IN THE SUPREME COURT OF FLORIDA

CASE NO. SC13-2105

ASKARI ABDULLAH MUHAMMAD,
FKA THOMAS KNIGHT,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE EIGHTH JUDICIAL CIRCUIT,
IN AND FOR BRADFORD COUNTY, STATE OF FLORIDA

SUPPLEMENTAL INITIAL BRIEF OF APPELLANT

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SUPPLEMENTAL PRELIMINARY STATEMENT

The following symbol will be used to designate references to the supplemental record in this appeal:

"3Supp. PC-R4." - record on appeal of the postconviction proceedings following this Court's November 18, 2013 remand;

SUPPLEMENTAL REQUEST FOR ORAL ARGUMENT

Mr. Muhammad is presently under a death warrant. This Court reversed the circuit court's summary denial of Mr. Muhammad's Rule 3.851 motion and remanded for an evidentiary hearing so that the circuit court could "carefully consider" Mr. Muhammad's factual allegations that Florida's current lethal injection violates his right to be free from cruel and unusual punishment. After a severely restricted evidentiary hearing, where the State disclosed a mere two pages of information and chose which witnesses would be called, when they would be called and how they would be presented, the circuit court denied relief. Now, 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. Mr. Muhammad, through counsel, urges that the Court permit oral argument.

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INTRODUCTION

> "If I had a world of my own, everything would be nonsense. Nothing would be what it is, because everything would be what it isn't. And contrary wise, what is, it wouldn't be. And what it wouldn't be, it would. You see?"

Lewis Carroll, *Alice's Adventures in Wonderland & Through the Looking-Glass*.

On September 9, 2013, the Florida Department of Corrections adopted a new lethal injection protocol identifying midazolam as the first drug in the three-drug cocktail. Secretary Crews wrote a cover letter to the Governor extolling the extensive research and reflection that had gone into making the change. Yet, the State won't revealed what research or what reflection occurred.

Indeed, the State has refused to disclose any documents, documentation, reports, memos, i.e. anything regarding how DOC decided to use midazolam and why no other adjustments were made to the protocol when midazolam was chosen to replace pentobarbital, which is from a completely different class drugs. Indeed, only two sheets of paper have been disclosed by the State, two letters written by Hospira, the purported manufacturer of the midazolam purchased by DOC, both dated months after the September 9th adoption of a new protocol incorporating midazolam.[1]

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[1]This Court directed DOC to disclose all correspondence and documents from "the manufacturer" of the midazolam it intends to use in Muhammad's execution. The fact that DOC turned over an October 18th, letter from Hospira would seemingly answer the question of who is the manufacturer. Indeed, Muhammad's counsel spent a great deal of time attempting to find out information about Hospira and convince the manufacturer to permit a representative to testify at the hearing. Hospira has corporate headquarters in Illinois. Therefore, Muhammad has no way to obtain the appearance of a representative from Hospira in the time frames set by this Court without Hospira's willingness to testify. Later, the State made references that suggested that Hospira is not the manufacturer. See (3Supp. PC-R4. VI 16) ("And my understanding in reading of this order, that's - that's what

Moreover despite carrying out the first execution in the nation using midazolam on October 15, 2013, the State has refused to disclose the identity of witnesses who were present or documentation that was generated pursuant to the protocol at that time. Muhammad and his counsel were not present at the Happ execution and are entirely dependent upon the State that carried out the execution to disclose the information in its possession regarding what occurred.

The State decided after this Court's remand to list two witnesses at the Happ execution, while arguing that Muhammad had listed irrelevant witnesses when he listed the witnesses at the Happ execution whose names he was not provided. The State then chose to call one witness who observed the Happ execution; a witness of its choice to testify about what he acknowledged was unusual movement that he observed during that execution.

Thus, the State, which has control of the relevant information regarding the protocol which it adopted and the Happ execution which it carried out, has chosen to exercise that control and deny Muhammad access to the information. The State then got to pick the one witness out of an unknown number that it

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the Department has received from, you know, a manufacturer"; (3Supp. PC-R4. VII 93)("Hospira is a manufacturer. Not necessarily the one of the drugs the Department of Corrections has."); (3Supp. PC-R4. VIII 37)([T]hey've been given the letter we received from the manufacturer, and of course, knowing there was more than one manufacturer, **the State was good enough to give them what they had from everyone**"(emphasis added). This Court should simply direct the State to identify "the manufacturer" since the State apparently believed that this Court's November 18th Order was ambiguous. In addition, if Hospira is not the manufacturer and the State has tricked Muhammad - wasting his time and taxpayer money for counsel's time in attempting to obtain the presence of a Hospira representative, then the State and DOC should face severe sanctions for the game playing and complete lack of candor with this Court and Muhammad's counsel.

wanted to testify regarding the October 15th execution.

This cannot be described as a functioning adversarial process, where one party gets to decide what information the other party gets to know and what evidence will be presented as to the relevant underlying facts. Indeed, it is reminiscent of something out of *Alice's Adventures in Wonderland & Through the Looking-Glass*.

So, Muhammad now requests that this Court once again remand his case for a full and fair evidentiary hearing on his claims at which there is a functioning adversarial process within the meaning of the Due Process Clause of the Fourteenth Amendment.

SUPPLEMENTAL STATEMENT OF THE CASE AND FACTS

Just after noon, on November 18, 2013, this Court entered an order reversing the circuit court and remanding Muhammad's case for an evidentiary hearing (3Supp. PC-R4. 51-54).

At approximately 1:40 p.m., the circuit court's staff attorney sent an e-mail indicating that the court could schedule the evidentiary hearing for November 21st and 22nd, and the parties were asked to "advise immediately re these dates". Muhammad's counsel responded by indicating that the records that had been ordered to be disclosed, had not yet been provided to her. Thus, she maintained that she was not in a position to agree to the hearing before receiving and reviewing the records.

Meanwhile, the State filed a motion to compel disclosure of a witness list citing the State's need "to know which witnesses Defendant plans to call on the limited issue so that it may effectively prepare for the hearing." It was before the hearing on November 19th, that DOC disclosed one sheet paper, an October

18, 2013, letter from Hospira, Inc., requesting that the drug it manufactures not be used in lethal injections in Florida. According to DOC, the letter was disclosed pursuant to this Court's directive that correspondence with "the manufacturer" be provided to Muhammad.

On the morning of November 19th, a status hearing was conducted. The State began by arguing it's motion to compel: "[W]e need to know which witnesses would be - with regard to the limited issue on this evidentiary hearing." (3Supp. PC-R4. V 4).

In response to the motion, Muhammad informed the circuit court that he intended to present the witnesses listed in the 3.851 motion[2] and add a few additional witnesses in light of this Court's remand order. Muhammad also requested that the State reveal the names of the individuals and FDLE agents present for the October 15th, execution (3Supp. PC-R4. V 4-5).

The State complained that Muhammad's witnesses were not relevant because they did not have any "expertise",[3] though it did not reveal what "expertise" was necessary to the issue before

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[2]The Rule 3.851 motion had been filed on October 29, 2013, some three weeks before the November 19th status hearing. The witness list appeared in footnote 7 of that pleading. Besides a list of nine named individuals, Muhammad also indicated his desire to call "all execution team members, medical personnel and Florida Department of Law Enforcement employees who monitored the October 15, 2013, execution." However, the State had refused to disclose the identity of these individuals or permit Muhammad an opportunity to speak with them while aliases were used. Subsequently when the State listed and then called FDLE Agent Feltgen to the stand, Muhammad learned that he was one of the FDLE agents who attended the October 15th, execution.

[3]Subsequently, the State called Feltgen who admitted that he had no expertise - but had merely been the FDLE agent assigned to observe the October 15th execution and maintain a log of what occurred. Despite calling Feltgen to testify regarding his observations, the court refused to order the State to disclose the log that Feltgen maintained during the execution.

the circuit court (3Supp. PC-R4. V 5).

Muhammad objected to what appeared to be argument seeking to strike his witnesses because he received no notice that such a motion would be heard (3Supp. PC-R4. V 6).

Without hearing any argument from Muhammad as to the relevance of the witnesses - David Arthmann and Misty Cash, both DOC employees, the circuit court asked Muhammad: "Can't you at least delete [those witnesses]", apparently pre-judging the issue without hearing anything from Muhammad. See (3Supp. PC-R4. V 6).

After Muhammad again objected to the court's hearing a motion to strike without notice, the State made an oral motion for the circuit court to consider a motion to strike (3Supp. PC-R4. V 7). The court granted the State's oral motion to hear the State's oral motion to strike and asked if Muhammad could narrow his witness list (3Supp. PC-R4. V 7). Muhammad responded that he could not and that he would file a complete witness by the end of the day, as the court directed (3Supp. PC-R4. V 9).

Thereafter, the State again asked the court to strike Arthmann, Cash and now Secretary Michael Crews because the witnesses were not relevant (3Supp. PC-R4. V 9).[4]

Muhammad again objected, stating:

> [C]learly, there's a disconnect here between the State's understanding of the Supreme Court's order and Mr. Muhammad's understanding of that order and - and who would be relevant to the issue at hand. And I don't think that

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[4]In his Rule 3.851 motion, Muhammad had specifically identified Crews and Cash and why he wished to call them as witnesses. Crews had signed a cover letter sent with the September 9th protocol advising the Governor that he and his staff and had researched midazolam and concluded that it was appropriate to switch to it in carrying out lethal injections in Florida. Cash was quoted in media statements making similar assertions.

> that should be taken up at a status conference the day after the order was entered with no notice to Mr. Muhammad's counsel that this would be - we would be required to respond to the significant issue about who will we be able to call at our hearing to prove our case.

(3Supp. PC-R4. V 10). Despite Muhammad's objection, the court granted the State's oral motion to strike Arthmann, Cash and Crews (3Supp. PC-R4. V 14).[5]

The State also made an oral motion for its witness to appear by phone (3Supp. PC-R4. V 17). Over Muhammad's objection, the court granted the motion (3Supp. PC-R4. V 20).

Finally, Muhammad's counsel informed the court that Dr. Heath was unavailable on Thursday and Friday - November 21-22, due to his work schedule at Columbia University (3Supp. PC-R4. V 18). The State's response to the unavailability of Dr. Heath at the scheduled evidentiary hearing was "Surely Dr. Heath is not - is going to eat lunch, is going to have other times during the day when he would be available to appear by phone." (3Supp. PC-R4. V 19). The circuit court concluded the hearing by directing Muhammad's counsel to "let us know about the time for attendance of her witness, as can the State... [s]o ...what time would be best for them, then we'll work out come sort of schedule." (3Supp. PC-R4. V 21). The circuit court suggested that an allowance could be made to accommodate Dr. Heath by starting at 8:00 a.m. (3Supp. PC-R4. V19).

Also, during the hearing, the State accused Muhammad's

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[5]Arthmann served as counsel for the DOC at the November 19th hearing. He was the individual who disclosed the two letters from Hospira to DOC that were provided to Muhammad pursuant to this Court's directive. Subsequently during the evidentiary hearing, the State sought to rely on an unsworn statement from Arthmann as evidence even though it had successfully had him struck as a witness arguing he had no relevant testimony.

counsel of being "obstructionist" and the circuit court joined in that characterization: (By the State): "And frankly, I'm getting very exasperated with these Defense tactics, which are nothing but obstructionist."; (By the Court): "The court is too because The Court is under a dictate from the Florida Supreme Court as to when an order has to be entered and filed with the Supreme Court.")[6](3Supp. PC-R4. V 14). The court also implied that Muhammad's counsel were less than truthful because they said they could not hear the court attempting to interrupt them because of the fact that in teleconferencing the speaker on the phone cannot hear sounds or voices from others while he or she is speaking. See 3Supp. PC-R4. V 13, 15, 16)("Well, apparently you and Mr. McClain are the only ones that are having difficulty with the phone conference.").

Later that day, Muhammad filed several pleadings, including, a witness list; a motion for rehearing relating to the court's striking of witnesses Arthmann, Cash and Crews; a motion to compel the State to reveal the identities of the witnesses who observed or participated in the executions on October 15th, and November 12th; a motion to continue due to Dr. Heath's unavailability; and a motion for discovery relating to specific information about the midazolam purchased by DOC to determine if the drugs had expired or were subject to recall (3Supp. PC-R4. III 58-64, 65-66, 67-70, 74-76, 100-3).

The following day, a hearing was held. Muhamamd's counsel

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[6]The Court later denied accusing Muhammad's counsel of being obstructionist, though the court did indeed make such an accusation (3Supp. PC-R4. V 20)("Ms. McDermott, The Court never has accused you of obstructionist tactics.").

explained that Dr. Heath was working Thursday and Friday and that his shift begins at 7:00 a.m. (3Supp. PC-R4. VI 5). Muhammad's counsel further explained:

> He works in the cardiothoracic unit as First Presbyterian at Columbia. They schedule surgeries there daily. They don't necessarily know when surgeries begin or - they might know when the first surgery begins in the morning, but they don't know when it ends. And so they don't necessarily know when they go to the next surgery. Surgeries generally last between four and eight hours. And they - as Dr. Heath explained to me, if you were being operated on and having major heart surgery, you would certainly not want your anesthesiologist to leave, nor would it be ethical for him to leave the operating room to go and testify in a case regarding something else.

(3Supp. PC-R4. VI 5-6).

The court inquired as to whether Dr. Heath would have a coffee break or respite break (3Supp. PC-R4. VI 7). Again, Muhammad's counsel responded that Dr. Heath would not have a scheduled break during his work day (3Supp. PC-R4. VI 7). The court inquired as to Dr. Heath's schedule for the first week of December, but Dr. Heath had not provided his December schedule (3Supp. PC-R4. VI 8).

Muhammad's counsel argued his motion to compel requesting the identities of the individuals who observed and participated in the execution on October 15th, stating: "[W]e do intend to call them at the evidentiary hearing in relation to the Midazolam and how it was used in the Happ execution and - so that we can show that it's not an appropriate drug to be used in the protocol." (3Supp. PC-R4. VI 13). Also, Muhammad argued that the stricken DOC witnesses were relevant due to the information that they possess about the use of midazolam (3Supp. PC-R4. VI 13).

The State's response to Muhammad's motion consisted of an accusation that he was "relitigating" issues and should be denied

(3Supp. PC-R4. VI 15). Curiously, the State relied on Valle v. State, to argue that the Court must deny Muhammad's requests, yet at the Huff hearing on October 31st, the State repeatedly distinguished the Valle litigation to argue that Muhammad was not entitled to an evidentiary hearing[7] (T. 77-8, 93).

The State also requested that all of Muhammad's witnesses be struck, other than the ones the State deemed relevant, i.e., "[n]ot medical professionals" (3Supp. PC-R4. VI 15, 20, 22-24). In response to the State's "not medical professionals" argument, Muhammad's counsel stated:

> [T]he State has now listed witnesses. Two FDLE witnesses. And because the State has acknowledged that the Happ execution is a part of our allegations about the use of Midazolam, they don't get to choose the witnesses that we put on in our case. We get to choose the witnesses. And therefore, they need to reveal the people that were present for the execution and participated in the execution, and then we get to do investigation to determine who we want to put on.

(3Supp. PC-R4. VI 25-26).[8] In addition, Muhammad's counsel pointed out that the State had originally taken the position that the Happ execution was irrelevant, so: "the State's acknowledgment that the witnesses from the Happ execution are

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[7]It is important to note that the Valle litigation did not involve midazolam or irregularities of a previous execution.

[8]However, the circuit court refused to order the identity of any other witnesses to the October 15th execution to be disclosed or to permit Muhammad's counsel any access to the witnesses. Since neither Muhammad nor his counsel were present at the October 15th execution, they had no means of finding out who was present absent the disclosure of the official records kept by DOC. As a result, the testimony from Feltgen was the only testimony presented in the circuit court from a witness at the October 15th execution, and he was chosen by the State, not Muhammad, as the only member of the execution team to testify. So in fact, the circuit court allowed the State to serve as the gatekeeper and determine which witnesses from the Happ execution would be permitted to testify at the evidentiary hearing.

relevant completely changes this. It changes the situation the Florida Supreme Court was addressing." (3Supp. PC-R4. VI 27).

As to Muhammad's request for discovery of more information about midazolam purchased by the State, he averred that in investigating Hospira in response to DOC's disclosure of the October 18th letter: "it's come to my attention that there have been recalls and there may be expiration issues with the drugs that were sold to - were purchased by the state of Florida from Hospira. ... Because that clearly would impact the efficacy of the drugs if there's been a recall. And the State hasn't - has not responded to it" (3Supp. PC-R4. VI 35).

Also, at the hearing, Arthmann stated:

> I understand that Counsel is seeking - claiming that we should have turned over package inserts of - in relation to that order. I just don't read that order as to include package inserts. Given that it's the same language used in Valle, we turned over a letter from the sole manufacturer of Pentobarbital in Valle that was out there claiming that they objected to our use of Pentobarbital in executions.
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> The package inserts would - **if the Supreme Court wanted us to turn over docu - things like package inserts - and I don't really know what package inserts are. I mean, it's a thing that comes in the box when you purchase a drug. But it - they would have been able to express that,** you know, **because that would in turn identify the source of Midazolam that we have in stock.**

(3Supp. PC-R4. VI 16-17).

At the conclusion of the hearing, the circuit court denied all of Muhammad's motions and granted the State's motion to strike all of Muhammad's witnesses other than Dr. Heath, the two newspaper reporters[9] and a representative from Hospira (3Supp.

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[9]It is unclear why the State did not seek to strike the newspaper reporters who had observed the Happ execution and reported their observations. These witness were not medical professionals and possessed no medical expertise. The State's failure to object to the two reporters as witnesses was inconsistent with the position it took in getting all of the

PC-R4. VI 36-37, 39-40, 41; 3Supp. PC-R4. VI 84-85).

After the hearing, Muhammad filed Dr. Heath's declaration wherein he stated that he was unavailable during business hours on November 21-22, but could be available on November 29th or December 6th or "outside of business hours or on weekend days" (3 Supp. PC-R4. VI 62).

Late in the day on November 20th, Lancelot Armstrong, an individual under a sentence of death, moved to intervene in Muhammad's case because the State had formally filed a pleading in his case that he would be bound by the outcome of Muhammad's evidentiary hearing (3Supp. PC-R4. III 63-81). The State objected (3Supp. PC-R4. III 88-95). After hearing argument on November 21st, the motion was denied (3Supp. PC-R4. III 100-1).

Then, the court heard a motion to quash the subpoenas for Brendan Farrington and Morgan Waters, the journalists who reported on the Happ execution and detailed their observations that Happ moved his head from side-to-side ten minutes into the execution, and after the consciousness check, but no additional consciousness check was performed. See Defense Exhibits 4, 5 and 6. Counsel appearing on behalf of the journalists maintained that a reporter's privilege applied and that Muhammad could not demonstrate that the information possessed by the journalists could be obtained from alternative sources who would "provide the same information as the reporters" (3Supp. PC-R4. VII 16).[10]

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other witnesses on Muhammad's witness list struck. Perhaps the State anticipated that the reporters would seek to have their subpoenas quashed.

[10]Later, the journalists again argued that: "What the privilege does is it makes the reporters the line of last defense. You have to go to every other person first, and then

Indeed, the journalists contended that the alternative sources must be disclosed to Muhammad before the journalists' privilege could be pierced (3Supp. PC-R4. VII 17); and as to the "compelling need" prong, counsel for the journalists argued:

> I would imagine that there are a lot of public records that establish that timeline of the execution as well, as I know the State keeps logs of that information. So it really isn't essential for the reporters to come in here and establish that timeline, especially when there are other sources who can do that.

(3Supp. PC-R4. VII 18).

Muhammad responded to the motion by arguing that the privilege did not apply because by their very nature the journalists were eyewitnesses to an event that was being considered by the court (3Supp. PC-R4. VII 19). In addition, if the privilege applied, then the balancing act to be conducted weighed in favor of Muhammad because of the seriousness of the constitutional issue before the court (3Supp. PC-R4. VII 20).

Muhammad also argued that the Happ execution was relevant due to the fact that the State had listed the FDLE agents who monitored the Happ execution and because the Happ execution was a specific, real example of ineffectiveness of midazolam in the lethal injection context (3Supp. PC-R4. VII 20). Most importantly, Muhammad argued that there were no alternative sources that had been provided to Muhammad who had the same information as the reporters (3Supp. PC-R4. VII 21)("We've been

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come to the reporter ...". Thus, the journalists relied heavily on the State's last minute disclosure of the FDLE agents who Muhammad had not known of until a day and a half before the hearing. Muhammad had no opportunity to interview or review their notes and logs to determine if the agents' possessed the same information as Farrington and Waters. And, based on Feltgen's testimony, it was clear that he was not an alternative source for the information possessed by the reporters.

completely shut off from investigating this issue as to who else was present and what they have to say so that we know who we want to present, in terms of this claim.").

Finally, picking up on an option that the journalists' counsel acknowledged as a proper alternative, Muhammad argued that, at a minimum, the court should accept affidavits of authentication from the journalists to be considered on behalf Muhammad's claims.[11] The State objected citing to Valle.

Counsel for the journalists had also argued that because the newspaper stories were themselves admissible as business records under §90.803(6) and/or (17) of the Evidence Code, it was unnecessary for the reporters to be called as witnesses.[12]

After hearing argument on November 21st, the circuit court granted the motion to quash the subpoenas thereby precluding Muhammad from calling the journalists who had witnessed the Happ execution (3Supp. PC-R4. III 182-4; VII 30-31).

Neither Dr. Heath nor a representative of Hospira were available on Thursday morning. As to the availability of Dr.

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[11]According to counsel for the journalists, they were prepared to execute affidavits acknowledging their news stories and the accuracy of the information set forth in those stories.

[12]The State subsequently disputed this contention that the news articles fit within the definition of a business record under §90.803(6) or commercial publication under §90.803(17), arguing that Valle had rejected the arguments. However, this Court in Valle actually said: "Although Valle generally references the journalistic privilege and the manner in which to authenticate business records, **he fails to explain why these documents do not constitute hearsay or fall within any applicable hearsay exception**. Thus, we conclude that the circuit court did not abuse its discretion in excluding these items from consideration." 70 So. 3d at 547 (emphasis added). Obviously, the assertion made by counsel for the journalists here, that the articles fit within the hearsay exception set forth in §90.803(6), was not made in Valle.

Heath, the State urged the circuit court to hear from Dr. Heath on Thursday, November 21st (3Supp. PC-R4 VII 34). Muhammad's counsel requested that Dr. Heath be called Friday evening or Saturday so that counsel could consult with him about his testimony since she had not been able to prepare for his testimony (3Supp. PC-R4. VII 36).

With Muhammad having no witnesses to present at that time, the State called Feltgen, who witnessed previous executions, including the execution of Happ on October 15th.[13] Despite calling this witness, the State refused to disclose any of the public records that would have been generated by Feltgen in his capacity of monitoring the Happ execution (3Supp. PC-R4. VII 44).

Feltgen testified that he had witnessed executions dating back to September, 2013, including the Happ execution on October 15th. Feltgen described his role as "[j]ust to observe and be a witness." (3Supp. PC-R4. VII 46). Feltgen's training was to attend a few executions and "watch one of those inspectors complete the check sheet and - just learning the process." (3Supp. PC-R4. VII 53).

Specifically, during Happ's execution, Feltgen knew that a new protocol was being used, but he was not provided the information so that he "would be aware of that when looking and making [his] observations." (3Supp. PC-R4. VII 55-6). Also, Feltgen was located in the chemical room with seven other individuals behind a two-way mirror where he could observe the

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[13]When presenting Feltgen as a witness, the State maintained that he was being called as an anticipatory rebuttal witness that it may or may not actually seek to introduce. Presumably this was akin to a deposition to perpetuate testimony conducted in front of the presiding judge.

death chamber (3Supp. PC-R4. VII 46, 58). The witnesses were located directly across from Feltgen, so while he looked at the back of Happ's head, the witnesses viewed Happ's face. He could not hear what was occurring in the death chamber because the "microphone is typically turned off" (3Supp. PC-R4. VII 47).

Feltgen stood next to the executioner (3Supp. PC-R4. VII 48). He knows when injections occur because the executioner announces "first syringe, second syringe, third syringe." (3Supp. PC-R4. VII 48). Feltgen admitted that he did not have "much knowledge of the chemicals." (3Supp. PC-R4. VII 60), and he had no idea what was being injected because he did not pay attention to the markings on the syringes (3Supp. PC-R4. VII 67). And, despite the protocol's description of Feltgen's role, Feltgen testified that he did not follow the protocol and instead, "my eyes kind of go back and forth between" the syringes and the condemned (3Supp. PC-R4. VII 48). And further, "I kind of look in both directions. **It's not necessarily my job to make sure that, I guess, the injections are going all the way in.**" (3Supp. PC-R4. VII 60-1)(emphasis added). Feltgen mentioned that there were monitors he viewed, as well (3Supp. PC-R4. VII 62). Feltgen candidly testified: "There's a lot of stuff going on. It's a lot of just my head moving back and forth." (3Supp. PC-R4. VII 64).

Feltgen also explained that every two minutes, he places a checkmark on the log that he maintains to indicate "everything's going good." (3Supp. PC-R4. VII 61). His determination that "everything's going good" is based on the fact "that the IV is still in the subject's arms." (3Supp. PC-R4. VII 61). Furthermore, "based on what I see, I don't see that he's in any

kind of pain or anything that would be worth noting. There's a comment thing. If you observe anything which you would consider out of the ordinary, you could also make a comment on that check sheet."[14] (3Supp. PC-R4. VII 61). There is no training as to what is out of the ordinary; it is merely Feltgen's opinion.[15] (3Supp. PC-R4. VII 62).

During the execution, after the first syringe, Feltgen noticed Happ's "chest rose off the table, and he laid back down" and "I don't know if that was just on the first syringe. It may have followed into the second and third syringe as well." (3Supp. PC-R4. VII 48). This was unusual compared to the two prior executions Feltgen witnessed (3Supp. PC-R4. VII 50).[16]

Feltgen was asked:

> Q: Now in relation to his movement, can you tell us - in other words, you - the heavy chest breathing and the head movement. Did that occur before or after the consciousness check?
>
> A: Oh, this was all done - there's phases of the execution, and the first three syringes are all considered the first phase. So this is the first phase of the execution I'm referring to.

(3Supp. PC-R4. VII 48-9).

After the consciousness check, where Happ's eye was tapped or flicked and his arm was shook a couple of times, phase two began (3Supp. PC-R4. VII 49-50). Feltgen later clarified that he

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[14]Despite repeated requests, the log maintained by Feltgen on October 15th was not disclosed to Muhammad.

[15]Happ's execution was just the third execution that Feltgen had attended.

[16]Because the State has not disclosed Feltgen's notes and logs, it is unclear whether he noted this as something out of the ordinary. Muhammad is entitled to Feltgen's notes and logs, particularly since he testified that he did in fact observe something unusual.

could tell that the tap was in the "area of the eye" but he did not know the exact position (3Supp. PC-R4. VII 70). Feltgen had no training in dealing with people who were unconscious, even after he volunteered to witness the executions as an agent with FDLE (3Supp. PC-R4. VII 51-2).

Critically, Feltgen testified about the timing of the injections:

> Q: Okay. How long between the first injection and the second injection?
> A: It's almost instantaneous.
> Q: Okay.
> A: Maybe a couple of seconds.
> Q: Okay. And the third injection, the same way?
> A: Same way.
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> Q: Okay. And so other than - three more syringes inserted.
> A: Yes.
> Q: So it'd be four, five and six?
> A: Correct.
> Q: They were done in the same way as one, two, and three?
> A: Yes.
> Q: Very fast?
> A: Yes.
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> Q: Okay. And how long after the third syringe did Deputy Secretary Cannon do his consciousness check? How many minutes?
> A: You mean after the third syringe?
> Q: Yeah.
> A: It's - I wouldn't go as far as a minute. I would say 30 seconds after the last syringe.
> Q: Okay.
> A: Even that could be too long.
> Q: And then after he gives the - how long does it take for him to give the thumbs-up to do his check?
> A: I would give him an additional 30 seconds.
> Q: Okay. And so then that's when the four, five, and six begin?
> A: After he acknowledges or - and confirms that he's unconscious and gives the nod, then they'll begin phase two. Yes.
> Q: In the course of keeping track of the time, do you have any recollection of how much time had passed from the start of phase one to the injection of four, five, and six?
> A: **It's probably only a minute.**

(3Supp. PC-R4. VII 66-77)(emphasis added).

On Thursday afternoon, Muhammad's counsel updated the court as to the defense's witnesses:

> I spoke to Dr. Heath during the lunch break, and he is anticipating tonight that he would not be available. He has to work until - well, presently, it looks like he would not be free to leave the hospital until the earliest at 7:30 p.m.
>
> ***
>
> Tomorrow, he said it might be a little earlier. He did tell me that sometime around 3:15 to 4:00, they'll at least have the schedule of the scheduled surgeries. Now, they also do emergency surgeries, so doesn't account for what might come in during the day tomorrow. But he did say that closer to the end of the day today, he would be able to take a look at the schedule for tomorrow. And because of where he is in the rotation, he thinks tomorrow night might be slightly earlier, although he can't guarantee that.
>
> He did say that Saturday is wide open, and he is free to appear in person on Saturday.

(3Supp. PC-R4. VII 81-2). As to Ms. Reed, from Hospira whose identity was first revealed by DOC 48 hours earlier, she was on an airplane during the lunch hour so Muhammad's counsel could not communicate with her.

The circuit court ruled that Dr. Heath would have to appear that night at 8:00 p.m., despite Muhammad's counsel's objection (3Supp. PC-R4. VII 85).[17] Indeed, the court erroneously

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[17]Muhammad's counsel stated: "[T]here is no opportunity to prepare Dr. Heath to address that and have him review the materials and do research before he has to testify this evening." (3Supp. PC-R4. VII 89). Muhammad's counsel continued:

> [Mr. Muhammad] is entitled to the right to effective assistance of counsel, even in a warrant situation. Especially in a warrant situation. ... To tell me that I have to put a witness on without having an opportunity to consult with them about what's happened this week denied [Mr. Muhammad] that right. I mean it would be unethical of me to put a witness on the stand that I haven't even had the opportunity to speak to. Dr. Heath's saying he won't even be available - the earliest would be 7:30 at night. And you're saying that he's going to be - we need to be here at 7;30, and he'll be put on the stand, if he's available, at 8 o'clock. That simply -

(3Supp. PC-R4. VII 91-2).

indicated that "he was prepared to testify last week."[18] (3Supp. PC-R4. VII 85).

Upon arriving back in the courtroom at 7:30, the circuit court seemed upset by the fact that Muhammad's counsel was not ready to proceed (3Supp. PC-R4. VII 94-5). Muhammad's counsel explained that Dr. Heath had recently left the hospital and was reviewing records.[19] The court informed Muhammad's counsel that she could have until 8:15 p.m. - a mere thirty seven minutes from the time the circuit judge left the bench in the middle of Muhammad's counsel's correction of the State's baseless implications that counsel could have been preparing Dr. Heath prior to court resuming:

> (By Ms. Jaggard): I would note that for the last 15 or 20 minutes, the Defense has been in this courtroom make (sic) no attempt to communicate with Dr. Heath.[20]

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[18]Dr. Heath had been listed as a witness in the Rule 3.851 motion filed on October 29, 2013. However, this Court issued its order for a remand on November 18th and Feltgen testified the morning November 21st, regarding the Happ execution. So, counsel had not had the opportunity to discuss with Dr. Heath the scope of the hearing or the testimony of Feltgen, nor the significance of the Hospira letter disclosed on November 19th and 21st.

[19]The court had directed the court reporter to provide counsel with a transcript of Feltgen's testimony. This transcript, along with this Court's remand order and the Hospira letter had been provided to Dr. Heath so he could begin reviewing the materials at 7:30 p.m. when he got off work.

[20]The State lied to the Court. The defense did not even arrive at the courthouse until after 7:15 p.m. Then, the courthouse doors to the side entrance near the parking area were locked. After beginning to walk around the building a courthouse employee left through the employee entrance and spoke to the defense about whether he should permit them to enter through that entrance. Ultimately, he let them enter. Then, the defense had to walk to the main entrance, proceed through security and take a very slow elevator to the second floor. So, Ms. Jaggard's representation to the court about the time the defense had been in the courtroom was a complete fabrication. Moreover before counsel could discuss the materials with Dr. Heath, he needed time to read them, which Dr. Heath was doing when counsel

(By the Court): Okay. We'll note that.
(By Ms. McDermott): Well, I need to correct something. Because Dr. Heath is reviewing the records. And I told him that I would call him back at 7:30 after I let The Court know what was going on.
(By the Court): Okay.
(By Ms. McDermott): And that is why I wasn't talking to him. Because he's sitting there reviewing records right now.
(By the Court): All right.
(By Ms. McDermott): The implications that the State is making about the Defense repeatedly in this courtroom, and from no reaction from You Honor to correct those implications -
(By the Court): We're taking time out here that you could be using to talk to your witness. So we'll reconvene at 8:15. Thank you.

(3Supp. PC-R4. VII 95-6).

Though Muhammad's counsel was not prepared to present the testimony of Dr. Heath, and though he testified that he had only an hour or so to review the materials (3Supp. PC-R4. VII 111), Muhammad's counsel was forced to present his testimony, beginning at 8:20 p.m. on November 21st.

In his testimony, Dr. Heath explained that as an anesthesiologist he was familiar with drugs that are routinely used in lethal injection procedures and "their properties and their clinical behavior and their risks and benefits." (3Supp. PC-R4. VII 102). In addition, Dr. Heath was aware that the two drugs that followed the anesthetic in a three-drug protocol, like Florida's "would be extremely agonizing if the prisoner was not first placed under general anesthesia. In other words, placed in a state where they are deeply unconscious and unarousable." (3Supp. PC-R4. VII 102).

Specifically as to the information Dr. Heath reviewed, he indicated that in order to thoroughly evaluate the efficacy of

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returned to the courtroom.

midazolam it is necessary to know about the context in which it's being administered (3Supp. PC-R4. VII 108-9). Therefore, knowing the "layout or configuration of the execution system" length of the IV tubing, information about exactly how the executioners inject the drug and their qualifications are all necessary to determine the efficacy of midazolam in the lethal injection context (3Supp. PC-R4. VII 109). However, the circuit court refused to allow Dr. Heath to explain how and why this information was necessary (3Supp. PC-R4. VII 110).

Dr. Heath explained that the efficacy of midazolam is dependent on the context of the lethal injection protocol (3Supp. PC-R4. VII 127). Dr. Heath also testified that midazolam "takes probably a minute or two to begin to take effect", but that can depend on a lot of variables, including "vein to brain" time which could take a minute on its own to begin to exert an effect[21]. (3Supp. PC-R4. VII 113-4). "The consciousness check is necessary to ascertain whether Midazolam has been effective and has efficacy." (3Supp. PC-R4. VII 141).

Dr. Heath also explained the difference between midazolam, a benzodiazepene and the previous barbituates that had been used in the protocol:

> [T]hey are unrelated molecules, and they have a different behavior when they are injected into the circulation. They go to different - or they concentrate in different parts of the body. They exert their effects in a different time frame. The commonality is that they depress brain function, but they do that in distinct ways.

(3Supp. PC-R4. VII 114). Additionally, midazolam may cause

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[21]Vein to brain time is largely dependent on an individual's circulation (3Supp. PC-R4. VII 114).

nausea and vomiting or retching (3Supp. PC-R4. VII 116).[22]

Dr. Heath testified that because Florida's lethal injection protocol failed to contain any time frame for the officials to wait before giving the second drug that this created a defect in the protocol, specifically because "Midazolam is a drug that will have a slower onset, compared with Pentothal." (3Supp. PC-R4. VII 118-9).[23] Dr. Heath knew of no research relating to the use of midazolam at the dose prescribed by Florida's lethal injection protocol (3Supp. PC-R4. VII 123).

Furthermore, no adjustments had been made to the consciousness check (3Supp. PC-R4. VII 119). Indeed, Dr. Heath opined that Florida's lethal injection protocol "is inadequate to ensure that an effective does of Midazolam has been successfully administered into the prisoner's circulation." (3Supp. PC-R4. VII 121). This is so because the consciousness check does not "involve a level of stimulation that is of the same level as the level of pain that is about to be inflicted." (3Supp. PC-R4. VII 121). And, someone may be unconscious but arousable or sedated, but able to experience pain (3Supp. PC-R4. VII 126).

As to the Happ execution, Dr. Heath remarked that "something very strange happened, or appears to have happened, which is that the prisoner moved a considerable period of time after the

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[22]Dr. Heath could not know whether Muhammad had experienced adverse effects to midazolam previously because he did not have Muhammad's medical records because DOC will not provide them to Muhammad despite his request. It is in fact counsel's understanding that Muhammad has had an adverse reaction to midazolam in the past couple of years which should be reflected in the records that DOC refuses to disclose.

[23]Even in a surgical setting, Dr. Heath generally waits a couple of minutes to determine the sedative effect of the midazolam (3Supp. PC-R4. VII 121).

Midazolam was given and after the consciousness check was performed." (3Supp. PC-R4. VII 124). Dr. Heath testified that: "before beginning or continuing a very painful thing, it would be essential to reassess consciousness to determine whether the movement was a result of consciousness and suffering." (3Supp. PC-R4. VII 127). In the Happ execution, the failure to perform a second consciousness check demonstrated that the "process was indifferent to whether or not that movement indicated suffering or the vulnerability to suffering from the Vecuronium and the Potassium."(3Supp. PC-R4. VII 127).

Due to the reports from the Happ execution, Dr. Heath was gravely concerned that the Happ's movement represented inadequate anesthesia, and therefore the midazolam was ineffective in the context of the execution[24] (3Supp. PC-R4. VII 127).

Furthermore, as to the Feltgen's testimony as to the timing of the injections, Dr. Heath testified that the single minute that passed between the injection of the midazolam and the injection of the pancuronium bromide was "not enough time to wait ... or for the Midazolam to have efficacy. And it - therefore, there is a substantial risk of harm (3Supp. PC-R4. VII 128).

Dr. Heath testified that in order to prevent the substantial risk of harm, Florida could stop giving the second and third

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[24]Of course during the Angel Diaz execution the first drug injected did not perform as expected because the IV had not been inserted properly. That is why there should be a consciousness check before moving on to the other drugs or whenever movement is observed. Whether midazolam should work in theory, the consciousness check is what is designed to insure its efficacy in practice in the context of the protocol.

drugs in the protocol (3Supp. PC-R4. VII 131).[25] Indeed, both Dr. Heath and Dr. Evans testified that a large dose of midazolam properly administered would produce death (3Supp. PC-R4. VII 137; VIII 8, 26). Therefore, Florida's lethal injection protocol contains an unnecessary and grave risk with no benefit (3Supp. PC-R4. VII 138, 139). If for some reason the midazolam has not had the anticipated effect (for example like the circumstances in the Diaz execution), the administration of the other two drugs will cause pain.

Finally, Dr. Heath opined that the use of midazolam in the context of the current lethal injection protocol causes a substantial risk of harm to Muhammad (3Supp. PC-R4. VII 142).

In rebuttal to Dr. Heath's testimony, the State called Dr. Lee Evans, who holds a Ph.D. in pharmacology. Initially, the State seemed to mislead the court and Muhammad as to Dr. Evans' experience in testifying as to the efficacy of drugs used in the lethal injections context, see 3Supp. PC-R4. VIII 5. However, because Muhammad's counsel was familiar with Dr. Evans from his prior capital work in Missouri where he worked with Dr. Evans who he had used to testify about mental health mitigation, it was revealed that Dr. Evans had only previously testified in one case involving lethal injection (3Supp. PC-R4. VIII 10-12). Likewise, when Dr. Evans was asked what the State had provided, he initially said that the State had only provided him with the lethal injection protocol (3Supp. PC-R4. VIII 12). Later, he

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[25]The court refused to permit Dr. Heath to testify as to the alternatives used in other states and whether or not the alternative of a one-drug protocol was feasible for Florida (3Supp. PC-R4. VII 131-2).

noted that the State had also provided him Feltgen testimony from the previous day (3Supp. PC-R4. VIII 18).

Dr. Evans testified that midazolam is commonly used in minor surgical procedures as a preanesthesia or anesthesia (3Supp. PC-R4. VIII 7). Dr. Evans later clarified that it would not be used in major surgeries, unless it was used "in combination with other drugs." (3Supp. PC-R4. VIII 29). He testified that he believed that an initial dose of 250 milligrams of midazolam would render an individual unconscious withing a minute-and-a-half to two minutes.[26] He later testified that an individual would become insensate within a "few minutes" (3Supp. PC-R4. VIII 8).

However, when questioned about midazolam's amnesiac quality, Dr. Evans agreed that because of that aspect of the drug it didn't necessarily mean that you don't feel pain, just that you don't remember it later (3Supp. PC-R4. VIII 30). Dr. Evans agreed with Dr. Heath that no research had been conducted on the use of midazolam in lethal injections (3Supp. PC-R4. VIII 30).

Dr. Evans also agreed with Dr. Heath that the efficacy of a drug is dependent upon the context in which it is being used (3Supp. PC-R4. VIII 13). Thus, it is important to consider the setup for the administration in order to determine the efficacy of the drug (3Supp. PC-R4. VIII 14).

Dr. Evans also agreed with Dr. Heath that the consciousness check was important to determine the effectiveness of the drug

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[26]Feltgen testified that the second drug was injected within a minute after the first phase commenced, therefore, even under Dr. Evan's testimony, the midazolam would not have had sufficient time to be an effective anesthetic to be used as the first-drug and would certainly subject Muhammad to a substantial risk of harm.

(3Supp. PC-R4. VIII 15, 17). This is so, because Dr. Evans agreed with Dr. Heath that "there are various levels of anesthesia" and there are cases of suboptimal anesthesia where someone could feel pain (3Supp. PC-R4. VIII 16-17).[27] Dr. Evans testified:

> Q: Is it necessary in the consciousness check to measure that the depth of the unconsciousness is sufficient for the subsequent procedure not to arouse the person who's unconscious?
> A: Yes.
> Q: So if there's something that's painful that's going to happen, you want the consciousness check to be equivalent pain to make sure that it's a deep enough unconsciousness that the subsequent procedure is not going to arouse the individual?
> A: I don't know that you can exercise an equivalent

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[27]Dr. Evans testified that someone can be unconscious and feel pain (3Supp. PC-R4. VIII 27). Also, Dr. Evans testified:

> Q: And the feeling of the pain may cause the level of consciousness to change, that the person may become closer to consciousness or actually become conscious because of the sensation of pain.
> A: Yes.
>
> * * *
>
> Q: I mean, is that one of the reasons why you indicated earlier that it's important to have somebody monitoring during surgery the patient in order to determine whether or not a body movement is of a type that may be indicative of the patient's unconsciousness level lessening?
> A: Yes, I think that would be one of the reasons.
> Q: So, I mean, some body movements could be convulsive, which may not reflect anything other than convulsions, and some body movements, like a shaking of the head would be something that would be different and may reflect something differently; is that fair?
> A: Yes, it could happen that way, yes.
> Q: So would it be fair to say that it would be important to be aware of the type of body movement?
> A: Generally, yes. If someone had an eye blink versus a full muscle movement, yes, that kind of thing, if that's what you're talking about.
> Q: Yes, that's what I'm talking about.

(3Supp. PC-R4. VIII 27-28). Thereafter, the court refused to permit Muhammad to obtain an answer to the question: "So a shaking of a head may be a sort of a no response which might reflect some level of consciousness, correct?" (3Supp. PC-R4. VIII 10-12).

amount of pain, not with a consciousness check.
Q: Okay.
A: That's all the more reason that anesthesia is monitored very closely for surgical procedures.

(3Supp. PC-R4. VIII 28). Also, Dr. Evans recommended waiting "five to ten minutes" in order to determine consciousness because then "you would definitely know if they were unconscious or not." (3Supp. PC-R4. VIII 23).[28]

Also contrary to the State's position, Dr. Evan's made clear that an individual who had been sedated would **not** move:

Q: And, Doctor, is it possible to move while unconscious?
In other words, if someone has been sedated, is it possible, without a paralytic, that they can, indeed, move?
A: No.

(3Supp. PC-R4. VIII 9). Dr Evans testified that he "would be very surprised" to see any movement after five minutes of administering midazolam" and that such movement would be "unusual" (3Supp. PC-R4. VIII 32).

As to the Happ execution, Dr. Evans agreed with Dr. Heath that he would like additional information to determine why there was movement several minutes into the administration of the midazolam as newspaper reporters who observed the execution reported (3Supp. PC-R4. VIII 21).

After Dr. Evans' testimony, Muhammad's counsel informed the court that Hospira was not willing to send a representative to testify voluntarily and there was not enough time to obtain a certificate of materiality (3Supp. PC-R4. VIII 34, 36). The State suggested that anything from Hospira would not be relevant

[28]Dr. Evans later indicated that you could conduct the consciousness check after "a couple of minutes" to see if "you're good to go." (3Supp. PC-R4. VIII 25).

because "it is what it is". (3Supp. PC-R4. VIII 36).

Muhammad's counsel also requested that the court permit Muhammad to call the journalists because it is clear that Feltgen did not possess the same information as them (3Supp. PC-R4. VIII 37-8). The journalists both reported that Happ began moving 9 to 10 minutes after the execution began with the administration of the first drug.

On November 25, 2013, the circuit court denied Muhammad all relief (3Supp. PC-R4. 171-81).

STANDARD OF REVIEW

Muhammad has presented issues which involve mixed questions of law and fact. The issues regarding the application of the law present questions of law and must be reviewed *de novo*. See Sochor v. State, 883 So. 2d 766, 772 (Fla. 2004). In regard to the facts, under Porter v. McCollum, deference is given only to historical facts.

SUPPLEMENTAL ARGUMENT

ARGUMENT I

MR. MUHAMMAD WAS DENIED DUE PROCESS THROUGHOUT HIS POSTCONVICTION PROCEEDINGS. THE PROCEEDINGS BELOW WERE NEITHER FULL NOR FAIR. MR. MUHAMMAD WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL.

On November 18, 2013, this Court reversed the circuit court's summary denial of Muhammad's claim challenging Florida's recently adopted lethal injection protocol and remanded for an evidentiary hearing. Muhammad v. State, SC13-2105 (Nov. 18, 2013). This Court also set a severely compressed schedule, ordering that the hearing be completed and an order entered within a mere eight days of the order, including the weekend. Id.

In addition to the compressed schedule, the State urged the

circuit court to construe the order to permit only evidence about midazolam, but not in the context of the lethal injection protocol. The State also argued that the circumstances of the Happ execution were not relevant. The circuit court adopted the State's positions and severely restricted Muhammad's presentation of evidence and refused to grant him any discovery.

From the outset, Muhammad indicated on the record that due to the severely compressed schedule he was having difficulty with the availability of witnesses. Likewise, Muhammad objected to lack of notice, failure to disclose information, the court's restrictions on the evidence that he was permitted to present and the inadequacy of his postconviction counsel. The circuit court denied every single motion Muhammad made, with the exception of transporting Muhammad to the evidentiary hearing, and granted every motion filed by the State and the journalists, to restrict evidence, present evidence in the way the State wanted it presented and preclude Muhammad from obtaining public records or information relevant to his claim.

The circumstances here are in fact strikingly similar to those in Jones v. Butterworth, 695 So. 2d 679 (Fla. 1997). There, this Court had ordered a hearing on whether Florida's electric chair comported with the Eighth Amendment following the execution of Pedro Medina. Jones v. Butterworth, 691 So. 2d 481 (Fla. 1997). Though at the ensuing hearing Jones was advised of the identity of those who had witnessed the Medina execution and permitted to call them as witnesses, he was denied due process when the circuit court did not allow him access to the electric chair equipment, when the State did not permit him access to the

charts and logs maintained during the Medina execution until after the presentation of evidence was closed, when the State did not give him access to the newly adopted protocol until the second day of the evidentiary hearing, and when he was unable to effectively cross-examine the State's experts nor call his own experts to testify about the newly adopted protocol. This Court reversed and remanded for further proceedings.[29]

As in Jones, the proceedings in here denied Muhammad due process and the effective assistance of collateral counsel.

A. THE STATE'S CHOICE OF MR. MUHAMMAD'S WITNESSES.

1. The Known DOC Employees

At a hearing on November 19, 2013, without notice to Muhammad the State made an oral motion to strike David Arthmann,

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[29]In its opinion reversed and remanding, this Court noted the following:

> Prior to the start of the evidentiary hearing, petitioner filed a motion for continuance which asserted that none of his expert witnesses could be available to testify at the scheduled hearing, but the motion was denied. During the course of the hearing, state witnesses explained that new written protocols for carrying out executions were being developed based upon the recommendations of the engineers who had examined and tested the electric chair. However, the witnesses had not seen these written protocols. Following the noon recess on April 16, the state provided the petitioner with the new written protocols covering execution in the electric chair which had just been signed by Secretary Singletary that day. These protocols consisted of two documents, entitled "Testing Procedures" and "Execution Day Procedures." At this point, petitioner claimed that he was unable to effectively cross-examine the state's experts concerning these protocols because he had not had an opportunity to submit them to his own experts. The court denied the petitioner's further motion for continuance. It was not until April 21, 1997, after testimony was closed, that the state also provided petitioner with the requested chart recordings pertaining to the performance of the electric chair during Pedro Medina's execution.

Jones v. Butterworth, 695 So.2d at 680-81.

Misty Cash and Secretary Michael Crews from Muhammad's witness list.[30] The State relied on the fact that the witnesses were "[n]ot medical professionals" - advancing the theme that the choice of midazolam and Florida's the current lethal injection protocol were not relevant to the issue of the efficacy of midazolam (3Supp. PC-R4. 15, 20, 22-24 - 11/20/13 Hearing).[31]

The circuit court's ruling to strike the witnesses ignored both the clear dictates of this Court's order and the US Supreme Court's opinion in Baze v. Rees:

> Instead, the proffered alternatives must effectively address a "substantial risk of serious harm." To qualify, the alternative procedure must be feasible, readily implemented, and in fact significantly reduce a substantial risk of severe pain. **If a State refuses to adopt such an alternative in the face of these documented advantages, without a legitimate penological justification for adhering to its current method of execution, then a state's refusal to change its method can be viewed as "cruel and unusual" under the Eighth Amendment.**

553 U.S. 35, 52 (2008)(emphasis added)(citations omitted).

Additionally, pursuant to Fla. Stat. § 90.104(a), "a proper objection must state the specific reason for excluding the evidence," and "**[an] objection that evidence is incompetent,**

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[30]The lack of notice and opportunity to be heard to Muhammad denied him due process. See Cleveland Bd. of Ed. v. Loudermill, 470 U.S. 532, 542 (1985).

[31]The State's interpretation of this Court's order, which was adopted by the circuit court was to review the efficacy of midazolam in a vacuum. However, by its very nature, the term "efficacy" requires that one consider the purpose of midazolam and/or the context in which it is being used, as both Dr. Heath and Dr. Evans testified. Here, the purpose of midazolam is to ensure that the condemned is fully unconscious before injecting the vecuronium bromide and potassium chloride - drugs that would cause agony and pain if injected before the condemned is fully unconscious. And, therefore, the determination of midazolam's efficacy must be considered in terms of the time frames set forth in the protocol, or followed in practice, the adequacy of the consciousness check, and the response to any irregularities that may indicate consciousness or arousal.

irrelevant, and immaterial is not a specific objection." Fla. Stat. § 104.2.24 (emphasis added).[32] In the proceedings on November 19, 2013, the State made no argument for the exclusion of the witnesses other than relevancy. Such a cursory objection, without more, does not meet the requirements for witness exclusion, and the circuit court erred in striking the witnesses. See Tampa Elec. Co. v Charles, 67 So. 572, 573 (Fla. 1915) ("'Where the grounds of objection interposed to proffered evidence were the same was immaterial, irrelevant and not pertinent to any issue made in the pleading, such grounds of objection are properly overruled, unless the evidence so objected is palpably prejudicial, improper and inadmissible for any purpose'")(quoting Brown v. Bowie, 50 So. 637 (Fla. 1909)).

And, if required to establish relevance before calling the witness to testify, Muhammad submits that Crews' letter to Governor Scott, informing him that a new lethal injection protocol had been adopted in and of itself demonstrates that, while not being a medical professional, Crews possessed relevant information to midazolam's efficacy:

> As Secretary of the Florida Department of Corrections, I have reviewed the Department's Execution by Lethal Injection Procedures to ensure proper implementation of the Department's statutory duties under Chapter 922, Florida Statutes. The procedure has been reviewed and is compatible with evolving standards of decency that mark the progress of

[32]Muhammad also submits that he is not required to make a showing of relevancy **before** calling witnesses. The proper time to make an objection as to the relevance of testimony is at the time the testimony is offered. As explained by Charles Ehrhardt in Florida Evidence (2008 Edition) § 104.5, pre-trial determinations on the admissibility of evidence are typically reserved for evidence that will be highly prejudicial to the moving party. Id. The State made no showing that the testimony would be prejudicial and therefore, the circuit court erred in striking the witnesses.

> a maturing society, the concepts of the dignity of man, and the advances in science, research, pharmacology, and technology. **The process will not involve unnecessary lingering or the unnecessary or wanton infliction of pain and suffering.**

(Def. Ex. 1). Accordingly, based upon the review by Crews and the DOC, he concluded that the new procedure, i.e., using midazolam did not create a "substantial risk of serious harm" (see Baze v. Rees, 553 U.S. 35, 50 (2008)). The information upon which Crews relied went to the very heart of the factual dispute which led this Court to grant the evidentiary hearing.[33]

As to Cash, on October 15th, Happ was executed using a three-drug protocol which called for midazolam to be administered as the first-drug. Midazolam had never before been used in an execution and was not intended to be used by any other state as the sedative in the primary three-drug protocol. On October 14th, it was reported that Cash, indicated that DOC "**did research** and determined that this is the most humane and dignified way to do the procedure", yet, she refused to identify a research laboratory or source for such data.[34] See Bill Cottrell, *Florida To Execute Man Using Untried Drug For Lethal Injection*, Reuters, Oct. 14, 2013 (emphasis added). Apparently, she too concluded based upon the DOC's research that the procedure did not create a

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[33]To date, Muhammad has been precluded from determining on what information or research Crews based his opinion. Further, Muhammad sought to question Crews as to whether any additional review has occurred in light of the Happ execution.

[34]Cash's statement shows that she was familiar with the review of the new protocol and the basis for using "midazolam hydrochloride as an anesthetic in the amount prescribed by Florida's protocol" Muhammad, SC13-2105, Order (Nov. 18, 2013).

"substantial risk of serious harm"[35] (see Baze v. Rees, 553 U.S. 35, 50 (2008)). The basis for Cash's statement is at the heart of the factual dispute which led this Court to grant Muhammad an evidentiary hearing.[36]

As to the relevance of Arthmann, he appeared before the circuit court repeatedly to argue that Muhammad should not be entitled to any information about midazolam or other executions. Arthman was aware of what records DOC possessed and what had been and had not been disclosed.[37] In addition, pursuant to this Court's order, Arthman on behalf of DOC disclosed two letters from Hospira because they related to "the manufacturer" of midazolam. Muhammad was not permitted to inquire of Arthmann about these two letters or any response to the letters.

The circuit court erred in striking Crews, Cash and Arthmann because they are not "medical professionals". Muhammad must be provided an opportunity to present the testimony of these witnesses. See Jones v. Butterworth.

2. The Unknown Witnesses to the Happ and Kimbrough Executions

Since October 21, 2013, Muhammad has attempted to obtain the

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[35]Neither Dr. Heath nor Dr. Evans was aware of any research as to the efficacy of midazolam as used in lethal injection.

[36]Indeed, DOC should not be allowed to tout it's research to the public in order to suggest that the efficacy of midazolamis sound, but then be permitted to hide that research to the individual most invested in the efficacy of the drug when he has obtained a hearing to determine that very issue.

[37]Based on Arthmann's statements to the circuit court it is clear that he, too, was familiar the research that was conducted by DOC which served as the basis for using "midazolam hydrochloride as an anesthetic in the amount prescribed by Florida's protocol". Muhammad, SC13-2105, Order (Nov. 18, 2013). Thus, Arthmann's knowledge is at the heart of the factual dispute which led this Court to grant an evidentiary hearing.

identities of the witnesses to the Happ execution - both those who participated in the execution and those who witnessed the execution. The circuit court originally denied Muhammad's request for the identities. On remand, Muhammad renewed his request for the identities of the witnesses who observed or participated in the executions on October 15, 2013, and November 12, 2013 - the two executions where midazolam was used as an anesthetic and listed these witnesses on his witness list. The circuit court refused to order the disclosure of the witnesses' identity and struck them from the witness list.

However, the State later argued that Dr. Heath's testimony was not credible because he "chose to rely on hearsay evidence regarding what the movement was" (3Supp. PC-R4. VIII 42). Dr. Heath made no such choice and neither did Muhammad. Muhammad was more than willing to present the testimony of every witness or participant to the Happ execution so that the court could make an informed decision as to what occurred and whether the midazolam was effective. Instead, the State chose the witness who admitted: "There's a lot of stuff going on. It's a lot of just my head moving back and forth." to explain what he observed during the Happ execution (3Supp. PC-R4. VII 64).[38]

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[38]The State selected the only witness whose job "at all times" was to observe "the preparation of the lethal chemicals and documenting and keeping a detailed log as to what occurs in the executioner's room at a minimum of two (2) minute intervals". Def. Ex. 1, p. 4-5. Clearly Feltgen violated the protocol and did not have adequate training or instruction as to his job. Feltgen admitted that he did not have "much knowledge of the chemicals." (3Supp. PC-R4. VII 60), and he had no idea what was being injected because he did not pay attention to the markings on the syringes (3Supp. PC-R4. VII 67). The blatant disregard for the protocol and clear lack of training should also cause this Court to permit Muhammad a full and fair evidentiary hearing as to the current protocol.

When Muhammad requested that the court reconsider its decision quashing his subpoenas of the journalists who witnessed the Happ execution, the State incongruently asserted that Muhammad could have presented any of the 28 witnesses even though the State had refused to disclose their identity and had them struck from Muhammad's witness list. See 3Supp. PC-R4. VII 38.

Muhammad was entitled to the identities of the witnesses and participants of the Happ and Kimbrough executions, the circuit court's denial of his request was error and deprived Muhammad a full and fair hearing. See Jones v. Butterworth.

3. Other Witnesses

Muhammad wanted to present the testimony of several other witnesses, including Thomas Winokur, John Palmer, Neal Dupree, Todd Scher, Suzanne Keffer, Roseanne Eckert and Todd Doss. Because of the circuit court and State's narrow interpretation of this Court's order, the circuit court struck all of these witnesses. The court erred.

The testimony of the witnesses, particularly Thomas Winokur, was relevant to the issue of the efficacy of midazolam and what Governor Scott and his representative knew about the research conducted by DOC in selecting the first-drug to be used in the three-drug protocol. The other witnesses went to what records had been disclosed in the Valle and Lightbourne litigation, how the September 9th protocol reached Muhammad's counsel, and how executions previous to the use of midazolam had progressed.

Muhammad should not have been constrained in presenting the evidence in his case. The circuit court's rulings in this regard denied him due process. Jones v. Butterworth.

B. THE STATE'S GAME OF HIDE AND SEEK.

1. Correspondence and Documents from the Manufacturer

After this Court reversed and remanded, DOC disclosed a single sheet of paper in response to this Court's directive - a letter, dated October 18, 2013, 3 days after the Happ execution, from Juliana Reed, Vice President, Hospira. The letter set forth Hospira's opposition to the use of its products in executions. Def. Ex. 2. During the hearing, DOC disclosed another letter, dated November 20, 2013, asking DOC to return the Hospira drugs.

After learning that Hospira was the manufacturer of the midazolam intended to be used in Muhammad's execution, Muhammad investigated Hospira and learned that the midazolam that the Florida may have purchased may be expired or subject to recall.[39] The only way to determine whether the drugs purchased by the State of Florida and intended to be used in Muhammad's execution are either subject to recall or expired is to be provided the specific information about the drugs, including the purchase date, lot number and expiration dates, presently available for use by the lethal injection team.

Furthermore, DOC's disclosure failed to comply with this Court's directive requiring the production of correspondence **and documents** from the manufacturer of midazolam. Muhammad submits that when the drug was purchased by the State there was undoubtedly drug information related to its use, package inserts and invoices related to the purchase from the manufacturer.

Muhammad requested the documents and the opportunity to depose DOC personnel, specifically, Arthmann and whoever

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[39]This is also true for the second and third drugs.

prescribed and purchased the drugs on behalf of the State. The circuit court denied Muhammad's request.

Indeed, Arthmann told the circuit court:

> I understand that Counsel if seeking - claiming that we should have turned over package inserts of - in relation to that order. I just don't read that order as to include package inserts. Given that it's the same language used in Valle, we turned over a letter from the sole manufacturer of Pentobarbital in Valle that was out there claiming that they objected to our use of Pentobarbital in executions.
>
> The package inserts would - **if the Supreme Court wanted us to turn over docu - things like package inserts - and I don't really know what package inserts are. I mean, it's a thing that comes in the box when you purchase a drug. But it - they would have been able to express that,** you know, **because that would in turn identify the source of Midazolam that we have in stock.**

(3Supp. PC-R4. 16-17 - 11/20/13 Hearing).[40]

The circuit court erred, Muhammad was entitled to the specific information about the drug, including the purchase dates, lot number and expiration dates of the midazolam in order to determine if it was expired or subject to recall as that would certainly effect the efficacy of the drug.

Muhammad was entitled to all of the "documents" received from the manufacturer, including the drug information related to its use, package inserts and invoices related to the purchase. It also clearly meant that DOC's purported research regarding midazolam was to be disclosed as well.

2. FDLE Logs and Notes

At the evidentiary hearing, the State presented the

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[40]Arthmann was about to characterize the material Muhammad requested as "documents" which is what this Court ordered was to be disclosed, but caught himself after uttering the first two syllables and then used the word "things" instead.

testimony of Feltgen, an FDLE monitor.[41] Feltgen's sole responsibility was to observe the preparation of the lethal chemicals and document and keep a log as to what occurred in the executioner's room. Feltgen did not fulfill his responsibility under the protocol. Rather, he testified: "There's a lot of stuff going on. It's a lot of just my head moving back and forth." (3Supp. PC-R4. VII 64).

Though Muhammad requested Feltgen's notes and log, the circuit court denied his request. This was so despite the fact that Feltgen admitted that something unusual had occurred during the Happ execution (3Supp. PC-R4. VII 50).

Denying Muhammad the opportunity to review Feltgen's notes and log denied Muhammad the opportunity to confront Feltgen and denied due process.

C. TIMING IS EVERYTHING.

On the night of November 18th, Muhammad's counsel spoke to Dr. Heath and alerted the court the following morning that Dr. Heath, a physician, was unavailable on November 21-22.[42]

The court requested that Muhammad find out more about Dr. Heath's schedule, specifically over the next few weeks. He did. The court requested that Muhammad file an affidavit from Dr. Heath about his schedule. He did. The court requested that Muhammad determine Dr. Heath's availability on the evening of November 21-22, and Saturday, November 23rd. He did. And

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[41]When the State called Feltgen, it described his testimony as a proffer of anticipatory rebuttal that it may later chose to introduce or not introduce.

[42]Dr. Heath was provided with just over 48 hours of notice that his testimony would be required.

through this process, Muhammad made clear that his counsel had not had the opportunity to consult with Dr. Heath as to his substantive testimony. Muhammad requested that he present Dr. Heath on Friday evening or Saturday morning, but those reasonable alternatives were dismissed by the court, at the State's urging. The court provided a mere thirty minutes for counsel to consult with Dr. Heath, before he testified. And, Dr. Heath testified that he had not had much time to review the Feltgen testimony or other materials.

Likewise, due to the time constraints Juliana Reed could not obtain approval for a representative from the manufacturer to voluntarily testify about the efficacy of midazolam.

Over Muhammad's objection, both Dr. Heath and Dr. Evans testified by phone.

Muhammad requested that the court continue the evidentiary hearing until a time when he could obtain the appearance of live witnesses after they had adequate time to review information, conduct research and consult with counsel. The hurried and incomplete hearing violated Muhammad's rights to due process, a full and fair hearing and the effective assistance of counsel.

D. LIMITATIONS UPON MR. MUHAMMAD'S DIRECT EXAMINATION OF DR. HEATH AND CROSS-EXAMINATIONS OF FELTGEN AND DR. EVANS.

Through out the direct examination of Dr. Heath and the cross-examinations of Feltgen and Dr. Evans, the State's repeated relevance objections were sustained. As a result, a goodly portion of the testimony of each of the witnesses was presented as proffers. On several occasions, the circuit court denied Muhammad the opportunity to even make a proffer. Thus, Muhammad was precluded from having important testimony from these three

witnesses introduced into evidence in violation of his right to present his case. See Jones v. Butterworth.

As in Jones v. Butterworth, this Court must reverse and remand for a full and fair evidentiary hearing on Muhammad's Eighth Amendment claim.

ARGUMENT II

MR. MUHAMMAD WAS DENIED HIS DUE PROCESS RIGHT TO PRESENT FAVORABLE EVIDENCE WHEN THE CIRCUIT COURT QUASHED HIS SUBPOENAS OF TWO REPORTERS. AS A RESULT, THE PROCEEDINGS BELOW WERE NEITHER FULL NOR FAIR.

Muhammad subpoenaed Morgan Watkins (Gainesville Sun) and Brendan Farrington (AP) to testify at the evidentiary hearing based on their reports of their observations during the Happ execution. See Def. Exs. 4, 5, 6. A motion to quash was filed on behalf of the journalists. The circuit court granted the motion to quash determining that the qualified privilege applied and that Muhammad had not met his burden under State v. Davis, 720 So. 2d 220 (Fla. 1998). This violated the principles this Court set forth in Roberts v. State, 840 So.2d 962 (Fla. 2002). There, this Court expounded:

> this Court has recognized that postconviction proceedings must comport with due process. See, e.g., Teffeteller v. Dugger, 676 So.2d 369, 371 (Fla.1996) (finding that postconviction hearing was procedurally flawed and violated the appellants' right to due process where court excluded the appellants from the courtroom while much of the evidence was presented and prevented appellants' counsel from cross-examining many of the witnesses). In Johnson v. Singletary, 647 So.2d 106 (Fla.1994), and Provenzano v. State, 750 So.2d 597 (Fla.1999), we determined that the postconviction defendants had been deprived of due process because they were not given an opportunity to present evidence or witnesses. Furthermore, as in Provenzano, "the purpose of our previous remand was never realized" in Roberts' case because the court never heard from Roberts' recanting witness even though he repeatedly requested a means to compel her attendance.

Roberts v. State, 840 So.2d at 971-72 (footnote omitted).

First, as Muhammad explained to the circuit court, the privilege was inapplicable because the journalists were not only reporting, but "eyewitnesses" to the events that were at issue before the circuit court. See Davis, 720 So. 2d at 226. Therefore, the circuit court erred in upholding the qualified privilege; particularly in light of Muhammad's right to present evidence. See Fla. Stat. § 90.5015 (2013); Roberts v. State.

However, even if the privilege applied, Muhammad met the requirements that this Court set forth in Davis, i.e., the three-prong balancing test. Davis, 720 So. 2d at 227. Under the test, Muhammad was required to establish: "(1) the reporter possesses relevant information; (2) the same information is not available from alternative sources; and (3) the movant has a compelling need for any information the reporter may have." Id.

As to the first prong, the descriptions of the observations of the journalists present at the Happ execution are relevant to determine the efficacy of the use midazolam in the Florida lethal injection protocol. Indeed, the State presented Feltgen as to his observations of the Happ execution. Thus, the reporters' observation of the length of the execution and the unusual, "full muscle movement" of Happ were equally relevant to determining the efficacy of the midazolam.[43]

Further, there can be no doubt that Muhammad did not have the opportunity to obtain the "same" information from alternative

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[43]The State was permitted to present a witness of its choice as to his observations during the Happ execution, but Muhammad was precluded from calling two witnesses who set forth there observations in newspaper articles. See Roberts v. State, 840 So.2d at 971 n. 2, referencing Johnson v. Singletary, 647 So.2d 106, 111 n. 3 (Fla. 1994).

sources. As the State argued to the circuit court, the journalists testimony was inconsistent with Feltgen's testimony and therefore, not the "same". In addition, the State thwarted Muhammad's attempts to discover an alternative source for the information the journalists possessed.

Finally, when the constitutional issue before court concerns the constitutionality of Florida's lethal injection protocol as to the Eighth Amendment a compelling need for the testimony has been satisfied. See Roberts v. State.

The circuit court erred in quashing the subpoenas and depriving Muhammad of the benefit of the extremely important and favorable testimony of the two journalists.

ARGUMENT III

THE EXISTING PROCEDURE THAT THE STATE OF FLORIDA UTILIZES FOR LETHAL INJECTION VIOLATES ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION AND THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION AS IT CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT.

ARGUMENT IV

THE EXISTING PROCEDURE THAT THE STATE OF FLORIDA UTILIZES FOR LETHAL INJECTION CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION AS IT CREATES A SUBSTANTIAL RISK OF SERIOUS HARM.

In Baze v. Rees, 553 U.S. 25, 39-50 (2008), the United States Supreme Court stated:

> Our cases recognize that subjecting individuals to a risk of future harm—not simply actually inflicting pain—can qualify as cruel and unusual punishment. To establish that such exposure violates the Eighth Amendment, however, the conditions presenting the risk must be "sure or very likely to cause serious illness and needless suffering," and give rise to "sufficiently imminent dangers." *Helling v. McKinney*, 509 U.S. 25, 33, 34-35, 113 S.Ct. 2475, 125 L.Ed.2d 22 (1993) (emphasis added). **We have explained that to prevail on such a claim there must be a "substantial risk of serious harm," an "objectively intolerable risk of harm" that prevents prison officials from pleading that they were "subjectively blameless for purposes of the Eighth Amendment."** *Farmer v. Brennan*, 511 U.S. 825, 842, 846, and

n. 9, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994).

(Emphasis added). The US Supreme Court further explained that a petitioner could establish that a challenged method violated the Eighth Amendment by showing an alternative that effectively eliminated the "'substantial risk of serious harm'." Id. at 52. And,

> [t]o qualify, the alternative procedure must be feasible, readily implemented, and in fact significantly reduce a substantial risk of severe pain. **If a State refuses to adopt such an alternative in the face of these documented advantages, without a legitimate penological justification for adhering to its current method of execution, then a state's refusal to change its method can be viewed as "cruel and unusual" under the Eighth Amendment.**

Id. at 52 (emphasis added)(citations omitted).

Muhammad has established that the use of midazolam as the first-drug in Florida's lethal injection protocol creates a substantial risk of serious harm. Further, if provided a full and fair hearing, Muhammad, would establish that, in light of the substantial risk of serious harm, the State of Florida's refusal "to adopt a one-drug protocol without any legitimate penological justification for adhering to its current method of execution" also violates the Eighth Amendment.[44]

In denying Muhammad's claim, the court stripped this Court's

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[44]Muhammad has demonstrated that the lethal injection protocol which was also described by Feltgen, creates a substantial risk of serious harm to Muhammad. Dr. Heath and Dr. Evans testified that the dose of midazolam, if administered correctly, which would be shown by a properly timed consciousness check, would produce death. Thus, Muhammad has established that the one-drug alternative is both feasible and readily implemented. However, the court refused to allow Muhammad to demonstrate the State has no penological justification for adhering to a three-drug protocol. Muhammad was not permitted to present the testimony of DOC officials who conducted research and made the determination to cling to an antiquated and barbaric three-drug protocol. Muhammad must be provided that opportunity.

use of the term "efficacy" from its meaning and simply judged the efficacy of midazolam to kill[45] without reference to context of its intended purpose as set forth in the protocol. This was inconsistent with this Court's Order, inconsistent with the dictates set forth in Baze and irreconcilable with reason.

By its very definition, the efficacy of a drug must be considered in relation to its intended purpose and logically procedure of determining the efficacy must also be considered. For Eighth Amendment purposes, as both Dr. Heath and Dr. Evans testified the efficacy of midazolam must be considered contextually in the lethal injection protocol. So, the issue before the Court is whether midazolam effectively produces a level of unconsciousness where the painful or agonizing stimuli, similar to the pain and agony produced by the injection of vecuronium bromide and potassium chloride, would not arouse Muhammad, when the second and third drugs in Florida's lethal injection protocol are injected. Therefore, the protocol cannot be divorced from determining the efficacy of midazolam, and specific consideration must be given to the timing and adequacy of the consciousness check following its administration. The circuit court's flawed analysis did just that.

Both Dr. Heath and Dr. Evans agreed on the qualities of midazolam - it is a benzodiazepine that is generally used as a pre-anesthetic or for minor medical procedures. Indeed, Dr. Evans testified that midazolam would not be used in major surgical procedures unless it was used in combination with other

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[45]In Florida's protocol, midazolam is not used to kill; that is the purpose of the subsequent injection of potassium chloride.

drugs. Midazolam depresses brain function, though not in the same way as the prior barbituates used as the first-drug in Florida's protocol. Neither Dr. Heath nor Dr. Evans were aware of any research relating to midazolam's effectiveness in the lethal injection context.

As to the time it would take to anesthesize Muhammad and make him insensate, both Dr. Heath and Dr. Evans opined that it would take a few minutes. However, both Dr. Heath and Dr. Evans explained that there are various levels of consciousness and there are cases of suboptimal anesthesia where the individual could still feel pain. Thus, Dr. Evans recommended waiting five to ten minutes before conducting the consciousness check because then "you would definitely know if they were unconscious or not.". Likewise, Dr. Heath explained that the effect of midazolam is dependent on several factors, including "vein to brain" time which is impacted by an individuals circulation.

After substituting midazolam for pentobarbital, DOC did not adjust the protocol to include a specific amount of time that Deputy Secretary Cannon should or must wait until performing a consciousness check, nor is there a provision requiring a second consciousness check if movement is observed subsequent to the first consciousness check. Indeed, Florida's lethal injection protocol does not include a single amount of time in relation to any of the steps in the protocol. According to Feltgen, who has now monitored four executions, phase one - the injection of midazolam followed by a saline flush - is completed rapidly. Following phase one, a consciousness check is immediately performed and takes less than 30 seconds. Feltgen testified that

the amount of time between the initial injection in phase one and the first injection of phase two - the injection of vecuronium bromide followed by a saline flush - is a minute.

Thus, even under the best of circumstances, midazolam is not an effective drug in Florida's lethal injection protocol. And, as Dr. Heath explained, the failure to adjust the protocol or wait the prescribed amount of time creates a substantial risk of harm to Muhammad because he will be injected with an agonizing paralytic before the midazolam has ablated consciousness.

Likewise, both Dr. Heath and Dr. Evans testified that the consciousness check was important to determining the efficacy of midazolam. This is so because the feeling of pain may cause the level of unconsciousness to change and pain can actually cause an individual to become conscious. Dr. Evans further explained that this was the reason that anesthesia must be "monitored very closely for surgical purposes". However, Florida's lethal injection protocol makes no provisions for "monitoring" consciousness or assessment of consciousness. Indeed, Feltgen's description of the consciousness check that occurs pursuant to Florida's lethal injection protcol consists simply of Deputy Secretary Cannon touching the condemned near the eye and then shaking his arm a few times. There is no "consultation" as required by the protocol.

The consciousness check set forth in the lethal injection protocol is inadequate and was not adjusted when DOC substituted midazolam as the first drug. As Dr. Evan's explained the consciousness check must measure the depth of unconsciousness sufficiently so that the subsequent procedures will not arouse

the person who is unconscious. Here, the touching of Muhammad's eyelid or face and shaking of his arm simply cannot measure the anesthetic depth required for the injection of the agonizing paralytic and painful potassium chloride. The failure to adjust the protocol to include an adequate consciousness check creates a substantial risk of harm to Muhammad because he will be injected with an agonizing paralytic without it being determined that he had reached an anesthetic depth necessary to be insensate.

Midazolam was used in the October 15th execution of Happ. According to Feltgen, something unusual happened during the execution that had not occurred in previous executions. Happ breathed heavily throughout the injections in the first phase.

Dr. Heath and Dr. Evans found the information reported by two different newspaper reporters about the full muscle movement of Happ, eight to ten minutes after the injection of midazolam concerning.[46] Indeed, Dr. Evans testified, contrary to the State's position that an individual who had been sedated would not move. Dr Heath and Dr. Evans also testified that movement could be indicative of an individual's level of unconsciousness lessening. Dr. Heath testified that it was necessary to reassess Happ's consciousness and DOC's failure to do so demonstrated an indifference in the process. Most importantly, Dr. Heath opined that he was gravely concerned that Happ's movement represented inadequate anesthesia and an ineffectiveness of the midazolam in Florida's lethal injection protocol.

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[46]Dr. Heath and Dr. Evans indicated that they would like more information about Happ's movements and the timing in relation to the injection of midazolam. The State has refused to disclose any information as to the movement reported by Farrington and Watkins.

Indeed, the reckless indifference and wanton disregard on behalf of DOC in failing to adjust the protocol and in failing to respond to Happ when he exhibited full muscle movement more than five minutes after being injected with midazolam establishes that Florida's lethal injection protocol violates the constitution.

In addition, to the testimony of Dr. Heath and Dr. Evans as to the ineffectiveness of midazolam in the lethal injection context, Feltgen's testimony demonstrates that DOC is consistently and willfully violating the protocol. First, Feltgen, who was the FDLE monitor in the executioner's room "is responsible for observing the preparations of the lethal chemicals and documenting and keeping a detailed log as to what occurs in the executioner's room at a minimum of two (2) minute intervals." Further, pursuant to the protocol Feltgen is required to "confirm that all lethal chemicals are correct and current." According to his testimony, Feltgen fulfills none of his responsibilities set forth in the protcol. In fact, Feltgen described his role as "[j]ust to observe and be a witness." Feltgen's training in this regard was to attend a few executions and "watch one of those inspectors complete the check sheet and - just learning the process."

Feltgen does not confirm the lethal chemicals are correct and current or monitor the executioner's room, as required by the protocol. Rather, Feltgen stands next to the executioner and only knows injections occur because the executioner announces "first syringe, second syringe, third syringe." Feltgen admitted that he did not have "much knowledge of the chemicals.", and **he had no idea what was being injected because he did not pay**

attention to the markings on the syringes.(emphasis added). Feltgen described his monitoring as: "my eyes kind of go back and forth between" the syringes and the condemned. And further, "I kind of look in both directions. **It's not necessarily my job to make sure that, I guess, the injections are going all the way in.**". (emphasis added). Feltgen candidly testified: "There's a lot of stuff going on. It's a lot of just me head moving back and forth.".

Feltgen also explained that every two minutes, he places a checkmark on his log to indicate "everything's going good.". His determination that "everything's going good" is based on the fact "that the IV is still in the subject's arms.". Furthermore, "based on what I see, I don't see that he's in any kind of pain or anything that would be worth noting. There's a comment thing. If you observe anything which you would consider out of the ordinary, you could also make a comment on that check sheet.". There is no training as to what is out of the ordinary; it is Feltgen's opinion.

Furthermore, based on Feltgen's testimony, it is clear that the consciousness check is not performed in compliance with the protocol. According to Feltgen, there is no "consultation" to determine whether the inmate is unconscious. Apparently, the team warden determines that on his own.

The circuit court restricted Muhammad from obtaining any information related to other breaches in the protocol. From the limited testimony of Feltgen, it is clear that DOC routinely and willfully violates the protocol. Muhammad should be provided the opportunity to obtain additional information in relation to

Feltgen's testimony as it is relevant to the determination of the constitutionality of Florida's lethal injection protocol.

Muhammad has established that Florida's lethal injection protocol, specifically, the use of midazolam as the first drug in a three-drug protocol creates a substantial risk of harm to him. Relief is warranted.

CONCLUSION

Based upon the record and his arguments, Mr. Muhammad respectfully urges the Court to reverse the circuit court, order a resentencing, and/or impose a sentence of life imprisonment, and/or remand for an evidentiary hearing.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by electronic transmission to all counsel of record on December 5, 2013.

CERTIFICATE OF FONT

This brief is typed in Courier 12 point not proportionately spaced.

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