

**IN THE SUPREME COURT OF FLORIDA
CASE NO. SC14-1178**

**EDDIE WAYNE DAVIS
Appellant,**

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

v.

**STATE OF FLORIDA
Appellee.**

**ON APPEAL FROM THE CIRCUIT COURT
OF THE TENTH JUDICIAL CIRCUIT FOR POLK COUNTY,
STATE OF FLORIDA**

AMENDED REPLY TO ANSWER BRIEF OF APPELLEE

**Ali A. Shakoor
Florida Bar No. 0669830
Assistant CCC**

**Richard E. Kiley
Florida Bar No. 0558893
Assistant CCRC-Middle
CAPITAL COLLATERAL
REGIONAL COUNSEL
MIDDLE REGION
3801 Corporex Park Drive
Suite 210
Tampa, FL 33619
(813) 740-3544
COUNSEL FOR PPELLANT**

TABLE OF CONTENTS

Table of Contents.....ii

Table of Authorities.....iii

Preliminary Statement 1

ARGUMENT I.

Mr. Davis is entitled to a stay of execution and remand due to a medical condition of porphyria that will subject him to unconstitutional levels of pain and suffering during the lethal injection process. The failure to grant a stay will violate Mr. Davis' 8th and 14th Amendment Constitutional rights under the United States Constitution and corresponding rights under the Florida Constitution. 1

Conclusion5

Certificate of Service6

Certificate of Compliance.....7

TABLE OF AUTHORITIES

Cases

Baze v. Rees,
553 U.S. 35(2008) 2

Lemon v. State,
498 So.2d 923 (Fla. 1986)..... 2

PRELIMINARY STATEMENT

This pleading addresses Issue I of the State's Answer Brief. As to all other arguments and claims, Mr. Davis relies on his Initial Brief.

Argument I

Mr. Davis is entitled to a stay of execution and remand due to a medical condition of porphyria that will subject him to unconstitutional levels of pain and suffering during the lethal injection process. The failure to grant a stay will violate Mr. Davis' 8th and 14th Amendment Constitutional rights under the United States Constitution and corresponding rights under the Florida Constitution.

On page 23 of the appellee's Answer Brief, Appellee contends that Mr. Davis' claims are not based on newly discovered evidence. Appellee bases this position on the claim that their "cursory review" of Mr. Davis' medical records indicates that Mr. Davis had been "treated for skin lesions on numerous occasions while in the Department of Corrections' custody dating back to, at least, 1999." The appellee fails to offer any specific dates or exhibits to support his assertion. Furthermore, although "Davis had been treated for skin lesions on numerous occasions while in the Department of Corrections' custody dating back to, at least, 1999"; Davis was treated for just that: skin lesions, not Cutaneous Porphyria. Mr. Davis' Initial Brief, along with the accompanying Motion for Stay of Execution, explain explicitly when Mr. Davis' counsel became aware of Mr. Davis exhibiting

a skin condition not unlike Cutaneous Porphyria. On page 27, the appellee argues that the lack of an affidavit attached to the Initial Brief from a medical expert concerning Davis suffering a “substantial risk of harm” pursuant to Baze v. Rees, 553 U.S. 35(2008) warrants a denial of relief. An affidavit from Dr. Joel Zivot, M.D. was filed with a Motion For Stay of Execution on the same day as Mr. Davis’ Initial Brief. Dr. Zivot opined in his affidavit: “Based on my review of Mr. Davis’ medical record, it is my opinion that a substantial risk exists that, during the execution, Mr. Davis will suffer from extreme or excruciating pain as a result of abdominal pain, tachycardia, hypertension, nausea, and vomiting.” Clearly, such a description demonstrates a “substantial risk of harm” for the appellant. Mr. Davis also detailed his medical condition and history of symptoms on pages 20 through 22 of his Initial Brief.

Regarding the issue of whether or not Mr. Davis is entitled to an evidentiary hearing on the successor motion, Mr. Davis cites for authority:

Lemon v. State, 498 So.2d 923 (Fla. 1986). The Lemon Court held:

George Lemon, a state prisoner for whom a death warrant has been signed, appeals the circuit court’s denial of his motion for post-conviction relief under Florida Rule of Criminal Procedure 3.850. We have jurisdiction. Art. V. § 3(b)(1), Fla. Const. We granted a stay of execution and now reverse the trial court’s order and remand for an evidentiary hearing. We previously affirmed appellant’s conviction for first-degree murder

and sentence of death. See *lemon v. State*, 456 So.2d 885 (Fla. 1984), *cert. denied*, 469 U.S. 1230 105 S.Ct. 1233, 84 L.Ed.2d 370 (1985).

It is clear that appellant is entitled to an evidentiary hearing unless “the motion and the files and records in the case conclusively show that the prisoner is entitled to no relief” Fla. R. Crim. P. 3.850; *State v. Crews*, 477 So.2d 984 (Fla. 1985); *O’Callaghan v. State*, 461 So.2d 1354 (Fla. 1984). Having reviewed appellant’s motion, files and record, we find that his allegations are sufficient to require an evidentiary hearing. Accordingly, we remand to the circuit court for further proceedings consistent herewith. The stay of execution issued November 4, 1986, is hereby dissolved
It is so ordered. Id. at 923.

Mr. Davis requested a stay of execution and evidentiary hearing on pages 4 and 24 of his **Successive Motion To Vacate Judgements of Conviction and Sentences and Request for Evidentiary Hearing and Stay of Execution**, filed on June 9, 2014. Mr. Davis also requested a stay of execution and evidentiary hearing on page 18 of the pending Initial Brief before this Court. Mr. Davis has offered details concerning his medical condition and has requested further testing and evaluation. The appellee has not made a sufficient case as to why Mr. Davis is unentitled to relief sought.

On page 17 of the State’s Answer Brief, they discussed how Florida has executed eight defendants since the drug Midazolam was introduced to its lethal injection cocktail, with the only “alleged problem” being William Happ’s reported

movement during his October 15, 2013 execution. However, none of those defendants had symptoms matching the serious illness of porphyria. Mr. Davis has a unique medical condition which puts him at risk for "serious illness and needless suffering." Baze at 49-50.

Defense counsel has not been dilatory in this matter. The logistical constraints placed upon Defense counsel were fully explained to the lower Court at the case management conference. Defense counsel made an inspection of Davis' body on June 24, 2014 at Florida State Prison. The Cutaneous Porphyria is still present although receding.

Dr. Zivot's opinion is specific as to Davis. Zivot opines the Midazolam was shown to significantly increase Porphyrin accumulation, even in low concentrations.

In the Florida execution protocol, the amount of Midazolam given is 100 to 200 times the amount that might be given in a clinical setting. The consequence of this massive quantity on Porphyrin accumulation and the ensuing symptoms would be profound. As Vecuronium Bromide is injected after Midazolam, the subsequent paralysis will mask the severe and terrifying pain and other adverse effects from the Midazolam exposure that will be experienced by Mr. Davis. Any testing done on Davis would have come up negative unless he was presenting

Cutaneous porphyria.

Davis' disease is present in his system but it is elusive to proper diagnosis and testing. What is not elusive is that a senior member of the Departments of Anesthesiology and Surgery, Emory University School of Medicine (Dr. Zivot) opined that Davis will suffer from extreme or excruciating pain as a result of abdominal pain, tachycardia, nausea and vomiting.

Unlike previous executions in the State of Florida; Davis's situation is unique.

The eight other previous executions should not be considered by this Court due to Davis' special circumstances. Relief is proper.

CONCLUSION AND RELIEF SOUGHT

In light of the facts and arguments presented above, Mr. Davis moves this Honorable Court to:

1. Grant Mr. Davis an opportunity for oral argument.
2. Stay Mr. Davis' execution.
3. Remand the proceeding to circuit court for an evidentiary hearing.
4. Vacate the sentence of death, and sentence him to life imprisonment.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 25th, 2014, I electronically filed the forgoing **AMENDED REPLY TO ANSWER BRIEF OF APPELLEE** with the Clerk of the Court by using the e-filing portal system which will send notice of electronic filing to the following: Judge Donald G. Jacobsen (JA Melanie M. Komorowski)mkomorowski@Jud10.FlCourts.org,wallace.rana@mail.dc.state.fl.us,warrants@flcourts.org,support@ccmr.state.fl.us,jaguero@sao10.com and cdaniels@sao10.com,capapp@myfloridalegal.com,deborah.speer@myfloridalegal.com,paula.montlary@myfloridalegal.com, Candance Sabella, Chief Assistant Attorney General, candance.sabella@myfloridalegal.com , Stephen D. Ake, Assistant Attorney General, stephen.ake@myfloridalegal.com , and Timothy A. Freeland, Assistant Attorney General, timothy.freeland@myfloridalegal.com ,

/s/ Richard E. Kiley
RICHARD E. KILEY
Florida Bar No. 0558893
Assistant CCC

/s/ Ali A. Shakoor
ALI ANDREW SHAKOOR
Assistant CCC
Florida Bar No. 669830
CAPITAL COLLATERAL REGIONAL
COUNSEL-MIDDLE REGION
3801 Corporex Park Drive
Suite 210
Tampa, Florida 33619

CERTIFICATE OF COMPLIANCE

HEREBY CERTIFY that a true copy of the foregoing **AMENDED REPLY TO ANSWER BRIEF OF APPELLEE** was generated in a Times New Roman 14 point font, pursuant to Fla. R. App. P.9.210.

/s/ Richard E. Kiley
RICHARD E. KILEY
Florida Bar No. 0558893
Assistant CCC

/s/ Ali A. Shakoor
ALI ANDREW SHAKOOR
Assistant CCC
Florida Bar No. 669830
CAPITAL COLLATERAL REGIONAL
COUNSEL-MIDDLE REGION
3801 Corporex Park Drive
Suite 210
Tampa, Florida 33619