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LETHAL INJECTION OR LETHAL LITIGATION: FLORIDA'S AMENDED LETHAL INJECTION PROTOCOL OPENS THE DOOR FOR CRIES OF CRUEL AND UNUSUAL PUNISHMENT

*Cynthia Ventura**

I. INTRODUCTION

"[A] man who deliberately murders another has committed the supreme crime and should pay the supreme penalty."[1] Capital punishment in the United States, and its tolerability as a constitutional form of punishment, has long been recognized and debated[2] over since its inception.[3] For a brief period, the Supreme Court of the United States abolished capital punishment in its entirety as a violation of a person's

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1. 10 July 1956 PARL. DEB., H.L. (5th ser.) (1956) 679 (U.K.), https://api.parliament.uk/historic-hansard/lords/1956/jul/10/death-penalty-abolition-bill#S5LV0198P0_19560710_HOL_65. *See generally Lord Goddard Is Dead at 94; A Former Lord Chief Justice*, THE NEW YORK TIMES (May 31, 1971), http://www.nytimes.com/1971/05/31/archives/lord-goddard-is-dead-at-94-a-former-lord-chief-justice-presided-at.html?mcubz=3 (describing little doubt that Lord Goddard favored corporal punishment and as a young boy, once recited the standard British court death sentence, "You will be taken from here to a place of execution and hanged by the neck until you are dead. And may the Lord have mercy on your soul.").

2. *See* Furman v. Georgia, 408 U.S. 238, 286 (1972) ("There has been no national debate about punishment, in general or by imprisonment, comparable to the debate about the punishment of death.").

3. *See Introduction to the Death Penalty*, DEATH PENALTY INFORMATION CENTER, https://deathpenaltyinfo.org/part-i-history-death-penalty#intro (last visited June 20, 2018) (discussing the history of the death penalty in the United States and changes from colonial times through current laws); *see also* Woody R. Clermont, *Your Lethal Injection Bill: A Fight To The Death Over An Expensive Yellow Jacket*, 24 ST. THOMAS L. REV. 248, 257–64 (2012) (discussing the history of state-sanctioned killing and different methods of execution). *See generally Changes in Death Penalty Laws*, THE DEATH PENALTY A CURRICULUM FOR HIGH SCHOOL STUDENTS AND TEACHERS, http://deathpenaltycurriculum.org/node/25 (last visited June 27, 2018) (discussing historical changes to death penalty laws).

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Eighth Amendment[4] protection against cruel and unusual punishment.[5] The Court then reinstated the death penalty when it upheld Georgia's bifurcated guilt and sentencing phases in *Gregg v. Georgia*.[6] In *Gregg*, the Court held that the relative infrequency of death sentences imposed by juries did not indicate rejection of capital punishment per se; rather, it reflected ". . . the humane feeling that this most irrevocable of sanctions should be reserved for a small number of extreme cases."[7]

In Florida, lethal injection has been the primary method of execution since the 1990s.[8] The Florida Department of Corrections recently amended its protocol by replacing all three drugs previously used.[9] The first administered lethal dose is now etomidate, an anesthetic that has never been used in the United States as a lethal injection drug.[10] This Comment discusses the lack of empirical research available to support the state of Florida's use of etomidate as an appropriate method of rendering a prisoner unconscious prior to administering the second and third injections. First, this Comment will provide a brief background of the history of the death penalty in the United States, its temporary abolition in *Furman*, and the administration of capital punishment post-*Furman*.[11] Second, this Comment will discuss Florida's capital sentencing scheme and the

4. U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, *nor cruel and unusual punishments inflicted*.") (emphasis added).

5. *See generally Furman*, 408 U.S. at 239–40 (holding ". . . that the imposition and carrying out of the death penalty . . . constitute[d] cruel and unusual punishment in violation of [both] the Eighth and Fourteenth Amendments.").

6. *See* Gregg v. Georgia, 428 U.S. 153, 169 (1976) ("[T]he punishment of death does not invariably violate the Constitution.").

7. *See Gregg*, 428 U.S. at 182 (1976) (noting that post-*Furman*, juries in many states continue to support the utility and necessity of capital punishment in certain appropriate cases); *see also Furman*, 408 U.S. at 402 (Burger, J., dissenting) ("The very infrequency of death penalties imposed by jurors attests their cautious and discriminating reservation of that penalty for the most extreme cases.").

8. *State-by-State: Florida*, DEATH PENALTY INFORMATION CENTER, https://deathpenaltyinfo.org/florida-1 (last visited June 27, 2018) ("Florida botches the electric chair executions of Jesse Tafero, Pedro Medina, and Allen Lee Davis and subsequently begins using lethal injection as its execution method.").

9. *See* FLORIDA DEPARTMENT OF CORRECTIONS: EXECUTION BY LETHAL INJECTION PROCEDURES (Jan. 4, 2017), http://www.dc.state.fl.us/oth/deathrow/lethal-injection-procedures-as-of_01-04-17.pdf (explaining the new lethal injection protocol to be implemented effective January 4, 2017).

10. *See* Asay v. State, 224 So. 3d 695, 705 (Fla. 2017) (finding that both Petitioner Asay and Respondent, the State of Florida, stipulated that etomidate has never been used anywhere in the United States as a lethal injection drug).

11. *See infra* Part II, Section A–D.

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procedures for administering lethal injection, along with the amended protocol implemented as of January 4, 2017.[12]

Next, this Comment will outline the substantial risks associated with use of etomidate as a lethal injection drug and its opening the door for prisoner claims of cruel and unusual punishment.[13] Lastly, this Comment will propose a solution to the possibility of endless litigation concerning constitutional violations with use of etomidate by calling for the discontinuation of use of etomidate until further medical literature and research is available regarding the substantial risk of harm and pain, as well as discontinued use until further research is conducted regarding the new, specific drugs which have replaced all three injections previously used in Florida, to determine their safety and efficacy when used in combination.[14]

II. BACKGROUND

A. BRIEF HISTORY OF THE DEATH PENALTY

The death penalty can be traced as far back in history as the eighteenth century B.C.E.,[15] with the oldest recorded death sentence in Egypt approximately 1,500 years before Christ.[16] The Romans recognized crimes pursuant to the Twelve Tablets which warranted the ultimate penalty, crimes such as perjury, knowingly or maliciously burning a house, and willfully murdering a free man.[17] By the sixteenth century, the English recognized capital punishment for treason, petty treason,[18] murder, larceny, robbery, burglary, rape, and arson.[19]

In America, the first known written capital offenses were drawn by the Massachusetts Bay Colony, dated 1636, as "The Capitall Lawes of

12. *See infra* Part II, Section E–F.

13. *See infra* Part III.

14. *See infra* Part IV.

15. *See* Clermont, *supra* note 3, at 257–58 (discussing ancient history through the seventeenth century in the American Colonies).

16. *See* Robert Hardaway, *Beyond A Conceivable Doubt: The Quest For A Fair And Constitutional Standard Of Proof In Death Penalty Cases*, 34 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 221, 232 (2008) ("The earliest recorded references to the death penalty are found in the Ancient Laws of China and as far back as the eighteenth century B.C. and the Code of King Hammurabi of Babylon.").

17. *See id.* (describing methods of inflicting the death penalty which included crucifixion, drowning criminals at sea, and burying them alive, among other methods).

18. *See Furman*, 408 U.S. at 334 (Marshall, J., concurring) (defining "petty treason" as the killing of a husband by his wife).

19. *See id.* (noting that shortly after the year 1800, these capital offenses increased to more than 200, including crimes against property and even those against the public peace).

New-England."[20] Although it is unclear how often or how vigorously these laws were enforced, by the eighteenth century, the list had lessened significantly with an average of twelve capital crimes per colony.[21] The first recorded execution in the American colonies was George Kendall of Virginia in 1608, for plotting to betray the British to the Spanish.[22] The first official execution of a criminal, however, did not occur until 1622 in Virginia, where Daniel Frank was sentenced to hang for the crime of burglary.[23] Eleven years later, Margaret Hatch became the first female to be executed in the colonies.[24] Under English law, death penalties were mandatory, but the American colonies rejected this mandatory requirement and implemented instead a new practice of granting jurors with discretion when it came to sentencing for capital crimes.[25]

With progress in capital sentences came the first written argument *against* capital punishment, written by Dr. Benjamin Rush in the late eighteenth century.[26] Prison advocate groups pushed for movements for reform, but these had little immediate impact on actual practices.[27] It was not until the early to mid-nineteenth century that the abolitionist movement gained momentum in the States.[28] Michigan became the first state to abolish the death penalty for all crimes, except treason, in 1846.[29] Although several states had abolished the death penalty completely in the

20. *See id.* at 335 ("These laws make the following crimes capital offenses: idolatry, witchcraft, blasphemy, murder, assault in sudden anger, sodomy, buggery, adultery, statutory rape, manstealing, perjury in a capital trial, and rebellion.").

21. *See id.* (noting that despite the decrease in capital crimes, executions continued as the best means to control the criminal population due to inadequate and insecure county jails).

22. *See* Hardaway, *supra* note 16; *see also* Clermont, *supra* note 15, at 261 ("The principle of torture was brought to the American colonies with the advent of the Massachusetts Body of Liberties (a colonial Bill of Rights, and the first in the colonies), and it permitted bodily torture to be used if a defendant was involved with other conspirators.").

23. *See* Clermont, *supra* note 15, at 262.

24. *See id.* (noting Ms. Hatch was sentenced to death for the crime of murder of a child born from an adulterous affair).

25. *See* Hardaway, *supra* note 16, at 233–34 (noting that Americans also introduced the notion of 'degrees' of murder, with the death penalty reserved only for murder in the first degree).

26. *See Furman*, 408 U.S. at 336 (Marshall, J., concurring) (noting Dr. Rush's draft, titled "An Enquiry into the Effects of Public Punishments Upon Criminals and Upon Society," was later followed up by then Attorney General of Pennsylvania, William Bradford, who wrote "An Enquiry how far the Punishment of Death is Necessary in Pennsylvania.").

27. *See id.* at 336–37 (noting that in the early 1800s, two New York governors urged the state legislature, unsuccessfully, to modify or end capital punishment).

28. *See Introduction to the Death Penalty*, *supra* note 3 (explaining many states built state penitentiaries and reduced the number of capital crimes, with Pennsylvania becoming the first state to being carrying out executions in correctional facilities, as opposed to in the public).

29. *Id.* ("Later, Rhode Island and Wisconsin abolished the death penalty for all crimes. By the end of the century, the world would see the countries of Venezuela, Portugal, Netherlands, Costa Rica, Brazil and Ecuador follow suit.").

mid-nineteenth century, it was not until much later during the first half of the twentieth century that death penalty reform finally took shape.[30]

B. CAPITAL PUNISHMENT BEFORE FURMAN[31]

By the 1950s, public sentiment towards capital punishment began to shift towards abolition.[32] During the 1960s, the fundamental legality of the death penalty came into question with a string of Supreme Court cases that began fine-tuning away at capital punishment.[33] In *United States v. Jackson*, the Supreme Court held that the practice of imposing the death penalty only upon recommendation of a jury was unconstitutional because it encouraged defendants to waive their right to a jury trial.[34] In 1968, in *Witherspoon v. Illinois*, the Court held that jurors in a death penalty case could only be disqualified if prosecutors could show that the juror's attitudes toward capital punishment would prevent them from making an impartial decision on the judgment; mere reservations were not enough to excuse such a juror.[35]

In 1971, the Court consolidated two cases[36] and again addressed problems associated with jurors in capital cases.[37] Petitioners in these cases argued a constitutional right of allocution[38] during their sentencing phases,

30. *Id.* (describing the beginning of the "Progressive Period" where six states completely abolished death penalty and three more limited it to crimes that were rarely committed).

31. *See generally Furman*, 408 U.S. 238.

32. *See Introduction to the Death Penalty*, *supra* note 3; *see also* Hardaway, *supra* note 16 (explaining that American suffering from the Great Depression and Prohibition favored capital punishment and criminologists supporting it as a necessary social measure).

33. *See Introduction to the Death Penalty*, *supra* note 3 (discussing how the Supreme Court decided several cases by merely 'suggesting' that the death penalty could constitute cruel and unusual punishment under the Eighth Amendment).

34. *See* United States v. Jackson, 390 U.S. 570, 582–83, 591 (1968) (holding the death penalty provision of the Federal Kidnaping Act unconstitutional because it impaired the free right to a jury trial).

35. *See* Witherspoon v. Illinois, 391 U.S. 510, 522–23 n. 21 (1968) (holding unconstitutional the practice of excluding jurors who voiced general objections to the death penalty or expressed religious scruples which would affect their imposition of such a sentence).

36. *See generally* McGautha v. California, 402 U.S. 183 (1971) (addressing issue of self-incrimination during capital first degree murder cases in *Crampton v. Ohio*, 1970 U.S. LEXIS 1658).

37. *Id.* at 207 ("In light of history, experience, and the present limitations of human knowledge, we find it quite impossible to say that committing to the untrammeled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution."); *see also Introduction to the Death Penalty*, supra note 3 (explaining how the Court consolidated the cases of *Crampton v. Ohio* and *McGautha v. California* under 402 U.S. 183).

38. *See Allocution*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining allocution as the opportunity for a defendant to provide an unsworn statement or to formally address a sentencing

free from any adverse consequences, which may impact the issue of guilt.[39] *Crampton* further argued that the Constitution required Ohio to follow California's bifurcated trial scheme rather than a single trial.[40] The Court refused to address the issue of whether a jury should be given standards by which to exercise their discretion to sentence a defendant to death.[41]

C. FURMAN AND TEMPORARY ABOLISHMENT NATIONWIDE OF THE DEATH PENALTY

"[T]he imposition and carrying out of the death penalty . . . constitute[s] cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments."[42] In June 1972, in one short paragraph accompanied by five concurring and four dissenting opinions, the Supreme Court swiftly abolished (for a brief period) capital punishment in the United States.[43] In his concurring opinion, Justice Douglas concluded that discretionary death penalty statutes are unconstitutional and pregnant with discrimination "not compatible with the idea of equal protection of the laws that is implicit in the ban on 'cruel and unusual' punishments."[44] Justice Brennan relied on "evolving standards of decency"[45] to support his position that the death penalty was no longer favored by contemporary society.[46]

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judge or jury); *see also McGuatha*, 402 U.S. at 218 (describing allocution as the right of a defendant to present evidence and to be heard on issues relevant to sentencing). The defendant is not subject to cross-examination and may explain his or her conduct, ask for mercy, apologize for the crime, or say anything else in an attempt to lessen the sentence to be imposed. BLACK'S, *supra*.

39. *See McGautha*, 402 U.S. at 218–20 (rejecting petitioner's argument that a single-trial procedure violated his Constitutional right against self-incrimination at the cost of surrendering any possibility to address the jury on the issue of punishment).

40. *See id.* at 208–09 (rejecting the argument that bifurcated trials should be the only method of conducting criminal trials as compelled by the Constitution).

41. *See id.* at 207–08 (explaining that no set of circumstances or appropriate factors would ever be complete so as to apply to each and every capital case).

42. *Furman*, 408 U.S. at 239–40 (invalidating death penalty statutes while upholding death sentences already imposed); *see also* Corinna Barrett Lain, *Furman Fundamentals*, 82 WASH. L. REV. 1, 8–10 (2007) (examining the historical context which led to the Supreme Court's landmark decision).

43. *See* Lain, *supra* note 42, at 10–11 (explaining how the facts of the Furman case were perfect to prove that arbitrary imposition of the death penalty was unconstitutional).

44. *See Furman*, 408 U.S. at 256–57 (Douglas, J., concurring) (declining to reach the question whether a mandatory death penalty would otherwise be constitutional); *see also* Lain, *supra* note 42, at 15 (explaining Justice Douglas's belief that imposition of death sentences was arbitrary, capricious, and discriminatory).

45. *See Furman*, 408 U.S. at 242 (Brennan, J., concurring) (relying on statements made by the Court in *Trop v. Dulles*, 356 U.S. 86, 99 (1958) as applied to the death penalty).

46. *See Furman*, 408 U.S. at 282 (Brennan, J., concurring) ("If a punishment is unusually severe, if there is a strong probability that it is inflicted arbitrarily, if it is substantially rejected by

Although several justices voiced their opinion that capital punishment itself was unconstitutional, the *Furman* Court ultimately held only that the statutes which gave juries complete sentencing discretion violated Constitutional protections.[47] This meant that states were free to rewrite their existing death penalty statutes so as to provide guidelines and avoid arbitrary application.[48]

D. POST-*FURMAN*: FLORIDA'S CAPITAL PUNISHMENT SCHEME PURSUANT TO § 921.41

Florida was the first state to re-enact its death penalty statute[49] in January 1973.[50] The revised statute implemented a bifurcated trial where if a defendant is found guilty of a capital offense, the court will hold a separate evidentiary hearing to determine the sentence.[51] The judge may allow evidence deemed relevant to sentencing and must also consider

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contemporary society, and if there is no reason to believe that it serves any penal purpose more effectively than some less severe punishment, then the continued infliction of that punishment violates the command of the Clause that the State may not inflict inhuman and uncivilized punishments upon those convicted of crimes."); *see also* Lain, *supra* note 42 (distinguishing that although Justice Marshall also used "evolving standards of decency" to reach his decision, he did not feel society had entirely rejected the concept as an acceptable means of punishment).

47. *See Introduction to the Death Penalty*, *supra* note 3 (describing the decision's effect of voiding forty death penalty statutes).

48. *See Introduction to the Death Penalty*, *supra* note 3.

49. *See* FLA. STAT. § 921.141 (2017) (implementing the death penalty statute based on the Model Penal Code).

> Following conviction or adjudication of guilt of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. This proceeding should be conducted before the trial jury as soon as possible. In the proceeding, the court may hear evidence on any matter that the court deems relevant to the nature of the crime and the character of the defendant. This evidence shall also include matters relating to any of the aggravating factors or mitigating circumstances enumerated under separate law as relevant to capital felony sentencing. Both the state and the defendant will be permitted to present arguments and evidence for or against a death sentence.

Id.

50. *See* Lain, *supra* note 42, at 47; *see also Introduction to the Death Penalty*, *supra* note 3 (noting that shortly after Florida rewrote its statute, thirty-four other states proceeded to do the same).

51. *See* Proffitt v. Florida, 428 U.S. 242, 247–48 (1976) (upholding Florida's new statute as appropriate in assuring that death sentences are not "freakishly" or "wantonly" imposed).

specific aggravating[52] and mitigating circumstances[53] before imposing the death penalty.

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52. *See* § 921.141(6).

> Aggravating factors shall be limited to the following: (a) The capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment or placed on community control or on felony probation. (b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person. (c) The defendant knowingly created a great risk of death to many persons. (d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any: robbery; sexual battery; aggravated child abuse; abuse of an elderly person or disabled adult resulting in great bodily harm, permanent disability, or permanent disfigurement; arson; burglary; kidnapping; aircraft piracy; or unlawful throwing, placing, or discharging of a destructive device or bomb. (e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody. (f) The capital felony was committed for pecuniary gain. (g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws. (h) The capital felony was especially heinous, atrocious, or cruel. (i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. (j) The victim of the capital felony was a law enforcement officer engaged in the performance of his or her official duties. (k) The victim of the capital felony was an elected or appointed public official engaged in the performance of his or her official duties if the motive for the capital felony was related, in whole or in part, to the victim's official capacity. (l) The victim of the capital felony was a person less than 12 years of age. (m) The victim of the capital felony was particularly vulnerable due to advanced age or disability, or because the defendant stood in a position of familial or custodial authority over the victim. (n) The capital felony was committed by a criminal gang member, as defined in s. 874.03. (o) The capital felony was committed by a person designated as a sexual predator pursuant to s. 775.21 or a person previously designated as a sexual predator who had the sexual predator designation removed. (p) The capital felony was committed by a person subject to an injunction issued pursuant to s. 741.30 or s. 784.046, or a foreign protection order accorded full faith and credit pursuant to s. 741.315, and was committed against the petitioner who obtained the injunction or protection order or any spouse, child, sibling, or parent of the petitioner.

Id.

53. *See* § 921.141(7).

> Mitigating circumstances shall be the following: (a) The defendant has no significant history of prior criminal activity. (b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance. (c) The victim was a participant in the defendant's conduct or consented to the act. (d) The defendant was an accomplice in the capital felony committed by another person and his or her participation was relatively minor. (e) The defendant acted under extreme duress or under the substantial domination of another person. (f) The capacity of the defendant to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired. (g) The age of the defendant at the time of the crime. (h) The existence of any other factors in the defendant's background that would mitigate against imposition of the death penalty.

Id.

Ventura: Lethal Injection or Lethal Litigation: Florida's Amended Lethal I

On July 2, 1976, merely four years after effectively abolishing the death penalty in the United States, the Supreme Court reinstated it by simultaneously upholding Georgia,[54] Texas,[55] and Florida's[56] revised statutes.[57] On May 25, 1979, Florida executed John Spenkelink, ending the moratorium which had been in place since 1967.[58] Since then, Florida has executed ninety-three inmates.[59]

E. FLORIDA'S PROCEDURES FOR ADMINISTERING LETHAL INJECTION

The Florida Department of Corrections ("DOC") administers executions by either lethal injection or the electric chair.[60] In 2000, Florida began using lethal injection as an alternative method of execution.[61] Lethal injection is widely tolerated as an appropriate method of carrying out the imposition of a death sentence, as it has been adopted as the preferred

54. *See Gregg*, 428 U.S. at 206 ("The new Georgia sentencing procedures, by contrast, focus the jury's attention on the particularized nature of the crime and the particularized characteristics of the individual defendant. While the jury is permitted to consider any aggravating or mitigating circumstances, it must find and identify at least one statutory aggravating factor before it may impose a penalty of death. In this way the jury's discretion is channeled.").

55. *See* Jurek v. Texas, 428 U.S. 262, 276–77 (1976) ("By providing prompt judicial review of the jury's decision in a court with statewide jurisdiction, Texas has provided a means to promote the evenhanded, rational, and consistent imposition of death sentences under law.").

56. *See Proffitt*, 428 U.S. at 250, 260 (highlighting that Florida's new statute also provides for automatic review of all death penalty sentences by the Florida Supreme Court).

57. *See generally Introduction to the Death Penalty*, *supra* note 3 (reinstating the death penalty *only* in those states and holding that the death penalty itself was constitutional under the Eighth Amendment).

58. *See* Robert A. Burt, *Disorder in the Court: The Death Penalty and the Constitution*, 85 MICH. L. REV. 1741, 1805 (1987) (discussing the tensions surrounding the execution); *see also* Bill Curry, *Convicted Murderer Executed by Florida*, THE WASH. POST (May 26, 1979), https://www.washingtonpost.com/archive/politics/1979/05/26/convicted-murderer-executed-by-florida/6610a1bd-c62c-43ec-8c2e-134733c09d6f/?utm_term=.68a4d29d3aea (detailing the execution of John Spenkelink by electric chair, noting the execution occurred just minutes after the Supreme Court in Washington, D.C. refused to stay his execution for a sixth time).

59. *See* FLORIDA DEPARTMENT OF CORRECTIONS: EXECUTION LIST: 1976 - PRESENT, http://www.dc.state.fl.us/oth/deathrow/execlist.html (last visited June 27, 2018) (providing statistics detailing the name of every inmate executed, along with the number of death warrants issued and the number of years spent on death row).

60. *See generally* FLORIDA DEPARTMENT OF CORRECTIONS: DEATH ROW FACT SHEET, http://www.dc.state.fl.us/oth/deathrow (last visited June 27, 2018) ("The three-legged electric chair was constructed from oak by Department of Corrections personnel in 1998 and was installed at Florida State Prison (FSP) in Raiford in 1999. The previous chair was made by inmates from oak in 1923 after the Florida Legislature designated electrocution as the official mode of execution.").

61. *See* DEATH ROW FACT SHEET, *supra* note 60 (providing general information and year-by-year statistics for executions held from 1979 through 1999).

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method of execution by thirty-six states, as well as by the federal government.[62]

Lethal injection carries specific protocols, as well as general procedures that apply to both lethal injections and the electric chair.[63] An execution team made up of correctional staff and other persons selected by the team warden will assist in the administration of the execution.[64] Each member of the execution team is required to have the necessary license or certification, as well as the necessary training and qualifications to perform the duties required.[65] The warden will select each team member and will designate each member's responsibility.[66] These members must be selected from the following classes: a paramedic or emergency medical technician, a licensed practical nurse, a registered nurse, or an advanced registered nurse practitioner.[67]

In addition to selecting the executioner team, the team warden also chooses an individual from the executioner team to serve as executioner.[68] The executioner's sole responsibility is to administer the chemicals by injecting them from the syringe to the inmate's IV port.[69] The warden will select two executioners capable of performing the necessary functions, designating one as the primary executioner and the other as a secondary executioner.[70] The secondary executioner's responsibility is to remain

62. *See* Baze v. Rees, 553 U.S. 35, 53 (2008) (refusing to regard the practice of lethal injection as "objectively intolerable" when it is so widely applied throughout the nation); *see also* 18 U.S.C. § 3591 (2017); Workman v. Bredesen, 486 F.3d 896, 903 (6th Cir. 2007) (noting that dozens of states already used the same three-drug protocol).

63. *See* EXECUTION BY LETHAL INJECTION PROCEDURES, *supra* note 9 (detailing specific procedures which apply to all lethal injections scheduled to occur after January 1, 2017).

64. *See id.* at 2 (explaining that each person selected as a member of the execution team shall be provided with a copy of the entire procedure and shall be fully informed as to their respective rights and responsibilities).

65. *See id.* at 2 (identifying several classes of trained professionals from which certain designated members of the execution team must be selected).

66. *See id.* at 3 (listing some of the team members' duties, such as being responsible for examining the inmate prior to execution; determining any health issues; attaching the leads to heart monitors and observing the monitors during the administration of the execution; and purchasing, maintaining, and mixing the lethal chemicals).

67. *See id.* at 2 (providing limited alternate classes from which certain designated professionals may be selected, such as the licensed practical nurse, registered nurse, or advanced registered nurse practitioner).

68. *See* EXECUTION BY LETHAL INJECTION PROCEDURES, *supra* note 9, at 2 (clarifying that the identity of the selected executioner shall be kept strictly confidential).

69. *See id.* at 3, 10 (noting that the executioner must also participate in a simulated execution procedure which shall be conducted the week prior to any scheduled execution).

70. *See id.* at 2 ("The primary executioner will be solely responsible for administering the flow of lethal chemicals into the inmate during the execution.").

present and available at all times during an execution and to assume the duties of the primary executioner, if need be.[71]

F. AMENDED PROTOCOL AS OF JANUARY 4, 2017, SUBSTITUTING EACH OF THE FORMER DRUGS

As of September 2013, the DOC injection protocol[72] consisted of the following chemicals: midazolam hydrochloride,[73] followed by vecuronium bromide,[74] and lastly potassium chloride.[75] Midazolam hydrochloride ("midazolam") is a tranquilizing anesthetic which should render the inmate unconscious and therefore, unable to feel pain when the remaining drugs are administered.[76] Once the inmate is unconscious, vecuronium bromide ("vecuronium") is administered as a paralytic agent to ensure that the inmate remains insensate to pain.[77] The final drug, potassium chloride, induces cardiac arrest by interfering with the electrical signals that stimulate the contractions of the heart.[78]

The lethal injection procedures and protocol are reviewed by the Secretary of the DOC at least once every two years.[79] On January 4, 2017, the DOC amended its protocol and substituted all three former drugs[80] but

71. *See id.*

72. *See id.* at 6 (detailing injection combination protocol with exact specifications for dosage, syringes, and sterility).

73. *See Midazolam hydrochloride*, ATTORNEY'S DICTIONARY OF MEDICINE ("A tranquilizer (similar to diazepam), administered by injection into a muscle or a vein, for the relief of anxiety and related conditions.").

74. *See Vecuronium bromide*, ATTORNEY'S DICTIONARY OF MEDICINE ("A neuromuscular blocking agent that is used as an adjunct to general anesthesia to cause relaxation of muscles and to facilitate endotracheal intubation.").

75. *See Potassium chloride*, ATTORNEY'S DICTIONARY OF MEDICINE ("Kaochlor (potassium chloride), potential side effects of treatment with (for low levels of potassium in the blood, as in digitalized patients), especially after prolonged or repeated usage or large doses.").

76. *See* Howell v. State, 133 So. 3d 511, 517 (Fla. 2014) (relying on an expert doctor's testimony regarding the proper use and administration of midazolam to effectively render an inmate deeply unconscious); *see also* Muhammad v. State, 132 So. 3d 176, 192 (Fla. 2013) (noting that defendant's own expert doctor testified that if the drug is used in the proper dose as required by protocol, midazolam would render an inmate unconscious within minutes).

77. *See* Glossip v. Gross, 135 S. Ct. 2726, 2735 (2015) (upholding the use of both midazolam and vecuronium as effective in rendering inmate unconscious and unable to feel pain from final lethal dose).

78. *See Baze*, 553 U.S. at 44 (acknowledging and upholding Kentucky's lethal injection protocol as humane if properly administered).

79. *See* EXECUTION BY LETHAL INJECTION PROCEDURES, *supra* note 9, at 13 (noting that the review shall take into consideration any available medical literature and legal jurisprudence, as well as the experiences and protocol ls followed by other jurisdictions).

80. *See id.* at 6 (replacing midazolam, vecuronium, and potassium chloride with new drugs); *see also Asay*, 224 So. 3d at 703–05 (Pariente, J., dissenting) (explaining various reasons why

provided little, if any, explanation as to why each drug was being replaced.[81] The crucial first injection will now be etomidate,[82] a hypnotic drug indicated for the induction of general anesthesia.[83] It will be followed by a rocuronium bromide[84] injection, and lastly, a potassium acetate injection.[85] Although etomidate is not an analgesic, it produces hypnosis rapidly, usually within one minute.[86] The inmate should be rendered unconscious immediately following the first injection.[87] If the inmate is not yet unconscious, the chemical is administered again through a second series.[88]

III. DISCUSSION

A. THE PHARMACEUTICAL INDUSTRY IS RELUCTANT TO ENDORSE THE USE OF ITS MEDICINAL PRODUCTS FOR NONMEDICINAL PURPOSES.

Etomidate has never been used before as a lethal injection drug in the United States.[89] In fact, Greg Panico, a spokesman from Janssen, the

petitioner's stay of execution should be granted, in part due to lack of information from DOC regarding the new protocol).

81. *See Asay*, 224 So. 3d at 706 (Pariente, J., dissenting) ("To this date, the State has refused to indicate why the new protocol was adopted or identify the manufacturer of the drugs used in the new protocol.").

82. *See Etomidate*, ATTORNEY'S DICTIONARY OF MEDICINE ("A potent depressant drug used, by injection into a vein, for induction of general anesthesia.").

83. *See Asay*, 224 So. 3d at 700–01 (arguing that Florida's adoption of etomidate poses a substantial risk of serious harm); *see also* U.S. FOOD AND DRUG ADMINISTRATION, CENTER FOR DRUG EVALUATION AND RESEARCH: AMIDATE (ETOMIDATE INJECTION) APPROVAL LETTER, NDA 18-227/S-012 (February 22, 1999), https://www.accessdata.fda.gov/drugsatfda_docs/nda/99/018227_S012_AMIDATE_APPROV.pdf (approving New Drug Application for Abbott Laboratories for "Geriatric Use").

84. *See Rocuronium bromide*, ATTORNEY'S DICTIONARY OF MEDICINE ("The nonproprietary name of a neuromuscular blocking agent that is used as an adjunct to general anesthesia.").

85. *See Diuretic salt*, ATTORNEY'S DICTIONARY OF MEDICINE ("A chemical compound, potassium acetate, used to stimulate the kidneys.").

86. *See* U.S. FOOD AND DRUG ADMINISTRATION, CENTER FOR DRUG EVALUATION AND RESEARCH: AMIDATE (ETOMIDATE INJECTION) APPROVED LABELING, NDA 18-227/S-012 (March 2001), https://www.accessdata.fda.gov/drugsatfda_docs/nda/99/018227_S012_AMIDATE_PRNTLBL.pdf (providing clinical pharmacology, indications and usage, contraindications, and adverse reactions).

87. *See* EXECUTION BY LETHAL INJECTION PROCEDURES, *supra* note 9, at 10 (explaining that if the inmate is not unconscious, the executioner will initiate the administration of the lethal chemical through a secondary access site by securing peripheral venous access or performing a central venous line placement).

88. *See id.*

89. *See Asay*, 224 So. 3d at 705 (Pariente, J., dissenting) (noting that both parties stipulate

division of Johnson & Johnson whose scientists invented etomidate, specifically condoned the use of its drug for such purposes.[90] "Janssen discovers and develops medical innovations to save and enhance lives. We do not support the use of our medicines for indications that have not been approved by regulatory authorities. We do not condone the use of our medicines in lethal injections for capital punishment."[91]

The pharmaceutical company's bold statement is mostly symbolic because, although a division of its scientists invented the drug, the company has never manufactured nor sold it.[92] However, Johnson & Johnson is not the only major company to take a stance: Pfizer, one of several makers of midazolam (the drug previously used as the first in the three-drug combination) implemented a strict distribution restriction policy in an attempt to ensure its product would not be used in lethal injections.[93]

In fact, it is incredibly difficult to determine where Florida is purchasing the drug from because the DOC has adamantly refused to disclose the identity of the manufacturer.[94] In *Asay v. State*, petitioner

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the drug has never been used before for lethal injection); *see also* Faith Karimi, *Florida death row inmate executed with new drug*, CNN (Aug. 25, 2017, 4:28 AM), http://www.cnn.com/2017/08/24/health/florida-death-row-inmate-execution/index.html (noting that the execution of Mark Asay marked the first execution in Florida in more than eighteen months, and the first time ever in the United States by administering etomidate).

90. *See* Karimi, *supra* note 89 (noting not just one, but several, pharmaceutical companies have publicly denounced the use of their drugs as lethal injections); *see also* Carolyn Y. Johnson, *Johnson & Johnson says its drug shouldn't be used in executions*, THE WASH. POST (Aug. 22, 2017), https://www.washingtonpost.com/news/wonk/wp/2017/08/22/johnson-johnson-says-its-drug-shouldnt-be-used-to-kill-prisoners/?utm_term=.4a807278608e (highlighting Johnson & Johnson as one of many drug companies worldwide that have outlined policies intended to prevent American states from obtaining their drugs for capital punishment).

91. *See* Winston Ross, *Pfizer's Stand On Lethal Drugs Complicates Capital Punishment*, NEWSWEEK (May 14, 2016, 5:47 PM), http://www.newsweek.com/pfizer-death-penalty-lethal-injection-460007; *see also* Johnson, *supra* note 90; John Haltiwanger, *Florida Preparing to Execute White Supremacist With New Drug Cocktail*, NEWSWEEK (Aug. 24, 2017, 1:20 PM), http://www.newsweek.com/florida-preparing-executive-white-supremacist-new-drug-cocktail-654687 (quoting the company's negative stance in light of the use of etomidate).

92. *See* Johnson, *supra* note 90 (explaining that due to secrecy laws and secrecy practices, the public does not generally know what a given state is doing to obtain lethal injection drugs or where they are obtaining the drugs from).

93. *See id.* (explaining how opposition from pharmaceutical companies has created a shortage of lethal injection drugs in the states); *see also* Tess Owen, *Florida is stockpiling an untested lethal-injection drug*, BUSINESS INSIDER (Dec. 7, 2016, 7:41 PM), http://www.businessinsider.com/florida-is-stockpiling-an-untested-lethal-injection-drug-2016-12 (raising new questions about Florida's already controversial capital punishment protocol).

94. *See Asay*, 224 So. 3d at 706 (Pariente, J., dissenting) (noting that despite the DOC's own requirement that lethal injection protocol and procedures be transparent, DOC repeatedly failed to disclose the identity of the manufacturer or where it purchased the drug); *see also* Dara Kam, *Death Penalty: Florida may be pondering 'novel' lethal injection change*, SUN SENTINEL (Dec. 5, 2016, 12:09 PM), http://www.sun-sentinel.com/news/florida/fl-nsf-novel-lethal-injection-change-

Mark Asay ("Asay") attempted for more than six months to obtain disclosure of the manufacturer who was providing the drug which the State planned to use in his execution.[95] The DOC refused, relying on a Florida statute[96] to assert they are required to keep the manufacturer's identity secret.[97] When the DOC eventually provided disclosure of redacted documents, Asay discovered that the manufacturer had made it clear that if their drugs were being used for lethal injections, they were being misused.[98] The Florida Supreme Court ultimately held that because Asay could not demonstrate that he was entitled to relief on claims related to obtaining records regarding the drug's manufacturer, the lower court properly denied his relief.[99]

B. CHALLENGING A METHOD OF IMPOSING A DEATH SENTENCE REQUIRES PROOF OF A SUBSTANTIAL RISK OF SEVERE HARM.

Asay argued that Florida's expected use of etomidate creates an unacceptable risk of pain and thus, constitutes cruel and unusual punishment in violation of the Eighth Amendment of the United States Constitution.[100] The Court "has never invalidated a State's *chosen* procedure for carrying out a sentence of death as the infliction of cruel and

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20161205-story.html (noting that only after receiving a subpoena seeking the records did the state disclose heavily-redacted records).

95. *See Asay*, 224 So. 3d at 707–08 (Pariente, J., dissenting) (asserting that the State's actions prohibited petitioner from effectively ensuring that his execution withstands constitutional scrutiny).

96. *See* FLA. STAT. § 945.10(1)(e) (2017) ("Except as otherwise provided by law or in this section, the following records and information held by the Department of Corrections are confidential and exempt from the provisions of § 119.07(1) and § 24(a), Article I of the State Constitution . . . Information which if released would jeopardize a person's safety."); *see also* FLA. STAT. § 945.10(1)(g) (2017) ("Except as otherwise provided by law or in this section, the following records and information held by the Department of Corrections are confidential and exempt from the provisions of §119.07(1) and s. 24(a), Art. I of the State Constitution . . . Information which identifies an executioner, or any person prescribing, preparing, compounding, dispensing, or administering a lethal injection.").

97. *See* Initial Brief of Appellant at 3, Asay v. State, 224 So. 3d 695 (Fla. 2017) (No. SC17-1400), 2017 WL 3390338, at 43; *see also Asay*, 224 So. 3d at 706 (highlighting petitioner's numerous unsuccessful attempts to obtain manufacturer's identity).

98. *See* Initial Brief of Appellant, *supra* note 97, at 43 (explaining the numerous requests made for disclosure and DOC's refusal to disclose information within a timely manner).

99. *See Asay*, 224 So. 3d at 700 ("[W]here a defendant cannot demonstrate that he or she is entitled to relief on a claim or that records are relevant or may reasonably lead to the discovery of admissible evidence, the trial court may properly deny a records request.").

100. *See generally* Initial Brief of Appellant, *supra* note 97, at 57–71 (arguing that the intentional choice of a drug protocol that includes a drug with an adverse warning that it often causes pain violates the Eighth Amendment).

unusual punishment."[101] Thus, Asay's claim must be tailored to address specific concerns raised by the lethal injection protocol.

Instead, recognizing that some risk of pain is inherent in any method of execution, the Court has held that executions do not require the avoidance of *all* risk of pain.[102] The petitioner challenging the constitutionality of an execution protocol bears the burden of establishing that the risk of harm is substantial when compared to a known and available alternative method of execution.[103]

1. Substantial Risk of Harm

First, the substantial risk of harm must be an "objectively intolerable" risk, not merely subjectively intolerable to the inmate challenging the protocol.[104] "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."[105] The Court has consistently held that the risk must be "sure or very likely to cause serious illness and needless suffering."[106]

In *Asay*, the circuit court held an evidentiary hearing where it heard expert testimony from both the State[107] and the petitioner.[108] The court also reviewed the pharmacology of etomidate as described by the drug insert[109]

101. *Baze*, 553 U.S. at 48 (emphasis added); *see also* Wilkerson v. Utah, 99 U.S. 130, 135 (1878) (upholding an execution by firing squad and rejecting the argument that it was a violation of the Eighth Amendment); *see also* In re Kemmler, 136 U.S. 436 (1890) (rejecting to incorporate the Eighth Amendment in a challenge to the first execution by electrocution in New York).

102. *See Glossip*, 135 S. Ct. at 2733 (refusing to interpret the Eighth Amendment as requiring the elimination of essentially all risk of pain).

103. *See id.* at 2738–39 (holding that a petitioner must identify an alternative method of execution in order to satisfy their burden of proof).

104. *See Baze*, 553 U.S. at 50 (pointing out that an isolated accident or mistake by a prison official will not give rise to the "substantial risk" that qualifies as cruel and unusual punishment).

105. *Id.* (noting that mistakes or accidents which do not suggest malevolence do not rise to the level of cruel and unusual punishment); *see generally* Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 465–66 (1947) (upholding a second attempt at an execution by electrocution after a mechanical malfunction).

106. *See Baze*, 553 U.S. at 51; *see also* Helling v. McKinney, 509 U.S. 25, 32–34 (1993) (explaining that subjecting individuals to a risk of future harm may qualify as cruel and unusual punishment, but noting that the risk must be "*sure or very likely* to cause serious illness and needless suffering" and give rise to "sufficiently *imminent* dangers") (emphasis added).

107. *See Asay*, 224 So. 3d at 701 (citing John Palmer, Associate Director of the Florida Department of Corrections; Dr. Daniel Buffington, a clinical pharmacologist; and Dr. Steven Yun, an anesthesiologist, as the experts relied upon by the State).

108. *See id.* (citing petitioner's expert witness as Dr. Mark Heath, an anesthesiologist who detailed the known effects of etomidate).

109. *See* U.S. FOOD AND DRUG ADMINISTRATION, AMIDATE APPROVED LABELING, *supra*

which described the pain caused by the drug as follows: "Transient venous pain was observed immediately following intravenous injection of etomidate in about 20% of the patients, with considerable difference in the reported incidence (1.2% to 42%). This pain is usually described as mild to moderate in severity but it is occasionally judged disturbing."[110]

All of the State's experts testified to the relatively low amount of patients experiencing pain and described the most frequent adverse reactions as merely transient venous pain on injection and transient skeletal movements.[111] Unfortunately, even Asay's defense expert, Dr. Heath, ultimately admitted that most patients who receive etomidate injections do not experience pain.[112] Because of the evidence presented and the testimony obtained at the evidentiary hearing, the court determined that Asay had not demonstrated that he was at substantial risk of serious harm.[113]

2. Alternative method of execution

> "[T]here are no methods of legal execution that are satisfactory to those who oppose the death penalty on moral, religious, or societal grounds."[114]

In addition to proving the substantial risk of serious harm, the petitioner challenging his intended method of execution must also identify a known and available alternative method of execution.[115] It is not enough to merely show a slightly or marginally safer alternative.[116] Instead, the

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note 86, at 1–4 (providing clinical pharmacology, indications and usage, contraindications, and adverse reactions).

110. *Id.* at 4; *Asay*, 224 So. 3d at 701.

111. *See Asay*, 224 So. 3d at 701 (citing John Palmer, Associate Director of the Florida Department of Corrections; Dr. Daniel Buffington, a clinical pharmacologist; and Dr. Steven Yun, an anesthesiologist, as the experts relied upon by the State; all of the experts testified as to the validity of the pharmacological data).

112. *See id.* (confirming that both the state's and petitioner's anesthesiologists corroborated the known effects and adverse reactions that the drug's pharmacological brochure provides).

113. *See id.* (concluding that rather than providing evidence of a substantial risk or serious harm, the evidence demonstrated a "*small* risk of *mild* to *moderate* pain") (emphasis added).

114. *Baze*, 553 U.S. at 41 (noting the theoretical impossibility of asking an opponent of the death penalty altogether to also propose a satisfactory alternative method of carrying out said death penalty).

115. *See Glossip*, 135 S. Ct. at 2731 (refusing to accept the proffered alternative method because the drugs proffered were no longer available and the state was unable to obtain them for lethal injections); *see also Baze*, 553 U.S. at 61 (2008). To qualify as an alternative, the proffered procedure must be feasible and readily implemented and, more important, must in fact significantly reduce the substantial risk of severe pain. *Id.*

116. *See Baze*, 553 U.S. at 51 ("Permitting an Eighth Amendment violation to be established on such a showing would threaten to transform courts into boards of inquiry charged with

alternative method proposed by the petitioner must be feasible, readily implemented, and proven to significantly reduce a substantial risk of severe pain.[117] One method proffered by Asay's expert anesthesiologist was for Florida to administer a one-drug protocol, as opposed to the three-drug protocol currently in place.[118] However, the Court rejected the argument that Florida's continued use of a three-drug protocol established a serious risk of needless suffering.[119]

Assuming, arguendo, that Asay accepted lethal injection as an appropriate and available method of execution and challenged only the administration of etomidate as the first drug, he would still be faced with the incredibly difficult task of obtaining information regarding alternative drugs or drug combinations.[120] One alternative offered by Asay's expert anesthesiologist was midazolam, which was the first drug previously used in Florida and was the first injection administered at the time Asay's death warrant was signed and his execution first scheduled.[121] In fact, Florida was the first state to use midazolam as part of its three-drug protocol in October 2013.[122] But midazolam has been the subject of numerous cruel and unusual punishment complaints, as well, and has left even the Supreme Court justices at odds with whether midazolam is effective for lethal injection purposes.[123]

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determining 'best practices' for executions, with each ruling supplanted by another round of litigation touting a new and improved methodology. Such an approach finds no support in our cases, would embroil the courts in ongoing scientific controversies beyond their expertise, and would substantially intrude on the role of state legislatures in implementing their execution[.]").

117. *See id.* at 52 (noting that once a feasible and available alternative has been identified, then "[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.").

118. *See Asay*, 224 So. 3d at 702 (denying Asay's claim because the court had previously rejected a similar argument and upheld the three-drug protocol).

119. *See id.*; *see also* Muhammad v. State, 132 So. 3d 176, 196–97 (Fla. 2013) (holding that simply because other states follow a one-drug protocol, Florida's use of a three-drug protocol is not unconstitutional).

120. *See supra* Part III, Section A.

121. *See* Initial Brief of Appellant, *supra* note 97, at 23–24 (explaining how Asay's expert anesthesiologist read and reviewed the reports about every single execution conducted with midalozan and could not recall any of them indicating that midazolam caused pain).

122. *See Glossip*, 135 S. Ct. at 2734 (noting that Florida has conducted eleven executions between October 2013 through June 2015, using midazolam followed by a paralytic agent and potassium chloride).

123. *Compare Glossip*, 135 S. Ct. at 2731 (finding that petitioners' failed to prove that midazolam was ineffective), *with* Warner v. Gross, 135 S. Ct. 824, 827 (2015) (Sotomayor, J., dissenting)

St. Thomas Law Review, Vol. 31, Iss. 1 [2024], Art. 6

The court ultimately rejected Asay's argument and held that he was unable to identify any known or available alternative method of execution.[124] On August 24, 2017, Mark James Asay was executed, making it the first execution in the United States to use etomidate as part of its lethal injection protocol.[125]

C. THE USE OF ETOMIDATE AS THE FIRST LETHAL INJECTION CREATES A SUBSTANTIAL RISK OF SEVERE HARM BECAUSE IT HAS THE POSSIBILITY OF CAUSING PAIN IN A PERSON WHO HAS NOT RECEIVED ANY ANESTHETIC.

Etomidate is intended to be used for the induction of general anesthesia by injection into the veins.[126] However, as the Food and Drug Administration ("FDA") itself acknowledged when it first approved etomidate, there are insufficient data and limited clinical studies regarding use of the drug in certain settings or for procedures other than those specifically approved.[127] Because it has never been used until now as a lethal injection drug, there are no studies regarding possible contraindications when combined with rocuronium bromide and potassium acetate.[128]

Asay argued that Florida's lethal injection protocol is the only one in which the first drug used causes pain, and as such, proposes to create or cause pain in a person who has not received an anesthetic or analgesic.[129]

> Although the State emphasizes that Florida continues to employ a lethal injection protocol that utilizes the same drug types and amounts as will now be employed in Oklahoma, its apparent success with that method is subject to question because the injection of the paralytic vecuronium bromide may mask the ineffectiveness of midazolam as an anesthetic: The inmate may be fully conscious but unable to move.

Id.

124. *See Asay*, 224 So. 3d at 702 (finding that the alternatives presented by Asay were previously rejected in other cases as speculative); *see also* Correll v. State, 184 So. 3d 478, 489 (Fla. 2015) (rejecting petitioner's challenge to the use of midazolam because he failed to show that he was likely to endure needless suffering merely upon the administration of midazolam).

125. *See* Haltiwanger, *supra* note 91 (stating, without evidence, that etomidate was previously used by mistake in an Oklahoma execution in 2015).

126. *See* U.S. FOOD AND DRUG ADMINISTRATION, AMIDATE APPROVED LABELING, *supra* note 86, at 3 (approving etomidate for use as recommended in administration in geriatric patients).

127. *See id.* (noting lack of sufficient data concerning use of etomidate in patients with recent severe trauma or patients below the age of ten, as well as no adequate and well-controlled studies in pregnant women).

128. *See Asay*, 224 So. 3d at 701 (noting that witnesses who testified at the evidentiary hearing held by the trial court discussed the known effects of etomidate and how it has been used in medical practice alone).

129. *See* Initial Brief of Appellant, supra note 97, at 23.

The most frequent adverse reactions associated with use of etomidate are transient venous pain and transient skeletal muscle movements.[130] One of the state's expert witnesses, Dr. Buffington, acknowledged that on average, about 20% of individuals experience discomfort upon injection of etomidate.[131] However, Dr. Buffington refused to characterize the manufacturer's adverse reaction as pain, referring to it, instead, as 'discomfort'.[132] Any such 'discomfort' experienced, according to Dr. Buffington, was described as merely mild to moderate, not severe, and subsiding very quickly.[133] Furthermore, once the inmate has received the 200 milligrams of etomidate proscribed by the protocol, according to Dr. Buffington, "there is no possibility that the individual would be conscious."[134]

Regardless whether the adverse reactions are labeled as "pain" or as "discomfort," experts from both the State and Asay agreed on one thing: etomidate has never been used as a lethal injection drug before[135] and therefore, there is insufficient data to conclude with certainty that etomidate does not create a substantial risk of causing severe harm.

IV. SOLUTION

A. RE-EVALUATE ETOMIDATE AND DISCONTINUE ITS USE UNTIL FURTHER MEDICAL RESEARCH AND STUDIES ARE AVAILABLE REGARDING THE SUBSTANTIAL RISK OF HARM AND PAIN.

The limited research available on etomidate warns against possible adverse reactions of transient venous pain and transient skeletal muscle movements.[136] Further research and clinical studies should be conducted to

130. *See* U.S. FOOD AND DRUG ADMINISTRATION, AMIDATE APPROVED LABELING, *supra* note 86, at 4–5 (providing adverse reactions reported during clinical studies performed).

131. *See* Answer Brief of Appellee at 14, Asay v. State, 224 So. 3d 695 (Fla. 2017) (No. SC17-1400), 2017 WL 3454089 (referring to Dr. Buffington's testimony regarding his personal experience regarding the use of etomidate).

132. *See id.* ("Of the approximately 250 times that Dr. Buffington has observed etomidate administered, he has never had a patient complain of pain.").

133. *See id.* at 15 ("The discomfort could be caused by the preservative that is packaged with the etomidate but research has not been done on that specifically.").

134. *Id.*

135. *See id.* at 49 (noting that use of etomidate was previously used by law enforcement as part of a reasonable search). "In *United States v. Husband*, 312 F.3d 247 (7th Cir. 2000), the Seventh Circuit held that the use of etomidate as a sedative to remove plastic baggies containing crack cocaine from a defendant's mouth was reasonable. Detectives handcuffed the defendant who was a suspected drug dealer." *Id.*

136. *See* U.S. FOOD AND DRUG ADMINISTRATION, AMIDATE APPROVED LABELING, *supra* note 86, at 4.

determine the intensity of the venous pain observed and whether this reaction can be properly avoided.[137] Empirical studies should also be conducted to determine whether the incidence of pain is observed more or less frequently when the injection is administered under similar conditions as those under which the drug is administered in the lethal injection protocol.[138] If pain is observed during the course of these studies, then additional research should be conducted to determine if there is an effective alternative to minimizing the pain, such as injecting the etomidate slower so as to dilute it as it enters the bloodstream, or administering an analgesic as a pain killer.[139]

Regarding the incidence of transient skeletal muscle movements, further research is needed to determine the frequency with which these movements are reported, when conducted under similar conditions as those under which the drug is administered for lethal injection purposes.[140] The current data available indicates presence of transient skeletal muscle movements in approximately 32%, "with considerable difference in the reported incident ranging from as low as 22.7% to as high as 63%."[141] Because the administration of the three-drug protocol is strictly regulated and designed, any sudden muscle movements as a result of the first etomidate injection could substantially affect the administration of the subsequent second and third injection.[142] Studies should be conducted to account for a remedy that would enable the executioner to continue with the administration of the second and third drugs, in the event the inmate reacts with sudden skeletal muscle movements.[143]

137. *See supra* Part III, Section B.

138. *See supra* Part II, Section F; *see also* EXECUTION BY LETHAL INJECTION PROCEDURES, *supra* note 9 (enumerating specific steps to be taken by executioner in administering each separate injection).

139. *See* Initial Brief of Appellant, *supra* note 97, at 17–18 (explaining possible alternatives to combat the prevalence of pain after etomidate injection is administered).

140. *See* U.S. FOOD AND DRUG ADMINISTRATION, AMIDATE APPROVED LABELING, *supra* note 86.

141. Initial Brief of Appellant, *supra* note 97, at 17, 21–22 (explaining the wide range of incidents reported).

142. *See id.* at 23 (discussing possible outcomes as a result of unexpected muscle movements).

143. *See supra* Part IV.

Ventura: Lethal Injection or Lethal Litigation: Florida's Amended Lethal I

B. DISCONTINUE THE CURRENT AMENDED THREE-DRUG PROTOCOL UNTIL FURTHER RESEARCH IS CONDUCTED TO DETERMINE THE SAFETY AND EFFICACY OF ALL THREE DRUGS WHEN USED IN COMBINATION.

Asay was only the first inmate executed under the new protocol; as of November 2017, there were currently 354 inmates in Florida on Death Row.[144] Because an appeal by a defendant from the sentence shall stay an execution, it is reasonably foreseeable that as an inmate's execution date approaches and a new death warrant signed, the inmate will likely file post-conviction motions seeking relief.[145] In an effort to avoid the lengthy litigation and time-consuming efforts required by the state to respond to these appeals for relief, the DOC should discontinue its use of the new, but scientifically untested, three-drug protocol until further research is conducted in order to determine the safety and efficacy of all the drugs currently administered in the new protocol when used in combination with one another.[146]

V. CONCLUSION

"Time and again, the People have voted to exact the death penalty as punishment for the most serious of crimes. Time and again, this Court has upheld that decision."[147] Recognizing that the death penalty is the most serious of punishments, Florida must take the most serious of precautions in ensuring that it imposes these sentences in the most humane and dignified way possible without unnecessary infliction of pain and suffering.[148]

144. *See* FLA. DEPARTMENT OF CORRECTIONS: DEATH ROW ROSTER, http://www.dc.state.fl.us/OffenderSearch/deathrowroster.aspx (last visited June 27, 2018) (providing detailed information of all inmates currently on Death Row, including the date of their offense, the date the death sentence was imposed, and the date they were initially received by the DOC).

145. *See* FLA. STAT. § 924.14 (2017) ("An appeal by a defendant from either the judgment or sentence shall stay execution of the sentence, subject to the provisions of § 924.065.").

146. *See supra* Part IV.

147. *Glossip*, 135 S. Ct., at 2749 (Scalia, J., concurring) (voicing agreement that society has consistently voted in favor of capital punishment).

148. *See supra* Part IV.