CAPITAL CASE

No. _____

In the Supreme Court of the United States

DUSTY RAY SPENCER,

Petitioner,

v.

STATE OF FLORIDA,

Respondents.

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

THIS IS A CAPITAL CASE
WITH AN EXECUTION SCHEDULED FOR
THURSDAY, JUNE 25, 2026, AT 6:00 P.M.

JULISSA R. FONTÁN*
FLORIDA BAR NUMBER 0032744
JOHN "JACK" LOBIANCO
FLORIDA BAR NUMBER 125860
LAW OFFICE OF THE CAPITAL COLLATERAL
REGIONAL COUNSEL - MIDDLE REGION
12973 N. TELECOM PARKWAY
TEMPLE TERRACE, FL 33637
TELEPHONE: (813) 558-1600
COUNSEL FOR THE PETITIONER
COUNSEL OF RECORD
**MEMBER OF THE BAR OF THE SUPREME COURT*

CAPITAL CASE

QUESTIONS PRESENTED

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 where inmates are not seeking an alternate method of execution, only seeking that the approved method is followed?

LIST OF PARTIES

Dusty Ray Spencer was the Appellant below.

The State of Florida was the Appellee below.

RELATED CASES

TRIAL AND SENTENCING

Circuit Court of the Ninth Judicial Circuit, Orange, Florida
Docket Number: 92-CF-473
Case Caption: State of Florida v. Dusty Ray Spencer
Date of Entry of Judgment: Convicted, November 7, 1992; Sentence of Death, December 21, 1992.
Unreported.

DIRECT APPEAL

Florida Supreme Court
Docket Number: No. 80,987
Case Caption: Dusty Ray Spencer v. State of Florida
Date of Entry of Judgment: Order entered, September 22, 1994; Rehearing Denied, December 6, 1994. Mandate issued: January 5, 1995.
Spencer v. State, 645 So. 2d 377 (Fla. 1994).

RE-SENTENCING AFTER DEATH SENTENCE VACATED ON DIRECT APPEAL

Circuit Court of the Ninth Judicial Circuit, Orange, Florida
Docket Number: 92-CF-473
Case Caption: State of Florida v. Dusty Ray Spencer
Date of Entry of Judgment: Re-sentencing Argument: January 11, 1995. Sentence of Death, January 18, 1995.
Unreported.

DIRECT APPEAL FROM BEING RE-SENTENCED TO DEATH

Florida Supreme Court
Docket Number: No. 80,119
Case Caption: Dusty Ray Spencer v. State of Florida
Date of Entry of Judgment: Order entered, September 12, 1996; Rehearing Denied, April 14, 1997; Mandate issued, May 20, 1997.
Spencer v. State, 691 So. 2d 1062 (Fla. 1996).

PETITION FOR WRIT OF CERTIORARI

United States Supreme Court
Docket Number: 97-5249

Case Caption: Dusty Ray Spencer v. Florida
Date of Entry of Judgment: October 6, 1997.
Spencer v. Florida, 118 S.Ct. 213 (1997).

POSTCONVICTION MOTION TO VACATE JUDGMENT AND SENTENCE

Circuit Court of the Ninth Judicial Circuit, Orange County, Florida
Docket Number: 92-CF-473
Case Caption: State of Florida v. Frank Athen Walls
Date of Entry of Judgment: April 27, 2000.
Unreported

APPEAL FROM DENIAL OF POSTCONVICTION MOTION TO VACATE JUDGEMENT AND SENTENCE AND CONSOLIDATED STATE HABEAS PETITION

Florida Supreme Court
Docket Number: SC00-01051 & SC00–2588
Case Caption: Dusty Ray Spencer v. State of Florida; Dusty Ray Spencer v. James V. Crosby, Jr., Secretary, Florida Department of Corrections
Date of Entry of Judgment: January 9, 2003; Rehearing Denied March 25, 2003; Mandate Issued, April 28, 2003.
Spencer v. State, 842 So. 2d 52 (Fla. 2003).

FEDERAL HABEAS CORPUS PETITION

United States District Court, Middle District of Florida, Orlando Division
Docket Number: 6:03-cv-991-Orl-28JGG
Case Caption: Dusty Ray Spencer v. James V. Crosby, et al.
Date of Entry of Judgment: September 7, 2006
Spencer v. Crosby, 2006 WL 7063316 (U.S. F.L.M.D. 2006).

SUCCESSIVE MOTION TO VACATE DEATH

Circuit Court of the Ninth Judicial Circuit, Orange County, Florida
Docket Number: 92-CF-473
Case Caption: State of Florida v. Dusty Ray Spencer
Date of Entry of Judgment: February 5, 2008
Unreported

APPEAL FROM SUMMARY DENIAL OF SUCCESSIVE POSTCONVICTION MOTION

Florida Supreme Court

Docket Number: SC08-2270
Case Caption: Dusty Ray Spencer v. State of Florida
Date of Entry of Judgment: November 18, 2009
Spencer v. State, 23 So. 3d 712 (Fla. 2009).
Unpublished

APPEAL FROM DENIAL OF PETITION OF FEDERAL HABEAS CORPUS

United States Court of Appeals, Eleventh Circuit.
Docket Number: 06-16503
Case Caption: Dusty Ray Spencer v. Secretary, Fl. Dept. of Corrections, Attorney General, State of Florida
Date of Entry of Judgment: June 22, 2010.
Spencer v. Secretary, Dept. of Corrections, 609 F.3d 1170 (11th Cir. 2010).

PETITION FOR WRIT OF CERTIORARI

United States Supreme Court
Docket Number: 10–7637
Case Caption: Dusty Spencer v. Secretary, Florida Department of Corrections, et al.
Date of Entry of Judgment: January 24, 2011.
Spencer v. McNeil, 562 U.S. 1203 (2011).

SUCCESSIVE MOTION TO VACATE DEATH

Circuit Court of the Ninth Judicial Circuit, Orange County, Florida
Docket Number:92-CF-473
Case Caption: State of Florida v. Dusty Ray Spencer
Date of Entry of Judgment: April 18, 2017; Rehearing Denied: June 7, 2017
Unreported

APPEAL FROM SUMMARY DENIAL OF SUCCESSIVE POSTCONVICTION MOTION

Florida Supreme Court
Docket Number: SC17–1296
Case Caption: Dusty Ray Spencer v. State of Florida
Date of Entry of Judgment: November 8, 2018; Rehearing denied: December 13, 2018; Mandate Issued, December 31, 2018.
Spencer v. State, 259 So. 3d 712 (Fla. 2018).

PETITION FOR WRIT OF CERTIORARI

United States Supreme Court
Docket Number: SC17-1269
Case Caption: Spencer v. Florida
Date of Entry of Judgment: May 28, 2019

DEFENDANT'S SUCCESSIVE MOTION TO VACATE JUDGMENT OF CONVICTION AND SENTENCE OF DEATH AFTER DEATH WARRANT SIGNED AND DEFENDANT'S MOTION FOR STAY OF EXECUTION CONSOLIDATED.

Circuit Court of the Ninth Judicial Circuit, Orange County, Florida
Docket Number: 92-CF-473
Case Caption: State of Florida v. Dusty Ray Spencer.
Date of Entry of Judgment: June 9, 2026.
Unreported

APPEAL FROM SUMMARY DENIAL OF SUCCESSIVE POSTCONVICTION MOTION TO VACATE JUDGMENT OF CONVICTION AND SENTENCE OF DEATH AFTER DEATH WARRANT SIGNED, DEFENDANT'S MOTION FOR STAY OF EXECUTION AND DEFENDANT'S WRIT FOR HABEAS CORPUS CONSOLIDATED

Florida Supreme Court
Docket Number: SC2026-0880
Case Caption: Dusty Ray Spencer v. State of Florida
Date of Entry of Judgment: June 18, 2026.

TABLE OF CONTENTS

CONTENTS **PAGE(S)**

INDEX TO APPENDICES

TABLE OF AUTHORITIES

PAGE(S)

Cases

Statutes

Constitutional Provisions

OTHER SOURCES:

PETITION FOR WRIT OF CERTIORARI

Petitioner, Dusty Ray Spencer, respectfully petitions for a writ of certiorari to review a judgment of the Supreme Court of Florida.

CITATION TO OPINIONS BELOW

The opinion of the Florida Supreme Court is attached as Appendix A. The trial court's order denying Spencer's successive motion for post-conviction relief is reproduced at Appendix B.

JURISDICTION

The opinion of the Florida Supreme Court was entered on June 18, 2026. (Appendix A). This petition is timely filed. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. AMEND. VIII.

The Eighth Amendment to the Constitution of the United States

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

U.S. CONST. AMEND. XIV.

The Fourteenth Amendment to the Constitution of the United States

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State 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

Dusty Spencer is scheduled to be executed on June 25th in Florida State Prison by a Department of Corrections which has neither acknowledged nor refuted the documented use of expired etomidate during seven executions carried out between January 1 and September 30, 2025. Mr. Spencer's current condition may still give rise to an unconstitutional execution. Mr. Spencer is an elderly man with a slew of medical issues including a diagnosis of cirrhosis[1] of the liver and portal hypertension which are all documented in medical records generated while he was in the custody of Florida Department of Corrections.

By virtue of the many serious health issues with which Mr. Spencer presents, even if the etomidate is administered in a manner consistent with the department's protocols, "[t]he results of this will be the exaggerated toxicity of etomidate, including an exaggerated hemodynamic impact that might spike up his blood pressure. In that instance, his esophageal varices might burst, and blood will pour from his mouth, choke him, and be easily visible to witnesses." See WR 470. With this in mind, any deviation from the protocol could have highly dangerous results. Further, The DOC lethal injection protocol makes no provisions to account for coexisting medical conditions. Because of his long-standing cirrhosis of the liver, Mr. Spencer is at

[1] Cirrhosis is the progressive scarring of the liver tissue, caused by long-term liver diseases or injuries. In cirrhosis, healthy liver tissue is replaced by permanent scarring. This scar tissue obstructs blood flow and prevents the liver from effectively filtering toxins, processing nutrients, and regulating blood clotting. WR 469. In the case of Mr. Spencer, I estimate him to be Child Class B. Individuals with this degree of cirrhosis carry a 30% chance of dying if they undergo abdominal surgery, and individuals in Child Class B should be evaluated for liver transplant candidacy. Id.

constant risk of dangerous bleeding. Id. The execution of Mr. Spencer will be carried out in violation of Florida's Lethal Injection Protocol causing a substantial risk of needless pain and cruelty. These circumstances present harm that is irreparable.

Spencer 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 Spencer'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).

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).

Procedural History:

Mr. Spencer was tried by a jury and found guilty on November 7, 1992, of first-degree murder, aggravated battery, and attempted second-degree murder in Orange County, Florida. The empaneled jury recommended a sentence of death for the first-degree murder conviction on December 8, 1992, by a non-unanimous vote of seven to five. The trial court sentenced Spencer to death on December 21, 1992. Spencer appealed.

On September 22, 1994, this Court affirmed the conviction, but vacated Spencer's death sentence because the trial court improperly instructed the jury on and considered the aggravating circumstance of "cold, calculated and premeditated" (CCP) and failed to consider the two mental health statutory mitigating circumstances. *Spencer v. State*, 645 So.2d 377 (Fla. 1994). On remand, the trial court, without empaneling a new jury, again sentenced Spencer to death and this Court affirmed. *Spencer v. State*, 691 So.2d 1062 (Fla. 1997). Spencer filed a petition for writ of certiorari, and the Supreme Court of the United States denied certiorari on October 6, 1997. *Spencer v. Florida*, 118 S. Ct. 213 (1997).

On July 13, 1998, Spencer filed a Motion to Vacate Judgment and Sentence pursuant to Fla. R. Crim. P. 3.850. The circuit court denied the Motion after a limited evidentiary hearing. Spencer appealed and filed a petition for state habeas relief to the Florida Supreme Court. That Court affirmed the denial of his 3.850 Motion and denied his state habeas petition. *Spencer v. State*, 842 So.2d 52 (Fla. 2003).

Subsequently, Spencer filed a successive 3.851 motion based upon *Hurst v. Florida*[2] and *Hurst v. State*[3]. The successive motion was subsequently summarily denied. An appeal was filed. That Court issued an Order to Show Cause. After responses were filed, the Court denied the successive motion. See *Spencer v. State*, 259 So.3d 712 (Fla. 2018). Petition for certiorari on this issue was denied by the United States Supreme Court. See *Spencer v. Florida*, 587 U.S. 1028 (2019).

On May 26, 2026, Governor DeSantis signed a death warrant for Mr. Spencer. Mr. Spencer filed his successive under warrant on June 3, 2026, raising concerns with Florida's lethal injection protocol, specifically in relation to the likely effects on Mr. Spencer due to his well-documented history of failing health and chronic conditions which could compromise the efficacy of the protocol. It was summarily denied on June 9, 2026. The decision was appealed and ultimately the Florida Supreme Court denied Mr. Spencer on June 18. 2026.

[SPACE INTENTIONALLY LEFT BLANK]

[2] *Hurst v. Florida*, 136 S. Ct. 616 (2016).
[3] *Hurst v. State*, 202 So. 3d 40 (Fla. 2016).

REASONS FOR GRANTING THE WRIT

I. SPENCER'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). Spencer 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.

On November 26, 2025, evidence was presented in a federal lawsuit filed by a recently executed inmate, Frank Walls, indicating that the Florida Department of Corrections' ("FDOC") ability to competently carry out Executions without deviating from its own Lethal Injection procedures is compromised. *Walls v. Dixon*, No. 4:25-cv-0488, ECF 1 (N.D. Fla. Nov. 26, 2025). Walls was denied relief because the courts found that the medical aspect of his as-applied challenge was untimely. Untimely though the claim may have been for Walls, the issues giving rise to his claim continue to implicate the constitutional rights of each individual sentenced to death in the State of Florida. *Id*.

A glimpse of the drug logs was obtained during the Frank Walls post-warrant litigation in November 2025, which include documentation of the three drugs used pursuant to 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, and being "used" during seven dates which correspond with dates of executions between January 1 and September 30, 2025.

According to Florida Department of Corrections ("DOC"), the promulgated protocols were designed to be "compatible with evolving standards of decency… and advances in science, research, pharmacology, and technology." WR 411. It further asserts that "The process will not involve unnecessary lingering or the unnecessary or wanton infliction of pain and suffering." Id. Under Florida law, a death sentence is to be carried out pursuant to the requirements of Fla. Stat. § 922.105. The statute does not prescribe the specific drugs, dosages, drug combinations, or manner of intravenous access employed during an execution. Furthermore, the statute is silent on certification, licensure, experience, or competence of those who participate in an execution. All decisions regarding the Lethal Injection Protocol are determined by DOC, which retains the unfettered ability to revise the Protocol whenever it is so inclined. The Lethal Injection Protocol calls for successive intravenous injections of 200 milligrams of etomidate, a sedative, followed by 1000 milligrams of rocuronium bromide, a paralytic agent, and 240 milliequivalents of potassium acetate, which stops the heart. WR 417-424. The source of the drugs used in the Lethal Injection Protocol is unknown, and the identity of the pharmacy that manufactures the chemicals used by DOC in executions is confidential. Fla. Stat. § 945.10. Little is known about DOC's standards for storing or testing of the drugs. After Florida's

governor signed Walls's warrant scheduling his execution, Walls 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.

Documents obtained in the Walls's case, including DOC logs, have exposed the routine maladministration of critical phases of the execution process and have raised serious concerns over the implementation of the written execution protocols. This is particularly so because neither the Governor, the Attorney General, nor DOC have taken any apparent action to either acknowledge, address, or remedy the alarming errors exposed in the records proffered by Walls. WR 426-466. DOC has continued to execute inmates at an unprecedented rate without pausing to ensure compliance with its own protocols.

Adding to the concerns caused by DOC's failure to timely record which drugs are checked out from inventory, and when, is that DOC's recordkeeping practices also reflect inaccuracies in the amounts of drugs checked out for each execution. The amount of each drug required for an execution is prescribed by the protocols and not subject to variation. WR 417-424. Variations in the amounts being removed for an execution is a worrying indicator that the lethal injection drugs are being administered at dosages inconsistent with FDOC's protocols. Compounding these concerns, the information suggests that the drugs being used were expired.

Based on the information that was obtained from Mr. Walls's litigation, which was gleaned from FDOC's records, Petitioner consulted and retained Dr. Joel Zivot, MD, a physician practicing anesthesiology and critical care. Dr. Zivot further examined Mr. Spencer's medical records and provided a declaration which explains the significance of the issues with the protocol as specifically applied to Mr. Spencer.

Mr. Spencer is an elderly man with a slew of medical issues including a diagnosis of cirrhosis of the liver and portal hypertension which are all documented in medical records generated while he was in the custody of Florida Department of Corrections. "In liver cirrhosis, drug distribution is fundamentally altered by changes in body composition and vascular hemodynamics. The expansion of extracellular fluid volume (e.g., ascites or edema) increases the volume of distribution for hydrophilic drugs and decreases the volume of distribution for lipophilic drugs. Cirrhosis also reduces serum albumin levels, leading to higher free, active concentrations of highly protein-bound medications." WR 469-470. Further, "Cirrhosis significantly impairs the liver's ability to metabolize lipophilic drugs into hydrophilic compounds for excretion. This leads to increased drug bioavailability, a larger volume of distribution, and longer half-lives." Id. Finally, Mr. Spencer's condition affects his ability to produce blood clots. "Normal clotting relies on the normal availability of liver-produced clotting factors and platelets. The liver produces a chemical that stimulates platelet production in the bone marrow. Individuals such as Mr. Spencer have a

cirrhosis-induced reduction in both clotting factors and platelets. Mr. Spencer is at constant risk of dangerous bleeding." Id.

These are crucial biological processes impacted by cirrhosis, rather than mere conjecture, as suggested by the State of Florida in litigation below. By virtue of the many serious health issues with which Mr. Spencer presents, even if the etomidate is administered in a manner consistent with the department's protocols, "[t]he results of this will be the exaggerated toxicity of etomidate, including an exaggerated hemodynamic impact that might spike up his blood pressure. In that instance, his esophageal varices might burst, and blood will pour from his mouth, choke him, and be easily visible to witnesses." See WR 470.

"Our cases recognize that subjecting individuals to a risk of future harm—not simply actually inflicting pain—can qualify as cruel and unusual punishment. To establish that such exposure violates the Eighth Amendment, however, the conditions presenting the risk must be 'sure or very likely to cause serious illness and needless suffering,' and give rise to 'sufficiently imminent dangers.'" *Baze v. Rees*, 553 U.S. 35, 49–50, (2008), citing *Helling v. McKinney*, 509 U.S. 25, 33, 34–35, 113 S.Ct. 2475, 125 L.Ed.2d 22 (1993) "We have explained that to prevail on such a claim there must be a 'substantial risk of serious harm,' an 'objectively intolerable risk of harm' that prevents prison officials from pleading that they were 'subjectively blameless for purposes of the Eighth Amendment.'" *Id.*, citing *Farmer v. Brennan*, 511 U.S. 825, 842, 846, and n. 9, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994). Had an evidentiary

hearing been granted, Dr. Joel Zivot could have expanded further on the issues. Any deviation from the protocol could have highly dangerous results.

However, even without full evidentiary development, the specter of future harm exists here. What Spencer 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 to risk of needless pain. 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).

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)).

a. Spencer has pled facts sufficient for a finding that DOC's 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 upcoming execution.

Although Spencer was denied public records to support his claim and an evidentiary hearing to present his claim to the lower court, Spencer sufficiently pled

that 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.[4] 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… "[5]

The State of Florida argued below that Dr. Zivot could only speculate that utilizing expired drugs may produce unanticipated or unnecessary complications resulting in unnecessary pain or discomfort prior to the inmate's death. WR 280. This conclusion is misleading. "In liver cirrhosis, drug distribution is fundamentally altered by changes in body composition and vascular hemodynamics. The expansion of extracellular fluid volume (e.g., ascites or edema) increases the volume of distribution for hydrophilic drugs and decreases the volume of distribution for lipophilic drugs. Cirrhosis also reduces serum albumin levels, leading to higher free, active concentrations of highly protein-bound medications." WR 469-470. Further,

---

[4] 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.").

[5] 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.").

"Cirrhosis significantly impairs the liver's ability to metabolize lipophilic drugs into hydrophilic compounds for excretion. This leads to increased drug bioavailability, a larger volume of distribution, and longer half-lives." Id. "The FDOC lethal injection protocol makes no provisions to account for coexisting medical conditions." WR 470. The possibility that Mr. Spencer's condition could affect the efficacy of the drugs is simply dismissed by the state as speculative. However, Dr. Zivot's conclusions are based on studies and science.

These are crucial biological processes impacted by cirrhosis, rather than mere conjecture, as suggested in the answer brief. By virtue of the many serious health issues with which Mr. Spencer presents, even if the etomidate is administered in a manner consistent with the department's protocols, "[t]he results of this will be the exaggerated toxicity of etomidate, including an exaggerated hemodynamic impact that might spike up his blood pressure. In that instance, his esophageal varices might burst, and blood will pour from his mouth, choke him, and be easily visible to witnesses." See WR 470.

What is known is that expired drugs are compromised. Uncompromised etomidate is necessary to render the person unconscious to ensure Florida's execution procedure adheres to constitutional standards. Waiting to see whether Mr. Spencer's constitutional protections against cruel and unusual punishment are violated by the State of Florida's non-adherence to protocol will render Mr. Spencer unlawfully

executed and beyond the reach of any judicial remedy, whilesubsequent inmates remain vulnerable to the very same unconstitutional cruelty.

The potential utilization of expired etomidate to carry out Spencer's execution presents dangers, actual and constitutional, that cannot be overlooked. Etomidate is the first drug of the protocol, and its purpose is to induce "unconsciousness" of the inmate during their execution. Unconsciousness of the inmate when the second and third drugs are administered is a crucial component of lethal injection' constitutional validity, as it can greatly reduce any sensations of pain experienced by the inmate during the administration of the second and third drugs. 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 an inmate "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 DOC is using compromised etomidate.

Utilizing what appears to be expired etomidate to carry out executions in the State of Florida would be the very maladministration of Lethal Injection Protocols contemplated by constitutional protections against cruel and unusual punishment. Florida Department of Correction's complacent approach to its duty to constitutionally carry out lethal injection executions is not a mere "one-off" but rather a pattern of significant deviations which would leave the men to be executed fully conscious but utterly paralyzed. This is the very type of undignified and torturous

death this Court has condemned as unconstitutional. See *Bucklew v. Precythe*, 587 U.S. 119, 132 (2019).

The allegations detailed above are neither conclusory nor speculative; instead, they rely on the DOC's own records which detail specific instances in which the department falls well short of what is required by constitution and conscience. DOC's documented, repeated maladministration of its own procedures destroys any confidence that it will comply with the procedures in Mr. Spencer's case. As such, Mr. Spencer has established that DOC's abrogation of its own protocol creates a "sure or very likely risks of sufficiently imminent danger." *Asay v. State*, 224 So. 3d 695, 701 (Fla. 2017).

b. ***The protocol as applied is flawed due to its inherent one size fits all methodology- if made flexible to adapt to an individual inmate, alternative execution method is unnecessary.***

The Florida DOC lethal injection protocol makes no provisions to account for coexisting medical conditions. Because of his long-standing cirrhosis of the liver, Mr. Spencer is at constant risk of dangerous bleeding. WR 469-470. The execution of Mr. Spencer will be carried out in violation of Florida's Lethal Injection Protocol causing a substantial risk of needless pain and cruelty. These circumstances are made more likely by virtue of Mr. Spencer's medical conditions, merely hoping they do not occur is an insufficient constitutional safeguard as the harm inflicted would be irreparable.

In addition to the general concerns with Florida DOC's ability to adhere to its own protocols, Mr. Spencer is specifically concerned by whether his host of infirmities,

not the least of which is compromised veinous access, will complicate the administration of the execution drugs. In Mr. Spencer's case, even if the protocol is followed, "he will be exposed to a much larger than usual quantity of etomidate. The results of this will be the exaggerated toxicity of etomidate, including an exaggerated hemodynamic impact that might spike up his blood pressure.

In that instance, his esophageal varices might burst, and blood will pour from his mouth, choke him, and be easily visible to witnesses." See WR 469, Appendix E. Further, "[i]ndividuals such as Mr. Spencer have a cirrhosis-induced reduction in both clotting factors and platelets. Mr. Spencer is at constant risk of dangerous bleeding." Id. Veinous access is a prominent issue in the administration of lethal injection drugs, as was demonstrated in the state of Tennessee.

Recently, the state of Tennessee granted Tony Carruthers a one-year reprieve after the state struggled for over an hour to find a vein and it was reported that he bled during the attempt.[6] The DOC lethal injection protocol makes no provisions to account for coexisting medical conditions. The DOC lethal injection protocol requires the placement of two intravenous lines, generally in the arms, but if this fails, a central line may be placed by a technique involving a surgical procedure known as a cut down. A cutdown opens the skin to identify and cannulate a vein that is otherwise not visible. Cutting into the skin or placing an intravenous into the skin of a person

[6] See USA Today, 'Torturous': Botched Tennessee execution sparks US death row debate, https://www.usatoday.com/story/news/nation/2026/05/28/botched-tennessee-execution-tony-carruthers-christa-pike/90268533007/, last accessed June 10, 2026.

with cirrhosis will cause significant bleeding. WR 470. In Mr. Spencer's case, the bleeding could be excessive if such a complication arose. See WR 470.

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 or if the inmate simply needs an adjustment to prevent a catastrophic issue. 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

For the foregoing reasons, Spencer respectfully requests that this Court grant the petition for writ of certiorari to review the judgment of the Florida Supreme Court.

Respectfully submitted,

/s/ Julissa R. Fontan
JULISSA R. FONTAN
FLORIDA BAR NO. 0032744
ASSISTANT CCRC
CAPITAL COLLATERAL REGIONAL
COUNSEL - MIDDLE REGION
12973 N. TELECOM PARKWAY
TEMPLE TERRACE, FL 33637
TELEPHONE: (813) 558-1600
COUNSEL FOR PETITIONER

JUNE 22, 2026