needless suffering and (2) identify a known and

available alternative method of execution that entails a significantly less severe risk of pain." *Randolph*, 422 So. 3d at 173 (Fla. 2025); *Bucklew v. Precythe*, 587 U.S. 119, 134, 140 (2019) (holding that "*all* Eighth Amendment method-of-execution claims" must "meet the *Baze-Glossip*[7] test") (emphasis added).[8]

Both this Court and the United States Supreme Court have held that prison staff are entitled to a strong presumption that they follow their method-of-execution protocol. *See e.g.*, *Baze*, 553 U.S. at 53-54; *Cole*, 392 So. 3d at 1065.[9] As a result, claims asserting that FDOC fails to follow its protocol must also allege legally sufficient facts to pierce that presumption before any evidentiary hearing. *Hannon v. State*, 228 So. 3d 505, 509 (Fla. 2017) (affirming summary

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[7] *Baze v. Rees*, 553 U.S. 35 (2008) (plurality opinion); *Glossip v. Gross*, 576 U.S. 863 (2015).

[8] As the *Bucklew* Court noted, the Eighth Amendment does not require "the avoidance of all risk of pain" in any method of execution. *Bucklew*, 587 U.S. at 134. How the Eighth Amendment applies to methods of execution "tells us that [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). That is most certainly true here as Hitchcock's victim suffered a prolonged and agonizing death.

[9] *See also Valle v. State*, 70 So. 3d 530, 545-49 (Fla. 2011); *Davis v. State*, 742 So. 2d 233, 236 (Fla. 1999); *Provenzano v. State*, 739 So. 2d 1150, 1153 (Fla. 1999).

denial of a claim that FDOC is "inconsistent with its protocol" because the allegations were insufficient to overcome the presumption that FDOC complies with the protocol).

Knowing full well this Court has rejected this claim under three recent warrants, Hitchcock attempts to raise this claim under the guise of Equal Protection. But this Court has made clear that no matter how the inmate attempts to frame his argument, it still must pass through an Eighth Amendment analysis. *Trotter*, 428 So. 3d at 73 ("While Trotter contends that his lethal injection claim is not a traditional "method-of-execution claim," the gist of his argument remains that executing him by lethal injection–given the allegations he raises–constitutes cruel and unusual punishment.").

Hitchcock's nod to equal protection does not salvage his claim. There is no such thing as a standalone failure-to-follow-protocol Eighth Amendment claim exempted from these requirements.[10]

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[10] *E.g., Lightbourne v. McCollum*, 969 So. 2d 326, 341 (Fla. 2007) (noting, despite concerns FDOC failed to follow protocol in prior executions, the court refused to stay an execution when nothing established the prior executions "caused unnecessary and wanton pain" or involved "torture or a lingering death"); *Jordan v. Mississippi State Executioner*, No. 25-70013, 2025 WL 1752391, at *2 & n.2, *3 (5th Cir. June 24, 2025) (denying a stay of execution despite officials

Where an Eighth Amendment claim alleges the risk of future harm at an execution, "the conditions presenting the risk must be '*sure or very likely* to cause serious illness and needless suffering,' and give rise to 'sufficiently *imminent* dangers.'" *Baze*, 553 U.S. at 50 (quoting *Helling v. McKinney*, 509 U.S. 25, 33, 34–35 (1993)); *Wellons v. Comm'r, Ga. Dep't of Corr.*, 754 F.3d 1260, 1265 (11th Cir. 2014) (noting that mere speculation "cannot substitute for evidence that the use of the drug is sure or very likely to cause serious illness and needless suffering").

Accordingly, Hitchcock's allegations must be legally sufficient to prevail on both prongs of the *Baze-Glossip* test and pierce the strong presumption that FDOC will follow its written protocol for this Court to grant an evidentiary hearing. *See Cole*, 392 So. 3d at 1065 (speculative lethal injection allegations insufficient to meet the *Baze-Glossip* test).

FDOC's protocol does not require contemporaneous or exact record keeping for the pharmaceuticals used on condemned inmates during an execution. It does require that drugs used in an execution

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admitting they had not performed required consciousness checks in prior executions).

not be beyond their expiration date and designates a team member for this task. (R. 435 para. 6*)* (lethal injection protocol requires that a designated execution team member "ensure that the lethal chemicals have not reached or surpassed their expiration dates" and FDLE monitors should be responsible for maintaining "a detailed log" of execution chamber occurrences but not of the pharmaceuticals used); *Troy v. State*, 57 So. 3d 828, 839 (Fla. 2011) (holding the protocol's failure "to require adequate record-keeping" did not give rise to an Eighth Amendment claim). Nor is FDOC required to reduce every aspect of its protocol to writing. *Sims v. State*, 754 So. 2d 657, 666, 668 (Fla. 2000). Florida courts cannot "micromanage the executive branch in fulfilling its own duties relating to executions." *Troy*, 57 So. 3d at 839.

Since the protocol does not require the record keeping Hitchcock relies on, his speculative reliance on ambiguous and heavily redacted records provides even less reason to believe FDOC actually deviated from its protocol.[11] Since inmates have raised

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[11]*Baze,* 553 U.S. at 53–61 (rejecting claims regarding the inadequate administration of the lethal injection protocol, including the risk that the procedures will not be properly followed by the department of corrections).

speculative claims about FDOC records, three additional executions have been carried out without reported incident.

In conclusion, there is nothing presented by Hitchcock that requires this Court to reconsider the etomidate protocol or its prior precedent affirming denial of public records claims relating to FDOC's administration of the protocol. The trial court's decision below was not an abuse of discretion. Accordingly, this Court should affirm the lower court's ruling.

D. Hitchcock fails To Name An Alternative Execution Method

Finally, Hitchcock does not even attempt to identify a "known and available alternative method of execution that entails a significantly less severe risk of pain" and thus fails the second prong of the *Baze-Glossip* test as a matter of law. This Court recently rejected a similar records-based claim in *Trotter,* squarely rejecting the notion that the defendant did not have to name an alternative method of execution. *Trotter*, 428 So. 3d at 73 ("Moreover, because Trotter incorrectly maintains that the *Glossip* requirements do not apply to his claim, he fails to identify an alternative method of

execution."). Hitchcock makes no attempt to distinguish *Trotter.* Rather than allege a "feasible and readily implemented alternative method of execution that would significantly reduce a substantial risk of severe pain" as required, *Bucklew*, 587 U.S. at 134, Hitchcock simply ignores that well established requirement. As noted, "*all* Eighth Amendment method-of-execution claims" are controlled by *Baze-Glossip*. *Bucklew*, 587 U.S. at 134 (emphasis added); *Baze*, 553 U.S. at 50 (quoting *Helling v. McKinney*, 509 U.S. 25, 33, 34-35 (1993)). The postconviction court correctly concluded that Hitchcock's motion also failed because he did not name an alternative method of execution. (R. 530).

In his motion below, Hitchcock relied on historical execution incidents and protocol reviews fares no better. Past events do not establish a present constitutional violation. Further, following the Angel Diaz execution, Florida revised its lethal injection protocol, which this Court later upheld. *Lightbourne v. McCollum*, 969 So. 2d 326, 352-53 (Fla. 2007); *see also Asay v. State*, 224 So. 3d 695 (Fla. 2017) (upholding Florida's current lethal injection protocol).[12] And

[12] Notably, FDC has successfully implemented its etomidate protocol more than thirty times since its adoption in 2017. *See*

earlier electric chair litigation likewise resulted in investigation and procedural modifications, not invalidation of executions. *See Buenoano v. State*, 565 So. 2d 309 (Fla. 1990).

Indeed, it is unclear what relief Hitchcock seeks from this Court. Rather than identify a known and available alternative, Hitchcock asks this Court to stay his execution and order the release of FDOC records so that he can pursue this claim, presumably without an active warrant. This approach, however, is not what the *Baze-Glossip* test mandates. The *Baze-Glossip* test requires the defendant point to a readily-implemented alternative execution *method* that the State can quickly carry out, not provide a wish-list of abstract reforms and investigations.[13] *See id.* Hitchcock's failure to plead an alternative execution method that would significantly reduce his risk of a painful

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https://www.fdc.myflorida.com/institutions/death-row/execution-list-1976-present. And, since the FDOC investigated and revamped its lethal injection protocol following the Angel Diaz execution, Florida has successfully implemented its lethal injection protocol some 66 times without mishap.

[13]Hitchcock's nebulous suggestion of an inquiry into FDOC's protocol administration runs afoul of the Supreme Court's admonition that a prisoner cannot succeed on a method-of-execution challenge by merely showing a marginally safer alternative, and that courts should not be transformed into "boards of inquiry" charged with determining "best practices" for executions. *Baze*, 553 U.S. at 51; *see also Muhammad v. State*, 132 So. 3d 176, 197 (Fla. 2013).

death is fatal to his claim. *See Randolph*, 422 So. 3d at 173 (affirming summary denial of a lethal injection claim where the defendant failed to propose a "readily implemented" execution method that "in fact significantly reduces" the "substantial risk of severe pain").

For all these reasons, this Court should affirm summary denial of Hitchcock's challenge to Florida's lethal injection protocol.

ISSUE II

The lower court did not abuse its discretion in denying Hitchcock's claim of actual innocence.

Hitchcock asked the lower court to set aside his death sentence because execution of an innocent man would violate the Eighth Amendment. Hitchcock has raised this same claim numerous times. He contends that despite his initial confession to rape and murder, it was his brother Richard who killed the victim. Hitchcock said as much during his 1977 trial, and his jury convicted him nevertheless. *Hitchcock v. State*, 413 So. 2d 741, 744 (Fla. 1982) (finding evidence that his brother Richard was the killer was "too remote to be relevant"). He advanced this as a newly discovered evidence postconviction claim in 1996. At the evidentiary hearing, Hitchcock's sister Wanda testified that Richard told her he killed Cynthia. The

court denied relief because it found her testimony unworthy of belief (R. 930), a determination this Court later affirmed. *Hitchcock*, 755 So. 2d 638 at 645 (affirming denial of Hitchcock's actual innocence claim because it was not relevant to his resentencing proceeding).

Hitchcock raised the claim, again alleging newly discovered evidence, and presented testimony from a number of family members who all recalled Richard, under various circumstances, having confessed to killing Cynthia. The court found none of Hitchcock's witnesses to be credible, largely because despite the fact that they were members of Hitchcock's family, not one of them stepped forward to corroborate the claim until nearly twenty years after Hitchcock's 1977 conviction, after Hitchcock had been sentenced to death for the third time. The extensive delay in coming forward, the court concluded, weighed heavily against their credibility. (R. 942). This Court affirmed that outcome, specifically noting with approval the lower court's assessment that the witnesses presented by Hitchcock lacked credibility. *Hitchcock v. State*, 991 So. 2d 337, 349 (Fla. 2008) (witnesses who testified that brother Richard confessed to the murder "suffered from an inherent lack of credibility" and the claim was properly rejected as newly discovered evidence for that reason).

Hitchcock now asserts an Eighth Amendment claim and contends that his execution would be cruel and unusual because he is actually innocent, and once again advances several of the same witnesses in support. Aside from the fact that none of his witnesses have ever been deemed credible by any judge who heard them testify, Florida does not recognize actual innocence as a postconviction claim. *Sweet v. State*, 293 So. 3d 448 (Fla. 2020).

To the extent that Hitchcock asserts that refusal to consider actual innocence in this forum violates the Eighth Amendment, this Court has previously held that a standalone actual innocence claim must be raised on direct appeal and summary denial of an actual innocence claim in a postconviction motion does not violate the Eighth Amendment. *Tompkins v. State*, 994 So. 2d 1072 (Fla. 2008).

Hitchcock has not been deprived of his ability to advance this frivolous claim; he has argued it no less than three times without success despite full advantage of evidentiary development.[14] And

[14] This claim is also untimely. Hithcock presents no new evidence in support of this previously rejected claim. Postconviction claims raised more than a year after the judgment and sentence become final are untimely and must "meet an exception to the time-limit rule-otherwise the claim" should be summarily denied. *Davis v. State*, 417 So. 3d 242, 247 (Fla. 2025) (citing Fla. R. Crim. P. 3.851(d)(2), (e)(2)).

while the State does not disagree, in theory, with his premise that executing an innocent man is cruel and unusual, we are in no danger of any Eighth Amendment violation as Hitchcock is clearly not an innocent man. This claim has been rejected over and over and the lower court's similar rejection of this frivolous claim should be affirmed.

ISSUE III

A STAY OF EXECUTION IS NOT WARRANTED HERE, NOR IS IT GRANTED AS A MATTER OF COURSE.

A stay of execution is not granted as "a matter of course." *Hill v. McDonough*, 547 U.S. 573, 583-84 (2006). Florida's standard for a stay of execution requires a showing that "there are substantial grounds upon which relief might be granted." *Dillbeck v. State*, 357 So. 3d 94, 103 (Fla. 2023); *see also Barwick v. State*, 361 So. 3d 785, 791 (Fla. 2023).

Hitchcock's case has been thoroughly litigated in both state and federal courts over the last forty years. The State rejects any notion that Hitchcock is innocent or that any of the previously filed and rejected claims come anywhere near the mark of legal innocence. The State of Florida and the surviving victims of Hitchcock's crimes have

an enormous interest in the finality and timely enforcement of valid criminal judgments and sentences. *Ledford v. Comm'r, GA Dep't of Corr.* 856 F. 3d 1312, 1320 (11th Cir. 2017) (denying an emergency stay of execution in a capital case because the claims were time-barred, not substantial, and noting the State and the victims' interest in the finality of the sentence).

Hitchcock confessed to the rape and murder after his arrest, stating he returned to the house around 2:30 a.m. and entered through a dining room window. He went into the victim's bedroom and raped her and afterwards, when she started to yell, and would not be quiet, he choked her to death and carried her outside and pushed her body into some bushes. *Hitchcock v. State*, 413 So. 2d 741, 743 (Fla. 1982).

This Court should deny the requested stay because Hitchcock's repackaged "cumulative innocence" theory is not cognizable and falls short of any recognized innocence standard. The Supreme Court has made clear that claims of actual innocence operate at most as a narrow gateway requiring new reliable evidence demonstrating that it is more likely than not that no reasonable juror would have convicted him. *Schlup v. Delo*, 513 U.S. 298, 324-327 (1995). Nor

does his case approach the extraordinarily high threshold for any freestanding innocence claim which the Supreme Court has described as requiring truly persuasive proof of innocence. *Herrera v. Collins*, 506 U.S. 390, 417 (1993). Because Hitchcock advances no cognizable claim, no new evidence, and no likelihood of success, the equities weigh decisively against a stay.

CONCLUSION

Based on the authorities and arguments presented herein, this Court should affirm the summary denial of Hitchcock's successive motion for postconviction relief and deny his request for a stay of execution.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of April, 2026, I electronically filed the foregoing with the Clerk of Court by using the Florida Courts E-Portal Filing System which will send a notice of electronic filing to the following: Eric Pinkard, Chief Assistant CCRC-M, Joshua Chaykin, Cortney Hackett, and Christopher Clemente, Assistants CCRC-M, Capital Collateral Regional Counsel-Middle Region, 12973 North Telecom Parkway, Temple Terrace, Florida 33637, **pinkard@ccmr.state.fl.us, chaykin@ccmr.state.fl.us, hackett@ccmr.state.fl.us, clemente@ccmr.state.fl.us, support@ccmr.state.fl.us,** and the Florida Supreme Court, **warrant@flcourts.org, canovak@flcourts.org**.

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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 Florida Rule

of Appellate Procedure 9.045(b). This brief contains 7695 words, in compliance with Florida Rule of Appellate Procedure 9.210(a)(2)(B).

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