No. 08-

IN THE
SUPREME COURT OF THE UNITED STATES

RICHARD HENYARD,
Petitioner
v.
STATE OF FLORIDA,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

PETITION FOR A WRIT OF CERTIORARI
CAPITAL CASE
EXECUTION SCHEDULED
SEPTEMBER 23, 2008 6:00 pm

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CAPITAL CASE

QUESTION PRESENTED

Does a state court violate due process if it construes a state law that affords counsel to criminal defendants in state and federal capital postconviction proceedings so as to prohibit that attorney from filing a challenge to the state's proposed method of execution by way of 28 U.S.C. §1983?

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Richard Henyard is the Petitioner. The Respondent is the State of Florida. These parties are named on the cover page of this petition. Pursuant to Fed. R. App. P. 26.1, Petitioner submits this certificate of interested persons and corporate disclosure statement:

Daphney Elaine Branham, CCRC Attorney for Petitioner

Mark Gruber, CCRC Attorney for Petitioner

Walter A. McNeil, Florida Secretary of Florida Department of Corrections,

Stephen Ake, Attorney for Respondent

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CITATION TO OPINIONS BELOW

The opinion supporting the judgment presented for review is reported at *Henyard v. State*, --- So.2d ----, 2008 WL 4148992 (Fla., September 10, 2008) (Appendix A). The mandate is dated September 11, 2008. Henyard's original judgment and sentence of death were affirmed by the Supreme Court of Florida in *Henyard v. State*, 689 So.2d 239 (Fla. 1996) (Appendix G). This Court denied certiorari on October 6, 1997. *Henyard v. State*, 522 U.S. 846 (1997) (Appendix H). The Florida Supreme Court's subsequent decision affirming the lower court's denial of postconviction relief is reported at *Henyard v. State et al.*, 883 So.2d 753 (Fla. 2004) (Appendix F). The denial of Henyard's federal petition for habeas corpus relief was affirmed at

Henyard v. McDonough, 459 F.3d 1217 (11th Cir. 2006); cert. denied,--- U.S. ----, 127 S.Ct. 1818, 167 L.Ed.2d 328 (2007).

JURISDICTION

Jurisdiction of this Court is sought pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

The Eighth Amendment to the United States Constitution provides that:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution provides that:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 2244(b)(2)(B) provides that

> (2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless . . . (B) (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

Florida has an explicit statutory scheme in place to provide postconviction counsel to all capital defendants. However, the scope of representation is limited.

Section 27.7001, Florida Statutes (2002) provides in part that:

> [C]ollateral representation shall not include representation during retrials, resentencings, proceedings commenced under chapter 940, or civil litigation.

Section 27.702(1) (2002), Florida Statutes, provides in pertinent part:

> The capital collateral regional counsel shall represent each person convicted and sentenced to death in this state for the sole purpose of instituting and prosecuting collateral actions challenging the legality of the judgment and sentence imposed against such person in the state courts, federal courts in this state, the United States Court of Appeals for the Eleventh Circuit, and the United States Supreme Court.

§ 27.702(1), Fla. Stat. (2002).

STATEMENT OF THE CASE

Florida has an explicit statutory scheme in place to provide postconviction counsel to all capital defendants, including Henyard. Chapter 27, Florida Statutes (2002). The Florida legislature's intent was stated in Section 27.7001, Florida Statutes:

> It is the intent of the Legislature to create part IV of this chapter, consisting of ss. 27.7001-27.711, inclusive, to provide for the collateral representation of any person convicted and sentenced to death in this state, so that collateral legal proceedings to challenge any Florida capital conviction and sentence may be commenced in a timely manner and so as to assure the people of this state that the judgments of its courts may be regarded with the finality to which they are entitled in the interests of justice. It is the further intent of the Legislature that collateral representation shall not include representation during retrials, resentencings, proceedings commenced under chapter 940, or civil litigation.

§ 27.7001, Fla. Stat. (2002). The Florida Supreme Court has said that this section makes "apparent the legislative intent to limit counsel's role to capital postconviction proceedings." *State v. Kilgore*, 976 So.2d 1066 (2007). The statute further provides that:

> The capital collateral regional counsel shall represent each person convicted and sentenced to death in this state for the sole purpose of instituting and prosecuting collateral actions challenging the legality of the judgment and sentence imposed against such person in the state courts, federal courts in this state, the United States Court of Appeals for the Eleventh Circuit, and the United States Supreme Court.

§ 27.702(1), Fla. Stat. (2002). The Florida legislature has also has established a registry of private attorneys to represent persons in postconviction capital collateral proceedings. Section 27.710, Florida Statutes (2002) (providing for the maintenance of a registry of private attorneys to represent death-sentenced individuals in postconviction proceedings). Section 27.711, Florida Statutes (2002). Section 27.711(11) limits the authority of registry counsel in much the same way that CCRC representation is limited by section 27.7001 as set out above:

> An attorney appointed under s. 27.710 to represent a capital defendant may not represent the capital defendant during a retrial, a resentencing proceeding, a proceeding commenced under chapter 940, a proceeding challenging a conviction or sentence other than the conviction and sentence of death for which the appointment was made, or any civil litigation other than habeas corpus proceedings.

Section 27.711(11), Florida Statutes (2002).

This Court has held that criminal defendants seeking state postconviction relief possess no constitutional right to counsel. *Murray v. Giarratano*, 492 U.S. 1 (1989); *Pennsylvania v. Finley*, 481 U.S. 551 (1987). As a result, the existence of any right to counsel in postconviction proceedings depends entirely on the federal and state legislatures. However, a line of cases within this Court's due process jurisprudence holds that if the government provides a right it has no obligation to provide and that right is designed to protect either the fairness and reliability of the criminal trial or the individual rights of criminal defendants, then due process requires that the right be meaningful. This petition urges that the Florida Supreme Court's interpretation and application of the statutory provisions cited above violates Petitioner's right to due process guaranteed by the federal Constitution. It also urges that there exists a conflict between the

decisions of the state's highest court on one hand and the jurisprudence of this Court and of the federal appeals court.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

After unsuccessfully seeking relief from his judgment and death sentence through direct appeal and postconviction litigation in the state and federal courts, Henyard filed a successive motion for postconviction relief in the state trial court on October 16, 2007. The motion, which was eventually summarily denied, raised claims which were later reasserted on appeal to the Florida Supreme Court. The claims were that: 1) Newly discovered evidence shows that Florida's lethal injection method of execution violates the Eighth Amendment; 2) Section 945.10 Florida Statues (2006), as implemented by Florida's execution protocols, which conceals the identity of the participants in an execution, is unconstitutional; and 3) Section 27.702 Florida Statutes, which as interpreted by the Florida Supreme Court prohibits CCRC from filing a 28 U.S.C. §1983 federal civil rights suit challenging the state's lethal injection method of execution, is unconstitutional. On July 9, 2008, while the summary denial of Henyard's motion was on appeal, Governor Charlie Crist signed a death warrant, setting Henyard's execution for 6 p.m., September 23, 2008. Henyard filed a subsequent motion raising additional claims about his death sentence, reasserting his lethal injection claims and his argument that Florida's statutory scheme was unconstitutional because it prevented him from seeking review in the intermediate federal courts. That motion was denied, and the appeal of that denial was consolidated with his then pending appeal. He also filed a petition directly with the Florida Supreme Court reasserting his argument about the statutory scheme which was consolidated with the appeals.

The Florida Supreme Court denied all relief on September 10, 2008. This petition

follows.

REASONS FOR GRANTING THE PETITION

The Florida Supreme Court in *State ex rel. Butterworth v. Kenny*, 714 So.2d 318 (Fla. 1998) (reaffirmed in Diaz v. State, 945 So.2d 1136 (Fla. 2006) and now in this case), construed the provisions of Chapter 27 Florida Statutes, which prevent state capital postconviction attorneys from filing civil rights lawsuits so as to include a prohibition on filing challenges to Florida's lethal injection method of execution by way of 42 U.S.C. §1983. The court addressed the argument that the statutory limitations on the filing of "civil litigation" needed some construing because historically, ***all*** postconviction remedies were civil in nature. The court got around this argument by reference to the "traditional" character of the action being brought. "We conclude 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." *Butterworth v. Kenny*, 714 So.2d at 410.

The outcome of *Butterworth v. Kenny* generally comported with the law of the U.S. Eleventh Circuit Court at the time it was written. Appointed capital postconviction lawyers in Florida would not have been able to challenge the state's method of execution under §1983 whether they were permitted to by statute or not at the time *Butterworth v. Kenny* was decided. However in November of 2007, the U.S. Eleventh Circuit Court of Appeals rejected Florida death row prisoner Mark Schwab's application to file a successive habeas petition in the district court challenging Florida's method of execution 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) citing *Hill v. McDonough*, 547 U.S. 573 (2006) and *Nelson v. Campbell*, 541 U.S. 637 (2004). In particular the court also cited its own decision in *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.

Despite Rutherford, supra, the Florida Supreme Court explicitly reaffirmed its position a few months later on the eve of Angel Diaz' execution:

> Diaz did have an alternative avenue for challenging the lethal injection procedure in federal court, but did not utilize it . . . Thus, it was due to his own lack of diligence that he missed the opportunity to challenge execution by lethal injection in a federal habeas action. Accordingly, we find no violation of Diaz's due process rights and no basis for striking down section 27.702 as unconstitutional.

Diaz v. State, 945 So.2d 1136 (Fla. 2006). The court again rejected a variant of this claim in the instant case:

> Henyard next argues that section 27.702, Florida Statutes, as interpreted in *State ex rel. Butterworth v. Kenny*, 714 So.2d 404 (Fla.1998), unconstitutionally limits a capital defendant's right to counsel.FN5We find there is no basis to challenge our opinion in Diaz, rejecting a similar claim.

Henyard v. State, supra. The court acknowledged The US Eleventh Circuit's reference to Rutherford cited above, but concluded that "In re Schwab does not undermine or call into

question this Court's decision in Diaz." Id.

The Florida Supreme Court also rejected an argument that its decision in State v. Kilgore called into question its position that Florida's statutes prohibited appointed capital postconviction lawyers from pursuing a method of execution via 1983:

> Alternatively, Henyard argues that this Court's decision in *State v. Kilgore*, 976 So.2d 1066 (Fla. 2007), petition for cert. filed,No. 07-11177 (U.S. May 28, 2008), requires a re-reading of section 27.702 to allow CCRC to file federal petitions under section 1983. However, this claim is also meritless. While Kilgore does appear to suggest a right to prosecute collateral attacks to a sentence of death, it explicitly precludes CCRC from acting as counsel in such cases. 976 So.2d at 1070 ("CCRC is not authorized to represent a death-sentenced individual in a collateral postconviction proceeding attacking the validity of a prior violent felony conviction that was used as an aggravator in support of a sentence of death."). Nowhere does Kilgore suggest a per se right to counsel as Henyard argues. Accordingly, we also reject this portion of Henyard's claim.

Henyard, supra n.6.

In the meantime, the U.S. Eleventh Circuit has considered (and ultimately rejected on procedural grounds) 42 U.S.C. § 1983 challenges to the states' lethal injection method of execution brought by death row prisoners in Georgia, Alabama and Florida via §1983. *McNair v. Allen*, 515 F.3d 1168 (11th Cir. 2008)(Ala.); *Crowe v. Donald*, 528 F.3d 1290 (11th Cir. 2008) (Ga.); *Alderman v. Donald*, Slip Copy, 2008 WL 4078755, (11th Cir. September 03, 2008) (Ga.) (NO. 08-12550) (unpublished opinion); and *Schwab v. Secretary*, Dept. of Corrections Slip Copy, 2008 WL 2571991 (11th Cir. 2008) (Fla.) (unpublished opinion).[1] To date, the U.S.

[1]CCRC counsel filed an unauthorized §1983 complaint on the eve of Schwab's originally scheduled execution in November of 2007. After this Court granted a stay of execution during the pendency of Baze, counsel filed a motion to withdraw and for appointment of counsel. His complaint was dismissed without prejudice and his motion to withdraw and for appointment of

Eleventh Circuit Court of Appeals has not decided a challenge to a state's proposed method of execution on the merits post *Baze v. Rees*, --- U.S. ----, 128 S.Ct. 1520, 170 L.Ed.2d 420 (2008).

Method of execution claims in Florida recur and are virtually certain to do so in the future. *Cf Provenzano v. State*, 739 So.2d 1150, 1154 (Fla. 1999) ("Despite the Court's holding, the Court expressed concern that the DOC had repeatedly failed to follow the protocol established for executions.") That point was recently illustrated by the execution of Angel Diaz, which prompted an executive suspension of executions, appointment of a Governor's Commission, two substantial revisions to Florida's lethal injection method of execution, and extensive litigation culminating in the companion cases of *Lightbourne v. McCollum*, 969 So.2d 326 (Fla. 2007), cert. denied,--- U.S. ----, 128 S.Ct. 2485, 171 L.Ed.2d 777 (2008), and *Schwab v. State*, 969 So.2d 318 (Fla. 2007), cert. denied,--- U.S. ----, 128 S.Ct. 2486, 171 L.Ed.2d 777 (2008). Regardless of the ultimate outcome of the case, the Florida Supreme Court has not declined to hear a method of execution case as long as it is based on newly discovered evidence

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counsel was denied as being moot when he did not seek to re-open the case a period of time after this Court's decision in Baze, as he had been directed to do by the court. He then "recruited" a private firm to appeal that decision. The appeal was unsuccessful. Schwab v. Secretary, Dept. of Corrections, supra. CCRC counsel did not refile the §1983 complaint and a cert. petition was not filed. The court did comment that:

> We do not mean to imply that Schwab has the right to appointed counsel in this civil case. The Morrison & Foerster firm was either "retained" or "engaged," not appointed. We recognize that 18 U.S.C. § 3006A(a)(2)(B) provides that counsel may be provided for any financially eligible person who "is seeking relief under section 2241, 2254, or 2255 of title 28." Schwab is not seeking relief under any of those provisions, but under 42 U.S.C. § 1983. If he were proceeding under § 2254, Schwab would be barred from doing so by 28 U.S.C. § 2244(b).

Schwab, id. n.1.

or at least some sort of fresh concern about the state's proposed method of execution:

> The State contends that Schwab's challenge to Florida's method of execution is procedurally barred because Schwab should have raised it within one year of the time that lethal injection became a method of execution. We disagree that this claim is procedurally barred. Schwab relies on the execution of Angel Diaz and alleges that the newly created lethal injection protocol does not sufficiently address the problems which occurred in the case of Diaz-a claim that did not exist when lethal injection was first authorized. As this Court has held before, when an inmate presents an Eighth Amendment claim which is based primarily upon facts that occurred during a recent execution, the claim is not procedurally barred. See *Buenoano v. State*, 565 So.2d 309, 311 (Fla.1990) (holding Eighth Amendment challenge to electrocution was not procedurally barred because the "claim rest[ed] primarily upon facts which occurred only recently during Tafero's execution"); see also *Lightbourne v. McCollum*, No. SC06-2391 (Fla. order filed Dec. 14, 2006) (relinquishing this same claim to the circuit court for an evidentiary hearing after problems occurred during Diaz's recent execution and implicitly recognizing that this claim was not procedurally barred).

Schwab v. State, supra 321-22. Also see *Provenzano v. Moore*, 744 So.2d 413 (Fla.1999)(botched execution of Allen Lee Davis); *Jones v. State*, 701 So.2d 76 (Fla. 1997)(botched Pedro Medina execution). On the other hand, such claims have been summarily denied or deemed procedurally barred where they have not been based on such recent events. E.g. *Suggs v. State*, 923 So.2d 419 (Fla. 2005) (claims that execution by electrocution or lethal injection constitutes cruel and unusual punishment procedurally barred because not raised on direct appeal); *Rolling v. State*, 944 So.2d 176 (Fla. 2006) (Capital defendant not entitled to evidentiary hearing on postconviction claim that death by lethal injection was cruel and unusual punishment, where claim had been rejected in other cases.).

Under the AEDPA as construed by the U.S. Eleventh Circuit Court of Appeals, a corresponding newly discovered evidence claim, ie one for which "the factual predicate . . .

could not have been discovered previously through the exercise of due diligence," § 2244(b)(2)(B)(ii), "cannot serve as a proper basis for a second or successive habeas petition. It cannot because it neither relies on a new rule of constitutional law made retroactive to cases on collateral review by the Supreme Court, 28 U.S.C. § 2244(b)(2)(A), nor involves facts relating to guilt or innocence, see 28 U.S.C. § 2244(b)(2)(B)(ii)." In re Schwab, supra, 506 F.2d at 1370. Once a capital prisoner's original habeas petition is decided, any subsequent habeas petition is deemed to be successive. The Eleventh Circuit mandate affirming the denial of Henyard's original petition for a writ of habeas corpus is dated October 13, 2006. Any petition for a federal writ of habeas corpus predicated on the Diaz execution and its aftermath would have been deemed successive, and therefore would have been dismissed because by its nature it could not have involved facts relating to guilt or innocence. In general, unless a death sentenced prisoner has the luck, so to speak, to have been in a position to raise and exhaust claims based on a recently botched execution or other new information in the original round of state and federal postconviction proceedings, he will not be able to obtain review in the intermediate federal courts. The Florida Supreme Court's construction of the state's statutory scheme has effectively insulated its decisions regarding method of execution claims from federal review.[2]

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[2]The Florida Supreme Court's decision here also contradicts the its own rationale in *Butterworth v. Kenny* and appears to frustrate the intentions of the state Legislature. Nowhere does ch.27 Fla. Stat. specifically prohibit litigation under §1983, rather the statutory scheme prohibits appointed counsel from engaging in "civil litigation" generally in the case of the CCRCs or " civil litigation other than habeas corpus proceedings" by appointed private counsel (Petitioner is represented by the former.) As pointed out above, historically ***all*** postconviction litigation is civil in nature. However, the statute also authorizes "collateral actions challenging the legality of the judgment and sentence . . . federal courts in this state." The *Butterworth v. Kenney* court construed these provisions by reference to "traditional" practice. Challenges to method of execution have traditionally been heard by the state court if they are based on new evidence. The corresponding provisions of the AEDPA prohibit federal review of such claims

The U.S. Eleventh Circuit Court of Appeals has rejected §1983 method of execution claims from prisoners in Alabama and Georgia on statute of limitations ground. *McNair v. Allen*, 515 F.3d 1168, supra; *Crowe v. Donald*, 528 F.3d 1290, supra; *Alderman v. Donald*, 2008 WL 4078755, supra, (unpublished opinion). That should not be the case in Florida. 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). The limitations period for filing a §1983 starts at the accrual of a cause of action. In *McNair v. Allen*, 515 F.3d 1168 (11th Cir. 2008), the court of appeals held that the 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 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 court 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 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.

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because they do not involve guilt or innocence, but such review is possible via §1983.

Significant and material changes in Florida.s protocol ***did*** occur on August 1, 2007 in the wake of the Diaz execution, which was followed by gubernatorial suspension of the death penalty, a Governor's commission to examine Florida's lethal injection method of execution, and make recommendations for changes. This point is especially compelling in Florida, where the statute is so open ended. As Florida Supreme 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. Petitioner could pursue a §1983 claim challenging method of execution, were his lawyers permitted to do so.

If the government provides a right it has no obligation to provide and that right is designed to protect either the fairness and reliability of the criminal trial or the individual rights of criminal defendants, then due process requires that the right be meaningful. *Evitts v. Lucey*, 469 U.S. 387 (1985). *Wolff v. McDonnell*, 418 U.S. 539, 556 (1974) ("Prisoners may ... claim the protections of the Due Process Clause."). In Evitts, the Court explicitly stated that "when a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution--and, in particular, in accord with the Due Process Clause." And in general a meaningful right is one that is designed to achieve its purpose.

It is "adequate and effective" rather than a "meaningless ritual" or a "futile gesture." Evitts, 469 U.S. at 397; *Douglas v. California*, 372 U.S. 353, 356 (1963). While due process protections for criminal defendants may well shrink as the criminal defendant moves away from the trial and direct appeal stages, these protections do not disappear completely. *Bounds v. Smith*, 430 U.S. 817, 821-33 (1977)) (applying due process principles to state postconviction review). In *Johnson v. Avery*, 393 U.S. 483 (1969) the Court invalidated a state prison regulation prohibiting "prison 'writ-writers,"' reasoning that the regulation interfered with the prisoners' ability to seek federal habeas relief. 393 U.S. at 488. Consistent with the meaningfulness requirement, the Court warned that "post-conviction proceedings must be more than a formality." Id. at 486. The prison regulation was impermissible "unless and until the State provides some reasonable alternative to assist inmates in the preparation of petitions for post-conviction relief." Id. at 490. See generally 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 (2003); Eric M. Freedman, *Giarratano is a Scarecrow: The Right to Counsel in State Capital Postconviction Proceedings*, 91 CORNELL L. REV. 1079 (2006).[3]

The decision by the state court below has construed Florida's statutory scheme in such a way as to render the state's grant of a right to counsel to pursue a traditional postconviction

[3]In *State ex rel. Butterworth v. Kenny*, the Florida Supreme 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. However, 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.Giarratano, 492 U.S. at 14-15 (Kennedy, J. concurring). See Freedman, *Giarratano is a Scarecrow, supra*, p. 1089.

remedy in the intermediate federal courts meaningless. Petitioner respectfully urges that this situation represents a conflict between Florida's court of last resort on one hand and the jurisprudence of this Court and of the Eleventh Circuit Court of Appeals on the other on an important question regarding the federal constitutional guarantee of due process of law.

CONCLUSION

For the foregoing reasons, Richard Henyard respectfully requests that this Court grant the Petition for Writ of Certiorari to review the judgment of the Supreme Court of Florida.

Respectfully Submitted,

_____
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_____
Dated

Docket No. _____ **CAPITAL CASE**

IN THE
SUPREME COURT OF THE UNITED STATES

RICHARD HENYARD,
Petitioner,

versus,

STATE OF FLORIDA
Respondents.

PROOF OF SERVICE

I, Mark S. Gruber, do swear or declare that on this date, September 18, 2008, as required by Supreme Court Rule 29, I have served the enclosed PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

The names and addresses of those served are as follows:

Stephen Ake
Assistant Attorney General
Concourse Center 4
3507 E. Frontage Road, Suite 200
Tampa, FL 33607

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 18, 2008.

_____
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