

**DOCKET NO. 18-6970**

**IN THE SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 2018**

---

---

**JOSE ANTONIO JIMENEZ,**

*Petitioner,*

**vs.**

**STATE OF FLORIDA,**

*Respondent.*

---

---

---

---

**APPLICATION FOR STAY OF EXECUTION**

---

---

**COMES NOW**, the Petitioner, **JOSE ANTONIO JIMENEZ**, by and through undersigned counsel and requests that this Honorable Court to grant a stay of his execution currently set for December 13, 2018, at 6:00 PM.

This stay application is made in connection with Mr. Jimenez's petition for a writ of certiorari which seeks review of the Florida Supreme Court's opinion of October 4, 2018. The petition asks for certiorari review of the Florida Supreme Court's rejection of two separate constitutional arguments that Mr. Jimenez had presented for its appellate review. The first matter at issue in his certiorari petition arises from the rejection of Mr. Jimenez's argument that his right to due process under *Giglio v. United States* and/or *Brady v. Maryland* had been violated when:

1) the State did not disclose that the police detectives had provided false and/or misleading deposition testimony and had written false and/or misleading police reports; and/or 2) the State suppressed exculpatory evidence at the time of his capital trial. The second matter at issue in his certiorari petition arise from Mr. Jimenez's argument to the Florida Supreme Court that Florida's lethal injection protocol violated the Eighth Amendment as demonstrated by the events that occurred during the Florida's most execution of Eric Branch on February 22, 2018.

As to the issue concerning Florida's lethal injection protocol, two justices of the Florida Supreme Court dissented and indicated that Mr. Jimenez should be granted an evidentiary hearing: "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." *Jimenez v. State*, \_\_ So. 3d \_\_ (Fla. ), 2018 WL 4784203 \*20. (J. Pariente, J. Quince dissenting)("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 defendants to a substantial risk of pain, in violation of the Eighth Amendment. Thus, I would reverse and remand for an evidentiary hearing."). Justice Pariente also urged that a one drug protocol be adopted in order to reduce any substantial risk of serious pain. *Id.*

Further as to his challenge to Florida's lethal injection protocol, Mr. Jimenez notes aspects of the issues on which he seeks certiorari review are currently already before this Court. On March 20, 2018, this Court granted a stay of execution in *Bucklew v. Precythe*, Case No. 17-3052 (2018). The issues raised in Bucklew's petition concerned an as applied challenge to Missouri's lethal injection protocol that had focused on the particular condemned inmate's

medical condition. However on April 30, 2018, when this Court granted certiorari review, it directed the parties to brief the following question: “Whether petitioner met his burden under *Glossip v. Gross*, 576 U. S. \_\_\_\_ (2015), to prove what procedures would be used to administer his proposed alternative method of execution, the severity and duration of pain likely to be produced, and how they compare to the State's method of execution.”

This Court’s resolution of the question it asked the parties to brief in *Bucklew* may resolve some of the questions presented in Mr. Jimenez’s petition and/or show that the Florida Supreme Court’s analysis was flawed. The Court’s decision in *Bucklew* will certainly help clarify 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 issue was before the state courts in Mr. Jimenez’s case when he argued that the analysis was a one-step process and the State arguing that the analysis was a two-step process. 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, Mr. Jimenez, like *Bucklew*, could be executed with the State knowing that the State’s method of execution would cause severe pain.

As to Mr. Jimenez’s arguments concerning the suppressed notes from law enforcement’s

file, the Florida Supreme Court imposed a diligence requirement upon Mr. Jimenez as a component of its legal analysis. At times, the Florida Supreme Court shrouded the requirement in terms like the defendant had sufficient personal knowledge, or that the defendant could have asked a question with more precision. But functionally, the Court imposed a duty of diligence on the defendant's part to know that the State possessed evidence, handwritten notes, showing that the police detectives were not truthful or at least extremely misleading in their deposition testimony and written reports as to what Mr. Jimenez and other witnesses told them in the course of their investigation. The Florida Supreme Court's analysis permits the State to play hide the ball and preclude a defendant, like Mr. Jimenez, from being heard if any relevant statute of limitations has expired before the exculpatory evidence, the detectives' handwritten notes, surfaced. This analysis seemingly rewards the State if it hides any withheld exculpatory evidence from a defendant long enough to preclude any complaint on his part from being heard. This also seems to stray from this Court's jurisprudence regarding the Due Process Clause requirement that in criminal prosecutions the state is obligated to disclose favorable information in its possession to the accused. It would benefit Mr. Jimenez and all of those involved in the criminal justice system for this Court to make clear that semantics cannot be used to convert the prosecution's duty to disclose into the defendant's duty to diligently pursue through more specific requests or more specific questions which cannot be evaded or misunderstood or answered untruthfully because only then is prosecution actually forced to actually honor its duty to disclose, as required by the Due Process Clause.

Mr. Jimenez will suffer irreparable prejudice if his execution is not stayed to permit this Court to give these issues presented full and deliberate consideration.

WHEREFORE, for the reasons set forth in the petition, Mr. Jimenez asks for a stay of his execution to permit full consideration of his petition for writ of certiorari which is pending before this Court in above-entitled matter.

Respectfully submitted,

/s/. Martin J. McClain  
MARTIN J. McCLAIN  
Florida Bar No. 0754773  
McClain & McDermott, P.A.  
141 N.E. 30<sup>th</sup> Street  
Wilton Manors, FL 33334  
Telephone (305) 984-8344

COUNSEL FOR PETITIONER

#### **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true copy of the foregoing supplemental brief has been furnished by United States Mail, first class postage prepaid, to Lisa Marie Lerner, Assistant Attorney General, Office of the Attorney General, 1515 N. Flagler Drive, Suite 900, West Palm Beach, FL 33401, on December 11, 2018.

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

LINDA MCDERMOTT  
Fla. Bar No. 0102857

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

JOHN ABATECOLA  
Fla. Bar No. 0112887

20301 Grande Oak Blvd  
Suite 118-61  
Estero, FL 33928  
Telephone: (954) 560-6742

COUNSEL FOR MR. JIMENEZ