DOCKET NO. 18-6970

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

JOSE ANTONIO JIMENEZ,

***Petitioner*,**

vs.

STATE OF FLORIDA,

***Respondent*.**

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

---

*Martin J. McClain
Fla. Bar No. 0754773

Linda McDermott
Fla. Bar No. 102857

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

***COUNSEL OF RECORD**

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE

DOCKET NO. 18-6970

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

JOSE ANTONIO JIMENEZ,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

Petitioner, **JOSE ANTONIO JIMENEZ,** files his reply to the State's Brief in Opposition to his Petition for Writ of Certiorari under Rule 15.6 of this Court's rules.

REPLY TO THE BRIEF IN OPPOSITION AND RESPONDENT'S ASSERTED REASONS FOR DENYING THE WRIT

A. Respondent's "Rewritten" Questions.

In an attempt to thwart this Court's review and distract from the actual issues raised by Mr. Jimenez, the Respondent "re-states" the questions presented by Mr. Jimenez (BIO at i). For example, rather than address the first four discrete questions raised in Mr. Jimenez's certiorari

petition related to the violations of *Brady v. Maryland*, 373 U.S. 663 (1984), and *Giglio v. United States*, 405 U.S. 150 (1972), Respondent collapses them into one misleading paragraph that "re-states" how the Respondent wishes the questions to be. Mr. Jimenez presented four questions in support of his certiorari petition asking that this Court review the decision of the Florida Supreme Court and the manner in which it disposed of the *Brady* and *Giglio* issues. Those are the questions, not the "re-stated" versions written by the Respondent.

Likewise, Petitioner set forth five distinct questions concerning Florida's lethal injection protocol in the context of the recent execution of Eric Branch on February 22, 2018 and the correct legal analysis required in assessing Petitioner's claim. However, Respondent ignores these five distinct questions, and instead makes up a single completely different "question presented" that omits the legal issues that Petitioner has asked this Court to consider for review (BIO at i).

Respondent's question ignores critical facts, circumstances and legal standards while making inaccurate presumptions. For instance, Respondent claims that there was "full and fair evidentiary development following the adoption of Etomidate" by the Florida Department of Corrections. However, what Respondent fails to include is that the evidentiary hearing occurred prior to the Branch execution at which, after the injection of the Etomidate, Branch let out a "blood curdling scream" and thrashed about on the gurney. There has been non evidentiary hearing regarding the Branch execution and whether the administration of Etomidate cause Branch to scream out in pain. Respondent's restated question does not reflect the critical facts and constitutional issues before this Court.

B. Reply to Statement of the Case and Facts.

At the end of the section of the BIO entitled "Statement of the Case and Facts," the Respondent discusses the history of the Eleventh Circuit Court of Appeals denying stays of execution and reversing district courts for granting stays of execution (BIO at 8-9). Further, the Respondent argues that this Court "lacks jurisdiction to entertain the underlying successive petition for writ of habeas corpus" (BIO at 9). But Mr. Jimenez is not seeking stay from the Eleventh Circuit in this proceeding, nor does his petition have anything to do with how that federal appellate court handles requests for stays of execution. Mr. Jimenez has asked this Court to issue of writ certiorari to the Florida Supreme Court in order to review constitutional questions arising from that court's denial of his recent appeals. This petition in the above-entitled matter is not asking for the review of a federal court's denial of a successive petition for writ of habeas corpus under § 2254. The jurisdiction of this Court in this petition is invoked under 28 U.S.C. § 1257, which confers jurisdiction on this Court to review decisions by the Florida Supreme Court, the court that issued the decision addressed in this certiorari petition. The Court should not be misled by the Respondent's befuddling jurisdictional arguments.

C. Reply to Respondent's Jurisdictional Arguments as to the *Brady/Giglio* Questions.

The gist of the Respondent's arguments why this Court should not grant certiorari to review the decision of the Florida Supreme Court in *Jimenez v. State*, 2018 WL 4784203 (Fla. Oct. 4, 2018), is that, in the Respondent's view, the Florida Supreme Court's denial of relief "rested on an adequate and independent state law procedural bar that the claims were time barred, which Jimenez fails to even address" (BIO at 10). Most of this sentence is wrong; some of it is simply false. This is why it is important to look at the questions that Mr. Jimenez actually

presented—not the "re-statement" of them as posed by the Respondent—and the arguments in the petition itself.

A review of the questions presented and the body of Mr. Jimenez's petition reveals that the first two questions address the "procedural bar" found by the Florida Supreme Court as to the *Brady/Gig*lio claims. The first two questions presented are as follows:

> 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 that 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?

(Pet. For Cert. at 1). These questions are, of course, directed at the Florida Supreme Court's conclusion that the *Brady/Giglio* allegations were procedurally barred because Mr. Jimenez had "personal knowledge" of information he contended had been withheld until 2018 and thus he could have raised the claims during his initial postconviction motion. *Jimenez*, 2018 WL 4784203 at *11 et seq.

As Mr. Jimenez explained in his petition: "With regard to the *Brady/Giglio* issues on which there was no evidentiary hearing, the Florida Supreme Court decided Jimenez's claims were [] *procedurally barred because, while Jimenez may not have known about the notes themselves, he was aware of the information contained in them. . .* (Pet. For Cert. at 27-28) (citing *Jimenez*, 2018 WL 4784203 at *15) (emphasis added). Mr. Jimenez then quoted those portions of the Florida Supreme Court's opinion where it explained how Mr. Jimenez

purportedly "knew" of the information contained in other parts of the 81-pages of notes disclosed by the North Miami Police Department (NMPD) on July 30, 2018 (Pet. For Cert. at 28).

Thus, the Respondent's accusation that Mr. Jimenez failed to address the "procedural bar" is an empty one; the "procedural bar" was based on the Florida Supreme Court's belief that the State is relieved of its disclosure obligations to a criminal defendant documents if the defendant "knew" of the information in the documents but was unaware of the existence of the documents that would have proven what he merely knew is precisely the basis of the first two federal questions presented. *See Banks v. Dretke*, 540 U.S. 668, 696 (2004) ("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.'"). In other words, it is the Florida Supreme Court's refusal to follow *Banks*–or its attempt to dismantle its holding–that is the main federal question presented by Mr. Jimenez. The Florida Supreme Court reimposed a diligence component to its analysis of *Brady* claims which *Banks* had held was improper.

The Respondent's argument that the Florida Supreme Court's "procedural bar" rested on an adequate and independent state law procedural bar reflects a fundamental misunderstanding of the independent and adequate state law bar doctrine. First, it is critical to identify the kind of "procedural bar" invoked by the Florida Supreme Court. The Florida Supreme Court did not find Mr. Jimenez's *Brady/Giglio* claims to be barred because the same claims had been previously raised and rejected, or were otherwise improperly raised in a Rule 3.851 postconviction motion. Indeed, the Florida Supreme Court acknowledged that if Mr. Jimenez did not know about the

information contained in the 81-pages of notes until July 30, 2018, as he alleged, his claims would have been timely filed and not procedurally barred. *Jimenez*, 2018 WL 4784203 at *8.

The "procedural bar" analysis by the Florida Supreme Court as to the *Brady/Giglio* claims in Mr. Jimenez's case is the same one addressed—and rejected as a matter of federal law—in *Banks* and in *Strickler v. Greene*, 527 U.S. 263 (1999). In both cases, this Court rejected arguments advanced by the State that the defendants' *Brady* claims were barred from federal habeas review because the evidence that had been suppressed by the State was discovered too late by the defendants and/or was information that the defendants knew or could have figured out. *See Banks*, 540 U.S. at 696 (rejecting State's argument that "the prosecution can lie and conceal and the prisoner still has the burden to . . . discover the evidence . . . so long as the 'potential existence' of a prosecutorial misconduct claim might have been detected"); *Strickler*, 527 U.S. at 284 (rejecting as "insubstantial" the State's argument that a witness's trial testimony and a letter the witness published in a newspaper "should have alerted the petitioner to the existence of undisclosed interviews of the witness by the police").

Because the "procedural bar" applied by the Florida Supreme Court in Mr. Jimenez's case was based on its avoidance of–or perhaps its attempt to strip all meaning of this Court's holdings in *Banks* and *Strickler*–it is not an independent state procedural bar. *See Ake v. Oklahoma*, 470 U.S. 68, 75 (1985) ("when resolution of the state procedural law question depends on a federal constitutional ruling, the state-law prong of the court's holding is not independent of federal law, and our jurisdiction is not precluded"). The Florida Supreme Court's finding that Mr. Jimenez's *Brady/Giglio* claims were procedurally barred because they were based on information that Mr. Jimenez should have figured out at some earlier time is a direct refutation of the federal law

governing the State's federal constitutional obligation; that obligation requires the State to disclose, not hide, exculpatory or impeaching information and hope the defendant does not find it before filing an initial postconviction motion. *Banks; Strickler*. This "federal-law holding is integral to the state court's disposition of this matter," and thus there is no independent state procedural bar to contend with here and this Court has jurisdiction over the federal questions presented by Mr. Jimenez.

D. Reply to Respondent's Arguments Concerning Lethal Injection.

Initially, Respondent argues that the analysis to be applied in a method of execution is a 2 step analysis: first, a condemned inmate must show that the method is "'sure of very likely to cause serious illness and needless suffering" *Glossip v. Gross*, 135 S.Ct. 2726, 2737 (2015); and, then distinctly identify an alternative method of execution that is feasible and readily implemented (BIO 19). But, respondent's reading of *Glossip* leads to the possibility that a petitioner could show a substantial risk of severe pain, but the method could survive because the petitioner could not establish a feasible, readily available alternative. Surely, that cannot be the result this Court intended.

Rather, the analysis must be a one-step analysis which still requires that Mr. Jimenenz establish a substantial risk of harm. The distinction is that the substantial risk is compared to the proposed alternative. *See Glossip*, 135 S.Ct. at 2738(holding "that any risk of harm was substantial **when compared to** a known and available alternative method of execution")(emphasis added); *see also Id*. 2741 ("When a method of execution is authorized under state law, a party contending that this method violates the Eighth Amendment bears the

burden of showing that the method creates an **unacceptable risk of pain**.")(emphasis added). Respondent makes no attempt to address the plain language of *Glossip*.

Further, utilizing the one-step analysis, which was not used in Mr. Jimenez's case, is entirely in line with the issue presented by the Petitioner in *Bucklew v. Precythe*, Case No. 17-3052 (2018). Respondent 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 (BIO at 21). However, the issue of which analysis is required, or in other words, the burden of petitioner, in challenging lethal injection, is squarely before this Court and impacts Mr. Jimenez's challenge to Florida's method of execution. This is particularly so because, Mr. Jimenez relied on evidence that it would be expected that 1 in 4 condemned inmates would feel pain upon the injection of etomidate. This evidence was corroborated by the execution of Eric Branch, whose screams upon the administration of etomidate further supported the evidence that the pain will, at a minimum, be severe or "disturbing" and will cause the inmate to scream and thrash about on the gurney. However, the trial court would not conduct an evidentiary hearing at which evidence regarding Branch's execution could be introduced because in its view, the Florida Supreme Court had in essence found a 25% risk of severe pain to be acceptable under the Eighth Amendment.

The trial court treated the *Glossip* inquiry as a two step process, and that the Florida Supreme Court's ruling in *Asay v. State* foreclosed any analysis of the second step. But if the proper analysis is a holistic one step analysis whether Mr. Jimenez can show that in comparison to his 25% chance of experiencing severe pain, alternative methods of execution, including the use of other drugs are readily available and feasible, he has met his burden.

Further, Respondent's citation to *Wellons v. Commissioner, Ga. Dept. Of Corrs.*, supports Mr. Jimenez's argument (BIO 22). "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). Here, Mr. 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.

Additionally, Respondent wants to focus on the evidence that was heard in the *Asay* litigation which occurred before Branch's execution. Robert Friedman witnessed the Branch execution and described Branch following the injection of etomidate: "[Branch] appeared to be in obvious distress"; he was "shaking". Further, the description of the incident in the FDLE Investigative Report indicated that Branch **"bellowed a forcible, guttural yell**" after the injection of etomidate. And, Dr. David Lubarsky opined: "Based on the fact that it is well-established that etomidate causes significant pain upon injection, it is my opinion that the scream is objective evidence of Mr. Branch experiencing significant pain during his execution. In a clinical setting, patients are given pre-treatment to reduce pain, and amnestic drugs are often used to ensure that the patient does not remember the pain if any occurs as pre-treatment is not assured to work."[1]

---

[1]While Respondent wishes to ignore Friedman's affidavit and assert that the movement was consistent with myoclonus, i.e. "involuntary twitching or movement", *see* BIO at 27-28, 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 (continued...)

Yet, rather than address the circumstances of the Branch execution, Respondent relies on evidence from the *Asay* litigation to argue that etomidate does not pose a significant risk of harm (BIO 23). Respondent repeats the mantra that Dr. Mark Heath testified that "most patients do not experience pain." (BIO 24, 26). 37, n.7.[2] First, if severe pain is felt 25% of the time, then most individuals would not experience the pain. Moreover, 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 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. None of these precautions are taken by DOC. Thus, without the complete context of Heath's testimony the State's contentions are simply misleading.

As to alternatives to the use of etomidate, Mr. Jimenez proposed multiple alternatives that present no risk of harm – they have been litigated, practiced and proven to accomplish executions with almost no risk of pain from the chosen lethal drugs.[3]

---

[1](...continued)
indicates.

[2]Respondent 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". (BIO 24-25). 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.

[3]The State criticizes Mr. 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." (BIO at 18). This ad hominem attack assumes that Mr. Jimenez's is not suppose to show respect to a court that has ruled against his claim and honor the ruling. The State's position is that when a
(continued...)

Respondent's reference to *Glossip*, *see* BIO 29-30, implies that Respondent wants to sell this Court on the idea that compounded pentobarbital is not available to DOC. But, Respondent is peddling a false and misleading claim. Given the opportunity, Mr. Jimenez can prove that compounded pentobarbital, midazolam and nitrogen gas are readily available for use by the DOC in executions. The deliberate indifference toward Mr. Jimenez is evident and it violates the Eighth Amendment.

Likewise, Respondent clings to the outdated rationales set forth in the plurality opinion in *Baze v. Rees* to argue that a three-drug protocol does not show a deliberate indifference to Mr. Jimenez (BIO 29-30)[4]. However, Respondent misses the point of Mr. Jimenez's argument, i.e.,

---

[3](...continued)
court ruled against challenges Mr. Jimenez's counsel made regarding other drugs, counsel is suppose disregard the judicial ruling that the drugs at issue were found compliant with the Eighth Amendment. Respondent also 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. Thus, there was a basis for the challenges. But, 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 fourteen of twenty 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 v. State*, 132 So. 3d 176 (Fla. 2013), extensive evidentiary development was conducted on midazolam in Oklahoma, after which this 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 *Muhammad*, Respondent'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, courts have found that there is no evidence that compounded pentobarbital or midazolam carries the risk of any pain upon injection. But, etomidate does.

[4]Respondent argues that the paralytic is particularly necessary to "prevent confusion of movement during the execution with consciousness." (BIO at 31). Yet, in Florida, DOC has selected a drug used as an anesthetic agent for induction of anesthesia, which actually causes involuntary movement. It also lasts for an extremely short duration. Thus, if DOC was concerned
(continued...)

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 Mr. 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 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.

Respondent also clings to the Florida Supreme 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. Mr. Jimenez submits that the tipping point has been reached.[5]

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

---

[4](...continued)
about "confusion" and not being able to determine whether an inmate's movement was a sign of consciousness or involuntary, etomidate would not have been selected as the first drug to be followed by a paralytic.

[5]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 (BIO at 31). 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.

> 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). There is simply no advantage to using a three drug protocol with what is know about various one drug protocols being used in dozens of executions since *Baze* was decided.

CONCLUSION

Based on the foregoing, Petitioner submits that certiorari review of the questions he presented in his Petition is warranted.

Respectfully submitted,

/s/. Martin J. McClain
MARTIN J. McCLAIN
Florida Bar No. 0754773
McClain & McDermott, P.A.
141 N.E. 30th 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 12, 2018.

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

LINDA MCDERMOTT
Fla. Bar No. 0102857

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

COUNSEL FOR MR. JIMENEZ