IN THE SUPREME COURT OF FLORIDA

CASE NO. SC11-1387

MANUEL VALLE,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, CRIMINAL DIVISION

BRIEF OF APPELLEE

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STATEMENT OF CASE AND FACTS

On April 13, 1978, Defendant was charged by indictment with the first degree murder of police officer Louis Pena, with a firearm; the attempted first degree murder of police officer Gary Spell, with a firearm; and the possession of a firearm by a convicted felon.[1] (R. 1-4).[2] The crimes were alleged to have been committed on April 2, 1978. A jury trial commenced on May 8, 1978. (R. 21) The jury found Defendant guilty as charged on all counts and recommended a death sentence. The trial court followed the jury's recommendation and sentenced Defendant to death. Defendant appealed his convictions and sentences to this Court, which reversed, finding that the trial court had abused its discretion in forcing Defendant to go to trial on such short notice. *Valle v. State*, 394 So. 2d 1004 (Fla. 1981).

The matter then proceeded to a retrial on July 29, 1981. (RTR. 36)[3] Defendant was again found guilty as charged on all counts. (RTR. 1042-44) The jury recommended a sentence of death by a vote of 9 to 3. (RTT. 1546) The trial court again followed the jury's recommendation and sentenced Defendant to death.

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[1] Defendant was also charged with grand theft auto, which was severed. (R. 45, 96)

[2] The symbol "R" denotes the record on appeal in Florida Supreme Court Case No. 54,572.

[3] The symbol "RTR" denotes the record on appeal in Florida Supreme Court Case No. 61,176. The symbol "RTT" will refer to the transcript of proceedings in that matter.

(RTR. 1045-50)

The facts of the case, as found by this Court, were:

> On April 2, 1978, Officer Louis Pena of the Coral Gables Police Department was on patrol when he stopped appellant and a companion for a traffic violation. The events that followed were witnessed by Officer Gary Spell, also of the Coral Gables Police Department. Officer Spell testified that when he arrived at the scene, appellant was sitting in the patrol car with Officer Pena. Shortly thereafter, Spell heard Pena use his radio to run a license check on the car appellant was driving. According to Spell, appellant then walked back to his car and reached into it, approached Officer Pena and fired a single shot at him, which resulted in his death. Appellant also fired two shots at Spell and then fled. He was picked up two days later in Deerfield Beach.

Valle v. State, 474 So. 2d 796, 798 (Fla. 1991).

Defendant again appealed his convictions and sentences to this Court, asserting, *inter alia*, that the trial court had abused its discretion in excluding evidence regarding whether he would be a model prisoner. This Court affirmed, finding all of the issues meritless. *Valle*, 474 So. 2d at 798-806.

Defendant then sought certiorari review in the United States Supreme Court, which vacated this Court's affirmance and remanded the matter for reconsideration in light of *Skipper v. South Carolina*, 476 U.S. 1 (1985). *Valle v. Florida*, 476 U.S. 1102 (1986). On remand, the State submitted a supplemental brief, in which it asserted that presentation of model prisoner evidence at a resentencing would be of "no use" to Defendant

because he had been caught attempting to escape. Defendant moved to strike this portion of the State's supplemental brief, and this Court granted that motion and vacated Defendant's sentence because of the exclusion of the "model prisoner" evidence. *Valle v. State*, 502 So. 2d 1225 (Fla. 1987).

Defendant's third sentencing trial commenced on February 3, 1988. (RSR. 53)[4] The jury recommended a sentence of death by a vote of 8 to 4. (RSR. 882) The trial judge again followed the jury's recommendation and imposed a sentence of death. (RSR. 899-908) In doing so, the trial court found five aggravating factors: prior violent felony, based on the conviction for the attempted murder of Off. Spell; murder of a law enforcement officer; avoid arrest; hinder law enforcement and CCP. (RSR. 889-908) The trial court merged the murder of a law enforcement officer, avoid arrest and hinder law enforcement aggravators. (RSR. 899-908) The trial court found no mitigation. (RSR. 899-908)

Defendant again appealed to this Court, which affirmed. *Valle v. State*, 581 So. 2d 40 (Fla. 1991). Defendant again sought certiorari, which was denied on December 2, 1991. *Valle v. Florida*, 502 U.S. 986 (1991).

[4] The symbol "RSR" will refer to the record on appeal in Florida Supreme Court case no. 72,328. The symbol "RSSR" will refer to the supplemental record in that proceeding.

During the course of the post conviction proceedings, the parties agreed that certain documents that the State Attorney's Office believed were not subject to disclosure would be submitted to the trial court for an *in camera* inspection. (PCT. 36-37)[5] The State Attorney's Office subsequently informed Defendant that it had submitted the documents for the inspection during a hearing at attended by Defendant's clemency counsel, who was named. (PCR-SR. 83) On December 1, 1993, Defendant filed his final amended motion for post conviction relief, raising 20 claims, including a claim requesting a stay of his post conviction motion because the Parole Commission refused access to clemency files about him and claims that counsel had been ineffective in failing to move to disqualify the resentencing judge after he allegedly kissed the victim's widow in view of the jury and in presenting the evidence about his prison behavior. (PCR. 1-62) During the *Huff* hearing, Defendant insisted that he had witnesses available to testify regarding alleged bias by the trial court at resentencing but that he should not be required to provide details about these witnesses because his allegations. (PCT. 56-65) The post conviction court denied the motion without an evidentiary hearing. (PCR. 105)

[5] The symbols "PCR.," "PCT." and "PCR-SR." will refer to the record on appeal transcripts of proceedings and supplemental record on appeal in Florida Supreme Court Case No. 88,203.

Defendant appealed the denial of this motion to this Court, raising 15 issues, including issues regarding the refusal to stay the post conviction proceedings while Defendant sought records and the denial of the claims of ineffective assistance of counsel without an evidentiary hearing. Initial Brief of Appellant, Case No. 88,203. This Court found that most of the claims were properly denied summarily. *Valle v. State*, 705 So. 2d 1331 (Fla. 1997). It determined that the request for the clemency files was properly denied because it had already determined that such records were confidential. *Id.* at 1335. However, it remanded for an evidentiary hearing on the claim that counsel was ineffective for failing to move for a mistrial and disqualification of the resentencing judge after he allegedly kissed the victim's widow in front of the jury and for presenting the model prisoner evidence. *Id.*

On remand, Defendant insisted that he could not proceed with the hearing because he needed to investigate to determine who his witnesses would be and did not have funds to do so. (PCR2. 36-38)[6] The post conviction court required Defendant to file a witness list and submit his witnesses for deposition before the start of the new fiscal year but set the evidentiary

[6] The symbol "PCR2." and "PCR2-SR." will refer to the record on appeal and supplemental record on appeal in Florida Supreme Court Case No. SC94754.

hearing in the new fiscal year. (PCR2. 38-40) Defendant filed an extraordinary writ petition in this Court, insisting that he did not have funds to provide a witness list because he did not know the identity of the witnesses he had stated who be available four years earlier, which the court granted to the extent of extending the time periods. *Valle v. State*, 717 So. 2d 541 (Fla. 1998).

At the beginning of the evidentiary hearing on remand, Defendant withdrew his claim that counsel was ineffective for failing to move for a mistrial and disqualification. (PCR2. 62, 152-53) As such, the hearing addressed only the claim of alleged ineffectiveness for presenting the model prisoner evidence. After receiving testimony from Edith Georgi Houlihan, Michael Zelman, and Elliot Scherker, Defendant's attorneys at resentencing, the post conviction court rejected this claim, finding that Defendant had proven neither deficiency nor prejudice. (PCR2. 280-92)

Defendant again appealed the denial of the motion to this Court, which affirmed. *Valle v. State*, 778 So. 2d 960 (Fla. 2001). On December 28, 2001, Defendant filed his first petition for writ of habeas corpus in this Court, raising four claims of ineffective assistance of appellate counsel. On August 29, 2002, this Court denied this petition, finding that all of the claims

of ineffective assistance of appellate counsel were meritless. *Valle v. Moore*, 837 So. 2d 905 (Fla. 2002).

On February 18, 2003, Defendant filed a second state habeas petition in this Court, raising a *Ring* claim. This Court summarily denied the petition on June 24, 2003. *Valle v. Crosby*, 859 So. 2d 516 (Fla. 2003). Defendant sought certiorari review of that decision in the United States Supreme Court, which was denied on March 24, 2004. *Valle v. Florida*, 541 U.S. 962 (2004).

On February 21, 2003, Defendant filed a petition for writ of habeas corpus in the Southern District of Florida, raising 13 claims. On May 4, 2004, after the second state habeas proceedings had concluded, Defendant filed a supplement to his federal habeas petition, adding one additional claim. On September 13, 2005, the district court denied the petition and supplement. *Valle v. Crosby*, 2005 WL 3273754 (S.D. Fla. Sept. 13, 2005). Defendant was granted a certificate of appealability and raised four issues on appeal. On August 11, 2006, the Eleventh Circuit affirmed the denial of federal habeas relief, finding all the issues were meritless. *Valle v. Sec'y for the Dept. of Corrections*, 459 F.3d 1206 (11th Cir. 2006). Defendant sought rehearing and rehearing en banc, which was denied. *Valle v. Sec'y for the Dept. of Corrections*, 478 F.3d 1326 (11th Cir. 2007). Defendant then sought certiorari review in the United

States Supreme Court, which was denied on October 1, 2007. *Valle v. McDonough*, 552 U.S. 920 (2007).

On June 30, 2011, a death warrant was signed, scheduling Defendant's execution for August 2, 2011. (PCR3. 13-16)[7] On July 1, 2011, Judge Jacqueline Hogan Scola held a telephonic status hearing regarding the warrant, which was attended by Neil Dupree, Assistant Attorney General Sandra Jaggard and Assistant State Attorney Penny Brill. (PCR3. 1355) At the beginning of the hearing, Judge Scola stated that she had been assigned to hear the case after the warrant was signed and that all she knew about the case was that Defendant was described in the news media as an accused cop killer. (PCR3. 1355-56) She then set an in court status hearing for July 5, 2011, and indicated that she was inclined to require that Defendant file any motion for post conviction relief by July 7, 2011, so that there would be time to hold an evidentiary hearing.

In the late afternoon of July 2, 2011, Defendant served public records demands, seeking records from the Department of Corrections (DOC), the Office of the Attorney General, the Governor Office's Office, the Office of the State Attorney, the Miami-Dade Department of Corrections and Rehabilitation (Dade DOC), the Broward County Sheriff's Office, the Coral Gables

[7] The symbols "PCR3." and "PCR3-SR." will refer to the record and supplemental record in the instant appeal.

Police Department, the Florida Department of Law Enforcement (FDLE), the Judicial Qualifications Commission (JQC), the Miami-Dade Police Department (MDPD), the Office of Executive Clemency and the Division of Elections. (PCR3. 68-148) The requests to the State Attorney's Office, MDPD, Broward County Sheriff, Coral Gables Police, Dade DOC and Office of Executive Clemency and one of the requests to DOC were made pursuant to Fla. R. Crim. P. 3.852(h)(3) and generally sought to production of all files regarding the case and personnel involved in the case. (PCR3. 74-76, 83-105, 146-48) Additionally, Defendant sought information about the jurors from the third sentencing hearing from the State Attorney. (PCR3. 97) The other requests were made pursuant to Fla. R. Crim. P. 3.852(i). The requests to the JQC and Division of Elections sought all information regarding the judges who had presided over Defendant's retrial, resentencing and post conviction proceedings. (PCR3. 138-45) One request to the Attorney General's Office sought all of its records regarding Defendant and information about the signing of the death warrant. (PCR3. 133-37) One request to the Governor's Office sought communications with the victims and information about the signing of the warrant. (PCR3. 122-25) The request to FDLE and the other requests to DOC, the Governor's Office and the Attorney General's Office sought information about lethal

injection. (PCR3. 68-73, 77-82, 106-21, 126-31)

The Attorney General, Governor, State Attorney and JQC filed written responses before the beginning of the July 5, 2011 hearing. (PCR3. 40-47, 157-85) The JQC argued that it had no records of formal charges against any of the judges and that any other information it had was confidential and not subject to public records disclosure. (PCR3. 40-47) The Attorney General and Governor argued that the requests to them were not diligently made, were overly broad, sought information exempt from disclosure and did not seek information that would be relevant to a colorable claim for post conviction relief. (PCR3. 157-69) The State Attorney asserted that it had previously provided Defendant with access to its entire file regarding the investigation and prosecution of Defendant and personnel files and that the new request was dilatory, overly broad and not calculated to lead to evidence of a colorable claim. (PCR3. 170-85)

At the beginning of the hearing on July 5, 2011, Defendant presented Judge Scola with a motion for disqualification. (PCR3. 149-56, 1361-62) In the motion, Defendant claimed that Judge Scola should be recused because she had been employed by Office of the State Attorney during the time Defendant’s third sentencing hearing and first post conviction motion were

pending. (PCR3. 149-56) He also stated that he did not know if Judge Scola had spoken to the State about the facts but that he feared she may have. *Id.* He also complained that by allegedly using the phrase "cop killer," Judge Scola demonstrated bias. *Id.* The State responded that none of these asserted bases was a valid basis for disqualification, as this Court has already rejected a claim that employment by the State Attorney's office was a valid basis for disqualification and the use of the phrase "alleged cop killer," merely accurately described the facts of the case. (PCR3. 1362-63) The trial court denied the motion as legally insufficient. (PCR3. 1363)

The State then informed the lower court that it had spoken to the agencies and ensured they had all received the demands and were working on responses. (PCR3. 1363-64) The lower court then asked the State for its position on the demands. (PCR3. 1365) The State responded that it believed that all of the requests were improperly overly broad, pointed out that Defendant's attorney had been handed the new lethal injection protocol a month earlier and argued that Defendant had the documents he needed to raise a claim about the protocol. (PCR3. 1366) Defendant interrupted, asserted that he was unprepared to address his requests and argued that the agencies should be present. (PCR3. 1366) The lower court explained that it needed

to know the State's position in order to determine whether an evidentiary hearing on public records would be necessary. (PCR3. 1366) After considering the parties' arguments, the lower determined that it would conduct a non-evidentiary public records hearing beginning at 1:30 p.m. (PCR3. 1366-73)

The trial court then stated that it wanted any motion Defendant intended to file to be filed by noon on July 6, 2011, and the State's response to that motion filed by noon on July 7, 2011. (PCR3. 1373) It averred that it would issue an order regarding whether an evidentiary hearing was necessary by noon on July 8, 2011, and stated that the evidentiary hearing would be conducted on July 11, 2011, beginning at 1:30 p.m. (PCR3. 1373) When Defendant complained that the agencies had not been noticed of a public records hearing and that he could not conduct a public records hearing that afternoon and prepare a motion by noon the next day, the trial court ordered that the agencies were to be called over lunch and extended the time for filing the motion until 5 p.m. (PCR3. 1374) The State agreed to notify the agencies as it had already been in contact with them that morning. (PCR3. 1374)

Prior to the commencement of the public records hearing, DOC and FDLE filed written responses. (PCR3. 33-37, 48-55, 444-45) FDLE objected that the request did not show that the records

were related to a colorable claim for post conviction relief. (PCR3. 444-45) DOC objected that the Fla. R. Crim. P. 3.852(i) request was improper because there was no diligence, the request was overly broad and the requested records would not lead to a colorable claim for post conviction relief. (PCR3. 33-37) It objected to the other request on similar grounds but agreed to provide Defendant's own prison records since 1993, if ordered, and noted that it could not provide medical records without a release. (PCR3. 48-55)

At the public records hearing, the Division of Election indicated that it was taking no position on the request. (PCR3. 1379-) Defendant then indicated that he was filing a motion to stay the proceedings and his execution to file a petition for writ of prohibition. (PCR3. 61-67, 1380-81) He also objected to the scheduling, stating that this Court's scheduling order had given "us" until July 15, 2011. (PCR3. 1381) The trial court noted that the scheduling order actually required proceeding to be concluded by July 15, 2011, and overruled the objection. (PCR3. 1381) It also denied the stay motions. (PCR3. 1382)

The trial court then denied the request to the Division of Elections, finding it did not meet any of the requirements of Fla. R. Crim. P. 3.852(i). (PCR3. 195, 1382) Defendant objected on the basis that the request was limited to all records

regarding four judges, that the trial court should not be ruling on a request for records related to it and that he believed the records might be relevant to a claim of judicial bias. (PCR3. 1382-83) The trial court overruled the objection. (PCR3. 1383)

The State then noted that it had been unable to contact the Office of Executive Clemency but that the reason Defendant did not have records from that agency was that an objection to production based on the exempt nature of the records had been sustained when the initial post conviction proceedings were pending. (PCR3. 1385) The trial court agreed that the records were not subject to public records disclosure. (PCR3. 1385)

The JQC then reiterated the arguments in its response. (PCR3. 1385-87) Based on the response, the trial court denied the motion. (PCR3. 196, 1387) Defendant then complained that he was not permitted to respond. (PCR3. 1387-88) However, when offered the opportunity to present argument, Defendant declined to do so. (PCR3. 1388)

Regarding the Fla. R. Crim. P. 3.852(h) request to DOC, Defendant argued that he had last received information from his general file in 1993, and last received information from his medical file in 2004, and averred that he needed updated information. (PCR3. 1390-92) He stated that he would be sending a release for the medical records. (PCR3. 1392) DOC responded

that the request was overly broad but that it did not object to providing Defendant with his files if a release was received for the medical files. (PCR3. 1392-93) The trial court then ordered that Defendant's own files be turned over to him by 2 p.m. on July 6, 2011. (PCR3. 1392-96)

Defendant then argued that he needed updated information regarding two other individuals who he described as snitches who had provided information about an escape attempt by Defendant during the resentencing proceedings. (PCR3. 1396-97) DOC indicated that it did not believe these individuals were still in custody, and the State pointed out that any information that was added after the first post conviction proceeding would not be relevant as neither of these individuals even testified. (PCR3. 1397-98) The trial court ruled that Defendant could have sought any relevant information about these individuals earlier and denied the request. (PCR3. 1398)

At Defendant's request, the lower court heard argument on the requests to DOC, FDLE, the Attorney General and the Governor regarding lethal injection records together. (PCR3. 1388-89) Defendant asserted that DOC had adopted a new lethal injection protocol that substituted pentobarbital for sodium thiopental on June 8, 2011, and that he needed documents regarding the review process that led to the change. (PCR3. 1400-02) He also claimed

that documents regarding research and training on pentobarbital were needed because Georgia had conducted an execution with pentobarbital that went wrong. (PCR3. 1402-03) He stated that he was also asking DOC for records about sodium thiopental because there had been a shortage and other states had obtained that drug through dubious methods. (PCR3. 1407-08)

The State responded that Defendant already had the new protocol and that this was the only document that would lead to a colorable claim. (PCR3. 1408-09) It averred that complaints about the source of the drug and sodium thiopental would not create a viable claim. (PCR3. 1409-10)

Defendant then complained that his counsel had been requesting documents about a new protocol for months, that the State had objected because the new protocol had not been issued and that after the new protocol was issued and provided to him, he received documents showing that the State was considering a new protocol during those months. (PCR3. 1410-12) The State responded that the State's actions in objecting until a new protocol was issued were proper and that Defendant's counsel had been provided with a copy of the new protocol the day after it was issued. (PCR3. 1412-13) Defendant continued to insist that he needed other documents about the research into the new protocol and the procurement of drugs to challenge the new

protocol. (PCR3. 1413-15)

DOC then added that the request for documents about sodium thiopental were particularly meritless as that drug was no longer part of the protocol. (PCR3. 1416) It also adopted the State's arguments about the other records. (PCR3. 1416-17) Defendant then suggested that the fact that this Court had previously upheld a ruling limiting public records disclosure about lethal injection to the protocol itself was irrelevant because there was allegedly no new protocol at the time. (PCR3. 1417) The State pointed out that this was not true, as the other case had been litigated as new protocols in the wake of the Diaz execution were being issued. (PCR3. 1417-18)

Defendant then complained that he was required to show relevance to obtain public records under Fla. R. Crim. P. 3.852 but that an ordinary citizen could obtain records without such a showing. (PCR3. 1418-19) He stated that he knew of someone who had made a public records request to DOC for similar documents and been told that 52 pages of documents were available. (PCR3. 1419) DOC responded that it had never provided records in response to that request. (PCR3. 1419) DOC and the State also pointed out that the restrictions in Fla. R. Crim. P. 3.852 had been implemented to curb abusive public records litigation by capital defendants. (PCR3. 1420-21, 1424-27) After reviewing the

response to the other request, the lower court indicated that it did not grant the access Defendant had claimed. (PCR3. 1422)

Defendant then asserted that he needed documents from FDLE because the protocol called for agents to observe executions and drug storage. (PCR3. 1429) He also complained that he had not received notes about observing execution since the *Lightbourne* litigation. (PCR3. 1430) FDLE responded that its role in executions was limited to observation and that it would probably not have any documents responsive to the request under the new protocol. (PCR3. 1431) Defendant insisted that FDLE had to have documents because the protocol called for an FDLE agent to monitor the preparation of the chemicals. (PCR3. 1432-34)

After taking a recess to consider the arguments, the lower court indicated that it was inclined to require DOC to submit the 52 pages of documents in had assembled for the response to the other public records request for an in camera review. (PCR3. 1438-40) It then inquired what information Defendant had about the alleged problem in Georgia, and Defendant responded that he had newspaper accounts and an affidavit from an expert who had interviewed a reporter who witnessed the execution. (PCR3. 1440-41) DOC responded that it was willing to disclose the 52 pages because it consisted only of a memo regarding the constitutionality of the old lethal injection protocol and

documents about the new protocol that had already been provided to Defendant's counsel. (PCR3. 1442-44)

The lower court then ordered FDLE to turn over any training logs and manuals that it maintained regarding executions and records regarding drug storage under the new protocol. (PCR3. 1445-47, 1455) It ordered DOC to turn over the 52 pages, any correspondence with federal agencies regarding the constitutionality and efficiency of using pentobarbital and training logs and manuals. (PCR3. 1448-51) It clarified that it was not requiring disclosure of records completed during training but only records regarding the procedures themselves and only concerning the new protocol. (PCR3. 1451-52, 1455, 1461) It required the Attorney General's Office to disclose correspondence regarding the constitutionality of the new protocol from the review of the protocol. (PCR3. 193, 1482) It required the same information from the Governor's Office if they were involved in the process of approving the lethal injection protocol. (PCR3. 191, 1483) It denied the remainder of Defendant's requests concerning lethal injection. (PCR3. 191, 193, 1451-1456, 1482, 1483) It required that the record be provided by 5 p.m. on July 6, 2011. (PCR3. 1456, 1482)

It then changed its scheduling order and required Defendant to file his motion by noon on July 7, 2011, and the State to

file its response by noon on July 8, 2011. (PCR3. 1457) It set a *Huff* hearing for 3 p.m. on July 8, 2011, and indicated that any evidentiary hearing would begin at 11 a.m. on July 12, 2011. (PCR3. 1458)

Regarding MDPD, Defendant argued that he needed records on Defendant, the codefendant, the alleged snitches and a series of articles because he had previously requested these records and did not have copies. (PCR3. 1461-62) The State Attorney's Office asked to be heard with MDPD, and Defendant agreed. (PCR3. 1463) Coral Gables then appeared telephonically, and Defendant indicated he had a similar request to Coral Gables. (PCR3. 1463-65) Coral Gables indicated that it had provided its record in 1993 and did not have any new records. (PCR3. 1465) The State Attorney's Office indicated that at the time of the initial public records production in this case, defendants routinely inspected the agencies files pursuant to Chapter 119 without copying everything, which explained why Defendant's files regarding all the law enforcement agencies and State Attorney's Office was sparse. (PCR3. 1465) It asserted that Defendant had not complained about public records production from these agencies at the time of the first post conviction proceedings such that there was a lack of diligence and relevancy. (PCR3. 1465-66) MDPD joined in the State Attorney's argument and added

that obtaining old records regarding its personnel would be burdensome and not relevant. (PCR3. 1467) Defendant insisted that he did not need to show diligence or relevancy to obtain the records, that he wanted the agencies to affirm they had no new records and that the State needed to disclose *Brady* information. (PCR3. 1468) The trial court rejected the requests to all three agencies based on a lack of diligence or relevancy. (PCR3. 190, 1468-69) It also denied the request to the Dade DOC on the same bases. (PCR3. 1484)

Defendant then indicated that he was also requesting information about the resentencing jurors' involvement with the criminal justice system to investigate a potential claim of juror misconduct. (PCR3. 1469-70) The State responded that Defendant was seeking to harass the jurors and had not been diligent. (PCR3. 1469-70) The lower court denied the request based on a lack of diligence. (PCR3. 1470)

Regarding the Broward Sheriff, Defendant stated that he needed the file regarding the case and personnel files of the officers involved in his arrest. (PCR3. 1470-71) Broward County responded that information about the case would have been destroyed by this time. (PCR3. 1471-72) The State pointed out that new information from the personnel files would not be relevant or diligently sought. (PCR3. 1472) The lower court

denied the request. (PCR3. 190, 1473)

Defendant then argued that he needed records about communications between the Attorney General, State Attorney and Governor's Office concerning communications about the signing of the warrant and communications with the victims to raise a claim about the decision to sign a warrant on him. (PCR3. 1473-75) The State responded that this Court had already ruled that such a claim would not be meritorious and that information that identified the victims or their addresses was confidential. (PCR3. 1475-76) Defendant claimed that this Court's precedent was distinguishable because he had never had clemency consideration. (PCR3. 1476-77) The State responded that the record in this case showed that Defendant had clemency consideration in 1993. (PCR3. 1477-78) Defendant then acknowledged that clemency records were confidential but suggested that the Office of Executive Clemency could waive the confidentiality. (PCR3. 1478-79) The lower court requested that the Office of Executive Clemency indicate in writing whether it would waive confidentiality. (PCR3. 1479-80)

The lower court then indicated that it was denying the requests for information about clemency made to the State Attorney, Attorney General and Governor. (PCR3. 192, 194, 1481) It also denied the request for the Attorney General's files

about this case. (PCR3. 194, 1481)

The following day, the Office of Executive Clemency filed a response, indicating that it viewed its records as confidential, and the lower court denied the request to that agency. (PCR3. 197, PCR3-SR. 5-8) DOC, FDLE and the Governor provided the records they had been ordered to provide. (PCR3. 447-63, 876-78, 1033-1308, PCR3-SR. 11-13) The Attorney General's Office certified that it had no records responsive to the request. (PCR3-SR. 9-10) The lower court reset the *Huff* hearing for 11 a.m. on July 11, 2011. (PCR3. 189)

At 8 p.m. on July 5, 2011, Defendant filed a petition for writ of prohibition, claiming that the lower court should have been disqualified based not only on the grounds asserted in the motion for disqualification but also because its scheduling order evidenced bias. This Court directed the State to respond. The State responded that the motion for disqualification had been properly denied because of the grounds in it were legally insufficient. It also asserted that the complaint about the schedule was unpreserved and meritless. This Court denied the petition.

On July 7, 2011, Defendant filed a successive motion for post conviction relief, raising six claims:

I.

[DEFENDANT] IS BEING DENIED FULL AND FAIR

POSTCONVICTION PROCEEDINGS IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS TO DUE PROCESS UNDER THEFIFTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

II.

THE STATE OF FLORIDA'S LETHAL INJECTION STATUTE, FLA. STAT. §922.105, AND THE EXISTING PROCEDURES THAT THE STATE OF FLORIDA UTILIZES FOR LETHAL INJECTION VIOLATE ARTICLE II, SECTION 3 AND ARTICLE I, SECTIONS 9 AND 17 OF THE FLORIDA CONSTITUTION, AND THE EIGHTH AMENDMENT TO THE U.S. CONSTITUTION, AS APPLIED AND ON ITS FACE.

III.

[DEFENDANT] WAS DENIED A CLEMENCY INVESTIGATION AND PROCEEDINGS, AND THE ASSISTANCE OF COUNSEL TO PREPARE A CLEMENCY PETITION, CONTRARY TO FLORIDA LAW. AS A RESULT OF THE ARBITRARY MANNER IN WHICH THE SUPPOSED "FAIL SAFE" OF CLEMENCY OPPERATED, [DEFENDANT'S] EXECUTION WOULD VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

IV.

THE ARBITRARY AND STANDARDLESS POWER GIVEN TO FLORIDA'S GOVERNOR TO SIGN DEATH WARRANTS RENDER THE FLORIDA CAPITAL SENTENCING SCHEME UNCONSTITUTIONAL UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

V.

THE TOTALITY OF THE PUNISHMENT THAT STATE HAD IMPOSED ON [DEFENDANT] VIOLATES THE EIGHTH AMENDMENT AND THE PRECEPTS OF *LACKEY*.

VI.

[DEFENDANT] WAS DEPRIVED OF HIS ARTICLE 36 RIGHT OF CONSULAR NOTIFICATION UNDER THE VIENNA CONVENTION ON CONSULAR RELATIONS, AND TO ALLOW HIS EXECUTION TO PROCEED WITHOUT AFFORDING HIS AN OPPORTUNITY TO LITIGATE HIS CLAIM WOULD BE A VIOLATION OF DUE PROCESS UNDER THE FIFTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION.

(PCR3. 210-441) The State responded to this motion on July 8,

2011. (PCR3-SR. 14-39)

At 2 p.m. on July 10, 2011, Defendant served a motion for leave to amend his motion and an amended motion that raised the same six claims as the original motion. (PCR3. 470-864) In the motion for leave to amend, Defendant asserted that he needed to amend because he had reviewed the public records provided to him before he filed the initial version of his successive motion, he had obtained a report from Dr. David Waisel on July 9, 2011, and a federal district court in Ohio had granted a stay of execution on July 8, 2011. (PCR3. 860-64) However, neither in his motion for leave to amend nor the amended motion did Defendant identify what claim he was amending on what basis. (PCR3. 470-864)

Also on July 10, 2011, the State filed a response to the motion for leave to amend and to the amended motion. (PCR3. 873-75, 880-908) In response to the motion for leave to amend, the State argued that it appeared to the State that Defendant was amending his claims regarding lethal injection, both clemency claims and his claim regarding the length of time that he had spent on death row. (PCR3. 873-75) It argued that there was no basis for amending the claims other than lethal injection because these claims had been available for years and claims that were based on public records that should have been sought earlier were barred. *Id.* It asserted that the lethal injection

claim information was also available earlier, as Defendant has acknowledged at the public records hearing that he had been provided with a copy of the new protocol the day after it was issued, he had claimed to be in possession of an affidavit from Dr. Waisel during that same hearing and Dr. Waisel's report included the same opinion about pentobarbital that he had offered in other states. *Id.*

At the beginning of the *Huff* hearing, Defendant asserted that he needed leave to amend because he had only had the opportunity to review the public records after he filed the motion, he had just received Dr. Waisel's report and the opinion from Ohio had just issued. (PCR3. 1490-92) The State reiterated its arguments from its response. (PCR3. 1490) The lower court initially stated that it was granting the motion, and the State objected regarding the claims other than the lethal injection claim as all the other claims had been available for years. (PCR3. 1492-93) Defendant responded that he was amending the other claims based on public records he had just received. (PCR3. 1493) The State replied that Defendant could have requested records about these claims years earlier. (PCR3. 1493-94) The lower court then stated that it was granting Defendant leave to amend the lethal injection claim but denying leave to amend the other claims because they could have been pursued

earlier. (PCR3. 1493-94)

Regarding Claim I, Defendant argued that he could not properly litigate his motion because the lower court had denied some of his public records requests and the schedule for pleading required him to act quickly under a death warrant. (PCR3. 1495) The State responded that the lower court had already ruled on the public records requests, that Defendant had not identified any agency that had not complied with the lower court's orders, that Defendant could have litigated most of his claims for years and that Defendant had been in possession of the new protocol for a month. (PCR3. 1495)

Regarding Claim II, Defendant asserted that the newly discovered evidence consisted of the switch from sodium thiopental to pentobarbital and the fact that there had been a shortage of sodium thiopental, which led other states to obtain that drug illegally. (PCR3. 1498-99) He insisted that what the other states had done showed that Florida used bad judgment. (PCR3. 1499-1500) He averred that there were problems with pentobarbital because it was not used for anesthesia and that Florida's lethal injection protocol did not require the use of medical professionals. (PCR3. 1500-02) He averred that the lack of medical research showed that Florida was not following its protocols. (PCR3. 1502-03)

The State responded that most of Defendant's assertions had been rejected in *Lightbourne*, that the only thing new in the protocol was the change in drugs and that Defendant had not presented sufficient allegations to show that this change was unconstitutional. (PCR3. 1503-06) When questioned by the court, Defendant admitted that the only change in the protocol was the substitution of pentobarbital. (PCR3. 1508-09) However, Defendant insisted that he should be allowed to relitigate all issues regarding lethal injection because other states had been illegally procuring sodium thiopental and Florida must have been. (PCR3. 1510) The State responded that the law did not permit such relitigation, that the United States Supreme Court had rejected a claim based on a drug source and that Florida had not attempted to execute anyone during the sodium thiopental shortage. (PCR3. 1510-11)

Regarding Claim III, Defendant insisted that there was a factual dispute about whether clemency proceedings had been held. (PCR3. 1512) However, he acknowledged that he had received a letter from the Governor in 1992 indicating that clemency proceedings were being conducted and that the record showed a clemency attorney had appeared on his behalf. (PCR3. 1512-14) He stated that he thought the clemency proceedings had not been conducted because he had no documents to show that it had. *Id.*

When the lower court inquired how this claim was timely and what Defendant could present to show an entitlement to clemency, Defendant insisted that he did not have to establish either factor. (PCR3. 1514-16) The State responded that Defendant knew in 1992 and 1993 about clemency and clemency counsel such that the claim was time barred. (PCR3. 1516-17) It also asserted the claim was meritless. (PCR3. 1517)

Regarding Claim IV, Defendant asserted that the Eighth Amendment required that the signing of a death warrant not be discretionary. (PCR3. 1518-20) The State responded that this Court had already rejected this claim. (PCR3. 1520) Regarding Claim V, Defendant simply insisted that he had been on death row too long, and the State responded that the claim had been repeatedly rejected. (PCR3. 1521-22) Regarding Claim IV, Defendant simply insisted that a new law might entitle him to raise the claim. (PCR3. 1522) When questioned how the claim was timely, Defendant insisted that he should be entitled to raise the claim now because it had been repeatedly rejected in the past. (PCR3. 1522-23) The State responded that the claim was time barred, procedurally barred and insufficiently plead and that Defendant lacked standing. (PCR3. 1523-24)

In conclusion, Defendant insisted that his clemency and lethal injection claims deserved an evidentiary hearing. (PCR3.

1524-25) However, Defendant asserted that the evidentiary hearing could not be held at that time because his expert was allegedly unavailable. (PCR3. 1525) The State responded that there was no basis for an evidentiary hearing but that if one was granted, Defendant should be required to present his expert electronically. (PCR3. 1525-26) It pointed out that it had made arrangements to have witnesses available. (PCR3. 1526)

At the conclusion of the arguments, the lower court took a recess to consider the matter. (PCR3. 1526) When it returned, it announced that it was summarily denying the motion and denying a stay. (PCR3. 1526-27) Defendant then noted for the record that a number of police officers had been present during the argument and were present for the ruling. (PCR3. 1527)

On July 13, 2011, Defendant moved for reconsideration of the oral ruling on the lethal injection based on the granting of a stay in Delaware, Texas had disclosed records regarding its procurement of lethal injection drugs and he had received a "response" to a request he had made for records from the Drug Enforcement Administration (DEA). (PCR3. 909-1032) The State responded to the motion, asserting that the unexplained stay in Delaware to conduct oral argument on a motion did not provide any basis for reconsideration. (PCR3-SR. 42-46) It noted that the Texas records and DEA "response" appeared to have been

available before the *Huff* hearing, that it was improper to wait to present them after a ruling and that they did not show that Florida's injection protocol was unconstitutional, particularly as the DEA "response" was nothing more than an acknowledgement that a request for records had been received. (PCR3-SR. 42-46)

On July 15, 2011, the lower court entered its orders denying Defendant's successive motion for post conviction relief and his motion for reconsideration. (PCR3. 1309-1344) It found that Claim I did not state a basis for relief and that Defendant had caused much of the timing issues about which he complained by his own dilatory conduct. (PCR3. 1310-44) It determined that Claim II was insufficiently plead because it relied on speculation and that same speculation had been repeatedly rejected by other courts. *Id.* It rejected Claim III and IV as untimely and insufficiently plead. *Id.* It rejected Claim V as meritless and insufficiently plead. *Id.* It rejected Claim VI because it was barred, Defendant lacked standing to raise it and Defendant did not plead prejudice. *Id.* This appeal follows.

SUMMARY OF THE ARGUMENT

Contrary to Defendant's assertion, the lower court did order the production of documents relevant to Defendant's claim and did not abuse its discretion in refusing to order the production of additional documents. The lower court summarily

denied the lethal injection claim. Most of the claim sought to relitigate *Lightbourne* and *Baze*. Further, Defendant did not present sufficient allegations to show that the substitution of pentobarbital, the only alteration in the protocol, was unconstitutional.

The lower court properly denied the claim regarding clemency because it was not cognizable, time barred and insufficiently plead. It properly denied the claim regarding the signing of the death warrant as meritless. It properly rejected the claim regarding the length of time on death row as time barred and meritless. It properly determined that the claim concerning the Vienna Convention was time barred, procedurally barred and insufficiently plead. Moreover, Defendant lacked standing to raise the claim.

ARGUMENT

I. THE LOWER COURT DID NOT ABUSE ITS DISCRETION IN RULING ON DEFENDANT'S PUBLIC RECORDS REQUESTS.

Defendant first asserts that the lower court abused its discretion in ruling upon the requests he made pursuant to Fla. R. Crim. P. 3.852(i) to the Governor, Attorney General, DOC and FDLE.[8] However, the lower court did not abuse its discretion in

[8] While Defendant made numerous other public records requests in the lower court, he only presents argument regarding his request for documents regarding lethal injection from these four agencies. As such, Defendant has waived any issue regarding

ruling upon the requests.[9]

In his brief, Defendant suggests that the lower court refused to require the production of any records regarding lethal injection. However, this is not true. At the public records hearing, Defendant acknowledged that he had been provided with the 2011 lethal injection protocol and drafts the day after the new protocol was promulgated. (PCR3. 1410-12) Moreover, the lower court ordered FDLE to turn over any training logs and manuals that it maintained regarding executions and records regarding drug storage under the new protocol. (PCR3. 1445-47, 1455) It ordered DOC to turn over the documents it had gathered in response to a 119 request, any correspondence with federal agencies regarding the constitutionality and efficiency of using pentobarbital and training logs and manuals. (PCR3. 1448-51) It ordered the Attorney General's Office to disclose correspondence regarding the constitutionality of the new protocol from the review of the protocol and the Governor's Office to do the same if it was involved in the process of approving the lethal injection protocol. (PCR3. 191, 193, 1482, 1483) Moreover, the agencies responded to these requests. (PCR3.

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these other requests. *Doorbal v. State*, 983 So. 2d 464, 482-83 (Fla. 2008).

[9] Trial court decisions regarding the disclosure of public records are reviewed for an abuse of discretion. *Johnson v. State*, 904 So. 2d 400, 405 (Fla. 2005).

447-63, 876-78, 1033-1308, PCR-SR. 9-13) As such, Defendant's suggestion that he was denied any records is simply false.

Moreover, in *Seibert v. State*, 35 Fla. L. Weekly S342 (Fla. Jul. 8, 2010), this Court upheld a trial court's order regarding access to public records regarding Florida's lethal injection protocol that limited production to the protocol itself and documents showing that the protocol was flawed. Similarly here, the lower court limited the production of documents to the new protocol, which Defendant acknowledged was already in his possession (PCR3. 1410-12), and the documents regarding the constitutionality of the new protocol that were considered in the review and adoption of the new protocol. Given these circumstances, the lower court did not abuse its discretion.

While Defendant insists that he was also entitled to documents related to how pentobarbital was selected as a substitute for sodium thiopental, to the procurement of lethal injection drugs, to the objections lodged by the manufacturers of lethal injection drugs regarding their use in executions and to executions conducted before the switch to pentobarbital, the lower court did not abuse its discretion in rejecting these requests. Pursuant to §922.105(7), Fla. Stat., the decision on how to conduct a lethal injection is left to DOC outside the process of the Administrative Procedures Act. This Court has

repeatedly held that this statute is constitutional. *Powers v. State*, 992 So. 2d 218, 220 (Fla. 2008); *Diaz v. State*, 945 So. 2d 1136, 1143-44 (Fla. 2006); *Sims v. State*, 754 So. 2d 657, 668 (Fla. 2000). Moreover, this Court has recognized that its role "is not to micromanage the executive branch in fulfilling its own duties relating to executions." *Lightbourne v. McCollum*, 969 So. 2d 326, 351 (Fla. 2007). As such, the lower court properly determined that these records would not lead to a colorable claim for post conviction relief.

Moreover, in *Brewer v. Landrigan*, 131 S. Ct. 445 (2010), the United States Supreme Court recognized that claims based on the source of lethal injection drugs did not state a claim that a lethal injection protocol was unconstitutional. While Defendant suggests the fact that other states obtained sodium thiopental from dubious sources would support a claim that Florida has used bad judgment and demonstrates that the State will carry out executions at all cost, he ignores that Florida did not even attempt to execute anyone during the shortage of thiopental, which shows that Florida was not trying to execute him at all costs. Further, this Court has rejected requests for additional public records regarding lethal injection protocols after *Lightbourne* because they would not support a colorable claim for post conviction relief. *Walton v. State*, 3 So. 3d

1000, 1013-14 (Fla. 2009). As Defendant acknowledged below, the only change made in the 2011 protocol was that pentobarbital was substituted for sodium thiopental. (PCR3. 1508-09) Defendant offered no explanation of how the letters from the manufacturers would show that this change of drugs created a substantial risk of serious harm in the use of the new protocol. Instead, Defendant appeared to be seeking these records merely in an attempt to challenge this Court's ruling in *Lightbourne* and decision in *Baze*. Given these circumstances, the lower court did not abuse its discretion in rejecting these requests. It should be affirmed.

Further, while Defendant suggests that possession of documents would allow him to make a claim similar to the one on which an inmate was granted a stay of execution in Ohio, he ignores that this Court has already rejected similar claims. *See*, *e.g. Schwab v. State*, 995 So. 2d 922, 926 (Fla. 2008); *see also Tompkins v. State*, 994 So. 2d 1072, 1080-81 (Fla. 2008). In fact, this Court has stated that it is not the Court's job to micromanage the State in the manner that the Ohio judge has micromanaged Ohio. *Lightbourne*, 969 So. 2d at 351. Given these circumstances, the lower court did not abuse its discretion in rejecting this claim.

II. THE LETHAL INJECTION CLAIM WAS PROPERLY DENIED.

Defendant asserts that the lower court erred in summarily denying his claim that Florida's new lethal injection protocol is unconstitutional. However, the lower court properly denied this claim as facially insufficient.

This Court has only permitted the inclusion of lethal injection claims in successive motions for post conviction relief when they are based on newly discovered evidence. *See Schwab v. State*, 969 So. 2d 318, 321 (Fla. 2007). Moreover, as this Court has acknowledged, a post conviction claim may be summarily denied where it fails to allege facts that are sufficient to raise a legal claim. *See Ragsdale v. State*, 720 So. 2d 203, 207 (Fla. 1998).

Here, as Defendant acknowledged below, the only difference between the 2007 lethal injection protocol and the 2011 lethal injection protocol was that 5 grams of pentobarbital was substituted for 5 grams of sodium thiopental. (PCR3. 1508-09) As the Eleventh Circuit has acknowledged, such a change is not a significant change in a lethal injection protocol. *Powell v. Thomas*, 641 F.3d 1255, 1258 (11th Cir. 2011).

In *Lightbourne v. McCollum*, 969 So. 2d 326 (Fla. 2007), this Court held that the 2007 protocols were constitutional. In doing so, this Court expressly rejected arguments regarding the

manner in which the drugs are administered, the assessment of consciousness, the monitoring of consciousness, the requirements to be an executioner and the facts of Diaz execution. *Id.* at 349-53; *Baze v. Rees*, 553 U.S. 35, 54-56, 58-60 (2008). This Court expressly rejected suggestions that more medically trained personnel should be involved in lethal injections based on the fact that ethical concerns prevented the involvement of such personnel. *Lightbourne*, 969 So. 2d at 351; *Baze*, 553 U.S. at 59-60, 63-66. Since *Lightbourne*, this Court has repeatedly refused to allow defendants to relitigate these issues. *Troy v. State*, 57 So. 3d 828, 839-40 (Fla. 2011); *Darling v. State*, 45 So. 3d 444, 447 (Fla. 2010). Given these circumstances, the lower court properly refused to allow Defendant to litigate these issues again, as they were unaffected by the change in the protocol. It should be affirmed.

Moreover, the lower court properly determined that Defendant had not set forth a facially sufficient claim regarding the actual change in the 2011 lethal injection protocol. In *Lightbourne*, 969 So. 2d at 334, this Court recognized that the Florida Constitution was amended in 2002 to require that this Court construe claims arising under the Cruel and Unusual Punishment Clause in accordance with the construction given to the Eighth Amendment to the United States

Supreme Court and that this Court uphold methods of execution that are constitutional under the United States Constitution. As this Court has also recognized, such conformity clauses require this Court not only to follow existing United States Supreme Court precedent on an issue but also forbid this Court from granting greater protection under the Florida Constitution. *Holland v. State*, 696 So. 2d 757, 759 (Fla. 1997).

In *Baze*, a plurality of the United States Supreme Court held that an inmate was required to show that the protocol created a "substantial risk of serious harm" that was "objectively intolerable" to demonstrate that a lethal injection protocol was unconstitutional. *Id.* at 49-50. To meet this standard, the Court required a showing that "the conditions presenting the risk must be 'sure or very likely to cause serious illness and needless suffering,' and give rise to 'sufficiently imminent dangers.'"[10] *Id.* at 50 (quoting *Farmer v. Brennan*, 511 U.S. 825, 842, 846, and n.9 (1994)). It noted that the mere fact that an execution method "may result in pain, either by accident or as an inescapable consequence of death" did not meet this standard. *Id.* at 50. It also held that that

[10] Given this standard, Defendant's suggestion that the lower court applied an incorrect standard is incorrect. Instead, it is Defendant, who by omitting the word serious and ignoring the requirement that the risk be sure or very likely, who is using the wrong standard.

"an isolated mishap alone does not give rise to an Eighth Amendment violation, precisely because such an event, while regrettable, does not suggest cruelty, or that the procedure at issue gives rise to a 'substantial risk of serious harm.'" *Id.* It required a defendant claiming that a risk of serious harm could be avoided by a different method of execution to show that there was a feasible alternative that addresses a substantial risk of serious harm. *Id.* at 52. It held that no stay was allowed unless the standard was met. *Id.* at 60.

While this Court has previously stated that it was unsure of the holding of *Baze* because of the fractured nature of that opinion, *Ventura v. State*, 2 So. 3d 194, 199-200 (Fla. 2009), the fact that the holding of *Baze* is found in the plurality opinion has since been clarified. In *Landrigan*, 131 S. Ct. 445, the Court reversed a stay that had been granted because Arizona had obtained sodium thiopental from a non-FDA approved source and refused to disclose how it had obtained the sodium thiopental. In doing so, the Court applied the standard set forth in the *Baze* plurality and held that a claim based on speculation that a drug received from a non-FDA source might not be effective was insufficient to state a claim. *Id.* As the Court has recognized, such decisions signal that the plurality decision is the holding of the case. *City of Lakewood v. Plain*

Dealer Publishing Co., 486 U.S. 750, 764 n.9 (1988); *see also Graham v. Collins*, 506 U.S. 461, 471-72 (1993). Thus, the lower court properly determined that Defendant was required to plead his claim under the *Baze* plurality standard.[11] *See also Dickens v. Brewer*, 631 F.3d 1139, 1144-46 (9th Cir. 2011); *Pavatt v. Jones*, 627 F.3d 1336, 1138-39 (10th Cir. 2010); *Raby v. Livingston*, 600 F.3d 552, 557-58 (5th Cir. 2010); *Jackson v. Danberg*, 594 F.3d 210, 216-24 (3d Cir. 2010); *Cooey v. Strickland*, 589 F.3d 210, 220-21 (6th Cir. 2009); *Clemons v. Crawford*, 585 F.3d 1119, 1125 (8th Cir. 2009); *Emmett v. Johnson*, 532 F.3d 291, 298 & n.4 (4th Cir. 2008).

Moreover, applying that standard to the limited change in the 2011 protocol, the lower court properly determined that Defendant had not stated a facially sufficient claim. The only information regarding how this change of drugs created a substantial risk of serious harm was Defendant's assertions that Dr. Waisel's report indicated that there were "concerns" over using pentobarbital because there was insufficient research to determine a clinical dose of pentobarbital sufficient to induce anesthesia. (PCR3. 489) However, Dr. Waisel's report also acknowledged that 100 mg is usually used for sedation and that

[11] Given this standard, the lower court properly rejected Defendant's assertion that the manufacturer Lundbeck's disapproval of the use of pentobarbital shows that the protocol is unconstitutional.

the total dose for a normal adult would be 500 mg. (PCR3. 669-70) Since the protocol calls for the use of 5 grams of pentobarbital, the dosage used is 50 times the normal sedation dose and 10 times the total dose. In fact, Dr. Waisel's opinion summary did not state that these concerns create a substantial risk of serious harm but that the protocols do not do enough to "protect inmates against a substantial risk of" harm. (PCR3. 666) Moreover, these same concerns by this same expert have been rejected. *See Pavatt*, 627 F.3d at 1338-40 (finding use of pentobarbital instead of sodium thiopental constitutional under *Baze*); *see also Powell*, 641 F.3d at 1257-58 (finding switch insufficient to establish a claim under *Baze*); *see also Beaty v. Brewer*, 2011 WL 2164022 (9th Cir. May 25, 2011)(same). Thus, they merely reflect speculation that pentobarbital might not render Defendant unconscious. However, the United States Supreme Court has held that such speculation is not sufficient to state a claim that an execution protocol is unconstitutional. *Landrigan*, 131 S. Ct. at 445. Moreover, the speculation was particularly unwarranted, as the protocol continues to contain provisions to check and ensure that Defendant is not conscious after the injection of pentobarbital. Thus, the lower court properly determined that the claim was insufficiently plead and should be affirmed.

While Defendant cited to a newspaper article regarding the execution of Georgia inmate Roy Blankenship and asserts that it shows that Georgia "botched" an execution using pentobarbital, the lower court properly determined that this did not state a facially sufficient claim. The newspaper article is inadmissible hearsay. §90.801 & §90.802, Fla. Stat. As such, it will not support a post conviction claim. Sims, 754 So. 2d at 660.

Moreover, Dr. Waisel's affidavit also did not make the claim sufficient. Dr. Waisel merely states that he believes that Blankenship was conscious for the first three minutes of the execution and "suffered greatly" without any explanation of why he was suffering or whether the suffering resulted from an isolated mishap in that execution. However, as *Baze* held, a lethal injection protocol is not unconstitutional simply because a defendant may suffer "pain, either by accident or as an inescapable consequence of death." *Baze*, 553 U.S. at 50. Further, the Court also held that that "an isolated mishap alone does not give rise to an Eighth Amendment violation, precisely because such an event, while regrettable, does not suggest cruelty, or that the procedure at issue gives rise to a 'substantial risk of serious harm.'" *Id.* Thus, the lower court properly determined that Defendant's suggestion that Georgia may have botched Blankenship's execution did not show that Florida's

lethal injection protocol is unconstitutional. *Sims*, 754 So. 2d at 667-68 (rejecting claim that evidence of "botched" executions in other jurisdictions showed Florida's use of lethal injection was unconstitutional). This is particularly true as Oklahoma, Texas, Mississippi, South Carolina, Alabama, and Arizona[12] have all conducted lethal injections using a protocol similar to Florida's protocol (approximately 15 such executions, both before and after Blankenship) without reported incident.

In fact, a federal court in Georgia rejected Dr. Waisel's opinion after taking testimony on the issue as it related to the Blankenship execution. *DeYoung v. Owens*, Case No. 11-CV-2324, Order at 14-16 (N.D. Ga. Jul. 20, 2011). The court found that Dr. Waisel, rather than offering any medical explanation for why pentobarbital might have caused pain, conceded that a patient would not feel pain when the drug is introduced intravenously. *Id.* The court also noted that Dr. Waisel admitted any pain would have been short lived and that this did not satisfy the *Baze* standard. *Id.* Accordingly, the Georgia challenge was denied. Moreover, the Eleventh Circuit affirmed this order, agreeing that Dr. Waisel's testimony regarding the use of pentobarbital and the Blankenship execution did not meet the *Baze* standard.

[12] Ohio has also executed two individuals using pentobarbital as it sole lethal injection drug successfully in two executions.

DeYoung v. Owens, Case No. 11-13235, slip op. at 10-15 (11th Cir. Jul. 20, 2011). The lower court here should be affirmed.

In a belated attempt to bolster his claim, Defendant now suggests that Alabama has also botched an execution. However, Defendant did not make this allegation below. As such, it is not properly before this Court. *See Griffin v. State*, 866 So. 2d 1, 11 n.5 (Fla. 2003); *Perez v. State*, 919 So. 2d 347, 359 (Fla. 2005); *Steinhorst v. State*, 412 So. 2d 332, 338 (Fla. 1982). Further, he supports the allegation with extra-record affidavits, which is completely improper. *Altchiler v. State, Dept. of Professional Regulation*, 442 So. 2d 349 (Fla. 1st DCA 1983)("That an appellate court may not consider matter outside of the record is so elemental that there is no excuse for any attorney to attempt to bring such matters before the court."). Further, as was true of the information about Georgia, the information present amounts to nothing more than that the inmate moved briefly without any showing that the inmate suffered more pain than that which arose "as an inescapable consequence of death," which does not make a lethal injection protocol unconstitutional. *Baze*, 553 U.S. at 50. In fact, the Eleventh Circuit so ruled. *DeYoung*, Case No. 11-13235, slip op. at 15 n.5. The lower court should be affirmed.

Further, while Defendant suggests that it was improper for the lower court to rely on federal cases rejecting this claim, this is untrue. This Court has rejected the suggestion that each defendant is entitled to his own evidentiary hearing on lethal injection. *Schoenwetter v. State*, 46 So. 3d 535, 550-51 (Fla. 2010). Moreover, while Defendant suggests that there is a lower standard for raising a lethal injection claim in state court, he ignores that Florida has adopted a conformity clause regarding the Eighth Amendment and is now required to follow the command of *Baze*, 553 U.S. at 60, regarding this claim. *Lightbourne*, 969 So. 2d at 334; *Holland*, 696 So. 2d at 759.

Moreover, the lower court also properly rejected Defendant's other arguments. While Defendant complains that he was only given a copy of the new lethal injection protocol once it was issued and that the State did insufficient medical research before it selected pentobarbital, he has offered no explanation of how this shows that the new protocol creates a substantial risk of serious harm. Instead, he appears to believe that he and the courts were entitled to input in devising a lethal injection protocol. However, pursuant to §922.105(7), Fla. Stat., the decision on how to conduct a lethal injection is left to DOC outside the process of the Administrative Procedures Act, and this Court has repeatedly held that this statute is

constitutional. *Powers*, 992 So. 2d at 220; *Diaz*, 945 So. 2d at 1143-44; *Sims*, 754 So. 2d at 668. In fact, this Court has recognized that "this Court's role is not to micromanage the executive branch in fulfilling its own duties relating to executions." *Lightbourne*, 969 So. 2d at 351. Thus, the lower court properly rejected these arguments.

Additionally, while Defendant complains about a lack of knowledge regarding the source of Florida's lethal injection drugs and the lack of FDA approval for the use of pentobarbital in lethal injection, he again does not explain how any of these assertions show that the protocol creates a substantial harm. Moreover, in *Landrigan*, 131 S. Ct. at 445, the Court expressly rejected a claim that the use of a drug from an undisclosed, non-FDA approved source was sufficient to state a claim that a protocol was unconstitutional. As such, the lower court properly rejected these arguments as well. The lower court should be affirmed.

Finally, Defendant's reliance on Ohio District Court order is misplaced. The judge in Ohio did not base his decision on a finding that the Ohio protocols violated the Eighth Amendment at all. Instead, he based his decision on the equal protection clause. (PCR3. 586-610) Moreover, he did not find that Ohio even violated that clause. (PCR3. 610) Instead, he simply found

Ohio's deviations from its protocols regarding such matters as who signed for the drugs and who was present when created a likelihood that the equal protection clause had been violated. Given the fact that Defendant did not raised an equal protection claim (and would now be barred from doing so) and the narrowness of the holding in Ohio, the decision does not support Defendant's claim.

Further, Defendant relies on the Ohio case to simply reargue the issues that were previously addressed and rejected during the *Lightbourne* litigation. This Court has consistently rejected arguments by capital defendants who urged that another evidentiary hearing was warranted on these same challenges and found no constitutional violation. *See, e.g. Schwab*, 995 So. 2d at 926; *see also Tompkins*, 994 So. 2d at 1080-81. In fact, this Court has stated that it is not the Court's job to micromanage the State in the manner that the Ohio judge has micromanaged Ohio. *Lightbourne*, 969 So. 2d at 351. Thus, the lower court should be affirmed.

III. THE CLEMENCY CLAIM WAS PROPERLY DENIED.

Defendant next asserts that the lower court erred by summarily denying his claim that he was improperly denied clemency. However, the lower court properly summarily denied this claim because claims regarding clemency proceedings do not

present a basis for post conviction relief, the claim was not asserted on a timely basis and the claim is insufficiently plead.

While Defendant's claim suggests that his denial of clemency presents a basis for relief from his convictions and sentences, a request for executive clemency does not seek to invalidate the fact or duration of a prisoner's confinement or detention on legal grounds. Instead, the remedy sought is extrajudicial, purely discretionary, and "simply a unilateral hope." *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458, 465 (1981). Death row inmates have no constitutional right to clemency proceedings. *See Herrera v. Collins*, 506 U.S. 390, 414 (1993). Indeed, prisoners have no constitutional right to the commutation of a sentence, *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 280 (1998), and clemency proceedings are not part of the trial -- or even of the adjudicatory process. They do not determine the guilt or innocence of the defendant, and are not intended primarily to enhance the reliability of the trial process. Rather, they are conducted by the Executive Branch, independent of direct appeal and collateral relief proceedings. *Woodard*, 523 U.S. at 284 (citing *Greenholtz v. Inmates of Neb. Penal and Corr. Complex*, 442 U.S. 1, 7-8 (1979)). Given these circumstance, this claim does not present a cognizable basis for

post conviction relief. In fact, pardon and commutation decisions are rarely even appropriate subjects for judicial review. *See Woodard*, 523 U.S. at 280.

In Florida, the clemency process is derived solely from the Florida Constitution and is strictly an executive branch function. *Parole Comm'n v. Lockett*, 620 So. 2d 153, 154-55 (Fla. 1993). As noted in *Marek v. McNeil*, 2009 WL 2488296 (S.D. Fla. Aug. 13, 2009), the Florida Supreme Court has interpreted the Florida Constitution to mean that the "people of [Florida] chose to vest sole, unrestricted, unlimited discretion exclusively in the executive in exercising this act of grace." *Id*. (citing *Sullivan v. Askew*, 348 So. 2d 312, 315 (Fla. 1977)).[13] As a result, this Court held in *Bundy v. State,* 497 So. 2d 1209, 1211 (Fla. 1986), it is not the prerogative of the judiciary to second-guess the application of this exclusive executive function. Thus, this Court has uniformly rejected eleventh hour "clemency" claims in death warrant proceedings and has repeatedly reaffirmed *Bundy*. *See Marek v. State*, 8 So. 3d 1123, 1129-30 (Fla. 2009); *Rutherford v. State*, 940 So. 2d 1112, 1121-23 (Fla. 2006); *King v. State,* 808 So. 2d 1237, 1241 n.5, 1246 (Fla. 2002); *Glock v. Moore*, 776 So. 2d 243, 252 (Fla. 2001);

[13] Florida's Rules of Executive Clemency (rev. 2007) provide in pertinent part that the "Governor has unfettered discretion to deny clemency at any time, for any reason."

Provenzano v. State, 739 So. 2d 1150, 1155 (Fla. 1999). Given these circumstances, this claim did not present a cognizable basis for relief and was properly summarily denied. The lower court should be affirmed.

In an attempt to avoid this result, Defendant now contends, contrary to his assertions in the motion to vacate, that the Governor denied clemency "without any clemency proceeding ever being conducted in [Defendant's] case." (Initial Brief at 41) However, in the Motion to Vacate, Defendant admitted that he was informed in 1992 that his clemency proceedings would have commenced and that Mark Evans was appointed to represent him in those proceedings. (PCR3. 232-33) In the motion, as he does here, he also contended that he was not given proper clemency proceedings and he did not have a proper attorney. *Id.*

In either case, the record from the first post conviction appeal shows that Defendant was aware of the existence of his clemency counsel and the identity of that counsel. (PCR-SR. 83-85, 88-90) In fact, the attachments to Defendant's present motion show that his post conviction counsel actually recommended Defendant's clemency counsel and that clemency counsel was investigating the case. (PCR3. 722) Thus, both Defendant and his post conviction counsel could have and should have known what occurred during his clemency proceedings through

an exercise of due diligence at the time these proceedings were occurring 18 years ago. Moreover, any general challenge to the law regarding clemency proceedings also could and should have been raised years earlier, as the law regarding clemency has remained the same throughout those years. Given these circumstances, the claim is also untimely and was properly summarily denied. *Jimenez v. State*, 997 So. 2d 1056 (Fla. 2008).

Defendant attempts to avoid the time bar by arguing that "prior to the signing his death warrant, which served to foreclose any consideration of clemency under Rule 15(C), [Defendant's] claim of the denial of clemency proceedings was not ripe for consideration." (Initial Brief at 53) However, Defendant offers no basis for this assertion. Defendant clearly was aware that his litigation had been completed and that he was eligible to be executed. If he was concerned about his clemency proceedings, Florida law recognizes the right to petition for the appointment of clemency counsel. §27.51(5)(a), Fla. Stat. (providing the trial court with power to appoint the public defender or other attorney not employed by the capital collateral regional counsel to represent such person in proceedings for relief by executive clemency pursuant to ss. 27.40 and 27.5303.) Defendant did not do so and did not attempt to raise this claim in any manner. Instead he chose to wait to

make his eleventh hour plea concerning clemency during the pendency of a death warrant. As such, this claim has been waived, is untimely, procedurally barred, and without merit.

Additionally, Defendant's complaints that a second clemency proceeding was never conducted provides no basis for relief. While the State does not concede that a second clemency review was not conducted, the law does not require a second clemency proceeding or dictate the form of any further clemency consideration. *Grossman v. State,* 29 So. 3d 1034, 1044 (Fla. 2010). The warrant issued by Governor Scott on June 30, 2011, attests that "it has been determined that Executive Clemency, as authorized by Article IV, Section 8(a), Florida Constitution, is not appropriate." (PCR3. 14) Clemency, which is purely a matter of executive grace, is not a second appeal, and there is no requirement that it be conducted anew whenever a defendant receives a new trial on procedural grounds or due to the passage of time. Defendant's denial-of-clemency claim must be rejected, as it is not the prerogative of the judiciary to second-guess the application of this exclusive executive function. *Bundy*, 497 So. 2d at 1211.

Although Defendant does not dispute that he *is* eligible for a death warrant and *has remained* eligible for years, he appears to suggest that he is entitled to heightened protections and

review of the state clemency proceedings under the Eighth Amendment, beyond what is provided under the Fourteenth Amendment's Due Process Clause. This argument has also been repeatedly rejected. *Woodard*, 523 U.S. at 279-81; *Grossman*, 29 So. 3d at 1044, *Marek*, 14 So. 3d at 998. In light of the overwhelming controlling authority cited above, this claim does not present a basis for review. The lower court properly summarily denied this claim and should be affirmed.

Moreover, the complaint about Defendant's clemency counsel does not even present a cognizable basis for relief. As noted above, Defendant did have clemency counsel. Thus, Defendant was neither abandoned by counsel nor left alone to navigate the clemency process from his jail cell. S*ee Harbison v. Bell*, 129 S. Ct. 1481 (2009).

Further, there is no constitutional right to effective assistance of clemency counsel. This Court in *Remeta v. State*, 559 So. 2d 1132, 1135 n.4 (Fla. 1990), plainly stated that because the "right to [clemency] counsel was clearly authorized by statute, we find no need to reach the question of whether an indigent, death-sentenced prisoner has a state or federal constitutional right to counsel in executive clemency proceedings." *Remeta* merely stands for the proposition that defendants do have a statutory right to have clemency counsel

appointed and paid accordingly. As the Court explained:

> In *Remeta v. State*, 559 So. 2d 1132 (Fla. 1990), however, we extended this reasoning to executive clemency proceedings, without "reach[ing] the question of whether an indigent, death-sentenced prisoner has a state or federal constitutional right to counsel" in that setting. *Id.* at 1135 n.4. We explained that, regardless of whether counsel is constitutionally required, "this state has established a right to counsel in clemency proceedings for death penalty cases, and this statutory right necessarily carries with it the right to have effective assistance of counsel." *Id.* at 1135. Because the statutory fee cap threatened to undermine that right, see §925.035(4), Fla. Stat. (1987), we held that courts could award extra compensation "when necessary to ensure effective representation" and "to prevent confiscatory compensation of counsel." *Remeta*, 559 So. 2d at 1135.

Florida Dept. of Financial Services v. Freeman, 921 So. 2d 598, 605 (Fla. 2006). Thus, Defendant's complaint about counsel provides no basis for relief. The lower court's summary denial of this claim should be affirmed.

Even if Defendant's claim was cognizable and had been timely presented, the lower court would still have properly denied this claim. In his motion, Defendant made no attempt to explain why his clemency proceedings were insufficient or why his clemency counsel was ineffective in this case. Instead, with regard to the proceedings, he merely noted that he did not have clemency counsel's file and stated that he believed clemency proceedings had not been conducted. (PCR3. 232-33) Moreover, he admitted below that his belief that there was no clemency

proceeding was based entirely on speculation because he had not obtained records concerning clemency.[14] (PCR3. 1512-14) However, "[p]ostconviction relief cannot be based on speculation or possibility." *Maharaj v. State*, 778 So. 2d 944, 951 (Fla. 2000). Defendant's failure to investigate and sufficiently plead his own claim no more entitles him to an evidentiary hearing, than does his current denial of the existence of that proceeding makes it the State's burden to prove.

Regarding the actions of clemency counsel, he merely pointed to the fact that other defendants had complained about the conduct of clemency counsel. (PCR3. 232, 721-29) The conduct the other defendants complained about, however, was convincing them to withdraw a request to discharge their post conviction counsel. (PCR3. 725-29) Given these circumstances, this complaint did not even show that counsel had been ineffective in the other defendants' cases. As this Court has held, such a vague, conclusory pleading is insufficient to state a claim for post conviction relief. *Doorbal v. State*, 983 So. 2d 464, 482 (Fla. 2008). The lower court properly summarily denied this claim and should be affirmed.

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[14] While Defendant bemoans the denial of his requests for clemency records, this Court ruled in Defendant's first post conviction appeal that he was not entitled to the records. *Valle*, 705 So. 2d at 1335. Defendant has yet to explain how this ruling was improper.

IV. THE CLAIM REGARDING THE SIGNING OF THE WARRANT WAS PROPERLY DENIED.

Defendant next asserts that the lower court improperly denied his claim that it is unconstitutional for the Governor to have discretion in determining for whom to sign a death warrant. However, the lower court properly summarily denied this claim.

This Court has already held that this claim is without merit as a matter of law:

> Marek argues that Florida's clemency process, particularly the Governor's authority to sign warrants, is unconstitutional because it does not provide sufficient due process to the condemned inmate. He asserts that public records documenting that the Governor reviewed Marek's case in September 2008 without input from Marek demonstrate that he was denied due process. Marek contends that because he did not obtain the public records until April 27, 2009, he could not have raised this claim in a prior proceeding. However, Marek did raise this claim in his second successive postconviction proceeding. In that proceeding, Marek analogized the Governor's decision to sign his death warrant to a lottery and contended that Florida's clemency process was one-sided, arbitrary, and standardless. This Court rejected Marek's challenges as meritless. *See Marek*, 8 So. 3d at 1129–30 (rejecting constitutional challenge to Florida's clemency process and declining to "second-guess" the application of the exclusive executive function of clemency). The current claim raises the same legal challenge this Court previously considered.
>
> The April 27, 2009, public records do not affect this Court's prior decision. This Court did not dispute Marek's factual assertion that he was not informed of the Governor's request for information about him in September 2008 but, rather, decided that as a matter of law we would not "second-guess" the executive clemency process. Marek has not provided any authority holding that he must be provided notice

> before a death warrant is signed or that the Governor may not sign the death warrant of an individual whose death sentence is final and who has had the benefit of a clemency proceeding. In *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 118 S. Ct. 1244, 140 L. Ed. 2d 387 (1998), five justices of the United States Supreme Court concluded that some minimal procedural due process requirements should apply to clemency proceedings. But none of the opinions in that case required any specific procedures or criteria to guide the executive's signing of warrants for death-sentenced inmates. Accordingly, Marek has not provided any reason for this Court to depart from its prior decision.

Marek v. State, 14 So. 3d 985, 998 (Fla. 2009). Defendant's attempts to distinguish this case are disingenuous at best. As review of the brief filed in *Marek* show that the same claim regarding the Governor's discretion to sign a warrant were made. Initial Brief, Florida Supreme Court Case No. SC09-1080, at 34-40. Additionally, Defendant's improperly asserted allegation[15] that the alleged constitutional infirmities in the Governor's warrant signing process is exacerbated by input from the Attorney General's Office was also raised in the Marek brief and relief was denied by this Court. Given these circumstances, the lower court properly denied this claim and should be affirmed.

V. THE *LACKEY* CLAIM WAS PROPERLY DENIED.

Defendant claims that the lower court erred in summarily denying his claim that his execution is unconstitutional because

[15] This claim was attempted to be raised in the amended motion. The request to amend was denied by the lower court.

of the length of time he has spend on death row. However, the lower court properly denied this claim as untimely and meritless and should be affirmed.

Pursuant to Fla. R. Crim. P. 3.851(d), motions for post conviction relief must be filed within one year of when the defendant's conviction and sentence became final unless they are based on newly discovered evidence or a newly recognized, fundamental constitutional right that applies retroactively. Here, Defendant's claim is based on *Lackey v. Texas*, 514 U.S. 1045 (1995), a statement regarding the denial of a certiorari petition that was issued in 1995, and concerned an inmate who had been on death row for 17 years. As Defendant had also been on death row for 17 years in 1995, the claim cannot be said to be based on either newly discovered evidence or a newly recognized constitutional right that was not available until the last year. As such, the lower court properly determined that this claim was time barred. *Jimenez*, 997 So. 2d at 1064 ("To be considered timely filed as newly discovered evidence, the successive rule 3.851 motion was required to have been filed within one year of the date upon which the claim became discoverable through due diligence"); *see also Allen v. Ornoski*, 435 F.3d 946, 958 (9th Cir. 2006)(finding *Lackey* claim barred for failure to raise in initial habeas petition); *Gardner v.*

State, 234 P.3d 1115, 1143-44 (Utah 2010)(finding *Lackey* claim untimely, noting that "we have no doubt that any harm that Mr. Gardner alleges is endured uniquely by death-row inmates surely would have become apparent to him during his first fourteen years of incarceration."). It should be affirmed.

Moreover, this Court has repeatedly rejected the claim that a length of time a defendant has spent on death row renders his sentences unconstitutional. *Tompkins*, 994 So. 2d at 1085; *Elledge v. State*, 911 So. 2d 57, 76 (Fla. 2005); *Booker v. State*, 969 So. 2d 186, 200 (Fla. 2007); *Gore v. State*, 964 So. 2d 1257, 1276 (Fla. 2007); *Lucas v. State*, 841 So. 2d 380, 389 (Fla. 2003); *Foster v. State*, 810 So. 2d 910, 916 (Fla. 2002); *see also Thompson v. Sec'y for the Dep't of Corr.*, 517 F.3d 1279, 1283-84 (11th Cir. 2008); *White v. Johnson*, 79 F.3d 432, 439 (5th Cir. 1996).

In an attempt to make it seem as if this ruling was incorrect, Defendant cites to *Lackey v. Texas*, 514 U.S. 1045 (1995). However, *Lackey* and its progeny all involve statements regarding the denial of certiorari. As the United States Supreme Court has itself stated, such statements have no precedential value. *Teague v. Lane*, 489 U.S. 288, 296 (1989). Thus, the statement from *Lackey* provides no basis to overrule this Court's precedent. The claim was properly denied.

This is particularly true, as Defendant has contributed to the delay in this matter and cannot even decide whether the State has proceeded too quickly or too slowly. Defendant had his first convictions and sentences reversed because he was taken to trial too quickly. *Valle*, 394 So. 2d at 1007-09.

Moreover, Defendant's convictions and sentences have been final since 1991. The period between that time and the end of 2007 was consumed by Defendant's unsuccessful attempts to gain relief from his convictions and sentences.

In the initial, April 5, 1993 version of his first post conviction motion, Defendant complained that he had not received public records from numerous agencies, including the State Attorney's office and MDPD. (PCR-SR. 9) However, he also noted that the State Attorney had made its records available for inspection and copying in March 1993, and that State Attorney's office was in possession of MDPD's files at the time. (PCR-SR. 9 nn.2 & 3) When the first *Huff* hearing on this motion was held on August 4, 1993, the lower court was informed, without dispute, that after spending four days in March, Defendant had made no further attempt to review these files (PCT. 32-34) Moreover, the lower court was also informed that MDPD's files had been present and inspected with the State Attorney's files. (PCT. 40-41) However, Defendant insisted that he had requested to have the

files returned to MDPD and inspected again in March and that MDPD has acceded to this request in April, but Defendant had yet to inspect the files for a second time. (PCT. 39-40) Further, Defendant acknowledged that DOC's files had been copied but he had yet to pick up the copies because he planned to dispute a copying fee DOC had charged him.[16] (PCT. 35)

During the second *Huff* hearing on his first post conviction relief held on August 24, 1994, Defendant insisted that he had witnesses available to testify regarding alleged bias by the trial court at resentencing but that he should not be required to provide details about these witnesses because his allegations had to be accepted as true. (PCT. 56-65) However, after this Court remanded that claim for an evidentiary hearing, *Valle*, 705 So. 2d at 1334, Defendant insisted that he could not proceed with the hearing because he needed to investigate to determine who his witnesses would be and did not have funds to do so. (PCR2. 36-38) Even though the only thing that the lower court required Defendant to do before the start of the new fiscal year was to file a witness list and submit his witnesses for deposition (PCR2. 38-40), Defendant filed an extraordinary writ petition in this Court, insisting that he did not have funds to

[16] It appears that Defendant did not actually file the suit concerning the fee until August 1994. Complaint, Leon County Case No. 94-3963-CA (2nd Jud. Cir. Aug. 18, 1994).

provide a witness list because he did not know the identity of the witnesses he had stated would be available four years earlier, which this Court granted to the extent of extending the time periods. *Valle v. State*, 717 So. 2d 541 (Fla. 1998). Then, when the evidentiary hearing actually commenced, Defendant withdrew the claim entirely. (PCR2. 62, 152-55)

Moreover, Defendant attempted to prove that his counsel had been ineffective for presenting good prisoner evidence at resentencing by having his trial attorneys testify that they only presented the good prisoner evidence because they believed that the State would somehow be able to convince this Court to withdraw its opinion reversing the death sentence imposed after the second trial if such evidence was not presented. *Valle*, 778 So. 2d at 965-66. However, the State had argued that there was no reason to remand for a new sentencing hearing because "the model prisoner argument would be of no use to" Defendant at such a hearing in light of his escape attempt in the initial version of the supplemental brief it filed in this Court before the case was remanded.[17] Since this Court has already rejected the State's attempt to prevent a remand based on the inability to present the good prisoner evidence without opening the door to rebuttal about the escape, this theory was frivolous as this Court

[17] This Court struck this portion of the State's supplemental brief on motion by Defendant.

eventually held. *Valle*, 778 So. 2d at 965-66.

Additionally, while Defendant complains about the time between when he concluded his federal habeas proceedings and the signing of his death warrant, this time period is also fairly attributable to the defense. Defendant concluded his initial federal habeas proceedings on October 1, 2007. *Valle v. McDonough*, 552 U.S. 920 (2007). At that time, the *Baze* and *Lightbourne* litigation regarding lethal injection was ongoing. Moreover, as the attachments to Defendant's motion show, there was a manufacturing problem with sodium thiopental in 2009, which Hospira planned to remedy before it decided to cease making the drug in 2011. (PCR3. 652-54) Since Defendant is even now complaining about Florida's lethal injection protocols, the last four years of delay are also fairly attributable to the defense.

Moreover, in this proceeding, Defendant has repeatedly complained that he does not have sufficient time to litigate his claims. However, as explained in response to the individual claims, with the exception of the portion of the lethal injection claim concerning pentobarbital, these claims have been available for years. Yet, he also complains that the signing of his warrant has taken too long. Given that the delay since 1991 is attributable to Defendant and Defendant's inability to decide

whether the State is proceeding too quickly or too slowly, this claim was properly denied. *See Mendoza v. State*, 2011 WL 2652193, *14 (Fla. Jul. 8, 2011)(stating that this Court "does not sanction such jockeying of positions within the course of continuing litigation"). The lower court should be affirmed.

In an attempt to bolster his claim, Defendant makes detailed allegations about the conditions he has allegedly endured on death row and suggests they are torture. However, Defendant made no such allegation in his motion for post conviction relief. (PCR3. 246-55) Instead, he tried to add those allegations through an amended motion and was denied leave to amend. (PCR3. 1493-94) As such, these assertions are not properly before this Court. This is particularly true, as the lower court did not abuse its discretion in refusing the amendment of this claim since Defendant would have been fully aware of his living conditions at all time. *Lugo v. State*, 2 So. 3d 1, 19-21 (Fla. 2008)(leave to amend properly denied where claim could have been raised earlier). Moreover, if Defendant truly believed his living conditions were tortuous, he could, but, apparently did not challenge the conditions of his confinement through the administrative grievance and appeals process provided through the Florida Department of Corrections. See 33 FL ADC 33-103.006. The lower court should be affirmed.

VI. THE VIENNA CONVENTION CLAIM WAS PROPERLY DENIED.

Defendant finally asserts that the lower court erred in rejecting his claim that his rights under the Vienna Convention were violated. However, the lower court properly denied this time-barred, procedurally barred, insufficiently plead claim that Defendant lacked standing to raise.

Pursuant to Fla. R. Crim. P. 3.851(d), a motion for post conviction relief must be filed within one year of when a defendant's conviction and sentence became final. An exception is made for claims that are based on newly discovered evidence or a newly recognized constitutional right that has been held to apply retroactively. Fla. R. Crim. P. 3.851(d)(2)(A) & (B). Here, Defendant's convictions and sentences became final on December 2, 1991, when the United States Supreme Court denied certiorari after resentencing. *Valle v. Florida*, 502 U.S. 986 (1991). Defendant does not suggest that the Vienna Convention, which has existed since 1963, would constitute newly discovered evidence or a new constitutional right. In fact, he offers no explanation of why he could not have raised this claim earlier. Instead, he simply points to the fact that a bill has been introduced in Congress that would provide a federal remedy for alleged Vienna Convention violations and an amicus pleading filed by the federal government in a different case. However,

neither of these documents could be considered newly discovered evidence because they are not evidence at all. Moreover, these documents could not constitute a retroactive change in law under *Witt v. State*, 387 So. 2d 922, 929-30 (Fla. 1980), because they do not constitute decisions from either the United States Supreme Court or the Florida Supreme Court. This is particularly true, as the Court has just rejected the federal government's position and denied a stay of execution based on the bill. *Leal Garcia v. Texas*, 2011 WL 2651245 (Jul. 7, 2011). As such, this claim does not meet either of the exceptions to the time bar. Thus, this claim was untimely and properly denied as such. *Jimenez*, 997 So. 2d at 1064.

Even if Defendant had raised the claim on a timely basis, the lower court would still have properly denied the claim because it is also procedurally barred and he lacks standing to raise it. This Court has held that claims regarding alleged Vienna Convention violations are procedurally barred in post conviction proceeding and that individual defendants lack standing to raise the claim. *Gordon v. State*, 863 So. 2d 1215, 1221 (Fla. 2003); *Maharaj*, 778 So. 2d at 959. In *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 360 (2006), the Court held that it was constitutional for states to bar Vienna Convention claims. As such, this claim was also procedurally barred and not

cognizable. The denial of the claim should be affirmed.

Even if the claim was timely and not procedurally barred, the claim was still properly denied as insufficiently plead. To establish prejudice in a Vienna Convention claim, Defendant must show that he was unaware that he could have contacted the consulate, that he would have availed himself of the opportunity to do so had he known and that the consulate would have provided some assistance. *United States v. Esparza-Ponce*, 193 F.3d 1133, 1139 (9th Cir. 1998). Moreover, Defendant must also show that the provision of that assistance would have had some effect of his trial. *Bread v. Greene*, 523 U.S. 371, 377 (1998); *Darby v. Hawk-Sawyer*, 405 F.3d 942, 946 (11th Cir. 2005). The showing of prejudice must not be speculative. *Breard*, 523 U.S. at 377. Here, Defendant made no attempt to explain how he was prejudiced. Instead, he suggested that he has not had sufficient time to investigate this claim. However, that assertion is specious as the Vienna Convention has existed since before Defendant committed these crimes, and Defendant could have and should have presented this claim before trial. Thus, the lower court also properly denied this claim as insufficiently plead. It should be affirmed.

CONCLUSION

For the foregoing reasons, the order denying the successive motion for post conviction relief should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **BRIEF OF APPELLEE** was furnished by email and U.S. mail to Suzanne Keffer, 101 N.E. 3rd Avenue, Suite 400, Fort Lauderdale, Florida 33301, this 21st day of July 2011.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief is typed in Courier New 12-point font.

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