IN THE SUPREME COURT OF FLORIDA

EDDIE WAYNE DAVIS,

Appellant,

v.

STATE OF FLORIDA

Appellee.
_____/

CASE NO. SC14-1178
L.T. No. 1994-CF-1248A-XX

DEATH WARRANT SIGNED
EXECUTION SCHEDULED
July 10, 2014, 6:00 p.m.

ON APPEAL FROM THE CIRCUIT COURT
OF THE TENTH JUDICIAL CIRCUIT,
IN AND FOR POLK COUNTY, FLORIDA

ANSWER BRIEF OF THE APPELLEE

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PRELIMINARY STATEMENT

Citations to the record in this brief will be designated as follows: The record on appeal concerning the original trial court proceedings shall be referred to as "DAR V_:__" followed by the appropriate page number. The record on appeal of the denial of the original 3.850 motion shall be referred to as "PCR1 V_:__" followed by the appropriate page number. The instant record on appeal will be designated as "PCR2 V_:__" 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 summary denial of Davis' successive motion to vacate. The claims raised in this successive motion for postconviction relief were summarily denied as untimely and/or meritless as a matter of established Florida law. Accordingly, argument will not materially aid the decisional process.

STATEMENT OF THE CASE AND FACTS

Eddie Wayne Davis was indicted on April 7, 1994 for first-degree murder, burglary with assault or battery, kidnapping a child under thirteen years of age, and sexual battery on a child under twelve years of age. He was found guilty as charged, the jury unanimously recommended a sentence of death and the trial court sentenced Davis to death. The salient facts from Davis' trial were set forth by this Court as follows in the direct appeal opinion:

> On the afternoon of March 4, 1994, police found the body of eleven-year-old Kimberly Waters in a dumpster not far from her home. She had numerous bruises on her body, and the area between her vagina and anus had been lacerated. An autopsy revealed that the cause of death was strangulation.
>
> On March 5, police questioned Davis, a former boyfriend of Kimberly's mother, at the new residence where he and his girlfriend were moving. Davis denied having any knowledge of the incident and said that he had been drinking at a nearby bar on the night of the murder. Later that same day police again located Davis at a job site and brought him to the police station for further questioning, where he repeated his alibi. Davis also agreed to and did provide a blood sample.
>
> While Davis was being questioned at the station, police obtained a pair of blood-stained boots from the trailer Davis and his girlfriend had just vacated. Subsequent DNA tests revealed that the blood on the boots was consistent with the victim's blood and that Davis's DNA matched scrapings taken from the victim's fingernails. A warrant was issued for Davis's arrest.
>
> On March 18, Davis agreed to go to the police station for more questioning. He was not told about

the arrest warrant. At the station, he denied any involvement and repeated the alibi he had given earlier. After about fifteen minutes, police advised Davis of the DNA test results. Davis insisted they had the wrong person and asked if he was being arrested. Police told him that he was. At that point Davis requested to contact his mother so she could obtain an attorney for him, and the interview ceased. Davis was placed in a holding cell.

A few minutes later, while Davis was in the holding cell, Major Grady Judd approached him and, making eye contact, said that he was disappointed in Davis. When Davis responded inaudibly, Judd asked him to repeat what he had said. Davis made a comment suggesting that the victim's mother, Beverly Schultz, was involved. Judd explained that he could not discuss the case with Davis unless he reinitiated contact because Davis had requested an attorney. Davis said he wanted to talk, and he did so, confessing to the crimes against Kimberly and implicating Beverly Schultz as having solicited the crimes. Within a half hour after this interview, police conducted a taped interview in which Davis gave statements similar in substance to the untaped confession. Davis's full Miranda [FN1] warnings were not read to him until the taped confession began.

In May, 1994, Davis wrote a note asking to speak to detectives about the case. In response, police conducted a second taped interview on May 26, 1994. Police asked Davis if he was willing to proceed without the advice of his counsel, to which Davis responded yes, but specific Miranda warnings were not recited to Davis. During this interview, Davis again confessed to killing Kimberly but stated that Beverly Schultz was not involved. Davis explained that he originally went to Schultz's house to look for money to buy more beer. Because Schultz normally did not work on Thursday nights and because her car was gone, Davis believed that no one was home. Indeed, Schultz was not home at the time because she had agreed to work a double shift at the nursing rehabilitation center where she was employed. However, her daughters, Crystal and Kimberly, were at the house sleeping. When

Davis turned on the lights in Beverly Schultz's bedroom, he saw Kimberly, who was sleeping in Schultz's bed. Kimberly woke up and saw him. He put his hand over her mouth and told her not to holler, telling her that he wanted to talk to her. Kimberly went with him into the living room. Davis put a rag in her mouth so she could not yell.

Davis related that they went outside and jumped a fence into the adjacent trailer park where Davis's old trailer was located. Davis said that while they were in the trailer, he tried to put his penis inside of Kimberly. When he did not succeed, he resorted to pushing two of his fingers into Kimberly's vagina. Afterwards, Davis took Kimberly to the nearby Moose Lodge. He struck her several times, then placed a piece of plastic over her mouth. She struggled and ripped the plastic with her fingers but Davis held it over her mouth and nose until she stopped moving. He put her in a dumpster and left.

Davis moved to suppress the March 18 and May 26 statements he made to law enforcement officers, arguing that his Miranda rights were violated. The trial court denied those motions. The jury found Davis guilty of first-degree murder, burglary with assault or battery, kidnapping a child under thirteen years of age, and sexual battery on a child under twelve years of age. The jury unanimously recommended a sentence of death and the trial court sentenced Davis to death.

In aggravation, the trial court found that the murder was: (1) committed by a person under sentence of imprisonment; (2) committed during the commission of a kidnapping and sexual battery; (3) committed for the purpose of avoiding or preventing a lawful arrest; and (4) especially heinous, atrocious, or cruel. As statutory mitigation, the court found that the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance and gave this factor great weight.

As nonstatutory mitigation, the court found that Davis was capable of accepting responsibility for his actions and had shown remorse for his conduct and

> offered to plead guilty; that he had exhibited good behavior while in jail and prison; that he had demonstrated positive courtroom behavior; that he was capable of forming positive relationships with family members and others; that he had no history of violence in any of his past criminal activity; that he did not plan to kill or sexually assault the victim when he began his criminal conduct; that he cooperated with police, confessed his involvement in the crime, did not resist arrest, and did not try to flee or escape; that he had always confessed to crimes for which he had been arrested in the past, accepted responsibility, and pled guilty; that he had suffered from the effects of being placed in institutional settings at an early age and spending a significant portion of his life in such settings; and that Davis obtained his GED while in prison and participated in other self-improvement programs. Although the trial court gave "medium weight" to several of these nonstatutory mitigators, most of them were assigned little weight.

Davis v. State, 698 So. 2d 1182, 1185-87 (Fla. 1997) (footnote omitted), cert. denied, 522 U.S. 1127 (1998).

Davis' initial Motion to Vacate Judgment of Convictions and Sentences with Special Request for Leave to Amend was filed pursuant to Florida Rule of Criminal Procedure 3.850 on May 28, 1998, and an amended motion was filed on June 23, 2000. (PCR1 V2-3:180-204, 282-410). Davis raised a number of claims, including a claim that his trial counsel was ineffective for failing to present expert mental health testimony at the penalty phase. At the postconviction evidentiary hearing in 2001, collateral counsel presented testimony from Dr. Michael Maher regarding his neurological examination of Davis in 2000. (PCR1

V4:557). Relevant to the current issues in this appeal, Dr. Maher testified that porphyria is a metabolic disease related to the way the body chemically processes blood and blood products. (PCR1 V4:558-59). Dr. Maher testified that the symptoms of porphyria could include "mental confusion, disorientation, poor judgment, irritability, impulsiveness. Poor coordination is another thing that can occur, and under severe circumstances, coma can occur." (PCR1 V4:559). Dr. Maher testified that there are specific metabolic tests to determine whether someone has porphyria, but Dr. Maher did not perform any of these tests on Davis and thus, did not diagnosis Davis with porphyria. (PCR1 V4:559, 573).

Following the evidentiary hearing, the postconviction court issued an order denying relief. (PCR1 V5:687-713). This Court affirmed the lower court's denial of postconviction relief and also denied Davis' petition for writ of habeas corpus. Davis v. State, 875 So. 2d 359 (Fla. 2003).

Davis filed his petition for habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court, Middle District, Tampa Division on November 23, 2004. On March 30, 2009, the United States District Court denied Davis habeas corpus relief on all grounds. Davis v. McNeil, 2009 WL 860628 (M.D. Fla. 2009) (unpublished). On April 13, 2009, the Eleventh

Circuit Court of Appeals denied a certificate of appealability. Davis v. Secretary, Dep't of Corr., No. 09-11907-P (11th Cir. Sept. 8, 2009) (unpublished). Davis' petition for writ of certiorari to the United States Supreme Court was denied on February 22, 2010. Davis v. McNeil, 559 U.S. 949 (2010).

On June 2, 2014, Governor Rick Scott signed Davis' death warrant and his execution is scheduled for July 10, 2014 at 6:00 p.m. Davis filed a successive motion for postconviction relief on June 9, 2014, raising the following three claims:

> Claim I: Mr. Davis is entitled to a stay of execution due to the recent "botched" execution in Oklahoma and the decision by the United States Supreme Court to stay the execution of a condemned inmate in the state of Missouri. The failure to grant a stay could violate Mr. Davis' 8th Amendment Constitutional rights under the United States Constitution and corresponding rights under the Florida Constitution.
>
> Claim II: Newly discovered evidence indicates that an execution of Mr. Davis violates his rights under the 8th Amendment of the United States Constitution and the corresponding provisions of the Florida Constitution.
>
> Claim III: Mr. Davis did not receive a proper clemency review process.

(PCR2 V2:307-47). The next day, Davis filed a motion seeking a stay of execution and an independent medical examination permitting the testing of Davis' blood at a laboratory certified to conduct testing to determine if Davis had porphyria. (PCR2 V2:348-51). Following the State's response to his successive

motion, Davis filed another motion asserting further grounds in support of his motion for a medical examination and sought an order compelling the Department of Corrections to obtain blood, urine, and stool samples from Davis. (PCR2 V3:406-13). After conducting a case management conference, the court issued orders denying Davis' successive postconviction motion and motion for independent medical examination. (PCR2 V3:474-78). This appeal follows.

SUMMARY OF THE ARGUMENT

The postconviction court properly denied Davis' request for an indefinite stay of execution. Davis requested a stay so that he could conduct further research and possibly raise facial and as-applied constitutional challenges to Florida's lethal injection procedures. As to his potential facial challenge, Davis alleged that he was entitled to a stay in order to review any results from Oklahoma's ongoing investigation into the recent execution of inmate Clayton Lockett. However, Oklahoma's failure to properly obtain and maintain venous access during Lockett's execution does not establish that Davis could meet his burden of presenting "substantial grounds for relief" on any potential facial challenge to Florida's lethal injection procedures.

Likewise, Davis failed to show that he had substantial grounds for relief on any potential as-applied challenge based on his possible medical condition. Davis claimed that he may suffer from porphyria and requested a stay of execution so he could obtain medical testing to determine whether he had the condition. However, even assuming he has porphyria, Davis never alleged that such a condition would have *any* effect on his pending execution, let alone that it was "sure or likely to cause serious illness and needless suffering" as required by

Baze v. Rees, 553 U.S. 445 (2010). Based on his facially insufficient and speculative claims, the court properly denied Davis' request for a stay.

The lower court properly denied Davis' claim that newly discovered evidence, along with the United States Supreme Court's decision in Roper v. Simmons, 543 U.S. 551 (2005), established that it would be unconstitutional to execute him because he had the mind of a juvenile at the time of the murder. Davis' claim was procedurally barred as his reliance on a recent study involving childhood family problems affecting brain development was not "newly discovered evidence." Furthermore, his claim lacked merit as this Court has repeatedly refused to extend the holding in Simmons to individuals who were eighteen or older at the time of the murder. Here, Davis was twenty-five years old when he kidnapped, raped and murdered eleven-year-old Kimberly Waters. Accordingly, this Court should affirm the court's order denying this claim.

As the lower court properly found, Davis' claim regarding his challenge to the clemency process is without merit as clemency is a determination which is exclusively within the Governor's discretion.

ARGUMENT

ISSUE I

THE LOWER COURT PROPERLY DENIED APPELLANT'S REQUEST FOR AN INDEFINITE STAY OF EXECUTION.

In the first claim of his successive postconviction motion, Davis sought a stay of execution so that he could conduct an independent medical examination to determine whether he suffers from porphyria, and to allow time for Oklahoma officials to conclude an investigation regarding the recent execution of inmate Clayton Lockett and for litigation in Missouri to be completed in the case of inmate Russell Bucklew. Although not alleged with any specificity in his successive motion, Davis sought the stay so that he could research these issues and potentially raise an Eighth Amendment constitutional challenge to Florida's lethal injection procedures. The lower court summarily denied his claim.

The State submits that the court properly denied Davis' claim. As this claim was summarily denied, review is *de novo*, accepting Davis' factual allegations as true to the extent they are not refuted by the record, and affirming the court's ruling if the record conclusively shows that Davis is entitled to no relief. Walton v. State, 3 So. 3d 1000, 1005 (Fla. 2009); State v. Coney, 845 So. 2d 120, 137 (Fla. 2003). Davis submits that

the lower court erred in failing to grant him an evidentiary hearing on this claim, but the record establishes that Davis never sought an evidentiary hearing for this claim in his motion. Rather, Davis simply requested a stay of execution so that he could conduct further research and await the results of events in Oklahoma and Missouri. (PCR2 V2:312-17). Additionally, even had Davis requested an evidentiary hearing, he would not have been entitled to one given the facially insufficient and speculative allegations in his motion.[1]

As both the United States Supreme Court and this Court have repeatedly held, a defendant must show that he has presented "substantial grounds for relief" from his conviction and sentence in order to be entitled to a stay of execution. See Barefoot v. Estelle, 463 U.S. 880, 895 (1983); Delo v. Stokes, 495 U.S. 320, 321 (1990); Bowersox v. Williams, 517 U.S. 345 (1996); Buenoano v. State, 708 So. 2d 941, 951 (Fla. 1998); Howell v. State, 109 So. 3d 763, 778 (Fla. 2013). In the instant case, Davis has not shown that he has substantial grounds for

[1] The State would further note that Davis failed to comply with the requirements of Rule 3.851(e)(2)(C) governing successive postconviction motions when raising a newly discovered evidence claim. Davis failed to provide any names and contact information for any witnesses supporting his claim. Davis likewise failed to attach any statements or affidavits from the witnesses regarding their availability for an evidentiary hearing.

relief on any potential Eighth Amendment challenge to Florida's lethal injection protocol. As such, the lower court properly denied his request for a stay of execution.

As noted, Davis did not raise an Eighth Amendment challenge to Florida's lethal injection protocol in his successive motion, but rather, sought a stay of execution so that he could conduct further research regarding the possibility of raising such a claim. Of course, in order to establish that he had substantial grounds for relief on any lethal injection challenge, Davis would have to first establish that he had a timely Eighth Amendment constitutional challenge to Florida's lethal injection protocols. In order for Davis to timely file a successive motion challenging lethal injection, he would have to specifically challenge Florida's use of midazolam in the protocol as that is the only change within the last year. See Fla. R. Crim. P. 3.851(d)(2)(A) (stating that no motion should be filed beyond the one-year time limitation unless the claim is predicated on facts which were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence.); Jimenez v. State, 997 So. 2d 1056, 1064 (Fla. 2008) (holding that claims based on newly discovered evidence must be filed within one year of when the evidence could have been discovered through an exercise of due diligence to be timely);

Muhammad v. State, 132 So. 3d 176, 205-06 (Fla. 2013) (noting that Florida's lethal injection protocol was revised on September 9, 2013 and midazolam hydrochloride was substituted as the first drug in the three-drug protocol).

In Schwab v. State, 969 So. 2d 318, 321 (Fla. 2007), this Court held that claims regarding a lethal injection protocol are not procedurally barred if the protocol has recently changed or if there has been a problem during a recent execution by lethal injection. Although Davis references complications in the recent Oklahoma execution of Clayton Lockett and the stay granted in a Missouri case involving inmate Russell Bucklew, Davis has not attempted to relate these two events to his pending execution in any manner that would allow for a timely postconviction claim. Davis simply wants an indefinite stay so that he can conduct further research and perhaps raise an Eighth Amendment challenge. Even assuming that Davis could timely raise a claim based on Florida's use of midazolam, he failed to establish that he had substantial grounds for relief on such a potential claim.

As this Court recently stated in Henry v. State, 134 So. 3d 938, 947 (Fla. 2014), in order for a defendant to successfully raise an Eighth Amendment challenge to Florida's lethal injection procedures:

> [A] defendant must show that the state's lethal injection protocol is "'sure or very likely to cause serious illness and needless suffering.'" Brewer v. Landrigan, ___ U.S. ____, 131 S. Ct. 445, 445, 178 L. Ed. 2d 346 (2010) (quoting Baze v. Rees, 553 U.S. 35, 50, 128 S. Ct. 1520, 170 L. Ed. 2d 420 (2008) (plurality opinion)). "In other words, there must be a substantial risk of serious harm, an objectively intolerable risk of harm that prevents prison officials from pleading that they were subjectively blameless for purposes of the Eighth Amendment." Howell, 133 So. 3d at 517 (internal quotation marks omitted). "This heavy burden is borne by the defendant — not the State." Id.

Here, Davis does not acknowledge his heavy burden under Baze when attempting to establish an Eighth Amendment violation based on a state's lethal injection protocol. As the Baze Court explained, "to prevail on such a claim, condemned inmates must demonstrate that 'the conditions presenting the risk must be '*sure or very likely* to cause serious illness and needless suffering,' and give rise to 'sufficiently *imminent* dangers.'" Pardo v. State, 108 So. 3d 558, 562 (Fla. 2012) (quoting Baze, 553 U.S. at 49-50). In requesting a stay of execution, Davis failed to carry his burden of showing that he had presented substantial grounds for relief on a lethal injection challenge as he never alleged that Florida's lethal injection protocols were sure or likely to cause him serious illness and needless suffering.

In his successive motion, Davis first argued that the recent execution of Clayton Lockett in Oklahoma entitled him to a stay because Oklahoma utilized the same drugs as Florida during the "botched" execution of Lockett. Davis sought a stay so that he could await the results of an on-going investigation into Oklahoma's execution. However, the Oklahoma execution involving complications obtaining the inmate's venous access provides no basis for readdressing the well-settled constitutionality of Florida's lethal injection procedures or for granting an indefinite stay.

According to news reports relied on by Davis, the complications involved in Oklahoma's execution of Clayton Lockett were related to the maladministration of the lethal injection drugs as opposed to the efficacy of the drugs. The situation in Oklahoma appears to be somewhat similar to the complications surrounding Florida's execution of Angel Diaz on December 13, 2006, which prompted substantial changes to Florida's lethal injection protocols. See generally Lightbourne v. McCollum, 969 So. 2d 326 (Fla. 2007). In Lightbourne, this Court upheld the then-existing lethal injection protocols against a number of challenges following a lengthy postconviction evidentiary hearing. As this Court noted, following the Diaz execution, "the executive branch under the

direction of the Governor and the DOC instituted an extensive and comprehensive review of the problem and proposed solutions," id. at 344, and ultimately revised the protocols to address concerns with the qualifications and training of the execution team members, assessing venous access and ensuring the inmate's unconsciousness, and challenges to the lethal injection drugs.

Although Florida's lethal injection chemicals have changed since the time of the Lightbourne decision, see Howell v. State, 133 So. 3d 511, 517 (Fla. 2014) (noting that the protocol has changed three times when the first and second drugs were replaced), the current protocol utilizing midazolam hydrochloride, vecuronium bromide, and potassium chloride has repeatedly been upheld by this Court as constitutional.[2] See Muhammad v. State, 132 So. 3d 176 (Fla. 2013); Chavez v. State, 132 So. 2d 826 (Fla. 2014); Howell v. State, 133 So. 2d 511 (Fla. 2014); Henry v. State, 134 So. 2d 938 (Fla. 2014). Under the current three-drug protocol utilizing midazolam as the first drug, Florida has executed eight defendants and the only alleged problem during this period of time was the reported movement by William Happ at his October 15, 2013 execution. In subsequent death warrant litigation, however, the issues surrounding Happ's

[2] Oklahoma utilized the same three drugs, in different dosages, in the Lockett execution. (PCR2 V3:377-84).

movement were litigated and this Court has rejected any argument that the lethal injection protocol is unconstitutional. See Muhammad, supra; Chavez, supra; Howell, supra; Henry, supra. Davis does not recognize, much less attempt to distinguish, these recent decisions upholding Florida's lethal injection protocol.

Davis asserted in his successive postconviction motion that the execution of Clayton Lockett in Oklahoma required the court to grant an indefinite stay because Oklahoma used the same drugs as Florida. However, a report detailing the Oklahoma execution demonstrates that Oklahoma had problems obtaining and ensuring proper venous access during the execution rather than any issues with the efficacy of the drugs. (PCR2 V3:381-84). The report indicates that after failing to locate appropriate IV locations in Lockett's arms, legs, neck, and feet, a catheter was placed in Lockett's groin area with a sheet covering the area. Oklahoma began the three-drug execution process by utilizing a dosage of 100 mg of midazolam. After determining that Lockett was unconscious, vecuronium bromide and potassium chloride were administered. The shades in the execution chamber were then closed and the doctor checked the IV and determined that "the blood vein has collapsed, and the drugs had either absorbed into tissue, leaked out or both" and that there were no more lethal

drugs available.[3] (PCR2 V3:383). The director called off the execution and Lockett was pronounced dead from a heart attack ten minutes later.

Obviously, a review of Florida's detailed lethal injection protocols, as well as the numerous recent cases from this Court discussing the issue, establishes that Florida's protocols are constitutional and the situation in the recent Oklahoma execution involving the maladministration of the drugs is inapplicable to Florida. Florida has detailed written protocols and training for the qualified medical personnel involved in the procedures utilized in obtaining the inmate's venous access and for determining that the IV is operating properly throughout the execution process. See generally Lightbourne v. McCollum, 969 So. 2d 326 (Fla. 2007). Florida has a duplicate amount of the lethal injection drugs available, and has provisions in place for determining the inmate's consciousness during the procedure. See id. at 347 (Fla. 2007) (noting testimony that the consciousness check includes an eyelash touch, calling the

[3] Subsequent to the proceedings below, a forensic pathologist retained by Lockett's attorneys conducted an autopsy and his preliminary report indicated that Lockett's veins did not collapse or "blow out," but found that the IV was not properly placed in Lockett's femoral vein. See generally Michael Muskal, Private Autopsy Blames Oklahoma for Botched Execution, Los Angeles Times, June 13, 2014.

inmate's name, and shaking the inmate); Howell v. State, 133 So. 3d 511, 522 (Fla. 2014) (stating that DOC recently added the noxious stimuli test of a painful pinch to the trapezius muscle).

In addition to having a detailed protocol for obtaining and maintaining venous access and for assessing consciousness after administering the first drug (midazolam), Florida also uses a five times larger dosage of midazolam than Oklahoma (500 mg in Florida and 100 mg in Oklahoma). In Muhammad v. State, 132 So. 3d 176, 194 (Fla. 2013), this Court addressed Florida's substitution of midazolam as the first drug in the three-drug lethal injection protocol and noted that the expert testimony established that Florida's 500 mg dosage of midazolam "is a much larger dose than that needed to produce unconsciousness and in that amount would, with certainty, produce death." The Muhammad court further found that the defendant failed to carry his burden under Baze of showing "that the risk of pain from maladministration of a concededly humane lethal injection protocol" constitutes cruel and unusual punishment. Id. at 195.

> We reject Muhammad's invitation to presume that the DOC will not act in accordance with its lethal injection procedures adopted by the DOC. The sufficiency of those procedures, other than the recent substitution of the midazolam hydrochloride as the first drug, were previously approved by this Court after a comprehensive evidentiary hearing in

> Lightbourne v. McCollum, 969 So. 2d 326 (Fla. 2007). When we relinquished for an evidentiary hearing in Valle to examine the safety and efficacy of pentobarbital, which had been substituted as the first drug in the three-drug lethal injection protocol, we reiterated that the portion of Florida's lethal injection protocol ensuring that an inmate will be unconscious prior to administration of the second and third drugs has not been altered since the protocol was approved in Lightbourne. Valle, 70 So. 3d at 541 n.12. Under that protocol, "he will not be injected with the final two drugs, and the execution will be suspended until Valle is unconscious." Id. In the instant case, as we said in Valle, the remainder of the protocol has not been revised. We presume that the DOC will follow its own procedures and Muhammad will not be injected with the final two drugs until he is unconscious.
>
> We acknowledge that, as we explained in Lightbourne, if the inmate is not fully unconscious when the second and third drugs, vecuronium bromide and potassium chloride, are administered, the inmate will suffer pain. See Lightbourne, 969 So. 2d at 351. However, we agree with the circuit court that Muhammad has not demonstrated that the conditions presenting this risk are "sure or very likely" to cause serious illness or needless suffering and give rise to "sufficiently imminent dangers" under the standard set forth in Baze. Thus, we reject his constitutional challenge to the use of midazolam hydrochloride in the lethal injection procedure. See also Valle, 70 So. 3d at 540–41 (rejecting challenge to newly-revised protocol substituting pentobarbital for the first drug in the three-drug protocol because Valle failed to show that the conditions presenting the risk must be sure or very likely to cause serious illness and needless suffering and give rise to sufficiently imminent dangers).

Muhammad, 132 So. 3d at 193-95 (footnotes omitted).

The recent maladministration of the lethal injection drugs in Oklahoma provided no basis for the court to issue a stay of

Davis' scheduled execution so Davis can await the outcome of Oklahoma's investigation into its own lethal injection procedures. Davis failed to make a showing that he has substantial grounds for relief from his convictions and sentences based on a challenge to Florida's lethal injection procedures as he has not even attempted to meet his burden under Baze of alleging that there is a "substantial risk of serious harm" to him from Florida's lethal injection protocols. Accordingly, the lower court properly denied Davis a stay of execution on this aspect of his claim.

Likewise, Davis failed to establish that he was entitled to a stay to investigate the possibility of raising an as-applied challenge to the constitutionality of Florida's lethal injection procedures. Davis claimed that he possibly suffered from porphyria, and therefore, needed to be seen by an independent medical professional to investigate his claim. Of course, Davis' medical condition is not newly discovered evidence as he has been aware of this information since 2000. At his 2001 original postconviction evidentiary hearing, collateral counsel presented testimony from Dr. Maher that Davis may suffer from porphyria. (PCR1 V4:557-59). Because Dr. Maher was not familiar with the metabolic tests necessary to determine this condition, no testing was done at that time. (PCR1 V4:557-59). Now, fourteen

years later and after a death warrant has been signed and his execution is imminent, Davis sought a stay of execution to further investigate this matter. The lower court properly denied his request.

At the case management conference, collateral counsel claimed that he was only made aware of a potential cutaneous porphyria diagnosis due to the recent June 2, 2014 examination by the Department of Corrections which indicated that Davis had skin lesions. According to collateral counsel, he could not have previously discovered this diagnosis because Davis had never displayed the skin lesions and testing would have come back negative unless Davis was exhibiting the lesions. (PCR2 V3:431). Collateral counsel never made any allegations regarding his efforts to determine whether Davis had previously exhibited skin lesions. Because of collateral counsel's representations and the underlying allegations, the State requested that the court compel the Department of Corrections to provide the State with a copy of Davis' confidential medical records. Collateral counsel had no objection, and after receiving these records, the State would note that a cursory review of these records establishes that Davis has been treated for skin lesions on numerous occasions while in the Department of Corrections' custody dating back to, at least, 1999. Thus, given Dr. Maher's 2001 testimony

and Davis' own documented medical history, any claim that his possible cutaneous porphyria diagnosis could not have been discovered prior to June 2, 2014, is without merit. As such, the lower court properly denied Davis' last minute request to indefinitely delay the proceedings while he conducts further research and medical testing as this information could have easily been obtained years ago with due diligence.

In support of his request for a stay, Davis also briefly referenced the United States Supreme Court's recent granting of a stay in a Missouri case involving death row inmate Russell Bucklew. Bucklew v. Lombardi, ___ S. Ct. ____, 82 U.S.L.W. 3684 (May 21, 2014) (granting stay pending disposition of defendant's appeal and leaving for further consideration whether an evidentiary hearing is necessary). Bucklew suffers from a rare medical condition known as cavernous hemangioma involving vascular deformities and tumors. Bucklew made an as-applied challenge to Missouri's lethal injection protocol and argued that, as a result of his condition, he would have a long, drawn-out, and painful death due to poor movement of the drugs through his circulatory system and that death would occur by choking and suffocation on blood released by his ruptured veins in his neck and face. Bucklew v. Lombardi, No. 14-2163, 2014 WL 2724648, at 2 (8th Cir. May 20, 2014) (vacated on reh'g en banc).

However, unlike the situation in Bucklew, Davis' facially insufficient allegations did not merit a stay of execution or evidentiary development. Davis never alleged that his possible medical condition created a "substantial risk of serious harm" that is "sure or very likely to cause serious illness or needless suffering" during his execution when Florida administers the first drug - midazolam. As the lower court properly found, "[t]he Defendant has not provided the Court with any evidence that the injection of Midazolam will not have the desired effect of rendering the Defendant unconscious and insensate and thereby eliminating any pain on the part of the Defendant as a result of his possible condition of suffering from Porphyria." (PCR2 V3:476). As this Court noted in Chavez v. State, 132 So. 3d 826, 831 (Fla. 2014), when upholding the summary denial of a similar successive postconviction claim, "[s]ummary denial of a lethal injection challenge is proper where the asserted reasons for holding an evidentiary hearing are based upon conjecture or speculation." In Chavez, like the instant case, Chavez failed to proffer any witnesses or evidence that he would present during an evidentiary hearing. Id. Accordingly, this Court found that "the assertion by Chavez that he could establish the unconstitutionality of Florida's lethal injection protocol is completely speculative." Id.; see also

Mann v. State, 4 So. 3d 677 (Fla. 2009) (upholding summary denial of successive postconviction claim alleging that problems regarding Mann's veins and obtaining venous access will raise a substantial probability that Florida's method of execution presents an undue risk of wanton and unnecessary pain).

Likewise, in the instant case, Davis' claim is completely based on speculation. Davis sought a stay at the last minute so that he can further investigate his medical condition to determine whether he can raise an as-applied constitutional challenge. However, Davis' allegations are simply insufficient when he fails to link his medical condition to the use of midazolam during his scheduled execution and to a valid, timely challenge to Florida's lethal injection procedures. Compare Henry v. State, 134 So. 2d 938 (Fla. 2014) (postconviction court summarily denied defendant's as-applied challenge that the use of midazolam would create an unconstitutional risk of severe pain given the defendant's hypertension, elevated cholesterol, and coronary artery disease, and this Court relinquished jurisdiction to conduct an evidentiary hearing on the claim given defendant's allegations and attached affidavits from an expert); Howell v. State, 133 So. 3d 511, 518-19 (Fla. 2014) (relinquishing jurisdiction in order to for the lower court to conduct an evidentiary hearing on defendant's as-applied

challenge where he attached a detailed expert affidavit and report and claimed that his mental conditions of bipolar disorder, brain damage, PTSD, and extreme anxiety would increase his risk of suffering a paradoxical reaction to midazolam and create a substantial risk of serious harm). Unlike the defendants in Howell and Henry, Davis failed to attach any affidavits or reports from an expert that his possible medical condition would subject him to a "substantial risk of harm" as required by Baze. In fact, Davis did not possess any such information and simply sought an indefinite stay to conduct further research into the issue. Based on his speculative and facially insufficient claims, the lower court properly denied his request for a stay of execution.

ISSUE II

THE LOWER COURT PROPERLY DENIED DAVIS' CLAIM THAT NEWLY DISCOVERED EVIDENCE, IN CONJUNCTION WITH THE UNITED STATES SUPREME COURT'S DECISION IN ROPER V. SIMMONS, 543 U.S. 551 (2005), ESTABLISHES THAT HE HAD THE MIND OF A JUVENILE AT THE TIME OF THE MURDER.

In his second claim, Davis alleged that newly discovered evidence regarding the effects of alcoholism and sexual abuse on brain development in children, along with the United States Supreme Court's decision in Roper v. Simmons, 543 U.S. 551 (2005), established that it would be unconstitutional to execute Davis because he "likely had the mind of a juvenile at the time

of the murder, as opposed to his actual 25 years of age." (PCR2 V2:321). The lower court summarily denied Davis' claim. (PCR2 V3:477).

The State submits that the court properly summarily denied Davis' claim as it was procedurally barred and without merit. Although the court did not address the procedural bar in its order denying relief, the State would submit that Davis' claim was not based on "newly discovered evidence" and was therefore procedurally barred. See Fla. R. Crim. P. 3.851(d)(2)(A) (requiring that, in order for a successive motion to be timely, the facts on which the claim is predicated must have been unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence). Although Davis cites to a study published in February, 2014, entitled "Childhood Family Problems Can Stunt Brain Development," (PCR2 V2:334-36), the subject of this article is not newly discovered evidence.[4] As the article notes, "[p]revious studies have focused on the effects of severe neglect, abuse and maltreatment in childhood on brain development," (PCR2 V2:335),

[4] Davis' also cited an article from an alcohol rehabilitation center in Miami stating that alcohol may stunt your emotional growth. (PCR2 V2:338-39). This article does not require further discussion as it is simply a generic article from a rehabilitation clinic.

while this particular study involved far less significant family problems like arguments with parents and lack of communication between family members. This Court has held that this type of evidence is not "newly discovered." See Schwab v. State, 969 So. 2d 318, 325 (Fla. 2007) (recognizing that 'new opinions' or 'new research studies' are not newly discovered evidence); Henyard v. State, 992 So. 2d 120, 131 (Fla. 2008) (claim of newly discovered evidence of mental illness and sexual molestation was not newly discovered as the issue was litigated at Henyard's penalty phase and postconviction proceedings and was known or could have been discovered by trial counsel). Accordingly, because Davis has been aware of his alcoholism and sexual abuse for decades, this Court should find that the instant claim is procedurally barred as it is not based on newly discovered evidence. See Davis v. State, 875 So. 2d 359, 370-71 (Fla. 2004) (noting that mental health experts testified at Davis' 1995 penalty phase and his 2001 postconviction evidentiary hearing about his alcoholism and sexual abuse).

Even if this Court addresses Davis' time-barred claim, the State submits that binding precedent establishes that Davis' claim lacks any merit. In Roper v. Simmons, 543 U.S. 551 (2005), the United States Supreme Court held that the execution of juvenile offenders who were *under* the age of 18 at the time of

their capital crimes is prohibited by the cruel and unusual punishment clause of the Eighth Amendment. The Court noted that a bright line must be drawn when an individual turns 18. "The age of 18 is the point where society draws the line for many purposes between childhood and adulthood." Simmons, 543 U.S. at 574.

Despite the unequivocal language in Simmons that limits the constitutional prohibition to executions of juveniles who were under the age of 18 at the time of their capital crimes, Davis argues that his death sentence should be vacated because he may have the mental age of a juvenile. Davis interprets Simmons and Urbin v. State, 714 So. 2d 411 (Fla. 1998),[5] as mandating a stay of execution, reversal for a new penalty phase, or an evidentiary hearing. Clearly, these decisions do not require the granting of such relief.

Davis was twenty-five years old when he kidnapped, raped and murdered eleven-year-old Kimberly Waters. This Court has repeatedly rejected claims that Simmons has any applicability to defendants who are 18 years old or older at the time of the

[5] In Urbin, this Court reversed the death sentence of a seventeen-year-old on proportionality review. This Court noted that "the closer the defendant is to the age where the death penalty is constitutionally barred, the weightier [the age] statutory mitigator becomes." Urbin, 714 So. 2d at 418.

murder. See Hill v. State, 921 So. 2d 579, 584 (Fla. 2006) (holding that Simmons "only prohibits the execution of those defendants whose chronological age is below eighteen"); England v. State, 940 So. 2d 389, 406-07 (Fla. 2006); Kearse v. State, 969 So. 2d 976, 992 (Fla. 2007) (denying relief based on Simmons where defendant was eighteen years and three months old at the time of the offense and suffered from low-level intellectual functioning and mental and emotional impairments); Henyard v. State, 992 So. 2d 120, 130-31 (Fla. 2008); Wade v. State, 41 So. 3d 857, 878 (Fla. 2010); Schoenwetter v. State, 46 So. 3d 535, 560-62 (Fla. 2010). Because the instant claim is not based on newly discovered evidence, is procedurally barred, and without factual or legal support, this Court should affirm the lower court's summary denial of the instant claim.

ISSUE III

DAVIS' CHALLENGE TO HIS CLEMENCY REVIEW IS WITHOUT MERIT.

In the final claim of his successive postconviction motion, Davis asserted that his constitutional rights were violated because of perceived deficiencies in the clemency process. This claim lacks any merit and was properly summarily denied by the lower court.

Davis challenges a determination which is exclusively within the Governor's discretion and his postconviction allegations are legally insufficient to warrant relief under controlling precedent. See Bundy v. State, 497 So. 2d 1209, 1211 (Fla. 1986) (explaining that the courts are not permitted to second-guess the clemency process as it would amount to a violation of the separation of powers doctrine); Rutherford v. State, 940 So. 2d 1112, 1121-23 (Fla. 2006) (rejecting claim that clemency process amounts to "flipping a coin," and therefore, judicial review is not required); King v. State, 808 So. 2d 1237, 1241 n.5, 1246 (Fla. 2002); Glock v. Moore, 776 So. 2d 243, 252 (Fla. 2001); Provenzano v. State, 739 So. 2d 1150, 1155 (Fla. 1999); Marek v. State, 14 So. 3d 985, 998 (Fla. 2009); Marek v. State, 8 So. 3d 1123, 1129-30 (Fla. 2009); Grossman v. State, 29 So. 3d 1034, 1044 (Fla. 2010); Johnston v. State, 27 So. 3d 11 (Fla. 2010; Valle v. State, 70 So. 3d 530, 550-551 (Fla. 2011); Gore v. State, 91 So. 3d 769 (Fla. 2012); Muhammad v. State, 132 So. 3d 176, 198-99 (Fla. 2013). As such, the lower court properly summarily denied Davis' request for judicial review of the clemency process.

Davis' claim does not constitute a challenge to the validity of his judgments of convictions and sentences, all of which were affirmed on direct appeal. Davis does not dispute

that he is eligible for a death warrant. Clemency proceedings are not part of the trial -- or even of the adjudicatory process. They do not determine the guilt or innocence of the defendant, and are not intended to enhance the reliability of the trial process. Rather, they are conducted by the executive branch, independent of judicial review. Ohio Adult Parole Authority v. Woodard, 523 U.S. 272, 284 (1998) (citing Greenholtz v. Inmates of Neb. Penal and Corr. Complex, 442 U.S. 1, 7-8 (1979)); Bundy v. Dugger, 850 F.2d 1402, 1424 (11th Cir. 1988) (explaining that Eighth Amendment concerns focus on the judicial processes of trial and appellate review and not discretionary processes such as clemency). Accordingly, pardon and commutation decisions are rarely appropriate subjects for judicial review. Woodard, 523 U.S. at 280. Nevertheless, Davis sought clemency relief in his successive motion by way of a judicial pleading that was intended solely to challenge the legal propriety of his trial and convictions. This he cannot do. Connecticut Bd. of Pardons v. Dumschat, 452 U.S. 458, 465 (1981) (explaining that the granting of clemency is not based on legal grounds, it is purely discretionary and it is "simply a unilateral hope."); see also Bundy v. State, 497 So. 2d 1209, 1211 (Fla. 1986); Rutherford v. State, 940 So. 2d 1112, 1121-23 (Fla. 2006); Johnston v. State, 27 So. 3d 11 (Fla. 2010); Valle

v. State, 70 So. 3d 530, 550-51 (Fla. 2011); Gore v. State, 91 So. 3d 769 (Fla. 2012).[6]

Davis complains, however, about certain arguments advanced by the State in its written response to his successive motion. However, as the State asserted below, Davis was afforded more than he is entitled to under the clemency rules, and we maintain that position here. Davis concedes he was considered for clemency when he was interviewed by the parole board, at which time he and his appointed counsel were afforded an opportunity to persuade the Governor to grant clemency. Consequently, the State maintains that there is no merit to Davis' claim that he was deprived of due process because he had no actual clemency hearing. He was considered for clemency; his case was again reviewed by Governor Scott prior to the signing of the instant warrant. As this Court has noted, the five justices in the Woodard plurality concluded that "some minimal procedural due process requirements should apply to clemency proceedings" and "none of the opinions in that case required any specific procedures or criteria to guide the executive's signing of

[6] In Florida, the clemency process is derived solely from the Florida Constitution and is strictly an executive function. Parole Comm'n v. Lockett, 620 So. 2d 153, 154-55 (Fla. 1993). Florida's Rules of Executive Clemency, 4 (rev. 2011) provides, in pertinent part, that the "Governor has unfettered discretion to deny clemency at any time, for any reason."

warrants for death-sentenced inmates." Marek v. State, 14 So. 3d 985, 998 (Fla. 2009).

Turning to the specific claims advanced in his brief, Davis argued below that because Mr. Charles H. Lawson was retired from the Clemency Board, his presence as part of the review committee was therefore a violation of due process. Davis failed to note, however, that Mr. Lawson was specially appointed to temporarily fill the vacant seat by Governor Scott. Florida Statutes, section 947.04(1) affirmatively authorizes this procedure: "[T]he chair may assign consenting retired commissioners or former commissioners to temporary duty when there is a workload need." Public record documents reflect that Governor Scott followed the statutory procedure and appointed Mr. Lawson as a temporary commissioner on April 23, 2013. (PCR2 V3:386-96). It is clear, therefore, that Davis' claim is without merit.

Even if his claim were factually established, however, it is not relevant here. Rule 4 provides that the Governor has "unfettered discretion" to deny clemency; granting clemency requires approval of the Governor and at least two members of the Clemency Board. See Florida's Rules of Executive Clemency, Rule 4 (rev. 2011) (The Governor has the unfettered discretion to deny clemency at any time, for any reason.).

Davis next complained because the Office of the Governor expressed disapproval for the "brutal crimes for which Eddie Wayne Davis was convicted" in a letter written in response to State Attorney Jerry Hill's request that Davis be executed soon. In that letter, Mr. Hill explained to the Governor that Davis:

> "kidnapped Kimberly from her home while she was asleep in her bed, brutally raped her, and then murdered her by suffocating her with a piece of plastic. He threw her into a garbage dumpster where she was found by police after her mother reported her missing."

These are the facts the Governor considered during the clemency review, and it was Davis' opportunity when he was interviewed by the parole board to persuade the Governor of the merit of his opposing position. Davis was given that chance. This Court has repeatedly expressed that "it is not the court's prerogative to second-guess the executive on matters of clemency in capital cases." Grossman v. State, 29 So. 3d 1034 (Fla. 2010). While Davis is entitled to minimal procedural due process, this Court in Marek concluded that there are no specific procedures mandated in the clemency process. Davis' present complaint, however, is that the Governor was not neutral and he was therefore denied due process.

The clemency process in Florida derives solely from the Florida Constitution and it is well recognized that the people of the State of Florida have vested "sole, unrestricted,

unlimited discretion exclusively in the executive in exercising this act of grace." Muhammad v. State, 132 So. 3d 176, 198 (Fla. 2013) (quoting Sullivan v. Askew, 348 So. 2d 312, 315 (Fla. 1977)). Davis had a full and fair trial before a neutral magistrate; he was convicted by a jury of his peers, and his conviction was affirmed by every court that has reviewed it. By the time he was eligible for clemency, Davis' guilt was well established and the appropriateness of the sentence imposed by the trial court affirmed. That Governor Scott should issue a letter expressing his belief that Davis should be afforded "swift justice" supported by the judicial review undertaken, does not relieve Governor Scott of his unfettered discretion in exercising an act of grace. Davis was afforded a clemency proceeding at which he was represented by counsel and was provided an opportunity to present whatever mitigation he wanted in support of his request for executive forgiveness for his crime. Florida courts have never found that he is specifically entitled to more than he received. See, e.g., Valle, 70 So. 3d at 550-51; Johnston, 27 So. 3d at 25-26 ("We again conclude that no specific procedures are mandated in the clemency process and that Johnston has been provided with the clemency proceedings to which he is entitled."); Carroll v. State, 114 So. 3d 883, 889 (Fla. 2013) ("Because Carroll's motion admits that a clemency

proceeding was held, and challenges only the sufficiency of it, and because we have refused based on the Florida Constitution to second-guess the executive branch on clemency matters in the past, Carroll's claim is without merit and was properly denied by the circuit court.").

Finally, the June 2, 2014 death warrant signed by Governor Scott provides, "WHEREAS, executive clemency, as authorized by Article IV, Section 8(a), Florida Constitution, was considered pursuant to the Rules of Executive Clemency and it was determined that executive clemency is not appropriate[.]" Thus, the executive branch has clearly stated that clemency has been considered but has been rejected in this case. See Valle v. State, 70 So. 3d 530 (Fla. 2011) (finding that similar language in death warrant indicated that clemency was "again considered by the executive branch prior to the signing of the warrant"). Accordingly, the lower court properly summarily denied the instant claim.

CONCLUSION

Based on the foregoing arguments and authorities, Appellee, the State of Florida, respectfully urges this Court to affirm the order of the lower court denying Davis' successive motion for postconviction relief and request for a stay of execution.

Respectfully submitted,

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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).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of June, 2014, a true and correct copy of the foregoing has been furnished electronically to the Clerk of the Florida Supreme Court at **warrant@flcourts.org**; and to Richard E. Kiley and Ali A. Shakoor, Assistants CCRC-M, Office of Capital Collateral Regional Counsel, Middle Region, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619-1136, [**kiley@ccmr.state.fl.us**], [**shakoor@ccmr.state.fl.us**], [**felician@ccmr.state.fl.us**] and [**support@ccmr.state.fl.us**]; and John Aguero, Assistant State Attorney, Polk County State Attorney's Office, Post Office Box 9000, Drawer SA, Bartow, Florida 33831, [**jaguero@sao10.com**] and [**cdaniels@sao10.com**].

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