IN THE SUPREME COURT OF FLORIDA

RICHARD HENYARD,

Petitioner,

v.

WALTER A. McNEIL,
Secretary, Florida Department
of Corrections,

Respondent.
_____/

Case No. SC08-1653
Lower Tribunal No. 93-159-CF
Active Death Warrant

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

COMES NOW, Respondent, WALTER A. McNEIL, Secretary, Florida Department of Corrections, by and through the undersigned counsel, and hereby responds to the Petition to Invoke All Writs Jurisdiction Re: Henyard's F.S. §27.702 Claim filed in the above-styled case. Respondent respectfully submits that the petition should be dismissed, and as grounds therefore, states:

This Court has held that the "all writs provision of [Article V], section 3(b)(7) does not confer added appellate jurisdiction on this Court, and this Court's all writs power cannot be used as an independent basis of jurisdiction as petitioner is hereby seeking to use it." St. Paul Title Ins. Corp. v. Davis, 392 So. 2d 1304, 1305 (Fla. 1980). Rather, it operates as an aid to the Court in exercising its "ultimate

jurisdiction." Williams v. State, 913 So. 2d 541, 543 (Fla. 2005).

In the instant case, this Court already has ultimate jurisdiction over the instant issue. Petitioner's all writs petition is simply a reassertion of the identical issue he unsuccessfully raised in his successive postconviction motions which are currently pending on appeal. See Henyard v. State, SC08-222 (Issue III) & SC08-1544 (Issue IV (C)). In those cases, Petitioner raised a constitutional attack to section 27.702, Florida Statutes, and argued that the statute is unconstitutional because it precludes CCRC from filing an independent civil action in federal court. The trial court summarily denied the claim as procedurally barred and also found that the claim lacked merit.

Henyard does not address the trial court's finding of a procedural bar on this issue and appears to relitigate this claim in the instant all writs petition as a possible vehicle to avoid a procedural bar. See generally Denson v. State, 775 So. 2d 288, 289 (Fla. 2000) (stating that an extraordinary writ petition cannot be used to relitigate issues that were raised in prior postconviction proceedings). As the lower court properly found when denying this successive postconviction claim, a challenge to the constitutionality of this statute could have

been brought previously; this statute has existed for over a decade and was specifically upheld against a similar challenge in 1998. See State ex rel. Butterworth v. Kenny, 714 So. 2d 404 (Fla. 1998). Henyard offers no explanation for his failure to raise this issue in his prior proceedings.

In addition, as this Court has previously held, this claim has no merit. Henyard's specific challenge to section 27.702 concerns the prohibition against Capital Collateral Regional Counsels from filing civil lawsuits in federal court. In 1998, this Court decided State ex rel. Butterworth v. Kenny, 714 So. 2d 404 (Fla. 1998), holding that section 27.702 prohibited the Capital Collateral Regional Counsels from pursuing a civil rights action which had been filed to challenge the constitutionality of Florida's electric chair as a method of execution. Likewise, in Diaz v. State, 945 So. 2d 1136, 1154-55 (Fla. 2006), this Court upheld section 27.702 against the same challenge Henyard now presents.

Henyard claims, however, that the rationale of Diaz has been undermined by an opinion of the Eleventh Circuit, In Re: Mark Dean Schwab, Petitioner, 506 F.3d 1369 (11th Cir. 2007), holding that Schwab was not entitled to bring a successive federal habeas petition to challenge lethal injection as a method of execution. This decision provides no basis for

reconsideration of Diaz. Diaz correctly noted that CCRC attorneys may obtain federal review of lethal injection challenges by filing a petition for writ of habeas corpus. The fact that the Eleventh Circuit ruled that Schwab could not bring such a claim in a *successive* habeas petition is of no moment; federal law provides strict limits on a defendant's ability to file a successive habeas petition. See 28 U.S.C. § 2244(b)(2). Given this distinction, the Eleventh Circuit's ruling in Schwab in no way undermined the rationale in Diaz.

Of course, Henyard was not precluded from bringing a lethal injection claim in federal court when he sought federal habeas review. Moreover, Henyard cannot bring a federal civil rights action challenging lethal injection in Florida, as the statute of limitations has run on any such claim. Crowe v. Donald, 528 F.3d 1290 (11th Cir. 2008) ("Crowe's claim accrued no later than 2001, when, after direct review of his convictions had been completed, Crowe became subject to the method of lethal injection that he challenges. . . . Crowe's complaint was filed several years beyond the applicable two-year statute of limitations.")[1]

[1] Crowe reaffirms 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," quoting McNair v.

Section 27.702 does not deny Henyard any right to challenge lethal injection in a federal civil action, it only denies use of his taxpayer-supplied capital collateral counsel for doing so. His attack on the statute is no more than a request for an unwarranted extension of his statutory right to counsel which this Court has previously rejected. Kenny, 714 So. 2d at 407-09.

WHEREFORE, the State respectfully requests that this petition be dismissed for lack of jurisdiction or otherwise rejected.

Respectfully submitted,

BILL MCCOLLUM
ATTORNEY GENERAL

/s/ Stephen D. Ake
STEPHEN D. AKE
ASSISTANT ATTORNEY GENERAL
Florida Bar No. 14087
Concourse Center 4
3507 East Frontage Road, Suite 200
Tampa, Florida 33607-7013
Telephone: (813) 287-7910
Facsimile: (813) 281-5501
stephen.ake@myfloridalegal.com

COUNSEL FOR RESPONDENT

Allen, 515 F.3d 1168, 1174 (11th Cir. 2008). While Florida's protocols have become "more specific and more detailed as to the drugs administered and the procedures to be followed," see Lightbourne v. McCollum, 969 So. 2d 326, 344 (Fla. 2007), they have not changed substantially as to create a new cause of action under 42 U.S.C. § 1983.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONSE TO PETITION TO INVOKE ALL WRITS JURISDICTION RE: HENYARD'S F.S. §27.702 has been furnished by U.S. Regular Mail to Mark S. Gruber, Assistant Capital Collateral Counsel, Capital Collateral Regional Counsel - Middle Region, 3801 Corporex Park Dr., Suite 210, Tampa, Florida 33619, this 3rd day of September, 2008.

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. 9.100(*l*).

Respectfully submitted,

BILL MCCOLLUM
ATTORNEY GENERAL

/s/ Stephen D. Ake
STEPHEN D. AKE
ASSISTANT ATTORNEY GENERAL
Florida Bar No. 14087
Concourse Center 4
3507 East Frontage Road, Suite 200
Tampa, Florida 33607-7013
Telephone: (813) 287-7910
Facsimile: (813) 281-5501
stephen.ake@myfloridalegal.com

COUNSEL FOR RESPONDENT