No. 24A202
CAPITAL CASE

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

IN THE
SUPREME COURT OF THE UNITED STATES

LORAN COLE,
Petitioner,

v.

STATE OF FLORIDA, ET. AL.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE FLORIDA SUPREME COURT

RESPONSE TO APPLICATION FOR STAY OF EXECUTION

On August 25, 2024, Cole, represented by state postconviction counsel Ali A. Shakoor and the Capital Collateral Regional Counsel ("CCRC"), filed, in this Court, a petition for writ of certiorari seeking review of a decision from the Florida Supreme Court in this active warrant case. The petition raised three issues: (1) whether Florida courts violated Cole's Fourteenth Amendment Due Process and Equal Protection rights by failing to hold an evidentiary hearing on his as-applied lethal challenge, (2) whether the *Baze-Glossip* test violates Cole's Equal Protection and Due Process rights under the Fourteenth Amendment by requiring him to allege an alternative method of execution, and (3) whether Florida's lethal injection procedures present a

substantial and imminent risk that is very likely to cause Cole needless suffering under *Glossip v. Gross*, 576 U.S 863 (2015) and *Baze v. Reese*, 553 U.S. 35 (2008). He also filed an application for a stay of execution based on that petition. This Court, however, should simply deny the petition and then deny the stay.

STAYS OF EXECUTION

Stays of executions are not granted as "a matter of course." *Hill v. McDonough*, 547 U.S. 573, 583-84 (2006). A stay of execution is "an equitable remedy" and "equity must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts." *Id.* at 584. There is a "strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay." *Nelson v. Campbell*, 541 U.S. 637,650 (2004). Equity must also consider "an inmate's attempt at manipulation." *Gomez v. U.S. Dist. Ct. for N. Dist. of Cal.*, 503 U.S. 653, 654 (1992). "Both the State and the victims of crime have an important interest in the timely enforcement of a sentence." *Calderon v. Thompson*, 523 U.S. 538, 556 (1998). This Court has also highlighted the State's and the victims' interest in the timely enforcement of the death sentence. *Bucklew v. Precythe*, 587 U.S. 119, 149-151 (2019). The people of Florida, as well as the surviving victims, "deserve better" than the "excessive" delays that now typically occur in capital cases. *Id.* at 149. The Court stated that courts should "police carefully" against last-minute claims being used "as tools to interpose unjustified delay" in executions. *Id.* at 150. This Court has also stated that last-minute stays of execution should be the "extreme exception, not the norm." *Id.* at 150.

To be granted a stay of execution, Cole must establish three factors: (1) a reasonable probability that the Court would vote to grant certiorari; (2) a significant possibility of reversal if review was granted; and (3) a likelihood of irreparable injury to the applicant in the absence of a stay. *Barefoot v. Estelle*, 463 U.S. 880, 895 (1983) (emphasis added). Cole must establish all three factors.

Probability of this Court granting certiorari

As to the first factor, there is little chance that four justices of this Court would vote to grant certiorari review on the issues raised here. In state court, Cole raised a claim that Florida's lethal injection procedures as applied to Cole constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. The Florida Supreme Court found this claim both untimely and meritless under Florida law. *Cole v. State*, SC2024-1170, 2024 WL 3909057, at *7 (Fla. Aug. 23, 2024). The time bar applied in state court below is reason enough to deny review. This Court does not grant review of issues that are matters of state law. *Michigan v. Long*, 463 U.S. 1032 (1983); *Foster v. Chatman*, 578 U.S. 488, 497 (2016).

Cole contends that Florida Supreme Court precedent requires an evidentiary hearing on as-applied claims and notes that the court relinquished jurisdiction previously for hearings to be held on four different as-applied claims. (Motion at 4). Yet Cole cites no state case that says an evidentiary hearing is always required when an as-applied claim is raised. He also ignores the fact that in the four cases he discusses, no court found that the defendants filed untimely postconviction motions for relief. And his allegations in this case were entirely speculative and legally insufficient to set forth an Eighth Amendment challenge.

Cole argues that this Court should stay the execution because it presents constitutional issues which this Court should be free of time constraint to properly consider. He laments that the Court only has several days to consider the issue.

However, this supposed conundrum is one created by Cole's own doing. Cole knew for at least seven years that he was suffering symptoms of Parkinson's disease but delayed bringing any claim challenging lethal injection as applied to him until his death warrant was signed. Nothing prevented him from doing so. The Florida Supreme Court has previously rejected the argument that a claim of this nature is not ripe until a death warrant is signed. *See Ferguson v. State*, 101 So. 3d 362, 365 (Fla. 2012) (rejecting an argument that a method-of-execution claim is not ripe until a death warrant is signed). Furthermore, the court has previously reviewed cases and rejected the challenges to the current lethal injection protocol based on involuntary movements. *See Asay*, 224 So. 3d 695, 701 (2017); *Long v. State*, 271 So. 3d 938, 944 (Fla. 2019) (crediting the trial court's finding that "[e]ven if Defendant had such a seizure, the lethal injection protocol requires that an inmate be restrained and the IV lines taped").

Cole asserts that a stay should be granted, in part, because he was a witness in an Iowa murder case. However, any theoretical and highly speculative harm to a potential third party is not a proper ground for a stay in this case. His alleged witness status in Iowa was not raised as one of the questions presented in the petition. Sup. Ct. R. 14 ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court."). Nor was this issue ever raised in state court below. *Youakim v. Miller*, 425 U.S. 231, 234 (1976) ("Ordinarily, this Court does not decide questions not raised or resolved in the lower court.") (string cites omitted). This 'claim' presents no legal or factual controversy for this Court to decide. This is clearly an attempt to interject an irrelevant issue before this Court in an effort to delay Cole's long overdue execution.

Moreover, there is no conflict between this Court's jurisprudence and the Florida Supreme Court's opinion regarding any question presented which is a major consideration in this Court granting review. There is little probability that the Court

would vote to grant certiorari review on any of the three questions presented in the petition. Cole fails the first factor, which is alone sufficient to deny the motion for a stay.

Significant possibility of reversal

As to the second factor, there is not a significant possibility of reversal on any of the three issues raised by Cole. Cole was not provided a hearing on his claims because under Florida law, the state courts may not consider a motion that is untimely. Cole has admitted that he has been aware of these symptoms since at least 2017 and yet failed to raise the claim until his execution warrant was issued. His attorney initially informed the postconviction court that the lethal injection protocol had been recently changed, but when he was challenged by the judge to explain what specific change would justify the delay, he was unable to do so. *Cole*, 2024 WL 3909057, at *7.

Aside from the procedural impediment to review, there is also very little chance of this Court reversing on the merits. Courts have long rejected similar Eighth Amendment claims. In *Baze v. Rees*, 553 U.S. 35, 55 (2008), this Court held that problems related to IV lines did not establish a sufficiently substantial risk of harm to meet the requirements of an Eighth Amendment claim. *See Barber v. Governor of Alabama*, 73 F.4th 1306, 1318 (11th Cir. 2023) (finding death row inmate's arguments "fatal[ly] flaw[ed]" because they were "premised on the assumption that protracted efforts to obtain IV access" would cause an unconstitutional level of pain); *Nance v. Comm'r, Georgia Dep't of Corr.*, 59 F.4th 1149, 1157 (11th Cir. 2023) (rejecting claim that state technicians would subject death row inmate to an unconstitutional level of pain by repeatedly pricking him with a needle due to his weak veins). There is no conflict among state and federal courts on this issue. Cole's lethal injection challenge is little more than an attack on settled precedent and does not warrant certiorari review, particularly when he was dilatory in bringing this

claim. *Bucklew*, 587 U.S. at 150. (Courts "can and should protect settled state judgments from undue interference by invoking their equitable powers to dismiss or curtail suits that are pursued in a dilatory fashion or based on speculative theories.").

Irreparable injury

As to the third factor of irreparable injury, it is a given in capital cases. While the execution will cause irreparable injury, that is the inherent nature of a death sentence. The factors for granting a stay are taken from the standard for granting a stay as applied to normal civil litigation. This factor is not a natural fit in capital cases. There must be more to establish this factor and Cole does not provide any unique or special argument in support of this factor. But Cole's argument is boilerplate as to this factor. For that reason, this truism by itself is not a critical factor in consideration of a stay of execution. While the execution means his pending litigation will be rendered moot, that consideration must be balanced by the fact that Cole has had years to raise these claims and did not do so until the eve of the execution. As the Eleventh Circuit has noted regarding stays of execution, they amount to a commutation of a death sentence to a life sentence for the duration of the stay. *Bowles v. DeSantis*, 934 F.3d 1230, 1248 (11th Cir. 2019) (citing *Bucklew v. Precythe*, 587 U.S. 119, 149-151 (2019)). Without finality, "the criminal law is deprived of much of its deterrent effect." *Calderon v. Thompson*, 523 U.S. 538, 555-56 (1998). And real finality is the execution.

Because Cole points to no specific argument in support of this factor, he fails this factor as well.

Cole fails to meet any of the three factors for being granted a stay of execution. Therefore, the motion for a stay of the execution should be denied. Accordingly, the application for stay of execution should be denied.

Respectfully submitted,

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