IN THE SUPREME COURT OF FLORIDA

CASE NO. SC17-1400

LOWER TRIBUNAL No. 16-1987-CF-06876

MARK JAMES ASAY,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE[1]

Mark James Asay was indicted on two counts of first degree premeditated murder on August 20, 1987 (R. 11). Trial commenced September 26, 1988 and Asay was convicted as charged on September 29, 1988 (R. 1081). The jury recommended death by votes of 9-3 on both counts and the trial court imposed sentences of death (R. 156-59). Asay appealed. This Court affirmed. *Asay v. State*, 580 So. 2d 610 (Fla. 1991). Certiorari review was denied on October 7, 1991. *Asay v. Florida*, 502 U.S. 895 (1991).

On March 16, 1993, Asay filed a Rule 3.850 motion in the circuit court. It was amended on November 24, 1993. Following an evidentiary hearing, the circuit court denied collateral relief. On appeal, this Court affirmed. *Asay v. State*, 769 So. 2d 974 (Fla. 2000). Rehearing was denied on October 26, 2000.

On October 25, 2001, Asay filed a habeas petition with this Court. After briefing and oral argument, this Court denied Asay's petition on June 13, 2002. *Asay v. Moore*, 828 So. 2d 985 (Fla. 2002). Rehearing was denied on October 4, 2002.

On October 17, 2002, Asay filed a successive postconviction motion in the circuit court in which he contended that Florida's capital sentencing scheme was unconstitutional pursuant to *Ring*

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[1]References to the record on appeal are designated as "R. ____." References to the initial postconviction record on appeal are designated as "PC-R. ____." References to the transcribed postconviction proceedings are designated as "PC-T. ____." References to the successive postconviction record on appeal are designated as "PC-R2. ____." References to the second successive postconviction record on appeal are designated as "PC-R3. ____." All other references are self-explanatory or otherwise explained herewith.

v. Arizona, 536 U.S. 584 (2002). The motion was denied on February 23, 2004. On appeal, this Court affirmed. *Asay v. State*, 892 So. 2d 1011 (Fla. 2004).

On August 15, 2005, Asay filed a federal habeas petition in the Middle District of Florida. Asay's petition was ultimately denied on April 14, 2014. Asay subsequently moved to withdraw his notice of appeal, which the Eleventh Circuit Court of Appeals granted on July 8, 2014.

On January 8, 2016, Florida Governor Rick Scott signed a death warrant scheduling Asay's execution for March 17, 2016. Asay filed a successive postconviction motion on January 27, 2016. An amendment was filed on January 31, 2016. The circuit court denied relief on February 3, 2016.

Asay's execution was stayed by this Court on March 2, 2016. Thereafter, subsequent to briefing and oral argument, this Court on December 22, 2016, issued an opinion affirming the denial of postconviction relief. *Asay v. State*, 210 So. 3d 1 (Fla. 2016). Rehearing was denied on February 1, 2017.

On April 29, 2017, Asay filed a petition for writ of certiorari in the U.S. Supreme Court. That petition is currently pending.

On July 3, 2017, the Florida Attorney General notified Governor Rick Scott that there was no stay of execution in effect. Later that day, Governor Scott re-set Asay's execution for August 24, 2017. Asay filed a successive Rule 3.851 motion on July 19, 2017. Following a limited evidentiary hearing on July 26-27, 2017, the circuit court denied relief on July 28, 2017.

STATEMENT OF THE FACTS

On January 8, 2016, Governor Rick Scott signed a death warrant for Asay and scheduled his execution for March 17, 2016. On January 13, 2016, Martin McClain was appointed to represent Asay. Under Florida Statute 922.052, "the warrant shall remain in full force and effect and the sentence shall be carried out as provided in s. 922.06".[2] This provision, providing for what is commonly referred to as the "continuous warrant", first became effective on October 1, 1996, though it was previously Fla. Stat. 922.09 (1996).

On January 27, 2016, Asay filed a Rule 3.851 motion before the circuit court. Asay did not challenge the lethal injection protocol in effect as it had been challenged previously and upheld by this Court. *See Muhammad v. State*, 132 So. 3d 176, 188 (Fla. 2013).[3] In fact, McClain had been co-counsel in the litigation relating to the substitution of midazolam as the first drug for Muhammad and was well aware that this Court had found that the September 9, 2013, protocol, including the drugs, did not violate the Eighth Amendment. Likewise, McClain was also aware that the September 9, 2013, protocol had been successfully

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[2]Florida Statute § 922.06 (2016), concerns the re-scheduling of an execution when either the Governor has entered a stay of execution or a stay has been entered by a court of competent jurisdiction.

[3]In *Correll v. State*, 184 So. 3d 478 (Fla. 2015), an evidentiary hearing had been conducted to consider whether Correll would suffer a paradoxical reaction to midazolam due to his history of drug abuse. However, the challenge was rejected and the September 9, 2013, protocol was approved for use in Correll's execution.

employed in thirteen executions.[4]

In January of 2016, McClain was aware that the U.S. Supreme Court had upheld the use of midazolam as the first drug in Oklahoma's lethal injection protocol, which mirrored Florida's protocol. Midazolam had not been shown to entail a substantial risk of severe pain. *Glossip v. Gross*, 135 S.Ct. 2726 (2015). Thus, undersigned did not have a basis to challenge the September 9, 2013, lethal injection protocol on behalf of Asay.[5] As a result, Asay did not challenge the lethal injection protocol in any pleading that he filed in the circuit court or in this Court in January and February of 2016. Asay registered no objection to the use of the protocol in his execution.

On March 2, 2016, this Court entered a stay of execution in Asay's case. However, due to Fla. Stat. § 922.052, Asay's continuous warrant remained "in full force". This Court continued to list it as an active death warrant.

On December 22, 2016, this Court issued its opinion affirming the circuit court's denial of Rule 3.851 relief. *Asay*

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[4]The following individuals were executed using the September 9, 2013, protocol: William Happ, October 15, 2013; Darious Kimbrough, November 12, 2013; Askari Abdullah Muhammad, January 7, 2014; Juan Carlos Chavez, February 12, 2014; Paul Howell, February 26, 2014; Robert Henry, March 20, 2014; Robert Hendrix, April 23, 2014; John Henry, June 18, 2014; Eddie Wayne Davis, July 10, 2014; Chadwick Banks, November 13, 2014; Johnny Kormondy, January 15, 2015; Jerry Correll, October 29, 2015; Oscar Ray Bolin, Jr., January 7, 2016.

[5]Absent a change in the protocol or some indication that a problem had occurred in a recent execution within the past year, the one year time limitation set forth in Rule 3.851 precludes a challenge to a well-established lethal injection protocol. *Ferguson v. State*, 101 So. 3d 362 (Fla. 2012).

v. State, 210 So. 3d 1 (Fla. 2016). At the conclusion of the opinion, this Court included language that it was lifting the stay in Asay's case. *Id.* at 29.[6] Asay proceeded to filed a motion for rehearing, which was denied by this Court on February 1, 2017. At that point in time, the opinion was final and the language in the opinion became effective. Asay's warrant, despite the stay, had remained "in full force".

On April 29, 2017, Asay filed a petition for a writ of certiorari in the U.S. Supreme Court. On June 5, 2017, the State applied for a thirty day extension to file a brief in opposition. The U.S. Supreme Court granted the extension request and ordered the response to be submitted on or before July 5, 2017.

On July 3, 2017, Attorney General Pam Bondi sent a letter to Governor Scott, pursuant to Fla. Stat. § 922.06, certifying that no stays of execution were in place. Pursuant to Fla. Stat. § 922.06, Governor Scott was required to re-schedule Asay's execution within ten days. Indeed, that same day, Governor Scott re-scheduled Asay's execution for August 24, 2017.

However, unbeknownst to Asay, on January 4, 2017, after what one can only reasonably suspect was months of secret consideration and consultation, the Florida Department of Corrections (DOC), adopted a new lethal injection protocol, which, for the first time since being adopted in 2000, called for the substitution of each of the three drugs in the protocol

[6]However, the opinion contained a statement at the end that the decision was not final until time for filing for a rehearing had expired or if a motion for rehearing was filed, the motion was denied.

(etomidate, rocuronioum bromide, potassium acetate)(Def. Ex. 1). The protocol itself replaced the September 13, 2013, protocol (midazolam, vecuronium bromide, potassium chloride). Neither Asay, a condemned inmate with a continuous death warrant, nor McClain were notified of the newly adopted protocol substituting each of the drugs from the former protocol and that it would be used in his execution when it was scheduled. Neither Asay nor McClain were told why there was a change from the September 9, 2013 protocol which had been successfully employed in thirteen executions. In fact, the September 9, 2013 protocol and its use of midazolam as the first drug had been upheld by this Court and the U.S. Supreme Court. It was only at a status hearing on July 10, 2017, that McClain learned that the new protocol would be used in Asay's execution. Pursuant the circuit court's directive, later that day McClain was provided a copy of the January 4, 2017, lethal injection protocol - six months after it was adopted and certified.

This is in sharp contrast to DOC's actions at the time that the September 9, 2013, protocol was adopted. On September 10, 2013, the condemned inmates with continuous warrants in place were notified of the new protocol. Marshall Gore's execution was scheduled for October 1, 2013. Gore's registry attorney, Todd Scher, was served with a notice of filing of the lethal injection protocol even though as the protocol explained, it would not be used in Gore's execution (PC-R3. 602-22). As the correspondence with Scher shows, DOC also gave notice of the new protocol to Robert Trease and Paul Howell, whose executions had been stayed,

but who had continuous warrants still in effect. Howell's execution did not take place until February 26, 2014, after his stay of execution was vacated. But, he and his counsel were notified on September 10, 2013 of the September 9, 2013, adoption of a new protocol which was to be used in Howell's execution if it was not rescheduled before November 30, 2013. This gave Howell notice and ample opportunity to raise any challenge to the substitution of a different protocol than the one in effect when his warrant was first signed.[7] In fact, Howell filed a challenge to the protocol in December of 2013.

Of course, Asay was entitled to be informed of the new protocol when it was adopted on January 4, 2017, just like Gore, Howell and Trease were notified in 2013, particularly since DOC planned to implement it at Asay's execution even though when his continuous warrant was signed he had been on notice that the September 9, 2013 protocol would be used. Indeed, the protocol itself provides for notification:

> (15) **Periodic Review and Certificate from Secretary**: There will be a review of the lethal injection procedure by the Secretary of the Florida Department of Corrections, at a minimum, once every two (2) years, or more frequently as needed. The review will take into consideration the available medical literature, legal jurisprudence, and the protocols and experience from other jurisdictions. The Secretary of the Department of Corrections shall, upon completion of this review, certify to the Governor of the State of Florida confirming that the Department is adequately prepared to carry out executions by lethal injection. The Secretary will confirm with the

[7]Trease's execution has not taken place. Though his warrant was signed in 2001, the stay of his execution remains in effect as far as counsel knows.

> team warden that the execution team satisfies current licensure and certification and all team members and executioners meet all training and qualifications requirements as detailed in these procedures. **A copy of the certification shall be provided to the Attorney General and the institutional warden shall provide a copy to a condemned inmate and counsel for the inmate after the warrant is signed.**
>
> The certification shall read:
>
> As Secretary for the 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 a maturing society, the concepts of the dignity of man, and advances in science, research, pharmacology, and technology. The process will not involve unnecessary lingering or the unnecessary or wanton infliction of pain and suffering. The foremost objective of the lethal injection process is a humane and di
> gnified death. Additional guiding principles of the lethal injection process are that it should not be of long duration, and that while the entire process of execution should be transparent, the concerns and emotions of all those involved must be addressed.
>
> I hereby certify that the Department is prepared to administer an execution by lethal injection and has the necessary procedures, equipment facilities, and personnel in place to do so. The Department has available the appropriate persons who meet the minimum qualifications under Florida Statutes and in addition have the education, training, or experience, including the necessary licensure or certification, required to perform the responsibilities or duties specified and to anticipate contingencies that might arise during the execution procedure.

(Def. Ex. 1). Asay's warrant was signed on January 8, 2016. That means under the terms of the protocol, Asay should have been provided the January 4, 2017, immediately after it was signed and effective. Instead, Asay's counsel did not receive a copy until the Attorney General's Office provided it pursuant to the circuit

court's directive on July 10, 2017.

And, according to newspaper accounts, DOC had anticipated litigation relating to the new protocol: Michelle Glady, a spokeswoman for the Florida Department of Corrections, revealed that "officials expect litigation in response to the new drugs." *Florida Changes Lethal Injection Drugs*, Dara Cam, New Service of Florida, January 5, 2017. Despite anticipating litigation and knowing that Asay's warrant remained "in full force"; that the circuit court had issued its opinion affirming the denial of his Rule 3.851 motion; that the Florida Supreme Court had indicated in its opinion that the stay had been lifted; and that Assistant Attorney General Carolyn Snurkowski notified Governor Scott of the opinion; no one, not the institutional warden, not another representative of DOC, and not a representative of the Attorney General, though all were certainly anticipating litigation, notified Asay or his counsel of the new protocol.

To make matters worse, when Asay and his counsel learned of the new protocol on July 10, 2017, and filed public records requests to DOC and FDLE relating to the new protocol, including the new drugs, DOC and FDLE objected to the requests. This was despite the clear and direct law contradicting their positions. Indeed, neither, DOC, FDLE, or opposing counsel informed the circuit court that pursuant to *Muhammad v. State*, records were required to be disclosed. *Muhammad*, 132 So. 3d 176, 188, 192-93 (Fla. 2013) (ordering DOC to disclose "correspondence and documents that it had received from the manufacturer of midazolam hydrochloride, including those materials addressing any safety

and efficacy issues."); *see also Valle v. State*, 70 So. 3d 525, 526 (Fla. 2011)(ordering DOC to disclose "correspondence and documents it has received from the manufacturer of pentobarbital concerning the drug's use in executions, including those addressing any safety and efficacy issues."). This lack of candor to the tribunal was a breach of opposing counsel's (DOC, FDLE, the Attorney General and the Office of the State Attorney) ethical obligations. The circuit court erroneously sustained DOC and FDLE's objections.

On July 19, 2017, Asay filed a motion for rehearing. Shortly after filing the motion, the circuit court granted it, in part, and directed DOC to disclose public records that were identified in *Muhammad* and *Valle*.

At approximately 9:30 p.m., on July 19th, after Asay had filed his Rule 3.851 motion and the affidavit from his expert, Mark J.S. Heath, M.D., DOC disclosed redacted records with a limited motion. In the limited motion, DOC requested that the identity of the manufacturer be kept secret. This was so even though the manufacturer of the drugs contacted DOC in February, 2017, to demand that the drugs be returned. The manufacturer has made clear that if the drugs are being used for lethal injection they are being "misused". On the afternoon of July 21st, DOC filed a supplemental disclosure of redacted documents that it indicated had been discovered after the July 19th disclosures.

Also on the evening of July 21st after the State had already filed a written answer opposing an evidentiary hearing, it disclosed two expert witnesses that it intended to call at an

evidentiary hearing.

On July 24, 201, a case management conference was held. During the case management conference numerous facts were revealed: First, on behalf of the State, Charmaine Millsaps, the Assistant Attorney General, made the point that "we changed the protocol for a reason." (PC-R3. 1076). However, despite this acknowledgment and the insistence that Asay had not met his burden of proof in showing that the new protocol violated the Eighth Amendment, the State refused to disclose the "reason" for the change in the protocol.

Second, both the State and DOC urged the circuit court to allow them to keep the identity of the manufacturer a secret. Initially, DOC asserted that Fla. Stat. § 945.10 (e) and (g), required that the manufacturer's identity be kept secret (PC-R3. 495-500). Further, the State took the position that: "[T]he manufacturer's opinion really should not be explored at any evidentiary hearing because it has no legal consequence." (PC-R3. 1078).

However, the State and DOC also revealed the true reason for hiding the identity of the manufacturer - because the State is afraid that the manufacturer will discontinue sale of the drugs to DOC. Assistant General Counsel of DOC, Philip Fowler stated:

> ... [T]he arguments on the limited motion would be that as stated in the motion itself, that the disclosure of the manufacturer or identities of those involved in the supply chain would cause a hardship to the State, because it would, as it has been shown, limit the State's ability to proceed with the purchase and use of these medications or drugs.
>
> And as far as efficacy or safety goes, the inserts as provided – provide a lengthy amount of information

regarding the uses of the drug.

(PC-R3. 1156; *see also* PC-R3. 1096) (Ms. Millsaps states: "{O]ne of the reasons they want the names of the manufacturers is so that the manufacturers and the middle man will stop selling [the drugs] to us.").

Asay, through counsel, pointed out that the State's reasons were illogical because the manufacturer had not asked for confidentiality and had advised that it wanted its drugs returned (PC-R3 1157). Indeed, the manufacturer was already aware that DOC had procured its drugs to use for lethal injection (Def. Ex. 3). So, any action to prevent the further sale of the drugs to DOC was already underway. Thus, the State's argument was not supported by the facts.

The circuit court held that Fla. Stat. 945.10 (e) and (g), did not protect the identity of the manufacturer. Yet, the circuit court held that the identity was not necessary to analyze Asay's claim (PC-R3. 1159; *see also* PC-R3. 1087 - "I don't believe that has relevance necessarily to the second claim or the other claims that you raise in your pleadings.").[8]

The circuit court granted an evidentiary hearing on the lethal injection issue. Prior to the hearing, the State filed a motion to strike most of Asay's witnesses, including the DOC pharmacist (PC-R3. 1146). The motion was granted, and Asay was only allowed to call Dr. Mark Heath and Director John Palmer; and

[8]Had Asay been provided the name of the manufacturer he would have amended his witness list to include a representative (PC-R3. 1088)

a stipulation was entered relating to Deborah Denno (PC-R3. 1134-6).

Though Asay's counsel repeatedly requested a continuance of the evidentiary hearing for additional records, discovery and preparation, the circuit court denied those motions. Indeed, the circuit court expressed its belief that it was forced by this Court's schedule order to deny the continuance request: "[G]iven the Florida Supreme Court's scheduling order, and I do feel, of course, guided and constrained by that, I am compelled to deny your motions." (PC-R3. 1086).

Therefore, on July 26, 2017, the circuit court heard the testimony of four witnesses: Mark Heath, M.D., a physician and anesthesiologist; Steve Yun, M.D., a physician and anesthesiologist; Daniel Buffington, a pharmacist and Director John Palmer, formerly Warden of Florida State Prison.

Asay also introduced the package inserts that provided information concerning the drugs and their adverse reactions (Def. Exs. 3, 5); the communications from the manufacturer to DOC in February, 2017, demanding that the drugs be returned and that if the drugs are being used for lethal injection they are being "misused" (Def. Ex. 3); and the lethal injection protocol (Def. Ex 1). Further, the circuit court accepted the stipulation that etomidate had never before been used in a lethal injection anywhere in the United States (PC-R3. 1145).

Heath described each of the drugs, working backwards, and testified that both the potassium acetate, used to stop the heart and rocuronium bromide, the paralytic, caused pain to a conscious

individual (PC-R3. 1412-13).

As to the first drug, the etomidate, Heath testified that it is used to induce anesthesia and its purpose in the protocol is to prevent pain (PC-R3. 1413). Both Yun and Buffington agreed that etomidate is a drug that is used to induce anesthesia (PC-R3. 1235; 1360). Heath explained that etomidate's trade name is Amidate which, in addition to the etomidate, contained a preservative, propylene glycol, which was "used as a vehicle to allow [the etomidate] to dissolve into solution so that it can be given intravenously." (PC-R3. 1415). In fact, there is an ongoing attempt to manufacture etomidate without propylene glycol in order to eliminate or reduce the pain caused by the drug (PC-R3. 1429).[9] Heath also recognized that other research had been conducted over the years in order to determine what was causing the pain associated with the injection of etomidate, so that alternatives could be produced to reduce or eliminate the pain (PC-R3. 1436-7; 847-9; 850-3). The research substantiated what he knew from his practice: etomidate causes venous pain (PC-R3. 1437).

Heath also explained why he used etomidate: "[t]he main advantage of etomidate is that ... [it] has a minimal effect on

[9]Heath testified: "If a drug company is going to go through all the trouble, and believe me it is a lot of trouble to get a new drug developed and approved and marketed, it's a lot of trouble to do that, that company would only do that if it were being done to address a significant issue." (PC-R3. 1433).

the blood pressure." (PC-R3. 1417)[10]. Thus, since many of Heath's patients are having heart surgery it is a useful drug in that setting (PC-R3. 1417).

The experts agreed that etomidate was short acting, i.e., it wears off quickly (PC-R3. 1237; 1416). Buffington testified that, in clinical practice, physicians use .2 to .6 milligrams per kilogram of body weight to induce anesthesia; so for an average individual of 150 lbs, 14-42 milligrams would be used (PC-R3. 1236-7; 1300). At the high end, with a dose of .3 to .6 milligrams per kilogram the effects of the etomidate would last between five and ten minutes before a patient resumed consciousness (PC-R3. 1300; 1340). Heath testified that using eight to fourteen milligrams would last only a few minutes before a patient resumed consciousness (PC-R3. 1416-7).

If administered properly, etomidate renders a patient unconscious and insensate (PC-R3. 1237). In the dose prescribed by the lethal injection protocol, Buffington and Yun testified that this would last from fifteen to thirty minutes or more, though this has not been proven (PC-R3. 1253, 1338). In fact, Yun testified that there may be a ceiling effect to the drug (PC-R3. 1367-8), meaning that there is a maximum time that the drug wears off, regardless of the dose. Buffington relied on records from the last two executions, not made available to Asay, to claim that from the conclusion of the administration of the first drug,

[10]Yun confirmed that etomidate was used in cardiovascular surgeries or in emergency setting or when a physician had "no other choice" (PC-R3. 1362).

the execution took less than 5 minutes.[11]

Heath testified that it generally takes twenty to thirty seconds, after completion of the injection of the etomidate, to render a patient unconscious (PC-R3 1423-4). However, he did testify that there is a lot of variation in the time (PC-R3. 1424). Buffington testified that it generally renders a patient unconscious within 30-60 seconds (PC-R3. 1238, 1338). On this point, Yun testified that when given fairly rapidly, etomidate produces unconsciousness in ten to twenty seconds (PC-R3. 1361; 1365).

Heath explained the disadvantages to his use of etomidate: First, Heath has observed that it causes moderate to severe pain when it is injected (PC-R3. 1418; 1472). He has observed patients first wince then grimace, tighten their arm, complain and vocalize that it "really hurts", moan and/or make "pretty loud exclamations saying 'ow, ow'" (PC-R3. 1419). Though Heath uses etomidate, he warns his patients that "it could hurt quite badly." (PC-R3. 1419). Indeed, Yun admitted that he does not use etomidate often (PC-R3. 1387).[12]

The manufacturer's information supports Heath's own observations (PC-R3. 1427). The manufacturer's package insert of etomidate states the following about venous pain upon injection

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[11]Asay, being deprived of these records, which he specifically requested, was effectively precluded from cross-examining Buffington regarding his representations of the content of the records and his interpretation of their meaning.

[12]Yun testified that while he has used midazolam in excess of 18,000 times in his career, he estimated he had used etomidate between 250 and 300 times.

under "ADVERSE REACTIONS":

> The most frequent adverse reactions associated with use of intravenous etomidate are transient venous pain on injection and transient skeletal muscle movements, including myoclonus:
>
> 1. Transient venous pain was observed immediately following intravenous injection of etomidate in about 20% of the patients, with considerable difference in the reported incidence (1.2% to 42%). This pain is usually described as mild to moderate in severity but it is occasionally judged disturbing. The observation of venous pain is not associated with a more than usual incidence of thrombosis or thrombophlebitis at the injection site. Pain also appears to be less frequently noted when larger, more proximal arm veins are employed and it appears to be more frequently noted when smaller, more distal, hand or wrist veins are employed.

(Def. Ex. 3). Heath, like the manufacturer, would describe the pain as mild to moderate, but occasionally disturbing (PC-R3. 1428; *see also* Def. Ex. 3). Heath recalled that the term "disturbing" came from some of the primary literature and "the first study that introduced etomidate to practitioners." (PC-R3. 1428).

According to Heath, the research suggests that the pain is caused by the propylene glycol (PC-R3. 1419).[13] Heath testified that the pain will increase the greater the dose since the pain is dependent on the concentration of the propylene glycol that builds up in the vein (PC-R3. 1420; 1448).

Heath explained that there were ways to minimize the pain:

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[13]Buffington corroborated Heath's testimony and explained that etomidate is used with propylene glycol. Propylene glycol produces pain when given intravenously (PC-R3. 1287-8). Thus, increasing the propylene glycol by using a larger dose increases the amount of the drug that causes the venous pain upon injection (PC-R3. 1301).

1) inject the etomidate slowly so that the propylene glycol gets diluted by the blood; 2) inject the drug into a large diameter vein, again to impact the dilution[14]; 3) give lidocaine, first, in order to numb the wall of the vein; 4) give midazolam for a sedative[15] and fentanyl, as an analgesic, which is a very strong pain killer (PC-R3. 1421-2).

The lethal injection protocol, other than encouraging the executioner to attempt to insert the I.V. at the medial aspect of the antecubital fossa, does not allow for any of the other mitigating procedures that Heath uses (PC-R3. 1423; *see also* Def. Ex. 1). In fact, as Heath testified: "[i]t's pretty clear that they can go to other locations that are what are called peripheral venous access which would be anywhere in the are or the leg, the hand or the foot." (PC-R3. 1442).

Heath further explained that it can be difficult to place an I.V. at the antecubital fossa for a variety of reasons (PC-R3. 1443). Further, in Heath's experience in studying the lethal injections in Florida and around the country, the I.V. is often not placed in the antecubital fossa (PC-R3. 1444).

Finally, Heath explained that because the amount of the propylene glycol would be some much greater than in clinical settings, the pain will be greater. Thus, even with the use of a

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[14]Buffington agreed that etomidate should not be administered in the hands or fine vessels because of potential for some other side effects, including the pain that is caused by the drugs' irritation of the blood vessel (PC-R3. 1235; 1242).

[15]Yun acknowledged that he also administered midazolam in five to ten percent of the cases in which he administered etomidate (PC-R3. 1382).

larger vein, pain is expected (PC-R3. 1448).

While Yun testified that he accepts that venous pain, upon the injection of etomidate, has been reported[16] (PC-R3. 1375), he stated that he had not seen any in his practice. Yun also dismissed the data relied on by the manufacturer because he does not think that the manufacturer's information is "backed by any firm science or data." (PC-R3. 1364). Without any other support, he stated that oftentimes a manufacturer includes information that is not accurate or extraneous" (PC-R3. 1370).[17] However, Yun's testimony shows that he uses unusually small doses of etomidate - .2 milligrams per kilogram; he also makes sure that the etomidate is entering the body through a large vein using a large bore I.V. (PC-R3. 1361; 1365; 1371; 1373). So the dosage he testified to is much smaller than the dosage set forth on the package inserts for which the warning of pain was provided.

Buffington's testimony concurred with Heath that the literature indicated that those who experience venous pain upon the injection of etomidate is around twenty-two percent, but up to forty-two percent (PC-R3. 1243; 1310-1). Buffington characterized the pain as discomfort with mild to moderate

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[16]In preparing to testify about etomidate, Yun only reviewed the manufacturer's drug information and Miller's textbook on Anesthesia; he did not review or rely on any other research (PC-R3. 1363).

[17]Buffington explained the approval process: "The manufacturer who makes that substance has to then submit to the F.D.A. and with supporting data that is – that becomes a published document for healthcare professionals to use as a baseline of understanding about that substance" (PC-R3. 1238).

sensation (PC-R3. 1242), and Buffington opined that the discomfort subsides fairly quickly (PC-R3. 1244).

In addition, while Buffington testified as to the manufacturer's data that corroborated Heath's experience with etomidate, he disagreed with Asay's interpretation of what the manufacturer meant by the term: transient. Buffington maintained that it meant intermittent, and disagreed with Asay's counsel that it meant moving (PC-R3. 1304; *see also* PC-R3. 1305 - "You can take that up with the pharmaceutical manufacturer for what they chose to include."). He also chose to interpret the manufacturer's use of the term disturbing to describe the pain to mean discomfort (PC-R3. 1307).

Buffington agreed that the manufacturer should be consulted as to the varying interpretation of what particular words meant (PC-R3. 1309). Likewise, as to the data and research, Buffington remarked that it would be nice to have "updated data", but because of the redactions, he could not "tell what date, what year, what version" of the package insert Asay was provided (PC-R3. 1311), including the fact that there was no specific resource referenced in the package insert (PC-R3. 1312). Buffington also referred Asay's counsel to look at the FDLE logs himself in relation to timing of the consciousness check, because in Buffington's opinion, the consciousness check should take only seconds (PC-R3. 1336).

As to another adverse effect, Heath explained that etomidate often causes muscle movement, or myoclonus, after a patient is unconscious (PC-R3. 1449; 1454). Heath testified that the

movement is "visually reminiscent of a seizure (PC-R3. 1449)("There's a kind of repetitive jerking motion of the arms and legas and of the muscles in the face."). Buffington explained that myoclonus is movement of muscles, that occurs about seventy-four percent of the time after a patient is unconscious (PC-R3. 1246-7).

Buffington would expect some of the adverse reactions to increase with an increase in the dosage (PC-R3. 1321-2). Specifically, the myoclous would be expected to increase (PC-R3. 1322). And, the incidence of pain was reported more often when movement happened (PC-R3. 1323). The manufacturer's package insert of etomidate is consistent with Buffington's understanding of etomidate. The package insert states the following about skeletal muscle movement under "ADVERSE REACTIONS":

> The most frequent adverse reactions associated with use of intravenous etomidate are transient venous pain on injection and transient skeletal muscle movements, including myoclonus:
>
> * * *
>
> 2. Transient skeletal muscle movements were noted following use of intravenous Etomidate in about 32% of the patients, with considerable difference in the reported incidence (22.7% to 63%). Most of these observations were judged mild to moderate in severity but some were judged disturbing. The incidence of disturbing movements was less when 0.1 mg of fentanyl was given immediately before induction. These movements have been classified as myoclonic in the majority of cases (74%), but averting movements (7%), tonic movements (10%), and eye movements (9%) have also been reported. No exact classification is available, but these movements may also be placed into three groups by location:
>
> a. Most movements are bilateral. The arms, legs, shoulders, neck, chest wall, trunk and all four extremities have been described in some

cases, with one or more of these muscle groups predominating in each individual case. Results of electroencephalographic studies suggest that these muscle movements are a manifestation of disinhibition of cortical activity; cortical electroencephalograms, taken during periods when these muscle movements were observed, have failed to reveal seizure activity.

b. Other movements are described as either unilateral or having a predominance of activity of one side over the other. These movements sometimes resemble a localized response to some stimuli, such as venous pain on injection, in the lightly anesthetized patient (averting movements). Any muscle group or groups may be involved, but a predominance of movement of the arm in which the intravenous infusion is started is frequently noted.

c. Still other movements probably represent a mixture of the first two types.

Skeletal muscle movements appear to be more frequent in patients who also manifest venous pain on injection.

Def. Ex. 3.

Yun contradicted Buffington and the manufacturer in that he believed that the massive dose prescribed for in the protocol would knock out the myoclonus (PC-R3. 1367). Yun had observed mild myoclonic movements just a few times when he used etomidate (PC-R3. 1366).

Buffington hypothesized that the purpose of the paralytic in the protocol is for the sake of the optics, though he encouraged Asay's counsel to find that out from DOC if the purpose of the paralytic was to make the execution less disturbing to the witnesses (PC-R3. 1316). As to the myoclonic movement associated with etomidate depriving the condemned of his dignity as he was executed, Heath stated that the movement may look undignified (PC-R3. 1455).

Heath indicated that the movement may also cause difficulty for the executioners to determine when to inject the second drug - the paralytic (PC-R3. 1450). Other first drugs cause the prisoner to become still (PC-R3. 1450). Heath stated that the expected movement would complicate when to give the paralyzing drug (PC-R3. 1453). And, there was potential that the movement could cause a problem for the stability of the I.V. (PC-R3. 1454-5).[18]

Overall, Heath testified that the use of etomidate in Florida's lethal injection protocol created a substantial risk of severe harm (PC-R3. 1455-6). And, "Florida's protocol is the only protocol in which the first drug that is used is a drug that causes pain and, thus, is a protocol that proposes to create pain or cause pain in a person who has received no anesthetic or analgesic" (PC-R3. 1462).

As to alternatives, Heath also testified about midazolam, which was used as the first drug in the lethal injection protocol that existed on January 8, 2016, when Asay's warrant was signed and his execution scheduled. Heath stated that midazolam is a painless drug. He has read and reviewed witness reports about every single execution in the U.S. and did not recall any of them indicating that pain from midazolam was observed (PC-R3. 1444-5).

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[18]Buffington dismissed this concern claiming that he had seen transcripts and photos and FDLE logs from Florida executions showing strapped down, even as recently as 48 hours prior to the hearing (PC-R3. 1315; 1334; 1352). The State failed to disclose those transcripts, photos and FDLE logs to Asay, thus, Asay was deprived of his right to due process and the opportunity to confront Buffington about his testimony.

Likewise sodium thiopental and pentobarbital - both of which Florida has also used as the first drug in its execution protocol do not cause any venous pain upon injection (PC-R3. 1446; *see also* PC-R3. 1447) ("we know that from all the executions, I'm guessing around a hundred executions now, in which pentobarbital has been used and prisoners do not evince any evidence of discomfort or pain when [pentobarbital is] injected."

Indeed, pentobarbital has been used successfully as a single-drug protocol in Georgia, Texas and Missouri - states that account for a large percentage of executions (PC-R3. 1447).

Buffington, who vaguely recalled that he had recently consulted with DOC about drugs (PC-R3. 1289-90), testified that he could prescribe, or order drugs, even for DOC, including etomidate, midazolam, morphine or pentobarbital (PC-R3. 1255-7). And, in the past, Buffington testified that an inmate would not experience pain with the use of midazolam as the first drug in a lethal injection protocol (PC-R3. 1258).

In addition to the testimony about the drugs and their effects, Director John Palmer of DOC, formerly the warden of Florida State Prison testified (PC-R3. 1182). Palmer left his position as warden on January 6, 2017 (PC-R3. 1183), just two days after the new lethal injection protocol was adopted.

However, Palmer was still involved and had attended the most recent quarterly training for the execution team members. Palmer indicated that: "[t]he dignity of the death process is a top priority", as well as the planning of the process (PC-R3. 1204, 1210; *see also* PC-R3. 1213) ("[I]t's important for the –

the team members ... to have all available information to consider as we're carrying out such an important mission."). Yet, though Palmer attended the training, he was not aware of any information about the new drug possibly causing pain (PC-R3. 1194; 1212). Likewise, Palmer was unaware of any information that the new drug was more likely to cause body movements (PC-R3. 1195).[19]

Palmer described the consciousness check that follows the administration of the third syringe: "It's conducted by the team warden and begins with an eyelash flick and continues with a – a trapezoid pinch." (PC-R3. 1189). He also stated that if there is any seizure-like activity or muscle twitching, "the team would treat that as a level of consciousness and take the necessary precautions." (PC-R3. 1192; *see also* 1198-9).

In his experience, Palmer believed that from the administration of the third syringe until the pronouncement of death averages "6 to 10 to 11 minutes".

The following morning, the circuit court heard closing statements. In addition, Asay renewed his motion to compel the name of the manufacturer, request for public records and motion for discovery (*See* PC-R3. 1508-14). The argument was based in large part on the fact that Yun had disputed the manufacturer's information and data provided in the package inserts as well as Buffington's repeated recognition that in order to understand the

[19]Heath saw no methods to reduce the incidence and severity of the adverse reactions caused by the etomidate injection had been added to the lethal injection protocol (PC-R3. 1464).

manufacturer's warnings it would be best to speak to the manufacturer. In addition, Buffington in his testimony relied on records and information that was not provided to Asay, though he specifically requested many of those records. The circuit court denied Asay's motions (PC-R3. 1515-7).

SUMMARY OF ARGUMENTS

1. Asay has been denied due process throughout his successive Rule 3.851 proceedings. The tone was set by the State as it failed to inform Asay that a new lethal injection protocol had been adopted as was required. The State then capitalized on its violation by urging the circuit court to deny due process and fundamental fairness to Asay at every turn, including obtaining public records and discovery, permitting adequate time to investigate and prepare, and providing him a meaningful opportunity to be heard on his claims. The State's actions and circuit court's ruling fly in the face of the recent U.S. Supreme Court pronouncement in *Hall v. Florida*, 134 S.Ct. 1986, 2001 (2014), that: "[p]ersons facing that most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution." Asay must be given the fair opportunity that he was promised.

2. The circuit court erred in summarily denying Asay's claim that the Eighth Amendment prohibits the State from using the lethal injection protocol that was adopted on January 4, 2017, in his execution. Asay has established that the current protocol, which was changed without notice after his death warrant was signed, creates a substantial risk of harm. In light

of the ready availability of the drugs that have no risk of pain if properly administered, Asay has satisfied his burden under *Glossip v. Gross*, 135 S.Ct. 2726 (2015).

3. Florida Statute § 922.06 is unconstitutional as it enables one party, the Attorney General, to have an unfair advantage over the opposing party, in this case Asay, thereby depriving that party of his right to due process.

STANDARD OF REVIEW

The claims presented in this appeal raised constitutional issues involving mixed questions of law and fact that are subject to *de novo* review, giving deference only to the trial court's findings of historical fact. *Stephens v. State*, 748 So. 2d 1028, 1034 (Fla. 1999).

ARGUMENT I

ASAY WAS DENIED DUE PROCESS THROUGHOUT THE SUCCESSIVE POSTCONVICTION PROCEEDINGS BELOW. THOSE PROCEEDINGS WERE NEITHER FULL NOR FAIR.

A. THE MANNER IN WHICH ASAY'S EXECUTION WAS RE-SET CONSTITUTES A VIOLATION OF HIS RIGHT TO DUE PROCESS. AS A MATTER OF EQUITY, THE STATE SHOULD BE ESTOPPED FROM GAINING A STRATEGIC ADVANTAGE IN THE INSTANT CASE. BECAUSE THE DENIAL OF DUE PROCESS WAS A STRUCTURAL DEFECT IN THE PROCEEDINGS, IT CANNOT BE HARMLESS; A DO OVER IS REQUIRED.

On January 8, 2016, Florida Governor Rick Scott signed a death warrant scheduling Asay's execution for March 17, 2016. While on appeal, Asay's execution was stayed by this Court on March 2, 2016.

On December 22, 2016, this Court issued an opinion affirming the denial of postconviction relief. *Asay v. State*, 210 So. 3d 1 (Fla. 2016). At the conclusion of its opinion, this Court stated

that it was lifting the stay in Asay's case. *Id.* at 29.[20] Asay proceeded to file a motion for rehearing, which was denied on February 1, 2017.

On April 29, 2017, Asay timely sought review from the U.S. Supreme Court through the filing of a petition for writ of certiorari. The State's brief in opposition was due to be filed on or before June 5, 2017. This would have meant that the U.S. Supreme Court would have likely decided whether to grant certiorari review before the end of the 2016 session, which ended June 28, 2017. However, on the day the brief in opposition was due, the State requested an extension of time.[21] The U.S. Supreme Court granted the motion and re-set the brief in opposition to be filed on or before July 5, 2017.

On July 3, 2017, Attorney General Pam Bondi sent a letter[22] to Governor Scott stating that, "Pursuant to §922.06(b) Fla. Stat., I hereby certify that the stay issued by the Florida Supreme Court has been lifted pursuant to the opinion dated

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[20]However, this Court stated that the decision was not final until rehearing was determined.

[21]When the Attorney General's Office contacted counsel for Asay and asked if he opposed an extension of time to file a brief in opposition to the petition for writ of certiorari, counsel assumed that this meant the Attorney General's Office would not be seeking a new execution date until after the Supreme Court's review of Asay's case was completed. Asay's counsel did not oppose the Attorney General's request for a thirty day extension.

[22]According to Carolyn Snurkowski, on July 3rd her office had no staff at the Attorney General's Office. She recalled that she had to assist in typing the letter due the absence of support staff. No explanation was provided for why it suddenly became urgent to send the letter on July 3rd when no support staff was available to assist.

December 22, 2016, in *Asay v. State*, 210 So. 3d 1 (Fla. 2016)."[23] On that same date, July 3, 2017, Governor Scott re-scheduled Asay's execution for August 24, 2017; and the Attorney General submitted its brief in opposition to Asay's petition for writ of certiorari.

Asay had, and still has, litigation pending at the time his execution date was re-set. Resetting Asay's execution effects the review that is conducted by the U.S. Supreme Court. Had the execution not been re-scheduled, the Supreme Court would have decided whether certiorari was warranted at the opening of the 2017 session in October, with it taking four of the nine justices to grant the petition. But now with an execution date, it will take five of the nine justices to stay Asay's execution before the petition can be granted. Thus, in requesting an extension to file the brief in opposition until after the Supreme Court was in recess and then advising the Governor that it was appropriate to re-schedule the execution on July 3, 2017, the State gained an advantage in that Asay's petition will now be considered under the exigency of an execution date and now five justices, rather than four, must agree to review his case.[24] Certainly, Asay does

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[23]According to §922.06(b) Fla. Stat., "If execution of the death sentence is stayed incident to an appeal, upon certification by the Attorney General that the stay has been lifted or dissolved, within 10 days after such certification, the Governor must set the new date for execution of the death sentence."

[24]Similarly, had the State not requested an extension of time to file a brief in opposition, Asay's petition would not have been decided under the exigency of a pending execution date, no stay would have been necessary, and therefore only four votes

not possess a power equivalent to that exercised here by his party opponent, the Florida Attorney General, to exercise statutory power to bring about an execution date that diminishes Asay's chances of his petition for certiorari review being granted by the U.S. Supreme Court.

Moreover, as illustrated by Asay's lethal injection challenge, the State gained an advantage as to Asay's challenge to the new protocol. Asay was provided with the new protocol on July 10th, one which substantially changed the drugs utilized to carry out his execution. However, the State was in possession of the protocol since January 4, 2017,[25] and had six months to prepare for litigation regarding the new protocol before Asay received it and was told he had nine days to file any challenges. The State had six months; Asay was given nine days to file his challenge. Even then, the State objected to an evidentiary hearing, strung out disclosures until after the challenge was filed, and disclosed expert witness for a hearing the State was opposing at 5 PM on a Friday night, less than five days before the evidentiary hearing began. Asay was not informed that an evidentiary hearing was granted until forty-eight hours before it began. He had no opportunity to talk to the expert witnesses whose identities were first disclosed late on a Friday afternoon, but who testified that the State had been preparing them to

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would have been required to review Asay's case.

[25]On January 4, 2017, Florida Department of Corrections Secretary, Julie L. Jones, signed into effect a new lethal injection protocol which has never been used before.

testify for weeks.

In its order denying Asay relief, the circuit court was of the belief that Asay's claim was not cognizable because he was not attacking his conviction or death sentence (PC-R3. 880, 894). The circuit court "decline[d] to consider Defendant's argument as to why, how, and when the AG requested the United States Supreme Court for an extension of time to file a brief." (PC-R3. 894). The circuit court also found "no correlation between the AG's actions in an unrelated petition before the United States Supreme Court and Defendant's due process rights in the instant proceeding." (PC-R3. 894). Further, the circuit court claimed that Asay "admit[ted] he did not have a basis to challenge the new lethal injection protocol until the July 3, 2017 rescheduling of his execution."[26] (PC-R3. 895). Thus, the circuit court rejected Asay's "implication that he was denied due process because of the expedited nature of these proceedings." (PC-R3. 895). Finally, the circuit court in its order relied on the fact that because Asay was granted an evidentiary hearing on his lethal injection claim, "[h]e cannot now allege he was denied notice and an opportunity to be heard on such." (PC-R3. 895).

Asay submits that the circuit court's determination is erroneous as a matter of fact and law. Indeed, the circuit court

[26]Of course, Asay had actually indicated that he could not challenge the new protocol when he had not been notified of the protocol and that it would be used to carry out his execution. The due process violation was the State's failure to tell him of the new protocol until July 10, when it had been preparing for litigation since January 4, 2017. That sure smacks of an unlevel playing field.

took a myopic view of the facts in concluding that the State's seeking an extension to submit a brief in opposition to Asay's certiorari petition has no correlation to his case. First, Asay's certiorari petition relates to an issue raised before this Court in January, 2016; an issue that concerns the convictions and sentences of death upheld by this Court. Thus, it is clearly not "an unrelated petition". Asay referenced it to show that the Attorney General's Office used its power to certify no stay was in effect to obtain a strategic advantage. In the letter informing Governor Scott that no stay was in effect, the Attorney General omitted in a detailed procedural history the pendency of the petition for a writ of certiorari in the U.S. Supreme Court. Rather, the letter represented that no proceedings were pending.[27]

Further, Asay does not claim that he had no basis to challenge the January 4, 2017, lethal injection protocol until July 3, 2017. Rather, he claims that he had no notice that the January 4, 2017 protocol would be used in his execution until July 10, 2017. Without notice, he did not have a basis for the claim. It is analogous to a defendant's ability to assert affirmative defenses; until the defendant is charged with a crime, he does not have notice that he needs to develop his affirmative defenses. Here, Asay was not given notice that the

[27]Since the brief in opposition that was placed in the mail to the U.S. Supreme Court on July 3, 2017, the same day in the same office that the letter sent to Governor Scott was typed, the omission from the letter of any information regarding the pending proceeding in the U.S. Supreme Court cannot be explained as an oversight. Evidentiary development was warranted.

new protocol would apply, despite the fact that by the terms of the protocol itself he was entitled to it on January 4, 2017. And, had he had the protocol, Asay could have challenged it before the stay was lifted and his execution was re-scheduled just as Paul Howell did in 2014 when he was notified of a new protocol even though a stay was pending in his case.[28]

Here, ignored by the circuit court is the fact that a party opponent delayed advising Asay of the new protocol and chose exactly when the State was the most prepared and Asay was the least prepared to take steps to cause the continuous warrant to be re-activated. The State's actions violated Asay's right to due process, which entails "'notice and opportunity for hearing appropriate to the nature of the case.'" *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 542 (1985), quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U. S. 306, 313 (1950). While the circuit court believed that merely being afforded a hearing insulates the State from due process concerns, the fact is that "[h]aste has no place in a proceeding in which a person may be sentenced to death. . . . Here, the appearance of irregularity so permeates these proceedings as to justify suspicion of unfairness."*Scull v. State*, 569 So. 2d 1251, 1252 (1990). As this Court explained in *Key Citizens for Gov., Inc. v. Florida Keys*

[28]Howell had a continuous warrant pending against him with a stay of execution in place when the September 2013 lethal injection protocol was adopted. A notice of filing of the new protocol was filed in his case the day after the protocol was adopted. What occurred in Howell's situation (identical to Asay's) shows what should have happened in Asay's case under the protocol itself and pursuant to due process.

Aqueduct Auth., 795 So. 2d 940 (Fla. 2001):

> The basic due process guarantee of the Florida Constitution provides that "[n]o person shall be deprived of life, liberty or property without due process of law." Art. I, § 9, Fla. Const. The Fifth Amendment to the United States Constitution guarantees the same. As this Court explained in *Department of Law Enforcement v. Real Property,* 588 So.2d 957, 960 (Fla.1991), "[p]rocedural due process serves as a vehicle to ensure fair treatment through the proper administration of justice where substantive rights are at issue." Procedural due process requires both fair notice and a real opportunity to be heard. *See id.* As the United States Supreme Court explained, the notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. **The notice must be of such nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance**." *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950) (citations omitted). **Further the opportunity to be heard must be "at a meaningful time and in a meaningful manner**." *Mathews v. Eldridge,* 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976); *accord Fuentes v. Shevin,* 407 U.S. 67, 80, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972) (stating that procedural due process under the Fourteenth Amendment of the United States Constitution guarantees notice and an opportunity to be heard at a meaningful time and in a meaningful manner).
>
> The specific parameters of the notice and the opportunity to be heard required by procedural due process are not evaluated by fixed rules of law, but rather by the requirements of the particular proceeding. *See Gilbert v. Homar,* 520 U.S. 924, 117 S.Ct. 1807, 138 L.Ed.2d 120 (1997); *see also Mullane,* 339 U.S. at 313, 70 S.Ct. 652 (stating that notice and opportunity for hearing need only be appropriate to the nature of the case). As the Supreme Court has explained, due process, "unlike some legal rules, is not a technical concept with a fixed content unrelated to time, place and circumstances." *Cafeteria & Restaurant Workers Union, Local 473, AFL-CIO v. McElroy,* 367 U.S. 886, 895, 81 S.Ct. 1743, 6 L.Ed.2d 1230 (1961). Instead, "due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer,* 408 U.S. 471, 481, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972).

(Emphasis added).

In addition to the constitutional implications, Asay submits that as a matter of equity, the State should be estopped from gaining an advantage in the instant case.[29] "[J]udicial estoppel is an equitable doctrine invoked by a court at its discretion." *New Hampshire v. Maine* 532 U.S. 742, 750 (2001) (internal quotation marks omitted). "[I]ts purpose is to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment." *Id.* at 749-50 (citation and internal quotation marks omitted). Here, the State manipulated the process to its own benefit and as a result the integrity of these proceedings is in doubt.

Asay submits that this Court should grant a stay and afford Asay the full and fair opportunity to have his case reviewed by the U.S. Supreme Court, and afford Asay a full and fair evidentiary hearing in the circuit court with regard to the new lethal injection protocol.

B. THE CIRCUIT COURT ERRED IN DENYING ASAY A STAY SO THAT HE COULD AMEND HIS RULE 3.851 MOTION AND THE COURT COULD CONTINUE THE EVIDENTIARY HEARING.

On July 19, 2017, Asay filed his Rule 3.851 motion and by separate motion requested that the circuit court grant a stay and hold an evidentiary hearing. As to the issue of whether the circuit court had the authority and obligation to enter a stay Asay cited to *State ex rel. Russell v. Schaeffer*, 467 So. 2d 698

[29]The circuit court in its order denying relief neglected to address this issue.

(Fla. 1985).

In denying Asay a stay, it is clear that the circuit court misunderstood this Court's decision in *Russell*. The circuit court interpreted *Russell* to mean that a defendant is required to establish that he is entitled to relief from either his judgment or his sentence **before** a stay can be granted (PC-R3. 896).[30] However, *Russell* makes clear that a stay is warranted when the defendant's "application for stay contained enough facts to show, on its face, that he **might be entitled to relief** under rule 3.850 and that his application for stay could be treated as a 3.850 motion subject to amendment." *State ex rel. Russell*, 467 So. 2d at 699 (emphasis added).[31] Thus, because there was a pending

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[30]According to the circuit court, Asay was required to prove that he was entitled to a new trial or a resentencing before it had the authority to enter a stay of execution.

[31]In *Russell*, this Court reviewed a request for a writ of prohibition challenging a circuit court's entry of a stay of execution on behalf of John Michael. A stay was requested from the circuit court even though no motion for postconviction relief had been filed. In determining that the circuit court lacked the authority to enter a stay when there was no pending motion for postconviction relief, this Court cited two cases in which stays of execution had properly been entered. James Agan had filed for collateral relief under Rule 3.850 and when so doing asked for a stay of execution. On the other hand, Robert Waterhouse had filed a motion for a stay of execution in which he had set forth "enough facts to show, on its face, that he might be entitled to relief under rule 3.850 and that his application for stay could be treated as a 3.850 motion subject to amendment." *Russell*, 467 So. 2d at 699. Both Agan and Waterhouse received a stay of execution from their respective circuit courts. This Court found as to both Agan and Waterhouse, the circuit courts had a valid basis for exercising jurisdiction and entering the stays of execution. However, the circuit court in Michael's case lacked jurisdiction to enter the stay because the motion for a stay was "**devoid of any facts** which would allow a court to consider that document **as a colorable motion** under rule 3.850." *Russell*, 467 So. 2d at 699 (emphasis added). *See Spalding v. Dugger*, 527 So.

matter, the trial court had jurisdiction to enter a stay and control its own docket. *Id*.

Under Article 1, § 3 of the Florida Constitution, matters of practice and procedure are the domain of the judicial branch. The machinery of the judicial process is not subject to encroachment by the other branches of government. Thus, when a court has jurisdiction to consider and hear a Rule 3.851 motion, it must have the power to enter a stay of execution and not permit the executive branch through the warrant signing authority to dictate the procedure governing Rule 3.851 motions. *Allen v. Butterworth*, 756 So. 2d 52, 62 (Fla. 2000) ("Due to the constitutional and quasi-criminal nature of habeas proceedings and the fact that such proceedings are the primary avenue through which convicted defendants are able to challenge the validity of a conviction and sentence, we hold that article V, section 2(a) of the Florida Constitution grants this Court the exclusive authority to set deadlines for postconviction motions.").[32]

The decision in *Russell* did not require the 3.851 movant must establish his entitlement to relief because either his conviction or death sentence had to be vacated before a stay was

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2d 71, 73 (Fla. 1988).

[32]This Court has held that capital collateral litigants are entitled to due process. *Huff v. State*, 622 So. 2d 982, 983 (Fla. 1993). As this Court has explained: "The essence of due process is that fair notice and a reasonable opportunity to be heard must be given to interested parties before judgment is rendered." *Scull v. State*, 569 So.2d 1251, 1252 (Fla.1990). Because a court is obligated to insure due process in collateral proceedings, it must have the power to enter a stay of execution when a scheduled execution will deprive a condemned litigant of "a reasonable opportunity to be heard."

authorized. Proof of the entitlement to relief before a stay of execution is authorized would be like requiring a conviction before an indictment could issue. What would be the point of a stay, discovery and an evidentiary hearing if a defendant had already proven his entitlement to relief in the pleading? By its plain language, *Russell* stands for the notion that a stay should be granted where the claims are colorable, when they are not conclusively refuted by the record, and that amendments are permissible in such situations – situations like here, when public records were erroneously withheld and disclosed **after** Asay was required to file his Rule 3.851 motion.[33]

Certainly, this Court recognized that when a defendant pleads a colorable claim which requires evidentiary development, circuit courts must have the authority and have an obligation to grant a stay so that the parties are provided with adequate notice and opportunity to be heard. *See Provenzano v. State*, 750 So. 2d 597, 600-1 (Fla. 1999). The touchstone of due process has been recognized as fair notice and reasonable opportunity to be heard. The right to due process entails "'notice and opportunity for hearing appropriate to the nature of the case.'" *Cleveland Bd. Of Ed. V. Loudermill*, 470 U.S. 532, 542 (1985), quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). "[F]undamental fairness is the hallmark of the procedural

[33]This Court's scheduling order gave the circuit court the impression that the court could not grant a stay and exceed the time parameters set by this Court: "[G]iven the Florida Supreme Court's scheduling order, and I do feel, of course, guided and constrained by that, I am compelled to deny your motions" to amend and continue the evidentiary hearing (PC-R3. 1086).

protections afforded by the Due Process Clause." *Ford v. Wainwright*, 477 U.S. 399, 424 (1986)(Powell, J., concurring in part and concurring in the judgment). The circuit court in denying the 3.851 motion ruled that any notice and opportunity to be heard, regardless of whether it was "fair" or "reasonable" is sufficient to protect Asay's rights (PC-R3. 895)("[T]his Court granted Defendant an evidentiary hearing on his lethal injection claim, during which he presented testimony and evidence. He **cannot now allege** he was denied notice and an opportunity to be heard on such.") (emphasis added).

In *Valle v. State*, 394 So. 2d 1004 (Fla. 1981), a capital defendant was forced to go to trial within 24 days after he was arraigned. Under the circuit court's reasoning and logic, Valle was granted a trial with the opportunity to present testimony and evidence, so he should not have been heard to claim that he was deprived of an opportunity to be heard. Yet, this Court not only allowed Valle to allege a denial of due process, it held due process was violated because Valle was not give "sufficient time" to prepare a defense. An opportunity to be heard that is not an opportunity to be meaningfully heard violates due process. Under due process, show trials or show hearings are an anathema. Being heard is not meant to be an empty gesture. Yet under the circuit court's reasoning, empty gestures would be permissible as long as a defendant got to present some testimony and evidence, even if

it was without a fair opportunity to prepare.[34] Because of the circuit court's misunderstanding of due process and the obligation to insure a meaningful opportunity to be heard, Asay was deprived of his right to due process.

Under the law, Asay was entitled to a stay and the circuit court had the authority to grant a stay in order insure a meaningful opportunity to be heard. The refusal to enter a stay was an abuse of discretion. Asay should be granted a stay, the opportunity to conduct discovery, to prepare and then a reasonable opportunity to be heard.

C. THE CIRCUIT COURT ABUSED ITS DISCRETION IN SUSTAINING THE STATE'S OBJECTIONS TO DISCLOSURE OF PUBLIC RECORDS.

On July 13, 2017, Asay filed public records requests, pursuant to Rule 3.852. In preparing those public records requests, Asay's counsel pursued an update of records from agencies which had previously produced public records, *see* Rule 3.852(h)(3)[35], and Asay pursued records to further develop the factual basis for two claims: 1) a challenge to the newly revised lethal injection protocol, *see* Def. Ex. 1; and 2) the circumstances by which his execution was rescheduled. These

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[34]In *Coker v. State*, 89 So. 222 (Fla. 1921), this Court found that a mere opportunity to present evidence was not enough when it was an empty opportunity because inadequate time to prepare was given. This Court explained: "A judicial trial becomes a farce, a mere burlesque, and in serious cases a most gruesome one at that, when a person is hurried into a trial upon an indictment charging him with a high crime, without permitting him the privilege of examining the charge and time for preparing his defense." *Id.*

[35]All of the agencies to which a 3.852(h)(3) request was sent satisfactorily responded.

requests were clearly not a fishing expedition as the State argued. DOC had adopted a new lethal injection protocol that changed all three drugs in a three drug protocol. Yet, the State, through the various state agencies involved, was playing the game of "I've got a secret." A challenge to the protocol and a challenge to how the execution got rescheduled were obvious claims that Asay did not need to fish for; and he was entitled to public records regarding these two issue to develop the contours of the claim.

1. Lethal Injection Records

The Attorney General's Office acknowledged at the July 10th hearing that it had been aware of the lethal injection protocol since its adoption (PC-R3. 986). The circuit court ordered the State to file and serve a copy of the new lethal injection protocol. The protocol had been adopted on January 4, 2017. The State obviously withheld certifying that no stay was in effect after this Court denied rehearing on February 1, 2017, so that it could prepare for an evidentiary hearing on a challenge to the protocol.

To make matters worse, when Asay filed public records requests to DOC and FDLE relating to the new protocol, including the new drugs, DOC and FDLE objected to the requests. This was so despite the clear and direct law contradicting their positions. Indeed, neither, DOC, FDLE, or opposing counsel informed the circuit court that pursuant to *Muhammad v. State*, records were required to be disclosed. 132 So. 3d 176 (Fla. 2013) (ordering DOC to disclose "correspondence and documents that it had

received from the manufacturer of midazolam hydrochloride, including those materials addressing any safety and efficacy issues."); *see also Valle v. State*, 70 So. 3d 525, 526 (Fla. 2011)(ordering DOC to disclose "correspondence and documents it has received from the manufacturer of pentobarbital concerning the drug's use in executions, including those addressing any safety and efficacy issues."). This lack of candor to the tribunal was a breach of opposing counsel's (DOC, FDLE, the Attorney General and the Office of the State Attorney) ethical obligations. And, the circuit court sustained DOC and FDLE's objections holding that "Defendant has failed to show how these requested records relate to a colorable claim for relief in this proceeding."[36]

On July 19, 2017, Asay filed a motion for rehearing when he submitted his Rule 3.851 motion. Shortly after filing the rehearing motion, the circuit court granted the motion, in part, and directed DOC to disclose public records that were identified in *Muhammad* and *Valle*.

At approximately 9:30 p.m., on July 19th, after Mr. Asay had filed his Rule 3.851 motion and the affidavit from his expert, Mark J.S. Heath, M.D., when DOC disclosed redacted records with a limited motion relating to redactions it had made. Then, without

[36]Ironically (or perhaps erroneously), the circuit court cited *Muhammad v. State* to justify it exercising its discretion to excuse DOC, FDLE and the Attorney General's Office from having to disclose anything at all regarding the new lethal injection protocol and the newly selected drugs for use in the lethal injection execution. In fact, *Muhammad* was relied upon in the motion for rehearing that asserted the circuit court's ruling was erroneous.

apology or a real explanation, DOC sent additional redacted records to Asay on the evening of Friday, July 21st at 6:20 p.m.

It should be noted that some of the redactions relate to the manufacturer of the drugs who contacted DOC in February, 2017, to demand that the drugs be returned. The manufacturer has made clear that if the drugs are being used for lethal injection they are being "misused".

At a case management conference on July 24, 2017, the circuit court granted DOC's motion seeking authorization for the redactions. The circuit court upheld the redactions.

a. DOC must reveal the manufacturer

Initially, DOC asserted that Fla. Stat. § 945.10 (e) and (g), required that the manufacturer's identity be kept secret (PC-R3. 495-500). Further, the State took the position that: "[T]he manufacturer's opinion really should not be explored at any evidentiary hearing because it has no legal consequence." (PC-R3. 1078).

Later, the State and DOC indicated the true reason for hiding the identity of the manufacturer - the State is afraid that the manufacturer will discontinue sale of the drugs to DOC. Assistant General Counsel of DOC, Philip Fowler stated:

> ... [T]he arguments on the limited motion would be that as stated in the motion itself, that the disclosure of the manufacturer or identities of those involved in the supply chain would cause a hardship to the State, because it would, as it has been shown, limit the State's ability to proceed with the purchase and use of these medications or drugs.
>
> And as far as efficacy or safety goes, the inserts as provided – provide a lengthy amount of information regarding the uses of the drug.

(PC-R3. 1156); (*See also* PC-R3. 1096) (Ms. Millsaps states: "[O]ne of the reasons they want the names of the manufacturers is so that the manufacturers and the middle man will stop selling [the drugs] to us.").[37]

Asay, through counsel, pointed out that the State's reasons were specious because the manufacturer did not seek or ask for confidentiality. The manufacture wanted its drugs returned (PC-R3 1157). Indeed, the manufacturer was already aware that DOC had procured its drugs to use for lethal injection (Def. Ex. 3). So, any action to prevent the further sale of the drugs to DOC was already underway. Thus, the State's argument was not supported by the facts.

The circuit court held that Fla. Stat. 945.10 (e) and (g), did not protect the identity of the manufacturer. Yet, the circuit court held that the identity was not necessary to analyze Asay's claim (PC-R3. 1159; *see also* PC-R3. 1087 - "I don't believe that has relevance necessarily to the second claim or the other claims that you raise in your pleadings.").[38]

In permitting DOC to keep the manufacturer secret, the

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[37]Millsaps' accusation was that Asay's counsel who did not challenge the September 9, 2013 protocol on Asay's behalf in January of 2016, were seeking the name of the manufacturer, not as Asay's counsel was trying to investigate a lethal injection challenge on behalf of Asay, but for some nefarious purpose unrelated to Asay and/or his scheduled execution. Millsaps' accusation was not made with a good faith basis. It was an effort on her part to personally attack Asay's counsel in order to prejudice the judge against counsel and Asay. Millsaps should be required to provide an explanation for her accusation.

[38]Had Asay been provided the name of the manufacturer he would have amended his witness list to include a representative (PC-R3. 1088).

circuit court placed Asay in a position in which the State's witnesses testified as to what the package inserts meant, or that the data cited was inaccurate, without any recourse for Asay to rebut the testimony with evidence directly from the manufacturer.

For example, Yun dismissed the data relied on by the manufacturer because he does not think that the manufacturer's information is "backed by any firm science or data." (PC-R3. 1364). Without any other support, he stated that oftentimes a manufacturer includes information that is not accurate or extraneous" (PC-R3. 1370).

Likewise, Buffington repeatedly disagreed with Asay's interpretation of what the manufacturer meant in the package insert, specifically as to the adverse effects of etomidate. For example, Buffington maintained that the description of the pain as "transient" meant intermittent, rather than Asay's counsel's position that it meant moving (PC-R3. 1304; *see also* PC-R3. 1305 - "You can take that up with the pharmaceutical manufacturer for what they chose to include."). He also chose to interpret the manufacturer's use of the term disturbing to describe the pain to mean discomfort (PC-R3. 1307).

Buffington agreed that the manufacturer should be consulted as to the varying interpretation of what particular words meant (PC-R3. 1309). Likewise as to the data and research, Buffington remarked that it would be nice to have "updated data", but because of the redactions, he could not "tell what date, what year, what version" of the package insert Asay was provided (PC-R3. 1311), including the fact that there was no specific resource

referenced in the package insert (PC-R3. 1312).

Clearly, based on the State's witnesses testimony, Asay was denied due process when DOC was permitted to withhold the identity of the manufacturer. *See Muhammad v. State*, 132 So. 3d 175, 192 (Fla. 2013)("The order required the DOC to produce correspondence and documents it received from Hospira concerning the drug's use in executions or otherwise, including those addressing the safety and efficacy issues.").

b. DOC must disclose the public records requested

In his request to DOC and FDLE, Asay requested: "Public records, including the required logs, notes, memoranda, letters, electronic mail, and facsimiles, relating to the executions by lethal injection of Oscar Ray Bolin, Jerry Correll, Johnny Kormondy, Chadwick Banks, Eddie Davis and John Henry. Asay confined his request to the prior six executions.

What Asay did not know when the circuit court sustained DOC and FDLE's objections to the those records was that the State would make those records available to Buffington prior to his testimony at the evidentiary hearing. Buffington dismissed the notion that the potential movement could cause a problem for the stability of the I.V. (PC-R3. 1314-15). In doing so, Buffington relied on the transcripts and photos and FDLE logs from Florida executions that he had been given access to prior to his testimony (PC-R3. 1315; 1334; 1352). The State did not give Asay access to those transcripts, photos and FDLE logs shown to Buffington, despite Asay request to be provide those records.

Buffington also referred Asay's counsel to look at the FDLE

logs himself when he was asked about the timing of the consciousness check, because in Buffington's opinion, the consciousness check should take only seconds (PC-R3. 1336). Asay never had the opportunity to look at the logs himself as they were not disclosed. Asay was deprived of his right to due process and the opportunity to confront Buffington about his testimony.

2. Records Relating to the Rescheduling of the Execution

As to the potential due process claim arising from the actions of the Attorney General's Office, Asay sent Rule 3.852 requests to the Governor's Office, the Attorney General's Office and the Florida's Department of Corrections.

On July 14, 2017 the Governor's office did not object to the public records request, and instead disclosed 38 pages of documents.

On July 14, 2017, the Attorney General's Office responded to Asay's public records request and objected. The Attorney General's Office wrote: "Defendant's request must be denied because the request is overly broad, speculative, and, not related to, or calculated to lead to a colorable claim for post-conviction relief." Asay's request was for records since December 21, 2016, relating to this Court's stay of execution, pending litigation in Defendant's case, or the rescheduling of the execution. This was in essence the same request made upon the Governor's Office. The Governor's Office did not object and was able to readily comply.

On July 14, 2017, the Florida Department of Corrections responded to Asay's requests for records. One of Asay's requests

for records from DOC was nearly identical to the request made upon the Governor's Office and the Attorney General's Office. Even though the Governor's Office had no problem complying with the request, DOC chose to object to the request as overly broad and argue that the prejudice that Asay suffered as a result of the Attorney General's Office bad faith affected unrelated postconviction proceedings.

At the July 17, 2017, hearing, the Attorney General's Office was represented by Charmaine Millsaps and Carolyn Snurkowski. Having advised Asay in the July 14th pleading that the Attorney General's Office objected to his request for public records, Millsaps and Snurkowski abandoned the objection, and each took a new position without notice to Asay. Millaps explained at length that her position with the Attorney General's Office did involve the creation of public records. She wrote briefs to be filed in courts. All she did was prepare drafts of court pleadings that were work product and not public records. And, the court pleadings she prepared were filed in court. According to Millsaps, there were no public records that she would generate in the course of duties with the Attorney General's Office.

Snurkowski on the other hand indicated that the only documents that were within the scope of Asay's request were two emails and the July 3rd letter. And, though she referenced the July 5th letter, she indicated that she believed it was outside the scope of Asay's request.

Just as the July 3rd letter which Snurkowski claimed to have prepared for Attorney General Bondi's signature omitted reference

to the pendency of a petition for writ of certiorari in the U.S. Supreme Court in order gain a strategic advantage, Millsaps and Snurkowski filed a baseless objection to the public records request in order to thwart the 3.852 process and interfere with undersigned's ability to effectively represent Mr. Asay.

Moreover, even though the Attorney General's Office ultimately abandoned its objection to Asay's request, the circuit court in its order entered after the hearing sustained an objection that was waived. After hearing that the request was not unduly burdensome because there were two emails and a letter that came within the scope of the request, the circuit court erroneously found Asay's request unduly burdensome. It clearly was not. As shown by Millsaps' statements and by Snurkowski's statements at the July 17th hearing, the objection filed by the Attorney General's Office was filed in bad faith. There was absolutely no reason for the Attorney General's Office to not simply comply with the request and disclose the two emails and one letter in a fashion similar to the Governor's Office.

3. The Circuit Court's Ruling in the July 28, 2017 Order

As to the denial of Asay's claim concerning public records, the circuit court overlooked and misapprehended both the facts and the law. First, the circuit court held that a claim concerning the denial of public records is not cognizable in a Rule 3.851 motion (PC-R3. 880). This holding is erroneous. *See Mordenti v. State*, 711 So. 2d 30, 32 (Fla. 1998)("Contrary to the trial court's findings in the order denying postconviction relief, public records requests are cognizable in a Rule 3.850

motion. *See Walton v. Dugger*, 634 So.2d 1059 (Fla. 1993) (inability to access certain files and records properly raised in postconviction motion). Additionally, if the trial court determines that public records have been withheld from Mordenti, then he should be allowed to amend his postconviction motion once those records are furnished.").[39]

Asay's public records claim is cognizable in a Rule 3.851, as has been for more than twenty-seven years. Furthermore, the circuit court's misunderstanding appears to have caused it to erroneously deny Asay's request to amend his Rule 3.851 motion based on the disclosure of public records after he had filed his motion.

Second, the circuit court suggests that the disclosure of the lethal injection protocol, more than six months after it was required to be disclosed and not in accordance with the provision contained within the protocol itself, somehow undermines Asay's characterization that he had not received "a single piece of paper relating to the DOC's newly revised protocol was provided, not even the protocol as required ..." (PC-R3. 880-1). Asay did use the word, "related" to the protocol, which should reasonably

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[39]This Court first recognized that it was proper to plead a claim that public records had been erroneously denied in a Rule 3.850 motion in 1990 in *Provenzano v. Dugger*, 561 So. 2d 541, 547 (Fla. 1990)("where a defendant's prior request for the state attorney's file has been denied, we believe that it is appropriate for such a request to be made as part of a motion for postconviction relief."). Thus, Florida law has for 27 years provided that a public records claim is properly pled in a Rule 3.850/3.851 motion. The circuit court's ruling that each claim in a Rule 3.851 must challenge the validity of either the conviction or the sentence is simply wrong. *Jennings v. State*, 583 So. 2d 316 (Fla. 1991); *Sims v. State*, 754 So. 2d 657 (Fla. 2000).

be read to mean documents related to the protocol and not the protocol, like the list of questions that DOC sent Buffington about drugs or any other information explaining why the new drugs were substituted or what "medical literature, legal jurisprudence, and [] protocols and experience from other jurisdictions."[40] *See* Def. Ex. 1.

Also, as to the description that Asay had not received the protocol, as required - this fact is indisputable. Both by the terms of the protocol and in prior practice, condemned inmates whose warrants had been signed and their counsel are entitled to receive a copy of the protocol when it is certified. Here, the State took more than six months to provide Asay with a copy of the protocol.

In addition to the circumstances relating to the disclosure of the protocol, the circuit court overlooked the fact that Asay did not receive the few public records that DOC had received from the manufacturer until after he filed his Rule 3.851 motion.[41]

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[40]Certainly relevant and curious is the fact that DOC suggests that it takes into consideration other states' protocols and experience, but then chose a drug as the first drug that no other state uses. This is despite the fact that multiple other jurisdictions have abandoned the paralytic and/or the three drug protocol and use pentobarbital or midazolam, both previous drugs used in Florida's lethal injection protocol and obviously available - Ohio used midazolam in a three drug execution that occurred on July 26, 2017, and Texas used pentobarbital in a one drug execution that occurred on July 28, 2017 - both executions were reported as without incident.

[41]The circuit court upheld DOC's request to keep the manufacturer a secret. However, in *Muhammad*, DOC revealed the manufacturer. 132 So. 3d 175, 192 (Fla. 2013)("The order required the DOC to produce correspondence and documents it received from Hospira concerning the drug's use in executions or otherwise,

This was so because the circuit court erroneously sustained DOC and FDLE's objections. The circuit court also overlooked facts from the evidentiary hearing. Testimony revealed that the State's expert was provided, relied on and testified to information contained in public records that were withheld from Asay (PC-R3. 1315, 1334, 1352). Thus, it is unreasonable to deny Asay's claim when those were the very records he had requested.

This Court should direct DOC to disclose the public records originally requested and enter a stay so that Asay has reasonable notice and a fair opportunity to be heard, i.e., permit him to amend his Rule 3.851 motion and hold an evidentiary hearing permitting Asay to present his witnesses and evidence.

D. THE FAILURE TO TIMELY NOTIFY ASAY THAT THE LETHAL INJECTION PROTOCOL CHANGED VIOLATED HIS RIGHT TO DUE PROCESS.

Unbeknownst to Asay, on January 4, 2017, after what one can only reasonably suspect was months of secret consideration and consultation, the Florida Department of Corrections adopted a new lethal injection protocol, which, for the first time since being adopted in 2000, called for the substitution of each of the three drugs in the protocol (etomidate, rocuronioum bromide, potassium acetate). The protocol itself replaced the September 13, 2013, protocol (midazolam, vecuronium bromide, potassium chloride).

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including those addressing the safety and efficacy issues."). In Asay's case, the information contained in the package inserts make it even more necessary that DOC disclose the manufacturer. Likewise, both State witnesses discussed the information contained in the inserts, including the adverse effects. Thus, it is a denial of Asay's due process rights to allow DOC to keep the manufacturer a secret, particularly where the experts acknowledged uncertainty as to how to read the package inserts provided by the manufacturer.

Neither Asay, a condemned inmate with a continuous death warrant, nor his counsel were notified of the newly adopted protocol substituting each of the drugs from the former protocol. Neither Asay nor his counsel were told why the former protocol which had been successfully employed in a dozen executions and with its call for midazolam as the first drug had been upheld by the U.S. Supreme Court was being changed. It was only on July 10, 2017, that Asay's counsel was provided a copy of the January 4, 2017, lethal injection protocol - six months after it was adopted and certified, and told that it would be used to execute Asay on August 24, 2017.

This is in sharp contrast to DOC's actions when the September 9, 2013, protocol was adopted. At that time, the condemned with continuous warrants in place were notified of the new protocol. Marshall Gore's execution was scheduled for October 1, 2013. Gore's registry attorney, Todd Scher, was served with a notice of filing of the lethal injection protocol even though as the protocol explained, it would not be used in his execution (PC-R3. 602-22). As the correspondence with Scher shows, DOC also gave notice of the new protocol to Robert Trease and Paul Howell, whose executions had been stayed, but who both had continuous warrants still in effect (PC-R3. 602-22). Howell's execution did not take place until February 26, 2014, after his stay of execution was vacated. But, he and his counsel were notified on September 10, 2013, after the adoption of the protocol on September 9, 2013. He was also advised that the protocol would be used in his execution if the execution was not rescheduled to

occur before November 30, 2013 (PC-R3. 602-22). This gave Howell notice and ample opportunity to raise any challenge to the substitution of a different protocol for the one that had been in effect when his warrant was first signed. Howell did file a challenge to that protocol in December of 2013.

Asay should have been informed of the new protocol when it was adopted on January 4, 2017, just like Gore, Howell and Trease had been notified in 2013. In addition, the protocol itself provided for notification:

> (15) **Periodic Review and Certificate from Secretary**: There will be a review of the lethal injection procedure by the Secretary of the Florida Department of Corrections, at a minimum, once every two (2) years, or more frequently as needed. The review will take into consideration the available medical literature, legal jurisprudence, and the protocols and experience from other jurisdictions. The Secretary of the Department of Corrections shall, upon completion of this review, certify to the Governor of the State of Florida confirming that the Department is adequately prepared to carry out executions by lethal injection. The Secretary will confirm with the team warden that the execution team satisfies current licensure and certification and all team members and executioners meet all training and qualifications requirements as detailed in these procedures. **A copy of the certification shall be provided to the Attorney General and the institutional warden shall provide a copy to a condemned inmate and counsel for the inmate after the warrant is signed.**
>
> The certification shall read:
>
> As Secretary for the 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 a maturing society, the concepts of the dignity of man, and advances in science, research, pharmacology, and technology. The process

> will not involve unnecessary lingering or the unnecessary or wanton infliction of pain and suffering. The foremost objective of the lethal injection process is a humane and dignified death. Additional guiding principles of the lethal injection process are that it should not be of long duration, and that while the entire process of execution should be transparent, the concerns and emotions of all those involved must be addressed.
>
> I hereby certify that the Department is prepared to administer an execution by lethal injection and has the necessary procedures, equipment facilities, and personnel in place to do so. The Department has available the appropriate persons who meet the minimum qualifications under Florida Statutes and in addition have the education, training, or experience, including the necessary licensure or certification, required to perform the responsibilities or duties specified and to anticipate contingencies that might arise during the execution procedure.

Def. Ex. 1 (emphasis added). Asay's warrant was signed on January 8, 2016. That means under the terms of the protocol, Asay should have been provided the January 4, 2017, protocol immediately after it was signed and effective. Instead, Asay's counsel did not receive a copy until the Attorney General's Office provided it on July 10, 2017, and notice at that time as well that it would be used to carry out his execution.

According to newspaper accounts, DOC had anticipated litigation relating to the new protocol: Michelle Glady, a spokeswoman for DOC had indicated that "officials expect litigation in response to the new drugs." *Florida Changes Lethal Injection Drugs*, Dara Cam, New Service of Florida, January 5, 2017. Despite anticipating litigation and knowing that Asay's warrant remained "in full force"; that the circuit court had issued its opinion affirming the denial of his Rule 3.851 motion; that the Florida Supreme Court had indicated in its opinion that

the stay had been lifted; and that Assistant Attorney General Carolyn Snurkowski notified Governor Scott of the opinion; no one, not the institutional warden, not another representative of DOC, and not a representative of the Attorney General, though all were certainly anticipating litigation, notified Asay or his counsel of the new protocol.

The failure to timely notify Asay of the new protocol violated his right to due process to notice and a reasonable opportunity to be meaningfully heard. Further, the State stacked the deck on an unlevel playing field and violated due process in doing so.

E. THE EXCLUSION OF WITNESSES AND THE CIRCUMSTANCES OF THE EVIDENTIARY HEARING DEPRIVED MR. ASAY OF A MEANINGFUL OPPORTUNITY TO BE HEARD.

At the case management conference, the State moved to strike all of the witnesses that Asay listed, other than Palmer and Heath. The State's motion to strike Asay's witnesses was granted, including the DOC pharmacist (PC-R3. 1146).

Additionally, due to the timing of the evidentiary hearing, Asay did not have an opportunity to have an expert present for the testimony of the State's witnesses in order to present rebuttal. In fact, his own witness was not available to travel to Florida, though he had agreed to be present for a hearing the week of August 14th. Thus, Asay had to present his testimony via telephone.

The rushed nature of the hearing with limited notice did not permit Asay to fully develop his claim. The cross-examination of the State's experts who had been prepping for weeks was for

Asay's counsel a discovery deposition because he had been given no time to prepare.

F. CONCLUSION.

Asay requests that this Court enter a stay of execution and direct the state agencies to disclose the public records he requested and allow him to amend his claims once he has had the opportunity to review and investigate the public records. In addition, Asay requests that this Court allow him to obtain discovery relating to the lethal injection protocol and have a meaningful opportunity to present that evidence to the circuit court.

ARGUMENT II

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 BECAUSE IT CREATES AN UNACCEPTABLE RISK OF PAIN. IT ALSO VIOLATES THE EIGHTH AMENDMENT BECAUSE THE STATE HAS REPLACED A PROTOCOL APPROVED BY THIS COURT AND THE U.S. SUPREME COURT THAT PROVIDED FOR THE USE OF MIDALOZAM THAT ALL EXPERTS AGREE IS PAIN FREE WITH A NEW PROTOCOL THAT USES AS THE FIRST DRUG ETOMIDATE THAT IS KNOWN TO CAUSE PAIN. THE INTENTIONAL CHOICE OF A PROTOCOL WITH A DRUG THAT HAS AN ADVERSE WARNING THAT IT OFTEN CAUSES PAIN TO REPLACE A PROTOCOL THAT USES MIDAZOLAM THAT IS RECOGNIZED AS A PAIN FREE DRUG VIOLATES THE EIGHTH AMENDMENT. FLORIDA HAS FAILED TO ADOPT ANY SAFEGUARDS TO THE PROTOCOL WHILE SUBSTITUTING ETOMIDATE AS THE FIRST DRUG WHICH CAUSES ADVERSE EFFECT. FURTHER, THE EIGHTH AMENDMENT PRECLUDES THE USE OF A DRUG THAT CARRIES A LIKELIHOOD OF SEIZURE-LIKE MOVEMENTS THAT WILL RESULT IN AN UNDIGNIFIED DEATH BEFORE WITNESSES.

In *Glossip v. Gross*, 135 S.Ct. 2726 (2015), the U.S. Supreme Court evaluated an Eighth Amendment challenge to lethal injection in Oklahoma. Yet, this recent decision was largely overlooked in the circuit court's analysis of Asay's claim. In fact, the circuit court only made one reference to *Glossip*, and that is to

the availability of pentobarbital. But, *Glossip* makes clear that the initial inquiry of a lethal injection challenge under the Eighth Amendment claim must be to determine if the defendant established "that any risk of harm was substantial **when compared to** a known and available alternative method of execution" *Id.* at 2738 (emphasis added); *see also Id.* 2741 ("When a method of execution is authorized under state law, a party contending that this method violates the Eighth Amendment bears the burden of showing that the method creates an **unacceptable risk of pain.**")(emphasis added).[42] The crux of the U.S. Supreme Court's ruling is that a defendant must be permitted to introduce evidence of alternative methods of execution in comparison to the risks attendant to the execution procedures the defendant is challenging. The "risk of harm" is not something that is not to be evaluated in a vacuum, but in comparison to other methods of execution. Thus, even a risk of ten or twenty seconds of moderate or disturbing pain could be considered "substantial" in contrast to another method where no pain is attendant to the procedure. The circuit court overlooked this crucial aspect of Asay's Eighth Amendment challenge (*See* PC-R3. 882), *citing King v. State*, 211

[42]Assistant Attorney General Millsaps explained Asay's burden at the July 24, 2017, case management conference: "He has to establish that this drug is better than that drug." ... "It really boils down to a – that the drug I'm identifying is much better in terms of pain killing ability, than the drug the State is using, significantly better ..." (PC-R3. 1097). Asay has satisfied his burden.

So. 3d 866 (Fla. 2017).[43] Given that here there was an existing lethal injection protocol that this Court had found to comply with the Eighth Amendment, and given that when his death warrant was signed, Asay registered no objection to that existing protocol, this aspect of *Glossip* applies when DOC seeks to substitute a protocol that uses a drug that carries an unacceptable risk of pain.

The evaluation of Asay's claim must begin (and end) with the fact that when his death warrant was signed on January 8, 2016, the lethal injection protocol in effect, which called for midazolam, vecuronium bromide and potassium chloride, had been tested; and tested by the crucible of multiple adversarial proceedings as well as tested in practice.[44] Further, as

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[43]Even though the circuit court cited *King v. State*, it overlooked the discussion in *King* regarding midazolam and the September 2013 lethal injection protocol:

> Both the United States Supreme Court and this Court have firmly rejected constitutional challenges to the use of midazolam as a sedative in lethal injection protocols. *See Glossip*, 135 S.Ct. at 2739-46; *Correll*, 184 So.3d at 488; *Banks v. State*, 150 So.3d 797, 800-01 (Fla. 2014); *Chavez v. State*, 132 So.3d 826, 831 (Fla. 2014); *Muhammad v. State*, 132 So.3d 176, 195 (Fla. 2013).

King v. State, 211 So. 3d at 888.

[44]It is important to note that when Asay filed a Rule 3.851 motion in January of 2016 following the signing of his death warrant, he did not challenge the September 2013 lethal injection protocol. He was on notice then that if and when he was executed pursuant to the continuous warrant signed January 8, 2016, the September 2013 lethal injection protocol would be used and midazolam would be the drug used to induce unconsciousness. When Florida adopted lethal injection as an alternative to the electric chair, death sentenced individuals were permitted to choose the old method of execution. *Sims v. State*, 754 So. 2d

Buffington stated and is clear from the lethal injection protocols in other states, midazolam is readily available. DOC can procure it from prescriptions (or orders) written by its own medical personnel or by Buffington (PC-R3. 1255-7).

Moreover, Heath testified that midazolam is a painless drug. He has read and reviewed witness reports about every single execution in the U.S. and did not recall any of them indicating that pain was observed (PC-R3. 1444-5). And, in the past, Buffington testified that an inmate would not experience pain with the use of midazolam as the first drug in a lethal injection protocol (PC-R3. 1258). Indeed, midazolam is know to be a pain free drug, unlike etomidate.

Likewise sodium thiopental and pentobarbital - both of which Florida has also used as the first drug in its execution protocol, do not cause any venous pain upon injection, as etomidate is reported to cause (PC-R3. 1446); *see also* PC-R3. 1447 ("we know that from all the executions, I'm guessing around a hundred executions now, in which pentobarbital has been used and prisoners do not evince any evidence of discomfort or pain when it's injected." (PC-R3. 1447). Indeed, pentobarbital has

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657, 665 (Fla. 2000) ("the new law gives inmates the option of choosing the method of execution"). Because the lethal injection protocol in place when Asay's continuous warrant was signed provided for the use of midazolam, Asay should be entitled to choose to be executed pursuant to that protocol. While the circuit court opined that etomidate was its preference, midazolam is Asay's preference. Since it is Asay's execution and since he would prefer that the September 2013 protocol be used if and when he is executed pursuant to the continuous warrant, this Court should reverse the circuit court's order and require that the September 2013 be used, instead of the January 4, 2017 protocol.

been used successfully as a single-drug protocol in Georgia, Texas and Missouri - states that account for a large percentage of executions (PC-R3. 1447).

Buffington, who had previously consulted with DOC about drugs (PC-R3. 1289-90), testified that he could prescribe, or order drugs, even for DOC, including etomidate, midazolam, morphine or pentobarbital (PC-R3. 1255-7).

Asay has set forth multiple painless alternative methods of execution. Buffington's testimony unequivocally establishes that midazolam, pentobarbital and morphine are readily available to DOC through a pharmacist like himself (PC-R3. 1255-7).

However, the information regarding etomidate is another matter. It carries a risk of pain and a risk of seizure-like movements as Asay dies. *See* Def. Ex. 3. Thus, Asay has shown that it raises Eighth Amendment bases to challenge both the substantial risk of harm and the undignified manner of death. *Hall v. Florida*, 134 S. Ct. 1986, 2001 (2014) ("The States are laboratories for experimentation, but those experiments may not deny the basic dignity the Constitution protects.").

In denying Asay's claim, the circuit court failed to address the aspect of the Eighth Amendment that requires that in capital cases the State maintain respect for human dignity "By protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons." *Roper v. Simmons*, 543 U.S. 551, 572 (2005); *see also Trop v. Dulles*, 356 U.S. 86, 100 (1958) (plurality opinion) ("The basic concept underlying the Eighth Amendment is nothing

less than the dignity of man"). "The Eighth Amendment's protection of dignity reflects the Nation we have been, the Nation we are, and the Nation we aspire to be." *Hall v. Florida*, 134 S. Ct. at 1992. Beyond the question of pain, the Eighth Amendment precludes a lethal injection protocol that would deprive the condemned of human dignity.

Indeed, Buffington hypothesized that the paralytic has been retained despite the criticism over the years to reduce the "optics" (PC-R3. 1316), meaning that a writhing, jerking inmate was not acceptable because it is an undignified death. Likewise, Palmer testified that: "[t]he dignity of the death process is a top priority" (PC-R3. 1204, 1210). However, as Heath stated, the movement that is likely to accompany the use of etomidate, which is administered before the paralytic, causes myoclonus or seizure-like movement that may certainly look undignified (PC-R3. 1455).

And, as for harm or pain, the prior protocol's use of midazolam had been shown to be pain free. Midazolam as a first drug in a three drug protocol has been upheld by this Court and the U.S. Supreme Court, *see Muhammad v. State*, 132 So. 3d 176, 196 (Fla. 2013), *Glossip v. Gross*, 135 S.Ct. at 2742. And, the very experts who testified before this Court on behalf of the State: Buffington and Yun, have lauded its use as the first-drug: *Experts Differ on Drug Arkansas Plans to Use in Executions*, John Lyon, Arkansas News, April 12, 2017 ("[Buffington] said [midazolam] would 'induce (a) significant reduced level of consciousness so that the individual would not experience severe

pain upon the timely administration of the second and third drugs employed in the procedure."; "Buffington said midazolam, a benzodiazepine, induces sedation repidly but its effects are short-lived, and for that reason it is not typically used as a general anesthetic for lengthy surgeries. That will not be an issue for Arkansas because lethal injection is a short procedure, he said."); *Decision on Delaying Ricky Gray's Jan. 18 Execution to Come No Later Than Next Week*", Frank Green, Richmond Times Dispatch, Jan. 3, 2017 ("Buffington said he was not aware of any botched execution caused by midazolam."); *see also* Dr. Yun testimony in *State v. Correll*, Orange County Case No. 1985-CF-00355 (PC-R3. 928-67).

Midazolam was used in an Ohio execution on July 26, 2017, and is reported to be "widely available": "As supplies of execution drugs have grown more scarce, at least seven states have turned to midazolam, a powerful sedative that is widely available ...". *Ohio Carries Out Its First Execution Since 2014*, Mitch Smith, The New York Times, July 26, 2017. Thus, the evidence, testimony by Yun and Buffington in other cases, and current practice belies the circuit court's conclusion that "etomidate is more efficient at achieving the intended purpose of the first drug within the three-drug protocol." (PC-R3. 892).

The circuit court also incorrectly relied on the decision in *Lighbourne v. State* (sic), 969 So. 2d 326 (Fla. 2007), to hold that the adequacy of the other aspects of the protocol have been approved by this Court, without acknowledging that the change in drugs, particularly the etomidate, requires consideration of

contingencies that has not occurred here.

Indeed, though Palmer has attended the recent training, he was not aware of any information about the new drug causing pain (PC-R3. 1194; 1212). Likewise, Palmer was unaware of any information that the new drug was more likely to cause body movements (PC-R3. 1195).[45]

Palmer described the consciousness check that follows the administration of the third syringe: "It's conducted by the team warden and begins with an eyelash flick and continues with a – a trapezoid pinch." (PC-R3. 1189). He also stated that if there is any seizure-like activity or muscle twitching, "the team would treat that as a level of consciousness and take the necessary precautions." (PC-R3. 1192; *see also* 1198-9). In his experience, Palmer believes that from the administration of the third syringe until the pronouncement of death averages "6 to 10 to 11 minutes".

Etomidate is short acting (PC-R3. 1237; 1416). Buffington testified that, in clinical practice, physicians use .2 to .6 milligrams per kilogram of body weight to induce anesthesia; so for an average individual of 150 lbs, 14-42 milligrams would be used (PC-R3. 1236-7; 1300). At the high end, with a dose of .3 to .6 milligrams per kilogram the effects of the etomidate would last between five and ten minutes before a patient resumed consciousness (PC-R3. 1300; 1340). Heath testified that using

[45]Heath saw none of the methods to reduce the incidence and severity of the etomidate injection added to the lethal injection protocol (PC-R3. 1464).

eight to fourteen milligrams would last only a few minutes before a patient resumed consciousness (PC-R3. 1416-7).

Further, in the dose prescribed by the lethal injection protocol, Buffington and Yun testified that this would last from fifteen to thirty minutes or more, though this has not been proven (PC-R3. 1253, 1338). In fact, Yun testified that there may be a ceiling effect to the drug (PC-R3. 1367-8), meaning that there is a maximum time that the drug wears off, regardless of the dose.

Thus, the protocol is flawed because it does not identify how the executions will address the adverse reaction of the myoclonis caused by the massive dose of etomidate (PC-R3. 1322), while racing against the short acting nature of etomidate. The safeguards added to the 2007 protocol, when pentobarbital was used as the first drug, are no longer sufficient safeguards for a protocol calling for etomidate as the first drug; there has been no consideration for the adverse reactions of pain and movement clearly identified by the drug manufacturer. The protocol should be tweaked to fit the drugs to be used. The circuit court's order premises its ruling on the notion that the drugs used in a lethal injection are fungible. But, the warnings for potential adverse reactions for each drug are different.

Additionally, the circuit court's conclusion that Asay had not shown that: "morphine, pentobarbital, or compounded pentobarbital were likely to cause less pain than etomidate and

were readily available" is not supported by the evidence.[46] Initially, Heath testified that sodium thiopental, pentobarbital and midazolam do not cause venous pain upon injection (PC-R3. 1444-5; 1446; *see also* PC-R3. 1447) ("we know that from all the executions, I'm guessing around a hundred executions now, in which pentobarbital has been used and prisoners do not evince any evidence of discomfort or pain when [pentobarbital is] injected." (PC-R3. 1447).[47]

Furthermore, *Glossip* does not say that Florida changed its protocol because of the inability to acquire pentobarbital; it simply stated: "Florida became the first state to substitute midazolam for pentobarbital." *Glossip*, 135 S.Ct. at 2734.[48] Indeed, numerous states, including Texas, Missouri, Georgia, Idaho and South Dakota use pentobarbital. And, Buffington testified that he as a pharmacist could acquire pentobarbital for

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[46]Morphine is well recognized to be a standard treatment for pain, particularly in terminally ill patients. *Gonzales v.Oregon*, 546 U.S. 243 (2006); *Hoover v. Agency for Health Care Admin.*, 676 So. 2d 1380, 1381 n.4 (Fla. 3rd DCA 1996); *Bradley v. Kraft Foods, Inc.*, 609 So. 2d 748 (Fla. 1st DCA 1992).

[47]The circuit court's reference to Heath's testimony in other cases related to the harmful effects of pentobarbital is flawed. Heath has often opined on the problems of various states' lethal injection protocols, but not as to the effect of a drug itself. Further, both Yun and Buffington have testified about the benefits and adequacy of midazolam. The circuit court overlooked this testimony.

[48]The circuit court also noted that the manufacturer wrote a letter to Florida's DOC requesting that DOC cease using pentobarbital; however, that doesn't mean that Florida did. Indeed, here, the manufacturer of the etomidate DOC intends to use in Asay's execution has requested that the drug be returned. Obviously, DOC has no intention of doing so.

DOC.[49]

Finally, in upholding the three drug protocol, the circuit court relied on this Court's opinions in *Muhammad* and *Howell*, when the first drug was midazolam. The appropriate analysis must consider the current drugs and the adverse reactions of those drugs. *See* Def. Ex. 3. Likewise, such a conclusion overlooks the fact that numerous states, including those with the most active death chambers, use a single drug protocol, without any reported incidents. If dignity and humanity were truly the goals of DOC, *see* Def. Ex. 1, a single drug protocol would be used in its execution protocol.

In incorrectly evaluating Asay's claim, the circuit court also overlooked and misapprehended the testimony and evidence presented. As to Heath, the circuit court cites to Heath's testimony that etomidate "is the safest drug to use for the patient" (*See* PC-R3. 884). The circuit court later relied on the testimony which is cited without any context to hold: "Dr. Heath's observation of pain in some patients is insufficient. Indeed, Dr. Heath admitted that despite this alleged pain, he still uses etomidate in his daily practice." (PC-R3. 887). Missing from the circuit court's statement and reasoning is that Heath explained that the benefit to his patients - mainly cardio-thoracic patients - is that the drug does not cause the patients' blood pressure to be lowered, a critical consideration with some

[49]On July 27, 2017, Texas executed Tai Chin Preyor with a single drug - pentobarbital. *Texas Executes Man For Killing Woman In 2004 After Break-In*, Michael Graczyk, Associated Press, July 27, 2016.

patients undergoing cardiac surgery (PC-R3. 1417). And, when the issue of his patient's blood pressure is a concern, Heath explained that there were ways to minimize the pain: 1) inject the etomidate slowly so that the propylene glycol gets diluted by the blood; 2) inject the drug into a large diameter vein, again to impact the dilution[50]; 3) give lidocaine, first, in order to numb the wall of the vein; 4) give midazolam for a sedative[51] and fentanyl, as an analgesic, which is a very strong pain killer (PC-R3. 1421-2). Thus, overlooked by the circuit court is the very real fact that the risk is outweighed by the benefit, and the steps taken to reduce or eliminate the pain when etomidate is used. Here, there is no benefit, and Director Palmer testified that the execution has not been informed of the potential adverse effects of etomidate, nor have any steps been taken to prepare for the adverse effects set forth on the package inserts.

Similarly, the circuit court overlooks much about the testimony of Yun who uses etomidate in an emergency setting (PC-R3. 1362). That setting further makes the benefit outweigh the risk, although that was not acknowledged by the circuit court. Further, Yun also uses extremely small doses of etomidate - .2 milligrams per kilogram and he attempts to inject the etomidate into a large vein using a large bore I.V. (PC-R3. 1361; 1365;

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[50]Buffington agreed that etomidate should not be administered in the hands or fine vessels because of potential for some other side effects, including the pain that is caused by the drugs' irritation of the blood vessel ((PC-R3. 1235; 1242).

[51]Yun administers midazolam in five to ten percent of the cases in which he administers etomidate (PC-R3. 1382).

1371; 1373). Thus, the dosage Yun injects in a large bore I.V., in a large vein, is minuscule in comparison to the dosage provided for in the protocol. The dosage Yun uses may due to its small size explain the fact that he has not aware of any pain occurring the 250 to 300 times he has used etomidate. Thus, his experience is not particularly relevant when considering that the current lethal injection protocol calls for an amount that is 10-20 times the clinical dosage which carries the manufacturer's warning and Yun uses less than the clinical dosage. Further, the protocol authorizes the execution team to place the IV in other veins, not just the antecubital fossa which Yun uses. *See* Def. Ex. 1. So, while Yun testified that his patients are often unconscious within 10-20 seconds, the circuit court overlooked his testimony that he uses larger bore I.V.s than are called for in the protocol and uses a larger vein than is required by the protocol.

Asay has established that Florida's current lethal injection protocol creates a risk of substantial harm when compared to known and available alternative methods of execution, in particular when compared to the September 9, 2013 protocol. *See Glossip*, 135 S.Ct. at 2737-8. When his continuous death warrant was signed on January 8, 2016, Asay knew that the September 9, 2013 protocol was to be used in his execution. In his 3.851 motion filed in January of 2016, Asay presented no challenge to that protocol. He had no objection to the use of the September 9, 2013 protocol to carry out his execution. Compared to the September 9, 2013 protocol to which Asay had no objection, the

January 4, 2017 protocol creates an unacceptable risk of pain. *Glossip*, 135 S.Ct. at 2741 ("When a method of execution is authorized under state law, a party contending that this method violates the Eighth Amendment bears the burden of showing that the method creates an unacceptable risk of pain.*")*.

Further, the testimony shows that DOC has not provided the execution team with any information regarding the risks associated with etomidate nor were any adjustments made to the protocol to safeguard against the risks identified with etomidate. *Glossip v. Gross*, 135 S.Ct. at 2742 ("Oklahoma has also adopted important safeguards to ensure that midazolam is properly administered.").

Likewise, in *Baze v. Rees*, 553 U.S. 25, 52 (2008), the U.S. Supreme Court held that a challenged method of execution violated the Eighth Amendment by showing an alternative that effectively eliminated the "'substantial risk of serious harm'." 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).

Moreover here, unlike the circumstances in *Glossip* or *Baze*, the State has knowingly chosen to replace a pain free drug, midazolam, with a drug that carries a substantial risk of pain, etomidate. Florida's intentional and knowing choice to create a substantial risk of pain when one did not exist before violates

the Eighth Amendment. *See Baze v. Rees*, 553 U.S. at 94 ("a method of execution violates the Eighth Amendment only if it is deliberately designed to inflict pain") (Thomas, J., concurring in judgment).

In these circumstances, this Court should enter an order directing DOC when carrying out Asay's execution to use the September 2013 protocol that has repeatedly found to be Eighth Amendment compliant, and that Asay does not object. Relief is warranted.

ARGUMENT III

FLORIDA STATUTE §922.06 IS UNCONSTITUTIONAL AS IT ENABLES ONE PARTY, THE ATTORNEY GENERAL, TO HAVE AN UNFAIR ADVANTAGE OVER THE OPPOSING PARTY, IN THIS CASE ASAY, THEREBY DEPRIVING THAT PARTY OF HIS RIGHT TO DUE PROCESS.

Fla. Stat. §922.06 states:

922.06 Stay of execution of death sentence.—

> (1) The execution of a death sentence may be stayed only by the Governor or incident to an appeal.
>
> (2)(a) If execution of the death sentence is stayed by the Governor, and the Governor subsequently lifts or dissolves the stay, the Governor shall immediately notify the Attorney General that the stay has been lifted or dissolved. Within 10 days after such notification, the Governor must set the new date for execution of the death sentence.
>
> (b) If execution of the death sentence is stayed incident to an appeal, upon certification by the Attorney General that the stay has been lifted or dissolved, within 10 days after such certification, the Governor must set the new date for execution of the death sentence. When the new date for execution of the death sentence is set by the Governor under this subsection, the Attorney General shall notify the inmate's counsel of record of the date and time of execution of the death sentence.

By its own language, §922.06(2)(a) requires the Governor to

act immediately upon the dissolution of a stay that had been issued by him. Immediate notification to the Attorney General is required, and a new execution date must be set within ten days.

Conversely, §922.06(2)(b) has no comparable triggering mechanism. While it requires the Governor to set an execution date within ten days upon certification by the Attorney General that a stay incident to appeal has been lifted, there is no requirement as to when the Attorney General must issue the certification.

In response to Asay's assertion that the statute provided the Attorney General with an unfair advantage, the circuit court likened this situation to the Governor's discretion in setting an execution date (PC-R3. 896). Moreover, according to the circuit court, "The timing of the AG's certification does not impact the merits or substance of the instant case." (PC-R3. 896). Rather, the circuit court was of the opinion that because the Governor, upon certification of the Attorney General, could have rescheduled Defendant's execution in February 2017, Asay "cannot logically argue having five more months of notice has denied him some constitutional right." (PC-R3. 896).

Asay submits that the circuit court's order is erroneous as a matter of fact and law. First, this issue has nothing to do with the Governor's discretion. Rather, the text of the statute "license[s] one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules." *R.A.V. v. St. Paul*, 505 U.S. 377, 392 (1992). Indeed, §922.06(2)(b) enables the Attorney General to pick and choose the

most advantageous time or set of circumstances, at the expense of the opposing party, in which to certify to the Governor that a stay has been lifted. In the instant case, for example, the Florida Supreme Court lifted Asay's stay on February 1, 2017. Yet, the Attorney General waited for five months - after an extension of time to file the brief in opposition to Asay's petition was filed, and after the United States Supreme Court recessed for the summer - in which to certify to the Governor that the stay had been lifted. As explained previously, the State gained an advantage in that Asay's petition for writ of certiorari will now be considered under the exigencies of an execution date and now five justices, rather than four, must agree to review his case.

Moreover, as illustrated by Asay's lethal injection challenge, the State gained an advantage in defending the new protocol. Asay did not have "five more months of notice" as the circuit court proclaimed. Rather, Asay was just provided with the new protocol, which substantially changed the drugs utilized to carry out his execution; yet the State has had since January 4, 2017,[52] in which to prepare a defense of the new protocol.

"[Flundamental fairness is the hallmark of the procedural protections afforded by the Due Process Clause." *Ford v. Wainwright*, 477 U.S. 399, 424 (1986)(Powell, J., concurring in part and concurring in the judgment). Here, Asay is being denied

[52]On January 4, 2017, Florida Department of Corrections Secretary, Julie L. Jones, signed into effect a new lethal injection protocol which has never been used before.

his constitutional protections because of a statute which provides the Attorney General with an unfair tactical advantage. *See United States v. Marion*, 404 U.S. 307, 324 (1971) ("Thus, the Government concedes that the Due Process Clause of the Fifth Amendment would require dismissal of the indictment if it were shown at trial that the pre-indictment delay in this case caused substantial prejudice to appellees' rights to a fair trial and that **the delay was an intentional device to gain tactical advantage over the accused.**") (Emphasis added). Relief is warranted.

CONCLUSION

Asay submits that relief is warranted in the form of the imposition of a life sentence, a remand to the circuit court for a full and fair hearing, or for any other relief that this Court deems proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing initial brief has been furnished by electronic mail to Charmaine Millsaps, Assistant Attorney General, on this 2nd day of August, 2017.

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This is to certify that this Initial Brief has been produced in a 12 point Courier type, a font that is not proportionately spaced.

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