IN THE SUPREME COURT OF FLORIDA

BOBBY JOE LONG
Appellant,

v.

CASE NO. SC19-726
L.Ct. 84-CF-013346-A

**DEATH WARRANT SIGNED**
**Execution set for May 23, 2019**

STATE OF FLORIDA,
Appellee.

_____/



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

# REPLY BRIEF OF THE APPELLANT

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## PRELIMINARY STATEMENT

Mr. Long will rely on the Statement of Case and Facts contained in the Initial Brief. This Reply Brief will address Issues I, II, III, and V. Mr. Long will rely on the arguments and citations of authority as set forth in the Initial Brief for Issue IV, VI, and VII.

## STATEMENT REGARDING ORAL ARGUMENT

Oral argument is requested. Oral argument is needed based on the number of unique and case specific issues.

## ISSUE I

THE TRIAL COURT'S SUMMARY DENIAL OF MR. LONG'S CLAIM THAT SCIENTIFIC ADAVANCES IN THE ASSESSMENT, QUANTIFICATION, AND CONSEQUENCES OF BRAIN INJURY AND BRAIN DAMAGE SUFFERED BY MR. LONG CONSTITUTES NEWLY DISCOVERED EVIDENCE ENTITLING MR. LONG TO A NEW PENALTY PHASE WAS ERROR.

In the trial court Mr. Long requested an evidentiary hearing in order to fully litigate this claim and his entitlement to a new penalty phase hearing. The State opposed the request for a hearing. The trial court denied the request for a hearing, thus depriving Mr. Long of the opportunity to present evidence and testimony sufficient to warrant relief.

In the Answer Brief the State first claims Mr. Long failed to identify any new scientific advancements made within one year and claimed Mr. Long could have raised this claim during the pendency of his first postconviction motion in 2011 or in the

subsequent proceedings in 2014 and 2017.[Answer Brief, p. 23-24] The State is incorrect on both points and the trial court's findings consistent with the State's argument are not supported by competent, substantial evidence.

Mr. Long identified two specific scientific developments in the last year that would not have been available to him prior to December 2018- NeuroQuant imaging and the presumptive test for CTE. Both of these tests have been available for less than six months, satisfying the one year rule. Thus, neither of these tests was available in 2011, 2014, or 2017, let alone 1989.

Mr. Long has not waited more than 30 years to raise this claim, as the State argues and the trial court found. Neither of these two tests was available to him previously. In addition to these two very specific tests Mr. Long identified other advances in scientific literature in the area of brain damage, brain damage in juveniles, and the link between this type of damage and behavior that was not available to him to utilize absent new testing. Mr. Long was diligently preparing to obtain the necessary new testing that could be used in conjunction with the new studies and other information about the juvenile brain prior to the signing of the warrant in order to raise a claim of newly discovered evidence. He was not dilatory.

However, before Mr. Long could avail himself of either new test, he needed his medical records. These records were a

prerequisite to testing and needed to be reviewed by the appropriate medical personnel.

In order to develop this claim, Mr. Long made a timely request to DOC to obtain his medical records which predated this warrant. Mr. Long outlined his efforts to obtain those records on page 5, n.1 of his *Defendant's Renewed Motion For Order Requiring State Agencies To Comply With The Requirements of Rule 3.852*. Mr. Long had taken the following steps:

On February 11, 2019, Mr. Long provided a signed medical release to DOC. Mr. Long paid the $1884.00 that DOC stated was required in order for him to obtain his "Classification Records". On February 26, 2019, Mr. Long, through counsel, notified DOC that a release had been provided to the Reception and Medical Center. These requests were made well in advance of the warrant being signed and done in furtherance of preparing a successive motion. It was not until April 26, 2019, that the medical records had been prepared and DOC invoiced $220.15 for them. However, later that same day DOC by email said the invoice had been issued in error and the records were unavailable. Mr. Long was diligently and in good faith preparing to raise a claim of newly discovered evidence when the warrant was signed. Mr. Long then immediately raised the claim. The trial court's basis for denial premised on Mr. Long's taking

thirty years to raise this claim is not supported by competent, substantial evidence.

Mr. Long maintains he was entitled to a hearing on this claim and the opportunity to utilize these new tests. Mr. Long's ability to obtain the tests has been compromised by DOC's failing to timely provide Mr. Long his medical records. Mr. Long was not waiting for a warrant to be signed to bring an 11th hour claim. Quite the opposite. The warrant forced Mr. Long to move forward and he did so.

Mr. Long's claim was facially sufficient. A summary denial will only be upheld where the record conclusively demonstrates no entitlement to relief. *Hutchinson v. State*, 17 So.3d 696 (Fla. 2009). Mr. Long has met that standard. The trial court's order in finding Mr. Long could have presented the evidence outlined in the current motion and attachments thirty years ago or in his previous postconviction litigation in 2011, 2014, or 2017 is not supported by competent, substantial evidence. Mr. Long could not have brought this claim two years ago, let alone thirty. Mr. Long is entitled to an evidentiary hearing which provides the opportunity for him to fully and completely litigate this claim.

## ISSUE II

FLORIDA'S LETHAL INJECTION PROTOCOL CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT IN VIOLATON OF THE EIGHTH AND AMMENDMENT TO THE UNITED STATES CONSTITUTION BECAUSE IT CREATES AN UNACCEPTABLE AND UNNECESSARY RISK OF PAIN

In his Initial Brief, Mr. Long argued the trial court erred in finding he failed to establish his unique medical condition coupled with the use of etomidate would result in a substantial risk of severe pain and that there were other feasible and available drugs, alternative protocols, or methods of execution that were available to the State. In response, the State first challenges Mr. Long's claim as untimely because Mr. Long has known of his TBI and epilepsy for decades and because etomidate has been used in executions since 2017.[Answer Brief, p.29] This argument is meritless.

Mr. Long has known of his brain damage and temporal lobe epilepsy since 1989. However, he has not known what method the State would choose to kill him or when. In 1989 the State of Florida used the electric chair and not lethal injection as a means of execution. Since the adoption of lethal injection and a three drug protocol, the State has repeatedly changed the combination of drugs. In fact, none of the three drugs used in 2014 during the execution of Juan Carlos Chavez are the drugs used in 2019. DOC did not adopt etomidate until January 2017 and it was not judicially approved until later that year. *Asay v.*

*State*, 224 So.3d 695, 705 (Fla. 2017). Mr. Long cannot be expected to anticipate every possible drug combination DOC will decide to use to kill him and litigate the use of those drugs prior to the signing of a warrant. If that were the case, Mr. Long would have had to have challenged at least five different initial drugs identified by the State in the Answer Brief.[Answer Brief, p.4-5]

The State expresses concern about the cost of litigation in this case on the very specific use of etomidate, but yet suggests condemned inmates should challenge each drug used by the State in an ever-changing protocol, whether they will be executed using those drugs or not. Mr. Long could not anticipate when a warrant would be signed and which drugs would be in the lethal injection protocol at that moment in time. Such litigation would be gross waste of the resources of the judiciary. This claim did not become ripe for review until the warrant was signed and it was known what drugs would be part of that warrant protocol.

Moreover, although etomidate came into use in 2017, Mr. Long's case involves the February 27, 2019 protocol. Although this protocol continues using etomidate, DOC could have easily used a new drug, as supported by past history.

Mr. Long maintains the trial court impermissibly limited his ability to fully litigate this claim by restricting the

testimony of Dr. Lubarsky.[R6301-04;6307;6311] The trial court's decision to exclude evidence from the prior executions was an abuse of discretion and the error was not harmless. *See Hinck v. Sate*, 260 So.3d 325 (Fla. 4th DCA 2018.)

Dr. Lubarsky testified the properties of etomidate and the data from the previous executions using etomidate informed his opinion on what was likely to occur if Mr. Long were injected with etomidate. A significant issue directly related to Mr. Long was how long the etomidate injection would last before wearing off. Etomidate is ultra-fast acting. It requires little delay between its injection and the completion of the execution with the remaining two drugs. This is particularly critical in Mr. Long's case because any delay from compromised consciousness checks would lead to either a greatly reduced amount of etomidate or the absence of etomidate in Mr. Long's body during the execution. The timing of the movements of Branch and Hannon during their executions is directly relevant evidence on the issue of the expected efficacy of etomidate during an execution as applied to Mr. Long. The evidence from the Branch and Hannon executions is indicative that the level of etomidate declined to unacceptable levels before the executions in those cases were complete. This evidence was critical to Dr. Lubarsky's opinion that etomidate would be ineffective as an anesthetic for Mr. Long if it induced a seizure and extended the consciousness

check past that in either the Branch or Hannon executions. This unnecessary restriction of evidence deprived Mr. Long of an opportunity to establish the basis of his claim- that prolonged consciousness checks alone or as the result of a seizure induced by etomidate would result in unacceptable and unconstitutional serious illness and needless suffering by Mr. Long, in violation both *Glossip v. Gross*, 135 S.Ct. 2726, 2737 (2016) and *Bucklew v. Precythe*, 139 S.Ct. 1112 (2019). Reversal is required, with an opportunity for Mr. Long to have a full and fair hearing on his claim that etomidate in his execution will violate the Eighth Amendment.

## ISSUE III

EXECUTION, WHEN ADDED TO THE INORDINATE AMOUNT OF TIME MR. LONG HAS SPENT ON DEATH ROW CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND BINDING NORMS OF INTERNATIONAL LAW

In his *Lackey* claim, Mr. Long challenged the inhumane practice of confining defendants for years on Florida's death row, then executing them. This claim was denied without the hearing Mr. Long requested. The summary denial deprived Mr. Long of the ability to establish the conditions he endured for thirty years on death row to support his entitlement to relief.

Similar to his second claim, Mr. Long raised this claim as an as-applied claim. Mr. Long sought an evidentiary hearing that would have allowed him to testify to the specific

conditions he has endured for thirty years. Mr. Long would have presented testimony such as the statements he made to the trial court when the issue of his transportation to the evidentiary hearing was being discussed. Mr. Long told the trial court that while he wanted to attend the evidentiary hearing, he did not wish to undergo the physical and psychological pain he would be subjected to because of the particular cruelty he would endure during the transport. Mr. Long spoke of the discomfort and pain resulting from seven or eight pounds of chains that would be placed on him during the twelve or more hours it would take for transport and attendance at the hearing if he was present at the evidentiary hearing. This, however, is just one example of the psychological and physical punishment that he has endured over a period of almost thirty years. Mr. Long was deprived of his right to present this evidence. The summary denial of this claim was predicated on an unfair exclusion of evidence that should be remedied by this Court.

The State then faults Mr. Long and other similarly situated defendants for the delay in execution due to the fact that they continually challenge their convictions.[Answer Brief, p. 53-4] The State's argument misses the point. As Justice Breyer explained in *Glossip v. Gross*, 135 S.Ct. at 2764, while the delays in capital cases are often necessary to pass

constitutional muster, they do not change the fact that defendant's suffer in a cruel and unusual way:

> The problems of reliability and unfairness almost inevitably lead to a third independent constitutional problem: excessively long periods of time that individuals typically spend on death row, alive but under sentence of death. That is to say, delay is in part a problem that the Constitution's own demands create. Given the special need for reliability and fairness in death penalty cases, the Eighth Amendment does, and must, apply to the death penalty "with special force." *Roper*, 543 U.S., at 568. Those who face "that most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution." *Hall v. Florida*, 572 U.S. __, (2014)(slip op. at 22). At the same time, the Constitution insists that "every safeguard" be "observed" when "a defendant's life is at stake." *Gregg*, 428 U.S., at 187.(joint opinion of Stewart, Powell, and Stevens, JJ.); *Furman*, 408 U.S., at 306 (Stewart, J., concurring)(death "differs from all other forms of criminal punishment, not in degree but in kind"); *Woodson*, supra, at 305 (plurality opinion)("Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two.)

(Breyer, J., joined by Ginsburg, J., dissenting).

Justice Breyer then summarized the problems caused by the delays created by these circumstances. He listed solitary confinement often of 22 hours or more per day leading to anxiety, panic, rage, loss of control, paranoia, hallucinations, and self-mutilation, and physical changes in EEG patterns consistent with stupor and delirium. Justice Breyer acknowledged these conditions are often aggravated by the uncertainty of whether the sentence will be carried out.

Mr. Long is not responsible for much of the delay in this case. He was not responsible for the time periods in the late 1990's into the early 2000's when he did not have counsel due to inaction by the State. Mr. Long had no control over the length of time it took the FBI to investigate and divulge issues with their analysts. Mr. Long had no control over the length of time it took the courts to recognize the unconstitutionality of Florida's death penalty statute. Mr. Long should not be forced to choose between competing constitutional rights- to pursue and protect his constitutional rights as he did when he raised newly discovered evidence claims not divulged until the 2000's or to pursue *Hurst* relief in 2016 at the expense of the Eighth Amendment claim he raises here.

## ISSUE V

### THE DENIAL OF MR. LONG'S REQUESS OF AND FOR DEFENSE EXECUTION WITNESSES IS UNCONSTITUTIONAL

In this issue, Mr. Long challenged the Department of Correction's restrictions on the number and/or composition of defense witnesses he would be permitted to have witness his execution and the restrictions placed on his witness by DOC. On April 29, 2019, six days after the death warrant was signed, Mr. Long sent a letter to Barry Reddish, Warden of Florida State Prison, requesting his legal witness be (1) permitted to have access to a writing pad and pen during his execution; (2)

allowed access to a telephone before and during the execution process; (3) that he be afforded a second witness, regardless of whether that person was clergy; and (4) that one of his witnesses be permitted to observe the IV insertion process. Mr. Long in his Motion states that he had not received a response, but based on similar requests from others, he expected to have his request for writing materials granted and the remainder of his requests denied.

In the Answer Brief the State contends the courts have no authority to address these types of requests because "Courts do not manage state execution practices and prison policies".[Answer Brief, p.58-60] This is not entirely correct.

The United States Supreme Court, on May 13, 2019, addressed the state execution practices of Texas and has addressed the state execution practices of Alabama earlier this year. In an application for stay in *Patrick Henry Murphy v. Bryan Collier, Executive Director, Texas Department of Criminal Justice, et.al,* No. 18A985, 587 U.S. ___(May 13, 2019), the Court granted a stay of execution to address the practices and policies of the State of Texas' rule permitting a Christian or Muslim religious advisor to be present either in the execution room or in the adjacent viewing room, but prohibited religious advisors of other religious denominations from being present in the execution room. Texas limited their presence to the viewing

room. Texas refused to allow Murphy's Buddhist spiritual advisor to be present in the execution room. The Court granted the stay request until Texas altered its practice/policy. The Court found Texas had a strong interest in controlling access to the execution room and could make restrictions there, but those restrictions could not be discriminatory.

While respecting the State's strong interest in tightly controlling access to an execution room, that interest appears to diminish when the viewing room is at issue. The Court did not identify a similarly strong State interest in the viewing room, noting that one option Texas had to correct the discriminatory practice was to limit all religious advisors to the viewing room. Mr. Long's requests that his counsel have writing implements, a cell phone, and that a non-clergy person could serve as his second witness do not involve the execution chamber. His request that his attorney viewed the IV insertion process could be accomplished with minimal intrusion or from the viewing room.

The second significant issue in *Murphy* was whether the request was timely. In *Murphy*, Texas scheduled Murphy's execution in November 2018. Texas set an execution date for March 28, 2019, four months away. One month before the execution Murphy requested a Buddhist religious advisor be present in the execution chamber. Texas, after "foot dragging", eventually

denied the request. Fifteen days after Texas responded, Murphy's lawyers challenged the denial of his request. A stay was granted on March 28, the day of the execution. In granting the stay, both Justice Kavanaugh and the Chief Justice found the one month request prior to the execution date to be sufficiently timely and the time period had given Texas more than enough time to modify their policy. Justice Alito dissented, arguing Murphy had unreasonably delayed with his request because his lawyers waited three months after the execution date was set before writing to the Texas Department of Criminal Justice.

Justice Alito relied on the Court's denial of an application for a stay in *Dunn v. Ray*, 586 U.S. ___ (2019). In *Ray*, an objection to the presence of a Christian minister in the execution room was made only ten days before the execution date. A stay was refused because, among other things, it was untimely.

In this case Mr. Long's request was timely under *Murphy* and did not involve dilatory practices. Mr. Long made his request within one week of the signing of the warrant. The time between the signing of the warrant and execution in this case is 30 days.

Mr. Long does have constitutional rights that cannot be abrogated by prison rules. In determining whether a prison rule may limit an inmate's constitutional rights four factors are considered: First, whether the prison rule bears a valid,

rational connection to a legitimate governmental interest; second, whether alternative means are open to inmates to exercise the asserted right; third, what impact an accommodation of the right would have on guards, inmates, and prison resources; and fourth, whether there are ready alternatives to the regulations. *Overton v. Bazzetta*, 539 U.S. 126, 132 (2003)(quoting *Turner v. Safley*, 482 U.S. 78, 89-91 (1987).

An analysis of *Murphy* and these four factors in this case compel a decision in Mr. Long's favor. First, Mr. Long is not requesting any modifications be made with regards to the execution room. His request that his legal witness have reasonable access to a cell phone and that instead of clergy his second witness be allowed to be a non-clergy witness will not interfere with the execution room in any manner. Neither will his request for his witness to view the insertion of the IV. Legal counsel can view this in a manner that would not compromise the execution room. Thus, under *Murphy*, Mr. Long's requests are neither untimely nor unreasonable, nor do they interfere with the execution room.

Mr. Long's requests should also be granted under *Overton*. As to the first factor, it is very doubtful the restrictions on reasonable access to a cell phone and having a non-clergy witness have a rational connection to a legitimate state interest. The integrity of the execution process would not be

hindered by having a non-clergy witness as opposed to a clergyman, or legal counsel having reasonable access to a cell phone. The State has not identified a legitimate state interest in keeping the IV insertion process a secret from legal counsel. The desire to hide damaging information about that process would not be a legitimate state interest.

Under the second factor alternate means are considered. There is not an alternative means open to Mr. Long to exercise these rights.

The third factor, the effect an accommodation would have on the guards, inmates, and prison resources militates in Mr. Long's favor. There is no impact on any of these groups if the second witness is not a member of the clergy. Legal counsel's having reasonable access to a cell phone does not impact the guards, inmates, or prison resources. The impact on any of these interests if legal counsel observes the IV insertion is *de minimums* at best.

The fourth factor examines whether there are ready alternatives to the regulations. Here, there are none. DOC has made no ready alternatives to the regulations. However, it would take little to no action to substitute non-clergy for clergy as the number of witnesses would not change. Legal counsel's reasonable access to a cell phone does not have any alternative, yet would create a minimal burden on DOC. The viewing of the IV

insertion would require little change in the protocol. There is no alternative remedy.

Mr. Long's request that DOC's rules be modified in this manner is not untimely under the constraints of the mere thirty days between the signing of the warrant and execution. His requests are reasonable, do not overburden DOC, and unnecessarily impinge on Mr. Long's constitutional rights should prevail when balanced against DOC's interest in restricting Mr. Long's choice of his second witness and the restrictions on legal counsel. Mr. Long also timely litigated this issue by concurrently bringing this issue before the court for review, while at the same time dealing with DOC on these issues.

## CONCLUSION

Based on the forgoing arguments, citations of law, and other authorities, Mr. Long respectfully requests the case be remanded for an evidentiary hearing on Claims 1, 2, and 3, that he be given a new penalty phase, and that his requests related to the execution witnesses be granted, and such other relief appropriate to the issues raised.

Respectfully submitted,

*/s/Robert A. Norgard*
ROBERT A. NORGARD

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished by electronic delivery to capapp@myfloridalegal.com, Stephen.ake@myfloridalegal.com, Christina.pacheco@myfloridalegal.com, warrant@flcourts.org, and by U.S. mail to Bobby Joe Long, DC#494041, Florida State Prison, P.O. Box 800, Raiford, FL 32083 this 14th day of May 2019.

## CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY the size and style font used in the preparation of this Reply Brief is Courier New 12 point in compliance with Fla. R. App. P. 9.210.

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