IN THE SUPREME COURT OF FLORIDA

CASE NO. SC06-2391

IAN DECO LIGHTBOURNE,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIFTH JUDICIAL CIRCUIT,
IN AND FOR MARION COUNTY, STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

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REPLY TO PRELIMINARY STATEMENT

The United States Supreme Court has granted certiorari following the denial of relief in a challenge to the State of Kentucky's lethal injection procedures. *Baze v. Rees*,___ S.Ct.___, 2007 U.S. LEXIS 9066 (September 25, 2007). *Baze* will determine the threshold question as to what legal standard should be applied in evaluating an Eighth Amendment claim challenging the method of execution in a capital case. *Baze* presented the following questions for review:

> I. Does the Eighth Amendment to the United States Constitution prohibit means for carrying out a method of execution that create an unnecessary risk of pain and suffering as opposed to only a substantial risk of the wanton infliction of pain?
>
> II. Do the means for carrying out an execution cause an unnecessary risk of pain and suffering in violation of the Eighth Amendment upon a showing that readily available alternatives that pose less risk of pain and suffering could be used?
>
> III. Does the continued use of sodium thiopental, pancuronium bromide, and potassium chloride, individually or together, violate the cruel and unusual punishment clause of the Eighth Amendment because lethal injections can be carried out by using other chemicals that pose less risk of pain and suffering?
>
> IV. When it is known that the effects of the chemicals could be reversed if the proper actions are taken, does substantive due process require a state to be prepared to maintain life in case a stay of execution is granted after the lethal injection chemicals are injected?

(*See* Pet. for Writ of Certiorari, p. ii-iii, Attachment A). First and foremost, Mr. Baze is seeking a determination as to what standard should be applied in evaluating an Eighth Amendment challenge to a method of execution—a question that must

necessarily be answered by this Court before Mr. Lightbourne's case can be decided. But the questions presented also seek answers to specific and detailed questions concerning the utilization and application of the specific chemicals involved in carrying out executions by lethal injection. Thus, the issues before the high court are much broader in scope than described by the State.[1]

The procedural differences between *Baze* and the instant case are largely insignificant, but the procedural similarities are important to how this Court chooses to proceed. *Baze* was litigated and appealed in the Kentucky state court system "without the constraints of an impending execution and with a fully developed record stemming from a 20-witness trial." (Pet. at ii). Mr. Lightbourne's case is before this Court absent the exigencies of a pending warrant and following evidentiary development in the state circuit court.[2] The State's reliance on the fact that the State of Texas was permitted to execute inmate Michael Wayne Richard is irrelevant to this Court's consideration of the significance of a grant of certiorari in *Baze*. We do not know, and can never know, why the U.S. Supreme Court declined to stay Mr. Richard's execution but, as far as Mr. Lightbourne is aware, Mr.

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[1] The State's characterization of the first question presented is wrong. While the U.S. Supreme Court may ultimately formulate any one of a number of different standards that have been applied across the country in similar cases, the first question posed by *Baze* does not reference "deliberate indifference" to pain and suffering.

[2] Mr. Lightbourne was denied the opportunity to fully develop the record due to the expedited and truncated schedule.

Richard did not have a pending challenge to the Texas lethal injection procedures at the time that certiorari was granted in *Baze*.[3] What we now know is that the U.S. Supreme Court has just granted a stay of execution to another Texas inmate, Carlton Turner, pending the disposition of the petition for writ of certiorari in that case. *Turner v. Texas,* __ S.Ct. __, Order No. 07A272 (September 27, 2007).[4]

The substantive questions—including the threshold issue—to be decided in Mr. Lightbourne's case are virtually indistinguishable from the issues presented in the Kentucky case. As Petitioner Baze aptly pointed out, the U.S. Supreme Court has left the lower courts with no guidance as to the legal standard in an Eighth Amendment challenge to lethal injection. Mr. Lightbourne argued to the lower court that Florida's August 1, 2007 protocols for carrying out lethal injection presented a foreseeable risk of gratuitous and unnecessary pain in violation of the Eighth Amendment. (R. 6498). He further explained how the events of the Diaz execution presented evidence of deliberate indifference on the part of DOC officials and call the reasoning underlying this Court's decision in *Sims v. State,*

[3] It is improper to deduce any legal significance from the United States Supreme Court's denial of a petition for writ of certiorari. *See Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 912-920 (1950) (Frankfurter, J., respecting denial of certiorari). The State asserted that the copies of the pleadings in Mr. Richard's case were attached to the Answer brief but only the orders are attached.

[4] A federal court judge in Delaware issued an order postponing a trial regarding a lethal injection challenge due to the grant of certiorari in *Baze*. *Jackson v. Danberg*, Case No. 1:06-cv-00300-SLR (D. Del. Sept. 26, 2007)(order postponing trial).

753 So. 2d 66 (Fla. 2000), into question.[5] The State accused Mr. Lightbourne of "blending" the legal standards to be applied. But at this stage of the litigation, the State's expressed dissatisfaction with Mr. Lightbourne's presentation of the applicable standard has become irrelevant: it is now up to the U.S. Supreme Court to settle the matter.

Mr. Lightbourne first raised an Eighth Amendment challenge to the use of the three-drug cocktail employed by the State of Florida in his Rule 3.851 motion filed on February 27, 2006. *Lightbourne v. State*, Circuit Court for the Fifth Judicial Circuit, Case No. 81-170-CF. Mr. Lightbourne specifically set out the risks associated with the use of each of the drugs and included a challenge to the unnecessary use of the paralytic agent, pancuronium bromide, as presenting a substantial risk of agonizing pain. (Rule 3.851 motion, p. 18-25.) There was testimony and evidence concerning the use of the three drugs presented at the evidentiary hearing. Florida employs the use of the same three-drug cocktail that Kentucky employs in carrying out executions by lethal injection. The issues

[5] In this appeal, Mr. Lightbourne challenged Judge Angel's reliance on the reasoning expressed by the circuit court in the *Schwab* case which misconstrued the standard by stating: "the mere possibility of human error in the process of execution does not render the current protocol inadequate." Order dated 17 August 2007 in *State v. Schwab*, in the Circuit Court for the Eighteenth Judicial Circuit in and for Brevard County, Florida, Case No. 05-1991-7249-AXXX. Initial Brief at 70. Mr. Lightbourne also questioned the lower court's focus on the fact that "a risk of accident" would not render procedures unconstitutional in light of the fact that this challenge is not simply about a "risk of accident." Initial Brief at 62.

currently before this Court fall squarely into the questions presented within the four corners of the petition for certiorari.

REPLY TO STATEMENT OF THE FACTS

The statement of facts as set forth by the State is extremely abbreviated. The State omits relevant portions of the evidence and testimony below. As a result, the statement of facts is misleading and, in places, incorrect.

For example, the State asserts that "The executioners switched from 'Rack A' (of the chemicals) to 'Rack B' and also switched to the other IV site. (V20, R2027; 2029; V9, R1504-05). The remaining chemicals in 'Rack A' were dispensed in proper sequence into IV Line B. (V20, R2033)." (Answer at 6). This is inaccurate. The executioner never switched from Rack A to Rack B; rather, he completed injecting all the syringes from Rack A in sequence, and then proceeded to inject the syringes from Rack B. *See* Initial Brief at 56-57.

The State asserts, in bold font, that "Congestive heart failure is part of the process of dying from a barbiturate overdose. (V20, R2006)." (Answer at 12). The record reflects, however, that Dr. Hamilton, the medical examiner who performed Diaz's autopsy, testified simply that congestive heart failure is "part of the process of dying," and therefore would be part of the process of dying from a barbiturate overdose. (R. 2006). The State fails to mention that Dr. Hamilton never concluded that Diaz died from a barbiturate overdose and reported the probable cause of death

as injection of lethal toxins, and that Dr. Hamilton testified that with Diaz's degree of coronary artery disease, he could have been in a state of congestive heart failure even before the execution began. (R. 1977).

While the State asserts that a patient with a malfunctioning IV catheter will normally complain (Answer at 12), Dr. Clark testified that a person might not even initially know that the catheter passed through his veins into the soft tissue, and because everyone has different levels of pain tolerance, she could not say whether someone would complain of any pain more than just the stick of the IV insertion. (R. 3683).

The State, citing to Dr. Sperry's testimony, asserts that where sodium thiopental and pancuronium bromide are injected subcutaneously, the sodium thiopental would take effect before the pancuronium bromide. (Answer at 24). The State neglects to mention, however, that Dr. Sperry based his opinion on his assumption that sodium thiopental was injected before the pancuronium bromide, as called for in the protocols, but admitted that he was not aware of the sequence in which the chemicals were injected into Diaz. (R. 4365-66). Furthermore, the State's other expert, Dr. Dershwitz, testified that he was unaware of anyone ever having studied the subcutaneous kinetics of sodium thiopental or pancuronium bromide. (R. 6357). The State also asserts that Dr. Sperry's opinion that Diaz was unconscious due to the sodium thiopental before the pancuronium bromide began

taking effect was consistent with the testimony of eyewitnesses (Answer at 27), ignoring Dr. Heath's testimony that between the states of absence of paralysis and total paralysis is the state of partial paralysis, and that the observations of Diaz's movements were "classic signs" of partial paralysis. (R. 4006). Likewise, the State misrepresents the testimony of Dr. Dershwitz on page 12 where it asserts that "`In the context of lethal injection, if the inmate is making head movements or speaking, he has not been paralyzed by the pancuronium bromide.' (V39, R6300)." Dr. Dershwitz's testimony was that "if the inmate were **completely** paralyzed, they would be unable to move" (R. 3600), and he conceded on cross-examination that for a few minutes after pancuronium bromide is administered, before the complete paralysis takes effect over a period of minutes, a person would be able to respond to an order to open their eyes. (R. 6373).

The State misrepresents Dr. Heath's testimony by stating that Dr. Heath "had no opinion as to whether Diaz was 'awake' when the second and third drugs were administered." (Answer at 16). Dr. Heath went on to testify that Diaz could have been rendered unconscious by either the sodium thiopental, or by the pancuronium bromide diffusing through his body and paralyzing his muscles, making him lose consciousness because of his inability to breathe. (R. 4516). Obviously, if it was the pancuronium bromide that rendered Diaz unconscious by taking away his ability to breathe, it follows that Diaz would have been conscious

when the pancuronium bromide was injected. On cross-examination, the State's own expert, Dr. Sperry, agreed that Diaz could have been conscious or conscious "at least to some extent" when the pancuronium bromide was injected. (R. 4366).

The State asserts that as of July 18, 2007, the execution team established in March/April had trained 12-13 times, without acknowledging that the executioners and technical (medical) team members have not trained nearly as many times as that. (Answer at 32). The training attendance reports which document attendance reveal that the primary executioner has attended only four training sessions and the secondary executioner has attended only three training sessions since Cannon became the Team Warden (Def. Exh. 24; Def. Exh. 25; R. 5869). Of the six technical team members who are responsible for mixing the chemicals, starting peripheral or central IVs, attaching the EKG leads, monitoring the IV sites, the heart monitors, and assessing the inmate's level of consciousness, two technical team members have been present at four training sessions each, one has been present at two training sessions, and the other three have only been present at one. (Def. Exh. 25).

The State, in summarizing Warden Cannon's July testimony, says that Physician's Assistant William Matthews will be in the execution area as a consultant and then says that he will be present as an advisor, but includes footnotes to each statement stating that later testimony clarified that Mr. Matthews

is not part of the execution team, will not fill any role on the execution team, and will not be in the execution area during an execution. (Answer at 30-31). Far from clarifying Mr. Matthews's role, the testimony is inconsistent and constantly changing regarding Mr. Matthew's future and past roles in executions. (*See* R. 1602, 2909, 2932, 3220, 3564, 6155, 6017, 6104, 6111, 6113, 6116).

Finally, the State says that the execution team has practiced various contingencies, such as a blocked IV line (Answer at 42), but does not explain that such contingencies are not rehearsed by simulating an actual blocked IV line so that the executioner could actually get a feel for how the syringe would react and the technical team members could practice recognizing problems with the IV site over a remote video monitor. (R. 6145). Rather, the team warden simply calls out to the team which contingency they are simulating and the team pretends to address it. (Id.).

Mr. Lightbourne's reply to the State's statement of facts serves to only highlight some of the omissions and inaccuracies set forth by the State. As such, Mr. Lightbourne's reply in this regard is not a full recitation of the relevant facts. Rather, Mr. Lightbourne relies on his Initial Brief. In his Initial Brief, Mr. Lightbourne utilized the relevant facts throughout his argument.

ARGUMENT I

In his Initial Brief, Mr. Lightbourne argued he was denied a full and fair

hearing in violation of his constitutional right to due process under the Fifth and Fourteenth Amendments to the U.S. Constitution and corresponding provisions of the Florida Constitution. The State incorrectly characterizes his claim as a "public records issue" ignoring the denial of Mr. Lightbourne's due process rights. The public records which were denied Mr. Lightbourne are merely one component of the argument and serve to show the game playing and secrecy which permeates the State's lethal injection procedures. There cannot be a fair adversarial testing of the constitutionality of Florida's lethal injection procedures without full disclosure and discovery and a full and fair hearing.

The State belittles Mr. Lightbourne's arguments by, for example, focusing on the number of witnesses involved or, the fact that Mr. Lightbourne was allowed to visit the execution chamber.[6] Unfortunately, the number of days that the hearing took was the direct result of the denial of discovery prior to the hearing. Regardless of the number of witnesses that were called before DOC conceded that changes to the protocol were necessary, Mr. Lightbourne has been denied the opportunity to meaningfully challenge the August 1, 2007 procedures.

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[6] The State asserted that Mr. Lightbourne has not identified any witness that he could not call due to time constraints. In addition to Dr. Heath, who was out of the country at the time of the hearing, Judge Angel denied Mr. Lightbourne the opportunity to call the executioners and technical team members due to time constraints. (R. 3026-27). Arguably, due to the fact that Mr. Lightbourne had to file his witness list just 10 days after receiving public records from the Department of Corrections, the denial of his right to call attorneys Dyehouse and McNaughten was due to time constraints as well.

Mr. Lightbourne was not able to consult with his expert, Dr. Heath, who was out of the country when DOC issued the new protocols. Dr. Heath was not present in the court room during the testimony of other witnesses and even more significantly, Dr. Heath was not in the country on the one day that Mr. Lightbourne was granted access to the execution chamber. This is significant because Dr. Heath testified that he has been granted access to execution chambers around the country and has used the information gained to formulate his opinions. (R. 4429).

In *Taylor v. Crawford*, 445 F. 3d 1095 (8th Cir. 2006), the plaintiff filed a civil rights action challenging Missouri's lethal injection procedure in federal district court. Mr. Taylor appealed the denial of relief following an expedited and truncated hearing in the district court **at which he was denied his right to present an expert witness who was not available within the time constraints.** Mr. Taylor argued that he was denied due process because the State's interest in carrying out his pending execution was elevated above his interest in properly presenting his constitutional claim. The Eighth Circuit reversed and remanded for a full hearing on the issues. Mr. Lightbourne is entitled to no less.

The State argues that the relevance of testimony from the executioners and the "medical" personnel from the Diaz execution is "marginal, at best," indicating that the "various investigations into the Diaz execution produced findings that are essentially uncontested, and there seems to be nothing that these people could add"

(Answer at 50). Despite the State's assertion that the findings of various investigations are uncontested, the circuit court got those findings wrong or expressed doubt over them. The State's argument ignores the circuit court's confusion regarding the events of the Diaz execution, specifically the inactions of the persons inserting the IVs, the sequence of the chemicals and the inaction of the executioners and "medical" personnel administering the chemicals.

The lower court has a fundamental misunderstanding of what actually happened in the chemical room. The lower court's confusion is apparent on the face of the order. The court found that there was "some doubt" about what happened, but yet went on to find that it "seems clear" that

> regardless of which stand of chemicals was used, or which IV site was used, the executioners at all times injected **all of the chemicals** from both stands into the body of the inmate in the proper sequence, i.e. first sodium pentothal, followed by pancuronium bromide, followed by potassium chloride.

(R. 6502). This is incorrect. All of the lethal chemicals were not used and the chemicals were not administered sequentially. The circuit court misunderstood these two key facts that could have been made clearer had Mr. Lightbourne been given the opportunity to question the executioners and the "medical" staff in an adversarial setting. It is not possible to fully comprehend the severe consequences of the executioners' and/or "medical" staffs' decision to administer the pancuronium bromide without a basic understanding as to the sequence in which

the chemicals were administered.

Additionally, the State asserts that it is frivolous for Mr. Lightbourne to complain because the Commission testimony of the executioner and the medical personnel were "successfully" offered as an exhibit. The State misunderstands the argument made below for admission of the Commission transcripts. When the State objected that the transcripts were hearsay, Mr. Lightbourne agreed and acknowledged that the Commission was not an adversarial proceeding. (R. 4390). Mr. Lightbourne sought to have the transcripts from the Commission admitted into evidence as nonhearsay evidence. Specifically, Mr. Lightbourne offered the transcripts not for the truth of the matter asserted (R. 4393), but for the purpose of providing documentation of what the Commission relied on in formulating its final report (R. 4394), for what DOC relied on in responding to the Commission's final report (R. 4391) and finally, what Dr. Heath relied on in formulating his opinions (R. 4391; 4394). The State ignores that the executioners and "medical" personnel have not been subjected to an adversarial testing. As a result, Mr. Lightbourne, and more importantly the lower court, has been unable to resolve issues which only the executioners and "medically qualified" individuals can address.

Further, the State downplays the relevance of the Diaz execution to the circuit court and this Court's inquiry. While it is true that the execution of Mr. Diaz triggered the events that followed, the relevancy does not merely lie in the

Department's response to the Diaz execution. *See* Argument III, *infra*.

The State makes no argument with regard to the Department's ability to protect the identities of the executioners or "medical" personnel. Mr. Lightbourne has a right to confront the confidential team members, even if only anonymously. To this end, Mr. Lightbourne offered several suggestions below as to how this could be accomplished and attached to his written motion transcripts from two federal court proceedings that demonstrated that this had been accomplished in other cases.[7] Further, the State does not address the necessity of questioning the executioners and "medical" personnel that will be involved in future executions. As Dr. Mark Heath, a board certified anesthesiologist and lethal injection expert, testified, the background, training, experience, and qualifications of the executioners and "medically qualified" personnel is essential to a proper determination of whether the DOC is capable of carrying out lethal injections in a humane manner. (R. 3886). Those persons best able to provide this information are the executioners and "medically qualified" personnel themselves. The fact remains that it is still unknown whether lack of experience and qualifications or some

[7] Mr. Lightbourne filed the transcript of Dr. John Doe #1 who was the dyslexic surgeon who was deposed in court before the judge while sitting behind a screen. A copy of the redacted transcript was later made available to the public in *Taylor v. Crawford*, U.S. District Court in Missouri, as attachment "A" to the motion. (R. 2625-2737). Attachment B was the transcript of a court proceeding where a live audio feed went into another courtroom that was closed in *Evans v. Saar*, U.S. District Court of Maryland. (R. 2738-2832).

hidden character flaw will impede the ability of the current team members to perform their duties.

ARGUMENT II

Relevant, material evidence that would support Mr. Lightbourne's Eighth Amendment claim was erroneously excluded. The State has argued that the Dyehouse memos themselves are privileged and inadmissible and that the subject matter contained within the memos are not helpful to Mr. Lightbourne's claim.

The State's argument that the Dyehouse memos were inadmissible without Dyehouse herself demonstrates the unfairness of the hearing below. On August 7, 2007, the lower court set forth an expedited litigation schedule and ordered the parties to submit witness lists by August 17, 2007. It was on that same day that Mr. Lightbourne was finally handed some public records in open court.[8] In that short period, Mr. Lightbourne reviewed the records and learned about new witnesses (Dyehouse and McNaughten) based on the memos. Mr. Lightbourne's attempts to interview the witnesses were unsuccessful so he decided to list them: the additional witness list was turned over only two business days after the arbitrarily set cut-off date. To the extent that the lower court denied Mr. Lightbourne the right to call the

[8] The Answer asserts that "According to Lightbourne, the memoranda at issue were produced to him by the Department on August 7, 2007." This fact is supported by DOC's decision to file copies of all the records that were provided to Mr. Lightbourne in the court file that same day. Mr. Lightbourne noticed that while the memos are sealed under Exh. 28, they remain unsealed in the record at R. 5112-15.

witnesses because of failure to timely list them—even though the State was on notice of these witnesses at least a week before the hearing, and arguably long before then since the Attorney General has claimed DOC is their client—that decision was an abuse of discretion. Further, there is simply no explanation for the court's refusal to allow Mr. Lightbourne to call McDonough or Changus—who were listed as witnesses by the cut-off date and who also could have provided the foundation to admit the memos. The record reflects that the Dyehouse memos were proffered only after all attempts at questioning live witnesses—including an attempt to authenticate the memos through the DOC attorney who gave them to Mr. Lightbourne—were thwarted.[9]

As the lower court recognized, the information contained in the memos was both relevant and material. The memos themselves, the information and subject matter that they revealed, and any testimony that could have been provided by Dyehouse and McNaughten, were admissible and not protected by any privilege whatsoever. The State has argued in the Answer that the memos remain privileged but never addressed the fact that any privilege that may have ever existed was affirmatively waived by DOC.

The Department of Corrections is a public agency and not entitled to make

[9] The State's argument about how it is "fundamental that writings must be authenticated" ignores the fact that all of Mr. Lightbourne's witnesses who could do this were struck.

public policy in secret. The mere fact that a document is prepared by a government lawyer while there is litigation going on does not magically turn it into something prepared in anticipation of litigation. The State failed to adduce any evidence below to support the conclusory assertion that the memos were made for the **sole** purpose of the anticipation of litigation in the cases of *Hill v State*, 921 So. 2d 579 (Fla. 2006), and *Rutherford v. State*, 940 So. 2d 1112 (Fla. 2006) .[10] Had the State attempted to make such a record, Mr. Lightbourne would have shown that *Hill* was executed without ever knowing about the new procedures that had been adopted in secret.

Even if the memos themselves could be construed as "work product" or "attorney-client" privilege, the subject matter of the memos is not protected by any privilege[11], and to the extent that it ever was, that privilege has been affirmatively waived.[12] DOC attorney Maximillian Changus testified on July 17, 2006 at length concerning the formulation of the 2006 procedures. (R. 3757-94). He explained DOC's intent in formulating the August 2006 procedures:

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[10] In fact, the State never asserted below that the memos were created in anticipation of litigation.

[11] The Circuit court recognized as much when it determined that the information could be gained from other sources, i.e. witnesses.

[12] The State continues to assert that the disclosure was inadvertent while ignoring the fact that the State did not object when the memos were first attached to a pleading in another case. Contemporaneous objection and procedural default rules apply not only to defendants, but also to the State. *Cannady v. State*, 620 So. 2d 165, 170 (Fla. 1993).

> The purpose of [] the exercise for August 16th was not to make changes to what we were doing, it was to get down what we were doing and make it more open and accessible to the public.

(R. 3793-94). Mr. Lightbourne was denied the right to impeach Mr. Changus's testimony with the information that changes were in fact contemplated and rejected by DOC and that an effort to consult with experts was thwarted by an assistant attorney general. Secretary McDonough also took the stand and testified about the process by which he reviewed the lethal injection procedures with his legal staff. (R. 2892-93, 2895-98, 2918-19). The testimony that his "general approach in the Department of Corrections is to be more transparent" belies any argument that the subject matter was ever intended to be kept confidential, by the Department of Corrections, at least. (R. 2892-93).

The State's theory that the memos are "not helpful to Mr. Lightbourne" only underscores the need for full evidentiary development concerning the information revealed. The State's "argument" concerning the BIS monitor is not supported by the evidence in the record and ignores the fact that the Dyehouse memo specifically **warned DOC that there should be a medical assessment of consciousness** whether by having an anesthesiologist present, or, perhaps, using the BIS monitor. The State's argument that the August 15, 2006 memo does not establish that the Department was "on notice" concerning the need for a medical assessment of consciousness also highlights the need for a hearing as this is a fact

in dispute. These memos continue to be relevant to any consideration regarding DOC's ability to carry out its duties as part of the executive branch, particularly because the current lethal injection procedures still do not provide for a medical assessment of consciousness.

The State's recitation of the literal holding of *Brady v. Maryland*, 383 U.S. 83, 87-88 (1963) misses the underlying principle of that case: it is a due process violation when the government hides information from a criminal defendant. Mr. Lightbourne has a significant interest in not being executed in a manner contrary to the Eighth Amendment and any evidence that the State possesses that is favorable to proving his Eighth Amendment claim, should be disclosed. This Court has held that it is appropriate for a death-sentenced inmate to challenge the method of execution through a Rule 3.851 motion or, in this case, through an all writs petition and the failure for the State to turn over information that can help prove the claim is a violation of due process.

The memos suggest that DOC cavalierly ignored advice to employ specific safeguards that could have prevented the Diaz fiasco and thus, the State was obligated to turn this information over to Mr. Lightbourne. The decision to ignore the advice of counsel demonstrated "deliberate indifference" to the risk of gratuitous pain. With regard to the August 1, 2007 protocols, neither Mr. Lightbourne, nor this Court, has any way of knowing what else the State is hiding.

ARGUMENT III

The State divides its response into several subheadings which are not entirely the same as those reflected in the Initial Brief, therefore Mr. Lightbourne will attempt to follow the State's headings in this Reply.

The "Standard of Review"

The State misunderstands Mr. Lightbourne's arguments with respect to the standard of review.[13] Regardless of the argument in Mr. Lightbourne's Initial Brief, any quibbling over the confusion of the standard for assessing an Eighth Amendment claim is moot. The United States Supreme Court has granted certiorari

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[13] In *Taylor v. Crawford*, 487 F. 3d 1072 (8th Cir. 2007), the Eighth Circuit differentiated between conduct that is alleged to be an accident or a deviation from the official procedure and conduct which is in fact the official procedure for deliberately carrying out the prescribed penalty. *Taylor* at 1081. The Eighth Circuit pointed out that where the "conduct challenged [ ] is alleged to be accidental [or] a deviation from the official procedure", this "would require a showing of intent to harm or deliberate indifference." *Id*. However, in challenging the "State's designated procedure for deliberately carrying out the prescribed penalty," i.e., the August 1, 2007 procedures, the appropriate standard in assessing cruel and unusual punishment is whether the lethal injection procedures involve a foreseeable risk of the wanton and unnecessary infliction of pain. *Taylor* at 1081-82.

Based on this differentiation, Mr. Lightbourne distinguished between the Diaz execution and the lethal injection procedures to be used in the future. Specifically, Mr. Lightbourne set forth that the Department was deliberately indifferent to the risk of unnecessary pain that resulted from the incompetence of the "medical" personnel and the executioners and the complete deviation of the procedures with respect to the administration of the lethal chemicals. Looking prospectively, Mr. Lightbourne argued that the August 1, 2007 procedures create a foreseeable risk of gratuitous and unnecessary pain in violation of the Eighth Amendment. Despite, Mr. Lightbourne's argument, the circuit court incorrectly applied the standard in *Jones v. State*, 701 So. 2d 76 (Fla. 1997).

to determine precisely this issue. The petitioner in *Baze v. Rees* asserted that certiorari should be granted, in part, because "lower courts are struggling - - with little to no guidance from this Court since 1878 - - to determine the legal standard applicable to the sudden mass of legal challenges arguing that a particular aspect of a method of execution is cruel and unusual punishment." Attachment A. *See* Reply to Preliminary Statement, *supra*.

"This Claim is not a Basis for Relief"

The State characterizes Mr. Lightbourne's claim that Florida's lethal injection procedures are unconstitutional as a *per se* constitutional challenge to lethal injection based on one sentence in Mr. Lightbourne's conclusion. The State takes issue with the statement that without an adequate medical determination of unconsciousness before the administration of the second and third drugs, there is a foreseeable risk of the unnecessary and wanton infliction of pain. The State's focus on this one sentence ignores the entirety of Mr. Lightbourne's challenge to the actual procedures.[14] The reference to a medical determination of unconsciousness seems merely to be a means of arguing that Mr. Lightbourne is attempting to "obtain a ruling that renders lethal injection an impossibly cumbersome means of carrying out a death sentence." (Answer at 64). This is an incorrect

[14] Despite the State's repeated claims that a *per se* challenge to the constitutionality of lethal injection has already been rejected by this Court, one of the issues for which the United States Supreme Court granted certiorari in *Baze v. Rees*, is whether the use of the three drug cocktail is unconstitutional.

characterization of Mr. Lightbourne's position and argument. In fact, Dr. Heath testified that doctors are involved in the process in many states (R. 4066-67). Dr. Heath referenced a pair of studies "surveying physicians as to their attitudes and actions that they would do in lethal injection procedures" (R. 4068-69). The studies indicated that 18% of doctors would actually be willing to administer the lethal chemicals (R. 4068). Dr. Heath noted "[t]here were other less involved actions that higher percentages of physicians said they were willing to do" (R. 4069).

The State argues that Mr. Lightbourne's argument with regard to the circuit court's complete flip-flopping from July 22, 2007 to September 10, 2007 "makes no sense," and only demonstrates dissatisfaction with the outcome. The Answer is replete with similar conclusory statements, with no real discussion of the issues raised by Mr. Lightbourne. Mr. Lightbourne addressed the substantial differences between the circuit court's July 22, 2007 order and the final order to demonstrate that the circuit court's findings are due no deference and stated as such in his brief. The complete about face by the circuit court, without any fact finding with regards to the new procedures and no discussion as to how the Department of Corrections has remedied the lower court's concerns, casts doubt on the credibility of its final order. While the State indicates that nothing prevented Judge Angel from finding the procedures adequate, the order fails to reflect any evidence or testimony to support that finding. Given the complete lack of factual findings, the order with

respect to the latest protocols is entitled to no deference at all.

The Diaz Execution

The State argues that the facts of the Diaz execution are not in dispute. Mr. Lightbourne disagrees and disagrees with the facts outlined as being undisputed. (*See* Answer at 66). The State first claims that it is not possible to determine and will never be known when in the execution process the IV catheters penetrated Mr. Diaz's veins. This is completely contrary to their own expert. As the State set forth in its statement of facts, Dr. Sperry opined that the IVs punctured Mr. Diaz's veins **upon insertion** (R. 4338-39)(emphasis added) based on the fact that the plastic cannula that covers the sharp needle, and is left inside the vein when the needle is withdrawn, is soft and flexible and cannot puncture the vein itself. (R. 4339). Dr. Heath agreed with Dr. Sperry that Mr. Diaz's veins were perforated upon insertion of the IVs (R. 4457).

While the State asserts that "It is undisputed that the level of thiopental sodium found in Diaz's blood (some 14 hours after his death) was a level which would cause unconsciousness" (Answer at 66), this statement is not supported by any testimony or evidence. Dr. Heath testified that he could not draw any conclusion about the levels of sodium thiopental in Diaz's blood during the execution or at his death from the toxicology report, but testified that 4.4 micrograms per milliliter of sodium thiopental is a concentration that would **not**

produce anesthesia or unconsciousness in most people. (R. 4044, 3924). While the State's expert Dr. Dershwitz did not review the Diaz toxicology report (R. 6332-33), he likewise stated that "[i]f the concentration is low, **it is impossible to draw any meaningful conclusions from it"** (R. 6303). Dr. Dershwitz also testified that Cp50[15] of thiopental for unconsciousness is 7.3 (R. 6335) and 4.4 is lower than 7.3. **The chart utilized by Dr. Dershwitz** during his testimony chart indicates that 4 mcg/ml equates to a 98.7% probability of consciousness (State's Exhibit 4). This is in agreement with Dr. Heath. Contrary to the State's assertion, neither expert believed that 4.4 mcg/ml, the level of sodium thiopental found in Mr. Diaz's blood 14 hours after death, would cause unconsciousness.

The State also argued that it is undisputed that thiopental sodium absorbs into the body faster than pancuronium bromide (Answer at 66). While the State's experts, Drs. Dershwitz and Sperry, both agreed to this assertion on direct examination, the State neglects to mention that on cross-examination Dr. Dershwitz admitted that he was unaware of anyone ever having studied the subcutaneous kinetics of sodium thiopental or pancuronium bromide (R. 6357). Dr. Sperry admitted that although he was not aware of the sequence in which the chemicals were injected into Diaz, his opinion was based solely on his assumption that the sodium thiopental was injected first. (R. 4365-66). Like Dr. Dershwitz, Dr.

[15] Cp50 represents the concentration of a medication that will cause half of a population to display a particular response.

Heath also testified that there were not enough scientific studies directly applicable to the question to make a determination of which drug would take its effect fastest when all three are injected subcutaneously. (R. 4517).

The State asserts that "it is undisputed that Diaz never cried out or communicated that he was in severe pain or discomfort," but cites nothing from the record to support this statement. The eyewitnesses to the Diaz execution testified completely the opposite. Their accounts, to the say the least, include descriptions of Mr. Diaz grimacing, gritting his teeth, pursing his lips, gasping, clenching his jaw, struggling to breath and attempting to speak. The State further ignores that due to the manner in which the drugs were injected and diffusing through Mr. Diaz's soft tissue, he could have been partially paralyzed and unable to cry out. The pancuronium bromide is a paralytic agent which causes degrees of paralysis over a period of minutes (R. 6373). As Dr. Dershwitz explained, initially, a person who had been administered pancuronium bromide would become weak and short of breath, and later on they would become completely paralyzed (R. 6342).[16] Dr. Heath also explained that movements will become fewer and fewer as the effects of the drug progress (R. 3865), therefore, while a person may be able to exhibit

[16] Dr. Dershwitz admitted that this would feel horrible in a person who was not anesthetized because he would feel like he needed air but would not be able to breathe. Dr. Dershwitz stated "it's what we call air hunger." (R. 6342).

some movement,[17] they may not be able to cry out.

Although the State says that it is "not seriously disputed that Diaz died from anything other than an overdose of thiopental sodium" (Answer at 66), there was no testimony below to that effect and the medical examiner listed the probable cause of death as "injection of lethal toxins." (Def. Exh. 7; R. 4334). As the State pointed out in its Answer at page 23, Dr. Sperry opined that Diaz's death was caused by a **combination** of lethal levels of sodium thiopental and pancuronium bromide in his system. (R. 4336). While the State notes Dr. Heath's opinion was "heavily qualified,"[18] Dr. Heath made clear that based on his expertise and all the evidence he reviewed, particularly the witness statements, his opinion was that Angel Diaz suffocated to death from the pancuronium bromide (R. 3863). Even Dr.

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[17] The testimony regarding partial paralysis equally contradicts the statement that it is undisputed that movements reported by witnesses are inconsistent with being paralyzed by pancuronium bromide.

[18] Mr. Lightbourne does not agree with this characterization and the State's assertion that Dr. Heath's refusal to be subject to cross-examination is evidence of his strong bias is also incorrect. Dr. Heath did not refuse to be cross-examined. As a medical professional, Dr. Heath was ethically uncomfortable providing the State with information to improve its lethal injection procedures. (R. 2693). Mr. Lightbourne pointed out that all his questions on direct examination were asked in the context of a clinical setting. (R. 4005). The lower court told the State to strike the words "in a lethal injection procedure" from its questions. (R. 4013). The State further claims that Dr. Heath's refusal to answer demonstrates his bias and "exemplifies why the defense did not want to use another expert, even though such persons are available." Answer at FN 45, p. 67. This overlooks the fact that, regardless of who Mr. Lightbourne may or may not have decided to use, those doctors who participated and testified during the Commission meetings, had similar ethical concerns and limited their statements to clinical settings. (*See*, *e.g*., Def. Exh. 20, T. 62.)

Sperry conceded that Mr. Diaz may have had some level of consciousness when the pancuronium bromide was administered and as a result it is possible that Mr. Diaz could conceive the fact that he could not breathe (R. 4366-67, 4464).

Contrary to the State's argument, the events that occurred during the Diaz execution were not a "mishap" or an "accident." The fact that on all three attempts to insert the catheters into Mr. Diaz's arms resistance was felt by the IV inserter is evidence of incompetence. Even assuming for the sake of argument, that the infiltration of Mr. Diaz's veins was accidental, the actions and inactions that followed cannot be similarly described. The resistance is a "hallmark sign" that the IV has not been properly placed. (R. 4461-63). Despite this type of resistance being a hallmark sign of an improperly placed IV, the individual inserting the IVs into Mr. Diaz did nothing. The IV inserter never told Warden Bryant that a second site had to be used, and was not sure if anyone else told him. (Def. Exh. 20, T. 137). Dr. Heath noted that if the catheter did not slide right in, it would be expected that the medical professional would provide "hand-off" information. (R. 4468). Instead, he/she told no one and waited "three metal doors away and at least 12 feet away from the execution room itself." (Def. Exh. 20, T. 138). Dr. Heath, Dr. Clark and Dr. Sperry agreed that infiltration of the veins, and the resulting extravasation, could have and should have been detected prior to the start of the execution.

As Mr. Lightbourne argued in his Initial Brief, the evidence demonstrates

that the actions, or inactions of the DOC during the execution of Angel Diaz were complete deviations from the written procedures due to the incompetence, inattention or ignorance of all those who participated. Both Dr. Heath and Dr. Sperry, the State's own expert, described the problems with inserting the IVs, monitoring Mr. Diaz after insertion of the IVs and during the administration of the chemicals and the inaction of the execution team throughout the execution as complete failures in the process (R. 4693-96, 3875).

The Diaz execution is the best evidence that the Department is no longer entitled to the presumption that it "will properly perform their duties." *Buenoano v. State*, 565 So. 2d 309, 311 (Fla. 1990). The August 16, 2006 lethal injection procedures were in effect at the time of Mr. Diaz's execution. It is evident that the Department did not follow those procedures. For example, the DOC Task Force concluded that there were "no indications reported to the warden that the condition of the inmates veins might pose difficulty" in obtaining venous access. (*See* Joint Exh. 3, p. 7).[19] The DOC Task Force also concluded that the FDLE independent observer was not present for the mixing of the chemicals as required by the procedures. (Id.). Of greatest significance, the DOC Task Force found "deviations from the established procedure" with regard to the administration of the lethal chemicals (Joint Exh. 3, p. 5).

[19] Yet, Secretary McDonough later admitted that it was reported to him that Mr. Diaz had weak or thin veins (R. 2875).

The Diaz execution is likewise relevant as it is the best evidence of the Department's deliberate indifference to the risk of unnecessary pain during an execution. During Mr. Diaz's execution, the DOC was deliberately indifferent to Mr. Diaz's pain. The DOC personnel involved in the execution turned a blind eye to the problems that occurred when inserting the catheter in both arms; turned a blind eye to the appropriate monitoring of Mr. Diaz in order to detect and correct the problems with the IV sites; turned a blind eye to the resistance felt when injecting the chemicals; turned a blind eye to the fact that the chemicals were obviously not having the intended effect; and turned a blind eye to the fact that they were injecting pancuronium bromide and potassium chloride into a person who was obviously still conscious.

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The State's assertion that *Taylor v. Crawford*, 487 F. 3d 1072 (8th Cir. 2007), "is indistinguishable from this case, and is dispositive of Lightbourne's claims" is overly simplified and concrete. (Answer at 74). Of course, while federal decisions from the Eighth Circuit are certainly persuasive, they are in no way binding upon the Florida courts. But more importantly, there are key factors that do distinguish the facts in *Taylor* from the circumstances in Florida.[20]

[20] The State's assertion that Dr. Heath's testimony was rejected by the Eighth Circuit is false. The federal district court in Missouri implicitly found Dr. Heath to be credible in relying on his testimony to fashion a remedy. The Eighth Circuit

In Florida, DOC personnel took the stand in the *Sims* case and promised that the Department would follow certain procedures and then did not, as evidenced by the failures in Diaz—Missouri has no such parallel case.[21] Additionally, after a full hearing in federal district court, the State of Missouri made an affirmative and clear choice not to further employ a medical doctor whose questionable character and qualifications were exposed through the course of litigation. In striking contrast, Mr. Lightbourne has been denied the opportunity to question the "medically qualified" personnel chosen to participate in executions in Florida. And while Florida steadfastly insists that a prison warden can somehow be qualified to assess consciousness, the State of Missouri at least recognized the need for trained medical personnel to "examine the prisoner physically to confirm that he is unconscious using standard clinical techniques" and to "inspect the catheter site again" before the administration of the pancuronium bromide or potassium chloride. *Id*. at 1083. Further, the Eighth Circuit recognized that the potassium chloride "will cause excruciating pain if the inmate is not adequately anesthetized"

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opinion is based on the applicable **legal standard** under the U.S. Constitution and not, as the State suggests, on any questions with respect to Dr. Heath's opinions. *Taylor v. Crawford*, 487 F. 3d at 1076. The State also failed to note that Judge Fogel necessarily "credited" Dr. Heath's testimony before granting relief in *Morales v. Tilton*, No. 5:06-CV-00219-JF (N.D. Cal. Dec 15, 2006).

[21] All of the State's assertions, as well as many of the findings in *Taylor*, rely on the presumption that the lethal injection chemicals are being adequately delivered through a working IV into the inmate's veins. Florida has seen what happens when the lethal chemicals are not being properly delivered through a working IV.

and that the pancuronium bromide "will simultaneously mask any visible sign of that pain." *Taylor* at 1082.

Mr. Lightbourne does not assert that the Missouri protocols are constitutionally adequate and must emphasize that the inquiry is more complex than a simple page count as the State suggests. (Answer at FN 49, p. 74). The Eighth Circuit opinion itself establishes that there may be specific character flaws of the medical personnel that would render them unsuitable for the job. But unlike Mr. Taylor, Mr. Lightbourne has never had the opportunity to learn anything about the medical personnel in Florida. Perhaps most significantly is that while Florida has a "team warden" with no medical training who is responsible for ensuring the inmate is unconscious, Missouri at the very least requires the medical personnel to go out and physically examine the inmate and re-check the IV sites. Mr. Lightbourne is certainly entitled to no less.

The State's argument harbors under the belief that underlying each of Mr. Lightbourne's "complaints" is the proposition that an execution is a medical procedure from start to finish. (Answer at 73). This is false. Mr. Lightbourne has not equated the entire lethal injection process to a medical procedure. Rather, Dr. Heath described only the administration of sodium thiopental, or the anesthetic drug, as a medical procedure, and expressed concern over any member of the execution team believing otherwise. (T. 2563). He explained that "the actual

execution is achieved by potassium, that's what kills the prisoners" and that the step in which the prisoner is given sodium thiopental is most aptly described as the administration or induction of general anesthesia, "which is necessary to ensure that [the prisoners] don't have a horrendous death from the potassium." (Id.). Further, Dr. Heath testified that "the administration of a general anesthetic is **always a medical procedure in any context**." (Id.)(emphasis added). While the State cites to *Taylor* to support the assertion that an execution is not a medical procedure, it, at the same time, ignores Missouri's requirement that medical personnel assess the IV sites to ensure proper functioning and assess the inmate for consciousness before administration of the second and third drugs. In requiring medical personnel to be involved, Missouri recognized that medical steps are involved in the process, *Taylor* at 1084, just as Dr. Heath does.

The protocol remains inadequate to prevent the foreseeable risk of gratuitous pain. Nothing in the State's answer refutes the fact that there has been no change to the most critical aspects of the lethal injection process. Specifically, provisions for the administration of the drugs, the assessment of consciousness and monitoring the inmate for consciousness throughout the procedure, remain inadequate to protect against the foreseeable risk of the unnecessary and wanton infliction of pain. The administration of the drugs and the assessment of consciousness are

being carried out by non-medical personnel,[22] while the monitoring of consciousness throughout the procedure is done from another room via a television monitor by personnel of unknown qualifications and background. There has been no determination, as there has been in other states,[23] as to whether the personnel involved have "character flaws that would make them unsuitable for participating" in an execution. (R. 3953).

The State took issue with Mr. Lightbourne's recitation of examples as to how the DOC employees' failure to recognize there was a problem with the Diaz execution impedes the ability to eradicate the foreseeable risk of gratuitous pain. The "extensive steps taken by the Department in response to the Diaz events"

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[22] Contrary to the State's assertion that it is insignificant that Cannon did not state that the purpose of the pancuronium bromide is cosmetic misses Mr. Lightbourne's point. Cannon's complete misunderstanding of the purpose and effect of pancuronium bromide is important because he does not understand that its paralytic effect makes monitoring anesthetic depth more complicated. Despite the State's bold assertion, the "true facts" do not reflect that Cannon is aware that pancuronium bromide is a paralytic agent that paralyzes all the skeletal muscles, not just breathing.

[23] *See Taylor v. Crawford*, No. 05-4173-CV-C-FJG (W.D. Mo. June 26, 2006) (unpublished). Additionally, the federal district court in *Harbison v. Little*, Case no. 3:06-01206 (M.D. Tenn. Sept. 19, 2007) learned that one of the IV team members was hospitalized in an alcoholic treatment center, pled guilty to possession of a controlled substance twice, and was diagnosed with deep-rooted depression and prescribed Paxil. The medical people testified that they had not been screened for drug problems or psychological disorders before being hired. Contrary to the State's position, the Tennessee federal district court's opinion that Florida's May 9, 2007 procedures are constitutional, notably a determination made without the benefit of the evidence and testimony presented here, has no bearing on this Court's decision.

touted by the State did little to address the specific deficiencies that led to the failures exposed in Diaz. Despite Secretary McDonough's earnest pronouncements that the protocols are designed to ensure a humane and dignified execution, neither DOC personnel nor the State of Florida have exhibited any actual comprehension of what the deficiencies actually are. Despite thirteen days of testimony, the State is still steadfast in the mistaken belief that the most that can be said about the Diaz execution is that it was an "accident" and that "there was a mishap of uncertain cause and unknown effect." (Answer at 72, 67). Unless and until the executive branch begins to comprehend that the **decision** to inject the paralytic agent into an awake person was either the product of cruelty or ignorance,[24] and not merely an "accident" or "mishap," the deficiencies in Florida's procedures cannot be remedied.

[24] (R. 4450).

CONCLUSION

Based on the foregoing, the arguments in Mr. Lightbourne's Initial Brief, and the totality of the evidence before this Court, this Court should find that Florida's lethal injection procedures are inherently cruel and unusual in violation of the Eighth Amendment to the U.S. Constitution and the corresponding provisions of the Florida Constitution. In the alternative, Mr. Lightbourne requests that this Court remand for an additional evidentiary proceeding in which Mr. Lightbourne is afforded due process and a full and fair hearing, and grant any other relief that this Court deems proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail to Kenneth S. Nunnelley, Assistant Attorney General, 444 Seabreeze Blvd, 5th Floor, Daytona Beach, FL 32118 and Rock E. Hooker, Assistant State Attorney, 19 NW Pine Avenue, Ocala, FL 34475 on September _____, 2007.

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