IN THE SUPREME COURT OF FLORIDA

ROBERT JOE LONG
A/K/A BOBBY JOE LONG,

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

CASE NO. SC19-726
L.T. No. 84-CF-013346

DEATH WARRANT SIGNED
EXECUTION SCHEDULED FOR
MAY 23, 2019 AT 6:00 PM

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRTEENTH JUDICIAL CIRCUIT,
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES..... iii

PRELIMINARY STATEMENT..... 1

STATEMENT REGARDING ORAL ARGUMENT..... 1

STATEMENT OF THE CASE AND FACTS..... 2

SUMMARY OF THE ARGUMENT..... 19

STANDARD OF REVIEW..... 21

ARGUMENT..... 23

CLAIM I..... 23

THE POSTCONVICTION COURT PROPERLY SUMMARILY DENIED LONG'S CLAIM BASED ON ALLEGED NEWLY DISCOVERED EVIDENCE. 23

CLAIM II..... 28

THE TRIAL COURT PROPERLY DENIED LONG'S EIGHTH AMENDMENT CHALLENGE TO FLORIDA'S LETHAL INJECTION PROTOCOL..... 28

CLAIM III..... 53

APPELLANT'S CLAIM THAT HIS LENGTH OF TIME ON DEATH ROW VIOLATES THE EIGHTH AMENDMENT IS WITHOUT MERIT..... 53

CLAIM IV..... 54

THE POSTCONVICTION COURT PROPERLY REJECTED LONG'S ATTEMPT TO RELITIGATE HIS HURST CLAIM..... 54

CLAIM V..... 57

LONG HAS NO CONSTITUTIONAL RIGHT TO HAVE ADDITIONAL EXECUTION WITNESSES, TO HAVE HIS WITNESSES VIEW THE IV INSERTION PROCESS, OR FOR HIS WITNESSES TO HAVE ACCESS TO A TELEPHONE DURING HIS EXECUTION..... 57

CLAIM VI..... 61

LONG'S CLAIM THAT THE EIGHTH AMENDMENT AND EVOLVING STANDARDS OF DECENCY PROHIBIT THE EXECUTION OF A DEFENDANT WITH SEVERE TRAUMATIC BRAIN INJURY IS PROCEDURALLY BARRED AND WITHOUT MERIT..... 61

CLAIM VII..... 63

THE POSTCONVICTION COURT ACTED WITHIN ITS SOUND DISCRETION IN DENYING LONG'S REQUEST FOR ADDITIONAL PUBLIC RECORDS..... 63

CONCLUSION..... 71

CERTIFICATE OF SERVICE..... 72

CERTIFICATE OF FONT COMPLIANCE..... 72

TABLE OF AUTHORITIES

Cases

Arthur v. Comm'r, Alabama Dep't of Corr.,
680 Fed. Appx. 894 (11th Cir. 2017) 60, 61

Asay v. State,
224 So. 3d 695 (Fla. 2017) ..... passim

Baze v. Reese
553 U.S. 35 (2008) 19, 34, 35, 40

Branch v. State,
236 So. 3d 981 (Fla. 2018) 26, 50, 53, 67

Bucklew v. Precythe,
139 S. Ct. 1112 (2019) ..... passim

Carroll v. State,
114 So. 3d 883 (Fla. 2013) 53, 54, 62

Chavez v. State,
132 So. 3d 826 (Fla. 2014) 68

Correll v. State,
184 So. 3d 478 (Fla. 2015) 31, 45, 53, 68

Cox v. State,
966 So. 2d 337 (Fla. 2007) 37

Davis v. State,
142 So. 3d 867 (Fla. 2014) 26, 30, 31, 41

Davis v. State,
207 So. 3d 142 (Fla. 2016) 56

Duckett v. State,
148 So. 3d 1163 (Fla. 2014) 22

Farina v. State,
992 So. 2d 819 (Fla. 2008) 27

Ferguson v. State,
101 So. 3d 362 (Fla. 2012) 53

Glossip v. Gross,
135 S. Ct. 2726 (2016) 19, 35, 40, 42

Grayson v. Warden,
672 Fed. Appx. 956 (11th Cir. 2016) 60, 61

Hannon v. State,
228 So. 3d 505 (Fla. 2017) ..... passim

Henry v. State,
134 So. 3d 938 (Fla. 2014) 41

Houchins v. KQED, Inc.,
438 U.S. 1 (1978) 59

Howell v. State,
133 So. 3d 511 (Fla. 2014) 31, 40, 41, 42

Hunter v. State,
29 So. 3d 256 (Fla. 2008) 22

Hurst v. Florida,
136 S. Ct. 616 (2016) ..... passim

Hurst v. State,
18 So. 3d 975 (Fla. 2009) 22

Hurst v. State,
202 So. 3d 40 (Fla. 2016),
cert. denied, 137 S. Ct. 2161 (2017) 3, 54

Jenkins v. Hutton,
137 S. Ct. 1769 (2017) 56

Jimenez v. State,
265 So. 3d 462 (Fla. 2018) ..... passim

Johnston v. State,
70 So. 3d 472 (Fla. 2011) 62

Jones v. State,
591 So. 2d 911 (Fla. 1991) 25, 27

Kelly v. State,
739 So. 2d 1164 (Fla. 5th DCA 1999) 55

King v. State,
211 So. 3d 866 (Fla. 2017) 57

Knight v. Florida,
528 U.S. 990 (1999) 54

Kocaker v. State,
119 So. 3d 1214 (Fla. 2013) 49

Lackey v. Texas,
514 U.S. 1045 (1995) 53

Lambrix v. State,
217 So. 3d 977 (Fla. 2017) 53

Lebron v. State,
232 So. 3d 942 (Fla. 2017) 28

Lightbourne v. McCollum,
969 So. 2d 326 (Fla. 2007) 40

Long v. Florida,
139 S. Ct. 162 (2018) 55

Long v. State,
118 So. 3d 798 (Fla. 2013) 2

Long v. State,
183 So. 3d 342 (Fla. 2016) 3

Long v. State,
235 So. 3d 293 (Fla.),
cert. denied, 139 S. Ct. 162 (2018) 3, 55

Long v. State,
529 So. 2d 286 (Fla. 1988) 2, 24

Long v. State,
610 So. 2d 1268 (Fla. 1992),
cert. denied, 510 U.S. 832 (1993) ..... passim

Morrison v. State,
818 So.2d 432 (Fla. 2002) 47

Morton v. State,
995 So. 2d 233 (Fla. 2008) 26

Muhammad v. State,
132 So. 3d 176 (Fla. 2013) 46, 53, 59, 68

Otte v. Morgan,
137 S. Ct. 2238 (2017) 45

Pardo v. State,
108 So. 3d 558 (Fla. 2012) 53

Perez v. State,
919 So. 2d 347 (Fla. 2005) 47

Schwab v. State,
969 So. 2d 318 (Fla. 2007) 26

Schwab v. State,
995 So. 2d 922 (Fla. 2008) 40

Simmons v. State,
105 So. 3d 475 (Fla. 2012) 62

Sims v. State,
753 So. 2d 66 (Fla. 2000) 64

State v. McBride,
848 So. 2d 287 (Fla. 2003) 55

Tompkins v. State,
872 So. 2d 230 (Fla. 2003) 64

Truehill v. State,
211 So. 3d 930 (Fla.),
cert. denied, 138 S. Ct. 3 (2017) 57

Valle v. Singer,
655 F.3d 1223 (11th Cir. 2011) 40

Valle v. State,
70 So. 3d 530 (Fla. 2011) 53

Ventura v. State,
2 So. 3d 194 (Fla. 2009) 50

Walton v. State,
3 So. 3d 1000 (Fla. 2009) 69

Wyatt v. State,
71 So. 3d 86 (Fla. 2011) 65

Zeigler v. State,
632 So. 2d 48 (Fla. 1993) 64

Zommer v. State,
31 So. 3d 733 (Fla. 2010) 27

Other Authorities

§ 922.11 Fla. Stat. (2018)..... 20, 58, 59

Art. I, § 16(b)(10), Fla. Const..... 33

Fla. R. Crim. P. 3.851..... passim

Fla. R. Crim. P. 3.851(d)..... 19

Fla. R. Crim. P. 3.851(d)(2)..... passim

Fla. R. Crim. P. 3.851(h)(5)..... 30
Fla. R. Crim. P. 3.852(h)..... 63, 67
Fla. R. Crim. P. 3.852(h)(3)..... 66, 67
Fla. R. Crim. P. 3.852(i)..... 65, 66
Fla. R. Crim. P. 3.852(i)(1)(C)..... 67
Fla. R. Crim. P. 3.852(j)..... 67
http:// www.cortechslabs.com/10-years-of-fda-clearance/..... 26

PRELIMINARY STATEMENT

Citations to the record in this brief will be designated as follows: The record on direct appeal will be referred to as "R" followed by the appropriate volume and page number. The record on direct appeal from Long's resentencing will be referred to as "RS" followed by the appropriate volume and page number. The record from Long's postconviction proceedings following the evidentiary hearing (SC12-102) will be referenced as "PCR" followed by the appropriate volume and page number. The record from the instant successive 3.851 proceedings (SC19-729) will be referenced as "PCR3" followed by the appropriate page number.

STATEMENT REGARDING ORAL ARGUMENT

The State respectfully submits that oral argument is not necessary on the appeal from the denial of Long's successive motion to vacate. The claims raised in this successive motion for postconviction relief were denied because they were procedurally barred or meritless as a matter of established Florida law. Accordingly, argument will not materially aid the decisional process.

STATEMENT OF THE CASE AND FACTS

On September 23, 1985, Appellant, Robert Joe Long, entered into a plea agreement with the State and pleaded guilty to the first-degree murder of Michelle Simms, along with seven additional counts of first-degree murder, numerous sexual battery and kidnapping counts, and a violation of probation. Following a penalty phase in July 1986, Long was sentenced to death for the murder of Michelle Simms. On direct appeal, this Court affirmed the convictions and all sentences except for the death sentence, which this Court vacated and remanded for a new sentencing proceeding. Long v. State, 529 So. 2d 286 (Fla. 1988).

Long unsuccessfully sought to withdraw his guilty plea prior to the resentencing proceeding in 1989. Thereafter, a unanimous jury recommended the death penalty and the trial court followed the recommendation and imposed a death sentence. This Court affirmed Long's death sentence on appeal. Long v. State, 610 So. 2d 1268 (Fla. 1992), cert. denied, 510 U.S. 832 (1993).

Long filed his initial postconviction motion in the circuit court in 1994, and following a 2003 amendment, the lower court conducted an evidentiary hearing. On November 28, 2011, the circuit court denied Long's motion. This Court affirmed this ruling on appeal. Long v. State, 118 So. 3d 798 (Fla. 2013).

Following his state court proceedings, Long sought relief by filing a petition for writ of habeas corpus in federal court. The United States District Court, Middle District of Florida, denied Long's habeas petition on August 30, 2016, and the Eleventh Circuit Court of Appeals denied a certificate of appealability on January 4, 2017.

On September 9, 2014, during the pendency of his federal habeas proceedings, Long again returned to the state circuit court and filed a successive postconviction motion based on alleged newly discovered evidence, which the court summarily denied. This Court affirmed this ruling. Long v. State, 183 So. 3d 342 (Fla. 2016).

On January 3, 2017, Long filed a second successive motion for postconviction relief raising claims for relief pursuant to Hurst v. Florida, 136 S. Ct. 616 (2016), and Hurst v. State, 202 So. 3d 40 (Fla. 2016), cert. denied, 137 S. Ct. 2161 (2017). The circuit court summarily denied Long's motion and Long appealed to this Court. This Court affirmed the summary denial of relief, finding that Hurst did not apply retroactively to Long's sentence of death that became final in 1993. Long v. State, 235 So. 3d 293 (Fla.), cert. denied, 139 S. Ct. 162 (2018).

On April 23, 2019, Governor Ron DeSantis signed Long's death warrant and his execution is scheduled for May 23, 2019, at 6:00 p.m. On April 29, 2019, pursuant to this Court's scheduling order,

Long filed his *third* successive motion for postconviction relief raising six claims. After reviewing the State's response and conducting a case management conference, the postconviction court summarily denied all of Long's claims with the exception of Claim 2(a); Long's as-applied challenge to Florida's lethal injection protocol.

On May 3, 2019, the court conducted an evidentiary hearing on Long's as-applied challenge. Long presented testimony from Dr. Lubarsky, Anesthesiologist; Dr. Frank Wood, Neuropsychologist; Silas Raymond, Clinical and Compounding Pharmacist; and Steven Whitfield, Chief of Pharmaceutical Services at the Department of Corrections (DOC). The State presented rebuttal testimony of Dr. Steven Yun, Clinical Anesthesiologist, and Dr. Daniel Buffington, Doctor of Pharmacy/Pharmacologist. The witnesses' testimony is summarized below.

Dr. David Lubarsky

Dr. Lubarsky, a board certified anesthesiologist, works at the University of California Davis as a professor and vice chancellor for human health services. (PCR3 6295, 6298). Dr. Lubarsky authored affidavits challenging the lethal injection protocols in many different cases. (PCR3 6324). He opposed sodium thiopental, pentobarbital, midazolam, and etomidate, and he

provided testimony for death row inmates contesting their protocols in five different states. (PCR3 6324-25).

Dr. Lubarsky also published several papers on the execution process, including issues related to the administration of lethal injection. (PCR3 6325). He testified that physicians have an obligation to help and heal, and it is very important that they "not be pressed into that service of the State as an instrument of death" in the execution process. (PCR3 6326-27). Dr. Lubarsky charged $800 an hour to review records in Long's case and $8,000 for his testimony during the evidentiary hearing. (PCR3 6328). In preparation for his testimony, Dr. Lubarsky reviewed the DOC's lethal injection protocol as well as some papers on the pharmacogenetics of etomidate. (PCR3 6300).

He testified that etomidate was a sedative, hypnotic drug and classified as a general anesthetic that was "ultra-short acting." (PCR3 6306). Dr. Lubarsky believed that etomidate produced a "very deep level of unconsciousness for a very short period of time." (PCR3 6330-31). He acknowledged that 20 milligrams of etomidate would render a person unconscious within 30-45 seconds. (PCR3 6332). He believed that in a nervous patient, up to 40 milligrams may be necessary to render that person unconscious. (PCR3 6332). Dr. Lubarsky agreed that no one in his profession would give an individual 200 milligrams of etomidate. (PCR3 6331).

He acknowledged that etomidate was frequently used in the emergency room. (PCR3 6329). Dr. Lubarsky felt that etomidate should not be used as a sole anesthetic because it did not have analgesic qualities. (PCR3 6330-31). He stated that etomidate resembled pentobarbital and its mechanism of action was similar to pentothal. (PCR3 6331).

Dr. Lubarsky testified that in "the anesthesia world," etomidate would be contraindicated in a patient with a history of epilepsy because of the very well-known increase in epileptical discharges associated with etomidate. (PCR3 6316). He stated that etomidate was given to patients to induce a seizure during electroconvulsive therapy. (PCR3 6316-17). He further explained that etomidate was used as a diagnostic tool to activate temporal lobe epileptic cells and to provoke epilepsy. (PCR3 6317). Dr. Lubarsky believed that etomidate could trigger seizures even in nonepileptic people. (6318). He acknowledged though that, at some point, higher doses of etomidate could actually reduce seizures. (PCR3 6418). He stated that very high doses of etomidate could suppress epileptogenic foci. (PCR3 6336).

Dr. Lubarsky opined that Long's epilepsy[1] and traumatic brain injury would interact with etomidate and also make the delivery of

[1] Dr. Lubarsky admitted that he did not know whether Long's medical records ever documented him having a seizure. (PCR3 6335).

the two subsequent drugs in the protocol much more difficult to time appropriately. (PCR3 6304). He also believed that a "condemned inmate" would have a fight-or-flight response as they faced death, which would shorten the course of the etomidate action to four or five minutes. (PCR3 6310, 6315).

Dr. Lubarsky was asked whether the use of etomidate in someone with traumatic brain injury or temporal lobe epilepsy would cause pain, and he answered, "Well, let me be clear, that almost everyone will experience pain on injection with etomidate because of the nature of the drug itself." (PCR3 6306-07). He continued,

> In terms of will it cause pain when the etomidate interacts with the epilepsy, the answer is, no, it will not cause pain, but it may unmask a seizure and that, in turn, will -- while not painful will complicate the clinical picture in terms of determining whether or not the etomidate has actually taken effect.

(PCR3 6307).

Dr. Lubarsky stated that the sequence of the execution was dependent on consciousness checks, and etomidate was a difficult drug to use to know that someone is not responsive because the "the drug itself will cause muscular movement prior to its full whole onset." (PCR3 6310). Dr. Lubarsky explained that it would be difficult to tell the difference between someone awake and moving, someone suffering from myoclonus, or someone having a seizure associated with temporal lobe epilepsy, which would delay the

protocol and risk the etomidate wearing off. (PCR3 6316, 6319). He believed that there was "a very large chance" that the amount of etomidate utilized would be insufficient to keep Long asleep and insensate during the course of the execution. (PCR3 6309). Dr. Lubarsky also believed that a seizure could interfere with the intravenous lines during the execution. (PCR3 6319).

Dr. Lubarsky was specifically asked how Long's pain and suffering would be increased if Long suffered a seizure from etomidate. (PCR3 6321). Dr. Lubarsky responded, "Well, again, I think that the whole point here is that, you know, etomidate, itself, is very painful. Seizures in and of themselves where the person suffering the seizure is restrained…if it's a significant seizure, then one can hurt themselves straining against the restraints." (PCR3 6321). He testified that the seizure itself was not painful, but he added that there was the possibility of a person to bite their tongue during a seizure. (PCR3 6321). Dr. Lubarsky concluded "there is no doubt in my mind that there is a marked chance, a very high chance that the anesthetic delivered will be insufficient and not take care of the condemned inmate's pain and suffering that attends second to drugs based on his underlying medical condition and the drug being chosen." (PCR3 6323).

Dr. Steven Yun

Dr. Yun, a board-certified anesthesiologist, has been practicing clinical anesthesiology full-time since 2000. (PCR3 6172-73). Dr. Yun received his medical degree from the University of Southern California, and he completed his postgraduate training in anesthesia at the UCLA Medical Center. (PCR3 6171). He had performed over 25,000 medical procedures in which he put patients under anesthesia. (PCR3 6172). Dr. Yun described etomidate as a hypnotic anesthetic agent used to induce unconsciousness. (PCR3 6175). He had used etomidate to induce unconsciousness in his practice approximately 300 times. (PCR3 6175). According to Dr. Yun, etomidate was a common choice used for emergency situations because it was one of the few hypnotic agents that would induce unconsciousness, but at the same time be relatively stable in terms of its effects on the cardiovascular system. (PCR3 6177). If somebody had a traumatic brain injury, an anesthesiologist may choose etomidate for its fast-acting properties and ability to keep the cardiovascular system stable. (PCR3 6177-78). Dr. Yun testified that etomidate's actions were predictable. (PCR3 6178). Generally, 0.2 milligrams per kilogram is needed to render a person unconscious, so for a 224-pound person, the dose would be 20 milligrams. (PCR3 6178). If a person were given 200 milligrams of etomidate, it would "predictably produce a very reliable deep state

of unconsciousness." (PCR3 6178). Dr. Yun stated that 200 milligrams would be considered a lethal dose if no other lifesaving measures were instituted. (PCR3 6179).

Dr. Yun testified that brain activity is measured by brainwaves or electroencephalogram ("EEG"), and those EEG signals often are characterized by various bursts. (PCR3 6179). Etomidate causes burst suppression. (PCR3 6179). Dr. Yun opined that a dose of 200 milligrams of etomidate would "greatly reduce the risk of a seizure event." (PCR3 6182). He explained that a dose of 200 milligrams is "such an overwhelming dose," "that it would predictably and reliably produce such a massive deep state of burst suppression and unconsciousness so as to eliminate any possible seizure activity." (PCR3 6182). He added that such an extreme dose would eliminate "the possibility of responding or feeling or perceiving any noxious stimuli." (PCR3 6183). Dr. Yun explained that he was very confident in his opinion because, in his experience, even 20 milligrams of etomidate reliably produced a deep level of unconsciousness that was suitable for the preparation of surgery. (PCR3 6183). Dr. Yun testified that in his best clinical estimate, a dose of 200 milligrams of etomidate would render the patient unconscious for several hours, but "at the very least for 30 minutes." (PCR3 6183).

According to Dr. Yun, epilepsy would not be contraindicated by the use of etomidate. (PCR3 6181). Dr. Yun further opined that brain damage would not interfere with the action of etomidate. (PCR3 6185-86). In clinical settings, etomidate is used for patients with suspected traumatic brain injury or epilepsy. (PCR3 6186). He opined that 200 milligrams of etomidate would insulate an individual from any noxious stimuli, even if they have brain damage. (PCR3 6186).

Dr. Yun was cross-examined on the fact that he could not name any recent articles that he had reviewed on etomidate, but Dr. Yun responded that his testimony was based on his experience rather than studying articles. (PCR3 6193-95). He stated, "as a clinical practicing anesthesiologist, I don't need to read basic textbooks to review my knowledge on etomidate in the same way I don't need to […] read the car manual in order to drive my car." (PCR3 6193). He charged $4,000 total for his appearance and fees associated with the case. (PCR3 6196). Dr. Yun was also cross-examined on the fact that sometimes a subtherapeutic dose of .05 to .1 milligram per kilogram is used to help the physician find epileptic foci. (PCR3 6202-03). He explained, "[l]ike most anesthetic agents, small doses of anesthetic agents actually display a seizure-like provoking effect, including midazolam, which is actually a drug used to treat seizures." (PCR3 6203). Dr. Yun agreed that in

smaller doses, etomidate can help with the mapping of epileptic foci. (PCR3 620 5-06). Dr. Yun acknowledged that his scientific opinion had not been tested because nobody could conduct scientific testing utilizing the 200 milligram dose utilized in Florida's lethal injection protocol. (PCR3 6213-14).

Dr. Yun concluded that if Long had epilepsy or brain damage, his testimony would not be impacted, as neither epilepsy nor brain damage interfered with etomidate's ability to render an individual unconscious. (PCR3 6218). He further testified that having an inmate restrained and secured during the administration of etomidate and any other chemicals would significantly reduce the risk that the IV line could become dislodged.

Dr. Frank Wood

Dr. Wood, a neuropsychologist and neuroscientist, reviewed Long's neuroimaging in his Pasco County case. (PCR3 6342-43). Dr. Wood testified that Long had severe brain injury. (PCR3 6349-50). He explained that seizures in patients with temporal lobe epilepsy were not always detectable. (PCR3 6351). Dr. Wood described the seizures as "partial seizures" (PCR3 6351). In some cases, it was possible for the seizures to be so miniscule that they would not be observable by the naked eye. (PCR3 6352).

Daniel E. Buffington

Dr. Buffington received his Doctor of Pharmacy degree from Mercer University, and he completed a pharmacy residency at Emory University Hospital and a clinical pharmacology fellowship at Emery University. (PCR3 6359). Dr. Buffington is a licensed pharmacist in Florida and Georgia. (PCR3 6359). He held various teaching positions at the University of South Florida and was published several times. (PCR3 6359).

Dr. Buffington had been present when etomidate was administered in a surgical setting fifty to one hundred times. (6374). He opined that it was not relevant to know whether those patients had epilepsy or traumatic brain injury because the drug did not affect the "GABA receptors." (PCR3 6374-75).

Dr. Buffington testified that it was very well documented in medical literature that lower doses of etomidate might help trigger a seizure, but higher doses do not promote epilepsy or any type of seizure activity. (PCR3 6366, 6376). Dr. Buffington stated that the higher the dose, the lower the provoke potential for seizures was, and eventually, it would actually treat seizures. (PCR3 6377, 8381-82). Dr. Buffington also testified that etomidate was the preferred drug for brain-damaged individuals. (PCR3 6371).

Dr. Buffington explained that the Florida lethal injection protocol used a 200 milligram dose of etomidate, and if the person

did not pass the consciousness check, they received another 200 milligrams. (PCR3 6366). Dr. Buffington testified that 60 minutes of unconsciousness would easily be achieved with the 200 milligram dose. (PCR3 6367). According to Dr. Buffington, the distribution half-life of etomidate was two to three minutes, and the elimination half-life was two to five hours. (PCR3 6369).

Dr. Buffington also explained that the protocol provided the option for the inmate to receive diazepam, which was an anti-seizure treatment, an anti-myoclonic medication, and an anti-anxiety medication. (PCR3 6369-70). Dr. Buffington stated that if Long requested diazepam, it would alleviate the possibility of a seizure. (PCR3 6369). He added that "there's also been no demonstration of any crosswalk of, should a partial seizure occur, that it would induce any disturbance for delay or conflict with the pharmaceutical effects of the three medications." (PCR3 6370). He explained that within fifteen to thirty seconds of administering etomidate, the individual would be under general anesthetic levels of sedation, and there was no reason to believe with any certainty that an individual would emerge from anesthesia for any of the symptoms discussed during the hearing. (PCR3 6371). Dr. Buffington added that the protocol requires that the inmate be fully restrained in each extremity and torso and the IV lines be placed with tape. (PCR3 6368).

Silas Raymond

Mr. Raymond testified that he is a clinical pharmacist at Trinova Health, a nonsterile compounding pharmacy and retail pharmacy in Tampa, Florida. (PCR3 6231). He also works as a nuclear pharmacist for West Coast Nuclear Pharmacy in Tampa, Florida. (PCR3 6230-31).

He stated that his pharmacy is registered with the Drug Enforcement Administration (DEA), which allows him to handle controlled substances. (PCR3 6238). Mr. Raymond can purchase pentobarbital and fentanyl, which are considered Class II substances, because he is registered with the DEA. (PCR3 6238-39). According to Mr. Raymond, the process for purchasing drugs began with receiving a request from a doctor for a medication. (PCR3 6241). Next, Mr. Raymond would check with his wholesaler account to determine whether the medication could be purchased. (PCR3 6241). "[I]f it is not available or if it's on backorder, the FDA then allows the ability for you to compound said product." (PCR3 6241).

In preparation of his testimony, Mr. Raymond was asked to determine whether he could purchase pentobarbital. (PCR3 6242). Mr. Raymond stated there were several sources that were FDA registered that could be contacted to purchase pentobarbital. (PCR3 6242-43). Mr. Raymond admitted that he did not determine

whether a manufacturer would sell him pentobarbital for use in an execution. (PCR3 6243). Additionally, if he were to compound pentobarbital, he would need a doctor's prescription. (PCR3 6244). Mr. Raymond testified that pharmacists compound drugs "under the direction of a prescription from a doctor to compound a specific medication for a specific patient to treat their specific need." (PCR3 6237). Mr. Raymond did not have a doctor's prescription to compound pentobarbital or fentanyl for use in an execution. (PCR3 6244).

Stephen Whitfield

Mr. Whitfield, a registered pharmacist, serves as the Chief of Pharmaceutical Services at the Florida Department of Corrections. (PCR3 109). Mr. Whitfield testified that it was part of his responsibility to purchase a wide range of drugs for the Department of Corrections. Mr. Whitfield stated that he had no knowledge of whether the DOC had made any attempts to purchase pentobarbital within the timeframe that etomidate was being used as part of the state's lethal injection protocol. (PCR3 6270).

Mr. Whitfield testified that pentobarbital was part of the state's lethal injection protocol in the past. (PCR3 6273). He explained that the manufacturer restricted the DOC from purchasing it for use in execution protocols, so the DOC was not able to purchase pentobarbital through wholesalers. (PCR3 6274). The DOC

subsequently changed its lethal injection protocol because pentobarbital was no longer available for purchase. (PCR3 6274). According to Mr. Whitfield, the DOC "is restricted from purchasing pentobarbital by the manufacturer." (PCR3 6270). Mr. Whitfield also testified that fentanyl was restricted from being purchased. (PCR3 6274). He explained that the manufactures of pentobarbital and fentanyl instructed wholesalers not to sell those drugs to the DOC for lethal injection purposes, and the wholesalers would not sell the DOC those drugs at all. (PCR2 6283).

Mr. Whitfield admitted that he was aware of pentobarbital being used in other states, and he did not believe the drug was purchased from the manufacturer. (PCR3 6270). He was not aware of any attempt of by Florida's DOC to obtain pentobarbital from a compounding pharmacy, nor was he aware of any efforts to find a compounding pharmacy to make pentobarbital for the DOC. (PCR3 6271). Likewise, Mr. Whitfield did not know of any attempts of the DOC to purchase fentanyl. (PCR3 6272).

Mr. Whitfield did not have a reason for why a protocol using pentobarbital or fentanyl could not be adopted if the drugs were hypothetically "readily available." (PCR3 6271-73). However, he acknowledged that he had no knowledge that pentobarbital and fentanyl were readily available to the DOC. (PCR 6277-78). Mr. Whitfield testified that if pentobarbital were purchased from a

compounding pharmacy, a prescription would be required. (PCR 6276). He did not know of any instances in which doctors prescribed medication to be used by lethal injection for an execution. (PCR3 6283). Currently, with the DOC purchasing lethal injection drugs from a wholesaler, a prescription is not required. (PCR3 6276). Mr. Whitfield did not know of any reasons that the DOC would have to switch from the current protocol. (PCR3 6275-76).

Following the evidentiary hearing, the court entered an order May 6, 2019, denying relief on all of Long's claim. (PCR 5540-5566). This appeal follows.

SUMMARY OF THE ARGUMENT

Claim I: The postconviction court properly summarily denied Long's alleged newly discovered evidence claim based on scientific advances relating to brain damage. The court correctly determined that Long's claim was untimely and procedurally barred because he had been aware of his brain injuries since the time of his penalty phase and unjustifiably waited until his death warrant was signed to attempt to litigate this issue. Long failed to cite to any specific scientific advancement developed within the last year to make his claim timely under Florida Rule of Criminal Procedure 3.851(d). Furthermore, the court properly determined that even if Long's evidence was considered "newly discovered," he failed to establish that it would likely produce a life sentence.

Claim II: Long's Eighth Amendment challenges were untimely raised in his successive postconviction motion when etomidate has been part of the state's lethal injection protocol for years, and Long has known about his medical conditions of temporal lobe epilepsy and traumatic brain injury for decades. Long's claims are also meritless, as he failed to meet his burden under Baze v. Reese 553 U.S. 35 (2008), Glossip v. Gross, 135 S. Ct. 2726 (2016), and Bucklew v. Precythe, 139 S. Ct. 1112 (2019), of showing that etomidate presents a risk that is "sure or very likely to cause serious illness and needless suffering" that gives rise to

sufficiently imminent dangers, and that there is an available alternative method of execution that is feasible and readily implemented that would "significantly reduce a substantial risk of pain." The trial court properly denied all of Long's Eighth Amendment challenges, and as will be explained in more detail below, this Court should affirm the denial of relief on all claims.

Claim III: The lower court followed well established precedent from this Court when summarily denying Long's claim that his length of time on death row violates the Eighth Amendment.

Claim IV: In his third successive motion filed after the signing of his death warrant, Long once again raised a claim that his death sentence is unconstitutional under Hurst v. Florida, 136 S. Ct. 616 (2016), and Hurst v. State, 202 So. 3d 40 (Fla. 2016), cert. denied, 137 S. Ct. 2161 (2017). Long previously raised this identical claim in his second successive postconviction motion and this Court affirmed the denial of relief. Long v. State, 235 So. 3d 293 (Fla.), cert. denied, 139 S. Ct. 162 (2018). Because Long's claim was untimely, successive, procedurally barred and barred by the doctrines of collateral estoppel and the law of the case, the lower court properly summarily denied his claim.

Claim V: Pursuant to section 922.11, Florida Statutes, the warden has discretion to select witnesses for the execution. Long is not entitled to hand-pick his own execution witnesses, nor is

he entitled to equip his witnesses with phones and materials that are restricted by the Department of Corrections (DOC). Courts do not manage state execution practices and prison policies. Instead, courts are limited to determining whether the state procedures violate a defendant's constitutional rights, and Long has not established any such violations. The circuit court properly denied this claim, and this Court should affirm the denial of relief.

Claim VI: Long alleged in his motion that the Eighth Amendment categorically bars his execution because of his traumatic brain injury and mental illness. The lower court properly followed this Court's precedent when summarily denying this claim as procedurally barred and without merit.

Claim VII: The trial court acted within its sound discretion in denying Long's requests for additional public records from the Eighth District Medical Examiner's Office, the Florida Department of Law Enforcement, and the Florida Department of Corrections. Long never established that he had previously requested documents from these agencies and also failed to establish that the documents would lead to a colorable claim for relief.

STANDARD OF REVIEW

Most of the claims raised by Long in his appellate brief involve claims that were summarily denied by the lower court. When a trial court summarily denies a claim raised in a postconviction

motion, the standard of review for the appellate court is de novo. Duckett v. State, 148 So. 3d 1163, 1698 (Fla. 2014). "Because a court's decision whether to grant an evidentiary hearing on a rule 3.851 motion is ultimately based on written materials before the court, its ruling is tantamount to a pure question of law, subject to de novo review." Hunter v. State, 29 So. 3d 256, 261 (Fla. 2008).

Long's as-applied Eighth Amendment claim is the only issue in which he was granted an evidentiary hearing. Under that claim, this Court deters to the factual findings of the lower court that are supported by competent, substantial evidence but reviews the application of the law to the facts de novo. Hurst v. State, 18 So. 3d 975, 988 (Fla. 2009). Additionally, "this Court will not substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of the witnesses as well as the weight to be given to the evidence by the trial court." Id. (quoting Blanco v. State, 702 So. 2d 1250, 1252 (Fla. 1997)).

ARGUMENT

CLAIM I

THE POSTCONVICTION COURT PROPERLY SUMMARILY DENIED LONG'S CLAIM BASED ON ALLEGED NEWLY DISCOVERED EVIDENCE.

Long alleged in his successive postconviction motion that scientific advances since his resentencing proceeding in 1989 constituted newly discovered evidence which required a new penalty phase. The lower court properly summarily denied Long's claim as it was untimely, procedurally barred, and without merit.

Long's claim in his *third* successive motion is untimely and subject to summary denial unless he establishes one of the exceptions to filing successive motions set forth in rule 3.851(d)(2). As this Court recently stated in Jimenez v. State, 265 So. 3d 462, 477 (Fla. 2018), when discussing the timeliness of a sixth successive motion filed pursuant to rule 3.851:

> A motion filed after the expiration of this time period is procedurally barred unless one of the following circumstances exists:
>
> (A) the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence, or
>
> (B) the fundamental constitutional right asserted was not established within the period provided for in subdivision (d)(1) and has been held to apply retroactively, or
>
> (C) postconviction counsel, through neglect, failed to file the motion.

In the instant case, the lower court correctly found that the alleged newly discovered evidence claim was untimely and procedurally barred.

At Long's original penalty phase, as well as his resentencing in 1989, Long presented evidence that he had brain damage as a result of multiple traumatic brain injuries and temporal lobe epilepsy. In fact, as will be further discussed infra, the sentencing court found both statutory mental mitigating circumstances were established in this case. See Long v. State, 529 So. 2d 286, 291 (Fla. 1988); Long v. State, 610 So. 2d 1268, 1271-72 (Fla. 1992). In his third successive motion filed after the signing of his death warrant, Long vaguely claimed that advances in brain imaging analysis since his resentencing in 1989 constitutes newly discovered evidence requiring a new penalty phase. However, as the lower court noted, Long "has waited more than 30 years and until after the issuance of his death warrant to first raise this claim," and only references "general advancements in neuroimaging techniques without citing to any particular advanced techniques that have become available within the past year." (PCR3 5543). Because Long could have easily raised this claim during the pendency of his original postconviction proceedings which concluded in 2011, or during his prior two successive postconviction proceedings in 2014 and 2107, the

postconviction court properly found the claim untimely and procedurally barred.

Additionally, although not required to address the merits of Long's untimely claim, the postconviction court found that Long's new scientific advances and studies did not constitute newly discovered evidence entitling him to a new penalty phase. In order to establish a claim of newly discovered evidence, the defendant must show: (1) that the newly discovered evidence was unknown by the trial court, by the party, or by counsel at the time of trial and it could not have been discovered through due diligence, and (2) that the evidence is of such a nature that it would probably produce a life sentence. Jones v. State, 591 So. 2d 911, 915 (Fla. 1991).

Long's motion failed to point to any specific brain imaging test or study developed within the last year,[2] and counsel's argument at the case management conference briefly mentioning a NeuroQuant test and a diagnostic tool for CTE were insufficient to qualify as newly discovered evidence. The NeuroQuant test, a quantitative analysis of an MRI, was mentioned in Dr. Bigler's attachment to the postconviction motion. (PCR3 504). According to

[2] Long filed an almost 400-page appendix to his motion, but failed to specifically identify any particular test or study within this voluminous packet of material.

the company's website cited in the report, the NeuroQuant test was FDA approved in 2006. See http:// www.cortechslabs.com/10-years-of-fda-clearance/. The State is unaware of the CTE diagnostic tool referenced by counsel at the case management conference as it is not cited anywhere in Long's motion, appendix, or brief.

As the postconviction court noted when denying this claim, the law is well settled from this Court that "new research studies" do not qualify as newly discovered evidence. See Branch v. State, 236 So. 3d 981, 986 (Fla. 2018) (rejecting claim that scientific research with respect to brain development qualifies as newly discovered evidence); Schwab v. State, 969 So. 2d 318, 325-26 (Fla. 2007) (stating that recent scientific articles regarding brain anatomy did not constitute newly discovered evidence); Morton v. State, 995 So. 2d 233, 245-46 (Fla. 2008) (upholding the summary denial of a newly discovered evidence claim based on 2004 brain mapping study because, even though the study had not yet been published at the time of Morton's trials, Morton or his counsel could have discovered similar research at that time that stated that the human brain was not fully developed until early adulthood); see also Davis v. State, 142 So. 3d 867, 874-75 (Fla. 2014) (affirming the summary denial of a defendant's newly discovered evidence claim involving the effects of alcoholism and sexual abuse on brain development where the defendant never raised

the claim in his direct appeal or postconviction proceedings, but waited until the signing of a death warrant, and the studies did not constitute newly discovered evidence); Farina v. State, 992 So. 2d 819 (Fla. 2008) (table decision) (holding that a "study on brain mapping is not newly discovered evidence").

Finally, even if Long's claim was timely and based on actual newly discovered evidence regarding brain mapping, the lower court properly concluded that Long failed to establish that the evidence would have probably produced a life sentence. Long presented evidence to the jury at his resentencing regarding his traumatic brain injuries and his diagnosis of temporal lobe epilepsy. See Long, 610 So. 2d at 1271-72 (detailing the expert and lay witness testimony regarding Long's brain injuries and his temporal lobe epilepsy). Despite the jury being acutely aware of this information and other mitigation, the jury nevertheless unanimously recommended a death sentence for the brutal murder of Michelle Simms. Given the weighty aggravation in this case, including CCP, HAC, prior violent felony convictions,[3] and during the course of a kidnapping, there is no question that Long failed to carry his burden under Jones of showing a probability of a life sentence if

[3] This Court has noted that these are three of the weightiest aggravating circumstances in Florida's statutory sentencing scheme. Zommer v. State, 31 So. 3d 733, 751 (Fla. 2010).

this evidence had been presented.[4] Accordingly, this Court should affirm the lower court's summary denial of this claim.

CLAIM II

THE TRIAL COURT PROPERLY DENIED LONG'S EIGHTH AMENDMENT CHALLENGE TO FLORIDA'S LETHAL INJECTION PROTOCOL.

In this issue, Long challenges the postconviction court's denial of his Eighth Amendment claims, which include (A) an as-applied challenge to the use of etomidate in the lethal injection protocol, (B) a challenge to the one-drug protocol, and (C) a facial constitutional challenge to the use of etomidate. The postconviction court denied Long's as-applied challenge after conducting an evidentiary hearing, and the court summarily denied his other two challenges.

From the outset, it is worth noting that all of Long's Eighth Amendment challenges should have been summarily denied as untimely. Long's as-applied challenge was based on his allegation that his traumatic brain injury (TBI) and temporal lobe epilepsy would be contraindicated by etomidate. Long, however, has known about these medical conditions for decades. During his penalty-

[4] The State also questions whether any of the unspecified "new" scientific advancements would lead to admissible evidence at a new penalty phase. See generally Lebron v. State, 232 So. 3d 942, 953-54 (Fla. 2017) (noting that the lower court did not err in excluding quantitative electroence-phalography (qEEG) evidence as it was unreliable and not a generally accepted means of diagnosing brain damage).

phase proceeding, Long presented the testimony of Dr. John Money regarding his alleged temporal lobe epilepsy, and Long also presented the testimony of Dr. Robert Berland concerning Long's alleged brain damage. Long v. State, 610 So. 2d 1268, 1271-72. The trial court actually found mitigation based on these conditions during Long's 1989 resentencing hearing. Id. Clearly, the evidence regarding these conditions is not new.

In addition, the use of etomidate in the state's three-drug protocol cannot be considered new evidence when etomidate has been part of the protocol since January 2017. Asay v. State (Asay VI), 224 So. 3d 695, 705 (Fla. 2017). Given that Long has known about the use of etomidate as part of the protocol, and has known about his medical conditions, he certainly has not shown that this claim was timely raised within a successive rule 3.851 motion.

By the same token, Long's general challenge to the state's three-drug protocol and to the use of etomidate is similarly untimely given that etomidate has been part of Florida's lethal injection protocol for more than two years. Long failed to provide any argument or justification to show how this claim could be considered timely under rule 3.851(d)(2).

While neither Long's postconviction motion nor his appellate brief provide any justification for the untimely filing, within the argument of Long's motion, he mentioned Eric Branch's February

2018 execution. Even if the circumstances surrounding Branch's execution could be considered newly discovered evidence, Long's motion was still being filed outside the one-year time limit for filing provided in rule 3.851, and thus, it was untimely. Additionally, the execution of Jose Jimenez could not be a basis to circumvent the time-bar when Long's own affidavit filed by attorney Joseph S. Hamrick illustrated that Jimenez's execution went according to protocol.

Long's motion merely alleged that these issues were not ripe until his death warrant was signed, but this assertion disregards the requirement that postconviction motions filed after a death warrant is issued are still subject to the time-limitation exceptions outlined in rule 3.851(d)(2). See Fla. R. Crim. P. 3.851(h)(5). In sum, Long has not offered any reason explaining why he waited so long to raise his Eighth Amendment claims, and they all should have been summarily denied as untimely.

Additionally, it appeared that the lower court felt compelled to grant Long an evidentiary hearing on his as-applied Eighth Amendment challenge merely because it was an as-applied challenge. In Davis v. State, 142 So. 3d 867 (Fla. 2014), Davis raised an as-applied challenge to Florida's lethal injection protocol alleging that he suffered from porphyria. The circuit court summarily denied his claim, noting that he did not meet his burden of demonstrating

that the protocol was sure or very likely to cause serious illness and needless suffering. Id. at 870. When Davis appealed that ruling to this Court, he also filed a motion for stay of execution and attached an affidavit about his porphyria to the motion. Id. This Court relinquished jurisdiction to ensure that the method of lethal injection comported with the Eighth Amendment. Id.

Similarly, in Howell v. State, 133 So. 3d 511, 518 (Fla. 2014), the circuit court summarily denied Howell's as-applied challenge to the use of midazolam, but on appeal, this Court relinquished jurisdiction for an evidentiary hearing. Also, in Correll v. State, 184 So. 3d 478, 487 (Fla. 2015), this Court relinquished jurisdiction for an evidentiary hearing on an as-applied challenge to midazolam.

In this case, Long's as-applied claim should have been summarily denied because he never raised a valid Eighth Amendment claim that warranted factual development during an evidentiary hearing. Even if this Court were to accept all of Dr. Lubarsky's allegations from his affidavit as true, Long still would not have a valid claim. Dr. Lubarsky's affidavit merely alleged that Long could have a seizure from etomidate, but this Court has acknowledged that one of the known side effects of etomidate includes "transient skeletal movements, including myoclonus." Asay VI, 224 So. 3d at 701. The use of etomidate in Florida's lethal

injection protocol has repeatedly been deemed constitutional despite the known side effects causing involuntary movement. Id.; Hannon v. State, 228 So. 3d 505, 508-09 (Fla. 2017), Jimenez v. State, 265 So. 3d at 474-75.

Dr. Lubarsky's remaining allegation was that a seizure may dislodge Long's intravenous lines, but this was far too speculative to warrant a hearing. Long also failed to identify in his motion any feasible and readily implemented alternative procedure that would significantly reduce a substantial risk of severe pain. Under these circumstances, his claim was facially insufficient, and summary denial was appropriate. Nevertheless, the circuit court judge appeared to believe that, based on this Court's precedent, if she did not grant an evidentiary hearing, once appealed, this Court would have remanded for a hearing. (PCR3 5985-87, 5990).

This Court should clarify that there is no per-se rule requiring an evidentiary hearing whenever an as-applied challenge is raised. If that were the case, nearly every death row inmate facing execution would be incentivized to raise an as-applied challenge, whether valid or not, in an effort to obtain a guaranteed evidentiary hearing. Evidentiary hearings can be

extremely expensive[5] and should not automatically be granted merely because a defendant raises an as-applied challenge. In addition to the cost, the automatic granting of evidentiary hearings could cause unwarranted delays in cases. The victims of crimes as well as the state have an interest in achieving finality and avoiding unnecessary delay. Bucklew v. Precythe, 139 S. Ct. 1112, 1133 (2019) ("Both the State and the victims of crime have an important interest in the timely enforcement of a sentence.") (quoting Hill v. McDonough, 547 U.S. 573, 584 (2006)); Art. I, § 16(b)(10), Fla. Const. (granting crime victims "[t]he right to proceedings free from unreasonable delay, and to a prompt and final conclusion of the case and any related postjudgment proceedings."). Having an evidentiary hearing on Long's untimely and facially deficient as-applied claim was entirely unnecessary in this case. Therefore, clarification on this point would be beneficial so that future cases do not follow the same path and risk expenditure of exorbitant funds and resources on a baseless claim.

Finally, in his Initial Brief, Long argues that the circuit court improperly prevented him for introducing evidence relating to other inmates' executions during the hearing on his as-applied

[5] Dr. Lubarsky alone charged $800 an hour to review records in Long's case and $8,000 for his testimony during the evidentiary hearing. (PCR3 6328).

challenge. This argument highlights another problem with automatically granting an evidentiary hearing on as-applied challenges, as Long sought to broaden the scope of his hearing beyond his individualized claim. Given that the hearing was only granted on Long's constitutional challenge regarding etomidate as it specifically applied to him and his conditions, the trial court properly excluded evidence relating to other inmates as irrelevant and beyond the scope of the hearing.

A. Long's As-Applied Challenge

Long alleges that his "unique medical conditions" render the etomidate protocol unconstitutional as applied to him. While the State does not agree with the lower court's granting of an evidentiary hearing on this claim, the lower court's ultimate ruling was proper and requires affirmance as it is supported by competent, substantial evidence.

In order to successfully challenge his method of execution, Long was required to (1) establish that it presents a substantial and imminent risk that is sure or very likely to cause serious illness and needless suffering, and (2) identify a known and available alternative method of execution that entails a significantly less severe risk of pain. Asay v. State (Asay VI), 224 So. 3d 695, 701 (Fla. 2017) (citing Glossip v. Gross, 135 S. Ct. 2726, 2737 (2016)); see also Baze v. Rees, 553 U.S. 35 (2008);

Bucklew v. Precythe, 139 S. Ct. 1112 (2019). Both requirements must be pled in order to have a facially sufficient claim. Long failed to properly plead both elements, and even after he was given an evidentiary hearing, he utterly failed to establish these required elements under Baze, Glossip and Bucklew.

Substantial Risk of Severe Pain

First, Long has not demonstrated that he is at a substantial risk of serious harm. This standard imposes a "heavy burden" upon the inmate to show that lethal injection procedures violate the Eighth Amendment. Baze, 553 U.S. at 53. As the United States Supreme Court has recognized, the Eighth Amendment does not require "the avoidance of all risk of pain" in any method of execution. Bucklew v. Precythe, 139 S. Ct. 1112, 1125 (2019). How the Eighth Amendment applies to methods of execution "tells us that the [it] does not guarantee a prisoner a painless death—something that, of course, isn't guaranteed to many people, including most victims of capital crimes." Id. (citing Glossip, 135 S. Ct. at 2732–33). Long has failed to meet his burden of establishing that the use of etomidate as part of his lethal injection protocol would cause him needless suffering in violation of the Eighth Amendment.

Long's main argument is that his TBI and/or temporal lobe epilepsy make it more likely that etomidate would be contraindicated and cause a seizure. During the evidentiary

hearing, however, Long presented no evidence that his TBI would interfere with etomidate.[6] Rather, the only focus during the evidentiary hearing was related to his temporal lobe epilepsy. In an effort to establish that claim, Long presented the testimony of Dr. David Lubarsky, who has frequently opposed lethal injection protocols in a number of different cases spanning across five different states. (PCR3 6324-25). Dr. Lubarsky opined that etomidate would be contraindicated in someone with a history of epilepsy because etomidate causes a well-known increase in epileptic discharges and triggers seizures. (PCR3 6316).

Dr. Lubarsky explained that a seizure would interfere with the DOC's consciousness checks because it would be difficult to tell the difference between someone awake and moving, someone suffering from myoclonus, or someone having a seizure associated with temporal lobe epilepsy, which would delay the protocol and risk the etomidate wearing off. (PCR3 6316, 6319). He believed that there was "a very large chance" that the amount of etomidate utilized would be insufficient to keep Long asleep and insensate during the course of the execution. (PCR3 6309). Dr. Lubarsky also

[6] Nevertheless, the State presented the testimony of Dr. Buffington, who testified that etomidate was the preferred drug for brain-damaged individuals. (PCR3 6371, 6377, 6381-82). Dr. Yun also testified that etomidate is used in a clinical setting for patients with TBI. (PCR3 6181, 6185-87).

believed that a seizure could interfere with the intravenous lines during the execution. (PCR3 6319).

In contrast, Dr. Yun, a very experienced, practicing anesthesiologist, opined that 200 milligrams of etomidate would "predictably produce a very reliable deep state of unconsciousness." (PCR3 6178). He disagreed that Long was at risk of a seizure from the 200 milligram dose of etomidate because such a large dose would reduce burst suppression "to eliminate any possible seizure activity." (PCR3 6182). The large 200 milligram dose would also eliminate the possibility of Long responding or feeling any noxious stimuli. (PCR3 6183). Dr. Yun concluded that neither TBI nor temporal lobe epilepsy would be contraindicated by the use of etomidate, and that in a clinical setting, etomidate is actually used for patients with TBI or epilepsy. (PCR3 6181, 6185-87).

Significantly, the lower court determined the testimony of Dr. Yun to be more credible than Dr. Lubarsky's testimony, and deference should be accorded to the court's credibility findings. See Cox v. State, 966 So. 2d 337, 357-58 (Fla. 2007) (recognizing and honoring the postconviction court's "superior vantage point" of assessing the credibility of witnesses). The court specifically credited Dr. Yun's testimony that "the massive dose of 200 milligrams of etomidate would produce such a deep state of burst

suppression and unconsciousness that it would eliminate any possible seizure activity, and render a person – even someone with traumatic brain injury and/or temporal love epilepsy – unaware of noxious stimuli." (PCR3 5556-57). The court also found more credible Dr. Yun's testimony that 200 milligrams of etomidate would render a person unconscious for at least 30 minutes, rather than the 8 minutes asserted by Dr. Lubarsky. (PCR3 5557).

Competent, substantial evidence supports the trial court's denial of this claim. In addition to Dr. Yun, Dr. Buffington testified that within fifteen to thirty seconds of administering etomidate, Long would be under general anesthetic levels of sedation, and there was no reason to believe with any certainty that he would emerge from anesthesia from any of the potential scenarios presented by Long. (PCR3 6371). Dr. Buffington also testified that higher doses of etomidate actually serve to treat and reduce seizures rather than to promote them. (PCR3 6371, 6377, 6381-82).

While Long has temporal lobe epilepsy, the penalty-phase records indicated that he has a non-seizure-forming type of epilepsy. See Long, 610 So. 2d at 1271 (noting that Long's expert testified that Long's temporal lobe epilepsy was "a peculiar kind of epilepsy because it does not cause seizures."). Long's entire argument is premised on assumption that he is at risk of having a

seizure from the administration of etomidate, but Long did not provide any documents, evidence, or testimony during the proceedings below to show that he had ever had a seizure. In addition, **all of the experts** at the evidentiary hearing recognized that a large dose of etomidate would actually reduce the likelihood of any seizure occurring. In sum, Long never established that it was likely that the 200 milligram dose of etomidate would cause a seizure. The court's finding that Long has not shown "that if he is administered 200 milligrams of etomidate, he is likely to have a seizure, even a partial undetectable seizure" is supported by competent, substantial evidence.

Even if he had established that etomidate presented a substantial risk of seizure, Long never showed how the possibility of a seizure could possibly prove that he was *very likely* to endure needless suffering. Long never asserted that a seizure would cause him significant pain, or any pain for that matter. Dr. Lubarsky unequivocally testified that a seizure **would not** cause Long pain. (PCR3 6307). Instead, he testified that it could complicate the "clinical picture in terms of determining whether or not the etomidate has actually taken effect." (PCR3 6307).

Not only are Dr. Lubarsky's assertions bellied by Dr. Yun and Dr. Buffington's testimony, but they also assume that the DOC will not follow its own protocol. The DOC is entitled to a presumption

that it will properly perform its duties while carrying out an execution. Hannon, 228 So. 3d at 509; Lightbourne v. McCollum, 969 So. 2d 326, 343 (Fla. 2007). The DOC's protocols require the execution team and executioners to be trained in possible contingencies that may occur, such as etomidate not rendering the inmate unconscious, or the inmate experiencing an unanticipated medical emergency.

It is well-established that no lethal chemicals are injected until the defendant is unconscious, as confirmed by the tiered-consciousness check, which includes noxious stimuli. See Lightbourne, 969 So. 2d at 349 (Fla. 2007) (noting that the Warden consults with medically-qualified team members in making his determination of consciousness; Howell v. State, 133 So. 3d 511, 522 (Fla. 2014) (noting that Florida's consciousness checks which include a painful pinch of the trapezius "will ensure that Howell is unable to perceive any noxious stimuli"). The possibility of an inmate passing such a test and remaining conscious during injection of the second and third drugs is so very remote, it cannot possibly meet the standard required by Baze, Glossip, and Bucklew. See Schwab v. State, 995 So. 2d 922, 930 (Fla. 2008) (detailing the steps of the consciousness check, which included a shake and shout and eyeball tap); Valle v. Singer, 655 F.3d 1223, 1233 (11th Cir. 2011) (noting that under Florida's protocol, a consciousness check

is required and "the execution cannot proceed until the individual is rendered unconscious").

Furthermore, this Court has consistently denied similar claims raised by other inmates who have alleged there was a risk that the anesthetic could wear off prior to the conclusion of the execution. See e.g., Jimenez, 265 So. 3d at 474-75 (affirming summary denial of a claim "that etomidate may not render Jimenez fully unconscious for the entire period of the execution, thereby placing him at substantial risk of serious harm."); Davis v. State, 142 So. 3d 867, 873 (Fla. 2014) ("Davis has not met his 'heavy burden' to show that the injection of midazolam in the amount prescribed by the lethal injection protocol will not render him unconscious and insensate before he suffers any of the effects of a possible porphyria attack."); Henry v. State, 134 So. 3d 938, 949 (Fla. 2014) ("[T]he evidence established that even if Henry were to suffer an acute coronary event as a result of an injection of midazolam, he would be unconscious and unable to process the pain associated with a heart attack."); Howell, 133 So. 3d at 522 ("[Howell] failed to establish that even if he reacted to midazolam in an unexpected manner, he would undergo needless suffering.").

Dr. Lubarsky's testimony that there is a chance that Long's intravenous lines may be dislodged if he has a seizure is based on pure speculation stacked upon more speculation. The mere fact that

there is a chance that Long's intravenous lines may be interrupted certainly does not amount to a valid Eighth Amendment challenge. A successful challenge to a method of execution must do more than merely provide a "list of horribles" that could occur in a lethal injection execution. Id. (citing Sims v. State, 754 So. 2d 657, 668 (Fla. 2000)); see also Glossip, 135 S. Ct. at 2740 n.3 ("[T]he mere fact that a method of execution might result in some unintended side effects does not amount to an Eighth Amendment violation.").

Moreover, Dr. Buffington acknowledged that the protocol requires the inmate to be fully restrained in each extremity and torso and the IV lines be placed with tape. (PCR3 6368). Dr. Yun opined that having an inmate restrained and secured during the administration of etomidate and any other chemicals would significantly reduce the risk that the IV line could become dislodged. Long has altogether failed to meet his burden of showing that the use of etomidate in the state's lethal injection protocol presents a substantial and imminent risk that is sure or very likely to cause him serious illness and needless suffering. For all these reasons, the court's ruling requires affirmance.

Alternative Drug

Next, Long also failed to meet his burden of identifying a known, readily-available, and implementable alternative to

etomidate that significantly reduces a substantial risk of severe pain. On this point, he presented the testimony of Silas Raymond and Stephen Whitfield. Mr. Raymond owns a compounding and retail pharmacy in Tampa, Florida, and he testified that he was able to purchase pentobarbital. (PCR3 6231, 6243). He also testified that if pentobarbital was not available for purchase, he would be able to compound it if he had a doctor's prescription for the drug. (PCR 6238-410).

Stephen Whitfield, Chief of Pharmaceutical Services at the Florida Department of Corrections, testified that he was not aware of any attempt of Florida's DOC to obtain pentobarbital from a compounding pharmacy, nor was he aware of any efforts to find a compounding pharmacy to make pentobarbital for the DOC. (PCR3 6271). Mr. Whitfield was not aware of any efforts by the DOC to purchase pentobarbital within the timeframe that etomidate has been part of the state's lethal injection protocol. (PCR3 6270). Likewise, Mr. Whitfield did know of any attempts of the DOC to purchase fentanyl. (PCR3 6272). Mr. Whitfield did not have a reason for why a protocol using pentobarbital or fentanyl could not be adopted if the drugs were hypothetically "readily available;" however, he acknowledged that he had no knowledge that pentobarbital and fentanyl were actually readily available to the DOC. (PCR 6271-73, 6277-78).

The court properly determined that Long's allegations regarding pentobarbital and fentanyl rest on unsupported speculation and are affirmatively contradicted by the record. (PCR3 5558). While Long presented the testimony of Mr. Raymond to show that he could purchase pentobarbital, Mr. Raymond admitted that did not determine whether a manufacturer would sell him pentobarbital for use in an execution. (PCR3 6243). In fact, Mr. Whitfield testified that the DOC was restricted from purchasing pentobarbital and fentanyl. (PCR3 6270, 6274). He explained that the manufactures of pentobarbital and fentanyl instructed wholesalers not to sell those drugs to the DOC for lethal injection purposes, and the wholesalers would not sell the DOC those drugs at all. (PCR2 6283). There was no showing that Mr. Raymond would be able to sell those drugs to the DOC. The lower court specifically found Mr. Whitfield's testimony credible that neither pentobarbital nor fentanyl is readily available to the DOC. (PCR3 5557).

In addition, Mr. Raymond testified that he could only compound pentobarbital and fentanyl if he had a prescription from a doctor, but Mr. Raymond did not have a doctor's prescription to compound pentobarbital or fentanyl for use in an execution. (PCR3 6241, 6244). Mr. Whitfield did not know of any instances in which doctors prescribed medication to be used by lethal injection for an

execution. (PCR3 6283). He further testified that the DOC did not need a doctor's prescription to purchase etomidate from a wholesaler, and he was not aware of any reasons why the DOC would switch from the current protocol. (PCR3 6275-76). Long failed to show that the state could carry out his proposed alternative method "relatively easily and reasonably quickly." Bucklew v. Precythe, 139 S. Ct. 1112, 1129 (2019) (internal quotations omitted); see also Otte v. Morgan, 137 S. Ct. 2238 (2017) (In finding pentobarbital unavailable, the court stated: "Ohio need not already have the drugs on hand. But for [the Glossip/Baze] standard to have practical meaning, the State should be able to obtain the drugs with ordinary transactional effort. Plainly it cannot"); Correll v. State, 184 So. 3d 478, 490 (Fla. 2015) (rejecting defendant's claims that Florida can obtain pentobarbital from other states or that it could license a compounding pharmacy to make it); Asay VI, 224 So. 3d at 701 (noting that Asay's alternatives have previously been rejected as speculative).

Lastly, Long has not proved how his proposed method of pentobarbital or fentanyl results in a "clear and considerable" difference in reducing pain compared to the use of etomidate within a three-drug protocol. Bucklew, 139 S. Ct. at 1130. As the lower court properly determined, Long did not present "any testimony or evidence that the use of either pentobarbital or fentanyl entails

a significantly less severe risk of pain." (PCR3 5558). Indeed, Long's own witness, Dr. Lubarsky, admitted that he did not approve of the use of pentobarbital as part of a lethal injection protocol. (PCR3 6324-25). The trial court's denial of this claim requires affirmance.

B. Florida's Three-Drug Protocol

Long also challenges the state's three-drug protocol, but this Court has consistently rejected challenges to Florida's use of a three-drug protocol instead of a one-drug protocol. See Jimenez v. State, 265 So. 3d 462 (Fla. 2018) (rejecting claim that Florida's continued use of a three-drug protocol instead of a one-drug protocol constitutes cruel and unusual punishment in light of evolving standards of decency); Hannon, 228 So. 3d at 509 ("we have consistently rejected Hannon's challenge that the DOC should substitute the current three-drug protocol with a one-drug protocol."); Asay VI, 224 So. 3d at 702 (rejecting Asay's argument that Florida's continued use of a three-drug protocol instead of a one-drug protocol constitutes cruel and unusual punishment in light of evolving standards of decency); Muhammad v. State, 132 So. 3d 176, 197 (Fla. 2013) (explaining that Florida is not obligated to adopt an alternative method of execution without a determination that its current three-drug protocol is unconstitutional.).

Long's bare-bones argument presented in his postconviction motion failed to allege that Florida's three-drug protocol presents a substantial and imminent risk that is sure or very likely to cause serious illness and needless suffering, and he failed to allege any known and available alternative method of execution that entails a significantly less severe risk of pain. Both elements were required to be pled in order to have a facially sufficient claim, and Long failed to do that. Long's claim was legally insufficient and properly summarily denied by the lower court.

Long's additional argument included in his Initial Brief does not remedy his insufficient pleading below. Furthermore, any new argument is unpreserved for appellate review. Perez v. State, 919 So. 2d 347, 359 (Fla. 2005) (holding that the defendant's specific claims in support of his argument on appeal were not preserved because they were never presented to the trial court in the defendant's motion); Morrison v. State, 818 So.2d 432, 446 (Fla. 2002) (holding that because appellant "did not argue the point he now raises below, he is foreclosed from raising that argument" on appeal). Long is not entitled to relief, and this Court should affirm the lower court's summary denial of this claim.

C. The Etomidate Protocol and the Eighth Amendment

In his next argument, Long complains that the use of etomidate is facially unconstitutional because it violates the Eighth Amendment by creating a substantial risk of serious harm. The use of etomidate was thoroughly litigated in Asay VI. Specifically, four expert witnesses testified in detail during an evidentiary hearing about the known effects of etomidate, how it was used in the protocol, and how it has been used in medical practice. Asay VI, 224 So. 3d at 701. In affirming the circuit court's denial of the claim, this Court clearly found that the use of etomidate as the primary drug in the execution protocol was constitutional. Id. at 701-02.

The use of etomidate was next challenged by Patrick Hannon. Hannon v. State, 228 So. 3d 505, 508-09 (Fla. 2017). The circuit court summarily denied Hannon's claim, and this Court affirmed, noting that rejection of Hannon's challenge to the constitutionality of the lethal injection protocol was appropriate given that the protocol was recently approved in Asay VI. Hannon, 228 So. 3d at 508.

Jose Antonio Jimenez also challenged the use of etomidate, and the circuit court summarily denied his claim. Jimenez v. State, 265 So. 3d 462 (Fla. 2018). This Court affirmed the summary denial. It explained, "[i]n Asay VI, we fully considered and approved of

the current lethal injection procedure, which replaced midazolam with etomidate as the first drug in the three-drug protocol." Id. at 474.

Jimenez argued that Eric Branch's execution constituted new evidence requiring reconsideration of the constitutionality of the lethal injection protocol; he specifically claimed that Branch's screaming and body movements during his execution showed that Jimenez would experience severe pain after the injection of etomidate and that etomidate may not render Jimenez fully unconscious. Id. at 474-75. This Court determined that Jimenez's "speculative and conclusory allegations" regarding Branch's execution were insufficient to warrant the court revisiting its holding in Asay VI approving the constitutionality of the use of etomidate in the lethal injection protocol. Id. at 475.

Given that this Court has approved the current lethal injection protocol in Asay VI, as well as Hannon and Jimenez, the lower court was required to summarily deny Long's claim. Long failed to raise any additional argument under this section that would warrant departure from this Court's well established precedent rejecting challenges to the use of etomidate in Florida's lethal injection protocol. Cf. Kocaker v. State, 119 So. 3d 1214, 1232 (Fla. 2013) ("We have previously rejected similar lethal injection challenges, and Kocaker has not made any additional

allegations that would call into question the State's current method of execution."); Ventura v. State, 2 So. 3d 194, 198 (Fla. 2009) ("This Court has thus previously rejected each of these challenges to Florida's lethal-injection protocol and — based upon the sound principle of stare decisis — we continue the same course here.").

Long's argument was also facially insufficient because he failed to allege how the use of etomidate presents a substantial and imminent risk that is sure or very likely to cause serious illness and needless suffering. Long points to the execution in Branch but, as previously mentioned, that argument has already been considered and rejected in Jimenez v. State, 265 So. 3d 462 (Fla. 2018). Like Long, Jimenez claimed that Branch's screaming and body movements during his execution constituted evidence that required reconsidering the constitutionality of the current lethal injection protocol. Id. at 474-75. Jimenez alleged that Branch's actions showed that Jimenez would experience severe pain from the injection of etomidate and that etomidate may not render him fully unconscious for the entire period of the execution, which would place him at substantial risk of serious harm. Id. In affirming the circuit court's summary denial of this claim, this Court found that it was "impossible to know whether Branch's actions were in protest of his execution or a reaction to etomidate[.]" Id. at

475. This Court ultimately found Jimenez's allegations regarding Branch's execution too speculative to have warranted an evidentiary hearing. Id.

Here, Long has not presented any additional argument that entitled him postconviction relief when his precise argument relating to Branch's execution has already been rejected in Jimenez. In an attempt to distinguish his case (and to circumvent the time bar), Long's postconviction motion referenced the circumstances surrounding Jimenez's execution. Long filed an affidavit from attorney Joseph S. Hamrick, who witnessed Jimenez's execution. Notably, however, Mr. Hamrick's affidavit did not make any mention of any facts that occurred during Jimenez's execution that would warrant factual development. To the contrary, Mr. Hamrick's affidavit showed that Jimenez's execution went according to protocol. Long's assertions that "irregularities and problems" were observed during Jimenez's execution, which included "visible struggles," are refuted by his own affidavit from Mr. Hamrick.

Furthermore, Long's reference to a news report was not sufficient evidence to entitle him to an evidentiary hearing when he merely alleged that the reporter claimed that Jimenez was blinking profusely, twitching, and breathing heavily. It is further worth noting that Long never filed an affidavit from that reporter or alleged that he was available to testify during an

evidentiary hearing. Even if he had, he would not have been entitled to relief. Any references to the alleged circumstances surrounding Jimenez's execution or Branch's execution are speculative and conclusory and do not warrant relief.

In Long's Initial Brief, he includes a new reference to the execution of Patrick Hannon, and he alleges that Hannon's execution constitutes new evidence that entitled him to an evidentiary hearing. This argument was never presented below, and thus, is unpreserved for appellate review. Even if he had presented it, Hannon's 2017 execution could not be considered new evidence under rule 3.851(d)(2).

This Court's Asay VI decision squarely and comprehensively addressed the safety and efficacy of etomidate. Given that this Court did not depart from Asay VI in Jimenez, there was absolutely no reason, or authority for that matter, for the lower court to depart from Asay VI in Long's case. Long offers no new, specific, or compelling facts that show this Court's Asay VI decision was in error, and that the protocol is sure or is very likely to cause serious illness and needless suffering. In the absence of such a showing, no Eighth Amendment violation has been established, and the summary denial of this claim requires affirmance.

CLAIM III

APPELLANT'S CLAIM THAT HIS LENGTH OF TIME ON DEATH ROW VIOLATES THE EIGHTH AMENDMENT IS WITHOUT MERIT.

The postconviction court summarily denied Long's claim that his length of time on death row violates the Eighth Amendment's prohibition against cruel and unusual punishment. Long's claim based on language contained in Justice Stevens' memorandum opinion regarding the Supreme Court's denial of certiorari review in Lackey v. Texas, 514 U.S. 1045 (1995), is unavailing and has repeatedly been denied by this Court in similar circumstances. See Jimenez v. State, 265 So. 3d 462 (Fla. 2018); Branch v. State, 236 So. 3d 981 (Fla. 2018); Lambrix v. State, 217 So. 3d 977, 988 (Fla. 2017); Correll v. State, 184 So. 3d 478, 486 (Fla. 2015); Muhammad v. State, 132 So. 3d 176, 206-07 (Fla. 2013); Carroll v. State, 114 So. 3d 883, 889 (Fla. 2013); Pardo v. State, 108 So. 3d 558, 569 (Fla. 2012); Ferguson v. State, 101 So. 3d 362, 366-67 (Fla. 2012).

In addition to being foreclosed by this Court's binding precedent, Long's claim is disingenuous. Most of the delay in execution is attributable to Long's own actions. See Valle v. State, 70 So. 3d 530, 552 (Fla. 2011) (Valle "cannot now contend that his punishment has been illegally prolonged because the delay in carrying out his sentence is in large part due to his own actions in challenging his conviction[s] and sentence."); Carroll

v. State, 114 So. 3d 883, 890 (Fla. 2013) ("Further, the length of time Carroll has spent on death row is due in large part to his postconviction motions and habeas petitions."). Long has been engaging in collateral challenges to his death sentence since it became final in 1993 in an attempt to avoid or delay his execution. Any complaint now that the process, which he has used to his advantage to delay his execution, took too long, is plainly frivolous. See Knight v. Florida, 528 U.S. 990 (1999) (Thomas, J., concurring) (On the denial of certiorari, "I write only to point out that I am unaware of any support in the American constitutional tradition or in this Court's precedent for the proposition that a defendant can avail himself of the panoply of appellate and collateral procedures and then complain when his execution is delayed."). The fact that Long's litigation has taken many years does not render his death sentence unconstitutional. Accordingly, this Court should affirm the summary denial of this claims.

CLAIM IV

THE POSTCONVICTION COURT PROPERLY REJECTED LONG'S ATTEMPT TO RELITIGATE HIS HURST CLAIM.

On January 3, 2017, Long filed a second successive motion for postconviction relief raising claims for relief pursuant to Hurst v. Florida, 136 S. Ct. 616 (2016), and Hurst v. State, 202 So. 3d 40 (Fla. 2016), cert. denied, 137 S. Ct. 2161 (2017). The lower

court summarily denied Long's motion and Long appealed to this Court. This Court affirmed the summary denial of relief, finding that Hurst did not apply retroactively to Long's sentence of death that became final in 1993. Long v. State, 235 So. 3d 293 (Fla. 2018). Long sought certiorari review of this Court's decision, and on October 1, 2018, the United State Supreme Court denied certiorari review. Long v. Florida, 139 S. Ct. 162 (2018).

Following the signing of his death warrant, Long filed the instant third successive postconviction motion and again raised the same Hurst-related claim. As the lower court properly noted, Long's claim is untimely, successive, procedurally barred and barred by the doctrines of collateral estoppel and the law of the case. See Kelly v. State, 739 So. 2d 1164, 1164 (Fla. 5th DCA 1999) (holding that "[s]uccessive 3.800(a) motions re-addressing issues previously considered and rejected on the merits and reviewed on appeal are barred by the doctrine of law of the case"); State v. McBride, 848 So. 2d 287, 290-91 (Fla. 2003) (noting that collateral estoppel is a judicial doctrine which in general terms prevents identical parties from relitigating the same issues that have already been decided).

Even if this Court were to ignore the procedural bar and address the merits of Long's claim, it is clear that he is not entitled to any Hurst relief. Despite any retroactivity concerns

and speculation as to what this Court may do in future cases,[7] Long is not entitled to any Hurst-based relief in his case. Here, Long pleaded guilty to numerous violent felonies, including murder, kidnapping and sexual battery, thereby establishing beyond a reasonable doubt the existence of two aggravating factors under Florida law. These convictions meant that Long entered the penalty phase eligible for the death penalty. Thus, there was no Sixth Amendment error under the facts of this case. See Jenkins v. Hutton, 137 S. Ct. 1769, 1772 (2017) (noting that the jury's findings that defendant engaged in a course of conduct designed to kill multiple people and that he committed kidnapping in the course of aggravated murder rendered him eligible for the death penalty).

Additionally, as this Court has consistently found, any alleged Hurst error would be harmless given his unanimous jury recommendation for death. See Davis v. State, 207 So. 3d 142, 174 (Fla. 2016) (holding that when the jury unanimously recommends a

[7] As this Court recently noted in its order denying Long's motion for a stay of execution, Long "is not entitled to retroactive application of the Hurst decisions," and "[i]f this Court were to recede, in Owen, from its current retroactivity analysis imposing a Ring cutoff for retroactivity of the Hurst decisions and hold, instead, that the Hurst decisions are not retroactive, Appellant would still not be entitled to relief. See Mosley, 209 So. 3d at 1285-91 (Canady, J., concurring in part and dissenting in part) (explaining that, under a proper analysis, the Hurst decisions should not apply retroactively)." Long v. State, Case No. SC19-726 (Fla. May 10, 2019).

death sentence, their unanimous recommendation "allow[s] us to conclude beyond a reasonable doubt that a rational jury would have unanimously found that there were sufficient aggravators to outweigh the mitigating factors"); King v. State, 211 So. 3d 866 (Fla. 2017) (finding Hurst error harmless when jury recommendation is unanimous); Truehill v. State, 211 So. 3d 930 (Fla.), cert. denied, 138 S. Ct. 3 (2017). Accordingly, this Court should affirm the lower court's ruling rejecting Long's attempt to relitigate a Hurst claim.

CLAIM V

LONG HAS NO CONSTITUTIONAL RIGHT TO HAVE ADDITIONAL EXECUTION WITNESSES, TO HAVE HIS WITNESSES VIEW THE IV INSERTION PROCESS, OR FOR HIS WITNESSES TO HAVE ACCESS TO A TELEPHONE DURING HIS EXECUTION.

In this fifth claim, Long challenges the DOC's policies of disallowing him multiple witnesses to observe his execution, having access to a telephone, and observing the IV insertion process. Long requested these accommodations by letter sent to Barry Reddish, Warden of Florida State Prison, and he anticipates that his requests will be denied. Initially, the state questions whether this claim is ripe for review and/or appropriately raised in a successive postconviction motion. As the lower court noted, Long asserts only that he *anticipates* the DOC will deny his requests, therefore, his claim may be premature. (PCR3 5563).

To the extent that Long's claim challenges the constitutionality of the DOC's policies, rather than just the anticipated denial of his requests from the warden, his claim should be considered untimely. The limitation on additional execution witnesses, access to a phone, and restriction on witnesses observing the IV insertion process has been part of the DOC's policies for years. Even Long's brief mentions that these same requests have been denied "[i]n other executions." Initial Brief at 65. Therefore, given that these policies have been in place and Long has been aware of them, there was absolutely no reason for Long to wait to challenge the constitutionality of them until right before his scheduled execution. None of the recognized exceptions for the timely filing of a successive rule 3.851 apply to Long. See Fla. R. Crim. P. 3.851(d)(2) (2018). Therefore, this claim should be considered untimely.

Even if the claim were not time-barred, Long still would not be entitled to relief. As the lower court properly found, Long's claim has no merit. Pursuant to section 922.11, Florida Statutes, "[t]welve citizens selected by the warden shall witness the execution." Long is permitted to have his legal counsel present along with a requested minister of religion. § 922.11(2) Fla. Stat. (2018). Representatives of news media are also allowed to be present. The statute requires that all "other persons, except

prison officers and correctional officers **shall** be excluded during the execution." Id. (emphasis added).

The statute provides the warden with discretion to select witnesses for the execution. Long, a serial killer and serial rapist, has victimized numerous people who have an interest in attending the execution in addition to the family of the victim he murdered in this case. Not only does the warden have discretion to choose the execution witnesses, but the warden is required by law to prohibit all other persons from attending the execution. This Court has recognized that the DOC has valid reasons for denying requests to have additional people observe executions, as "the execution chamber is small and any additional personnel could interfere with the orderly and proper administration of the lethal injection." Muhammad v. State, 132 So. 3d 176, 205 (Fla. 2013). Long is not constitutionally entitled to have hand-picked witnesses during his execution.[8]

As to the remaining claims, the DOC has policies limiting what is permitted inside the prison and the execution viewing room,

[8] In Houchins v. KQED, Inc., 438 U.S. 1, 12 (1978) (plurality), the Court explained that the extent to which penal institutions should be open "is clearly a legislative task which the Constitution has left to the political processes." The Court further noted that the judiciary cannot force prisons to allow access to facilities. Doing so improperly "involve[s] [the Court] in what is clearly a legislative task which the Constitution has left to the political processes." Id. at 13.

and the DOC has procedures relating to how executions are performed. Courts do not manage state execution practices and prison policies. Instead, courts are limited to determining whether the state procedures violate constitutional rights, and Long has not established that these practices violate any of his constitutional rights. Notably, Long has not cited any cases that would even suggest that the DOC's policies are unconstitutional.

Long merely claims that by not allowing a member of his team to witness the IV insertion process, and another person to have access to a telephone, he is being denied access to the courts because he will not be able to raise an Eighth Amendment challenge if anything goes wrong during the execution process. This is far too speculative to show that the DOC's policies violate his constitutional rights. See, e.g., Arthur v. Comm'r, Alabama Dep't of Corr., 680 Fed. Appx. 894, 909 (11th Cir. 2017) ("Arthur has not offered anything more than the speculative, conjectural possibility that something might go wrong during his execution which would subject him to cruel and unusual punishment in violation of the Eighth Amendment and that therefore [his attorney] must have a cell phone in the viewing room to call a court to present an Eighth Amendment claim."). Additionally, to have a valid right-to-access claim, Long would have to establish actual injury. Grayson v. Warden, 672 Fed. Appx. 956, 966-67 (11th Cir. 2016). He

clearly has not done that here. Id. (explaining that a request for access to a landline based on the possibility that something might go wrong does not qualify as "actual injury.").

The Eleventh Circuit has cautioned against recognizing a claim like the one Long has raised, as it "would lead to more potential harm to both the inmate's and the State's interests than good." Arthur, 680 Fed. Appx. at 912. The lower court properly determined that Long failed to show that the limitation on his execution witnesses and the DOC's policies violate his constitutional rights. This Court should affirm the lower court's denial of relief.

CLAIM VI

LONG'S CLAIM THAT THE EIGHTH AMENDMENT AND EVOLVING STANDARDS OF DECENCY PROHIBIT THE EXECUTION OF A DEFENDANT WITH SEVERE TRAUMATIC BRAIN INJURY IS PROCEDURALLY BARRED AND WITHOUT MERIT.

Long asserted in his successive postconviction motion that the Eighth Amendment's prohibition against cruel and unusual punishment should serve as a categorical bar to executing an individual with severe traumatic brain injury that substantially impairs the individual's capacity to appreciate the criminality of his conduct or conform his actions to the law. The postconviction court summarily denied Long's claim as procedurally barred and noted that this Court has repeatedly rejected identical claims on

the merits. Citing Carroll v. State, 114 So. 3d 883, 886-87 (Fla. 2013) (finding Carroll's claim that his mental illness "places him within the class of persons, similar to those under the age eighteen at the time of the crime and those with mental retardation, who are categorically excluded from being eligible for the death penalty" was untimely, procedurally barred and without merit); Simmons v. State, 105 So. 3d 475, 510-11 (Fla. 2012) (finding defendant's claim "that he is exempt from execution under the Eighth Amendment to the United States Constitution because he has mental illness and neuropsychological deficits" was both procedurally barred and without merit); Johnston v. State, 70 So. 3d 472, 484-85 (Fla. 2011) ("This Court has repeatedly held that there is no per se bar to imposing the death penalty on individuals with mental illness. . . . Specifically, this Court has recently considered and rejected the precise arguments that Johnston raises here regarding the evolving standards of decency in death penalty jurisprudence.").

Because Long has failed to show any basis for this Court to retreat from its well established precedent,[9] this Court should

[9] Even if this Court were to consider receding from its precedent, the instant case would not be the proper vehicle for such a change. The State accepted for the purposes of the instant successive postconviction proceedings that Long presented evidence in support of his alleged brain damage and temporal lobe epilepsy at his penalty phase. However, the State would note that the evidence

once again affirm the summary denial of this claim in the instant death warrant successive postconviction proceedings.

CLAIM VII

THE POSTCONVICTION COURT ACTED WITHIN ITS SOUND DISCRETION IN DENYING LONG'S REQUEST FOR ADDITIONAL PUBLIC RECORDS.

Following the signing of his death warrant, Long's counsel sought additional public records pursuant to Florida Rule of Criminal Procedure 3.852(h) from the Department of Corrections (DOC), Florida Department of Law Enforcement (FDLE), and the Eighth District Medical Examiner's Office. After conducting a hearing on Long's public records requests, the postconviction court sustained the objections from the agencies and denied Long's requests.[10] The State submits that the lower court acted in its sound discretion in denying Long's requests because Long was unable to show that his requests were relevant, not overly broad or that the

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surrounding these conditions was in conflict as the State introduced testimony from an expert psychiatrist, Dr. Sprehe, at the resentencing proceeding that Long did not suffer from brain damage that would affect his mental capability, was in total control at the time of the murder, had an antisocial personality, was not a sexual sadist but raped women for sexual satisfaction, and neither of the statutory mental mitigating factors applied in this case. (RS 735-48). In addition, even the defense's mental health expert, Dr. Berland, "determined that Long was above average in intelligence, with an IQ of 118." Long, 610 So. 2d at 1272.

[10] The trial court granted Long's request to the DOC for his medical records for the last five years and any medical records relating to his gallbladder surgery at an unknown date between 2011-13.

information sought would likely to lead to discoverable evidence. See Hannon v. State, 228 So. 3d 505, 511 (Fla. 2017) (noting that this Court reviews rulings on public records for abuse of discretion).

As this Court has long emphasized, public records requests made after a death warrant has been signed are supposed to be used to receive updates of previously discovered information and not to conduct eleventh-hour fishing expeditions. Sims v. State, 753 So. 2d 66 (Fla. 2000). Moreover, this Court has held that a defendant who believes he may have a basis to raise a claim in a successive motion need not await the signing of a death warrant to seek records. Tompkins v. State, 872 So. 2d 230, 243-44 (Fla. 2003) ("Thus, a defendant must show how the requested records relate to a colorable claim for postconviction relief *and good cause as to why the public records request was not made until after the death warrant was signed*.") (emphasis added). In fact, this Court has long recognized that claims that are based on the production of public records that could have been requested earlier are barred. Zeigler v. State, 632 So. 2d 48, 50 (Fla. 1993).

To the extent Long urges a due process argument on the limitations placed on his access to records in this case, such an argument is without merit. This Court has expressly upheld the validity of this rule. Wyatt v. State, 71 So. 3d 86, 110-11 (Fla.

2011) (rejecting constitutional challenge to rule 3.852). As noted in Wyatt, reasonable restrictions on the access to public records do not offend the constitution. Id. The rule was promulgated to provide a remedy to the inordinate delay occasioned by securing public records for purposes of capital postconviction litigation and is reasonably tailored to accomplish its purposes. Moreover, this Court has repeatedly held that where a defendant makes public records requests that could have been, but were not made until after the death warrant has been signed, must show good cause explaining why the request was not made earlier. See, e.g., Hannon v. State, 228 So. 3d 505, 511 (Fla. 2017); Asay v. State, 224 So. 3d 695, 700 (Fla 2017). All of the records Long sought to obtain below could have been requested prior to the signing of the present warrant, and Long has not made the slightest effort to explain why he waited until the last minute to seek records that obviously have been in existence for years. See Hannon, 228 So. 3d at 512 ("Hannon waited until a death warrant was signed and requested these voluminous records despite the truncated period for his postconviction motion. In the past, we have not condoned eleventh hour attempts to delay the execution with records requests, and we will not begin now.") (quotations omitted).

Florida Rule of Criminal Procedure 3.852(i) makes it clear that it is the defendant's burden to establish his request is not

unduly burdensome or overbroad, and, that it would relate to either a pending claim or relate to a colorable postconviction claim before a court may order the records disclosed. The defendant's burden is not met by a theoretical exercise of positing unlikely scenarios where the records could possibly or conceivably be relevant to a postconviction claim. Since the records requests made by Long were so tenuous in their possible relation to an Eighth Amendment claim, the lower court did not abuse its discretion in denying those requests.

Long filed expansive requests for "additional" public records in the court below, seeking, *inter alia*, records pertaining to the prior five executions in Florida, records relating to the procedures and drugs used in Florida's lethal injection protocol, and Long's medical records for the past thirty years while incarcerated in the DOC's custody. Pursuant to Rule 3.852(i), a defendant must establish that "the additional public records are either relevant to the subject matter of the postconviction proceeding or are reasonably calculated to lead to the discovery of admissible evidence." As Long failed to establish the existence of a colorable claim, the court below properly denied these records.

Long alleges that the court erred in denying his requests because rule 3.852(h)(3) requires that each agency copy, index,

and deliver to the repository all records which have not previously been produced. Of note, however, rule 3.852(h)(3) applies to a request for the production of public records from an "agency from which collateral counsel has previously requested public records." In this case, Long never established that he had previously requested public records from the DOC, FDLE or the Eighth District Medical Examiner's Office, thus, Long's request was not a 3.852(h) request. Additionally, rule 3.852(j) provides the trial court with the authority to deny the disclosure of *any* records, especially when counsel has failed to establish under rule 3.852(i)(1)(C) that the records are "either relevant to the subject matter of the postconviction proceeding or are reasonably calculated to lead to the discovery of admissible evidence."

In this case, Long did not explain how his requests were relevant to a colorable claim for postconviction relief other than vaguely claiming the records would be relevant to a claim "that execution by Florida's lethal injection procedures constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the U.S. Constitution and corresponding provisions of the Florida Constitution." However, as it relates to the records request for autopsy records from past executions, this Court has repeatedly affirmed denials of similar public records demands. See e.g., Branch v. State, 236 So. 3d 981, 985 (Fla. 2018)

(explaining that autopsy records are not likely to lead to a colorable claim because they "would not establish when the inmates became unconscious or whether they experienced pain during their executions"); Hannon v. State, 228 So. 3d 505, 512 (Fla. 2017) (finding that the court properly denied Hannon's request for records of the last eight executions); Correll v. State, 184 So. 3d 478, 492 (Fla. 2015) (concluding that the public records request for the autopsy records of twenty-one inmates was unlikely to lead to a colorable claim); Chavez v. State, 132 So. 3d 826, 830 (Fla. 2014) (concluding that the public records request for the autopsy records of two executed inmates was properly denied because the autopsy records would not establish when the inmates became unconscious or whether they experienced pain during their executions); Muhammad v. State, 132 So. 3d 176, 203 (Fla. 2013) (affirming the trial court's denial of public records request for the autopsy records of an executed inmate because the defendant did not explain "how autopsy photographs and reports concerning [the inmate] could disclose at what point [the inmate] was rendered unconscious or whether he experienced pain").

Likewise, the postconviction court acted within its sound discretion in denying Long's request for records relating to Florida's lethal injection process made to the DOC and FDLE. The requests to these agencies sought records and correspondence with

federal agencies relating to the procedures and creation of the current protocol used for lethal injection; reasons for the changes in protocol and alternatives that were considered in lieu of the current protocol; documentation regarding the drugs used in the protocol; and documentation as to the logs of the observers from FDLE and the DOC in prior executions. The lower court denied all of Long's requests, with the exception of Long's relevant medical records from the DOC for the last five years and from his gallbladder surgery, as Long failed to establish that these records related to a colorable claim.

The court acted within its sound discretion in denying the requested records as it is well settled that records regarding lethal injection are unlikely to lead to a colorable claim once "the challenge to the constitutionality of lethal injection as currently administered in Florida has been fully considered and rejected by the Court." Walton v. State, 3 So. 3d 1000, 1013-14 (Fla. 2009). The constitutionality of the current lethal injection protocol was fully considered and rejected by this Court in Asay v. State (Asay VI), 224 So. 3d 695, 700-702 (Fla. 2017), and most recently, Jimenez v. State, 265 So. 3d 462 (Fla. 2018) (explaining that because the current lethal injection protocol was fully considered and approved in Asay, production of records relating to lethal injection are unlikely to lead to a colorable claim for

relief). Since the lower court's ruling is in accord with this Court's precedent in Asay, Hannon, and Jimenez, it cannot be said the court abused its discretion in denying Long's records requests in this case. The requested records of the DOC and FDLE in this case represent little more than a last minute fishing expedition with little chance of yielding any useful information for a legitimate Eighth Amendment challenge. Accordingly, the lower court's ruling should be affirmed.

CONCLUSION

WHEREFORE, the Appellee, State of Florida, respectfully requests that this Honorable Court affirm the Order denying post-conviction relief entered below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of May, 2019, I electronically filed the foregoing with the Clerk of the Florida Supreme Court by using the Florida Courts E-Portal Filing System which will send a notice of electronic filing to the following: Robert A. Norgard, Esq. and Andrea M. Norgard, Esq., Post Office Box 811, Bartow, Florida 33831, **norgardlaw@verizon.net**; and to **warrant@flcourts.org**.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

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