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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC18-1247

DEATH WARRANT SIGNED
EXECUTION SCHEDULED
FOR TUESDAY, AUGUST 14, 2018

JOSE ANTONIO JIMENEZ,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, JOSE ANTONIO JIMENEZ, the defendant in the trial court, will be referred to as appellant, the defendant, or by his proper name. Appellee, the State of Florida, will be referred to as the State. Pursuant to Rule 9.210(b), Fla. R. App. P. (1997), this brief will refer to a volume according to its respective designation within the Index to the Record on Appeal. A citation to a volume will be followed by the appropriate page number within the volume. The 2018 warrant litigation in the trial court will be referred to as "2018 Succ. PC" followed by the appropriate page number. The symbol "IB" will refer to appellant's initial brief and will be followed by any appropriate page number. All double underlined emphasis is supplied.

FACTS AND PROCEDURAL HISTORY

Jimenez is in custody and under a sentence of death. He is subject to the lawful custody of the State of Florida pursuant to a valid judgement of guilt and a subsequent sentence of death entered on December 14, 1994, for first-degree murder. He was also convicted of armed burglary of a dwelling with assault. The Florida Supreme Court found the facts to be as follows:

> On October 2, 1992, Jimenez beat and stabbed to death sixty-three-year-old Phyllis Minas in her home. During the attack her neighbors heard her cry, "Oh God! Oh my God!" and tried to enter her apartment through the unlocked front door. Jimenez slammed the door shut, locked the locks on the door, and fled the apartment by exiting onto the bedroom balcony, crossing over to a neighbor's balcony and then

> dropping to the ground. Rescue workers arrived several minutes after Jimenez inflicted the wounds, and Minas was still alive. After changing his clothes and cleaning himself up, Jimenez spoke to neighbors in the hallway and asked one of them if he could use her telephone to call a cab.
> Jimenez's fingerprint matched the one lifted from the interior surface of the front door to Minas's apartment, and the police arrested him three days later at his parents' home in Miami Beach. In 1994, a jury found him guilty of first-degree murder and burglary of an occupied dwelling with an assault and battery and unanimously recommended the death sentence. The court followed the jury's recommendation, finding four aggravating circumstances, one statutory mitigating circumstance, and two nonstatutory mitigating circumstances.

Jimenez v. State, 703 So. 2d 437 (Fla. 1997). After the jury's unanimous death recommendation, the court found four aggravating factors: that the defendant was previously convicted of another capital felony or felony involving the use or threat of violence; the murder was committed while Defendant was engaged in the commission of a burglary of an occupied dwelling; the murder was committed while Defendant was on community control; and the murder was especially heinous, atrocious, or cruel (HAC). *Jimenez v. State*, 703 So. 2d at n1. The trial court found one statutory mitigating factor, that the capacity of the Defendant to appreciate the criminality of his conduct or conform his conduct to the requirements of law was substantially impaired. The trial court found two non-statutory mitigating circumstances: Jimenez's potential for rehabilitation, to which the court attributed little weight, and his potential sentence (life with a twenty-five-year minimum mandatory, calculated by the Department as a ninety-nine-year sentence with a

release date at age eighty-one) which the court gave great weight.

The Florida Supreme Court affirmed Jimenez's convictions and death sentence in *Jimenez v. State*, 703 So. 2d 437 (Fla. 1997). His sentence became final on May 18, 1998, when the U.S. Supreme Court denied certiorari. *Jimenez v. Florida*, 523 U.S. 1123 (1998).

On February 1, 2000, Jimenez filed his initial motion for post-conviction relief. That motion was subsequently amended and denied by the state trial court on June 8, 2000. On September 26, 2001, the Florida Supreme Court affirmed the trial court's denial of relief in *Jimenez v. State,* 810 So.2d 511 (Fla. 2001), cert. denied, *Jimenez v. Florida*, 535 U.S. 1064 (2002). His state petition for writ of habeas corpus, filed in the Florida Supreme Court on December 11, 2002, was denied in *Jimenez v. Crosby*, 861 So.2d 429 (Fla. 2003), on June 10, 2003. A second petition for writ of habeas corpus was filed in the Florida Supreme Court May 26, 2004. The Court denied relief in *Jimenez v. Crosby*, 905 So.2d 125 (Fla. 2005), on March 18, 2005.

Jimenez also filed his initial federal petition for writ of habeas corpus in the U.S. District Court for the Southern District of Florida on January 20, 2004 and amended it on April 27, 2005. The federal district court dismissed his petition and then denied the amended petition on January 30, 2006. A second federal habeas petition was filed *pro se* on February 28, 2005 and was denied on March 1, 2006.

Jimenez sought certificates of appealability [COA] in his 2006 litigation and the Eleventh Circuit Court of Appeals denied the COAs in *Jimenez v. Fla. Dept. of Corrections*, 481 F.3d 1337 (11th Cir. 2007), cert. denied, *Jimenez v. McDonough*, 552 U.S. 1029 (2007).

During that same time-period, Jimenez returned to the state trial court and filed a successive Rule 3.850 motion for post-conviction relief on April 28, 2005. The trial court denied relief on September 15, 2005, and the Florida Supreme Court affirmed the trial court's denial of relief in *Jimenez v. State*, 997 So.2d 1056 [Fla. 2008), cert. denied, *Jimenez v. Florida*, 557 U.S. 925 (2009).

On November 29, 2010, Jimenez filed another successive motion for post-conviction relief. That motion was denied February 11, 2011. He filed another successive motion in the trial court on March 20, 2013. That motion was denied on April 24, 2014, and the appeal that followed in the Florida Supreme Court was affirmed in *Jimenez v. State*, 153 So.3d 906 [Fla. 2014), cert. denied, *Jimenez v. Florida*, 135 S.Ct. 1712 (2015).

Jimenez sought further successive review in the federal district court in a Rule 60(b) motion (Fed R.Civ.P. 60(b)), filed May 16, 2014. The federal district court denied the motion June 12, 2014. Jimenez then filed a motion to alter or amend the judgment denying his 60(b) motion, which was denied July 29, 2014, and on August 29, 2014, sought a COA from the district court. On October 28, 2014, the district

court denied the COA. He filed his request for a COA in the Eleventh Circuit Court of Appeals on November 17, 2014. That Court denied the COA request May 29, 2015. His certiorari petition to the United States Supreme Court was denied on February 27, 2017, in *Jimenez v. Jones*, 137 S.Ct. 1220 (2017).

On January 11, 2017 (amended November 3, 2017), Jimenez filed a *Hurst v. State*, 202 So.3d 40, 60 (Fla. 2016), claim in the trial court. Relief was denied on November 16, 2017. An appeal followed in the Florida Supreme Court, which affirmed the trial court's denial of relief on June 28, 2018. A rehearing motion was filed July 13, 2018, which the Florida Supreme Court struck on July 18, 2018.

On July 18, 2018, Governor Scott signed a death warrant for Jimenez's execution. (2018 Succ. PC 95). The following day, this Court issued a scheduling Order directing that "[t]he proceedings pending in the trial court, if any, shall be completed and orders entered by 3:00 p.m., Tuesday, July 31, 2018." ((2018 Succ. PC 86).

On July 20, 2018, Jimenez through his collateral counsel filed demands for additional public records with six agencies: 1) the North Miami Police Department ("NMPD"); 2) the Miami-Dade Police Department ("MDPD"); 3) the Miami-Dade State Attorney's Office ("SAO"); 4) the Florida Department of Corrections ("DOC"); 5) the Medical Examiner's District 8 Office ("ME") the Florida Department of Law Enforcement ("FDLE"). (2018 2018 Succ. PC 145-65; 190-91).

All agencies filed responses and objections to these records by July 22, 2018. (2018 2018 Succ. PC 166-79; 183-89; 192-97; 201-254).

On July 23, 2018 the lower court held a hearing regarding said requests (hereinafter "Public Records Hearing"). (2018 Succ. PC 198-200; 255-56). The lower court denied most of Jimenez's requests for additional records from all agencies but granted in part limited disclosure of additional records pertaining to the FDLE and DOC observer logs in defendant Eric Branch's execution. (2018 Succ. PC 258-69; 366-67).

Jimenez filed his successive motion for post-conviction relief on July 24, 2018 (2018 Succ. PC 270) and the State responded (2018 Succ. PC 379). The circuit court held a case management hearing on July 26, 2018. (2018 Succ. PC 843).

On July 29, 2018, Jimenez filed amended demands for public records from the SAO and MDPD, as well as a motion to access the unredacted NMPD records that were transmitted to the repository on July 20, 2018 in the abundance of caution. (2018 Succ. PC 619-76). The lower court denied Jimenez's demands pertaining to the SAO and MDPD; however, it granted Jimenez's motion to access the unredacted records of the NMPD. (2018 Succ. PC 704, 708, 756).

Jimenez then filed a rule 3.800(a) motion to correct his burglary sentence on July 29, 2018. (2018 Succ. PC 677). The State responded (2018 Succ. PC 697) and the circuit court denied the motion on July 30, 2018 (2018 Succ. PC 705). The court

also denied the additional public records requests. (2018 Succ. PC 708). Jimenez filed a motion for rehearing on July 31, 2018 (2018 Succ. PC 772), which was denied (2018 Succ. PC 760). The circuit court denied relief on the post-conviction motion on that same day. (2018 Succ. PC 761). Jimenez filed a timely notice of appeal to this Court. (2018 Succ. PC 782).

SUMMARY OF THE ARGUMENT

I: The post-conviction court did not abuse its discretion in sustaining the objections to Jimenez's public records requests because Jimenez was unable to show that his requests were relevant, not overly broad, or that the information sought would likely lead to discoverable evidence.

II. Jimenez did not meet the requirements set out in *Baze v. Rees*, 553 U.S. 35, 128 S.Ct. 1520 (2008) and *Glossip v. Gross*, 135 S.Ct. 2726 (2015) to show that Florida's lethal injection procedure violates the Eighth Amendment. The Branch execution presented no basis to grant another evidentiary hearing on the use of etomidate and any such hearing would merely replicate the one conducted in *Asay v. State*, 224 So. 3d 695 (Fla. 2017).

III. This Court has repeatedly found that Florida is not constitutionally required to adopt a one drug execution protocol.

IV. The time Jimenez has spent on death row does not violate the Eighth Amendment and is not unusual in modern times.

V. The circuit court correctly denied Jimenez's rule 3.800(a) motion since it was procedurally barred and not the appropriate method to challenge his conviction of armed burglary.

ARGUMENT

ISSUE I

THE POST-CONVICTION COURT DID NOT ABUSE ITS DISCRETION IN RULING ON JIMENEZ'S PUBLIC RECORDS REQUESTS.

Jimenez initially challenges the trial court's denial of his post-warrant requests for public records. Rulings with regard to public records requests under Florida Rule of Criminal Procedure 3.852 are reviewed for an abuse of discretion. *Valle v. State*, 70 So. 3d 530, 549 (Fla. 2011); *see also Hannon v. State, 228 So. 3d 505, 511 (Fla.), cert. denied sub nom. Hannon v. Fla., 138 S. Ct. 441, 199 L. Ed. 2d 326 (2017)* (quoting *Parker v. State*, 904 So.2d 370, 379 (Fla. 2005) "Discretion is abused only when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable person would take the view adopted by the trial court." (citation omitted)).

As this Court has long emphasized, public records requests made after a death warrant has been signed are supposed to be used to receive updates of previously discovered information and not to conduct eleventh-hour fishing expeditions. *Sims v. State*, 753 So. 2d 66 (Fla. 2000). Moreover, this Court has held that a defendant

who believes he may have a basis to raise a claim in a successive motion need not await the signing of a death warrant to seek records. *Tompkins v. State*, 872 So. 2d 230, 243-44 (Fla. 2003). In fact, this Court has long recognized that claims that are based on the production of public records that could have been requested earlier are barred. *Zeigler v. State*, 632 So. 2d 48, 50 (Fla. 1993).

A. <u>3.852(h) Requests</u>

Jimenez filed four expansive 3.852(h)(3) requests for public records that requested "any and all" records pertaining to this case "received or produced since the previous request" or that were "for any reason, not produced previously" from: 1) the State Attorney's Office; 2) the North Miami Police Department; 3) the Miami-Dade Police Department; and 4) the Department of Corrections. Jimenez specifically asserts that he has been denied due process and equal protection rights under the Eighth and Fourteenth Amendments due to the denial of additional records from 1) State Attorney's Office and involved police departments to investigate *Brady* claims (IB at p. 11; 2018 Succ. PC 619-25; 645-50; 659-63.); 2) Department of Corrections records, which he claims "were necessary to investigate competency to be executed claims found in *Muhammad v. State*, 132 So. 3d 176, 201 (Fla. 2013)." (IB at p. 16) As demonstrated below, these arguments are without merit and were properly denied by the lower court.

i. The SAO, NMPD and MDPD Public Records

The premise and condition precedent to any demand/request for records directed to any agency after the signing of a death warrant under Fla. R. Crim. P. 3.852 (h)(3), is that collateral counsel has previously requested public records. *Id.* ("Within 10 days of the signing of a defendant's death warrant, collateral counsel may request in writing the production of public records from a person or agency **from which collateral counsel has previously requested public records**.") (emphasis added); *see also Hannon v. State*, 228 So. 3d 505, 511 (Fla. 2017), *cert. denied sub nom. Hannon v. Florida*, 138 S. Ct. 441 (2017); *Rolling v. State*, 944 So. 2d 176, 181 (Fla. 2006) ("Because there is no evidence in the record that Rolling has ever requested records from . . . [agencies post warrant] we find that the trial court was correct in denying this claim without an evidentiary hearing."); *Rutherford v. State*, 926 So. 2d 1100, at 1116-17 ("Rutherford's requests are not authorized under rule 3.852(h)(3), which is designed to allow an update of records previously requested, because **he has failed to demonstrate that he previously requested records from these agencies** ....")(emphasis added).

In the instant case, this Court's mandate in the direct appeal proceedings herein was issued on January 28, 1998. The first collateral counsel Mr. L. Casuso was appointed on August 26, 1998 to represent Jimenez in post-conviction proceedings. Under Fla. R. Crim. P. 3.852 (h)(l), in cases such as this where the

mandate was issued prior to October 1, 1998, "and no initial public records requests have been made by collateral counsel by that date, the attorney general and the state attorney shall file notifications with the trial court as required by subdivisions (d) and (e) of this rule." Accordingly, and pursuant to Fla. R. Crim. P. 3.852 (e)(2), the State Attorney's Office, the North Miami Police Department, and the Miami-Dade Police Department - without any request from the defense - delivered all of their public records and exempt records to the records repository of the Secretary of State and filed Notices of Compliance. (2018 Succ. PC 814-18).

At the Public Records Hearing, there was no demonstration of any prior requests by collateral counsel. Indeed, the defense conceded that "collateral counsel" had not previously requested any records from any of said agencies. (2018 Succ. PC 795) Jimenez however suggests that because of the timing of this case and because the agencies were required to submit their initial records to the repository, "it was no longer necessary for Jimenez's collateral counsel to make a public records request in order to gain access to them in order to prepare his Rule 3.851 and file any *Brady* claims…." (2018 Succ. PC 795, IB at p. 14) This is simply incorrect, as such a position is contrary to the express language of the rule and the multiple constructions of it by this Court as stated above. As the State argued to the lower court, Jimenez's position would render the express provisions for requesting public records by

collateral counsel under subsections 3.852(g) and (i) useless and surplusage.[1] (2018 Succ. PC 801).

Moreover, this Court has repeatedly held that requests under Rule 3.852(h)(3) are properly denied if they are overbroad and do not clearly demonstrate how the records were relevant to a colorable claim. *See Muhammad v. State*, 132 So. 3d 176, 201 (Fla. 2013):

> Muhammad requested public records under rule 3.852(h)(3) ... In each of these requests, Muhammad asked for "any files, records, reports, letters, memoranda, notes, drafts and/or electronic mail in the possession or control of your agency pertaining to Mr. Muhammad that were received or produced by your agency since Mr. Muhammad's previous request; and/or any documents that were, for any reason, not produced previously." The circuit court denied Muhammad's motion to compel these entities to produce the requested records. We conclude that with one exception, the court did not abuse its discretion in denying the motion. The requests are overly broad and Muhammad did not clearly demonstrate how the records were relevant to a colorable claim.

(emphasis added). *See also Rodriguez v. State*, 919 So. 2d 1252, 1273 n.11 (Fla. 2005) (a request for "any and all" files was deemed "unduly broad and vague."); *Mills v. State*, 786 So. 2d 547, 551-52 (Fla. 2001) (requests are properly

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[1] Fla. R. Crim. P. 3.852(g) "Demand for Additional Public Records" states:

... if collateral counsel was appointed prior to October 1, 2001, then within 90 days after collateral counsel is appointed, ... **such counsel shall send a written demand for additional public records to each person or agency submitting public records** or identified as having information ....

(Emphasis added). The provisions of subsection (i) are set forth *infra*. As was argued by the State in the lower court, Jimenez's position would obviate the need for such provisions. (*See* PCR at 17)

denied where the demand specified "[a]ll notes, memoranda, letters, electronic mail, and/or files, drafts, charts, reports, and/or other files ...").

In this case, the SAO indicated at the Public Records Hearing that, although there was no request for additional records to trigger 3.852(h)(3), it nevertheless searched through eight boxes of material to determine if any further investigative records existed pursuant to this case after 2000. (2018 Succ. PC 803-04). Indeed, the State explained:

> If there's a colorable claim of relevance that they think is in my files in the past 20 years I'd be happy to go through them if it's not exempt, if it exists I'll submit it for in-camera review. If it's not exempt I'll be happy to turn it over, but to say on a separate note -- and that's separate from 3.852 H, under any subsection that you go to, [this Court] has repeatedly said any and all files and notes and document. . . is overbroad, it is burdensome.

(2018 Succ. PC 804).

The State further represented that since the trial on direct appeal, all of the motions for post-conviction relief have been summarily denied and that the SAO boxes are mostly pleadings, motions, notices, the State's responses, and the defense's replies, "all of which since 2002 Mr. McClain is the one who's been filing them." (2018 Succ. PC 812-13). Jimenez was given the opportunity to limit his request at the Public Records Hearing in this case but declined to do so. Therefore, the claims pertaining to all agencies for "any and all records" from the SAO, NMPD, and MDPD were properly denied.

Jimenez's amended public records demands to the State Attorney's Office and to the Miami-Dade Police Department on July 29 were also properly denied, as both demands were no more specific than the first requests, simply indicating that the defense sought possible *Brady* material, but failing to make any specifications as to a colorable claim. In its response, the State asserted:

> Moreover, the Defendant has argued that the instant request is being made to "discover violations of *Brady v. Maryland*, 373 U.S. 83 (1963)." See Amended Request at pp. 3-5. The State respectfully submits that this is not a colorable claim as it is entirely devoid of any specificity, or legal, or factual basis. Likewise, the "public records" requested herein which are in the possession of collateral counsel, are not relevant as such records cannot be deemed withheld so as to establish a *Brady* claim. The State would note that the prior *Brady* claims referenced by the Defendant are of no assistance to him, either. Said claims, which were first raised in 2005, are detailed by [this Court] and were found not only to be procedurally barred but also without merit more than a decade ago. *See Jimenez v. State*, 997 So. 2d 1056, 1064-1071 (Fla. 2008).

(2018 Succ. PC 689).

Further, the State restated its prior objections to Jimenez's timeliness of his demands. (2018 Succ. PC 689). While his amended demand was filed on July 29, the State pointed out that its initial objection was filed on July 22, 2018 and that the Public Records hearing took place on July 23, 2018, "where the SAO not only again detailed its objections and what was in its files, but also offered to produce any specific record/request by collateral counsel." (2018 Succ. PC 689). Jimenez did not at the time mention any amended requests nor did he use his July 24 successive post-

conviction motion to specify public records that he was seeking. (2018 Succ. PC 689). Collateral counsel further did not mention any amendment of his public records request at the *Huff* hearing on July 27. (2018 Succ. PC 689). The State also filed an affidavit indicating that no further "investigative records" were created. (2018 Succ. PC 756). The lower court agreed with the State that all records leading to a colorable claim have in fact been turned over and further indicated that "MDPD was not the investigating agency and does not have additional records." (2018 Succ. PC 756, 763). Therefore, the lower court properly denied the amended demands.

ii. The DOC Records

Jimenez specifically contends that like the facts in *Muhammad*, the inmate file would be necessary to raise a claim for competency. (IB 14). Although there was apparently a prior request made by collateral counsel in 2015 concerning a claim of clemency, the 3.852(h)(3) requests specifically to the DOC were similarly for "any and all files," and not limited to updated records for the prior clemency related request. Thus, the claim was vague and overbroad.

Moreover, collateral counsel at the Public Records Hearing centered upon the claim of lethal injection irregularities, which pertained to Jimenez's 3.852(i) demands. This Court in *Muhammad* clarified that, in granting his request for public records concerning his inmate files:

> "The record reflects that Muhammad's counsel had made previous requests for these records from the DOC, and in this proceeding he

> sought an update of his inmate and medical files. He also supported the request with the explanation that such records would be relevant to a potential colorable claim concerning Muhammad's mental health.

132 So. 3d at 20l (emphasis added).

In the instant case, unlike Muhammad's counsel, present collateral counsel did not argue or proffer a colorable claim concerning mental health/competency to be executed. Indeed, even after DOC provided Jimenez's medical and psychological records to the defense as a courtesy, no such colorable argument was proffered that Jimenez was in fact possibly incompetent, other than a conclusory statement that records were needed to assert a competency claim, nor did he raise a specific claim in the instant motion for post-conviction relief. (2018 Succ. PC 763, 838-39). However, collateral counsel conceded at the *Huff* hearing that he does not have "a basis to assert there is any specific condition that makes [Jimenez] unique in turns[sic] of legal objection protocol and drugs being used…" (2018 Succ. PC 851). Thus, because the inmate file would not have put forth any medical indications of competency, the lower court was correct to summarily deny Jimenez's requests for "any and all records" with respect to his inmate files and this Court should affirm the lower court's ruling.

Jimenez also asserts the DOC inmate file was necessary to confirm that Jimenez had previously requested the electric chair as his method of execution because he was never provided with a copy of the document he signed when lethal

injection was adopted. (IB at p. 17). However, this specific argument was never made to the lower court in his successive post-conviction motion, the public records hearing or the *Huff* hearing. Consequently, this argument is not preserved for appeal. *See Tillman v. State*, 471 So.2d 32, 35 (Fla.1985)("In order to be preserved for further review by a higher court, an issue must be presented to the lower court and the specific legal argument or ground to be argued on appeal or review must be part of that presentation if it is to be considered preserved."); *Sunset Harbour Condo. Ass'n v. Robbins*, 914 So.2d 925, 928 (Fla. 2005) (holding that an issue must be presented to the lower court and the specific legal argument or ground to be argued on appeal must be part of that presentation if it is to be considered preserved).

Therefore, the lower court was correct to deny his amended demand for public records request and find that all of Jimenez's 3.852(h) requests were over broad, unduly burdensome and would not lead to a colorable claim. (2018 Succ. PC 763).

B. <u>3.852(i) requests</u>

Jimenez filed three additional expansive requests for public records in the court below, seeking from the DOC, ME and FDLE, *inter alia*, records and autopsy reports pertaining to four prior defendant executions in Florida; records and correspondence with federal agencies relating to the procedures and creation of the current protocol used for lethal injection; reasons for the changes in protocol and

alternatives that were considered in lieu of the current protocol; and documentation as to the logs of the observers from FDLE and DOC in the Eric Branch execution. (IB p. 18). The lower court denied all of Jimenez's requests, but granted limited disclosure of the Branch observer logs created by FDLE and DOC. (2018 Succ. PC 764-65). Jimenez now asserts in his initial brief that these records "are relevant to and necessary for the presentation of his constitutional challenge to Florida's lethal injection protocol" for Jimenez to show under *Glossip v. Gross*, 135 S. Ct. 1885 (2015). (IB 20). Contrary to Jimenez's contention, the lower court properly denied his requests for those records, as they did not establish a colorable claim. (2018 Succ. PC 764). *See Correll v. State*, 184 So. 3d 478, 491 (Fla. 2015)(observing that information regarding the manufacture and source of drugs does not lead to a viable Eighth Amendment claim).

Pursuant to Rule 3.852(i), a defendant must establish that "the additional public records are either relevant to the subject matter of the post-conviction proceeding or are reasonably calculated to lead to the discovery of admissible evidence." In *Pardo v. State*, 108 So. 3d 558, 565 (Fla. 2012), this Court stated that before a court can order additional public records disclosed, the following requirements must be met:

> Pursuant to Florida Rule of Criminal Procedure 3.852(i)(2), Pardo must demonstrate the following requirements before a circuit court can order that additional public records be disclosed:

> (A) collateral counsel has made a timely and diligent search of the records repository;
>
> (B) collateral counsel's affidavit identifies with specificity those additional public records that are not at the records repository;
>
> (C) the additional public records sought are either relevant to the subject matter of a proceeding under rule 3.851 or appear reasonably calculated to lead to the discovery of admissible evidence; and
>
> (D) the additional records request is not overly broad or unduly burdensome.

Fla. R. Crim. P. 3.852(i)(2).

Florida Rule of Criminal Procedure 3.852(i) makes it clear that it is the **defendant's burden** to establish his request is not unduly burdensome or overbroad, and, that it would relate to either a pending claim or relate to a colorable post-conviction claim **before** a court may order the records disclosed. The defendant's burden is not met by a theoretical exercise of positing unlikely scenarios where the records could possibly or conceivably be relevant to a post-conviction claim. Since the records requests made by Jimenez were so tenuous in their possible relation to an Eighth Amendment claim, the lower court did not abuse its discretion in denying those requests.

i. <u>Current Drug Protocol and Alternatives</u>

In this case, Jimenez did not explain how his denied requests for public records pertaining to the creation of the current drug protocol and the alternatives

considered were relevant to a colorable claim for post-conviction relief. According to the demands, Jimenez conclusively stated that the requested records "are reasonably calculated to lead to the discovery of admissible evidence in that such records may contain, or through further investigation may lead to the discovery of, evidence that execution by Florida's lethal injection procedures constitutes cruel and unusual punishment. . .." (2018 Succ. PC 157). He further asserted that all of these records were necessary because he possessed other information that etomidate was painful and would cause substantial risk of harm when compared to a knowing and available method of execution under *Glossip v. Gross*, 135 S. Ct. 1885 (2015). (IB at 20; 2018 Succ. PC 857).

To the extent Jimenez urges a general due process argument on the limitations placed on his access to records in this case (IB p. 19-20), such an argument is without merit. This Court has expressly upheld the validity of this rule. *Wyatt v. State*, 71 So. 3d 86, 110-11 (Fla. 2011) (rejecting constitutional challenge to Rule 3.852). As noted in *Wyatt*, reasonable restrictions on the access to public records do not offend the constitution. *Id.* The rule was promulgated to provide a remedy to the inordinate delay occasioned by securing public records for purposes of capital post-conviction litigation, and it is reasonably tailored to accomplish its purposes.

Moreover, this Court has repeatedly held that where a defendant makes public records requests that could have been made but were not made until after the death

warrant has been signed, he must show good cause explaining why the request was not made earlier. *See*, *e.g., Asay v. State*, 224 So. 3d 695, 700 (Fla. 2017) and cases cited therein. All of the records Jimenez sought to obtain below could have been requested prior to the signing of the present warrant, and Jimenez did not adequately demonstrate why he waited until the last minute to seek records that have been in existence, other than to claim that he was not aware that a death warrant would be signed so quickly. The lower court therefore did not abuse its discretion in rejecting such requests, and any claim that the rule unreasonably restricts the availability of information after a death warrant has been signed is without merit.

Additionally, Jimenez's 3.852(i) request referenced DOC's recent adoption of etomidate and sought records relating not only to the supplier of that drug but also all drugs used in the protocol. (2018 Succ. PC 157-58). While collateral counsel made reference to his requests for alternatives and suggested midazolam and phenobarbital (2018 Succ. PC 857-58), this Court has held that similar records requests were clearly overly broad and burdensome. *See Hannon*, 228 So. 3d at 511 (finding the circuit court properly denied Hannon's records request to the DOC and FDLE pursuant to Rule 3.852(i) regarding the three-drug protocol and stating that this Court specifically rejected similar claims in the past as "overbroad and burdensome").

Contrary to Jimenez's contention, this Court's decisions in *Valle v. State*, 70 So. 3d 525 (Fla. 2011) and *Muhammad v. State*, 132 So. 3d 176 (Fla. 2013), disposing of records requests under two recent death warrants support the lower court's ruling in this case. In both *Valle* and *Muhammad*, the defendants made numerous requests relating to lethal injection and associated records from the Department of Corrections and other agencies. However, in each case this Court affirmed the denial of the records requests, with the exception of documents from the manufacturer relating to the efficacy of either pentobarbital [*Valle*] or midazolam [*Muhammad*].[2]

Here, the records sought by Jimenez in this case far exceed the records disclosures this Court deemed appropriate in *Valle* and *Muhammad*. Since the lower court's ruling is in accord with this Court's precedent, it cannot be said the court abused its discretion in denying Jimenez's records requests in this case. Jimenez's request for records from DOC and FDLE was even more far removed from any

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[2] On November 18, 2013, this Court entered an order staying defendant Muhammad's execution and relinquishing jurisdiction to the lower court. *Muhammad v. State*, 132 So. 3d 176 (Fla. 2013). This Court's order relinquishing jurisdiction stated that the relinquishment was "for the narrow purpose of holding an evidentiary hearing solely on [defendant's] claim regarding the efficacy of midazolam hydrochloride as an anesthetic in the amount prescribed by Florida's protocol." It further stated that DOC was to produce "correspondence and documents it has received from the manufacturer of midazolam concerning the drug's use in executions or otherwise, including those addressing any safety and efficacy issues." Id. It further mandated that Defendant "shall not be permitted to relitigate or raise any other claims." *Id.*

potential post-conviction claim than those made by the defendants in *Valle* and *Muhammad* wherein the defendants sought to address the effectiveness or efficacy of a substituted anesthetic in the lethal injection protocol. In this case, the trial court had the benefit of this Court's ruling in *Muhammad* which, in addition to addressing overbreadth, also comprehensively rejected challenges to midazolam in the September 2013 protocol. Since the present protocol no longer employs midazolam, it is clear that none of the records requesting documents generated under the midazolam protocol would lead to a colorable Eighth Amendment claim.

In *Walton v. State*, 3 So. 3d 1000, 1013-14 (Fla. 2009), this Court explained that records regarding lethal injection do not lead to a colorable claim once "the challenge to the constitutionality of lethal injection as currently administered in Florida has been fully considered and rejected by the Court." *See also Tompkins v. State*, 994 So. 2d 1072, 1081 (Fla. 2008) ("This Court has repeatedly rejected appeals from summary denials of Eighth Amendment challenges to Florida's August 2007 lethal injection protocol since the issuance of *Lightbourne v. McCollum*, 969 So. 2d 326 (Fla. 2007).") (string cites omitted); accord *Darling v. State*, 45 So. 3d 444, 447 (Fla. 2010). Here, challenges to the 2017 lethal injection protocol have been fully considered and rejected by this Court. *Asay*, at 700. As such, the trial court's ruling below should be affirmed.

ii. The Observer Logs From Three Prior Executions

Jimenez also submits the lower court erred when it denied requested records from the three executions of defendants Asay, Lambrix, and Hannon. However, at no point during the *Huff* hearing did Jimenez explain how the logs and notes from the previous executions where no alleged irregularities occurred would be relevant to any colorable Eighth Amendment claim in this case. *See Valle*, 70 So. 3d at 549 (affirming lower court's denial of records requests "on the DOC's administration of executions for the last five inmates executed" noting that there is a presumption that members of the executive branch will follow the execution protocol).

In rejecting this request, the lower court recognized that nothing from Jimenez's pleadings and requests for previous logs from Asay, Hannon, and Lambrix would indicate that "the consciousness check or valid consciousness check as part of protocol was interfered" within this case.[3] The court did not err in finding the requested records were not related to a colorable claim in this case. *See Rolling v. State*, 944 So. 2d 176, 180-81 (Fla. 2006) (rejecting request that serological samples be preserved for testing and for public records related to lethal injection because, *inter alia*, the records would not relate to a colorable claim since lethal injection is constitutional). Moreover, while Branch's FDLE observer records were

[3] As previously noted, Jimenez does not explain why he waited until his warrant was signed to seek the records from executions which occurred in 2017.

turned over in the abundance of caution, Jimenez through his counsel never indicated that anything else in particular was abnormal about the other three defendants' executions. Thus, seeking such a broad swath of records simply to find out what they might contain is clearly a fishing expedition and is not the least bit narrowly tailored.

Therefore, this Court should find that the lower court did not abuse its discretion in denying Jimenez's 3.852(h) or 3.852(i) requests and affirm the lower court's summary denial, as all of Jimenez's requests were overly broad, unduly burdensome and would not lead to a colorable claim.

ISSUE II

FLORIDA'S LETHAL INJECTION PROCEDURE DOES NOT VIOLATE THE EIGHTH AMENDMENT. (Restated)

Jimenez next contends that the circuit court improperly denied him an evidentiary hearing and relief on his claim that Florida's lethal injection procedure, specifically the use of etomidate, constitutes cruel and unusual punishment in violation of the Eighth Amendment. He asks this Court to stay his execution in light of the United States Supreme Court granting certiorari in another death penalty case from a different state, arguing that the Supreme Court is likely to elucidate its ruling in *Glossip v. Gross*, 135 S.Ct. 2726 (2015). He argues that etomidate inflicts severe pain upon injection and that other drugs, like pentobarbital or medazolam, or

methods of execution, nitrogen gas, are available.[4] He then asserts that the execution of Eric Branch earlier this year provided new evidence on the effects of etomidate which warrant an evidentiary hearing. Finally, he argues that the trial court improperly summarily denied the claim by not accepting Jimenez's factual allegations regarding the execution of Branch. His argument is without merit and the lower court properly summarily denied the claim.

When a trial court summarily denies a claim in a post-conviction motion, this Court reviews that ruling de novo. *Pardo v. State*, 108 So.3d 558, 561 (Fla. 2012). Because a trial court's decision to summarily deny a post-conviction motion is "ultimately based on written materials before the court, its ruling is tantamount to a pure question of law, subject to de novo review." *Barnes v. State*, 124 So.3d 904, 911 (Fla. 2013). Furthermore, the issue of whether a lengthy stay on death row violates the Eighth Amendment prohibition on cruel and unusual punishment is a

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[4] Previously while representing other death row inmates, counsel for Jimenez made arguments in conflict with the challenge to the lethal injection protocols submitted here. For example, in *Reed v. State*, 116 So.3d 260, 266 (Fla. 2013), counsel argued against the substitution of pentobarbital for sodium thiopental. In counsel's challenge to the execution of Askari Abdullah Muhammad, F/K/A Thomas Knight, he argued against the use of midazolam hydrochloride as the first drug replacing pentobarbital. There he claimed midazolam was not fast acting and had a much shorter efficacy duration than other drugs, such as sodium thiopental and pentobarbital, that Florida had used in its lethal injection protocol. Yet now counsel argues to this Court that either pentobarbital or midazolam should be used instead of etomidate. Apparently, the arguments offered by counsel for the condemned are designed to stop executions rather than offering a consistent challenge to the drugs utilized in the lethal injection protocol.

pure question of law reviewed *de novo*. *Staples v. State*, 202 So.3d 28, 32 (Fla. 2016) (explaining that "where the issue presented is a question of law, the standard of review is de novo").

A. The appropriate analysis conducted for an Eighth Amendment challenge to a method of execution.

Initially, Jimenez cites to *Bucklew v. Precythe,* Case No. 17-8151 (2018), where the United States Supreme Court granted certiorari where a condemned prisoner challenged Missouri's lethal injection method. Jimenez contends that the Supreme Court, by directing the parties to address an additional question, indicated that it was likely to clarify the defendant's burden in challenging an execution method under the Eighth Amendment as set forth in *Glossip*. The question from the Supreme Court in *Bucklew* is: **"**Whether petitioner met his burden under *Glossip v. Gross*, 576 U. S. ____ (2015), to prove what procedures would be used to administer his proposed alternative method of execution, the severity and duration of pain likely to be produced, and how they compare to the State's method of execution."

The defendant in *Bucklew* suffers from an unusual medical condition which makes many of his blood vessels weak and malformed, often forming tumors on them, and making his peripheral veins in his hands and arms compromised. Bucklew's medical expert concluded that, given his medical condition, there was a substantial risk that the lethal injection drugs would not properly circulate in his body, leading to a long and painful execution. The doctor further opined that there

was a substantial risk that Bucklew would hemorrhage during the event, leading him to choke on his own blood. *Bucklew v. Precythe*, 883 F.3d 1087, 1090 (8th Cir.), cert. granted, 138 S. Ct. 1706, 200 L. Ed. 2d 948 (2018). Thus, the issue before the Supreme Court is really a very narrow one involving an individual inmate's medical condition and its potential effect on his execution. Even with the addition of that question, the *Bucklew* case will not clarify any issue in Jimenez's case. Further, it is not the place of a state court to divine what the Supreme Court will do based on a question posed in the granting of certiorari.

A stay of execution is warranted only when there are substantial grounds upon which relief might be granted. *Chavez v. State*, 132 So.3d 826, 832 (Fla. 2014) (citing *Bowersox v. Williams*, 517 U.S. 345 (1996) and denying a stay); *Howell v. State*, 109 So.3d 763, 778 (Fla. 2013) (stating that a defendant must show that there are substantial grounds upon which relief might be granted to obtain a stay of execution and denying a stay). There are no substantial grounds being raised in the initial brief. All of the claims being raised in the appeal of the successive post-conviction are meritless under this Court's controlling precedent, as explained in this brief. Accordingly, any motion for stay should be denied

Jimenez asserts that *Glossip* only mandates the defendant prove that he has an alternative method of execution which has less of a risk and/or pain involved than the method adopted by the State. Such a reading would essentially allow an inmate

to choose the method of execution rather than the State deciding on the appropriate method. Jimenez's reading of *Glossip* is incorrect. *See Muhammad v. State*, 132 So. 3d 176, 197 (Fla. 2013)("Permitting an Eighth Amendment violation to be established on such a showing would threaten to transform courts into boards of inquiry charged with determining "best practices" for executions, with each ruling supplanted by another round of litigation touting a new and improved methodology.'" (quoting *Baze v. Rees*, 553 U.S. 35, 51 128 S.Ct. 1520 (2008)).

The Eighth Amendment prohibition on cruel and unusual punishment applies to lethal injection protocols. But, as the United States Supreme Court itself has observed, it has "never invalidated" a lethal injection protocol. *Glossip*, 135 S. Ct. at 2732. *Baze* and *Glossip* established two requirements for an Eighth Amendment challenge to a method of execution. First, the challenger must "establish that the method presents a risk that is '*sure or very likely* to cause serious illness and needless suffering,' and give rise to 'sufficiently *imminent* dangers.'" *Glossip*, 135 S.Ct. at 2737 (emphasis in original), citing *Baze*, 553 U.S. at 50, 128 S.Ct. 1520. This evidence must show that the pain and suffering being risked is severe in relation to the pain and suffering that is accepted as inherent in any method of execution. *Id.* at 2733. Second, the challenger must "identify an alternative that is feasible, readily implemented, and in fact significantly reduces a substantial risk of severe pain." *Glossip*, 135 S.Ct. at 2737, citing *Baze*, 553 U.S. at 52. This is clearly a two-part

standard. There is no question that the United States Supreme Court explicitly requires prisoners to identify a known and available alternative method of execution that entails a lesser degree of pain as part of any viable constitutional challenge. In *Baze*, the Court held that, "a condemned prisoner cannot successfully challenge a State's method of execution merely by showing a slightly or marginally safer alternative," clearly contradicting Jimenez's assertion. *Baze*, 553 U.S. at 51, 61; *Glossip*, 135 S. Ct. at 2731.

The Court has held that to state a claim under the Eighth Amendment, a defendant must show that the state's lethal injection protocol is "'sure or very likely to cause serious illness and needless suffering.'" *Brewer v. Landrigan*, 562 U.S. 996, 996 (2010) (quoting *Baze v. Rees*, 553 U.S. 35, 50 (2008) (plurality opinion)). The Court defined a substantial risk of harm precisely in order to prevent courts from creating their own subjective and ill-defined standards. The Eleventh Circuit reiterated the proper standard under *Baze* in *Wellons v. Commissioner, Ga. Dept. of Corrections*, 754 F.3d 1260, 1265 (11th Cir. 2014), stating:

> In order to prevail on an Eighth Amendment challenge, Wellons must demonstrate that the State is being deliberately indifferent to a condition that poses a substantial risk of serious harm to him. Indeed, where an Eighth Amendment cruel and unusual punishment claim alleges the risk of future harm, "the conditions presenting the risk must be 'sure or very likely to cause serious illness and needless suffering,' and give rise to 'sufficiently imminent dangers.'" *Baze, 553* U.S. at 50, 128 S.Ct. 1520 (quoting *Helling v. McKinney*, 509 U.S. 25, 33, 34-35, 113 S.Ct. 2475, 125 L.Ed.2d 22 (1993)). "In the lethal injection context, this standard requires an inmate to show an objectively intolerable risk

> of harm that prevents prison officials from pleading that they were subjectively blameless for purposes of the Eighth Amendment." *DeYoung*, 646 F.3d at 1325 (internal quotations and citation omitted). A plaintiff must also show that the risk of severe pain is "substantial when compared to the known and available alternatives." *Baze,* 553 U.S. at 61, 128 S.Ct. 1520.

See also Thorson v. Epps, 701 F.3d 444, 449 (5th Cir. 2012) ("Furthermore, nothing in the record points toward a substantial risk of serious harm by the DOC in carrying out executions; mere speculation cannot rise to the level of an objectively intolerable risk.").

B. Whether there is new evidence relevant to a challenge to Florida's lethal injection protocol.

Jimenez asserts that the Branch execution is new evidence warranting an evidentiary hearing and would call into question the findings the circuit court made after the evidentiary hearing held in *Asay*. As part of his claim, he alleged in his successive post-conviction motion that Branch "screamed" and "thrashed" as a result of the injection of etomidate. Much, if not most, of the assertions made in his initial brief regarding the Branch execution are wholly based on assumptions and emotionally tinged "press" reports. Branch's attorney stated in his affidavit that Branch made a final statement condemning the Governor and the Attorney General. He noted that Branch then screamed just as the execution began and then shouted "Murderers" three times. After that, Branch's legs, head, and chest moved. His legs and chest continued to move or shake for several minutes, including after the

consciousness check was completed. (2018 Succ. PC 324). The FDLE and DOC observers noted that Branch yelled "murderers" as the execution began. (2018 Succ. PC 264-265). None of the witnesses reported thrashing.

In *Asay v. State*, 224 So. 3d 695 (Fla. 2017), this Court held that the use of etomidate as the first drug in Florida's current lethal injection protocol did not create a substantial risk of serious harm and, therefore, did not violate the Eighth Amendment. The trial court in *Asay* held an evidentiary hearing at which three experts testified: Dr. Daniel Buffington, a clinical pharmacologist; Dr. Steven Yun, an anesthesiologist; and Dr. Mark Heath, an anesthesiologist. *Asay*, 224 So. 3d at 701. These witnesses "detailed the known effects of etomidate, how it would be used in the protocol, and how it has been used in medical practice."[5] *Id.* The court observed that "even the defense expert, Dr. Heath, testified that most patients do not

[5]Etomidate is a commonly used anesthetic/hypnotic in medical practice. *See Miller's Anesthesia*, Eighth Ed., Elsevier, pg. 854 ("Etomidate is a well-known and widely used anesthetic agent for induction of anesthesia.") See generally *Sells v. Livingston*, 561 Fed. Appx. 342, 344 (5th Cir. 2014) (unpublished) ("If the State here were using a drug never before used or unheard of, whose efficacy or science was completely unknown, the case might be different."). Although Florida is the first state to adopt etomidate as part of its lethal injection protocol, that fact does nothing to suggest a violation of the Eighth Amendment. *See In re Kemmler*, 136 U.S. 436, 447 (1890) (while adopting of electrocution as a manner of punishment was unusual in that it would be the first state to adopt it, it was not violative of the constitution and "that it was for the legislature to say in what manner sentence of death should be executed [.]").

experience pain." *Id.* The court found, based on the record, that there was only "a small risk of mild to moderate pain." *Id*. This Court relied on the standard announced by the United States Supreme Court in *Glossip* which requires the inmate to establish that the method of execution presents a substantial and imminent risk that is sure or very likely to cause serious illness and needless suffering and to identify a known and available alternative method of execution which entails a significantly less severe risk of pain. *Asay*, 224 So. 3d at 701 (citing *Glossip*, 135 S. Ct. at 2737). The defendant in *Asay* failed to meet either of those two prongs.

Jimenez asserts that he will be subject to significant pain on injection but does not articulate how likely such pain will be or how long such injection pain may last. However, as noted above, such assertions were fully addressed in *Asay*. As recounted in the Florida Supreme Court opinion:

> **Transient venous pain was observed immediately** following intravenous injection of etomidate in about 20% of the patients, with considerable difference in the reported incidence (1.2% to 42%). This pain is usually described as mild to moderate in severity but it is occasionally judged disturbing. The observation of venous pain is not associated with a more than usual incidence of thrombosis or thrombophlebitis at the injection site. Pain also appears to be less frequently noted when larger, more proximal arm veins are employed and it appears to be more frequently noted when smaller, more distal, hand or wrist veins are employed.
>
> The information in the inserts was confirmed in the testimony of both anesthesiologists. Even the defense expert, Dr. Heath, testified that most patients do not experience pain.

Asay, 224 So. 3d at 701 (emphasis in original) (quoting from the drug package insert). Jimenez cites no compelling, much less persuasive, evidence in his claim to suggest this Court's findings in *Asay* were erroneous.

Etomidate carries a slight risk of pain on injection and the pain ordinarily associated with its injection is most often described as mild to moderate. However, even if such pain or discomfort is experienced, it would only last until Jimenez is rendered unconscious, at the very most, one minute. Nothing offered by Jimenez suggests that the risk of pain or discomfort as he describes rises above the level of speculation and, therefore, cannot set forth a plausible Eighth Amendment claim. As the Supreme Court noted: "And because some risk of pain is inherent in any method of execution, we have held that the Constitution does not require the avoidance of all risk of pain. After all, while most humans wish to die a painless death, many do not have that good fortune. Holding that the Eighth Amendment demands the elimination of essentially all risk of pain would effectively outlaw the death penalty altogether." *Glossip*, 135 S. Ct. at 2732-33 (internal citations omitted).

Jimenez also asserts that etomidate is ultra-short acting and that it may wear off prior to the conclusion of the execution. While at first glance such a claim might appear to be at least plausible, this claim too, upon examination, is far too speculative to support an Eighth Amendment challenge. While Jimenez's expert concedes that a typical anesthetic dose of etomidate can render an individual unconscious, his expert

barely acknowledges the fact that Florida does not employ a normal anesthetic dose. Florida employs a massive overdose of etomidate, seven to ten times [depending on the inmate's weight] the normal anesthetic dose. Consequently, Jimenez's assertion that Branch had 1/10th of the clinical dose (20-40 mg) at the completion of the execution is wholly misleading. Florida administers 200 mg of etomidate, clearly enough to maintain its levels in the bloodstream for the duration of the execution. While Jimenez's expert suggests that the length of unconsciousness is not dose related, the FDA approved package insert provides:

> Intravenous injection of etomidate produces hypnosis characterized by a rapid onset of action, usually within one minute. **Duration of hypnosis is dose dependent** but relatively brief, usually three to five minutes when an average dose of 0.3mg/kg is employed.

Asay, 224 So. 3d 701 (emphasis added). *See* Order Denying Defendant's Successive Motion To Vacate Judgement And Sentence And Motion for Stay, Case No. 16-1987-CF-06876-AXXX-MA, dated July 28, 2017 (noting that the two experts called by the State, Doctors Steve Yun and Daniel Buffington testified that 200 milligrams of etomidate would "absolutely render an individual unconscious and insensate for at least thirty minutes and as long as multiple hours.").[6]

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[6]The order from The Honorable Tatiana R. Salvador also noted that the defense expert, Dr. Heath, was "not questioned about the projected duration of unconsciousness associated with 200 milligrams of etomidate. *See* Order at 19.

Since the period of time from completion of injection of the first drug, in two injections, to time of death was approximately fourteen minutes in Branch's execution, and less in previous ones, Jimenez's assertions that there is a "substantial" risk the drug may wear off before the final drug stops electrical activity in the heart is not sufficiently plausible to merit a hearing. A claim that acknowledges it is founded upon speculation cannot meet the "sure or very likely" standard of *Baze* and *Glossip*. *See Mann v. Palmer*, 713 F.3d 1306, 1315 (11th Cir. 2013) (denying stay noting that defendant's claims regarding lack of FDA approval and speculation regarding lack of research or duration of the anesthetic will not substitute for evidence that use of the drug is sure or very likely to cause serious illness and needless suffering) (internal quotation marks omitted).

Furthermore, there have been three executions since the execution of Asay. Both the Lambrix and Hannon executions proceeded without reported incident. In fact, contrary to Jimenez's assertions, all of the executions under the current protocol have proceeded without any reported incident that would call into question either the drugs used or the implementation of Florida's protocol by the Department of Corrections. There were no irregularities during Branch's execution; if there had been, the State would have conducted an inquiry into the execution, as counsel for FDLE noted in her public records objection and at the public records hearing.

Jimenez suggests that there were problems and irregularities in the Branch execution due to etomidate.[7] However, upon examination, the "facts" Jimenez points to do not move his allegations beyond unsupported speculation. For example, Jimenez attempted to establish flaws in the current protocol by submitting an affidavit and news articles referring to Branch's yelling "murderers" three times, “thrashing” as he did so, and subsequently moving several parts of his body. The circuit court noted in its order denying relief that Jimenez could only call medical experts to testify at an evidentiary hearing; those experts could only testify essentially to the same evidence already presented in the *Asay* hearing regarding the use and effects of etomidate. There exists no evidence, not based on speculation or assumptions, that Branch’s yell, statements, or movements were the result of pain rather than from other causes like anger or the side effects of the drug, which were documented in the manufacturer’s literature and in the *Asay* record. This Court noted in *Asay* that one of the most common side effects of etomidate is involuntary movement. *Asay*, 224 So. 3d at 701 (quoting the drug insert for etomidate stating that one of the most common side effects of the drug was "transient skeletal movements, including myoclonus."). Consequently, the lower court concluded that

[7] Most unpersuasive is Jimenez’s allegation that Dr. Heath’s testimony now must be considered more credible in light of Branch’s execution. However, as this Court noted, “[e]ven the defense expert, Dr. Heath, testified that most patients do not experience pain.” *Asay*, 224 So. 3d at 701. Dr. Heath ultimately testified that his experience using etomidate was in line with the drug package insert.

an evidentiary hearing in this case would simply duplicate the one already conducted in *Asay*. (2018 Succ. PC 768).

Jimenez argues that Branch's actions were predicted by Dr. Health and, thus, would lead a court to re-evaluate the credibility determinations of both Dr. Health and Dr. Yun. That argument is faulty because its foundation rests on the underlying assumption that Branch's yell and movements were the result of pain. The information on the Branch execution notes that his body continued to move after he quieted, which all observers noted was within a moment of receiving the first injection. (2018 Succ. PC 264-265, 324; IB 27-28). Those body movements were noted in the *Asay* testimony and the manufacturer's drug information to be possible side effects of etomidate which might cause involuntary twitching or movement. The lower court did not accept as true that Branch's yell, words, and movements were the result of pain, as Jimenez states (IB 22); the court accepted as true that they happened.

Jimenez argues that Dr. Lubarsky would testify to the severe pain caused by etomidate and to the risk of remaining conscious. Indeed, Dr. Lubarsky's affidavit presents a rather glaring contradiction when he both posits that a fully anesthetized individual does not move at all while at the same time he complains that the myoclonic movements associated with etomidate will complicate the consciousness

check.[8] There is nothing from any of the four executions using etomidate to suggest that the prisoner was conscious following administration of 200 milligrams of etomidate.[9] Such speculative assertions cannot establish a substantial risk of harm under *Baze* or *Glossip*.

Jimenez contends that the circuit court found without evidence that the consciousness check was performed. However, attached to his own motion were the affidavit of Mr. Friedman as well as the FDLE logs, all of which indicated that the consciousness check was appropriately done. (2018 PC 264-265, 324). He also contends that the court had no support for finding that Branch's pain was mild to moderate. As noted before, the lower court made no finding on whether or not Branch felt pain. It is well-established that no lethal chemicals are injected until the defendant is unconscious as confirmed by the tiered consciousness check employed by Florida, which includes a test to establish that the condemned inmate is insensate

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[8] Dr. Lubarsky cites an article he co-authored published in a medical journal, the Lancet, criticizing levels of sodium thiopental given in executions based upon autopsies from executed inmates. As noted by the Supreme Court in *Baze,* this study was subject to criticism for its methodology in a subsequent response which was also published in the *Lancet. See Baze*, 553 U.S. at 51 n.2. Obviously, Dr. Lubarsky, citing his own research addressing a different drug, sodium thiopental, is slim evidence indeed to support a challenge to Florida's current protocol.

[9] Jimenez states that the Branch execution took seventeen minutes; however, the FDLE logs indicate that the execution began at 6:49 and stopped at 7:03, fourteen minutes. (2018 Succ. PC 264).

to pain. *See Howell v. State*, 133 So. 3d 511, 522 (Fla. 2014) (noting that Florida's consciousness checks which include a painful pinch of the trapezius "will ensure that Howell is unable to perceive any noxious stimuli..."). The possibility of an inmate passing such a test and remaining conscious during injection of the second and third drugs is so very remote, it cannot possibly meet the *Baze* standard. *See also Schwab v. State*, 995 So. 2d 922, 930 (Fla. 2008) (detailing the steps of the consciousness check, which included a shake and shout and eyeball tap); *Valle v. Singer*, 655 F.3d 1223, 1233 (11th Cir. 2011) (noting that under Florida's protocol, a consciousness check is required and "the execution cannot proceed until the individual is rendered unconscious.").

It is significant that this Court has said that the courts will not "micromanage" DOC's implementation of its protocol, and nothing in the record before this Court establishes that the methods presently used amount to a constitutional violation. Jimenez bears a heavy burden of establishing that Florida's lethal injection procedures violate the Eighth Amendment. *Valle v. State,* 70 So. 3d 530 (Fla. 2011).

The lower court also addressed Jimenez's argument that Dr. Lubarsky could add anything new or different to the testimony in *Asay*.

> The testimony of the witnesses in Asay and the insert for etomidate indicate that mild to moderate transient venous pain is not unexpected upon initial injection. Myoclonus during the Branch execution is also consistent with the Asay evidence. Both Drs. Heath and Lubarsky were concerned that myoclonus could be confused with pain and that it might

> make the consciousness checks difficult. In the Branch execution, it did not interfere with the consciousness check.
>
> The affidavit of Dr. Lubarsky does not present any new information that was not previously considered by the Florida Supreme Court. And as defense counsel conceded during the instant Huff hearing, Dr. Lubarsky does not believe that any drug should be used in executions. The affidavit of Dr. Heath is not new evidence, but rather, consistent with his testimony in Asay. The affidavit of Robert Friedman indicates that Branch's legs moved for about a minute after he shouted. He further states that at 6:50 Branch's chest was still moving and that at 6:53 an execution official shook him. His chest stopped moving shortly after that and at 6:04 an execution official checked for a heartbeat. As Dr. Lubarsky and Dr. Heath have both testified either in a hearing or by affidavit, myoclonus can be confused with distress. Myoclonus is not painful. While Branch's chest was moving (he was still breathing), the consciousness check indicates that Branch was unconscious as he did not respond to the shaking. As myoclonus is a known and testified to side effect of etomidate, it is not unreasonable to conclude that the movement was myoclonus. As the Florida Supreme Court stated in *Asay*, at 701, "Even the defense expert, Dr. Heath, testified that most patients do not experience pain." The evidence presented at the hearing and found in the insert indicated that pain is more common when injected into a small vein.

(2018 Succ. PC 767 n. 3). The circuit court's denial of an evidentiary hearing and of relief was proper.

Importantly, the lower court simply recognized that while Branch yelled out at the beginning of his execution, a hearing would not shed light on why he did so - either from pain or as a continued expression of his unhappiness at being executed. And, all of the allegations in the motion agree that Branch fell silent before the consciousness check. See *Schwab v. State*, 995 So. 2d 922, 929 (Fla. 2008)("[I]n terms of the Eighth Amendment, the critical point in the lethal injection process

comes immediately prior to the injection of the second drug."). Consequently, the motion was properly denied without a hearing.

It is important to note that the administration of the second and third drugs in Florida is only made after a determination that the first drug has had the desired effect and the inmate is unconscious. *Howell v. State*, 133 So. 3d 511, 522 (Fla. 2014) (noting that Florida's consciousness check which includes a painful pinch of the trapezius "will ensure that Howell is unable to perceive any noxious stimuli... *"); Schwab v. State*, 995 So. 2d 922, 930 (Fla. 2008) (detailing the steps of the consciousness check, which included a shake and shout and eyeball tap); *Valle v. Singer*, 655 F.3d 1223, 1233 (11th Cir. 2011) (noting that under Florida's protocol, a consciousness check is required and "the execution cannot proceed until the individual is rendered unconscious.").

This is particularly true because Florida has successfully implemented lethal injection for more than a decade since the last execution in which complications or problems were encountered and reported - the execution of Angel Diaz in December of 2006. Following that event, the State conducted an intensive review of its procedures and made substantial revisions following Diaz's execution. Indeed, both the State's implementation of its protocol, as well as the changes that were subsequently implemented, were reviewed and affirmed by the Florida Supreme Court. *Lightbourne v. McCollum, Id.* And, in the more than thirty executions

conducted since Angel Diaz, there have been no legitimate challenges to Florida's protocol regarding either the use of the initial drug to induce unconsciousness or the procedures used to assess consciousness. *See* Florida Dept. of Corrections' Execution List at www.dc.state.fl.us/oth/deathrow/execlist.html. Florida's successful record of effective, constitutional executions demonstrates the efficacy of the State's revisions. *Lightbourne*, 969 So. 2d at 349 (noting that the Warden consults with medically-qualified team members in making his determination of consciousness).

Finally, in *Glossip*, the Court observed that pentobarbital "became unavailable" for use in judicial executions, which required States to turn to midazolam. *Glossip* at 2733-34. Jimenez simply asserts that pentobarbital and medazolam are available. He also suggests the courts could completely change the method of execution by directing the State to use nitrogen gas. Jimenez has utterly failed to meet either prong under *Baze* and *Glossip* as the implementation of Florida's execution protocol is wholly consistent with the dictates of the Eighth Amendment and, even if it were not, Jimenez has not established the availability to Florida of a reasonable, viable alternative.

With regard to Jimenez's claims challenging how the condemned inmate is clothed and where he is placed relative to the viewing area are no different from similar challenges reviewed and rejected in *Valle v. State*, 70 So. 3d 530, 546 (Fla.

2011). The Department of Corrections retains certain discretion to act in its implementation of the execution protocol and, even when considered as a whole, Jimenez has not established anything substantial or any reason for this Court to find that his Eighth Amendment rights have been violated. Jimenez's complaints about the positioning of either the inmate or the spectators, matters squarely within the prerogative of the Department of Corrections, do not set forth a valid Eighth Amendment claim.[10] This Court should therefore affirm.

ISSUE III

FLORIDA IS NOT CONSTITUTIONALLY REQUIRED TO ADOPT A ONE-DRUG PROTOCOL.

Here, Jimenez alleges that Florida's continued use of a three-drug lethal injection protocol is unconstitutional and, in an attempt to carry his burden under *Baze* and *Glossip*, offers that it be replaced by the single barbiturate drug, pentobarbital. He points to the protocols of other states which have elected to use a one-drug protocol and that Florida should join the "growing" list of states changing their protocol away from using three drugs. Reporting what other states have instituted does not meet the pleading requirements for an Eighth Amendment

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[6] Moreover, Jimenez must recognize that an execution is not a public event and cannot be made more transparent than it already is. To the extent that he complains that the execution itself is not made more visible, DOC has a solemn obligation to ensure the privacy and security of its staff as well as the effective and constitutional application of its execution protocol.

claim.[11] Further, as argued extensively above and incorporated into this issue, Jimenez failed to "establish that the [current protocol] presents a risk that is '*sure or very likely* to cause serious illness and needless suffering,' and give rise to 'sufficiently *imminent* dangers.'" *Glossip*, 135 S.Ct. at 2737 (emphasis in original), citing *Baze*, 553 U.S. at 50, 128 S.Ct. 1520. Under existing law, the lower court properly denied this claim.

Jimenez complains about the continued use of a paralytic agent, rocuronium bromide, in Florida's three-drug protocol. There is no merit to this claim under established law and relief must be denied. *Baze,* 553 U.S. at 58 (holding Kentucky's protocol was not rendered cruel and unusual by the State's refusal to modify its protocol to use only a barbiturate (to ensure painless death) or to omit the paralytic pancuronium bromide (to ensure that pain responses were not merely masked)). As the United States Supreme Court has explained, one of the reasons for including a paralytic agent in a lethal injection protocol is to prevent the confusion of movement

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[11] Jimenez's allegations concerning the possibility of switching from lethal injection to lethal gas based upon recent developments in other states is legally and factually insufficient. This claim was not pled below with any specificity and therefore it is not preserved for appeal. Nor, has any State successfully employed lethal gas in an execution. Regardless, the lack of facts in his motion below on this matter was sufficient reason enough to reject it. See *Doorbal v. State*, 983 So. 2d 464, 484 (Fla. 2008) ("Counsel for Doorbal appears to operate under the incorrect assumption that conclusory, nonspecific allegations are sufficient to obtain an evidentiary hearing and that specific facts and arguments need not be disclosed or presented until the evidentiary hearing.").

during the execution with consciousness. *Baze*, 553 U.S. at 57. As that Court noted, "convulsions or seizures could be misperceived as signs of consciousness or distress." *Id.* Accordingly, this claim is clearly insufficient as a matter of law and must be denied.[12] *See Baze*, 553 U.S. at 68 (Alito, Justice, concurring) (noting problems encountered in euthanasia in the Netherlands with a single large dose of barbiturate and recognizing that a barbiturate takes longer and is less predictable) (citations omitted). This Court has consistently rejected Jimenez's challenge that the DOC should substitute the current three-drug protocol with a one-drug protocol. *See Asay*, 224 So.3d at 702; *Muhammad*, 132 So.3d at 196–97; *Hannon v. State*, 228 So. 3d 505, 509 (Fla. 2017). Likewise, the Eleventh Circuit Court of Appeals has squarely rejected the notion that Florida is required to adopt a one-drug protocol. *See Pardo v. Palmer*, 500 Fed. Appx. 901, 904 (11th Cir. 2012) (unpublished) and *Ferguson*, 493 Fed. Appx. at 25 (rejecting inmates' claims that Florida's failure to adopt a one-drug protocol violated the Eighth Amendment and observing that courts are not boards of inquiry which determine the best execution methods or procedures).

The lower court noted that Jimenez failed to show the existence of a "known

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[12] The wisdom of a three-drug protocol is clearly seen as some of those states employing an overdose protocol are finding that it is less predictable and prolongs the execution. *Glossip*, 135 S. Ct. at 2745-46 (noting the July 2014 Arizona execution of Joseph Wood lasted nearly two hours and involved fifteen 50-milligram doses of midazolam).

and available alternatives" to the use of etomidate in Florida's three-drug protocol. *See Chavez v. Florida SP Warden*, 742 F.3d 1267, 1272 (11th Cir. 2014). To the extent that there was any doubt about pleading this second step, the *Glossip* Court put that to rest by holding that there was no constitutional violation because "the prisoners failed to identify a known and available alternative method of execution that entails a lesser risk of pain." *Glossip*, 135 S. Ct. at 2731. As the Supreme Court explained, one of "the substantive elements of an Eighth Amendment method-of-execution claim" is that a prisoner must "plead and prove a known and available alternative." *Id.* at 2739. Because the prisoners in *Glossip* did not meet that pleading prerequisite, the Court reasoned their claim failed as a matter of law. *Id.*

Prior to *Glossip*, other courts acknowledged this requirement for an Eighth Amendment claim. The Eighth Circuit Court of Appeals held: "Without a plausible allegation of a feasible and more humane alternative method of execution, or a purposeful design by the State to inflict unnecessary pain, the plaintiffs have not stated an Eighth Amendment claim." *In re Lombardi*, 741 F.3d 888, 896 (8th Cir. 2014). Likewise, the Chief Judge of the Eleventh Circuit Court of Appeals stated: "An inmate obviously cannot begin to prove that there is an 'available,' 'feasible,' and 'readily implemented' alternative drug that will 'in fact significantly reduce a substantial risk of severe pain,' . . . without identifying a specific drug that meets those requirements." *Chavez*, 742 F.3d at 1274 (Carnes, C.J., concurring) (citing

Baze, 553 U.S. at 51, 61).

Jimenez appears to recognize his burden of pleading an alternative drug as he offers Florida could use a single-drug protocol with pentobarbital, either manufactured, or compounded under 'transparent' conditions. While Jimenez mentions an alternative, and suggests other states have obtained pentobarbital easily, he fails to allege any facts showing that pentobarbital could be feasibly obtained and readily implemented in Florida's lethal injection protocol.[13] Without alleging facts showing how this drug can be "readily" obtained by Florida, his motion is fatally defective. *See King v. State*, 211 So. 3d 866, 888 (Fla. 2017) (finding meritless claim where defendant "failed to allege the existence of a readily available alternative method of execution.").

Merely suggesting an alternative drug without showing it can be implemented readily, as Jimenez has done here, is a pleading deficiency necessitating the denial of relief. As the federal Eleventh Circuit recognized:

> *Glossip*'s second prong requires that a proposed alternative method of execution be "known and available"—or, as the Court also puts it, "feasible[and] readily implemented." *See Glossip*, 135 S.Ct. at 2737 (*quoting Baze*, 553 U.S. at 52, 61, 128 S.Ct. 1520 (plurality op.)). This requirement plainly imposes real, practical limitations on the acceptable alternative methods of execution that a prisoner can plead in order to state a claim for an Eighth Amendment method-of-execution

[13] Of course, it may very well be that Jimenez's lethal injection challenge is not so much a claim for relief based upon the possibility of experiencing any pain during his execution but rather an attempt to prohibit his execution altogether.

> challenge. "Feasible" means "capable of being done, executed, or effected." Webster's Third New International Dictionary 831 (2002). And "readily" means "with fairly quick efficiency," "without needless loss of time," "reasonably fast," or "with a fair degree of ease." *Id*. at 1889.[fn1] Moreover, the method of execution must be feasible and readily implemented for the state seeking to carry out the execution. *See Jones*, 811 F.3d at 1295; *Brooks*, 810 F.3d at 820. Accordingly, for a proposed method of execution to satisfy Glossip's second prong, the state must be able to implement and carry out that method of execution relatively easily and reasonably quickly, and in a manner that "in fact significantly reduces a substantial risk of severe pain" relative to the intended method of execution. *Glossip*, 135 S.Ct. at 2737 (alteration adopted quotation omitted).

Boyd v. Warden, Holman Corr. Facility, 856 F.3d 853, 867-68 (11th Cir. 2017), *cert. denied*, 138 S. Ct. 1286 (2018).

The United States Supreme Court has acknowledged that states, like Florida, have changed their lethal injection protocol because of the inability to acquire pentobarbital. *Glossip*, 135 S. Ct. at 2734 (noting Danish manufacturer of pentobarbital in 2012 ceased shipment of pentobarbital to United States for execution purposes). Simply because some other states have used compounded pentobarbital does not mean that it is reasonably available to the State of Florida. *See Grayson v. Warden*, 672 Fed. Appx. 956, 964 (11th Cir. 2016) (unpublished) (opining "[a]s this Court has noted many times, and the Supreme Court reiterated in *Glossip*, both pentobarbital and sodium thiopental are unavailable for use in executions as a result of the advocacy of death penalty opponents. *See id.; Glossip*, 135 S. Ct. at 2738.").

In *Brooks v. Warden*, 810 F.3d 812 (11th Cir. 2016), the Eleventh Circuit held a single-injection protocol was not a feasible, readily implemented alternative when compared to a three-drug protocol. Brooks proposed three alternatives to Alabama's three-drug protocol: (1) a single injection of pentobarbital; (2) a single injection of sodium thiopental; or (3) a single injection of midazolam. *Id.* at 819. Brooks pointed out that a single dose of pentobarbital was a common single-drug protocol used by other states in numerous prior executions. But the Eleventh Circuit found the inmate had not established that pentobarbital was currently available. The Eleventh Circuit noted that just because pentobarbital was available to other states in the past did not mean that it was available to Alabama presently. Further, the Eleventh Circuit noted that it was not the State's burden to plead and prove that it cannot acquire the drug. *Id.* at 820. Rather, it was the inmate's burden to establish that there is currently a source for pentobarbital that would sell it to Alabama for use in executions and Brooks had failed in that respect. *Brooks,* 810 F.3d at 820. *See Correll v. State*, 184 So. 3d 478, 490 (Fla.), *cert. denied*, 2015 WL 6111411 (2015) (rejecting defendant's claims that Florida can obtain pentobarbital from other states or that it could license a compounding pharmacy to make it).

Jimenez does not acknowledge, much less even attempt to distinguish, the ample precedent establishing that pentobarbital is not available to Florida, and other states, for the purpose of carrying out an execution by lethal injection. The failure of

opposing counsel to identify any manufacturer of pentobarbital or licensed compounding pharmacy that has agreed to supply these drugs for executions means he has failed to establish his suggested alternative is ***actually*** available to Florida. To satisfy the second prong of *Glossip*, the inmate has to do more than just suggest another drug. The inmate must establish that the drug is ***truly*** available to the State. *See Zink v. Lombardi*, 783 F.3d 1089, 1103 (8th Cir. 2015) (determining condemned inmate's complaint was dismissed properly because "[t]he second amended complaint include[d] no factual matter that even hint[ed] at how the State - drawing on feasible and readily implemented alternatives - could modify its lethal-injection protocol to reduce significantly the alleged substantial risk of severe pain."). Here, Jimenez clearly has failed to show that there is an alternative to Florida's current protocol as required by *Glossip* and *Baze*. As Jimenez has failed to meet his burden, his Eighth Amendment claim is facially and fatally insufficient. The denial of relief should be affirmed.

ISSUE IV

THE TRIAL COURT PROPERLY SUMMARILY DENIED THE CLAIM THAT A LENGTHY STAY ON DEATH ROW VIOLATES THE EIGHTH AMENDMENT BASED ON A DISSENTING OPINION IN *LACKEY V. TEXAS*, 514 U.S. 1045 (1995). (Restated)

Jimenez, relying on Justice Stevens's dissenting opinion from the denial of certiorari in *Lackey v. Texas*, 514 U.S. 1045 (1995), as well as several dissents

from Justice Breyer and various international cases, additionally asserts that his incarceration of 23 years on death row violates the Eighth Amendment prohibition on cruel and unusual punishment. However, there is no United States Supreme Court case endorsing such a view of the Eighth Amendment. The United States Supreme Court has consistently denied review of claims that lengthy stays on death row violate the Eighth Amendment. Moreover, this Court has consistently rejected *Lackey* claims and done so in numerous cases where the capital defendant has spent significantly more time on death row than Jimenez has spent. Indeed, as this Court has observed, no court has found any merit to such claims. Furthermore, difficulty in locating a pro bono attorney to file a civil § 1983 action in federal court is not cruel and unusual punishment. It is not a violation of the Sixth Amendment right to counsel, much less a violation of the Eighth Amendment. The trial court properly summarily denied this claim.

<u>The trial court's ruling</u>

The trial court summarily denied the *Lackey* claim observing that this Court "has consistently rejected claims that a lengthy stay on death row violates the Eighth and Fourteenth Amendments of the United States Constitution." (2018 Succ. PC at 707-708) (citing *Pardo v. State*, 108 So.3d 558, 569 (Fla. 2012) (twenty-four years); *Johnston v. State*, 27 So.3d 11, 27 (Fla. 2010) (almost twenty-five years); *Tompkins v. State*, 994 So.2d 1072, 1085 (Fla. 2008) (twenty-three years); *Booker v. State*, 969

So.2d 186, 200 (Fla. 2007) (almost thirty years); *Ferguson v. State*, 101 So.3d 362, 366 (Fla. 2012) (more than thirty years); *Waterhouse v. State*, 82 So.3d 184, 87 (Fla. 2012) (more than thirty-one years); *Valle v. State*, 70 So.3d 530, 552 (Fla. 2011) (thirty-three years)). The trial court concluded that Jimenez was not entitled to relief on the *Lackey* claim. (2018 Succ. PC at 1136-1137).

Standard of review

When a trial court summarily denies a claim in a post-conviction motion, this Court reviews that ruling de novo. *Pardo v. State*, 108 So.3d 558, 561 (Fla. 2012). Because a trial court's decision to summarily deny a post-conviction motion is "ultimately based on written materials before the court, its ruling is tantamount to a pure question of law, subject to de novo review." *Barnes v. State*, 124 So.3d 904, 911 (Fla. 2013). Furthermore, the issue of whether a lengthy stay on death row violates the Eighth Amendment prohibition on cruel and unusual punishment is a pure question of law reviewed *de novo*. *Staples v. State*, 202 So.3d 28, 32 (Fla. 2016) (explaining that "where the issue presented is a question of law, the standard of review is de novo").

Merits

The Eighth Amendment does not prohibit lengthy stays on death row.

Conformity Clause

Under Florida's constitution, Florida courts are bound by United States

Supreme Court precedent in the area of Eighth Amendment jurisprudence, including the lack of precedent. Art. I, § 17, Fla. Const.; *Correll v. State*, 184 So. 3d 478, 489 (Fla. 2015) ("this Court is bound by the conformity clause of the Florida Constitution to construe the state prohibition against cruel and unusual punishment consistently with pronouncements by the United States Supreme Court"); *Howell v. State*, 133 So.3d 511, 516 (Fla. 2014), cert. denied, 134 S.Ct. 1376 (2014) (explaining that, under article I, section 17, of the Florida Constitution, Florida courts are required to evaluate all Eighth Amendment claims in conformity with decisions of the United States Supreme Court). Florida courts are not free to create new precedent in the area of Eighth Amendment law.

There is no United States Supreme Court case holding that a lengthy stay on death row violates the Eighth Amendment. The United States Supreme Court has consistently denied petitions for review of *Lackey* claims. Indeed, the United States Supreme Court recently denied review of a *Lackey* claim where the defendant had been on death row for forty years. *Sireci v. Florida*, 137 S.Ct. 470 (2016). A single Justice's dissenting opinion, such as Justice Stevens opinion in *Lackey* or Justice Breyer's dissenting opinion in *Sireci*, is not Eighth Amendment

law.[14] Unless and until, the United States Supreme Court holds otherwise, there is no Eighth Amendment prohibition regarding the number of years a defendant may spend on death row.

<u>This Court's precedent rejecting *Lackey* claims</u>

This Court has consistently rejected *Lackey* claims. *Valle v. State*, 70 So.3d 530, 552 (Fla. 2011) (rejecting a *Lackey* claim where the defendant had been on death row for 33 years); *Lambrix v. State*, 217 So.3d 977, 988 (Fla. 2017) (rejecting a *Lackey* claim where the defendant had been on death row for over 31 years), cert. denied, 138 S.Ct. 312 (2017); *Muhammad v. State*, 132 So.3d 176, 206-07 (Fla. 2013) (rejecting a *Lackey* claim where the defendant had been on death row for over 30 years), cert. denied, 134 S.Ct. 894 (2014); *Ferguson v. State*, 101 So.3d 362, 366-67 (Fla. 2012) (rejecting a *Lackey* claim where the defendant had been on death row for 30 years), cert. denied, 133 S.Ct. 497 (2012); *Correll v. State*, 184 So.3d 478, 486 (Fla. 2015) (rejecting a Lackey claim where the defendant had been on death row for 29 years), cert. denied, 2015 WL 6111441 (Oct. 29, 2015); *Gore v. State*, 91

[14] While Justice Breyer thinks the Court should address the issue, Justice Thomas has written that there is no support in the American constitutional tradition or in the Court's precedent "for the proposition that a defendant can avail himself of the panoply of appellate and collateral procedures and then complain when his execution is delayed." *Compare Correll v. Florida*, 2015 WL 6111441 (2015) (Breyer, J., dissenting from denial of certiorari), and *Johnson v. Bredesen*, 558 U.S. 1067 (2009) (Stevens, J., and Breyer, J., dissenting from denial of certiorari), with *Knight v. Florida*, 528 U.S. 990 (1999) (Thomas, J., concurring from denial of certiorari).

So.3d 769, 780-81 (Fla. 2012) (rejecting a Lackey claim where the defendant had been on death row for over 28 years). Every one of these defendants had spent more time on death row than Jimenez has. *Gore*, 91 So.3d at 781 (rejecting a *Lackey* claim and observing that another inmate, who had been on death row even longer, had just been executed). This Court has never found merit in a *Lackey* claim.

Other state and federal precedent

The Eleventh Circuit has also consistently rejected *Lackey* claims as well. *Thompson v. Sec'y, Fla. Dept. of Corr.*, 517 F.3d 1279, 1283-84 (11th Cir. 2008) (rejecting a *Lackey* claim where the defendant had been on death row for over 31 years); *Tompkins v. Sec'y, Fla. Dept. of Corr*., 557 F.3d 1257, 1260-61 (11th Cir. 2009) (denying a COA on a *Lackey* claim where the defendant had been on death row for 24 years). Indeed, as this Court has observed, no federal or state court has accepted the argument that a prolonged stay on death row constitutes cruel and unusual punishment. *Carroll v. State*, 114 So. 3d 883, 889 (Fla. 2013).

Lengthy stays on death row are not unusual

Moreover, the Eighth Amendment prohibition requires both cruel and unusual punishment. As is obvious from the above list of Florida cases, spending decades on death row is not unusual. And such lengthy delays are common in other states as well. *Johnson v. Bredesen*, 558 U.S. 1067 (2009) (denying review of a *Lackey* claim in a Tennessee case where the defendant had been on death row for nearly 29 years);

Andrews v. Davis, 866 F.3d 994, 1039-40 (9th Cir. 2017) (denying a COA on a *Lackey* claim in a California case where the defendant had been on death row for 22 years). Lengthy delays in capital cases are not "unusual" in modern times and therefore, lengthy stays on death row are not a violation of the Eighth Amendment prohibition on cruel and unusual punishment.

Such delays did not occur at common law when there was little or no appellate review and executions were carried out immediately. *McKenzie v. Day*, 57 F.3d 1461, 1467 (9th Cir. 1995) (noting at common law, executions could be carried out on the dawn following the pronouncement of sentence). Appellate review, state post-conviction proceedings, federal habeas review, and warrant litigation, which were unknown at common law, cause the delays. *Carroll v. State*, 114 So. 3d 883, 890 (Fla. 2013) (noting that "the length of time Carroll has spent on death row is due in large part to his post-conviction motions and habeas petitions"). As this Court has observed, defendants contribute to the lengthy time and delay "by continually challenging his convictions and sentences" and they are not permitted to contend that their punishment has been illegally prolonged because the delay in carrying out the sentence that is, in large part, "due to his own actions" in challenging his convictions and sentences. *Lambrix*, 217 So.3d at 988. During the vast majority of his time on death row, Jimenez's case was being reviewed by the state and federal courts, including reviewing his *pro se* motions.

A defendant may not premise a constitutional claim based in large part on his own conduct. When defendants waive these proceedings, their executions do not take decades. A good example of this is John Blackwelder, whose conviction and death sentence was affirmed by this Court in the direct appeal in July of 2003, who waived all other proceedings and was executed in May of 2004. *Blackwelder v. State*, 851 So.2d 650 (Fla. 2003). He spent less than one year on death row after his sentence was affirmed by the Florida Supreme Court after its mandatory review.[15] The trial court properly summarily denied the *Lackey* claim.

ISSUE V

THE CIRCUIT COURT CORRECTLY DENIED THE 3.800(a) MOTION SINCE IT WAS PROCEDURALLY BARRED AND WITHOUT MERIT. (Restated)

In his last issue, Jimenez argues that his life sentence for the armed burglary with an assault is illegal in light of *Delgado v. State*, 776 So.2d 233 (Fla. 2000) and the lower court should have so found in ruling on his rule 3.800(a) motion. This claim is utterly without merit. Jimenez is not truly challenging the sentence but is challenging his actual conviction for the burglary; consequently, a rule 3.800(a)

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[15] *Robertson v. State*, 143 So.3d 907 (Fla. 2014) (holding this Court would review the defendant's conviction and death sentence even if defendant wished to argue in favor of the death sentence); *Yacob v. State*, 136 So. 3d 539, 546 (Fla. 2014) (describing this Court's review of capital cases as being "automatic, mandatory, and statutorily required "); *Doty v. State*, No. SC13-1257 (order of July 14, 2014) (denying a *pro se* motion to dismiss the direct appeal citing *Klokoc v. State*, 589 So. 2d 219 (Fla. 1991)).

motion is not the appropriate method to challenge the conviction. A rule 3.800 cannot be used to evade the requirements of Rule 3.850 or Rule 3.851 nor to relitigate previously rejected claims. The issue is procedurally barred since it was raised in Jimenez's amended post-conviction challenge and this Court ruled on it in *Jimenez v. State*, 810 So.2d 511, 512 (Fla. 2001). The lower court properly denied the motion.

This Court addressed this issue as follows:

> At the time of the murder, section 810.02(1), Florida Statutes (1991), defined burglary as "entering or remaining in a structure or a conveyance with the intent to commit an offense therein, unless the premises are at the time open to the public or the defendant is licensed or invited to enter or remain." On direct appeal Jimenez argued that the burglary was not proven because there was no proof of forced entry or that Minas refused entry or that she demanded that he leave the apartment. We held that "[n]either forced entry nor entry without consent are requisite elements of the burglary statute" and that circumstantial proof could establish that the occupant withdrew his or her consent. *Jimenez,* 703 So.2d at 441. In affirming Jimenez's convictions and sentences, we concluded that the trier of fact could reasonably have found beyond a reasonable doubt that Minas withdrew consent for Jimenez to remain in her home when he brutally beat and stabbed her numerous times. *Id.*
>
> In *Delgado v. State*, 776 So.2d 233, 240 (Fla.2000), this Court receded from *Jimenez* and held:
>
>> In section 775.021(1), Florida Statutes (1997), the Legislature mandated that courts use the following rule of construction:
>>
>>> The provisions of this [criminal] code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused.

> Applying this principle to the present case, the most favorable interpretation of Florida's burglary statute is to hold that the "remaining in" language applies only in situations where the remaining in was done surreptitiously. This interpretation is consistent with the original intention of the burglary statute. In the context of an occupied dwelling, burglary was not intended to cover the situation where an invited guest turns criminal or violent. Rather, burglary was intended to criminalize the conduct of a suspect who terrorizes, shocks, or surprises the unknowing occupant.

> Immediately after the release of this Court's opinion in *Delgado*, Jimenez filed an amended 3.850 motion for post-conviction relief, presenting the issue of whether *Delgado* should apply retroactively. The circuit court denied 3.850 relief and Jimenez appealed.
>
> We determine that Jimenez is not entitled to relief. His convictions were final prior to the release of our opinion in *Delgado*. Retroactivity is therefore determined by the criteria set forth in *Witt v. State*, 387 So.2d 922 (Fla.1980). In order for *Delgado* to have retroactive application, it must: (1) emanate either from this Court or the United States Supreme Court; (2) be constitutional in nature; and (3) have fundamental significance. *Id*. at 929-30. We have determined that *Delgado* does not meet the second or third prongs of the *Witt* test; hence it is not subject to retroactive application. *See Delgado*, 776 So.2d at 241. Moreover, in its most recent session, the Legislature declared that *Delgado* was decided contrary to legislative intent and that this Court's interpretation of the burglary statute in Jimenez's direct appeal was in harmony with legislative intent. Ch.2001-58, § 1, 2001 Fla. Sess. Law Serv. 282, 283 (West).

Jimenez, 810 So. 2d at 512–13. Given that this is the exact issue raised previously in that post-conviction challenge, Jimenez is procedurally barred from raising it again here. *See Walker v. State*, 88 So. 3d 128, 137 (Fla. 2012) (noting that defendant is not permitted to relitigate a claim on post-conviction appeal where the underlying

issue was raised on direct appeal) (citing Green v. State, 975 So. 2d 1090, 1106 (Fla. 2008)); *Vining v. State*, 827 So. 2d 201, 211 (Fla. 2002) (noting that because the claim was raised and rejected on direct appeal, recharacterizing the claim in terms of ineffective assistance would not bypass the procedural bar).

Jimenez has not stated a new claim upon which relief can be predicated. A Rule 3.800(a) motion cannot be used to challenge the conviction. *Jones v. State*, 78 So. 3d 675 (Fla. 4th DCA 2012); *Edwards v. State*, 35 So. 3d 121 (Fla. 4th DCA 2010); *Prince v. State*, 903 So. 2d 1068 (Fla. 2d DCA 2005).

Further, a motion under Florida Rule of Criminal Procedure 3.800(a) cannot be brought in a situation such as Jimenez's. Such motions can be filed "at any time," even long after the sentence is final, but must address errors apparent on the face of the record. *Brooks v. State*, 969 So. 2d 238, 238 (Fla. 2007). Any supposed defect in his burglary sentence is clearly not apparent on the face of the record. Additionally, this Court has stated:

> Noting that the term "illegal sentence" is not defined in the rule, we have held that to be subject to correction under rule 3.800(a) a sentence must be "one that no judge under the entire body of sentencing laws could possibly impose." *Wright v. State*, 911 So.2d 81, 83 (Fla. 2005) (citing *Carter*, 786 So.2d at 1178). Put another way, "[a] sentence that patently fails to comport with statutory or constitutional limitations is by definition 'illegal.'" *Plott*, 148 So.3d at 94 (alteration in original) (quoting *State v. Mancino*, 714 So.2d 429, 433 (Fla. 1998)).
>
> We have recognized that few claims raised under rule 3.800(a) "come within the illegality contemplated by the rule." *Wright*, 911 So.2d at 83. For example, in *Wright*, we held that a trial court's failure to provide

> written reasons for retaining jurisdiction over a defendant's sentence did not constitute an illegal sentence subject to correction under the rule. *Id*. at 82. We explained that while the defendant was entitled to challenge this technical sentencing error on direct appeal, he could not do so in a rule 3.800(a) motion because the error was not one involving "a court's patent lack of authority or jurisdiction, a violation of the sentencing maximums provided by the Legislature, or a violation of some other fundamental right resulting in a person's wrongful imprisonment." *Id.* at 84. By comparison, we have held that a sentence that has been unconstitutionally enhanced in violation of the double jeopardy clause is illegal and, therefore, may be corrected under rule 3.800(a). *Hopping v. State*, 708 So.2d 263, 265 (Fla. 1998).

Martinez v. State, 211 So. 3d 989, 991–92 (Fla. 2017). Jimenez's burglary sentence is not "one that no judge under the entire body of sentencing laws could possibly impose." *Id.*

Jimenez asserts that a new substantive right was created by *Delgado* requiring it to be applied retroactively to his burglary sentence. He points to *Fiore v. White*, 531 U.S. 225, 226 (2001) to no avail. There, Fiore and his co-defendant, Scarpone, were convicted of operating a hazardous waste facility without a permit. The State of Pennsylvania argued that while Fiore and Scarpone had a permit, they deviated so dramatically from its terms that they violated the statute. The Pennsylvania Supreme Court declined to review Fiore's conviction, but later reversed Scarpone's conviction finding that although it was unlawful to operate without a permit, one who merely deviates from a permit's terms did not qualify as a person without a permit. *Fiore,* 531 U.S at 227.

The Court of Appeals reviewing Fiori's federal habeas petition believed the

Pennsylvania Supreme Court had announced a new rule in Scarpone's case, inapplicable to Fiore, and pointed out that state courts are under no constitutional obligation to apply new rules retroactively. *Id*. However, upon review, the United States Supreme Court requested the Pennsylvania Supreme Court explain whether Scarpone's case created a new law. The Pennsylvania court replied that the decision in Scarpone's case did not announce a new law but clarified the law at the date Fiore's conviction became final. Based on that explanation, the United States Supreme Court ruled that because Scarpone's case did not create a new law, it did not present an issue of retroactivity; instead, the question was whether Fiore could be convicted for conduct that Pennsylvania's criminal statute did not prohibit. Hence, the Court ruled Fiore's conviction was a violation of due process because failure to possess a permit is a basic element of the crime and Pennsylvania could not prove this element as Fiore had the appropriate permit. *Id*. at 228-229.

Here however, *Fiore* is inapplicable. Fiore was convicted of a crime where the state could not prove an essential element, i.e., that he did not possess a permit. Conversely, Jimenez was found guilty of armed burglary with assault by a unanimous jury; the State proved all required elements. Further, this Court specifically conducted a *Witt* analysis and determined that *Delgado* did not meet the final two tests to make it retroactive.

Jimenez also cites to *Schriro v. Summerlin,* 542 U.S. 348 (2004), *Bouie v. City*

of Columbia, 378 U.S. 347 (1964), and *Lanzetta v. New Jersey,* 306 U.S. 451 (1939) that *Delgado* should apply to his case since due process requires statutes to give fair warning of what conduct constitutes a crime. The *Delgado* decision, as stated previously, did not meet the requirements for retroactivity. This Court explained that "[t]he quoted portion of the *Jimenez* opinion ... was a discussion of why the *Delgado* decision did not meet the test for retroactivity: *Delgado* was not constitutional in nature and did not have fundamental significance." *State v. Ruiz*, 863 So. 2d 1205, 1210 (Fla. 2003). Consequently, the *Delgado* decision did not raise either federal due process or fundamental fairness issues.

> Similarly, in *Lockhart*, we concluded that, given the overriding interest in fundamental fairness, the likelihood of a different outcome attributable to an incorrect interpretation of the law should be regarded as a potential "windfall" to the defendant rather than the legitimate "prejudice" contemplated by our opinion in *Strickland*. … Because the ineffectiveness of Fretwell's counsel had not deprived him of any substantive or procedural right to which the law entitled him, we held that his claim did not satisfy the "prejudice" component of the *Strickland* test.

Williams v. Taylor, 529 U.S. 362, 392–93, 120 S. Ct. 1495, 1512–13, 146 L. Ed. 2d 389 (2000).

Finally, Jimenez asserts that the "resolution of the issue raised in this motion does carry implications for Mr. Jimenez's death sentence" because if the conviction was found illegal, it would allow him to challenge his death sentence under *Johnson v. Mississippi*, 486 U.S. 578 (1988)." *Id.* This, however, is a misconstrued assertion.

In *Johnson v. Mississippi*, 486 U.S. 578, (1988), the sole evidence supporting one of Johnson's three aggravating circumstances that he had been "'previously convicted of a felony involving the use or threat of violence to [another] person' consisted of an authenticated copy of his commitment to prison in 1963 following his New York conviction of second-degree assault with intent to commit first-degree rape." At the sentencing hearing, the prosecutor in *Johnson* repeatedly referred to the commitment document but subsequent to the Mississippi Supreme Court's affirmance of the death sentence, the assault conviction was reversed by the New York Court of Appeals. *Id.* In reversing the defendant's death sentence, the *Johnson* Court found that, "[t]he New York conviction did not provide any legitimate support for petitioner's sentence. Its reversal deprives the prosecutor's sole piece of evidence as to the aggravating circumstance of any relevance to the sentencing decision." *Id.* Moreover, the fact that the prosecutor repeatedly urged the jury to give it weight "was clearly prejudicial." *Id.* at 578-79.

In *Carter v. State*, 980 So.2d 473, 481 (Fla. 2008), the defendant attempted to attack the validity of the finding of aggravating circumstances arguing that the "trial court's application of the burglary aggravator was erroneous because the 2001 revision of the burglary statute has such an expansive reach that using it as a justification for imposing death no longer 'genuinely narrows' the class of capital defendants eligible for a death sentence." The Florida Supreme Court disagreed and found that "[t]he 2001 amendment to the burglary statute was intended to repudiate this Court's decision in *Delgado v. State,* 776 So.2d 233 (Fla.2000), and to clarify, not broaden, the definition of burglary." *Id*. Additionally, the Court held that "competent, substantial evidence supports the trial court's and the jury's conclusion that the murders of [the victims] were committed in the course of a burglary" whether he or not he "entered [the victim's] home uninvited with the intent to

commit murder therein, or, notwithstanding an invitation, remained in her home to commit or attempt to commit a forcible felony." *Id.*

Therefore, even if Jimenez could get past the procedural bar and the inapplicability of raising this issue under rule 3.800(a) to assert that there could be a potential argument concerning the aggravating circumstances, Jimenez's similar argument fails because there was still competent substantial evidence to support the jury's conclusion based on the facts that were presented at trial, which is clearly distinguishable from the argument based in *Johnson*.

Relief was properly denied.

CONCLUSION

The State respectfully requests that this Court affirm the trial court's summary denial of the successive post-conviction motion and deny the motion for stay of execution.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of August, 2018, I electronically filed the foregoing with the Clerk of the Court by using the e-portal filing system which will send a notice of electronic filing to the following: Martin J. McClain, Esquire, McClain and McDermott, P.A., 141 N.E. 30th Street, Wilton Manors, Florida 33334-1064, martymcclain@comcast.net; and Abbe Rifkin, Assistant State Attorney, at AbbeRifkin@MiamiSAO.com and Fariba Komeily, Assistant State Attorney, at FaribaKomeily@MiamiSAO.com.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the instant brief has been prepared with 14-point Times New Roman type, a font that is not spaced proportionately on August 7, 2018.

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