IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC14-398

ROBERT L. HENRY,

APPELLANT

VS.

STATE OF FLORIDA

APPELLEE

ON APPEAL FROM THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT, IN AND FOR BROWARD COUNTY, FLORIDA, (CRIMINAL DIVISION)

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, Robert L. Henry, Defendant below, will be referred to as "Henry" and Appellee, State of Florida, will be referred to as "State". Reference to the appellate record documents will be by "RR," the transcript will be by "RT," . Henry's initial brief will be notated as "IB."

STATEMENT OF THE CASE AND FACTS

On February 13, 2014, the Governor signed a death warrant for Henry scheduling his execution for Thursday, March 20, 2014, at 6:00p.m. In response, this Court instructed that all proceedings pending in the trial court, if any, be completed and orders entered by 12:00 p.m., Wednesday, February 26, 2014.

On February 19, 2014, Henry filed a successive motion for postconviction relief challenging Florida's lethal injection protocol as unconstitutional on various grounds[1]. Among his claims, Henry argued an "as applied" constitutional challenge to the use of midazolam which he termed as being the same claim raised by then-condemned inmate Paul Augustus Howell wherein

[1] Specifically, Henry argued that midazolam is not a proper first drug because it is not a barbiturate, that the timing of the injection sequence is not adequately explained, that Agt. Jonathan Feltgen's testimony in *Muhammad* and execution shows flaws in the protocol, that the protocol does not provide for adequately trained personnel, that alleged movement during the Happ execution shows that midazolam does not work, the consciousness check provided in the protocol is inadequate and Florida should be forced to adopt a one drug protocol – the one drug being midazolam.

this Court remanded for an evidentiary hearing in *Howell v. State*, SC14-167 (R 79-80). Specifically, in paragraph four of his motion, Henry alleged that due to

> specific medical…issues affecting Robert Henry, the use of midazolam will result in a substantial risk of harm. Dr. Joel Zivot would testify that a substantial risk for a precipitous fall in blood pressure leading to an acute coronary event would occur. This would be experienced as significant chest pain and shortness of breath in [his] case.

(R 72-73)[2]

In light of these factual allegations, Henry argued that an evidentiary hearing was warranted in order to determine "whether the use of midazolam in consideration of [his] medical history… will subject him to a 'substantial risk of serious harm'" in violation of the Eighth amendment (R 79-80).

Henry expanded upon this argument at the hearing on the amended motion on February 21, 2014. Specifically, Henry argued that Dr. Zivot's letter, which he attached to his motion, raised the same concerns that were raised in *Howell* – that is, because of Henry's physical condition, the midazolam will not render him unconscious but would cause him excruciating pain (R 292). Accordingly, Henry argued, an evidentiary hearing was necessary. The State responded that Henry's claim that there is a potential for a heart attack once the midazolam is injected was

[2] In support of this proposition, Henry attached a letter from Dr. Joel Zivot stating same.

insufficient on its face to warrant a hearing (Vol. III, T 297). The *Muhammad* Court had already approved of the findings that midazolam, when administered pursuant to the protocol, would begin to work immediately and render the condemned unconscious and insensate (Vol. III, T 297). Allegations of a potential heart attack in light of the efficacy of midazolam did not suffice to meet Henry's burden to establish the need for an evidentiary hearing (Vol. III, T 297). The trial court denied a request for evidentiary hearing on February 21, 2014 (R 230).

Before a final order was entered, however, Henry filed an amended successive motion, again seeking an evidentiary hearing (R 236-242) alleging that he "intend[ed] to present evidence that he will experience an exaggerated reaction to Midazolam and that he will fail the graded noxious stimuli test that DOC employees undertake to ensure unconsciousness" – the exaggerated reaction being the lowering of Henry's blood pressure precipitously (R 238-239). Henry further alleged that his evidence would include testimony that the fall in blood pressure "[would] result in an acute coronary event that will be experienced as severe chest pain and shortness of breath" (R 238). In support of this amended motion, Henry attached two affidavits from Dr. Joel Zivot testifying that a large dose of midazolam, in hypertensive patients like Henry, "will lower the blood pressure precipitously in Mr. Henry in an exaggerated

manner" which "will, with a high probability of certainty, result in an acute coronary event…" (R 247- 248).

Henry filed his second amended successive motion for post conviction relief arguing that his sentences of death violated the Eighth Amendment as they were the product of a non-unanimous jury. The trial court heard argument as to both of Henry's amended successive motions on February 25, 2014.

At the hearing, Henry argued that his death sentences violated the Eighth Amendment as they were the product of a non-unanimous jury. Henry also argued that an evidentiary hearing was warranted on his as-applied challenge where midazolam would cause Henry to have a heart attack as opposed to render him unconscious (SR 45). Henry again argued that the proceedings in *Howell* dictated an evidentiary hearing in his case (R 46). In his argument, Henry conceded that Henry had "a different medical problem that Mr. Howell had" (R 46). Notwithstanding, Henry continued, as this Court "recognized that the affidavit was enough to order a hearing", then the trial court should have a hearing as well (R 46).

The State responded that the amended motion was nothing more than a rehearing (SR 46). Dr. Zivot's affidavit did not state that Henry would be conscious and awake in the event that he suffered a heart attack (SR 48). Moreover, the State continued, the Florida Supreme Court had already considered

midazolam's ability to cause cardiac arrest and respiratory arrest and still determined that its use did not violate the 8th Amendment (SR 48). Finally, the State argued that the pleading was insufficient where it failed to allege an available alternative as required by *Baze* (SR 49). The trial court again denied the request for an evidentiary hearing.

On February 26, 2014, Henry filed a Motion to Declare §922.052, Florida Statutes unconstitutional. At 11:40 a.m., Henry then filed a Motion to Dismiss Defective Warrant (R 197-198). The trial court denied Henry's Motion to Declare §922.052, Florida Statutes as well as Henry's Motion to Dismiss Defective Warrant (R 180-182, R 199-200). The trial court also entered a 14 page order denying Henry's successive motion for post conviction relief along with its two amendments (R 183-196).

This appeal follows.

SUMMARY OF THE ARGUMENT

Issue I –The trial court's summary denial of Henry's constitutional challenge to *Fla. Stat.* §922.052 based on *Muhammad v. State,* 2013 WL 6869010 (Fla. Dec. 19, 2013) was proper as Henry cannot establish that the Governor's decision to deny clemency and sign a death warrant was compelled by the "Timely Justice Act." Moreover Henry's constitutional challenge must fall as he misstates the law.

Issue II – The trial court's summary denial of his request to dismiss the death warrant was proper as Henry cannot establish that he was prejudiced by the alleged technical deficiency in the warrant. Moreover, pursuant to the Separation of Powers Clause of the Florida Constitution, courts are not authorized to "dismiss" based on ministerial defects.

Issue III - The trial court's summary denial of Henry's "as-applied" challenge to midazolam was proper. Henry patently failed to meet his burden where his proffer of evidence did not support his allegations but directly contradicted them. As Henry's challenge amounted to nothing more than a general challenge to the efficacy of midazolam, an evidentiary hearing was not warranted.

ARGUMENT

ISSUE I

THE TRIAL COURT PROPERLY DENIED WITHOUT AN EVIDENTIARY HEARING HENRY'S FACIAL AND AS APPLIED CONSTITUTIONAL CHALLENGE TO *FLA. STAT.* §922.052.

Herein Henry challenges the trial court's summary denial of his constitutional challenge to the amendment of *Fla. Stat. §*922.952(b), contained in the "Timely Justice Act," and herein referred to as "TJA". Henry alleged generally below, and again on appeal, that the law as amended is an unconstitutional encroachment by the Legislative Branch on the Executive branch and therefore is in violation of the Separation of Powers Clause of the Florida Constitution. (SROA 53-57). The trial court, did not rule on the constitutional issue raised and instead summarily denied relief adopting the identical reasoning of this Court in *Muhammad v. State,* 2013 WL 6869010 (Fla. Dec. 19, 2013). (ROA 180-181). For the reasons stated below, the trial court's ruling must be affirmed.

In *Muhammad,* this Court noted that Muhammad's clemency proceedings started well before enactment of the amendment and therefore Muhammad could not demonstrate that the challenged provisions in anyway resulted in the Governor's decision to sign a death warrant in his case. This Court also noted that it was beyond the Court's authority to even inquire into the Governor's

reasoning behind the signing of any warrant and therefore Muhammad's invitation to speculate regarding the Governor's clemency decision was precluded. *Muhammad, supra* at *13-14.

The trial court below applied the same reasoning noting that Henry's clemency proceedings commenced long before the challenged enactment became law, which was even "further before the passage of the Act than that of Muhammad's clemency proceeding," and therefore Henry's claim was insufficient and without merit. (ROA 181). Henry attempts to distinguish *Muhammad* on two fronts, neither of which are accurate. First he argues that the denial of clemency in this case unlike that in *Muhammad,* occurred on the same day the Governor signed his death warrant and therefore it must be presumed that the Governor did so because of the TJA. **Brief at 20-21.** However Henry's argument fails because the signing of the death warrant for Muhammad also occurred on the same date that his clemency was denied. This Court explicitly so stated:

> Muhammad rejected the opportunity for a clemency interview in September 2012 based on what the record reflects to be his own misunderstanding of medical advice about the use of his voice. **In signing the death warrant in this case, the Governor indicated that clemency has been considered and rejected.**

Muhammad, supra at *13(emphasis added).

Henry also claims that *Muhammad* is distinguishable based on the fact that the clemency office accepted clemency documents

from Muhammad for several months thereafter. See **Brief at 20,** quoting *Muhammad* at *14. Henry appears to be implying that the "thereafter" equates to after Muhammad's warrant was signed. He then states that no such follow-up occurred for Henry because the TJA "interrupts and limits" review of follow-up documents following the signing of a death warrant. However Henry again is incorrect. In *Muhammad* this Court recounted the facts as follows:

> We do not reach Muhammad's constitutional challenge to the amendments to section 922.052 pursuant to the Act. **The Office of Executive Clemency initiated Muhammad's clemency proceeding in September 2012, long before passage of the Act, and that office accepted follow-up documents as to clemency for several months thereafter.** It cannot be said that Muhammad's death warrant would not have been signed but for the Act.

Muhammad, at *14. Clearly this Court's reference to the receipt of follow-up documents[3] by the clemency office was within several months after clemency was initiated and not after a warrant the

[3] Henry assumes in his brief that once a warrant is signed, the Governor will not or cannot accept or consider any further information for the purposes of clemency. **See Brief at 20.** Again Henry misstates the law. By signing the warrant, the Governor signifies that at that point in time clemency will not be granted and the Governor will not intervene in the carrying out of the inmate's sentence. The **statue is silent regarding any further review by the Governor should someone present other information as a request for clemency.** Henry's assumption that the Governor is precluded from considering any other clemency request up until the sentence is carried out is not supported by the law whatsoever. Moreover Henry has not identified any attempt by him to present any follow-up documentation to the Governor for further clemency consideration following the signing of his death warrant. His argument is baseless.

warrant was signed in October of 2013. *Muhammad* at *3, 13. Consequently the facts of *Muhammad* are indistinguishable from the facts herein and therefore Henry cannot overcome the rationale of *Muhammad.* For the same reasons this Court found it unnecessary and inappropriate to consider the constitutionality of the "TJA" in *Muhammad,* this Court must reject Henry's invitation as well and uphold the trial court's summary denial of Henry's claim.

With regards to the substance of the claim the state argues as follows. In deciding this issue, Legislation comes before this Court with a presumption of constitutionality, which is only overcome if the invalidity appears beyond reasonable doubt, and this Court must construe the statute to affect a constitutional outcome whenever possible. *Crist v. Florida Association of Criminal Defense Lawyers, Inc,* 978 So. 2d 134 (Fla. 2008). Moreover, insertion of a word not found anywhere in the statute is impermissible when the statute's meaning is clear and language is plain. *See GTC, Inc. v. Edgar,* 967 So. 2d 781, 781 (Fla. 2007)(explaining that if statute is clear, courts will go no further than applying its plain language). Henry turns this basis rule of statutory construction on its head as he reads something into the statute that isn't there. Henry's argument fails to overcome the presumption of constitutionality due the Timely Justice Act.

The gravamen of his claim is that the legislature by mandating when the Governor shall sign a death warrant results in a scheme that "outlaws a Governor's exercise of discretion to design a *de novo* Clemency proceeding that discounts a prior one, …." **Brief at 15.** In making this assertion Henry inserts the word "initial" into the statute that simply is not there. He has decided that §922.052(2)(b) is referencing the "*initial* denial of Clemency the *sin qua non* of a warrant, as it says he must sign the warrant 'if the executive clemency process has concluded'". **Brief at 15.** (emphasis included). Henry then infers that the TJA now precludes the Governor from performing a clemency review **at any time**, and therefore infringes on the Governor's exclusive authority to grant clemency. **Brief at 16.**

Fatal to Henry's argument however is that the statute at issue does not identify or characterize the clemency process as being the **initial** denial of clemency. There is no time continuum included in the description of the clemency process whatsoever. It is Henry who manufactures that description and injects the concept without any basis to do so. The statue refers explicitly to the clemency **process** with no mention of a defined beginning or more importantly a requirement of when if ever that process should end. Henry cannot read a meaning into the law that does not exist simply so he can create an argument. *Rollins v. Pizzarelli,* 7651 So. 2d 294, 297 (Fla.2000)(ruling that statute

must be given its plain meaning when it is clear an unambiguous). Consequently his arguments fails on that basis alone.

Additionally the TJA does not make any defendant eligible or ineligible for a warrant or otherwise affect the status of any death-sentenced inmate. It does not expand or restrict any postconviction rights or litigation, either before or after a death warrant may be signed. Therefore Henry's claim of interference with the Governor's authority and sole discretion to issue death warrants is meritless.

The statute provides only that the Florida Supreme Court's Clerk notify the Governor when a capital defendant has either completed his or her initial round of state postconviction review and litigated a federal habeas petition and appeal or has allowed the time for federal review to elapse, and that a death warrant should be issued within 30 days of that certification "if the executive clemency process has concluded." The sharing of this information with the Governor by the Clerk of the Court does not usurp any power of the Governor. And that is because a death warrant is not issued automatically upon receipt of this information. To the contrary, the warrant is issued only when the Governor has determined that the inmate will not be granted clemency. As conceded by Henry, the death warrant is itself the Governor's decision to deny clemency. *See Muhammad v. State,*

2013 WL 6869010 *13 (Fla. 2013)(recognizing that the act of signing a death warrant is indicative that the Governor has considered and rejected clemency). Clearly it is the Governor who controls that process and only the Governor. Consequently the timing of the warrant, is still left to the Governor's broad discretion, the warrant signifies the Governor's decision to deny clemency. Therefore the law as written, fully respects the duties and obligations of the Governor and does not infringe upon, or interfere with, his discretion in the signing of death warrants. Henry's argument must fall.

Additionally, the Governor's authority to issue death warrants is also generally bestowed by the constitutional mandate for the Governor "to see that the laws be faithfully executed." See Fla. Const. Art. 4, §1; In re Advisory Opinion to Governor, 19 So. 2d 370, 370 (Fla. 1944) ("There are few, if any, duties devolving upon the Governor which have more direct relation to the faithful execution of the laws than the proper issuance of death warrants"). In that case, this Court held that the Governor must comply with the statutory directive that required a warrant week to be designated, beginning no less than five days after the signing of the warrant. In 1996, the warrant issuance provision was amended to mandate that a warrant remain in full force and effect even if execution is not accomplished during the week designated in the warrant. See §922.052(2), *Fla.*

Stat. (1996) [renumbered to §922.052(4) by the Timely Justice Act]. Thus, this Court has previously confirmed, issuance of a warrant is properly subject to general law as proscribed by the Legislature to be enforced by the Governor under our Constitution.

Accordingly, the law's requirement that the execution be scheduled within 180 days of the signing of a death warrant is well within the authority of the Legislature. This Court has long recognized that the Legislature has authority "to provide the method, the means, and the instrumentalities for executing death sentences imposed by the courts." *Blitch v. Buchanan*, 131 So. 151, 155 (Fla. 1930). *See also Jarvis v. Chapman,* 159 So. 282. (Fla. 1935). Therein this Court reaffirming *Blitch, supra* described the signing of a warrant as the Governor's decision to not interfere with execution of a valid sentence and instead, "that the law shall take its course, the judgment and conviction be executed so far as any power vested in him shall be exercised to the contrary." In essence the signing of the warrant is the Governor's decision to "pass the baton" back to those responsible to see that the law is faithfully executed and the sentence be carried out. *Jarvis,* 159 So. at 285.

Consequently, the Legislature can determine that a six-month warrant period is excessive, contrary to the interests of the State, and against public policy, and the Legislature has

the authority to enact a reasonable restriction in furtherance of that determination. A 180 day maximum period between warrant signing and execution is no different than the five day minimum period between warrant signing and execution week enforced by this Court in 1944. The Legislature's authority in this regard has been repeatedly exercised, such as the 1996 amendment mandating that a warrant remain in full force and effect even if execution is not accomplished during the week designated in the warrant, and has never been denied by this Court. *See* §922.052(2), *Fla. Stat*. (1996) [renumbered to §922.052(4) by the Timely Justice Act].

In conclusion, Henry has failed to demonstrate that the Timely Justice Act of 2013 violates the separation of powers set forth in the Florida Constitution by encroaching on the Governor with respect to his power to grant clemency at any time. The trial court's summary denial of this claim must be affirmed.

ISSUE II

HENRY'S CLAIM THAT HIS DEATH WARRANT SHOULD BE DISMISSED BECAUSE IT DID NOT INCLUDE THE DATE AND TIME OF HIS EXECUTION WAS PROPERLY DENIED BY THE TRIAL COURT (RESTATED)

Henry, reasserting the argument made before the trial court, states that he is entitled to dismissal of the death warrant because it does not contain the date and time of his

execution as required pursuant to *Fla. Stat.* §922. 052(b) (ROA 197-198, 224). Below the trial court, without benefit of a response by the state, denied the claim summarily.[4] The state asserts that the trial court's summary denial was proper as Henry's claim is legally insufficient.

Henry's claim below and before this Court is not premised on any constitutional due process violation claiming he was unaware of the date and time of his pending execution. Nor has he alleged that because of this omission/deficiency he has been prejudiced in any manner. His claim is simply that the alleged technical deficiency, in the death warrant requires "dismissal" irrespective of whether he is able to demonstrate that he has been prejudiced in anyway. Henry fails to cite to any authority that requires relief based on a technical error that did not result in any prejudice. Indeed that deficiency alone in his argument requires affirmance of the trial court's summary denial. *Cf. Hoffman v. State,* 397 So. 2d 288, 290 (Fla. 1981)(refusing to grant relief for mistake or technical defect in information absent showing of prejudice to defendant).

Moreover the record is clear that Henry was not prejudiced by the failure to include the date and time of his execution

[4] Approximately nineteen minutes prior to the deadline imposed by this Court that required all proceedings to be completed in the trial court, (ROA 203), Henry filed a pleading styled, "Motion To Dismiss Defective Death Warrant". (ROA 197).

into the body of the warrant, because he has known the date and time of his execution as early as February 14, 2014, a day following the Governor's signing of the warrant. This Court issued its warrant schedule which begins as follows:

> Because 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 all further proceedings in this case be expedited.

(ROA 45). His argument is therefore frivolous. *State v. Schoop,* 653 So. 2d 1016, 1018-1019 (Fla. 1995)(approving requirement demonstrating that defendant was prejudiced by discovery violation prior to granting relief); *Campbell v. Stte,* 125 So. 3d 733, 736 (Fla. 2013)(refusing to grant motion to withdraw plea after sentencing based on technical violation absent a showing of prejudice to the defendant); *Tucker v. State,* 559 So. 2d 218, 220 (Fla. 1990)(recognizing long standing principle that technical noncompliance with rule does not warrant relief if there is no harm to the defendant); *Hoffman, supra.*

Consistent with this Court's precedent is *Fla. Stat. §*924.33 which requires a finding that the substantial rights of a defendant have been prejudiced by the claimed error before a defendant is entitled to relief. Henry has not nor can he demonstrate that he suffered any prejudice that would entitle him to a "dismissal" of the active death warrant.

Next, the remedy requested by Henry is unavailable to him because courts have no authority to "dismiss a death warrant." To afford Henry the relief requested would be unconstitutional as a violation of the separation of powers clause of the Florida Constitution, *see Fla. Const. Article II Section*, because the signing of a death warrant, amounts to Governor's decision to deny clemency. That decision is solely a function within the exclusive power/discretion of the executive branch, and is therefore insulated from judicial scrutiny. *See Muhammad v. State,* 2013 WL 6869010 *13 (Fla. 2013)(recognizing that the act of signing a death warrant is indicative that the Governor has considered and rejected clemency);*see also Carroll v. State,* 114 So. 3d 883 (Fla. 2013)(clemency process represents the executive branch's unlimited and sole discretion in deciding whether to grant "this act of grace" *citing to Sullivan v. Askew,* 348 So. 2d 312, 315 (Fla. 1977); *Parole Comm'n v. Lockett,* 620 So.2d 153, 154-55 (Fla. 1993)(explaining that clemency is strictly an executive function and beyond the purview of the judiciary); *Bundy v. Dugger*, 850 F.2d 1402, 1424 (11th Cir. 1988)(explaining Eighth Amendment concerns focus on the judicial processes of trial and appellate review and not the discretionary processes such as clemency); *see also Blitch v. Buchanan,* 131 So. 151, 157 (Fla. 1930)(explaining that capital punishment is prescribed by the legislative branch; adjudge by the judicial branch and

carried out by the executive branch via a death warrant);*Jarvis v. Champman,* 159 So. 282, 285 (Fla. 1935)(same).

Moreover, the circumstances surrounding the actual signing of the warrant, including affixing the date and time of the execution, are simply ministerial steps necessary to carry out the execution. As such, this Court has determined that these ministerial acts are completely irrelevant to issues that are properly before courts, namely the constitutional validity of a conviction and sentence. *Jarvis, supra, So. 259 at* 288. Consequently, the state asserts that this Court cannot grant Henry's request of "dismissal" as it is not based on any **legal** challenge to his conviction or sentence. *See Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 118 S.Ct. 1244, 140 L.Ed.2d 387 (1998)(*citing Greenholtz v. Inmates of Neb. Penal and Corr. Complex,* 442 U.S. 1, 7-8 (1979), for proposition that clemency proceedings do not determine defendant's guilt or innocence, and are not intended to enhance the reliability of the trial process, but is instead a matter of grace); *Herra v. Collins,* 506 U.S. 390, 411-415 (1993)(recognizing the traditional availability and significance of clemency as part of executive authority, without suggesting that clemency proceedings are subject to judicial review).

For that same reason, the "technical defect" in the warrant could not be a basis for a stay of execution pursuant to *Fla.*

Stat. § 922.06(1), because a stay must be predicated on an issue "incident to an appeal." Appellate review involves errors of law relevant to the validity of convictions and sentences only. *See Fla. Stat. §*924.066 and 924.09; *see also Fla. R. App. Pro.* 9.140 (b) (1)-(4), 9.142 and *Crim. R. of Pro.* 3.851-3.853. As noted above, Henry's alleged error regarding ministerial acts involving the signing of a death warrant do not implicate in any manner the validity of his conviction and sentence, and is therefore beyond appellate review. Consequently, a stay of execution could never be premised on Henry's claim. *Pardons v. Dumschat*, 452 U.S. 458, 465 (1981) (explaining that the granting of clemency is not based on legal grounds, it is purely discretionary and is "simply a unilateral hope.")

In summary, to find merit in Henry's claim and "dismiss" the death warrant would be a violation of long standing precedent from this Court that relief can only be predicated on a finding of prejudicial error. Henry has not demonstrated that he has been in any way prejudiced by this technical deficiency. Moreover this Court does not have the power to grant the requested relief based on the doctrine of separation of powers. Summary denial by the trial court was proper. *Hoffman, supra; Jarvis, supra; Muhammad, supra; Carroll, supra.*

ISSUE III

THE TRIAL COURT DID NOT ERR IN SUMMARILY DENYING HENRY'S SUCCESSIVE MOTION FOR POST CONVICTION RELIEF (AND THEIR AMENDMENTS) AS TO HIS "AS-APPLIED" CHALLENGE TO THE CONSTITUTIONALITY OF THE USE OF MIDAZOLAM WHERE HIS ALLEGATIONS DID NOT WARRANT RELIEF (RESTATED)

STANDARD OF REVIEW

As this claim involves the Eighth Amendment of the United States Constitution, a review of the relevant standard to be applied to such claims is necessary. The Eighth Amendment to the Constitution, applicable to the States through the Due Process Clause of the Fourteenth Amendment, provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." *Baze v. Rees*, 553 U.S. 35, 47, 128 S. Ct. 1520, 1529, 170 L. Ed. 2d 420 (2008). As capital punishment is constitutional, it necessarily follows that there must be a means of carrying it out. As the risk of pain is inherent in any method of execution, the Constitution does not demand the avoidance of all risk of pain. *Id.* Instead, the United States Supreme Court concerns itself with the exposure of individuals to a risk of future harm as their cases recognize that such exposure *can* qualify as cruel and unusual punishment. *Baze*, 553 U.S. at 50.

To that end, the Supreme Court has held that to establish a claim under the Eighth Amendment, a defendant must show that the

state's lethal injection protocol is "'sure or very likely to cause serious illness and needless suffering.'" *Brewer v. Landrigan*, 131 S. Ct. 445, 445, (2010) (quoting *Baze v. Rees*, 553 U.S. 35, 50, (2008) (plurality opinion)). The protocol must also be shown to give rise to "sufficiently imminent dangers." *Helling v. McKinney*, 509 U.S. 25, 33, 34–35, 113 S.Ct. 2475, 125 L.Ed.2d 22 (1993) (emphasis added). Moreover, to prevail on such a claim there must be a "substantial risk of serious harm," an "objectively intolerable risk of harm" that prevents prison officials from pleading that they were "subjectively blameless for purposes of the Eighth Amendment." *Farmer v. Brennan*, 511 U.S. 825, 842, 846, and n. 9, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994). This Court noted that "[t]his standard imposes a "heavy burden" upon the inmate to show that lethal injection procedures violate the Eighth Amendment." *Valle v. State*, 70 So.3d 530, 539 (Fla. 2011) (quoting *Baze*, 553 U.S. at 53) (additional cites omitted); *Howell v. State*, SC14-167, Slip. Op. at 18 (Fla. February 20, 2014).

In *Lightbourne v. McCollum*, 969 So. 2d 326 (Fla. 2007), the court explained that courts have a limited review in assessing Florida's lethal injection protocol. The court made it clear that "[d]etermining the specific methodology and the chemicals to be used are matters left to the DOC and the executive branch, and this Court cannot interfere with the DOC's decisions in

these matters unless the petitioner shows that there are inherent deficiencies that rise to an Eighth Amendment violation." *Id.* at 352. The United States Supreme Court has also warned that the Eighth Amendment should not be used to "transform courts into boards of inquiry charged with determining 'best practices' for executions, with each ruling supplanted by another round of litigation touting a new and improved methodology." *Baze*, 553 U.S. at 51.

When a claim is raised on a motion for post conviction relief, such as Henry's claim here, it is without dispute that the defendant is entitled to an evidentiary hearing on the motion unless (1) the motion, files, and records in the case conclusively show that the prisoner is entitled to no relief; or (2) the motion or particular claims are legally insufficient. *Patton v. State*, 784 So.2d 380, 386 (Fla. 2000). It is equally without dispute that where no evidentiary hearing is held below, this Court must accept the defendant's factual allegations ***to*** the extent they are not refuted by the record. *Foster v. State*, 810 So.2d 910, 914 (Fla. 2002). The defendant in a postconviction proceeding bears the burden of establishing a prima facie case based upon a legally valid claim. *Patton*, 784 So.2d at 386. Mere conclusory allegations are not sufficient. *Id.*

ARGUMENT

On appeal, Henry argues that the trial court erred in summarily denying relief on his "as-applied" challenge to the constitutionality of midazolam. Relying on *Howell*, Henry claims that Dr. Zivot's affidavit entitled him to an evidentiary hearing because the State submitted no affidavit, document or evidence to refute Dr. Zivot's proffer. Initial Brief, 30. Henry's argument misses the point. The trial court's summary denial was predicated solely on its determination that Henry's claim was legally insufficient as pled. The state was not required to "refute Dr. Zivot's proffer" because Dr. Zivot's proffer did not factually support Henry's "as applied" claim.

At bar, the trial court summarily denied Henry's "as-applied" challenge noting that even the most "detailed affidavit submitted by Dr. Zivot…does not support this allegation that midazolam will not have the intended effect of rendering Defendant unconscious" (R 215). The trial court also highlighted the fact that

> the amended affidavit of Dr. Zivot does not specify that Defendant will be conscious at the onset of the acute coronary event. Neither does the Dr. Zivot's proffer state that midazolam will not have the intended effect of rending Defendant unconscious and insensate, and cause him to experience an acute coronary event while conscious.

(R 216). In sum, Dr. Zivot's affidavit did "not proffer

anything that calls into question that Defendant would be rendered unconscious and insensate by a properly administered dosage of 500 milligrams of midazolam" (R 217) prior to the precipitous drop in blood pressure and resulting coronary event. It is this deficiency in the affidavit that required summary denial. Henry's protestations of error, however, are unavailing as the record supports the trial court's determination.

As observed by the trial court, Dr. Zivot's initial letter and subsequent affidavits were completely lacking in its attempt to bolster Henry's alleged "as applied" challenge to the lethal injection protocols. Simply because Henry can present evidence that he suffers from a rather common malady of hypertension and high cholesterol which could lead to a coronary event during the execution process did not state a valid "as applied" claim. In fact it states nothing more than the general attack presented and rejected by this Court in *Muhammad v. State,* 2013 WL 6869010 *9 (Fla. December 19, 2013) (recognizing that a toxic dose of midazolam as part of Florida's lethal injection process would render a person "insensate" and "would cause respiratory arrest and possibly cardiac arrest"). Irrespective of Henry's use of the term "as applied" in his challenge, his proffered evidence did not support that characterization. As such, summary denial was warranted as the affidavit of Dr. Zivot did not factually support a claim similar to the one raised in *Howell.*

Henry's claim fails because his **argument** that there is a "substantial risk of serious harm" should he be injected with midazolam (R 238), is not **factually** supported by the proffered evidence. Nowhere in Dr. Zivot's affidavit did he proffer whatsoever when, if ever, this acute coronary event will occur. In an attempt to cure this deficiency, Henry conflates the affidavits with his **argument** hoping that the two together will support a determination that he was entitled to an evidentiary hearing. In his brief he cites to the **argument of counsel** below at 239-240, 300-302, as part of his proof that Henry will be conscious when his blood pressure drops and suffers a heart attack. **See brief at 30.** That is not the law. It is not the argument of counsel that gives rise to a factual dispute, it is the proffered evidence that does so. Dr. Zivot did not offer any evidence in support of Henry's argument/claim[5].

[5] To the contrary, this proffer directly contradicts counsel's claim that Henry will suffer a coronary event while still conscious. Dr. Zivot's affidavit **refutes** Henry's argument. In describing his own clinical experience with midazolam, in paragraph 21 of the affidavit. Dr. Zivot explains that the effects of midazolam, i.e., a fall in blood pressure occurs in his already unconscious patients (R 248). Obviously if the anesthesiologist's patients are unconscious when their blood pressure drops after the administration of a medical/therapeutic dose of midazolam, Henry's argument that he will be conscious during "a coronary event" following 500 mg. of midazolam is not possible. In other words, the factual dispute herein is between Henry's **argument** and his own evidence. The trial court's summary denial of this claim was proper.

In contrast, Henry's claim was not the same as Mr. Howell's because Henry did not sufficiently make an "as applied" challenge to midazolam, let alone one that is similar to Mr. Howell's. As noted by the trial court, Henry did not "proffer anything that call[ed] into question that Defendant would be rendered unconscious and insensate by a properly administered dosage of 500 miligrams of midazolam" (R 217). Zivot never came close to making such an assertion. Accordingly, the claim amounted to nothing more than an ***uncorroborated challenge*** to the efficacy of midazolam – a claim that was properly denied without an evidentiary hearing. *Hunter v. State*, 29 So. 3d 256 (Fla. 2008)(holding that the defendant-appellant failed to comply with rule 3.851(e)(2)(C) because he did not attach relevant documents and did not proffer any expert witnesses to support his claim).

As stated above, the only claim Henry presented through the Dr. Zivot's affidavit was a general challenge to the efficacy of midazolam. In *Muhammad*, this Court affirmed the lower court's findings regarding the efficacy of midazolam. This Court recounted some of the testimony upon which the lower court relied when it found that Muhammad failed to meet his burden of establishing that use of Midazolam was "sure or very likely to cause serious illness and needless to suffering" under *Baze*. That testimony included the following:

> The State presented the testimony of Dr. Roswell Lee Evans, Jr., a pharmacist, professor of pharmacy, and Dean at Auburn University. He testified that midazolam hydrochloride is an FDA-approved drug used for induction of general anesthesia, with a dose of 35 to 40 milligrams for minor surgeries. **Dr. Evans testified that midazolam hydrochloride is quickly absorbed into the bloodstream when introduced intravenously.** If a person were given 250 milligrams, he or she would be rendered unconscious in no more than two minutes; and that the higher the dose, the longer the person will remain unconscious. He testified that the dosage called for in the lethal injection protocol, 500 milligrams given in two separate doses, would cause respiratory arrest and possibly cardiac arrest, and would render the person insensate or comatose.

Muhammad v. State, 2013 WL 6869010 *9 (Fla. 2013)(emphasis added).

Additionally, this Court in affirming the lower court's findings in *Howell,* recounted the trial court's findings which included the following:

> The Court credits the testimony of Dr. Evans that **midazolam will begin to work immediately.** Midazolam reaches [its] maximum efficacy approximately 10 minutes after administration but will render the condemned defendant unconscious and insensate much sooner.

Howell, Slip Op. at 17 (emphasis added). It is without dispute that Florida law has established that midazolam is constitutionally effective in rendering an inmate comatose, and the effects of the drug are felt immediately. *Muhammad, Howell.* In sum, ***if*** Henry's "exaggerated response" comes to fruition,

this Court has already determined that no effects would be felt as Henry would be insensate.

Because Henry is bound by the findings in *Howell* and *Muhammad* regarding the immediacy of midazolam's effects, the trial court noted that Henry's argument would at best be a claim that the acute coronary would occur simultaneously with him being rendered unconscious. In addressing that point, the trial court continued, "[e]ven assuming that the onset of the acute coronary event coincides with the moment when midazolam is taking effect", Henry was still not entitled to relief. Quoting *Muhammad v. State*, 2013 WL 6869010 (Fla. December 19, 2013), the trial court noted that midazolam is quickly absorbed into the bloodstream and would render an individual unconscious in no more than two minutes (R 217). In light of the efficacy of midazolam, the trial court determined that Henry could not establish the type of "objectively intolerable risk" required under *Baze* where "some risk of pain is inherent in any method of execution – no matter how humane" (R 217-218).

Finally, the trial court also noted that summary denial was warranted where Henry failed to identify an alternative drug to midazolam as required by *Baze* (R 218). The United States Supreme Court has explained that in order to meet his burden that the State's use of the challenged protocol demonstrates "a substantial risk of severe pain", Henry ***must*** present an

alternative method of execution that effectively addresses his claim. *Baze*, 553 U.S. at 61. In other words, he must show that the state is intentionally ignoring a "known and available" alternative that is "feasibly, readily implemented" method of execution that would alleviate the objectively intolerable risk in favor of the challenged method. The Court explained:

> A stay of execution may not be granted on grounds such as those asserted here unless the condemned prisoner establishes that the State's lethal injection protocol creates a demonstrated risk of severe pain. **He must show that the risk is substantial when compared to the known and available alternatives.** A State with a lethal injection protocol substantially similar to the protocol we uphold today would not create a risk that meets this standard.

Baze, 553 U.S. at 61 (emphasis added). See also *Valle v. State, 70 So.3d 525, 528 (Fla. 2011)(*explaining that Valle despite the acknowledged unavailability of sodium thiopental, he has made no attempt to allege that any risk of severe pain created by the revised protocol "is substantial when compared to the known and available alternatives"). Henry did not sufficiently plead this claim where he failed to "identify[] a ***specific*** drug that meets [the requirements of *Baze*]". *Chavez* v. D.O.C. *2014 WL 552856 *5* (11th Cir. February 12, 2014)(finding that the United States Supreme Court could not have been more clear that an inmate must present a known and available alternative in order to

demonstrate a claim for relief under *Baze*)(*concurring*, C.J. Carnes). Accordingly, summary denial was warranted.

In sum, Henry's claim did not merit an evidentiary hearing where it was clear that his arguments were unsubstantiated by his proffer. As properly noted by the trial court, "the most detailed affidavit submitted by Dr. Zivot…does not support this allegation that midazolam will not have the intended effect of rendering Defendant unconscious" (R 215). Indeed, the trial court pointed out that although the affidavits did express concern over the onset of an acute coronary event, the affidavit did not specify "that Defendant will be conscious at the onset of the acute coronary event" (R 216). Contrary to Henry's assertion, by pointing out these deficiencies, the trial court did not require Zivot to "deny every conceivable exception" before ordering an evidentiary hearing. Initial Brief, 34. Instead, the trial court expected Henry to meet his burden – that is to corroborate his allegation. Rule 3.851(e)(2)(C), Fla. R.Crim. P. He did not. The trial court's order denying relief must be sustained.

CONCLUSION

Based upon the foregoing, the State requests respectfully this Court affirm the trial court's order denying successive post conviction relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing pleading was sent via electronic mail to: I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic transmission to Mr. Kevin Kulik, Esq. at kevinkulik@hotmail.com; Melodee Smith, Esq. at msmith@smithcriminaldefense.com, the Honorable Judge Andrew L. Siegel at jsiegel@17th.flcourts.org; Judicial Assistant Denise E. Goodsmith at dgoodsmi@17th.flcourts.org; Co-counsel Carolyn McCann, Esq. at cmccann@sao17.state.fl.us, Joel Silvershein, Esq. at jsilvershein@sao17.state.fl.us and Steven Klinger, Esq. at sklinger@sao17.state.fl.us;steven_larimore@flsd.uscourts.gov, jim leanhart@flmd.uscourts.gov, shannon_shoulders@flmd.uscourts.gov and warrant@flcourts.org on this 5th day of March, 2014.

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CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

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