IN THE SUPREME COURT OF FLORIDA

CASE NO. SC11-1387

MANUEL VALLE,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, CRIMINAL DIVISION

SUPPLEMENTAL BRIEF OF APPELLEE

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STATEMENT OF CASE AND FACTS

The State relies on the statement of case and facts from its initial brief with the following additions.

On the afternoon of July 25, 2011, this Court entered an order staying the execution and relinquishing jurisdiction for an evidentiary hearing on the "narrow issue" of "the efficacy of pentobarbital as an anesthetic in the amount prescribed by Florida's protocol." *Valle v. State*, 2011 WL 3093866 (Fla. 2011).

The following morning, the lower court held a status hearing at which it announced that it was scheduling the evidentiary hearing for July 28-29, 2011. (PCR3-SR. 212) It then requested that the parties file witness lists, and the State immediately did so. (PCR3-SR. 58-85, 212) It ordered Defendant, who claimed to have considered what witnesses needed to be called to support his claim, to file a witness list by noon. (PCR3-SR. 212-13) The lower court stated that it believed that the limited scope of the hearing would not necessitate the calling of many witnesses and that it would limit the number of witnesses who could be called. (PCR3-SR. 213-14) Defendant responded that he believed that numerous witnesses were needed, including Warden Cannon, the execution team leader; Rana Wallace, DOC counsel; Greg Bluestein, a

reporter who witnessed the Blakenship execution; and two attorneys who witnessed an execution in Alabama. (PCR3-SR. 214-15)

The lower court stated that Defendant needed to have his witnesses available to testify on July 28 and 29, 2011. (PCR3-SR. 215) Defendant responded that Dr. Waisel was not available until August 2, 2011, and the lower court ordered Defendant to present him by phone or videoconferencing or find a substitute witness. (PCR3-SR. 215-16) The lower court then inquired about the State's witnesses, and the State explained that it would be calling an expert by phone or video and two lay witnesses to the Blankenship execution. (PCR3-SR. 216-19)

The State then requested that the lower court require a proffer regarding the expected testimony of the witnesses, which was granted. (PCR3-SR. 221) It also indicated that DOC was in the process of providing the letters this Court had ordered disclosed. (PCR3-SR. 221-22) When the lower court asked Defendant for the proffers, Defendant stated that he would include that information on his witness list, and the lower court indicated that doing so was acceptable. (PCR3-SR. 222)

Before noon, DOC provided copies of three letters that it had received that purported to be from Lundbeck, the manufacturer of pentobarbital. (PCR3-SR. 718-28) At noon,

Defendant provided a witness list, on which he included Warden Cannon, Ms. Wallace, DOC Secretary Edwin G. Buss and two executioners. (PCR3-SR. 676-97) Defendant proffered that he wished to question Warden Cannon about the procurement of pentobarbital, the training of the execution team and the assessment of consciousness. *Id.* He averred that he wished to question Ms. Wallace and Secretary Buss about the review of the execution protocols and the selection of pentobarbital. *Id.* He stated that he wished to question the executioners about their training. *Id.*

Just before 1 p.m., Defendant sent a renewed public records request pursuant to Fla. R. Crim. P. 3.852(i) to DOC, seeking records regarding the selection and procurement of pentobarbital. (PCR3-SR. 698-703) At 2 p.m., Defendant sent an amended witness list, adding DOC employees Russell Hosford and Jennifer Parker, whom he proffered he wished to question about their response to the Lundbeck letters. *Id.*

The State then moved the lower court to strike Mr. Hosford, Ms. Parker, Warden Cannon, Secretary Buss, Ms. Wallace and the executioners from Defendant's witness list. (PCR-SR. 86-92) The State asserted that the testimony that Defendant wished to elicit from these witnesses was not relevant to the narrow issue on which this Court had relinquished jurisdiction. *Id.* It also

pointed out that some of the information Defendant sought to present was confidential. *Id.*

DOC filed an objection to the renewed request for public records. (PCR3-SR. 729-34) It pointed out that filing the records request violated this Court's order, which prohibited the relitigation of other issues and that the request remained overly broad. *Id.*

Defendant filed a response to the State's motion to strike, asserting that the determination of whether the witnesses had relevant testimony to provide should be made on a question by question basis at the evidentiary hearing. (PCR3-SR. 711-17) He further asserted that he believed that anything regarding the selection and procurement of pentobarbital and the protocols was relevant to the narrow issue on remand. *Id.*

On July 27, 2011, the lower court held a telephonic hearing regarding the State's motion and the renewed public records demand. (PCR3-SR. 231-51) The State argued that the scope of the remand was limited, that this Court had forbidden the raising of other issues and that the witnesses it had moved to strike could not provide testimony relevant to the limited issue. (PCR3-SR. 235-36) Defendant responded that he believed that anything about the selection and procurement of pentobarbital, the training and experience of the execution team and the manner in which an

execution was conducted were within the scope of the issue on which this Court had remanded. (PCR3-SR. 236-43) As such, he believed that he should be permitted to call the witnesses he wanted and obtain the records he sought. (PCR3-SR. 236-41) The lower court ruled that the remand order was limited, found that the witnesses were not relevant and granted the State's motion to strike them. (PCR3-SR. 237-44, 670-71) It also sustained the objection to the request for additional documents as an improper attempt to relitigate an issue and overly broad. (PCR3-SR. 245, 674-75)

At the beginning of the evidentiary hearing, Defendant moved the lower court to continue the hearing so that he could present Dr. Waisel in person. (PCR3-SR. 261-67) In support of this request, Defendant presented an affidavit from Dr. Waisel, indicating that he was unable to travel to Miami to attend the hearing because of work commitments, while acknowledging that he had made arrangements to travel to Georgia to testify when he had been required to do so. (PCR3-SR. 95, 262-63) After considering argument on the issue, the lower court took the issue under advisement. (PCR3-SR. 261-80)

Matt Schluz testified that he was a federal public defender who had represented Alabama death row inmate Eddie Powell and attended his execution. (PCR3-SR. 284-88) During the execution,

he was seated in the witness area seven to eight feet from the left side of Powell. (PCR3-SR. 293-97) He observed the curtains to the execution chamber open, a couple of minutes later, the warden asked Powell about his last words and Powell made a statement. (PCR3-SR. 295, 298) The warden then left the chamber, and Mr. Schulz could no longer see him and did not know when the drugs were administered. (PCR3-SR. 298-99) He did observe a chaplain speaking to Powell and Powell laying his head down for a minute. (PCR3-SR. 300) Powell then lifted his head, appeared to be straining against his restraints, clenched his jaw, looked confused and seemed to have blood pumping into his face. (PCR3-SR. 301-02) After about a minute, Powell appeared to be unconscious. (PCR3-SR. 302, 303, 315) One of the guards then called Powell's name and brushed his eyelashes. (PCR3-SR. 303-04) Mr. Schluz observed that Powell's eyes remained about 20-25% open. (PCR3-SR. 304)

On cross, Mr. Schluz admitted that he was distressed because his client was being executed and this was the first time he had been in that situation. (PCR3-SR. 312, 313) He acknowledged that he did not actually look at a clock during the execution and his statements about time were estimates. (PCR3-SR. 311-13) He admitted that he had no idea when the drugs were actually being administered and that his view of Powell was

obstructed by the chaplain at times. (PCR3-SR. 310-11)

Defendant then announced that the parties had stipulated that the letters DOC had provided were letters that DOC received that purported to be from Lundbeck and that Lundbeck had stated that they had sent the letters. (PCR3-SR. 317-18) As such, the lower court admitted the letters into evidence. (PCR3-SR. 96-102, 321) Defendant then attempted to admit an affidavit from Bluestein, but the State objected. (PCR3-SR. 320) Defendant announced that his only other witness would be Dr. Waisel. (PCR3-SR. 316, 318-21) The lower court then announced that it would permit Defendant to call Dr. Waisel on August 2, 2011. (PCR3-SR. 336)

The State then called John Harper, a Georgia prison guard who had witnessed 28 executions by lethal injection and was in the equipment room during the Blankenship execution. (PCR3-SR. 343-45) Mr. Harper stated that he was 86 inches from Blankenship's head. (PCR3-SR. 345) He was also in a position to observe the executioners. (PCR3-SR. 358) He stated that five seconds after the first syringe of pentobarbital was started in the IV connected to the right arm, he observed Blankenship look at his left arm and grunt. (PCR3-SR. 346-47) About ten seconds after the drugs began, Blankenship was no longer moving and appeared to be unconscious. (PCR3-SR. 360-62)

On cross, Defendant elicited that the equipment room was small and there were a number of people in it. (PCR3-SR. 354-56) Mr. Harper was involved in his duties during the execution. (PCR3-SR. 356-58)

Dr. Jacqueline Martin, a deputy medical examiner in Georgia, testified that she witnessed the Blankenship execution as part of her official duties. (PCR3-SR. 378-79) She had previously witnessed two other executions. (PCR3-SR. 379) She was seated on the first row of the witness area, approximately five feet from Blankenship with an unobstructed view. (PCR3-SR. 380) A nurse was standing by his right arm. (PCR3-SR. 381) About two to three minutes after the warden left the execution chamber, Dr. Martin observed Blankenship look at one arm, move his mouth and then the other arm. (PCR3-SR. 384) He did not appear to be in distress and laid down thereafter. (PCR3-SR. 384-91)

On cross, Dr. Martin acknowledged that she was employed by a law enforcement agency and that it was part of her job to attend executions, which she had now done on four occasions. (PCR3-SR. 390, 392-93) She did not consult with the department of corrections after the executions. (PCR3-SR. 393-95) She described the movement of Blankenship's mouth that she observed as a chewing motion. (PCR3-SR. 395)

Before Defendant presented the testimony of Dr. David Waisel, the State moved in limine to prevent Defendant from attempting to use Dr. Waisel as a conduit for hearsay. (PCR3-SR. 414-15) It asserted that while Dr. Waisel could testify that he had reviewed affidavits and spoken to Greg Bluestein, that he had formed an opinion based on that information and what opinion he had formulated, he could not repeat what he had read or been told. (PCR3-SR. 415-17)

Defendant responded by seeking to admit affidavits from Bluestein and Eddie Ledbetter, reporters who witnessed the Blankenship execution. (PCR3-SR. 419-20) Defendant asserted that since the §90.5015(6), Fla. Stat. permit the use of an affidavit to authenticate certain materials from a journalist, the affidavits should be admitted to authenticate stories the journalists had published. (PCR3-SR. 420-21) The State responded that while the affidavit might authenticate the articles, the content of the articles remained inadmissible hearsay. (PCR3-SR. 421) During the course of argument, Defendant admitted that he had not attempted to subpoena Bluestein but stated that he had spoken to an attorney representing Bluestein who stated that Bluestein would attempt to assert the journalist privilege had he been subpoenaed. (PCR3-SR. 418-20) The lower court indicated that it would not have allowed the assertion of the privilege

had it been made. (PCR3-SR. 429)

After considering the arguments on these issues, the lower court ruled that the newspaper articles would not be admissible as business records. (PCR3-SR. 433) Alternatively, it ruled that if it they did qualify as business records, it would not admit them because a review of the articles caused it to have clear and convincing doubt over the accuracy of the information contained in the articles. (PCR3-SR. 433-36) Defendant then moved to strike the testimony of Dr. Martin and Mr. Harper. (PCR3-SR. 437) He averred that their testimony should not have been admitted before he presented his case and that their testimony was somehow improper rebuttal evidence. (PCR3-SR. 437-38) The State responded that the lower court had discretion to allow witnesses to be called out of turn. (PCR3-SR. 438-39) The lower court indicated that it would not consider this motion until all of the evidence was presented. (PCR3-SR. 438-39)

Defendant also argued that experts were allowed to testify regarding hearsay because they were allowed to rely upon it. (PCR3-SR. 439-44) The lower court then granted the State's motion in limine regarding using Dr. Waisel as a conduit for hearsay. (PCR3-SR. 444-45)

Dr. Waisel then testified that he had been an anesthesiologist since 1993, and that he taught in the subject

both at Harvard Medical School and at professional conferences. (PCR3-SR. 448-51) He stated that he had also been trained in medical ethics through courses but that he had not attended a formal training program on the subject. (PCR3-SR. 451-53) He had written professional articles, most of which concerned medical ethics but some of which concerned anesthesiology. (PCR3-SR. 454) He had testified regarding lethal injection protocols in proceedings in Oklahoma and Georgia. (PCR3-SR. 455) He had also written reports about lethal injection protocols in Delaware, Pennsylvania and Connecticut. (PCR3-SR. 456) He stated that he had also communicated with individuals from a death penalty clinic at a law school through intermediaries. (PCR3-SR. 456-57)

Regarding this case, Dr. Waisel stated he was first contacted by Defendant via email on July 5, 2011, and was later hired to assist the defense. (PCR3-SR. 457-58) He had reviewed Florida's 2007 and 2011 lethal injection protocols. (PCR3-SR. 458) He stated his understanding of the current protocol was that it used pentobarbital to render the inmate unconscious, pancuronium bromide to stop movement and sodium chloride to stop the inmate's heart. (PCR3-SR. 459-60) He averred that the second and third drug would be painful if the inmate was conscious. (PCR3-SR. 460-61)

He stated that pentobarbital and sodium thiopental were both barbiturates but averred that they were not interchangeable. (PCR3-SR. 461) He stated that sodium thiopental had been a standard drug used in anesthesia from the 1950's through the early 1990's and had been extensively studied. (PCR3-SR. 462) In contrast, pentobarbital had not been extensively used in surgical anesthesia and had not been studied for such use. (PCR3-SR. 462-63) He did admit that pentobarbital was used for the control of seizures and brain swelling and that it stopped electrical signals in the brain. (PCR3-SR. 463) He stated that pentobarbital was used infrequently during surgeries in which there was anticipated that there would be a lack of blood flow to the brain. *Id.* It was also used to sedate children during radiological studies. *Id.* He claimed that when pentobarbital was used, additional drugs were given to stabilize the patient's blood pressure because pentobarbital, like sodium thiopental, decreased blood pressure. (PCR3-SR. 465-66)

Dr. Waisel stated that the new lethal injection protocol called for the administration of the same five gram about of pentobarbital as the amount of sodium thiopental that had been part of the old protocol. (PCR3-SR. 469-70) He averred that the upper limit dose of sodium thiopental was five mg per kilogram and that the upper limit dose of pentobarbital was 500 mg

regardless of the patient's weight. (PCR3-SR. 470) However, he insisted that this dose only referred to sedation and that a sedated person might be conscious. (PCR3-SR. 470-71, 477-78) He stated that package insert for pentobarbital stated that there was no average intravenous dose for pentobarbital but that recommended dose to sedate a 70 kilogram adult was 100 mg. (PCR3-SR. 476) He also acknowledged that the highest total dose of pentobarbital that the package insert stated should be given is between 200 and 500 mg. (PCR3-SR. 477) He insisted that the dose necessary to reach surgical anesthesia was not known. (PCR3-SR. 479) He stated that if he used pentobarbital, he would give a small dose initially and would gradually increase the dose while monitoring the patient until the desire effect was achieved because it was important in medicine not to overdose a patient. (PCR3-SR. 479)

Dr. Waisel had reviewed the Lundbeck letters. (PCR3-SR. 48-81) He believed they were significant because drug manufacturers did not usually issue such letters until after the Food and Drug Administration (FDA) had found a problem and issued its own warning. (PCR3-SR. 481) He stated that if he had received a similar letter about a drug in his medical practice, he would not use the drug unless it was his only choice and the patient would die without the drug. (PCR3-SR. 481-82)

Regarding the Blankenship execution, Dr. Waisel testified he spoke to Bluestein and reviewed numerous affidavits, including those from Ledbetter, Mitchell Peace and approximately 13 individuals Georgia had relied upon in the DeYoung litigation. (PCR3-SR. 484-86) Based on this information, he opined that Blankenship had suffered extremely because he looked at one arm with discomfort, looked at the other arm with discomfort, lifted his head, grimaced and mouthed words. (PCR3-SR. 487-88) He believed this occurred three minutes after the execution began. (PCR3-SR. 488) He stated that a person receiving an IV dose of pentobarbital should only be able to move for about 15 seconds after the injection. (PCR3-SR. 488-89)

On cross, Dr. Waisel admitted that he was not a pharmacologist and that sodium thiopental was no longer available. (PCR3-SR. 490, 492) He acknowledged that pentobarbital was a short or intermediate acting barbiturate and that sodium thiopental was an ultra-short acting barbiturate. (PCR3-SR. 494) He admitted that the reason pentobarbital was not used during surgery was that its effects lasted too long. (PCR3-SR. 495) He acknowledged that the dose of pentobarbital that would produce burst suppression, the stopping of electrical signals in the brain, was known and was 10 mg per kilogram of

body weight. (PCR3-SR. 495-97) He acknowledged that burst suppression was a deeper level of anesthesia than surgical anesthesia. (PCR3-SR. 498) He admitted that five grams of pentobarbital was probably sufficient to cause burst suppression. (PCR3-SR. 498-99)

Dr. Waisel admitted that he had personally used pentobarbital to sedate children but stated that he had not done so in the last year. (PCR3-SR. 499) He acknowledged that drugs could be used for off label purposes and cited to dopamine and fentanyl as examples of drugs that were frequently used for off label purposes. (PCR3-SR. 499-501) He admitted that the reason why doctors are cautious about administering too much of a barbiturate is that an overdose can be fatal and that the drugs suppress blood pressure and respiration. (PCR3-SR. 503-04) He acknowledged that pentobarbital was used in both assisted suicide and euthanasia. (PCR3-SR. 505)

On redirect, Dr. Waisel stated that when he uses pentobarbital, he monitors the patient closely. (PCR3-SR. 506) He stated that he did not use pentobarbital much because other drugs were available. (PCR3-SR. 506-07)

Dr. Mark Dershwitz, a pharmacologist and anesthesiologist with 25 years experience, testified that pentobarbital was mainly used for seizures and to induce barbiturate comas. (PCR3-

SR. 512-21) He stated that in inducing a barbiturate coma, a doctor was attempting to induce a condition called burst suppression in which all electrical activities in the brain ceases and an EEG reading is flat line. (PCR3-SR. 521-22) He stated that this condition resulted in a deeper state of unconsciousness than was created during surgical anesthesia. (PCR3-SR. 523) He stated that the dose of pentobarbital necessary to induce this state was well known and that papers had been published about the dosage as early as the late 1970's. (PCR3-SR. 523-24) He stated that the dosage range with pentobarbital was great and affected by age, weight and genetics. (PCR3-SR. 524-25)

Dr. Dershwitz opined that a five gram dose of pentobarbital administered during the time periods called for in a lethal injection protocol would produce a massive overdose. (PCR3-SR. 525-27) He stated that pentobarbital affects the brain, heart and lungs and that an overdose would result in a flat line EEG, apnea and such a precipitous drop in blood pressure such that circulation might stop. (PCR3-SR. 527) He believed that the use of this dose would definitely be fatal. (PCR3-SR. 527)

Dr. Dershwitz testified that people under general anesthesia may make reflexive movements and can have their eyes open. (PCR2-SR. 528-29) In fact, he averred that he sees

anesthetized patients with open eyes once or twice a week. (PCR3-SR. 529)

Dr. Dershwitz admitted that pentobarbital was not FDA approved for general anesthesia. (PCR3-SR. 530) However, he stated that off label uses of drugs was common and cited fentanyl as an example of a drug that was commonly used for an off label purpose. (PCR3-SR. 530-31) He stated that one reason why drugs were frequently used for off label purposes was that getting FDA approval for a new label use was expensive. (PCR3-SR. 530) He stated that the reason why pentobarbital was not commonly used during surgery was that its effects lasted too long. *Id.*

On cross, Defendant elicited that Dr. Dershwitz had been contacted by the State about this matter probably in early July. (PCR3-SR. 532) He was not provided with the new protocol but was informed that the only change from the old protocol was the substitution of pentobarbital. (PCR3-SR. 535) He did not recall the exact number of times he had spoken with individuals from the State or the exact content of the conversation. (PCR3-SR. 532-33) However, he stated that most of his discussions had been about the logistics of testifying both before the motion was originally denied and after the remand. (PCR3-SR. 534)

Dr. Dershwitz admitted that he had provided testimony and

affidavits regarding lethal injection protocols for numerous states. (PCR3-SR. 536-37) He had never consulted with a state about formulating a lethal injection protocol because it was not ethical for a physician to do so. (PCR3-SR. 537-38) When asked if he believed sodium thiopental was a better choice for a lethal injection drug than pentobarbital, Dr. Dershwitz stated that he had been informed by the Board of Anesthesiology that such comparison testimony was unethical. (PCR3-SR. 534-44) As such, he could not answer the question. *Id.* When asked about specific incidents of such prior testimony, Dr. Dershwitz stated that he did not recall specific testimony from specific cases but that if there was a transcript containing such testimony, he had no reason to suggest that he had not given such testimony. (PCR3-SR. 544-55) He also stated that the drug most commonly used as a general anesthetic today was propofol. (PCR3-SR. 558)

Based on this evidence, Defendant argued that he had proved its use was unconstitutional because Dr. Waisel had testified the effects of pentobarbital were unknown and that Blankenship suffered. (PCR3-SR. 567-68, 569, 570) He further stated that Schulz's testimony showed that Powell suffered. (PCR3-SR. 569, 570) When asked about how pentobarbital resulted in suffering since it could kill a person, Defendant responded that Dr. Waisel's testimony showed that there was insufficient knowledge

to show whether pentobarbital would take sufficient effect before the other two drugs were administered. (PCR3-SR. 568-59) He also insisted that the Lundbeck letters showed pentobarbital was unsafe. (PCR3-SR. 571) When the lower court pointed out that there was a consciousness check before the other two drugs were administered, Defendant insisted that the scope of the remand should be expanded to allow him to show that the consciousness checks were insufficient. (PCR3-SR. 572-76)

The State responded that Dr. Waisel's testimony was insufficient to carry Defendant's burden of proof. (PCR3-SR. 576) It further asserted that the emphasis on surgical anesthesia was incorrect as the purpose of a lethal injection was to cause death; not unconsciousness. (PCR3-SR. 577) It pointed out that both Dr. Waisel and Dr. Dershwitz had agreed that high doses of pentobarbital stopped all electrical activity in the brain such that an inmate could not feel pain and would die. (PCR3-SR. 576-78)

When the State began to discuss the Blankenship execution, Defendant interrupted and renewed his motion to strike. (PCR3-SR. 578-79) Defendant argued that the State should not be allowed to present direct evidence about the Blankenship execution because he had not been permitted to present hearsay testimony through Dr. Waisel and the State had elected not to

cross examine Dr. Waisel about the hearsay on which he had relied. (PCR3-SR. 579-80) The lower court ruled that Defendant had the opportunity to present his own direct evidence about the Blankenship execution and the fact he elected not to use that opportunity to present such evidence did not make the State's evidence improper. (PCR3-SR. 580)

The State then argued that the fact that an expert's opinion was inconsistent with the factual evidence on an issue was a sufficient basis to reject the expert's opinion. (PCR3-SR. 580) It then pointed out that Dr. Martin's testimony established that while Blankenship may have moved three minutes after the warden left the execution chamber, it showed that Blankenship was not in pain and that the witnesses had no way to know when the drugs were injected. (PCR3-SR. 580-81) It also asserted that Mr. Harper's testimony showed that the movement had occurred within five seconds of the first injection and ceased within ten seconds of that injection. (PCR3-SR. 580-81) It argued that even Dr. Waisel acknowledged that a person could move within 15 seconds of an injection of pentobarbital. (PCR3-SR. 581)

Regarding the Powell execution, it argued that Defendant had not proven suffering because Schluz could not say when the brief movement he observed occurred in relation to the administration of pentobarbital. (PCR3-SR. 581) It also pointed

out that Schulz's testimony about the calling of Powell's name and brushing of his eyelids showed that the movement occurred before the consciousness check and administration of the other two drugs. (PCR3-SR. 581-82)

Regarding the Lundbeck letters, the State asserted that the letters did not state that the use of pentobarbital in a lethal injection was unsafe. (PCR3-SR. 582) Instead, they merely stated that it was an off label use for which safety information was not available. (PCR3-SR. 582) It also pointed out that the use of all lethal injection drugs were off label uses as the FDA had refused to involve itself in the regulation of lethal injection drugs. (PCR3-SR. 582)

On August 3, 2011, the lower court entered its order denying the lethal injection claim again. (PCR3-SR. 173-93) It found that the evidence Defendant presented was insufficient to carry his burden of proof and was incredible. It also found the State's evidence credible. This appeal follows.

SUMMARY OF THE ARGUMENT

The denial of the lethal injection claim should be affirmed. The lower court's factual findings are supported by competent, substantial evidence and its application of the law to those facts was correct. The lower court also did not abuse its discretion in its rulings about the admissibility of evidence.

ARGUMENT

I. THE LOWER COURT PROPERLY DENIED THE LETHAL INJECTION CLAIM.

Defendant next asserts that the lower court erred in rejecting his claim that Florida's lethal injection protocol is unconstitutional. However, this claim presents no basis for relief.

After a trial court conducts an evidentiary hearing on a claim regarding the constitutionality of an execution method, this Court accepts the lower court's factual findings so long as they are supported by competent, substantial evidence. *See Provenzano v. State*, 761 So. 2d 1097, 1099 (Fla. 2000). Here, the lower court rejected Defendant's claim, stating:

> **Matt Schulz**
>
> The first defense witness presented was Matt David Schulz ("Schulz"). By agreement of the parties he was sworn by the clerk of court for Miami- Dade County, Florida and testified by phone from Montgomery, Alabama.
>
> Schulz testified that he is a three (3) year employee with the Federal Public Defender's Office in Montgomery, Alabama. On June 16, 2011, he witnessed the execution of his client, Eddie Powell, in Alabama. After visiting with Mr. Powell and his family and noting that Powell was in no visible distress, he was escorted by the guards to a viewing room. There, he was seated, approximately 7-8 feet from Powell, who was covered with sheets except for his face and upper body and strapped down to the gurney. Schulz was facing Powell's left side and could see some of Powell's right arm also because the arms were outside of the sheets. The chaplain and warden then entered the room. The warden read the death order and asked

Powell if he had any last words. The warden allowed Powell to make a last statement. The warden then walked behind Powell and made an announcement that the execution was to be carried out. The I.V. lines ran into the wall. Schulz was unable to see any activity behind that wall and unable to see when syringes were pushed. The chaplain approached Powell, spoke a few words to him, and nodded. Powell looked to the left, nodded, took a deep breath, and then put his head back down. The chaplain talked to him for 30-60 seconds. Powell lay there approximately one (1) minute then suddenly jerked his head and his upper and lower body appeared as if pressing against the restraints. Schulz believed that Powell was attempting to sit up. Powell, he said, had a look of confusion when he looked at the chaplain. Schulz asserted that Powell clenched his jaw, flexed his muscles, and his arteries bulged. His eyes rolled back in his head, he took a deep breath and closed his eyes. This lasted about one (1) minute. The guard approached and called his name ("Eddie, Eddie, Eddie") several times. He did not respond. The guard did an "eyelash check" to which there was no response. After a few minutes or so, he noticed that Powell's eyes were opened partly.

This was the first execution Schulz ever attended and it was very stressful for him.

The entire process that he observed seemed to last 20-25 minutes. He was able to see a clock directly but was not watching it. He did notice it but not until after the guard called Powell's name during the consciousness check.

He is not sure what the lethal injection protocol is but *believes* that 2500 mg. of pentobarbital is administered.

This testimony is speculative and without more specific testimony or expert testimony it is of little value to the court in consideration of the question at hand. Even if the entire situation lasted one minute, it certainly does not establish that the Defendant suffered to establish an Eighth Amendment claim. *See Baze*.

Evidence admitted via Stipulation

After Schulz' testimony, defense counsel entered into evidence their sole Exhibit #A. By stipulation

of the parties #A is a collection of letters sent to both the Governor of Florida and the Secretary of the Department of Corrections for Florida from the Manufacturer of pentobarbital. In these letters, Lundbeck, Inc., the manufacturer of pentobarbital, protests the use of their product in executions claiming that they (Lundbeck) are in the business of improving their customers' lives. There was no mention of medical evidence or anything relevant to the court's inquiry. This exhibit is of no legal value and carries no weight.

Dr. David Waisel

On Tuesday August 2, 2011 at 9:00 a.m. the defense presented Dr. David B. Waisel, M.D. who testified after being duly sworn by the Clerk of the Court as follows:

He is a practicing anesthesiologist at Children's Hospital Boston and an Associate Professor of Anesthesia, Harvard Medical School. He has been practicing clinical anesthesiology, primarily pediatric anesthesiology, for approximately 18 years. He has written numerous articles and teaches courses on anesthesiology at Harvard Medical School and presents to other physicians in his field both nation and worldwide.

He further has provided consultation for the death penalty clinic at University of California Berkeley and testimony on the Pavatt (Oklahoma) execution and DeYoung and Blankenship (Georgia) executions. He has also provided consultations in written form for death penalty litigation in Delaware, Connecticut and Pennsylvania.

He has been asked by the attorneys who represent the Defendant to provide an expert medical and scientific opinion about observations of the execution of Roy Blankenship by lethal injection on June 23, 2011.

Dr. Waisel was not in attendance at the execution. His information about the execution comes from the affidavit and interview of an eyewitness, Greg Bluestein, a reporter, whose report is the type of information experts in his field normally and regularly rely on in forming expert opinions. He also reviewed the affidavits of other purported eye

witnesses who are also reporters; i.e., Eddie Ledbetter and Mitchell Peace. He also reviewed and relied on the 2007 and 2011 Florida lethal injection protocol as well as defense Exhibit #A and other affidavits described as approximately twelve (12) DOC officials without further elaborating.

Waisel opined that Blankenship "suffered extremely" based on Waisel's understanding of what took place; that is, that Blankenship looked at one arm with "discomfort", looked at the other arm "with pain", grimaced, jerked his head up, mouthed words and all of this lasted for three (3) minutes. He is also of the impression that pentobarbital was used and that had the pentobarbital worked properly Blankenship would have moved for only fifteen (15) seconds after the drug was administered. Dr. Waisel never opined as to what time the pentobarbital was administered.

Waisel testified that he does not know the proper amount of pentobarbital necessary to anesthetize the patient; only to sedate them. He stated that sedation and anesthetizing can be viewed along a continuum. Sedation would be at one end where a sedated patient may still be responsive and the anesthetized patient may be unconscious enough to have open-heart surgery. The average patient he stated to be 150 pounds and the proper dosage for sedation with pentobarbital would be from 100 to 500 mg. The amount used by the state for anesthetizing the inmate, he acknowledged, to be 5000 mg. but claims that he *cannot say* that the dosage is actually 10 times the sedation dosage because *there has not been enough testing*. He calls this use of pentobarbital an off-label use. He acknowledges that there are legitimate off-label uses for drugs. That is, the use as an anesthetic in execution is not the "intended use" of the manufacturer. Only when a drug has been tested systematically can one begin to reliably assess how an untested use of a drug will affect human subjects, according to Dr. Waisel. Because *we do not have sufficient data, there is no way to know, in any given case, how an overdose of pentobarbital will affect basically healthy inmates*.

Waisel admitted that Blankenships movements could indicate discomfort or pain. He conceded that sodium thiopental, which he says was an ideal drug for use in executions, is an ultra short-acting barbiturate while pentobarbital is a short to intermediate-acting

barbiturate.

This witnesses' testimony cannot and does not establish the necessary "substantial risk of serious harm". His testimony is based on speculation and, is therefore, inherently unreliable. At the very least, he does not establish a reasonable **effective, readily implemented alternative** to pentobarbital. *See Baze* at 52. Further he does not establish that pentobarbital will not work. He seriously doesn't know. His testimony falls far short of meeting the required standard of "demonstrating a substantial likelihood of serious harm."

STATE WITNESSES

John Harper

On July 28, 2011, the State presented witness John Harper, who being sworn by the Clerk of Court, stated the following:

He is a 23 year employee of the Georgia Department of Corrections ("GDC"). He has attended all 28 lethal injections in Georgia as part of his duties. He witnessed the June 23, 2011 execution of Roy Blankenship at the Georgia Diagnostic and Classification Prison in Jackson, Georgia. He was in the mechanical room which is physically behind the execution chamber during the execution. That area is separated from the execution chamber by a one-way mirror and the gurney on which Blankenship lay restrained is 86 inches from where Harper was located in the mechanical room. His view was mostly unobstructed; however, people did walk in front of him. He could see Blankenship's left side profile. Blankenship had an intravenous line into each of his arms. He saw Blankenship look around and look at his left arm about five (5) seconds after the start of the first syringe. However, the pentobarbital was first administered to Blankenship's right arm. He heard Blankenship make a "grunt" sound. Harper knew when the drugs were administered because he was given a signal and he was keeping a time log. About ten (10) seconds passed between the time the syringe was pushed and when Blankenship appeared to be unconscious. There was no flailing or thrashing. After the pentobarbital was administered a consciousness check was performed and Blankenship did not respond.

Of all the witnesses on the issue of the Blankenship execution, Harper is the most credible on this topic. He actually could hear and could see the pushing of the syringes and was keeping a time log. His testimony is in keeping, ironically, with the acceptable parameters testified to by Dr. Waisel. Waisel stated that if the pentobarbital were to work properly that it would take effect within fifteen (15) seconds. That it did, according to the only witness able to testify with any degree of certainty as to the timing of the administration of the drugs and rendering of unconsciousness.

Jacqueline M. Martin, M.D.

On Thursday July 28, 2011 the State called Jacqueline M. Martin, M.D., as a witness. Without objection she was sworn by both the clerk of Courts in Miami-Dade County, Florida, and a court reporter authorized to give an oath in New York, N.Y. from where the witness testified by telephone.

She stated that she was a witness to the June 23, 2011 execution of Roy Blankenship in Georgia. She is a physician licensed to practice in Georgia and also the Deputy Chief Medical Examiner for the Georgia Bureau of Investigation. She obtained her medical degree from Ponce School of Medicine in Puerto Rico in 1985. She has also acted as Deputy Medical Examiner in Rochester, N.Y. and from 1997-1999 she was the Medical Examiner in Palm Beach County, Florida. Though she is not a clinical physician she was trained in medical school to administer anesthesia. This was the third execution that she attended.

According to Dr. Martin she sat on the front row in the witness viewing area. She could see clearly from where she was and could see into the execution chamber. She was about 5 feet away from the inmate. Blankenship was strapped down with I.V. lines in each arm. There was a nurse on the right of the gurney and officers to the left and right. The warden read the execution order and left. Two (2) to three (3) minutes after the warden left, Blankenship looked to his left arm and moved his mouth-he had no teeth-and looked at his right arm, put his head down on the pillow and stayed put. She saw no obvious signs of distress or facial features indicating pain.

She did not consult with the Department of Corrections or the Georgia Bureau of Investigation afterward. It is part of her duties as M.E. to view the execution.

Dr. Martin's testimony is consistent with that of Mr. Harper. She is a medical professional who could see Blankenship's actions and facial features. Her interpretation of his reactions to the drugs substantiate that Blankenship in no way experienced pain or suffering.

Dr. David Dershwitz, M.D.

On Tuesday, August 2, 2011 the State presented the testimony of Martin Dershwitz, M.D., who testified that he is a physician who has also had a Ph.D. in Pharmacology since 1982. He has had his license and certification in anesthesiology since 1987. He has taught Medical Pharmacology since 2001 at the University of Massachusetts Medical School and also teaches Medical Biochemistry. He has written numerous articles, books and contributed chapters to books on pharmacology. He is presently an anesthesiologist at UMass Memorial Medical Center in Worcester, Massachusetts.

Dershwitz testified that pentobarbital, also known as Nembutal, is used primarily to induce a barbiturate coma or as a sedative or to treat intractable seizures. He explained that the dose usually administered was established in the 1970's. It is based on a person's body weight, age, and sometimes genetic factors though this last factor is not well-understood. The range of doses is quite large. However, the effect of 5000 mg. of Nembutal (pentobarbital), as provided for in the Florida lethal injection protocol, is "far in excess of the dose that would be needed or used for a human". Two things would occur with the administering of this amount of drugs: first, the cardiovascular system and, second, the respiratory system would experience a shut-down. That is, the blood pressure would plummet and the circulatory system would cease to function. He distinguished the amount of the drug as well as the rate of administration of drugs given for hospital use versus that used in the execution protocol. The dose used in the lethal injection protocol at the rapid

rate at which it is administered, would bring about a total flat line on the EEG in brain activity. Therefore, the person would have no perception of pain or sensation. However, he did point out that unconscious patients, while under sedation, can still have active EEG's while remaining unconscious and being in an anesthetized state. It is even possible for anesthetized patients to move and/ or react to stimuli as a reflex at the spinal cord level. This reaction does not necessarily indicate consciousness. He also stated that it is possible, though it does not occur frequently that people's eyes remain open while unconscious. It would then be necessary to close their eyes to prevent corneal damage or drying out.

According to Dr. Dershwitz, Nembutal is not used as an anesthetic because it lasts longer and causes a longer "hangover" after medical procedures; doctors prefer their patients awake at the end of surgery. The FDA has not approved it for use in lethal injection. This is considered an "off label use". There are a number of drugs which are commonly used by doctors for an "off label use". Interestingly, both Dr. Waisel and Dr. Dershwitz referred to Fentanyl as such a drug.

Dr. Dershwitz admitted that he had testified in the Dickens and Alderman cases about the efficacy of sodium thiopental. However, that drug is no longer available and has not been, to his knowledge, for some two (2) years or more.

Ultimately he testified that no one could survive 5000 mg of pentobarbital intravenously. The doses and rates of administering the drug for surgery are one tenth of what is used in the protocol.

Dr. Dershwitz' testimony was credible and persuasive. Further, he refuted any suggestion that the dose of pentobarbital in the Florida lethal injection protocol would leave an inmate conscious and able to experience pain and suffering during the lethal injection process. The court credits the testimony of Dr. Dershwitz over that of Dr. Waisel.

LEGAL ANALYSIS

Defendant has alleged an Eighth Amendment claim. In order to do so, in the lethal injection context, a defendant must show an objectively intolerable risk of harm which must be sure or very likely to cause

needless suffering. *Baze v. Rees*, 553 U.S. 35, 50 (2008). Not only has the Defendant failed to meet this standard, he has failed to present any credible evidence of any risk of needless suffering.

The facts and testimony is this case are substantially similar to that in *DeYoung v. Owens*, 2011 WL 28997[0]4 (11th Cir. 2011).

> A significant part of DeYoung's Eighth Amendment claim in his §1983 complaint is based on the State of Georgia's execution of Roy Blankenship on June 23, 2011. DeYoung largely points to events surrounding the Blankenship execution as the basis for his Eighth Amendment claim. DeYoung attempts to use evidence of the Blankenship execution to show two things: (1) that administration of 5,000 milligrams of pentobarbital to an inmate causes needless suffering in and of itself, and (2) that the pentobarbital dose does not adequately render an inmate unconscious, thereby leading to needless suffering.
>
> After hearing testimony by DeYoung's expert and reviewing multiple affidavits, the district court found (1) that DeYoung failed to establish that pentobarbital caused Blankenship any pain during his execution given that DeYoung's expert failed to provide a medical explanation for why pentobarbital might have caused Blankenship pain, or will cause pain in executions; and (2) that, in any event, DeYoung "has absolutely no likelihood of success on the merits" of his claims.
>
> As the district court aptly found, DeYoung's medical expert, David B. Waisel, M.D., formulated his opinion based on witnesses' accounts of the execution and some movement by Blankenship during the initial three minutes at the start of the execution process. The witnesses disagree about two things: (1) the type of movement; and (2) whether it occurred before or during the administration of the pentobarbital.
>
> As to the movement, witnesses describe

it in very different ways. To some, Blankenship was just looking up and watching what was occurring, looked at his left arm (which had an IV saline drip) and then 30 to 60 seconds later looked toward his right arm where the administration of the pentobarbital was starting. To others, Blankenship appeared to grimace, or have a startled face, or jerked his arm twice, or had his mouth open and tried to mouth something.

As to timing, some believe all the movement occurred before the pentobarbital was started in the IV and others appear to think that it was after the pentobarbital was started in the IV. In any event, the movement occurred only a few times and all briefly during a total time period of three minutes. The evidence undisputedly shows that Blankenship became still and was unconscious before the second drug was administered.

Even assuming Blankenship's movement was during the administration of the pentobarbital or right after, the evidence in this record does not establish a substantial risk of serious harm from the pentobarbital, or even that Blankenship necessarily suffered any harm, much less serious harm. First, as the district court pointed out, "Dr. Waisel entirely failed to provide a medical explanation for why pentobarbital might have caused Blankenship pain. To the contrary, Dr. Waisel testified that a patient will not feel pain at the moment when a drug is introduced intravenously unless it is a drug, such as potassium chloride, which causes a burning sensation."

Second, the district court noted that Dr. Waisel admitted that "any 'suffering' was short lived as it clearly ended within a few minutes—three minutes at the most—after the pentobarbital was injected." The Eighth Amendment does not protect against all harm, only serious harm; and it does not prohibit

> all risks, only substantial risks. "Simply because an execution method may result in pain, either by accident or as an inescapable consequence of death, does not establish the sort of 'objectively intolerable risk of harm' that qualifies as cruel and unusual." *Baze*, 553 U.S. at 50, 128 S.Ct. at 1531 (plurality opinion). In any event, Dr. Waisel was not present at the Blankenship execution; rather, he opines from the witnesses' varied descriptions of Blankenship's movements that those movements were a sign of "discomfort," which Dr. Waisel termed "suffering." Dr. Waisel acknowledged that no one reported any movement by Blankenship after the nurse's consciousness check. Further, Blankenship's autopsy revealed no evidence of trauma. The catheters were inside Blankenship's veins and the veins were not burst or broken. There was no infiltration of fluid in the soft tissue of the right arm near the catheter site.
>
> Notably too, DeYoung presented no evidence to show that unconsciousness is not achieved after the complete administration of a 5000-mg dose of pentobarbital.

DeYoung, at 4-5. (Footnotes omitted.)

The Eleventh Circuit Court of Appeals also rejected the claim that pentobarbital has not been sufficiently tested for ability to cause an anesthetic coma in fully conscious persons. The Court noted:

> However, DeYoung's expert candidly admits he does not know how the State's dosage of pentobarbital will affect inmates because he claims there is no way to know. This asserted lack of knowledge obviously cannot satisfy DeYoung's burden of affirmatively showing that a substantial risk of serious harm exists. Thus, DeYoung's evidence focuses largely on the Blankenship execution.

DeYoung, at N.4.

In this case, the State presented two very

credible witnesses, John Harper and Dr. Martin, both of whom witnessed the Blankenship execution personally. They viewed the execution from opposite sides of the execution chamber. Both testified consistently that Blankenship, looked at his left arm, he looked at his right arm. Harper stated he made a grunting sound. Dr. Martin testified his mouth moved, which would be consistent with the grunting sound. Both said he laid his head down and never moved again. Dr. Martin did not view any signs of distress.

Dr. Waisel was not present at the execution. He relied upon the affidavit of a reporter, who was not called to testify. Dr. Waisel did not testify or present any evidence to demonstrate that the usage of pentobarbital would create an objectively intolerable risk of harm which must be sure or very likely to cause needless suffering. Dr. Waisel testified that the effects of pentobarbital are unknown. The Eleventh Circuit Court of Appeals found in *DeYoung, supra*, this does not meet the requirements of *Baze, supra*. This court agrees. The Defendant must prove that there is a substantial risk, not that the risk is unknown.

The testimony of the witnesses to Blankenship's execution differed with regard to the amount and nature of the movement by Blankenship. No one could testify conclusively about the relationship between the reported movement and the administration of the pentobarbital with the exception of the state's witness, John Harper. He reported only minimal movement and within seconds of the pushing of the syringe. There is no indication that the inmate was in any discomfort much less pain or suffering; only that he glanced at his arm and gave a grunt. Within ten (10) seconds the inmate was unconscious, according to Harper, who was not only in a more advantageous place to see and note what was taking place. He also kept a time log.

To the extent that the witnesses differed in their testimony, this court resolves credibility issues in favor of Mr. Harper who is accustomed to watching executions and thus, has a more objective view. He testified quite credibly and persuasively. Further, there was no movement of the inmate reported by any witnesses after the prison official's consciousness check.

> The only witness testifying about the execution of Powell did not know when the pentobarbital was administered. The relationship between the supposed short term movements reported and the administration of pentobarbital is totally speculative. Nor was Schulz aware of the amount of drugs used in that instance. Schulz stated that the inmate did not move after the consciousness check was done by the prison officials. This same consciousness check is included in the Florida protocol. If after the initial administration of the pentobarbital the inmate shows any signs or responsiveness, more anesthetic (pentobarbital) is administered. No additional drugs were necessary for Powell, according to the testimony, suggesting that the inmate was unconscious and the pentobarbital was effective in rendering him unconscious.
>
> **CONCLUSION**
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> The defendant has failed to show that the substitution of pentobarbital as an anesthetic violated the Eighth Amendment's prohibition of cruel and unusual punishment. Defendant has attempted to use evidence of two (2) earlier executions (Powell and Blankenship) to show that the administration of 5,000 mg of pentobarbital causes needless suffering in and of itself, and that the pentobarbital dose does not adequately render an inmate unconscious, thereby leading to needless suffering. The evidence presented did not establish substantial risk of serious harm from pentobarbital, or even that inmates who were executed earlier necessarily suffered any harm, much less serious harm, from intravenous administration of pentobarbital.
>
> Like the Federal District Courts in *Powell*, *DeYoung*, and *Pavatt*, this court finds that usage of pentobarbital does not create an objectively unreasonable risk of suffering.

(PCR3-SR. 175-92) Here, each of the lower court's factual findings is supported by competent, substantial evidence. Each of the witnesses testified in the manner the lower court

described. (PCR3-SR. 284-316, 343-63, 378-95, 448-507, 511-65) Moreover, Dr. Waisel's testimony about his opinion of the Blankenship execution was contrary to the factual testimony concerning what occurred during that execution. (PCR3-SR. 484-89, 343-63, 378-95) This alone provided a sufficient basis to reject his opinion. *Durousseau*, 55 So. 3d at 562; *Walls*, 641 So. 2d at 390-91. Further, while Defendant asserts that the Lundbeck letters show that pentobarbital is unsafe, the lower court's characterization of the letters is supported by them. The letters never say that pentobarbital is unsafe. Instead, they merely state that use of pentobarbital "outside the approved labeling has not been established" and that the safety and effectiveness profiles cannot be assured. (PCR3-SR. 98-102) Since the lower court's factual findings are supported by competent, substantial evidence, they are binding on this Court. *Provenzano*, 761 So. 2d at 1099.

Moreover, given those findings, the lower court properly determined that Defendant had failed to prove his claim. In *Baze v. Rees*, 553 U.S. 35 (2008), the Court held that an inmate was required to show that the protocol created a "substantial risk of serious harm" that was "objectively intolerable" to demonstrate that a lethal injection protocol was unconstitutional. *Id.* at 49-50. To meet this standard, the Court

required a showing that "the conditions presenting the risk must be 'sure or very likely to cause serious illness and needless suffering,' and give rise to 'sufficiently imminent dangers.'" Id. at 50 (quoting *Farmer v. Brennan*, 511 U.S. 825, 842, 846, and n.9 (1994)). It noted that the mere fact that an execution method "may result in pain, either by accident or as an inescapable consequence of death" did not meet this standard. *Id.* at 50. It noted that the burden on a defendant to prove such a claim was heavy. *Id.* at 53. It required a defendant claiming that a risk of serious harm could be avoided by a different method of execution to show that there was a feasible alternative that addresses a substantial risk of serious harm. *Id.* at 52. It held that no stay was allowed unless the standard was met. *Id.* at 60. Moreover, in *Brewer v. Landrigan*, 131 S. Ct. 445, 445 (2010), the Court further held that "speculation cannot substitute for evidence that the use of the drug" meets the *Baze* standard.

Here, Defendant presented nothing more than the Lundbeck letters and Dr. Waisel's speculation that he might remain conscious after being administered five grams of pentobarbital because the drug was not generally used in surgical anesthesia and the dosage necessary to obtain a surgical plane of anesthesia had not been studied. Moreover, the Lundbeck letters

contained nothing more than a statement that safety and effectiveness profiles could not be assured. However, such speculation was insufficient to carry Defendant's burden of showing that the administration of pentobarbital created a substantial risk of serious harm. *Landrigan*, 131 S. Ct. at 445; *DeYoung v. Owens*, 2011 WL 2899704, *4 n.4 (11th Cir. Jul. 20, 2011); *Powell v. Thomas*, 641 F.3d 1255, 1257-58 (11th Cir. 2011); *Beaty v. Brewer*, 2011 WL 2040916 (9th Cir. May 25, 2011); *Pavatt v. Jones*, 627 F.3d 1336, 1138-39 (10th Cir. 2010); *Jackson v. Danberg*, 2011 WL 3205453 (D. Del. Jul. 27, 2011). Thus, the lower court properly determined that Defendant had failed to prove his claim. It should be affirmed.

Moreover, the rejection of the speculation was particularly appropriate here. Both Dr. Waisel and Dr. Dershwitz testified that the use and dosage of pentobarbital to induce a barbiturate coma had been studied and was known and that using the drug in high doses resulted in a cessation of electrical activity in the brain. They both admitted that this state was a deeper state of unconsciousness than a surgical plane of anesthesia. Moreover, Dr. Dershwitz, who the lower court found more credible, stated that not only would the dose of pentobarbital called for by the protocol render Defendant unconscious, but also it would be lethal. Given these circumstances, the lower court properly

denied this claim and should be affirmed.

While Defendant believes the Lundbeck letters bolstered Mr. Waisel's speculation, the lower court properly rejected this assertion. The Lundbeck letters stated little more than using pentobarbital was an off label use. However, the same was true of sodium thiopental. *See Heckler v. Chaney*, 470 U.S. 821, 823-25 (1985)(rejecting attempt to force FDA to prevent states from using sodium thiopental for the off label purpose of lethal injection). Moreover, Dr. Waisel and Dr. Dershwitz both acknowledged that drugs are used for off label purposes in medicine. The claim was properly denied.

Further, the lower court properly rejected Defendant's reliance on the Powell and Blankenship executions to support this claim. The evidence regarding the Powell execution merely showed that Powell appeared to strain against a restraint at some point during the execution process before his consciousness was checked. However, the evidence did not show that this brief movement occurred after the pentobarbital had been injected. Moreover, the evidence regarding the Blankenship execution merely showed that Blakenship moved without showing pain about five seconds after the injections began and was no longer moving five seconds later. Even Dr. Waisel acknowledged that a person injected with pentobarbital could move within the first 15

second after the injection. Given these circumstances, the lower court properly determined that this evidence did not meet the *Baze* standard. *DeYoung*, 2011 WL 2899704 at *4-*5; *Jackson*, 2011 WL 3205453 at *2-*3. The lower court properly denied this claim, and should be affirmed.

II. THE LOWER COURT DID NOT ABUSE ITS DISCRETION IN ITS RULINGS REGARDING THE ADMISSIBILITY OF EVIDENCE.

Defendant first asserts that he was deprived of a full and fair hearing on his claim. According to Defendant, this occurred because the lower court struck several DOC employees from his witness lists, and excluded hearsay evidence about the Blankenship execution while admitting direct evidence about it. However, the lower court did not abuse its discretion in any of these rulings.[1]

When an appellate court has relinquished jurisdiction to a lower court for a specific purpose, the lower court only has jurisdiction to consider matters regarding that purpose. *Palm Beach County v. Boca Development Assoc., Ltd.*, 485 So. 2d 449, 450-51 (Fla. 4th DCA 1986); *Palma Sola Condominium, Inc. v. Huber*, 374 So. 2d 1135, 1138 (Fla. 2d DCA 1979); *see also Duckett v. State*, 918 So. 2d 224, 238-39 (Fla. 2005); *Songer v. State*, 365 So. 2d 696, 699 (Fla. 1978). Here, this Court's order relinquishing jurisdiction directly stated that the relinquishment was "for the narrow purpose of holding an evidentiary hearing solely on [Defendant's] claim regarding the efficacy of pentobarbital as an anesthetic in the amount

[1] Trial court decisions regarding the admissibility of evidence are reviewed for an abuse of discretion. *Ray v. State*, 755 So. 2d 604, 610 (Fla. 2000); *Zack v. State*, 753 So. 2d 9, 25 (Fla. 2000).

prescribed by Florida's protocol." *Valle*, 2011 WL 3093866 at *1. It further stated that DOC was to produce "correspondence and documents it has received from the manufacturer of pentobarbital concerning the drug's use in executions, including those addressing any safety and efficacy issues." *Id.* It further mandated that Defendant "shall not be permitted to relitigate or raise any other claims." *Id.* Thus, this Court's order limited the lower court's jurisdiction to conducting a hearing regarding efficacy of pentobarbital and seeing that DOC produced the documents this Court direct produced. Given the limited scope of the jurisdiction this Court granted the lower court, the lower court did not abuse its discretion in granting the State's motion to strike witnesses.

This issue regarding the exclusion of the DOC witnesses is not preserved. To preserve an issue regarding the exclusion of evidence, the substance of the evidence that the litigant sought to admit must either be proffered or apparent from the face of the record. *Finney v. State*, 660 So. 2d 674, 685 (Fla. 1995). For a proffer to be sufficient, it must include not only the questions sought to be asked but the answers the witness would have given. *Lucas v. State*, 568 So. 2d 18, 22 (Fla. 1990). Here, while Defendant responded to the lower court's order for a proffer by proffering the areas of questions he wished to ask,

he made no attempt to proffer what answers he expected to receive. (PCR3-SR. 676-97, 704-08) As such, this issue is not preserved and should be rejected.

Even if the issue was preserved, the lower court did not abuse its discretion in granting the State's motion to strike witnesses and to preclude Defendant from calling those witnesses. In his amended witness list, Defendant included Russell Hosford, Jennifer Parker, Timothy Cannon, Edwin G. Buss, Rana Wallace, the Primary Executioner and the Second Executioners, all of whom were DOC employees. (PCR3-SR. 704-08) Defendant proffered the purpose of calling Mr. Hosford and Ms. Parker was to question them regarding the response to the Lundbeck letters. *Id.* He stated that he wished to question Mr. Buss and Ms. Wallace about the process of reviewing and recertifying lethal injection protocols and the decision to use pentobarbital. *Id.* He averred that the purpose of calling Warden Cannon was to elicit testimony concerning the source of the pentobarbital, training of the execution team, the consciousness assessment and the development of the new protocol. As noted above, this Court relinquished jurisdiction only for the narrow purpose of whether five grams of pentobarbital would be effective as an anaesthetic and precluded the consideration of other issues. *Valle*, 2011 WL 3093866 at

*1. Since Defendant's proposed purpose of calling the DOC witnesses did not relate to this subject, the lower court did not abuse its discretion in finding that this testimony would not be relevant. It should be affirmed.

Additionally, the lower court also did not abuse its discretion in precluding Defendant from attempting to use Dr. Waisel as a conduit for hearsay. As this Court held in *Linn v. Fossum*, 946 So. 2d 1032, 1037-39 (Fla. 2006), the mere fact that an expert relied on information that was not admissible in evidence does not permit a party to admit the inadmissible information. Instead, this Court has stated that it expects experts to testify "that they formed their opinions in reliance on sources that contain inadmissible information without also conveying the substance of the inadmissible information." *Id.* at 1038-39. In fact, this Court has recently upheld that application of this principle to capital post conviction litigation. *Mendoza v. State*, 2011 WL 2652193, *16-*17 (Fla. Jul. 8, 2011). As such, the lower court did not abuse its discretion in refusing to allow Dr. Waisel to be used a conduit for hearsay. It should be affirmed.

While Defendant insists that he should have at least been permitted to admit the affidavits of Bluestein and Ledbetter under §90.5015(6), Fla. Stat., the lower court also did not

abuse its discretion in refusing to allow Defendant to do so. Section 90.5015(6), Fla. Stat., merely provides a method for authenticating "[p]hotographs, diagrams, video recordings, audio recordings, computer records, or other business records" from a reporter. However, the mere authentication of a document containing hearsay is not sufficient to admit the statement. Instead, when the document constitutes hearsay, the proponent of the evidence must also show that the evidence satisfies a hearsay exception before the document is admitted. *See Sikes v. Seaboard Coast Line Railroad Co.*, 429 So. 2d 1216, 1220 (Fla. 1st DCA 1983); *see also Amos v. Gartner, Inc.*, 17 So. 3d 829, 833 (Fla. 1st DCA 2009). The contents of newspaper articles are hearsay. *Dockery v. Florida Democratic Party*, 799 So. 2d 291, 296 (Fla. 2d DCA 2001); *Dollar v. State*, 685 So. 2d 901, 902-03 (Fla. 5th DCA 1996); *Silvia v. Cumberland Farms*, 588 So. 2d 1069, 1071 (Fla. 1991).

Here, Defendant's argument was that because newspapers are in the business of publishing stories, the stories qualified as "other business records" under §90.5015, Fla. Stat. and were admissible under the business records exception. However, the lower court did not abuse its discretion in rejecting this argument. First, §90.902(6), Fla. Stat. makes newspaper articles are self authenticating. Thus, reading §90.5015, Fla.

Stat. to also govern the authentication of newspaper articles would render one of these sections superfluous. However, "a basic rule of statutory construction provides that the Legislature does not intend to enact useless provisions, and courts should avoid readings that would render part of a statute meaningless." *State v. Goode*, 830 So. 2d 817, 824 (Fla. 2002). Second, business records pursuant to §90.803(3), Fla. Stat. generally refer to records that are kept in the ordinary course of a business. *Yisreal v. State*, 993 So. 2d 952, 956 (Fla. 2008). This reference to records kept by a business provides the rationale behind the exception. *See* Charles W. Ehrhardt, *Florida Evidence* §803.6 (2011 ed.)("The [business records] evidence is reliable because it is of a type that is relied upon by a business in the conduct of its daily affairs and the records are customarily checked for correctness during the course of the business activities."). However, that rationale is lacking regarding newspaper articles because:

> A newspaper article is a product of the newspaper business, as distinguished from a record maintained for the purpose of systematically conducting the business itself. While accuracy of reporting is highly desirable from the standpoint of the newspaper-reading public, inaccuracy of reporting bears no direct relationship to the newspaper publishing business itself. Generally, there is no legal obligation on a newspaper reporter to give such an accurate account of the subject upon which he reports as would vouch for its truthfulness.

Samuel Sheitelman, Inc. v. Hoffman, 255 A.2d 807, 809 (N.J. Super. Ct. App. Div. 1969). Given these circumstances, the lower court properly rejected the assertion that the newspaper articles were admissible as business records. It should be affirmed.

Moreover, even if the articles could have been considered to be an "other business record" under §90.5015(6), the lower court would still have not abused its discretion in excluding the articles. Pursuant §90.5015(7), Fla. Stat., a trial court may exclude evidence if it has clear and convincing doubt about the accuracy of the information. Here, the lower court found such a doubt because the articles were sensationalized and not based solely on first hand reports. A review of the articles and affidavits supports this finding. As such, the lower court did not abuse its discretion and should be affirmed.

Finally, Defendant contends that the lower court abused its discretion by refusing to strike the testimony of Dr. Martin and Mr. Harper after it refused to admit the hearsay on which Dr. Waisel relied. According to Defendant, the State's evidence was not relevant because it concerned the facts of the Blankenship execution that Dr. Waisel was not permitted to relate through hearsay. However, pursuant to §90.401, Fla. Stat. relevant evidence is defined as "evidence tending to prove or disprove a

material fact." Moreover, as this Court has recognized, showing that an expert's opinion is not consistent with the facts is proper basis to challenge an opinion. *Durousseau v. State*, 55 So. 3d 543, 562 (Fla. 2010)("[A] jury may reject expert medical testimony when there exists relevant, conflicting lay testimony . . . ." *Weygant v. Fort Myers Lincoln Mercury, Inc.*, 640 So. 2d 1092, 1094 (Fla. 1994)"); *see also Walls v. State*, 641 So. 2d 381, 390-91 (Fla. 1994)("Opinion testimony gains its greatest force to the degree it is supported by the facts at hand, and its weight diminishes to the degree such support is lacking.").

Here, Dr. Waisel was permitted to give his opinion that Blankenship suffered and to relate that he reached that opinion based on his belief that Blankenship looked at one arm with discomfort, looked at the other arm with discomfort, lifted his head, grimaced and mouthed words three minutes after the execution began. (PCR3-SR. 484-88) Thus, the testimony of Dr. Martin and Mr. Harper was relevant to refute Dr. Waisel's opinion concerning the Blankenship execution. Given these circumstances, the lower court did not abuse its discretion in refusing to strike the testimony of Dr. Martin and Mr. Harper. It should be affirmed.

CONCLUSION

For the foregoing reasons, the order denying the successive motion for post conviction relief should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **BRIEF OF APPELLEE** was furnished by email and U.S. mail to Suzanne Keffer, 101 N.E. 3rd Avenue, Suite 400, Fort Lauderdale, Florida 33301, this 16th day of August 2011.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief is typed in Courier New 12-point font.

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