*** CAPITAL CASE ***

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 United States Court of Appeals for the Eleventh Circuit

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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

Linda McDermott
Counsel of Record
Sean Gunn
Office of the Federal Public Defender
Northern District of Florida
227 N. Bronough St., Suite 4200
Tallahassee, FL 32301
(850) 942-8818
linda_mcdermott@fd.org
sean_gunn@fd.org

Counsel for Petitioner

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REPLY ARGUMENT

This is a case about a pattern of serious deviations in Florida's lethal injection protocol, and FDOC's culture of noncompliance and nonadherence to their own standards and those endorsed by this Court. While Respondents seek to assure this Court that the varied violations, including those that have been altered with Wite-Out, will not continue, they simultaneously seek a rubber stamp approving their negligent approach to executions as constitutional "unless [a] deviation results in a violation of the *Baze/Glossip* test." Response at 23. But that substantial risk of serious harm is currently present for Jesse Guardado, and significantly painful executions have indeed likely happened before, unbeknownst to observers, due to Florida's archaic reliance on a paralytic drug.[1]

I. The State seeks to avoid thorough review of its pervasive and severe maladministration of the lethal injection protocol

A. Numerous factual disputes remain outstanding

This Court retains the final opportunity to withdraw the trust thus-far afforded to Respondents, and it should do so because they are demonstrably untrustworthy. While the lower courts failed to consider Guardado's claim within the context of Respondents' generalized malfeasance, this Court should review

[1] FDOC has clung to a three-drug protocol for more than 25 years, while other states have either abolished the death penalty entirely, moved to a one-drug protocol, or adopted some other method of execution. *See State-by-State Execution Protocols*, Death Penalty Info Ctr., *available at* https://deathpenaltyinfo.org/executions/methods-of-execution/state-by-stateexecution-protocols (last accessed Oct. 26, 2026).

Guardado's allegations holistically, considering the substantial risk posed to Guardado within a system permitting executions without any way of verifying the dosage or potency of drugs used; that credits an "investigation" that answered only one question, and only partially, out of several; and that treats its own set of guidelines as a mere suggestion. This is not merely a "fact-bound" inquiry, Response at 21, but rather one that rectifies the lower courts' myopic view of Guardado's Eighth Amendment claim.

On the eve of his execution, the pressing issues Guardado's identified with Respondents' administration of the protocol remain outstanding. Respondents have offered no insight regarding the dosage, quantity, or potency of etomidate used in numerous executions, instead crediting post-mortem toxicology findings as conclusive evidence of administration despite discrediting those same results when the data is problematic for the State. Response at 11; 17-18. Respondents take no issue with a system that is only capable of validating whether a drug, like etomidate, was administered at all, but that in multiple instances cannot verify the efficacy of that drug. Given the importance of the sedative drug as endorsed by this Court, *see Baze v. Rees*, 553 U.S. 35, 53 (2008), this glaring lack of evidence demands further review.

Respondents still do not deny recording inaccurate dosages of drugs in other executions, relying instead on the district court's erroneous, and premature, conclusion that there would be no Eighth Amendment violation regardless. App. A1 (Eleventh Circuit's Order), CA11-ECF 10 at 11-12. This logic undermines the protocol itself, which specifies dosages of each drug to minimize the risk of unnecessary pain.

App. A2 (District Court's Order), MDFL-ECF 1-4 at 2. For example, an improper or less potent dose of the ultrafast-acting etomidate combined with an insufficient dosage of potassium acetate implicates a death from conscious suffocation via rocuronium bromide, a manner of death deemed unconstitutional in the Eleventh Circuit. *Lee v. Comm'r, Ala. Dep't of Corr.*, No. 26-11864, 2026 WL 1651147 (11th Cir. Jun. 8, 2026). This is an example of the lower court's abuse of discretion in crediting Dr. Marcano, who could only defend this oversight by citing her personal knowledge of the execution team. App. A3 (Redacted Evidentiary Hearing Transcript), EH Tr. 240, 242.

To that end, Respondents' assurances that Dr. Marcano, the FDOC's Bureau Chief of Pharmacy, has in any way instituted cultural changes within the pharmacy's execution practices strains credulity, as (1) the errors persist in the records recently produced; and (2) Dr. Marcano's testimony at the evidentiary hearing was altogether unresponsive and devoid of content. Dr. Marcano was pressed at the hearing regarding the factual basis for every claim Guardado has asserted. In response, Dr. Marcano's answers included:

- "I'm not sure why" the worksheet FDOC contemporaneously prepares when removing execution drugs is destroyed, EH Tr. 231;
- "I am not familiar with the process that occurred before me" when explaining deviations that occurred before her tenure in July 2025, EH Tr. 236;
- "I wasn't able to resolve why" only seven vials of potassium acetate were removed for the Wainwright execution, EH Tr. 239;
- "I do not feel like that drug could have been shorted or over…So I don't know," EH Tr. 240 (regarding the 17 vials of potassium acetate removed for the Gudinas execution);
- "I can't speak for them, I don't know," as to why entries in FDOC's execution drug logs are not made contemporaneously, EH Tr. 241;

- "I can only speculate. I don't know," regarding the number of vials removed for the Wainwright and Gudinas executions, EH Tr. 242;
- "It is not clear to me how that was changed" when shown records that had been altered with Wite-Out, EH Tr. 243;
- "I don't know why that was written," EH Tr. 243;
- "It is not clear to me what happened on that entry," regarding the amount of rocuronium bromide used in the Gudinas execution, EH Tr. 246;
- "That's not clear to me. I don't know," when asked why someone would update the drug logs two days after an execution, EH Tr. 247;
- "[Y]ou would have to ask the execution team members [how lidocaine is tracked]." EH Tr. 249;
- "I can't speak for how they handled the log [for the removal of drugs in the Zakrzewski execution, which occurred under her tenure]" EH Tr. 252;
- "[L]ikely, there was something that occurred…because possibly they were off a couple days or something like that. But I'm speculating," EH Tr. 252 (concerning the drugs used in the execution of Zakrzewski being removed from the pharmacy two days early);
- "I know the right amount of [etomidate used in the execution of Gudinas] arrived [at the prison]…[b]ecause the execution could not have occurred without it." EH Tr. 255.

Moreover, Respondents' discussion of the lidocaine issue, CA11-ECF 10 at 23, is broadly reflective of their overall disregard for their own written protocol and the lower court's evasion of Guardado's claim: Respondents have yet to address relevant issues such as FDOC's handling, storage, and administration of lidocaine, and this information was only learned, for the first time, during the evidentiary hearing.

The totality of this evidence, which would not have been provided by Respondents outside of the confines of a federal evidentiary hearing, establishes multiple substantial risks arising from Defendants' maladministration. And the evidence only shows that multiple questions remain outstanding. These errors, in isolation or in tandem, produce a substantial risk of serious harm because they

implicate a fundamental portion of the lethal injection process: the potency, quality, quantity, and consistency of the drugs themselves.

B. Respondents drastically misread applicable law and cite precedent in a blatantly misleading manner.

To further distract from the underlying Eighth Amendment claim, Respondents misstate applicable law, adopting an overly narrow reading of *Baze* and *Glossip v. Gross*, 576 U.S. 863 (2015), that obfuscates the legal significance of serious, consistent, and prolonged maladministration of a uniquely perilous lethal-injection protocol. *Baze* does not state that a continuous pattern of wanton and dangerous non-compliance with a risky protocol could not amount to an Eighth Amendment violation. In reality, this Court in *Baze* established that "subjecting individuals to a risk of future harm—not simply actually inflicting pain—can qualify as cruel and unusual punishment" where it can be demonstrated that there is "a 'substantial risk of serious harm,' an 'objectively intolerable risk of harm.'" 553 U.S. at 49 (quoting *Farmer v. Brennan*, 511 U.S. 825, 842, 846 n.9 (1994)). In addressing the concerns surrounding the normal circumstances of the lethal injection protocol at issue, which were detailed over the course of a nearly week-long bench trial consisting of 20 witnesses, the Court found that the issues the petitioners asserted either were "minimal," or that the state had adopted detailed procedures to safeguard against the risk of substantial harm. 553 U.S. at 46, 54-55, 56.

Meanwhile in *Glossip*, the Court observed that during a three-day hearing preceded by discovery, "petitioners' own experts effectively conceded that they lacked evidence to prove their case beyond dispute." 576 U.S. at 884, 887. Moreover, the two

allegedly problematic prior executions cited were described by this Court as being significantly factually dissimilar to Glossip's potential execution—one of them had occurred in an entirely different state. *Id*. at 892-93. Neither case supports that, should continuous and egregious maladministration rise to the level creating a substantial risk of serious harm, or objectively intolerable risk of harm test, it would not violate the Eighth Amendment. To the contrary, *Baze* explicitly states "[i]t is uncontested that, failing a proper dose of [the first drug in a three-drug protocol] that would render the prisoner unconscious, there is a substantial, constitutionally unacceptable risk of suffocation from the administration of" the second and third drugs. *Id*. at 53.

Moreover, it bears mentioning that, in addition to being this Court's governing precedent when dealing with challenges to the administration of a state's execution protocol, both *Baze* and *Glossip* were cases raising highly fact-bound questions under the Eighth Amendment as to the constitutionality of lethal injection protocols—and this Court nonetheless granted the petitions for certiorari to address the significant questions raised. 553 U.S. at 40-41, 44-46; 576 U.S. at 867. And neither case contained a record with so many documented crucial, dangerous, and continuous systemic failures in administration of an inherently risky protocol as what Guardado demonstrated below.

Further, while Respondents cite *Cooey v. Strickland*, 589 F.3d 210 (6th Cir. 2009), and *Jordan v. Mississippi State Executioner*, No. 25-70013, 2025 WL 1752391 (5th Cir. June 24, 2025), for the proposition that protocol deviations "in and of

themselves, are not a violation of the Eighth Amendment," Response at 22, these cases focus on a much more limited set of alleged deviations. In *Cooey*, the basis for the challenge was merely one aborted execution and a general concern about IV placement. 589 F.3d at 224. The Sixth Circuit wrote that the inmate used "-little more than speculation and the argument that if failure happened once, it could happen again," *id*. at 224 n.3, and held that one "isolated mishap alone does not" give "rise to a 'substantial risk of serious harm,'" *id*. at 224 (quoting *Baze*, 553 U.S. at 50). In *Jordan*, the Fifth Circuit dealt with a facial challenge to Mississippi's three-drug midazolam protocol and only made one reference to protocol deviations—a brief footnote acknowledging that consciousness checks were not strictly followed in two executions. 2025 WL 1752391, at *2 n.2. These cases dealt with circumstances far afield of the nearly two-year-long saga of varied systemic failures by Respondents.

Respondents seek this Court's endorsement of the strategy of setting an execution date to avoid scrutiny of their lethal injection practices. Misstating this Court's precedent regarding "dilatory" or "speculative" suits, Respondents gloss over the fact that Guardado filed his complaint in the district court only a few weeks ago, outside the exigencies of a death warrant. *See Bucklew v. Precythe*, 587 U.S. 119, 125-26 (2019) ("the State scheduled Mr. Bucklew's execution for May 21. But 12 days before the execution Mr. Bucklew filed yet another lawsuit, the one now before us."); *Hill v. McDonough*, 547 U.S. 573, 577 (2006) ("On November 29, 2005, the Governor of Florida signed Hill's death warrant, which ordered him to be executed on January

24, 2006. . . .Hill then challenged, for the first time, the State's lethal injection procedure.").

Cognizant that diligence concerns had arisen in prior lethal-injection suits that were filed after the prisoner's death warrant had been signed, Guardado filed his action at the earliest opportunity, just weeks after he became warrant-eligible.[2] 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 over the surge of the last two years—he anticipated the opportunity to obtain reasonable discovery and meaningfully litigate his timely filed claim. Yet just a week after his claim was filed, his death warrant was signed.

Guardado seeks certiorari not because of an evidentiary failure on his part, but because Respondents have consistently withheld explanations for a series of glaring violations reflected in those records. The evidentiary hearing raised more questions than it answered and should not have been the end of this suit. 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.

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[2] While clemency is an executive function in Florida, the Florida Legislature has statutorily prescribed that an individual's death sentence cannot be carried out without the undertaking of the clemency process. Specifically, although the legislature has empowered the Governor to initiate, with the signing of a death warrant, the execution of a death-sentenced individual, the Governor is only permitted to issue such a warrant if "the executive clemency process has concluded[.]" *See* Fla. Stat. § 922.052(b), (c). Guardado's clemency proceedings concluded in August 2026.

II. Respondents bolster the lower courts' piecemeal, truncated review of Guardado's significant constitutional claim in order to avoid scrutiny

Respondents mischaracterize the due process aspect of Guardado's petition as wholly revolving around the district court's "partial denial of the motion for discovery." Response at 24; *see also* Response at 23, 25, 26, 29. But the issue is not about any singular non-dispositive ruling. Rather, the issue is Respondents' complete failure to engage in good faith during the litigation process, and the lower courts' tacit reward of that bad faith to avoid disrupting a scheduled execution date.

Respondents' position relies on the lower courts' conclusion that "without more," Guardado's Eighth Amendment claim is too speculative to justify further review. Response at 7, 8, 10, 11, 12. But it is precisely this contention that necessitates certiorari. Earlier this year, this Court declined to intervene regarding similar protocol maladministration allegations due to a lack of "evidentiary support for [the] claim[.]" *Trotter v. Florida*, 146 S. Ct. 755, 755 (Feb. 24, 2026) (Sotomayor, J., statement respecting denial of certiorari). Nevertheless, a member of the Court lamented that "[b]y continuing to shroud its executions in secrecy, Florida undermines both the integrity of its own execution process and, potentially, this Court's ability to ensure the State's compliance with its constitutional obligations." *Id.* at 756. Rather than heed such a warning, Florida has relied upon judicial noninterventionism to keep death-sentenced individuals "in a Catch-22" that prevents meaningful "determin[ation of] whether the lapses at issue are likely to lead to an Eighth Amendment violation." *Id.*

If the Court does not act, this pattern will repeat and worsen. Over the past year, numerous courts have expressed concerns with the risks of Florida's lethal injection protocol—particularly in light of the State's documented noncompliance. *See, e.g.*, *Walls v. Dixon*, No. 4:25-cv-488-MW-MAF, ECF 22 at 9-10 (district court "acknowledg[ing] that Mr. Walls has presented evidence demonstrating that he may well suffer a cruel death by experiencing a feeling akin to drowning as the result of pulmonary edema"); *Trotter*, 146 S. Ct. at 755 (Sotomayor, J., statement respecting denial of certiorari) (describing that "the record to date [in early 2026] is troubling"); MDFL-ECF 63 at 43 (district court describing that FDOC's "records contain a concerning number of errors"); CA11-ECF 13-1 at 20 (Eleventh Circuit judge describing Florida's "completely inappropriate" alteration of its logs as "even more concerning" than the original allegations of the State's documented protocol deviations). And, over the past year, the evidence of noncompliance has mounted and morphed into evidence of the State's knowing malfeasance and deliberate indifference. *See* MDFL-ECF 63 at 36 (recognizing that "Guardado has provided more evidence compared to that in Heath and Trotter").

It is clear that Florida has no interest in "ensuring that it conducts executions consistently with its approved protocol, and assuring all involved that it is preventing any infliction of needless suffering on those being executed in the State." *Trotter*, 146 S. Ct. at 756 (Sotomayor, J., statement respecting denial of certiorari). And, as Guardado's case demonstrates, Florida will not hesitate to weaponize a death warrant to curtail any viable truth-seeking processes. Thus, without this Court's

review, Florida will continue to evade constitutional oversight and individuals at risk of a torturous execution will be deprived of any meaningful opportunity to be heard.

In addition, Respondents attempt to justify their efforts to moot Guardado's action and defend the fast-track proceedings following the death warrant by constructing another basis for the fundamentally unfair process—that confidentiality eclipses Guardado's Eighth Amendment protections. Response at 23, 25-28. Respondents are wrong.

Respondents' drug logs and invoices that supported Guardado's maladministration claim were provided through a public records request in the fall of 2025. MDFL-ECF 55-2. The records were redacted to protect the identity of the manufacturer or distributer of the drugs. *See* Fla. Stat. § 945.10(1)(j). Thereafter, the redacted records were made public when a complaint was filed during the under-warrant litigation in *Walls*, No. 4:25-cv-0488, ECF 1 (N.D. Fla. Nov. 26, 2025), in November of 2025. After the complaint was filed, Respondents refused to disclose any further records, citing the same statute that previously caused the records to be redacted. Fla. Stat. § 945.10(1)(j).

The fact that the redacted records were disclosed pursuant to a public records request belies Respondents' argument that the records are confidential under state law. Response at 25. Moreover, Respondents filed records that are publicly available following the district court's scheduling of an evidentiary hearing. App. A5 (FDOC 2026 Execution Drug Logs), MDFL-ECF 55-8; App. A6 (FDOC Executioners' Logs), MDFL-ECF 56-1. Though the records comprised a fraction of the records Guardado

sought in his motion for discovery, Respondents did not ask that the records remain under seal or protected in any way. And, while Respondents' own drug logs have been public for almost a year, they have still secured large quantities of etomidate which belies their arguments that permitting discovery or a fair process will result in "anti-death penalty advocates" hounding "the drug supplier . . . until the supplier capitulates and ceases supplying the drug." MDFL-ECF 55-8 at 2-3.

Guardado brought this action before his death warrant was signed. He should not be wholly foreclosed from adequately presenting a claim under *Baze*/*Glossip* due to Respondents' actions and efforts to obscure and evade scrutiny of whether they are complying with their constitutional obligations in administering their protocol, particularly when their own records demonstrate significant malfeasance that has created a substantial risk of serious harm if Guardado's execution were to proceed.

III. Conclusion

The petition for writ of certiorari should be granted.

Respectfully submitted,

/s/ Linda McDermott
Linda McDermott
Counsel of Record
/s/ Sean Gunn
Sean Gunn
Office of the Federal Public Defender
Northern District of Florida
227 N. Bronough St., Suite 4200
Tallahassee, FL 32301
(850) 942-8818
linda_mcdermott@fd.org
sean_gunn@fd.org

Counsel for Petitioner

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