IN THE THIRTEENTH JUDICIAL CIRCUIT COURT
FOR HILLSBOROUGH COUNTY, FLORIDA
Criminal Justice and Trial Division

STATE OF FLORIDA

v.

ROBERT JOE LONG
AKA BOBBY JOE LONG,
Defendant.
_____/

CASE NO.: 84-CF-013346
DIVISION: J

DEATH WARRANT SIGNED
EXECUTION SCHEDULED FOR
MAY 23, 2019 AT 6:00 P.M.

FINAL ORDER DENYING DEFENDANT'S MOTION TO VACATE JUDGMENT OF CONVICTION AND SENTENCE OF DEATH AFTER DEATH WARRANT SIGNED

THIS MATTER is before the Court on Defendant's Motion to Vacate Judgment of Conviction and Sentence of Death After Death Warrant Signed, filed on April 29, 2019, pursuant to Florida Rule of Criminal Procedure 3.851. On April 30, 2019, the State filed its response. On May 1, 2019, the Court held a case management conference, granted an evidentiary hearing on claim 2A, and reserved ruling on the remaining claims. The Court held an evidentiary hearing on claim 2A on May 3, 2019. After considering Defendant's motion and attachments, the State's response, the court file, and the record, as well as the testimony, evidence, and arguments of counsel presented during the May 3, 2019, evidentiary hearing, the Court finds as follows.

PROCEDURAL HISTORY

On September 23, 1985, Defendant pleaded guilty to first degree murder, sexual battery and kidnapping in the above-styled case, and pleaded guilty in seven other cases. The trial court imposed a death sentence for first degree murder in the instant case, and life sentences in each of the other counts and cases. The Florida Supreme Court affirmed the convictions and sentences in the seven non-death penalty cases as well as the conviction in the instant case, but vacated the

death sentence and remanded for a new penalty phase. *See Long v. State*, 529 So. 2d 286 (Fla. 1988).

On June 29, 1989, a jury unanimously recommended a death sentence and, on July 21, 1989, the trial court imposed a death sentence in the instant case. The Florida Supreme Court affirmed Defendant's death sentence. *See Long v. State*, 610 So. 2d 1268 (Fla. 1992), *cert. denied*, 510 U.S. 832 (1993).

Defendant filed an initial motion for postconviction relief and, on March 13, 2003, an amended motion for postconviction relief. Following an evidentiary hearing on certain claims, on November 29, 2011, the postconviction court rendered a final order denying Defendant's amended motion postconviction relief. The Florida Supreme Court affirmed the postconviction court's rulings. *See Long v. State*, 118 So. 3d 798 (Fla. 2013).

On September 9, 2014, Defendant filed his first successive motion for postconviction relief, and alleged newly discovered evidence. On November 4, 2014, the Court summarily denied Defendant's successive motion, and the Florida Supreme Court subsequently affirmed. *See Long v. State*, 183 So. 3d 342 (Fla. 2016).

On January 3, 2017, Defendant filed his second successive motion for postconviction relief, seeking relief pursuant to *Hurst v. Florida*, 136 S. Ct. 616 (2016), and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). The Court summarily denied relief, citing precedent and finding that *Hurst* did not apply retroactively to Defendant's death sentence, which became final in 1993. The Florida Supreme Court affirmed. *See Long. v. State*, 235 So. 3d 293 (Fla. 2018), *cert. denied*, 139 S. Ct. 162 (2018).

On April 23, 2019, the Governor issued a death warrant to carry out Defendant's death sentence. The instant motion is Defendant's third successive motion for postconviction relief.

CLAIMS

CLAIM 1

SCIENTIFIC ADVANCES SINCE 1989 CONSTITUTE NEWLY DISCOVERED EVIDENCE THAT REQUIRES A NEW SENTENCING PROCEEDING.

In claim 1, Defendant alleges he was sentenced almost 30 years ago and "scientific advances since 1989 relevant to [his] case are such that these advances constitute newly discovered evidence." Defendant cites to advanced neuroimaging techniques and superior image clarity, and asserts such scientific advances constitute newly discovered evidence which requires a new penalty phase. Defendant alleges "these advances are in the areas of new technologies to quantify brain damage/injuries, assessment of chronic traumatic encephalopathy [CTE], and the use of new technologies to better understand the multitude of consequences that result from traumatic brain injury [TBI], the testing regarding brain damage, the relationship between brain damage and behavior, juvenile brain development, the significance of brain trauma to the developing juvenile brain, and Adverse Childhood Experiences (ACES)." In support of his allegations, Defendant attaches affidavits from Erin Bigler, Ph.D., Ronald C. Savage, Ed.D., Frank Balch Wood, Ph.D., and James M. McGovern, Psy.D. Defendant alleges the result of the proceedings would have been different had this evidence been available and presented to the jury. At the May 1, 2019, case management conference, Defendant further argued he was not relying on past information or new research studies and opinions, but on new neuroimaging techniques, which are analogous to advancements in DNA testing.

In its response, the State asserts that Defendant's allegations are untimely and procedurally barred, and should be summarily denied. The State asserts Defendant makes only vague allegations about advances within the past 30 years, but does not pinpoint any specific

advancement within the past year, as required in order timely allege a claim based on newly discovered evidence pursuant to rule 3.851(d)(2)(a). The State further asserts that in light of the evidence presented during his penalty phase, Defendant cannot demonstrate the new advanced neuroimaging techniques would probably produce a life sentence. The State requests that the Court summarily deny claim 1.

During the May 1, 2019, case management conference, the Court denied an evidentiary hearing on claim 1. In order to obtain relief based on newly discovered evidence, the Florida Supreme Court has set forth the following two-prong test:

> First, in order to be considered newly discovered, the evidence "must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known [of it] by the use of diligence."
>
> Second, the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial.

Jones v. State, 709 So. 2d 512, 521 (Fla. 1998) (internal citations omitted). "If the defendant is seeking to vacate a sentence, the second prong requires that the newly discovered evidence would probably yield a less severe sentence." *Walton v. State*, 246 So. 3d 246, 249 (Fla. 2018) (citing *Jones v. State*, 591 So.2d 911, 915 (Fla. 1991)).

The Court agrees with the State's response and finds Defendant has waited more than 30 years and until after the issuance of his death warrant to first raise this claim. Defendant has clearly been aware of his TBI and temporal lobe epilepsy diagnoses since the penalty phase. In his motion, Defendant does not sufficiently allege any scientific advances that were not available to him at the time of his initial postconviction proceeding or his successive postconviction proceedings in 2014 and 2017. The affidavits supplied by Defendant only reference general advancements in neuroimaging techniques without citing to any particular advanced techniques that have become available within the past year. At the May 1, 2019, case management conference, postconviction

counsel generally referenced a Neuroquant test and a diagnostic tool for CTE that became available in December 2018, but such allegations are insufficient to warrant a hearing; again, Defendant has waited until the eve of execution to raise this claim. Defendant's assertions that the defense was previously unable to obtain any testing as the defense has been trying to seek Defendant's medical records since last year is unavailing.

Additionally, the Florida Supreme Court has held that new research studies and new opinions based on previously available data do not qualify as newly discovered evidence. *See e.g.*, *Branch v. State*, 236 So. 3d 981, 986 (Fla. 2018) (noting that it has previously rejected claims on the basis that scientific research with respect to brain development does not qualify as newly discovered evidence); *Schwab v. State*, 969 So. 2d 318, 325-26 (Fla. 2007) ("[T]his Court has not recognized 'new opinions' or 'new research studies' as newly discovered evidence."); *Morton v. State*, 995 So. 2d 233, 245-46 (Fla. 2008) ("Although this 2004 brain mapping study had not yet been published at the time of Morton's trials, Morton or his counsel could have discovered similar research at that time that stated that the human brain was not fully developed until early adulthood."). Defendant's TBI and temporal lobe epilepsy have been known to him and, although Defendant referenced a couple of tests that were only made available in December 2018, Defendant could have obtained testing with other similar advanced imaging techniques developed in the last 30 years. Defendant has failed to establish the first requirement for newly discovered evidence.

Defendant has further failed to demonstrate the alleged newly discovered evidence is of such a nature that it would probably produce a life sentence. Defendant already presented testimony and evidence regarding Defendant's TBI and temporal lobe epilepsy at his penalty

phase. (*See* ROA V4:525-711). The Florida Supreme Court summarized the penalty phase as follows,

> Testimony was also presented that Long had suffered the following head injuries: he had fallen out of a swing and was knocked unconscious for a few minutes; he had fallen down a flight of stairs and had been knocked out for fifteen to twenty minutes; he had been hit by a car at age seven and had his face torn up (this resulted in his being hospitalized for a week or more); he had been thrown from a horse and knocked unconscious; and, finally, at age twenty and while in the army, he had been in a serious motorcycle accident in which he had been thrown over a car and had suffered serious head injuries.
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> Long's former wife testified that they were married for more than six years and had two children. She testified that after Long's motorcycle accident he was a different person. She stated that he would explode about little things or nothing at all. Additionally, she indicated that his sexual appetite increased and that he often wanted to have sex three or four times a day. Moreover, she stated that his moods varied, that he experienced temper tantrums in which he sometimes became violent, and that he took amphetamines for nine months to a year after the accident.
>
> Two mental health professionals testified on behalf of Long. The first was Dr. John Money, a professor of medical psychology and pediatrics at John Hopkins University School of Medicine. He testified that Long had the disease of "sexual sadism," a brain disorder that, according to Dr. Money, caused Long's criminal behavior. Dr. Money also diagnosed Long as having temporal lobe epilepsy. He indicated that this was a peculiar kind of epilepsy because it does not cause seizures; instead, it causes one to enter an altered state of consciousness. Dr. Money stated that temporal lobe epilepsy often occurs with paraphilia of sexual sadism. He explained that an overlapping syndrome is a manic depressive disorder in which a person experiences alternating periods of extreme high or mania and melancholy or despair. It was his opinion that a head injury could be one hundred percent responsible for sexual sadism. Dr. Money also stated that the change in Long's sexual behavior from normal to hypersexual following his motorcycle accident and related head injuries was characteristic of sexual sadism and could result from damage to certain areas of the brain. He stated that Long's description of his feelings during the two rapes for which he had been convicted and during the murder at issue indicated that he was in an altered state of consciousness brought on by the temporal

> lobe epilepsy. Dr. Money explained that sexual sadists become sexually aroused by inflicting pain, but that such an individual is also capable of having sex in a normal fashion. Dr. Money expressed the view that, although Long knew what he was doing when he killed Simms, he had no control over his actions and that, in his opinion, Long lacked the capacity to appreciate the criminality of his conduct. He also expressed the view that Long's ability to conform his conduct to the requirements of law was substantially impaired when he killed Simms.
>
> The second mental health expert who testified on Long's behalf was Dr. Robert Berland, a forensic psychologist. Dr. Berland interviewed Long on several occasions and subjected him to psychological testing. He determined that Long was above average in intelligence, with an IQ of 118. He diagnosed Long as having four kinds of disorders, two of which were nonpsychotic-paraphilia and antisocial personality disorder-and two of which were psychotic. The two psychotic disturbances consisted of an inherited bipolar or manic depressive psychosis and an organic personality syndrome caused by damage to brain tissue. He believed that the second psychosis may have been caused by Long's motorcycle accident or his chronic amphetamine abuse following the accident. He explained that, when brain damage is added to an inherited bipolar disorder, the psychosis is worsened. Dr. Berland concluded that, in his opinion, the evidence suggested there was no substantial impairment of Long's ability to appreciate the criminality of his act in murdering the victim in this case, but he found that Long was substantially impaired in his ability to conform his behavior to the requirements of law because of his mental condition. In Dr. Berland's view, Long was under the influence of extreme mental or emotional disturbance when he killed the victim and Dr. Berland believed that Long killed her in a fit of rage.

Long, 610 So. 2d at 1271–72. The jury still unanimously recommended that the death penalty be imposed upon Defendant. Additionally, the State presented evidence establishing the aggravators that the crime was committed while Defendant was engaged in the commission of a kidnapping; the crime was especially heinous, atrocious, or cruel (HAC); Defendant was previously convicted of a felony involving the use or threat of violence; and the crime was committed in a cold, calculated, and premeditated manner (CCP). *See id.* at 1272. Prior violent felony, HAC and CCP

are "among the weightiest in Florida's death penalty scheme." *See Martin v. State,* 151 So. 3d 1184, 1198 (Fla. 2014).

Based on the foregoing, the Court finds Defendant's allegations do not qualify as newly discovered evidence warranting a new penalty phase, therefore, his allegations are untimely and procedurally barred. **No relief is warranted on claim 1.**

CLAIM 2

FLORIDA'S THREE DRUG LETHAL INJECTION PROTOCOL IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED TO BOBBY JOE LONG.

In claims 2A, 2B, and 2C, Defendant challenges Florida's current lethal injection protocol, on its face and as applied to him.

Claim 2A

In claim 2A, Defendant alleges that the current lethal injection protocol is unconstitutional as applied to him. Specifically, Defendant alleges that he has been diagnosed with TBI and temporal lobe epilepsy. Defendant further alleges that etomidate, the first drug in the lethal injection protocol, is contraindicated for persons with TBI and/or temporal lobe epilepsy as it is likely to induce seizures. Defendant posits that "in addition to the independent pain and suffering [a seizure] would inflict, [it] is also likely to cause the intravenous (IV) lines to become dislodged creating a substantial rise for mis-delivery of the execution drugs…." Defendant further asserts that one of the side effects of etomidate is myoclonus, and it is "entirely foreseeable that a seizure could be mistaken for this common side effect, and there is an intolerable risk that untrained lay prison officials will not recognize the medical significance of what is actually happening and will allow the tortuous execution to proceed."[1]

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[1] In his motion, Defendant further contends that he is "at higher than normal risk of intra-operative awareness, thereby increasing the risk that he will awaken before the execution is over and will

Pursuant to the requirements of *Bucklew v. Precythe*, 139 S. Ct. 1112 (2019), Defendant further alleges that a "feasible and available alternative is one of the following: 1) a single dose of properly compounded pentobarbital, 2) nitrogen hypoxia, or 3) a single drug protocol that uses an overdose of fentanyl or other opiates."

In its response, the State asserts Defendant's allegations are untimely and procedurally barred. The State asserts Defendant's conditions - TBI and temporal lobe epilepsy - have been known to him for decades and were raised by him during his penalty phase. The State further contends Defendant has failed to allege a legally sufficient claim.

During the May 1, 2019, case management conference, the Court granted an evidentiary hearing on this claim. The Court finds, "[A] condemned prisoner must: (1) establish that the method of execution presents a substantial and imminent risk that is sure or very likely to cause serious illness and needless suffering and (2) identify a known and available alternative method of execution that entails a significantly less severe risk of pain." *Asay v. State*, 224 So. 3d 695 (Fla. (citing *Glossip v. Gross*, 135 S. Ct. 2726, 2737 (2015) and *Baze v. Rees*, 553 U.S. 35, 50 and 61 (2008)).

In order to prevail on the first prong, "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.'" *Baze*, 553 U.S. at 50. In order to establish the second prong, "the alternative procedure must be feasible, readily implemented, and in fact significantly reduce a substantial risk of severe pain." *Id.* at 52.

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suffer excruciating pain as the second and third drugs are administered." However, this claim was withdrawn prior to the May 3, 2019, evidentiary hearing. As such, the Court does not discuss it herein.

During the May 3, 2019, evidentiary hearing, David Lubarsky, M.D., M.B.A., and Stephen Yun, M.D., testified as experts in anesthesiology. Frank Wood, Ph.D., testified as an expert in neuropsychology. Additionally, Silas Raymond, Pharm.D., testified as an expert in compounding pharmacy and Daniel Buffington, Pharm.D., testified as an expert in pharmacology.

Dr. Lubarsky, who testified on behalf of Defendant, testified that etomidate is a sedative, hypnotic drug, classified as a general anesthetic and an ultra-short acting anesthetic. (*See* May 3, 2019, transcript, p. 154). Dr. Lubarsky further testified that etomidate is a known pro-epileptogenic drug and is contraindicated in persons prone to epilepsy. (*See* May 3, 2019, transcript, pp. 164-65). Etomidate is given to induce seizures in patients receiving electroconvulsive therapy, and to provoke epileptic spikes as a diagnostic or pre-surgical tool for people with temporal lobe epilepsy. (*See* May 3, 2019, transcript, pp. 165-65). Etomidate can even trigger seizures in non-epileptic persons. (*See* May 3, 2019, transcript, p. 166). Dr. Lubarsky testified that seizures can be activated by both lower doses and higher doses of etomidate, and that "[a]t some point it actually reduces seizures." (*See* May 3, 2019, transcript, pp. 166).

Dr. Lubarsky opined that the dosage of etomidate administered during an execution would wear off in eight (8) minutes on a normal, nonhyperdynamic adult, but within four (4) to five (5) minutes on a condemned inmate whose execution is imminent, and noted that most executions last more than eight (8) minutes. (*See* May 3, 2019, transcript, pp. 154, 157-154, 164). When asked if etomidate will cause pain when administered to a person with TBI and temporal lobe epilepsy, Dr. Lubarsky testified that due to the nature of etomidate, "almost everyone" experiences pain upon injection, especially in smaller veins. (*See* May 3, 2019, transcript, pp. 154-55). As to epilepsy in particular, Dr. Lubarsky testified,

> In terms of will it cause pain when the etomidate interacts with the epilepsy, the answer is, no, it will not cause pain, but it may unmask

> a seizure and that, in turn, will -- while not painful will complicate the clinical picture in terms of determining whether or not the etomidate has actually taken effect.

(*See* May 3, 2019, transcript, p. 155). Dr. Lubarsky testified to other potential dangers should the etomidate trigger a seizure during the lethal injection protocol, specifically, a series of events that include the possibility of the execution team failing to properly recognize whether Defendant is awake, experiencing myoclonus or having a seizure, Defendant dislodging the IV lines, and prolongation of the execution so that there is insufficient anesthetic/etomidate in Defendant's body when the other lethal injection medications are administered. Specifically, Dr. Lubarsky testified as follows:

> So the sequence of the execution is dependent on consciousness checks which should show that the inmate is unresponsive. The use of -- the use of etomidate, which is a drug that is very difficult to use and know that someone is not responsive because the drug itself will cause muscular movement prior to its full whole onset.
>
> And if you have a seizure, you will see fine motor movement at the very least, and basically larger motor movement which means they're difficult to differentiate from being awake. That then prolongs the process, so eight minutes no longer is sufficient and eight minutes is, as I mentioned, only -- this has been – there's a whole paper on this, around that -- that specific time frame.

(*See* May 3, 2019, transcript, p. 158).

> . . . .
>
> And having a seizure with fine motor movements attached to it will make it very difficult to proceed with the second and third drugs because it won't be clear to the executioners, having -- having the etomidate having induced this feature and the inmate moving, it would be not possible for those individuals doing the lethal injection to know that that would not -- you know, a movement of an awake inmate versus a temporal lobe epilepsy seizure induced by the etomidate in combination with this prisoner's underlying medical condition.
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> That prolongation of the process will almost assuredly result in an inadequate amount of anesthetic in the condemned inmate's

body when the rest of the lethal injection protocol is being carried out. So it is a cascade of events that begins with a drug that works super short and that induces a condition that will prolong[] the execution procedure.

(*See* May 3, 2019, transcript, p. 162).

. . . .

It is very difficult to differentiate. I'm awake and moving, I'm suffering myoclonus from the initial disinhibition of extrapyramidal nerves is what's the cause of myoclonus, or I'm having a seizure associated with my temporal lobe epilepsy.

So all three of those things sort of look alike and all three of those things actually carry the risk of dislodging an intravenous line to be -- also to be very clear about that.

(*See* May 3, 2019, transcript, pp. 163-4).

. . . .

I believe as I stated previously, because it will be very difficult to differentiate, my thoughts, small motor movement, which more often accompanies temporal lobe epilepsy than large motor, but it varies. And from that of a condemned prisoner making voluntary movements, which would indicate he or she is insufficiently anesthetized, which would then delay the protocol which would then assure that the etomidate would wear off.

. . .

That is one of the major problems with both myoclonus, a known side effect, and one very likely by the way to occur up to 80 percent of individuals not premedicated will experience myoclonus with higher doses leading to more severe myoclonus and seizures. And again, the more severe the seizure, the more likely the intravenous line may be dislodged from its place in a vein.

(*See* May 3, 2019, transcript, p. 167).

. . . .

Well, again, I think that the whole point here is that, you know, etomidate, itself, is very painful. Seizures in and of themselves where the person suffering the seizure is restrained, the -- if it's a -- if it's a significant seizure, then one can hurt themselves

> straining against the restraints. And - but the seizure, itself, other than in terms of a very short term besides things like myalgia and potential to hurt yourself in the movement, it's not painful in and of itself.
>
> I mean, you can - don't get me wrong, if you've ever seen a seizure, like you can bite your tongue, you can bite part of your tongue off, you can do all sorts of things during the seizure. You know, again, that's all very well described. So maybe I'm -- you know, I'm not really giving great credence to that only because it's supposed to be a very short-term event.
>
> But certainly, you know, as I think about if, that's always -- if you're not prepared and you're inducing the seizure, for instance, during electroconvulsive therapy as we do, we always place mouthguards and soft bite blocks in a person to which we're administering etomidate to induce a seizure, we would always take very great care that they are - they didn't clamp down on their tongue because jaw biting and clenching is a routine manifestation of seizures.

(*See* May 3, 2019, transcript, pp. 169-70).

Dr. Wood testified regarding Defendant's 1993 PET scans (which Dr. Woods had previously testified about in proceedings related to another of Defendant's cases) and the severity of Defendant's TBI. (*See* May 3, 2019, transcript, pp. 195-98). Dr. Wood further testified that seizures associated with temporal lobe epilepsy are partial seizures, and are not necessarily detectable by the naked eye. (*See* May 3, 2019, transcript, pp. 198-99). Such seizures can be characterized by convulsions and movement, but not like those associated with a grand mal seizure, and could be detected by a trained observer. (*See* May 3, 2019, transcript, p. 199).

Dr. Raymond, a compounding pharmacist, also testified on behalf of Defendant. Dr. Raymond testified that both pentobarbital and fentanyl are Class II substances, at the highest level of medicinal value. (*See* May 3, 2019, transcript, p. 87). Dr. Raymond testified that with his Class II DEA registration, he can purchase and compound pentobarbital and fentanyl. (*See* May 3, 2019, transcript, pp. 87-88). Dr. Raymond testified that when he receives a request for a particular medication, he first determines through his wholesaler account whether the medication can be

purchased; if it is not available or is on the FDA's registered list of back-ordered products, the FDA permits the product to be compounded. (*See* May 3, 2019, transcript, pp. 89-90). Dr. Raymond testified that the active pharmaceutical ingredient for pentobarbital as well as manufactured injectable pentobarbital are available for purchase by a licensed registered Florida pharmacist. (*See* May 3, 2019, transcript, pp. 90). On cross-examination, Dr. Raymond acknowledged that he did not determine whether a manufacturer of pentobarbital would sell it for the purpose of an execution. (*See* May 3, 2019, transcript, p. 91). He further testified a doctor's prescription would be required to compound a Class II substance such as pentobarbital, and he did not have a prescription to compound either pentobarbital or fentanyl for use in an execution. (*See* May 3, 2019, transcript, p. 92).

Defendant also presented the testimony of Stephen Whitfield, Chief of Pharmaceutical Services for the Department of Corrections (DOC), who testified that the manufacturer has restricted DOC from purchasing pentobarbital. (*See* May 3, 2019, transcript, pp. 118, 121-22). Mr. Whitfield did not have any knowledge as to whether DOC has attempted to find a compounding pharmacy to make pentobarbital available. (*See* May 3, 2019, transcript, p. 119). Mr. Whitfield did not know why Florida has declined to adopt a single-drug protocol using pentobarbital or fentanyl. (*See* May 3, 2019, transcript, p. 119-20). To his knowledge, DOC has not attempted to purchase fentanyl through a manufacturer or compounding lab, however, it was Mr. Whitfield's understanding that the manufacturer of fentanyl also will not allow DOC to use it for lethal injection purposes. (*See* May 3, 2019, transcript, pp. 120-23). Mr. Whitfield was not aware of any concerns or reasons why DOC should change its current protocol. (*See* May 3, 2019, transcript, pp. 123-24). To Mr. Whitfield's knowledge, neither pentobarbital nor fentanyl is readily available to DOC, no compounding pharmacy has offered to compound pentobarbital or

fentanyl for DOC, and no doctor has offered to write a prescription for pentobarbital or fentanyl. (*See* May 3, 2019, transcript, pp. 125-126).

The State presented the testimony of Dr. Yun and Dr. Buffington. Dr. Yun testified that etomidate is commonly used in emergency situations, including in persons with traumatic injury or brain injury, because "it is one of the few hypnotic agents that will induce unconsciousness, but at the same time be relatively stable in terms of its effects on the cardiovascular system." (*See* May 3, 2019, transcript, pp. 25-26). Additionally, Dr. Yun testified that brain activity is measured by brainwaves or EEG, and the EEG signals are characterized by various bursts; etomidate has the property of causing marked suppression of these burst patterns. (*See* May 3, 2019, transcript, pp. 27-28).

Dr. Yun testified that, generally, the dosage for etomidate is .2 mg/kg, i.e., 200 milligrams for a 100 kilogram or 224-pound man. (*See* May 3, 2019, transcript, p. 26). Therefore, 200 milligrams of etomidate will "predictably produce a very reliable deep state of unconsciousness," and such a dose "would certainly be a lethal dose if no other lifesaving measures were instituted." (*See* May 3, 2019, transcript, pp. 26-27). Dr. Yun testified that 200 milligrams of etomoidate is "such an overwhelming dose, well beyond the accepted limits, that it would predictably and reliably produce such a massive deep state of burst suppression and unconsciousness so as to eliminate any possible seizure activity." (*See* May 3, 2019, transcript, pp. 30-31). Dr. Yun further testified that 200 milligrams of etomidate is "such an extreme unbelievable dose that it eliminates the possibility of responding or feeling or perceiving any noxious stimuli." (*See* May 3, 2019, transcript, p. 31). Dr. Yun further estimated 200 milligrams of etomidate would render a patient unconscious "for several hours, but at least - - at the very least for 30 minutes." (*See* May 3, 2019, transcript, p. 31). Even with a 20 milligram dose of etomidate, a patient is typically unconscious

within 30 seconds. (*See* May 3, 2019, transcript, pp. 34-35). Dr. Yun reiterated, "I can't emphasize enough that it's such an extreme, even outrageous dose that in all medical probability be it from everything we know about pharmacokinetics and pharmacodynamics, it would reliably produce unconsciousness and the loss of perception and response to noxious stimuli in any human being on this planet." (*See* May 3, 2019, transcript, pp. 35-36).

Dr. Yun acknowledged that in small subtherapeutic doses of .05 to .1 mg/kg, etomidate is used for epileptic mapping or to help physicians find epileptic foci. (*See* May 3, 2019, transcript, pp. 50-51, 54). Dr. Yun also acknowledged that etomidate causes moderate pain in some patients, and that if the IV lines were compromised due to seizure movement, the drug may not work properly. (*See* May 3, 2019, transcript, pp. 58-60, 64). Dr. Yun also opined that neither epilepsy nor brain damage would interfere with the ability of etomidate to render a person quickly unconscious and insensate. (*See* May 3, 2019, transcript, pp.). Dr. Yun testified, "Even if a person had epilepsy or traumatic brain injury, a massive dose of 200 milligrams of etomidate would in my estimation and clinical experience produce deep level unconsciousness to the point where they're not aware of noxious stimuli." (*See* May 3, 2019, transcript, pp. 66).

Dr. Buffington testified that the medical literature reflects that etomidate can promote or trigger seizure activity at lower doses, .05 mg/kg to .1 mg/kg, but "at higher doses, [.2 mg/kg, .3 mg/kg], that we use clinically and even higher, it's demonstrated that it does not promote epilepsy or any type of seizure activity." (*See* May 3, 2019, transcript, pp. 214). He explained that "when you look at the interval between EEG patterns, you see the actual seizure potential evoked and it can occur. At the larger doses, the depth of sedation is so far beyond that, that it is actually abating EEG activity." (*See* May 3, 2019, transcript, pp. 230).

Dr. Buffington further testified that a dosage of .2 mg/kg to .3 mg/kg is sufficient to render unconscious and insensate a person suffering from epilepsy for the time necessary to complete an execution. (*See* May 3, 2019, transcript, pp. 214-215). Dr. Buffington further testified that etomidate is dose dependent, therefore, an increase in the dose administered will increase the duration and depth of sedation. (*See* May 3, 2019, transcript, pp. 215, 235). As to the duration of sedation during the lethal injection protocol, which uses 200 milligrams of etomidate, Dr. Buffington opined "if the typical is 15 minutes in the standard doses, 15 to 30 minutes, 60 minutes or more would easily be achieved with the doses that are rendered here." (*See* May 3, 2019, transcript, pp. 215). Dr. Buffington also noted that the lethal injection protocol requires restraint of the inmate's torso and extremities, and the IV lines are taped. (*See* May 3, 2019, transcript, pp. 216). Dr. Buffington also testified that diazepam, which is incorporated into the lethal injection protocol, "is an anti-seizure treatment, an anti-myoclonic medication and anti-anxiety medication," which would alleviate the possibility of having a seizure. (*See* May 3, 2019, transcript, pp. 218). Additionally, Dr. Buffington testified that even if a partial seizure should occur during the execution, there is no indication "that it would induce any disturbance []or delay or conflict with the pharmaceutical effects" of the lethal injection medications. (*See* May 3, 2019, transcript, p. 218). Dr. Buffington also testified that etomidate is preferred for use with brain injury patients and "having TBI doesn't change the pharmacologic effect of the drug." (*See* May 3, 2019, transcript, p. 234).

The Court finds the testimony of Dr. Yun to be more credible than that of Dr. Lubarsky. The Court finds credible Dr. Yun's testimony that the massive dose of 200 milligrams of etomidate would produce such a deep state of burst suppression and unconsciousness that it would eliminate any possible seizure activity, and render a person - even someone with traumatic brain injury

and/or temporal lobe epilepsy - unaware of noxious stimuli. Even if Defendant had a seizure, the Court finds credible Dr. Lubarsky's testimony that the seizure itself is not painful, as well as Dr. Yun's testimony that Defendant would be unconscious and insensate. The Court further finds more credible Dr. Yun's testimony that 200 milligrams of etomidate would render a person unconscious for at least 30 minutes, rather than the maximum of 8 minutes asserted by Dr. Lubarsky. The Court further finds the possible risks associated with the "cascade of events" described by Dr. Lubarsky is highly speculative. Defendant has not shown that if he is administered 200 milligrams of etomidate, he is likely to have a seizure, even a partial undetectable seizure as described by Dr. Wood. And, although Defendant has been diagnosed with TBI and temporal lobe epilepsy, there is no testimony or evidence reflecting that Defendant has a history of the pronounced or violent seizures that would dislodge his IV lines, or any seizure history at all.[2] Even if Defendant had such a seizure, the lethal injection protocol requires that an inmate be restrained and the IV lines taped. Based on the foregoing, the Court finds Defendant has failed to demonstrate etomidate is sure or very likely to cause him serious illness and needless suffering.

Additionally, the Court finds Defendant has failed to meet his burden under the second prong. Although Defendant submitted and the Court has taken judicial notice of the lethal injection protocols of other states that use pentobarbital, specifically, Texas, Missouri, South Dakota, and Georgia, the Court finds the existence of such protocols do not demonstrate that pentobarbital is feasible and readily implemented here in Florida. The Court finds credible Mr. Whitfield's testimony that neither pentobarbital nor fentanyl is readily available to DOC. Although Dr. Raymond's testimony reflected that pentobarbital or fentanyl could be purchased or compounded

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[2] The Court further notes that during the penalty phase, defense expert Dr. Money, who diagnosed Defendant with temporal lobe epilepsy, testified that temporal lobe epilepsy does not cause seizures but causes one to enter an altered state of consciousness. *See Long*, 610 So. 2d at 1271.

by a licensed, registered Florida pharmacist, he did not testify that those medications are available for purchase by DOC or that those medications meet the FDA criteria for compounding. As in *Bucklew*, Defendant's allegations regarding pentobarbital and fentanyl rest on unsupported speculation and are affirmatively contradicted by the evidence. The Court further finds Defendant has failed to present any testimony or evidence that the use of either pentobarbital or fentanyl entails a significantly less severe risk of pain. Because Defendant has failed to establish either prong of *Glossip/Baze*, his as-applied challenge must also fail. **No relief is warranted on claim 2A.**

Claims 2B and 2C

In claims 2B and 2C, Defendant alleges the current lethal injection protocol is unconstitutional. Specifically, in claim 2B, Defendant asserts that "[e]volving standards of decency forbid States from executing inmates by the use of three-drug formula where the second drug is a paralytic, because the inclusion of such a drug serves no purpose but to make the experience more pleasant for the onlookers, while enabling the State to conceal its own potentially unconstitutional conduct." Defendant seeks an evidentiary hearing "to establish the consistent direction of the change and national consensus towards one drug protocols."

In claim 2C, Defendant alleges that etomidate is "an ultra-short drug that causes significant pain upon injection, and one that is not used by any other state's lethal injection protocol," and that its use in the lethal injection protocol is unconstitutional as it "raises a substantial risk of serious harm."

In its response, the State asserts Defendant's allegations are untimely and procedurally barred. The State asserts etomidate has been a part of the lethal injection protocol for more than two years. The State further asserts the Florida Supreme Court has already rejected challenges to

use of Florida's three-drug protocol as well the use of etomidate. The State contends Defendant's claims are legally insufficient and should be summarily denied.

During the May 1, 2019, case management conference, the Court denied Defendant's request for an evidentiary hearing on claims 2B and 2C. The Court agrees with the State's response, and finds the Florida Supreme Court has already rejected similar challenges to Florida's three-drug protocol as well as to the use of etomidate in the current lethal injection protocol. *See Jimenez v. State,* 265 So. 3d 462, 474-75 (Fla. 2018) (finding that in *Asay VI*, it "fully considered and approved of the current lethal injection procedure, which replaced midazolam with etomidate as the first drug in the three-drug protocol," and affirming the denial of defendant's claim "that Florida's continued use of a three-drug protocol instead of a one-drug protocol constitutes cruel and unusual punishment in light of evolving standards of decency"); *Hannon v. State*, 228 So. 3d 505, 508-509 (Fla. 2017) (finding the circuit court correctly rejected defendant's challenge to the current lethal injection protocol as it was approved in *Asay VI*, and noting it has "consistently rejected Hannon's challenge that the DOC should substitute the current three-drug protocol with a one-drug protocol"); *Asay v. State (Asay VI)*, 224 So. 3d 695, 699-702 (Fla. 2017) (approving the use of etomidate in the current lethal injection protocol and rejecting Asay's allegation that the three-drug protocol - as opposed to a single-drug protocol - constituted "cruel and unusual punishment in light of evolving standards of decency"); *Muhammed v. State*, 132 So. 3d 176, 197 (Fla. 2013) (rejecting defendant's claim that Florida's failure to use a one-drug protocol constituted cruel and unusual punishment in light of evolving standards of decency and finding defendant failed to establish that Florida must adopt a one-drug lethal injection protocol). **No relief is warranted on claims 2B and 2C.**

CLAIM 3

THE TOTALITY OF THE PUNISHMENT IMPOSED BY THE STATE VIOLATES THE EIGHTH AMENDMENT AND THE PRECEPTS OF *LACKEY*.[3]

In claim 3, Defendant alleges his incarceration on death row began after his initial sentence was imposed on July 25, 1986, and on the date of his scheduled execution, May 23, 2019, he will have spent over thirty (30) years on death row. Defendant asserts the "unnecessary and gratuitous psychological pain caused by spending over 30 years on death row far exceeds the sentence of death imposed in July 1989, and constitutes cruel and unusual punishment under the Eighth Amendment and corresponding provision of [the] Florida Constitution." Defendant contends the Florida Supreme Court "is waiting for lower courts to address this issue" and "urges reconsideration" of various Florida Supreme Court decisions.

In its response, the State asserts Defendant's claim is untimely and procedurally barred. The State further cites to precedent and asserts Defendant's claim is further without merit. The State requests that the Court summarily deny claim 3.

During the May 1, 2019, case management conference, the Court denied Defendant's request for an evidentiary hearing on claim 3. As the State argues, the Court finds the Florida Supreme Court has repeatedly rejected this same claim. *See e.g., Jimenez*, 265 So. 3d at 475-76 ("Jimenez argues that, because he has spent over 23 years on death row, adding his execution to that punishment constitutes cruel and unusual punishment in light of evolving standards of decency. We have consistently rejected this argument and decline to recede from our long-standing precedent in Jimenez's case."); *Branch v. State*, 236 So. 3d 981, 988 (Fla. 2018); *Lambrix v. State*,

[3] *Lackey v. Texas*, 514 U.S. 1045 (1995).

217 So. 3d 977, 988 (Fla. 2017); *Correll v. State*, 184 So. 3d 478, 486 (Fla. 2015). **No relief is warranted on claim 3.**

CLAIM 4

THE DENIAL OF *HURST* RELIEF TO BOBBY JOE LONG VIOLATED THE EIGHTH AMENDMENT'S BAN ON CRUEL AND UNUSUAL PUNISHMENT AND THE FOURTEENTH AMENDMENT'S GUARANTEES OF EQUAL PROTECTION AND DUE PROCESS.

In claim 4, Defendant alleges his death sentence is unconstitutional under *Hurst v. Florida* and *Hurst v. State*, and that failure to apply *Hurst* retroactively to his case is unconstitutional. However, Defendant acknowledges that he raised this issue in prior postconviction relief proceedings, his claim was denied, and the denial was affirmed on appeal. Defendant further contends that in *Owen v. State*, SC18-810, the Florida Supreme Court has ordered the parties to brief the issue of whether it should recede from its retroactivity analysis.

In its response, the State asserts Defendant's allegations are untimely, successive and procedurally barred. The State further asserts this claim is barred by collateral estoppel and the law of the case doctrine, and cites to *Kelly v. State*, 739 So. 2d 1164 (Fla. 5th DCA 1999), and *State v. McBride*, 848 So. 2d 287, 290-91 (Fla. 2003).

During the May 1, 2019, case management conference, the Court denied Defendant's request for a stay pending the Florida Supreme Court's decision in *Owen*. As noted in the procedural history above, Defendant has previously sought and this Court has previously denied *Hurst* relief, and the Florida Supreme Court affirmed. *See Long*, 235 So. 3d at 293-94. Defendant's allegations again seeking relief pursuant to *Hurst* are untimely, successive, procedurally barred and barred by the doctrines of collateral estoppel and the law of the case. **No relief is warranted on claim 4.**

CLAIM 5

THE DENIAL OF BOBBY JOE LONG'S REQUESTS RELATED TO DEFENSE EXECUTION WITNESSES IS UNCONSTITUTIONAL.

In claim 5, Defendant alleges he has requested that Barry Reddish, Warden of Florida State Prison, allow Defendant's designated legal witness access to a writing pad/pen and to a phone before and during the execution process, that Defendant be afforded a second execution witness, and that one of his witnesses be allowed to view the IV insertion process. Defendant anticipates that his requests will be denied. Defendant requests that the Court direct the DOC to allow a second designated witness to observe his execution, allow at least one of his witnesses access to a phone, and allow at least one of his witnesses to observe the IV insertion process. Defendant posits that having at least two witness attorneys present - one who can access the phone and one who can continue to monitor the execution should phone access be necessary - will ensure adequate access to the courts. Defendant contends DOC's policy of denying his witnessing counsel's access to a phone during the execution violates Defendant's right of access to the courts. Defendant asserts that "[i]f DOC has difficulty in achieving venuous access, and it either takes an unusually long time with multiple attempts to locate a vein, and/or requires a painful cutdown procedure to be used, Long has no way of communicating his pain and suffering to his counsel, in violation of both his Sixth and Eighth Amendment rights."

In its response, the State questions whether this claim is ripe for review and/or properly raised in the instant postconviction proceeding. The State further cites to section 922.11, Florida Statutes, and asserts Defendant's claim is without merit. The State asserts section 922.11(2) provides the warden discretion in selecting 12 citizens to witness the execution, and permits a defendant to have legal counsel and a requested minister of religion present. The State asserts,

"Not only does the warden have discretion to choose the execution witnesses, but the warden is required by law to prohibit all other persons from attending the execution." The State further posits the courts "do not manage state execution practices and prison policies" but rather "are limited to determining whether the state procedures violate the prohibition against cruel and unusual punishment...." The State contends Defendant has failed to show that the statutes and policies violate his constitutional rights.

The Court first notes postconviction counsel asserts only that he *anticipates* DOC will deny his requests, therefore, this claim may be premature. Even if DOC has denied counsel's requests, the Court finds his allegations are without merit. As the State contends, section 922.11 sets forth the regulation of an execution and provides,

> Twelve citizens selected by the warden shall witness the execution. A qualified physician shall be present and announce when death has been inflicted. Counsel for the convicted person and ministers of religion requested by the convicted person may be present. Representatives of news media may be present under rules approved by the Secretary of Corrections. All other persons, except prison officers and correctional officers, shall be excluded during the execution.

Fla. Stat. § 922.11(2) (2019). The Court finds Defendant failed to show that the limitation on his execution witnesses and DOC's policies violate his constitutional rights. The Court further finds Defendant has failed to demonstrate that DOC's policies preventing access to a phone during the execution are violative of the Sixth and Eighth Amendments. **No relief is warranted on claim 5.**

CLAIM 6

[THE] EIGHTH AMENDMENT CATEGORICALLY EXEMPTS LONG FROM EXECUTION BECAUSE HE SUFFERS FROM SEVERE TRAUMATIC BRAIN INJURY.

In claim 6, Defendant asserts the Eighth Amendment categorically bars his execution because he has severe TBI and is severely mentally ill. Defendant posits that "[o]bjective indicia

of contemporary standards establish that an individual suffering from severe traumatic brain injury that substantially impairs that individual's capacity to appreciate the criminality of his conduct or conform his actions to the law should be categorically excluded from the death penalty because, like juveniles and the intellectually disabled, he/she is not among the 'worst of the worst' or 'most culpable' of offenders." Defendant alleges the American Psychiatric Association, American Psychological Association and American Bar Association have all recommended that the severely mentally ill be excluded from capital punishment, and that at least ten (10) states have either passed or have pending legislation barring the execution of the severely mentally ill.

In its response, the State asserts Defendant is relying on *Atkins*[4] and *Roper*,[5] and asserts his claim is untimely, procedurally barred and without merit. The State cites a litany of cases and seeks summary denial of this claim.

During the May 1, 2019, case management conference, Defendant clarified that this claim is based on neither *Atkins* nor *Roper*, but rather on the evolving standards of decency. Defendant seeks a categorical bar to execution for the seriously mentally ill based on evolving standards of decency.

The Court finds Defendant's claim is procedurally barred and has been previously rejected on the merits by the Florida Supreme Court. *See Carroll v. State*, 114 So. 3d 883, 886-87 (Fla. 2013) (finding Carroll's claim that his mental illness "places him within the class of persons, similar to those under age eighteen at the time of the crime and those with mental retardation, who are categorically excluded from being eligible for the death penalty" was untimely, procedurally barred and without merit); *Simmons v. State*, 105 So. 3d 475, 510-11 (Fla. 2012) (finding defendant's claim "that he is exempt from execution under the Eighth Amendment to the United

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[4] *Atkins v. Virginia*, 536 U.S. 304 (2002).
[5] *Roper v. Simmons*, 543 U.S. 551 (2005).

States Constitution because he has mental illness and neuropsychological deficits " was both procedurally barred and without merit); *Johnston v. State*, 70 So. 3d 472, 484-85 (Fla. 2011) ("This Court has repeatedly held that there is no per se bar to imposing the death penalty on individuals with mental illness. . . . Specifically, this Court has recently considered and rejected the precise arguments that Johnston raises here regarding the evolving standards of decency in death penalty jurisprudence."). There is no legal authority which would permit or require this Court to find the Eighth Amendment categorically bars Defendant's execution because he suffers from severe traumatic brain injury. **No relief is warranted on claim 6.**

ORDER OF THE COURT

It is therefore **ORDERED AND ADJUDGED** that Defendant's Successive Motion to Vacate Judgment of Conviction and Sentence Pursuant to Rule 3.851 with Special Request for Leave to Amend is hereby **DENIED**.

Pursuant to the Supreme Court of Florida order dated April 24, 2019, the notice of appeal shall be filed by 10:00 a.m. on Tuesday, May 7, 2019.

DONE AND ORDERED in Chambers in Hillsborough County, Florida this 6th day of May, 2019.

MICHELLE SISCO
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this order has been furnished to Robert Norgard, Esquire, **norgardlaw@verizon.net**, Norgard, Norgard & Chastang, P.O. Box 811, Bartow, FL 33831-0811; Stephen D. Ake, Esquire, **stephen.ake@myfloridalegal.com** and **capapp@myfloridalegal.com**, Scott Browne, Esquire, **Scott.Browne@myfloridalegal.com** and

capapp@myfloridalegal.com, Tim Freeland, Esquire, **Timothy.Freeland@myfloridalegal.com** and **capapp@myfloridalegal.com**, and Christina Z. Pacheco, Esquire, **christina.pacheco@myfloridalegal.com** and **capapp@myfloridalegal.com**, Office of the Attorney General, 3507 East Frontage Road, Suite 200, Tampa, FL 33607-7013; Jay Pruner, Esquire, **pruner_j@sao13th.com** and **mailprocessingstaff@sao13th.com**, Office of the State Attorney, 419 Pierce Street, Tampa, FL 33602, by inter-office mail; Katherine Marx Horst, Esquire, **kathryn.horst@fdc.myflorida.com** and **CourtFilings@fdc.myflorida.com**, and Phillip A. Fowler, Esquire, **Philip.Fowler@fdc.myflorida.com** and **CourtFilings@fdc.myflorida.com**, Department of Corrections, Office of the General Counsel, 501 South Calhoun Street, Tallahassee, Florida, 32399-6505; D. Jason Harrison, Esquire, **JasonHarrison@fdle.state.fl.us**, Florida Department of Law Enforcement, PO Box 1489, Tallahassee, FL 32302-1489; and the Florida Supreme Court at **warrant@flcourts.org**, on this 6th day of May, 2019.

Valerie Anderson
Deputy Clerk