

**IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR FLAGLER COUNTY, FLORIDA**

STATE OF FLORIDA,

Plaintiff,

LOUIS BERNARD GASKIN,

Defendant.

**Case No. 1990-CF-1
Emergency Capital Case
Death Warrant Signed
Execution Scheduled for
April 12, 2023 at 6:00 p.m.**

**DEFENDANT'S DEMAND FOR PRODUCTION OF ADDITIONAL PUBLIC
RECORDS RELATED TO LETHAL INJECTION
[MEDICAL EXAMINER'S OFFICE – DISTRICT EIGHT]**

To: **William Hamilton, M.D.,
Chief Medical Examiner**
Office of the Medical Examiner, District Eight
Attn: Office of the General Counsel
606 SW 3rd Avenue
Gainesville, Florida 32601

The Defendant, **LOUIS BERNARD GASKIN**, by and through undersigned counsel, hereby makes the following demands of Chief Medical Examiner William Hamilton of the **OFFICE OF THE MEDICAL EXAMINER** for District Eight, pursuant to Florida Rule of Criminal Procedure 3.852(h)(3) and (i), for additional public records pertinent to this capital case under a truncated schedule. In support, Mr. Gaskin states as follows:

1. Mr. Gaskin is an indigent Florida inmate under a sentence of death and subject to execution by lethal injection pursuant to Section 922.105, Florida Statutes (2019). A Death Warrant was signed by Governor Ron DeSantis on Monday, March 13, 2023. This warrant was accompanied by a letter dated March 13, 2023, to the Governor from the Attorney General Ashley Moody. Mr. Gaskin's execution has been scheduled for Wednesday, April 12, 2023.
2. On March 10, 2023, Ricky D. Dixon, Secretary for the Florida Department of

Corrections, signed into effect the current three-drug protocol. The protocol lists etomidate as the first drug administered. Etomidate, which is marketed as “Amidate,” is a short-acting drug that induces anesthesia but is severely painful upon injection, producing a burning feeling. Etomidate wears off quickly because the liver quickly breaks down the drug which is why it is characterized as a drug to induce anesthesia. Etomidate has **no analgesic** properties.

3. In 2016, an evidentiary hearing occurred in Jacksonville, Florida in *Asay v. State*, Duval County Case No. 87-6876-CF, as to the efficacy of etomidate as the first drug. Mr. Asay’s execution was the first to be scheduled after the adoption of the new protocol. At his hearing, Mr. Asay presented evidence that the injection of etomidate was painful and because the etomidate is the first drug administered in the sequence, the inmate will be fully conscious and will experience severe pain. Testimony was presented that Mr. Asay might vocalize his reaction to the pain.

4. The Florida Supreme Court ultimately affirmed the denial of relief as to Mr. Asay’s contention that etomidate was not an effective first drug in an execution protocol and the current protocol did not violate the eighth amendment. *See Asay v. State*, 224 So. 3d 695, 702 (Fla. 2017).

5. However, the unheeded warnings in *Asay* about the pain and suffering caused by etomidate were shown to be prescient in the February 22, 2018, execution of Eric Branch. Mr. Branch experienced serious pain in violation of the Eighth Amendment. Witness and media accounts detailed that Mr. Branch **screamed and thrashed** on the gurney. One media account indicated: “Just as officials were administering the lethal drugs that included a powerful sedative, [Mr.] Branch let out a **blood-curdling scream, thrashed on the gurney, then yelled ‘Murderers! Murderers! Murderers!’** before falling silent after a guttural groan.” Associated Press, *Eric Branch Yells ‘Murderers!’ During His Execution for Killing College Student in 1993* (February 22, 2018) <http://www.orlandosentinel.com/news/os-florida-execution-eric-scott-branch-0222->

story.html.

6. Attorney Robert Friedman, who witnessed the execution on behalf of Mr. Branch's counsel stated that a minute after being told that the execution phase was about 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. Following Mr. Branch's execution, when asked whether Mr. Branch's scream could have been caused by the execution drugs, FDOC spokesperson, Michelle Gladly stated that "there was no indication' that the inmate's last actions were a result of the injection procedure. She said that conclusion had been confirmed by the Florida Department of Law Enforcement." Sky News, *Killer Eric Scott Branch shouts 'murderers!' as he is executed in Florida* (February 23, 2018) <https://news.sky.com/story/killer-eric-scott-branch-shouts-murderers-as-hes-executed-in-florida-11262985>. However, to date, neither FDOC nor the Florida Department of Law Enforcement ("FDLE") have provided any further information about how that conclusion was reached.

8. Despite documented evidence that the Etomidate Protocol creates a substantial risk of serious pain, Florida nevertheless continued setting Etomidate Protocol executions. It was used in the execution of Jose Jimenez, who also suffered obvious pain in violation of the Eighth Amendment. After the execution of Mr. Jimenez on December 13, 2018, it was reported that "Local 10 News investigative reporter Jeff Weinsier, who witnessed the execution, said Jimenez was blinking profusely, twitching and breathing heavily. Then it all stopped." Jeff Weisner, Associated Press, *Man executed for North Miami Woman's 1992 Murder* (updated December 19,

2018) <https://www.local10.com/news/florida/north-miami/jose-antonio-jimenez-execution>.

9. In her dissent in *Jimenez v. State*, 265 So. 3d 462, 492 (Fla. 2018), Justice Pariente described the Branch execution as follows:

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 of 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 – 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 “1/10th of the clinical dose 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 an evidentiary hearing.

10. Despite the call from a member of the Supreme Court for further inquiry, the State of Florida proceeded undaunted, all the while refusing to turn over relevant public records. In the execution of Bobby Joe Long on May 23, 2019, it was reported that, soon after the administration of the three execution drugs, “[Mr. Long’s] breathing became **disjointed**. His mouth appeared to **start twisting and his breathing grew more labored**. A state official pressed on his shoulders at 6:47 p.m. A minute later, [Mr.] Long appeared to stop breathing.” Kathryn Varn, Tampa Bay

Times, *Tampa serial killer Bobby Joe Long* is executed in silence (updated May 24, 2019) <https://www.tampabay.com/tampa/tampa-serial-killer-bobby-joe-long-is-executed-in-silence-20190523/>.

11. Reporter Evan Donovan, who witnessed the execution, provided a detailed timeline of Mr. Long’s movements. See Evan Donovan, News Channel 8 WFLA, *Execution of Bobby Joe Long: Death sentence carried out* (updated May 24, 2019) <https://www.wfla.com/news/local-news/execution-of-bobby-joe-long-death-sentence-carried-out/>. At 6:44 p.m. he reported that “[w]hether in anticipation of something happening or as a reaction to the first drug, etomidate, being delivered into his system, **Long’s breathing begins to pick up. His mouth opens. He’s taking deliberate, deep breaths as his chest begins to rise and fall more noticeably. He’s exhaling through his mouth, and his jaw begins to move slightly side-to-side.**” *Id.* Then, at 6:45 pm, he reported that “**[m]ore heavy breathing. Long’s body begins to move slightly. There’s an occasional, very slight twitch as his shoulder pushes up under the sheet.**” *Id.* Then at 6:46 p.m., “Long is showing **very little movement now.** His body is calm. **His breathing is very slow and regular.**” *Id.* Then at 6:48 p.m. “[t]he only movement you can see from Long now is the **very slow rise and fall of his chest as he takes breathes** (sic).” *Id.*

12. Despite report after report by objective lay witnesses, FDOC employed the same torturous and unaltered protocol in the execution of Mr. Gary Ray Bowles. A reporter there provided a detailed timeline of Mr. Bowles’ movements during the execution. See Tarik Minor – Anchor, I-Team reporter, News4JAX, *Tarik Minor: Eyewitness to the Execution of Gary Ray Bowles* (updated August 24, 2019) <https://www.news4jax.com/news/florida/i-witnessing-the-execution-of-gary-ray-bowles>. He reported that at 10:44 p.m., “[a]s the first injection is administered into the IV connected to Bowles’ arm, it appears Gary Bowles was praying. I could

see his mouth was moving but it's impossible to read his lips and know what he was saying or murmuring under his breath." *Id.* Then, at 10:46 p.m., "Bowles begins to take exaggerated deep breaths. I see his chest moving up and down and it's clear his heart is still beating in the final minutes of his life. One minute later Bowles' mouth stops moving altogether but his chest continues to rise and fall dramatically." *Id.* Then, at 10:48 p.m., "There is still movement in Bowles' upper torso and chest. He appears to still be alive and then suddenly, some slight movement in his neck and then his body seemingly goes limp. There was no movement in his body for the next several minutes." *Id.* Once again, it is clear that Mr. Bowles suffered.

13. For decades, Florida has experimented with various execution procedures and protocols. The Florida Supreme Court has recognized that when new facts arise from problems or unusual occurrences, like those that occurred in the executions of Mr. Branch, Mr. Jimenez, Mr. Long, and Mr. Bowles, disclosure of records is warranted. *See Lightbourne v. McCollum*, 969 So. 2d 326 (Fla. 2007); *see Muhammad v. State*, 132 So. 3d 176 (Fla. 2013). It should be noted that substantial litigation is pending regarding the constitutionality of the current lethal injection protocol before the Middle District Court of Florida. FDOC and Secretary Inch are the respondents in these civil lawsuits brought pursuant to 42 U.S.C. §1983. *See Davis v. Reddish et al.*, Case Number 3:18-cv-00353-MMH-PDB (Middle District of Florida); *Anderson v. Palmer et al.* Case Number 3:14-cv-01148-MMH-JBT (Middle District of Florida); *Brant v. Reddish et al.*, Case number 3:13-cv-412-K-32MCR (Middle District of Florida); *Jackson v. Palmer et al.*, Case Number 3:14-cv-01149-MMH-JBT (Middle District of Florida) (the District Court has denied the Respondents' Motion to Dismiss the lawsuit and has ordered discovery to proceed). While the denial of the State's motions to dismiss in those cases is not in itself a finding that the Etomidate Protocol is unconstitutional, the Court clearly rejected the State's argument that the lawsuit was

meritless on its face. The Court further recognized that the Etomidate Protocol must be subjected to reliable testing and investigation through the discovery process. Mr. Gaskin is seeking the disclosure of public records in order to commence that reliable testing of the constitutionality of the Etomidate Protocol.

14. Mr. Gaskin has a constitutional right to public records. Article I, Section 24 of the Constitution for State of Florida, provides that “every person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state.” FLA. CONST. art. I, § 24; *see also Town of Gulf Stream v. O’Boyle*, No. 15-80182-CIV, 2015 WL 3970612, at *4 (S.D. Fla. June 30, 2015), *aff’d*, 654 F. App’x 439 (11th Cir. 2016). The Florida Supreme Court promulgated Florida Rule of Criminal Procedure 3.852 to streamline the process for capital defendants in the pursuit of postconviction relief. *See In re Amendment to Florida Rules of Criminal Procedure-Capital Postconviction Pub. Records Prod.*, 683 So. 2d 475, 475 (Fla. 1996). At the time the new rule was put into place, former Justice Harry Lee Anstead emphasized in his concurring opinion that **“this rule in no way diminishes the right of an individual Florida citizen, including a capital defendant, to access to public records” and that “the State and its agencies have indicated they will essentially follow an ‘open file’ policy.”** *In re Amendment to Florida Rules of Criminal Procedure-Capital Postconviction Pub. Records Prod.*, 683 So. 2d at 477 (emphasis added).

15. In light of the foregoing objective and contemporaneous documented witness statements, Mr. Gaskin seeks to challenge the method of execution. He has satisfied the minimal requirement of establishing that the records sought are relevant and pertinent to the subject matter of whether Florida’s three-drug lethal injection protocol would violate Mr. Gaskin’s constitutional rights afforded to him by U.S. CONST. amend. VIII and FLA. CONST. art. I, § 17. *See infra* p.11-

16. Furthermore, Secretary Ricky D. Dixon has made clear that the “entire process of execution **should be transparent**.” (emphasis added). Mr. Gaskin agrees with Secretary Dixon that it *should* be transparent and if the Secretary’s “foremost objective of the lethal injection process is a humane and dignified death,” then the requested records must be disclosed to Mr. Gaskin forthwith.

17. The public records requested are as follows:¹

****Note: Responsive email communications related to public business contained in private email accounts are public records and must be produced.***

A. Records consisting of copies of documents concerning the post mortem examinations performed on Mark J. Asay (DC# 078387), Michael R. Lambrix (DC# 482053), Patrick C. Hannon (DC# 500914), Eric S. Branch (DC# 313067), Jose A. Jimenez (DC# 406677), Bobby Joe Long (DC # 494041), and Gary Ray Bowles (DC # 086158).² This includes but is not limited the foregoing individual’s history and physical, any and all consultations, radiology reports, lab reports, and any and all doctor’s or other medical professional’s progress notes.

B. Writings or documents relating to this Medical Examiner’s Office’s autopsy protocols that were in effect at the time of the autopsies of Mark J. Asay (DC# 078387), Michael R. Lambrix (DC# 482053), Patrick C. Hannon (DC# 500914), Eric S. Branch (DC# 313067), Jose A. Jimenez (DC# 406677), Bobby Joe Long (DC # 494041), and Gary Ray Bowles (DC # 086158).

18. Undersigned counsel attests that the aforementioned requests:

- (A) Are relevant to a pending death warrant proceeding;
- (B) Are not the subject of a previous objection; and

¹ The provisions of Fla. Stat. § 406.135 providing for the confidentiality of autopsy photographs and video and audio recordings exempts criminal proceedings under subsection (7), and therefore does not apply to this request. Similar documents were provided to other death row inmates following the horrific botched execution of Angel Diaz.

² This is critically important in light of the botched execution of Eric Branch, where he screamed and thrashed on the gurney as the execution drugs were being delivered. A clear understanding of the timing of the delivery of the drugs is relevant and likely to lead to discoverable evidence.

(C) Have not been previously produced.

19. Based on the foregoing, Mr. Gaskin attests that the requested records detailed below are reasonably calculated to lead to the discovery of admissible evidence in that such records may contain, or through further investigation may lead to the discovery of, evidence that execution by Florida's lethal injection procedures constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the U.S. Constitution and corresponding provisions of the Florida Constitution. *See* U.S. CONST. amends. VIII; XIV; FLA. CONST. arts. I, § 9; 17; 24. Furthermore, these records are necessary for the disclosure of evidence that would need to be presented at an evidentiary hearing to support an as-applied challenge in light of the procedures created by the Supreme Court of the United States in their divided opinions in *Bucklew v. Precythe*, 139 S. Ct. 1112 (2019) and *Glossip v. Gross*, 135 S. Ct. 2726 (2015). *See infra* p.11-14.

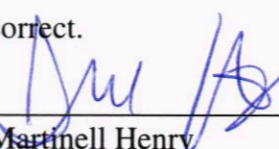
20. The request is not overly broad or unduly burdensome. A mere inconvenience to the agency cannot outweigh Mr. Gaskin's due process rights to gather evidence to avoid the ultimate sanction of execution.

21. Mr. Gaskin demands that the records requested be copied, indexed and delivered to the records repository by your agency pursuant to this Court's scheduling order with a courtesy copied delivered via e-mail to undersigned counsel.

WHEREFORE, Mr. Gaskin requests an order for the records described above.

AFFIDAVIT OF COLLATERAL COUNSEL

I, Tracy Martinell Henry, having been duly sworn or affirmed, do hereby depose and say that the above statements are true and correct.



Tracy Martinell Henry
ASSISTANT CAPITAL COLLATERAL REGIONAL
COUNSEL - MIDDLE
Counsel for Mr. Gaskin

Sworn to or affirmed and subscribed before me this 15th day of March, 2023, by TRACY MARTINELL HENRY who is personally known to me or has shown the following identification:



NOTARY PUBLIC, STATE OF FLORIDA

My Commission Expires:



CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of March, 2023, I electronically filed the foregoing Demand for Additional Public Records with the Clerk of Circuit Court by using the Florida Courts e-portal filing system which will send a notice of electronic filing to the following: Assistant State Attorney Rosemary Calhoun, at CalhounR@sao7.org and PaughN@sao7.org; Assistant Attorney General Doris Meacham, at Doris.Meacham@myfloridalegal.com and Assistant Attorney General Patrick Bobek at Patrick.Bobek@myfloridalegal.com and capapp@myfloridalegal.com; and the Florida Supreme Court, at warrant@flcourts.org.

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