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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.

REPLY BRIEF OF APPELLANT

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ARGUMENT IN REPLY

ARGUMENT I: PUBLIC RECORDS

Initially, as to the 3.852(h) demands that Jimenez filed, the only issue before this Court is the circuit court's failure to follow the law and direct the Florida Department of Corrections (DOC) to produce Jimenez's inmate file in accordance with *Muhammad v. State*, 132 So. 3d 176, 201 (Fla. 2013).[1] Contrary to the State's assertion, Jimenez did not argue in his initial brief that the circuit court erred in denying his request for records from the Office of the State Attorney (SAO).[2] Thus,

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[1]Jimenez would note that the North Miami Police Department recently disclosed public records. Within those records, Jimenez received several pages of handwritten notes, some of which are exculpatory and now the subject of a pending Rule 3.851 motion.

[2]Jimenez's initial request to the SAO was denied as being overly broad. Pursuant to the circuit court's scheduling order, the 3.852(h) request had been submitted 47 hours after he received notice that a death warrant had been signed. Preparation of the request was rushed. Rule 3.852(h) provides that the condemned has ten days from the date a death warrant is signed to file an (h) request. Given the technical deficiencies that were identified as the basis for the circuit court's denial of the 3.852(h) request made upon the SAO, Jimenez amended his 3.852(h) request within ten days of the signing of the death warrant to correct the specifically identified defects under *Spera v. State*, 971 So. 2d 754, 761 (Fla. 2007). With more time, Jimenez was able to set forth the information in the request that caused the circuit court to deny the original 3.852(h) request as overly broad. After receiving the amended 3.852(h) request, the SAO filed the appropriate notice indicating that there were no additional records. The circuit court then entered an order denying the request finding that the SAO, as reflected in the affidavit provided by the SAO, had no additional records to provide. Because this denial was in reality a finding that the SAO had complied with the request, Jimenez raised no argument relating to the SAO in his initial brief. The answer brief ignored the fact that the SAO had complied with the amended request by documenting that it had no additional records, ignored the fact that Jimenez had not raised an issue about this in the initial brief, and addressed a matter that is not before this Court. That portion of the answer brief should be disregarded.

the State devotes five pages of argument to an issue that is not before this Court. *See* AB at 10-15. Whether the State is attempting to obfuscate from the clear issue before the Court, Jimenez's right to an update of his inmate file, or did not read Jimenez's Initial Brief and just attempted to anticipate his argument, Jimenez will not waste this Court's time in responding to an argument he did not present and is not properly before the Court.

As to Jimenez's right to his DOC inmate file, the State does not dispute that in *Muhammad* this Court overruled the circuit court and directed that DOC disclose Muhammad's inmate records. *See* AB at 15. Instead the State argues that Jimenez's request for any and all of his inmate files was vague and overbroad because he did not limit his claim to those records that had been produced since his inmate file was provided in relation to his clemency proceedings. *See* AB at 15.

It is important to note that the request made in *Muhammad* was identical to the request made in Jimenez's case. There, this Court did not conclude that the "any and all" language was vague or overbroad. *See Muhammad*, 132 So. 3d at 201 ("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].". Jimenez specifically requested an update of his inmate file. There is nothing vague or overbroad in his language as DOC knows exactly what records comprise Jimenez's inmate file. And, DOC knows exactly when the file was produced to

collateral counsel and clemency counsel.[3]

Further, the State argues that Jimenez did not explain why his DOC inmate file was relevant to the proceedings. *See* AB at 16. First, it is Jimenez's position that Rule 3.852(h)(3) does not require that he show relevancy; however, in Claim 1 of his Rule 3.851 motion Jimenez specifically stated that the file was germane to the issue of Jimenez's competency to proceed and to be executed (6PC-R. 284). Likewise, both the State and DOC are surely familiar with this Court's opinion in *Muhammad* and the reason that such records would be relevant to Jimenez's counsel.

The State also argues that Jimenez received his medical and psychological records and did not raise a competency claim in his Rule 3.851 motion. *See* AB at 16. However, while Jimenez's medical records may indicate an issue with his competency, so may his inmate records. A review of all of Jimenez's DOC records, both his inmate file as well as his medical records, are necessary to fully investigate the issue of his competency to be executed. Jimenez must be provided the same opportunity to review his inmate file as was Muhammad.

Finally, the State argues that Jimenez did not notify the circuit court that he recalls selecting the electric chair as the

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[3]Jimenez submits that DOC must produce his inmate file from the date of the initial production made to collateral counsel in 1999 and not since the production to clemency counsel in 2015. Jimenez's collateral counsel was not appointed to represent Jimenez in his clemency proceedings. *See* Fla. Stat. § 940.031 ("The Board of Executive Clemency may appoint private counsel to represent a person sentenced to death for relief by executive clemency at such time as the board deems appropriate for clemency consideration."). Thus, Jimenez's collateral counsel does not possess any of his DOC inmate file after the initial production.

method of execution in his case and therefore the argument is waived. *See* AB at 17. First, Jimenez included this information because it is critical to determine as DOC may be violating his right to select his method of execution and it is yet another example of why an update of the inmate file must be disclosed after a death warrant is signed and an execution date scheduled. And, as Jimenez has repeatedly stated, due to the severely abbreviated schedule before the circuit court, his public record requests were made in less that 48 hours from the time he learned that his execution had been scheduled within twenty-four days. While his case was pending in the circuit court, prior to the case management conference, counsel only had an opportunity to speak to Jimenez a handful of times by phone.[4] Had the records been disclosed in accordance with the Rule, counsel could have learned of the information. *See* Rule 3.852(h)(3) ("Thus, pursuant to the rule, the state agencies "**shall** copy, index and deliver, to the repository any public record" **not previously disclosed or recently received or produced**, not subject to a valid exemption."). Jimenez properly complied with Rule 3.852(h)(3). The circuit court erroneously sustained DOC's objection as to Jimenez's inmate file. *See Muhammad*, 132 So. 3d at 201.

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[4]Moreover as this Court has recognized, counsel is suppose to be monitoring Jimenez mental state after a death warrant has been signed so that he can evaluate whether there is a question about his competency. Checking the inmate file in order know if information received from a client is accurate, is an important part of counsel's duty to monitor his client's mental condition. Without the inmate file, counsel is deprived of information that would assist him see whether his client's grasp on reality is impaired.

In response to Jimenez's argument that the circuit court erred in denying his public records requests, pursuant to Rule 3.852(i), the State contends that "Jimenez did not adequately demonstrate why he waited until the last minute to seek records that have been in existence". *See* AB at 21, 24 n.3. However, Jimenez submits that post-*Asay*, the issue of Florida's lethal injection protocol no longer presented a colorable claim, because this Court had considered the change on the protocol and ruled that it was constitutional. *See Asay v. State*, 224 So. 3d 695 (Fla. 2017). However, after the Branch execution at which Branch let out a blood-curdling scream and thrashed about on the gurney after the first injection of etomidate, what had been a settled issue was no longer settled. *Schwab v. State*, 969 So. 2d 318, 321 (Fla. 2007) ("As this Court has held before, when an inmate presents an Eighth Amendment claim which is based primarily upon facts that occurred during a recent execution, the claim is not procedurally barred.").

The specific procedural bar referenced in *Schwab* was whether the Eighth Amendment challenge to the lethal injection protocol was time barred because the claim had been filed more than one year after the protocol had been first adopted. Implicit in the ruling that the timeliness of the claim was measured from the events in the recent execution giving rise to the claim, was the holding that the prior decision in *Sims v. State*, 754 So. 2d 657, 667-68 (Fla. 2000), upholding the lethal injection protocol was not controlling when a challenge rests on new evidence that did not exist at the time of *Sims v. State* issued. *Schwab v. State*,

969 So. 2d at 321 ("Schwab relies on the execution of Angel Diaz and alleges that the newly created lethal injection protocol does not sufficiently address the problems which occurred in the case of Diaz—a claim that did not exist when lethal injection was first authorized."). Here, Mr. Jimenez's challenge was based upon evidence from Branch's execution, as well as what was observed in the Hannon, Lambrix and Asay executions. While the focus of Jimenez's claim is on Branch's screams during his execution, all four of the executions were subsequent to the decision in *Asay* and not before this Court when that decision was rendered.[5] Information of the three executions that preceded the Branch execution is needed to gauge the significance of what was observed during Branch's execution. Indeed, movement was reportedly observed during the Hannon and Lambrix executions.

Thus, Jimenez sought the records related only to the four executions conducted after this Court's decision in *Asay v. State* which had been carried out with the use of etomidate[6]; the

[5]Jimenez did not and is not arguing that each execution on its own constituted new evidence warranting revisiting *Asay v. State*. *See Provenzano v. State*, 739 So. 2d 1150, 1154 (Fla. 1999) (a challenge to the rebuilt electric chair was summarily denied because there was no showing that the four most recent executions caused "unnecessary and wanton pain" or that they involved "torture or a lingering death"); *Provenzano v. Moore*, 744 So. 2d 413, 415 (Fla. 1999)(problems observed during Davis's execution warranted revisiting issue rejected in *Provenzano v. State* and required an evidentiary hearing to be conducted in the trial court).

[6]The State argues that the logs and notes from the previous executions are not relevant because "no alleged irregularities occurred". *See* AB at 24. Jimenez attached the affidavit of Neal Dupree to his Rule 3.851 motion. Dupree witnessed both Lambrix and Hannon's executions and his affidavit makes clear that the

records related to the change from midazolam to etomidate as the first drug; and the records related to the expiration dates and manufacturer's information about the drugs. These records are relevant to the ultimate issue currently being considered by the U.S. Supreme Court: "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." *See Bucklew v. Precythe*, Case No. 17-3052 (2018).

The State relies on this Court's opinion in *Hannon v. State*, 228 So. 3d 505 (Fla. 2018), to argue that Jimenez is not entitled to any records related to lethal injection. *See* AB at 21. However, the glaring distinction between *Hannon* and Jimenez's case is that at the time of Hannon's death warrant litigation the Branch execution had not occurred. Thus, Jimenez's claim rests on new evidence that did not exist at the time that this Court decided *Hannon v. State*. *See Schwab v. State*. Branch's execution and the pain he experienced require that this Court revisit

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movement of the inmates, time it took for the execution to be conducted and measures DOC took to conceal any irregularities are all relevant to Jimenez's claim, particularly in light of the Branch execution. Jimenez should be provided with the logs and notes for all of the etomidate executions as it is evident that etomidate is not working as the State's experts testified it would in *Asay*.

Moreover, the State's suggestion that an irregularity is the measure as to whether a colorable claim exists and discovery is warranted is satisfied as to the Branch execution. Without realizing it, the State's argument against disclosure of logs from the Asay, Lambrix and Hannon rests on the need for an evidentiary hearing as to the Branch execution given the observed irregularity. *See Schwab v. State*.

Asay as the evidence presented there that the circuit court relied upon in finding tha the protocol did not violate the eighth amendment has been severely undermined by what occurred at the Branch execution.

Additionally, Jimenez agrees that the records he asserts should be disclosed "far exceeds the records disclosures this Court deemed appropriate in *Valle* and *Muhammad*", *see* AB at 22; however, the circumstances of the Branch execution are more akin to the observed irregularities during executions of Pedro Medina,[7] Allen Davis,[8] Bennie Demps[9] and Angel Diaz[10] which resulted in extensive discovery in the successive death warrant litigation and the evidentiary hearing in cases involving inmates next scheduled to be executed. Thus, the State's reliance on cases concerning a change in the lethal injection protocol to argue that public records requests were properly denied is misplaced. This is a challenge based on events at an execution. The discovery needed in this type of case is clearly distinct from what was issue in the cases on which the State relies.

ARGUMENT II: LETHAL INJECTION

Initially, the State opposes Jimenez's argument that a stay

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[7] An evidentiary hearing was ordered regarding the Medina execution in *Jones v. Butterworth*, 691 So. 2d 481 (Fla. 1997)).

[8] An evidentiary hearing was ordered regarding the Davis execution in *Provenzano v. Moore*, 744 So. 2d 413 (Fla. 1999).

[9] An evidentiary hearing was conducted by the circuit court regarding the Demps execution in *Provenzano v. State*, 761 So. 2d 1097, 1098 (Fla. 2000).

[10] An evidentiary hearing was order regarding the Diaz execution in *Lightbourne v. McCollum*, 969 So. 2d 326 (Fla. 2007).

is warranted. *See* AB at 27-9. The State argues that the issue in *Bucklew* is a narrow one, specifically relating to the petitioner's medical condition and the problems that may arise at his execution. However, a review of the question the U.S. Supreme Court directed the parties to address targets the analysis required, or the burden of petitioner, in challenging lethal injection. And, while the State disputes that the issue is unresolved, repeatedly urging a two-step (or "two pronged") analysis, *see* AB at 28-30, 33, the question in *Bucklew* makes clear the U.S. Supreme Court is poised to revisit the issue and clarify petitioners', like Jimenez, burdens of proof. The U.S. Supreme Court's resolution of the question in *Bucklew* will directly impact Jimenez's argument concerning Florida's lethal injection protocol and how it worked in practice during the Branch execution. This Court has not hesitated to issue stays of execution where the U.S. Supreme Court is considering issues that are directly relevant to those being litigated before this Court. *See Correll v. State*, Case No. SC15-147 (Feb. 17, 2015).

Further, while the State claims that Jimenez has not presented any substantial grounds warranting a stay, *see* AB at 28, Jimenez submits that the circumstances of the Branch execution, where he let out a guttural scream and thrashed about on the gurney after the injection of etomidate, presents a substantial question under the Eighth Amendment. Stays were granted by this Court when evidentiary hearings were necessary after problematic or irregular executions. *See Jones v. Butterworth*; *Provenzano v. Moore*. As the circuit court framed the

issue: does the likelihood that etomidate will cause severe pain 25% of the time rise to the level of a substantial risk of harm?[11] Contrary to the State's assertion, that question cannot be answered while the U.S. Supreme Court is considering the correct analysis to address the inquiry.

Next, in outlining the standards set forth in the various lethal injection opinions, the State argues that the analysis that Jimenez posits - the one-step analysis, would allow the defendant to continuously litigate "best practices" for executions. *See* AB at 29. The State relies on *Baze v. Rees*, 553 U.S. 35 (2008). However, this is simply not the case. First, *Baze* predates the U.S. Supreme Court's opinion in *Glossip* and was clearly modified by *Glossip*. But, more importantly, the one-step analysis still requires that Jimenenz establish a substantial risk of harm. The distinction is that the substantial risk is compared to the proposed alternative. *See Glossip v. Gross*, 135 S.Ct. 2736, 2738 (2015)(holding "that any risk of harm was substantial when compared to a known and available alternative method of execution"); *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 State makes no attempt to address the plain language of *Glossip*. *See* AB at 30.

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[11] Moreover, the issue that arises here is: does it matter that it is certain that severe pain will be felt 25% of the time satisfy *Glossip* or must an individual show that as to him the chances he will feel severe pain exceeds 50%?

And, the State's citation to *Wellons v. Commissioner, Ga. Dept. Of Corrs.*, supports Jimenez's argument. *See* AB at 30. "Wellons must demonstrate that the State is being deliberately indifferent to a condition that poses a substantial risk of serious harm to him." *Wellons*, 754 F.3d 1260, 1265 (11th Cir. 2014).[12] Here, Jimenez has alleged not only that etomidate causes pain upon injection, but that it caused severe pain to Branch. And, that DOC's measures to conceal an inmate's pain and suffering, by the use of mitten-like covers over his hands and placing his body so that his face and the tubing leading to the IV are difficult to see demonstrate a deliberate indifference to the significant risk of harm caused by the use of etomidate.

The State also disputes the facts that Jimenez asserted below and before this Court, categorically ignoring the law[13] and critical statements in the affidavits of Robert Friedman as to the Branch execution and Neal Dupree as to the Lambrix and Hannon executions. For example, in summarizing Friedman's affidavit, the State neglects to include Friedman's description that "[Branch] appeared to be in obvious distress" and that he was "shaking" (6PC-R. 312). Further, the description of the incident in the FDLE Investigative Report indicated that Branch **"bellowed a forcible, guttural yell**" after the injection of etomidate (*See* 6PC-R. 252)(emphasis added). Thus, Jimenez's allegation that Branch experienced severe pain is corroborated by the witness

[12] Again is a 25% likelihood a substantial risk, or does the risks have to carry a 50% likelihood.

[13] *See Pardo v. State*, 108 So. 3d 558, 560-61 (Fla. 2012).

accounts which establish that Branch vocalized his reaction to the pain upon injection as well as physically demonstrating the same by his movements. Further, the FDLE logs and DOC records show that the etomidate had been injected at the time of Branch's blood-curdling scream and thrashing about on the gurney (6PC-R. 310-2). Though the State attempts to ignore them, the facts must be taken as true in determining whether an evidentiary is required.

While disputing the specific observations during the Branch execution, the State, like the circuit court, also relies on evidence from the *Asay* litigation to argue that etomidate does not pose a significant risk of harm.[14] *See* AB at 32-4. The State repeats the mantra that Dr. Mark Heath testified that "most patients do not experience pain." *See* AB at 32-3, 37, n.7.[15] However, this single line fails to consider all of the other aspects of Heath's testimony that he took every precaution to minimize his patient's pain, including that he always pre-treated

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[14]In describing the usefulness of etomidate as an anesthetic, the State relies on a description in *Miller's Anesthesia*, Eighth Ed. *See* AB at 32, n.5. Dr. David Lubarsky previously contributed to the textbook for over two decades including a section on etomidate (6PC-R. 342). And, as the description in the textbook makes clear etomidate is "widely used [as an] **anesthetic agent for the induction of anasthesia**." *Miller's Anesthesia*, Eighth Ed., Elsevier, p. 854)(emphasis added).

[15]The State also wants to rely on the package inserts which describe the pain as mild to moderate, ignoring the language about that the pain often observed may reach a degree that will be "disturbing". *See* AB at 33-4. Of course, what is being addressed in the package insert is the clinical use of the drug, not its use in executions where it is administered in such large doses by individuals who are not trained in anesthesia.

patients with analgesics prior to injecting etomidate, that he was using very small doses of the drug, that he injected etomidate slowly and that he used a large vein for the injection.[16] None of these precautions is taken by DOC. Thus, without the complete context of Heath’s testimony the State’s argument is simply misleading.

Further, the State and the circuit court cannot rely upon the circuit court’s findings in her order that this Court accepted in *Asay*. The circuit court in *Asay* made credibility findings in favor of the State’s expert, Dr. Steve Yun who claimed that he had never seen anyone experience pain from the use of etomidate and that the manufacturer’s inserts and warnings on adverse effects were not legitimate. The credibility of Yun is completely undermined by what occurred during the Branch execution.

Moreover, Yun disagreed with the package inserts and said even if a small degree of pain occurred it would brief, a matter of a few seconds, at the most 10 to 20.[17] At most, it would be a

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[16] Again, is the likelihood of severe pain in 25% of the executions a substantial risk of pain under *Glossip*. The circuit court denied Jimenez’s claim based on its reading of *Asay v. State* in which this Court was advised of the likelihood of severe pain in 20 to 28% of the times its is used and this Court’s conclusion that an Eighth Amendment violation was not shown.

[17]The State wants to move the goal post as to what constitutes a risk of pain, now arguing that an inmate’s pain and suffering for a minute is simply not enough to establish severe pain, though in *Asay* this Court accepted seconds, not minutes. *See* AB at 34. Further, the State wants to define a “slight risk” as a 25% chance of experiencing severe pain. Thus, Yun’s testimony that he had never seen a patient in all of the times he had injected etomidate, i.e., a zero percent chance has now

brief flash of mild to moderate pain which of course he had never seen in the numerous time he had used etomidate. Again, Yun's testimony is undermined by what occurred in the Branch execution. The time frame of Branch's distress and severity of pain was clearly longer than the seconds and level of pain hypothesized by Yun; it resulted in guttural screaming.

The State also repeatedly argues that Jimenez presented no persuasive evidence to undermine the evidence presented in *Asay*. *See* AB at 34. However, apparently lost on the State is the fact that Jimenez had no opportunity to present his evidence. Contrary to what the State seems to suggest, Jimenez was not required to prove his claim in his pleading. Rather, Jimenez presented numerous, factual allegations that are supported by the record which undermine the evidence presented in *Asay* and, at a minimum, entitle him to an evidentiary hearing. Jimenez alleged that Branch experienced severe pain and was in "distress". This lasted for a minute or more and significantly impeaches the State's evidence in *Asay* and renders that Yun's testimony not credible.

Additionally, as the State concedes, Jimenez presented allegations to counter the evidence presented by the Yun, i.e., the 200mg dose of etomidate will wear off extremely quickly. *See* AB 34. This is not speculative as Lubarsky explained the formula for determining when a particular dose of etomidate wears off (6PC-R. 334-5). Further, contrary to the State, Lubarsky's calculation did account for the increased dose of etomidate being

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morphed to a 25% chance as acceptable.

used in lethal injections (6PC-R. 334-5). Lubarsky's expertise and research undermines the testimony of Yun at the *Asay* evidentiary hearing. The State's refusal to accept Jimenez's proffer and factual allegations as true requires an evidentiary hearing.

Further ignored by the State is Warden John Palmer's testimony at the *Asay* evidentiary hearing which is also inconsistent with the evidence of how long the executions of Lambrix, Hannon and Branch took. The State attempts to shorten the time in Branch (even so it is still significantly longer than the time to which Palmer testified), failing to consider that phase three was completed at 7:03 p.m., meaning that the last syringe of potassium acetate had been completely injected at that time. *See* AB at 36, 39, n. 9. Even, by giving the State the benefit of the doubt, the execution still took 15 minutes from the first injection until the last syringe was injected. That time frame is simply too short in light of the speed with which the etomidate wears off to confidently state that the etomidate would effectively prevent the excruciating pain from the potassium acetate.

Finally, the State apparently wants this Court to disregard Friedman's affidavit stating that he observed Branch in "obvious distress" and Lubarsky's affidavit and opinion that: "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 is not assured to work." (6PC-R. 334). Thus contrary to the State's argument, Jimenez's factual allegations are different than the evidence presented in *Asay* because we now know what happens 25% of the time when an individual is injected with such a massive dose of etomidate. Moreover, this Court has consistently ordered evidentiary hearings when there is new evidence from a recent irregular execution that may have caused the condemned to suffer pain.

As to the movement of Branch, while the State wishes to ignore Friedman's affidavit and assert that the movement was consistent with myoclonus, i.e. "involuntary twitching or movement", *see* AB at 38, that is simply not consistent with Friedman's observation, the newspaper account that Branch was thrashing about on the gurney or Lubarsky's affidavit as to his opinion about what the movement indicates.[18] Myoclonus is distinct from voluntary movement that occurs in a reaction to pain.

The State repeatedly characterizes Jimenez's allegations as

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[18]The State refuses to take Jimenez's allegations as true and prefers to argue as if an evidentiary hearing had occurred. There is no evidence or information before this Court indicating that Branch's movements, after the initial injection of etomidate, were myoclonus. Further, there is no contradiction in Lubarsky's affidavit. *See* AB at 38. Based on the time frames, Branch's screaming and yelling and the movement described by Friedman, Lubarsky concluded that the movement was not myoclonus, but evidence of conscious pain and suffering. Lubarsky also indicated that generally myoclonic movement complicate the consciousness check because they are difficult. Those statements are mutually exclusive of one another and are consistent.

evidence. *See* AB at 39. However, Jimenez had no opportunity to present evidence before the circuit court. Thus, the argument that the circuit court could appropriately make findings of fact contrary to Jimenez's allegations is erroneous. *See* AB at 39. *See Pardo*, 108 So. 3d at 560-61.

At its core, the State is arguing that the circuit court's reading of *Asay* is right, i.e. that this Court ruled that the eighth amendment is not violated when it is certain that in 25% the executions in which etomidate is used there will be severe pain and screams of pain will be heard from the condemned as the etomidate is administered and he is executed. The State argues and the circuit court concluded that the risk of screams from the condemned in 25% of the executions is quite acceptable.[19] *See* AB at 36. So, the refusal to conduct an evidentiary hearing comes down to this question: does *Asay* stand for the proposition that this Court has approved as okay screams of pain from a condemned inmates upon the injection of a massive dosage of etomidate in 25% of Florida's execution.[20]

However, again, the State's posited analysis neglects the fact that there are numerous alternatives that present no risk of harm – they have been litigated, practiced and proven to

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[19]Indeed, the State's reference to Branch as a serial rapist and murderer before the circuit court suggests that the State is justifying Branch's screams as warranted and in accord with the eighth amendment.

[20]Of course, the condemned inmates will now be on notice that in their execution they have a one in four chance to be the one who will be screaming in pain as he is executed. That will add some psychological torture even for the lucky 75% who do not get to feel the severe pain when etomidate is injected.

accomplish executions with almost no risk of pain from the chosen lethal drugs.[21]

The State's reference to *Glossip*, *see* AB at 43, implies that the State wants to sell this Court on the idea that compounded pentobarbital is not available to DOC. But, the State is peddling

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[21]The State criticizes Jimenez's counsel for having previously challenged drugs used in lethal injection (pentobarbital and midazolam), but now suggesting that they be used as alternatives to etomidate as the first drug, i.e., the anesthetic. The State gratuitously asserts "Apparently, the argument offered by counsel for the condemned are designed to stop executions rather than offering a consistent challenge to the drugs utilized in the lethal injection protocol." *See* AB at 26, n.4. First, the State ignores the fact that counsel is required to represent clients and present the claims and arguments available to the individual client. Moreover, Jimenez's counsel could turn the State's argument around as say do not believe any of the Assistant Attorney General's who argue against a lethal injection claim because all they are concerned with is hoodwinking this Court into not staying an execution. But, it would not be an appropriate argument to make except in response to the ludicrous and offensive argument put forth in the Answer Brief.

Moreover, what the State fails to mention is that in both instances, the adoption of pentobarbital and midazolam had not been previously challenged and according to experts had limitations in their use as the anesthetic in a lethal injection protocol. However, over time as both pentobarbital and compounded pentobarbital were used in executions in Florida and other states, numerous executions were completed without incident. In the case of compounded pentobarbital, it has been used as the sole drug in ten of the fourteen executions this year, all without incident. In the case of midazolam, a dozen executions were conducted in Florida, none of which resulted in any irregularities or botches. Also, after the litigation in *Muahmmad*, extensive evidentiary development was conducted on midazolam in Oklahoma, after which the U.S. Supreme Court found that midazolam had not been shown to entail a substantial risk of severe pain. *Glossip v. Gross*, 135 S.Ct. 2726 (2015). Furthermore, during the evidentiary hearing in *Asay*, the State's experts lauded the efficacy of midazolam as an anesthetic in a lethal injection protocol. Despite these developments, DOC abandoned midazolam without explanation, though it is readily available. And, there is no evidence that compounded pentobarbital or midazolam carries the risk of any pain upon injection. But, etomidate does. Thus, the State's anserine accusations are based on ignorance rather than reason.

a false and misleading claim. Given the opportunity, Jimenez would prove that compounded pentobarbital, midazolam and nitrogen gas are readily available for use by the DOC in executions. The State attempts to hide these facts from this Court and hope that the Court will not provide Jimenez an opportunity to prove his alternatives, pursuant to *Glossip*. The State's game playing is misleading and unethical. The State is well aware that these drugs are available and DOC is well aware that these drugs present significantly less risk of harm than etomidate. The deliberate indifference toward Jimenez is real and it violates the eighth amendment.

Finally, the State's argument is fundamentally flawed in that it is the State's contention that: "[t]here were not irregularities during Branch's execution." Branch's forced guttural screams which were accompanied by shaking or thrashing as well as other movements cannot be characterized by any reasonable individual to not be considered irregularities. Indeed, FDLE's refusal to acknowledge the irregularity and conduct some review as counsel for FDLE stated below is itself a demonstration of a fear that to do so and acknowledge a problem is a fear that it will mean an evidentiary hearing will be ordered by this Court. Likewise, though the State disputes it, *see* AB at 35, the description of the movement that occurred during the Lambrix and Hannon executions was also irregular.

DOC's extreme measures to hide any irregularities[22] and use of an unnecessary paralytic in its protocol must also be considered when determining whether DOC has acted deliberately indifferent to the substantial risk of pain.

ARGUMENT III: THE THREE DRUG PROTOCOL

The State continues to mislead this Court in arguing that Jimenez has proposed a one-drug alternative using pentobarbital, without identifying the fact that Jimenez specifically stated the alternative of pentobarbital or compounded pentobarbital. *See* AB at 44. Certainly, the State is aware that compounded pentobarbital is readily available to DOC.

Likewise, the State clings to the outdated rationales set forth in the plurality opinion in *Baze v. Rees*. *See* AB at 45-46. However, the State misses the point of Jimenez's argument, i.e., that the changes that have been made in recent years to a one-drug protocol have been implemented in order to comply with the evolving standards of decency. Thus this shift by the states not only undermines the plurality opinion in *Baze*, but also establishes the "deliberate indifference" to Jimenez and other similarly situated condemned inmates in the State of Florida. The refusal to modify the arcane three-drug protocol can rise to the level of cruel and unusual punishment within the meaning of the

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[22]The State contends that these measures were related to privacy and security rationales. *See* AB at 43-44. However, that assertion is meaningless and pure speculation without an evidentiary hearing. There is no reasonable explanation for DOC's recent changes, made after the *Asay* evidentiary hearing, other than the fact that DOC expects pain and suffering because of the use of etomidate and hopes to hide Jimenez's reactions to the drug.

Eighth Amendment, because it "constitutes the 'unnecessary and wanton infliction of pain,'" contrary to contemporary standards of decency. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). This is true as to the use of the paralytic, too.

The State also clings to this Court's prior opinions as to the constitutionality of a three drug protocol without accepting that at some point a tipping point is met and a procedure previously said to comply with the eighth amendment no longer does. Jimenez submits that the tipping point has been reached.[23]

Furthermore, the State's argument ignores the most critical part of a method of execution analysis as set forth in *Baze:*:

> 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).

Jimenez has proposed several alternatives, using drugs like

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[23]Interestingly, the State relies on the *Glossip* opinion which referenced the botched one-drug execution in Arizona of Joseph Wood as a basis to uphold Florida's three-drug protocol. However, Arizona's response to the Wood execution was not to return to a three-drug protocol. In fact, following the investigation of the Wood execution, 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). Thus, one of the lessons of the Wood execution is to remove the paralytic.

compounded pentbarbital, midazolam or nitrogen gas. All of these drugs are readily available to DOC. Given the opportunity to present evidence, Jimenez would do so.

ARGUMENT IV: *LACKEY*

The State faults Jimenez and other similarly situated defendants for the delay in execution due to the fact that they continually challenge their convictions and sentences. *See* AB at 57. Consequently, the State asserts that a defendant such as Jimenez may not premise a constitutional claim based in large part on his own conduct. *See* AB at 58.

Jimenez submits that the State's argument misses the point. As Justice Breyer explained in *Glossip*, 135 S.Ct. at 2764, while the delays in capital cases are often necessary to pass constitutional muster, they do not change the fact that defendants suffer in a cruel and unusual manner as a result:

> The problems of reliability and unfairness 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. That is to say, delay is in part a problem that the Constitution's own demands create. Given the special need for reliability and fairness in death penalty cases, the Eighth Amendment does, and must, apply to the death penalty "with special force." *Roper*, 543 U. S., at 568. Those who face "that most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution." *Hall v. Florida*, 572 U.S. ___, ___ (2014) (slip op., at 22). At the same time, the Constitution insists that "every safeguard" be "observed" when "a defendant's life is at stake." *Gregg*, 428 U. S., at 187 (joint opinion of Stewart, Powell, and Stevens, JJ.); Furman, 408 U. S., at 306 (Stewart, J., concurring) (death "differs from all other forms of criminal punishment, not in degree but in kind"); *Woodson*, supra, at 305 (plurality opinion) ("Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from

> one of only a year or two”).
>
> These procedural necessities take time to implement. And, unless we abandon the procedural requirements that assure fairness and reliability, we are forced to confront the problem of increasingly lengthy delays in capital cases. Ultimately, though these legal causes may help to explain, they do not mitigate the harms caused by delay itself.

(Breyer, J., joined by Ginsburg, J., dissenting).

Justic Breyer proceeded to summarize many of the problems cause by delays in capital case:

> Turning to the first constitutional difficulty, nearly all death penalty States keep death row inmates in isolation for 22 or more hours per day. American Civil Liberties Union (ACLU), A Death Before Dying: Solitary Confinement on Death Row 5 (July 2013) (ACLU Report). This occurs even though the ABA has suggested that death row inmates be housed in conditions similar to the general population, and the United Nations Special Rapporteur on Torture has called for a global ban on solitary confinement longer than 15 days. See *id.*, at 2, 4; ABA Standards for Criminal Justice: Treatment of Prisoners 6 (3d ed. 2011). And it is well documented that such prolonged solitary confinement produces numerous deleterious harms. See, e.g., Haney, Mental Health Issues in Long-Term Solitary and “Supermax” Confinement, 49 Crime & Delinquency 124, 130 (2003) (cataloguing studies finding that solitary confinement can cause prisoners to experience “anxiety, panic, rage, loss of control, paranoia, hallucinations, and self-mutilations,” among many other symptoms); Grassian, Psychiatric Effects of Solitary Confinement, 22 Wash U. J. L. & Policy 325, 331 (2006) (“[E]ven a few days of solitary confinement will predictably shift the [brain’s] electroencephalogram (EEG) pattern toward an abnormal pattern characteristic of stupor and delirium”); accord, *In re Medley*, 134 U. S. 160, 167-168 (1890); see also *Davis v. Ayala*, ante, at 1-4 (KENNEDY, J., concurring).
>
> The dehumanizing effect of solitary confinement is aggravated by uncertainty as to whether a death sentence will in fact be carried out. In 1890, 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.” *Medley*,

> supra, at 172. The Court was there *describing a delay of a mere four weeks*. In the past century and a quarter, little has changed in this respect— except for duration. Today we must describe delays measured, not in weeks, but in decades. *Supra*, at 18-19.

Glossip, 135 S.Ct. at 2766 (Breyer, J., joined by Ginsburg, J., dissenting) (emphasis in original).

In following up on its original argument, the State claims that when defendants waive their proceedings, their executions do not take decades to occur. *See* AB at 58. The State's argument again misses the point. It is the very thought of the cruel and unusual punishment laying ahead that causes many capital defendants to take matters into their own hands and bypass their constitutional protections:

> Furthermore, given the negative effects of confinement and uncertainty, it is not surprising that many inmates volunteer to be executed, abandoning further appeals. See, e.g., ACLU Report 8; Rountree, Volunteers for Execution: Directions for Further Research into Grief, Culpability, and Legal Structures, 82 UMKC L. Rev. 295 (2014) (11% of those executed have dropped appeals and volunteered); ACLU Report 3 (account of "`guys who dropped their appeals because of the intolerable conditions'"). Indeed, one death row inmate, who was later exonerated, still said he would have preferred to die rather than to spend years on death row pursuing his exoneration. Strafer, Volunteering for Execution: Competency, Voluntariness and the Propriety of Third Party Intervention, 74 J. Crim. L. & C. 860, 869 (1983). Nor is it surprising that many inmates consider, or commit, suicide. *Id.*, at 872, n. 44 (35% of those confined on death row in Florida attempted suicide).

Glossip, 135 S.Ct. at 2766 (Breyer, J., joined by Ginsburg, J., dissenting).

ARGUMENT V: RULE 3.800(a)

The State offers a number of procedurally based objections to Jimenez's argument that his life sentence is an illegal one.

Included in these arguments are the following: A Rule 3.800(a) motion is not the appropriate method to challenge the conviction; a Rule 3.800 motion cannot be used to evade the requirements of Rule 3.850/3.851; the issue is procedurally barred since it was raised previously; and Jimenez has not stated a new claim upon which relief can be predicated. *See* AB at 58-61.

Jimenez disagrees with the State's various assertions. First, the State fails to recognize the distinctions in the three subdivisions of Rule 3.800, which in actuality provide a potential remedy or avenue for sentencing relief for three different circumstances. What serves as a basis for 3.800(a) relief is different than what is a basis for seeking 3.800(b) relief, and more different than what 3.800(c) is all about.

Rule 3.800(a) provides that "[a] court may at any time correct an illegal sentence." This subdivision can only be successfully invoked when the sentence being challenged is illegal. Further, the illegality must be apparent from the face of the record. *Plott v. State*, 148 So. 3d 90, 93 (Fla. 2014); *Spellers v. State*, 224 So. 3d 303 (Fla. 5th DCA 2017). Unlike motions filed under Rule 3.800(b) and/or 3.800(c), motions filed under Rule 3.800(a) can be filed at any time because the "court may at any time correct an illegal sentence." The significance of this distinction can be readily seen by looking at the time limits contained in Rule 3.800(b) and 3.800 (c).[24]

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[24]Subdivision (b) provides a means of correcting any sentencing error and specifically includes a "scrivener's error" or a mathematical error in computing "incorrect jail credit."

Another aspect of Rule 3.800(a) that is distinct is the absence of any language indicating that it is inapplicable to those cases in which a death sentence has been imposed. By comparison, Rule 3.800(b) provides "**[t]his subdivision** shall not be applicable to those cases in which the death sentence has been imposed and direct appeal jurisdiction is in the supreme court." (Emphasis added). And, Rule 3.800(c) provides "**[t]his subdivision** shall not be applicable to those cases in which the death sentence is imposed or those cases in which the trial judge has imposed the minimum mandatory sentence or has no sentencing discretion." (Emphasis added).

In addition to failing to recognize the aforementioned distinctions, the State misconstrues the actual argument being made by Jimenez. For instance, the State cites to a number of cases which concern instances where the Rule 3.800(a) motion was found to be a challenge to the sufficiency of the evidence supporting a conviction.[25]

However, unlike the motions at issue in the cases cited by the State, Jimenez's Rule 3.800(a) motion is not a challenge to

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Subdivision (b) envisions that an evidentiary hearing may be needed to prove the sentencing error. "The motion must identify the error with specificity and provide a proposed correction. In contrast to subdivision (a) and subdivision (b), subdivision (c) provides sentencing courts with the limited ability to modify or reduce a sentence it imposed within 60 days the imposition of the sentence or within 60 days of the end of the direct appeal proceedings. A 3.800(c) motion is an appeal the sentencing judge's sentencing discretion.

[25]*See* AB at 61, citing to *Jones v. State*, 78 So. 3d 675 (Fla. 4th DCA 2012); *Edwards v. State*, 35 So. 3d 121 (Fla. 4th DCA 2010); and *Prince v. State*, 903 So. 2d 1068 (Fla. 2nd DCA 2005).

the sufficiency of the evidence. Rather, he is challenging the legality of his life sentence for conduct that the Florida Supreme Court in *Delgado v. State*, 776 So. 2d 233, 240 (Fla. 2000), held that the burglary statute had not intended to criminalize ("burglary was not intended to cover the situation where an invited guest turns criminal or violent."). **Surely, it is illegal to impose a life sentence upon an individual for conduct that this Court specifically held in *Delgado* was not meant to be criminalized**. *Delgado v. State*, 776 So. 2d at 240-41 ("burglary was intended to criminalize the conduct of a suspect who terrorizes, shocks, or surprises the unknowing occupant. *** appellant's actions are not the type of conduct which the crime of burglary was intended to punish.").

The State also claims that this is the exact issue that was raised previously in Jimenez's amended postconviction challenge. *See* AB at 59-60. While it is true that the amended 3.850 motion was premised upon the decision in *Delgado*, the relief sought was "a new trial or a new penalty proceeding in the first degree murder count and the conviction for burglary with an assault must be vacated." Jimenez's Rule 3.800(a) motion asserts that the life sentence for an armed burglary of an occupied dwelling is illegal and must be vacated. At issue in his 3.800(a) motion is the legality of his life sentence for conduct that this Court in *Delgado* held that the burglary statute did not intend to punish.

It should also be noted that the Eighth and Fourteenth Amendment arguments made in Jimenez's Rule 3.800(a) motion were not advanced in the amended 3.850 motion, nor in the briefing

filed in Jimenez's appeal from the denial of Rule 3.850 relief. At that time, the decisions in *Bunkley v. Florida*, 538 U.S. 835 (2003), *Schriro v. Summerlin*, 542 U.S. 348 (2004), and *State v. Barnum*, 921 So. 2d 513, 521 (Fla. 2005), had not been rendered.

In any event, the State's response cites no case law to support the argument it seems to make that the reliance on *Delgado* in the Rule 3.850 motion filed in 2000 bars Jimenez's Rule 3.800(a) motion. The State does not address the language in Rule 3.800(a) allowing a motion at any time, or the recent decision in *Plott v. State*, 148 So. 3d 90, 93 (Fla. 2014).

Further, the State claims that Jimenez is "assert[ing] that a new substantive right was created by *Delgado* requiring it to be applied retroactively to his burglary sentence." *See* AB at 62. Thus, according to the State, the U.S. Supreme Court's decision in *Fiore v. White*, 531 U.S. 225 (2001), is inapplicable. **The State's argument is wholly erroneous and grossly misrepresents the crux of Jimenez's actual argument.** Jimenez's claim concerns the statute and what constituted the substantive criminal offense of burglary in 1992. The argument is based on the Florida Supreme Court's decision in *Delgado* which did not change the law; rather, it merely explained what the statute was meant to criminalize when it was enacted, or certainly effective in 1990, the time of Delgado's conduct which had not been criminalized by the statute. *See Bousley v. United States*, 523 U.S. 614, 625 (1998) (Stevens, J., concurring in part and dissenting in part). Thus, contrary to the State's argument, Jimenez is actually asserting that it is error to apply *Witt v. State*, 387 So. 2d 922 (Fla. 1980), to a

decision concerning substantive law, i.e. the statutory definition of a criminal offense. *Delgado* concerned what conduct the statute was intended to criminalize and whether it fits within a criminal offense defined by Florida's substantive law. *See State v. Barnum*, 921 So. 2d 513, 521 (Fla. 2005); *Bunkley*, 538 U.S. at 841-42.

The State also takes umbrage at Jimenez's citation to *Johnson v. Mississippi*, 486 U.S. 578 (1988), in support of his assertion that a ruling that the burglary conviction and sentence are illegal would allow him to challenge his death sentence. *See* AB at 64-65. Indeed the State attempts to distinguish the facts of *Johnson* from Jimenez's case. *See* AB at 64-65. In doing so, the State ignores the prosecutor's penalty phase closing in Jimenez's case regarding the in the course of a burglary aggravating circumstance: "By your own verdict, by your own decision, finding him guilty of burglary, we know that has been met." (T. 1090). Based upon the existence of the automatic aggravators, the prosecutor told the jury: "Our 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." (T. 1095).

The State also overlooks what the U.S. Supreme Court stated in *Johnson* regarding granting collateral relief when the reliability of a death sentence has been called into question: "We do not share the Mississippi Supreme Court's concern that its procedures would become capricious if it were to vacate a death sentence predicated on a prior felony conviction when such a conviction is set aside. * * * To the contrary, especially in the

context of capital sentencing, it reduces the risk that such a sentence will be imposed arbitrarily." 486 U.S. at 587.

Finally the State cites to *Carter v. State*, 980 So. 2d 473 (Fla. 2008), which concerned an attack on the 2001 revision of the burglary statute. *See* AB at 65. However, *Carter* is totally irrelevant as the burglary at issue there occurred in 2002 after the legislature explicitly amended the statute to make clear that it intended the statute to apply where an invited guest turns criminal or violent. *See Carter*, 980 So. 2d at 481 ("The 2001 amendment to the burglary statute was intended to repudiate this Court's decision in *Delgado v. State*, 776 So.2d 233 (Fla.2000), and to clarify, not broaden, the definition of burglary."). The fact is that the Ex Post Facto Clause precludes a legislature from broadening the scope of a criminal statute and to make conduct criminal that previously was not criminal and apply the broadened statute to conduct that occurred before the enactment of the broadened statute.

CONCLUSION

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.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing reply brief has been electronically furnished to opposing counsel of record, on this 9th day of August, 2018.

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

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