**IN THE SUPREME COURT OF FLORIDA**

**CASE NO. SC 08-887**

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**ALLEN W. COX,**
**Appellant,**

**v.**

**STATE OF FLORIDA,**
**Appellee.**

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

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# REPLY BRIEF OF APPELLANT

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## PRELIMINARY STATEMENT

Any arguments not raised are not abandoned and Mr. Cox continues to rely on all arguments raised in his Initial Brief.

## 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 State argues that this Court has analyzed the application of Baze v. Rees, 128 S.Ct. 1520 (2008) to Florida's death penalty scheme in Henyard v. State, 33 Fla. L. Weekly S629 (Fla. Sept. 10, 2008), and further argues that this claim must be denied on that basis. However, the State does acknowledge that Mr. Cox has alleged that the Florida execution procedure "may be deemed cruel and unusual if there is a refusal to adopt a procedure that reduces a substantial risk of pain" (Appellee's AnswerBrief p. 15). This language referenced by the state is the Supreme Court holding 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 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).

Unlike previous lethal injection cases previously before this Court, such as Lightbourne v. McCollum, 969 So. 2d 326 (Fla. 2007), Mr. Cox has asserted that he could present evidence of a reasonably feasible alternative that could be adopted by the state of Florida and which would reduce a "substantial risk of serious harm."

In order for such a claim to be properly addressed, an evidentiary hearing must be conducted. This Court acknowledged such a situation in Schwab v. State, 969 So. 2d 318 (Fla. 2007). In that case, this Court upheld the denial of an evidentiary hearing on the basis that Schwab did not assert that he would present any additional testimony or evidence on this issue than was presented in Lightbourne. However, in this case, Mr. Cox has asserted that he would present additional evidence and testimony to address issues not argued or presented in Lightbourne. The trial court's failure to grant such a hearing in these circumstances, especially in light of Baze's new standard as to how a death sentenced inmate would establish an Eighth Amendment violation, requires this case be remanded for a hearing on this claim.

## 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

The State argues that this claim is procedurally barred, and further argues that the statute at issue has been in place for over a decade and was previously affirmed in Diaz v. State, 945 So. 2d 1136 (Fla. 2006). However, Mr. Cox did not

find himself in position of having his due process rights violated as regards this statute until after the Diaz execution occurred, and additional information became available through the Governor's Commission and the Lightbourne hearings. He has clearly laid out in his initial brief why this claim is a timely one based upon newly discovered evidence, and would rely upon that argument in refuting the State's claim of a procedural bar.

Mr. Cox is also clearly in a distinct position from Diaz. Mr. Cox has, in fact, attempted to raise his lethal injection claims in his initial federal habeas petition filed in 2007. However, the State has moved to dismiss this claim based upon a lack of exhaustion, and has further refused to waive exhaustion so that the claim could be heard in federal court. This Court has held that the lethal injection claims filed on the basis of the Diaz execution were timely filed and not procedurally barred. Mr. Cox has not unreasonably delayed in filing his claim in state court or federal court and, unlike Diaz, actually included such a claim in his initial federal habeas petition. Therefore, the reasons for rejecting Diaz's challenge to Fla. Stat. 27.702, namely that he failed to file his lethal injection claims in a timely manner, clearly do not apply to Mr. Cox. In that case, Fla. Stat. 27.702 effectively bars Mr. Cox from raising this claim for federal review.

**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**

Mr. Cox would rely upon his position as stated in his initial brief in support of this 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.**

In response to the State's argument that this claim is procedurally barred, Mr. Cox would rely upon his argument as to this issue in his initial brief, and again state that it was not until the events of Diaz, the Lightbourne hearings, and the Governor's Commission, that much of the information came to light about the executioners employed by the state of Florida that are the basis of this claim. Mr. Cox did not have reason to challenge the fact that he would need to challenge Fla.

Stat. 945.10 until he became aware of the many problems with the executioners being employed by DOC.

As to the merits of this claim, Mr. Cox would again emphasize that the Bryan and Provenzano cases only dealt with this issue in the realm of public records requests. Mr. Cox has asserted an entirely different claim in arguing that the protection of the identity of executioners violates his due process rights in light of recent botched executions and problems with executioners, including criminal records and drug abuse problems. Mr. Cox would again state that without access to the identity of these executioners, he has no way to make a proper Eighth Amendment challenge to the manner in which his execution would be carried out by the state of Florida, and such a denial violates his due process rights under both the Florida and Federal constitutions.

## 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 and in Mr. Cox's initial brief, 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 November, 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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