APPENDIX A

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-11942

D.C. Docket No. 8:19-cv-01193-MSS-AEP

BOBBY JOE LONG,

Plaintiff-Appellant,

versus

SECRETARY, DEPARTMENT OF CORRECTIONS, WARDEN, FLORIDA STATE PRISON, JOHN DOES, as designee of Barry Reddish, and/or Mark S. Inch,

Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

(May 22, 2019)

Before ED CARNES, Chief Judge, MARCUS, and JORDAN, Circuit Judges.

ED CARNES, Chief Judge:

Bobby Joe Long kidnapped, sexually battered, and murdered Michelle Denise Simms. And at least seven more women. He brutalized others. After pleading guilty, he was convicted and sentenced to death for the Simms murder. That was more than 32 years ago. After his sentence was vacated and the case remanded, he was resentenced to death. That was more than 30 years ago.

Seven days before Long is scheduled to be executed, he filed a 28 U.S.C. § 1983 complaint in the United States District Court for the Middle District of Florida. He also filed an emergency motion for a temporary restraining order, preliminary injunction, or stay of execution to prevent the State of Florida from executing him on May 23, 2019.

I. PROCEDURAL HISTORY

In September 1985, Long pleaded guilty to eight counts of first-degree murder, nine counts of kidnapping, eight counts of sexual battery, and one probation violation. Long v. State, 610 So. 2d 1268, 1269 (Fla. 1992). That plea included his admission that he kidnapped, sexually battered, and murdered Michelle Denise Simms. Id. The State of Florida agreed that it would not seek the death penalty for the other murders Long admitted committing. Id. A full penalty phase proceeding before a jury was held in the case involving the crimes Long committed against Simms. Long v. State, 529 So. 2d 286, 288, 291 (Fla. 1988).

The jury recommended the death penalty by a vote of eleven to one. Id. at 291. The trial court adopted that recommendation and sentenced Long to death. Id.

On direct appeal, the Florida Supreme Court affirmed Long's convictions and sentences except for the death sentence. Id. at 291–93. It concluded that because the trial judge had found that one of Long's prior convictions qualified as an aggravating factor, and that prior conviction had since been reversed and vacated by an appellate court as a result of a Miranda violation, Long was entitled to a new sentencing proceeding. Id. at 293. A resentencing trial was conducted before a new jury and in a new venue. See Long, 610 So. 2d at 1270. The jury recommended death, this time unanimously. Id. at 1272. The trial court adopted that recommendation and imposed the death penalty. Id. The Florida Supreme Court affirmed, id. at 1275, and the United States Supreme Court denied Long's petition for a writ of certiorari, Long v. Florida, 510 U.S. 832 (1993), making his convictions and sentences final in 1993.

Following the conclusion of his direct appeals, Long unsuccessfully sought postconviction relief in state court three times. See Long v. State, 235 So. 3d 293 (Fla. 2018); Long v. State, 183 So. 3d 342 (Fla. 2016); Long v. State, 118 So. 3d 798 (Fla. 2013). Long also filed a federal habeas petition in the district court in 2013. The district court denied that petition on the merits, and this Court denied Long's application for a certificate of appealability. See Long v. Sec'y, Fla. Dep't

of Corr., No. 16-16259 (11th Cir. Jan. 4, 2017); Long v. Sec'y, Dep't of Corr., No. 8:13-cv-02069-T-27AEP (M.D. Fla. Aug. 30, 2016).

After all of Long's attempts at postconviction relief had been resolved conclusively against him, the Florida Commission on Offender Review initiated state clemency proceedings in Long's case. The Commission conducted proceedings and took the matter under submission in September 2018. After the Commission reported to the Governor, he denied clemency. Long was notified of that decision in April 2019.

The Governor signed Long's death warrant on April 23, 2019, and the Warden set the execution date for May 23, 2019. Since then, Long has filed in the Florida courts a flurry of motions, including two motions for a stay of execution, a motion to dismiss his death warrant as defective, and a motion for postconviction relief (the fourth one he had filed). He also filed a petition for habeas corpus in the Florida Supreme Court. All of his motions and petitions have been denied.

On May 8, 2019, Long filed in the United States District Court for the Northern District of Florida a § 1983 complaint. In that complaint, he claims that the State of Florida violated his federal statutory right to counsel by declining to allow his federally-appointed attorneys to appear at his interview in the state clemency proceedings and that the state-appointed attorney who was present and represented him at that interview rendered ineffective assistance of counsel in

violation of the Sixth Amendment. Along with that § 1983 complaint, Long filed an emergency motion for a stay of execution. The district court denied that motion on May 16, 2019. On May 20, 2019, Long filed a motion for reconsideration in the district court, which it denied on May 21, 2019.

In his complaint in this § 1983 proceeding, Long raises five claims. First, he claims that Florida's use of a three-drug protocol instead of a one-drug protocol violates the Eighth Amendment. Second, he claims that Florida's use of etomidate as the first drug in that three-drug protocol is facially unconstitutional because it creates a risk of severe pain that is substantial when compared to the known and available alternative of using the single drug pentobarbital. Third, he claims that even if the use of etomidate does not amount to cruel and unusual punishment in all cases, it does in his case because of his serious medical conditions (traumatic brain injury and temporal lobe epilepsy).

Fourth, he claims that the State violated his First, Fifth, Eighth, and Fourteenth Amendment rights by objecting to his requests for public records and refusing to answer his questions about the lethal injection protocol. And finally, Long claims that the Warden violated his First, Sixth, Eighth, and Fourteenth Amendment rights by refusing his requests to: (1) have an additional attorney witness at his execution in lieu of a spiritual adviser, (2) permit Long's attorneys to have access to a phone during the execution, and (3) permit one of Long's

witnesses to observe the insertion of the IV line that will be used to administer the lethal drugs.

Along with his complaint, Long filed an emergency motion for a temporary restraining order, preliminary injunction, or stay of execution. He requested that the district court order the State to hold off on his execution until the court had time to consider each of his claims (which, according to Long, would require discovery and an evidentiary hearing).

The district court denied Long's motion for a temporary restraining order, preliminary injunction, or stay of execution on May 19, 2019. It concluded that all of Long's claims were barred by the doctrine of res judicata as a result of the Florida Supreme Court's decision in Long v. State, No. SC19-726, 2019 WL 2150942 (Fla. May 17, 2019). For that reason, he could not show a substantial likelihood of success on the merits. Long filed a notice of appeal the same day. On May 20, 2019, he filed in this Court a motion for a stay of execution, or in the alternative, an expedited appeal. We granted his motion to expedite the appeal.

On May 20, 2019, Long filed two petitions for a writ of certiorari in the United States Supreme Court, each accompanied by an application for a stay of execution. One of those petitions seeks review of the Florida Supreme Court's denial of his state habeas petition. The other one seeks review of the Florida Supreme Court's denial of his fourth motion for postconviction relief. In that one,

he raises two claims that he also raised in the § 1983 lawsuit at issue in this appeal: (1) his claim about the Warden's denial of his requests for exceptions to the Department of Corrections' witness policy, and (2) his challenge to Florida's use of etomidate in its lethal injection protocol.

II. STANDARD OF REVIEW

We review the district court's denial of a motion for a temporary restraining order, preliminary injunction, or stay of execution only for abuse of discretion. Gissendaner v. Comm'r, Ga. Dep't of Corr., 779 F.3d 1275, 1280 (11th Cir. 2015) (temporary restraining order); Chavez v. Fla. SP Warden, 742 F.3d 1267, 1271 (11th Cir. 2014) (preliminary injunction); Muhammad v. Sec'y, Fla. Dep't of Corr., 739 F.3d 683, 688 (11th Cir. 2014) (stay of execution). A district court abuses its discretion if, among other things, "it applies an incorrect legal standard, follows improper procedures in making the determination, or makes findings of fact that are clearly erroneous." Grayson v. Warden, Comm'r, Ala. DOC, 869 F.3d 1204, 1238 (11th Cir. 2017) (quotation marks omitted).

A federal court may grant a temporary restraining order, preliminary injunction, or a stay of execution only if the movant establishes that (1) he has a substantial likelihood of success on the merits, (2) he will suffer irreparable injury unless the injunction issues, (3) the injunction would not substantially harm the other litigant, and (4) if issued, the injunction would not be adverse to the public

interest. Powell v. Thomas, 641 F.3d 1255, 1257 (11th Cir. 2011); see also Gissendaner, 779 F.3d at 1280; Chavez, 742 F.3d at 1271.

III. DISCUSSION

A. Long's Method of Execution Claims

The district court did not abuse its discretion in declining to stay Long's execution on account of his three method of execution claims. Each of them is barred for two independently adequate reasons. First, Long engaged in inexcusable delay in bringing the claims, which is enough to deny him the equitable remedy of a stay. And second, as the district court properly held, each of his claims is barred by the doctrine of res judicata.

1. Inexcusable Delay

Long is not entitled to a stay of execution "as a matter of course" simply because he brought a § 1983 claim. Hill v. McDonough, 547 U.S. 573, 583–84 (2006). Instead, a stay of execution is an equitable remedy and all of the rules of equity apply. See Rutherford v. Crosby, 438 F.3d 1087, 1092 (11th Cir. 2006) (explaining that "where petitioner's scheduled execution is imminent, there is no practical difference between denying a stay on equitable grounds and denying injunctive relief on equitable grounds in a § 1983 lawsuit"), vacated on other grounds, Rutherford v. McDonough, 547 U.S. 1204 (2006).

One of those rules is that "[e]quity must take into consideration the State's strong interest in proceeding with its judgment" and an inmate's "attempt at manipulation." Gomez v. U.S. Dist. Ct. for N. Dist. of Cal., 503 U.S. 653, 654 (1992) (per curiam). As a result, before granting a stay of execution, a court must "consider not only the likelihood of success on the merits and the relative harms to the parties, but also the extent to which the inmate has delayed unnecessarily in bringing the claim." Nelson v. Campbell, 541 U.S. 637, 649–50 (2004). There is a "strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay." Id. at 650.

The Supreme Court has reiterated the importance of these principles three times this year. The first time was in February when a stay entered by this Court was vacated by the Supreme Court. Dunn v. Ray, 139 S. Ct. 661 (2019). In vacating the stay, the Court quoted from Gomez: "A court may consider the last-minute nature of an application to stay execution in deciding whether to grant equitable relief." Id. at 661 (quoting Gomez, 503 U.S. at 654).

And then in April, when affirming the Eighth Circuit's denial of an inmate's as-applied challenge to the State's method of execution, the Supreme Court explicitly instructed lower courts that: "Courts should police carefully against attempts to use such challenges as tools to interpose unjustified delay. Last-minute

stays should be the extreme exception, not the norm, and the last-minute nature of an application that could have been brought earlier, or an applicant's attempt at manipulation, may be grounds for denial of a stay." Bucklew v. Precythe, 139 S. Ct. 1112, 1134 (2019) (quotation marks omitted).

And later that same month, the Supreme Court vacated another stay of execution that this Court had issued. Its decision to vacate the stay was based on the fact that the inmate had delayed bringing his challenge to the State's lethal injection protocol until about two months before his scheduled execution, and then waited until just a few hours before that execution to submit additional evidence. Dunn v. Price, 139 S. Ct. 1312, 1312 (2019). The Supreme Court again relied on Gomez to instruct courts to consider the last-minute nature of a stay in determining whether equitable relief is appropriate. Id.

Long's case is not one of the "extreme exception[s]" in which a last-minute stay should be entered, but instead is within "the norm" where the "strong equitable presumption against the grant of a stay" applies. Bucklew, 139 S. Ct. at 1134; Hill, 547 U.S. at 584 (quotation marks omitted).

The first of Long's method of execution claims is that Florida's use of a three-drug protocol instead of a one-drug protocol violates the Eighth Amendment. But Florida has used a three-drug protocol since January 14, 2000, when it added lethal injection as a new method of execution. See Heynard v. Sec'y, DOC, 543

F.3d 644, 647 (11th Cir. 2014). Long has had nineteen years to challenge the use of a three-drug protocol. Nineteen years is too long to wait.

To the extent that Long argues that a challenge to three-drug protocols would not have been valid until now because other states have only recently begun using one-drug protocols, that argument is belied by allegations in his own complaint. It alleges that at least four other states have "used a single-drug method for executions since 2009." Ten years is too long to wait.

Long's other two method of execution claims also suffer from his delay in bringing them. In those claims, he contends that Florida's use of etomidate as the first drug in its three-drug protocol is unconstitutional regardless of the health of the inmate, and that it is especially so as applied to him because of his serious medical conditions.

Florida adopted etomidate as the first drug in its three-drug protocol in January of 2017, two years and four months ago. But Long waited until a week ago to file this § 1983 challenge to it. Long alleges in his complaint that three of Florida's recent executions using etomidate show that the drug causes inmates severe pain because it does not properly anesthetize them. To the extent that Long argues (and it is not clear that he does) that the delay in bringing his claims was based on facts arising from those executions, his argument is not persuasive. The first of the three executions occurred on November 8, 2017, the second on

February 22, 2018, and the last of them on December 13, 2018. A delay of five months, fifteen months, or eighteen months is too long.

Long's person-specific claim is that his medical conditions will complicate Florida's use of etomidate and may cause him unnecessary pain. But Long has known about his medical conditions for decades. During his 1989 resentencing trial, he presented as mitigating evidence the testimony of two medical experts about his traumatic brain injury and temporal lobe epilepsy. See Long, 610 So. 2d at 1271–72. Any argument about how etomidate would be uniquely harmful to him could have been raised as soon as Florida adopted etomidate as the first drug in its three-drug protocol. That happened in January 2017, two years and four months before Long brought this lawsuit.

If Long had truly intended to challenge Florida's lethal injection protocol instead of just seeking to delay his execution, he would not have deliberately waited to file this lawsuit until a decision on the merits would require entry of a stay. We have refused to grant stays in cases involving delayed filings before, and Long's delay was even more pronounced and less justifiable. See e.g., Brooks v. Warden, 810 F.3d 812, 826 (11th Cir. 2016) (holding that an inmate was not entitled to a stay where he delayed filing his § 1983 challenge until eleven weeks before his execution); In re Hutcherson, 468 F.3d 747, 749–50 (11th Cir. 2006) (denying prisoner's motion to stay his execution pending this Court's resolution of

his application for leave to file a successive petition because he waited until eight days before his scheduled execution to file it and, as a result, his "need for a stay of execution [was] directly attributable to his own failure to bring his claims to court in a timely fashion"); Diaz v. McDonough, 472 F.3d 849, 851 (11th Cir. 2006) (declining to grant a preliminary injunction so that an inmate could pursue an appeal because he filed his § 1983 complaint less than three days before his scheduled execution); cf. Jones v. Allen, 485 F.3d 635, 640 (11th Cir. 2007) (holding that inmate was not entitled to a stay of execution because he waited four years after learning that the state intended to execute him by lethal injection to file his § 1983 challenge).

2. Res Judicata

Even if Long's method of execution claims were not barred on equitable grounds, the district court properly concluded that he could not show a likelihood of success on the merits because the claims are barred by the doctrine of res judicata. All of the claims Long raises in this § 1983 action were raised, or could have been raised, in his fourth motion for postconviction relief, which the Florida Supreme Court rejected. See Long, 2019 WL 2150942, at *6–7.

To the district court's concise and correct discussion, we add one point, which responds to Long's argument that applying the doctrine of res judicata would work a manifest injustice in his case. He claims that because the state

courts did not give him a hearing on the merits of his general challenge, and because the hearing that they did give him on his person-specific challenge was "severely restricted" due to the "extraordinarily constrained timeline" for the litigation of his fourth postconviction motion, it would be unjust to give the Florida Supreme Court's decision preclusive effect.

There are three big problems with this argument. First, his position is unprecedented. Long has not pointed to a single published decision of the Florida courts or this Court applying Florida law holding that it is a "manifest injustice" to apply res judicata if the initial state court decision resolved a claim without granting an evidentiary hearing.[1]

The second problem with Long's position is that the "extraordinarily constrained timeline" that he complains of is a direct result of his delay in filing his method of execution claims in state postconviction proceedings until after his execution date had been set. As we have discussed, there is no reason why Long could not have challenged Florida's use of a three-drug protocol as early as 2000

[1] The inapplicability of the precedent that Long cites and the unpersuasiveness of the arguments that he makes are illustrated by the following sentence and citation from his brief: "This Court has declined to apply res judicata where an inmate was not given an evidentiary hearing on his challenge in state court. See Chavez v. Sec'y, 742 F.3d 1267 (11th Cir. 2014)." That citation is disingenuous. The entire discussion of res judicata in the Chavez opinion consists of the following footnote: "In light of our conclusion that Chavez has not established a substantial likelihood of success on the merits of any of his claims, we do not address and imply no view about the State's asserted defenses based on the statute of limitations, exhaustion of administrative remedies, and res judicata." Chavez, 742 F.3d at 1273 n.5.

(when Florida adopted lethal injection as a method of execution) or at least by 2009 (when, according to the allegations in his complaint, a number of states had switched to a one-drug protocol). And there is no reason why Long could not have challenged Florida's use of etomidate, both in general and specifically as to him, in January 2017, when the Florida Department of Corrections decided to use it as the first drug in the three-drug protocol. It is worse than ironic for Long to argue that the state court's decision does not deserve res judicata effect because the state court had to render that decision under the time constraints that Long forced on it.

There is another fundamental problem with Long's arguments against the application of res judicata. Reduced to its essence, his position is that the res judicata doctrine applies only if the court in which it is asserted agrees with the initial court's decision on de novo consideration. And, he says, we shouldn't agree with the decision of the Florida courts on these claims for a number of reasons. But that is not the way that res judicata works. If it did, the doctrine would be toothless, pointless, and fruitless. It would apply only when it made no difference. The Florida courts have never suggested such a rule-devouring exception, and we will not presume to create one for them here. See Kremer v. Chem. Constr. Corp., 456 U.S. 461, 481–82 (1982) ("It has long been established that [28 U.S.C.] § 1738 does not allow federal courts to employ their own rules of res judicata in determining the effect of state judgments. Rather, it goes beyond the common law

and commands a federal court to accept the rules chosen by the State from which the judgment is taken.").

B. Long's Public Records and Witness Claims

In addition to his three method of execution claims, Long contends that the defendants violated his constitutional rights by (1) objecting to some of his public records requests and refusing to answer some of his questions about the lethal injection protocol, and (2) denying his requests for exceptions to the Department of Corrections' witness policies. As the district court already held, both of those claims are also barred by the doctrine of res judicata. Long raised a public records claim in the Florida courts, see Long, 2019 WL 2150942, at *6–7, and he could have asserted any similar claims in the state court proceedings.

There are many published decisions that support the district court's ruling that, under Florida law, res judicata bars claims that Long could have raised in the state postconviction proceedings but didn't. See, e.g., Topps v. State, 865 So. 2d 1253, 1255 (Fla. 2004) ("The doctrine of res judicata bars relitigation in a subsequent cause of action not only of claims raised, but also claims that could have been raised."); Fla. Dep't of Transp. v. Juliano, 801 So. 2d 101, 105 (Fla. 2001) ("Importantly, the doctrine of res judicata not only bars issues that were raised, but it also precludes consideration of issues that could have been raised but were not raised in the first case."); see also Vasquez v. YII Shipping Co., 692 F.3d

1192, 1199 (11th Cir. 2012) (applying Florida law to explain that "the purpose of res judicata is that a final judgment in a court of competent jurisdiction is absolute and settles all issues actually litigated in a proceeding as well as those issues that could have been litigated.") (quotation marks omitted). The district court was entirely correct in concluding that Long's public records and witness claims are barred by res judicata.

IV. CONCLUSION

We **AFFIRM** the district court's denial of Long's emergency motion for a temporary restraining order, preliminary injunction, or stay of execution. We **DENY** Long's motion for a stay of execution from this Court.

JORDAN, Circuit Judge, concurring.

The district court denied Mr. Long's claims on res judicata grounds based on the Florida Supreme Court's decision in *Long v. State*, 2019 WL 2150942 (Fla. May 17, 2019). I agree with the majority that the district court properly applied the doctrine of res judicata, and therefore join Parts I, II, III.A.2, and III.B of its opinion. Because our affirmance of the district court's res judicata ruling conclusively resolves Mr. Long's claims and requests for relief here, I find it unnecessary to address the issue of delay.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

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May 22, 2019

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 19-11942-P
Case Style: Bobby Joe Long v. Secretary, Department of Corre, et al
District Court Docket No: 8:19-cv-01193-MSS-AEP

This Court requires all counsel to file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause. Enclosed is a copy of the court's decision filed today in this appeal. Judgment has this day been entered pursuant to FRAP 36. The court's mandate will issue at a later date in accordance with FRAP 41(b).

The time for filing a petition for rehearing is governed by 11th Cir. R. 40-3, and the time for filing a petition for rehearing en banc is governed by 11th Cir. R. 35-2. Except as otherwise provided by FRAP 25(a) for inmate filings, a petition for rehearing or for rehearing en banc is timely only if received in the clerk's office within the time specified in the rules. Costs are governed by FRAP 39 and 11th Cir.R. 39-1. The timing, format, and content of a motion for attorney's fees and an objection thereto is governed by 11th Cir. R. 39-2 and 39-3.

Please note that a petition for rehearing en banc must include in the Certificate of Interested Persons a complete list of all persons and entities listed on all certificates previously filed by any party in the appeal. See 11th Cir. R. 26.1-1. In addition, a copy of the opinion sought to be reheard must be included in any petition for rehearing or petition for rehearing en banc. See 11th Cir. R. 35-5(k) and 40-1 .

Counsel appointed under the Criminal Justice Act (CJA) must submit a voucher claiming compensation for time spent on the appeal no later than 60 days after either issuance of mandate or filing with the U.S. Supreme Court of a petition for writ of certiorari (whichever is later) via the eVoucher system. Please contact the CJA Team at (404) 335-6167 or cja_evoucher@ca11.uscourts.gov for questions regarding CJA vouchers or the eVoucher system.

For questions concerning the issuance of the decision of this court, please call the number referenced in the signature block below. For all other questions, please call David L. Thomas at (404) 335-6171.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: David L. Thomas
Phone #: 404-335-6151

OPIN-1 Ntc of Issuance of Opinion

ARGUMENTS AND CITATIONS TO AUTHORITY

Res Judicata Does Not Bar Long's § 1983 Because He Did Not Receive a Full and Fair Opportunity to Litigate His Claims in State Court Proceedings, and Strict Adherence to the Doctrine Would Work an Injustice

The District Court abused its discretion when it held that res judicata barred Long's § 1983 lawsuit under *Muhammad v. Secretary, Florida Department of Corrections*, 739 F. 3d 683 (11th Cir. 2014). The particular circumstances in Long's case overcome the defense of res judicata because, unlike Mr. Muhammad, Long was denied a full and fair constitutional hearing on the merits of his general lethal injection claim and the hearing on his as-applied lethal injection claim was severely restricted. It would thus be a manifest injustice to execute Long using a torturous protocol, without any court ever providing him an evidentiary hearing on his general claim and without a full and fair hearing on his as-applied claim.

Res judicata is not an absolute doctrine, and Florida courts have held the doctrine should not be adhered to where its application would "work an injustice." *See, e.g.*, *deCancino v. Eastern Airlines, Inc.*, 283 So. 2d 97, 98 (Fla. 1973). "Indeed, [the Florida Supreme Court], among others, has announced the salutary principle that the doctrine of res judicata should not be so rigidly applied as to defeat the ends of justice." *Universal Const. Co. v. City of Fort Lauderdale*, 62 So. 2d 366, 369 (Fla. 1953) ("Although we are constrained to adhere to our former opinion that all the requisites of res judicata appear to exist, we are now convinced that this doctrine should not necessarily be controlling under the facts and circumstances attendant upon this

litigation."). As the Florida Supreme Court has stated,

> Stare decisis and res adjudicata are perfectly sound doctrines, approved by this court, but they are governed by well-settled principles and when factual situations arise that to apply them would defeat justice we will apply a different rule. Social and economic complexes must compel the extension of legal formulas and the approval of new precedents when shown to be necessary to administer justice. In a democracy the administration of justice is the primary concern of the State and when this cannot be done effectively by adhering to old precedents they should be modified or discarded. Blind adherence to them gets us nowhere.

Wallace v. Luxmoore, 24 So. 2d 302, 304 (1946). More recently, the Florida Supreme Court has explained that a procedural bar premised upon res judicata may be overcome in order to avoid manifest injustice:

> The State contends that the law of the case doctrine and collateral estoppel barred the Second District from addressing this claim below. We disagree. Under Florida law, appellate courts have "the power to reconsider and correct erroneous rulings [made in earlier appeals] in exceptional circumstances and where reliance on the previous decision would result in manifest injustice." *Muehlman v. State*, 3 So. 3d 1149, 1165 (Fla. 2009) (alteration in original) (recognizing this Court's authority to revisit a prior ruling if that ruling was erroneous) (quoting *Parker v. State*, 873 So. 2d 270, 278 (Fla. 2004)); see *State v. J.P.*, 907 So. 2d 1101, 1121 (Fla. 2004) (same); *Parker v. State*, 873 So. 2d 270, 278(Fla. 2004) (same); *see also Fla. Dep't of Transp. V. Juliano*, 801 So. 2d 101, 106 (Fla. 2001) ("[A]n appellate court has the power to reconsider and correct an erroneous ruling that has become the law of the case where a prior ruling would result in a 'manifest injustice.'" (quoting *Strazzulla v. Hendrick*, 177 So. 2d 1, 3 (Fla. 1965).

State v. Akins, 69 So. 3d 261, 268 (Fla. 2011). *See also Strazzulla v. Hendrick*, 177 So. 2d 1, 3-4 (Fla. 1965).

The Florida Supreme Court's recognition of its "power to reconsider and correct

erroneous rulings [made in earlier appeals] in exceptional circumstances and where reliance on the previous decision would result in manifest injustice" under *Muehleman v. State,* 3 So. 3d 1149, 1165 (Fla. 2009), is in accord with the well-recognized inherent equitable powers vested in American courts. Indeed, a court's inherent equitable powers were explained in *Holland v. Florida*, 130 S. Ct. 2549 (2010), by the United States Supreme Court:

> But we have also made clear that often the "exercise of a court's equity powers . . . must be made on a case-by-case basis." In emphasizing the need for "flexibility," for avoiding "mechanical rules," we have followed a tradition in which courts of equity have sought to "relieve hardships which, from time to time, arise from a hard and fast adherence" to more absolute legal rules, which, if strictly applied, threaten the "evils of archaic rigidity." The "flexibility" inherent in "equitable procedure" enables courts "to meet new situations [that] demand equitable intervention, and to accord all the relief necessary to correct . . . particular injustices.

130 S. Ct. at 2563.

The circumstances presented by Long demonstrate "exceptional circumstances" such that "reliance on the previous decision would result in manifest injustice." *Muehleman v. State*, 3 So. 3d at 1165. Immense social harm will ensue by invoking the doctrine of res judicata to bar Long's complaint – including the highest dignity interests inherent in the Eighth Amendment by conducting a torturous execution and society's interest in avoiding unconstitutional punishments. Where the Florida courts have declined to invoke res judicata for mere economic interest, *see, e.g.*, *Universal Const. Co.*, 68 So.2d at 370, surely res judicata cannot be applied here.

The Eleventh Circuit has also recognized the interests exception to res judicata in *Shell v. Schwartz,* 357 F. App'x 250, 252 (11th Cir 2009). The *Shell* Court declined to apply the exception because it found that "Shell was, in fact, given *a full and fair opportunity to litigate his claims* in the state court proceedings and he did so." *Id.* (emphasis added). Again, here the injustice exception is linked to the full and fair opportunity for claims to be heard. Unlike in *Shell*, Long was not given a full and fair opportunity to litigate his claims in the state court.

A. Long Was Summarily Denied A Hearing on His General Method of Execution Challenge in All Courts, Despite Significant New Evidence that Florida's Protocol Will Result in Severe, Unconstitutional Pain

To date, Long's general method of execution challenge has never received an evidentiary hearing *in any court.* Long was denied an evidentiary hearing the circuit court. The Florida Supreme Court upheld this summary denial based on the hearings or challenges conducted by past inmates. These past hearings should not have barred Long's own ability to illustrate that the science and medicine had evolved since the last hearing, and that new evidence from the most recent executions including one in December 2018 affects the Florida Supreme Court's prior analyses. The state courts did this despite that Long provided evidence of irregularities in the Branch and Jimenez executions and an extensive and updated expert affidavit was provided. Moreover, Long was denied discovery by the state and the courts that would have enabled him to further plead and prove his claims, including the need for an evidentiary

hearing. This places Long in stark contrast to Muhammad, who received a *full hearing* on his general lethal injection challenge in state court. *See Muhammad*, 739 F.3d, at 685. This lack of a hearing resulted in the denial of even a modicum of due process under the Fourteenth Amendment, which prevents the state court judgment from having preclusive effect. See *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 481-82 (1982) (state court's failure to comply with requirements of Due Process Clause would prevent the preclusive effect of that state court's judgment); *Allen v. McCurry*, 449 U.S. 90, 101 (1980) ("Collateral estoppel does not apply where the party against whom an earlier court decision is asserted did not have a full and fair opportunity to litigate the claim or issue decided by the first court.").

In the District Court below, Long was also denied an evidentiary hearing, despite providing additional expert testimony in the form of Dr. Gail Van Norman's declaration that presented evidence not examined in the Florida Supreme Court's cases of *Asay* and *Jimenez* that were used to block his state challenge. Dr. Van Norman, who has extensive experience administering anesthesia and specifically etomidate, explained that experienced anesthesiologists (like the ones relied on by the state in prior litigation) often mistake "recall" for "awareness," and that awareness is of upmost concern in lethal injection, given the excruciating pain of the second and third drugs used in Florida's protocol. As Dr. Van Norman explained, a patient cannot be unconscious unless he or she is also unaware of pain or noxious stimuli. In practice,

the use of etomidate without other anesthetic drugs including analgesics, while it can induce sleep, cannot induce a lack of awareness or perception to pain. Indeed, as Dr. Van Norman described, even during full general anesthesia (which involves more than a single sleep-inducing drug), awareness episodes have been shown in multiple studies to occur in over 71% of patients, even though the anesthesiologists believed that their patients were unconscious and unaware at the time. Critically, in one study, 42% of patients who had awareness indicated they also experienced pain. Dr. Van Norman thus concluded that it was therefore *very likely* that using etomidate as a sole agent to produce unconsciousness in the lethal injection protocol will result in many prisoners being aware at the time of administration of the muscle relaxant and potassium, and as a result, Florida's protocol was "virtually certain" to cause severe pain, terror, and panic.

Notably, in *Chavez v. State*, 132 So. 3d 826 (Jan. 31, 2014), the Florida Supreme Court upheld a summary denial of Chavez's challenge to the lethal injection protocol without an evidentiary hearing, much like the court did here in this case with Long. However, when Chavez brought a subsequent § 1983 proceeding in federal court, Chavez ***was given an evidentiary hearing*** and ***this Court ruled on the merits of Chavez's claim***. *Chavez*, 742 F.3d 1267. Importantly, the Chavez ruling came ***after*** *Muhammad*, yet neither the District Court nor the Circuit denied Chavez's claims on the grounds of res judicata. Thus, the lack of an evidentiary hearing on Long's general

claims is dispositive here.

B. Long's As-Applied Evidentiary Hearing in State Court Was Severely Curtailed, Such That It Violated Due Process and Was Neither Full Nor Fair.

Although Long received a limited evidentiary hearing on his as-applied challenge, the circuit court strictly curtailed his ability to prove his claims by limiting discovery, restricting witnesses, and limiting lines of inquiry, all within an extraordinarily constrained timeline created by the state courts.[2]

The following summary of the state court procedural history demonstrates Long was denied a full and fair opportunity to present his evidence in support of his as-applied claims. This full and fair opportunity to litigate is required to apply the doctrine of res judicata as a prohibition from proceeding in federal court. Long was given just 30 days from the issuance of his warrant on April 23, 2019, to his execution date of May 23, 2019. On April 24, 2019, the Florida Supreme Court issued an expedited briefing schedule requiring all proceedings in the circuit court to be completed by May 7, 2019, and all appellate briefing to be completed a mere seven days later by May 14, 2019. *See Ex.* 3.[3] The post-conviction court then set a schedule requiring all record

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[2] On May 2, 2019, Long filed an Emergency Motion for the Extension of the Circuit Court's Jurisdiction in Warrant Proceedings, requesting an extension from May 6, 2019, to May 9, 2019—a mere three more days, which would not have interfered with the scheduled execution date. *See Ex.* 1. The Florida Supreme Court denied the request on the same day. *See Ex.* 2.

[3] Exhibit numbers refer to exhibits to Long's Reply In Support of his TRO Motion in

requests to be completed by April 26, 2019 (the next day) at noon; all post-conviction motions to be filed by April 29, 2019, at noon (four days later); the case management conference[4] to be conducted on May 1, 2019, at 9:30 am; and the evidentiary hearing, if granted, to be held on May 2, 2019, and/or May 3, 2019. *See Ex.* 4; *see Ex.* 5.

At the case management conference held on May 1, 2019, the trial court set an evidentiary hearing for May 3, 2019, and limited the hearing to only Long's as-applied challenge. *See Ex.* 6. The trial court further ordered each party to file their evidentiary hearing lists by 5:00 p.m. on May 1, 2019. *Id.*

Following Long's timely witness list filing, the State filed a motion to strike witnesses on May 2, 2019. At 9:56 a.m. that day, Long's counsel, who were in the process of preparing for the evidentiary hearing, were informed the trial court would hear that motion at 2:00 p.m. that afternoon. During the hearing, Long withdrew several listed witnesses. *See Ex.* 7. Then, the trial court unreasonably restricted Long to only one expert witness (neuropsychologist) to present essential evidence of Long's severe traumatic brain injury and temporal lobe epilepsy and further required Long to choose which one would testify within one hour of the hearing. *See id.* at 13. These witnesses were crucial to explaining why Long's medical conditions presented a severe risk of pain. The state court also struck three lay witnesses that were prepared

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the District Court below.

[4] Under Fla. R. Crim. P. 3.851, the Defendant must disclose his witnesses at the Case Management Conference.

to testify as to the agony and terror of experiencing awareness during surgery. *See id.* at 27.

The state court severely limited Long's ability to present evidence by excluding witnesses as to the availability of an alternative method of execution. Specifically, the state court prohibited Long from calling a paralegal and any FDOC witnesses that he designated to support his burden under *Bucklew*[5] and *Glossip*.[6] *See* Ex. 7 at 16-21. The state court told the State that they can "come up with a name of a person with the [FDOC] who would be able to testify . . . why the State of Florida doesn't follow the protocols of other states when it comes to lethal injection." *Id.* at 21-22. The state was ordered to provide that name by 4:00 p.m. May 2, 2019. *See id.* As a result, Long's counsel met the DOC official on the day of the May 3, 2019 evidentiary hearing. Additionally, during the hearing, the circuit court sustained objections to questions regarding the general effects of etomidate and the second and third drugs, because these were deemed to apply to the general challenge, even though such information was highly relevant to the as-applied challenge.

The state court proceedings were not an adversarial proceeding nor were they indicative of the presentation that Long wanted to present under his constitutional procedural and substantive due process rights. As argued in his Complaint, Long was

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[5] *Bucklew v. Precythe*, 139 S. Ct. 1112 (2019).
[6] *Glossip v. Gross*, 135 S. Ct. 2726 (2015).

restricted from receiving relevant records, in particular his medical records pursuant to a properly executed release, to support his claims. That Long was denied access to his own medical records under HIPAA was an abject denial of due process, especially since the state attempted to question witnesses regarding the presence or absence of seizures in the medical records.[7] The state court prejudiced Long by severely limiting his witnesses and by allowing the State to choose Long's FDOC witness, who he could not speak to until the day of the evidentiary hearing. Long was given inadequate time to interview that witness and was prevented from proffering evidence during the hearing. Long requested a brief extension so that he could have a full and fair opportunity to litigate his claims, but he was denied. The state court proceedings were not "conclusive not only as to every matter which was offered and received to sustain or defeat the claim, [or] as to every other matter which might with propriety have been litigated and determined in that action." *Fla. Dep't of Transp. v. Juliano,* 801 So.2d 101, 105 (Fla. 2001) (quoting *Kimbrell v. Paige,* 448 So. 2d 1009, 1012 (Fla.1984)).

The state court proceedings created bar after bar on Long and created an unjust and unconstitutional hearing. The incredible limitations placed on Long's litigation by the state courts sets his aside from *Muhammad.* The proper remedy for this injustice is to allow Long a full and fair opportunity to litigate in federal court.

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[7] Notably, seizures do not need to be recent to present a risk with etomidate.

RELIEF SOUGHT
(Fed.R.App.P. 28(a)(9))

Long requests that this Court reverse and remand his case with directions to grant the TRO or to afford any relief this Court deems necessary and proper.

CERTIFICATE OF FONT AND WORD COUNT
(Fed.R.App.P. 28(a)(10))

Undersigned counsel certifies that this brief is in 14 point Times New Roman and excluding the cover page, the certificate of interested persons and corporate disclosure statement, the table of contents, the table of citations, the statement with respect to oral argument and any certificates of counsel contains 4649 words.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on Monday, May 20, 2019, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system

/s/Robert A. Norgard
ROBERT A. NORGARD

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

BOBBY JOE LONG,

Plaintiff,

v. **Case No: 8:19-cv-1193-MSS-AEP**

MARK S. INCH, in his capacity as the Secretary, Florida Department of Corrections, BARRY REDDISH, in his capacity as the Warden of Florida State Prison, JOHN DOES, as designee[s] of Barry Reddish, and/or Mark S. Inch,

Defendants.

ORDER

THIS CAUSE comes before the Court for consideration of Plaintiff's Emergency Motion for Temporary Restraining Order, Preliminary Injunction and/or Stay of Execution, (Dkt. 2), the response in opposition thereto filed by Defendants Mark S. Inch and Barry Reddish, (Dkt. 16), and Plaintiff's reply in support of the Motion. (Dkt. 19) Plaintiff Bobby Joe Long ("Long") moves this Court for an emergency stay of his execution, which is scheduled to take place on May 23, 2019 at 6:00 P.M. Upon consideration of all relevant filings, case law, and being otherwise fully advised, the Court **DENIES** Long's Motion.

I. BACKGROUND

On September 23, 1985, pursuant to a plea agreement, Long pleaded guilty to the murder, kidnapping, and sexual battery of Michelle Simms in Hillsborough County Case No. 84-13346. Long additionally pleaded guilty to seven counts of first-degree murder and sexual battery, eight additional counts of kidnapping, and one violation of probation.

Under the agreement, Long received a five-year sentence on the probation violation charge and life sentences on every count of each case, except for the first-degree murder, kidnapping, and sexual battery counts in the Michelle Simms murder. The agreement provided for a full penalty phase proceeding before a jury in the Simms case. The advisory jury recommended the death penalty by a vote of eleven-to-one. The trial court imposed a sentence of death. However, the Florida Supreme Court vacated the sentence and remanded the case for resentencing. After the second sentencing proceeding, the jury recommended a sentence of death by unanimous vote. The trial judge sentenced Long to concurrent life sentences for the sexual battery and kidnapping counts and imposed the death sentence for the first-degree murder of Michelle Simms after finding that the aggravating factors outweighed the mitigating factors. The Florida Supreme Court affirmed Long's conviction and sentence on direct appeal. Long v. State, 610 So.2d 1268 (Fla. 1992), cert. denied, 510 U.S. 832 (1993).

Long sought postconviction relief in state court asserting eight grounds. After conducting multiple evidentiary hearings, the state trial court denied relief. The Florida Supreme Court affirmed. Long v. State, 118 So.3d 798 (Fla. 2013). Long then filed a federal habeas petition under 28 U.S.C. § 2254, which was denied on August 28, 2016. Long v. Secretary, Department of Corrections et al., Case No: 8:13-cv-2069-JDW-AEP (M.D. Fla. Aug. 30, 2016). The court also denied Long's request for a certificate of appealability. Id. On January 4, 2017, the Eleventh Circuit Court of Appeals likewise denied Long's motion for certificate of appealability. Long v. Secretary, Department of Corrections et al., No 16-16259 (11th Cir. Jan. 4, 2017).

On April 23, 2019, the Governor of the State of Florida issued a death warrant to carry out Long's death sentence. Long filed a state court petition pursuant to Florida Rule of Criminal Procedure 3.851 to vacate the judgment of conviction and sentence of death, raising five grounds. The state court denied the petition, and the Florida Supreme Court affirmed the lower court's decision. Long v. State, No. SC19-726, 2019 WL 2150942, at *1 (Fla. May 17, 2019).

Proceeding under 42 U.S.C. § 1983, Long sues Defendants Mark S. Inch, in his official capacity as the Secretary of the Florida Department of Corrections, and Barry Reddish, in his official capacity as the Warden of Florida State Prison (collectively, "the State") claiming they have violated or threatened to violate his First, Fifth, Sixth, Eighth, and Fourteenth Amendment rights. (Dkt. 1) Thus, Long seeks a temporary restraining order, preliminary injunction, or stay of the execution currently scheduled for May 23, 2019 at 6:00 P.M. For the reasons that follow, the Court denies Long's Motion.

II. LEGAL STANDARD

To be entitled to a stay of execution, Long must establish: "(1) he has a substantial likelihood of success on the merits; (2) he will suffer irreparable injury unless the injunction issues; (3) the stay would not substantially harm the other litigant; and (4) if issued, the injunction would not be adverse to the public interest." Price v. Comm'r, Dep't of Corr., 920 F.3d 1317, 1323 (11th Cir. 2019) (quoting Arthur v. Comm'r, Ala. Dep't of Corr., 840 F.3d 1268, 1321 (11th Cir. 2016) (quoting Brooks v. Warden, 810 F.3d 812, 818 (11th Cir. 2016))). Preliminary injunctions and temporary restraining orders require proof of the same elements. Gissendaner v. Comm'r, Georgia Dep't of Corr., 779 F.3d 1275, 1280 (11th Cir. 2015) (explaining that "[t]he standard for granting a temporary restraining order

or a stay of execution is the same"); Chavez v. Fla. SP Warden, 742 F.3d 1267, 1271 (11th Cir. 2014) (defining elements for entitlement to a preliminary injunction in a death penalty case). Long has the burden of establishing each of these elements. Grayson v. Warden, 672 F. App'x 956, 962 (11th Cir. 2016) (citing Mann v. Palmer, 713 F.3d 1306, 1310 (11th Cir. 2013)). "The 'first and most important question' regarding a stay of execution is whether the petitioner is substantially likely to succeed on the merits of his claims." Id. (Jones v. Comm'r. Ga. Dep't of Corr., 811 F.3d 1288, 1292 (11th Cir. 2016)). Thus, the Court must address the viability of Long's § 1983 claims.

III. DISCUSSION

A. Rooker-Feldman Doctrine

Defendants have raised, as a threshold matter, the question of whether this Court's jurisdiction over Long's § 1983 claims is barred by the Rooker-Feldman doctrine. (Dkt. 16 at 7–11) The Rooker-Feldman doctrine derives from two United States Supreme Court cases, Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923), and District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983). The doctrine is a jurisdictional rule that precludes lower federal courts from reviewing state court judgments. Nicholson v. Shafe, 558 F.3d 1266, 1270 (11th Cir. 2009). However, in Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280 (2005), the United States Supreme Court has cautioned that the doctrine's scope is narrow:

> The *Rooker–Feldman* doctrine, we hold today, is confined to cases of the kind from which the doctrine acquired its name: cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments. *Rooker–Feldman* does not otherwise override or supplant preclusion doctrine or augment the circumscribed doctrines that allow federal courts to stay or dismiss proceedings in deference to state-court actions.

Id. at 284. In order for the doctrine to apply, "the state court must have rendered judgment before the district court proceedings commenced," i.e. the state court proceedings must have ended. Nicholson, 558 F.3d at 1274. State court proceedings have "ended" for purposes of the Rooker-Feldman doctrine in three scenarios:

> (1) when the highest state court in which review is available has affirmed the judgment below and nothing is left to be resolved, (2) if the state action has reached a point where neither party seeks further action, and (3) if the state court proceedings have finally resolved all the federal questions in the litigation, but state law or purely factual questions (whether great or small) remain to be litigated.

Lozman v. City of Riviera Beach, Fla., 713 F.3d 1066, 1072 (11th Cir. 2013) (quoting Nicholson, 558 F.3d at 1275) (other citations omitted).

In Nicholson v. Shafe, 558 F.3d 1266 (11th Cir. 2009), the Eleventh Circuit expressly held that "state proceedings have not ended for purposes of *Rooker–Feldman* when an appeal from the state court judgment remains pending at the time the plaintiff commences the federal court action that complains of injuries caused by the state court judgment and invites review and rejection of that judgment." Id. at 1279. Moreover, a federal court's jurisdiction will not be defeated in the event that the state appellate court affirms the lower court's decision *after* the filing of the federal action. Id. at 1279 n.13 (11th Cir. 2009) (noting that "the *Rooker–Feldman* doctrine cannot spring into action and vanquish properly invoked subject matter jurisdiction in federal court when state proceedings subsequently end"); see also Exxon Mobil, 544 U.S. at 294 (providing that "neither *Rooker* nor *Feldman* supports the notion that properly invoked concurrent jurisdiction vanishes if a state court reaches judgment on the same or related question while the case remains *sub judice* in a federal court").

Based on the binding precedent cited above, the Court finds that the Rooker-Feldman doctrine does not apply to bar this Court's jurisdiction over Long's claims. Plaintiff commenced this action on May 16, 2019. (Dkt. 1) On May 17, 2019, one day after Long filed his federal Complaint, the Florida Supreme Court affirmed the state postconviction court's judgment denying Long's requested relief. Long, 2019 WL 2150942 at *1. Thus, at the time Long filed his Complaint, his postconviction appeal, raising the same issues he complains of in the instant matter, was still pending before the Florida Supreme Court. Under the dictates set forth in Exxon Mobil and Nicholson, this Court finds that it has jurisdiction over Long's claims.[1]

However, when there is parallel state and federal court litigation, "[d]isposition of the federal action, once the state-court adjudication is complete, would be governed by preclusion law." Exxon Mobil Corp., 544 U.S. at 293. Though the Court finds that Long's Complaint is not jurisdictionally barred by the Rooker-Feldman doctrine, his claims are barred by the doctrine of res judicata, as discussed below.

B. Likelihood of Success on the Merits and Res Judicata

Long's request to stay his execution due to alleged violations of his federal constitutional rights is due to be denied for failure to demonstrate a substantial likelihood of success on the merits because all of his claims are barred by res judicata.

The Eleventh Circuit squarely addressed the application of the doctrine of res judicata in a method-of-execution case in Muhammad v. Secretary, Florida Department of Corrections, 739 F.3d 683, 688 (11th Cir. 2014). Therein, the court explained that in

[1] Long argues that the Rooker-Feldman doctrine does not apply because the injuries alleged in his federal Complaint were not caused by the state trial court's or the Florida Supreme Court's judgments. (Dkt. 19 at 2–4) While this argument appears facially meritless, the Court does not address it because the Court finds that it has jurisdiction for the reasons stated above.

deciding "whether to give res judicata effect to a state court judgment, we 'must apply the res judicata principles of the law of the state whose decision is set up as a bar to further litigation.'" Id. (quoting Green v. Jefferson Cnty. Comm'n, 563 F.3d 1243, 1252 (11th Cir. 2009) (quoting Kizzire v. Baptist Health Syst., Inc., 441 F.3d 1306, 1308–09 (11th Cir. 2006))). "In Florida, a judgment on the merits bars a later-filed complaint when the following four conditions are present: '(1) identity of the thing sued for; (2) identity of the cause of action; (3) identity of persons and parties to the action; and (4) identity of quality in persons for or against whom [the] claim is made.'" Id. (quoting Brown v. R.J. Reynolds Tobacco Co., 611 F.3d 1324, 1332 (11th Cir. 2010)). "Florida law establishes that '[a] judgment on the merits rendered in a *former* suit between the same parties or their privies, upon the same cause of action, by a court of competent jurisdiction, is conclusive not only as to every matter which was offered and received to sustain or defeat the claim, but as to every other matter which might with propriety have been litigated and determined in that action.'" Id. at 688 (emphasis in original) (quoting Fla. Dep't of Transp. v. Juliano, 801 So.2d 101, 105 (Fla. 2001) (quoting Kimbrell v. Paige, 448 So.2d 1009, 1012 (Fla.1984)).

In Muhammad, the Eleventh Circuit found that the plaintiff's Eighth Amendment claim brought under § 1983 was barred by res judicata because the Florida Supreme Court had already decided the claim. The court explained as follows:

> The decision rendered by the Supreme Court of Florida was a judgment on the merits that rejected the same claim Muhammad now alleges in federal court: the use of midazolam hydrochloride in Florida's three-drug lethal injection protocol creates a substantial risk of serious harm. The cause of action is the same in federal court as it was in state court because both actions involve similar facts essential to the Eighth Amendment claim: allegations that an inmate executed in October 2013 moved minutes after the administration of midazolam hydrochloride; allegations that midazolam hydrochloride does not last as long as other drugs used as anesthesia in executions; allegations that midazolam hydrochloride requires more time to

> take effect; and allegations that the Department of Corrections fails to follow protocol during executions by failing to ensure that the inmate is unconscious. We acknowledge that the amended complaint incorporates factual allegations derived from the execution logs that Florida officials disclosed to Muhammad and the district court after the Supreme Court of Florida issued its decision. But those execution logs provide only more detailed factual allegations about previous executions that Muhammad extensively discussed in his motion for relief that the Supreme Court of Florida rejected. Finally, the parties involved in the state-court action and the federal lawsuit are also the same. The individuals named in the federal lawsuit are sued in their official capacity and are in privity with the State of Florida, the defendant in the state-court action. *See Welch v. Laney*, 57 F.3d 1004, 1009 (11th Cir.1995) ("[W]here a plaintiff brings a[ ] [§ 1983] action against a public official in his official capacity, the suit is against the office that official represents, and not the official himself.").

Id. at 689. The court therefore found that the plaintiff failed to establish a substantial likelihood of success on the merits of his claim and denied his motion for stay of execution. It noted that "[f]ederal review of [the plaintiff's] Eighth Amendment claim, already decided by the Supreme Court of Florida, is available in the Supreme Court of the United States, in which his petition for a writ of certiorari is pending," referring to the procedure under 28 U.S.C. § 1257, which provides for U.S. Supreme Court review of final judgments rendered by the highest court of a State. 28 U.S.C. § 1257; Muhammad, 739 F.3d at 689. Moreover, in accordance with Muhammad, the district court in Davis v. Scott denied an emergency motion for stay of execution in a § 1983 case where the petitioner raised the same claims in state court and those claims had been resolved by the Florida Supreme Court. No. 8:14-CV-01676-T-27TB, 2014 WL 3407473, at *1 (M.D. Fla. July 10, 2014) (citing Muhammad, 739 F.3d at 685, 688) ("Davis' constitutional challenge to the clemency proceedings is identical to those brought in state court, and is therefore barred by res judicata.").

Like the plaintiffs in Muhammad and Davis, Long brings to this Court a § 1983 action that raises the claims that he brought and lost by a now final decision of the Florida Supreme Court. Thus, like those of the plaintiffs in Muhammad and Davis, Long's claims are barred under the doctrine of res judicata.

First, the identity of "the thing sued for" in both of Long's actions are the same. In his state court motion and appeal and in the instant matter, Long has sought an order enjoining the State from executing him by means of lethal injection in accordance with its current procedures and protocols, declaring the State's lethal injection protocol and procedures unconstitutional, and permitting the discovery and public records requested by Long. (Dkt. 1 at 39); State v. Long, 84-CF-013346, Defendant's Motion to Vacate Judgment of Conviction and Sentence of Death After Death Warrant Signed, at 5, 11–14, 23–25; Long v. State, SC19-726, Initial Brief of the Appellant, at 32–49, 64–72.

Second, the identity of the causes of action are the same. "Florida law defines identical causes of action as causes 'sharing similarity of facts essential to both actions.'" Muhammad, 739 F.3d at 688 (quoting Fields v. Sarasota Manatee Airport Auth., 953 F.2d 1299, 1307–08 (11th Cir. 1992) (internal quotation marks omitted)). In the instant case, Long brings four claims pursuant to 42 U.S.C. § 1983 for "violations and threatened violations" of his federal constitutional rights. (Dkt. 1)

In Count One, Long asserts that Florida's etomidate protocol creates a substantial and imminent risk that is sure or very likely to cause serious pain and needless suffering, both in general and as applied to him, in violation of his Eighth Amendment right to be free from cruel and unusual punishment. (Id. at ¶¶ 131–34) Specifically, Long contends that Florida's use of etomidate as the first drug in its three-drug protocol is problematic

for four principal reasons: (1) it is short-acting and thus likely to wear off during the execution, (2) it will not allay pain because it is not an analgesic, (3) it may result in myoclonus (involuntary movements), which could lengthen the execution by making the consciousness check more difficult, and (4) it may cause significant pain on injection. (Id. at ¶¶ 58–69) Long also contends that the second drug in the protocol, rocuronium bromide, increases the risk of serious pain and suffering because it will mask any ineffectiveness of etomidate by paralyzing Long and rendering him unable to convey any pain or suffering during administration of the third drug, potassium acetate. (Id. at ¶¶ 44–50) Long further claims that his unique medical conditions of traumatic brain injury ("TBI") and temporal lobe epilepsy render etomidate unconstitutional as applied to him, because the drug can induce seizures in persons with epilepsy. (Id. at ¶¶ 81–90) Long proposes that a single dose of pentobarbital is an allegedly available alternative to Florida's current protocol that would pose a significantly reduce risk of pain and suffering. (Id. at ¶¶ 95–104) In Count Two, Long contends that Florida's refusal to adopt a one-drug protocol violates the Eighth Amendment by failing to comport with evolving standards of decency that mark the progress of a maturing society. (Id. at ¶¶ 106–13; 135–37) In Count Three, Long contends that the State has violated his First, Fifth, Eighth, and Fourteenth Amendment rights by objecting to his public record requests and limiting his access to information necessary to prove his case. (Id. at ¶¶ 114–20; 138–39) In Count Four of his Complaint, Long contends that the State has denied his due process right to access to courts and his First, Sixth, Eighth, and Fourteenth Amendment rights by refusing his request for two attorney witnesses, attorney telephone phone access, and a witness to observe the IV insertion during the execution. (Id. at ¶¶ 121–30; 140–41)

All of Long's asserted claims were raised or could have been raised during Long's previously filed postconviction proceedings before the Florida Supreme Court. See Long v. State, 84-CF-013346, Initial Brief of the Appellant, at p. 34–41 (arguing that Long's unique medical conditions render the etomidate protocol unconstitutional under the Eighth Amendment as applied to him); p. 41–45 (arguing that Florida's refusal to adopt a one drug protocol violates the Eighth Amendment by failing to comport with evolving standards of decency); p. 45–49 (arguing that etomidate protocol violates the Eighth Amendment generally); p. 64–67 (arguing Sixth and Eighth Amendment violations for the refusal of Long's requests for defense witnesses at his execution, access to a telephone, and viewing of the IV insertion process); p. 69–71 (arguing Eighth and Fourteenth Amendment violations for objections to Long's public record requests).

While the Court notes that Long did not assert violations of the First and Fifth Amendments in his postconviction claim regarding the objections to his public record requests and access to other information or violations of the First and Fourteenth Amendments in his postconviction claim concerning his request for witnesses and phone access in the execution viewing room, such claims could have been litigated and determined in that action. See Juliano, 801 So. 2d at 105 ("Importantly, the doctrine of res judicata not only bars issues that were raised, but it also precludes consideration of issues that could have been raised but were not raised in the first case."); Shell v. Schwartz, 357 F. App'x 250, 252 (11th Cir. 2009)[2] (citing Dep't of Agric. and Consumer Serv. v. Mid-Florida Growers, Inc., 570 So.2d 892, 901 (Fla. 1990) (stating that the "[t]he

[2] The Court notes that "[a]lthough an unpublished opinion is not binding on this court, it is persuasive authority. See 11th Cir. R. 36-2." United States v. Futrell, 209 F.3d 1286, 1289 (11th Cir. 2000).

[res judicata] doctrine further requires plaintiffs to raise all available claims involving the same circumstances in one action.")). Long does not provide any reason why he could not have asserted First, Fifth, and Fourteenth Amendment violations for this conduct during his state postconviction proceedings.

Third, both suits have the same parties. Long's 3.851 postconviction action was asserted against the State of Florida, and this action was filed against Mark S. Inch, in his capacity as the Secretary of the Florida Department of Corrections, Barry Reddish, in his capacity as the Warden of Florida State Prison, and unspecified "John Does," as designees of Defendants Inch and Reddish.[3] (Dkt. 1) Long's argument in his reply that the defendants in the two actions are different is foreclosed by binding precedent. (Dkt. 19 at 5) As in Muhammad, "[t]he individuals named in the federal lawsuit are sued in their official capacity and are in privity with the State of Florida, the defendant in the state-court action." Muhammad, 739 F.3d at 689 (citing Welch, 57 F.3d at 1009 ("[W]here a plaintiff brings a[ ] [§ 1983] action against a public official in his official capacity, the suit is against the office that official represents, and not the official himself.")).

Fourth and finally, both the state court action and the instant matter share the same "identity of quality in persons for or against whom [the] claim is made." This element concerns "whether the parties in the state action had the incentive to adequately litigate the claims in the same character or capacity as would the parties to the federal

[3] The Court notes that "[f]ictitious party pleading is not permitted in federal court, unless a plaintiff describes the defendants with enough specificity to determine their identities." Bryant v. Progressive Mountain Ins. Co., 243 F. Supp. 3d 1333, 1343 (M.D. Ga. 2017) (citing Richardson v. Johnson, 598 F.3d 734, 738 (11th Cir. 2010)). Thus, the Court declines to consider the John Does on this inquiry because their identities were not properly pleaded with specificity. Moreover, as the John Does are alleged to be "designees" of Defendants Inch and Reddish "who may be assigned duties" in the administration of Long's execution, suit against them would also be suit against the State of Florida for the same reasons stated herein. (See Dkt. 1 at ¶20)

action." Stockton v. Lansiquot, 838 F.2d 1545, 1546–47 (11th Cir. 1988) (citing Ford v. Dania Lbr. & Supply Co., 150 Fla. 435, 7 So.2d 594 (1942)). Here, the claims raised in the state court are virtually indistinguishable from those raised in this Court, and thus the Parties' incentive to litigate the claims would likewise be equivalent. See Stockton, 838 F.2d at 1547 (finding that the fourth element of Florida's res judicata doctrine was met where the "same plaintiff sued the same defendants for relief on substantially the same claim, arising from the same circumstances, and raised the same underlying issues in the federal proceeding as he had previously raised in the state proceeding").

As each of the elements of res judicata is satisfied with respect to each claim set forth in Long's Complaint, Long claims are barred. Therefore, he has failed to demonstrate that he is likely to succeed on the merits of his claims.

The two additional arguments posited by Long in his reply do not alter this result.[4] First, Long identifies a rarely applied exception to the res judicata doctrine that it "should not be adhered to where its application would work an injustice." (Dkt. 19 at 4 (citing deCancino v. Eastern Airlines Inc., 283 So.2d 97, 98 (Fla. 1973); Shell, 357 F. App'x at 252)) Long urges the Court to apply the exception in his case, contending he was not given a full and fair opportunity to litigate his claims in the state court. In particular, Long claims the expedited briefing schedule and summary denial of several of his asserted claims without an evidentiary hearing limited his ability to present his case.

The Court finds that the record belies this contention. Long was provided an opportunity to present his constitutional claims to the state court in a 29-page postconviction motion. Upon consideration of the parties' briefings, the state court denied

[4] The Court addressed Long's argument that the defendants in both actions are not the same in its application of the res judicata elements. See supra at 12.

some claims on the basis that they presented pure questions of law that were readily determinable by the court. The state court held an evidentiary hearing on Long's Eighth Amendment as-applied challenge and permitted Long to present witnesses and other evidence in support of the claim. Moreover, Long presented the same challenge he raises here, that he had an inadequate opportunity to be heard by the postconviction court, on appeal to the Florida Supreme Court, and the Florida Supreme Court rejected his arguments. On this record, the Court finds that state court provided Long with a full and fair opportunity to present his claims initially and on appeal to the state's highest court. As explained in the case cited by Long, "The record shows that [Long] was, in fact, given a full and fair opportunity to litigate his claims in the state court proceedings, and he did so. The application of the doctrine does not contravene any public policy, nor is there any resulting injustice in the required sense. [Long]'s arguments to the contrary are little more than a rehash of his losing state court arguments." Shell, 357 F. App'x at 252.

Secondly, Long's claim in his reply that the process in Muhammad, which the Eleventh Circuit found barred relitigation in federal court, bears no comparison to the process he received is also without merit. The Florida governor in Muhammad's case signed a death warrant on October 21, 2013, setting execution for December 3, 2013 (42 days by comparison to Long's 30 days). Muhammad v. State, 2013 WL 6844489 at *2–5 (explaining the procedural history of Muhammad's case). Muhammad filed his 3.851 motion for postconviction relief on an expedited basis on October 29, 2013. Id. Five days after Muhammad filed his motion, the circuit court summarily rejected it without any evidentiary hearing. Id. On November 18, 2013, the Florida Supreme Court remanded the matter for the limited purpose of requiring the circuit court to hold an evidentiary hearing

concerning the efficacy of the drug protocol to be used in Muhammad's execution. Id. Although the Supreme Court granted a stay until December 27, 2013, an additional 24 days by comparison to Long's timeline, the circuit court immediately set and conducted an evidentiary hearing a mere three days later on November 21, 2013, continuing to November 22, 2013, and it rendered its decision three days later, on November 25, 2013. Id. As with Long, the Muhammad postconviction evidentiary hearing significantly restricted the presentation of witnesses and evidence. See Muhammad v. State, 132 So.3d 176, 191 (Fla. 2013). On review, the Florida Supreme Court found the process to have been adequate. See id.

In the subsequent § 1983 action, the Eleventh Circuit, considering the posture of the case and the nature of the claim, found that res judicata applied to bar review at the federal level. See Muhammad, 739 F.3d 683. Against this legal backdrop and given the procedural posture of these proceedings, Long's claims, likewise, are barred by res judicata. As such, he cannot show that he is likely to succeed on the merits of his claims.[5]

IV. CONCLUSION

Upon consideration of the foregoing, the Court hereby **ORDERS** that Plaintiff's Emergency Motion for Temporary Restraining Order, Preliminary Injunction and/or Stay of Execution, (Dkt. 2), is **DENIED**.

DONE and **ORDERED** in Tampa, Florida, this 19th day of May, 2019.

MARY S. SCRIVEN
UNITED STATES DISTRICT JUDGE

[5] The Court notes that Defendants further contend that Long failed to properly exhaust his administrative remedies and that his § 1983 claims are barred by the statute of limitations. (Dkt. 16 at 15–22) Because the Court finds that Long's claims are barred by the doctrine of res judicata, it does not reach these alternative arguments.

Copies furnished to:
Counsel of Record
Any Unrepresented Person

APPENDIX C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

BOBBY JOE LONG,

Plaintiff,

vs.

Case No.

Death Penalty Case

DEATH WARRANT ISSUED
Execution Date: May 23, 2019

MARK S. INCH, in his capacity as the Secretary, Florida Department of Corrections,
BARRY REDDISH, in his capacity as the Warden of Florida State Prison

JOHN DOES, as designee of Barry Reddish, and/or Mark S. Inch,

Defendants.
_____/

COMPLAINT

NATURE OF ACTION

1. Plaintiff, BOBBY JOE LONG, a disabled veteran with a service-connected disability who suffered a severe traumatic brain injury while on active duty, brings this action pursuant to 42 U.S.C. § 1983 for violations and threatened violations by the Florida Department of Corrections ("FDOC") that deprive him of the right to be free from cruel and unusual punishment under the Eighth and Fourteenth amendments to the U.S. Constitution. In this Complaint, Plaintiff does not challenge his underlying capital conviction or sentence of death, nor does he allege that lethal injection as a form of execution is *per se* unconstitutional. Plaintiff has simultaneously filed an Emergency Motion for Temporary Restraining Order, Preliminary Injunction and/or Stay of

Execution, and specifically incorporates by reference all factual assertions and legal arguments contained therein.

2. Defendants' recently enacted February 27, 2019, lethal injection protocol (hereinafter "Etomidate Protocol") uses etomidate as the first drug in a three drug protocol. (Attached as Appendix 1). The February 27, 2019 Etomidate Protocol is substantially the same as the January 4, 2017 lethal injection protocol which first substituted etomidate for midazolam hydrochloride (Attached as Appendix 1). The purpose of the first drug is to induce and maintain unconsciousness and unawareness, so that the inmate does not feel or experience the excruciating pain and terror of the second and third drugs.

3. Etomidate is an ultra-short acting hypnotic that works quickly and wears off in minutes. It is not an analgesic and has no pain relieving properties. As such, it is insufficient to keep a patient at an anesthetic depth throughout an execution, particularly after administration of the second and third drugs. Additionally, a well-known side effect of etomidate is myoclonus, which is defined as involuntary muscle movements that may look purposeful to a layperson. The myoclonus makes it very difficult to determine consciousness accurately during the "consciousness" check and thus delays the time before the administration of the second drug. Because etomidate works and processes through the body so quickly, any delays further the likelihood that the effects of the etomidate will dissipate and wear off before the execution is complete. In addition, Mr. Long has a longstanding documented history of traumatic brain injury (TBI) and temporal lobe epilepsy. Etomidate is contraindicated for people with a history of TBI and temporal lobe epilepsy because of the high likelihood that the etomidate will trigger an epileptic seizure. Such a seizure can be confused with and/or add to the myoclonus, or simulate unconsciousness when the inmate is

conscious, thereby invalidating the "consciousness" check and risking the administration of the second and third drugs on a conscious plaintiff.

4. The failure to induce a surgical plane of pain-free, immobile unconsciousness violates the Eighth Amendment to the U.S. Constitution because the administration of the next two drugs causes unconstitutionally severe pain to the individual. The paralytic blocker, rocuronium bromide, causes the sensation of excruciating suffocation, and the death agent, potassium acetate, causes severe, searing pain, akin to being burned alive from the inside.

5. The combination of the etomidate and rocuronium bromide further violates Plaintiff's Eighth Amendment rights because the paralytic blocker masks any substantial harm or pain that the individual undergoing the protocol may be suffering as a result of the ineffectiveness of the etomidate. It also disables Plaintiff from signaling his consciousness so that another dose of anesthetic could be given.

6. Finally, the Etomidate Protocol ignores the evolving standards of decency and disregards the nationwide shift towards more humane, single-drug protocols.

7. There are feasible and readily implemented available alternative methods of execution that entail a significantly less severe risk of pain, such as a one-drug pentobarbital injection.

8. Plaintiff seeks temporary, preliminary, and permanent injunctive relief to prevent Defendants from executing him by means of lethal injection as currently performed in Florida. Plaintiff asks that Defendants be restrained from carrying out Plaintiff's execution until such time as Defendants have eliminated the substantial risk of serious harm presented by the Etomidate Protocol.

9. Alternatively, if the Court finds Plaintiff has not met his burden regarding the Etomidate Protocol, it is Defendants' repeated refusals to produce documents, testimony, and information

requested by Plaintiff that has unconstitutionally hindered Plaintiff's ability, in violation of the Fifth and Fourteenth Amendments right to Due Process, the Fourteenth Amendment right to Equal Protection, the First Amendment right to access public documents pertaining to governmental proceedings, and the Eighth Amendment right to be free from cruel and unusual punishment. The Defendants have also severely and unconstitutionally limited Plaintiff's ability to question the relevant FDOC employee on the issue of alternative methods of execution available to DOC.

10. Finally, the defendants have refused Plaintiff's reasonable requests for two attorney witnesses in lieu of a spiritual advisor, for attorney-witness telephone access, and for a witness to the iv-insertion process. These refusals violate Plaintiff's First, Sixth, Eight, and Fourteenth Amendment rights.

JURISDICTION AND VENUE

11. This court has jurisdiction under 28 U.S.C. §§ 1331 (federal question), 1343 (civil rights violations), 2201 (declaratory relief), 2202 (Injunctive relief) and 1367 (supplemental jurisdiction). This action arises under the First, Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution, and 42 U.S.C. § 1983.

12. Venue is proper pursuant to 28 U.S.C. § 1391 (b) and pursuant to the June 25, 2009 Order by United States Chief District Court Judge Anne C. Conway, which states that civil cases seeking a stay of execution or challenging the method of execution in state death penalty cases with a previously filed habeas petition must be assigned to the division and judge to whom the original habeas action was assigned. *See In Re: Civil Cases Seeking Stay of Death Warrant and/or Challenging Method of Execution in State Death Penalty Cases*, Case No. 6:09-mc-00090-ACC, (M.D. Fla. 2009) (Doc.1).

13. Plaintiff is currently incarcerated at Florida State Prison, 7819 N.W. 228th Street, Raiford, Florida 32026, located in this District. Plaintiff has been sentenced to death by means of lethal injection at the same facility, under the direction of Defendant Warden Barry Reddish.

14. In addition to the Plaintiff and Defendant Warden Reddish being located in this District, all executions conducted by FDOC occur at Florida State Prison. Therefore, "a substantial part of the events or omissions giving ride to the claim" will occur in this District. 28 U.S.C. § 1391 (b).

15. Declaratory relief is sought pursuant to 28 U.S.C. §§ 2201 and 2202.

16. Temporary, preliminary, and permanent injunctive relief is sought pursuant to Federal Rule of Civil Procedure 65.

PARTIES

17. Plaintiff is a resident of the State of Florida. Plaintiff is currently a death-sentenced inmate at Florida State Prison, and is in the custody of Defendant Mark S. Inch, Secretary, FDOC and Defendant Barry Reddish, Warden of Florida State Prison.

18. Defendant Barry Reddish as the Warden of Florida State Prison is responsible for all executions and for the administration of lethal injection for FDOC. He is sued in his official capacity.

19. Defendant Mark S. Inch is the secretary of FDOC. As such, he is responsible for the creation and enforcement of policies and procedures generally applicable to all prisons and all prisoners, including the procedures and protocols related to executions by lethal injection. He is sued in his official capacity.

20. Defendant(s) John Doe(s) are any designees of Defendant Inch and/or Defendant Reddish who may be assigned the duties described above of Defendant Inch and/or Defendant Reddish.

21. At all times relevant to this action, Defendants act under color or state law and their actions constitute state action.

EXHAUSTION OF ADMINISTRATIVE REMEDIES

22. Plaintiff does not believe that exhaustion is necessary under the Prison Litigation Reform Act, 42 U.S.C. § 1997(e), because there are no available administrative remedies that could address the challenged constitutional violations inasmuch as (a) Defendants have repeatedly responded to prisoner grievances on this subject by denying any authority to change Florida's lethal injection practices; (b) exhaustion would be futile inasmuch as Defendants have already formally stated that the Etomidate Protocol is lawful, *see* Ltr. from Sec'y Mark Inch to Gov. Ron DeSantis (Attached as Appendix 1); and (c) the State of Florida has in court litigation challenging the lethal injection protocol in every instance maintained their lethal injection protocols are constitutional.

23. However, in an effort to exhaust any possible administrative remedies, Plaintiff filed a grievance with FDOC based on the Etomidate Protocol on or about May 8, 2019.

GENERAL ALLEGATIONS

24. Under Florida law, a death sentence is to be "executed by lethal injection… under the discretion of the Secretary of Corrections or the secretary's designee." Fla. Stat. § 922.105(1). All of the details of the execution process are to be determined by the Defendant Secretary and are specifically exempt from Florida's Administrative Procedures Act. *See* Fla. Stat. § 922.105(7).

25. The United States Supreme Court has explained that a lethal injection protocol violates the Eighth Amendment where there is a "substantial" or "objectively intolerable risk of harm." *Baze v. Rees*, 553 U.S. 35, 50 (2008). To meet this standard, an individual must demonstrate that there are alternatives that are "feasible, readily implemented, and in fact significantly reduce a substantial risk of severe pain." *Id.* at 52. "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" violates the Eighth Amendment. *Id.*

26. Defendants intend to execute Plaintiff on May 23, 2019, using the Etomidate Protocol.

27. According to the Etomidate Protocol, Plaintiff's execution by lethal injection will be accomplished by intravenous injection of a sequence of three chemicals: (i) 200 milligrams of etomidate delivered in two 100 milligram injections to the IV line, (ii) 1,000 milligrams of rocuronium bromide delivered in two 500 milligram injections to the IV line, and (iii) 240 milliequivalents of potassium acetate delivered in two 120 milliequavalents injections to the IV line. The death agent Florida plans to use pursuant to the protocol is potassium acetate, which induces cardiac arrest by interfering with the heart's electrical activity. When injected in a conscious and/or aware person, even at smaller concentrations than that in the execution protocol, it causes excruciating pain in the veins and lungs akin to being burned alive. Defendants also plan to inject Plaintiff with rocuronium bromide, a neuromuscular blocking agent that paralyzes all voluntary muscles, including the diaphragm, without affecting consciousness or the perception of pain. If not properly anesthetized by the first drug in the lethal injection protocol, Plaintiff will suffer horrific pain and terror as a result of asphyxiation and air hunger, in addition to the extreme pain associated with the injection of potassium acetate, and will be unable to convey what he is experiencing or that he is conscious and/or aware.

28. The Etomidate Protocol was created in response to the unavailability of midazolam. By replacing midazolam with etomidate as the first drug in the protocol, the Etomidate Protocol marks a substantial change from prior protocols. Midazolam is a benzodiazepine (sedative), and has a

short duration of action. Although etomidate has some similarities to midazolam, it is classified as a hypnotic and it has an ultra-short duration of action.

29. Florida is the only state in the nation to use etomidate as the first drug in a three-drug lethal injection protocol. As will be demonstrated in this Complaint, etomidate is an extremely poor choice as the first drug in a three-drug protocol in general and as applied to Mr. Long because it cannot induce and maintain unconsciousness for the duration of the execution.

I. The Etomidate Protocol Creates a Substantial and Imminent Risk that Is Sure or Very Likely to Cause Serious Pain and Needless Suffering When Compared to a Known Available Alternative.

30. Dr. Gail Van Norman, M.D., is a board-certified anesthesiologist who has extensive experience in the actual administration of anesthesia in the clinical setting, including cardiothoracic anesthesia and the use of etomidate. A majority of her clinical experience has been based in cardiac and general anesthesiology, as well as perioperative care of the anesthesia patient. She maintains an active clinical practice in anesthesiology and perioperative medicine. *See generally* Dr. Gail Van Norman, M.D., Curriculum Vitae (Attached as Appendix 29).

31. Dr. Van Norman currently holds positions as Professor of Anesthesiology and Pain Medicine; Adjunct Professor of Bioethics; and Physician Champion, Compliance Officer in the Department of Anesthesiology and Pain Medicine at the University of Washington. Previously, Dr. Van Norman has served as a staff anesthesiologist at several Washington hospitals and medical centers; as Director of Transesophageal Echocardiography Education in the Department of Anesthesiology at St. Joseph Medical Center in Tacoma, Washington; and as Clinical Director, Department of Anesthesiology, at St. Joseph Medical Center. She has previously served in private practice as Vice President and member of the Board of Directors of Pacific Anesthesia, Inc., in Bellevue, Washington. *See id.*

32. Dr. Van Norman has over 120 publications in peer-reviewed journals, textbooks, and other venues that include topics of cardiac anesthesia research, ethics, geriatric medicine, perioperative medicine and intensive care. She also serves as a journal reviewer for journals such as *Anesthesia and Analgesia*, *Anesthesiology*, *Mayo Clinic Proceedings*, and *European Journal of Anaesthesiology*, among others. She published a textbook titled *The Cambridge Textbook of Clinical Ethics for Anesthesiologists* with Cambridge University Press in 2011. Dr. Van Norman has focused expertise and publications in end-of-life issues, including physician-assisted suicide, euthanasia, and physician participation in lethal injection. *See id.*

33. Dr. Van Norman has served internationally and nationally as an invited speaker at such venues as the American Society of Anesthesiologists, American Society of Interventional Pain Physicians, Harvard Medical School, American Society of Bioethics and Humanities, World Congress of Anesthesiologists (Santiago, Chile), and many others. She is an internationally-invited guest speaker on the topic of ethics in anesthesia.

34. Dr. Van Norman's Curriculum Vitae more fully develops her credentials and experience as an anesthesiologist. *See id.*

35. It is Dr. Van Norman's ultimate professional opinion that the Etomidate Protocol is virtually certain to cause severe pain. *See* Dr. Gail Van Norman Decl. (Attached as Appendix 30).

36. Dr. David Lubarsky is a board certified anesthesiologist who has extensive experience in the actual administration of anesthesia in the clinical setting and extensive experience with scientific studies regarding anesthesia. *See generally* Dr. David Lubarsky Curriculum Vitae (Attached as Appendix 5).

37. Dr. Lubarsky is currently the CEO of UC Davis Health and Vice Chancellor of Human Health Services, and a Professor of Anesthesiology at the UC Davis School of Medicine. From

December 2001 until July 2018, Dr. Lubarsky held an endowed honorary title as the Emmanuel M. Pepper Professor of Anesthesiology and served for 17 years as the Chairman of the Department of Anesthesiology for the University of Miami, School of Medicine. From July 1988 to November 2001, Dr. Lubarsky's experience included service as the Vice-chair of the Department of Anesthesiology at Duke University Medical Center. *See id.*

38. Dr. Lubarsky is licensed to practice medicine in Florida and California. He is Board Certified in Anesthesiology. He is also certified in pain management from the American Academy of Pain Management. *See id.*

39. Dr. Lubarsky has conducted research and published peer reviewed articles on the suitability of various drugs as anesthetics, and how to adequately maintain anesthetic depth in a clinical setting. For almost two decades, Dr. Lubarsky was a recurring author of the chapter on intravenous induction agents in the primary authoritative book on anesthesiology, *Miller's Anesthesia*, which includes sections on etomidate. *See id.*

40. Dr. Lubarsky has published peer-reviewed articles on the subject of lethal injection, and the drugs utilized in these methods of execution. *See id.*

41. Dr. Lubarsky's Curriculum Vitae more fully develops his credentials and experience as an anesthesiologist. *See id.*

42. It is Dr. Lubarsky's ultimate opinion for numerous scientifically supported reasons that the Florida Etomidate Protocol presents a substantial and imminent risk that is sure or very likely to cause serious illness and needless suffering. *See* Dr. David Lubarsky Decl. (Attached as Appendix 3).

43. The Etomidate Protocol is a three-drug protocol. The first drug is etomidate. Between the administration of etomidate and the other two drugs there is a very basic and rudimentary "consciousness" check.

44. The second drug in the Etomidate Protocol—injected after the basic "consciousness" check – is rocuronium bromide. The 1,000 milligram dose of this drug is intended to paralyze all skeletal muscles and prevent all movement, including breathing and speaking. Rocuronium bromide is a paralytic or neuromuscular blocking agent. The rocuronium bromide will paralyze Plaintiff and render him unable to convey any pain or suffering.

45. If a person is conscious and/or aware when paralytic drugs like rocuronium bromide are administered, they cause the terrifying sensations of suffocation, air hunger, and feeling entombed alive without being able to move or convey suffering to others. *See* Van Norman Decl; Lubarsky Decl.

46. Rocuronium bromide masks the ability of any lay observer to discern whether the etomidate has been properly delivered and whether it continues to keep the prisoner unconscious. Moreover, because of the risks associated with the administration of rocuronium bromide and its ability to camouflage awareness, even to trained professionals, the American Veterinary Medical Association ("AVMA") prohibits the use of paralytics for euthanasia of animals. By statute, Florida also prohibits the use of paralytics in animal euthanasia. *See* Fla. Stat. 828.058 (3).

47. The only purpose of the administration of the rocuronium bromide is to make the execution more aesthetically pleasing to observers in that it reduces the ability of the individual being executed to move, scream, or show any pain associated with the execution process. Yet Plaintiff would experience a sensation akin to being buried alive, but not be able to convey the feelings of

pain or suffocation, and the paralysis would camouflage any voluntary movement that might result from an incomplete loss of consciousness.

48. Administration of a paralytic agent increases the chance that the prisoner will be aware when the potassium acetate is given, since incidence of awareness has been shown to be almost doubled in the setting of paralytic agents. Van Norman Decl.

49. The third drug in the Etomidate Protocol is potassium acetate. The 240 millequivalent dose of potassium acetate, delivered in two 120 millequivalent doses, is to stop the heart from beating, and is the intended mechanism of death.

50. The death agent potassium acetate is a caustic chemical that causes the searing, agonizing physical pain of being burned alive from the inside in a conscious and/or aware person. *See* Van Norman Decl.; Lubarsky Decl.

51. Because the second and third drugs are excruciatingly painful, it is imperative that the first drug, etomidate, render Mr. Long fully unconscious and maintain that unconsciousness throughout the administration of the second and third drugs. That is, the first drug must render him unaware and insensate, including to experiencing pain or other noxious stimuli. As described more fully below, etomidate cannot do this. *See* Van Norman Decl.; Lubarsky Decl.

52. "Consciousness" refers to the ability of the brain to perceive and react to subjective experiences in the environment around it. "Unconsciousness" is the absence of awareness (perception), including the absence of the experience of pain or other noxious and agonizing stimuli, with or without the absence of voluntary movements responding to such stimuli. Absence of movement does not mean that a person is unconscious, particularly if a muscle paralytic agent has been administered to paralyze muscle movements. *See* Van Norman Decl.

53. Experienced anesthesiologists mistake "recall" for "awareness" and markedly underestimate how often patients are aware. "Recall" and "awareness" mean different things: while recall is not of concern during lethal injection, the much more common problem of awareness is. *See* Van Norman Decl.

54. Awareness episodes during full general anesthetics have been shown in multiple studies to occur in over 71% of patients, although the anesthesiologists believed that their patients were unconscious and unaware at the time. In one study, 42% of patients who had awareness indicated they also experienced pain. It is therefore very likely that using etomidate as a sole agent to produce unconsciousness in the lethal injection protocol will result in many prisoners being aware at the time of administration of the muscle relaxant and potassium. *See* Van Norman Decl.

55. Etomidate is a ultra-short-acting hypnotic. Sedative-hypnotics as a class of drugs are used to induce sleep. *See* Lubarsky Decl.

56. In the surgical setting, etomidate is most commonly used in emergency situations primarily as an induction agent for brief unconsciousness to enable rapid sequence intubation. In the non-emergency surgical setting, etomidate has infrequently been used for anesthesia induction for short operative procedures that involve low discomfort, such as a colonoscopy. It is also used as a pre-surgical tool for people with epilepsy because it can induce seizures, and therefore can be used to help doctors identify the epileptic zones of the brain that need to be removed. *See* Lubarsky Decl.

57. Notably, etomidate *has zero* analgesic properties and therefore is not a drug that relives pain. Etomidate *cannot and will not* render a person insensate. Thus, it independently cannot allay the feelings of suffocation after administration of the paralytic agent rocuronium bromide and

excruciating pain during the injection of the potassium acetate. *See* Van Norman Decl.; Lubarsky Decl.

58. Because etomidate has no analgesic properties, it is not suitable as a form of anesthesia as a single drug without additional pain relieving drugs. Etomidate is not FDA-approved for use as the sole drug to produce anesthesia in even minor surgical procedures. It is never used as a sole anesthetic in any procedure that involves any significant noxious stimuli, as it has zero analgesic effect. *See* Van Norman Decl.; Lubarsky Decl.

59. It bears repeating that etomidate is ultra-short acting. It displays a pharmacodynamics profile (how long it works) similar to sodium thiopental, *see* Lubarsky Decl., which has previously been shown to be insufficient to keep a patient at an anesthetic depth throughout an execution at least 50% of the time. *See* Koniaris LG, Zimmers TA, Lubarsky DA, Sheldon JP, *Inadequate Anaesthesia in Lethal Injection for Execution*, The Lancet 2005, vol. 365; 9468:1412-1414 (Attached as Appendix 4).

60. Because etomidate is ultra-short acting, there is a substantial risk that it will wear off during the execution. Given its unique pharmacokinetic characteristics, etomidate will not induce *and maintain* unconsciousness throughout the lethal injection process. Etomidate's clinical effect (the induction of sleep) occurs very rapidly and lasts for only a few minutes. *See* Van Norman Decl.; Lubarsky Decl. Etomidate travels very quickly from its injection site to the brain, where its hypnotic effects become active and produce brief sedation. However, the body's fatty tissues immediately soak up the drug from the bloodstream, which rapidly drops the levels of etomidate in the blood and brain within 2.7 minutes. Because etomidate has no sedative effects outside of the brain, once the drug leaves the brain and enters the fatty tissue, consciousness and awareness to noxious stimuli return. *See* Van Norman Decl.; Lubarsky Decl.

61. The intended and unintended effects of etomidate are highly dependent on factors related to the pharmacokinetic characteristics of the drug (how quickly it is metabolized, and/or redistributed to places in the body, such as fat, where it will have no pharmacologic effects; the method of administration of the drug; the individual to whom it is administered; and the surgical or other stimulus applied). Because of its pharmacokinetics, there is no evidence that a large dose (200 milligrams given in two different bolus injections of 100 milligrams in quick succession) results in a longer duration of the clinical effects. *See* Van Norman Decl.; Lubarsky Decl.

62. Etomidate acts at the GABA receptors in the brain, and once GABA receptors are saturated, the clinical effect it can have in any individual person is limited. Increasing the dose or repeating the dose of etomidate cannot overcome this effect, in part because of the rapid redistribution of the drug out of the brain. Even brief pauses in the lethal injection protocol, such as the pause to carry out a "consciousness" check and the time it takes for rocuronium to take effect after injection, will lead to rapid falls in brain levels of etomidate below levels that produce sleep in unstimulated patients. *See* Van Norman Decl.

63. By example, because it only takes 2.7 minutes for the drug to enter the fatty tissues and diminish its supply in the brain and consequently its sedative effects, in a 17-minute execution like that of Mr. Branch, by the 16th minute, the concentration of etomidate in the blood would be 1/64th the original dose, or approximately the same as if the injection were a mere 3.5 milligrams. A standard clinical dose needed to induce unconsciousness is 20 to 40 milligrams. Therefore, the amount of etomidate in Mr. Branch's bloodstream before the execution was complete was 1/10th of the clinical dose. This dosage is insufficient to ensure that a prisoner would not feel the excruciating pain of the second and third drugs. *See* Lubarsky Decl.

64. In addition, any pause in the administration of the second and third drugs—however brief, such as the pause to carry out a "consciousness" check and the time it takes for rocuronium bromide to take effect after injection, will lead to rapid falls in brain levels of etomidate below levels that produce sleep in unstimulated patients. *See* Van Norman Decl.; Lubarsky Decl. Thus, even if a member of the execution team determines that Mr. Long is "unconscious," the time it takes to do that will lead to the ineffectiveness of the etomidate during the second and third drugs.

65. A known side effect of etomidate is myoclonus, which is defined as involuntary muscle movements that may look purposeful. To a layperson, myoclonus is easily confused with conscious movements. By selecting etomidate, Florida has chosen a drug that makes determining consciousness even more difficult. There is a high likelihood that an execution team member will either disregard purposeful movements as myoclonus or take longer to determine whether the movements are purposeful, during the "consciousness" check. This will cause the determination of consciousness to take longer and/or result in inaccurate determinations of consciousness. This is indicated by the affidavit of Robert Friedman, Esquire, a witness to the Eric Branch execution, who stated that six minutes lapsed from the beginning phase of the execution until the consciousness check took place, and Mr. Branch was still moving at that time (Attached as Appendix 6). Mr. Branch's screams were also documented by reporter Jason Dearen (Attached as Appendix 7). Because etomidate is ultra-short acting, the difficulty is assessing consciousness from the etomidate compounds the significant risk that the etomidate will wear off prior to the painful injection of the second and third drugs.

66. Given the above factors, there is a substantial risk that the etomidate will wear off during the execution, and Mr. Long will be aware and sensate of the excruciating pain and terror of the

second and third drugs. This is insufficient to ensure that a prisoner would not feel the excruciating pain of the second and third drugs. *See* Lubarsky Decl.

67. The use of etomidate also involves the substantial risk of pain that occurs on injection in a significant number of administrations. *See* Lubarsky Decl. Even with the administration of very low doses, 1 to 2 milligrams, a significant number of patients report moderate pain. On a commonly used medical pain scale, 1-5 is considered mild, 6-7 is moderate and 8 or greater is severe. Medically, "moderate pain" is defined as a level of pain that significantly interferes with daily activity. The Etomidate Protocol uses 200 milligrams of etomidate, an amount that is 100-200 times greater than the amount of etomidate that is known to cause moderate pain upon injection. The pain from etomidate is so significant that the person will feel at the injection site and continue to feel the pain as the entire 200 milligrams of etomidate is pushed into his veins or until he loses consciousness.

68. There is a strong likelihood that inmates previously subjected to the etomidate protocol suffered severe pain. Even though the State of Florida insists on using a paralytic which prevents inmates from vocalizing the pain they are enduring, eyewitness accounts from the executions suggest that even in a paralyzed state, prior condemned inmates showed significant signs of distress. Local 10 News investigative reporter Jeff Weinsier, who witnessed the Jimenez execution, said Jimenez was blinking profusely, twitching and breathing heavily. Then it all stopped. *See* Jeff Weisner, Associated Press, *Man executed for North Miami Woman's 1992 Murder* (Dec. 19, 2018), https://www.local10.com/news/florida/north-miami/jose-antonio-jimenez-execution. Additionally, Joseph S. Hamrick, a licensed Florida attorney, was a witness at Jimenez's execution at the request of his counsel. After Jimenez's execution, Attorney Hamrick did an affidavit regarding his observations. (See Appendix 28). The movement and heavy slow

breathing of Jimenez, which occurred *after* the consciousness check is indicative that Jimenez was struggling to breathe, and was aware of that fact, which would produce extreme terror. Other irregularities occurred during the execution of Eric Branch who let out a blood-curdling scream when he was injected with etomidate suggesting pain at the injection site. *See* Lubarsky Decl.

69. In summary, etomidate is an unsuitable choice as the first drug in a three drug protocol for several reasons. First and foremost, it is likely to wear off and drop below anesthetic levels. Second, it is not an analgesic and is not meant to allay the pain of the rocuronium bromide and potassium acetate injection. Third, some involuntary movements have been associated with use of etomidate, making it impossible to easily ascertain if the patient is awake or suffering from a side effect of the medication. Finally, there is routinely significant pain on injection, which increases based on the dosage and lasts for the entire administration of the etomidate or until the prisoner becomes unconscious.

70. Without an adequate determination of the depth of unconsciousness, if given a forceful stimuli such as air hunger from paralysis due to the rocuronium bromide or painful stimuli, such as injection of potassium acetate, there is a substantial risk that Plaintiff would awaken from the noxious and painful stimuli. While a heavily sedated person might not respond to name calling or a subtle pinch, that is a very different level of stimulus than being starved for air once paralyzed, or having a caustic chemical injected intravenously. As an analogy, a person asleep might not awaken to the stroke of a feather on the leg but would certainly awaken to a blowtorch applied to the same area. *See* Van Norman Decl.; Lubarsky Decl.

71. The "consciousness" check described in the Etomidate Protocol is not sufficient to determine unconsciousness and the inability to feel pain from the noxious stimuli of the rocuronium bromide and potassium acetate. *See* Van Norman Decl.; Lubarsky Decl.

72. Determining whether an anesthetic drug has rendered someone truly insensate takes repetitive training and experience, because the signs that someone is not insensate can be very subtle. DOC personnel cannot be adequately trained without the formal repetitive anesthesia experience one obtains over a four-year residency in anesthesia after a four-year course of medical school and a four year pre-medical preparation in college. *See* Lubarsky Decl.

73. In a clinical setting, the practitioner checking for consciousness would typically look for fine motor movements such as a moving of the feet or hands. Additionally, the practitioner would look for evidence of awareness during the surgical incision or other noxious stimulus. This is not something that a lay person will necessarily observe or notice.

74. Moreover, in order to make sure an individual will be insensate to noxious stimuli, they must be in a surgical plane of anesthesia. In clinical practice, a common way to test for a surgical plane of anesthesia is to apply a surgical clamp (such as a Kelly Clamp) on the area where you are going to make the incision. The pain/pressure created by this clamp is severe and cannot be equated with a human being conducting a trapezius pinch, shouting someone's name, touching an eyelid or shaking a person's shoulder.

75. In addition to initially assessing unconsciousness, it is necessary to continually monitor unconsciousness throughout the remainder of the execution. It is not possible for any lay person to evaluate whether someone is unconscious. While some use the assistance of a properly monitored processed electroencephalogram ("EEG"), processed EEG's are not reliable with etomidate. Additionally, sophisticated instruments such as brain wave monitors cannot detect consciousness reliably and have been discredited as indicating drug effects on consciousness in patients and in clinical studies. There is therefore no reliable instrument to demonstrate that a person who has received a paralytic agent is unconscious and unware. The evaluation of

consciousness by a prison employee as called for in the lethal injection protocol cannot predict whether the prisoner will be unconsciousness at the time of administration of the paralytic agent or potassium. *See* Van Norman Decl.

76. As noted earlier, a known side effect of etomidate is myoclonus, which is defined as involuntary muscle movements that can look purposeful. Myoclonus occurs with administration of etomidate in doses of 0.3 mg/kg in over 90% of patients. To a layperson, myoclonus could be confused with conscious movements. By selecting etomidate, Florida has chosen a drug that makes determining consciousness even more difficult, and thus causes the determination of consciousness to take longer and/or result in an inaccurate determination of unconsciousness. *See* Lubarsky Decl.; Van Norman Decl.

77. Dr. Lubarsky has previously published on the incompatibility of certain drug mixtures with etomidate during intravenous administration, including the incompatibility of vecuronium bromide, a steroid based muscle relaxant structurally similar to rocuronium bromide, which is drug two in the Etomidate Protocol. *See* Hadzija BW, Lubarsky DA: *Compatibility of etomidate, sodium thiopental and propofol injections with other drugs commonly administered during induction of anesthesia.* Am J Health-Syst Pharm 52: 997-999, 1995 (Attached as Appendix 4).

78. The affidavit of Robert Friedman, Esq., documents the significant problems that happened during the execution of Eric Branch. *See*, Friedman Affidavit (attached as Appendix 6). The significant problems with Branch execution were also documented by eyewitness press reports. *See*, Jason Dearen, *Eric Branch lets out blood-curdling screams, yells 'murderer' as he is executed*, PENSACOLA NEWS JOURNAL, February 28, 2018 (Attached as Appendix 7). As the etomidate was being administered, Eric Branch let out a "blood-curdling" scream "at the top of his lungs." Based on the fact that it is well-established that etomidate causes significant pain upon

injection, it is Dr. Lubarsky's opinion that the scream is objective evidence of Mr. Branch experiencing significant pain during his execution. Because etomidate has no analgesic properties and therefore cannot reduce pain, in a clinical setting, patients are given pre-treatment and post-treatment medications to reduce the pain, and amnestic drugs are often used to ensure that the patient does not remember the pain if any occurs as pre-treatment to prevent pain is not assured to work. The availability of an optional intramuscular injection of diazepam if requested by Mr. Long does nothing to reduce these problems, as the purpose of such injection, per the protocol, is simply to reduce anxiety. *See* Florida Lethal Injection Protocol.

79. As evidenced by the eyewitness reports from the execution of Eric Branch and Patrick Hannon, there was movement after the purported "consciousness" check, which indicates an insufficient anesthetic depth prior to the administration of the second and third drugs. The movement of Mr. Branch and Mr. Hannon is evidence of them not being adequately anesthetized, or, more likely that the ultra-short acting etomidate dissipated and wore off before the execution was complete. An individual does not make movements if he is totally unconscious and anesthetized. Therefore the protocol failed. It is Dr. Lubarsky's opinion that the worst possible death experience was delivered – beginning with pain upon injection followed by the paralytic effectively burying the prisoner alive, whose agony at being aware but unable to draw a breath was only brought to a horrendous end through the agonizing delivery of a caustic chemical surging through his body. *See* Lubarsky Decl.

80. Furthermore, the eyewitness reports from the executions of Michael Lambrix, Patrick Hannon and Eric Branch, all describe varying degrees of obstruction of the witnesses' view of the prisoner. The position of the prisoner, with his feet facing the witnesses, blocks the view of the venous access sites and the full view of the prisoner's hands due to both positioning and bandaging.

All of this prevents the observation of subtle fine motor movements one would see if a person is either not unconscious or has awakened during the execution. Therefore, it appears that affirmative steps to obscure the witnesses' view of potential movement of the prisoner after the administration of the etomidate.

81. In addition to the above-described problems with the etomidate, Mr. Long also has as applied issues based on his well-documented medical issues. These medical issues raise serious concerns about the use of etomidate in his execution.

82. Mr. Long has a long standing history of TBI and temporal lobe epilepsy as documented by the following:

a. Disability determinations by the Veteran's Administration following Mr. Long's Honorable Discharge from the U.S. Army for medical reasons (Attached as Appendix 8).

b. The 1989 Resentencing Trial testimony of Dr. John William Money (Attached as Appendix 9).

c. The findings of the trial court in its Sentencing Order following the 1989 Resentencing trial (Attached as Appendix 10).

d. The affidavits of Erin Bigler, Ph.D. (Attached as Appendix 11) and Frank Wood Ph.D. (Attached as Appendix 12).

e. The Florida Attorney General's Office during the state post-conviction proceedings stipulated for the purpose of an as-applied challenge that Mr. Long suffers from a Traumatic Brain Injury and Temporal Lobe Epilepsy. *See* Transcript Excerpt (Attached as Appendix 31)

83. Traumatic brain injuries are a major cause of epilepsy and lead to an increased risk of seizures even years after the injury. Depending on the severity of the TBI (and here, we know Mr. Long's TBI is severe), individuals with traumatic brain injury are 1.5 to 17 times more likely than the general population to develop seizures, with brain injury being the leading cause of epilepsy in young adults. Studies have also shown that individuals surviving one-year post-traumatic brain

injury have 37 times increased risk of death from seizures. Another study – a retrospective analysis of charts for patients admitted with TBI between 1961 and 2002 – revealed that TBI patients were 22 times more likely to die of seizures than the general population matched for age, race, and gender. Moreover, epilepsy stemming from TBI has been known to develop years after the initial injury. *See* B. Masel, et al., *Traumatic Brain Injury: A Disease Process, Not an Event,* 27 J of Neurotrauma 1529-1540 (Aug. 2010). (Attached as Appendix 13). Accordingly, by virtue of his severe traumatic brain injury, it is not surprising that Mr. Long did in fact develop temporal lobe epilepsy, which is undisputed in this case.

84. Temporal lobe seizures can involve both awareness and a lack of awareness during the seizure. Lasting 30 to 60 seconds, the seizures can cause a fixed stare, impaired consciousness, fumbling with fingers, change in arm posture, lip-smacking movements, gibberish or inability to speak, and generalized tonic-clonic jerking (i.e., convulsions, including the rapid jerking of arms and legs). In addition, temporal lobe epilepsy itself can create feelings of fear, panic, anxiety, or terror during a seizure. *See, e.g.*, Holmes, Sirven & Fisher, *Temporal Lobe Epilepsy (TLE)*, Epilepsy Foundation (Sept. 4, 2013), *available at* https://www.epilepsy.com/learn/types-epilepsy-syndromes/temporal-lobe-epilepsy-aka-tle.

85. Unless induction of seizures is the desired outcome, which is not the case with lethal injection, etomidate is contraindicated in patients with epilepsy because it can cause seizures. It is important to note that this risk is separate from the general risk of etomidate causing myoclonic movements as described earlier. Those myoclonic movements are not associated with actual epileptic activity in patients without epilepsy or high risk of seizure. In contrast, many references caution against use of etomidate in seizing patients or patients with a history of seizure, as etomidate can lower the seizure threshold. For example, in patients with epilepsy, a dosage of

etomidate as low as 0.2 milligrams can actually activate seizure foci within 30 seconds. Use of etomidate can progress to full-blown seizures, and it is recommended that EEG monitoring be conducted when using etomidate to monitor the brain for seizure activity.

86. Medical professionals sometimes use etomidate as a pre-surgical procedure in seizure patients *for the purpose of activating* and monitoring seizure foci during operations related to treatment for epilepsy, including temporal lobe epilepsy. Even in small studies, etomidate induced seizures in patients with temporal lobe epilepsy. *See*, *generally* J. Pasot, et al., *Etomidate Accurately Localizes the Epileptic Area in Patients with Temporal Lobe Epilepsy*, 51 Epilepsia 602-09 (2012). (Attached as Appendix 14).

87. In procedures where induction of seizures is not the desired outcome, such as in lethal injection, etomidate carries a substantial risk of causing seizures, which would create a serious risk causing substantial pain. First, the seizure itself could cause Mr. Long to suffer serious pain as a result of violent involuntary movements against the restraints or biting of the tongue, lips, or cheeks. Although Mr. Long may be unaware of this pain during the actual seizure, as soon as the seizure subsides the pain would be readily felt.

88. Second, these involuntary movements are likely to cause the IV line to become dislodged, which could result in less than a full dose of etomidate being administered.

89. Finally and most significantly, particularly given etomidate's known common side effect of myoclonus, it will be impossible for the execution team to determine if any movements by Mr. Long after the administration of etomidate are the result of voluntary movements indicating consciousness, involuntary muscle movements caused by etomidate's myoclonus, or seizures

caused by etomidate. Additionally, the presence of an "absence seizure"[1] may mimic unconsciousness when Mr. Long is actually conscious and will be aware when the brief seizure ends. The execution team will essentially have no way of knowing if Mr. Long is actually unconscious, and the time it takes to figure it out will result in the etomidate wearing off and the excruciating pain of the second and third drugs.

90. Etomidate is a poor choice of drug for the reasons previously mentioned and for the reason that it is contraindicated in patients with epilepsy, like Mr. Long, as it can cause seizures that may increase the pain and suffering for Mr. Long, interfere with the integrity of the intravenous lines, and render the "consciousness" check meaningless.

91. Information gained by Dr. Lubarsky regarding eyewitness press accounts of the executions of Mr. Branch and Mr. Hannon, the affidavit of Robert Friedman, Esquire, who observed the execution of Eric Branch, and the affidavit of Joseph Hamrick, Esquire, not only support a general claim regarding the Etomidate Protocol, but also add further support to an as applied claim by Mr. Long based on his TBI and temporal lobe epilepsy.

92. It is Dr. Lubarsky's opinion to a reasonable degree of medical certainty that using the Etomidate Protocol in general creates a substantial risk of causing severe pain and needless suffering to Mr. Long, and creates an additional substantial risk of causing Mr. Long serious pain and needless suffering because of his traumatic brain injury (TBI) and temporal lobe epilepsy.

93. It is Dr. Van Norman's expert opinion that the Florida Protocol is virtually certain to cause severe pain, and to result in prisoners experiencing the agonizing symptoms of severe air hunger, compulsion to breathe, terror, and panic.

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[1] An "absence seizure" is a seizure that usually only affects a person's awareness of what is going on at the time and can include "blank stares."

94. In *Glossip v. Gross,* the majority reiterated the necessity of proving both prongs of *Baze*: 1) petitioners must establish that a likelihood that a State's lethal injection protocol creates a demonstrated risk severe pain; and 2) that the risk is substantial when compared to the known and available alternatives. 135 S. Ct. 2726, 2737 (2015). And most recently, in *Bucklew v. Precythe,* the Court held that *Baze* and *Glossip* govern all Eighth Amendment challenges, whether facial or as-applied, requiring all plaintiffs to identify an available alternative. 139 S.Ct. 1112, 1126 (2019).

95. The Plaintiff identifies the following as a known and available alternative method of execution that entails a significantly less severe risk of pain and suffering and that is a feasible, readily implemented alternative method of execution: Pentobarbital. (In accordance with the protocols of the State of Texas (Attached as Appendix 18), or Georgia (Attached as Appendix 16), or Missouri (Attached as Appendix 15), or South Dakota's single drug pentobarbital protocol. (Attached as Appendix 17).

96. The risk of pain associated with Florida three-drug Etomidate Protocol is substantial when compared to the known available alternative of a single drug pentobarbital protocol. A large dose of injected pentobarbital will rapidly induce unconsciousness and produce a quick and painless death. In prior litigation in the state of Ohio, Dr. Mark Dershwitz, who has testified on behalf of the State of Florida in similar litigation, attested that it was his "opinion to a reasonable degree of medical certainty that pentobarbital, as used in the Ohio Legal injection protocol [a 5 gram dose of injected pentobarbital], will result in the rapid and painless death of the inmate whom it is administered." Dershwitz Decl. ¶¶ 5, 12, as filed in *In Re: Ohio Execution Protocol Litigation*, No. 2:11-cv-01016-EAS-MRM, Dkt. No. 146-2 (S.D. Ohio) (filed Dec. 10, 2012) (Attached as Appendix 27).

97. Thus, an injection of pentobarbital would significantly reduce the high risk of severe pain, terror, and suffering resulting from the Etomidate protocol, as outlined above and result in a quick death with swift unconsciousness and minimal pain.

98. Moreover, Pentobarbital is not known to induce seizures and is actually used as treatment to prevent seizures. *See, e.g.*, Pentobarbital-Induced Anesthesia, Epilepsy Foundation (Last Updated May 1, 2004), *available* at https://www.epilepsy.com/learn/professionals/resource-library/tables/pentobarbital-induced-anesthesia; Pentobarbital (injection), Drugs.com, https://www.drugs.com/mtm/pentobarbital-injection.html (last accessed May 15, 2019) ("Pentobarbital is also used as an emergency treatment for seizures."). Additionally, pentobarbital has been shown to have "neuroprotective effects on patients with traumatic brain injury." *See* Pentobarbital Coma Protocol, Vanderbilt University Medical Center Division of Trauma and Surgical Critical Care (Feb. 11, 2013), available at https://www.vumc.org/trauma-and-scc/files/trauma-and-scc/public_files/Protocols/Pentobarbital%20Coma.pdf.

99. Pentobarbital is available in Florida. According to the latest Automated Reports and Consolidated Ordering System (ARCOS) Diversion Control Division of the U.S. Department of Justice and Drug Enforcement Administration, for the reporting period 2017, manufacturers and distributors provided 284,606.14 grams of pentobarbital to Florida, enough to kill 56,921 people. (Attached as Appendix 24)

100. Pentobarbital or the active pharmaceutical ingredient ("API") of pentobarbital is a Schedule II controlled drug that is available to pharmacies, including compounding pharmacies in Florida. *See,* testimony of Silas Raymond, Pharm.D., a Florida licensed clinical pharmacist (Attached as Appendix 25); *see* Declaration and curriculum vitae of Dr. Silas Raymond (Attached as Appendix 26.) Dr. Raymond testified and avowed in his declaration that, in his expert opinion

as a DEA registered, licensed clinical pharmacist, he could obtain either injectable pentobarbital directly from the manufacturer or the API of pentobarbital that could be compounded upon the receipt of a prescription into pentobarbital. *Id.* Dr. Raymond also testified and avowed that when he purchases drugs that the sellers do not generally ask why the pharmacy is acquiring the drugs. *Id.*

101. Stephen Whitfield, Chief of Pharmaceutical Services with the FDOC, (Florida's execution secrecy laws protected him from testifying as to the specifics concerning Florida's choice of execution protocol and lethal injection drugs) was required to acknowledge that part of his responsibility for the FDOC was to purchase drugs for the department. (Attached as Appendix 21). Mr. Whitfield also acknowledged that he could purchase Schedule II drugs. *See id.* Pentobarbital is a Schedule II drug. *See id.* Mr. Whitfield stated that he had no knowledge as to any attempts by the FDOC to obtain pentobarbital from either a manufacturer or a compounding pharmacy during the timeframe of its current execution protocol. *See id.* He also acknowledged that FDOC had previously used certain drugs for executions despite the manufacturer's specific directive not to use its drugs in an execution. *See id.*

102. The three drugs in the current Etomidate Protocol, etomidate, rocuronium bromide and potassium acetate, all require prescriptions to obtain them, as does the valium/diazepam FDOC allows Mr. Long to request in the time immediately before his execution. (Attached as Appendix 1); *See* Declaration of Dr. Silas Raymond (Attached as Appendix 26.) Pentobarbital also requires a prescription to obtain it. *See id.* Dr. Raymond testified and avowed as an expert that in his experience as a compounding pharmacist in the State of Florida that he could obtain either already compounded injectable Pentobarbital or Pentobarbital API to be compounded. *See id.* Once a compounding pharmacy acquires pentobarbital or pentobarbital API, subject to any policy

considerations of a given compounding pharmacy, FDOC can simply provide a prescription to that compounding pharmacy to obtain pentobarbital – just as they currently have to provide a prescription to obtain all of the drugs in the current protocol. *See id.*

103. Although not a requirement under *Glossip*, *Baze*, and *Bucklew*, Florida's state law authorizes lethal injection and therefore authorizes lethal injection by a different choice of drug, pentobarbital. The same execution chamber and supplies that are used in the Etomidate Protocol could be used in a pentobarbital protocol, so there would be no significant delay for Florida to change to pentobarbital.

104. At least[2] ten states have either used or intend to use compounding pharmacies to obtain their drugs for lethal injection, including compounded pentobarbital. These states include South Dakota, Missouri, Texas, Georgia, Oklahoma, Virginia, Ohio, Mississippi, Louisiana, Pennsylvania, and Colorado. *See* Death Penalty Information Center, https://deathpenaltyinfo.org/state-lethal-injection.

105. Florida's secrecy laws unjustly and actively prevent an inmate from meeting the incomprehensible requirement that inmates facing death must offer alternative methods for their execution if they object to the pain and suffering inflicted by the State's protocol. *See*, Testimony of Stephen Whitfield (Attached as Appendix 21). Florida's execution secrecy laws prevent a condemned inmate from questioning State actors to gain access to the potentially crucial information to meet this requirement. *Id.* The State should be required to provide Mr. Long the discovery necessary for him to meet the great burden placed on him – the burden of pleading his case for a humane method by which the State should kill him.

[2] Because of various states' secrecy laws, this number is likely conservative and is only based on publicly known and available information.

II. By Ignoring the Prevalence of the Use of One-Drug Protocols, Florida is violating the Evolving Standards of Decency.

106. The U.S. Supreme Court has construed the Eighth Amendment to require that punishment for crimes comport with "the evolving standards of decency that mark the progress of a maturing society." *Roper v. Simmons*, 543 U.S. 551, 561 (2005) (quoting *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958) (plurality opinion)). "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man." *Trop*, 356 U.S. at 100.

107. In assessing the evolving standards of decency, the Court considers laws around the entire world where appropriate. *See id.* at 102-03. The Court further stated in *Trop* that "[t]he provisions of the Constitution are not time work adages or hollow shibboleths. They are vital, living principles that authorize and limit governmental powers in our Nation." *Id.* at 103.

108. Pursuant to *Graham v. Florida*, analysis under the Eighth Amendment's Cruel and Unusual Punishment Clause as to allegations of a failure to comport with the evolving standards of decency requires that a court make two determinations regarding a "sentencing practice at issue." 560 U.S. 48, 61 (2010). Courts must first take into account "objective indicia of society's standards as expressed in legislative enactments and state practice." *Id.*; *see also Atkins v. Virginia*, 536 U.S. 304, 312 (2002) ("[T]he clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures.") (quoting *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989)). Second, courts consider whether the punishment at bar comports with "the standards elaborated by controlling precedents and by the court's own understanding and interpretation of the Eighth Amendment's test, history, meaning and purpose." *Graham*, 536 U.S. at 61.

109. The *Baze* Court recognized the need to look to the practice of other states to determine whether Kentucky's lethal injection protocol violated the Eighth Amendment. "Thirty-

six States that sanction capital punishment have adopted lethal injection as the preferred method of execution. . . . This broad consensus goes not just to the method of execution, but also to the specific three-drug combination used by Kentucky. Thirty States, as well as the Federal Government, use a series of sodium thiopental, pancuronium bromide, and potassium chloride, in varying amounts. No State uses or has ever used the alternative one-drug protocol belatedly urged by petitioners." *Baze v. Rees*, 553 U.S. 35, 53 (2008) (internal citations omitted).

110. In contrast to the time of *Baze*, today many states use, have used, or intend or have intended to use a one-drug protocol. Four states currently use a one-drug protocol: Georgia, Missouri, Texas, and South Dakota. Four other states have also used a single-drug method for executions since 2009, Arizona, Idaho, Ohio, and Washington, although Washington no longer has the death penalty. Six other states have at one point or another announced plans to use a one-drug protocol, but have not carried out such an execution (Arkansas, California, Kentucky, Louisiana, North Carolina, and Tennessee). *See* Death Penalty Information Center, https://deathpenaltyinfo.org/state-lethal-injection.

111. No other state uses etomidate as the first drug in its lethal injection protocol, and Ohio recently abandoned Midazolam as the first drug in its protocol, due to concerns over its cruelty.

112. After *Baze*, the trial court in that case recognized that "recent developments in the use of the one-drug protocol in other states" proved that "well-established alternatives [to the three-drug protocol] now exist." *Baze v. Dep't of Corr.*, No. 04-CI-1094, 2012 WL 1473425 (Ky. Cir. Ct. Apr. 25, 2012). The court ordered that, if the Kentucky Department of Corrections did not institute rulemaking to propose a one-drug alternative within 90 days, the Court would "set a discovery schedule and set a date for a trial on the merits to determine whether a three-drug

protocol as the exclusive means of lethal injection remains constitutional under the Eighth Amendment as applied in *Baze* in light of the ready availability of an alternative form of lethal injection." *Id.* The Kentucky Department of Corrections complied with the court's order and within 90 days created a single-drug protocol.

113. Standards of decency have evolved since the Court's opinion in *Baze* and now prohibit the use of a three-drug protocol involving a paralytic agent.

III. Alternatively, if this Court finds Plaintiff Has Not Met Its Burden Regarding the Lethal Injection Protocol, Then Defendants Have Violated Plaintiff's Constitutional Rights by Objecting to His Document Request and By Limiting His Access to Information From Defendant's Employees Necessary to Prove His Case.

114. Plaintiff requested records from Defendants pursuant to Fla. R. Crim. P. 3.852. (Attached as Appendix 19).

115. The information requested in this Public Record Request would have reasonably led to information that would have assisted the Plaintiff with developing additional proof that the Etomidate Protocol presents a substantial and imminent risk that it is sure or very likely to cause serious harm and needless suffering both in general and as applied. This information would also have reasonably led to information that would have assisted the Plaintiff with developing additional proof that there are known and available alternatives of execution that entail a significantly less severe risk of pain.

116. The Defendants objected to the disclosure of these materials. (Attached as Appendix 20). The Defendants had the option of disclosing this material but chose not to do so. Their failure to do so is especially egregious in light of Defendant Inch's statement in a letter to Governor DeSantis certifying the Etomidate Protocol that "[a]dditional guiding principles of the lethal injection process are that... the entire process of execution should be transparent..." (Attached as Appendix 1).

117. When Plaintiff was given an opportunity to question an employee of Defendant Inch, FDOC counsel, through the Office of the Florida Attorney General, severely curtailed this examination by asserting a claim of privileged information. The information was sought through questions posed to Stephen Whitfield, FDOC Chief of Pharmaceutical Services, and was for the purpose of obtaining information regarding an alternative method of execution.

118. If Dr. Lubarsky were given additional information, such as pictures of the exact set up, an examination of the execution chamber, a video of the practice runs, a video of the actual execution, specifically including close up pictures of all connections and tubing, more detailed logs of timing of delivery of the actual chemicals, expiration dates and storage conditions of drugs, training and experience of the person conducting the consciousness check, and autopsy reports from the four etomidate executions, including toxicology reports, he would be able to offer a more complete opinion.

119. It is patently unfair to permit the state to use secrecy as a sword and shield to defeat Mr. Long's claims. Mr. Long is being prohibited from proving his claims before they are denied.

120. The failure to provide the requested materials and the failure to allow a more complete examination of the FDOC employee is a violation of Mr. Long's First Amendment Right to Access Governmental Proceedings, a violation of Mr. Long's Eighth Amendment cruel and unusual punishment clause, a violation Mr. Long's Fifth and Fourteenth Amendment Rights of Due Process, and a violation of Mr. Long's Fourteenth Amendment Right to Equal Protection.

IV. Defendants Have Violated Plaintiff's Constitutional Rights by Denying to His Request to Have Two Attorneys Present During His Execution, by Denying His Request to Have Attorney Access to a Phone During the Execution, and by Denying his Request to Have a Witness Observe the Insertion of the IV Line that Will be Used to Administer the Lethal Drugs.

121. On April 29, 2019, counsel for the Plaintiff sent a letter to Warden Barry Reddish. The letter requested that Plaintiff's attorneys have access to pen and paper during the execution, that Plaintiff be allowed to replace his allowed spiritual adviser witness with a second attorney witness, that Plaintiff's attorneys have access to a phone during the execution, and that the Plaintiff be allowed to have a witness who is able to observe the insertion of the IV line that will be used to administer the lethal drugs. (Attached as Appendix 22).

122. On May 9, 2019, counsel for the Plaintiff received a response from Warden Reddish. The response granted Plaintiff Counsel's request to have access to pen and paper during the execution, but denied his request to replace his allowed spiritual adviser witness with a second attorney witness, denied his request to have attorney phone access during the execution, and denied his request to have a witness who is able to observe the insertion of the IV line that will be used to administer the lethal drugs. (Attached as Appendix 23).

123. Depriving Mr. Long's lawyers from phone access, denying Mr. Long a substitution attorney witness, and prohibiting Mr. Long's attorneys from viewing the IV insertion deprives Mr. Long access to the courts and his right to counsel and Due Process in violation of his First, Sixth, Eighth, and Fourteenth Amendment rights.

124. If Mr. Long's execution is carried out in an unconstitutionally cruel and unusual manner, Mr. Long's lone attorney would have to exit the witness room and the prison facility in order to contact the courts to stop the unconstitutional execution. Doing so would leave Mr. Long without an attorney, and the inevitable delay in reaching an accessible phone would likely mean that Mr. Long would be dead before help can be reached.

125. Execution is a critical stage of the proceedings. The right to counsel and the right to be free from cruel and unusual punishment mean nothing if Mr. Long's sole advocate present

at the execution site has no ability to advise the courts if his execution is being carried out in a cruel and unusual manner.

126. Mr. Long is currently being housed in a cell directly across from the execution chamber. During the pendency of the warrant, Mr. Long has had access to a cordless landline telephone so that he can communicate with his lawyers and friends and family. It is therefore beyond dispute that a cordless telephone exists within the prison in close proximity to the execution chamber.

127. By statute, two witness spots are reserved for Mr. Long. Section 922.11, Florida Statutes (2019). Mr. Long wishes to substitute the spiritual advisor for a second attorney.

128. The state has no legitimate penological interest in preventing Mr. Long from substituting a second lawyer for the spiritual advisor allowed by law.

129. Having a second attorney would permit one lawyer to observe the execution while the other leaves to seek help in the event of an unconstitutional execution.

130. In 2006, Florida tortured Angel Diaz to death when both IV lines were inserted all the way through the veins, causing the lethal drugs to pool into soft tissue.[3] In 2009, Ohio tortured Romell Broom, unsuccessfully trying to find a suitable vein for more than two hours.[4] In 2014, Oklahoma tortured Clayton Lockett to death. After an hour of attempting to find a suitable vein and ultimately inserting an IV into his groin, a supervising physician declared Mr. Lockett unconscious following the administration of the first sedative drug.[5] The next two drugs were

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[3] Adam Liptak & Terry Aguayo, *After Problem Execution, Governor Bush Suspends the Death Penalty in Florida*, NEW YORK TIMES, Dec. 16, 2006.
[4] Alan Johnson, *Effort to Kill Inmate Halted - 2 Hours of Needle Sticks Fail; Strickland Steps In*, COLUMBUS DISPATCH, Sept. 16, 2009.
[5] Bailey Elise McBride & Sean Murphy, *Oklahoma Inmate Dies after Execution is Botched,* Associated Press, Apr. 29, 2014, available at https://apnews.com/.

administered, and three minutes later, Mr. Lockett attempted to raise his head, was writhing in pain, and began to speak that "something's wrong." It took 43 minutes for Mr. Lockett to die, and a subsequent investigation determined that a failed IV line led to the botched execution.[6] On February 22, 2018, Alabama called off the execution of Doyle Hamm after two and a half hours of attempting to insert the IV line.[7] Mr. Hamm was left with 10-12 incisions, including a penetrated femoral artery and a punctured bladder.

CLAIMS FOR RELIEF

COUNT I

PLAINTIFF HAS THE RIGHT TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT PURSUANT TO THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION

131. Plaintiff hereby incorporates by reference the allegations contained in paragraphs 1 through 105.

132. Defendants are acting under color of Florida law in administering to Plaintiff chemicals that will cause unnecessary pain in the execution of a sentence of death, thereby depriving Plaintiff of his rights under the Eighth Amendment as applied to the States to be free from cruel and unusual punishment, in violation of 42 U.S.C. § 1983.

133. For all the reasons alleged in this Complaint, it has been established that the Etomidate Protocol presents a substantial and imminent risk that Plaintiff is sure or very likely to suffer serious harm and needless suffering, both in general and as applied to him.

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[6] Eric Eckholm, *One Execution Botched, Oklahoma Delays the Next*, New York Times, Apr. 29, 2014.

[7] Tracy Connor, *Lawyer Describes Aborted Execution Attempt for Doyle Lee Hamm as 'Torture,'* https://www.nbcnews.com/storyline/lethal-injection/lawyer-calls-aborted-... (Feb 25, 2018); Roger Cohen, *Death Penalty Madness in Alabama,* N.Y. Times, Feb. 27, 2018.

134. For all the reasons alleged in this Complaint, Plaintiff has identified a known and available alternative method of execution that entails a significantly less severe risk of pain.

COUNT II

DEFENDANTS' REFUSAL TO ADOPT A ONE-DRUG PROTOCOL VIOLATES THE EVOLVING STANDARDS OF DECENCY THAT MARK THE PROGRESS OF A MATURING SOCIETY ENCOMPASSED IN THE EIGHTH AMENDMENT

135. Plaintiff hereby incorporates by reference the allegations contained in paragraphs 1 through 113.

136. For all the reasons alleged in this Complaint, Plaintiff has identified a known and available alternative method of execution that entails a significantly less severe risk of pain.

137. Florida's continued adherence to a three drug protocol with the adoption of the Etomidate Protocol constitutes a violation of the Cruel and Unusual Punishment Clause of the Eighth Amendment as applied to the States, in violation of 42 U.S. § 1983, because of the evolving standards of decency that mark the progress of a maturing society.

COUNT III

DEFENDANTS VIOLATED THE PLAINTIFF'S FIRST, FOURTEENTH, AND EIGHTH AMENDMENT RIGHTS BY REFUSING ACCESS TO PUBLIC DOCUMENTS AND RELEVANT INFORMATION

138. Plaintiff hereby incorporates by reference the allegations contained in paragraphs 1 through 118.

139. Defendants' refusal to provide requested Public Records and to allow questioning of the FDOC employees on matters relevant to this matter is a violation of Plaintiff's First, Eighth, and Fourteenth Amendment Rights, in violation of 42 U.S.C. § 1983.

COUNT IV

DEFENDANTS VIOLATED PLAINTIFF'S RIGHT TO ACCESS TO COURTS AND HIS FIRST, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS BY

REFUSING HIS REQUEST FOR TWO ATTORNEY WITNESSES, ATTORNEY PHONE ACCESS, AND A WITNESS TO OBSERVE IV INSERTION DURING THE EXECUTION

140. Plaintiff hereby incorporates by reference the allegations contained in paragraphs 1 through 130.

141. Defendants' refusal to allow counsel for Plaintiff to replace his allowed spiritual advisor witness with a second attorney witness, to allow his attorneys access to a phone during the execution (either a cell phone in the witness area, or a landline in reasonable proximity to the witness area), and to allow a defense witness to observe the insertion of the IV line used to administer the lethal drugs is a violation of Plaintiff's First, Sixth, Eighth and Fourteenth Amendment Rights, in violation of 42 U.S.C. § 1983.

REQUEST FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court grant the following relief:

(a) Grant temporary, preliminary, and permanent injunctive relief by enjoining the Defendants from executing Plaintiff by means of lethal injection in accordance with the existing procedures and protocols;

(b) Issue an Order declaring unconstitutional the Defendants' Etomidate Protocol and procedures, as a violation of the Eighth and Fourteenth Amendments to the United States Constitution;

(c) Order discovery requested by Plaintiff.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Complaint has been sent by E- Mail to each party named on the attached service list, this 16th day of May 2019.

/s/ ROBERT A. NORGARD
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I hereby certify that the forgoing complaint was electronically served on this date, May 16, 2019, to the defendants in this matter through the ECF system.

/s/Robert A. Norgard
ROBERT A. NORGARD

APPENDIX D

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

BOBBY JOE LONG,
Plaintiff,

vs.

Case No.

DEATH WARRANT ISSUED
Execution Date: May 23, 2019

MARK S. INCH, in his capacity as the Secretary, Florida Department of Corrections,

BARRY REDDISH, in his capacity as the Warden of Florida State Prison

JOHN DOES, as designee of Barry Reddish, and/or Mark S. Inch,
Defendants.
_____/

PLAINTIFF'S EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER, PRELIMINARY INJUNCTION AND/OR STAY OF EXECUTION

COMES NOW the Plaintiff, BOBBY JOE LONG, by and through his undersigned counsel, and pursuant to Fed. R. Civ. P. 65(a) and 65(b) moves this Court for a temporary restraining order (TRO), a preliminary injunction to prevent the Defendants and/or their agents from acting jointly or severally to execute BOBBY JOE LONG as presently scheduled for May 23, 2019, at 6:00 p.m. utilizing Florida's current lethal injection protocol that uses etomidate as the first drug in a three-drug protocol, and submits the following facts, law and argument in support of this Motion:

LAW GOVERNING TRO, PRELIMINARY INJUNCTION AND STAY OF EXECUTION

A TRO and preliminary injunctive relief's purpose is to preserve the status quo until the parties' rights can be fully and fairly litigated through to a final hearing or merits trial or a request for a permanent injunction. *See Texas v. Camenisch*, 451 U.S. 390, 395 (1981) ("[T]he purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on

the merits can be held."); *Performance Unlimited v. Questar Publishers*, 52 F. 3d 1373, 1378 (6th Cir. 1995) ("[T]he object and purpose of a preliminary injunction is to preserve the existing state of things until the rights of the parties can be fully and fairly investigated and determined.").

The requirements for a stay of execution are identical to those for obtaining injunctive relief. *Grayson v. Allen*, 491 F. 3d 1318, 1322 (11th Cir. 2007) ("The equitable principles at issue when inmates facing imminent execution delay in raising their § 1983 method-of-execution challenges are equally applicable to requests for both stays and injunctive relief.")

The test contains four factors. The court must consider whether the movant has shown:

> (1) substantial likelihood of success on the merits; (2) that irreparable injury will be suffered if the relief is not granted; (3) that the threatened injury outweighs the harm the relief would inflict on the non-movant; and (4) that entry of the relief would serve the public interest.

Schiavo ex rel. Schindler v. Schiavo, 403 F. 3d 1223, 1225-26 (11th Cir. 2005); *see also Hill v. McDonough*, 547 U.S. 573 584 (2006) ("Inmates seeking time to challenge the manner of their execution must satisfy all of the requirements for a stay, including showing a significant possibility of success on the merits.") The movant carries the burden of proof. *See Hill*, 547 U.S. at 584.

Simultaneously with this motion for temporary restraining order, preliminary injunction, and/or stay of execution of his state death sentence, Plaintiff Bobby Joe Long filed an action pursuant to 42 U.S.C. § 1983. In this complaint, Mr. Long has proffered facts that satisfy each of the elements necessary for a TRO, preliminary injunction, and/or stay of execution. Thus, in this motion, Mr. Long respectfully moves for a stay of his scheduled May 23, 2019 execution pending the disposition of his § 1983 claims. Plaintiff specifically incorporates by reference the contents of the accompanying § 1983 complaint.

MOVANT MEETS THE REQUIREMENTS OF THE FOUR PART TEST FOR A TEMPORARY RESTRAINING ORDER, PRELIMINARY INJUNCTION, AND/OR STAY OF EXECUTION

Factor 1: Movant Has a Substantial Likelihood of Success on the Merits.

Mr. Long need only satisfy a substantial likelihood of success on the merits for "at least one of his claims," no more, in order to meet prong one of the test for injunctive relief or a stay. *Ferguson v. Warden, Fla. State Prison*, 493 F. App'x 22, 26 (11th Cir. 2012) (per curiam).

Despite only needing to prove a likelihood of success for at least one of his claims, Mr. Long can demonstrate a substantial likelihood of success on each of his claims, which are interrelated. Mr. Long argues first that the Etomidate Protocol violates his Eighth Amendment right to be free from cruel and unusual punishment as applied to the States through the Fourteenth Amendment.

Plaintiff is likely to succeed on the merits of Claim I of his Complaint.

The United States Supreme Court held in *Baze v. Rees*, 553 U.S. 35 (2008) (plurality opinion), that to block a particular execution method under the Eighth Amendment, a condemned prisoner must "establish that the State's lethal injection protocol creates a demonstrated risk of severe pain [and] . . . that the risk is substantial when compared to the known and available alternatives." *Id.* at 61; *see also Glossip v. Gross*, 135 S. Ct. 2726, 2737 (2015). This standard also applies to as-applied lethal injection challenges. *See Bucklew v. Precythe*, 139 S. Ct. 1112 (2019). Mr. Long's evidence will show a strong likelihood that he will prevail on the merits of his claims.

Mr. Long can satisfy *Glossip's* first prong

Defendant's use of etomidate as the critical first drug followed by a paralytic and potassium acetate makes it sure or very likely that Mr. Long will experience severe pain and suffering. That the second and third drugs cause severe pain and suffering absent an effective first drug is well-

settled. *See, e.g.*, *Glossip*, 135 S. Ct. at 2743; *Baze*, 553 U.S. at 53; *Valle v. State*, 70 So. 3d 530, 539 (Fla. 2011). Paralytic drugs[1] cause the terrifying sensations of suffocation, air hunger, and feeling entombed alive without being able to move or convey suffering to others. *See, e.g.*, *Baze*, 553 U.S. at 53 ("suffocation"); *Glossip*, 135 S. Ct. at 2781 ("asphyxiated and unable to demonstrate 'any outward sign of distress'"); Van Norman Dec. ¶ 8 (attached as App. 1) ("Administration of a paralytic agent to an awake person causes feelings of terror, air hunger, and suffocation, as has been well described by people who have survived the experience."); Lubarsky Dec. ¶ 18 (Attached as App. 2) ("Plaintiff would experience a sensation akin to being buried alive, but not be able to convey the feeling of pain or suffocation . . . ."). The final third potassium-based drug that stops the heart[2] causes the searing physical pain of being burned alive from the inside. *See, e.g.*, *Baze*, 553 U.S. at 53; *Glossip*, 135 S. Ct. at 2781 ("excruciating pain"); *See* Van Norman Decl. ¶ 9 ("Administration of more than 40 to 80 mEq of potassium in 1 liter of fluid causes excruciating pain akin to 'having gasoline poured on them and set on fire,' as has been well described by patients who have survived the experience."); *See* Lubarsky Decl. ¶ 20 ("Potassium acetate is a caustic chemical and would cause excruciating pain to Plaintiff upon injection . . . ."); *See* Lubarsky Dec. ¶ 26 ("agonizing delivery of a caustic chemical surging through his body").

The United States Supreme Court has already accepted that either and both of the last two drugs cause pain sufficiently serious enough to be unconstitutional if not abated for the inmate. *See, e.g.*, *Baze*, 553 U.S. at 53 ("It is uncontested that, failing a proper dose of [drug] that would

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[1] Florida's protocol uses the paralytic drug rocuronium bromide, which is "functionally equivalent" for the purposes of a lethal injection challenge as the pancuronium bromide used in the *Baze* and *Glossip* protocols. *See Glossip*, 135 S. Ct. at 2735.

[2] Although the Kentucky and Oklahoma protocols at issue in *Baze* and *Glossip* used potassium chloride, potassium acetate used in Florida's protocol is also recognized as causing the same excruciating pain due to potassium's caustic nature. *See, e.g.*, *Van Norman* ¶ 8.

render the prisoner unconscious, there is a substantial, constitutionally unacceptable risk of suffocation from the administration of pancuronium bromide and pain from the injection of potassium chloride."). Following *Baze*, the Supreme Court accepted as a given in *Glossip* that the pain and suffering associated with the paralytic and potassium chloride are sufficiently severe as to be unconstitutional if the inmate is not protected from that pain and suffering. *See Glossip*, 135 S. Ct. at 2743 (noting that the "relevant question here" deals with whether a 500-milligram dose of midazolam has "the effect of rendering a person insensate to pain caused by the second and third drugs"); *id.* at 2733 (noting that petitioners conceded that barbiturates "'reliably induce and maintain a comalike state that renders a person *insensate to pain*' caused by administration of the second and third drugs in the protocol." (emphasis added)). Using the second and third drugs unquestionably causes severe pain and suffering if Mr. Long is not protected from that pain.

Etomidate cannot to protect Mr. Long from that pain. It is wholly unsuitable as the protocol's first drug. First, etomidate has no analgesic properties and does not prevent pain. Etomidate is not FDA-approved for use as the sole anesthesia drug in minor surgical procedures, and it is *never* used as the sole agent to maintain general anesthesia in any procedure that involves any significant noxious stimuli. *See* Van Norman Decl. ¶ 1; Lubarsky Decl. ¶¶ 10-12. Thus, it cannot prevent Mr. Long from experiencing suffocation after rocuronium bromide administration and excruciating pain during the potassium acetate injection. *See* Van Norman Decl. ¶¶ 1, 12; Lubarsky Decl. ¶¶ 12-13.

Without analgesic, it is imperative the first drug achieve and maintain unconsciousness. *Cf. Glossip*, 135 S. Ct. at 2741 (affirming district court because although first drug was not an analgesic, testimony indicated it could "nonetheless render the person unconscious and 'insensate' during the remainder of the procedure'" (internal quotation marks omitted)); *see also Valle*, 70 So.

3d at 539 ("In the lethal injection context, 'the condemned inmate's lack of consciousness is the focus of the constitutional inquiry.'"). Unconsciousness is the absence of awareness and perception, including the absence of experiencing pain or other noxious stimuli. *See* Van Norman Decl. ¶ 3; Lubarsky Decl. ¶¶ 7, 13. However, given its pharmacokinetic characteristics, etomidate will not induce *and maintain* unconsciousness throughout the lethal injection process. Etomidate is an ultra-short acting hypnotic, which means that its clinical effect (the induction of sleep) occurs very rapidly and lasts for a very short time—mere minutes. *See* Van Norman Decl. ¶ 2; Lubarsky Decl. at ¶¶ 9, 17. Etomidate travels rapidly from its injection site to the brain, where its hypnotic effects become active and produce brief sedation. However, the body's fatty tissues immediately soak up the drug from the bloodstream, which rapidly drops the levels of etomidate in the blood and brain within less than three minutes. Because etomidate has no sedative effects outside of the brain, once the drug leaves the brain and enters the fatty tissue, consciousness returns. *See* Van Norman Decl. ¶ 2; Lubarsky Decl. ¶ 17. Thus, there is a substantial risk the etomidate will wear off during the execution, and Mr. Long will be aware and sensate of the excruciating pain and terror of the second and third drugs.[3] This is insufficient to ensure that a prisoner would not feel the excruciating pain of the second and third drugs. *See* Lubarsky Decl. ¶ 17.

[3] There is a strong likelihood inmates previously subjected to the etomidate protocol suffered severe pain. Even though Florida insists on using a paralytic which prevents inmates from vocalizing the pain they are enduring, eyewitness accounts from the executions suggest that even in a paralyzed state, prior condemned inmates showed significant signs of distress. Local 10 News investigative reporter Jeff Weinsier, who witnessed the Jimenez execution, said Jimenez was blinking profusely, twitching and breathing heavily. Then it all stopped. *See* Jeff Weisner, Associated Press, *Man executed for North Miami Woman's 1992 Murder* (Dec. 19, 2018), https://www.local10.com/news/florida/north-miami/jose-antonio-jimenez-execution. Additionally, Joseph Hamrick, a licensed Florida attorney, witnessed Jimenez's execution at his counsel's request. After Jimenez's execution, Attorney Hamrick did an affidavit regarding his observations. *See Hamrick Affidavit* (Attached as App. 3)The movement and heavy slow breathing of Jimenez, which occurred *after* the consciousness check is indicative that Jimenez was struggling to breathe, and was aware of that fact, which would produce extreme terror. Other irregularities occurred during the execution of Eric Branch who let out a blood-curdling scream when he was injected with etomidate suggesting pain at the injection site. *See* Lubarsky Decl. ¶16.

Etomidate's intended and unintended effects are highly dependent on factors related to the drug's pharmacokinetic characteristics (how quickly it is metabolized, and/or redistributed to places in the body, such as fat, where it will have no pharmacologic effects; the method of the drug's administration; the individual to whom it is administered; and the surgical or other stimulus applied). Because of its pharmacokinetics, there is no evidence that a large dose (200 milligrams given in two different bolus injections of 100 milligrams in quick succession) results in a longer duration of the clinical effects. *See* Van Norman Decl. ¶ 2; Lubarsky Decl. ¶ 17. [4] Moreover, even brief pauses in the protocol, such as the pause to do a "consciousness check" and the time it takes for rocuronium to take effect after injection, will lead to rapid falls in etomidate's brain levels below those that produce sleep in unstimulated patients. *See* Van Norman Decl. ¶ 2; Lubarsky Decl. ¶¶ 7, 23.

Mr. Long Can satisfy *Glossip's* second prong

To meet the second part of his injunctive relief burden, Mr. Long must show a substantial likelihood that he can establish that the risk of severe pain and suffering posed by Defendants' current execution method is substantial when compared to the known and available alternatives. *Glossip,* 135 S. Ct. at 2737. That is, he must show it is substantially likely he can establish an alternative execution method that is available. As noted recently in *Bucklew*, this is not a difficult burden. 139 S. Ct. 1112, 1128 (2019) ("Finally, the burden . . . under the *Baze-Glossip* test can be overstated."). A plaintiff "seeking to identify an alternative method of execution is not limited to

[4] Because it only takes 2.7 minutes for the drug to enter the fatty tissues and diminish its supply in the brain and consequently its sedative effects, in a 17-minute execution like that of Mr. Branch, by the 16th minute, the concentration of etomidate in the blood would be 1/64th the original dose, or approximately the same as if the injection were a mere 3.5 milligrams. A standard clinical dose needed to induce unconsciousness is 20 to 40 milligrams. Therefore, the amount of etomidate in Mr. Branch's bloodstream before the execution was complete was 1/10th of the clinical dose. This dosage is insufficient to ensure that a prisoner would not feel the excruciating pain of the second and third drugs. Lubarsky Decl. ¶ 17.

choosing among those presently authorized by a particular State's law." *Id.* Indeed, a plaintiff "may point to a well-established protocol in another State as a potentially viable option." *Id.* The Court thus saw "little likelihood that an inmate facing a serious risk of pain will be unable to identify an available alternative." *Id.* In a concurring opinion, Justice Kavanaugh emphasized that "[i]mportantly, all nine Justices . . . agree" current state law need not authorize the alternative method of execution for it to be available. *Id.* at 1136 (J. Kavanaugh, concurring). He also underscored that a plaintiff "who contends that a particular method of execution is very likely to cause him severe pain should ordinarily be able to plead some alternative method of execution that would significantly reduce the risk of severe pain." *Id.*

A single-drug pentobarbital protocol is feasible and readily implemented

Mr. Long proposes using a single injection of pentobarbital as a feasible, readily implemented alternative method of execution, in accordance with the protocols of the State of Texas (Attached as App. 4), or Georgia (Attached as App. 5), or Missouri (Attached as App. 6), or South Dakota's single-drug pentobarbital protocol[5] (Attached as App. 7). *See Bucklew*, 139 S. Ct. at 1128 (holding a plaintiff "may point to a well-established protocol in another State as a potentially viable option").

Pentobarbital is available for purchase in Florida. *See* Licensed Florida Pharmacist Silas Raymond Decl. ¶¶ 15-22 (Attached as App. 8).[6] Pentobarbital can be obtained either in

[5] South Dakota's protocol, Attached as App. 7, provides for a three-drug protocol, a two-drug protocol, and a one-drug protocol, depending on the date of the inmate's conviction. Mr. Long is only alleging the one-drug protocol as an alternative method of execution.

[6] In 2017, the most recent year available, enough pentobarbital to conduct 56,920 executions using 5 grams was distributed throughout the state of Florida. *See* ARCOS Retail Drug Summary Report: Reporting Period – 2017, U.S. Dep't of Justice DEA Diversion Control Div., at 804 (2017), *available at* https://www.deadiversion.usdoj.gov/arcos/retail_drug_summary/report_yr_2017.pdf. (Attached as App. 9.)

manufactured form from a manufacturer or distributor, or compounded form from a compounding pharmacist. *See id.* ¶¶ 17-22. Manufactured pentobarbital is available for purchase within the State of Florida. *See id.* ¶¶ 20-22. The active pharmaceutical ingredient ("API") for pentobarbital is available for purchase by a licensed pharmacist in the State of Florida, and pentobarbital is therefore able to be compounded within the State of Florida. *See id.* ¶¶ 14-19. The State of Florida has made no attempts to purchase pentobarbital from a compounding pharmacy or to ascertain the availability of compounded pentobarbital. *See* Transcript of Evidentiary Hearing at 119, *State of Florida v. Bobby Joe Long*, Case No. 84-CF-013346 (Fla. Cir. Ct. 13) (May 3, 2019) (hereinafter "May 3 EH Transcript") (Attached as App. 10).

Florida has previously asserted that it is unable to purchase manufactured pentobarbital because the manufacturers object to its use in lethal injections. *See* May 3 EH Transcript, at 118. This argument is unpersuasive for two reasons. First, Florida freely admits that it obtained and used drugs in the past for use in lethal injection in spite of the manufacturer's objection.

> Q. But I mean, you get the letters from the manufacturers, they find out you got their drugs, they say don't use it. But DOC has used it despite the manufacturer saying don't, right?
>
> A. I believe – yes, we have used that.

See May 3 EH Transcript, at 132-33. Second, manufacturers of etomidate, including the company that developed it, Janssen (a subsidiary of Johnson and Johnson),[7] also object to its use in lethal injections.[8] Thus, manufacturer objection has never stopped Florida before, and applies with equal

[7] "We do not condone the use of our medicines in lethal injections for capital punishment." Carolyn Johnson, *Johnson & Johnson says its drugs shouldn't be used in executions*, Wash. Post (August 22, 2017), https://www.washingtonpost.com/news/wonk/wp/2017/08/22/johnson-johnson-says-its-drug-shouldnt-be-used-to-kill-prisoners/?utm_term=.401a5f8904f3.

[8] Over 50 global healthcare companies have taken action to ensure that their products are not used in lethal injection. The list includes Pfizer, Athenex, Auromedics, Hikma, Mylan, Gland, Par, Emcure, Heritage, Zydus, all of whom are manufacturers of etomidate. *See generally* Lethal Injection

weight to etomidate, yet Florida has no reservations using etomidate. The fact that other states routinely carry out executions using pentobarbital is additional proof that it is a feasible, readily implemented alternative. *See Bucklew*, 139 S. Ct. at 1128. The State of Texas has carried out three executions in 2019 alone using a one-drug pentobarbital protocol, including as recently as April 24, 2019, and the State of Georgia executed John Scotty Garnell Morrow using a one-drug pentobarbital protocol earlier this month on May 2, 2019.[9]

Florida has no legitimate reason for refusing to adopt a single-drug pentobarbital protocol, such as that used by Texas, Georgia, Missouri, and South Dakota. *See Bucklew*, 139 S. Ct. at 1125. Florida Department of Corrections Chief of Pharmaceutical Services, Stephen Whitfield, testified on May 3, 2019, that assuming the availability of pentobarbital, he is not aware of any reason why the State of Florida could not adopt a one-drug pentobarbital protocol. *See* May 3 EH Transcript, at 119-20. The state cannot assert any legitimate penological reasons why it has not adopted the one-drug pentobarbital protocol: unlike other states, Florida has made no "good-faith efforts" to obtain the drug so cannot claim it is unavailable; adopting a one-drug protocol would only enhance "the dignity of the procedure," not detract from it; changing the lethal injection drugs would not "require the involvement of persons whose professional ethics rules or traditions impede their participation"; and the pentobarbital protocol is not "untried and untested" by other states. *See Bucklew*, 139 S. Ct. at 1125, 1130 (citing legitimate reasons why a state may decide not to adopt an alternative protocol). Thus, pentobarbital is a feasible and readily implemented alternative.

Information Center, https://lethalinjectioninfo.org (last visited May 15, 2019).

[9] Executions in 2019, Death Penalty Information Center, https://deathpenaltyinfo.org/execution-list-2019) (last updated May 3, 2019).

A single-drug pentobarbital protocol would significantly reduce the Etomidate Protocol's risk of substantial pain.

The risk of pain associated with Florida three-drug Etomidate Protocol is substantial when compared to the known available alternative of a single-drug pentobarbital protocol. The risk of pain associated with Florida's three-drug Etomidate Protocol is outlined in detail above and hinges on etomidate's inability to induce lasting unconsciousness and Mr. Long's subsequent awareness of the excruciating pain and suffering of the second and third drugs. In contrast, it is well-settled that a large dose of injected pentobarbital will rapidly induce unconsciousness and produce a quick and painless death. *See, e.g.*, *Bucklew*, 139 S. Ct. at 1132 (crediting the State's expert who "testified that pentobarbital . . . would render [plaintiff] fully unconscious and incapable of experiencing pain within 20 to 30 seconds"); *West v. Schofield*, 519 S. W. 3d 550, 562 (Tenn. 2017) (upholding trial court's finding "that the medical and pharmacy experts who testified agreed 'that the injection of five grams of pentobarbital, if compounded properly and if administered properly, will likely cause death with minimal pain and with quick loss of consciousness'"); *cf. Pavatt v. Jones*, 627 F. 3d 1336, 1340 (10th Cir. 2010) (in a three-drug protocol with pentobarbital as the first drug, affirming the district court's finding "that the amount of pentobarbital . . . was sufficient to induce unconsciousness in an inmate, and indeed would likely be lethal in most, if not all, instances"); *Valle v. State*, 70 So. 3d 530, 541 (Fla. 2011) (in a three-drug protocol using pentobarbital as the first drug, affirming the circuit court's conclusion that Dr. Mark Dershwitz "'refuted any suggestion that the dose of pentobarbital in the Florida lethal injection protocol would leave an inmate conscious and able to experience pain and suffering during the lethal injection process'"). Indeed, in prior litigation in the state of Ohio, Dr. Mark Dershwitz, who has testified on behalf of the State of Florida in similar litigation, attested that it was his "opinion to a reasonable degree of medical certainty that pentobarbital, as used in the Ohio Legal injection protocol [a 5 gram dose

of injected pentobarbital], will result in the rapid and painless death of the inmate whom it is administered." Dershwitz Decl. ¶¶ 5, 12, as filed in *In Re: Ohio Execution Protocol Litigation*, No. 2:11-cv-01016-EAS-MRM, Dkt. No. 146-2 (S.D. Ohio) (filed Dec. 10, 2012) (Attached as App. 11). Thus, an injection of pentobarbital would significantly reduce the high risk of severe pain, terror, and suffering resulting from the Etomidate protocol, as outlined *supra*, and result in a quick death with swift unconsciousness and minimal pain.

Accordingly, Mr. Long can establish the second prong of *Glossip*, requiring a feasible and readily implemented alternative protocol that substantially reduces the risk of pain.

Florida's etomidate protocol violates the Eighth Amendment as applied to Mr. Long due to Mr. Long's unique medical conditions

In addition to the general constitutionally intolerable risk of severe pain from the Etomidate Protocol, Mr. Long suffers from specific medical conditions, namely severe Traumatic Brain Injury (TBI) and Temporal Lobe Epilepsy that substantially increase the risk that he will suffer severe pain from the protocol. *See* Compl. ¶ 82. Patients who suffer a traumatic brain injury, especially a severe one, faces an increased risk of post-traumatic epileptic seizures, including for years after the initial injury. *See, e.g.*, *Epilepsy Can Follow Traumatic Brain Injury*, CDC (Mar. 27, 2017), *available at https://www.cdc.gov/features/epilepsy-tbis/index.html*; B. Masel, et al., *Traumatic Brain Injury: A Disease Process, Not an Event*, 27 J. of Neurotrauma 1529-1540 (Aug. 2010). In addition to this risk of post-traumatic seizures, Mr. Long also suffers from temporal lobe epilepsy. Temporal lobe epilepsy is the most common form of partial or location-related epilepsy, named for the location of the epileptic activity (the temporal lobe). Temporal lobe seizures can involve both awareness and a lack of awareness during the seizure. Lasting 30 to 60 seconds, the seizures can cause a fixed stare, impaired consciousness, fumbling with fingers, change in arm posture, lip-smacking movements, gibberish or inability to speak, and generalized tonic-clonic

jerking. *See, e.g.*, Holmes, Sirven & Fisher, *Temporal Lobe Epilepsy (TLE)*, Epilepsy Foundation (Sept. 4, 2013), *available at https://www.epilepsy.com/learn/types-epilepsy-syndromes/temporal-lobe-epilepsy-aka-tle*.

Etomidate is contraindicated for individuals who are predisposed to seizures because it is more likely to induce a seizure. *See, e.g.*, Lubarsky Decl. ¶¶ 32-33. A seizure may cause independent pain and suffering, including from biting of the tongue or thrashing against the restraints used in the lethal injection protocol, which could cause severe pain once the seizure has subsided. In addition, it would be difficult for the execution team to tell the difference between movements due to seizure, movements due to myoclonus caused by the etomidate, and voluntary movement indicating consciousness. This difficulty risks the execution team assessing unconsciousness before that stage has been reached. In addition, it is also likely to delay the time it takes to complete a consciousness check, such that the ultra-short-acting etomidate will wear off. Even if the seizures result in a temporary loss of awareness, this symptom may mimic unconsciousness such that the execution team may misinterpret Mr. Long as unconscious. After administration of the paralytic, once out of the seizure, Mr. Long would be physically unable to alert the execution team to his awareness. If the consciousness check is invalid or delayed, the administration of the second and third drugs will cause excruciating pain to Mr. Long. Lubarsky Decl. ¶ 23, 32-34. Additionally, a seizure involving movement could cause the intravenous (IV) lines to become dislodged, creating a substantial risk for mis-delivery of the execution drugs, much like what happened in the 2006 botched execution of Angel Diaz. Lubarsky Decl. ¶ 34.

Plaintiff is likely to succeed on the merits of Claim II of his Complaint

Mr. Long is also likely to succeed on the merits of Count II, which challenges the state of Florida's three-drug protocol in lieu of one-drug protocol as violating the evolving standards of

decency. The Eighth Amendment requires that punishment for crimes comply with the "evolving standards of decency that mark the progress of a maturing society." *Roper v. Simmons*, 543 U.S. 551, 561 (2005) (quoting *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958) (plurality opinion)). To determine evolving standards, courts look to the "objective indicia of society's standards"; "the clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." *Atkins*, 536 U.S. at 312. (2002). Since *Baze*, when no state used a one-drug protocol and the "broad consensus" was a three-drug protocol, many states now use, have used, intend, or have intended to use a one-drug protocol, including Georgia, Missouri, Texas, South Dakota, Arizona, Idaho, Ohio, Washington, Arkansas, California, Kentucky, Louisiana, and North Carolina.[10] *See* Death Penalty Information Center, https://deathpenaltyinfo.org/state-lethal-injection. Because no state currently uses etomidate as the first drug especially, Florida's use of a three-drug protocol using etomidate constitutes cruel and unusual punishment.

Plaintiff is likely to succeed on the merits of Claim III of his Complaint

If this Court disagrees that Plaintiff is substantially likely to succeed on the merits of claims one and/or two, this is only because the defendants have violated Mr. Long's constitutional rights under the First, Fifth, Eighth, and Fourteenth Amendments by objecting to his document request and limiting access of information from Defendant's employees. Accordingly, Mr. Long is substantially likely to succeed on claim three in the alternative.

As argued in claims one and two, the Constitution's prohibition against cruel and unusual punishment protects persons who are sentenced to death from being executed in a manner that denies basic human dignity. *See* U.S. Const. amend. VIII; *Bucklew*, 139 S. Ct. at 1124; *Glossip*,

[10] Some of these states no longer have the death penalty or have a moratorium on executions. Others have since changed protocols or not carried out an execution. However, the point is that unlike like in *Baze* when a one-drug protocol was essentially untested, one-drug executions routinely occur in several states and others have considered such protocols.

135 S. Ct. at 2737; *Baze*, 553 U.S. at 50. However, if persons who are sentenced to death are denied a fair opportunity to challenge an unconstitutional method of execution, then the Eighth's Amendment guarantee is meaningless. "It has long been recognized that 'fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights." *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972) (quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 170 (1951) (Frankfurter, J., concurring)); *see also United States v. 408 Peyton Rd., S.W., Atlanta, Fulton Cty., Ga.*, 162 F. 3d 644, 651 (11th Cir. 1998) ("In any event, ex parte presentation of such evidence would not suffice to protect the innocent owner's interests because 'fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights.'"). That state here seeks such a secret, one-sided determination of facts decisive of Mr. Long's right to be free from a preventable and excruciating death.

Here, the state's concealment of records, testimony, and information denies Mr. Long the opportunity to protect his Eighth Amendment rights because it precludes him from accessing information necessary to challenge his method of execution, a clear violation of Due Process. *See, e.g.*, *Mathews v. Eldrige*, 424 U.S. 319 (1976) ("The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'"); *Morrissey v. Brewer*, 408 U.S. 471, 481-83 (1972); *Goldberg v. Kelly*, 397 U.S. 254, 260-63 (1970) ("The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss,' and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest . . . ." (internal citation omitted)).

Due Process "is flexible and calls for such procedural protections as the particular situation demands." *Mathews*, 424 U.S. at 334; *Morrissey*, 408 U.S. at 481. Here, in particular, Mr. Long has been denied the "basic ingredient of due process": "an opportunity to be allowed to substantiate

a claim before it is rejected." *See Ford v. Wainwright*, 477 U.S. 399, 414 (1986) (plurality opinion) (internal quotation marks omitted). It is patently unfair to permit the state to use secrecy as a sword and shield to defeat Mr. Long's claims. *See, e.g., Cox v. Adm'r U.S. Steel & Carnegie*, 17 F. 3d 1386, 1417 (11th Cir. 1994) ("[A] defendant may not use the privilege to prejudice his opponent's case or to disclose some selected communications for self-serving purposes.").

Plaintiff is likely to succeed on the merits of Claim IV of his Complaint

Mr. Long is also likely to succeed on the merits of Count IV of his Complaint. Claim IV of the Complaint challenges the constitutionality of Warden Barry Reddish's denial of Mr. Long's requests that his lawyers have access to a phone during the execution, that he be allowed to substitute the allowed spiritual advisor witness with a second attorney witness, and that he be allowed to have a witness who is able to see the insertion of the IV line used to administer the lethal drugs.

With regards to attorney phone access, Mr. Long is specifically requesting that his lawyer be allowed to bring a cell phone into the witness area, or alternatively, to have access to a landline within reasonable distance to the execution chamber. In similar circumstances, the United States District Court for the Middle District of Tennessee granted a temporary restraining order requiring Tennessee to provide phone access to the plaintiff's attorneys. *See Zagorski v. Haslam*, 3:18-CV-01205, 2018 WL 5454148, at *4 (M.D. Tenn. Oct. 29, 2018), *aff'd*, 741 Fed. Appx. 320 (6th Cir. 2018), cert. denied, 139 S. Ct. 20 (2018) [11]. Depriving Mr. Long's lawyers from phone access deprives Mr. Long access to the courts in violation of his First, Sixth, Eighth, and Fourteenth

[11] The Plaintiff acknowledges *Grayson v. Warden*, 672 Fed. Appx. 956, 966 (11th Cir. 2016), but asserts that this case is distinguishable. First, Florida guarantees the right to have counsel for the convicted person present at the execution, whereas Alabama strictly prohibits attendance by a lawyer in their legal capacity. *Compare* Section 922.11, Florida Statutes (2019), *with* Ala. Code § 15-18-83. Additionally, Grayson did not challenge Alabama's phone restriction on Sixth Amendment grounds.

Amendment rights. Mr. Long has the right to effective assistance of counsel at any critical stage in his proceedings. *See Strickland v. Washington*, 466 U.S. 668 (1984). Execution, as the discrete implementation of his sentence, is a critical stage of the proceedings. *Cf. Glover v. United States*, 531 U.S. 198, 202 (2001) (sentencing is a critical stage of the proceedings).[12] The right to counsel and the right to be free from cruel and unusual punishment mean nothing if Mr. Long's sole advocate present at the execution site has no ability to advise the courts if his execution is being carried out in a cruel and unusual manner. Without a telephone, Mr. Long is constructively denied his right to counsel. Mr. Long currently has access to a cordless phone in his cell which is in close proximity to the execution chamber. There is therefore no legitimate penological reason why Mr. Long's attorneys cannot have similar access.

In terms of having a second attorney witness, there is no legitimate penological interest in preventing Mr. Long from substituting a second lawyer for the spiritual advisor allowed under Section 922.11, Florida Statutes (2019). Clearly, the Defendants have a legitimate interest in limiting the number of people allowed to be present at an execution in order to assure overcrowding does not occur and to include the family members of the victims. However, because Mr. Long is asking to substitute a spiritual advisor witness, which he is guaranteed by statute, with a second lawyer, there would be no increase in the number of people present and his second attorney's presence would not impede the designated spots for victim-witnesses. Having a second attorney witness is critically important, particularly given Defendants' refusal to allow phone access, because should something go wrong, Mr. Long's first attorney will be required to leave the witness room to attempt to contact the courts.

Finally, Mr. Long requests that he be allowed to have a witness present at the execution

[12] Indeed, Florida has recognized this by statutorily authorizing an inmate's attorney as one of twelve execution witnesses, under Section 922.11, Florida Statutes (2019).

who is able to view the insertion of the IV line that will be used to administer the lethal drugs. A constitutional execution cannot occur if the execution team is not able to successfully insert IV lines, nor if the IV insertion process itself is torturous. In 2006, Florida tortured Angel Diaz to death when both IV lines were inserted all the way through the veins, causing the lethal drugs to pool into soft tissue.[13] In 2009, Ohio tortured Romell Broom, unsuccessfully trying to find a suitable vein for more than two hours.[14] In 2014, Oklahoma tortured Clayton Lockett to death. After an hour of attempting to find a suitable vein and ultimately inserting an IV into his groin, a supervising physician declared Mr. Lockett unconscious following the administration of the first sedative drug.[15] The next two drugs were administered, and three minutes later, Mr. Lockett attempted to raise his head, was writhing in pain, and began to speak that "something's wrong." It took 43 minutes for Mr. Lockett to die, and a subsequent investigation determined that a failed IV line led to the botched execution.[16] On February 22, 2018, Alabama called off the execution of Doyle Hamm after two and a half hours of attempting to insert the IV line.[17] Mr. Hamm was left with 10-12 incisions, including a penetrated femoral artery and a punctured bladder.

These are but a few examples of botched executions that resulted from difficulty in inserting the IV line. Florida's solution to these problems is hiding the IV insertion and execution

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[13] Adam Liptak & Terry Aguayo, *After Problem Execution, Governor Bush Suspends the Death Penalty in Florida*, NEW YORK TIMES, Dec. 16, 2006.

[14] Alan Johnson, *Effort to Kill Inmate Halted - 2 Hours of Needle Sticks Fail; Strickland Steps In*, COLUMBUS DISPATCH, Sept. 16, 2009.

[15] Bailey Elise McBride & Sean Murphy, *Oklahoma Inmate Dies after Execution is Botched,* Associated Press, Apr. 29, 2014, available at https://apnews.com/.

[16] Eric Eckholm, *One Execution Botched, Oklahoma Delays the Next*, New York Times, Apr. 29, 2014.

[17] Tracy Connor, *Lawyer Describes Aborted Execution Attempt for Doyle Lee Hamm as 'Torture,'* https://www.nbcnews.com/storyline/lethal-injection/lawyer-calls-aborted-... (Feb 25, 2018); Roger Cohen,*Death Penalty Madness in Alabama,* N.Y. Times, Feb. 27, 2018.

from view, and blindly asking the condemned and courts to believe them when they say that it will not happen again. The First, Sixth, Eighth, and Fourteenth Amendments demand more.

Factor 2: Movant Will Suffer Irreparable Injury if a Stay is not Granted.

There is little doubt that a prisoner facing execution will suffer irreparable injury if a stay is not granted. *Wainwright v. Booker*, 473 U.S. 935 n.1 (1985) (Powell, J., concurring) ("The third requirement that irreparable harm will result if a stay is not granted is necessarily present in capital cases.").

> Attorneys representing defendants under sentence of death have a difficult and arduous task to perform, but in seeking stays of execution they need devote little time to the oft-litigated issue of "irreparable injury," Death is a punishment different from all other sanctions in kind rather than degree." *Woodson v. North Carolina*, 428 U.S. 280, 303-304, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976) (opinion of STEWART, POWELL, and STEVENS, JJ.). The irreversible nature of the penalty makes irreparable by definition any injury inflicted in violation of the United States Constitution.

Wainwright v. Spenkelink, 442 U.S. 901, 902 (1979) (REHNQUIST, J., dissenting from order denying Florida's Attorney General's motion to vacate stay of execution). *See also O'Bryan v. Estelle*, 691 F.2d 706, 708 (5th Cir. 1982) (the "irreversible nature of the death penalty constitutes irreparable injury and weighs heavily in favor of granting a stay"); *Harris v. Johnson*, No. H-04-CV-1514 (S.D. Tex. June 29, 2004; *Oken v. Sizer, Jr.*, 321 F. Supp. 2d 658 (D. MD. 2004); *Hill v. Ozmint*, No. 2:04-0489-18AJ (D.S.C. March 4, 2004).

Justice Rehnquist's observation regarding the irreparable injury standard in *Spenkelink* stands to reason even if one evaluates the irreparable harm that would stem from extreme pain and suffering during the administration of a specific protocol, rather than the inmate's death itself. *See Powell v. Thomas*, 784 F. Supp. 2d 1270, 1283 (M.D. Ala. 2011) ("However, the alleged irreparable injury is not the fact alone that [the inmate] will die by execution. That alone is not a cognizable constitutional injury, *Baze*, 553 U.S. at 47, 28 S. Ct. 1520. The alleged irreparable

injury lies in the assertion that, under present protocols, he may be conscious after being injected with pentobarbital and able to feel pain during the administration of the final two chemicals."), *aff'd*, 641 F. 3d 1255 (11th Cir. 2011). This is not only because the pain described by Drs. Van Norman and Lubarsky is torturous, but because a violation of constitutional rights is presumed to cause irreparable injury. *See Jolly v. Coughlin*, 76 F. 3d 468, 482 (2d Cir. 1996). Thus, where a movant has demonstrated a substantial likelihood of success on the merits of one or more constitutional claims, as Mr. Long has done here, irreparable injury will be presumed. Where, as here, the constitutional violation involves torturous pain, that presumption cannot be rebutted.

Finally, the Court must look to whether the irreparable injury is "actual" and "imminent." *Siegel v. LePore*, 234 F. 3d 1163, 1176-77 (11th Cir. 2000) (*quoting Ne. Fla. Chapter of Ass'n of Gen. Contractors of Am. v. City of Jacksonville, Fla.* 896 F. 2d 1283, 1285 (11th Cir. 1990)). If Mr. Long is not granted an injunction or a stay of execution, he will be put to death with a substantial risk of harm in violation of the Eighth and Fourteenth Amendments on May 23, 2019. This is, without doubt, an "actual" and Imminent" injury. Thus, Movant can meet the second prong of the test for injunctive relief.

Factor 3: The Threatened Injury to Mr. Long Far Outweighs the Threatened Harm that the Injunction May Cause the Defendants.

While recognizing that the State of Florida has a finality interest in imposing sentences of death, substantial harm will not result if a stay of execution is granted. Movant will remain in the custody of FDOC, where he has been held since his conviction. He is not seeking an injunction to prevent the state from carrying out his sentence; rather Movant is only seeking to enjoin Defendants from violating his constitutional right in the process of carrying out his sentence. The delay resulting from granting the temporary relief sought herein will have little adverse effect upon the State's interest. *See, Gomez v. U.S. Dist.Ct. for Northern Dist. Of Ca.*, 966 F. 2d 460,462 (9th

Cir. 1992) (Noonan J., dissenting from grant of writ of mandate) ("The state will get its man in the end. In contrast, if persons are put to death in a manner that is determined to be cruel, they suffer injury that can never be undone, and the Constitution suffers an injury that can never be repaired.") If Movant loses on the merits, his execution will go forward, albeit somewhat later in time. If Movant prevails on the merits, the FDOC will still be permitted to execute him once it issues a constitutional protocol, which will not take long given that Florida already authorizes and uses lethal injection so it has the chamber and supplies. Thus, the balance of harms tips sharply in favor of entering a preliminary injunction.

Factor 4: Granting an Injunction or Stay will not Disserve the Public Interest.

The issue of whether the State is executing its prisoners in a manner that subjects them to an excruciatingly painful, torturous death is a matter of vital public interest – so much so that the courts look to the national community to assist in determining the evolving standards of decency for an Eighth Amendment claim challenging a state's method of execution. Humanity and dignity, as well as respect for the Constitution, are gravely offended by executions that violate such standards of decency. Thus, it is affirmatively in the public interest to address and resolve the merits of Movant's claims in order to identify and put an end to unnecessary procedures that post a substantial risk of causing gratuitous and grievous suffering. *See Cooey v. Taft*, 2007 U.S. Dist. LEXIS 39534 at *6 (S.D. Ohio 2007) (granting emergency motion for preliminary injunction and stating "Public interest is served only by enforcing constitutional rights. By comparison, the public interest has never been and could never be served by rushing to judgment at the expense of a condemned inmate's constitutional rights.").

IMPORTANCE OF EVIDENTIARY HEARING

Based on the matters raised in this Complaint and this Motion, it is important that this Court

conduct an evidentiary hearing based on *Chavez v. Florida Secretary Department of Corrections, et al.*, 742 F. 3d 1267 (11th Cir., 2014), with consideration given to the following in that opinion:

a. Wilson, Circuit Judge, concurring:

> "I write separately to underscore that the question of whether a significant change has occurred to a state's lethal injection protocol is a fact-intensive inquiry for which an evidentiary hearing is especially important. The district judge in this case properly conducted and evidentiary hearing and thoroughly studied the parties' filings and exhibits and the governing legal principles."

b. Martin, Circuit Judge, concurring:

1. "At the beginning of the evidentiary hearing, the District Court heard arguments on preliminary matters, including arguments about the necessity of even having an evidentiary hearing... After hearing additional argument, the District Court denied the State's motion for the Court to reconsider its order setting an evidentiary hearing, explaining that the issues raised by the state "are all fact dependent.' I could not agree more with the District Court's decision that an evidentiary hearing was necessary."

2. "All this is to say, the District Court should be commended for its cautious and deliberate approach to deciding the disputed factual issues concerning Florida's new midazolam drug protocol."

It is also very important that this Court conduct an evidentiary hearing because after the botched Branch execution, the Florida Courts have failed to fully re-evaluate the Etomidate Protocol after a complete and thorough evidentiary hearing.

Although Mr. Long was given an evidentiary hearing in the State trial court on his as-applied challenge, Mr. Long was severely limited by the State trial court as to what evidence he could present regarding the Etomidate Protocol. Mr. Long was not allowed to present any evidence regarding a general challenge to the Etomidate Protocol despite the evidence regarding the botched Branch execution. Even on the as-applied claim, Mr. Long was severely restricted by the State trial court as to what evidence he could present regarding his as-applied challenge. The State trial court did not allow Mr. Long to present evidence regarding anything the state trial court felt went

to a general challenge. This precluded Mr. Long from presenting relevant evidence that went to his as-applied claim, and prevented him from meeting his burden under *Baze*, *Glossip*, and *Bucklew*. The state trial court also limited Mr. Long's witnesses and therefore his ability to prove his unique medical condition, its effects on the protocol, and the availability of an alternative.

In *Jimenez v. State*, 265 So. 3d 462 (Fla. 2018), the Florida Supreme Court once again refused to look at the mounting evidence that the Etomidate Protocol subjects the defendant to cruel and unusual punishment. Mr. Jimenez was executed.

In her dissent in *Jimenez*, Justice Pariente stated the following:

> "Although *Asay VI* is now final, Jimenez presents new, additional evidence from the executions Florida has performed since that decision – Mark Asay on August 24, 2017, Michael Lambrix on October 6, 2017, Patrick Hannon on November 8, 2017, and Eric Branch on February 22, 2018 – regarding the possibility that the lethal injection protocol subjects the defendant to cruel and unusual punishment.
>
> As to the administration of the first drug in the lethal injection protocol, etomidate the postconviction court wrote in its order denying Jimenez's motion: 'As the administration the etomidate commenced, Branch released a guttural yell or scream... Branch's legs were moving, his head moved, and his body was shaking.' Order, at 4. His body 'continued to shake and his chest was heaving for another four minutes.' Initial Br., at 38. The postconviction court noted and the majority accepts that all of this took place 'before the consciousness check was performed before the subsequent administration of the second and third drugs.' Order, at 4; majority op. at 475. Dr. Lubarsky, 'an experienced anesthesiologist.' Initial Br., at 29, opined that this was 'indicative of insufficient anesthetic depth prior to the administration of the second and third drugs.' Id. At 38.
>
> As to the second and third drugs, Jimenez alleges that – according to Dr. Lubarsky's review of Florida's lethal injection protocol and records from Branch's execution – Branch had only '$1/10^{th}$ of the clinical does of etomidate... in his bloodstream' by the end of the execution process, an amount that is 'insufficient to ensure that' he did 'not feel the excruciating pain of the second and third drugs.' Id. at 31. In Dr. Lubarsky's opinion, Branch's scream was 'objective evidence' of his 'experiencing significant pain during [the] execution,' id. at 35 – not 'in protest of his execution or a reaction to etomidate.' Majority op. at 475. Of course, this information was unknown when this Court rejected Asay's challenge to the new lethal injection protocol.
>
> 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 evidentiary hearing."

Although the Florida Supreme Court has refused to properly examine this issue, this Court can do so by conducting in evidentiary hearing in this case.

As part of this evidentiary hearing, Mr. Long would have an opportunity to present evidence as to an alternative manner of execution that has a greater likelihood of reducing any substantial risk or pain. In her dissent in *Jimenez*, Justice Pariente also stated the following:

> Further, I reiterate my 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. See Initial Br., at 49. I again urge the executive branch to adopt a one-drug protocol to avoid this unconstitutional risk.

Jimenez, 224 So. 3d at 705-08 (Pariente, J., dissenting)

Of additional concern regarding the way the Florida Courts have handled his issue is the fact that Mr. Long has been denied relevant documents by various state agencies that would have provided support for his claims regarding the lethal injection protocol. These matters are raised in Count III of Mr. Long's Complaint. In her dissent in *Jimenez*, Justice Pariente further stated the following:

> In my dissenting opinion in *Asay VI*, I explained that Asay was unconstitutionally denied access to documents that may have supported his claim that Florida's new lethal injection protocol – which replaced midazolam with etomidate as the first drug in the protocol, intended to induce unconsciousness – violates the Eighth Amendment's bar against cruel and unusual punishment.

Jimenez, 224 So. 3d at 492 (Pariente, J., dissenting)

In requesting this hearing, Mr. Long understands because this case is being litigated under a death warrant that there is limited time to litigate this issue. But as Justice Pariente noted in her

Jimenez dissent:

> While I realize that all proceedings should be completed by the time the Governor signs a death warrant, some claims, such as those challenging the execution method, cannot be raised or evaluated until the signing of the death warrant. At the least, defendants must have adequate time to investigate and raise and courts must have adequate time to properly review these warrant-based claims.

Jimenez, 224 So. 3d at 493 (Pariente, J., dissenting)

These comments were being made in the context of Justice Pariente noting the short warrant period in *Jimenez*. Mr. Jimenez was only given 27 days, and he at least received a stay in the Florida Courts. Mr. Long was only given 31 days, and as of the date of the filing of this Motion has not been granted any stays.

Despite Justice Pariente in *Jimenez* urging the Executive Branch to set a longer warrant period, so necessary judicial proceedings can be completed before the execution, the Executive Branch has not chosen to do so. And as Justice Pariente noted, this has put the State courts and Federal courts in the position of dealing with short warrant periods. This is not Mr. Long's fault, and he is simply asking for his constitutional rights to be heard.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the forgoing motion was electronically served on this date, May 16, 2019, to the defendants in this matter through the ECF system.

/s/Robert A. Norgard
ROBERT A. NORGARD

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

BOBBY JOE LONG,

Plaintiff,

vs.

Case No.

Death Penalty Case

DEATH WARRANT ISSUED
Execution Date: May 23, 2019

MARK S. INCH, in his capacity as the Secretary, Florida Department of Corrections,
BARRY REDDISH, in his capacity as the Warden of Florida State Prison

JOHN DOES, as designee of Barry Reddish, and/or Mark S. Inch,

Defendants.
_____/

APPENDIX TO PLAINTIFF'S EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER, PRELIMINARY INJUNCTION AND/OR STAY OF EXECUTION
VOLUME I

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

BOBBY JOE LONG,

Plaintiff,

vs.

Case No.

Death Penalty Case

DEATH WARRANT ISSUED
Execution Date: May 23, 2019

MARK S. INCH, in his capacity as the Secretary, Florida Department of Corrections,
BARRY REDDISH, in his capacity as the Warden of Florida State Prison

JOHN DOES, as designee of Barry Reddish, and/or Mark S. Inch,

Defendants.
_____/

APPENDIX TO PLAINTIFF'S EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER, PRELIMINARY INJUNCTION AND/OR STAY OF EXECUTION

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APPENDIX
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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

ROBERT JOE LONG,
A/K/A BOBBY JOE LONG,

Plaintiff,

v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, et al.,

Defendants.
_____/

CASE NO. 8:19-cv-1193-MSS-AEP

DEATH WARRANT SIGNED
EXECUTION SCHEDULED FOR
MAY 23, 2019 AT 6:00 PM

RESPONSE TO EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER, PRELIMINARY INJUNCTION AND/OR STAY OF EXECUTION

COME NOW, Defendants, MARK S. INCH, Secretary, Florida Department of Corrections, et al., by and through undersigned counsel, and hereby respond to Petitioner's Application for Stay of Execution.

PRELIMINARY STATEMENT REGARDING THE LAW AND EQUITABLE PRINCIPLES

Plaintiff has spent the last thirty years unsuccessfully challenging his death sentence arising from his guilty plea to first-degree murder. See Long v. State, 610 So. 2d 1268 (Fla. 1992). Now, with his execution looming in a matter of days, Plaintiff has filed a section 1983 complaint with this Court seeking to delay his scheduled execution. This Court should not reward Plaintiff's dilatory actions by granting him a stay on a complaint that lacks merit.

The United States Supreme Court has advised that "[f]iling an action that can proceed under § 1983 does not entitle the complainant to an order staying an execution as a matter of course." Hill v. McDonough, 547 U.S. 573, 583-84 (2006). "Both the State and the victims of crime have an important interest in the timely enforcement of a sentence." Id. at 584 (citing Calderon v. Thompson, 523 U.S. 538, 556 (1998)). A court considering a stay must also apply "a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay." Id. (citing Gomez v. United States Dist. Court, 503 U.S. 653, 654 (1992) (noting that the "last-minute nature of an application" or an applicant's "attempt at manipulation" of the judicial process may be grounds for denial of a stay")); see also Bucklew v. Precythe, 139 S. Ct. 1112, 1133-34 (2019) (stating that last minute stays should be the "extreme exception, not the norm," and federal courts can, and should, invoke their equitable powers to dismiss suits that are pursued in a dilatory fashion or based on speculative theories); Price v. Dunn, 587 U.S. ___, 2019 WL 2078104 at *4 (May 13, 2019) (Thomas, J., concurring in the denial of certiorari) (noting that seeking a stay shortly before a scheduled execution, after delaying bringing the section 1983 challenge in the first place, "only encourages the proliferation of dilatory litigation strategies that we have recently and repeatedly sought to discourage").

Here, there is no question that Plaintiff has been dilatory in bringing his complaint. Long's lethal injection challenges are based on his allegation that his traumatic brain injury (TBI) and temporal lobe epilepsy would be contraindicated by

etomidate. Long, however, has known about his medical conditions for decades. During his penalty-phase proceeding, Long presented the testimony of Dr. John Money regarding his alleged temporal lobe epilepsy, and Long also presented the testimony of Dr. Robert Berland concerning Long's alleged brain damage. Long v. State, 610 So. 2d 1268, 1271-72. The trial court actually found mitigation based on these conditions during Long's 1989 resentencing hearing. Id. Clearly, the evidence regarding these conditions is not new.

In addition, the use of etomidate in the state's three-drug protocol has been part of the protocol since January 2017. Asay v. State (Asay VI), 224 So. 3d 695, 705 (Fla. 2017). Given that Long has known about the use of etomidate as part of the protocol for over two years, and has known about his medical conditions for decades, he cannot justify waiting until seven days before his scheduled execution in bringing this claim. Accordingly, the instant action is clearly dilatory and the equities lie decidedly in favor of the State, the murder victim's surviving family members, and the numerous other victims of Long's violent and heinous crimes. The law in this circuit is clear, Long's dilatory conduct alone disentitles him to the equitable relief he seeks. See Rutherford v. McDonough, 466 F.3d 970, 975 (11th Cir. 2006) (noting that Petitioner's last-minute filing under a death warrant was unjustified and dilatory); Arthur v. Commissioner, Ala. Dep't of Corr., 695 Fed. Appx. 418, 425-26 (11th Cir. 2017) (noting that plaintiff unreasonably delayed filing his claim until only nine days before his execution); Brooks v. Warden, 810 F.3d 812, 826 (11th Cir. 2016) (the equities did not favor granting a stay when the prisoner unreasonably delayed filing his 1983 challenge eleven weeks prior to

his execution date); see also Bible v. Davis, 739 Fed. Appx. 766 (5th Cir. 2018) (unpublished) (affirming denial of stay where inmate filed his section 1983 lethal injection challenge only 19 days prior to his scheduled execution).

PROCEDURAL BACKGROUND

Over the course of 1984, Long abducted, sexually assaulted, and murdered numerous women in the Tampa Bay area. The instant death warrant case stems from Long's guilty plea to eight homicides in Hillsborough County. On September 23, 1985, Long entered into a plea agreement with the State and pleaded guilty to the murder, kidnapping, and sexual battery of Michelle Simms, along with seven additional counts of first-degree murder, numerous sexual battery and kidnapping counts, and a violation of probation. According to the plea agreement, the State would be limited to seeking the death penalty only as to the murder of Michelle Simms.[1] See Long v. State, 529 So. 2d 286, 288 (Fla. 1988).

After Long was originally sentenced to death, the Florida Supreme Court reversed his death sentence and remanded for a new penalty phase. Id. at 291-93. Following a resentencing proceeding before a jury, Long was again sentenced to death for the murder of Michelle Simms, and his sentence was affirmed on appeal. See Long v. State, 610 So. 2d 1268, 1269-71 (Fla. 1992), cert. denied, 510 U.S. 832 (1993).

Following the completion of his initial state postconviction proceedings, Long v. State, 118 So. 3d 798 (Fla. 2013), Long sought relief in federal court by filing a petition for writ of habeas corpus in the United States District Court, Middle District of Florida.

[1] Long received concurrent life sentences in the seven other murder cases.

Long v. Secretary, Fla. Dep't of Corr., Case No. 8:13-cv-02069-MSS-AEP. On August 30, 2016, the district court issued an order denying Long's habeas petition. Long filed an application for a certificate of appealability (COA) in the Eleventh Circuit Court of Appeals, and on January 4, 2017, the court of appeals denied the COA.

On April 23, 2019, Governor Ron DeSantis signed Long's death warrant and his execution is scheduled for May 23, 2019, at 6:00 p.m. On April 29, 2019, pursuant to the Florida Supreme Court's scheduling order, Long filed a third successive motion for postconviction relief raising six claims, including the identical four claims raised in Long's section 1983 complaint. After reviewing the State's response and conducting a case management conference, the postconviction court summarily denied all of Long's claims with the exception of Claim 2(a); Long's as-applied challenge to Florida's lethal injection protocol.

On May 3, 2019, the state court conducted an evidentiary on Long's as-applied challenge to Florida's lethal injection protocol. Long presented testimony from Dr. David Lubarsky, Anesthesiologist; Dr. Frank Wood, Neuropsychologist; Silas Raymond, Clinical and Compounding Pharmacist; and Steven Whitfield, Chief of Pharmaceutical Services at the Florida Department of Corrections (FDOC). The State presented rebuttal testimony of Dr. Steven Yun, Clinical Anesthesiologist, and Dr. Daniel Buffington, Doctor of Pharmacy/Pharmacologist. After hearing the testimony, the state court issued a comprehensive order denying all relief.

Long appealed the state court's ruling on his successive motion to the Florida Supreme Court, and on May 17, 2019, the court issued an opinion affirming the denial of relief. Long v. State, Case No. SC19-726 (Fla. May 17, 2019).

On May 16, 2019, Plaintiff filed a complaint pursuant to 42 U.S.C. § 1983 raising four claims: (1) that Florida's lethal injection protocol utilizing etomidate as the first drug at Long's execution would constitute cruel and unusual punishment; (2) Florida's failure to use a single-drug protocol violates the Eighth Amendment's evolving standards of decency; (3) that Florida's public records laws violated his constitutional rights; and (4) that the Florida Department of Corrections' (FDOC) refusal of his requests regarding witnesses and access during the execution violate his right to access to the courts. Plaintiff simultaneously filed an emergency motion for temporary restraining order, preliminary injunction, and/or stay of execution.

ARGUMENT

As the Eleventh Circuit has held, an inmate is not entitled to a stay of execution to litigate a section 1983 complaint unless he meets his burden of showing: "(1) he has a substantial likelihood of success on the merits; (2) he will suffer irreparable injury unless the injunction issues; (3) the stay would not substantially harm the other litigant; and (4) if issued, the injunction would not be adverse to the public interest." Valle v. Singer, 655 F.3d 1223, 1225 (11th Cir. 2011) (quoting DeYoung v. Owens, 646 F.3d 1319, 1324

(11th Cir. 2011)). Here, Plaintiff cannot satisfy any of these requirements for his claims.[2] See Siegel v. LePore, 234 F.3d 1163, 1176 (11th Cir. 2000) (noting that in this Circuit a preliminary injunction is "an extraordinary and drastic remedy" and should not be granted unless the "movant clearly" establishes "each of the four prerequisites." (internal quotes omitted) (citing McDonald's Corp. v. Robertson, 147 F.3d 1301, 1306 (11th Cir. 1998)).

Plaintiff's motion for a stay of execution should be denied because: (1) this Court lacks jurisdiction under the Rooker-Feldman doctrine to review the Florida Supreme Court's rejection of Long's claims; (2) his claims are barred by res judicata; (3) Long failed to properly exhaust his administrative remedies; (4) his section 1983 action was filed beyond the statute of limitations, and (5) he has failed to show a substantial likelihood of success on the merits of his claims.

1. Rooker-Feldman doctrine[3]

Long cannot establish a substantial likelihood of success on his complaint because Long's section 1983 complaint should be dismissed for lack of subject-matter jurisdiction. Jurisdiction is a threshold matter, and "[f]ederal courts must determine that they have jurisdiction before proceeding to the merits." Lance v. Coffman, 549 U.S. 437, 439 (2007); Steel Co. v. Citizens for Better Env't, 523 U.S. 83, 94 (1998) (rejecting the

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[2] Because the standard for granting a temporary restraining order is the same as obtaining a stay of execution, Defendants will address Long's motion as a request for a stay of execution. See Gissendaner v. Commissioner, Ga. Dep't of Corr., 779 F.3d 1275, 1280 (11th Cir. 2015).

[3] The doctrine is named after two cases: Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923), and District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983).

doctrine of hypothetical jurisdiction and explaining that the determination of jurisdiction is a threshold matter). This Court lacks jurisdiction under the Rooker-Feldman doctrine to review the merits of Long's claims because his claims were reviewed and decided by the Florida Supreme Court on the merits.

The Rooker-Feldman doctrine recognizes that 28 U.S.C. § 1257 gives the United States Supreme Court the sole authority to review final decisions of the state courts.[4] Other federal courts are not authorized to exercise appellate jurisdiction over state courts. Rather, Congress reserved that power for the United States Supreme Court. Verizon Md., Inc. v. Public Serv. Comm'n of Md., 535 U.S. 635, 644 n.3 (2002). This Court may not review the decision of the Florida Supreme Court which decided all of Long's section 1983 claims, only the United States Supreme Court may do that. Long may not relitigate claims that he lost in state court in federal district court. His sole path of review of the Florida Supreme Court's decision is to seek certiorari review in the United States Supreme Court. This court simply does not have the power to review the Florida Supreme Court's decision. That is exactly what the Rooker-Feldman doctrine prohibits. Any decision by this Court would necessarily involve this Court reviewing the Florida Supreme Court's decision rejecting Long's claims which is exactly what the Rooker-Feldman doctrine is designed to prevent.

The Rooker-Feldman doctrine prohibits a party from litigating a claim in state court, losing, and then turning around and bringing the same claim in federal court. Long

[4] Section 1257(a) provides that "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari . . ."

may not file a federal section 1983 action after raising the same claims in state court. He, like all other litigants, must choose between state and federal court.

The Supreme Court has explained that the Rooker-Feldman doctrine is confined to cases that are "brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments" and noting the purpose of the doctrine is that the authority to review state court decisions is vested solely in the United States Supreme Court, not other federal courts. Exxon Mobil Corp. v. Saudi Indus. Corp., 544 U.S. 280, 284 (2005). That is exactly what Long is - a state-court loser turned federal plaintiff. Long raised his Eighth Amendment lethal injection challenges in state court, as well as his public records and execution witness access claims, and the Florida Supreme Court rejected those claims on the merits. Long may not now seek review of those same claims in a federal district court.

In Alvarez v. Attorney General of Fla., 679 F.3d 1257 (11th Cir. 2012), the Eleventh Circuit held the Rooker-Feldman doctrine barred an as-applied due process claim in a section 1983 action where the defendant had previously sought DNA testing in state court. Alvarez was convicted of first-degree murder, sexual battery, and aggravated child abuse and sentenced to life imprisonment. In his state postconviction proceedings, he sought DNA testing. The state trial court denied the motion for DNA testing and the state intermediate appellate court affirmed. Alvarez then filed a section 1983 action in federal district court seeking DNA testing. The district court dismissed the action for

failure to state a claim and that it lacked jurisdiction to entertain the claim under the Rooker-Feldman doctrine.

The Eleventh Circuit first explained that the doctrine is a jurisdictional rule that precludes the lower federal courts from reviewing state court judgments. Alvarez, 679 F.3d at 1262. The Court explained that 28 U.S.C. § 1257 vests authority to review a state court judgment solely in the Supreme Court. Id. (citing Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, 292 (2005)). The "Rooker-Feldman doctrine operates as a bar to federal court jurisdiction where the issue before the federal court was 'inextricably intertwined' with the state court judgment so that (1) the success of the federal claim would 'effectively nullify' the state court judgment, or that (2) the federal claim would succeed 'only to the extent that the state court wrongly decided the issues.'" Id. at 1262-63 (quoting Casale v. Tillman, 558 F.3d 1258, 1260 (11th Cir. 2009)). The Eleventh Circuit acknowledged the "narrowness" of the doctrine but nevertheless held that the doctrine applied and prohibited the federal action because the Florida courts' resolution was "squarely within its orbit." The Eleventh Circuit found it "abundantly clear" that success on Alvarez's claim "would 'effectively nullify' the state court's judgment and that the claim would succeed only to the extent that the state court wrongly decided the issues." Id. at 1264. Therefore, "Alvarez's claim meets all of the criteria for application of the Rooker-Feldman doctrine." Id.; see also Helton v. Ramsay, 566 Fed. Appx. 876 (11th Cir. 2014) (holding Rooker–Feldman doctrine precluded procedural due process claim alleging that Florida state officials erred in denying him access to evidence for a motion for post-conviction DNA testing citing Alvarez).

Long's section 1983 action, like the one in Alvarez, is barred by the Rooker-Feldman doctrine for the same reasons. As in Alvarez, it is "abundantly clear" that success on the claims in this case would "effectively nullify" the state court's judgment and that the claims would succeed only to the extent that the state court wrongly decided the issues. Because this Court should ultimately dismiss the section 1983 action for lack of subject-matter jurisdiction under the Rooker-Feldman doctrine, Long has not shown that he has a substantial likelihood of success on the merits of his complaint. But see Valle v. Scott, 441 Fed. Appx. 688, 2011 WL 4472170 (11th Cir. 2011).[5]

2. Res Judicata

Even if this Court were to determine that the Rooker-Feldman doctrine did not apply to preclude jurisdiction, it is clear that Long cannot establish that he has a substantial likelihood of success on the merits of his claims when his claims are barred by the doctrine of res judicata. Under the Full Faith and Credit Act, 28 U.S.C. § 1738, a federal court must give preclusive effect to a state court judgment to the same extent as

[5] In Valle, the court stated that "[w]e are not convinced that the Rooker-Feldman doctrine bars the exercise of jurisdiction here" when Valle was arguing that his execution would violate his constitutional rights because he was denied clemency. Valle, 441 Fed. Appx. at 688. The Court noted that the doctrine is "confined to cases of the kind from which the doctrine acquired its name: cases brought by state-court losers complaining of injuries caused by state-court judgments ... and inviting district court review and rejection of those judgments." Id. (citing Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, 284 (2005)). The Valle Court then stated that the "doctrines of issue or claim preclusion may bar Valle's clemency claims, but we are not convinced that dismissal is warranted for lack of jurisdiction." Id. But the Valle Court did not explain why Valle was not a state-court-loser-turned-federal-plaintiff just like the prototypical model described in Brown v. R.J. Reynolds Tobacco Co., 611 F.3d 1324, 1330 (11th Cir. 2010), or Alvarez. Moreover, Alvarez and Brown are published opinions and Valle is not. And Alvarez was decided after Valle. Furthermore, both Alvarez and Brown discuss the doctrine in far more detail than the couple of sentences concerning the doctrine in Valle.

would courts of the state in which the judgment was entered. Brown v. R.J. Reynolds Tobacco Co., 611 F.3d 1324, 1331 (11th Cir. 2010) (concluding ordinary preclusion rules govern the effect of the prior state court litigation rather than the Rooker-Feldman doctrine). Res judicata is routinely applied by the Eleventh Circuit in section 1983 actions. Muhammad v. Secretary, Fla. Dep't of Corr., 739 F.3d 683 (11th Cir. 2014); Starship Enterprises of Atlanta, Inc. v. Coweta County, 708 F.3d 1243, 1252–53 (11th Cir. 2013) (applying res judicata to bar certain claims in a § 1983 action); Green v. Jefferson County Comm'n, 563 F.3d 1243, 1251-54 (11th Cir. 2009) (same).

In determining whether an action is barred by res judicata, a federal court applies the law of the state in which it sits, which in this case is Florida. Starship Enterprises, 708 F.3d at 1252–53. The Eleventh Circuit explained Florida's res judicata principles in detail in Brown v. R.J. Reynolds Tobacco Co., 611 F.3d 1324, 1331-1334 (11th Cir. 2010). Claim preclusion "bars a subsequent action between the same parties on the same cause of action." Id. at 1332 (citing State v. McBride, 848 So. 2d 287, 290 (Fla. 2003), and Florida Bar v. Rodriguez, 959 So. 2d 150, 158 (Fla. 2007)).

Here, the same parties, Long and the State of Florida, litigated the same cause of actions in state court. As part of the current death warrant litigation, Long recently filed a third successive postconviction motion in the state trial court raising six claims, including identical Eighth Amendment challenges to Florida's lethal injection protocol, a public records access claim, and an execution-witness-access claim. The state postconviction court granted an evidentiary hearing on Long's as-applied constitutional challenge to the lethal injection protocol and summarily denied his remaining claims relying on well

established precedent. The Florida Supreme Court affirmed the trial court's ruling. Long v. State, Case No. SC19-726 (Fla. May 17, 2019).

There is a merits ruling from both the state trial court and the state supreme court. Long may not raise a claim in state court and obtain a merits ruling from the state court and then walk across the street and file the same claim in federal court. Res judicata prohibits such relitigation. Muhammad v. Secretary, Fla. Dep't of Corr., 739 F.3d 683 (11th Cir. 2014).

In Muhammad, the Eleventh Circuit held that a lethal injection challenge to Florida's lethal injection protocol was barred by res judicata. Muhammad, as part of his death warrant litigation, filed a section 1983 action challenging Florida's lethal injection protocol and requested a stay of execution. Id. at 685. Muhammad argued that Florida's protocol, which at that time used midazolam hydrochloride as the first drug in a three-drug protocol, violated the Eighth Amendment's prohibition on cruel and unusual punishment, asserting that midazolam does not effectively anesthetize the inmate before the second and third drugs in the protocol are administered. Id. Muhammad, however, a few months before filing the section 1983 civil rights action in federal court, had filed a motion for postconviction relief in state court which raised the identical challenges to the use of midazolam in Florida's three-drug lethal injection protocol as those raised in federal court. Id. The Florida Supreme Court had affirmed the state trial court's denial of the Eighth Amendment challenges. Id. at 685-86. Muhammad's federal complaint, like his state court motion, alleged that the use of midazolam violated the Eighth Amendment.

Id. at 686. The federal complaint relied primarily on the same evidence as in the state court. Id. at 687.

The federal district court ruled the section 1983 action was barred by the statute of limitations and denied the stay finding that Muhammad had "failed to show a substantial likelihood of success on the merits of his lethal injection claim." Id. On appeal, the Eleventh Circuit affirmed the district court's denial of the stay of execution and denied the stay filed in the appellate court as well. Muhammad, 739 F.3d at 688-89. The Eleventh Circuit concluded that because the Florida Supreme Court had already decided his Eighth Amendment claim, res judicata barred any federal complaint. Id. at 688. The Eleventh Circuit explained that federal courts apply the res judicata principles of the state in which the federal action arises and that Florida law precluded subsequent suits when there was a judgment on the merits. The Eleventh Circuit concluded that, under Florida's res judicata principles, the Florida Supreme Court's decision barred his "attempt to litigate that claim anew in federal court" because the Florida Supreme Court's decision "was a judgment on the merits." Id. The Eleventh Circuit concluded that "res judicata bars Muhammad from relitigating these claims in his federal complaint" and noted that the federal review available to him was via petition for a writ of certiorari in the United States Supreme Court, not a section 1983 filed in federal district court. Muhammad, 739 F.3d at 689.

For the same reasons as in Muhammad, Long's section 1983 action is likewise barred by the doctrine of res judicata. Muhammad is indistinguishable from this case and is controlling precedent. All of the counts in Long's section 1983 action were raised in

state court and the state courts, including the Florida Supreme Court, rejected the claims on the merits. The entire action is barred by res judicata.

3. Failure to Properly Exhaust

Pursuant to 42 U.S.C. § 1997e(a), the exhaustion requirement is mandatory and applies to Plaintiff's suit. See Nelson v. Campbell, 541 U.S. 637 (2004) (permitting defendants to bring challenges to portions of an execution protocol on the basis that they were challenges to prison conditions but in doing so, the court expressly stated that exhaustion of remedies pursuant to the Prison Litigation Reform Act of 1995 (PLRA) was applicable to such claims). The United States Supreme Court has noted that "proper exhaustion" is required so that the agency addresses the issues on the merits. See Woodford v. Ngo, 548 U.S. 81, 95 (2006) ("The benefits of exhaustion can be realized only if the prison grievance system is given a fair opportunity to consider the grievance. The prison grievance system will not have such an opportunity unless the grievant complies with the system's critical procedural rules.").

Plaintiff failed to exhaust his claims because he did not properly exhaust the Florida Department of Corrections' grievance procedure before filing the instant lawsuit. On or about May 8, 2019, Plaintiff filed an informal grievance with FDOC solely regarding the use of the etomidate protocol,[6] and after being informed by Defendant Warden Reddish that his grievance failed to state a basis on which relief may be granted,

[6] Plaintiff's informal grievance did not allege that he had identified a known and available alternative method of execution that entails a significantly less severe risk of pain, nor did Plaintiff make any grievance complaints regarding his public records or execution witness claims.

Long failed to file a formal grievance in accordance with Rule 33-103.006, Florida Administrative Code.

In McDaniel v. Crosby, 194 Fed. Appx. 610, 613 (11th Cir. 2006), the Eleventh Circuit stated, "[t]o the extent [Plaintiff] relies upon the grievances and appeals he submitted after filing his initial complaint, such grievances and appeals cannot be used to support his claim that he exhausted his administrative remedies because satisfaction of the exhaustion requirement was a precondition to the filing of his suit, and thus, must have occurred before the suit was filed." See also Luckey v. May, Case No. 5:14-cv-315-MW-GRJ, 2016 WL 1128426 at *7 (Fla. N.D. Dec. 17, 2016) ("Although Plaintiff filed an amended complaint . . ., the relevant date for exhaustion is the date of Plaintiff's initial complaint.") (unpublished). Only the grievances and appeals filed before a plaintiff initially files his complaint in federal court are sufficient to satisfy the exhaustion requirement. Luckey, 2016 WL 1128426 at *7 (citing McDaniel v. Crosby, 194 Fed. Appx. 610, 613 (11th Cir. 2006)); Smith v. Terry, 491 Fed. Appx. 81, 83 (11th Cir. 2012) (The only facts pertinent to determining whether a prisoner has satisfied the PLRA's exhaustion requirement are those that existed when he filed his original complaint) (unpublished); Gould v. Owens, 383 Fed. Appx. 863, 867-68 (11th Cir. 2010) (unpublished) ("Because Gould never made any attempt to pursue the remedies for this incident . . . the district court correctly concluded that amending his complaint to include these new allegations would have been futile [and]. . . denying Gould's motion for leave to amend was not an abuse of discretion.").

The exhaustion requirement is not subject to either waiver by a court or futility or inadequacy exceptions. Rather, "where Congress specifically mandates, exhaustion is required." Booth v. Churner, 532 U.S. 731 (2001). In the instant case, Plaintiff contends that he should not be required to exhaust administrative remedies because to do so would be futile. He further states that, nevertheless, he made "an effort to exhaust" by filing an informal grievance. However, as noted, the judicially recognized futility and inadequacy exceptions may not be applied to excuse the PLRA's mandatory exhaustion requirement. Alexander v. Hawk, 159 F.3d 1321, 1325-26 (11th Cir. 1998) (Since Congress now has mandated exhaustion in section 1997e(a), there is no longer discretion to waive the exhaustion requirement). In Alexander, the Eleventh Circuit noted the important policy reasons underlying an administrative remedies exhaustion requirement:

> (1) to avoid premature interruption of the administrative process; (2) to let the agency develop the necessary factual background upon which decisions should be based; (3) to permit the agency to exercise its discretion or apply its expertise; (4) to improve the efficiency of the administrative process; (5) to conserve scarce judicial resources, since the complaining party may be successful in vindicating rights in the administrative process and the courts may never have to intervene; (6) to give the agency a chance to discover and correct is own errors; and (7) to avoid the possibility that "frequent and deliberate flouting of the administrative processes could weaken the effectiveness of an agency by encouraging people to ignore its procedures."

Id. at 1327 (citing Kobleur v. Group Hospitalization & Med. Services, Inc., 954 F.2d 705 (11th Cir. 1992)).[7]

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[7] In fact, the department's rules recognize several of these important policy factors:

> (1) The purpose of the grievance procedure is to provide an inmate with a channel for the administrative settlement of a grievance. In addition to providing the inmate with the opportunity of having a grievance heard and

A review of Plaintiff's grievance reveals that he generally claims that the department's current lethal injection protocol using etomidate is unconstitutional and that it is not a meaningful improvement from the department's previous protocol. Plaintiff asserts that the department's protocol unnecessarily risks infliction of pain and suffering, especially in Long's situation given his traumatic brain injuries (TBI) and temporal lobe epilepsy. All of these assertions are conclusory in nature and lack any factual support that would provide notice to the department.

Unlike his grievance, however, Plaintiff's section 1983 complaint contains numerous contentions not mentioned in his grievance. For example, Plaintiff asserts that the current lethal injection protocol utilizing etomidate is substantially likely to cause severe pain because etomidate is a short-acting hypnotic that will not sufficiently render Long fully unconscious. Long claims that after the injection of etomidate and the "basic and rudimentary," "insufficient" consciousness check, the second paralytic drug, rocuronium bromide, will be administered and cause terrifying sensations of suffocation, air hunger, and feeling entombed without being able to move or convey suffering. Long further alleges that the third drug, potassium acetate, will stop the heart, but a conscious person will feel searing and agonizing pain from the drug. Additionally, Long claims that

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> considered, this procedure will assist the department by providing additional means for internal resolution of problems and improving lines of communication. This procedure will also provide a written record in the event of subsequent judicial or administrative review. The inmate grievance procedure was fully certified by the United States Department of Justice in March, 1992, pursuant to the requirements of Sections 944.09 and 944.331, F.S.

Fla. Admin. Code. R. 33-103.001(1).

a side effect of etomidate is myoclonus which is easily confused with consciousness and will therefore make the consciousness check even more difficult. In sum, Plaintiff makes numerous specific claims that he in no way presented to the department of corrections for their consideration.

The Florida Department of Corrections "has designated the Bureau of Inmate Grievance Appeals (BIGA) to receive, review, and respond to appeals filed with the Secretary." Lyons v. Trinity Services Group, Inc., 401 F. Supp. 2d 1290 (S.D. Fla. 2005) (citing Fla. Admin. Code R. 33-103.007(4)). Plaintiff cannot be considered to have exhausted his administrative remedies when he has not presented all of his issues to the Department of Corrections and given the department an opportunity to address them. Plaintiff has in a very general and conclusory fashion asserted in his grievance that the department's lethal injection protocol is unconstitutional. By so doing, the department has been deprived of providing a full response to the claims that are now raised in the section 1983 complaint and developing a record that would be beneficial to the Court. The Prison Litigation Reform Act (PLRA) provides that "[n]o action shall be brought with respect to conditions under [42 U.S.C. § 1983], or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). Failure to exhaust is fatal to the underlying claim, Johnson v. Meadows, 418 F.3d 1152, 1158-59 (11th Cir. 2005), and there is no discretion to waive the exhaustion requirement. See Bryant v. Rich, 530 F.3d 1368, 1373 (11th Cir. 2008).

Plaintiff's generalized and conclusory claims that the use of etomidate in the department's lethal injection protocol presents a substantial risk of harm and is unconstitutional do not suffice for purposes of exhaustion. Because Long's complaint is subject to dismissal on this ground, Long has failed to show that he has a substantial likelihood of success on the merits.

4. Statute of limitations

Because Long's section 1983 action was filed significantly beyond the applicable statute of limitations period, he would not be entitled to success on the merits of his claims.[8] In section 1983 actions, a federal court imports the statute of limitations of the state in which the action was filed. McNair v. Allen, 515 F.3d 1168, 1173 (11th Cir. 2008) (citing Wilson v. Garcia, 471 U.S. 261, 275-76 (1985)). Florida's four-year statute of limitations bars this section 1983 action. See § 768.28(14), Fla. Stat. (2018). The Florida Legislature enacted lethal injection as a method of execution on January 14, 2000. See Sims v. State, 754 So.2d 657, 664 n.11 (Fla. 2000) (citing Ch. 2000-2, Laws of Fla.).

Long then had 30 days under the new statute to select his preferred method, which was until Monday, February 14, 2000. Under Florida's four-year statute of limitations, § 768.28(14), Fla. Stat., Long was required to bring suit within four years of that date, i.e., by Friday, February 13, 2004. Yet, Long did not file this action until May 16, 2019. Thus, this section 1983 action is more than 15 years late.

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[8] As will be discussed infra, Long's claims regarding public records and execution witnesses are not properly raised in a section 1983 complaint and therefore the statute of limitation is inapplicable to those claims.

The Eleventh Circuit, in a series of cases, has enforced the statute of limitations in section 1983 actions challenging lethal injection protocols. In Henyard v. Secretary, Dep't of Corr., 543 F.3d 644 (11th Cir. 2008), the court found a section 1983 action challenging Florida's lethal injection protocols barred by Florida's four-year statute of limitations. Henyard was a death row inmate, who the day before he was scheduled to be executed filed a section 1983 action asserting that Florida's method of execution constituted cruel and unusual punishment.

Henyard sought a stay of execution which the district court denied. The district court also found the complaint barred by Florida's four-year statute of limitations. Henyard, 543 F.3d at 646. The court explained that Florida adopted lethal injection as a method of execution on January 14, 2000, and that Henyard was required to bring his section 1983 action within four years of the new method being adopted but he did not. The court concluded that the section 1983 complaint was barred by the applicable statute of limitations. See also Ledford v. Commissioner, Georgia Dep't of Corr., 856 F.3d 1312, 1315-16 (11th Cir. 2017) (holding a section 1983 action challenging Georgia's protocol was barred by the statute of limitations). Here, as in Henyard and Ledford, this section 1983 action is barred by the statute of limitations.

Furthermore, the Eleventh Circuit has repeatedly held that changes in the drugs used in a protocol do not restart the clock for purposes of the statute of limitations unless the changes are "substantial." Wellons v. Commissioner, Ga. Dep't of Corr., 754 F.3d 1260, 1263-64 (11th Cir. 2014) (holding a change to compounded pentobarbital was not a substantial change for purposes of the statute of limitations); Gissendaner v.

Commissioner, Ga. Dep't of Corr., 779 F.3d 1275, 1280-82 (11th Cir. 2015) (concluding that the section 1983 action challenging Georgia's protocol violated Georgia's two-year statute of limitations); Whitaker v. Collier, 862 F.3d 490, 494-96 (5th Cir. 2017) (explicitly following the Eleventh Circuit in Gissendaner and holding that Texas' change in its protocol to compounded pentobarbital was not a substantial change and therefore, did not restart the applicable statute of limitations in a section 1983 action); but see Arthur v. Thomas, 674 F.3d 1257 (11th Cir. 2012) (reversing a district court for concluding a section 1983 challenge to Alabama's protocol was barred by the statute of limitations explaining that changes in drugs are a fact intensive inquiry). Florida's change to the FDA-approved drug of etomidate in 2017 is not a "substantial" change from midazolam and therefore does not restart the statute of limitations. Because Long's section 1983 action is barred by the statute of limitations, he cannot demonstrate a substantial likelihood of success on the merits of his claim.

5. No Substantial likelihood of success

To state an Eighth Amendment method-of-execution claim, a plaintiff must plead facts sufficient to establish: 1) the state's lethal injection protocol creates a demonstrated risk of severe pain, and 2) there is a "known and available" alternative method of execution that is "feasible, readily implemented, and in fact significantly reduces a substantial risk of severe pain." Boyd v. Warden, 856 F.3d 853, 866 (11th Cir. 2017) (citing Glossip v. Gross, 135 S. Ct. 2726, 2737 (2015)).

In Glossip v. Gross, 135 S. Ct. 2726 (2015), the United States Supreme Court rejected an Eighth Amendment challenge to Oklahoma's use of midazolam in its three-

drug protocol. The inmates claimed that midazolam fails to render a person insensate to pain. The Court held, in a section 1983 action, that the inmates failed to establish that the risk of harm was substantial. The Glossip Court observed that because it was settled that capital punishment is constitutional, "it necessarily follows that there must be a constitutional means of carrying it out." Id. at 2732-33. The Court noted that if they held the Eighth Amendment demanded the elimination of essentially all risk of pain, such a holding "would effectively outlaw the death penalty altogether." Id. at 2733.

Notably, Long never claims that etomidate will cause him any pain. Instead, he argues that etomidate will not effectively render him unconscious, and thus, he will feel pain from the administration of the second and third drugs in the protocol. At his evidentiary hearing in state court, the court found the state's expert, Dr. Yun, credible. Dr. Yun, a very experienced, practicing anesthesiologist, opined that 200 milligrams of etomidate would "predictably produce a very reliable deep state of unconsciousness." See Defendants' Appendix A at 26. He explained that the large 200 milligram dose would also eliminate the possibility of Long responding or feeling any noxious stimuli.

The use of etomidate was also thoroughly litigated in Asay v. State (Asay VI), 224 So. 3d 695, 705 (Fla. 2017). Specifically, four expert witnesses testified in detail during an evidentiary hearing about the known effects of etomidate, how it was used in the protocol, and how it has been used in medical practice. Asay VI, 224 So. 3d at 701. In affirming the circuit court's denial of the claim, the Florida Supreme Court clearly found that the use of etomidate as the primary drug in the execution protocol was constitutional. Id. at 701-02.

Etomidate has also been administered as part of a Fourth Amendment search. United States v. Husband, 312 F.3d 247 (7th Cir. 2000) (holding that the use of etomidate as a sedative to remove plastic baggies containing crack cocaine from a defendant's mouth was reasonable). The Seventh Circuit concluded in Husband that the risks of etomidate were "relatively low" following an extensive evidentiary hearing on the drug's effects. Id. at 254. The goal in any search is for the person to live without any permanent damage but that is not the goal in an execution. If a drug satisfies the Fourth Amendment's reasonableness standard, that drug necessarily satisfies the Eighth Amendment's standard.

Plaintiff generally asserts that etomidate is ultra-short acting and that it may wear off prior to the conclusion of the execution. While at first glance such a claim might appear to be at least plausible, litigation in state court shows that he has little, if any, chance of success in his effort to establish an Eight Amendment violation on this basis. Both experts presented by the State during Long's evidentiary hearing testified that the length of unconsciousness is dose related. (Defendants' Appendix A at 031). At the massive dose called for by Florida's protocol there is no risk of a defendant regaining consciousness during the relatively short time frames of an execution. (Defendants' Appendix A at 215). Florida employs a massive overdose of etomidate, seven to ten times [depending on the inmate's weight] the normal anesthetic dose. While Plaintiff's experts suggest that the length of unconsciousness is not dose related, a claim contradicted by Doctors Yun and Buffington, the FDA approved package insert provides:

> Intravenous injection of etomidate produces hypnosis characterized by a rapid onset of action, usually within one minute. **Duration of hypnosis is dose dependent** but relatively brief, usually three to five minutes when an average dose of 0.3mg/kg is employed.

Asay, 224 So. 3d 701 (emphasis added). There is little chance relitigating the same issue again in federal court will result in a more favorable outcome for Petitioner.

Long's claim that etomidate will not render him unconscious has already been disproven, and his allegations do not meet the standard required under Glossip for raising a valid method-of-execution claim. In addition, the five successful executions in Florida using the etomidate protocol further invalidate his claim. See Long v. State, Case No. SC19-726 (Fla. May 17, 2019) (noting that "[a]lthough Long argues that events during recent executions discredit the testimony on which the postconivciton court relied because 'it is clear that inmates were not sufficiently anesthetized,' these are the type of 'speculative and conclusory allegations' that we have held are insufficient to warrant an evidentiary hearing, let alone relief"). It is well-established that Florida has adopted important safeguards to ensure that no lethal chemicals are injected until the defendant is unconscious, as confirmed by the state's tiered-consciousness check, which includes noxious stimuli. See Lightbourne v. McCollum, 969 So. 2d 326, 349 (Fla. 2007) (noting that the Warden consults with medically-qualified team members in making his determination of consciousness); Howell v. State, 133 So. 3d 511, 522 (Fla. 2014) (noting that Florida's consciousness checks which include a painful pinch of the trapezius "will ensure that Howell is unable to perceive any noxious stimuli"). The possibility of an inmate passing such a test and remaining conscious during injection of the second and

third drugs is so very remote, it cannot possibly meet the standard required by the Court in Glossip, as well as Baze v. Rees, 553 U.S. 35(2008) and Bucklew. See Schwab v. State, 995 So. 2d 922, 930 (Fla. 2008) (detailing the steps of the consciousness check, which included a shake and shout and eyeball tap); Valle v. Singer, 655 F.3d 1223, 1233 (11th Cir. 2011) (noting that under Florida's protocol, a consciousness check is required and "the execution cannot proceed until the individual is rendered unconscious").

In addition, Long cannot satisfy the second requirement of Glossip, which requires he "identify an alternative that is feasible, readily implemented, and in fact significantly reduces a substantial risk of severe pain." Glossip, 135 S. Ct. at 2737. Long proposes a single-drug pentobarbital protocol as his alternative method, but he does not, and cannot, show how it is feasible, readily implemented, and a better method. While Long alleges that pentobarbital is available for purchase in Florida, he seems to disregard the evidence presented during his state court evidentiary hearing that the Florida Department of Corrections is unable to purchase pentobarbital for use in executions. So while Long's witness Silas Raymond may be able to purchase pentobarbital, the Department of Corrections is unable to purchase pentobarbital from Mr. Raymond or anywhere else.[9]

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[9] Long's motion argues that this is unpersuasive because "Florida freely admits that it obtained and used drugs in the past for use in lethal injection in spite of the manufacturer's objection." Motion at 9. But Long is incorrect. The witness only testified that a drug was used one time despite the manufacturer's objection. The witness never testified that the drug was purchased despite the manufacturer's objection. To the contrary, the witness testified that the manufacturer would prohibit the Department of Corrections from purchasing drugs for use in executions, and once that occurred, the Department was unable to purchase the drug. Long also cites a news article to claim that

Additionally, Long claims that pentobarbital can be compounded in Florida, but as established during his evidentiary hearing, a doctor's prescription is required for a compounding pharmacy to compound pentobarbital. The Florida Department of Corrections' witness did not know any instances in which doctors prescribed drugs to be used by lethal injection for an execution. He further testified that the FDOC did not need a doctor's prescription to purchase etomidate from a wholesaler, and he did not know of any reason why the FDOC would want to switch from the current protocol.

Long's allegation that other states routinely carry out executions using pentobarbital does not satisfy his burden of showing that pentobarbital is feasible and readily implemented in Florida. See In re Ohio Execution Protocol, 860 F.3d 881, 891 (6th Cir. 2017), cert. denied Otte v. Morgan, 137 S. Ct. 2238 (2017) (In finding pentobarbital unavailable, the court stated: "Ohio need not already have the drugs on hand. But for [the Glossip/Baze] standard to have practical meaning, the State should be able to obtain the drugs with ordinary transactional effort. Plainly it cannot"); see also Correll v. State, 184 So. 3d 478, 490 (Fla. 2015) (rejecting defendant's claims that Florida can obtain pentobarbital from other states or that it could license a compounding pharmacy to make it); Asay VI, 224 So. 3d at 701 (noting that Asay's alternatives have previously been rejected as speculative).

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the manufacturer of etomidate objects to its use in lethal injections. While the manufacturer may not condone use of its medicine in lethal injections, it has not restricted the Department of Corrections from purchasing it. This conclusory burden-shifting argument does not satisfy Long's requirement of establishing that pentobarbital is feasible and readily available in Florida.

Long also fails to establish that pentobarbital results in a "clear and considerable" difference in reducing pain compared to the use of etomidate within a three-drug protocol. Bucklew, 139 S. Ct. at 1130. On this point, Long merely claims that pentobarbital will rapidly reduce unconsciousness and produce a quick and painless death. In order for Long to establish that requirement, however, it would have to be established that etomidate would not render him unconscious, and the evidence has contradicted that point. Thus, his claim boils down to more speculative assertions that etomidate, which has been proven effective, will not work. This does not satisfy his burden. See, e.g., Bucklew v. Precythe, 139 S. Ct. 1112, 1130 (2019) (rejecting Bucklew's examples for why nitrogen gas would significantly reduce his pain as opposed to pentobarbital when he speculated that with pentobarbital there may be problems with the IV process; forcing him to lie on his back may impair his breathing; and the stress may cause his tumors to bleed).

Long fails both prongs of Glossip. He has established neither a substantial risk of severe pain nor a "feasible, readily implemented, and significantly safer" alternative. The section 1983 action fails to state a cause of action under Glossip and the Eighth Amendment. Accordingly, Long cannot show a substantial likelihood of success on the merits on Claim I of his complaint, and his motion for stay should be denied.

Long's complaint also alleges that his specific medical conditions render the use of etomidate unconstitutional as applied to him, but Long was already provided an opportunity to establish this claim in state court, and he failed to do so. The state circuit court specifically found the state's witness more credible than Long's witness that the

massive dose of 200 milligrams of etomidate would produce such a deep state of burst suppression and unconsciousness that it would eliminate any possible seizure activity. Long v. State, SC19-726 (Fla. May 17, 2019).

Even if Long had established that etomidate presented a substantial risk of seizure, Long has not alleged that the possibility of having a seizure could show that he was *very likely* to endure needless suffering. Long never asserted that a seizure would cause him significant pain; or any real pain for that matter; his complaint only raises the possibility that if he had a seizure, he may bite his tongue or strain from thrashing against his restraints. This is far too speculative to amount to a valid Eighth Amendment challenge. Glossip, 135 S. Ct. at 2740 n.3 ("[T]he mere fact that a method of execution might result in some unintended side effects does not amount to an Eighth Amendment violation."). Likewise, Long's contention that a seizure may cause him pain by dislodging the IV lines is also too speculative to meet the Glossip standard. The mere fact that there is a chance that Long may bite his tongue or interrupt the IV lines certainly does not amount to a valid Eighth Amendment challenge. Id.

While Long cites to the execution of Angel Diaz to argue what could go wrong during his execution, Florida conducted an intensive review of its procedures and made substantial revisions of its protocol following Diaz's execution. Lightbourne v. McCollum, 969 So. 2d 326, 343 (Fla. 2007). The Florida Department of Corrections also currently has protocols in place requiring that the execution team and executioners be trained in possible contingencies that may occur, such as etomidate not rendering the inmate unconscious, or the inmate experiencing an unanticipated medical emergency.

Also, as testified to by the state's experts during the evidentiary hearing in this case, Florida's protocol requires that the inmate to be fully restrained in each extremity and torso and the IV lines be placed with taped, and having an inmate restrained and secured during the administration of etomidate and any other chemicals would significantly reduce the risk that the IV line could become dislodged. Long has altogether failed to state a claim for relief that the use of etomidate in Florida's lethal injection protocol presents a substantial and imminent risk that is sure or very likely to cause him serious illness and needless suffering. Bible v. Davis, 739 Fed. Appx. 766, 772 (5th Cir. 2018) (unpublished) ("Here the state has not botched any execution since it instituted its protocol. But even if a mishap were to occur in Bible's execution, that post-facto incident alone could not constitute evidence that he was sure or very likely to suffer needlessly ex ante."); Whitaker v. Collier, 862 F. 3d 490, 500–01 (5th Cir. 2017), cert. denied, 138 S. Ct. 1172 (2018) (explaining that pointing to "botched executions" is just the kind of "isolated mishap" that is not cognizable in a method-of-execution claim).

Long has also failed to show a substantial likelihood of success on the merits with regard to the second claim of his complaint. In this claim, he alleges that Florida's use of a three-drug protocol violates evolving standards of decency because many states now use, or intend to use, a one-drug protocol. Just because other states have altered, or allegedly intend to alter, their methods of lethal injection, does not mean that Florida's current protocol violates the Eighth Amendment. This claim is without merit as a matter of established law. Baze, 553 U.S. at 58 (The Court held that Kentucky's protocol was not rendered cruel and unusual by the State's refusal to modify its protocol to use only a

barbiturate (to ensure painless death) or to omit the paralytic pancuronium bromide (to ensure that pain responses were not merely masked)). As the Supreme Court has explained, one of the reasons for including a paralytic agent in a lethal injection protocol is to prevent the confusion of movement during the execution with consciousness. Baze, 553 U.S. at 57. The Eleventh Circuit Court of Appeals has squarely rejected the notion that Florida is required to adopt a one-drug protocol. See Pardo v. Palmer, 500 Fed. Appx. 901, 904 (11th Cir. 2012) (unpublished) and Ferguson v. Warden, Fla. State Prison, 493 Fed. Appx. 22, 25 (11th Cir. 2012) (rejecting inmates' claims that Florida's failure to adopt a one-drug protocol violated the Eighth Amendment and observing that courts are not boards of inquiry which determine the best execution methods or procedures) Accordingly, Long's motion should be denied, as he has not shown a substantial likelihood of success on the merits.

Long makes vague allegations in his third claim regarding alleged violations of his constitutional rights as it relates to access of information regarding Florida's lethal injection protocol. The basis of these claims is the state circuit court's sustaining of the FDOC's objection to Long's public records requests filed pursuant to Florida Rule of Criminal Procedure 3.852 and to the trial court's sustaining objections during the evidentiary hearing to certain questions of the FDOC employee Stephen Whitfield posed by Long's counsel. These claims, however, do not give rise to valid causes of action under section 1983.

Section 1983 provides a vehicle for an inmate to challenge the "circumstances of his confinement." Hill v. McDonough, 547 U.S. 573, 579 (2006). Long's complaint that

the state trial court prevented him from obtaining records from the FDOC regarding the lethal injection protocol and sustained objections to questions to a FDOC employee at an evidentiary hearing do not give rise a section 1983 cause of action and certainly do not constitute a violation of his First, Fifth, Eighth and Fourteenth Amendment rights.

There is no First Amendment right of access to governmental information. As the United States Supreme Court has observed, the Constitution is not "a Freedom of Information Act." Houchins v. KQED, Inc., 438 U.S. 1, 14 (1978); see also In Center for Nat'l Security Studies v. U.S. Dep't of Justice, 331 F.3d 918, 934 (D.C. Cir. 2003) (holding the "narrow" First Amendment right of access to information recognized in Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980), does not extend to non-judicial documents that are not part of a criminal trial). The Sixth Circuit has rejected a First Amendment right to "government information" regarding Ohio executions. Phillips v. DeWine, 841 F.3d 405, 419 (6th Cir. 2016), cert. denied, Tibbetts v. DeWine, 138 S. Ct. 301 (2017). Ohio death row inmates brought a constitutional challenge to an Ohio statute that provided for the confidentiality of information related to lethal injection. The Sixth Circuit explained that the right of access to government proceedings "is not a tool for judges to pry open the doors of state and federal agencies because they believe that public access to this type of information would be a good idea." Phillips, 841 F.3d at 419. There is no First Amendment right to any internal Department of Corrections documents.

In Wellons v. Commissioner, Ga. Dep't of Corr., 754 F.3d 1260, 1266-67 (11th Cir. 2014), the Eleventh Circuit rejected a First Amendment and due process challenge to obtaining details of Georgia's lethal injection protocol. Wellons argued that Georgia's

adoption of the Lethal Injection Secrecy Act and the refusal to provide him with information regarding his execution denied him due process and his First Amendment right of access. The Eleventh Circuit rejected that argument explaining that "neither the Fifth, Fourteenth, or First Amendments afford Wellons the broad right to know where, how, and by whom the lethal injection drugs will be manufactured" or "the qualifications of the person or persons who will manufacture the drugs, and who will place the catheters." Id. at 1267; see also Whitaker v. Collier, 862 F.3d 490, 500-01 (5th Cir. 2017) (stating that failure to disclose information relating to lethal injection protocol did not violate defendant's First, Eighth, and Fourteenth Amendment rights); Valle v. Singer, 655 F.3d 1223, 1237 n.13 (11th Cir. 2011) (rejecting a due process claim for refusing to reveal information about the training of the execution team and the source or vendor history of the lethal injection drugs because "the failure to disclose is not unconstitutional"). The Eleventh Circuit has also concluded that an inmate has no Eighth Amendment right to know the details of the protocol. Powell v. Thomas, 641 F.3d 1255, 1258 (11th Cir. 2011) (rejecting a secrecy and lack of oversight challenge to Alabama's change in its lethal injection protocol).

As the United States Supreme Court explained, the state's adoption of new drugs in a lethal injection protocol, such as etomidate, arose in the first place because anti-death-penalty advocates had pressured pharmaceutical companies to refuse to supply the drugs that were originally used. Glossip, 135 S. Ct. at 2733. The Glossip Court detailed the activity of the anti-death-penalty advocates who first pressured the manufacturer of sodium thiopental to stop providing that drug for use in executions, despite being

approved by courts, which caused the states to switch to pentobarbital. The advocates then pressured the manufacturer of pentobarbital to stop providing that drug for use in executions, despite it also being approved by courts, which then caused the states to switch to midazolam, which was also approved by courts. Indeed, one American manufacturer of a previous drug used in the protocol was persuaded to cease production of the drug altogether. The capital defense bar attempting to out the manufacturer and source of etomidate in this case is simply more of the same. This Court should not encourage such tactics by creating a right to information about the manufacturer or source of the drugs. Courts should recognize that creating a right to know information regarding the manufacturer or source of the drugs will simply cause endless changes in protocols by forcing the State to adopt yet another new drug when the old drug becomes unavailable due to political pressure and result in endless litigation about those changes that were forced on the States.

Moreover, Florida is relatively transparent regarding its lethal injection protocols. Unlike many states, once adopted, Florida widely and publicly disseminates its protocols. Baze v. Rees, 553 U.S. 35, 120, n.5 (2008) (Ginsburg, J., dissenting) (observing that "most death-penalty States keep their protocols secret."). Florida's current lethal injection protocol is publicly and widely available including on the Internet at the FDOC's website. But transparency, while a laudable political goal, is not a constitutional right. There is no constitutional right to know the details of the lethal injection protocol. Because Long's section 1983 action fails to state a claim regarding his constitutional rights, he is unable to establish substantial likelihood of success on the merits.

Long's contention that he is likely to succeed on the merits of Claim IV of his Complaint is entirely incorrect. This claim involves Warden Barry Reddish's denial of Long's requests that his lawyers have access to a phone during the execution, that Long be allowed to substitute the spiritual advisor with a second "attorney witness," and that he be allowed to have a witness who is able to observe the intravenous line insertion process.

Long claims that depriving his attorney access to a telephone during the execution process amounts to a deprivation of Long's right to access the courts. In order to have a valid right-to-access claim, Long is required to prove actual injury. Grayson v. Warden, 672 Fed. Appx. 956, 966–67 (11th Cir. 2016). Long's argument is premised on his theory that if something goes wrong during the execution, his attorney should be able to notify the courts by having a phone within the execution room. The Eleventh Circuit has unequivocally found that this does not amount to actual injury. Id. (explaining that a request for access to a landline based on the possibility that something might go wrong does not qualify as "actual injury."); Arthur v. Commissioner, Ala. Dep't of Corr., 680 Fed. Appx. 894, 909 (11th Cir.), cert. denied sub nom., Arthur v. Dunn, 137 S. Ct. 1521 (2017). ("A witness's lack of a cell phone in the viewing room, and concomitant lack of ability to communicate with the court from that room, does not independently qualify as an 'actual injury' sufficient to state a claim under Bounds[v. Smith, 430 U.S. 817 (1977)] and Lewis v. Casey, 518 U.S. 343, 351 (1996)] because, absent an underlying violation of a fundamental right, no 'injury in fact'—and thus no standing—has been shown.").

Long's claim is far too speculative to constitute a valid right-to-access-the-courts claim. See, e.g., Arthur, 680 Fed. Appx. at 909 ("Arthur has not offered anything more than the speculative, conjectural possibility that something might go wrong during his execution which would subject him to cruel and unusual punishment in violation of the Eighth Amendment and that therefore [his attorney] must have a cell phone in the viewing room to call a court to present an Eighth Amendment claim."). Therefore, he has failed to show a substantial likelihood of success on the merits.

While Long points to a Tennessee case in which a temporary injunction was granted in part to preclude the defendant's execution from occurring unless his attorney was provided access to a telephone during the execution, that case is readily distinguishable from Long's case. In Zagorski v. Haslam, 3:18-CV-01205, 2018 WL 5454148, at *4 (M.D. Tenn. Oct. 29, 2018), aff'd, 741 Fed. Appx. 320 (6th Cir. 2018), cert. denied, 139 S. Ct. 20 (2018), the court questioned whether the claim was actually procedurally barred based on the Tennessee Supreme Court's specific ruling on the issue, and the court found there were serious questions about whether there was a legitimate penological reason to prohibit the plaintiff's attorney from having access to a cell phone when the commissioner of the Tennessee Department of Correction testified that he had no opposition to providing an attorney access to a telephone during an execution. Here, the Florida Department of Corrections does not permit attorney access to cell phones, and it has consistently opposed such requests made by inmates.

Long claims there is no legitimate penological reason why his attorney cannot have access to a cell phone; however, the Eleventh Circuit is "dubious" of such a

"suggestion that there is no 'legitimate penological justification' for forbidding witness [...] from having access to a phone in the [execution] viewing room itself." Arthur, 680 Fed. Appx. at 912. The court noted that a cell phone ban would help protect the privacy of prison officials involved and preserve the solemnity of the execution process. Id. Moreover, the Eleventh Circuit has specifically cautioned that allowing access to phones during executions could "lead to more potential harm to both the inmate's and the State's interests than good." Arthur, 680 Fed. Appx. at 912. Based on firm precedent from the Eleventh Circuit, Long's right-to-access claim has no likelihood of success on the merits.

By the same token, Long's claim that he is entitled to have a second attorney witness present during his execution in place of a spiritual advisor does not amount to a valid claim for relief. Florida law provides the warden with discretion to choose the execution witnesses. § 922.11(2) Fla. Stat. (2018). The statute provides that "[c]ounsel for the convicted person and ministers of religion requested by the convicted person may be present." § 922.11(2) Fla. Stat. (2018). The Department of Corrections allows one attorney to be present and one minister of religion to be present, if requested by the inmate. There is no provision that allows the inmate to swap a minister of religion for a different witness of the inmate's choosing. If the minister of religion is not present, any other witness would fall within the discretion of the warden's choosing. Long has no constitutional right to have a second attorney present.

Long, a serial killer and serial rapist, has victimized numerous people who have an interest in attending the execution in addition to the family of the victim he murdered in this case. Any judicial interference with the warden's discretion to choose execution

witnesses would be improper.[10] Long's claim that he is entitled to have a second attorney replace the designated spot of a minister of religion for his execution does not contain any sufficient factual matter that, if accepted as true, would state a § 1983 claim to relief that is plausible on its face.

Also, this Court should know that prior to filing the instant pleading, the Defendants were just made aware of the fact that Long has requested that a spiritual advisor be present during his execution, and the Department of Corrections has approved his request. See Defendants' Appendix B. To the extent that Long's argument under this section relies on his theory that he will not be having a minister of religion present, this argument is now moot.

Lastly, the Florida Department of Corrections' procedure of prohibiting execution witnesses from observing the insertion of the intravenous line is not a reason for this Court to grant Long's motion for stay of execution. Courts do not manage state execution practices and prison policies. See generally Baze v. Rees, 553 U.S. 35, 51 (2008) (cautioning courts not to become "boards of inquiry charged with determining 'best practices' for executions"). Instead, courts are limited to determining whether the state procedures violate constitutional rights, and Long has not established that these practices violate any of his constitutional rights. There is no authority that would permit this Court

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[10] See Houchins v. KQED, Inc., 438 U.S. 1, 12-13 (1978) (plurality) (explaining that the extent to which penal institutions should be open "is clearly a legislative task which the Constitution has left to the political processes" and noting that the judiciary cannot force prisons to allow access to facilities. Doing so improperly "involve[s] [the Court] in what is clearly a legislative task which the Constitution has left to the political processes.").

to intrude into a state-administered judicial execution in the manner proposed by Long in this claim. Accordingly, Long's motion for stay should be denied.

IRREPARABLE HARM AND BALANCE OF HARMS

As the Eleventh Circuit has recognized, the State has an important interest in the timely enforcement of its judgments and the victims also have an important interest in the timely enforcement of a sentence. Crowe v. Donald, 528 F.3d 1290, 1292 (11th Cir. 2008). Here, the murder was committed almost 35 years ago. Plaintiff has already delayed the enforcement of that final judgment and sentences for more than 30 years. As such, while Plaintiff may be executed, the execution will be constitutional and the harm to the State and the victim's family members from further delay far greater. See Price v. Dunn, 587 U.S. ___, 2019 WL 2078104 at *5-6 (May 13, 2019) (Thomas, J., concurring in the denial of certiorari) (noting the injustice to the victim's family, in the form of justice delayed, by allowing a stay of execution based on a section 1983 action filed shortly before an execution).

Here, Plaintiff waited until one week before his scheduled execution to file his section 1983 complaint and motion for stay even though his claims have been available to him for years. The Eleventh Circuit denied Long a certificate of appealability following the denial of federal habeas relief on January 4, 2017. Long v. Secretary, Fla. Dep't of Corr., Case No. 16-16259-P (Jan. 4, 2017). Long's case then became ripe for a death warrant following the expiration of time for filing a petition for writ of certiorari to the United States Supreme Court. Given both Long's dilatory actions and the State's and the victim's family's strong interests in finality, the balance of harms favors the State's

interests. See Hill v. McDonough, 547 U.S. 573, 584 (2006) (applying "a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay."); Bucklew v. Precythe, 139 S. Ct. 1112, 1133-34 (2019) (stating that last minute stays should be the "extreme exception, not the norm," and federal courts can, and should, invoke their equitable powers to dismiss suits that are pursued in a dilatory fashion or based on speculative theories).

PUBLIC INTEREST

Finally, while Plaintiff suggests that it is in the public interest that he receive a stay, this is again not true. Long has been dilatory in bringing this action, and as discussed above, there is no substantial likelihood of success on the merits of his claims. Granting Long a stay will merely result in more inmates pursuing this dilatory litigation strategy in cases with scheduled executions. See Price v. Dunn, 587 U.S. ___, 2019 WL 2078104 (May 13, 2019) (Thomas, J., concurring in the denial of certiorari); Murphy v. Collier, 587 U.S. ___, (Alito, J., dissenting from grant of application for stay). The filing of dilatory lawsuits is not in the public interest and allowing such lawsuits to proceed merely encourages them. Thus, allowing Long's suit to proceed will harm the public interest. Given these circumstances, the balance of the factors establish that Long is not entitled to a stay.

CONCLUSION

WHEREFORE, Defendants respectfully requests that this Honorable Court enter an Order DENYING the Emergency Motion for Temporary Restraining Order, Preliminary Injunction and/or Stay Of Execution filed herein.

Respectfully submitted,

ASHLEY MOODY
ATTORNEY GENERAL

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of May, 2019, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following: Robert A. Norgard, Esq., Post Office Box 811, Bartow, Florida 33831-0811, **norgardlaw@verizon.net.**, Gregory W. Brown, Assistant Federal Defender and Tennie Martin, Assistant Federal Defender, Office of the Federal Public Defender, Capital Habeas Unit, 400 North Tampa Street, Suite 2700, Tampa, Florida 33602–4726, **Greg_Brown@fd.org and Tennie_Martin@fd.org**. I Further certify that a copy has been sent electronically to the Florida Supreme Court at **warrant@flcourts.org**.

/s/ Stephen D. Ake
Counsel for Defendants

APPENDIX F

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

BOBBY JOE LONG,
Plaintiff,

vs.

Case No.

DEATH WARRANT ISSUED
Execution Date: May 23, 2019

MARK S. INCH, in his capacity as the Secretary, Florida Department of Corrections,

BARRY REDDISH, in his capacity as the Warden of Florida State Prison

JOHN DOES, as designee of Barry Reddish, and/or Mark S. Inch,
Defendants.
_____/

PLAINTIFF'S REPLY IN SUPPORT OF EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER, PRELIMINARY INJUNCTION AND/OR STAY OF EXECUTION

COMES NOW the Plaintiff, BOBBY JOE LONG, by and through his undersigned counsel, and hereby submits this reply in support of Plaintiff's emergency motion for a temporary restraining order (TRO), preliminary injunction, and/or stay of execution. Defendants and/or their agents plan to execute BOBBY JOE LONG on May 23, 2019, at 6:00 p.m. using a lethal injection protocol that is substantially likely to cause him severe pain and result in a torturous death, in contrast to a protocol using pentobarbital, a feasible and readily implemented alternative drug. Plaintiff relies on the arguments made in his initial motion and additionally provides the following:

1. **Equitable Principles Support Mr. Long's § 1983 Suit and the Avoidance of a Constitutionally Intolerable Torturous Execution.**

Importantly, Mr. Long does not seek to delay his execution—rather, he seeks an execution in which he will not be tortured and functionally buried and burned alive. In his complaint and motion

for TRO, Mr. Long has explained the ease with which the Florida Department of Corrections (FDOC) can obtain pentobarbital, an alternative drug with a well-established history of causing swift death with minimal pain. *See also infra* Section 6B. However, because the FDOC refuses to investigate sources of compounded pentobarbital without legitimate reason, Mr. Long is forced now to seek an execution stay so that he can prove the allegations in his complaint.

To understand why Mr. Long has not been dilatory in suing, it is crucial to examine the framework of Florida's execution procedures. In Florida, more than 100 inmates are eligible for a death warrant. Although clemency proceedings typically precede the issuance of a warrant, the initiation of clemency proceedings does not signal the imminence of a warrant; many inmates have clemency years before their actual warrant is signed. There is no accurate way to predict which inmate will be next to get a death warrant, even when that inmate has had clemency proceedings.[1]

Other states, like Ohio, Texas, and Tennessee, have an execution schedule months to years in advance.[2] However, Mr. Long received mere 30-day notice of his execution. Although Mr. Long's counsel had been investigating and preparing for litigation within the four-year limitations period, *see infra* Section 5, Mr. Long was forced to collect evidence, draft, and file this litigation within thirty days, while simultaneously meeting an extremely expedited state court schedule.[3] *See infra* Section 3. Mr. Long proceeded as expeditiously as possible given these circumstances.

2. The *Rooker-Feldman* Doctrine Does Not Apply To This § 1983 Suit Because Plaintiff Is Not Challenging a State Court Judgment But Rather the Defendants' Unconstitutional Actions/Inaction

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[1] Notably, a different administration's clemency board heard Mr. Long's clemency proceedings.
[2] For example, Ohio has scheduled executions through 2024, Tennessee through December 2019, and Texas through October 2019. *See Upcoming Executions*, Death Penalty Information Center, *available at* https://deathpenaltyinfo.org/upcoming-executions (last accessed May 18, 2019).
[3] Undersigned counsel Robert Norgard is also Mr. Long's state counsel.

The Defendants fundamentally misunderstand the *Rooker-Feldman* doctrine. "The *Rooker-Feldman* doctrine . . . is confined to cases of the kind from which the doctrine acquired its name: cases brought by state-court losers complaining of **injuries caused by state-court judgments** rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005). (Emphasis added). "If the injury complained of is 'simply ratified, acquiesced in, or left unpunished' by the state court, the injury claimed in federal court is not directly caused by the state court judgment, and *Rooker-Feldman* does not bar the federal suit." *KIPP Acad. Charter Sch. v. United Fed'n of Teachers, AFT NYSUT, AFL-CIO*, 723 F. App'x 26, 29 (2d Cir. 2018). The doctrine only bars suit if the state court judgment **causes** plaintiff's injury.

The cases cited by the Defendants do not dispute this principle, but rather reinforce it. In *Alvarez v. Attorney Gen. for Fla.*, the Eleventh Circuit, citing *Brown v. R.J. Reynolds Tobacco Co.*, emphasized that it must be the state judgment itself that caused the moving parties' injury in order for *Rooker-Feldman* to apply.

> The [*Rooker-Feldman*] doctrine bars the losing party in state court "from seeking what in substance would be appellate review of the state judgment in a United States district court, based on the losing party's claim that *the state judgment itself violates the loser's federal rights.*"

679 F.3d 1257, 1264 (11th Cir. 2012) (emphasis in original) (quoting *Brown v. R.J. Reynolds Tobacco Co.*, 611 F.3d 1324, 1330 (11th Cir. 2010) and *Johnson v. De Grandy,* 512 U.S. 997 (1994)). In *Alvarez*, the plaintiff's "as-applied procedural due process claim plainly and broadly attack[ed] the state court's *application* of Florida's DNA access procedures to the facts of his case; notably, it d[id] not challenge the constitutionality of those underlying procedures." *Id.* at 1263 (emphasis in original). In *Brown*, on the other hand, the Eleventh Circuit found the *Rooker-Feldman* doctrine inapplicable. Thus the only relevant proposition to be gleaned from *Brown* is

the Eleventh Circuit's recognition that "[T]he Supreme Court's recent *Rooker -Feldman* decisions have noted the 'narrowness' of the rule . . . ." *Id.* at 1330.

The injuries alleged in Plaintiff's complaint were not caused by the judgments of either the state trial court or the Florida Supreme Court, but instead derive from Defendants' planned actions and inactions. The state courts in this case "simply ratified, acquiesced in, or left unpunished" the constitutional violations produced by these Defendants, they did not cause them. *See KIPP Acad. Charter Sch.*, 723 F. App'x at 29. Unlike *Alvarez*, where the movant challenged the state court's *application* of the state's DNA statute, and did not challenge the underlying procedure's constitutionality, Mr. Long clearly challenges the constitutionality of the Etomidate Protocol, not the state courts' application of it. Thus, the *Rooker-Feldman* doctrine is wholly inapplicable.

3. Res Judicata Does Not Bar Plaintiff's § 1983 Because He Did Not Receive a Full and Fair Opportunity to Litigate His Claims in State Court Proceedings, and Strict Adherence to the Doctrine Would Work an Injustice

The Defendants next argue that Mr. Long's claims are barred by the doctrine of res judicata. Defendants claim that *Muhammad v. Sec'y, Fla. Dep't of Corr.*, is indistinguishable from this case and is controlling precedent. 739 F. 3d 683 (11th Cir. 2014). However, the particular circumstances in Mr. Long's case overcome the defense of res judicata because Mr. Long was denied a full and fair constitutional hearing on the merits of his general lethal injection claim and his as-applied lethal injection claim.

Res judicata is not an absolute doctrine, and Florida courts have held the doctrine should not be adhered to where its application would work an injustice. *See deCancino v. Eastern Airlines, Inc.*, 283 So. 2d 97, 98 (Fla.1973). The Eleventh Circuit also recognized this exception to res judicata in *Shell v. Schwartz,* 357 Fed. Appx. 250, 252 (11th Cir 2009). The *Shell* Court declined to apply the exception because it found that "Shell was, in fact, given *a full and fair opportunity*

to litigate his claims in the state court proceedings and he did so." *Id.* (emphasis added). Unlike *Shell*, Mr. Long was not given a full and fair opportunity to litigate his claims in the state court.

In reviewing res judicata, it should be noted that the opposing party to Mr. Long in state court was the "State of Florida," which is the state prosecuting agency. The Defendants served in this matter are strictly the Warden of Florida State Prison, Barry Reddish, and Mark S. Inch, the Secretary of FDOC. Defendants are not prosecuting bodies. Defendants are being sued, as laid out in the Complaint, for violating Mr. Long's constitutional rights with their lethal injection execution protocol they will administer on May 23, 2019. Therefore, the opposing parties are not the same.

Muhammad is distinguishable from Mr. Long's case because Muhammad received a *full hearing* on his general lethal injection challenge in state court, while Mr. Long was summarily denied a hearing on his general challenge. *See Muhammad*, 739 F. 3d, at 685. Furthermore, the state court in Mr. Long's case granted a very restricted hearing on his as-applied challenge. In the constrained timeline, created by the state courts,[4] Mr. Long's presentation was severely restricted.

The following summary of the state court procedural history demonstrates Mr. Long was denied a full and fair opportunity to present his evidence in support of his claims. This full and fair opportunity to litigate is required to apply the doctrine of res judicata as a prohibition from proceeding in federal court. Mr. Long was given just 30 days from the issuance of his warrant on April 23, 2019, to his execution date of May 23, 2019. On April 24, 2019, the Florida Supreme Court issued an expedited briefing schedule requiring all proceedings in the circuit court to be completed by May 7, 2019, and all appellate briefing to be completed a mere seven days later by

[4] On May 2, 2019, Mr. Long filed an Emergency Motion for the Extension of the Circuit Court's Jurisdiction in Warrant Proceedings, requesting an extension from May 6, 2019, to May 9, 2019—a mere three more days, which would not have interfered with the scheduled execution date. *See Ex.* 1. The Florida Supreme Court denied the request on the same day. *See Ex.* 2.

May 14, 2019. *See Ex.* 3. The post-conviction court then set a schedule requiring all record requests to be completed by April 26, 2019 (the next day) at noon; all post-conviction motions to be filed by April 29, 2019, at noon (four days later); the case management conference[5] to be conducted on May 1, 2019, at 9:30 am; and the evidentiary hearing, if granted, to be held on May 2, 2019, and/or May 3, 2019. *See Ex.* 4; *see Ex.* 5.

At the case management conference held on May 1, 2019, the trial court set an evidentiary hearing for May 3, 2019, and limited the hearing to only Mr. Long's as-applied challenge. *See Ex.* 6. The trial court further ordered each party to file their evidentiary hearing lists by 5:00 p.m. on May 1, 2019. *Id.*

Following Mr. Long's timely witness list filing, the State filed a motion to strike witnesses on May 2, 2019. At 9:56 a.m. that day, Long's counsel, who were in the process of preparing for the evidentiary hearing, were informed the trial court would hear that motion at 2:00 p.m. that afternoon. During the hearing, Mr. Long withdrew several listed witnesses. *See Ex.* 7. Then, the trial court unreasonably restricted Mr. Long to only one expert witness (neuropsychologist) to present essential evidence of Mr. Long's severe traumatic brain injury and temporal lobe epilepsy and further required Mr. Long to choose which one would testify within one hour of the hearing. *See id.* at 13. The state court also struck three lay witnesses that were prepared to testify as to the agony and terror of experiencing awareness during surgery. *See id.* at 27.

The state court severely limited Mr. Long's ability to present evidence by excluding witnesses as to the availability of an alternative method of execution. Specifically, the state court prohibited Mr. Long from calling a paralegal and any FDOC witnesses that he designated to support his

[5] Under Fla. R. Crim. P. 3.851, the Defendant must disclose his witnesses at the Case Management Conference.

burden under *Bucklew* and *Glossip*. *See* Ex. 7 at 16-21. The state court told the State that they can "come up with a name of a person with the [FDOC] who would be able to testify . . . why the State of Florida doesn't follow the protocols of other states when it comes to lethal injection." *Id.* at 21-22. The state was ordered to provide that name by 4:00 p.m. May 2, 2019. *See id.* As a result, Mr. Long's counsel met the DOC official on the day of the May 3, 2019 evidentiary hearing.

The state court proceedings were not an adversarial proceeding nor were they indicative of the presentation that Mr. Long wanted to present under his constitutional procedural and substantive due process rights. As argued in his Complaint, Mr. Long was restricted from receiving relevant records, in particular his medical records pursuant to a properly executed release, to support his claims. The state court prejudiced Mr. Long by severely limiting his witnesses and by allowing the State to choose Mr. Long's FDOC witness, who he could not speak to until the day of the evidentiary hearing. Mr. Long was given inadequate time to interview that witness and was prevented from proffering evidence during the hearing. Mr. Long requested a brief extension so that he could have a full and fair opportunity to litigate his claims, but he was denied. The state court proceedings were not "conclusive not only as to every matter which was offered and received to sustain or defeat the claim, [or] as to every other matter which might with propriety have been litigated and determined in that action." *Fla. Dep't of Transp. v. Juliano,* 801 So.2d 101, 105 (Fla. 2001) (quoting *Kimbrell v. Paige,* 448 So. 2d 1009, 1012 (Fla.1984)).

The state court proceedings created bar after bar on Mr. Long and created an unjust and unconstitutional hearing. The incredible limitations placed on Mr. Long's litigation by the state courts sets his aside from *Muhammed.* The proper remedy for this injustice is to allow Mr. Long a full and fair opportunity to litigate in federal court and to grant his temporary restraining order.

4. Mr. Long Was Not Required To Exhaust His Administrative Remedies Because A Remedy Was Unavailable, But His Filed Grievance Was Also Sufficient To Put the Department On Notice.

Defendants allege Mr. Long's motion should be dismissed for failure to exhaust the FDOC grievance procedure before filing the instant lawsuit. Acknowledging Mr. Long filed an informal grievance on May 8, 2019, Defendants' complain he failed to file a formal grievance under Rule 33-103.006, Florida Administrative Code. Defendants also protest that Mr. Long's grievances lack sufficient detail. Importantly, Defendants bear the burden of establishing Mr. Long failed to exhaust his **available** administrative remedies. *See, e.g.*, *White v. Berger*, 709 F. App'x 532, 542 (11th Cir. 2017) (holding the district court "improperly shifted the burden of proof" when it ruled plaintiff failed to exhaust after prison transfer, when "defendants failed to prove [the remedies] were available" to plaintiff); *Griggs v. Vitani*, No. 627-CV-1808, 2019 WL 313791, at *3 (M.D. Fla. Jan. 24, 2019) ("Defendants have not met their burden of showing [Plaintiff] failed to exhaust his available administrative remedies.").

Mr. Long does not concede he is required to exhaust administrative remedies, as this lawsuit does not challenge prison conditions. Nevertheless, Mr. Long followed the appropriate grievance procedures, and his grievance sufficiently satisfied § 1997e(a)'s intent. It was not until Mr. Long's warrant was issued on April 23, 2019, that Mr. Long knew which protocol Florida would use to execute him.[6] *See supra* Section 1. Shortly after the warrant issued, Mr. Long began the grievance process on May 8, 2019. Mr. Long received the Warden's response to his informal grievance on May 14, 2019. *See* Ex. 8. He has 15 days from the date of receipt of the response to file a formal grievance. However, Mr. Long will be executed before the grievance process can be

[6] Per the Etomidate Protocol, the Secretary of the FDOC is required to review and certify the lethal injection procedures "at a minimum, once every two (2) years, or more frequently as needed." *See* Compl. App. 1.

completed, and diligence required filing this lawsuit as soon as the purpose of the grievance procedure was functionally met.

A. There is no available administrative remedy to Long's method-of-execution challenge.

The PLRA requires a prisoner to exhaust only administrative remedies that "are available" before filing a lawsuit challenging prison conditions. "[T]he exhaustion requirement hinges on the 'availab[ility]' of administrative remedies: An inmate, that is, must exhaust available remedies, but need not exhaust unavailable ones." *Ross v. Blake*, 136 S.Ct. 1850, 1858 (2016).[7] The Supreme Court has defined "available" procedures as "those, but only those . . . that are capable of use to obtain some relief for the action complained of." *Id.* at 1859 (internal quotation marks omitted) (citing *Booth v. Churner*, 532 U.S. 731, 738 (2001)). Further, this Court is required to apply the definition "to the real-world workings of prison grievance systems." *Id.* In *Ross*,[8] the Supreme Court clarified that an administrative procedure is considered "unavailable" when "(despite what regulations or guidance materials may promise) it operates as a simple dead end—with officers unable or consistently unwilling to provide any relief to aggrieved inmates." *Id.* at 1859-60. Defendants' grievance procedure for a method-of-execution challenge operates as a simple dead end. The individual institution housing Mr. Long, Florida State Prison, has no authority to change the method of execution. Such authority only comes from the Secretary of FDOC, pursuant to Fl. Stat. 922.105 (2018). However, even though the Secretary has "apparent authority," a remedy can be determined unavailable if the officials "decline ever to exercise it." *Ross*, 136. S.Ct. at 1859.

[7] In arguing that the "exhaustion requirement is not subject to either waiver by a court or futility or inadequacy expensions," Defendants wholly ignore *Ross v. Blake* and cite only pre-*Ross* precedent on this point.

[8] The case on remand resolved with a settlement, so no further hearings regarding "availability" were held. *See Blake v. Ross, et.al.*, Case. No. 8:09-cv-2367-GJH (D. Md.) (Docs. 190, 191).

The Court explained, "When the facts on the ground demonstrate that no such potential exists, the inmate has no obligation to exhaust the remedy." *Id.*

A review of Defendants' response to Mr. Long demonstrates that the remedy is unavailable because the Secretary "decline[s] to ever exercise it." At the institutional level, Defendants responded to Mr. Long's grievance by repeating that "lethal injection is constitutional," the current protocol "complies with . . . the Florida Statutes," and it "has not been found unconstitutional by any court." Ex. 8. Warden Reddish also deferred to the Florida court's rulings on Mr. Long's as-applied challenge. *Id.* The defendants' repeated deference to state and federal court rulings on the lethal injection protocol in response to filed grievances illustrates that the officials decline to ever exercise authority to remedy a lethal injection grievance, *unless a court first finds a violation.* To then insulate the lethal injection protocol from court review based on the grievance procedures would create an unfair windfall for defendants and trap Plaintiff in a procedural quagmire.

Likewise, when a prison excludes certain topics from the grievance process, administrative remedies are unavailable and operate as a simple dead end, because "the relevant administrative procedure lacks authority to provide any relief or to take any action whatsoever in response to a complaint." *See Booth v. Churner*, 532 U.S. 731, 736 & n.4 (2001). The prison's response illustrates that the lethal injection protocol falls outside the scope of Florida's Administrative Code for inmate grievances. *See* Fla. Admin. Code R. 33-103.001. In particular, "[i]nmates cannot file complaints regarding . . . [t]he substance of State and federal court decisions; [and] [t]he substance of State and federal laws and regulations." Fla. Admin. Code 33-103.001(5)(a)-(b). As noted, Defendants respond to lethal injection grievances by noting the protocol "complies with Chapter 922 . . . and has not been found unconstitutional by any court." Ex. 8; *see also id.* ("In *Baze v. Rees*, . . . the United States Supreme Court ruled that lethal injection is constitutional."); *id.*

("Florida's use of etomidate has been reviewed by several courts, including the Florida Supreme Court. The issue of whether the use of etomidate is unconstitutional as applied to you was addressed recently by your sentencing court."). It is clear based on the Warden's response that he views the protocol's legality as the province of the courts, even though the defendants are now arguing the authority belongs to Defendants. Because the administrative policy states that inmates may not grieve the substance of court decisions, statutes, and regulations, and the defendants view the constitutionality of lethal injection as an area for the courts to decide, an administrative remedy was unavailable to Mr. Long. *See, e.g.*, *Pritchett v. Fairley*, 730 F. App'x 549, 550 (9th Cir. 2018) (citing *Ross v. Blake*, 136 S. Ct. at 1858 (2016)) ("Pritchett raised a genuine dispute of material fact as to whether administrative remedies were unavailable under the Department of Corrections' policy stating that inmates may not grieve misconduct reports or investigations leading to or arising from misconduct reports.")

B. The substance of Mr. Long's grievance was sufficient to place Defendants on notice of the alleged harm.

Mr. Long sufficiently grieved the complaint's allegations. An inmate complies with the exhaustion requirement "as long as the inmate's grievance provides sufficient detail to allow prison officials to investigate the alleged incident." *Maldonado v. Unnamed Defendant*, 648 F. App'x 939, 953 (11th Cir. 2016) (citing *Jones v. Bock*, 549 U.S. 199, 219 (2007)). Defendants are simply incorrect when they are assert Mr. Long's grievance is invalid for alleging "conclusory" assertions that "lack any factual support." Def. Resp. at 18. The plaintiff need not grieve "the specific legal theory he later pursues in a § 1983 action." *Maldonado*, 648 F. App'x at 953. Under the PLRA, only "the essence of the claim [must] be clearly stated." *Minnis v. Jones*, No. 17-CIV-20575, 2017 WL 9605074, at *5 (S.D. Fla. Nov. 20, 2017).

Mr. Long's grievance clearly states the essence of his claims—that Florida's updated protocol and application of it to him violates the Eighth Amendment, including that etomidate "is too short acting to be a reliable sedative"—the heart of the § 1983 claim. *See* Ex. 8. Mr. Long further put the Department on notice that his "TBI/temporal lobe epilepsy renders the procedure particularly" problematic because "[e]tomidate is known to cause seizures in individuals with TBI." *Id.* Any reasonable investigation by the Department would have clarified further the details raised by Mr. Long and the factual support for his claims. Contrary to Defendants' arguments, Mr. Long's grievance is not so "conclusory in nature" or lacking in factual support as to fail to provide notice to the department. *See Flanagan v. Shipman*, No. 308-CV-204, 2009 WL 4043063, at *6 (N.D. Fla. Nov. 20, 2009) (noting that the allegations in the grievances were adequate to alert prison officials to the issues, without naming every fact or incident, and a "reasonable investigation into Plaintiff's grievances *should* have put prison officials on notice of the specifics of Plaintiff's claims" (emphasis in original)).

Moreover, "[c]ompliance with the prison grievance procedures . . . is all that is required by the PLRA to 'properly exhaust.'" *Jones v. Bock*, 549 U.S. 199, 218 (2007). "The prison's requirements, rather than the PLRA, dictate the level of detail necessary for proper exhaustion." *Maldonado*, 648 F. App'x at 951-52 (11th Cir. 2016) (citing *Jones*, 549 U.S. at 218)). Florida's inmate grievance procedures require the form be "legible, that included facts are accurately stated, and that only one issue or complaint is addressed." Fla. Admin. Code r. 33-103.005(a) (informal grievance); *see also Mincey v. Dela Cerna*, No. 3:06-CV-292, 2007 WL 778655, at *5 (M.D. Fla. Mar. 12, 2007) (describing these as "the only requirements regarding the substance of an inmate grievance" in Florida). "There is no requirement as to the degree of specificity," *Flanagan*, No. 308-cv-204, 2009 WL 4043063, at *6, although the reviewing authority may return a grievance

without a response on the merits if it is "so broad, general, or vague in nature that it cannot be clearly investigated, evaluated, and responded to," Fla. Admin. Code r. 33-103.014(1)(b). Instead of returning the grievance under this section, the Warden responded to the grievance's merits, revealing the Warden's ability to understand and evaluate Mr. Long's claims. *See Kornagay v. Diedeman*, No. 3:17-cv-795, 2018 WL 4333543, at *8 (M.D. Fla. Sept. 11, 2018) (declining to dismiss, even though inmate failed to identify parties involved because he provided other details and FDOC referred the issue for an investigation instead of returning the grievance). Indeed, the Warden familiarized himself with Mr. Long's state court litigation. *See* Ex. 8.

Thus, Mr. Long fulfilled the grievance process's purpose to place the Department on notice of an alleged violation so that it has the opportunity to address the violation at the institutional level. *See Jones v. Bock*, 549 U.S. 199, 219 (2007) ("We have identified the benefits of exhaustion to include allowing a prison to address complaints about the program it administers before being subjected to suit, reducing litigation to the extent complaints are satisfactorily resolved, and improving litigation that does occur by leading to the preparation of a useful record."); *Alexander v. Hawk*, 159 F.3d 1321, 1327 (11th Cir. 1998) (identifying seven policies favoring exhaustion including "to conserve scarce judicial resources" and "to give the agency a chance to discover and correct its own errors"). A fair reading of Mr. Long's grievance establishes that it gave the Department sufficient notice about the nature of the claimed constitutional violations. Defendants cite no case that requires the grievance include every specific factual allegation. "[W]hile § 1997e(a) requires that a prisoner provide as much relevant information as he *reasonably* can in the administrative grievance process, it does not require that he do more than that." *Brown v. Sikes*, 212 F.3d 1205, 1207 (11th Cir. 2000) (emphasis added) (reversing dismissal when plaintiff did not include defendants' names in grievance). As the Eleventh Circuit

elaborated, "[t]he best you can do is the best you can do." *Id.* at 1210. Mr. Long is an unsophisticated death row prisoner, not a lawyer or a medical expert. *See Parzyck v. Prison Health Servs., Inc.*, 627 F.3d 1215, 1218 (11th Cir. 2010) ("In holding that [Plaintiff] had not exhausted his first grievance against [Defendant] because it referenced acts that occurred before he became Chief Health Officer, the district court confused the question of [Defendant's] liability on the merits of the claim with the separate and distinct question of whether [Plaintiff] exhausted his administrative remedies."); *Johnson v. Johnson*, 385 F.3d 503, 522 (5th Cir. 2004) ("We are mindful that the primary purpose of a grievance is to alert prison officials to a problem, not to provide personal notice to a particular official that he may be sued; the grievance is not a summons and complaint that initiates adversarial litigation."); *see also Porter v. Nussle*, 534 U.S. 516, 529 (2002) ("Proof requirements once a case is in court . . . do not touch or concern the threshold inquiry before us: whether resort to a prison grievance process must precede resort to a court.").

Mr. Long "is not attempting to litigate unrelated claims and events" in his complaint. *Flanagan*, No. 308-cv-204, 2009 WL 4043063, at *6. The complaint's claims, including that etomidate is an ultra-short acting hypnotic with no analgesic properties, etomidate is insufficient to keep an inmate at an anesthetic depth throughout an execution particularly after administration of the second and third drugs, Long will suffer severe pain and suffering upon injection of the second and third drugs, the "consciousness" check is insufficient, and etomidate causes side effects, all "concern" the unconstitutionality of the Etomidate Protocol and its application, and in particular relate to the grievance's allegation that etomidate "is too short acting to be a reliable sedative." *See id.* "The claims in his complaint have not significantly broadened the issues raised in the grievance process. . . . Plaintiff's claims are related and sufficiently put prison officials on notice of the substance of Plaintiff's issue with the Department." *See id.*; *see also Baskerville v.*

Blot, 224 F. Supp. 2d 723, 730 (S.D.N.Y. 2002) (concluding exhaustion was satisfied despite that "[t]he scope of the grievance that plaintiff filed . . . was much narrower than the issues he [was] raising in the instant complaint").

All of Defendants' exhaustion arguments lack merit, would amount to a manifest injustice particularly since Mr. Long faces a torturous execution, and should be rejected.

5. Mr. Long Filed His § 1983 Complaint Within the Statute of Limitations.

The statute of limitations in Mr. Long's case with respect to the issues raised in his complaint began on January 4, 2017, and runs four years from that date until January 4, 2021. *See* Fla. Stat. § 768.28(14) (2018). January 4, 2017 marks the date Florida implemented a new and substantially changed lethal injection protocol—when, once again and without transparency, Florida adopted a new execution protocol. *See Asay v. State*, 224 So. 3d 695, 706 (Fla. 2017). Defendants argue that Florida's decision to change from midazolam to etomidate is not a substantial change and thus the statute of limitations did not begin to run at that time. Defendants are wrong.

This § 1983 action is controlled by *Arthur v. Thomas*, 674 F.3d 1257 (11th Cir. 2012), which Defendants acknowledge is contrary to their argument yet do not distinguish. *Arthur* requires an evidentiary hearing on whether substituting etomidate for midazolam is a substantial change in the protocol, and the complaint cannot be summarily denied on statute of limitations grounds without this hearing. *Id.* Like in *Arthur*, Long has presented new allegations and evidence regarding a substantial change to Florida's execution protocol, and therefore this Court must consider these new allegations and evidence. *See id.* at 1260-61. Long attached two expert declarations that, like the two expert affidavits in *Arthur*, provide new evidence supporting a significant change in Florida's execution protocol. *See id.* As a result, Mr. Long is well within the statute of limitations.

Defendants cite no cases where a state's execution protocol changes from one drug class to an entirely different drug class[9] as is the issue here. Rather, defendants rely on clearly inapposite cases where an execution protocol's drugs did not change. In *Henyard v. Sec'y, DOC*, 543 F.3d 644, 648 (11th Cir. 2008), Henyard did not make a "wholesale" challenge to Florida's protocol but instead complained of inadequate training of execution personnel and lack of medical personnel, challenges relevant to lethal injection but not to the drug characteristics themselves. The *Henyard* court explicitly noted, "no one disputes that Florida has used the same drugs, in the same order, for all executions." *Id.* In *Ledford v. Comm'r, Georgia Dep't of Corr.*, 856 F.3d 1312, 1315 (11th Cir.), in changing its execution protocol, "Georgia changed from using a single dose of FDA-approved pentobarbital to using a single dose of compounded pentobarbital." The three other cases defendants cite essentially rely on this same premise—that a state switching from "FDA-approved pentobarbital to compounded pentobarbital is not a substantial change because the switch between two forms of the same drug does not significantly alter the method of execution." *See Gissendaner v. Comm'r, Georgia Dep't of Corr.*, 779 F.3d 1275, 1282 (11th Cir. 2015); *Wellons v. Comm'r, Ga. Dep't of Corr.*, 754 F.3d 1260, 1264 (11th Cir. 2014); *see also Whitaker v. Collier*, 862 F.3d 490, 496 (5th Cir. 2017). "[T]hat [another state's] method of execution may not have undergone a substantial change in the relevant time period has no bearing on the factual question of whether a substantial change has occurred in the way that [Florida] administers its method of execution, as [Mr. Long's] complaint alleges." *See Arthur*, 674 F.3d at 1261.

[9] The January 4, 2017 Florida execution protocol replaced midazolam, a benzodiazepine, with etomidate, a hypnotic.

Moreover, defendants wholly ignore that plaintiff is also well within the four-year statute of limitations on his as-applied challenge. Because Mr. Long's as-applied challenge specifically relates to the interaction between his unique medical conditions *and the drug etomidate*, he could not have brought his claims prior to the 2017 change to etomidate in the lethal injection protocol. It is irrelevant that he was aware of his medical conditions before the etomidate protocol, since etomidate is the only drug alleged to interact with his medical conditions. The complaint is thus timely filed within four years of the switch to etomidate.

6. Mr. Long Has a Substantial Likelihood of Success on the Merits.

As outlined in his emergency motion for temporary restraining order, preliminary injunction, and/or stay of execution, Mr. Long is substantially likely to succeed on the merits of his claims.

A. Mr. Long has shown etomidate creates a demonstrated risk of severe pain.

Mr. Long has provided proof in support of his complaint and motion that Florida's use of etomidate, as part of a three-drug protocol, creates a substantial risk of severe pain.

First, the state is simply incorrect when it argues "[n]otably, [Mr.] Long never claims that etomidate will cause him any pain." Resp. at 23. Mr. Long specifically alleged, supported by expert declaration and witness reports, the "use of etomidate also involves the substantial risk of pain that occurs on injection in a significant number of administrations" and that the "pain from etomidate is so significant that the person will feel at the injection site and continue to feel the pain as the entire 200 milligrams of etomidate is pushed into his veins or until he loses consciousness." Compl.

¶ 67.[10] This risk of pain is independent of the severe suffering caused by etomidate's inability to render an inmate fully unconscious.

In any event, Plaintiff is not required to establish the drug *itself* will cause pain but rather that its use in a lethal injection protocol will. While executions need not be free from all pain, the United States Supreme Court has already acknowledged that the pain from the second and third drugs, if felt, is **constitutionally intolerable**. *See, e.g.*, *Baze v. Rees*, 553 U.S., 35, 53 (2008); *Glossip v. Gross*, 135 S. Ct. 2726, 2733, 2743. Notably, nowhere do defendants attempt to dispute the horrendous pain and suffering that the second and third drugs would cause on a sensate person.

Accordingly, the crucial constitutional issue is whether etomidate can render Mr. Long sufficiently unconscious that he will be fully unaware of pain or noxious stimuli. *See, e.g.*, *Baze*, 553 U.S. at 53; *Glossip*, 135 S. Ct. at 2743; *Valle v. State*, 70 So. 3d 530, 539 (Fla. 2011). Contrary to Defendants' claims, Mr. Long has presented ample evidence at this stage establishing a substantial likelihood that etomidate cannot render him fully unconscious and insensate, including the two expert declarations by anesthesiologists with substantial experience with etomidate.

Defendants rely on Dr. Steve Yun's state court testimony that "200 miligrams of etomidate would 'predictably produce a very reliable deep state of unconsciousness." Resp. at 23. However, Plaintiff has produced evidence by more experienced anesthesiologists that Dr. Yun is just wrong.

First, there are substantial questions[11] about Dr. Yun's experience necessary to opine on the three-drug protocol using etomidate, particularly against the vast experience of both Drs. Gail

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[10] Notably, in the Appendix to Defendants' Response, Dr. Yun—the defendants' expert—agreed that "etomidate has been reported to cause pain in some patients with IV administration" and that this pain could be "severe." Def. App. at 60.

[11] In his testimony, Dr. Yun claims to have inducted anesthesia more than 25,000 times in his career. *See* Def. App. 1, at 22. This number belies logic, given that Dr. Yun has been practicing for less than 19 years. This number means that Dr. Yun has inducted anesthesia nonstop every day for the last 19 years, conducting at least 3-4 procedures *every single day including the*

Van Norman and David Lubarsky. *Compare* Dr. Steve Yun Curriculum Vitae, Ex. 9, *with* Lubarsky CV, App. 5; Van Norman CV, App. 29. Defendants refer to Dr. Yun as "a very experienced, practicing anesthesiologist." Resp. at 23. However, Dr. Yun testified that he has only used etomidate 300 times, Def. App.. at 25, or 1.2% of the time, Def. App. at 52, and that he most commonly uses propofol or midazolam, Def. App. at 51. In addition, Dr. Yun testified that he had not reviewed any scientific studies or literature in regards to etomidate, had not reviewed any studies on etomidate and seizures including those cited in Dr. Lubarsky's affidavit, did not recall any specific studies on myoclonus and etomidate, and could not name a single article or study he had reviewed on etomidate. Def. App. at 44-63. Nor has Dr. Yun published any peer-reviewed articles on any topics, let alone anesthesia or etomidate. Def. App. at 41. Ultimately, Dr. Yun cited no scientific research or studies to support his extrapolations and conclusions; Dr. Yun simply repeatedly asserted that—despite his lack of experience with etomidate—he was "so familiar with etomidate, that [he's] able to give his expert opinion on it." Def. App. at 44.[12]

In contrast, Dr. Van Norman is a specialist in cardiothoracic anesthesia who is thoroughly familiar not only with etomidate in clinical use but also with the scientific research and studies on etomidate. She has over 120 publications in peer-reviewed journals, textbooks, and other venues

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weekend without vacation. For this even to be a credible number, it is most likely that Dr. Yun has participated extensively in relatively quick dental procedures, as his current practice and specialty is *dental anesthesia*, *see* Dr. Steve Yun, M.D. "Excellence in Dental Anesthesia—Every Patient, Every Time," https://www.dentalanesthesiamd.com/ (Last accessed May 18, 2019). rather than significant experience with the types of procedures that use etomidate (like cardiac procedures) and those with significant noxious stimuli.

[12] As an example of Dr. Yun's lack of experience and knowledge regarding etomidate, Dr. Yun testified that myoclonus occurs in "less than two percent" of cases. Def. App. at 58. However, as Dr. Van Norman discusses, myoclonus "occurs with the administration of etomidate in doses over 0.3 mg/kg in over 90% of patients," a number supported by scientific studies. Van Norman Decl. ¶ 6. If Dr. Yun can be so drastically wrong about one of etomidate's most common side effects, what else is he wrong about?

that include the topics of cardiac anesthesia research, perioperative medicine, and end-of-life issues. *See* Compl. ¶¶ 30-34; Van Norman CV, App. 29. Dr. Lubarsky is lifetime board-certified as an anesthesiologist with at least seven book publications, including a chapter in the seminal anesthesiology textbook *Miller's Anesthesia*, including sections on etomidate. Dr. Lubarsky also has conducted research and published numerous peer-reviewed articles on the suitability of various drugs as anesthetics and how to maintain anesthetic depth, as well as articles on etomidate and other lethal injection drugs. *See* Compl. ¶¶ ; Lubarsky Decl., App. 3; Lubarsky CV, App. 5.

Second, the research and pharmacokinetics of etomidate, as elucidated by Drs. Van Norman and Lubarsky, do not support Dr. Yun's unsupported assertions regarding etomidate. Importantly, Dr. Van Norman discussed how anesthesiologists—like Dr. Yun—routinely confuse awareness and recall. Van Norman Decl. ¶¶ 3-4. For an individual to be fully unconscious, he must have the "absence of the experience of pain or other noxious and agonizing stimuli." *Id.* ¶ 3. Unlike Dr. Yun, Dr. Van Norman reviewed "multiple studies" showing a remarkably high incidence of awareness during full general anesthesia, including the perception of pain, and that the use of a paralytic agent increases the risks of awareness. *Id.* ¶¶ 5, 11. Additionally, both Dr. Lubarsky and Dr. Van Norman describe etomidate's lack of pain-relieving properties and how without analgesia or other pain medications, etomidate cannot protect Mr. Long from the excruciating effects of the second and third drugs. Van Norman Decl. ¶ 1; Lubarsky Decl. ¶. Finally, Dr. Van Norman actually explains how etomidate works on the GABA receptors such that "[i]ncreasing the dose or repeating the dose of etomidate" cannot overcome the clinical ultra-short-acting effects. Van Norman Decl. ¶ 1.[13] Dr. Yun, in contrast, cited no evidence for his bald assertions regarding

[13] Defendants' argument regarding the FDA insert and dose dependency does not conflict with Dr. Van Norman's testimony because Defendants argument fails to take into account the ceiling effect of etomidate, due to its interaction with GABA receptors.

etomidate's dose, other than the pedestrian argument that because the dose is so much higher than the clinical dose, it must induce full unconsciousness. This is a baseless argument and not scientific evidence; it is akin to saying that because ibuprofen's clinical dose is 200 milligrams, and because ibuprofen relieves pain, that giving a patient the whole bottle of ibuprofen stops him from feeling the pain of being set on fire with gasoline. Unlike Dr. Yun, both Dr. Lubarsky and Dr. Van Norman based their opinions on scientific, peer-reviewed studies and extensive experience, and avoid the broad, vague claims of Dr. Yun.

To illustrate further how incorrect and baseless Dr. Yun's testimony was, Dr. Yun also testified that 200 milligrams of etomidate is "such an extreme, excessive dose completely outside the realm of clinical practice, that such an extreme dose would be lethal." Def. App. at 36. First, if this were true, then there would be no need to inject Mr. Long with the horrifying painful second and third drugs in the protocol; Florida could simply inject an overdose of etomidate. However, no inmate has been declared dead prior to the administration of the remaining drugs, and the other inmates in Florida's executions have continued moving for several minutes after the injection of 200 mg of etomidate. Second, Dr. Yun's statement is unsupported by scientific literature. For example, lethal doses in rats require approximately 26-times the therapeutic dose (or equivalent to more than 700 mg of etomidate in Mr. Long). *See, e.g.*, Janssen PA, Niemegeers CJ, Marsboom RP. *Etomidate, a potent non-barbiturate hypnotic. Intravenous etomidate in mice, rats, guinea-pigs, rabbits and dogs.* Arch Int. Pharmacodyn Ther. 1975; 214:92-132. Additionally, the FDA label reports even with overdosage that "no adverse cardiovascular or respiratory effects attributable to [etomidate] overdose have been reported." U.S. Food and Drug Administration. Amidate FDA label. Available at: https://www.accessdata.fda.gov/drugsatfda_docs/label/2017/018227s032lbl.pdf (Accessed May 18, 2019). In at least one study, some human

patients received up to the equivalent of 150 mg of etomidate in Mr. Long; not only did the patients survive—**but they reported awareness during surgery**. *See* Russell IF., *Comparison of wakefulness with two anaesthetic regimens. Total IV v. balanced anesthesia.* Br J Anaesth 1986; 58:965-8. Thus, the evidence clearly supports Mr. Long's experts and the likelihood that Mr. Long will suffer severe pain because of etomidate.[14]

Defendants' citation to *United States v. Husband*, 312 F.3d 247 (7th Cir. 2000) is irrelevant and bizarre. First, Defendants' claim that because a different court upheld the reasonableness of etomidate use in a Fourth Amendment search, then "that drug necessarily satisfies the Eighth Amendment standard" completely conflates the two Amendments and the **standard in lethal injection cases**. Just because it is reasonable for licensed doctors to administer etomidate to remove contraband from someone's mouth does not mean that it is constitutional to give an inmate etomidate and then functionally burn them alive from the inside out. The question is not whether etomidate causes independent harm but rather whether it is sufficient to protect Mr. Long from excruciating, unconstitutional pain. *Husband* does not speak to that issue. Second, the Defendants argument that the "risks of etomidate were 'relatively low'" contradicts Dr. Yun's testimony that one can lethally overdose on etomidate and further supports Dr. Yun's lack of experience. Def. Resp. at 24.

Finally, Defendants' arguments that the "consciousness" check resolves any concern about the etomidate wearing off ignores first, that because etomidate works so quickly, it is substantially likely to wear off *after* the "consciousness" check but before death, when the inmate is paralyzed

[14] Defendants cite *Asay v. State*, 224 So. 3d 695, 705 (Fla. 2017). However, Mr. Long was not a party to that case (and he was not permitted to raise his compelling evidence on the general lethal injection challenge in state court because the trial court followed *Asay*). Moreover, the Court only briefly addressed etomidate and did not discuss the high risk of *awareness* of the second and third drugs. *Asay* does not bind this Court.

and unable to signal his awareness.[15] *See, e.g.*, Van Norman Dec. ¶ 2. Second, because stimulus applied in the "consciousness" check must match the stimulus of the second and third drugs—even a trapezius pinch (which is not always done in Florida according to execution witnesses) does not match the pain of feeling buried alive or lit on fire. *See, e.g.*, Lubarsky Decl. ¶ 13. Contrary to the Defendants' bald assertion that "possibility of an inmate passing such a test and remaining conscious during injection of the second and third drugs is so very remote," Plaintiff has produced extensive evidence that the possibility is not only likely, but "virtually certain." *See, e.g.*, Van Norman Decl.; Lubarsky Decl.[16]

B. Mr. Long has proven that pentobarbital is a feasible, readily implemented alternative drug that would significantly reduce the Etomidate Protocol's substantial risk of severe pain.

Defendants allege that Mr. Long cannot meet the second requirement of *Glossip* because he has not shown an alternative that is feasible, readily implemented and that significantly reduces a substantial risk of severe pain.

One of the defendant's assertions is that because Mr. Long's alternative, pentobarbital, requires a prescription for use in a given individual, defendants cannot obtain the drug. *See* Def. Resp. at 27. While it is true that pentobarbital requires a prescription, it is also true that every single one of the other drugs in the Florida Execution protocol requires a prescription for use in a given

[15] For this reason, the state cannot rely on the past executions being "successful" because Florida paralyzed each of those inmates and thus there was no means to gauge awareness after the injection of the paralytic. Furthermore, Plaintiff disputes that those five executions went smoothly, as detailed in the Complaint and supporting exhibits.

[16] Regarding Mr. Long's as-applied challenge, Defendants ignore that the risk of pain is not limited to pain caused by the seizure itself or dislodging the IV lines. Rather, as thoroughly explained in the Complaint and Motion for TRO, one of the most likely risks is that the combination of etomidate's seizure triggering effects and its ultra-short-acting nature means that for Mr. Long, there exists a substantial likelihood that the etomidate will wear off because his "consciousness" check will be delayed or invalid. Thus, he will experience the unconstitutional pain of the second and third drugs without being able to signal for help.

individual. *See* Expert Decl. of Silas A. Raymond, Pharm. D., App. 26, ¶¶ 5-9. So either Florida is flouting the law and merely pulling drugs off the shelf to administer to a condemned inmate without a legal prescription, or, an authorized person is, in fact, writing prescriptions for use of the execution protocol drugs in Mr. Long's execution. In fact, Florida law specifically allows, "a person authorized by state law to prescribe medication and designated by the [FDOC] may prescribe the drug or drugs necessary to compound a lethal injection." Fla. Stat. Ann. § 922.105 (West that it "does not constitute the practice of medicine, nursing, or pharmacy" when individuals prescribe, prepare, compound, dispense and administer a lethal injection for prescription, preparation, compounding, dispensing, and administration of a lethal injection." *Id.* This statute does not say the FDOC can merely pull drugs off its shelves to use in lethal injections. This statute stands for the proposition that a prescription is required for any drugs used in an execution, and it gives DOC medical personnel legal cover to write these prescriptions.

Defendants also claim that testimony shows FDOC is not able to purchase pentobarbital for use in executions. This is false. It is not that Florida cannot purchase pentobarbital for executions; it is that Florida **has not attempted to** purchase pentobarbital for executions. Stephen Whitfield, Chief of Pharmaceutical Services for the FDOC testified that in states that use pentobarbital for executions, in his understanding, those states obtain the drug from compounding pharmacies. Mr. Whitfield also testified that FDOC never attempted to purchase pentobarbital from a compounding pharmacy. According to the testimony and declaration of Dr. Silas Raymond, Pharm.D., a clinical pharmacist, the API of pentobarbital is available to compounding pharmacies and that, subject to the policies of the individual pharmacy, a compounding pharmacy could provide compounded, injectable pentobarbital based on a prescription to FDOC. Defendants cannot hide behind their abject refusal to seek pentobarbital from a compounding pharmacy to claim that FDOC is not able

to purchase pentobarbital for use in executions, particularly when they have not provided and cannot provide a legitimate penological reason for refusing to seek pentobarbital from compounding pharmacies.

Tellingly, defendants do not contest Long's assertion that pentobarbital will rapidly induce unconsciousness and produce a quick, painless death. Importantly, Mr. Long is not alleging that pentobarbital replace etomidate as the first-drug; rather, Plaintiff alleges an overdose of pentobarbital as the lethal drug. This is crucial because Mr. Long need not show that pentobarbital will protect him from the horrifying pain of the second and third drugs, because he will not be needlessly subjected to that pain under a one-drug protocol. Instead, as everyone seems to agree, pentobarbital will quickly cause death with minimal pain. Instead of contesting the effectiveness of pentobarbital, Defendants falsely claim Mr. Long has not established that etomidate would will fail to render him unconscious. As described in Section 6A *supra*, because etomidate is ultra short-acting even at large doses, Mr. Long is virtually certain to feel, first, the agony of suffocation and air hunger, followed immediately by the searing pain of potassium acetate.[17]

CONCLUSION

Because Mr. Long's execution will result in his torture, Mr. Long respectfully requests a stay of execution, followed by a thorough evidentiary hearing. This request is supported by Mr. Long's § 1983 Complaint, its supporting exhibits, his initial Emergency Motion for a TRO, Preliminary Injunction, and/or Stay of Execution, and this Reply In Support Thereof.

Respectfully submitted,

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[17] Mr. Long rests on the arguments made in his initial Motion as to the remaining issues.

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CERTIFICATE OF SERVICE

I hereby certify that the forgoing motion was electronically served on this date, May 18, 2019, to the defendants in this matter through the ECF system.

/s/Robert A. Norgard
ROBERT A. NORGARD

APPENDIX G

Appeal No. No. 19-11942-P

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BOBBY JOE LONG,
APPELLANT,

V.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS ET AL.
APPELLEES.

Appeal from the United States District Court for the Middle District of Florida
District Court No.: 8:19-cv-1193 MSS-AEP
Capital Case. Execution Scheduled for May 23, 2019.

APPELLANT'S EMERGENCY MOTION FOR STAY OF EXECUTION PENDING THE APPEAL OR MOTION FOR EXPEDITED APPEAL

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IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT (11th Cir. R. 26.1 & Fed.R.App.P. 28(a)(1))

Bobby Joe Long v. Secy', Florida Department of Corrections et al.
Appeal No. 19-11942-P

Pursuant to Rule 26.1 of the Rules of the United States Court of Appeals for the Eleventh Circuit, counsel for Appellant, Bobby Joe Long, hereby certifies that the following trial judges, attorneys, persons, associations of persons, firms, partnerships, or corporations have an interest in the outcome of this case:

1. Ahmed, Raheela, Assistant Federal Public Defender, Middle District of Florida.

2. Ahmed, Syed, former Assistant Capital Collateral Regional Counsel for Middle Region of Florida.

3. Ake, Stephen D., Assistant Attorney General and counsel for Appellees.

4. Allen, Curt, former Assistant State Attorney for the Thirteenth Judicial Circuit in and for Hillsborough County, Florida.

5. Backhus, Terri Lynn, Assistant Federal Public Defender, Middle District of Florida

6. Barkett, Rosemary, former Florida Supreme Court Justice.

7. Behnke, Debra, former Circuit Court Judge for the Thirteenth Judicial Circuit in and for Hillsborough County, Florida.

8. Black, Anthony K., former Circuit Court Judge for the Thirteenth Judicial Circuit in and for Hillsborough County, Florida.

9. Blanco, Katherine Vickers, former Assistant Attorney General.

10. Bondi, Pamela Jo, former Attorney General of Florida.

11. Brown, Gregory William., Assistant Federal Public Defender, Middle District of Florida and counsel for Appellant.

12. Browne, Scott Andrew, Assistant Attorney General.
13. Butterworth, Robert A., former Attorney General of Florida.

14. Canady, Honorable Charles T., Florida Supreme Court Chief Justice.

15. Chalu, Wayne, former Assistant State Attorney for the Thirteenth Judicial Circuit in and for Hillsborough County, Florida.

16. DeBock, Chris, former Assistant Capital Collateral Regional Counsel for Middle Region of Florida.

17. DeSantis, Ronald, Governor of Florida.

18. Dillinger, Bob, Public Defender for the Sixth Judicial Circuit.

19. Egan, Brenna Maryann, Research and Writing Specialist, Middle District of Florida.

20. Elm, Donna Lee, Federal Public Defender, Middle District of Florida.

21. Ehrlich, Raymond, former Florida Supreme Court Justice.

22. Freeland, Timothy Arthur, Assistant Attorney General.

23. Griffin, John P., former Circuit Court Judge for the Thirteenth Judicial Circuit in and for Hillsborough County, Florida.

24. Grimes, Stephen H., former Florida Supreme Court Justice.

25. Gruber, Mark, Assistant Capital Collateral Regional Counsel for Middle Region of Florida.

26. Gunn, Sean, Assistant Federal Public Defender, Northern District of Florida.

27. Harding, Major B., former Florida Supreme Court Justice.

28. Hileman, Byron P., former Assistant Capital Collateral Regional Counsel for Middle Region of Florida.

29. Inch, Mark A., Secretary of the Florida Department of Corrections and Appellee.

30. Kilgore, Sidney W., former Assistant Capital Collateral Regional Counsel for Middle Region of Florida.

31. Kogan, Gerald, former Florida Supreme Court Justice.

32. Labarga, Honorable Jorge, Florida Supreme Court Justice.

33. Lagoa, Barbara, Florida Supreme Court Justice.
34. Landry, Robert J., former Assistant Attorney General.

35. Lawson, Alan, Florida Supreme Court Justice.

36. Lazzara, Richard A., former Circuit Court Judge for the Thirteenth Judicial Circuit in and for Hillsborough County, Florida.

37. Long, Bobby Joe, Appellant.

38. Lewis, Honorable R. Fred, former Florida Supreme Court Justice.

39. Luck, Robert J., Florida Supreme Court Justice.

40. Martin, Tennie, Assistant Federal Public Defender, Middle District of Florida and counsel for Appellant.

41. McDonald, Parker Lee, former Florida Supreme Court Justice.

42. Moody, Ashley, Attorney General of Florida.

43. Moody, Chris, former Assistant State Attorney for the Thirteenth Judicial Circuit in and for Hillsborough County, Florida.

44. Moorman, James Marion, former Public Defender for Tenth Judicial Circuit, Florida.

45. Moser, John, former Capital Collateral Regional Counsel for Middle Region of Florida.

46. Muñiz, Carlos G., Florida Supreme Court Justice.

47. Nolas, Billy H., former Assistant Federal Public Defender, Northern District of Florida.

48. Norgard, Andrea M., Esquire.

49. Norgard, Robert Anthony, Esquire, counsel for Appellant.

50. Overton, Ben F., former Florida Supreme Court Justice.

51. Owens, A. Anne, Assistant Public Defender for the Tenth Judicial Circuit.

52. Pacheco, Christina Z., Assistant Attorney General and counsel for Appellees.

53. Pariente, Honorable Barbara J., former Florida Supreme Court Justice.

54. Perry, James E. C., former Florida Supreme Court Justice.

55. Polston, Honorable Ricky, Florida Supreme Court Justice.

56. Porcelli, Anthony E., United States District Court Magistrate Judge for the Middle District of Florida.

57. Pruner, James Jay, Assistant State Attorney for the Thirteenth Judicial Circuit in and for Hillsborough County, Florida.

58. Quince, Honorable Peggy A., former Florida Supreme Court Justice.

59. Rappaport, David M., Esquire.

60. Reddish, Barry, Warden of Florida State Prison and Appellee.

61. Reiter, Michael, former Assistant Capital Collateral Regional Counsel for Middle Region of Florida.

62. Rubin, Ellis S., Esquire.

63. Seace, Kim, former Assistant State Attorney for the Thirteenth Judicial Circuit in and for Hillsborough County, Florida.

64. Scriven, Mary S., United States District Court Judge for the Middle District of Florida.

65. Sexton, Susan G., former Circuit Court Judge for the Thirteenth Judicial Circuit in and for Hillsborough County, Florida.

66. Shaw, Leander J. Jr., former Florida Supreme Court Justice.

67. Simms, Michelle, victim.

68. Sisco, Michelle, Circuit Court Judge for the Thirteenth Judicial Circuit in and for Hillsborough County, Florida.

69. Whittemore, James D., United States District Court Judge for the Middle District of Florida.

70. Williams, Shirley, former Assistant State Attorney for the Thirteenth Judicial Circuit in and for Hillsborough County, Florida.

71. Wright, Carol, Chief Assistant Federal Public Defender, Middle District of Florida.

72. Vollrath, Sharon, former Assistant State Attorney for the Thirteenth Judicial Circuit in and for Hillsborough County, Florida.

73. Young, James A., former Assistant Attorney General.

Appellant, Bobby Joe Long ("Long"), by his undersigned counsel, respectfully moves the Court to stay his execution scheduled for May 23, 2019, or in the alternative expedite his pending appeal given his scheduled execution. In support, Long submits the following:

PROCEDURAL HISTORY

Long is incarcerated at Florida State Prison under a death sentence. On April 23, 2019, Florida's governor signed a warrant for the execution of Long on May 23. On May 16, 2019, Long filed a Complaint pursuant 42 U.S.C. §1983 against Appellees for the violations and threatened violations of his constitutional rights. (Doc.1).[1] Long raised four counts in his Complaint. (Doc.1). Simultaneously, Long filed a Motion for a Temporary Restraining Order, for a Preliminary Injunction, and/or a Stay of Execution. (Doc.2).

On May 17, 2019, the District Court issued an Order requiring expedited briefing on Long's Motion for a Temporary Restraining Order, for a Preliminary Injunction, and/or a Stay of Execution ("TRO"). The District Court ordered Appellees file their response on May 17, and Long to file his reply by May 18. (Doc.10). Appellees filed their response on May 17, and Long filed his reply on May 18. (Doc.16; 19). On

[1] The docket entries referenced in this pleading will be filed in a Notice of Filing unless it is part of the Initial Appeal Package transmitted.

May 18, the Court issued an Order denying relief. (Doc.21). On May 18, Long filed his Notice of Appeal. (Doc.22)

REQUEST FOR STAY OF EXECUTION

Long is facing his imminent execution on May 23. Long requested a stay of execution in the District Court, but was denied relief. (Doc.2; Doc.21). The Court should stay his execution to allow this Court to afford him a full and constitutional review of his case. The issues raised below are complex, unique to Long, and will determine whether he lives or dies before a proper review. Equity supports a stay in Long's case. *See Grayson v. Allen*, 491 F.3d 1318, 1322 (11th Cir. 2007) ("The equitable principles at issue when inmates facing imminent execution delay in raising their § 1983 method-of-execution challenges are equally applicable to requests for both stays and injunctive relief.")

Long can meet these four factors for a stay of execution:

> (1) substantial likelihood of success on the merits; (2) that irreparable injury will be suffered if the relief is not granted; (3) that the threatened injury outweighs the harm the relief would inflict on the non-movant; and (4) that entry of the relief would serve the public interest.

Schiavo ex rel. Schindler v. Stchiavo, 403 F.3d 1223, 1225-26 (11th Cir. 2005); *see also Hill v. McDonough*, 547 U.S. 573 584 (2006). Long carries the burden of proof. *See Hill*, 547 U.S. at 584.

Long need only satisfy a substantial likelihood of success on the merits for "at least one of his claims," no more, to meet prong one of the test for injunctive relief

or a stay. *Ferguson v. Warden, Fla. State Prison*, 493 F. App'x 22, 26 (11th Cir. 2012). Despite only needing to prove a likelihood of success for at least one of his claims, Long can show a substantial likelihood of success on each of his claims, which are interrelated. Long argues first the Etomidate Protocol violates his Eighth Amendment right to be free from cruel and unusual punishment as applied to the States through the Fourteenth Amendment.

The United States Supreme Court held in *Baze v. Rees*, 553 U.S. 35 (2008), that to block a particular execution method under the Eighth Amendment, a condemned prisoner must "establish that the State's lethal injection protocol creates a demonstrated risk of severe pain [and] ... that the risk is substantial when compared to the known and available alternatives." *Id.* at 61; *see also Glossip v. Gross*, 135 S.Ct. 2726, 2737 (2015). This standard also applies to as-applied lethal injection challenges. *See Bucklew v. Precythe*, 139 S.Ct. 1112 (2019). Long's evidence will show a strong likelihood he will prevail on the merits of his claims.

Appellees' use of etomidate as the critical first drug followed by a paralytic and potassium acetate makes it sure or very likely Long will experience severe pain and suffering. That the second and third drugs cause severe pain and suffering absent an effective first drug is well-settled. *See, e.g.*, *Glossip*, 135 S.Ct. at 2743; *Baze*, 553 U.S. at 53; *Valle v. State*, 70 So. 3d 530, 539 (Fla. 2011). Paralytic drugs[2] cause the

[2] The paralytic rocuronium bromide, which is "functionally equivalent" for the

terrifying sensations of suffocation, air hunger, and feeling entombed alive without being able to move or convey suffering to others. *See, e.g.*, *Baze*, 553 U.S. at 53 ("suffocation"); *Glossip*, 135 S.Ct. at 2781 ("asphyxiated and unable to demonstrate 'any outward sign of distress'"); *see* Van Norman Dec. ¶8 (Doc.1-4; p.237) ("Administration of a paralytic agent to an awake person causes feelings of terror, air hunger, and suffocation, as has been well described by people who have survived the experience."); Lubarsky Dec. ¶18 (Doc.1-2; p.25) ("Plaintiff would experience a sensation akin to being buried alive, but not be able to convey the feeling of pain or suffocation"). The final third potassium-based drug that stops the heart[3] causes the searing physical pain of being burned alive from the inside. *See, e.g.*, *Baze*, 553 U.S. at 53; *Glossip*, 135 S.Ct. at 2781 ("excruciating pain"); *see* Van Norman Decl. ¶9 (Doc.1-4; p.237) ("Administration of more than 40 to 80 mEq of potassium in 1 liter of fluid causes excruciating pain akin to 'having gasoline poured on them and set on fire,' as has been well described by patients who have survived the experience."); Lubarsky Decl. ¶20 (Doc.1-2; p.26) ("Potassium acetate is a caustic chemical and would cause excruciating pain to Plaintiff upon injection"); Lubarsky

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purposes of a lethal injection challenge as the pancuronium bromide used in the *Baze* and *Glossip*. *See Glossip*, 135 S. Ct. at 2735.

[3] Like, potassium chloride, potassium acetate used in Florida's protocol is recognized as causing the same excruciating pain due to potassium's caustic nature. *See, e.g.*, *Van Norman* ¶ 8 (Doc. 1-4 at p237).

Dec. ¶26 (Doc.1-2; p.28) ("agonizing delivery of a caustic chemical surging through his body").

The United States Supreme Court has already accepted either and both of the last two drugs cause pain sufficiently serious enough to be unconstitutional if not abated for the inmate. *See, e.g.*, *Baze*, 553 U.S. at 53. Following *Baze*, the Supreme Court accepted as a given in *Glossip* that the pain and suffering associated with the paralytic and potassium chloride are sufficiently severe as to be unconstitutional if the inmate is not protected from that pain and suffering. *See Glossip*, 135 S.Ct. at 2743 (noting the "relevant question here" deals with whether a 500-milligram dose of midazolam has "the effect of rendering a person insensate to pain caused by the second and third drugs"); *id.* at 2733 (noting petitioners conceded barbiturates "'reliably induce and maintain a comalike state that renders a person *insensate to pain*' caused by administration of the second and third drugs in the protocol." (emphasis added)). Using the second and third drugs unquestionably causes severe pain and suffering if Long is not protected from that pain.

Etomidate cannot protect Long from pain. It is wholly unsuitable as the protocol's first drug. First, etomidate has no analgesic properties and does not prevent pain. Etomidate is not FDA-approved for use as the sole anesthesia drug in minor surgical procedures, and it is *never* used as the sole agent to maintain general anesthesia in any procedure involving any significant noxious stimuli. *See* Van

Norman Decl. ¶1 (Doc.1-4; p.236); Lubarsky Decl. ¶¶10-12 (Doc.1-2; 23-24). Thus, it cannot prevent Long from experiencing suffocation after rocuronium bromide administration and excruciating pain during the potassium acetate injection. *See* Van Norman Decl. ¶¶1, 12 (Doc.1-4; p.236, 237); Lubarsky Decl. ¶¶12-13 (Doc.1-2; p.24).

Without analgesic, it is imperative the first drug achieve and maintain unconsciousness. *Cf. Glossip*, 135 S.Ct. at 2741; *see also Valle*, 70 So. 3d at 539. Unconsciousness is the absence of awareness and perception, including the absence of experiencing pain or other noxious stimuli. *See* Van Norman Decl. ¶3 (Doc.1-4; p.236); Lubarsky Decl. ¶¶7, 13 (Doc.1-2; p.22-23, 24). Given its pharmacokinetic characteristics, etomidate will not induce *and maintain* unconsciousness throughout the lethal injection process. Etomidate is an ultra-short acting hypnotic, which means its clinical effect (the induction of sleep) occurs very rapidly and lasts for a very short time-mere minutes. *See* Van Norman Decl. ¶2 (Doc.1-4; p.236); Lubarsky Decl. at ¶¶9, 17 (Doc.1-2; p.23, 25). Etomidate travels rapidly from its injection site to the brain, where its hypnotic effects become active and produce brief sedation. However, the body's fatty tissues immediately soak up the drug from the bloodstream, which rapidly drops the levels of etomidate in the blood and brain within less than three minutes. Because etomidate has no sedative effects outside of the brain, once the drug leaves the brain and enters the fatty tissue, consciousness

returns. *See* Van Norman Decl. ¶2 (Doc.1-4; p.236); Lubarsky Decl. ¶17 (Doc.1-2; p.25). Thus, there is a substantial risk the etomidate will wear off during the execution, and Long will be aware and sensate of the excruciating pain and terror of the second and third drugs.[4] This is insufficient to ensure a prisoner would not feel the excruciating pain of the second and third drugs. *See* Lubarsky Decl. ¶17 (Doc.1-2; p.25).

Etomidate's effects depend highly on factors related to pharmacokinetic characteristics. Because of its pharmacokinetics, there is no evidence a large dose (200 milligrams) causes a longer duration of the clinical effects. *See* Van Norman Decl. ¶2 (Doc.1-4; p.236); Lubarsky Decl. ¶17 (Doc.1-2; p.25).[5] Moreover, even

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[4] A strong likelihood exists inmates previously subjected to the etomidate protocol suffered severe pain. Even though Florida insists on using a paralytic, accounts suggest even while paralyzed, inmates showed significant distress. Jeff Weinsier, witness to Jimenez's execution, said Jimenez blinked profusely, twitched, and breathed heavily before stopping. *See* Jeff Weisner, Associated Press, *Man executed for North Miami Woman's 1992 Murder* (Dec. 19, 2018), https://www.local10.com/news/florida/north-miami/jose-antonio-jimenez-execution. Joseph Hamrick who also witnessed Jimenez's execution made similar observations. *See Hamrick Affidavit* (Doc.1-4; p.206-207). Jimenez's movement and heavy slow breathing occurring *after* the "consciousness" check indicates Jimenez breathing struggles and awareness, which produces extreme terror. Other irregularities occurred during Branch's execution with his blood-curdling scream when etomidate was injected suggesting pain at injection. *See* Lubarsky Decl. ¶16 (Doc. 1-2; p.24-25).

[5] Because the drug only takes 2.7 minutes to enter fatty tissues, diminishing its supply in the brain and its sedative effects, in Branch's 17-minute execution, by the 16th minute, etomidate's blood concentration would be 1/64th the original dose, the same as at 3.5 mg injection, far under the standard clinical dose of 20-40 milligrams.

brief pauses, such as doing a "consciousness check" and the time it takes for rocuronium injection to take effect, will lead to rapid falls in etomidate's brain levels below those producing sleep in unstimulated patients. *See* Van Norman Decl. ¶2 (Doc.1-4; p.236); *see* Lubarsky Decl. ¶¶7, 23 (Doc.1-2; p.22-23, 26-27).

Long must show a substantial likelihood he can establish the risk of severe pain and suffering posed by Defendants' current execution method is substantial when compared to known and available alternatives. *Glossip,* 135 S.Ct. at 2737. He must show it is substantially likely he can establish an alternative execution method available. As noted recently in *Bucklew*, this is not a difficult burden. 139 S.Ct. 1112, 1128 (2019). A plaintiff "seeking to identify an alternative method of execution is not limited to choosing among those presently authorized by a particular State's law." *Id.* Indeed, a plaintiff "may point to a well-established protocol in another State as a potentially viable option." *Id.* The Court thus saw "little likelihood that an inmate facing a serious risk of pain will be unable to identify an available alternative." *Id.* In a concurring opinion, Justice Kavanaugh emphasized "[i]mportantly, all nine Justices ... agree" current state law need not authorize the alternative method of execution for it to be available. *Id.* at 1136. He also underscored a plaintiff "who contends that a particular method of execution is very

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Therefore, the etomidate in Branch's bloodstream before completed execution was 1/10th the clinical dose, insufficient to ensure Branch would not feel the other drugs' excruciating pain. Lubarsky Decl. ¶17 (Doc. 1-2; p.25).

likely to cause him severe pain should ordinarily be able to plead some alternative method of execution that would significantly reduce the risk of severe pain." *Id.*

Long proposes using a single injection of pentobarbital as a feasible, readily implemented alternative method of execution, in accordance with the protocols of Texas (Doc.1-4; p.28-34), Georgia (Doc.1-4; p.2-14), Missouri (Doc.1-3; p.39-40), or South Dakota's single-drug pentobarbital protocol[6] (Doc.1-4; p.16-26). *See Bucklew*, 139 S.Ct. at 1128 (holding a plaintiff "may point to a well-established protocol in another State as a potentially viable option").

Pentobarbital is available for purchase in Florida. *See* Licensed Florida Pharmacist Silas Raymond Decl. ¶¶15-22 (Doc.1-4; p.157).[7] Pentobarbital can be obtained either in manufactured-form from a manufacturer or distributor, or compounded-form from a compounding pharmacist. *See id.* ¶¶17-22 (Doc.1-4; p.157). Manufactured pentobarbital is available for purchase within Florida. *See id.* ¶¶20-22 (Doc.1-4; p.157). The active pharmaceutical ingredient ("API") for

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[6] South Dakota's protocol, (Doc.1-4; p.16-26), provides for a three-drug protocol, a two-drug protocol, and a one-drug protocol, depending on the date of the inmate's conviction. Appellant is only alleging the one-drug protocol as an alternative method of execution.

[7] In 2017, enough pentobarbital to conduct 56,920 executions was distributed throughout Florida. *See* ARCOS Retail Drug Summary Report: Reporting Period – 2017, U.S.D.O.J. DEA Diversion Control Div., at 804 (2017), *available at* https://www.deadiversion.usdoj.gov/arcos/retail_drug_summary/report_yr_2017.pdf. (Doc.1-4; p.102-136).

pentobarbital is available for purchase by a licensed pharmacist in Florida, and pentobarbital is therefore able to be compounded within Florida. *See id.* ¶¶14-19 (Doc.1-4; p.157). The Florida has made no attempts to purchase pentobarbital from a compounding pharmacy or to ascertain the availability of compounded pentobarbital. *See* Transcript of Evidentiary Hearing, *State of Florida v. Bobby Joe Long*, Case No.84-CF-013346 (Fla. Cir. Ct. 13) (May 3, 2019) ("May 3 EH Transcript") (Doc.1-4; p.79).

Florida has previously asserted it is unable to purchase manufactured pentobarbital because the manufacturers object to its use in lethal injections. *See* May 3 EH Transcript, at 118 (Doc.1-4; p.80). This argument is unpersuasive for two reasons. First, Florida freely admits it obtained and used drugs in the past for use in lethal injection in spite of the manufacturer's objection. *See* May 3 EH Transcript, at 132-33 (Doc.1-4; p.92-93). Second, manufacturers of etomidate, including its developer, Janssen (a subsidiary of Johnson and Johnson),[8] also object to its use in lethal injections.[9] Thus, manufacturer objection has never stopped Florida before,

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[8] "We do not condone the use of our medicines in lethal injections for capital punishment." Carolyn Johnson, *Johnson & Johnson says its drugs shouldn't be used in executions*, Wash. Post (August 22, 2017), https://www.washingtonpost.com/news/wonk/wp/2017/08/22/johnson-johnson-says-its-drug-shouldnt-be-used-to-kill-prisoners/?utm_term=.401a5f8904f3.

[9] *See generally* Lethal Injection Information Center, https://lethalinjectioninfo.org (last visited May 20, 2019).

and applies with equal weight to etomidate, yet Florida has no reservations using etomidate. That other states routinely carry out executions using pentobarbital is additional proof it is a feasible, readily implemented alternative. *See Bucklew*, 139 S.Ct. at 1128. Texas has carried out three executions in 2019 alone using a one-drug pentobarbital protocol, including as recently as April 24, 2019, and Georgia executed John Scotty Garnell Morrow using a one-drug pentobarbital protocol earlier this month on May 2, 2019.[10]

Florida has no legitimate reason for refusing to adopt a single-drug pentobarbital protocol, such as that used by Texas, Georgia, Missouri, and South Dakota. *See Bucklew*, 139 S.Ct. at 1125. Florida Department of Corrections Chief of Pharmaceutical Services, Stephen Whitfield, testified on May 3, 2019, that assuming the availability of pentobarbital, he is not aware of any reason why Florida could not adopt a one-drug pentobarbital protocol. *See* May 3 EH Transcript, at 119-20 (Doc.1-4; p.79-80). The state cannot assert any legitimate penological reasons why it has not adopted the one-drug pentobarbital protocol: unlike other states, Florida has made no "good-faith efforts" to obtain the drug so cannot claim it is unavailable; adopting a one-drug protocol would only enhance "the dignity of the procedure," not detract from it; changing the lethal injection drugs would not "require the

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[10] Executions in 2019, Death Penalty Information Center, https://deathpenaltyinfo.org/execution-list-2019) (last updated May 3, 2019).

involvement of persons whose professional ethics rules or traditions impede their participation"; and the pentobarbital protocol is not "untried and untested" by other states. *See Bucklew*, 139 S.Ct. at 1125, 1130 (citing legitimate reasons why a state may decide not to adopt an alternative protocol). Thus, pentobarbital is a feasible and readily implemented alternative.

The risk of pain associated with Florida three-drug Etomidate Protocol is substantial when compared to the known available alternative of a single-drug pentobarbital protocol. The risk of pain associated with Florida's three-drug Etomidate Protocol is outlined in detail above and hinges on etomidate's inability to induce lasting unconsciousness and Long's subsequent awareness of the excruciating pain and suffering of the second and third drugs. In contrast, it is well-settled a large dose of injected pentobarbital will rapidly induce unconsciousness and produce a quick and painless death. *See, e.g.*, *Bucklew*, 139 S.Ct. at 1132; *West v. Schofield*, 519 S. W. 3d 550, 562 (Tenn. 2017); *cf. Pavatt v. Jones*, 627 F.3d 1336, 1340 (10th Cir. 2010); *Valle v. State*, 70 So. 3d 530, 541 (Fla. 2011). Indeed, in prior litigation in Ohio, Dr. Mark Dershwitz, who has testified on behalf of Florida in similar litigation, attested it was his "opinion to a reasonable degree of medical certainty that pentobarbital, as used in the Ohio Legal injection protocol [a 5 gram dose of injected pentobarbital], will result in the rapid and painless death of the inmate whom it is administered." Dershwitz Decl. ¶¶5, 12 (Doc.1-4; p.166; 168), as

filed in *In Re: Ohio Execution Protocol Litigation*, No. 2:11-cv-01016-EAS-MRM, Dkt. No. 146-2 (S.D. Ohio) (filed Dec. 10, 2012). Thus, an injection of pentobarbital would curtail the high risk of severe pain, terror, and suffering resulting from the Etomidate protocol, as outlined *supra*, and lead to a quick death with swift unconsciousness and minimal pain. Accordingly, Long can establish the second prong of *Glossip*, requiring a feasible and readily implemented alternative protocol that substantially reduces the risk of pain.

In addition to the general constitutionally intolerable risk of severe pain from the Etomidate Protocol, Long suffers from specific medical conditions, namely severe Traumatic Brain Injury (TBI) and Temporal Lobe Epilepsy that substantially increase the risk he will suffer severe pain from the protocol. (Doc.1). Patients who suffer a traumatic brain injury, especially a severe one, faces an increased risk of post-traumatic epileptic seizures, including for years after the initial injury. *See, e.g.*, *Epilepsy Can Follow Traumatic Brain Injury*, CDC (Mar. 27, 2017), *available at https://www.cdc.gov/features/epilepsy-tbis/index.html*; B. Masel, et al., *Traumatic Brain Injury: A Disease Process, Not an Event*, 27 J. of Neurotrauma 1529-1540 (Aug. 2010). In addition to this risk of post-traumatic seizures, Long also suffers from temporal lobe epilepsy. Temporal lobe epilepsy is the most common form of partial or location-related epilepsy, named for the location of the epileptic activity (the temporal lobe). Temporal lobe seizures can involve both awareness and a lack

of awareness during the seizure. Lasting 30 to 60 seconds, the seizures can cause a fixed stare, impaired consciousness, fumbling with fingers, change in arm posture, lip-smacking movements, gibberish or inability to speak, and generalized tonic-clonic jerking. *See, e.g.*, Holmes, Sirven & Fisher, *Temporal Lobe Epilepsy (TLE)*, Epilepsy Foundation (Sept. 4, 2013), *available at https://www.epilepsy.com/learn/types-epilepsy-syndromes/temporal-lobe-epilepsy-aka-tle*.

Etomidate is contraindicated for individuals who are predisposed to seizures because it is more likely to induce a seizure. *See, e.g.*, Lubarsky Decl. ¶¶32-33 (Doc.1-4; p.25). A seizure may cause independent pain and suffering, including from biting of the tongue or thrashing against the restraints used in the lethal injection protocol, which could cause severe pain once the seizure has subsided. In addition, it would be difficult for the execution team to tell the difference between movements due to seizure, movements due to myoclonus caused by the etomidate, and voluntary movement indicating consciousness. This difficulty risks the execution team assessing unconsciousness before that stage has been reached. In addition, it is also likely to delay the time it takes to complete a consciousness check, such that the ultra-short-acting etomidate will wear off. Even if the seizures result in a temporary loss of awareness, this symptom may mimic unconsciousness such that the execution team may misinterpret Long as unconscious. After administration of the paralytic,

once out of the seizure, Long would be physically unable to alert the execution team to his awareness. If the consciousness check is invalid or delayed, the administration of the second and third drugs will cause excruciating pain to Long. Lubarsky Decl. ¶23, 32-34 (Doc.1-4; p.26-27; 30-31). Additionally, a seizure involving movement could cause the intravenous (IV) lines to become dislodged, creating a substantial risk for mis-delivery of the execution drugs, much like what happened in the 2006 botched execution of Angel Diaz. Lubarsky Decl. ¶34 (Doc.1-4; p.227).

Long is also likely to succeed on the merits of Count II of his Complaint, which challenges Florida's three-drug protocol in lieu of one-drug protocol as violating the evolving standards of decency. The Eighth Amendment requires punishment for crimes comply with the "evolving standards of decency that mark the progress of a maturing society." *Roper v. Simmons*, 543 U.S. 551, 561 (2005) (quoting *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958) (plurality opinion)). To determine evolving standards, courts look to the "objective indicia of society's standards"; "the clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." *Atkins*, 536 U.S. at 312. (2002). Since *Baze*, when no state used a one-drug protocol and the "broad consensus" was a three-drug protocol, many states now use, have used, intend, or have intended to use a one-drug protocol, including Georgia, Missouri, Texas, South Dakota, Arizona, Idaho, Ohio, Washington, Arkansas, California, Kentucky,

Louisiana, and North Carolina.[11] *See* Death Penalty Information Center, https://deathpenaltyinfo.org/state-lethal-injection. Because no state currently uses etomidate as the first drug, Florida's use of etomidate constitutes cruel and unusual punishment.

If the Court disagrees Long is substantially likely to succeed on the merits of claims one and/or two, this is only because the defendants have violated Long's constitutional rights under the First, Fifth, Eighth, and Fourteenth Amendments by objecting to his document request and limiting access of information from Defendant's employees. Accordingly, Long is substantially likely to succeed on claim three in the alternative. The Constitution's prohibition against cruel and unusual punishment protects persons who are sentenced to death from being executed in a manner that denies basic human dignity. *See* U.S. CONST. AMEND. VIII; *Bucklew*, 139 S.Ct. at 1124; *Glossip*, 135 S.Ct. at 2737; *Baze*, 553 U.S. at 50. "It has long been recognized that 'fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights." *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972) (quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 170 (1951) (Frankfurter, J., concurring)); *see United States v. 408 Peyton Rd., S.W., Atlanta, Fulton Cty., Ga.*, 162 F.3d 644, 651 (11th Cir. 1998). Florida seeks such a

[11] Some of these states no longer have the death penalty or have a moratorium on executions. Others have since changed protocols or not carried out an execution.

secret, one-sided determination of facts decisive of Long's right to be free from a preventable and excruciating death. *See, e.g.*, *Mathews v. Eldrige*, 424 U.S. 319 (1976); *Morrissey v. Brewer*, 408 U.S. 471, 481-83 (1972); *Goldberg v. Kelly*, 397 U.S. 254, 260-63 (1970). It is patently unfair to permit the state to use secrecy as a sword and shield to defeat Long's claims. *See, e.g.*, *Cox v. Adm'r U.S. Steel & Carnegie*, 17 F.3d 1386, 1417 (11th Cir. 1994).

There is little doubt a prisoner facing execution will suffer irreparable injury if a stay is not granted. *Wainwright v. Booker*, 473 U.S. 935 n.1 (1985) (Powell, J., concurring).

> Attorneys representing defendants under sentence of death have a difficult and arduous task to perform, but in seeking stays of execution they need devote little time to the oft-litigated issue of "irreparable injury," Death is a punishment different from all other sanctions in kind rather than degree." *Woodson v. North Carolina*, 428 U.S. 280, 303-304, 96 S.Ct. 2978, 49 L. Ed. 2d 944 (1976) (opinion of STEWART, POWELL, and STEVENS, JJ.). The irreversible nature of the penalty makes irreparable by definition any injury inflicted in violation of the United States Constitution.

Wainwright v. Spenkelink, 442 U.S. 901, 902 (1979) (REHNQUIST, J., dissenting from order denying Florida's Attorney General's motion to vacate stay of execution). *See also O'Bryan v. Estelle*, 691 F.2d 706, 708 (5th Cir. 1982); *Harris v. Johnson*, No. H-04-CV-1514 (S.D. Tex. June 29, 2004; *Oken v. Sizer, Jr.*, 321 F. Supp. 2d 658 (D. MD. 2004); *Hill v. Ozmint*, No. 2:04-0489-18AJ (D.S.C. March 4, 2004).

Justice Rehnquist's observation regarding the irreparable injury standard in *Spenkelink* stands to reason even if one evaluates the irreparable harm stemming from extreme pain and suffering during the administration of a specific protocol, rather than the inmate's death itself. *See Powell v. Thomas*, 784 F. Supp. 2d 1270, 1283 (M.D. Ala. 2011) ("However, the alleged irreparable injury is not the fact alone that [the inmate] will die by execution. That alone is not a cognizable constitutional injury, *Baze*, 553 U.S. at 47, 28 S.Ct. 1520. The alleged irreparable injury lies in the assertion that, under present protocols, he may be conscious after being injected with pentobarbital and able to feel pain during the administration of the final two chemicals."), *aff'd*, 641 F.3d 1255 (11th Cir. 2011). This is not only because the pain described by Drs. Van Norman and Lubarsky is torturous, but because a violation of constitutional rights is presumed to cause irreparable injury. *See Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996). Thus, where a movant has demonstrated a substantial likelihood of success on the merits of one or more constitutional claims, as Long has done here, irreparable injury will be presumed. Where, as here, the constitutional violation involves torturous pain, that presumption cannot be rebutted.

Finally, the Court must look to whether the irreparable injury is "actual" and "imminent." *Siegel v. LePore*, 234 F.3d 1163, 1176-77 (11th Cir. 2000) (*quoting Ne. Fla. Chapter of Ass'n of Gen. Contractors of Am. v. City of Jacksonville, Fla.* 896 F. 2d 1283, 1285 (11th Cir. 1990)). If Long is not granted an injunction or a stay of

execution, he will be put to death with a substantial risk of harm in violation of the Eighth and Fourteenth Amendments on May 23, 2019. This is, without doubt, an "actual" and Imminent" injury. Thus, Long can meet the second prong of the test for injunctive relief.

While recognizing that Florida has a finality interest in imposing sentences of death, substantial harm will not result if a stay of execution is granted. Long will remain in the custody of FDOC, where he has been held since his conviction. He is not seeking an injunction to prevent the state from carrying out his sentence; rather Movant is only seeking to enjoin Appellees from violating his constitutional right in the process of carrying out his sentence. The delay resulting from granting the temporary relief sought herein will have little adverse effect upon the State's interest. *See, Gomez v. U.S. Dist.Ct. for Northern Dist. Of Ca.*, 966 F. 2d 460,462 (9th Cir. 1992) (Noonan J., dissenting from grant of writ of mandate) ("The state will get its man in the end. In contrast, if persons are put to death in a manner that is determined to be cruel, they suffer injury that can never be undone, and the Constitution suffers an injury that can never be repaired.") If Movant loses on the merits, his execution will go forward, albeit somewhat later in time. If Movant prevails on the merits, the FDOC will still be permitted to execute him once it issues a constitutional protocol, which will not take long given that Florida already authorizes and uses lethal injection so it has the chamber and supplies. Thus, the balance of harms tips sharply

in favor of entering a preliminary injunction.

The issue of whether the State is executing its prisoners in a manner that subjects them to an excruciatingly painful, torturous death is a matter of vital public interest – so much so that the courts look to the national community to assist in determining the evolving standards of decency for an Eighth Amendment claim challenging a state's method of execution. Humanity and dignity, as well as respect for the Constitution, are gravely offended by executions that violate such standards of decency. Thus, it is affirmatively in the public interest to address and resolve the merits of Movant's claims in order to identify and put an end to unnecessary procedures that post a substantial risk of causing gratuitous and grievous suffering. *See Cooey v. Taft*, 2007 U.S. Dist. LEXIS 39534 at *6 (S.D. Ohio 2007) (granting emergency motion for preliminary injunction and stating "Public interest is served only by enforcing constitutional rights. By comparison, the public interest has never been and could never be served by rushing to judgment at the expense of a condemned inmate's constitutional rights.").

IN THE ALTERNATIVE, LONG REQUESTS AN EXPEDITED APPELLATE PROCEEDING

In light of the imminence of the execution and the gravity of the consequences on Long, there is certainly good cause for the Court to expedite this appeal. Only upon a motion to the Court, an appeal may be expedited for good cause shown. *See* 11th Cir. R. 27; *see* IOP 27(3). The Court clearly considers motions in capital cases,

where there is a pending execution, to be emergency motions. *See* 11th Cir. R. 27-1(b); *see e.g.*, *Dominique Ray v. Commissioner, Alabama Dep't.*, 11th Cir. Appeal No.19-10405-P. The District Court proceedings were completed within three days. Long filed his notice of appeal shortly after the denial of relief and he did not request any further reconsideration by the District Court. Further, there are only 29 days between the signing of the warrant and the date of the execution for litigation. Long's warrant litigation has continually been constrained, but he has reasonably met the courts' deadlines. Long is set to be executed on May 23, 2019. A failure to expedite these appellate proceedings will bring irreparable harm to Long because he will be executed pursuant to an unconstitutional three-drug lethal injection protocol by Appellees.

RELIEF SOUGHT

Long requests that the Court stay his execution or in the alternative expedite his appeal, or grant any relief the Court deems necessary and proper.

CERTIFICATE OF FONT AND WORD COUNT

Undersigned counsel certifies that this motion is in 14 point Times New Roman and excluding the cover page, the certificate of interested persons and corporate disclosure statement, and any certificates of counsel contains 5119 words.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on Monday, June 1, 2015, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system

/s/Robert A. Norgard
ROBERT A. NORGARD

APPENDIX H

Appeal No. 19-11942-P

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BOBBY JOE LONG,
APPELLANT,

V.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS ET AL.
APPELLEES.

Appeal from the United States District Court
for the Middle District of Florida
District Court No.: 8:19-cv-1193 MSS-AEP
Capital Case. Execution Scheduled for May 23, 2019.

BRIEF OF THE APPELLANT

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Rules of the United States Court of Appeals for the Eleventh Circuit, counsel for Appellant, Bobby Joe Long, hereby certifies that the following trial judges, attorneys, persons, associations of persons, firms, partnerships, or corporations have an interest in the outcome of this case:

1. Ahmed, Raheela, Assistant Federal Public Defender, Middle District of Florida.
2. Ahmed, Syed, former Assistant Capital Collateral Regional Counsel for Middle Region of Florida.
3. Ake, Stephen D., Assistant Attorney General and counsel for Appellees.
4. Allen, Curt, former Assistant State Attorney for the Thirteenth Judicial Circuit in and for Hillsborough County, Florida.
5. Backhus, Terri Lynn, Assistant Federal Public Defender, Middle District of Florida
6. Barkett, Rosemary, former Florida Supreme Court Justice.
7. Behnke, Debra, former Circuit Court Judge for the Thirteenth Judicial Circuit in and for Hillsborough County, Florida.
8. Benito, Michael L., former Assistant State Attorney for the Thirteenth Judicial Circuit in and for Hillsborough County, Florida
9. Black, Anthony K., former Circuit Court Judge for the Thirteenth Judicial Circuit in and for Hillsborough County, Florida.
10. Blanco, Katherine Vickers, former Assistant Attorney General.
11. Bolotin, Steven L., Assistant Public Defender for the Tenth Judicial Circuit.
12. Bondi, Pamela Jo, former Attorney General of Florida.

13. Brown, Gregory William., Assistant Federal Public Defender, Middle District of Florida and counsel for Appellant.

14. Browne, Scott Andrew, Assistant Attorney General.

15. Butterworth, Robert A., former Attorney General of Florida.

16. Canady, Honorable Charles T., Florida Supreme Court Chief Justice.

17. Chalu, Wayne, former Assistant State Attorney for the Thirteenth Judicial Circuit in and for Hillsborough County, Florida.

18. Crist, Charlie, former Attorney General of Florida and former Governor of Florida.

19. DeBock, Chris, former Assistant Capital Collateral Regional Counsel for Middle Region of Florida.

20. DeSantis, Ronald, Governor of Florida.

21. Dillinger, Bob, Public Defender for the Sixth Judicial Circuit.

22. Egan, Brenna Maryann, Research and Writing Specialist, Middle District of Florida.

23. Elm, Donna Lee, Federal Public Defender, Middle District of Florida.

24. Ehrlich, Raymond, former Florida Supreme Court Justice.

25. Fraser, Robert A., Esquire.

26. Freeland, Timothy Arthur, Assistant Attorney General.

27. Griffin, John P., former Circuit Court Judge for the Thirteenth Judicial Circuit in and for Hillsborough County, Florida.

28. Grimes, Stephen H., former Florida Supreme Court Justice.

29. Gruber, Mark, Assistant Capital Collateral Regional Counsel for Middle Region

of Florida.

30. Gunn, Sean, Assistant Federal Public Defender, Northern District of Florida.

31. Harding, Major B., former Florida Supreme Court Justice.

32. Hileman, Byron P., former Assistant Capital Collateral Regional Counsel for Middle Region of Florida.

33. Inch, Mark A., Secretary of the Florida Department of Corrections and Appellee.

34. Kilgore, Sidney W., former Assistant Capital Collateral Regional Counsel for Middle Region of Florida.

35. Kogan, Gerald, former Florida Supreme Court Justice.

36. Labarga, Honorable Jorge, Florida Supreme Court Justice.

37. Lagoa, Barbara, Florida Supreme Court Justice.

38. Landry, Robert J., former Assistant Attorney General.

39. Lawson, Alan, Florida Supreme Court Justice.

40. Lazzara, Richard A., former Circuit Court Judge for the Thirteenth Judicial Circuit in and for Hillsborough County, Florida.

41. Long, Bobby Joe, Appellant.

42. Lewis, Honorable R. Fred, former Florida Supreme Court Justice.

43. Luck, Robert J., Florida Supreme Court Justice.

44. Martin, Tennie, Assistant Federal Public Defender, Middle District of Florida and counsel for Appellant.

45. McDonald, Parker Lee, former Florida Supreme Court Justice.

46. Mitcham, Bob Anderson, former Circuit Court Judge for the Thirteenth Judicial

Circuit in and for Hillsborough County, Florida

47. McNeil, Walter A., former Secretary of Florida Department of Corrections.

48. Moody, Ashley, Attorney General of Florida.

49. Moody, Chris, former Assistant State Attorney for the Thirteenth Judicial Circuit in and for Hillsborough County, Florida.

50. Moorman, James Marion, former Public Defender for Tenth Judicial Circuit, Florida.

51. Moser, John, former Capital Collateral Regional Counsel for Middle Region of Florida.

52. Muñiz, Carlos G., Florida Supreme Court Justice.

53. Nolas, Billy H., former Assistant Federal Public Defender, Northern District of Florida.

54. Norgard, Andrea M., Esquire.

55. Norgard, Robert Anthony, Esquire, counsel for Appellant.

56. Ober, Mark A., former State Attorney for the Thirteenth Judicial Circuit in and for Hillsborough County, Florida.

57. Overton, Ben F., former Florida Supreme Court Justice.

58. Owens, A. Anne, Assistant Public Defender for the Tenth Judicial Circuit.

59. Pacheco, Christina Z., Assistant Attorney General and counsel for Appellees.

60. Pariente, Honorable Barbara J., former Florida Supreme Court Justice.

61. Perry, James E. C., former Florida Supreme Court Justice.

62. Polston, Honorable Ricky, Florida Supreme Court Justice.

63. Porcelli, Anthony E., United States District Court Magistrate Judge for the

Middle District of Florida.

64. Pruner, James Jay, Assistant State Attorney for the Thirteenth Judicial Circuit in and for Hillsborough County, Florida.

65. Quince, Honorable Peggy A., former Florida Supreme Court Justice.

66. Rappaport, David M., Esquire.

67. Reddish, Barry, Warden of Florida State Prison and Appellee.

68. Reiter, Michael, former Assistant Capital Collateral Regional Counsel for Middle Region of Florida.

69. Rubin, Ellis S., Esquire.

70. Sabella, Christopher C., Circuit Court Judge for the Thirteenth Judicial Circuit in and for Hillsborough County, Florida.

71. Seace, Kim, former Assistant State Attorney for the Thirteenth Judicial Circuit in and for Hillsborough County, Florida.

72. Scriven, Mary S., United States District Court Judge for the Middle District of Florida.

73. Sexton, Susan G., former Circuit Court Judge for the Thirteenth Judicial Circuit in and for Hillsborough County, Florida.

74. Shaw, Leander J. Jr., former Florida Supreme Court Justice.

75. Simms, Michelle, victim.

76. Sisco, Michelle, Circuit Court Judge for the Thirteenth Judicial Circuit in and for Hillsborough County, Florida.

77. Tucker, Kenneth, former Secretary of Florida Department of Corrections.

78. Warren, Andrew, State Attorney for the Thirteenth Judicial Circuit in and for Hillsborough County, Florida.

79. Whittemore, James D., United States District Court Judge for the Middle

District of Florida.

80. Williams, Shirley, former Assistant State Attorney for the Thirteenth Judicial Circuit in and for Hillsborough County, Florida.

81. Wright, Carol, Chief Assistant Federal Public Defender, Middle District of Florida.

82. Vollrath, Sharon, former Assistant State Attorney for the Thirteenth Judicial Circuit in and for Hillsborough County, Florida.

83. Young, James A., former Assistant Attorney General.

STATEMENT REGARDING ORAL ARGUMENT
(Fed.R.App.P. 34 (a), (f) & 11th Cir. R. 34-3(c))

Appellant Bobby Joe Long respectfully requests the opportunity to present oral argument. This is a death penalty case with an execution date set for May 23, 2019, and it addresses the means by which Appellant will be executed. Moreover, Appellant has raised novel claims on which the Court would benefit from oral argument.

CITATIONS TO THE RECORD

Reference to the District Court Record shall reference the Docket Number of the filing followed by page number, if necessary.

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STATEMENT OF JURISDICTION
(Fed.R.App.P. 28(a)(4))

This is an appeal from the denial of Long's Motion for Temporary Restraining Order, Preliminary Injunction, and/or Stay of Execution ("TRO"). This Court's jurisdiction rests on 28 U.S.C. §1292. Jurisdiction originally vested in the United States District Court, Middle District of Florida, under 28 U.S.C. §§ 1331 (federal question), 1343 (civil rights violations), 2201 (declaratory relief), 2202 (injunctive relief) and 1367 (supplemental jurisdiction).

The district court's final order denying Appellant's Motion for Temporary Restraining Order, Preliminary Injunction, and/or Stay of Execution was filed on May 19, 2019.

STATEMENT OF THE ISSUES
(Fed.R.App.P. 28(a)(5))

The District Court abused its discretion in denying the Request for a TRO based upon finding res judicata bars this suit.

STATEMENT OF THE CASE
(Fed.R.App.P. 28(a)(6))

Bobby Joe Long ("Long") is a disabled army veteran with a VA-certified service-connected disability after suffering a severe Traumatic Brain Injury while on active duty. Long is incarcerated at Florida State Prison under a death sentence set to be executed on May 23, 2019. Pursuant to an extremely expedited briefing schedule set by both the Florida Supreme Court and the local circuit court, Long filed a Motion to Vacate Judgment of Conviction and Sentence of Death After Death Warrant Signed as a third successive post-conviction motion in state court. Claim two, relevant here, argued Florida's current lethal injection protocol, in particular etomidate's use as the first drug, violates the Eighth Amendment's prohibition against cruel and unusual punishment. In addition, Long claimed that Florida's etomidate protocol as applied to him and his unique medical conditions of severe traumatic brain injury and temporal lobe epilepsy would cause him severe suffering.

(a) Factual and Procedural History of the Trial Proceedings.

The procedural history and facts of the trial proceedings were summarized by the Florida Supreme Court in its direct appeal opinion as follows:

> On November 28, 1984, a Hillsborough County grand jury indicted Long for the kidnapping, sexual battery, and first-degree murder of Simms. This murder occurred on May 27, 1984.
>
> On April 27, 1985, Long was convicted of the kidnapping and first-degree murder of another victim, Virginia Johnson, in Pasco County, for which he was sentenced to death on May 10, 1985. Johnson's body had been

discovered on November 6, 1984.

> On September 23, 1985, Long entered into a plea agreement in which he pleaded guilty to all offenses charged against him in Hillsborough County. Those offenses included at least eight counts of first-degree murder, nine counts of kidnapping, eight counts of sexual battery, and one probation violation. In accordance with the plea agreement, Long agreed not to contest the admissibility of his confession or of physical evidence found in his car and apartment. In return, the State agreed to life sentences for all of the murders for which he was charged except that of the victim in this case. It was agreed that the State could seek the death penalty for this murder. Additionally, the agreement prohibited the State from using the other Hillsborough murder convictions that resulted from the plea agreement as aggravating factors for the murder in this case. However, it was agreed that convictions entered against Long before he executed the plea agreement could be used against him in aggravation.

Long v. State, 610 So. 2d 1268, 1269 (Fla. 1992). After a penalty phase proceedings, a jury rendered a unanimous advisory vote. *See id.* at 1272. The trial court sentenced him to death. *See id.* The trial court found the following aggravators:

> (1) that the crime was committed while Long was engaged in the commission of a kidnapping; (2) that the crime was especially heinous, atrocious, or cruel; (3) that Long was previously convicted of a felony involving the use or threat of violence; and (4) that the crime was committed in a cold, calculated, and premeditated manner.

Id. The trial court found the following evidence in mitigation:

> (1) that Long's capacity to appreciate the criminality of his conduct or conform his actions to the law was substantially impaired, and (2) that the capital felony was committed while Long was under the influence of extreme mental or emotional disturbance.

Id.

(b) Factual and Procedural History of the relevant Post-conviction Proceedings.

The following summary of the state court procedural history during the warrant proceedings demonstrates that Long was denied a full and fair opportunity to present his evidence in support of his claims. Long was given just 30 days from the issuance of his warrant on April 23, 2019, to his execution date of May 23. On April 24, 2019, the Florida Supreme Court issued an expedited briefing schedule requiring all proceedings in the circuit court to be completed by May 7, and all appellate briefing to be completed a mere seven days later by May 14. The post-conviction court then set a schedule requiring all record requests to be completed by April 26, at noon; all post-conviction motions to be filed by April 29, at noon (four days later); the case management conference to be conducted on May 1, at 9:30 am; and the evidentiary hearing, if granted, to be held on May 2, and/or May 3.

After a hearing on the records requests, Long was restricted from receiving relevant records, in particular his medical records pursuant to a properly executed release, to support his claims. At the case management conference held on May 1, the post-conviction court set an evidentiary hearing for May 3, 2019, and limited the hearing to only Long's as-applied challenge. The post-conviction court further ordered each party to file their evidentiary hearing lists by 5:00 p.m. on May 1.

Following Long's timely witness list filing, the State of Florida filed a motion to strike witnesses on May 2. That day, Long's counsel, who were in the process of

preparing for the evidentiary hearing, were informed the trial court would hear that motion at 2:00 p.m. that afternoon. During the hearing, Long withdrew several listed witnesses. Then, the post-conviction court unreasonably restricted Long to only one expert witness (neuropsychologist) to present essential evidence of Long's severe traumatic brain injury and temporal lobe epilepsy and further required Long to choose which one would testify within one hour of the hearing. The state court also struck three lay witnesses that were prepared to testify as to the agony and terror of experiencing awareness during surgery.

The state court limited Long's ability to present evidence by excluding witnesses as to the availability of an alternative method of execution. Specifically, the state court prohibited Long from calling a paralegal and any FDOC witnesses that he designated. The post-conviction court told the State that they can "come up with a name of a person with the [FDOC] who would be able to testify . . . why the State of Florida doesn't follow the protocols of other states when it comes to lethal injection." The state was ordered to provide that name by 4:00 p.m. May 2, 2019. As a result, Long's counsel met the DOC official for the first time on the day of the evidentiary hearing.

(c) Factual and Procedural History of the District Court Proceedings

On May 16, 2019, Long filed a Complaint pursuant 42 U.S.C. §1983 against Appellees for the violations and threatened violations of his constitutional rights. (Doc.1). Long raised four counts in his Complaint. (Doc.1). Simultaneously, Long

filed a Motion for a Temporary Restraining Order, for a Preliminary Injunction, and/or a Stay of Execution. (Doc.2).

On May 17, 2019, the District Court issued an Order requiring expedited briefing on Long's Motion for a Temporary Restraining Order, for a Preliminary Injunction, and/or a Stay of Execution ("TRO"). The District Court ordered Appellees file their response on May 17, and Long to file his reply by May 18. (Doc.10). Appellees filed their response on May 17, and Long filed his reply on May 18. (Doc.16; 19). On May 18, the Court issued an Order denying relief. (Doc.21).

(d)Ruling Presented for Review before this Court

Long requests that this Court review the final order dated May 18, 2019, by the District Court denying him relief. (Doc.1).

SUMMARY OF THE ARGUMENTS

Res judicata cannot bar Long's claims because giving preclusive effect to a summary denial without a hearing on Long's general method of execution claims and with a severely curtailed, unfair hearing on Long's as-applied challenge, would violate Due Process under the Fourteenth Amendment and work a manifest injustice.

Res judicata is not to be applied rigidly. This Court has declined to apply res judicata where an inmate was not given an evidentiary hearing on his challenge in state court. *See Chavez v. Sec'y*, 742 F.3d 1267 (11th Cir. Feb. 12, 2014). Like in Chavez, Long was denied an evidentiary hearing on his general challenge, despite providing compelling new evidence regarding the dangers of Florida's torturous etomidate protocol.

Even where Long received an evidentiary hearing in state court, this Court's opinion in *Muhammad v. Secretary, Florida Department of Corrections*, 739 F. 3d 683 (11th Cir. 2014), does not bar relief. Unlike Mohammad, Long's state-court evidentiary hearing was severely curtailed in violation of the Fourteenth Amendment, because crucial discovery was denied, including Long's relevant medical records; the court excluded numerous witnesses including Department of Corrections personnel with knowledge of drug alternatives and experts who could opine on Long's unique medical conditions; and the curtailment of questioning regarding the general effects of etomidate and the other drugs, which was relevant to Long's as-applied challenge.

Thus, applying res judicata to bar Long's § 1983 complaint would work a manifest injustice resulting in a torturous death for Long.

STANDARDS OF REVIEW
(Fed.R.App.P. 28(a)(8)(B))

Denials of a stay of execution and denials of a preliminary injunction are both reviewed under the abuse-of-discretion standard. *See Jones v. Allen,* 485 F.3d 635, 639 (11th Cir.2007) (denial of stay of execution); *McDonald's Corp. v. Robertson,* 147 F.3d 1301, 1306 (11th Cir. 1998) (denial of motion for a preliminary injunction). A stay of execution is a form of equitable relief. *Williams v. Allen,* 496 F.3d 1210, 1212–13 (11th Cir.2007). This Court should grant a stay of execution, where, as here, the moving party has shown[1] that: (1) he has a substantial likelihood of success on the merits; (2) he will suffer irreparable injury unless the injunction issues; (3) the stay would not substantially harm the other litigant; and (4) if issued, the injunction would not be adverse to the public interest. *See Powell v. Thomas*, 641 F.3d 1255, 1257 (11th Cir. 2011); *In re Holladay,* 331 F.3d 1169, 1176 (11th Cir.2003).

[1] Long incorporates the arguments made in his Motion for Temporary Restraining Order, Preliminary Injunction, and/or Stay of Execution, filed in the District Court (Doc. 2), his Reply In Support of Emergency Motion for Temporary Restraining Order, Preliminary Injunction, and/or stay of execution (Doc. 19), and the motion for a stay of execution presented before this Court. In this Brief, Long addresses res judicata because that is the basis for the denial of his motion before the District Court; however, Long has fully briefed all four requirements in these other pleadings.

APPENDIX

I

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Case No. 19-11942-P

BOBBY JOE LONG,

Petitioner/Appellant,

v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, et. al.,

Respondents/Appellees.

Appeal from the United States District Court for the
Middle District of Florida, Tampa Division
District Court No. 8:19-cv-1193-MSS-AEP

ANSWER BRIEF OF THE APPELLEES

ASHLEY MOODY
ATTORNEY GENERAL OF FLORIDA

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Senior Assistant Attorney General
Florida Bar No. 14087

/s/ Christina Z. Pacheco
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Bobby Joe Long v. Secretary, FL DOC, et al.
Case No. 19-11942-P

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and 11th Circuit Rule 26.1-1, counsel for Appellees state that the following trial judges, attorneys, persons, associations of persons, firms, partnerships, or corporations have an interest in the outcome of this case:

Ahmed, Raheela, Assistant Federal Public Defender, Middle District of Florida;

Ahmed, Syed, former Assistant Capital Collateral Regional Counsel for Middle Region of Florida;

Ake, Stephen D., counsel for Appellee;

Allen, Curt, former Assistant State Attorney for the Thirteenth Judicial Circuit in and for Hillsborough County, Florida

Backhus, Terri L., federal counsel for Appellant;

Barkett, Honorable Rosemary, former Florida Supreme Court Justice;

Behnke, Debra, former Circuit Court Judge, Thirteenth Judicial Circuit;

Benito, Michael, former counsel for Appellee;

Black, Anthony, Circuit Court Judge, Thirteenth Judicial Circuit;

Blanco, Katherine V., former counsel for Appellee;

Bolotin, Steven, former counsel for Appellant;

Bondi, Pamela Jo, former Attorney General of Florida;

Brown, Gregory, federal counsel for Appellant;

Browne, Scott, Chief-Assistant Attorney General;

Butterworth, Robert A., former Attorney General of Florida;

Canady, Honorable Charles T., Florida Supreme Court Justice;

Chalu, Wayne, former Assistant State Attorney for the Thirteenth Judicial Circuit in and for Hillsborough County, Florida;

Crews, Michael D., former Secretary, Florida Department of Corrections;

Crist, Charlie, former Attorney General of Florida;

DeBock, Chris, former Assistant Capital Collateral Regional Counsel for Middle Region of Florida;

DeSantis, Ron, Governor of Florida;

Dillinger, Bob, Public Defender for the Sixth Judicial Circuit;

Egan, Brenna Maryann, Research and Writing Specialist, Middle District of Florida;

Elm, Donna Lee, Federal Public Defender, Middle District of Florida;

Ehrlich, Honorable Raymond, former Florida Supreme Court Justice;

Fraser, Robert, former counsel for Appellant;

Freeland, Timothy, Assistant Attorney General;

Griffin, John P., former Circuit Court Judge for the Thirteenth Judicial Circuit in and for Hillsborough County, Florida;

Grimes, Honorable Stephen H., former Florida Supreme Court Justice;

Gruber, Mark, Assistant Capital Collateral Regional Counsel for Middle Region of Florida;

Gunn, Sean, federal counsel for Appellant;

Harding, Honorable Major B., former Florida Supreme Court Justice;

Hileman, Byron P., former counsel for Appellant;

Inch, Mark S., Secretary, Florida Department of Corrections;

Jones, Julie L., former Secretary, Florida Department of Corrections;

Kilgore, Sidney W., former Assistant Capital Collateral Regional Counsel for Middle Region of Florida;

Kogan, Honorable Gerald, former Florida Supreme Court Justice;

Labarga, Honorable Jorge, Florida Supreme Court Justice;

Lagoa, Barbara, Florida Supreme Court Justice;

Landry, Robert J., former Assistant Attorney General;

Lawson, Honorable Alan, Florida Supreme Court Justice;

Lazzara, Richard A., Circuit Court Judge, Thirteenth Judicial Circuit;

Lewis, Honorable R. Fred, Florida Supreme Court Justice;

Bobby Joe Long v. Secretary, FL DOC, et al.
Case No. 19-11942-P

Long, Robert Joe, Appellant;

Luck, Robert J., Florida Supreme Court Justice;

Martin, Tennie B., federal counsel for Appellant;

McDonald, Honorable Parker Lee, former Florida Supreme Court Justice;

McLain, W.C., former counsel for Appellant;

McNeil, Walter A., former Secretary, Florida Department of Corrections;

Mitcham, Honorable Bob Anderson, former Circuit Court Judge, Thirteenth Judicial Circuit;

Moody, Ashley, Attorney General of Florida;

Moody, Chris, former Assistant State Attorney for the Thirteenth Judicial Circuit in and for Hillsborough County, Florida;

Moorman, James Marion, former Public Defender, Tenth Judicial Circuit;

Moser, John W., former counsel for Appellant;

Muñiz, Carlos G., Florida Supreme Court Justice;

Nolas, Billy H., former federal counsel for Appellant;

Norgard, Andrea M., counsel for Appellant;

Norgard, Robert Anthony, counsel for Appellant;

Ober, Mark A., former State Attorney, Thirteenth Judicial Circuit of Florida;

Overton, Honorable Ben F., former Florida Supreme Court Justice;

Owens, A. Anne, former counsel for Appellant;

Pacheco, Christina Z, counsel for Appellee;

Pariente, Honorable Barbara J., Florida Supreme Court Justice;

Perry, Honorable James E. C., Florida Supreme Court Justice;

Polston, Honorable Ricky, Florida Supreme Court Justice;

Porcelli, Honorable Anthony E., United States District Court Magistrate Judge, Middle District of Florida;

Pruner, Jay, Assistant State Attorney, Thirteenth Judicial Circuit;

Quince, Honorable Peggy A., former Florida Supreme Court Justice;

Rappaport, David M., former counsel for Appellant;

Reddish, Barry, Warden of Florida State Prison and Appellee;

Reiter, Michael, former Assistant Capital Collateral Regional Counsel for Middle Region of Florida;

Rubin, Ellis S., former counsel for Appellant;

Sabella, Honorable Christopher C., Circuit Court Judge, Thirteenth Judicial Circuit;

Seace, Kim, former Assistant State Attorney for the Thirteenth Judicial Circuit in and for Hillsborough County, Florida;

Scriven, Honorable Mary S., United States District Court Judge;

Sexton, Susan G., former Circuit Court Judge for the Thirteenth Judicial Circuit in and for Hillsborough County, Florida;

Shaw, Honorable Leander J. Jr., former Florida Supreme Court Justice;
Simms, Michelle Denise, deceased victim;

Sisco, Honorable Michelle D., Circuit Court Judge, Thirteenth Judicial Circuit;

Tucker, Kenneth, former Secretary, Florida Department of Corrections;

Vollrath, Sharon Morgan, former counsel for Appellee;

Warren, Andrew H., State Attorney, Thirteenth Judicial Circuit of Florida;

Whittemore, Honorable James D., United States District Court Judge, Middle District of Florida;

Williams, Shirley, former counsel for Appellee;

Wright, Carol A., federal counsel for Appellant;

Vollrath, Sharon, former Assistant State Attorney for the Thirteenth Judicial Circuit in and for Hillsborough County, Florida;

Young, James A., former counsel for Appellee.

PRELIMINARY STATEMENT

In this appeal, Respondents-Appellees, Secretary, Florida Department of Corrections, et al., will be referred to as "Secretary" or "the State." The Petitioner-Appellant, Bobby Joe Long, will be referred to as "Petitioner" or "Long." References to the district court record follow the procedure authorized by this Court when the volume numbers are not available, i.e., "Doc. (Doc. #)-(page #).

STATEMENT REGARDING ORAL ARGUMENT

Respondents-Appellees submit that oral argument is not necessary for appellate review of the instant cause. The issues presented may be resolved on the face of the record and the case law cited herein. See Fed. R. App. P. 34(a) and 11th Cir. R. 34-3(b). The decisional process will not be significantly aided by oral argument.

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STATEMENT REGARDING ADOPTION OF BRIEFS OF OTHER PARTIES

Respondents-Appellees, Secretary, Florida Department of Corrections, et al., do not adopt any part of a brief of another party.

STATEMENT OF JURISDICTION

This is an appeal from the denial of a motion for temporary restraining order, preliminary injunction, and stay of execution in a section 1983 action by the United States District Court for the Middle District of Florida. This Court's jurisdiction rests on 28 U.S.C. § 1292.

STATEMENT OF THE ISSUE

Whether the district court acted within its sound discretion in denying a stay of execution in a section 1983 action where the action was barred by res judicata and Appellant failed to establish a substantial likelihood of success on the merits of his complaint?

STATEMENT OF THE CASE AND FACTS

Over the course of 1984, Long abducted, sexually assaulted, and murdered numerous women in the Tampa Bay area. The instant death warrant case stems from Long's guilty plea to eight homicides in Hillsborough County. On September 23, 1985, Long entered into a plea agreement with the State and pleaded guilty to the murder, kidnapping, and sexual battery of Michelle Simms, along with seven additional counts of first-degree murder, numerous sexual battery and kidnapping counts, and a violation of probation. According to the plea agreement, the State would be limited to seeking the death penalty only as to the murder of Michelle Simms.[1] See Long v. State, 529 So. 2d 286, 288 (Fla. 1988).

After Long was originally sentenced to death, the Florida Supreme Court reversed his death sentence and remanded for a new penalty phase. Id. at 291-93. Following a resentencing proceeding before a jury, Long was again sentenced to death for the murder of Michelle Simms, and his sentence was affirmed on appeal. See Long v. State, 610 So. 2d 1268, 1269-71 (Fla. 1992), cert. denied, 510 U.S. 832 (1993).

Following the completion of his initial state postconviction proceedings, Long

[1] Long received concurrent life sentences in the seven other murder cases.

v. State, 118 So. 3d 798 (Fla. 2013), Long sought relief in federal court by filing a petition for writ of habeas corpus in the United States District Court, Middle District of Florida. Long v. Secretary, Fla. Dep't of Corr., Case No. 8:13-cv-02069-MSS-AEP. On August 30, 2016, the district court issued an order denying Long's habeas petition. Long filed an application for a certificate of appealability (COA) in this Court, and on January 4, 2017, this Court denied the COA.

On April 23, 2019, Governor Ron DeSantis signed Long's death warrant, and his execution is scheduled for May 23, 2019, at 6:00 p.m. On April 29, 2019, pursuant to the Florida Supreme Court's scheduling order, Long filed a third successive motion for postconviction relief raising six claims, including the identical four claims raised in Long's section 1983 complaint. After reviewing the State's response and conducting a case management conference, the postconviction court summarily denied all of Long's claims with the exception of Claim 2(a); Long's as-applied challenge to Florida's lethal injection protocol.

On May 3, 2019, the state court conducted an evidentiary on Long's as-applied challenge to Florida's lethal injection protocol. Long presented testimony from Dr. David Lubarsky, Anesthesiologist; Dr. Frank Wood, Neuropsychologist; Silas Raymond, Clinical and Compounding Pharmacist; and Steven Whitfield, Chief of Pharmaceutical Services at the Florida Department of Corrections (FDOC). The

State presented rebuttal testimony of Dr. Steven Yun, Clinical Anesthesiologist, and Dr. Daniel Buffington, Doctor of Pharmacy/Pharmacologist. After hearing the testimony, the state court issued a comprehensive order denying all relief. Long appealed the state court's ruling on his successive motion to the Florida Supreme Court, and on May 17, 2019, the court issued an opinion affirming the denial of relief. Long v. State, Case No. SC19-726, 2019 WL 2150942 (Fla. May 17, 2019).

On May 16, 2019, Long filed a complaint pursuant to 42 U.S.C. § 1983 in the district court raising four claims: (1) that Florida's lethal injection protocol utilizing etomidate as the first drug at Long's execution would constitute cruel and unusual punishment; (2) Florida's failure to use a single-drug protocol violates the Eighth Amendment's evolving standards of decency; (3) that Florida's public records laws violated his constitutional rights; and (4) that the FDOC's refusal of his requests regarding witnesses' access during the execution violated his right to access the courts. Long simultaneously filed an emergency motion for temporary restraining order (TRO), preliminary injunction, and/or stay of execution. On May 19, 2019, the district court issued an order denying Long's motion for TRO, preliminary injunction and/or stay of execution and found that Long had not established a substantial likelihood of success on the merits of his claims because all of his claims were barred by res judicata. Long now appeals the district court's ruling and seeks a

stay of execution pending the appeal.

STANDARD OF REVIEW

This Court reviews a district court's denial of a motion for temporary restraining order and stay of execution for an abuse of discretion. Valle v. Singer, 655 F.3d 1223, 1225 (11th Cir. 2011).

SUMMARY OF THE ARGUMENT

Long is not entitled to a stay of execution based solely on his dilatory litigation tactics of filing his section 1983 complaint only seven days before his scheduled execution. Even if this Court were to overlook the last-minute nature of his filing, it is clear that the district court acted within its sound discretion in determining that Long had not established a substantial likelihood of success on the merits of his complaint. Long litigated the exact same issues in state court and res judicata bars him from relitigating his claims in a section 1983 action. Additionally, even if not barred by res judicata, Long cannot show a substantial likelihood of success as his claims are meritless, barred by the statute of limitations, and barred for failure to exhaust his administrative remedies.

ARGUMENT

Appellant has spent the last thirty years unsuccessfully challenging his death sentence arising from his guilty plea to first-degree murder. See Long v. State, 610 So. 2d 1268 (Fla. 1992). With his execution looming in only a matter of days, Long filed a section 1983 complaint with the district court seeking to delay his scheduled execution based on claims that he could have clearly raised at an earlier date. This Court should not reward Long's dilatory actions by granting him a stay on a complaint that lacks merit. As the district court properly found when analyzing Long's claims, the doctrine of res judicata precludes him from relitigating his claims in federal court. Even if not barred by res judicata, Long has not established that he has a substantial likelihood of success on the merits on his complaint.

STATEMENT REGARDING THE LAW AND EQUITABLE PRINCIPLES

The United States Supreme Court has advised that "[f]iling an action that can proceed under § 1983 does not entitle the complainant to an order staying an execution as a matter of course." Hill v. McDonough, 547 U.S. 573, 583-84 (2006). "Both the State and the victims of crime have an important interest in the timely enforcement of a sentence." Id. at 584 (citing Calderon v. Thompson, 523 U.S. 538, 556 (1998)). A court considering a stay must also apply "a strong equitable presumption against the grant of a stay where a claim could have been brought at

such a time as to allow consideration of the merits without requiring entry of a stay." Id. (citing Gomez v. United States Dist. Court, 503 U.S. 653, 654 (1992) (noting that the "last-minute nature of an application" or an applicant's "attempt at manipulation" of the judicial process may be grounds for denial of a stay")); see also Bucklew v. Precythe, 139 S. Ct. 1112, 1133-34 (2019) (stating that last minute stays should be the "extreme exception, not the norm," and federal courts can, and should, invoke their equitable powers to dismiss suits that are pursued in a dilatory fashion or based on speculative theories); Price v. Dunn, 587 U.S. ___, 2019 WL 2078104 at *4 (May 13, 2019) (Thomas, J., concurring in the denial of certiorari) (noting that seeking a stay shortly before a scheduled execution, after delaying bringing the section 1983 challenge in the first place, "only encourages the proliferation of dilatory litigation strategies that we have recently and repeatedly sought to discourage").

Here, there is no question that Long was dilatory in bringing his complaint. Long's lethal injection challenges are based on his allegation that his traumatic brain injury (TBI) and temporal lobe epilepsy would be contraindicated by etomidate. Long, however, has known about his medical conditions for decades. During his penalty-phase proceeding, Long presented the testimony of Dr. John Money regarding his alleged temporal lobe epilepsy, and Long also presented the testimony

of Dr. Robert Berland concerning Long's alleged brain damage. Long v. State, 610 So. 2d 1268, 1271-72. The trial court actually found mitigation based on these conditions during Long's 1989 resentencing hearing. Id. Clearly, the evidence regarding these conditions is not new.

In addition, the use of etomidate in the state's three-drug protocol has been part of the protocol since January 2017. Asay v. State (Asay VI), 224 So. 3d 695, 705 (Fla. 2017). Given that Long has known about the use of etomidate as part of the protocol for over two years, and has known about his medical conditions for decades, he cannot justify waiting until *seven* days before his scheduled execution to bring this claim. Accordingly, the instant action is clearly dilatory and the equities lie decidedly in favor of the State, the murder victim's surviving family members, and the numerous other victims of Long's violent and heinous crimes. The law in this circuit is clear, Long's dilatory conduct alone disentitles him to the equitable relief he seeks. See Rutherford v. McDonough, 466 F.3d 970, 975 (11th Cir. 2006) (noting that Petitioner's last-minute filing under a death warrant was unjustified and dilatory); Brooks v. Warden, 810 F.3d 812, 826 (11th Cir. 2016) (the equities did not favor granting a stay when the prisoner unreasonably delayed filing his 1983 challenge prior to his execution date); Arthur v. Commissioner, Ala. Dep't of Corr., 695 Fed. Appx. 418, 425-26 (11th Cir. 2017) (unpublished) (noting that plaintiff

unreasonably delayed filing his claim until only nine days before his execution). Due to Long's dilatory litigation strategy in presenting this claim to the district court only a week before his scheduled execution, this Court should deny his motion for a stay of execution for this reason alone.

LONG HAS FAILED TO CARRY HIS BURDEN OF ESTABLISHING AN ENTITLEMENT TO A STAY OF EXECUTION

A stay of execution is equitable relief which this Court may grant only when an inmate meets his burden of showing: "(1) he has a substantial likelihood of success on the merits; (2) he will suffer irreparable injury unless the injunction issues; (3) the stay would not substantially harm the other litigant; and (4) if issued, the injunction would not be adverse to the public interest." Valle v. Singer, 655 F.3d 1223, 1225 (11th Cir. 2011) (quoting DeYoung v. Owens, 646 F.3d 1319, 1324 (11th Cir. 2011)). Preliminary injunctions and temporary restraining orders require proof of the same elements. See Gissendander v. Commissioner, Ga. Dep't of Corr., 779 F.3d 1275, 1280 (11th Cir. 2015). This Court reviews a district court's denial of a motion for TRO and stay of execution for abuse of discretion. Valle, 655 F.3d at 1225.

The district court properly acted within its discretion in denying Long's

motion for a TRO, preliminary injunction, and stay of execution.[2] As the district court correctly found, all of Long's claims are barred by res judicata and thus, he cannot demonstrate a substantial likelihood of success on the merits. See Muhammad v. Secretary, Fla. Dep't of Corr., 739 F.3d 683 (11th Cir. 2014). Even if res judicata does not bar Long's claims, Long cannot show a substantial likelihood of success as his claims are meritless, barred by the statute of limitations,[3] and barred for failure to exhaust his administrative remedies. Additionally, Long failed to carry

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[2] Respondents-Appellees question whether the district court had jurisdiction based on the Rooker-Feldman doctrine given Long's filing of his complaint only hours before the release of the Florida Supreme Court's decision. Pursuant to this Court's Order on Expedited Briefing, Respondents-Appellees adopts the arguments contained in their pleadings filed in the district court regarding this doctrine as well as any other matters contained therein.

[3] As the state argued below, Long has little chance of success on his underlying Eighth Amendment challenge because his complaint is barred by the statute of limitations. "[A] method of execution claim accrues on the later of the date on which state review is complete, or the date on which the capital litigant becomes subject to a new or substantially changed execution protocol." McNair v. Allen, 515 F.3d 1168, 1174 (11th Cir. 2008). In Henyard v. Sec'y, Dept. of Corr., 543 F.3d 644, 647 (11th Cir. 2008), this Court held that the statute of limitations for § 1983 claims regarding Florida's 2007 lethal injection protocol for inmates whose convictions and sentences were final before Florida's adoption of lethal injection as a means of execution began to run on February 13, 2000, and expired on February 13, 2004. Florida's January 4, 2017 protocol substituting one anesthetic for another, notwithstanding Plaintiff's speculative challenges, does not constitute a major change that would operate to restart the limitations period.

his burden of establishing that the stay would not substantially harm the other litigant, and if issued, the stay would not be adverse to the public interest.

SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS

The district court acted within its sound discretion when it found that Long failed to establish a substantial likelihood of success on the merits of his four claims because res judicata barred consideration of these claims.[4] The district court properly relied on this Court's decision in Muhammad v. Secretary, Fla. Dep't of Corr., 739 F.3d 683 (11th Cir. 2014), which is directly on point to Long's case.

A federal court must give preclusive effect to a state court judgment to the same extent as would courts of the state in which the judgment was entered. Brown v. R.J. Reynolds Tobacco Co., 611 F.3d 1324, 1331 (11th Cir. 2010). Res judicata is routinely applied by this Court in section 1983 actions. Muhammad v. Secretary, Fla. Dep't of Corr., 739 F.3d 683 (11th Cir. 2014); Starship Enterprises of Atlanta, Inc. v. Coweta County, 708 F.3d 1243, 1252–53 (11th Cir. 2013); Green v. Jefferson County Comm'n, 563 F.3d 1243, 1251-54 (11th Cir. 2009).

In determining whether an action is barred by res judicata, a federal court

[4] Long has not presented any argument regarding his fourth claim in his motion or brief filed before this Court.

applies the law of the state in which it sits, which in this case is Florida. Starship Enterprises, 708 F.3d at 1252–53. This Court explained Florida's res judicata principles in detail in Brown v. R.J. Reynolds Tobacco Co., 611 F.3d 1324, 1331-34 (11th Cir. 2010). Claim preclusion "bars a subsequent action between the same parties on the same cause of action." Id. at 1332. Here, the same parties, Long and the State of Florida, litigated the same cause of actions in state court.[5] As part of the current death warrant litigation, Long filed a successive postconviction motion in the state trial court raising six claims, including Eighth Amendment challenges to Florida's lethal injection protocol, both generally and as-applied to Long, and a claim relating to his public records requests. The state postconviction court granted an evidentiary hearing on Long's as-applied constitutional challenge to the lethal injection protocol and summarily denied his remaining claims relying on well established precedent. The Florida Supreme Court affirmed the trial court's ruling. Long v. State, Case No. SC19-726, 2019 WL 2150942 (Fla. May 17, 2019).

Because there has been a merits ruling from the state courts on the exact same

[5] Long's argument in the district court that the parties are different because his state court proceedings involved the "State of Florida," whereas his § 1983 claim involved the Secretary of Florida's Department of Corrections and the Warden of Florida State Prison is without merit and was specifically rejected by this Court in Muhammad. See Muhammad, 739 F.3d at 689.

issues Long raises in his § 1983 complaint, his claims are barred by res judicata. Long may not raise a claim in state court and obtain a merits ruling from the state court and then walk across the street and file the same claim in federal court. Res judicata prohibits such relitigation. Muhammad v. Secretary, Fla. Dep't of Corr., 739 F.3d 683 (11th Cir. 2014).

In Muhammad, this Court held that a lethal injection challenge to Florida's lethal injection protocol was barred by res judicata. Muhammad filed a section 1983 action challenging Florida's lethal injection protocol and requested a stay of execution. Id. at 685. Muhammad argued that Florida's protocol, which at that time used midazolam hydrochloride as the first drug in a three-drug protocol, violated the Eighth Amendment's prohibition on cruel and unusual punishment because it did not effectively anesthetize the inmate before the second and third drugs were administered. Id. However, shortly before filing the section 1983 suit in federal court, Muhammad filed a postconviction motion in state court raising the identical challenges as those raised in federal court and the Florida Supreme Court affirmed the state court's denial of the Eighth Amendment challenges. Id. at 685-86. Muhammad's federal complaint, like his state court motion, relied primarily on the same evidence as in the state court and alleged that the use of midazolam violated the Eighth Amendment. Id. at 686-87.

The federal district court ruled the section 1983 action was barred by the statute of limitations and denied the stay finding that Muhammad had "failed to show a substantial likelihood of success on the merits of his lethal injection claim." Id. On appeal, this Court affirmed the district court's denial of the stay of execution and concluded that because the Florida Supreme Court had already decided his Eighth Amendment claim, res judicata barred any federal complaint. Muhammad, 739 F.3d at 688-89. This Court explained that federal courts apply the res judicata principles of the state in which the federal action arises and that Florida law precluded subsequent suits when there was a judgment on the merits. This Court concluded that, under Florida's res judicata principles, the Florida Supreme Court's decision barred his "attempt to litigate that claim anew in federal court" because the Florida Supreme Court's decision "was a judgment on the merits." Id. at 688-89 (noting that the federal review available to Muhammad was via a petition for a writ of certiorari in the United States Supreme Court, not a section 1983 filed in federal district court).

For the same reasons as in Muhammad, Long's section 1983 action is barred by the doctrine of res judicata. Muhammad is indistinguishable from this case and is controlling precedent. All of the counts in Long's section 1983 action were raised in state court, or could have been raised, and the state courts rejected his claims on the merits. The entire action is barred by res judicata.

Any attempt to avoid this bar by alleging that he was denied a full and fair opportunity to litigate his claims in state court is unavailing as res judicata bars all of the claims that were raised, *or that could have been raised*, during Long's previous state court proceedings. Citibank, N.A. v. Data Lease Financial Corp., 904 F.2d 1498, 1501 (11th Cir. 1990) (noting that the "doctrine of res judicata, or claim preclusion, bars the filing of claims which were raised or could have been raised in an earlier proceeding"); Muhammad, 739 F.3d at 688 ("Florida law establishes that '[a] judgment on the merits rendered in a *former* suit between the same parties or their privies, upon the same cause of action, by a court of competent jurisdiction, is conclusive not only as to every matter which was offered and received to sustain or defeat the claim, *but as to every other matter which might with propriety have been litigated and determined in that action*.'") (emphasis added) (quoting Florida Dep't of Transp. v. Juliano, 801 So. 2d 101, 105 (Fla. 2001)).

Long argues that res judicata should not apply based on the "rarely applied exception" that it would result in manifest injustice because he was allegedly denied a fair and full opportunity to litigate his claims in state court. However, as the district court correctly found, Long's raised claims in the state court regarding the expedited scheduling and the summary denial of several of his claims which allegedly limited

his ability to fully present his case.[6] Doc. 21 at 13-15. Although Long did not raise any claims in the Florida Supreme Court following his evidentiary hearing regarding the state court's handling of witnesses, this is certainly a claim that could have been raised and is thus barred by res judicata.

Long's reliance on Chavez v. Florida State Prison Warden, 742 F.3d 1267 (11th Cir. 2014), is misplaced as this Court did not hold that res judicata is inapplicable when a defendant's lethal injection challenges are summarily denied in the state court proceedings. Long implies that Chavez rejected a res judicata finding when Chavez's lethal injection challenges were summarily denied in state court and he was subsequently granted an evidentiary hearing in federal court after filing a section 1983 action.[7] However, this Court specifically declined to "address and impl[ied] no view about" the doctrine of res judicata,[8] see Chavez, 742 F.3d at 1273 n.5, and certainly did not reject its application. Long is not entitled to an evidentiary

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[6] Long raised claims to the Florida Supreme Court regarding the scheduling timelines, the denial of public records requests, and the summary denial of some of his Eighth Amendment challenges to Florida's lethal injection protocol.

[7] Notably, Chavez did not receive an evidentiary hearing in state court on any of his lethal injection challenges.

[8] Unlike in the instant case, the district court judge in Chavez did not apply res judicata to bar Chavez's claims. See Chavez v. Palmer, Case No. 3:14-cv-110-J-39JBT, 2014 WL 521067 (M.D. Fla. Feb. 10, 2014).

hearing in federal court when he had a fair and full opportunity to litigate his claims in state court. Accordingly, this Court should find that the district court properly found that Long cannot establish a substantial likelihood of success when his complaint is barred by res judicata. Muhammad, supra; Shell v. Shwartz, 357 Fed. Appx. 250, 252 (11th Cir. 2009) (unpublished).

Even if res judicata does not bar Long's claims, he still has not shown a substantial likelihood of success on the merits of his complaint. Long challenges Florida's lethal injection protocol by raising a facial challenge to the use of etomidate as the first drug in the state's three-drug protocol; he raises an as-applied challenge that alleges that his temporal lobe epilepsy and traumatic brain injury increases the risk that he will suffer from etomidate; and he challenges Florida's use of a three-drug protocol instead of a one-drug protocol.

To raise a valid Eighth Amendment method-of-execution claim, a plaintiff must plead facts sufficient to establish: 1) the state's lethal injection protocol creates a demonstrated risk of severe pain, and 2) there is a "known and available" alternative method of execution that is "feasible, readily implemented, and in fact significantly reduces a substantial risk of severe pain." Boyd v. Warden, 856 F.3d 853, 866 (11th Cir. 2017) (citing Glossip v. Gross, 135 S. Ct. 2726, 2737 (2015)); see also Baze v. Reese, 553 U.S. 35 (2008); Bucklew v. Precythe, 139 S. Ct. 1112

(2019). Both requirements must be pled in order to have a facially sufficient claim. Long failed to meet his burden as he has not shown that any of his Eighth Amendment arguments have a substantial likelihood of success on the merits.

Long's argument is premised on his allegation that etomidate, the first drug in Florida's lethal injection protocol, will not induce and maintain unconsciousness throughout the execution. First, with regard to etomidate inducing unconsciousness, the State presented the testimony of Dr. Yun, a very experienced, practicing anesthesiologist, during the evidentiary hearing in state court, and the state court found Dr. Yun's testimony credible over Long's witness, Dr. Lubarsky. Dr. Yun opined that the 200 milligrams of etomidate used in Florida's lethal injection protocol would "predictably produce a very reliable deep state of unconsciousness." See Doc. 16-1 at 26. Long's assertion that etomidate cannot protect him from pain relating to the two subsequent drugs in the protocol has already been disproven by the State's experts who testified that 200 milligrams of etomidate would render a person unconscious and insensate when the remaining two drugs are administered.

Dr. Yun testified that in his best clinical estimate, a dose of 200 milligrams of etomidate would render the patient unconscious for **several hours**, but "at the very least for 30 minutes." (Doc. 16-1 at 31). Dr. Buffington testified that 60 minutes of unconsciousness would easily be achieved with the 200 milligram dose. (Doc. 16-1

at 215). Dr. Buffington further testified that the protocol provides for an additional 200 milligram dose of etomidate to be administered if the person does not pass the consciousness check. (Doc. 16-1 at 214).

Long generally asserts that etomidate is ultra-short acting and that it may wear off prior to the conclusion of the execution. While at first glance such a claim might appear to be at least plausible, litigation in state court shows that he has little, if any, chance of success in his effort to establish an Eight Amendment violation on this basis. Both experts presented by the State during Long's evidentiary hearing testified that the length of unconsciousness is dose related. (Doc. 16-1 at 31). At the massive dose called for by Florida's protocol, there is no risk of an inmate regaining consciousness during the relatively short timeframes of an execution. (Doc. 16-1 at 215). Florida's massive dose of etomidate is approximately ten times the normal anesthetic dose. While Long's experts suggest that the length of unconsciousness is not dose related, their assertion is contradicted by Doctors Yun and Buffington, as well as the FDA approved package insert, which provides:

> Intravenous injection of etomidate produces hypnosis characterized by a rapid onset of action, usually within one minute. **Duration of hypnosis is dose dependent** but relatively brief, usually three to five minutes when an average dose of 0.3mg/kg is employed.

Asay v. State (Asay VI), 224 So. 3d 695, 701 (Fla. 2017) (emphasis added). Long's

assertion that there is **no evidence** that a large dose of etomidate causes a longer duration of clinical effects is patently false.[9]

Long's effort to point to other recent executions using etomidate to support his theory is also unavailing.[10] His conclusory assertions that Jose Jimenez's heavy breathing means that Jimenez was conscious and facing "extreme terror" is entirely speculative. Further, Long's assertion that Eric Branch must have been experiencing

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[9] It is further worth pointing out that the only support for Long's theory that Florida's massive dose of etomidate in its lethal injection protocol will have the same duration of effect as a normal clinical dose is a study cited in Dr. Lubarsky's affidavit. (Doc. 1-2, para 9, pg. 29). Dr. Lubarsky cites an article published in the Lancet that he co-authored which criticizes levels of sodium thiopental given in executions based upon autopsies from executed inmates. As noted by the Supreme Court in Baze, this study was subject to criticism for its methodology in a subsequent response which was also published in the Lancet. See Baze, 553 U.S. at 51 n.2. Obviously, Dr. Lubarsky, citing his own research addressing a different drug, sodium thiopental, is slim evidence to support a challenge to Florida's current protocol.

[10] See Long v. State, Case No. SC19-726, 2019 WL 2150942, at *4 ((Fla. May 17, 2019) ("Although Long argues that events during recent executions discredit the testimony on which the postconviction court relied because 'it is clear that inmates were not sufficiently anesthetized,' these are the type of 'speculative and conclusory allegations' that we have held are insufficient to warrant an evidentiary hearing, let alone relief."); Jimenez v. State, 265 So. 3d 462, 475 (Fla.), cert. denied, Jimenez v. Florida, 139 S. Ct. 659 (2018) ("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. Moreover, the record indicates that the required consciousness check was performed before the subsequent administration of the second and third drugs.").

pain from the etomidate injection is unsupported when Branch actually yelled, "Murderers!" The most that can be gleaned from his statement is that he was unhappy about being executed.[11] Long has not even come close to showing that any of these so-called irregularities were the result of unconstitutional pain and suffering. See e.g., Grayson v. Warden, 672 Fed.Appx. 956, 966 (11th Cir. 2016) (unpublished) (per curiam) ("[T]he fact that Brooks opened one eye during his execution, without more, falls far short of a showing of ... a substantial risk of serious pain."). There is nothing from any of Florida's five previous executions using etomidate to suggest that the inmate was conscious following administration of 200 milligrams of etomidate. Such speculative assertions as eyes blinking or a chest rising and falling (breathing heavily) cannot establish a substantial risk of harm under Baze or Glossip.

While Long's brief vaguely claims that science and medicine have evolved since the last hearing on etomidate in Asay VI, and therefore, he should be entitled to a hearing on his facial challenge, he fails to explain what advancements support his claim. Long had an opportunity to present any such advancements to the state

[11] This is supported by Branch's previous statement that the governor and attorney general should have been the ones carrying out his sentence rather than the correction officers in his room.

circuit court in support of why a hearing should have been granted, and he never did. The only new evidence he appears to be presenting is the affidavit of Dr. Gail A. Van Norman, who does not add anything significantly different from what Long's expert, Dr. Lubarsky has already alleged. Long should not be given an evidentiary hearing based on the fact that he acquired additional affidavits from doctors while in federal court, when all of those affidavits could have been presented to the state court when he originally requested his evidentiary hearing.

Long also argues that his temporal lobe epilepsy and traumatic brain injury will be contraindicated by etomidate. However, this also was disproven during his evidentiary hearing in state court. Dr. Yun testified that neither brain damage nor epilepsy would interfere with the action of etomidate. (Doc. 16-1 at 29-34). He further testified that etomidate is used for patients with suspected traumatic brain injury and epilepsy in clinical settings. (Doc. 16-1 at 34). Long alleges that small doses of etomidate can induce a seizure; however, the experts agreed that large doses of etomidate, such as the one in the lethal injection protocol, can actually reduce the risk of seizures to the point of treating seizures. (Doc. 16-1 at 29-30, 166, 225). Additionally, the protocol provides Long with the option to receive diazepam, which is an anti-seizure, anti-myoclonic, and anti-anxiety medication. (Doc. 16-1 at 217-218). While Dr. Buffington opined that there was no reason to believe that Long

would have a seizure in the first place from etomidate, he testified that diazepam would alleviate any possibility of a seizure occurring. (Doc. 16-1 at 218).

Long never asserts that a seizure would cause him significant pain; or any real pain for that matter; his complaint only raises the possibility that if he had a seizure, he may bite his tongue or strain from thrashing against his restraints. This is far too speculative to amount to a valid Eighth Amendment challenge. Glossip v. Gross, 135 S. Ct. 2726, 2740 n.3 (2015) ("[T]he mere fact that a method of execution might result in some unintended side effects does not amount to an Eighth Amendment violation."). Likewise, Long's contention that a seizure may cause him pain by dislodging the IV lines is also too speculative to meet the Glossip standard. The mere fact that there is a chance that Long may bite his tongue or interrupt the IV lines certainly does not amount to a valid Eighth Amendment challenge. Id.

While Long cites to the execution of Angel Diaz to argue what could go wrong during his execution, Florida conducted an intensive review of its procedures and made substantial revisions of its protocol following Diaz's execution. Lightbourne v. McCollum, 969 So. 2d 326, 343 (Fla. 2007). The Florida Department of Corrections also currently has protocols in place requiring that the execution team and executioners be trained in possible contingencies that may occur, such as etomidate not rendering the inmate unconscious, or the inmate experiencing an

unanticipated medical emergency. Also, as testified to by the State's experts during the state court evidentiary hearing, Florida's protocol requires that the inmate be fully restrained in each extremity and torso and the IV lines be placed with tape, and having an inmate restrained and secured during the administration of etomidate and any other chemicals would significantly reduce the risk that the taped-down IV lines could become dislodged. (Doc. 16-1 at 67, 216).

Long has altogether failed to state a claim for relief that the use of etomidate in Florida's lethal injection protocol presents a substantial and imminent risk that is sure or very likely to cause him serious illness and needless suffering. Bible v. Davis, 739 Fed. Appx. 766, 772 (5th Cir. 2018) (unpublished) ("Here the state has not botched any execution since it instituted its protocol. But even if a mishap were to occur in Bible's execution, that post-facto incident alone could not constitute evidence that he was sure or very likely to suffer needlessly ex ante."); Whitaker v. Collier, 862 F. 3d 490, 500–01 (5th Cir. 2017), cert. denied, 138 S. Ct. 1172 (2018) (explaining that pointing to "botched executions" is just the kind of "isolated mishap" that is not cognizable in a method-of-execution claim). Long's assertion that he would be conscious and able to feel pain before the execution is completed has already been contradicted by the State's evidence, and Long has no substantial likelihood of success on the merits of this claim if a stay were granted. There is little

chance that relitigating the same issue again in federal court will result in a more favorable outcome for Long.

Moreover, Long has not satisfied the second requirement of Glossip, which requires that he "identify an alternative that is feasible, readily implemented, and in fact significantly reduces a substantial risk of severe pain." Glossip, 135 S. Ct. at 2737. Long proposes a single-drug pentobarbital protocol as his alternative method, but he does not, and cannot, show how it is feasible, readily implemented, and a better method. While Long alleges that pentobarbital is available for purchase in Florida, he seems to disregard the evidence presented during his state court evidentiary hearing that the Florida Department of Corrections is unable to purchase pentobarbital for use in executions. So while Long's witness Silas Raymond may be able to purchase pentobarbital, the Department of Corrections is unable to purchase pentobarbital from Mr. Raymond or anywhere else.[12]

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[12] Long's motion argues that this is unpersuasive because "Florida freely admits that it obtained and used drugs in the past for use in lethal injection in spite of the manufacturer's objection." But Long is incorrect. The witness only testified that a drug was used one time despite the manufacturer's objection. The witness never testified that the drug was purchased despite the manufacturer's objection. To the contrary, the witness testified that the manufacturer would prohibit the Department of Corrections from purchasing drugs for use in executions, and once that occurred, the Department was unable to purchase the drug. Long also cites a news article to claim that the manufacturer of etomidate objects to its use in lethal injections. While the manufacturer may not condone use of its medicine in lethal injections, it has not

Long claims that pentobarbital can be compounded in Florida, but as established during his evidentiary hearing, a doctor's prescription is required for a compounding pharmacy to compound pentobarbital. Stephen Whitfield, FDOC Chief of Pharmaceutical Services, testified that the FDOC did not need a doctor's prescription to purchase etomidate from a wholesaler, and he did not know of any reason why the FDOC would want to switch from the current protocol.

Long's allegation that other states routinely carry out executions using pentobarbital does not satisfy his burden of showing that pentobarbital is feasible and readily implemented in Florida. See In re Ohio Execution Protocol, 860 F.3d 881, 891 (6th Cir.), cert. denied, Otte v. Morgan, 137 S. Ct. 2238 (2017) (In finding pentobarbital unavailable, the court stated: "Ohio need not already have the drugs on hand. But for [the Glossip/Baze] standard to have practical meaning, the State should be able to obtain the drugs with ordinary transactional effort. Plainly it cannot"); see also Correll v. State, 184 So. 3d 478, 490 (Fla. 2015) (rejecting defendant's claims that Florida can obtain pentobarbital from other states or that it could license a compounding pharmacy to make it); Asay VI, 224 So. 3d at 701

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restricted the Department of Corrections from purchasing it. This conclusory burden-shifting argument does not satisfy Long's requirement of establishing that pentobarbital is feasible and readily available in Florida.

(noting that Asay's alternatives have previously been rejected as speculative).

Long also fails to establish that pentobarbital results in a "clear and considerable" difference in reducing pain compared to the use of etomidate within a three-drug protocol. Bucklew, 139 S. Ct. at 1130. Etomidate has been proven to quickly and effectively induce unconsciousness, and the state's three-drug protocol using etomidate does not involve any unconstitutional pain. Long's assertion that pentobarbital will work better than etomidate is based on his speculative and disproven theories about why etomidate will allegedly not work properly. Long must do more in order to show that pentobarbital would significantly reduce a substantial risk of severe pain. See, e.g., Bucklew v. Precythe, 139 S. Ct. 1112, 1130-31 (2019) (rejecting Bucklew's examples for why nitrogen gas would significantly reduce his pain as opposed to pentobarbital when he speculated that with pentobarbital there may be problems with the IV process; forcing him to lie on his back may impair his breathing; and the stress may cause his tumors to bleed). Long has neither established a substantial risk of severe pain, nor a "feasible, readily implemented, and significantly safer" alternative.

Long has further failed to show a substantial likelihood of success on the merits with regard to his claim that Florida's use of a three-drug protocol violates evolving standards of decency because many states now use, or intend to use, a one-

drug protocol. First, this claim is clearly barred by the statute of limitations. Since lethal injection first became a statutorily-authorized method of execution in Florida, Florida has always employed a three-drug protocol. See Boyd v. Warden, Holman Corr. Facility, 856 F.3d 853, 873–74 (11th Cir. 2017), cert. denied sub nom. Boyd v. Dunn, 138 S. Ct. 1286 (2018) (holding that a change to one aspect of a state's lethal injection protocol does not make timely a prisoner's wholesale challenge to the State's protocol). Therefore, Long's untimely challenge to the state's three-drug protocol is barred by the statute of limitations.

Next, just because other states have altered, or allegedly intend to alter, their methods of lethal injection, does not mean that Florida's current protocol violates the Eighth Amendment. This claim is without merit as a matter of established law. Baze, 553 U.S. at 58 (holding that Kentucky's protocol was not rendered cruel and unusual by the State's refusal to modify its protocol to use only a barbiturate (to ensure painless death) or to omit the paralytic pancuronium bromide (to ensure that pain responses were not merely masked)). As the Supreme Court has explained, one of the reasons for including a paralytic agent in a lethal injection protocol is to prevent the confusion of movement during the execution with consciousness. Baze, 553 U.S. at 57. This Court has squarely rejected the notion that Florida is required to adopt a one-drug protocol. See Ferguson v. Warden, Fla. State Prison, 493 Fed.

Appx. 22, 25 (11th Cir. 2012) (unpublished) (rejecting inmate's claims that Florida's failure to adopt a one-drug protocol violated the Eighth Amendment and observing that courts are not boards of inquiry which determine the best execution methods or procedures); Pardo v. Palmer, 500 Fed. Appx. 901, 904 (11th Cir. 2012) (unpublished). Accordingly, Long has not shown a substantial likelihood of success on the merits, and his motion for stay should be denied.

IRREPARABLE HARM AND BALANCE OF HARMS

As this Court has recognized, the State has an important interest in the timely enforcement of its judgments and the victims also have an important interest in the timely enforcement of a sentence. Crowe v. Donald, 528 F.3d 1290, 1292 (11th Cir. 2008). Here, Long has already delayed the enforcement of that final judgment and sentences for more than 30 years. As such, the harm to the State and the victim's family members from further delay is substantial. See Price v. Dunn, 587 U.S. ___, 2019 WL 2078104 at *5-6 (May 13, 2019) (Thomas, J., concurring in the denial of certiorari) (noting the substantial injustice to the victim's family, in the form of justice delayed, by allowing a stay of execution based on a section 1983 action filed shortly before an execution).

PUBLIC INTEREST

Finally, while Long suggests that it is in the public interest that he receive a stay, that is not true. Long has been dilatory in bringing this action and there is no substantial likelihood of success on the merits of his claims. Granting Long a stay will merely result in more inmates pursuing this dilatory litigation strategy in cases with scheduled executions. See Price v. Dunn, 587 U.S. ___, 2019 WL 2078104 (May 13, 2019) (Thomas, J., concurring in the denial of certiorari); Murphy v. Collier, 587 U.S. ___, (Alito, J., dissenting from grant of application for stay) (May 13, 2019). The filing of dilatory lawsuits is not in the public interest and allowing such lawsuits to proceed merely encourages them.

CONCLUSION

Petitioner has failed to establish entitlement to a stay of his execution. The equities in this case tilt decidedly against Long in favor of the State and the victim's family members. Accordingly, Respondents-Appellees respectfully request that this Honorable Court deny the emergency motion for stay of execution pending the appeal.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the type-volume limitation set forth in Fed. R. App. P. 32(a)(7)(B). This brief contains 9,041 words.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of May 2019, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following: Robert A. Norgard, Esq., P.O. Box 811, Bartow, Florida 33831-0811, **norgardlaw@verizon.net**; Tennie B. Martin, Assistant Federal Defender, **Tennie_Martin@fd.org**, and Gregory W. Brown, Assistant Federal Defender, **Greg_Brown@fd.org**, Office of the Federal Public Defender, Middle District of Florida, 400 N. Tampa St., Suite 2700, Tampa, Florida 33602. I further certify that a copy has been sent via email to the Florida Supreme Court at **warrant@flcourts.org**.

/s/ Stephen Ake
COUNSEL FOR RESPONDENTS/APPELLEES

APPENDIX J

Appeal No. 19-11942-P

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BOBBY JOE LONG,
APPELLANT,

V.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS ET AL.
APPELLEES.

Appeal from the United States District Court
for the Middle District of Florida
District Court No.: 8:19-cv-1193 MSS-AEP
Capital Case. Execution Scheduled for May 23, 2019.

REPLY BRIEF OF THE APPELLANT

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Rules of the United States Court of Appeals for the Eleventh Circuit, counsel for Appellant, Bobby Joe Long, hereby certifies that the following trial judges, attorneys, persons, associations of persons, firms, partnerships, or corporations have an interest in the outcome of this case:

1. Ahmed, Raheela, Assistant Federal Public Defender, Middle District of Florida.
2. Ahmed, Syed, former Assistant Capital Collateral Regional Counsel for Middle Region of Florida.
3. Ake, Stephen D., Assistant Attorney General and counsel for Appellees.
4. Allen, Curt, former Assistant State Attorney for the Thirteenth Judicial Circuit in and for Hillsborough County, Florida.
5. Backhus, Terri Lynn, Assistant Federal Public Defender, Middle District of Florida
6. Barkett, Rosemary, former Florida Supreme Court Justice.
7. Behnke, Debra, former Circuit Court Judge for the Thirteenth Judicial Circuit in and for Hillsborough County, Florida.
8. Benito, Michael L., former Assistant State Attorney for the Thirteenth Judicial Circuit in and for Hillsborough County, Florida
9. Black, Anthony K., former Circuit Court Judge for the Thirteenth Judicial Circuit in and for Hillsborough County, Florida.
10. Blanco, Katherine Vickers, former Assistant Attorney General.
11. Bolotin, Steven L., Assistant Public Defender for the Tenth Judicial Circuit.
12. Bondi, Pamela Jo, former Attorney General of Florida.

13. Brown, Gregory William., Assistant Federal Public Defender, Middle District of Florida and counsel for Appellant.

14. Browne, Scott Andrew, Assistant Attorney General.

15. Butterworth, Robert A., former Attorney General of Florida.

16. Canady, Honorable Charles T., Florida Supreme Court Chief Justice.

17. Chalu, Wayne, former Assistant State Attorney for the Thirteenth Judicial Circuit in and for Hillsborough County, Florida.

18. Crist, Charlie, former Attorney General of Florida and former Governor of Florida.

19. DeBock, Chris, former Assistant Capital Collateral Regional Counsel for Middle Region of Florida.

20. DeSantis, Ronald, Governor of Florida.

21. Dillinger, Bob, Public Defender for the Sixth Judicial Circuit.

22. Egan, Brenna Maryann, Research and Writing Specialist, Middle District of Florida.

23. Elm, Donna Lee, Federal Public Defender, Middle District of Florida.

24. Ehrlich, Raymond, former Florida Supreme Court Justice.

25. Fraser, Robert A., Esquire.

26. Freeland, Timothy Arthur, Assistant Attorney General.

27. Griffin, John P., former Circuit Court Judge for the Thirteenth Judicial Circuit in and for Hillsborough County, Florida.

28. Grimes, Stephen H., former Florida Supreme Court Justice.

29. Gruber, Mark, Assistant Capital Collateral Regional Counsel for Middle Region

of Florida.

30. Gunn, Sean, Assistant Federal Public Defender, Northern District of Florida.

31. Harding, Major B., former Florida Supreme Court Justice.

32. Hileman, Byron P., former Assistant Capital Collateral Regional Counsel for Middle Region of Florida.

33. Inch, Mark A., Secretary of the Florida Department of Corrections and Appellee.

34. Kilgore, Sidney W., former Assistant Capital Collateral Regional Counsel for Middle Region of Florida.

35. Kogan, Gerald, former Florida Supreme Court Justice.

36. Labarga, Honorable Jorge, Florida Supreme Court Justice.

37. Lagoa, Barbara, Florida Supreme Court Justice.

38. Landry, Robert J., former Assistant Attorney General.

39. Lawson, Alan, Florida Supreme Court Justice.

40. Lazzara, Richard A., former Circuit Court Judge for the Thirteenth Judicial Circuit in and for Hillsborough County, Florida.

41. Long, Bobby Joe, Appellant.

42. Lewis, Honorable R. Fred, former Florida Supreme Court Justice.

43. Luck, Robert J., Florida Supreme Court Justice.

44. Martin, Tennie, Assistant Federal Public Defender, Middle District of Florida and counsel for Appellant.

45. McDonald, Parker Lee, former Florida Supreme Court Justice.

46. Mitcham, Bob Anderson, former Circuit Court Judge for the Thirteenth Judicial

Circuit in and for Hillsborough County, Florida

47. McNeil, Walter A., former Secretary of Florida Department of Corrections.

48. Moody, Ashley, Attorney General of Florida.

49. Moody, Chris, former Assistant State Attorney for the Thirteenth Judicial Circuit in and for Hillsborough County, Florida.

50. Moorman, James Marion, former Public Defender for Tenth Judicial Circuit, Florida.

51. Moser, John, former Capital Collateral Regional Counsel for Middle Region of Florida.

52. Muñiz, Carlos G., Florida Supreme Court Justice.

53. Nolas, Billy H., former Assistant Federal Public Defender, Northern District of Florida.

54. Norgard, Andrea M., Esquire.

55. Norgard, Robert Anthony, Esquire, counsel for Appellant.

56. Ober, Mark A., former State Attorney for the Thirteenth Judicial Circuit in and for Hillsborough County, Florida.

57. Overton, Ben F., former Florida Supreme Court Justice.

58. Owens, A. Anne, Assistant Public Defender for the Tenth Judicial Circuit.

59. Pacheco, Christina Z., Assistant Attorney General and counsel for Appellees.

60. Pariente, Honorable Barbara J., former Florida Supreme Court Justice.

61. Perry, James E. C., former Florida Supreme Court Justice.

62. Polston, Honorable Ricky, Florida Supreme Court Justice.

63. Porcelli, Anthony E., United States District Court Magistrate Judge for the

Middle District of Florida.

64. Pruner, James Jay, Assistant State Attorney for the Thirteenth Judicial Circuit in and for Hillsborough County, Florida.

65. Quince, Honorable Peggy A., former Florida Supreme Court Justice.

66. Rappaport, David M., Esquire.

67. Reddish, Barry, Warden of Florida State Prison and Appellee.

68. Reiter, Michael, former Assistant Capital Collateral Regional Counsel for Middle Region of Florida.

69. Rubin, Ellis S., Esquire.

70. Sabella, Christopher C., Circuit Court Judge for the Thirteenth Judicial Circuit in and for Hillsborough County, Florida.

71. Seace, Kim, former Assistant State Attorney for the Thirteenth Judicial Circuit in and for Hillsborough County, Florida.

72. Scriven, Mary S., United States District Court Judge for the Middle District of Florida.

73. Sexton, Susan G., former Circuit Court Judge for the Thirteenth Judicial Circuit in and for Hillsborough County, Florida.

74. Shaw, Leander J. Jr., former Florida Supreme Court Justice.

75. Simms, Michelle, victim.

76. Sisco, Michelle, Circuit Court Judge for the Thirteenth Judicial Circuit in and for Hillsborough County, Florida.

77. Tucker, Kenneth, former Secretary of Florida Department of Corrections.

78. Warren, Andrew, State Attorney for the Thirteenth Judicial Circuit in and for Hillsborough County, Florida.

79. Whittemore, James D., United States District Court Judge for the Middle

District of Florida.

80. Williams, Shirley, former Assistant State Attorney for the Thirteenth Judicial Circuit in and for Hillsborough County, Florida.

81. Wright, Carol, Chief Assistant Federal Public Defender, Middle District of Florida.

82. Vollrath, Sharon, former Assistant State Attorney for the Thirteenth Judicial Circuit in and for Hillsborough County, Florida.

83. Young, James A., former Assistant Attorney General.

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Res Judicata Does Not Bar Long's § 1983 Because He Did Not Receive a Full and Fair Opportunity to Litigate His Claims in State Court Proceedings, and Strict Adherence to the Doctrine Would Work an Injustice

The Appellant, Bobby Joe Long ("Long"), continues to rely on his Initial Brief for all purposes, and does not concede or waive any argument or issues asserted. Long would direct the Court to the following arguments in response to the Appellees' Answer Brief.

The District Court's ruling is limited. The Court denied Long relief because his claims "are barred by res judicata." (Doc. 21; p.15). The District Court specifically did not address the Appellees' other contentions because the Court found Long's claims were barred by the doctrine of res judicata. (Doc. 21; p.15, footnote 5). This appeal reviews this erroneous finding by the Court that res judicata applies in Long's case. Should this Court determine that Long's claims are not barred res judicata, then it should remand to the District Court for further proceedings.

Long's case is distinguishable from *Muhammad v. Secretary, Florida Department of Corrections*, 739 F. 3d 683 (11th Cir. 2014), and should not be barred by the doctrine of res judicata. *Muhammad* was the first case in Florida to challenge the lethal injection protocol using midazolam as the first drug ("midazolam protocol"). *See Muhammad*, 739 F. 3d 683. Muhammad was allowed to present expert testimony by the state court as to his general lethal injection challenge. *See id.* In contrast, Long

was summarily denied a hearing on his general challenge. The state court denied Muhammad's general challenge to the midazolam protocol. The Florida Supreme Court upheld this denial. *See Muhammad*, 739 F. 3d 683. Muhammad then filed a 42 U.S.C. §1983 action before the federal district court, where he tried to re-litigate the issue on which he had already had an evidentiary hearing in state court. Thus, he was barred in federal court by the doctrine of res judicata.

Long's case is similar to *Chavez*, a case in which the petitioner was *granted* an evidentiary hearing by the federal district court. *See Chavez v. Sec'y*, 742 F.3d 1267 (11th Cir. Feb. 12, 2014). *Chavez* involved the second case in Florida to challenge the midazolam protocol. *See id.* Chavez challenged the midazolam protocol in the state court, but was not granted an evidentiary hearing based on state court precedent in *Muhammad*, finding the midazolam protocol constitutional. The Florida Supreme Court upheld the denial of the hearing pursuant to *Muhammad*. Chavez then filed a 42 U.S.C. §1983 action before the federal district court, and unlike Muhammad, was granted an evidentiary hearing. The district court did not bar Chavez from a hearing under the doctrine of res judicata.

Like Chavez, Long raised a general constitutional challenge to the lethal injection protocol, which replaced midazolam with etomidate ("etomidate protocol"). Like Chavez, Long was denied an evidentiary hearing pursuant to precedent set in *Asay v. State*, 224 So.3d 695 (Fla 2017). Long also raised an as-applied lethal injection

challenge, which was granted an evidentiary hearing. However, that hearing was very limited by the state court. Long's expert was precluded from testifying as to evidence regarding previous executions under the etomidate protocol, even though Long's expert testified these matters were relevant to his as-applied claim. Long was denied a full and fair evidentiary hearing. Like Chavez, Long should not be barred by the doctrine of res judicata, and should be afforded a full and adequate evidentiary hearing.

More importantly, it would be an injustice to deny Long his constitutional full and adequate evidentiary hearing on his claims. In *Chavez*, United States Circuit Court of Appeals Judge for the Eleventh Circuit Charles R. Wilson stated that although Chavez did not meet his burden "nothing prevents a future inmate from presenting an anesthesiologist or expert to assert an opinion based on more conclusive and methodologically sound results. Further, in the event of a botched execution in this or a future case, such evidence may be relevant in a subsequent Eighth Amendment challenge to Florida's execution practices." *Chavez*, 742 F. 3d at 1275 (Wilson, J. concurring).

Both of the foregoing factors noted by United States Circuit Court of Appeals Judge Wilson apply to Long. First, the challenge by Long is based on more conclusive and methodologically sound results. In *Asay*, the defendant relied on the expert testimony of Dr. Mark Heath. In Long's case, he relied on the expert testimony of Dr. David Lubarsky, an expert whose opinions are more conclusive and methodologically

sound than Dr. Heath's. Dr. Lubarsky's opinions are based on scientific calculations utilizing the pharmacodynamic and pharmacokinetic properties of etomidate. His opinions regarding how etomidate affects the quality and length of the consciousness checks are based on scientific studies that show in a significant number of administrations of etomidate that myoclonus occurs[1]. This is very important because unlike midazolam, which is a short acting drug, etomidate is an *ultra-short acting* drug. In Long's case, a second expert, Dr. Gail Van Norman rendered opinions supported by scientific studies. Particularly, Dr. Van Norman's opinions in the area of anesthesia awareness and the studies related to this.

There is also objective evidence regarding botched executions utilizing the etomidate protocol. After Mark Asay's execution (August 24, 2017), there have been four other executions utilizing the etomidate protocol, namely, the executions of Michael Lambrix (October 15, 2017), Patrick Hannon (November 8, 2017), Eric Branch (February 22, 2018), and Jose Jimenez (December 13, 2018). In these executions, the observations of eyewitnesses have added additional relevant information for experts that demonstrate serious problems with the etomidate protocol.

Most disturbing was the description of the execution of Eric Branch as laid out in Long's Complaint. (Doc.1). As indicated by the affidavit of Robert Friedman, Esquire, a witness to the Branch execution, six minutes lapsed from the beginning

[1] Myoclonus is defined as involuntary muscle movement that look purposeful, that would then lead to delays in administering the other two drugs

phase of the execution until the consciousness check took place, and Mr. Branch was still moving at that time. (Doc.1). Branch's screams were also documented by reporter Jason Dearen. (Doc.1). With regard to these observations, Dr. Lubarsky opined that in his declaration that

> [E]tomidate is ultra short-acting, and there is a substantial risk that it will wear off during the execution. Etomidate has a re-distribution half-life2 of 2.7 minutes. Therefore in a 17-minute execution like that of Mr. Branch, by the 16th minute, the concentration of etomidate in the blood would be 1/64th the original dose, or approximately the same as if the injection were a mere 3.5 mg. A standard clinical dose needed to induce unconsciousness is 20 to 40mg. Therefore, the amount of etomidate in Mr. Branch's bloodstream before the execution was complete was 1/10th of the clinical dose. As will be discussed further below, this is insufficient to ensure that a prisoner would not feel the excruciating pain of the second and third drugs.

Lubarsky Decl. ¶17 (Doc.1-2; p.25).

Despite the evidence in the Branch execution, the Florida courts have failed to allow a thorough evaluation of the etomidate protocol in a full and adequate evidentiary hearing. In *Jimenez v. State*, 265 So.3d 462 (Fla 2018), Jimenez did not receive an evidentiary hearing, and was summarily based on *Asay*. In seeking an evidentiary hearing, Jimenez cited the information regarding the Branch execution. This Court should heed the words of former Florida Supreme Court Justice Barbara J. Pariente, who detailed the concerns that were raised by Branch's execution. *See Jimenez*, 265 So.3d at 491-93. Justice Pariente recognized that:

> [T]his 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.

Id. at 492 (Pariente, J. dissenting). It is certain that Florida's continued adherence to a three drug protocol with the adoption of the etomidate protocol constitutes a violation of the Cruel and Unusual Punishment Clause of the Eighth Amendment as applied to the States, in violation of 42 U.S. § 1983. Long should be granted a full and fair evidentiary hearing.

RELIEF SOUGHT
(Fed.R.App.P. 28(a)(9))

Long requests that this Court reverse and remand his case with directions to grant the TRO, grant an evidentiary hearing, or to afford any relief this Court deems necessary and proper.

CERTIFICATE OF FONT AND WORD COUNT
(Fed.R.App.P. 28(a)(10))

Undersigned counsel certifies that this brief is in 14 point Times New Roman and excluding the cover page, the certificate of interested persons and corporate disclosure statement, the table of contents, the table of citations, the statement with respect to oral argument and any certificates of counsel contains 1410 words.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on Tuesday, May 21, 2019, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system

/s/Robert A. Norgard
ROBERT A. NORGARD

APPENDIX K

CERTIFICATION TO GOVERNOR

and

EXECUTION BY LETHAL INJECTION PROCEDURES

Dated

FEBRUARY 27, 2019

FLORIDA
DEPARTMENT of
CORRECTIONS

Governor
RON DESANTIS

Secretary
MARK S. INCH

501 South Calhoun Street, Tallahassee, FL 32399-2500

http://www.dc.state.fl.us

February 27, 2019

The Honorable Ron DeSantis
Executive Office of the Governor
PL 05, The Capitol
400 South Monroe Street
Tallahassee, Florida 32399-0001

Dear Governor DeSantis:

I have carefully reviewed the lethal injection procedures issued by my department. Pursuant to these procedures, I represent the following:

As Secretary of the Florida Department of Corrections, I have reviewed the Department's Execution by Lethal Injection Procedures to ensure proper implementation of the Department's statutory duties under Chapter 922, Florida Statutes. The procedure has been reviewed and is compatible with evolving standards of decency that mark the progress of a maturing society, the concepts of the dignity of man, and advances in science, research, pharmacology, and technology. The process will not involve unnecessary lingering or the unnecessary or wanton infliction of pain and suffering. The foremost objective of the lethal injection process is a humane and dignified death. Additional guiding principles of the lethal injection process are that it should not be of long duration, and that while the entire process of execution should be transparent, the concerns and emotions of all those involved must be addressed.

I hereby certify that the Department is prepared to administer an execution by lethal injection and has the necessary procedures, equipment, facilities, and personnel in place to do so. The Department has available the appropriate persons who meet the minimum qualifications under Florida Statutes and in addition have the education, training, or experience, including the necessary licensure or certification, required to perform the responsibilities or duties specified and to anticipate contingencies that might arise during the execution procedure.

Sincerely,

Mark S. Inch
Secretary

FLORIDA
DEPARTMENT of
CORRECTIONS

Governor
RON DESANTIS

Secretary
MARK S. INCH

501 South Calhoun Street, Tallahassee, FL 32399-2500

http://www.dc.state.fl.us

EXECUTION BY LETHAL INJECTION PROCEDURES

PURPOSE: To establish the procedures for the execution by lethal injection of inmates sentenced to death, pursuant to the dictates of Chapter 922, Florida Statutes and adhering to the requirements imposed under the Constitution of the State of Florida and the United States Constitution. The foremost objective of the lethal injection process is a humane and dignified death.

APPLICATION: This procedure applies to any execution scheduled to occur after February 27, 2019.

DEFINITIONS:

(1) **Execution team**, where used herein, refers to correctional staff and other persons who are selected by the team warden designated by the Secretary to assist in the administration of an execution by lethal injection, and who have the training and qualifications, including the necessary licensure or certification, required to perform the responsibilities or duties specified. Individuals on the execution team will be referred to as "execution team member" or "team member" in these procedures.

(2) **Executioner**, where used herein, refers to an individual selected by the team warden to initiate the flow of lethal chemicals into the inmate. The executioner's sole function is to inject the chemicals into the IV access port by physically pushing the chemicals from the syringe. The executioner is only authorized to carry out this specific function under the direction of the team warden. An executioner shall be an adult, undergo a criminal background check and be sufficiently trained to administer the flow of lethal chemicals. The executioner must demonstrate to the satisfaction of the team warden, that s/he is competent, trained, and of sufficient character to carry out the required function under the team warden's direction.

(3) **Institutional warden**, where used herein, refers to the warden of Florida State Prison, who shall be responsible for handling support functions necessary to carry out the lethal injection process.

(4) **Team warden**, where used herein, refers to the warden designated by the Secretary. The team warden shall be a person who has demonstrated through experience, training, and good moral character the ability to perform an execution by lethal injection. The team warden has the final and ultimate decision making authority in every aspect of the lethal injection process. No deviation from any part of this procedure is authorized unless approved and directed by the team warden.

SPECIFIC PROCEDURES:

(1) **Receipt of Warrant:** These execution procedures will commence upon receipt of the Governor's Warrant of Execution. The institutional warden will schedule the execution for a date and time certain that is within the period of time designated in the warrant. The institutional warden will provide a copy of the Warrant of Execution to the Department's Secretary and General Counsel, deliver a copy to the named inmate and the team warden, and notify the Florida Department of Law Enforcement (FDLE), any state correctional institutions, and any local agencies that may be affected by the issuance of the warrant and of the date and time selected for the execution.

(2) **Selection of the Executioners:**

(a) The team warden will select two (2) executioners who are fully capable of performing the designated functions to carry out the execution. The team warden will provide each executioner with a copy of this procedure and will explain fully their respective duties and responsibilities and assure that each executioner is trained for the function assigned. The identities of the executioners will be kept strictly confidential as provided by statute.

(b) The team warden will designate one (1) of the selected executioners as the primary executioner and the other as the secondary executioner. The primary executioner will be solely responsible for administering the flow of lethal chemicals into the inmate during the execution. The secondary executioner will be present and available during the execution to assume the role of the primary executioner if the primary executioner becomes unable for any reason, as determined by the team warden, to carry out his/her functions.

(3) **Selection of the Execution Team:** The team warden will designate the execution team members and verify that each team member has the training and qualifications, and possesses current, necessary licensure or certification, required to perform the responsibilities or duties specified. The team warden will ensure that all execution team members and other involved staff have been adequately trained to perform their requisite functions in the execution process. The team warden shall select personnel with sufficient training and experience to perform the technical procedures needed to carry out an execution by lethal injection, including the mixing of the chemicals and placement of the venous access lines. The identities of any team members with medical qualifications shall be strictly confidential.

(a) The team warden shall select the team member(s) responsible for achieving and monitoring peripheral venous access from the following classes of trained professionals: a phlebotomist certified by the American Society of Clinical Pathologists (ASCP), National Certification Agency for Medical Laboratory Personnel (NCA), American Society of Phlebotomy Technicians (ASPT) or American Medical Technologists (AMT); a paramedic or emergency medical technician, certified under Chapter 401, Florida Statutes; a licensed practical nurse, a registered nurse, or an advanced practice registered nurse licensed under Chapter 464, Florida Statutes, or a physician or physician's assistant licensed under Chapter 458 or Chapter 459, Florida Statutes.

(b) The team warden shall select the team member(s) responsible for achieving and monitoring central venous access, if necessary, from the following classes of trained professionals: an advanced practice registered nurse licensed under Chapter 464,

Florida Statutes; a physician or physician's assistant licensed under Chapter 458 or Chapter 459, Florida Statutes.

(c) The team warden shall select the team member(s) responsible for examining the inmate prior to execution to determine health issues from the following classes of trained professionals: a paramedic or emergency medical technician, certified under Chapter 401, Florida Statutes; a licensed practical nurse, a registered nurse, or an advanced practice registered nurse licensed under Chapter 464, Florida Statutes, or a physician or physician's assistant licensed under Chapter 458 or Chapter 459, Florida Statutes.

(d) The team warden shall select the team member(s) responsible for attaching the leads to the heart monitors and observing the monitors during the administration of execution from the following classes of trained professionals: a paramedic or emergency medical technician, certified under Chapter 401, Florida Statutes; a licensed practical nurse, a registered nurse, or an advanced practice registered nurse licensed under Chapter 464, Florida Statutes, or a physician or physician's assistant licensed under Chapter 458 or Chapter 459, Florida Statutes.

(e) The team warden shall select the team member(s) responsible for purchasing, maintaining and mixing the lethal chemicals from the following classes of trained professionals: a physician, licensed under Chapter 458 or Chapter 459, Florida Statutes or a pharmacist licensed under Chapter 465, Florida Statutes.

(f) The team warden shall select other execution team members to carry out the following tasks:

1. Showering and preparation of the inmate.
2. Ensuring that the equipment necessary for an execution is in proper working order.
3. Escorting the inmate from his/her cell to the execution chamber.
4. Applying restraints to the inmate prior to applying the heart monitor leads and acquiring venous access.
5. Maintaining the open telephone line with the Office of the Governor.
6. Reporting the actions inside the executioner's room to the team warden.
7. Maintaining the checklists that detail the events surrounding the execution.
8. Opening and closing the window covering to the witness gallery and turning on and off the public address (PA) system.

This list is not intended to be exhaustive. There may be other necessary tasks to carry out an execution and such tasks will be assigned by the team warden.

Each execution team member is responsible and authorized to raise concerns that become apparent during the execution and bring them to the attention of the team warden.

(4) **Training of the Execution Team and Executioners**: There shall be sufficient training to ensure that all personnel involved in the execution process are prepared to carry out their distinct roles for an execution. All team members shall be instructed on the effects of each lethal chemical. All simulations or reviews of the process shall be considered training exercises. The team warden, or his/her designee, will conduct simulations of the execution process on a quarterly basis at a minimum or more often as needed as determined by the team warden. Additionally, a simulation shall be conducted the week prior to any scheduled execution. All persons involved with the execution should participate in the simulations. If a

person cannot attend the simulation, the team warden shall provide for an additional training opportunity or otherwise ensure that the person is adequately trained to complete his or her assigned task. There shall be a written record of any training activities. The simulations should anticipate various contingencies. Examples of possible contingencies shall include:

(a) Issues related to problems with equipment needed to carry out an execution.

(b) Problems related to venous access of the inmate, including the necessity to obtain an alternate venous access site during the execution process.

(c) The inmate is not rendered unconscious after the administration of the etomidate injection.

(d) Combative inmate.

(e) Incapacity of any execution team member or executioner.

(f) Unanticipated medical emergency concerning the inmate, an execution team member or executioner.

(g) Problems related to the order and security at the Florida State Prison.

(h) Power failure or other facility problems.

This list is not meant to be exhaustive and only provides examples of the types of contingencies that could arise during the course of an execution. The team warden is responsible for ensuring that training addresses, at a minimum, the above situations.

(5) **Use of Checklists**: Compliance with this procedure will be documented on appropriate checklists. Upon completion of each step in the process, an execution team member will indicate when the step has been completed. Prior to the administration of the lethal chemicals, the team warden will consult with the designated team member and verify that all steps in the process have been performed properly. At the conclusion of the process, the team warden will again consult with the designated team member and verify that the remaining steps in the process were performed properly. The team warden will then sign the forms, attesting that all steps were performed properly.

(6) **Purchase and Maintenance of Lethal Chemicals**: A designated execution team member will purchase, and at all times ensure a sufficient supply of, the chemicals to be used in the lethal injection process. The designated team member will ensure that the lethal chemicals have not reached or surpassed their expiration dates. The lethal chemicals will be stored securely at all times as required by state and federal law. The FDLE agent in charge of monitoring the preparation of the chemicals shall confirm that all lethal chemicals are correct and current.

(7) **FDLE Monitors:**

(a) Two (2) FDLE agents shall serve as monitors and shall be responsible for observing the actions of the execution team and the condition of the condemned inmate at all times during the execution process.

(b) The first FDLE agent shall be located in the executioner's room and is responsible for observing the preparation of the lethal chemicals and documenting and keeping a detailed log as to what occurs in the executioner's room at a minimum of two (2) minute intervals. A copy of the log shall be provided to the team warden and shall be available at the post execution debriefings.

(c) The second FDLE agent shall be located in the execution chamber, and will be responsible for keeping a detailed log of what is occurring in the execution chamber at a minimum of two (2) minute intervals. A copy of the log shall be provided the team warden and shall be available for the post execution debriefings.

(8) **Approximately One (1) Week Prior to Execution**:

(a) The team warden will designate one or more execution team members to review the inmate's medical file and to make a limited physical examination of the inmate to determine whether there are any medical issues that could potentially interfere with the proper administration of the lethal injection process. The team member(s) will verbally report his/her findings to the team warden as soon as is practicable following the file review and physical examination. The results of this examination shall be documented in the inmate's file. After reviewing the results of the examination which should include a determination of the best access site and conferring with the team member(s) that performed the examination, the team warden shall conclude what is the more suitable method of venous access (peripheral or femoral) for the lethal injection process given the individual circumstances of the condemned inmate based on all information provided.

(b) If a team member reports any issue that could potentially interfere with the proper administration of the lethal injection process, the team warden will consult with any or all of the members of the execution team and resolve the issue.

(9) **On the Day of Execution:**

(a) A food service director, or his/her designee, will personally prepare and serve the inmate's last meal. The inmate will be allowed to request specific food and non-alcoholic drink to the extent such food and drink costs forty dollars ($40) or less, is available at the institution, and is approved by the food service director.

(b) The inmate will be escorted by one (1) or more team members to the shower area where a team member of the same gender will supervise the showering of the inmate. Immediately thereafter, the inmate will be returned to his/her assigned cell and issued appropriate clothing. A designated member of the execution team will obtain and deliver the clothing to the inmate.

(c) A designated execution team member will ensure that the telephone in the execution chamber is fully functional and that there is a fully-charged, fully-functional cellular telephone in the execution chamber. Telephone calls will be placed from the telephone to ensure proper operation. Additionally, a member of the team shall ensure that the two-way audio communication system and the visual monitoring equipment are fully functional.

(d) A designated execution team member will ensure that the PA system is fully functional.

(e) The only staff authorized to be in the execution chamber area are members of the execution team and others as approved by the team warden, including two monitors from FDLE.

(f) A designated execution team member, in the presence of one or more additional team members and an independent observer from FDLE, will prepare the lethal injection chemicals as follows, ensuring that each syringe used in the lethal injection process is appropriately labeled, including the name of the chemical contained therein:

(1) Etomidate injection: A sterile, disposable sixty cubic centimeter (60cc) syringe and needle will be used to draw fifty milliliters (50mls) of etomidate injection 2mg/ml from one or more vials containing same, for a total of one hundred milligrams (100mg) of etomidate injection. The syringe will then be fitted with an eighteen (18) gauge, one (1) inch, blunt cannula (tube), clearly labeled with the number one (1), and placed in the first slot on a stand designed to hold eight (8) such syringes in separate slots. The stand will be clearly labeled with the letter "A." This process will be repeated with a second syringe, which will be clearly labeled with a number two (2) and placed in the second slot on stand "A." Two additional syringes will be drawn in the same manner, fitted with the blunt cannula, and clearly labeled with the numbers one (1) and two (2), respectively. These two syringes will be placed in the first two slots on a second stand that has been clearly labeled with the letter "B." All materials used to prepare these syringes will be removed from the work area and discarded pursuant to state and federal law.

(2) Rocuronium bromide injection: A sterile, disposable sixty cubic centimeter (60cc) syringe will be used to draw five hundred milligrams (500mg) of rocuronium bromide injection from one or more vials containing same. The syringe will then be fitted with an eighteen (18) gauge, one (1) inch, blunt cannula (tube). This procedure will be repeated until there are four (4) syringes, each containing five hundred milligrams (500mg) of rocuronium bromide injection, for a total of two thousand milligrams (2000mg). Two syringes will be clearly labeled with the numbers four (4) and five (5), respectively, and placed into slots four (4) and five (5) on stand "A." This procedure will be repeated with the other two syringes, each of which will be fitted with a blunt cannula, labeled appropriately and placed in slots four (4) and five (5), respectively, on stand "B." All materials used to prepare these syringes will be removed from the work area and discarded pursuant to state and federal law.

(3) Potassium acetate injection: A sterile, disposable sixty cubic centimeter (60cc) syringe will be used to draw one hundred twenty milliequivalents (120mEq) of potassium acetate injection from one or more vials containing same. The syringe will then be fitted with an eighteen (18) gauge, one (1) inch blunt cannula (tube). This procedure will be repeated until there are four (4) syringes, each containing one hundred twenty milliequivalents (120mEq) of potassium acetate injection, for a total of four hundred eighty (480) milliequivalents. Two syringes will be clearly labeled with the numbers seven (7) and eight (8), respectively, and placed into slots seven (7) and eight (8) on stand "A." This procedure will be repeated with the other two syringes, each of which will be fitted with a blunt cannula, labeled appropriately, and placed in slots seven (7) and eight (8), respectively, on stand "B." All materials used to prepare these syringes will be removed from the work area and discarded pursuant to state and federal law.

(4) Saline solution: A sterile, disposable twenty cubic centimeter (20cc) syringe will be used to draw twenty milliliters (20ml) of sterile saline solution from one or more vials containing same. This procedure will be repeated until there are four (4) syringes, each containing twenty milliliters (20ml) of sterile saline solution, for a total of eighty (80) milliliters. Each syringe will then be fitted with an eighteen (18) gauge, one (1) inch, blunt cannula (tube). Two syringes will be clearly labeled with the numbers three (3) and six (6), respectively, and placed into slots three (3) and six (6) on stand "A." This procedure will be repeated with the other two syringes, each of which will be placed in slots three (3) and six (6), respectively, on stand "B." All materials used to prepare these syringes will be removed from the work area and discarded pursuant to state and federal law.

(g) The execution team member who has prepared the lethal chemicals will transport them personally, in the presence of one or more additional members of the execution team, to the executioner's room. Stand "A" will be placed on the worktop for use by the primary executioner, to be used during the execution by lethal injection. Stand "B" will be placed on a shelf underneath the worktop within easy reach of the executioners should they be needed during the execution. Stand "B" will not be used unless expressly ordered to be used by the team warden. The lethal chemicals will remain secure until the executioners arrive. No one other than the executioners will have access to the lethal chemicals, unless a stay is granted, in which case the execution team member who prepared the lethal chemicals will retrieve them from the locked room and dispose of them according to state and federal law.

(h) A designated execution team member will prepare, using an aseptic technique, two (2) standard intravenous (IV) infusion sets, each consisting of a pre-filled, sterile plastic bag of normal saline for IV use (a solution of sodium chloride at 0.9% concentration) with an attached drip chamber, a long sterile tube fitted with a back check valve and a clamp to regulate the flow, a connector to attach to the access device, and an extension set fitted with a luer lock tip for a blood cannula to allow for the infusion of the lethal chemicals into the line. The extension set that will be used to infuse the lethal chemicals into the primary injection line will be clearly marked with a "1," and the additional extension set that will be attached to the secondary injection line will be clearly marked with a "2."

(i) The team warden will explain the lethal injection preparation procedure to the inmate and ensure the provision of any medical assistance or care deemed appropriate. The inmate will be offered and, if accepted, will be administered intramuscular injections of diazepam, in appropriate dosages relative to weight, to ease anxiety.

(j) Authorized media witnesses will be picked up at the designated media on-looker area located at New River Correctional Institution by two (2) designated Department of Corrections escort staff, transported to the main entrance of Florida State Prison as a group, cleared by security, and escorted to the population visiting park, where they will remain until being escorted to the witness room of the execution chamber by the designated escort staff.

(k) The team warden will administer both a presumptive drug test (oral swab method) and a presumptive alcohol test (breath analyzer) to each execution team member. A positive indication for the presence of alcohol or any chemical substance that may impair their

normal faculties will disqualify that person from participating in the execution process. Upon the arrival of the executioners to perform their duties, the team warden will administer both a presumptive drug test (oral swab method) and a presumptive alcohol test (breath analyzer) to each executioner. A positive indication for the presence of alcohol or any chemical substance that may impair their normal faculties will disqualify that person from participating in the execution process. If one or both of the executioners is disqualified, the team warden will continue to select and test as many additional executioners as is necessary to ensure the presence of two qualified executioners at the execution.

(10) **Approximately Thirty (30) Minutes Prior to Execution**:

(a) A designated execution team member will establish telephone communication with the Office of the Governor on behalf of the team warden. The team warden will communicate with the Office of the Governor to determine whether any cause for delay exists. The phone line will remain open to the Office of the Governor during the entire execution procedure. The team member will use this open line to report the ongoing activities of the execution team and other personnel to the Office of the Governor.

(b) When the team warden determines that no cause for delay remains, a designated member of the execution team will escort the two (2) executioners into the executioner's room, where they will remain until the execution process is complete.

(c) The team warden will read the Warrant of Execution to the inmate. The inmate may waive the reading of the warrant.

(d) Designated members of the execution team will apply wrist restraints to the inmate and escort him/her from his cell to the execution chamber.

(e) Designated members of the execution team will assist the inmate, if necessary, in positioning himself/herself onto the execution gurney in the execution chamber.

(f) Designated members of the execution team will secure the restraining straps.

(g) One or more designated members of the execution team will attach the leads to two (2) heart monitors to the inmate's chest, ensuring that the monitors are operational both before and after the chest restraints are secured.

(h) Unless the team warden has previously determined to gain venous access through a central line, a designated team member will insert one intravenous (IV) line into each arm at the medial aspect of the antecubital fossa of the inmate and ensure that the saline drip is flowing freely. The team member will designate one IV line as the primary line and clearly identify it with the number "1." The team member will designate the other line as the secondary line and clearly identify it with the number "2." If venous access cannot be achieved in either or both of the arms, access will be secured at other appropriate sites until peripheral venous access is achieved at two separate locations, one identified as the primary injection site and the other identified as the secondary injection site.

(i) If peripheral venous access cannot be achieved, a designated team member will perform a central venous line placement, with or without a venous cut-down (wherein a vein is exposed surgically and a cannula is inserted), at one or more sites deemed appropriate

by that team member. If two sites are accessed, each line will be identified with a "1" or a "2," depending on their identification as the primary and secondary lines.

(j) One or more designated members of the execution team will remove, one at a time, from the pole attached to the gurney, the two (2) saline bags and pass the bags, along with the extension sets attached to lines labeled "1" and "2," through a small opening into the executioner's room, where a team member will hang the bags on separate hooks inside the room. The designated team member(s) will ensure that the tubing from the IV insertion points to the bags has not been compromised and that the saline drip is flowing freely. The team member will be responsible for continuously monitoring the viability of the IV lines prior to and during the administration of the execution.

(11) **Approximately Fifteen (15) Minutes Prior to Execution:**

(a) Official witnesses will be secured in the witness room of the execution chamber by two designated Department of Corrections escort staff.

(b) Authorized media witnesses will be secured in the witness room of the execution chamber.

(c) The only persons authorized in the witness room are: twelve (12) official witnesses, including family members of the victim, four (4) alternate official witnesses, one (1) nurse or medical technician, twelve (12) authorized media representatives, one (1) representative from the Department's public affairs office, one (1) designated staff escort, and one (1) designated team member. Any exception must be approved by the institutional warden.

(d) The execution chamber will be secured. Only the team warden, one (1) additional execution team member and one (1) FDLE monitor shall be allowed in the chamber during the administration of the execution. Any exception must be approved by the team warden.

(e) The executioner's room will be secured. Only the executioners, the team member reporting actions in the executioner's room to the warden, the team member reporting actions to the Office of the Governor, the team member observing the heart monitors, the team member maintaining the checklists, and the FDLE agent assigned to the executioner's room shall be allowed in the executioner's room. Any exception must be approved by the team warden.

(12) **Administration of Execution:**

(a) An execution team member will open the covering to the witness gallery window. The team warden will use the open telephone line to determine from the Governor whether there has been a stay of execution. If the team warden receives a negative response, s/he will then proceed with the execution.

(b) An execution team member will turn on the PA system. The team warden will permit the inmate to make an oral statement, which will be broadcast into the witness gallery over the PA system. At the conclusion of the inmate's statement, or if the inmate declines to make a statement, the team warden will announce that the execution process has begun. A designated member of the execution team will turn off the PA system.

(c) In the presence of the secondary executioner and within sight of one (1) or more execution team members and one (1) of the FDLE monitors, the primary executioner will administer the lethal chemicals in the following manner:

(1) The executioner will remove from the stand on the worktop the syringe labeled number one (1), which contains one hundred milligrams (100mg) of etomidate injection, place the blunt cannula into the open port of the IV extension set connected to the primary line and push the entire contents of that syringe into the IV port at a rate that meets the injection resistance of the cannula. When the syringe is depleted, s/he will hand the empty syringe to the secondary executioner for safe disposal.

(2) The executioner will remove from the stand on the worktop the syringe labeled number two (2), which contains one hundred milligrams (100mg) of etomidate injection, place the blunt cannula into the open port of the IV extension set connected to the primary line and push the entire contents of that syringe into the IV port at a rate that meets the injection resistance of the cannula. When the syringe is depleted, s/he will hand the empty syringe to the secondary executioner for safe disposal.

(3) The executioner will remove from the stand on the worktop the syringe labeled number three (3), which contains twenty milliliters (20ml) of saline solution, place the blunt cannula into the open port of the IV extension set connected to the primary line, and push the entire contents of that syringe into the IV port at a rate that meets the injection resistance of the cannula. When the syringe is depleted, s/he will hand the empty syringe to the secondary executioner for safe disposal.

(4) At this point, the team warden will assess whether the inmate is unconscious. The team warden must determine, after consultation, that the inmate is indeed unconscious. If the inmate is unconscious and the team warden orders the executioners to continue, the executioners shall proceed to step (6).

(5) In the event that the inmate is not unconscious, the team warden shall signal that the execution process is suspended and note the time and order the window covering to the witness gallery to be closed. The execution team shall assess the viability of the secondary access site. If the secondary access site is deemed viable, then the team member shall designate this site as the new primary access site. If the secondary access site is compromised, a designated execution team member will secure peripheral venous access at another appropriate site or will perform a central venous line placement, with or without a venous cut-down, at one or more sites deemed appropriate by that team member. Once the team warden is assured that the team has secured a viable access site, the team warden shall order the drapes to be opened and signal that the execution process will resume. The executioners will then be directed to initiate the administration of lethal chemicals from stand "B" into the newly established primary line, starting with the syringes of etomidate injection, labeled one (1) and two (2) and the first syringe of saline. The executioners will continue to use the remaining chemicals from stand "B" throughout the execution at the direction of team warden. The team warden will then again proceed to step (4) and assess whether the inmate is unconscious.

(6) The executioner will remove from the stand on the worktop the syringe labeled number four (4), which contains five hundred milligrams (500mg) of rocuronium bromide injection, place the blunt cannula into the open port of the IV extension set connected to the primary line, and push the entire contents of that syringe into the IV port at a rate that meets the injection resistance of the cannula. When the syringe is depleted, s/he will hand the empty syringe to the secondary executioner for safe disposal.

(7) The executioner will remove from the stand on the worktop the syringe labeled number five (5), which contains five hundred milligrams (500mg) of rocuronium bromide injection, place the blunt cannula into the open port of the IV extension set connected to the primary line, and push the entire contents of that syringe into the IV port at a rate that meets the injection resistance of the cannula. When the syringe is depleted, s/he will hand the empty syringe to the secondary executioner for safe disposal.

(8) The executioner will remove from the stand on the worktop the syringe labeled number six (6), which contains twenty milliliters (20ml) of saline solution, place the blunt cannula into the open port of the IV extension set connected to the primary line, and push the entire contents of that syringe into the IV port at a rate that meets the injection resistance of the cannula. When the syringe is depleted, s/he will hand the empty syringe to the secondary executioner for safe disposal.

(9) The executioner will remove from the stand on the worktop the syringe labeled number seven (7), which contains one hundred twenty milliequivalents (120mEq) of potassium acetate injection, place the blunt cannula into the open port of the IV extension set connected to the primary line, and push the entire contents of that syringe into the IV port at a rate that meets the injection resistance of the cannula. When the syringe is depleted, s/he will hand the empty syringe to the secondary executioner for safe disposal.

(10) The executioner will remove from the stand on the worktop the syringe labeled number eight (8), which contains one hundred twenty milliequivalents (120mEq) of potassium acetate injection, place the blunt cannula into the open port of the IV extension set connected to the primary line, and push the entire contents of that syringe into the IV port at a rate that meets the injection resistance of the cannula. When the syringe is depleted, s/he will hand the empty syringe to the secondary executioner for safe disposal.

(11) The primary executioner shall at all times administer the lethal injection chemicals. Only if the primary executioner becomes incapacitated shall the secondary executioner administer the lethal chemicals. At no time shall more than one (1) executioner inject any lethal chemicals to complete the execution.

(d) If at any time during the administration of the lethal chemicals the primary venous access becomes compromised, the team warden shall order the execution process stopped and order the window covering to the witness gallery to be closed. The execution team shall assess the primary access site and assess the viability of the secondary access site and take appropriate remedial action at the access site, if necessary. If neither access site is viable, a designated execution team member will secure peripheral venous access at another appropriate site or will perform a central venous line placement, with or without a venous cut-down, at one or more sites deemed

appropriate by that team member. Once the team warden is assured that the execution team has secured a viable access site, the warden shall order the drapes to be opened and direct that the execution process will resume using the newly established primary line. The executioners will be directed to initiate the administration of lethal chemicals from stand "B" into the IV set attached to the newly established primary line, starting with the syringes of etomidate injection, labeled one (1) and two (2) and the first syringe of saline, labeled number three (3). The team warden will then proceed to step (c)(4), as described above.

(e) Throughout the execution process, one (1) or more designated execution team members will observe the heart monitors. If the heart monitors reflect a flat line reading during or following the complete administration of the lethal chemicals, a physician will examine the inmate to determine whether there is complete cessation of respiration and heartbeat.

(f) Once the inmate is pronounced dead by the physician, a designated member of the execution team will record the time of death on the appropriate lethal injection procedures checklist.

(g) The team warden will notify the Governor via the open phone line that the sentence has been carried out and the time of death.

(h) A designated execution team member will turn on the PA system. The team warden shall make the following announcement to the witnesses in the gallery: "The sentence of the State of Florida vs. [Inmate Name] has been carried out at [time of day]."

(i) The designated Department of Corrections escort staff will escort the official witnesses and all of the media pool from the witness room of the execution chamber.

(13) **Immediate Post-Execution Procedures:**

(a) Designated execution team members will dispose of the equipment and any remaining chemicals as required by state and federal law.

(b) The institutional warden will coordinate the entry of hearse attendants for recovery of the inmate's body.

(c) The inmate's body will be removed from the execution table by hearse attendants under the supervision of the designated team member.

(d) The institutional warden, or his/her designee, will obtain a certification of death from the physician and will deliver the certification to the hearse attendants prior to their departure.

(e) The inmate's body will be transported by the hearse attendants to the medical examiner's office in Alachua County for an autopsy.

(f) The team warden shall conduct a brief debriefing interview with every execution team member and the executioners, documenting any exceptional circumstances that arose during the execution. Subsequent debriefings will take place, as appropriate.

(14) **Follow-Up Procedures:**

(a) The institutional warden will forward the Warrant of Execution and a signed statement of the execution to the Secretary of State.

(b) The institutional warden will file an attested copy of the Warrant of Execution and a signed statement of the execution with the clerk of the court that imposed the sentence.

(c) The institutional warden, or his/her designee, will advise central office records by e-mail of the inmate's name and the date and time of death by execution.

(15) **Periodic Review and Certificate from Secretary:** There will be a review of the lethal injection procedure by the Secretary of the Florida Department of Corrections, at a minimum, once every two (2) years, or more frequently as needed. The review will take into consideration the available medical literature, legal jurisprudence, and the protocols and experience from other jurisdictions. The Secretary of the Department of Corrections shall, upon completion of this review, certify to the Governor of the State of Florida confirming that the Department is adequately prepared to carry out executions by lethal injection. The Secretary will confirm with the team warden that the execution team satisfies current licensure and certification and all team members and executioners meet all training and qualifications requirements as detailed in these procedures. A copy of the certification shall be provided to the Attorney General and the institutional warden shall provide a copy to a condemned inmate and counsel for the inmate after a warrant is signed.

The certification shall read:

As Secretary of the Florida Department of Corrections, I have reviewed the Department's Execution by Lethal Injection Procedures to ensure proper implementation of the Department's statutory duties under Chapter 922, Florida Statutes. The procedure has been reviewed and is compatible with evolving standards of decency that mark the progress of a maturing society, the concepts of the dignity of man, and advances in science, research, pharmacology, and technology. The process will not involve unnecessary lingering or the unnecessary or wanton infliction of pain and suffering. The foremost objective of the lethal injection process is a humane and dignified death. Additional guiding principles of the lethal injection process are that it should not be of long duration, and that while the entire process of execution should be transparent, the concerns and emotions of all those involved must be addressed.

I hereby certify that the Department is prepared to administer an execution by lethal injection and has the necessary procedures, equipment, facilities, and personnel in place to do so. The Department has available the appropriate persons who meet the minimum qualifications under Florida Statutes and in addition have the education, training, or experience, including the necessary licensure or certification, required to perform the responsibilities or duties specified and to anticipate contingencies that might arise during the execution procedure.

Mark S. Inch

MARK S. INCH
SECRETARY

2/27/19

Date

APPENDIX L

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Florida executes man for pair of killings dating to 1991

By JASON DEAREN November 9, 2017

STARKE, Fla. (AP) — A man convicted of killing two people in 1991 on Wednesday became the third inmate executed in Florida since the state resumed carrying out the death penalty after a hiatus.

Fifty-three-year-old Patrick Hannon received a lethal injection and was pronounced dead at 8:50 p.m. at Florida State Prison in Starke, the office of the governor said.

Hannon was strapped to a gurney as witnesses watched on the other side of a glass window. While he expressed regret over the killings, he said it was two accomplices that killed the victims, Robert Carter and Brandon Snider. Carter was fatally shot and Snider had his throat slashed.

"I hope the execution gives the Carter family some peace. I wish I could have done more to save Robert. I didn't kill anybody, but I was there," he said.

As he spoke, one of the victim's female family members cursed.

"Robby was a good man and a good friend, and I let him down when he needed me most," Hannon continued. "As far as Brandon Snider, I think that everybody knows what he did to get this ball rolling. I'm sorry things worked out like this the way it did."

The same woman, who authorities declined to identify later, cursed again in a whisper.

Then as the execution began at 8:38 p.m., the woman made eye contact with Hannon and raised her hand as if to wave "bye, bye."

Hannon's body moved during the execution procedure. His lips twitched, his chest heaved and his arms, legs and body appeared to convulse a bit. Then, 12 minutes after the execution began, he was pronounced dead.

Florida resumed executions in August after making changes to its death penalty sentencing law. The law now requires a unanimous jury vote for a death sentence.

The U.S. Supreme Court had previously found that Florida's old sentencing law, which did not require unanimity, to be unconstitutional. However, the new sentencing law did not affect Hannon's case because the state's high court ruled that those decided before 2002 were not eligible for relief.

Hannon was convicted in 1991 of two counts of first-degree murder in the slayings of Snider and Carter.

It was in January 1991 when Hannon and two other men went to Snider's apartment in Tampa.

Hannon's friend, Jim Acker, initially attacked Snider with a knife, according to authorities. Prosecutors said the attacks were motivated by Snider's vandalizing of Acker's sister's apartment. Snider was "eviscerated" by the initial stabbing, according to court documents, and Hannon sliced his throat, nearly cutting off the victim's head.

Carter, who was Snider's roommate, also was home and fled the violence to an upstairs bedroom, where Hannon dragged him out from under a bed and shot him six times, the jury found.

Hannon's jury recommended death unanimously after finding him guilty of both killings.

Hannon's lawyers had earlier requested a halt to the execution plan before the Florida Supreme Court, but that was denied. Hannon had asked for a new sentencing phase, citing recent changes to Florida's death sentencing system. Florida Supreme Court Justice Barbara Pariente, who dissented from the rest of the court, wrote that the jury was not given enough information to make an informed decision in Hannon's sentencing phase.

Without explanation Wednesday evening, the U.S. Supreme Court denied two last-hour requests by Hannon's lawyer sto block the execution.

Follow Jason Dearen on Twitter: http://www.twitter.com/JHDearen

APPENDIX M

STATE OF FLORIDA
COUNTY OF LEON

COMES NOW THE AFFIANT, ROBERT S. FRIEDMAN, WHO, UNDER THE PENALTY OF PERJURY, HEREBY SWEARS AND AFFIRMS AS FOLLOWS:

1. My name is Robert S. Friedman, and I have been a licensed Florida attorney since 1985. I currently serve as the Capital Collateral Regional Counsel for North Florida, and I have held that position since 2014.

2. During my tenure as Capital Collateral Regional Counsel-North (CCRC-North), my office represented Eric Branch during his post-conviction appeals. It was in my capacity as CCRC-North that I witnessed the execution of Mr. Branch at Florida State Prison on February 22, 2018. It was the first execution I have ever witnessed.

3. Prior to the execution, my office had made several requests regarding my witnessing of the execution. These requests included: 1) That I be allowed to bring a pen and paper into the execution chamber, 2) That a second witness from the legal team also be present as a witness, 3) That I have access to a telephone to contact Mr. Branch's legal team, and 4) That I or a member of our legal team be allowed to observe the IV insertion process. The first request regarding a pen and paper was granted, and the other three requests were denied. (See request and response attached as Exhibit 1).

4. On February 22, 2018, in accordance with Florida Department of Corrections' (FDOC) procedure, I arrived at the administration building of the Florida State Prison at 4:20 p.m. At 4:45 p.m., FDOC personnel made me give up my cell phone, as well as my own pad and pen, and they provided me with their own pad and two pencils. At 5:15 p.m. a FDOC official stated we were ready to leave the administration building and enter the prison. We entered the prison through security, and stood by a door waiting for a van until 5:40 p.m. Then, at 5:40 p.m., we were taken to the chapel, and stayed there until 6:30 p.m. At 6:32 p.m. we walked back to the door and got in the van and were driven to the execution chamber. From 4:45 p.m. on, I was unable to contact Mr. Branch's legal team, as I had no access to my cell phone. However, I observed at least one FDOC employee who was also a witness to the execution using a cell phone during the time the witnesses were confined to the chapel. It was only after the execution that I had access to my cell phone.

4. At 6:37 p.m. I was seated in the execution chamber in the second chair of the front row. Mr. Branch was strapped to the gurney in a vertical position. His hands were wrapped and bandaged tightly. I was able to see only the very tips of his fingers.

5. At 6:47 p.m. Mr. Branch gave a final statement, saying that Rick Scott and Pam Bondi should be the ones conducting the execution, instead of the prison officials in the chamber.

6. At 6:48 p.m. the execution officials stated the execution phase was to begin. 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.

7. At 6:50 p.m., his chest was still moving. Between 6:50 p.m. and 6:52 p.m. his body was shaking and his chest was moving. The execution official grabbed him by the shoulders and shook him at this time. At 6:53 p.m., after the execution official had grabbed him and shook him, I still observed the same movements – his chest heaving and body shaking. At 6:54 p.m. I observed slight movement.

7. From 6:55 p.m. until 7:04 p.m. there was no movement. At 7:04 p.m. a person with a stethoscope came in and appeared to listen to Mr. Branch's heart. At 7:05, the same person shined a pen light in Mr. Branch's eyes. At 7:05 p.m., the execution official stated that the sentence had been carried out. The curtains closed at 7:06 p.m.

FURTHER AFFIANT SAYETH NAUGHT

Robert S. Friedman

SWORN TO AND SUBSCRIBED TO before me this 7th day of March, 2018, by Robert S. Friedman, who is personally known to me, or produced the following identification

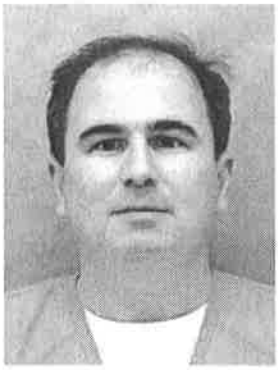
NOTARY PUBLIC, STATE OF FLORIDA
My Commission Expires:

THERESA E. FARLEY
Commission # FF 159894
Expires September 15, 2018
Bonded thru Troy Fain Insurance 800-385-7019

APPENDIX N

Eric Branch lets out blood-curdling screams, yells 'murderers' as he is executed

Jason Dearen, AP Published 5:53 p.m. CT Feb. 22, 2018 | **Updated 10:34 p.m. CT Feb. 22, 2018**



(Photo: Courtesy of Florida Department of Corrections)

Update 7:45 p.m.

The sister of the University of West Florida student murdered in 1993 held her composure as she made an emotional address to the media after the execution of her sister's killer, Eric Branch.

"We have mourned her longer than she was with us," said Wendy Morris Hill, the sister of Susan Morris

Branch, who spent more than 20 years on death row, was executed Thursday night. He was pronounced dead at 6:05 p.m. Central Standard Time.

Morris Hill spoke more about her sister than of Branch and his crime.

She said she'll always have the memory of watching Susan growing up — losing her baby teeth, playing at Pensacola Beach, all the times she listened to mix tapes while sunbathing on the roof.

Morris Hill also recalled her sister promising that she would teach her how to drive a stick shift in that same red 1986 Toyota Celica she was abducted in.

"Today's event is the final action of the state of Florida on a crime committed over 25 years ago," Morris Hill said. "As relieved as we are that the legal process has now concluded, nothing will bring Susan back."

Morris Hill ended the press conference by thanking the officials involved in the case, from the defense counsel, to the judge, to the law enforcement officers who helped find Branch, to the attorneys who prosecuted the case.

6:25 p.m.

Eric Branch let out a blood-curdling scream, a plea to the execution team not to carry out the sentence and several shouts of the word "murderers," before he was executed on Thursday evening.

He was pronounced dead at 6:05 p.m.

Branch addressed the three men who were part of the execution team shortly before the lethal injection was administered.

"I've learned that you are good people and this is not what you should be doing," he said, at the three men.

Branch also said Attorney General Pam Bondi and Gov. Rick Scott should take the men's place and execute him themselves.

A spokeswoman for the Florida Departmnet of Corrections later said there was no indication that Branch's scremas were the result of any part of the lethal injction process.

Florida has executed a man convicted of raping and killing a college student in 1993 so he could steal her car.

Authorities said Eric Scott Branch was pronounced dead at 6:05 p.m. Thursday after a lethal injection at Florida State Prison.

Branch was convicted of the rape and murder of University of West Florida student Susan Morris, whose naked body was found buried in a shallow grave near a nature trail.

Family members of Susan Morris speak after Eric Branch was executed at Florida State Prison on Thursday, Feb. 22, 2018. *(Photo: Emma Kennedy/ekennedy@pnj.com)*

Evidence shows that Branch approached Morris after she left a night class on Jan. 11, 1993, so he could steal her red Toyota and return to his home state of Indiana. He was arrested while traveling there.

More: Officials share details about inmate's final day (/story/news/2018/02/22/eric-branch-execution-officials-share-details-inmates-final-day/363914002/)

Branch also was convicted of sexually assaulting a 14-year-old girl in Indiana and of another sexual assault in Panama City, Florida.

Update 5:30 p.m.

The U.S. Supreme Court has denied last-minute appeals to halt the execution of a Florida inmate convicted of the 1993 rape and murder of a college student.

The court rejected the appeals of 47-year-old Eric Scott Branch without comment Thursday, about a half hour after his scheduled execution was initially to have taken place. Authorities can now proceed with a lethal injection at Florida State Prison.

Branch was convicted in the death of 21-year-old University of West Florida student Susan Morris, whose naked body was found buried in a shallow grave.

Evidence in the case shows that Branch approached Morris after she left a night class on Jan. 11, 1993, so he could steal her red Toyota and return to his home state of Indiana. He was arrested while traveling there.

Update 5 p.m.

Florida authorities are awaiting a U.S. Supreme Court ruling on whether to proceed with executing an inmate convicted of the rape and murder of a college student.

More: Eric Branch execution: Officials share details about inmate's final day (/story/news/2018/02/22/eric-branch-execution-officials-share-details-inmates-final-day/363914002/)

More: Eric Branch's News Journal front pages after the crime (/story/news/crime/2018/02/22/eric-branch-5-news-journal-front-pages-after-crime/364215002/)

Forty-seven-year-old Eric Scott Branch was set to receive a lethal injection at 6 p.m. Thursday at Florida State Prison. But that time passed with correction officials still awaiting a decision on the inmate's final appeals.

Branch was convicted in the death of 21-year-old University of West Florida student Susan Morris, whose naked body was found buried in a shallow grave in 1993.

Evidence in the case shows that Branch approached Morris after she left a night class on Jan. 11, 1993, so he could steal her red Toyota and return to his home state of Indiana. He was arrested while traveling there.

Update 3 p.m.

A man scheduled for execution in Florida for raping and killing a college student in 1993 has had his last meal and was described as in good spirits.

Barring a last-minute stay, 47-year-old Eric Scott Branch will be put to death by lethal injection at 6 p.m. Thursday at Florida State Prison.

Corrections Department spokeswoman Michelle Glady says his last meal was a pork chop, T-bone steak, French fries and 2 pints of Ben & Jerry's ice cream. He was visited by his daughter this morning and refused a meeting with a spiritual adviser.

Branch was convicted of the January 1993 rape and fatal beating of 21-year-old University of West Florida student Susan Morris. Authorities say Branch killed Morris so he could steal her car. The woman's body was found buried in a shallow grave.

Original story

Florida is scheduled to execute a man convicted of raping and killing a college student in 1993 so he could steal her car.

Barring a last-minute stay, 47-year-old Eric Scott Branch will be put to death by lethal injection at 6 p.m. Thursday at Florida State Prison.

Branch was convicted of the rape and fatal beating of 21-year-old University of West Florida student Susan Morris whose naked body was found buried in a shallow grave.

Evidence in the case shows that Branch approached Morris after she left a night class on Jan. 11, 1993, so he could steal her red Toyota and return to his home state of Indiana. He was arrested while traveling there.

Branch was also convicted of another Florida rape and one in Indiana.

Pensacola News Journal reporter Emma Kennedy contributed to this story.

Read or Share this story: https://www.pnj.com/story/news/crime/2018/02/22/eric-branch-execution-escambia-county-inmate-pronounced-dead-lethal-injection-susan-morris/365474002/

APPENDIX O

UNIVERSITY OF MIAMI
CURRICULUM VITAE

Date: November 15, 2017

PERSONAL

Name: David Alan Lubarsky, M.D., MBA

Office Phone: (305) 585-7037

Office Address: University of Miami / Miller School of Medicine
Jackson Memorial Hospital
1611 NW 12th Avenue
Central Building: C-300
Locator Code: R-370
Miami, Florida 33136

Date of Birth: August 2, 1959

Place of Birth: New York, NY

Present Academic Rank and Title:

Primary academic appointment:

Chief Medical and Systems Integration Officer
University of Miami Health System

Emanuel M. Papper Professor and Chairman
Department of Anesthesiology,
Perioperative Medicine and Pain Management
Professor of Anesthesiology, with tenure
University of Miami Leonard M. Miller School of Medicine

Secondary academic appointment:

Professor
Department of Management
and
Department of Health Sector Management and Policy
University of Miami School of Business Administration

Professor
University of Miami School of Nursing and Health Studies

Citizenship: U.S.A.

HIGHER EDUCATION

Washington University, St. Louis, MO, May, 1980, B.A.
Washington University School of Medicine, St. Louis, MO, May, 1984, M.D.
Fuqua School of Business, Duke University, Durham, NC, August, 1999, M.B.A.

Medical licensure: 2002 – Florida State License #ME86449
1988–North Carolina State License #32774, inactive
1985–New York State License #162663-1, inactive

Certification: National Board of Medical Examiners–July, 1985
Part I American Board of Anesthesiology (99th%) –July, 1987
Part II Board Certification–October, 1988
American Academy of Pain Management–1991
Recertified American Board of Anesthesiology – 2004, 2014

Previous Academic Appointments

Vice-Chair, Department of Anesthesiology
Professor of Anesthesiology, with tenure
Chief, Division of General, Vascular and Transplant Anesthesia and Surgical Intensive Care
Department of Anesthesiology
Duke University Medical Center
July 1988 – November 2001

Adjunct Professor, Fuqua School of Business, Duke University 6/2000-6/2002

Academic training:

Weekend Executive Masters in Business Administration (WEMBA) Program
The Fuqua School of Business
Duke University
January 1998 – August 1999
Honored as Fuqua Scholar (valedictorian)

Fellowship in Transesophageal Echocardiography
Duke University Medical Center
Fiona M. Clements, M.D., Chief, Division of Cardiac Anesthesiology
Joseph A. Kisslo, M.D., Director, Echocardiography Lab
October 1992–December 1992

Fellowship in Cardiac and Vascular Anesthesia and Clinical Research
New York University Medical Center
Stephen Thomas, M.D., Division Head
July 1987–June 1988

Residency
Department of Anesthesiology
New York University Medical Center
Herman Turndorf, M.D., Professor and Chairman
July 1985–June 1987

Internship
Department of Medicine
Westchester County Medical Center
Richard Levere, M.D., Chairman
July 1984–June 1985

Recognitions:

Best Doctor annually
Who's Who in America, annually

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3. Supportive Care for Surgical Patients: Confronting the Risks of PONV, PGA Annual meeting December 12 – 16, 2003, produced by Accel Healthcare Communications.

4. NMB video tape, October 12, 2003, produced by Abbott Pharmaceuticals.

5. "Permission to Be Pain Free™: Understanding Labor Epidurals," conceived, scripted and presented by David A. Lubarsky, Donald H. Penning, and Janice Henderson; produced as a joint venture between Duke University and The Informed Patient, LLC, © 1999.

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2. **Lubarsky, DA**: Being Part of a Multispecialty Practice group is not a Good Financial Deal. American Society of Anesthesiologists newsletter September 2005 v. 69; 9.

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6. **Lubarsky DA**: Are computers useful to reduce costs in outpatient surgery? Society for Ambulatory Anesthesia (SAMBA) 15th Annual Meeting Syllabus, May 5-8, 2000.

7. **Lubarsky DA**: "Putting a Value on Pain, Suffering and Anxiety: Willingness-to-Pay Analyses"
"Pharmaceutical Practice Guidelines";"Computerization in the OR: Electronic Medical Record" published in the syllabus of the Scott & White Symposium, 6th Annual National Meeting, Santa Fe, NM, June 22-24, 2000 (Scott & White Hospital, Temple, TX).

8. **Lubarsky DA**, Reves JG: Using Medicare multiples results in disproportionate reimbursement for anesthesiologists compared to other physicians. Association of Anesthesia Clinical Directors (AACD) 12th Annual Meeting Syllabus, October, 1999.

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Electronic, World Wide Web, and/or Internet Publications:

1. **Lubarsky DA** (Chief Editor and Project Manager): Anesthesiology On-Line. (1000 Chapter Textbook prepared for emedicine.com)

2. **Anesthesia Web, 1996-2001, Editor in Chief. Edited a monthly scientific update and created/hosted an anesthesia information specialty forum with 17,000 unique healthcare professionals joining.**

3. Commentary: 1997: The year in review. In Anesthesia Web, January, 1998.

4. Commentary: Notes from the SCA (Society of Cardiovascular Anesthesiologists) annual meeting. In Anesthesia Web, June, 1998.

5. Commentary: What was new at the ASA in Orlando. In Anesthesia Web, November, 1998.

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PROFESSIONAL

Funded Research Performed:

1. Picis 2005
   $36,000.00 unrestricted grant for research within the Center for Informatics and Perioperative Management (CIPM).
   Role: Co-Principal Investigator with Dr. Michael Vigoda.

2. University of Miami Office of the Provost 2004
   $10,000 - Inter school development grant for development of a business school elective for senior medical students
   Role: Co-Principal Investigator with Dr. Michael Vigoda.

3. Roche Labs 2002
   $ 50,000 educational grant for development/integration of palm pilot based algorithms in the treatment of PONV and preoperative vascular workups.
   Role: Co-Principal Investigator with Dr. Thomas Powell.

4. Organon, Inc. 2000
   $36,000 for project entitled "A Multi-Center Trial to Evaluate the Interaction of Maintenance Doses of Rocuronium with an Intubating Dose of Rapacuronium, Rocuronium, or Succinylcholine."
   Role: Co-Principal Investigators: with Dr. TJ Gan

5. Aspect Medical Systems, Inc. 1999
   $22,590 research agreement to support "Willingness to Pay for Avoidance of Awareness During General Anesthesia." Co-Principal Investigators: with Dr.TJ Gan.

6. Abbott Labs 1999-2001
   $250,000 educational grant to direct AnesthesiaWeb.com
   Role: Dr. Lubarsky, Director and Chair, Editorial Board

7. Roche Laboratories 1996 - 1999
   $100,000 grant x 3 years to the Department of Anesthesiology to administer and direct AnesthesiaWeb.com: An Educational Resource for Anesthesia Providers.
   Role: Dr. Lubarsky, Director, Founder and Chair, Editorial Board.

8. North American Dräger 1998 - 2001
   $1,500,000 contract to develop an Anesthesia Information Management System (AIMS) prototype for Drager (Saturn) within the Duke perioperative environment..
   Role: Co-Principal Investigators with Dr Iain Sanderson

9. Roche 1996
   $45,000 research grant in support of Database Use in Outcomes Research, used to fund "The successful implementation of pharmaceutical practice guidelines: Analysis of associated outcomes and cost savings"
   Role: Principal Investigator

10. Glaxo-Wellcome 1996 - 1997
    $25,000 research grant for "How Much are Patients Willing to Pay to Avoid Postoperative Nausea and Vomiting"
    Role: Principal Investigator

11. Abbott Laboratories 1992 - 1993
    $35,000 unrestricted educational grant to evaluate use and safety of etomidate
    Role: Principal Investigator

12. Sanofi Winthrop Pharmaceuticals 1993
    $10,000 research grant for the study "Comparison of Amrinone versus Nitroprusside for Hemodynamic Control and Support During Infrarenal Aortic Clamping for Abdominal Aortic Aneurysm Repair".
    Role: Principal Investigator

13. Somatogen 1992
    $13,500 research grant to study the cost of perioperative transfusions
    Role: Principal Investigator

Professional Organizations:

- American Society of Anesthesiologists, 1988 – Present
- American Medical Association, 1988 – Present
- Association of University Anesthesiologists, 2000 – Present
- International Anesthesia Research Society, 1988 – Present
- Florida Society of Anesthesiologists, 2002 - Present
- North Carolina Society of Anesthesiologists, 1988 – 2002
- Society of Cardiovascular Anesthesia, 1991 – Present

Selected International Engagements:

- Invited Speaker – Triennial 2017 Joint meeting of the Israeli Society of Critical Care and Israeli Society of Anesthesiology. Incentive systems and the impact of Behavioral Economics on Patient and Provider Decision Making.

- Invited Speaker – Japanese Society of Anesthesiology, The 60th Annual Meeting of JSA, Sapporo, Japan, May 23, 2013, President's Panel on Concepts of Clinical Research and Publication: How to Address Conflicts of Interest, the U.S. Experience.

- Invited Speaker/Executive – Harbin University, October 7-10, 2010 Harbin China. Lecture – managing abdominal aortic aneurysms. Honorary faculty professorship bestowed. Sino-American medical cooperative exchange agreement to train transplant and associated ICU teams.

- Invited Speaker – 6th Evidence Based Peri-Operative Medicine Conference, University College London, IET/Savoy Place, London, July 5 – 6, 2007.

- Invited Speaker - Beta Blockers in Non-Cardiac Surgery: Who, What, When and Why. 20th International Congress of the Israel Society of Anesthesiologists, Tel-Aviv, Israel, September 26 – 29, 2005.

- Plenary Speaker - Japanese Society of Anesthesiology, May 2004, Nagoya, Japan. Understanding Practice Guidelines.

- Kagoshima University School of Medicine, Department of Anesthesiology & Critical Care, Kagoshima, Japan, May 23 – 29, 2004.

- Annual Hong Kong Visiting Professor, Commissioned Training in Anaesthesiology 2002/03, Pamela Youde Nethersole Eastern Hospital, Hong Kong [by Dr. Wallace Chiu (wkychiu@ha.org.hk), Chairman, Training Subcommittee in Anaesthesiology, Hospital Authority, Hong Kong] – January 2003
  - Valuing Health Care in 2002
  - Using Information Technology in Medicine – Near Future or False hope?
  - A weeklong tour, lecture and seminar series in every hospital training program in Hong Kong

- Valuing Healthcare lecture XXXIIth International Meeting of Anesthesiology and Critical Care, March 18 & 19, 2000, in Paris, France, Prof. Pierre Coriat, organizer Journees D'Enseignement Post Universitaire (JEPU) (Anesthesiology and Critical Care Conference), Paris, France, March 17-23, 2000. Invited by Dr. Pierre Coriat. Lectures: "Est-on prêt à payer la prise en charge de la douler et de l'anxiété postopératoires?" *or* "Putting a value on pain, suffering and anxiety: willingness to pay?" and "Gestion informatisée des coûtes des agents d'anesthésie" *or* "Managing perioperative drug costs using informatics."

National/State Presentations, Conferences, Speaking, Roundtable and Panel Engagements:

Practical Advice for Creating Incentive Plans in Healthcare, ASA Practice Management Meeting 2017 Grapevine, TX. January 27, 2017.

Modern Integration in Healthcare – what does population health really mean. University of Miami School of Business, Miami, FL, March, 2016

Panel: Promoting a new economic curriculum; Lecture: What Health Systems Want from Perioperative Managers: American Association of Clinical Directors Annual Meeting, March 2016 Miami Florida

Invited participant national physician executive/CMO quarterly roundtable hosted by CCI and McKinsey. NY, NY. Sample topics:

Building a team of teams
An m-platform to evaluate pharmaceutical costs in the physician office
Patient engagement: a discussion with the CEO of Weight Watchers
Lean Six Sigma today: a discussion with the CEO of Virginia Mason
The exchange market: a discussion with Aon Hewitt
The future of defined contribution versus defined benefit health plans: a discussion of national data with McKinsey consultants

Practical Advice to Build Incentive Programs in Healthcare, ASA Practice Management Meeting 2016, San Diego CA. January 29, 2016.

The ACA, ACO's and the future, ASA Practice Management Meeting 2016, San Diego CA. January 29, 2016.

Invited panelist The Institution of Innovation in Large Organizations (ILO) Gathering; February 18, 2016.

Invited Roundtable participant with HHS Secretary Burwell: Access via the ACA in Miami and Florida. November 18, 2015.

How to Transform a Health Organization Culture to Deliver High Quality Patient Care; University of Miami School of Business, Miami, FL, June 7, 2015.

Medical Records without Borders; eMerge (Latin America- America technology conference), Miami, Florida, May 5, 2015.

The ACA, AC01s and the Anesthesiologist: What it Means to You in 2015; Duke University Anesthesia Camp, Grand Cayman Islands, January 28, 2015.

Health Care Negotiations 101-How to Think About Getting To Yes; Anesthesia Camp, Duke University Grand Cayman Islands, January 28, 2015.

Perioperative Oxygen Supplementation and Surgical Site Infections - Update; Duke University Anesthesia Camp, Grand Cayman Islands, January 28, 2015.

Building Effective Leaders: Using Incentives (Financial and Otherwise); ASA Practice Management Meeting 2015, Atlanta, Georgia, January 23, 2015.

Change Management: Identifying What Change Is Needed; How Fast Can/Should You Go? SAAC (Society of Anesthesia Academic Chairs) Annual Meeting, Chicago, IL, November 7, 2014.

Invited roundtable participant with Lawrence Summers, former US Secretary of the Treasury on the future financing of healthcare. Healthcare Executives forum hosted by Greg Sorensen, CEO Siemens North America at the Siemens Executive Conference, Carlsbad California, April 2014

Using Evidence to Improve Quality, Safety, and Patient Outcomes - 9th Perioperative Medicine Summit 2014 Scottsdale, AZ, February 20-22, 2014.

Opening Speaker and Chair, Host Committee: Introduction and Welcome to the 60th Annual Meeting Speech; AUA (Association of University Anesthetists) 60th Annual Meeting, Miami, Florida, April 4-6, 2013.

Anesthesiology Education in the 21st Century. A Brave New World; Speaker – Manpower, Training and the New Value Proposition: Are You Ready for Health Care Reform, ASA Annual Meeting, Washington DC, October 13-16, 2012

ASA Legislative Conference, Washington DC, April 30-May 2, 2012

Changing Physician Behavior in an Era of Accountability – 7th Annual Perioperative Medicine Summit 2012, Miami Beach, Florida, March 15-18, 2012

Plenary Session: Negotiating Successfully With Your Hospital . . . And the Car Salesman. . . And Your Spouse - Conference on Practice Management 2011 at the ASA in Houston, Texas. January 28 – January 30, 2011

Sedation Update: GI Society of the AGA Presentation at The Loew's Hotel Miami Beach, Florida January 13 – January 15, 2011

- University of Wisconsin meeting aboard Royal Caribbean Cruises. January 17- 23, 2011
    - 'How to Manage Open & Endovascular AAA Repair' '
    - Pharmacologic Protection during AAA Surgery' '
    - Current Treatment: Post-operative Nausea & Vomiting' '
    - Basics of Patient Safety Teamwork'
    - 'Medical Malpractice: Anatomy of a Lawsuit - Keeping the Hounds at Bay' '
    - How to Use an Anesthesia Information System' '
    - Workshop on How to Negotiate with Hospitals' –

Future Potential Alternatives to RVU Payment - Do We have to be Different? RVU's and RBRVS RVU's, End the Confusion! Presentation at the AAPD/SAAC (Society of Anesthesia Academic Chairs) in Washington, D.C. November 5 – November 7, 2010

PGA Panel with Mark Warner on Patient Safety - Patient Safety and Practice Management - ASA 2010 Annual Meeting October 18 – October 20, 2010

Anesthesia for the Medical Consultant Lecture - Perioperative Medicine Summit 2010 at The Eden Roc Hotel Miami Beach, Florida. March 4, 2010

Propofol Sedation: Is it Standard of Care? GI Update Presentation at the 4th Perioperative Medicine Summit in Miami, Florida, February 5 - February 7, 2009

Academic Anesthesia Panel at the Anesthesia & Critical Care Conference - University of Chicago [10th Annual Conference] in St. John US Virgin Islands, January 2008

Plenary Speaker: Negotiating Financial Support with Hospitals and Deans. Academic Anesthesia Panel at the ASA Practice Management Conference in Tampa, Florida, January 2008.

Negotiating Financial Support with Hospitals and Deans. Practice Management Conference, Panel Presentation on Academic Anesthesia at the ASA Annual Meeting in San Francisco, October 2007.

Southern University Department of Anesthesiology Chairs (SUDAC) Meeting, Meeting Moderator, Administrative Round Table Discussion. April 13 – April 15, 2007.

Management of PONV. Presentation at the Western Pennsylvania Hospital , Fourth Annual Arizona Anesthesia Adventure, Phoenix, Arizona, March 2 – 5, 2007.

Anesthesia for AAA. Presentation at the Western Pennsylvania Hospital , Fourth Annual Arizona Anesthesia Adventure, Phoenix, Arizona, March 2 – 5, 2007.

Anesthesia for Endovascular Procedures. Presentation at the Western Pennsylvania Hospital, Fourth Annual Arizona Anesthesia Adventure, Phoenix, Arizona, March 2 – 5, 2007.

Negotiations 101: Terminology and Preparation. Presentation at the Western Pennsylvania Hospital , Fourth Annual Arizona Anesthesia Adventure, Phoenix, Arizona, March 2 – 5, 2007.

Neuromuscular Blockers. Presentation at the Western Pennsylvania Hospital , Fourth Annual Arizona Anesthesia Adventure, Phoenix, Arizona, March 2 – 5, 2007.

Understanding the cost and consequences of PONV. 60th Postgraduate Assembly in Anesthesiology (PGA), New York City, New York, December 8-10, 2006.

Postoperative Nausea and Vomiting invited guest lecture at the Dallas Society of Anesthesiologists Annual Meeting in Dallas, TX, September 19 – 20, 2006.

The Academic Pain Practice: Can It Survive? Panel Presentation at the ASA Annual Meeting in Chicago, October 2006.

Abdominal Aortic Surgery Including Endovascular. Refresher Course Presentation at the ASA Annual Meeting in Chicago, October 2006.

Education, Economics and Evolution of Cardiovascular Anesthesia. Luncheon Panel Presentation at the ASA Annual Meeting in Chicago, October 2006.

Pharmacoeconomics and Evidence Based Practice: Dispelling Practice Myths and Urban Legends. Panel Presentation at the ASA Annual Meeting in Chicago, October 2006.

Resident Research Forum Presentation at the ASA Annual Meeting in Chicago, October 2006.

Course Director of the Western Pennsylvania Hospital's 3rd Annual Arizona Adventure Conference, Phoenix, Arizona, March 26 – 30, 2006.

Aligning Incentives. Association of Anesthesia Clinical Directors (AACD) Workshop on Operating Room Management, March 10 - 12, 2006.

How to Get What You Want: The Art of Negotiation. Association of Anesthesia Clinical Directors (AACD) Workshop on Operating Room Management, March 10 – 12, 2006.

Southern University Department of Anesthesiology Chairs (SUDAC) Meeting, Guest Faculty, Negotiating with hospitals. March 31 – April 2, 2006.

Arizona Society of Anesthesiologists 32nd Annual Scientific Meeting, Guest Faculty, Finding Value in IT: Near Future or False Hope? February 17 – 19, 2006.

Arizona Society of Anesthesiologists 32nd Annual Scientific Meeting, Guest Faculty, Preventing PONV. February 17 – 19, 2006.

Arizona Society of Anesthesiologists 32nd Annual Scientific Meeting, Guest Faculty, Perioperative Management of the Patient Undergoing Abdominal Aortic Surgery. February 17 – 19, 2006.

SAAC/AAPD, Annual Meeting, session moderator on Training the Anesthesiologist of the Future. Saturday, November 5, 2005.

American Society of Anesthesiologists, Annual Meeting, Refresher Course on Perioperative Management of the Patient Undergoing Abdominal Aortic Surgery. October 22, 2005

American Society of Anesthesiologists, Annual Meeting, Clinical Forum on Cardiology. Consult? Revascularization? Or Just beta-Blocker? October 25, 2005

American Society of Anesthesiologists, Annual Meeting, panel on Pharmaceuticals, Economics and Anesthesia Practice (The Use of Practice Guidelines to Minimize Drug Costs.) October 26, 2004.

American Society of Anesthesiologists, Annual Meeting, panel on Academic Anesthesiology Training Programs – Should you Secede from the Medical School to Better Meet your Academic and Clinical Missions? (Pro: You Should Secede!) October 26, 2004

American Society of Anesthesiologists, Annual Meeting, panel on Practice Management, Oct 14, 2003.

Michigan State Society of Anesthesiologists, April 26, 2003. "Cox-2 Inhibitors: Periprocedural Pain Control and Thoughts on Central Sensitization."

New York State Society of Anesthesiologists, Post Graduate Assembly, panel on the Future of Economics and Anesthesia, Dec 2002.

Panel Chair, Supporting Surgical Outcomes, dinner meeting at PGA, Dec 2002. Presentation, "The Value of PONV therapy."

Medical University of South Carolina Continuing Education Weekend, Charleston, SC, May 4-6, 2001. Lecture: "Current Concepts in Neuromuscular Blockade."

Kansas University Medical Center 51st Annual Postgraduate Symposium on Anesthesiology, Kansas City, Missouri, April 6-8, 2001. Lectures: "Where is the Value in IT?" and "Valuing Healthcare: New Approaches to Costs and Outcomes."

Committee Chair, Drug Information Association workshop in collaboration with the Duke Clinical Research Institute, "Internet Health Information Programs: Integrating Vision and Basic Business Principals," Durham, NC, April 3-4, 2000. Dr. Lubarsky, Program Committee with and Kevin A. Schulman, M.D., M.B.A. (Program Chairperson). Moderator of panel, Specialist content sites. Lecture: "Healthcare Internet Business Models that Work."

Southern University Department of Anesthesia Chairs (SUDAC), Annual Meeting, Charleston, South Carolina, March 23-25, 2001. Lecture and discussion: "Departmental Practice Plans."

Society for Technology in Anesthesia, "STA 2001: An Information Odyssey," Scottsdale, Arizona, January 10-13, 2001.

Coordinator of IT Industry Panel: "Who is the Information Consumer? User Perspectives on Anesthesia Information," and "Understanding Value Creation from Information Systems Elucidates Consumers of That Information" October 2001

International Anesthesia Research Society 75th Clinical and Scientific Congress, Ft. Lauderdale The University of Chicago Department of Anesthesia & Critical Care 14th Annual Conference, "Challenges for Clinicians in the New Millennium," Chicago, Illinois, December 1-3, 2000. Presentations: "Willingness to Pay: Valuing Pain, Suffering & Anxiety in Health Care" and "Understanding the Business of E-Health."

American Society of Anesthesiologists Annual Meeting, San Francisco, CA, October 15-18, 2000. Foundation for Anesthesia Education and Research (FAER) panel on "Information Overload: Data Analysis from Genes to Populations." "Clinical Data: Outcomes, Cost and Quality"

Greater Atlanta Society of Anesthesiologists, New Concepts in Neuromuscular Blockade, September 14, 2000

Scott & White Symposium, 6th Annual National Meeting, Santa Fe, NM, June 22-24, 2000. Presentations:
"Putting a Value on Pain, Suffering and Anxiety: Willingness-to-Pay Analyses"
"Pharmaceutical Practice Guidelines"
"Computerization in the OR: Electronic Medical Record"

Society for Ambulatory Anesthesia (SAMBA) Annual Meeting, Washington, DC May 5-8, 2000. Participated on the panel "Managing the Costs of Ambulatory Anesthesia" Presentation: "Are Computers Useful to Reduce Costs in Outpatient Surgery?"
Participated on the panel "Life After Residency" Presentation: "Managing Your Money."

Committee Chair, Drug Information Association workshop in collaboration with the Duke Clinical Research Institute, Durham, NC, April 3-4, 2000: "Internet Health Information Programs: Overview and Market Opportunities." Dr. Lubarsky, Program Committee with Dr. Robert Califf, Robert Taber, Ph.D., and Kevin A. Schulman, M.D., M.B.A. (Program Chairperson)

New York State Society of Anesthesiologists 53rd Annual Post-Graduate Assembly, New York, NY. Participated on the panel: "The Year 2000: How Computers Will Improve Anesthesia," December 12, 1999. Presentation: "Anesthesia Information Management: Economic Implications."

American Society of Anesthesiologists Annual Meeting, Dallas, TX, October 12, 1999. Panel: "Practice Management/Compliance Coding—What They Didn't Teach Us in Medical School," Peter B. Kane, M.D., Moderator. Presentation: "Income Redistribution: The Politics of Communism in the OR"

American Society of Anesthesiologists Annual Meeting, Dallas, TX, October 12, 1999. Panel on Value-Based Anesthesia, Peter Rock, Panel Moderator. Presentation: "Quality Improvement and Identification of Key Indicators: Are Electronic Record Keepers the Answer?"

Association of Anesthesia Clinical Directors 12th Annual Meeting, October 10, 1999. Abstract presentation: "Using Medicare multiples results in disproportionate reimbursement for anesthesiologists compared to other physicians."

New York State Society of Anesthesiologists 52nd Annual Post-Graduate Assembly, New York, NY. Participated on the "Fraud and Abuse" panel (Current Issues Forum) December 13, 1998. Presentation: "Making the Plan Work: How to Get Doctors to Do What They Don't Want to Do."

Value-Based Anesthesia Care Committee Panel discussion, (a committee of the American Society of Anesthesiologists), Orlando, FL, October 21, 1998. Presentation: "Anesthesia Practice Management: Practice Guideline and Clinical Pathway Development."

Association of Anesthesia Clinical Directors Panel "Practical Approaches to OR Management" at the American Society of Anesthesiologists annual meeting, Orlando, FL, October 19, 1998. Presentation: "Maximizing Use of an Anesthesia Information Management System in 1998—What's New, What's Left to Do, and Is It for YOU?"

Society for Intravenous Anesthesia (SIVA) Annual Meeting, Orlando, FL, October 16, 1998. Lecture: "Is Intravenous Anesthesia Too Expensive for My Practice?"

Society of Cardiovascular Anesthesiologists (SCA) Workshop on Perioperative Cost Management and Contract Negotiation in Cardiac Surgery, Seattle, WA, April 25, 1998. Lecture: "Managing Drug Costs in the Perioperative Period" and leading a breakout session "Managing Labor Costs in the Perioperative Period." April 27, 1998: Breakfast panel with Dr. Robert Johnstone: "Economics and the Cardiovascular Anesthesiologist."

Association of Anesthesia Clinical Directors workshop on operating room management, Phoenix, AZ, March 20–22, 1998. (Invited by Dr. William Mazzei, University of California-San Diego) Lecture: "Real World Cost Reduction."

Nashville Society of Anesthesiologists, Nashville, TN, September 25, 1997.

Pittsburgh Symposium for Nurse Anesthetists, Pittsburgh, PA, September 27, 1997.

International Anesthesia Research Society annual meeting, San Francisco, CA, March 14–18, 1997. "Anesthesia Information Management: Where Are We?" presented by J.G. Reves, M.D., Thomas E. Stanley, M.D. and the Duke Anesthesia Section on Information Systems (Dr. Lubarsky, member).

Society of Cardiovascular Anesthesiologists 19th annual meeting, Baltimore, MD, May 11–14, 1997. (Invited by Steven Frank, M.D. and Jan C. Horrow, M.D., Chair, Scientific Program Committee) Presentation: "ICU Care After Vascular Surgery (Con)."

American Association of Anesthesia Assistants national meeting, Kiawah Island, SC, May 16–18, 1997. Lectures: "The Clinical Use of Sevoflurane" and "The Niche for Etomidate in Current Anesthetic Practice."

American Society of Anesthesiologists Bi-District Meeting, New Orleans, LA, May 23–25, 1997. (Invited by Donald Harmon, M.D. of the Ochsner Hospital) Lecture: "Cost Containment in Anesthesia."

Association of Anesthesia Clinical Directors annual meeting, San Diego, CA, October 19, 1997. (Invited by Barbara DeRiso, M.D., Director of the AACD) Keynote address: "Practice Guidelines, Information Management and Resource Utilization—Buzzwords for the New Millennium."

NC Society of Anesthesiologists 1996 Annual Fall Meeting in Myrtle Beach, SC, September 20–22, 1996. Lecture: "Value Based Anesthesia: The Academic Experience."

Scott & White Memorial Hospital 5th Annual Anesthesia Update/Resident Research Day, Temple, TX, April 13, 1996. (Invited by Charles McLeskey, M.D.) Lectures: "Pharmaceutical Practice Guidelines" and "Management Controversies for the Patient at Risk for Myocardial Ischemia Undergoing Non-cardiac Surgery." After dinner keynote address: "Economics vs. Hypocrites."

American Society of Anesthesiologists annual meeting, Washington, DC, March 9–13, 1996. Poster presentation: "PACU Clinical Outcomes and Financial Savings Following a Pharmaceutical Cost Containment Program in Anesthesia Using Practice Guidelines." Association of University Anesthesiologists Satellite Symposium on Outcomes Research, Chatham, MA, May 19–21, 1996. Poster presentation: "Pharmaceutical Practice Guidelines in Anesthesia: Implementation, Cost Savings and Outcome"

American Society of Anesthesiologists annual meeting, Memorial Convention Center, New Orleans, LA, October 19–23, 1996. Poster Presentation: "Sustaining Cost Savings Through Distribution Control and Individualized Feedback." Poster-Discussion Presentation: "Validation of the Programming of an Anesthesia Information Management System For Cost Calculations."

Society for Intravenous Anesthesia Fourth Annual Meeting, October 20, 1995. Topic: "Does Fast Track Recovery Have Limitless Possibilities?"

Southern University Department of Anesthesia Chairmen (SUDAC) 1995 Annual Meeting, Washington Duke Inn, Durham, NC, April 6–7, 1995. Lecture: "Cost Savings for Hospital and Department—The Duke Plan."

Dallas County Anesthesia Society, Dallas, TX, September 21, 1995.

Tejas Anesthesia, San Antonio, TX, December 7, 1995.

Greater Atlanta Society of Anesthesiologists, Atlanta, GA, November 17, 1994.

Society of Cardiovascular Anesthesiologists Breakfast Panel at the American Society of Anesthesiologists annual meeting, October 17, 1994. Topic on hemodilution: "Will It Work? How Much Will It Cost?"

First National Duke Heart Center Conference—"Shaping the Future: Innovations in Technology, Quality, and Caring" September 22–24, 1994. Presentation: "Patients at Risk for Ischemia Going to the Operating Room for Non-Cardiac Surgery: Management Controversies"

American Society of Anesthesiologists Annual Meeting, Washington, DC, October 9-13, 1993. Poster presentation: "Defining the relationship of oxygen delivery and consumption: use of biologic system models."

American Society of Anesthesiologists Annual Meeting, New Orleans, LA, October 14-18, 1989. Poster presentation: "Measurement of cytochrome aa3 redox potentials by NIR spectroscopy during normovolemic hemodilution."

U.S. Selected Visiting Professorships:

2016:

Henry Ford Hospital, Detroit, MI (HFH), Grand Rounds Lecture: Speaker: Didactic Lecture: Speaker – "Practical Advice for Creating Incentive Systems in Healthcare" Detroit, Michigan, June 1, 2016.

University of Southern California, Los Angeles (USC), Grand Rounds Lecture: Speaker – "Practical Advice on Building Incentive Systems in Healthcare" Los Angeles, California, April 22, 2016.

2014:

University of Florida – Jacksonville (UF), Grand Rounds Lecture: Speaker - "The Accountable Care Organizations & Anesthesia" Jacksonville, Florida, September 03, 2014.

University of California – Los Angeles (UCLA), Grand Rounds Lecture: Speaker - "The Affordable Care Act and Other New Government Mandates: What is this all about and what does it mean to Anesthesiology?" Los Angeles, California, April 2, 2014.

University of California – Los Angeles (UCLA), Resident Didactic Lecture: Speaker - "Preventing Surgical Site Infections: Use of High FiO2 and New Thoughts on OR Hand Hygiene," Los Angeles, California, April 1, 2014.

2013:

Geisinger Health System, Grand Rounds: Speaker – What's New in Anesthesia for the Medical Consultant, Danville, Pennsylvania, October 4, 2013.

Texas A & M University, Health Science Center College of Medicine, Gillespie Family Lectureship in Anesthesiology: Speaker - The Affordable Care Act Implications for Anesthesiology, College Station, Texas, September 25-26, 2013.

2012:

University of Washington, Department of Anesthesiology, Seattle, WA, September 11-13

2010:

The Brigham & Women's Hospital, Department of Anesthesiology, Boston, MA, January 20

Harbin Medical University, Department of Anesthesiology, Harbin Heilongjiang, China October 7-10; ***honorary faculty member***

2009:

New York University, Department of Anesthesiology, New York, NY, March 31- April 1

Beth Israel Deaconess Medical Center, Department of Anesthesiology, Critical Care and Pain Medicine, Boston, MA, November 3-4

Penn State Milton Hershey Medical Center, Department of Anesthesiology, Hershey, PA, December 10-11

2008:

University of Pennsylvania Health System, Department of Anesthesiology and Critical Care, Philadelphia, PA, May 21 - 22

2007:

Paoli Hospital, Department of Anesthesiology, Paoli, Pennsylvania, April 25- 26

2006:

University of Cincinnati College of Medicine, Department of Anesthesiology, Cincinnati, Ohio, November 15 -16

2005:

Oklahoma University Health Science Center, Department of Anesthesiology, Oklahoma City, OK, December 15 – 16

Brookwood Medical Center, Department of Anesthesiology, Birmingham, AL, December 5 – 6

Carraway Methodist Hospital, Department of Anesthesiology, Birmingham, AL, December 5 -6

CMC Hospital, Department of Anesthesiology, Charlotte, NC, November 9 – 10

University of Kansas, Department of Anesthesiology, Wichita, Kansas, April 11 – 13

2004:

Brigham & Women's Hospital, Department of Anesthesiology, Boston, MA, October 12

Mount Sinai School of Medicine, Department of Anesthesiology, New York, New York, October 5-7

John Hopkins University, Department of Anesthesiology, Baltimore, MD, August 26 – 27

Greater Baltimore Medical Center, Department of Anesthesiology, Baltimore, MD, August 26 - 27

Kagoshima University School of Medicine, Department of Anesthesiology & Critical Care, Kagoshima, Japan, May 23 – 29

Christiana Hospital, Department of Anesthesiology, Newark, DE, May 11 -12

2003:

Medical College of Georgia, Department of Orthopedics, Macon, Georgia, October 7-8

Hong Kong College of Anesthesiology – lectured on various aspects of anesthesia and electronic medical records at each hospital groups for all the anesthesiologists in Hong Kong. Hosted by Dr. Wallace Chiu, Pamela Youde Nethersole Eastern Hospital, Department of Anesthesiology, Hong Kong, China, January 6-10

2002:

Washington University, Department of Anesthesiology, St. Louis, Missouri, November 5-6

Baylor University Medical Center, Dallas, Texas, May 21-22 (Grand Rounds: "NMB Update-Re-examining Succinylcholine and it's Alternatives")

University of Wisconsin, Department of Anesthesiology, Madison, Wisconsin, April 2-3

2001:

State University of New York (SUNY) at Stony Brook, Long Island, NY, June 7-8 (Resident lecture: "Understanding Cost Concepts in the Literature" Grand Rounds: "Valuing Health Care: New Approaches to Costs and Outcomes")

University of Miami Medical Center, Department of Anesthesiology, Miami, FL, June 7

Christiana Hospital, Newark, DE, May 30

Peninsula Regional Medical Center, Salisbury, MD, May 29

St. Francis Hospital, Greenville, SC, April 30

University of Texas-Southwestern Medical Center Department of Anesthesiology, Dallas, TX, March 15-16 (Faculty lecture: "What Are Patients Willing to Pay?" Resident lecture: "What Are They Willing to Do About Nausea?")

Atlanta Medical Center Department of Anesthesiology, Atlanta, GA, February 14

Baptist Hospital Anesthesia Group, Pensacola, FL, January 31

Roper and St. Francis Hospitals, Charleston, South Carolina, January 18

2000:

Crawford Long Hospital, Department of Anesthesiology, Atlanta, GA, November 15

St. Luke's-Roosevelt Hospital, Department of Anesthesiology, New York, NY, November 7.

Christiana Hospital and Health System, Department of Anesthesiology, Newark, DE, May 3.

William Beaumont Hospital, Department of Anesthesiology, Royal Oak, MI, April 12.

1999:

University of Texas-Southwestern Medical Center, Parkland Memorial Hospital, Department of Anesthesiology, April 28, 1999.

University of South Florida, Department of Anesthesiology, Tampa General Hospital, Tampa, FL, April 22, 1999.

Visiting Professor, Department of Anesthesiology, Loma Linda University, Loma Linda, CA, January 27, 1999.

Washington Hospital System, Anesthesiology Department, Washington, DC, January 19, 1999.

Rex Hospital, Department of Anesthesiology, Raleigh, NC, June 3, 1999.

Jackson Memorial Hospital, Department of Oral and Maxillofacial Surgery, Miami, FL, March 11, 1999.

Forsyth Memorial Hospital, Anesthesia Department, Winston-Salem, NC, February 11, 1999.

The Scripps System, Anesthesia Department, San Diego, CA, January 27, 1999

1998

St. Joseph's Hospital System, Anesthesia Department, Albuquerque, NM, November 11, 1998.

University of Michigan, Department of Anesthesiology, Ann Arbor, MI, February 25–26: "Relational Databases, Benchmarking, Practice Guidelines and Other Buzzwords of the New Millennium" and "Management Controversies for the Cardiac Patient Undergoing Non-Cardiac Surgery"

St. Anthony Hospital, Denver, CO, September 28, 1998.

Olean General Hospital, Jamestown, NY, September 16, 1998.

St. Vincent's Medical Center in Worcester, MA, May 20, 1998.

1997

Visiting Professor, Stanford University Medical Center, Department of Anesthesia, Stanford, CA, December 3–4, 1997. \"Relational Databases, Benchmarking, Practice Guidelines and Other Buzzwords of the New Millennium." Thursday afternoon case discussion and evening

case discussion with Drs. Vitez, Navarro, Scibetta, Diachun of the Stanford faculty Health Policies Fellowship.

Fletcher Allen Health Care, M.C.H.V. Campus, Burlington, VT, November 20, 1997.

Visiting Professor, New York University Medical Center, Department of Anesthesiology, New York, NY, November 18–19, 1997. Guest Speaker at Morbidity & Mortality Grand Rounds. Lectured on Wednesday morning: "Relational Databases, Benchmarking, Practice Guidelines and Other Buzzwords of the New Millennium."

Newark Beth Israel Hospital, Newark, NJ, April 7, 1997.

Hackensack University Medical Center, Hackensack, NJ, April 8, 1997.

Hartford Hospital, Hartford, CT, September 4, 1997.

Rhode Island Hospital, Providence, RI, October 8, 1997.

Abbott Northwestern Medical Center, Minneapolis, MN, November 11, 1997.

Visiting Professor, Medical College of Georgia, Department of Anesthesiology, Augusta, GA, November 12, 1997. Conference presentation: "Relational Databases, Benchmarking, Practice Guidelines and Other Buzzwords of the New Millennium." Case presentation.

Doctors of the Medical Center of Columbus, St. Francis and Doctor's Hospitals, Columbus, GA, November 13, 1997.

Keynote speaker at the program "New Advances in Anesthesia," Methodist Hospital, St. Louis Park, MN, November 10, 1997.

1996

Athens Regional and Saint Mary's Hospitals, joint Grand Rounds, Athens, GA, January 18, 1996.

Visiting Professor, Vanderbilt University Department of Anesthesiology, Nashville, TN, February 22, 1996.) Facilitated a multi-departmental task force meeting. Subject: "Expense Reduction—Anesthesia Drugs." Lecture: "Pharmacoeconomics in Anesthesia."

Piedmont Hospital, Atlanta, GA, March 27, 1996.

Tampa General Hospital, Tampa, FL, May 9, 1996.

Richland Memorial Hospital, Columbia, SC, May 16, 1996.

St. Louis University Department of Anesthesiology, St. Louis, MO, August 14, 1996.

The Medical Center of Central Georgia, Macon, GA, August 22, 1996.

Visiting Professor, University of Alabama–Birmingham, Department of Anesthesiology, Birmingham, AL, September 16, 1996. Lectures: "Value Based Anesthesia: The Academic Experience" and "Management Controversies for Cardiac Patients Undergoing Non-cardiac Surgery"

St. John's Hospital, Queens, NY, September 30, 1996.

American Association of Nurse Anesthetists national meeting to discuss practice and reimbursement issues when CRNAs and anesthesiologists are working together, Rosemont, IL, September 12, 1996

1995

Baylor University Medical Center, Dallas, TX, September 20, 1995.

Mercy Hospital, Pittsburgh, PA, November 1, 1995.

Visiting Professor, University of Medicine and Dentistry of New Jersey, Robert Wood Johnson Medical School, New Brunswick, NJ, November 8, 1995. Lecture: "Management Controversies for the Patient at Risk for Myocardial Ischemia Undergoing Non-cardiac Surgery"

1994

Deaconess Hospital, Boston, MA
Maine Medical Center, Department of Anesthesiology, Portland, ME, August 4, 1994.
Bronx–Lebanon Hospital Center, Department of Anesthesiology, Bronx, NY, November 30, 1994.

Lectured at the Osler Anesthesiology Review Course, Ft. Lauderdale, FL, February 14–15, 1994. Lectures: "Trauma," "How to Take the Written Boards," "How to Take the Oral Boards," "Anesthesia for Carotid Endarterectomy," "A Comparison of Induction Agents," "Management Controversies," "Answering Strategies for the Oral Boards".

1993

New York University Medical Center, New York, NY

Massachusetts General Hospital, Cardiac Division, Boston, MA

University of Medicine and Dentistry of New Jersey, Newark, NJ

Wake Medical Center, Raleigh, NC

Saint Barnabas Hospital, Livingston, NJ

Sutter Hospital, Sacramento, CA

Christiana Hospital, Wilmington, DE

Brandywine Regional Medical Center, Coatesville, PA

Englewood Hospital, Englewood, NJ

Addressed Abbott Laboratories national product development group, Chicago, IL, March 24, 1997. Lectures: "Types of Studies to Determine Cost Justification" and "Economic Trends and Issues in Health Care Related to Anesthesia."

Addressed Abbott Laboratories national sales training meeting, Chicago, IL, July 27–30, 1998. Lectures: "Clinical Implications of Package Insert Changes" and "Cost Perspectives: Low Flow Sevoflurane."

Editorial and review board positions:

1. Perioperative Medicine, Editorial Board for BioMed Central, 1995- Present.

2. Co - Editor-in-chief of Anesthesiology, the electronic anesthesia textbook on emedicine.com.

3. AnesthesiaWeb, a World Wide Web site developed for the anesthesia community (accumulated 16,000 subscribers, the largest anesthesia e-magazine in the world), Chair, Editorial Board, October 1996–2002.

4. Journal of Clinical Anesthesia, Section Editor, Cost Containment and Operations Improvement, 1995–2010.

5. Abstract Reviewer on Economics, Education and Patient Safety. 77th and 78th Annual IARS Congress, March 27 – 31, 2004

6. Journal of Clinical Monitoring and Computing, Section Editor, Information Systems, 1999-2002

7. Anesthesiology, Guest Reviewer, 1996–present.

8. Anesthesia and Analgesia, Guest Reviewer, 1991–present.

9. Cardiovascular and Thoracic Anesthesia Journal Club Journal – Section Editor, Vascular Anesthesia, 1996–1999.

10. Anesthesia Cost Containment bulletin board on the Internet, Coordinator and Initiator, 1995.

11. TranspO2rt, Contributing Editor, 1993-1994.

12. Butterworths Publishing Company, Boston, Guest Reviewer of anesthesia texts, 1991–93.

TEACHING

Awards:

- Medical Student "Teacher of the Year" Award, 1990.
- Fuqua Scholar Award, 1999.

Teaching specialization:

- Mentor to cost effective care clerkship
- Annual advisee to multiple residents

Lectures for Fuqua School of Business Course "Informatics, the internet, and healthcare" Fall 2000, Term 1 (Course repeated with update Fall 2001, Term 1)

- "Informatics, The Internet and Healthcare: Introduction and Overview," August 28
- "IT Development and Value," "EMR Ideals and Recap," "Functionality of Other HIS," August 31
- "Resource Utilization Control Using Informatics Systems," September 4
- "The Medicalogic Business Model – ROI for EMR," Sept. 7
- "Introduction to The Internet," and B2B business exchanges September 11
- "MD2MD Texts, Journals, CME and Intellectual Property," September 14
- "The Regulatory Environment," September 18
- "Content Sites," Sept 21
- "Medical Care Over the Internet," Sept 28

Spring 2001, Term 3

- "Operations Management Seminar, Department of Operations: Healthcare and Management Science," March 5

University Lectures

University of Miami – School of Medicine Educational Lectures 2002-2011

Duke University Medical Center Educational Lecture, 2001

- Resident Lecture: "How to Value Health Care."
- Medical Student 2nd year Medical Practice in Health Systems (MPS 206C.82) Lectures, "Understanding Cost Concepts in the Literature."

Duke University Medical Center Educational Lectures, 2000

- Resident Lecture: "Management Controversies for the Patient At-Risk for Myocardial Ischemia Undergoing Non-Cardiac Surgery."
- Medical Student 2nd year Medical Practice in Health Systems (MPS 206C.82) Lectures, "Understanding Cost Concepts in the Literature."

Duke University Medical Center Educational Lectures, 1999

- Anesthesiology Resident Lecture, "Contracts, Reimbursement, and Compliance Issues"
- CA-1 Resident Orientation Lecture, "PACU Issues and Transport"
- Medical Student 2nd year Medical Practice in Health Systems (MPS 206C.82) Lectures, "Understanding Cost Concepts in the Literature."

Duke University Medical Center Educational Lectures, 1998

- Medical Student 2nd year Medical Practice Health Systems Lecture, "Understanding Cost Concepts in the Literature"
- CA-1 Resident Orientation Lecture, "PACU Issues and Transport" Resident Lecture, "Preparing for the Oral Boards"
- Medical Student 2nd year Medical Practice Health Systems Lecture, "Understanding Cost Concepts in the Literature"
- Resident and Residency Graduate All-day Seminar, "Preparing for the Anesthesia Orals"

Duke University Medical Center Educational Lectures, 1997

- Grand Rounds, "Relational Databases, Benchmarking, Practice Guidelines and Other Buzzwords of the New Millennium" Anesthesiology Resident Lecture, "Understanding Cost Concepts in the Literature: Part 2"
- Medical Student 2nd year Medical Practice Health Systems Lecture, "Understanding Cost Concepts in the Literature"
- Anesthesiology Resident Lecture, "Understanding Cost Concepts in the Literature: Part 1"
- Resident Lecture, "Controversies in Care of the Patient with Coronary Artery Disease for Non-cardiac Surgery"
- Resident and Residency Graduate Weekend Seminar, "Preparing for the Anesthesia Orals"
- Medical Student 2nd year Medical Practice Health Systems Course (previously called the Cost-Effective Care Clerkship), Lecture, "Understanding Cost Concepts in the Literature"
- Resident Lecture, "Common PACU Problems"
- Medical Student 2nd year Cost Effective Care Clerkship Lecture, "Understanding Cost Concepts in the Literature"
- CRNA Staff Meeting Presentation, "New Medicare Teaching Physician Rules: How They Affect the Anesthesia Care Team"
- Resident and Residency Graduate Weekend Seminar, "Preparing for the Anesthesia Orals"
- Medical Student 2nd year Cost Effective Care Clerkship Lecture, "Understanding Cost Concepts in the Literature"

Duke University Medical Center Educational Lectures, 1996

- Medical Student 2nd year Cost Effective Care Clerkship Lecture, "Understanding Cost Concepts in the Literature"
- Resident and Residency Graduate Weekend Seminar, "Preparing for the Anesthesia Orals"
- Resident Lecture, "Common Problems and Decision Making"
- Departmental Grand Rounds, "Morbidity and Mortality"
- Medical Student 2nd year Cost Effective Care Clerkship Lecture, "Understanding Cost Concepts in the Literature"
- Departmental Grand Rounds, with Dr. JG Reves, Department Chairman, "The New HCFA (Medicare) Guidelines"
- Resident lecture, "New Medicare Teaching Rules--How They Affect You, the Resident." (Short presentation followed by Question & Answer Session on the Introduction of New Departmental Policies)
- Departmental Grand Rounds, "Cost Containment"
- Resident Lecture, "Preoperative Evaluation of the Cardiac Patient for Non-Cardiac Surgery"
- Medical Student 2nd year Cost Effective Care Clerkship Lecture, "Understanding Cost Concepts in the Literature"
- Medical Student 2nd year Cost Effective Care Clerkship Lecture, "Understanding Cost Concepts in the Literature"
- Critical Care Grand Rounds, "Cost Containment in the ICU"

Duke University Medical Center Educational Lectures, 1995

- Medical Student 2nd year Cost Effective Care Clerkship Tutorial Sessions
- Anesthesiology Resident Lecture, "Common Problems in Anesthesia"
- Medical Student 2nd year Cost Effective Care Clerkship Lecture, "Understanding Cost Concepts in the Literature"
- Anesthesiology Resident Lecture, "Common Problems in Anesthesia"
- Grand Rounds in Family Medicine, "Understanding Cost Concepts in the Literature"
- Anesthesiology Resident Lecture, "Board Review"
- Medical Student 2nd year Anesthesiology Rotation Lecture, "Hemodynamic Monitoring"

Duke University Medical Center Educational Lectures, 1994

- Current Topics in Vascular & Thoracic Anesthesia (CME Category 1 departmental conference), "Prevention of Endotracheal Tube-Induced Coughing During Emergence from General Anesthesia" with Dr. Daryl Malak
- CA-1 Resident Orientation Lecture, "Recovery Room Problems (& Transport): Basic Clinical Problem Solving"
- Current Topics in Vascular & Thoracic Anesthesia (CME Category 1 departmental conference), "Infection Control in Anesthesia" with Dr. Josef Grabmayer
- Anesthesiology Resident Lecture (Vascular & Thoracic Series), "Management Controversies for the Patient at Risk for Myocardial Ischemia Undergoing Non-cardiac Surgery"
- Current Topics in Vascular & Thoracic Anesthesia (CME Category 1 departmental conference), "Cell Saver: To Use or Not to Use?" with Dr. Nancy Knudsen

National board review courses (Invited lectures given multiple times 1991–1995):

"How to Take the Oral Board Exam"
"Carotid Endarterectomy"
"Oral Exam Answering Strategies"
"Pre-operative Evaluation—History and Physical Exam"
"Pre-operative Evaluation—Labs and Tests"
"Written Questions and Answers"
"Recovery Room—Differential Diagnoses and Therapies for Common Clinical Problems"
"Induction Agents for the Boards"
"Trauma Anesthesia"

SERVICE

Committees and offices:

Florida Society of Anesthesiologists:
*FSA Board Member 2*001-present

American Society of Anesthesiologists (ASA)
ASA Alternate Delegate 2016- present
ASA Delegate for FSA, 2003-2015
Committee on Economics 2003- 2008
Committee on Information Management 2002-3
Committee on Electronic Media and Information Technology, 2001-2.
Committee on Value Based Anesthesia Care 1995-1999
Task Force on Value-Based Anesthesia 1994 – 1995
Ad Hoc Committee on Health Outcomes in Anesthesia 1997-1999

University of Miami-School of Medicine
Chair, Department of Anesthesiology
University of Miami Medical Group Governing Board 2001-present

Duke University Medical Center and Health System
Duke University Hospital, Perioperative Executive Committee, 2000 - 2002.
Duke University Health System/Duke University Medical Center Internet Advisory Committee, 2000 – 2002.
Managed Care Committee (PDC = Private Diagnostic Clinic = 850 MD paratnerhsip) and PDC representative to Managed Care Coordination Group (Duke University Health System and PDC) 2001-2002.
Private Diagnostic Clinic Business Strategy Committee, 1999 – 2002.
Steering Committee, Duke University Health System Revenue Management Initiative, October, 1999 - 2002.
Organizer, Duke University Medical MBA's (an internal consulting group for the Duke University Health System), 1999.
Physician Co-Director, Private Diagnostic Clinic (HCFA/CMS) Compliance Committee, March, 1997 - 2002.
Administration and Citizenship Work Group, managed by Provider Transition Strategies, LLC, charged with implementing a physician performance improvement system within the Duke Health System, February, 1998 – February, 1999.
Perioperative Services Advisory Committee, 1997 – 2002.
Faculty of Medical School cost-effective care course, 1995 – 2002.

Private Diagnostic Clinic Retirement Trust Plan Committee, representing the Departments of Anesthesiology, Pathology, Radiation Oncology and Radiology, 1995 – 2002.
Product Standardization Committee, Departmental Representative, May, 1995 – 1996.
Medical Center Cost Effectiveness Committee, January, 1995 – 2002.
Task Force on Teaching Cost Effectiveness, April, 1994 – June, 1995.

Duke Hospital Operations Improvement Steering Committee, 1994 – 1996.
Operating Room Mission Statement Committee, 1994.
Pharmacoeconomics Committee, 1994.
Liaison to Operating Room Clinical Laboratories, 1994 – 2002.
Task Force to Choose Managed Care Partners, 1994.
Duke University Medical Center, Hospital Budget Advisory Committee and Capital Equipment Committee, 1991 – 1994.

Duke Department of Anesthesiology
Chairman, Finance Committee, January, 1991–2002.
Chairman, Equipment, Supplies, and Product Standardization Committee, 1996–2002.
Coordinator, Practice Guidelines Development, 1994–2002.
Coordinator, Drug Utilization Review, 1995–2002.
Director, Outside Hospital Anesthesia Service Contracts, 1996–2002.
Physician Director of Reimbursement Analysts, 1996–2002.
Departmental Compliance Officer
Developer of departmental wide staffing model & incentive plans
Direct supervision of business office and business manager
Chief, Division of General/Vascular/Transplant Anesthesia and Surgical Critical Care Medicine (12 attendings, 10 CRNAs, 2-4 residents, 2-4 fellows, 8 PA's in preop screening unit) 1998-2002
Coordinator/creator, Current Topics in Vascular and Thoracic Anesthesia, a weekly CME Category 1 approved conference, July 1991–July 1998.
Director, Departmental Retreat, July 1994, "Upping the Pace of ACE (Anesthesia Cost Effectiveness)".
Resident Education Committee, 1991–1994.
Director, Mock Oral Board Review Course, 1989–2002.

Non-Physician Presentations, 2001

Draeger Global Management Team Meeting, at the R. David Thomas Center of the Fuqua School of Business, Duke University, February 1, 2001. Presentation: "The Value of Information Technology."

Chair, Roche Pharmaceuticals, Advisory panel on PONV, Miami FL Dec 2001. "Understanding the pharmacoencomics of PONV agents"

Pain Management Advisory Board, Pfizer/Pharmacia

Non-Physician Presentations, 2000

Chair, Pharmacoeconomic Council on Neuromuscular Blocking Agents Retreat, Organon, Inc., St. Thomas, VI, May 19-21, 2000

Remifentanil Advisory Board, Abbott Laboratories, Chicago, IL, May 12-13

Vertebrae Medical Advisory Board (an Internet company to support web-medicine), Westchester, NY, May 12

Cox-II/Parecoxib – U.S. Health Outcomes Advisory Group Meeting, Searle, Chicago, IL, April 24-25

Dexmedetomidine Advisory Panel, Abbott Laboratories, Aventura, FL, March 3-5

Trainer, Abbott Laboratories Perioperative Services Meeting, Dallas, TX, February 6

AnesthesiaWeb Position Strategy Meeting, New York, NY, January 12.

Other Presentations, 1998

"The Impact of Inhalation Agents on Global Cost," Cog Hill Golf and Country Club, Lemont, IL, September 4, 1998.

Addressed the North American Dräger national sales meeting, Philadelphia, PA, March 29, 1998. Lecture: "Anesthesia Information Systems of the New Millennium."

Addressed the Abbott Laboratories national sales training meeting, Ft. Lauderdale, FL, February 3, 1998. Lecture: "The Economics of Postoperative Nausea and Vomiting."

Non-Physician Presentations, 1997

APPENDIX P

EXPERT DECLARATION OF DAVID ALAN LUBARSKY, M.D., M.B.A

1. My name is Dr. David Lubarsky. I am currently the CEO of UC Davis Health and Vice Chancellor of Human Health Sciences, and a Professor of Anesthesiology in the UC Davis School of Medicine. From Dec 2001 until July 2018, I held an endowed honorary title as the Emanuel M. Papper Professor of Anesthesiology and served for 17 years as the Chairman of the Department of Anesthesiology for the University of Miami Miller School of Medicine. The factual statements I make in this declaration are true and correct to the best of my knowledge and experience.

2. In addition to my current position, my experience as an anesthesiologist includes service as the Vice-Chair of the Department of Anesthesiology at Duke University Medical Center from July 1988 to November of 2001. I am licensed to practice medicine in Florida. I am Board Certified in Anesthesiology, and certified in pain management from the American Academy of Pain Management. I have conducted research and published peer reviewed articles on the suitability of various drugs as anesthetics and how to adequately maintain anesthetic depth in a clinical setting. For almost two decades I was a recurring author of the chapter on intravenous induction agents in our specialty's primary authoritative textbook (Miller's Anesthesia), which included sections on the agent Etomidate.

3. I have published peer reviewed articles on lethal injection and have served as an expert witness in lethal injection litigation in several states, including in Alabama in the case of *Arthur v. Thomas*, 674 F. 3d 1257 (11th Cir. 2012), and in Oklahoma in the case of *Glossip v. Gross*, 135 S. Ct. 2726 (2015). I have also served as an expert witness in cases in Ohio, Tennessee, and Florida. A current copy of my complete CV is attached to this declaration as Exhibit A.

4. I have been asked to review Florida's "Execution by Lethal Injection Procedures" dated February 27, 2019 (Hereinafter Etomidate Protocol) and to address the suitability of etomidate as

an anesthetic in a three-drug lethal injection protocol, as well as to address the suitability of the other two drugs in the protocol – rocuronium bromide and potassium acetate. I have been asked to opine whether the use of the Etomidate Protocol as a whole creates a substantial risk of serious harm to the Defendant, Mr. Bobby Joe Long.

5. In formulating my opinion, I have reviewed the Etomidate Protocol, which calls for the use of etomidate, rocuronioum bromide, and potassium acetate, I also have reviewed eyewitness press accounts of the executions of Eric Branch and Patrick Hannon[1]; the affidavit of Robert Friedman, Esq., who observed the execution of Eric Branch; and the affidavit of Joseph S. Hamrick, Esq., who observed the execution of Jose Jimenez. I have also been provided the testimonies/evaluations of Dr. Henry Dee, Dr. Robert Berland, Dr. Frank Wood, and Dr. John Money.

6. I have previously published on the incompatibility of certain drug mixtures with etomidate during intravenous administration, including the incompatibility of vecuronium, a steroid based muscle relaxant structurally similar to rocuronium. Hadzija BW, **Lubarsky DA**: Compatibility of etomidate, sodium thiopental and propofol injections with other drugs commonly administered during induction of anesthesia. Am J Health-Syst Pharm 52: 997–999, 1995.

7. In a clinical setting, the purpose of anesthesia is to render a patient insensate to the effects of a proposed intervention. When a general anesthetic is utilized, induction and maintenance of unconsciousness and lack of responsiveness to noxious stimuli are the goals and expected

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[1]*See* Jason Dearen, *Eric Branch lets out blood-curdling screams, yells 'murderers' as he is executed*, Pensacola News Journal (February 22, 2018) *available at* https://www.pnj.com/story/news/crime/2018/02/22/eric-branch-execution-escambia-county-inmate-pronounced-dead-lethal-injection-susan-morris/365474002/ and Jason Dearen, Florida executes man for pair of killings dating to 1991, Associated Press (November 9, 2017) *available at* https://apnews.com/0bbc2f048bc94fdd98ef41d0f9fb445c

outcomes. The state of general anesthesia is defined as being insensate, unconscious and immobile in the face of noxious stimuli.

8. The three drugs in the Etomidate Protocol are etomidate, rocuronium bromide, and potassium acetate. The 200 mg dose of etomidate is intended to induce and maintain unconsciousness. The 1000 mg dose of rocuronium bromide is intended to paralyze all skeletal muscles and prevent all movement, including breathing and speaking. Finally, the 480 milliequivalent dose of potassium acetate is intended to stop the heart from beating and be the mechanism of death.

9. Etomidate is an ultra-short acting hypnotic. In clinical use, it is not intended for use as a total anesthetic. It displays a pharmacodynamic profile (how long it works for) similar to sodium thiopental, which has previously been shown to be insufficient to keep a patient at an anesthetic depth throughout an execution at least 50% of the time (Koniaris LG, Zimmers TA, Lubarsky DA, Sheldon JP; Evidence of Inadequate Anaesthesia in Lethal Injection for Execution. The Lancet 2005, vol. 365; 9468:1412-1414.

10. Sedative-Hypnotics are a class of drugs which are primarily used to induce sleep. Many, like etomidate, do not have any analgesic properties and will not create an insensate state when administered so that pain can be felt and may awaken the individual despite being seemingly asleep. They include drugs such as thiopental and etomidate.

11. Etomidate can be used to induce unconsciousness, but because it has no analgesic properties, it is not suitable as a form of anesthesia as a single drug without additional pain-relieving drugs.

12. Etomidate is not FDA-approved for use as the *sole drug* to produce anesthesia in minor surgical procedures. It is never used as a sole anesthetic in any procedure that involves any significant noxious stimuli, as it has zero analgesic effect.

13. Without an adequate determination of the depth of unconsciousness, if given a forceful stimuli such as air hunger from paralysis due to rocuronium or painful stimuli, such as an injection of potassium acetate, there is a substantial risk that Plaintiff might awaken from the noxious and painful stimuli. While a heavily sedated person might not respond to name calling or a subtle pinch, that is a very different level of stimulus than being starved for air once paralyzed, or having a caustic chemical injected intravenously. As an analogy, a person asleep might not awaken to the stroke of a feather on the leg but would certainly awaken to a blowtorch applied to the same area.

14. The consciousness check described in the Etomidate Protocol and detailed by the witness affidavits is not sufficient to determine unconsciousness and inability to feel pain from the noxious stimuli of the rocuronium bromide and potassium acetate.

15. The 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.

16. I have reviewed the affidavit of Robert Friedman, Esq., as well as the eyewitness press reports describing etomidate executions. As the etomidate was being administered, Eric Branch let out a "blood-curdling" scream "at the top of his lungs." 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 the pain, and amnestic drugs are often

used to ensure that the patient does not remember the pain if any occurs as pre-treatment to prevent pain is not assured to work.

17. As noted above, etomidate is ultra short-acting, and there is a substantial risk that it will wear off during the execution. Etomidate has a re-distribution half-life[2] of 2.7 minutes. Therefore in a 17-minute execution like that of Mr. Branch, by the 16th minute, the concentration of etomidate in the blood would be 1/64th the original dose, or approximately the same as if the injection were a mere 3.5 mg. A standard clinical dose needed to induce unconsciousness is 20 to 40mg. Therefore, the amount of etomidate in Mr. Branch's bloodstream before the execution was complete was 1/10th of the clinical dose. As will be discussed further below, this is insufficient to ensure that a prisoner would not feel the excruciating pain of the second and third drugs. Forman, Stuart A., M.D., Ph.D.: Clinical and Molecular Pharmacology of Etomidate. Anesthesiology, 114:695-707, 2011.

18. Further compounding the risk of using etomidate as the first drug is the fact that a neuromuscular blocking agent, rocuronium bromide, is used as the second drug in the Etomidate Protocol. The rocuronium bromide will paralyze Plaintiff and render him unable to convey any pain or suffering. Plaintiff would experience a sensation akin to being buried alive, but not be able to convey the feeling of pain or suffocation, and the paralysis would camouflage any voluntary movement that might result from an incomplete loss of consciousness.

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[2] Distribution is the initial injection to action, or where the drug goes initially. Re-distribution is where the drug goes after initial effect, or how is it washed out - by metabolism in the blood stream and slow leaching out of initial effect site or more rapidly by re-distributing to tissues with lesser circulation than initial impact tissue - i.e. the brain. The brain, kidney and liver get a lot of the initial blood flow, so they get high initial concentrations of an injected drug, and its solubility in tissues like fat and muscle determine how quickly it is pulled out of the brain.

19. Rocuronium bromide masks the ability of any lay observer to discern whether the etomidate has been properly delivered and whether it continues to keep the prisoner unconscious. Moreover, because of the risks associated with the administration of rocuronium bromide and its ability to camouflage awareness, even to trained professionals, the American Veterinary Medical Association (AVMA) prohibits the use of paralytics for euthanasia of animals. By statute, Florida also prohibits the use of paralytics in animal euthanasia. Fl. Stat. 828.058(3). The only purpose of the administration of the rocuronium bromide is to make the execution more aesthetically pleasing to observers in that it reduces the ability of the individual being executed to move or show any pain associated with the execution process.

20. The third drug in the Etomidate Protocol is potassium acetate. Potassium acetate is a caustic chemical and would cause excruciating pain to Plaintiff upon injection if he is not placed into and maintained in a surgical plane of anesthesia from the etomidate for the duration of the execution.

21. Determining whether an anesthetic drug has rendered someone truly insensate takes repetitive training and experience, because the signs that someone is not insensate can be very subtle. Correctional personnel cannot be adequately trained without the formal repetitive anesthesia experience one obtains over a four year residency in anesthesia after a four year course of medical school and a four year pre-medical preparation in college.

22. In a clinical setting, the practitioner checking for consciousness would typically look for fine motor movements such as a moving of the feet or hands. This is not something that a lay person will necessarily observe or notice.

23. Further, a known side effect of etomidate is myoclonus, which is defined as involuntary muscle movements that may look purposeful. To a lay person, myoclonus could be confused with

conscious movements. By selecting etomidate, Florida has chosen a drug that makes determining consciousness even more difficult, and thus will cause the determination of consciousness to take longer and/or result in inaccurate determinations of consciousness. This is indicated by the affidavit of Robert Friedman, who stated that it was 6 minutes from the beginning phase of the execution until the consciousness check took place, and Mr. Branch was still moving at that time.[3] Again, because etomidate is ultra-short acting, the difficulty in assessing consciousness from the etomidate compounds the significant risk that the etomidate will wear off prior to the painful injection of the second and third drugs.

24. Moreover, in order to make sure an individual will be insensate to noxious stimuli, they must be in a surgical plane of anesthesia. In clinical practice, a common way to test for a surgical plane of anesthesia is to apply a surgical clamp (sharp toothed, e.g. a Kelly) on the area where you are going to make the incision. The pain/pressure created by this clamp is severe and cannot be equated with a human being conducting a trapezius pinch, shouting someone's name, touching an eyelid, or shaking a person's shoulder.

25. In addition to initially assessing unconsciousness, unconsciousness must be continually monitored throughout the remainder of the execution. It is not possible for any lay person to evaluate whether someone is unconscious without the assistance of a properly monitored processed EEG (requires training) or a trained medical professional schooled in the art of anesthesia. Processed EEG's are not reliable with etomidate, regardless.

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[3] While I understand that no logs from the Florida Department of Law Enforcement (FDLE) have been disclosed from any of the etomidate executions, it is my understanding from my review of previous logs from several midazolam executions, that the logs indicate the exact timing of the administration of the various drugs.

26. As evidenced by the eyewitness reports from the execution of Eric Branch and Patrick Hannon, there was movement after the purported consciousness check, which indicates an insufficient anesthetic depth prior to the administration of the second and third drugs. The movement of Mr. Branch and Mr. Hannon is evidence of them not being adequately anesthetized, or, more likely that the ultra-short acting etomidate dissipated and wore off before the execution was complete. An individual does not make movements if he is totally unconscious and anesthetized. Therefore the protocol failed. It is my opinion that the worst possible death experience was delivered – beginning with pain upon injection followed by the paralytic effectively burying the prisoner alive, whose agony at being aware but unable to draw a breath was only brought to a horrendous end through the agonizing delivery of a caustic chemical surging through his body.

27. Furthermore, the eyewitness reports from Lambrix, Hannon, and Branch, all describe varying degrees of obstruction of the witnesses' view of the prisoner. The position of the prisoner, with his feet facing the witnesses, leads to an inability to see the venous access sites and an inability to fully see the prisoner's hands due to both positioning and bandaging. All of this prevents the observation of subtle fine motor movements one would see if a person is either not unconscious or has awakened during the execution. Therefore, it appears that affirmative steps to obscure the witnesses' view of potential movement of the prisoner after the administration of the etomidate.

28. In summary, etomidate is an unsuitable choice as the first drug in a three drug protocol for several reasons. First and foremost is that it is likely to wear off and drop below anesthetic levels just as thiopental was shown to do. Second, there is routinely significant pain on injection, which increases based on the dosage and lasts for the entire administration of the etomidate or until the prisoner becomes unconscious. Third, it is not an analgesic and is not meant to allay the pain of

potassium acetate injection. Fourth, some involuntary movements have been associated with use of etomidate, making it impossible to easily ascertain if the patient is awake or suffering from a side effect of the medication. Fifth, it may precipitate in the IV tubing with rocuronium, leading to loss of the IV in the middle of the procedure and a result akin to Clayton Lockett who died an agonizing death over approximately an hour with inadequate anesthesia and partially paralyzed, slowly suffocating to death and suffering a heart attack from the inordinate stress of that. *See* Hadzija BW, Lubarsky DA: Compatibility of etomidate, sodium thiopental and propofol injections with other drugs commonly administered during induction of anesthesia. Am J Health-Syst Pharm 52:997–999, 1995.

29. In addition to the general troubles that the etomidate protocol poses, Mr. Long's particular medical issues raise serious concerns about the use of etomidate for his execution. According to Dr. Erin Bigler's affidavit, which I have reviewed for this case, Mr. Long has a history of severe traumatic brain injury, which is a progressive and long-lasting disability. The chronic lesions and abnormalities produced by traumatic brain injury are permanent.

30. Traumatic brain injuries are a major cause of epilepsy and lead to an increased risk of seizures. Depending on the severity of the TBI (and here, we know Mr. Long's TBI is severe), individuals with traumatic brain injury are 1.5 to 17 times more likely than the general population to develop seizures, with brain injury being the leading cause of epilepsy in young adults. Studies have also shown that individuals surviving one-year post-traumatic brain injury have 37 times increased risk of death from seizures. Another study—a retrospective analysis of charts for patients admitted with TBI between 1961 and 2002—revealed that TBI patients were 22 times more likely to die of seizures than the general population matched for age, race, and gender. Moreover, epilepsy stemming from TBI has been known to develop years after the initial injury.

(B. Masel, et al., *Traumatic Brain Injury: A Disease Process, Not an Event*, 27 J. of Neurotrauma 1529-1540 (Aug. 2010)). Accordingly, by virtue of his severe traumatic brain injury, Mr. Long is significantly more prone to the development of epilepsy, seizures, and death by seizure.

31. A review of trial testimony has revealed that this risk of seizures and epilepsy after severe traumatic brain injury was born out in Mr. Long's case, with Mr. Long's development of temporal lobe epilepsy. Temporal lobe epilepsy can be associated with a variety of seizing behaviors, including, as relevant here, fumbling with fingers, lip smacking movements, gibberish speech, and generalized tonic-clonic jerking (i.e., convulsions, including the rapid jerking of arms and legs). In addition, temporal lobe epilepsy itself can create feelings of fear, panic, anxiety, or terror during a seizure. (*See* generally Epilepsy Foundation, www.epilepsy.com).

32. Etomidate is contraindicated in patients with epilepsy because it can cause seizures. It is important to note that this risk is separate from the general risk of myoclonic movements described earlier in this declaration from etomidate. Those myoclonic movements are not associated with actual epileptic activity in patients without epilepsy or high risk of seizure. In contrast, many references caution against use of etomidate in seizing patients or patients with a history of seizure, as etomiate can lower the seizure threshold. For example, in patients with epilepsy, a dosage of etomidate as low as 0.2 mg can actually activate seizure foci within 30 seconds. Use of etomidate can progress to full-blown seizures, and it is recommended that EEG monitoring be conducted when using etomidate to monitor the brain for seizure activity.

33. Medical professionals sometimes use etomidate offensively in seizure patients *for the purpose of activating* and monitoring seizure foci during operations related to treatment for epilepsy, including temporal lobe epilepsy. Even in small studies, etomidate induced seizures in patients with temporal lobe epilepsy. (*See generally* J. Pastor, et al., *Etomidate Accurately*

Localizes the Epileptic Area in Patients with Temporal Lobe Epilepsy, 51 Epilepsia 602-09 (2012)). In procedures that are not designed for the diagnosis and treatment of epilepsy, like lethal injection, etomidate risks seizure when it would be harmful to the outcome of the procedure, including but not limited to increasing panic and terror in the inmate and increasing risk of convulsions that could interfere with the placement and maintenance of IV lines.

34. Etomidate is a poor choice of drug for the reasons previously mentioned and for the reason that it is contraindicated in patients with epilepsy, like Mr. Long, as it can cause seizures that may increase the pain and suffering of Mr. Long and interfere with the integrity of the intravenous lines.

35. As such, based on the information that I have been provided thus far, it is my opinion to a reasonable degree of medical certainty that using the Etomidate Protocol creates a substantial risk of serious harm to Mr. Long.

36. If I were given additional information, such as pictures of the exact set up, an examination of the execution chamber, a video of the practice runs, a video of the actual execution, specifically including close up pictures of all connections and tubings, more detailed logs of timing of delivery of the actual chemicals, expiration dates and storage conditions of drugs, training and experience of the person conducting consciousness check, and autopsy reports from the four etomidate executions, including toxicology reports, I would be able to offer a more complete opinion. I reserve the right to amend this declaration if provided with any or all of those materials.

Pursuant to 28 U.S.C. Sec. 1746 I declare under penalty of perjury that the foregoing is true and correct.

/s/ David Lubarsky
Dr. David Lubarsky
Address

E-mail: dlubarsky@med.miami.edu

Dated this 13th day of May, 2019.

APPENDIX Q

CURRICULUM VITAE
Gail A. Van Norman, M.D.

Education:

1973-1977	University of Washington, Seattle, Washington	Honors B.S, Microbiology
1977-1981	University of Washington School of Medicine, Seattle, Washington	M.D. with Honors

Postgraduate Training:

1981-1982	Virginia Mason Hospital, Seattle Washington	Internship	Internal Medicine
1982-1984	Virginia Mason Hospital, Seattle, Washington	Residency	Internal Medicine
1986-1988	University of Washington, Seattle, Washington	Residency	Anesthesiology
1988-1989	University of Washington, Seattle, Washington	Fellowship	Cardiothoracic Anesthesiology
1992-1993	University of Washington, Seattle, Washington, Department of Biomedical Ethics	Certification	Health Care Ethics
2001	Perioperative Transesophageal Echocardiography Examination	Testamur	
2011	ASA Business Management Certification	Certification	

Faculty Positions Held:

1989-1994	Clinical Acting Instructor, Department of Anesthesiology, University of Washington, Seattle, Washington
1994-1995	Acting Instructor, Department of Anesthesiology, University of Washington, Seattle, Washington
1995-1997	Acting Assistant Professor, Department of Anesthesiology, University of Washington, Seattle, Washington
1997-2000	Assistant Professor, Department of Anesthesiology, University of Washington, Seattle, Washington
1997-2000	Adjunct Assistant Professor, Department of Internal Medicine, University of Washington, Seattle, Washington
2000-2001	Clinical Assistant Professor, Department of Anesthesiology, University of Washington, Seattle, Washington
2001 -2008	Clinical Associate Professor, Department of Anesthesiology, University of Washington, Seattle, Washington
2008-	Professor, Department of Anesthesiology, University of Washington, Seattle, Washington
2008-	Adjunct Professor, Department of Biomedical History and Ethics, University of Washington, Seattle, Washington

Hospital Positions Held:

1984-1985	Attending Internist, Jefferson Memorial Hospital, Port Townsend, Washington
1985-1986	Attending Internist, Highline Community Hospital, Burien, Washington
1989-1992	Staff Anesthesiologist, Northwest Hospital, Seattle, Washington
1992-1994	Staff Anesthesiologist, Swedish Hospital, Seattle, Washington
2000 – 2008	Staff Anesthesiologist, St. Joseph Medical Center, Tacoma, Washington
2000 – 2006	Director, Transesophageal Echocardiography Education, Department of Anesthesiology, St. Joseph Medical Center, Tacoma, Washington
2003-2004	Clinical Director, Department of Anesthesiology, St. Joseph Medical Center, Tacoma, Washington
2008-2013	Medical Director, PreAnesthesia Clinic, University of Washington Medical Center, Seattle, Washington
2010-	Physician Champion, Compliance Officer, Dept of Anesthesiology and Pain Medicine, University of Washington, Seattle WA

Non-Hospital Positions Held:

1984-1985	Consulting Internist, Spokane Urban Indian Health Center, Spokane, Washington
1985-1986	Consulting Internist, Seattle Community Health Clinics serving economically disadvantaged patients; for Group Health Cooperative of Puget Sound, Seattle, Washington
2005-2006	Chair CQI Process, Pacific Anesthesia, Inc., Tacoma, Washington
2006 -2008	Board of Directors, Pacific Anesthesia, Inc., Tacoma, Washington
2007-2008	Vice President, Pacific Anesthesia, Inc., Bellevue, Washington

Honors:

1978	Medical-Scientist Traineeship Grant, University of Washington, Seattle, Washington
1980	Alpha Omega Alpha
1981	Merck Manual Medicine Award
1981	John J. Bonica Anesthesiology Award, Department of Anesthesiology, University of Washington
1985	Award of Merit for Service to the Health Care Needs of Native Americans, Spokane Urban Indian Health Service
2000	President's Award, Pacific Anesthesia, Inc. Tacoma, Washington
2008	Mary Jane Kugel Award, Medical Science Review Committee, Juvenile Diabetes Research Foundation International
2011	Brocher Foundation Residency in Ethics

Board Certification:

1984	American Board of Internal Medicine
1990	American Board of Anesthesiology

License to Practice:

1981-	Washington State
1991-2003	Wisconsin

Professional Organizations:

1984-1987	American Society of Internal Medicine
1989-2000	King County Medical Society

1989-2000	Washington State Society of Anesthesiologists; Co-chair, Medical Education Committee, 1994-1997
1989-2013	American Society of Anesthesiologists; Committee on Ethics, 1992-2013
2003-2007	Society of Cardiovascular Anesthesiologists; Committee on Ethics; 2003-2007
2008-2013	American Society of Bioethics and Humanities
2015-present	International Academy of Law and Mental Health
2015-present	Overseas Fellow, Royal Society of Medicine

Teaching Responsibilities:

Lectures:

Undergraduate Student Lectures:

1999-2008	University of Washington, Undergraduate Introduction to Bioethics Course (MHE 411) "Informed Consent"
2001	University of Washington, Seattle Biomedical Ethics for Medical Students Lecture Series, "Informed Consent"
2008	University of Washington Dept. of Biomedical History and Ethics: MHE 597C, Informed Consent in Clinical Practice
2009-2017	University of Washington Dept. of Biomedical History and Ethics: MHE 597C, Informed Consent

Resident Lectures:

1992-1994	University of Washington, Department of Anesthesiology, "Clinical Ethical Issues in Anesthesia Practice"
1994-2000	University of Washington, Department of Anesthesiology, Resident Core Lecture series, "Perioperative Diabetes Management"
1994-2000	University of Washington, Department of Anesthesiology, Resident Core Lecture Series "Anesthetic Implications of Neuromuscular Disease"
1994-2000	University of Washington, Department of Anesthesiology, Resident Core Lecture Series, "Pathophysiology of Ischemic Heart Disease"
1994-2000	University of Washington, Department of Anesthesiology, Resident Core Lecture Series, "Intraoperative Management of the Patient with Ischemic Heart Disease"
1994-2000	University of Washington, Department of Anesthesiology Resident Core Lecture Series, "Preoperative Evaluation of the Patient for Anesthesia and Surgery"
1994-2000	University of Washington, Department of Anesthesiology, Resident Core Lecture Series, "CQI: Quality Improvement in Practice"
1994-2000	University of Washington, Department of Anesthesiology, Resident Core Lecture Series, "Post Operative Cognitive Dysfunction"
1994-	University of Washington, Department of Anesthesiology, Resident Core Lecture Series, "Clinical Ethical Issues in the Practice of Anesthesiology,"
1994-	University of Washington, Department of Anesthesiology R2 Core Lecture series, "Ethical Issues of Informed Consent"
1994-	University of Washington, Department of Anesthesiology R2 Core Lecture series, "Do Not Resuscitate Orders in the Operating Room"
1994-	University of Washington, Department of Anesthesiology R3 Core Lecture series, "Ethics of Surrogate Consent"
1994-	University of Washington, Department of Anesthesiology R3 Core Lecture series, "Ethical Issues in Organ Transplantation"
1994-	University of Washington, Department of Anesthesiology R4 Core Lecture series, R4 Seminar: "Allocation of Scarce Resources in a Managed Care Environment"

1995	University of Washington, Department of Anesthesiology, Resident Special Evening Lecture Series: Forum on Ethical Issues in Anesthesiology, "Informed Consent and Surrogate Consent: Who Speaks for the Patient?"
1995	University of Washington, Department of History and Ethics, Ethics Brown Bag Lecture Series, "Ethical Dilemmas in the Operating Room"
1995, 1997	University of Washington Department of Anesthesiology, Evening Resident Special Workshop, " Fiberoptic Intubation and Management of the Difficult Airway"
1996	University of Washington, Department of Anesthesiology, Resident Special Evening Lecture Series: Forum on Ethical Issues in Anesthesiology, "Ethical Issues in Organ Transplantation, and The Impaired Practitioner"
1997	University of Washington, Department of Anesthesiology, Resident Special Evening Lecture Series: Forum on Ethical Issues in Anesthesiology, "Physician-Assisted Suicide, and the Impaired Physician,"
1997	University of Washington, Department of History and Ethics; Ethics Brown Bag Lecture Series "DNR in the Operating Room: Should Different Rules Apply?"
1997	University of Washington, Department of History and Ethics, Ethics Brown Bag Lecture Series "Ethical Pain Management in the Addicted Patient Undergoing Surgery--Is There A Duty to Rescue?"
1999	University of Washington, Department of Biomedical Ethics and History, Master's Course in Biomedical Ethics, "Informed Consent."
1999	University of Washington, Department of Biomedical Ethics and History Ethics, Brown Bag Lecture Series, "Who is Captain of the Ship on the Multidisciplinary Team: Lessons from the Operating Room"
2004	University of Washington, Department of Anesthesiology, Resident Special Evening Lecture Series: Forum on Ethical Issues in Anesthesiology "Ethics of Organ Transplantation"
2008-	University of Washington, R2 Core lecture "Introduction to Preoperative Evaluation."
2008-present	University of Washington CA1 PAC lecture series: "informed Consent/Informed Refusal"
2010-present	University of Washington Resident Introductory Lecture series: "EHR Integrity"
2010-present	University of Washington R2 and R3 Core Lectures: "Coding and Documentation"

Grand Rounds Lectures

1994-1996	New England Deaconess Hospital, Boston, Massachusetts: "Ethical Issues in Anesthesia Practice"
1994	University of Washington, Ethics Grand Rounds, "DNAR in the Operating Room"
1996	University of Washington, Hematology Grand Rounds, "Antifibrinolytics, Use, Clinical Efficacy, and Cost Effectiveness"
1998	Providence Medical Center, Department of Surgery, Surgery Grand Rounds "Ethical Issues in Surgical Care: A Panel Discussion"
1998	University of Washington School of Medicine: Combined Cardiothoracic Surgery/Cardiology Grand Rounds, "Brain Death and Organ Donation"
2001	Rush-Presbyterian-St. Luke's Medical Center, Anesthesia Grand Rounds, Department of Anesthesiology Chicago, Illinois, "Historical Perspectives on the Ethics of Clinical Research"
2002	University of Pittsburgh Medical Center, Pittsburgh, Pennsylvania, Department of Anesthesiology, Anesthesia Grand Rounds, "Ethical Issues in Brain Death"
2008	University of Washington Anesthesiology Grand Rounds: "Perioperative Management of Pacers and AICDs"
2009	University of Washington Medical Center Combined Anesthesiology and Surgery Grand Rounds "Preoperative Evaluation: Where Have We Been, Where are We Going?"

2009	University of Oklahoma Anesthesiology Grand Rounds, "Is a Free Pen Just a Free Pen? Conflicts of Interest in Clinical Practice, Research and Industry." February, 2009.
2009	University of Washington Department of Anesthesiology; DNR in the Operating Room April, 2009
2010	University of Washington Department of Orthopedics; Preoperative Testing: Should Your Patient have a Preoperative Chest XRay? April, 2010.
2010	University of Washington Department of Obstetrics and Gynecology: Preoperative Testing: Less is More. May, 2010
2011	MD Anderson Cancer Center; Houston Texas. Dept of Anesthesiology. Fraud and Plagiarism in Medical Research. February 14, 2011
2012	MD Anderson Cancer Center: Houston Texas. Dept of Anesthesiology. Physician Assisted Suicide and Euthanasia. April 18, 2012
2012	MD Anderson Cancer Center, Houston Texas. Risk Management Department. Fraud and Plagiarism in Medical Research. April 18 2012
2012	Overlake Medical Center Department of Anesthesiology: Lifeboat Ethics. April, 2012 Bellevue, WA
2018	University of Washington "Respecting Patient Privacy". Feb 28, 2018

Resident Journal Club:

1995	University of Washington, Department of Anesthesiology "Use of Magnesium for Cardiac Surgery Patients"
1996	University of Washington, Department of Anesthesiology; "Anesthesia for IVF, Teratogenicity of Anesthetics, and Anesthesia and the Breast-Feeding Patient"
1996	University of Washington, Department of Anesthesiology, "N2O: Friend or Foe?"

Faculty Lectures:

1995	University of Washington, Department of Anesthesiology, CME lecture, "Ethics and the Examiners"

Workshops:

1994-1996	University of Washington, Department of Anesthesiology, CME Workshop, "Difficult Airway"
1996	University of Washington School of Medicine CME Workshop, "Aprotinin and Other Antifibrinolytics," Blood Therapy: Applications and Alternatives"

Nursing Lectures:

1996-1997	University of Washington Medical Center, Pre-Surgical Clinic Nursing Lecture Series; "Preoperative Assessment of the Patient for Anesthesia"
1999	University of Washington Medical Center Operating Room, Nurses Weekly Conference, "Informed Consent in the Operating Room."
1999	University of Washington, Association of Operating Room Nurses, Perioperative Nursing Internship Program "Informed Consent in the Operating Room"
2000	University of Washington, Department of Radiology Nursing Staff Lectures, "Sedation of the Patient with Severe Liver Disease for TIPS Procedure"
2008	University of Washington Medical Center Operating Room Nursing Conference, "Informed Consent in the Operating Room."
2011	Overlake Medical Center, Bellevue WA. Perioperative Nursing Education. DNR in the OR.

Editorial Responsibilities:

1997-2003	Consulting Editor, ASA Syllabus on Ethics, American Society of Anesthesiologists, Park Ridge, Illinois
2004-	Editor, ASA Syllabus on Ethics, American Society of Anesthesiologists, Park Ridge, Illinois.
2009	Editor-in-Chief, *Clinical Ethics for Anesthesiologists, a Cambridge University Press Case-Based Textbook.*
2012-2017	Associated Editor, North America Clinical Ethics, Journal of Bioethical Inquiry.

Special National Responsibilities:

1992-2014	Committee on Ethics, American Society of Anesthesiologists, Park Ridge, Illinois
1994	Panelist, American Society of Anesthesiologists Annual Meeting, Panel on Ethics: Ethical Issues in Anesthesiology
1995	Moderator Ethics Panel, American Society of Anesthesiologists, Annual Meeting, "Is There a Role for the Anesthesiologist in Physician-Assisted Suicide?"
1996-2006	Moderator Clinical Forum, American Society of Anesthesiologists, Annual Meeting, "Ethics/Geriatrics"
1996-1999	Moderator Problem-Based Learning Discussion, American Society of Anesthesiologists Annual Meeting, Ethics cases
1997	Panelist, American Society of Anesthesiologists Annual Meeting Panel on Education, "Can Ethics be Taught?"
1998	Workshop Organizer and Lecturer, American Society of Anesthesiologists, "Teaching Clinical Ethics in Anesthesia Residency"
1999	Invited Participant, Duke University, Durham, North Carolina, Second Duke Conference on Surgery and the Elderly
2001	Panelist, American Society of Anesthesiologists Annual Meeting Panel on Professionalism, "Defining and Demanding Excellence in Anesthesia Job Performance"
2004	Panelist International Liver Transplantation Society Annual Meeting, "Ethics of Liver Transplantation, NHB/DCD Donors: Perioperative Issues in Liver Transplantation"
2005	Representative for the American Society of Anesthesiologists (one of four), First National (UNOS) Conference on Donation After Cardiac Death, Philadelphia [please see Bernat J.L. et al. Report of a National Conference on Donation After Cardiac Death. Am J Transpl 6: 281-91, 2006.]
2005-	Ethics Reviewer, Research and Funding Department, Juvenile Diabetes Research Foundation, New York
2006	Panelist, American Society of Anesthesiologists Annual Meeting, Panel on Professionalism, "Role of the Anesthesiologist in End-of-Life Care –Do physicians have conflicts of interest?"
2006	Panel Moderator, American Society of Anesthesiologists Annual Meeting, Panel on Professionalism, "Working Hard—or Sleeping at the Wheel. Should the ASA adopt aviation-style standards for work hours for anesthesiologists?"
2006	Panel Moderator, American Society of Anesthesiologists Annual Meeting: Panel on Ethics, "Should Anesthesiologists Participate in Executions?"
2007	Panelist, ASA Panel on Ethical Issues in Perioperative Medicine
2007	Panelist, ASA Panel on Professionalism in Multidisciplinary Teams: Palliative Care and Multidisciplinary Pain Management
2007	Panelist, ASA Panel "What is Professionalism? Do I Need it? Do I Have it?"
2007	ASA Clinical Forum: Special Topics in Bioethics

2008-2011	Chair, American Society of Anesthesiologists Committee on Ethics
2008	Panelist, ASA Panel "Lethal Injection."
2008	Panelist, ASA Panel "DCD—do we need it? Con."
2008	Moderator, ASBH panel "Opioid Pain Medication for Chronic Nonmalignant Pain: A Right or a Wrong?" American Society of Bioethics and Humanities
2008	Invited lecturer: 37th Annual Advances in Family Practice and Primary Care, August. Seattle WA: "DNR and Other Advance Directives in the OR"
2008	Invited Lecturer: AANA. "Preoperative Testing" and "Perioperative beta blockade." September. Spokane, WA
2009	Refresher Course Lecture: Ethics for Anesthesiologists in the 21st Century. New Orleans LA.
2010	Refresher Course Lecture: Protecting Vulnerable Subjects in Research: Ethical Obligations to Human and Animal Research Subjects. San Diego, CA
2010	Panelist, ASA Panel "Health Care Reform." ASA Annual Meeting, San Diego, CA.
2011	Invited lecturer: "DNR Orders in the Perioperative Period." Overlake Medical Center, Bellevue Washington.
2011	Should Anesthesiologists Participate in Physician-Assisted Suicide? Pro and Con. American Society of Anesthesiologists Annual Meeting. Chicago, Il. 2011
2012	Invited Lecturer: Informed Consent and Informed Refusal in the OR. Puget Sound Multi-Chapter AORN Coalition. Kent, WA Jan 2012
2012	Invited lecturer, American Society of Interventional Pain Physicians Refresher Course and Review. Fraud in Anesthesia Research, and Ethics of Interventional Pain Management. April 2012 Phoenix, AZ
2012	Invited lecturer, American Society of Interventional Pain Physicians Refresher Course and Review. Fraud in Anesthesia Research, and Ethics of Interventional Pain Management. August 2012 San Francisco, AZ
2012	Invited Lecturer: 41st Annual Refresher Course for Nurse Anesthetists. Ethics of Informed Consent; Ethics of Informed Refusal; Ethical Issues in Preoperative Testing. Nov 2012 Orlando, FL.
2012	Invited Lecturer: Idaho State Society of Anesthesiologists: The Ethics of Preoperative Testing. Boise, Idaho, Spring 2012.
2013	Invited lecturer, American Society of Interventional Pain Physicians Refresher Course and Review. Ethics of Interventional Pain Management. February 2012 Phoenix, AZ
2013	Invited lecturer, American Society of Interventional Pain Physicians Refresher Course and Review. Ethics of Interventional Pain Management. October 2013 Denver, CO
2013	Panelist: Controversial Cases in Organ Donation and End-of-Life Care, American Society of Anesthesiologists Annual Meeting, San Francisco CA.
2014	Panelist: Controversies in Organ Transplantation, American Society of Anesthesiologists Annual Meeting, New Orleans LA
2014	Ethical Issues Regarding Open Access Journals, American Society of Bioethics and Humanities Annual Meeting, San Diego CA.
2015	Harvard Anesthesia Update 2015. Point/Counterpoint. Physician Involvement in Lethal Injection. May 2015
2015	Invited lecturer, American Society of Interventional Pain Physicians Refresher Course and Review. Ethics of Interventional Pain Management. Chicago Il, July 2015
2015	Faculty, Moya Annual CRNA Refresher Course. Orlando, FA. Nov 2015

Special Regional Responsibilities:

1991-1993	Member, Medical Ethics and Practice Committee, King County Medical Society, Seattle, Washington
1992-1994	Member, Professional Liability Panel, King County Medical Society, Seattle, Washington
1992-1996	Co-chair, Committee on Education, Washington State Society of Anesthesiologists, Seattle, Washington
1995	Program Chair, Washington State Society of Anesthesiologists Spring Meeting, "Controlling Our Destiny: Leadership Opportunities Beyond the Operating Room"
1995	Program Chair, Washington State Society of Anesthesiologists Fall Meeting, "The Difficult Airway: Clinical Approaches and Risk Management"
1996	Program Co-Chair, Washington State Society of Anesthesiologists Spring Meeting, "Preoperative Issues for the Surgical Patient"
1996	Representative, Washington State Society of Anesthesiologists, ASA Legislative Session, Washington, DC

Special Local Responsibilities:

1991-1993	Ethics Committee, Swedish Hospital, Seattle, Washington
1995-2000	Associate Medical Director, Pre-surgery Clinic, University of Washington Medical Center, Seattle, Washington
1996-1997	Member, Advisory Committee on Ethics, University of Washington Medical Center, Seattle, Washington
1998-2000	Chair, Continual Quality Improvement University of Washington Medical Center, Department of Anesthesiology
1997-2000	Co-chair, Advisory Committee on Ethics, University of Washington Medical Center, Seattle, Washington
1999-2000	Acting Chief, Cardiothoracic Anesthesia, University of Washington Department of Anesthesiology
2006 -	Regional Ethics Committee member, Franciscan Health Care Systems, Tacoma, Washington
2006-2008	Member, Regional Committee on Organ Transplantation, Franciscan Health Care System, Tacoma, Washington
2008-2009	Member, Joint Transfusion Committee, HMC and UWMC
2009-2010	Member, Standards and Finance Committee, University of Washington Department of Anesthesiology and Pain Medicine
2010-2016	Member, Business Excellence Committee, University of Washington Physicians
2010-	Chair/co-chair Standards and Finance Committee, University of Washington Department of Anesthesiology and Pain Medicine
2010-present	Compliance Officer, Department of Anesthesiology and Pain Medicine, University of Washington, Seattle WA.
2014-present	Member, Dept of Anesthesiology and Pain Medicine Promotions Committee

Research Funding:

University of Washington Department of Anesthesiology; "The Effects of PTCA vs. CABG in Reducing Postoperative Cardiac Morbidity in Patients Undergoing Noncardiac Surgery"; 1995; $500 [Investigators: Chan V, Van Norman G, Posner K]

Washington State Society of Anesthesiologists; The Effects of PTCA vs. CABG in Reducing Postoperative Cardiac Morbidity in Patients Undergoing Noncardiac Surgery; 1995; $2000; [Investigators: Chan V, Van Norman G, Posner K]

Washington State Society of Anesthesiologists: Echocardiography Screening in the PreAnesthesia Clinic. 2010. $5000 [Investigators: Wako E, Van Norman GA, Rooke A, Otto C.]

BIBLIOGRAPHY

Publications in Refereed Journals:

1. Van Norman G., Groman N.. A Method of Quantitating Sensitivity to a Staphylococcal Bacteriocin. Infection and Immunity 26(2): 787-789, 1979.

2. Dreis D., Winterbauer R., Van Norman G, Sullivan S., Hammer S. Cephalosporin-Induced Interstitial Pneumonitis. Chest 86(1): 138-140, 1984.

3. Winterbauer R., Hammer S., Van Norman G. Histiocytosis X, Case Report and Discussion. J Resp Dis February 1985.

4. Van Norman G, Pavlin E, Eddy C, Pavlin J. Hemodynamic and Metabolic Effects of Aortic Unclamping Following Emergency Surgery for Traumatic Thoracic Aortic Tear in Shunted and Unshunted Patients. J Trauma 31(7): 1007-1016, 1991.

5. Van Norman, G. Diabetes in the Operating Room: Metabolic Challenges for the Anesthesiologist. Seminars Anesth 14(3): 210-220,1995

6. Van Norman, G. Preoperative Assessment of Common Diseases in the Outpatient Setting. Anesthesiology Clinics of North America. 14(4): 631-654,1996.

7. Van Norman G. Preoperative Management of Common Minor Medical Issues in the Outpatient Setting. Anesthesiology Clinics of North America. 14(4): 655-678, 1996.

8. Aziz S, Haigh W, Van Norman G, Kenney R, Kenney M. Blood Ionized Magnesium Concentration During Cardiopulmonary Bypass and Their Correlation with Other Circulating Cations. J Card Surg Sep-Oct 11(5): 341-7, 1996.

9. Van Norman G, Gernsheimer T, Chandler W, Cochran P, and Spiess B. Indicators of Fibrinolysis During Cardiopulmonary Bypass After Exogenous Antithrombin III Administration for Acquired Antithrombin III Deficiency. J. Cardiothoracic Vasc Anesth 11(6): 760-763, 1997.

10. Jackson S, Palmer S, Van Norman G, et al. Ethical Issues in Anesthesia. Adv Anesth 14:227-260, 1997.

11. Van Norman G. A Matter of Life and Death: What every anesthesiologist should know about the medical, legal, and ethical aspects of declaring brain death. Anesthesiology 91(1): 275-287, 1999.

12. Posner K, Van Norman G, Chan V. Adverse Cardiac Events Following Noncardiac Surgery in Patients with Coronary Artery Disease Undergoing Prophylactic PTCA. Anesth Analg 89: 553-60, 1999.

13. Reilly DF, McNeely JM, Doerner D, Greenberg DL, Staiger TO, Geist MJ, Vedovatti PA, Coffey JE, Mora MW, Johnson TR, Guray Ed, Van Norman GA, Fihn S. Self-Reported Exercise Tolerance and the Risk of Serious Perioperative Complications. Arch Int Med 159: 2185-92,1999.

14. Van Norman G. Ethics and The Elderly Patient. Current Anesth Rep 1:13-17, 1999.

15. Pavlin DJ, Arends RH, Gunn H, Van Norman G, Keorschgen M, Shen D. Optimal Propofol-Alfentanil Combinations for Supplementing Nitrous Oxide for Outpatient Surgery. Anesthesiology 91(1): 97-108, 1999.

16. Jackson S, Van Norman, G. Goals and Values Directed Approach to Informed Consent in the "DNR" Patient Presenting for Surgery--More Demanding of the Anesthesiologist? Editorial. Anesthesiology 90:3-6, 1999.

17. Pavlin JD, Colley PS, Weymuller EA, Van Norman GA, Gunn HC and Koerschgen M. Propofol Versus Isoflurane For Endoscopic Sinus Surgery. Am J Otolaryn; 10: 96-101, 1999.

18. Van Norman, G. Angioplasty and Noncardiac Surgery: Risks of Myocardial Infarction. Current Opinion in Anesthesiology, 12(1):15-20, 1999.

19. Van Norman, G. Response: Re: Can Brain Death Testing Be Perfect? Anesthesiology. 92(4): 1204-5, 2000.

20. Van Norman G, Patel MA, Robledo J, Chandler W, and Vocelka C. Effect of Hemofiltration on Serum Aprotinin Levels in Patients Undergoing Cardiopulmonary Bypass. J. Cardiothor Vasc Anesth 14(3): 253-256, 2000.

21. Van Norman G, Palmer S. Coercion and Restraint in Anesthesia Practice. International Clinics of Anesthesiology. Medical Ethics 39(3): 131-143, 2001.

22. Van Norman, G. Ethical Issues and the Role of Anesthesiologists in Non-Heart-Beating Organ Donation. Current Opinion Anesthesiology 16(2): 215-9, 2003

23. Van Norman G. Another Matter of Life and Death; What Every Anesthesiologist Should Know About the Ethical, Legal and Policy Implications of the Non-Heart-Beating Organ Donor. Anesthesiology 2003. 98(3):763-73.

24. Van Norman G, Jackson S, Waisel D. Ethical Issues in Informed Consent. Current Opinions in Anesthesiology 17(2): 177-81, 2004.

25. Van Norman GA. Ethical Issues of Importance to Anesthesiologists Regarding Organ Donation After Cardiac Death. Current Opinion Organ Transplant 10(2): 105-109, 2005.

26. Van Norman GA. Controversies in Organ Donation: Donation After Cardiac Death. Periop Nurs Clin, 3(3):233-240, 2008

27. Van Norman GA. Ethical Issues in Informed Consent. Periop Nurs Clin 3(3):213-222, 2008

28. Ivashkov Y, Van Norman GA. Informed Consent and Ethical Management of the Elderly Patient. Anesthesiology Clinics 2009; 27(3):569-80

29. Souter M, Van Norman GA. Ethical Controversies at End-of-Life After Traumatic Brain Injury: Defining Death and Organ Donation. Critical Care Medicine. Accepted for publication, anticipated Fall 2010.

30. Souter M, Van Norman GA. [Letter to the Editor] Reply to: Concerns regarding definition of brain death. Critical care medicine 2011;39(3):606-7

31. Sara Kim, PhD; Sinan Jabori, BS; Jessica O'Connell, MD, FACS; Shanna Freeman, APRN; Cha Chi Fung, PhD; Sahrish Ekram, BA; Amruta Unawame, MD; Gail Van Norman, MD. Current Trends of Research Methodologies in Informed Consent Studies: Time to Re-examine? Patient Educ Couns 2013; 93:559-66

32. Van Norman G. Physician Aid-in-Dying: Cautionary Words. Curr Opinion Anesthesiol 2014; 27:177-82

33. Van Norman GA. Five Days at Memorial: Life and Death in a Storm-Ravaged Hospital. Book Review. Anesth Analg 2014; 199:494

34. Van Norman GA. Abusive and Disruptive Behavior in the Surgical Team. *AMA Journal of Ethics*. 2015; 17:215-220. . http://journalofethics.ama-assn.org/2015/03/ecas3-1503.html. Accessed March 3, 2015.

35. Van Norman GA. A Matter of Mice and Men: Ethical Controversies in Animal Experimentation. Int Anesthesiol Clin. 2015; 53:63-78.

36. Rooke GA, Lombaard SA, Dziersk J, Natrajan KM, Van Norman G, Larson LW, Poole JE. Initial experience of an anesthesiology-based service for perioperative management of pacemakers and implantable cardioverter defibrillators. Anesthesiology 2015; 123:1024-32.

37. Nair BG, Grunzweig K, Peterson GN, Horibe M, Nerdilek MB, Newman SF, Van Norman G, et al. Intraoperative blood glucose management: impact of a real-time decision support system on adherence to institutional protocol. J Clin Monitor Comput June 12, 2015; epub ahead of print

38. Grunzweig K, Nair BG, Peterson GN, Horibe M, Neirdilek MB, Newman SF, Van Norman G, et al. Decisional practices and patterns of intraoperative glucose management in an academic medical center. 2016; 32:214-23

39. Van Norman G. Drugs, devices and the FDA: an overview of the approval processes: Part 1 Approval of drugs. JACC Basic Translation Sci 2016; 1: 170-9

40. Van Norman G. Drugs, devices and the FDA: an overview of the approval processes: Part 2 Approval of medical devices. JACC Basic Translation Sci 2016; 1:277-87

41. Van Norman G. Drugs and Devices Part 3: a Comparison of U.S. and European Processes. JACC Basic Translation Sci 2016; 1:399-412

42. Van Norman GA. Decisions regarding foregoing life-sustaining treatments. Curr Opin Anesth 2016; Nov 30 [epub ahead of print].

43. Van Norman GA, Eisenkott R. Technology Transfer: From the Research Bench to Commercialization. Part 1. Intellectual Property Rights-Basics of Patents and Copyrights. JACC Basic Translation Sci 2017; 2:85-97

44. Van Norman GA, Eisenkott R. Technology Transfer. Part 2. The Commercialization Process. JACC Basic Translation Sci 2017; 2:197-208

45. Van Norman GA. Overcoming the declining trends in innovation and investment in cardiovascular therapeutics: beyond EROOM's law. JACC Basic Translational Sci 2017; 2:613-25

46. Van Norman GA. Expanding Patient Access to Investigational Drugs: Single Patient INDs and "Right to Try". JACC Basic Translational Sci 2018; 3:280-91

47. Van Norman GA. Expanding Patient Access to Investigational Drugs: Overview of Intermediate and Widespread Treatment INDs, and Emergency Authorization in Public Health Emergencies. JACC Basic Translational Sci 2018; 3:403-14

48. Van Norman GA. Expanded patient access to investigational new devices: review of emergency and non-emergency expanded use, custom and 3D printed devices. JACC Basic Translational Sci. 2018; 3:533-44

49. Shah AC, Ma K, Faraoni D, Oh D, Rooke A, Van Norman GA. Self-reported functional status predicts post-operative outcomes I noncardiac surgery patients with pulmonary hypertension. PLOS ONE. Aug 16, 2018. https://doi.org/10.1371/journal.pone.0201914

50. Van Norman GA. The problem of Phase II clinical trials: reducing costs and predicting success. JACC Basic Translational Science. Accepted, publication pending.

Books:

Cambridge Textbook of Clinical Ethics for Anesthesiologists. Van Norman G, Ed. Palmer S, Jackson S, Rosenbaum S co-ed. Cambridge University Press, 2011. London, UK.

Book Chapters:

1. Van Norman, G. Jehovah's Witnesses, in Atlee, J. (ed): *Complications in Anesthesiology.* WB Saunders, Philadelphia., 1999, pp. 937-939.

2. Van Norman, G. Patient Confidentiality, in Atlee, J. (ed): *Complications in Anesthesiology.* WB Saunders, Philadelphia, 1999. Pp. 931-933.

3. Van Norman, G. DNR in the Operating Room, in Atlee, J (ed): *Complications in Anesthesiology.* WB Saunders, Philadelphia, 1999, pp. 934-936.

4. Van Norman G. Ethical Considerations: Informed Consent, Advanced Directives, DNR Orders. In Hanson, E.(ed): *Medical Clerkship Companion 2.* Harcourt Brace, Chestnut Hill, MA, 2003.

5. Van Norman G. Ethical Decisions/End-of-Life Care in Patients with Vascular Disease. In Kaplan, J. (ed): *Vascular Anesthesia, 2nd Edition.* Churchill Livingstone, Philadelphia, PA, 2004, pp. 387-406.

6. Van Norman, G. DNR in the Operating Room. In Atlee, J. (ed): *Complications in Anesthesiology, 2nd Edition.* WB Saunders, Philadelphia. 2005.

7. Van Norman, G. Jehovah's Witnesses. In Atlee, J. (ed): *Complications in Anesthesiology, 2nd Edition.* WB Saunders, Philadelphia, 2005.

8. Van Norman, G. Patient Confidentiality. In Atlee, J. (ed): *Complications in Anesthesiology, 2nd Edition.* WB Saunders, Philadelphia, 2005.

9. Van Norman GA. Anesthesiology Ethics. *IN* Singer P, Viens A (eds): *The Cambridge Textbook of Clinical Ethics.* 2008. Cambridge University Press, London.

10. Van Norman GA, Rosenbaum S. Ethical Issues in Anesthesia Care. *IN* Miller R, Ed. *Miller's Anesthesia, 7th Ed.* Elsevier Publications, Philadelphia PA. 2009

11. Van Norman GA. Informed Consent: Respecting Patient Autonomy. *IN* Van Norman GA, Ed. *Cambridge Textbook of Ethics for Anesthesiologists.* 2011 Cambridge University Press, London, UK.

12. Van Norman, GA. Informed Consent for Preoperative Testing: Pregnancy Testing and Other Tests Involving Sensitive Patient Issues. *IN* Van Norman GA, Ed. 2011 *Cambridge Textbook of Ethics for Anesthesiologists.* Cambridge University Press, London, UK.

13. Van Norman GA. Revising the Anatomical Gift Act—the Role of Physicians in Shaping Legislation. *IN* Van Norman GA, Ed. 2011 *Cambridge Textbook of Ethics for Anesthesiologists.* Cambridge University Press, London, UK.

14. Van Norman GA. Animal Subjects Research Part II: Ethics of Animal Experimentation. *IN* Van Norman GA, Ed. 2011 *Cambridge Textbook of Ethics for Anesthesiologists.* Cambridge University Press, London, UK.

15. Van Norman GA. Publication Ethics: Obligations of Authors, Peer-Reviewers and Editors. *IN* Van Norman GA, Ed. 2011*Cambridge Textbook of Ethics for Anesthesiologists.* Cambridge University Press, London, UK.

16. Van Norman GA. Sexual Harassment, Discrimination, and Faculty-Student Intimate Relationships in Anesthesia Practice. *IN* Van Norman GA, Ed. 2011*Cambridge Textbook of Ethics for Anesthesiologists.* Cambridge University Press, London, UK..

17. Van Norman GA. Physician Participation in Executions. *IN* Van Norman GA, Ed. 2011 *Cambridge Textbook of Ethics for Anesthesiologists.* Cambridge University Press, London, UK.

18. Wako E, Van Norman GA. Laboratory Testing in Spine Disease. *IN* Chapman JR, Dettori JR, Norvell, DC (2011) *Measurements in Spine Care.* 1st ed. Stuttgart New York: Thieme.

19. Van Norman GA. Ethical Standards in Medical Practice. *IN* Manchikanti L, Christo P, Trescot A, Falco FJE (eds). *Foundations of Pain Medicine and Interventional Pain Management Board Review.* 2011 ASIPP Publishing, Paducah, KY 42001

20. Van Norman GA. Ethics of Research in Pain Management. *IN* Manchikanti L, Christo P, Trescot A, Falco FJE (eds). 2011 *Foundations of Pain Medicine and Interventional Pain Management Board Review.* ASIPP Publishing, Paducah, KY 4200

21. Van Norman GA. Ethics in Anesthesiology. *IN* Miller R, Ed. *Miller's Anesthesia, 8th Ed.* Elsevier Publications, Philadelphia PA, 2015.

22. Van Norman GA. Anesthesia Pearls. *IN* Wong C, Hamlin N Eds. *The Medicine Consult Handbook.* Springer Science and Business Media Inc. New York, NY. 2012

23. Van Norman GA. Organ Transplantation. *IN* Brennan. Michael (ed.). The A-Z of Death and Dying: Social, Medical and Cultural Aspects. Santa Barbara, CA: ABC-Clio. 2013

24. Van Norman GA. Life Support Systems. *IN*: Brennan. Michael (ed.). The A-Z of Death and Dying: Social, Medical and Cultural Aspects. Santa Barbara, CA: ABC-Clio. 2013

25. Jackson S, Van Norman GA. Anesthesia, Anesthesiologists and Modern Medical Ethics. *IN* The Wondrous Story of Anesthesiology, Eger EI II, SAidman L, Westhorpe RN Eds. Springer, NY. 2014 pp205-218

26. Van Norman G, Rosen J. Michael Jackson: Medical Ethics and What Went Wrong. In; Pediatric Sedation Outside of the Operating Room: a Multispecialty International Collaboration, Second Edition. Mason KP Ed. Springer, NY 2015 pp685-698

27. Van Norman, GA. Ethics and clinical aspects of palliative sedation in the terminally ill child. In; Pediatric Sedation Outside of the Operating Room: a Multispecialty International Collaboration, Second Edition. Mason KP Ed. Springer, NY 2015 pp699-710

28. Van Norman G. Anesthesia Pearls. *In* The Perioperative Medicine Consult Handbook, Jackson M, ed. Springer, 2015.

29. Van Norman GA. Preoperative Testing: Ethical Challenges, Evidence-Based Medicine and Informed Consent. In: Ethical Issues in Anesthesiology and Surgery. Springer publications. Jericho B, Ed. Springer, New York, 2016.

30. Van Norman GA. Ethics and Evidence Regarding Animal Subjects Research: Splitting Hares--or Swallowing Camels? In: Ethical Issues in Anesthesiology and Surgery. Jericho B, ed. Springer, New York, 2016.

31. Jackson S, Van Norman GA. Ethics in Research and Publication. In: Ethical Issues in Anesthesiology and Surgery. Jericho B, Ed. Springer, New York. 2016.

32. Van Norman GA. Ethical Issues in Elderly Patients: Informed Consent. In: Barnett S, ed. Perioperative Care of the Elderly Patient. Cambridge University Press, Cambridge UK. 2017

33. Van Norman GA. Ethical Issues: Withdrawing, Withholding and Futility. In Principles of Geriatric Critical Care. Akhtar S, Rosenbaum S, Eds. Cambridge University Press, UK. Dec 6, 2018.

34. Van Norman GA, Rosenbaum S. Ethics in Anesthesiology. Miller's Anesthesia 9th Ed. Elsevier. Accepted 2018, anticipated publication spring 2019

Other Publications:

Print Publications

1. Van Norman, G. Cheney F. Falsely Elevated Oximeter Reading Dangerous on One Lung. APSF Newsletter (letter to the editor) Issue 23. June, 1989.

2. Van Norman G. Ethics of Informed Consent. ASA Newsletter 58(8): 15-17, 1994

3. Van Norman, G. Special Paper: Implementation of an Ethics Curriculum: Getting Started. In Waisel D, Van Norman G (eds): *ASA Syllabus on Ethics: Informed Consent.* ASA publications, Park Ridge, Illinois. 1997, pp. 1-6.

4. Jackson S, Fine P, Palmer S, Rosebaum S, Truog R, Van Norman G. Letter to Editor, Comment on Bastron, D. Response to: Ethical Concerns in Anesthetic Care for Patients with Do-Not-Resuscitate Orders. Anesthesiology 87(1): 176-177, 1997.

5. Van Norman, G. Who Speaks for the Patient? Ethical Principles in Assessing Patient Competence and Appropriate Use of Proxy Decision-Makers in the Practice of Anesthesiology. In Waisel D, Van Norman G (eds*): ASA Syllabus on Ethics: Informed Consent.* ASA publications, Park Ridge, Illinois. 1997, pp. B2-B34.

6. Waisel D, Van Norman G, Fine P. Special Article, Hospice Care: Live All the Days of Your Life. An Interview with Perry G. Fine. In Waisel D, Van Norman G (eds). *ASA Syllabus on Ethics: Informed Consent.* ASA publications, Park Ridge, Illinois. 1997, pp. 1-9.

7. Van Norman G. Redefining Death. Ethical, Legal and Medical Implications of Brain Death Determination in Anesthesia Practice. In Waisel D., Van Norman G. (eds): *ASA Syllabus on Ethics: End of Life Issues.* ASA publications, Park ridge, Illinois. 1999, pp. G1-G7.

8. Van Norman G. Chapter 17: Misinformed Consent--A Problem in the OR? In*: ASA Refresher Courses in Anesthesiology*. ASA Publications, Chicago Ill. 1999, pp.215-223.

9. Van Norman G, and Posner K. Coronary Stenting or Percutaneous Transluminal Coronary Angioplasty Prior to Noncardiac Surgery Increases Adverse Perioperative Cardiac Events; the Evidence is Mounting. (letter to the editor). J Amer Coll Cardiol 36(7): 2351, 2000.

10. Van Norman, G, Palmer S. When Should Anesthesiologists Restrain Uncooperative Patients? ASA Newsletter 65(3), 2001.

11. Van Norman G. The Student-Teacher Relationship in Medicine: Are Intimate Relationships Between Faculty and Medical Trainees Ethical? In Van Norman G, Waisel D. (eds): *ASA Syllabus on Ethics: Ethics of Professional and Personal Relationships in Anesthesiology Training and Practice*. ASA, Park Ridge, Illinois. 2004.

12. Van Norman G. Non-Heart-Beating Cadaver Organ Donation: Ethical Issues for Anesthesiologists. ASA Newsletter 67(11), 2003.

13. Van Norman GA, Palmer SK, Jackson SH. The Ethical Role of Medical Journal Editors. [Letter} Anesth Analg 100:603-4, 2005.

14. Brown S, Van Norman G. Compassion and Choice in End-of-Life Decisions. Editorials and Opinions, *The Seattle Times*, April 1, 2005

15. Van Norman GA. Practical Ethical Concerns Regarding Intimate Relationships in the Operating Room. ASA Newsletter 2007, 71(5).

16. Van Norman G, Brown S. Organ Donation a Personal Decision. Opinion, *The Seattle Post Intelligencer,* March 20, 2007.

17. Van Norman GA. Contributing Writer: *Handbook of Anesthesia and Co-Existing Disease.* Elsevier publications, Philadelphia PA. 2009.

18. Sweitzer BJ, Vidoga M, Milokjic, et al. Resident's knowledge of ACC/AHA Guidelines for Preopererative Cardiac Evaluation is Limited. Cleveland Clinic J Med 2010; 77(ESuppl):eS11-eS12.

19. Palmer SK, Van Norman GA, Jackson SL. Letter to the editor. Routine pregnancy testing before elective anesthesia is not an American Society of Anesthesiologists standard. Anesth Analg. 2009; 208(5):1715-6.

20. Van Norman GA, Jackson SL. Back to our roots: the importance of enforcing professionalism at the ASA. ASA Newsletter. May, 2011. 75(5):10-12

21. Jackson SL, Van Norman GA. Ethical issues in the publication of medical research. ASA Newsletter. May 2011. 75(5):14-15

22. Van Norman GA. Misinformed Consent: A problem in the Operating Room? Ethical principles of informed consent and their application for the anesthesiologist. Refresher Courses Anesth 2011; 39(1):215-223

23. Van Norman GA. Ethics of Ending Life; Physician-Assisted Suicide and Euthanasia, Part 1. California Society of Anesthesiologists Bulletin, CA. Winter 2012.

24. Van Norman GA. Physician Assisted Suicide. ASA Newsletter. Spring 2012.

25. Van Norman GA. Ethics of Ending Life; Physician-Assisted Suicide and Euthanasia, Part 2. California Society of Anesthesiologists Bulletin, CA. Summer 2012.

26. Van Norman GA. Ethical Challenges of Routine Preoperative Tests. ASA Newsletter, Nov. 2012

27. Rooke A, Natrajan K, Lombaard S, Dziersk J, Van Norman GA, Poole J. Letter to the Editor In Reply: Initial experience of an anesthesiology based service for perioperative management of pacemakers and implantable cardioverter defibrillators. Anesthesiology 2016; 124: 1195

Web publications

1. Update Author, *Sleisinger and Fordtran's Gastrointestinal and Liver Disease, 7th Edition,* on-line version. Mark Feldman MD, Editor. Elsevier Scientific Publications, Philadelphia *[www.sfgastro.com],* 2003 to 2006.

2. Update Author, *Anesthesia, 6th Edition,* on-line version. Ron Miller MD, Editor. Elsevier Scientific Publications, Philadelphia. *[www.anesthesiatext.com]* 2004 to present.

3. Update Author, *Diseases of the Heart, 6th Edition,* on-line version. Eugene Braunwald MD, Editor. Elsevier Scientific Publications, Philadelphia [*www.branwalds.com],* 2004 to present.

4. Update Author, *Murry and Nadel's Textbook of Respiratory Medicine,* on-line version. Robert J. Mason MD, John F. Murray MD, V. Courtney Broaddus MD, and Jay A Nadel MD, editors. Elsevier Scientific Publications, Philadelphia *[www.respmedtext.com],* 2005-2006.

5. Update Author, *Drugs for the Heart,* on-line version. Lionel H Opie MD and Bernard J Gersh MD, editors. Elsevier Scientific Publications, Philadelphia *[www.opiedrugs.com],*, 2005 to 2008

6. Update Author, *Clinical Gastroenterology and Hepatology,* on-line version, Wilfred M Weinstein MD, C J Hawkey MD, J Bosch MD, editors. Elsevier Scientific Publications, Philadelphia *[www.clingastrotext.com],* 2005-2006.

7. Medifile author for *FirstConsult,* Medical website for primary care physicians. Elsevier Scientific Publications, London UK *[www.firstconsult.com],* 1998 to 2008.

8. Topic Editor, *First Consult.* Medical website for primary care physicians. Elsevier Scientific Publications, London UK, *[www.firstconsult.com],* 1998 to 2008

9. Medical writer, Clinical Procedures website, Elsevier Scientific Publications, Philadelphia, 2008 to present

Abstracts:

1. Van Norman G, Pavlin E, Eddy C, and Pavlin J. Hemodynamic and Metabolic Effects of Aortic Unclamping Following Emergency Surgery for Traumatic Thoracic Aortic Tear in Shunted and Unshunted Patients. Presented to the 50th Annual Meeting of the American Association for the Surgery for Trauma, 1989.

2. Van Norman G, Pavlin E, Eddy C, and Pavlin J. Hemodynamic and Metabolic Effects of Aortic Unclamping Following Emergency Surgery for Traumatic Thoracic Aortic Tear in Shunted and Unshunted Patients. Presented to the American Society of Anesthesiologists Annual Meeting, 1989.

3. Van Norman G, Spiess B, Lu J, et al. Aprotinin Versus Aminocaproic Acid in Moderate-to-High-Risk Cardiac Surgery: Relative Efficacy and Costs of Transfusion. Anes Anal Supplement, March 1995.

4. Kenney M, Van Norman G, Hague G, et al. Variations in Ionized Magnesium During Cardiopulmonary Bypass. Presented to the Cardiopulmonary Bypass Meeting, San Diego, California, 1995.

5. Pavlin J, Gunn H, Van Norman G, et al. Optimal Propfol/Alfentanil Combinations for Supplementing N20 For Outpatient Surgery. Presented to the Annual Meeting of the American Society of Anesthesiologists, 1997. Anesthesiology 87(3S) Supplement 308A, 1997.

6. Van Norman G, Posner K, Wright I, et al. Adverse Cardiac Events Following Noncardiac Surgery in Patients with Prior PTCA versus Normal Patients, and Patients with Nonrevascularized CAD. Presented to the Scientific Sessions of the American Heart Association, Orlando, Florida, 1997, published in supplement to Circulation, October 1997.

7. Simmons E, Van Norman G, Robledo J, et al. Effect of Hemofiltration on Aprotinin Activity in Patients Undergoing Cardiopulmonary Bypass. Presented to WARC (Western Anesthesia Residents Conference, 1998.

8. Lee J, Karjeker S, Van Norman GA et al. Advance Directives in the Perioperative Period. Presented to WARC (Western Anesthesia Residents Conference), 2009

9. Karjeker S, Van Norman G, et al. Advance Directives in the PreAnesthesia Clinic. Presented at the American Society of Anesthesiologists' Annual Meeting, New Orleans, LA. 2009

10. Rooke, G.A., Natrajan, K., Lombaard, S., Dziersk, J., Van Norman, G., Poole, J.: Initial experience of an anesthesia-based service for perioperative management of CIEDs. Anesthesiology 117:A835, 2012.
11. Shah A, Ma K, Rooke GA, Van Norman G. Pulmonary HTN in the perioperative patient. (working title). Accepted to IARS Annual Meeting, Honolulu HI. March 2015.

12. Rooke A, Natrajan K, Lombaard S, Dziersk J, Van Norman G, Poole J. Poster: Initial experience of an anesthesia-based service for perioperative management of CIEDs. ASA American Society of Anesthesiologists Annual Meeting, Washington DC, 2012

OTHER

International and National Invitational Lectures:

1. "DNR in the OR: Am I a Bad Doctor if I Let My Patient Die?" American Society of Anesthesiologists, Refresher Course, San Francisco, CA, June 29, 1996.
2. "Misinformed Consent: Is This a Problem in the Operating Room?" American Society of Anesthesiologists Refresher Course, San Francisco, CA, June 29, 1996.
3. "Ethics: A New Hot Topic in Resident Education," The Society for Education in Anesthesia Fall Meeting: Educational Strategies for the 21st Century, New Orleans, 1996.
4. "Ethics: A New Hot Topic in Resident Education," The Society for Education in Anesthesia Fall Meeting: Educational Strategies for the 21st Century, San Diego, CA, October 1997.
5. "Misinformed Consent: A Problem in the Operating Room?" American Society of Anesthesiologists Workshop in Practical Bioethics for the Anesthesiologist, Boston, MA, 1997.
6. "Brain Dead, or Only Mostly Dead? What's the Difference, I'm Just the Anesthesiologist!" American Society of Anesthesiologists Workshop in Practical Bioethics for the Anesthesiologist, Boston, MA, 1997.
7. "PTCA prior to Noncardiac Surgery." World Congress of Cardiovascular Anesthesiologists, Santiago, Chile, 1998.
8. "Ethics Case Discussion: Assessing Cardiac Risks for Patients with Coronary Artery Disease Undergoing Noncardiac Surgery" and "Ethics Case Discussion: Assessing Brain Death" Rush-Presbyterian-St. Luke's Medical Center, Chicago Illinois, Visiting Professorship, 1998
9. "Brain Death: What Every Anesthesiologist Should Know" Midwest Anesthesia Conference and Peri-Anesthesia Care Symposium, Chicago, Il, 1999.
10. "Ethical Issues in the Operating Room," American Society of Anesthesia Technologists and Technicians, Seattle, WA, 2000.
11. "Ethical Issues in the Operating Room," American Society of Extracorporeal Technologists, Seattle, WA, 2000.
12. "Ethical Boundaries of Persuasion: Coercion and Restraint in Pediatric Anesthesia Practice," Mid-Year SAMBA meeting, New Orleans, LA, 2001.
13. "Ethics: Brain Death and Organ Donation" Rush-Presbyterian-St. Luke's Medical Center and Rush University, Chicago, Illinois Department of Anesthesiology and Undergraduate Medical School; Inaugural Speaker, Katalin Selemczi MD Memorial Lecture Series in 2001
14. "Donation After Cardiac Death—Stretching the Definitions of Death Too Far?" Invited lecturer; European Society of Anesthesiology, Copenhagen Denmark, May 2008.

15. "Conflicts of Interest: Industry Reps." February 2009; Visiting Professor, University of Oklahoma Department of Anesthesiology. Oklahoma City, OK

16. "DNR in the Patient Undergoing Surgery and Anesthesia." Sept 2009 Primary Care Medicine. Seattle, WA

17. Perioperative Beta Blockers." National Association of Nurse Practitioners. Aug 2010. Seattle, WA

18. Ghosts of OR Cancellations Past and Present." Combined WSSA, BCAA international meeting. Dec 2010 (Elizabeth Wako MD and Gail Van Norman MD speakers)

19. Ethics of Organ Donation After Cardiac Death. Society for Cardiovascular Anesthesiologist. Annual Meeting, April 2011. Savannah, Georgia.

20. Ethics of Organ Donation After Cardiac Death. Dept of Anaesthesiology and Intensive Care, St. Mary's Hospital. London, UK. August 2011.

21. Physician-assisted Suicide and Euthanasia. Brocher Foundation. Hermance, Switzerland, August 2011.

22. Fraud in Publication and Medical Research. Dept of Anaesthesiology and Intensive Care Medicine, University of Geneva. Geneva, Switzerland. Sept 2011.

23. Informed Consent and Informed Refusal in the Operating Room. AORN annual meeting, Seattle, WA Jan. 2012

24. Fraud and Plagiarism in Research. Risk Management Division, MD Anderson Medical Center, Houston TX, April 18, 2012

25. Physician-Assisted Suicide and Euthanasia, Department of Anesthesiology, MD Anderson Medical Center, Houston TX, April 18, 2012

26. Ethics in Anesthesiology. Annual Review Course for Certified Nurse Anesthetists. Orlando Florida, November 2012

27. Invited Lecturer: Ethics of Interventional Pain Management. ASIPP. Phoenix, AZ. Feb 2012

28. Invited Lecturer: Ethics of Interventional Pain Management. ASIPP. San Francisco CA Aug 2012.

29. Invited Lecturer: Ethics of Interventional Pain Management. ASIPP. Phoenix, AZ. July 2013

30. Invited Lecturer: Ethics of Interventional Pain Management. ASIPP. Denver CO; Oct 2013

31. Invited Lecturer; Controversial Cases in Organ Transplantation: clinical forum. American Society of Anesthesiologists Annual Meeting. San Francisco CA. Oct 2013

32. Invited Lecture: Ethics of DCD Organ Donation. St. Mary's Hospital Dept of Anesthesiology and Critical Care, London UK. Dec 2014

33. Invited Lecture: DNR in the OR. London Soc Anesthesiology, UK. Dec 2014

34. International Academy of Law and Mental Health. Moderator: Brain Death, Personhood, Body Integrity: Ethical and Legal Considerations in Vital Organ Transplantation. Vienna Austria July 2015

35. Invited Lecturer: Harvard Anesthesia Update Spring 2015. Pro/Con Debate: Should Physicians Participate in Lethal Injection.

36. Invited Lecturer: Ethics of Interventional Pain Management. ASIPP, Chicao Il. July, 2015

37. Keynote Speaker: Terminal Sedation in Pediatric Sedation: Suffering, Palliation and Transcendance (working title). Conference for Pediatric Sedation Outside of the Operating Room. Cancun, Mexico Sept 2015

38. Invited Ethics Lecturer: Moya Review Course for Nurse Anesthetists. Orlando Fl, November 2015

39. Invited Participant; 2015 Alumni Meeting of the Scholars of the Brocher Foundation, Geneva Switzerland, June 16-18, 2015.

40. Invited Speaker: 2016 World Congress of Anesthesiologists. Ethics Section. Hong Kong, Aug 27-Sept 1, 2016

41. Invited Lecturer; Medical Professionalism. St. Mary's Hospital Department of Anesthesiology and Critical Care. London, UK. July 2016

42. 2017 International Academy of Law and Mental Health. Invited panelist, moderator. Ethics of Psychosurgery. Prague, Czech Republic, July 2017

43. 2017 Mazama Spine Summit, Mazama WA. Invited Speaker: What is Professionalism and the Practice of Medicine? Lessons from the Michael Jackson Case.

Regional Invitational Lectures:

1. "Treatment of Intraoperative Emergencies: Wheezing; Inability to Ventilate" CME Lecture, Washington State Society of Anesthesiologists, Seattle, WA, 1991.

2. "Ethical Issues in Anesthesiology," Washington State Society of Anesthesiologists, Moderator and CME Lecturer, Seattle, WA, 1993.

3. Washington State Association of Nurse Anesthetists, Tukwila, Washington "Ethical Issues in Anesthesia Practice", 1995.

4. Washington State Association of Nurse Anesthetists "Ethical Issues in Anesthesia Practice" Seattle, WA, 1998.

5. "Management Issues In the Preoperative Clinic." Society for Ambulatory Anesthesia (SAMBA), Seattle, Washington, 1999.

6. "Physiology of Perioperative Myocardial Blood Flow." Washington State Society of Nurse Anesthetists, Seattle, WA, 1999.

7. "Ethical Issues in the Operating Room." American Society of Anesthesiology Technologists, Seattle, WA, 2000.

8. "DNR orders in the Operating Room," Combined Anesthesia and Surgery Grand Rounds, Southwest Washington Medical Center, Vancouver, WA, 2001.

9. "Medical Ethics: Balancing Patient Advocacy and Managed Care." Western Pension and Benefits Conference, Seattle, WA, 2003.

10. "Conscious Sedation for Radiological Procedures in the Outpatient," Northwest Hospital Radiology Department, Seattle, WA, 1991.

11. Instructor, Certified Post Anesthesia Nurse (CPAN) Certification Course, Northwest Hospital, Seattle, WA, 1991.

12. Conflicts of Interest with Industry. AORN winter meeting, Kent WA, 2009

13. "Preoperative Testing." Wash. State Nurse Anesthetists. Sept 2009, Spokane, WA

13. "Implementing Intra-Operative Glucose Control: What Does it Take?" Washington State Hospital Association. April 2014, Seattle, WA

14. "Who's Doing Your Surgery and Anesthesia? Ethical Issues in Informed Consent in Medical Direction and Overlapping Surgeries." Washington Ambulatory Surgery Association 2019 Conference. November 2018, Seattle WA.

Invited Journal Reviews:

1. Invited Journal Reviewer, cardiovascular anesthesia, *Anesthesia and Analgesia,* 1998 to present.
2. Invited Journal Reviewer, medical ethics, *Anesthesiology*, 1998 to present.
3. Invited Journal Reviewer, medical ethics, *Journal of Obstetrics and Gynecology*, 1998.
4. Clinical Reviewer, *FirstConsult.* Medical website for primary care physicians, Elsevier publications, London UK. *[www.firstconsult.com]* ,1998 to present.
5. Invited Journal Reviewer, medical ethics, *Mayo Clinic Proceedings,* 2006-2009.
6. Invited Journal Reviewer, *Journal of Philosophy, Ethics, and Humanities*, 2007.
7. Invited Journal Reviewer, *European Journal of Anaesthesiology,* 2013

Web Authorships

1. Update Author, *Anesthesia, 6th Edition,* on-line version. Ron Miller MD, Editor. Elsevier Scientific Publications, Philadelphia. *[www.anesthesiatext.com]* 2004 to present.

2. Update Author, *Sleisinger and Fordtran's Gastrointestinal and Liver Disease, 7th Edition,* on-line version. Mark Feldman MD, Editor. Elsevier Scientific Publications, Philadelphia *[www.sfgastro.com],* 2003 to 2006.

3. Update Author, *Diseases of the Heart, 6th Edition,* on-line version. Eugene Braunwald MD, Editor. Elsevier Publications, Philadelphia [*www.branwalds.com],* 2004 to present.

4. Update Author, *Murray and Nadel's Textbook of Respiratory Medicine,* on-line version. Robert J. Mason MD, John F. Murray MD, V. Courtney Broaddus MD, and Jay A Nadel MD, editors. Elsevier publications, Philadelphia *[www.respmedtext.com],* 2005-2006.

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Miscellaneous:

Consulting Anesthesiologist, Woodland Park Zoological Society, 1992-2002.
Medical writer Handbook for Stoelting's Anesthesia and Co-Existing Disease, 3rd Edition 2009
Content/formatting editor, Journal of American College of Cardiology 2015-present
Medical Writer, Journal of American College of Cardiology 2016-present

Updated, Feb 2019

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APPENDIX R

DECLARATION OF GAIL A. VAN NORMAN, MD

Summary of Expert Opinion[1]

1. Administration of etomidate has been used in the setting of anesthesia and surgery in combination with other drugs such as narcotics to produce sedation. It is never used as a sole agent to maintain general anesthesia. It has no analgesic properties and does not treat or prevent pain. It cannot prevent the prisoner from experiencing feelings of suffocation after administration of the paralytic agent rocuronium bromide, and excruciating pain during the injection of potassium acetate.
2. Etomidate acts at the GABA receptors in the brain, and once GABA receptors are saturated, the clinical effect it can have in any individual person is limited. Increasing the dose or repeating the dose of etomidate cannot overcome this effect, in part because of the rapid redistribution of the drug out of the brain. Even brief pauses in the lethal injection protocol, such as the pause to carry out a "consciousness check" and the time it takes for rocuronium to take effect after injection, will lead to rapid falls in brain levels of etomidate below levels that produce sleep in unstimulated patients.
3. "Consciousness" refers to the ability of the brain to perceive and react to subjective experiences in the environment around it. "Unconsciousness" is the absence of awareness (perception), including the absence of the experience of pain or other noxious and agonizing stimuli, with or without the absence of voluntary movements responding to such stimuli. Absence of movement does not mean that a person is unconscious, particularly if a muscle paralytic agent has been administered to paralyze muscle movements.
4. Experienced anesthesiologists mistake "recall" for "awareness" and markedly underestimate how often patients are aware. "Recall" and "awareness" mean different things: while recall is not of concern during lethal injection, the much more common problem of awareness is.
5. Awareness episodes during full general anesthetics have been shown in multiple studies to occur in over 71% of patients, although the anesthesiologists believed that their patients were unconscious and unaware at the time. In one study, 42% of patients who had awareness indicated they also experienced pain. It is therefore *very likely* that using etomidate as a sole agent to produce unconsciousness in the lethal injection protocol will result in many prisoners being aware at the time of administration of the muscle relaxant and potassium.
6. Myoclonus occurs with administration of etomidate in doses of 0.3 mg/kg in over 90% of patients. These movements will mask voluntary movements by the prisoner indicating awareness or pain, and make it impossible to determine if the prisoner is aware.
7. Sophisticated instruments such as brain wave monitors cannot detect consciousness and have been discredited as indicating drug effects on consciousness in patients and in clinical studies. There is therefore no reliable instrument to demonstrate that a

[1] My qualifications as an expert in the field of Anesthesiology are laid out in the attached curriculum vitae. (Attached as Appendix I)

person who has received a paralytic agent is unconscious and unware. The evaluation of consciousness by a prison employee as called for in the lethal injection protocol cannot predict whether the prisoner will be unconsciousness at the time of administration of the paralytic agent or potassium.

8. Administration of a paralytic agent to an awake person causes feelings of terror, air hunger, and suffocation, as has been well described by people who have survived the experience.
9. Administration of more than 40 to 80 mEq of potassium acetate in 1 liter of fluid causes excruciating pain akin to "having gasoline poured on them and set on fire", as has been well described by patients who have survived the experience. Etomidate has no analgesic properties that will relieve or even reduce this excruciating pain.
10. Due to the administration of a paralytic agent during the lethal injection protocol, when the prisoner regains awareness due to the excruciating pain of the potassium acetate, they will be unable to move or otherwise indicate that they are aware. To outside observers, the execution will appear "serene", even if the prisoner is in excruciating pain or is experiencing suffocation and air hunger.
11. Administration of a paralytic agent *increases* the chance that the prisoner will be aware when the potassium acetate is given, since incidence of awareness has been shown to be almost doubled in the setting of paralytic agents.
12. In my expert opinion, the Florida Protocol is virtually certain to cause severe pain, and to result in prisoners experiencing the agonizing symptoms of severe air hunger, compulsion to breathe, terror, and panic.

I declare under penalty of perjury under the laws of the Unites States of America that the foregoing is true and correct. Executed on May 14, 2019.

Gail A. Van Norman MD

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