IN THE SUPREME COURT OF FLORIDA

ROBERT LAVERN HENRY,	)	
	)	
Appellant,	)	**CASE NO. SC14-398**
	)	**L.T. NO. 87-18628CF10A**
v.	)	
	)	**DEATH WARRANT SIGNED**
STATE OF FLORIDA,	)	**EXECUTION SET FOR**
	)	**MARCH 20, 2014**
Appellee.	)	
	)	

INITIAL BRIEF OF APPELLANT

On Appeal from the Circuit Court of the Seventeenth Judicial Circuit in and for Broward County, Florida

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PRELIMINARY STATEMENT

This is an appeal from denial of a successive motion for postconviction relief in a capital case. Appellant, Robert Lavern Henry, is under Active Death Warrant, with Execution set for March 20, 2014. Mr. Henry was the Defendant in the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida. Appellee, State of Florida, was Plaintiff. References to the Record on Appeal will be designated by the symbol "R," followed by page number(s),encased in parentheses. References to the Supplemental Record on Appeal are designated by the symbol "SR," followed by page number(s), encased in parentheses.

JURISDICTIONAL STATEMENT

This Court has jurisdiction in this capital case. Art. V, § 3(b)(1), Fla. Const.

STANDARDS OF REVIEW

Point I challenges the constitutionality of a statute, and review is *de novo*. "The courts of this state have consistently held that . . . determinations concerning the constitutionality of statutes are pure questions of law subject to the *de novo* standard of review." *State v. Sigler*, 967 So. 2d 835, 841 (Fla. 2007).

Point II involves the legal effect of a document, creating questions of law. The Standard of Review is therefore *de novo*. *PGA N. II of Florida, LLC v. Div. of Admin., State of Fla. Dept. of Transp.*, 126 So. 3d 1150, 1152 (Fla. 4thDCA 2012).

Point III: Rule 3.851(f)(5)(B) permits denial of a successive postconviction motion without an evidentiary hearing "[i]f the motion, files, and records in the case conclusively show that the movant is entitled to no relief." Because a postconviction court's decision whether to grant a Rule 3.851 evidentiary hearing depends upon the written materials before the court, its ruling is tantamount to a pure question of law subject to *de novo* review. *See, e.g., Rose v. State,* 985 So.2d 500, 505 (Fla.2008). In reviewing a trial court's summary denial of postconviction relief, the Court must accept the defendant's allegations as true to the extent they are not conclusively refuted by the record. *See Freeman v. State,* 761 So.2d 1055, 1061 (Fla.2000).

STATEMENT OF THE CASE AND FACTS

This is an appeal from the summary denial of postconviction relief without an evidentiary hearing. Appellant is currently under an Active Death Warrant.

Appellant, Robert Lavern Henry, was charged by Indictment with committing the first-degree murders of Janet Thermidor and Phyllis Harris, contrary to §782.04, Fla. Stat. He was also charged with armed robbery, contrary to §812.13, Fla. Stat., and arson, contrary to §806.01, Fla. Stat. *Henry v. State*, 586 So. 2d 1033 (Fla.1991), and found guilty as charged. *Id*. At penalty phase proceedings, a jury recommended death, which the trial court imposed, also sentencing Mr. Henry to concurrent terms of life imprisonment on the armed robbery and arson convictions. *Id*. Mr. Henry filed his direct criminal appeal of these convictions and sentences, and this Court affirmed. *Id*. The facts in this case appear in this Court's opinion on direct appeal:

> Around 9:30 p.m. on November 1, 1987 fire fighters and police officers responded to a fire at a fabric store in Deerfield Beach. Inside they found two of the store's employees, Phyllis Harris, tied up in the men's restroom, and Janet Thermidor, on the floor of the women's restroom. Each had been hit in the head with a hammer and set on fire. Harris was dead when found. Although suffering from a head wound and burns over more than ninety percent of her body, Thermidor was conscious. After being taken to a local hospital, she told a police officer that Henry, the store's maintenance man, had entered the office, hit her in the head, and stolen the store's money. Henry then left the office, but returned, threw a liquid on her, and set her on fire.

> Thermidor said she ran to the restroom in an effort to extinguish the fire. She died the following morning.
>
> Based on Thermidor's statement, the police began looking for Henry and found him shortly before 7:00 a.m. on November 3, at which time they arrested him. Henry initially claimed that three unknown men robbed the store and abducted him, but later made statements incriminating himself. A grand jury indicted Henry for two counts of first-degree murder, armed robbery, and arson. The jury convicted him as charged and recommended the death sentence for each of the murders, which the trial court imposed.
>
> After being arrested, Henry made a total of six oral and taped statements. In the first two he claimed that unknown robbers forced their way into the store and denied any personal involvement. In the other statements he confessed that he acted alone.

Henry v. State, 586 So. 2d 1033, 1034-35 (Fla. 1991) *cert. granted, judgment vacated*, 505 U.S. 1216, 112 S. Ct. 3021 (1992).

Mr. Henry sought certiorari in the United States Supreme Court, which granted the writ, vacated the judgment and remanded for reconsideration in light of its earlier decision in *Espinoza v. Florida*, 505 U.S. 1079, 112 S.Ct. 2926 (1992). *Henry v. Florida*, 505 U.S. 1216, 112 S.Ct. 3021 (1992). This Court affirmed on remand. *Henry v. State*, 613 So. 2d 429 (Fla. 1992).A petition for writ of certiorari was denied January 10, 1994.*Henry v. Florida*, 510 U.S. 1048, 114 S.Ct. 699 (1994).

Mr. Henry filed a motion for postconviction relief, which was denied on January 17, 2003, and was later affirmed by this Court May 26, 2006. *Henry v.*

State, 937 So. 2d 563 (Fla. 2003). Henry moved for DNA testing pursuant to Rule 3.853, Florida Rules of Criminal Procedure, which was denied and was never appealed. Henry sought belated appeal of the denial of his Rule 3.853 motion, which this Court dismissed on February 24, 2010. *Henry v. State*, 43 So. 3d 690 (Fla. 2010). Meanwhile, Henry had filed a federal petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254,*Henry v. McNeil*, Case No. 07-CV-61281, which was denied on April 27, 2009, and a certificate of appealability denied by the Eleventh Circuit Court of Appeals on July 9, 2010. The United States Supreme Court denied certiorari on April 5, 2010.*Henry v. Florida Dept. of Corrections*, 559 U.S. 1050 (2010).

On April 17, 2012, Mr. Henry filed a *pro se* Rule 3.851 motion, alleging newly discovered evidence: that the chronic drug addiction he had during the crime is now scientifically recognized in the medical community as a brain disease, giving rise to evidence he could raise at a new penalty phase proceeding. This Court later affirmed the trial court's denial of relief. *Henry v. State*, 125 So. 3d 745, 752 (Fla. 2013).

THE CURRENT PROCEEDINGS

Mr. Henry's Clemency process "concluded" February 13, 2014 (R 254, 259), and his Death Warrant was signed by the Governor on February 13, 2014 (R

245, 249). The Death Warrant signed by the Governor contains no time for the execution (Id.).[2]

This Court then entered a written Order on February 14, 2014, indicating, "[b]ecause the Governor has signed a death warrant for the execution of Robert L. Henry at 6:00 p.m., Thursday, March 20, 2014, we direct that all further proceedings in this case be expedited," setting a detailed, time-limited schedule for judicial filings and proceedings (R 45-46). The trial court then appointed co-counsel (R 47-48).

On February 18, 2014, Mr. Henry's undersigned counsel moved for a determination of Mr. Henry's competency to proceed, Rule 3.851(g), Florida Rules of Criminal Procedure, noting his cocaine-induced psychosis and inability to assist counsel during the Executive Clemency process, properly certifying the motion and attaching a May 14, 2013 neuropsychological evaluation demonstrating he has multiple cognitive deficits (R 49-57). The State opposed the motion (R 58-62), and the trial court denied the motion without rationale, February 19, 2014 (R 69-70, 282).

[2] On *February 13, 2013*, the Office of Executive Clemency sent the undersigned a letter stating a Death Warrant was signed *February 13, 2014*, which "concludes the clemency process." The letter was before the trial court on the record (R254, 259).

Mr. Henry filed his Successive Motion for Postconviction Relief February 19, 2014, (R 71-103), an Amended Successive Motion on February 25, 2014 (SR 5-33), and Supplemental Successive Motion on February 25, 2014 (R 123-124).[3]

Preserving the issues previously raised, Mr. Henry's postconviction motion also alleged that, due to his specific medical condition, the use of the drug Midazolam as the first of three drugs employed in Florida's lethal injection protocol, as applied to Mr. Henry, in view if his medical condition, creates an imminent, substantial and objectively intolerable risk of serious harm (R 71-103, 123-124, 226-242, 243-249), attaching the report and Affidavits of Dr. Joel Zivot, Assistant Professor of Anesthesiology and Surgery at the Emory University School of Medicine, Medical Director of the Cardiothoracic and Vascular Intensive Care Unit, and Academic Director of the Critical Care Medicine Fellowship for the Department of Anesthesiology, with multiple domestic and international Board Certifications, leadership positions and licensure by the Drug Enforcement Administration (R 245).

As an anesthesiologist, Dr. Zivot has personally administered large doses of Midazolam, observing a rapid fall in blood pressure that required immediate and ongoing infusions of other medications to restore humane blood pressure(R 248).

[3] Mr. Henry's Successive Motion for Postconviction Relief was Amended and Supplemented to include additional evidence supporting Mr. Henry's claims.

Dr. Zivot reviewed Mr. Henry's medical records (R 246), noting 90% of coronary events occur in persons possessing *one* risk factor for a coronary event. Mr. Henry evidences *two* such risk factors, dyslipidemia and hypertension (R 246).

Dr. Zivot personally examined Mr. Henry on February 24, 2014 (R 246, 247), noting he is taking an ACE inhibitor and the diuretic, hydrochlorothiazide (R 247).

Dr. Zivot's expected testimony at an evidentiary hearing is memorialized in his Affidavits attesting to the "very high risk" Mr. Henry, as a particular individual, will suffer severe pain in his chest and difficulty breathing when given Midazolam:

> "A fall in blood pressure, leading to an acute coronary event in an individual with a very high risk of coronary artery disease will result in an acute coronary event that will be experienced as severe chest pain and shortness of breath. Mr. Henry is such an individual. Midazolam, given in the dose described in the lethal injection procedure document will lower the blood pressure precipitously in Mr. Henry in an exaggerated manner as a consequence of his long-standing hypertension."

(R 246-247) (See also R 248).

Noting that the Department of Corrections' current lethal injection protocol does not take coronary risk factors into account, Dr. Zivot stated in his Affidavit:

> "The design of the Florida lethal injection procedure will *very likely* cause serious illness and needless suffering to Mr. Henry as a consequence of the acute coronary event. This lethal injection procedure presents a substantial risk of serious harm . . ."

(R 247) (emphasis added).

Mr. Henry's counsel proffered Dr. Zivot's expected expert testimony which he would give at an evidentiary hearing, expressing his medical opinion Mr. Henry, as a particular individual, will have an exaggerated reaction to Midazolam, and will not only fail the graded noxious stimuli test Department of Corrections officials plan to use to ensure Mr. Henry's unconsciousness (R 239-240), but will also experience unnecessary pain and suffering while undergoing an acute coronary attack (R 247).

Mr. Henry asserted an "as applied" Eighth Amendment challenge to the way Florida plans to kill him, and postconviction counsel requested an evidentiary hearing in which to prove his claims (R 71-103, 123-124, 226-242, 243-249).

The State presented no documentary, testimonial or physical evidence in response to the claims, relying solely on its own argument(R 104-120, 128-142).

The trial court's order denying an evidentiary hearing on Mr. Henry's claim that, as applied to his specific medical condition, using the drug Midazolam as the first drug in the lethal injection protocol would cause him needless pain, suffering and harm, states solely it "does not warrant an evidentiary hearing" (R 230, SR 58).

Mr. Henry moved the trial court declare § 922.052, Fla. Stat., as amended by Chapter 2013-216, § 12, Laws of Florida, the "Timely Justice Act of 2013" ("TJA"), unconstitutional (SR 53-57). The State responded to the motion to declare the TJA unconstitutional (R 173-179), and the trial court denied the motion (R 180-182).

Mr. Henry moved the trial court to dismiss the Death Warrant as violating the TJA, as it failed to state a time or date for the execution, and failed to direct the warden when any execution should occur (R 197-198). The trial court unilaterally denied the Motion to Dismiss the Death Warrant on February 26, 2014. (R 199-200).

The trial court summarily denied Mr. Henry's Rule 3.851 motion, including its amendments and supplements, without an evidentiary hearing (R 183-196).

Mr. Henry timely filed notice of appeal (R 205-225).

This Initial Brief follows.

SUMMARY OF ARGUMENT

I. The trial court erred in denying Mr. Henry's motion to declare § 922.052, Fla. Stat., as amended by Chapter 2013-216, § 12, Laws of Florida, the "Timely Justice Act of 2013" ("TJA"), unconstitutional.

II. The trial court erred in denying Mr. Henry's motion to dismiss the Death Warrant against him as it fails to state a time of execution.

III. The trial court erred in summarily denying Mr. Henry's motion for postconviction relief without holding an evidentiary hearing, as the trial court's ruling lacked a proper evidentiary basis, the proffered evidence was unrefuted, and the files and record do not conclusively show that Mr. Henry is entitled to no relief.

POINT I

THE TRIAL COURT ERRED IN DENYING MR. HENRY'S MOTION TO DECLARE § 922.052, FLORIDA STATUTES UNCONSTITUTIONAL AS THE STATUTE, FACIALLY AND AS APPLIED, VIOLATES THE SEPARATION OF POWERS CLAUSE OF ARTICLE II, § 3, FLORIDA CONSTITUTION

Mr. Henry moved the trial court declare § 922.052, Fla. Stat., as amended by Chapter 2013-216, § 12, Laws of Florida, the "Timely Justice Act of 2013" ("TJA"), an unconstitutional encroachment by the Legislative Branch on the Executive, in violation of the Florida Constitution's Separation of Powers Clause, as its mandatory terms limit the Governor's authority *whether and when* to exercise Executive power.

Article II, § 3, Florida Constitution--the "Separation of Powers Clause"--provides:

> The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.

Article IV, 8(a), Florida Constitution, moreover, provides as follows:

> Except in cases of treason and in cases where impeachment results in conviction, the governor may, by executive order filed with the secretary of state, suspend collection of fines and forfeitures, grant

> reprieves not exceeding sixty days and, with the approval of three members of the cabinet, grant full or conditional pardons, restore civil rights, commute punishment, and remit fines and forfeitures for offenses.

Rule 4 of the Florida Rules of Executive Clemency consequently asserts: "The Governor, with the approval of at least two members of the Clemency Board, has the unfettered discretion to grant, ***at any time***, for any reason, the following forms of clemency ..." Rule 4, Florida Rules of Executive Clemency (emphasis added).[4]

The Separation of Powers Clause extends "equally" to a Governor's authority to sign death warrants. In *Gore v. State*, 91 So. 3d 769 (Fla. 2012) (a pre-TJA case), this Court recognized the Governor's warrant-signing power is part and parcel of the Governor's constitutionally unfettered exercise of Clemency power:

> Our analysis in the previous section [regarding clemency power] applies equally to this claim. The same principles—the Governor's unfettered discretion under the Florida Rules of Executive Clemency, see Fla. R. Exec. Clem. 4, and separation of powers concerns—arise again in the context of a claim that the Governor's decision to sign Gore's warrant was arbitrary and standardless.

[4] Rule 4, Fla. R. Exec. Clem., provides: "The Governor has the unfettered discretion to deny clemency at any time, for any reason. The Governor, with the approval of at least two members of the Clemency Board, has the unfettered discretion to ***grant, at any time***, for any reason, the following forms of clemency: . . ." (emphasis added).

Gore, 91 So. 3d at 780, observing "this Court has repeatedly declined to interject itself into what is, under the Florida Constitution, an executive function." *Id*. at 779.

In *Valle v. State*, 70 So. 3d 530 (Fla. 2011), this Court treated a challenge to the Governor's warrant-signing as identical to a challenge to the Clemency process:

> In *Marek v. State*, 8 So. 3d 1123, 1129–30 (Fla. 2009), we rejected a similar constitutional challenge to Florida's clemency process and declined to "second-guess" the application of the exclusive executive function of clemency. While our decision in *Marek* was pending, Marek filed another successive postconviction motion, specifically contending that the manner in which the Governor determined that a death warrant should be signed was arbitrary and capricious. This Court affirmed the denial of relief, explaining in more detail:
>
> > Marek argues that Florida's clemency process, *particularly the Governor's authority to sign warrants*, is unconstitutional because it does not provide sufficient due process to the condemned inmate . . . However, Marek did raise this claim in his second successive postconviction proceeding. In that proceeding, Marek analogized the Governor's decision to sign his death warrant to a lottery and contended that Florida's clemency process was one-sided, arbitrary and standardless. This Court rejected Marek's challenges as meritless. The current claim raises the same legal challenge this Court previously considered.

Valle v. State, 70 So. 3d at 551 (cite omitted) (emphasis in original).

This Court later described *Valle* as "holding that under the doctrine of separation of powers it is not this Court's prerogative to second-guess the executive in matters of clemency, thus rejecting [a] claim that the Governor's absolute discretion to sign death warrants renders Florida's death penalty structure unconstitutional." *Carroll v. State*, 114 So. 3d 883, 887-888 (Fla. 2013). Rejecting a challenge to a Governor's warrant-signing authority, this Court noted in *Carroll*, "[t]he clemency process in Florida derives solely from the Florida Constitution and we have recognized that the people of the State of Florida have vested 'sole, unrestricted, unlimited discretion exclusively in the executive in exercising this act of grace.'" *Id.*, 114 So. 3d at 888 (quoting *Sullivan v. Askew*, 348 So. 2d 312, 315 (Fla. 1977)). This Court has thus treated the Separation of Powers Clause as applying equally to a Governor's authority to grant Clemency and sign death warrants.

The TJA renders the Governor's *initial* denial of Clemency the *sine qua non* of a warrant, as it says he must sign the warrant "if the executive clemency process has concluded," § 922.052(2)(b), Fla. Stat., *mandating* the Governor sign a warrant, not by virtue of the signing-authority, but through the Executive Clemency power. TJA's scheme outlaws a Governor's exercise of discretion to design a *de novo* Clemency proceeding that discounts a prior one, despite Rule 4,

Florida Rules of Executive Clemency's assertion: "The Governor, with the approval of at least two members of the Clemency Board, has the unfettered discretion to grant [Clemency], ***at any time***, for any reason," Rule 4, Fla. R. Exec. Clem. (emphasis added).

By enacting the TJA, the Legislature violates a Governor's constitutionally unfettered Clemency power, limiting when he can sign warrants and set executions, as warrant-signing power is controlled by Clemency power. This Court has repeatedly declined to infringe upon a Governor's unfettered authority to sign death warrants, not due to any statutory authority granted the Governor by the Legislature, but by holding the Florida Constitution vests that power *solely* in the Governor.

Section 922.052, Fla. Stat., as amended by the TJA, however, explicitly limits *whether and when* a Governor *shall* sign a death warrant. That enactment by the Legislative Branch concerning this Executive Power, first provides that the Clerk of this Court must provide a Governor a letter certifying a person sentenced to death has completed appellate and postconviction proceedings, and states in pertinent part:

> [(2)](b) ***Within 30 days*** after receiving the letter of certification from the clerk of the Florida Supreme Court, ***the Governor shall*** issue a warrant for execution if the executive clemency process has

> concluded, ***directing the warden to execute the sentence within 180 days***, at a time designated in the warrant.
>
> (c) If, in the Governor's sole discretion, the clerk of the Florida Supreme Court has not complied with the provisions of paragraph (a) with respect to any person sentenced to death, the Governor may sign a warrant of execution for such person where the executive clemency process has concluded.

§ 922.052(2), (b), (c), Fla. Stat. (emphasis added).[5]

Mr. Henry asserted below, and now asserts in this appeal, this act of the Legislature may not take precedence over, or limit, a Governor's exclusive authority in *whether and when* to sign Mr. Henry's and others prisoners' death warrants or reprieves, or *whether and when* the Governor and Cabinet may exercise Executive discretion to grant Mr. Henry and other prisoners a full or conditional pardon, or commute his and other prisoners' punishment in the exercise of Executive power.

The Florida Constitution grants a Governor sole discretion over Clemency and the signing of death warrants. The Legislature or Judiciary lack authority to prescribe occasions for exercising this Executive power, or its manner, procedure

[5] Mr. Henry challenges the constitutionality of the TJA as a violation of the Separation of Powers Clause *solely as to its encroachment on the Executive Branch*, and does not take issue with other apparent constitutional ills, briefed and argued more thoroughly in *Dave Abdool, et al., v. Bondi, et al.*, Case No. SC13-1123.

or timing. *Parole Commission v. Lockett*, 620 So. 2d 153, 154-55 (Fla. 1993) ("the clemency process is derived solely from the constitution and is strictly an executive branch function, and . . . consequently, the Legislature, by statute, may neither preempt nor overrule the clemency rules without violating the separation of powers doctrine"); *In re Advisory Opinion to the Governor*, 334 So.2d 561 (Fla. 1976) (statutory Administrative Procedure Act could not apply to exercise of the Executive Branch's clemency power); *In re Advisory Opinion of Governor Civil Rights*, 306 So. 2d 520 (Fla. 1975) (statutory section of Florida Correctional Reform Act of 1974, authorizing *automatic* reinstatement of convicts' civil rights "constitute[s] a clear infringement upon the constitutional power of the Governor to restore civil rights").[6]

The trial court's Order denying the motion to declare the TJA unconstitutional (R 180-182) completely ignored the Separation of Powers Clause, stating instead:

> The Supreme Court of Florida considered precisely the same constitutional challenges in *Muhammad v. State*, 2013 WL 6869010,

[6] "[W]hen the Constitution prescribes the manner of doing an act, the manner prescribed is exclusive, and it is beyond the power of the Legislature to enact a statute that would defeat the purpose of the constitutional provision." *In re Advisory Opinion of Governor Civil Rights*, 306 So. 2d 520, 523 (Fla. 1975) (quoting *Weinberger v. Board of Public Instruction*, 93 Fla. 470, 112 So. 253, 256 (Fla. 1927).

> at *13-14 (Fla. Dec. 19, 2013). However, the Court declined to reach Muhammad's constitutional challenge. The Court explained that "[t]he Office of Executive Clemency initiated Muhammad's clemency proceeding in September 2012, long before passage of the act, and that the office accepted follow-up documents as to clemency for several months thereafter." *Muhammad*, at 2013 WL 6869010 at *14. The Court concluded that because it could not be stated that before the Act the Governor would not have signed Muhammad's death warrant, and it could not be presumed that Muhammad's death warrant was prompted by the Act, or by the letter sent by the Clerk to the Governor, "it is inappropriate and unnecessary for this Court, or the trial court to reach the issue of the constitutionality of any portion of the [TJA] (...) or to strike the death warrant in this case." *Id*. The [trial court] finds that the same reasoning applies in [Mr. Henry's] case, especially since the Office of Executive Clemency initiated [Mr. Henry's] clemency proceeding on February 20, 2012, even further before passage of the Act than Muhammad's clemency proceeding. (R 181).

The trial court's reliance on *Muhammad* to uphold the TJA *as constitutional* is misplaced, as this Court did not therein decide a Separation of Powers challenge, stating: "Because we do not reach the issue, our affirmance of the circuit court's denial of postconviction relief in this appeal is not a ruling on the merits concerning the constitutionality of any portion of the Act." *Muhammad v. State*, SC13-2105, 2013 WL 6869010 *14 (Fla. 2013) *cert. denied*, 134 S. Ct. 894 (U.S. 2014).

Though the trial court's Order states Mr. Henry's initial clemency proceeding was "initiated" February 20, 2012 (*i.e.*, before the TJA's July 1, 2013

effective date), Mr. Henry's clemency proceeding *concluded* February 13, 2014, *i.e.*, seven and a half months *after* the passage of the TJA, which provides: "Within 30 days after receiving the letter of certification from the clerk of the Florida Supreme Court, the Governor shall issue a warrant for execution if the executive clemency process has *concluded*." § 922.052(2)(b), Fla. Stat. (emphasis added). Thus, the relevant date is not when the clemency process was "initiated," but when it "concluded." *Id*.

The trial court quotes *Muhammad*: "the [clemency] office accepted follow-up documents as to clemency for several months thereafter." 2013 WL 6869010 at *14. But Mr. Henry's Death Warrant was signed on February 13, 2014--the *same day* the clemency process concluded. The operation of the TJA, as applied to Mr. Henry, thus interrupts and limits the time the Governor may review follow-up documents.

While the trial court noted *Muhammad* said "it could not be stated that before the Act the Governor would not have signed Muhammad's death warrant" (R 181), it seems unlikely a Governor would sign Mr. Henry's Death Warrant while his Clemency process remained pending from February 20, 2012 to February 13, 2014. Indeed, it was precisely on the date the TJA's statutorily-created

conditions for this exercise of Executive Power were met that the Governor signed the Death Warrant.

Though the trial court finally noted that, in *Muhammad*, this Court concluded "it could not be presumed that Muhammad's death warrant was prompted by the Act, or by the letter sent by the Clerk to the Governor" (R 181), Mr. Henry's name was not only in the letter to the Governor mandated by TJA, but his Death Warrant, citing § 922.052, was signed the day Mr. Henry's "clemency process . . . *concluded*," § 922.052(2)(b), Fla. Stat. (emphasis added), fulfilling each of the TJA's conditions.[7]

In response to the motion to declare the TJA unconstitutional, the State argued that "[this] Court has long recognized that the Legislature has authority 'to provide the method, the means, and the instrumentalities for executing death sentences,' *Blitch v. Buchanan*, 131 So. 151, 155 (Fla. 1930)," and went on to cite *In re Advisory Opinion to Governor*, 19 So. 2d 370 (Fla. 1944) (governor was subject to statute requiring the designation of a particular week the death warrant was to be executed), to stand for the proposition that, "as [this] Court has

[7] Notwithstanding the trial court's stated reliance on *Muhammad*'s rationale that it "could not be presumed that Muhammad's death warrant was prompted by the Act," *id.*, the trial court's order appointing co-counsel reveals its own misconception that a Governor's death warrant power is controlled by statute. The trial court appointed co-counsel due to "death warrant requirements of Governor by statute" (R 48).

previously confirmed, issuance of a warrant is subject to general law as proscribed by the Legislature to be enforced by the Governor *under our Constitution*" (R 176-177) (emphasis added).

But neither *Blitch*, nor *In re Advisory Opinion to Governor* were decided "under our Constitution." Both were decided under the Florida Constitution of 1885.

The State's reliance on cases decided under the Florida Constitution of 1885 is unavailing, as the 1885 Constitution differed in at least one important respect. Article II of the 1885 Florida Constitution sported a "Distribution of Power" provision similar to the Separation of Powers Clause in the current (1968) Revision:

> The powers of the government of the State of Florida shall be divided into three departments: Legislative, Executive and Judicial; and no person properly belonging to one of the departments shall exercise any powers appertaining to either of the others, *except in cases expressly provided for by this Constitution*.

Article II, Florida Constitution of 1885 (emphasis added).

But Article IV, § 12 of the 1885 Florida Constitution, provided exceptions to its "Distribution of Power" provision that created a much different power landscape:

> Section 12. The Governor, Justices of the Supreme Court, and Attorney General, or a major part of them, of whom the Governor shall be one, may, upon such conditions, and with such limitations and restrictions as they may deem proper, remit fines and forfeitures, commute punishment and grant pardons after conviction, in all cases except treason and impeachment, *subject to such regulations as may be prescribed by law relative to the manner of applying for pardons*.

Article IV, Section 12, Florida Constitution of 1885 (emphasis added).

The 1885 Constitution was amended in 1896 to provide the Secretary of State, Comptroller, and Commissioner of Agriculture would take the places of the Justices of the Supreme Court as members of the Board of Pardons. [1895 JR 3 (Article IV, Section 12) {Adopted}]. Just one month later, this Court held the Legislature was constitutionally prohibited from creating an act concerning restoration of civil rights. *Singleton v. State*, 21 So. 21 (Fla. 1896) (noting "Judge Story [U.S. Supreme Court (1811-1845)] says . . . 'no law can abridge the constitutional powers of the executive department, or interrupt its right to interpose by pardon in such cases.'"). See also *In re Advisory Opinion of Governor Civil Rights*, 306 So. 2d 520, 522 (Fla. 1975) (quoting *Singleton*) ("As early as 1896, this Court committed itself to the proposition that the power of pardon is reposed exclusively in the chief executive and with the approval of three members of his cabinet. In *Singleton v. State* [cite omitted], this Court struck down an act of the

legislature purporting to restore civil rights to a convicted felon for the reason that the power to commute punishment and grant pardons for crimes after conviction had been conferred upon the governor and cabinet '. . . and it is not competent for the legislature to exercise such power.'").[8]

As the Separation of Powers Clause applies equally to a Governor's authority to sign death warrants, *Gore v. State*, 91 So. 3d at 780; *Valle v. State*, 70 So. 3d at 551; *Marek v. State*, 8 So. 3d at 1129-30; *Carroll v. State*, 114 So. 3d at 887-888, the Legislature's recent enactment of the TJA to fully mandate that "***[w]ithin 30 days*** after receiving the letter of certification from the clerk of the Florida Supreme Court, ***the Governor shall issue a warrant for execution*** if the executive clemency process has concluded, ***directing the warden to execute the sentence within 180 days***, at a time designated in the warrant," § 922.052(2)(b), Fla. Stat. (emphasis added), is more akin to an unconstitutional usurpation of Executive power in violation of the Separation of Powers Clause, Article II, § 3, Fla. Const., than it is "Timely Justice."[9]

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[8]"[T]he usual deference given to the Legislature's resolution of public policy issues is at all times circumscribed by the Constitution. Acting within its constitutional limits, the Legislature's power to resolve issues of civic debate receives great deference. *Beyond those limits, the Constitution must prevail over any enactment contrary to it*." *Bush v. Holmes*, 919 So. 2d 392, 398 (Fla. 2006) (emphasis added).

[9]Mr. Henry originally raised the constitutionality of the TJA in the court below as,"[o]rdinarily the initial challenge to the constitutionality of a statute should be

POINT II

THE TRIAL COURT ERRED IN DENYING MR. HENRY'S MOTION TO DISMISS THE DEATH WARRANT AS IT VIOLATED § 922.052(2)(b) FLA. STAT. BY FAILING TO DESIGNATE THE TIME OF EXECUTION AND DIRECT THE WARDEN TO EXECUTE THE SENTENCE WITHIN 180 DAYS

Even assuming--though by no means conceding--that the challenged section of the "Timely Justice Act of 2013" ("TJA") is constitutional, the Death Warrant signed by the Governor violates TJA, as well as pre-TJA § 922.052, Florida Statutes.

Mr. Henry moved the trial court to dismiss the Death Warrant against him because it clearly violates both § 922.052, Florida Statutes (2013), as amended by Chapter 2013-216, § 12, Laws of Florida, and the Governor's constitutional duty to faithfully execute that law, as provided by Article IV, § 1(a), Florida Constitution.

Article IV, § 1(a), Florida Constitution, creating the Office of Governor, mandates: "The governor shall take care that the laws be faithfully executed . . ."

Section 922.052(2)(b), Fla. Stat., as amended by Chapter 2013-216, § 12, Laws of Florida, specifically requires the Governor's Death Warrant to designate the time of the execution, and requires the Governor to direct the warden to

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made before a trial court." *Id.* at 807.*Allen v. Butterworth*, 756 So. 2d 52, 54-55 (Fla. 2000) (quoting *Division of Bond Finance v. Smathers,* 337 So.2d 805 (Fla.1976)).

execute the death sentence within one hundred and eighty (180) days. That enactment by the Florida Legislature concerning the contents of the Death Warrant mandates:

> (b) Within 30 days after receiving the letter of certification from the clerk of the Florida Supreme Court, ***the Governor shall issue a warrant*** for execution if the executive clemency process has concluded, ***directing the warden to execute the sentence within 180 days***, ***at a time designated in the warrant***.

Section 922.052(2)(b), Fla. Stat. (emphasis added).

The Governor's Death Warrant for Mr. Henry is devoid of any date or time of execution, and fails to direct the warden to execute the sentence within 180 days.

Section 922.052(3), Florida Statutes (2013) [formerly part of § 922.052(1)], which the TJA simply moved and renumbered, provides:

> (3) ***The sentence shall not be executed until*** the Governor issues a warrant, attaches it to the copy of the record, and transmits it to the warden, directing the warden to execute the sentence at ***a time designated in the warrant***.

Section 922.052(3), Florida Statutes (2013).

Thus, under either the pre-TJA § 922.052(1), or post-TJA § 922.052(3), the statute requires a death warrant contain a "time" of execution. Id.

Either the Governor's death warrant power is subject to the Legislature's regulation by statute (and Mr. Henry's warrant is fatally defective), or a Governor's death warrant power is an exclusive Executive Power under the Florida Constitution (and the TJA unconstitutionally usurps that Executive Power, as noted in Point I).

POINT III

THE TRIAL COURT ERRED IN SUMMARILY DENYING POSTCONVICTION RELIEF WITHOUT AN EVIDENTIARY HEARING ON MR. HENRY'S "AS APPLIED" CHALLENGE TO FLORIDA'S USE OF MIDAZOLAM AS THE FIRST DRUG IN ITS LETHAL INJECTION PROTOCOL AS HIS ALLEGATIONS AND DOCUMENTATION SHOWING HIS SPECIFIC MEDICAL CONDITION CREATESAN IMMINENT SUBSTANTIAL OBJECTIVELY INTOLERABLE RISK OF SERIOUS HARM PAIN AND SUFFERINGCOMPRISING CRUEL & UNUSUAL PUNISHMENT & VIOLATING THE EIGHTH AMENDMENT ARE NOT CONCLUSIVELY REFUTED BY THE RECORD

Mr. Henry's postconviction motion alleges that, due to his specific personal medical condition, the use of the drug Midazolam as the first drug in Florida's lethal injection protocol creates an imminent, substantial and objectively intolerable risk of serious harm, preventing prison officials from claiming subjective blamelessness concerning the Eighth Amendment to the United States

Constitution's protection against cruel and unusual punishment (R 71-103, 123-124, 226-242, 243-249), attaching the Affidavit of Dr. Joel Zivot, Assistant Professor of Anesthesiology and Surgery at the Emory University School of Medicine, Medical Director of the Cardiothoracic and Vascular Intensive Care Unit, and Academic Director of the Critical Care Medicine Fellowship for the Department of Anesthesiology, with multiple United States and international Board Certifications, leadership positions and licensure by the United States Drug Enforcement Administration (R 245).

As an anesthesiologist, Dr. Zivot has personally administered relatively large doses of Midazolam, observing a rapid fall in blood pressure that required immediate and ongoing infusions of medications to restore adequate blood pressure (R 248).

Dr. Zivot reviewed Mr. Henry's medical records (R 246), noting 90% of coronary events occur in persons possessing *one* risk factor for a coronary event. Mr. Henry evidences *two* such risk factors, dyslipidemia and hypertension (R 246).

Dr. Zivot personally examined Mr. Henry on February 24, 2014 (R 246, 247), noting he is taking an ACE inhibitor and the diuretic, hydrochlorothiazide (R 247).

Dr. Zivot's expected testimony at an evidentiary hearing is memorialized in his Affidavits attesting to the "very high risk" Mr. Henry, as a particular individual, will suffer severe pain in his chest and difficulty breathing when given Midazolam:

> "A fall in blood pressure, leading to an acute coronary event in an individual with a very high risk of coronary artery disease will result in an acute coronary event that will be experienced as severe chest pain and shortness of breath. Mr. Henry is such an individual. Midazolam, given in the dose described in the lethal injection procedure document will lower the blood pressure precipitously in Mr. Henry in an exaggerated manner as a consequence of his long-standing hypertension."

(R 246-247) (See also R 248).

Noting the Florida Department of Corrections' lethal injection protocol does not take coronary risk factors into account, Dr. Zivot stated in his Affidavit:

> "The design of the Florida lethal injection procedure will *very likely* cause serious illness and needless suffering to Mr. Henry as a consequence of the acute coronary event. This lethal injection procedure presents a substantial risk of serious harm . . ."

(R 247) (emphasis added).

Mr. Henry's counsel proffered Dr. Zivot's expected expert testimony which he would give at an evidentiary hearing, expressing his medical opinion Mr. Henry, as a specific individual, will have an exaggerated reaction to Midazolam,

and will not only fail a graded noxious stimuli test Department of Corrections officials plan to test Mr. Henry's unconsciousness (R 239-240, 300-302), but will experience unnecessary pain and suffering while having an acute coronary attack (R 247).

Mr. Henry's postconviction counsel requested an evidentiary hearing in which to prove these claims (R 71-103, 123-124, 226-242, 243-249).

Though the existing files and records below did not show conclusively that Mr. Henry was entitled to no relief, the State relied solely upon its own *argument*, submitting *no* affidavit, document or evidence to overcome: (a) Mr. Henry's claim, (b) Dr. Zivot's Affidavit, and (c) proffered testimony that if he, as an individual, receives Midazolam, it "will *very likely* cause serious illness and needless suffering to Mr. Henry as a consequence of the acute coronary event. This lethal injection procedure presents a substantial risk of serious harm . . ." (R 247) (emphasis added).

The trial court's denial of an evidentiary hearing on this claim simply states it "does not warrant an evidentiary hearing" (R 230).

But Rule 3.851(f)(5)(B) only permits denial of a successive postconviction motion without an evidentiary hearing "[i]f the motion, files, and records in the case conclusively show that the movant is entitled to no relief." In reviewing a trial

court's summary denial of postconviction relief, this Court accepts the defendant's allegations as true to the extent they are not conclusively refuted by the record. *Freeman v. State*, 761 So.2d 1055, 1061 (Fla.2000). The motion, files, and record in the present case do not conclusively show that Mr. Henry is not entitled to relief. There is absolutely nothing in the files and record to refute Mr. Henry's allegations. Accepted as true, and wholly unrefuted by the files and records, the allegations of Mr. Henry's motion make out a viable Eighth Amendment violation.

Just recently, this Court considered an "as applied" challenge to Florida's lethal injection procedure involving divergent individualized facts in *Howell v. State*, SC14-167, 2014 WL 659943 (Fla. 2014) *cert. denied*, 13-1021, 2014 WL 727245 (U.S. 2014), where the Court ultimately held the use of Midazolam as the first of the three drugs administered pursuant to Florida's lethal injection protocol did not constitute cruel and unusual punishment *as applied to that defendant*, though that defendant, who allegedly suffered from mental illness, presented expert testimony on the use of Midazolam *in patients with mental illness*. Though the Court ultimately affirmed denial of relief in *Howell*, this Court's decision was predicated upon, and limited to, the particular basis for that "as applied" challenge, as well as the particular expert testimony adduced at an evidentiary hearing

ordered by this Court. The Court later explained its reasoning in remanding for an evidentiary hearing as follows:

> The postconviction court summarily denied relief, concluding that an evidentiary hearing was not necessary because Howell's claims had either been previously rejected by this Court or were speculative in nature. However, *because Howell raised factual as-applied challenges and relied on new evidence not yet considered by this Court, which raised a concern that Howell could regain consciousness during the administration of the second and third drugs in the protocol and thus be subjected to extreme pain*, this Court relinquished jurisdiction for an evidentiary hearing as to the claim pertaining to the use of Midazolam as the first drug in the protocol. *Howell v. State*, No. SC14–167, Order at 2 (Fla. Sup.Ct. Order entered Feb. 6, 2014).

Howell v. State, SC14-167, 2014 WL 659943 *2.

Like *Howell*, Mr. Henry raises an "as applied" Eighth Amendment challenge to the method the State of Florida intends to use to put him to death. Unlike *Howell*, however, Mr. Henry does not so much contend that he will be conscious when the second and third drugs are administered, as he does assert he will suffer a painful coronary event while still conscious when the first drug, Midazolam, is administered.

The trial court's summary denial of Mr. Henry's "as applied" challenge to the use of Midazolam because of the "very likely" risk of his needless pain and suffering *in this particular case*--which must be accepted as true, *Freeman v. State*,

761 So. 2d at 1061--overextends this Court's *post-evidentiary hearing* opinion in *Howell*.

The trial court characterized *Howell* as "reject[ing] the claim that Midazolam fails to sufficiently render an inmate unconscious and insensate before the administration of the second and third drugs," and that this Court "found that the consciousness check . . . is sufficient to ensure that the inmate is unable to perceive any noxious stimuli" (R 189). The trial court goes on to discuss the particular facts and circumstances germane to *Muhammad v. State,* SC13-2105, 2013 WL 6869010 (Fla. 2013) *cert. denied*, 134 S. Ct. 894 (U.S. 2014) (R 191-193).

The trial court concluded that "Dr. Zivot's affidavit does not proffer anything that calls into question that [Mr. Henry] would be unconscious and insensate by a properly administered dosage of 500 mg of Midazolam," and "does not specify how long after the administration of Midazolam [Mr. Henry] would suffer an acute coronary event, if at all" (R 193-194); that "reference to protocols used by other states that do not require Midazolam falls short of identifying a 'known alternative'" (R 194); and that Henry cannot meet a burden under *Base v. Rees*, 553 U.S. 35 (2008) (plurality opinion) of showing that injecting him with Midazolam is "sure or very likely to cause serious illness and needless suffering,"

and give rise to "*sufficiently imminent dangers*." *Base v. Rees*, 553 U.S. at 49-50 (citation omitted). (R 193).[10]

But following the trial court's rationale to its logical end would require a party's *expert* affiant to deny every conceivable exception or counterexample to each of his assertions in order to withstand *layman* "cross-examination" without benefit of an evidentiary hearing. Dr. Zivot *medically* examined Mr. Henry (R 246, 247), and clearly stated administration of Midazolam "will *very likely* cause serious illness and needless suffering to Mr. Henry as a consequence of the acute coronary event";that Mr. Henry will experience "severe" pain in his chest; that Mr. Henry will have difficulty breathing; and that, with respect to Mr. Henry as an individual with a specifically documented medical history and physical examination, Midazolam "presents a *substantial* risk of serious harm" (R 247) (emphasis added).

The trial court's own *questions* about how long into the procedure Mr. Henry would suffer a heart attack, or whether he would be unconscious while experiencing severe pain in his chest and difficulty breathing (R 247) would best

[10]The trial court's adoption of the State's reliance on the plurality opinion in *Baze* (R 110, 132-133), as setting a higher standard for lethal injection claims, is incorrect. *Ventura v. State*, 2 So. 3d 194, 199 (Fla. 2009) ("we have rejected contentions that *Base* set a different or higher standard for lethal injection claims") (citation omitted).

be posed by the prosecution on cross-examination at an evidentiary hearing into these matters of fact.

Only an evidentiary hearing can decide this lingering factual dispute, germane, as it is, to the field of anesthesiology. See *Way v. State,* 630 So.2d 177 (Fla.1993)(purpose of an evidentiary hearing is to resolve disputed issues of fact); *Maharaj v. State*, 684 So. 2d 726, 728 (Fla. 1996) ("an evidentiary hearing on at least some of his claims is warranted because those claims involve disputed issues of fact"); *LaGrand v. Stewart,* 173 F.3d 1144 (9thCir.1999) (federal trial court's *post- evidentiary hearing* findings on "extreme pain, the length of time this extreme pain lasts, and the substantial risk that inmates will suffer this extreme pain for several minutes require the conclusion that execution by lethal gas is cruel and unusual").[11]

As the motion, files, and records in this case do not conclusively show that Mr. Henry is entitled to no relief, Rule 3.851(f)(5)(B), this Court should accept the allegations in the postconviction motion as true to the extent they are not

[11]The trial court also concluded that "reference to protocols used by other states that do not require Midazolam falls short of identifying a 'known alternative'" (R 194). In *Base* itself, however, the petitioners "propose[d] an alternative protocol, one that they concede[d] has not been adopted by any State and has never been tried." *Base*, 553 U.S. at 41. Also, in addition to other states' lethal injection protocols, Mr. Henry identified Florida's prior protocols employing traditional clinical anesthesia (R 123).

conclusively refuted by the record, *Freeman v. State*, 761 So.2d at 1061, crediting Dr. Zivot's Affidavits and proffered testimony, *id.*, and affording Mr. Henry a full evidentiary hearing at which to prove his "as applied" Eighth Amendment claim.

CONCLUSION

The Court should declare § 922.052, Fla. Stat., as amended by Ch. 2013-216, § 12, Laws of Florida, the "Timely Justice Act of 2013" ("TJA"), unconstitutional.

The Court should dismiss Mr. Henry's Death Warrant as it violates that statute.

The trial court's order denying the motion to vacate should be reversed and remanded for an evidentiary hearing at which Mr. Henry may prove his claims.

CERTIFICATE OF FONT AND TYPE SIZE

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing has been furnished on this 4th day of March, 2014, to the following:

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