No. 08-6392
CAPITAL CASE

IN THE
SUPREME COURT OF THE UNITED STATES

RICHARD HENYARD,
Petitioner
v.
WALTER A. MCNEIL, ET AL.,
Respondent

REPLY TO CONSOLIDATED BRIEF IN OPPOSITION

CAPITAL CASE
EXECUTION SCHEDULED
SEPTEMBER 23, 2008 6:00 pm

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Richard Henyard, by counsel, respectfully submits this reply to the State of Florida's consolidated brief in opposition.

Mr. Henyard's claim was decided on the merits.

The State of Florida in its brief in opposition argues that this Court should not exercise its certiorari jurisdiction in the case at hand because it was decided correctly by the Florida Supreme Court based on state law procedural grounds. As the State of Florida correctly cited in its brief in opposition, this Court has previously held that it "will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). In *Harris v. Reed*, however, this Court held that "a procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case 'clearly and expressly' states that its judgment rests on a state procedural bar." *Harris v. Reed*, 489 U.S. 255, 263 (1989).

In the case at hand, the State of Florida incorrectly relied on the lower court's ambiguous statement "even if this Court ignores Henyard's procedural bar," to support its argument that the Florida Supreme Court decided this issue based on procedural bar. *See Henyard v. State*, 33 Fla. L. Weekly S629 (Fla. Sept. 10, 2008). However, the Florida Supreme Court offered no analysis of the procedural bar argument, nor did it offer any definitive holding as to whether the issue in question was procedurally barred. *Id.* In fact, the last state court rendering judgment in this case did not clearly and expressly state that its judgment rested on a procedural bar, and thus the issue in question is not barred from consideration by this Court under *Harris*. *See Id.* Instead, the court offered an analysis of the merits of the claim and held that it was without merit based on its previous decision in *Diaz v. State*, 945 So.2d 1136 (Fla. 2006). *Id.*

Furthermore, an application of a state procedural bar in this case would be contrary to state procedural law. Sec. 3.851 (1), Fla. Stat. states that "any motion to vacate judgment of conviction and sentence of death shall be filed within 1 year after the judgment and sentence become final." Defendants are permitted to file successive motions pursuant to this rule outside of the one year time period where "the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence." Sec. 3.851 (1), Fla. Stat. In the case at hand, Mr. Henyard's desire to file a 42 U.S. § 1983 claim, and by implication his need for an attorney to assist in that matter, was triggered by the botched execution of Angel Diaz in December 2006 and Florida's revised August 1, 2007 lethal injection protocols. Mr. Henyard first asserted a claim that Sec. 27.702, Fla. Stat. is unconstitutional on October 16, 2007, which was only two and a half months after the August 1, 2007 lethal injection protocols were instituted and less than a year after the botched execution of Angel Diaz.

Additionally, an application of state procedural bar in the case at hand would be inconsistent with previous decisions of the Florida Supreme Court. In *Diaz v. State*, Mr. Diaz filed a petition under the all writs authority of the Florida Supreme Court, in which he argued that Sec. 27.702, Fla. Stat. (2006) is unconstitutional both facially as applied. *Diaz v. State*, 945 So.2d 1136, 1154. Although the court stated that Mr. Diaz previously had an alternative method for challenging the lethal injection procedure in federal court, the court did not address the issue of procedural bar and instead decided the issue entirely on the merits. *Id.* To apply a procedural bar in the case of Mr. Henyard and not in the case of Mr. Diaz would be an inconsistent application of the law.

Conclusion

If the State of Florida decides to grant a right to counsel when they are in no way obligated to do so, the right to and assistance of counsel should be meaningful. To argue that Henyard has the means and capabilities to access the federal court to file a civil action under §1983 to not implicate due process violations is unpersuasive. Henyard at all times has been found to be functioning at a level below normal. He has limited to no education and at all times during his appeals has had the assistance of counsel. Additionally, while being under a death warrant in Florida, Henyard does not have readily available legal resources or means in which to file a civil suit. Therefore, the Petitioner in this cause respectfully states that the arguments presented by the State are meritless and prays that this Court grant the pending motion for stay of execution and the petition.

Respectfully Submitted,

s/Mark S. Gruber
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CERTIFICATE OF SERVICE

I, Mark Gruber, hereby certify that the foregoing Reply To Consolidated Brief In Opposition was served via electronic mail and overnight courier on the following counsel for Respondents:

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