IN THE SUPREME COURT OF FLORIDA

BOBBY JOE LONG
Appellant,

v.

CASE NO. SC19-726
L.Ct. 84-CF-013346-A

DEATH WARRANT SIGNED
Execution set for May 23, 2019

STATE OF FLORIDA,
Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRTEENTH JUDICIAL CIRCUIT
IN AND FOR HILLSBOROUGH COUNTY, FL

INITIAL BRIEF OF THE APPELLANT

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PRELIMINARY STATEMET

In this appeal Bobby Joe Long challenges the denial of his Motion for Post-Conviction Relief After Death Warrant Signed. Mr. Long, the appellant, will be referred to by name and the Appellee, the State of Florida, will be referred to as the State.

Due to the time constraints for filing the Initial Brief after preparation of the record, the documents cited to herein identify the document by name. To the extent possible, after receipt of the record, the record page numbers have been added. All hearings on this matter are cited by the record page numbers.

STATEMENT OF THE CASE AND FACTS

On November 28, 1984, the Grand Jury for the Thirteenth Judicial Circuit, in and for Hillsborough County, returned an Indictment against Mr. Long for the offenses of first-degree murder, kidnapping, and sexual battery. The October 15, 1992 opinion of this Court outlines the procedural history of the case. *Long v. State*, 610 So. 2d 1268 (Fla. 1992), *cert. denied*, 510 U.S. 832 (1993). The opinion summarized the proceedings as follows:

On September 23, 1985, Mr. Long pled guilty to the three charges in this case. In addition, Mr. Long pled guilty to 7 additional counts of first-degree murder, 7

counts of sexual battery, 8 counts of kidnapping, and one probation violation. The plea permitted the State to seek a death sentence through a penalty phase for this murder, but agreed to a life sentence for the other seven. The State was prohibited from using the seven murder convictions as aggravation, but any convictions entered prior to the plea agreement could be used. Mr. Long agreed not to contest the admissibility of his confession or of physical evidence found in his car and apartment.

The trial court sentenced Mr. Long to life in prison on all counts except those related to Michelle Sims and revoked Mr. Long's probation.

Mr. Long successfully moved to withdraw his plea in the trial court in October-November of 1985.

On December 12, 1985, Mr. Long changed his mind and elected to proceed with the plea. Defense counsel advised the trial court that Mr. Long wished to maintain his plea and would not withdraw it. Mr. Long was placed under oath and affirmed that he wished to maintain the plea. At the conclusion of the penalty phase, Mr. Long was sentenced to death. His plea was affirmed on appeal, but the death sentence was vacated and the case remanded to the trial court for a second penalty phase. *Long v. State*, 259 So.2d 286 (Fla. 1988)

Prior to the second penalty phase, Mr. Long moved, *pro se*, to withdraw his plea in the trial court. Mr. Long claimed that the consequences of the plea had not been fully explained to him. The motion was denied.

A new penalty phase was then conducted. The jury recommended death by a unanimous vote. The trial court sentenced Mr. Long to death, finding four aggravating factors. The trial court found both statutory mental health mitigators. The trial court found the aggravation outweighed the mitigation, but assigned no specific weight to each factor, and sentenced Mr. Long to death.

The validity of the plea and sentence of death were affirmed. *Long v. State*, 610 So.2d 1268 (Fla. 1992), *cert. denied*, 510 U.S. 832 (Fla. 1993)

Mr. Long's first Motion for Post-Conviction Relief was filed on December 29, 1994. The motion was denied as facially insufficient on August 1, 1995. Mr. Long appealed to this Court, which dismissed the appeal pursuant to the State's argument. A second motion for postconviction relief was filed on October 4, 1995.

Years of litigation then ensued over the public records requests. Ultimately, in 1998, this Court tolled the time for the filing of motions due to funding

constraints during the reorganization of CCRC into three districts.

On October 25, 1999, CCRC was removed from representing Mr. Long and counsel from the Registry was appointed.

An Amended Motion to Vacate Judgments of Conviction and Sentence was filed by registry counsel on March 13, 2003 and a second Amended Motion to Vacate Judgments of Conviction and Sentence was filed on March 31, 2003. The motion raised claims for relief as follows: Claim 1- Mr. Long never actually entered a lawful plea; Claim II- Mr. Long is severely brain damaged, thus requiring special care in order to understand the plea agreement. Counsel was ineffective in failing to explain to Mr. Long the full consequences of the plea, did not go over the written plea agreement point by point, did not provide Mr. Long with a written copy of the plea agreement, did not provide Mr. Long an adequate opportunity to read the plea agreement prior to the entry of the plea; Claim III- The plea was never formally accepted, no factual basis for the plea exists in the record, the plea was not voluntarily, knowingly, and intelligently made, and the plea agreement has been repeatedly violated; Claim IV-trial counsel was ineffective, an adversarial testing of the State's case did

not occur by counsel's failure to file a motion to suppress, the convictions and death sentence are unreliable ; Claim V-prosecutorial misconduct rendered the convictions and sentences fundamentally unfair; Claim VI- counsel was ineffective in failing to pursue a motion to suppress; Claim VII-the court and prosecutor misled the jury as to sentencing responsibility; Claim XIII (as labeled in the motion)- second penalty phase counsel was ineffective in failing to investigate, obtain, and present evidence of four witnesses to support the withdrawal of the plea.

The trial court entered an order granting an evidentiary hearing on Claims II and III-3 of the motion, denying the remainder of the claims, and denying the motion to amend.

The trial court's Final Order Denying Defendant's Amended Motion to Vacate Judgments and Sentences was entered on November 29, 2011. This Court affirmed the denial of all post-conviction claims in *Long v. State*, 118 So.3d 798 (Fla. 2013).

Mr. Long then filed a federal petition for writ of habeas corpus in the U.S. District Court, Middle District in August 2013. The petition was denied on August 30, 2016. The 11th Circuit Court of Appeals denied a COA request on

January 4, 2017. *Long v. Secretary, Dept. of Corrections*, Case No. 16-16259-P (USDA Jan. 4, 2017).

During this same period Mr. Long filed a successive motion for postconviction relief in state court premised on newly discovered evidence grounded on improper testing and testimony of FBI lab analyst Michael Malone in his case. The trial court denied relief on November 4, 2014. This Court affirmed the denial of relief in *Long v. State*, 183 So.3d 342 (Fla. 2016).

After the issuance of the *Hurst* decisions, Mr. Long filed a successor motion for postconviction relief on January 3, 2017. The trial court denied relief on April 27, 2017. Mr. Long appealed to this Court, which directed him to respond to an Order to Show Cause on September 25, 2017. This Court denied *Hurst* relief on January 29, 2018 in *Long v. State*, 235 So.3d 293 (Fla. 2018), *cert. denied*, 139 S.Ct. 162 (2018).

On April 23, 2019, a death warrant was signed by the Governor, with execution set for May 23, 2019.

Mr. Long made public records requests of the following agencies: the medical examiner's office, the Department of Corrections [DOC], and Florida Department of Law Enforcement[FDLE]. Each agency objected to the production of documents requested. The trial court conducted a

hearing on the requests on April 30, 2019. The trial court sustained the objections of the medical examiner, FDLE, and DOC except to order DOC to provide the past five years of Mr. Long's medical records as well as records from gallbladder surgery between the years 2011-13. The trial court refused to require any agency to affirm whether the requested records existed and refused to conduct an *in camera* inspection of any documents. Mr. Long filed a renewed motion to obtain public records on April 30, 2019, which was denied.

Mr. Long filed a Motion for Postconviction Relief After Death Warrant Signed on April 29, 2019, pursuant to the order of the trial court. Mr. Long raised the following claims for relief: (1)Scientific Advances Since 1989 Constitute Newly Discovered Evidence That Requires a New Resentencing Proceeding; (2) Florida's Three Drug Lethal Injections Protocol is Unconstitutional On Its Face and as Applied to Bobby Joe Long; (3) The Totality of the Punishment Imposed by the State Violates the Eighth Amendment and the Precepts of *Lackey*; (4) The Denial of *Hurst* Relief to Bobby Joe Long Violated the Eighth Amendment's Ban on Cruel and Unusual Punishment and the Fourteenth Amendment Guarantees of Equal Protection and Due Process; (5)The Denial of Bobby Joe Long's Requests Related

to Defense Execution Witnesses is Unconstitutional, and (6) The Eighth Amendment Bars the Execution of The Severely Mentally Ill.

Mr. Long also filed a Motion For Stay of Execution Pending Florida Supreme Court's Decision in *Owen v. State*, which was denied by the trial court on May 1, 2019.

The State's Response was filed on April 30, 2019.

On May 1, 2019, the trial court conducted a CMC Hearing and reviewed issues such as outstanding public records requests.[P6097] The trial court summarily denied Claims 1,3,4,5 and 6.[P6055] The trial court granted an evidentiary hearing on Claim 2a, as applied to Mr. Long, but denied the remainder of Claim 2.[P6016-7;46]

The testimony at the evidentiary hearing on May 3, 2019 is summarized as follows:

Dr. Steven Yun is a practicing anesthesiologist in California.[P6171] He has used etomidate in his practice.[P6175] Etomidate is a hypnotic agent used to induce unconsciousness to patients before surgery.[P6177] The standard dosage is .02 milligrams per kilogram of patient weight.[P6178] Injections of etomidate can cause moderate pain.[P6211-2] 200 milligrams of etomidate would produce a very reliable deep state of unconsciousness and would be considered a lethal dose without lifesaving

measures.[P6178-9] Etomidate is a burst suppressant.[P6179-80] A 20 milligram dose renders unconsciousness in 30 seconds.[P6187]

Dr. Yun did not believe etomidate would interfere or cause Mr. Long pain due to his epilepsy.[P6180] Epilepsy is not a contraindication for the use of etomidate in surgical application.[P6181] A 200 milligram injection of etomidate would reduce the risk of seizure.[P6182] Dr. Yun admitted etomidate is used as a pre-surgical drug used for mapping epilepsy to provoke epileptic spikes in small doses.[P6202-4] Dr. Yun testified whether etomidate induces seizures is controversial due to small study size, flawed studies, and inconclusive results.[P6205] He did not read the study cited to by Dr. Lubarsky that reaches a contrary conclusion.[P6206] Etomidate can cause myoclonus, which is involuntary movement in an extremity.[P6208]

A 200 milligram injection would eliminate the possibility of responding, feeling, or perceiving any noxious stimuli.[P6183] A 200 milligram dose should render a patient unconscious for 30 minutes, at the very least.[P6183] This is due to the 3-5 hour half-life.[P6184]

Dr. Yun did not believe brain damage would interfere with etomidate.[P6186]

Dr. Yun agreed it is important that the IV line in an execution be uncompromised.[P6215] A compromised line would interfere with the drugs working properly.[P6216]

Clinical pharmacists Silas Raymond is a licensed Florida pharmacist.[P6229] He works as a compounding pharmacist.[P6230] A compounding pharmacist, under the direction of a prescription from a doctor, will compound a medication specific to a patient.[P6237]

Dr. Raymond was familiar with pentobarbital and fentanyl.[P6238] Both are Class II substances.[P6239] A pharmacy with the appropriate license from the DEA can purchase both drugs.[P6239] Dr. Raymond can compound each drug.[P6240] A drug can be compounded when it is not available or on back-order.[P6241]

Dr. Raymond did not determine whether a manufacturer would sell pentobarbital or fentanyl for an execution.[P6243]

Stephen Whitfield testified he is a registered pharmacist with DOC.[P6261] The trial court prohibited Mr. Whitfield from answering defense counsel's questions about his involvement with the lethal injection protocol, present or past.[P6264] As part of his job he purchases drugs for DOC.[P6166] He can purchase Class II drugs.[P6266]

Mr. Whitfield had no knowledge whether DOC had attempted to purchase pentobarbital or fentanyl during the time frame of this execution, but DOC is restricted by the manufacturer from purchasing pentobarbital.[P6270;2;3] Mr. Whitfield believed the purchase of fentanyl was also restricted.[P6274] Other states which use pentobarbital or fentanyl purchase it from a compounding pharmacy.[P6270; 6273] Mr. Whitfield was not aware of any attempt by DOC to purchase pentobarbital from a compounding pharmacy.[P6271] Mr. Whitfield did not know whether either of those drugs was readily available for purchase by DOC.[P6277-8] DOC has used drugs in executions despite objections from manufacturers.[P6285] Mr. Whitfield did not know why the State of Florida has not adopted a single drug lethal injection protocol.[P6271]

Dr. David Lubarsky testified he is currently employed by the University of California as vice chancellor for human health sciences and CEO of the UC Davis Health System.[P6295] He is an anesthesiologist.[P6295] Dr. Lubarsky reviewed Mr. Long's medical records, the execution protocol and scientific papers on etomidate.[P6302-3]

Dr. Lubarsky testified etomidate is a imidazole derivative which is a hypnotic or sedative drug.[P6306] It is an ultra-short acting anesthetic like thiopental, with a

half life of approximately 2.7 minutes and its effects terminate in somewhere between 4 and 8 minutes.[P6306] It has no analgesic properties, but is used medically for a very short period in order for a patient to tolerate something such as intubation.[P6330]

Almost everyone will experience pain upon injection with etomidate.[P6306] The smaller the vein, the greater the pain.[P6307] Etomidate will not increase pain in someone with epilepsy, but may unmask a seizure, which will in turn complicate the clinical picture of determining whether or not the etomidate has taken effect.[P6307]

Dr. Lubarsky testified there is a very large chance the amount of etomidate being utilized in the protocol will be insufficient to keep Mr. Long unconscious and insensate during the course of the execution.[P6309] The dose delivered during an execution has been shown to wear off in about eight minutes.[P6309] This is due to the interplay between pharmacodynamics and pharmcokinetics.[P6310-2] For someone such as Mr. Long, with a heightened state of arousal, four to five minutes would be the expected time before the drug wears off, even with the massive dose.[P6314] It will be difficult, if not impossible, to adequately perform a consciousness evaluation due to the possibility of a seizure with fine motor movements induced

by the etomidate.[P6314] Any prolongation of the process to determine whether or not Mr. Long is unconscious will result in an inadequate amount of anesthetic in the body when the rest of the execution is carried out.[P6314]

Myoclonus is one of the side effects of etomidate.[P6315] Myoclonus could be confused with a seizure, as the two would be very difficult to differentiate.[P6315] Myoclonus or a seizure carry the risk of dislodging the IV line.[P6316]

Etomidate is contraindicative as an anesthetic for people with epilepsy as it can induce seizures.[P6316] Etomidate has been known to induce seizures in therapeutic treatments.[P6317] Etomidate is used as a pre-surgical drug to locate temporal lobe epilepsy because it will induce cells to fire abnormal- when you want to provoke epileptic spikes.[P6317] Etomidate can even trigger seizures in non-epileptic patients.[P6318] A seizure could interfere with the integrity of the IV lines.[P6319]

Dr. Lubarsky testified there was no doubt in his mind that there is a marked chance, a very high chance, that the anesthetic delivered will be insufficient and not prevent pain and suffering for Mr. Long due to his medical condition and the drugs being used.[P6323]

Dr. Frank Wood, a neuroscientist with a specialty in neuroimaging, performed PET scans on Mr. Long in a Pasco county case.[P6343] In 1994 he testified as to the extent of Mr. Long's brain damage.[P6344] Dr. Wood was prohibited from testifying as to the extent of Mr. Long's brain damage at this hearing.[P6346] Mr. Long has hypo-metabolism in the left anterior medial temporal lobe.[P6348] Mr. Long has severe TBI.[P6349)

Seizures from temporal lobe epilepsy are not usually visible to the naked eye.[P6350] It would take a trained observer to identify a temporal lobe epileptic seizure.[P6351]

The statements contained in Dr. Lubarsky's affidavit regarding the Branch and Jimenez executions was proffered to the trial court.[P6354] Dr. Wood's 1994 testimony was marked as an exhibit for inclusion in the record.[P6355]

The State then called Dr. Daniel Buffington, a pharmacologist.[P6358] He testified etomidate can cause seizures in small doses, but that it suppresses seizures in higher doses.[P6365] The 200 milligram dose in the protocol is sufficient to render someone with epilepsy unconscious.[P6367] The use of diazepam would also reduce seizures, anxiety, and is an anti-myoclonic.[P6370]

Etomidate is preferred for brain damaged individuals.[P6372]

The trial court entered an order denying relief on May 6, 2019. As to Claim 1, the trial court denied relief finding Mr. Long had not sufficiently alleged any scientific advances that were not available to him or cite to any advanced technique available to him in the last year.[P5543] The trial court rejected new research studies and new opinions based on previous data as newly discovered evidence.[P5544] The trial court further found any new evidence of the type alleged by Mr. Long was unlikely to result in a reduced sentence.

As to Claim 2, the trial court found as to 2A, that the testimony of Dr. Yun was more credible than that of Dr. Lubarsky on the issue of whether the injection of etomidate would produce a sufficient level of unconsciousness for a period of at least 30 minutes and eliminate seizure activity.[P5556-7] The trial court also concluded Mr. Long failed to demonstrate etomidate is sure or very likely to cause him serious illness and needless suffering.[P5557] The trial court further found Mr. Long failed to meet his burden under the second prong because he did not establish pentobarbital or fentanyl are readily available to DOC or

that either of those drugs would entail a significantly less severe risk of pain.[P5557-8]

As to 2B and 2C, the trial court denied relief that the three drug protocol and the use of etomidate are not cruel and unusual punishment, relying on this Court's prior opinions upholding the protocol.[P5559]

As to Claim 3, the trial court rejected Mr. Long's *Lackey* claims based on this Court's rejection of these claims. [P5560] As to Claim 4, the trial court found Mr. Long's *Hurst* claim to be untimely, successive, and procedurally barred.[P5561] As to Claim 5, found DOC's policies regarding defense execution witnesses did not violate Mr. Long's constitutional rights and the denial of access to a phone during the execution for Mr. Long's attorney did not violate the Sixth or Eighth Amendments.[P5563] As to Claim 6, the trial court denied relief on Mr. Long's claim he was exempt from execution due to severe brain damage because the claim was procedurally barred and had been previously rejected by this Court.[P5564]

Mr. Long timely filed his appeal.

SUMMARY OF THE ARGUMENT

Issue I: The trial court erred by not conducting an evidentiary hearing and summarily denying Mr. Long's claim

he is entitled to a new penalty phase based on newly discovered evidence in neuroimaging and neuroscience. There is a reasonable probability a new jury would not unanimously recommend a death sentence if this evidence was presented at a new penalty phase.

Issue II: Mr. Long's execution should not proceed because the anticipated effects of etomidate on him, due to his unique medical conditions, violate the Eighth Amendment. Florida's current three drug protocol violates the Eighth Amendment where there are other methods of execution that lessen the substantial risk of undue suffering. The use of the Etomidate Protocol violates the Eighth Amendment and the trial court should have conducted an evidentiary hearing on Mr. Long's general challenge to it.

Issue III: Because of the inordinate length of time Mr. Long has spent in solitary confinement on death row, adding his execution to that punishment constitutes cruel and unusual punishment which violates the Eighth and Fourteenth Amendments to the United States Constitution, and the trial court erred in summarily denying this claim without an evidentiary hearing.

Issue IV: The denial of *Hurst* relief to Mr. Long violates the Eighth Amendment ban on arbitrary and

unreasonable punishment where the Court's retroactivity cut-off has resulted in continuing unconstitutional denials of relief and violates the Fourteenth Amendment's guarantee of equal protection and due process.

Issue V: The undue restrictions by the Department of Corrections on Mr. Long's designated legal witness, coupled with the denial of his request for a second witness violates his right to due process under the Fourteenth Amendment.

Issue VI: The Eighth Amendment bars the execution of those with severe mental illness under the evolving standards of decency analysis.

Issue VII: The denial of Mr. Long's public records requests to the medical examiner, Florida Department of Law Enforcement, and the Department of Corrections violate due process and Equal Protection.

STANDARD OF REVIEW

The claims presented in this appeal are constitutional in nature and involve mixed questions of law and fact. Claims summarily denied without a hearing require Mr. Long's factual allegations to be taken as true by this Court when reviewing the trial court's rulings *de novo*. *Peedee v. State*, 748 So.2d 253, 257 (Fla. 1999).

IN reviewing postconviction claims after an evidentiary hearing, the appellate court accepts the factual findings of the trial court provided they are supported by competent, substantial evidence and reviews the trial court's application of the law to the facts *de novo*. *Douglas v. State*, 141 So.3d 107 (Fla. 2012).

ARGUMENT

ISSUE I

THE TRIAL COURT'S SUMMARY DENIAL OF MR. LONG'S CLAIM THAT SCIENTIFIC ADVANCES IN THE ASSESSMENT, QUANTIFICATION AND CONSQUENCES OF BRAIN INJURY AND BRAIN DAMAGE SUFFERED BY MR. LONG CONSTITUTE NEWLY DISCOVERED EVIDENCE ENTITLING HIM TO A NEW PENALTY PHASE WAS ERROR.

The Death Warrant in Mr. Long's case was signed on April 23, 2019. Mr. Long was sentenced to death on July 21, 1989. The sentencing proceeding resulting in this death sentence occurred almost thirty years ago- from June 26-29, 1989. The study of the brain, and, in particular, scientific and neurologic advances directly relevant to Mr. Long's brain damage and adolescent development since 1989 render the previous penalty phase unconstitutional. These scientific advances constitute newly discovered evidence entitling Mr. Long to a new penalty phase.

Although scientific evidence relevant to Mr. Long's mental health and brain function were presented in 1989, compelling and significant advances in the areas of brain

damage, the testing for brain damage, the relationship between brain damage and behavior, juvenile brain development, and the significance of brain trauma to the developing juvenile brain have emerged along with the development of the Adverse Childhood Experiences (ACES) evaluation, all of which were unavailable in 1989.

The trial court's summary denial of this claim was error. A postconviction movant is entitled to an evidentiary hearing when he presents a facially sufficient claim that requires a factual determination. *Troy v. State*, 57 So.3d 828, 833(Fla. 2011). To the extent there is any question about whether or not the movant has made a facially sufficient claim requiring a factual determination, the trial court must presume that an evidentiary hearing is required. *Id*. The trial court may only deny a claim without a hearing when it is legally insufficient, procedurally barred or refuted by the record. The motion and attachments supporting Claim 1 satisfied this requirement.

Mr. Long made a facially sufficient claim. The new scientific advances in neuro-imaging coupled with advances in the identification of TBI and CTE would refute the State's arguments in 1989, shed new light on the severity of Mr. Long's deficits, and provide new information of the

nexus between Mr. Long's deficits and the offenses. Mr. Long established the necessary baseline for an evidentiary hearing on this claim. To uphold the denial of an evidentiary hearing, the record must conclusively demonstrate the movant is not entitled to relief. *Hutchinson v. State*, 17 So.3d 696, 700 (Fla. 2009). In this case, the summary denial should be reversed and this case remanded for an evidentiary hearing after Mr. Long has had sufficient time to prepare.

Mr. Long has established that developments in neuroscience and neuroimaging, particularly the NeuroQuant imaging in December 2018 and the test for CTE, available for the first time in April 2018, as well as new developments related to TBI, its effect on the juvenile brain, and the nexus between Mr. Long's brain damage and mitigation qualify as newly discovered evidence. Mr. Long has brought his claim within one year of these developments as required by Fla. R. Crim. P. 3.851.

In order to constitute newly discovered evidence the evidence must not have been known to the party, defense counsel, or the court at the time of trial and it must appear that the defendant or counsel could not have known of it by the use of due diligence. *Marek v. State*, 14 So.3d 985, 990 (Fla. 2009). In order to obtain a new penalty

phase the newly discovered evidence must be such that it would probably result in a life sentence. *See Williamson v. State*, 961 So.2d 229, 237 (Fla. 2007). Advances in science, including medical studies, reports, articles and advances in testing and diagnostics can be considered newly discovered evidence. *See Hildwin v. State*, 951 So.2d 784, 788-89 (Fla. 2006); *Henry v. State*, 125 So.3d 745, 750-51(Fla. 2013)(leaving open possibility that scientific articles based on new data and scientific information as opposed to a compilation of "previously existing" data may constitute newly discovered evidence); *Clark v. State*, 995 So.2d 1112, 1113 (Fla. 2d DCA 2008). In this case, the development of new technologies related to the diagnosis and effect of traumatic brain injury [TBI] and the diagnosis of CTE and related matters are newly discovered evidence entitling Mr. Long to a new penalty phase.

The State argued this claim should be denied as untimely.[P6037-9] In response to questioning by the trial court on the question of timeliness, defense counsel stated the NeuroQuant imaging did not become available until December 2108 and a new test to diagnose CTE prior to death had only become available earlier in April 2019, thus well within the one-year time period for raising newly discovered evidence claims.[P6040-3] Mr. Long has

diligently been pursuing this claim at the time the warrant was signed by making requests for his medical records, a pre-requisite for testing, but DOC has not complied with the requests and/or has not provided all the records. Thus, there is no procedural bar to support summary denial.

Nor does the record refute Mr. Long's claim. As this Court's prior opinions have outlined, Mr. Long presented mental health testimony during the 1989 penalty phase. However, the State aggressively challenged the mental health testimony, attacking the science and diagnostic tools on which it was based.

During the penalty phase in 1989 testimony was presented by Dr. John Money about Mr. Long's head injury he sustained in a motorcycle accident at age 20. [Attachment 2 to postconviction motion P488-90] Evidence was presented Mr. Long was injured on the left side of his face and head and he was rendered unconscious. Expert testimony in 1989 identified the primary long-term damage to Mr. Long in terms of physical injury to the retina, the left facial nerve, damage to the left inner ear, and brain damage.

The defense questioned Dr. Money about the effect of the head injuries on Mr. Long's behavior. During cross-examination by the State, the prosecutor emphasized that the "study of the effect of the brain on human behavior is

an inexact science." and there was not, and might never be, answers to how the brain affects human behavior.[Attachment 3 to postconviction motion, p.571-72] Dr. Money admitted the science was not exact, it was unknown whether more answers would be provided about the effect of the brain on human behavior in the future, and that "the explanation for the entire cause of the disease is the one that requires still a lot more research work."[Attachment 3 to postconviction motion, p.572] When asked by the prosecutor if there would be an answer in the "next century… as to why Bobby Joe Long killed and why he raped", Dr. Money responded he did not think that could be done scientifically between 1989 and 2000, but "with science, you never know." [Attachment 4 to postconviction motion, p.586]

Dr. Robert Berland also testified as a defense expert in 1989. During cross-examination by the State, Dr. Berland testified he administered the MMPI because, at that time, it was the "most objective, the most robust, the best" diagnostic tool.[Attachment 5 to postconviction motion, p.677] Again, the prosecutor focused on the probability that "down the road other tests might be developed that are better than the MMPI?". Dr. Berland admitted this was possible, agreeing that if better tests were developed he

would discard the results of the MMPI that formed the basis of his testimony. The prosecutor emphasized the study of the mind is "a continuous process" and that "… we certainly do not have all the answers to how the brain affects human behavior?".[Attachment 5 to postconviction motion, p.678] The prosecutor invited the jury to disregard mitigation stemming from Mr. Long's brain damage because the science was incomplete and subject to revision or rejection in the future. The prosecutor denigrated Mr. Long's brain damage claim by emphasizing the limits of science and diagnostic tools available in 1989.

In his motion Mr. Long outlined the advances in both neuroimaging and significant advances in neuroscience in understanding and identifying the multitude of consequences that result from TBI, the likelihood Mr. Long has CTE, the relationship between brain damage and behavior, juvenile brain development and the significance of sustained or repeated brain trauma on the juvenile brain, and the development of the ACES scale. Because the trial court summarily denied Mr. Long's claim, the factual allegations therein must be accepted as true. The factual basis for the claim as set forth in the motion and attachments is summarized below:

Magnetoencephalography, specialized PET scans, and far superior imaging clarity to quantify brain damage/injuries, assessment of chronic traumatic encephalopathy, and the use of new technologies to understand the consequences that result from TBI, testing regarding TBI, the relationship between brain damage and behavior, juvenile brain development, and the significance of brain trauma to the developing brain as well as the development of the Adverse Childhood Experiences (ACES) diagnostic tool constituted newly discovered evidence.[Motion, P438-9] Mr. Long did not rely solely on articles and studies. He attached the affidavits of Dr. Erin Bigler, a neuropsychologist specializing in brain injury and neuroimaging and how brain injury alters behavior [Attachment 6 of postconviction motion P500-640]; Dr. Ronald Savage, a specialist in TBI, with an emphasis in how TBI affects the juvenile and pediatric brain [Attachment 7 of postconviction motion P642-672]; the declaration of Dr. Laurence Steinberg, a developmental psychologist specializing in adolescence development ages 10-20 with extensive experience in the treatment of juveniles under the law [Attachment 8 of postconviction motion P674-756]; the affidavit of Dr. Frank Wood, a psychologist and professor emeritus of neurology at Wake Forest University School of Medicine, who performed a

PET scan on Mr. Long [Attachment 9 of postconviction motion P758-770; the affidavit of Dr. James McGovern, a clinical neuropsychologist with experience in the areas of brain/behavior relationships and ACES evaluation protocol. [Attachment 10 of postconviction motion P772-780]. The experts, in their affidavit or declaration, outlined the newly discovered evidence applicable to Mr. Long as follows:

Dr. Bigler, using data obtained from Mr. Long's medical and clinical records, reviewed the 1974 motorcycle accident Mr. Long suffered at age 20. Mr. Long was unconscious for at least two hours and suffered severe trauma to the left side of his head. According to Dr. Bigler, this injury using current diagnostic criteria, would be classified as a severe TBI [traumatic brain injury] and not the "concussion" it was diagnosed as in 1974. The diagnosis of a severe TBI is buttressed by a VA assessment of Mr. Long, which would demonstrate permanent neurological findings of a severe TBI which caused structural damage to the brain. Further buttressing this new diagnosis are observations from Dr. Dorothy Lewis in 1986, that Mr. Long's hypersexualized behavior first became evident while he was still in casts after this injury.

According to Dr. Bigler, what had been guesswork in 1989 to try to determine whether Mr. Long's brain was damaged, would be straightforward today with the advances in technology. The PET scans done by Dr. Wood are of poor quality and not interpretable, although a graph prepared depicted a very deviant value for Mr. Long in the region of the amygdala, however many questions remained in 1989. Dr. Bigler maintained that with the use of technology today, that did not exist in 1989, it is possible to verify the presence of pathology, obtain higher magnetic field strength, and utilize post-processing methods to answer the questions in this case that could not be answered in 1989. Scans and neuroimaging today are triple in sensitivity in detecting abnormalities, especially those from TBI than those used in 1989. These unanswered questions were those exploited by the prosecutor in attacking the mental health and brain damage evidence in Mr. Long's 1989 penalty phase. Dr. Bigler recommended updated neuroimaging of Mr. Long's brain using PET and MRI scans, utilizing the NeuroQuant method to integrates the new PET and MRI scans to specifically identify and quantify the extent of damage in specific areas, such as the amygdala, and other diagnostic tools such as an EEG, MEG, or MRI with spectroscopy and diffusion tensor imaging to identify underlying brain

pathology which would allow an accurate assessment of Mr. Long's neurological and neuropsychiatric disorders.

Dr. Savage advocated updated neurological testing for Mr. Long, which would not allow a "look inside the brain" with the use of fMRI, MRI with DTI, and SPECT scan that could identify specific brain damage from TBI. The identification of specific damage would allow a comparison of the TBI and resulting brain damage Mr. Long suffered with that of normal brain development, which was not available in 1989. Advances in information about the development of the adolescent and juvenile brain, of which Mr. Long was at the time of his head injuries, would allow additional testimony about the effects of repeated brain injury from childhood forward that Mr. Long suffered and why he exhibited maladaptive behaviors as an adult.

Dr. Steinberg would testify as to the developments in the understanding and function of the adolescent brain, including the expected neurological development in the brain in the early 20's, the time when Mr. Long sustained the defining TBI. This knowledge was not available at the time of Mr. Long's sentencing in 1989. Dr. Steinberg would testify about the development of information about neuroplasticity in adolescence, which would suggest a high degree of brain vulnerability during this period to adverse

experiences. The TBI Mr. Long sustained was at a particularly sensitive time in both brain development and in a region responsible for self-regulation, suggesting interference with the brain systems responsible for self-control and emotion regulation.

Dr. Wood's affidavit reflects the constraints of technology in 1989. According to Dr. Wood, the most he could deduce from the PET scan he performed was there was abnormal hypo-metabolism in the anterior-medial temporal lobe, especially vivid in the left hemisphere. If there were injury in this area, it would lead to increased likelihood to act violently and inhibit control of impending behavior.

Dr. McGovern emphasized that the CT and PET scan technology in the 1980's was in its infancy and other imaging and diagnostic techniques were in experimental phases, if in existence at all. Today, TBI would be established and evaluated not with just a PET scan, but would involve a match between MRI evidence of structural brain damage, evidence of focal functional impairment in the same area obtained from an EEG, quantitative EEG, SPECT or PET, and neurological findings supportive of both. This diagnostic level of confidence was not available in 1989, as the prosecutor repeatedly emphasized. Of further

significance to Mr. Long's case was the lack of rehabilitative measures at the time of his injury. Dr. McGovern would also testify that significant advances have been made in understanding what various brain systems are impacted as a result of TBI and repeated brain trauma during childhood.

During the hearing held on May 2, 2019, defense counsel argued the motion alleged sufficient facts to require a hearing to determine whether Mr. Long was entitled to pursue cutting edge neuroimaging and testing that had just become available.[P6197, 6205] Defense counsel advised the trial court that numerous and ongoing requests for Mr. Long's medical records had been made prior the warrant, but DOC had failed to fully provide the records. Counsel advised the court testing could not have occurred without review of Mr. Long's medical records.[P6219-6222] Mr. Long has met his burden, he presented a facially sufficient claim that is not procedurally barred or refuted by the record. Thus, the trial court erred in summarily denying Claim I.

Mr. Long further submits that his motion has presented sufficient facts to entitle him to a new penalty phase. To obtain a new penalty phase premised on a claim of newly discovered evidence Mr. Long must establish that it is

probable that a life sentence would result. Mr. Long has met that burden.

There is reasonable probability that one juror would recommend a life sentence if Mr. Long were afforded the opportunity to present the evidence alleged in this motion at a new penalty phase. One jurors vote for life is all that is required under Florida law, a far different scenario that Mr. Long faced in 1989. Mr. Long is entitled to a new jury determination of his sentencing that affords Mr. Long the opportunity to demonstrate an accurate picture or the depth of this mental health issues and nexus between those issues and the offense in this case.

ISSUE II

FLORIDA'S LETHAL INJECTION PROTOCOL CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUION BECAUSE IT CREATES AN UNACCEPTABLE AND UNNECESSARY RISK OF PAIN

Mr. Long challenged the constitutionality of the current three-drug lethal injection protocol as applied to him [Claim 2A], as well as the continued use of the three drug protocol as a means of execution [Claim 2B and 2C. The trial court granted an evidentiary hearing as to 2A and summarily denied 2B and 2C. The trial court's denial of relief was error.

On January 4, 2017, DOC adopted a new three drug protocol utilizing etomidate as the first drug, rocuronium bromide as the second drug, and potassium acetate as the third drug. The objective of etomidate is to induce a level of unconsciousness that will achieve and maintain a surgical plane of anesthesia that renders a person insensate to the pain and suffering of the second and third drugs. The objective of the second drug, rocuronium bromide, is to give the appearance of a serene death by paralyzing all voluntary muscles, thus preventing the inmate from manifesting pain. Rocuronium bromide has no anesthetic properties and does not affect consciousness or perception of pain. A conscious person under the influence of rocuronium bromide would experience the sensation of death by drowning as the diaphragm is immobilized. The objective of the third drug, potassium acetate, is to kill the inmate by inducing cardiac arrest. Potassium acetate causes excruciating pain as it travels through the bloodstream toward the heart, causing an intense burning sensation. If not adequately anesthetized, the inmate will suffer tortuous pain, but be incapable of expressing suffering due to the paralytic.

DOC did not consider the utility of the specific chemicals in an execution and whether the chemicals

involved were necessary to properly and painlessly conduct an execution by lethal injection. There is no longer justification for using a three drug protocol, particularly those used in the Etomidate Protocol.

Mr. Long is aware of his burden and requirements he must meet under *Bucklew v. Precythe*, 139 S.Ct. 1112 (2019) and *Glossip v. Gross*, 135 S.Ct. 2726 (2015), and submits that a feasible and available alternative to Florida's three drug protocol is (1) a single dose of properly compounded pentobarbital; (2) nitrogen hypoxia; or (3) a single drug protocol that uses an overdose of fentanyl or other opiates.

A. Mr. Long's Unique Medical Conditions Render the Etomidate Protocol Unconstitutional As Applied to Him

An evidentiary hearing was conducted by the trial court on Mr. Long's challenge to Florida's use of etomidate due to his unique medical condition. The trial court's undue restriction on evidence that was relevant to Mr. Long's individualized claim, but was also relevant to a general challenge to the use of etomidate was error. Mr. Long requests he be given a new hearing in which he is permitted to address all the effects of etomidate, as well as the remaining two drugs and the execution protocol in total.

At the hearing on May 3, 2019, the State called two witnesses, Dr. Yun, an anesthesiologist and Dr. Buffington, a pharmacologist.

Dr. Yun's testimony mirrored his testimony in *Asay v. State*, 224 So.3d 695 (Fla. 2018). Dr. Yun opined the injection of 200 milligrams of etomidate will create a sufficient anesthetic plane lasting at least 30 minutes to produce a loss of consciousness and response to noxious stimuli.[P6177-83] Dr. Yun admitted small doses of etomidate can induce seizures in those with temporal lobe epilepsy, but opined that this disappears with higher dosages.[P6202-3] Dr. Yun opined that such a large dose of etomidate would suppress any "bursts" in the brain and that neither epilepsy or brain damage would interfere with the anesthetic properties of etomidate.[P6202-4] Dr. Yun did not believe any seizures would occur that could dislodge IV lines, but acknowledge compromised IV lines would adversely affect the drugs.[P6210-6] Etomidate can also cause moderate pain during injection.[P6210-2]

Dr. Buffington also acknowledged that etomidate can induce seizures.[P6366] However, he opined the larger dose of etomidate would abate any seizure.[P6382] Dr. Buffington testified that because etomidate is a "dose dependent" drug, its effects are increased as dosage

increases.[P6367,6387] A dose of 200 milligrams would induce sedation for 15, 30, or even 60 minutes.[P6367]

Mr. Long presented the testimony of Dr. Lubarsky, an anesthesiologist; Dr. Frank Wood, a neuroscientist; Dr. Silas Raymond, a compounding pharmacist; and Stephen Whitfield, Chief of Pharmaceutical Services for DOC.

Dr. Lubarsky testimony on the general properties of etomidate is summarized in this Court's opinion in *Asay*, however the trial court prohibited him from testifying to these principles or about the Hannon, Branch, and Jimenez executions. Dr. Lubarsky testified the use of etomidate in persons with epilepsy is contraindicated because it can induce seizures and in pre-surgical procedures for people with epilepsy it can produce seizures.[P6316-7] Dr. Lubarsky testified etomidate can produce seizures at both low and high doses.[P6318]

Dr. Lubarsky opined the anesthetic properties of etomidate would wear off in about eight minutes in a normal, clinical setting such as an ER, but would wear off in four to five minutes in an execution due to the pharmacodynamic and pharmacokinetic factors.[P6306-9;6316]

There would also be pain associated with etomidate injection.[P6307]

The danger in etomidate for those with epilepsy, such as Mr. Long, was the induction of a seizure, which "…would complicate the clinical picture in terms of determining whether or not the etomidate has actually taken effect."[P6307] A seizure would cause physical symptoms in Mr. Long that could extend the consciousness check past the point where etomidate would be effective as an anesthetic into the execution process. Further, the myoclonus effect of etomidate could also extend the consciousness check phase past the point where etomidate would be effective.[P6310;6314-6;6319]

A further complication of etomidate induced seizures would be interference or dislodging of the IV line.[P6321-2] The use of restraints would not necessarily mitigate the danger to the IV lines, as persons who are restrained during a seizure can still injure themselves when straining against the restraints.[P6321-2]

Dr. Frank Wood testified he performed PET scans on another case related to Mr. Long and had previously testified in that case about the severity of Mr. Long's TBI.[P6347-50] Dr. Wood testified the seizures Mr. Long was likely to experience would be difficult to detect with the naked eye by other than a trained clinician.[P6350-1] These

seizures may be characterized by convulsions and movement, but not to the extent of a grand mal seizure.[P6351]

Dr. Silas Raymond testified he is a compounding pharmacist.[P6239] A compounding pharmacist, with the appropriate licensure from the DEA, can purchase and compound both pentobarbital and fentanyl.[P6239-40] Both drugs can be purchased from a wholesaler, bypassing the manufacturer if the drugs is not available or is on backorder.[P6240-1] The necessary components of pentobarbital can be obtained by a licensed, registered Florida pharmacist.[P6242] A physician prescription is necessary in order to compound either drug.[P6244]

Stephen Whitfield testified the manufacturer of pentobarbital and the manufacturer of fentanyl have barred DOC from purchasing these drugs for use in an execution.[P6270, 6272-3;6272-5] He acknowledged other states use compounding pharmacies to obtain these drugs for execution, but had no knowledge of whether Florida had attempted to find such a source for pentobarbital.[P6271] He was unaware of any compounding pharmacy offering to compound either drug for an execution or whether there was a physician to write the prescription.[P6277-5412] Mr. Whitfield did not know why Florida had not adopted a single drug execution protocol.[P6271-2]

The trial court found Dr. Yun's testimony to be more credible than Dr. Lubarsky's testimony and did not establish the use of etomidate was "very likely to cause him serious illness and needless suffering".[Order, P5556-7] The trial court found Mr. Long failed to satisfy the second prong of providing an alternate means of execution, despite the use of pentobarbital, nitrous gas, and fentanyl as evidence by the execution protocols in other states.[Order, P5557] Mr. Long submits the trial court's order is in error.

Mr. Long presented substantial, competent evidence to support his claim that the use of etomidate in his execution violates the Eighth Amendment. The State stipulated Mr. Long has TBI and epilepsy. There was consensus among all the experts that etomidate can cause seizures in people with temporal lobe epilepsy. All agreed intact and operable IV lines are necessary to ensure a proper execution.

The trial court's reliance on Dr. Yun as opposed to Dr. Lubarsky is misplaced. Dr. Yun's testimony about the anesthetic properties of etomidate and the length of time it is effective has been discredited by the Hannon, Branch and Jimenez executions. Dr. Lubarsky's testimony in this case reflects what has already occurred in three

executions- Hannon, Branch and Jimenez. The inmates were not sufficiently anesthetized and had movement consistent with insufficient anesthesia after the consciousness check. A prolonged consciousness check is likely to occur in this case given the likelihood of Mr. Long having sustained movement resulting from either a seizure or myoclonus, or both. Any prolonging of the consciousness check which results in a delay in the administration of the remaining drugs creates an unreasonable and unnecessary risk of needless pain and suffering by Mr. Long as it is probable the anesthetic effect of etomidate will have worn off by the time the second and third drugs are injected.

It is also probable that the IV lines would be compromised were Mr. Long to suffer a seizure. Dr. Lubarsky's testimony that even restrained patients can injure themselves on the actual restraints creates an unreasonable risk that Mr. Long's IV could be compromised during his execution, causing needless suffering to Mr. Long as the execution progresses.

There is a substantial risk Mr. Long faces an agonizing death due to his unique medical condition if the State is permitted to use the three drug protocol to execute him.

As to the second prong under *Glossip*, Mr. Long established there is a feasible and available alternative to the Etomidate Protocol for use in his execution. Mr. Long presented evidence that other States use pentobarbital or fentanyl obtained from a compounding pharmacy in their execution protocols. Mr. Long presented the testimony of a Florida registered compounding pharmacist, Silas Raymond, who testified both drugs can be compounded in Florida by a registered Florida pharmacist. Mr. Whitfield's testimony was essentially that Florida had made no efforts to utilize the proven methods other states have used to obtain pentobarbital or fentanyl in executions. Florida's refusal to try to obtain these drugs does not mean this alternative is not feasible or available. Mr. Whitfield offered no reasons for why the State of Florida has not explored or attempted to use the alternate method proposed by Mr. Long.

B. Florida's Refusal to Adopt a One Drug Protocol Violates the Evolving Standards of Decency That Mark the Progress of a Maturing Society

In *Baze v. Rees*, 553 U.S. 35, (2008), a plurality of the U.S. Supreme Court, set forth the standard for establishing that a method of execution constitutes cruel and unusual punishment. In *Baze* the Court considered whether Kentucky's three drug protocol, which was substantially similar to Florida's at the time, violated

the Eighth Amendment. Baze's challenge rested "on the contention that [the petitioner] have identified a significant risk of harm that can be eliminated by adopting alternative procedures, such as a one-drug protocol that dispenses with the use of the paralytic and potassium chloride and provides additional monitoring by trained personnel to ensure that the first dose of sodium thiopental has been adequately delivered. *Id., at 51.*

The plurality agreed such a challenge was cognizable and indicated the burden that must be met in order to demonstrate the challenged method violated the Eighth Amendment. The proffered alternatives must address a "substantial risk of serious harm." The proposed alternative procedure must be feasible, readily implemented, and significantly reduce a substantial risk of severe pain. The State's refusal to change, absent a legitimate, penological interest, can be viewed as cruel and unusual punishment under the Eighth Amendment. *Id.*, at 52. The Court rejected Baze's proposal at the time. In *Glossip v. Gross*, 135 S.Ct. 2726, 2726 (2015), the Court indicated the inquiry of a lethal injection challenge under the Eighth Amendment must be to determine if the defendant established "that any risk of harm was substantial when

compared to a known and available alternative method of execution."

In the ensuing eleven years since *Baze*, numerous states have either switched to a one-drug protocol or at least abandoned the paralytic. Presently, thirty-one states, the U.S. Government and the U.S. military authorize executions. Of those thirty-three jurisdictions, more than a dozen have not held an execution for ten or more years. Since *Baze*, thirteen states- Arizona, Arkansas, California, Georgie, Idaho, Kentucky, Louisiana, Missouri, Ohio, South Dakota, Tennessee, Texas, and Washington have adopted or announced they will adopt a single drug protocol.

Ten executions carried out in 2018 that used a one-drug protocol were without incident. Those carried out in Florida, in particular that of Eric Branch, were markedly different. The abandonment of the three drug protocol by many jurisdictions reflect an evolving standard of decency. *Trop v. Dulles*, 356 U.S. 86 (1958).

Of particular concern has been the use of the second, paralytic drug. Arizona has banned its use permanently. There is no scientific reason for Florida's use of rocuronium bromide in its lethal injection protocol and its use presented serious dangers. Rocuronium bromide increases the risk that Mr. Long will suffer a torturous and painful

death silently because this drug will mask any ineffectiveness of the etomidate.

Rocuronium bromide is a neuromuscular blocking agent that paralyzes all voluntary muscles, including the diaphragm, without affecting consciousness or the perception of pain. Administered by itself as a "lethal dose," rocuronium bromide would not result in a quick death; instead, it would cause death by conscious asphyxiation over the course of roughly a dozen minutes. It thus creates the danger that if not properly anesthetized, Mr. Long will be unable to convey pain and suffering he is experiencing as a result of the dry drowning of death by asphyxiation or the extreme pain associated with the injection of potassium acetate he would receive.

Rocuronium bromide has another deleterious effect. It makes the detection of awareness, and verification of anesthetic depth, much more difficult even for properly trained medical personnel. It makes verification almost impossible without advanced medical training.

These issues are significant because it is beyond dispute that an insufficiently anesthetized person who is injected with a paralytic and potassium acetate will feel agonizing pain, but will be unable to outwardly express that pain. *See, e.g., Baze v. Rees*, 553 U.S. at 53.

Florida's use of rocuronium bromide in its execution protocol is especially troubling because, while Florida characterizes its use as "humane", it prohibits the use of paralytic drugs on animals in performing euthanasia. *See* Fla. Stat. §828.058(3); §828.065. It would be illegal for a veterinarian to put a cat or dog to death using the same method the State will use to kill Mr. Long. Florida's use of the three drug protocol that includes rocuronium bromide and potassium acetate creates unnecessary risks of pain and suffering.

Florida must switch to a single-drug protocol, such as pentobarbital or compounded pentobarbital. Texas, Georgia, Missouri, and other states have easily obtained pentobarbital from compounding pharmacies. Pentobarbital is feasible and available to DOC. It reduces a substantial risk of severe pain that is created by the etomidate injections, the paralytic, and then potassium acetate. The numerous experiences by states which use pentobarbital where condemned inmates have died without apparent complications from a large dose of a barbiturate without the administration of a paralytic or potassium acetate demonstrate the substantial risks of severe pain presented by Florida's three drug protocol are objectively intolerable and readily avoidable.

C. The Etomidate Protocol Violates the Eighth Amendment

The State of Florida has chosen to use the drug etomidate as the first drug in the three drug protocol. Etomidate, an ultra-short acting drug that causes significant pain upon injection raises a substantial risk of serious harm. Etomidate is not an appropriate drug to use as the first drug because (1) its effects wear off quickly and likely drop below the necessary anesthetic levels before the execution is complete; (2) it causes significant pain upon injection; (3) it has no analgesic properties; (4) its side effect include myoclonus, making the assessment of consciousness more difficult and time consuming; and (5) if it comes into contact with rocuronium bromide in the IV tubing, it will precipitate, leading to incomplete drug delivery and the loss of the IV in the middle of the procedure. Etomidate lacks the basic properties necessary to induce a level of anesthesia to render the condemned insensate and unresponsive to the pain of the second and third drugs.

The trial court denied an evidentiary hearing on this portion of Mr. Long's claim. This was error. The executions of Patrick Hannon, Eric Branch and Jose Jimenez are sufficient new evidence to warrant reconsideration of this Court's approval of the use of etomidate in *Asay v.*

State, 224 So.3d 695 (Fla. 2017) and in *Jimenez v. State*, 265 So.3d 462 (Fla. 2018).

In her dissent in *Jimenez*, Justice Pariente wrote as follows regarding the execution of Eric Branch:

> As to the administration of the first drug in the lethal injection protocol, etomidate, the post-conviction court wrote in its order denying Jimenez's motion: "As the administration of the etomidate commenced, Branch released a guttural yell or scream.. Branch's legs were moving, his head moved, and his body was shaking." Order, at 4. his body "continued to shake and his chest was heaving for another four minutes." Initial Br., At 38. The postconviction court noted and the majority accepts all this took place "before the consciousness check was performed before the sub-sequent administration of the second and third drugs." Order, at 4; majority op. at- Dr. Lubarsky ,"an experienced anesthesiologist," Initial Br., at 29, opined that this was "indicative of insufficient anesthetic depth prior to the admin-istration of the second and third drugs." Id., at 38. As to the second and third drugs, Jimenez alleges that- according to Dr. Lubarsky's review of Florida's lethal injection protocol and records from Branch's execution- Branch had only "1/10th of the clinical dose of etomidate.. in his blood stream by the end of the execution process, an amount that is "insufficient to ensure that" he did "not feel the excruciating pain of the second and third drugs." Id., at 31. In Dr. Lubarsky's opinion Branch's scream was "objective evidence" of his "experiencing significant pain during [the] execution." Id., at 35- not "in protest of his execution or a reaction to etomidate." Majority Op., at-. Of course, this new information was unknown when this Court rejected Asay's challenge to the new lethal injection protocol. In my view, this new information makes it impossible to allow another execution to proceed without thoroughly reviewing whether Florida's lethal injection protocol subjects defendant's to a substantial risk of pain, in violation of the Eighth Amendment. Thus, I would reverse and remand for an evidentiary

hearing.

Observers of Jimenez's execution reported that "Local 10 News investigative reporter Jeff Weisner, who witnessed the execution, said Jimenez was blinking profusely, twitching and breathing heavily. Then it all stopped." *See*, Weisner, Jeff, Associated Press, *Man Executed for North Miami Woman's 1992 Murder* (updated December 19, 2018) https://www.local10com/news/florida/north-miami/jose-antonio-jimenez-execution.

The affidavit of Joseph S. Hamrick, (Attachment 12 to postconviction motion P800-1), a licensed Florida attorney, witnessed Jimenez's execution. According to Mr. Hamrick, the movement and slow breathing of Jimenez occurred *after* the consciousness check- indicative that Jimenez was struggling to breathe. His visible struggles ceased only after the paralytic took over. The ultra-short acting life of etomidate leads to the reasonable conclusion Jimenez was awake and aware and suffering unnecessary and significant pain prior to his death.

When this Court approved the current three drug protocol in *Asay*, no one had been executed using etomidate. The testimony of the two experts, Dr. Heath for Mr. Asay and Dr. Yun for the State sharply disagreed over the pain etomidate would cause upon injection and whether etomidate

would maintain the necessary anesthetic plane during the entire execution. Dr. Yun's testimony that etomidate would not cause significant pain and would be able to provide the necessary anesthetic plane for the duration of the execution has been called into serious questions by the Hannon and Branch executions. These executions impeach Dr. Yun's testimony and corroborate Dr. Heath's testimony. Dr. Lubarsky's subsequent review of the Branch execution and his testimony in this case further emphasize the need for this Court to follow Justice Pariente's lead and call for a review of the use of etomidate.

ISSUE III

EXECTUION, WHEN ADDED TO THE INORDINATE AMOUNT OF TIME MR. LONG HAS SPENT ON DEATH ROW, CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND BINDING NORMS OF INTERNATIONAL LAW.

Mr. Long is set to be executed just shy of 30 years after the imposition of a death sentence. During these three decades he has been kept in solitary confinement, in a six by nine cell, with minimal time allowed out of that cell. Mr. Long submits the Eighth Amendment's prohibition on cruel and unusual punishment bar his execution after so much time on death row.

At the CMC hearing on May 1, defense counsel asked for an evidentiary hearing on this claim in order to present

evidence specific to Mr. Long's experiences on death row, which does not appear to have been done in previous Florida cases.[P6050-62] The trial court summarily denied Mr. Long's claim.[P6050-62] Mr. Long recognizes that this Court has consistently rejected these claims based solely on chronological years on death row, but is asking this Court to remand this issue for an evidentiary hearing so Mr. Long can present testimony as to his unique experiences over the last 30 years.

The Eighth Amendment requires that "the sanction imposed cannot be so totally without penological justification that it results in the gratuitous infliction of suffering." *Gregg v. Georgia*, 428 U.S. 153, 183 (1976). Punishments that entail exposure to a risk that "serves no 'legitimate penological objective'" and that result in gratuitous infliction of suffering violate the Eighth Amendment." *Farmer v. Brennan*, 511 U.S. 825, 833 (1994) (quoting *Hudson v. Palmer*, 468 U.S. 517, 548 (1984) (Stevens, J., concurring in part and dissenting in part)(the suffering of living under a prolonged sentence of death, 23 years, cannot be considered incidental to the processing of the appeals. It is unnecessary and unconstitutional. Such long term suffering becomes a separate form of punishment, which is equivalent to or

greater than an actual execution. *See Coleman v. Balkom*, 451 U.S. 949, 952 (1981)(Stevens, J., concurring in denial of certiorari.)); *In re Medley*, 134 U.S. 160, 172 (1890).

In *Lackey v. Texas*, Justice Stevens wrote:

> Though novel, petitioner's claim is not without foundation. In *Gregg v. Georgia*, this Court held that the Eighth Amendment does not prohibit capital punishment. Our decision rested in large part on the grounds that (1) the death penalty was considered permissible by the Framers and (2) the death penalty might serve "two principal social purposes: retribution and deterrence."
>
> It is arguable that neither ground retains any force for prisoners who have spent some 17 years under a sentence of death. Such a delay, if it ever occurred, certainly would have been rare in 1789, and thus the practice of the Framers would not justify a denial of petitioner's claim. Moreover, after such an extended time, the acceptable state interest in retribution has arguably been satisfied by the severe punishment already inflicted. Over a century ago, this Court recognized that "when a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it." *In re Medley*, 134 U.S. 160, 172, 33 L.Ed.2d 835, 10 S.Ct. 384 (1890). If the Court accurately described the effect of uncertainty in *Medley*, which involved a period of four weeks, that description should apply with even greater force in the case of delays that last for many years. Finally, the additional deterrent effect from an actual execution now, on the one hand, as compared to 17 years on death row followed by the prisoner's continued incarceration for life, on the other, seems minimal.

514 U.S. 1045 (1995)(J. Stevens, memorandum respecting denial of certiorari)

Justice Breyer echoed similar concerns in the denial of certiorari in another case. Writing about a defendant

who spent 23 years on Florida's death row, Breyer observed "After such a delay, an execution may well cease to serve the legitimate penological purposes that otherwise may provide a necessary constitutional justification for the death penalty." *Elledge v. Florida*, 119 S.Ct. 366 (1998)(J. Breyer, dissenting). In yet another case involving an extended stay on death row, Justice Breyer stated:

> Nor can one justify lengthy delays by reference to constitutional tradition, for our Constitution was written at a time when delay between sentencing and execution could be measured in days or weeks, not decades. *See Pratt v. Attorney General of Jamaica, [1994] 2 A.C. 1,18,4 All E. R. 760, 773 (P.C.1993) (en banc)*(Great Britain's "Murder Act" of 1751 prescribed that execution take place on the next day but one after sentence).

Knight v. Florida, 528 U.S. 990, 995 (1999)(J. Breyer, dissenting from the denial of certiorari). Justice Breyer described the psychological impact of a long stay on death row:

> It is difficult to deny the suffering inherent in a prolonged wait for execution –a matter which courts and individual judges have long recognized… The California Supreme Court has referred to the "dehumanezing effects of … lengthy imprisonment prior to Execution." In *Furman v. Georgia*, *408 U.S. at 288-289* (concurring opinion), Justice Brennan wrote of the "inevitable long wait" that exacts " a frightful toll." Justice Frankfurter noted that the "onset of insanity while awaiting execution of a death sentence is not a rare phenomenon."

Knight, 528 U.S. at 994-95. Justice Stevens, in a concurring opinion denying certiorari in *Thompson v. McNeil*, 129 S.Ct. 1299, 1300 (2009), wrote:

> In sum, our experience during the past three decades has demonstrated that delays in state-sponsored killings after such delays is unacceptably cruel. This inevitable cruelty, coupled with the diminished justification for carrying out an execution after the lapse of so much time, reinforces my opinion that contemporary decision "to retain the death penalty as a part of our law are the product of habit and inattention rather than an acceptable deliberative process.

Justice Breyer and other members of the Court have continued to raise alarm over the lengthy time spent on death row. Justice Breyer, writing in *Glossip v. Gross*, 135 S.Ct. 2726, 2764-69 (2015), in which Justice Ginsberg joined in his dissent, observed "[t]the problem of reliability and unfairness [with the current capital punishment laws] almost inevitably lead to a third independent constitutional problem: excessively long periods of time that individuals typically spend on death row, alive but under sentence of death." The resulting lengthy delays "create two special constitutional difficulties," namely (1) the "dehumanizing effect of solitary confinement" aggravated by "uncertainty as to whether a death sentence will in fact be carried out, and (2) the undermining of "the death penalty's penological rational, perhaps irreparably so." *See Jordan v.*

Mississippi, 138 S.Ct. 2567 (June 28, 2018)(J. Breyer, dissenting from denial of certiorari); *Dunn v. Madison*, 138 S.Ct. 913 (2017)(Breyer, J., joining Ginsberg, J., and Sotomayor, J., concurring)("And we may well have to consider the ways in which lengthy periods of imprisonment between death sentence and execution can deepen the cruelty of the death penalty while at the same time undermining its penological rationale.")

International law strongly suggests three decades on death row is not consistent with evolving standards of decency. The Privy Council of the United Kingdom invalidated death sentences for two Jamaican men after 14 years on death row and commuted their sentences to life, suggesting a stay of no more than five years would be excessive. *Pratt v. Attorney General of Jamaica*, [1994] 2 A.C.1,18, 4 All.E.R. 769, 773 (P.C.1993)(en banc). Foreign jurisdictions refuse extradition of criminal suspects to the United States on the grounds life on death row violates international human rights treaties. *Soering v. United Kingdom*, 11 Eur.H.R. Rep. 439 (1989).

To execute Mr. Long after he has already had to endure almost thirty years of incarceration under sentence of death would be unconstitutionally cruel and unusual punishment. Because the Eighth Amendment standards of

decency are evolving, consideration of Mr. Long's claim is required.

ISSUE IV

THE DENIAL OF *HURST* RELIEF TO MR. LONG VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATE CONSTITUTION.

Mr. Long continues to challenge the unconstitutionality of the retroactivity bar promulgated by this Court which denies *Hurst* relief to defendant's whose cases became final on direct appeal prior to the issuance of *Ring v. Arizona*, 536 U.S. 584 (2002). Mr. Long urges this Court to reconsider the judicially created bar whose continued application demonstrates the arbitrary and capriciousness of the line-drawing at *Ring* violates the Eighth and Fourteenth Amendments to the United States Constitution. The resulting application of the *Ring* cut-off is not only arbitrary and capricious, but has resulted in disparate treatment between death-sentenced prisoners on collateral review.

Mr. Long has filed a Motion for Stay of Execution Pending the Florida Supreme Court's Decision in *Owen v. State*. After denying approximately eighty similar pre-*Ring* appeals in 2017 based on *Hitchcock v. State*, 226 So.3d 216 (Fla. 2017), this Court has continued to deny relief to pre-*Ring* defendants. However, on April 24, 2019, just one

day after the warrant was signed in this case, this Court issued an order to show cause in *Owen v. State*, No. SC18-1810. The Order to Show Cause specifically directs the parties to brief whether the Florida Supreme Court should "recede" from its *Ring*-based retroactivity cutoff. The order specifically references *Asay v. State*, 210 So.3d 1 (Fla. 2016); *Mosley v. State*, 209 So.3d 1248 (Fla. 2016), and *James v. State*, 615 So.2d 668 (Fla. 1993), and seems to indicated this Court is finally reconsidering abandoning the *Ring* cutoff. Mr. Owen has two death sentences- one pre-*Ring* and one post-*Ring*. Mr. Long has consistently argued that *Hurst* should apply to him, even before such claims had a name. Mr. Long's scheduled execution should not proceed while this Court decides in *Owen* whether to "recede from the retroactivity analysis" in *Asay* and *Moseley*. It would be the height of injustice to allow Mr. Long's execution to proceed on May 23, 2019, only for the Florida Supreme Court to subsequently rule in *Owen* that Mr. Long has been correct all along.

This Court's prior precedent would merit a stay. The last time this Court considered whether to uphold the *Asay* cutoff, in *Hitchcock*, this Court stayed nearly every pending appeal raising a *Hurst* issue by an appellant whose case became final prior to *Ring*. It is not constitutionally

tolerable to allow an execution to proceed while the legal framework denying retroactive application of a substantial constitutional right has been called into question by this Court.

Mr. Long is a pre-*Ring* defendant. Mr. Long unsuccessfully argued in his direct appeal in 1992 that the trial court erred in denying Mr. Long's motion to preclude the jury being told their verdict was advisory and not binding- thus raising *Ring/Hurst* claims before such claims had those names. *Long v. State*, 610 So. 2d 1268 (Fla. 1992) In his postconviction litigation, as soon as *Ring* issued, Mr. Long argued his death sentence was unconstitutional under *Ring.* Mr. Long's claim was denied.

In *Hurst v. Florida*, 136 S.Ct. 616 (2016), the United States Supreme Court and the Florida Supreme Court in *Hurst v. State*, 202 So.3d 40, (Fla. 2016), *cert. denied*, 137 S.Ct. 2161 (2017),found Florida's death penalty statute unconstitutional. That same unconstitutional statute was the basis for Mr. Long's death sentence. A jury did not consider and find the aggravating factors, determine whether those aggravators were sufficient to impose death, consider and find the mitigating factors, and determine whether death was an appropriate sentence.

The *Hurst* decisions required that all facts that are statutorily necessary before a judge is authorized to impose a sentence of death must be found by a jury pursuant to a capital defendant's Sixth Amendment right to jury trial. *Hurst*, 136 S.Ct. at 620-1. This Court held in *Hurst v. State* that all the critical findings necessary before the trial court may consider a death sentence must be unanimously found by the jury. *Hurst v. State*, 202 So.3d at 44. In *Asay v. State*, 210 So.3d 1 (Fla. 2016), this Court applied the *Witt v. State*, 387 So.2d 922 (Fla. 1980), retroactivity test. The *Asay* majority concluded that *Hurst* would not apply to cases in which the death sentence became final before the issuance of *Ring*. *Id.*, at 35.

The application of this "line-drawing" has resulted in an arbitrary and capricious granting of relief to death sentenced defendants, particularly those on collateral review. Mr. Long submits, while acknowledging this Court's contrary determinations, that to ensure fairness and uniformity in Florida's application of the death penalty *Hurst v. Florida* must be applied retroactively to all cases, including this case.

The result of the majority opinion in *Asay* has been that some defendants whose murders were committed long before *Hurst*, but not others, violates *Witt's* requirement

of fairness and uniformity. For example, Asay was not entitled to *Hurst* relief and was executed for a 1987 murder, but Douglas Ray Meeks, who committed two murders in 1974, was entitled to *Hurst* relief because the State stipulated to a new penalty phase in 2000. Paul Hildwin and Ana Cardona have been granted relief in similarly arbitrary fashions. *See Hildwin v. State*, 141 So.3d 1178 (Fla. 2014); *Cardona v. State*, 185 So.3d 514 (Fla. 2016).

Since *Asay*, the continued application of the bright-line *Ring* cutoff has continued to lead to unconstitutionally arbitrary results. As Justice Pariente pointed out in her dissent in *State v. Murray*, 44 Fla. Law Weekly S3 (Fla. December 20, 2018), the "line-drawing for the retroactivity of *Hurst* creates unconstitutional results for defendants", as evidenced by the result between Murray and his co-defendant Taylor. Taylor and Murray were both convicted of the same 1990 first-degree murder of the same victim and both were sentenced to death. The jury recommended death for Murray 11-1 and 10-2 for Taylor. Murray obtained *Hurst* relief because he case did not become final until 2009 due to three re-trials. Taylor was denied *Hurst* relief because his case became final in 1994. Ensuring uniformity and fairness in the application of the death penalty requires *Hurst* be applied retroactively to

all capital cases, not just final after the issuance of *Ring*.

The failure to apply *Hurst* relief to Mr. Long violates the dictates of *Caldwell v. Mississippi*, 472 U.S. 320 (1985). In *Caldwell*, the Court held the jury must correctly be instructed as to its sentencing responsibility. Post-*Hurst* jurors must know that each will bear the responsibility for a death sentence resulting in a defendant's execution since each juror possess the power to require the imposition of a life sentence simply by voting against the death recommendation. As was explained in *Caldwell*, jurors must feel the weight of their sentencing responsibility if the defendant is ultimately executed after no juror exercised his or her power to preclude a death sentence. Because the jury's sense of responsibility was inaccurately diminished in *Caldwell*, the Supreme Court held the jury's unanimous verdict imposing a death sentence in that case violated the Eighth Amendment and vacated the death sentence. There is a reasonable probability, if instructed properly, at least one juror would vote for life in this case, thus any error is not harmless.

The failure to apply *Hurst* retroactively deprived Mr. Long of a jury determination. After *Hurst v. Florida* each juror is still free to vote for a life sentence even if the

requisite facts have been found by the jury unanimously. Individual jurors may decide to exercise mercy and vote for a life sentence and, in doing so, preclude the imposition of a death sentence. Despite the unanimous jury recommendation in this case, Mr. Long has been deprived of the mercy option if he is not given *Hurst* relief. One juror voting for a life sentence is all it takes to mandate the imposition of a life sentence. It is probable, with the newly discovered evidence outlined in *Issue I*, the correct jury instructions, and a new penalty phase at least one juror would vote for life, thus mandating a life sentence.

Justice Pariente, in her dissenting opinion in *Asay*, correctly concludes:

> The retroactivity of *Hurst* should be extended to those defendants, who, prior to *Ring*, properly asserted, presented, and preserved challenges to the lack of jury fact finding and/or lack or unanimity. Justice Lewis, in his dissent in *Asay*, argued such a result would be consistent with the precedent of the court, citing to *James v. State*, 615 So.2d 668, 669 (Fla. 1993). The Defendant raised a claim prior to penalty phase directed at the improper denigration of the jury's role in sentencing and other constitutional infirmities with the jury's role. The Defendant is entitled to have his claim heard- a claim he raised before it had a name. The requirement imposed by the majority that in order to be afforded relief under *Hurst* had to cite to *Ring* by name even if the defendant raised the substantive basis for *Hurst* violates the Eighth Amendment by drawing an arbitrary and unreasonable line- June 24, 2002, the date *Ring* was issued- on who is entitled to relief and who is not. This violation is particularly egregious in those cases, such as this, where the Florida

> Supreme Court rejected pre-*Ring* and *Apprendi* claims as meritless.

The correct application of *Witt* mandates full retroactivity of *Hurst.* Again, in her dissenting opinion in *Asay*, Justice Pariente correctly concludes:

> A faithful *Witt* analysis includes consideration of the uniqueness and finality of the death penalty, together with the fundamental constitutional rights at stake, when the State sentences someone to death- namely the rights to trial by jury and sentencing by a unanimous jury as guaranteed by both the Sixth Amendment to the United States Constitution and Article I, Section 22 of the Florida Constitution.
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> Ultimately, when applying the retroactivity equation of balancing "the justices' system's goals of fairness and finality" in this circumstance, fairness must prevail over finality. *Ferguson v. State*, 789 So.2d 306, 312 (Fla. 2001). I recognize, as does the majority, the victims and their families "need for finality", but stress, as does Justice Perry in his dissent, that no conviction shall be disturbed. Majority op. at 32; see Asay, No. SC16-223, slip op. at 75 (Perry, J., dissenting). The question is not of guilt or innocence, but of life and death.
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> (Pariente, J., slip op. at 61-62).

The application of retroactivity under *Asay* is arbitrary and capricious, in violation of the Eighth Amendment. The granting of relief in capital cases, where "death is different", should not turn on the date of sentence, resentence, or the arbitrariness of the timing of the docket. This Court has never before imposed such a date determinant requirement for retroactivity. *See, Asay v. State,* Perry., J. dissenting. This interpretation reduces the continued sentence of death under an unconstitutional

statute on "little more than a roll of the dice. This cannot be tolerated." *Id.*

The retroactivity cutoff violates the rights of equal protection and due process. The cut-off treats prisoners in the same posture- on collateral review- differently without "some ground of difference that rationally explains the different treatment." *Eisenstadt v. Baird*, 405 U.S. 438, 447 (1972). When two classes are created to receive different treatment by a state actor, the question becomes "whether there is some ground of difference that rationally explains the different treatment…" *Id.; see also McLaughlin v. Florida*, 379 U.S. 184, 191 (1964). Distinctions in state criminal laws that impinge on fundamental rights must be strictly scrutinized. Capital defendants have a fundamental right to a reliable determination of their sentences. *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). The State's justification for the arbitrary line for retroactivity cannot pass strict scrutiny.

Denying the benefit of post-*Hurst* sentencing to "pre-*Ring*" defendants like Mr. Long violates the Fourteenth Amendment. Once a state requires certain sentencing procedures, it creates a Fourteenth Amendment life and liberty interest in those procedures. *See, e.g., Evitts v. Lucey*, 469 U.S. 387, 393 (1985)(due process interest in

state created right to direct appeal); *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980)(liberty interest in state-created sentencing procedure.) Capital defendants have vested life and liberty interests that are protected by due process in state-created death penalty procedures. *See Ford v. Wainwright*, 447 U.S. 399, 427-31 (1986)(liberty interest in meaningful state proceedings to adjudicate competency to be executed); *Ohio Adult Parole Authority v. Woodard*, 532 U.S. 272, 288-89 (1998)(O'Connor, J., with Souter, Ginsburg, and Breyer, JJ., concurring)(life interest in state-created right to capital clemency proceedings). Mr. Long has a vested right in jury determined sentencing, a right which has been denied to him.

Mr. Long is now scheduled to be executed based on a death sentence that was based on a statute that was found unconstitutional by both the United States Supreme Court and the Florida Supreme Court. The statutes was just as wrong and unconstitutional in 1972 when the statute was implemented, in 1989 when Mr. Long was sentenced to death, and in 2016 when *Hurst* was decided. Mr. Long should not be executed because it took the courts 40 years to finally rule the statute was unconstitutional.

ISSUE V

THE DENIAL OF MR. LONG'S REQUESTS OF AND FOR DEFENSE EXECUTION WITNESSES IS UNCONSTITUTIONAL

In his postconviction motion filed after the death warrant was signed, Mr. Long made specific requests of and for defense witnesses for his execution. Mr. Long sent a letter by U.S. mail to Warden Barry Reddish, Warden of Florida State prison, making several requests of and for the legal witness[es] he is permitted to have present at this execution. Mr. Long requested that at his execution on May 23, 2019 he be (1) given a second witness to his execution; (2) one of his designated legal witnesses be allowed access to a writing pad and pen during his execution; (3) that one of Mr. Long's designated legal witnesses be allowed access to a telephone before and during the execution process; and (4) that one of Mr. Long's legal witnesses be allowed to view the IV insertion process. In other executions, the warden granted the request that a single witness have access to writing implements, but denied the remaining requests. Mr. Long's requests were also denied by the trial court. The refusal of these requests amounts to a denial of due process and access to the Courts preventing Mr. Long and other similarly situated inmates from raising and proving Florida's execution procedures violation the Eighth Amendment. A refusal of these requests denies Mr. Long a fair opportunity to protect his Eighth Amendment rights

because it deprives him of the necessary information and access to challenge whether his execution is constitutional. As such, he is being denied a "basic ingredient of due process- an opportunity to be allowed to substantiate a claim before it is rejected." *See Ford v. Wainwright,* 477 U.S. 399 (1986)(plurality opinion)(internal quotation marks omitted).

Unlike Florida, other states where lethal injection executions have gone awry, those state have taken steps to increase transparency and attorney access. This should be done in Florida.

To ensure adequate access to the courts, it is necessary to have at least two attorneys present at the viewing- one who can access a phone, and one who can continue to monitor the execution should phone access be necessary. By preventing witnessing counsel from adequate phone access- indeed, any phone access- during the execution, violates Mr. Long's right of access to the courts. By refusing to allow a member of the legal team to witness the IV insertion process, DOC is actively preventing Mr. Long from bringing an Eighth Amendment challenge that would arise after the execution process begins yet prior to the flow of lethal chemicals that will cause death. Such a violation would serve as a basis for a

stay of execution. If DOC has difficulty in achieving venous access, and it either takes an unusually long time with multiple attempts to locate a vein, and/or requires a painful cut-down procedure to be used, Mr. Long has no way of communicating his pain and suffering to his counsel, in violation of both his Sixth and Eighth Amendment rights.

ISSUE VI

THE EIGHTH AMENDMENT BARS MR. LONG'S EXECUTION BECAUSE HE HAS SEVERE TRAUMATAIC BRAIN INJURY AND SEVERE MENTAL ILLNESS

Mr. Long suffers from a severe mental illness, as well as traumatic brain injury [TBI]. The Eighth Amendment bars the execution of those defendants, such as Mr. Long, who have such severe mental impairment.

The Eighth Amendment, whose jurisprudence requires ongoing examination of the "evolving standards of decency that mark the progress of a maturing society" as informed by objective factors, requires those defendants with a severe mental illness to be ineligible for execution. *Atkins v. Virginia*, 536 U.S. 304, 311-312 (2002). In *Atkins* and *Roper v. Simmons* 543 U.S. 551 (2005), the United States Supreme Court found the Eighth Amendment barred the execution of those with an intellectual disability and those under 18. Under the same analysis, execution should be barred when an individual suffers from a severe mental

illness that include TBI if those conditions substantially impair the defendant's capacity to appreciate the criminality of his conduct or conform his actions to the law. In light of *Atkins* and *Roper,* the American Psychiatric Association, the American Psychological Association, and the American Bar Association have all recommended defendants with severe mental illness be excluded from capital punishment. *Recommendation and Report on the Death Penalty and Persons with Mental Disabilities*, 30 Mental & Physical Disability L. Rep. 668 (2006).

Prior to banning capital punishment in 2012, Connecticut barred the execution of the severely mentally ill. Conn. Gen. Stat. §5q-46a(h). Ten state legislatures have introduced bills that have yet to become law to ban the death penalty for those with a severe mental illness. *See, e.g.*, Missouri [H.B. 2509 (2018)]; Texas [H.B. 3080(2017)]; North Carolina [S.B. 166 (2017)]; Kentucky [SB107(2018)]; Ohio [SB40/HB81(2017/2018)]; Arkansas [H.B. 2170(2017)]; Tennessee [H.B. 345, S.B.378 (2017/2018)]; South Dakota [H.B. 1099(2017)]; Virginia[H.B. 1522,S.B 1348(2017), H.B. 758, S.B.802(2018)]; Indiana[S.B. 155(2017)]. Given that the "clearest and most reliable objective evidence of contemporary values is the legislation enacted by this country's legislatures,"

Atkins, 536 U.S. 311, the recent push amount state legislatures to introduce, debate, and consider categorical exemptions from the death penalty for the severely mentally ill is persuasive that contemporary standards of decency demand the exclusion of those, such as Mr. Long, with a severe mental illness from execution.

ISSUE VII

MR. LONG HAS BEEN DENIED HIS DUE PROCESS AND EQUAL PROTECTION RIGHTS AS GUARANTEED BY THE EIGTHT AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONSO OF THE FLORIDA CONSTITUITON BECAUSE ACCESS TO THE FILES AND RECORDS PERTAINING TO HIS CASE IN THE POSSESSION OF CERTAIN STATE AGENCIES HAVE BEEN WITHHELD FROM HIM IN VIOLATION OF RULE 3.8532, FLA. R. CRIM. P.

After the signing of the warrant, Mr. Long made public records requests to the medical examiner, the Department of Corrections [DOC], and the Florida Department of Law Enforcement [FDLE]. Each agency objected to the requests. The trial court conducted a hearing on the matter on April 30, 2019. The trial court granted in part and denied in part Mr. Long's request for his own medical records. The trial court sustained the objections of the medical examiner's office and FDLE, and the remainder of DOC's objections.

The trial court refusal to require the three agencies to comply with 3.852(h), upon the signing of a death warrant each agency is required to place in the registry

all documents not previously objected to, a documents received since the last request, and not previously produced. After this is done, an affidavit must be done certifying that these provisions have been complied with. None of the three agencies complied with this requirement. No agency acknowledged whether or not the records requested in the public records requests existed or not. Mr. Long requested the court required each agency to either deposit the requested records in the repository or state, in an affidavit the requested items did not exist.

Secondly, it was Mr. Long's position that the record requests were not overbroad and would lead to a colorable claim in general and on the as applied claim in his motion, 2A, which challenged the lethal injection protocol specific to him. Defense counsel noted that in the litigation in *Bucklew* the defense had been provided extensive discovery and that Mr. Long was being denied that same access provided to the defendant in *Bucklew v. Precythe*, 139 S.Ct. 1112 (2019). The trial court denied this request.

Lastly, Mr. Long requested any documents that had been requested that existed be examined by the trial court *in camera* prior to a denial. The trial court denied the request for an *in camera* inspection of documents.

Postconviction litigation is governed by principles of due process. *Easter v. Endell*, 37 F.3d 1343 (8th Cir. 1994); *Holland v. State*, 503 So.2d 1250 (Fla. 1987). Here, Mr. Long has been denied access to public records. Mr. Long has a need for these records, unlike many others. The records are relevant to his constitutional challenge to Florida's lethal injection protocol. The records relate to the matters Mr. Long must show under *Glossip v. Gross*, 135 S.Ct. 1885 (2015) and *Bucklew.*

Mr. Long must be given a fair opportunity to show his execution will violate the Fourteenth Amendment. *Hall v. Florida*, 134 S.Ct. 1986, 2001 (2014)("The death penalty is the gravest sentence our society may impose. Persons facing that most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution.") The trial court's refusal to safeguard Mr. Long's constitutional rights was error.

CONCLUSION

Based on the forgoing arguments and citations of authority, Mr. Long requests that the scheduled execution be stayed, that this cause be remanded to the trial court for a full evidentiary hearing, that this cause be remanded to the trial court for an *in camera* examination of the

Pubic Records and/or disclosure of the Public Records, and/or that the Sentence of death be vacated.

Respectfully submitted,
/s/Robert A. Norgard
ROBERT A. NORGARD

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished by electronic delivery to Stephen.ake@myfloridalegal.com, Christina.pacheco@myfloridalegal.com, warrant@flcourts.org, and by U.S. mail to Bobby Joe Long, DC#494041, Florida State Prison, P.O. Box 800, Raiford, FL 32083 this 9th day of May 2019.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style font used in the preparation of this Initial Brief is Courier New 12 point in compliance with Fla. R. App. P. 9.210(a)(2).

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