*** CAPITAL CASE ***

**No. _____**

IN THE

# Supreme Court of the United States

JESSE GUARDADO,

Petitioner,

v.

RICHARD COMERFORD, SECRETARY,
FLORIDA DEPARTMENT OF CORRECTIONS, ET AL.,

Respondents.

*On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit*

## PETITION FOR WRIT OF CERTIORARI

***EXECUTION SCHEDULED FOR NOVEMBER 5, 2026, AT 6:00 P.M.***

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**CAPITAL CASE**
**QUESTIONS PRESENTED**

As a member of this Court observed, Florida's recent history of noncompliance with its lethal injection protocol "could mask yet additional failings" that implicate the Eighth Amendment. *Trotter v. Florida,* 146 S. Ct. 755, 755 (2026) (Sotomayor, J., statement respecting denial of certiorari). Amidst additional factual discoveries since *Trotter*, Petitioner Jesse Guardado initiated a 42 U.S.C. § 1983 action alleging that he faced a substantial risk of serious harm based on Florida's failure to adhere to its already risky three-drug protocol, including through the administration of insufficient dosages of drugs, unauthorized drugs, expired drugs, and drugs that are wholly unaccounted for altogether. The State responded with a death warrant.

Based on Guardado's proffered evidence, the District Court for the Middle District of Florida held an evidentiary hearing. There, additional evidence emerged that was "even more concerning" than the allegations of Florida's documented protocol deviations:

> When the Department realized that its logs contained inaccurate information about drug expiration dates, its solution was to use Wite-Out liquid eraser to alter the logs….The evidence in this case shows that these types of untraceable edits to a log tracking the storage of a drug is "completely inappropriate" and indeed "invalidates the point[] of the records[.]"

CA11-ECF 13-1 at 20 (Pryor, J., concurring). Yet despite the emergence of mounting evidence of Florida's malfeasance, which is at odds with the "paramount importance" of an execution being carried out "consistently with its approved protocol," *Trotter*, 146 S. Ct. at 756, the lower courts paved the way for Guardado's execution and mooting of his pending suit.

In a separate concurrence below, Judge Pryor emphasized that the court of appeals' conclusion "should not in any way signal or suggest that we condone the Department of Corrections' failure to meet its basic responsibility[.]" CA11-ECF 13-1 at 20. But the district court's and Eleventh Circuit's denial of meaningful process in this action removed any opportunity to "instill[] confidence in the [execution] protocol for everyone—prisoners, the courts, and the public alike." *Trotter*, 146 S. Ct. at 756.

The questions presented are:

1. Whether Guardado demonstrated a substantial risk of serious harm based on the evidence developed at the hearing, including Respondents' documented administration of insufficient dosages of drugs, unauthorized drugs, expired drugs, and drugs that are wholly unaccounted for altogether, which compound the risk of prolonged suffering within the context of an already risky protocol.

2. Whether the Eleventh Circuit appropriately rejected Guardado's claim on insufficient-evidence grounds after Guardado was disallowed the discovery necessary to establish the extent of the State's protocol maladministration.

## PARTIES TO THE PROCEEDING BELOW

Petitioner (Plaintiff below) is Jesse Guardado, a Florida death-row prisoner scheduled to be executed on November 5, 2026, at 6:00 p.m. Respondents (Defendants below) are Richard Comerford, the Secretary of the Florida Department of Corrections, and Randall Polk, the Warden of Florida State Prison.

## DIRECTLY RELATED PROCEEDINGS

**Proceedings Below Under 42 U.S.C. § 1983:**

Caption: *Guardado v. Secretary, Florida Department of Corrections*
Court: United States District Court, Middle District of Florida
Docket: 3:26-cv-2596-MMH-SJH
Decided: October 30, 2026
Published: 2026 WL 3265131

Caption: *Guardado v. Secretary, Florida Department of Corrections*
Court: United States Court of Appeals, Eleventh Circuit
Docket: 26-14027-P
Decided: November 2, 2026
Published: N/A

**Underlying Criminal and Collateral Proceedings:**

Direct Review

Caption: *Guardado v. State*
Court: Supreme Court of Florida
Docket: SC05-2035
Decided: June 28, 2007
Published: 967 So. 2d 108 (Fla. 2007)

State Collateral Review

Caption: *State v. Guardado*
Court: Circuit Court of the First Judicial Circuit, Walton County, Florida
Docket: 2004-CF-903
Decided: March 30, 2012 (Initial State Postconviction Motion)
Published: N/A

Caption: *Guardado v. State*
Court: Supreme Court of Florida
Docket: SC12-1040
Decided: April 16, 2015
Published: 176 So. 3d 886 (Fla. 2015)

Caption: *Guardado v. Jones*
Court: Supreme Court of Florida
Docket: SC17-389
Decided: May 11, 2017

Published: 226 So. 3d 213 (Fla. 2017) (State Habeas Petition Based on *Hurst*)

Caption: *State v. Guardado*
Court: Circuit Court of the First Judicial Circuit, Walton County, Florida
Docket: 2004-CF-903
Decided: September 28, 2017 (Motion to Vacate Based on *Hurst*)
Published: N/A

Caption: *Guardado v. State*
Court: Supreme Court of Florida
Docket: SC17-1903
Decided: March 8, 2018
Published: 238 So. 3d 162 (Fla. 2018)

Federal Habeas Review

Caption: *Guardado v. Sec'y, Fla. Dep't of Corr.*
Court: United States District Court, Northern District of Florida
Docket: 4:15-cv-256
Decided: January 19, 2022
Published: N/A

Caption: *Guardado v. Sec'y, Fla. Dep't of Corr.*
Court: United States Court of Appeals, Eleventh Circuit
Docket: 22-10957
Decided: August 12, 2024
Published: 112 F.4th 958 (11th Cir. 2024)

Certiorari Review

Caption: *Guardado v. Florida*
Court: Supreme Court of the United States
Docket: 07-8094
Decided: February 19, 2008
Published: 552 U.S. 1197 (Cert. Denied)

Caption: *Guardado v. Jones*
Court: Supreme Court of the United States
Docket: 17-7171
Decided: April 2, 2018
Published: 584 U.S. 922 (Cert. Denied; Sotomayor, J., dissenting)

Caption: *Guardado v. Florida*
Court: Supreme Court of the United States

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|---|---|
| Docket: | 17–9284 |
| Decided: | November 13, 2018 |
| Published: | 586 U.S. 1004 (Cert. Denied; Thomas, J., concurring; Sotomayor, J., dissenting) |

| | |
|---|---|
| Caption: | *Guardado v. Dixon* |
| Court: | Supreme Court of the United States |
| Docket: | 24-6549 |
| Decided: | June 23, 2025 |
| Published: | 145 S. Ct. 2822 (Cert. Denied) |

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Petitioner Jesse Guardado respectfully requests a writ of certiorari to review the decision of the Eleventh Circuit Court of Appeals.

## DECISION BELOW

The Eleventh Circuit's order denying Guardado's emergency motion for a stay of execution is reproduced in the Appendix (App.) at A1.[1]

## JURISDICTION

On November 2, 2026, the Eleventh Circuit denied Guardado's motion for a stay of execution. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment provides:

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

42 U.S.C. § 1983 provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

## STATEMENT OF THE CASE

### I. The Complaint and Evidentiary Proffer

On September 28, 2026, Guardado filed a 42 U.S.C. § 1983 complaint detailing shocking revelations about Florida's pervasive maladministration of its lethal

[1] Citations to documents included in the Appendix will refer to the Appendix and assigned number "A_" in their first instance, followed by the lower-court ECF and page numbers for all subsequent references.

injection protocol.[2] Guardado's claim and evidence in support included new and highly disconcerting documentation of maladministration of Florida's lethal injection protocol, beyond what was known to the petitioner in *Trotter v. Florida*, 146 S. Ct. 755 (Feb. 24, 2026) (Sotomayor, J., statement respecting the denial of the application for stay of execution and denial of certiorari). It also included medical expert reports that discussed the implications of Florida's multi-faceted maladministration in the context of an already risky three-drug protocol. Guardado alleged that Florida's documented use of expired, under-dosed, and unauthorized drugs during executions creates a substantial risk of serious harm and proffered the firing squad as a feasible, readily implemented alternative. And Guardado explicitly noted that he was filing his action "before any death warrant issued [specifically] to allow for meaningful judicial review" of the issues presented. MDFL-ECF 1 at 4, 36. Just one week later, on October 5, 2025, with full knowledge of Guardado's pending claim, the State issued his death warrant, setting his execution for November 5, 2026.

Expedited proceedings followed in the district court, including an evidentiary hearing, where despite having less than one week's notice and the district court only partially granting his discovery requests, Guardado still presented significant evidence of Respondents' maladministration of the protocol. *See* App. A3 (Redacted Evidentiary Hearing Transcript). That evidence, much of which Respondents could

[2] Since the beginning of 2025 and continuing to the present, an unprecedented number of individuals have been executed in Florida. Records first produced by Respondents in October 2025 demonstrate that each individual was subjected to an execution process that operated differently, both in implementation and in result. MDFL-ECFs 1-5, 1-8, 1-9.

not explain or rebut at the hearing, established a substantial risk of serious harm resulting from Respondents' documented maladministration of the protocol.

## II. The Evidentiary Hearing

At the October 22, 2026, evidentiary hearing, both parties presented testimony and evidence pertaining to FDOC's pharmaceutical and execution practices, as well as the potential risks presented by the use of expired drugs, lower dosages of drugs, unauthorized drugs, and other matters relating to Respondents' protocol deviations. Drs. Joel Zivot and Michaela Almgren testified for Guardado, explaining that the three drugs called for in Florida's protocol give rise to inherent risks, even assuming no deviations from the protocol.[3] EH Tr. 18-24, 27, 90-98.

Dr. Almgren, an expert in pharmacology and pharmaceutical ethics, explained that the first drug, "etomidate[,] induces a short timeframe of unconsciousness, three to five minutes, that is not increased by the massive dose given." EH Tr. 21. At most, the large dose of etomidate may impact the depth of unconsciousness, but not the duration. EH Tr. 21-22. Dr. Zivot reiterated that "simply adding more" provides no effect. EH Tr. 90. And, while etomidate may affect consciousness, it is not an

[3] Respondents have clung to a three-drug protocol for more than 25 years, while other states have either abolished the death penalty, moved to a one-drug protocol, or adopted some other method of execution. *Authorized Methods by State*, Death Penalty Information Center, https://deathpenaltyinfo.org/executions/methods-of-execution/authorized-methods-by-state. (last visited Nov. 3, 2026). Meanwhile, in Florida, when critical discrepancies have arisen about the drugs used, Respondents have continuously brushed any concerns aside. Yet Respondents' own records, first uncovered late last year, reveal that during this recent upsurge in executions, corrections officials deviated from the protocol on numerous occasions—implicating the potential use of expired drugs, lower dosages of drugs than required, and unauthorized drugs. MDFL-ECFs 1-5, 1-8, 1-9.

analgesic, and thus it has "no capacity at any dose to relieve anything that is pain." EH Tr. 91. On the other hand, the second drug, rocuronium bromide, is "long-acting." EH Tr. 124. It paralyzes the skeletal muscles, including the diaphragm, making it impossible to move or breathe. EH Tr. 93-94. If a person were to "find themselves paralyzed and unable to move and be fully awake, it would be a terrifying experience. It would be suffocation[,]" EH Tr. 94, a death both Dr. Zivot and Respondents' expert, Dr. Joseph Antognini, agreed would be a "terrifying experience[,]" EH Tr. 94, 75. The third drug, potassium acetate, which stops the heart, is "quite painful" upon injection because "[i]t burns the vein, it burns the tissue[,]" and "would be extremely, extremely painful, you know, for anyone." EH Tr. 95-96.

Given these inherent risks, any deviation, such as giving expired, lower, or other drug doses, carries substantial risks of torturous and prolonged pain during an execution. Thus, even when adhered to, there is a risk that an individual will experience conscious suffocation due to the drugs used in Florida's protocol.

But Guardado's claim included much more. His evidence revealed numerous problems in Respondents' administration of the protocol, beyond those this Court was made aware of in *Trotter*. This included documentation of the use of expired vials of etomidate in at least six instances (rather than the four reflected by the logs obtained in 2025 and addressed in *Trotter*), and which Respondents later obscured by altering records with Wite-Out, App. A5 (FDOC 2026 Execution Drug Logs), MDFL-ECF 55-8 at 8, as well as evidence of improper dosages of drugs being utilized in the executions of Thomas Gudinas and Anthony Wainwright. Respondent's own records

reflect removal of only 7 of the required 12 vials of potassium acetate for the execution of Wainwright on June 10, 2025, MDFL-ECF 55-8 at 22, and only half of the required 20 vials of rocuronium bromide for the execution of Gudinas on June 24, 2025, MDFL-ECF 55-8 at 13, in addition to the total omission of potassium acetate until an entry a day after Gudinas's execution noting the removal of 17 vials, MDFL-ECF 55-8 at 22. Additional evidence that not all three drugs in the protocol were being used included no documented removal of etomidate for the July 15, 2025, execution of Michael Bell, MDFL-ECF 55-8 at 8; EH Tr. 258, or for the June 24, 2025, execution of Gudinas, MDFL-ECF 55-8 at 8. There was also documentation of Respondents improvising the use of other chemicals during executions, such as by using lidocaine, a drug not authorized by the protocol. App. A4 (FDOC 2025 Execution Drug Logs), MDFL-ECFs 55-2 at 16; 55-8 at 27. And Guardado presented autopsy and toxicology reports from more recent executions showing a wide disparity in individuals' postmortem etomidate levels, including about one third of recent executions reflecting levels too low to ensure a non-torturous execution. EH Tr. 115, 120. This is alarming because, were the etomidate to wear off before administration of the paralytic drug, the result would be a torturous death by suffocation while the lungs are incapacitated.

Respondents repeatedly assured the district court at the evidentiary hearing that Florida Department of Corrections (FDOC) personnel could be trusted despite their own records demonstrating a continuous pattern of systemic failures. Dr. Marcano, the Bureau Chief of Pharmacy Services at FDOC and the pharmacist

tasked with investigating the issues found in Respondents' logs last year, provided largely unresponsive explanations. Dr. Marcano invoked the fact that her tenure began on July 4, 2025, even though she was Bureau Chief of Pharmacy Services during the time when a substantial amount of these documented issues occurred, EH Tr. 220-21, 237-41. She admitted to only investigating some of the anomalies; she stopped inquiring before investigating later executions raising similar concerns. EH Tr. 221.

The hearing evidence also demonstrated that, when confronted with the discrepancies, Respondents altered their records. Numerous entries in Respondents' logs were Wited-Out and changed to reflect compliance with protocol—for example, changing the expiration dates on execution drugs without providing any documentation or explanation as to why the incorrect date had been logged originally. MDFL-ECF 55-8 at 8. When asked why expired dates had been repeatedly logged, Dr. Marcano could only point to the fact that the person working in the pharmacy at the time did not speak English as their first language. EH Tr. 233. When Respondents' witnesses were asked to explain their other deviations from the protocol, their testimony largely consisted of conclusory answers, speculation, and an assumption that the protocol must have been followed, despite their own records showing otherwise. EH Tr. 237-41. There was no indication of an investigation beyond Dr. Marcano's personal estimation that the individuals involved in executions at FSP are "very methodical," EH Tr. 255, and that she "know[s] the transporter [of the drugs]," EH Tr. 240, along with her internal discussions with execution team

members to explain why these errors had happened and why they would not recur, EH Tr. 259.

Respondents also presented the testimony of two Florida Department of Law Enforcement (FDLE) agents who served as monitors at several of the executions implicated by the records, where they would observe the drugs and their handling by the execution team. Agents Adam Graff and Kevin James provided testimony that illustrated the lack of any specialized expertise or notable training for FDLE monitors to witness executions, while also showcasing blanket assertions combined with a critical lack of personal knowledge or recollection. Specifically, this testimony established that FDLE monitors are not chosen for any medical expertise or knowledge, but rather for their proximity to Florida State Prison. EH Tr. 155. Agent James revealed that those tasked with ensuring that an execution complies with the protocol receive training simply by serving on an execution team and reading the protocol. EH Tr. 203. And when the team does practice executions, those exercises do not simulate filling syringes or checking expiration dates. App. A6 (FDOC Executioners' Logs), MDFL-ECFs 56-1 at 17; 56-2 at 16; 56-3 at 17; 56-4 at 16; 56-5 at 17. Furthermore, though Agent Graff testified that he was present for the execution of Michael Bell, he was unable to provide any specific testimony about that execution, EH Tr. 152, 162, and despite his claim that he remembered that none of the drugs used in the executions he attended were expired, he demonstrated gaps in his recall and knowledge of crucial details such as the expiration dates of the drugs. EH Tr. 159, 166.

Numerous pivotal questions of fact remained unanswered at the close of the hearing. These included: how an incorrect expiration date of the critical first drug in the protocol could have been improperly recorded six times without anyone noticing; how numerous dosing and drug withdrawal anomalies could have been inaccurately recorded if in fact proper doses were being withdrawn; what was the expiration date and potency of the drugs used when the removal of those drugs was not documented at all; why there were such concerning disparities in postmortem toxicology reports regarding the levels of etomidate reflected across the various blood samples taken from peripheral sites; whether inmates are being sufficiently and consistently administered etomidate in light of nearly a third of toxicology reports showing levels below that required for entry-level hypnosis; and how and with what guidance and safeguards are non-authorized drugs such as lidocaine being administered.

At the close of the evidentiary hearing, the district court ordered Respondents to submit copies of unredacted etomidate logs for in-camera review by close of business the following day. EH Tr. 264-66. The next day, however, the district court had to reiterate its order because "[Respondents] only partially complied with the Court's Order by submitting a page of an Etomidate log but failed to submit the full Etomidate logs as directed." MDFL-ECF 53. The court directed Respondents to submit "copies of all pages of the Etomidate logs in evidence showing the Invoice Numbers and Lot Numbers[.]" *Id*.

After the close of evidence and after the parties filed written closings on October 26, Respondents submitted a declaration from Dr. Marcano in which she

attested to having set aside unexpired drugs to use for Guardado's execution (although she stated that Guardado's execution was occurring on November 5, 2025, not 2026). MDFL-ECF 59 at 1-2.

## III. The District Court's Order

The district court denied a stay of execution on October 30, finding that Guardado's claim did not have a substantial likelihood of success on the merits. App. A2 (District Court's Order), MDFL-ECF 63. Based on its in camera review of the unredacted etomidate logs, which Guardado has still never seen, the district court found that FDOC had not used expired etomidate in prior executions, and that FDOC appeared to continue to have a supply of unexpired etomidate for future use. MDFL-ECF 63 at 36-38. The district court also found that Guardado had failed to present evidence "that the potential use of expired etomidate would result in him not being rendered sufficiently insensate to the pain that accompanies the administration of the second and third drugs in the lethal injection protocol." MDFL-ECF 63 at 39. As for the other instances of maladministration, including improper drug dosages, failure to use all drugs called for in the protocol, and the use of unauthorized drugs, the district court broadly found that Guardado had failed to present evidence to support his allegations. *See* MDF-ECF 63 at 40-44. The district court did not analyze the remaining stay factors.

## IV. The Eleventh Circuit's Order

The Eleventh Circuit denied a stay of execution on November 2, finding that Guardado failed to meet his burden of showing a substantial likelihood of success on

the merits. CA11-ECF 13-1. Two panel members found that Guardado also could not satisfy the remaining stay factors, although Judge Jill Pryor did not join those parts of the decision. *Id*. As to the likelihood of success, the Eleventh Circuit essentially agreed with the district court that Guardado had not shown "a substantial risk that the state [of Florida] would improperly apply its lethal injection protocol during his execution" and that, "[a]s to each alleged misapplication," "there was no substantial likelihood that Guardado was 'sure or very likely' to experience needless suffering." CA11-ECF 13-1 at 4-5. The Eleventh Circuit also relied on Dr. Marcano's declaration to support its conclusion. CA11-ECF 13-1 at 8-9.

The Eleventh Circuit's findings included: Guardado's contention that "the state will not use etomidate during his execution" fails, CA11-ECF 13-1 at 5, because it is "scientific fact" based on postmortem toxicology reports that each prisoner whose drug log entries do not reflect removal of etomidate for their executions—Gudinas, Bell, and Zakrzewski—did in fact receive etomidate during execution, CA11-ECF 13-1 at 5-6; Guardado's contention that "the state will not give him enough etomidate to render him unconscious" and thus will cause him to "consciously suffocate as the other two drugs are administered" fails because whole blood and plasma are not comparable and postmortem blood levels do not reveal much about pre-mortem concentrations, CA11-ECF 13-1 at 6-7; Guardado's contention that "the state will likely use expired etomidate during this execution" fails because expired etomidate was not actually used in prior executions—the notations were merely "record-keeping errors," CA11-ECF 13-1 at 8; Guardado's contention that "there [i]s a substantial risk

he will not receive proper doses of the other two drugs in the lethal injection protocol" is inconsequential because even if it were a lower dose, he would not feel it because of the etomidate, CA11-ECF at 13-1 at 9-10; and Guardado's contention that there is " a substantial risk the state will use lidocaine" similarly fails because Guardado has not shown he would need a cut-down procedure for which it might be used, and the fact that it "could" have dangerous side effects is not enough to show a risk of harm. CA11-ECF 13-1 at 10-11.

As for the other stay factors, the Eleventh Circuit majority began its analysis with a discussion of what it deemed Guardado's "delay" in bringing his claim. CA11-ECF 13-1 at 13. The court called Guardado's assertion that he had acted diligently by filing his complaint shortly after becoming warrant-eligible "mistaken" and found that he could have filed his complaint several months earlier based on claims brought by other individuals earlier this year. CA11-ECF 13-1 at 13-15. The court found that, in light of what it viewed as Guardado's delay, it "should apply the strong equitable presumption against granting [a] stay." *Id.* at 15. The Eleventh Circuit proceeded to conduct a blended analysis of the remaining stay factors, "amounting to a weighing of the equitable interests of Guardado, the State, and the public." *Id.* (cleaned up). Based on this weighing process, the court concluded that "the other equitable factors caution[ed] against granting a stay." *Id.* at 15-16.

## V. Judge Pryor's Opinion

In her separate opinion, Judge Pryor detailed the "concerning" nature of the facts "this case has brought to light" regarding FDOC's "failure to maintain accurate

records for drugs used in its executions[,]" CA11-ECF 13-1 at 18, and the "even more concerning" "response once [FDOC] learned during litigation about the errors in its drug log"—"us[ing] Wite-Out liquid eraser to alter the logs" without "any attempt to document either in the log or elsewhere that a change had been made to the log, when the change was made, who made the change, or why the change had been made[,]" CA11-ECF 13-1 at 19. She concluded: "these types of untraceable edits to a log tracking the storage of a drug is 'completely inappropriate' and indeed 'invalidates the point[] of the records,' which should be a contemporaneous record of each drug that was acquired and used." CA11-ECF 13-1 at 19. Judge Pryor described the "deeply concerning" nature of "the State's lack of transparency and failure to maintain accurate records," and echoed Justice Sotomayor's admonishment in *Trotter*, 146 S. Ct. at 756, that "such records are needed to 'instill[] confidence in the [execution] protocol for everyone—prisoners, the courts, and the public alike.'" CA11-ECF 13-1 at 19-20. Judge Pryor cautioned that the denial of a stay "should not in any way signal or suggest that we condone the Department of Corrections' failure to meet its basic responsibility to maintain accurate records." CA11-ECF 13-1 at 20.

## REASONS FOR GRANTING THE WRIT

### I. Guardado demonstrated a substantial risk of serious harm

In evaluating the evidence of maladministration Guardado presented in the district court, the Eleventh Circuit overlooked the inherently risky three-drug protocol, parsed FDOC's misapplications of the protocol into discrete errors rather than reviewing them collectively as a matter of overall risk, and minimized the

concerning data related to the autopsy and toxicology reports in order to determine that no substantial risk of serious harm existed. However, Guardado's maladministration claim is based upon the pervasive and significant errors that the records indicate occurred in conjunction with the protocol itself, which calls for an ineffective first drug and other defects. Particularly in the context of the protocol, the deviations and errors occurring in the recent spree of executions and data stemming from them establish that a substantial risk of serious harm exists.

### A. Respondents' recently revealed violations should be considered within the context of the inherent riskiness of Florida's lethal injection protocol

The Eleventh Circuit panel disregarded entirely the broader context of Guardado's claim, which is that Respondents' poorly documented and sloppy approach to carrying out the lethal injection protocol increases the likelihood of torture given the precarious design of the protocol itself. This Court should clarify the proper Eighth Amendment analysis by considering the maladministration Guardado has raised within the greater context of an already dangerous lethal injection protocol. *See* CA11-13-1 at 20 (Pryor, J., concurring) ("[A] State's failure to maintain accurate records will invariably lead to concerns and questions about whether the State is adhering to its protocol as well as the *efficacy and constitutionality of that protocol*.") (emphasis added).

FDOC's protocol calls for three drugs to be administered, none of which have analgesic properties. EH Tr. 19. The first drug, etomidate, is a short-acting, non-barbiturate hypnotic drug, used for the induction of general anesthesia and sedation.

MDFL-ECF 1-7 at 4. Etomidate induces a short timeframe of unconsciousness, three to five minutes, that is not increased by the massive dose given. EH Tr. 21. At most, the large dose of etomidate may impact the *depth* of unconsciousness, but not the duration of time. EH Tr. 21-22.

The second drug, rocuronium bromide, paralyzes the skeletal muscles, including the diaphragm, making it impossible to move or breathe. EH Tr. 93-94. Both parties' anesthesiology experts testified during the evidentiary hearing that should a prisoner regain consciousness during an execution and "find themselves paralyzed and unable to move and be fully awake, it would be a terrifying experience. It would be suffocation. And, you know, death in this way, death by suffocation, is an easily relatable and terrifying experience for people." EH Tr. 94; *see also* EH Tr. 75 (Dr. Antognini testifying that when an individual has been given anesthesia, given a paralytic, and then regains consciousness, he or she "would be unable to move, unable to breathe. And when that has happened, it has been, for quite a number of people, a terrifying experience.").

The very design of the three-drug protocol interferes with an accurate assessment of consciousness because the paralytic drug interferes with the prisoner's ability to express signs of awareness. EH Tr. 107. Without a potent dose of etomidate, there is an increased likelihood that prisoners will feel the sensations of the paralytic drug. Compounding the already substantial risk of serious pain, Respondents record a consciousness check taking just one minute or less by a non-medical execution team member. MDFL-ECF 56-1 at 9; 56-2 at 6; 56-3 at 12; 56-4 at 8; 56-5 at 7.

The record reflects that Respondents' anomalous three-drug protocol and flawed consciousness checks create an already hazardous manner of death even before considering the added danger that could result from their documented and routine maladministration of the protocol in serious ways. At bottom, Guardado's claim is about overall risk. The district court failed to consider his argument that Respondents' recurrent, pervasive, and barely rectified maladministration places prisoners, already subject to a precarious protocol, at significant risk of wanton pain.

### B. Respondents' records, and internal response to the violations contained therein, reflect a real and significant risk of harm

During the evidentiary hearing, Dr. Almgren testified regarding the ethical and necessary requirements for accurate recordkeeping for the handling of drugs. She stated: "[r]ecords should reflect your practice." EH Tr. 42. What was revealed at the evidentiary hearing was that Respondents' records actually do reflect their practice—obscurity, lack of transparency, and a "trust us" approach, notwithstanding mounting evidence that rebuts any such presumption they are due.

The records reveal deficiencies in five different areas: (1) Respondents have carried out executions without documenting the removal of required drugs, raising questions about dosage and potency received; (2) disparate autopsy and toxicology data support the inference that etomidate is not being administered consistently; (3) Respondents documented the administration of expired etomidate six times in a row; (4) Respondents have used insufficient dosages of drugs in the protocol, raising questions concerning manner of death; and (5) Respondents administer unauthorized drugs on an ad hoc basis. *See* CA11-ECF 13-1 at 5.

### 1. Respondents neglect to log drugs entirely

On June 24, 2025, Thomas Gudinas was executed. There was no documented removal of etomidate in FDOC's drug logs. Instead, there is a documented removal of 50 vials of etomidate with a June 30, 2025, expiration date on June 25—seemingly, the removal of drugs set to expire. MDFL-ECF 55-2 at 5.

On July 15, 2025, Michael Bell was executed. Though the drug logs indicate that potassium acetate and rocuronium bromide were removed on July 16, there was no corresponding entry for any etomidate. MDFL-ECF 55-2 at 26, 30, 39; EH Tr. 40, 103, 258.

On July 31, 2025, Edward Zakrezewski was executed. Again, the drug logs do not reflect a removal of etomidate. MDFL-ECF 55-2 at 26; EH Tr. 39-40, 103, 251. The logs instead contain two entries: one showing the removal of 10 vials on July 28, 2025, and the other showing the removal of 20 vials on August 1, 2025, both with an expiration date of July 31, 2025. MDFL-ECF 55-8 at 8; MDFL-ECF 55-2 at 26; EH Tr. 253-54. At best, the logs indicate the drugs were removed three days *before* the execution of Zakrzewski, whose execution was scheduled on the date of expiration for the etomidate. *Id*. However, such speculation contradicts Dr. Marcano's testimony about how and when the drug logs are updated. *Id*.

At a minimum, there were three executions where, according to the logs, no etomidate was removed for use. In its order, the Eleventh Circuit minimized the significance of the error, incorrectly framing Guardado's claim as a failure to administer etomidate at all to the prisoners. CA11-ECF 13-1 at 5. In so doing, the

Eleventh Circuit affirmed the swift dismissal of any concerns as "merely recordkeeping errors," pointing to the testimony of FDLE Agent Graff, who stated from his recollection that etomidate was administered in the Bell execution, and to the toxicology results, showing etomidate appeared in the postmortem blood testing of the prisoners, CA11-ECF 13-1 at 6. But the Eleventh Circuit's analysis is far too reductive. Without documentation there is simply no way to know anything about the administration of the critical first drug, including whether the correct dosage or potency was administered. *See* MDFL-ECF 55-2 at 26; EH Tr. 258-59.

Largely due to Respondents' lack of contemporaneous recordkeeping, EH Tr. 36, it is clear records are not kept showing what was happening in real time before an execution, but rather what might have happened, or what should have happened. But that defeats the purpose of keeping records in the first place. According to Dr. Almgren, "the point is when you write down you retrieved the vials, how many you retrieved, the expiration date, the lot number, who retrieved it, all that would be recorded. So, of course, again, in the spirit of the good documentation practices, you would make the note in the records contemporaneously, meaning when it's happening." *Id.* That did not happen here, risking a devastating outcome where the maladministration of the sedative-drug is followed by a painful paralytic causing suffocation, all without the ability for observers to detect such a torturous consequence.

And, while Graff testified that he was present for the execution of Bell, he provided no specific testimony about Bell and instead relied on a description of a

check-the-box procedure, which appears to take a matter of moments. Considering the numerous vials and the requirement that each drug name, dosage, and expiration date needs to be checked, that would surely require additional time. EH Tr. 152, 162.

Contributing to the inability to explain the discrepancies in the records or verify what was administered to the prisoner was the description of a "worksheet" that is prepared when removing drugs but that is later destroyed and would have reflected the actual dosages and drugs removed for use in executions. "I'm not sure why," Dr. Marcano explained, "we just don't keep the worksheet." EH Tr. 229-31. Without the worksheet, there is no contemporaneous paper trail providing the actual dates, quantity, and lot information for each vial removed from the pharmacy for an execution, and no way to conduct an audit for that information later.

At a minimum, there were three executions where, according to the logs, no etomidate was removed for use. This is a significant error that should not be resolved based simply upon speculation that drugs may have been removed early or included in subsequent entries. Given the fundamental importance of a functioning sedative in a three-drug protocol where an improper dose of a sedative drug could yield "a substantial, constitutionally unacceptable risk of suffocation from the administration of [the subsequent two drugs]," *see Baze v. Rees*, 553 U.S. 35, 53 (2008) (plurality opinion), this issue implicates the risk of torture should Guardado receive an insufficient dose or one that lacks potency. Further, this Court's observation in *Baze* is even more pertinent here as Respondents' chosen sedative is from an entirely different class of drugs and is not a barbiturate. Indeed, in this instance, due to

etomidate's ultra-fast acting properties, accurate dosages and potency in the lethal injection protocol are critical.

**2. Autopsy reports and toxicology data are significant**

The toxicology records and expert testimony introduced at the evidentiary hearing further support that there is a real and substantial risk of harm to Guardado should his execution proceed. In rejecting the import of the autopsy and toxicology data, the Eleventh Circuit focused on two issues: first, whether blood plasma levels of a drug like etomidate could be compared to whole blood levels. The Eleventh Circuit cited Dr. Milad Webb's testimony that there was not a one-to-one measurement. CA11-ECF 13-1 at 7. But Dr. Webb admitted that he did not deal with blood plasma in his professional experience and therefore did not know what the difference in the etomidate levels between plasma and whole blood would be. EH Tr. 174, 178. And, he could not answer which sample would produce a lower measurement. EH Tr. 173.

However, Dr. Zivot, an experienced anesthesiologist who uses etomidate regularly in his practice, explained that to achieve the state of unawareness or the pain-free state desired for an execution, likely a higher level than the manufacturer-recommended 0.23 mcg/mL would be needed. He expounded that while the recommended 0.23 mcg/mL level is in relation to blood plasma, EH Tr. 115-17, 128, postmortem levels in whole blood would likely be a close approximation to plasma levels given the stability of etomidate, which would not likely degrade for approximately a week after execution. EH Tr. 117-19. Thus, the Eleventh Circuit

erroneously concluded that the "comparison fails out of the gate." CA11-ECF 13-1 at 7.

The toxicology data is significant in determining whether, at the time of execution, a prisoner would have attained even a basic entry-level of hypnosis, let alone whether an individual would have been capable of registering the pain and terror of suffocation. EH Tr. 115-16, 130, 133-34. Dr. Zivot voiced concern that etomidate levels were not adequate to accomplish "the kind of pain control that I think you would need" to prevent an individual from suffering both the sensations of conscious suffocation and severe pain from the second and third drugs under the Florida protocol. EH Tr. 121.

Notably, in discussing the reference level of etomidate expected in plasma to produce hypnosis, Dr. Webb believed that the number was in fact within a higher range than the manufacturer provided. EH Tr. 187 ("I'm saying that every anesthesia textbook that I have looked at … says anywhere between [0].2 and [0].6."). Thus, according to Dr. Webb, the expected number could be up to three-fold *higher* than that provided by the manufacturer. Of the 30 autopsy and toxicology reports reviewed by Dr. Webb and Dr. Zivot, every prisoner's etomidate level from peripheral samples was below the range cited by Dr. Webb, with nine of 12 being below 0.23. *See* MDFL-ECF 55-7 at 11, 40, 66, 73, 101, 116, 132, 145, 156, 166, 240. The data is scientifically reliable from which to draw conclusions.

Second, the Eleventh Circuit addressed whether "postmortem etomidate blood levels would have been similar to the etomidate in [prisoners'] blood at the time of

their executions." CA11-ECF 13-1 at 7. Holding that "science does not back up Guardado's assumption," the Eleventh Circuit dismissed the data. *Id.* But the science did support Guardado's claim. Both Dr. Zivot and Dr. Webb agreed that peripheral blood is a more reliable indicator of the level of etomidate in a prisoner's system "at the time of death," EH Tr. 182-83, 117, because a sample from this source "minimizes the effect of post-mortem redistribution," EH Tr. 182-83. The Eleventh Circuit's reliance on Dr. Zivot's report, where he acknowledged some postmortem redistribution, CA11-ECF 13-1 at 7, overlooked the next sentence in his report which he affirmed in his testimony: "Even so, this disparity does not support the conclusion that the protocol reliably delivers a consistent dose of etomidate to each prisoner." MDFL-ECF 1-7 at 11; EH Tr. 139.

Further, Dr. Zivot explained that the breakdown of etomidate via bodily processes occurs in the liver, which ceases functioning upon death. EH Tr. 140. Therefore, the stability of etomidate in the blood allows for conclusions to be drawn by the postmortem level tested. EH Tr. 140-41. Dr. Zivot added that the manufacturer recommends a level of etomidate in the plasma of 0.23 and that such a level "should be exceeded to create kind of the basic entry-level hypnosis." EH Tr. 115. In fact, the manufacturer's information is included in the postmortem toxicology report itself– implicitly affirming that the postmortem measurement should still be greater than 0.23 to sufficiently induce hypnosis. *See, e.g.*, MDFL-ECF 55-7 at 57, 146, 167, 175. Dr. Almgren, who worked in manufacturing and has prepared such studies herself,

EH Tr. 16, testified that manufacturers' stability studies, for example, are "extensive," "large-scale," and "very specific," EH Tr. 56.

While Dr. Webb opined that there was some degradation of etomidate after death until the body temperature sufficiently cools, EH Tr. 175, 183, he could only say that there was "appreciable rate of degradation," EH Tr. 175, and he did not know "at what point the cellular processes will shutdown," EH Tr. 183-84.

Although Dr. Webb himself was uncertain about the meaning of postmortem etomidate levels, he committed to continuing to order that the tests be conducted because "it seems that there is some interest and value to the quantification of etomidate." EH Tr. 196.

Finally, even in the context of differing physical compositions or medical statuses of different individuals, Dr. Zivot concluded that there should be more consistency between postmortem etomidate levels in blood drawn from the same location. EH Tr. 141. For instance, Kayle Bates' postmortem etomidate level, drawn from the femoral vein, was just 0.22 mcg/mL, which is below the level recommended by the manufacturer to induce "basic entry-level hypnosis." MDFL-ECF 55-7 at 167; EH Tr. 115. Samuel Smithers' postmortem etomidate level, drawn from the peripheral iliac vein, was only 0.13 mcg/mL. MDFL-ECF 55-7 at 253.

Based upon his extensive training and experience, Dr. Zivot testified that almost certainly under the current manner in which FDOC carries out its lethal injection protocol, someone will be consciously suffocated and aware of pain in violation of the Eighth Amendment—even as often as one in five executions. EH Tr.

141. Dr. Zivot testified that "it's happening with repeated regularity." EH Tr. 141. At a minimum, the clinically insufficient levels of etomidate obtained in one third of the autopsies reviewed by Dr. Zivot, EH Tr. 120, and the notable variance among postmortem etomidate levels collectively provide additional evidence of the maladministration of FDOC's protocol and support that there is a substantial risk of serious harm in Respondent's administration of its lethal injection protocol.

### 3. Respondents documented the administration of expired drugs

As Judge Pryor observed in her opinion, "[i]t is undisputed that the logs [Respondents] maintained showed that Florida had used expired etomidate in several previous executions," and that "the State's lack of transparency and failure to maintain accurate records is deeply concerning," CA11-ECF 13-1 at 18, 19. But what the panel missed is that, regardless of the district court's myopic resolution of these instances in isolation, this practice reflects Respondents' approach to the protocol as a whole and has broader implications for the drugs—and dosages—that may be used during Guardado's execution, creating a substantial likelihood of a torturous, drawn-out execution if it is allowed to continue without judicial intervention.

Respondents' internal handling of the discovery of the potential use of expired etomidate is not reassuring. First, the practice of documenting the removal of expired drugs went on, uncorrected, for six executions, implicating the reliability of Respondents' efficacy as a whole. During the evidentiary hearing, Dr. Marcano sought to dodge accountability, even though she was Bureau Chief of Pharmacy Services during the time when a substantial amount of the maladministration

occurred, and for most of the series of documented uses of expired etomidate. *See* EH Tr. 220 (Dr. Marcano testifying she took over as Bureau Chief on July 4, 2025). Despite her oversight of the pharmacy at this time, she was also tasked with conducting an internal investigation into the errors. EH Tr. 221.

Respondents' Wite-Out solution to the expired drugs in no way addressed the severity of the error—a remedy reflective of their disregard for the dignity and attention they claim to agree is due at an execution. EH Tr. 205-06. Expired etomidate "can lose potency," meaning it "may not be at the strength" contemplated for use in the protocol. EH Tr. 27. The drug may begin to operate as a different drug altogether: "[i]t may change pH, so it will become more acidic or it may become more basic. And that, of course, will impact how it will be absorbed and how it will react within [a prisoner's] body. It can precipitate . . . . Sometimes the molecule itself, the active ingredient, will degrade." EH Tr. 27.

It is also clear from the timeframe of Dr. Marcano's inquiry into the violations that the scope of her "investigation" was not the necessary audit that such a violation should garner, but rather a simple fix to localized errors raised in another case, *Walls v. Dixon*, *et al.*, No. 4:25-cv-00488-MW-MAF, ECF 1 (N.D. Fla. Nov. 26, 2025), *cert denied*, 146 S. Ct. 1436 (Mem) (Dec. 18, 2025), in late November and December 2025, and which only covered a limited timeframe up to September 30, 2025. EH Tr. 221 (Dr. Marcano explaining the errors came to her attention in December or January). She apparently did not investigate what occurred in executions after that date,

beyond applying Wite-Out to the two subsequent, and previously unknown,[4] entries of expired etomidate corresponding with the execution of Samuel Smithers and Norman Grim. MDFL-ECF 55-8 at 8.

When asked to explain why expired dates had been repeatedly logged, Dr. Marcano could only point to the fact that the person working in the pharmacy at the time did not speak English as his first language. EH Tr. 233. However, she did not explain why such an error was never identified or addressed by the other individual working in the pharmacy, or by her predecessor.

The fact that six consecutive entries of expired etomidate were logged at all, coupled with Respondents' practice of simply erasing evidence of discrepancies in their drug logs, without providing an explanation as to why those errors occurred or assurances that they will not happen again, raises fundamental concerns about competence and oversight within the FDOC pharmacy—concerns that are directly related to Respondents' ability to carry out Guardado's execution without inflicting severe pain and suffering.

**4. Inaccurate dosages of drugs**

Respondents' logs also show inappropriate dosages of drugs administered during multiple other executions which are inconsistent with the protocol. This includes removing only 7 of the required 12 vials of potassium acetate for the execution of Anthony Wainwright on June 10, 2025, MDFL-ECF 55-8 at 22, and only

[4] Despite Respondents' initial attempts to limit the scope of the evidentiary hearing to the first four instances, MDFL-ECF 23, updated records received in limited discovery reveal this happened six times, MDFL-ECF 55-5 at 8.

half of the required 20 vials of rocuronium bromide for the execution of Thomas Gudinas on June 24, 2025, MDFL-ECF No. 55-8 at 13. This was never explained at the evidentiary hearing, nor were these concerns sufficiently addressed by the Eleventh Circuit, which glossed over these concerns by defaulting to a generalized defense of the protocol. CA11-ECF 13-1 at 9.

First, this finding completely overlooks the fact that when questioned about this discrepancy, Dr. Marcano "wasn't able to resolve why that says negative 7" instead of the appropriate removal of 12 vials. EH Tr. 239. Gudinas was then executed on June 24, 2025. EH Tr. 246. The logs do not reflect any removal of potassium acetate on June 24, instead showing a withdrawal of 17 vials on June 25. MDFL-ECF 55-8 at 22. No investigation was conducted into this issue, and Dr. Marcano did not provide a written memo or any proof that the correct dosage was given to Wainwright or Gudinas. EH Tr. 261-62. Dr. Marcano only expressed her personal belief that, "I do not feel like that drug could have been shorted or over—or there could have been an overage. So I don't know." EH Tr. 240.

Further acknowledging that only half of the required dosage for rocuronium bromide was withdrawn for the execution of Thomas Gudinas on June 24, EH Tr. 245, Dr. Marcano could only answer that "[i]t is not clear to me what happened on that entry." EH Tr. 246. As Dr. Almgren pointed out, that is precisely the issue with Respondents' recordkeeping system. Dr. Marcano should be able to explain exactly what happened on each execution date, even those before her tenure, based on a reading of the records: "this way, whoever comes after you, anybody who's auditing

the records can say, oh, I see you made a correction; you wrote the wrong date." EH Tr. 41.

Instead, Dr. Marcano testified she felt confident the accurate dosage was given because "I know the process. I know the transporters." EH Tr. 240. She credited her personal knowledge of the execution team members, but admitted that conclusion was not based on any kind of objective investigation. EH Tr. 240. She testified: "I can only speculate. I don't know." EH Tr. 242.

Avoiding discussion of the gaps in Dr. Marcano's testimony entirely, the Eleventh Circuit wrongfully opted to dismiss Guardado's argument that each dosage in a three-drug protocol is mandated for a specific reason, and an insufficient dosage of one drug could lead to unnecessary suffering from another. CA11-ECF 13-1 at 9. But this ignores the established dangers of the protocol as designed: because etomidate is an ultrashort acting sedative, an insufficient dosage of potassium acetate would lead to a drawn out, torturous death by the paralytic while the inmate is aware—a nearly identical manner of death that the Eleventh Circuit itself recently deemed unconstitutional. *See Lee v. Comm'r, Ala. Dep't of Corr.,* No. 26-11864, 2026 WL 1651147 (11th Cir. Jun. 8, 2026). Furthermore, the argument that Guardado would not feel the effects of an insufficient dosage of one of the three-drugs of the lethal injection protocol because he will be rendered unconscious by etomidate assumes, without any proof, that Guardado will certainly receive a correct dosage of etomidate. *Id.* Yet, based on Respondents' record-keeping lapses discussed *supra*, that is not guaranteed.

A failure to consider these errors within the broader context of the protocol, and the cause of death it is supposed to induce, was improper and leaves a critical portion of Guardado's maladministration claim outstanding. As this Court noted in *Baze*, 553 U.S. at 53, an improper dose of a sedative drug could yield "a substantial, constitutionally unacceptable risk of suffocation from the administration of [the subsequent two drugs]." That observation is even more pertinent here as Respondents' chosen sedative is from an entirely different class of drugs and is not a barbiturate. Indeed, in this instance, due to etomidate's ultra-fast acting properties, accurate dosages in the lethal injection protocol are critical.

**5. Unauthorized drugs**

The Eleventh Circuit also failed to consider the role of lidocaine within the broader picture of protocol deviations that Guardado has raised. Though lidocaine is not mentioned in the protocol, MDFL-ECF 55-1, Respondents' records demonstrate that injectable lidocaine was removed from the pharmacy and taken to Florida State Prison ("FSP"), where executions are carried out, on a few occasions. MDFL-ECFs 52-2 at 16; 52-8 at 27. Respondents failed to adequately explain when, and why, they include drugs not specified in the written protocol, instead raising additional questions. While Dr. Marcano stated that the lidocaine was kept on a cart at FSP in case the need for a cutdown procedure arises, EH Tr. 247, her explanation was not due to personal knowledge of how lidocaine was handled at FSP. EH Tr. 249. Contrary to the Eleventh Circuit's assessment, this issue should not be restricted to Guardado's individual necessity or vulnerability to the drug, particularly as

Guardado was unable to address relevant issues such as FDOC's handling, storage, and administration of lidocaine.

The evidence presented during the evidentiary hearing, through Dr. Almgren, established that the use of drugs not provided for in the protocol "could lead to medication error" because there is simply no guidance on "how much you would use, how would you use [it]," or "when do you use it." EH Tr. 35. This should be written in the protocol because, without that guidance, "[t]here's just no information." EH Tr. 35. Dr. Zivot testified that liquid lidocaine could be potentially dangerous because the drug "can actually cause a seizure sometimes, depending on how much is given and where it's given." EH Tr. 102. An ad hoc addition of liquid lidocaine to the wrong prisoner could be "life-threatening" if it caused an allergic reaction, for example. EH Tr. 103.

While the Eleventh Circuit dismissed Guardado's concerns about the use of lidocaine, that conclusion overlooked the little information that Guardado had about Respondents' use of that drug, and what little was revealed during the hearing. In light of the testimony presented describing the dangerous effects lidocaine can have, and the uncertainty regarding the extent to which it has been used in executions, Guardado has shown that this is yet another serious deviation from the protocol and is reflective of Respondents' overall indifference to the risk of inflicting substantial pain and suffering.

### 6. Guardado satisfied all pleading requirements

While the Eleventh Circuit was split on whether this argument was necessary at this stage, CA11-ECF 13-1 at 18 n.1 (Pryor, J., concurring), Guardado nonetheless sufficiently pleaded both prongs required for a method-of-execution claim, and the Eleventh Circuit's suggestion to the contrary was wrong. Guardado sufficiently proffered the firing squad as an alternative, which he said will lessen the risk of pain. *See* MDFL-ECF 1 at ¶ 96 ("Guardado submits that the firing squad is a reasonable, readily available alternative to the current iteration of the lethal injection protocol.")

A plaintiff in a method-of-execution case "may point to a well-established protocol in another State as a potentially viable option." *Bucklew v. Precythe*, 587 U.S. 119, 140 (2019). As recently as June of this year, the Eleventh Circuit found that the firing squad is a feasible, readily implemented alternative to a protocol that causes conscious suffocation. *Lee,* 2026 WL 1741802, at *5-7. Guardado proffered a nearly identical firing squad protocol to the one accepted in *Lee*. MDFL-ECF 1 at ¶ 101. Moreover, Guardado demonstrated that Florida could reasonably implement this protocol. *Id.* at ¶ 100. The Eleventh Circuit's analysis regarding Guardado's proffered alternative overlooked that Guardado's alleged alternative was legally unnecessary at that point in the proceedings, which focused on Guardado's substantial likelihood of success on the merits and was not decided based on Guardado's proffered alternative method but rather whether the pervasive, documented maladministration in the context of the overall protocol demonstrated a substantial risk of pain. *See* A2; *see also Nance v. Ward*, 597 U.S. 159, 164 (2022) ("**First**, he must

establish that the State's method of execution presents a 'substantial risk of serious harm'….**Second**…he must identify an alternative method that is feasible, readily implemented, and in fact significantly reduce[s]' the risk of harm involved.") (citing *Glossip v. Gross,* 576 U.S. 863, 877 (2015)) (emphasis added).

## II. The Eleventh Circuit wrongly rewarded the State's effort to fast-track, truncate, and ultimately moot Guardado's already pending claim regarding Respondents' maladministration

The Court should also grant review in this case due to the minimal process and evidentiary development afforded to Guardado after the State decided to sign his death warrant with full knowledge of his pending maladministration claim. While the strength of Guardado's evidentiary proffer compelled the district court to set an evidentiary hearing, the court allowed the signing of Guardado's death warrant to dictate the scope and pace of the litigation that ensued. The Eleventh Circuit endorsed this approach, even though it resulted in rushed and restricted proceedings that were inadequate to address the serious issues and evidence Guardado presented.

In prior cases over the last year, the State had been able to rely on the prisoner's undue delay or lack of evidentiary support for their Florida maladministration claim in order to secure dismissal of their suits.[5] But Guardado's complaint differed from prior challenges in several key respects. First, cognizant that diligence concerns had arisen in prior lethal injection suits filed after a death warrant had been signed, Guardado filed his action shortly after becoming warrant-eligible

[5] *See, e.g.*, *Walls*, No. 4:25-cv-00488 (N.D. Fla.); *Heath v. State*, 426 So. 3d 1253 (Fla. 2026); *Trotter v. State*, 428 So. 3d 68 (Fla. 2026).

but before any death warrant issued. And second, Guardado's complaint was accompanied by a robust evidentiary proffer beyond those relied on in previous cases, including Dr. Almgren's expert report and postmortem toxicology reports. Thus, Guardado's litigation presented a unique challenge for the State. They solved that challenge by choosing to sign his death warrant despite dozens of other warrant-eligible inmates. Rather than pushing back against this tactic by stepping in to slow things down, the district court acquiesced to it by holding fast-tracked, truncated proceedings that were insufficient to afford Guardado the process and evidentiary development he was due and then blaming Guardado for failing to prove his case. The Eleventh Circuit's approval of a scenario where the State is permitted to fast-track and potentially moot substantial litigation by signing a litigant's death warrant calls for this Court's review.

Indeed, Guardado filed his complaint in the district court only a few weeks ago, and just weeks after he became warrant-eligible under Florida law.[6] Given that Guardado was sentenced in 2005 and only completed his federal habeas proceedings in this Court in 2025—recently compared to others whose death warrants have been signed during Florida's surge of executions over the last two years—he anticipated

[6] In disputing that Guardado only became warrant-eligible a few weeks before filing his complaint, the Eleventh Circuit ignored black-letter Florida law. According to the Eleventh Circuit, Guardado "became warrant-eligible in 2025 when the Supreme Court denied certiorari review in his federal postconviction appeal." CA11-ECF 13-1 at 14 n.3. That is wrong. Under Florida law, Guardado became warrant-eligible in August 2026, when his clemency proceedings were submitted. *See* Fla. Stat. § 922.052(2)(b); *Abdool v. Bondi*, 141 So. 3d 529, 539-40 (Fla. 2014) (a death warrant may be signed only after clemency process concluded).

the opportunity to obtain reasonable discovery and meaningfully litigate his claim. Yet just a week after his claim was filed, his death warrant was signed. The evidentiary hearing was then ordered with less than a week's notice, and Guardado's motion for discovery in advance of the hearing was only granted to the extent that he received 22 pages of heavily redacted updated drug logs from Respondents that had been altered with Wite-Out.[7] MDFL-ECFs 30, 38. The claim Guardado pleaded relied on just a fraction of FDOC's drug records, which were obtained before FDOC ceased providing any further information. Even the snapshot of records Guardado could access showed multiple serious problems, but the district court refused to order Respondents to provide him with all of the records needed to fully understand the scope of their maladministration. Just before the hearing, Guardado learned of new disturbing discrepancies in the records, including the Wite-Out of additional expiration dates. And at the hearing itself, Guardado learned additional facts that implicated his claim and needed development.[8] But in deference to the intervening

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[7] While the district court ordered that a handful of unredacted records related to etomidate be disclosed for an in-camera review, Guardado was not provided those records. He could have been provided them pursuant to a protective order to maintain the secrecy of the drug manufacturer which would have allowed him the opportunity to review the unredacted documents and challenge their reliability. But the exigent circumstances of the death warrant meant that these possible workarounds were not considered by the district court and put Guardado at an unfair disadvantage in the proceedings.

[8] For instance, the district court blamed Guardado for failing to present evidence to support the notion that lidocaine presents a risk because it is not a drug in the protocol. MDFL-ECF 63 at 42. But before the hearing, almost nothing was known about FDOC's use of lidocaine, and after the hearing serious questions remained to be explored. The district court never allowed Guardado an opportunity for further

death warrant, the district court disallowed further inquiry and instead proceeded on an expedited schedule and truncated proceedings.

Guardado does not claim that his pending complaint should have shielded him from a death warrant, but that the death warrant should not be an excuse for denying a fair and thorough process regarding his significant pending claim. As Respondents noted in the Eleventh Circuit, the district judge in this case has been presiding over a yearslong facial challenge to the same protocol, which raises similar issues regarding its inherent riskiness. CA11-ECF 10 at 27. Guardado never advocated for such extended proceedings, and indeed agreed they should be expedited. But the claim should not have been rushed to judgment. Guardado's complaint, which combined evidence of that inherently risky protocol with evidence of Respondents' multi-faceted maladministration of the protocol, warranted more than a few days of evidentiary development and review in the district court.

Less than nine months ago, Justice Sotomayor described the evidentiary Catch-22 that ensnares Florida prisoners who seek to raise a maladministration claim without access to the evidence that would support a colorable Eighth Amendment claim. *Trotter*, 146 S. Ct. at 756 (Sotomayor, J., statement respecting the denial of the application for stay of execution and denial of certiorari). Respondents here consistently withheld explanations for a series of glaring violations reflected in their own records, only denying or justifying those violations on the eve and day of

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discovery to answer those questions and then faulted him for the lack evidentiary proof. MDFL-ECF 63 at 42.

the evidentiary hearing, with no follow-up by Guardado permitted. The hearing itself raised more questions than it answered and should not have been the end of this suit.

Judge Pryor's concurrence illustrates that things have gotten worse since *Trotter*, and that this Court's intervention is warranted now. As Judge Pryor observed, "[w]e now know that the Department of Corrections was not taking care to ensure that its logs contained accurate information." CA11-ECF 13-1 at 18.

"Testimony from the evidentiary hearing showed that the person preparing the logs improperly recorded the expiration date of the etomidate because English was not his first language, and he did not understand that the log was requesting the expiration date for the drug, not the current year." CA11-ECF 13-1 at 18.

"But even more concerning is Florida's response once it learned during litigation about the errors in its drug log. When the Department realized that its logs contained inaccurate information about drug expiration dates, its solution was to use Wite-Out liquid eraser to alter the logs. It did not make any attempt to document either in the log or elsewhere that a change had been made to the log, when the change was made, who made the change, or why the change had been made. The evidence in this case shows that these types of untraceable edits to a log tracking the storage of a drug is 'completely inappropriate' and indeed 'invalidates the point[] of the records,' which should be a contemporaneous record of each drug that was acquired and used." CA11-ECF 13-1 at 19.

These new revelations underscore that more inquiry and factual development was due to properly assess the overall risk posed to Guardado, including access to the

discovery that is necessary to fully illuminate the issues with Florida's demonstrated "failure to meet its basic responsibility to maintain accurate records." CA11-ECF 13-1 at 20. The issues raised by the evidence in this case concern more than recordkeeping; they go to the fundamental risk level posed by Florida's pervasive and multi-faceted protocol maladministration. This Court should grant review.

## CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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