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.

REPLY BRIEF OF APPELLANT

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ARGUMENT IN REPLY

Mr. Valle submits this Reply to the State's answer. Given the short time provided to prepare this Reply Brief, Mr. Valle cannot and will not reply to every argument raised by the State. Mr. Valle neither abandons nor concedes any issues and/or claims not specifically addressed in this Reply Brief. Mr. Valle expressly relies on the arguments made in his Initial Brief for any claims and/or issues that are only partially addressed or not addressed in this Reply Brief.

REPLY TO ARGUMENT I

Mr. Valle does not dispute that the circuit court ordered the DOC, the FDLE, the Attorney General's Office and the Governor's Office to disclose very limited records concerning lethal injection. However, very significant and relevant records were not required to be produced.

The Department of Corrections was required to produce 57 pages of records which it had previously agreed to provide to a private attorney pursuant to Fla. Stat. §119, but which the DOC repeatedly objected to providing to death sentenced inmates represented by CCRC-South. Even during the hearing in Mr. Valle's case, when asked by the court what private counsel would have been entitled to pursuant to her request, counsel for DOC responded:

> Well, she may have been [entitled to the records] up until the point that she was appointed as collateral counsel for a death row inmate. If she was just indeed a private citizen and remained such, we agree that

> she would be entitled to those records. But once she became appointed as collateral counsel for a death row inmate, she was no longer able.

(Transcript July 5, 2011 at 74-75). When questioned further as to why a private citizen could obtain the records and death row inmates—who are, of course, those individuals to whom the records are most significant and relevant—could not, the DOC simply stated: "We didn't make the rules." (Id.). Mr. Valle highlights this argument because this is the mentality of all the agencies and quite frankly the court.

Nevertheless, the extent of the records disclosed from DOC included a two page invoice, the April 21, 2008 lethal injection procedures with a memo requesting the then Secretary's signature, the June 8, 2011 lethal injection procedures, two drafts dated December 29, 2010 of the lethal injection procedures reflecting a change from sodium thiopental to pentobarbital, a legal memorandum on the state of lethal injection litigation across the country, and blank copies of all execution checklists and other materials used by the execution team, during training sessions and during an execution. This was by no means the entirety of Mr. Valle's request.

It is significant that the lower court only required the DOC to provide blank checklists and training logs but now faults Mr. Valle for not providing his expert with information regarding the previous five executions. The lower court found those records irrelevant, but now deems that those records should have been given

to Mr. Valle's expert. Had the lower court required DOC to disclose the actual checklists, logs and notes as requested, the lower court would not have been able to fault Mr. Valle in this regard.

The DOC and FDLE were required to disclose correspondence from January 1st, 2010, to the present with any federal agency within drug enforcement, FDA, BOP or DOJ, with regard to the constitutionality and/or efficacy of the chemical combination in the new protocol from June 8th, 2011. Neither agency provided these records and each certified they turned over everything they had with respect to the court's order. Therefore, the only explanation is that these records don't exist.

The FDLE was only required to turn over training logs, manuals, or protocol having to do with their involvement in the execution process and logs or record books regarding the maintenance, storage, use and disposal of pentobarbital. The FDLE only disclosed training logs for 3 dates in 2010, yet certified to the lower court that it provided all the records responsive to the court's order. Again, this was not the extent of the information requested from FDLE. Importantly, FDLE is an integral part of the lethal injection process because the agents are supposed to serve as independent observers. Further, FDLE is required to confirm that all lethal chemicals are correct and current, including compliance with state and

federal law. This is relevant to Mr. Valle's claims that the lethal injection drugs, specifically sodium thiopental and pentobarbital have been obtained illicitly.

Mr. Valle agrees with the State that the Office of the Attorney General was required to disclose correspondence regarding the constitutionality of the new protocol and similar correspondence from the Governor's Office to the extent it would approve or review changes to the lethal injection procedures. Again, this was not the extent of the request to these two agencies.

The State ignores that the records which the court required these agencies to produce were extremely limited and that the refusal to disclose information, and the courts' acquiescence, has prevented Mr. Valle from being able to more fully plead his claim. As such, the lower court has denied Mr. Valle's motion in contravention of *Ventura v. State*, 673 So. 2d 479 (Fla. 1996). The State too ignores that it is estopped from arguing the denial or dismissal of Mr. Valle's claims for this same reason. "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." *Id.*

It is interesting that the State now properly argues the decision in *Seibert v. State*, 35 Fla. L. Weekly S342 (Fla. July 8, 2011). In the lower court, the State, and following the State's, lead the DOC, argued repeatedly that *Seibert* stood for the proposition that only the protocol was required to be disclosed. Of course, this

is incorrect. In *Seibert*, this Court upheld the lower court's decision requiring the Department of Corrections, the Office of the Attorney general and the Office of the Governor to disclose the protocol itself **and any documents showing the protocol was flawed**. The same reasoning applies here. Yet, the DOC has never turned over to Mr. Valle, or any other capital defendant, public records that we now know to exist. Both Hospira, Inc., the manufacturer of sodium thiopental, and Lundbeck, Inc., the manufacturer of pentobarbital, have publicly stated that they sent letters to state departments of corrections condemning the use of their product in executions by lethal injection. In Lundbeck's case, the company's concern was based on serious concerns regarding the efficacy of the drug for such use. Certainly, concerns over the efficacy of a drug, which is intended to be the most crucial aspect of the three drug sequence is an indication of a flaw in the procedures.

In an effort to continue the lack of transparency in the lethal injection process, the State argues that Mr. Valle is not entitled to the records because his claims do not have merit. However, Mr. Valle is not required to prove the merits of his claims in order to gain access to public records. In effect, the States is arguing that Mr. Valle is not entitled to records disclosure because he is not entitled to postconviction relief. This is putting the cart before the horse.

In order to obtain additional public records pursuant to Fla. R. Crim. P. 3.852, a capital defendant must show that:

> (A) collateral counsel has made a timely and diligent search of the records repository;
>
> (B) collateral counsel's affidavit identifies with specificity those additional public records that are not at the records repository;
>
> (C) the additional public records sought are either relevant to the subject matter of a proceeding under rule 3.851 or appear reasonably calculated to lead to the discovery of admissible evidence; and
>
> (D) the additional records request is not overly broad or unduly burdensome.

Fla. R. Crim. P. 3.852(i)(2). The clear meaning of Fla. R. Crim. P. 3.852 is that the relevancy requirement is met if Mr. Dennis demonstrates that the records are relevant to the subject matter of a proceeding under rule 3.851. Rule 3.852 does not require Mr. Valle to prove the merits of his claim, or the entitlement to an evidentiary hearing, to demonstrate that he is entitled to public records disclosure. Requiring Mr. Valle to prove the merits of his claim in order to obtain the public records would completely obviate the purpose of Rule 3.852.

Recent events demonstrated that the DOC **continues** to ignore its own written procedures that call for transparency in the process. Despite the attempts of undersigned counsel to obtain information regarding the use of a new drug, the FDOC played a game of hide-and-seek and refused to provide any information to Mr. Valle or other death sentenced inmates, all the while misleading the Florida state courts regarding the status of the procedures.

The Office of the Capital Collateral Regional Counsel only learned through various media reports that DOC was in the process of rewriting the execution

procedures and considering the use of pentobarbital in place of sodium thiopental. Frank Fernandez, *Jury Recommends Death for Gregory*, Daytona Beach Journal (Mar. 10, 2011). Undersigned counsel served public records demands on DOC, FDLE, the Governor's Office and the Office of the Attorney General in an effort to obtain information concerning the possible change of drugs in the case of *State v. Lightbourne*, Case no. 81-00170 (Fifth Judicial Circuit) and *State v. Williams*, Case no. 93-3005 CF10A (Seventh Judicial Circuit). The agencies raised blanket objections that the detailed requests were irrelevant, overly broad, and unduly burdensome. Counsel for DOC repeatedly represented that no new procedure existed and that the DOC had not switched to the use of pentobarbital. It was not until a hearing on June 9, 2011 in *State v. Lightbourne*, that DOC counsel announced the existence of a new protocol. At that time, the DOC disclosed the new protocol, signed just one day before on June 8, 2011. Yet, the draft of that procedure, also disclosed for the first time at the *Lightbourne* hearing, has been in existence since December 2010. A review of the documents indicates there were no changes between the December 2010 draft and the final procedure on June 8, 2011.

The DOC's repeated protestations that the procedure had not been changed were disingenuous, at best. In a proceeding in *State v. Zakrzewski*, Case no. 94-1283 (First Judicial Circuit), the Assistant Attorney General even offered to submit

to the court in that case a sworn affidavit signed by the DOC's general counsel attesting to the fact that no new procedure existed. Upon objection from defense counsel on the basis that the submission of a sworn statement constitutes a concession that an evidentiary hearing is required, the Assistant Attorney General withdrew the affidavit. Although the December 2010 procedure, draft or otherwise, undercuts the sworn statement and other representations made by counsel for the DOC in circuit courts throughout the state with respect to the existence of a new procedure and new drug protocol, these procedures were never disclosed to counsel for death sentenced inmates.

However, 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. Despite the fact that DOC released the procedure to the media, it continued to misrepresent to numerous courts that such procedures did not exist. The misrepresentations and secrecy contradicts the requirements of the DOC's own certification and procedure that the entire process by transparent. The refusal to disclose records pursuant to Mr. Valle's requests, and the circuit court's acquiescence, is more of the same.

Mr. Valle is challenging the method of execution based on the new substitution of pentobarbital for sodium thiopental, specifically the introduction of an untested, non-FDA approved drug, of unknown efficacy, into a system with a

problematic history of botched executions and a continued practice of deviating from established protocol. He has met the minimal requirement of establishing that the records sought are relevant or will lead to the discovery of admissible evidence.

REPLY TO ARGUMENT II

Like the lower court, the State is requiring Mr. Valle to prove on the face of his postconviction motion that Florida's lethal injection procedures are unconstitutional. If defendants were required to prove all of their allegations on the face of the motion, then there would never be a need for an evidentiary hearing in any case. Instead, the lower courts could simply make credibility determinations on paper, or reject the testimony of witnesses simply because they made some statement, in some other proceeding, in some other jurisdiction. Certainly, that is not the intent of Fla. R. Crim P. 3.851 or the long line of cases from this Court setting out the standard for granting an evidentiary hearing.

The State argues that this Court has rejected the claim that every defendant is entitled to his own evidentiary hearing on lethal injection, citing *Schoenwetter v. State*, 46 So. 3d 535 (Fla. 2010). *Schoenwetter* certainly does not stand for the proposition that if some defendant in some other jurisdiction in some other state received an evidentiary hearing and presented similar witnesses, a defendant is precluded from an evidentiary hearing in this State. The State is not relying on evidentiary development during a hearing in Florida state courts. Rather, it relies

on evidentiary development and testimony in other states with respect to that state's own procedures. Without comparison in every instance to the procedures at issue in the other states, which in and of itself would be a factual determination, the cases cited by the State do not preclude Mr. Valle from receiving an evidentiary hearing.

In each of the cases relied on by the State, factual development occurred in the lower court upon which the appellate courts relied. Mr. Valle was not a party to those proceedings. 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). It cannot be said that Mr. Valle does not get an evidentiary hearing on Florida's procedures and the effect of substituting a new drug into those procedures based on the factual determinations and credibility findings of courts in other states.

The State's answer exemplifies precisely why an evidentiary hearing is necessary: the material facts as pled by Mr. Valle are in dispute. The most

significant fact in dispute is whether the substitution of pentobarbital for sodium thiopental is a substantial change. The State cites to *Powell v. Thomas* 641 F. 3d 1255 (11th Cir. 2011) for the proposition that it is not a significant change. First and foremost, *Powell* was decided based on factual determinations made after an evidentiary hearing. Second, as Mr. Valle argued in his brief, Florida is not Alabama. While Florida has a history and pattern of botching executions, Alabama, at the time of the Eleventh Circuit's *Powell* decision, had none. *Powell* rested on the simplistic factual determination that the State of Alabama merely substituted one barbiturate for another. Mr. Valle has pled numerous facts detailing material differences between the two drugs and the significance of those differences to his claim. Mr. Valle has provided a detailed expert 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 to Mr. Valle. (P. 665 - 698).

Mr. Valle's case can also be distinguished from the Eleventh Circuit Court of Appeals opinion in *DeYoung v. Owens*, No. 11-13235 (11th Cir. July 20, 2011).[1]

[1] While the State has filed the Third Circuit Court of Appeals order in *Jackson v. Danberg*, No. 11-9000 (3rd Cir. July 21, 2011) as supplemental authority, Mr. Valle would point out that the Third Circuit vacated the stay on procedural grounds, i.e., that the district court had not set forth its reasoning for granting a stay. It bears noting that while Delaware Attorney General invited the Third Circuit

DeYoung, a condemned Georgia inmate, acknowledged in his § 1983 complaint that *Powell* was on point, but argued that the evidence he proffered undermined the premise of *Powell*. Mr. Valle has alleged that it is the combination of substituting a new drug of questionable efficacy and about which there is zero relevant clinical history, **combined with** continuing deficiencies in the DOC's procedures that constitutes a substantial change in the procedures. It is no secret that the DOC has a history of botching executions. After the Angel Diaz execution, executions stopped across the country. Yet 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 serious harm. Unlike Arizona, Alabama, and Georgia, the most significant medical aspects of the procedures are performed by either non-medically trained personnel, or personnel of unknown training, experience, or qualifications. Florida's lethal injection procedures were upheld **explicitly based on the use of sodium thiopental** to

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Court of Appeals to make a merits ruling, the court declined to do so, instead remanding to the district court to afford that court an opportunity to reinstate the stay with reasons set forth. The district court had entered the stay of execution sua sponte after Jackson moved to reopen his case based on Delaware's substitution of pentobarbital for sodium thiopental. The district court has scheduled a hearing on Jackson's motion to reopen his case on July 27, 2011 and stated that it would not have a ruling prior to the scheduled execution on July 29, 2011. *Jackson v. Danberg*, No. 06-cv-00300 (D. Del. July 12, 2011). Thus, it appears that Jackson, unlike Mr. Valle, will be afforded a meaningful review of his allegation that the substitution of pentobarbital for sodium thiopental is a substantial change.

protect against the risk of serious harm that could be caused by any deficiencies in the procedures. *Lightbourne v. McCollum*, 969 So. 2d 326 (Fla. 2007). This no longer holds true.

In rejecting Dr. Waisel's opinion, the State relies on the same federal cases cited by the lower court. Mr. Valle addresses the lower court's misplaced reliance on *Pavatt v. Jones*, 627 F.3d 1336 (10th Cir. 2010), *Powell v. Alabama*, 641 F.3d 1255 (11th Cir. 2011) and *Beaty v. Brewer*, 2011 WL 2050124 (D. Ariz. 2011) in his initial brief. Mr. Valle will reiterate here though that the State's 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 be heard.

The fact that other courts have rejected Dr. Waisel's opinion regarding other states' lethal injection procedures in deciding the merits of a lethal injection challenge is of no relevance to the issue at hand: whether Mr. Valle has made a facially sufficient claim to require an evidentiary hearing. The State's argument about Dr. Waisel's opinion regarding other states falls flat. There are significant differences between Florida and Oklahoma, Alabama, and Arizona—differences which Mr. Valle submits are relevant to a resolution of the merits of his action. For example, none of the other states have histories of botched executions and patterns

of deviating from written procedures, and in both Oklahoma and Arizona, medically trained personnel play key roles in executions.

The State suggests that "the only information regarding how this change of drugs created a substantial risk of serious harm was Defendant's assertions that Dr. Waisel's report indicated that there were 'concerns' over using pentobarbital because there was insufficient research to determine a clinical dose of pentobarbital sufficient to induce anesthesia." (Answer at 41). A detailed reading of the brief will demonstrate an abundance of problems with use of pentobarbital as an anesthetic in an already dysfunctional procedure. These problems were discussed throughout Dr. Waisel's report. A few, for example, include:

- pentobarbital has not been FDA-approved for the induction of anesthesia;

- pentobarbital has no relevant clinical history;

- pentobarbital 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 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 injection puts the inmate at risk for serious undue pain and suffering;

- 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; and

- the competency to insert an intravenous catheter and properly monitor the catheter after insertion are neither expected nor required of phlebotomists;

- 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, but there is no requirement of evidence of recent practice or competency in these skills.

- 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; and

-unqualified individuals are very likely to miss subtle signs of inadequate anesthesia that highly qualified, certified individuals will recognize.

The State fails to consider the entirety of Dr. Waisel's opinion and Mr. Valle's allegations.

Additionally, the State takes an overly simplistic view of Dr. Waisel's opinion regarding his explanation of the inadequacy of the dosage of pentobarbital set forth in the procedures. Dr. Waisel stated:

> The pentobarbital package inserts states for sedation that a commonly used initial dose for the 70 kg adult is 100 mg. **To be clear, the state of sedation is different than the state of anesthesia.** Sedated individuals are often aware and often perceive pain. The insert also states "the drug may be given up to a total of from 200 to 500 mg for normal adults." **The package insert does not say the intended effects of these dosage recommendations.** But since pentobarbital is not approved for induction of anesthesia, it is reasonable to assume that these doses are either for sedation or for control of an acute seizure.

(P. 669). Dr. Waisel confirmed that the 5 grams of pentobarbital is injected into the prisoner is NOT 10 times the dose needed to induce anesthesia, because we do not have any clinical or research information on what dose reliably induces anesthesia.

(P. 669). In any event, based on the State's argument, Dr. Waisel's opinion is clearly in dispute; an evidentiary hearing is required.

Furthermore, the State ignores the new evidence from Lundbeck, Inc., the sole manufacturer of pentobarbital. Additional evidence regarding the efficacy of pentobarbital as an anesthetic in executions includes Lundbeck's condemnation of the misuse of its product for executions by lethal injection. The company has 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's position is clearly one of concern for the safety and efficacy of pentobarbital as an anesthetic component in lethal injection executions. 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. The State ignores this new evidence entirely.

The State, like the lower court, does not understand how a lack of knowledge about the source of the drugs used in lethal injections or the fact that

the drugs are not FDA-approved demonstrates that the procedures are unconstitutional. However, Mr. Valle does not understand why those who are charged with the duty of enforcing the law are not outraged by the fact that the DOC has obtained, is obtaining or will obtain the drugs necessary to carry out lethal injection in violation of the law. Mr. Valle has alleged that U.S. prisons across the country have been obtaining the drugs used in executions illegally. The DOC has refused to turn over public records establishing that it has obtained the drugs to be used in Mr. Valle's execution legally. It stands to reason, however, that if other states must obtain execution drugs (including pentobarbital) illegally, then Florida must have similarly obtained the drugs. That fact, combined with the shroud of secrecy regarding the execution process serves to undermine the presumption that the DOC will carry out their duties as specified in the protocol.

The State's reliance on *Brewer v. Landrigan*, 131 S. Ct. 445 (2010) to support its argument regarding the source of the drugs is misplaced. The United States Supreme Court's reversal of the district court decision granting a stay to Arizona death-row inmate Jeffrey Landrigan has no bearing on Mr. Valle's claim. In *Landrigan*, the stay was reversed based on a lack of sufficient evidence that the Arizona Department of Corrections (ADOC) had illegally obtained sodium thiopental, and that if it did, there was no evidence that it was unsafe. *Brewer v.*

Landrigan, 131 S. Ct. 445 (2010). Plaintiff Landrigan's complaint was based on the following:

> ADOC's use of sodium thiopental that was manufactured by a foreign source not approved by the FDA creates a substantial and unnecessary risk of serious harm in violation of his rights under the Eighth Amendment. Plaintiff further claims that ADOC's failure to provide him notice regarding the sodium thiopental it intends to use in his execution violates his right to due process under the Fourteenth Amendment. Finally, Plaintiff alleges that the administration by a medical doctor or other trained medical professional of non-FDA approved sodium thiopental from a foreign source demonstrates deliberate indifference to his right to be free from cruel and unusual punishment.

Landrigan v. Brewer, 2010 WL 4269559 (D. Az. Oct. 25, 2010). Initially, it must be noted that Landrigan's complaint challenged the use of sodium thiopental and not pentobarbital. Additionally, Mr. Valle's complaint is broader-based precisely because of the DOC's demonstrated history of not following written instructions. Whether DOC has obtained any of the drugs illegally is not just a question of the efficacy of the drugs, but more significantly casts doubt on the presumption that they will carry out their duties in a humane and competent manner. It cannot be said that violating the law fulfills that obligation. Rather, it demonstrates that DOC will carry out an execution at all costs.

The State complains that Mr. Valle is relitigating the deficiencies in the procedures which were already rejected and found to be sufficient in *Lightbourne v. McCollum*, 969 So. 2d 326 (Fla. 2007). The State maintains that 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—were unaffected by the change in the procedure. The State fails to understand that if the most significant safeguard in the procedure, sodium thiopental, is changed, then the remaining and interdependent components must be reevaluated to meet that change. 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. For example, Dr. Waisel opined 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**. There are also problems inherent in the training and qualifications required in the procedures. "Unqualified individuals are very likely to miss the subtle signs of inadequate anesthesia that highly qualified, certified individuals will recognize. This lack of a meaningful framework for consciousness check could easily result in a mis-identification of an inmate as unconscious when in fact the inmate is conscious but paralyzed, raising a high risk of needless pain and suffering." (P. 671). These continuing deficiencies combined with the addition of a

new anesthetic of questionable efficacy undoubtedly create a substantial risk of harm. 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 State's assertion that Mr. Valle is arguing he is entitled to input in devising the lethal injection procedures is unfounded. In contrast, Mr. Valle argued that recent events demonstrated that the DOC **continues** to ignore its own written procedures that call for transparency in the process. Despite the attempts of undersigned counsel to obtain information regarding the use of a new drug, the DOC played a game of hide-and-seek and refused to provide any information to Mr. Valle, or any other condemned inmate, all the while misleading the Florida state courts regarding the status of the procedures. The DOC failed to conduct even the administrative tasks that were written into its own procedure: for example, the Defendants failed to conduct the required bi-annual review of the process and have failed to conduct any research, medical or otherwise, into the efficacy of pentobarbital. There can be no rational basis or compelling reason for failing to conduct the bi-annual review, nor is there any justification for the failure to conduct research into the use of pentobarbital. If the Defendants failed to undertake the task of reviewing the procedures despite the fact that it is required under the protocol, Mr. Valle has no reason to believe that the Defendants will follow the

procedures during the pressure of an execution. It must make one pause and ask how else is DOC failing to fulfill its obligations to ensure a humane and competent execution.

Mr. Valle has pled sufficient facts to show that the substitution of pentobarbital in Florida's procedures is a substantial change. It is a question about which there is a genuine dispute of material fact which requires evidentiary development to resolve. Florida's unique history and pattern of botched executions makes the substitution of pentobarbital far more significant than in states without such a gruesome history. The protections afforded by Florida's previous lethal injection procedures passed muster because sodium thiopental, a drug with a long clinical history of reliably inducing anesthesia, was used. The substitution of an untested and likely problematic drug whose own manufacturer has warned about its unreliability for use in lethal injections effectively negates the procedural safeguards upon which the constitutionality of Florida's procedures have historically been upheld.

REPLY TO ARGUMENT III

The State's reply to this argument starts by completely misstating the argument for the State's convenience. Mr. Valle did not claim, and the circuit court did not deny a claim, "that he was improperly denied clemency." (Answer at 48). Rather, Mr. Valle claimed, rightfully, that he was denied any clemency

proceeding. The State correctly argues that pardon and commutation decisions are rarely appropriate subjects for judicial review. (Answer, at 50, citing *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272 (1998)). However, the State ignores the fact that this court and the United States Supreme Court in *Woodard*, have repeatedly expressed that the clemency process is a vital part of the justice system. Mr. Valle's case is precisely the kind of rare case where "[j]udicial intervention might, for example, be warranted . . . where the State arbitrarily denied a prisoner any access to its clemency process." *Woodard*, 523 U.S. 272 at 289.

Moreover, the State ignores the fact that in *Woodard*, as this Court has also recognized, five justices of the United States Supreme Court concluded that at least some minimal procedural due process requirements should apply to clemency proceedings. *See Marek v. State*, 14 So. 3d 985, 998 (Fla. 2009). It strains reason to believe that a death-sentenced inmate could be executed after arbitrarily being denied a clemency proceeding after a majority of the Supreme Court has found that some due process, even minimal, attaches to such proceedings.

Similarly, while the State, like the lower court, is quick to point out that this Court has refused to "second guess" the application executive clemency process, (Answer at 50 *citing Rutherford v. State*, 940 So. 2d 1112, 1122-23 (Fla. 2006)), *King v. State*, 808 So. 2d 1237, 1246 (Fla. 2002), *Glock v. Moore*, 776 So. 2d 243, 252 (Fla. 2001), *Bundy v. State*, 497 So. 2d 1209, 1211 (Fla. 1986), it conveniently

ignores the fact that in every one of the cases it cites, the defendant was afforded a clemency proceeding. While the State and lower court are quick to cite to this Court's opinion in *Marek*, and the cases on which it relies, they fail to recognize that, unlike Marek, Rutherford, King, Glock and Bundy who "had the benefit of a clemency proceeding," *Marek v. State*, 14 So. 3d 985, 998 (Fla. 2009), Mr. Valle did not.

Rather than address the legal import of this striking factual distinction, the State attempts to divine its own facts. The State avers that Mr. Valle "now contends, contrary to the assertions in the motion to vacate, that the Governor denied clemency 'without any clemency proceeding ever being conducted'." The State further alleges that Mr. Valle "admitted that he was informed in 1992 that his clemency proceedings would have commenced and that Mark Evans was appointed to represent him in those proceedings." (Answer at 51). This is a patent misrepresentation of the record.

Mr. Valle alleged in his motion to vacate:

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

(P. 233) (emphasis added). The allegation in the motion could not have been clearer: Mr. Valle was not afforded a clemency proceeding. The State's attempt to

foreclose this Court's consideration of that claim by misrepresenting the arguments below is simply specious.

At no time has Mr. Valle "admitted below that his belief that there was no clemency proceeding was "based entirely on speculation." (Answer at 56). Quite to the contrary, the portions of the record to which the State cites reflect that counsel unequivocally stated that "there is simply no evidence that a clemency proceeding ever occurred." (P. 1514). Far from speculating, counsel challenged the State to present *any* evidence to establish that this allegation was not true. The State has not done so. It is the State that is basing its argument on speculation, not Mr. Valle.

The State's factual representations are inaccurate and misleading. At no time did Mr. Valle "admit that he was informed that clemency proceedings would have commenced" or that "Mark Evans was appointed to represent him in those proceedings." (Answer at 51). To the contrary, Mr. Valle's motion to vacate alleged that

> Attorney Mark Evans **undertook** to represent Mr. Valle in clemency proceedings at some time after the Florida Supreme 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**.

(P. 232).[2] The State appears to find it more convenient to misstate Mr. Valle's factual allegations than to produce any facts or records to dispute them or address their legal significance.

The State's assertion that "Defendant made no attempt to explain why his clemency proceedings were insufficient or why his clemency counsel was ineffective in this case" is likewise specious. Proceedings cannot be any less sufficient than no proceedings at all, which is what Mr. Valle got. Moreover, the State's assertion that the postconviction record "shows that Defendant was aware of the existence of his clemency counsel and the identity of that counsel" is an incomplete and inaccurate representation of the record. The postconviction record reflects that Mark Evans, who was not postconviction counsel, improperly appeared at a postconviction public records hearing of which Mr. Valle's CCR counsel had no notice. CCR counsel moved to strike those proceedings and for sanctions against the State for producing records ex-parte. Assuming, *arguendo*, that Mr. Evans was appointed as clemency counsel (and there is no court order or record reflecting that he was), Mr. Evans had no business involving himself in Mr. Valle's postconviction proceedings. The fact that he did so demonstrates that he clearly did not understand his role, if he had any, as clemency counsel.

[2] Mark Evans died in 1995.

The State's claim that "postconviction counsel actually recommended [Mr. Evans as] Defendant's clemency counsel and that clemency counsel was investigating his case" is based on Mr. Evans' one-line representation in a 4-page rambling letter to Justice Rosemary Barkett. That letter, which can only be described as bizarre, demonstrates that Mr. Evans travelled to death row to speak to Mr. Valle and another inmate. It also establishes that Mr. Evans's trip was incidental to his trip to Tallahassee to give a sworn statement to FDLE regarding allegations against personnel at CCR, who was representing Mr. Valle at that time. Contrary to the State's suggestion, the letter hardly establishes that Mr. Valle and his postconvcition counsel should have known that Mr. Evans was "investigating" anything other than his allegations against Mr. Valle's postconviction counsel.[3]

In any event, contrary to the State's belief, there is no evidence that Mr. Evans ever investigated, prepared or presented a clemency application. There is simply no basis for the statement that Mr. Valle "was neither abandoned by counsel nor left alone to navigate the clemency process from his jail cell." (Answer at 54, *citing Harbison v. Bell*, 129 S. Ct. 1481 (2009)). Indeed, if there is no evidence that Mr. Evans abandoned Mr. Valle as clemency counsel, it can only be attributed to the fact that he was never appointed at all. Mr. Evans did worse than

[3] Tellingly, in his letter, Mr. Evans does not even spell Mr. Valle's name correctly.

simply abandon Mr. Valle; he undermined postconviction counsel's efforts on Mr. Valle's behalf.

The State asserts that "Defendant's failure to investigate and sufficiently plead his own claim no more entitles him to an evidentiary hearing, than does his current denial of the existence of that proceeding makes it the State's burden to prove." (Answer at 56). Undersigned counsel has difficulty understanding what the State is saying here. Counsel assumes that the State bemoans the fact that Mr. Valle has plead facts which, if true, would entitle him to relief, and that the State is unable to conclusively refute these facts. In any event, the facts are clearly in dispute. While the State wishes to believe otherwise, there is no evidence to suggest that a clemency proceeding ever occurred. There is nothing in Mr. Valle's files, the court files or records or, apparently, the State's possession, to establish that there was ever a clemency proceeding. There is no transcript of any statements, true copies of which Mr. Valle would be entitled to, if they existed. Rule 15 G, Rules of Executive Clemency. The State has failed to point to anything in the files or records that establishes that Mr. Valle's allegations are not true.

Lastly, the State's assertion that "claims regarding clemency proceedings do not present a basis for postconviction relief," (Answer at 48-49), is an overly simplistic dismissal of this courts' reliance on clemency as an integral part of Florida's death penalty scheme. When the clemency process is rendered

meaningless, as it was here, the death penalty scheme is constitutionally defective. When the clemency process never occurs, it cannot operate as the "fail safe" as it is envisioned. In Mr. Valle's case, the Florida capital sentencing scheme must be found defective as applied. A death sentence returned under a constitutionality defective sentencing scheme cannot stand.

REPLY TO ARGUMENT IV

Like the lower court, the State does not address Mr. Valle's argument. Rather, the State quotes, at length, this Court's opinion in *Marek v. State*, 14 So. 3d 985 (Fla. 2009), which is clearly distinguishable. Rather than meaningfully engaging the significance of the factual and legal distinctions, the State simply dismisses Mr. Valle's argument as "disingenuous at best." (Answer at 58). The State avers that "the same claim regarding the Governor's discretion to sign a warrant were [*sic*] made" in *Marek*. (Answer at 58). This statement is wilfully ignorant of the fact that, unlike Mr. Marek and the defendants in every case on which *Marek* relies, Mr. Valle did not have the benefit of a clemency proceeding. *Marek*, 14 So. 3d 985 (Fla. 2009). By failing to acknowledge this legally significant distinction, it is the State who is being disingenuous.

Mr. Valle's factual and legal position is different from Marek's in several important ways that the State fails recognize. Marek's arguments regarding the Governor's discretion to sign death warrants were based on his assertion that the

clemency process was one-sided and lacked due process. By significant contrast, Mr. Valle rightly asserts that he was denied any clemency proceeding at all. (Claim III, *supra*). More significantly, Marek's arguments were based on his belief that, prior to the signing of his death warrant, a *second* clemency proceeding occurred without his knowledge or input. This Court rejected Marek's argument that the Governor's review of the case prior to signing a warrant was a second clemency proceeding.

While "Marek has not provided any authority holding that he must be provided notice before a death warrant is signed or that the Governor may not sign a death warrant of an individual whose death sentence is final and who has had the benefit of a clemency proceeding" *Marek v. State*, 14 So. 3d 985, 998 (Fla. 2009), Mr. Valle has provided ample authority that he may not arbitrarily be denied a clemency proceeding, *Ohio Adult Parole Authority, et. al v. Woodard*, 523 U.S. 272, 288 (1998), and that the proceeding should encompass at least minimal due process. *Harbison v. Bell*, 129 S. Ct. 1481 (2009). *See also Marek*.

In its oversimplification of the issues, the State fails to address the additional facts of Mr. Valle's case, as outlined in his Initial Brief, that were not at issue in *Marek*: Mr. Valle was denied the benefit of a clemency proceeding; the Governor was criticized in the press because he had not signed any warrants in his first six months in office; and the Governor had received communications from the

victim's daughter urging that a warrant be signed. The State also fails to acknowledge that the Governor's discretionary power makes him a sentencer in Florida's death penalty scheme. The Court system, with all its safeguards and redundancies, is the lesser determiner, imposing death sentences that more often than not are replaced by the actual punishment of life on death row.

Consideration of this Constitutional claim requires a reasoned analysis of these factual issues, and not merely the recitation of a legally and factually distinguishable case.

REPLY TO ARGUMENT V

The State absolutely fails in all respects to conceptualize this issue and the result is a series of nonresponsive arguments that do nothing to undermine the claim.

First, the State contends that Mr. Valle's Eighth Amendment claim based on the principles articulated in *Lackey v. Texas*, 514 U.S. 1045 (1995) is untimely as Florida Rule of Criminal Procedure 3.851(d) only permits successive claims based on newly discovered evidence or fundamental changes in the law. (Answer at 59). The State bases that contention on the fact Mr. Valle like Mr. Lackey had been on death row for 17 years in 1995 when *Lackey* issued, and thus, any claim that Mr. Valle would have based on *Lackey* arose in 1995 and would be untimely today. (Answer at 59).

However, the principles articulated in *Lackey* strike at something much more profound and involve an analysis much more sophisticated than the simple math of counting years. That crude simplification of *Lackey* represents either an utter failure to comprehend the nature of the issue or an argumentative strategy to reduce the discourse on this issue of enormous complexity down to constitutional dilettantism. *Lackey* is not merely about duration of imprisonment, such that a magic number is created that is a uniform lower threshold (and, under the State's analysis, an upper threshold) of constitutional protection. *Lackey* does not substitute simple math for an inquiry into the *reality* of a punitive confinement with a component of psychological torment. *Lackey* is about the notion that a period of imprisonment in the psychologically and physically destructive environment of death row *counts for something* in the constitutional calculus when inquiring into the penological justification for an execution. Whatever the penological justification for Mr. Valle's execution was when he was sentenced, it is something less today, and if it is not sufficient to make his execution a meaningful punishment, then his execution is unconstitutional. It is a factual inquiry into the conditions of confinement, the psychological consequences of the confinement, the duration, perhaps the reasons for the delay—all accumulating to a total degree of punishment resulting from imprisonment on death row that must be said to reduce the penological justifications for an execution. Arguing that Mr.

Valle should have filed this claim after 17 years on death row because Mr. Lackey's happened to have his claim heard after 17 years on death row is a layperson's approach to this issue, and it is not worthy of the high-minded discourse that these proceedings call for.

Beyond that simplistic argument, the State argues that there is no new evidence on which to base a claim under Rule 3.851(d). However, there are several events that give rise to this claim.[4]

The fact that the warrant has now been signed—the decision to go forward with an execution the penological justifications of which have waned during Mr. Valle's confinement—gives rise to this claim. In other words, until the State makes the decision to execute an individual after already punishing them by a period of confinement that removes the constitutional underpinnings for that execution, that individual cannot yet argue that they are being executed unconstitutionally. Until the State succumbed to the temptation of stacking punishment on punishment, Mr. Valle could not yet know the quantum of punishment constituted by his confinement and thus the degree to which the justifications for his execution would

[4] With regard to these events, it is noteworthy that this Court recently "recede[d] from the statement in *Kearse*—which involved different circumstances—that the evidence must have existed . . . at the time of trial." *Wyatt v. Buss*, Case No. SC08-655, at 18 (Fla. July 8, 2011). The requirement that newly discovered evidence must have existed at the time of the trial was "an incorrect recitation of the test." *Id*. at 19. Thus, there is no requirement that events described here as giving rise to the present claim must have existed at the time of Mr. Valle's trial.

be reduced. If Mr. Valle raised this claim in 1995, his confinement in that time would have reduced to a lesser degree the portion of his punishment represented by execution. Since what matters under *Lackey* is the *reality* of the situation—the actuality of the punitive imprisonment, the extent of the penological confinement—the extent of the *Lackey* violation is not known until the full degree of the alternative punishment of confinement on death row is realized.

Further, the fact that the State was without a means to carryout an execution for a period of time, beginning when the State ran out of sodium thiopental and ending on June 8, 2011 when a new pentobarbital procedure was certified, creates a further factual problem underlying Mr. Valle's claim that is not common to all *Lackey*-based Eighth Amendment claims and which did not until recently arise: here, the State was holding Mr. Valle *without a means to carry out his judicially-imposed punishment*, which begs the question *what punishment was the State imposing on Mr. Valle?* The answer is clear: a non-judicially imposed and indefinite term of imprisonment on death row. In fact, that is the *actual* punishment that the majority of death row inmates receive. If we, like *Lackey*, are concerned with the *reality* of the situation rather than its technical characterization, then the fact that the State did not even have a means to carry out the judicially-imposed sentence leaves us with no other conclusion than that the State is content to impose its own non-judicially-imposed sentence. That fact implicates *Lackey* in a novel

way. If we accept the premise that it is unconstitutional to execute someone when that execution will not sufficiently serve penological purposes, then it is a special problem for the State to be intentionally confining an individual without as much as a means of carrying out their execution. It shows quite clearly that the State is not exclusively, or even primarily, in the execution business when it comes to death-sentenced inmates. The State is in the business of indefinite confinement involving psychological torment based on the impending prospect of death. The Eighth Amendment requires us to ask if this situation is *decent*. *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958).

However, the State fixates on the non-precedential nature of *Lackey* rather than addressing the Eighth Amendment principles it describes. The State contends that *Lackey* is merely a denial of cert and thus cannot support a constitutional claim here. (Answer at 60). However, "*Lackey*" is not used by Mr. Valle to refer to a precedent that creates a constitutional right; it is a shorthand for the Eighth Amendment principles articulated in that memorandum that must be conceptualized and resolved by this Court. The source of the claim is the Eighth Amendment, not the memorandum. *Lackey* is explanatory and validating to be sure, but it is not where the claim resides. This Court must interpret the Eighth Amendment to determine whether the issue at hand is *decent*.

The State then reaches a major issue of contention: who bears the blame for the delay. The State argues that Mr. Valle is responsible for the delay from 1991, when his third sentence became final, to 2007, when the United States Supreme Court denied his petition for certiorari, because that time "was consumed by Defendant's unsuccessful attempts to gain relief . . . ." (Answer at 61).[5] This is an extremely important point because it has been a sticking point for this Court in the past. *See, e.g.*, *Ellege v. State*, 911 So. 2d 57, 76 (Fla. 2005) ("[o]n the basis of this record, we find no merit in Elledge's constitutional claim predicated on the cruel and unusual nature of his prolonged stay on death row.")

First, it must be recognized that *Lackey* mentions cause of delay merely as a consideration that might potentially have constitutional implications, stating "[t]here may well be constitutional significance to the reasons for the various

[5] As an aside, the State complains that Mr. Valle "cannot even decide whether the State has proceeded too quickly or too slowly" as "his first convictions and sentences [were] reversed because he was taken to trial too quickly." (Answer at 61). Obviously, the fact that Mr. Valle deserves an opportunity to prepare a case in his defense when he is still presumed innocent has *nothing* to do with the Eighth Amendment implications of his confinement after he is convicted. Equally obvious is the fact that the State knows this, so we must conclude that here the State makes light of the fact that it *violated the Constitution* in obtaining a capital felony conviction and death sentence. Making an argument with no legal significance because it seems witty recalls the United States Supreme Court's admonition that "[f]rom beginning to end, judicial proceedings conducted in a capital case for the purpose of deciding whether a defendant shall be put to death shall be conducted with dignity and respect." *Wellons v. Hall*, 130 S. Ct. 727, 728 (2010). It does not only disrespect Mr. Valle to lower the discourse of capital proceedings, it disrespects the justice system at its most critical moment.

delays . . . .” *Lackey*, 514 U.S. at 1045. It is not a forgone conclusion that the reason for the delay matters, and there is an extremely compelling reason to find that it does not: to hold death-sentenced defendants responsible for the period of the delay attributable to their postconviction process forces them to choose between exercising their various constitutional rights while forfeiting their Eighth Amendment rights described in *Lackey* or declining to exercise their rights to ensure that *Lackey* principles are not violated at their expense. The State seeks to hold capital defendants responsible for the fact that it may not be able to provide due process without violating the Eighth Amendment. If the State cannot satisfy all constitutional requirements at once, it cannot be in the business of capital punishment. Creating a process of collateral attack with the expectation that it be used, and making that expectation clear by extending to capital defendants the *right* to avail themselves of it, precludes the State from penalizing defendants for exercising their rights—not only the rights that underlie their claims, but the right to raise those claims. The State’s argument is duplicitous. It is not a sustainable model for our justice system to make constitutional rights a zero-sum game in which one right is forfeited in order to put forth another. That model seems wrong because it is wrong, and that wrongness is constitutional in nature because it cannot ensure one right without infringing another.

Second, even if we are to begin from the premise that the question of who is to blame for a delay enters into the constitutional calculus, Mr. Valle is nevertheless not responsible for the delay in this case. *Lackey* clearly distinguished between an "abuse of the judicial system by . . . frivolous filings" and a "legitimate exercise of [the] right to review." *Id*. Thus, the State's attempt to hold Mr. Valle accountable for the period of litigation between 1991 and 2007 is mistaken.

But worse, the State attempts to circumvent the distinction between frivolous claims and claims that may have some merit but are ultimately denied by claiming that Mr. Valle's claim of ineffective assistance of counsel at his resentencing was ". . . frivolous as this Court eventually held." (Answer at 64). However, this Court held no such thing. This Court held that "we agree with the trial court that defense counsel's performance at the 1988 resentencing proceeding did not fall outside the bounds of reasonable professional conduct" and "our confidence in the outcome of the resentencing phase proceedings was not undermined as a result of counsel's performance." *Valle v. State*, 778 So. 2d 960, 966-67 (Fla. 2001). This Court *did not find the claim to be frivolous*, which is a meaningfully different finding from a denial of relief. The State knows that frivolity has a legal significance in the present issue because a critical distinction is drawn based on it. The State knows that denying a claim is not the same as finding that claim frivolous. The State's claim that this Court found Mr. Valle's ineffective assistance claim frivolous is a

falsehood on a matter of crucial importance to the Court's disposition of the present claim. Again, a higher level of discourse is called for.

But the State then stoops lower. The State contends that even though Mr. Valle's litigation was fully completed on October 1, 2007, "the defense" is nevertheless responsible for the subsequent four years of delay because "[a]t that time, the *Baze* and *Lightbourne* litigation regarding lethal injection was ongoing." (Answer at 64).[6] As Mr. Valle was not party to that litigation and the State nevertheless asserts that "the defense" is responsible for that litigation, we can only conclude that the State believes that Mr. Valle is responsible for litigation performed by counsel on behalf of *other clients*. And even more disturbing, the delay in executions caused by the *Lightbourne* litigation was due to the fact that Governor Bush issued an executive order calling for a moratorium because the State horrifically botched and then vehemently defended the execution of Angel Diaz. The delay was due to the moratorium. The moratorium was due to the State's defense of its own incompetence that resulted in a horrific mutilation and torturous

[6] Mr. Valle was named in an all writs petition in *Lightbourne*, however, "[o]n February 9, 2007, the Court dismissed without prejudice all petitioners' claims in Case No. SC06-2391 other than Lightbourne's." *Lightbourne v. McCollum*, 969 So. 2d 326, 329 (Fla. 2007). Mr. Valle's involvement in the lethal injection litigation was terminated prior to his other litigation and has no bearing on this issue. Mr. Valle did not file any further claim, based on lethal injection or otherwise, after October 1, 2007 until his death warrant was signed. Thus, the State's argument cannot be read to mean that Mr. Valle was party to the *Baze* and *Lightbourne* litigation.

execution. The State's attempt to hold a non-party responsible for litigation arising from its own failures is unworthy of these proceedings.

The State then points to the fact that Mr. Valle failed to describe the details of his confinement in his initial motion for postconviction relief and did so only by amendment. (Answer at 65). As described exhaustively both in Mr. Valle's original *Lackey* claim and his claim regarding the extent to which the lower court's scheduling orders prevented a full and fair hearing below, Mr. Valle was forced to file a cursory version of his *Lackey* claim to comply with the lower court's impossibly restrictive scheduling orders. He was only able to develop his claim more fully upon amending. It is a minor point here though, because the denial of an evidentiary hearing in this case prevented Mr. Valle from proving the punitive nature of his confinement—in kind and degree—such that the State cannot now argue that he should have made better factual proof for his claim. Mr. Valle seeks desperately the opportunity to present to this Court the facts underlying his claim. If that opportunity is denied, he should not be blamed for not being able to do so.

Finally, the State asserts that Mr. Valle should have "challenge[d] the conditions of his confinement through the administrative grievance and appeals process provided through the Florida Department of Corrections" if he found them torturous. (Answer at 65). That argument is a final indication of the State's inability to conceive of the *Lackey* problem. Viewing Mr. Valle as a human being,

and exercising the slightest modicum of empathy and insight, it is easy to envision that being confined for decades in constant anticipation of immanent death is a larger issue than how hot the hot water is and how similar to food the food is. It is not petty complaints that Mr. Valle puts forth here. The psychological torment of confinement on death row cannot be solved by filing a grievance with DOC.

Above, Mr. Valle chronicles what he hopes this Court recognizes as a series of disturbing falsehoods and gaming unworthy of the high-minded discourse that these proceedings demand.

REPLY TO ARGUMENT VI

In one breath the State argues that Mr. Valle's claim is time barred because he could have raised it sooner, and in the next breath it claims had he raised it sooner it still would have been denied as procedurally barred and for a lack of standing. Had Mr. Valle raised it sooner, based on the State's position, it probably would have complained that such a claim was frivolous. The State's reasoning is circular.

In fact, at the case management conference below, Mr. Valle argued that it was not raised sooner because the United States Supreme Court has never given full effect 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. Additionally, 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.

Mr. Valle is seeking a stay of execution to allow Congress the time to pass the Consular Notification Compliance Act of 2011 (CNCA), S. 1194, 112th Cong. 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 and the State rely on in rejecting Mr. Valle's claim. 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 brief is typed in Times New Roman 14 point font, in compliance with Fla. R. App. P. 9.210(a)(2).

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