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)

SUPPLEMENTAL ANSWER BRIEF OF APPELLEE

PAMELA JO BONDI
Attorney General
Tallahassee, FL

CELIA A. TERENZIO
Assistant Attorney General
Florida Bar No.: 0656879
1515 N. Flagler Dr.
Ste. 900
West Palm Beach, FL 33401
Telephone (561) 837-5000
COUNSEL FOR APPELLEE

KATHERINE Y. MCINTIRE
Assistant Attorney General
Florida Bar No. 0521159
1515 N. Flagler Dr.
Ste. 900
West Palm Beach, FL 33401
Telephone (561) 837-5000
COUNSEL FOR 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 supplemental appellate record documents will be by "SR Vol. II,". Henry's initial brief will be notated as "Supp. IB."

STATEMENT OF THE CASE AND FACTS

For the majority of this Statement, the state will rely on the Statement Of The Case and Facts that appear in the Answer brief filed with this Court on March 5, 2014, prior to the remand in this case. The additional pertinent facts developed during the remand appear as follows.

On March 10, 2014, the Honorable Judge Siegel held an evidentiary hearing pursuant to this Court's order of March 6, 2014. This Court limited the scope of the evidentiary to Henry's "as-applied" challenge which was supported by the affidavit of Dr. Joel Zivot. *See Henry v. State*, SC14-398, Order of March 6, 2014. The relevant contents thereof was recounted by this Court as, "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.'" *Id.*

At a status hearing on March 6, 2014, the lower court directed the state and Henry to exchange witness lists no later than the following morning. (SR Vol. II, 2). Included in Henry's list, was the aforementioned Dr. Joel Zivot, and a Dr. Javier Gonzalez[1], a veterinarian, never previously mentioned in these proceedings. The state sought and by order of the trial court, received a proffer regarding the relevance of Dr. Gonzalez's testimony (SR Vol. II, 8-11). Henry filed a proffer of his testimony which stated in relevant part:

> Dr. Gonzalez is an expert in the general use and knowledge of pharmaceutical, and he will testify that if, as applied to Mr. Henry, Midazolam violates the Eighth Amendment to the U.S. Constitution, an alternative drug, Pentobarbital, is feasible and available.

(SR Vol. II, 10-11). The state objected to Dr. Gonzalez's testimony because it was beyond the scope of this Court's remand; his testimony regarding the Eighth Amendment challenge would be a legal conclusion; and Dr. Gonzalez as a veterinarian could not possibly qualify as an expert for the purposes of this

[1] Although Henry refers to his expert witness as Dr. Rodriguez, Supp. IB. 14, the record is clear that he is actually veterinarian, Dr. Javier Gonzalez (SR 6-11).

hearing given that his training and expertise does not include humans (SR Vol. II, 43-46, 49-50). Ultimately the trial court ruled that Dr. Gonzalez's could testify provided it was limited to "the effect of midazolam on Defendant." (SR Vol. II, 8-9). The Court precluded Henry from offering any testimony contained in the proffer (SR Vol. II, 8-9).

The trial court then conducted an evidentiary hearing pursuant to this Court's order. At this hearing, Henry offered testimony from Dr. Joel Zivot, while the State offered testimony from Dr. Roswell Lee Evans and Dr. Mark Dershowitz. **As Henry's initial brief is replete with misrepresentations as to what the testimony actually was, the following is a description of the testimony elicited.**

Dr. Joel Zivot

Anesthesiologist Dr. Joel Zivot was called as an expert by the defense. Dr. Zivot testified he was of the opinion that Henry has "coronary artery disease of a significant nature" (SR Vol. II, 65). He made this diagnosis despite the fact that he had not observed any stress tests on Henry, that Henry's blood pressure was occasionally in the mild range and occasionally in a moderate range, and that Henry's cholesterol was also in a moderate range (SR Vol. II, 88-89). Zivot agreed he could not predict exactly when a heart attack may happen (SR Vol. II, 94).

Dr. Zivot went on to testify that "virtually all medicine that [he gives] will have some affect on lowering the blood pressure" (SR Vol. II, 68). Midazolam would "cause a fall in blood pressure by causing sedation" (SR Vol. II, 58). The faster he gives Midazolam, the more likely ***the fall in blood pressure*** would occur (SR Vol. II, 58)(emphasis added). As far as his familiarity with the effects of 500 mg of Midazolam, Zivot explained that, in the fashion he administers Midazolam, "what [he did] know [was] that…long before unconsciousness would occur with Midazolam, there will be that ***fall in blood pressure***…" (SR Vol. II, 72-73)(emphasis added).

Zivot conceded that he could not cite any study that indicates how much an individual's blood pressure would drop with a substantial amount of midazolam in their blood stream (SR Vol. II, 96). Zivot also candidly admitted that he did not know how 250mg of midazolam could be injected intravenously within one minute (SR Vol. II, 99). Although he read the protocol, he did not understand how the midazolam was actually being delivered (SR Vol. II, 99). Indeed, he did not know the size of the catheter being used during the protocol or the kind of vein the catheter is being placed in (SR Vol. II, 117).

Zivot also could not opine on the likelihood of one's ability to feel pain while deeply unconscious where the "investigation of that [would] be impossible to verify" (SR Vol.

II, 100). When twice asked directly whether "…Mr. Henry is sure or very likely to be conscious at the time the Midazolam has so reduced, according to [him], his blood pressure as to initiate a heart attack at the time of, that he's been given the lethal injection", Dr. Zivot refused to answer the question in the affirmative or the negative (SR Vol. II, 109-110).

When given the opportunity to explain his inability to answer question by Henry's counsel, Dr. Zivot opted to draw a picture to illustrate his testimony that he did not know when Henry would reach unconsciousness as a result of the Midazolam (SR Vol. II, 112). Dr. Zivot went on to clarify that "in the dosage of Midazolam that [he administers], which is considerably less…that ***fallen blood pressure will be seen***...especially in somebody who has a diagnosis of hypertension" (SR Vol. II, 123)(emphasis added). However, "…that's no where near an ***unconscious dose*** that is being contemplated here" (SR Vol. II, 123)(emphasis added).

Dr. Zivot went on to concede that it was "hard to know" whether a bigger dose of Midazolam would cause a more rapid or higher drop in blood pressure (SR Vol. II, 124). Dr. Zivot again conceded that "[i]n terms of what quantity will result in unconsciousness, therein lies some uncertainty" (SR Vol. II, 126).

Dr. Roswell Lee Evans

Dr. Roswell Lee Evans is a board certified psychiatric pharmacist (SR Vol. II, 136). He is familiar with Florida Lethal Injection Protocol and has testified about Midazolam in *Chavez v. State*, *Powell v. State*, and *Muhammad v. State* (SR Vol. II, 139). Dr. Evans testified that the first part of the body to be effected by Midazolam is the brain (SR Vol. II, 140). Within one to two minutes, there will be a very significant effect on the central nervous system (SR Vol. II, 140).

250 milligrams of Midazolam is a toxic dose of the drug (SR Vol. II, 141). It would almost immediately render an individual unconscious (SR Vol. II, 141). The first dose of 250 milligrams of Midazolam[2] would render an individual unconscious within one to two minutes, however, once the drug has been administered, a person would not count to ten (SR Vol. II, 141). A person who is unconscious cannot feel pain by definition (SR Vol. II, 142). A person who is unconscious is insensate (SR Vol. II, 144). Pain is not an issue at the level of unconsciousness under these circumstances (SR Vol. II, 154). Dr. Evans explained that insensate is a term referred to in surgical procedures, and "we are far beyond it" here (Vol. II, T 154).

Dr. Evans testified that literature suggested that

[2] Florida's Lethal Injection Protocol calls for the administration of two - 250 mg syringes of Midazolam.

midazolam could cause a reduction in blood pressure of about twenty percent, which is not a significant amount (SR Vol. II, 142-143). The effect is the same regardless of the individual's coronary health - there is no sequela from having an abnormal cholesterol or history of hypertension (SR Vol. II, 143). There is no literature to suggest that midazolam causes heart attacks (SR Vol. II, 145).

Dr. Evans testified that coronary events cannot be predicted to a medical certainty (SR Vol. II, 143). However, he could testify within a reasonable degree of pharmacological certainty that, even assuming Henry experiences an acute coronary event as result of a reduction in his blood pressure during the procedure, he would not be conscious to experience any pain associated with it given the administration of 250 milligrams of Midazolam (SR Vol. II, 143).

Dr. Mark Dershwitz

Anesthesiologist and Pharmacologist Mark Dershwitz testified he reviewed medical records listing Henry's blood pressure reading and blood lipoprotein concentrations over a period of time, specifically 2010, 2011, 2012, and 2013 (SR Vol. II, 165-166). Dr. Dershwitz also reviewed a document of what appeared to be the equivalent of an office visit (SR Vol. II, 165). If Henry has hypertension, it's very controlled (SR Vol. II, 166). His blood tests for lipids are generally within

normal limits (SR Vol. II, 166). Based upon the degree of high blood pressure that he has, and the degree, if any, of abnormalities in his lipoproteins, Henry would be considered ***at most*** a mild risk for coronary artery disease (SR Vol. II, 165)(emphasis added).

Dr. Dershwitz went on to testify that five hundred milligrams of Midazolam is "far more than necessary to induce unconsciousness, or a state of general anesthesia on any human" (SR Vol. II, 162). The largest dose that Dr. Dershwitz, himself, has used to induce general anesthesia is 50 mg, which is a dose that is typically greater than necessary (SR Vol. II, 162). He used this dose because he wanted a more rapid onset and a deeper level in patients with brain tumors (SR Vol. II, 162). 50 mg of Midazolam renders an individual not only unconscious but in the state of general anesthesia, that is, they could not perceive or process any sort of noxious stimuli (SR Vol. II, 164).

If 250 mg of midazolam is given intravenously, there is no absorption (SR Vol. II, 163). Consciousness will be lost around 25 to 35 mg (SR Vol. II, 163). The onset of effect is usually quoted as around one to two minutes (SR Vol. II, 163). One study used Midazolam as a drug to treat seizures (SR Vol. II, 163). Of the group that was given Midazolam, no patient took longer than 100 seconds for the seizure to stop – many of them

responded earlier than that (SR Vol. II, 163). It would probably take under half a minute to administer 500 mg of midazolam in the fashion described by the protocol (SR Vol. II, 181-183). The amount considered enough to cause general anesthesia would actually go in within the first couple of seconds (SR Vol. II, 182).

Dr. Dershwitz explained that when Midazolam is given at the usual doses for inducing general anesthesia, the drop in blood pressure is very mild, if at all (SR Vol. II, 164). If blood pressure is lowered as a result of the administration of anesthesia, it typically happens gradually (SR Vol. II, 182). Dr. Dershwitz has never heard of an association of a higher risk of heart attack in patients with mild hypertension when using midazolam (SR Vol. II, 167). Dr. Dershwitz acknowledged Dr. Zivot's affidavit which hypothesized that Henry "would have a heart attack based upon a substantial and dangerous drop in blood pressure produced by the Midazolam" (SR Vol. II, 168). However, he did not agree with such a hypothesis where, in his experience, a dangerous drop in blood pressure with even a dose of 50 mg is unheard of (SR Vol. II, 168).

Dr. Dershwitz went on to testify that even if in the unlikely event that a drop in blood pressure initiates a heart attack, the Midazolam would have already rendered Henry unconscious explaining:

> …whatever change in blood pressure that might occur, which at the doses that are clinically used are relatively mild, those effects are produced by an effect on the peripheral blood vessels. Now, in order for the hypothesis of the inmate's suffering to be true, that would mean that the effect on the blood vessels would have to proceed earlier and more rapidly than the effect on the brain to induce unconsciousness. And that is completely implausible. Because, first of all, after the blood is pumped from the heart to the circulation, the brain receives literally the first amount of the blood pumped from the heart because of its proximity. And so once the brain will have received approximately twenty-five milligrams the inmate will be unconscious. Now, for the blood pressure to fall, not only does the Midazolam need to be pumped far more distantly, especially to the lower extremities, but once it reaches there it then has to start a cascade of events to result in the relaxation of smooth muscle to cause the dilation of the blood vessels that would then result in a drop of blood pressure. And that does not happen instantly. And so there is no plausible way that I could imagine that even if the Midazolam caused a drop in blood pressure it would occur prior to the inmate losing consciousness.

(SR Vol. II, 169-170)

Dr. Joel Zivot on Rebuttal

On rebuttal, Dr. Zivot reiterated his medical opinion that Henry "will experience ***a fall in his blood pressure*** in the setting of his coronary artery disease, and with being exposed to Midazolam" (SR Vol. II, 200)(emphasis added). With regard to an opinion as to whether Henry would be unconscious in one and a

half to two minutes as testified to by Dr. Evans and Dr. Dershwitz, Dr. Zivot was clear:

> I would disagree with any statement that would claim such certainty, unequivocal certainty, that such a thing will occur because ***it can't be known until it's done. It's only speculation at best.***

(SR Vol. II, 201)(emphasis added).

Dr. Zivot went on to admit that a drop in blood pressure could be gradual in a person with coronary artery disease (SR Vol. II, 202). Dr. Zivot also credited Dr. Dershwitz's testimony that midazolam goes to the brain and that the effect of midazolam on the brain might ultimately be unconsciousness (SR Vol. II, 203). Dr. Zivot concluded his testimony by agreeing with counsel's rendition of the pith of his testimony: in his opinion, "there is a substantial risk that ***the fall in blood pressure*** in Mr. Henry's case would occur before a loss of complete consciousness" (SR Vol. II, 203)(emphasis added).

On March 11, 2014, the trial court entered an order denying Henry's successive motion for post conviction relief after an evidentiary hearing (SR Vol. II, 12-25). This appeal follows.

SUMMARY OF THE ARGUMENT

The trial court's denial of Henry's "as-applied" challenge to midazolam following an evidentiary hearing was proper. Henry patently failed to present any evidence in support of his claim. In fact, Henry's expert ultimately could not testify in conformity with Henry's assertions. Moreover, the trial court made factual findings that Henry presented only a moderate risk of heart disease; and based on the state's unrebutted evidence, Henry would be unconscious and would be unable to process pain should he have a coronary event during the execution process. Therefore the trial court properly determined that Henry failed to prove his claim.

ARGUMENT

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

The remand of this case was limited to an evidentiary hearing regarding Henry's "as-applied" Eighth Amendment challenge that based on his alleged significant hypertension/coronary disease, the injection of 500 milligrams of midazolam will cause a precipitous drop in his blood pressure, and that exaggerated drop will lead to a coronary event, prior to rendering him unconscious. Subsequent to hearing testimony from Dr. Zivot on behalf of Henry, and Drs. Evans and Dershwitz on behalf of the state, the trial court denied relief finding that Henry failed to present any evidence whatsoever regarding the pivotal question that Henry would be conscious while experiencing a coronary event during the execution process (SR Vol. II, 17, 22-23). The trial court also found that Henry presented only a moderate risk for coronary disease and that based on the state's unrebutted evidence, the state sufficiently established that Henry would be unconscious, and therefore unable to feel any pain should he have a coronary event during the execution process. As will be discussed in detail below, a review of the record, conclusively demonstrates that the trial

court's factual findings are supported by the record and its legal conclusions are supported by the law. Relief was denied properly.

On appeal, Henry's sole argument is an attack on the trial court's decision to give credence and credibility to the testimony of the state's witnesses over that of his own. To that end, Henry blatantly misrepresents the testimony elicited at the evidentiary hearing below. He makes several attempts to disguise his deficiency in proof by attempting to confuse this Court into believing that the pivotal question at bar is not whether Henry ***will suffer a heart attack*** while conscious but whether Henry's blood pressure would drop while conscious. The trial court rebuffed Henry's similar attempt to divert attention from Henry's lack of proof and the record supports the trial court's findings.

There are three important principles of law established and recognized by this Court that are applicable to the resolution of this appeal. First, because the trial court conducted an evidentiary hearing in this matter the standard of review requires this Court to defer to the factual findings of the postconviction court so long as those findings are supported by competent, substantial evidence. That deference extends to the credibility findings as well as the weight given to any evidence by the lower court. *Valle v. State,* 70 So. 3d 530, 540 (Fla.

2013)(upholding trial court's finding that state's witness Dr. Dershwitz to be more credible and persuasive than defense witness in evidentiary hearing on lethal injection claim); *Mungin v. State*, 2013 WL 3064817, 3 (Fla. June 20, 2013)(reaffirming that Florida Supreme Court will defer to postconviction court's factual findings made following evidentiary hearing as long as they are supported by the record, and legal conclusions will be reviewed *de* novo); *Griffin v. State*, 114 So.3d 890, 905 (Fla. 2013)(same).

Second, in order to prevail on his claim Henry must demonstrate that based on his hypertension/coronary disease, the use of midazolam is **sure or very likely** to cause a coronary event while conscious. The law is very clear as explained by this Court again just recently in *Howell v. State,* 2014 WL 659943 at *9 (Fla. February 20, 2014):

> As this Court has recognized repeatedly, in order to prevail on an Eighth Amendment challenge, a claimant must show that "the conditions presenting the risk must be '***sure or very likely*** to cause serious illness and needless suffering,' and give rise to 'sufficiently imminent dangers.' " *Pardo*, 108 So.3d at 562 (quoting *Baze*, 553 U.S. at 49–50). In other words, "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.' " *Id.* (quoting *Baze*, 553 U.S. at 50). This heavy burden is borne by the defendant—not the State.

Henry must prove that use of midazolam gives 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). And the risk 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).

Third, the burden is on Henry to prove his as-applied constitutional challenge. *Valle*, *supra* at 539 (quoting *Baze*, 553 U.S. at 53) (additional cites omitted)(This Court noted that "[t]his standard imposes a 'heavy burden' upon the inmate to show that lethal injection procedures violate the Eighth Amendment."); *see also Howell v. State*, 2014 WL 659943 (Fla. February 20, 2014). It is not the state's burden to disprove his allegations. Nor is it sufficient for Henry to simply attack the strength of the state's case or identify perceived weaknesses therein. *See Howell, supra* at *9. As applied to the facts of this case, it is Henry who must affirmatively present evidence to support his claim that he will have a coronary event during the execution process; he will be conscious when that event occurs; and therefore there is an intolerable risk of harm. *Howell, supra; Muhammad v. State,* 2013 WL 6869010 (Fla. December 19, 2013). With these principles in mind Henry has failed to establish an entitlement for relief.

Henry cannot prevail on appeal because he failed completely in his attempt to prove his claim at the evidentiary hearing below as his "proof" was lacking in substance. For instance, most of Dr. Zivot's testimony was irrelevant as he discussed at length his disagreement with the use of midazolam in general in the lethal injection protocol,[3] as well as his fixation on his opinion that Henry would be conscious when ***his blood pressure begins to drop*** as illustrated in pages 3-5, and 10-11 in the State's rendition of facts above.

Yet when Dr. Zivot was asked on cross examination the pivotal question: after the drop in blood pressure, whether Henry would be conscious to feel the effect of a heart attack, he flatly refused to answer (SR Vol. II, 109-110). Most telling was Dr. Zivot's rebuttal testimony. Therein he was asked to explain or comment on the state's experts' testimony that unconsciousness for Henry will occur within one to two minutes following the injection of the first two hundred and fifty milligrams of midazolam, and therefore he would not feel any

[3] During the proceedings, Dr. Zivot admitted that he has been a vocal critic "on the details of the lack of science around lethal injection" (T 46). In fact, he has written two articles titled "Why I'm for a Moratorium on Lethal Injection" and "Absence in Cruelty is Not the Presence of Humaneness, Physicians and the Death Penalty in the United States" (Vol. I, T 46-47). Dr. Zivot expressed frustration with the fact that use of lethal injection as a means of capital punishment negatively affected his ability to obtain drugs necessary for his practice (Vol. I, T 46)

pain of any kind, Dr Zivot criticized the testimony and stated:

> I would disagree with any statement that would claim such certainty, unequivocal certainty, that such a thing will occur because **it can't be known until it's done. It's only speculation at best.**

(SR Vol. II, 201)(emphasis added).

Henry makes the statement that Dr. Zivot definitively testified that Mr. Henry would suffer a heart attack while conscious upon the administration of Midazolam. Supp. IB. 28. Henry does not offer any record cite in support of this statement. Nor could he because Dr. Zivot **never** made such a statement anywhere during his testimony. In addition to the testimony recounted above, Dr. Zivot when asked on direct about Mr. Henry and the "substantial risk of pain" associated with the standard announced in *Baze,* prefaced his response by refusing to the answer the question in the context of Florida's lethal injection process. He cautioned:

> Well, just again, to be clear I can't comment on, on the lethal injection, I'm not an expert.

He then made a general statement, based on his experience in the context of the clinical setting that someone like Mr. Henry, should Henry receive midazolam alone there would be a drop in blood pressure which would lead to a coronary event that would be experienced as pain. (SR Vol. II, 84). There was no mention of a toxic dose of midazolam used in the execution process, nor any mention of how the drug was administered.

Indeed, Dr. Zivot later reiterated his lack of knowledge regarding the various aspects of the injection protocols. Recall, Zivot candidly admitted that he did not know how 250mg of midazolam could be injected intravenously within one minute (SR Vol. II, 99), did not understand how the midazolam was actually being delivered (SR Vol. II, 99), and did not know the size of the catheter being used during the protocol or the kind of vein the catheter is being placed in (SR Vol. II, 117).

Based on Zivot's testimony, Judge Siegel found as follows:

> Even assuming *arguendo* that this Court were to credit Dr. Zivot's version that Defendant will be unconscious when his blood pressure drops, that is not decisive. The issue before this Court is whether the use of midazolam in Defendant's case, given his medical history and condition, is "sure of very likely to cause serious illness and needless suffering." Brewer v. Landrigan,131 S.Ct. 445, 445 (2010). According to Dr. Zivot's testimony, it **is the acute coronary event that would cause Defendant to experience sever pain. However Dr. Zivot could not provide an answer to the question whether Defendant would be conscious and able to process pain, when, if ever the acute coronary event would occur. Even when called as a rebuttal witness by the defense, Dr. Zivot did not offer an opinion as to whether Defendant will be conscious in the event he suffered an acute coronary event.** He only re-emphasized his opinion that there is a substantial risk he will experience a fall in blood pressure prior to attaining unconsciousness.

(SR Vol. II, 22-23)(emphasis added). The trial court's factual findings that Henry failed to prove his claim are supported by the record and therefore they must be affirmed on appeal. *Branch v. State,* 952 So. 2d 470, (Fla. 2006)(affirming postconviction

court's denial of relief on claim of ineffective assistance of counsel due to defendant's lack of proof presented at evidentiary hearing).

Although the glaring deficiency in Henry's "proof" is sufficient in and of itself to uphold the trial court's determination, the trial court included additional findings in support of its ruling. First, the trial court found as follows:

> After carefully considering the testimony of all the experts and reviewing Defendant's medical records entered into evidence as defense Exhibit 1 and State's Exhibit 1, this Court finds that although Defendant was diagnosed with hypertension, his blood pressure is quite successfully managed by medication. Similarly, the two drugs for lowering cholesterol are able to successfully manage his total cholesterol. This justifies Dr. Dershwitz's opinion that Defendant presents a moderate risk of coronary artery disease.

(SR Vol. II, 21-22). These findings are supported by Dr. Dershwitz's testimony (SR Vol. II, 165-166).

The second finding was that the state's witness offered **unrebutted** testimony that Henry would be unconscious and therefore unable to process pain even if were to have an acute coronary event. (SR Vol. II, 23). The court clearly explained its rationale for crediting the states' witnesses on this point:

> Dr. Dershwitz clearly explained the science that grounds his opinion, stating that it is highly improbable that the effects of midazolam would be perceived as the vascular level, prior to affecting the brain and the centers that can process pain. Dr. Evan's testimony that the brain is the first organ affected by midazolam, reinforced Dr. Dershwitz's opinion.

(SR Vol. II, 23). The court further noted that that although Dr. Zivot never offered an opinion about whether Henry would be unconscious during an acute coronary event, he did testify that the administering of 500 mg of midazolam would take a long time and therefore it would delay the onset of unconsciousness. (SR Vol. II, 23).

In contrast, Dr. Dershwitz's opined it would probably take under half a minute to administer 500 mg of midazolam in the fashion described by the protocol (SR Vol. II, 181-183). The amount considered enough to cause general anesthesia would actually go in within the first couple of seconds (SR Vol. II, 182). The court explained its rationale for crediting the testimony of Dr. Dershwitz on this point because:

> he [Dr. Dershwitz] has used midazolam in a clinical setting to induce anesthesia, whereas Dr. Zivot has only used midazolam in a clinical setting as a pre-anesthesia drug and as a constant infusion to treat critically ill patients.

(SR Vol. II, 23).

The state notes that there are additional reasons in the record to discount Zivot's testimony. After opining that the length of time to administer 500 mg of midazolam would surely affect the length of time when unconsciousness would be achieved, Zivot immediately discredited his opinion when, as discussed earlier, he candidly admitted that he did not know how

250mg of midazolam could be injected intravenously within one minute (SR Vol. II, 99). Although he read the protocol, he did not understand how the midazolam was actually being delivered (SR Vol. II, 99). Indeed, he did not know the size of the catheter being used during the protocol or the kind of vein the catheter is being placed in (SR Vol. II, 117). His lack of knowledge regarding these basic and relevant elements of the protocols warrants a complete rejection of his opinions.

Additionally, in rebuttal, Zivot agreed with Dr. Dershwitz's opinion that Henry's blood pressure would not drop precipitously but would rather do so gradually (SR Vol. II, 202). The importance of this concession is significant because Zivot's affidavit and testimony rely on the precipitous drop in blood pressure to be the triggering event to his predicted coronary event. Its absence therefore, completely undercuts the entire premise of his as-applied claim that a heart attack will occur at some point during the process while conscious.[4] The trial court's findings are completely supported by the record and must be affirmed. *Howell, Muhammad, Valle.*

Although not relevant to Henry's as applied challenge, the state would also note that its evidentiary presentation was consistent with earlier findings upheld by this Court regarding

[4] In fact, Zivot actually agreed he could not predict exactly when a heart attack may happen (Vol. I, T 54).

the efficacy and therefore constitutionality of midazolam's usage in Florida's protocol. *See Muhammad, supra* at *9 (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); *see also Howell, supra.* Henry has failed to call into question those previous findings.

In conclusion, although Henry failed miserably in his attempt to prove his claim, the state asserts that these proceedings illustrate the percolating abuse that is afoot with these "as-applied" challenges to the lethal injection protocols. The state asserts that *Baze* never contemplated that it would be used as authority to justify holding an evidentiary hearing in every case where a defendant is able to identify a unique malady to him that may or may not cause some level of pain in the execution process.

Baze rejected implementation of a standard that would require a state to alter their protocols any and every time an inmate identifies an alternative method that may be "slightly" better than the current one. The Court explained that, there is a risk of pain inherent in any execution whether from an accident or the "inescapable consequence of death". *Baze,* 553 U.S. at 50. That is a constitutionally acceptable premise, especially in light of the fact that because capital punishment

is constitutional, there must be a way of carrying out that sentence. Avoidance of all pain is not demanded by the constitution. 553 U.S. at 47.

Next, requiring states to "tweak" or implement "best practices" every time a new drug or new method of administering a drug is discovered was renounced as it would inevitably lead to the following:

> would threaten 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. Such an approach finds no support in our cases, would embroil the courts in ongoing scientific controversies beyond their expertise, and would substantially intrude on the role of state legislatures in implementing their execution procedures—a role that by all accounts the States have fulfilled with an earnest desire to provide for a progressively more humane manner of death. See Bell v. Wolfish, 441 U.S. 520, 562, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979) ("The wide range of 'judgment calls' that meet constitutional and statutory requirements are confided to **1532 officials outside of the Judicial Branch of Government").

Baze, 553 U.S. at 51.

These principles support the state's argument that *Baze* does not require the focus of an Eighth amendment challenge to be on the individual inmate - it cannot be for the reasons stated above. **Instead the focus is on whether there is an objectively identifiable and intolerable risk associated with the execution protocols.** 553 U.S. at 50.

With these principles in mind, the state asserts that this Court's granting of evidentiary hearings in every as-applied challenge based on unique mental or physical maladies of **individual** inmates is the antithesis of *Baze.* Granting evidentiary hearings in cases under active death warrants presents enormous time and expense for the litigants and the courts. The cost of such hearings becomes even greater when time and time again the results of the hearings consistently reaffirm the well established findings that the use of midazolam in Florida's protocol is constitutionally sound under *Baze.* See *Valle, Muhammad, Howell.*

The integrity of those findings become more glaring in "as applied" challenges like this one because the record below unequivocally establishes that Robert Henry was never prepared to offer the testimony/evidence that was "proffered" in his motion. His expert could not and did not testify at any point in the proceedings that Henry was "sure or very likely" to have a heart attack while conscious prior to the midazolam rendering him unconscious. In fact, on rebuttal Dr. Zivot "came clean" and admitted that he could never make that claim, as it was speculative at best. The integrity of this process was further undermined by Henry's attempt to rely on the expertise of a veterinarian in support of his claim. Such abuses will continue to occur as long as inmates are afforded evidentiary hearings

based on these "as applied challenges", particularly when those challenges are based on affidavits that offer nothing more than pure speculation which cannot meet the standard of a "sure or very likely risk of serious pain." *Cooey v. Strickland*, 604 F.3d 939, 944 (6th Cir. 2010)

In summary, the state asserts that these "as applied" challenges based on individual maladies of inmates are improper and are truly nothing more than general attacks on the efficacy of the protocol that have previously been tested and rejected. "New" claims based on identified nuances of individual inmates are not a proper basis to raise an Eighth amendment claim as contemplated under the controlling precedent of *Baze.*

CONCLUSION

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

Respectfully submitted,

PAMELA JO BONDI
ATTORNEY GENERAL

/s/Celia Terenzio
CELIA A. TERENZIO
Sr. Asst. Attorney General
Bureau Chief
Florida Bar No.: 0656879
1515 N. Flagler Drive

9th Floor
West Palm Beach, FL 33401
Office: (561) 837-5000
Facsimile (561) 837-5108
celia.terenzio@myfloridalegal.com
[and] capapp@myfloridalegal.com
COUNSEL FOR APPELLEE

/s/ Katherine Y. McIntire
KATHERINE Y. MCINTIRE
Assistant Attorney General
Florida Bar No. 0521159
1515 N. Flagler Dr.
Ste. 900
Telephone: (561) 837-5000
capapp@myfloridalegal.com
COUNSEL FOR APPELLEE

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.

/s/Celia Terenzio
CELIA A. TERENZIO

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).

/s/Celia Terenzio
CELIA A. TERENZIO