Supreme Court of Florida

THURSDAY, MARCH 6, 2014

CASE NO.: SC14-398
Lower Tribunal No(s).: 87-018628ACF10A

ROBERT L. HENRY vs. STATE OF FLORIDA

Appellant(s) Appellee(s)

Robert Lavern Henry, a prisoner under sentence of death and for whom a death warrant has been signed, appeals the summary denial of his amended successive motion for postconviction relief, filed pursuant to Florida Rule of Criminal Procedure 3.851; his motion to declare section 922.052, Florida Statutes (2013), unconstitutional; and his motion to dismiss his death warrant. We hereby temporarily relinquish jurisdiction to the Circuit Court of the Seventeenth Judicial Circuit, Broward County, to hold an evidentiary hearing limited to Henry's claim that due to his alleged hypertension, high cholesterol level, and coronary artery disease, the use of midazolam hydrochloride as the first drug of Florida's lethal injection protocol, as applied to Henry, violates the Eighth Amendment to the United States Constitution.

On February 13, 2014, the Governor signed a death warrant for inmate Henry. Henry sought postconviction relief in the circuit court, raising several claims, including an as-applied challenge to Florida's lethal injection protocol issued by the Florida Department of Corrections. Among other allegations, Henry challenged the use of midazolam as the first drug of the protocol. In support of his claim, Henry proffered an affidavit and a letter from Dr. Joel B. Zivot, in which Dr. Zivot averred that "[m]idazolam, 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" and asserted the concern that "a precipitous fall in blood pressure as a direct result of the large dose of midazolam" "will, with a high probability of certainty, result in an acute coronary event that will be experienced [by Henry] as extremely severe chest pain and shortness of breath."

After a review of the briefs, the record, and Dr. Zivot's letter and affidavit, the Court has determined that an evidentiary hearing is necessary regarding Henry's as-applied challenge to Florida's lethal injection protocol based on his hypertension, high cholesterol level, and coronary artery disease. Henry has raised a factual dispute, not conclusively refuted, as to whether the use of midazolam, in

conjunction with his medical history, 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)). This relinquishment is consistent with the approach that we have followed in lethal injection cases where factual allegations are made that are not conclusively refuted by the record. See, e.g., Howell v. State, No. SC14-167 (Fla. order dated Feb. 6, 2014) (remanding for evidentiary hearing after determining that the expert affidavits and the allegations in the amended successive postconviction motion raised a factual dispute not conclusively refuted by the record).

Upon the conclusion of the evidentiary hearing, the circuit court shall enter a written order. The hearing shall be concluded and the order entered no later than **5:00 p.m., Tuesday, March 11, 2014**. Upon issuance of the circuit court's order, the circuit court clerk shall immediately transmit a copy of the order to this Court. The circuit court clerk shall file a record of the entire relinquishment proceeding, including transcripts, with this Court no later than **12:00 p.m., Wednesday, March 12, 2014**. The record resulting from the above relinquishment proceeding shall reflect "supplemental record volume 2, etc.," and page numbering should start with page 1 and run consecutively. Per In Re: Mandatory Submission of Electronic Copies of Documents, Fla. Admin. Order No. AOSC04-84 (Sept. 13, 2004), the court reporters are directed to transmit a copy of any transcripts, in addition to paper copies, in an electronic format as required by the provisions of that order. An electronic version of the circuit court's order and the transcripts shall be submitted to the following e-mail address: warrant@flcourts.org.

Thereafter, the parties are directed to file supplemental briefs limited solely to issues raised during the relinquishment proceeding regarding the use of midazolam in the amount prescribed by Florida's lethal injection protocol as applied to Henry. The supplemental initial brief shall be filed no later than **5:00 p.m., Wednesday, March 12, 2014**. The supplemental initial brief shall be limited to fifty pages. The supplemental answer brief shall be filed no later than **12:00 p.m., Thursday, March 13, 2014**. The supplemental answer brief shall be limited to fifty pages. The supplemental reply brief shall be filed no later than **5:00 p.m., Thursday, March 13, 2014**. The supplemental reply brief shall be limited to twenty-five pages. NO MOTION FOR ENLARGEMENT OF THE BRIEFS SHALL BE CONSIDERED. The above briefs shall be filed in this Court and copies provided to opposing counsel via e-mail to the following address: warrant@flcourts.org.

Oral argument set for Wednesday, March 12, 2014, is canceled, and the Court will consider the issues raised in the supplemental briefs without oral argument.

The Court defers ruling on the remainder of the issues raised on appeal until after the conclusion of the relinquishment proceedings and receipt of the supplemental record.

PARIENTE, LEWIS, QUINCE, LABARGA, and PERRY, JJ., concur.
CANADY, J., dissents with an opinion, in which POLSTON, C.J., concurs.

CANADY, J., dissenting.

The postconviction court did not err in summarily denying Henry's as-applied challenge to Florida's lethal injection protocol. In Baze v. Rees, 553 U.S. 35, 61 (2008) (plurality opinion), a plurality of the United States Supreme Court concluded that in order to state a claim under the Eighth Amendment of the United States Constitution, a condemned prisoner must—in addition to other pleading requirements—allege that the risk created by his state's method of execution "is substantial when compared to the known and available alternatives." See also Mann v. Palmer, 713 F. 3d 1306, 1315 (11th Cir. 2013) (denying motion for stay of execution in part because while "Mann mentioned an alternative procedure in a memorandum filed in the district court, he failed to show that any such alternative procedure or drug is feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain." (internal quotation marks omitted)). Like Mann, Henry failed to sufficiently plead the "known and available alternatives" element of a claim that Florida's method of execution violates the Eighth Amendment. In a supplement to his amended motion for postconviction relief, Henry alleged: "Obviously, either of Florida's previous protocols involving clinical anesthesia, i.e. Phenobarbital, etc., would not be contraindicated for Mr. Henry. Alternatively, other states that allow death sentences carried out by lethal injection use alternative protocols that do not use Midazolam." While Henry alleged a known alternative to Florida's lethal injection protocol, he did not address whether phenobarbital or another method of "clinical anesthesia" is available to the Florida Department of Corrections for use in executions. Accordingly, Henry has failed to meet his burden of presenting "a detailed allegation of the factual basis for

any claim for which an evidentiary hearing is sought" as required by Florida Rule of Criminal Procedure 3.851(e)(1)(D). As a result, I dissent.

POLSTON, C.J., concurs.

A True Copy
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John A. Tomasino
Clerk, Supreme Court

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