IN THE SUPREME COURT OF FLORIDA
CASE NO. SC08-1544

RICHARD HENYARD

Petitioner,
v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.
_____/

Death Warrant Signed
Execution Scheduled for
September 23, 2008 at 6:00 pm

PETITION TO INVOKE ALL WRITS JURISDICTION
RE: HENYARD'S F.S. §27.702 CLAIM

Comes now the petitioner by counsel and files this motion to invoke this Court's all writs jurisdiction under F.S. Const. Art. 5 § 3(b)(7) and states:

This is a death sentence case over which this Court has plenary jurisdiction under F.S. Const. Art. 5 § 3(b)(1).

This petition reasserts the argument that has already been made in briefs filed in cases SC08-222 and SC08-1544 to the effect that F.S. §27.702 ***as interpreted by this Court in Diaz v. State, 945 So.2d 1136 (Fla. 2006)*** is unconstitutional due to the recent decisions by the U.S. Eleventh Circuit Court of Appeals which indicate that a federal challenge to Florida's lethal injection method of execution can only be brought by way of a 42 U.S.C. §1983 civil rights action rather than by a petition for writ of habeas corpus under 28 U.S.C. §2254. The

trial court in its most recent decision denied Henyard's postconviction claim based on this argument, but appears to have done so only by treating the claim as a facial attack on the constitutionality of F.S. §27.702, and did not address the effect of the federal appeals court's decisions.

Petitioner's Florida Statute § 27.702 claim was originally filed in October of 2007. The State filed its response to the postconviction motion on November 7, 2007. The response merely cited *Diaz* verbatim and argued that the claim should therefore be denied on the merits. The State did not argue any additional ground other than that *Diaz* was binding precedent, and the lower court agreed. Henyard reasserted an updated version of the argument in the most recent round of litigation with the same results.

The substance of Henyard's argument is as follows:

This Court in *State ex rel. Butterworth v. Kenny*, 714 So.2d 318 (Fla. 1998) and *Diaz v. State*, 945 So.2d 1136 (Fla. 2006), construed Florida Statutes §§27.702 and 27.7001 so as to prevent CCRC attorneys from filing civil rights challenges to Florida's lethal injection method of execution by way of 42 U.S.C. §1983. The statutes prohibit CCRC attorneys from filing "civil actions" without specifically referring to actions brought under §1983 (or pursuant to any other specific civil cause of action). The Court acknowledged that "all postconviction remedies are historically civil in nature," but reasoned that "the legislature, in expressing its

intent to prohibit CCRC from engaging in civil litigation on behalf of capital defendants, meant only to prohibit CCRC from engaging in civil litigation other than for the purpose of instituting and prosecuting the traditional collateral actions challenging the legality of the judgment and sentence imposed." *Id.*

The problem then arises that challenges to a method of execution are "traditional actions challenging the legality of the . . . sentence imposed." In fact, challenges to method of execution made by CCRC or registry attorneys have traditionally and historically been accepted by this Court without any question about the attorney's authority to make such challenges. E.g. *Buenoano v. State*, 565 So.2d 309, 311 (Fla.1990); *Lightbourne; Schwab; Diaz; Provenzano v. Moore*, 744 So.2d 413 Fla.1999); *Jones v. State*, 701 So.2d 76 (Fla.1997); *Sims v. State*, 754 So.2d 657 (Fla. 2000) and so on.

CCRC counsel again argued that they should be permitted to file a §1983 challenge to method of execution in *Diaz*. Their argument was that the US Supreme Court had authorized challenges to method of execution by way of a §1983 action rather than by way of §2254 in *Hill v. McDonough*, 547 U.S. 573, 126 S.Ct. 2096 (2006) and *Nelson v. Campbell*, 541 U.S. 637 (2004), and that prevention of CCRC and registry attorneys from filing such claims constituted a denial of equal protection and due process. The *Diaz* Court denied relief, reasoning that CCRC had misconstrued the *Hill* and *Nelson* decisions, and that

such claims could still be filed under §2254 so long as the attorneys met the timeliness requirements of that statute. The Court therefore saw no reason to alter its position in *Butterworth v. Kenney* that the statue prohibited CCRC from filing such claims under §1983.

The Court's rationale in *Diaz* has been undermined by the recent decision in which the U.S. Eleventh Circuit Court of Appeals rejected death row prisoner Mark Schwab's application to file a § 2254 petition challenging lethal injection. Schwab filed an application to file a successive habeas petition in the district court challenging Florida's method of execution in the U.S. Eleventh Circuit Court of Appeals. That court denied Schwab's application because Schwab could not meet the stringent requirements of a successive § 2254 petition, but the court added the following language:

> Even if such a claim were properly cognizable in an initial federal habeas petition, instead of in a 42 U.S.C. § 1983 proceeding . . . this claim cannot serve as a proper basis for a second or successive habeas petition.

In Re: Mark Dean Schwab, Petitioner, 506 F.3d 1369 (2007). The court cited *Hill v. McDonough* and *Nelson v. Campbell*, *supra.* In particular the court also cited *Rutherford v. McDonough,* 466 F.3d 970, 973 (11th Cir.2006) for the proposition "that pre *Nelson* circuit law requiring challenges to lethal injection procedures to be brought in a § 2254 proceeding is 'no longer valid in light of the Supreme

Court's *Hill* decision.'" *Schwab, id.*

Henyard's argument here is that this Court in *Diaz* and its progenitors reasoned that his CCRC attorneys could have filed a federal method of execution claim under 28 U.S.C. § 2254 instead of 42 U.S.C. § 1983, whereas the U.S. Eleventh Circuit has now said that the opposite is true. According to the law of this jurisdiction, a federal challenge to Florida's lethal injection method of execution must be brought by way of a § 1983 action rather than a § 2254 petition, contrary to this Court's rationale in Diaz. The Court's original analysis in *State ex rel. Butterworth v. Kenny*, 714 So.2d 318 (Fla. 1998) and *Diaz* may well have accurately stated the Eleventh Circuit's procedural law at the time, but their analysis has been undermined by *Rutherford* and *Schwab*.

There are significant timing issues that apply to this claim in particular. A § 1983 claim carries a four year statute of limitations, but does not require exhaustion of state remedies, unlike the one year statute of limitations and exhaustion requirements of § 2254. The U.S. Eleventh Circuit Court of Appeals has held that the four-year statute of limitations under Fla. Stat. § 95.11(3) applies to § 1983 claims arising in Florida. *Chappell v. Rich*, 340 F.3d 1279 (11th Cir.2003) (per curiam). That court recently held that a federal district court erred when it applied the one-year statute of limitations of Fla . Stat. § 95.11(5)(g), which provides a one-year statute of limitations for "action[s] brought by or on

behalf of a prisoner ... relating to the conditions of the prisoner's confinement." *Ellison v. Lester*, 275 Fed.Appx. 900 (C.A.11 (Fla.) 2008).

The "start date" for § 2254 limitations period is determined by the finality of the judgment and the completion of state postconviction proceedings, whereas the limitations period for filing a § 1983 starts at the accrual of a cause of action. This issue was recently addressed in *McNair v. Allen*, 515 F.3d 1168 (C.A.11 (Ala.), January 29, 2008). There, the court of appeals held that the two-year statute of limitations on § 1983 claim brought by an Alabama death row inmate challenging the method by which he was to be executed began to run, not at time of inmate's execution or on the date that federal habeas review was completed, but when the inmate, after his death sentence had already become final, became subject to new execution protocol. McNair's start date was found to have been the point at which he "opted" (by silence, similar to Florida) to be executed by lethal injection rather than by electrocution.[1] However, the court specifically noted that "[T]he statute of limitations began to run at that time; therefore, absent a significant change in the state's execution protocol (which did not occur in this case) . . ." *McNair*, 1177

[1]The *McNair* court referred to *Schwab*, but noted that "[W]e have yet to determine how the relevant statute of limitations applies to inmates who wish to bring a § 1983 challenge to the method of their execution, because the question has not been placed squarely before us." *McNair v. Allen*, supra, 1172. Schwab's motion for a stay of execution was denied in part on laches grounds. The argument that he could not have proceeded earlier because of this Court's decisions preventing his lawyers from doing so was not made because his lawyer had, in fact, filed a '1983 complaint.

(*emphasis added*). The court further noted that:

> The dissent notes Alabama's execution protocol is subject to change. Although that is true, neither party suggests the lethal injection protocol has undergone any material change between 2002 and the present.

Id. n.6.

The Eleventh Circuit Court of Appeals recently reaffirmed this analysis with regard to Georgia's lethal injection protocol in *Crowe v. Donald*, 528 F.3d 1290 (11th Cir. 2008). Citing *McNair*, the court reaffirmed and explained that "a method of execution claim accrues on the later of the date on which state review is complete [ie when the conviction and sentence become final], or the date on which the capital litigant becomes subject to a new or substantially changed execution protocol." *Crowe* at *1293.*

Significant and material changes in Florida's protocol ***did*** occur on August 1, 2007. In fact two of the many changes that occurred are those which have been often cited by the State in response to claims that Florida's method of execution is constitutional, namely the qualifications of the execution team and the addition of a consciousness assessment requirement.[2]

This point is especially compelling in Florida, where the statute is so open

[2]Needless to say, this is not a concession that Florida's method of execution under the August 1, 2007 protocol is constitutional. It is merely to say that an effort to fit Florida within the date of election start date rather than the August 1, 2007 protocol would be misguided.

ended. As this Court stated in *Lightbourne*:

> Section 922.105(1) now provides: "A death sentence shall be executed by lethal injection, unless the person sentenced to death affirmatively elects to be executed by electrocution." The statute does not provide the specific procedures to be followed or the drugs to be used in lethal injection; instead it expressly provides that the policies and procedures created by the DOC for execution shall be exempt from the Administrative Procedure Act, chapter 120, Florida Statutes.

Lightbourne v. McCollum, 969 So.2d 326, 342 (Fla. 2007). The statute is not self-implementing. Instead, the DOC must establish "policies and procedures" for carrying out an execution by lethal injection. Thus, Henyard's cause of action for § 1983 purposes accrued on August 1, 2007, and he has four years from that date to file a claim. *McNair* and *Crowe* tend to support the view that Henyard could pursue a §1983 claim challenging method of execution, were his lawyers permitted to do so.

By denying CCRC counsel the opportunity to pursue a 42 U.S.C. § 1983 federal civil rights suit challenging method of execution, Fla. Stat. 27.702 as interpreted by this Court not only denies capital defendants the right to effective assistance of postconviction counsel, it in essence denies them the right to any counsel at all in certain situations. In *State ex rel. Butterworth v. Kenny*, this Court cited *Murray v. Giarratano*, 492 U.S. 1 (1989), for the proposition that there is no right to counsel for postconviction relief proceedings even where a defendant has

been sentenced to death. *Butterworth v. Kenny*, 714 So. 2d at 407.

Mr. Henyard urges this court to reconsider its holding in *Butterworth* that capital defendants are not constitutionally entitled to postconviction counsel. First, rather than rejecting the claim that capital defendants are entitled to counsel in state postconviction proceedings, *Giarratano* only rejected the claim that Giarratano was entitled to postconviction counsel in his particular case, and "implicitly held that other facts would lead to other results." Eric M. Freedman, *Giarratano is a Scarecrow: The Right to Counsel in State Capital Postconviction Proceedings*, 91 CORNELL L. REV. 1079, 1089; *Giarratano*, 492 U.S. at 14-15 (Kennedy, J. concurring). Second, "the Eighth Amendment mandate of reliability in capital proceedings is simply not achievable unless a defendant has the assistance of counsel" in postconviction proceedings. *Id.* This point is especially relevant in light of the fact that 68 percent of death sentences do not survive postconviction review. *Id.* at 1096. Challenges to method of execution based on recent events such as the Diaz execution or recent changes in the execution protocol are not repetitive precisely because they are based on recent events that could not have been raised in prior proceedings. Prohibiting CCRC counsel from filing federal civil rights actions under 42 U.S.C. § 1983 creates a gap in representation in an area that is of crucial importance to capital defendants.

Furthermore, even if this Court finds that there is not an inherent

constitutional right to postconviction counsel; the government's decision to provide capital defendants with counsel for postconviction proceedings triggers a constitutional obligation to provide those defendants with effective assistance of counsel. *See* Celestine Richards McConville, *The Right to Effective Assistance of Capital Postconviction Counsel: Constitutional Implications of Statutory Grants of Capital Counsel*, 2003 *Wis. L. Rev*. 31. In *Evitts v. Lucey*, the United States Supreme Court interpreted the Due Process Clause of the Constitution to contain a meaningfulness requirement. 469 U.S. 387, 397 (1985). What this means is "that when the government creates a right designed to protect or enhance the reliability of the criminal trial or the individual liberty of criminal defendants, the voluntarily-created statutory right must be meaningful; it must be more than a futile gesture." McConville, *supra*, at 37. Thus, because Florida statutorily provides capital defendants with postconviction counsel under Fla. Stat. 27.701, it is obligated under the Due Process and Equal Protection Clauses to ensure that that representation is meaningful, and that postconviction counsel in effective. This Court's restrictive interpretation of the statute interferes with counsel's ability to provide meaningful and effective representation with regard to method of execution claims, in violation of the Due Process and Equal Protection Clauses.

CONCLUSION AND RELIEF SOUGHT

Henyard's counsel should be authorized to pursue a method of execution claim in the federal courts. Fla. Stat. §§ 27.702 and 27.7001 should be deemed unconstitutional or this Court should reconsider its interpretation of those statutes so as to permit CCRC counsel to pursue a method of execution claim in the federal courts.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition To Invoke All Writs Jurisdiction Re: Henyard's F.S. §27.702 Claim has been furnished by Electronic Mail and United States Mail, first class postage prepaid, to all counsel of record on this 2nd day of September, 2008.

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