IN THE SUPREME COURT OF FLORIDA

ALLEN W. COX,

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

CASE NO. SC08-887
Lower Tribunal No. 99-249-CF
DEATH PENALTY CASE

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIFTH JUDICIAL CIRCUIT,
IN AND FOR LAKE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

This is an appeal from the trial court's summary denial of Allen Ward Cox's successive Rule 3.851 motion to vacate.

The following factual summary is taken from this Court's opinion affirming Cox's conviction and sentence on direct appeal:

> On February 5, 1999, a grand jury indicted Appellant, Allen Ward Cox, for premeditated murder and battery which occurred in a detention facility. The charges against Cox resulted from a chain of events within the Lake Correctional Institute ("LCI") that culminated in the death of Thomas Baker and an assault upon Lawrence Wood. At trial, the State presented the testimony of numerous corrections officers and inmates regarding the circumstances surrounding the murder of Baker, who was also a LCI inmate. On December 20, 1998, the appellant discovered that someone had broken into his personal footlocker and stolen approximately $500. Upon making this discovery, Cox walked out onto the balcony of his dorm and announced that he would give fifty dollars to anyone willing to identify the thief. He also indicated that when he discovered who had stolen from him, he would stab and kill that person, and that he did not care about the consequences.
>
> During the prison's lunch period on December 21, the appellant called Baker over to him, and then hit him with his fists to knock him down. During the attack, the victim continuously attempted to break free from Cox, and also denied stealing from him multiple times. At a lull in the beating, the appellant said, "This ain't good enough," and stabbed Baker with an icepick-shaped shank three times. After the stabbing, Appellant walked away stating, "It ain't over, I've got one more ... to get." He then walked behind the prison pump house and hid the shiv in a pipe. Cox proceeded from the pump house to his dorm, where he encountered Donny Cox (unrelated to the appellant). There, Appellant questioned him about his stolen money and told him that if Cox had his money,

he would kill him also. Following this exchange, the appellant returned to his cell, where he next attacked his cellmate, Lawrence Wood, advising him that Wood was "lucky I put it up, or I'd get [you]."

While the appellant was returning to his cell, the stabbing victim fled the attack scene and ran to corrections officers in a nearby building. The officers present at the time testified at trial that Baker had blood coming from his mouth, and that he was hysterically complaining that his lungs were filling with blood. Baker also responded to the prison officials' questions regarding who had attacked him by saying, "Big Al, Echo dorm, quad three." Although the corrections officers attempted to expedite emergency treatment of the victim by placing him on a stretcher and carrying him on foot to the prison medical center, Baker died before arriving at the hospital.

Doctor Janet Pillow testified that upon her autopsy of the victim, she found that the victim had been stabbed three times. Two of the wounds inflicted were shallow punctures of the lower torso, but the fatal wound had entered the victim's back and traveled through the chest cavity, between two ribs, and finally pierced the lungs and aorta. She testified that a conscious person with this wound would suffer from "air hunger," and would be aware of the "serious danger of dying." She described the wound as being approximately 17.5 centimeters deep, although only two millimeters wide. Doctor Pillow verified that the shank found by the pump house was consistent with the victim's injuries, despite the fact that the wound was deeper than the length of the weapon. She attributed the discrepancy between the length of the weapon and the depth of the wound to the elasticity of human tissue.

The appellant also testified, contending that all of the previous witnesses were correct, except that they had not seen what truly happened when he, Baker, and Vincent Maynard, a third inmate, were close together. According to Cox, it was he who had in fact dodged Baker and Maynard's attempts to stab him, and it was Maynard who actually stabbed Baker in the back accidentally. In Cox's version of the events, he had only struck the victim because he was defending himself from both of the other attacking men. Following the conclusion of the guilt phase testimony

> and argument, the jury deliberated, apparently rejected the view of the evidence offered by Cox, and found the appellant guilty of first-degree murder.

Cox v. State, 819 So. 2d 705, 709-10 (Fla. 2002) (footnotes omitted), cert. denied, 537 U.S. 1120 (2003).

After hearing the penalty phase testimony presented by both the defense and the prosecution, the jury recommended a sentence of death by a vote of ten to two. Following a Spencer[1] hearing, the trial court followed the jury's recommendation and sentenced Cox to death, finding four aggravating circumstances: (1) the capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment; (2) the Defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence; (3) the capital felony was especially heinous, atrocious or cruel; and (4) the capital felony was a homicide and was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. The trial court did not find any statutory mitigation, but considered numerous nonstatutory mitigating circumstances.

On direct appeal to this Court, Cox raised the following issues: (1) the trial court erred in denying his motion for a mistrial based upon a discovery violation; (2) the trial court

[1] Spencer v. State, 615 So. 2d 688 (Fla. 1993).

erred in denying his motion for a mistrial following a witness's unknowing testimonial violation of the court's order in limine; (3) the trial court erred in ordering Cox's penalty phase mental health expert to turn over her notes and testing materials to the State prior to trial; (4) the trial court erred in refusing to accept Cox's offer to stipulate to his prior violent felony convictions; (5) the prosecutor's misstatements of the law and allegedly improper argument amounted to fundamental error; (6) the trial court erred by instructing the jury on and in finding that the murder was especially heinous, atrocious, or cruel ("HAC"); (7) the trial court erred by instructing the jury on and in finding that the murder was committed in a cold, calculated, and premeditated manner, without any pretense of legal or moral justification ("CCP"); (8) the trial court erred by failing to consider all available mitigating evidence and in giving little weight to valid mitigation; (9) the death penalty is not proportional in the instant case; and (10) Florida's death penalty scheme violates the Florida and United States constitutions. This Court affirmed Cox's judgments and sentence. Cox v. State, 819 So. 2d 705 (Fla. 2002).

Cox then petitioned the United State Supreme Court for a writ of certiorari. On January 13, 2003, the United States

Supreme Court denied his petition. Cox v. Florida, 537 U.S. 1120 (2003).

On January 6, 2004, Cox filed a Motion to Vacate pursuant to Florida Rule of Criminal Procedure 3.851. Cox raised three issues for which he sought an evidentiary hearing and also presented two legal claims for which an evidentiary hearing was not requested. See Cox v. State, 966 So. 2d 337 (2007).[2] After

[2] Cox alleged that (I) counsel conceded his guilt during opening statements without obtaining an express waiver from him, and, as a result, he was deprived of meaningful adversarial testing as mandated by United States v. Cronic, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984); (II) counsel was ineffective during the investigative, guilt, and penalty phases under Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), in the following ways: (a) failing to object to statements made and questions asked by the prosecutor during voir dire and by conducting incomplete and cursory voir dire; (b) conceding guilt during opening statements; (c) failing to object to the State eliciting opinions from the medical examiner that did not meet the standard for admissibility under Florida law; (d) failing to obtain an independent expert to review and testify to the opinions stated by the medical examiner; (e) failing to properly cross-examine the medical examiner; (f) questioning witness Vincent Maynard in a manner that led to the introduction of inadmissible evidence; (g) failing to investigate and present evidence of a pattern of threats and intimidation utilized by State investigators at Lake Correctional Institution; (h) failing to adequately investigate potential witnesses who could have corroborated that Maynard fatally stabbed Baker; (i) failing to investigate information provided by Cox that incarcerated State witnesses received favorable treatment as a result of their testimony against him; (j) failing to adequately investigate potential mitigation evidence for use during the penalty phase; and (k) failing to present available mitigating evidence during the penalty phase and the hearing held pursuant to Spencer v. State, 615 So. 2d 688 (Fla. 1993). Under this claim, Cox also alleged that counsel's cumulative errors presented a reasonable probability

conducting a case management conference, the trial court issued an order granting an evidentiary hearing on a majority of Cox's claims. After the evidentiary hearing, the trial court entered an order denying Defendant's postconviction motion. This Court affirmed the trial court's denial on appeal. Id.

On October 2, 2007, Cox filed a Successive Motion to Vacate Judgments of Sentence raising four claims relating to Florida's lethal injection procedure (SPCR 1-24).[3] On November 27, 2007, the State filed its response (SPCR 43-66). A case management conference was held on February 29, 2008. Cox maintained that an evidentiary hearing was required on claims one, three and four but conceded that claim two presented a legal claim for which an evidentiary hearing would not be required (SPRC 124).

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that the result of his trial would have been different, sufficient to undermine confidence in the outcome; (III) the court-appointed psychologist failed to conduct the appropriate tests for organic brain damage and mental illness; (IV) counsel was ineffective for failing to litigate the following constitutional challenges to Florida's sentencing structure in general, and Cox's death sentence in particular: (a) Florida's structure violates Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), and Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); (b) the jury impermissibly renders only an advisory sentence; (c) the jury is not required to reach a verdict on the aggravating circumstances found; (d) Florida does not require a unanimous jury verdict to recommend a death sentence; and (e) the elements of the offense necessary to establish capital murder were not charged in Cox's indictment; and (V) counsel's cumulative errors deprived Cox of a fair trial.

[3] The instant successive post-conviction record will be cited as "SPCR" with the appropriate page numbers (SPCR page#); there exists a single volume.

Claim one asserted that Florida's method of execution constituted cruel and unusual punishment, claim two asserted Florida Statute Section 27.702 relating to Capital Collateral Regional Counsel's duties was unconstitutional, claim three asserted that potentially compromised venous access created an undue risk of pain and suffering, claim four asserted Florida Statute Section 945.10, which exempts from the disclosure the identity of the executioner was unconstitutional (SPCR 1-24). With regard to claim one, Cox argued Ligthbourne v. McCollum, 969 So. 2d 326 (Fla. 2007), did not present this Court with an adequate record to evaluate Florida's method of execution (SPCR 126-27). Specifically, Cox wanted to present testimony regarding the use of the "three-drug cocktail" (SPCR 127). With regard to claim three, Cox argued a hearing was necessary to present evidence relating to his physical condition and the DOC protocol for medical examination (SPCR 129-130). With regard to claim four, Cox argued a hearing was necessary for him to determine if execution team members may cause his execution to be problematic (SPCR 133-35). For example, Cox cited to instances in other states where execution team members had psychological or criminal problems (SPRC 133-34).

The State argued that claim one was addressed in Lightbourne and therefore should be summarily denied (SPCR 138).

The State submitted that claim three was speculative and not appropriately before the court (SPCR 138). Furthermore, the State argued that current DOC protocols adequately address an inmate's physical condition (SPCR 139). As to claim four, the State argued the claim could have been raised previously and was barred (SPCR 139). The State also submitted claim four was without merit (SPCR 139).

An order summarily denying Cox's Motion was entered on March 24, 2008. (SPCR 94-99). Cox filed a Motion for Rehearing which the trial court denied (SPCR 100-09, 111-12). Cox now appeals from the trial court's order summarily denying his successive motion for post-conviction relief (SPCR 113-14).

SUMMARY OF THE ARGUMENT

The court below properly summarily denied Cox's successive motion for post-conviction relief alleging that Florida's procedures for execution by lethal injection violate the Eighth Amendment proscription against cruel and unusual punishment.

Cox's challenges to the constitutionality of sections 27.702 and 945.10, Florida Statutes, are procedurally barred and without merit. Thus, summary denial was likewise appropriate.

ARGUMENT

ARGUMENT I

LETHAL INJECTION CLAIM

Regarding Cox's lethal injection claim the trial court, following this Court's precedent, held:

> This Court notes that the Florida Supreme Court has consistently upheld the constitutionality of the lethal injection process. See e.g., Sims v. State, 754 So. 2d 657 (Fla. 2000). In Sims, the court noted the Defendant was attacking the details and procedures of the execution process. Id. at 666. The Court has consistently applied the holding in Sims to deny claims that lethal injection is unconstitutional. See e.g., Hill v. State, 921 So. 2d 579 (Fla. 2006); Rutherford v. State, 926 So. 2d 1100 (Fla. 2006). . . . . [Moreover,] the Florida Supreme Court has held, as recently as November of last year, that the lethal injection procedures currently in place in Florida, as actually administered, do not violate the constitutional prohibition against cruel and unusual punishment. Schwab v. State, 32 Fla. L. Weekly S687 (Fla. Nov. 1, 2007); Lightboume v. McCollum, 969 So. 2d 326 (Fla. 2007); Schwab v. State, 969 So. 2d 318 (Fla. 2007). This Court finds that issue I of Defendant's Successive Motion to Vacate Judgements of Sentence is summarily DENIED.

(SPCR 96)(emphasis supplied).

Cox's primary claim asserts that the court below should not have rejected his argument that Florida's current procedures for execution by lethal injection violate the Eighth Amendment prohibition against cruel and unusual punishment. The summary denial of Cox's motion is a legal issue which is reviewed *de novo*. State v. Coney, 845 So. 2d 120, 137 (Fla. 2003) (holding

pure questions of law discernible from the record to be subject to *de novo* review).

As the following will show, Cox's *per se* challenge to "lethal injection" is procedurally barred and the claim regarding the constitutionality of lethal injection after the events that occurred during the execution of Angel Diaz is without merit.

First, lethal injection became a method of execution in 2000, and Cox could, and should, have raised any *per se* challenge to lethal injection within one year of the release of the Sims v. State, 754 So. 2d 657 (Fla. 2000), decision in February of 2000. See Fla. R. Crim. P. 3.851(d)(2).

Furthermore, any *per se* challenge to lethal injection is not only procedurally barred, but also without merit. The court below rejected Cox's claim that Florida's current procedures for execution violate the Eighth Amendment, citing to Lightbourne v. McCollum, 969 So. 2d 326 (Fla. 2007), cert. denied, 128 S. Ct. 2485 (2008), and Schwab v. State, 969 So. 2d 318 (Fla. 2007) (SPCR 96). Cox asserts that this was error, claiming that the United States Supreme Court decision in Baze v. Rees, 128 S. Ct. 1520 (2008), demonstrates that this Court applied an incorrect standard in Lightbourne. A review of the relevant cases, however, refutes this claim.

In Henyard v. State, 33 Fla. L. Weekly S629 (Fla. Sept. 10, 2008), this Court stated:

> Henyard presents the same argument previously denied by this Court in Lightbourne and Schwab. Henyard attempts to get around this by asserting the United States Supreme Court's decision in Baze sheds new light on this Court's decisions because the standard to review Eighth Amendment challenges was changed. A review of the Supreme Court's plurality opinion demonstrates otherwise.
>
> In Baze, the Supreme Court addressed whether Kentucky's lethal injection protocol was unconstitutional under the Eighth Amendment. 128 S. Ct. at 1526. The Court affirmed the Kentucky Supreme Court's decision, holding that Kentucky's protocol did not constitute cruel and unusual punishment. Id. This holding is the only portion of the opinion upon which the majority of the Court agreed.[fn7] The standard to be applied resulted in the splintered opinion of the Court.
>
> [fn7]. See Marks v. United States, 430 U.S. 188, 193 (1977) (stating that when the Court issues a decision where no rationale receives the vote of five justices, the holding of the Court is the "position taken by those members who concurred in the judgments on the narrowest of grounds.") (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976)). Courts have interpreted Marks differently to allow for either the narrowest holding in a particular case or the narrowest application of the standard applied to reach that holding, but it does not appear that any court would adopt Henyard's interpretation of Baze. Cf. United States v. Johnson, 467 F.3d 56, 60-65 (1st Cir. 2006) (discussing the application of Marks by federal courts to the Supreme Court's plurality decision in Rapanos v. United States, 547 U.S. 715 (2006)), cert. denied, 128 S. Ct. 375 (2007).

> The plurality opinion, in which Chief Justice Roberts and Justices Kennedy and Alito joined, concluded the appropriate standard was one of "substantial risk of harm." Id. at 1531. The plurality explicitly rejected the "unnecessary risk" standard Henyard suggests. Id. Justices Thomas and Scalia concurred in judgment, stating that a method of execution violates the Eighth Amendment "if it is deliberately designed to inflict pain." 128 S. Ct. at 1556 (Thomas, J. concurring in the judgment). Justices Breyer, Ginsburg, and Souter agreed that "the degree of risk, magnitude of pain, and availability of alternatives must be considered." 128 S. Ct at 1563 (Breyer, J., concurring in the judgment); 128 S. Ct at 1568 (Ginsburg, J., dissenting).
>
> We have previously concluded in Lightbourne and Schwab that the Florida protocols do not violate any of the possible standards, and that holding cannot conflict with the narrow holding in Baze. Furthermore, we have specifically rejected the argument that Florida's current lethal injection protocol carries "a substantial, foreseeable, or unnecessary risk of pain." Lightbourne, 969 So. 2d at 353. Accordingly, we reject Henyard's argument.

Henyard, 33 Fla. L. Weekly at 631-32.

As this Court recognized in Henyard, there is one standard to be taken from Baze; when the Court is split, the holding of the Court "may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." Marks v. United States, 430 U.S. 188, 193 (1977). This principle means that the appropriate standard to be applied from Baze requires a defendant to show that a particular method of execution presents a "substantial risk of serious harm," or an

"objectively intolerable risk of harm." Baze, 128 S. Ct. at 1531.

The "substantial risk of serious harm" was one of several standards discussed and applied in Lightbourne. That case, of course, considered the constitutionality of Florida's current lethal injection procedures following an extensive evidentiary hearing in the circuit court. This Court concluded in Lightbourne and reaffirmed in Henyard under the protocols adopted by the Department of Corrections in August, 2007, Florida's procedures do not present a substantial risk of harm and do not violate the Eighth Amendment. Henyard, 33 Fla. L. Weekly at 631; Lightbourne, 969 So. 2d at 353.

This Court in Henyard also rejected the claim that Lightbourne must be reconsidered because this Court applied a higher, "inherent cruelty" standard in upholding Florida's current protocols. This assertion fails to acknowledge that this Court discussed and applied several standards. In fact, this Court expressly considered and rejected the argument that the adoption of a different standard in Baze would affect this Court's ruling to uphold the constitutionality of Florida's execution procedures. Lightbourne, 969 So. 2d at 352 ("Alternatively, even if the Court did review this claim under a 'foreseeable risk' standard as Lightbourne proposes or 'an

unnecessary' risk as the Baze petitioners propose, we likewise would find that Lightbourne has failed to carry his burden of showing an Eighth Amendment violation").

In Lightbourne this Court specifically found that "Lightbourne has not shown a substantial, foreseeable or unnecessary risk of pain." Lightbourne, 969 So. 2d at 353. While Baze did indeed reject the lower "unnecessary risk" standard, this Court found that Lightbourne had not met that standard or the higher "substantial risk" standard which Baze did apply. Clearly, Cox cannot demonstrate any Eighth Amendment violation under Lightbourne or Baze.

Cox argues that Florida's execution procedures may be deemed cruel and unusual if there is a refusal to adopt a procedure that reduces a substantial risk of pain (Appellant's Initial Brief p. 6). Cox's suggested alternative procedure is that of veterinary euthanasia specifically rejected in Baze (Appellant's Initial Brief p. 13-14). "[V]eterinary practice for animals is not an appropriate guide to humane practices for humans." Baze 128 S. Ct. at 1536.

The Baze decision itself affirms that Florida's procedures comply with the Eighth Amendment. In Baze, the Court specifically held that protocols similar to those used in Kentucky "would not create a risk that meets this standard," and

Florida's protocols provide greater protection than Kentucky's protocols, thereby reducing the risk of unnecessary harm. See Baze, 128 S. Ct. at 1537 (discussing standard); Baze, 128 S. Ct. at 1570 (Ginsburg, J., dissenting, noting that Florida has adopted safeguards for protection not found in Kentucky's protocols). Clearly, Baze offers no support for the claim that Florida's procedures are constitutionally flawed, or that this Court misapplied the Eighth Amendment in Lightbourne. See also Sexton v. State, 33 Fla. L. Weekly S86, S691 (Fla. Sept. 18, 2008) ("This same method of execution, consisting of lethal injection of the same three-drug combination under similar protocols, has also been found by the United States Supreme Court to be constitutional.").

As Lightbourne explains, the current protocols, adopted in August 2007, represent a concerted effort to improve the administration of the death penalty following recognition of weaknesses identified both by the Governor's Commission and the Department of Corrections following the Diaz execution. Lightbourne affirms the presumption of deference to the executive branch in administering lethal injection. Lightbourne, 969 So. 2d at 352; Provenzano v. State, 739 So. 2d 1150, 1153 (Fla. 1999); Buenoano v. State, 565 So. 2d 309, 311 (Fla. 1990).

The court below properly denied relief, applying binding precedent from Lightbourne and Schwab. Baze has now confirmed that Florida's procedures are constitutionally valid and this Court has concluded in Henyard that the holding in Lightbourne does not conflict with Baze. This Court must affirm the denial of relief on this issue.

ARGUMENT II

THE CONSTITUTIONALITY OF FLORIDA STATUTE SECTION 27.702

In summarily denying Cox's claim that Florida Statutes, section 27.702 is unconstitutional, the trial court found that the claim was procedurally barred and lacked merit (SPCR 96). The trial court citing to this Court's decisions in Diaz v. State, 945 So. 2d 1136 (Fla. 2006), and State ex rel. Butterworth v. Kenny, 714 So.2d 404 (Fla. 1998), summarily denied relief (SPCR 96).

Cox challenges the denial of his claim that Section 27.702, Florida Statutes, is unconstitutional. The constitutionality of a statute and the propriety of finding a procedural bar are legal questions, subject to *de novo* review. Rubio v. State, 967 So. 2d 768 (Fla. 2007); State v. Coney, 845 So. 2d 120, 137 (Fla. 2003).

Cox does not address the trial court's finding of a procedural bar on this issue. A challenge to the facial

validity of this statute could have been brought previously; this statute has existed for over a decade and was specifically upheld against a similar challenge in 1998. Cox's claim is thus procedurally barred.

In addition, this claim has no merit. Cox's specific challenge to section 27.702 concerns the prohibition against Capital Collateral Regional Counsels from filing civil lawsuits in federal court. In 1998, this Court decided State ex rel. Butterworth v. Kenny, 714 So. 2d 404 (Fla. 1998), holding that section 27.702 prohibited the Capital Collateral Regional Counsels from pursuing a civil rights action which had been filed to challenge the constitutionality of Florida's electric chair as a method of execution. In Diaz v. State, 945 So. 2d 1136, 1154-55 (Fla. 2006), this Court upheld section 27.702 against the same challenge Cox presents:

> Diaz contends that his due process rights have been violated because his CCRC attorneys cannot file a section 1983 action in federal court to challenge Florida's lethal injection procedures and lethal injection as a method of execution. Diaz further alleges that he has no other avenue available to bring such a federal challenge in light of the holding in Hill v. McDonough, 126 S. Ct. 2096, 165 L. Ed. 2d 44 (2006). We conclude that Diaz has misinterpreted the Hill decision. In Hill, the defendant filed a federal action under section 1983 to challenge the lethal injection procedure as cruel and unusual punishment. The federal district court and the Eleventh Circuit Court of Appeals both denied Hill's claim, holding that his section 1983 claim was the functional equivalent of a habeas petition. Because Hill had

> sought federal habeas relief earlier, his section 1983 action was deemed successive and thus procedurally barred. Hill, 126 S. Ct. at 2097. However, the United States Supreme Court reversed and held that a challenge to the constitutionality of the lethal injection procedure did not have to be brought in a habeas petition, but could proceed under section 1983. Id. at 2098. However, contrary to Diaz's assertions here, the United States Supreme Court did not hold that a constitutional challenge to lethal injection procedures could not be brought under a habeas petition.
>
> Accordingly, Diaz did have an alternative avenue for challenging the lethal injection procedure in federal court, but did not utilize it. In 1999, Diaz filed a federal habeas petition in federal district court. The petition was pending until January 2004. On January 14, 2000, section 922.105 was amended to provide for lethal injection as the method of execution in Florida. See ch. 2000-2, § 3, at 4, Laws of Fla. Also, while his federal habeas petition was pending, Diaz filed two habeas petitions in this Court. See Diaz v. Moore, 828 So. 2d 385 (Fla. 2001); Diaz v. Crosby, 869 So. 2d 538 (Fla. 2003).
>
> Under 28 U.S.C. § 2254, an application for a writ of habeas corpus in a federal court may be granted if the applicant has exhausted the remedies available in the state courts. Thus, had Diaz raised a lethal injection claim in either of his two state habeas petitions that were filed after lethal injection was adopted as the method of execution in Florida, he could have then raised the claim in his initial federal habeas petition that was pending from 1999 until 2004. However, Diaz did not utilize this avenue that was available to him. Thus, it was due to his own lack of diligence that he missed the opportunity to challenge execution by lethal injection in a federal habeas action. Accordingly, we find no violation of Diaz's due process rights and no basis for striking down section 27.702 as unconstitutional. We deny Diaz's petition for all writs relief.

Section 27.702 does not deny Cox *any right* to challenge lethal injection in a federal civil action, it only denies use

of his taxpayer-supplied capital counsel for doing so. His attack on the statute is no more than a request for an unwarranted extension of his statutory right to counsel. As the court below properly found this challenge to be both procedurally barred and without merit, this Court should affirm the summary rejection of this claim. See also Henyard v. State, 33 Fla. L. Weekly S629, 631 (Fla. Sept. 10, 2008) (noting that recent caselaw from the Eleventh Circuit Court of Appeals did not undermine or call into question this Court's ruling in Diaz).

ARGUMENT III

VENOUS ACCESS CLAIM

In his third claim, Cox asserts that current or future health condition may cause concerns over obtaining venous access during any lethal injection procedure. The trial court summarily denied relief stating:

> This Court agrees with the State that this claim is not proper for post-conviction relief because it does not attack the judgment or sentence. Foster v. State, 400 So. 2d 1, 4 (Fla. 1981). Moreover, this claim is speculative. Significantly, Mr. Cox does not contend that there is any current medical problem or condition that indicating a problem with venous access. The State also correctly points out that Florida's protocols provide for inmates who have medical considerations. Thus, for the reasons stated above, issue three is summarily DENIED.

(SPCR 97).

This claim was properly denied and should be affirmed. Cox argued that current and future health conditions *may* contribute to difficulties in obtaining venous access (SPCR 18). First, post-conviction relief is not available since this challenge does not invalidate either the judgment or the imposition of sentence. Foster v. State, 400 So. 2d 1, 4 (Fla. 1981); see also Fla. R. Crim. P. 3.851(e). Moreover, the claim was speculative and post-conviction relief cannot be based on "speculation or possibility". Maharaj v. State, 778 So. 2d 944 (Fla. 2000).

Notwithstanding, the claim is without merit. While Cox asserted that he is a man of "significant" height and weight, (according to DOC's website, Cox is 6'1" and weighs 247 pounds), he did not contend that there is presently any vein problem and he seemed to predicate his claim on "any future medical or health conditions Mr. Cox may develop" (SPCR 18). Obviously, any future problems that arise will have to be addressed considering the particular problems, the protocols operative at that time and other technological advances made. As for the present time, Florida's protocols provide for inmates who have health considerations (SPCR 62-63). As the court below noted, the current protocols take into consideration the individual medical conditions of each inmate (SPCR 97). Cox ignores these

protocols. Because Cox's speculative assertions are legally insufficient and without merit, this Court should affirm the trial court's summary denial.

CLAIM IV

THE CONSTITUTIONALITY OF FLORIDA STATUTE SECTION 945.10

In his fourth claim, Cox claims that Florida Statutes, Section 945.10 is unconstitutional because it prohibits the disclosure of the identities of members of the execution team. In denying relief the trial court held:

> This Court notes once again that Mr. Cox is attacking the manner in which his sentence is to be carried out and not the sentence itself. The Florida Supreme Court has stated "the motion to vacate under Florida Rule of Criminal Procedure 3.850 must be directed to the judgment and sentence of the trial court." Foster v. State, 400 So. 2d 1, 4 (Fla. 1981). This Court notes the Florida Supreme Court in Bryan v. State, 753 So. 2d 1244 (Fla. 2000) stated that the § 945.10 exemption satisfied constitutional requirements for exemption to public records disclosure law, as it provided a meaningful exemption that was supported by a thoroughly articulated public policy. Thus, the requisite public necessity under the Florida Constitution justified public records disclosure exemption for information, which if released, would identify executioner of death sentence. Such disclosure of information identifying the executioner would jeopardize that person's safety and welfare by exposing that person to potential harassment, intimidation, and harm. Id. at 1250-51; see also, Provenzano v. State, 761 So. 2d 1097, 1099 (Fla. 2000). Thus, issue four is summarily DENIED.

(SPCR 97-98).

Cox challenges the denial of his claim that the confidentiality of the execution team, codified in section

945.10, Florida Statutes, violates his constitutional rights. The court below summarily denied this claim based on this Court's prior precedent. The constitutionality of a statute is a legal question, subject to *de novo* review. Rubio, 967 So. 2d at 771.

The State submits that the instant issue is procedurally barred. Cox's motion suggested that newly discovered evidence rendered the statute unconstitutional, citing to the Diaz execution, testimony before the Governor's Commission and the Lightbourne hearings, and evolving standards of decency (SPCR 19). However, none of these events had any impact on the statute at issue, the construction of the statute, or Cox's particular challenge. Cox offers no explanation as to why his claim was not presented previously; it is procedurally barred and the lower court could have summarily denied the claim on that basis alone. See Henyard v. State, 33 Fla. L. Weekly S629, 632 (Fla. Sept. 10, 2008) (noting that identical claim was procedurally barred).

Furthermore, as the lower court ruled, this claim is without merit. Cox's substantive claim has already been rejected by this Court in Bryan v. State, 753 So. 2d 1244, 1250-51 (Fla. 2000). Even if a particular situation required a court to consider testimony from an execution team member, this Court

has recognized that accommodations could be taken to satisfy this requirement without compromising the identity of execution team members. Provenzano v. State, 761 So. 2d 1097, 1099 (Fla. 2000) (upholding exclusion of such testimony without foreclosing the possibility of taking such testimony in camera). This Court directly upheld the constitutionality of this statute in Bryan, and Cox's argument provides no basis for retreat from that holding.

Cox asserts, without citing any authority, that "[e]xecutions carried out by anonymous team members put inmates at unnecessary and foreseeable risk of infliction of pain and violate Due Process" (Appellant's Initial Brief p. 37). Most states, like Florida, maintain the confidentiality of this information. As noted in Baze, "it is difficult to regard a practice as 'objectively intolerable' when it is in fact widely tolerated." Baze, 128 S. Ct. at 1532. At any rate, Cox has failed to offer any reasonable basis for relief on this claim.

None of the cases cited by Cox supports his claim that section 945.10 is unconstitutional. Much of his argument on this issue describes ongoing lethal injection challenges in other states. Reliance on those other situations to demonstrate that Florida's public records exemption is unconstitutional is misplaced; none of the other situations discussed involve the

application of Florida's current protocols for execution or any constitutional requirement for disclosure of this information.

In California First Amendment Coalition v. Woodford, 299 F.3d 868 (9th Cir. 2002), the federal court found that California's "Procedure 770" unconstitutionally limited the public's right of access to executions conducted in that state. One of the factors supporting this conclusion was the court's determination that the identification of execution team members could be protected through less restrictive means, such as requiring team members to wear surgical masks to conceal their identities. Id. at 880, 884-85. Thus, while the court struck Procedure 770's restrictions in several respects, that case cannot be read as requiring disclosure of execution team member identities.

Similarly, Travaglia v. Department of Corrections, 699 A.2d 1317 (Pa. Commw. Ct. 1997), does not compel disclosure of execution team identities. Travaglia, decided under Pennsylvania's public records laws, held that the identities of *witnesses* to prior executions must be disclosed upon request. Travaglia upheld the confidentiality of a manual describing Pennsylvania's lethal injection procedures, and there is no indication that a records request seeking the identity of *execution team members* was before the court for consideration.

Cox claims that this information is necessary for a successful challenge to Florida's current lethal injection protocols, yet he cites no authorities holding that disclosure of execution team members' identities is constitutionally required. This claim was properly summarily denied, and this Court must affirm the denial of relief.

CONCLUSION

In conclusion, Appellee respectfully requests that this Honorable Court affirm the lower court's denial of Cox's successive motion for post-conviction relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Nathaniel E. Plucker, Assistant Capital Collateral Regional Counsel, Office of the Capital Collateral Regional Counsel – Middle Region, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619, on this 7th day of October, 2008.

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).

Respectfully submitted,

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