In the Supreme Court of Florida

MARK JAMES ASAY,

Appellant,

v.

CASE NO. SC17-1400
DEATH WARRANT SIGNED
EXECUTION SCHEDULED
FOR THURSDAY, AUGUST 24, 2017

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, MARK JAMES ASAY, the defendant in the trial court, will be referred to as appellant, the defendant or by his proper name. Appellee, the State of Florida, will be referred to as the State. Pursuant to Rule 9.210(b), Fla. R. App. P. (1997), this brief will refer to a volume according to its respective designation within the Index to the Record on Appeal. A citation to a volume will be followed by any appropriate page number within the volume. The symbol "IB" will refer to appellant's initial brief and will be followed by any appropriate page number. All double underlined emphasis is supplied.

STATEMENT OF THE CASE AND FACTS

This is the appeal from the trial court's denial of a successive 3.851 postconviction motion in a death warrant case. The trial court held an evidentiary hearing on the lethal injection claim raised in the successive postconviction motion but summarily denied the other three claims.

The facts of this case, as recited by the Florida Supreme Court in the direct appeal opinion, are:

> According to testimony of Asay's brother, Robbie, and Robbie's friend, "Bubba" McQuinn, on July 17, 1987, the three met at a local bar where they drank beer and shot pool. They left the bar around 12:00 a.m. and went to a second bar where they stayed until closing at 2:00 a.m. Although Asay drank a number of beers, both Bubba and Robbie testified that Asay did not appear drunk or otherwise impaired.
>
> After the bar closed, Robbie said he wanted to try to "pick up a girl" he had seen at the bar, so Bubba and Asay drove around the corner in Asay's truck. They returned to discover that Robbie had been unsuccessful with the girl he had seen, so Bubba suggested that they go downtown to find some prostitutes and he would pay for oral sex for them all. Asay and Bubba left in Asay's truck and Robbie left in his. Once downtown, Asay and Bubba soon spotted Robbie who was inside his truck talking to a black man, Robert Lee Booker. Robbie was telling Booker who was standing at the driver's side window of Robbie's truck that he and his friends were looking for prostitutes.
>
> After spotting Booker standing by Robbie's truck, Asay told Bubba to pull up next to the truck. Asay immediately got out of his truck, proceeded to Robbie's truck, and told Robbie "You know you ain't got to take no s--t from these f---ing niggers." Although Robbie told Asay that "everything is cool," Asay began to point his finger in Booker's face and verbally attack him. When Booker told him "Don't put your finger in my face," Asay responded by saying "F--k you, nigger" and pulling his gun from his back pocket, shooting Booker once in the abdomen. Booker grabbed his side and ran. According to the medical examiner, the bullet perforated the intestines and an artery causing internal hemorrhaging. Booker's body was later found under the edge of a nearby house.
>
> Robbie drove away immediately after the shooting. Asay jumped into the back of his truck, as Bubba drove off. When Asay got into the cab of the truck, Bubba asked him why he shot Booker. Asay responded, "Because you got to show a nigger who is boss." When asked if he thought he killed Booker, Asay replied, "No, I just scared the s--t out of him."
>
> Bubba testified that after the shooting, Asay and Bubba continued to look for prostitutes. According to Bubba, he saw "Renee" who he knew would give them oral sex. It appears that at the time neither Bubba nor Asay was

> aware that "Renee" was actually Robert McDowell, a black man dressed as a woman. According to Bubba, he negotiated a deal for oral sex for them both. Bubba drove the truck into a nearby alley. McDowell followed. Bubba testified that McDowell refused to get into the truck with them both, so Asay left the truck and walked away to act as a lookout while Bubba and McDowell had sex. As McDowell started to get into the truck with Bubba, Asay returned, grabbed McDowell's arm, pulled him from the truck and began shooting him. McDowell was shot six times while he was backing up and attempting to get away. Asay jumped back in his truck and told Bubba to drive away. When asked why he shot McDowell, Asay told Bubba that he did it because "the bitch had beat him out of ten dollars" on a "blow job." McDowell's body was found on the ground in the alley soon after the shots were heard. According to the medical examiner, any of three wounds to the chest cavity would have been fatal.
>
> Asay later told Charlie Moore in the presence of Moore's cousin, Danny, that he shot McDowell because McDowell had cheated him out of ten dollars on a drug deal and that he had told McDowell, "if he ever got him that he would get even." Asay told Moore that he was out looking for "whores," when he came across McDowell. According to Moore's cousin, Danny, Asay also told Moore that his plan was to have Bubba get McDowell in the truck and they "would take her off and screw her and kill her." Moore testified that Asay told him that when Bubba "didn't have [McDowell] in the truck so they could go beat him up," Asay "grabbed [McDowell] by the arm and stuck the gun in his chest and shot him four times, and that when he hit the ground, he finished him off." As a result of tips received from Moore and his cousin after McDowell's murder was featured on a television Crime Watch segment, Asay was arrested and charged by indictment with two counts of first-degree murder.
>
> The state also presented testimony of Thomas Gross, who was Asay's cellmate while he was awaiting trial. Gross testified that when the black prisoners, who were also housed in their cell, were out in the recreation area, Asay told him he was awaiting trial for a couple of murders. According to Gross, Asay then showed him some newspaper articles and told him, "I shot them niggers." While they were discussing the murders, Asay showed Gross his tattoos, which included a swastika, the words "White Pride," and the initials "SWP" which Gross said stand for supreme white power.

Asay v. State, 580 So.2d 610, 610-12 (Fla. 1991).

The jury found Asay guilty of both murders and recommended a death sentence by a vote of nine to three. *Asay v. State*, 210 So.3d 1, 7 (Fla. 2016). The trial court followed the recommendation and imposed a sentence of death for each conviction. The court found two aggravating factors established in connection with both murders: that Asay was under sentence of imprisonment at the time of the murders and had been previously convicted of a capital felony (based on the

contemporaneous murder conviction). *Id.* In addition, the trial court found a third aggravator as to the McDowell murder only: that the murder was committed in a cold, calculated, premeditated manner (CCP). *Id.* As to both murders, the trial court found Asay's age of 23 at the time of the murders to be the only mitigation for his offenses. *Id.*

In his direct appeal to the Florida Supreme Court, Asay raised seven issues: 1) the trial court erred by allowing racial prejudice to be injected into the trial; 2) the trial court erred in failing to advise Asay of his right to represent himself and to conduct an inquiry when Asay asked to discharge court-appointed counsel; 3) the trial court erred in denying Asay's *pro se* motion for a continuance of the penalty phase of the trial to enable him to secure additional mitigation witnesses; 4) the prosecution improperly diminished the jury's role in sentencing; 5) the trial judge erred by failing to grant his motion for judgment of acquittal on count I of the indictment charging him with the first-degree premeditated murder of Robert Lee Booker; 6) the trial court erred in finding the McDowell murder was committed in a cold, calculated, and premeditated manner (CCP); and 7) death is not proportionate for these murders because they were "spontaneous, impulsive killings during stressful circumstances." *Asay v. State*, 580 So.2d 610, 612, n.1 (Fla. 1991) (listing four of the seven issues raised in the direct appeal). The Florida Supreme Court found that issues one through four did not merit discussion. *Id.* at 612. The Florida Supreme Court affirmed the two convictions for first-degree murder and the death sentences.

Asay filed a petition for writ of certiorari in the United States Supreme Court which was denied on October 7, 1991. *Asay v. Florida*, 502 U.S. 895 (1991).

On March 16, 1993, Asay filed an initial 3.850 postconviction motion in state court raising 20 claims. *Asay v. State*, 769 So.2d 974, 978, n.5 (Fla. 2000) (listing the claims in the amended initial postconviction motion). On March 25-27, 1996,

an evidentiary hearing was held on various claims of ineffectiveness. On April 23, 1997, the trial court denied the postconviction motion.

Asay appealed the denial of his postconviction motion to the Florida Supreme Court. *Asay v. State*, 769 So.2d 974, 977 (Fla. 2000). In his postconviction appeal to the Florida Supreme Court, Asay raised the following claims: 1) judicial bias during the trial and postconviction proceedings resulted in a denial of a fair and impartial tribunal throughout his proceedings in violation of his due process rights; 2) the trial court improperly limited the scope of the evidentiary hearing by (a) limiting the testimony of some of Asay's siblings concerning mitigating evidence not presented during the sentencing phase, (b) limiting the scope of Asay's examination of his trial counsel regarding his knowledge of prior inconsistent statements of key witnesses, and (c) refusing to hear the testimony of Thomas Gross recanting his trial testimony; 3) ineffectiveness of counsel during the guilt phase for (a) failing to adequately impeach the State's key witnesses, (b) for failing to present a voluntary intoxication defense, and (c) for failing to rebut the State's arguments that he committed the crime due to his racial animus; 4) ineffectiveness of counsel during the penalty phase for (a) failing to investigate and present statutory mitigating evidence that he was acting under extreme emotional distress and his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired, and (b) failing to present nonstatutory mitigating evidence of physical and emotional abuse and poverty during his childhood, alcohol abuse and his history of "huffing" inhalants; 5) the trial court improperly summarily denied several claims; and 6) cumulative error. *Asay v. Moore*, 828 So.2d 985, 989, n.7 (Fla. 2002) (listing the issues raised in the postconviction appeal in a footnote). Following oral argument, the Florida Supreme Court affirmed the trial court's denial of the postconviction motion. *Asay v. State*, 769 So.2d 974 (Fla. 2000).

On October 25, 2001, Asay filed a state habeas petition in the Florida Supreme Court raising five claims. The Florida Supreme Court concluded that: 1) the defense attorney's failure to confer with petitioner before the final acceptance of the jury panel did not violate due process right to be present during critical stages; 2) the trial court's misstatement during voir dire concerning mitigating factors was not fundamental error; 3) appellate counsel did not render ineffective assistance; 4) the trial court did not commit fundamental error by failing to refer to additional mitigating evidence; and 5) the instruction on the CCP aggravating factor was correct. The Florida Supreme Court denied the petition. *Asay v. Moore*, 828 So.2d 985 (Fla. 2002).

On October 17, 2002, Asay filed a successive 3.851 postconviction motion in state trial court raising a *Ring v. Arizona*, 536 U.S. 584 (2002), claim. The trial court denied the successive motion. On December 20, 2004, the Florida Supreme Court rejected the *Ring* claim in an unpublished opinion, which states in its entirety:

> "Mark James Asay appeals the circuit court's order summarily denying his successive motion to vacate judgment and sentence wherein he challenges the validity of his death sentences under *Ring v. Arizona*, 536 U.S. 584 (2002). The circuit court's order is hereby affirmed." *Asay v. State*, 892 So.2d 1011 (Fla. 2004).

Asay then filed a petition for writ of certiorari in the United States Supreme Court, which the Court denied on November 2, 2009. *McNeil v. Asay*, 558 U.S. 1007 (2009).

On August 15, 2005, original federal habeas counsels, Dale Westling and Mary Catherine Bonner, filed a federal habeas petition. *Asay v. Sec'y, Fla. Dep't. of Corr.* No. 3:05-cv-147-J-32PDB, 2014 WL 1463990, *6 (M.D. Fla. April 14, 2014). The original habeas petition was untimely. Previously, before the habeas petition was

filed by counsel, on February 11, 2005, Asay had filed a letter with the federal district court complaining that his habeas petition would be untimely. The federal district court ordered several rounds of briefing and conducted two oral arguments on the issue of the timeliness of the petition. The district court also conducted an evidentiary hearing on the issue of equitable tolling. Following the evidentiary hearing on equitable tolling, Respondents, in light of *Holland v. Florida*, 560 U.S. 631 (2010), without waiving the timeliness argument, agreed to proceed to the merits of the habeas petition.

On March 11, 2011, newly appointed habeas counsel, Thomas Fallis, filed a motion to adopt the original habeas petition. The original habeas petition had raised 11 grounds for habeas relief: 1) the trial court's failure to provided substitute trial counsel under *Nelson v. State*, 274 So.2d 256 (Fla. 4th DCA 1973), and to advise Petitioner that he had the right to proceed *pro se*; 2) ineffective assistance of his trial counsel, Raymond A. David, for delegating the investigation to an investigator; 3) ineffectiveness for failing to meet with him in jail and for failing to cross-examine the State's witnesses, "Bubba" O'Quinn, Danny Moore, Charlie Moore, and Dr. Floro, regarding inconsistencies in their testimony; 4) ineffectiveness for not more vigorously pursuing the reasonable doubt trial strategy, such as failing to object to admission of evidence which tied Petitioner to the type of gun used in the murders and failing to present a voluntary intoxication defense; 5) failing to present his abusive childhood and mental mitigation during the penalty phase; 6) denial of a fair trial due to the prosecution introducing evidence that the murders were racially motivated and that counsel was ineffective for failing to keep race out of the trial; 7) Thomas Gross's trial testimony was a violation of *Giglio v. United States*, 405 U.S. 150 (1972), and *Brady v. Maryland*, 373 U.S. 83 (1963); 8) ineffective assistance of counsel for advising him not to testify in his own behalf; 9) ineffectiveness during guilt phase

closing argument for acknowledging that Asay shot someone in the dark; 10) a claim that Florida's death penalty statute violates *Ring v. Arizona*, 536 U.S. 584 (2002); and 11) ineffectiveness for failing to convey a plea offer from the trial court. On August 15, 2011, Respondents filed an answer on the merits to the habeas petition. Asay filed a reply abandoning grounds 1, 7, 9 and 11.

On April 14, 2014, the federal district court denied the federal habeas petition on the merits but granted a certificate of appealability (COA) on the issue of whether "Petitioner received ineffective assistance of counsel at the penalty phase of trial because counsel failed to investigate, obtain and present additional mitigating evidence."

Asay, again represented by federal habeas counsel Fallis, filed a notice of appeal to the Eleventh Circuit. On June 13, 2014, federal habeas counsel Fallis filed a motion to withdraw the appeal stating that Asay directed him to dismiss the appeal. The Eleventh Circuit voluntarily dismissed the federal habeas appeal with prejudice.

2016 warrant litigation

On January 8, 2016, Governor Rick Scott signed a death warrant setting Asay's execution for Thursday, March 17, 2016, at 6:00 p.m. On January 27, 2016, now represented by Martin J. McClain, filed his second successive postconviction motion, asserting four grounds for relief: 1) newly discovered evidence exists that diminishes the reliability of firearms identification evidence presented at trial; 2) Asay's due process and equal protection rights were violated because he did not have state counsel at the time the Governor signed his death warrant and for the previous 10 years; 3) Asay is entitled to relief under *Hurst v. Florida*, 136 S.Ct. 616 (2016), and that *Hurst v. Florida* applies retroactively so that the execution should be stayed; and 4) the State violated *Brady v. Maryland*,

373 U.S. 83 (1963), by suppressing numerous documents Asay recently received. *Asay v. State*, 210 So.3d 1, 10 (Fla. 2016). The state trial court summarily denied all four claims and denied the motion for a stay of execution.

Asay appealed the denial of his successive postconviction motion to the Florida Supreme Court raising four issues. *Asay v. State*, 210 So.3d 1, 10 (Fla. 2016). Asay also filed a state habeas petition in the Florida Supreme Court. Asay also filed a motion for stay of execution based on *Hurst v. Florida*, 136 S.Ct. 616 (2016). On March 2, 2016, the Florida Supreme Court granted a stay of execution. On December 22, 2016, the Florida Supreme Court affirmed the denial of the successive motion and denied the state habeas petition. *Asay v. State*, 210 So.3d 1 (Fla. 2016).

Asay filed a motion for rehearing which the Florida Supreme Court denied on February 1, 2017. On February 1, 2017, the Florida Supreme Court lifted the stay.

On April 29, 2017, Asay then filed a petition for writ of certiorari in the United States Supreme Court from the Florida Supreme Court's opinion raising three claims: 1) a *Brady v. Maryland*, 373 U.S. 83 (1963), claim; 2) a *Strickland v. Washington*, 466 U.S. 668 (1984), claim; and 3) a claim of newly discovered evidence. *Asay v. Florida*, 16-9033. The State's brief in opposition was originally due June 5, 2017. The State filed a motion for a 30-day extension of time to file its brief. Opposing counsel did not object to the extension and the United States Supreme Court granted the motion. The brief was then due on July 5, 2017. The State filed its brief in opposition on July 3, 2017. The petition is still pending in the United States Supreme Court.

2017 warrant litigation

On July 3, 2017, Governor Scott rescheduled the execution in this case for August 24, 2017.

On July 10, 2017, the trial court held a first case management conference to schedule the proceedings in the trial court as required by Florida Rule of Criminal Procedure 3.851(h)(6). (974-1002). At that hearing, registry counsel Marty McClain stated that he had read a newspaper article at the beginning of the year indicting that there was a new lethal injection protocol but he had not received the protocol itself from the Department of Corrections (DOC) (983). Undersigned counsel explained to the Court that the new protocol was publicly available online at DOC's website just as the previous protocols have been. (986)[1]. On the same day, July 10, 2017, the State filed a copy of the 2017 lethal injection protocol with the trial court and served opposing counsel with a copy (256-271).

Asay filed nine public record demands with the Department of Corrections (DOC); Florida Department of Law Enforcement (FDLE); the Office of the State Attorney for the Fourth Judicial Circuit (SO); the Office of the Attorney General (AG); the Jacksonville Sheriff's Office (JSO); and the Office of the Governor. (279-330). The agencies responded. (334-361, 373-387). On July 17, 2017, the trial court held a hearing on the public record demands. (1003-1048).

On July 19, 2017, Asay filed a successive postconviction motion raising four claims: 1) a claim that the trial court's ruling regarding the public record demands violates due process; 2) a claim that Florida's three-drug lethal injection protocol using etomidate violates the Eighth Amendment; 3) a claim that the Governor

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[1] The protocol is available at:

http://www.dc.state.fl.us/oth/deathrow/lethal-injection-procedures-as-of_01-04-17.pdf

signing a death warrant when a petition for writ of certiorari is pending in the United States Supreme Court violates due process; and 4) a claim that the stay statute, § 922.06(2)(b), Florida Statutes (2017), violates due process. (399-423). Asay also filed a motion for evidentiary hearing and for a stay of execution. (434-453).

On July 21, 2017, the State filed an answer to the successive motion (539-564). The State also filed a response to the motion for stay. (485-489).

In a footnote to the successive motion, Asay listed a number of proposed witnesses that he intended to present if granted an evidentiary hearing on the lethal injection claim including 1) Michelle Glady, Communications, DOC; 2) Philip Fowler, Assistant General Counsel, DOC; 3) Julie L. Jones, Secretary, DOC; 4) Dr. Mark J. Heath, anesthesiologist, defense expert witness; 5) Professor Deborah Denno, law professor; 6) Warden John Palmer, Florida State Prison, DOC; 7) all execution team members including the team warden and medical personnel; 8) the DOC pharmacist; and 9) Florida Department of Law Enforcement (FDLE) employees who intend to participate in the execution. (405 at n.10). On July 24, 2017, the State filed a motion to strike the proposed witnesses (565-574). The State did not object to the testimony of Dr. Mark J. Heath, an anesthesiologist, in its motion.

On July 24, 2017, the trial court held a second case management conference, commonly referred to as *Huff* hearing, to determine which claims required factual development at an evidentiary hearing. (1049-1171). The trial court summarily denied claims 1, 3, and 4 but determined an evidentiary hearing would be held on claim 2 regarding the safety and efficacy of etomidate. (1104-1106).

On July 26, 2017, the trial court held an evidentiary hearing limited to the issue of the safety and efficacy of etomidate. On July 26, 2017, the trial court held an evidentiary hearing on the use of etomidate as the first drug in the 2017

protocol. Four witnesses testified at the evidentiary hearing: 1) Associate Director John Palmer of Florida's Department of Corrections; 2) Dr. Daniel Buffington, a clinical pharmacologist, for the State; 3) Dr. Steven Yun, an anesthesiologist, for the State; and 4) Dr. Mark Heath, an anesthesiologist, for the defense.

John Palmer is the Assistant Director of institutions in Region 2 for DOC. (1182). Assistant Director Palmer has worked for the DOC for 28 years, which includes 10 years as a warden at Florida State Prison (F.S.P.). (1182). As the Warden of F.S.P., he was required to ensure that the executions were carried out in compliance with Florida law. (1183). Director Palmer oversaw 18 executions while warden, and was involved with more than 40 executions over the course of his employment with the DOC. (1204). An "efficient, respectful, dignified execution is a priority" for the DOC. (1204). The execution team receives quarterly training on execution procedures. (1196).

The execution protocol requires that execution team members "understand the effects of the drugs that are used in the lethal injection process." (1193). After the injection of the first drug, the execution team performs a consciousness check to determine if the inmate is unconscious. (1190). This check includes an eyelash flick, a trapezoid pinch, and the shake and shout. (1189, 1206, 1215). This check is performed approximately 2 minutes 20 seconds after the initial injection of etomidate. (1215). The execution team has experienced muscle twitching during previous executions and is aware to expect such movements during executions. (1191). In the event of seizure like activity, the execution team "would treat that as a level of consciousness and take the necessary precautions." (1192). The process would be suspended and the experts on the team with medical training would evaluate the I.V. as well as the prisoner. (1199).

There are two trays, A and B, which contain the protocol drugs. (1207). Each tray has "the exact same syringes"; they are duplicates. (1208). If after

administering the etomidate from tray A, the process was suspended due to a concern with consciousness, the process would start anew with the etomidate from tray B. (1208). Mr. Palmer estimates that from previous executions, the time from the first drug being administered until death is approximately six to ten minutes. (1209).

Dr. Daniel Buffington was qualified as an expert in the field of pharmacology (1231). Dr. Buffington described etomidate as a sedative hypnotic agent or an F.D.A. approved anesthetic agent often used for the initiation of anesthesia (1232, 1235). Etomidate is used "all across the country and in a variety of practice settings and compared to other anesthetics has less cardiovascular complications" (1244-45). It can be used for long procedures in large doses and the "effects are dose dependent meaning the bigger the does we give the more the effect we achieve" as far as the duration of sedation. (1235). When using etomidate in surgical procedures, dosing varies based on an individual's size, weight, and other characteristics, but the normal dosing range is ".2 to .6 milligrams per kilogram of weight" (1236). Generally, approximately 30-40 milligrams are used to render an individual unconscious, which occurs in approximately 30 to 60 seconds (1237-38). The dosage indicated for the lethal injection protocols is between 5 and 14 times the dose generally used and would render an individual unconscious and insensate to pain stimuli for "an extended period of time," likely beyond 30 minutes. (1237, 1253, 1300).

Regarding any pain experienced by the patient, Dr. Buffington testified that on average, about 20 percent of individuals experience discomfort upon injection of etomidate, which is described as "mild to moderate, not severe" and the “discomfort abates or subsides very quickly.” (1241-42, 1244). Of the approximately 250 times that Dr. Buffington has observed etomidate administered, he has never had a patient complain of pain. (1343, 1351). There

are over 450 medications that have post-injection discomfort. (1242-43). Midazolam and etomidate both are described similarly as having instances of discomfort associated with injection in some individuals. (1258). Any discomfort experienced is localized to the vein receiving the injection and is intermittent. (1302-03). The discomfort could be caused by the preservative that is packaged with the etomidate but research has not been done on that specifically. (1330). No research "supports that there's an increase or a dose dependent response to pain." (1341, 1485). Once sedation is achieved seconds after injection, the individual is "not conscious of external stimuli" and would not feel any pain. (1248). In Dr. Buffington's expert opinion, as "designed and administered in the protocol there would be no anticipation of perception of pain or discomfort" after being sedated with etomidate. (1252).

After receiving the 200 milligrams of etomidate described in the protocol, there is no possibility that the individual would be conscious. (1250). The consciousness checks prescribed in the protocol are also routinely done in the surgical setting (1250). In Dr. Buffington's opinion, and based on his expertise, the medical literature, and the manufacturer's materials, after receiving the prescribed dosage of etomidate and passing a consciousness check, an individual would not perceive the effects of the second and third drugs in the protocol (1251). Dr. Buffington would expect that an individual given 200 milligrams of etomidate would remain unconscious for more than 30 minutes. (1253). The lethal injection protocol timeline from the injection of etomidate to completion is expected to last under five minutes (1254).

Further, the second drug, rocuronium, a paralytic agent, does not induce pain. (1251). Rocuronium is also commonly used in the clinical setting after an anesthetic such as etomidate for procedures like intubation (1252). The paralytic is used to decrease subsequent movement after sedation. (1316).

Etomidate, as well as many other medications, can cause “transient skeletal movement.” (1246). This muscle reaction, or myoclonus, "is not a movement in response to a pain stimuli, so it's just an automatic or musculoskeletal response.” (1246-47). When given etomidate, 63 percent of individuals experience myoclonus. (1321). The most common muscle reaction to etomidate is described as tonic, or "some physical contraction or movement that takes place that's not violent and that's not seizure like.” (1246). Over 75 percent of myoclonus experienced with use of etomidate is tonic. (1321). Dr. Buffington described these movements as being like a finger moving, a wrist turning, the head turning, or a grimace on the face (1247). Muscular movements during general anesthesia are common and are why individuals are restrained for surgical procedures. (1247-48). These reactions are dose dependent, so they would likely be an increase in occurrence under the protocol’s 200 milligram dosage. (1321). This increase is merely in incidence and not in intensity. (1322). Individuals that experienced some type of venous discomfort also appeared more likely to experience muscular movement. (1324).

Dr. Steve Yun received an undergraduate degree in medicine from the University of Wisconsin, his M.D. from University of Southern California, Los Angeles. (1355). He is board certified in anesthesiology and is on staff at the Western University School of Medicine. (1355). Dr. Yun was recognized by the court as an expert in the field of anesthesiology. (1359).

Dr. Yun has administered etomidate roughly 250-300 times during his career, never having used a premedication (1360). He has never had a patient complain about pain at the injection site or following the etomidate injection (1361). At a standard dosage, etomidate renders an individual unconscious within 10 to 20 seconds (1361). Dr. Yun chooses to administer etomidate "because of its reliability, predictability and also its stability in terms of cardiovascular issues"

(1361). Etomidate is not as popular as other anesthetic drugs because it has a higher instance of post-surgery nausea and it interferes with hormone production (1376). In his expert opinion, etomidate "does not cause pain on injection." (1365). Dr. Yun testified that two injections of 100 miligrams of etomidate administered back to back would "absolutely" render an individual unconscious and insensate prior to any injury or insult. (TR. 1367).

In his experience, Dr. Yun has only witnessed "two or three patients exhibit mild myoclonic movements of their extremities" after being injected with etomidate (1366). These movements are not a reaction to pain, but merely an involuntary movement associated with etomidate administration. (1384). However, Dr. Yun's opinion is that the large dose of etomidate would "completely wipe out any possibility of myoclonic movements." (1366). He believes 200 milligrams of etomidate would render someone unconscious for 45 minutes to 1.5 hours (1367). Dr. Yun testified that there may be a ceiling effect but that "certainly the duration of action will be prolonged as the dose of medicine increases." (1368).

Dr. Mark Heath has a bachelor degree in Biology from Harvard and a doctorate in medicine from University of North Carolina, Chapel Hill (1394). Dr. Heath is board-certified in anesthesiology and is currently a full-time attending anesthesiologist and professor in the Department of Anesthesiology at Columbia University. (1395-96). The trial court recognized Dr. Heath as an expert in anesthesiology. (1401-02).

Dr. Heath has only testified on behalf of prisoners who are facing execution (1407). He is opposed to lethal injection as it is currently practiced in this country (1466).

Dr. Heath has administered etomidate several hundred times and chooses to use it because it is "the safest drug to use for the patient" and "most patients don't

have pain." (1418-19, 1472). Some of Dr. Heath's patients have moaned, winced, grimaced, or said "ow" upon receiving etomidate. (1418).

Dr. Heath believes the pain is caused by propylene glycol (1419). Propylene glycol helps to dissolve etomidate into a solution that can be administered intravenously. (1415). Dr. Heath admits he does not know much about propylene glycol but believes that the pain is dependent on "the concentration of propylene glycol that builds up in the vein." (1420). This pain is lessened if the solution is injected slowly and into a large diameter vein (1421). Once etomidate reaches a patient's brain and spinal cord, "it's not possible to experience anything including pain" (1422). It takes approximately 20 to 30 seconds for etomidate to be carried from the injection site to the brain, but could occur in as little as 10 seconds (1423-24). Pain occurs in approximately 20 percent of individuals (1427). Once etomidate reaches the brain and the individual becomes unconscious, body movement can sometimes be observed (1449). On average, about 30 percent of patients experience myoclonic movement (1475). Dr. Heath describes the movement as "not a seizure" but "repetitive jerking motions of the limbs" (1453). A large dose is likely to cause prolonged muscle movement (1455). Dr. Heath believes this might complicate the decision of when the second drug should be administered because it might appear that the prisoner is still conscious (1453).

The next day, on July 27, 2017, the trial court heard closing arguments. (1174-1493).

On July 28, 2017, the trial court denied the successive postconviction motion and the motion to stay. (869-897). On July 31, 2017, Asay filed a motion for rehearing with numerous attachments. (899-973). The trial court denied rehearing.

This appeal follows.

SUMMARY OF ARGUMENT

ISSUE I

Asay asserts that the trial court's denial of his motion to continue the evidentiary hearing and denial of public records including the disclosure of the source of the etomidate rendered the evidentiary hearing not full and fair in violation of due process. The evidentiary hearing was full and fair. Asay's expert anesthesiologist was permitted to appear by phone to testify (the State's expert anesthesiologist did not testify in person either). The trial court properly denied the motion to continue the evidentiary hearing. Due process does not require the disclosure of the source or manufacturer of the lethal injection drugs. The trial court also properly denied the public record demands regarding the disclosure of the manufacturer of etomidate. The warrant litigation did not violate due process.

ISSUE II

Asay also asserts that the trial court erred in denying his Eighth Amendment challenge to Florida's 2017 lethal injection protocol which uses etomidate as the first drug in a three-drug protocol. IB at 57. Asay must establish: 1) the state's lethal injection protocol creates a substantial risk of severe pain, and 2) there is a "known and available" alternative method of execution that is "feasible, readily implemented, and in fact significantly reduces a substantial risk of severe pain" but he has not done so. The first drug, etomidate, is approved by the Federal Drug Administration and is routinely used in the clinical setting. Etomidate does not cause "severe" pain. According to the testimony at the evidentiary hearing, the majority of patients given etomidate experience no pain whatsoever. And the minority of patients who do experience pain have only mild to moderate pain and experience that pain only for the ten seconds it takes for the drug to take effect. Additionally, as the trial court found, the side effect of muscle movements will not

interfere with the protocol. Furthermore, the proposed alternatives of a single dose of morphine or pentobarbital are not available, or feasible or readily implemented. Asay meets neither of the criteria required to establish an Eighth Amendment violation. The trial court properly denied the claim following an evidentiary hearing.

ISSUE III

Asay raises a due process challenge to the stay statute, § 922.06, Florida Statute (2017), arguing the statute's failure to require the Attorney General Office to certify that the stay has been lifted within a certain time frame allows the State to have an "unfair advantage" which violates due process. IB at 71. Asay lacks standing to challenge the stay statute. Furthermore, this claim is not cognizable under this Court's precedent because the stay statute does not create any enforceable rights. The trial court properly summarily denied this claim.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING A MOTION FOR CONTINUANCE OF THE EVIDENTIARY HEARING AND THE PUBLIC RECORD DEMANDS? (Restated)

Asay asserts that the trial court's denial of his motion to continue the evidentiary hearing and denial of public records including the disclosure of the source of the etomidate rendered the evidentiary hearing not full and fair in violation of due process. The evidentiary hearing was full and fair. Asay's expert anesthesiologist was permitted to appear by phone to testify (the State's expert anesthesiologist did not testify in person either). The trial court properly denied the motion to continue the evidentiary hearing. Due process does not require the disclosure of the source or manufacturer of the lethal injection drugs. The trial court also properly denied the public record demands regarding the disclosure of the manufacturer of etomidate. The warrant litigation did not violate due process.

A. Rescheduling the execution

Asay claims it is a violation of due process for the Governor to reschedule an execution when a petition for writ of certiorari is pending in the United States Supreme Court. IB at 27. Opposing counsel claims that the State moving for an extension of time in the United States Supreme Court and then the Governor signing a warrant permits the State to manipulate the system in a manner that may allow the State to obtain a litigation advantage. But, as this Court has repeatedly stated, the scheduling of executions is an executive function that may not be challenged by a capital defendant. The trial court properly summarily denied this claim.

Background

On April 29, 2017, Asay filed a petition for writ of certiorari in the United States Supreme Court raising three claims. *Asay v. Florida*, 16-9033. The State's brief in opposition was originally due June 5, 2017. The State filed a motion for a 30-day extension of time to file its brief. Opposing counsel did not object to the extension and the United States Supreme Court granted the motion. The brief was then due on July 5, 2017. The State filed its brief in opposition two days early, on July 3, 2017. On July 3, 2017, Governor Scott rescheduled the execution in this case for August 24, 2017.

The trial court's ruling

The trial court summarily denied this claim. (893-895). The trial court first noted that this due process claim regarding the timing of rescheduling the execution was not an attack on the underlying convictions or death sentence. (894). The trial court then noted that Asay did not dispute he was eligible for a death warrant once the Florida Supreme Court lifted the stay in February of 2017. The trial court also observed that the claim involved entirely separate litigation pending before another Court. Because the due process claim was premised on the effect on the litigation in the United States Supreme Court, the state trial court declined to consider the claim.

The trial court also found "no merit" to the claim that the Attorney General Office's letter to the Governor regarding the stay being lifted not mentioning the pending litigation in the United States Supreme Court was bad faith. (894). The trial court noted that the Governor may sign a death warrant or reschedule the execution while litigation is pending citing *Howell v. State*, 133 So.3d 511, 514 (Fla. 2014) (noting a petition for writ of certiorari in the United States Supreme Court was "still pending" when the execution was rescheduled). The trial court

found “no correlation” between the Attorney General’s motion for extension in an “unrelated petition” in the United States Supreme Court and the defendant’s due process rights in the state postconviction litigation. (894).

The trial court also rejected the argument that defense counsel’s belief that the pending petition would preclude the Governor from rescheduling the execution mislead him into focusing on the federal habeas litigation. (894-895) The trial court also rejected the claim that the expedited nature of death warrant litigation denied Asay a fair opportunity to be heard noting that all the parties, as well as the courts, operate under the same time constraints during a warrant. (895).

Standard of review

There is no standard of review because this claim is not cognizable. At its core, this is a claim that the Governor may not reschedule an execution when there is litigation pending which is not a legally recognizable claim.

Merits

In *Howell v. State*, 109 So.3d 763, 773 (Fla. 2013), this Court held that the trial court did not abuse its discretion in refusing to remove registry counsel as counsel of record during the warrant litigation. Howell asserted that the trial court improperly denied his motion to remove registry counsel based on a conflict of interest and Rule 4-3.7(a) of the Florida Rules of Professional Conduct. Howell was claiming that registry counsel should be removed from being counsel in state court based on a potential problem that would arise, if at all, in federal court. The conflict of interest related to the future federal litigation, not the litigation in state court. This Court declined to address the issue because it was “not within the scope of this Court's review to address any claims Howell may attempt to raise in the federal forum.” *Id.* at 773. This Court reasoned that the Florida Rules of

Professional Conduct do "not require a trial court to remove an attorney when that attorney may be a potential witness in a different case in a different forum." *Id*.

Here, as in *Howell*, the trial court properly declined to address this issue. As the trial court correctly observed, the claim involved entirely separate litigation pending before another Court. The appropriate forum, if any, to raise this claim is the United States Supreme Court, not the state court. As in *Howell*, this Court should decline to address the issue.

The due process claim does not relate to the conviction or sentence. Rather, the claim concerns the rescheduling of the execution. Asay's real complaint is the timing of the signing of the warrant. But the scheduling of executions is an executive function. *Abdool v. Bondi*, 141 So.3d 529, 544 (Fla. 2014) (observing that the Governor has unfettered discretion to issue warrants); *Henry v. State*, 134 So.3d 938, 945 (Fla. 2014) (concluding that a death-sentenced inmate could not challenge the Governor's issuance of a warrant or the timing of his execution). As this Court has stated, "it is not this Court's prerogative to inquire into the basis on which the Governor signed any individual death warrant." *Muhammad v. State*, 132 So.3d 176, 200 (Fla. 2013). Asay does not dispute that he was eligible for a death warrant once the stay was lifted.

Moreover, pending litigation does not preclude the Governor from signing a warrant. Under the Timely Justice Act, the Governor may sign a warrant after one complete round of state and federal review regardless of any additional litigation pending in any court. Additionally, in actual practice, warrants have been signed and executions rescheduled despite pending litigation. *Howell v. State*, 133 So.3d 511, 514 (Fla. 2014) (noting a petition for writ of certiorari in the United States Supreme Court was "still pending" when the execution was rescheduled); *Marek v. State*, 8 So.3d 1123, 1126 (Fla. 2009) (noting Governor Charlie Crist signed Marek's death warrant while his second successive postconviction motion was

pending in the circuit court). Opposing counsel Marty McClain was counsel of record in *Marek* and therefore, has actual personal knowledge that pending litigation does not preclude the Governor from signing a death warrant. *Marek*, 8 So.3d at 1125 (listing Martin J. McClain of McClain & McDermott, P.A., as counsel of record). Any claim that opposing counsel believed pending litigation would preclude the execution from being rescheduled is simply belied by *Marek*.
And regardless, any belief or presumption on opposing counsel's part does not create a due process claim.

Appellate courts, including the United States Supreme Court and this Court, routinely grant extensions of time to file major pleadings. Such a practice does not violate due process. Due process challenges to appellate court practices are routinely rejected by appellate courts. *Henry v. State*, 937 So.2d 563, 575 (Fla. 2006) (upholding a page limit on appellate briefs in capital cases citing *United States v. Battle*, 163 F.3d 1 (11th Cir. 1998)); *Jones v. Barnes*, 463 U.S. 745, 753 (1983) (noting that oral argument is strictly limited in most appellate courts, often to as little as 15 minutes, and page limits on briefs are widely imposed). Extensions of time do not violate due process.

Furthermore, opposing counsel did not object to the extension. Opposing counsel cannot agree to an action and then claim that action violates due process.

Nor did the failure to personally serve opposing counsel with a copy of the 2017 lethal injection protocol until the execution was rescheduled violate due process. Mr. McClain admitted at the first case management conference that he had read a newspaper article at the beginning of the year indicting that Florida had adopted a new lethal injection protocol. (983). Opposing counsel had actual notice that protocol had been changed from another source, months before the warrant litigation started. Given that Florida's lethal injection protocols are

publicly available on the Internet, and have been for years, counsel's failure to obtain a copy earlier is lack of diligence, not lack of due process.

The stay statute, § 922.06, Florida Statutes (2017), only requires information regarding the stay; it does not require information regarding pending litigation. Because the statute requires no such information, not including such information in the certification letter cannot properly be characterized as an omission, much less bad faith.

And, it is this "omission" in the Attorney General's letter that opposing counsel mischaracterizes as "misconduct" and then asserts as a basis for judicial estoppel of the execution. But judicial estoppel only applies when a party asserts inconsistent factual positions. *Mulvaney Mech., Inc. v. Sheet Metal Workers Int'l Ass'n, Local 38*, 288 F.3d 491, 504 (2nd Cir. 2002) (limiting application of judicial estoppel to inconsistent factual position, not legal conclusions); *1000 Friends of Maryland v. Browner*, 265 F.3d 216, 226 (4th Cir. 2001) (noting "the position sought to be estopped must be one of fact rather than law or legal theory").

Here, the State has not taken any inconsistent factual positions. The State never claimed that the petition was not pending in the United States Supreme Court or that it did not take an extension to file its brief to the Governor, any court, or any party. The State has not taken any inconsistent factual position; it took an extension of time. Judicial estoppel cannot be based on omissions, much less an "omission" that is not properly characterized as an omission under the terms of the statute. Judicial estoppel simply does not apply. *In re Ohio Execution Protocol*, 860 F.3d 881 (6th Cir. 2017) (rejecting a judicial estoppel argument in connection with a lethal injection challenge because a change in policy in response to unforeseen circumstances is hardly the kind of inconsistency that warrants estoppel). At its core, opposing counsel is requesting that this Court

stay an execution because the United States Supreme Court granted an extension of time to file a brief.

Accordingly, the trial court properly summarily denied the due process claim regarding the rescheduling of the execution.

B. Denial of motion to continue the evidentiary hearing

Asay claims that the trial court abused its discretion in denying his motion to continue the evidentiary hearing. IB at 35. A trial court's decision to deny a motion for continuance is reviewed for abuse of discretion. *Williams v. State*, 209 So.3d 543, 556 (Fla. 2017) (explaining that a court's ruling on a motion for continuance will only be reversed for an abuse of discretion and that standard is generally not met unless the ruling results in undue prejudice to the defendant), *cert. denied*, 2017 WL 1481162 (June 26, 2017). There was no prejudice from the denial of the continuance. Asay's expert anesthesiologist was permitted to appear by phone to testify. The State's expert anesthesiologist did not testify in person either. Rather, he appeared via videoconference. Neither of the anesthesiologists testified in person.

In *Muhammad v. State*, 132 So.3d 176, 189-93 (Fla. 2013), the Florida Supreme Court rejected a claim that the evidentiary hearing on the lethal injection protocol was not full and fair. On appeal, Muhammad contended that the hearing was not full and fair because he was not allowed more time to consult with his expert, Dr. Heath. *Id.* at at 189; 193. This Court affirmed the trial court's denial of the continuance for additional time to consult with the defense expert. *Id.* at 193. The Florida Supreme Court found the evidentiary hearing was full and fair. *Muhammad*, 132 So.3d at 193.

Here, as in *Muhammad*, the evidentiary hearing was full and fair. The trial court gave counsel time between the State's experts' testimony to discuss their

testimony with his expert. Opposing counsel points to no particular omissions in his presentation at the evidentiary hearing that would have warranted an continuance. The trial court did not abuse its discretion by deny the motion to continue.

C. Public Records

Asay asserts the trial court abused its discretion in denying his public record demands on DOC to disclose the name of the manufacturer of etomidate and the logs from six prior executions. IB at 41. The trial court did not abuse its discretion in denying the additional demands. *Pardo v. State*, 108 So.3d 558, 565 (Fla. 2012) (stating: "This Court reviews the circuit court's denial of a public records request for an abuse of discretion.").

The trial court denied the additional public records demands . (880-881). The trial court first noted that the lethal injection protocol was provided to counsel on July 10, 2017, which was nine days before his successive motion was due. (880). In a footnote, the trial court observed that during the evidentiary hearing the defense expert Dr. Heath testified as to the sole manufacturer of etomidate in the United States. (881 at n.10).

In *Pardo v. State*, 108 So.3d 558, 565 (Fla. 2012), this Court rejected a public records claim that DOC had "frustrated condemned inmates' efforts to discover and present relevant facts necessary to evaluate the constitutionality of Florida's lethal injection procedures, including how the DOC procures the drugs" by not providing information in response to the additional public records demands. This Court held that the trial court did not abuse its discretion in denying Pardo's public records requests. *Id.* at 566.

Asay has no due process right to know the manufacturer's name. *Sepulvado v. Jindal*, 729 F.3d 413, 418 (5th Cir. 2013) (rejecting a claim that due process

requires "prompt and detailed disclosure of Louisiana's most recent execution protocol"); *see generally In Center for Nat'l Security Studies v. U.S. Dep't. of Justice*, 331 F.3d 918, 934 (D.C. Cir. 2003) (holding the "narrow" First Amendment right of access to information recognized in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), does not extend to non-judicial documents). But, as the trial court noted, the defense expert knew the name of the sole manufacturer in the United States. Opposing counsel could have merely ask his expert for the name of the manufacturer of etomidate in the United States. Counsel could have then asked the manufacturer for background information about the insert.

The logs and notes from the six prior executions have little relevance to the issue explored at the evidentiary hearing which was the safety and efficacy of etomidate. The prior executions of Bolin, Corell, Kormandy, Banks, Davis and Henry did not involve the current protocol. None of those six prior executions involved etomidate. The prior logs simply are not relevant to etomidate. The only possible relevance is to show the time frame from the first drug to the third drug but there is little dispute regarding that time frame. Contrary to opposing counsel's claim, Dr. Buffington was not provided all the information about all six executions either. Dr. Buffington stated that he had reviewed the logs from only the past two executions in Florida. (1315, 1334). Moreover, the trial court established the time frame for an execution based on Director Palmer's testimony and the Director was a defense witness.

Accordingly, the trial court properly denied the public records claim

D. Notice of the protocol itself

Asay claims that the Department of Corrections' failure to provide him a copy of the new protocol at the time the protocol was changed in January of 2017 violates due process. IB at 52. On January 4, 2017, the Department of

Corrections adopted a new three-drug protocol using etomidate, rocuronium bromide, and potassium acetate. The new protocol was publicly available online at DOC's website, just as the previous protocols have been.[2]

The State formally served opposing counsel a copy of the new protocol on July 10, 2017, after the first case management conference, which was 16 days before the evidentiary hearing. (256-271); *Cook v. State*, 281 P.3d 1053, 1058 (Ariz. Ct. App. 2012)(finding a "seven-day advance notice required by the amended protocol" was constitutional and noted that "although relatively short, is an improvement on the one-day or two-day notice provided by the Department in the past.").

Mr. McClain admitted at the first case management conference that he had read a newspaper article at the beginning of the year indicting that Florida had adopted a new lethal injection protocol. (983). Counsel had actual notice that protocol had been changed. Opposing counsel also knew that Asay was under a stayed warrant. If counsel had any questions regarding which protocol DOC would use when the execution was rescheduled, he simply could have asked. Given that Florida's lethal injection protocols are publicly available on the Internet, and have been for years, counsel's failure to obtain a copy earlier is lack of diligence, not lack of due process Opposing counsel is making an empty formality out of due process.

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[2] The protocol is available at:

http://www.dc.state.fl.us/oth/deathrow/lethal-injection-procedures-as-of_01-04-17.pdf

E. Exclusion of witnesses

Asay asserts the trial court abused its discretion by granting the State's motion to strike the proposed defense witnesses. IB at 56. In a footnote to the successive motion, Asay listed a number of proposed witnesses that he intended to present if granted an evidentiary hearing on the lethal injection claim including: 1) Michelle Glady, Communications, Florida Department of Corrections (DOC); 2) Philip Fowler, Assistant General Counsel, DOC; 3) Julie L. Jones, Secretary, DOC; 4) Dr. Mark J. Heath, anesthesiologist, defense expert witness; 5) Professor Deborah Denno, law professor; 6) Warden John Palmer, Florida State Prison, DOC; 7) all execution team members including the team warden and medical personnel; 8) the DOC pharmacist; and 9) Florida Department of Law Enforcement (FDLE) employees who intend to participate in the execution. (405 at n.10).

On July 24, 2017, the State filed a motion to strike the proposed witnesses. (565-574). The State did not object to the testimony of Dr. Mark J. Heath, an anesthesiologist, in its motion.

During the July 24, 2017 *Huff* hearing, the trial court addressed the State's motion to strike the witnesses. (1133). The State explained its position regarding each of the categories of proposed witnesses. (1134-1138). The State pointed out to the trial court that members of the execution team including the team warden and medical personnel, as well as the DOC pharmacist, were statutorily prohibited from having to testify. § 945.10(g), Fla. Stat. (2017) (providing: "[i]nformation which identifies an executioner, or any person prescribing, preparing, compounding, dispensing, or administering a lethal injection" is confidential). (1135-1136). Mr. McClain argued that it was important to establish what steps the team planned to take regarding the consciousness checks given that one possible side effect of etomidate is movement (1139-1143). But Director Palmer was available to testify as the evidentiary hearing to establish those steps. (1139-

1143). The trial court granted the State's motion to strike the other proposed defense witnesses finding that those are "not appropriate witnesses to call." (1146-1147). The trial court noted the confidential information statute prohibited the disclosure of the execution team. (1147).

In *Muhammad v. State*, 132 So.3d 176, 189-93 (Fla. 2013), this Court rejected a claim that the trial court abused its discretion by striking many of the defendant's proposed witnesses for the evidentiary hearing on the lethal injection protocol. Muhammad's attorney during the warrant, Martin J. McClain, had an extensive list of proposed witnesses, including DOC attorney David Arthmann; Secretary of DOC Michael Crews; DOC Deputy Communications Director Misty Cash; Florida State Prison Warden John Palmer; attorneys D. Todd Doss, Neal Dupree, Roseanne Eckert, Suzanne Keffer, Todd Sher; Executive Office of the Governor attorney Thomas Winokur; and execution team members and observers from the Happ execution and the Kimbrough execution. *Id.* at 191. The trial court had stricken all of these witnesses except Dr. Mark Heath and a representative from the drug manufacturer. *Id.* at 191. The testimony at the evidentiary hearing was limited to Dr. Heath for the defense and Dr. Roswell Lee Evans and FDLE Inspector Jonathan Feltgen, who testified regarding the Happ execution, for the State. Id. at 188, 192.

On appeal, Muhammad contended that the hearing was not full and fair because most of his proposed witnesses were stricken and not permitted to testify at the evidentiary hearing. *Muhammad*, 132 So.3d at 189, 193. This Court noted that it was "well settled" that "the admissibility of evidence is within the sound discretion of the trial court, and the trial court's determination will not be disturbed on appellate review absent a clear abuse of that discretion." *Id.* at 191. The Florida Supreme Court concluded that the circuit court did not abuse its discretion in striking the witnesses because they had remanded the case for a

limited evidentiary hearing solely on this issue of the efficacy of the first drug in the protocol (which was midazolam at the time). *Id.* at 192. The Florida Supreme Court noted their concern was "focused on evidence relating to whether the drug will sufficiently render an inmate unconscious before the administration of the last two drugs." *Id.* The Florida Supreme Court noted that the DOC's witnesses testimony "was not relevant" to that "narrow issue." *Id.* The Florida Supreme Court noted that they had not relinquished the case to the trial court to conduct an evidentiary hearing on why DOC chose midazolam as the first drug in the protocol. *Id.* at 192. Rather, they had ordered an evidentiary hearing "to determine if the drug would be safe and efficacious if administered according to the protocols." *Id.* "Nor did we relinquish to hear what transpired in executions under prior protocols." *Id.* This Court relied on its prior holding in *Valle v. State*, 70 So.3d 530, 547 (Fla. 2011), where the Court had previously affirmed the striking of a number of DOC witnesses. This Court found the evidentiary hearing was full and fair. *Muhammad*, 132 So.3d at 193.

Here, as in *Muhammad*, the trial court properly granted the State's motion to strike. Opposing counsel was seeking to call the execution teams as well as FDLE observers in violation of the Confidential Information statute. § 945.10(g), Fla. Stat. (2017). The trial court properly limited the evidentiary hearing to the effects of etomidate and consequently properly limited the witnesses to those who could testify regarding etomidate.

Accordingly, the warrant litigation did not violate due process.

ISSUE II

WHETHER THE TRIAL COURT PROPERLY DENIED THE EIGHTH AMENDMENT CHALLENGE TO FLORIDA'S CURRENT LETHAL INJECTION PROTOCOL USING ETOMIDATE FOLLOWING AN EVIDENTIARY HEARING? (Restated)

Asay also asserts that the trial court erred in denying his Eighth Amendment challenge to Florida's 2017 lethal injection protocol which uses etomidate as the first drug in a three-drug protocol. IB at 57. Asay must establish: 1) the state's lethal injection protocol creates a substantial risk of severe pain, and 2) there is a "known and available" alternative method of execution that is "feasible, readily implemented, and in fact significantly reduces a substantial risk of severe pain" but he has not done so. The first drug, etomidate, is approved by the Federal Drug Administration and is routinely used in the clinical setting. Etomidate does not cause "severe" pain. According to the testimony at the evidentiary hearing, the majority of patients given etomidate experience no pain whatsoever. And the minority of patients who do experience pain have only mild to moderate pain and experience that pain only for the ten seconds it takes for the drug to take effect. Additionally, as the trial court found, the side effect of muscle movements will not interfere with the protocol. Furthermore, the proposed alternatives of a single dose of morphine or pentobarbital are not available, or feasible or readily implemented. Asay meets neither of the criteria required to establish an Eighth Amendment violation. The trial court properly denied the claim following an evidentiary hearing.

Evidentiary hearing testimony

On July 26, 2017, the trial court held an evidentiary hearing on the use of etomidate as the first drug in the 2017 protocol. Four witnesses testified at the evidentiary hearing: 1) Associate Director John Palmer of Florida's Department of

Corrections; 2) Dr. Daniel Buffington, a clinical pharmacologist, for the State; 3) Dr. Steven Yun, an anesthesiologist, for the State; and 4) Dr. Mark Heath, an anesthesiologist, for the defense.

John Palmer is the Assistant Director of institutions in Region 2 for DOC. (1182). Assistant Director Palmer has worked for the DOC for 28 years, which includes 10 years as a warden at Florida State Prison (F.S.P.). (1182). As the Warden of F.S.P., he was required to ensure that the executions were carried out in compliance with Florida law. (1183). Director Palmer oversaw 18 executions while warden, and was involved with more than 40 executions over the course of his employment with the DOC. (1204). An "efficient, respectful, dignified execution is a priority" for the DOC. (1204). The execution team receives quarterly training on execution procedures. (1196).

The execution protocol requires that execution team members "understand the effects of the drugs that are used in the lethal injection process." (1193). After the injection of the first drug, the execution team performs a consciousness check to determine if the inmate is unconscious. (1190). This check includes an eyelash flick, a trapezoid pinch, and the shake and shout. (1189, 1206, 1215). This check is performed approximately 2 minutes 20 seconds after the initial injection of etomidate. (1215). The execution team has experienced muscle twitching during previous executions and is aware to expect such movements during executions. (1191). In the event of seizure like activity, the execution team "would treat that as a level of consciousness and take the necessary precautions." (1192). The process would be suspended and the experts on the team with medical training would evaluate the I.V. as well as the prisoner. (1199).

There are two trays, A and B, which contain the protocol drugs. (1207). Each tray has “the exact same syringes”; they are duplicates. (1208). If after administering the etomidate from tray A, the process was suspended due to a

concern with consciousness, the process would start anew with the etomidate from tray B. (1208). Mr. Palmer estimates that from previous executions, the time from the first drug being administered until death is approximately six to ten minutes. (1209).

Dr. Daniel Buffington was qualified as an expert in the field of pharmacology (1231). Dr. Buffington described etomidate as a sedative hypnotic agent or an F.D.A. approved anesthetic agent often used for the initiation of anesthesia (1232, 1235). Etomidate is used "all across the country and in a variety of practice settings and compared to other anesthetics has less cardiovascular complications" (1244-45). It can be used for long procedures in large doses and the "effects are dose dependent meaning the bigger the does we give the more the effect we achieve" as far as the duration of sedation. (1235). When using etomidate in surgical procedures, dosing varies based on an individual's size, weight, and other characteristics, but the normal dosing range is ".2 to .6 milligrams per kilogram of weight" (1236). Generally, approximately 30-40 milligrams are used to render an individual unconscious, which occurs in approximately 30 to 60 seconds (1237-38). The dosage indicated for the lethal injection protocols is between 5 and 14 times the dose generally used and would render an individual unconscious and insensate to pain stimuli for "an extended period of time," likely beyond 30 minutes. (1237, 1253, 1300).

Regarding any pain experienced by the patient, Dr. Buffington testified that on average, about 20 percent of individuals experience discomfort upon injection of etomidate, which is described as "mild to moderate, not severe" and the “discomfort abates or subsides very quickly.” (1241-42, 1244). Of the approximately 250 times that Dr. Buffington has observed etomidate administered, he has never had a patient complain of pain. (1343, 1351). There are over 450 medications that have post-injection discomfort. (1242-43).

Midazolam and etomidate both are described similarly as having instances of discomfort associated with injection in some individuals. (1258). Any discomfort experienced is localized to the vein receiving the injection and is intermittent. (1302-03). The discomfort could be caused by the preservative that is packaged with the etomidate but research has not been done on that specifically. (1330). No research "supports that there's an increase or a dose dependent response to pain." (1341, 1485). Once sedation is achieved seconds after injection, the individual is "not conscious of external stimuli" and would not feel any pain. (1248). In Dr. Buffington's expert opinion, as "designed and administered in the protocol there would be no anticipation of perception of pain or discomfort" after being sedated with etomidate. (1252).

After receiving the 200 milligrams of etomidate described in the protocol, there is no possibility that the individual would be conscious. (1250). The consciousness checks prescribed in the protocol are also routinely done in the surgical setting (1250). In Dr. Buffington's opinion, and based on his expertise, the medical literature, and the manufacturer's materials, after receiving the prescribed dosage of etomidate and passing a consciousness check, an individual would not perceive the effects of the second and third drugs in the protocol (1251). Dr. Buffington would expect that an individual given 200 milligrams of etomidate would remain unconscious for more than 30 minutes. (1253). The lethal injection protocol timeline from the injection of etomidate to completion is expected to last under five minutes (1254).

Further, the second drug, rocuronium, a paralytic agent, does not induce pain. (1251). Rocuronium is also commonly used in the clinical setting after an anesthetic such as etomidate for procedures like intubation (1252). The paralytic is used to decrease subsequent movement after sedation. (1316).

Etomidate, as well as many other medications, can cause “transient skeletal movement.” (1246). This muscle reaction, or myoclonus, "is not a movement in response to a pain stimuli, so it's just an automatic or musculoskeletal response.” (1246-47). When given etomidate, 63 percent of individuals experience myoclonus. (1321). The most common muscle reaction to etomidate is described as tonic, or "some physical contraction or movement that takes place that's not violent and that's not seizure like.” (1246). Over 75 percent of myoclonus experienced with use of etomidate is tonic. (1321). Dr. Buffington described these movements as being like a finger moving, a wrist turning, the head turning, or a grimace on the face (1247). Muscular movements during general anesthesia are common and are why individuals are restrained for surgical procedures. (1247-48). These reactions are dose dependent, so they would likely be an increase in occurrence under the protocol’s 200 milligram dosage. (1321). This increase is merely in incidence and not in intensity. (1322). Individuals that experienced some type of venous discomfort also appeared more likely to experience muscular movement. (1324).

Dr. Steve Yun received an undergraduate degree in medicine from the University of Wisconsin, his M.D. from University of Southern California, Los Angeles. (1355). He is board certified in anesthesiology and is on staff at the Western University School of Medicine. (1355). Dr. Yun was recognized by the court as an expert in the field of anesthesiology. (1359).

Dr. Yun has administered etomidate roughly 250-300 times during his career, never having used a premedication (1360). He has never had a patient complain about pain at the injection site or following the etomidate injection (1361). At a standard dosage, etomidate renders an individual unconscious within 10 to 20 seconds (1361). Dr. Yun chooses to administer etomidate "because of its reliability, predictability and also its stability in terms of cardiovascular issues"

(1361). Etomidate is not as popular as other anesthetic drugs because it has a higher instance of post-surgery nausea and it interferes with hormone production (1376). In his expert opinion, etomidate "does not cause pain on injection." (1365). Dr. Yun testified that two injections of 100 miligrams of etomidate administered back to back would "absolutely" render an individual unconscious and insensate prior to any injury or insult. (TR. 1367).

In his experience, Dr. Yun has only witnessed "two or three patients exhibit mild myoclonic movements of their extremities" after being injected with etomidate (1366). These movements are not a reaction to pain, but merely an involuntary movement associated with etomidate administration. (1384). However, Dr. Yun's opinion is that the large dose of etomidate would "completely wipe out any possibility of myoclonic movements." (1366). He believes 200 milligrams of etomidate would render someone unconscious for 45 minutes to 1.5 hours (1367). Dr. Yun testified that there may be a ceiling effect but that "certainly the duration of action will be prolonged as the dose of medicine increases." (1368).

Dr. Mark Heath has a bachelor degree in Biology from Harvard and a doctorate in medicine from University of North Carolina, Chapel Hill (1394). Dr. Heath is board-certified in anesthesiology and is currently a full-time attending anesthesiologist and professor in the Department of Anesthesiology at Columbia University. (1395-96). The trial court recognized Dr. Heath as an expert in anesthesiology. (1401-02).

Dr. Heath has only testified on behalf of prisoners who are facing execution (1407). He is opposed to lethal injection as it is currently practiced in this country (1466).

Dr. Heath has administered etomidate several hundred times and chooses to use it because it is "the safest drug to use for the patient" and "most patients don't

have pain." (1418-19, 1472). Some of Dr. Heath's patients have moaned, winced, grimaced, or said "ow" upon receiving etomidate. (1418).

Dr. Heath believes the pain is caused by propylene glycol (1419). Propylene glycol helps to dissolve etomidate into a solution that can be administered intravenously. (1415). Dr. Heath admits he does not know much about propylene glycol but believes that the pain is dependent on "the concentration of propylene glycol that builds up in the vein." (1420). This pain is lessened if the solution is injected slowly and into a large diameter vein (1421). Once etomidate reaches a patient's brain and spinal cord, "it's not possible to experience anything including pain" (1422). It takes approximately 20 to 30 seconds for etomidate to be carried from the injection site to the brain, but could occur in as little as 10 seconds (1423-24). Pain occurs in approximately 20 percent of individuals (1427). Once etomidate reaches the brain and the individual becomes unconscious, body movement can sometimes be observed (1449). On average, about 30 percent of patients experience myoclonic movement (1475). Dr. Heath describes the movement as "not a seizure" but "repetitive jerking motions of the limbs" (1453). A large dose is likely to cause prolonged muscle movement (1455). Dr. Heath believes this might complicate the decision of when the second drug should be administered because it might appear that the prisoner is still conscious (1453).

The trial court's ruling

The trial court denied the challenge to Florida's 2017 lethal injection protocol following an evidentiary hearing. (881-892). The trial court observed that the main focus of Asay's argument was the risk of pain from the etomidate itself. (883). Asay claims that etomidate contains a preservative, propylene glycol, that causes pain and because etomidate is not an analgesic, the first drug will cause severe pain. (883) The trial court noted that it was "undisputed" at the evidentiary

hearing, that "etomidate is an FDA- approved anesthetic or hypnotic agent used by doctors and hospitals across the country to induce anesthesia or complete unconsciousness." (884). The trial court alo noted that the defense expert, Dr. Heath, testified that he "chooses to use etomidate because it is the safest drug to use for the patient." (884). The defense expert testified that some patients moan and complain, but he had "never seen a patient scream" though, not so loud it could be heard down the hallway. (884). The FDA package inserts for etomidate stated that an average of twenty percent of people experience venous pain at injection. (885).

The state's expert Dr. Yun testified "sixty seconds is an eternity during an emergency-room situation and if etomidate really took that long to take effect, he would never use it." (885) Dr. Yun testified he has never observed a patient experience pain while receiving an etomidate injection nor has he ever pre-medicated a patient before administering etomidate. (886). Dr. Yun believes any risk of pain is insignificant and, in fact, he routinely chooses etomidate because it does not burn upon injection like the more commonly used sedative drug propofol. (886). Any pain "would be gone within ten to twenty seconds as the individual would be asleep at that time and unaware of any pain." Dr. Yun Dr. Yun injects etomidate into larger veins, such as the soft area of the elbow exposed when the palm is facing upward, as larger veins are not as sensitive to pain, as are the smaller veins in hands and feet and the DOC uses this area as well. (886 & n.11). Dr. Yun, testified that the dosage of etomidate used in the protocol, 200 milligrams, is a "massive overdose." Dy. Yun testified that because the duration of unconsciousness is prolonged as the dose of etomidate increases, an individual would likely be unconscious for thirty minutes to multiple hours if given such a overdose. (886).

Dr. Buffington testified it would be "inconceivable" for a person to be conscious after such a dose. (886-887). Dr. Buffington also testified that he has never personally witnessed a person experiencing pain with etomidate. (887). Dr. Buffington testified that he was aware of reports that etomidate may cause "mild to moderate" pain but not severe pain. (887). Dr. Buffington also testified that he was not aware of any evidence that the potential pain associated with etomidate is dose dependent. (887). The only dose dependent, adverse reactions he is aware are myoclonus (involuntary movements) and respiratory suppression. (887)

The trial court found etomidate is "very effective and reliable at rendering an individual unconscious." (887). The trial court noted it is "routinely used in hospital and emergency situations where doctors need to rapidly render an individual sedate." (887) The trial court also observed that both Dr. Yun and Dr. Buffington "specifically stated 200 milligrams would absolutely render an individual unconscious and insensate for at least thirty minutes and as long a multiple hours."

The trial court also found that "not everyone who receives an etomidate injection experiences pain;" rather, only "twenty percent of people on average experience mild to moderate pain." (887). And the trial court found, "an individual would only feel this mild to moderate pain until he is rendered unconscious, which would be tens of seconds." The trial court also observed, that the "possibility of pain is also reduced by the protocol's location of the IV in the large vein located in the medial aspect of the antecubital fossa (the inner elbow area)." (887).

The trial court found the defendant's reliance on Dr. Heath's observation of pain in some patients was "insufficient." (887). Rather, the Defendant "has only demonstrated a possibility of mild to moderate pain that would last, at most, tens

of seconds." (887-888). Etomidate "does not present risks that are sure or very likely" to cause needless suffering. (888).

The trial court also rejected the defendant suggestion Defendant also asserts that the protocol is inadequate in that it does not account for the involuntary movements (myoclonus) which may result from etomidate that could: 1) dislodge the IV lines; 2) be mistaken for consciousness, causing a delay in the protocol (which would result in the etomidate wearing off since it is extremely short acting); and/or 3) cause the execution team to ignore real movement demonstrating consciousness. (888). The trial court first noted that it was "undisputed the involuntary movements, or myoclonus, associated with etomidate only occurs when the individual is unconscious and, thus, it is not indicative of pain." (888).

The trial court then explained that Director Palmer testified about the consciousness checks at the evidentiary hearing which "consists of an eyelash flick, a vigorous trapezoid pinch, and a shake and shout." (888-889). Director Palmer explained that body movement upon administration of the first drug was not uncommon with past executions and the execution team is aware of and has been trained in the possibility of movement. (889). He testified that if there appears to be muscle twitching or seizure-like activity indicating consciousness, the team would take necessary precautions and err on the side of caution. Specifically, the team would suspend the procedure, consult the expert members who have licensure to perform the evaluation of the venous access points to determine if any IV has been compromised, and then proceed from there. He further explained the execution team contains a member who is an expert on the effects of the specific drugs. If the inmate is in fact conscious, the execution team will administer another round of the anesthetic drug. (889). Director Palmer and the execution team engage in quarterly training. (889). Director Palmer has participated in twenty-eight executions and in his experience,

the average time it takes between the administration of the first drug to the pronouncement of death is between six and eleven minutes. (889-890).

This trial court found "the protocol anticipates the possible myoclonus associated with etomidate." (890). The FDA-approved etomidate inserts suggest that myoclonus "only occurs thirty-two percent of the time on average and when it does occur, the movements are 'mild to moderate' and not comparable to the extreme flailing of a grand mal seizure." (890). Dr. Yun testified that in his seventeen-year career, he has only seen two to three patients exhibit myoclonus from etomidate. The trial court noted the required restraints used during the procedure "would undoubtedly mitigate" and extreme movement. (890). The trial court found that the defendant did not established that myoclonus is "sure or very likely" to be caused by etomidate or to cause serious needless suffering." The trial court did "not find that etomidate will cause the macabre writhing of a gibbetted chemical marionette." (890)

The trial court found etomidate "will render the person unconscious for at least thirty minutes if not hours" which is "well over the average six to eleven minute timeframe needed to complete the procedure." (890).

The trial court also found the defendant did not establish the second prong of *Glossip v. Gross*, 135 S.Ct. 2726 (2015). The trial court found that the Defendant did not established that his proposed alternatives would "cause less pain and are readily available." (891 citing *Correll v. State*, 184 So.3d 478, 489 (Fla. 2015)). The trial court noted that the defendant " did not present any evidence that morphine, pentobarbital, or compounded pentobarbital were likely to cause less pain than etomidate and were readily available." (891). The trial court noted there "was no evidence presented regarding the use of morphine." (891). The trial court also noted "that the United States Supreme Court acknowledged that states like Florida have changed their lethal injection protocol because of the inability to

acquire pentobarbital. (891 citing *Glossip v. Gross*, 135 S.Ct. 2726, 2734 (2015) (noting Danish manufacturer of pentobarbital ceased shipment of pentobarbital to United States for execution purposes in 2012)). So, the defendant "failed to establish that his proposed alternatives are readily available for use in executions in Florida." (891). Regarding midazolam as an alternative, the trial court found etomidate was "more efficient at achieving the intended purpose of the first drug." (892).

The trial court also rejected a one-drug protocol citing *Howell v. State*, 133 So.3d 511, 515 (Fla. 2014) and *Muhammad v. State*, 132 So.3d 176, 197 (Fla. 2013). (892). The trial court explained that before a one-drug alternative is required, "the current three-drug lethal injection protocol must be determined to present a substantial risk of serious harm." (892 citing *Muhammad*, 132 So.3d at 197). But the defendant had "failed to establish that the current three-drug protocol presents a serious risk of needless suffering," (892).

Standard of review

Where the trial court has conducted an evidentiary hearing, this Court defers to the factual findings of the trial court that are supported by competent, substantial evidence but reviews the application of the law to the facts *de novo*. *Hurst v. State*, 18 So.3d 975, 988 (Fla. 2009).

Merits

Asay argues that the 2017 lethal injection protocol's use of etomidate violates the Eighth Amendment because etomidate can cause some pain in some individuals and because it may cause myoclonus, which are muscle movements that could interfere with the consciousness checks. He also claims that the painless myoclonus itself violates the dignity required by the Eighth Amendment.

Eighth Amendment requirements

The Eighth Amendment prohibition on cruel and unusual punishment applies to lethal injection protocols. But, as the United States Supreme Court itself has observed, it has "never invalidated" a lethal injection protocol. *Glossip v. Gross*, 135 S.Ct. 2726, 2732 (2015).

To state an Eighth Amendment method-of-execution claim, a plaintiff must establish: 1) the state's lethal injection protocol creates a substantial risk of severe pain, **and** 2) identify a "known and available" alternative method of execution that is "feasible, readily implemented, and in fact significantly reduces a substantial risk of severe pain." *Boyd v. Warden*, 856 F.3d 853, 866 (11th Cir. 2017) (citing *Glossip v. Gross*, 135 S.Ct. 2726, 2737 (2015)). Asay needs to establish both prongs of *Glossip*. *Correll v. State*, 184 So.3d 478, 489 (Fla. 2015) (noting an inmate challenging the lethal injection protocol must demonstrate both that the challenged method is very likely to result in needless suffering and that there is an alternative that is readily available and significantly reduces the risk of pain).

In *Glossip v. Gross*, 135 S.Ct. 2726 (2015), the United States Supreme Court rejected an Eighth Amendment challenge to Oklahoma's use of midazolam in its three-drug protocol. The inmates claimed that midazolam fails to render a person insensate to pain. The Court held, in a § 1983 action, that the inmates failed to establish that the risk of harm was substantial. The *Glossip* Court observed that because it was settled that capital punishment is constitutional, "it necessarily follows that there must be a constitutional means of carrying it out." *Id.* at 2732-33. The Court noted that if they held the Eighth Amendment demanded the elimination of essentially all risk of pain, such a holding "would effectively outlaw the death penalty altogether." *Id.* at 2733.

The Court explained that the inmate must "identify an alternative that is feasible, readily implemented, and in fact significantly reduces a substantial risk of severe pain." *Glossip*, 135 S.Ct at 2737. "The Eighth Amendment requires a prisoner to plead and prove a known and available alternative." *Id.* at 2739. The Court held that the inmates failed to identify a known and available alternative method of execution that entails a lesser risk of pain, a requirement of all Eighth Amendment method-of-execution claims. *Id.* at 2731.

The Court concluded that inmates also failed to establish that the use of a massive dose of midazolam entailed "a substantial risk of severe pain." *Glossip*, 135 S.Ct at 2731. The Court also contrasted the use of a drug during surgery and use of a drug for an execution. The Court noted the safeguards in the protocol used to ensure the efficacy of the drugs, such as a consciousness check.[3]

The Florida Supreme Court also enforces the requirement of identifying a known and available alternative. *Correll v. State*, 184 So.3d 478, 489 (Fla. 2015) (rejecting a claim that *Glossip* incorrectly required a prisoner to prove the existence of an available alternative method of execution). In *King v. State*, 211 So.3d 866, 888 (Fla. 2017), the Florida Supreme Court rejected a facial challenge to the prior protocol. The Florida Supreme Court stated that the cursory allegation was insufficient "to satisfy the ***heavy*** burden of a successful constitutional challenge" . . . "under *Glossip* and *Baze*." *Id*. at 888 (emphasis added). The Florida Supreme Court noted that King "failed to allege the existence of a readily available alternative method of execution." *Id.*

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[3] The *Glossip* Court also explained that the use of midazolam in protocols arose in the first place because anti-death-penalty advocates had pressured pharmaceutical companies to refuse to supply the drugs that were originally used. *Id.* Indeed, one American manufacturer of a previous drug used in the protocol was persuaded to cease production of the drug altogether.

The Eleventh Circuit also follows *Glossip* and requires the inmate identify known and available alternatives. The Eleventh Circuit mandates that the inmate identify a "feasible, readily implemented, and significantly safer" alternative. *Arthur v. Comm'r, Ala. Dep't of Corr.*, 840 F.3d 1268, 1315 (11th Cir. 2016), *cert. denied, Arthur v. Dunn*, _ U.S. _, 137 S.Ct. 725 (2017) (rejecting the proposed alternative of a firing squad as statutorily unauthorized and not feasible due to lack of experience); *Boyd v. Warden*, 856 F.3d 853, 867 (11th Cir. 2017) (rejecting the proposed alternative of a firing squad or hanging because neither was "feasible or readily implementable in Alabama").

Asay must establish both prongs of *Glossip*. *See Correll*, 184 So.3d at 489. But he has failed to establish either prong.

Substantial risk of severe pain

Given that lethal injection protocols use needles to deliver the drugs, all such protocols involve some pain. But executions are not required to be totally painless. *Baze v. Rees*, 553 U.S. 35, 47 (2008) (stating that the Constitution does not require painless executions and observing that some risk of pain is inherent in any method of execution). Rather, the risk of pain from the protocol must be *sure or very likely* to cause "needless suffering." *Baze*, 553 U.S. at 50 (emphasis in original). Moreover, the risk of pain is not considered in a vacuum. The risk of severe pain is compared to the known and available alternatives. *Baze*, 553 U.S. at 61.

Both of the State's expert testified that, while the medical literature refers to 20 percent of patients experiencing some pain from etomidate, neither had ever actually seen a patient experience any pain. (1343, 1351). Even the defense expert, Dr. Heath, admitted that approximately 80 percent of patients experience no pain whatsoever. (1427). And of the minority of patients that do experience

some pain, they experience only mild to moderate pain and that pain lasts for only 10 to 20 seconds. Contrary to Asay's assertion, a risk of ten to twenty seconds of "moderate or disturbing pain" cannot be considered severe pain. IB at 58.

Under *Glossip*, Asay must demonstrate a **substantial** risk of **severe** pain from the first drug in the protocol and he has not. Etomidate is a F.D.A. approved drug that is used in emergency medicine and has been for decades. Given its routine clinical use, Asay cannot demonstrate that the pain associated with etomidate is "severe" pain.

Opposing counsel drew an analogy between etomidate and Novocaine used by a dentist. An execution that is only as painful as a trip to the dentist does not violate the Eighth Amendment. That analogy itself undermines any claim regarding severe pain.

Moreover, while etomidate has not been used as part of a lethal injection protocol, it has been used by law enforcement as part of a reasonable search. In *United States v. Husband*, 312 F.3d 247 (7th Cir. 2000), the Seventh Circuit held that the use of etomidate as a sedative to remove plastic baggies containing crack cocaine from a defendant's mouth was reasonable. Detectives handcuffed the defendant who was a suspected drug dealer. *Id.* at 249. They saw a large lump in the defendant's left cheek and told him to spit it out but he refused. At the hospital, the emergency room doctor, Dr. Gravett, after consulting two medical texts, *Rosen's Principles and Practice of Emergency Medicine* and *Tientalli Emergency Medicine*, administered 40 mg of etomidate to the defendant and then removed the baggies containing crack cocaine from his mouth. *Id.* at 249. The defendant filed a motion to suppress arguing the use of anesthetic to execute a search violated the Fourth Amendment. *Id.* at 250. The Seventh Circuit remanded the case for an evidentiary hearing on risks involved in the use of etomidate at which two experts, Dr. Gravett and Dr. Griffin, testified. *Id.* at 250, 254. Dr.

Gravett testified that etomidate was "the safest agent" that would "promptly cause relaxation." *Id.* Dr. Gravett testified that the main risk was that the patient will stop breathing which the defendant did. Both doctors testified that etomidate was "the safest method of removing the object from" the defendant's mouth "relative to all other alternatives." *Id.* The Court noted that Dr. Gravett had consulted two medical texts, *Rosen's Principles and Practice of Emergency Medicine* and *Tientalli Emergency Medicine*, before using etomidate. *Id.* at 249, 254. The federal appellate court then concluded the risks of etomidate were "relatively low." *Id.* at 254. The Seventh Circuit found the search to be reasonable given the low risks associated with etomidate. *Id.* at 255. Asay has failed to establish the first prong of *Glossip* by failing to demonstrate a substantial risk of severe pain.

Alternative drugs

Under *Glossip*, Asay must identify a "known and available" alternative method of execution that is "feasible, readily implemented, and in fact significantly reduces a substantial risk of severe pain." *Glossip*, 135 S.Ct at 2737. Asay proposes that the State use the 2013 lethal injection protocol which used midazolam as the first drug in his brief to this Court. IB at 59 n.44. He also proposed two alternative protocols in his successive motion filed in the trial court: (1) a single dose of morphine or (2) a single dose of pentobarbital. But these alternatives are not available. Asay has not established that either midazolam, morphine, or pentobarbital is currently available to the State of Florida for use as an execution drug.

Asay has not established that either midazolam, morphine, or pentobarbital is actually available to the states to use as a drug in any protocol. As the United States Supreme Court explained in *Glossip*, the reason states change the drugs in their protocol is the anti-death penalty advocates pressure on drug companies

to make the drugs unavailable. The states are then forced to adopt new drugs in their protocols due to the unavailability of the original drugs in their established protocols. The State of Florida would naturally prefer to use their established protocols that have been upheld by courts in the past but that option is foreclosed due to the tactics of the capital defense bar. The Eleventh Circuit has also noted the States' "admitted challenges" in locating sources for the drugs for a lethal injection protocol. *Arthur v. Comm'r, Ala. Dep't of Corr.*, 840 F.3d 1268, 1319 (11th Cir. 2016), *cert. denied, Arthur v. Dunn*, 137 S. Ct. 725 (2017). Indeed, Florida had to change its protocol using pentobarbital because pentobarbital became unavailable. *Glossip*, 135 S.Ct. at 2734 (noting that states including Florida changed to midazolam because they were unable to acquire either sodium thiopental or pentobarbital).

Opposing counsel's entire argument regarding the 2013 protocol using midazolam as the first drug and his consent to its use rests on the incredible premise that DOC changed the first drug from midazolam to etomidate on a whim rather than based on midazolam's unavailability. And they indulged that whim, despite this Court having upheld the use of midazolam in prior cases and the knowledge that any such change would likely require yet another evidentiary hearing to establish the efficacy of the new first drug as any such change in the past has required. That argument rebuts itself.

Furthermore, the manufacturer of pentobarbital, Lundbeck, wrote letters to both the Governor and DOC requesting that the State of Florida stop using pentobarbital to execute prisoners. *Valle v. State*, 70 So.3d 530, 542 (Fla. 2011); *see also Powell v. Thomas*, 784 F.Supp.2d 1270, 1281 n.7 (M.D. Ala. 2011) (noting that the manufacturer of pentobarbital has pronounced that it is opposed to its drug being used for executions). They cannot be considered a source for pentobarbital.

Opposing counsel seems to be suggesting that Dr. Buffington is himself a source for midazolam, morphine, or pentobarbital because he has prescribed those drugs before. IB at 61. But a prescription is a piece of paper, not a source for a drug. Dr. Buffington is not a manufacturer of drugs nor does he operate a compounding pharmacy. Dr. Buffington is not a source for any drug.

In *Brooks v. Warden*, 810 F.3d 812 (2016), the Eleventh Circuit held a single-injection protocol was not a feasible, readily implemented alternative when compared to a three-drug protocol. Brooks proposed three alternatives to Alabama's three-drug protocol: (1) a single injection of pentobarbital; (2) a single injection of sodium thiopental; or (3) a single injection of midazolam. *Id.* at 819. Brooks pointed out that a single dose of pentobarbital was a common single drug protocol used by other states in the past in numerous executions. But the Eleventh Circuit found the inmate had not established that pentobarbital was currently available. The Eleventh Circuit noted that just because pentobarbital was available to other states in the past, did not mean that was available to Alabama now. The Eleventh Circuit noted that it was not the State's burden to plead and prove that it cannot acquire the drug. *Id.* at 820. Rather, it was the inmate's burden to establish that there is currently a source for pentobarbital that would sell it to Alabama for use in executions and he had not done so.

In *Correll v. State*, 184 So.3d 478, 490 (Fla. 2015), the Florida Supreme Court held an inmate failed to offer evidence regarding the availability of compounded pentobarbital and therefore, failed to show evidence of the drug's ready availability as a feasible alternative. Correll pointed to other states that use compounded pentobarbital. He argued that Florida had a pharmacy that could import compounded pentobarbital or the State could apply for a sterile compounding license. The Florida Supreme Court, however, explained that while those

statements may be correct, they did not amount to competent, substantial evidence of the drug's ready availability.

Opposing counsel does not identify any source for the single dose of morphine. The failure of opposing counsel to identify any manufacturer of morphine that has agreed to supply these drugs for executions regardless of protests means he has failed to establish this alternative is actually available. To satisfy the second prong of *Glossip*, the inmate has to do more than just suggest another drug. The inmate must establish that the drug is truly available to the State.

Opposing counsel suggests a compounding pharmacy as a source for pentobarbital but that was the exact argument the Florida Supreme Court rejected in *Correll v. State*, 184 So.3d 478, 490 (Fla. 2015). Moreover, when states use pentobarbital from compound pharmacies, inmates then challenge those pharmacies for using "unknown ingredients and in unknown circumstances." *Wellons v. Comm'r, Ga. Dept. of Corr.*, 754 F.3d 1260, 1262 (11th Cir. 2014).

Even if Asay actually identified a manufacturer willing to provide either morphine or pentobarbital for the purpose of lethal injection, there are still problems with single-drug protocols. Justice Alito, relying on the experience of the Netherlands with euthanasia, noted the problem with a single large dose of a barbiturate is that it takes longer and is unpredictable. *Baze*, 553 U.S. at 68 (Alito, Justice, concurring). It is the third drug in the three-drug protocols that cause the heart to stop and makes executions short. *Lightbourne v. McCollum*, 969 So.2d 326, 331 (Fla. 2007) (noting that three-drug protocols produce a sequence of unconsciousness, cessation of all muscular function, and cessation of heart function, resulting in death). Single drug protocols will lack the heart stopping drug and therefore, will last significantly longer and unpredictably so. This is true of both a single dose of morphine and a single dose of pentobarbital.

Furthermore, courts often rely on the short period of time an execution takes as a good indicator of the efficacy of the protocol and the particular drugs in that protocol. *Arthur v. Comm'r, Ala. Dep't of Corr.*, 17-12257-P, 2017 WL 2297616, at *9 (11th Cir. May 25, 2017) (recounting the timing of several recent executions in Virginia and Arkansas as lasting "only fourteen minutes" and "only thirteen minutes" as a basis for the conclusion "midazolam worked as intended"), *cert. denied*, *Arthur v. Dunn*, 137 S.Ct. 2185 (2017). Given this history, if a State adopts a single dose of morphine or pentobarbital as their protocol, their executions may well last an hour or two, and the defense bar will assert the sheer length of time is a violation of the Eighth Amendment. *Glossip*, 135 S.Ct. at 2745-46 (noting the July 2014 Arizona execution of Joseph Wood lasted nearly two hours and involved fifteen 50-milligram doses of midazolam).

Asay has not established that either a single dose of morphine or a single dose of pentobarbital is actually available. Nor has he established that either morphine or pentobarbital significantly reduces pain compared to etomidate. Asay has also failed to establish the second prong of *Glossip* by failing to identify an available alternative that significantly reduces pain.

Dignity

Asay also claims that the painless myoclonus itself violates the dignity required by the Eighth Amendment. IB at 61. While the Eighth Amendment is concerned with dignity, the United States Supreme Court's focus in lethal injection cases has always been on pain. And all the experts who testified at the evidentiary hearing agreed that the myoclonus side effects of etomidate were not indications of pain.

Even when certain Justices discuss the concept of dignity regardless of pain, they focus on the prohibition on mutilation, not mere movement. *Provenzano v.*

Moore, 744 So.2d 413, 429 (Fla. 1999) (Shaw, J., dissenting); *Glass v. Louisiana*, 471 U.S. 1080, 1085 (1985) (Brennan, J., dissenting from the denial of certiorari) (stating that basic notions of human dignity command that the State minimize mutilation and distortion of the condemned prisoner's body).

Moreover, the protocol requires that the inmate be restrained preventing the inmate from falling off the table. Furthermore, it is hard to fathom how relatively small movements of muscles would violate the Eighth Amendment's concept of dignity. Absolute stillness is not constitutionally required.

Accordingly, the current lethal injection protocol using etomidate does not violate the Eighth Amendment.

ISSUE III

WHETHER THE TRIAL COURT PROPERLY SUMMARILY DENIED THE DUE PROCESS CHALLENGE TO THE STAY STATUTE, § 922.06, FLORIDA STATUTES (2017)? (Restated)

Asay raises a due process challenge to the stay statute, § 922.06, Florida Statute (2017), arguing the statute's failure to require the Attorney General Office to certify that the stay has been lifted within a certain time frame allows the State to have an "unfair advantage" which violates due process. IB at 71. Asay lacks standing to challenge the stay statute. Furthermore, this claim is not cognizable under this Court's precedent because the stay statute does not create any enforceable rights. The trial court properly summarily denied this claim.

The trial court's ruling

The trial court summarily denied the claim citing *Tompkins v. State*, 994 So.2d 1072, 1084 (Fla. 2008), and *Henry v. State*, 134 So.3d 938, 945 (Fla. 2014). (895-896). The trial court also noted that the statute did not "impact the merits or substance" of this case. The trial court also observed that because the Governor could have rescheduled the execution any time after February of 2017 when the stay was lifted, the end result was that Asay had approximately five more months until the execution was actually rescheduled. The trial court found it illogical to argue that that end result "denied him some constitutional right." (896).

Standard of review

The issue of whether a statute violates due process is a pure question of law reviewed *de novo*. As this Court has explained, while the constitutionality of a statute is a question of law subject to *de novo* review, this Court is "obligated to accord legislative acts a presumption of constitutionality and to construe

challenged legislation to effect a constitutional outcome whenever possible." *Crist v. Ervin*, 56 So.3d 745, 747 (Fla. 2010).

Standing

Asay lacks standing to challenge the stay statute. As the trial court noted, there was no prejudice to the defendant from the stay statute. A defendant who is helped rather than harmed by a statute has suffered no injury in fact and therefore, lacks standing. *State v. J.P.*, 907 So.2d 1101, 1113 n.4 (Fla. 2004) (explaining that there are three requirements to establish standing including that a defendant must demonstrate an "injury in fact," which is "concrete," "distinct and palpable," and "actual or imminent").

Merits

The "Stay of execution of death sentence" statute, § 922.06, Florida Statutes (2017), provides:

> (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.

The terms of the stay statute, § 922.06(2)(b), were complied with in this case. The Attorney General Office's certified by letter to the Governor that the Florida Supreme Court's stay had been lifted and the Governor rescheduled the execution within 10 days of receipt of the letter. The Attorney General's Office also notified

Asay's counsel of record, Martin J. McClain, of the new date for, and time of, the execution.

This Court has repeatedly rejected challenges to this statute. As this Court has explained, the stay statute does not "explicitly or implicitly" provide a criminal defendant with any enforceable rights or a "right" to a speedy execution. *Tompkins v. State*, 994 So.2d 1072, 1084 (Fla. 2008). In *Tompkins*, the Florida Supreme Court rejected a claim that the Governor was required to reschedule an execution from the date the stay was lifted by the court rather than from the date of the Attorney General's certification. *Id.* at 1083-85. This Court found no violation of the statute, explaining that "a death-sentenced inmate could not challenge the Governor's issuance of a warrant or the timing of his execution." *Henry v. State*, 134 So.3d 938, 945 (Fla. 2014) (citing *Tompkins*). The Florida Supreme Court in *Henry* concluded that there was no authority to support a claim that a death sentence "should be delayed or commuted as a result of any noncompliance with a statute governing the issuance of a death warrant." *Id.* at 946. Asay simply may not rely on the stay statute as a basis for a legal claim under this Court's precedent.

Furthermore, while opposing counsel raises a due process challenge to the stay statute, he does not cite any due process case that is even remotely similar. The State is unaware of any due process case from the United States Supreme Court or from the Florida Supreme Court requiring a state statute to be rewritten to add a timing provision as to when warrants must be signed. *Cf. Abdool v. Bondi*, 141 So.3d 529, 539 (Fla. 2014) (rejecting a constitutional challenge to the Timely Justice Act and noting the Act did not impose a deadline on the clerk as to when the certification must be made and observed that there was no time frame in which the clerk is required to act and no enforcement provision, if the clerk failed to act).

Nor does the State have any time advantage regarding the litigation of the new protocol. Opposing counsel admitted at the first case management conference that he had read a newspaper article at the beginning of the year indicting that Florida had adopted a new lethal injection protocol. (983). And he certainly knew that Asay's execution was likely to be rescheduled after the stay had been lifted by the Florida Supreme Court in February of 2017. As the trial court noted, all parties, as well as the Courts, are operating under time constraints during a warrant.

And, as the trial court noted, there was no prejudice to the defendant. The end result was that the execution was rescheduled for August of 2017 instead of February of 2017. It is illogical for a defendant to argue that his execution was rescheduled later than it should have been. Not rescheduling the execution sooner does not violate due process or any other constitutional provision. There is no constitutional right to a speedy execution.

The stay statute may not be challenged by a defendant because it creates no enforceable rights as to him and, alternatively, even if it could be challenged, the stay statute does not violate due process as written.

Accordingly, the trial court properly summarily denied this claim.

CONCLUSION

The State respectfully requests that this Court affirm the trial court's denial of the successive postconviction motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF has been furnished via the e-portal to Martin J. McClain, McClain & McDermott, 141 N.E. 30th Street, Wilton Manors, FL 33334; phone: (305) 984-8344; email: martymcclain@earthlink.net this 3rd day of August, 2017.

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CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was typed using Bookman Old Style 12 point font.