

No. _____

In the Supreme Court of the United States

DOMINICK OCCHICONE,
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: July 28, 2026, at 6:00 PM ET

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CAPITAL CASE
QUESTION PRESENTED

In 2025 and 2026, the State of Florida engaged in an unprecedented spree of death warrants, resulting in 19 executions during 2025 and 10 so far in 2026, with one scheduled to occur mere hours before Occhicone’s and another one scheduled 3 weeks later. As recently as 2023, before the accelerated rate of executions, Justice LaBarga of the Florida Supreme Court raised concerns over the pace of executions occurring in Florida in his dissent in *Barwick v. State*, 361 So. 3d 785, 796 (Fla. 2023)

As the majority observes, “post-warrant litigation is arduous,” *see* majority op. at 7, and a death warrant by its very nature requires expedited proceedings. However, these solemn proceedings ultimately involve carrying out a sentence of death for the most aggravated and least mitigated of murders and must still ensure due process of law. I am extremely concerned by the recent pace of death warrants and the speed with which the parties and involved entities must carry out their respective duties.

Barwick has raised concerns about the accelerated timetable and argues that “[t]he death warrant proceedings in [his] case lacked any indicia of meaningfulness.” While I agree that Barwick’s claims are not entitled to relief under this Court’s precedent, I nonetheless caution that even in this final stage of capital proceedings, a meaningful process must be ensured.

During the rash of executions, the Florida Department of Corrections (“FDOC”) complied with a records request regarding how the agency carried out the administration of its lethal injection protocol. The logs produced pursuant to said records request, indicated concerns regarding whether Florida is carrying out its lethal injection protocol in a manner consistent with the United States Constitution. Florida courts, including the Florida Supreme Court (“FSC”), have consistently refused to force FDOC to produce additional records regarding the evidence of the

maladministration of the current lethal injection protocols. Thus, Florida capital defendants under warrant have raised challenges to this Court in an effort for federal judicial intervention at the highest level. The following previously executed defendants raised claims to this court based on Eighth Amendment grounds: *Walls v. Florida*, cert denied, No. 25-6357, --- U.S. ----, 2025 WL 3674295 (U.S. December 18, 2025); *Heath v. Florida*, cert denied, No. 25-6746, --- U.S. ----, 2026 WL 363902 (U.S. February 10, 2026); *Smithers v. State*, 420 So. 3d 460, 465 (Fla.), cert. denied sub nom. *Smithers v. Florida*, 146 S. Ct. 323, 223 L. Ed. 2d 143 (2025); *Trotter v. Florida*, cert denied, No. 25-6853, --- U.S. ----, 2026 WL 504237 (U.S. February 24, 2026); *Spencer v. State*, No. SC2026-0880, 2026 WL 1757938 (Fla. June 18, 2026), cert. denied sub nom. *Spencer v. Fla.*, No. 25-7648, 2026 WL 1827690 (U.S. June 25, 2026). Other previously executed defendants raised claims related to the maladministration of FDOC's protocols as due process and equal protection claims: *King v. State*, --- So. 3d ---, 2026 WL 672101 (Fla. Mar. 10, 2026); *Willacy v. State*, --- So. 3d ---, 2026 WL 1021168 (Fla. Apr. 15, 2026). Whereas only this Honorable Court has the power and authority to hold Florida to address Florida's actions, Petitioner raises the following questions presented regarding this deadly serious matter:

- 1. Does the Florida courts' complete refusal to provide additional FDOC records to Occhicone, by imposing an improper standard of raising a "colorable claim for relief" in order to obtain those records, along with their refusal to conduct an evidentiary hearing result in an abuse of discretion in violation of Occhicone's due process and equal protection rights under the Fourteenth Amendment?**
- 2. Does the State of Florida's interpretation of the Eighth Amendment and reliance on its Conformity Clause violate**

Occhicone's right to be free from cruel and/or unusual punishment and right to due process under the Fourteenth Amendment?

LIST OF PARTIES

All parties appear in the caption on the cover page.

RELATED CASES

Trial and Sentencing

Circuit Court of the Sixth Judicial Circuit, Pasco County
Docket Number: 1986CF001355CFAWS
Case Caption: State of Florida v. Dominick Occhicone
Date of Entry of Judgement: Convicted, September 18, 1987; Sentenced,
November 9, 1987
Unreported

Direct Appeal

Supreme Court of Florida
Docket Number: SC1960-71505
Case Caption: Occhicone v. State
Date of Entry of Judgement: Denied, October 11, 1990; Rehearing Denied,
December 26, 1990
Occhicone v. State, 570 So. 2d 902, 904 (Fla. 1990)

Petition for Writ of Certiorari

Supreme Court of the United States
Docket Number: 90-7541
Case Caption: Occhicone v. Florida
Date of Entry of Judgement: Denied, May 20, 1991
Occhicone v. Fla., 500 U.S. 938, 111 S. Ct. 2067, 114 L. Ed. 2d 471 (1991)

Petition for Writ of Habeas Corpus

Supreme Court of Florida
Docket Number: 80234
Case Caption: Occhicone v. Singletary
Date of Entry of Judgement: Denied, April 8, 1993; Rehearing Denied, June
7, 1993
Occhicone v. Singletary, 618 So. 2d 730, 730 (Fla. 1993)

Motion for Postconviction Relief

Circuit Court of the Sixth Judicial Circuit, Pasco County
Docket Number: 1986CF001355CFAWS
Case Caption: Dominick Occhicone v. State of Florida
Date of Entry of Judgement: Denied in Part, July 17, 1995, Order Granting
in Part, September 12, 1996; Evidentiary Hearing Concluded, November 18,
1997; Denied, May 19, 1998
Unreported

Motion for Belated Appeal (Pro Se)

Supreme Court of Florida
Docket Number: SC1960-92887
Case Caption: Occhicone v. State
Date of Entry of Judgement: Denied, August 17, 1998
Occhicone v. State, 718 So. 2d 1234 (Fla. 1998)

Appeal from Denial of Motion for Postconviction Relief

Supreme Court of Florida
Docket Number: SC1960-93343
Case Caption: Occhicone v. State
Date of Entry of Judgement: Denied, June 29, 2000; Rehearing Denied
October 10, 2000
Occhicone v. State, 768 So. 2d 1037, 1039 (Fla. 2000)

Federal Petition for Writ of Habeas Corpus

United States District Court, Middle District of Florida
Docket Number: 8:01CV2136T27TGW
Case Caption: Occhicone v. Moore
Date of Entry of Judgement: Denied, March 31, 2005
Occhicone v. Moore, No. 8:01CV2136T27TGW, 2005 WL 1073936, at *1 (M.D.
Fla. Mar. 31, 2005), *aff'd sub nom. Occhicone v. Crosby*, 455 F.3d 1306 (11th
Cir. 2006)

Appeal from Denial of Federal Petition for Writ of Habeas Corpus

United States Court of Appeals, Eleventh Circuit
Docket Number: 05-12502
Case Caption: Occhicone v. Crosby
Date of Entry of Judgement: Denial Affirmed, July 14, 2006
Occhicone v. Crosby, 455 F.3d 1306, 1313 (11th Cir. 2006)

Petition for Writ of Certiorari

Supreme Court of the United States
Docket Number: 06-7160
Case Caption: Occhicone v. McDonough
Date of Entry of Judgement: Denied, January 8, 2007
Occhicone v. McDonough, 549 U.S. 1122, 127 S. Ct. 944, 945, 166 L. Ed. 2d
722 (2007)

Successive Motion for Postconviction Relief (*Hurst* Relief)

Circuit Court of the Sixth Judicial Circuit, Pasco County
Docket Number: 1986CF001355CFAWS

Case Caption: Dominick Occhicone v. State of Florida
Date of Entry of Judgement: Denied, May 18, 2017
Unreported

Petition for Writ of Habeas Corpus (*Hurst* Relief)

Supreme Court of Florida
Docket Number: SC2017–1112
Case Caption: Occhicone v. State
Date of Entry of Judgement: Denied, January 30, 2018
Occhicone v. State, 235 So. 3d 299, 300 (Fla. 2018)

Petition for Writ of Certiorari

Supreme Court of the United States
Docket Number: 17-9497
Case Caption: Occhicone v. Florida
Date of Entry of Judgement: Denied, October 1, 2018
Occhicone v. Fla., 586 U.S. 863, 139 S. Ct. 181, 202 L. Ed. 2d 112 (2018)

Successive Motion for Postconviction Relief (Post Warrant)

Circuit Court of the Sixth Judicial Circuit, Pasco County
Docket Number: 1986CF001355CFAWS
Case Caption: Dominick Occhicone v. State of Florida
Date of Entry of Judgement: Denied, July 10, 2026
Unreported

Appeal from Denial of Successive Motion for Postconviction Relief (Post Warrant)

Supreme Court of Florida
Docket Number: SC2026-1042
Case Caption: Occhicone v. State
Date of Entry of Judgement: Denied, July 21, 2026;
Occhicone v. State, 2026WL2097359 (Fla. 2026)

**Complaint for Declaratory and Injunctive Relief
Pursuant to 42 U.S.C. § 1983**

United States District Court, Northern District of Florida
Docket Number: 4:26-cv-00355-TKW-MAF
Case Caption: James Aren Duckett & Dominick Occhicone v. Ron DeSantis,
Governor of Florida, et.al
Pending: Filed July 23, 2026

TABLE OF CONTENTS

QUESTIONS PRESENTED	ii
LIST OF PARTIES	v
RELATED CASES	vi
TABLE OF CONTENTS	ix
INDEX TO APPENDIX	x
TABLE OF AUTHORITIES	xi
PETITION FOR WRIT OF CERTIORARI	1
DECISION AND ORDER BELOW	1
JURISDICTION.....	1
CONSTITUTIONAL PROVISIONS INVOLVED	1
STATEMENT OF THE CASE.....	2
REASONS FOR GRANTING THIS PETITION.....	4
CONCLUSION	32

INDEX TO APPENDIX

- A. July 21, 2026 Florida Supreme Court Opinion
- B. Florida Supreme Court Initial Brief on the Merits
- C. Circuit Court Order Denying Relief
- D. FDOC-FOIA logs
- E. February 25, 2026 case management hearing transcript
- F. February 19, 2026 Rule 3.852 Records hearing transcript
- G. February 18, 2025 Florida Lethal Injection Protocols.

TABLE OF AUTHORITIES

Cases

<i>Abdool v. Bondi</i> , 141 So. 3d 529, 547–48 (Fla. 2014)	17
<i>Anderson v. State</i> , 267 So. 2d 8 (Fla. 1972)	30
<i>Asay v. State</i> , 224 So. 3d 695 (Fla. 2017)	12
<i>Atkins v. Virginia</i> , 536 U.S. 304, 304, 122 S. Ct. 2242, 2243, 153 L. Ed. 2d 335 (2002)	25
<i>Barwick v. State</i> , 361 So. 3d 785, 794 (Fla. 2023)	25, 29
<i>Bates v. State</i> , 416 So. 3d 312 (Fla. 2025)	12
<i>Braddy v. State</i> , 219 So. 3d 803 (Fla. 2017)	12
<i>Branch v. State</i> , 236 So. 3d 981 (Fla. 2018)	12
<i>Brown v. Bd. of Ed. of Topeka, Shawnee Cnty., Kan.</i> , 347 U.S. 483, 492–93, 74 S. Ct. 686, 691, 98 L. Ed. 873 (1954)	9
<i>Brown v. Bd. of Educ. of Topeka, Kan.</i> , 349 U.S. 294, 75 S. Ct. 753, 99 L. Ed. 1083 (1955)	9
<i>Bucklew v. Precythe</i> , 587 U.S. 119, 150 (2019)	4
<i>Chavez v. State</i> , 132 So. 3d 826 (Fla. 2014)	12
<i>City of Riviera Beach v. Barfield</i> , 642 So.2d 1135, 1136 (Fla. 4th DCA 1994)	15
<i>Coker v. Georgia</i> , 433 U.S. 584, 599, 97 S. Ct. 2861, 2869, 53 L. Ed. 2d 982 (1977). 26	
<i>Cole v. State</i> , 392 So. 3d 1054 (Fla. 2024)	12
<i>Dailey v. State</i> , 383 So. 3d 782 (Fla. 2019)	12
<i>Dobbs v. Jackson Women's Health Org.</i> , 597 U.S. 215, 264–65, 142 S. Ct. 2228, 2262, 213 L. Ed. 2d 545 (2022)	8-9, 16

<i>Ford v. Wainwright</i> , 477 U.S. 399, 400, 106 S. Ct. 2595, 2597, 91 L. Ed. 2d 335 (1986)	11, 17, 29, 31
<i>Furman v. Georgia</i> , 408 U. S. 238 (1972)	30
<i>Gray v. McAuliffe et al.</i> , No. 3:16-cv-982-HEH, ECF 21 (E.D. Va. Dec. 23, 2016)18-19	
<i>Greenholtz v. Inmates of Nebraska Penal and Correctional Complex</i> , 442 U.S. 1, 13 (1979)	11
<i>Gudinas v. State</i> , 412 So. 3d at 714 (Fla. 2025)	28
<i>Hamdi v. Rumsfeld</i> , 542 U.S. 507, 529(2004) (quoting <i>Mathews v. Eldridge</i> , 424 U.S. 319, 335 (1976)	11
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<i>Heath v. Florida</i> , cert denied, No. 25-6746, --- U.S. ---, 2026 WL 363902 (U.S. February 10, 2026)	iii
<i>Heath v. State</i> , 426 So. 3d 1253 (Fla. 2026)	12
<i>Hutchinson v. State</i> , 416 So. 3d 273 (Fla. 2025)	12
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<i>Jimenez v. State</i> , 265 So. 3d 462 (Fla. 2018)	12
<i>Jones v. State</i> , 701 So. 2d 76 (Fla. 1997).....	30
<i>Jordan et al. v. Fisher et al.</i> , 3:15-cv-00295-HTW-LGI, ECF 310-18 (S.D. Miss. Jun. 4, 2025)	18
<i>Kennedy v. Louisiana</i> , 554 U.S. 407, 128 S. Ct. 2641, 2642, 171 L. Ed. 2d 525, <i>as modified</i> (Oct. 1, 2008	26
<i>King v. State</i> , --- So. 3d ---, 2026 WL 672101 (Fla. Mar. 10, 2026)	iii, 12
<i>Lightbourne v. McCollum</i> , 969 So.2d 326, 332-333 (Fla. 2007)	15
<i>Long v. State</i> , 271 So. 3d 938 (Fla. 2019).....	12

<i>Marbury v. Madison</i> , 5 U.S. 137, 173–74, 2 L. Ed. 60 (1803)	20
<i>Martin</i> , 1:18-cv-4617, 2021 WL 1186749 at *5 (N.D. Ga. Mar. 30, 2021)	18
<i>Mathews v. Eldridge</i> , 424 U.S. 319, 333 (1976)(quoting <i>Armstrong v. Manzo</i> , 380 U.S. 545, 552 (1965)	10,11
<i>Minersville School Dist. v. Gobitis</i> , 310 U.S. 586, 60 S.Ct. 1010, 84 L.Ed. 1375 (1940)	9
<i>Morrissey v. Brewer</i> , 408 U.S. 471, 481 (1972)	11
<i>Muhammad v. State</i> , 132 So. 3d 176 (Fla. 2013).....	12
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<i>Nance v. Oliver et al.</i> , 1:20-cv-00107-JPB, ECF 132 (N.D. Ga. May 16, 2024)	18
<i>Occhicone v. State of Florida et al.</i> , --- So. 3d ---, 2026 WL (Fla. July 2026).....	3
<i>Occhicone v. State</i> , 2026WL2097359 (Fla. 2026).....	25
<i>Packingham v. North Carolina</i> , 582 U.S. —, 137 S.Ct. 1730, 198 L.Ed.2d 273 (2017)	30
<i>Parole Comm'n v. Lockett</i> , 620 So. 2d 153, 154–55 (Fla. 1993)	17
<i>Pizzuto v. Derrick, et al.</i> , 1:21-cv-00359-BLW, ECF 183-6 (D. Id. Mar. 25, 2025)	18
<i>Pizzuto v. Tewalt</i> , 136 F. 4th 855, 867-73 (9th Cir. 2025).....	17
<i>Prado v. State</i> , 108 So. 3d 558 (Fla. 2012)	12
<i>Randolph v. State</i> , 422 So. 3d 166 (Fla. 2025);.....	12
<i>Rogers v. State</i> , 409 So. 3d 1257 (Fla. 2025).....	12
<i>Roper v. Simmons</i> , 543 U.S. 551, 551, 125 S. Ct. 1183, 1184, 161 L. Ed. 2d 1 (2005)	25
<i>Ruiz et al., v. Texas Dep't of Criminal Justice et. al.</i> , D-1-GN-22-007149, Travis County District Court (Dec. 14, 2022).....	18
<i>Schwab v. State</i> , 969 So. 2d 318 (Fla. 2007)	12

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<i>Sims v. State</i> , 753 So. 2d 66, 70 (Fla. 2000).....	15
<i>Smithers v. Florida</i> , 146 S. Ct. 323, 223 L. Ed. 2d 143 (2025).....	22
<i>Smithers v. State</i> , 420 So. 3d 460 (Fla.), cert. denied, — U.S. —, 146 S. Ct. 323, 223 L.Ed.2d 143 (2025)	23
<i>Spencer v. Fla.</i> , No. 25-7648, 2026 WL 1827690 (U.S. June 25, 2026).....	iii, 23
<i>Spencer v. State</i> , No. SC2026-0880, 2026 WL 1757938, at *6 (Fla. June 18, 2026) .	23
<i>Tanzi v. State</i> , 407 So. 3d 385 (Fla. 2025)	12
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<i>Trotter v. Florida</i> , 146 S. Ct. 755 (2026)	21, 23
<i>Trotter v. Florida</i> , 607 U.S. ___, Case No. 25-6853 (25A926) (Feb. 24, 2026).....	19
<i>Trotter v. Florida</i> , cert denied, No. 25-6853, --- U.S. ----, 2026 WL 504237 (U.S. February 24, 2026)	iii
<i>Trotter v. State</i> , --- So. 3d ---, 2026 WL 444544 (Fla. Feb. 17, 2026)	12
<i>Valle v. State</i> , 70 So. 3d 530 (Fla. 2011)	12
<i>Walls v. Dixon</i> , No.4:25-cv-0488, ECF 1 (N.D. Fla. Nov. 26, 2025)	2, 4
<i>Walls v. Florida</i> , cert denied, No. 25-6357, --- U.S. ----, 2025 WL 3674295 (U.S. December 18, 2025)	iii
<i>West Virginia Bd. of Ed. v. Barnette</i> , 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943)	9
<i>Willacy v. State</i> , --- So. 3d ---, 2026 WL 1021168 (Fla. Apr. 15, 2026).....	iii

<i>Williams v. People of State of N.Y.</i> , 337 U.S. 241, 247, 69 S. Ct. 1079, 1083, 93 L. Ed. 1337 (1949)	26,27,28
<i>Woodson v. North Carolina</i> , 428 U.S. 280, 281, 96 S. Ct. 2978, 2980, 49 L. Ed. 2d 944 (1976).	11,26-27
<i>Zakrzewski v. State</i> , 415 So. 3d 203 (Fla. 2025)	12

Statutes

28 U.S.C. § 1257(a)	1
§ 27.708(3), Fla. Stat.....	15
§ 27.7081, Fla. Stat.....	13
§ 119.01(a), Fla. Stat.....	13
§ 119.011(12), Fla. Stat.....	13
§ 922.105(7), Fla. Stat.....	14
§ 945.10, Fla. Stat.	16
Chapter 119, Fla. Stat.	13,15
Chapter 120, Fla. Stat.	14

Rules

Fla. R. Crim. P. 3.852	13-14
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Constitutional Provisions

Fla. Const. art. I, § 17.....	22
Fla. Const. art. I, § 24.....	12-13

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PETITION FOR WRIT OF CERTIORARI

Dominick Occhicone 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 FSC is attached as Appendix A. The order of the Sixth Judicial Circuit of the State of Florida, Pasco County,(warrant court) is unpublished and attached as Appendix C.

JURISDICTION

The judgment of the FSC was entered on July 21, 2026. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment of the U.S. Constitution 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

Dominck Occhicone (“Occhicone”) is scheduled to be executed on July 28th in Florida State Prison by a Department of Corrections, who has neither acknowledged nor refuted the documented use of etomidate, the first drug used in Florida’s lethal injection protocol¹ with an expiration date of January 31, 2025 during the executions of Kayle Bates on August 19, 2025; Curtis Windom on August 28, 2025; David Pittman on September 17, 2025; and Victor Jones on September 30, 2025.

Due to redactions, only a glimpse of the drug logs was uncovered during Frank Walls² 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. App. D. The drug logs documented Etomidate, Potassium Acetate, Rocuronium, the three drugs used in the State of Florida’s lethal injection protocol, as well as Sodium Chloride, Hydroxyzine, and Lidocaine Hydrochloride. After Florida’s governor signed Petitioner’s warrant scheduling his execution, Petitioner was prevented from obtaining additional records from FDOC regarding their supply of etomidate during a well-documented ongoing shortage for the period from February 18, 2025 through June 30, 2026. App. A.

Occhicone argued to Florida’s state courts that FDOC’s pattern of protocol deviation caused reason for alarm, indicating the department of corrections had failed to properly comply with their protocols especially during this shortage of a critical life-saving medication creating a substantial risk they will also violate Petitioner’s

¹ Florida Lethal Injection Protocols – App. G

² *Walls v. Dixon*, No.4:25-cv-0488, ECF 1 (N.D. Fla. Nov. 26, 2025)

equal protection rights. FSC denied Petitioner's claim for relief. Appendix A, *Dominck Occhicone v. State of Florida et al.*, --- So. 3d ---, 2026 WL (Fla. July 2026). This petition follows.

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REASONS FOR GRANTING THIS PETITION

I. OCCHICONE'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). Occhicone raises a claim for judicial review which could not have been brought at an earlier time. The limited records giving rise to Occhicone's Fourteenth Amendment concerns were only made public in late 2025 in *Walls v. Dixon*, No.4:25-cv-0488, ECF 1 (N.D. Fla. Nov. 26, 2025). Additionally, Occhicone could not have known the ongoing etomidate shortage would still be a concern until his execution was scheduled by the signing of his death warrant by Governor Ron DeSantis on June 26, 2026. Therefore, it is not an attempt to manipulate the judicial branch to delay his execution.

To distinguish his claims from prior claims raised in post warrant litigation in Florida, in addition to raising his claims based on due process and equal protection violations, Occhicone presented evidence regarding the ongoing shortage of etomidate, which provides support for the plain reading of the *Walls* records and indicates a valid claim he will not be treated the same as all inmates subjected to lethal injection pursuant to the current protocols. The etomidate shortage has been an ongoing concern for pharmacists, as well as the United States military. In the November 2023, the United States Department of Defense published a report on the pharmaceutical supply chain risks which considered the Food and Drug Administration and

American Society of Health System Pharmacists drug shortage databases, both of which listed etomidate starting in October 2022.³ US Pharmacopeia published a list of vulnerable medicines due to ongoing supply concerns. Etomidate identified as an essential medicine by the FDA/WHO, was on the shortage list as of February 2026, but was carried over from the same list in 2024.⁴ In March 2026, *The Hill* reported on how the ongoing war with Iran has further added to the concerns over the shortage of etomidate as one of the key countries being impacted by the closure of the Strait of Hormuz is Jordan, which produces approximately half the world's supply of etomidate.⁵

Etomidate is a short-acting intravenous anesthetic agent used to induce general anesthesia and for sedation in critically ill patients. It has particular value in emergency medicine and intensive care units due to its hemodynamic stability and is specifically used for patients at risk of hypotension, it is preferred for use in rapid sequence intubation procedures,⁶ and is a valuable tool for anesthesiologists and critical care physicians.⁷ As of April 7, 2026, less than 13 weeks before Governor

³*Report on the Department of Defense Pharmaceutical Supply Chain Risks*, (November 2023), <https://www.warren.senate.gov/wp-content/uploads/media/doc/FY23%20NDAA%20sec%20860%20Risk%20management%20for%20DoD%20Pharmaceuticals1.pdf> (Last accessed July 24, 2026)

⁴USP, *Addressing Strategic Constraints to Strengthen the US Medicine Supply Chain* (Apr. 7, 2026), <https://www.usp.org/sites/default/files/usp/document/public-policy/vulnerable-medicines-list-2025.pdf> (Last accessed July, 24, 2026)

⁵Joseph Choi, *Pharmaceutical Supply Chains Get Tangled in War with Iran*, (March 29, 2026) <https://thehill.com/policy/healthcare/5805149-iran-war-pharmaceutical-supply-chain/> (Last accessed July 24, 2026)

⁶Synapse, *What is Etomidate Used For?*, (June 14, 2024) <https://synapse.patsnap.com/article/what-is-etomidate-used-for> (Last accessed July 24, 2026)

⁷Rachel Tyndale, *Etomidate Mechanism of Action, Clinical Uses and Side Effects*, (August, 02, 2023) <https://www.longdom.org/open-access/etomidate-mechanism-of-action-clinical-uses-and-side-effects-101923.html> (Last accessed July 24, 2026)

DeSantis signed the execution warrant for Occhicone, the American Society of Health-System Pharmacists reported an ongoing shortage of etomidate.⁸ Pharmaceutical Executive also reported this shortage in its April 2026 issue,⁹ The results of pharmaceutical shortages have wide-reaching impacts across society, not just for Occhicone. This shortage of a critical and beneficial drug creates ethical issues based on overall human rights forcing physicians to allocate resources to the individuals who will benefit most of the use of the available drugs.¹⁰ “Doctors and pharmaceutical experts have raised growing concerns about the shortages in recent months. The American Medical Association has reiterated its concern drug shortages are an “urgent public health crisis” and a threat to national security.”¹¹ As recently as July 1, 2026, the Utah Bureau of Emergency Medical Services also reported on the shortage of this critical medication.¹²

The standard therapeutic dose for etomidate in adult patients is a range of 0.2 to 0.6 milligrams per kilogram of body weight and should be calculated and

⁸ASHP, *Etomidate Injection* (April 7, 2026) <https://www.ashp.org/drug-shortages/current-shortages/drug-shortage-detail.aspx?id=873&loginreturnUrl=SSOCheckOnly> (Last accessed July 24, 2026)

⁹ Nicholas Jacobus, *Top Drugs at Risk of Supply Shortages: Report*, (April 22, 2026) <https://www.pharmexec.com/view/top-drugs-risk-supply-shortages-report> (Last accessed July 24, 2026)

¹⁰Maya C. Wai, *Drug Shortage and Ethical Issues: Integrating Multidisciplinary Perspectives with a Shared Ethical Framework* (September 2024)

¹¹Sofia Quaglia, ‘An urgent public health crisis’: Why so many people are struggling to get medicine (October 22, 2025) <https://www.bbc.com/future/article/20251021-why-youre-having-trouble-getting-your-meds> (Last accessed July 24, 2026)

¹²Bureau of Emergency Medical Services; Utah Department of Public Safety, *Utah EMS Medication Shortage Procedure*, (July 1, 2026) <https://ems.utah.gov/utah-ems-education-shortage-information/> (Last accessed July 24, 2026)

administered by trained professionals who can properly evaluate adjustments based on specific patient considerations, such as the elderly or individuals with certain medical conditions.¹³ The protocols require the administration of a 200mg dose of etomidate without regard to the weight of the individual involved, which is the equivalent dosage for an approximately 350 pound person. Rather than using this critically important medication as it was intended to be used to sedate people who need lifesaving medical procedures, the state is implementing a manifest injustice on the people of the State of Florida by not only continuing to use etomidate in this manner, but also to do so in such large quantities and at such an incredible and unprecedented rate.

Considering the ongoing shortage, it is unconscionable for FDOC to proceed considering the quantity of the etomidate used for executions and the pace of death warrants in Florida. When there has been emergency use authorization¹⁴ for the use of etomidate after its expiration date, it has only been extended by six months,¹⁵¹⁶ which was exceeded by FDOC in these executions. The Federal Drug Administration requires manufacturers to provide data regarding the shelf-life of their medications, as well as expiration dates so the public is guaranteed the medications being administered have not degraded to the point of not providing the intended benefit or

¹³SCIENCEINSIGHTS, *What is the Standard Etomidate Dose for Intubation?* (November 26, 2025)<https://scienceinsights.org/what-is-the-standard-etomidate-dose-for-intubation/> (Last accessed July 24, 2026)

¹⁴*Utah EMS Medication Shortage Information*, *supra* at 11

¹⁵Fresenius Kabi (December 20, 2022) <https://www.fda.gov/media/164122/download> (Last accessed July 24, 2026)

¹⁶*Utah EMS Medication Shortage Information*, *supra* at 11

causing unintended side effects.¹⁷ Without being able to further investigate the drugs to be used in his execution, Occhicone has reason to assert his equal protection rights will be violated by the use of extremely expired etomidate during his execution.

This Court has the ability and responsibility to intervene and correct this manifest injustice. There are exceptions to the law of the case and stare decisis which apply to the facts and circumstances surrounding the pending execution of Occhicone, as well as the other inmates scheduled for execution in Florida. In *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 264–65, 142 S. Ct. 2228, 2262, 213 L. Ed. 2d 545 (2022), this Court said:

And it restrains judicial hubris and reminds us to respect the judgment of those who have grappled with important questions in the past. “Precedent is a way of accumulating and passing down the learning of past generations, a font of established wisdom richer than what can be found in any single judge or panel of judges.” N. Gorsuch, *A Republic, If You Can Keep It* 217 (2019).

1617 We have long recognized, however, that *stare decisis* is “not an inexorable command,” *Pearson v. Callahan*, 555 U.S. 223, 233, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009) (internal quotation marks omitted), and it “is at its weakest when we interpret the Constitution,” *Agostini v. Felton*, 521 U.S. 203, 235, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997). It has been said that it is sometimes more important that an issue “be settled than that it be settled right.” *Kimble*, 576 U.S. at 455, 135 S.Ct. 2401 (quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406, 52 S.Ct. 443, 76 L.Ed. 815 (1932) (Brandeis, J., dissenting)). But when it comes to the interpretation of the Constitution—the “great charter of our liberties,” which was meant “to endure through a long lapse of ages,” *Martin v. Hunter's Lessee*, 1 Wheat. 304, 326, 14 U.S. 304, 4 L.Ed. 97

¹⁷US Food & Drug Administration, *Expiration Dates - Questions and Answers* (November 21, 2025) <https://www.fda.gov/drugs/pharmaceutical-quality-resources/expiration-dates-questions-and-answers> (Last accessed July 24, 2026)

(1816) (opinion for the Court by Story, J.)—we place a high value on having the matter “settled right.” In addition, when one of our constitutional decisions goes astray, the country is usually stuck with the bad decision unless we correct our own mistake. An erroneous constitutional decision can be fixed by amending the Constitution, but our Constitution is notoriously hard to amend. See Art. V; *Kimble*, 576 U.S. at 456, 135 S.Ct. 2401. Therefore, in appropriate circumstances we must be willing to reconsider and, if necessary, overrule constitutional decisions.

This Court went on to say it doesn’t require a change “during the intervening period other than the Court’s belated recognition that its earlier decision had been seriously wrong,” when discussing the overruling of *Minersville School Dist. v. Gobitis*, 310 U.S. 586, 60 S.Ct. 1010, 84 L.Ed. 1375 (1940), after only three years in *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943). *Id.* at 2263.

Although simply correcting earlier egregious decisions can be sufficient to overlook stare decisis, there is also historical precedent for considering public policy when determining whether to look past the law of the case. In *Brown v. Bd. of Ed. of Topeka, Shawnee Cnty., Kan.*, 347 U.S. 483, 492–93, 74 S. Ct. 686, 691, 98 L. Ed. 873 (1954), supplemented sub nom. *Brown v. Bd. of Educ. of Topeka, Kan.*, 349 U.S. 294, 75 S. Ct. 753, 99 L. Ed. 1083 (1955), this Court determined a proper interpretation of the Fourteenth Amendment did not require

turn[ing] the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout *493 the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.

In this case the ongoing worldwide shortage of etomidate creates a valid and important public policy reason for this Court to step in and correct the manifest injustice which continues to occur in Florida where executions are being carried out at an unprecedented pace using massive dosages of a critical medication which could be used to save lives rather than end them.

The circuit court's decision to prohibit Occhicone from a full investigation into the drugs to be used for *his* lethal injection further violates the Fourteenth Amendment, as all prisoners being executed by the State of Florida are entitled to be treated the same, as well as be guaranteed FDOC is following its self-imposed protocols, rather than being differentiated between in arbitrary and capricious manners by being given different drugs, whether those differences are the drugs injected, the amounts of the drugs injected, or expired drugs being injected. This prohibition results in a manifest injustice which "shocks the conscience," and demands correction.¹⁸

Occhicone is entitled to due process of law as established by the Fourteenth Amendment to the United States Constitution. "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner'." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)(quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). Because Occhicone has been denied access to the records he demanded, his ability to present additional evidence of the State's violation of his equal protection and due process rights, based on the use of expired etomidate during

¹⁸LSD Law Legal Dictionary (March 2026) *What is manifest injustice? simple definition & meaning* · LSD Law. Available at: <https://definitions.lsd.law/manifest-injustice> (Last Accessed July 2, 2026)

multiple executions as shown in the Walls' records, his due process rights have been violated. "[T]he process due in any given instance is determined by weighing 'the private interest that will be affected by the official action against the Government's asserted interest, 'including the function involved' and the burdens the Government would face in providing greater process." *Hamdi v. Rumsfeld*, 542 U.S. 507, 529(2004) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)). "It is axiomatic that due process is flexible and calls for such procedural protection as the situation demands." *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1, 13 (1979) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).

The trial court abused its discretion in denying Occhicone's demand for additional public records pursuant to Rule 3.852, Florida Rules of Criminal Procedure, and in summarily denying his claims without conducting an evidentiary hearing to allow Occhicone to present witnesses and evidence in support of his equal protection claim. It has long been recognized "execution is the most irremediable and unfathomable of penalties; that death is different." *Ford v. Wainwright*, 477 U.S. 399, 411 (1986) (citing *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976)). This distinction is nowhere more critical than on the verge of executing an almost 81-year-old man using etomidate, when there are known shortages of this drug combined with the evidence of ongoing maladministration by FDOC of their protocols involving the exact same drug. The process which has been afforded to Occhicone by the State of Florida is nothing more than a mere gesture and performative at best. Occhicone was foreclosed from proper review of his postconviction claim for relief because the state

courts foreclosed any avenue for redress. Simply providing a system where Occhicone can file public records demands or successive motions is meaningless when he is denied meaningful *access* to records to support such a motion. “[p]rocess which is a mere gesture is not due process.” *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 315 (1950). Occhicone is the latest, in a long line of Florida death row inmates, who has been denied access to the public records related to the current protocols in violation of their due process and equal protection rights, not to mention Florida law.¹⁹

It is axiomatic the State has claimed Occhicone is asking the courts to intervene and micromanage issues within the control of FDOC, when it is actually the FSC which has consistently intervened in matters exclusively granted to the legislature in by Fla. Const. art. I, § 24 which states:

- (a) Every person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution. This section specifically includes the legislative, executive, and judicial branches of government and each agency or department created thereunder; counties, municipalities, and districts; and each constitutional

¹⁹ See, *King v. State*, --- So. 3d ---, 2026 WL 672101 (Fla. Mar. 10, 2026); *Trotter v. State*, --- So. 3d ---, 2026 WL 444544 (Fla. Feb. 17, 2026); *Heath v. State*, 426 So. 3d 1253 (Fla. 2026); *Randolph v. State*, 422 So. 3d 166 (Fla. 2025); *Bates v. State*, 416 So. 3d 312 (Fla. 2025); *Zakrzewski v. State*, 415 So. 3d 203 (Fla. 2025); *Rogers v. State*, 409 So. 3d 1257 (Fla. 2025); *Tanzi v. State*, 407 So. 3d 385 (Fla. 2025); *Hutchinson v. State*, 416 So. 3d 273 (Fla. 2025); *Cole v. State*, 392 So. 3d 1054 (Fla. 2024); *Dailey v. State*, 383 So. 3d 782 (Fla. 2019); *Long v. State*, 271 So. 3d 938 (Fla. 2019); *Jimenez v. State*, 265 So. 3d 462 (Fla. 2018); *Branch v. State*, 236 So. 3d 981 (Fla. 2018); *Asay v. State*, 224 So. 3d 695 (Fla. 2017); *Braddy v. State*, 219 So. 3d 803 (Fla. 2017); *Chavez v. State*, 132 So. 3d 826 (Fla. 2014); *Muhammad v. State*, 132 So. 3d 176 (Fla. 2013); *Prado v. State*, 108 So. 3d 558 (Fla. 2012); *Valle v. State*, 70 So. 3d 530 (Fla. 2011); *Tompkins v. State*, 994 So. 2d 1072 (Fla. 2008); *Schwab v. State*, 969 So. 2d 318 (Fla. 2007)

officer, board, and commission, or entity created pursuant to law or this Constitution.

...

- (c) This section shall be self-executing. The legislature, however, may provide by general law passed by a two-thirds vote of each house for the exemption of records from the requirements of subsection (a) and the exemption of meetings from the requirements of subsection (b), provided that such law shall state with specificity the public necessity justifying the exemption and shall be no broader than necessary to accomplish the stated purpose of the law. The legislature shall enact laws governing the enforcement of this section, including the maintenance, control, destruction, disposal, and disposition of records made public by this section, except that each house of the legislature may adopt rules governing the enforcement of this section in relation to records of the legislative branch. Laws enacted pursuant to this subsection shall contain only exemptions from the requirements of subsections (a) or (b) and provisions governing the enforcement of this section, and shall relate to one subject.

Although the State of Florida has a broad directive from the Florida Constitution, followed by Chapter 119, Florida Statutes, granting every person the right to access the public records of the State, the FSC has restricted this right for postconviction capital defendants through its implementation and later interpretation of Fla. R. Crim. P. 3.852, which was originally modeled on the language created by the Florida legislature in Fla. Stat. § 27.7081. Fl. Stat. § 119.01(a), states, “General state policy on public records,” which provides “[i]t is the policy of this state that all state, county, and municipal records are open for personal inspection and copying by any person.” It goes on to say: “Providing access to public records is a duty of each agency.” *Id.* The records Occhicone sought are clearly public records under § 119.011(12), Florida Statutes, which defines a public record as all documents and records, regardless of form, “made or received pursuant to law or ordinance or in

connection with the transaction of official business by any agency” including “any material prepared in connection with official business which is intended to perpetuate, communicate, or formalize knowledge of some type.” *Shevin v. Byron, Harless, Schaffer, Reid, and Associates, Inc.*, 379 So. 2d 633, 640 (1980).

In § 922.105(7), Fla. Stat., the Florida Legislature delegated the creation of procedures for the execution of inmates sentenced to death by lethal injection to FDOC, rather than creating procedures within the Administrative Procedures Act in Chapter 120, Florida Statutes. This procedure forces Occhicone to raise any concerns about his equal protection rights in court pursuant to Fla. R. Crim. Proc. 3.852, where he has been denied access to the additional records he has requested, despite neither the state nor FDOC refuting Occhicone’s allegations. Based on these errors, Occhicone has clearly established his entitlement to the records demanded from FDOC regarding violations of his constitutionally protected equal protection rights. The requirements for a demand for additional public records are set forth in Rule 3.852(i)(1), Fla. R. Crim. P., which requires capital postconviction counsel to file an affidavit which:

- (A) attests that collateral counsel has made a timely and diligent search of the records repository; and
- (B) identifies with specificity those public records not at the records repository; and
- (C) establishes that the additional public records are either relevant to the subject matter of the postconviction proceeding or are reasonably calculated to lead to the discovery of admissible evidence; and
- (D) shall be served in accord with subdivision (c)(1) of this rule.

There is no language in this rule, of any of the statutes implemented by the Florida Legislature that there a requirement for Occhicone, or any defendant, to establish a

“colorable claim” as argued by FDOC in its objection to production of the records or the trial court and FSC in their denial of his demand. The plain language of the rule only requires Occhicone to establish the records are “relevant to the subject matter” of a proceeding or “reasonably calculated to lead to the discovery of admissible evidence,” not the higher burden imposed by the trial court of a colorable claim which was established by the FSC which held:

The language of section 119.19 and of rule 3.852 clearly provides for the production of public records after the governor has signed a death warrant. However, it is equally clear that this discovery tool is not intended to be a procedure authorizing a fishing expedition for records unrelated to a colorable claim for postconviction relief.

Sims v. State, 753 So. 2d 66, 70 (Fla. 2000). Later the FSC recognized the public records act “is to be construed liberally in favor of openness, and all exemptions from disclosure are to be construed narrowly and limited in their designated purpose.” *Lightbourne v. McCollum*, 969 So.2d 326, 332-333 (Fla. 2007), quoting *City of Riviera Beach v. Barfield*, 642 So.2d 1135, 1136 (Fla. 4th DCA 1994).

Based on the plain language of the Florida Constitution, Chapter 119, Florida Statutes, and § 27.708(3), Fla. Stat., it is clear the Florida Legislature intended for capital postconviction inmates to have full access to the same public records any other person would be entitled to receive. The FDOC records Occhicone requested fall under the well-established public policy in the State of Florida of having an open and transparent government. “The law provides any member of the public access to public records, whether he or she be the most outstanding civic citizen or the most heinous

criminal.”²⁰ Considering the overreaching by the FSC to put further restrictions on Occhicone’s right to meaningful access to the courts, the FSC has substituted its beliefs for those of the legislative bodies. This Court has held:

courts cannot “substitute their social and economic beliefs for the judgment of legislative bodies.” *Ferguson*, 372 U.S. at 729–730, 83 S.Ct. 1028; see also *Dandridge v. Williams*, 397 U.S. 471, 484–486, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970); *United States v. Carolene Products Co.*, 304 U.S. 144, 152, 58 S.Ct. 778, 82 L.Ed. 1234 (1938). That respect for a legislature’s judgment applies even when the laws at issue concern matters of great social significance and moral substance. See, e.g., *Board of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 365–368, 121 S.Ct. 955, 148 L.Ed.2d 866 (2001) (“treatment of the disabled”); *Glucksberg*, 521 U.S., at 728, 117 S.Ct. 2258 (“assisted suicide”); *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 32–35, 55, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973) (“financing public education”).

Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 300, 142 S. Ct. 2228, 2284, 213 L. Ed. 2d 545 (2022)

Even considering the narrow exemption created by the Florida Legislature in § 945.10, Fla. Stat. which exempts disclosure of:

Information or records that identify or could reasonably lead to the identification of any person or entity that participates in, has participated in, or will participate in an execution, including persons or entities administering, compounding, dispensing, distributing, maintaining, manufacturing, ordering, preparing, prescribing, providing, purchasing, or supplying drugs, chemicals, supplies, or equipment necessary to conduct an execution in compliance with chapter 922.

²⁰47, Florida Office of the Attorney General, *GOVERNMENT-IN-THE-SUNSHINE MANUAL, A Reference For Compliance with Florida’s Public Records and Open Meetings Laws*, (2025 ed.) p. 179-80. Downloadable PDF version is available at: Office of Attorney General, James Uthmeier, Sunshine Manual, myfloridalegal.com, <https://www.myfloridalegal.com/sites/default/files/government-in-the-sunshine-manual.pdf>

The plain meaning of the statute shows that the Florida legislature did not intend to prevent all access to records related to lethal injection, but rather only any information leading to the identity of individuals or entities involved in the lethal injection process. Occhicone does not seek any identifying information and agrees any such information could and should be redacted according to the statute.

The separation of powers set forth in the Florida Constitution has long been recognized in both the FSC and this Court

As previously noted, article II, section 3, of the Florida Constitution provides that “[n]o person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.” This provision encompasses two fundamental *548 prohibitions. *See Chiles v. Children A, B, C, D, E, & F*, 589 So.2d 260, 264 (Fla.1991). The first is that no branch may encroach upon the powers of another. *Id.* The second is that no branch may delegate to another branch its constitutionally assigned power. *Id.* However, the separation of powers doctrine does not contemplate that every governmental activity must be classified as belonging exclusively to a single branch. *See State v. Johnson*, 345 So.2d 1069, 1071 (Fla.1977). Rather, a branch of government is prohibited from the exercise of power that has been constitutionally assigned exclusively to another branch. *State v. Palmer*, 791 So.2d 1181, 1183 (Fla. 1st DCA 2001), *rev. denied*, 817 So.2d 849 (Fla.2002).

Abdool v. Bondi, 141 So. 3d 529, 547–48 (Fla. 2014). *See also Parole Comm'n v. Lockett*, 620 So. 2d 153, 154–55 (Fla. 1993); *Ford v. Wainwright*, 477 U.S. 399, 400, 106 S. Ct. 2595, 2597, 91 L. Ed. 2d 335 (1986).

The records Occhicone sought from FDOC are certainly capable of being produced in response to lethal injection claims. *See Pizzuto v. Tewalt*, 136 F. 4th 855, 867-73 (9th Cir. 2025) (affirming district court’s orders requiring Idaho Department of Corrections to share various pieces of information related to drug quality, including

types and location of sources, and dates associated with purchase orders and testing results); *Martin*, 1:18-cv-4617, 2021 WL 1186749 at *5 (N.D. Ga. Mar. 30, 2021) (ordering Georgia Department of Corrections to disclose information about how chemicals were “created, stored, and transported” because the prisoner was “attacking the potency of Georgia’s compounded pentobarbital.”). In *Martin*, operating under a similar secrecy statute which protects the identity of execution suppliers, a compounding pharmacist involved in executions was deposed after the district court balanced Georgia’s interest in “enforce[ing] its laws” against the “basic presumption...that the public is entitled to every person’s evidence.” *Id.* at *2, *9.

In other states, similar information has become part of the case record without incident. See *Jordan et al. v. Fisher et al.*, 3:15-cv-00295-HTW-LGI, ECF 310-18 (S.D. Miss. Jun. 4, 2025) (witness’ chronology of Mississippi execution in the public record); *Pizzuto v. Derrick, et al.*, 1:21-cv-00359-BLW, ECF 183-6 (D. Id. Mar. 25, 2025) (chain of custody of Idaho lethal injection drugs in the public record); *Nance v. Oliver et al.*, 1:20-cv-00107-JPB, ECF 132 (N.D. Ga. May 16, 2024) (transcripts of depositions of Georgia execution team members in the public record); Petitioners’ Original Verified Petition and Application for Temporary Injunction, Declaratory Relief, and Permanent Injunction, *Ruiz et al., v. Texas Dep’t of Criminal Justice et. al.*, D-1-GN-22-007149, Travis County District Court (Dec. 14, 2022) (lab testing results, drug logs, and purchase order forms of Texas lethal injection drugs in the public record); *In re Federal Bureau of Prisons’ Execution Protocol Cases*, 1:19-mc-00145-TSC, ECF 69-1 (D. DC Jan. 14, 2020) (certificate of analysis of federal government’s supply of

compounded pentobarbital in the public record); *Gray v. McAuliffe et al.*, No. 3:16-cv-982-HEH, ECF 21 (E.D. Va. Dec. 23, 2016) (lethal injection drug labels, certificate of analyses, and package inserts for Virginia lethal injection drugs in the public record).

Considering authority from other jurisdictions, and Florida's continued refusal to allow legitimate due process, this Court's intervention is paramount. It has only been after full and fair hearings, with presentation of witnesses and evidence, courts have taken action to force compliance with properly drafted and administered regulations and protocols. Occhicone has raised valid and concerning due process and equal protection claims, but Florida is foreclosing record access and factual development. Summarily denying Occhicone's claims violates his right to due process and access to the courts under the Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.

The *Walls* records indicate FDOC is practicing its lethal injection protocol in an ad hoc manner, devoid of uniformity in treatment and specifically indicating the use of expired etomidate, Occhicone has a constitutional right pursuant to the Equal Protection Clause of the Fourteenth Amendment as selectively incorporated into state application. Occhicone's claim applies to the actions of a state agency and legitimately effects the way he will be put to death. As recently as March 2026, Justice Sotomayor issued a statement connected to the United States' Supreme Court's denial of certiorari in *Trotter v. Florida*, 607 U.S. ___, Case No. 25-6853 (25A926) (Feb. 24, 2026) (Sotomayor, J., respecting the denial of the application for

stay of execution and denial of certiorari), regarding the concerns raised by the limited records by Walls, saying:

The record reflects at least the possibility that recent Florida executions have involved—in addition to expired drugs—incorrect drug doses, the use of nonprotocol drugs, and recordkeeping lapses that could mask yet additional failings. The Florida Supreme Court, moreover, has thus far not allowed further inquiry into these potential problems and has recently denied requests for records that would prove or disprove claims like Trotter’s. See, e.g. *Heath* ___ S.3d. at _____. It has affirmed the denial of requests for records on these issues, at least in part, because the prisoners do not yet have enough information to raise a “colorable” Eighth Amendment claim. *Ibid.* the very reason the prisoners are seeking the records, however, is to gather enough information to raise a colorable Eighth Amendment claim. (footnote excluded).

For over two centuries, this Court has been vested with

the whole judicial power of the United States in one supreme court, and such inferior courts as congress shall, from time to time, ordain and establish. This power is expressly extended to all cases arising under the laws of the United States; and consequently, in some form, may be exercised over the present *174 case; because the right claimed is given by a law of the United States.

Marbury v. Madison, 5 U.S. 137, 173–74, 2 L. Ed. 60 (1803)

And the courts of our nation have been bound by the United States Constitution to find a “law repugnant to the constitution is void; and that *courts*, as well as other departments, are bound by that instrument. *Id.*

It is a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress. 3 Bl. com. 109. There are some injuries which can only be redressed by a writ of mandamus, and others by a writ of prohibition. There must then be a jurisdiction some where competent to issue that kind of process. Where are we to look for it but in that court which the constitution and laws have made supreme, and to which they have given appellate jurisdiction? Blackstone, vol. 3, p. 110

Id. at 147.

Denying access to these records is problematic because there is no way for anyone to ever challenge FDOC's actions based on this "Catch-22" lethal injection protocol loop. *See Trotter v. Florida*, 146 S. Ct. 755, 756 (2026) (Justice Sotomayor's Statement regarding the denial of the application for a stay of execution). Accordingly, Florida's public records litigation process for capital postconviction inmates amounts to no process at all.

Occhicone respectfully requests this Court to enter a stay, reverse the lower court's ruling and remand with instructions to grant the additional records request and allow for full factual development of his claims.

II. THE STATE OF FLORIDA'S CONTENTION THERE IS NO DISTINCTION BETWEEN CATEGORICAL AND AS-APPLIED CHALLENGES IS VIOLATIVE OF OCCHICONE'S CONSTITUTIONAL RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS

Occhicone presents this Court with a question only this Court can resolve. Occhicone has been denied his Eighth Amendment rights against cruel and unusual punishment despite having exhausted all remedies in state court. Occhicone has not asserted his sentence is prohibited by the Eighth Amendment based on being in a "class" of elderly people. Rather, the issue is the execution of the death sentence upon Occhicone, after nearly four decades on death row, would constitute cruel and unusual punishment based on his individual age and condition, as he is nearing 81 years old.

a. Procedural History of Old Age Related Claims in Florida

In litigating age-related claims, the FSC has consistently ruled that categorical exemptions to the death penalty are ruled by the Conformity Clause of the Florida Constitution (“Conformity Clause”):

Excessive punishments.—Excessive fines, cruel and unusual punishment, attainder, forfeiture of estate, indefinite imprisonment, and unreasonable detention of witnesses are forbidden. The death penalty is an authorized punishment for capital crimes designated by the legislature. The prohibition against cruel or unusual punishment, and the prohibition against cruel and unusual punishment, shall be construed in conformity with decisions of the United States Supreme Court which interpret the prohibition against cruel and unusual punishment provided in the Eighth Amendment to the United States Constitution. Any method of execution shall be allowed, unless prohibited by the United States Constitution. Methods of execution may be designated by the legislature, and a change in any method of execution may be applied retroactively. A sentence of death shall not be reduced on the basis that a method of execution is invalid. In any case in which an execution method is declared invalid, the death sentence shall remain in force until the sentence can be lawfully executed by any valid method. This section shall apply retroactively.

Fla. Const. art. I, § 17. (Emphasis added).

Similar age-related claims were raised in the post warrant litigation of Samuel Smithers, Melvin Trotter, and Dusty Ray Spencer. In *Smithers* it was argued those over the age of 65 should be exempt from execution. *Smithers v. State*, 420 So. 3d 460, 465 (Fla.), cert. denied sub nom. *Smithers v. Florida*, 146 S. Ct. 323, 223 L. Ed. 2d 143 (2025). The FSC in *Smithers* did not consider the issue on the merits of whether executing the elderly is inconsistent with the evolving standards of decency or whether executing the elderly violates federal and state constitutional prohibitions against cruel and unusual punishment where the executions do not have a deterrent or a retributive purpose because they found the *Smithers* claim to be untimely,

procedurally barred, and foreclosed by the conformity clause. The FSC affirmed the circuit court's ruling that Smithers, who was 72 at the time of his execution, could and should have raised his claim when he was 65. *Id.*

While Smithers is correct that he could not have known exactly when his death warrant would be signed, he has known for several years that upon the signing of his death warrant and the exhaustion of any related successive postconviction process, he would fall within the class of individuals that he now seeks to exempt from execution due to advanced age.

Id. Because they found the claim to be time barred; the court did not determine the case on its merits. *Id.* Samuel Smithers was executed by the state on October 14, 2025.

Because the claim was not ruled upon its merits, Melvin Trotter attempted to revive it. Since Trotter turned 65 mere weeks before his execution warrant was signed, Trotter's claim was timely and could not be procedurally barred. *Trotter* argued imposition of his death sentence at 65 years of age offends the evolving standards of decency and constitutes cruel and unusual punishment. The FSC denied the claim, relying on its holding in *Smithers v. State*, 420 So. 3d 460 (Fla.), cert. denied, — U.S. —, 146 S. Ct. 323, 223 L.Ed.2d 143 (2025) and declined to expand the prohibition against cruel and unusual punishment to include the class of individuals 65 years of age and older. *Trotter v. State*, 428 So. 3d 68, 71 (Fla.), cert. denied sub nom. *Trotter v. Florida*, 146 S. Ct. 755 (2026). Melvin Trotter was executed by the state on February 24, 2026.

Months later, Dusty Ray Spencer, who was 74, also asked the Florida courts to recognize a categorical exemption from execution based on advanced age. *Spencer v. State*, No. SC2026-0880, 2026 WL 1757938, at *6 (Fla. June 18, 2026), cert. denied

sub nom. *Spencer v. Fla.*, No. 25-7648, 2026 WL 1827690 (U.S. June 25, 2026). The FSC denied his claim as untimely because he did not raise the claim until nearly a decade after reaching the age at which he contended a categorical exemption from execution should apply, that age being 65. *Id.* The FSC also ruled that the claim was prohibited by the above Conformity Clause:

We have explained that the Supreme Court's interpretation of the Eighth Amendment is both the floor and the ceiling for protection from cruel and unusual punishment in Florida... No decision from the Supreme Court has read the Eighth Amendment as categorically exempting defendants of advanced age from execution, and we are not about to create one now. Spencer is thus foreclosed from relief on this basis.

Id. Dusty Ray Spencer was executed by the State of Florida on June 25, 2026, making him the oldest man to ever be executed in the state.²¹

The claims in *Smithers*, *Trotter*, and *Spencer* were all based on a categorical bar to execution of those 65 and older. Each claim was denied based on the FSC's position that categorical exemptions to the Eighth Amendment are the purview of the Supreme Court of the United States and thus barred by the Conformity Clause. Occhicone's claim can be distinguished from the cases above. Occhicone seeks Eighth Amendment relief from execution based on his individual age and condition, he does not seek a categorical bar to the execution of those 65 and above. Because he does not

²¹ Dusty Ray Spencer is no longer the oldest man executed in the State of Florida. That title goes to Dennis Sochor who was subsequently executed by the state on July 14, 2026. Sochor, also 74, was 12 days older than Spencer and outlived him by 19 days. If executed on July 28, the record will pass to Occhicone of being the oldest man executed in Florida and the second oldest executed in the United States.

argue a categorical bar based on age, the FSC precedent in *Smithers*, *Trotter*, and *Spencer* does not apply.

A ruling on Occhicone’s claim does not require the creation of a new class exempt from execution. Nor does it conclusory exempt any other elderly person from execution. Faced with that distinction the FSC ruled:

Whether Occhicone seeks a categorical or as-applied exemption based on his advanced age is a distinction without a difference. Either way, he asks this Court to recognize an age-based exemption that the U.S. Supreme Court has never recognized. The conformity clause of article I, section 17 of the Florida Constitution precludes that. It provides that “[t]he prohibition against cruel or unusual punishment, and the prohibition against cruel and unusual punishment, shall be construed in conformity with decisions of the United States Supreme Court which interpret the prohibition against cruel and unusual punishment provided in the Eighth Amendment to the United States Constitution.” This means that the Supreme Court’s interpretation of the Eighth Amendment sets both the floor and the ceiling for protection from cruel and unusual punishment in Florida. *Barwick v. State*, 361 So. 3d 785, 794 (Fla. 2023).

Occhicone v. State, 2026WL2097359 (Fla. 2026)(emphasis added)(App. A). However, there is a very real difference between categorical and as-applied challenges to the Eighth Amendment. Categorical challenges effectively block punishment for a group or class, regardless of individual facts and circumstances, creating a bright-line rule for exemption, such as the rule proposed by *Spencer*, *Trotter*, and *Smithers*, that those over the age of 65 should not be executed. (See *Roper v. Simmons*, 543 U.S. 551, 551, 125 S. Ct. 1183, 1184, 161 L. Ed. 2d 1 (2005), in which it was held the Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed; *Atkins v. Virginia*, 536 U.S. 304, 304, 122 S. Ct. 2242, 2243, 153 L. Ed. 2d 335 (2002) in which it was held

executions of mentally retarded criminals are “cruel and unusual punishments” prohibited by the Eighth Amendment). As-applied challenges evaluate whether a particular sentence is grossly disproportionate or cruel when applied to a specific individual, as is Occhicone’s contention, and often rely on the proportionality of the crime to the punishment. (See *Coker v. Georgia*, 433 U.S. 584, 599, 97 S. Ct. 2861, 2869, 53 L. Ed. 2d 982 (1977), holding a death sentence was unconstitutionally excessive as-applied to a defendant convicted of rape of an adult woman where the crime did not result in death; *Kennedy v. Louisiana*, 554 U.S. 407, 128 S. Ct. 2641, 2642, 171 L. Ed. 2d 525, *as modified* (Oct. 1, 2008), *opinion modified on denial of reh’g*, 554 U.S. 945, 129 S. Ct. 1, 171 L. Ed. 2d 932 (2008), holding the death penalty was not constitutional as-applied to the crime of rape of a child when the crime did not intend to, nor result in, the death of the victim).

b. Florida’s Failure to Distinguish Between Categorical and As-Applied Challenges Denies Defendants the Right to Individualized Sentencing Guaranteed in Capital Cases

Florida’s sudden erasure of this well-established legal distinction is confounding and precludes Occhicone from a ruling on the true merits of his claim. Rejection of as-applied challenges goes against the individualized capital sentencing doctrine of this Court’s death penalty jurisprudence. This Court has long upheld the philosophy that “the punishment should fit the offender and not merely the crime.” *Williams v. People of State of N.Y.*, 337 U.S. 241, 247, 69 S. Ct. 1079, 1083, 93 L. Ed. 1337 (1949). A capital sentence is cruel and unusual under the Eighth Amendment if it is imposed without an individualized determination that the punishment is

“appropriate”—whether or not the sentence is “grossly disproportionate.” *Harmelin v. Michigan*, 501 U.S. 957, 995, 111 S. Ct. 2680, 2701, 115 L. Ed. 2d 836 (1991).

The respect for human dignity underlying the Eighth Amendment, *Trop v. Dulles*, supra, 356 U.S. at 100, 78 S.Ct. at 597 (plurality opinion), requires consideration of aspects of the character of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of imposing the ultimate punishment of death.

Woodson v. North Carolina, 428 U.S. 280, 281, 96 S. Ct. 2978, 2980, 49 L. Ed. 2d 944 (1976). (Emphasis added). In *Woodson*, this Court held North Carolina’s mandatory imposition of death penalty upon all first-degree murder convictions to be unconstitutional because the statute “impermissibly treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the death penalty.”

Occhicone argues that the execution of the elderly defies the evolving standards of decency of the Eighth Amendment and seeks exemption based on a totality of the circumstances manifest at the time of execution, arguing the determination of age is not based on class, but is a fact specific analysis of the vulnerability of the individual at the time of injury. (See Appendix B, Claim Two for full discussion of the claim). The FSC’s opinion in this matter analyzes neither the evolving standards of decency nor whether age and vulnerability can even be a factor in an Eighth Amendment analysis. (Appendix A). Florida’s disregard to Occhicone’s as-applied challenge relegates him merely to one in a faceless class of elderly death row inmates, distinguished only by their age and not by their individual

characteristics. It flies in the face of the idea propounded by this court in *Williams*, that the punishment should fit Occhicone and not just the crime he committed four decades ago. *Williams v. People of State of N.Y.*, 337 U.S. 241, 247, 69 S. Ct. 1079, 1083, 93 L. Ed. 1337 (1949).

c. The State Of Florida's Interpretation of the Conformity Clause Denies Its Citizens Access to Their Eighth Amendment Rights

Florida's conformity clause does not preclude the expansion of Eighth Amendment rights. It is true that neither the Eighth or the Fourteenth Amendment require a state to "expand the protections afforded by the Eighth Amendment or to interpret their own corresponding state constitutional prohibitions against cruel and unusual punishment in a more expansive manner than the Supreme Court has interpreted the federal prohibition." *Gudinas v. State*, 412 So. 3d at 714 (Fla. 2025). It is also true this Court has hitherto not determined a case based on whether the elderly are categorically exempt from execution. However, Florida's conclusion based on those two facts is incorrect.

this Court is bound by those interpretations and is precluded from interpreting Florida's prohibition against cruel and unusual punishment to exempt ... those whose chronological age was over eighteen years at the time of their capital crime(s).

Smithers v. State, 420 So. 3d 460, 465 (Fla.), *cert. denied sub nom. Smithers v. Fla.*, 146 S. Ct. 323, 223 L. Ed. 2d 143 (2025), quoting *Gudinas v. State*, 412 So. 3d 701, 713 (Fla.).

this Court cannot interpret Florida's prohibition against cruel and unusual punishment to provide protection that the Supreme Court has decided is not afforded by the Eighth Amendment.

Ford v. State, 402 So. 3d 973, 979 (Fla.), *cert. denied sub nom. Ford v. Fla.*, 145 S. Ct. 1161, 221 L. Ed. 2d 225 (2025).

This Court simply does not have the authority to extend *Roper* to Barwick based on his age of nineteen at the time of the murder. Accordingly, Barwick is not entitled to relief.

Barwick v. State, 361 So. 3d 785, 794 (Fla. 2023).

Florida seems to believe not only that the expansion of the Eighth Amendment beyond what is offered by this Court is not required, but that it is actually *precluded* by the Conformity Clause, stripping them of jurisdiction over Eighth Amendment matters. This effectively prohibits citizens of the state of Florida from ever having an opportunity to have an Eighth Amendment claim meaningfully heard on its merits, thus denying them access to their Eighth Amendment rights against cruel and/or unusual punishment, unless the issue has already been heard by this court.

**d. Florida’s Current Interpretation of the Conformity Clause
also Violates Capital Defendants’ Right to Due Process
Under the Fourteenth Amendment of United States
Constitution**

Florida has previously created exemptions from execution despite its Conformity Clause. In *Ford v. Wainwright* the state created entitlement to avoid execution during insanity was discussed and the process found to be lacking. *Ford v. Wainwright*, 477 U.S. 399, 400, 106 S. Ct. 2595, 2597, 91 L. Ed. 2d 335 (1986). Justice Marshall delivered the opinion that “the Eighth Amendment prohibits the State from inflicting the death penalty upon a prisoner who is insane,” codifying the common law right already recognized by the state of Florida into a Constitutionally protected right for all Americans. *Id.* If Florida had not first afforded this right to its constituents, independent of the Supreme Court of the United States, the right may never have come before this Court to earn its constitutional protection.

Florida's Conformity Clause does not prohibit Florida courts from finding on the merits of Eighth Amendment claims. In essence, the Conformity Clause states decisions construing the prohibition against cruel or unusual punishment must be made in conformity with decisions of the United States Supreme Court.²² Adoption of the Eighth Amendment by the State of Florida implicitly carries with it the Fourteenth Amendment's guarantees of Due Process. "In considering whether the Fourteenth Amendment incorporates a protection contained in the Bill of Rights, we ask whether the right guaranteed—not each and every particular application of that right—is fundamental or deeply rooted." *Timbs v. Indiana*, 586 U.S. 146, 156, 139 S. Ct. 682, 690, 203 L. Ed. 2d 11 (2019). The fundamental right in question is the Eighth Amendment's prohibition of cruel and/or unusual punishment. Take for example *Packingham v. North Carolina*, 582 U.S. —, 137 S.Ct. 1730, 198 L.Ed.2d 273 (2017), in which this Court held a North Carolina statute prohibiting registered sex offenders from accessing certain commonplace social media websites violated the First Amendment right to freedom of speech. In reaching this conclusion, this Court noted

²² The Commentary to the 1998 Amendment of the Conformity Clause, by William A. Buzzett and Deborah K. Kearney specifies that the purpose of the amendment was to allow the Legislature to provide for any method of execution not prohibited by the United States Constitution and so that changes in the method of execution may be applied retroactively. Should the method of execution be held invalid, sentences of death will remain in force until a valid method of execution is enacted. The amendment was proposed after Florida's electric chair malfunctioned for a second time (see *Jones v. State*, 701 So. 2d 76 (Fla. 1997)). The Legislature wished to ensure that should electrocution be held unconstitutional sometime in the future, death sentences would not be commuted to life sentences, as happened in the wake of *Furman v. Georgia*, 408 U. S. 238 (1972); *Anderson v. State*, 267 So. 2d 8 (Fla. 1972). The commentary does not mention limiting or precluding the expansion of Eighth Amendment rights.

the First Amendment's Free Speech Clause was “applicable to the States under the Due Process Clause of the Fourteenth Amendment.” *Id.* This Court did not find inquiry into whether the Free Speech Clause's application specifically to social media websites was fundamental or deeply rooted. The particular application of that right discussed here is whether age and vulnerability of an individual, such as Occhicone, at the time of execution can be considered. It does not matter that “age and vulnerability” is not in itself a fundamentally protected right, and does not automatically entitle Occhicone to relief, it still requires full due process of the law in making that determination.

In the earlier discussed case of *Ford v. Wainright*, Florida’s conduct in determining the question of competency to be executed was found wanting. 477 U.S. 399, 400, 106 S. Ct. 2595, 2597, 91 L. Ed. 2d 335 (1986). This Court found that the finding of competency required sufficient due process by allowing the defendant and counsel to present material relevant evidence of the defendant’s individual condition to the factfinder and a “full and fair hearing” on the critical issue where the defendant, through counsel, may challenge or impeach the state’s experts. Similarly, by finding that Occhicone’s claims are precluded by the Conformity Clause, the FSC denies Occhicone full due process of the law and a determination on the merits of his claims.

Occhicone respectfully requests this Court enter a stay, reverse the lower court’s ruling and remand with instructions to allow an evidentiary hearing on the merits of the claims or alternatively a ruling on the merits of the claims raised in

Occhicone's Initial Brief, to afford Occhicone due process in regard to his Eighth Amendment claims.

CONCLUSION

This Court should grant this petition to resolve the conflicting holdings of this Court and resolve how this Court's precedent applies to Occhicone. It is this Court and this Court alone that can resolve such a conflict.

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Dated