IN THE SUPREME COURT OF FLORIDA
CASE NO. SC15-147

JERRY WILLIAM CORRELL,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT IN AND FOR ORANGE COUNTY, STATE OF FLORIDA
Lower Tribunal No. 85-CF-3550

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This is an appeal from the denial of Correll's third successive motion for postconviction relief brought pursuant to Florida Rule of Criminal Procedure 3.851, which was filed after the Governor of Florida signed a death warrant for Correll on January 16, 2015. Page references to the current record on appeal will be in the form W[volume number]/[page number]. Page references to the record on appeal for Correll's direct appeal will be in the form R[volume number]/[page number].

REQUEST FOR ORAL ARGUMENT

The resolution of the issues in this action will determine whether Correll lives or dies. This Court has allowed oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be appropriate in this case, given the seriousness of the claims involved and the fact that a life is at stake. Correll accordingly requests that this Court permit oral argument.

PROCEDURAL HISTORY

(A) TRIAL AND DIRECT APPEAL PROCEEDINGS

Correll was charged by indictment in the Ninth Judicial Circuit, Orange County, Florida, with four counts of first-degree murder for the murders of his

ex-wife's mother, Mary Lou Hines (Count I), his ex-wife, Susan Correll (Count II), his ex-wife's sister, Marybeth Jones (Count III), and his five-year old daughter, Tuesday Correll (Count IV). A jury trial was held, and Correll was found guilty as charged on February 6, 1986. The penalty phase trial and judicial sentencing were conducted on February 7, 1986. The jury recommended death by a vote of 9 to 3 on Count II and 10 to 2 on Counts, I, III, and IV, and Correll was sentenced to death as to each count. This Court, in its opinion on direct appeal, summarized the trial court proceedings in Correll's case as follows:

> On the morning of July 1, 1985, the bodies of the four victims were discovered in Mrs. Hines' home in Orlando. All had been repeatedly stabbed and died from massive hemorrhages; the three older victims had defensive wounds on their hands. A sheriff's department investigator was called to the scene and approximately an hour and a half after his arrival encountered Jerry Correll there. Correll was asked for a statement and subsequently went to the sheriff's department where he gave first an oral and then a tape recorded statement. In his statement, Correll indicated that on the night of the murders he had been drinking and smoking marijuana with a woman, who later drove him to Kissimmee. While at the sheriff's department, Correll consented to having his fingerprints taken and having pictures of the scratches, cuts and bruises on his hands and forearms taken. The next day, Correll was again interviewed and subsequently arrested. After being advised of and waiving his *Miranda* rights, Correll gave another statement after his arrest. Several bloody fingerprints and palm prints found at the murder scene were later matched to Correll's. Evidence that he had previously threatened to kill his ex-wife was also admitted. In addition, he could not be ruled out as the person whose bloodstains were found at the scene and whose sperm was found in Susan Correll's vagina.

> The jury convicted Correll of four first-degree murders and recommended the death penalty with respect to each of them. The trial court found the following aggravating factors: Correll had been previously convicted of another capital offense; the murder of Susan Correll was heinous, atrocious, and cruel and was committed during a sexual battery; the murder of Marybeth Jones was committed during a robbery and for the purpose of avoiding arrest; the murder of Tuesday Correll was heinous, atrocious and cruel, committed in a cold, calculated and premeditated manner and was for the purpose of avoiding arrest; and the murder of Mary Lou Hines was heinous, atrocious and cruel. Finding no mitigating factors, the trial court sentenced Correll to death on all four murders.

Correll v. State, 523 So. 2d 562 (Fla. 1988).

This Court affirmed Correll's convictions and sentences of death. A petition for writ of certiorari was denied on October 3, 1988. *Correll v. Florida*, 488 U.S. 871, 109 S.Ct 183, 102 L.Ed. 2d 152 (1988).

(B) POST-CONVICTION PROCEEDINGS

The Governor of Florida signed a death warrant for Correll on January 10, 1990. On February 22, 1990, Correll filed a motion for postconviction relief pursuant to Fla. R. Crim. P. 3.850, alleging that he was denied effective assistance of trial counsel. The postconviction judge, who was also the trial judge, summarily denied Correll's motion for postconviction relief. On February 22, 1990, Correll filed a petition for writ of habeas corpus in this Court, alleging ineffective assistance of appellate counsel. On March 16, 1990, after granting two temporary stays of

execution, this Court denied relief in a consolidated order on the petition for writ of habeas corpus and appellate review of the denial of the Rule 3.850 motion. *Correll v. Dugger*, 558 So. 2d 422 (Fla. 1990).

On March 16, 1990, Correll filed his initial petition for a writ of habeas corpus in the United States District Court for the Middle District of Florida, and the District Court entered an indefinite stay of execution. The action was stayed in 1995 to allow Correll to exhaust a claim based on newly discovered evidence involving the trial testimony of the State's purported blood spatter expert. The federal habeas action was reopened in 1998 after the state court proceedings concluded. *Correll v. State*, 698 So. 2d 522 (Fla. 1997). The action was again held in abeyance from 2002 to 2005 to await this Court's determination of the effect on Florida law of *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed 2d 556 (2002). The circuit court's denial of the *Ring* claim was affirmed. *Correll v. State*, 880 So. 2d 1210 (Fla. 2004). The parties filed updated briefs in December 2010 and January 2011. In an order dated March 19, 2013, the District Court denied Correll's request for a writ of habeas corpus, as well as a certificate of appealability. *Correll v. Sec'y, Dep't of Corr.*, 932 F.Supp. 2d 1257 (M.D. Fla. 2013). Correll filed an application for certificate of appealability with the Eleventh Circuit Court of Appeals on May 23, 2013, which the Eleventh Circuit denied on July 25, 2013. A petition for writ of

certiorari was filed on October 18, 2013 and denied on January 27, 2014. *Correll v. Crews*, 134 S.Ct. 1024, 88 L.Ed. 2d 124 (2014).

On January 16, 2015, Governor Rick Scott denied clemency and signed a death warrant for Correll. The execution is scheduled for February 26, 2015 at 6:00 p.m.

On January 21, 2015, Correll sent demands for public records pursuant to rule 3.852(h) and Florida Statutes Chapter 119 to the Florida Department of Corrections (FDOC), the Florida Department of Law Enforcement (FDLE), and the Office of the Medical Examiner, District Eight. W3/306-354. The FDOC and the FDLE filed objections to Correll's demands for the above listed public records on January 21, 2015. W3/444-458. The Office of the Attorney General filed an objection on behalf of the Eighth District Medical Examiner's Office on January 15, 2015. W3/473-479. A hearing regarding the additional record requests was held on January 22, 2015. W3/459-472. On January 23, 2015, the circuit court issued a separate order pertaining to each of the three record requests, sustaining the agencies' objections. W4/637-653.

Correll filed a Third Successive Motion to Vacate Judgments of Conviction and Sentences on January 21, 2015. W3/359-441. A case management conference was held on January 26, 2015, at which time Correll's attorneys

advised the circuit court that they would be filing a motion for stay of execution in light of the United States Supreme Court's grant of certiorari in *Glossip, Richard E., et al. v. Gross, Kevin J., et al.*, ___ S.Ct. ___, 2015 WL 302647 (Jan. 23, 2015) (No. 14-7955). W14/2203-2210. Later that day, Correll filed an emergency motion for stay of execution, and the State filed a response on January 27, 2015. W5/679-878; W6/879-901; W11/1732-1739; W12/1740-1927; W13/1728-2027; W14/2-28-2202. A hearing on Correll's emergency motion for stay of execution was held on January 27, 2015. W15/2212-2228. On January 28, 2015 the circuit court issued orders denying Correll's Third Successive Motion to Vacate Judgments of Conviction and Sentences, as well as his emergency motion for stay of execution. W15/2229-2232; W15/2233-2241. Correll filed a notice of appeal on January 29, 2015. W15/2256-2257.

On January 29, 2015, Correll filed an Emergency Petition for Stay of Proceedings and Stay of Execution in this Court. The Appellee filed a response and objection to the Petition on January 30, 2015. The Petition is currently pending in this Court.

STANDARD OF REVIEW

The constitutional arguments advanced in this brief present mixed questions of fact and law. As such, this Court is required to give deference to the factual conclusions of the lower court to the extent they are supported by supported by competent and substantial evidence. The legal conclusions of the lower court are to be reviewed independently. *See Ornelas v. U.S.*, 517 U.S. 690, 116 S.Ct. 1657, 134 L.Ed. 2d 911 (1996); *Stephens v. State*, 748 So. 2d 1028 (Fla. 1999)

Denials of public records requests are reviewed under the abuse of discretion standard. *Pardo v. State*, 108 So. 3d 558, 565 (Fla. 2012).

SUMMARY OF THE ARGUMENTS

ARGUMENT I: The circuit court erred in denying Correll's public records requests where the information requested was relevant to a colorable claim for relief. As a result, Correll was denied due process under the Fourteenth Amendment to the United States Constitution.

ARGUMENT II: The circuit court erred when it denied Correll's claim that Florida's death penalty statute, which allows a non-unanimous verdict, is unconstitutional under the Eighth Amendment to the United States Constitution and violates the evolving standards of decency which mark the progress of a maturing society. Correll's death sentence was imposed after a vote of 9 to 3 on Count II and

10 to 2 on Counts, I, III, and IV. Correll would have been sentenced to death with these jury recommendations in only two other states. Florida's outlier status in not requiring unanimous verdicts renders Correll's death sentences unconstitutional.

ARGUMENT III: The circuit court erred when it denied Correll's claim that the totality of the punishment the State has imposed on him violates the Eighth Amendment and the precepts of *Lackey*. The State has subjected Correll to the non-judicially imposed punishment of 29 years' confinement on death row with the psychological torment of living under the ever-present shadow of death. The extent to which Correll exercised his rights to direct appeal and postconviction challenges is irrelevant in accounting for the delay in his execution, as he cannot be made to choose between his Eighth Amendment protections against cruel and unusual punishment and the appeal and postconviction process to which he is constitutionally entitled. The United States Supreme Court in *Lackey* left it to state courts, such as this Court, to exercise their own judgment as to the Eighth Amendment principles at issue here. Correll should not be executed while this Court defers this issue.

ARGUMENT IV: The circuit court erred when it denied Correll's claim that Florida's failure to reveal information about the execution team members violates Correll's constitutional rights. There is legitimate concern regarding the

individuals who will be participating in Correll's execution, and whether a lack of training and experience on their part could cause Correll to suffer cruel and unusual punishment in violation of the Eighth Amendment. Correll's constitutional right to know the identity and qualifications of the executioners overwhelmingly overrides Florida's unsubstantiated safety concerns for the executioners.

ARGUMENT V: The circuit court erred when it denied Correll's emergency motion for stay of execution, where the United States Supreme Court in *Glossip* has accepted certiorari on the question of the constitutionality of Oklahoma's three-drug lethal injection protocol, which is nearly identical to Florida's current three-drug protocol. To allow Correll's execution to proceed before the United States Supreme Court has ruled on this issue of great importance poses a substantial risk that Correll will be executed by a method that is unconstitutional, and as a result he will experience irreparable harm.

ARGUMENT I

THE CIRCUIT COURT ERRED IN DENYING CORRELL'S PUBLIC RECORD REQUESTS MADE PURSUANT TO FLORIDA RULE OF CRIMINAL PROCEDURE 3.852(h) AND FLORIDA STATUTES CHAPTER 119, WHICH RESULTED IN A DENIAL OF DUE PROCESS AND PROCEEDINGS THAT WERE NEITHER FULL NOR FAIR.

On January 21, 2015, Correll sent demands for public records pursuant to Fla. R. Crim. P. 3.852(h) and Florida Statutes Chapter 119 to the Florida Department of Corrections (FDOC), the Florida Department of Law Enforcement (FDLE), and the Office of the Medical Examiner, District Eight seeking information in support of a potential Eighth Amendment lethal injection claim, as well as Claim III of his postconviction motion for relief regarding the constitutionality of Fla. Stat. 945.10. W2/306-354. Correll requested the following records from the FDLE regarding lethal injection and the execution team:

> A. Any and all records concerning the review process which led to the promulgation of the September 9, 2013 lethal injection procedures, including, for example, computer print-outs or copies of research or literature reviewed, emails, faxes, letters, minutes or notes of meetings, telephone call records or notes, including any communications with the Florida Department of Corrections, Florida Department of Law Enforcement, the Office of the Attorney General, the Office of the Governor, any other outside agencies, experts (medical or other), other states or state departments of corrections, and/or the federal government.
>
> B. Any and all records relating to any research and/or experiments

done by the Florida of Law Enforcement or on behalf of the Florida Department of Law Enforcement, with respect to midazolam hydrochloride.

C. Any and all records relating to any correspondence, with any federal agency including the Drug Enforcement Administration, the Food and Drug Administration, the Federal Bureau of Prisons, or the Department of Justice relating to Florida's execution procedures or the drugs used for lethal injection. This would include, but is not limited to, application or registration for permits and/or licenses, or permits and/or licenses required by any federal agency in connection with the purchase, storage, use, research, and disposal of, vecuronium bromide, potassium chloride, and midazolam hydrochloride.

D. Any and all records relating to any consultation with experts (medical or otherwise) with respect to midazolam hydrochloride, including, for example, faxes, letters, minutes or notes of meetings, telephone call records or notes, including any internal communications within Florida Department of Law Enforcement and its personnel.

E. Any and all records relating to execution training exercises, including logs, checklists, sign-in sheets, photographs, and videos from September 9, 2013 to the present.

F. Any and all records relating to correspondence with other Florida state agencies including the Florida Department of Health, from September 9, 2013, through to the present, relating to the acquisition of vecuronium bromide, potassium chloride, and midazolam hydrochloride.

G. Any and all records, including logs or record books regarding the purchase, storage, maintenance, use, distribution, disposal, and expiration dates of midazolam hydrochloride that show compliance (or non-compliance) with the Federal Controlled Substances Act and Florida Statutes, Chapters 828, 893, and 465 from September 9, 2013 to the present.

H. Any and all records relating to how Florida Department of Law Enforcement obtained midazolam hydrochloride and/or vecuronium bromide and/or potassium chloride including purchase orders, prescriptions, contracts, invoices, bills, payments, emails, letters, or any other communication relating to the procurement of pentobarbital and/or midazolam hydrochloride and/or vecuronium bromide from September 9, 2013 to the present.

I. Any and all records relating to Florida Department of Law Enforcement's solicitation of bids for midazolam hydrochloride and/or vecuronium bromide and/or potassium chloride from September 9, 2013 to the present.

J. Any and all records showing the name of the manufacturer and distributor of the lethal injection drugs including package insert information and/or manufacturer's instructions, the date of manufacture, and the shelf life of midazolam hydrochloride and/or vecuronium bromide and/or potassium chloride currently possessed by the Florida Department of Law Enforcement.

K. Any and all records consisting of photographs or videos of the execution chamber, including close-up photographs of all connections and tubing.

L. Any and all records, including the required logs, notes, memoranda, letters, electronic mail, and facsimiles, relating to the executions by lethal injection of William Happ, Darius Kimbrough, Askari Abdullah Muhammad, Juan Carlos Chavez, Paul Howell, Robert Henry, Robert Hendrix, John Henry, Eddie Davis, Chadwick Banks, and Johnny Kormondy. The Florida Department of Law Enforcement's logs regarding William Happ and Darius Kimbrough have previously been provided to the Records Repository. Mr. Correll is requesting all logs requested in this section which **have not previously** been furnished to the Records Repository.

M. Any and all records consisting of photographs and videos of the actual executions by lethal injection of William Happ, Darius

Kimbrough, Askari Abdullah Muhammad, Juan Carlos Chavez, Paul Howell, Robert Henry, Robert Hendrix, John Henry, Eddie Davis, Chadwick Banks, and Johnny Kormondy.

N. Any and all records related to the training and experience of all individuals directly involved with the executions of William Happ, Darius Kimbrough, Askari Abdullah Muhammad, Juan Carlos Chavez, Paul Howell, Robert Henry, Robert Hendrix, John Henry, Eddie Davis, Chadwick Banks, and Johnny Kormondy.

THE EXECUTION OF JERRY CORRELL BY LETHAL INJECTION

O. We would also request for the identity or identities (full legal name) of the execution team members involved in Mr. Correll's death sentence and execution including but not limited to the individual(s) administrating the lethal injection to Mr. Correll along with their complete employment background, educational/training background, curriculum vita, qualifications, certifications, disciplinary records, medical background, medical disciplinary background, history of failed/botched execution involvement and all other related records that ensures that the execution team is qualified, reliable, and experienced to perform their assigned duties.
If this agency is permitted by the Court not to release the true identity of the executioner(s) involved in Mr. Correll's death sentence and execution, then in the alternative, it is requested that their complete employment background, educational/training background, curriculum vita, qualifications, certifications, disciplinary records, medical background, medical disciplinary background, criminal record, history of failed/botched execution involvement and all other related records that ensures that the execution team is qualified, reliable, and experienced to perform their assigned duties.

P. Any and all records related to the execution protocol/medical procedure/training/assigned duties that were provided to the execution team and/or individual team members from this agency or any other State of Florida agency in concert with this agency, and which is to be

followed in the administration of Mr. Correll's sentence of death via lethal injection.

Q. Any and all records relating to the exact description, colour, viscosity, nature, content, chemistry, concentration, dosage, rate of dosage, scientific and non-scientific nomenclature, side-effects, active ingredients, inactive ingredients, source of manufacturer, name and address of the manufacturer, accreditation of the manufacturer, place of production by the manufacturer, date of production, date of expiration of the drugs to be used in the administration of the lethal injection to execute Mr. Correll.

R. Any and all information regarding the chain of custody of the drugs to be used in the administration of the lethal injection to execute Mr. Correll, which includes where it was stored, under what temperature control, logs of checks on the condition of the drugs, the caretaker of the drugs and the logs of the caretaker of the drugs, and all other information that relates to the storage and care of the drugs.

S. Any or all information about the equipment/device(s) specifically to be used to administer the lethal injection to execute Mr. Correll including but not limited to the maintenance logs, age of the equipment/device(s), manufacturer of the equipment/device(s), serial number/model/make of the equipment/device(s), history of problems with the equipment/device(s), whether it was involved in failed/botched executions, the scientific and non-scientific nomenclature of the equipment/device(s), and service of the equipment/device(s). This is to include any and all medical equipment that will be used before, during, and after the execution process in Mr. Correll's case.

W2/327-330. Correll requested the same records from the FDOC and the Eighth District Medical Examiner's Office, except that where the records pertained specifically to the FDLE the other agencies were substituted. W2/311-315;

W2/342-346. (For example, whereas Correll requested from the FDLE "Any and all records relating to any research and/or experiments done by the Florida Department of Corrections or on behalf of the Florida Department of Corrections, with respect to midazolam hydrochloride", he requested from the FDOC "Any and all records relating to any research and/or experiments done by the Florida Department of Corrections or on behalf of the Florida Department of Corrections, with respect to midazolam hydrochloride".) Additionally, Correll asked the Eighth District Medical Examiner's Office for the following records:

> O. Copies of documents concerning post-execution photographs and post mortem examinations performed on Manuel Valle, Oba Chadler, Robert Waterhouse, David Gore, Manuel Pardo, Larry Mann, Elmer Carroll, William Van Poyck, John Ferguson, Marshall Lee Gore, William Happ, Darius Askari Abdullah Muhammad, Juan Carlos Chavez, Paul Howell, Robert Henry, Robert Hendrix, John Henry, Eddie Davis, Chadwick Banks, and Johnny Kormondy, including but not limited to autopsy narrative reports, notes, diagrams, photos, and toxicology studies.
> P. Writings or documents relating to the Medical Examiners' autopsy protocols that were in effect at the time Manuel Valle, Oba Chadler, Robert Waterhouse, David Gore, Manuel Pardo, Larry Mann, Kimbrough,Elmer Carroll, William Van Poyck, John Ferguson, Marshall Lee Gore, William Happ, Darius Kimbrough, Askari Abdullah Muhammad, Juan Carlos Chavez, Paul Howell, Robert Henry, Robert Hendrix, John Henry, Eddie Davis, Chadwick Banks, and Johnny Kormondy were executed.
>
> Q. Writings or documents relating to discoloring, physical nature, consciousness, heart rate, and breathing of Manuel Valle, Oba Chadler, Robert Waterhouse, David Gore, Manuel Pardo, Larry Mann, Elmer

> Carroll, William Van Poyck, John Ferguson, Marshall Lee Gore, William Happ, Darius Kimbrough, Askari Abdullah Muhammad, Juan Carlos Chavez, Paul Howell, Robert Henry, Robert Hendrix, John Henry, Eddie Davis, Chadwick Banks, and Johnny Kormondy.

W2/344.

In support of his demands, Correll offered reasons why the information he was requesting would lead to a colorable claim for relief.

Correll argued:

> On September 9, 2013, former Florida Department of Corrections Secretary Michael W. Crews signed into effect yet another new lethal injection protocol which substitutes benzodiazepine midazolam hydrochloride for use **as an anesthetic** for the pentobarbital that was called for in the 2012 lethal injection protocols. Midazolam hydrochloride is a short-acting benzodiazepine better known by the trade name of Versed. Benzodiazepines are a class of drugs which are primarily used for treating anxiety and which includes drugs such as diazepam (Valium), lorazepam (Ativan) and alprazolam (Xanax). Midazolam is a controlled substance and listed as a Schedule IV drug by the Federal Drug Enforcement Agency. It is often used as a sedative prior to the induction of anesthesia in surgical settings. The new protocol calls for an injection of 250 milligrams of midazolam hydrochloride solution[1], which is 12½ times the dose that may be prescribed for any legitimate medical purpose.
>
> . . .
>
> The use of this drug as an anesthetic as part of a three-drug protocol in combination with the neuromuscular blocking agent and potassium

[1] Undersigned counsel acknowledges its mistake in that the protocol actually calls for 500 mg. of midazolam, as opposed to 250 mg - an amount that is identical to the amount used in Oklahoma.

> chloride is unprecedented in the United States. Of the few states that have proposed using midazolam hydrochloride in their upcoming executions, it would only be used as a back-up drug or as another option. Even then, those states have proposed using the midazolam in conjunction with hydromorphone (an opiate) as a single-drug cocktail and not as an anesthetic. In other words, those three states—unlike Florida—have made some attempt to reduce the risk of substantial harm. The decision to experiment with an untested benzodiazepine instead of a barbiturate for the purpose of inducing anesthesia represents a substantial change to the protocol; one that warrants discovery, investigation, and judicial review.

W2/311-312; W2/327; W2/342.

Citing Justice Sotomayor's dissent regarding the United States Supreme Court's denial of a stay of execution in *Warner v. Gross, et al.*, 135 S.Ct. 824 (2015) (mem.), which was released just one day before Correll's warrant was signed, Correll further argued:

> Supreme Court of the United States Justice, the Honorable Sotomayor, J., joined by Justice Ginsburg, Justice Breyer, and Justice Kagan, in her recent dissent (day before the warrant was signed in this case) in *Warner et al. v. Gross, et al.*, 574 U.S. ___ (January 15, 2015), specifically noted that in the execution of Clayton Lockett in Oklahoma (carried under the same protocol in Florida) "went poorly, to say the least." *Warner*, 574 U.S. ___, page 1 of the dissent. The dissent further stated that "the State [Oklahoma] issued a report that placed **much of the blame on the execution team's failure to insert properly an intravenous (IV) line**, finding that a large quantity of the drugs that should have been introduced into Lockett's blood stream had instead pooled in the tissue near the IV access point." (emphasis added) *Id*. at page 2 of the dissent. This led to the state of Oklahoma "adopt[ing] a new execution protocol" that "contains a number of procedures to better ensure that execution team members

> are able to insert properly an IV line and assess the condemned inmate's consciousness." *Id*. at page 2 of the dissent. Moreover, the "deficiency of the midazolam may generally be revealed only in an execution, such as Lockett's, where the IV fails to sufficiently deliver the paralyzing agent." *Id*. at page 6 of the dissent. This request for these records is necessary to prevent these very cruel deaths and to establish that there are trainings, protocols, safeguards and experienced executioner(s) who do not cause a death in violation of Mr. Correll's Eight Amendment that "guarantees that no one should be subjected to an execution that cause searing, unnecessary pain before death." *Warner*, 574 U.S. ___, page 8 of the dissent.

W2/314; W2/329-330; W2/345.

The FDOC and the FDLE filed objections to Correll's demand for the above listed public records on January 21, 2015. W3/444-458. The Office of the Attorney General filed an objection on behalf of the Eighth District Medical Examiner's Office on January 15, 2015. W3/473-479. A brief hearing regarding the additional records requests was held on January 22, 2015. W3/459-472.

On January 23, 2015, the circuit court issued a separate order pertaining to each of the three records requests, sustaining the agencies' objections and finding that "Defendant failed to meet his burden in showing that the production of the records requested . . . would lead to a colorable claim for relief. *See Muhammad* [*v. State*, 132 So. 3d 176 (Fla. 2013)] at 202-203; and *Chavez* [*v. State*, 132 So. 3d 826 (Fla. 2014)] at 829." W4/637-653. The circuit court further found that "Defendant has not demonstrated that the conditions presenting the risk of cruel and

unusual punishment are sure or very likely to cause serious illness and needless suffering and give rise to sufficiently imminent dangers. *Baze v. Rees*, 128 S.Ct. 1520 (2008)", and that Correll has not met his burden in proving a cognizable claim under *Baze v. Rees*, 553 U.S. 35, 128 S.Ct. 1520, 170 L.Ed. 2d 420 (2008). W4/640; W4/645; W4/650.

The circuit court erred in finding that the requested records would not lead to a colorable claim for relief. Midazolam, the first drug in Florida's three-drug protocol, has been the subject of constitutional concerns implicating the Eighth Amendment since states began using it as part of their lethal injection protocols, and botched executions resulted in the states of Ohio, Oklahoma, and Arizona. *See* Death Penalty Information Center, *State by State Lethal Injection*, http://www.deathpenaltyinfo.org/state-lethal-injection (last visited Jan. 28, 2015). During the January 16, 2014 Ohio execution of Dennis McGuire, which used a two-drug protocol of midazolam and hydromorphone, McGuire was reported to have snorted and gasped several times and to have taken more than 15 minutes to die.[2] During the April 29, 2014 Oklahoma execution of Clayton Lockett, which

[2] Andrew Welsh-Huggins, *Executed Killer Dennis McGuire Gasped And Snorted For 15 Minutes Under New Lethal Drug Combo*, HUFFINGTON POST (HUFF POST CRIME) (Jan. 16, 2014),

used a three-drug protocol of midazolam, vecuronium bromide, and potassium chloride, Lockett writhed, gasped, and called out, "Oh, man." At one point, he attempted to rise and exhaled loudly. Lockett had been declared unconscious after administration of the midazolam, and the botch was reportedly due to vein failure.[3] And, during the July 23, 2014 Arizona execution of Joseph Wood, which used a two-drug protocol of midazolam and hydromorphone, Wood gasped and struggled to breathe for nearly two hours, at which point, he finally died. One witness reported that he gasped 640 times during the execution and described his last breaths as like "a fish on shore gulping for air."[4] As Justice Sotomayor argued in *Warner*, and as Correll pointed out in his demands, because a paralytic is used as the second drug, the deficiency of midazolam may only be revealed where the IV fails to sufficiently deliver the paralytic. *Warner*, 135 S.Ct. at 827. Thus, if the paralytic is properly administered, observers may be completely unaware of the intense pain that is being experienced by inmates who are executed under the current protocol.

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http://www.huffingtonpost.com/2014/01/16/dennis-mcguire-execution_n_4610582.html.

[3] Erik Eckholm, *One Execution Botched, Oklahoma Delays the Next*, THE NEW YORK TIMES (Apr. 29, 2014), http://www.nytimes.com/2014/04/30/us/oklahoma-executions.html.

[4] Amy Davidson, The Death Penalty Fails Again, THE NEW YORKER (July 24, 2014), http://www.newyorker.com/news/amy-davidson/death-penalty-fails.

Oklahoma's three-drug lethal injection protocol calls for the exact same 500 mg. dose of midazolam as Florida's three-drug protocol. The United States Supreme Court's grant of certiorari in *Glossip, Richard E., et al. v. Gross, Kevin J., et al.*, ___ S.Ct. ___, 2015 WL 302647 (Jan. 23, 2015) (No. 14-7955), in which the Court will consider the constitutionality of Oklahoma's three-drug protocol, adds strong support for Correll's argument that the production of the records requested would lead to a colorable claim for relief and proves that there is a cognizable Eighth Amendment claim regarding a three-drug lethal injection protocol such as Florida's, where midazolam is the first drug. *Glossip* clearly demonstrates that there is substantial evidence in the scientific community that midazolam cannot reliably achieve and maintain unconsciousness such that the prisoner remains insensate during the administration of the second and third drugs. The Petitioners in *Glossip* argue that

> Oklahoma intends to execute Petitioners using a three-drug protocol with the same second and third drugs addressed in *Baze*. However, the first drug to be administered (midazolam) is not a fast-acting barbiturate; it is a benzodiazepine that has no pain-relieving properties, and there is a well-established scientific consensus that it cannot maintain a deep, comalike unconsciousness. For these reasons, it is uncontested that midazolam is not approved by the FDA for use as general anesthesia and is never used as the sole anesthetic for painful surgical procedures.
>
> Although Oklahoma admits that administration of the second or third

> drug to a conscious prisoner would cause intense and needless pain and suffering, ***it has selected midazolam because of availability rather than to create a more humane execution***.

Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit at i, *Glossip, Richard E., et al. v. Gross, Kevin J., et al.*, ___ S.Ct. ___ (Jan. 13, 2015) (No. 14-7955); W5/700.

Without access to relevant public records, Correll is foreclosed from finding out relevant information that would support an Eighth Amendment claim. The records requests made by Correll are not, as the circuit court suggests, a "fishing expedition", but are in response to well-founded concerns regarding the constitutionality of his pending execution. As a result of the denial of public records, his ability to plead a claim regarding lethal injection is severely limited.

In *Sims v. State*, 753 So. 2d 66, 72 (Fla. 2000), Justice Anstead cautioned that "We need to be very careful that we not end up with an outcome where a death-sentenced defendant, whose life may literally be affected, is barred from enforcing his constitutional right as a citizen to access to public records that any other citizen could routinely access." (Anstead, J. concurring). Yet, this is exactly what is occurring in Correll's case. Justice Anstead had earlier emphasized that "[t]rial courts must be mindful of our intention that a capital defendant's right of access to public records be recognized under this rule" because "[i]f there is any

category of cases where society has an interest in seeing that all available information is disclosed, it is obviously in those cases where the ultimate penalty has been imposed." *In re Amendment to Florida Rules of Criminal Procedure-Capital Postconviction Pub. Records Prod.*, 683 So. 2d 475, 477 (Fla. 1996). Furthermore, Justice Anstead acknowledged assurances from the State and its agencies that they will essentially follow an "open file" policy. *Id.* This promise has been not been fulfilled. Instead, these agencies have continuously shielded themselves with a harsh and unconstitutional interpretation of Fla. R.Crim. P. 3.852 to avoid turning over to capital defendants, including Correll, the information they need to fully plead their lethal injection claims.

In 2011, the United States District Court for the Southern District of Ohio stayed the execution of Kenneth Smith, indicating that Smith had demonstrated a substantial likelihood of proving the unconstitutionality of Ohio's method of execution practices. *Cooey v. Kasich*, 801 F.Supp. 2d 623 (S.D. Ohio 2011). The Court's conclusion was premised on the Ohio Department of Corrections policy and practice of permissible core deviations from its execution procedures or its failures with respect to the procedure altogether. Significantly, in the Ohio litigation, Smith was able to prove a substantial likelihood of success due in part to the fact that he and the State of Ohio engaged in meaningful disclosure of public records and

meaningful discovery. Smith learned through discovery numerous details including information about the execution team members, their qualifications, which team members were involved at particular executions, the licenses and registration requirements, and which team members possess those, for receiving ordering, possessing and distributing controlled substances, and where particular execution drugs were obtained. *Id.* Smith was able to take testimony from numerous team members including those whose identity was protected. It is obvious from the facts set forth in the opinion that Smith received documentation, logs, and checklists from previous executions and training sessions, applications for membership on the execution team, team members' certifications and sign-in sheets for training/rehearsal sessions, and order forms for execution chemicals. These are precisely the type of records Correll requested in his Rule 3.852(h) demands to the DOC, the FDLE, and the Medical Examiner's Office, and which are relevant to an Eighth Amendment claim. The opinion of the United States District Court demonstrates just how relevant these records are. *See also Walker v. Humphrey*, 08-V-1088 (Ga. Superior Ct. July 19, 2011) (finding that there are many facts relevant to the constitutionality of the State's execution process that it has refrained from disclosing to those who seek to challenge it and granting petitioner's request to gather further evidence relevant to this claim).

In light of the foregoing, the circuit court's denial of access to public records was an abuse of discretion, which denied Correll due process under the Fourteenth Amendment of the United States Supreme Court and resulted in proceedings that were neither full nor fair. Correll has established that the records sought are relevant and would lead to a colorable claim for relief. A stay of execution should be entered and this case remanded to the lower court for further proceedings after the records Correll has requested have been provided to him.

ARGUMENT II

THE CIRCUIT COURT ERRED IN DENYING CORRELL'S CLAIM THAT FLORIDA'S DEATH PENALTY STATUTE, WHICH ALLOWS FOR A NON-UNANIMOUS VERDICT, IS UNCONSTITUTIONAL UNDER THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND VIOLATES EVOLVING STANDARDS OF DECENCY WHICH MARK THE PROGRESS OF A MATURING SOCIETY.

Correll alleged in Claim I of the motion for postconviction relief that Florida's death penalty statute, which allows for a non-unanimous verdict, is unconstitutional under the Eighth Amendment to the United States Constitution and violates the evolving standards of decency which mark the progress of a maturing society. W3/368-374. The circuit court summarily denied this claim in light of this Court's previous rulings in *Kimbrough v. State*, 125 So. 3d 752 (Fla. 2013), *cert. denied*, __ U.S. __, 134 S.Ct. 632 (2013), *Mann v. State*, 112 So. 3d 1158, 1162 (Fla. 2013), and

Robards v. State, 112 So. 3d 1256, 1267 (Fla. 2013). W15/2236. Correll seeks review of these findings.

Fla. Stat. § 921.141 allows the sentencing court to impose a sentence of death where the jury's recommendation is non-unanimous. Fla. Stat. § 921.141 (2015)[5]. In Correll's case, the jury recommended death by a vote of 9 to 3 on Count II and 10 to 2 on Counts, I, III, and IV. R17/2009-11. Florida's outdated and unconstitutional death penalty statute results in an unreliable sentencing determination.

The Eighth Amendment has been construed by the Supreme Court of the United States to require that punishment for crimes comport with "the evolving standards of decency that mark the progress of a maturing society." *Roper v. Simmons*, 543 U.S. 551, 561, 1255 S.Ct. 1183, 161 L.Ed. 2d 1 (2005) (*quoting Trop v. Dulles*, 356 U.S. 86, 100-01, 78 S.Ct. 590, 2 L.Ed. 630 (1958) (plurality opinion). "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man." *Trop*, 356 U.S. at 100. In assessing the evolving

[5] Fla. Stat. § 921141(2) Reads as follows:

> **Findings in support of the sentence of death. –** Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which a sentence of death is based as to the facts . . .

standards of decency, the Court considered laws around the entire world. *Id*. at 102-03. The Court further stated that "[t]he provisions of the Constitution are not time-worn adages or hollow shibboleths. They are vital, living principles that authorize and limit governmental powers in our Nation." *Id*. at 103.

The Eighth Amendment to the Federal Constitution requires additional procedural protections in capital cases. *Beck v. Alabama*, 447 U.S. 625, 637-38, 100 S.Ct. 2382, 65 L.Ed. 392 (1980). "Death is a different kind of punishment from any other which may be imposed in this country. From the point of view of the defendant, it is different in both its severity and its finality . . . from the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." *Gardner v. Florida*, 430 U.S. 349, 357-58, 97 S.Ct. 1197, 51 L.Ed. 2d 393 (1977).

Florida's jury system in capital cases has failed to keep pace with the evolving standards of decency that mark the progress of a maturing society as demonstrated by the other state and federal death penalty statutes nationwide and worldwide. Florida's system is not in accord with the evolving standards of decency because juries are not required to issue a unanimous death verdict and the

State still adheres to a practice of allowing a judge to override a jury's life verdict. Florida's capital punishment statute regarding juror unanimity is nonconforming with all but two other states with the death penalty.

Pursuant to *Graham v. Florida*, when conducting an Eighth Amendment Cruel and Unusual Punishment Clause analysis, where failure to comport with the evolving standards of decency is alleged, a court must make two determinations on a "sentencing practice at issue." 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed. 2d 825 (2010). Courts are first to take into account "objective indicia of society's standards, as expressed in legislative enactments and state practice." *Id. See also Atkins v. Virginia*, 536 U.S. 304, 312, 122 S.Ct. 2242, 153 L.Ed. 2d 335 (2002) ("[T]he clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures.") (*quoting Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed. 2d 256 (1989)). Second, courts consider whether the punishment at bar comports with "the standards elaborated by controlling precedents and by the Court's own understanding and interpretation of the Eighth Amendment's text, history, meaning and purpose." *Id*.

With respect to societal standards, 31 out of 34 death penalty states require unanimous death sentences, and 32 do not allow judges to override the jury. *Unanimous Sentencing in Capital Felonies, available at*

http://floridacapitalresourcecenter.org/statutes-rules/proposed-legislation/2012/.

The Federal Death Penalty Statute also requires a unanimous verdict. 18 U.S.C. § 3593 (2015). Only three states allow a death sentence to be imposed with a less than unanimous jury verdict: Alabama, Florida and Delaware. But even Alabama requires a minimum jury recommendation of 10 to 2, in favor of death, before a death sentence can be imposed. *See* Ala. Code § 13A-5-46(f). Delaware requires a unanimous vote on the finding of one aggravator before a sentence of death can be considered. Del. Code Ann. Title 115 4209. Florida is the *only* state in the entire country that allows juries to recommend a death sentence by a simple majority. *See* Raoul Cantero and Mark Schlakman, *Florida ignores "unanimous jury" legislation in death penalty cases at its peril*, Miami Herald, Feb. 20, 2012, ("Florida is an outlier insofar as allowing capital-case juries to find aggravating circumstances and recommend a death sentence by a simple majority. All 33 other death penalty states require some form of unanimity ... Regardless of ... one's views on capital punishment, maintaining the status quo and thereby Florida's outlier status in this country does not serve the cause of justice. States like Texas and Georgia, known for their pro-death penalty stance, require unanimous juries. So should we.").

In a different context regarding a *Ring*[6]*/Apprendi*[7] challenge, this Court recognized that Fla. Stat. § 921.141 has placed the Florida death penalty system on the fringes of constitutionality. *State v. Steele*, 921 So. 2d 538, 548-550 (Fla. 2005). "[I]n light of development in other states and at the federal level, the Legislature should revisit the statute to require some unanimity in the jury's recommendations." *Id*. at 548.

The Connecticut Supreme Court has stated:

> [W]e perceive a special need for jury unanimity in capital sentencing. Under ordinary circumstances, the requirement of unanimity induces a jury to deliberate thoroughly and helps to assure the reliability of the ultimate verdict. The "heightened reliability demanded by the Eighth Amendment in the determination whether the death penalty is appropriate; *Sumner v. Shulman*, 483 U.S. 66, 107 S.Ct. 2716, 2720, 97 L.Ed.2d 56 (1987); convinces us that jury unanimity is an especially important safeguard at a capital sentencing hearing. In its death penalty decisions since the mid-1970s, the United States Supreme Court has emphasized the importance of ensuring reliable and informed judgments. These cases stand for the general proposition that the "reliability" of death sentences depends on adhering to guided procedures that promote a reasoned judgment by the trier of fact. The requirement of a unanimous verdict can only assist the capital sentencing jury in reaching such a reasoned decision.

State v. Daniels, 207 Conn. 374, 389, 542 A.2d 306, 315 (Conn. 1988) (internal citations omitted).

In considering whether the punishment at bar comports with "the standards

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[6] *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed. 556 (2002).

[7] *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed. 2d 435 (2000).

elaborated by controlling precedents and by the Court's own understanding and interpretations of the Eighth Amendment's text, history, meaning and purpose, the Court has emphasized that the Eighth Amendment cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed." *Furman v. Georgia*, 408 U.S. 238, 310, 92 S.Ct. 2726, 2763, 33 L.Ed. 2d 346 (1972) (Stewart, J., concurring).

This is exactly what Florida's outlier system has allowed. In allowing for a death verdict based on a simple majority, with no breakdown of which, if any, aggravators were found by a majority of jurors, Florida's death sentencing rates and wrongful convictions are some of the highest in the country. In 2012, Florida had the most death sentences of any state, in 2013 Florida had the second highest number of death sentences of any state, and in 2014 Florida was tied with Texas for the second highest number of death sentences. Death Penalty Information Center, *Death Sentences in the United States Since 1977 by State and by Year*, *available at* http://www.deathpenaltyinfo.org/death-sentences-united-states-1977-2008. Florida has the second largest number of death row inmates of any state in the country. Death Penalty Information Center, *Facts about the Death Penalty*, *available at* http://www.deathpenaltyinfo.org/documents/FactSheet.pdf. Florida also has the

most death row exonerations of any state, at 25 since 1973. *Id.*

In addressing Sixth Amendment challenges to jury systems, the Supreme Court, in *Ballew v. Georgia*, 435 U.S. 223, 98 S.Ct. 1029, 55 L.Ed. 2d 234 (1978), held that a state criminal trial of only five persons violated the Sixth and Fourteenth Amendments. The Court noted that the purpose of a jury trial is to "prevent oppression by the Government." *Id*. at 229. "Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased or eccentric judge." *Id*. (internal citations omitted). The Court found that based on empirical data, smaller juries are less likely to foster deliberation which leads to inaccurate fact-finding. *Id*. at 232. "When individual and group decision making were compared, it was seen that groups performed better because prejudices of individuals were frequently counterbalanced, and objectivity resulted. Groups also exhibited increased motivation and self-criticism. ... Because juries frequently face problems laden with value choices, the benefits are important and should be retained. In particular, the counterbalancing of various biases is critical to the accurate application of the common sense of the community." *Id*. These same criticisms and concerns are now known to also apply to non-unanimous jury decision making.

The Supreme Court has also noted that, "we have long been of the view that '[t]he very object of the jury system is to secure unanimity by a comparison of views and by arguments among jurors themselves.' *Allen v. United States*, 164 U.S. 492, 501, 41 L.Ed. 528, 17 S.Ct. 154 (1896)." *Jones v. United States*, 527 U.S. 373, 382, 119 S.Ct. 2090, 144 L.Ed. 2d 370 (1999). In a capital sentencing, it is important that a jury "express the conscience of the community on the ultimate question of life or death." *Lowenfeld v. Phelps*, 484 U.S. 231, 238, 108 S.Ct. 546, 98 L.Ed. 2d 568 (1988) (quoting *Witherspoon v. Illinois*, 391 U.S. 510, 519, 88 S.Ct. 1770, 1775, 20 L.Ed. 2d 776 (1968). The Court has also held that "[u]nanimity in jury verdicts is required where the Sixth and Seventh Amendments apply. In criminal cases, this requirement of unanimity extends to all issues -- character or degree of the crime, guilt and punishment -- which are left to the jury. . . . [T]he jury's decision upon both guilt and whether punishment of death should be imposed must be unanimous." *Andres v. United States*, 333 U.S. 740, 748-49, 68 S.Ct. 880, 884, 92 L.Ed. 1055 (1948).

Additionally, the Supreme Court has stated that there are "size and unanimity limits that cannot be transgressed if the essence of the jury trial right is to be maintained." *Brown v. Louisiana*, 447 U.S. 323, 330-31, 100 S.Ct. 2214, 2221, 65 L.Ed. 2d 159 (1980). A fractured court in *Johnson v. Louisiana/Apodaca*

v. Oregon, 406 U.S. 356, 92 S.Ct. 1620, 32 L.Ed. 2d 152 (1972) (plurality opinion) barely upheld a less than unanimous verdict of nine to three in a non-capital case as constitutional under the Sixth Amendment.

The circuit court denied Correll's claim due to its reliance on *Kimbrough*, *Mann*, and *Robards*. It is respectfully urged that this Court recede from such authority and grant Correll's appeal by declaring the portion of the Florida death penalty statute that allows non-unanimous jury verdicts unconstitutional under the Eighth Amendment's evolving standards of decency.

ARGUMENT III

THE CIRCUIT COURT ERRED IN DENYING CORRELL'S CLAIM THAT THE TOTALITY OF THE PUNISHMENT THE STATE HAS IMPOSED ON CORRELL VIOLATES THE EIGHTH AMENDMENT AND THE PRECEPTS OF *LACKEY*[8].

Correll alleged in Claim II of the motion for postconviction relief that the totality of the punishment the State has imposed on him violates the Eighth Amendment and the precepts of *Lackey v. Texas*, 514 U.S. 1045, 115 S.Ct. 1421, 131 L.Ed. 2d 304 (1995) (memorandum of Stevens, J., respecting the denial of certiorari). W3/374-378. The circuit court summarily denied this claim, and found that:

[8] *Lackey v. Texas*, 514 U.S. 1045, 115 S.Ct. 1421, 131 L.Ed. 2d 304 (1995) (memorandum of Stevens, J., respecting the denial of certiorari)

> The Florida Supreme Court "has repeatedly rejected similar claims that imposition of the death sentence after an extended period of time on death row constitutes cruel and unusual punishment or that it violates binding norms or international law." *Carroll v. State*, 114 So. 3d 883, 889-890 (Fla. 2013), finding no merit to a similar claim filed by a defendant who was sentenced in 1990 and cites numerous other cases, including, but not limited to, *Valle v. State*, 70 So. 3d 530, 52 (Fla. 2011) (33 years on death row), and *Booker v. State*, 773 So. 2d 1079, 1096 (Fla. 2000) (almost 30 years on death row).

W15/2237. Correll seeks review of these findings.

Correll's incarceration on death row began on February 8, 1986, when he was thirty years old. On February 26, 2015, the date of his scheduled execution, he will be 59 years old, and he will have spent 29 years on Florida's death row. Correll is not the same man today that he was when he arrived on death row.

Like Correll, the average inmate on Florida's death row spends many years awaiting execution, not knowing if, or when, his sentence will ultimately be carried out. As of December 31, 2013, prisoners on Florida's death row spent an average of 15 years awaiting execution. U.S. Department of Justice Bureau of Justice Statistics, *Capital Punishment, 2013- Statistical Tables* at Table 15 (revised December 19, 2014), *available at* http://www.bjs.gov/content/pub/pdf/cp13st.pdf. In fact, in 2013 just as many death row inmates in Florida died from other causes as were executed (seven each). *Id.* at Table 9.

In 1890, the United State Supreme Court described the psychological effects

on an inmate awaiting execution for a period of four weeks: "[W]hen 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, 10 S. Ct. 384, 388, 33 L.Ed. 835 (1890). The Framers of the Constitution could not have anticipated a decades-long delay between sentencing and execution when "[s]uch a delay, if it ever occurred, certainly would have been rare in 1789." *Lackey*, 514 U.S. 1045.

More than one hundred years later, United States Supreme Court Justices Stevens and Breyer, in *Lackey*, expressed concerns regarding the length of time prisoners are spending on death row prior to execution:

> The cruelty of capital punishment lies not only in the execution itself and the pain incident thereto, but also in the dehumanizing effects of the lengthy imprisonment prior to execution during which the judicial and administrative procedures essential to due process of law are carried out. Penologists and medical experts agree that the process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture.

Lackey, 514 U.S. at n.* (quoting *People v. Anderson*, 493 P.2d 880, 894 (Cal. 1972); *See also*, *Furman*, 408 U.S. at 288-89 (Brennan, J., concurring) ("The prospect of pending execution exacts a frightful toll during the inevitable long wait between the imposition of sentence and the actual infliction of death.")

The length of time spent on death row is made worse by the fact that

Florida's death row is not intended for long-term residency:

> . . . [P]risoners who have been sentenced to death are maintained in a six-by nine-foot cell with a ceiling nine and one-half feet high. These prisoners are taken to the exercise yard for two-hour intervals twice a week. Otherwise, these prisoners are in their cells except for medical reasons, legal or media interviews, or to see visitors (allowed access to visit from 9 a.m. to 3 p.m. on weekends only). These facilities and procedures were not designed and should not be used to maintain prisoners for years and years.

Swafford v. State, 679 So. 2d 736, 744 n. 8 (Fla. 1996) (Wells, J., concurring in part and dissenting in part) (citations omitted). Additionally, there is no air conditioning, and the inmates are only allowed to shower every other day. Florida Department of Corrections, *The Daily Routine of Death Row Inmates*, *available at* http://www.dc.state.fl.us/oth/deathrow/. The cruelty and unusualness of the punishment of being housed for decades under these circumstances is not humane, and it is not constitutionally negligible. "Confinement in a prison or in an isolation cell is a form of punishment subject to scrutiny under Eighth Amendment standards." *Hutto v. Finney*, 437 U.S. 678, 685, 985 S.Ct. 2565, 2571, 57 L.Ed. 522 (1978).

The State of Florida has added to Correll's death sentence the morbid additional sentence of being taunted with death for nearly three decades, almost half of his life, in inhumane conditions, not knowing if or when a death warrant

would ever be signed. This additional sentence constitutes cruel and unusual punishment under the Eighth Amendment of the United States Constitution, as it is a greater punishment than that to which Correll has been sentenced and that which the Eighth Amendment condones. In *Lackey*, Justice Stevens conducted an analysis recognizing the merit of Petitioner's argument that executing a prisoner who has spent seventeen years on death row violates the Eighth Amendment, and stated that the claim has both "importance and novelty":

> Petitioner raises the question whether executing a prisoner who has already spent some 17 years on death row violates the Eighth Amendment's prohibition against cruel and unusual punishment. Though the importance and novelty of the question presented by this certiorari petition are sufficient to warrant review by this Court, those factors also provide a principled basis for postponing consideration of the issue until after it has been addressed by other courts.[9]

Lackey, 514 U.S. 1045. Correll has been on death row nearly twice as long as the Petitioner in *Lackey*.

Justice Stevens also expressed the view that there is a foundation for the

[9] At this juncture, this issue has been considered by other courts, and is ripe for review by the United States Supreme Court. In 2014, the United States District Court for the Central District of California held that the dysfunctional administration of California's death penalty system, which results in "an inordinate and unpredictable delay preceding" execution violates the Eighth Amendment's prohibition against cruel and unusual punishment. *Jones v. Chappell*, 31 F.Supp. 1050 (C.D. Cal. 2014).

claim, meaning it is not without merit, and recognized a strong argument that the Eighth Amendment prohibits such punishment:

> Though novel, petitioner's claim is not without foundation. In *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed. 2d 859 (1976), 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, *see id.*, at 177, 96 S.Ct., at 2927 (opinion of Stewart, Powell, and STEVENS, JJ.), and (2) the death penalty might serve "two principal social purposes: retribution and deterrence," *id. at 183.*
>
> It is arguable that neither ground retains any force for prisoners who have spent some 17 years under a sentence of death.

Lackey, 514 U.S. 1045.

Justice Breyer has continued to voice his concerns regarding the length of time between sentencing and execution. *See, e.g.*, *Elledge v. Florida*, 525 U.S. 944, 119 S.Ct. 366, 142 L.Ed. 2d 303 (1998) (Breyer, J., dissenting) (stating that the claim of Petitioner, who spent more than 23 years on death row, "that the Constitution forbids his execution after a delay of this length – is a serious one"); *Valle v. Florida*, 132 S.Ct. 1, 180 L.Ed. 2d 940 (2011) (mem.) (Breyer, J., dissenting) (stating that he would consider Petitioner's claim that 33 years of incarceration on death row, more than twice the average of 15 years spent on death row, violates the Constitution's prohibition of cruel and unusual punishment).

Furthermore, as Justice Stevens recognized in *Lackey*, lengthy delays in the

execution of death sentences deprive the death penalty of any deterrent or retributive effect it might once have had. *Lackey*, 514 U.S. 1045. When punishment incident to the death penalty eclipses the death penalty itself in penological effect, the death penalty becomes "the pointless and needless extinction of life with only marginal contributions to any discernable social or public purpose. A penalty with such negligible returns to the State would be patently excessive and cruel and unusual punishment violative of the Eighth Amendment." *Furman*, 408 U.S. at 312.

In its order denying relief, the circuit court appears to blame Correll for the length of time he has spent awaiting execution, and cites Justice Thomas' concurring opinion in *Knight v. Florida*, 528 U.S. 990, 990, 120 S.Ct. 459, 145 L.Ed. 370 (1999), wherein he states, ". . . I am unaware of any support in the American constitutional tradition or in this Court's precedent for the proposition that a defendant can avail himself of the panopoly of appellate and collateral procedures and then complain when his execution is delayed." W15/2237-2238. Although, as Justice Stevens pointed out in *Lackey*, there is a question about what portion of the delay should be considered in the analysis, Correll was merely availing himself of the appellate procedures allowed by the law. *See Valle*, 132 S.Ct. at 2 ("[O]ne cannot realistically expect a defendant condemned to death to

refrain from fighting for his life by seeking to use whatever procedures the law allows.") While Correll could certainly have avoided suffering through the review process by simply waiving his appeals, he has constitutional rights which are meaningless if not exercised, and in order to exercise them, he has to avail himself of the judicial system. If that system cannot reach a result within a time period permitted by the Eighth Amendment, then the problem is with the system, not with Correll's choice to exercise his rights. He does not forfeit his Eighth Amendment rights by exercising his other constitutional rights.

Furthermore, at least a portion of the delay was due to the United States District Court for the Middle District of Florida losing the state court record for an unspecified period of time. In an order dated July 15, 2010, United States District Judge Steven D. Merryday struck Correll's second amended petition for writ of habeas corpus with leave to file a third amended petition, explaining that:

> This case was transferred twice between two divisions of the district and was stayed several times because additional state proceedings were necessary. During the pendency of this action in federal court, the state court record was lost. Following a long and exhaustive search, the state court record was located recently in the Federal Records Center in Georgia and returned to this court. Both counsel agree that an updated petition and new memoranda are required.

Order Dated July 15, 2010, Case 8:90-cv-00315-SDM, Document 118. Certainly, Correll cannot be faulted for this delay.

Correll's imprisonment on death row for 29 years, during which time he endured unnecessary and gratuitous pain in the form of intense psychological suffering exceeds the sentences of death that were imposed on him in 1986 and constitutes cruel and unusual punishment under the Eighth Amendment. In *Valle*, this Court explained its rationale for denying *Lackey* claims:

> Under this Court's clear precedent, Valle's claim is facially invalid, and the circuit court did not err in summarily denying relief. In *Tompkins*, this Court observed that "no federal or state court has accepted the argument that a prolonged stay on death row constitutes cruel and unusual punishment, especially where both parties bear responsibility for the long delay." 994 So. 2d at 1085 (quoting *Booker v. State*, 969 So. 2d 186, 200 (Fla. 2007)). In line with *Tompkins*, this Court has repeatedly held this claim to be meritless. *See, e.g., id*. (rejecting claim that twenty-three years on death row constituted cruel and unusual punishment); *Booker*, 969 So. 2d at 200 (rejecting claim that almost thirty years on death row constituted cruel and unusual punishment); *Gore v. State*, 964 So. 2d 1257, 1276 (Fla. 2007) (rejecting claim that twenty-three years on death row constituted cruel and unusual punishment); *Rose v. State*, 787 So. 2d 786, 805 (Fla. 2001) (holding as without merit cruel and unusual punishment claim of death row inmate under death sentence since 1977).

Valle v. State, 70 So. 3d 530, 552 (Fla. 2011). Twenty years ago in *Lackey*, Justice Stevens expressed a desire to postpone consideration of the issue of whether executing a prisoner who has spent 17 years on death row violates the Eighth Amendment until after it has been addressed by other courts. *Lackey*, 514 U.S. 1045. There appears to be a stalemate, where the lower courts are waiting for

guidance from the United States Supreme Court, while the Supreme Court is waiting for the lower courts to address this issue. The time to address this important issue is long overdue. Correll urges this Court to recede from its prior decisions in *Carroll v. State*, 114 So. 3d 883 (Fla. 2013), *Valle v. State*, 70 So. 3d 530 (Fla. 2011), and *Booker v. State*, 773 So. 2d 1079 (Fla. 2000).

ARGUMENT IV

THE CIRCUIT COURT ERRED IN DENYING CORRELL'S CLAIM THAT FLORIDA'S FAILURE TO REVEAL INFORMATION ABOUT THE EXECUTION TEAM MEMBERS VIOLATES CORRELL'S RIGHTS GUARANTEED BY THE FIRST, FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AND OF HIS CORRESPONDING RIGHTS UNDER THE CONSTITUTION OF THE STATE OF FLORIDA.

On January 21, 2015, Correll sent demands for public records pursuant to rule 3.852(h) and Florida Statutes Chapter 119 to the Florida Department of Corrections (FDOC), the Florida Department of Law Enforcement (FDLE), and the Office of the Medical Examiner, District Eight. W2/306-354. In all three demands, Correll requested the following information regarding the execution team members involved in Correll's execution:

> We would also request for the identity or identities (full legal name) of the execution team members involved in Mr. Correll's death sentence and execution including but not limited to the individual(s)

> administrating the lethal injection to Mr. Correll along with their complete employment background, educational/training background, curriculum vita, qualifications, certifications, disciplinary records, medical background, medical disciplinary background, history of failed/botched execution involvement and all other related records that ensures that the execution team is qualified, reliable, and experienced to perform their assigned duties.
>
> If this agency is permitted by the Court not to release the true identity of the executioner(s) involved in Mr. Correll's death sentence and execution, then in the alternative, it is requested that their complete employment background, educational/training background, curriculum vita, qualifications, certifications, disciplinary records, medical background, medical disciplinary background, criminal record, history of failed/botched execution involvement and all other related records that ensures that the execution team is qualified, reliable, and experienced to perform their assigned duties.

W2/314; W2/329-330; W2/344-345. The circuit court sustained the agencies' objections to the production of these records, finding that "any request for records relating to the identities of the executioners, or any persons prescribing, preparing, compounding, dispensing, or administering lethal injection, is confidential and exempt from disclosure pursuant to § 945.10[(1)](g), Fla. Stat."[10] W4/639; W4/644; W4/650.

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[10] Fla. Stat. § 945.10 (1)(g) provides that:

> (1) Except as otherwise provided by law or in this section, the following records and information held by the Department of Corrections are confidential and exempt from the provisions of s. 119.07(1) and s. 24(a), Art. I of the State Constitution:
>
> (g) Information which identifies an executioner, or any person prescribing, preparing, compounding, dispensing, or administering a lethal injection.

Subsequent to filing these demands, Correll argued in Claim III of the motion for postconviction relief that Florida's failure to reveal information about the execution team members violates Correll's constitutional rights. The circuit court summarily denied this claim, finding that:

> The Florida Supreme Court has also rejected challenges to this claim, including but not limited to *Deparvine v. State*, 146 So. 3d 1071, 1104 (Fla. 2014); *Darling v. State*, 45 So. 3d 444, 447-448 (Fla. 2010); *Henyard v. State*, 992 So. 2d 120, 130 (Fla. 2008). "A claim that the protocol can be improved and the potential risks of error reduced can always be made." *Troy v. State*, 57 So. 3d 828, 840 (Fla. 2011), *quoting Lightbourne v. McCollum*, 969 So. 2d 326, 351 (Fla. 2007). However, it is not the role of the Florida Supreme Court, let alone this trial court, "to micromanage the executive branch in fulfilling its own duties relating to executions." *Id.* Finally, Correll's claims do not "overcome the presumption of deference" the Florida Supreme Court gives to the executive branch, not do they establish "cruelty inherent in the method of execution" or "a substantial, foreseeable, or unnecessary risk of pain." *Id.* at 353.

W15/2238-2239. Correll seeks review of these findings.

Correll recognizes that there is a conflict between the State of Florida's need to protect only the identity of the execution team members pursuant to Fla. Stat. § 945.10 and Correll's constitutional right to know that the ultimate sentence will be carried out in a humane and non-cruel and unusual manner. *See Cal. First Amendment Coal. v. Woodford*, 299 F.3d 868, 873 (9th Cir. 2002). However, the constitutionality of the sentence of death depends on who performs the execution

and how the execution is done. *See Taylor v. Crawford*, No. 05-4173-CV-C-FJC, 2006 WL 1779035 (W.D. Mo. June 26, 2006); *see also Morales v. Tilton*, 465 F.Supp. 2d 972 (N.D. Cal. 2006) (Dr. Mark Heath highlighted the problems with regard to the qualifications of the executioners in lethal injection protocols and the protocols themselves). The use of Fla. Stat. § 945.10 as an absolute curtain as to any information about the qualifications, experience, reliability, and relevant information as to the individuals involved goes too far and goes in the face of the public and Correll's right to know pursuant to his First, Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendment rights. Society's evolving standards of decency demand that this information be revealed; otherwise, the death sentence upon Correll is unconstitutional. *See* Ellyde Roko, *Executioner Identities: Toward Recognizing A Right to Know Who is Hiding Beneath the Hood*, 75 Fordham Law Review 2791-2829 (2007).

It is a constitutional necessity for Correll to know the identity, qualifications, and all related information about the executioners who will be administering his death because of the level of the skills that are involved in performing the lethal injection protocol, which is a medical procedure. Execution procedures have evolved and now go beyond a rope tied around the condemned prisoner's neck or the

flip of a switch to electrocute the person. It is obvious that much more is demanded from the execution team members in administering lethal injection, and it is Correll's right to know if the individual(s) are qualified to ensure a humane sentence. Dr. Alan R. Doerhoff[11], who presided over 50 executions in Missouri, is one example of the very reason why the shroud must be lifted and Correll must be allowed to challenge his executioner. *See* Jeremy Kohler, *Lake Hospital's letters deal crucial blow to credibility of execution doctor*, St. Louis Post-Dispatch, January 20, 2008 at A1; *see also* Molly Hennessy-Fiske & Seth Klamann, *Doctors assist in executions despite ethics rules*, LA Times, May 21, 2014 at A1; *see also* Cheryl Wittenauer, *Execution Doctor: 'Nothing will go wrong'*, Columbian Missourian, August 15, 2008 at A1. Other examples of what has gone wrong can be found in *Oken v. Sizer*, 321 F.Supp.2d 658, 667 n.7 (D. Md. 2004) (execution team failed to properly administer the IV line, which caused the lethal injection chemicals to leak onto the floor); *State v. Rivera*, Nos. 08CA009426, 08CS009427, 2009 WL 80619(Ohio App. 9 Dist. Mar. 30, 2009); *Morales v. Tilton*, 465 F. Supp. 2d 972

[11] In Missouri, Dr. Alan R. Doerhoff, a Missouri physician who wrote the state's lethal injection protocol and also supervised over 50 executions, was found to have his medical privileges from two hospitals; was found to have been reprimanded in 2003, by the state board of Healing Arts for failing to disclose malpractice suits against him; testified that he was dyslexic and often confused the names and amounts of the lethal injection drugs; and testified that he would change the drug protocol at will.

(N.D. Cal. 2006); *Taylor v. Crawford*, No. 05-4173-CV-C-FJG, 2006 WL 1779035 (W.D. Mo. June 16, 2006); and recently, Mr. Clayton Lockett's execution. *See* Jon Herskovitz & Heide Brandes, *RPT-Lethal drugs leaked in botched Oklahoma execution – report*, June 13, 2014, http://www.reuters.com/article/2014/06/13/us-usa-execution-oklahoma-idUSKBN0EO25N20140613; *see also Oklahoma execution of Clayton Lockett - timeline of the botched procedure*, The Guardian, May 1, 2014, http://www.theguardian.com/world/interactive/2014/may/01/oklahoma-execution-clayton-lockett-timeline-document.

Should this Court allow the State of Florida to completely conceal any and all information about the execution team members, then it has gone against society's evolving standards of decency and has returned this State to the archaic concept of the hooded executioner in Correll's pending execution. Most importantly, this Court should heed the warnings and concerns of four justices from the Supreme Court of the United States Justice in *Warner*. The Honorable Justice Sotomayor joined by Justice Ginsburg, Justice Breyer, and Justice Kagan in dissent (the day before the warrant was signed in Correll's case) specifically noted that the execution of Clayton Lockett in Oklahoma, which was carried out under the same protocol used in Florida "went poorly, to say the least." *Warner*, 135

S.Ct. at 824. The dissent further stated that "the State [Oklahoma] issued a report that placed *much of the blame on the execution team's failure to insert properly an intravenous (IV) line*, finding that a large quantity of the drugs that should have been introduced into Lockett's blood stream had instead pooled in the tissue near the IV access point." (emphasis added) *Id*.; *see also* Joseph I. Cohen, M.D., *Independent Autopsy Examination of Clayton Lockett (P14-0514)*, June 12, 2014. This led to the state of Oklahoma "adopt[ing] a new execution protocol" that "contains a number of procedures to better ensure that execution team members are able to insert properly an IV line and assess the condemned inmate's consciousness." *Warner*, 135 U.S. at 824-825. Moreover, the "deficiency of the midazolam may generally be revealed only in an execution, such as Lockett's, where the IV fails to sufficiently deliver the paralyzing agent." *Id*. at 827. The requested records are necessary to prevent cruel deaths, including the type of described abuse, and to establish that there are trainings, protocols, safeguards and experienced executioner(s) who do not cause a death in violation of Correll's Eight Amendment right which "guarantees that no one should be subjected to an execution that cause searing, unnecessary pain before death." *Id.* at 828. There is a grave and real concern as to the individuals who are performing these executions. Therefore, Correll's constitutional right to know the identity and qualifications of

the executioners overwhelmingly overrides Florida's unsubstantiated safety concerns for the executioners, who are paid by Florida to perform a medical procedure under the seal of Florida. *See, e.g., Travaglia v. Dept. of Corrections*, 699 A. 2d 1317, 1323 n.5 (Pa. Cmmw. Ct. 1997).

Based on the foregoing, Correll asks that this Court recede from its precedent and declare Fla. Stat. §945.10(g) unconstitutional. A stay of execution should be entered and this case remanded to the lower court for further proceedings after the records Correll has requested regarding the execution team have been provided to him.

ARGUMENT V

THE CIRCUIT COURT ERRED IN DENYING CORRELL'S EMERGENCY MOTION FOR STAY OF EXECUTION.

On the afternoon of Friday, January 23, 2015, the Supreme Court of the United States granted the petitioners' petition for writ of certiorari in *Glossip, Richard E., et al. v. Gross, Kevin J., et al.*, ___ S.Ct. ___, 2015 WL 302647 (Jan. 23, 2015) (No. 14-7955); W5/698-727. Since the Supreme Court of the United States did not rewrite the questions presented, it can be assumed that it will review all of the questions as laid out in the petitioners' petition for writ of certiorari. The questions raised are directly related to the constitutionality of the execution protocol of the

State of Florida which is essentially the same as in Oklahoma,[12] and are as follows:

> **Question 1: Is it constitutionally permissible for a state to carry out an execution using a three-drug protocol where (a) there is a well-established scientific consensus that the first drug has no pain relieving properties and cannot reliably produce deep, comalike unconsciousness, and (b) it is undisputed that there is a substantial, constitutionally unacceptable risk of pain and suffering from the administration of the second and third drugs when a prisoner is conscious.**
>
> **Question 2: Does the *Baze*-plurality stay standard apply when states are not using a protocol substantially similar to the one that this Court considered in *Baze*?**
>
> **Question 3: Must a prisoner establish the availability of an alternative drug formula even if the state's lethal-injection protocol, as properly administered, will violate the Eighth Amendment?**

Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit at i, *Glossip, Richard E., et al. v. Gross, Kevin J., et al.*, ___ S.Ct. ___ (Jan. 13, 2015) (No. 14-7955); W5/700.

At the Case Management Conference, undersigned counsel notified the circuit court and all parties that Correll would be filing a motion for a stay of execution based upon the recent grant of certiorari in *Glossip*. W14/2206.

[12] The Oklahoma cases focus on the constitutionality of the sedative, midazolam, which is used in its three-drug execution protocol. The petitioners argued that the midazolam should not be used as an anesthetic as it is unreliable in rendering the inmate unconscious.

Thereafter, shortly before noon on January 26, 2015, Correll filed an emergency motion for stay of execution based on the Supreme Court of the United States' grant of certiorari in *Glossip*. W5/679-878; W6/879-901.

After Correll filed his emergency for motion for stay of execution, the Office of the Attorney General for the State of Oklahoma filed an application for stays of execution of sentences of death on January 26, 2015, in *Glossip*. In its application, the Attorney General of Oklahoma requested that the Supreme Court of the United States stay the executions of Richard E. Glossip, John M. Grant and Benjamin R. Cole until the final disposition of their appeal before the Supreme Court of the United States, or, alternatively, until the Oklahoma Department of Corrections has in its possession a viable alternative to midazolam for use in its executions[13]. Then, the Petitioners in *Glossip* filed a response in support of the respondent's application for stays of execution of sentences of death.

Thereafter, on January 27, 2015, the State of Florida filed a response to Correll's motion for stay. W11/1732-2202. The circuit court conducted a hearing on January 27, 2015, on Correll's emergency motion for stay. W15/2212-2228.

[13] It should be noted that Oklahoma Department of Corrections' drug protocol "allows for the use of sodium thiopental, pentobarbital or midazolam to carry out executions" while Florida Department of Corrections' drug protocol only allows for the sedative midazolam hydrochloride.

The circuit court allowed Correll to file an appendix of additional transcripts[14] in response to the State's appendix of exhibits. W15/2217-2218; W7/903-1731. The circuit court denied the motion for stay the late morning of January 28, 2015. W15/2229-2232. Later on January 28, 2015, the Supreme Court of the United States issued the following order and granted a stay of execution for petitioners Glossip, Grant, and Cole:

> Respondents' application for stays of execution of sentences of death presented to Justice Sotomayor and by her referred to the Court is granted and it is hereby ordered that petitioners' executions using ***midazolam*** are stayed pending final disposition of this case.

Order Granting Stay of Execution, *Glossip, Richard E., et al. v. Gross, Kevin J., et*

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[14] The contents of the appendix consists of the following (Doctors Lubarsky and Evans testified in Florida and Oklahoma):

Appendix A.	Appendix to Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit, *Glossip, Richard E., et al. v. Gross, Kevin J., et al.*, ___ S.Ct. ___ (Jan. 13, 2015); Volumes I to III.
Appendix B.	Declaration of David A. Lubarsky M.D. M.B.A.in *Warner v. Gross*, ___ F.3d ___, 2015 WL 137627 (10th Cir. Jan. 12, 2015).
Appendix C.	Declaration of Larry D. Sasich Pharm D. MPH, FASHP in *Warner v. Gross*, ___ F.3d ___, 2015 WL 137627 (10th Cir. Jan. 12, 2015).
Appendix D.	Transcript from the Evidentiary Hearing in *Chavez v. Palmer*, Case No. 3:14-cv-00110-BJD-JBT (Middle District of Florida, Jacksonville Division) conducted on February 5, 2014 (testimonies of Dr. Lubarsky and Dr. Roswell Lee Evans).

al., ___ S.Ct. ___ (Jan. 28, 2015) (No. 14-7955) (emphasis added).

In its order denying Correll's emergency motion for stay of execution, the circuit court ruled that Correll had not shown that there were "substantial grounds upon which relief might be granted," citing *Barefoot v. Estelle*, 463 U.S. 880, 895, 103 S.Ct. 3383, 77 L.Ed. 2d 1080 (1983). W15/2230. According to *Estelle*, there must be (1) a reasonable probability that four members of the Supreme Court would consider the underlying issue sufficiently meritorious to grant certiorari; (2) a "significant possibility of reversal of the lower court's decision," and (3) a likelihood that irreparable harm will result if the decision is not stayed." *Id.*, *citing White v. Florida*, 458 U.S. 1301, 1302, 103 S.Ct. 1, 73 L.Ed. 2d 1385 (1982). The circuit court held that the first and third factors were not disputed, but with regard to the second factor, the court held that Correll could "only speculate that Florida's lethal injection protocol might eventually be overturned." W15/2230.

The circuit court erred when it found that Correll had not satisfied the second factor as set forth in *Estelle*. The fact is that, not only is there a reasonable probability that four justices of the United States Supreme Court would consider the issue of the constitutionality of Florida's midazolam protocol sufficiently meritorious to grant certiorari, four justices *have* ruled the issue sufficiently meritorious, and *have* granted certiorari on the issue of the constitutionality of

midazolam's use in lethal injection executions as raised by the Oklahoma petitioners in *Glossip*. Because Florida's lethal injection protocol is essentially the same as the protocol in dispute in *Glossip*, and because there is continually emerging evidence in Florida and other states that the administration of midazolam as a sedative in lethal injection protocols leads to an unreasonable risk of extreme pain and suffering, there is a substantial possibility of the reversal of the Florida precedent. In order for Florida's current lethal injection protocol to be deemed unconstitutional, five Supreme Court of the United States justices would need to agree with the sentiments summarized by Justice Sotomayor in her recent dissent in *Warner:*[15]

> Petitioners' likelihood of success on the merits turns primarily, then, on the contention that midazolam cannot be expected to maintain a condemned inmate in an unconscious state. I find the District Court's conclusion that midazolam will in fact work as intended difficult to accept given recent experience with the use of this drug. … [The Supreme Court of the United States] should have granted petitioners' application for stay. The questions before us are especially important now, given States' increasing reliance on new and scientifically untested methods of execution. Petitioners have committed horrific crimes, and should be punished. But the Eighth Amendment guarantees that no one should be subjected to an execution that causes searing, unnecessary pain before death. I hope that our failure to act today does not portend our unwillingness to consider these questions.

[15] In *Warner*, the Supreme Court of the United States declined to stay the execution of Charles Warner, one of the original petitioners in *Glossip.* The Court soon thereafter granted certiorari in *Glossip,* and has since stayed the executions of the remaining three petitioners.

135 S.Ct. at 828. In her dissent, Justice Sotomayor was joined by Justices Ginsburg, Breyer, and Kagan. Therefore, it is clear that four justices have definite concerns about the use of midazolam by the states to carry out lethal injection. Given the tenor of facts continually emerging as to its efficacy as a sedative, there is a significant possibility that a fifth justice will, upon hearing such facts, be persuaded that it is unconstitutional. Therefore, Correll submits that the circuit court incorrectly determined that he had not satisfied the second factor set forth in *Estelle*, that there is a significant possibility of reversal of Florida's precedent. *See Lightbourne v. McCollum*, 969 So. 2d 326, 335 (Fla. 2007), *citing* Art. 1, § 17, Fla. Const. ("[W]e must evaluate whether lethal injection is unconstitutional 'in conformity with decisions of the United States Supreme Court.'"). Accordingly, Correll submits that the circuit court should have granted a stay, and further, that this Court must grant him a stay to allow the Supreme Court of the United States to address the constitutionality of the midazolam protocol.

CONCLUSION AND REQUEST FOR RELIEF

Based on the foregoing arguments, Correll is entitled to have the circuit court's orders reversed and his case remanded to the circuit court for full public records disclosure. Additionally, Correll is entitled to a stay of execution pending the United States Supreme Court's decision in *Glossip*. Furthermore, Correll requests that his sentences of death be vacated and that he be granted a new sentencing hearing or life sentences.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to **Supreme Court of Florida** at warrant@flcourts.org on this 3rd day of February, 2015.

I HEREBY FURTHER CERTIFY that a true copy of the foregoing has been furnished via electronic mail to **Carol Dittmar, Candance M. Sabella & Carolyn M. Snurkowski**, Assistant Attorney Generals, Office of the Attorney General, Criminal Appeals & Capital Collateral Appellate Division, Concourse Center 4, 3507 East Frontage Road, Suite 200, Tampa, Florida 33607-7013, at carol.dittmar@myfloridalegal.com, candance.sabella@myflorida.com, caroyln.snurkowski@myfloridalegal.com, and at capapp@myfloridalegal.com on this 3rd day of February, 2015.

I HEREBY FURTHER CERTIFY that a true copy of the foregoing has been furnished to **Jerry William Correll**, DOC# 101151, Florida State Prison, 7819 N.W. 228th Street, Raiford, Florida 32026, on this 3rd day of February, 2015.

Respectfully submitted

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief of Appellant was generated in a Times New Roman 14 point font, pursuant to Fla. R. App. P.9.210.

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