Case No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 2018

BOBBY JOE LONG,

Petitioner,

vs.

MARK S. INCH, ET AL,

Respondent

PETITION FOR WRIT OF CERTIORARI

ON PETITION FOR WRIT OF CERTIORARI
TO THE ELEVENTH CIRCUIT COURT

DEATH WARRANT ISSUED
EXECUTION SET FOR MAY 23, 2019

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CAPTIAL CASE

DEATH WARRANT ISSUED
EXECUTION SET FOR
MAY 23, 2019

QUESTIONS PRESENTED

QUESTION I

WHETHER THE ELEVENTH CIRCUIT COURT OF APPEALS ERRED IN HOLDING THAT MR. LONG WAS NOT ENTITLED TO A STAY BECAUSE OF INEXCUSABLE DELAY IN BRINGING HIS LETHAL INJECTION CLAIMS?

QUESTION II

WHETHER THE ELEVENTH CIRCUIT COURT OF APPEALS ERRED IN HOLDING THAT MR. LONG WAS PRECLUDED BY RES JUDICATA FROM PURSUING A SECTION 1983 CLAIM THAT FLORIDA'S CURRENT LETHAL INJECTION PROTOCOL (ETOMIDATE PROTOCOL) VIOLATES THE EIGHTH AMENDMENT CRUEL AND UNUSUAL PUNISHMENT CLAUSE?

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[L] Newspaper Account of Hannon Execution

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2018

BOBBY JOE LONG, Petitioner,

v.

MARK S. INCH, ET AL, Respondent,

The petitioner, BOBBY JOE LONG, respectfully requests that a stay of execution be entered and that a writ of certiorari issue to review the opinion of the U.S. Circuit Court of Appeals for the Eleventh Circuit entered in this cause on May 20, 2019.

OPINION BELOW

The opinion of the Eleventh Circuit affirming the Order denying petitioner's Emergency Motion for Temporary Restraining Order, Preliminary Injunction and/or Stay of Execution filed in his Section 1983 action is found at *Long v. Inch*, Case No. 19-11942, May 22, 2019, and is reproduced in Appendix A. The Order of the District Court Judge for the Middle District of Florida is reproduced in Appendix B.

JURISDICTION

The Eleventh Circuit affirmed the denial of petitioner's Emergency Motion for Temporary Restraining Order, Preliminary Injunction and/or Stay of Execution and denied the application for stay on May 22, 2019. On May 16, 2019, the petitioner asserted below, and asserts here, a deprivation of his rights guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution. Title 28 United States Code, Section 1257(a) confers certiorari jurisdiction in this Court to review this matter.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides:

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

The Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due

process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE AND FACTS

STATEMENT OF THE CASE:

Petitioner, BOBBY JOE LONG, is a Florida death row inmate whose execution date has been set for May 23, 2019.

On May 16, 2019, Mr. Long through counsel, filed a Complaint pursuant to 42 U.S.C. §1983 challenging Florida's Lethal Injection Protocol which substituted etomidate for midazolam hydrochloride as the first drug in the three drug protocol (Appendix C). Along with the Complaint, Mr. Long, through counsel, also filed an Emergency Motion for Temporary Restraining Order, Preliminary Injunction and/or Stay of Execution (Appendix D).

On May 17, 2019, pursuant to Court Order, the respondents filed a Response to Emergency Motion for Temporary Restraining Order, Preliminary Injunction and/or Stay of Execution (Appendix E). On May 18, 2019, the petitioner filed a Reply in Support of Emergency Motion for Temporary Restraining Order, Preliminary Injunction and/or Stay of Execution (Appendix F).

On May 19, 2019, the district court issued an Order denying petitioner's Motion (Appendix B).

On May 19, 2019, a timely Notice of Appeal was filed.

On May 20, 2019, the petitioner filed an Emergency Motion for Stay of Execution Pending the Appeal or Motion for Expedited Appeal (Appendix G). On May 20, 2019, pursuant to Court Order, petitioner also filed his Initial Brief (Appendix H). On May 21, 2019, the defendants filed an Answer Brief (Appendix I). The petitioner then immediately filed a Reply Brief (Appendix J).

On May 22, 2019, the Eleventh Circuit Court of Appeals denied the stay request and upheld the Order of the district court denying petitioner's Motion (Appendix A).

STATEMENTS OF THE FACTS:

On January 4, 2017, the State of Florida adopted a lethal injection protocol that substituted etomidate for midazolam hydrochloride as the first drug in a three drug protocol. On February 27, 2019, the State of Florida re-adopted an Etomidate Protocol that is almost identical to the January 4, 2017 Etomidate Protocol (Appendix K). The February 27, 2019 Etomidate Protocol is the lethal injection protocol that applies to Mr. Long.

In *Asay v. State*, 224 So 3d 695 (Fla, 2017), the Supreme Court found the Etomidate Protocol did not violate the Eighth Amendment Cruel and Unusual Punishment Clause.

In Mr. Asay's case, there was an evidentiary hearing where the defense used Dr. Mark Heath as their expert.

On November 17, 2017, Patrick Hannon was executed utilizing the Etomidate Protocol. In Mr. Hannon's execution, there is an eyewitness report that after the purported consciousness check, there was movement by Mr. Hannon (Appendix L).

On February 22, 2018, Eric Scott Branch was executed utilizing the Etomidate Protocol. In Mr. Branch's execution, there are eyewitness reports that as the etomidate administration commenced, Mr. Branch released a guttural yell or scream. Mr. Branch's legs were moving, his head moved, and his body was shaking. His body continued to shake and his chest was heaving for another four minutes. Like in Mr. Hannon's execution, even after the purported consciousness check, there was movement by Mr. Branch. *See*, Affidavit of Robert Friedman (Appendix M) and newspaper account of Branch execution (Appendix N).

The eyewitness reports from the Hannon execution and Branch execution are extremely important to the determination of whether or not the Etomidate Protocol violates the Eighth Amendment Cruel and Unusual Punishment Clause. These eyewitness reports are extremely important to experts.

Dr. David Lubarsky is an anesthesiologist whose curriculum vita is reproduced as Appendix O. Dr. Lubarsky has reviewed the Etomidate Protocol and could testify at an evidentiary hearing as to matters not raised by Dr. Heath in the *Asay* general challenge to the Etomidate Protocol. More importantly, Dr. Lubarsky could testify at an evidentiary hearing as to the significance of the eyewitness reports to the Hannon and Branch executions. *See*, Declaration of Dr. Lubarsky reproduced as Appendix P.

Dr. Gail Van Norman is an anesthesiologist whose curriculum vita is reproduced as Appendix Q. Dr. Van Norman has reviewed the Etomidate Protocol and could testify at an evidentiary hearing as to matters not raised by Dr. Heath in the *Asay* general challenge, and can testify to matters that support Dr. Lubarsky's opinion, as well as additional matters not raised by Dr. Lubarsky. *See*, Declaration of Dr. Gail Van Norman reproduced as Exhibit R.

As of this date, there has not been an evidentiary hearing in Florida for the purpose of thoroughly reviewing the Etomidate Protocol in light of the new evidence from the Hannon and Branch executions[1].

[1] Although Dr. Lubarsky did testify in Mr. Long's State court evidentiary hearing on Mr. Long's as applied claims he was not allowed to testify as to a general challenge or as to the significance of the Hannon and Branch executions.

REASONS FOR GRANTING THE WRIT

REASON 1

THE ELEVENTH CIRCUIT COURT OF APPEALS ERRED IN HOLDING THAT MR. LONG WAS NOT ENTITLED TO A STAY BECAUSE OF INEXCUSABLE DELAY IN BRINGING HIS LETHAL INJECTION CLAIMS

There was no delay by Mr. Long in bringing his lethal injection claims. The Eleventh Circuit Court of Appeal was wrong, both legally and factually in its holding regarding this.

Mr. Long's Complaint in the District Court for Middle District of Florida is a § 1983 challenging Florida's January 2017/February 2019 Etomidate Protocols which substituted etomidate for midazolam hydrochloride as the first drug in a three drug protocol. Mr. Long's Complaint was filed well within the four year statute of limitations. The Eleventh Circuit did not address this.

The lower court in its opinion first suggests that Mr. Long should have raised his claim when Florida first implemented its three-drug protocol on January 14, 2000. What the lower court has overlooked was that in 2000, the first drug in the three-drug protocol was sodium thiopental. In 2011, the first drug in the three-drug protocol was changed to pentobarbital. In 2013, the first drug in the three-drug protocol was changed to midazolam

hydrochloride. It was not until January 2017 that the first drug in the three-drug protocol was changed to etomidate. It is the use of etomidate as the first drug in the three-drug protocol that Mr. Long is challenging.

The lower court next suggests that Mr. Long should have raised his claim in 2009 when at least four other states began the use of a single-drug method for executions. What the lower court has overlooked is that Mr. Long is primarily offering the one-drug protocol as a constitutionally sufficient alternative to the Florida three-drug protocol. It is being offered as an alternative to the Etomidate Protocol that did not come into use until January 2017.

The lower court then suggests that Mr. Long should have raised his claim in January 2017 when the Etomidate Protocol was first implemented in Florida. What the lower court has overlooked is that Mr. Long's case does not exist in a vacuum. While Mr. Long was evaluating his claims under the new Etomidate Protocol, because of the Mark Asay death warrant the *Etomidate Protocol was already in litigation. Asay's* case was not decided until August 14, 2017. Given the precedent of *Asay*, it would have been pointless to raise a lethal injection claim until more

conclusive evidence was developed and/or problems in executions with the Etomidate Protocol were documented.

The lower court finally suggests that Mr. Long should have raised his claims shortly after problems began to be documented with the Etomidate Protocol, to-wit Patrick Hannon (November 8, 2017), Eric Branch (February 22, 2018) and Jose Jimenez (December 13, 2018). What the lower court has again overlooked is that Mr. Long case does not exist in a vacuum. Because of the Jose Jimenez death warrant, the courts in Florida were asked to conduct a full evidentiary hearing to review the use of the Etomidate Protocol. Mr. Jimenez was not executed until December 13, 2018. Another aspect of Mr. Long's case not existing in a vacuum is that in early 2019, the State of Florida was required to adopt or re-adopt its lethal injection protocol. This was not done until February 27, 2019. At the time, although Florida re-adopted the Etomidate Protocol, they could have also substituted a new first drug. This was a reasonable consideration in that it has been widely publicized that the Florida Department of Corrections has had significant problems getting a particular drug once it is known that the drug is being used in executions. This was true for the previous drugs being used, and it is also true regarding etomidate.

Finally, the lower court in pointing out that Mr. Long filed his § 1983 a week ago failed to mention that Mr. Long filed a challenge in state court on April 29, 2019, less than one week after his warrant was signed, and that Mr. Long's § 1983 was well within the four year statute of limitations.

An additional consideration that this Court should take into account is that at the time Mr. Long's death warrant was signed, his attorneys had been actively working to develop viable claims for Mr. Long. At the time Mr. Long's death warrant was signed, considerable time and effort had already been spent on developing not only a lethal injection claim, but claims related to his traumatic brain injury, *Hurst*, challenges to the clemency process in Florida, etc. The § 1983 action was well within the four year statute of limitations. Its filing was accelerated solely because of the death warrant – something Mr. Long had no control over.

Ironically, it took the court's around 45 years to rule in *Hurst* that Florida's death penalty statute was unconstitutional. It has been almost 30 years since Mr. Long challenged this unconstitutional statute. Yet Mr. Long is not being afforded relief based on the

unconstitutionality of the statute because of the length of time it took the courts to recognize this.

REASON II

THE ELEVENTH CIRCUIT COURT OF APPEALS ERRED IN HOLDING THAT MR. LONG WAS PRECLUDED BY RES JUDICATA FROM PURSUING A SECTION 1983 CLAIM THAT FLORIDA'S CURRENT LETHAL INJECTION PROTOCOL (ETOMIDATE PROTOCOL) VIOLATES THE EIGHTH AMENDMENT CRUEL AND UNUSUAL PUNISHMENT CLAUSE.

The Eleventh Circuit Court of Appeals erred in holding that Mr. Long was precluded by res judicata from pursuing a Section 1983 claim. In cases of manifest injustice the res judicata doctrine should not apply. In Mr. Long's case, the res judicata should not apply based on his case specific reasons.

The lower court was wrong in its assessment of the law on manifest injustice as it relates to the res judicata doctrine. The lower court was wrong in its analysis that in effect makes res judicata an absolute doctrine without exception. The lower court was also wrong in stating that an exception based on manifest injustice is without precedent. Mr. Long cited a number of cases in his Initial Brief that provide precedent for this proposition. *See*, Petitioner's Initial Brief pages 10-12. These cases include *De Cencino v. Eastern Airlines, Inc.*, 283 So 2d 97 (Fla 1973), *Universal Construction Company v. City of Fort*

Lauderdale, 62 So 2d 366 (Fla. 1953), *State v. Akins*, 69 So 3d 261 (Fla 2011), *Strazzulla v. Hendrick*, 177 So 2d 1 (Fla, 1965) and *Muehleman v. State*, 3 So 3d 1149 (Fla 2009). The lower court failed to address this precedent.

Also, the lower court failed to address the specific facts related to Mr. Long's case that establish manifest injustice. The facts that support manifest injustice are presented in the statement of facts in this petition, as supported by the documentary material in the Appendix. It would be a manifest injustice not to allow Mr. Long an evidentiary hearing to establish the unconstitutionality of the death penalty in light of more conclusive evidence with a methodologically sounds basis and in light of the mounting evidence from executions of significant problems with the use of the Etomidate Protocol.

Ironically, as the court seeks to bar Mr. Long from challenging the two year old *Asay* case based on new and compelling evidence, the Florida Supreme Court in *Owen* has announced that despite unchanged circumstances, it is considering receding from its two year old cases on *Hurst* retroactively to the apparent detriment of Mr. Owen.

CONCLUSION

Petitioner respectfully requests this Honorable Court grant this petition for writ of certiorari to review the decision of the U.S. Circuit Court of Appeals for the Eleventh Circuit regarding the Order Denying petitioner's Motion in District Court.

Respectfully submitted,

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Respondent.

CERTIFICATE OF SERVICE

I, ROBERT A. NORGARD, a member of the Bar of this Court, hereby certify that on this **23rd** day of May, 2019, one copy of the Petition for Writ of Certiorari, one copy of the Motion for Leave to Proceed In Forma Pauperis, and one copy of the Petitioner's Affidavit in support of this Motion were e-mailed to the Assistant Attorney General, at capapp@myflorialegal.com counsel for respondent. I further certify that all parties required to be served have been served.

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