

DOCKET NO. _____

**IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 2019**

BOBBY JOE LONG

Petitioner,

v.

STATE OF FLORIDA

Respondent.

**APPLICATION FOR STAY OF EXECUTION PENDING RESOLUTION OF PETITION
FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT –
OPINION AFFIRMING ORDER DENYING THIRD SUCCESSIVE
POST CONVICTION MOTION**

**CAPITAL CASE, DEATH WARRANT SIGNED
EXECUTION IMMINENT
SCHEDULED FOR MAY 23, 2019, AT 6:00 p.m.**

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REQUEST FOR STAY OF EXECUTION

Comes now the Petitioner, **BOBBY JOE LONG** by and through undersigned counsel, and hereby requests a stay of execution. Mr. Long is currently scheduled to be executed in Florida on May 23, 2019, at 6:00 p.m. Mr. Long applies to this Court pursuant to 28 U.S.C. § 2201(f) for a stay of his execution, currently scheduled for May 23, 2019 at 6:00 p.m. Mr. Long will suffer irreparable harm if this Court does not enter the requested stay of execution. *Barefoot v. Estelle*, 463 U.S. 880 (1983). In support Mr. Long states:

I. PROCEDURAL HISTORY

A. Proceedings on the Writ

On April 23, 2019 Governor DeSantis signed a death warrant setting Mr. Long's execution for May 23, 2019 at 6:00 p.m. . Mr. Long timely filed a third successive postconviction motion in the trial court on April 29, 2019. The motion raised six claims for relief: Claim 1: Scientific advances in neuro-imaging coupled with advances in scientific research on brain damage, CTE, injury to juvenile brains, and juvenile brain development constituted newly discovered evidence entitling Mr. Long to a new penalty phase; Claim 2: that the current lethal injection protocol adopted by the State of Florida on January 4, 2017 and recertified on February 27, 2019 that uses etomidate as the first drug in the three drug protocol is unconstitutional as applied to Mr. Long as it is contraindicated for

this with temporal lobe epilepsy and brain damage, and the continued use of the three drug protocol is unconstitutional, and the use of etomidate is unconstitutional under the Eighth Amendment and violates *Baze v. Rees*, 553 U.S. 35, 128 S.Ct. 1520, 170 L.Ed.2d 420 (2008); *Glossip v. Gross*, 125 S.Ct. 2726 (2015) *Bucklew v. Precythe*, 139 S.Ct. 1112 (2019); Claim 3: Mr. Long's almost thirty years on death row should constitute a bar to his execution under the precepts of *Lackey*; Claim 4: The denial of *Hurst* relief to Mr. Long violates the Eighth Amendment's ban on cruel and unusual punishment as the Fourteenth Amendment guarantees of equal protection and due process; Claim 5: The Department of Correction's restriction on Mr. Long's permitted legal witness and his second witness is unconstitutional; Claim 6: Mr. Long's severe mental illness and traumatic brain injury should bar his execution.

Mr. Long appealed this decision to the Florida Supreme Court, which denied relief on May 17, 2019 in *Long v. State*, 2019 WL 2066964. Mr. Long has filed a Petition for Writ of Certiorari simultaneously with this motion.

B. Prior Proceedings

Mr. Long's procedural history is described below:

Mr. Long was indicted for the offense of first-degree murder, sexual battery, and kidnapping in 1984. He was tried by jury, convicted as charged and sentenced to death. His conviction and sentence were upheld by the Florida Supreme Court

in *Long v. State*, 610 So.2d 1268 (Fla. 1992), *cert. denied*, 510 U.S. 832 (1993).

Mr. Long sought collateral relief in state court. The trial court held an evidentiary hearing several of the claims on the motion for postconviction relief and subsequently denied relief on all claims. The Florida Supreme Court affirmed at *Long v. State*, 118 So.3d 342 (Fla. 2013).

Mr. Long filed a successor postconviction motion alleging newly discovered evidence related to FBI analyst Mike Malone on September 9, 2014. The motion was summarily denied and affirmed by the Florida Supreme Court at *Long v. State*, 183 So.3d 342 (Fla. 2016).

Mr. Long then sought federal review through the filing of a Petition for Writ of Habeas Corpus in the Federal District Court-Middle District on August 9, 2013. The district court entered an Order denying the Petition for Writ of Habeas Corpus.. Mr. Long appealed to the 11th Circuit Court of Appeals. The 11th Circuit denied the certificate of appealability. *Long v. Sec'y, Dept. of Corrections*, Case No. 16-16259-P (11th Cir. Jan. 4, 2017).

On January 3, 2017, Mr. Long filed a Second Successor Motion for Postconviction Relief in the trial court premised on *Hurst v. Florida*, 136 S.Ct. 616 (2016). The trial court summarily denied relief. Mr. Long appealed to the Florida Supreme Court. The Florida Supreme Court affirmed the denial of *Hurst* relief at *Long v. State*, 235 So.3d 293 (Fla. 2018), *cert. denied*, 139 S.Ct. 162 (2018)

(Mem.).

On January 4, 2017, the State of Florida altered the lethal injection protocol by substituting the drug etomidate for the first drug in the three-drug protocol. The three drug protocol was re-certified on February 27, 2019.

Governor DeSantis signed a death warrant for Mr. Long on April 23, 2019.

Mr. Long filed a public records request with the Department of Corrections, in which he requested information in the possession of DOC from the manufacturer of etomidate and any data, including that of expert and medical witnesses which address the safety and efficacy of etomidate in executions and that was relied upon by DOC in choosing to substitute etomidate, and Mr. Long's medical records. Mr. Long also sought public records from the Office of the Medical Examiner, District 8, and Florida Department of Law Enforcement [FDLE].

Mr. Long filed a Third Successor Motion for Postconviction Relief in the trial court on April 29, 2019. In his second claim for relief, Mr. Long challenged the constitutionality of etomidate as the first drug in the lethal injection protocol as unconstitutional as applied due to his unique medical condition; the continued use of the three drug protocol instead of a one-drug protocol or other alternate means of execution, and the use of etomidate. Mr. Long argued that the hearing conducted by the Florida Supreme Court in *Asay v. State*, 224 So.3d 695 (Fla.

2017) was incomplete and flawed and new evidence from the Branch and Hannon executions warranted a new hearing. Mr. Long specifically requested leave to amend his motion due to the time periods imposed by the trial court. Mr. Long requested an evidentiary hearing on his claim and requested that a stay of execution be granted. In his third claim for relief Mr. Long argued the almost thirty years he has spent on death row should bar his execution under the precepts of *Lackey*. In his fourth claim Mr. Long argued the denial of *Hurst* relief to him was cruel and unusual punishment, arbitrary and capricious, and the Florida Supreme Court's apparent pending reconsideration of the retroactivity bar warranted a stay of execution pending that decision. In his fifth claim Mr. Long argued

DOC's refusal to permit his legal witness of have access to a cell phone before and during the execution and to observe the IV insertion and DOC's refusal to permit a lay person instead of a minister of religion to serve as Mr. Long's second witness is unconstitutional.

The trial court denied Mr. Long's request for records from all agencies except Mr. Long's medical records for the last five years and the period from 2011-2013. The trial court summarily denied Mr. Long's first, third, fourth, fifth, and sixth claims. The trial court granted a partial evidentiary hearing on Mr. Long's the as-applied challenge to etomidate, but denied a full hearing on the

three-drug protocol and restricted evidence regarding etomidate in general. The trial denied relief after the partial evidentiary hearing on the as-applied claim.

Mr. Long appealed to the Florida Supreme Court. The Florida Supreme Court affirmed the rulings of the trial court. *Long v. State*, 2019 WL 2066964 (May 17, 2019).

Mr. Long sought relief in federal court after the denial of his motion by the trial court. Mr. Long filed a §1983 suit in the Northern District of Florida. The suit contained the affidavits of Dr. David Lubarsky and Dr. Gail Van Norman, who attested to the safety and efficacy of etomidate and the specific issues pertinent to Mr. Long. The district court denied relief without a hearing.

II. BASIS FOR A STAY OF EXECUTION

A. The relevant law governing stays of execution.

In *Hill v. McDonough* the U.S. Supreme Court stated that the requirements for a stay of execution listed in *Nelson v. Campbell*, 541 U.S. 637 (2004) and *Gomez v. United States Dist. Court for Northern Dist. Of Cal.*, 503 U.S. 653, 654 (1992) (*per curiam*) should be followed. 126 S.Ct 2096 (2006). The Eleventh Circuit Court of Appeals has in the past used a four-part test in determining whether a stay of execution should be granted that generally comports with *Gomez*:

whether the movant has made a showing of likelihood of success on the merits and of irreparable injury if the stay is not granted, whether the stay would substantially harm other parties, and whether granting the stay would serve

the public interest.

Bundy v. Wainwright, 808 F.2d 1410, 1421 (11th Cir.1987). Mr. Chavez has met the standards attendant to the granting of a stay of his execution. Each of the *Gomez* criteria are satisfied in this case.

B. Mr. Long is likely to succeed on the merits of his claims

The issues presented in this case are of great constitutional magnitude. Mr. Long's first claim concerns the rights of death sentenced inmates to exercise their Sixth Amendment right to counsel, their First Amendment right of access to the courts, and their Eighth Amendment rights which are being abrogated by the Department of Corrections refusal to permit Mr. Long's legal witness to his execution to view the IV insertion process and to have access to a cell phone during the execution. Further, DOC's refusal of Mr. Long's request to have a layperson instead of a minister of religion as his second witness violates the Establishment Clause of the First Amendment of the United States Constitution and constitutes unequal treatment.

Mr. Long's second issue raises significant Eighth and Fourteenth Amendment concerns that the State of Florida's *Hurst* retroactivity bar has created an unconstitutional arbitrary and capricious application of the death penalty. The Florida Supreme Court is poised to reconsider their retroactivity bar and Mr. Long is entitled to a stay of his execution while the Florida Supreme Court reconsiders

whether the *Hurst* decisions should apply retroactively and to whom.

Mr. Long's third issue addresses the rights of death sentenced inmates and their collateral counsel to be treated equally by the courts. Mr. Long sought to obtain public records from the Department of Corrections that contain vital information regarding the reasons and methodology for the decision made by the Department of Corrections to utilize the current lethal injection protocol that swapped etomidate for midazolam as the first drug in the three-drug lethal injection protocol. Mr. Long has contended that an execution process that is shrouded in government-sponsored secrecy has deprived him of his constitutional rights to due process, to effective assistance of counsel, to not be subject to cruel and unusual punishment, and to guarantee to him and his attorney the right to access public records that inure to other Florida citizens.

Mr. Long submits that the state courts of Florida violated his Fifth Amendment right to due process, his Sixth Amendment right to effective assistance of counsel, his Eighth Amendment right against cruel and unusual punishment, and his right to Equal Protection under the Fourteenth Amendment when he was denied a full and fair evidentiary hearing on his claim that the use of etomidate was unconstitutional as applied to him due to his unique medical condition, that Florida's three-drug protocol violates the Eighth Amendment, and that the use of etomidate as the first drug is also unconstitutional.

In his fourth claim Mr. Long was denied an evidentiary hearing to establish his almost thirty years on death row bar his execution under the precepts of *Lackey*. Mr. Long would have testified to the physical and psychological punishment he has endured for over thirty years on death row. Mr. Long would have further testified as to the effect of living with the uncertainty of execution has had on him. This issue is ripe for review by this Court.

C. Irreparable injury to Mr. Long of the stay is not granted.

Nothing is more irreparable than death. If a stay is not granted, Mr. Long will suffer irreparable injury as a matter of law, and as a matter of fact.

1) Mr. Long will suffer irreparable injury as a matter of law

Because Mr. Long has demonstrated a likelihood of success on his constitutional claims, a finding of irreparable harm exists as a matter of law. If the requested temporary injunction is not issued, Mr. Long will be executed at Florida State Prison on May 23, 2019 at 6:00 p.m. without being afforded federal review of his claims by this Court. This constitutes irreparable injury. *See, e.g., Evans v. Bennett*, 440 U.S. 1301, 1306 (1979) (Rehnquist, Circuit Justice, granting a stay of execution and noting the “obviously irreversible nature of the death penalty”); *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); *Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996) (holding that

continued pain and suffering resulting from deliberate medical indifference is irreparable harm).

2) Mr. Long will suffer irreparable injury as a matter of fact

Even if a finding of irreparable harm were not mandated by law upon a finding of likely success on Mr. Long's constitutional claims, there is no doubt in this case that failure to grant a stay would cause Mr. Long irreparable injury in fact, since Defendants will execute him, and soon. Further harm will result from Mr. Long's execution because he will no longer have any meaningful remedy, because he will be dead. The State's violation of Mr. Long's constitutional rights alone validates a presumption of irreparable harm. *See Associated General Contractor's of California, Inc. v. Coalition for Economic Equity*, 950 F.2d 1401, 1412 (9th Cir. 1991) (an alleged constitutional infringement will often alone constitute irreparable harm).

D. Harm to parties

While recognizing that the State of Florida has a finality interest in imposing the sentence of death, substantial harm will not ensue if a stay of execution is granted. Mr. Long will remain in the custody of FDOC, where he has been held since his conviction. Mr. Long is only seeking to prohibit the Defendants from violating his constitutional rights. Under these circumstances, this Court should not permit Mr. Long's execution to proceed before the Court has the opportunity to

review Mr. Long's constitutional claims. Mr. Long has demonstrated specific facts unique to him that require judicial action. The delay resulting from granting the relief sought here will have little adverse effect on the State's interest and will ensure that it does not perform an unconstitutional execution.

A continuation of the status quo while this Court reviews Mr. Long's constitutional claims can cause absolutely no harm to other parties. *See Gomez v. U.S. Dist. Ct. For Northern Dist. Of Cal.*, 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.") Granting a stay will not substantially harm other parties and, if there was some harm, Mr. Long's potential injury outweighs that harm

E. Public interest

Upholding the U.S. Constitution is always in the public interest. Although there are competing public interests, ultimately one factor favors the issuance of the relief sought. Certainly, the public has an interest in the execution of Mr. Long pursuant to the judgment of the Florida Courts. More importantly, however, it has an interest in having no execution take place until it is determined that Mr. Long's execution will be carried out consistent with the requirements of the First, Fifth,

Sixth, Eighth and Fourteenth Amendments. It is therefore paramount that Mr. Long's weighty constitutional claims be resolved on the merits. The delay in carrying out the execution, which will be necessitated by review and consideration of the merits of Mr. Long's case, is a small price to pay to assure fairness in this critical aspect of carrying out Mr. Long's sentence.

This Court should not be blinded by the State of Florida's rush to execute Mr. Long in violation of his constitutional rights until his constitutional claims are reviewed by this Court.

IV. CONCLUSION

WHEREFORE, Mr. Long respectfully requests this Court stay his execution and allow his Petition for Writ of Certiorari to be fully and fairly litigated without an imminent execution date looming.

Respectfully submitted,

/s/ ROBERT A. NORGDARD
Robert A. Norgard
Counsel for Mr. Long

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 20th, 2019, I forwarded a copy of the foregoing pleading by electronic transmission to the Office of the Attorney General, at capapp@myfloridalegal.com . I further certify that all parties required to be served have been served.

/s/ ROBERT A. NORGDARD

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