IN THE SUPREME COURT OF FLORIDA

CASE NO. SC17-1400

LOWER TRIBUNAL No. 16-1987-CF-06876

MARK JAMES ASAY,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

REPLY BRIEF OF APPELLANT

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ARGUMENT IN REPLY[1]

ARGUMENT I: THE DENIAL OF DUE PROCESS THROUGHOUT THE PROCEEDINGS.

A. THE RESCHEDULING OF ASAY'S EXECUTION.

The State in it Answer Brief asserts that "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" (AB 21). Later, the State again asserts that "this is a claim that the Governor may not reschedule an execution when there is litigation pending which is not a legally cognizable claim." (AB 23). Citing to case law in support of the notion that the Governor has unfettered discretion to issue warrants, the State argues that the setting of executions is an executive function (AB 24). Moreover, relying on *Howell v. State*, 109 So. 3d 763 (Fla. 2013), the State argues that because the pending litigation relates to a petition in the U.S. Supreme Court, the appropriate forum, if any, is to raise this claim there (AB 23-24). Further, the State faults Asay for a lack of diligence because "[o]pposing counsel had actual notice that protocol had been changed from another source, months before the warrant litigation started." (AB at 25).[2]

Asay submits that the State's arguments are erroneous. First, as the State is well aware, Asay's due process claim does

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[1]Asay will address the State's statement of facts in his reply to the State's arguments.

[2]According to the State, "Mr. McClain admitted at the first case management conference that he had read a newspaper article at the beginning of the year indicating that Florida had adopted a new lethal injection protocol." (AB 25).

not concern the fact that the Governor signed his warrant while a certiorari petition was pending. Rather, it was the actions of the Attorney General that have prompted the constitutional violations at issue. Indeed, the Attorney General utilized her statutory power to bring about an execution date that diminished Asay's chances of his petition for certiorari review being granted by the U.S. Supreme Court. And, as explained in Asay's initial brief, the State gained an advantage in litigating the new lethal injection protocol, as it had six months to prepare for litigation while Asay had a mere nine days.[3]

Also, the State's reliance on *Howell* is misplaced. There, Howell was attempting to remove his registry counsel because he "may have to serve as a witness in upcoming federal habeas proceedings." *Howell*, 109 So. 2d at 773. In denying relief, this Court ruled 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 when that litigation has not yet commenced. *Id.* at 773.

Unlike in *Howell*, the conduct at issue here concerns the actual conduct of a party opponent exercising her power to tilt the playing field to Asay's disadvantage. *See Ruiz v. State*, 743 So. 2d 1, 8-9 (Fla.1999) (error to "attempt[] to tilt the playing

[3]Nowhere in the State's brief does it offer any other plausible explanation as to why the Attorney General waited five months, until July 3, a day her office was closed, to certify to the Governor that the stay had been lifted. The Attorney General would have been keenly aware that scheduling Asay's execution would reduce the chances that the U.S. Supreme Court would grant the certiorari petition.

field and obtain a conviction and death sentence in a number of improper ways: by invoking the immense power, prestige, and resources of the State"). The manner in which Asay's certiorari petition will be considered is an example of the prejudice from the actions taken by the Attorney General, a party opponent, to gain a strategic advantage. This Court is the appropriate forum in which to address Asay's due process claim.

Finally, the State's attempts to place the blame on Asay's counsel, despite the fact that the State was required to produce the new protocol to him are disingenuous. In fact, the State failed to produce the protocol for six months after it was adopted and certified. Asay's continuous warrant was signed on January 8, 2016. Because his continuous warrant remained active when the protocol was adopted, notice of changes to the protocol was required to be provided to him.[4]

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[4]And such notice had been provided to those with active warrants when the previous protocol was adopted on September 9, 2013. Paul Howell had an active continuous warrant, though the 11th Circuit had stayed his execution earlier in 2013. He did not have an execution date set at the time the protocol was adopted. But on September 10, 2013, DOC filed the new protocol in his case and gave Howell and his counsel notice of its adoption and of the fact that the new protocol would only be used to carry out his execution if the new execution date was set for sometime after November 30, 2013. What occurred in Howell's case is what the protocol requires. Further, the September 9, 2013 protocol was not used in Marshall Gore's October 1, 2013 execution. Aware of those circumstances when the 2013 protocol was adopted, Asay and his counsel had every reason to believe that if there was a change in what protocol would be used in his execution, he would immediately be notified. Notice by publication in a newspaper is not adequate before the government can take an individual's property. *Jones v. Flowers*, 547 U.S. 220, 226 (2006)("we have stated that due process requires the government to provide 'notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'").

Moreover, contrary to the State's assertion, McClain's statements at the July 10 hearing was not an admission of notice; rather, counsel was asking that he be notified if there was going to be a different protocol used:

> So in terms of the schedule I mean at the moment I - - I haven't really looked at anything. I don't know what there is. I read a newspaper article at the beginning of the year indicating there was a new lethal protocol and new drugs were being used in an execution before.
>
> I don't know if that's true. I have not received from either the Department of Corrections, State Attorney General's Office or the Governor's Office about the new protocol and what the new drugs are. I would have thought that that would be something that would be provided to defense counsel automatically.

(PC-R3. 983). Again, Asay had no reason to know that a new protocol, to the extent it existed, would apply to him. The State's dilatory antics violated Asay's right to due process.

B. THE DENIAL OF A STAY AND OPPORTUNITY TO AMEND.

The State like the circuit court believe that Asay is only entitled to a process, but not due process.[5] "'The fundamental requisite of due process of law is the opportunity to be heard.'. The hearing must be at 'a meaningful time and in a meaningful manner.'." *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970)(citations omitted). Here, the State argues that the mere fact that Asay could present Heath's testimony after consulting with about what evidence had been presented in the hearing and what its significance was in Heath's opinion, precluded Asay from being able to complain or show a denial of due process. *See* AB at 27.

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[5]Affording only process that does not include the right to be meaningfully heard results in a proceeding called a "show trial," something that is associated with the old Soviet Union, not the U.S.A. *See Coker v. State*, 89 So. 222 (Fla. 1921).

First, from the outset the State objected to an evidentiary hearing (PC-R3. 539; 556; 564). On July 24 the judge announced an evidentiary hearing would occur and the hearing went from a hypothetical to an actuality set to occur two days later. Asay had informed the judge that Heath's schedule for the month of July was extremely busy[6], but that he would make himself available for in person testimony during his vacation scheduled for the week of August 14th (PC-R3. 452). But, the judge decided his availability after work at 5:30 PM was enough because this Court's scheduling order gave her no choice.

A brief continuance so that Heath would have a meaningful opportunity to prepare for his testimony, consult with counsel and testify like in *Provenzano v. State*, 750 So. 2d 597, 600-1 (Fla. 1999), was not granted. Asay was given no information as to the substance of Buffington's testimony until he received Buffington's letter as his counsel drove from south Florida to Jacksonville the evening before the hearing; Asay was given no information or discovery as to what Yun's expected testimony would be. And though Asay was given a brief time to consult with Heath about Buffington and Yun's testimony there was no time for Heath to conduct any research in rebuttal of Buffington's and Yun's testimony.[7] Likewise, counsel's ability to relay

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[6]Heath's schedule not only impacted when he could appear for testimony but also his ability to review the records disclosed by DOC, conduct research and consult with Asay's counsel, as well as be present for the testimony of the State's experts.

[7]Following Palmer, Buffington and Yun's testimony, which concluded at approximately 5:00 p.m. After consulting with Asay's counsel, the judge told the parties to return to court at 6:30

significant information was limited to the notes she had taken and her understanding as a lay person of the importance of the State's witnesses' testimony.

Had Asay had a meaningful opportunity to consult with Heath he would have had Heath explain the relevance of Yun's use of extremely small doses, just .2 milligrams per kilogram of body weight versus the doses Heath administered. He would have also had Heath explain the significance between using an 18 gauge I.V. and a larger bore head, as Yun indicated he used. If he was aware, Heath would have also described the onerous and scientific process by which a drug is submitted pursuant to F.D.A. regulations in order to be used in the United States. Thus, contrary to the State's position, the omissions in Asay's presentation were significant and would have certainly supported his claim and contradicted the State's evidence. *See* AB at 28.

To further deprive Asay of due process, the State withheld the name of the manufacturer of the etomidate as well as information and documents that it provided to Buffington in order to prepare for his testimony. (Buffington did in fact rely on the logs, photos and conversation with FDLE Agent Biddle in his testimony).[8] *See* PC-R3. 1315; 1334; 1336; 1352.

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p.m. (PC-R3. 1389). As Heath had indicated that he would not be available until 5:30 p.m. (PC-R3. 1122-3), Asay's counsel had less than an hour to consult with him. And, there were no transcripts of the lengthy testimony from Buffington and Yun, just counsel's notes.

[8]In its argument as to the constitutionality of the current protocol, the State relied on Buffington's testimony as to records not given to Asay about prior executions to argue that the time between the "injection of etomidate to completion is

Asay had no idea before the testimony of Buffington and Yun that each witness would testify in relation to the manufacturer's information provided in the package inserts: Buffington construed the information in a way that rendered it insignificant, even though it clearly listed the "adverse reactions" found by the manufacturer (PC-R3. 1304; 1305; 1307; 1309; 1311-2). Yun, on the other hand opined that the manufacturer's data and conclusions were not based on science and were unreliable (PC-R3. 1364; 1370)[9]. The witnesses relied on information and documents not given to Asay. They testified about the manufacturer's warnings about the risks of etomidate, without Asay being allowed to know who manufactured the etomidate to be used. Asay was thus not able to have someone address how to read the package insert and what data supported the warnings. The hearing was quintessentially a "license for one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules." *R.A.V. v. St. Paul*, 505 U.S. 377, 392 (1992).

C. PUBLIC RECORDS.

When adopting the January 4, 2017 protocol that changed all three drugs, Julie l. Jones, Secretary of DOC, represented that:

> [t]he procedure has been reviewed and is compatible with the evolving standards of decency that mark the progress of a maturing society, the concepts of the dignity of man, and advances in science, research, pharmacology, and technology.

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expected to last under five minutes". *See* AB at 15. But, the State has no basis for its assertion because etomidate has not been used in an execution before. The time line is just a guess.

[9]Asay, with some time, has been able to obtain and file a declaration from Dr. John Robert Sneyd that completely refutes Yun's testimony. *See* Sneyd Declaration.

> The process will not involve unnecessary lingering or the unnecessary or wanton infliction of pain and suffering. The foremost objective of the lethal injection process is a humane and dignified death. Additional guiding principles of the lethal injection process are that it should not be of long duration, and that while the entire process of execution should be **transparent**, the concerns and emotions of all those involved must be addressed.

(Def. Ex. 1) (emphasis added). The call for transparency has turned out to be empty rhetoric. The how and why etomidate was chosen to now be the first drug been has been withheld from Asay.

First, DOC refuses to tell Asay the identity of the manufacturer who was responsible for the redacted package inserts at issue at the hearing. The State argues that Heath identified Hospira as the sole manufacturer of etomidate in the U.S. in his testimony at the July 26 hearing (AB at 28).[10] The State has a cite for this, but it is not to Heath's testimony; its to the July 29 order (AB at 28).[11] Heath testified as follows:

> Q: Now what – what is Amidate?
> A: Amidate is a brand name for a preparation of etomidate that is made by a company called Hospira.
> Q: Hospira, is that what you said?
> A: Yes, H-O-S-P-I-R-A.
> Q: Are they the only manufacturer of etomidate?
> A: I'm not – not in the world, but I'm not aware of another supplier in the U.S.. **There maybe one but what I use**

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[10]The State's assertion that there is one manufacturer is absolutely **false**. The State won't reveal the identity of the manufacturer, and then seems to be saying because there is only one manufacturer, Asay does know who manufactured the etomidate in DOC's possession. First, if the State's assertion is true why has DOC adamantly opposed disclosing the name of the sole manufacturer. Second, it's not true. There are at least ten manufacturers who are authorized to manufacture etomidate.

[11]The order was written before there was transcript, but the State had the transcript when it wrote its brief. The transcript shows that the judge's order is not correct. Apparently, the State would prefer to rely on the misstatement in the order, as opposed to acknowledge that was not Heath's testimony.

is from Hospira.

(PC-R3. 1414)(emphasis added). Thus, Heath did not know if there was another manufacturer of Hospira in the U.S.[12] DOC has refused to disclose the identity of the manufacturer. The State's refusal to recognize what Heath actually said, i.e., that there may be another manufacturer, shows a lack of candor before this Court.[13]

Furthermore, it's the State's obligation to disclose the information. The State's attempt to shift the burden to Asay makes no sense. The State is the party in possession of the information, as the U.S. Supreme Court noted in *Banks v. Drehtke*: "A rule thus declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process." 540 U.S. 668, 696 (2004).

The State asserts that Asay has "no due process right to know the manufacturer's name" (AB at 28)(*citing Spulvado v. Jindal*, 729 F.3d 413, 418 (5th Cir. 2013). This Court in *Muhammad v. State*, recognized that the identity of the manufacturer was

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[12]As the declaration of Dr. Sneyd indicates, there are ten companies authorized to manufacture and sell etomidate.

[13]This Court should require the State to disclose the name of the manufacturer to Asay. By arguing that Asay could have obtained the name of the manufacturer from Heath, the State implies that Hospira is the sole manufacturer, yet, Heath made clear that there could be another one. Therefore, if, in fact, Hospira is not the manufacturer, the State has "damaged the public by undermining the confidence in the very core of the judicial process-the search for truth." *Florida Bar v. Cox*, 794 So. 2d 1278, 1286 (Fla. 2001).

Indeed, as recently as August 5, 2017, Asay's counsel has learned that besides Hospira, several companies are authorized to manufacture etomidate for distribution in th U.S., including Aurobindo Pharma, Emcure Pharma, Gland Pharma, Hikma, Luitpold Pharma, Mylan (2), Par Sterile, West-Ward, and Zydus Pharma.

revealed there. 132 So. 3d 175, 192 (Fla. 2013) ("The order required the DOC to produce correspondence and documents it received from Hospira concerning the drug's use in executions or otherwise, including those addressing the safety and efficacy issues."). This Court's statement in *Muhammad*, suggests that the disclosure of the identity of the manufacturer is warranted.

Here, the information contained in the package inserts make it even more necessary that DOC disclose the manufacturer. Both State witnesses discussed the information contained in the inserts, including the adverse effects of the drug. It is a denial of Asay's due process rights for DOC to keep the manufacturer's identify a secret, given that the experts acknowledged uncertainty as to how to read the package inserts provided by the manufacturer.

As to the records and information provided to Buffington, including the records from the last two executions, photographs, logs and transcripts, Buffington relied on these records at various points in his testimony (*see* PC-R3. 1315, 1334, 1336, 1352). That makes it clear that the records of prior executions had more than the "little relevance" ascribed to them by the State (AB at 29). And, this belied the Stat's argument that because those records concerned executions that did not involve the use of etomidate they were not relevant (AB at 29). Certainly the State and its witnesses found them relevant to the issues at hand and extensively relied on them for specific issues, including the average amount of time from the last injection of

the first drug until an inmate is pronounced dead.[14] This is relevant to whether etomidate will last long enough to keep Asay insensate when the second and third drugs are injected, and to how an inmate is retrained, which is relevant to the expected myoclonis and whether the seizure-like movements could cause the IV to be displaced or be violent enough to bear on the issue of the dignity of the process. (PC-R3. 1315, 1334, 1336, 1352). These are exactly the records Asay requested. Denying him access to them while allowing the State to use on them is the epitome of a violation of due process.

D. THE FAILURE NOTIFY ASAY ABOUT THE CHANGE IN PROTOCOL.

In response to Asay's argument, the State ignores the clear and unambiguous language of the protocol requiring that the protocol be "provided to the Attorney General and the institutional warden shall provide a copy to a condemned inmate and counsel for the inmate after the warrant is signed." The State also ignores the past practice when the September, 2013, protocol was adopted. *See* PC-R3. 602-22. The State's silence as to the requirement in the protocol and past practice speaks volumes; the State's failure to disclose the protocol was error and that error severely prejudiced Asay.

The only defense the State mounts is to argue that the protocol is publicly available on DOC's website and Asay's

[14]The State has the audacity to argue that the records were not important because there is little dispute as to the "time frame from the first drug to the third drug" (AB at 29). However, there is "little dispute" because the State has asserted facts based on documents not disclosed to Asay.

counsel mentioned that he had read a newspaper article indicating that a new protocol had been adopted (AB at 30). If notice by publication in a newspaper is not adequate before the government can take an individual's property, it is not adequate regarding a change in how one's execution will be carried out. In *Delta Property Management v. Profile Investments, Inc.*, 87 So.3d 765, 771 (Fla. 2012), this Court explained:

> The United States Supreme Court has explained that to satisfy due process, notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950). The Supreme Court has further explained that whether a particular method of notice is "reasonably calculated" to provide adequate notice requires "due regard for the practicalities and peculiarities of the case." Id. at 314, 70 S.Ct. 652. In *Dawson v. Saada*, 608 So.2d 806, 808 (Fla.1992), we concluded that section 197.522(1) mandates "notice reasonably calculated to apprise landowners of the pending deprivation of their property" and thus is facially constitutional.

See Jones v. Flowers, 547 U.S. 220, 226 (2006)("we have stated that due process requires the government to provide 'notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'"). Asay did not receive adequate notice that the protocol, to which he had not objected, would not be used in his execution until July 10, 2017.

E. THE EXCLUSION OF WITNESSES.

The State argues that the witnesses Asay wanted to present, many from DOC, including a DOC pharmacist were protected by Fla. Stat. § 945.10 (g) (AB at 31). Yet, the State also wanted to assert that various drugs were unavailable to DOC (AB at 34; 50;

53). According to the protocol, the entire process of execution should be transparent (Def. Ex. 1). If the scope of that transparency does not include information as to why DOC determined that the "advances in science, research, pharmacolgy, and technology" caused it to switch the prior three drug protocol which had been approved by this Court, *see Muhammad v. State*, 132 So. 3d 176 (Fla. 2013), and used thirteen times without incident, then the word "transparent" has lost its meaning.

In *Glossip v. Gross*, the evaluation of an eighth amendment challenge to a lethal injection protocol included consideration of "known and available alternative methods of execution." 135 S.Ct. 2726, 2738 (2015). This means that Asay was entitled to an opportunity for Asay to present evidence as to the efficacy of the prior protocol and evidence as to why DOC abandoned a "known and available" method of execution.

In refusing to reveal the identity of the manufacturer, the State denied Asay the opportunity to respond to Buffington's interpretation of the package inserts (PC-R3. 1304, 1305, 1307, 1309, 1311, 1312), and Yun's testimony that the manufacturer's information is not "backed by any firm science or data." (PC-R3. 1364; *see also* 1370; Sneyd Declaration.

The preclusion of the DOC witnesses and a representative of the manufacturer denied Asay of the opportunity to present evidence as to the efficacy of the prior protocol and evidence as to why DOC abandoned a "known and available" method of execution.

ARGUMENT II: LETHAL INJECTION.

Statement of Facts

As to Palmer, the State asserts that he testified that the execution team members understand the effects of the drugs (AB at 35). But, Palmer testified that, he was not aware of any information about etomidate possibly causing pain (PC-R3. 1194; 1212). Likewise, Palmer was unaware of any information that the new drug was more likely to cause body movements (PC-R3. 1195).

When asked about movements of the inmates, Palmer said that there had been "muscle twitching" with previous drugs (PC-R3. 1191), but he also stated:

> Q: Was there any information as to whether it was more likely or less likely to have body movements with the new drug?
> A: I would defer that question to the medical experts.

(PC-R3. 1191). Thus, the notion that DOC is prepared for what are the known adverse reactions including seizure like activity (AB at 35), is not supported by the record.

As to Buffington, the State asserts that he testified that "[m]idazolam and etomidate both are described similarly as having instances of discomfort associated with injection in some individuals." (AB at 15, 37). Buffington actually testified:

> Q: So have you testified about midazolam in various states and indicated **no pain or discomfort** if used in a lethal injection?
> A: **I would assume so** but I would prefer to review any prior statements and testimony to see that.

(PC-R3. 1258)(emphasis added).[15]

[15]The State also relies on Buffington's statement about the etomidate warning and the phrase "[t]his pain is usually described as mild to moderate in severity but it is occasionally

Buffington relied on the records from FDLE Agent Biddle about prior executions to report that the etomidate would be sufficient to maintain a level of sedation through the entire procedure. The State has not disclosed these records to Asay so he was unable to adequately cross-examine Buffington on this point. *See* Argument I, subsection C.

The State did acknowledge that Buffington testified that the data upon which the manufacturer relied makes clear that the more likely an individual is to experience myoclonus, the more likely that person is to experience pain. Because Buffington said that the risk of myoclonus goes up with a larger dose of etomidate, here 5 to 15 times more than a clinical dose (PC-R3. 1299-1300), the risk of pain should logically increase with the larger dose.

Buffington's testimony that rocuronium does not cause pain is just wrong (AB at 15). The manufacturer of rocurunium bromide, which has not been disclosed to Asay states in the package insert: "Rocuronium bromide has no known effect on consciousness, pain threshhold, or cerebration. Therefore, its administration must be accompanied by adequate anesthesia or sedation." (Def. Ex. 3). Heath also testified that rocuronium bromide would cause pain to a conscious individual (PC-R3. 1412-13).

As to Yun, the State says that he never uses pre-medication when using etomidate (AB at 38). However, Yun stated that he uses midazolam in 10% of his cases before injecting etomidate (PC-R3.

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judged disturbing" (Def. Ex. 3), to mean that there was no pain, but discomfort (AB 36). Of course, the term "pain" and the progression of "mild to moderate in severity but occasionally judged disturbing" belies his interpretation.

1382).

The State also relies on Yun's testimony that a large dose of etomidate would "wipe out any possibility of myoclonic movements." (PC-R3. 1366)(AB at 17). However, the State ignores the fact that Yun's testimony was contradicted by Heath, the manufacturer's information in the package insert and Buffington - all of whom made it clear that the myoclonic movement would increase the greater the dose (PC-R3. 1322; Def. Ex. 3; *see also* Sneyd Declaration).

Argument

The State concedes that in deciding whether Florida's lethal injection protocol violates the eighth amendment, this Court must consider "[t]he risk of severe pain" when "compared to the known and available alternatives." (AB at 48).

However, the State posits that because "lethal injection protocols use needles to deliver the drugs, all protocols involve some pain." (AB at 48).[16] From there, the State contends that the twenty percent of patients who experience "some pain ... experience only mild to moderate pain and that pain lasts for only 10 to 20 seconds." (AB at 49). Thus, the State concludes that moderate or disturbing pain for such a limited time cannot be considered unconstitutional (AB 49).

First, the State doesn't cite any portions of the record for its proclamation that the pain will only be mild to moderate and

[16]Though not at issues here, certainly even the pain associated with the use of needles could be nearly eliminated if an inmate was given a topical analgesic. The State's claim that pain is necessarily present when an IV is used is not true.

last for 10 to 20 seconds. The testimony at the hearing was clear that the time for the etomidate to enter the travel from the vein to the brain is variable. In his experience, Heath testified that it generally takes 20 to 30 seconds, after completion of the injection of the etomidate, to render a patient unconscious (PC-R3 1423-4). But, he did testify that there is a lot of variation in the time (PC-R3. 1424). Buffington said that it should render a patient unconscious within 30-60 seconds, which is consistent with the information provided by the manufacturer (PC-R3. 1238; 1338; Def. Ex. 3). Yun said that when given rapidly, etomidate produces unconsciousness in 10 to 20 seconds (PC-R3. 1361; 1365).

Likewise, the level of pain will vary: Heath has seen it cause moderate to severe pain (PC-R3. 1418; 1472), which is corroborated by the research cited by the manufacturer (Def. Ex. 3). And as Buffington noted, the data cited by the manufacturer indicated that the more likely an individual is to experience myoclonus, the more likely that individual is to experience pain. Because Buffington testified that the risk of myoclonus increases with a larger dose of etomidate, here five to fifteen times more than a clinical dose (PC-R3. 1299-1300), it is clear that the risk of pain also increases due to the higher dose.

The State ignores that the eighth amendment analysis is not solely concerned with the severity of the pain and the length of time, but rather focuses on the risk of harm when compared to the known and available alternatives. *See Glossip v. Gross*, 135 S.Ct. 2726, 2738 (2015)(holding that the evaluation of the claim consider "that any risk of harm was substantial when compared to

a known and available alternative method of execution". Thus, Asay does not have to demonstrate that the pain is "severe"[17], but rather, that the State has a known and available alternative that has a less substantial risk of harm – here that is clearly and indisputably the prior protocol.

The State relies on an opinion concerning a fourth amendment search and seizure issue: *United States v. Husband*, 3112 F.3d 247 (7th Cir. 2000)(AB at 49-50). In *Husband*, the 7th Circuit considered whether it violated Husband's fourth amendment rights when the police injected him with etomidate so that he would open his mouth and they could retrieve the drugs that they believed were hidden there. *Id*.

Of course, the fourth amendment and the eighth amendment provide completely distinct protections for individuals. The U.S. Supreme Court recognized in 1966 that obtaining a blood sample - using needles – was acceptable under the fourth and fifth amendments, labeling such procedures as "minor intrusions" and because the procedure was conducted in a hospital setting by a physician. *Schmerber v. California*, 384 U.S. 757, 771-2 (1966)("Petitioner's blood was taken by a physician in a hospital environment **according to accepted medical practices**. We are thus not presented with the serious questions which would arise if a search involving use of a medical technique, even of the most

[17]The State argues that the pain from etomidate is not severe because it is used in clinical settings (AB at 49). This assertion ignores the testimony about the particular benefits that etomidate provides for patients with cardiovascular conditions (PC-R3. 1417). And, the State ignores the steps Heath takes to reduce or eliminate the pain when etomidate is used.

rudimentary sort, were made by other than medical personnel or in other than a medical environment—for example, if it were administered by police in the privacy of the stationhouse.)(emphasis added); *see also Breithaupt v. Abram*, 352 U.S. 432, 438 (1957)(focusing on the offensiveness of the police conduct.).

The fourth amendment concern of police conducting an offensive or intrusive search is distinct from the eighth amendment concern that a state employ a method of execution that does not create a substantial risk of harm in light of known and available alternatives. Thus, "[i]f a State refuses to adopt such an alternative in the face of these documented advantages, without a legitimate penological justification for adhering to its current method of execution, then a State's refusal to change its method can be viewed as "cruel and unusual" under the Eighth Amendment." *Baze v. Rees*, 553 U.S. 25, 52 (2008).

As to the alternative methods, the State insists that neither a single dose of pentobarbital or morphine is available to DOC (AB at 50-1). But, Buffington testified that he could prescribe, or order drugs, even for DOC, including etomidate, midazolam, morphine or pentobarbital (PC-R3. 1255-7). Indeed, pentobarbital has been used successfully as a single-drug protocol in Georgia, Texas and Missouri - states that account for a large number of executions (PC-R3. 1447). The State offered nothing to contradict Buffington or Heath as to the availability

of pentobarbital for the use in lethal injections.[18] And, though the State cited letters that had been written by the manufacturer requesting that DOC return its product and not use pentobarbital in lethal injections, we know that DOC ignored those requests, just as it has ignored the request to return the etomidate (AB at 51). *See* Def. Ex. 3.[19]

Though the State says that midazolam is not available; there is no testimony or evidence supporting this assertion - it is not in evidence. *See* AB at 50-1. Rather, Buffington unequivocally testified that he could prescribe or order midazolam for DOC:

> Q: So you could write a prescription for midazolam for the prison?
> A: Under the right circumstances, yes.
> Q: So they could carry out a lethal injection protocol using midazolam?
> A: Under the right circumstances, yes.

(PC-R3. 1256).

Later, the State again asserts without any evidence that "that option", presumably the use of midazolam, "is foreclosed due to the tactics of the capital defense bar." (AB at 51).[20]

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[18]The State, like the circuit court, argues that *Glossip* indicates that Florida changed its protocol because of the inability to acquire pentobarbital. This is not accurate, *Glossip* simply stated: "Florida became the first state to substitute midazolam for pentobarbital." *Glossip*, 135 S.Ct. at 2734.

[19]The circuit court noted that the manufacturer wrote to Florida's DOC asking that DOC cease using pentobarbital. But, that doesn't mean that Florida complied. Here, the manufacturer of the etomidate has requested that the drug be returned. But, DOC does not intend to honor that request.

[20]The repeated suggestion that Asay's counsel is responsible for the requests by drug manufacturers that states stop using their drugs in lethal injections is hollow given that in January of 2016, Asay filed no challenge to the midazolam protocol.

But, the State offered no evidence that midazolam is unavailable. Buffington's testimony is unrefuted.[21]

The State suggests to this Court that rather than rely on evidence, it should just assume that the State would not have changed its protocol unless midazolam was unavailable. But, the only evidence presented on the issue was the State's witness, Buffington, that midazolam was available and he could supply it (PC-R3. 1255-6).[22] Buffington is indeed a "source" though he may not be a manufacturer (AB at 52). Midazolam is available in the U.S., and Buffington, or a DOC pharmacist could order the drug for use in lethal injection.

Contrary to the State's argument (AB at 52-3), Asay has presented unrebutted evidence that midazolam, as well as pentobarbital and morphine, are available to DOC.

Finally, as to a one drug alternative, the State argues that one drug protocols "may well last an hour or two" (AB at 54), and cites to *Arthur v. Comm'r, Ala. Dep't of Corr.*, 2017 WL 2297616 (11th Cir. May 25, 2017), a case in which the 11th Circuit

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See AB at 51. Long before Asay or his counsel were informed on July 10th that the State would use etomidate to execute Asay, the manufacturer had requested that DOC return its drugs because to use them in a lethal injection would be a misuse of the drug (Def. Ex. 3).

[21]On the day of the evidentiary hearing, Ohio used midazolam in an execution. A news account of the execution indicated: "As supplies of execution drugs have grown more scarce, at least seven states have turned to **midazolam**, a powerful sedative **that is widely available** ...". *Ohio Carries Out Its First Execution Since 2014*, Mitch Smith, The New York Times, July 26, 2017.

[22]The State did not conduct any re-direct of Buffington related to his testimony that he could obtain midazolam for DOC to be used in lethal injections. His testimony is uncontradicted.

recognized the advantages of using midazolam in its protocol. *See* AB at 54 (describing the *Arthur* opinion: "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'"). Significantly, the State's argument defeats it's own assertion that midazolam is unavailable as well as supporting Asay's claim that the September 2013 protocol should be used in his execution.

The State also cites to the Joseph Wood execution in Arizona in 2014 in support of retention of Florida's three drug protocol because the Wood execution with a two drug protocol lasted nearly two hours (AB 54).[23] No evidence was presented at the hearing about the Wood execution, though Asay would be happy to present evidence on remand.[24]

One drug protocols do not cause the time of an execution to be lengthy as seen by the numerous executions performed over the past few years using pentobarbital in a single drug protocol.

What is seemingly overlooked in the Answer Brief is the U.S. Supreme Court's reliance in *Glossip* on Florida's amicus brief filed by the Florida Attorney General in April of 2015. In that

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[23]Because the protocol in Wood was a two drug protocol, the U.S. Supreme Court in *Glossip* held that the Wood execution was irrelevant to whether midazolam's use as the first drug in a three drug protocol was constitutional. 135 S.Ct. at 2745-6.

[24]However, perhaps more important than whether the Wood execution justifies retaining a three drug protocol is what occurred following the Wood execution: On June 21, 2017, the State of Arizona stipulated that "**[the Arizona Department of Corrections] will never again use a Paralytic in an executions**". (PC-R3. 471-81)(emphasis added). Thus, Arizona, like many other states abandoned the paralytic.

brief Attorney General Bondi represented to the U.S. Supreme Court that at that time Florida had conducted eleven executions using midazolam in a three drug protocol. Brief for State of Florida as Amicus Curiae in Support of Respondents in Glossip v. Gross, at page 4 ("Florida's record of consistent, successful executions using midazolam undermines any argument that the drug introduces substantial risk of harm."); *Id.* at 17 ("As Florida's experience demonstrates, midazolam has proven safe and effective in rendering an inmate unconscious, just as the previous drugs did in the similar protocol approved in *Baze.* The procedures for carrying out the capital sentences in states like Oklahoma and Florida provide protections well beyond what the Eighth Amendment requires."). Given Florida's representations to the U.S. Supreme Court, a switch to etomidate which carries a substantial risk of pain cannot be justified as consistent with the eighth amendment. Florida is choosing to expose Asay to a risk of pain.

In light of Florida's representations in the *Glossip*, Asay seeks to have the September 9, 2013 protocol, which was in effect when his continuous warrant was signed, be used in his execution.

The State also argues that the U.S. Supreme Court is more concerned with the pain of an execution rather than the dignity. That is simply not true. In *Hall v. Florida*, the U.S. Supreme Court reaffirmed its commitment to the concept of dignity:

> The Eighth Amendment "is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice." *Weems v. United States*, 217 U.S. 349, 378, 30 S.Ct. 544, 54 L.Ed. 793 (1910). To enforce the Constitution's protection of human dignity, this Court looks to the "evolving standards of decency that mark the progress of a maturing society." *Trop*, *supra*, at 101, 78

> S.Ct. 590. The Eighth Amendment's protection of dignity reflects the Nation we have been, the Nation we are, and the Nation we aspire to be.

134 S.Ct. 1986, 1993 (2014). There is no doubt that the evolving standards of decency requires that Florida abandon its paralytic and adopt a single drug lethal injection protocol.

ARGUMENT III: FLORIDA STATUTE §922.06 IS UNCONSTITUTIONAL.

According to the State, Asay has no standing to challenge the statute because he is helped rather than harmed by it (AB 57). Further, citing to *Tompkins v. State*, 994 So. 2d 1072 (Fla. 2008), the State asserts that this Court has repeatedly rejected challenges to the statute (AB 58). Thus, according to the State, "Asay simply may not rely on the stay statute as a basis for a legal claim under this Court's precedent." (AB 58). Additionally, the State claims that it didn't have any time advantage regarding the litigation of the new protocol, as Asay's counsel was aware at the beginning of the year, through a newspaper article, that the State had adopted a new lethal injection protocol (AB 59).

Asay disagrees with the State's assertions. As Asay explained in his initial brief, yet ignored by the State, the Attorney General, a party opponent, utilized §922.06(2)(b) to choose the most advantageous time and circumstances, at Asay's detriment, in which to certify that a stay had been lifted.

Moreover, ignored by the State is that the issue in *Tompkins* bears no resemblance to Asay's case. Indeed, *Tompkins* involved a challenge to the Governor's failure to reschedule his execution within ten days of the lifting of a stay. 994 So. 2d at 1084. This Court stated that "there is no authority that supports a

claim that section 922.06(2) either explicitly or implicitly provides criminal defendants with any enforceable rights and, specifically, a 'right' to a speedy execution." *Id.* at 1084.

Here, unlike in *Tompkins*, Asay is not challenging the Governor's actions nor is he complaining that he was denied a speedy execution. Rather, Asay's complaint concerns the unfettered discretion the Attorney General used to gain an unfair tactical advantage over a party opponent. *See United States v. Marion*, 404 U.S. 307, 324 (1971).

Finally, as Asay previously explained, he cannot be faulted for the State's failure to provide him with the new protocol in a timely fashion, or to alert him to the fact that the new protocol would apply to him. The State's six month delay in providing the new protocol to Asay resulted in an unfair tactical advantage.

CONCLUSION

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing reply brief has been furnished by electronic mail to Charmaine Millsaps, Assistant Attorney General, on this 7th day of August, 2017.

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

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