No. 26-6051

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 ELEVENTH CIRCUIT COURT OF APPEALS

BRIEF IN OPPOSITION
EXECUTION SCHEDULED FOR NOVEMBER 5, 2026, AT 6:00 P.M.

JAMES UTHMEIER
ATTORNEY GENERAL OF FLORIDA

SCOTT A. BROWNE
CHIEF ASSISTANT ATTORNEY GENERAL
Counsel of Record

CHARMAINE M. MILLSAPS
SPECIAL COUNSEL, ASSISTANT ATTORNEY GENERAL

JASON W. RODRIGUEZ
SPECIAL COUNSEL, ASSISTANT ATTORNEY GENERAL

COUNSEL FOR RESPONDENTS

Office of the Attorney General
3507 E. Frontage Rd., Ste. 200
Tampa, Florida 33607
Telephone: (813) 287-7900
scott.browne@myfloridalegal.com
capapp@myfloridalegal.com

CAPITAL CASE

QUESTIONS PRESENTED

QUESTION 1

This Court should not Grant Review of the Eleventh Circuit's Decision Denying the Motion to Stay the Execution after Properly Concluding there was not a Substantial Likelihood of Success on the Merits of the Eighth Amendment challenge to Florida's Three-drug Protocol based on a Claim of Maladministration.

QUESTION 2

This Court should not Grant Review of the Eleventh Circuit's Decision denying the Motion to Stay the Execution Finding no Abuse of Discretion in the District Court's Denial of Additional Discovery.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINION BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED 1

STATEMENT OF THE CASE AND FACTS 1

REASONS FOR DENYING THE PETITION 9

QUESTION 1 9

QUESTION 2 23

CONCLUSION 29

TABLE OF AUTHORITIES

Cases

Arthur v. Comm'r, Ala. Dep't of Corr.,
840 F.3d 1268 (11th Cir. 2016) 25

Barr v. Lee,
591 U.S. 979 (2020) 7, 15, 17, 20, 21

Baze v. Rees,
553 U.S. 35 (2008) 9, 15, 16, 17, 20

Bradley v. King,
556 F.3d 1225 (11th Cir. 2009) 25

Braxton v. United States,
500 U.S. 344 (1991) 21, 27

Bucklew v. Precythe,
587 U.S. 119 (2019) 15, 17, 18

Cash v. Maxwell,
565 U.S. 1138 (2012) 14

Cooey v. Strickland,
589 F.3d 210 (6th Cir. 2009) 22

Dunn v. McNabb,
583 U.S. 941 (2017) 3

Glossip v. Gross,
576 U.S. 863 (2015) 9, 15, 18, 19, 20, 26

Guardado v. Sec'y, Fla. Dep't of Corr.,
112 F.4th 958 (11th Cir. 2024) 2

Guardado v. State,
965 So. 2d 108 (Fla. 2007) 2

Guardado v. State,
No. SC2026-1605, 2026 WL 3267707 (Fla. Oct. 29, 2026) 2

Heath v. State,
426 So. 3d 1253 (Fla. 2026) 12

Hill v. McDonough,
547 U.S. 573 (2006) 18

Hitchcock v. Florida,
146 S. Ct. 2617 (2026) 25

Hitchcock v. State,
431 So. 3d 514 (Fla. 2026) 25

Houchins v. KQED, Inc.,
438 U.S. 1 (1978) 26

In re Ohio Execution Protocol Litig.,
946 F.3d 287 (6th Cir. 2019) 22

Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Phillips Corp.,
510 U.S. 27 (1993) 25

Jennings v. State,
422 So. 3d 107 (Fla. 2025) 13

Jones v. Comm'r, Ga. Dep't. of Corr.,
811 F.3d 1288 (11th Cir. 2016) 28

Jordan v. Comm'r, Miss. Dep't of Corr.,
947 F.3d 1322 (11th Cir. 2020) 28

Jordan v. Miss. State Executioner,
No. 25-70013, 2025 WL 1752391 (5th Cir. June 24, 2025) 22

Lewis v. Casey,
518 U.S. 343 (1996) 25, 26

Long v. Sec'y, Dep't of Corr.,
924 F.3d 1171 (11th Cir. 2019) 21

McBurney v. Young,
569 U.S. 221 (2013) 26

N.C.P. Mktg. Group, Inc. v. BG Star Productions, Inc.,
556 U.S. 1145 (2009) 25

Nance v. Ward,
597 U.S. 159 (2022) 15

Nelson v. Campbell,
541 U.S. 637 (2004) 13, 18

Nken v. Holder,
556 U.S. 418 (2009) 17

Phillips v. DeWine,
841 F.3d 405 (6th Cir. 2016) 28

Rockford Life Ins. Co. v. Ill. Dep't of Revenue,
482 U.S. 182 (1987) 22, 28

Sepulvado v. Jindal,
729 F.3d 413 (5th Cir. 2013) 28

Trotter v. State,
428 So. 3d 68 (Fla. 2026) 12

Trottie v. Livingston,
766 F.3d 450 (5th Cir. 2014) 28

United States v. Johnston,
268 U.S. 220 (1925) 14

Wardius v. Oregon,
412 U.S. 470 (1973) 26

Weatherford v. Bursey,
429 U.S. 545 (1977) 26

Zink v. Lombardi,
783 F.3d 1089 (8th Cir. 2015) 28

Constitutional Provisions

U.S. Const. amend. VIII 1

Statutes

28 U.S.C. § 1254(1) 1

28 U.S.C. § 2101(c) 1

42 U.S.C. § 1983 2

§ 922.052(2), Fla. Stat. (2026) 13

Rules

Fla. R. Crim. P. 3.851(j) 13

OPINION BELOW

The Eleventh Circuit's decision denying the motion to stay the execution is unpublished but is available at *Guardado v. Sec'y, Fla. Dep't of Corr.*, No. 26-14027, (11th Cir. Nov. 2, 2026); (Doc. #13).

JURISDICTION

On November 3, 2026, Petitioner Guardado, represented by the Capital Habeas Unit of the Office of Federal Public Defender of the Northern District of Florida (CHU—N), filed a petition for writ of certiorari in this Court seeking review of the Eleventh Circuit's decision. The petition was timely. *See* Sup. Ct. R. 13.3; 28 U.S.C. § 2101(c). This Court has jurisdiction. 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment to the U.S. Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

STATEMENT OF THE CASE AND FACTS

"Guardado beat Jackie Malone with a breaker bar and stabbed her with a knife, again and again and again, until she was dead so he could rob her and buy crack with the loot he stole." *Guardado v. Sec'y, Fla. Dep't of Corr.*, No. 26-14027, slip op. at 1-2 (11th Cir. Nov. 2, 2026). "Guardado's guilt was never in doubt" because he

"confessed and pleaded guilty." *Id*. at 2. The facts of the brutal murder of 75-year-old Jackie Malone are also recited in the Florida Supreme Court's prior opinions as well as in the Eleventh Circuit's prior opinion affirming the denial of habeas relief. *Guardado v. State*, 965 So. 2d 108, 110-11 (Fla. 2007); *Guardado v. State*, No. SC2026-1605, 2026 WL 3267707, at *1 (Fla. Oct. 29, 2026); *Guardado v. Sec'y, Fla. Dep't of Corr.*, 112 F.4th 958, 962-64 (11th Cir. 2024), *cert. denied*, *Guardado v. Dixon*, 145 S. Ct. 2822 (2025). The procedural history of the prior litigation is recounted in the Florida Supreme Court's most recent opinion and in the Eleventh Circuit's prior opinion. *Guardado*, 2026 WL 3267707, at *1-*3; *Guardado*, 112 F.4th at 964-82.

On September 28, 2026, Guardado, represented by CHU—N, filed a 42 U.S.C. § 1983 action in federal district court raising an Eighth Amendment method-of-execution challenge to Florida's three-drug protocol, based on allegations that the Florida Department of Corrections (FDOC) had used expired etomidate in six recent executions. *Guardado v. Comerford*, No.: 3:26-cv-02596 (M.D. Fla.) (Doc. #1). Guardado asserted that Florida's three-drug protocol, which uses massive doses of drugs, will cause pulmonary edema in his lungs and, if the etomidate used as the first drug is expired, he could be unconscious enough to pass the consciousness check but conscious enough to experience the sensation of suffocating in violation of the Eighth Amendment. The assertion that the etomidate was expired was based on records from an off-site pharmacy purporting to show expired etomidate was used in six consecutive executions, specifically the August 19, 2025 execution of Bates; the August 28, 2025 execution of Windom; the September 17, 2025 execution of Pittman;

the September 30, 2025 execution of Jones; the October 14, 2025 execution of Smithers; and the October 28, 2025 execution of Grim.

On October 5, 2026, Florida Governor Ron DeSantis signed a death warrant, scheduling Guardado's execution for November 5, 2026.

A few days after the warrant was signed, on October 8, 2026, Guardado filed an emergency motion for an injunction under the All Writs Act in the federal district court seeking to stay the execution. (Doc. #11). On October 12, 2026, Defendants filed a response to the motion to stay the execution noting that the All Writs Act did not apply under this Court's holding in *Dunn v. McNabb*, 583 U.S. 941 (2017), and asserted that Guardado had to establish the four traditional stay factors instead. (Doc. #16). On October 13, 2026, CHU—N, filed a reply regarding the stay. (Doc. #17).

On October 22, 2026, the district court held an evidentiary hearing which focused mainly on the issue of whether the etomidate used in the executions of Bates; Windom; Pittman; Jones; Smithers; or Grim was expired. (Doc. #54). The evidentiary hearing also explored the issue of post-mortem retrograde extrapolations to determine the amount of etomidate in the inmate's bloodstream at the time of the execution. The complaint had noted the toxicology report from the autopsy of inmate Smithers, using whole blood, showed that his etomidate level at the time of the autopsy was .13 milligrams, which is below the level required to maintain unconsciousness of .23 milligrams for plasma blood. Both parties submitted exhibits during the hearing. (Docs. #55, #56).

On the same day, October 22, 2026, the district court ordered Defendants to

disclose the unredacted etomidate logs showing the invoice numbers and lot numbers. (Doc. #51). The next day, October 23, 2026, the district court ordered further disclosures of additional unredacted etomidate logs from later executions. (Doc. #53).

On October 26, 2026, both parties filed written closing arguments. (Docs. #57, #58). Defendants argued that the evidence at the evidentiary hearing affirmatively established that the etomidate used in these six executions was not expired. The onsite and contemporaneous checklists from the actual executions of all six inmates established that all the drugs used in the six executions were verified by both the execution team and investigators from Florida Department of Law Enforcement (FDLE) to be within the expiration date, including the etomidate. The testimony of two FDLE agents, who were eyewitnesses to five of the six executions at issue, established that the three drugs, including the etomidate, were not expired. The two agents testified that a few hours before the execution, the transport pharmacy detail, the FDLE agents, and then other execution team members all verified that all of the drugs to be used in the execution, including the etomidate, were not expired. (Doc. #58). Dr. Marcano, the bureau chief of FDOC's pharmacy, testified that she conducted an investigation using the lot numbers, the National Drug Code (NDC) number, and invoices for the etomidate to determine that the correct expiration date for the etomidate used in those six executions was January of 2027, not 2025. (Doc. #58 citing T. 217-218). She testified that the incorrect expiration date in the pharmacy logs was simply "human error." (Doc. #58 citing T. 218).

On October 27, 2026, the Defendants filed a declaration from bureau chief Dr.

Renea Marcano stating that she set aside the drugs that would be used in Guardado's execution and listing their expiration dates, including the unexpired etomidate. (Doc. #59). She stated, under penalty of perjury, the expiration date of the etomidate that would be used in Guardado's execution.

On October 30, 2026, the district court found that Guardado failed to demonstrate "a substantial likelihood of success on the merits of his Eighth Amendment claim as to warrant a stay of his execution" and denied the motion to stay on that basis alone. (Doc. #63 at 36, 46-47). The federal district court judge found that expired etomidate was not used in any of the six executions at issue. (Doc. #63 at 36-38). The judge noted that bureau chief Dr. Marcano testified that her investigation into the expiration dates in the pharmacy logs, using the Invoice Number and Lot Number of the etomidate, "determined that the true expiration date was January 2027." *Id*. at 36. The district court found, based on the court's own in camera review of the lot numbers of, and invoices for, the etomidate, that Dr. Marcano's testimony was "accurate." *Id*. at 36-37. The lower court concluded that Dr. Marcano's testimony "combined with the execution checklists and the testimony of FDLE Agents Graff and James that they each checked the expiration dates of the etomidate, and no expired etomidate was used in any execution they attended is sufficient to overcome Guardado's contention that expired etomidate was used in the executions." *Id*. at 38.

The district court also concluded that "even if expired etomidate had been used in the past, Guardado has failed to present evidence to support a finding that FDOC

will use expired etomidate in his execution" or that the potential "use of expired etomidate would result in him not being rendered sufficiently insensate to the pain." (Doc. #63 at 39). The district court, noted the defense expert pharmacist, Dr. Almgren, testified as to the "potential" for a drug to degrade after the expiration date, but reasoned that a "potential" for degradation does not show a risk that is 'sure or very likely' to cause serious harm" as required by the *Baze/Glossip* test. *Id*. at 39. The district court concluded that Guardado had failed to make the required showing regarding expired etomidate. *Id*. at 40.

The district court also rejected the challenge to the protocol based on the post-mortem retrograde extrapolations of etomidate levels finding that Guardado failed to present the evidence necessary to establish the risk of the etomidate not working sufficiently to maintain unconsciousness. (Doc. #63 at 44-46). She noted that Guardado relied on the tenfold difference in the postmortem etomidate levels of Michael Bell compared to postmortem etomidate levels of Samuel Smithers. *Id.* at 44. But the district court relying on the testimony of the Chief Medical Examiner, Dr. Webb, explained that the difference could be explained because the blood used for Bell's toxicology testing was from the heart; whereas, the blood used for Smither's toxicology testing was from the iliac. *Id*. at 44. She rejected the defense expert's, Dr. Zivot's concern that one-third of the 30 toxicology reports of the recent Florida executions he reviewed showed etomidate levels below the recommended level of .23 mcg/ml to maintain unconsciousness. *Id*. at 45, 46. The district court noted that the recommended level was for plasma blood, not whole blood and the toxicology reports

all involved whole blood instead. *Id*. at 45. She observed that both Dr. Zivot and Dr. Webb testified that there is evidence of drug redistribution and metabolism following death, which can affect the toxicology levels. *Id*. at 45. Dr. Webb opined that the etomidate continues to degrade until the body has become cool and it takes the medical examiner's office two hours to transport the body to the office after the execution. *Id*. at 45. For all these reasons, she rejected the proposition that the toxicology reports reviewed by Dr. Zivot supported the claim that the amount of etomidate used in Florida's protocol was too low to maintain unconsciousness. *Id*. at 46 n.6. The district court concluded that the toxicology reports did not establish that there was "a risk that is sure or very likely to cause needless suffering." *Id*. at 46.

The district court judge noted that pulmonary edema that commonly occurs in an execution by lethal injection happens after the condemned has lost consciousness. (Doc. #63 at 46 n. 7 citing *Barr v. Lee*, 591 U.S. 979, 981 (2020)).

The district court also found that Guardado failed to make the required showing regarding the use of lesser doses of the drugs in the protocol in the executions of Wainwright and Gudinas. (Doc. #63 at 40). The lower court found that Guardado had offered "no evidence to overcome the undisputed proposition that if etomidate sufficiently renders him insensate, he will not experience the pain associated with the other two drugs in the protocol." *Id*. at 40. The lower court concluded that an inmate receiving less rocuronium bromide or potassium acetate than called for in the protocol, "without more, does not present a risk that is sure or very likely to cause needless suffering." *Id*. at 40.

The district court rejected the recordkeeping challenge as well. (Doc. #63 at 41). The court explained that, although Guardado pointed to the pharmacy logs related to the executions of Gudinas, Zakrzewski, and Windom showing that no etomidate was withdrawn on the day of their executions, the toxicology reports of the autopsies of all three inmates established that etomidate was in their post-mortem blood. *Id*. at 41. The district court found that the evidence established that etomidate "was indeed administered to each of the three individuals." *Id*. at 41. Poor recordkeeping does not "show a substantial and imminent risk that is sure or very likely to cause serious illness or needless suffering." *Id*. at 41. The district court observed that the pharmacy records "contained a concerning number of errors, this poor recordkeeping without more does not show a substantial and imminent risk that is sure or very likely to cause serious illness and needless suffering during an execution." *Id*. at 43. She noted that Dr. Marcano testified as to her "overhauling" of the pharmacy's recordkeeping practices. *Id*. at 43.

The district court also rejected the challenge to the proper storage of expired drugs based on Dr. Marcano's testimony, noting that Guardado pointed to no evidence undermining Dr. Marcano's explanation about the storage and maintenance of the drugs or evidence of any failure to properly do so. (Doc. #63 at 42-43).

Guardado appealed the district court's denial of the motion to stay to the Eleventh Circuit. *Guardado v. Sec'y, Fla. Dep't of Corr.*, No. 26-14027. Guardado filed an emergency motion to stay the execution in the Eleventh Circuit. (Doc. #9). The next day, the Defendants filed a response to the motion to stay. (Doc. #10). Guardado

filed a reply. (Doc. #11). On November 2, 2026, the Eleventh Circuit denied the motion to stay the execution. *Guardado v. Sec'y, Fla. Dep't of Corr.*, No. 26-14027 (11th Cir. Nov. 2, 2026); (Doc. #13).

REASONS FOR DENYING THE PETITION

QUESTION 1

> This Court should not grant review of the Eleventh Circuit's Decision denying the Motion to Stay the Execution after Properly Concluding there was not a Substantial Likelihood of Success on the Merits of the Eighth Amendment challenge to Florida's Three-drug Protocol based on the Claim of Maladministration.

Guardado asserts Pet. at 12. This Court typically does not grant review to review the evidence and discuss specific facts. This Court should not grant review in this case merely to decide whether the district court's factual findings following an evidentiary hearing were clearly erroneous. On that basis alone, review should be denied. The Eleventh Circuit denied the motion to stay the execution based in large part on a determination that Guardado failed to establish a substantial likelihood of success on the merits of his Eighth Amendment challenge under *Baze v. Rees*, 553 U.S. 35 (2008), and *Glossip v. Gross*, 576 U.S. 863 (2015). The Eleventh Circuit's denial of the stay does not conflict with this Court's caselaw on Eighth Amendment challenges to lethal injection protocols or with this Court's decisions regarding stays of executions. Nor does the Eleventh Circuit's denial of the stay conflict with the other

federal circuit courts or the state courts of last resort on either the *Baze/Glossip* issue or on the issue of a stay of execution. Review should be denied.

The Eleventh Circuit's Decision Denying a Stay

The Eleventh Circuit unanimously denied the motion to stay the execution. *Guardado v. Sec'y, Fla. Dep't of Corr.*, No. 26-14027, slip. op. at 15-16 (11th Cir. Nov. 2, 2026); *id.*, slip. op. at 18 (Pryor, Jill, J., concurring). The Eleventh Circuit described Guardado's maladministration claim as asserting that the State of Florida would "improperly apply" its protocol in any one of five different ways, resulting in risk that he would consciously suffocate. *Id.* at 4-5. The circuit court held that the district court's factual findings underlying its conclusion that there was not "a substantial likelihood that Guardado was sure or very likely to experience needless suffering" were "not clearly erroneous." *Id.* at 5. The panel concluded that Guardado had "not met his burden on the first method-of-execution requirement" of showing there was a "substantial risk of serious harm—severe pain over and above death itself." *Id.* at 4,5,11.

First, the Eleventh Circuit rejected Guardado's assertion that he would not receive any etomidate, based on drug logs from executions of Gudinas, Bell, and Zakrzewski, concluding that the district court's finding that the three inmates did, in fact, receive etomidate during their execution "was well supported by the evidence." *Id.* at 5-6. The circuit court reasoned that, based on the toxicology reports of the three inmates showing they had etomidate in their blood after the executions, the three

inmates "undisputably" received etomidate, and concluded that "we know as a scientific fact that they received the first drug in the protocol." *Id*. at 5-6. Next, the panel rejected Guardado's assertion that he would not receive enough etomidate based on the toxicology report of Smithers, explaining that post-mortem blood etomidate levels "don't tell us much" about the etomidate level "at the time of the execution" due to redistribution and metabolization of the etomidate. *Id*. at 6-7. Then, the panel rejected Guardado's assertion that expired etomidate would be used based on the drug logs of six prior executions. *Id*. at 8. The panel relied on the district court's finding that the logs showing expired etomidate was used in prior executions were actually recordkeeping errors. The Court determined that the record supported that finding, pointing to the testimony of Dr. Marcano and the eyewitness testimony of the two agents who were present at most of the six executions. *Id*. The panel concluded that there was "no substantial likelihood that the state will use expired etomidate" for Guardado's execution. *Id*. at 9. The Eleventh Circuit also rejected Guardado's assertion that he would not receive the correct dose of rocuronium bromide and potassium acetate required by the protocol based on the drug logs for Wainwright and Gudinas showing lower doses of the second and third drugs. *Id*. at 9. The Eleventh Circuit agreed with the district court's conclusion that there was "no substantial risk of serious harm to Guardado from the lower doses of the other two drugs because the etomidate would render him insensate" and observed that he "would be deeply unconscious." *Id*. The panel observed that there was "no evidence in the record to support his speculation" that an insufficient dosage of one drug could

lead to unnecessary suffering from another drug. *Id*. at 9 (emphasis added). The panel observed that "could is not enough" to establish a violation of the Eighth Amendment. *Id*. at 9-10. And finally, the Eleventh Circuit rejected Guardado's assertion that there was a substantial risk the state will use the unauthorized drug of lidocaine. *Id*. at 10. The panel agreed with the district court's conclusion that Guardado failed to present evidence that the rare use of lidocaine would "cause needless suffering." *Id*. at 10. The Court noted that there was "no evidence—and Guardado does not argue—that he will need a cutdown procedure for his execution" and therefore, there was "no substantial likelihood that lidocaine will be used on him." *Id*.

The majority noted that the motion for stay filed in the appellate court did not identify any alternative method of execution which was "fatal" to his request for a stay. *Id*. at 11. The majority also rejected his contention that a stay was necessary because he did not have the information and time to meet his burden of proof due to the lack of full discovery and the compressed evidentiary hearing, recounting the discovery requests that were granted. *Id*. at 11-13. The majority found that a stay was not warranted due to the delay in bringing the § 1983 suit. *Id*. at 13-15 & n.3. The majority reasoned that Guardado could have raised his method-of-execution claim at least nine months earlier pointing to similar litigation in state court. *Id*. at 13 (citing *Heath v. State*, 426 So. 3d 1253, 1261–62 (Fla. 2026), and *Trotter v. State*, 428 So. 3d 68, 71–73 (Fla. 2026)). Because Guardado offered no explanation for the

delay, the majority applied the "strong equitable presumption against granting the stay" *Id*. at 15 (quoting *Nelson v. Campbell*, 541 U.S. 637, 650 (2004)).[1]

The majority denied the stay because Guardado had "not shown a substantial likelihood that he will prevail in his appeal" and because the "other equitable factors caution against granting a stay." *Id*. at 15-16. The concurring opinion agreed that Guardado had "not shown a substantial likelihood of success on the merits of his method-of-execution claim" but did not join other parts of the majority opinion.

---

[1] Guardado faults the Eleventh Circuit for its definition of "warrant eligible" insisting the term refers to clemency proceedings. Pet. at 32 n.6. The Florida Supreme Court defines "warrant eligible" as meaning the Governor can sign a warrant for an inmate's execution, which occurs once the "direct appeal, initial postconviction proceeding in state court, and habeas corpus proceeding and subsequent appeal in federal court" are completed. *Jennings v. State*, 422 So. 3d 107, 114 (Fla. 2025) (concluding that Jennings was on notice that he was "warrant eligible" for nearly nine years from the Attorney General Office filing a notice of finality in the Florida Supreme Court clerk's office in 2016), *cert. denied*, 146 S. Ct. 402 (2025); *see also* Fla. R. Crim. P. 3.851(j) (providing: "The Office of the Attorney General must notify the clerk of the supreme court when it believes the defendant has completed his or her direct appeal, initial postconviction proceeding in state court, and habeas corpus proceeding and appeal therefrom in federal court. The Office of the Attorney General must serve a copy of the notification on defendant's counsel of record."). The term "warrant eligible" originates from a provision of the Timely Justice Act of 2013, which requires the clerk of court of the Florida Supreme Court to maintain a list of all capital defendants that have completed federal habeas review or allowed the time for federal habeas review to expire. § 922.052(2), Fla. Stat. (2026). Clemency is not part of the definition in either the statute or the rule of court. The Eleventh Circuit was correct about the definition of "warrant eligible" under Florida law.

The State filed a notice of finality in this case with the clerk of the Florida Supreme Court on June 27, 2025, *See Guardado v. State*, SC2005-2035 (Fla.). The State served both his state postconviction counsel and federal counsel, CHU-N, with that notice. So, Guardado and his federal habeas counsel were on notice for over 13 months that he was "warrant eligible" before CHU-N filed this § 1983 suit in September of 2026.

Guardado, No. 26-14027, slip. op. at 18 & n.1 (Pryor, Jill J., concurring) (joining parts I, II.A, II.C, and IV of the order).[2]

Review of Fact-bound Questions

This Court does not typically grant review of questions that are fact bound. Sup. Ct. Rule 10 (stating a petition for a writ of certiorari "is rarely granted when the asserted error consists of erroneous factual findings"); *United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts"); *Cash v. Maxwell*, 565 U.S. 1138 (2012) (statement of Sotomayor, J., respecting the denial of certiorari) (stating that a disagreement with a "highly factbound conclusion" is an "insufficient basis for granting certiorari.").

The federal district court, following an evidentiary hearing, ruled that the maladministration challenge to the protocol was meritless based on numerous findings of fact, including that the etomidate used in the executions was not expired and the Eleventh Circuit concluded that those factual determinations were not

[2] The concurring opinion expressed concern regarding the pharmacy's inaccurate recordkeeping without explaining how poor recordkeeping could result in any actual harm during the execution. Nor did the concurring opinion note the testimony at the evidentiary hearing of the bureau chief of Pharmacy Services, Dr. Marcano that she had overhauled their recordkeeping practices as a result of her investigation into the mistake regarding the expiration date of the etomidate. *Guardado v. Comerford*, 3:26-cv-02596 (M.D. Fla) (Doc. #63 at 22) (noting Dr. Marcano "instituted new procedures to bring more accuracy to the logs" including "appointing new individuals to handle the logs; and requiring that on days of executions, the two caretakers and the two transporters, along with Dr. Marcano, review the logs for accuracy" citing T. at 219, 241)).

clearly erroneous. *Guardado*, No. 26-14027, slip. op. at 5. This Court should not grant review of a question merely to decide whether the district court's factual findings were clearly erroneous and certainly not when the determination that the etomidate was not expired was made, in part, based on the judge's in camera review of additional evidence. On this basis alone, review of the question should be denied.

This Court's Eighth Amendment Test

This Court has established a test for all Eighth Amendment method-of-execution challenges whether classified as facial or as-applied challenges. *Bucklew v. Precythe*, 587 U.S. 119, 135-36 (2019) (holding that *Baze v. Rees*, 553 U.S. 35 (2008), and *Glossip v. Gross*, 576 U.S. 863 (2015) "supply the controlling test"). The *Baze/Glossip* test requires that the inmate show that the method is "sure or very likely to cause serious illness and needless suffering, amounting to an objectively intolerable risk of harm." *Glossip*, 576 U.S. at 875 (quoting *Baze*, 553 U.S. at 50). There must be a "substantial" risk of "serious harm" or "severe pain." *Nance v. Ward*, 597 U.S. 159, 164 (2022) (quoting *Glossip*, 576 U.S. at 877). This Court has observed that it "has yet to hold that a State's method of execution qualifies as cruel and unusual." *Barr v. Lee*, 591 U.S. 979, 980 (2020).

Poor recordkeeping is not a violation of the Eighth Amendment. Inaccurate recordkeeping is not a violation of the *Baze/Glossip* test because inaccurate documentation does not result in any illness or needless suffering. *Glossip*, 576 U.S.

at 875 (quoting *Baze*, 553 U.S. at 50). Indeed, the accuracy of the recordkeeping of an execution is a non-sequitur under *Baze/Glossip*.

This Court in *Baze*, observed that permitting an Eighth Amendment violation to be established on a showing of a risk that the protocol will not be followed, particularly regarding the administration of the first drug, "would threaten to transform courts into boards of inquiry charged with determining 'best practices' for executions . . ." *Baze*, 553 U.S. at 51. Guardado seeks to force federal courts not only to become boards of inquiry into best practices inside the execution chambers but inside the prison's pharmacy as well. He seeks for this Court to mandate that Florida amend its protocol to adopt the standards of recordkeeping required by pharmacy associations, such as the USP compendium, chapter 1029. (T. 16-17, 26-27). But this Court's decision in *Baze* prohibits such a path.

There is no such Eighth Amendment claim as maladministration or deviations from a protocol unless the deviation results in a violation of the *Baze/Glossip* test. Provided the deviation does not increase the risk of serious illness or needless suffering, it is of no moment constitutionally. Deviations from a protocol, in and of themselves, are not a violation of the Eighth Amendment.

Additionally, the mere use of "unauthorized" drugs does not itself establish a violation of the Eighth Amendment. The use of the additional drug must actually cause "serious illness or needless suffering," as required by *Baze/Glossip*, irrespective of whether it is listed in the protocol. The use of lidocaine, an analgesic, alone does not establish any illness or any suffering as it is used to decrease pain. It in no way

adds terror, pain, or disgrace to an execution. *Baze*, 553 U.S. at 107 (Thomas, J., concurring) (concluding that Kentucky's protocol did not violate the Eighth Amendment because it did not "add elements of terror, pain, or disgrace to the death penalty," as required to be considered cruel historically, quoting 4 W. Blackstone, *Commentaries on the Laws of England* 376 (1769)). Lidocaine certainly does not "superadd" pain to an execution. *Bucklew*, 587 U.S. at 133 (explaining the Eighth Amendment forbids punishment that superadds terror, pain, or disgrace quoting *Baze*, 553 U.S. at 48). So, the use of this "unauthorized" drug lessens the pain and therefore, lessens the possibility of a violation of *Baze/Glossip*. The Eighth Amendment subclaim based on lidocaine makes no sense legally. A drug being "unauthorized" alone does not amount to a violation of the *Baze/Glossip* test.

This Court's Caselaw Regarding Stays of Executions

The traditional standard for granting a stay has four factors: (1) a strong showing that he is likely to succeed on the merits; (2) irreparable injury absent a stay; (3) whether the stay will substantially injure the other parties; and (4) the public interest. *Nken v. Holder*, 556 U.S. 418, 434 (2009). The first stay factor of likelihood of success on the merits is the most critical of the four factors and this Court has vacated a stay of execution based on the first factor alone. *Barr v. Lee*, 591 U.S. 979, 980 (2020).

In addition to the four traditional stay factors, this Court has explained that stays of executions are an "equitable remedy" that is not available as a matter of right

and all the "rules of equity apply" to requests for a stay. *Nelson v. Campbell*, 541 U.S. 637, 649 (2004).

In *Bucklew v. Precythe*, 587 U.S. 119, 151 (2019), this Court stated, in a § 1983 challenge to Missouri's protocol, that federal courts "can and should protect settled state judgments from undue interference by invoking their equitable powers" to "curtail" § 1983 suits "based on speculative theories." *See also Hill v. McDonough*, 547 U.S. 573, 585 (2006) ("The federal courts can and should protect States from dilatory or speculative suits").

Guardado's theory of getting enough etomidate to remain unconscious during the consciousness check but not enough etomidate to remain unconscious a few minutes later when the other drugs are administered requires a sort of "just right" Goldilocks scenario regarding the efficacy of etomidate is that exactly the type of speculative challenge that this Court said the lower federal court should "curtail" in *Bucklew*. The Eleventh Circuit characterized this claim as speculative. *Guardado*, No. 26-14027, slip. op. at 9 ("Guardado speculates that "an insufficient dosage of one drug could lead to unnecessary suffering from another," but there's no evidence in the record to support his speculation."). This Court in *Glossip* found similar assertions regarding the ceiling effect of midazolam to be too "speculative" to warrant relief. *Glossip*, 576 U.S. at 887-88. Guardado's theory regarding etomidate's ceiling effect is just as speculative as Glossip's was. While the plaintiff's experts testified at the evidentiary hearing in this case that more etomidate only effected the depth of hypnosis rather than the length, they were testifying as to the clinical doses, not as

to the effect of the massive dose in Florida's protocol. The Defendants' anesthesiologist testified that the massive dose in Florida's protocol is sufficient to render the inmate unconscious for the duration of the execution. This Court should curtail this speculative litigation by denying review.

No Conflict with this Court's Jurisprudence

There is no conflict between this Court's Eighth Amendment or stay jurisprudence and the Eleventh Circuit's denial of a stay of execution in this case. Sup. Ct. R. l0(b) (listing conflict with this Court as a consideration in the decision to grant review).

This Court in *Glossip* rejected a similar challenge to Oklahoma's three-drug protocol. The plaintiffs asserted that the first drug in that protocol would wear off during the execution and they could regain consciousness. They contended that the first drug in the protocol midazolam "was too weak to maintain unconsciousness and insensitivity to pain" during the execution. *Glossip*, 576 U.S. at 883. They argued, just as Guardado does, that the massive dose of first drug, which was "much higher than the normal therapeutic dose," was irrelevant because the first drug had "a ceiling effect—that is, at a certain point, an increase in the dose administered will not have any greater effect on the inmate." *Id*. at 883 (emphasis added). The Court reasoned that the "party contending that this method violates the Eighth Amendment bears the burden of showing that the method creates an unacceptable risk of pain" but the plaintiff's "own experts effectively conceded that they lacked evidence to prove

their case." *Id.* at 884. This Court also rejected the challenge to the protocol in part because plaintiff bore the burden and he did not meet that burden. *Glossip*, 576 U.S. at 881.

The *Glossip* Court's reasoning and conclusion applies equally to Guardado. As the district court and the Eleventh Circuit found, Guardado failed to meet his burden of proof at the evidentiary hearing. Guardado failed to prove that Florida ever used expired etomidate in any execution. Guardado seeks further factfinding based on what he views as discrepancies in the evidence or omissions in the testimony of the defense witnesses. But such arguments are attempts to shift the burden of proof to the Defendants. Inmates seeking to challenge a state's method of execution have a "heavy burden." *Baze*, 553 U.S. at 53. The heavy burden to establish that Florida's protocol violates the Eighth Amendment was Guardado's, not the Defendants. *Baze*, 553 U.S. at 41 (holding that the inmates had "not carried their burden of showing that the risk of pain from maladministration of a concededly humane lethal injection protocol").

This Court rejected an Eighth Amendment challenge to the federal lethal-injection protocol based on a very similar speculative theory and did so, in part, due to the successful track-record of federal executions using that protocol. In *Barr v. Lee*, 591 U.S. 979 (2020), the Court, in a § 1983 suit, rejected an Eighth Amendment challenge to the federal lethal injection protocol of a single dose of pentobarbital. Federal inmates asserted that the protocol would cause flash pulmonary edema which would temporarily produce the sensation of drowning or asphyxiation. *Barr*,

591 U.S. at 981. The district court enjoined the federal executions but the Supreme Court vacated the stays finding that the plaintiffs had not established that they are likely to succeed on the merits of their Eighth Amendment claim. *Id.* at 980. The Court noted that the protocol had been used "to carry out over 100 executions without incident." *Id*. This Court then vacated the stay, reasoning that conflicting expert testimony on consciousness does not merit a stay. *Id*. at 981.

Florida adopted its current protocol in 2017. *Long v. Sec'y, Dep't of Corr.*, 924 F.3d 1171, 1177 (11th Cir. 2019). Since 2017, there have been 51 executions carried out in Florida using the current etomidate protocol "without incident." *Lee*, 591 U.S. at 981. Florida's proven track record of successful executions trumps Guardado's speculation regarding the massive dose of etomidate wearing off during the execution which was rebutted at the evidentiary hearing.

No Conflict with the Lower Appellate Courts

Nor is there any conflict with either the federal circuit courts of appeals or the state courts of last resort and the Eleventh Circuit's decision denying a stay. As this Court has observed, a principal purpose for certiorari jurisdiction "is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law." *Braxton v. United States*, 500 U.S. 344, 347 (1991); *see also* Sup. Ct. R. l0(b) (listing conflict among federal appellate courts and state supreme courts as a consideration in the decision to grant review). Issues that have not divided courts or are not important questions of federal law do not merit

this Court's attention. *Rockford Life Ins. Co. v. Ill. Dep't of Revenue*, 482 U.S. 182, 184, n.3 (1987).

There is also no conflict between the federal circuit courts of appeal and the Eleventh Circuit's decision denying a stay. Guardado does not point to any case from any circuit court holding that an inmate, who was granted an evidentiary hearing regarding his Eighth Amendment challenge to the state's method-of-execution, should be granted a stay of execution to litigate the challenge further after the presiding judge found that the inmate failed to prove the claims and made factual findings rebutting the main allegation.

Both the Fifth Circuit and the Sixth Circuit have held that deviations from a protocol, in and of themselves, are not a violation of the Eighth Amendment. *Jordan v. Miss. State Executioner*, No. 25-70013, 2025 WL 1752391, at *2, n.2 & *3 (5th Cir. June 24, 2025) (denying a stay of execution to litigate a deviation from the protocol claim in an Eighth Amendment challenge to Mississippi's three-drug protocol where prison officials admitted they did not strictly follow the protocol regarding the consciousness checks); *Cooey v. Strickland*, 589 F.3d 210, 225 (6th Cir. 2009) (stating that even proof of medical negligence in past executions is "not sufficient to render a facially constitutionally sound protocol unconstitutional"). Furthermore, the Sixth Circuit has rejected a similar challenge to a state's protocol based on pulmonary edema. *In re Ohio Execution Protocol Litig.*, 946 F.3d 287, 289-91 (6th Cir. 2019) (rejecting an Eighth Amendment challenge to Ohio's midazolam protocol based on pulmonary edema because the inmate would be "deeply sedated").

There is also no conflict between the state courts of last resort and the Eleventh Circuit's decision denying a stay. Guardado does not point to any case from any state court of last resort holding that an inmate, who was granted an evidentiary hearing regarding his Eighth Amendment challenge to the state's method-of-execution should be granted a stay of execution to litigate the challenge further after the presiding judge made factual findings rebutting the main allegation in the complaint.

In sum, Guardado is seeking review of factual findings made after an evidentiary hearing but this Court does not grant review of a case to review the evidence and discuss specific facts. Nor does this Court grant review of denial of a motion to stay the execution to further litigate challenges to a lethal injection protocol that does not conflict with this Court's Eighth Amendment *Baze/Glossip* test or its stay standard. Nor does the Eleventh Circuit's decision denying a stay conflict with any identified decision of any federal circuit court or state court of last resort. Review of the first question should be denied.

QUESTION 2

This Court should not Grant Review of the Eleventh Circuit's Decision denying the Motion to Stay the Execution Finding no Abuse of Discretion in the District Court's Denial of Additional Discovery.

Guardado asserts it was a denial of due process for the district court to deny his motion for discovery. Pet. at 31. There is a threshold issue regarding the confidentiality of certain aspects of executions, such as the execution team and the supplier of the drugs. There is no conflict with this Court's due process caselaw

regarding the right to government information and the Eleventh Circuit's decision finding no abuse of discretion in denying additional discovery. Nor is there any conflict with the lower appellate courts and the Eleventh Circuit's decision finding no abuse of discretion. Furthermore, a question regarding whether a district court abused its discretion by partially granting and partially denying a motion for discovery is simply not certiorari-worthy. Review of the second question should be denied.

The Eleventh Circuit's Decision

The Eleventh Circuit unanimously found no abuse of discretion in the district court's partial denial of the motion for discovery. *Guardado v. Sec'y, Fla. Dep't of Corr.*, No. 26-14027, slip. op. at 11-13 (11th Cir. Nov. 2, 2026); *id.*, slip. op. at 18 (Pryor, Jill, J., concurring) (joining part IIC regarding discovery). The panel rejected Guardado's contention that a stay was necessary because he did not have the information and time to meet his burden of proof due to the lack of full discovery and the compressed evidentiary hearing, recounting the discovery requests that were granted. *Id.* at 11. The Court noted that the Defendants provided checklists, autopsy reports, and toxicology reports before the district court had ruled on the motion for discovery and that the district court had granted the motion in part, requiring Defendants to disclose updated drug logs through the present. *Id.* at 12. The district court also ordered the Defendants to submit unredacted drug logs for in camera review. *Id.* The Court noted that Guardado had not specifically identified how the discovery rulings had harmed his case or prevented him from proving a fact when

Eleventh Circuit precedent requires a showing of "substantial harm to a party's case" to amount to an abuse of a district court's wide discretion in discovery matters. *Id.* at 11-13 (citing *Arthur v. Comm'r, Ala. Dep't of Corr.*, 840 F.3d 1268, 1304-05 (11th Cir. 2016) (quoting *Bradley v. King*, 556 F.3d 1225, 1229 (11th Cir. 2009)).

Threshold Issue

This question creates a threshold issue regarding the secrecy of the information sought in discovery as a matter of state statutory law. *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Phillips Corp.*, 510 U.S. 27 (1993) (dismissing a writ of certiorari as improvidently granted because there was a threshold issue); *N.C.P. Mktg. Group, Inc. v. BG Star Productions, Inc.*, 556 U.S. 1145 (2009) (statement of Kennedy, J., respecting the denial of certiorari) (explaining that the petition for writ of certiorari was properly denied by the Court, despite the question being presented being a significant one that is worthy of review, because the case might require the Court to first resolve antecedent questions of state law). Much of the information Guardado sought in his discovery motion, including the pharmacy logs, is confidential under state law. *Hitchcock v. State*, 431 So. 3d 514, 522-24 (Fla. 2026) (affirming the denial of public records request and rejecting a due process claim of a right to discovery to pursue an Eighth Amendment challenge to the protocol citing *Lewis v. Casey*, 518 U.S. 343, 354 (1996) and federal circuit cases), *cert. denied*, *Hitchcock v. Florida*, 146 S. Ct. 2617 (2026). This threshold issue is an independent reason for this Court to decline review of this question.

No Conflict with this Court's Jurisprudence

There is no conflict between this Court's Due Process jurisprudence regarding discovery or the right to Government information and the Eleventh Circuit's decision finding no abuse of discretion in the partial denial of the motion for discovery. Sup. Ct. R. l0(b) (listing conflict with this Court as a consideration in the decision to grant review).

There is no federal constitutional right to information. *Houchins v. KQED, Inc.*, 438 U.S. 1, 10 (1978) (stating the Court "did not remotely imply a constitutional right guaranteeing anyone access to government information beyond that open to the public generally). The "Constitution itself is not a Freedom of Information Act." *McBurney v. Young*, 569 U.S. 221, 232 (2013) (quoting *Houchins*, 438 U.S. at 14).

Nor is there any federal constitutional right to discovery. *Lewis v. Casey*, 518 U.S. 343, 354 (1996) (disclaiming any right for an inmate to discover grievances and to litigate effectively once in court). The "Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded." *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977) (quoting *Wardius v. Oregon*, 412 U.S. 470, 474 (1973)). Guardado does not have any constitutional right to the Florida Department of Corrections' drug logs.

This Court has noted the problems that have been caused by the disclosure of the drug companies that supply drugs for executions. In *Glossip v. Gross*, 576 U.S. 863 (2015), this Court noted that its prior decision in *Baze* had upheld the most

common three-drug protocol which had allowed numerous states "to carry out the death penalty in a quick and painless fashion." *Id.* at 869. But anti-death-penalty advocates pressured pharmaceutical companies to refuse to supply the drugs used to carry out death sentences. *Id.* at 870. States then could no longer obtain the first drug in that common protocol and later replaced that first drug with another drug but that drug "also became unavailable" when "anti-death-penalty advocates lobbied the Danish manufacturer of the drug to stop selling it for use in executions." *Id.* at 871. This Court is well aware of problems that disclosing the drug companies cause to safe, reliable, and constitutional protocols.

Furthermore, a question regarding whether a district court abused its discretion by partially granting and partially denying a motion for discovery is simply not certiorari-worthy. This Court does not grant review of such mundane questions.

No Conflict with the Lower Appellate Courts

There is also no conflict with either the federal circuit courts of appeals or the state courts of last resort and the Eleventh Circuit's decision regarding discovery. As this Court has observed, a principal purpose for certiorari jurisdiction "is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law." *Braxton v. United States*, 500 U.S. 344, 347 (1991); *see also* Sup. Ct. R. l0(b) (listing conflict among federal appellate courts and state supreme courts as a consideration in the decision to grant review). Issues that have not divided courts or are not important questions of federal law do not merit

this Court's attention. *Rockford Life Ins. Co. v. Ill. Dep't of Revenue*, 482 U.S. 182, 184, n.3 (1987).

The federal appellate courts have upheld state laws designed to protect information regarding lethal injection protocols. *See e.g., Phillips v. DeWine*, 841 F.3d 405, 410 (6th Cir. 2016). No circuit court "has ever recognized the kind of due process right-of-access" claim regarding information related to executions. *Jones v. Comm'r, Ga. Dep't. of Corr.*, 811 F.3d 1288, 1293 (11th Cir. 2016) (citing *Zink v. Lombardi*, 783 F.3d 1089, 1109 (8th Cir. 2015), and *Trottie v. Livingston*, 766 F.3d 450, 452 (5th Cir. 2014)). Courts have upheld keeping the protocol itself secret. *See e.g.*, *Sepulvado v. Jindal*, 729 F.3d 413, 420 (5th Cir. 2013) (holding that Louisiana withholding the details of its execution protocol does not violate the Due Process Clause). Florida, in contrast, does not conceal the details of its protocol. Indeed, Florida's protocol is available on the internet.

But Florida does protect the source of its lethal injection drugs and it does so for a reason. The Eleventh Circuit, citing this Court in *Glossip*, has noted the problems caused by the disclosure of the names of drug companies that supply drugs for executions. The disclosure "will have predictable consequences: anti-death penalty advocates will hound the supplier of that drug until the supplier capitulates and ceases supplying the drug." *Jordan v. Comm'r, Miss. Dep't of Corr.*, 947 F.3d 1322, 1341-42 (11th Cir. 2020). Complete transparency is simply not possible for that reason.

Guardado cites no case from any federal circuit court or state supreme court holding that the partial denial of discovery motion is a violation of the federal due process clause.

In sum, the question raises a threshold issue. There is no conflict with this Court or the lower appellate courts and the Eleventh Circuit's decision finding no abuse of discretion in the district court denying the motion for discovery. And the question as presented simply is not certiorari-worthy. Review of the second question should be denied.

Accordingly, the petition should be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

JAMES UTHMEIER
ATTORNEY GENERAL OF FLORIDA

/S/ SCOTT A. BROWNE
SCOTT A. BROWNE
Chief Assistant Attorney General
Counsel of Record

Charmaine M. Millsaps
Special Counsel, Assistant Attorney General

Jason W. Rodriguez
Special Counsel, Assistant Attorney General

COUNSEL FOR RESPONDENTS

Office of the Attorney General
3507 E. Frontage Rd., Ste. 200
Tampa, Florida 33607
Telephone: (813) 287-7900
scott.browne@myfloridalegal.com
capapp@myfloridalegal.com