DOCKET NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

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JOSE ANTONIO JIMENEZ,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

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PETITION FOR WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

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QUESTIONS PRESENTED--CAPITAL CASE

1. Whether a defendant's personal knowledge of an exculpatory or favorable fact relieves the State of its duty to disclose evidence in its possession proving the existence of the favorable fact and demonstrating the police have dishonestly denied the existence of the exculpatory or favorable fact?

2. Whether a defendant's personal knowledge of information showing his innocence relieves the State of its duty to disclose exculpatory evidence proving or supporting the defendant's innocence?

3. Whether the materiality prong of the *Brady* analysis requires a reviewing court to consider how the undisclosed information would have affected counsel's strategic choices and what the jury would have been entitled to find if it had heard the undisclosed information impeaching the credibility of the police and the investigation the police had conducted?

4. When a police officer knowingly testifies falsely in a deposition and thereby misleads defense counsel, does that constitute a violation of due process under the *Giglio* line of cases?

5. Whether under *Glossip v. Gross*, 576 U. S. ____ (2015), the consideration of the severity and duration of pain likely to be produced under the existing lethal injection protocol and the consideration of whether the availability of an alternative has adequately been shown are to be evaluated holistically or are they separate and distinct steps?

6. Whether the known probability that some, not all, of those who are executed under a lethal injection protocol will experience pain and the mental anguish the condemned will feel in anticipating that he or she might be one of the unlucky ones who will experience the pain must be considered in determining whether use of such a protocol violates the Eighth Amendment?

7. Whether a condemned inmate must show that a readily available alternative exists if he has established that the existing method of execution creates a substantial risk of severe pain?

8. Whether other states' use of a method of execution satisfies a condemned inmate's burden to establish a readily available alternative?

9. When a condemned inmate's screams as the first drug in the three-drug protocol is administered and the manufacturer has warned that its administration occasionally causes severe pain, can an Eighth Amendment challenge that relies on the inmate's screams as demonstrative of the infliction of pain be dismissed on the grounds that the claim rests on speculation?

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PETITION FOR WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

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Petitioner, **JOSE ANTONIO JIMENEZ,** is a condemned prisoner in the State of Florida. Petitioner respectfully urges that this Honorable Court issue a writ of certiorari to review the decision of the Florida Supreme Court issued on October 4, 2018.

CITATION TO OPINION BELOW

The Florida Supreme Court's opinion appears at *Jimenez v. State*, __ So. 3d __, 2018 WL 4784203 (Fla. 2018). The opinion is attached to this Petition as Attachment A.

STATEMENT OF JURISDICTION

Petitioner invokes this Court's jurisdiction to issue a writ of certiorari to the Florida Supreme Court on the basis of 28 U.S.C. § 1257. The petition asks this Court to review the Florida Supreme Court's decision issued on October 4, 2018.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides in relevant part:

> No persons . . . shall . . . be deprived of life, liberty or property, without due process of law.

The Sixth Amendment to the Constitution of the United States provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.

The Eighth Amendment to the Constitution of the United States provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the Constitution of the United States provides in relevant part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

Jose 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. Two women who lived in apartments next to the victim's second floor apartment heard noises coming from the victim's apartment at about 8:10 p.m.[1] 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.[2] Alarmed, the women called the police. At 8:21 p.m., the police arrived and obtained a key to the victim's apartment. Upon entering, the victim, Phyllis Minas, was discovered lying on the floor in a pool of blood. She had been stabbed. Upon arrival at the hospital, she was pronounced dead.

Jimenez's trial began on October 3, 1994. The State's case was circumstantial as the State would concede in closing argument (T. 891).[3] Four circumstances were cited: 1) A fingerprint on the inside of the apartment's front door was matched to Jimenez; 2) a witness, the building's custodian, testified that he saw Jimenez jump from a second floor balcony of an apartment next to the

---

[1]The two women had returned to the apartment complex with groceries at about 7:55 p.m., and had seen Jimenez in the parking lot as he descended the stairs from the second floor.

[2]At Jimenez's trial, the State argued that the victim's assailant was in her apartment and was the one to push the front door shut while the two women stood outside the door at 8:10 p.m.

[3]No one saw Jimenez enter or exit Minas' apartment. The front door opened onto a catwalk that ran the length of the second floor. A patio door opened on to a balcony on the back side of the apartment. The victim's balcony was separated from her neighbor's balcony by just a foot or so which made it easy for someone to go from one balcony to another.

victim's apartment between 7:45 p.m. and 8:00 p.m.;[4] 3) the medical examiner's opinion that it was likely that the assailant was right handed; and 4) when speaking with his probation office on October 5, Jimenez said that police wanted to speak with him about a stabbing, and at that time the State asserted only the assailant would have known that the victim had been stabbed.[5]

The defense argued in its guilt phase closing that Jimenez did not stab nor kill Minas. As to the armed burglary count, the defense 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 rebuttal, 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).

On October 6, 1994, the jury found Jimenez guilty on both

---

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

[5]Detective Ojeda, the lead detective, testified that before Jimenez's arrest on October 5, he had not told witnesses how Minas was killed (T. 753). But of course, witness Virgina Taranco testified that on the night of the crime, witness Ponce told her that "the neighbor across from Phyllis, that she had seen her laying on the floor and there was some blood on her" (T. 626). Taranco herself testified that after the police arrived and the door was open, she could also see "there was blood on her" (T. 627). She later clarified that it was "a lot of blood" and knew that Minas did not merely have a heart attack given the blood that she observed (T. 642; 644).

counts of the indictment (T. 957). On November 10, 1994, a penalty phase was conducted, and the jury returned a unanimous death recommendation (R. 487). On December 14, 1994, the judge followed the jury's recommendation and imposed a sentence of death (R. 529; T. 1138). On direct appeal, the Florida Supreme Court affirmed the judgment and sentence. *Jimenez v. State*, 703 So. 2d 437 (Fla. 1997), *cert. denied*, 523 U.S. 1123 (1998).

On January 31, 2000, Jimenez filed a motion to vacate under Rule 3.851 (1PC-R. 29-36). After it was amended, the trial court summarily denied the motion on June 8, 2000. (1PC-R. 91). On appeal, the Florida Supreme Court affirmed. *Jimenez v. State*, 810 So. 2d 511 (Fla. 2001), *cert. denied*, 535 U.S. 1064 (2002).

On December 11, 2002, Jimenez filed a petition for a writ of habeas corpus which presented the Florida Supreme Court with a number of issues. On June 10, 2003, the court denied the petition in an unpublished opinion. *Jimenez v. Crosby*, 861 So. 2d 429 (Fla. 2003).

On May 24, 2004, Jimenez filed another petition for a writ of habeas corpus. It relied upon new case law receding from the Florida Supreme Court's basis for affirming Jimenez's burglary conviction in his direct appeal. On March 18, 2005, the Florida Supreme Court issued an order denying the petition without any written explanation.

On January 20, 2004, Jimenez sought habeas relief in federal district court. His petition was denied on January 30, 2006. When he sought to appeal, the district court denied him a certificate of appealibility (COA). The Eleventh Circuit issued an opinion

denying a COA on March 23, 2007. *Jimenez v. Florida Dep't of Corrections*, 481 F.3d 1337 (11th Cir. 2007), *cert. denied*, 552 U.S. 1029 (2007).

Jimenez filed a second Rule 3.851 motion on April 28, 2005, which included claims alleging *Brady* violations and ineffective assistance of counsel (2PC-R. 68-93). The motion was summarily denied on September 9, 2005. After Jimenez appealed, the Florida Supeme Court affirmed on June 19, 2008. *Jimenez v. State*, 997 So. 2d 1056 (Fla. 2008).

On November 29, 2010, Jimenez filed a third Rule 3.851 motion premised on the ruling in *Porter v. McCollum*, 558 U.S. 30 (2009). Relief 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 (3PC-R. 211-13). After Jimenez appealed, the Florida Supreme Court affirmed on October 29, 2014. *Jimenez v. State*, 153 So. 3d 906 (Fla. 2014), *cert. denied*, 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 the Florida Supreme Court's decision in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). The circuit court denied relief on November 28, 2017.

On June 28, 2018, the Florida Supreme Court affirmed. *Jimenez v. State*, 247 So. 3d 395 (Fla. 2018). Jimenez filed a motion for rehearing which the 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. It included a challenge to Florida's lethal injection protocol as a result of accounts of the February 2018 execution of Eric Branch. Jimenez's motion was summarily denied by the circuit court on July 31, 2018. After he appealed that ruling, Jimenez filed a seventh postconviction motion on August 6, 2018, based on newly disclosed records alleged to show due process violations under *Brady v. Maryland* and *Giglio v. United States*. The circuit court denied the motion on August 9, 2018.

On August 10, 2018, the Florida Supreme Court stayed Jimenez's scheduled execution and set a briefing schedule. On October 4, 2018, the Florida Supreme Court affirmed the denial of relief as to both of Jimenez's postconviction motions. *Jimenez v. State*, __ So. 3d __, 2018 WL 4784203 (Fla. 2018). In its opinion, the Florida Supreme Court also lifted the stay of execution.

On November 25, 2018, the Florida Governor reset Jimenez's execution for December 13, 2018.

FACTS RELEVANT TO QUESTIONS PRESENTED

A. PREVIOUSLY UNDISCLOSED RECORDS SHOW *BRADY/GIGLIO* VIOLATIONS

After his death warrant was signed on July 18, 2018, Jimenez sought access to records of the North Miami Police Department (NMPD) regarding his case. On July 20, 2018, the NMPD sent all of its records on Jimenez's case to the records repository. After the repository received the NMPD records on July 25, 2018, the trial court at Jimenez's request on July 30 granted him access to the records the NMPD had just sent to the repository.

Jimenez then reviewed the NMPD records that the repository received on July 25, 2018. He compare them to the records that the NMPD had sent in 1999 which had previously been available to him. He discovered 81 handwritten pages of material in the records sent by the NMPD in 2018, which had not been provided when the NMPD was to have sent all of its records to the repository in 1999. Upon a review of the previously undisclosed 81 pages, Jimenez discovered that they contained previously undisclosed information that was favorable to Jimenez's defense, and some of the 81 pages showed the lead police detectives had given testimony in depositions that was materially inaccurate.

The information discovered in the previously undisclosed 81 pages can be broken down as follows:

1. Jimenez's statement to the police. Within the 81 pages of newly undisclosed NMPD records were the handwritten notes of two detectives regarding their conversation with Jimenez after his arrest on October 5, 1999. The handwritten notes show that Detectives Diecidue and Ojeda in their depositions gave false or, at best, misleading testimony regarding what occurred when they met with Jimenez several hours after his arrest. The notes also show inaccuracies in Ojeda's trial testimony and in the police reports provided to trial counsel regarding what if any information Jimenez gave to the police following his arrest.

At trial, Detective Ojeda testified that prior to Jimenez's arrest, Ojeda had only told Jimenez that he just wanted to talk with him about "some burglaries." Ojeda testified that he did not mention a stabbing to Jimenez. So when Rochelle Baron, Jimenez's

probation officer, testified that Jimenez said that the police wanted to talk with him about a "stabbing," the State argued that Jimenez's reference to a "stabbing" showed guilty knowledge, *i.e*, Ojeda said no one had been told that Minas had been stabbed. In closing argument, Jimenez's reference to stabbing was cited as key circumstantial evidence,"that is why we're here":

> We're also here because I learned again, checking my notes that Mr. Matters failed to mention something else, that was **what Detective Ojeda said. He talked to the defendant**, and he went to see him about the burglary, and **he was careful to only mention burglary**, and when the defendant was in his house or his parents' home and the police were waiting outside he called Rochelle Baron, and he tells her they say I stabbed someone, and Ms. Baron wrote that down on her calendar. They say I stabbed someone not that I shot someone, beat someone or kicked someone. I stabbed **someone. That is why we're here.**

(T. 880) (emphasis added).

Because Jimenez's reference to a stabbing became an essential piece of the State's case, Ojeda's credibility was critical. It was his testimony that he never mentioned anything about a stabbing to Jimenez and his testimony that he told no one prior to Jimenez's October 5 phone call with Baron that the victim had been stabbed. Any evidence showing that Ojeda fudged his testimony in order to strengthen the State's case did not just undercut the reliability of the police investigation, it undercut the lynchpin of the State's circumstantial case.

On October 5, 1992, Ojeda and Diecidue armed with an arrest warrant went looking for Jimenez. They went to his parents' home in Miami Beach where they expected to find Jimenez. When no one answered the door, they left a card asking Jimenez to call. They

then went to the Miami Beach Police Department to look for more information regarding Jimenez's family. They found an address for where Jimenez's father worked. On the way there, Ojeda was paged and told that Jimenez had seen the card that was left and called the police station to talk with him. Ojeda then called Jimenez.

At trial, Ojeda testified that he told Jimenez that he wanted to talk with him about "some burglaries" and asked if he could go to the station or agree to have Ojeda pick him up (T. 749).[6] Jimenez said he was busy, but he would come in the next day (*Id*). After the call ended, Ojeda requested that a perimeter be set up around the parents' house. Ojeda and Diecidue headed there at about 1:15 p.m. (*Id.*). Ojeda called Jimenez back and told him he did not want to wait. Jimenez asked if Ojeda had an arrest warrant (T. 750). Ojeda said that he did, and told Jimenez that the house was surrounded (*Id.*). About 15 minutes later, Jimenez came out. He said that he had been talking to someone on the phone (T. 752).[7] Jimenez was arrested and then taken to the police station (*Id.*).

---

[6]In his deposition, Ojeda testified that when he told Jimenez that "we wanted to speak with him with regard to some burglaries in North Miami," Jimenez said that "he didn't know anything about any burglaries" and that "he had been arrested before" and "didn't trust the police because they lie" (7PC-R. 482). Jimenez pointed out specifically that "he had had problems with Miami Beach PD and he didn't trust the police. That's all he kept saying" (*Id.*).

[7]Ojeda also testified that was he spoke with Rochelle Baron, who was Jimenez's probation officer and learned she was the person with whom Jimenez had been talking to before coming out of his parents' home. Ojeda spoke with Baron on October 7, 1992 (T. 752). She testified at Jimenez's trial that when they spoke on October 5, he had said that the police wanted to talk to him about a stabbing.

In his deposition, Diecidue testified that a couple of hours later at 3:55 p.m., he and Ojeda went into an interview room where Jimenez was waiting in order to question him. (7PC-R. 399-400). In his deposition, Diecidue testified:

> Q What happened?
>
> A He had a soda. We asked him if he wanted anything to eat. He said no. He was advised he was under arrest for first degree murder. He became upset with that.
>
> Q Let me ask you, **was he questioned at all or spoken to before he was advised he was under arrest?**
>
> A **No, no.** Oh, name address, telephone number, date of birth.
>
> Q General information?
>
> A General information.
>
> Q **Anything regarding the case?**
>
> A **No.**
>
> Q Was he given anything to look at?
>
> A Like what?
>
> Q Photographs or anything to look at?
>
> A No.
>
> Q So after he sat down he was asked his name and vital statistics, basically?
>
> A Right.
>
> Q And then he was read Miranda rights?
>
> A Okay. Advised that he was under arrest for first degree murder and **became visibly upset and very nervous,** stated he didn't know anything about any murder. Tony and I both explained to him the facts in evidence against him such as the fingerprint, the photograph.
>
> Q Was this before or after Miranda?
>
> A No, it was still – **he's not talking. We're doing**

the talking.

Q Now my question is when you start advising him as to the facts, was this before or after Miranda was given to him?

A Before.

Q Okay.

A We're just advising him why he's there, that he's been arrested for first degree murder. We even allowed him to read the arrest warrant. He wanted to see it so we gave it to him. He was allowed to read it and the statement of facts.

Q Why is it that you didn't give him his Miranda warnings?

A **Because he wasn't talking. We didn't ask him any questions. We were telling him at that time, that's when he was given his rights.**

Q After you told him all the evidence against him?

A Right. After, he was allowed to read the warrant.

Q Did he make any comment?

A And the fact statement. I don't remember him crying. Got real upset. After he read it, he said he didn't want to read anymore or see anymore.

Q What did you mean see anymore? What did you show him to look at?

A I don't recall showing him anything. You know, that's what Tony documented in his report. Tony had him read Miranda aloud, which he did, and he invoked his right to an attorney. And then once he did, all conversation ceased. He was placed in the holding cell and consequently transported to the Dade County Jail.

Q Was it the three of you in the interview room, you, Ojeda, and Jose?

A Yes.

Q How long were you in the interview room with him before he was advised of his Miranda rights when he decided not to talk?

A Okay. He went in at - we went in at 3:55. And

during the time, like I said, everything that we did was explained – 4:45 it was terminated.

Q So you terminated since he said 'I don't want to talk'?

A So you're talking about an hour.

Q You were there almost an hour until you read him – okay.

But he didn't make any exculpatory statement?

A **No.**

Q **Before Miranda was read anyway, did he?**

A **No. He didn't say anything.** Like I said, he just cried and was upset. And basically, you know, once we got to his Miranda, he invoked his right.

He wanted to read the warrant. We advised him what's your name, your address, your telephone number. Do you understand why you're here, why you've been arrested? We have a warrant for your arrest for first degree murder. He didn't believe us. He wanted to see it, wanted to read it. He read the data fact sheet of the statement of the facts on the warrant also. And he read that.

So prior to asking him any questions, he was doing most of the asking. We were doing the answering. And when it came time for us to talk to him, he was given his Miranda and he declined to make a statement and it was terminated.

(7PC-R. 400-404) (emphasis added). There was no tape recording of this encounter (7PC-R. 404).

Ojeda in his deposition was also asked about the 3:55 p.m. interaction he and Diecidue had with Jimenez. Ojeda testified that after he and Diecidue entered the room, Jimenez was shown the arrest warrant and allowed to read the supporting facts (7PC-R. 489). Jimenez became upset when he saw reference to him as a known burglar (*Id*). Ojeda testified that "[r]ight from the beginning we told him he was under arrest for first degree

murder" but "[h]e didn't want to tell us anything, invoked his rights" (7PC-R. 490). In his deposition, Ojeda then testified:

> Q Your report indicates that he invoked his rights at approximately 4:45 p.m.
>
> A That's correct.
>
> Q Which is approximately fifty minutes later than when the interview began?
>
> A Right.
>
> Q What were you doing for those fifty-five minutes?
>
> A We asked him if he wanted some, small talk, if he wanted something to eat, if he wanted another soda, get general information, although we have it, we want to make sure this is the right individual.
>
> We will get the same general information, name, address, all this kind of stuff. At that particular point, you know, like I said, we told him that he was under arrest for first degree murder. He didn't know anything about the murder. We proceeded to show him these different pieces of paper. He reads them a couple of times, he breaks down, he's crying, he's upset, he's very nervous. He's sweating.
>
> A **He didn't make any exculpatory statements?**
>
> Q **No. He just denied involvement in it.**

(7PC-R. 490-91) (emphasis added).

The police reports that the State disclosed on November 4, 1992, include Ojeda's 15-page supplemental report dated October 6, 1992 (7PC-R. 321). This report recounted the meeting with Jimenez on October 5, 1992, as follows:

> At approximately 3:55PM we brought the subject Jose Jimenez into the interview room and we were able to get basic information from the subject, i.e., name, address, etc. At that point we noted that the subject had a soda and we asked him if he wanted another or wanted anything to eat prior to us speaking with him, however, he refused anything further. We then advised the subject that he was under arrest for first degree murder at which time he became visibly upset and very

> nervous. He stated that he didn't know anything about a Murder and we then detailed the evidence we had against him allowing him to read the Arrest Warrant and the Statement of Facts and while doing so he became angry at some of the information contained in the same which indicated that he was a known burglar. While reading the same the subject stopped several times and cried. At one point I showed the subject the information I had from the autopsy at which time he stated that he didn't want to see anything more. The subject was then given his Rights. Per Miranda written form which he read aloud at which time he invoked his rights to an attorney. Once the subject had done this all conversation ceased with the subject and he was subsequently placed into a hold cell for processing and transporting. The interview was completed at approximately 4:45PM.

(7PC-R. 330-31).

The 81 pages of NMPD records that Jimenez was first given permission to access on July 30, 2018, include handwritten notes that Ojeda and Diecidue had made regarding their meeting with Jimenez at 3:55 p.m. on October 5, 1992. The handwritten notes paint an entirely different picture of what transpired before Jimenez formally invoked his *Miranda* rights. The notes by both Detectives Ojeda and Diecidue reveal that, unlike the portrayal depicted by them in their depositions and police reports of Jimenez as a nervous, tearful, fearful, guilty-minded and uncooperative accused criminal, he was the opposite. Indeed, Jimenez engaged in a dialogue with the officers and provided them a wealth of information, including details about his whereabouts on the days and times in question, the layout of the apartment building where the homicide took place, and a prior contact with the victim on the night of her murder. In other words, Jimenez was cooperating with the police officers, answering their questions, and providing them with exculpatory information which

the officers later decided to lie about when specifically questioned on this topic during their depositions.

Detective Diecidue's notes of the what Jimenez said were less detailed than the notes Ojeda scribed. According to Diecidue's notes, he first indicated that the interview with Jimenez began at 2:50 p.m. (not 3:55 p.m. as reflected in the police reports and in his deposition testimony). The notes reflect that Jimenez not only provided his Miami Beach address and phone number but that he told them that "used phone approx 8:00 p.m. *** called cab went down to get cab saw police" (7PC-R. 674). Diecidue's notes also reflect that Jimenez told him that he "knocked on Phyllis' door approx. 7:00 – to use phone" (Id).[8]

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[8]It appears that Diecidue may have first written 8:00 p.m. but the 8 was crossed out and 7:00 written above (7PC-R. 674). Jimenez telling Diecidue and Ojeda that he knocked on Minas' door at 7:00 p.m. to use the phone is a critical detail that the jury did not know; nor did defense counsel. It is also a detail that the police had been previously given by Virginia Wallace, a friend and hairdresser of Minas, **two days before they interviewed Jimenez**. Ojeda's police report reveals that on October 3, 1992, the day after the homicide, he received a call from Wallace (7PC-R. 328). Wallace explained that a week before her death, Minas had a dizzy spell and had fallen, resulting in a bruise to her right hip (*Id.*). The report then stated:

> **Ms. Wallace also stated that she spoke with the victim on Friday, 10/02/92, the day she was killed at approximately 7:00 PM.** Ms. Wallace stated that nothing seemed unusual at that time and no one was at the apartment according to the victim. Ms. Wallace stated that the victim confirmed her normal appointment with Ms. Wallace for her hair and then they hung up. The length of the conversation was about 15 minutes. According to Ms. Wallace everything was fine at that time.

(7PC-R. 328) (emphasis added). A handwritten note that appears to be also in Ojeda's handwriting, turned over on July 25, 2018, by (continued...)

Detective Ojeda's notes of the substance of the information Jimenez offered during the interview on October 5, 1992, state that the interview began at 3:55 p.m. (7PC-R. 689). The notes then detail Jimenez telling Ojeda and Diecidue about, for example, the occupants of various apartments in the complex where the murder took place and what clothes he was wearing that night:

Lucrecia/Ponce#209 Gomez use phone

Latins in 308 Friday 8:00 PM – Cab - Virg -

Latin Virg. #208

Phyllis #206 or 207 Friday Knocked – on phone

Skip #310

Prob. w/Mary 307/306 Music

Joel Cautious #4 flr Next to Elevator M.B. High

1st floor Edward

Wrg – Blue faded jeans – beige t-shirt – hat

Dk blue "Help Line" – Gold – White Sneakers

No Drugs

3:55p Interview began

4:45 p Interview completed

(7PC-R. 689).[9]

---

[8](...continued)
the NMPD, confirms the substance of the telephone conversation with Wallace and the information she provided to Ojeda on October 3, 1992 (7PC-R. 687).

[9]An important detail in Ojeda's notes is the fact that when Jimenez knocked on Phyllis' door at 7 p.m., she was "on phone." This would indicate that there was interaction with Minas in order for Jimenez to know she was on the phone at 7 p.m. as the police verified with another witness. The defense could easily
(continued...)

The handwritten notes that were made by Diecidue and Ojeda of the meeting with Jimenez demonstrate that Ojeda's police report regarding the meeting and their deposition testimony was false or, at best, extremely misleading.

2. Virginia Taranco. Among the previously undisclosed handwritten notes was one written by Diecidue memorializing statements given by Virginia Taranco, a neighbor of the victim who was a witness for the prosecution at Jimenez's trial. While the record reflects — and defense counsel were aware — that Taranco was interviewed by police and ultimately gave a sworn taped statement on October 7, 1992, one page of the notes disclosed by the NMPD provides a previously unknown statement by Taranco; the note begins with 6 lines that are crossed out, presumably shortly after those 6 lines were written down before the pre-statement interview with Taranco commenced at 4:15 p.m.

The six handwritten lines clearly reflect what Taranco first told Ojeda and Diecidue on October 7. The content of these six lines, if true and reflecting Taranco's recall at the time, establish that Jimenez could not have committed the murder. In these six lines, Taranco is saying that while she was at Minas' door investigating the sounds she heard, she observed Jimenez come down from the third floor. Of course, if Jimenez was observed by Taranco outside Minas' door while the assailant was

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[9](...continued)
have used this information to examine Ojeda about whether that meant that Minas' door was opened so that Jimenez could see she was on the phone. It further suggests that Jimenez and Minas were familiar with each other, contrary to the State's claim at trial.

still inside (and the assailant was the one who slammed the door when the neighbors tried to open it), then Jimenez could not possibly have been the assailant.

3. Yvette Imhoff. Among the records Jimenez was first able to access on July 30, 2018, was a handwritten note by Ojeda concerning what Yvette Imhoff had told him. The note has information that did not appear in Ojeda's report where he recounts what Imhoff told him. Imhoff had been Jimenez's girlfriend and had lived with him in unit 309 at the apartment complex in North Miami on and off from September, 1991, until July, 1992. By the time she spoke to Ojeda in October of 1992, she was Jimenez's estranged girlfriend.

In his report, Ojeda detailed that when he asked Imhoff if she or Jimenez knew "the victim," "she stated that one time she had come home from work and the subject told her that her daughter, Keychel, had made friends with **some lady downstairs. She said the subject never mentioned her name** and she would never allow her daughter to inside any apartments at the complex" (7PC-R. 333) (emphasis added). However, in his handwritten notes of his conversation with Imhoff, Ojeda wrote: "**Phyllis** became friends w/ daughter" (7PC-R. 692) (emphasis added). The next line says "came home Keychel made friend w/lady downstairs" (*Id*). In other words, Imhoff actually identified the "lady downstairs" who befriended her daughter after she came home from a visit with Jimenez as "Phyllis," whereas Ojeda, in his report, wrote that

Imhoff said "the subject never mentioned her name."[10]

The handwritten note clearly shows that the identity of the woman who had befriended Imhoff's daughter was mentioned, it Phyllis Minas. This undisclosed information would have impeached the State's claim that Jimenez had no connection and there was only one explanation for his fingerprint inside her front door.

4. Jeffrey Allen. Also included in the NMPD materials for the first time on July 25, 2018, was a note in Diecidue's handwriting of a March 15, 1993, interview of Jeffrey Allen, a jailhouse information who had claimed he had heard Jimenez confess.[11] The NMPD records also included two handwritten letters from Allen dated February 16, 1993, and February 20, 1993. While the letters do not show a specified recipient, they were written to the police collectively or to an unnamed officer. At one

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[10] As reflected in the notes taken by Ojeda, Imhoff also told him something else that was not reflected in his report: there is a cryptic entry in the notes that reads "wh/van unk span/male" (7PC-R. 692). Officer Corland testified at trial that when he arrived at Minas' apartment at 8:22 p.m. he went through it looking for the assailant. He went out onto the balcony and saw a white van parked under the balcony, which could have been used to gain relatively easy access to Minas' apartment. Thus, this discussion of a white van by Imhoff raises the question as to what Ojeda's discussion with Imhoff about a white van was all about and what specifically was said. The omission of any reference to this from Ojeda's report makes it all the more baffling. Was this about the white van that was parked under the balconies of unit 206 and unit 207? Is it the same white van that Merriweather had one on occasion said that Jimenez landed on when he purportedly dropped down from a second floor balcony?

[11] While Allen did not testify at Jimenez's trial, the previously undisclosed material shows that he had spoken with the police before he began trying to get evidence for them. The fact that the police were trying to use a jail inmate as a State agent to speak with Jimenez in violation of the Sixth Amendment shows the depths that Ojeda and Diecidue were willing to go to get Jimenez convicted.

point, Allen wrote that Jimenez was laughing at "you" because while being questioned by "you" he wore the same pants he had on at the time of the crime. The 81 pages of NMPD records included a phone message from Allen dated February 8, for "Pearce." And, also included was Ojeda's note dated February 9 as to his phone conversation with Allen and Allen's report that he had become Jimenez's cell mate. It is after Ojeda's February 9 phone call with Allen that he starts writing letters with claims as to what Jimenez had told him.[12] These notes collectively show that Allen was acting as a state agent in February of 1993.

In their depositions, Ojeda and Diecidue falsely testify that their first contact with Allen regarding Jimenez occurred on March 15, 1993. Their willingness to hide the truth seriously undermines Ojeda's testimony and the legitimacy of the police investigation.

5. Sessler Materials. In the NMPD materials that Jimenez was first able to access on July 30, 2018, was a FAX coversheet from Steve Sessler to Diecidue dated October 16, 1992, which shows Sessler was assisting the NMPD in pursuing a case against Jimenez by October 16. While Jimenez had previously learned that Sessler had assisted the NMPD, he had not previously had anything indicating when Sessler began assisting. Sessler was in the employ of Manuel Calderon who wanted Sessler to get Jimenez

[12]The 81 pages of the previously undisclosed NMPD records included one page from Allen in which he set forth his "demands" or "terms," describing what he wanted in exchange for his help. The notes show an understanding wass in place before the March 15 interview and a flow of information before March 15, 1993.

behind bars. Sessler's involvement in the police investigation and his interest in going after Jimenez significantly impeaches the reliability of the investigation.

6. Ali Anwar. The previously undisclosed documents contain new information regarding Ali Anwar, the cab driver dispatched by the taxi company in response to Jimenez's 8:20 p.m. request for a cab on October 2, 1992. In the documents that Jimenez was granted access on July 30, 2018, there is a handwritten note by Diecidue about his interview with Ali (7PC-R. 674). Diecidue wrote down Ali's name and phone number and then nothing. He did not write down what Ali told him happened when he went to the apartment complex to pick up "Jose" in his cab. "Jose"'s call for a cab had been received at 8:20 p.m. on October 2, 1992. Yet, Ojeda and Diecidue testified in their depositions that Diecidue wrote a report on his interview of Ali, but the report had mysteriously disappeared. Ojeda said it was lost.[13]

Jimenez learned when Ali was located years after his trial that the police seemed frustrated when he said he had picked up a fare near the apartment complex who was bleeding from his face.[14]

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[13]This was a reoccurring problem in Jimenez's case; many reports were "lost." *See* 7PC-R. 505 ("Q: This might have been one of the reports that was lost? A: It may have been lost. Detective Diecidue is usually very good with his reports. May have gotten lost in the file. Unfortunately they handle tons of paperwork").

[14]When Jimenez was briefly represented by a public defender, Ali was contacted a couple weeks after Minas' homicide. At that time, he said that he had been dispatch at 8:21 p.m. to pick up a fare named "Jose." When he reached the complex, he said that he was unable to find "Jose." Instead, he picked up another fare, a man whose face was bleeding as if he had been in an altercation.
(continued...)

Ali said the police kept trying to get him to identify a photo as showing the person who was the fare who had scratch marks on his face and was bleeding. Ali kept saying that the photo was not the person. Ultimately, Ali grew frustrated with responding to the police and just starting ignoring subpoenas.

The newly available NMPD records include Ojeda's notes about his contact with Ali in September, 1993. This was 11 months after Minas' homicide. Ojeda's notes indicate that Ali was no longer certain of when he picked up the fare whose face was bleeding. Not only were Ojeda's notes regarding his conversation with Ali not previously disclosed, the fact that Ojeda spoke to Ali was never disclosed. No police report write-up of this interview was ever provided.

7. Ojeda's Trial Script. Finally, among the newly discovered NMPD documents was an 11-page document in which Ojeda was given the questions he would be asked at trial. The document is clearly not written in Ojeda's handwriting; both the questions and **answers** Ojeda was to give are in someone else's handwriting.

Ojeda's direct testimony at Jimenez's trial was conducted by Assistant State Attorney Ann Lyons. The handwriting in the 11-page document appears to match her handwriting as it appears in

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[14](...continued)
The man explained he received the scratches because he had been mugged. Ali was contacted by the police and shown photographs of Jimenez; Ali insisted that Jimenez was not the fare he picked up near the apartment complex with the bleeding face. Jimenez's trial counsel were unable to locate Ali at the time of trial in order to present him as a witness. Collateral counsel spoke to him many years later, and by then he was uncertain of the date that he picked up the man with the bleeding face.

the record. Her direct examination of Ojeda in many places is identical to that which appears in the 11-page document outlining both the questions and answers to be given. For many of the questions the document includes the answer Ojeda is to give. At one point there is a section that is marked with the word "out" in the margin, showing that this portion of the suggested testimony should not be given. This section concerned Officer Cardona's investigation of the white van under Minas' balcony.

B. LETHAL INJECTION

On February 22, 2018, the State of Florida executed Eric Branch using Florida lethal injection protocol which includes the use of etomidate, a drug not used by any other state practicing lethal injection. Branch was the fourth inmate executed with the this protocol calling for two injections of 100 milligrams of etomidate 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.

Robert Friedman witnessed the February 22, 2018, Branch execution. He reported that 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 description was 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.

Records from the Florida Department of Law Enforcement (FDLE) were ordered disclosed to Jimenez on July 23, 2018. The disclosed FDLE records include two accounts of the execution. 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). In FDLE's Investigative Report which was prepared after the execution, 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).

Following the Branch execution, Dr. David Lubarsky, who is the 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 eyewitness Neal Dupree (6PC-R. 309-12, 320-39). 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 injection, ... the scream is objective evidence of Mr. Branch experiencing significant pain during his execution." (6PC-R. 334).

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).

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. 334-35).

Jimenez when asked what evidence he would present at an evidentiary hearing besides Dr. Lubarsky referenced the evidence presented during an evidentiary hearing before Mark Asay's execution, the first one in which etomidate was used. Jimenez advised that Branch's screams when the etomidate was injected was new and previously unavailable evidence that supported Dr. Heath's testimony in that case. He had indicated that roughly 25% of time, there would be severe or significant pain upon the

administration of etomidate. Given that Branch's execution was the fourth one using etomidate, his screams were consistent with the expectation that about 25% of the time, severe pain would be felt when etomidate administered.

The trial court did not conduct an evidentiary hearing and accepted that Branch's screams were indicative of his pain. The trial court then pointed to the Florida Supreme Court's ruling in *Asay v. State*, 224 So. 3d 695, 701-02 (Fla. 2017). The trial 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). The court framed the issue in terms of whether the Florida Supreme Court's decision in *Asay* constituted a finding that screams of pain at 25 percent of the executions did not amount to cruel and unusual punishment. The trial court concluded that the 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 trial court in essence ruled 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.

THE FLORIDA SUPREME COURT'S RULINGS

With regard to the *Brady/Giglio* issues on which there was no evidentiary hearing, the Florida Supreme Court decided Jimenez's claims were be procedurally barred because, while Jimenez may not

have known about the notes themselves, he was aware of the information contained in them. *See Jimenez*, 2018 WL 4784203 at *15 ("The fact that these statements were made by Jimenez and the fact that the detectives took notes while Jimenez made them is not newly discovered evidence because Jimenez necessarily had personal knowledge of these facts and because the detectives generally disclosed the substance of the conversations that occurred prior to Jimenez invoking his rights under *Miranda*."); *Id*. at *11 ("The record establishes that Jimenez has known of the existence of Taranco's pre-interview since before trial because it was mentioned in her sworn taped statement—a transcript of which was provided to trial counsel in discovery and included in NMPD's original submission to the records repository more than 18 years before the successive post-conviction motion at issue was filed."); *Id*. at *12 ("To the extent it is not clear from the context that the report's reference to a 'lady downstairs' is in reference to the victim, with due diligence, Jimenez could have followed up years ago and discovered this information.); *Id*. at *13 ("Collateral counsel could have made a specific public records request to NMPD to obtain Allen's letters and notes but did not do so, and in any event, the police reports in this case describe the information that Allen provided to the detectives."); *Id*. at *17 ("Although Jimenez was unsuccessful in his attempt to subpoena Ali to testify at trial, there is plentiful evidence establishing that, with the exercise of due diligence, the defense could have contacted Ali.").

The Florida Supreme Court alternatively found that Jimenez's

Brady/*Giglio* claims were lacking in merit without considering how the undisclosed information may have affected counsel's strategic choices or what the jury would have been entitled to find had it known of the content of what was not disclosed. *Id.* at *19.

As to Jimenez's lethal injection issue, the Florida Supreme Court stated that "it is impossible to know whether Branch's actions were in protest of his execution or a reaction to etomidate, such as the 'transient venous pain on injection and transient skeletal movements, including myoclonus' recognized among the 'most frequent adverse reactions' in *Asay VI*, 224 So. 3d at 701." *Jimenez*, 2018 WL 4784203 at *6. The Florida Supreme Court concluded that, "In sum, Jimenez's speculative and conclusory allegations regarding Branch's execution are insufficient to require revisiting our holding in *Asay VI* approving the constitutionality of lethal injection as currently administered in Florida over the challenge that the use of etomidate as the first drug in the lethal injection protocol presents a substantial risk of serious harm." *Id.*

In her dissent, Justice Pariente said that she would reverse and remand for an evidentiary hearing on Jimenez's lethal injection claims. *Id.* at *19 (Pariente, J., concurring in part and dissenting in part with an opinion, in which Quince, J., concurs). According to Justice Pariente, "Jimenez challenges Florida's lethal injection protocol in light of new and troubling information, specifically regarding Florida's most recent execution, which, at the very least, should be fully developed at an evidentiary hearing." *Id.* at *20. Justice Pariente reiterated

her "long-standing concern that a one-drug protocol has a greater likelihood of reducing any substantial risk of pain. Specifically, Florida's continued use of a paralytic agent, such as rocuronium bromide, could lead to a situation where defendants like Jimenez are entirely aware of the execution, including the attendant extreme pain and suffering, but unable to inform anyone of or indicate such awareness." *Id.* at *29.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD REVIEW WHETHER THE FLORIDA SUPREME COURT'S ANALYSIS OF JIMENEZ'S *BRADY/GIGLIO* CLAIM IS IN DIRECT CONFLICT WITH THE PRECEDENT OF THIS COURT.

Jimenez submits that this Court should grant certiorari to consider whether the Florida Supreme Court's determination was based on a flawed legal and factual analysis. In addressing the specific *Brady/Giglio* violations alleged by Jimenez, the Florida Supreme Court rejected each allegation separately, finding that at every turn Jimenez did not meet his burden of showing the information was suppressed either because he had personal knowledge of the information contained in the notes and/or did not exercise due diligence in obtaining the information from law enforcement or the witnesses at the time of his capital trial proceedings. *Jimenez*, 2018 WL 4784203 at *9-18.

For example, as to Jimenez's statements to law enforcement about his whereabouts on the evening of the crime, his relationships with the other individuals living at the apartment complex, including the victim, and his description of the clothing he wore on the night of the crime, the Florida Supreme Court denied Jimenez's claim holding that: "[t]he fact these

statements were made by Jimenez and the fact that the detectives took notes while Jimenez made them is not newly discovered evidence because Jimenez necessarily had personal knowledge of these facts and because the detectives generally disclosed the substance of the conversations that occurred prior to Jimenez invoking his rights under *Miranda*." *Id*. at *13. This is so despite the fact that the detectives failed to include the information in their reports and falsely testified during deposition that Jimenez's statements were nothing more than "general information" - "name, address, telephone number, date of birth" - nothing regarding the case. "He wasn't talking."

Likewise, as to the undisclosed notes taken during the interview with Virginia Taranco, before the taped portion of the interview commenced, the Florida Supreme Court held that law enforcement's disclosure that there was a "pre-interview", though not indicating what was said by Taranco, was sufficient to meet its obligation to disclose exculpatory evidence. *Id*. at *11.

As to witness Ali Anwar and the exculpatory information he possessed, the failure of the police to reveal the substance and details of their contact with Anwar was again disregarded by the Florida Supreme Court. The Court held that the information could have been obtained by the exercise of due diligence. *Id*. at 17.

The Florida Supreme Court ignored that fact that Jimenez did seek discovery and was told that he had been provided everything. Jimenez did question the police officers in depositions in order to seek out any undisclosed favorable information. When the police were asked what happened during the 50 minutes that they

were with Jimenez, trial counsel was told that Jimenez did not say anything, and that was why he was not given *Miranda* warnings until the end of the 50 minutes.

Jimenez submits that the Florida Supreme Court's reasoning for denying his claim directly conflicts with this Court's jurisprudence: "A rule thus declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process. 'Ordinarily, we presume that public officials have properly discharged their official duties.'" *Banks v. Dretke*, 540 U.S. 668, 696 (2004).

Under *Banks*, the burden is on the State to disclose all favorable information in its possession. The defense is entitled to assume that the State has honored its obligation to disclose. *Banks*, 540 U.S. at 694 ("If it was reasonable for Banks to rely on the prosecution's full disclosure representation, it was also appropriate for Banks to assume that his prosecutors would not stoop to improper litigation conduct to advance prospects for gaining a conviction."). The defense was entitled to assume that the police reports were accurate and that the detectives were truthful when they testified in depositions that Jimenez was not given *Miranda* warnings because he "wasn't talking".

The Florida's Supreme Court's determination that any information within the defendant's knowledge cannot establish a violation of due process is contrary to the facts and law of *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny. In *Brady*, the issue concerned the culpability of Brady and his co-defendant in a homicide. Brady was aware of his role and his co-defendant's

role in the crime. When the prosecution suppressed a statement from the co-defendant admitting his role in the crime which impacted Brady's culpability, this Court determined that the suppression violated Brady's right to due process. *Brady*, 373 U.S. at 86. This was so even though Brady had "personal knowledge" of his and his co-defendant's culpability. Thus, contrary to the Florida Supreme Court's determination, while a defendant may have personal knowledge of a fact or other information, it does not relieve the State of its obligation to disclose evidence in its possession that demonstrates that fact which the police and/or the prosecution are denying or disputing.

Here, Jimenez knew what he had said to the police, but the police denied that he said anything. In the State's possession were notes written by the police officers that showed that the police had not testified truthfully about what Jimenez had said. The notes were exculpatory evidence that was hidden from Jimenez.

Alternatively, the Florida Supreme Court determined that Jimenez had failed to show that the content of the handwritten material was exculpatory. *Jimenez*, 2018 WL 4784203 at *9-18. But, the court reached this finding by viewing each piece of evidence separately and through a narrow lens, without considering how counsel could have used the evidence or what the evidence would have entitled the jury to find. *See Kyles v. Whitley*, 514 U.S. 419, 453 (1995)(consideration must be given to what "[t]he jury would have been entitled to find").

This Court's precedent make clear that the materiality of undisclosed information must contemplate not just its effect on a

trial witness's testimony or the actual exculpatory nature of the information; as a matter of constitutional law, it also entails a holistic analysis of how the entire defense case would have changed had the withheld information been disclosed. *Kyles*. Consideration must also be given to how the defense could have used the information to argue to the jury that the prosecution or law enforcement investigation lacked thoroughness and good faith, or employed shoddy methodology. *Id*.

For example, as to Jimenez's statements to law enforcement, the Florida Supreme Court held that the undisclosed notes of law enforcement's interview were not material because "Jimenez's cooperation or lack thereof was not a feature of the State's case, and the value of Jimenez's statements concerning his interaction with the victim is limited." *Jimenez*, 2018 WL 4784203 at *14. However, at trial, Detective Ojeda was asked about his interaction with Jimenez on the day of his arrest and testified as to his interactions with Jimenez. He also indicated that Jimenez was not willing to come to the police station when asked. Yet, Ojeda neglected to tell the jury about all of the information Jimenez willingly provided about the evening of the crime, much of which was corroborated by other witnesses.

The Florida Supreme Court also disregarded the fact that Ojeda had given false testimony in his deposition which shows the bad faith of the police investigation. Ojeda, who gave some of the most damning evidence, could have been shown to not be credible given his false and misleading deposition testimony as established by the withheld documents. But worse, false testimony

by a police officer in a deposition misleads defense counsel and should fall within *Giglio v. United State*, 405 U.S. 150 (1972).

Moreover, the fact that Jimenez cooperated with Ojeda and Diecidue and provided information during his dialogue with them introduces an entirely different (and new) element to the defense side of the case: rather than a guilty-minded balcony-jumping criminal who got rid of the murder weapon after stabbing an unsuspecting and unknown elderly lady to death, Jimenez cooperated with law enforcement and wanted to show them he was innocent. He provided them with important (and exculpatory) evidence—evidence which was corroborated by the detectives themselves and which cast the entire case in a whole new light. This information totally alters the picture of Jimenez and the case itself. It rebuts and refutes the State's narrative. It is the power of Jimenez's undisclosed statements that explains why someone committed to convicting Jimenez would hide the evidence.

If for no other reason, certiorari review is warranted for exactly the reasons Justice Stevens outlined in his concurrence in *Kyles v. Whitley*, 514 U.S. at 454-55.

II. THIS COURT SHOULD GRANT CERTIORARI REVIEW IN ORDER TO CONSIDER WHETHER 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.

On March 20, 2018, this Court granted a stay of execution in *Bucklew v. Precythe*, Case No. 17-3052 (2018). The issues before this Court concern an as applied challenge to Missouri's lethal injection protocol that focuses on Bucklew's medical condition.

This Court directed the parties to address the broader question of: "Whether petitioner met his burden under *Glossip v. Gross*, 576 U. S. ____ (2015), to prove what procedures would be used to administer his proposed alternative method of execution, the severity and duration of pain likely to be produced, and how they compare to the State's method of execution."

The question posed by this 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.

This very issue was argued before the state courts 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. Thus, under the State's approach, an inmate could establish a substantial risk of severe harm but fail to meet the second prong of establishing an available method of execution as an alternative. Specifically, Jimenez, like Bucklew, could be executed with the State knowing that its method of execution would cause severe pain. Jimenez submits that this is

certainly not what the Eighth amendment or *Glossip* intended.

The trial court accepted Jimenez's facts that etomidate will cause severe pain 25% of the time. However, the Florida Supreme Court ignored that finding and created the ultimate "Catch-22" by refusing Jimenez an opportunity to establish that Branch had felt severe pain, but then concluding that it was "impossible to know whether Branch's actions were in protest of his execution or a reaction to etomidate." *See Jimenez v. State*, __ So. 3d __, 2018 WL 4784203 at *6. This was so despite Jimenez's uncontradicted evidence from Dr. Lubarsky and Robert Friedman that established that Branch's reaction to the etomidate was due to the pain that it caused upon injection; pain that the manufacturer recognizes. *See Asay v. State*, 224 So. 3d 695 (Fla. 2017).

In her dissent, Justice Pariente recognized the legal conundrum created by the majority and called for a proper review of the "troubling information" concerning Branch's execution where "'[a]s the administration of the etomidate commenced, Branch released a guttural yell or scream ... Branch's legs were moving, his head moved and his body was shaking.'" *Jimenez*, 2018 WL 4784203 at *20 (Pariente, J., concurring in part and dissenting in part with an opinion, in which Quince, J., concurs). After citing to Jimenez's proffered evidence, Justice Pariente concluded: "In my view, this new information makes it impossible to allow another execution to proceed without thoroughly reviewing whether Florida's lethal injection protocol subjects defendant's to a substantial risk of pain, in violation of the Eighth Amendment." *Id*.

Furthermore, Justice Pariente, joined by Justice Quince, addressed the issue of the proposed one-drug alternative and reiterated her concern that one-drug protocol has a greater likelihood of reducing any substantial risk of pain. *Id*. Yet, the majority refused to allow Jimenez to show that a one-drug protocol, using pentobarbital or compounded pentobarbital, would reduce the substantial risk of severe pain created by the existing three drug protocol. The majority called the alternative "speculative" and refused to accept that of the 14 executions in 2018, that had occurred at that time, 10 had been completed using a single dose of pentobarbital.[15] Contrary to the Florida Supreme Court's ruling, pentobarbital is readily available from compounding pharmacies.[16]

Finally, Jimenez, like Bucklew, has proposed the use of nitrogen gas.[17] The Florida Supreme Court faulted Jimenez for

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[15]Another 7 executions have occurred since Jimenez submitted his claim to the state courts. Of those 7, 4 used a single dose of compounded pentobarbital without incident. While 2 of the 3 used a multi drug cocktail, the other was carried out by use of the electric chair. Thus, 14 of 20 lethal injections have been carried out using a single dose of pentobarbital.

[16]Jimenez also proposed the use of midazolam as the first drug, which was approved by this Court in *Glossip* and has been used as recently as August, 2018. Clearly, the drug is readily available.

[17]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 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); (continued...)

failing to show that this method was a known and available alternative without giving him an opportunity to do so. *Jimenez*, 2018 WL 4784203 at *6. Indeed, in Jimenez's case, the state court failed to grant him the opportunity to show that the current lethal injection protocol creates a "risk of harm [that is] substantial **when compared to** a known and available alternative method of execution" *Glossip*, 135 S.Ct. at 2738 (emphasis added).

"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. The Eighth Amendment should preclude a lethal injection protocol that deprives the condemned of human dignity, as occurred in Eric Branch's execution. Certiorari

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[17](...continued)
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. 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.

review is warranted.

CONCLUSION

Based on the foregoing, Petitioner submits that certiorari review is warranted to review the decision of the Florida Supreme Court in this cause.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing petition has been furnished by electronic service to Lisa-Marie Lerner and Melissa Roca Shaw, Office of the Attorney General, 1515 No. Flagler Drive, Ninth Floor, West Palm Beach, FL 33401, on this 6th day of December, 2018.

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