IN THE SUPREME COURT OF FLORIDA

NO. SC11-1387

MANUEL VALLE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

DEATH WARRANT SIGNED
EXECUTION SCHEDULED FOR
AUGUST 2, 2011 AT 6:00 P.M.

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of an order summarily denying Mr. Valle's successive Rule 3.851 motion. All other references are self-explanatory or otherwise explained herein.

REQUEST FOR ORAL ARGUMENT

Mr. Valle is presently under a death warrant with an execution scheduled for August 2, 2011 at 6:00 p.m. This Court has not hesitated to allow oral argument in other warrant cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved, as well as Mr. Valle's pending execution date. Mr. Valle, through counsel, urges that the Court permit oral argument.

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INTRODUCTION

Mr. Valle is an indigent Florida inmate under sentence of death. On June 30, 2011 Governor Rick Scott signed his death warrant. Mr. Valle's execution is scheduled for August 2, 2011. Manuel Valle's incarceration on Florida's death row began May 16, 1978, five days prior to his twenty-eighth birthday. Mr. Valle is now 61, and has been on death row for 33 years. Thirty-three years because the State of Florida repeatedly botched his trials and resentencings during his first 10 years on death row. Thirty-three years because even when his appeals and collateral proceedings had concluded, the Governor of Florida exercised his absolute discretion for some four years not to sign Mr. Valle's death warrant. Now, the Governor has changed his mind, passing over at least 50 inmates who have been through the federal appeals process. While the reasons for signing a death warrant on Manuel Valle on June 30 are not known, what is known is that the previous week, Governor Scott was criticized online and in the press for not signing a death warrant after six months in office. Also, in the months leading to Mr. Valle's warrant being signed, the victim's daughter wrote to the Governor on three occasions asking why Mr. Valle's warrant had not yet been signed. There are no standards; there is no guidance.

Furthermore, Mr. Valle has never had a clemency proceeding. There is no indication that a clemency petition or interview was completed subsequent to his

1988 direct appeal. There is no indication that Governor Scott, any previous governor or the clemency board conducted any clemency investigation pursuant to the rules currently in effect. Despite this troubling fact, the death warrant explicitly states that it has been determined that Executive Clemency, as authorized by Article IV, Section 8(a), Florida Constitution is not appropriate. Thus, the investigation, if any, would have sought input only from those individuals or agencies that have advocated for Mr. Valle's execution. By only allowing those in favor of the signing of a death warrant to speak, the process shut out Mr. Valle and those who would have advocated that a death warrant not be signed. The essential failsafe of clemency was rendered inoperable.

Exacerbating these flaws in the justice system which seeks to now execute Mr. Valle, the State of Florida intends to do so with a new drug being used for the first time in Florida. The Florida DOC intends to use pentobarbital to purportedly render Mr. Valle unconscious. However, pentobarbital has never been tested on human beings for the purpose of inducing an anesthetic coma, thereby putting an unknown variable into an already poor system. Since the signing of Mr. Valle's death warrant, two other jurisdictions have stayed executions to consider inmates' claims based on allegations substantially the same as Mr. Valle's regarding the constitutionality of lethal injection procedures employing pentobarbital. The United States District Court for the Southern District of Ohio stayed the execution

of Kenneth Smith, indicating Plaintiff Smith had demonstrated substantial likelihood of proving the unconstitutionality of Ohio's method of execution practices. *Cooey v. Kasich*, et. al., No. 2:09-cv-242 (S.D. Ohio July 8, 2011). The Court's conclusion was premised on the Ohio department of corrections policy and practice of permissible core deviations from its execution procedures or its failures with respect to the procedure altogether. Yet another U.S. district court, the District of Delaware, entered a stay of execution for Plaintiff Robert W. Jackson, III based on concerns about the State of Delaware changing one of the three drugs used in lethal injections, specifically switching from sodium thiopental, which the same judge had approved last year, to pentobarbital. *Jackson v. Danberg*, No. 06-300-SLR (D. Del. July 11, 2011). Florida is pursuing Mr. Valle's execution despite the same circumstances and concerns that have lead other jurisdictions to take pause and carefully reconsider.

Instead, the State of Florida continues to stonewall Mr. Valle by shielding itself with an incorrect and unconstitutional interpretation of public records law. The DOC's history of secrecy regarding its lethal injection procedures has long frustrated condemned inmates' efforts to discover and present facts necessary to fully evaluate the constitutionality of Florida's procedures. This secrecy has persisted and persists in Mr. Valle's proceedings despite the fact that during the past three administrations, the Office of the Governor has attempted to make the

process more transparent and open to the public. Former-Governor Bush attempted to introduce transparency and accountability into the lethal injection process with the creation of the Governor's Commission on Lethal Injection, which Governor Crist then took over. Nearly five years later, one of Governor Scott's first actions upon taking office was to issue an executive order claiming that "an open government in which decisions are made in a transparent manner is also imperative to preserving the public trust" and "all Floridians have a right to know and have access to information with which they can hold the government accountable for the management and expenditure of taxpayer dollars." Executive Order Number 11-03 (January 4, 2011). The misrepresentations and secrecy surrounding Florida executions contradicts the pronouncements of the Governor and the requirements of the DOC's own certification and procedure that the entire process be transparent.

Proceeding with Mr. Valle's execution in the face of so much doubt and confusion is a haphazard step down a path Florida could come to regret when the jurisdictions that have chosen a more measured approach have allowed the unanswered questions surrounding lethal injection to be resolved. As Florida is one of the handful of states that permits the Governor rather than the judiciary to issue death warrants, it is a haphazard step towards arbitrary death warrant decisions without the more deliberate hand of a high court surveying the legal landscape

before proceeding. It is a haphazard step away from the essential failsafe of clemency. It is a haphazard step towards the approval of proceeding with executions despite decades of delay during which the condemned lives in the ever-present shadow of death, and towards a refusal to acknowledge the Eighth Amendment implications of those decades of confinement and dread.

PROCEDURAL HISTORY

Mr. Valle was charged by indictment dated April 13, 1978, in Dade County, Florida, with one count of first-degree murder, one count of attempted first-degree murder, and one count of possession of a firearm by a convicted felon. His convictions and sentence were reversed by the Florida Supreme Court [hereinafter FSC] because the trial court abused its discretion in forcing Mr. Valle to trial within 24 days of the indictment. *Valle v. State*, 394 So. 2d 1004 (Fla. 1981) (*Valle I*).

Mr. Valle's second trial resulted in his convictions and a sentence of death. On appeal, the FSC affirmed. *Valle v. State*, 474 So. 2d 796 (Fla. 1985) (*Valle II*). The facts adduced at trial, set out in *Valle II*, fairly represent the testimony adduced at trial. However, Mr. Valle's sentence was vacated by the Supreme Court in light of *Skipper v. South Carolina*, 476 U.S. 1 (1986). *Valle v. Florida*, 476 U.S. 1102 (1986).

On remand, the FSC vacated Mr. Valle's death sentence and remanded for a

jury resentencing in light of *Skipper*. *Valle v. State*, 502 So. 2d 1225 (Fla. 1987) (*Valle III*). Mr. Valle was again sentenced to death, and the FSC affirmed. *Valle v. State*, 581 So. 2d 40 (Fla.), *cert. denied*, 502 U.S. 986 (1991) (*Valle IV*).

Mr. Valle's motion for postconviction relief was summarily denied by the trial court, and the FSC affirmed in part and reversed in part, remanding for an evidentiary hearing. *Valle v. State*, 705 So. 2d 1331 (Fla. 1997) (*Valle V).* Following the hearing, the trial court denied relief and the FSC affirmed. *Valle v. State*, 778 So. 2d 960 (Fla. 2001) (*Valle VI*). Two petitions for habeas corpus were later denied. *Valle v. Moore*, 837 So. 2d 905 (Fla. 2002); *Valle v. Crosby*, 859 So. 2d 516 (Fla. 2003), *cert. denied*, 541 U.S. 962 (2004).

On February 21, 2003, Mr. Valle filed his petition for habeas corpus relief. The State filed its response, and Mr. Valle filed a reply (DE #71). Mr. Valle's petition was subsequently supplemented and The State answered the supplemental claim. The district court denied the petition, and a timely Notice of Appeal was filed. The district court granted a certificate of appealability.

After briefing and oral argument, the Eleventh Circuit Court of Appeals affirmed the denial of habeas corpus relief. *See Valle v. Sec'y. for Dep't. Of Corrections,* 459 F. 3d 1206 (11th Cir. 2006). A timely motion for rehearing and rehearing *en banc* was denied on August 11, 2007. *Valle v. Sec'y. for Dep't. Of Corrections,* 478 F. 3d 1326 (11th Cir. 2007). On October 1, 2007, the United

States Supreme Court denied certiorari review. *See Valle v. McDonough*, 552 U.S. 920 (2007).

On June 30, 2011, Governor Rick Scott signed a death warrant. Mr. Valle's execution is scheduled for August 2, 2011. This Court held a telephonic status hearing on July 1, 2011.

On Saturday, July 2, 2011, Mr. Valle filed public records demands pursuant to Fla. R. Crim. P. 3.852(h)(3) and 3.852(i). On Tuesday, July 5, 2011 the circuit court held a second status conference. Prior to the start of the hearing, Mr. Valle filed a motion to disqualify the judge which was denied in open court. The court announced a schedule for the proceedings in circuit court, ordering Mr. Valle to file his Rule 3.851 motion by 12:00 noon on Wednesday, July 6, 2011.

Further the court announced that there would be a hearing on Mr. Valle's public records demands that same afternoon. After hours of public records litigation, the court adjusted its scheduling order, requiring Mr. Valle to file his motion by 12:00 noon on Thursday, July 7, 2011.

On July 6, 2011, Mr. Valle filed a Petition for Writ of Prohibition in the Florida Supreme Court. Upon order of the Florida Supreme Court, the State responded on that same date. The petition for writ of prohibition was denied.

Mr. Valle timely filed his successive postconviction motion pursuant to this court's schedule. On Sunday, June 10, 2011, Mr. Valle served a motion for leave to

amend with the amended postconviction motion attached. The State filed a response and opposed the amendment.

A case management conference was held on Monday, July 11, 2011. The circuit court agreed to consider Mr. Valle's amendment with respect to Claim II of the motion, but denied Mr. Valle's request to amend Claims III – VI. On the same day, the circuit court orally pronounced that the motions were summarily denied.

On July 13, 2011, Mr. Valle filed his motion for reconsideration and/or rehearing. The circuit court issued its final order denying relief and order denying reconsideration/rehearing on July 15, 2011. This appeal follows.

SUMMARY OF THE ARGUMENTS

ARGUMENT I: Mr. Valle was denied a full and fair postconviction proceeding where the circuit court abused its discretion in denying access to public records.

ARGUMENT II: The state of Florida's lethal injection statute and the recently certified procedure that the State of Florida intends to use to execute Mr. Valle create a substantial risk of harm in violation of the Florida Constitution, and the Eighth Amendment to the U.S. constitution.

ARGUMENT III: Mr. Valle was denied any clemency investigation, any assistance of counsel to prepare a clemency petition, and any clemency proceedings, contrary to Florida law. To execute Mr. Valle after the arbitrary

denial of a clemency proceeding, the supposed "fail safe" of our criminal justice system, would violate the Eighth and Fourteenth Amendments to the United States Constitution and corresponding provisions of the Florida Constitution.

ARGUMENT IV: The arbitrary and standardless power given to Florida's Governor to sign death warrants renders the Florida capital sentencing scheme unconstitutional under the Eighth and Fourteenth Amendments to the United States Constitution and corresponding provisions of the Florida Constitution.

ARGUMENT V: The State has subjected Mr. Valle to the non-judicially imposed punishment of 33 years confinement on death row with the psychological torment of living under the ever-present shadow of death. For part of that time, the State had no means of carrying out Mr. Valle's judicially-imposed death sentence, and chose instead to punish him with an indefinite term of confinement. The punishment of 33 years on death row accounts for a portion of the punishment imposed on Mr. Valle by the State, and thus reduces the degree to which penological justifications support Mr. Valle's execution. The extent to which Mr. Valle exercising his right to direct appeal and postconviction challenges accounts for the delay in his execution is irrelevant, as he cannot be made to choose between his Eighth Amendment protections against cruel and unusual punishment and the appeal and postconviction process to which he is constitutionally entitled. The United States Supreme Court in *Lackey* left it to state courts, such as this Court, to

exercise their own judgment as to the Eighth Amendment principles at issue here. Mr. Valle should not be executed while this Court defers this issue.

ARGUMENT VI: Mr. Valle was deprived of his right of consular notification under the Article 36 of the Vienna Convention on Consular Relations. Mr. Valle was never informed of his rights under Article 36 upon his arrest and never contacted or received any assistance from the Cuban government. Had he known of his rights under Article 36, he would have availed himself of his rights and it is likely that contact with his consul would have resulted in assistance to him. To allow his execution to proceed without affording him 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.

STANDARD OF REVIEW

The Constitutional arguments advanced in this brief present mixed questions of fact and law. As such, this Court is required to give deference to the factual conclusions of the lower court to the extent they are supported by supported by competent and substantial evidence. The legal conclusions of the lower court are to be reviewed independently. *See Ornelas v. U.S.*, 517 U.S. 690 (1996); *Stephens v. State*, 748 So. 2d 1028 (Fla. 1999).

A postconviction court's decision whether to grant an evidentiary hearing is subject to *de novo* review. *State v. Coney*, 845 So. 2d 120, 137 (Fla. 2003).

Because the lower court denied an evidentiary hearing, the facts presented in this appeal must be taken as true, even in a successor Rule 3.851 proceeding being considered during the pendency of a death warrant. *Lightbourne v. State*, 549 So. 2d 1364, 1365 (Fla. 1989); *Scott v. State*, 657 So. 2d 1129, 1132 (Fla. 1995); *Roberts v. State*, 678 So. 2d 1232, 1235 (Fla. 1996).

ARGUMENT

ARGUMENT I: MR. VALLE HAS BEEN DENIED ACCESS TO PUBLIC RECORDS TO WHICH HE IS ENTITLED, IN VIOLATION OF FLA. R. CRIM. P. 3.852, AND FLA. STAT. § 119.

Mr. Valle sought public records pursuant to Florida Statutes Chapter 119 and Florida Rule of Criminal Procedure 3.852(h)(3) and (i). *See Ventura v. State*, 673 So. 2d 479 (Fla. 1996); *Muehleman v. Dugger*, 634 So. 2d 480 (Fla. 1993); *Walton v. Dugger*, 634 So. 2d 1059 (Fla. 1993); *Mendyk v. State*, 592 So. 2d 1076 (Fla. 1992); *State v. Kokal*, 562 So. 2d 324 (Fla. 1990); *Provenzano v. Dugger*, 561 So. 2d 541 (Fla. 1990). This Court has ruled that collateral counsel must obtain every public record in existence regarding a capital case or else a procedural default will be assessed against the defendant. *Porter v. State*, 653 So. 2d 375 (Fla. 1995), *cert. denied* 115 S. Ct. 1816 (1995).. However, a concomitant obligation under relevant case law as well as Chapter 119 rests with the State to furnish the requested materials. *Ventura v. State*, 673 So. 2d 479 (Fla. 1996).

Within two days of the death warrant being signed, Mr. Valle sent demands for public records pursuant to rule 3.852(i) to the Department of Corrections, the Office of the Attorney General, the Office of the Governor, and FDLE seeking information in support of his Eighth Amendment lethal injection claim and the newly released lethal injection procedures. Specifically, Mr. Valle sought records from these agencies in an effort to obtain information including, but not limited to, the change of drugs, how the drugs are obtained, and how the new procedures will be carried out, in addition to requesting information regarding the five previous executions. The agencies raised blanket objections, as they always do, that the detailed requests were irrelevant, overly broad, and unduly burdensome.[1] The

[1] The DOC's repeated stonewalling is best demonstrated in its failure to timely disclose the existence of new procedures. The DOC's repeated protestations that the procedure had not been changed were disingenuous, at best. Amended Motion at 13-15. Despite efforts to obtain information regarding the lethal injection procedures, the DOC played a game of hide-and-seek and refused to provide any information, all the while misleading the courts regarding the status of the procedures.

Mr. Valle has learned through public records disclosed by the Governor's Office that DOC had in fact provided the media with a copy of the new procedures as early as Februrary 1, 2011. (Attachment D and E, Amended Motion). Prior to DOC's disclosure to the media, there had been no acknowledgement that a new procedure existed. In fact, in an email, the Governor's Office acknowledged that it had instructed the DOC not to respond to media inquiries regarding switching to another lethal injection drug. (Attachment F , Amended Motion). These emails demonstrate an effort to keep any change in the procedure secret, until such time as the State felt it was necessary to have a procedure in place. None of the records received from the DOC or the Governor's Office demonstrate any ongoing research or editing between the date of the December 2010 "draft" and the June 8,

lower court found the records were irrelevant, in large part, and denied the requests, particularly with respect to records which would support those claims the court found to be insufficiently pled.

As a result of the denial of public records, the lower court concluded that Mr. Valle's allegations with respect to his lethal injection challenge were vague, speculative and conclusory.[2] However, the court ignores the fact that Mr. Valle cannot plead this claim more fully without access to relevant public records. The DOC and other relevant state agencies have —despite repeated requests—refused to disclose **any** records regarding a new procedure, the change in drugs, how or where the drugs came from or the previous five executions. This refusal to disclose information, and the courts' acquiescence, has prevented Mr. Valle from being able to more fully plead his claim. However, when the State's inaction in failing to

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2011 procedure. Despite the fact that DOC released the procedure to the media, it continued to misrepresent to numerous courts that such procedures did not exist.

There is simply no justification for any state agency to keep the ongoing development of new execution procedures a secret. Given that DOC counsel was aware of the existence of the "draft," and had in fact disclosed the procedure to the media, the repeated argument to the contrary was a dilatory tactic. It can only be said that the final document was completed as of December 29, 2010, and DOC failed to disclose it after repeated requests to do so. The State's failure to be candid with the courts and to disclose the documents to Mr. Valle and other capital litigants was a dilatory tactic designed to ensure the State an advantage in the litigation regarding the new procedure.

[2] Mr. Valle maintains that he set forth sufficient facts to warrant an evidentiary hearing. See Argument II.

disclose public records results in a capital post conviction litigant's inability to fully plead claims for relief, the State is estopped from claiming that the post conviction motion should be denied or dismissed. *Ventura v. State,* 673 So. 2d 479 (Fla. 1996). ("The State cannot fail to furnish relevant information and then argue that the claim need not be heard on its merits because of an asserted procedural default that was caused by the State's failure to act"). Mr. Valle and other capital litigants have been stonewalled by the State's and the DOC's repeated objections.

In *Sims v. State,* 753 So. 2d 66, 72 (Fla. 2000), Justice Anstead cautioned that "We need to be very careful that we not end up with an outcome where a death-sentenced defendant, whose life may literally be affected, is barred from enforcing his constitutional right as a citizen to access to public records that any other citizen could routinely access." (Anstead, J. concurring). Yet, this is exactly what is occurring in Mr. Valle's case. Justice Anstead had earlier emphasized that "[t]rial courts must be mindful of our intention that a capital defendant's right of access to public records be recognized under this rule" because "[i]f there is any category of cases where society has an interest in seeing that all available information is disclosed, it is obviously in those cases where the ultimate penalty has been imposed." *In re Amendment to Florida Rules of Criminal Procedure-Capital Postconviction Pub. Records Prod.,* 683 So. 2d 475, 477 (Fla. 1996). Furthermore, Justice Anstead acknowledged assurances from the State and its

agencies that they will essentially follow an "open file" policy. *Id.* This promise has been not been fulfilled. Instead, these agencies have continuously shielded themselves with a harsh and unconstitutional interpretation of Fla. R. of Crim. P. Rule 3.852 to avoid turning over to capital defendants, including Mr. Valle, the information he needs to fully plead his lethal injection claim.

On July 8, 2011, the United States District Court for the Southern District of Ohio stayed the execution of Kenneth Smith, indicating Plaintiff Smith had demonstrated substantial likelihood of proving the unconstitutionality of Ohio's method of execution practices. *Cooey v. Kasich*, 2011 WL 2681193 (S.D. Ohio July 8, 2011). The Court's conclusion was premised on the Ohio department of corrections policy and practice of permissible core deviations from its execution procedures or its failures with respect to the procedure altogether. Significantly, in the Ohio litigation, Mr. Smith was able to prove a substantial likelihood of success due in part to the fact that Mr. Smith and the State of Ohio engaged in meaningful disclosure of public records and meaningful discovery. Mr. Smith learned through discovery numerous details including information about the execution team members, their qualifications, which team members were involved at particular executions, the licenses and registration requirements, and which team members possess those, for receiving ordering, possessing and distributing controlled substances, and where particular execution drugs were obtained. *Cooey* at 5-7. Mr.

Smith was able to take testimony from numerous team members including those whose identity was protected. It is obvious from the facts set forth in the opinion, *Cooey* at 7-34, that Mr. Smith received documentation, logs and checklists from previous executions and training sessions, applications for membership on the execution team, team members' certifications and sign-in sheets for training/rehearsal sessions, and order forms for execution chemicals. These are precisely the type of records Mr. Valle requested in his Rule 3.852(i) demands to the DOC, the FDLE, the AG and the Governor's Office and which are relevant to the claims set forth here. The opinion of the United States District Court demonstrates just how relevant these records are. *See also Walker v. Humphrey*, 08-V-1088 (Ga. Superior Ct. July 19, 2011) (finding that there are many facts relevant to the constitutionality of the State's execution process that it has refrained from disclosing to those who seek to challenge it and granting petitioner's request to gather further evidence relevant to this claim).

In light of the foregoing, the lower court's denial of access to public records was an abuse of discretion. Mr. Valle is challenging the method of execution and he has met the minimal requirement of establishing that the records sought are relevant, i.e., have something to do with the subject matter of lethal injection, or will lead to the discovery of admissible evidence.

<u>ARGUMENT II</u>: THE STATE OF FLORIDA'S LETHAL INJECTION STATUTE, FLA. STAT. § 922.105, AND THE EXISTING PROCEDURE 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

The State of Florida intends to execute Mr. Valle with a new drug being used for the first time in Florida. The Florida DOC intends to use pentobarbital to purportedly render Mr. Valle unconscious. However, pentobarbital has never been tested on human beings for the purpose of inducing an anesthetic coma. The use of pentobarbital in the lethal injection drug sequence introduces an unknown variable into an already deficient system. Alarmingly, the State of Florida is experimenting with Mr. Valle's life, just as the State of Georgia experimented with Roy Willard Blankenship's life, in what can only be called a failure.

The substitution of a new drug is not inconsequential. There are serious concerns with the DOC's choice of pentobarbital for use as an anesthetic: unlike sodium thiopental which is widely used in surgical settings, pentobarbital has never been tested on human beings for the purpose of inducing an anesthetic coma. Pentobarbital has not been FDA-approved for the induction of anesthesia, has no relevant clinical history, and has no relevant clinical reference doses by which to determine an appropriate dosage for a clinically adequate depth of anesthesia to avoid the excruciating pain caused by an injection of potassium chloride. The combination of these significant unknowns with the inadequate implementation of

procedural safeguards puts Mr. Valle at a substantial risk of serious harm.

As this Court is well aware, in 2008, the U.S. Supreme Court laid out the legal standard that governs Eighth Amendment challenges to methods of execution. *Baze v. Rees*, 128 S. Ct. 1520 (2008). That standard requires a condemned inmate to establish that a method of execution will cause a "substantial risk of harm." *Id.* at 1531.[3] The most vital component of the lethal injection procedure that safeguards against the risk of infliction of gratuitous pain is a reliable method by which to ensure that the condemned inmate is sufficiently sedated. In *Baze*, the use of sodium thiopental as an anesthetic rendered Kentucky's procedures constitutional. Similarly, this Court in *Lightbourne v. McCollum*, 969 So. 2d 326 (Fla. 2007) found that the most constitutionally significant of the three drugs used in the procedures was sodium thiopental, the ultra short-acting anesthetic, because "it was undisputed that if pancuronium bromide or potassium chloride [ ] are injected into a conscious person, significant pain would result from each of the chemicals." *Id*. at 344-45. Simply put, the sodium thiopental was an indispensible part of the process.

[3] At least twice in its order, the lower court incorrectly states the standard for evaluating method of execution challenges as a "substantial likelihood of serious harm." (Order at 19 and 22). In both instances, the court states that as the standard by which Mr. Valle must make his claim and indicates that he has failed to demonstrate a likelihood of harm. This is a heavier burden than that required by *Baze*.

Significantly, the only U.S. maker of sodium thiopental, Hospira, Inc., ceased production of the drug because the company simply could not prevent prisons in the U.S. from using the drug during the course of executing human beings. Hospira took the drastic step after years of mailing letters to each state that used the drug in the course of executions, including Florida, setting forth moral and ethical objections to the use of its product in executions. Nathan Koppel, *Drug Halt Hinders Executions in the U.S.*, The Wall Street Journal (Jan. 22, 2011). The world-wide shortage of sodium thiopental sent U.S. prisons scrambling to find a new supply of the drug. The State of Florida was left without means to obtain sodium thiopental and has abandoned its use.

On June 8, 2011, the FDOC formally changed its lethal injection procedures, substituting pentobarbital (Nembutal) for sodium thiopental for use as an anesthetic before the introduction of pancuronium bromide and potassium chloride. Pentobarbital is a short-acting barbiturate approved by the Food and Drug Administration (FDA) for the treatment of seizures, preoperative (and other) sedation, and use as a hypnotic. Although both drugs are classified as barbiturates, pentobarbital and sodium thiopental are not interchangeable.

Mr. Valle alleged in the his Rule 3.851 motion that he consulted with Dr. David Waisel, pediatric anesthesiologist and Associate Professor of Anaesthesia, Harvard Medical School. Dr. Waisel reviewed the June 8, 2011 lethal injection

procedures and rendered an opinion about the risk they pose to Mr. Valle. According to Dr. Waisel, pentobarbital has not been FDA-approved for the induction of anesthesia, has no relevant clinical history, and has no relevant clinical reference doses by which to determine an appropriate dosage for a clinically adequate depth of anesthesia to avoid the excruciating pain caused by an injection of potassium chloride. (Attachment O, Amended Motion). Unlike pentobarbital which has never been considered an agent to induce anesthesia, sodium thiopental has a long history of being used for clinical induction of anesthesia in healthcare and for induction of anesthesia for lethal injection.[4] Dr. Waisel emphasized that the "combination of significant unknowns from a lack of clinical history related to using pentobarbital to induce anesthesia, inadequate implementation of procedural safeguards and a cavalier attitude toward lethal

[4] The package inserts for the two drugs reflect these differences:

> The package insert for PENTOBARBITAL declares that pentobarbital may be used in the parenteral form for sedatives, hypnotics for short-term treatment of insomnia, preanesthetics (essentially sedatives) and anticonvulsants. Contrast the pentobarbital FDA package insert with the SODIUM THIOPENTAL package insert which explicitly states that sodium thiopental is approved for use as a sole anesthetic or to induce anesthesia.
>
> The pentobarbital package insert also states **"There is no average intravenous dose of NEMBUTAL Sodium Solution (pentobarbital sodium injection) that can be relied on to produce similar effects in different patients.**

(emphasis added) Report of Dr. Waisel at 5-6.

injection puts the inmate at risk for serious undue pain and suffering." Expert Report of David B. Waisel, M.D. at 3.

This risk turned into a reality during Georgia's first execution using pentobarbital. It was reported that during the June 23, 2011 execution of Roy Blankenship, Blankenship repeatedly jerked his head, made a "startled face," blinked rapidly, and mouthed words for about three minutes after the injection of pentobarbital. Blankenship "grimaced, gasped, and lurched twice toward his right arm." His eyes opened and remained open throughout the execution. (Expert Report of Dr. David Waisel). The pentobarbital did not work as the state claimed it would work.[5] Just as the Georgia Department of Corrections experimented on Mr. Blankenship, so too is the Florida DOC experimenting on Mr. Valle to determine the efficacy of pentobarbital, the effects of which are unknown when used for this purpose.

Additionally, on July 1, 2011, the New York Times reported that Lundbeck, Inc., the sole manufacturer of pentobarbital, issued a position paper publically condemning the misuse of its product for executions by lethal injection and instituting restricted distribution procedures to ensure that U.S. prisons will not be

[5] "There is no way to know, in any given case, how a massive dose of pentobarbital will affect a human patient, because it has not been tested to any remotely sufficient degree to be able to say. The way Blankenship reacted to the injection of pentobarbital may be indicative of how many human beings will react." (Report of Dr. Waisel at 4).

able to obtain the drug for use in executions. David Jolly, *Danish Company Blocks Sale of Drug for U.S. Executions*, New York Times (July 1, 2011). The company also stated that "The use of pentobarbital to carry out the death penalty in US prisons falls outside its approved indications. Lundbeck cannot assure the associated safety and efficacy profiles in such instances. Lundbeck does not promote pentobarbital for use as part of lethal injections and is doing everything in its power to put an end to this misuse." Lundbeck's position regarding the misuse of pentobarbital in execution of prisoners, *available at* http://www.lundbeck.com/Media/pentobarbital.asp (last visited July 2, 2011). Lundbeck sent letters affirming its position to all of the DOCs and Governors in states which had declared their intention to use pentobarbital to execute prisoners, including Florida. The first letter addressed their general concerns about the use of Lundbeck's drugs in executions, the second addressed the medical efficacy and safety issue. Florida has never disclosed these letters despite requests for them.

The circuit court dismissed Lundbeck's concerns. Contrary to the lower court's assertion that Lundbeck simply does not want its drug used in executions, Lundbeck's position is clearly one of concern for the safety and efficacy of pentobarbital as an anesthetic component in lethal injection executions. Furthermore, there has never previously been evidence of an explicit warning from the manufacturer of the drug to be used as an anesthetic that the drug is unsafe for

judicial lethal injections. Therefore, Lundbeck's position is legally relevant as it is newly discovered evidence that Florida's lethal injection procedures violate the Eighth Amendment.

While Hospira, Inc., ceased production of the drug because of similar concerns about its use during the course of executing human beings, at least the sodium thiopental was approved by the FDA for anesthesia.

As stated previously, the shortage of sodium thiopental sent departments of corrections across the nation scrambling to find a new supply of the drug; public records obtained in other states reveal that a number of states violated federal law and illegally imported the drug.[6] To this day, the FDA has never confirmed the

[6] The United States Drug Enforcement Administration (DEA) has seized sodium thiopental from the Kentucky, Georgia, and Tennessee Departments of Corrections over concerns about whether the drugs have been illegally imported from overseas. Nathan Koppel, *Two States Turn Over Execution Drug to U.S.*, Wall Street Journal (April 1, 2011). The State of Georgia illegally obtained the sodium thiopental from Dream Pharma Ltd., a small mom-and-pop run pharmaceutical company based out of London, England. Similarly, counsel for Kentucky death row inmate Ralph Baze discovered through public records that the Kentucky Department of Corrections has recently purchased sodium thiopental from a Georgia company called "Correct Health," on the recommendation of the Georgia Department of Corrections. Based on the information obtained as a result of the public records requests, it appears that the sodium thiopental that Correct Health sold to the Kentucky DOC may have been part of the same supply of sodium thiopental that the DEA seized from the Georgia DOC over concerns that it was illegally obtained. The Nebraska DOC recently purchased a drug from Kayem Pharmaceutical Pvt. Ltd., and Indian pharmaceutical company. Kevin O'Hanlon, *Company says it no longer will sell drug for lethal injection*, Lincoln Journal Star (April 7, 2011).

safety of the imported thiopental. The records litigants have received in other states are exactly the type of public records Mr. Valle has sought from the Florida DOC.[7] The lower court denied his request and now determines that Mr. Valle provided no support for the allegation that sodium thiopental and pentobarbital was illegally obtained or from a foreign country. This places Mr. Valle in a catch-22 in pleading his claim. The lower court also believes that it is irrelevant from where the sodium thiopental was obtained, because no executions occurred in Florida during the shortage of the drug. This ignores entirely Mr. Valle's argument that the fact that DOC has obtained any of the drugs illegally cast doubt on the presumption that they will carry out their duties in a humane and competent manner. Rather, it demonstrates that DOC will carry out an execution at all costs.

Two Texas death row inmates have filed a lawsuit alleging that the Texas Department of Public Safety used the Drug Enforcement Administration registration number of a hospital that has been closed since 1983 to purchase all the drugs called for in its lethal injection protocol, including sodium thiopental and now pentobarbital, in violation of state and federal law. Mike Ward, *Complaint says execution drugs procured illegally*, American Statesman (March 30, 2011). Finally, a group of death row inmates from Arizona, California, and Tennessee recently filed a federal lawsuit in the U.S. District Court in the District of Columbia questioning the use of imported drugs: "The imported thiopental in question has not been listed with the FDA, was manufactured by foreign companies that have not registered with the FDA, and was exported by a wholesaler located in the United Kingdom." *Id*.

[7] Mr. Valle requested purchasing orders, prescriptions, contracts, invoices, bills, payments, emails, letters, or any other communication relating to the procurement of sodium thiopental, pentobarbital, pancuronium bromide and potassium chloride.

According to Lundbeck, the company has never sold the drug directly to any U.S. prison. This begs the questions: From whom did the DOC obtain the drug? Was it obtained using subterfuge? Did the DOC comply with federal and state rules and regulations given the fact that pentobarbital Schedule II substance with a high potential for abuse? An execution carried out by state actors that have violated the law violates Florida's promise of due process under article I, section 9 of the Florida Constitution. *State v. Glosson*, 462 So. 2d 1082, 1085 (Fla. 1985). Indeed, *Baze* itself was predicated on the presumption that the individual actors were acting in accordance with the law.

The fact that various states have obtained the drugs for use in execution in an illicit manner threatens the integrity of the entire judicial system. *State v. Williams*, 623 So. 2d 462, 467 (Fla. 1993) (quoting *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting)). It also certainly casts doubt on the judgment of those involved in the process and casts doubt on whether the DOC is carrying out their procedures as promised: in a humane and competent manner. The DOC —despite repeated requests—has refused to disclose **any** records regarding how or from where their lethal injection drugs were obtained. This stubborn secrecy has prevented Mr. Valle from being able to plead this claim more fully. See Argument I. Moreover, DOC arbitrarily chooses to whom, when and how it will disclose such records. Although the DOC has never claimed any

exemptions in response to public records requests submitted by Mr. Valle or other condemned inmates pursuant to Fla. R. Crim. P. 3.852, and has never submitted any records under seal claiming any exemptions, when a reporter for the Orlando Sentinel recently attempted to obtain the "vendor history" for the DOC's supply of sodium thiopental, the DOC claimed that such records are "confidential." Anthony Colarossi, *Company urged Florida not to use its drug in execution 'cocktail,'* Orlando Sentinel (February 21, 2011). The DOC's response indicates that such records exist, as common sense says they would: it is absurd to think that the drugs simply appeared at the DOC's front door without any record of how they were obtained. The same holds true for pentobarbital. Yet, it remains unknown from whom, or in what manner, the DOC has obtained the sodium thiopental, pentobarbital, or the other two drugs that have been and will be used to carry out executions.

The concerns about the efficacy of pentobarbital as an anesthetic and the safety of any illicitly obtained drugs combined with deficiencies in Florida's lethal injection procedures create a recipe for disaster. The most critical aspects of Florida's lethal injection process—specifically, the administration of the drugs, the assessment of consciousness, and the monitoring of the inmate for consciousness throughout the procedure—remain inadequate to protect against a substantial risk of harm. It bears repeating that this Court found it undisputed that if pancuronium

bromide or potassium chloride were injected into a conscious person, "significant pain would result." *Lightbourne*, 969 So. 2d at 344-35. Yet, the June 2008 procedures require that the administration of the three drugs be performed by an executioner who has no medical training and may be as young as eighteen-years-old. The assessment of the inmate's consciousness is then performed by a prison warden whose only medical training is that required of any correctional officer. Additionally, the monitoring of consciousness throughout the procedure is performed from another room via a television monitor by personnel of unknown qualifications and background.

There are also problems inherent in the training and qualifications required in the procedures. The DOC's lethal injection procedures specify that the warden will select the team member(s) responsible for achieving and monitoring the peripheral venous access. The procedures' list of acceptable members include phlebotomists. According to Dr. Waisel, the competency to insert an intravenous catheter and properly monitor the catheter after insertion are neither expected nor required of phlebotomists. Report of Dr. Waisel at 7. "Although the other types of individuals (such as registered nurses, licenses practical nurses, nurse practitioners, paramedics, emergency medical technicians, physicians and physician assistants) may have certifications consistent with intravenous catheter insertions and assessment, there is no requirement of evidence of recent practice or competency

in these skills." Id. Dr. Waisel noted similar concerns regarding the lack of training, experience, skill and certification for obtaining central venous access and performing a surgical cut down for venous access. Report of Dr. Waisel at 7-8. The DOC has refused to disclose any meaningful information about the qualifications, experience, and training of the execution team members.

Additionally, Dr. Waisel detailed in his report his serious concerns about the inadequacy of monitoring for patency of the intravenous line, pointing out the risk of such inadequacies. Report of Dr. Waisel at 8-9.[8] Finally, Dr. Waisel warned that there are serious issues with the adequacy of monitoring for continuing consciousness of the condemned inmate after the pentobarbital is injected, "**particularly in light of lack of information available about how fast pentobarbital takes effect in a lethal injection scenario**" (Report of Dr. Waisel at 9)(emphasis added). Because there are "gradations of consciousness and anesthesia…an inmate may appear unconscious but may be able to perceive pain

[8] As pointed out by Dr. Waisel, the package insert for pentobarbital states:

> "Parenteral solutions of barbiturates are highly alkaline. Therefore, extreme care should be taken to avoid perivascular extravasation or intra-arterial injection. Extravascular injection may cause local tissue damage with subsequent necrosis; consequences of intra-arterial injection may vary from transient pain to gangrene of the limb. Any complaint of pain in the limb warrants stopping the injection."

Report of Dr. Waisel at 9.

or may have some awareness." (Id.) Thus, "unqualified individuals are very likely to miss subtle signs of inadequate anesthesia that highly qualified, certified individuals will recognize." (Id.) These continuing deficiencies combined with the addition of a new anesthetic of questionable efficacy undoubtedly create a substantial risk of harm.

The lower court faults Mr. Valle's expert because "he also was not provided with any information from the five (5) successful executions which used the April 8, 2008 protocol" Order at 18. The court fails to recognize that Mr. Valle sought records pertaining to the last five executions by lethal injection[9] and the court, granting objections from the DOC and the FDLE, denied Mr. Valle's request. While the court characterizes the previous executions as "successful", without the records, neither the court nor Mr. Valle have any evidence that the five previous executions were "successful." Ironically, the circuit court's concern that Dr. Waisel was not provided with these records proves Mr. Valle's position that the records sought are relevant to his claim.

Mr. Valle alleged in his postconviction motion, that Florida has a unique

[9] Mr. Valle requested public records, including notes, memoranda, letters, electronic mail, and facsimiles, relating to the executions by lethal injection of Mark Dean Schwab, Richard Henyard, Wayne Tomkins, John R. Marek, and Martin Grossman and argued these records were necessary for Mr. Valle to review to determine whether any problems—caused by counterfeit or ineffective drugs, or otherwise—occurred in these executions.

history of deviating from written execution procedures. *See, e.g., Davis v. Florida*, 742 So. 2d 233 (Fla. 1999) (relying on the presumption that DOC will properly perform its duties but expressing concern with respect to the electric chair that "**once again**. . . there is an indication that [the Florida Department of Corrections] has not followed the protocol established for the appropriate functioning of the electric chair and carrying out of the death penalty."); *Provenzano v. Moore*, 744 So. 2d 413 (Fla. 1999) (detailing the subsequent bloody execution of Allen Lee Davis, only a week after his challenge was denied). This history remains relevant no matter what new written procedures are established or what drugs are used. The Angel Diaz execution continues to be relevant and significant because it demonstrated once again that although a state may have a written protocol in place that contains a myriad of safeguards, if the people carrying out the execution choose not to follow the protocol, its existence does little to mitigate the risk of harm. The individual cases illustrate a repeated failure of the Department of Corrections personnel to do what they say they are going to do whether in the context of the electric chair or lethal injection.

In *Baze*, the U.S. Supreme Court reiterated 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.'" *Baze v. Rees*, 553 U.S. 35, 50

(2008) (citing *Farmer v. Brennan*, 511 U.S. 825, 842 (1994)). However, deviations from the procedure demonstrate that problems with any one execution are not an unforeseeable or isolated mishap.

Again the lower court concludes that there is no allegation that the DOC failed to follow its protocols in the executions of Tompkins, Henyard, Schwab, Grossman and Marek. (Order at 21). Relying on the Diaz execution, where it is well settled that the DOC did not follow its procedures, Mr. Valle alleged that the DOC has a history of not following its procedures. But again, Mr. Valle is being denied the very records that would afford him the opportunity to fully plead this relevant postconviction claim.

Evidence that the DOC is deviating from its procedures when it deems necessary supports Mr. Valle's Eighth Amendment claim. It flies in the face of reason for Mr. Valle to idly stand by and accept the representations of the State and the DOC that they follow their procedures and that there have been no problems with the five executions since Diaz, particularly given the DOC's repeated efforts to conceal the promulgation of a new procedure and a new drug from those to whom that information is most relevant. The fact that DOC is likely to conduct an execution inconsistent with its procedure is evidenced by the fact that it has stated publicly that it believed it could be ready to conduct a humane and competent execution even in the face of its repeated assertions that it was rewriting the

procedure and considering a new drug, thereby representing that no procedure was in place. Mr. Valle attached to his amended 3.851 motion the emails evincing this flawed reasoning. (Attachment C, Amended Motion). Regardless of whether the DOC had a procedure or not, it stated that it thought it could conduct a humane execution at any time.

Mr. Valle alleged that the lethal injection procedures themselves require, at a minimum a bi-annual review that must take into consideration: available medical literature, legal jurisprudence and the protocols and experience from other jurisdictions. *See* August 1, 2007 Execution by Lethal Injection Procedures, p. 13, 15. The DOC is then required to certify to the Governor that the DOC is adequately prepared to conduct an execution. There is no evidence that DOC complied with its own directive: Mr. Valle has not seen any documents that indicate that DOC conducted the required review between April 2008 and the signing of the June 8, 2011 procedure. There is no evidence that the DOC conducted any research into the efficacy of pentobarbital, nor any other medical research. Without the necessary review required by its own procedures, the certification is rendered utterly meaningless.

The lower court acknowledged Mr. Valle's argument that Florida's continued use of lethal injection violates evolving standards of decency, but failed to understand its significance. The Secretary's certification promises that the

procedure has been reviewed and "is compatible with evolving standard of decency that mark the progress of a maturing society." It is obvious from the facts pled in Mr. Valle's postconviction motion that the Secretary is simply paying lip service to this phrase.

It is striking that when faced with the inability to obtain the sodium thiopental—which is an indispensible component of the lethal injection procedure—due to the ethical and moral concerns of the manufacturer, prison officials and state authorities across the country failed to take pause and question whether the process itself met the evolving standards of decency that mark the progress of a maturing society. Rather than addressing the moral and ethical concerns of misusing the anesthetic, Florida Attorney General Pam Bondi joined other states in writing U.S. Attorney General Eric Holder and begging for assistance in getting the drug.[10] The international moral and ethical pressures on U.S. prisons to stop misusing and abusing sodium thiopental should have caused DOC officials to question whether "evolving standards of decency" might be a consideration. In *Roper v. Simmons*, the U.S. Supreme Court considered international opinion when it recognized that the execution of juveniles violates the

[10] Mr. Valle and other inmates have never been provided this correspondence by the Attorney General's Office despite requests for such emails and despite the fact that this correspondence demonstrates that the State of Florida had no legal method of execution in place absent the sodium thiopental.

Eighth Amendment prohibition against cruel and unusual punishment:

> The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.

Roper v. Simmons, 125 S. Ct. 1183 (2005). Sodium thiopental was discontinued under pressure from the Italian drug manufacturers. Now, U.S. prisons are facing similar scrutiny from Danish pharmaceutical companies. Evolving standards of decency under the Eighth Amendment and Florida's **own written protocol** require at least the consideration of international opinion in determining whether the method of execution is cruel and unusual punishment. "[F]rom the time of the Court's decision in *Trop,* the Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of "cruel and unusual punishments." *Id.* at 1198. Although this Court has previously declared Florida's lethal injection procedures constitutional in *Lightbourne v. State*, 969 So. 2d 326 (Fla. 2007), standards have evolved and new evidence has been gathered and developed that calls into question that decision.

The lower court relies on three federal court cases to summarily deny Mr. Valle's lethal injection challenge. The court's reliance on these cases is misplaced. First, the court relies on *Pavatt v. Jones*, 627 F. 3d 1336 (10th Cir. 2010). Inmate Jeffrey Matthews was scheduled to be executed on August 17, 2010. When the

department of corrections announced, on the eve of Mr. Matthews's execution, its intent to switch to pentobarbital as the first drug, Matthews moved for a stay of execution and to intervene in *Pavatt v. Jones*, Case No. 10-141-F (W.D. Okla. 2010). Significantly, though overlooked by the circuit court, the motions were **granted.** Matthews was given the opportunity to conduct discovery and file an expert report. Despite its reliance on *Pavatt*, the circuit court denied Mr. Valle a similar opportunity to conduct discovery and litigate the issue at an evidentiary hearing.

The lower court also relied on the Oklahoma district court's credibility findings of Dr. Mark Dershwitz, the anesthesiologist retained by the Oklahoma department of corrections. Such reliance on credibility findings made by another judge in a foreign jurisdiction is improper. Not only was the circuit court not able to gauge the witness's credibility, but Mr. Valle had no opportunity to refute those findings or challenge Dr. Dershwitz's credibility. The reliance on Dr. Dershwitz establishes that there are material facts in dispute which require resolution at an evidentiary hearing. The circuit court's summary denial of Mr. Valle's claim amounts to an "evidentiary hearing on paper," conducted without due process or an opportunity for Mr. Valle to be heard.

In any event, the findings of the district court in Oklahoma have little bearing on Mr. Valle's claim regarding Florida's lethal injection procedures.

Oklahoma's lethal injection procedures differ from Florida's in at least one striking respect. The district court opinion cited by the lower court illustrates that the Oklahoma procedures require an **attending physician** to assess consciousness of the inmate after administration of pentobarbital. Florida's procedure, whereby an unqualified team member assesses consciousness, lacks this significant additional safeguard.

Additionally, the lower court erroneously relies on *Powell v. Alabama*, 641 F. 3d 1255 (11th Cir. 2011). Certainly, Florida's procedures were not upheld in Powell as the lower court suggests. Rather, *Powell* rested on the simplistic factual determination that the Alabama Department of Corrections simply substituted one barbiturate for another. Mr. Valle has pled numerous facts detailing the differences between the two drugs and the significance of those differences to his claim. *Powell* can also be distinguished because, while Florida has earned a reputation for botching executions, Alabama, at least at the time of the Eleventh Circuit's decision in *Powell*, had not. Since then, however, Mr. Powell himself had the unfortunate distinction of becoming Alabama's first botched execution by lethal injection using pentobarbital.[11] Mr. Valle, provided the court with a detailed expert

[11] A witness reported that after the start of the execution:

> Mr. Powell violently jerked his head up off the gurney, his eyes were wide open and looked galzed and confused, He seemed to be looking and turned his head from side to side. His jaw muscles seemed to

report explaining how the addition of pentobarbital, "an untested and likely problematic drug whose own manufacturer has warned about its unreliability for use in lethal injections into an already dysfunctional and dangerous system," creates a substantial risk of serious harm. Report of Dr. Waisel at 8.

Similarly, in *Beaty v. Brewer*, 2011 WL 2050124 (D.Ariz.2011), also relied on by the circuit court, the facts at issue were not the same as those alleged by Mr. Valle. The petitioners in *Beaty* argued that the execution team did not have the time necessary to adequately train for the use of pentobarbital. They did not

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> clench. He appeared to be in pain. He lay his head back down, but his eyes still appeared to be slightly open. Because we were seated in an observation room to on Mr. Powell's side, it was difficult to tell how long this lasted, but his eyes appeared to remain open in this position for quite awhile.

Affidavit of Christine A. Freeman, attorney and Executive Director, Middle District of Alabama Federal Defender Program, Inc. A second witness reported:

> About a minute or so after he closed his eyes, Mr. Powell raised his head abruptly. He appeared to be attempting to sit up, and was pressing against the restraints. He then lookd to his left and then downward. He appeared to be looking down at the chaplain, and had a look of confusion on his face. He also appeared to be clenching his teeth, and his blood appeared to be pumping quite strongly. I could see his neckartery expanding and contracting, and blood apparently pumping into his face. In the intensity of the moment, I looked only at Mr. Powell's face, and thus am not aware if the arterires in his arms were pumping similarly. All of this lasted for approximately a minute. After about a minute, Mr. Powell's jaw and neck muscles flexed a few last times, before his eyes closed and his head again laid back down.

Affidavit of Matt D. Schultz, Assistant Federal Defender, Federal Defender Office for the Middle District of Alabama.

challenge the efficacy of the new drug when used to execute human beings, as Mr. Valle does here.

Apparently considering stay and certiorari denials to be binding authority, the lower court states: “Surely the U.S. Supreme Court would not have allowed Beatty, Matthews and Williams to be executed if there were any doubt that pentobarbital created a serious risk of harm.” Yet, that is exactly what the United States Supreme Court did for years before it granted certiorari in *Baze v. Rees*. The court goes one step further, relying on the denial of certiorari in these three case from the Ninth, Tenth and Eleventh Circuits and incorrectly concludes “that it appears the Supreme Court found that substitution of pentobarbital for sodium thiopental did not violate *Baze*” Order at 17. This ignores well established jurisprudence that denial of certiorari is not a decision on the merits. *See Teague v. Lane*, 489 U.S. 288 (1989).

Finally, the circuit court overlooks the fact that the standard for a stay of execution in federal district court is higher than that required for an evidentiary hearing (and a stay of execution) in state court. In order to succeed in having a stay granted in federal court, a plaintiff must show, in part, a likelihood of success on the merits. *See Nelson v. Campbell*, 541 U.S. 637 (2004). In state court, standards governing the grant of a stay of execution and the grant of an evidentiary hearing are the same. A stay of execution is proper when the defendant presents "enough facts to

show . . . that he might be entitled to relief under rule 3.850." *State v. Schaeffer*, 467 So. 2d 698, 699 (Fla. 1985). A Rule 3.851 litigant is entitled to an evidentiary hearing (and a stay of execution) unless "the motion and the files and records in the case conclusively show that the prisoner is entitled to no relief." Fla. R. Crim. P. 3.850; *Lemon v. State*, 498 So. 2d 923 (Fla. 1986); *State v. Crews*, 477 So. 2d 984 (Fla. 1985); *O'Callaghan v. State*, 461 So. 2d 1354 (Fla. 1984); *Sireci*, 502 So. 2d at 1224; *Mason v. State*, 489 So. 2d 734, 735-37 (Fla. 1986). *See also Groover v. State*, 489 So. 2d 15 (Fla. 1986). Where, as here, a capital postconviction litigant presents a well-pled claim, an evidentiary hearing is warranted. *See Roberts v. State*, 678 So. 2d 1232 (Fla. 1996); *Scott v. State*, 657 So. 2d 1129 (Fla. 1995); *Johnson v. Singletary*, 647 So. 2d 106 (Fla. 1994); *Jones v. State*, 591 So. 2d 911 (Fla. 1991).

In deciding whether to deny a Rule 3.850 motion without an evidentiary hearing and a stay of execution, the Court must first determine "whether the motion on its face conclusively shows that [the defendant] is entitled to no relief." *Squires v. State*, 513 So. 2d 138, 139 (Fla. 1987). The question is not whether the defendant will ultimately win a new trial or sentencing proceeding; the question is whether it can conclusively be said that the defendant will ultimately lose. *State v. Crews*, 477 So. 2d 984 (Fla. 1985).

The lower court has overlooked the appropriate standards. In error, Mr. Valle's application for stay was denied as follows: "The Defendant has not shown

that he is conclusively entitled to relief." Mr. Valle can only assume that the lower court relied on the same improper standard in determining an evidentiary hearing was not required. The lower court seems to be requiring Mr. Valle to prove his claim on the motion alone, repeatedly stating that Mr. Valle has failed to demonstrate that there is a substantial likelihood of serious harm. This was improper.

Notwithstanding the court's denial of access to public records which would allow Mr. Valle to more fully plead his claims (See Argument I), Mr. Valle's motion was legally sufficient as pled. Rule 3.851(f)(5)(B) permits the denial of a successive postconviction motion without an evidentiary hearing "[i]f the motion, files, and records in the case conclusively show that the movant is entitled to no relief." *Id.* at 1080-81. Mr. Valle claimed that the June 9, 2011 disclosure of a new lethal injection procedure, wherein pentobarbital is substituted for sodium thiopental, is newly discovered evidence of an Eighth Amendment violation. "The facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence." *Tompkins v. State*, 994 So. 2d 1072, 1080 (Fla. 2008) (citing Fla. R. Crim. P. 3.851(d)(2)(A)). Mr. Valle supported his claim with detailed factual allegations, including an expert opinion, which this Court must accept as true to the extent that they are not conclusively refuted by the record. *Lightbourne v. State*, 549 So. 2d

1364, 1365 (Fla. 1989). When these facts are accepted as true, it is clear that the record does not conclusively refute Mr. Valle's claim and that an evidentiary hearing is required.

ARGUMENT III: MR. VALLE 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 OPERATED, MR. VALLE'S EXECUTION WOULD VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

Mr. Valle's death warrant, signed by Governor Rick Scott on June 30, 2011, explicitly states that "it has been determined that Executive Clemency, as authorized by Article IV, Section 8(a), Florida Constitution is not appropriate." As alleged in Mr. Valle's postconviction motion, the Governor reached this conclusion without any clemency proceeding ever being conducted in Mr. Valle's case. In *Remeta v. State*, 559 So. 2d 1132, 1135 (Fla. 1990), the Florida Supreme Court held that "it is clear that 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. We emphasize that this type of clemency proceeding is just part of the overall death penalty procedural scheme in this state." Thus, Mr. Valle was entitled to a clemency proceeding, and counsel obligated to provide effective representation in preparing and presenting a

clemency application.

As the Supreme Court recognized, the importance of the clemency process in a capital case cannot be understated: "Far from regarding clemency as a matter of mercy alone, we have called it 'the "fail safe" in our criminal justice system.'" *Harbison v. Bell*, 129 S. Ct. 1481 (2009). When the clemency process is rendered meaningless, as it was here, Florida's death penalty scheme is constitutionally defective. When the clemency process cannot operate as the "fail safe" for the criminal justice system, the criminal justice system is rendered defective. Mr. Valle's case, where *he received no clemency proceedings at all*, Florida's capital sentencing scheme must be found defective as applied. A death sentence returned under a constitutionality defective sentencing scheme cannot stand.

The circuit court denied this claim, in part, because the "fail safe" argument was raised and rejected in *Johnston v. State*, 27 So. 3d 11, 24-26 (Fla. 2010). (Order at 24). The court ignores the fact that Mr. Valle, unlike Mr. Johnston and the defendants in all of the cases on which *Johnston* relies, was never afforded any clemency proceeding. Far from rejecting the "fail safe" argument wholesale, as the circuit court does here, this Court in *Johnston* recognized the importance of clemency's fail safe function:

> We conclude that the clemency system in Florida performed as intended in providing a "fail safe" for Johnston. **He was given a full clemency hearing in 1987 at which he was represented by counsel**. When the death warrant was signed on April 20, 2009, it stated that "it

> has been determined that Executive Clemency, as authorized by Article IV, Section 8(a), Florida Constitution, is not appropriate." Thus, clemency was **again considered** by the executive branch prior to the signing of the warrant in this case.

Johnston (emphasis added). This Court likened Johnston's claim to others' who received the benefit of clemency proceedings:

> Moreover, we have considered and rejected this same claim in other cases where a full clemency proceeding had been held and because the clemency process is a matter for the executive branch. See, e.g., *Rutherford v. State*, 940 So. 2d 1112, 1122-23 (Fla. 2006) (rejecting attack on clemency process where a clemency hearing was held and because it is an executive function); *King v. State*, 808 So. 2d 1237, 1246 (Fla. 2002) (holding that clemency claim was meritless in light of precedent); *Glock v. Moore*, 776 So. 2d 243, 252 (Fla. 2001) (rejecting clemency claim where Glock had a clemency hearing and because the matter is an executive function); *Bundy v. State*, 497 So. 2d 1209, 1211 (Fla. 1986) (clemency is an executive function and it is not the Court's prerogative to second-guess that executive decision).

This is not a situation where Mr. Valle is asking the courts to "second guess" the executive's decision or micro-manage the clemency proceedings. Nor is this a situation where Mr. Valle is seeking a second clemency proceeding, as the circuit court mistakenly believes. (Order at 25). Mr. Valle was denied due process because he never was afforded even one clemency proceeding. Under these circumstances, judicial oversight is warranted:

> Judicial intervention might, for example, be warranted in the face of a scheme whereby a state official flipped a coin to determine whether to grant clemency, **or in a case where the State arbitrarily denied a prisoner any access to its clemency process**.

Ohio Adult Parole Authority, et al. v. Woodard, 523 U.S. 272 at 289 (emphasis

added). Certainly, the denial of any clemency process in Mr. Valle's case ignored *Woodard*, in which the Supreme Court held that judicial intervention was warranted in a case where the executive's decision making process in deciding who lives and who dies was arbitrary.

In *Ohio Adult Parole Authority, et. al v. Woodard*, 523 U..S. 272, 288 (1998), Justices O'Connor and Stevens reasoned that as long as the condemned person is alive, he had an interest in his life that the Due Process Clause protects. 523 U.S. at 288-89 & 291-92. Both cited examples of behavior that would at least raise a question as to whether a defendant had received adequate clemency access under the due process clause: Justice O'Conner wrote of "a scheme whereby a state official flipped a coin to determine whether to grant clemency, or in a case where the State arbitrarily denied a prisoner any access to its clemency process." 523 U.S. at 289. Justice Stevens criticized late Chief Justice Rehnquist's opinion because it would tolerate "procedures infected by bribery, personal or the deliberate fabrication of false evidence," 523 U.S. at 290-91, and the use of "race, religion, or political affiliation as a standard for granting or denying clemency." *Id.* at 292.

Justice Stevens suggested that clemency proceedings have become "an integral part of its system for finally determining whether to deprive a person of life," 523 U.S. at 292, with the effect that, under *Evitts v. Lucey*, 469 U.S. 387, 396 (1985), a state is obliged to adhere to the Due Process Clause. Like Justice

O'Connor, Justice Stevens reasoned that the life interest in capital clemency proceedings requires a higher standard of due process protection than the rights of appellants, probationers, and parolees, because of the qualitative and quantitative differences between death and all other punishments. 523 U.S. at 293-94, citing *Gardner v. Florida*, 430 U.S. 349, 357 (1977). Justice O'Connor found that the specific flaws Mr. Woodard cited did not rise to the level which would trigger a cognizable due process challenge, *i.e.* that he was only given 3 days notice of his interview; and that he did not have enough time to prepare a clemency petition. 523 U.S. at 289-90.

Each of these criticisms dealt with the internal structuring of a hearing rather than situation Mr. Valle faces: *Mr. Valle has been completely denied any clemency proceeding at all*. Due process demands that Mr. Valle be afforded what every other death sentenced inmate had--a clemency proceeding that accurately reflects "a broad picture of the applicant's history and activities, which assist the Board in making informed decisions". *Annual Report, Fla. Parole Commission, 2007-2008,* pg. 24.

Mr. Valle has been arbitrarily denied access to the clemency process of this state. Mr. Valle was denied the right recognized in *Remeta v. State* to have court-appointed counsel prepare and present his side as to why clemency should be considered. The vital failsafe function envisioned by the Supreme Court in

Harbison failed in Mr. Valle's case. The clemency process lacked even "some minimal due process," *id*., because it did not occur at all.

The files and records show that on February 6, 1992, Governor Lawton Chiles requested a clemency investigation be conducted. The Rules of Executive Clemency in effect in 1992, at the time Governor Chiles requested a clemency investigation, provided that:

> A. In all cases where the death penalty has been imposed, the Florida Parole Commission shall conduct a thorough and detailed investigation into all factors relevant to the issue of clemency. The investigation shall include (1) an interview with the inmate (who may have legal counsel present) by at least three members of the Commission; (2) an interview, if possible, with the trial attorneys who prosecuted the case and defended the inmate; and (3) an overview, if possible, with the victim's family.
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> * * *
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> D. Upon request, a copy of the actual transcript of any statement or testimony of the inmate that are made part of the report shall be provided to the state attorney, attorney for the inmate, or victim's family.

Rules of Executive Clemency, Fla. Admin. Code Ann. R. 27-app. (1992). Additionally, it appears from records in other CCR cases that Attorney Mark Evans undertook to represent Mr. Valle in clemency proceedings at some time after this Court's affirmance of conviction and sentence on direct appeal. However, Mr. Valle is not in possession of any records or files of Mr. Evans and has no records indicating that he was ever actually appointed to represent Mr. Valle in clemency

proceedings or that he did represent him. In any event, based on counsel's investigation, Mr. Evans was neither competent nor effective in his representation at Mr. Valle's clemency proceedings, if any occurred.

However, despite rules requiring that a "thorough and detailed investigation," be conducted, there is no indication that any clemency investigation or proceedings were actually conducted. Due to changes in policies and procedures instituted by Governor Chiles in the early 1990s, there were no clemency proceedings conducted pursuant to Florida statutes or the Rules of Executive Clemency in Mr. Valle's case.

Prior to Governor Chiles's request to the Parole Commission to initiate a clemency investigation on Mr. Valle, the Governors' policy was to conduct clemency proceedings upon the inmate's conviction and sentence becoming final on direct appeal and denial of certiorari in the United States Supreme Court. If he determined that clemency was not appropriate, the Governor would then sign a death warrant, prompting the inmate to file a motion for postconviction relief and request that the execution be stayed.

Months after Governor Chiles requested the Parole Commission start its investigation of Mr. Valle's case, the Governor's General Counsel wrote to then-CCR Larry Spalding to inform him of changes in the policies regarding clemency proceedings and the scheduling of warrants. That June 5, 1992 letter

explained that the Governor would send a written request for investigations "in all cases" immediately after the mandate on direct appeal has been issued by the Florida Supreme Court or certiorari is denied by the United States Supreme Court. The letter also explained that the Governor would not sign death warrants on or before the specified "filing dates" for any of a number of specified inmates, including Mr. Valle. The letter instructed the inmates to file postconviction relief motions before the specified "filing dates," on or after which the Governor would decide whether to sign a warrant for the particular case. This procedure would allow and encourage the inmate to timely pursue collateral proceedings and in effect, obviated the need to conduct clemency proceedings immediately upon the conviction and sentence becoming final.

Mr. Valle's specified "filing date" was May 10, 1993. He filed his initial motion for postconviction relief on April 6, 1993. There is no indication in Mr. Valle's files of any clemency proceeding being conducted thereafter. This is consistent with Governor Chiles's then-newly instituted policies regarding the timing of clemency and the signing of warrants. In the cases of other similarly situated CCR clients whose clemency proceedings were initiated by Governor Chiles, the Office of Executive Clemency called a special meeting of the Clemency Board to consider the case within weeks of the Governor's initial letters requesting the Parole Commission to begin their investigations. Collateral counsel was

notified, in writing, of the scheduling of those meetings. In each instance, those documents were placed in the CCR clients' files.[12]

No such documentation appears in Mr. Valle's files, and neither the State nor the Office of Executive Clemency have produced any records to establish that any clemency proceeding was ever conducted.[13]

Moreover, there is no indication that Governor Scott or the clemency board conducted any clemency investigation pursuant to the rules currently in effect. The only evidence that any governor gave any consideration to clemency is Governor Scott's statements to the press that "He killed a law enforcement officer. He attempted to kill another law enforcement officer. . . It's a hard decision but it's the right thing to do."

The lower court failed to consider the facts supporting Mr. Valle's contention that he was never afforded any clemency proceeding. Instead, it

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[12] For example, On September 13, 1991, the Governor instructed the Parole Commission to conduct an investigation of CCR client Jerry Halliburton. On October 7, 1991, the Governor notified the Office of Executive Clemency that he had called a special meeting of the Clemency Board to for December 3, 1991 to consider clemency cases, including Mr. Halliburton's. The Governor copied such communications regarding clemency proceedings to Capital Collateral Representative Larry Spalding.

[13] Mr. Valle requested records regarding clemency investigations and proceedings from the Governor's Office, Attorney General's Office, Office of Executive Clemency and Office of the State Attorney. The circuit court sustained the agencies' objections to disclosure or the agency represented that they had no such records.

disposed of Mr. Valle's claim on the basis that he was not entitled to a second clemency proceeding prior to the execution of the death sentence. This was not the issue. To the extent that the State contests whether or not Mr. Valle received a clemency proceeding, he is entitled to an evidentiary hearing.

To the extent that the Governor might have considered clemency without conducting an investigation or proceeding as required by the Rules of Executive Clemency, such consideration cannot comport with due process where Mr. Valle was excluded from the process and was not even aware that such proceedings occurred. The touchstone of due process has been recognized as fair notice and reasonable opportunity to be heard. The right to due process entails "'notice and opportunity for hearing appropriate to the nature of the case.'" *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 542 (1985), quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). "[F]undamental fairness is the hallmark of the procedural protections afforded by the Due Process Clause." *Ford v. Wainwright*, 477 U.S. 399, 424 (1986) (Powell, J., concurring in part and concurring in the judgment).

The Florida Constitution provides a right to due process under Art. I, Sec. 9 and a right to clemency under Art. IV, Sec. 8. Neither section anticipates a one-sided process that relies upon input from the prosecutors or victims' family members alone. Florida law and the Parole Commission's own reports indicate that

a "quasi-judicial" investigation by the Parole Commission should comport with due process. See, *Annual Report, Fla. Parole Commission 2007-2009*, pg. 18.[14] Without notice, without the opportunity to be heard, without counsel, Mr. Valle's clemency proceedings, if any, did not comport with due process.

The Clemency Board and the Governor could not have made an "informed decision" about whether to grant clemency when the process excluded his voice or the voice of anyone who would speak in his favor. Mr. Valle was denied the right recognized in *Remeta v. State*, to have court-appointed counsel prepare and present his side as to why clemency should be considered.

Even assuming that a clemency proceeding was conducted pursuant to Governor Chiles initial request, such a proceeding conducted before state or federal postconviction proceedings (and nearly two decades before Governor Scott's decision to execute Mr. Valle) in no way serves the purposes for which clemency is intended. In *Harbison v. Bell*, 129 S. Ct. 1481 (2009), the Supreme Court explained that federal habeas counsel may develop in the course of his representation "the basis for a persuasive clemency application" which arises from the development of "extensive information about his [client's] life history and

[14] In its annual report, the Florida Parole Commission describes its function as a "quasi-judicial" body that conducts "administrative proceedings, and hearings, elicits testimony from witnesses and victims, which might otherwise be performed by a judge in a State Court System, a much costlier proceeding." *Annual Report, Fla. Parole Commission 2007-2008, pg. 18.*

cognitive impairments that was not presented during his trial or appeals." *Harbison*, 129 S. Ct. at 1494. This analysis presupposed that the clemency proceeding is conducted not just after trial, not just after direct appeal, but after the federal habeas proceedings have been concluded. This would insure that clemency consideration would fulfill the "fail safe" function for which it is intended, allowing the arbiter of clemency to consider all of the information that was uncovered in the course of the collateral litigation which may warrant serious clemency consideration. The mitigating aspects of Mr. Valle's character and life developed in postconviction proceedings, which Mr. Valle or his representative should have been allowed to investigate and present, were not considered because he was not permitted to participate in clemency proceedings, if any were conducted at all.

Finally, the lower court denied Mr. Valle's claim on the basis that it was untimely. The court faulted Mr. Valle for failing to show "why the facts could not have been ascertained by the exercise of diligence, rather than upon the eleventh hour after his death warrant has been signed." Order at 25. The circuit court overlooks the fact that Mr. Valle was never informed, and could not otherwise have known, that the Governor had given any consideration to executive clemency before he issued a death warrant announcing that executive clemency inappropriate. Moreover, because the Governor my initiate clemency proceedings

at any time, Mr. Valle's claim that he was denied a clemency proceeding is not ripe until the Governor signs a death warrant stating that clemency is not appropriate. Rule 15(C) provides, "Notwithstanding any provision to the contrary in the Rules of Executive Clemency, in any case in which the death sentence has been imposed, the Governor may at any time place the case on the agenda and set a hearing for the next scheduled meeting or at a specially called meeting of the Clemency Board." Rule 15(C). Thus, prior to the signing his death warrant, which served to foreclose any consideration of clemency under Rule 15(C), Mr. Valle's claim of the denial of clemency proceedings was not ripe for consideration.

It is through the clemency process that a death sentenced individual has his only opportunity to have either the Governor's ear, or the ear of the Governor's staff. As this Court recognized in *Remeta v. State*, 559 So. 2d 1132, 1135 (Fla. 1990), a clemency proceeding is "part of the overall death penalty procedural scheme in this state." Where that critical proceeding is not conducted, the death penalty procedural scheme is obviated.

The circuit court erred in denying his claim as untimely and legally insufficient. Mr. Valle is entitled to an evidentiary hearing on this claim because the files and records fail to show, much less conclusively so, that he is not entitled to relief.

<u>ARGUMENT IV</u>: THE ARBITRARY AND STANDARDLESS POWER GIVEN TO FLORIDA'S GOVERNOR TO SIGN DEATH WARRANTS RENDERS THE FLORIDA CAPITAL SENTENCING SCHEME UNCONSTITUTIONAL UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

Over thirty years ago, the United States Supreme Court announced that under the Eighth Amendment, the death penalty must be imposed fairly, and with reasonable consistency, or not at all. *Furman v. Georgia*, 408 U.S. 238, 310 (1972) (per curiam). At issue in *Furman* were three death sentences: two from Georgia and one from Texas. Relying upon statistical analysis of the number of death sentences being imposed and upon whom they were imposed, it was argued that the death penalty was cruel and unusual within the meaning of the Eighth Amendment. Five justices agreed, and each wrote a separate opinion setting forth his reasoning. Each found the manner in which the death schemes were then operating to be arbitrary and capricious. *Furman*, 408 U.S. at 253 (Douglas, J., concurring) ("We cannot say from facts disclosed in these records that these defendants were sentenced to death because they were black. Yet our task is not restricted to an effort to divine what motives impelled these death penalties. Rather, we deal with a system of law and of justice that leaves to the uncontrolled discretion of judges or juries the determination whether defendants committing these crimes should die or be imprisoned. Under these laws no standards govern the selection of the penalty. People live or die, dependent on the whim of one man

or of 12."); *Id*. at 293 (Brennan, J., concurring) ("it smacks of little more than a lottery system"); *Id*. at 309 (Stewart, J., concurring) ("[t]hese death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual"); *Id*. at 313 (White, J., concurring) ("there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not"); *Id.* at 365-66 (Marshall, J., concurring). Thus, as explained by Justice Stewart, *Furman* means that: "The Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be . . . wantonly and . . . freakishly imposed" on a "capriciously selected random handful" of individuals. *Id*. at 310.

In Florida, the Governor has the absolute discretion and unconstrained power to schedule executions.[15] The decision by a Florida governor to sign a death warrant is just as necessary as the sentencing judge's decision to sign his name to a document imposing a sentence of death. In Florida, no death sentence can be imposed unless the judge signs the sentencing order imposing a sentence of death. Similarly, no individual who receives a sentence of death will in fact be executed

[15] Unlike Florida, most states have the judicial branch in charge of scheduling execution dates. Either the trial court or the highest appellate court to hear death appeals determines when an execution date is ready and should be set. At that point, the condemned can petition for clemency before those charged with considering clemency applications. Only Florida, New Hampshire, *see* N.H. Rev. Stat. Ann. § 630:5, and Pennsylvania, *see* 61 Pa. Cons. Stat. Ann. § 4302, vest the governor with such unconstrained discretion.

until the Governor exercises his discretion to sign a death warrant. There are absolutely no governing standards as to how the Governor should exercise his warrant signing power. In fact, the Governor's discretion is absolute and subject to no review at all. While this process is veiled in secrecy, with no opportunity for the condemned to be heard, it is not free of influence and advocacy on behalf of the State.

The Governor's absolute discretion to decide who lives and who dies must be compared with the standards and limits placed upon a sentencing judge's decision to impose a death sentence. The Eighth Amendment requires there to be a principled way to distinguish between who is executed by a state and who is not. It is this constitutional principle that has required the sentencing judge to specifically address what aggravating and mitigating circumstances are present. It is because of the Eighth Amendment that Florida requires the sentencing judge to weigh the aggravating circumstances against the mitigating circumstances when deciding whether to impose a sentence of death.

In the past, the State contested whether a Florida jury who recommends a sentence to the judge in a capital case is subject to the Eighth Amendment principles that constrain the sentencing judge's sentencing discretion in a capital case. For years the State contended that because the jury merely made a recommendation to the judge, and because it was the judge who actually decided

whether to impose a sentence of death, the penalty phase jury was not subject to the same Eighth Amendment requirements that were placed upon the sentencing judge. However in 1992, the United States Supreme Court found that because the jury's role in making a sentencing recommendation was an essential step in the Florida capital scheme, the jury should be viewed as a co-sentencer and its decision making process should be subject to the same Eighth Amendment constraints that had been imposed upon the sentencing judge in a capital case in Florida. *Espinosa v. Florida*, 505 U.S. 1079 (1992).

There is really no principled way to distinguish between the individual who signs a document entitled "the sentence" which imposes a death sentence, a necessary step before an individual in Florida can be executed, and the individual who signs a document entitled "death warrant" which is an equally necessary step before an individual in Florida can be executed. For the same reasons that the United States Supreme Court determined that the Florida penalty phase jury's recommendation was just as much an essential component to the death penalty scheme as the judge's decision to impose a death sentence and found the Eighth Amendment constraints applicable to the penalty phase jury, the Governor's absolute power to sign or not sign a death warrant must be subject to the Eighth Amendment. Without the Governor's signature upon a death warrant, an individual housed on Florida's death row will never be executed. Currently without any

meaningful standards constraining the Governor's otherwise absolute discretion, Florida capital sentencing scheme violates the Eighth Amendment principles set forth in *Furman v. Georgia*.

There must be enforceable standards placed upon the Governor's otherwise limitless power to decide of the 380 individuals on Florida's death row who lives and who dies. The Eighth Amendment requires that there must be a principled way to distinguish between those who receive a death warrant (which is necessary to authorize a death sentence to be carried out) and those who do not receive a death warrant and who are thus not subject to execution until the Governor decides to sign a death warrant authorizing their execution. The lower court failed to address Mr. Valle's Eighth Amendment argument entirely.

On June 30, 2011, Governor Scott exercised his unbridled discretion, signing a death warrant scheduling Mr. Valle's execution for August 2, 2011. Why Governor Scott chose Mr. Valle over any other death-sentenced inmate is not known. Why the Governor chose June 30 is not known. Prior to June 30, the Governor exercised his unfettered discretion for three years and nine months, subsequent to the completion of Mr. Valle's judicial proceedings, not to execute Mr. Valle. For three years and nine months, the Governor deemed execution inappropriate. Then, on June 30, the Governor changed his mind although

execution had been deemed inappropriate for Mr. Valle for years.[16]

While the reasons for signing a death warrant on Manuel Valle on June 30 are not known, what is known is that the previous week, Governor Scott was criticized online and in the press for not signing any death warrants after six months in office. (ATTACHMENT X, Amended Motion). What is known is that, in the previous months, Officer Pena's daughter wrote to the Governor on three occasions asking why Mr. Valle's warrant had not yet been signed. (ATTACHMENT Y, Amended Motion). It is also now known that, from at least January, 2011, the Department of Corrections was without the necessary drugs to carry out executions, and it had not certified a new procedure prior to June 8, 2011.

Most disturbingly, it is now known that the Governor's Office seeks the counsel of the Attorney General when choosing which condemned inmates will be executed. While Florida law, including the opinions of this Court, envisions the Governor exercising his sole discretion when performing that function, the Governor's office has admitted that the Governor "in conjunction with the Attorney General's Office determines when a death warrant is signed." (ATTACHMENT EE, Amended Motion). Thus, because it advocates to the

[16] Of course Mr. Valle would be justified in forming the notion that he would be one of the majority of individuals on death row for whom execution would not be their punishment. Mr. Valle justifiably formed the expectation that his sentence was a lifetime on death row, the more common actual sentence for death row inmates, and the sentence the Governor had chosen for years.

Governor which of the minority of death sentenced individuals should be next to be executed*, in Florida, the attorney general is part of the sentencing mechanism*.I

The constitutional infirmities resulting from the Governor's absolute discretion in signing death warrants is exacerbated by the fact that the Governor rests much of that discretion in the parties who have advocated, and continue to advocate, for Mr. Valle's death. The Governor's Office openly admits that the decisions of who is executed and when is made in conjunction with the Attorney General's Office. A one-sided process that allows prosecutors, victims' family members and the press to influence decisions of life and death without any input from the condemned cannot comport with the Eighth Amendment's requirement that there be a principled way to distinguish between who is to be executed and who is not.

To the extent, the Governor allowed others to influence his decision, Governor Scott's actions arbitrarily excluded Mr. Valle from participating in this process. Of course, the touchstone of due process is notice and reasonable opportunity to be heard. The right to due process entails "'notice and opportunity for hearing appropriate to the nature of the case.'" *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 542 (1985), quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). "[F]undamental fairness is the hallmark of the procedural protections afforded by the Due Process Clause." *Ford v.*

Wainwright, 477 U.S. 399, 424 (1986)(Powell, J., concurring in part and concurring in the judgment). In addition to violating the Eighth Amendment, Mr. Valle's execution has been approved without providing any notice or opportunity to be meaningful heard as to why the Governor should not sign a continuous warrant.

The decision to authorize an execution should not turn on the word of unknown witnesses, undisclosed letters from victims' family members, criticism from the press, or one-side prosecutorial advocacy on the part of the Attorney General's Office. Nor can the Governor's decision of whether to sign death warrants rest on the Department of Corrections' ability or inability to carry out executions. The limitations on the Governor's exercise of his otherwise unfettered discretion due to DOC's inability to plan or carry out their duties, or the volatilities of the international pharmaceuticals trade, violate the Eighth and Fourteenth Amendments.

The signing of Mr. Valle's death warrant was nothing more than a lottery – with the Attorney General picking what numbers to play. There were over fifty (50) death row inmates who have presented federal habeas petitions to the federal courts and who have had the federal courts refuse to grant any habeas relief. There is no principled way to distinguish between Mr. Valle and the decision to sign his death warrant and authorize his execution from the decision to not sign a death

warrant on these individuals who completed one round of collateral review of their convictions and sentences of death. For that matter, there is no principled way to distinguish between Mr. Valle, and the Governor's decision to authorize his execution, and the other 380 individuals on Florida's death row, and the Governor's decision to exercise his discretion by not signing a death warrant authorizing their execution. There is certainly no principled way for the Governor to make such a decision "in conjunction with" one-sided advocacy on the part of the prosecution. There are no standards. There is no guidance. The Governor's discretion is absolute, but the prosecution has his ear. The process can only be described as a lottery; the very kind of system that the United States Supreme Court in *Furman v. Georgia* said would no longer be allowed.

The circuit court denied this claim, finding it without merit and legally insufficient (Order at 28). The court's analysis is based solely on this Court's rulings in *Rutherford v. State*, 940 So. 2d 1112 (Fla. 2006), and *Marek v. State*, 14 So. 3d 985 (2009), regarding the constitutionality of the clemency process. As the court recognized, Rutherford argued that "the circuit court erred in summarily denying his claim that Florida's clemency process is arbitrary and capricious and thus violates the Eighth and Fourteenth Amendments." (Order at 26). The circuit court conflates Mr. Valle's clemency claim with this claim that the Governor arbitrarily signed the death warrant. Furthermore, the circuit court's reliance on

Rutherford fails to recognize that Mr. Valle was never afforded any clemency process. See Argument III. Similarly, in *Marek*, the issue before the court was whether the defendant was entitled to notice before a death warrant is signed. This Court rejected Marek's claim because he had "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 warrant of an individual whose death sentence is final and who has had the benefit of a clemency proceeding." The lower court's reliance on these cases is misplaced.

Unlike Rutherford and Marek, Mr. Valle does not challenge the due process afforded him at his clemency proceeding because he was not afforded a clemency proceeding at all. See Argument III. Thus, these cases are significantly factually distinguishable. Mr. Valle does challenge the Governor's discretion to arbitrarily and capriciously sign death warrants on whoever he chooses, for whatever reason he chooses. Moreover, Mr. Valle challenges the constitutionality of Florida's death penalty scheme which allows the prosecuting authority to advocate for who of the several eligible condemned prisoners is next to be executed without allowing the condemned to be heard. None of these concerns are addressed by the circuit court's ruling. The court does not consider the arbitrariness of the Governor's signing power, or the propriety of Attorney General's Office involving itself in the warrant process.

The manner in which the warrant signing process now functions in Florida and the manner in which it functioned in Mr. Valle's case violates the Eighth Amendment principles enunciated in *Furman*. Florida's death penalty scheme stands in violation of the Eighth Amendment. As a result, Mr. Valle's death sentences cannot stand. An evidentiary hearing, and thereafter relief, is warranted.

ARGUMENT V: THE TOTALITY OF THE PUNISHMENT THE STATE HAS IMPOSED ON MR. VALLE VIOLATES THE EIGHTH AMENDMENT AND THE PRECEPTS OF *LACKEY*

Introduction

Manuel Valle's incarceration on Florida's death row began May 16, 1978, five days prior to his twenty-eighth birthday. His execution is scheduled for August 2, 2011. He will be 61, and he will have been on death row for 33 years. Thirty-three years because the State of Florida repeatedly botched his trials and resentencings. Thirty-three years because even when his appeals and collateral proceedings had concluded, the Governor of Florida exercised his discretion for some four years not to sign Mr. Valle's death warrant. Mr. Valle has spent the majority of his life on death row living beneath "the ever-present shadow of death," *Soering v. United Kingdom*, 11 Eur. H.R. Rep. 439, §106 (1989), and that is a punishment very different from his judicially-imposed sentence.

The State of Florida has added to Mr. Valle's death sentence the morbid additional sentence of being taunted with death for three decades—the greater part

of his life. The issue now is whether that fact should be ignored with respect to the Eighth Amendment inquiry of whether the State's treatment of Mr. Valle is cruel and unusual. It is clear that the State cannot constitutionally impose a greater punishment than that to which a defendant has been sentenced and that which the Eighth Amendment condones. The State's punishment of Mr. Valle oversteps in both respects. Thus, unless it is determined that 33 years of imprisonment on death row is not constitutionally cognizable, Mr. Valle is entitled to relief.

More Florida death row inmates die from natural causes than from execution.[17] The average death row inmate is on the row for 12.68 years.[18] Thus, Florida has created a macabre lottery, whereby death-sentenced inmates—a group of individuals all given the exact same sentence by the Florida judiciary—wait on average more than a decade and in some instances, as with Mr. Valle, more than *three decades*, to find out whether they will be one of the unlucky *minority* to be randomly chosen for execution, or one of the alternatively misfortunate required to

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[17] According to information provided to PolitiFact by the Florida Department of Corrections ("DOC")), 30 of the 55 inmates who have died on death row since January 1, 2000 have died of natural causes and 25 were executed. PolitiFact, *What's killing inmates on Florida's death row?*, (January 25, 2011), *available at* http://www.politifact.com/florida/statements/2011/jan/25/dean-cannon/whats-killing-inmates-floridas-death-row/.

[18] That figure is drawn from information compiled by DOC since the reinstitution of the death penalty in Florida in 1976. Florida Department of Corrections, Public Affairs Office, *Death Row Fact Sheet*, *available at* http://www.dc.state.fl.us/oth/deathrow/.

live out their lives in fear and torment—a punishment to which no court sentenced them.

And this gruesome affair is made worse by the fact that Florida's death row is an environment so destructive to the human psyche that it is not intended for long term residency:

> . . . [P]risoners who have been sentenced to death are maintained in a six- by nine-foot cell with a ceiling nine and one-half feet high. These prisoners are taken to the exercise yard for two-hour intervals twice a week. Otherwise, these prisoners are in their cells except for medical reasons, legal or media interviews, or to see visitors (allowed to visit from 9 a.m. to 3 p.m. on weekends only). ***These facilities and procedures were not designed and should not be used to maintain prisoners for years and years.***

Swafford v. State, 679 So. 2d 736, 744 (Fla. 1996) (Wells, J., concurring in part and dissenting in part) (citations omitted) (emphasis added). The cruelty and unusualness of the punishment of being housed for decades under these circumstances is not humane, and it is not constitutionally negligible. "Confinement in a prison or in an isolation cell is a form of punishment subject to scrutiny under the Eighth Amendment." *Hutto v. Finney*, 437 U.S. 678 (1978).

The truth about Florida's death penalty is that *in most cases* it is not a sentence of death: it is a sentence of a lifetime of physical and psychological torture. It is *in most cases*, and in Mr Valle's case, a penalty unfit for a morally sophisticated and civilized justice system: a lifetime locked in a closet-sized cell waiting to be killed at any moment.

The public in whose name criminal punishments are carried out does not retain moral superiority to the criminals it punishes when is imposes a punishment so ghastly. And that is not a statement without legal impact, because the Eighth Amendment prohibition on cruel and unusual punishment draws the constitutional line of acceptable punishments at "the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958); *see Roper v. Simmons*, 543 U.S. 551 (2005). The Eighth Amendment applies "with special force" to the death penalty. *Thompson v. Oklahoma*, 487 U.S. 815 (1988) (O'Connor, J., concurring in judgment). If the people find the punishment to be indecent, it is unconstitutional, and who among us is prepared to say that this situation is *decent*?

Mr. Valle's punishment of 33 years of psychological torture was not judicially imposed, and now he has become one of Florida's few death-sentenced inmates to get the penalty Florida's judiciary imposed on him. However, *Lackey v. Texas*, 514 U.S. 1045 (1995), forbids it.

> The cruelty of capital punishment lies not only in the execution itself and the pain incident thereto, but also in the dehumanizing effects of the lengthy imprisonment prior to execution during which the judicial and administrative procedures essential to due process of law are carried out. Penologists and medical experts agree that the process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture.

Id. at 1045 n.* (citing *People v. Anderson*, 493 P.2d 880, 894 (1972) (footnote

omitted)).

And when punishment incident to the death penalty eclipses the death penalty itself in penological effect, the death penalty becomes "the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes. A penalty with such negligible returns to the State would be patently excessive and cruel and unusual punishment violative of the Eighth Amendment." *Furman v. Georgia*, 408 U.S. 238, 312 (1972).

Factual Background

Mr. Valle arrived on death row on May 16, 1978 following his death sentence being imposed on May 10, 1978. Some three years later the Florida Supreme Court reversed Mr. Valle's conviction and death sentence. *Valle v. State*, 394 So. 2d 1004 (Fla. 1981). For his first three years on death row, he was there unconstitutionally. Those three years of psychological torture were wrongly imposed by the State.

Mr. Valle was tried again in 1981, convicted and resentenced to death. This time the Florida Supreme Court affirmed. *Valle v. State*, 474 So. 2d 796 (Fla. 1985). However, the United States Supreme Court, after the Florida judicial system failed for five years to redress a constitutional violation, vacated Mr. Valle's death sentence in 1986. *Valle v. Florida*, 476 U.S. 1102 (1986). On top of the three years Florida unconstitutionally punished Mr. Valle under his initial unconstitutional

conviction and sentence, he had now been subject to an unconstitutional torture sentence for a further six years.

Mr. Valle was resentenced to death on March 16, 1988. That sentence was affirmed throughout Mr. Valle's state and federal appellate and postconviction proceedings, concluding with Mr. Valle's cert petition to the United States Supreme Court being denied on October 1, 2007.

For the following three years and nine months, the Governor of Florida exercised his standardless discretion to decline to sign Mr. Valle's death warrant. For three years and nine months, the Governor deemed execution inappropriate for Mr. Valle. But on June 30, 2011, Governor Rick Scott changed his mind and signed a death warrant for Mr. Valle.

Mr. Valle has been incarcerated on death row at Union Correctional Institution in Raiford, Florida. Life on Florida's death row is an unremitting regime of isolation and psychological anguish. Inmates on death row spend up to 23 hours per day alone in a 6' x 9' cell.[5] There is no air conditioning, and the inmates are only allowed to shower every *other* day, *id*., meaning for 33 years Mr. Valle has endured Florida summers with no air conditioning and has spent every other day,

[5]Florida Department of Corrections, *The Daily Routine of Death Row Inmates*, *available at* http://www.dc.state.fl.us/oth/deathrow/index.html#Routine; Florida Department of Corrections, *2005-2006 Annual Report* at 52, *available at* http://www.dc.state.fl.us/oth/deathrow/index.html#Routine.

half of those 33 years, without as much as a shower. Unlike inmates in close management custody, death row inmates are not permitted to make phone calls to their families except in cases of family crisis. Fla. Admin. Code R. 33-602.205(1). Inmates have no opportunities to work and have very limited interaction with other inmates.

Mr. Valle's execution is scheduled for August 2, 2011. When his judicially imposed sentence is carried out, he will be 61. When he committed the crime for which he is being executed, he was 27. The person the State will execute and the person who committed the crime are as different as a lifetime of personal development allows. The two do not remotely resemble one another, any more than the jurists who will review this claim resemble who they were 34 years ago.

The lower court denied this claim summarily, refusing Mr. Valle the opportunity to present supporting evidence.

Discussion

In *Lackey v. Texas*, the United States Supreme Court perceived a constitutional problem with a confinement on death row ***lasting half as long*** as Mr. Valle's. *See* 514 U.S. 1045, 1045 (1995). Seventeen years of death row confinement raised great concern in *Lackey*; Mr. Valle has been on Florida's death row for 33 years.

In *Lackey*, Justice Stevens wrote the memorandum of the Court denying cert

on a claim that the Eighth Amendment prohibits the cruel and unusual punishment of 17 years on death row, taking the rare course of conducting an analysis recognizing the merit of the claim and that the claim has both "importance and novelty," *id*., stating

> Petitioner raises the question whether executing a prisoner who has already spent some 17 years on death row violates the Eighth Amendment's prohibition against cruel and unusual punishment. Though the importance and novelty of the question presented by this certiorari petition are sufficient to warrant review by this Court, those factors also provide a principled basis for postponing consideration of the issue until after it has been addressed by other courts. *See*, *e.g.*, *McCray v. New York*, 461 U.S. 961, 103 S. Ct. 2438, 77 L.Ed.2d 1322 (1983) (STEVENS, J., respecting denial of certiorari).

Id. The Court also expressed the view that there is a foundation for the claim, meaning it is not without merit, and recognized a strong argument that the Eighth Amendment prohibits such punishment:

> Though novel, petitioner's claim is not without foundation. In *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L.Ed.2d 859 (1976), this Court held that the Eighth Amendment does not prohibit capital punishment. Our decision rested in large part on the grounds that (1) the death penalty was considered permissible by the Framers, *see id*., at 177, 96 S. Ct., at 2927 (opinion of Stewart, Powell, and STEVENS, JJ.), and (2) the death penalty might serve "two principal social purposes: retribution and deterrence," *id*., at 183, 96 S. Ct., at 2929-2930.
>
> It is arguable that neither ground retains any force for prisoners who have spent some 17 years under a sentence of death.

Thus, the *Lackey* memorandum broke out two considerations for how a long wait on death row prior to execution runs afoul of the Eighth Amendment by removing

the two justifications for the death penalty. The Court then addressed those considerations in turn, addressing first the notion that the Framers did not write the Eighth Amendment with a death penalty scheme in mind that allows for years of tortuous confinement prior to execution:

> Such a delay, if it ever occurred, certainly would have been rare in 1789, and thus the practice of the Framers would not justify a denial of petitioner's claim.

Id. The Framers would not have envisioned that a condemned man would spend 33 years awaiting execution. Justice Breyer recognized that fact in his dissent in *Knight*:

> Nor can one justify lengthy delays by reference to constitutional tradition, for our Constitution was written at a time when delay between sentencing and execution could be measured in days or weeks, not decades. See *Pratt v. Attorney General of Jamaica*, [1994] 2 A. C. 1, 18, 4 All E. R. 769, 773 (P. C. 1993) (en banc) (Great Britain's "Murder Act" of 1751 prescribed that execution take place on the next day but one after sentence).

528 U.S. at 995.

The Framers were concerned that the government might be "tempted to cruelty." *Furman*, 408 US at 267 (Brennan, J., concurring). When the government was so tempted, the Framers intended the protections of the Eighth Amendment to safeguard citizens. Nothing creates more of a temptation to inflict a cruel and unusual punishment on a criminal defendant than a conviction for murder. It is an unspeakably horrific act for which Mr. Valle was convicted, and that only serves to

heighten the need for Eighth Amendment protection and for the State not to lose its way. *See Ayers v. Belmontes*, 549 US 7 (2006) ("the incremental value to California of carrying out a death sentence at this late date is far outweighed by the interest in maintaining confidence in the fairness of any proceeding that results in a State's decision to take the life of one of its citizens"). Mr. Valle's death sentence simply no longer stands for what it did when it was imposed on a young man decades ago, but the State has succumbed to the temptation of imposing it anyway.

Having disposed of that potential justification for the death penalty, the Court then addressed the justifications for punishment underlying our criminal justice system, starting with retribution:

> Moreover, after such an extended time, the acceptable state interest in retribution has arguably been satisfied by the severe punishment already inflicted. Over a century ago, this Court recognized that "when a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it." *In re Medley*, 134 U.S. 160, 172, 10 S. Ct. 384, 388, 33 L.Ed. 835 (1890). If the Court accurately described the effect of uncertainty in *Medley*, which involved a period of four weeks, *see ibid*., that description should apply with even greater force in the case of delays that last for many years.

Id. At this point the Court, with chilling awareness, faced head on the fact that states that permit long stays on death row are in the business of torture, surveying judicial acknowledgments to that effect over the years:

> *See also People v. Anderson*, 6 Cal.3d 628, 649, 100 Cal.Rptr. 152, 166, 493 P.2d 880, 894 (1972) ("The cruelty of capital punishment

> lies not only in the execution itself and the pain incident thereto, but also in the dehumanizing effects of the lengthy imprisonment prior to execution during which the judicial and administrative procedures essential to due process of law are carried out. Penologists and medical experts agree that the process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture") (footnote omitted); *Furman v. Georgia*, 408 U.S. 238, 288-289, 92 S. Ct. 2726, 2751-2752, 33 L.Ed.2d 346 (1972) (Brennan, J., concurring) ('[T]he prospect of pending execution exacts a frightful toll during the inevitable long wait between the imposition of sentence and the actual infliction of death"); *Solesbee v. Balkcom*, 339 U.S. 9, 14, 70 S. Ct. 457, 94 L.Ed. 604 (1950) (Frankfurter, J., dissenting) ("In the history of murder, the onset of insanity while awaiting execution of a death sentence is not a rare phenomenon"); *Suffolk County District Attorney v. Watson*, 381 Mass. 648, 673, 411 N.E.2d 1274, 1287 (1980) (Braucher, J., concurring) (death penalty is unconstitutional under State Constitution in part because "[i]t will be carried out only after agonizing months and years of uncertainty"); *id.*, at 675-686, 411 N.E.2d, at 1289-1295 (Liacos, J., concurring).

Id. at 1045 n.*. The *Lackey* memorandum did no less than to acknowledge a potential fatal flaw in the death penalty itself: the proposition that a death penalty *cannot* be constitutionally carried out if delay is had, and delay *must* be had to conduct necessary review to ensure constitutionality.

Then the Court turned to the justification of deterrence:

> Finally, the additional deterrent effect from an actual execution now, on the one hand, as compared to 17 years on death row followed by the prisoner's continued incarceration for life, on the other, seems minimal. *See, e.g.*, *Coleman v. Balkcom*, 451 U.S. 949, 952, 101 S. Ct. 2031, 2033, 68 L.Ed.2d 334 (1981) (STEVENS, J., respecting denial of certiorari) ("[T]he deterrent value of incarceration during that period of uncertainty may well be comparable to the consequences of the ultimate step itself"). As Justice White noted, when the death penalty "ceases realistically to further these purposes, . . . its

> imposition would then be ***the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes. A penalty with such negligible returns to the State would be patently excessive and cruel and unusual punishment violative of the Eighth Amendment.***" *Furman v. Georgia*, 408 U.S. 238, 312, 92 S. Ct. 2726, 2764, 33 L.Ed.2d 346 (1972) (opinion concurring in judgment); *see also Gregg v. Georgia*, 428 U.S., at 183, 96 S. Ct., 2929 ("[T]he sanction imposed cannot be so totally without penological justification that it results in the gratuitous infliction of suffering").

Id. (emphasis added). In other words, as the punishment of tortuous confinement incident to the death penalty grows, the justifications for the death penalty wane, until there is no justification left, and the State must ask what it is doing executing an individual if not for punishment.

In this case, the circuit court failed to see the nexus between the constitutionality of a death sentence and the prior punishment of 33 years on death row, concluding from the outset of its order that the claim is "irrelevant[] and does not attack [Mr. Valle's] conviction or sentence." (Order at 28). *Lackey* clearly describes that connection. It assesses the impact on the justifications for a death sentence that results from a prior punishment of imprisonment on death row. However, the circuit court, rather than ruling that carrying out Mr. Valle's death sentence would not be cruel and unusual in violation of the principles espoused in *Lackey*, ruled that the principles espoused in *Lackey* are nonexistent and not a constitutionally relevant consideration. This Court need go no further to find error in the circuit court's decision. There can be no doubting that the instant claim goes

to Mr. Valle's sentence. A conclusion to the contrary requires that we not recognize 33 years on death row as a form of punishment. However, any term of imprisonment (even under conditions far less severe than those on death row) is a constitutionally cognizable form of punishment. *Hutto v. Finney*, 437 U.S. 678 (1978). Mr. Valle's execution is unconstitutional because it will no longer serve the penological purposes of either deterrence or retribution, which have already been served in great part by 33 years of imprisonment.

After defining the nexus between confinement on death row and the constitutionality of a death sentence, which the circuit court failed to recognize, *Lackey* looked back past the Framers, at current interpretations of the English constitutional provision that is the parent of our Eighth Amendment, and around the world to other countries to assess the current state of humanity's thinking on the death penalty:

> Petitioner's argument draws further strength from conclusions by English jurists that "execution after inordinate delay would have infringed the prohibition against cruel and unusual punishments to be found in section 10 of the Bill of Rights 1689." *Riley v. Attorney General of Jamaica*, [1983] 1 A.C. 719, 734, 3 All E.R. 469, 478 (P.C.1983) (Lord Scarman, dissenting, joined by Lord Brightman). As we have previously recognized, that section is undoubtedly the precursor of our own Eighth Amendment. *See, e.g., Gregg v. Georgia*, 428 U.S., at 169-170, 96 S. Ct., at 2922; *Harmelin v. Michigan*, 501 U.S. 957, 966, 111 S. Ct. 2680, 2686, 115 L.Ed.2d 836 (1991) (SCALIA, J., concurring in judgment).
>
> Finally, as petitioner notes, the highest courts in other countries have found arguments such as petitioner's to be persuasive. *See Pratt v.*

> *Attorney General of Jamaica*, [1994] 2 A.C. 1, 4 All E.R. 769 (P.C.1993) (en banc); id., at 32-33, 4 All E.R., at 785-786 (collecting cases).

Id. In other words, that hand-full of other countries that still cling to the death penalty do not pretend that a lifetime of waiting to die is not a constitutionally cognizable form of punishment. They do not sweep under the rug the fact that dangling the needle in front of the defendant for a lifetime diminishes the portion of his punishment that his execution constitutes.

However, the State of Florida does not recognize a problem in punishing its death sentenced inmates by decades-long terms of imprisonment. The public records received in this case demonstrate that the State delayed Mr. Valle's execution by holding him on death row while not having a certified lethal injection procedure to carry out his death sentence. DOC regarded that fact as something that "hasn't been an issue for us because we've had no executions and none are pending." (ATTACHMENT FF to Amended Motion). In other words, the State of Florida does not see a problem with holding an inmate on death row indefinitely, without the ability to carry out his sentence. This case is unlike other *Lackey* cases that have arisen in Florida because here we have an inability on the part of the State to carry out a judicially-imposed sentence and an expression of contentment with instead punishing death-sentenced inmates with non-judicially-imposed indefinite terms of imprisonment on death row.

The line of Eighth Amendment protection is not static, *Gregg*, 428 U.S. at 173, and the State's willingness to substitute life-on-death-row for judicially-imposed death sentences must be judged by modern standards of decency. Whether a punishment violates the Eighth Amendment must be judged by the standards that "currently prevail," not those of the past. *Atkins v. Virginia,* 536 U.S. 304, 311 (2002). The Supreme Court has reaffirmed that

> [t]he prohibition against cruel and unusual punishment, like other expansive language in the Constitution, must be interpreted according to its text, by considering history, tradition, and precedent, and with due regard for its purpose and function in the constitutional design. To implement this framework, we have established the propriety and affirmed the necessity of referring to the evolving standards of decency that mark the progress of a maturing society to determine which punishments are so disproportionate as to be cruel and unusual.

Roper v. Simmons, 543 U.S. 551, 560-61 (2005) (citations omitted). The question then is whether most Americans think that decades of psychological torment prior to carrying out a judicially-imposed sentence is decent. Mr. Valle ventures that they would not.

Beyond American standards, the Supreme Court has taken international standards into account when determining current standards of decency. "[A]t least from the time of the Court's decision in *Trop v. Dulles*, 356 U.S. 86, 98 (1958) the Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of 'cruel and unusual punishments.'" *Roper*, 543 U.S. at 575. The Supreme Court cited the

international community's overwhelming disapproval of executing the mentally retarded and juvenile offenders in concluding that such executions also ran afoul of the Eighth Amendment. *Atkins v. Virginia*, 536 U.S. 304, 316 (2002); *see also Roper*, 543 U.S. at 575 ("our determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty"). Developments in international law strongly suggest that the execution of a condemned individual after over three decades on death row is inconsistent with current standards of decency.

The *Lackey* memorandum then turned to the issue of the *reason* for the delay:

> Closely related to the basic question presented by the petition is a question concerning the portion of the 17-year delay that should be considered in the analysis. There may well be constitutional significance to the reasons for the various delays that have occurred in petitioner's case. It may be appropriate to distinguish, for example, among delays resulting from (a) a petitioner's abuse of the judicial system by escape or repetitive, frivolous filings; (b) a petitioner's legitimate exercise of his right to review; and (c) negligence or deliberate action by the State. Thus, though English cases indicate that the prisoner should not be held responsible for delays occurring in the latter two categories, *see id.*, at 33, 4 All E.R., at 786, it is at least arguable that some portion of the time that has elapsed since this petitioner was first sentenced to death in 1978 should be excluded from the calculus.

Id. In this case it is quite clear that Mr. Valle's appeal falls in the category of a legitimate exercise of his right to review. Given the fact that it took the State three

tries to impose a death sentence on Mr. Valle that would be upheld as constitutional, it is inconceivable that the State would with that track record represent that Mr. Valle's appeals and postconviction proceedings have been an abuse of the judicial system. For the last three years and nine months of his imprisonment, Mr. Valle will have not had any appeals pending. And for the first 10 years of his time on death row, Mr. Valle was there unconstitutionally.

While Mr. Valle could certainly avoid suffering through the review process by simply waiving his appeals, he has constitutional rights that are meaningless if not exercised, and in order to exercise them, he has to avail himself of the judicial system. If that system cannot reach a result within a time period permitted by the Eighth Amendment, then the problem is with the system, not with Mr. Valle's choice to exercise his rights. In other words, he does not forfeit his Eighth Amendment rights by exercising his other constitutional rights. He is not required to choose between them.

Lackey cites *People v. Anderson*, 493 P.2d 880, 894 (1972), for the proposition that "the judicial and administrative procedures" that delay execution are "essential to due process of law," such that they cannot be blamed on Mr. Valle or held against him. *See id*. at 1045 n.*. If they are essential to due process of law, Mr. Valle has done nothing wrong by availing himself of his appeals. Mr. Valle's use of direct appeal and postconviction collateral procedures does nothing to

reduce the cruel and unusual nature of his lengthy incarceration under sentence of death. The direct appeal from the sentence is automatic, and a postconviction appeal is a matter of right under Florida law. These remedies are provided by law, in the belief that they are the appropriate means of testing convictions and death sentences. The expectation is that death-sentenced prisoners are entitled to have their cases reviewed by higher courts.

Finally, the *Lackey* memorandum addressed the precedential nature of its memorandum:

> As I have pointed out on past occasions, the Court's denial of certiorari does not constitute a ruling on the merits. *See, e.g., Barber v. Tennessee*, 513 U.S. 1184, 115 S. Ct. 1177, 130 L.Ed.2d 1129 (1995); *Singleton v. Commissioner*, 439 U.S. 940, 942 (1978) (STEVENS, J., respecting denial of certiorari). Often, a denial of certiorari on a novel issue will permit the state and federal courts to "serve as laboratories in which the issue receives further study before it is addressed by this Court." *McCray v. New York*, 461 U.S., at 963, 103 S. Ct., at 2439. Petitioner's claim, with its legal complexity and its potential for far-reaching consequences, seems an ideal example of one which would benefit from such further study.

Id. This Court is part of the Supreme Court's laboratory, and it is experimenting with Mr. Valle's life.

The United States Supreme Court has given its approval to this Court acting on the Eighth Amendment to reach one of the decisions that will serve to inform the Supreme Court's treatment of this issue. The laboratory does not work if every court waits for the Supreme Court to tell them what the right conclusion will be

prior to acting. This Court will not get a second chance to address Mr. Valle's claim after the Supreme Court makes a decision on whether execution after lengthy confinement on death row constitutes cruel and unusual punishment.

The circuit court found that "reliance on *Lackey* is not well-founded as *Lackey* stands solely for the Court's denial of a petition . . . ." (Order at 28). Understanding that statement is crucial to understanding the court's failure to properly conceive of *Lackey*. The court relies on the fact that the *Lackey* memorandum represents the denial of a cert petition, rather than a merits ruling by the United States Supreme Court, to find that Mr. Valle cannot rely on *Lackey*. Ironically, the court relies on the *Lackey* memorandum for the proposition that a claim does not exist, while faulting Mr. Valle for relying on the *Lackey* memorandum for the proposition that a claim exists. The problem is, if the fact that *Lackey* is not a merits ruling means that it cannot establish a claim, it also must mean that it cannot disallow a claim. And more importantly, the *Lackey* memorandum addressed and dispelled that distinction: ". . . the Court's denial of certiorari does not constitute a ruling on the merits," but it can "permit the state and federal courts to 'serve as laboratories in which the issue receives further study before it is addressed by this Court,'" then concluding that "Petitioner's claim, with its legal complexity and its potential for far-reaching consequences, seems an ideal example of one which would benefit from such further study." 514 U.S. at

1045.

Thus, the circuit court's refusal to entertain this claim because it is based on a cert denial is in error. The circuit court and this Court are encouraged to interpret the Constitution in accordance with their own knowledge and understanding when there is not a clear precedent establishing or disallowing a constitutional claim. *See McCray v. New York*, 461 U.S. 961, 963 (1983) (Stevens, J., dissenting from denial of certiorari, joined by Blackmun, J. and Powell, J.). *Lackey* articulates a clear constitutional problem with strong support representing a strong need for redress, but this Court and the circuit court decline to act based on the notion that they must wait to see what the United States Supreme Court does, while the United States Supreme Court is waiting to see what this Court does. Meanwhile defendants are being executed.

The problem is put in sharper relief when one considers the decisions of this Court on which the circuit court relied in determining there was no viable claim, which boil down to the proposition that relief should be denied because "no federal or state courts have accepted [the] argument that a prolonged stay on death row constitutes cruel and unusual punishment, especially where both parties bear responsibility for the long delay." *Knight v. State*, 746 So. 2d 423, 437 (Fla. 1998). That line of cases denies defendants a cognizable claim because they are waiting for a higher court to create a claim while the higher court is waiting on the lower

court to exercise its judgment. Mr. Valle urges this Court not to permit another death row inmate to be executed without deciding whether the Eighth Amendment contemplates decades of imprisonment on death row and how such imprisonment affects the constitutionality of carrying out an execution, and does so without constraining the analysis by the fact that no higher court has paved the way for this Court. Deferring this issue to another day is inappropriate while the State is executing individuals raising this claim.

Mr. Valle's death sentence simply no longer stands for what it did when it was imposed. The psychological and emotional toll from prolonged incarceration in the harsh conditions of death row has been termed "the death row phenomenon" or "death row syndrome." *Soering v. United Kingdom*, 11 Eur. H.R. Rep. 439 (1989). Justices Stevens and Breyer have urged repeatedly that certiorari should be granted to consider whether such prolonged confinement on death row, and execution after such confinement, violates the Eighth Amendment's prohibition on cruel and unusual punishment. *Lackey*, 514 U.S. at 1045; *Foster v. Florida,* 537 U.S. 990 (2002) (Breyer, J., dissenting from denial of certiorari); *Knight v. Florida*, 528 U.S. 990 (1999) (Breyer, J., dissenting from denial of certiorari); *Elledge v. Florida*, 525 U.S. 944 (1998) (Breyer, J. dissenting from denial of certiorari).

Beyond a shadow of a doubt, the State of Florida is imposing a very real punishment on death row inmates by holding them for decades under the ever-

present shadow of death. That punishment is no less real than judicially-imposed terms of imprisonment. It must be part of the constitutional calculus. It must be said to reduce the penal justifications for carrying out an execution. Mr. Valle is entitled to relief.

ARGUMENT VI: MR. VALLE 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 HIM 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

Mr. Valle is a Cuban national. The United States and Cuba are both signatories to Article 36 of the Vienna Convention on Consular Relations, which requires that foreign nationals arrested in signatory states be advised of their right to have their consulate notified of their arrest and to consult with the consulate or a diplomatic officer without delay.[19] Vienna Convention on Consular Relations and

[19] The treatment of Article 36 violations has been the subject of two recent cases in the International Court of Justice (I.C.J.). In 2001, the I.C.J. decided *LaGrand Case* (F. R. G. v. U.S.), 2001 I. C. J. 466 (Judgment of June 27) (*LaGrand*), a case involving two brothers, both German citizens, who were arrested, tried, convicted, and executed in Arizona for committing capital murder. There was no dispute that the Arizona authorities had failed to inform the brothers that they could request that the German Consulate be notified of their arrests. Germany brought suit in the I.C.J., claiming that the U.S. had "violated the **individual rights** conferred on the detainees by Article 36 ." *Id.* at ¶ 48 (emphasis added). Agreeing with Germany's construction of Article 36 , the I.C.J. rejected the U.S.'s assertion that "rights of consular notification and access under the Vienna Convention are rights of States, not individuals." *Id.* at ¶ 76 .

Optional Protocol on Disputes, art. XXXVI, Dec. 24, 1969, 21 U.S.T. 77. Mr. Valle was never informed of his rights under Article 36 upon his arrest and never contacted or received any assistance from the Cuban government. Had he known of his rights under Article 36, he would have availed himself of his rights and it is likely that contact with his consul would have resulted in assistance to him. Contrary to the lower court's assertion that there are not Cuban consulates on American soil, there is an Interests Section. The Cuban Interests Section is in Washington, D.C. Therefore while the two countries do not have formal diplomatic relations, the Interests Sections function as de facto embassies,

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In 2004, the I.C.J. decided the *Case Concerning Avena and Other Mexican Nationals* (*Mex. v. U.S.*), 2004 I.C.J. No. 128 (Judgment of Mar. 31) (*Avena*) , after Mexico argued that the U.S. had denied 54 Mexican nationals their individual rights under the Vienna Convention. Citing *LaGrand*, the I.C.J. again held that Article 36 creates individual rights in detained foreign nationals. *Id.* at ¶ 40 . The I.C.J. confirmed that an individual's rights under Article 36 "are to be asserted, at any rate in the first place, within the domestic legal system of the United States." *Id.* Importantly, the I.C.J. also ruled that the U.S. was obligated to provide judicial review and reconsideration of the convictions and sentences of the Mexican nationals in question, and that procedural default rules may not be invoked to prevent meaningful review and reconsideration of cases in which violations of Article 36 have occurred. *Id.* The Court also made clear that **its judgment should apply to all individuals in similar circumstances in the United States, regardless of nationality**. *Id.* at ¶ 151 (emphasis added).

In 2005, President Bush determined that the U.S. would discharge its duties under the I.C.J.'s ruling in *Avena* by "having State courts give effect" to *Avena* in the cases addressed in that decision. Yet in *Medellin v. Texas*, 552 U.S. 491, 498-99 (2008), the U.S. Supreme Court ruled that neither the I.C.J.'s ruling in *Avena* nor the President's Memorandum constituted directly enforceable federal law. The Court observed, however, that Congress could make the I.C.J.'s ruling enforceable by implementing legislation to that effect. *Id*. at 520.

providing consular services.

Recently, on June 14, 2011, Senator Patrick Leahy introduced the Consular Notification Compliance Act of 2011 (CNCA), S. 1194, 112th Cong., in the United States Senate. (ATTACHMENT JJ). The bill states that "[n]othwithstanding any other provision of law, a Federal court shall have jurisdiction to review the merits of a petition claiming a violation of Article 36(1)(b) or (c) of the Vienna Convention, filed by an individual convicted and sentenced to death by any Federal or State court." CNCA § 4(a)(1). The bill would provide foreign nationals on death row a process by which to ASSERT the violation of their rights under Article 36 in a manner that is consistent with the ICJ's ruling in Avena. This avenue has never before been available to these defendants. The CNCA would also require that a federal district court grant a stay of execution if necessary to afford review of such a petition, CNCA § 4(a)(2), and it provides that no petition filed within a year of the enactment of the bill "shall be considered a second or successive habeas corpus application or subjected to any bars to relief based on pre-enactment proceedings," CNCA § 4(a)(5). In order to obtain relief, the petitioner must prove "actual prejudice to [his] criminal conviction or sentence as a result of the violation." CNCA § 4(a)(3).

On July 1, 2011, the United States Solicitor General filed an amicus brief in support of an application for a stay of execution for Humberto Leal Garcia, a

Mexican national scheduled to be executed in Texas on July 7, 2011. (Attachment KK). The Untied States Supreme Court denied the stay, however, the Court was split 5-4. In a dissenting opinion, Justice Breyer recognized:

> this Court has adequate legal authority to grant the requested stay. Should Senator Leahy's bill become law by the end of September (when we would consider the petition in the ordinary course), this Court would almost certainly grant the petition for a writ of certiorari, vacate the judgment below, and remand the case for further proceedings consistent with that law. Indeed, were the Solicitor General to indicate at that time that the bill was about to become law, I believe it likely that we would hold the petition for at least several weeks until the bill was enacted and then do the same. And this Court, under the All Writs Act, 28 U. S. C. §1651, can take appropriate action to preserve its "potential jurisdiction." *FTC v. Dean Foods Co.*, 384 U. S. 597, 603 (1966).
>
> Thus, on the one hand, international legal obligations, related foreign policy considerations, the prospect of legislation, and the consequent injustice involved should that legislation, coming too late for Leal, help others in identical circumstances all favor granting a stay. And issuing a brief stay until the end of September, when the Court could consider this matter in the ordinary course, would put Congress on clear notice that it must act quickly. On the other hand, the State has an interest in proceeding with an immediate execution. But it is difficult to see how the State's interest in the immediate execution of an individual convicted of capital murder 16 years ago can outweigh the considerations that support additional delay, perhaps only until the end of the summer.

Leal Garcia v. Texas, 564 U.S. ____ (2011).

Additionally, the Solicitor General's arguments remain significant. The Solicitor General argued that noted that Senator Leahy had introduced the CNCA after extensive consultation with the Department of State and the Department of

Justice, and that the Secretary of State and the Attorney General had jointly written to Senator Leahy to express the Executive Branch's strong support for the CNCA.[20] *See* Letter from Hillary Rodham Clinton, Secretary of State, and Eric H. Holder, Jr., Attorney General, to Senator Patrick J. Leahy (Jun. 28, 2011). In its amicus brief, the Solicitor General stated that Garcia's case "implicates United States foreign-policy interests of the highest order." Amicus brief at 11. The Solicitor General further argued that Garcia's execution would cause "irreparable harm to those interests by placing the United States in irremediable breach of its international-law obligation, imposed by the I.C.J.'s judgment in *Avena*, to provide judicial review of petitioner's Vienna Convention claim." *Id*. at 12. The Solicitor General noted also that such a breach would have serious repercussions for U.S. foreign relations, law enforcement, and other cooperation with Mexico, and the ability of American citizens traveling abroad everywhere to have the benefits of consular assistance in the event of detention. *Id*.

For the same reasons that the Solicitor General urged the U.S. Supreme Court to grant a stay of execution in Garcia's case and for the reasons Justice Breyer explained that a stay should be granted, Mr. Valle urged the lower court to grant a stay of execution in Mr. Valle's case to allow Congress the time to pass the

[20] *Compare Medellin v. Texas*, 554 U.S. 759 (2008) (denying a stay of execution in the absence of any representation by the Executive Branch that there was a likelihood of action on the proposed legislation).

CNCA. The passage of the CNCA would allow Mr. Valle to seek judicial review of the violation of his rights under Article 36 of the Vienna Convention on Consular Relations without being subjected to the procedural bars the lower court relies on in denying Mr. Valle's claim. The lower court misunderstood this argument. To allow Mr. Valle to be executed without an opportunity for judicial review of his claim would be an egregious violation of due process.

CONCLUSION

In light of the foregoing arguments, Mr. Valle submits that he is entitled to have the lower court's order reversed and his case remanded to the circuit court for full public records disclosure and an evidentiary hearing on his claims. Based on his claims for relief, Mr. Valle is entitled to a new trial and/or sentencing proceeding.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by electronic mail and United States Mail to Sandra Jaggard, Assistant Attorney General, 444 Brickell Ave., Suite 650 Miami, Florida 33131 this 20th day of July, 2011.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this petition is typed in Times New Roman 14 point font, in compliance with Fla. R. App. P. 9.210(a)(2).

SUZANNE MYERS KEFFER