

Case No.: SC2026-0736

EXECUTION SCHEDULED FOR JUNE 2, 2026, at 6:00 P.M.

IN THE SUPREME COURT OF FLORIDA

**ANDREW RICHARD LUKEHART,
Appellant,**

v.

**STATE OF FLORIDA,
Appellee.**

***On Appeal from the Circuit Court for the Fourth Judicial
Circuit, in and for Duval County, Florida
Lower Tribunal Case No.: 1996-CF-2645***

INITIAL BRIEF OF THE APPELLANT

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REQUEST FOR ORAL ARGUMENT

Andrew Lukehart (“Lukehart”) respectfully requests oral argument pursuant to Florida Rule of Appellate Procedure 9.320. The resolution of the issues involved in this action will determine whether Lukehart lives or dies. This Court has not hesitated to allow argument in other capital cases in a similar procedural posture. See *Asay v. State*, 224 So. 3d 695, 699 (Fla. 2017) (where this Court stayed Asay’s execution after holding an oral argument). A full opportunity to air the issues through oral argument is appropriate in this case because of the seriousness of the claims at issue and the ultimate penalty that the State seeks to impose on Lukehart.

PRELIMINARY STATEMENT REGARDING REFERENCES

References to the current record on appeal before this Court in Florida Supreme Court Case No.: SC2026-0736 are of the form: PC/[page number[s]]. All other record references will be self-explanatory.

STATEMENT OF THE CASE AND FACTS¹

Lukehart was charged with first-degree murder and aggravated child abuse. His trial commenced on February 24, 1997. On February 27, 1997, the jury found Lukehart guilty as charged, and recommended death by a vote of nine to three. On April 4, 1997, the trial court imposed a death sentence. Lukehart appealed his conviction and death sentence. This Court affirmed his capital conviction and death sentence, but remanded for a re-sentencing on his aggravated child abuse conviction. *Lukehart v. State*, 776 So. 2d 906 (Fla. 2000).² The United States Supreme Court denied Lukehart's

¹ More specific and relevant facts for each of Lukehart's arguments for relief will be included under each argument where necessary.

² The following issues were raised on direct appeal: 1) the trial court erred in refusing to suppress Lukehart's statements; 2) the trial court erred by limiting cross-examination; 3) Lukehart's convictions of first-degree murder and aggravated battery are invalid because of insufficient evidence of premeditation and the lack of a felony independent of the homicide; 4) the trial court erred in instructing the jury on justifiable or excusable homicide; 5) Lukehart's death sentence is disproportionate; 6) the trial court erred in finding that the aggravator of murder in the course of a felony cannot be based on a felony that constitutes the homicidal act; 7) the trial court erred in giving instruction on the aggravator of a crime committed while on felony probation and trial court erred in finding it in violation of ex post facto provisions; 8) the trial court erred in finding both murder in the course of a felony and that the victim was under twelve as aggravators; 9) the victim-under-twelve aggravator and the standard

petition for writ of certiorari on June 25, 2001. *Lukehart v. Florida*, 533 U.S. 934 (2001). On September 27, 2001, Lukehart filed a "shell" motion for postconviction relief. The trial court struck this as improper, but allowed Lukehart until June 25, 2002 to file an amended motion for postconviction relief. On June 20, 2002, Lukehart filed his amended motion for postconviction relief, raising seventeen claims.³ The trial court granted an evidentiary hearing on

jury instruction on the aggravator are unconstitutional; 10) the trial court erred in allowing a collateral crime to be a feature of the penalty phase; 11) the prosecutor's comments during penalty phase closing argument were fundamental error; and 12) the trial court erred regarding the sentence for the noncapital conviction and the restitution orders. *Lukehart v. State*, 776 So. 2d 906, 911, n.1 (Fla. 2000).

³ 1) the trial court erred in striking his shell motion; 2) Florida's death penalty statute is unconstitutional and violates *Ring v. Arizona*, 536 U.S. 584 (2002), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000); 3) trial counsel was ineffective during the guilt phase and the penalty phase; 4) trial counsel was ineffective for failing to object to jury instructions on the ground that they shifted the burden to the defendant to prove that a life sentence was appropriate; 5) the "victim under twelve" aggravator is unconstitutional; 6) the trial court violated the mandates of *Caldwell v. Mississippi*, 472 U.S. 320 (1985), by informing the jury that their sentencing recommendation was advisory; 7) Florida rule of professional conduct prohibiting juror interviews is unconstitutional; 8) Florida's lethal injection protocol constitutes cruel and unusual punishment and violates the ex post facto clause; 9) Lukehart's execution would violate the dictates of *Ford v. Wainwright*, 477 U.S. 399 (1986); 10) Lukehart's death sentence violates *Furman v. Georgia*, 408 U.S. 238 (1972), and its

claim three, which involved multiple grounds of ineffective assistance of counsel. The remaining claims were summarily denied by the court. An evidentiary hearing was held on May 9-10, 2007. Subsequently, Lukehart moved to amend the postconviction motion to include new claims based on testimony elicited at the hearing.⁴ On March 27, 2009, the trial court entered an order denying the ineffective assistance of counsel claims for which a hearing had been held, summarily denying the remaining claims, and declining to consider the newly raised ineffective assistance of counsel claims.

progeny; 11) Lukehart's mental health expert was ineffective under *Ake v. Oklahoma*, 470 U.S. 68 (1985); 12) the prosecutor's comments violated Lukehart's right to a fair trial; 13) Florida's statute prohibiting the imposition of a sentence of death to be imposed on a mentally retarded defendant, section 921.137, Florida Statutes (2001), violates substantive due process because the statute does not apply retroactively; 14) the imposition of the death penalty on a mentally retarded defendant violates equal protection and due process; 15) Lukehart's death sentence constitutes cruel and unusual punishment in violation of *Atkins v. Virginia*, 536 U.S. 304 (2002); 16) the trial court failed to consider mitigating evidence in violation of the Eighth Amendment and *Campbell v. State*, 571 So. 2d 415, 419 (Fla. 1990); and 17) cumulative error. *Lukehart v. State*, 70 So. 3d 503, 510 n.3 (Fla. 2011).

⁴ Lukehart attempted to add claims that trial counsel was ineffective for not investigating or moving to cease his medications and that trial counsel was ineffective for not moving to continue the trial.

Lukehart appealed this denial to this Court⁵ and also filed a state habeas petition.⁶ *Lukehart v. State*, 70 So. 3d 503 (Fla. 2011). On June 23, 2011, this Court affirmed the circuit court's denial of the postconviction motion and denied habeas relief. *Id.* at 525.

⁵ Lukehart raised the following issues in his postconviction appeal: 1) counsel was ineffective for failing to challenge the prior violent felony aggravator during the penalty phase, 2) counsel was ineffective for failing to file a motion to cease Lukehart's medication and a motion for continuance, 3) counsel was ineffective for failing to present Dr. Harry Krop during the guilt phase, 4) Lukehart's amended postconviction motion should relate back to the filing of his shell motion, 5) counsel was ineffective for failing to include an additional argument in the motion to suppress, 6) counsel was ineffective for failing to properly argue and object to the jury instructions and the State's allegedly improper arguments regarding the instructions, (7) counsel was ineffective pursuant to *Caldwell v. Mississippi*, 472 U.S. 320 (1985), 8) counsel was ineffective for failing to present live testimony rather than deposition testimony during the penalty phase, 9) counsel was ineffective for failing to object to allegedly improper prosecutorial comments, 10) the rule prohibiting juror interviews is unconstitutional, 11) Florida's lethal injection protocols are unconstitutional, and 12) cumulative error is present. *Lukehart v. State*, 70 So. 3d 503, 510 n.5 (Fla. 2011).

⁶ Lukehart's state habeas petition included three claims: 1) this Court should revisit its prior proportionality review in light of Page's uncontroverted testimony at the evidentiary hearing, 2) Florida's lethal injection protocol violates the Eighth Amendment, and 3) the inclusion of pancuronium bromide in Florida's lethal injection protocol violates free speech. *Lukehart v. State*, 70 So. 3d 503, 510 n.6 (Fla. 2011).

On December 19, 2011, Lukehart filed a successive motion for postconviction relief raising three claims that he had previously attempted to include in an amended motion following the evidentiary hearing.⁷ The circuit court summarily denied this motion and Lukehart appealed. On November 8, 2012, this Court affirmed the summary denial by the circuit court, finding that the claims were procedurally time-barred, without reaching the merits of his claims. *Lukehart v. State*, 103 So. 3d 134 (Fla. 2012).

Lukehart filed a petition for writ of habeas corpus in the Middle District of Florida. *Lukehart v. Sec. Dept. of Corr.*, Case No. 3:12-cv-585-J-32PDB, 2020 WL 2183150 (M.D. Fla. April 28, 2020). The petition and supplemental claims were denied and the case was dismissed with prejudice. *Id.* However, the court granted a certificate of appealability as to Ground Seven - Whether the Florida Supreme Court unreasonably applied clearly established federal law in

⁷ Lukehart raised the following claims in his successive motion for postconviction relief: 1) counsel was ineffective for failing to (a) learn the effects of the medication Lukehart was taking, (b) inform the court and the jury that Lukehart was on medication and explain its effects, (c) move the court for the medications to cease, and (d) request a continuance; 2) Lukehart was incompetent at trial due to medication; and 3) Lukehart was involuntarily required to take medication.

denying Petitioner's claims under *Miranda v. Arizona*, 384 U.S. 436 (1966), and *Edwards v. Arizona*, 451 U.S. 477 (1981), as alleged in the federal habeas petition. *Id.* Subsequently, the United States Court of Appeals for the Eleventh Circuit affirmed the denial of Lukehart's federal habeas petition. *Lukehart v. Sec. Dept. of Corr.*, 50 F. 4th 32 (11th Cir. 2022).

Governor Ron DeSantis signed Lukehart's active death warrant on Friday, May 1, 2026. The warrant set Lukehart's execution date thirty-two days later on June 2, 2026. This Court issued a briefing schedule the same day, ordering that "the proceedings pending in the trial court, if any, shall be completed and orders entered as expeditiously as possible, but by no later than 11:00 a.m., Thursday, May 14, 2026." The lower court subsequently issued a scheduling order, stating that Lukehart must file all requests for public records by Tuesday, May 5, 2026, at 11:00 a.m. PC/37. The order further stated that Lukehart's final successive motion for postconviction relief under Florida Rule of Criminal Procedure 3.851 must be filed by Friday, May 8, 2026, at 9:00 a.m. PC/38.

Lukehart timely filed three records demands pursuant to Florida Rule of Criminal Procedure 3.852 requesting records related

to lethal injection from the Florida Department of Corrections, Florida Department of Law Enforcement, and District Eight Medical Examiner's Office. See PC/66-140; 166-243. The lower court denied all three demands in three separate orders issued on May 6, 2026. PC/293-304. Lukehart timely filed his Successive Motion to Vacate Judgments of Conviction and Sentence of Death With Leave to Amend and simultaneously filed a Motion for Stay of Execution, Postponement of All Proceedings and Leave to Amend Motion for Postconviction Relief on May 8, 2026. PC/337-395. The State filed its Answer to the Third Successive Postconviction Motion and State's Response to Motion to Stay the Execution on May 9, 2026. PC/396-430.

A *Huff*⁸ hearing was held on Lukehart's successive Fla. R. Crim. P. 3.851 motion on May 9, 2026, at 11:00 a.m., where defense counsel argued that Lukehart should receive an evidentiary hearing on his claims for postconviction relief. See PC/38; 434-448. The lower court orally denied an evidentiary hearing at the conclusion of the *Huff* hearing, and issued a written order only approximately fifteen

⁸ *Huff v. State*, 622 So. 2d 982 (Fla. 1993).

minutes after the conclusion of the hearing. See PC/431-33, 446. The lower court subsequently issued its Order Summarily Denying Defendant's Successive 3.851 Motion for Vacation of Death Sentence and Stay of Execution on May 12, 2026. PC/449-458. This timely appeal follows. Lukehart's execution is scheduled for June 2, 2026, at 6:00 p.m.

SUMMARY OF ARGUMENT

ARGUMENT I: Florida's current lethal injection procedures are unconstitutional as specifically applied to Lukehart because there is a substantial and imminent risk that executing Lukehart under those procedures will very likely cause him needless pain and suffering due to the interaction of Florida's lethal injection procedures with Lukehart's severe kidney disease. *Glossip v. Gross*, 576 U.S. 863 (2015); *Baze v. Rees*, 553 U.S. 35 (2008). The lower court erred in summarily denying relief on this claim.

ARGUMENT II: Florida's current lethal injection procedures are facially unconstitutional because the procedures create a risk of needless pain and suffering. *Glossip v. Gross*, 576 U.S. 863 (2015); *Baze v. Rees*, 553 U.S. 35 (2008). The lower court erred in summarily denying relief on this claim.

ARGUMENT III: Florida’s truncated warrant process and Lukehart’s resulting thirty-two-day warrant period foreclose him from receiving a full and fair postconviction proceeding during his active death warrant and violate his due process rights. The circuit court erred when summarily denying relief on this claim.

ARGUMENT IV: The lower court abused its discretion when denying Lukehart’s timely requests for records related to lethal injection from the Florida Department of Corrections, the Florida Department of Law Enforcement, and the District Eight Medical Examiner’s Office filed pursuant to Florida Rule of Criminal Procedure 3.852.

STANDARD OF REVIEW

Because the lower court denied postconviction relief without an evidentiary hearing, this Court must accept the factual allegations presented in Lukehart’s motion and in this appeal as true to the extent they are not conclusively refuted by the record. *Ventura v. State*, 2 So. 3d 194, 197-98 (Fla. 2009). Further, this Court “review[s] the trial court’s application of the law to the facts *de novo*.” *Green v. State*, 975 So. 2d 1090, 1100 (Fla. 2008). A postconviction court’s decision whether to grant an evidentiary hearing is likewise subject to *de novo* review. *Rose v. State*, 985 So. 2d 500, 505 (Fla. 2008).

ARGUMENT I

THE LOWER COURT ERRED IN SUMMARILY DENYING LUKEHART'S CLAIM THAT FLORIDA'S LETHAL INJECTION PROCEDURES AS APPLIED TO LUKEHART ARE UNCONSTITUTIONAL AND CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION. FLORIDA'S LETHAL INJECTION PROCEDURES PRESENT A SUBSTANTIAL AND IMMINENT RISK THAT IS VERY LIKELY TO CAUSE LUKEHART NEEDLESS SUFFERING UNDER *GLOSSIP v. GROSS*, 576 U.S. 863 (2015) AND *BAZE v. REES*, 553 U.S. 35 (2008).

Florida's current lethal injection procedures are unconstitutional as specifically applied to Lukehart because there is a substantial and imminent risk that executing Lukehart under those procedures will very likely cause him needless pain and suffering due to the interaction of Florida's lethal injection procedures with Lukehart's severe kidney disease. *Glossip v. Gross*, 576 U.S. 863 (2015); *Baze v. Rees*, 553 U.S. 35 (2008). The lower court erred in summarily denying relief on this claim. PC/452-455.

As an initial matter, undersigned counsel submits that this Court must relinquish jurisdiction to the lower court with instructions to hold an evidentiary hearing on Lukehart's as-applied challenge and must also grant a stay of execution so that there is

enough time to hold a full and fair evidentiary hearing. This Court's prior precedent proves that as-applied challenges to the constitutionality of Florida's execution procedures should be decided after a full and fair evidentiary hearing in the lower court. The lower court erred when summarily denying Lukehart's as-applied claim without first holding an evidentiary hearing.

In 2019, while under an active death warrant, Bobby Joe Long filed an as-applied constitutional challenge to Florida's lethal injection procedures. *See Long v. State*, 271 So. 3d 938 (Fla. 2019). Long argued that his traumatic brain injury and temporal lobe epilepsy rendered Florida's use of etomidate in his execution unconstitutional under the Eighth Amendment. *Id.* at 943. The lower court held an evidentiary hearing on the claim without the need for this Court to relinquish jurisdiction. *See id.* at 944. This Court affirmed the lower court's rejection of Long's as-applied challenge. *See id.* at 945. However, this Court was able to make that determination based on the testimony of competing expert witnesses since Long was granted an evidentiary hearing. Lukehart should be afforded the same opportunity.

This Court has previously relinquished jurisdiction to the lower court in at least **four separate cases** under active death warrants so that evidentiary hearings could be held on those defendants' as-applied challenges to Florida's execution procedures. See *Correll v. State*, 184 So. 3d 478, 483 (Fla. 2015); *Howell v. State*, 133 So. 3d 511, 515 (Fla. 2014); *Henry v. State*, 134 So. 3d 938, 943 (Fla. 2014); *Davis v. State*, 142 So. 3d 867, 870 (Fla. 2014). When relinquishing jurisdiction in 2014 to consider Eddie Wayne Davis's as-applied challenge to Florida's execution procedures based on his diagnosis of Porphyria, this Court explained that this Court relinquished jurisdiction based, in part, on the "constitutional obligation to ensure that the method of lethal injection in this state comports with the Eighth Amendment." *Davis*, 142 So. 3d at 870.

As discussed in greater detail below, Lukehart has retained anesthesiologist Dr. Joel Zivot to opine on the interaction of Florida's lethal injection procedures with Lukehart's severe kidney disease and other unique medical conditions. Dr. Zivot's general opinions and expected testimony following a preliminary evaluation of Lukehart's case were presented to the lower court in Lukehart's May 8, 2026 Fla. R. Crim. P. 3.851 Motion and also in Dr. Zivot's affidavit attached

to the motion. See PC/346-352; 374-379. The lower court erred in summarily denying Lukehart's as-applied challenge, and further erred in failing to hold an evidentiary hearing so Dr. Zivot's full testimony and an explanation of his findings could be presented. See PC/452-455.

Undersigned counsel acknowledges this Court's recent precedent holding that lower courts did not err in summarily denying similar as-applied challenges to lethal injection raised by prior defendants under an active death warrant. See *Randolph v. State*, 422 So. 3d 166 (Fla. 2025); *Tanzi v. State*, 407 So. 3d 385 (2025); *Rogers v. State*, 409 So. 3d 1257 (Fla. 2025); *Cole v. State*, 392 So. 3d 1054 (Fla. 2024). Undersigned counsel respectfully submits that these recent opinions evidence a concerning departure from this Court's prior precedent and acknowledgement of this Court's "constitutional obligation to ensure that the method of lethal injection in this state comports with the Eighth Amendment." See *Davis*, 142 So. 3d at 870.

While Florida courts appear to be abdicating this constitutional obligation by consistently and pervasively denying evidentiary hearings on such claims, other jurisdictions are holding hearings. In

2017, Arkansas capital defendant Marcel Williams, who was under an active death warrant, filed a 42 U.S.C. § 1983 action in the United States District Court for the Eastern District of Arkansas raising an as-applied challenge to Arkansas's lethal injection protocol. *See Williams v. Kelley*, No. 5:17-CV-00103-KGB (E.D. Ark. 2017). On April 21, 2017, the district court held an evidentiary hearing on Williams's motion for a preliminary injunction where Williams's qualified medical expert provided testimony concerning the interaction of Arkansas' lethal injection protocols and Williams's unique medical conditions. *See Williams v. Kelley*, 854 F.3d 998, 1000-1001 (8th Cir. 2017).

In 2019, Ohio capital defendant Warren Keith Hennes, who was under an active death warrant, filed a suit under 42 U.S.C. § 1983 raising an Eighth Amendment challenge to Ohio's lethal injection protocols. *See In re Ohio Execution Protocol Litig.*, 946 F.3d 287 (6th Cir. 2019). The district court denied relief after Hennes presented expert testimony in support of his claim at an evidentiary hearing. *See id.* at 289.

In 2022, Arizona capital defendant Frank Atwood, who was under an active death warrant, filed a 42 U.S.C. § 1983 action and a

motion for preliminary injection raising an Eighth Amendment as-applied challenge to Arizona's lethal injection protocol. *See Atwood v. Shinn*, No. CV-22-00860-PHX-MTL (JZB), 2022 WL 1970017 (D. Ariz. June 4, 2022). The district court held an evidentiary hearing on the motion where Atwood's qualified medical expert offered expert testimony regarding his unique medical conditions. *See id.* at *4.

In 2023, Alabama capital defendant James Edward Barber filed a 42 U.S.C. § 1983 action and a motion for preliminary injection while under an active death warrant asserting that the manner in which Alabama executed its lethal injection protocol violated the Eighth Amendment's prohibition against cruel and unusual punishment. *See Barber v. Governor of Alabama*, 73 F.4th 1306 (11th Cir. 2023). The motion was denied after the United States District Court for the Middle District of Alabama held an evidentiary hearing on the motion. *See id.* at 1314-1316.⁹ In 2025, Tennessee capital defendant Byron

⁹ Capital defendants in Alabama under recent active death warrants have also received evidentiary hearings in 2025 on their Eighth Amendment constitutional challenges to Alabama's protocol for carrying out executions by nitrogen hypoxia. *See Frazier v. Hamm*, No. 2:24-CV-732-ECM [WO], 2025 WL 361172 (M.D. Ala. Jan. 31, 2025) (district court conducted an evidentiary hearing on Alabama capital defendant's 42 U.S.C. § 1983 action challenging nitrogen hypoxia protocols under the Eighth Amendment while under an

Black, who was under an active death warrant, sought a temporary injunction in the trial court arguing an as-applied Eighth Amendment challenge to Tennessee’s lethal injection protocols. *See Black v. Strada*, 721 S.W.3d 223 (Tenn. 2025). The trial court heard evidence from competing experts at an evidentiary hearing regarding Black's as-applied challenge to the lethal injection protocols. *See id.* at 227.

Despite the constitutional obligation that this Court has previously acknowledged and other jurisdictions allowing evidentiary hearings on similar claims, this Court continues to affirm Florida trial courts’ summary denials of Eighth Amendment claims challenging Florida’s lethal injection procedures during active death warrants. Undersigned counsel acknowledges this current precedent, but respectfully submits that the only way to ensure Lukehart receives the due process he is entitled to during his active

active death warrant); *see also Boyd v. Hamm*, No. 2:25-CV-529-ECM, 2025 WL 2884410 (M.D. Ala. Oct. 9, 2025) (same).

death warrant is to grant a stay¹⁰, relinquish jurisdiction, and remand to the lower court to hold an evidentiary hearing where Lukehart’s Eighth Amendment challenges to lethal injection can be heard “at a meaningful time and in a meaningful manner.” See *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).¹¹

Before reaching the merits of Lukehart’s as-applied claim, the lower court erroneously found the claim is procedurally barred as untimely. PC/452. The court highlighted that “[t]he facts on which this claim is predicated have been available since at least 2023 by [Lukehart’s] own admission,” referring to Lukehart’s assertion in his Rule 3.851 motion that “[a]lthough Lukehart’s medical records show some diminished kidney values starting in 2023, his numbers became severe in January of 2026. Around January 24, 2026,

¹⁰ An Appellant’s Motion for Stay of Execution and Relinquishment of Jurisdiction to the State Circuit Court is being filed simultaneously with this Initial Brief.

¹¹ If this Court chooses not to relinquish jurisdiction for an evidentiary hearing, then this Court must accept the factual allegations presented in Lukehart’s motion and in this appeal as true to the extent that they are not conclusively refuted by the record. See *Ventura v. State*, 2 So. 3d 194, 197-98 (Fla. 2009).

Lukehart collapsed as a result of a medical emergency caused by his severe kidney disease.” PC/349; 452. The lower court further found that Lukehart “has not shown that his kidney condition has recently deteriorated past the theoretical threshold that would render Florida’s lethal injection protocol unconstitutional as applied to him, just that his condition “became severe” in 2026 ... That is not enough to rise to the level of a cognizable claim.” PC/452.

It is difficult to know how Lukehart could reasonably prove a cognizable claim for relief based on his kidney disease without having an evidentiary hearing where a qualified medical expert like Dr. Zivot could thoroughly explain how Lukehart’s kidney disease would interact with Florida’s lethal injection protocol to cause needless pain and suffering. Regardless, because the lower court denied an evidentiary hearing, this Court must accept the factual allegations presented in Lukehart’s motion and this appeal as true. Lukehart’s motion alleged that “[a]round January 24, 2026, Lukehart collapsed as a result of a medical emergency caused by his severe kidney disease.” PC/349. January 24, 2026 is a date clearly less than one year prior to the May 8, 2026 filing date of Lukehart’s successive Rule 3.851 motion, meaning that the facts underlying Lukehart’s as-

applied claim based on his severe kidney disease qualify as newly discovered evidence that is not procedurally barred as untimely under Fla. R. Crim. P. 3.851(d)(2).

Further, Lukehart alleged and Dr. Zivot opined that Lukehart's "kidney function has declined to the point of nearing a need for hemodialysis." PC/348, 375. If Dr. Zivot had been allowed to testify at an evidentiary hearing on this claim, he could have explained that Lukehart's kidney condition *has* recently deteriorated past the theoretical threshold that would render Florida's lethal injection protocols unconstitutional as applied to him. Dr. Zivot could have explained that a January 24, 2026 blood test around the time of Lukehart's collapse shows an e-GFR value of 18 mL/min, which is in the severely decreased range and only three points above the 15 mL/min threshold for kidney failure. Dr. Zivot and Lukehart were not afforded that opportunity.

Further still, the facts underlying Lukehart's as-applied challenge to lethal injection based on his severe kidney disease could not fully be known until after his active death warrant was signed, because there was no way for Lukehart to know which execution procedures would be in place when and if his death warrant was

signed. Lukehart was sentenced to death on April 4, 1997, and the mandate was issued in his case on February 26, 2001. Lukehart has sat on death row for twenty-nine years since his 1997 death sentence facing the possibility of an eventual death warrant and execution. At the time that Lukehart was originally sentenced to death in 1997, lethal injection was not even an option for execution in Florida, as the first execution by lethal injection in the state would not take place until 2000. *See Florida's First Lethal Injection*, CBS NEWS (originally published February 23, 2000), <https://www.cbsnews.com/news/floridas-first-lethal-injection/>.

Since then, Florida's lethal injection protocols have changed, including a switch from midazolam to etomidate as the first drug in the three-drug cocktail in 2017. The Florida Department of Corrections has also regularly issued updated lethal injection procedures every two years since at least 2019- issuing them on February 27, 2019, May 6, 2021, March 10, 2023, and February 18, 2025 respectively. It was impossible for Lukehart to know if these procedures would show a change to the lethal injection protocols until they were issued and also impossible for him to know which protocols would apply to his own execution until his death warrant

was signed. The lower court states that “[t]he current three-drug protocol has remained essentially unchanged since 2017.” PC/452. Regardless, it was still impossible for Lukehart to know which procedures he would actually be executed under or when or how those procedures would be changed. If Lukehart had raised his as-applied challenge prior to the signing of his active death warrant, the claim could have been premature and not fully ripe for consideration.

Lukehart also could not have known what his kidney functioning would be at the time of execution until his death warrant was signed because kidney disease is a progressive condition that deteriorates over time. The lower court points to this Court’s precedent finding such claims untimely even in cases where the disease has a progressive nature. *See* PC/452 (citing *Randolph v. State*, 422 So. 3d 166 (Fla. 2025) and *Cole v. State*, 392 So. 3d 1054 (Fla. 2024)). Undersigned counsel acknowledges this precedent, but submits that it is at odds with federal jurisprudence concerning other execution-related claims for relief.

In 2007, the United States Supreme Court found, in part, that a capital defendant's *Ford*¹²-based claim of incompetency to be executed was not barred by the Antiterrorism and Effective Death Penalty Act's prohibition against "second or successive" applications, because the claim was not ripe until the defendant's date of execution was set. See *Panetti v. Quarterman*, 551 U.S. 930, 943-947 (2007). The State argued in *Panetti* that a "federal court is permitted to review a prisoner's *Ford* claim once it becomes ripe if the prisoner preserved the claim by filing it in his first federal habeas application." *Panetti*, 551 U.S. at 943.

Rejecting this argument, the *Panetti* court explained that if the State's "interpretation of 'second or successive' were correct, the implications for habeas practice would be far reaching and seemingly perverse." *Panetti*, 551 U.S. at 943 (quoting *Stewart v. Martinez-Villareal*, 523 U.S. 637, 644 (1998)). The *Panetti* court further explained that

A prisoner would be faced with two options: forgo the opportunity to raise a *Ford* claim in federal court; or raise the claim in a first federal habeas application (which generally must be filed within one year of the relevant

¹² *Ford v. Wainwright*, 477 U.S. 399 (1986).

state-court ruling), even though it is premature. The dilemma would apply not only to prisoners with mental conditions indicative of incompetency but also to those with no early sign of mental illness. **All prisoners are at risk of deteriorations in their mental state. As a result, conscientious defense attorneys would be obliged to file unripe (and, in many cases, meritless) Ford claims in each and every § 2254 application.**

551 U.S. 930, 943 (2007) (emphasis added). The *Panetti* court understood that prisoners' mental state can vary and deteriorate over time when considering the appropriate timing of incompetency to be executed claims, and the same logic should apply to physical conditions that would prevent executions in accordance with Eighth Amendment principles.¹³ Similar to the dilemma identified by the Supreme Court in *Panetti*, Florida capital defendants may be forced

¹³ Undersigned counsel is not arguing that capital defendants should only be allowed to raise as-applied challenges to Florida's execution procedures after their death warrant is signed. However, this Court should consider the fact that some medical conditions that could interact with lethal injection are progressive in nature, and defendants with these conditions should not be required to raise such claims until they deteriorate to the point of supporting an Eighth Amendment challenge. Further, such challenges could be premature when raised prior to the signing of an active death warrant, considering that the Florida Department of Corrections promulgates new execution procedures every two years and there is no way to know what changes may be made or which procedures an inmate will actually be executed under until a warrant is signed.

to raise premature as-applied challenges to Florida’s execution protocols, if they are forced to file those claims the minute that there is some evidence of a physical condition that may interact with lethal injection at the time of some potential future execution. Having addressed the lower court’s findings on timeliness, this brief will now turn to the merits of Lukehart’s as-applied challenge.

The Eighth Amendment, which is made applicable to the States through the Fourteenth Amendment, prohibits the infliction of “cruel and unusual punishments.” *Glossip v. Gross*, 576 U.S. 863, 876 (2015). To succeed on an Eighth Amendment method-of-execution claim, Lukehart must: (1) establish that the method of execution presents a substantial and imminent risk that is sure or very likely to cause serious illness and needless suffering, and also (2) identify a known and available alternative method of execution that entails a significantly less severe risk of pain. *See Asay v. State*, 224 So. 3d 695, 701 (Fla. 2017) (*citing Glossip*, 576 U.S. at 877 and *Baze*, 553 U.S. at 50, 61).

Immediately following the issuance of Lukehart’s warrant, defense counsel emailed counsel for FDOC and requested his most recent medical records – from October 1, 2025 through present. Since

counsel had recently obtained updated medical records, the request was narrowed to this timeframe. However, the records were not received until 9:28 a.m. on Wednesday, May 6, 2026, just less than forty-eight hours from Lukehart's Rule 3.851 deadline as ordered by the lower court.

Undersigned counsel retained anesthesiologist Dr. Joel Zivot, who is available and willing to testify to the substantial risk of needless pain and suffering that Lukehart faces if executed by lethal injection due to his medical conditions. Dr. Zivot is an associate professor and senior member of the Departments of Anesthesiology and Surgery at Emory University School of Medicine in Atlanta, Georgia. Dr. Zivot holds board certification in Anesthesiology from the Royal College of Physicians and Surgeons of Canada and the American Board of Anesthesiology. He is board-certified in Critical Care Medicine from the American Board of Anesthesiology. Dr. Zivot has practiced anesthesiology and critical care medicine for over thirty years, during which time he has personally performed or supervised the care of over 50,000 patients.

Dr. Zivot reviewed Lukehart's medical records and Florida's lethal injection procedures, and he can opine generally to the

following.¹⁴ According to Lukehart's medical records, he 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.

Based on his review of records, Dr. Zivot observed that Lukehart is a man in poor health. His kidney function has declined to the point of nearing a need for hemodialysis. His obesity, along with hypertension, diabetes, elevated cholesterol, and a smoking history, makes him very high risk for significant heart disease. There do not appear to be records of any examination of his cardiac function, but

¹⁴ Due to the extreme time constraints and expedited filing schedule caused by the Governor's signing of a 32-day death warrant, Dr. Zivot has been able to conduct a preliminary evaluation by reviewing Lukehart's medical records prior to the filing of the Rule 3.851 motion. A stay of execution must be granted so that Dr. Zivot can conduct a complete in-person evaluation of Lukehart.

based on his risk factors, he is likely on a path to suffering a heart attack. Recurrent bacterial urinary tract infections suggest poor immune health or anatomical abnormalities of his genitourinary system, including prostatitis. Infections of this nature, if not treated in a timely fashion, can lead to septic shock and death.

Florida's lethal injection procedures involve the sequential intravenous delivery of three drugs. The first drug is etomidate, followed by rocuronium bromide, and then potassium acetate. Etomidate is a non-barbiturate sedative hypnotic drug used in anesthesiology practice in several different situations. Etomidate is not classically considered an analgesic, which is a medicine used for the control of pain. Further, neither of the subsequent drugs used in Florida's lethal injection procedures are analgesic. Rocuronium bromide is a rapidly acting paralyzing drug and will paralyze any individual, in this case the prisoner, making it impossible to communicate to observers that pain is occurring. Potassium acetate is a drug that regulates the contraction of the heart. In large doses, potassium acetate is painful when injected and will cause the heart to cease functioning.

As a consequence of Lukehart's severe kidney disease, injected drugs as used in the FDOC 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. As 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. Dr. Zivot further opined that "[s]hould Mr. Lukehart be executed by DOC's current lethal injection protocol, *he has an extremely high likelihood of suffering a needless, cruel, and painful death.*"

Additionally, Lukehart is allergic to diphenhydramine, a first-generation antihistamine, which likely means he is also allergic to hydroxyzine. FDOC is known to offer prisoners the option of hydroxyzine prior to the establishment of intravenous access to reduce anxiety. However, it is unknown whether this drug is effective in reducing the anxiety of anticipating one's own death. Should FDOC give Lukehart hydroxyzine, it would result in a significant and

dangerous risk of a severe allergic reaction, for which FDOC has no protocols to handle should intervention be necessary.

It is clear from Dr. Zivot's preliminary evaluation of Lukehart's medical history that Florida's lethal injection procedures place Lukehart at a substantial risk of needless pain and suffering. Even more troubling is the fact that because Lukehart will be administered the paralytic rocuronium bromide, the ensuing paralysis of his body will likely prevent him from exhibiting any external signs of his physical anguish. Florida therefore cannot constitutionally execute Lukehart.

To succeed on his Eighth Amendment method-of-execution claim, Lukehart is also required to identify a method of execution other than lethal injection that is "feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain." *Glossip*, 576 U.S. at 877 (quoting *Baze*, 533 U.S. at 52). The requirement under current federal jurisprudence that Lukehart choose another less-painful method of execution is morally repugnant, impossible to realistically meet, and violates Lukehart's First, Fifth, Sixth, Eighth, and Fourteenth Amendment rights under the United States Constitution.

The alternative method requirement of the *Baze-Glossip* test violates Lukehart’s right to religious freedom under the First Amendment to the United States Constitution. Lukehart has a First Amendment right to the free exercise of his religion, even as an incarcerated prisoner facing an imminent execution. *See Ramirez v. Collier*, 595 U.S. 411, 424–25 (2022) (citing 42 U.S.C. § 2000cc–1(a)) (explaining the Religious Land Use and Institutionalized Persons Act provides that no government shall impose a substantial burden on the religious exercise of a person confined to an institution, including state prisoners); *see also Murphy v. Collier*, 587 U.S. 901 (2019) (granting defendant’s application for stay of execution and finding the State could not carry out the execution unless the State permitted a Buddhist spiritual advisor to accompany the defendant in the execution chamber).

Lukehart is a long-time practicing Catholic. Having to choose an alternative method for his own execution runs afoul of church doctrine which views both murder and suicide as grave violations of the Fifth Commandment – “Thou shalt not kill.” This stems from the belief that human life is sacred, belonging to God, who is the sole author of life and death. Forcing Lukehart to make such a choice in

order to succeed on his Eighth Amendment challenge to lethal injection prohibits his free exercise of religion, which the First Amendment sought to protect.

Furthermore, the alternative method requirement of the *Baze-Glossip* test violates Lukehart's Fifth and Fourteenth Amendment due process rights because there is no guaranteed or scientific way to prove that any alternative method will cause significantly less pain than other methods available in the United States. There exists no way to legally, humanely, or ethically test any alternative method of execution to determine if it will cause less pain compared to another. Specific to Lukehart, there exists no legal or scientific way to test any alternative method of execution on an individual with severe kidney disease prior to Lukehart's execution to determine what level of pain they may suffer. Lukehart, and all capital defendants facing execution, are therefore forced to choose an alternative method without actually knowing if it will cause less pain and suffering. The United States Supreme Court has promulgated a standard that is unconstitutional and cannot actually be met, and undersigned counsel maintains that Lukehart should not be subject to execution in the first place.

Lukehart's unconstitutional execution by lethal injection is currently scheduled for Tuesday, June 2, 2026, at 6:00 p.m., only sixteen days from the filing date of this appellate brief. The risk that Lukehart will experience needless pain and suffering could not be more imminent or substantial. Undersigned counsel respectfully submits that this Court must relinquish jurisdiction so an evidentiary hearing can be held on Lukehart's Eighth Amendment method-of-execution claim, allowing the claim to be decided based on complete expert testimony detailing the risks that Lukehart faces.

Undersigned counsel also respectfully submits that this Court must grant Lukehart a stay of execution because his Eighth Amendment method-of-execution claim is a substantial ground upon which relief might be granted and deserves to be fully addressed at an evidentiary hearing that is free from the constraints of an accelerated death warrant schedule. *See Chavez v. State*, 132 So. 3d 826, 832 (Fla. 2014) (internal citations omitted) (explaining that a stay of execution pending the disposition of a successive motion for postconviction relief is warranted when there are substantial grounds upon which relief might be granted); *see also Correll v. State*, 184 So. 3d 478, 482 (Fla. 2015) (granting a stay of execution prior to

evidentiary hearing on capital defendant's as-applied challenge to Florida's execution procedures). Relief is proper.

ARGUMENT II

THE LOWER COURT ERRED IN SUMMARILY DENYING LUKEHART'S CLAIM THAT BY UTILIZING A PARALYTIC DRUG THAT SUFFOCATES THE CONDEMNED AND MASKS THE EXTREME PAIN CAUSED BY ALL THREE DRUGS, FLORIDA'S LETHAL INJECTION PROCEDURES CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

Florida's current lethal injection procedures are facially unconstitutional because the procedures create a risk of needless pain and suffering. *Glossip v. Gross*, 576 U.S. 863 (2015); *Baze v. Rees*, 553 U.S. 35 (2008). The lower court erred in summarily denying relief on this claim. PC/455-456.

The lower court held that Lukehart's facial challenge to Florida's lethal injection procedures under the Eighth Amendment is denied for all the reasons that his as-applied challenge in Argument One is denied. PC/455. As an initial matter, undersigned counsel submits that this Court must relinquish jurisdiction to the lower court with instructions to hold an evidentiary hearing on Lukehart's facial challenge and must also grant a stay of execution to ensure there is

sufficient time to hold a full and fair evidentiary hearing. The lower court erred in summarily denying relief on this claim without first holding an evidentiary hearing. PC/455-456. Lukehart relies on his legal arguments articulated at pages 10-17 of Argument One to support the need for an evidentiary hearing on his facial challenge to lethal injection, and those arguments are fully incorporated herein in support of Argument Two. This brief will now turn to the merits of Lukehart's facial challenge.

The Eighth Amendment, which is made applicable to the States through the Fourteenth Amendment, prohibits the infliction of "cruel and unusual punishments." *Glossip v. Gross*, 576 U.S. 863, 876 (2015). To succeed on an Eighth Amendment method-of-execution claim, Lukehart must: (1) establish that the method of execution presents a substantial and imminent risk that is sure or very likely to cause serious illness and needless suffering, and also (2) identify a known and available alternative method of execution that entails a significantly less severe risk of pain. *See Asay v. State*, 224 So. 3d 695, 701 (Fla. 2017) (*citing Glossip*, 576 U.S. at 877 and *Baze*, 553 U.S. at 50, 61).

Under Florida law, “[a] death sentence shall be executed by lethal injection ... under the direction of the Secretary of Corrections or the secretary’s designee.” Fla. Stat. § 922.105(1). The State seeks to execute Lukehart pursuant to FDOC’s protocols that call for the intravenous injection of the following drugs: 1) 200 milligrams of etomidate, 2) 1000 milligrams of rocuronium bromide, and 3) 240 milliequivalents of potassium acetate. These drugs must be given in this specific order, as outlined in FDOC’s lethal injection protocols. *See* PC/391-393.

The objective of the first drug, etomidate, is to induce a level of unconsciousness that achieves and maintains a surgical plane of anesthesia, *i.e.*, one that renders a person insensate to the pain of the second and third drugs. The objective of the second drug, rocuronium bromide, is to give the appearance of a serene death. It paralyzes all voluntary muscles, preventing the inmate from manifesting pain. It also prevents the inmate from breathing by paralyzing the diaphragm, which prevents air from being moved in and out of the lungs.

Rocuronium bromide is not an anesthetic and does not affect consciousness or the perception of pain. 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. The objective of the third and final drug, potassium acetate, is to kill the inmate. This is done by interfering with the heart's electrical activity which induces cardiac arrest. 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. Notably, FDOC's lethal injection protocol does not provide for an individualized assessment of an inmate's specific medical conditions and how these might affect the lethal injection process. The dosage of drugs remains the same regardless of the age, height, and weight of the inmate.

Defense expert Dr. Zivot reviewed FDOC's lethal injection protocols and opined that the protocol, as designed, creates an objectively intolerable risk of needless pain and suffering. See PC/376-379. Dr. Zivot was available to opine generally to the

following at an evidentiary hearing in the lower court, had one been granted. Dr. Zivot has reviewed the autopsy records and toxicology reports of all nineteen prisoners executed by Florida in 2025. Strikingly, on top of the faulty FDOC drug logs publicized in now-deceased inmate Frank Walls's case, the autopsy and toxicology reports of the nineteen executions Dr. Zivot reviewed show a high prevalence of additional concerning irregularities. Dr. Zivot opines that Florida's lethal injection protocol creates an objectively intolerable risk of needless pain and suffering.

In the autopsies of now-deceased inmates James Ford, Jeffrey Hutchinson, Glen Rogers, Anthony Wainwright, Thomas Gudinas, Samuel Smithers, and Richard Randolph¹⁵, the physical evidence-notations of intramuscular injections in the shoulder of each inmate-points to a high likelihood that all these men received a mysterious dosage of an unknown substance. The FDOC lethal injection protocol makes no mention of any option that permits an intramuscular

¹⁵ James Ford was executed on February 13, 2025. Jeffrey Hutchinson was executed on May 1, 2025. Glen Rogers was executed on May 15, 2025. Anthony Wainwright was executed on June 10, 2025. Thomas Gudinas was executed on June 24, 2025. Samuel Smithers was executed on October 14, 2025. Richard Randolph was executed on November 20, 2025.

injection. Ad hoc polypharmacy as an adjunct to lethal injection raises the serious and likely risk of needless pain and suffering.

Owing to its favorable minimal impact on blood pressure, etomidate is used as an induction agent in critically ill individuals with unstable blood pressure in a medical setting. Although etomidate is known to affect plasma cortisol concentrations, this effect would be of no consequence in an execution. Etomidate is the first injected chemical in the FDOC execution protocol. As etomidate is rarely lethal, it is unclear if FDOC intended to use etomidate as the cause of death. In as little as three minutes after an etomidate injection, rapid redistribution of the drug within the circulation will allow a return to consciousness. As etomidate is rarely fatal and short-acting, death is more likely to be caused by the chemical suffocation induced by the injection of the second drug in the protocol - the paralytic rocuronium bromide.

“Fatal” etomidate blood levels are generally considered to be 0.4-3.6 mcg/mL in the blood. In the cases of now-deceased inmates Kayle Bates, David Pittman, Richard Randolph, and Frank Walls, the toxicology reports in their autopsy records found etomidate blood

levels below 0.4 mcg/mL.¹⁶ It is noteworthy that of these four executions, three have previously been flagged as potentially involving expired etomidate. These toxicology results from prior executions could prove that concern, as expired etomidate may lose potency over time.

The awareness of death by suffocation is not a rare event. In the nineteen executions of 2025, awareness of dying by suffocation occurred more than 20% of the time. Veterinary guidelines strongly condemn using paralytics alone for euthanasia as they can paralyze a conscious animal, causing suffering without allowing them to show distress. Thus, the FDOC execution protocol kills human beings by a technique rejected by the American Veterinary Medical Association. Florida's lethal injection procedures essentially treat prisoners as of lower value than animals. Florida's lethal injection procedures create superadded pain and suffering, and this finding is not merely theoretical but is found unambiguously in the toxicology evidence.

¹⁶ Kayle Bates was executed on August 19, 2025. David Pittman was executed on September 17, 2025. Richard Randolph was executed on November 20, 2025. Frank Walls was executed on December 18, 2025.

Pulmonary edema is a very common post-mortem finding in lethal injection executions. In Dr. Zivot's review of over 250 post-lethal injection execution autopsies, pulmonary edema or bloody frothy fluid in the lungs was found as often as 80% of cases. A review of the nineteen post-execution autopsies in Florida from 2025 found the presence of heavy, blood-filled lungs with frothy bloody fluid in **fifteen of nineteen cases.** This corresponds to an incidence of 79% at the low estimate end.

The airways with normal lungs are always free of fluid, and only pathological states result in pulmonary edema. Fluid in the lung airways is a highly dangerous and extremely uncomfortable sensation. It is akin to the sensation of drowning. Waterboarding is a technique used to extract information from captured individuals, made notorious in the global war on terror. Also known as enhanced interrogation, waterboarding is widely classified as torture by international human rights organizations, legal experts, and the United Nations. To the person subjected to waterboarding, the experience feels like drowning. The individual suffers from an uncontrollable sensation of panic, terror, and slow-motion

suffocation. Victims experience intense pain, broken willpower, and involuntary convulsions.

Florida's lethal injection protocol creates death akin to waterboarding, but the fluid rises from within the lungs. Death occurs not in seconds but may take minutes. The sensation of torture is evident in seconds, but the paralysis created by the second drug rocuronium bromide creates the outward appearance of calmness while hiding the inmate's inward sensation of panic, terror, and suffocation. This is not a theoretical concern but an actual event.

Should Lukehart, or any other inmate, be executed by FDOC's current lethal injection protocol, they have an extremely high likelihood of suffering a needless, cruel, and painful death. The use of etomidate as the first injected chemical in the three-drug protocol virtually guarantees the common experience of death by cruel and terrifying suffocation. After reviewing multiple lethal injection protocols in other death penalty states, Dr. Zivot opines that Florida currently has the worst of the worst lethal injection protocol.

Regarding Lukehart's assertion that three recent executions have been flagged as involving potentially expired etomidate, the lower court held that FDOC is presumed to comply with its lethal

injection protocols. See PC/455. The lower court further found that the possibility that expired etomidate may have been used in prior executions is insufficient to overcome this presumption. PC/455. The court overlooks the other evidence that Dr. Zivot found from his review of the autopsy records indicating that FDOC is not following its own lethal injection procedures, surely creating the risk of needless suffering. Dr. Zivot found evidence in at least seven post-execution autopsies - James Ford, Jeffrey Hutchinson, Glen Rogers, Anthony Wainwright, Thomas Gudinas, Samuel Smithers, and Richard Randolph - of intramuscular injections in the shoulder of each inmate, which points to a high likelihood that all these men received a mysterious dosage of an unknown substance. However, the FDOC lethal injection protocol makes no mention of any option that permits an intramuscular injection. This startling evidence, along with other deviations indicated by the FDOC drug logs obtained in the *Walls v. Dixon*, No. 4:25-cv-0488, ECF 1 (N.D. Fla. Nov. 26, 2025) litigation and argued in Lukehart's demand for FDOC records (PC/66-140), pierces the presumption that FDOC will follow its own lethal injection procedures and increases the likelihood of needless pain and suffering.

To succeed on his Eighth Amendment method-of-execution claim, Lukehart is also required to identify a method of execution other than lethal injection that is “feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain.” *Glossip*, 576 U.S. at 877 (quoting *Baze*, 533 U.S. at 52). The requirement under current federal jurisprudence that Lukehart choose another less-painful method of execution is morally repugnant, impossible to realistically meet, and violates Lukehart’s First, Fifth, Sixth, Eighth, and Fourteenth Amendment rights under the United States Constitution. Lukehart relies on his legal arguments articulated at pages 29-31 of Argument One to support his argument that the alternative method pleading requirement of the *Baze-Glossip* test is unconstitutional, and those arguments are fully incorporated herein in support of Argument Two.

Lukehart’s unconstitutional execution by lethal injection is currently scheduled for Tuesday, June 2, 2026, at 6:00 p.m., only sixteen days from the filing date of this appellate brief. The risk that Lukehart will experience needless pain and suffering could not be more imminent or substantial. Undersigned counsel respectfully submits that this Court must relinquish jurisdiction so an

evidentiary hearing can be held on Lukehart's Eighth Amendment method-of-execution claim, and this claim may be decided based on complete expert testimony detailing the risks that Lukehart faces.

Undersigned counsel also respectfully submits that this Court must grant Lukehart a stay of execution because his Eighth Amendment method-of-execution claim is a substantial ground upon which relief might be granted and deserves to be fully addressed at an evidentiary hearing that is free from the constraints of an accelerated death warrant schedule. *See Chavez v. State*, 132 So. 3d 826, 832 (Fla. 2014) (internal citations omitted) *see also Correll v. State*, 184 So. 3d 478, 482 (Fla. 2015). The United States Supreme Court explained in *Glossip v. Gross* that “[b]ecause capital punishment is constitutional, there must be a constitutional means of carrying it out.” 576 U.S. at 863. There is no constitutional way for Florida to carry out Lukehart's execution under the current lethal injection protocols. Relief is proper.

ARGUMENT III

THE CIRCUIT COURT ERRED IN SUMMARILY DENYING LUKEHART'S CLAIM THAT FLORIDA'S WARRANT PROCESS DEPRIVES LUKEHART OF A FULL AND FAIR POSTCONVICTION PROCEEDING IN VIOLATION OF HIS CONSTITUTIONAL RIGHT TO SUBSTANTIVE AND PROCEDURAL DUE PROCESS UNDER

THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

Florida's truncated warrant process and Lukehart's resulting thirty-two-day warrant period foreclose him from receiving a full and fair postconviction proceeding during his active death warrant and violate his due process rights. The circuit court erred when summarily denying relief on this claim. PC/456.

A. Legal Authority.

The absence of a reasonable warrant schedule denies Lukehart of full, fair, and meaningful postconviction proceedings in violation of the Due Process Clause of the Fifth and Fourteenth Amendments and Article I, Section 9, of the Florida Constitution. The right to due process entails "notice and opportunity for hearing appropriate to the nature of the case." *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 542 (1985) (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)). "[F]undamental fairness is the hallmark of the procedural protections afforded by the Due Process Clause." *Ford v. Wainwright*, 477 U.S. 399, 424 (1986) (Powell, J., concurring in part and in the judgment).

Undersigned counsel acknowledges this Court's prior adverse precedent summarily denying similar claims raised during active death warrants. See PC/456 (citing *Jennings v. State*, 422 So. 3d 107 (Fla. 2025); *Bates v. State*, 416 So. 3d 312 (Fla. 2025); *Tanzi v. State*, 407 So. 3d 385 (2025); *Barwick v. State*, 361 So. 3d 785 (Fla. 2023)). Undersigned counsel respectfully submits that defense counsel litigating active death warrants continue to raise such claims based on the good-faith belief and first-hand experience that active death warrants cannot reasonably be litigated on approximately thirty-day time frames. Further, undersigned counsel submits that in one of those cases - *Barwick v. State* - this Court itself recognized the extraordinary pace imposed by active death warrant litigation and expressed concern regarding the compressed timeframes under which such proceedings are required to be litigated. In his concurrence, Justice Labarga expressed his concerns during the active death warrant litigation of Darryl Barwick:

As the majority observes, "post-warrant litigation is arduous," see majority op. at 7, and a death warrant by its very nature requires expedited proceedings. However, these solemn proceedings ultimately involve carrying out a sentence of death for the most aggravated and least mitigated of murders and must still ensure due process of law. I am extremely concerned by the recent pace of death

warrants and the speed with which the parties and involved entities must carry out their respective duties ...

I nonetheless caution that even in this final stage of capital proceedings, a meaningful process must be ensured.

Barwick, 361 So. 3d at 796 (Labarga, J., concurring) (emphasis added).

Lukehart submits that he has been deprived of the critical component of due process—fundamental fairness and meaningful or real opportunity to be heard. Importantly, as this Court explained in *Key Citizens for Gov., Inc. v. Florida Keys Aqueduct Auth.*, 795 So. 2d 940, 948 (Fla. 2001) (emphasis added):

The basic due process guarantee of the Florida Constitution provides that “[n]o person shall be deprived of life, liberty or property without due process of law.” Art. I, § 9, Fla. Const. The Fifth Amendment to the United States Constitution guarantees the same. As the Florida Supreme Court explained in *Department of Law Enforcement v. Real Property*, 588 So. 2d 957, 960 (Fla. 1991), “[p]rocedural due process serves as a vehicle to ensure fair treatment through the proper administration of justice where substantive rights are at issue.” Procedural due process requires both fair notice and a real opportunity to be heard. *See id.* As the United States Supreme Court explained, the notice must be “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice must be of such nature as reasonably to convey the required information, and it must afford a reasonable

time for those interested to make their appearance.” *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 94 L. Ed. 865 (1950) (citations omitted). **Further the opportunity to be heard must be “at a meaningful time and in a meaningful manner.”** *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976); accord *Fuentes v. Shevin*, 407 U.S. 67, 80, 92 S. Ct. 1983, 32 L. Ed. 2d 556 (1972) (stating that procedural due process under the Fourteenth Amendment of the United States Constitution guarantees notice and an opportunity to be heard at a meaningful time and in a meaningful manner).

The specific parameters of the notice and the opportunity to be heard required by procedural due process are not evaluated by fixed rules of law, but rather by the requirements of the particular proceeding. See *Gilbert v. Homar*, 520 U.S. 924, 117 S. Ct. 1807, 138 L. Ed. 2d 120 (1997); see also *Mullane*, 339 U.S. at 313, 70 S. Ct. 652 (stating that notice and opportunity for hearing need only be appropriate to the nature of the case). As the Supreme Court has explained, due process, “unlike some legal rules, is not a technical concept with a fixed content unrelated to time, place and circumstances.” *Cafeteria & Restaurant Workers Union, Local 473, AFL-CIO v. McElroy*, 367 U.S. 886, 895, 81 S. Ct. 1743, 6 L. Ed. 2d 1230 (1961). Instead, “due process is flexible and calls for such procedural protections as the particular situation demands.” *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972).

Lukehart does not simply assert that a particular number of days from the warrant signing to the execution violates due process. Rather, he has been denied the meaningfulness and fundamental fairness required due to the circumstances present in his case. See *Abdool v. Bondi*, 141 So. 3d 529, 544 (Fla. 2014) (“there is no single

test which applies to determine whether the requirements of procedural due process have been met. Courts instead consider the individualized facts of each case to determine whether the defendant has been accorded the process which the state and federal constitutions demand.”).

B. Florida’s Truncated Warrant Process.

The warrant procedure in Florida and its constituent proceedings are so truncated that they preclude a meaningful hearing on any of Lukehart’s claims, preclude counsel’s meaningful and effective representation, and cause unnecessary strain and chaos on the judicial system, particularly at the circuit court level. The Due Process Clause of the Fourteenth Amendment guarantees that “no State shall . . . deprive any person of life, liberty, or property without due process of law.” Amend. XIV, U.S. Const. Likewise, “one of the basic tenets of Florida law is the requirement that all proceedings affecting life, liberty, or property must be conducted according to due process.” *Scull v. State*, 569 So. 2d 1251, 1252 (Fla. 1990) (citing Art. 1, § 9, Fla. Const.).

“Whether acting through its judiciary or through its legislature, a state may not deprive a person of all existing remedies for the

enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it.” *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 682 (1930) (emphasis added). “At a minimum,” due process “require[s] that deprivation[s] of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.” *Armstrong v. Manzo*, 380 U.S. 545, 550 (1965) (quoting *Mullane*, 339 U.S. at 313).

As the United States Supreme Court held in *Mathews v. Eldridge*, “the fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’” 424 U.S. 319, 333 (1976) (quoting *Armstrong*, 380 U.S. at 553). Nowhere can these principles be more important than in a capital case, where the Supreme Court has repeatedly emphasized that the Eighth Amendment requires a heightened degree of reliability in the process. *See, e.g., Herrera v. Collins*, 506 U.S. 390 (1993); *McKoy v. North Carolina*, 494 U.S. 433 (1990); *Loudermill*, 470 U.S. at 542 (quoting *Mullane*, 339 U.S. at 313) (reiterating that the due process requirements of notice and opportunity must be “appropriate to the nature of the case”); *Eddings v. Oklahoma*, 455

U.S. 104 (1982); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

Contrary to this Court’s finding in *Hannon v. State*, 228 So. 3d 505, 509 (Fla. 2017), the “function” of the Eighth Amendment is not fulfilled “by the time that a defendant is warrant eligible.” Indeed, both the imposition of a death sentence and the process of carrying out an execution must withstand constitutional scrutiny:

If the Constitution renders the fact or timing of his 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.”

Herrera, 506 U.S. at 406 (quoting *Ford*, 477 U.S. at 411).

The Supreme Court has held that factual determinations related to the constitutionality of a person’s execution are “properly considered in proximity to the execution.” *Id.* at 406 (noting competency to be executed determination is more reliable near time of execution whereas guilt or innocence determination becomes less reliable). In other words, whether the carrying out of a death sentence violates the Eighth Amendment depends on the facts existing after a

death warrant is signed and the determination of these facts requires *increased reliability*.

Despite this requirement, warrant proceedings in Florida are unnecessarily truncated and fail to provide capital defendants a meaningful time or manner to challenge their convictions and sentences. This is particularly abhorrent when the end result is the ultimate penalty—actual death. Section 922.052, Florida Statutes, sets a maximum 180-day warrant period, but fails to provide a reasonable, minimum time to ensure meaningful process. Unlike other death penalty states, Florida’s warrant stage litigation structure fails to ensure that capital defendants receive due process and a meaningful opportunity to be heard in the final stages of a capital case.

Other active death penalty states, including Texas and Missouri, provide by statute or rule a minimum of 90 days in which to raise challenges under warrant. Tex. Code Crim. Proc. Ann. art. 43.141(c) (2015); Mo. Sup. Ct. R. 29.08 (2014). Oklahoma requires that an execution be set not less than 60 days from the issuance of a warrant. Okla. Stat. Ann. tit. 22, §1001 (2025). Louisiana also requires a minimum warrant period of 60 days and provides up to 90

days from the warrant being issued. La. Stat. 15:567(B) (2024). In Ohio, the Supreme Court sets the execution date between 2-3 years in advance, thus there is no element of surprise on the parties and adequate time for stakeholders to conduct meaningful review.

The reality of Florida's truncated warrant process and failure to statutorily set a minimum time-frame for active death warrants has resulted in practice to provide an essentially meaningless process that fails to conform with the requirements of the Fifth, Sixth, Eighth, and Fourteenth Amendments facially and as applied to Lukehart.

C. Truncated Warrant Period Resulted in an Inadequate Investigation or Review of Lukehart's Claims.

Counsel for Lukehart received notice at 5:12 p.m. on Friday, May 1, 2026, that a warrant had been signed. Lukehart's execution was scheduled for June 2, 2026. Less than 15 minutes later, this Court issued a scheduling order directing "that all further proceedings in this case be expedited." Scheduling Order, *Lukehart v. State*, SC1960-90507 (Fla. May 1, 2026). This Court ordered that all circuit court proceedings be completed by 11:00 a.m. on Thursday, May 14, 2026.

Although the warrant period is thirty-two days in Lukehart's case, this Court's scheduling order provided approximately nine business days for circuit court proceedings to be completed. PC/37-39. The circuit court's scheduling order gave Lukehart less than seven days to investigate warrant-related issues, review additional records provided by State agencies, consult with experts, and file his final Rule 3.851 motion in the circuit court. *Id.* Accordingly, Lukehart had just one business day to file all public records demands and four business days to file any claims challenging his conviction and sentence. *Id.* This extremely expedited schedule prevented Lukehart from having any meaningful process or opportunity to fully investigate and present his claims, hindered counsel in providing effective representation, and caused unnecessary strain and chaos for the courts and all parties involved.

As indicated by the scheduling order, the Court expects counsel to work around the clock in order to meet the rigorous deadlines imposed. While counsel for Lukehart accepts that obligation, neither counsel nor experts have unfettered ability to meet with or speak with capital defendants on death watch at Florida State Prison ("FSP"). Even under warrant, FSP allows counsel and experts to meet with

clients only on weekdays during specific hours, and calls are limited to thirty minutes. Calls, visits, and expert evaluations are approved subject to availability due to the overlapping warrants, as at least two capital defendants are usually on death watch at a time. This process frustrates counsel's ability to meet ethical duties and ensure Florida's death penalty is administered consistent with basic notions of fundamental fairness and process which are the cornerstone of our system of justice.

Furthermore, Lukehart suffers from severe kidney disease, and this truncated warrant period makes it impossible to meet with him as often as is necessary while also investigating and presenting his claims. Counsel cannot effectively represent Lukehart under these circumstances.

The unnecessarily truncated process coupled with the surprise nature of the signing of a warrant creates an untenable and impossible situation. Judges and counsel for all parties must cancel all previously scheduled matters, including necessary medical appointments, and must attend hearings notwithstanding any illness, regardless of its severity. However, it is unreasonable to assume that experts, witnesses, and family of the client and the

parties (including outside agencies and court staff) are able to do the same.

Moreover, the process impacts counsel's ability to effectively represent other clients. While Rule 3.851(h)(2) provides that warrant proceedings take precedence over all other cases and courts may be willing to move previously scheduled hearings, counsel is not absolved from their ethical and constitutional obligations to other clients. The very nature of warrant proceedings under this truncated period requires around the clock representation of a single client. Lukehart's expedited warrant period of only thirty-two days and the resulting extreme demands on counsel's time and resources forced lead counsel for Lukehart, Assistant CCRC-North Adrienne Shepherd, to file motions to continue four separate matters scheduled in her other clients' cases in May alone. (*Deviney v. Sec'y, Dept. of Corr.*, SC2026-0043; *Deviney v. State of Florida*, SC2025-0906; *State of Florida v. Deviney*, Duval Co. Case No.: 2008-CF-12641; *State of Florida v. Hector Sanchez-Torres*, Duval Co. Case No.: 2009-CF-671). Co-counsel for Lukehart, Assistant CCRC-North Alicia Hampton, was involved in a two-week evidentiary hearing on another case (*State of Florida v. Bevel*, Duval Co. Case No.: 2004-CF-

4525), and was not able to assist on Lukehart's warrant until that evidentiary hearing concluded. Thus, acting CCRC-North, Dawn Macready, was assisting with Lukehart's warrant proceedings, in addition to performing her administrative duties for the agency.

This truncated time period posed a significant hardship to Lukehart's counsel, and in turn, violated Lukehart's rights to a full, fair, and meaningful postconviction proceeding in violation of the Due Process Clause of the Fifth and Fourteenth Amendments and Article I, Section 9, of the Florida Constitution. Postconviction counsel simply cannot adequately represent Lukehart under these circumstances. *See Wilson v. Wainwright*, 474 So. 2d 1162, 1164 (Fla. 1985) (holding the basic requirement of due process in an adversarial system is that an accused be zealously represented at "every level"; in a death penalty case such representation is the "very foundation of justice").

The circuit court found that Lukehart "has been noticed and heard, but complains the thirty-two-day warrant period is simply too short to provide him a meaningful opportunity to challenge his execution." PC/456. However, the record of Lukehart's active warrant proceedings indicate he was not heard in a way that truly comports

with his right to due process. As only one example, a *Huff* hearing was held on Lukehart's successive Rule 3.851 motion on May 9, 2026 at 11:00 a.m., where defense counsel argued that Lukehart should receive an evidentiary hearing on his claims for postconviction relief. *See* PC/38; 434-448. The circuit court orally denied an evidentiary hearing at the conclusion of the *Huff* hearing, and issued a written order only approximately **fifteen minutes after** the hearing had ended. *See* PC/431-33, 446.

The denial of an evidentiary hearing, and therefore an opportunity to be heard in a truly meaningful way, appears to have been a forgone conclusion based on the timing of the circuit court's ruling and order. However, the circuit court was adhering to this Court's scheduling order, which was based on the thirty-two-day warrant period signed by Governor Ron DeSantis. Capital defendants litigating active death warrants in Florida will continue to be denied due process as long as such short timeframes are set for warrants.

This Court has recognized that: "[h]aste has no place in proceedings in which a person may be sentenced to death." *Scull v. State*, 569 So. 2d 1251, 1252 (Fla. 1990). Indeed, in Lukehart's case, the stakes are even greater as the stakes at issue relate to his

imminent execution. The hasty and inadequate review of Lukehart's pending motion, resulting in the summary denial of his claims, violated his constitutional right to due process. Relief is proper.

ARGUMENT IV

THE CIRCUIT COURT ABUSED ITS DISCRETION IN DENYING LUKEHART'S REQUEST FOR PUBLIC RECORDS UNDER FLORIDA RULE OF CRIMINAL PROCEDURE 3.852, DENYING HIM HIS DUE PROCESS AND EQUAL PROTECTION RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

This Court reviews lower court rulings based on public records requests pursuant to Florida Rule of Criminal Procedure 3.852 for abuse of discretion. *See Dailey v. State*, 283 So. 3d 782, 792 (Fla. 2019). Lukehart timely requested public records related to lethal injection from three state agencies - the Florida Department of Corrections, Florida Department of Law Enforcement, and District Eight Medical Examiner's Office¹⁷ - pursuant to Florida Rule of Criminal Procedure 3.852 (h) and (i) ("the Rule") on May 5, 2026. In denying **every single records request** to which the three agencies

¹⁷ The full text of the specific records requested from each agency and Lukehart's arguments in support of receiving the requested records can be found at PC/66-140 (FDOC); PC/166-173 (ME8); PC/174-243 (FDLE).

objected, the circuit court held that Lukehart's demands were unrelated to any colorable claim, and were not relevant nor reasonably calculated to lead to the discovery of admissible evidence under Rule 3.852(i). *See* PC/295, 299, 303, Orders Denying Defendant's Post-Warrant Demand for Additional Public Records, dated May 6, 2025. The circuit court indicated that Rule 3.852 "generally requires the requested records relate to a colorable claim and good cause for why the request was not made until after the death warrant was already signed." *See* PC/293-94, 298, 301-02, *citing Jones v. State*, 419 So. 3d 619, 628 (Fla. 2025).

Lukehart maintains that the lethal injection records requested from FDOC, FDLE, and ME8 are related to colorable claims for postconviction relief in that they would further support his investigation into his Eighth Amendment as-applied and facial challenges to Florida's lethal injection procedures. *See* PC/69-72; 168-170; 176-178. Lukehart also maintains that the lethal injection records requested from FDOC and FDLE are related to a colorable claim for postconviction relief in that they are reasonably calculated to lead to the discovery of admissible evidence which would support a claim that FDOC has repeatedly deviated from its lethal injection

procedures and such deviation from the procedures creates unreasonable suffering and cruelty in violation of the Eighth Amendment. *See* PC/72-75; 178-182.

A capital postconviction defendant “bears the burden of demonstrating that the records sought [pursuant to Fla. R. Crim. P. 3.852] relate to a colorable claim for postconviction relief.” *Branch v. State*, 236 So. 3d 981, 984 (Fla. 2018) (citing *Chavez v. State*, 132 So. 3d 826, 829 (Fla. 2014) and *Mann v. State*, 112 So. 3d 1158, 1163 (Fla. 2013)). A court may order the production of records if “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 ... the additional records request is not overly broad or unduly burdensome.” Fla. R. Crim. P. 3.852(i).

The requested lethal injection records from the three agencies relate to claims that Florida’s method for lethal injection is unconstitutional and are necessary for undersigned counsel to continue to investigate Lukehart’s Eighth Amendment challenges to the constitutionality of Florida’s current method of lethal injection. The requested records specifically relate to FDOC’s current

procedures for lethal injection. The most recent version of FDOC's lethal injection procedures were promulgated on February 18, 2025. See PC/85-99. The procedure uses Florida's three-drug "etomidate protocol," which includes etomidate, rocuronium bromide, and potassium acetate. Lukehart only requested records related to the lethal injection drugs and executions that have taken place solely under the February 18, 2025 protocol. The requested records are still necessary for Lukehart to continue his investigation into his claims that Florida's lethal injection procedures are facially unconstitutional and also unconstitutional as applied to him because the procedures violate the Eighth Amendment's prohibition against cruel and unusual punishment. *Glossip v. Gross*, 576 U.S. 863 (2015); *Baze v. Rees*, 553 U.S. 35 (2008).

Undersigned counsel acknowledges this Court's current precedent finding that lethal injection records requests do not relate to a colorable claim for postconviction relief because this Court has upheld the constitutionality of Florida's "etomidate protocol" in *Asay v. State*, 224 So. 3d 695 (Fla. 2017) and subsequent opinions. However, undersigned counsel respectfully submits that this Court has not had a full and fair opportunity to judge the constitutionality

of Florida's lethal injection procedures, because previous capital defendants, including defendants under an active death warrant like Lukehart, have never been given access to complete records related to Florida's lethal injection procedures or the executions of individuals under these procedures. Capital defendants in Florida have never been able to thoroughly investigate and present claims challenging the constitutionality of lethal injection because Florida courts have consistently and pervasively denied them access to agency records related to lethal injection.

The requested records are necessary to prove that the current procedures are "very likely to cause serious illness and needless suffering," and there is a "substantial risk of serious harm" to Lukehart if the State of Florida executes him under the current method. *Glossip*, 576 U.S. at 877 (internal citations omitted). The requested records are necessary for undersigned counsel to adequately investigate Lukehart's as-applied and facial challenges to lethal injection based on the interaction between FDOC's lethal injection protocols and Lukehart's medical conditions. In addition to supporting Eighth Amendment challenges to Florida's lethal injection protocols, the requested records are also reasonably calculated to

lead to the discovery of admissible evidence which would support a claim that FDOC has repeatedly deviated from its lethal injection procedures and such deviation from the lethal injection procedures creates unreasonable suffering and cruelty in violation of the Eighth Amendment of the United States Constitution and the corresponding provisions of the Florida Constitution.

Heavily redacted records obtained from FDOC by counsel for the now-deceased Frank Walls in *Walls v. Dixon*, No. 4:25-cv-0488, ECF 1 (N.D. Fla. Nov. 26, 2025) raise serious questions as to whether FDOC has deviated from the lethal injection procedures, and highlight the need for disclosure of the requested lethal injection records and greater transparency concerning the lethal injection process. The potential risks of applying the etomidate protocol to a medically vulnerable individual like Lukehart are heightened because, while Florida shatters records for the speed and volume of executions in 2025 and 2026, FDOC have demonstrated repeated negligence and noncompliance with respect to their own protocol. The heavily redacted records received by counsel in *Walls v. Dixon* raise serious concerns about FDOC's administration of its own procedures. For example, Florida executed Michael Bell on July 15,

2025. However, the corresponding inventory log shows that FDOC did not record removing rocuronium bromide or potassium acetate until the next day, July 16, 2025. *See* PC/105, 107. Even more concerning, the logs contain no entry indicating that etomidate was removed for Bell's execution at all, so it is not clear what amount of etomidate Michael Bell received during his execution.

FDOC noted that they removed all three drugs used during Thomas Gudinas's execution on June 25, 2025, despite the execution taking place on June 24, 2025. *See* PC/104, 105, 107. For the execution of Anthony Wainwright, FDOC recorded the removal of etomidate, rocuronium bromide, and potassium acetate on June 12, 2025, despite the execution taking place on June 10, 2025. *See* PC/104, 105, 107. FDOC consistently records that execution drugs are removed from supply after executions take place, indicating that the records are inaccurate and, for some reason, being filled out after the fact. On June 25, 2025, a date corresponding to Thomas Gudinas's execution (which actually occurred on June 24), the inventory logs only show 10 x 10 ml vials of rocuronium bromide were removed (1000 mg), suggesting that FDOC may have only prepared half of the required paralytic drug, in violation of the etomidate

protocol, which requires that 2000 mg, or 20 x 10 ml vials, be prepared. *See* PC/107; *see also* PC/92.

On June 12, 2025, a date corresponding to Anthony Wainwright's execution (which occurred on June 10, 2025), seven vials of potassium acetate were removed from FDOC's inventory. This suggests that FDOC may have prepared only 280 milliequivalents of potassium acetate in violation of the etomidate protocol, which requires 480 milliequivalents (12 x 20ml vials) be prepared. *See* PC/105; *see also* PC/92. The log sheets show that during the executions of Edward James and Michael Tanzi, FDOC administered lidocaine, an anesthetic drug not called for in the etomidate protocol. *See* PC/127.

Lastly, FDOC indicates on the log sheets that they used etomidate with an expiration date of January 31, 2025, during the executions of Victor Jones on September 30, 2025; David Pittman on September 17, 2025; Curtis Windom on August 28, 2025; and Kayle Bates on August 19, 2025. *See* PC/125. The discrepancies in these records expose the troubling absence of a mechanism to regularly ensure that FDOC are complying with their own etomidate protocol. Given that Lukehart is very likely already at a heightened risk of

severe pain and suffering due to his unique medical conditions, these partial records from FDOC indicating potential deviation from their own etomidate protocol raise grave concerns that Lukehart may experience needless pain and suffering during his execution currently scheduled for June 2, 2026.

Notably, in Dr. Zivot's evaluation of the autopsies of now-deceased inmates James Ford, Jeffrey Hutchinson, Glen Rogers, Anthony Wainwright, Thomas Gudinas, Samuel Smithers, and Richard Randolph¹⁸, the physical evidence- notations of intramuscular injections in the shoulder of each inmate- points to a high likelihood that all these men received a mysterious dosage of an unknown substance. The FDOC lethal injection protocol makes no mention of any option that permits an intramuscular injection. This finding from Dr. Zivot's evaluation provides further support for the argument that FDOC is deviating from its lethal injection protocols, and Dr. Zivot has opined that ad hoc polypharmacy as an adjunct to

¹⁸ James Ford was executed on February 13, 2025. Jeffrey Hutchinson was executed on May 1, 2025. Glen Rogers was executed on May 15, 2025. Anthony Wainwright was executed on June 10, 2025. Thomas Gudinas was executed on June 24, 2025. Samuel Smithers was executed on October 14, 2025. Richard Randolph was executed on November 20, 2025.

lethal injection raises the serious and likely risk of needless pain and suffering.

Undersigned counsel acknowledges that Florida courts have recently denied requests for lethal injection records based on similar arguments during recent active death warrants.¹⁹ However, these continued denials of records related to lethal injection place Lukehart and all other Florida capital defendants in an impossible Catch-22 that can only be remedied by granting defendants access to these records. Justice Sonia Sotomayer recently wrote in the Melvin Trotter case “to express concern about Florida's implementation of its execution protocol and the secrecy surrounding it.” *See Trotter v. Fla.*, 146 S. Ct. 755, 755 (2026) (statement respecting the denial of the application for stay and petition for certiorari). Justice Sotomayer further wrote in Trotter’s case that

The record reflects at least the possibility that recent Florida executions have involved—in addition to expired drugs—incorrect drug doses, the use of nonprotocol drugs, and record keeping lapses that could mask yet additional

¹⁹ *See State of Florida v. Melvin Trotter*, Manatee County Case No.: 1986-CF-1225; *see also State of Florida v. Michael King*, Sarasota County Case No.: 2008-CF-1087; *see also State of Florida v. James E. Hitchcock*, Orange County Case No.: 1976-CF-1942.

failings. The Florida Supreme Court, moreover, has thus far not allowed further inquiry into these potential problems and has recently denied requests for records that would prove or disprove claims like Trotter's ... In doing so, the Florida Supreme Court appears to be placing prisoners in a Catch-22: It has affirmed the denial of requests for records on these issues, at least in part, because the prisoners do not yet have enough information to raise a “colorable” Eighth Amendment claim ... The very reason the prisoners are seeking the records, however, is to gather enough information to raise a colorable Eighth Amendment claim.

Individuals seeking to challenge the method of their execution should not have to guess at whether the State is, or is not, following its execution protocol. Nor does the State appear to have any legitimate confidentiality interest in shielding from inspection basic facts about the implementation of its execution protocol, such as whether the State is using expired drugs. If the protocol is in fact being followed, then transparency instills confidence in the protocol for everyone—prisoners, the courts, and the public alike. If it is not, then secrecy is intolerable, and disclosure of the relevant records is indispensable for determining whether the lapses at issue are likely to lead to an Eighth Amendment violation ...

By continuing to shroud its executions in secrecy, Florida undermines both the integrity of its own execution process and, potentially, this Court's ability to ensure the State's compliance with its constitutional obligations.

Trotter v. Fla., 146 S. Ct. 755, 755–56 (2026) (internal citations and footnotes omitted). Lukehart’s case presents this Court with the opportunity to remedy this Catch-22 situation that Florida capital defendants have been placed under by the persistent denial of

records related to lethal injection and also help ensure that the State of Florida is meeting its constitutional obligations related to executions. Lukehart should not have to guess at whether the State of Florida is, or is not, following its own etomidate protocol. Lukehart is entitled to information about the reliability and effectiveness of the drugs being used to kill him. Denying him the opportunity to access records that directly relate to how the State of Florida intends to carry out his execution on June 2, 2026 violates his right to due process and access to the courts under the Eighth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.

The records that Lukehart requested in each of his demands relate to the subject matter of his postconviction claims and/or are reasonably calculated to lead to the discovery of admissible evidence corroborating claims raised therein. The circuit court abused its discretion in holding otherwise. Lukehart clearly explained in each records demand, and again at the records hearing held on May 6, 2026, the precise reason for each request and articulated clearly to the court what the anticipated nature of admissible evidence to be discovered was. PC/66-140; 166-173; 174-243; 314-320.

Nevertheless, the circuit court abused its discretion when it denied each of the three records demands filed on May 5, 2026. PC/293-304.

Notably, Lukehart argued to the circuit court that the requested records certainly could lead to the discovery of admissible evidence, as the qualified medical expert that undersigned counsel has hired to evaluate Lukehart's medical conditions, including his diminished kidney functioning, could rely on them to form the basis of his opinion on whether Florida's lethal injection procedures will cause Lukehart needless pain and suffering. This has proven to be true, as the very records that Lukehart requested from the District Eight Medical Examiner's Office have been shown in Lukehart's case to support a colorable claim for postconviction relief, rendering the circuit court's findings as to these records incorrect and directly challenging this Court's precedent holding that records related to lethal injection are not discoverable under Rule 3.852 because they do not relate to a colorable claim.²⁰

²⁰ See *Jones v. State*, 415 So. 3d 113, 120 (Fla. 2025); *Dailey v. State*, 283 So. 3d 782, 792 (Fla. 2019); *Long v. State*, 271 So. 3d 938, 943-36 (Fla. 2019); *Jimenez v. State*, 265 So. 3d 462 (Fla. 2018); *Walton v. State*, 3 So. 3d 1000, 1014 (Fla. 2009).

Lukehart's qualified medical expert, Dr. Zivot, relied on some of the very same records that Lukehart requested and was denied from the District Eight Medical Examiner's Office when reaching his expert opinion supporting Lukehart's claim that Florida's lethal injection procedures are facially unconstitutional under the Eighth Amendment. Lukehart requested, but was denied, the autopsy files from the last ten executions that have occurred under FDOC's current lethal injection procedures. PC/166-173. Dr. Zivot was able to review the files of some of these post-execution autopsies when forming his opinions in Lukehart's case, and they support his expert opinion that Florida's lethal injection procedures create an objectively intolerable risk of needless pain and suffering. *See supra* at pp. 36-41.

The circuit court also abused its discretion in finding that Lukehart's records demands to the agencies should have been filed prior to the signing of his death warrant. Lukehart clearly explained to the circuit court at the records hearing precisely why the demands were not made until the warrant was signed. Specifically, under Fla.

R. Crim. P. 3.852(i), the subsection that governs requests for additional public records from an agency in a capital postconviction case, the Defendant must assert that the public records sought are “relevant to the subject matter of a proceeding under rule 3.851, or appear reasonably calculated to lead to the discovery of admissible evidence.” See Fla. R. Crim. P. 3.852 (i)(1)(C). Accordingly, any requests for information regarding lethal injection records, executioner and execution team training materials and credentials, autopsy files for the last ten individuals executed by lethal injection in Florida, or checklists and logs documenting previous executions could be denied as not relevant to a pending proceeding, as any related claim by an individual not under an active death warrant may not truly be ripe.²¹

Additionally, unlike every other natural person or corporation in the world, Lukehart belongs to a unique class of individuals²²

²¹ Lukehart does not assert that capital defendants are prohibited from filing public records demands for these types of records prior to the signing of a death warrant where the records are necessary to investigate and litigate potential method-of-execution claims.

²² That is, all death-sentenced individuals in the State of Florida. See Fla. R. Crim. P. 3.852(a)(1) (“This rule is applicable only to the

prohibited from obtaining public records pursuant to the broad “Sunshine laws” Florida has enacted under Chapter 119, Florida Statutes. Instead, as a death-sentenced individual, Lukehart is required to engage in an impossible endeavor of requesting records from various state agencies at precisely the correct time, and his requests are subject to the objections of the agencies, unlike requests made pursuant to Chapter 119. *See Fla. R. Crim. P. 3.852 (c)(1); (g)(3).*

To the extent that Rule 3.852 prohibits Lukehart from obtaining public records to which he would otherwise be entitled, Lukehart asserts that the Rule violates his Equal Protection and Due Process Rights under the Fourteenth Amendment of the United States Constitution and the corresponding provisions of the Florida Constitution.

Further, as Justice Sotomayor recently recognized, this Court has constantly rejected capital defendants access to execution-related records on the basis that the defendants cannot yet establish a colorable Eighth Amendment claim, while withholding the very

production of public records for capital postconviction defendants ...”).

records necessary to uncover and prove such a claim. *Trotter v. Florida*, 146 S. Ct. 755, 755-56 (2026) (statement respecting the denial of the application for stay and petition for certiorari). That inequity is even more apparent here, where individuals outside the capital litigation process were nevertheless able to obtain the execution-related records that Lukehart was forced to request under Rule 3.852. Capital defendants are therefore placed at a substantial disadvantage and forced to litigate constitutional violations blindly, while the State maintains exclusive control over the evidence necessary to prove them. Florida's continued reliance on secrecy not only frustrates meaningful constitutional review, but effectively insulates potential misconduct from scrutiny altogether.

Postconviction litigation is governed by principles of due process. *Easter v. Endell*, 37 F.3d 1343 (8th Cir. 1994); *Holland v. State*, 503 So. 2d 1250 (Fla. 1987). Lukehart has been denied due process and access to public records, *i.e.* records that any other natural person or corporation in the world is entitled to view. Lukehart has a need for these records that the rest of the public does not have: they are relevant to and necessary for the presentation of his constitutional challenge to his conviction and sentence, as well

as to Florida's lethal injection protocol. *See e.g. Glossip v. Gross*, 576 U.S. 863 (2015).

Lukehart must be given a fair opportunity to show that his execution will violate the Eighth and Fourteenth Amendments of the United States Constitution and the corresponding provisions of the Florida Constitution. *Hall v. Florida*, 134 S. Ct. 1986, 2001 (2014) (“The death penalty is the gravest sentence our society may impose. Persons facing that most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution.”). For Lukehart to have that fair opportunity, he must be provided the complete records requested from the Florida Department of Law Enforcement, the Florida Department of Corrections, and the District Eight Medical Examiner's Office. Relief is proper.

CONCLUSION AND RELIEF SOUGHT

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been electronically filed with the Florida Supreme Court by using the Florida Courts e-portal filing system and has been served on all counsel of record, on this 17th day of May, 2026.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fla. R. App. P. 9.045, I hereby certify that the Initial Brief of the Appellant has been produced in Bookman Old Style 14-point font. This brief complies with the requirements of Fla. R. App. P. 9.210(a)(2)(D), as it contains approximately 15, 606 words.

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