IN THE FLORIDA SUPREME COURT
CASE NO. SC09-1788

ANDREW RICHARD LUKEHART, *Petitioner*

v.

WALTER A. McNEIL, *Respondent*.

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

Lukehart filed a petition for writ of habeas corpus in this Court raising three issues. For the reasons discussed, the petition should be denied.

FACTS AND PROCEDURAL HISTORY

The facts of the case and its procedural history are recited in the accompanying answer brief.

Lukehart was represented in the direct appeal by then Assistant Public Defender Chet Kaufman, who is now a federal assistant public defender.[1]

[1] This information is available on the Florida Bar's website which this Court can take judicial notice of because the Florida Bar is supervised by this Court.

A.P.D. Kaufman was admitted to the Florida Bar in 1989. In 2003, he became board certified in the area of criminal appellate law. He is rated AV by Martindale-Hubbell.[2] Assistant Federal Public Defender Kaufman had prior experience in capital appeals. According to this Court's docketing, he has represented capital defendants in this Court since 1996.[3] A.P.D. Kaufman was counsel of record in four capital cases prior to representing Lukehart.

In the direct appeal, Assistant Public Defender Kaufman raised twelve (12) issues. *Lukehart v. State*, 776 So.2d 906, 911 n.1 (Fla. 2000)(listing issues). Assistant Public Defender Kaufman filed a 100 page initial brief which included 32 pages of facts. The brief raised twelve issues - four guilt phase issues and eight penalty phase issues. He filed a 35 page reply brief addressing all twelve of the original issues raised. This Court affirmed the conviction and death sentence but remanded for resentencing regarding the aggravated child abuse conviction. A.P.D. Kaufman filed a motion for rehearing. He later also filed a notice of supplemental authority.

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[2] This information is available on the Florida Bar's website which this Court can take judicial notice of because the Florida Bar is supervised by this Court.

[3] This Court docketing of APD Kaufman's cases is available at http://jweb.flcourts.org/pls/docket/ds_cases_person?psReportStyle=Display&p_userid=&psCourt=FSC&psSearchType=&psHow=contains&psRole=atty&pnPersonId=30700&psButton=Submit

INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

This Court noted that a habeas petition is the proper vehicle to assert ineffective assistance of appellate counsel. *Davis v. State*, 928 So.2d 1089, 1126 (Fla. 2005)(citing *Rutherford v. Moore*, 774 So.2d 637, 643 (Fla. 2000) and *Thompson v. State*, 759 So.2d 650, 660 (Fla. 2000)). "Claims of ineffective assistance of appellate counsel are properly raised in a petition for writ of habeas corpus addressed to the appellate court that heard the direct appeal." *Connor v. State*, 979 So.2d 852, 868-869 (Fla. 2007)

In *Rutherford v. Moore*, 774 So.2d 637 (Fla. 2000), this Court explained that the standard for proving ineffective assistance of appellate counsel mirrors the standard for proving ineffective assistance of trial counsel established in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). So, appellate's counsel performance must be deficient and there must be prejudice. Appellate counsel's performance will not be deficient if the legal issue that appellate counsel failed to raise was meritless. *Spencer v. State*, 842 So.2d 52, 74 (Fla. 2003)(observing that appellate counsel will not be considered ineffective for failing to raise issues that have little or no chance of success.) Appellate counsel has a "professional duty to winnow out weaker arguments in order to concentrate on key issues" even in capital cases. *Thompson v. State*, 759 So.2d 650, 656, n.5 (Fla. 2000)(citing *Cave v. State*, 476 So.2d 180, 183 n. 1 (Fla. 1985)). Furthermore, appellate counsel is not

ineffective for failing to raise claims that were not preserved in the trial court, in the absence of fundamental error. *Lowe v. State*, 2 So.3d 21, 45 (Fla. 2008)(explaining that appellate counsel cannot be deemed ineffective for failing to present a claim that was not preserved citing *Davis v. State*, 928 So.2d 1089, 1132-1133 (Fla. 2005)); *Morton v. State*, 995 So.2d 233, 247 (Fla. 2008)(noting that appellate counsel is not ineffective for failing to raise an issue that was not preserved at trial unless the claim rises to the level of fundamental error citing *Rodriguez v. State*, 919 So.2d 1252, 1281-1282 (Fla. 2005)).

In the appellate context, the prejudice prong of *Strickland* requires a showing that the appellate court would have afforded relief on appeal. Petitioner must show that he would have won a reversal from this Court had the issue been raised. This Court has explained that to show prejudice petitioner must show that the appellate process was compromised to such a degree as to undermine confidence in the correctness of the result. *Rutherford*, 774 So.2d at 643.

The standard of review of an ineffectiveness claim is *de novo. Stephens v. State*, 748 So.2d 1028, 1034 (Fla. 1999); *Holladay v. Haley*, 209 F.3d 1243, 1247 (11th Cir. 2000).

ISSUE I

WHETHER THIS COURT SHOULD REVISIT ITS PRIOR PROPORTIONALITY REVIEW IN LIGHT OF TESTIMONY AT THE EVIDENTIARY HEARING?

Lukehart contends that this Court should revisit its prior holding regarding proportionality in light of Brenda Page's testimony at the post-conviction evidentiary hearing. Pet. at 7. Habeas counsel is attempting not merely to relitigate the proportionality issue but the validity of the underlying conviction used as an aggravator. He is asserting that Lukehart was actually innocent of the crime used to establish the prior violent felony aggravator in this case.

First, this claim is not proper in a habeas petition. Habeas petitions are vehicles to raise ineffective assistance of appellate counsel claims, not proportionality claims.

Furthermore, this claim is procedurally barred by the law of the case doctrine. This Court has already upheld Lukehart's death sentence. This Court found the death sentence to be proportionate in the direct appeal. *Lukehart v. State*, 776 So.2d 906, 925-926 (Fla. 2000)(finding "no merit" to the proportionality attack; finding "Lukehart's death sentence to be proportionate and concluding "[t]his murder of a defenseless infant falls within the category of the most aggravated and least mitigated of capital crimes.").

Habeas counsel omits crucial language in his quote of this Court's direct appeal opinion. Pet. at 8 (quoting *Lukehart*, 776 So.2d

at 926). The full quote is:

> This case is significantly aggravated by the existence of the prior conviction for felony child abuse. Lukehart had previously pled guilty to felony child abuse for shaking his former girlfriend's eight-month-old daughter, Jillian French, so hard that the infant sustained a closed head injury resulting in seizures and visual deficits. This occurred on April 14, 1994. The murder for which Lukehart was convicted was committed less than two years after the felony abuse of that infant. In fact, Lukehart was still on probation for that prior felony conviction for abusing eight-month-old Jillian when Lukehart killed another girlfriend's infant daughter, the five-month-old infant victim in this case, on February 25, 1996. Thus, Lukehart's prior felony aggravator is an exceptionally weighty aggravating factor under the circumstances of the present case.

Lukehart, 776 So.2d at 926.

Lukehart is really raising a *Johnson v. Mississippi*, 486 U.S. 578, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988) claim regarding the felony child abuse conviction that was used as the prior violent felony aggravator. However, to raise a valid *Johnson* claim, petitioner must directly attack and have the underlying conviction set aside. As this Court has explained, a legitimate *Johnson* claim requires that the underlying conviction has been set aside. *Nixon v. State*, 932 So.2d 1009, 1023 (Fla. 2006)(rejecting a claim when the defendant asserted that the two prior felonies used to support the prior violent felony aggravator were invalid "because the prior violent felonies used in Nixon's case have not been vacated and are still valid convictions" citing *Buenoano v. State*, 708 So.2d 941, 952 (Fla. 1998)); *Bundy v. State*, 538 So.2d 445, 447 (Fla. 1989)(concluding that

Johnson provided no basis for relief because the validity of Bundy's Utah conviction of aggravated kidnapping, which was a basis for the finding of a prior violent felony, had not been challenged citing *Straight v. State*, 488 So.2d 530 (Fla. 1986)). Lukehart's prior conviction for felony child abuse for shaking an eight-month-old infant so hard that the infant sustained a closed head injury resulting in seizures and visual deficits, to which he pled guilty, has not been set aside by any court. Without the setting aside of the underlying conviction, there is no proper *Johnson* claim.

While habeas counsel asserts that he established by "uncontroverted facts" that Lukehart did not commit the prior violent felony at the evidentiary hearing, this was not the proper means or forum to raise a *Johnson* claim. Pet. at 9. The State did indeed not call any rebuttal witnesses regarding the validity of the underlying conviction at the evidentiary hearing because it was not proper to relitigate the validity of the underlying non-capital conviction used as an aggravator inside the evidentiary hearing in this capital case. Pet. at 11-12. Lukehart must file a 3.850 motion in the trial court based on newly discovered evidence directly attacking his felony child abuse conviction and appeal it to the First District to raise such a claim.[4] If the trial court or First District vacates his

[4] Any 3.850 motion attacking his felony child abuse conviction would, of course, be untimely. To avoid the time bar, Lukehart would have to allege newly discovered evidence based on Brenda Page's testimony. However, there was nothing "new" about Brenda Page's testimony. All the information that Lukehart relies

felony child abuse conviction, then Lukehart may present a *Johnson* claim in a successive 3.851 motion or successive habeas petition in this Court but he may not do so until that underlying conviction has been vacated. Until then, Lukehart is in the wrong court.

Petitioners may not relitigate the validity of their underlying convictions under the guise of relitigating the finding of an aggravator. Lukehart simply may not present a *Johnson* claim in this forum and manner. *Melton v. State*, 949 So.2d 994, 1005 (Fla. 2006)(agreeing with the State that "Melton may not relitigate the Saylor murder conviction in these proceedings" in a case where the defendant was challenging in this Court an underlying murder conviction used as an aggravator which had been affirmed by the First District in both the direct appeal and post-conviction and never vacated).

Accordingly, this claim should be denied as improper in a habeas

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on regarding the charge was known to Brenda Page, as well as to Lukehart, himself, at the time of the prior charge and could have been presented at any trial. Pet. at 10-11. Lukehart would not be able to meet the newly discovered evidence exception to the time bar with Page's testimony. *Blanco v. State*, 963 So.2d 173, 179 (Fla. 2007)(noting to obtain relief on a claim of newly discovered evidence, a defendant must establish in part that the evidence was not known at the time of trial). Any 3.850 motion attacking the underlying conviction would be summarily denied as untimely. No doubt, this is why Lukehart is attempting to raise this claim in this manner and this Court.

Moreover, Lukehart entered a guilty plea to the felony child abuse charge. While rule 3.850 allows a defendant who entered a guilty plea to attack their convictions based on a plea, at the very least, to be credible, a defendant who enters a guilty plea must explain why he entered a plea of guilty when he was not guilty. Lukehart presented no such explanation.

petition, barred by the law of the case, and an improper *Johnson* claim raised in an improper forum.

ISSUE II

WHETHER FLORIDA'S LETHAL INJECTION PROTOCOL VIOLATES THE EIGHTH AMENDMENT?

Lukehart argues that Florida's lethal injection protocol violates the Eighth Amendment's ban on cruel and unusual punishment. Pet at 12. As state habeas counsel openly acknowledges, this Court has repeatedly rejected Eighth Amendment attacks on lethal injection. *Davis v. State*, - So.3d -, -, n.3, 2009 WL 3644172 at n.3, 34 Fla. L. Weekly S605 (Fla. November 5, 2009)(citing a string of cases rejecting such claims including *Ventura v. State*, 2 So.3d 194, 200 (Fla.), *cert. denied*, - U.S. -, 129 S.Ct. 2839, 174 L.Ed.2d 562 (2009); *Power v. State*, 992 So.2d 218, 220-21 (Fla.2008); *Sexton v. State*, 997 So.2d 1073, 1089 (Fla.2008); *Schwab v. State*, 995 So.2d 922, 933 (Fla.), *cert. denied*, 128 S.Ct. 2996 (2008); *Woodel v. State*, 985 So.2d 524, 533-34 (Fla.), *cert. denied,* - U.S. -, 129 S.Ct. 607, 172 L.Ed.2d 465 (2008); *Lebron v. State*, 982 So.2d 649, 666 (Fla.2008); *Schwab v. State*, 982 So.2d 1158, 1159-60 (Fla.2008); *Lightbourne v. McCollum*, 969 So.2d 326, 350-53 (Fla.2007)).

Furthermore, so has the United States Supreme Court. In *Baze v. Rees*, - U.S. -, 128 S.Ct. 1520, 170 L.Ed.2d 420 (2008), the United States Supreme Court rejected a challenge to Kentucky's lethal injection protocols. While *Baze* was a § 1983 challenge to Kentucky's lethal injection method of execution, the actual holding applies to

Florida. Kentucky's lethal injection protocol involves a three-drug combination of 3 grams of thiopental, 50 milligrams of pancuronium bromide, and 240 milliequivalents of potassium chloride. *Baze*, 128 S.Ct. at 1528. The *Baze* Court rejected the "unnecessary risk" standard and instead held that a method of execution does not violate the Eighth Amendment unless it creates a "substantial risk of serious harm," or "a demonstrated risk of severe pain." The *Baze* Court explained that "simply because an execution method may result in pain, either by accident or as an inescapable consequence of death, does not establish the sort of 'objectively intolerable risk of harm' that qualifies as cruel and unusual" under the Eighth Amendment. *Baze*, 128 S.Ct. at 1531. The Court rejected the contention that a method must include an assessment of consciousness, by the use of medical professionals or a BIS monitor. *Baze*,128 S. Ct. at 1534-1537. The *Baze* Court noted that a "State with a lethal injection protocol substantially similar to the protocol we uphold today would not create a risk that meets this standard." *Baze*, 128 S.Ct. at 1537.[5]

Florida's protocols are substantially similar to Kentucky's and therefore, Florida's protocols were upheld as well. Indeed, Justice Ginsburg, in her dissenting opinion, relied on Florida's method as

[5] The plurality opinion was written by Chief Justice Roberts with Justices Alito and Kennedy joining. Justice Thomas' concurring opinion, joined by Justice Scalia, would have adopted a standard that a method of execution violates the Eighth Amendment "only if it is deliberately designed to inflict pain" which is a lower standard. So, the plurality written by Chief Justice Roberts actually is the opinion of the Court.

a model example. Specifically noting that Florida's protocols differed from Kentucky's because Florida's contained an assessment of consciousness, she explained:

> Recognizing the importance of a window between the first and second drugs, other States have adopted safeguards not contained in Kentucky's protocol. Florida pauses between injection of the first and second drugs so the warden can "determine, after consultation, that the inmate is indeed unconscious." The warden does so by touching the inmate's eyelashes, calling his name, and shaking him.

Baze, 2008 WL 1733259 at *47 (Ginsburg, J., dissenting with Souter, J., joining). She also noted that "the eyelash test" was the most common assessment used in the operating room to determine consciousness. *Baze*, at n.6 (Ginsburg, J., dissenting with Souter, J., joining). So, both the majority and the dissent in *Baze* approved of Florida's protocols.

There was an extensive evidentiary hearing in recent years regarding Florida's lethal injection protocols ordered by this Court. *Lightbourne v. McCollum*, 969 So.2d 326 (Fla. 2007), *cert. denied*, - U.S. -, 128 S.Ct. 2485, 171 L.Ed.2d 777 (2008)(rejecting a challenge to Florida's lethal injection protocols following an extensive evidentiary hearing). Since that extensive evidentiary hearing, this Court has held lethal injection claims are properly summarily denied even when a defendant wishes to present materials not presented during the evidentiary hearing in *Lightbourne*. *Tompkins v. State*, 994 So.2d 1072 (Fla.2008), *cert. denied*, - U.S. -, 129 S.Ct. 1305, -L.Ed.2d - (2009).

Both the United States Supreme Court and the Florida Supreme Court have rejected constitutional challenges to lethal injection. In this Court's words, this claim is "foreclosed" by that controlling precedent. *Davis v. State*, - So.3d -, -, n.3, 2009 WL 3644172 at n.3 (Fla. November 5, 2009)(explaining that "the decisions in *Baze v. Rees*, - U.S. -, 128 S.Ct. 1520, 170 L.Ed.2d 420 (2008), and *Tompkins v. State*, 994 So.2d 1072, 1081 (Fla.2008), *cert. denied*, - U.S. -, 129 S.Ct. 1305, -L.Ed.2d - (2009), foreclose relief on this issue.").

ISSUE III

WHETHER THE INCLUSION OF PANCURONIUM BROMIDE IN FLORIDA'S LETHAL INJECTION PROTOCOL VIOLATES THE FIRST AMENDMENT FREE SPEECH CLAUSE?

Lukehart asserts that the second drug in the three drug lethal injection protocol, pancuronium bromide, violates the First Amendment's free speech clause. Pet at 19. As state habeas counsel openly acknowledges, this Court has repeatedly rejected this attack on lethal injection. *Rolling v. State*, 944 So.2d 176, 180 (Fla. 2006)(rejecting a contention that the administration of pancuronium bromide, which paralyzes the muscles, violates his right to free speech because it renders him unable to communicate any feeling of pain that may result if the execution procedure is carried out improperly because there was no evidence that he would be conscious after the administration of the first drug, sodium pentothal); *Rutherford v. State*, 926 So.2d 1100, 1114-1115 (Fla. 2006)(rejecting a claim that the administration of pancuronium bromide violates the First Amendment because a two gram dose of the first drug, sodium pentothal, is "a lethal dose" which is "certain to cause rapid loss of consciousness (i.e., within 30 seconds of injection)."). Other state Supreme Courts have agreed with this Court. *Spicer v. State*, 973 So.2d 184, 207-208 (Miss. 2007)(looking "to our sister state of Florida" and relying on this Court's decision in *Rolling v. State*, 944 So.2d 176, 180 (Fla. 2006) to reject a claim that the use of pavulon, the second drug in Mississippi's lethal injection protocol,

which is designed to paralyze the condemned, amounts to an unconstitutional prior restraint of speech.).

CONCLUSION

The State respectfully requests that this Honorable Court deny the habeas petition.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing response to petition for writ of habeas corpus has been furnished by U.S. Mail to Michael P. Reiter 5313 Layton Drive, Venice, FL 34293 this 28th day of December, 2009.

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CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was typed using Courier New 12 point font.

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