**IN THE SUPREME COURT OF FLORIDA**

**CASE NO. SC08-222**

**RICHARD HENYARD,**

**Appellant,**

**Death Warrant Signed**
**Execution Scheduled for**
**September 23, 2008 at**
**6:00 p.m.**

**STATE OF FLORIDA**

**Appellee.**

**ON APPEAL FROM THE CIRCUIT COURT**
**OF THE FIFTH JUDICIAL CIRCUIT FOR LAKE COUNTY,**
**STATE OF FLORIDA**

# REPLY BRIEF OF APPELLANT

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## ARGUMENT

Counsel relies on the arguments presented in the initial brief and replies to the answer brief as follows:

I. Mr. Henyard’s challenges to the constitutionality of sections 945.10 and 27.702, Florida Statutes, are not procedurally barred.

The State of Florida argues in its answer brief that “Henyard’s challenges to the constitutionality of sections 945.10 and 27.702, Florida Statutes, are procedurally barred.” Answer Brief of Appellee at 9. The State has repeatedly offered a straw man argument to the effect that a lethal injection claim, however it is couched, is a per se challenge to the use of lethal injection to carry out an execution. Therefore, so the argument goes, the start date of the limitations period for any such claim must be the point at which lethal injection was adopted by the legislature as the method of carrying out executions in this State. The reality is that challenges to lethal injection raised by Schwab, Lightbourne, Baze, and other death row inmates have not been challenges to lethal injection as such; they have all focused on particular aspects of the way the state or federal governments propose to carry it out.

Mr. Henyard's claims are based on the recent execution of Angel Diaz and the newly created lethal injection protocols. In particular, the first argument asserted in the initial brief is a newly discovered evidence claim. The third argument challenges the constitutionality of Florida's statutory scheme "as interpreted by this Court." Florida Statute 922.105 providing for execution by lethal injection is not self-implementing. It must be implemented in accordance with the protocols written by the Florida Department of Corrections. The current protocols were published on July 31, 2007 and are commonly styled the "August 1, 2007 protocols." Claims based on either the protocols themselves or their implementation by DOC personnel did not exist within one year of the enactment of the lethal injection statute. In *State v. Schwab,* this Court held that Schwab's claim that Florida's lethal injection protocol violates the Eighth Amendment was not procedurally barred because, like Mr. Henyard, Schwab relied on the execution of Angel Diaz and the newly created lethal injection protocols in his claim. *Schwab v. State*, 969 So.2d 318, 321 (Fla. 2007). Furthermore, this Court has previously held that "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." *Id.*; See also *Buenoano v. State*, 565 So.2d 309, 311 (Fla. 1990). Therefore, Mr. Henyard's claims are not procedurally barred and should be decided on the merits.

## II. POST-BAZE ANALYSIS

The State argues that the trial court properly denied Mr. Henyard's claim that Florida's lethal injection method of execution violates the Eighth Amendment when it applied *Lightbourne* and *Schwab* as precedent. Answer Brief of Appellee at 14. However, under the Florida Constitution, Florida's interpretation of the Eighth Amendment prohibition against cruel and unusual punishment must be in conformity with the United States Supreme Court's decisions. Art. I, § 17 Fla. Const.; See also *Lightbourne v. McCollum*, 969 So. 2d 326, 334 (Fla. 2007). Although *Baze v. Rees*, 551 U.S. __, 128 S.Ct. 1250, 170 L.Ed. 2d 428 (2008), had not been decided at the time Mr. Henyard filed his successive motion, this Court is bound to follow *Baze* because it is a decision of the United States Supreme Court. His claim is not based on an isolated mishap, but rather on the assertion that the current (August 1, 2007) Florida Department of Corrections protocols and their proposed implementation were defective. The botched execution of Angel Diaz is not an isolated incident, but rather is evidence of the problems inherent in Florida's lethal injection method of execution. This Court's reaffirmation of an inherent cruelty standard in *Lightbourne v. McCollum*, 969 So.2d 326 (Fla. 2007) and

*Schwab v. State*, 969 So.2d 318 (Fla.), is now in conflict with the plurality decision in *Baze* and with the position taken by all but two of the members of the U.S. Supreme Court. Thus, the trial court erred by declining to reexamine Florida's lethal injection procedures in light of *Baze*.

## III. The 27.702 Claim

Florida Statutes §§ 27.702 and 27.7001, which, as interpreted by this Court in *Diaz v. State*, 945 So.2d 1136 (Fla. 2006), prevent CCRC attorneys from filing civil rights challenges to Florida's lethal injection method of execution by way of 42 U.S.C. § 1983, are unconstitutional. The Court's rationale in *Diaz*, which was that CCRC clients seeking to file an action challenging lethal injection may do so by way of a petition for a writ of habeas corpus under 28 U.S.C. § 2254 has been undermined by the recent decision in which the U.S. Eleventh Circuit Court of Appeals rejected Mark Schwab's application to file a § 2254 petition challenging lethal injection. The gist of 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.

Appellant's Florida Statute § 27.702 claim was originally filed in October of 2007. The claim as stated in the successive Rule 3.851 motion acknowledged this Court's decision in *Diaz*, but argued simply that:

> Mr. Henyard and any other similarly situated death row inmate should not have their right to challenge the constitutionality of lethal injection in a federal proceeding impaired or extinguished because of the arbitrary constraints of section 27.702. The statutory limitation on CCRC is an unconstitutional deprivation of due process, access to the courts, equal protection and the protection against cruel and unusual punishment as embodied in the federal constitution. A similarly situated death row inmate, who is not represented by CCRC but represented by registry counsel, pro bono counsel or privately retained counsel, can file a section 1983 suit challenging the constitutionality of Florida's lethal injection proceedings. Mr. Henyard, who is indigent and cannot retain other counsel to represent him, is deprived of that right due to the arbitrary constraints of Section 27.702.

Successive Motion to Vacate, p. 18-19.[1]

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's response did argue any reason for denying the claim other than that *Diaz* was binding precedent.

[1]The assertion about registry counsel was mistaken.

Some of the events that gave this claim more force occurred during the second week of November, 2007, immediately after this Court had denied all relief in *Schwab*. Schwab then filed an application to file a successive habeas petition challenging Florida's method of execution in the U.S. Eleventh Circuit Court of Appeals. That court denied the 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). As the reason for the disclaimer, the court cited *Hill v. McDonough*, 547 U.S. 573, 126 S.Ct. 2096, 2099, 165 L.Ed. 2d 44 (2006); *Nelson v. Campbell*, 541 U.S. 637, 124 S.Ct. 2117, 158 L.Ed. 2d 924 (2004). In particular the court 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.'"[2] A federal challenge to

[2]A reasonable interpretation of all of the cited authority, including Rutherford, could be permissive rather than restrictive, ie that a federal petitioner could challenge a state's method of execution either way. This Court presumably understood the federal cases to be saying that when

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 State argues that not only is this claim procedurally barred, but the statute of limitations has run for Mr. Henyard to file a federal civil rights action challenging lethal injection in Florida. Answer Brief of Appellee at 20-21. The issue of procedural bar with regard to lethal injection claims in general was addressed above. With regard to this claim, 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*. The result is a gap in representation.

There are significant timing issues that apply to this claim in particular. A § 1983 claim carries a two 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 "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

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it decided in Diaz that a CCRC attorney could be constitutionally required by statute to proceed under only one of the two available ways.

(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.[3] However, the court specifically noted that "The 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 (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.

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[3]The *McNair* court referred to *Schwab*, but noted that "We 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*, supra1172. Schwab was cited as an example of an inmate who, in the court's opinion, had waited until it was too late to seek a stay of execution in order to pursue his §1983 complaint. Issues about a stay are not before this Court, although the consequences of the Court's Diaz interpretation are relevant.

The Eleventh Circuit Court of Appeals recently reaffirmed this analysis with regard to the Georgia lethal injection protocol in *Crowe v. Donald*, 528 F.3d 1290 (11th Cir. 2008). Citing McNair, the court reaffirmed explained that "a method of execution claim accrues on the later of the date on which state review is complete, or the date on which the capital litigant becomes subject to a new or substantially changed execution protocol." *Crowe, id. 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 rebuttal 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.[4]

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

[4]Needless to say, this is not a concession that Florida's method of execution under the August , 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.

> 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 two years from that date to file a claim.

## CONCLUSION AND RELIEF SOUGHT

The lower court's order summarily denying relief should be reversed and the Appellant should have the opportunity to develop his claims in a full and fair hearing. 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 copy of the foregoing Reply Brief of Appellant has been furnished by e mail and U.S. Mail, first class postage, to all counsel of record on this 18th day of August, 2008.

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## CERTIFICATE OF COMPLIANCE

Pursuant to Fl.R.App.P. 9.210, I hereby certify that this brief is prepared in Times New Roman 14-point font and complies with the requirement of Rule 9.210(a)(2).


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