ACTIVE WARRANT CASE NO. SC2026-0736
EXECUTION SCHEDULED FOR JUNE 2, 2026, AT 6:00 P.M.
L.T. NO. 1996-CF-2645

In the

Supreme Court of Florida

ANDREW RICHARD LUKEHART,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE FOURTH JUDICIAL CIRCUIT COURT IN AND FOR DUVAL COUNTY, FLORIDA

APPELLEE'S ANSWER BRIEF

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INTRODUCTION

Andrew Richard Lukehart murdered a five-month-old child in 1996 while on felony probation for abusing an eight-month-old child less than two years earlier. He received a death sentence in 1997, and his death warrant issued in 2026. Neither the expedited warrant litigation nor his belated challenges to Florida's lethal-injection protocol provide any reason to delay his execution.

The Supreme Court has warned lower courts to "police carefully against attempts to use" method-of-execution "challenges as tools to interpose unjustified delay" in capital cases. *Bucklew v. Precythe*, 587 U.S. 119, 122, 150 (2019). That caution reverberates with the reality that the Court has *never* found a method of execution cruel and unusual. *Id.* at 133. Most method-of-execution challenges end up as "little more than attacks on settled precedent" that fail on "many essential legal elements set forth in our case law and required by the Constitution's original meaning." *Id.* at 149.

Lukehart's belated method-of-execution claims fit squarely in that norm. He failed to show timeliness, plead an alternative execution method, and his claims attacked settled precedent upholding Florida's protocol. His record demands and expedited-

warrant-litigation complaints suffered similar flaws.

By contrast, the people of Florida and surviving victims deserve better than any further delay in this case. *Id.* And in this State, they are constitutionally entitled to better. *See* Art. I, § 16(b)(10), (d), Fla. Const. Expedited warrant litigation thirty years after the crime and belated constitutional claims do not overcome that constitutional right to prompt finality here. *See Calderon v. Thompson*, 523 U.S. 538, 556–58 (1998) (recognizing "finality acquires an added moral dimension" after one round of state and federal postconviction review given the State's and victims' powerful interests in punishing the guilty).

This Court should affirm and bring true finality to this case.

ORAL ARGUMENT OBJECTION

The State opposes Lukehart's oral argument request. 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."). This Court has not held oral arguments in any recent warrant case over the past three years. It should not hold oral arguments in this one either.

STATEMENT OF THE CASE AND FACTS

Lukehart has litigated and relitigated his conviction and death sentence for the 1996 murder of five-month-old Gabrielle Hanshaw for decades. A jury convicted him of first-degree murder and aggravated child abuse and recommended death by a 9-3 vote. *Lukehart v. State*, 776 So. 2d 906, 911 (Fla. 2000). The sentencing judge followed the jury's recommendation after effectively finding two valid aggravators: (1) Lukehart committed the murder during the commission of felony aggravated child abuse on a victim under twelve; and (2) Lukehart was on felony probation for abusing another child when he murdered Gabrielle. *See id.* at 911, 924–26.

On direct appeal, this Court recited the facts of the crime and affirmed Lukehart's first-degree murder conviction and death sentence.[1] *Id.* at 910–11, 925–27; *see also Lukehart v. Sec'y, Fla. Dep't of Corr.*, 50 F.4th 32, 36–40 (11th Cir. 2022). Lukehart's conviction and death sentence became final in June 2001. *Lukehart*

[1] Given none of Lukehart's appellate issues involve his guilt or death-worthiness, and the State and Court have detailed the facts in full, the State will not repeat them here. *See Humphreys v. Comm'r, Ga. Dep't of Corr.,* 161 F.4th 1300, 1304 (11th Cir. 2025) (explaining the court would rely on its prior descriptions of the crime since they were "not directly relevant to the legal challenge before" it "and because of time constraints").

v. Florida, 533 U.S. 934 (2001).

In the following decades, Lukehart unsuccessfully sought both state and federal postconviction relief. *Lukehart v. State*, 70 So. 3d 503, 525 (Fla. 2011) (affirming denial of initial state postconviction and denying state habeas relief); *Lukehart v. State*, 103 So. 3d 134, 136 (Fla. 2012) (affirming denial of first successive postconviction motion); *Lukehart v. Jones*, No. SC16-1225, 2017 WL 1033691, at *1 (Fla. Mar. 17, 2017) (denying successive state habeas petition);[2] *Lukehart*, 50 F.4th at 48 (affirming denial of federal relief).

Florida Governor Ron DeSantis signed Lukehart's death warrant on May 1, 2026, with the execution scheduled for June 2, 2026. Shortly thereafter, Lukehart unsuccessfully sought method-of-execution-related records from the Florida Department of Corrections (DOC), Florida Department of Law Enforcement (FDLE), and District 8 Medical Examiner (8ME) under Florida Rule of Criminal Procedure 3.852. (WPCR:66–76, 166–301.)[3]

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[2] Lukehart also litigated a second successive postconviction motion but did not appeal its summary denial to this Court. (WPCR:451.)

[3] The State will cite the record in this appeal as WPCR:[page number].

Lukehart then filed his post-warrant Florida Rule of Criminal Procedure 3.851 motion raising three numbered claims: (1) an "as-applied" method-of-execution claim alleging his poor kidney function "may" cause etomidate to remain in his system longer and repeatedly burn his lungs; (2) a facial challenge to Florida's use of etomidate, a hypnotic, and rocuronium bromide, a paralytic, as the first two drugs in its three-drug, lethal-injection protocol;[4] and (3) a due-process challenge to expedited warrant litigation decades after his death sentence finalized. (WPCR:342–364.) He also sought a stay. (WPCR:337–41.)

The State answered the motion and urged summary denial while also opposing a stay. (WPCR:396–422.) The circuit court summarily denied all of Lukehart's claims after a *Huff*[5] hearing, and Lukehart timely appealed. (WPCR:434–58, 467.)[6]

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[4] Lukehart did not independently challenge the third drug in Florida's protocol, potassium acetate, which stops the heart. *See Long v. Inch*, No. 8:19-cv-1193-MSS-AEP, 2019 WL 11666604, at *5 (M.D. Fla. May 19, 2019); *Brant v. Allen*, No. 3:13-cv-412-MMH-SJH, 2025 WL 1685417, at *4 (M.D. Fla. June 16, 2025).

[5] *Huff v. State,* 622 So. 2d 982 (Fla. 1993).

[6] The State will recount additional facts as they are relevant to the legal analysis of each issue Lukehart presents below.

ARGUMENT SUMMARY

Issue 1: "As-Applied" Method of Execution Challenge

The postconviction court correctly denied Lukehart's "as-applied" challenge to Florida's lethal-injection protocol without an evidentiary hearing. This claim is a disguised facial challenge to the use and effectiveness of etomidate rather than a true as-applied challenge. In any event, Lukehart failed to establish timeliness for either the kidney or allergy related aspects of this claim, and both are procedurally barred because his allegations show they could have been raised before his death warrant issued.

On the merits, Lukehart's allegations showed neither a sure or very likely risk of severe pain nor a valid alternative method of execution. Etomidate combined with Florida's consciousness checks ensure he will be unconscious and insensate for half an hour rather than experiencing pain during execution. And Lukehart's objections to the alternative-method requirement both lack merit and indicate, at most, that the Eighth Amendment should only ask whether a State designed its method of execution to cause pain. This Court should affirm the summary denial of claim 1.

Issue 2: Facial Method-of-Execution Challenge

The postconviction court also correctly denied Lukehart's facial method-of-execution challenge without evidentiary development. This claim is both untimely and procedurally barred given Florida's protocol has remained essentially unchanged since 2017. It is also legally insufficient given this Court has long affirmed the facial constitutionality of Florida's execution protocol. This Court should affirm the summary denial of claim 2.

Issue 3: Expedited Warrant Litigation Challenge

Lukehart's third issue challenging expedited warrant litigation fails as a matter of law. By providing Lukehart with postconviction counsel for decades, notice of his warrant eligibility in 2024, notice of the warrant in 2026, and an opportunity to be heard by neutral judicial officers on any substantive claims, Florida has provided Lukehart with more process than he was ever constitutionally due. There is nothing fundamentally unfair about allowing the condemned decades to obtain relief and then a final expedited chance after his death warrant issues. This Court should affirm the circuit court's summary denial of claim 3.

Issue 4: Public Records Denials and Rule 3.852 Constitutionality

The circuit court did not abuse its discretion by finding Lukehart's method-of-execution-related demands unrelated to a colorable claim for relief and unduly broad and burdensome. The ruling below fits squarely within this Court's established caselaw. And Lukehart's constitutional challenges fail under this Court's well-settled precedent. This Court should affirm because the circuit court did not abuse its discretion in denying Lukehart's demands and Rule 3.852 is constitutional.

STANDARDS OF REVIEW

Issues 1–4: This Court reviews the summary denial of a postconviction claim, and constitutional challenges to Rule 3.852, de novo as pure questions of law with no deference to the lower court. *E.g.*, *Tanzi v. State*, 407 So. 3d 385, 390 (Fla. 2025); *Braddy v. State*, 219 So. 3d 803, 819 (Fla. 2017).

Issue 4: This Court reviews the actual denial of public records under Rule 3.852 for abuse of discretion. *Zakrzewski v. State*, 415 So. 3d 203, 213 (Fla. 2025). Appellate courts must affirm under this standard unless "no reasonable person would take the view adopted by the trial court." *Id.*

SUMMARY DENIAL STANDARD

This Court affirms a summary denial when the claim is: "[1] untimely, [2] procedurally barred, [3] legally insufficient,[7] or [4] refuted by the record." *Hutchinson v. State*, 416 So. 3d 273, 279 (Fla. 2025). "Mere conclusory allegations do not warrant an evidentiary hearing" either. *Cole v. State*, 392 So. 3d 1054, 1061 (Fla. 2025).

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[7] A claim is legally insufficient when it fails "as a matter of law." *Owen v. State*, 986 So. 2d 534, 544 (Fla. 2008).

ARGUMENT

Three decades ago, Lukehart murdered five-month-old Gabrielle Hanshaw and discarded her body in a pond. This post-warrant appeal challenges neither his guilt nor death-worthiness. Instead, Lukehart raises four issues attacking Florida's method of execution, his expedited warrant litigation, and the denial of his post-warrant public records demands.

The State will address each issue in turn. But not one warrants relief. The simple truth is Lukehart has been living on borrowed time for decades while his victims awaited the justice they are now entitled to under our Constitution. *See* Art. I, § 16(b)(10), (d), Fla. Const. There is no time left for Lukehart to borrow.

This Court should affirm all issues raised and allow true finality in this case. *See Calderon v. Thompson*, 523 U.S. 538, 555, 557 (1998) ("Finality is essential to both the retributive and the deterrent functions of criminal law" and disturbing it inflicts "profound injury" on the State's and victims' "powerful and legitimate interest in punishing the guilty.").

1. THE POSTCONVICTION COURT CORRECTLY SUMMARILY DENIED LUKEHART'S "AS-APPLIED" METHOD-OF-EXECUTION CLAIM ALLEGING DECREASED KIDNEY FUNCTION.

Lukehart's first issue asserts what he calls an "as-applied" challenge to Florida's three-drug, lethal-injection protocol based on his decreased kidney function. He contends "drug concentrations *may* rise higher in the bloodstream due to his kidney disease, creating the *potential* for a scenario in which it *may* take a longer time for etomidate to repeatedly pass through the lungs, burning them with each pass." (WPCR:453 (cleaned up; emphasis added).) This claim is untimely, procedurally barred, and legally insufficient on both prongs of the *Baze-Glossip*[8] test.

But a few quick points first. Lukehart's citations to evidentiary hearings in other cases, including from other jurisdictions, are red herrings. This Court requires evidentiary hearings when capital defendants make facially sufficient claims that are neither untimely nor procedurally barred. Nothing in Lukehart's vague citations to evidentiary hearings in discrete cases shows a constitutional issue with this Court's precedent.

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

Lukehart also complains that it would be difficult for him to prove his claim without an evidentiary hearing. But he misses the obvious. At the pleading phase, he must *allege facts* that, taken as true, show entitlement to relief. If the facts alleged by a capital defendant do not show a timely, not barred, and facially valid claim, there is no point in holding an evidentiary hearing during an active warrant. And if, as he claims for the first time on appeal, Dr. Zivot would testify Lukehart's kidney condition has recently deteriorated past the theoretical threshold that would render Florida's protocol unconstitutional as applied to him, he should have included that allegation in his motion filed below. He did not. And he cannot fix that now. Lukehart did not allege his Eighth Amendment claims only accrued in the past year, only that his condition became severe in January 2026. As the circuit court found, that is not enough.

For both these and the more detailed reasons that follow, this Court should affirm the summary denial.

Relevant Facts

The first claim in Lukehart's post-warrant motion asserted an "as-applied" challenge to Florida's lethal-injection protocol based on the use of etomidate and his decreased kidney function.

(WPCR:346–352.) The claim began by describing Lukehart's general state of health.

> [Lukehart] is a 53-year-old man with a long list of medical problems, including poor mental health, recurrent polymicrobial urinary tract infections, epididymitis-orchitis, obesity, being a former smoker, elevated cholesterol, hypothyroidism, gastrointestinal reflux, hypertension, type II diabetes, and chronic kidney disease stage III-IV. He takes medication for hypertension, reflux, diabetes, and elevated cholesterol. Although hypothyroidism is a listed illness, he is not currently being treated for this issue. Lukehart also has a moderate allergy to diphenhydramine, a first-generation antihistamine.

(WPCR:347.) Lukehart further alleged his "medical records show some diminished kidney values starting in 2023" but his "numbers became severe in January of 2026." (WPCR:349.) "Around January 24, 2026, Lukehart collapsed as a result of a medical emergency caused by his severe kidney disease." (WPCR:349.)

To demonstrate a sure or very likely risk of needless suffering on *Baze-Glossip*'s first prong, Lukehart alleged:

> As a consequence of Lukehart's severe kidney disease, injected drugs as used in the DOC lethal injection protocol *may* rise higher in his bloodstream *because of a reduction in urinary excretion*. The effect of this is the *potential* for an exaggerated negative consequence on his heart and lungs, making his own death more painful and cruel. When etomidate is injected, the beating heart rapidly delivers the strong acid solution to the lungs,

> where it burns them from the inside. Since Lukehart has reduced kidney function, etomidate *may* not be eliminated as quickly. The effect is a longer time for etomidate to repeatedly pass through the lungs, burning them with each pass.

(WPCR:349 (emphasis added).)

Lukehart retained Dr. Zivot[9] to testify that Florida's protocol, as-applied to Lukehart, risked needless pain and suffering.

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[9] Dr. Zivot is a go-to expert for the capital defense bar in method of execution cases and has critiqued the methods employed by, at least, four states as unconstitutional. *E.g., Bucklew v. Precythe*, 587 U.S. 119, 145–48 (2019) (critiquing Dr. Zivot's analysis and finding it insufficient to survive summary judgment); *Price v. Dunn*, 587 U.S. 1036, 1036 (2019) (denying a stay of execution despite Dr. Zivot's opinion); *Heath v. State*, 426 So. 3d 1253, 1261 (Fla. 2026) (recounting Dr. Zivot's declaration); *Rogers v. State*, 409 So. 3d 1257, 1266 (Fla. 2025) (same); *Davis v. State*, 142 So. 3d 867, 872 (Fla. 2014) ("Dr. Zivot failed to demonstrate that the injection of midazolam, as the first drug in the lethal injection protocol, would not render Davis unconscious and insensate prior to him experiencing any possible symptoms"); *Johnson v. Lombardi*, 809 F.3d 388, 391 (8th Cir. 2015) (finding the "attached affidavit of Dr. Joel Zivot fails to show a likelihood of success under the Eighth Amendment standard" because he speculated and equivocated); *Williams v. Kelley*, 854 F.3d 998, 1000 (8th Cir. 2017) (noting Dr. Zivot testified for the defense both below and for a different defendant in *McGehee v. Hutchinson*, 854 F.3d 488 (8th Cir. 2017)); *Jones v. Kelley*, 854 F.3d 1009, 1015 (8th Cir. 2017) (holding Dr. Zivot's testimony there was a "real possibility" of complications fell short); *Smith v. Comm'r, Ala. Dep't of Corr.,* No. 22-13781, 2022 WL 17069492, at *4 (11th Cir. Nov. 17, 2022); *Gissendaner v. Comm'r, Ga. Dep't of Corr.,* 779 F.3d 1275, 1279 (11th Cir. 2015) (Dr. Zivot's affidavit); *Ledford v. Comm'r, Ga. Dep't of Corr.,* 856 F.3d 1327, 1332 n.1 (11th Cir. 2017) (stating Dr. Zivot's opinion and caveat).

(WPCR:347, 349–50.) Lukehart alleged Dr. Zivot would explain kidney function decreases naturally over time, and that deterioration "can be accelerated by certain medical conditions." (WPCR:348.) He did *not* allege Dr. Zivot would testify Lukehart's kidney disease rendered Florida's protocol unconstitutional as applied to him within the past year. Nor did he allege how many passes through his lungs etomidate would take in April 2025 as opposed to now.

Lukehart then complained about his potential allergy to a drug DOC offers condemned inmates to ease anxiety before execution. (WPCR:350.) He alleged it was "unknown" whether the drug was effective for that purpose, and that his possible allergy would result in a dangerous risk of a severe allergic reaction. (WPCR:350.)

Turning to the second prong of the *Baze-Glossip* test, Lukehart refused to offer an alternative method of execution. (WPCR:350.) He primarily argued this settled Eighth Amendment requirement violated: (1) his First Amendment right to religious freedom because, as a practicing Catholic, he could not participate in his own execution by selecting an alternative; and (2) his due process rights under the Fifth and Fourteenth Amendments because there

was no guaranteed way to prove one method causes less pain than another. (WPCR:350–51.)

But Lukehart then vaguely pointed to other states' methods of execution. (WPCR:351–52.) Without identifying any particular drug, he seemingly suggested using an "analgesic" rather than etomidate and abandoning any use of paralytic drugs.[10] (WPCR:352.) He also pointed out some states carry out executions via electrocution or lethal gas. (WPCR:352.)[11]

Ruling Below

The circuit court summarily denied Lukehart's "as-applied" method-of-execution challenge to the interplay between Florida's protocol and his kidney function as untimely and legally insufficient

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[10] Lukehart called etomidate a paralytic below. (WPCR:352.) But etomidate isn't a paralytic. *Asay v. State*, 224 So. 3d 695, 701 (Fla. 2017) ("Etomidate is a hypnotic drug without analgesic activity.") The second drug in Florida's protocol, rocuronium bromide, is a paralytic. *See Jimenez v. State*, 265 So. 3d 462, 474 (Fla. 2018); *id.* at 492 (Pariente, J., concurring in part).

[11] Incidentally, that alternative is available in Florida. *See* § 922.105(1)–(2), Fla. Stat. *See also Jones v. State*, 701 So. 2d 76, 80 (Fla. 1997) (holding that execution by electrocution does not violate the Eighth Amendment); *Provenzano v. Moore*, 744 So. 2d 413 (Fla. 1999) (same); *Bucklew v. Precythe*, 587 U.S. 119, 141 (2019) (acknowledging that execution by electrocution has never been held unconstitutional by the United States Supreme Court).

on both prongs of the *Baze-Glossip* test. (WPCR:452–56.)

In finding this claim untimely, the circuit court relied on this Court's settled caselaw holding method-of-execution claims, even when the underlying disease is progressive, do not automatically ripen upon a death warrant's issuance. (WPCR:452.) The court found Lukehart failed to allege "his kidney condition has recently deteriorated past the theoretical threshold that would render Florida's lethal injection protocol unconstitutional as applied to him." (WPCR:452.)

The court then found this claim legally insufficient. (WPCR:451.) Lukehart's allegations failed to establish a "sure or very likely" risk of needless suffering because they were all "contingent, speculative, and conclusory." (WPCR:453.) They also failed to overcome "the well-established fact that the administration of etomidate will render him unconscious throughout the execution." (WPCR:454.) And Lukehart had "not even attempted" to allege an alternative method of execution as required by *Baze-Glossip*'s second prong. (WPCR:455) ("It is insufficient to point out the fact that other states carry out executions differently.").

In footnotes, the court dismissed Lukehart's allergy concerns and conclusory allegations about expired etomidate. (WPCR:453–54 n.2, n.3.)

Untimely

The circuit court properly summarily denied Lukehart's as-applied method-of-execution claim as untimely. (WPCR:452, 455.) Both facial and as-applied method-of-execution challenges generally ripen long before the Governor signs a death warrant. *E.g., Randolph v. State*, 422 So. 3d 166, 172 (Fla. 2025) (collecting cases); *Rogers v. State*, 409 So. 3d 1257, 1267 (Fla. 2025); *Ferguson v. State*, 101 So. 3d 362, 365 (Fla. 2012).

As with all successive postconviction claims that ripen before a warrant issues, Lukehart must show one of the exceptions in Florida Rule of Criminal Procedure 3.851(d)(2) applies to his as-applied challenge for it to be timely. *See Knight v. State*, No. SC2026-0718, 2026 WL 1361316, at *7 (Fla. May 15, 2026). "It is incumbent upon the defendant to establish the timeliness of a successive postconviction claim." *Sparre v. State*, 391 So. 3d 404, 406 (Fla. 2024). At the pleading phase, the allegations must demonstrate the claim is timely or summary denial is proper. *Id.*

The timeliness exception in Florida Rule of Criminal Procedure 3.851(d)(2)(A) requires Lukehart to show that he filed the claim within a year of when "the facts on which the claim is predicated" became discoverable through due diligence. *Bates v. State*, 416 So. 3d 312, 319 (Fla. 2025). But Florida's current lethal-injection protocol "has remained essentially unchanged since 2017." *Randolph*, 422 So. 3d at 172 (holding an as-applied, method-of-execution claim untimely because both the protocol and medical conditions existed years before the death warrant).

That means Lukehart must show something changed in the past year that rendered Florida's lethal-injection protocol unconstitutional under the Eighth Amendment as applied to him. *See Bates*, 416 So. 3d at 319. Because he failed to do so, this Court should affirm the summary denial of this untimely claim. *See, e.g., Cole v. State*, 392 So. 3d 1054, 1064 & n.17 (Fla. 2024).

Lukehart failed to establish timeliness. His complaints about increased etomidate-induced burning because of his declining kidney function are little more than a disguised facial challenge to the use and effectiveness of etomidate. His decreased kidney function is not a new factual predicate—it matters only if etomidate

fails to render him unconscious and insensate for the duration of his execution. But likely within a minute, the etomidate dosage required by Florida's protocol will render him unconscious and insensate for thirty minutes. *See Rogers*, 409 So. 3d at 1268; *Long v. State*, 271 So. 3d 938, 944 (Fla. 2019). This claim is therefore nothing more than a disguised and untimely facial challenge to the use and effectiveness of etomidate. It falls outside Rule 3.851(d)(2)(A) and therefore this Court should affirm.

But even if Lukehart's decreased kidney function could be a new factual predicate, he failed to meet his timeliness burden. Lukehart alleged poor health and that his "chronic" kidney disease has caused decreased kidney function over time. (WPCR:347.) He did not attempt to show that his medical condition recently deteriorated to the point that Florida's protocol became unconstitutional as applied to him within the past year.

Asserting his kidney condition became "severe" in January 2026 does not allege Florida's method-of-execution only became unconstitutional as applied to him then. Lukehart never said how many passes through his lungs etomidate would take in his current condition as opposed to his condition in April 2025. He also did not

say how many passes would violate the Eighth Amendment and cause, in his view, his method-of-execution claim to accrue. Without that information, Lukehart cannot show timeliness. *See Damren v. State*, 397 So. 3d 607, 613 (Fla. 2023) ("Without credibly offering the date on which his claims became discoverable, Damren has failed to establish that they were timely.").

The portion of this claim relating to Lukehart's alleged allergy is also untimely. Lukehart never alleged when he became allergic to the drug DOC gives condemned inmates the option of receiving to ease their anxiety. Since method-of-execution claims do not automatically ripen upon the signing of a death warrant, the lack of any allegations on that front require finding this claim untimely. *See id.*

This Court should therefore affirm the summary denial on untimeliness grounds.

Procedurally Barred

Lukehart's as-applied challenge is also procedurally barred. Florida imposes a strict procedural bar to all claims that could have

been raised before a warrant issued.[12] *See Rogers v. State*, 409 So. 3d 1257, 1263 & n.7 (Fla. 2025). "In an active warrant case, a postconviction claim that could have been raised in a prior proceeding is procedurally barred." *Id.* (holding a claim asserting a post-warrant motion to withdraw should have been granted was barred where the attorneys could have sought withdrawal pre-warrant despite the defendant having "no pending state court litigation" during the relevant timeframe). This bar applies even if the claim itself would otherwise be timely. *See id.* at 1263 & n.7.

Lukehart could have raised this as-applied challenge pre-warrant. Florida's protocol has remained unchanged since 2017, and he alleged his "chronic" kidney disease caused "some diminished kidney values starting in 2023." (WPCR:347, 349.) He then alleged his kidney numbers "became severe" in January 2026, and his "severe kidney disease" made him collapse around January

[12] The State did not raise this procedural bar below but may do so for the first time on appeal because it prevailed in the circuit court. *See Sexton v. State*, 221 So. 3d 547, 555 (Fla. 2017) (explaining the "tipsy coachman" doctrine); *Cohen v. Mohawk, Inc.*, 137 So. 2d 222, 225 (Fla. 1962) (holding appellate courts are obligated to affirm "if upon the pleadings and evidence before the trial court, there was *any* theory or principle of law which would support the trial court's judgment") (emphasis in original).

24, 2026. (WPCR:349.)

These allegations demonstrate Lukehart could have filed this challenge before his death warrant issued. Lukehart has been aware since at least 2023 of his declining kidney function and acknowledges it became severe in January 2026. But the Governor did not sign his death warrant until May 1, 2026. Lukehart thus had every opportunity to raise this claim before his death warrant issued. *See Walls v. Sec'y, Dep't of Corr.*, 161 F.4th 1281, 1285 (11th Cir. 2025) (finding a defendant unduly delayed by filing suit four months after he said his as-applied challenge accrued and only after his death warrant issued). As this "as-applied" claim could have been raised at least months before a warrant, it is barred now even if it would otherwise be timely. *See Rogers*, 409 So. 3d at 1263 & n.7; *cf. Walls*, 161 F.4th at 1286 (refusing to grant a stay even if the claim was timely under the statute of limitations).

The State's interest in enforcement of a death sentence and victims' right to prompt finality support this Court's strict bar.[13] *See Calderon v. Thompson*, 523 U.S. 538, 556–58 (1998); Art. I, § 16(b)(10), Fla. Const. These rights and interests reach their zenith after decades of litigation when the State has marshaled its resources and set an execution date. *See Bucklew v. Precythe*, 587 U.S. 119, 150 (2019); Art. I, § 16(b)(10)b, Fla. Const. (providing, just after giving victims rights against unreasonable delay and to prompt finality, that all collateral attacks in capital cases should conclude within "five years from the date of" direct appeal unless the court issues an order explaining the delay).

It is no answer to say Lukehart could not predict when his warrant would be signed. *Cf. Abbott v. League of United Latin Am. Citizens*, No. 25A608, 2025 WL 3484863, at *1 (U.S. Dec. 4, 2025) (invoking the caution federal courts should not intervene close to an election over a dissent that argued the Texas Legislature bore any

[13] *See also Spenkelink v. Wainwright*, 372 So. 2d 927, 927 (Fla. 1979) (Alderman, J., concurring specially) (noting the "questionable practice of waiting until a death warrant is signed by the governor to file petitions raising matters which could have been brought to the Court's attention months or even years before the warrant is signed" and opining doing so "is an abuse of the judicial process").

fault for altering an election map close to an election). "Warrant-eligible"[14] capital defendants cannot wait to file their successive claims at the last possible moment—a full year after the facts undergirding the claim become discoverable—under *Rogers*. They must instead act swiftly or risk having their claim barred by the death warrant's issuance. *Cf. Walls*, 161 F.4th at 1286 (denying a stay even if the claim would have been timely).

Since Lukehart could have raised this as-applied challenge in the months or years preceding his death warrant, it is barred now. *See Rogers*, 409 So. 3d at 1263 & n.7. This Court should affirm the circuit court's summary denial of this procedurally barred claim.

Legally Insufficient

Lukehart did not raise a legally sufficient "as-applied" Eighth Amendment method-of-execution claim on either prong of the *Baze-Glossip* test. The Eighth Amendment prohibits "cruel and unusual

[14] *See Jones v. State*, 419 So. 3d 619, 626 (Fla. 2025) (defining "warrant-eligible" as those defendants for whom the Governor can sign a warrant at any time after they complete direct appeal, initial state postconviction, and initial federal review).

punishment." U.S. Const. amend. VIII.[15] In Florida, "the Eighth Amendment is both the floor and the ceiling for protection from cruel and unusual punishment." *Barwick v. State*, 361 So. 3d 785, 794 (Fla. 2023). This Court lacks authority to extend Eighth Amendment jurisprudence beyond the Supreme Court's limits. *Gudinas v. State*, 412 So. 3d 701, 713 (Fla. 2025).

"The Eighth Amendment does not guarantee a prisoner a painless death—something that, of course, isn't guaranteed to many people, including most victims of capital crimes." *Bucklew v. Precythe*, 587 U.S. 119, 132–33 (2019). "Simply because an execution method *may* result in pain, either by accident or as an inescapable consequence of death, does not establish" cruel and unusual punishment. *Baze v. Rees*, 553 U.S. 35, 50 (2008) (plurality opinion) (emphasis added).

An Eighth Amendment method-of-execution claim requires the condemned 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

[15] The Fourteenth Amendment's Due Process Clause incorporates this prohibition against the States. *E.g., Jones v. Mississippi*, 593 U.S. 98, 105 (2021).

available alternative method of execution that entails a significantly less severe risk of pain." *Randolph v. State*, 422 So. 3d 166, 173 (Fla. 2025); *Bucklew*, 587 U.S. at 134, 140 ("All Eighth Amendment method-of-execution claims" must "meet the *Baze-Glossip* test").

Both before and after a death warrant, method-of-execution claims must allege legally sufficient facts meeting both prongs of the *Baze-Glossip* test to—procedural hurdles aside—obtain an evidentiary hearing. *See Randolph*, 422 So. 3d at 173; *Cole v. State*, 392 So. 3d 1054, 1061, 1064–65 (Fla. 2024). If a defendant fails to provide sufficient allegations, accepted as true, to show he can prevail on *both* prongs of the test, the method-of-execution claim should be summarily denied. *See Randolph*, 422 So. 3d at 173. That remains true even if the allegations make a facially valid showing on one prong but not the other. *See id.*

Lukehart's allegations below did not establish a legally sufficient claim on either prong of the *Baze-Glossip* test.

A. Lukehart's Allegations Failed to Establish a Very Likely Risk of Needless Suffering.

Lukehart's allegations did not facially establish the requisite level of risk or pain. The first prong of the *Baze-Glossip* test places

the burden on the capital defendant to show a risk that is "*sure or very likely* to cause serious illness and needless suffering." *See Glossip v. Gross*, 576 U.S. 863, 877 (2015) (emphasis in original). There "must be a substantial risk of serious harm, an objectively intolerable risk of harm that prevents prison officials from pleading that they were subjectively blameless for purposes of the Eighth Amendment." *Id.* Speculation does not demonstrate the requisite level of risk. *Brewer v. Landrigan*, 562 U.S. 996, 996 (2010).

Instead, the condemned must show "a virtual certainty" he will experience an unconstitutional level of pain and cannot shift his burden to the State. *Heath v. State*, 426 So. 3d 1253, 1262 (Fla. 2026); *Glossip*, 576 U.S. at 884 (holding "the party contending that this method violates the Eighth Amendment bears the burden of showing that the method creates an unacceptable risk of pain," and by shifting the burden the defendants "effectively conceded that they lacked evidence to prove their case beyond dispute"); *In re Ohio Execution Protocol*, 860 F.3d 881, 887 (6th Cir. 2017).

The alleged pain must be "severe" to violate the Eighth Amendment. *Bucklew*, 587 U.S. at 132–33, 136, 138, 150 & n.4. And the condemned must actually subjectively experience that

severe pain for it to matter. *In re Ohio Execution Protocol*, 946 F.3d 287, 290 (6th Cir. 2019) ("It is immaterial whether the inmate will experience *some* pain" the "question is whether the level of pain the inmate subjectively experiences is constitutionally excessive."). Even severe pain does not count if the prisoner is "fully insensate" to it rather than awake to experience it. *See Barr v. Lee*, 591 U.S. 979, 981 (2020); *Glossip v. Gross*, 576 U.S. 863, 888 (2015); *Howell v. State*, 133 So. 3d 511, 521–22 (Fla. 2014).

Applying these well-settled rules, Lukehart's allegations did not come close to showing a very likely risk of needless suffering. First and most obviously, Lukehart's allegations failed to show he would subjectively experience any pain given the well-established effect of etomidate. Florida's protocol requires enough etomidate to render the condemned "unconscious and insensate" for "at least 30 minutes." *Long v. State*, 271 So. 3d 938, 944 (Fla. 2019).[16] And

[16] Dr. Zivot suggested "in as little as 3 minutes after etomidate injection, rapid redistribution of the drug within the circulation will allow a return to consciousness." (WPCR:354, 377.) But this Court has expressly held that "disagreement among experts about the risks associated with etomidate" no longer provides grounds for an evidentiary hearing given its prior approval of the current protocol. *Long*, 271 So. 3d at 946. Dr. Zivot also seems to rely on an average dose of etomidate rather than the massive dose Florida's protocol

etomidate works fast, likely rendering the condemned unconscious and insensate "within one minute." *See Rogers v. State*, 409 So. 3d 1257, 1268 (Fla. 2025).

Florida also employs consciousness checks to ensure the condemned is unconscious before the execution proceeds. *See Valle v. Singer*, 655 F.3d 1223, 1233 (11th Cir. 2011) (Under Florida's protocol, a consciousness check is required and "the execution cannot proceed until the individual is rendered unconscious.").[17]

None of Lukehart's allegations overcome the well-established effectiveness of etomidate or Florida's use of consciousness checks. *See Schwab v. State*, 995 So. 2d 922, 929 (Fla. 2008) ("The constitutional focus is unconsciousness, not the duration of the execution following unconsciousness."); *Baze*, 553 U.S. at 64 (Alito,

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calls for. *See Asay v. State*, 224 So. 3d 695, 701 (Fla. 2017) (explaining etomidate's "duration of hypnosis is dose dependent but relatively brief, usually three to five minutes when an average dose of 0.3mg/kg is employed"); WPCR:391–92 (Florida's protocol requires 200 milligrams of etomidate across two injections).

[17] *See also Howell*, 133 So. 3d at 522 (noting that a consciousness check, which included a painful pinch of the trapezius, would "ensure that Howell is unable to perceive any noxious stimuli"); *Glossip*, 576 U.S. at 877–78 (explaining the Supreme Court upheld a protocol even without a "consciousness check"); *Baze*, 553 U.S. at 120 (Ginsburg, J., dissenting) (praising Florida's consciousness checks).

J., concurring) ("The first step in" these "lethal injection protocols" is "the anesthetization of the prisoner. If this step is carried out properly," the "prisoner will not experience pain during the remainder of the procedure."). Any burning sensation he would otherwise feel is irrelevant since he will likely be unconscious and insensate, for at least thirty minutes, a minute after the etomidate injections. *See Rogers*, 409 So. 3d at 1268; *Long*, 271 So. 3d at 944.

Indeed, Lukehart's own allegations suggest etomidate will be more effective in his case rather than less. His "reduced kidney function" means the etomidate "may not be eliminated as quickly" from his system. (WPCR:349.) That would logically leave him unconscious and insensate for longer than a normal condemned inmate. *Cf. Bucklew*, 587 U.S. at 148 (finding Dr. Zivot's analysis unpersuasive because he failed "to specify how long Mr. Bucklew is likely to be able to feel pain").

This Court has repeatedly affirmed summary denial of method-of-execution challenges based on the proven effectiveness of etomidate and the fact that the execution cannot proceed until the

condemned is unconscious.[18] This case is no different.

But even if Lukehart cleared the etomidate hurdle, he still could not prevail. As the circuit court found, his allegations were speculative. He alleged his kidney disease "may" cause the drugs in Florida's protocol to rise higher in his bloodstream, "may" cause slower elimination of etomidate from his system, and that there was a "potential for an exaggerated negative consequence to his heart and lungs." (WPCR:349.) Mays and potentials do not show a sure or very likely risk of needless suffering. *See Brewer*, 562 U.S. at 996. *See also Johnson v. Lombardi*, 809 F.3d 388, 391 (8th Cir. 2015) (finding the "attached affidavit of Dr. Joel Zivot fails to show a likelihood of success under the Eighth Amendment standard" because he speculated and equivocated).

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[18] *E.g., King v. State*, No. SC2026-0336, 2026 WL 672101, at *5 (Fla. Mar. 10, 2026) ("Even positing King's speculation that the records support the inference that other inmates received varying doses of rocuronium and potassium acetate, those drugs are administered after the inmate has been rendered unconscious by etomidate."); *Rogers*, 409 So. 3d at 1268 ("Rogers does not explain how his speculative porphyria attack overcomes the well-established fact that the administration of etomidate will render him unconscious likely within one minute."); *Cole*, 392 So. 3d at 1065 (recognizing the current "protocol includes safeguards to ensure the condemned is unconscious throughout the execution").

Lukehart's vague allegations of a "burning" sensation also failed to show an unconstitutional level of pain. Since the Eighth Amendment does not guarantee a painless death, Lukehart had to show he would experience "severe" pain that constitutes cruel and unusual punishment, not just "some pain." *In re Ohio Execution Protocol*, 946 F.3d 287, 290 (6th Cir. 2019). None of his non-conclusory allegations in this claim suggested anything other than some pain. The Eighth Amendment requires more. *See id.*

Lukehart's challenge to being offered "the option of hydroxyzine prior to the establishment of intravenous access to reduce anxiety" fails on a similar analysis. He speculated about whether he was actually allergic to the drug and failed to show any allergic reaction would cause an unconstitutional level of pain.

In any event, a defendant's alleged allergy to an optional drug he can refuse provides no basis for an Eighth Amendment challenge. *See Stewart v. LaGrand*, 526 U.S. 115, 119 (1999) (holding a defendant waived any challenge to a method of execution that he chose). If Lukehart chooses to take the drug, he waives any objection he might otherwise have to it. *See id.* And if he chooses not to take the drug, there is no issue at all.

In short, nothing in Lukehart's first claim showed he was sure or very likely to suffer an unconstitutional level of pain because of Florida's protocol as applied to him. This Court should therefore affirm the summary denial on *Baze-Glossip*'s first prong.

B. Lukehart Did Not Identify a Readily Implementable Alternative Method of Execution that Significantly Reduced the Risk of Severe Pain.

As the circuit court found, Lukehart effectively refused to provide the alternative execution method *Baze-Glossip*'s second prong requires. (WPCR:350–52, 455.) His "as-applied" method-of-execution claim cannot survive summary denial without those allegations, providing this Court a straightforward ground for affirmance.[19] *See Randolph*, 422 So. 3d at 173; *Correll v. State*, 184 So. 3d 478, 489 (Fla. 2015) (explaining the conformity clause binds this Court to the alternative-method requirement).

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[19] *See also Bucklew*, 587 U.S. at 141 (holding "a bare-bones proposal" does not meet *Baze-Glossip*'s second prong); *Heath v. State*, 426 So. 3d 1253, 1262 (Fla. 2026) (affirming summary denial where the condemned "failed to make even a bare allegation that this method would be feasible or readily implemented, and he offered only a single unelaborated assertion that a firing squad would entail less risk of error and severe pain"); *Johnson v. Lombardi*, 809 F.3d 388, 391 (8th Cir. 2015) (holding a "threadbare assertion that lethal gas is legally available in Missouri is not the same as showing that the method is a feasible or readily implementable alternative method of execution").

Baze-Glossip's second prong requires the condemned to provide an alternative execution method that is "feasible, readily implemented, and in fact significantly reduces a substantial risk of severe pain." *Glossip*, 576 U.S. at 877 (cleaned up). *See also Nance v. Ward*, 597 U.S. 159, 169 (2022) (Supreme Court precedent compels prisoners "bringing a method-of-execution claim to propose an alternative way for the State to carry out his death sentence."). "The inmate's proposal must be sufficiently detailed to permit a finding that the State could carry it out relatively easily and reasonably quickly." *Bucklew*, 587 U.S. at 141.

The Supreme Court has confirmed and reconfirmed that anyone bringing an Eighth Amendment method-of-execution claim alleging the infliction of unconstitutionally cruel pain must identify "an alternative method of execution." *See Bucklew*, 587 U.S. at 136, 140, 149 ("*Glossip* expressly held that identifying an available alternative is a requirement of *all* Eighth Amendment method-of-execution claims alleging cruel pain.") (emphasis in original).

The Court also explained why. "Distinguishing between constitutionally permissible and impermissible degrees of pain, *Baze* and *Glossip* explained, is a *necessarily* comparative exercise."

Id. at 136 (emphasis in original). Deciding "whether the State has cruelly superadded pain to the punishment of death isn't something that can be accomplished by examining the State's proposed method in a vacuum, but only by comparing that method with a viable alternative." *Id.*

Rather than a rule created by judicial fiat, "the original and historical understanding of the Eighth Amendment" requires an alternative method to compare the State's method with. *Id.* The common law understood ancient and barbaric methods of execution as cruel "precisely because—by comparison to other available methods—they went so far beyond what was needed to carry out a death sentence that they could only be explained as reflecting the infliction of pain for pain's sake." *Id.* at 137. By contrast, the main method of execution at the founding, "hanging, carried with it an acknowledged and substantial risk of pain but was not considered cruel because that risk was thought—by comparison to other known methods—to involve no more pain than was reasonably necessary to impose a lawful death sentence." *Id.*

The alternative-method requirement thus provides a necessary component of answering whether a state's method is cruel and unusual. *See id.* ("To determine whether the State is cruelly superadding pain, our precedents and history require asking whether the State had some other feasible and readily available method to carry out its lawful sentence that would have significantly reduced a substantial risk of pain.").

Far from placing an "impossible burden," on condemned inmates, the alternative-method requirement is "necessary to conform to the Eighth Amendment. Unless an alternative is feasible and readily implemented in the sense described, the State has a legitimate penological justification for adhering to its current method of execution in order to carry out lawful sentences." *McGehee v. Hutchinson*, 854 F.3d 488, 493 (8th Cir. 2017).

Lukehart did not provide a "sufficiently detailed" proposal showing the State could "relatively easily and reasonably quickly" execute him in a way that "would significantly reduce a substantial risk of severe pain." *See Bucklew*, 587 U.S. at 141, 143. Vaguely pointing to other lethal-injection protocols, electrocution, and lethal gas, is not enough. *Compare Bucklew*, 587 U.S. at 141 (holding "a

bare-bones proposal falls well short"), *with* WPCR:351–52.

This Court should therefore affirm the summary denial of this claim on the second prong of the *Baze-Glossip* test.

C. Lukehart's Eighth Amendment Analysis Objections.

The analysis above provides more than enough to affirm the summary denial of Lukehart's first post-warrant claim. But his various objections to the *Baze-Glossip* test are worth considering for future cases and because they elide an obvious problem—if not *Baze-Glossip*, then what does the Eighth Amendment require?

First things first. Below, Lukehart protested *Baze-Glossip*'s second prong as a violation of five different federal constitutional provisions.[20] The Fifth, Sixth, and Eighth Amendment challenges can be easily dispensed with. Fifth Amendment due process only applies to the federal government. *E.g., Betts v. Brady*, 316 U.S. 455, 462 (1942); *Douglass v. Nippon Yusen Kabushiki Kaisha*, 46 F.4th 226, 236 (5th Cir. 2022) (en banc). The Sixth Amendment has no arguable application to a postconviction claim. *See* U.S. Const.

[20] Those rights were: (1) the free exercise clause of the First Amendment; (2) the due process clause of the Fifth Amendment; (3) some unidentified provision of the Sixth Amendment; (4) the Eighth Amendment; and (5) the due process clause of the Fourteenth Amendment. (WPCR:350.)

amend. VI. (providing seven express rights "in criminal prosecutions"). And the Eighth Amendment, as authoritatively construed by the Supreme Court, cannot conflict with itself. *See Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 164 (1803).

That cursory analysis leaves the First and Fourteenth Amendment objections to *Baze-Glossip* remaining. Neither gets Lukehart very far. The First Amendment to the United States Constitution provides: "*Congress* shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. Const. amend. I (emphasis added). The First and Eighth Amendments were ratified by the States together in 1791. *See Bute v. Illinois*, 333 U.S. 640, 650 (1948). Both have since been incorporated against the States through the Fourteenth Amendment's due process clause.

The co-ratification of these amendments puts Lukehart's attempt to pit them against each other on shaky ground. Since the original understanding of the Eighth Amendment required an alternative method for comparison, *Bucklew*, 587 U.S. at 136, the Framers understood that requirement to coexist with the First Amendment's guarantees. Nor is it evident that the First

Amendment would prevail over the Eighth Amendment if there is a conflict between the two.

But the text of the First Amendment reveals no tension with the Eighth. *See Jones v. Crow*, No. 21-6139, 2021 WL 5277462, at *8 (10th Cir. Nov. 12, 2021) (emphasizing the First Amendment is a prohibition on legislative action while rejecting a free-exercise challenge to *Baze-Glossip*'s alternative-method requirement). Nothing in the First Amendment's text suggests it operates to limit the analytical framework undergirding a co-equal provision of the Federal Constitution. *See id.* (explaining the Eighth Amendment is a neutral law of general applicability that would not offend the First).

Even if tension existed, however, that would not help Lukehart. When two constitutional rights cannot be exercised at the same time, the defendant must choose between the two. That occurs all the time in the Sixth Amendment context. *See Koon v. Rushton*, 364 F. App'x 22, 27 (4th Cir. 2010) (explaining "the right to self-representation and the right to representation by counsel, while independent, are essentially inverse aspects of the Sixth Amendment and" so the "assertion of one constitutes a de facto waiver of the other").

If Lukehart cannot exercise both his First and Eighth Amendment rights simultaneously—a position the State doubts but need not dispute here—then he must pick which one to exercise and forgo the other. *See id.* That provides him with no escape from the alternative-method requirement.

Nor does the Fourteenth Amendment's right to due process. Since the Eighth Amendment's prohibition only applies to the States through the Fourteenth Amendment's due process clause, there can hardly be any conflict between the two. *Cruz v. State*, 372 So. 3d 1237, 1245 (Fla. 2023) (explaining incorporation means the "prohibition on cruel and unusual punishments [] is a particular aspect of due process").

Condemned inmates cannot invoke the Swiss Army Knife of constitutional law when an explicit provision governs a claim. Because the Eighth Amendment "provides an explicit textual source of constitutional protection against" cruel and unusual punishment, "that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these

claims." *See Graham v. Connor*, 490 U.S. 386, 395 (1989).[21]

For all these reasons, the First and Fourteenth Amendments provide Lukehart no escape from providing an alternative method of execution as the Eighth Amendment requires. But his objections, perhaps, illuminate that method-of-execution jurisprudence should be far simpler. Rather than trying to determine the likelihood of harm, courts evaluating these claims should ask a simple question: in crafting its execution method, did the State intend to inflict an unconstitutional level of pain? *See Bucklew*, 587 U.S. at 135.

Justices Thomas and Scalia persuasively took that position in *Baze*. 553 U.S. at 94–107 (Thomas, J., concurring in the judgment with Scalia, J.). *See also Glossip*, 576 U.S. 863, 899–900 (Thomas, J., concurring with Scalia, J.) (explaining the Eighth Amendment, properly understood, "prohibits only those methods of execution" that are "deliberately designed to inflict pain"); *Bucklew*, 587 U.S. at 151–52 (Thomas, J., concurring) ("Because there is no evidence that

[21] *See also Sattazahn v. Pennsylvania*, 537 U.S. 101, 116 (2003) (declining the "invitation to hold that the Due Process Clause provides greater double-jeopardy protection than does the Double Jeopardy Clause"); *County of Sacramento v. Lewis,* 523 U.S. 833, 843 (1998) (same idea); *United States v. Lanier*, 520 U.S. 259, 272 n.7 (1997) (same idea).

Missouri designed its protocol to inflict pain on anyone, let alone Russell Bucklew, I would end the inquiry there."). That view of the Eighth Amendment vitiates Lukehart's concerns about comparing levels of pain or providing alternative methods.

Lukehart's refusal to provide an alternative method means the only arguable way he can show an Eighth Amendment violation is by showing Florida's designed its protocol to cause him unconstitutional levels of pain. But Florida, like other jurisdictions with capital punishment, adopted its current protocol to provide the condemned "a humane and dignified death." (WPCR:382.) "Far from seeking to superadd terror, pain, or disgrace to their executions, the States have often sought more nearly the opposite." *Bucklew*, 587 U.S. at 133. Under any valid standard, there is no facial Eighth Amendment violation here. This Court should therefore affirm the summary denial of this claim.

2. THE POSTCONVICTION COURT CORRECTLY SUMMARILY DENIED LUKEHART'S FACIAL CHALLENGE TO FLORIDA'S LONGSTANDING LETHAL-INJECTION PROTOCOL.

Lukehart next contests the lower court's summary denial of his facial[22] challenge to Florida's long-upheld lethal-injection protocol, which has remained materially unchanged since 2017. This claim is untimely, procedurally barred, and legally insufficient on both prongs of the *Baze-Glossip* test.

Relevant Facts

A. Lukehart's Prior Method-of-Execution Challenges.

Lukehart raised three method-of-execution challenges across his initial postconviction motion and habeas petition. *Lukehart v. State*, 70 So. 3d 503, 524–25 (Fla. 2011) (discussing a facial postconviction challenge to Florida's lethal-injection protocol, a habeas claim raising the same facial challenge, and another habeas claim asserting the use of a paralytic would render him "unable to communicate any feeling of pain that may result if the execution is

[22] A facial challenge attacks a method of execution protocol itself as written and without considering the defendant's personal characteristics or specific implementation. *See Bucklew v. Precythe*, 587 U.S. 119, 138 (2019) ("A facial challenge is really just a claim that the law or policy at issue is unconstitutional in *all* its applications.") (emphasis added).

improperly performed"). This Court rejected the first and third claims on the merits and held the second barred as duplicative. *Id.*

B. The Litigation History of Florida's Etomidate Protocol

Florida adopted etomidate as the first drug in its lethal-injection protocol in January 2017. *Long v. Sec'y, Dep't of Corr.*, 924 F.3d 1171, 1179 (11th Cir. 2019). During an active death warrant, the circuit court held a full evidentiary hearing to determine whether "the State's adoption of etomidate as the first drug in the lethal injection protocol" placed the defendant at "substantial risk of serious harm in violation of the Eighth Amendment." *See Asay v. State*, 224 So. 3d 695, 699, 701 (Fla. 2017). "Four expert witnesses testified at the evidentiary hearing held on this issue." *Id.* at 701.

> Etomidate is a hypnotic drug without analgesic activity. Intravenous injection of etomidate produces hypnosis characterized by a rapid onset of action, usually within one minute. *Duration of hypnosis is dose dependent* but relatively brief, *usually three to five minutes when an average dose of 0.3mg/kg is employed*.

Id. (quoting drug insert; emphasis added). Florida's current protocol calls for the condemned to receive *200 milligrams of etomidate* before the team warden assesses the condemned for consciousness. (WPCR:391–92) (Florida's current protocol as attached by Lukehart)

(emphasis added).[23]

> The most frequent adverse reactions associated with use of intravenous etomidate are transient venous pain on injection and transient skeletal movements, including myoclonus.
>
> . . .
>
> Transient venous pain was observed immediately following intravenous injection of etomidate in about 20% of the patients, with considerable difference in the reported incidence (1.2% to 42%). This pain is usually described as mild to moderate in severity but it is occasionally judged disturbing. The observation of venous pain is not associated with a more than usual incidence of thrombosis or thrombophlebitis at the injection site. Pain also appears to be less frequently noted when larger, more proximal arm veins are employed and it appears to be more frequently noted when smaller, more distal, hand or wrist veins are employed.

Asay, 224 So. 3d at 701. (quoting drug insert). Both the State and defense anesthesiologists agreed "most patients do not experience pain" from etomidate. *Id.*

Considering this evidence, this Court upheld the etomidate protocol against facial challenge under the *Baze-Glossip* test. *Id.* at

[23] Putting these numbers in perspective and rounding up, a 400-pound individual weighs 182 kilograms. At a rate of 0.3 milligrams per kilogram, this individual requires 55 milligrams of etomidate to cause the three to five minutes of hypnosis discussed in the insert. But Florida's protocol almost quadruples the dosage discussed in the insert for even this 400-pound individual.

700–02. And, citing *Asay*, this Court affirmed summary denial of two more post-warrant facial challenges to the etomidate protocol in 2017 and 2018. *Hannon v. State*, 228 So. 3d 505, 508–09, 511 (Fla. 2017); *Jimenez v. State*, 265 So. 3d 462, 474–75 (Fla. 2018).

Then, again during an active death warrant, a circuit court granted an evidentiary hearing on an as-applied challenge to the etomidate protocol in 2019. *Long v. State*, 271 So. 3d 938, 943 (Fla. 2019). The defendant there asserted "his traumatic brain injury and temporal lobe epilepsy render the use of etomidate in his execution unconstitutional under the Eighth Amendment." *Id.*

But the circuit court instead found "that the massive dose of 200 milligrams of etomidate would produce such a deep state of burst suppression and unconsciousness that it would eliminate any possible seizure activity, and render a person—even someone with traumatic brain injury and/or temporal lobe epilepsy—unaware of noxious stimuli." *Id.* at 944. Even if the defendant had a seizure, he would be "*unconscious and insensate*" because "*200 milligrams of etomidate would render a person unconscious for at least 30 minutes*." *Id.* (emphasis added).

This Court affirmed the as-applied challenge in *Long*—along with two summarily denied general challenges to the protocol and use of etomidate—and upheld the etomidate protocol once again under the *Baze-Glossip* test. *Id.* at 943–46. Since then, this Court has affirmed the summary denial of every challenge to the etomidate protocol.[24] Florida's current lethal-injection protocol "has remained essentially unchanged since 2017." *Randolph*, 422 So. 3d at 172.

C. Post-Warrant Facial Challenge

The second claim in Lukehart's post-warrant motion asserted a facial challenge to Florida's use of etomidate (a hypnotic) and rocuronium bromide (a paralytic) as the first two drugs in its three-drug, lethal-injection protocol. (WPCR:353–56.) He recognized "the objective of the first drug, etomidate, is to induce a level of unconsciousness that achieves and maintains a surgical plan of anesthesia, i.e., one that renders a person insensate to the pain of

[24] *See King v. State*, No. SC2026-0336, 2026 WL 672101, at *4–6 (Fla. Mar. 10, 2026); *Trotter v. State*, 428 So. 3d 68, 73 (Fla. 2026); *Heath v. State*, 426 So. 3d 1253, 1261 (Fla. 2026); *Randolph v. State*, 422 So. 3d 166, 172 (Fla. 2025); *Rogers v. State*, 409 So. 3d 1257, 1266–69 (Fla. 2025); *Tanzi v. State*, 407 So. 3d 385, 392–93 (Fla. 2025); *Cole v. State*, 392 So. 3d 1054, 1064 (Fla. 2024).

the second and third drugs," rocuronium bromide and potassium acetate respectively. (WPCR:353.)

Lukehart alleged the final two drugs in Florida's three-drug protocol cause a painful death *if* the inmate is not "fully anesthetized" beforehand. (WPCR:354.) According to him, "a *conscious* person under the influence of rocuronium bromide would experience the sensation of death by drowning but be unable to communicate this. An inmate *not fully anesthetized before the rocuronium bromide takes effect* would suffer a lingering and torturous death." (WPCR:354 (emphasis added).) Likewise, "potassium acetate causes excruciating pain and suffering if administered to a condemned prisoner *who is not sufficiently anesthetized*. As potassium acetate travels through the bloodstream from the injection site towards the heart, the chemical activates sensory nerve fibers inside the veins, causing a prolonged and intense burning sensation." (WPCR:345.)

Dr. Zivot reviewed Florida's protocol and claimed etomidate would allow the condemned to return to consciousness "in as little as 3 minutes" because of "rapid redistribution of the drug." (WPCR:354.) In a conclusory sentence, Lukehart and Dr. Zivot

expressed concern that three recent executions "potentially" involved expired etomidate and "awareness of dying by suffocation occurred more than 20% of the time." (WPCR:354–55, 377.)

Lukehart relied on the arguments in his first claim to fulfill the *Baze-Glossip* test's requirement for an alternative method of execution. (WPCR:356.)

Ruling Below

The circuit court summarily denied Lukehart's facial challenge to Florida's lethal-injection protocol as untimely and legally insufficient on both prongs of the *Baze-Glossip* test. (WPCR:454–55.) The court further explained Lukehart's single-sentence reference to the possibility of expired etomidate failed to either pierce the presumption the Florida Department of Corrections follows its protocol or show a valid method-of-execution claim. (WPCR:454–55.)

Untimely

The circuit court correctly summarily denied Lukehart's facial method-of-execution challenge to Florida's longstanding three-drug protocol as untimely. (WPCR:454.)

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. *See Davis v. State*, 417 So. 3d 242, 247 (Fla. 2025) (citing Fla. R. Crim. P. 3.851(d)(2), (e)(2)). A narrow exception to this time limit exists when "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." Fla. R. Crim. P. 3.851(d)(2)(A).

This exception encompasses formerly unripe claims predicated on a factual basis that only recently came into existence. *Cf. Randolph v. State*, 422 So. 3d 166, 172 (Fla. 2025) (finding a claim untimely because "the facts on which this claim is predicated have been available since at least 2017"); *Flores-Ramirez v. Foster*, 811 F.3d 861, 865 (7th Cir. 2016) (explaining claims are genuinely unripe when "the factual predicate that gives rise to the claim has not yet occurred"). If a claim's factual predicate does not yet exist, it definitionally cannot be ascertained through due diligence.

Successive capital claims based on the Rule 3.851(d)(2)(A) exception must be filed within a year of when "the facts on which

the claim is predicated" become ascertainable by "the exercise of due diligence." *Bates v. State*, 416 So. 3d 312, 319 (Fla. 2025) (collecting cases).

Given Lukehart's arguments, the State will address timeliness in two parts: (A) identifying when facial method-of-execution claims ripen and (B) applying that framework to Lukehart's claims.

A. Method-of-Execution Challenges Ripen When the Defendant's Capital Sentence Becomes Final.

Facial method-of-execution challenges are ripe for inclusion in initial postconviction motions. While this Court's firm warrant precedent consistently holds method-of-execution challenges do not ripen upon the signing of a death warrant, Florida caselaw is less clear on exactly when method-of-execution claims become ripe. The Eleventh Circuit correctly identified the ripening dates in *McNair v. Allen*, 515 F.3d 1168, 1174–78 (11th Cir. 2008). This Court should follow suit to alleviate any lingering confusion in Florida on when these challenges must be raised.

i. Florida's Method-of-Execution-Ripeness Caselaw.

This Court's firm warrant precedent disposes of any notion method-of-execution claims only ripen once a death warrant is

signed. *E.g.*, *Rogers v. State*, 409 So. 3d 1257, 1267 (Fla. 2025) (rejecting the argument that an as-applied method-of-execution claim was timely because the defendant "could not know what execution procedures would be in place until his death warrant was signed"); *Tanzi v. State*, 407 So. 3d 385, 392 (Fla. 2025) (holding a claim "that administering Florida's lethal injection protocol" to a defendant "would be unconstitutional due to his present medical conditions" was "untimely"); *Cole v. State*, 392 So. 3d 1054, 1064 & n.17 (Fla. 2024) (holding an as-applied challenge based on Parkinson's disease untimely and noting this Court had long rejected the "argument that a method-of-execution claim is not ripe until a death warrant" issues).

But Florida caselaw inconsistently identifies the date method-of-execution claims ripen. *See Ferguson v. State*, 101 So. 3d 362, 365 (Fla. 2012) (affirming a circuit court finding that a method-of-execution challenge ripened after the Supreme Court denied certiorari review from the denial of 28 U.S.C. § 2254 relief);[25] *Douglas v. State*, 141 So. 3d 107, 127 (Fla. 2012) (citing *Jones v.*

[25] It is not entirely clear whether this Court adopted the circuit court's timing in *Ferguson* since it only noted its agreement the claim was untimely.

State, 928 So. 2d 1178, 1182 n.5 (Fla. 2006) and holding a method-of-execution claim barred because it should have been raised on direct appeal);[26] *Rigterink v. State*, 66 So. 3d 866, 897 (Fla. 2011) (holding a method-of-execution claim unripe on direct appeal).

As a result, while capital defendants cannot wait until after a warrant to pursue method-of-execution challenges that could have been pursued beforehand, it is far less clear exactly when these claims must be raised. No opinion from this Court—at least that the State has uncovered in this expedited timeframe—provides a deep analytical justification for any general ripening date. But the Eleventh Circuit has extensively considered this issue in the context of accrual under a statute of limitations.

ii. The Eleventh Circuit's Analysis in *McNair*.

The Eleventh Circuit held facial challenges to a method of execution accrue "on the later of the date on which state review is complete, or the date on which the capital litigant becomes subject

[26] There is, admittedly, weighty support for the position that method-of-execution challenges are ripe for inclusion on direct-appeal and defaulted if raised later. *See Stewart v. LaGrand*, 526 U.S. 115, 119 (1999) (holding a capital defendant procedurally defaulted his method-of-execution claim because he failed to raise it on direct appeal).

to a new or substantially changed execution protocol." *McNair*, 515 F.3d at 1174.

The court analyzed "four potentially viable dates on which" a method of execution claim could accrue: (1) the day the death sentence finalized on direct review; (2) the day the defendant became subject to a substantially changed protocol; (3) the day denial of his federal challenges to his judgment under 28 U.S.C. § 2254 finalized; and (4) the date of execution. *Id.* at 1173–74. A claim accrues "when the plaintiff has a complete and present cause of action, that is, when the plaintiff can file suit and obtain relief." *Id.* (quoting *Wallace v. Kato*, 549 U.S. 384 (2007)).

On that analysis, "a capital litigant may file suit and obtain injunctive relief long before he is executed." *Id.* The court noted that setting the accrual date after the conclusion of initial 28 U.S.C. § 2254 litigation would vitiate the State's strong interest in enforcing a death sentence after initial state and federal review concluded. *Id.* at 1175–76. That late date also clashed with equitable precedents requiring stay denials in method-of-execution cases based on undue delay. *Id. See also Walls v. Sec'y, Dep't of Corr.*, 161 F.4th 1281, 1285 (11th Cir. 2025) (holding a delay of four

months from assumed accrual to suit constituted undue delay and warranted denying a stay of execution). For those reasons, the court found the conclusion of initial federal review too late an accrual date for method-of-execution claims. *McNair*, 515 F.3d at 1175–76.

Instead, facial method-of-execution challenges ripen after the Supreme Court denies certiorari review on direct appeal. *Id.* at 1176. At that point, "the relevant facts (*i.e.,* the manner and certainty of execution under state law) should be apparent to a person with a reasonably prudent regard for his rights." *Id.* This accrual date struck the right balance between ensuring defendants file method-of-execution claims in enough time to decide them without entering a stay but not prematurely, before the death sentence finalizes and is more certain. *Id.* at 1177.

The court in *McNair* then explained what happens if the method of execution later substantially changes. *Id.* In that case, the statute of limitations restarts, and the capital defendant gets another chance to challenge the substantially changed protocol. *Id.* The fact that the method of execution could change again does not alter this accrual date. *Id.* at 1177 & n.6. But, of course, another substantial change means the defendant's claim accrues again. *Id.*

at 1177.[27]

The Fifth and Sixth circuits concur with the Eleventh on when facial Eighth Amendment method-of-execution claims accrue.[28] *See Walker v. Epps*, 550 F.3d 407, 414–15 (5th Cir. 2008); *Whitaker v. Collier*, 862 F.3d 490, 494–96 (5th Cir. 2017); *Cooey v. Strickland*, 479 F.3d 412, 416–24 (6th Cir. 2007). *See also Middlebrooks v.*

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[27] A state's preferred method of execution and supporting protocols do not often change in a substantial enough way to restart the accrual date. *See Valle v. Singer*, 655 F.3d 1223, 1229–30 (11th Cir. 2011) (rejecting a capital litigant's claim that the statute of limitations had restarted based upon Florida's anesthetic change). And even when they do change, the newly accrued challenge only encompasses the substantially changed part of the method or protocol. *See Whitaker*, 862 F.3d at 495. As a result, the likelihood of true piecemeal litigation from the Eleventh Circuit's general accrual dates is low.

[28] These appear to be the only three circuit courts that have expressly addressed the ripeness or accrual date for a method of execution claim. The ripeness question is open in the Ninth Circuit. *See Hogan v. Bean*, 140 F.4th 1001, 1044 (9th Cir. 2025). But the United States Supreme Court has tacitly rejected an imminent execution date as the appropriate accrual date in the stay denial context. *See Gomez v. U.S. Dist. Ct. for N. Dist. of Cal.*, 503 U.S. 653, 654 (1992) (vacating a stay of execution because the method-of-execution claim "could have been brought more than a decade ago" and there was "no reason for this abusive delay"). The Seventh, Eighth, and Tenth Circuits have done the same while indicating these claims should be filed soon after direct review of a judgment. *See Lambert v. Buss*, 498 F.3d 446, 449, 453–54 (7th Cir. 2007); *Nooner v. Norris*, 491 F.3d 804, 808–10 & n.3 (8th Cir. 2007); *Patton v. Jones*, 193 F. App'x 785, 788–89 (10th Cir. 2006).

Parker, 15 F.4th 784, 793 (6th Cir. 2021) (rejecting the argument an as-applied challenge based on medical condition "is not ripe until the government seeks the inmate's execution").

This Court should clarify Florida's caselaw by adopting the Eleventh Circuit's well-reasoned analysis and holding facial method-of-execution claims ripen after direct review. Capital defendants should raise these claims in initial postconviction motions on pain of future procedural hurdles. This analysis also applies to as-applied challenges based on facts existing during initial postconviction litigation. After that, any as-applied or facial challenges must be raised within a year of when the "facts on which they are predicated" come into existence and are discoverable via due diligence unless another timeliness exception applies. *See* Fla. R. Crim. P. 3.852(d)(2).

Capital defendants can meet the Rule 3.852(d)(2)(A) exception when either the protocol substantially changes or the inmate's medical condition deteriorates to the point that a once-constitutional method no longer survives Eighth Amendment scrutiny. But, in either event, the capital defendant must raise his newly-accrued Eighth Amendment claim within a year of the Rule

3.851(d)(2) triggering date for it to be timely. *See Bates*, 416 So. 3d at 319 (collecting cases).

Florida's strong emphasis on finality supports the Eleventh Circuit's earlier triggering dates. *See Saffold v. State*, 429 So. 3d 424, 428–29 (Fla. 2026) (discussing the importance of finality in Florida and dismissing reliance on out-of-state cases that do not place the same emphasis on it); § 924.051(8), Fla. Stat. Indeed, our State Constitution provides victims with rights to prompt finality and against unreasonable delay. *See* Art. I, § 16(b)(10), Fla. Const.

Finality, to say nothing of the victims' rights under our Constitution, favors requiring capital defendants to raise method-of-execution claims sooner rather than once a warrant issues. Once a warrant issues, the State's and victims' rights to execute a judgment after decades of review are at their apex, and a capital defendant's right to challenge his death sentence in any way is at its lowest. *See McNair*, 515 F.3d at 1175 (Finality counsels against method-of-execution claims accruing after federal review "since doing so would provide capital defendants with a means of delaying execution even after their sentences have been found lawful by both state and federal courts."). That is inconsistent with a categorical

rule—which no federal appellate court uses—that method-of-execution claims ripen only once a death warrant issues.

Therefore, like the Eleventh Circuit, this Court should hold method-of-execution claims are ripe for inclusion in initial postconviction motions and must meet a timeliness exception thereafter. Indeed, this Court has arguably just done so. *Knight v. State*, No. SC2026-0718, 2026 WL 1361316, at *7 (Fla. May 15, 2026) (holding a capital defendant "was required to raise" a method-of-execution claim "within one year after his" death sentence finalized or within one year of the Rule 3.851(d)(2)(A) exception).

But since the only way Lukehart's claim could be timely is if—contrary to this Court's recent warrant precedent and every federal circuit to address the issue—his facial challenge only ripened after his warrant issued, this Court can simply reject his claim as untimely for the reasons below.

B. Lukehart Asserted His Facial Challenge Long After the Facts Undergirding It Came into Existence.

Lukehart's facial challenge is untimely. Florida's method of execution and the underlying protocol have "remained essentially unchanged since 2017." *See Randolph v. State*, 422 So. 3d 166, 173

(Fla. 2025). Indeed, Florida's protocol has used both etomidate and rocuronium bromide since 2017. *See Jimenez v. State*, 265 So. 3d 462, 474 (Fla. 2018) (recognizing the court in 2017 "fully considered and approved of the current lethal injection procedure, which replaced midazolam with etomidate as the first drug in the three-drug protocol"); *id.* at 492 (Pariente, J., concurring in part) (reiterating her concern with Florida's "use of a paralytic agent, such as rocuronium bromide").

Lukehart's facial challenge to Florida's method of execution protocol initially ripened in June 2001 when his death sentence finalized. *See Lukehart v. Florida*, 533 U.S. 934 (2001); Fla. R. Crim. P. 3.851(d)(1)(B). And he seized upon that opportunity by raising no less than three method-of-execution claims across his initial postconviction motion and state habeas petition. *Lukehart*, 70 So. 3d at 524–25.

When Florida switched to the current protocol in 2017, Lukehart arguably had a chance to facially challenge the newly-adopted-etomidate aspect of the current protocol. *See Long v. Sec'y, Dep't of Corr.*, 924 F.3d 1171, 1179 (11th Cir. 2019) ("There is no reason why Long could not have challenged Florida's use of

etomidate, both in general and specifically as to him, in January 2017, when the Florida Department of Corrections decided to use it as the first drug in the three-drug protocol.").[29] But he had to raise that claim within one year for it to be arguably timely under Rule 3.851(d)(2)(A). *See Bates*, 416 So. 3d at 319 (collecting cases). He did not do so. This claim is therefore untimely.

Lukehart's brief and conclusory reference to DOC inventory logs do not change that analysis. By his own admission, this is a facial challenge requiring him to prove the protocol "is unconstitutional in all its applications." *See Bucklew v. Precythe*, 587 U.S. 119, 138 (2019). His perfunctory and baseless accusations of using expired etomidate have no relevance to his facial challenge. *See id.*; *see also Muhammad v. State*, 132 So. 3d 176, 203 (Fla. 2013) (holding information related to "actions of lethal injection personnel in past executions do not relate to a colorable claim concerning future executions because there is a presumption that members of the executive branch" properly perform their duties).

[29] *But see Valle v. Singer*, 655 F.3d 1223, 1229–37 (11th Cir. 2011) (switching from sodium thiopental to pentobarbital as the first drug in Florida's protocol not a significant enough change to restart the clock, especially given Florida's consciousness checks).

The inventory logs and Lukehart's conclusory assertions are also not a new factual predicate under Rule 3.851(d)(2)(A). Capital litigants have long accused DOC of not following protocol without a sufficient factual basis. *E.g.*, *Hannon v. State*, 228 So. 3d 505, 508 (Fla. 2017). Since the inventory logs "need not and likely do not match the amounts administered," *King v. State*, No. SC2026-0336, 2026 WL 672101, at *4 (Fla. Mar. 10, 2026), neither the logs nor Lukehart's conclusory assertions form a new factual predicate, *see Suggs v. State*, 421 So. 3d 410, 417 (Fla. 2025). They are not the clear evidence Lukehart needs to overcome the presumption DOC follows protocol.[30, 31] *See Heath v. State*, 426 So. 3d 1253, 1261 (Fla. 2026). So they are not a new factual predicate. *See Rivas v.*

[30] Courts must presume government officials will properly discharge their duties absent "clear evidence to the contrary." *See United States v. Armstrong*, 517 U.S. 456, 464–65 (1996) (selective-prosecution claim); *La. ex rel. Francis v. Resweber*, 329 U.S. 459, 462 (1947) (plurality opinion) (method-of-execution claim).

[31] Lukehart also claims—for the first time on appeal—that Dr. Zivot found evidence of an injection in the shoulders of seven executed inmates. This allegation did not appear in his post-warrant motion below and is unpreserved in this appeal. And it is just as speculative as the rest of the records this Court has routinely rejected as evidence DOC deviated from protocol. *E.g.*, *Heath*, 426 So. 3d at 1261–62. Unknown injection sites do not prove anything relevant to a *Baze-Glossip* analysis, assuming they exist. *See id.*

Fischer, 687 F.3d 514, 535 (2d Cir. 2012) (defining factual predicate in 28 U.S.C. § 2244(d)(1)(D) as the "vital facts" without which a claim would be summarily dismissed).

Lukehart's facial challenge hinges on the use and effectiveness of etomidate "in all its applications" in Florida executions. *See Bucklew*, 587 U.S. at 138. That claim could and should have been pursued years ago. It is untimely now.

Procedurally Barred

This facial challenge is also procedurally barred. *See Rogers v. State*, 409 So. 3d 1257, 1263 (Fla. 2025) (holding claims that could have been raised before a warrant are barred in warrant litigation). Lukehart could have raised this facial challenge long ago. Its operative facts have existed, at the latest, since 2017 when Florida switched to its current protocol and remained effectively unchanged since then. *See Randolph v. State*, 422 So. 3d 166, 173 (Fla. 2025). As this claim could have been raised before a warrant, it is barred now. *See Rogers*, 409 So. 3d at 1263.[32]

[32] This Court can affirm on this ground despite the State not raising it below. *See, e.g., Sexton v. State*, 221 So. 3d 547, 555 (Fla. 2017).

Legally Insufficient

Lukehart's facial challenge to Florida's lethal-injection protocol is no more legally sufficient than his earlier as-applied challenge. Once this Court has "upheld the constitutionality of a lethal injection protocol, that protocol is facially constitutional as a matter of law." *Banks v. State*, 150 So. 3d 797, 801 (Fla. 2014).

This Court has repeatedly affirmed the 2017 etomidate protocol[33] after two evidentiary hearings and numerous summary denials. *E.g., Randolph v. State*, 422 So. 3d 166, 172 (Fla. 2025) (collecting cases); *Long v. State*, 271 So. 3d 938, 944 (Fla. 2019) (collecting cases). Those holdings dispense with the notion Florida's protocol is sure or very likely to cause an unconstitutional level of pain and needless suffering under *Baze-Glossip*'s first prong.

Lukehart's desire to relitigate etomidate's effectiveness casts no doubt on this Court's holdings. The amount of etomidate Florida's protocol calls for will render him "unconscious and insensate" for "at least 30 minutes," unable to experience any pain he would otherwise suffer if awake. *Long*, 271 So. 3d at 944, 946

[33] Florida's lethal-injection protocol has used both etomidate and rocuronium bromide since 2017. *See Jimenez v. State*, 265 So. 3d 462, 474 (Fla. 2018); *id.* at 492 (Pariente, J., concurring in part).

(affirming denial of a challenge to etomidate while explaining expert disagreement on the risks of etomidate is no longer enough to obtain another evidentiary hearing after *Asay*); *see Barr v. Lee*, 591 U.S. 979, 981 (2020) (denying a stay of execution because there was competing expert testimony indicating "any pulmonary edema occurs only *after* the prisoner has died or been rendered fully insensate") (emphasis in original). Florida's protocol also calls for checks to ensure the defendant is unconscious. *Valle*, 655 F.3d at 1233. The execution does not proceed until he is. *Id.*

Given these safeguards and established precedents upholding Florida's protocol, Lukehart's facial challenge fails as a matter of law on *Baze-Glossip*'s first prong of very likely needless suffering.[34]

But Lukehart's facial challenge also fails *Baze-Glossip*'s alternative-execution-method prong. He did not provide a sufficiently detailed alternative method of execution or allege the State could carry out his proposal "relatively easily and reasonably quickly." *See Bucklew v. Precythe*, 587 U.S. 119, 141 (2019). Bare

[34] Florida has successfully implemented its etomidate protocol more than thirty-five times since its adoption in 2017. *See* https://www.fdc.myflorida.com/institutions/death-row/execution-list-1976-present (last accessed May 18, 2026).

allegations about what other states do is not enough. *See Heath v. State*, 426 So. 3d 1253, 1262 (Fla. 2026); *Johnson v. Lombardi*, 809 F.3d 388, 391 (8th Cir. 2015) (holding a "threadbare assertion that lethal gas is legally available in Missouri is not the same as showing that the method is a feasible or readily implementable alternative method of execution"). The same alternative-method arguments raised in Issue 1 above apply equally here.

This Court should therefore affirm the summary denial of Lukehart's second claim as untimely, procedurally barred, and legally insufficient on both prongs of the *Baze-Glossip* test.

3. THE POSTCONVICTION COURT CORRECTLY SUMMARILY DENIED LUKEHART'S CLAIM THAT EXPEDITED WARRANT LITIGATION VIOLATES THE STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS.

Lukehart's third issue asserts that expedited warrant litigation violates his right to due process under both the Florida and Federal Constitutions. This Court has rejected this claim at least eleven times in various forms since 2023.[35] That wall of precedent dooms Lukehart's claims because he does not show those precedents are clearly erroneous, the first step to overturning them. *See State v. Poole*, 297 So. 3d 487, 507 (Fla. 2020) (setting *stare decisis* test).

Lukehart's focus on the time between his death warrant's issuance and execution date is both misplaced and misleading.

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[35] *Knight v. State*, No. SC2026-0718, 2026 WL 1361316, at *7–8 (Fla. May 15, 2026); *Randolph v. State*, 422 So. 3d 166, 173 (Fla. 2025) (due process), *cert. denied*, 146 S. Ct. 819 (2025); *Jennings v. State*, 422 So. 3d 107, 118–19 (Fla. 2025) (due process and right-to-counsel), *cert. denied*, 146 S. Ct. 402 (2025); *Jones v. State*, 419 So. 3d 619, 625 (Fla. 2025) (due process), *cert. denied*, 146 S. Ct. 79 (2025); *Zakrzewski v. State*, 415 So. 3d 203, 211 (Fla. 2025) (due process), *cert. denied*, 146 S. Ct. 66 (2025); *Bell v. State*, 415 So. 3d 85, 106–07 (Fla. 2025) (due process), *cert. denied*, 145 S. Ct. 2872 (2025); *Hutchinson v. State*, 416 So. 3d 273, 279–80 (Fla. 2025) (due process), *cert. denied*, 145 S. Ct. 1980 (2025); *Bates v. State*, 416 So. 3d 312, 321 (Fla. 2025) (due process and right to counsel), *cert. denied*, 146 S. Ct. 66 (2025); *Windom v. State*, 416 So. 3d 1140, 1150 (Fla. 2025) (due process), *cert. denied*, 146 S. Ct. 665 (2025); *Tanzi v. State*, 407 So. 3d 385, 390–91 (Fla.) (due process), *cert. denied*, 145 S. Ct. 1914 (2025); *Barwick v. State*, 361 So. 3d 785, 789 (Fla. 2023), *cert. denied*, 143 S. Ct. 2452 (2023).

Since his death sentence finalized in 2001, he has had well over *twenty years* with taxpayer-paid postconviction counsel to litigate and relitigate claims. He cannot complain about a 32-day warrant.

Capital postconviction defendants must litigate all substantive claims that can be raised pre-warrant before the Governor issues a death warrant. *Rogers v. State*, 409 So. 3d 1257, 1263 (Fla. 2025). There are procedures in place for the very few that cannot be raised pre-warrant, such as incompetency for execution. Lukehart fails to explain why expedited warrant litigation prevented him from raising any claim that could not have been raised sooner. His decades with publicly funded counsel prove he has been afforded far more process than he was ever constitutionally due.

Relevant Facts

Lukehart has had publicly funded postconviction counsel since his initial postconviction litigation over two decades ago. *See Lukehart v. State*, 70 So. 3d 503, 510 (Fla. 2011) (noting Lukehart filed his operative initial postconviction motion in 2002); WPCR:40, 51–52, 54–55 (listing counsel). The State filed its Florida Rule of Criminal Procedure 3.851(j) notice confirming his warrant eligibility on March 20, 2024. *See Lukehart v. State*, SC1960-90507.

CCRC-N has represented Lukehart as lead postconviction counsel since March 17, 2025. (WPCR:40.) More than a year into its representation, CCRC-N litigated Lukehart's post-warrant challenges below and in this appeal. (*E.g.*, WPCR:40, 342–363.)

Ruling Below

The circuit court summarily denied Lukehart's claim that the 32-day warrant violates his State or Federal constitutional right to due process. (WPCR:456.) It also ruled any reliance on the Sixth Amendment's right-to-counsel provision failed because that right "does not apply in the postconviction context." (WPCR:456.)

Legally Insufficient

Lukehart's challenge to expedited warrant litigation after decades attacking his death sentence is legally insufficient. Neither the State nor Federal constitutional right to due process gives Lukehart more process than he has already been given. *See Jennings*, 422 So. 3d at 121 ("The extensive procedural history we have summarized demonstrates ample access to the courts.").

The circuit court correctly denied this claim as legally insufficient under this Court's well-worn precedent. *See Barwick*, 361 So. 3d at 789–90 (affirming summary denial of due process and

effective-representation claims based on expedited warrant litigation); *Jones*, 419 So. 3d at 625 (same with a due process challenge to an expedited warrant schedule and an argument the warrant was a "surprise"); *Jennings*, 422 So. 3d at 117–21 (same with due process and right-to-counsel challenges to an expedited warrant schedule despite new postconviction counsel being appointed only after the warrant was signed); *Tanzi*, 407 So. 3d at 390–91, 393–94 (same with a due process challenge to an expedited warrant schedule and a challenge to the Governor's authority to issue a warrant and set the execution date).

Lukehart fails to overcome the *stare decisis* effect of these decisions. *See Tanzi*, 407 So. 3d at 392 (affirming because the defendant failed to show prior precedent was clearly erroneous). When it comes to constitutional interpretation, this Court only recedes from precedent if it is (1) clearly erroneous and (2) there is no valid reason against receding from it. *Poole*, 297 So. 3d at 507.

That first step requires this Court to conclude its "relevant precedents clearly erred in their understanding of" due process. *See Thompson v. DeSantis*, 301 So. 3d 180, 184 (Fla. 2020); *Poole*, 297 So. 3d at 506–07 (stressing the importance of clear error). Clearly

erroneous precedent either lacks any fair support in governing law or plainly misconstrues or conflicts with the controlling authorities. *See Poole*, 297 So. 3d at 501–07 (receding from a decision that misconstrued United States Supreme Court precedent, misread Florida statutory law, and broke with long-settled Florida precedent); *Steiger v. State*, 328 So. 3d 926, 932 (Fla. 2021) (receding from a decision inconsistent with statutory law); *State v. Penna*, 385 So. 3d 595, 601 (Fla. 2024) (receding from a categorical rule with no support in either caselaw or constitutional text).

Lukehart fails to show this Court's due process precedents permitting expedited warrant litigation are wrong, much less clearly erroneous. There is no due process right to a second (let alone a fourth) chance at state postconviction relief for even the legally innocent. *See Jones v. Hendrix*, 599 U.S. 465, 482–87 (2023) (holding there is no constitutional right to even a second shot at postconviction review). Since due process gives Lukehart *no* right to challenge his execution this late into finality, it cannot provide him a right to complain about doing so in expedited fashion in compliance with Florida's substantive law and procedural rules.

Nor does requiring him to operate within this State's procedural rules deprive him of "all existing remedies for the enforcement of a right." *See Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 682 (1930). First and most obviously, Florida Rule of Criminal Procedure 3.851 provides him with the right to bring his method-of-execution "claims before the courts and to be heard at the appropriate time(s) and through the appropriate channel(s)." *See Gudinas v. State*, 412 So. 3d 701, 714–15 (Fla. 2025). The fact Lukehart waited too long and only tried to invoke these procedures after a warrant was signed does not deny him all existing remedies. He simply cannot invoke those remedies late.[36]

Setting that aside, Lukehart's complaint that Florida's postconviction procedures deprive him of *all* existing remedies to pursue his lethal-injection challenge is absurd. His own cases show

[36] And unlike in *Hill*, where the state procedures drastically changed to effectively eliminate a previously available remedy the shareholders invoked and open up another one, which the shareholders could no longer invoke, for the first time on appeal, Lukehart cannot claim surprise at how Florida's time and procedural bars applied to his claims. *See Cole v. State*, 392 So. 3d 1054, 1064 & n.17 (Fla. 2024) (holding an as-applied challenge based on Parkinson's disease untimely and noting the court had long rejected the "argument that a method-of-execution claim is not ripe until a death warrant").

he knows that a 42 U.S.C. § 1983 suit affords him another remedy to pursue method-of-execution challenges *if* he had chosen to exclusively litigate his post-warrant challenges in federal court.[37] *See Nance v. Ward*, 597 U.S. 159, 169–170 (2022) (holding a 42 U.S.C. § 1983 suit is the proper vehicle to pursue Eighth Amendment method-of-execution challenges in federal court).

But federal courts frown on granting stays for capital defendants with an active warrant who wait months after their claim accrued to pursue that remedy too. *See Dunn v. Ray*, 586 U.S. 1138, 1138 (2019) (vacating a stay of execution when a capital

[37] If he tried to litigate post-warrant claims in *both* state and federal court, then his § 1983 claims would be barred because he could have raised them in state court. *See Long v. Sec'y, Dep't of Corr.*, 924 F.3d 1171, 1179–80 (11th Cir. 2019) (holding "under Florida law, *res judicata* bars claims that Long could have raised in the" post-warrant "state postconviction proceedings but didn't"). *See also Kremer v. Chem. Const. Corp.*, 456 U.S. 461, 466 (1982) (holding 28 U.S.C. § 1738 "commands a federal court to accept the rules chosen by the State from which the judgment is taken."). Post-warrant piecemeal litigation in both state and federal court also likely dooms any attempt to receive a federal stay. *See Gomez v. U.S. Dist. Ct. for N. Dist. of California*, 503 U.S. 653, 654 (1992) (holding a capital defendant engaged in "last-minute attempts to manipulate the judicial process" by waiting to file § 1983 lethal-injection claims he could have raised in other litigation); *McGehee v. Hutchinson*, 854 F.3d 488, 491 (8th Cir. 2017) ("Whether or not the claim technically is barred by doctrine of res judicata or collateral estoppel, the prisoners' use of "piecemeal litigation" and dilatory tactics is sufficient reason by itself to deny a stay.").

defendant waited 83 days after the claim ripened to file it); *Walls v. Sec'y, Dep't of Corr.*, 161 F.4th 1281, 1285 (11th Cir. 2025) (finding a defendant unduly delayed by filing suit four months after he said his as-applied challenge accrued and only after his death warrant issued). The problem for Lukehart is not the lack of remedies. It is his failure to timely invoke one.

Ford v. Wainwright, 477 U.S. 399 (1986) confirms Lukehart received due process here. Justice Powell's concurring opinion in *Ford* provides the Court's holding on what procedures were necessary for due process in competency-to-be-executed proceedings.[38] *See Panetti v. Quarterman*, 551 U.S. 930, 949 (2007) (explaining Justice Powell provided the holding for the procedural question under *Marks v. United States*, 430 U.S. 188 (1977)

[38] Lukehart's cites the *Ford* plurality's non-binding conclusion that "if the Constitution renders the fact *or timing of execution contingent upon establishment of a further fact*, then that fact must be determined with the high regard for truth that befits a decision affecting the life or death of a human being." 477 U.S. at 411 (emphasis added). But that sentence provides neither a due process nor Eighth Amendment holding. Justice Powell's concurring opinion contained the Court's holding and expressly disagreed with the majority on that sentence. *See id.* at 418 (Powell, J., concurring). The Supreme Court has never adopted the position advanced by the "plurality in *Ford*." *See Herrera v. Collins*, 506 U.S. 390, 406 (1993) (quoting the plurality in describing the defendant's argument and distinguishing *Ford*).

because there was no majority opinion in *Ford*).

Justice Powell held Florida's competency-to-be-executed procedures unconstitutional because: (1) the Governor decided the substantive issue of competency; and (2) the competency hearing failed to comport with procedural due process. *Ford*, 477 U.S. at 423–24 (Powell, J., concurring). He found the competency hearing deficient because the decisionmaker did not need to hear from the capital defendant *at all* before deciding competency. *Id.* at 425.

But Justice Powell disclaimed the notion due process imposed any grand constraints on competency-to-be-executed hearings. *Id.* at 425–27. "Decisions imposing heightened procedural requirements on capital trials and sentencing proceedings" did not apply to a claim challenging "not *whether*, but *when*, his execution may take place." *Id.* at 425 (emphasis in original).[39] Even ordinary "adversarial procedures"—like cross-examination or oral argument—were not necessary to make the hearing fair. *Id.* at 426.

[39] This holding that the Eighth Amendment's heightened procedural protections do not apply to proceedings challenging "not whether, but when" an execution will take place confirms this Court's precedent on the matter. *See Hutchinson v. State,* 416 So. 3d 273, 280 (Fla. 2025) (rejecting the Eighth Amendment's application to alleged warrant-phase arbitrariness); *Hannon v. State*, 228 So. 3d 505, 509 (Fla. 2017) (same).

There was also nothing wrong with requiring a "substantial threshold showing" before holding an evidentiary hearing. *Id.*

In short, Justice Powell held due process requires an "impartial officer or board" that could receive evidence and argument from the condemned on the question of competency after a substantial threshold showing. *Id.* at 427. Beyond that, due process afforded states "substantial leeway." *Id.* Nothing in his opinion suggested having to litigate competency-to-be-executed, or any other claim, in an expedited timeframe offends due process.

Ford therefore confirms this Court's due process cases are correct. The State provided Lukehart with an impartial judicial officer to decide his substantive claims, postconviction counsel to litigate them, notice, and an opportunity to be heard at each step of the post-warrant litigation. That complies with *Ford*'s actual holding as opposed to the plurality's dictum.

Ford also shows *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) is the wrong place to look for clear error in this Court's post-warrant due process precedents. *See Ford*, 477 U.S. at 424, 427 (Powell, J., concurring) ("Fundamental fairness is the hallmark of the procedural protections afforded by the Due Process Clause.").

The Supreme Court has two disparate lines of caselaw to determine whether an individual received due process. The *Mathews* balancing test governs civil proceedings, while the *Medina v. California*, 505 U.S. 437, 445 (1992) fundamental-fairness standard governs both criminal and postconviction proceedings. *See Dist. Att'y's Off. for Third Jud. Dist. v. Osborne*, 557 U.S. 52, 69 (2009) (holding a valid due process challenge to a state's postconviction procedure must demonstrate the procedure "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental, or transgresses any recognized principle of fundamental fairness in operation.") (cleaned up); *Medina*, 505 U.S. at 443 ("The *Mathews* balancing test does not provide the appropriate framework for assessing the validity of state procedural rules" which "are part of the criminal process.").

Lukehart does not begin to show expedited warrant litigation offends either a deeply rooted, fundamental principle of justice or is fundamentally unfair. He would be hard pressed to do so given "for more than 160 years, capital sentences were carried out in an average of two years or less." *Glossip v. Gross*, 576 U.S. 863, 898 (2015) (Scalia. J, concurring with Thomas, J.) (recognizing modern

delays in death penalty execution are the result of the Supreme Court's distorted Eighth Amendment jurisprudence). Likewise, only relatively recent innovations allowed extensive postconviction litigation and re-litigation. *See Hendrix*, 599 U.S. at 482–88.[40]

There is nothing fundamentally unfair about expediting warrant litigation decades after Lukehart's death sentence finalized. *See Gudinas v. State*, 412 So. 3d 701, 714–15 (Fla. 2025) (holding a post-warrant capital defendant had "not been denied an opportunity to bring his claims before the courts and to be heard at the appropriate time(s) and through the appropriate channel(s)").

Lukehart had decades to litigate for relief before his warrant. And Florida's post-warrant process lets him raise valid claims that both fall into a timeliness exception and are not procedurally barred because they could have been raised pre-warrant. *See* Fla. R. Crim. P. 3.851(e)(2), (d)(2); *Rogers*, 409 So. 3d at 1263 & n.7. For good reason, those claims are few and far between. *Gudinas*, 412 So. 3d at 715 (quoting § 924.051(8), Florida Statutes, to explain barriers to relief are strictly enforced to ensure all postconviction claims "are

[40] The Supreme Court also explained in *Hendrix* that the Eighth Amendment "creates no freestanding entitlement to a second or successive round of postconviction review" either. 599 U.S. at 488.

raised and resolved at the first opportunity"); Art. I, § 16(b)(10), (d), Fla. Const. (providing victims with rights to prompt finality and against unreasonable delay).

Even ignoring this case's lengthy history, Lukehart received more process than the Constitution requires. Florida provided him with the opportunity to obtain postconviction relief—if he had timely, not-barred, and meritorious claims—even at this late hour despite lacking any constitutional obligation to entertain his third successive motion. *See Hendrix*, 599 U.S. at 482–92. Florida created and pays for the agency serving as his current postconviction counsel (which has represented him for over a year) even though due process allows the State to let Lukehart litigate his post-warrant claims without counsel. *See Barwick*, 361 So. 3d at 791.

Lukehart received notice of his warrant eligibility in 2024. He then, over two years later, received notice of the death warrant and execution date the day the warrant issued. And he has had an opportunity to be heard both at every step below and in this appeal. That is more than fundamentally fair. *See Avery v. Alabama*, 308 U.S. 444, 447–53 (1940) (capital defendant convicted and sentenced to death was not denied due process despite counsel having only

three days to prepare for trial).[41]

This Court correctly decided the due process precedents Lukehart must overturn to prevail. As a result, he cannot meet his far higher burden of showing those precedents are clearly erroneous.[42] His complaints about the "haste" in his expedited warrant proceeding strain the bounds of credulity given the decades since his crime. *See Sullivan v. Wainwright*, 464 U.S. 109, 112 (1983) (Burger, C.J., concurring in denial of execution stay) ("I emphasize that this case has been in the courts for ten years and is here for the fourth time. This alone demonstrates the speciousness of the suggestion that there has been a 'rush to judgment.'").

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[41] The warrant timeframes and practices of other states are not relevant to the due process question here. *See Hutchinson v. State*, 416 So. 3d 273, 280 (Fla. 2025) (rejecting reliance on procedures in other states as irrelevant to the constitutional question).

[42] Given Lukehart has not established this Court's precedents addressing the interplay between expedited warrant litigation and due process are clearly erroneous, there is no need to address reliance interests. *See Penna*, 385 So. 3d at 601 (identifying reliance interests as the critical consideration in retaining even clearly erroneous precedent). But the State, Florida's Governor, and victims have a strong interest in carrying out Lukehart's long-final death sentence and have relied on this Court's precedents affirming expedited warrant litigation. *See Poole*, 297 So. 3d at 507.

This Court should therefore adhere to its correctly decided precedents holding expedited warrant litigation does not offend due process. Due process is not, after all, whatever process a capital defendant believes he is due.

4. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION IN DENYING LUKEHART'S POST-WARRANT DEMANDS FOR LETHAL-INJECTION-RELATED RECORDS AND RULE 3.852 IS CONSTITUTIONAL.

Lukehart's final issue argues the circuit court either abused its discretion in denying his demands for lethal-injection-related public records or Florida Rule of Criminal Procedure 3.852 is unconstitutional. But the circuit court was well within its discretion under this Court's clear-cut caselaw and Lukehart's constitutional challenges to Rule 3.852 fail. This Court should therefore affirm.

Relevant Facts & Ruling Below

Lukehart filed post-warrant demands for lethal-injection records on DOC, FDLE, and 8ME. (WPCR:66–76, 166–74.) All three agencies objected. (WPCR:244–92.)

The circuit court issued written orders denying these demands, except as to the Defendant's own medical records.[43] (WPCR:305–335 (hearing), 293–304 (denial orders). The Court found Lukehart's demand: (1) to FDLE was not related to a colorable claim for relief (WPCR:295); (2) to DOC was not related to a colorable claim for relief and overly broad and burdensome (WPCR:299); and

[43] The court dismissed that part as moot since DOC had no objection and produced those records. (WPCR:298.)

(3) to 8ME was not related to a colorable claim for relief and also overly broad and burdensome (WPCR:303.)

Lukehart's postconviction motion alleged Dr. Zivot already had access to "the 19 post-execution autopsies from 2025" despite demanding autopsy information related to four 2025 executions from the 8ME. (WPCR:167, 355.)

Merits

Lukehart raises two overarching challenges to the denial of records here: (1) the lower court abused its discretion; and (2) Rule 3.852 is unconstitutional. Neither has merit.

A. No Abuse of Discretion.

The circuit court did not abuse its discretion in denying Lukehart's public-records demands. Rule 3.852(i)(2) provides a circuit court may order production of "additional public records only upon finding *each* of the following":

> (A) collateral counsel has made a timely and diligent search of the records repository;
>
> (B) collateral counsel's affidavit identifies, with specificity those additional public records that are not at the records repository;
>
> (C) the additional public records sought are either relevant to the subject matter of a proceeding under

> rule 3.851, or appear reasonably calculated to lead to the discovery of admissible evidence; and
>
> (D) the additional public records request is not overly broad or unduly burdensome.

Fla. R. Crim. P. 3.852(i)(2)(A)–(D). Rule 3.852(i) demands made after a death warrant must also show "good cause as to why the public records request was not made until after the death warrant" issued. *Zakrzewski v. State*, 415 So. 3d 203, 212 (Fla. 2025).

The circuit court was well within its discretion to deny Lukehart's post-warrant demands for lethal injection records. As the court reasonably found, they were unrelated to a colorable claim and unduly broad and burdensome. *See id.* at 212–13.

Lukehart did not offer sufficient allegations in his demand to show his proposed lethal-injection claim was timely, not barred, and facially valid on both prongs of the *Baze-Glossip* test. A claim that is time-barred, procedurally barred, or legally insufficient on the crucial elements needed to support it, is not a colorable claim for postconviction relief. *Cf. Mann v. State*, 112 So. 3d 1158, 1163 (Fla. 2013) (trial court properly denied a public records request that could have helped the defendant accurately support his allegations

because "the claim is not cognizable"); *Muhammad v. State*, 132 So. 3d 176, 202–03 (Fla. 2013) (meritless claims are not colorable).

Failure to provide legally sufficient allegations supporting both prongs of the *Baze-Glossip* test requires denying method-of-execution-related demands. *Hitchcock v. State*, No. SC2026-0574, 2026 WL 1101539, at *9 (Fla. Apr. 23, 2026). That holding dooms Lukehart's arguments that his demands related to a colorable claim because he made no attempt to allege *Baze-Glossip*'s second prong and his allegations on the first prong were legally insufficient. *See id.* (holding a post-warrant capital defendant whose demand omitted any allegations on *Baze-Glossip*'s second prong and insufficiently alleged the first did not show a colorable claim).

This Court has repeatedly upheld the post-warrant denial of these records as unrelated to colorable claims and unduly broad and burdensome. *E.g.*, *Hitchcock*, 2026 WL 1101539, at *9; *Zakrzewski*, 415 So. 3d 203, 213; *Muhammad*, 132 So. 3d at 203.

This case is no different. Despite Lukehart's protestations that he obtained the records he was denied, and that they supported a colorable claim, they in fact did not. (*See* Issues 1 and 2 above.) The

circuit court's denials fit squarely within its discretion rather than being a clear abuse of discretion. This Court should affirm.

B. Lukehart's Constitutional Challenges Fail.

Lukehart also asserts that—if Rule 3.852 was correctly applied—it violates his right to due process and equal protection.

These constitutional claims are procedurally barred and untimely. Rule 3.852 has existed in its current form for years. These facial challenges to it could have been raised long ago and are barred now. *See* Fla. R. Crim. P. 3.851(d)(2), (e)(2). *Cf. Ellerbee v. State*, 232 So. 3d 909, 917 (Fla. 2017) (noting a capital defendant raised a claim that Rule 3.852 is unconstitutional because it "impermissibly restricts" access to public records in his initial postconviction motion). There is nothing unique about the denials below that sets Lukehart's claims apart from a facial challenge.

The equal protection claim is also unpreserved. Lukehart never argued that the denial of public records violated his right to equal protection. The phrase "equal protection" appears three times in the warrant record and none of them occur in his 3.852 demands. (WPCR:52, 266, 343.) So this claim is unpreserved and

no basis for relief. *Hutchinson v. State*, 416 So. 3d 273, 279 (Fla. 2025) (rejecting challenges to Rule 3.852 as unpreserved).

But these claims are nothing new. This Court has repeatedly rejected constitutional challenges to the limitations imposed by Rule 3.852. *See Hutchinson*, 416 So. 3d at 279 (rejecting due process and equal protection challenges to Rule 3.852); *Dailey v. State*, 283 So. 3d 782, 792–93 (Fla. 2019) (affirming the refusal to provide lethal injection records and rejecting constitutional challenges, including the due process and equal protection ones Lukehart raises here). The due process claim is also meritless for all the reasons this Court thoroughly laid out in *Hitchcock v. State*, No. SC2026-0574, 2026 WL 1101539, at *6–7 (Fla. Apr. 23, 2026) (collecting numerous federal cases on discovery and due process).

The State has nothing to add to this Court's well-settled precedent rejecting constitutional challenges to Rule 3.852. This Court should reject them again given nothing Lukehart presents comes close to demonstrating this Court's precedents are clearly erroneous. *See Tanzi*, 407 So. 3d at 392.

The circuit court did not abuse its discretion in applying Rule 3.852, which is constitutional. This Court should therefore affirm.

CONCLUSION

This Court should affirm and bring true finality to the victims, the State of Florida, and Andrew Lukehart.

Respectfully submitted and certified,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of May 2026, I electronically filed the foregoing with the Clerk of the Court by using the Florida Courts E-Portal Filing System which will send a notice of electronic filing to the following: **Dawn Macready, Adrienne Shepherd, and Alicia Hampton**, Capital Collateral Regional Counsels-Northern Region, **Dawn.Macready@ccrc-north.org, adrienne.shepherd@ccrc-north.org,** and **alicia.hampton@ccrc-north.org;** and the **Florida Supreme Court Clerk, 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. *See* Fla. R. App. P. 9.045(b). This brief contains **17,432** words in compliance with the 20,000-word limit. *See* Fla. App. P. 9.210(a)(2)(D); Fla. App. P. 9.210 (a)(2)(E).

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