

No.
CAPITAL CASE

IN THE
Supreme Court of the United States

BYRON LEWIS BLACK,
Petitioner,

v.

FRANK STRADA, ET. AL,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
EXECUTION SCHEDULED FOR AUGUST 5, 2025, AT 10:00 AM.

OFFICE OF THE FEDERAL PUBLIC DEFENDER
FOR THE MIDDLE DIST. OF TENNESSEE
CAPITAL HABEAS UNIT

KELLEY J. HENRY*
CHIEF, CAPITAL HABEAS UNIT

AMY D. HARWELL
FIRST ASST. FED. PUB. DEFENDER
ASST. CHIEF, CAPITAL HABEAS UNIT

ELI W. SWINEY
RESEARCH & WRITING SPECIALIST

KATHERINE M. DIX
KATHERYN P. THOMAS
DREW S. BRAZER
ASSISTANT FEDERAL PUBLIC DEFENDERS

810 Broadway, Suite 200
Nashville, TN 37203
Phone: (615) 736-5047
Fax: (615) 736-5265
Email: Kelley.Henry@fd.org

**Counsel of Record*

**CAPITAL CASE
QUESTIONS PRESENTED**

1. Where a state government facilitated the implantation of a cardiac defibrillator that has been shown to be very likely to result in severe pain during an inmate's execution, and the inmate has established that deactivating the defibrillator before the execution is an available and readily implemented option, does it violate the Eighth Amendment to proceed with the execution without deactivating the defibrillator?
2. Where an individual facing execution has demonstrated his entitlement to an injunction requiring the State to facilitate a minor medical procedure in order to reduce the unnecessary suffering related to his execution, is it consistent with due process to deny him the benefit of that injunction based on a newly announced, retroactively applied procedural rule that forecloses all possibility of effective relief prior to the execution?

LIST OF PARTIES TO THE PROCEEDINGS

Petitioner, respondent below, is Byron Black.

Respondents, applicants below, are Frank Strada, in his official capacity as Commissioner of the Tennessee Department of Correction, and Kenneth Nelsen, in his official capacity as Warden of Riverbend Maximum Security Institution.

LIST OF PROCEEDINGS

1. *State v. Black*, 815 S.W.2d 166 (Tenn. 1991) (direct appeal).
2. *Black v. State*, No. 01C01-9709-CR-00422, 1999 WL 195299 (Tenn. Crim. App. Apr. 8, 1999), *cert denied Black v. Tennessee*, 528 U.S. 1192 (2000) (post-conviction).
3. *Black v. State*, No. M2004-01345-CCA-R3PD, 2005 WL 2662577 (Tenn. Crim. App. Oct. 19, 2005), *cert. denied Black v. Tennessee*, 549 U.S. 852 (2006) (motion to reopen post-conviction/intellectual disability).
4. *Black v. Bell*, 181 F. Supp. 2d 832 (M.D. Tenn. 2001) (habeas corpus).
5. *Black v. Bell*, No. 02-5032, 2007 U.S. App. LEXIS 30798 (6th Cir. May 30, 2007) (remanding *Atkins* claim).
6. *Black v. Bell*, No. 3:00-0764, 2008 U.S. Dist. LEXIS 33908 (M.D. Tenn. Apr. 24, 2008) (*Atkins* claim).
7. *Black v. Bell*, 664 F.3d 81 (6th Cir. 2011) (remanding *Atkins* claim).
8. *Black v. Colson*, No. 3:00-0764, 2013 WL 230664 (M.D. Tenn. Jan. 22, 2013) (reconsideration of *Atkins* claim).
9. *Black v. Carpenter*, 866 F.3d 734 (6th Cir. 2017), *cert. denied Black v. Mays*, 584 U.S. 1015 (2018) (affirming the denial of the *Atkins* claim).
10. *Black v. State*, No. M202200423CCAR3PD, 2023 WL 3843397 (Tenn. Crim. App. June 6, 2023) (intellectual disability).
11. *Black v. State*, No. M2000-00641-SC-DPE-CD, 2025 Tenn. LEXIS 279, (Tenn. July 8, 2025) (common law incompetency to be executed claim) (petition for writ of certiorari filed July 15, 2025).
12. *Black v. State*, No. M2004-01345-SC-R11-PD (Tenn. July 8, 2025) (motion to recall the mandate) (petition for writ of certiorari filed July 28, 2025).
13. *Burns v. Strada*, No. 25-0414-IV (Davidson Cnty. Ch. Ct. July 18, 2025) (preliminary injunction regarding Mr. Black's ICD).
14. *Burns v. Strada*, No. 25-0414-IV (Davidson Cnty. Ch. Ct. July 22, 2025) (revised preliminary injunction regarding Mr. Black's ICD).
15. *Black v. Strada*, No. M2025-01095-SC-RDO-CV, (Tenn. July 31, 2025) (opinion below).

TABLE OF CONTENTS

QUESTIONS PRESENTED	i
LIST OF PARTIES TO THE PROCEEDINGS	ii
LIST OF PROCEEDINGS	iii
TABLE OF CONTENTS	iv
TABLE OF APPENDICES.....	v
TABLE OF AUTHORITIES.....	vi
INTRODUCTION.....	1
OPINIONS AND ORDERS BELOW	1
JURISDICTION	1
STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT.....	4
I. CERTIORARI IS WARRANTED BECAUSE THE ONLY COURT TO CONSIDER MR. BLACK'S REQUEST FOR INJUNCTIVE RELIEF ON THE MERITS CORRECTLY HELD THAT HE HAD SHOWN HIS ENTITLEMENT TO THAT RELIEF, ONLY FOR IT TO BE TAKEN AWAY THROUGH A NEWLY CREATED STATE PROCEDURAL RULE.....	4
II. CERTIORARI IS WARRANTED BECAUSE THE QUESTION OF HOW THE <i>BAZE/GLOSSIP/BUCKLEW</i> FRAMEWORK APPLIES TO REQUESTS FOR MEDICAL ACCOMMODATIONS THAT DO NOT REQUIRE ALTERATION OF THE UNDERLYING METHOD OF EXECUTION IS AN ISSUE OF GREAT IMPORTANCE THAT WILL LEAD TO RECURRING PROBLEMS IF NOT ADDRESSED.....	9
II. CERTIORARI IS WARRANTED BECAUSE THE TENNESSEE SUPREME COURT GROSSLY DEPARTED FROM ORDINARY JUDICIAL PROCESS IN A MANNER INCONSISTENT WITH DUE PROCESS.....	13
CONCLUSION	16

TABLE OF APPENDICES

APPENDIX A: <i>Black v. Strada</i> , No. M2025-01095-SC-RDO-CV, (Tenn. July 31, 2025).....	A-001
APPENDIX B: <i>Black v. Strada</i> , No. M2025-01095-SC-RDO-CV, (Tenn. July 31, 2025) (Tennessee Supreme Court Judgment).....	A-008
APPENDIX C: <i>Burns v. Strada</i> , No. 25-0414-IV (Davidson Cnty. Ch. Ct. July 22, 2025) (Revised Memorandum and Order).....	A-009
APPENDIX E: <i>Burns v. Strada</i> , No. 25-0414-IV (Davidson Cnty. Ch. Ct. July 22, 2025) (Order)	A-024
APPENDIX F: <i>Burns v. Strada</i> , No. 25-0414-IV (Davidson Cnty. Ch. Ct. July 18, 2025) (Memorandum and Order).....	A-027

TABLE OF AUTHORITIES

CASES

<i>Barr v. Lee</i> , 591 U.S. 979, 981 (2020)	16
<i>Baze v. Rees</i> , 553 U.S. 35 (2008)	5,9,11,12
<i>Black v. Strada</i> , No. M2025-01095-SC-RDO-CV, (Tenn. July 31, 2025)	1
<i>Bouie v. City of Columbia</i> , 378 U.S. 374 (1964)	8,3,7,8
<i>Brinkerhoff-Faris Tr. & Sav. Co. v. Hill</i> , 281 U.S. 673 (1930)	13
<i>Bucklew v. Precythe</i> , 587 U.S. 119 (2019).....	5,6,9,10,11, 12
<i>Burns v. Strada</i> , No. 25-0414-IV (Davidson Cnty. Ch. Ct. July 18, 2025).....	1
<i>Burns v. Strada</i> , No. 25-0414-IV (Davidson Cnty. Ch. Ct. July 22, 2025).....	1
<i>Coe v. Sundquist</i> , No. M2000-00897-SC-R9-CV (Tenn. April 19, 2000)	8
<i>Cruz v. Arizona</i> , 598 U.S. 17 (2023).....	8
<i>Farmer v. Brennan</i> , 511 U.S. 825 (1994).....	5
<i>Ford v. Georgia</i> , 498 U.S. 411 (1991).....	8
<i>Glossip v. Gross</i> , 576 U.S. 863 (2015)	5,6,9,10,11,12
<i>Goldberg v. Kelly</i> , 397 U.S. 254 (1970)	14
<i>In re Ohio Execution Protocol Litig.</i> , 946 F.3d 287 (6th Cir. 2019)	11
<i>James v. Kentucky</i> , 466 U.S. 341 (1984).....	8
<i>Joint Anti-Fascist Refugee Committee v. McGrath</i> , 341 U.S. 123 (1951).....	14
<i>Jones v. Comm’r, Ga. Dep’t of Corr.</i> , 812 F.3d 923 (11th Cir. 2016)	14
<i>Jordan v. Comm’r, Mississippi Dep’t of Corr.</i> , 947 F.3d 1322 (11th Cir. 2020) .	
<i>Landgraf v. USI Film Prods.</i> , 511 U.S. 244 (1994).....	14
<i>Middlebrooks v. Parker</i> , 15 F.4th 784 (6th Cir. 2021)	11
<i>Moore-Pennoyer v. State</i> , 515 S.W.3d 271 (Tenn. 2017)	13
<i>Mullane v. Cent. Hanover Bank & Tr. Co.</i> , 339 U.S. 306 (1950).....	14
<i>Nance v. Ward</i> , 597 U.S. 159, 164 (2022)	10
<i>Nelson v. Campbell</i> , 541 U.S. 637 (2004)	4
<i>State v. Payne</i> , No. W2022-00210-SC-R11-CD, 2025 WL 1682152 (Tenn. June 16, 2025).....	8

<i>West v. Ray</i> , No. M2010-02275-SC-R11-CV (Tenn. Nov. 6, 2010)	9,13
<i>West v. Schofield</i> , 460 S.W.3d 113 (Tenn. 2015)	12
CONSTITUTIONAL PROVISION AND OTHER STATUTES	
U.S. Const. amend. VIII	2,4,5,10
U.S. Const. amend. XIV § 1	passim
28 U.S.C. § 1257	1
Tenn. Const. article VI § 2	15
Tenn. Code Ann. § 17-1-204	4,8,15
Tenn. Code Ann. § 41-2-109	2
Tenn. Sup. Ct. R. 12.4	4,8,15

INTRODUCTION

In 2024, the State of Tennessee arranged for Byron Black, a prisoner on its death row with severe heart failure, to receive an implanted cardiac device intended to administer painful, but potentially life-saving, shocks in response to ventricular fibrillation. In 2025, the State issued a new lethal injection protocol—its first active protocol since the device was implanted—that contained no provisions for individual medical accommodations. Mr. Black immediately and expeditiously challenged the policy, first via grievance and then via state court, and established that he was entitled to have the device turned off shortly before the execution went forward. Then, mere days before the execution, but before the ICD was deactivated, the Tennessee Supreme Court vacated the injunction that Mr. Black received based on a newly propounded, never-before-applied state procedural rule. He now asks this Court to address both the important substantive issues raised by his request for injunctive relief, and the last-second procedural modification that deprived him of that relief after he demonstrated his entitlement to it and left him with no avenue for obtaining such relief before his execution goes forward.

OPINIONS AND ORDERS BELOW

The opinion of the Tennessee Supreme Court is unpublished. App. A1–8, *Black v. Strada*, No. M2025-01095-SC-RDO-CV, (Tenn. July 31, 2025). The opinions and orders of the trial court are unpublished. App. A9–23, *Burns v. Strada*, No. 25-0414-IV (Davidson Cnty. Ch. Ct. July 22, 2025) (Revised Memorandum and Order); A24–26, *Burns v. Strada*, No. 25-0414-IV (Davidson Cnty. Ch. Ct. July 22, 2025) (Revised Order); App. A27–40, *Burns v. Strada*, No. 25-0414-IV (Davidson Cnty. Ch. Ct. July 22, 2025) (Revised Memorandum and Order).

JURISDICTION

The order of the Tennessee Supreme Court denying relief to Mr. Black is a final, appealable order. Jurisdiction is invoked pursuant to 28 U.S.C. § 1257.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution provides, in relevant part, that “[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law.” U.S. Const. amend. XIV, § 1.

The Eighth Amendment to the U.S. Constitution provides that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. Const. amend. VIII.

STATEMENT OF THE CASE

In 2024, the Tennessee Department of Correction (“TDOC”), acting pursuant to its statutory responsibility to provide adequate medical care to inmates, Tenn. Code Ann. § 41-2-109(5), arranged for Byron Black to receive an implantable cardiac defibrillator, or “ICD,” in his chest. At the time, Mr. Black was awaiting execution on Tennessee’s death row, but Tennessee had rescinded its previous lethal injection protocol, leaving the timing and circumstances of Mr. Black’s anticipated execution unknown. In early 2025, TDOC released its new execution protocol (“2025 Tennessee Lethal Injection Protocol”) that called for executions to be performed by the injection of a lethal dose of pentobarbital. Mr. Black filed a timely grievance complaining that, among other things, the protocol failed to address, or establish any mechanism for addressing, individualized medical considerations that could interfere in a planned execution. While his grievance was pending, the Tennessee Supreme Court set Mr. Black’s execution date for August 5, 2025.

TDOC rejected Mr. Black’s grievance and took no remedial steps. The next day, Mr. Black filed suit in Tennessee state court challenging various aspects of the 2025 Tennessee Lethal Injection Protocol, including its failure to address his unique medical needs. Among Mr. Black’s unique medical needs is that his TDOC-acquired ICD will, unless deactivated prior to the execution, very likely shock Mr. Black’s heart at least once, and more likely several times, in an effort to restore his normal cardiac

rhythm. ICD shocks are extremely painful, and Mr. Black will very likely still be aware and capable of experiencing the severe pain when the device shocks him.

On June 30, Mr. Black filed a Motion for Preliminary Injunction requiring TDOC to deactivate the ICD immediately prior to, or simultaneously with, his execution. The motion did not call on TDOC to change Mr. Black's date of execution, to adopt an alternative method of execution instead of lethal injection, or to use any chemical other than or in addition to pentobarbital. Rather, it sought only the timely, effective deactivation of Mr. Black's ICD. The Tennessee Chancery Court for the 20th Judicial District heard two days of evidence regarding Mr. Black's motion. In addition to the expert testimony presented regarding the risks posed by the ICD, the court heard evidence establishing that ICD deactivations are routinely performed by medical practitioners for many reasons, including as part of end-of-life care. TDOC presented no evidence that it would experience any hardship in locating an individual or entity to perform the deactivation.

On Friday, July 18, the court issued a memorandum and order granting Mr. Black's motion for an injunction. After making those factual findings, the Chancellor concluded that: (1) Mr. Black showed a preliminary likelihood of success on his claim, (2) he made a sufficient showing of a risk of irreparable harm if his device is not deactivated "shortly before or at the point of administering the lethal injection, without any undue administrative or logistical burden being placed on the State," (3) the injunction does not operate to delay Mr. Black's execution, and (4) the public interest and the balancing of harms militate in favor of granting the limited temporary injunction. App. A39–40. The Chancellor directed Defendants to "arrange to have the necessary medical or certified technical professional present, along with any necessary equipment, at the execution to deprogram and deactivate" Mr. Black's ICD. *Id.*, A40. On July 23, 2025, the Chancellor, at the request of TDOC, modified the Order to permit the ICD deactivation to occur at a location outside the prison. *Id.*, A9–26.

The Defendants appealed, asking the Tennessee Supreme Court to vacate the injunction. On July 31, the Tennessee Supreme Court did so. The Court, however, did not find any abuse of discretion in the Chancellor’s findings or his Eighth Amendment analysis. Rather, the Tennessee Supreme Court held, for the first time and contrary to preexisting general statutory authority, *see* Tenn. Code Ann. § 17-1-204, that Tennessee trial courts have no power to issue injunctions bearing on secondary issues related to a scheduled execution.

Immediately following the Tennessee Supreme Court’s decision, Mr. Black filed a Motion for Stay of Execution with the Tennessee Supreme Court, seeking time to comply with the new procedural rule. On August 1, 2025, the Tennessee Supreme court rejected that motion on the ground that, based on the court’s interpretation of Rule 12.4(E) of the Tennessee Supreme Court, no stay may be sought under any docket number—and therefore in any proceedings—other than the docket number used by the Tennessee Supreme Court when it set the execution date. *See* Attachment 1 to Motion for Stay of Execution contemporaneously filed. No such provision appears in the text of Rule 12.4(E).

REASONS FOR GRANTING THE WRIT

I. CERTIORARI IS WARRANTED BECAUSE THE ONLY COURT TO CONSIDER MR. BLACK’S REQUEST FOR INJUNCTIVE RELIEF ON THE MERITS CORRECTLY HELD THAT HE HAD SHOWN HIS ENTITLEMENT TO THAT RELIEF, ONLY FOR IT TO BE TAKEN AWAY THROUGH A NEWLY CREATED STATE PROCEDURAL RULE.

As this Court has long recognized, a method of execution that is generally permissible may nevertheless pose Eighth Amendment concerns based on the individualized medical condition of the prisoner being executed. *See, e.g., Nelson v. Campbell*, 541 U.S. 637, 640 (2004). Sometimes litigants seek to have that problem addressed by requiring a change in the method of execution. Sometimes, however, it is far simpler to address the underlying condition itself. That is the case with Mr. Black, whose execution is, at present, highly likely to be compromised and rendered

torturous by a problem that can, quite literally, be solved with a few clicks of a laptop cursor.

After two days of live testimony from four expert witnesses, the chancery court in Davidson County, Tennessee found that Mr. Black had demonstrated a likelihood of success on the merits of his Eighth Amendment as-applied claim—namely, that executing Mr. Black without first deactivating his ICD would subject him to cruel and unusual punishment. Indeed, Mr. Black established through overwhelming evidence that the lethal injection of pentobarbital would very likely trigger his ICD’s pacing and defibrillating functions—prolonging Mr. Black’s death and causing him to suffer exceedingly painful shocks. Mr. Black further established that he would very likely be conscious to experience those defibrillating shocks. Finally, Mr. Black demonstrated that it would not be unduly burdensome for the State to deactivate his ICD immediately prior to, or simultaneously with, his execution through the use of an “interrogator,” a widely available tool for reprogramming an ICD with a laptop.

It is well-settled that the Eighth Amendment bars a state from executing any person in a manner that poses an “objectively intolerable risk of harm’ that qualifies as cruel and unusual.” *Baze v. Rees*, 553 U.S. 35, 50 (2008) (quoting *Farmer v. Brennan*, 511 U.S. 825, 846 (1994)). The applicability of the Eighth Amendment is particularly clear in this instance, because, as this Court has repeatedly stressed, the Cruel and Unusual Punishments Clause is especially concerned with so-called “superadded” suffering—that is, suffering that is over and above the suffering inherently attendant to death by execution. See *Bucklew v. Precythe*, 587 U.S. 119, 136 (2019) (quoting *Glossip v. Gross*, 576 U.S. 863, 877 (2015)). The violent electric shocks that Mr. Black will experience if his ICD is not deactivated prior to his execution are unambiguously superadded to the ordinary experience of execution by lethal injection. Executing a person by lethal injection while also subjecting him to painful, but non-lethal, electric shocks is no different from executing a person by

electric chair while also administering a painful, but non-lethal, poison. The superaddition is self-evident.

To prevail on a method-of-execution claim,¹ this Court has held that a plaintiff must first show that the challenged method of execution presents a “substantial risk of serious harm,” meaning a risk that is “sure or very likely to cause serious illness and needless suffering” and gives rise to “sufficiently imminent dangers.” *Baze*, 553 U.S. at 50 ; *Glossip*, 576 U.S. at 878. Second, the plaintiff must identify a “feasible, readily implemented” alternative method of execution that “significantly reduce[s] a substantial risk of severe pain” and that the state has refused to adopt without a legitimate penological reason. *Bucklew*, 587 U.S. at 127 (quoting *Glossip*, 576 U.S. at 877). In *Bucklew*, the Court clarified that this standard applies to both facial and as-applied challenges. *Id.* at 135–40. Here, Mr. Black’s as-applied ICD claim satisfies both requirements.

As to the first prong, Mr. Black established that by failing to account for his ICD, Tennessee’s lethal injection protocol is very likely to cause Mr. Black to experience severe pain. The trial court heard testimony from Dr. Gail Van Norman—a highly credentialed expert in cardiothoracic anesthesiology and internal medicine—that Mr. Black’s ICD would be triggered at least once, and more likely several times, during his execution. Specifically, Dr. Van Norman opined that the ICD would initiate a treatment sequence of one to eight powerful and extremely painful defibrillating shocks, which are very likely to succeed in restoring Mr. Black’s normal cardiac rhythm. Consequently, Mr. Black would likely suffer through multiple rounds of cardiac destabilization and ICD defibrillation—a cycle which could last up to 30

¹ Whether this appeal actually involves a “method-of-execution” claim is debatable, given that Mr. Black has not sought an injunction requiring TDOC to depart from its chosen method of pentobarbital poisoning to perform his execution. Because the claim does ultimately involve the circumstances of Mr. Black’s execution, however, he has sought to comply with all caselaw governing such claims.

minutes. Meanwhile, Dr. Van Norman opined that Mr. Black would very likely be aware and sensate to pain when the ICD shocks him.

As to the second prong, Mr. Black established that the risk of him suffering severe pain if he is executed with an active ICD is substantial both in an absolute sense and as compared to the alternative: deactivating Mr. Black's ICD shortly prior to, or simultaneously with, his lethal injection. By deactivating the device, the State could fully eliminate any risk that Mr. Black's ICD would prolong his death and subject him to superadded pain and suffering. Mr. Black presented evidence that ICD deactivation is a routine, commonplace procedure, and that it is the standard of care to turn off an ICD in the hospice setting when an individual is dying. The State presented no evidence to contradict Mr. Black's evidence as to the feasibility of the deactivating the device. As such, the trial court found that Mr. Black's ICD could be deactivated shortly before or simultaneous with the lethal injection, without any undue administrative or logistical burden being placed on the State.

Having satisfied both prongs of this Court's test for method-of-execution challenges, Mr. Black is entitled to relief on his as-applied Eighth Amendment claim. The Tennessee Supreme Court did not hold otherwise; rather, it simply announced a new procedural rule that nullified the trial court's injunction. Then, the Tennessee Supreme Court announced a *second* entirely new procedural rule to hold that Mr. Black is not entitled to even seek a stay in connection with these proceedings. Those newly announced procedural rules, however, provide no obstacle to this Court's either granting Mr. Black the relief to which he has already shown he is entitled or resolving this important legal issue for future litigants.

Defendants will likely argue that this Court does not have jurisdiction to entertain Mr. Black's petition because the Tennessee Supreme Court's decision was based on an interpretation of state law regarding when a preliminary injunction is available, rather than the merits of the underlying federal constitutional issue. In order to deprive this Court of jurisdiction, however, "an adequate and independent

state procedural bar to the entertainment of constitutional claims must have been ‘firmly established and regularly followed’ *by the time as of which it is to be applied.*” *Ford v. Georgia*, 498 U.S. 411, 424 (1991) (quoting *James v. Kentucky*, 466 U.S. 341, 348 (1984)) (emphasis added). Accordingly, “an unforeseeable and unsupported state-court decision on a question of state procedure does not constitute an adequate ground to preclude this Court’s review of a federal question.” *Cruz v. Arizona*, 598 U.S. 17, 26 (2023) (quoting *Bowie*, 378 U.S. at 354). This was, moreover, clearly a procedural bar. Although the Tennessee Supreme Court spoke of the matter as involving “jurisdiction,” it did not hold that the trial court lacked the authority to hear Mr. Black’s claim—only the authority to issue a preliminary injunction granting him necessary relief. App. A6. The Tennessee Supreme Court, moreover, has confirmed as recently as June of this year that it has never acknowledged a difference between a court’s “authority” and its “jurisdiction.” *See State v. Payne*, No. W2022-00210-SC-R11-CD, 2025 WL 1682152, at *6 n.7 (Tenn. June 16, 2025) (“For purposes of this opinion, we need not decide whether jurisdiction and authority may sometimes be distinct concepts, as other states have.”). As the Tennessee Supreme Court explicitly acknowledged in this case, it was—whatever terminology it chose to use—considering only the “narrow issue” of “whether, in the context of an impending execution, the trial court had the authority to grant” the injunctive relief requested. App. A5.

Tennessee Code Annotated § 17-1-204 grants Tennessee chancery courts the power “to grant injunctions, attachments and all other extraordinary process.” Tenn. Code Ann. § 17-1-204. That statute contains no exception based on the fact that the matter under consideration involves an execution, and Rule 12.4 of the Tennessee Supreme Court, which governs the setting of execution dates, similarly contains no such carveout. The Tennessee Supreme Court has, consistently with Rule 12.4, held that a trial court cannot enter an injunction that effectively supersedes an order setting an execution date by, for example, postponing the execution. *Coe v. Sundquist*, No. M2000-00897-SC-R9-CV (Tenn. April 19, 2000). However, before these

proceedings, no Tennessee decision, rule, or statute forbade a trial court to enter a preliminary injunction bearing on a secondary issue related to an execution that did not conflict with the order setting execution date. Accordingly, until July 31, 2025—five days before his execution—the unambiguous law in the State of Tennessee was that the appropriate and only mechanism for receiving the relief that Mr. Black sought was by seeking a preliminary injunction in a trial court, exactly as he did. *See West v. Ray*, No. M2010-02275-SC-R11-CV (Tenn. Nov. 6, 2010) (“We do not agree that the time constraints created by the pending execution necessarily prevented the Chancery Court from taking proof and issuing a declaratory judgment on the issue of whether Tennessee’s three-drug protocol constitutes cruel and unusual punishment . . .”).

The rule on which the Tennessee Supreme Court relied was entirely new; neither the Court nor the Defendants identified a single instance of it having been applied in a prior case. The Defendants may respond that the Tennessee Supreme Court considered its rule to be merely an application of its prior precedents. All of those prior precedents, however, concern the ability of a trial court to change an execution date in direct contradiction of an order of the Tennessee Supreme Court. The fact that the Tennessee Supreme Court considered its new rule an extension of a previous rule does not negate its objective newness. The Tennessee Supreme Court’s decision, therefore, provides no basis for this Court to decline review of Mr. Black’s Eighth Amendment claim.

II. CERTIORARI IS WARRANTED BECAUSE THE QUESTION OF HOW THE *BAZE/GLOSSIP/BUCKLEW* FRAMEWORK APPLIES TO REQUESTS FOR MEDICAL ACCOMMODATIONS THAT DO NOT REQUIRE ALTERATION OF THE UNDERLYING METHOD OF EXECUTION IS AN ISSUE OF GREAT IMPORTANCE THAT WILL LEAD TO RECURRING PROBLEMS IF NOT ADDRESSED.

Because Mr. Black’s showing of the risks associated with his ICD was based on the Chancellor’s assessment of the relative credibility of experts who provided live testimony, the Defendants relied, in their appeal, largely on arguing that Mr. Black failed to satisfy the second prong of the *Baze/Glossip/Bucklew* framework: whether

there was an available, readily implemented alternative course of action. The approach to that requirement that Defendants advocated, however, misreads those cases in a way that this Court should foreclose before it leads to havoc in future litigation. Specifically, Defendants argued that the second prong of the *Baze/Glossip/Bucklew* framework requires the prisoner, in every instance, to identify specific vendors willing to provide any necessary services requested. That interpretation, however, cannot be squared with the cases themselves or with well-established Tennessee policy and rules surrounding the confidentiality of participants in executions.

This Court has been clear that the purpose of the second *Baze/Glossip/Bucklew* prong is not to shift the responsibility for administering a prisoner's execution to the prisoner himself as a policy matter. To the contrary, there is no right, under current Eighth Amendment caselaw, for an individual to dictate the method or circumstances of his own execution. *Bucklew*, 587 U.S. at 134 (“There are, the Court recognized, many legitimate reasons why a State might choose, consistent with the Eighth Amendment, not to adopt a prisoner's preferred method of execution.”). Rather, a plaintiff must plead and prove at least one feasible alternative method of execution in order to establish that his lawsuit is one about the constitutionality of the challenged method itself, not the death penalty altogether. If there is no viable alternative method of execution, this Court has explained, then the challenge is to the sentence, not to the method, and should be treated accordingly. *See Glossip*, 576 U.S. at 879–80.

A plaintiff can establish that his challenge is to the method of execution, rather than the death penalty itself, by establishing that there exists at least one alternative method that “is feasible, readily implemented, and in fact significantly reduce[s] the risk of harm involved.” *Nance v. Ward*, 597 U.S. 159, 164 (2022) (quoting *Glossip*, 576 U.S. at 877). As long as that plausible alternative exists, the plaintiff's challenge does

not allege, either explicitly or by implication, that “the death penalty is categorically unconstitutional.” *Glossip*, 576 U.S. at 880.

The *Baze/Glossip/Bucklew* framework has frequently been litigated in the context of choices between different lethal injection drugs. See, e.g., *In re Ohio Execution Protocol Litig.*, 946 F.3d 287, 290–92 (6th Cir. 2019). The feasibility analyses performed in those cases have, unsurprisingly, reflected the particular features of the market for drugs likely to be used in executions. Many of those drugs have a small number of identifiable manufacturers who exercise substantial control over the distributors through whom their products are sold. See *Glossip*, 576 U.S. at 870 (discussing the “the sole American manufacturer of sodium thiopental, the first drug used in the standard three-drug protocol”). As such, the question of whether a particular drug is a feasible alternative often involves considering a small number of sources to determine whether the drug being proposed is truly available. See, e.g., *Middlebrooks v. Parker*, 15 F.4th 784, 792 (6th Cir. 2021).

Mr. Black does not here dispute the appropriateness of that analysis, under *Baze/Glossip/Bucklew*, when the issue under consideration is the availability and feasibility of using a particular lethal injection drug. While *Baze*, *Glossip*, and *Bucklew* do not, on their face, require a plaintiff to identify a specific vendor, a focus on that inquiry is arguably consistent with an application of the *Baze/Glossip/Bucklew* availability determination to the actually existing market for at least some commercial pharmaceuticals.

The Defendants invited error, however, when they advocated importing those assumptions to this case and the question of whether deactivating Mr. Black’s ICD is a readily available service. Unlike the relatively uncompetitive market for many commercial pharmaceuticals, ICD deactivation is a service available from countless suppliers. The trial court heard, and was persuaded by, evidence that ICD deactivation is a commonplace procedure performed by numerous healthcare providers on a routine basis, including, specifically, in the context of end-of-life

decisions. Indeed, TDOC easily found a provider that informed it that it was able to perform the deactivation the day before Mr. Black’s execution, although that option appears to have fallen apart when TDOC publicly divulged the identity of the facility in question, despite the fact that the Chancellor had previously ruled that the State could protect all execution participants with pseudonyms.

Indeed, the collapse of that option reveals the unworkability of Defendants’ reading of *Baze/Glossip/Bucklew*. Tennessee, like many states, has a “public policy . . . favor[ing] the anonymity of those involved in carrying out capital punishment.” *West v. Schofield*, 460 S.W.3d 113, 124–25 (Tenn. 2015). That policy is based on the assertion—frequently voiced by Defendants themselves—that participants in executions “may be subject to retaliation and harassment if their identities became known throughout the institution or to the public at large.” *Id.* at 123. Defendants and other commissioners of correction, moreover, routinely assert this interest in confidentiality not only to prevent public disclosure, but to prevent even disclosure to counsel pursuant to a protective order. *Cf. Jordan v. Comm’r, Mississippi Dep’t of Corr.*, 947 F.3d 1322, 1326 (11th Cir. 2020) (“[D]eath penalty opponents have vigorously lobbied drug manufacturers to make this drug entirely unavailable for use in American executions.”). A requirement that a prisoner personally identify and recruit execution participants simply cannot be squared with that policy or the concerns underlying it. Defendants are, in effect, asking the courts to require the proverbial foxes to stock the henhouse.

It may well be that the economic features of the pentobarbital market, for example, would require a plaintiff to make a more rigorous demonstration of feasibility in cases concerning the availability of specific pharmaceuticals. There is no reason, however, to apply such a standard when neither the circumstances nor the principles of *Baze*, *Glossip*, and *Bucklew* support it. There are innumerable facilities and individuals who could deactivate Mr. Black’s ICD. The State of Tennessee’s own

policies dictate that whoever does so should be someone chosen—and protected—by TDOC.

America’s aging death row population means that issues involving the need for medical accommodations in the execution setting will continue to arise—likely at an increasing rate. This Court should take action to ensure that, when they do, the underlying cases are not thrown into chaos by a standard that, in effect, not only encourages but requires unnecessary meddling in the execution process by courts and prisoners. Accordingly, this Court should grant certiorari and make clear that the *Baze/Glossip/Bucklew* framework, if it applies to such claim at all, requires the identification of specific prospective participants in executions only insofar as those facts are actually necessary to establish the ready availability of the course of action requested. In this instance, they are not.

III. CERTIORARI IS WARRANTED BECAUSE THE TENNESSEE SUPREME COURT GROSSLY DEPARTED FROM ORDINARY JUDICIAL PROCESS IN A MANNER INCONSISTENT WITH DUE PROCESS.

The Tennessee Supreme Court, as the constitutional body with inherent supervisory authority over the Tennessee court system, has broad discretion in setting the structure for how issues related to executions may be raised. *Moore-Pennoyer v. State*, 515 S.W.3d 271 (Tenn. 2017). However, it must exercise that discretion consistently with the federal constitutional guarantee of due process. See *Brinkerhoff-Faris Tr. & Sav. Co. v. Hill*, 281 U.S. 673, 681–82 (1930) (“[W]hile it is for the state courts to determine the adjective as well as the substantive law of the state, they must, in so doing, accord the parties due process of law.”). It failed, in this instance, to do so. Instead, at the last second, the Tennessee Supreme Court eliminated the previously appropriate avenue for relief that Mr. Black sought and then refused to modify its order setting his execution date to permit him to avail himself of whatever still-unclear process to which his appropriately raised concerns would have to be newly directed. See *West v. Ray*, *supra* (staying execution date and

remanding to chancery court to afford the parties the opportunity to present evidence and the chancery court to make findings of facts and conclusions of law).

“The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be ‘condemned to suffer grievous loss,’” *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring), and depends upon whether the recipient’s interest in avoiding that loss outweighs the governmental interest in summary adjudication” *Goldberg v. Kelly*, 397 U.S. 254, 262–63 (1970). This principle has been applied to ensure that individuals facing execution are afforded a meaningful opportunity to raise their constitutional claims, in order to prevent unnecessary suffering. *See Jones v. Comm’r, Ga. Dep’t of Corr.*, 812 F.3d 923, 937 (11th Cir. 2016).

There are, moreover, few, if any, aspects of due process more important than notice and the right to a hearing. *See Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950) (“An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice 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.”) (collecting cases). The Tennessee Supreme Court’s decision deprives Mr. Black of both. It deprives him of notice by changing the procedures applicable to his claim at the last second, leaving him no opportunity to pursue any alternative course of action before his execution is to be carried out. It deprives him of the right to a hearing, in turn, both by imposing that last-second procedural modification and by ushering in a status quo in which there is, at the moment, *no* apparent mechanism that actually permits Mr. Black to present the evidence necessary for him to assert his rights.

“Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted.” *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994). Based on that principle, this Court has recognized that “[t]here can

be no doubt that a deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language.” *Bouie v. City of Columbia*, 378 U.S. 347, 352 (1964). Mr. Black filed his motion in reliance on the clear statutory authority afforded to the chancery court by Tennessee Code Annotated § 17-1-204 and the fact that the relief he sought conflicted with no other law, including Rule 12.4 and the Order setting Mr. Black’s execution date. After he demonstrated his right to relief under Tennessee Code Annotated § 17-1-204, however, the Tennessee Supreme Court changed the law to take that right away.

Mr. Black has been deprived of his right to a hearing, moreover, because, while the Tennessee Supreme Court declared itself the only court capable of hearing Mr. Black’s concerns, it did so without providing any effective mechanism for doing so. The Tennessee Constitution explicitly dictates that the jurisdiction of the Tennessee Supreme Court “shall be appellate only,” with the exception of “such other jurisdiction as” was “conferred by law on” on that Court at the time of that Constitution’s adoption in 1870. Tenn. Const. art. VI, § 2. While that exception has been interpreted to permit the Tennessee Supreme Court to set execution dates, it does not confer on that court the jurisdiction to consider original actions, such as the state law declaratory judgment action underlying Mr. Black’s request. Indeed, unless and until the Tennessee Supreme Court amends its rules to provide some mechanism for an individual in Mr. Black’s position to raise his concerns, it appears that there is no mechanism for Mr. Black or any other such person to actually present evidence at a contested hearing with live testimony, other than by litigating a claim entirely to judgment.

Mr. Black, however, had no such option. The Tennessee Supreme Court set his execution date for mere months after his underlying claim was ripe, while Mr. Black was still pursuing administrative exhaustion. Even though Mr. Black immediately grieved his concern, filed his complaint as soon as he was able, and litigated his suit

on an expedited basis, he will not survive to see the final adjudication of his claims (likely sometime in 2026).

Mr. Black understands that an individual challenging the circumstances of his execution is not guaranteed the opportunity to litigate his claims to completion before the execution is carried out. *See, e.g., Barr v. Lee*, 591 U.S. 979, 981 (2020). That does not mean, however, that the courts may, after he has made the necessary showing for relief, change procedures at the last second to take that relief away from him with no time or even sufficient mechanism for getting that relief back. The court that took Mr. Black's remedy away from him is the same court that insists that he must be executed before he can regain it. The effect is a total, irremediable deprivation of due process that, unless addressed by this Court, will be a model for future state appellate courts seeking to deprive litigants of meaningful process.

CONCLUSION

For the foregoing reasons, this Court should grant this petition for a writ of certiorari.

Respectfully submitted,

OFFICE OF THE FEDERAL PUBLIC DEFENDER
FOR THE MIDDLE DIST. OF TENNESSEE
CAPITAL HABEAS UNIT

KELLEY J. HENRY*
CHIEF, CAPITAL HABEAS UNIT

AMY D. HARWELL
FIRST ASST. FED. PUB. DEFENDER
ASST. CHIEF, CAPITAL HABEAS UNIT

ELI W. SWINEY
RESEARCH & WRITING SPECIALIST

KATHERINE M. DIX
KATHERYN P. THOMAS
DREW S. BRAZER
ASSISTANT FEDERAL PUBLIC DEFENDERS

810 Broadway, Suite 200
Nashville, TN 37203
Phone: (615) 736-5047
Fax: (615) 736-5265
Email: Kelley_Henry@[fd.org](mailto:Kelley_Henry@fd.org)

BY: _____

**Counsel of Record*

