

**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**

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

The Appellant relies on the arguments presented in his Initial Brief. While he will not reply to every issue and argument raised by the Appellee, he expressly does not abandon the issues and claims not specifically replied to herein.

REPLY TO ARGUMENT I

The Appellee, at page 6 of its Answer, echoes the findings in the orders of the circuit court regarding Correll's records requests:

The Florida Supreme Court has repeatedly held that collateral post-conviction public records requests are not to be used for fishing expeditions, and that a defendant bears the burden of proving the records are related to a colorable claim for relief. *See Moore v. State*, 820 So. 2d 199, 204 (Fla. 2002); and *Glock v. Moore*, 776 So. 2d 243, 253 (Fla. 2001). Denial of requests for additional public records has been upheld where the request sought information to research and discover" post-conviction claims that a defendant had no specific basis for believing existed. *Johnson v. State*, 804 So. 2d 1218, 1224 (Fla. 2001).

W4/639, 643-644, 649. The circuit court further found that "there is a presumption that the members of the executive branch will properly perform their duties and a defendant bears the burden of alleging a sufficient basis to overcome the presumption. *Squires v. State*, 565 So. 2d 318, 139-20 (Fla. 1990); *Provenzano v. State*, 739 So. 2d 1150, 1153 (Fla. 1999); and *Buenoano v. State*, 565 So. 2d 309, 311 (Fla. 1990)." W4/639, 644, 650.

Correll's requests amount to much more than a "fishing expedition" or an attempt to "research and discover", and instead are based on legitimate concerns regarding the constitutionality of Florida's lethal injection protocol. This case is distinguishable from the cases cited by the circuit court, where the risks identified by the Appellants in those cases involved human error or protocols not being followed as opposed to the execution protocols themselves, and this Court found that the problems associated with prior executions did not have a substantial probability of recurring. *See Squires*, 565 So. 2d 318; *Buenoano*, 565 So. 2d 309; *Provenzano*, 739 So. 2d 1150. There is compelling evidence that Florida's current lethal injection protocol, as written, is unconstitutional and likely to cause excruciating pain and suffering in violation of the Eighth Amendment even if properly administered. The current Florida lethal injection protocol is also distinguishable from the protocol considered in *Baze*, which, if properly administered, does not pose a risk of harm "so substantial or imminent as to amount to an Eighth Amendment violation." *Baze v. Rees*, 553 U.S. 35, 54-56, 128 S.Ct. 1520, 170 L.Ed. 2d 420 (2008).

The states of Florida and Oklahoma turned to the sedative midazolam when they no longer had access to the lethal injection combination approved by the Supreme Court of the United States in *Baze*. There is substantial evidence that

midazolam cannot reliably achieve and maintain unconsciousness such that the prisoner remains insensate during the administration of the second and third drugs. *See Warner v. Gross, et al.*, 135 S.Ct. 824 (2015) (mem.) (“I am deeply troubled by the evidence suggesting that midazolam cannot constitutionally be used as the first drug in a three-drug lethal injection protocol.”). As Correll noted at page 21 of his Initial Brief, Oklahoma selected midazolam because of its availability. Like Oklahoma, it appears that Florida’s decision to switch to a three drug protocol using midazolam has everything to do with the unavailability of pentobarbital and the availability of midazolam, and nothing to do with a desire to create a more humane execution. *See* W5/747, 752, 806-807 (proceedings before the United States District Court for the Middle District of Florida, Jacksonville Division, in which Assistant Attorney General Scott Browne admitted to the court that he believes the only reason from the substitution of midazolam for pentobarbital as the first drug in the three-drug protocol was the unavailability of pentobarbital). Without access to the requested records, Correll is foreclosed from finding out other relevant information regarding the reason for the change in Florida’s lethal injection protocols, which would be relevant to an Eighth Amendment claim.

Additionally, in *Provenzano*, even though this Court rejected the Appellant’s Eighth Amendment claim regarding the condition and operation of the electric chair,

this Court recognized the need for transparency and instituted an open file policy relating to information relating to the operation and functioning of the electric chair:

[W]e deem it appropriate that the results of any and all tests and any other records generated relating to the operation and functioning of the electric chair be promptly submitted to this Court, the Attorney General's Office, the regional offices of the Capital Collateral Counsel (CCRC), and the capital cases statewide registry of attorneys, on an ongoing basis. By this, we contemplate an open file policy relating to *any* information regarding the operation and functioning of the electric chair.

Provenzano, 739 So. 2d at 1154. It is necessary and appropriate to institute a similar open file policy regarding lethal injection.

“Interpreting the Constitution is a *judicial function*”, and a constitutional claim of cruel and unusual punishment should not be left up to the executive branch to decide without question or judicial review. *Buenoano*, 565 So. 2d at 312 (Barkett, J., dissenting). The executive branch, and the Florida Department of Corrections in particular, have repeatedly proven that they cannot always be trusted to do what is right, or what is required under the Constitution, as is evidenced by a long history of mistreatment of prisoners by the FDOC. *See, e.g.*, Fred Grimm, *Prison Scandal Awakens Ugly Memories*, MIAMI HERALD, September 27, 2014, *available* *at*
<http://www.miamiherald.com/news/local/news-columns-blogs/fred-grimm/article>

2273058.html; Barbara Liston, *Human Rights Groups Seek Inquiry into Florida Prison Shower Death*, REUTERS, June 25, 2014, available at <http://www.reuters.com/article/2014/06/25/us-usa-florida-prisoneridUSKBN0F02YU20140625>; Mary Ellen Klas, *Florida Senate to Review Department of Corrections Abuse Allegations*, TAMPA BAY TIMES, available at <http://www.tampabay.com/news/politics/stateroundup/florida-senate-panel-to-review-department-of-corrections-abuse-allegations/2214286>; United States Department of Justice Civil Rights Division, *Investigation of the Arthur G. Dozier School for Boys and the Jackson Juvenile Defender Center, Marianna, Florida*, December 1, 2011, available at http://www.justice.gov/crt/about/spl/documents/dozier_findltr_12-1-11.pdf; Lizette Alvarez, *At Boys' Home, Seeking Graves, and the Reason*, The New York Times, February 9, 2013, available at http://www.nytimes.com/2013/02/10/us/10dozier.html?pagewanted=all&_r=1&.

Inmates such as Correll who are facing pending execution dates have been repeatedly denied records that they need to full plead lethal injection claims. *See, e.g., Muhammad v. State*, 132 So. 3d 176 (Fla. 2013); *Chavez v. State*, 132 So. 3d 826 (Fla. 2014). Transparency is needed to ensure that the government is acting in the best interest of its citizens and that executions are carried out in accordance with the Eighth Amendment.

REPLY TO ARGUMENT II

Regarding Argument II, Correll relies on his Initial Brief.

REPLY TO ARGUMENT III

Regarding Argument III, Correll relies on his Initial Brief.

REPLY TO ARGUMENT IV

Regarding Argument IV, Correll relies on his Initial Brief.

REPLY TO ARGUMENT V

The Appellee calls Correll’s assertion that there is a significant possibility of a reversal of this Court has conclusively determined about midazolam.” Answer at 17-18.

Correll acknowledges that this Court has previously rejected Eighth Amendment challenges to the current protocol. See, e.g., *Banks v. State*, 150 So. 3d 797, 800 (Fla.), *cert denied*, 135 S.Ct. 511 (2014). However, Correll’s Initial Brief clearly demonstrates that there is a significant possibility of reversal of this Court’s precedent based on the actions of the Supreme Court of the United States and also based on the questions to be decided by the Supreme Court of the United States. In *Warner*, Justice Sotomayor, joined by Justices Ginsburg, Breyer, and Kagan, found that the criteria set forth in *Estelle*¹ for the grant of a stay had been satisfied. *Warner v. Gross*, 135 S.Ct. 824, 826 (2015) (mem.). Pursuant to *Warner*, it is clear

1 *Barefoot v. Estelle*, 463 U.S. 880, 103 S.Ct. 3383, 77 L.Ed. 2d 1080 (1983).

that Correll has shown that there is a significant possibility of reversal because Correll will be executed under essentially the same protocol as Glossip, Grant, and Cole.

Although the State continues to emphasize that Florida continues to employ a lethal injection protocol that utilizes the same drug types and amounts as will now be employed in Oklahoma, its apparent success with that method is subject to question because the injection of the paralytic vecuronium bromide may mask the ineffectiveness of midazolam as an anesthetic: The inmate may be fully conscious but unable to move.

Warner, 135 S.Ct. at 827. Likewise, in its order dated February 4, 2015 relinquishing jurisdiction in the case at hand, this Court found that “[s]ince the filing of pleadings by Correll, the United States Supreme Court has not only accepted certiorari review, but has also issued stays of execution in connection with *Glossip v. Gross*, No. 14-7955, which involves a challenge to the constitutionality of using midazolam hydrochloride in the lethal injection protocol used in Oklahoma, which is identical to the protocol used in Florida.”

Furthermore, at the time the dissent in *Warner* was written, the United States Supreme Court had not yet decided whether to grant certiorari in that case. Now that the Court has granted certiorari on the questions raised by *Warner* and his follow petitioners in *Glossip, Richard E., et al. v. Gross, Kevin J., et al.*, ___ S.Ct. ___, 2015 WL 302647 (Jan. 23, 2015) (No. 14-7955), there is an even greater possibility

of a reversal of Florida’s precedent regarding the lethal injection protocol. In other words, if there was not a significant possibility that the United States Supreme Court will find that it is unconstitutional “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” the Supreme Court never would have granted certiorari on that question in the first place.

Additionally, the Appellee argues that Correll “has identified nothing new beyond Dr. Lubarsky’s opinion” in support of his request for a stay. Answer Brief at 21. In response, Correll would reiterate that the United States Supreme Court’s grant of certiorari in *Glossip* is new and does create new and significant possibility of reversal of this Court’s precedent. Furthermore, repeated denials of requests for records pertaining to lethal injection have severely limited the ability of condemned inmates such as Correll to successfully raise lethal injection claims. To deny Correll access to newly discovered evidence that could support an Eighth Amendment challenge to the current protocol and then complain that he has failed

to bring forth newly discovered evidence in support of such a claim is fundamentally unfair and a denial of due process.

CONCLUSION

Based on the foregoing arguments, as well as the arguments set forth in his Initial Brief, 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.

Respectfully submitted

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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 9th 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 9th 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 9th 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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