IN THE SUPREME COURT OF FLORIDA

CASE NO. SC18-1247

LOWER TRIBUNAL No. 92-34156-CF

JOSE ANTONIO JIMENEZ,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

INITIAL BRIEF OF APPELLANT

MARTIN J. MCCLAIN
Fla. Bar No. 0754773

LINDA MCDERMOTT
Fla. Bar No. 0102857

McClain & McDermott, P.A.
Attorneys at Law
141 N.E. 30th Street
Wilton Manors, Florida 33334
Telephone: (305) 984-8344

COUNSEL FOR APPELLANT

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STATEMENT OF THE CASE AND FACTS[1]

Jimenez was charged by indictment on October 21, 1992, in Dade County, Florida with one count of first degree murder and one count of burglary with an assault (R. 1-2). The criminal offenses were alleged to have occurred on October 2, 1992 in an apartment complex. Two women who lived in an apartment next to the victim's second floor apartment heard noises coming from the victim's apartment at about 8:10 pm.[2] They then noticed the front door of the victim's apartment ajar. When one of them went to push it open, the door was pushed shut from inside the apartment and locked.[3] Alarmed by this the women called the police. At 8:21

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[1]References to the record on direct appeal are designated as "R. ____." References to the trial transcripts are designated as "T. ____." References to the postconviction record on appeal from the denial of the first postconviction motion are designated as "1PC-R. ____." References to the postconviction record on appeal from the denial of the second postconviction motion are designated as "2PC-R. ____." References to the postconviction record on appeal from the denial of the third and fourth postconviction motions are designated as "3PC-R. ____." References to the postconviction record on appeal from the denial of the fifth postconviction motion are designated as "5PC-R. ___ ." References to the postconviction record on appeal from the denial of the sixth postconviction motion are designated as "6PC-R. ____." All other references are self-explanatory or otherwise explained herewith.

[2]These two women along with a third had returned to the apartment complex with groceries at about 7:55 pm, and had seen Jimenez in the parking lot. It appeared that he had come down the stairs leading up to the second floor.

[3]At Jimenez's trial, the State argued that the victim's assailant was in her apartment and had been the one to push the front door closed and then lock it with the two women standing outside the apartment at about 8:10 pm.

pm, the police arrived. They obtained a key to the victim's apartment. Upon entering they discovered the victim, Phyllis Minas, lying in a pool of blood on the floor having been stabbed. She was pronounced dead when she arrived at the hospital.

Jimenez's trial began on October 3, 1994. The State's case was based on circumstantial evidence as the State acknowledged in its closing argument (T. 891). Four circumstances were cited: 1) A fingerprint found on the inside of the front door was matched to Jimenez; 2) a witness, the building's custodian, claimed to have seen Jimenez jump from a second floor balcony of the apartment building between 7:45 pm and 8:00 pm on the night of the murder;[4] 3) the fact that the medical examiner concluded that it was likely that the victim was stabbed by a right handed man; and 4) when speaking with his probation office on October 5, Jimenez said that he understood the police wanted to speak with him about a stabbing, and according to the State only the person responsible for the stabbing would have known that the victim was stabbed.[5]

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[4]According to a police report, the custodian told the police at about 9:00 pm on October 2 that he had seen a white male jump from a balcony adjoining Minas' balcony shortly before 8:00 pm.

[5]No one saw Jimenez enter Minas' apartment or exit her apartment. The front door was on a catwalk that ran the length of the second floor. A patio door opened on to a balcony on the opposite of the apartment building. While many of the apartments had balconies on the back side of the building, the balconies were often separated from a neighboring balcony by just a foot which made it easy for someone to go from one balcony to another balcony.

The defense argued in its guilt phase closing that Jimenez did not stab and kill Minas. As to the armed burglary count, the defense also argued that: "Detective Pearce told you, and he's a crime scene specialist, that there is no point of entry. Now, with no point of entry that leads one to conclude that the perpetrator of this crime gained entry by knocking on the door and having Phyllis Minas open it." (T. 907). In the State's rebuttal closing, the prosecutor argued, "The defendant entered, and what's important to us is he **remained** in the dwelling. He went in and he stayed there long enough to kill her, and didn't have permission or consent of the person to enter or **remain** in the dwelling." (T. 930) (emphasis added). The prosecutor further argued: "**Well, certainly if he got in that apartment for some reason with her consent we all know she didn't consent for him to remain in her apartment and kill her. When he began that attack any consent that might have existed in anyone's imagination is gone.**" (T. 930) (emphasis added).

On October 6, 1994, the jury found Jimenez guilty on both counts of the indictment: first degree murder and armed burglary of an occupied dwelling (T. 957).

On November 10, 1994, a penalty phase proceeding was conducted. In the State's closing, the jury was told that its verdict finding Jimenez guilty of armed burglary established that the "in the course of a burglary" aggravator had already been

found (T. 1090). The prosecutor then indicated that as to the jury's sentencing recommendation, "[o]ur legislature made a decision for you, like it or not, and no one wants to participate in a process where a life will be taken." The jury was told, "[y]ou all took an oath to follow the law, and you promised you would follow the law, and whether or not you like the law". Then, the prosecutor told the jury, "[t]he death penalty has been imposed in this case by the actions of this defendant upon Phyllis Minas, a victim who was not protected by the law, lawyer, or Court or legal safeguard. A victim not given an opportunity to plead her case or present to you mitigating factors." (T. 1095). After hearing the prosecutor's arguments, the jury returned a unanimous recommendation of death (R. 487).

On December 14, 1994, the judge followed the jury's death recommendation and imposed a sentence of death on the first degree murder conviction (R. 529; T. 1138). In her sentencing order, the judge found four aggravators: 1) the defendant was on community control at the time of the offense; 2) the defendant was previously convicted of resisting arrest with violence; 3) the homicide occurred in the course of a burglary; and 4) the homicide was especially heinous, atrocious or cruel. The judge found one statutory mitigator and two nonstatutory mitigators. In addition to the death sentence, the judge also imposed a sentence of life imprisonment to run consecutive to the death sentence.

On direct appeal, this Court affirmed the judgment and

sentence of death. *Jimenez v. State*, 703 So. 2d 437 (Fla. 1997), *cert. denied*, 523 U.S. 1123 (1998). This Court rejected Jimenez's challenge to the sufficiency of the evidence supporting the burglary conviction, stating, "[n]either forced entry nor entry without consent are requisite elements of the burglary statute." *Id.* at 441. This Court also found the use of the burglary conviction as an aggravator was proper. *Id.*[6]

On January 28, 1998, this Court issued its mandate. On October 18, 1998, the Attorney General's Office gave notice to the Department of Corrections and the State Attorney of their obligation to provide their public records regarding Jimenez to the records repository. This was pursuant to the newly amended Rule 3.852(h) which had become effective on October 1, 1998.[7] Rule 3.852 required the State Attorney to notify all law enforcement agencies involved of their obligation to provide their public records regarding Jimenez to the records repository. The repository received submissions from the State Attorney's Office, the North Miami Police Department, the Miami-Dade Police

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[6]Further, this Court found Jimenez's arguments that the prosecutor's penalty phase closing argument violated *Caldwell v. Mississippi*, 472 U.S. 320 (1985), and *Campbell v. State*, 679 So. 2d 720 (Fla. 1996), were unpreserved. *Jimenez*, 703 So. 2d at 442.

[7]Rule 3.852(h) provided: "If the mandate affirming the defendant's conviction and sentence of death 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."

Department, and the Department of Corrections.

On January 31, 2000, a motion to vacate pursuant to Rule 3.850 was filed in Jimenez's case (1PC-R. 29-36). On March 10, 2000, the motion was amended and a seventh claim was added based upon the decision in *Delgado v. State*, 776 So. 2d 233 (Fla. 2000).[8] On June 8, 2000, the circuit court entered its order denying the motion to vacate (1PC-R. 91).

An appeal was filed and a new trial was sought on the basis of *Delgado*. However, this Court found that *Delgado* was not retroactive under *Witt v. State*, 387 So. 2d 922 (Fla. 1980), and affirmed the denial of postconviction relief. *Jimenez v. State*, 810 So. 2d 511 (Fla. 2001). Certiorari was denied by the U.S.

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[8]In *Delgado*, this Court addressed the statute defining the criminal offense of burglary. Delgado challenged his conviction of having committed an armed burglary on August 30, 1990. As the opinion explained: "The issue for th[e]Court to consider is whether the phrase 'remaining in' found in Florida's burglary statute should be limited to situations where the suspect enters lawfully and subsequently secretes himself or herself from the host." *Delgado*, 776 So. 2d at 238. The Court wrote: "[t]he question before this Court is whether the Legislature intended to criminalize the particular conduct in this case as burglary when it added the phrase 'remaining in.'" *Id.* at 239-40. The Court concluded that the burglary statute was meant to "appl[y] 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." *Id.* at 240. This reading of the burglary statute was treated as governing the question of whether Delgado had committed a burglary on August 30, 1990. In *Delgado*, the Court specifically referenced the discussion of the burglary statute and the finding of sufficient evidence to support the burglary conviction in *Jimenez*, 703 So. 2d at 44, and receded from its decision there.

Supreme Court. *Jimenez v. Florida*, 535 U.S. 1064 (2002).

On December 11, 2002, Jimenez filed a petition for a writ of habeas corpus which presented this Court with a number of issues, including whether Jimenez had been denied effective collateral representation. On June 10, 2003, this Court denied the petition in an unpublished opinion. *Jimenez v. Crosby*, 861 So. 2d 429 (Fla. 2003). A motion for rehearing was denied on November 14, 2003.

On May 24, 2004, Jimenez filed another petition for a writ of habeas corpus which relied upon new case law. Jimenez argued that under the decisions in *State v. Ruiz*, 863 So. 2d 1205 (Fla. 2003), and *Fitzpatrick v. State*, 859 So. 2d 486 (Fla. 2003), his burglary conviction violated his right to due process. He also relied upon *Bunkley v. Florida*, 538 U.S. 835 (2003). He presented a separate argument based on *Crawford v. Washington*, 541 U.S. 36 (2004), and contended that his confrontation rights had been violated by the introduction of hearsay at his penalty phase. On March 18, 2005, this Court issued an order denying the petition without any written explanation.

On January 20, 2004, Jimenez sought federal habeas relief in the federal district court. The petition was denied on January 30, 2006. Jimenez appealed, and the Eleventh Circuit Court of Appeals affirmed on March 23, 2007. *Jimenez v. Florida Dep't of Corrections*, 481 F.3d 1337 (11th Cir. 2007). Jimenez's petition for a writ of certiorari was denied by the U.S. Supreme Court on

November 13, 2007. *Jimenez v. McDonough*, 552 U.S. 1029 (2007).

Jimenez filed a second Rule 3.851 motion on April 28, 2005, which included claims based on *Brady* and ineffective assistance of counsel (2PC-R. 68-93). The motion was summarily denied on September 9, 2005, and rehearing was denied November 7, 2005. After Jimenez appealed, this Court affirmed on June 19, 2008. *Jimenez v. State*, 997 So. 2d 1056 (Fla. 2008). Rehearing was denied on January 29, 2009.

On November 29, 2010, Jimenez filed a third Rule 3.851 motion. It was premised on the ruling in *Porter v. McCollum*, 558 U.S. 30 (2009). The motion was denied on February 11, 2011 (3PC-R. 134-40).

On March 20, 2013, Jimenez filed a fourth Rule 3.851 motion based on the decision in *Martinez v. Ryan*, 132 S.Ct. 1309 (2012). The circuit court denied the motion on April 25, 2013, and it denied rehearing on June 10, 2013 (3PC-R. 211-13, 274-75). After Jimenez appealed, this Court affirmed on October 29, 2014. Jimenez's petition for a writ of certiorari was denied by the U.S. Supreme Court on March 30, 2015. *Jimenez v. Florida*, 135 S.Ct. 1712 (2015).

On January 11, 2017, Jimenez filed a fifth postconviction motion on the basis of the decision in *Hurst v. Florida*, 136 S.Ct. 616 (2016), and this Court's decision in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). The motion was amended with a claim based upon the March 13, 2017 enactment of Chapter 2017-1, Laws

of Florida. The circuit court denied relief on November 28, 2017.

A notice of appeal was filed on December 26, 2017. On April 2, 2018, this Court ordered Jimenez to show cause as to "why the trial court's order should not be affirmed in light of this Court's decision in Hitchcock v. State, SC17-445."

On May 14, 2018, Jimenez filed his response to the order. Thereafter, this Court on June 28, 2018, affirmed. Jimenez filed a motion for rehearing which this Court struck on July 18, 2018. Later that day, the Governor signed Jimenez's death warrant and set Jimenez's execution for August 14, 2018.

Jimenez filed a sixth postconviction motion on July 24, 2018, and he filed a Rule 3.800(a) motion on July 29, 2018. The circuit court denied both motions; the 3.800(a) was denied on July 30, and a rehearing motion as to that ruling was denied on July 31, while the 3.851 was denied on July 31, 2018. The denial of both the 3.800(a) motion and the 3.851 motion are the subject of this appeal.

SUMMARY OF ARGUMENTS

1. Jimenez has been denied his due process and equal protection rights because access to the files and records pertaining to his case in the possession of certain state agencies, which other similarly situated individuals have been able to access, have been withheld from Jimenez in violation of Chapter 119, Fla. Stat. And Rule 3.852, Fla. R. Crim. P.

2. The existing procedure that Florida uses in its current

lethal injection protocol constitutes cruel and unusual punishment. In light of the Eric Branch execution, at which Branch screamed in pain upon the injection of etomidate as Dr. Heath had predicted in his testimony in *Asay v. State*, this Court must revisit that decision given that what occurred at Branch's execution corroborates Dr. Heath's testimony while impeaching the testimony of the State's expert, Dr. Yun. The Branch execution is in essence new evidence which did not exist when Asay was before the Court.

3. Because of the inordinate length of time that Jimenez has spent in solitary confinement on death row, adding his execution to that punishment would constitute cruel and unusual punishment and violate the Eighth and Fourteenth Amendments to the United States Constitution, as well as binding norms of international law.

4. Jimenez's life sentence for his conviction of the armed burglary of an occupied dwelling count is an illegal sentence and should be corrected pursuant to Fla. R. Crim. 3.800 (a).

STANDARD OF REVIEW

The claims presented in this appeal are constitutional in nature and involve mixed questions of law and fact. Because the claims were summarily denied without an evidentiary hearing, Jimenez's factual allegations must be taken as true by this Court when reviewing the circuit court's rulings de novo. *Peede v. State*, 748 So. 2d 253, 257 (Fla. 1999).

ARGUMENT I

JIMENEZ HAS BEING DENIED HIS DUE PROCESS AND EQUAL PROTECTION RIGHTS AS GUARANTEED BY THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION, BECAUSE ACCESS TO THE FILES AND RECORDS PERTAINING TO HIS CASE IN THE POSSESSION OF CERTAIN STATE AGENCIES, WHICH OTHER SIMILARLY SITUATED INDIVIDUALS HAVE BEEN ABLE TO ACCESS, HAVE BEEN WITHHELD FROM JIMENEZ IN VIOLATION OF CHAPTER 119, FLA. STAT. AND RULE 3.852, FLA. R. CRIM. P.

A. 3.852(h)(3) REQUESTS

Florida Rule of Criminal Procedure 3.852(h) which went into effect on October 1, 1998 states:

> (h) Cases in Which Mandate was Issued Prior to Effective Date of Rule.
>
> (1) If the mandate affirming a defendant's conviction and sentence of death 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.
>
> (2) If on October 1, 1998, a defendant is represented by collateral counsel and has initiated the public records process, collateral counsel shall, within 90 days after October 1, 1998, or within 90 days after the production of records which were requested prior to October 1, 1998, whichever is later, file with the trial court and serve a written demand for any additional public records that have not previously been the subject of a request for public records. The request for these records shall be treated the same as a request pursuant to subdivisions (d)(3) and (d)(4) of this rule, and the records shall be copied, indexed, and delivered to the repository as required in subdivision (e)(5) of this rule.
>
> (3) 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. A person or agency shall copy, index, and deliver to the repository any public record:
>
> > (A) that was not previously the subject of an objection;
> > (B) that was received or produced since the previous request; or
> > (C) that was, for any reason, not produced previously.
>
> The person or agency providing the records shall bear the costs of copying, indexing, and delivering such records. If none of these circumstances exist, the person or agency shall file with the trial court and the parties an affidavit stating that no other records exist and that all public records have been produced previously. A person or agency shall comply with this subdivision within 10 days from the date of the written request or such shorter time period as is ordered by the court.

Prior to October 1, 1998, Rule 3.852 required collateral counsel to make all public records requests on the law enforcement agencies involved in the capital prosecution. The October 1, 1998, amendment to Rule 3.852 was designed to speed up the production of the public records requiring the Attorney General's Office to provide notification that reaches all the law enforcement agencies of their obligation to timely submit the public records from the capital prosecution to the records repository. This meant that the record production would begin even before collateral counsel was in place. It also meant that the records submitted to the repository would be where collateral counsel would go to access the public records regarding his or

her client and the client's capital prosecution.

On September 18, 1998, this Court had promulgated the amendment to Rule 3.852 and ordered it be effective on October 1, 1998. Under the Rule 3.852 as amended effective October 1, 1998, it was no longer capital collateral counsel's job to initiate public record requests. In order to speed up the process by which public records were provided to capital collateral counsel, the amended Rule 3.852 put the burden on the Attorney General's Office and the State Attorney's Office to notify the appropriate law enforcement agencies and insure that the production of records began sooner and was automatic. The records would be submitted to the records repository where they would be available to collateral counsel without the necessity of collateral counsel having to make a requests. *In re Amendments to Fla. Rule of Crim. Pro.-Rule 3.852*, 723 So. 2d 163 (Fla. 1998).

On January 28, 1998, this Court's mandate issued in Jimenez's case prior to the effective date of the amended Rule. Counsel was appointed on August 28,1998, but had yet to make any public records request when 33 days later the amended Rule 3.852 became effective. The circumstances of Jimenez's case on October 1, 1998, fit within Rule 3.852(h)(1). Under that provision since collateral counsel as of October 1, 1998, had not yet made any public records requests, the obligation to the various law enforcement agencies to provide collateral counsel with access to the public records was squarely place upon the Attorney General's

Office and the State Attorney's Office as set forth in Rule 3.852(d) and (e).

In accord with these provisions of the amended Rule 3.852 that became effective on October 1, 1998, the Attorney General's Office on October 19, 1998, sent notices to the State Attorney's Office and the Department of Corrections as the Florida Supreme Court's docket shows. *See Jimenez v. State*, Case No. 60-85014. *See* Rule 3.852(d)(1) ("The attorney general shall make a good faith effort to assist in the timely production of public records and written notices of compliance by the state attorney and the Department of Corrections."); Rule 3.852(e)(1) ("The state attorney shall make a good faith effort to assist in the timely production of public records and a written notice of compliance by each additional person or agency with a copy to the trial court."). Under these provisions, the public records in Jimenez's case were provided to the records 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 revealed by access to the public records.

In *Sims v. State*, this Court first addressed the purpose of Rule 3.852(h)(3):

> **The language of section 119.19 and of rule 3.852 clearly provides for the production of public records after the governor has signed a death warrant.** However, it is equally clear that this discovery tool is not intended to be a procedure authorizing a fishing

> expedition for records unrelated to a colorable claim for postconviction relief. To prevent such a fishing expedition, **the statute and the rule provide for the production of public records from persons and agencies who were the recipients of a public records request at the time the defendant began his or her postconviction odyssey**. The use of the past tense and such words and phrases as "requested," "previously," "received," "produced," "previous request," and "produced previously" are not happenstance.
>
> **This language was intended to and does convey to the reader the fact that a public records request under this rule is intended as an update of information previously received or requested**. To hold otherwise would foster a procedure in which defendants make only a partial public records request during the initial postconviction proceedings and hold in abeyance other requests until such time as a warrant is signed. Such is neither the spirit nor intent of the public records law. Rule 3.852 is not intended for use by defendants as, in the words of the trial court, "nothing more than an eleventh hour attempt to delay the execution rather than a focused investigation into some legitimate area of inquiry."

753 So. 2d 66, 70 (Fla. 2000)(emphasis added).

Of course in *Sims*, the denial of the initial postconviction motion had been affirmed in 1992. *See Sims v. State*, 602 So. 2d 1253 (Fla. 1992). After a death warrant was signed in 2000, collateral counsel for Sims made public records request under Rule 3.852(h)(3). This Court ruled that Sims was not entitled to use Rule 3.852(h)(3) to request public records after a death warrant was signed when he had not previously availed himself of his right to access the available public records. The Court noted: "The record, read in the light most favorable to this defendant, demonstrates that the Seminole County Sheriff's Office

was the recipient of a prior public records request via a letter dated April 19, 1990." *Sims v. State*, 753 So. 2d 66, 70 (Fla. 2000). This Court concluded in those circumstances that Sims had failed to exercise his right to the public records when previously seeking postconviction relief. Of course prior to October 1, 1998, it was up to collateral counsel to make the public records request; and in *Sims*, the public records requests were not made.

On July 20, 2018, Jimenez made a request, pursuant to Fla. R. Crim. P. 3.852 (h)(3) to the Department of Corrections to obtain an update of his inmate/classification file as well as any medical and psychological records (6PC-R. 152-3). Jimenez requested records pursuant to 3.852(h)(3)(B) and (C), i.e., only an update of records that were "received or produced since the previous request" or that were "for any reason, not produced previously." (6PC-R. 152-3). Jimenez was not on a fishing expedition but simply wanted DOC to produce any records that were not previously produced. The DOC request is necessary to investigate competency to be executed claims as this Court specifically found in *Muhammad v. State*, 132 So. 3d 176, 201 (Fla. 2013) ("we conclude that the circuit court abused its discretion in denying Muhammad his own inmate and medical records."). *Id* ("we find that Muhammad's inmate and medical records are relevant to ... a potental [competency to be executed]."

Furthermore, Jimenez has now advised counsel that to the best of his recollection he had requested the electric chair as his method of execution, but was not provided with a copy of the document he signed when lethal injection was adopted as Florida's method of execution. Without the inmate file, Jimenez cannot confirm that he made an election for the electric chair, a method that was clearly offered to him.

The circuit court denied Jimenez's demand for "additional" public records under 3.852(h)(3) as to the inmate file even though this Court in *Muhammad* found the denial of the inmate file "that . . . for whatever reason w[as] not previously produced." *Muhammad*, 132 So. 3d at 201.

Jimenez submits that his inmate/classification files and records are germane to the issue of his competency to proceed and must be disclosed to him as his opportunity to file a claim concerning his competency to be executed has only now ripened with the scheduling of his execution.

B. 3.852(i) Requests

Florida Rule of Criminal Procedure 3.852(i) states:

> (1) In order to obtain public records in addition to those provided under subdivisions (e), (f), (g), and (h) of this rule, collateral counsel shall file an affidavit in the trial court which:
>
> > (A) attests that collateral counsel has made a timely and diligent search of the records repository; and
> >
> > (B) identifies with specificity those public records not at the records repository; and

(C) establishes that the additional public records are either relevant to the subject matter of the postconviction proceeding or are reasonably calculated to lead to the discovery of admissible evidence; and

(D) shall be served in accord with subdivision (c)(1) of this rule.

(2) Within 30 days after the affidavit of collateral counsel is filed, the trial court shall order a person or agency to produce additional public records only upon finding each of the following:

(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.

Jimenez requested records, pursuant to Rule 3.852(i), concerning the current lethal injection protocol and the four recent executions since the protocol was promulgated in January, 2017. His requests were made to DOC, FDLE, and the Medical Examiner, District 8 (6PC-R. 135-41; 142-9). Jimenez requested records specifically related to his challenge to the constitutionality of Florida's current lethal injection protocol because it creates a significant risk of severe harm when compared to alternatives. In addition, as to the issue of whether

DOC has shown deliberate indifference as to the lethal injection protocol, Jimenez requested records concerning the choice of the three drugs used and any alternatives that had been considered. He specifically identified the records he requested and established relevance by linking the requests to colorable claims that he intended to pursue through his 3.851 motion. In prior instances, such records have been relevant to the development and presentation of Eighth Amendment challenges to lethal injection protocols.

While the circuit court granted Jimenez's requests as to checklists, logs and documents which memorialize the execution of Eric Branch, Jimenez submits that records related to the selection of drugs, creation of the protocol, alternatives to the current protocol, the reasons for the recent changes that have been made (one example is having the inmate wear mitten-like covers over his hands), and the records of the three other executions using the current protocol (Asay, Lambrix and Hannon), are relevant to his colorable claims.[9]

Postconviction litigation is governed by principles of due

[9]Presumably the records that FDLE and DOC provided regarding the Branch execution were also created for the Asay, Lambrix and Hannon executions. At the hearing below, counsel for FDLE was questioned by the judge and required to identify what documentation regarding the Branch execution was made and maintained by FDLE. Similar questioning was done of counsel for DOC. The Branch records that they identified were ordered turned over, while the judge did not order those same records from the Asay, Lambrix and Hannon executions turned over.

process. *Easter v. Endell*, 37 F.3d 1343 (8th Cir. 1994); *Holland v. State*, 503 So. 2d 1250 (Fla. 1987). Here, Jimenez has been denied access to public records, i.e. records that any other member of the public is entitled to view. But Jimenez has a need for these records other don't have. They are relevant to and necessary for the presentation of his constitutional challenge to Florida's lethal injection protocol. These records relate to the matters that Jimenez must show under *Glossip v. Gross*, 135 S. Ct. 1885 (2015).

Jimenez must be given a fair opportunity to show that his execution will violate the Eighth Amendment. *Hall v. Florida*, 134 S.Ct. 1986, 2001 (2014) ("The death penalty is the gravest sentence our society may impose. Persons facing that most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution."). For Jimenez to have the requisite fair opportunity, he must be provided the records that FDLE and DOC possess from the Asay, Lambrix, and Hannon executions.

ARGUMENT II

IN LIGHT OF THE ERIC BRANCH EXECUTION, AT WHICH BRANCH SCREAMED IN PAIN UPON THE INJECTION OF ETOMIDATE AS DR. HEATH HAD PREDICTED IN HIS TESTIMONY IN *ASAY v. STATE*, THIS COURT MUST REVISIT THAT DECISION GIVEN THAT WHAT OCCURRED AT BRANCH'S EXECUTION CORROBORATES DR. HEATH'S TESTIMONY WHILE IMPEACHING THE TESTIMONY OF THE STATE'S EXPERT, DR. YUN. THE BRANCH EXECUTION IS IN ESSENCE NEW EVIDENCE WHICH DID NOT EXIST WHEN *ASAY* WAS BEFORE THE COURT WHICH CALLS INTO QUESTION THE TRIAL JUDGE'S OPINION IN *ASAY* FINDING DR. YUN CREDIBLE WHILE

DISCOUNTING DR. HEATH'S TESTIMONY AS NOT CREDIBLE. AS A RESULT, THE EXISTING PROCEDURE THAT FLORIDA USES IN ITS CURRENT LETHAL INJECTION PROTOCOL CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT AND VIOLATES THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION BECAUSE IT CREATES AN UNACCEPTABLE AND UNNECESSARY RISK OF PAIN. THE PAIN AND SUFFERING CAUSED BY THE INJECTION OF ETOMIDATE IS UNNECESSARY AS THERE ARE MULTIPLE ALTERNATIVES AVAILABLE AND CURRENTLY BEING USED IN STATES WITH ACTIVE EXECUTION CHAMBERS, LIKE TEXAS. THE EXISTING PROCEDURE ALSO VIOLATES THE EIGHTH AMENDMENT BECAUSE THE STATE HAS DEMONSTRATED DELIBERATE INDIFFERENCE TOWARD JIMENEZ IN TAKING EXTREME MEASURES TO CONCEAL HIS PAIN AND SUFFERING.

A. THE UNITED STATES SUPREME COURT'S CONSIDERATION OF THE APPROPRIATE ANALYSIS OF METHOD OF EXECUTION CLAIMS

On March 20, 2018, the U.S. Supreme Court granted a stay of execution in *Bucklew v. Precythe*, Case No. 17-3052 (2018). The issues raised in Bucklew's petition concerned an as applied challenge to Missouri's lethal injection protocol that had focused on the particular condemned inmate's medical condition. However on April 30, 2018, when the U.S. Supreme Court granted certiorari review, it directed the parties to brief the following question: "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." By directing the briefing of this particular question, the Court broadened the scope of the case. As result, resolution of *Bucklew* will address whether the *Glossip* analysis is a one step analysis as Jimenez

argued in the circuit court, or a two step analysis as the State advocated.

More specifically, the question posed by the U.S. Supreme Court will undoubtedly clarify the confusion concerning how the *Glossip* analysis is to be conducted, i.e., whether the analysis of the constitutionality of a method of execution is a one-step process where a condemned inmate's alternative method of execution and/or protocol is compared to the existing method and/or protocol in order to determine if the proposed alternative method carries less risk and/or less pain, or whether the analysis is a two-step process requiring the condemned inmate to first show a substantial risk of severe harm, and only if he does, then he must propose an alternative to the existing method and/or protocol that carries less risk and/or less pain.

Indeed, this very issue was argued before the circuit court with Jimenez taking the position that the analysis was a one-step process and the State taking the position that the analysis was a two-step process.

The circuit court ducked the issue by concluding that this Court had known of the likelihood that etomidate will cause severe pain 25 percent of the time.[10] Given that much of the

[10]The circuit court accepted as true some of the factual allegations presented in the 3.851 motion, i.e. that Branch's screams were the result of the severe pain that the administration of etomidate caused. Indeed without an evidentiary hearing, the circuit court and this Court are required to accept the factual allegations as true.

evidence in *Asay* had predicted one in four executions would result in even the most stoic inmate vocalizing the pain from the etomidate, the circuit court said that it could not find that Branch's screams from the pain were "unforeseen, or unacceptable under *Asay*" (6PC-R. 708). The circuit court seemed to want to know from this Court whether in *Asay* it meant to hold that screams of pain from 25 percent of those being executed is acceptable under the Eighth Amendment. In deferring to this Court's decision in *Asay*, the circuit court avoided addressing the *Glossip* standard and whether it requires a one step or two step analysis. Jimenez submits that the circuit court employed an erroneous analysis and that *Bucklew* will resolve the issue in his favor.

Indeed, in *Glossip v. Gross*, 135 S.Ct. 2726 (2015), the U.S. Supreme Court evaluated an Eighth Amendment challenge to lethal injection in Oklahoma. In *Glossip*, the U.S. Supreme Court indicated that the inquiry of a lethal injection challenge under the Eighth Amendment must be to determine if the defendant established "that any risk of harm was substantial **when compared to** a known and available alternative method of execution" *Id.* at 2738 (emphasis added); *see also Id.* 2741 ("When a method of execution is authorized under state law, a party contending that this method violates the Eighth Amendment bears the burden of showing that the method creates an **unacceptable risk of**

pain.")(emphasis added). The crux of the U.S. Supreme Court's ruling is that a defendant must be permitted to introduce evidence of alternative methods of execution in comparison to the risks attendant to the execution procedures the defendant is challenging. The "risk of harm" is not something that is not to be evaluated in a vacuum, but in comparison to other methods of execution. Thus, the issue before the circuit court was whether a risk of pain, like that exhibited by Branch through his screams and thrashing on the gurney could be considered "substantial" in contrast to another method where no pain is attendant to the procedure.[11] The circuit court in deferring to *Asay*, did not employ the requisite one-step analysis in Jimenez's case.

Jimenez alleged multiple alternatives to DOC's current lethal injection protocol. Any one of the protocols, using pentobarbital or compounded pentobarbital[12] as the first or sole drug, using midazolam as the first drug or switching from lethal injection to nitrogen gas[13] would all reduce the risk that is

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[11]Finding that screams from the condemned while being executed is acceptable 25 percent of the time is not consistent with this country's "commitment to dignity and its duty to teach human decency as the mark of a civilized world." *Hall*, 134 S.Ct. at 2001.

[12]Of the fourteen executions thus far in 2018, ten have been completed using a single dose of pentobarbital. Contrary to the circuit court's determination, pentobarbital is available from drug manufacturers and compounding pharmacies.

[13]In March, 2018, Oklahoma announced that it would execute all death row inmates going forward using nitrogen gas. Okla. Stat. tit. 22, § 1014.B. On July 10, 2018, the State of Alabama

inherent and substantial in the use of etomidate as the first drug in a three-drug protocol.

Based upon the U.S. Supreme Court's stay of execution and directive in *Bucklew* that the parties brief the issue as to whether Bucklew met his burden in showing that the risk of harm was decreased when his proposed alternative was compared to the State's existing lethal injection protocol, it is clear that U.S. Supreme Court is poised to clarify the analysis to be used in a challenge to a method of execution, a stay of execution would be more than appropriate in this case. *See Ford v. State*, 168 So. 3d 224 (Fla. 2015)("However, the United States Supreme Court recently granted certiorari in *Warner v. Gross*, 83 2015 WL 302647 (U.S. Jan. 23, 2015), in which the plaintiffs argue that Oklahoma's three-drug lethal injection protocol using midazolam

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agreed to switch from lethal injection to nitrogen gas. *See* Ala. Code § 15-18-82.1. In addition, Arizona, California, Mississippi, Missouri and Wyoming have all adopted nitrogen gas as an authorized method of execution. *See* Ariz. Rev. Stat. Ann. § 13-757.B; Cal. Penal Code § 3604; Miss. Code Ann. § 99-19-51(2); Mo. Rev. Stat. § 546.720; Wyo. Stat. Ann. § 7-13-904(b). Further, Louisiana has extensively investigated the feasability and availability of lethal gas.

Oklahoma's legislature has determined that the costs would be minimal and include the one time purchase of a gas mask (similar to what one experiences at the dentist), and the price for a canister of nitrogen. Indeed, an Oklahoma multicounty Grand Jury, convened in October 2015 to review evidence and issue a report after the botched execution of Charles Warner, also concluded that given the abundance of nitrogen gas, it would be easy and inexpensive to obtain. Evidence suggested that nitrogen-induced hypoxia would be an easy method of execution to administer, and would not require the participation of licensed medical professionals. Lethal gas requires no venous access at all.

hydrochloride as the first drug, as Florida does, is unconstitutional. We issued a stay of execution for Jerry William Correll, a prisoner under sentence of death who had an active death warrant in Florida, based on the Supreme Court's grant of certiorari. *See Florida v. Correll*, 2015 WL 787038 (U.S. Feb. 25, 2015)").[14] As it did in *Correll v. State*, Case No. SC15-147, this Court should issue a stay of execution while the U.S. Supreme Court considers *Bucklew*.

B. NEW EVIDENCE DEMONSTRATES THAT FLORIDA'S CURRENT LETHAL INJECTION PROTOCOL IS UNCONSTITUIONAL

The circuit court indicated that Jimenez had indicated that he would present the same evidence that was presented in *Asay* if an evidentiary hearing were ordered. While operating under the exigencies of a death warrant, we all make mistakes. Jimenez did not indicate that he would be presenting the same evidence as in *Asay*, he asserted that the Branch execution provides new and previously unavailable evidence that require a re-evaluation of the findings based on the evidence presented in *Asay*. Because Dr. Heath predicted what occurred in Branch, while Dr. Yun did not,

[14]Recently, in *Jordan et al v. Fisher et al*, Southern District of Mississippi Case No. 3:15-cv-00295-HTW-LRA, a trial on Mississippi's current lethal injection protocol was scheduled to commence on August 27, 2018. However, the parties in this case agreed that, as to the question the U.S. Supreme Court directed the parties in *Bucklew* address, the trial be indefinitely continued. The parties averred that the question concerned "one of the most heavily contested issues that the Court will be required to decide." The same is true concerning the arguments presented by Jimenez.

should strengthen Dr. Heath's credibility while impeaching Dr. Yun.

On February 22, 2018, the State of Florida executed Eric Branch using a protocol that is not used by any other state practicing lethal injection. Branch was the fourth inmate executed with the recently promulgated protocol which calls for the use of two injections of 100 milligrams of etomidate for use as the first drug and anesthetic. However, etomidate is an ultra-short acting hypnotic. It has no analgesic properties. Importantly, etomidate is often severely painful upon injection; in the package insert accompanying etomidate, the manufacturer warns of "transient venous pain" which often accompanies the administration of etomidate.

According to Robert Friedman, who witnessed the February 22, 2018, Branch execution, a minute after being told that the execution phase was beginning, "Mr. Branch's legs were moving, his head was moving, and his chest was heaving. At 6:49 he screamed at the top of his lungs, then he yelled out 'murderers.' His body was shaking. For about a minute after he yelled out, his legs were moving. He appeared to be in obvious distress." (6PC-R. 312). Friedman's observations were consistent with media accounts: "Just as officials were administering the lethal drugs that included a powerful sedative, Branch let out a blood-curdling scream, thrashed on the gurney, then yelled 'Murders! Murderers! Murderers!' before falling silent after a guttural

groan." *Eric Branch Yells 'Murderers!' During His Execution for Killing College Student in 1993*, The Associated Press, Feb. 22, 2018.

Following Branch's execution, when asked whether Branch's scream could have been caused by the execution drugs, Department of Corrections (DOC) spokesperson, Michelle Glady, did not dispute that Branch had screamed, but rather, simply stated that: "'there was no indication' that the inmate's last actions were a result of the injection procedure. She said that conclusion had been confirmed by the Florida Department of Law Enforcement." *Killer Eric Scott Branch shouts 'murderers!' as he is executed in Florida*, Sky News, February 23, 2018.

However, Ms. Glady's representation appears to conflict with the newly disclosed records of the Florida Department of Law Enforcement (FDLE). While FDLE Examiner #1 did not note any irregularities during the Branch execution, FDLE Examiner #2 noted in his log of the execution that at 6:49, which is a minute after the first injection of etomidate began, Branch "yelled murderers" (*See* 6PC-R. 251, 252). In FDLE's Investigative Report which was prepared and written after the execution had been completed, the author stated: "Branch rendered a final statement and the warden authorized commencement of the procedure. Shortly thereafter Branch bellowed a forcible, guttural yell and repeated the word "murderers" three times before going unconscious." (6PC-R. 343). Branch's yelling was not viewed as an unusual occurrence

or problem that warranted any follow-up investigation or review as counsel for FDLE explained at the public records hearing before the circuit court. Apparently, FDLE views the screams of pain from a condemned while being executed as to be expected and nothing to be concerned about.

Had Branch been properly anesthetized he would not have screamed and he would not have been thrashing about; the fact that he let out a "blood curdling scream", thrashed about on the gurney and was in obvious distress indicates that he was not unconscious and that he felt significant pain. Indeed, the observations of what occurred upon the administration of etomidate was entirely consistent with what is known about etomidate.[15]

Following the Branch execution, Dr. David Lubarsky, who currently holds the position as Vice Chancellor of human health sciences and Chief Executive Officer of UC Davis Health, reviewed the affidavit of Friedman, among other documents, including the eyewitness press accounts describing the execution and an affidavit from Neal Dupree (*See* 6PC-R. 309-12, 320-3, 330-9). Dr. Lubarsky, who was also familiar with the current Florida lethal injection protocol, opined: "Based on the fact that it is well-established that etomidate causes significant pain upon

[15]Dr. Heath's testimony in the *Asay* evidentiary hearing predicted that what occurred during the Branch execution would occur due to Florida's decision to use etomidate as the first drug.

injection, ... the scream is objective evidence of Mr. Branch experiencing significant pain during his execution." (6PC-R. 334).

Dr. Lubarsky is an experienced anesthesiologist who has been practicing medicine for thirty years. He is Board Certified in Anesthesiology and certified in pain management from the American Academy of Pain Management (6PC-R. 330). He has researched and published numerous papers and chapters on the suitability of various drugs as anesthetics, how to adequately maintain anesthetic depth in a clinical setting and intravenous induction agents, including etomidate. He is also well versed in lethal injection protocols around the country, as well as Florida, and has published articles and served as an expert witness on several occasions.

Indeed in the context of the Branch execution, Dr. Lubarsky explained why etomidate causes a significant risk of pain in the lethal injection protocol:

> 14. [DOC's] use of etomidate to induce unconsciousness also ignores a substantial risk of pain upon injection, **which occurs in most administrations. The pain from etomidate is significant, real pain, and the prisoner will feel it at the injection site and will continue to feel it as the entire 200mg of etomidate is pushed into his veins or until he loses consciousness.**

(6PC-R. 334)(emphasis added).

Further, based upon the known time frames of the Branch execution, according to Dr. Lubarsky, at the completion of the

execution, Branch had 1/10th of the clinical dose of etomidate, the only anesthetic being used, in his bloodstream. This quantity is "insufficient to ensure that [Jimenez] would not feel the excruciating pain of the second and third drugs" (6PC-R. 334-5).

The pain and suffering that Branch felt in the context of what is known about etomidate can be expected to occur execution after execution, i.e., there is a substantial risk of harm to Jimenez. Indeed, the Florida Department of Corrections (DOC) is well aware of the substantial risks that accompany the use of etomidate. The manufacturer of etomidate warns about the intravenous pain that accompanies injection in its own package insert. Likewise, the fact that etomidate is an ultra-short acting hypnotic with no analgesic properties is well known in the medical community and to DOC. Yet, rather than find a less painful alternative, DOC has demonstrated deliberate indifference to condemned inmates like Jimenez. Indeed, DOC's response to the known limitations to the use of etomidate as the first drug has been to take every measure to obstruct the witnesses' ability to observe movement and distress. The placement of the gurney in relation to the witnesses' seating is such that the witnesses no longer have an unobstructed view of much of the inmate's body and intravenous line. They are unable to see the lethal drugs flowing through the tubing (6PC-R. 320-3). The inmate's hands and fingers are now completely covered up to the wrists with what appear to be a "giant mitten" (6PC-R. 320-3). The steps DOC has taken to

obscure the witnesses' view of potential movement of the inmate shows deliberate indifference to the clear, severe substantial risk of harm.

C. ANALYSIS OF JIMENEZ'S ARGUMENT

The circuit court summarily denied Jimenez's claim (6PC-R. 704-7). The circuit court viewed the issue before it as: "Did the observations made during Eric Branch's execution fall outside of the expected physical results that had been evaluated and approved by *Asay*?" (6PC-R. 705). Thus, the circuit court framed the issue in terms of whether this Court's decision in *Asay* constituted a determination that screams of pain at 25 percent of the executions does not amount to cruel and unusual punishment.

Again, Jimenez alleged that the Branch screamed because he was in severe pain. That factual allegation must be accepted as true in deciding whether Jimenez is entitled to an evidentiary hearing. However, in circumscribing the issue within the confines of *Asay*, the circuit court concluded that this Court's ruling in *Asay* amounted to a determination that the evolving standards of decency are not violated when it is likely that one in four inmates executed in Florida will be screaming from the severe pain accompanying the etomidate injection while thrashing about on the gurney.

The State filed the circuit court order that was issued by the judge in *Asay* and that this Court reviewed in *Asay*. From its review of that order setting forth the testimony in *Asay*, the

circuit court here found the events in Branch's executions as set forth by Jimenez's factual allegations had been predicted. This Court was aware of the testimony presented in *Asay* and what Dr. Heath expected and what the manufacturer's inserts warned were the risks and how often there would be severe or disturbing pain. The circuit court here concluded from what was before this Court that *Asay* meant that the infliction of severe pain in 25 percent of the executions was not a substantial enough risk to constitute cruel and unusual punishment. But, the circuit court's reading of this Court's affirmance in *Asay* failed to recognize that this Court found competent and substantial evidence to support the circuit court's determination. That is not the same thing as finding it okay to have one in four condemned inmates screaming and writhing in pain as they are executed.

It is worth noting that the circuit court order in *Asay* issued before anyone had been executed using etomidate. The judge had testimony from two experts who sharply disagreed as to how common and how severe the pain from the injection of etomidate was. The judge credited the State's expert who said he had never seen a patient experience pain from the administration of etomidate, while discounting Dr. Heath's testimony that he regularly saw patients experience severe pain when etomidate was administered. Branch's execution impeaches the State's expert in *Asay* while corroborating Dr. Heath's opinion.

In *Pardo v. State*, this Court held that in a method of

execution challenge:

> An evidentiary hearing on a rule 3.851 motion should be held whenever the movant makes a facially sufficient claim that requires a factual determination. However, postconviction claims may be summarily denied when they are legally insufficient, should have been brought on direct appeal, or are positively refuted by the record. Because the circuit court denied [the] successive rule 3.851 motion without holding an evidentiary hearing, we review the circuit court's decision de novo, accepting the movant's factual allegations as true to the extent they are not refuted by the record, and affirming the ruling if the record conclusively shows that the movant is entitled to no relief.

108 So.3d 558, 560-1 (Fla. 2012)(internal quotations and citations omitted).

In Jimenez's case the circuit court did accept that the allegation that Branch's screams reflected the severe pain that he felt from the injection of etomidate. But, the circuit court in some of the discussion in the order failed to accept Jimenez's other allegations as true. First, the circuit court without any evidence before it, found: that the appropriate consciousness check was performed before the administration of the second and third drugs (6PC-R. 704); that Branch's thrashing about on the gurney and movements were "involuntary muscular movements" (6PC-R. 705); that Branch's movements were involuntary, did not interfere with the consciousness check and were not painful (6PC-R. 707); that Branch's movements were simply myoclonus (6PC-R. 707); that the pain suffered by Branch was mild to moderate (6PC-

R. 707).[16]

However on these points, the circuit court did not carefully consider the affidavit of Friedman and the declaration of Dr. Lubarsky in making such findings. Friedman specifically described Branch's "screaming" and "shaking" as obvious signs of "distress". Likewise, the newspaper accounts described Branch as letting out a "blood-curdling scream" and thrashing about on the gurney. Certainly, this reaction and movement were neither obviously involuntary or an exhibition of pain that is clearly just mild to moderate pain, as opposed to severe.

The circuit court's deference to its reading of this Court's decision in *Asay*, blinded it to the contents of the declaration of Dr. Lubarsky who opined: "Based on the fact that it is well-established that etomidate causes significant pain upon injection, it is my opinion that the scream is objective evidence of Mr. Branch experiencing significant pain during his execution. In a clinical setting, patients are given pre-treatment to reduce pain, and amnestic drugs are often used to ensure that the patient does not remember the pain if any occurs as pre-treatment

[16]The circuit court also erroneously questioned Jimenez's allegations that Branch's scream and thrashing about were reactions to the injection of the etomidate. (*See* 6PC-R. 705)("No assertion is made that these reactions to the etomidate (if, in fact, all could be established to be reactions to the etomidate) occurred past the first minute of the protocol."

is not assured to work." (6PC-R. 334).[17] Furthermore, based on the timing provided by Friedman, Dr. Lubarsky was also prepared to testify that before Branch's execution was complete, he had approximately the equivalent of 3.5 mg of etomidate in his bloodstream, or "1/10th of the clinical dose" which "is insufficient to ensure that a prisoner would not feel the excruciating pain of the second and third drugs (6PC-R. 334-5).[18]

The circuit court's failure to take Jimenez's facts as true requires that this Court reverse and remand for an evidentiary hearing. Jimenez pleaded a number of facts that were not conclusively refuted by the record. Rather than accept them all as true, only Jimenez's allegations concerning Branch's screams and the severe pain he felt when the etomidate was first

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[17]The circuit court's finding that the affidavit of Dr. Lubarsky "does not present any new information that was not previously considered by the Florida Supreme Court" is erroneous. Dr. Lubarsky's declaration not only provided his opinion about the severe harm suffered by Branch due to the use of etomidate as the first drug in Florida's lethal injection protocol, but also the substantial risk of severe harm that Jimenez faces. Indeed, Dr. Lubarsky's testimony significantly undermines the evidence that was before this Court in *Asay*. The amount of time that the Branch execution took was much longer than previous executions and substantially increases the risk that the etomidate will no longer be rendering the inmate unconscious when the potassium acetate is administered and cause severe pain to any conscious inmate who the paralytic has rendered unable to move despite the severe pain.

[18]Friedman documented the timing of various events during Branch's execution. The execution procedure lasted 17 minutes. Friedman's timeline is corroborated by the FDLE logs. (*See* 6PC-R. 251, 252, 310-2).

injection were accepted as true. The allegations regarding the length of time of the execution and the likely effect that has on etomidate, the indifference that DOC has shown to Branch's screams, DOC's efforts to obscure the witnesses view of potential pain and distress of the inmate,[19] and the allegations regarding the availability of alternative methods of execution were either ignored or not accepted as true.

The circuit court also deferred to the judge's order in *Asay* and this Court's affirmance without recognizing the outcome there turned on the judge's evaluation of the experts' credibility. Branch's execution must change that credibility analysis because Dr. Heath predicted what happened in Branch, while Dr. Yun said that etomidate did not cause pain and he did not accept the manufacturer's inserts as providing an accurate assessment of the risks of adverse reactions to etomidate. The circuit court simply failed to recognize that the State's evidence in *Asay* has now been undermined and undercut by what occurred in the Branch execution. (*See* 6PC-R. 707)("All of the evidence that would be presented to this court in an evidentiary hearing was previously presented in Asay."). This is simply not the case.

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[19]The circuit court did not address the specific allegations concerning the recent modifications made to obfuscate any irregularities or problems. (*See* 6PC-R. 320-3). However, these facts demonstrate a deliberate indifference to the pain and suffering caused by etomidate and in and of themselves mandate that an evidentiary hearing be held.

First, Branch's reaction to the injection of etomidate exhibited more than the mild or moderate pain which Judge Salvador had said was possible, though unlikely, a ruling that this Court accepted because competent and substantial evidence supported it.

According to Friedman, media accounts and FDLE's Investigative Report, Branch let out a blood-curdling scream, "screamed at the top of his lungs" or let out a guttural yell shortly after the first injection of etomidate. He then continued to yell the word: "murderers" and thrash about on the gurney. Friedman observed that Branch's legs were shaking and he was in obvious distress for about a minute after he screamed. Thereafter, his body continued to shake and his chest was heaving for another four minutes. Dr. Lubarsky opined that this movement was indicative of insufficient anesthetic depth prior to the administration of the second and third drugs (6PC-R. 336-8)("The movement of Mr. Branch and Mr. Hannon is evidence of them not being adequately anesthetized, or, more likely that ultra-short acting etomidate dissipated and wore off before the execution was complete.").

The evidence of the Branch execution and Dr. Lubarsky's opinions must be contrasted to the evidence presented by the State through Dr. Steve Yun who testified to counter the testimony of defense witness, Dr. Mark Heath. Dr. Yun testified

that in his experience he had ever observed a patient experience **any** pain from the injection of etomidate (6PC-R. 427). Indeed, in crediting Dr. Yun's testimony, Judge Salvador stated: "Defendant's reliance on Dr. Heath's observation of pain in some patients is **insufficient**. Indeed, Dr. Heath admitted that despite this alleged pain, he still uses etomidate in his daily practice. If it were so excruciating and severe, such routine and continued use in the medical arena would be illogical." (6PC-R. 428-9) (emphasis added). Here, based upon the Branch execution, the testimony of Dr. Yun has been substantially impeached and undermined. Judge Salvador did not have the observations of the Branch execution and the opinions drawn from those observations when she credited Dr. Yun and disregarded Dr. Heath's testimony.

Likewise, Dr. Yun also emphasized that etomidate was fast-acting and any pain experienced by an individual would be gone within ten to twenty seconds (6PC-R. 427). Friedman's observations and Dr. Lubarsky's opinions clearly refute Dr. Yun's testimony. Again, Judge Salavdor did not have the evidence of the Branch execution before her when she credited Dr. Yun's testimony.

And, Dr. Yun testified that using a larger vein, like those Warden John Palmer testified were used during executions, were not as sensitive to pain (6PC-R. 427). Yet, according to DOC's Execution Preparation Process log, the vein identified by Dr. Yun

was in fact used to inject the lethal drugs into Branch's bloodstream.[20] However, contrary to Dr. Yun's testimony, there is no doubt that Branch experienced an extremely painful sensation, one that caused him to let out a blood-curdling scream. Again, the observations and evidence surrounding the Branch execution provides ample impeachment of Dr. Yun's testimony in Asay.

Likewise, Dr. Yun believed that 200mgs of etomidate would not wear off before the execution had been completed (6PC-R. 427). Yet, Dr. Lubarsky knowing the time it took for Branch's execution to be completed confirmed that the etomidate in Branch's blood stream at the conclusion of the execution would have been less than needed in a minor surgery. Further, the evidence before Judge Salvador from Palmer was that from the administration of the first drug until the pronouncement of death averages "6 to 10 to 11 minutes". However, according to both Friedman and the FDLE logs, the Branch execution took seventeen minutes. And, according to the affidavit of Neal Dupree, who witnessed both Michael Lambrix and Patrick Hannon's executions, Lambrix's execution took fourteen minutes and Hannon's execution took twelve minutes. All of the executions took at least double of the low end of Palmer's testimony and still more than the high

[20]Contrary to the circuit court's order, though the "evidence presented at the [Asay] hearing and found in the insert indicated that pain is more common when injected into a small vein", the vein used in Branch, was not a small vein.

end. Certainly, this evidence was not before Judge Salvador, but it impeaches Palmer and Dr. Yun and supports Dr. Lubarsky's opinion that the effects of the etomidate rapidly wear off creating a real and substantial risk of severe harm.

Also, at the *Asay* evidentiary hearing, Palmer described the consciousness check that follows the administration of the third syringe and he testified that any movement would cause the execution team to treat "that as a level of consciousness and take the necessary precautions." Yet, based on Friedman's affidavit, it is clear that the second drug - the paralytic - was injected while Branch was still moving and shaking. According to Dr. Lubarsky, this movement indicated a level of consciousness. DOC, whether through malice or incompetence, ignored this movement and injected a drug known to cause severe pain. And if the etomidate had worn off due to how long the Branch execution took, Branch would have experienced the sensation of being buried alive. None of the evidence now available from Branch's execution was before Judge Salvador; had it been, it would have completely altered the evaluation of the witnesses' credibility and the consideration their testimony.

Thus, when Judge Salvador determined that "the potential pain and anesthetic aspect of etomidate does not present risks

that are "sure or very likely"[21] to cause serious illness or needless suffering or give rise to 'sufficiently imminent dangers'", she did not have before her the clear and compelling evidence that etomidate caused needless pain and suffering. The picture was incomplete and faulty due to the flawed testimony of Dr. Yun and Palmer.

Further, the circuit court's reliance on the evidence presented in *Asay* and Judge Salvador's conclusions fails to realize that the evidence of the Branch execution and the steps DOC has taken to obscure the observation of pain, suffering and consciousness of inmates, changes the analysis of the ultimate question, i.e., whether Florida's current lethal injection protocol creates a substantial risk of harm when compared to a known and available alternative method of execution. *See Glossip v. Gross*, 135 S.Ct. at 2738. In light of the evidence relating to the Branch execution, at a minimum, Jimenez has met his burden to obtain an evidentiary hearing.

Finally, while the circuit court did not correctly analyze Jimenez's claim because the court made no mention of Jimenez's proposed alternatives and whether the known risks of etomidate

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[21]And how should the "sure or very likely" language be applied. It is now known that it is sure or very likely that 25 percent of the condemned will experience severe pain while being executed. And of course, its not more likely than not that one particular condemned is "sure or very likely" to experience severe pain. Of course, hopefully the U.S. Supreme Court will address this in *Bucklew*.

are substantial when compared to the known alternatives, Jimenez submits that he alleged multiple known and available alternatives. Certainly, compounded pentobarbital is available and can be used as either the sole drug or the first-drug in a three-drug protocol. Jimenez would present evidence on the availability of compounded pentobarbital. Likewise, midazolam is available and was used as the first-drug, without incident, by DOC in numerous executions prior to January, 2017. Jimenez would present evidence on the availability of midazolam. And, nitrogen gas is both feasible and readily available to be used by DOC. Jimenez would present evidence on the availability of nitrogen gas. Each of Jimenez's proposed alternatives presents substantially less risk than the continued use of etomidate as the first-drug in a three-drug protocol.

And if Jimenez in any way made technical errors in pleading his claim in his rush to meet the deadline set for filing the 3.851 motion after the warrant was set, he is entitled to an opportunity to correct the defect. *Spera v. State*, 971 So. 2d 754, 761 (Fla. 2007)("Accordingly, when a defendant's initial rule 3.850 motion for postconviction relief is determined to be legally insufficient for failure to meet either the rule's or other pleading requirements, the trial court abuses its discretion when it fails to allow the defendant at least one opportunity to amend the motion.").

D. CONCLUSION

In denying Jimenez's claim, the circuit court failed to address the aspect of the Eighth Amendment that requires that in capital cases the State must maintain respect for human dignity "By protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons." *Roper v. Simmons*, 543 U.S. 551, 572 (2005); *see also Trop v. Dulles*, 356 U.S. 86, 100 (1958) (plurality opinion)("The basic concept underlying the Eighth Amendment is nothing less than the dignity of man"). "The Eighth Amendment's protection of dignity reflects the Nation we have been, the Nation we are, and the Nation we aspire to be." *Hall v. Florida*, 134 S.Ct. at 1992. Beyond the question of pain, the Eighth Amendment precludes a lethal injection protocol that would deprive the condemned of human dignity. Relief is warranted.

ARGUMENT III

THE EXISTING PROCEDURE THAT THE STATE OF FLORIDA UTILIZES FOR LETHAL INJECTION CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION AS IT CREATES A SUBSTANTIAL RISK OF SERIOUS HARM.

In *Baze v. Rees*, a plurality of the U.S. Supreme Court set forth the standard for establishing that a method of execution constitutes cruel and unusual punishment. 553 U.S. 35 (2008). Specifically, in *Baze*, the Supreme Court considered whether or not Kentucky's three drug protocol, which was substantially

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

The plurality agreed that such a challenge was indeed cognizable and indicated the burden that must be met in order to demonstrate that the challenged method violated the Eighth Amendment:

> Instead, the proffered alternatives must effectively address a "substantial risk of serious harm." To qualify, the alternative procedure must be feasible, readily implemented, and in fact significantly reduce a substantial risk of severe pain. **If a State refuses to adopt such an alternative in the face of these documented advantages, without a legitimate penological justification for adhering to its current method of execution, then a state's refusal to change its method can be viewed as "cruel and unusual" under the Eighth Amendment.**

Id. at 52 (emphasis added)(citations omitted).

The plurality rejected Baze's claim because at the time "[n]o State uses or has ever used the alternative one-drug protocol ..." *Id*. at 53.

However, in the past ten years, numerous states have either switched to a one-drug protocol or at least abandoned the

paralytic. Presently, thirty-one states, the U.S. Government and the U.S. Military authorize executions.[22] Of those thirty-three jurisdictions, a dozen or more have not had an execution for the past ten or more years (Kansas and New Hampshire have had no executions in the modern era of the death penalty).

Since *Baze*, thirteen states – Arizona, Arkansas, California, Georgia, Idaho, Kentucky, Louisiana, Missouri, Ohio, South Dakota, Tennessee, Texas, and Washington—have adopted or announced that they will adopt a single drug protocol. *See* Michael Kiefer, *Arizona Switching to 1 Drug for Next Execution*, The Arizona Republic (Feb. 27, 2012); Rhonda Cook, *Expired Drugs Led to Cancellation of Execution by Lethal Injection*, The Atlanta Journal-Constitution (August 2, 2012); Associated Press, *Idaho Switches Execution Protocol to Single-Drug Lethal Injection*, The Spokesman-Review (May 18, 2012); Associated Press, *Ky. Alters Execution Protocol*, The Herald-Dispatch (Feb. 16, 2010); Ariane De Vogue & Dennis Powell, *Ohio Killer Executed in First Use of Single-Drug Lethal Injection*, ABC News (Dec. 8, 2009); John Hult, *Execution Options Added, Sioux Falls Argus Leader* (Oct. 22, 2011); Brandi Grissom, *Texas Will Change Its Lethal Injection Protocol*, The Texas Tribune (July 10, 2012); Associated Press,

[22]New Mexico abolished the death penalty but the repeal may not apply retroactively, leaving two prisoners on death row facing possible execution.

Washington State Switches to One Drug Method of Execution, The Seattle Times (Mar. 2, 2010). And, Alabama and Oklahoma have now adopted nitrogen gas as the method of execution in those states. *See* Ala. Code § 15-18-82.1; Okla. Stat. tit. 22, § 1014.B.

Of the fourteen executions of 2018 to date, ten were carried out, without incident, using a one-drug protocol (pentobarbital). Thus, of the active death penalty jurisdictions, use of a three-drug protocol is now in the minority. And in a number of these states, executions remain on hold due to ongoing litigation.

This is a cataclysmic shift in the legal landscape and one that makes clear that the Florida Department of Corrections' decision to continue to use a three-drug protocol is objectively unreasonable. States are moving to a one-drug protocol because the risks of serious pain when using three drugs are significant and well documented. A one-drug protocol avoids the unconstitutional pain inflicted by three-drug protocols because it relies simply on a large dose of an appropriate barbiturate, which accomplishes a quick and painless death without use of a paralytic or potassium acetate.

DOC adopted the January 4, 2017, three-drug protocol in Florida without considering the medical utility of the specific chemicals in the context of an execution. DOC did not consider, in adopting the three-drug protocol, whether the chemicals involved were necessary to properly and painlessly conduct an execution by lethal injection. There is no longer a justification

for utilizing the three-drug sequence.

The recent developments in this area across the United States reflect this nation's evolving standards of decency which are rapidly moving away from the three-drug protocol. *Trop v. Dulles*, 356 U.S. 86 (1958).

Other states have made clear that a paralytic will never be used again. On June 21, 2017, the State of Arizona stipulated that "[the Arizona Department of Corrections] will never again use a Paralytic in an executions". *First Amendment Coalition of Arizona, Inc. et al. v. Charles L. Ryan, Director of ADC*, United States District Court for the District of Arizona, Case No. 2:14-cv-01447-NVW-JFM (June 21, 2017)(Doc. 186).

DOC intends to inject Jimenez with rocuronium bromide, a paralytic. There simply is no scientific reason for using a paralytic drug, such as rocuronium bromide, in its lethal-injection protocol, and doing so presents serious dangers. Rocuronium bromide increases the risk that Jimenez will suffer a torturous and painful death silently because this drug will mask any effectiveness of the etomidate. Rocuronium bromide is a neuromuscular blocking agent that paralyzes all voluntary muscles, including the diaphragm, without affecting consciousness or the perception of pain. Administered by itself as a "lethal dose," rocuronium bromide would not result in a quick death; instead, it would cause death by conscious asphyxiation over the course of roughly a dozen minutes. It thus creates the danger

that, if not properly anesthetized, Jimenez will be unable to convey the horrific pain and suffering he is experiencing as a result of the dry drowning of death by asphyxiation or the extreme pain associated with the injection of potassium acetate he would receive. In other words, the rocuronium bromide could leave Jimenenz entirely aware of this extreme pain and suffering, but entirely unable to inform the attendants of his misery. Without the use of rocuronium bromide, Jimenez would at least be able to signal that he was still conscious or had regained consciousness or awareness before the potassium acetate was administered.

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

These issues are significant because it is beyond dispute that an insufficiently anesthetized person who is injected with a paralytic and potassium acetate will feel agonizing pain but will be unable to outwardly express that pain. *See, e.g., Baze v. Rees*, 553 U.S. 35, 53 (2008).

Florida's use of rocuronium bromide in its execution protocol is especially troubling because, even as the State of Florida characterizes its three-drug protocol as "humane," it prohibits the use of paralytic drugs on non-human animals in

performing euthanasia. Fla. Stat. § 828.058(3) ("any substance which acts as a neuromuscular blocking agent . . . may not be used on a dog or cat for any purpose[,]" even by a trained veterinarian performing animal euthanasia); *see also* Fla. Stat. § 828.065 (proscribes the same for euthanasia of warm-blooded animals offered for sale, or obtained for sale by pet shops). In other words, it would be illegal for a Florida veterinarian to put a dog to death by the same method the state plans to use to kill Jimenez.

Florida's use of a three-drug lethal-injection protocol that injects human beings with rocuronium bromide and potassium acetate creates unnecessary risks of pain and suffering.

Florida must switch to a one-drug protocol using pentobarbital or compounded pentobarbital. Texas, Georgia, Missouri and other states have easily obtained pentobarbital from compounding pharmacies. Pentobarbital is feasible and available to DOC. It also reduces a substantial risk of severe pain that is created by injecting Jimenez with etomidate, a drug that presents a substantial risk of severe pain.

The multitude of experiences that states now have had with single drug executions—where condemned inmates have died without apparent complication using a large dose of a barbiturate without administration of a paralytic or potassium acetate – demonstrates that the substantial risks of severe pain presented by Florida's three-drug protocol are objectively intolerable and readily

avoidable.

In denying Jimenez's claim, the only basis stated by the circuit court is its erroneous finding that pentobarbital is not an available alternative (6PC-R. 709-10). This is simply not true and not supported by the record. Compounded pentobarbital is readily available to DOC and has been used in ten of the fourteen executions that have been carried out in 2018.

The circuit court also seemed to suggest that Jimenez had not adequately pled that alternative drugs were available that would carry less risk. Due to the exigencies of the unusually short warrant, there was insufficient time to prepare and file a professionally adequate 3.851 motion in the time allotted. To the extent that the circuit court found and/or this Court finds that the 3.851 was inadequately pled or technically deficient, this Court should afford Jimenez an opportunity to amend and correct the deficiency. *Spera v. State*, 971 So. 2d 754, 761 (Fla. 2007) ("Accordingly, when a defendant's initial rule 3.850 motion for postconviction relief is determined to be legally insufficient for failure to meet either the rule's or other pleading requirements, the trial court abuses its discretion when it fails to allow the defendant at least one opportunity to amend the motion.").

Moreover, the circuit court's reference to *Glossip*[23] and

[23]*Glossip* does not say that Florida changed its protocol because of the inability to acquire pentobarbital; it simply

Foster and the manufacturer's letter requesting that pentobarbital not be used in executions misses a significant part of Jimenez's allegation (*see* 6PC-R. 709); compounded pentobarbital is readily available to DOC. Jimenez must be provided an evidentiary hearing at which he will present evidence of the availability of compounded pentobarbital.

Jimenez is entitled to a fair opportunity to demonstrate that the constitution bars his execution. *Hall v. Florida*, 134 S. Ct. at 2001 ("The death penalty is the gravest sentence our society may impose. Persons facing that most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution."). Under the time parameters he has been given and without disclosure of relevant public records, Jimenez has not been given the fair opportunity to which he is entitled.

This Court should reverse, order additional public records disclosed, permit Jimenez to amend, and order an evidentiary hearing on his challenge to the lethal injection protocol. Relief will be warranted.

ARGUMENT IV

BECAUSE OF THE INORDINATE LENGTH OF TIME THAT JIMENEZ HAS SPENT IN SOLITARY CONFINEMENT ON FLORIDA'S DEATH ROW, ADDING HIS EXECUTION TO THAT PUNISHMENT WOULD CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT AND VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND BINDING NORMS OF INTERNATIONAL LAW.

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stated: "Florida became the first state to substitute midazolam for pentobarbital." *Glossip*, 135 S.Ct. at 2734.

Jimenez is set to be executed over 23 years after the imposition of a death sentence. Through those 23 years Jimenez has been kept in solitary confinement on Florida's death row. The Eighth Amendment's prohibition on cruel and unusual punishment bars the execution of a prisoner who has spent so much time on death row.[24] This conclusion is derived from the fact that the Eighth Amendment requires that "the sanction imposed cannot be so totally without penological justification that it results in the gratuitous infliction of suffering." *Gregg v. Georgia*, 428 U.S. 153, 183 (1976). Punishments that entail exposure to a risk that "serves no 'legitimate penological objective'" and that result in gratuitous infliction of suffering violate the Eighth Amendment. *Farmer v. Brennan*, 511 U.S. 825, 833 (1994) (quoting *Hudson v. Palmer*, 468 U.S. 517, 548 (1984) (Stevens, J., concurring in part and dissenting in part).[25]

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

> Though novel, petitioner's claim is not without

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[24]Jimenez recognizes, as the trial court did in denying relief, 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." (6PC-R. 710). Jimenez respectfully requests that this Court revisit the issue.

[25]Where, as here, the inherent cruelty of living under a sentence of death is prolonged for over 23 years, such suffering cannot be considered incidental to the processing of the appeals. It is unnecessary and unconstitutional. Such long-term suffering becomes a separate form of punishment, which is equivalent to or greater than an actual execution. *See Coleman v. Balkom*, 45 1 U.S. 949, 952 (1981)(Stevens, J., concurring in denial of certiorari); *cf. In re Medley*, 134 U.S. 160, 172 (1890).

> foundation. In *Gregg v. Georgia*, this Court held that the Eighth Amendment does not prohibit capital punishment. Our decision rested in large part on the grounds that (1) the death penalty was considered permissible by the Framers and (2) the death penalty might serve "two principal social purposes: retribution and deterrence".
>
> It is arguable that neither ground retains any force for prisoners who have spent some 17 years under a sentence of death. Such a delay, if it ever occurred, certainly would have been rare in 1789, and thus the practice of the Framers would not justify a denial of petitioner's claim. Moreover, after such an extended time, the acceptable state interest in retribution has arguably been satisfied by the severe punishment already inflicted. Over a century ago, this Court recognized that "when a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it." *In re Medley, 134 U.S. 160, 172, 33 L. Ed. 835, 10 S. Ct. 384 (1890)*. If the Court accurately described the effect of uncertainty in *Medley*, which involved a period of four weeks, that description should apply with even greater force in the case of delays that last for many years. Finally, the additional deterrent effect from an actual execution now, on the one hand, as compared to 17 years on death row followed by the prisoner's continued incarceration for life, on the other, seems minimal.

514 U.S. 1045 (1995) (J. Stevens, memorandum respecting denial of certiorari) (citations omitted).[26]

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[26]Certainly, the Framers of the United States Constitution would not have envisioned that a condemned man would spend over 23 years awaiting execution. The Eighth Amendment's prohibition on cruel and unusual punishment in the 1776 Virginia Declaration of Rights was based on the 1689 English Bill of Rights. *Harmelin v. Michigan*, 501 U.S. 957, 966 (1991). The English Bill of Rights said "excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted" when executions took place within weeks of a death sentence, and if a delay in carrying out the execution was unduly prolonged, it could be commuted to a life sentence. *Riley v. Attorney Gen. of Jamaica*, 3 All E.R. 469, 478 (P.C. 1983) (Lord Scarsman,

In a subsequent denial of certiorari review in another case, Justice Breyer echoed the concerns voiced by Justice Stevens in *Lackey*. Justice Breyer wrote in a case involving a defendant who had been on Florida's death row over 23 years that: "After such a delay, an execution may well cease to serve the legitimate penological purposes that otherwise may provide a necessary constitutional justification for the death penalty." *Elledge v. Florida*, 119 S. Ct. 366 (1998) (J. Breyer, dissenting). In yet another case involving an extended stay on Florida's death row, Justice Breyer stated:

> Nor can one justify lengthy delays by reference to constitutional tradition, for our Constitution was written at a time when delay between sentencing and execution could be measured in days or weeks, not decades. See *Pratt v. Attorney General of Jamaica, [1994] 2 A. C. 1, 18, 4 All E. R. 769, 773 (P. C. 1993) (en banc)* (Great Britain's "Murder Act" of 1751 prescribed that execution take place on the next day but one after sentence).

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

> It is difficult to deny the suffering inherent in a prolonged wait for execution -- a matter which courts and individual judges have long recognized....The California Supreme Court has referred to the "dehumanizing effects of . . . lengthy imprisonment prior to execution." In *Furman v. Georgia, 408 U.S. at 288-289* (concurring opinion), Justice Brennan wrote of the "inevitable long wait" that exacts "a frightful

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dissenting); *Pratt v. Attorney General of Jamaica*, [1994] 2 A. C. 1, 18, 4 All E. R. 769, 773 (P. C. 1993) (en banc) .

> toll." Justice Frankfurter noted that the "onset of insanity while awaiting execution of a death sentence is not a rare phenomenon."

Knight, 528 U.S. at 994-95.

In a concurring opinion denying certiorari review, Justice Stevens explained:

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

Thompson v. McNeil, 129 S.Ct. 1299, 1300 (2009)(Stevens, J., concurring in judgment)(citation omitted).

More recently, Justice Breyer expanded on his views, writing that "[t]he problems of reliability and unfairness [with the current capital punishment laws] almost inevitably lead to a third independent constitutional problem: excessively long periods of time that individuals typically spend on death row, alive but under sentence of death." *Glossip v. Gross*, 135 S.Ct. 2726, 2764 (2015) (Breyer, J., joined by Ginsburg, J., dissenting). As Justice Breyer explained, "delay is part of a problem that the Constitution's own demands create" because "the special need for reliability and fairness in death penalty cases" apply to the death penalty "with special force." *Id.* (citation omitted). The "procedural necessities [demanded by the Eighth

Amendment] take time to implement" and the resulting lengthy delays "create two special constitutional difficulties," namely (1) the "dehumanizing effect of solitary confinement" aggravated by "uncertainty as to whether a death sentence will in fact be carried out, and (2) the undermining "the death penalty's penological rational, perhaps irreparably so." *Id*. at 2564-69. Justice Breyer has continued to raise the constitutional alarm in numerous cases since his dissent in *Glossip*. *See, e.g. Jordan v. Mississippi*, 138 S.Ct. 2567 (June 28, 2018) (Breyer, J., dissenting from the denial of certiorari); *Dunn v. Madison*, 138 S.Ct. 9, 13 (2017) (Breyer, J., joining Ginsburg, J., and Sotomayor, J., concurring) ("And we may well have to consider the ways in which lengthy periods of imprisonment between death sentence and execution can deepen the cruelty of the death penalty while at the same time undermining its penological rationale").

A review of international law strongly suggests that the execution of a condemned individual after 23 years on death row is not consistent with evolving standards of decency. For example, in 1993 two Jamaican death row inmates challenged their death sentences on the basis that their 14 year incarceration on death row violated the Jamaican Constitution's prohibition against inhuman punishment. The Privy Council of the United Kingdom invalidated their death sentences and indicated that a stay on death row of more than five years would be excessive, and

commuted their sentence from death to life in prison. *Pratt v. Attorney General of Jamaica*, [1994] 2 A. C. 1, 18, 4 All E. R. 769, 773 (P. C. 1993) (en banc). As a result of the prolonged stays on death rows in the United States, combined with the inhumane conditions typical of death row, foreign jurisdictions have refused extradition of criminal suspects to the United States where it was likely that a death sentence would result, on the grounds that the experience of years of living on death row would violate international human rights treaties. *Soering v. United Kingdom*, 11 Eur. H.R. Rep. 439 (1989). In *Soering*, the European Court of Human Rights held that the extradition of a capital defendant, a German national, to the United States would violate Article 3 of the European Convention on Human Rights, which bars parties to the Convention from extraditing a person to a jurisdiction where they would be at significant risk of torture or inhumane punishment. The Court cited the risk of delay in carrying out the execution, which in Virginia averaged between six and eight years. The Court found that "the condemned prisoner has to endure for many years the conditions on death row and the anguish and mounting tension of living in the ever-present shadow of death." *Id.* at §106. Since the U.S. government could not assure that the death penalty would not be sought in the Virginia courts, extradition was barred by the United Kingdom.

Moreover, a proscription against "torture or cruel, inhuman, or degrading treatment or punishment," is contained in both the

International Covenant on Civil and Political Rights and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Since the early 1990s, the United States has been a signatory of both treaties. Under the Supremacy Clause, those two treaties are binding on the states as well as the federal government. *See Missouri v. Holland*, 252 U.S. 416 (1920).[27] Numerous leading international law tribunals have held that the prohibition against "cruel, inhuman or degrading punishment or treatment" prohibits a state from keeping a condemned person on death row for an inordinate period of time. *See, e.g., Pratt & Morgan v. Attorney General of Jamaica*, 2 A.C. 1 (British Privy Council 1993) (en banc) (citing numerous

[27]The U.S. has filed "reservations" with respect to both treaties, which contend that the U.S. understands the language "torture or cruel, inhuman or degrading punishment or treatment" to mean the same thing as the phrase "cruel and unusual punishments" in the Eighth Amendment. *See* David P. Stewart, *United States Ratification of the Covenant on Civil and Political Rights: The Significance of the Reservations, Understandings, and Declarations*, 42 DePaul L. Rev. 1183 (Summer 1993). No other signatory nation has filed a "reservation" or otherwise objected to that particular language in the treaty. Michael H. Posner & Peter Shapiro, *Adding Teeth to the United States Ratification of the Covenant on Civil and Political Rights*, 42 DePaul L. Rev. 1209, 1216 (Summer 1993). Numerous signatory nations have lodged objections to the U.S. "reservations" in the United Nations. The fact that well over 100 nations are signatories of the International Covenant on Civil and Political Rights, *see id.* at 1212, means that the language in Article VII of the Covenant has assumed the status of a "peremptory norm" of international law, or jus cogens. *See Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 715-16 (9th Cir. 1992). Such a fundamental norm of international law is binding on the federal government and the states even in the absence of a treaty. *See The Paquete Habana*, 175 U.S. 677, 700 (1900).

decisions of courts around the world); *Soering v. United Kingdom*, 11 European Human Rights Reporter 439 (1989)(extradition to U.S. to face capital murder charges refused because of time on death row if sentenced to death); *Vatheeswarren v. State of Tamil Nadu*, 2 S.C.R. 348 (India, 1983)("dehumanizing character of delay"); *Sher Singh v. State of Punjab*, 2 SCR 582 (India 1983)(Prolonged delay in the execution an important consideration in considering whether sentence should be carried out); *Catholic Commission for Justice and Peace in Zimbabwe v. Attorney General*, No. S.C. 73/93 (Zimbabwe 1993) [reported in 14 Human Rights L. J. 323 (1993)]. To ignore that the rest of the world is watching the United States and specifically Florida administer the death penalty after lengthy stays on death row in solitary confinement such as Jimenez has endured, vitiate this country's commitment to teach human decency which was recognzed in *Hall v. Florida*, 134 S.Ct. 1986, 2001 (2014) ("our Nation's commitment to dignity and its duty to teach human decency as the mark of a civilized world.").

Here, to execute Jimenez after he has already had to endure over 23 years of incarceration under sentence of death, would be unconstitutionally cruel and unusual punishment. *See, e.g., Schabas, Execution Delayed, Execution Denied,* 5 Crim. L. Forum 180 (1994); Lambrix, *The Isolation of Death Row in Facing the Death Penalty*, 198 (Radelet, ed. 1989); Millemann, *Capital Postconviction Prisoners' Right to Counsel*, 48 MD. L. Rev. 455,

499-500 (1989)("There is little doubt that the consciousness of impending death can be immobilizing... this opinion has been widely shared by [jurists], prison wardens, psychiatrists and psychologists, and writers.")(Citing authorities); Mello, *Facing Death Alone*, 37 Amer. L. Rev. 513, 552 and n. 251 (1988)(same)(citing studies); Wood, *Competency for Execution: Problems in Law and Psychiatry*, 14 Fla. St. U. L. Rev. 35, 37-39 (1986)("The physical and psychological pressure present in capital inmates has been widely noted... Courts and commentators have argued that the extreme psychological stress accompanying death row confinement is an eighth amendment violation in itself or is an element in making the death penalty cruel and unusual punishment.")(citing authorities); Stafer, *Symposium on Death Penalty Issues: Volunteering for Execution*, 74 J. Crim. L. 860, 861 & n.10 (1983)(citing studies); Holland, *Death Row Conditions: Progression Towards Constitutional Protections*, 19 Akron L. Rev. 293 (1985); Johnson, *Under Sentence of Death: The Psychology of Death Row Confinement*, 5 Law and Psychology Review 141, 157-60 (1979); Hussain and Tozman, *Psychiatry on Death Row*, 39 J. Clinical Psychiatry 183 (1979); West, *Psychiatric Reflections on the Death Penalty*, 45 Amer. J. Orthopsychiatry 689, 694-695 (1975); Gallomar and Partman, *Inmate Responses to Lengthy Death Row Confinement*, 129 Amer. J. Psychiatry 167 (1972); Bluestone and McGahee, *Reaction to Extreme Stress: Impending Death By*

Execution, 119 Amer. J. Psychiatry 393 (1962); Note, *Mental Suffering Under Sentence of Death: A Cruel and Unusual Punishment*, 57 Iowa L. Rev. 814, 830 (1972); G. Gottlieb, *Testing the Death Penalty*, 34 S. Cal. L. Rev. 268, 272 and n. 15 (1961); A. Camus, *Reflections on the Guillotine in Resistance, Rebellion and Death*, P. 205 (1966)("As a general rule, a man is undone waiting for capital punishment well before he dies."); Duffy and Hirshberg, *Eighty-Eight Men and Two Women*, P. 254 (1962) ("One night on death row is too long, the length of time spent there by [some inmates] constitutes cruelty that defies the imagination. It has always been a source of wonder to me that they didn't all go stark, raving mad.")(Quoting former warden of California's San Quentin Prison).

Because the Eighth Amendment standards of decency are evolving, serious consideration of Jimenez's claim is required under the Eighth Amendment. *Hall*, 134 S.Ct. at 2001 ("The death penalty is the gravest sentence our society may impose. Persons facing that most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution.").

ARGUMENT V

JIMENEZ'S LIFE SENTENCE FOR HIS CONVICTION OF THE ARMED BURGLARY OF AN OCCUPIED DWELLING IS AN ILLEGAL SENTENCE AND SHOULD BE CORRECTED PURSUANT TO RULE 3.800(a).

Fla. R. Crim. P. 3.800(a) provides:

> A court **may at any time correct** an illegal sentence imposed by it, or an incorrect calculation made by it

> in a sentencing scoresheet, when it is affirmatively alleged that the court records demonstrate on their face an entitlement to that relief, provided that a party may not file a motion to correct an illegal sentence under this subdivision during the time allowed for the filing of a motion under subdivision (b)(1) or during the pendency of a direct appeal.

(Emphasis added). This Court recently discussed Rule 3.800(a) and explained its scope and purpose:

> Rule 3.800 allows defendants to petition "the courts to correct sentencing errors that may be identified on the face of the record." *Williams v. State*, 957 So.2d 600, 602 (Fla.2007). The intent of rule 3.800(a) is "to balance the need for finality of convictions and sentences with the goal of ensuring that criminal defendants do not serve sentences imposed contrary to the requirements of law." *Carter v. State*, 786 So.2d 1173, 1176–78 (Fla.2001).
>
> "Since 1968, our procedural rules have provided for the correction of illegal sentences." Id. at 1176. An "illegal sentence" is undefined in rule 3.800. This Court has "generally defined an 'illegal sentence' as one that imposes a punishment or penalty that no judge under the entire body of sentencing statutes and laws could impose under any set of factual circumstances." *Williams*, 957 So.2d at 602 (quoting *Carter*, 786 So.2d at 1181).

Plott v. State, 148 So. 3d 90, 93 (Fla. 2014).

On December 14, 1994, Judge Rothenberg announced Jimenez's sentences as follows:

> As to count one of the indictment, the first degree murder of Phyllis Minas, the Court hereby sentences you, Jose Jimenez, to death.
>
> As to count two of the indictment, armed burglary of an occupied dwelling with an assault and battery, the Court hereby sentences you to life imprisonment, and this sentence is to run consecutive to the sentence of death imposed in count one of the indictment.
>
> The Court, in a footnote to that, departs from the

> recommended sentencing guidelines due to the unscorable nature of the capital felony, citing *Hansbrough v. State* found at 509 So. 2d 1081, Florida, 1987, and *Torres-Arboledo v. State*, found at 524 So. 2d 403, Florida, 1988.

(T. 1130). The issue raised herein is whether the life sentence for armed burglary of an occupied dwelling is an illegal sentence given that this Court held that the burglary statute in place in 1990 was not intended to apply when an invited guest turns criminal or violent as this Court held in *Delgado v. State*, 776 So. 2d 233 (Fla 2000). In others words, if the conduct was not intended to constitute an armed burglary of an occupied dwelling, then imposing a sentence for a crime for conduct that was not meant to be criminalized is illegal. Under Rule 3.800(a), a court can be asked to correct an illegal sentence at any time, i.e. there is no time limitation for a Rule 3.800(a) motion.

In addition to the death sentence, Jimenez was given a consecutive life sentence for an armed burglary of an occupied dwelling conviction. But, this sentence has to be recognized as illegal since the burglary statute in effect on October 2, 1992 states that "[i]n the context of an occupied dwelling, burglary was not intended to cover the situation where an invited guest turns criminal or violent." *Delgado*, 776 So. 2d at 240. This Court in *Delgado* explained that "[t]he question before this Court is whether the Legislature intended to criminalize the particular conduct in this case as burglary when it added the phrase 'remaining in' to the burglary statute." *Id.* at 239-40. In

Delgado, the date of the alleged burglary at issue was August 30, 1990. *Id.* at 234. This Court in *Delgado* was addressing whether on August 30, 1990, the criminal offense of armed burglary applied when an invited guest turned criminal or violent. And in *Delgado*, this Court concluded that whatever other crimes the invited guest may have committed when he turned violent, the invited guest had not committed a burglary simply by turning violent. *Id.* at 241 ("[**A]ppellant's actions are not the type of conduct which the crime of burglary was intended to punish.** Our decision in no way prevents the State from prosecuting appellant for whatever crimes he may have committed once inside the victims' home. But considering both the record in this case and the State's theory of the crime, appellant's conduct does not amount to burglary.") (Emphasis added).[28] In *Delgado*, this Court receded from its contrary ruling in Jimenez's case. *Id.*, 776 So. 2d at 241.[29]

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[28]In *Fitzpatrick v. State*, 859 So. 2d 486, 487 (Fla. 2003), this Court applied its reading of the scope of the burglary statute set forth in *Delgado* to a case in which the purported burglary arose from conduct occurring in February of 1980. In *Fitzpatrick*, this Court explained: "In *Delgado*, we held that where an individual enters a dwelling with consent, the burglary statute only applies if the individual remains there surreptitiously." *Id.* at 490. Because *Delgado* was applied in *Fitzpatrick*, the burglary statute in 1980 "was not intended to cover the situation where an invited guest turns criminal or violent." *Delgado*, 776 So. 2d at 240. The State must prove that the invited guest "had surreptitiously remained therein." *Fitzpatrick*, 859 So. 2d at 490.

[29]In *Delgado*, this Court referenced its decision in Jimenez's case in the following fashion: "*Jimenez v. State*, 703 So.2d 437, 441 (Fla.1997) ('In the instant case, we conclude that

Jimenez is aware that this Court in *Delgado* stated that its ruling there was not retroactive under *Witt v. State*, 387 So. 2d 922 (Fla. 1980), and would not apply to cases that were already final. *Delgado*, 776 So. 2d at 241. Indeed, the circuit court in denying relief relied on the fact that "[t]he Florida Supreme Court went on to hold that *Delgado*, which was released after Jimenez's convictions were final, did not apply to Jimenez because it failed to meet the criteria for retroactivity set forth in *Witt v. State*, 3827 So. 2d 922 (Fla. 1980)." (6PC-R. 706). But, that *Witt* analysis did not comport with due process for the reasons set forth in *Bunkley v. Florida*, 538 U.S. 835 (2003).

Jimenez submits that applying *Witt* to a decision that concerns what conduct the statute was intended to criminalize and whether it fits within criminal offense defined by Florida's substantive law was erroneous. *See State v. Barnum*, 921 So. 2d 513, 521 (Fla. 2005) ("The essential lesson from *Fiore* is that a conviction runs afoul of due process guarantees if, at the time it was rendered, the activity in which the defendant was engaged was not a crime."). *See Bunkley*, 538 U.S. at 841-42 ("The proper question under *Fiore* is not just whether the law changed. Rather,

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the trier of fact could reasonably have found proof of withdrawal of consent beyond a reasonable doubt. There is ample circumstantial evidence from which the jury could conclude that [the victim] withdrew whatever consent she may have given for [the defendant] to remain, when he brutally beat her and stabbed her multiple times....')." *Delgado*, 776 So. 2d at 238-39.

it is when the law changed. The Florida Supreme Court has not answered this question; instead, it appeared to assume that merely labeling L.B. as the 'culmination' in the common pocketknife exception's 'century-long evolutionary process' was sufficient to resolve the Fiore question. 833 So.2d, at 745. It is not. Without further clarification from the Florida Supreme Court as to the content of the common pocketknife exception in 1989, we cannot know whether *L.B.* correctly stated the common pocketknife exception at the time he was convicted.").

In *Lebron v. State*, 799 So. 2d 997, 1019-20 (Fla. 2001), this Court observed that: "'[I]t is firmly established law that the statutes in effect at the time of commission of a crime control as to the offenses for which the perpetrator can be convicted, as well as the punishments which may be imposed.' *State v. Smith*, 547 So.2d 613, 616 (Fla.1989) (quoting with approval *Heath v. State*, 532 So.2d 9, 10 (Fla. 1st DCA 1988)), quoted in *Bates v. State*, 750 So.2d 6, 19 (Fla.1999) (Harding, C.J., specially concurring)." When a court construes a statute and identifies **the elements of a statutorily defined criminal offense, the ruling constitutes substantive law** and dates to the statute's enactment. *Bousley v. United States*, 523 U.S. 614, 625 (1998) (Stevens, J., concurring in part and dissenting in part) (**"This case does not raise any question concerning the possible retroactive application of a new rule of law**, *cf. Teague v. Lane*,

489 U.S. 288 (1989), because our decision in *Bailey v. United States*, 516 U.S. 137 (1995), did not change the law. **It merely explained what § 924(c) had meant ever since the statute was enacted.** The fact that a number of Courts of Appeals had construed the statute differently is of no greater legal significance than the fact that 42 U.S.C. § 1981 had been consistently misconstrued prior to our decision in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989).") (emphasis added). "A judicial construction of a statute is an authoritative statement of what the statute meant **before as well as after the decision** of the case giving rise to that construction." *Rivers v. Roadway Exp., Inc.*, 511 U.S. 298, 312-13 (1994) (emphasis added).

In *Fiore v. White*, 531 U.S. 225, 226 (2001), the U.S. Supreme Court ordered the issuance of habeas relief because Fiore was serving an illegal sentence due to the fact that the State had not been proven an element of the offense nor could the State prove the element beyond a reasonable doubt. The sentence was imposed for a crime that the State had not proven had been committed. The Court in *Fiore* noted:

> We granted certiorari in part to decide when, or whether, the Federal Due Process Clause requires a State to apply a new interpretation of a state criminal statute retroactively to cases on collateral review.

But before addressing the issue, the U.S. Supreme Court asked the Pennsylvania Supreme Court to explain the basis for a decision (*Scarpone*) it issued regarding the elements of the

statutorily defined criminal offense for which Fiore had been convicted.[30] The *Scarpone* decision had issued after Fiore's conviction was final. The U.S. Supreme Court wanted to know if the decision in *Scarpone* construing the criminal statute was **a new interpretation** or was it **a straightforward reading of the statute**? *Fiore*, 531 U.S. at 226.

The Pennsylvania Supreme Court responded and explained that *Scarpone* "merely clarified the plain language of the statute." *Id*. at 228. The U.S. Supreme Court then held that due process required Fiore to receive the benefit of the *Scarpone* decision since it merely followed the plain meaning of the statute. *Scarpone* was not a new construction of the statute. It merely followed what the legislature intended when enacting the statute. *Id*. at 228 (because the Pennsylvania Supreme Court's statement of the statute's plain meaning "was not new law, this case presents

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[30]Fiore was convicted of operating a hazardous waste facility without a permit. While Fiore had a permit, the State had "argued that Fiore had deviated so dramatically from the permit's terms that he nonetheless had violated the statute." 531 U.S. at 227. On the State's theory, Fiore was convicted. After Fiore's unsuccessful appeals had concluded, the Pennsylvania Supreme Court in a different case held: "[t]he statute made it unlawful to operate a facility without a permit; one who deviated from his permit's terms was not a person without a permit; hence, a person who deviated from his permit's terms did not violate the statute." *Id.* at 227. After Fiore unsuccessfully challenged his conviction in state court collateral proceedings based on the Due Process Clause, he sought federal habeas relief. "The Court of Appeals believed that the Pennsylvania Supreme Court, in Scarpone's case, had announced a new rule of law and thus was inapplicable to Fiore's already final conviction." *Id*. at 227.

no issue of retroactivity."). In Fiore's case, the element of the criminal offense found in *Scarpone*, dumping without a license, was not proven by the State. As result, Fiore's conviction was invalid under the Due Process Clause and his sentence was illegal; his "continued incarceration on this charge violate due process." *Fiore*, 531 U.S. at 228.

The U.S. Supreme Court in *Schriro v. Summerlin*, 542 U.S. 348 (2004), identified circumstances in which a court's ruling must be applied retroactively:

> New substantive rules generally apply retroactively. This includes decisions that narrow the scope of a criminal statute by interpreting its terms, *see Bousley v. United States*, 523 U.S. 614, 620-621, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998), as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish, *see Saffle v. Parks*, 494 U.S. 484, 494-495, 110 S.Ct. 1257, 108 L.Ed.2d 415 (1990); *Teague v. Lane*, 489 U.S. 288, 311, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) (plurality opinion). **Such rules apply retroactively because they "necessarily carry a significant risk that a defendant stands convicted of 'an act that the law does not make criminal' " or faces a punishment that the law cannot impose upon him.** *Bousley, supra*, at 620, 118 S.Ct. 1604 (quoting *Davis v. United States*, 417 U.S. 333, 346, 94 S.Ct. 2298, 41 L.Ed.2d 109 (1974)).

Schriro, 542 U.S. at 351-52 (emphasis added) (footnote omitted).

In *Delgado*, the State was required to prove the existence of a fact at the time of the alleged armed burglary in 1990 that it was not held to have to prove in order to convict Jimenez and sentence him for an armed burglary based on his conduct in

1992.[31] In *Delgado*, this Court held that the burglary statute was not meant to criminalize the conduct for which armed burglary conviction was returned as to Delgado, which is virtually the same conduct that this Court found the statute criminalized in *Jimenez v. State*. Even though the same burglary statute was at issue in both cases and even though Delgado's conduct occurred two years before Jimenez's conduct, Delgado's conviction was overturned while Jimenez's conviction inexplicably remains. Jimenez has a life sentence for conduct that this Court in *Delgado* ruled did not constitute the crime of burglary and had not been criminalized.

In *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939), the U.S. Supreme Court explained that under the Due Process Clause:

> No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids. The applicable rule is stated in *Connally v. General Const. Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322: 'That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law; and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process

[31]In *State v. Ruiz*, 863 So. 2d 1205, 1211 (Fla. 2003), this Court discussed *Delgado* and explained: "Thus, the essence of *Delgado* is that evidence of a crime committed inside the dwelling, structure, or conveyance of another cannot, in and of itself, establish the crime of burglary."

> of law.'

(Footnote omitted). In *Bouie v. City of Columbia*, 378 U.S. 347, 350-51 (1964), the U.S. Supreme Court recognized that due process requires that a statute give fair warning as to what conduct constitutes a crime: "The basic principle that a criminal statute must give fair warning of the conduct that it makes a crime has often been recognized by this Court."

It is hard to see how the statute defining what constitutes the armed burglary of a dwelling gave fair warning to Jimenez that it applied when an invited guest turns criminal or violent given that the Florida Supreme Court in *Delgado* specifically explained: "[i]n the context of an occupied dwelling, burglary was not intended to cover the situation where an invited guest turns criminal or violent." *Delgado*, 776 So. 2d at 240. To these circumstances, the law set forth in *Bouie v. City of Columbia* seems particularly pertinent:

> We have recognized in such cases that '**a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law,**' *ibid.*, and that '**No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes.** All are entitled to be informed as to what the State commands or forbids.'

378 U.S. at 351 (emphasis added). Given that this Court's ruling in *Delgado* that the statute was not intended to apply to invited guests unless the State proved that the guest remained in the

occupied dwelling surreptitiously, Jimenez had to speculate at the time of his conduct in 1992 as to the meaning of the armed burglary statute. For the same conduct that Delgado engaged in 1990 which was found to not constitute an armed burglary, Jimenez was convicted of armed burglary and given a sentence of life imprisonment. For his conduct in 1992, Jimenez received a sentence of life imprisonment even though this Court in *Delgado* stated that the burglary statute was not meant to apply and criminalize his conduct. To convict of armed burglary of an occupied dwelling, the State had to prove that the guest remained in the occupied dwelling surreptitiously. As in *Delgado*, the State presented no evidence that Jimenez surreptitiously remained in the occupied dwelling as this Court's opinion in *Jimenez v. State*, 703 So. 2d at 441, acknowledged when instead it ruled that the jury could have found that consent had been withdrawn. In *Delgado*, this Court specifically concluded that the reasoning of *Jimenez* and the construction of the statute on which it was based, "leads to an absurd result." *Delgado*, 776 So. 2d at 239.

The life sentence imposed upon Jimenez for conduct that the statute did not intend to criminalize is illegal within the meaning of Rule 3.800(a). *See Plott*, 148 So. 3d at 93 ("The intent of rule 3.800(a) is 'to balance the need for finality of convictions and sentences with the goal of ensuring that criminal defendants do not serve sentences imposed contrary to the requirements of law.' *Carter v. State*, 786 So.2d 1173, 1176–78

(Fla.2001).").

Jimenez's life sentence for armed burglary must be vacated. As noted in *Delgado*, the statute was not meant to apply to Jimenez's conduct. The armed burglary conviction cannot stand on the basis of the reasoning in *Fiore v. White*, *Bouie v. City of Columbia*, and *Schriro v. Summerlin*.[32]

CONCLUSION

Jimenez submits that relief is warranted in the form of the imposition of a life sentence, a remand to the circuit court for a full and fair hearing, or for any other relief that this Court deems proper.

[32]Resolution of the issue raised here does carry implications for Jimenez's death sentence. Since the armed burglary conviction was used to establish an aggravating circumstances, a ruling that the conviction and sentence are illegal would allow Jimenez to challenge his death sentence under *Johnson v. Mississippi*, 486 U.S. 578 (1988). *See Armstrong v. State*, 862 So. 2d 705, 718 (Fla. 2003).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing initial brief has been electronically furnished to opposing counsel of record, on this 3rd day of August, 2018.

/s/ Martin J. McClain
MARTIN J. MCCLAIN
Fla. Bar No. 0754773

LINDA MCDERMOTT
Fla. Bar No. 0102857

McClain & McDermott, P.A.
Attorneys at Law
141 N.E. 30th Street
Wilton Manors, Florida 33334
Telephone: (305) 984-8344

COUNSEL FOR APPELLANT

CERTIFICATE OF FONT

This is to certify that this Initial Brief has been produced in a 12 point Courier type, a font that is not proportionately spaced.

/s/ Martin J. McClain
MARTIN J. MCCLAIN