No. _____

In the Supreme Court of the United States

MELVIN TROTTER,
Petitioner,
v.
STATE OF FLORIDA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

CAPITAL CASE
DEATH WARRANT SIGNED
Execution Scheduled: February 24, 2026, at 6:00 PM ET

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CAPITAL CASE

QUESTION PRESENTED

This Court has determined that the *Baze-Glossip* test applies to all Eighth Amendment method of execution claims. This test has been expanded to encompass as-applied challenges as well as method of execution challenges. The lower court's application of this test expands it further to cover challenges to the maladministration of the lethal injection protocol. This expansion is incompatible with any meaningful judicial scrutiny of the process, as to whether maladministration challenges rise to the level of cruel and unusual punishment as prohibited by the Constitution.

1. Does this Court's precedent in *Baze v. Rees* and *Glossip v. Gross*, apply to Eighth Amendment challenges when determining whether maladministration of an execution protocol amounts to cruel and unusual punishment when inmates are not seeking an alternate method of execution, only seeking that the approved method is followed?

LIST OF PARTIES

All parties appear in the caption on the cover page.

RELATED CASES

Trial and Sentencing

Circuit Court of the Twelfth Judicial Circuit, Manatee County Florida
Docket Number: 86-CF-001225-A
Case Caption: State of Florida v. Melvin Trotter aka Melvin Turner
Date of Entry of Judgement: Convicted April 9, 1987; sentence to death May 18, 1987; motion for new trial denied July 10, 1987.
Unreported

Direct Appeal

Florida Supreme Court
Docket Number: 70714
Case Caption: Melvin Trotter v. State of Florida
Date of Entry of Judgement: Affirmed in part, remanded in part reversing sentence of death and remanding for resentencing December 20, 1990; rehearing Denied April 4, 1991
Trotter v. State, 576 So. 2d 691 (Fla. 1990)

Resentencing

Circuit Court of the Twelfth Judicial Circuit, Manatee County Florida
Docket Number: 86-CF-001225-A
Case Caption: State of Florida v. Melvin Trotter aka Melvin Turner
Date of Entry of Judgement: Sentenced to death July 23, 1993
Unreported

Direct Appeal from Resentencing

Florida Supreme Court
Docket Number: 82142
Case Caption: Melvin Trotter v. State of Florida
Date of Entry of Judgement: Affirmed December 16, 1996; rehearing denied April 4, 1997.
Trotter v. State, 690 So. 2d 1234 (Fla. 1996)

Petition for Writ of Certiorari

United States Supreme Court
Docket Number: 97-5118
Case Caption: Melvin Trotter v. Florida
Date of Entry of Judgement: Denied Oct 6, 1997.
Trotter v. Fla., 522 U.S. 876, 118 S. Ct. 197, 139 L. Ed. 2d 134 (1997)

Postconviction Motion to Vacate Judgement and Sentence with Special Request for Leave to Amend & Second Amended Postconviction Motion to Vacate Judgement and Sentence

Circuit Court of the Twelfth Judicial Circuit, Manatee County Florida
Docket Number: 86-CF-001225-A
Case Caption: State of Florida v. Melvin Trotter
Date of Entry of Judgement: Denied March 20, 2003
Unreported

Defendant's Successive 3.851 Motion for Postconviction Relief for Determination of Mental Retardation as a Bar to Execution

Circuit Court of the Twelfth Judicial Circuit, Manatee County Florida
Docket Number: 86-CF-001225-A
Case Caption: State of Florida v. Melvin Trotter
Date of Entry of Judgement: Denied July 7, 2005
Unreported

Appeal from Denial of Postconviction Motion to Vacate Judgement and Sentence and Consolidated State Habeas Petition

Florida Supreme Court
Docket Number: SC03-735, SC03-1967
Case Caption: Melvin Trotter v. State of Florida, Melvin Trotter v. Jame R. McDonough, etc.
Date of Entry of Judgement: Sentence affirmed; habeas petition denied May 25, 2006.
Trotter v. State, 932 So. 2d 1045, 1047 (Fla. 2006)

Federal Habeas Corpus Petition

United States District Court of Appeals, Middle District of Florida, Tampa Division
Docket Number: 8:06-cv-1872-T-17MSS
Case Caption: Melvin Trotter v. Secretary, Department of Corrections
Date of Entry of Judgement: Denial affirmed, November 6, 2007.
Trotter v. Sec'y, Dep't of Corr., No. 8:06-CV-1872T-17MSS, 2007 WL 3326672, at *33 (M.D. Fla. Nov. 6, 2007)

Appeal from Denial of Petition of Federal Habeas Corpus

United States Court of Appeals, Eleventh Circuit
Docket Number: 07-15755, 07-15755-P
Case Caption: Melvin Trotter v. Secretary, Department of Corrections
Date of Entry of Judgement: Denial affirmed July 23, 2008; rehearing denied, September 15, 2008.
Trotter v. Sec'y, Dep't of Corr., 535 F.3d 1286, 1293 (11th Cir. 2008);
Trotter v. Sec'y, Dep't of Corr., 307 F. App'x 438 (11th Cir. 2008)

Petition for Writ of Certiorari

United States Supreme Court
Docket Number: 08-6797
Case Caption: Melvin Trotter v. Walter A. McNeil
Date of Entry of Judgement: Petition denied December 15, 2008.
Trotter v. McNeil, 555 U.S. 1087, 129 S. Ct. 767, 172 L. Ed. 2d 758 (2008)

Amended Successive Motion to Vacate Death Sentence

Circuit Court of the Twelfth Judicial Circuit, Manatee County Florida
Docket Number: 86-CF-001225-A
Case Caption: State of Florida v. Melvin Trotter
Date of Entry of Judgement: Denied June 13, 2008
Unreported

Appeal From Final Order Denying Defendant's Successive Motion to Vacate Death Sentence

Florida Supreme Court
Docket Number: SC08-1254
Case Caption: Melvin Trotter v. State of Florida
Date of Entry of Judgement: Affirmed denial April 30, 2009.
Trotter v. State, 10 So. 3d 633 (Fla. 2009)

Defendant's Successive Rule 3.851 Motion to Vacate Sentence of Death

Circuit Court of the Twelfth Judicial Circuit, Manatee County Florida
Docket Number: 86-CF-001225-A
Case Caption: State of Florida v. Melvin Trotter
Date of Entry of Judgement: Denied March 6, 2017; rehearing denied April 17, 2017.
Unreported

Defendant's Successive Motion to Vacate Death Sentence (Hurst)

Florida Supreme Court
Docket Number: SC17-950
Case Caption: Melvin Trotter v. State of Florida
Date of Entry of Judgement: Denied January 26, 2018
Trotter v. State, 235 So. 3d 284, 285 (Fla. 2018)

Defendant's Demand for Additional Public Records Florida Department of Law Enforcement

Circuit Court of the Twelfth Judicial Circuit, Manatee County Florida
Docket Number: 86-CF-001225-A
Case Caption: State of Florida v. Melvin Trotter
Date of Entry of Judgement: Denied January 29, 2026.
Unreported

Defendant's Demand for Additional Public Records Florida Department of Corrections

Circuit Court of the Twelfth Judicial Circuit, Manatee County Florida
Docket Number: 86-CF-001225-A
Case Caption: State of Florida v. Melvin Trotter
Date of Entry of Judgement: Denied January 29, 2026.
Unreported

Defendant's Motion for a Stay of Execution

Circuit Court of the Twelfth Judicial Circuit, Manatee County Florida
Docket Number: 86-CF-001225-A
Case Caption: State of Florida v. Melvin Trotter
Date of Entry of Judgement: Denied February 6, 2026.
Unreported

Defendant's Successive Rule 3.851 Motion to Vacate Sentence of Death

Circuit Court of the Twelfth Judicial Circuit, Manatee County Florida
Docket Number: 86-CF-001225-A
Case Caption: State of Florida v. Melvin Trotter
Date of Entry of Judgement: Denied February 6, 2026.
Unreported

Appeal from Denial of Successive Rule 3.851 Motion to Vacate Defendant's Sentence of Death After a Signed Death Warrant and Motion for Stay of Execution

Florida Supreme Court
Docket Number: SC2026-0214, SC2026-0217
Case Caption: Melvin Trotter v. State of Florida v. Secretary, Department of Corrections
Date of Entry of Judgement: Denied February 17, 2026.
MELVIN TROTTER, Appellant, v. STATE OF FLORIDA, Appellee. MELVIN TROTTER, Petitioner, No. SC2026-0214, 2026 WL 444544, at *1 (Fla. Feb. 17, 2026)

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PETITION FOR WRIT OF CERTIORARI

Melvin Trotter respectfully petitions for a writ of certiorari to review a judgment of the Supreme Court of Florida.

DECISIONS AND ORDERS BELOW

The opinion of the Florida Supreme Court is attached as Appendix A. The order of the Twelfth Judicial Circuit of the State of Florida, Manatee County, (warrant court) is unpublished and attached as Appendix B.

JURISDICTION

The judgment of the Florida Supreme Court was entered on February 17, 2026. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment provides, in relevant part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Melvin Trotter is scheduled to be executed on February 24th in Florida State Prison by a Department of Corrections who has neither acknowledged nor refuted the documented use of expired etomidate during seven executions between January 1 through September 30, 2025.

A glimpse of the drug logs was uncovered during Frank Walls[1] post-warrant litigation in November 2025, which provides documentation of the three drugs used during Florida's three-drug-protocol between January 1, 2025 and September 30, 2025. The drug logs documented etomidate, the first drug of the protocol, which had either reached its expiration or was expired, as being "used" during seven dates which correspond with dates of executions between January 1 and September 30, 2025. After Florida's governor signed Petitioner's warrant scheduling his execution, Petitioner was prevented from obtaining additional records from the Florida Department of Corrections ("FDOC") and Department of Law Enforcement documenting and logging the drugs used for the additional six executions which took place in 2025 in Florida.

Based on the information which was gleaned from FDOC's records, Petitioner consulted and retained clinical pharmacologist Dr. Daniel Buffington. Dr. Buffington provided an affidavit which explains the significance of the use of expired drugs. The use of the lethal drugs "that are expired may have reduced pharmacologic effect or produce unanticipated or unnecessary complications." Appendix C, Signed Affidavit,

[1] Walls v. Dixon, No.4:25-cv-0488, ECF 1 (N.D. Fla. Nov. 26, 2025)

Dr. Daniel Buffington, at ¶ d. "Such an error or deviation could result in unnecessary pain or discomfort or an unexpected termination of the execution procedure prior to the inmate's death." Appendix C, Signed Affidavit, Dr. Daniel Buffington, ¶ d.

The significance of etomidate which has reached or surpassed its expiration cannot be overlooked. Etomidate is the first drug of the protocol used to cause "unconsciousness" of the inmate during their execution. Unconsciousness is so significant that this Court has considered such checks when determining whether a method of execution violates the Eighth Amendment. See generally, *Glossip v. Gross*, 576 U.S. 863, 886-7 (2015); *Baze v. Rees*, 553 U.S. 35, 120 (2008) (Ginsburg, J. dissent) (acknowledging Florida's consciousness check). It is well understood the use of etomidate is intended to render the person executed "unconscious" to alleviate the pain of the second and third drugs killing them. However, the "consciousness" check can no longer stand as a safeguard when the Florida Department of Corrections is using compromised etomidate.

Etomidate is a fast and short-acting anesthetic drug. Compromised etomidate with reduced or negative pharmacologic effect would be masked by the rocuronium used as the second drug. Onlookers would not know that the etomidate had reduced pharmacologic effect because the second drug, rocuronium, is the paralytic causing muscle paralysis and the men experiencing pain would be prevented from indicating the cruel suffering they are experiencing.

Petitioner argued to Florida's state courts that Florida Department of Corrections' pattern of protocol deviation caused reason for alarm, that the

department of corrections had documented using expired etomidate in seven of the thirteen executions, creating a substantial risk of unnecessary pain and suffering during Trotter's execution. The Florida Supreme Court denied Petitioner's claim for relief applying the *Baze-Glossip* test set by this Court. Appendix A, *Melvin Trotter v. State of Florida et al.*, --- So. 3d ---, 2026 WL 444544 (Fla. Feb. 17, 2026).

As to prong one, Florida Supreme Court found that Petitioner had not demonstrated a substantial and imminent risk that is sure or very likely to cause serious illness and needless suffering. Appendix A, *Melvin Trotter v. State of Florida et al.*, --- So. 3d ---, 2026 WL 444544 at *10 (Fla. Feb. 17, 2026). The Florida Supreme Court also found "the outcomes suggested in the affidavit are speculative..." Appendix A, *Melvin Trotter v. State of Florida et al.*, --- So. 3d ---, 2026 WL 444544 at *10 (Fla. Feb. 17, 2026) (citing, *Heath v. State*, 2026 WL 320522, at *3 (Fla. Feb. 3, 2026). As to prong two, the Florida Supreme Court found that Trotter failed to identify an alternative method of execution, as required by *Glossip*. 576 U.S. 863 (2015).

While the Florida Supreme Court seemingly recognizes that Trotter's claim for relief is not a "traditional method-of-execution" challenge, "the gist of his argument remains that executing him by lethal injection – given the allegations he raises – constitutes cruel and unusual punishment." Appendix A, *Melvin Trotter v. State of Florida et al.*, --- So. 3d ---, 2026 WL 444544 at *10 (Fla. Feb. 17, 2026). The Florida Supreme Court still found that Trotter must establish both prongs of *Baze-Glossip* to obtain relief. Yet, the second prong, feasible alternative to execution, of this Court's *Baze-Glossip* test inevitably forecloses proper judicial review of maladministration of

the lethal injection protocol. Challengers seek investigation and enforcement of the *already established protocol*. An alternative method of execution is impractical when the challenge is that the department of corrections is failing to competently carry out *already established* protocols. Maladministration challenges are in essence seeking the alternative method, that the constitutionally accepted protocol be precisely followed.

Invoking the Eighth Amendment's prohibition against cruel and unusual punishment does not serve as a "last-ditch effort" to escape punishment. Nor does such claim expand or contort the Constitution's prohibition against cruel and unusual punishment. The protections of the Eighth Amendment apply to all that are punished, *especially those* that have committed violent and cruel crimes and have been sentenced to the most severe punishment. The Eighth Amendment also protects *us* as citizens of this Country because it serves to protect "the dignity of society itself from … barbarity." *Ford v. Wainwright*, 477 U.S. 399, 410 (1986).

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REASONS FOR GRANTING THIS PETITION

I. TROTTER'S CASE PRESENTS AN EXTREME EXCEPTION TO THE PRESUMPTION AGAINST JUDICIAL INTERVENTION IN THE ELEVENTH HOUR BEFORE AN EXECUTION.

It is the role of the judiciary to ensure challenges to lawfully issued sentences are resolved fairly and expeditiously. *Bucklew v. Precythe*, 587 U.S. 119, 150 (2019). Trotter raises a claim for judicial review that could not have been brought at an earlier time, therefore it is not an attempt to manipulate the judicial branch to delay his execution.

Trotter presents this Court with a single question which this Court and only this Court can resolve: *whether Florida's maladministration of their lethal injection protocol violates the prohibition against cruel and unusual punishment*. Similarly, when determining whether this Court will grant Trotter's Petition for Certiorari, this Court should equally look to the four factors of a "traditional standard for a stay" which includes: (1) whether there is a strong showing of success on the merits; (2) whether there will be irreparable injury; (3) whether there will be substantial injury to other interested parties; and (4) public interest. See, *Bucklew v. Precythe*, 587 U.S. at 171-172 (Sotomayor, J. dissenting); *Nken v. Holder*, 556 U.S. 418, 425-426 (2009); *Hilton v. Braunskill*, 481 U.S. 770, 777 (1987).

In addition to Trotter's strong showing of success on the merits, as will be discussed below, the imminent execution of Mr. Trotter being carried out in violation of Florida's lethal injection protocol causing a substantial risk of needless pain and

cruelty, presents harm that is irreparable. Inmates who will be executed by the Florida Department of Corrections are also at risk of irreparable injury. Florida alone accounted for 40% of all executions in the United States in 2025 and this year, the governor has signed four death warrants already.

This pales in comparison to Florida's desire to cut dangerous corners during executions to ultimately put Trotter to death. There is not a substantial injury which can be found to Florida's interest. Lastly, the public has an interest in ensuring that the State is in fact carrying out executions in Florida in accordance with the Eighth Amendment. Florida's public has an interest that Mr. Melvin Trotter will be executed humanely and without needless pain and suffering.

This Court's presumption against petitions in the eleventh hour before an inmate is executed is inapplicable to claims asserting the imminent execution will violate the Constitution when the Eighth Amendment violation is predicated upon current actions and failures demonstrating a pattern of behavior during executions by a state's department of corrections.

Petitioner anticipates the State of Florida will argue that Trotter seeks to evade justice and contort constitutional interpretation of the Eighth Amendment. These arguments simply ignore the Florida Department of Corrections' pattern of significant protocol deviation by administering etomidate which appears to have reached or surpassed its expiration. As to public interest, there is no greater a public interest than when government wields its power and ends an inmate's life. These allegations also ignore that use of compromised etomidate presents irreparable harm

and cruelty upon those executed beyond the natural harm and pain which occurs during death.

II. MALADMINISTRATION CHALLENGES DIFFER IN NATURE TO METHODS-OF-EXECUTION AND AS-APPLIED CHALLENGES.

A maladministration challenge neither asserts that the state's chosen execution method itself is unconstitutional nor that the method would be unconstitutional as-applied to that particular inmate. Maladministration challenges do not argue that the method itself is a violation of the Eighth Amendment but rather the protocol deviation, or maladministration, presents a substantial risk or needless pain and suffering. This differs significantly from a method-of-execution claim and an as-applied claim. Trotter's maladministration challenge is one that is systematic in nature. Florida Department of Corrections protocol deviations appear to be deeply engrained in the way in which they are conducting executions. This is a significant difference between methods-of-execution and as-applied challenges. Method-of-execution challenges are individual to the method and as-applied challenges are individual to the person, whereas maladministration claims infect the process.

a. *Baze v. Rees* and this Court's precedent cited within, provides constitutional interpretations applicable to maladministration challenges.

This Court looked at a challenge to Kentucky's lethal injection procedure in *Baze v. Rees*, in which this Court found "that petitioners [had] not shown that the risk of an inadequate dose of the first drug substantial." 553 U.S. at 53-54 (holding, Kentucky's lethal injection protocol satisfied the Eighth Amendment). The

petitioners in *Baze*, asserted "that there was a significant risk" *if* the lethal injection procedures were not properly followed. *Id*. at 49. This is different than a maladministration claim which asserts that the protocol *is not* being followed. Although *Baze* was a challenge to the method of execution, this Court's opinion provides guidance to constitutional interpretations applicable to maladministration challenges.

Future harm can qualify as cruel and unusual punishment. "[T]he conditions presenting the risk must be '*sure or very likely* to cause serious illness and needless suffering,' and give rise to 'sufficiently *imminent* dangers.'" *Id*. at 50 (citing, *Helling v. McKinney*, 509 U.S. 25, 33, 34–35, (1993) (emphasis added)). "[T]here must be a 'substantial risk of serious harm,' and 'objectively intolerable risk of harm' that prevents prison officials from pleading that they were 'subjectively blameless for purposes of the Eighth Amendment.'" *Baze v. Rees*, 553 U.S. at 50 (citing, *Farmer v. Brennan*, 511 U.S. 825, 842, 846 and n.9 (1994)).

This Court further recognized that it is not a singular accident "for which no man is to blame" that offends the constitutional protections. *Id*. at 50 (citing, *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 463-464 (1947)). This Court specifically wrote:

> [H]owever, "a hypothetical situation" involving "a series of abortive attempts at electrocution" would present a different case. In terms of our present Eighth Amendment analysis, such a situation—unlike an "innocent misadventure—would demonstrate an "objectively intolerable risk of harm" *that officials may not ignore*. In other words, an isolated mishap alone does not give rise to an Eighth Amendment

> violation, precisely because such an event, while regrettable, does not suggest cruelty, or that the procedure at issue gives rise to a "substantial risk of serious harm." (internal citations omitted).

Id. at 50 (citing, *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 470-471 (1947) (concurring opinion); *Farmer v. Brennan*, 511 U.S. 825, 842 (1994)) (emphasis added).

This precedent is directly applicable to maladministration challenges and supports a finding that the execution of Melvin Trotter on February 24th will violate the Eighth Amendment protections. However, because this Court in *Baze* was determining whether the method of execution itself violated the Eighth Amendment, this Court's opinion goes on to require inmates to present an alternative method of execution. This is incompatible with maladministration challenges.

b. Trotter has pled facts sufficient for a finding that Florida Department of Corrections' protocol deviations amount to risk that is sure or very likely to cause serious illness and needless suffering, giving rise to imminent danger during his execution on February 24th.

Although Trotter was denied public records to support his claim and an evidentiary hearing to present his claim to the lower court, Trotter sufficiently pled the use of expired etomidate was sure to present needless suffering giving rise to sufficient imminent danger during his execution.

Etomidate provides a short duration of sedation.[2] Using etomidate which has reached its expiration or surpassed its expiration creates a substantial risk of needless pain and cruelty during the execution. In a clinical setting, "[p]atients given etomidate and rocuronium may also regain consciousness after 5 minutes; however, they remain paralyzed due to the longer duration of action of rocuronium. Patients in this situation may be fully awake yet unable to alert bedside clinicians…[3]"

The significance of using expired lethal chemicals was attested to by Dr. Daniel Buffington in his affidavit filed along with Trotter's demand for public records in the circuit court. Appendix C, Signed Affidavit, Dr. Daniel Buffington. Dr. Buffington affirmed that "[f]ailure to properly monitor and remove expired substances could result in the use of substances with reduced pharmacologic effect or produce unnecessary complications for the inmate or the abrupt and early termination of an execution." Appendix C, Signed Affidavit, Dr. Daniel Buffington.

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[2] Calvin Hwang, PharmD, BCEMP et al., *Impact of paralytic choice on postintubation sedation and analgesia in the emergency department*, 82 (suppl 3), Am J. Health-Syst Pharm, Jun. 1, 2025, at 2929 ("about 3 to 5 minutes.").

[3] Calvin Hwang, PharmD, BCEMP et al., *Impact of paralytic choice on postintubation sedation and analgesia in the emergency department*, 82 (suppl 3), Am J. Health-Syst Pharm, Jun. 1, 2025, at 2929, 2930 (Further indicating "[a]wareness has been reported in up to 7.4% of patients intubated with rocuronium and is an event that may cause significant physiological and psychological morbidity.").

The State has argued that Dr. Buffington could only speculate that utilizing expired drugs *may* produce unanticipated or unnecessary complications and *could* result in unnecessary pain or discomfort prior to the inmate's death. Their conclusion is misleading. What is known is that expired drugs are compromised. Uncompromised etomidate is necessary to render the person unconscious so that they are not tortured. A more definite assertion is impossible because the person is dead.

The FDOC logs support that 7 of the 13 men executed between January 2025 and September 30, 2025, appear to have received expired etomidate by the Florida Department of Corrections. See, Appendix D, FDOC Log Part 1; Appendix E, FDOC Log Part 2. Etomidate is the first drug of the protocol used to "sedate" the person being executed so that they do not feel the pain or torture of the second and third drugs killing them. This suggests that of the people executed between January 2025 and September 30, 2025, that more than 50% of the executed men received doses of etomidate that could have had the reduced pharmacologic effect thus not rendering them unconscious but because of the second drug, rocuronium, they are paralyzed and unable to signal to the execution team they are in distress above and beyond that which is permissible by the constitution. The safeguards of the protocol, such as consciousness checks, are ineffective in such a circumstance, a circumstance in which the Florida Department of Corrections is not blameless. Those monitoring the execution would not know that the sedative had reduced pharmacologic effect because the second drug, rocuronium, is the paralytic causing muscle paralysis and the men

experiencing pain would be prevented from indicating the cruel suffering they are experiencing.

The administration of what appears to be expired etomidate during executions in Florida provides just the circumstance in which maladministration of lethal injection protocol runs afoul with constitutional protections. Florida Department of Corrections complacent approach to its duty to constitutionally carry out lethal injection executions is not a mere "one-off" but rather a patterned series of significant deviations which would render the men executed completely conscious and paralyzed. This is the very type of undignified and torturous death this Court has condemned as being examples of what would be considered unconstitutional. *See*, *Bucklew* 587 U.S. at 132. What Trotter presents to this Court is not a type of pain that is inherently part of death, he presents this Court a circumstance that is sure or very likely risk of needless pain. Florida's maladministration of their lethal injection protocol is the one for which prison officials cannot render themselves subjectively blameless, for it is the execution team which is directly responsible for maintaining and administering the drugs used for the execution. The risk of needless pain caused by compromised etomidate cannot rationally be considered unfortunate but inevitable and only intensifies the sentence of death with cruel terror, pain, and disgrace. See, *Baze*, 553 U.S. at 48 (Thomas, J. concurring in judgment).

III. THE TWO PRONGS OF THE BAZE-GLOSSIP TEST DO NOT ENCOMPASS MALADMINISTRATION CHALLENGES TO ACCEPTED PROTOCOLS.

This Court recognized in *Glossip v. Gross*, petitioners have the burden of establishing that any risk of harm was substantial when compared to a known and available alternative when asserting that the lethal injection method is unconstitutional. 576 U.S. at 878. In *Glossip*, like in *Baze*, petitioners asserted that the method of execution violated the Eighth Amendment protections. 576 U.S. 863. Four years later, this Court in *Bucklew v. Precythe*, emphasized its rulings in both *Baze* and *Glossip* and reaffirmed that *all* Eighth Amendment challenges to executions, whether the entire method is challenged or the method as-applied to the inmate, must satisfy both prongs of the *Baze-Glossip* test. The *Baze-Glossip* test creates conflict between the test and this Court's Eighth Amendment jurisprudence.

The *Baze-Glossip* test is inapplicable to inmates who challenge their imminent execution when a state's deviation from the accepted lethal injection protocol supports a substantial risk of needless pain. Inmates will never satisfy the second prong of *Baze-Glossip* requiring a feasible alternative be identified because a "protocol deviation" challenge is neither a facially unconstitutional challenge nor an as-applied challenge. The *Baze-Glossip* test prevents judicial scrutiny of a state's protocol deviation.

First, by the very nature of a maladministration challenge, inmates are asserting that the accepted protocol would be the very alternative they are seeking. Inmates seeking independent investigations into whether the department of

corrections is carrying out executions in accordance with the constitution, are prevented from any remedy. The very state contesting the assertion is the same entity which stands as a roadblock from seeking reasonable relief. While departments of corrections ordinarily have a presumption that they are carrying out their duties in accordance with the constitution, the *Baze-Glossip* test, shields departments of corrections from judicial scrutiny even when inmates have overcome such a presumption. This Court's jurisprudence conflicts with any ability for inmates to seek any reasonable remedy.

Secondly, an alternative method of execution is impractical in maladministration challenges. Simply, why would inmates have any confidence in a department of corrections ability to follow a different protocol if it is not following the one already in place? Without meaningful judicial scrutiny, after a pattern of deviations which create a needless suffering, departments of corrections are allowed to continue to act without accountability. The precedent set by this Court forecloses inmates from challenging the dangerous conduct of the department of corrections. This Court has referred to the safeguards and procedures put in place by states to prevent needless torture and suffering. However, when departments of corrections no longer comply with the safeguards, the protocols are meaningless.

Petitioner acknowledges that inmates are not entitled to a painless death. The respondents are most certain to point out that methods of execution were seemingly more painful at the time of the adoption of the Eighth Amendment. In that same vein, executions were also public. Executions were not carried out in the secrecy of an

"execution chamber" in which even those that are witnessing the execution only see a mere glimpse of what is occurring as the executioner, hidden from sight, injects drugs from behind a wall. The Founding Fathers would equally be astounded by the secrecy of governmental agencies taking the life of the condemned. In the State of Florida, executions were carried out publicly until 1924. Fla. Stat. Ch. 9169 § 6124 (1924). Even after executions were removed from general public viewing, the executions were "in the presence of a jury of twelve respectable citizens who shall be requested to be present." Fla. Stat. Ch. 9169 § 6125 (1924).

Florida's impenetrable veil of secrecy concerning the way executions are being conducted today, goes against the philosophies of originalism and exacerbates the conflict created by the opinions in *Baze* and *Glossip*.

CONCLUSION

This Court should grant this petition to resolve the conflicting holdings of this Court and resolve how this Court's precedent applies to maladministration challenges amounting to cruel and unusual punishment. It is this Court and this Court alone that can resolve such a conflict.

Respectfully submitted,

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