IN THE SUPREME COURT OF FLORIDA

CASE NO. SC 08-887

ALLEN W. COX,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

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

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This is the appeal of the circuit court's summary denial of Mr. Cox's successive motion for post conviction relief brought pursuant to Florida Rule of Criminal Procedure 3.851.

Citations shall be as follows: The record on appeal shall be referred to as ROA P.-. All other references will be self-explanatory or otherwise explained herein.

REQUEST FOR ORAL ARGUMENT

Allen Cox has been sentenced to death. The resolution of issues involved in this action will determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar posture. A full opportunity to air the issues through oral argument would be appropriate in this case, given the seriousness of the claims at issue and the stakes involved. Allen Cox, through counsel, respectfully requests this Court grant oral argument.

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Procedural History

On February 5, 1999, Mr. Cox was charged by indictment with one count of first-degree murder and related offenses. The jury rendered a guilty verdict on March 14, 2000, and recommended a death sentence on March 18, 2000. Death was imposed, and the sentencing order entered, on July 24, 2000. The Florida Supreme Court affirmed Mr. Cox's convictions and sentences on direct appeal. Cox v. State, 819 So.2d 705 (Fla. 2002), *cert. denied*, Cox v. Florida, 537 U.S. 1120 (2003). Mr. Cox filed a post-conviction motion for relief under Fla. Crim. R. 3.851 on January 6, 2004, and the motion was denied on April 19, 2005.

On May 13, 2005, Mr. Cox appealed the denial of his 3.851 post-conviction motion to the Florida Supreme Court. The initial brief was filed on January 12, 2006. Following oral arguments on December 7, 2006, the Florida Supreme Court denied relief on July 5, 2007, and denied a motion for rehearing on September 25, 2007. Cox v. State, 966 So.2d 337 (Fla. 2007). Thereafter, Mr. Cox timely filed a petition for habeas corpus relief in Federal District Court on October 17, 2007. That petition is still pending.

On October 1, 2007, Mr. Cox filed a Successive Motion To Vacate Judgments of Sentence. ROA P.1-26. The State filed its Response on November 26, 2007. ROA

P.43-66. The Circuit Court held a case management conference on February 29, 2008. ROA P.119-151. The lower court summarily denied Mr. Cox's successive Motion for Post Conviction Relief on March 24, 2008, and a motion for rehearing on April 8, 2008. ROA P.94-9, 111-2. Mr. Cox timely filed his Notice of Appeal. This appeal follows.

STATEMENT OF FACTS

Mr. Cox raised four claims in his Successive Motion for Postconviction Relief: 1) Newly discovered evidence proves execution by lethal injection violates the Eighth Amendment prohibition against cruel and unusual punishment and therefore Mr. Cox's death sentence is unconstitutional, 2) Florida Statute 27.702 is unconstitutional on its face and as applied in violation of the Due Process and Equal Protection Clauses of the Florida and Federal Constitution, 3) Mr. Cox's current and future health issues raise a substantial probability that Florida's method of lethal injection raises an unconstitutional risk of wanton and unnecessary pain, 4) the Florida Department of Corrections' Procedures, coupled with Florida Statute 945.10 which prohibits Mr. Cox from knowing the identity of specified members of the execution team, violates his constitutional rights under the Fifth, Sixth, Eighth and Fourteenth Amendments. In addition, Mr. Cox filed numerous documents in support of these claims. The lower court denied all of these claims without an evidentiary hearing. ROA P.94-9.

STANDARD OF REVIEW

Florida Rule of Criminal Procedure 3.850(d) provides that a defendant is entitled to an evidentiary hearing on postconviction claims for relief unless the motion, files, and records in the case conclusively show that the movant is entitled to no relief. Florida Rule of Criminal Procedure 3.851(f)(5)(B) applies the same standard to successive postconviction motions in capital cases. In reviewing a trial court's summary denial of postconviction relief without an evidentiary hearing, this Court must accept all allegations in the motion as true to the extent they are not conclusively rebutted by the record. Hodges v. State, 885 So.2d 338, 355 (Fla. 2004) (quoting Gaskin v. State, 737 So.2d 509, 516 (Fla. 1999)). To uphold the trial court's summary denial of claims raised in a 3.850 motion, the claims must be either facially invalid or conclusively refuted by the record. McLin v. State, 827 So.2d 948, 954 (Fla. 2002) (quoting Foster v. Moore, 810 So.2d 910, 914 (Fla. 2002)).

ARGUMENT I

THE LOWER COURT ERRED IN SUMMARILY DENYING ALLEN COX'S SUCCESSIVE 3.851 MOTION AS A MATTER OF LAW. THE COURT FAILED TO ADDRESS THE ENTIRE RECORD AND FAILED TO APPLY THE FACTS OF THE CASE TO THE LAW. THE LOWER COURT ALSO ERRED IN HOLDING THAT FLORIDA'S METHOD OF EXECUTION DOES NOT VIOLATE THE EIGHTH AMENDMENT PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT.

The lower court erred as a matter of law in summarily denying Mr. Cox's motion. Mr. Cox alleged in his Motion that based on newly discovered evidence, Florida's procedures, training and method of lethal injection are unconstitutional. At the time Mr. Cox's motion was pending, this Court decided Lightbourne v. McCollum, 969 So.2d 326 (Fla. 2007) and Schwab v. State, 969 So.2d 318 (Fla. 2007). In Lightbourne, this Court explained the constitutional standard for addressing method of execution claims. In order for a method of execution to "constitute cruel or unusual punishment, it must involve 'torture or a lingering death' or the infliction of 'unnecessary and wanton pain.' . . . [A] punishment is not cruel and unusual if a state's protocol does not expose the prisoner to 'more than a negligible risk of being subjected to cruel and wanton infliction of pain,' . . . 'the mere possibility of human error or a technical malfunction cannot constitute a sufficient showing to meet this burden."

Lightbourne v. McCollum, 969 So.2d at 349 (internal citations omitted). The lower court relied on those rulings in denying Mr. Cox's motion.

However, during the pendency of Mr. Cox's appeal, the Supreme Court of the United States issued its decision in Baze v. Rees, -- U.S. --, 128 S. Ct. 1520, -- L. Ed. 2d. -- (2008). In Baze, the Supreme Court, in a plurality decision which addressed its punishment jurisprudence as far back as 1879, held that in order to prevail on a claim that a method of execution violates the Eighth Amendment, a petitioner must demonstrate that the particular method of carrying out a death sentence raises a "substantial risk of serious harm," or an "objectively intolerable risk of harm," that prevents prison officials from pleading that they were "subjectively blameless for purposes of the Eighth Amendment." Baze v. Rees, 128 S.Ct. at 1530-31 (*quoting* Farmer v. Brennan, 511 U.S. 825, 842, 846, and n.9, 114 S. Ct. 1970, 128 L.Ed.2d 811 (1994)). The Supreme Court explicitly rejected the "unnecessary risk standard." Id. at 1532. The Court explained that:

> Simply because an execution method may result in pain, either by accident or as an inescapable consequence of death, does not establish the sort of "objectively intolerable risk of harm" that qualifies as cruel and unusual. In Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 67 S.Ct. 374, 91 L.Ed. 422 (1947), a plurality of the Court upheld a second attempt at executing a prisoner by electrocution after a mechanical malfunction had interfered with the first attempt. The principal opinion noted that "[a]ccidents happen for which no man is to blame," Id. at 462, 67 S.Ct. 374, and concluded that such "an accident, with no suggestion of

> malevolence," Id. at 463, 67 S.Ct. 374, did not give rise to an Eighth Amendment violation, Id. at 463-464, 67 S.Ct. 374.
>
> As Justice Frankfurter noted in a separate opinion based on the Due Process Clause, however, "a hypothetical situation" involving "a series of abortive attempts at electrocution" would present a different case. Id. at 471, 67 S.Ct. 374 (concurring opinion). In terms of our present Eighth Amendment analysis, such a situation-unlike an "innocent misadventure," Id. at 470, 67 S.Ct. 374 - would demonstrate an "objectively intolerable risk of harm" that officials may not ignore. See Farmer, 511 U.S., at 846, and n. 9, 114 S.Ct. 1970. In other words, an isolated mishap alone does not give rise to an Eighth Amendment violation, precisely because such an event, while regrettable, does not suggest cruelty, or that the procedure at issue gives rise to a "substantial risk of serious harm." Id. at 842, 114 S.Ct. 1970.

Baze, 128 S.Ct. at 1531.

The Supreme Court further explained that such a showing can be made when a state refuses to adopt reasonably feasible alternatives if they "effectively address a 'substantial risk of serious harm.' To qualify, the alternative procedure must be feasible, readily implemented, and in fact significantly reduce a substantial risk of severe pain. If a State refuses to adopt such an alternative in the face of these documented advantages, without a legitimate penological justification for adhering to its current method of execution, then a State's refusal to change its method can be viewed as 'cruel and unusual' under the Eighth Amendment." Baze, 128 S.Ct. at 1532 (internal citations omitted).

Because Florida's Constitution was amended in 2002 to require this Court to interpret Florida's cruel and unusual punishment clause in conformity with the United States Supreme Court, this Court must apply the standard set out in Baze to its analysis of Mr. Cox's claim. Lightbourne v. McCollum, 969 So.2d at 334, 335.

In denying this claim, the lower court held that Mr. Cox had challenged Florida's lethal injection protocols as violating the Eighth Amendment and that Mr. Cox had alleged that newly discovered evidence established that Florida's use of lethal injection as a means of execution violated the Eighth Amendment. ROA P.95. The lower court then held that the first issue was precluded by this Court's rulings in Sims v. State, 754 So.2d 657 (Fla. 2000), finding lethal injection to be constitutional, and that the second issue was precluded by this Court's decisions in Schwab and Lightbourne. ROA P.95-6.

The lower court's ruling is erroneous for two reasons. First, the lower court did not have the benefit of the Supreme Court's ruling in Baze and therefore did not apply the proper standard. Second, the lower court incorrectly interpreted Lightbourne and Schwab, improperly finding that relief was barred because this Court had upheld "the lethal injection procedures currently in place in Florida, as actually administered," and therefore no challenges to the current protocols could be sustained. ROA P.96.

In his Motion, Mr. Cox set out sufficient facts, which must be accepted as true since the motion was summarily denied, to meet the standard established in Baze. Mr. Cox alleged that Florida's method of execution, as shown by the newly discovered evidence of the botched execution of Angel Diaz, testimony presented in the Lightbourne hearings, and the Governor's Commission on Lethal Injection, establishes that Florida's training methods and protocols create a substantial and objectively intolerable risk of harm.

Mr. Cox alleged that Florida's lethal injection procedures and its protocol effective August 1, 2007 (hereinafter August 2007 Protocol) are defective for the following reasons:

> (1) The Florida Department of Corrections (hereinafter FDOC) screening of members of the execution team is inadequate, inconsistent and unreliable. FDOC has failed to set meaningful and adequate standards, qualifications or verifiable or documented safeguards in ensuring that meaningful qualifications or standards are met for the primary or secondary executioners, team members or medically trained personnel. By way of example, the executioner need merely be an adult who has undergone a criminal background check and who is sufficiently trained to administer the lethal chemicals. There is no other requirement and no description of the contents or method of training, who administers it or what qualifies as sufficient training. There is no way of knowing if the executioner is mentally ill, has a personality disorder, a drug and alcohol problem, pending legal troubles or whether he/she has been able to achieve a high school education. For example, the new protocols do not describe the manner in which the team warden who is in charge, will select the execution team members. The warden who was in charge of the last four executions by lethal injection, Warden Bryant, testified at

the Lightbourne hearing. At the hearing, Warden Bryant described the following procedure: He is taken by a third person (whose name he stated he could not disclose per the confidentiality statute) to the place of employment of the medically qualified persons. He is shown their medical licenses and makes sure that they are valid, but admits that their names are blocked out. **Even the Warden does not know who the medically qualified persons are**. The unidentified third person literally points out to the Warden who the individuals are who will be serving as the "medically qualified persons for the upcoming execution. Then, when the "medically qualified persons arrive at the prison, Warden Bryant is able to recognize them **by sight** as being the same people who were pointed out to him.

There is nothing in the August 1, 2007 protocols to suggest that the "team warden, who by definition in the protocol has the final and ultimate decision making authority in every aspect of the lethal injection process, will know the identity of all of the members of his execution team. The new protocols still do not require the team warden to obtain the employment records, error rates, and proficiency testing of the execution team members;

(2) The FDOC has failed to ensure or implement meaningful training, supervision, or oversight, and/or verifiable or documented safeguards that training, supervision and oversight of the execution team/executioners and medically qualified personnel is met, which has created an undue risk of unnecessary pain during the execution procedure. By way of example, DOC personnel at the Lightbourne hearing testified that the executioners have no professional licensures or certifications, and no medical training or background, and the DOC training consisted of pushing empty syringes or, when the chemicals were actually used, emptying the syringes into a bucket, a method that would be inadequate to train clinically naive personnel to competently and reliably detect IV infiltration or other potential problems with the IV site. The August 1, 2007 protocols also state that there should be at a minimum, quarterly training sessions where all members of the execution team will be present. The protocols call for a written record of these training sessions, but do not state what should be included in the

written record. Under the new protocols, it appears that it would be sufficient for the "team warden to state that a training occurred, without documenting who was present and what training they actually completed;

(3) The FDOC has failed to conduct or implement meaningful oversight to ensure that executions are carried out in a lawful manner required accurate and reliable record keeping of the lethal injection procedures, including but not limited to time frames of the actual execution process, injection of chemicals, maintenance of the chemicals, participants roles and locations and documentation of unforeseen events and responses to those events. For example, while the new protocols do require some written records of activities, there is still not written record of when the lethal chemicals begin to flow, nor is there a written printout of the data from the heart monitors;

(4) The FDOC has allowed improper mixing, preparation and administration of the lethal chemicals by unqualified execution team members, has failed to require accurate and reliable record keeping of the storage, mixing, preparation and administration of the chemicals, which has created an undue risk of unnecessary pain during the execution procedure. Further, the use of pancuronium bromide as a paralytic creates an undue and unnecessary risk that the inmate will experience excruciating and undue pain as he slowly suffocates to death but will be unable to move or speak to indicate that he is in pain. The use of pancuronium bromide is prohibited in the euthanasia of animals;

(5) The FDOC execution chamber is an inadequate and poorly designed facility and clothing and other apparatus used to conceal the identities of the executioners and medically qualified personnel creates an undue risk of unnecessary pain and wanton suffering because it impairs the executioners and medically qualified personnel's ability to monitor intravenous infiltration and other potential problems. Deficiencies in the design and set up of the chamber which create an undue risk of unnecessary pain during the execution procedure include but are not limited to: inadequate lighting, the chemicals and the individual administering the chemicals are not in direct view, close

enough to or even in the same room with the inmate which creates an undue risk that the executioners will fail to detect difficulty or problems with anesthetic consciousness or intravenous access, which creates an undue risk of unnecessary pain. The syringes are kept in a syringe holder which is a departure from clinical practice and is not used in any other execution chamber in the country that Mr. Cox is aware of. The use of a syringe holder also creates the risk of unnecessary pain and undue suffering. FDOC has failed to obtain or require the use of a bispectral index monitor to monitor anesthetic depth as recommended by DOC's general counsel in the August 15, 2006 Dyehouse memorandum;

(6) The FDOC has failed to ensure that properly trained, clinically experienced, certified and licensed medical professionals oversee and conduct the lethal injection procedure. The August 2007 Protocols fail to ensure or set minimal standards that execution team members and/or licensed medical professionals are qualified to properly monitor and/or adequately assess consciousness of the inmate, implement and monitor intravenous access, address medical issues likely to occur as a result of inadequate, compromised or failed intravenous access. FDOC has failed to obtain or require the presence of an anesthesiologist as outlined by DOC's general counsel in the August 15, 2006 Dyehouse memo;

(7) The FDOC has failed to ensure a sufficient protocol to reasonably manage complications inherent in the lethal injection process. For example, there is nothing in the new protocols that defines a procedure for notification to the inmate or the inmate's counsel should the medical examination reveal any potential complications with venous access or any other aspect of the lethal injection other than to say that the team warden will resolve the issue. Nothing in the August 1, 2007 protocols addresses the possible remedies for complications noted in the medical examinations that take place a week prior to the execution. The protocols merely state that the "team warden will consult with the other team members that performed the evaluation and conclude what is the more suitable method of venous access (peripheral or femoral) for the lethal injection process given the individual circumstances of the condemned inmate based on all information provided. In addition, there is no provision for the inmate to have his own designated independent

physician or medically qualified professional present for the examination;

(8) The FDOC's refusal to provide any information as to the qualifications, training or background of the executioners, execution team members or the medically qualified members prohibits meaningful review or oversight of the lethal injection process, fails to comport with Due Process and renders meaningless any assessment as to whether the Department of Corrections is capable of carrying out lethal injections in a humane manner. The State's death penalty scheme cannot maintain integrity if the State is not accountable to the public. As noted above, not even the Warden will know the identity of all of the members of his execution team. The employment records, error rate, and proficiency testing are not required or requested, nor is up to date medical equipment to monitor levels of consciousness required. In addition, the FDOC has dug in its heels and continues to mandate the use of pancuronium bromide, a paralytic, the only purpose for which it is used is for aesthetic concerns for the observers. This purpose does not warrant the undue risk that pancuronium may cause a person to experience excruciating pain while he suffocates to death, unable to breath, speak or move;

(9) The provision for Periodic Review and Certificate from the Secretary is insufficient to insure that there will not be a risk of unnecessary pain during the execution procedure. For example, all that is required is that the Secretary of the Department of Corrections certify to the Governor that the Department is adequately prepared to carry out executions by lethal injection. The Certification is not required to contain how the lethal injection procedure was reviewed, what aspects the Secretary considered in his review of the procedures, or how the Secretary verified that he does in fact have all the "necessary procedures, equipment, facilities, and personnel in place..." In addition, the Certification is to be provided to the inmate and the inmate's counsel, **after** the review has been completed. There is no provision for the inmate or the inmates counsel's to be present **during** the actual reviewing process and certification;

ROA Vol. 7, p. 1148-1154.

In addition, Mr. Cox listed Teresa Zimmers, Ph.D. and Linda Waterman, D.V.M. as witnesses who would testify to the use of a paralytic and veterinary practices in euthanasia of animals, including the use of a single barbiturate. ROA P. 27-35 (Exhibit List).

Mr. Cox has alleged, based on Florida's unique history of botched executions, including that of Angel Diaz and Bennie Demps, that the method of execution and the training and procedures create a substantial and objectively intolerable risk of harm. Mr. Cox has alleged that not only are there problems with the training, oversight and actual practice of executions but he has also alleged that there exists a "reasonably feasible alternative to effectively address [Florida's]'substantial risk of serious harm.' . . . [T]he alternative procedure [is] feasible, readily implemented, and in fact [will] significantly reduce a substantial risk of severe pain. [Because Florida] refuses to adopt such an alternative in the face of these documented advantages, without a legitimate penological justification for adhering to its current method of execution, … [its] refusal to change its method [is] 'cruel and unusual' under the Eighth Amendment." Baze, 128 S.Ct. at 1532 (internal citations omitted). As alleged by Mr. Cox in his motion, the reasonably feasible alternative is following the practices set out

by veterinarians, either using a single barbiturate or another alternative which does not include the paralytic.

By summarily denying this claim, Mr. Cox was unconstitutionally deprived of his Due Process right to present testimony, cross-examine the actual executioners, present a reasonably feasible alternative as established by veterinary standards, or to present testimony as to how his unique history and characteristics will render him especially susceptible to a botched execution due to Florida's failures to provide sufficient safeguards, training and qualified executioners.

The lower court's second error was in its finding that Schwab and Lightbourne bar relief in any lethal injection claims under the current protocols. In Schwab, this Court addressed the standard for considering challenges to lethal injection protocols in light of Lightbourne. In upholding the denial of Schwab's claims without an evidentiary hearing, this Court focused on the fact that Schwab did not assert that he would have presented additional testimony or other evidence to support his claims outside of what was presented in Lightbourne. See Schwab, 969 So.2d at 322, n.2; 969 So.2d at 324, n.4; 969 So.2d at 324-5. Mr. Cox raised in his successive motion additional evidence and testimony outside of what was presented in Lightbourne, and would present such at an evidentiary hearing. Specifically, Mr. Cox seeks to present the testimony of experts related to anesthesia and euthanasia which was not presented

in Lightbourne, and would also be seeking to present testimony from executioners and the medically qualified personnel, which was not presented in either Lightbourne or Schwab.

While some parts of Mr. Cox's claims may have been addressed by Lightbourne, certainly this Court did not address the issues of Mr. Cox's venous access, whether the lower court should hear from veterinarians or others experienced in euthanasia, or hear testimony about the training, experience and identity of the actual executioners. As such, this Court should reverse the lower court's summary denial of his claims and allow Mr. Cox to present testimony as to his venous access (also raised in Argument III), a reasonably feasible alternative in light of Baze, and to cross examine the executioners as to their training, experience and background (also raised in Argument IV).

ARGUMENT II

THE LOWER COURT ERRED IN SUMMARILY DENYING MR. COX'S CLAIM THAT FLORIDA STATUTE 27.702 IS UNCONSTITUTIONAL FACIALLY AND AS APPLIED IN VIOLATION OF THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FLORIDA AND FEDERAL CONSTITUTION

Mr. Cox alleged that he is an indigent prisoner under sentence of death. This Court, pursuant to Fla. Stat. § 27.702(1994), appointed the office of the Capital

Collateral Regional Counsel - Middle to represent Mr. Cox in his post conviction proceedings in state and *federal court*. Mr. Cox also alleged that the State of Florida, unlike many jurisdictions, has established a statutory right to counsel in capital postconviction proceedings. It has created and has specially funded Capital Collateral Regional Counsel Offices (CCRC) to provide representation to death-sentenced inmates in postconviction collateral actions and extends to both the state and federal system to ensure continuity of counsel. However, Florida Statute 27.702 (2006) prohibits CCRC from filing any 28 U.S.C. § 1983 claims on Mr. Cox's behalf. Mr. Cox raised below that this portion of the Statute is unconstitutional facially and as applied to the particular facts of his case.

The lower court denied this claim, finding that it was procedurally barred and without merit. ROA P.96. The lower court found that this Court has held that postconviction or collateral actions authorized by statute do not include civil rights actions under 42 U.S.C. §1983, citing Diaz v. State, 945 So.2d 1136, 1154-55 (Fla. 2006) and State ex rel Butterworth v. Kenny, 714 So.2d 404, 410 (Fla. 1998), and denied the claim on that basis.

Mr. Cox is in a unique position - his initial state postconviction motion was pending before this Court at the time the events leading up to his issues in Claims I, II and IV of his successive motion occurred, including the botched execution of Angel

Diaz, the Governor's Commission on the Administration of Lethal Injection hearings, and the Lightbourne hearings. Mr. Cox timely filed the instant successive post-conviction motion on October 1, 2007. However, when this Court denied Mr. Cox relief on his initial post-conviction motion, he was required under federal law to file his federal habeas petition by October 17, 2007. Therefore, the claims in his successive motion are unexhausted, and Mr. Cox faces the very real possibility that he will not be able to obtain federal review of the claims in his successive motion because of Florida Statute 27.702. As such, Fla. Stat. 27.702 is unconstitutional as applied to Mr. Cox in that it prevents his counsel from seeking relief under 42 U.S.C. § 1983, the only viable avenue for review of this claim left to Mr. Cox if the State is successful in having this claim dismissed in federal court. This denial of his counsel seeking his only viable avenue for relief in the federal courts is a denial of his due process and equal protection rights under both the Florida and United States Constitutions.

The lower court relied on the Diaz case in rejecting this claim. However, the lower court's analysis is flawed. First, Mr. Cox has met the standards for newly discovered evidence. Mr. Cox is raising his claim based on the newly discovered evidence of the botched execution of Angel Diaz, the Report on the Governor's Commission, the Lightbourne hearings and the Dyehouse memos. None of this

evidence was reasonably available through due diligence prior to the time Mr. Cox filed his initial post-conviction motion or his appeal to this Court of that motion. It is also important to note that this Court has impliedly and expressly held in Lightbourne and Schwab that these events did constitute newly discovered evidence. *See also* Buenoano v. State, 565 So.2d 309, 311 (Fla. 1990) (holding Eighth Amendment challenge was not procedurally barred because the "claim rest[ed] primarily upon facts which occurred only recently during Tafero's execution.")

Second, Mr. Cox's case is distinguishable from Diaz. In Hill v. McDonough, 547 U.S. 573, 126 S.Ct. 2096, 165 L.Ed.2d 44 (2006), the Supreme Court held that a section 1983 suit was a valid means to challenge lethal injection that did not implicate the AEDPA's prohibition against successive federal habeas petitions. In December of 2006, this Court held, in Diaz, that the prohibition against CCRC from filing an action under 28 U.S.C. § 1983 to attack the constitutionality of lethal injection was not unconstitutional facially and as applied, because Diaz could have filed the claim in his federal habeas petition. This Court explained:

> [T]he "postconviction or collateral actions authorized by statute" do not include civil rights actions under 42 U.S.C. § 1983. State ex rel. Butterworth v. Kenny, 714 So.2d 404, 410 (Fla.1998).
>
> 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, ---U.S. ----, 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.

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.

Diaz v. State, 945 So.2d 1136, 1154-55 (Fla. 2006).

Mr. Cox's case is distinguishable from Diaz on a number of points. First, as outlined above, Mr. Cox is filing his claim under newly discovered evidence (something Diaz could not have done since it was his execution that was botched and upon which Mr. Cox relies). This difference alone undercuts the rationale for the result in Diaz and requires a different result in this case.

Second, Mr. Cox has made diligent efforts to raise his lethal injection claim in federal court but has been denied an opportunity to do so. Mr. Cox's federal habeas petition is pending, and while he has raised this claim in it, it is an unexhausted claim as the claims are still pending before this Court. See Cox v. McDonough, M.D. Fla. 5:07-cv-425-Oc-10GRJ. After the botched Angel Diaz execution, the Governor's Commission on Lethal Injection, and the Lightbourne hearings, Mr. Cox timely filed his successive 3.851 motion in state court based on this newly discovered evidence. Shortly thereafter, he was required under federal law to file his habeas petition. Mr. Cox was then placed in a position where he either had to file a mixed petition (one with exhausted and unexhausted claims) or abandon the claims in his successive petition. Mr. Cox did not want to abandon this claim, and therefore filed a mixed

petition. Mr. Cox then moved to stay the federal proceedings so that he could exhaust his claim in state court.

The State of Florida opposed Mr. Cox's motion to stay the proceedings in federal court, and the federal court denied the motion to stay. The State subsequently has argued in its response to Mr. Cox's habeas petition that the claim is unexhausted and that it should therefore be dismissed. If the State prevails on its argument, it will have successfully precluded Mr. Cox from obtaining any federal review of his claim.

Lastly, Mr. Cox could not have raised his challenge previously, and it was not "due to his own lack of diligence that he missed the opportunity to challenge execution by lethal injection in a federal habeas action." Until the Diaz execution, Mr. Cox, based on the promises and assurances of the Florida Department of Corrections and the office of the Attorney General, as relayed in Sims v. State, 753 So.2d 66 (Fla. 2000), believed that the FDOC had procedures and processes in place which would ensure that lethal injection in Florida would comport with evolving standards of decency. Mr. Cox could not anticipate that the promises and assurances of FDOC and the Attorney General were false and misleading, nor could Mr. Cox have been aware of the 2006 Dyehouse memos or the secretly established August 2006 protocols. Further, it was not until the United States Supreme Court decided Hill in June of 2006 that Mr. Cox could have been aware that a Section 1983 claim was a viable method to

challenge lethal injection. The Eleventh Circuit Court of Appeals had held such a pleading was a successive petition barred by the constraints of the AEDPA. This was the state of the law until it was overruled in Hill.

Mr. Cox has shown a violation of Due Process and Equal Protection. As the United States Supreme Court has stated:

> [D]ue process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard. Early in our jurisprudence, this Court voiced the doctrine that '(w)herever one is assailed in his person or his property, there he may defend,' Windsor v. McVeigh, 93 U.S. 274, 277, 23 L.Ed. 914 (1876). See Baldwin v. Hale, 1 Wall. 223, 17 L.Ed. 531 (1864); Hovey v. Elliott, 167 U.S. 409, 17 S.Ct. 841, 42 L.Ed. 215 (1897). The theme that 'due process of law signifies a right to be heard in one's defense,' Hovey v. Elliott, supra, 417, 17 S.Ct. at 844, has continually recurred in the years since Baldwin, Windsor, and Hovey. Although '(m)any controversies have raged about the cryptic and abstract words of the Due Process Clause,' as Mr. Justice Jackson wrote for the Court in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950), 'there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.' Id., at 313, 70 S.Ct. at 656.

Boddie v. Connecticut, 401 U.S. 371, 377-78, 91 S. Ct. 780, 28 L. Ed. 2d 113 (1971). "Our cases further establish that a statute or a rule may be held constitutionally invalid as applied when it operates to deprive an individual of a protected right although its general validity as a measure enacted in the legitimate exercise of state power is

beyond question." Id. at 379.

Mr. Cox and any other similarly situated death row inmate should not have their right to challenge the constitutionality of lethal injection in a federal proceeding impaired or extinguished because of the arbitrary constraints of Section 27.702. The statutory limitation on CCRC is an unconstitutional deprivation of due process, access to the courts, equal protection and the protection against cruel and unusual punishment as embodied in the federal constitution. A similarly situated death row inmate, who is not represented by CCRC, but has privately retained counsel, can file a Section 1983 suit challenging the constitutionality of Florida's lethal injection proceedings. Mr. Cox, who is indigent and cannot retain other counsel to represent him, is deprived of that right due to the arbitrary constraints of Section 27.702.

Mr. Cox urges this Court to reconsider its holding in Diaz. As the Supreme Court has stated:

> This case should be decided upon, the principles developed in the line of cases marked by Griffin v. Illinois, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891. There we considered a state law which denied persons convicted of a crime full appellate review if they were unable to pay for a transcript of the trial. Mr. Justice Black's opinion announcing the judgment of the Court stated:
>
> > 'Such a denial is a misfit in a country dedicated to affording equal justice to all and special privileges to none in the administration of its criminal law. There can be no equal justice where the kind of a trial a man gets depends on the

> amount of money he has. Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts.' Id. at 19, 76 S.Ct. at 591.

Boddie v. Connecticut, 401 U.S. 371, 383 (Douglas, J., *concurring*). Mr. Cox respectfully requests that this Court consider his claim, and the procedural posture of his case and recognize that Section 27.702, Florida Statute (2006) is unconstitutional as applied to the facts of his case.

ARGUMENT III

THE LOWER COURT ERRED IN SUMMARILY DENYING MR. COX'S CLAIM THAT MR. COX'S CURRENT AND FUTURE HEALTH ISSUES AND PROBLEMS WITH COMPROMISED VENOUS ACCESS RAISE A SUBSTANTIAL PROBABILITY THAT FLORIDA'S METHOD OF LETHAL INJECTION PRESENTS AN UNDUE RISK OF WANTON AND UNNECESSARY PAIN

In its order denying relief as to Claim III of Mr. Cox's successive postconviction motion for relief, the lower court held that the claim was speculative, that Florida Department of Corrections protocols provide consideration for inmates who have medical conditions, and that this claim is not proper for postconviction relief, citing Foster v. State, 400 So.2d 1, 4 (Fla. 1981). ROA P.97.

Florida Rule of Criminal Procedure 3.850(d) provides that a defendant is entitled to an evidentiary hearing on postconviction claims for relief unless "the

motion, files, and records in the case conclusively show that the movant is entitled to no relief." Florida Rule of Criminal Procedure 3.851(f)(5)(B) applies the same standard to successive postconviction motions in capital cases. All allegations in the motion must be accepted as true to the extent they are not conclusively rebutted by the record. Hodges v. State, 885 So.2d 338, 355 (Fla. 2004).

The lower court's findings on this claim overlook certain facts necessary to the proper adjudication of this claim. First, it overlooks the fact that there is a history of botched lethal injections, specifically related to venous access, in Florida's recent execution history, and that Mr. Cox would present such evidence at an evidentiary hearing. Second, it overlooks testimony from the Lightbourne hearings, which Mr. Cox would present at an evidentiary hearing, about the exact nature and extent of the medical examinations conducted by the FDOC prior to an execution and the problems with those examinations. Third, it overlooks the fact that there is insufficient evidence that the personnel who are tasked with gaining venous access are properly trained, qualified and supervised.

Mr. Cox has alleged and is able to present evidence that his personal characteristics put him at a heightened and undue risk of suffering unnecessary pain during an execution, that such risk is not speculative, and that the present FDOC protocols and their administration do not adequately protect against such risks.

The deficiencies of the FDOC protocols, coupled with the FDOC's history of botched lethal injections, including Angel Diaz and Bennie Demps (where FDOC attempted a cut down and left significant bruising on Mr. Demps' arms), the lack of proper training, qualifications and oversight of the medically trained personnel and the executioners, create a "substantial risk of serious harm," or an "objectively intolerable risk of harm," that prevents prison officials from pleading that they were "subjectively blameless for purposes of the Eighth Amendment." Baze v. Rees, -- U.S. --, 128 S.Ct. 1520,1530-31, -- L.Ed. 2d.-- (2008)(*quoting* Farmer v. Brennan, 511 U.S. 825, 842, 846, and n.9, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994)).

Mr. Cox has alleged in his successive post-conviction motion that the current FDOC procedures and policies are inadequate to assess, establish and maintain adequate venous access necessary to carry out a humane and dignified execution by lethal injection of Mr. Cox. By way of example, testimony at the Lightbourne hearings established that if DOC does discover a problem with venous access, they do not notify the inmate or his attorney, or in any way document what the procedure would be to prevent problems with access.

Mr. Cox's allegations of problems with venous access have not been refuted by the record, and Hodges therefore requires an evidentiary hearing be held on this matter. Likewise, no evidence about the FDOC's medical exams has been presented,

and the Court's reliance on such evidence is improper for a summary denial of a claim under Fla. R. Crim. P. 3.851.

Mr. Cox also submits that the lower court has erroneously applied this Court's holding in Foster. First, Foster deals with an appeal of a motion filed under Fla. R. Crim. P. 3.850 case, not a capital case under Fla. R. Crim. P. 3.851. 400 So.2d at 2. In addition, Mr. Foster was challenging the use of materials for review by this Court, which found that the issue did not provide a proper ground for relief. In finding against Mr. Foster, this Court listed examples of proper grounds for proper postconviction motions, including in the list that the "sentence was imposed in violation of the constitution or laws of the United States or the state of Florida" or that "the judgment or sentence is otherwise subject to collateral attack." Id. at 4. In this case, Mr. Cox has made a specific allegation that problems with venous access during the Diaz execution, and evidence presented during the Lightbourne hearings, reveal that FDOC procedures in this regard are inadequate and a constitutional violation. This is, at a minimum, a collateral attack on the sentence to be imposed on Mr. Cox, and, like his lethal injection claim, should be recognized as a proper ground for postconviction relief.

The lower court's ruling is erroneous because Mr. Cox has been denied an opportunity to present testimony as to the specific problems with his veins, whether or

not a cut down would be required, and, in light of the fact that a cut down would require a doctor, whether there is in fact, a properly qualified doctor to perform a cut down if necessary. This is particularly so since all the so-called "medically qualified" members of the execution team testified that they did not and would not assist in an execution, other than to declare death. The lower court erred in summarily denying this claim without hearing testimony as to Mr. Cox's particular issues. Mr. Cox respectfully requests that this Court reverse the lower court and remand his case for an evidentiary hearing on this claim so that he can present evidence and testimony in support of his claim.

ARGUMENT IV

THE LOWER COURT ERRED IN SUMMARILY DENYING MR. COX'S CLAIM THAT FDOC'S PROCEDURES AS OUTLINED ABOVE, COUPLED WITH FLORIDA STATUTE 945.10 WHICH PROHIBITS MR. COX FROM KNOWING THE IDENTITY OF SPECIFIED MEMBERS OF THE EXECUTION TEAM, VIOLATES HIS CONSTITUTIONAL RIGHTS UNDER THE FIRST, FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

Mr. Cox raised this claim below based on the newly discovered evidence of the botched execution of Angel Diaz, testimony before the Governor's Commission and the Lightbourne hearings, recent developments of information of botched executions in other states and under evolving standards of decency under the Eighth Amendment

to the United States Constitution. Mr. Cox alleged that the Florida statutory provision which prohibits the disclosure of the identity of the members of the execution team and the executioners is unconstitutional and deprives him of Due Process of law, meaningful access to the courts and protection against cruel and unusual punishment under the First, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

The lower court rejected this claim relying upon this Court's decision in Bryan v. State, 753 So.2d 1244 (Fla. 2000), holding Fla. Stat. 945.10 to be constitutional, and again found that the claim was not proper for post-conviction litigation, citing Foster v. State, 400 So.2d 1, 4 (Fla. 1981). ROA P.97-8.

As in the previous claim, Mr. Cox submits that the lower court has erroneously applied this Court's holding in Foster. First, Foster deals with an appeal of a motion filed under Fla. R. Crim. P. 3.850 case, not a capital case under Fla. R. Crim. P. 3.851. 400 So.2d at 2. In addition, Mr. Foster was challenging the use of materials for review by this Court, which found that the issue did not provide a proper ground for relief. In finding against Mr. Foster, the Court listed examples of proper grounds for proper postconviction motions, including in the list that the "sentence was imposed in violation of the constitution or laws of the United States or the state of Florida" or that "the judgment or sentence is otherwise subject to collateral attack." Id. at 4. In this

case, Mr. Cox has made a specific allegation that the statute concealing the identities of certain execution team members violates both his Eighth Amendment and due process rights. This is, at a minimum, a collateral attack on the sentence to be imposed on Mr. Cox, and, like his lethal injection claim, should be recognized as a proper ground for postconviction relief.

As to the lower court's reliance on the Bryan case, Mr. Cox would point out that this Court's decision in that case only deals with the public records exemption for the identity of execution team members, finding that there is a sufficient public necessity justifying the statutory exemption. However, Mr. Cox's claim does not deal with public records. Instead, Mr. Cox has argued that the newly discovered evidence of the botched Diaz execution, when combined with the growing body of problems with executioners in other cases, invalidates the presumption that FDOC will carry out its duties properly and that the shielding of the identity of execution team members violates due process and the Eighth Amendment. This issue was not addressed by the Bryan decision, and no other decision by this Court has addressed the issue raised by Mr. Cox.

In analyzing the merits of the claim, it is important to note that independent public scrutiny - made possible by the public and media witnesses to an execution - plays a significant role in the proper functioning of capital punishment. An informed

public debate is critical in determining whether execution by lethal injection comports with "the evolving standards of decency which mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86, 101, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958). To determine whether lethal injection executions are fairly and humanely administered, or whether they ever can be, citizens must have reliable information about the "initial procedures," which are invasive, possibly painful and may give rise to serious complications. *Cf.* Globe Newspaper, 457 U.S. at 606, 102 S.Ct. 2613 ("Public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the factfinding process, with benefits to both the defendant and to society as a whole."). This information is best gathered first-hand or from the media, which serves as the public's surrogate. *See* Richmond Newspapers, 448 U.S. at 572, 100 S.Ct. 2814 ("People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing."). Further, "public access ... fosters an appearance of fairness, thereby heightening public respect for the judicial process." Globe Newspaper, 457 U.S. at 606, 102 S.Ct. 2613; *accord* Richmond Newspapers, 448 U.S. at 572, 100 S.Ct. 2814.

The statute in question, Section 945.10, Fla. Stat. (2006) exempts from disclosure under Section 24(a), Article I of the Florida Constitution (the right to access public records): "g) Information which identifies an executioner, or a person

prescribing, preparing, compounding, dispensing, or administering a lethal injection." This Court found the statute constitutional based upon concerns for the safety of those involved in executions. Bryan v. State, 753 So.2d 1244, 1250-51 (Fla. 2000). In upholding this denial of a constitutional right, this Court found that there is a presumption that the members of the executive branch will properly perform their duties in carrying out an execution. Provenzano v. State, 761 So.2d 1097, 1099 (2000). However, as outlined above, Bryan raised a public records request and therefore does not address Mr. Cox's issue and challenge to the statute.

Mr. Cox argued below that in light of the botched execution of Angel Diaz, testimony presented to the Governor's Commission, testimony presented at the Lightbourne proceedings, and the Dyehouse memos, that the Provenzano presumption is no longer valid. Evolving standards of decency as recognized in Eighth Amendment jurisprudence, notions of Due Process and access to the courts and information about government conduct, render Statute 945.10 unconstitutional.

Access to prisons by the press and public is a constitutional right. Pell v. U.S. Procunier, 417 U.S. 817 (1974). This access to prisons has been found to include access to view executions as well, based upon both historical traditions and the functional importance of public access to executions. California First Amendment Coalition v. Woodford, 299 F.3d 868 (9th Cir. 2002). The right to view executions

includes all parts of the execution, including the manner in which intravenous lines are injected. Id. at 883. The court held that limitations on what parts of the execution were viewed by the public based on safety concerns for the prison staff members involved was not justified. Id. at 880. The court found that concerns that execution team members would be publically identified and retaliated against was "an overreaction, supported only by questionable speculation." Id. Importantly, the court pointed out that numerous high profile individuals are involved with the implementation of executions, including a warden, a governor and judges, and there is a significant history of safety around these publicly known officials. Id. at 882. Pennsylvania courts have likewise rejected safety concerns as a basis for protecting the identity of execution witnesses as wholly unsupported speculation. Travaglia v. Dept. of Corrections, 699 A.2d 1317, 1323 n.5 (Pa. Commw. Ct. 1997).

The litany of states that have had challenges to the manner in which lethal injection is used has grown as additional problems have been documented. These states include Florida and then Governor Jeb Bush's moratorium on executions following news accounts of the botched execution of Angel Diaz. In Maryland, a federal district court issued a stay of execution after lethal injection chemicals leaked onto the floor during a previous execution. Oken v. Sizer, 321 F. Supp. 2d 658, 659 (D. Md. 2004). In Ohio, two executions were marked by long delays related to venous

access, including one in which the inmate's hand swelled because of improper venous access.[1] See State v. Rivera, Case No. 04CR065940, Lorraine County, Court of Common Pleas (July 24, 2007); Cooey v. Taft, 2006 WL 352646 (S.D. Ohio Dec. 6, 2006).

In California, a federal district court held that execution protocols violated the Eight Amendment. Morales v. Tilton, 465 F. Supp. 2d 972 (N.D. Cal. 2006). A review by the court of execution logs revealed potential problems with the administration of chemicals in six out of thirteen executions. Id. at 975. More significantly, the court also found serious problems with members of the execution team. One execution team member was disciplined for smuggling drugs into prison including pilfering the anesthetic used in executions. Another team member was diagnosed with post-traumatic stress disorder. In general, team members expressed minimal concern about problems that arose. Id. at 979. The court wrote:

> However, the record in this case, particularly as it has been developed through discovery and the evidentiary hearing, is replete with evidence that in actual practice OP 770 does not function as intended. The evidence shows that the protocol and Defendants' implementation of it suffer from a number of critical deficiencies, including:
>
> 1. *Inconsistent and unreliable screening of execution team members:* For

[1]Adam Liptak, Trouble Finding Inmate's Vein Slows Lethal Injection in Ohio, N.Y. Times, May 3, 2006, at A16.

> example, one former execution team leader, who was responsible for the custody of sodium thiopental (which in smaller doses is a pleasurable and addictive controlled substance), was disciplined for smuggling illegal drugs into San Quentin; another prison guard led the execution team despite the fact that he was diagnosed with and disabled by post-traumatic stress disorder as a result of his experiences in the prison system and he found working on the execution team to be the most stressful responsibility a prison employee ever could have.
>
> 2. *A lack of meaningful training, supervision, and oversight of the execution team:* Although members of the execution team testified that they perform numerous "walk-throughs" of some aspects of the execution procedure before each scheduled execution, the team members almost uniformly have no knowledge of the nature or properties of the drugs that are used or the risks or potential problems associated with the procedure. One member of the execution team, a registered nurse who was responsible for mixing and preparing the sodium thiopental at many executions, testified that "[w]e don't have training, really." While the team members who set the intravenous catheters are licensed to do so, they are not adequately prepared to deal with any complications that may arise, and in fact the team failed to set an intravenous line during the execution of Stanley "Tookie" Williams on December 13, 2005. Although Defendants' counsel assured the Court at the evidentiary hearing that "Williams was a lesson well learned, one that will never occur again," the record shows that Defendants did not take steps sufficient to ensure that a similar or worse problem would not occur during the execution of Clarence Ray Allen on January 17, 2006, or Plaintiff's scheduled execution the following month.

Morales v. Tilton, 465 F.Supp. 972, 979 (footnotes omitted). The court also noted that "Indeed, the execution team members' reaction to the problem at the Williams execution was described by one member as nothing more than 'shit does happen, so.'" Id. at fn. 8. One of the Florida execution team members expressed a similar sentiment

when he said the Diaz execution was successful because Diaz died.

In North Carolina, a federal district court found that an inmate "raised substantial questions as to whether North Carolina's execution protocol creates an undue risk of excessive pain." Brown v. Beck, 2006 WL 3914717, *8 (E.D.N.C. 2006). This conclusion was based upon both toxicology studies of post-mortem levels of sodium pentothal in inmates and the testimony of multiple witnesses indicating possible complications. Id. at *4-5. The district court allowed Brown's execution to go forward on the condition that execution personnel with sufficient medical training be present to ensure that the condemned was unconscious prior to and during the administration of the lethal chemicals. Id. at *8. However, executions were halted again when it was revealed that the state had not properly monitored inmates levels of consciousness as promised Conner v. North Carolina Council of State, Case No. 07GOV0238, County of Wake, Office of Administrative Hearings (Aug 9, 2007).

Finally, in Missouri, a federal district court temporarily put a halt to executions after hearing anonymous testimony from a medical doctor involved in executions. Taylor v. Crawford, 2006 WL 1779035 (W.D. Mo. 2006). This medical doctor/executioner testified that he made his own changes to the amounts of drugs that were administered and the location where drugs were administered during executions and said he often made mistakes in writing things down because he was dyslexic. Id.

at *5. Along with these concerns, the court also noted the constitutional problems created by the fact that little or no monitoring was done to ensure that an adequate dose of anesthesia was administered prior to other drugs being injected. Id. At *8. It was also revealed that the doctor had been sued for malpractice more than twenty times and that his privileges had been revoked at two hospitals. Missouri then agreed to stop employing him for executions.[2]

This intersection of problems heightens the constitutional concerns that require the disclosure and compulsory testimony of the identity of members of the execution team and so called medically qualified members. Executions carried out by anonymous team members puts an inmate at an objectively intolerable risk of harm and violates Due Process and the Eighth Amendment.[3]

The burden to show an Eighth Amendment violation in capital punishment

[2]Adam Liptak, After Flawed Executions, States Resort to Secrecy, N.Y. Times, July 30, 2007.

[3]Measures protecting the identity of executioners can actually increase the risk of unnecessary pain and suffering during a lethal injection execution. Florida, like many other states, uses low or dimmed lighting during executions to help hide the identities of those involved in executions and the team members and executioners wear cumbersome "bee keeper suits" to further conceal their identities. This effort to protect identities actually makes it more difficult for execution team members to see what they are doing and properly monitor the inmate and progress of the execution.

cases is on the condemned. Without access to the identities of the team members, Mr. Cox cannot establish a violation. Mr. Cox cannot show that the team members are unqualified, or marginally qualified, or have a criminal history or a history of disciplinary proceedings for malpractice. To deprive him of this information violates his rights under the First, Fifth, Sixth, Eighth and Fourteenth Amendments to ensure his punishment is not cruel and unusual. In addition, if the State wants to ensure integrity in its method of executing its citizens, surely it should want everything out in the open and above board. If the execution team members and so called medically qualified personnel meet FDOC's minimal qualifications then the State should be pleased to identify these people. Likewise, safety concerns for the members of the execution team are purely speculative and, more importantly, run counter to the evidence that far more prominent individuals involved in executions, such as judges, governors, and wardens, have not been the target of any serious or widespread harm. Finally, the cases in Missouri, California and North Carolina show that merely requiring the involvement of medical personnel is not a sufficient protection. Without access to the identities of these individuals, there is no way for a condemned to determine whether they are competent and qualified to ensure the Eighth Amendment is not violated.

Since the identity of the members of the execution team is protected by statute,

there is no way for Mr. Cox to establish whether the involvement of any of these individuals creates a substantial risk of unnecessary pain during a lethal injection procedure. With the mounting evidence of botched executions continuing to grow, this statute deprives Mr. Cox of his due process rights to ensure he is not subject to cruel and unusual punishment and therefore this statue is unconstitutional.

Mr. Cox respectfully requests that this Court reverse the finding of the lower court, allow the disclosure of the execution team members and so-called medically qualified members so that Mr. Cox can have meaningful access to the courts, Due Process of law and present his claim that Florida's method of execution does not comport with evolving standards of decency because it raises an objectively intolerable risk of harm or a substantially intolerable risk of harm and that there exists a "reasonably feasible alternative to effectively address [Florida's]'substantial risk of serious harm.' . . . [T]he alternative procedure [is] feasible, readily implemented, and in fact [will] significantly reduce a substantial risk of severe pain. [Because Florida] refuses to adopt such an alternative in the face of these documented advantages, without a legitimate penological justification for adhering to its current method of execution, … [its] refusal to change its method [is] 'cruel and unusual' under the Eighth Amendment." Baze, 128 S.Ct. at 1532 (internal citations omitted).

CONCLUSION AND RELIEF SOUGHT

To summarily deny these claims without an evidentiary hearing is a denial of Due Process under the Florida and Federal constitutions. For the above stated reasons, this Court should declare Florida's method of execution unconstitutional and grant Allen Cox a life sentence, or, in the alternative, remand this case to the lower court with instructions to conduct an evidentiary hearing. Further, this Court should find that Florida Statutes 945.10 and 27.702 are unconstitutional facially and as applied.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief of Appellant has been furnished by U.S. Mail to all counsel of record on this ____ day of August, 2008.

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CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Initial Brief of Appellant, was generated in Times New Roman 14 point font, pursuant to Fla. R. App. P. 9.100 and 9.210.

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