IN THE SUPREME COURT OF FLORIDA

NO. SC11-1387

MANUEL VALLE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

DEATH WARRANT SIGNED

SUPPLEMENTAL REPLY BRIEF OF APPELLANT

NEAL A. DUPREE
Capital Collateral Regional Counsel—South

SUZANNE KEFFER
Chief Assistant CCRC-South

OFFICE OF THE CAPITAL COLLATERAL REGIONAL COUNSEL—SOUTH
101 N.E. 3rd Avenue, Suite 400
Ft. Lauderdale, Florida 33301
(954) 713-1284

COUNSEL FOR MR. VALLE

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ARGUMENT IN REPLY

Mr. Valle submits this Reply to the State's supplemental 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 and Supplemental Initial Brief for any claims and/or issues that are only partially addressed or not addressed in this Reply Brief.

REPLY TO THE STATEMENT OF FACTS

The question before this Court is whether the use of pentobarbital as an anesthetic is sufficient to guard against the substantial risk of harm during the execution process. Germane to that issue is whether Mr. Valle was precluded from proving his Eighth Amendment claim due to the exclusion of witnesses and evidence. The State's rendition of the Statement of Facts includes irrelevant procedural history that has nothing to do with the issues as well as misleading assertions that serve only to undermine the credibility of Mr. Valle's expert witness and the integrity of his counsel. As such, those statements that are "unduly argumentative" and/or "immaterial and impertinent to the controversy" should be stricken and/or ignored. *Williams v. Winn-Dixie Stores, Inc.*, 548 So. 2d 829 (Fla.

1st DCA 1989); *see also Greenfield v. Westmoreland*, 3D06-2081, 2007 WL 518637 (Fla. Dist. Ct. App. Feb. 21, 2007).

At the Tuesday morning status hearing following the relinquishment, the lower court unilaterally scheduled the evidentiary hearing for the Thursday and Friday of that week, July 28-29, 2011. (T. 07/26 7). The State recounts the fact that Mr. Valle informed the Court that his expert, Dr. David Waisel, would not be available until the next week, August 2, 2011 and that the "lower court ordered Defendant to present him by phone or videoconferencing or find a substitute witness." Supplemental Answer at 2. The State then asserts that Mr. Valle moved for a continuance at the start of the evidentiary hearing so that he could present Dr. Waisel in person and that he presented an affidavit in support of his request with the implication that he was merely trying to delay the proceedings. Supplemental Answer at 5. Later in the recitation of the facts, the State simply asserts that the lower court decided that Mr. Valle would be permitted to present Dr. Waisel during the following week. Supplemental Answer at 7. This narration regarding Dr. Waisel's availability is not germane to any issue on appeal; the facts as portrayed by the State mischaracterize what happened at the hearing and serve only to portray Mr. Valle, his witness, and his counsel in a negative light.

Given that the State has made Dr. Waisel's availability an issue, it would be more accurate to state that Mr. Valle announced at the beginning of the evidentiary

hearing that he was prepared to present one witness and documentary evidence but that Dr. Waisel's schedule would not permit him to testify until the following week (T. 07/28 7-8). This was especially true given that he had just taken time off from his job as a pediatric anesthesiologist to travel to Georgia for his testimony in the *DeYoung* case. *See* Affidavit of Dr. Waisel; (T. 07/28 8, 14-15). Further, Mr. Valle had no objection to the State presenting its witnesses out-of-turn. (T. 07/28 9). The State repeatedly argued that Dr. Waisel could appear by telephone (T. 07/28 15, 16, 20, 22). In fact, the State's intention was to present its own witness, Dr. Dershwitz by telephone (T. 07/28 71). Mr. Valle wanted to have Dr. Waisel testify in person due to the technological limitations presented by telephonic testimony, especially in light of the need for credibility findings (T. 07/28 71-72, 74). It was during this discussion that the circuit court expressed a clear preference for video-conferencing, agreeing that it is important for the court to see the witness (T. 07/28 74). The State fails to recite that its expert had other commitments that prevented him from getting to a video-conferencing facility on the days scheduled for the evidentiary hearing (T. 07/28 73). In fact, the State finally admitted that Dr. Dershwitz was not available to testify by video-conference until the following week, either. (T. 07/28 78). It was then that the lower court agreed that the witnesses would be heard on August 2, 2011 (T. 07/28 81). The foregoing facts are relevant to the extent that the State has misrepresented the record.

Additionally, the State makes inaccurate statements about a number of material facts about the expert witnesses that are not supported by the record. These inaccuracies can only be an attempt to mislead this Court. The State mischaracterizes Dr. Waisel's testimony in stating that he was "hired to assist the defense." Supplemental Answer at 11. Dr. Waisel never testified he was hired, because in fact Dr. Waisel does not charge any expert or witness fees. This mischaracterization is striking given that the State leaves out that its expert, Dr. Dershwitz makes $3500.00 per day for his testimony and charges an hourly rate for preparation, review and consultation (T. 08/02 130). The misstatement is important with respect to evaluating the lower court's credibility findings.

The State argues in its statement that Dr. Waisel testified that "the upper limit dose of pentobarbital was 500 mg regardless of the patient's weight," Supplemental Answer at 12-13, when in fact his testimony indicated that the upper limit dose of pentobarbital was 500 mg for an unspecified weight (T. 08/02 60). The difference is important because Dr. Waisel did not testify that he would disregard a patient's weight, rather he testified that the recommended doses do not specify a weight therefore, he titrates the dose to the affect he observes (T. 08/02 65-69). Importantly, Dr. Waisel testified that there is no average intravenous dosage of pentobarbital that can be relied on to produce similar effects in different patients (T. 08/2 67).

Additionally, the State indicates that Dr. Waisel acknowledged that pentobarbital is used for "assisted suicides and euthanasia." Supplemental Answer at 15. The record reflects that Dr. Waisel indicated that pentobarbital is used in physician-assisted suicides and animal euthanasia (T. 08/02 95). In neither one of those circumstances would pancuronium bromide be injected into either the patient or the animal after the introduction of the pentobarbital. Here again, the fact the State finds it necessary to misrepresent these facts is perhaps more relevant than the facts themselves.

The State also asserts that Dr. Dershwitz testified that the use of the dose of pentobarbital as prescribed in the lethal injection procedures "would definitely be fatal" Supplemental Answer at 16. This ignores that Dr. Dershwitz conceded that he was overstating "definitely" (T. 8/2 150-151), because this dose has never been used clinically (T. 8/2 149).

The State also misrepresents the testimony of Dr. Dershwitz concerning his previous testimony regarding pentobarbital. When asked if he testified previously that thiopental is better than pentobarbital for executions, Dr. Dershwitz refused to answer:

> In order to answer that question, I'd have to draw a comparison that I am no longer allowed to do. However, the written record is extensive and I stand behind the answers I gave in the past, and I cannot answer that question today.

(T. 8/2 134-5). Dr. Dershwitz did not simply state "he had no reason to suggest that

he had not given such testimony," Supplemental Answer at 18, but in fact indicated he stood by his previous answers and reiterated that at the time he made the statements, those statements were true (T. 08/02 144). Therefore, Dr. Dershwitz not only admitted those were his statements, but he vouched for the accuracy of his previous testimony where he questioned the use of pentobarbital in lethal injections due to a lack of research. This is perhaps the most important fact concerning the expert testimony: both experts agree that there little to no data or research concerning the use of pentobarbital as an anesthetic agent.

Finally, the State uses the recitation of the oral arguments as *argument* rather than a narrative of the relevant, material facts. Supplemental Answer at 18-21. The State repeatedly oversimplifies arguments made by the Defendant, interjecting conclusory statements which don't accurately reflect the record. While a Statement of Facts should be persuasive, it is inappropriate to present it in an unduly argumentative manner. *Williams v. Winn-Dixie Stores, Inc.*, 548 So. 2d 829 (Fla. 1st DCA 1989). The Eighth Amendment issue before the Court is too serious for Mr. Valle to ignore the State's misrepresentations.

REPLY TO ARGUMENT I

The State's Answer Brief demonstrates a fundamental misunderstanding of the issue on several different levels. First, the State's comparison of the use of sodium thiopental off label in the lethal injection context to the use of pentobarbital

off label, Supplemental Answer Brief at 39, completely misses the point of Mr. Valle's argument; Mr. Valle presented evidence that the induction of anesthesia is an off label use of pentobarbital. In other words, pentobarbital is not FDA approved for the induction of anesthesia. That the use of sodium thiopental in lethal injections is off label is irrelevant. Sodium thiopental is FDA approved for—and prior to the halt of its production was very commonly used for—the induction of anesthesia, which was also its role in lethal injections. In contrast, the use of pentobarbital for induction of anesthesia in any context, let alone in lethal injections, is off label. While it is true that *doctors* may, in their educated discretion, choose to use certain drugs "off label," in this case, it is not a doctor who is made the decision to use the pentobarbital as an anesthetic in this context.

Similarly, the State confuses the purpose of pentobarbital and the purpose of lethal injection, arguing both below and in its Answer that "the emphasis on surgical anesthesia was incorrect as the purpose of a lethal injection was to cause death; not unconsciousness." Supplemental Answer Brief at 19 (citing PCR3-SR. 577). As Mr. Valle pointed out in his Supplemental Initial Brief, the fact that Florida has chosen to adopt a three-drug protocol—consisting of an anesthetic, a paralytic, and a drug to stop cardiac activity—renders the issues very different from the issues in states that use pentobarbital as the sole drug. Supplemental Initial Brief at 24, FN 5. While the purpose of lethal injection as a whole is to

cause death, the State overlooks that the specific purpose of pentobarbital is to cause unconsciousness so that the condemned inmate does not feel the certain excruciating pain of the second and third drugs. The substantial risk of serious harm stems from the risk that the pentobarbital will not sufficiently anesthetize the condemned inmate to prevent the undisputedly serious harm of the second and third drugs being injected into a conscious person.

Further, the State asserts that "Dr. Dershwitz opined that a five gram does of pentobarbital administered during the time periods called for in a lethal injection protocol would produce a massive overdose." Supplemental Answer at 16 (citing PCR3-SR 525-27). It bears noting that Dr. Dershwitz also testified that he did not review Florida's June 8, 2011 procedures, (T. 8/2 125), that the June 8, 2011 procedures do not specify a time period for the injection of the drugs, and there has been no evidence presented regarding the time period for the administration of the drugs. Dr. Dershwitz agreed that he "nor anyone else on Earth, could draw the high resolution graphs for pentobarbital that [he] drew for thiopental, because in order to do so, we need human studies that don't exist." (T. 08/02 139). Dr. Dershwitz also agreed, based on his previous testimony, that it was necessary to know the respiratory and hemodynamic effects of pentobarbital, not simply how long it will keep someone unconscious. Dr. Dershwitz acknowledged there was not much human data with respect to pentobarbital in these areas (T. 08/02 139-40).

As Mr. Valle pointed out in his Supplemental Initial Brief, there is a continuum between the state of being conscious and the state of being anesthetized. Even if the pentobarbital works as the State says it will, and even if pentobarbital in the dose called for in Florida's procedures will eventually cause death, the ultimate question—the only question—is at what point on the continuum from consciousness to death are the excruciatingly painful second and third drugs administered. Central to the issue of the safety and efficacy of pentobarbital remains the sufficiency of the consciousness check in the procedures and the training of the personnel involved in administering and overseeing the lethal injection process. The lethal injection procedures do not delineate the method for assessing consciousness. It is unknown whether the assessment of consciousness has been changed, which is significant "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).

While Mr. Valle was not permitted to present evidence regarding the sufficiency of the consciousness check called for in the procedures, he maintains that it is not sufficient to mitigate against the substantial risk of serious harm. It is important to note that evidence regarding the procedures with respect to the introduction of the pentobarbital and the second and third drug would not have been beyond the scope of the remand; the procedures *must* be considered in the

context of the issue of the efficacy of the pentobarbital. In fact, the failure to understand the difference between the purpose of lethal injection as opposed to the purpose of the pentobarbital can be attributed to the consideration of the drug in a vacuum.

The State oversimplifies the testimony of Dr. Waisel regarding the use of pentobarbital to induce a barbiturate coma. Dr. Waisel testified that dosages necessary to induce a barbiturate coma, **in patients with injured brains** are "fairly well established." Dr. Waisel recalled articles from the 1970's, with the caveat that "nearly every article I have ever read suggests that you titrate to affect, because people respond differently to drugs, and the goal is to achieve burst suppression, so we don't just give a dose and walk away" (T. 08/02 93). Both Dr. Waisel and Dr. Dershwitz agreed that an EEG is used to monitor the patient (T. 08/02 86, 117). On more than one occasion, Dr. Waisel clarified that the body of knowledge regarding the use of pentobarbital to achieve a barbiturate coma is exclusively in patients with brain damage, such as a swollen brain or intractable seizures, and in most cases the patient has already been anesthetized (T. 08/02 88). Likewise, Dr. Dershwitz could not say that the state of an individual's brain did not affect the reliability of the known doses because the range in doses is quite large (T. 08/02 114). This is an important distinction because there are no studies regarding the use of pentobarbital for induction of anesthesia in a person with a healthy brain.

In large part, the State ignores the arguments of Mr. Valle, instead regurgitating the lower court's order in whole. In conclusory fashion, the State merely claims that each of the witnesses testified as the lower court described in its order. Therefore, Mr. Valle relies on the remaining facts and arguments presented in his Supplemental Initial Brief as those arguments refute the findings of the lower court. Given the complete dearth of information, research, and history of pentobarbital for inducing anesthesia, the lower court's finding that Mr. Valle has not met his burden of demonstrating a substantial risk of serious harm is not supported by substantial, competent evidence.

REPLY TO ARGUMENT II

The State complains that Mr. Valle did not preserve the issues regarding the exclusion of witnesses because he did not proffer their anticipated testimony. Supplemental Answer at 42. The State then argues that the lower court did not abuse its discretion in striking these witnesses based on what was proffered. Supplemental Answer at 43. Indeed, the court considered the proffer offered by Mr. Valle and determined that these witnesses would not be relevant. Such a finding could only be made upon a sufficient proffer. The court had a sufficient proffer of each witnesses' anticipated testimony with which to make relevancy findings. The subject matter of the witnesses' testimony was evident.

To the extent that Mr. Valle could not proffer exact answers to questions he would ask of the Department of Corrections witnesses, this is due to the conduct of the Department of Corrections in failing to disclose relevant information. In any event, the import of these witnesses' testimony seems lost on the State, as it was on the lower court. This Court remanded for an evidentiary hearing on Mr. Valle's allegations concerning the efficacy of pentobarbital as a substitute for sodium thiopental in Florida's lethal injection procedures. While this issue is limited, it cannot be considered in a vacuum. The efficacy of pentobarbital must be considered in the context in which the drug is to be administered. Moreover, in order to test whether pentobarbital is appropriate, it is necessary to establish what information the Department of Corrections relied on in establishing pentobarbital as the anesthetic to be used in the lethal injection procedure.

Mr. Valle would have presented Warden Cannon, Secretary Buss, Rana Wallace, Russell Hosford and Jennifer Parker to establish what, if anything, DOC did in response to letters from the Lundbeck, Inc., manufacturer of pentobarbital warning that their drug not be used for this purpose. Dr. Waisel testified to the significance of these letters, and what should be done in response to them. Surely, the testimony of the people who were responsible for considering Lundbeck's concerns about the safety and efficacy of their product for a particular purpose was relevant to the issue of the efficacy of that product for that purpose.

Not only must the choice of pentobarbital be considered, but also the means by which it is to be administered. Whether pentobarbital is administered properly, by personnel with the necessary training and experience with the drug, is determinative of its efficacy. Similarly, the source of the drug, and whether the Department of Corrections obtained it legally, are relevant to the drug's effectiveness. If we don't even know where the drug comes from, it is impossible to determine its efficacy. This is especially so where several corrections agencies throughout the country have been obtaining their lethal injection drugs from questionable suppliers, through illegal measures. Mr. Valle should have been permitted to present these witnesses to establish his claims.

The State also complains, as it did in its motion in limine below, that Mr. Valle sought to use Dr. Waisel as a "conduit for hearsay." Supplemental Answer at 44. It further argues that the "the lower court also did not abuse its discretion in precluding Defendant from attempting to use Dr. Waisel as a conduit for hearsay." Supplemental Answer at 44. The State asserts that their motion in limine was granted. Supplemental Answer at 10. This is simply untrue. Firstly, Mr. Valle sought only to present testimony of what information Dr. Waisel relied upon in forming his opinion and why that information was important. The court did not grant the State's motion in limine. Rather, the court simply stated that "I think it will become clear as the testimony develops." (T. 8/2 444). The issue did not arise

during Dr. Waisel's testimony, and Mr. Valle made no attempt to use Dr. Waisel as a conduit for hearsay, as the State suggests.

The State appears to confuse the issue of the motion in limine regarding Dr. Waisel's testimony, which Mr. Valle did not raise in his initial brief, with the separate issue of the admissibility of the affidavits themselves. With regard to that issue, the State argues that the trial court properly excluded the affidavits of Greg Bluestein and Eddie Ledbetter, who had written newspaper articles about the Blankenship execution, because it had clear and convincing doubt about the accuracy of the information contained in the newspaper articles. Supplemental Answer at 47. The State avers that the court found the articles were "sensationalized" and not based solely on first-hand reports, and that "a review of the articles and affidavits supports such a finding." Supplemental Answer at 47. This is incorrect. Mr. Bluestein and Mr. Ledbetter are both professional journalists employed by established press organizations. While the court may have its suspicions that "newspapers are motivated by the need to sensationalize things" (T. 8/2 433), or that Mr. Bluestein's reporting is "a little bit suspect" (T. 8/2 436), there is no basis for the court to determine that the facts as stated in those newspaper articles are not true where they are the product of professional journalists, working for established and reputable press organizations, who have affirmed the accuracy of their statements through affidavit. The lower court's

exclusion of the affidavits was an abuse of discretion.

CONCLUSION

In light of the foregoing arguments, Mr. Valle submits that this Court should find Florida's lethal injection procedures unconstitutional under the Eighth Amendment or, in the alternative, he should be granted a full and fair evidentiary hearing.

SUZANNE MYERS KEFFER
Chief Assistant CCRC-South
Florida Bar No. 0150177

Paul Kalil
Assistant CCRC-South
Florida Bar No. 174114

M. Chance Meyer
Staff Attorney
Florida Bar No. 0056362

Capital Collateral Regional Counsel - South
101 NE Third Avenue, Suite 400
Ft. Lauderdale, FL 33301
(954) 713-1284

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 17th day of August, 2011.

_____
SUZANNE MYERS KEFFER

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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SUZANNE MYERS KEFFER