

**IN THE SUPREME COURT OF FLORIDA
CASE NO. SC08-222**

RICHARD HENYARD,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

The Appellant was convicted of two counts of first degree murder, three counts of armed kidnapping, one count of attempted first degree murder, and sexual battery. On August 19, 1994, Henyard was sentenced to death on two counts of first degree murder consecutive to life sentences on all other charges. The judgment and sentence were affirmed on direct appeal. *Henyard v. State*, 689 So.2d 239 (Fla. 1996), cert. denied, *Henyard v. Florida*, 522 U.S. 846, 118 S.Ct. 130, 139 L.Ed.2d 80 (U.S. Fla. Oct 06, 1997). He then filed a motion for postconviction relief, followed by an amended Rule 3.850 motion. The trial court's denial of postconviction relief was affirmed in *Henyard v. State*, 883 So. 2d 753 (Fla. 2004). Thereafter, Henyard filed a petition for a writ of habeas corpus in federal court, which was denied. *Henyard v. Crosby*, 2005 WL 1862694 (M.D. Fla. 2005). The United States Court of Appeals Eleventh Circuit granted a Certificate of Appealability on two issues and denied relief. *Henyard v. McDonough*, 459 F.3d 1217 (11th Cir. 2006). The United States Supreme Court denied certiorari. *Henyard v. McDonough*, 127 S.Ct. 1818 (2007). A first successive postconviction motion based primarily on the United States Supreme Court's decision in *Roper v. Simmons*, 543 U.S. 551 (2005) was denied by the trial court, and the denial was affirmed on appeal. *Henyard v. State*, 929 So.2d 1052

(Fla. 2006).

This case is one of a large number of challenges to Florida's lethal injection method of execution brought by death row inmates after the Diaz execution in December of 2006. During the proceedings before the Governor's Commission on the Administration of Lethal Injection and the subsequent litigation in *Lightbourne v. McCollum*, 969 So.2d 326 (Fla. 2007) and *Schwab v. State*, 969 So.2d 318 (Fla. 2007) the Appellee has successfully urged that the trial courts take a wait and see approach to cases like this, arguing that Lightbourne was the "lead case" on the subject of lethal injection in Florida. In the meantime, the United States Supreme Court took up the lethal injection issue in *Baze v. Rees*, 551 U.S. ---- (U.S. No. 07-5439, April 16, 2008). The State successfully opposed arguments by Lightbourne and Schwab that their cases should be delayed until after the Supreme Court's decision in *Baze*, and this Court eventually decided those cases in the State's favor while *Baze* was still pending. Thereafter, the State has, for the most part successfully, taken a hurry-up posture in the lethal injections cases that remained around the state.

In the instant case, Henyard filed a successive motion on October 16, 2007. The motion, which was eventually summarily denied, contained four claims, three of which are asserted here. Rearranged, they are: 1) Newly discovered evidence

shows that Florida's lethal injection method of execution violates the Eighth Amendment; 2) Fla. Stat. §945.10 (2006) as implemented by the protocols, which conceals the identity of the participants in an execution, is unconstitutional; and 3) Fla. Stat. §27.702, which as interpreted by this Court prohibits CCRC from filing a §1983 federal rights suit challenging lethal injection, is unconstitutional. The trial court summarily denied these claims on January 8, 2008 and Henyard took this appeal.

On May 19, 2008, Henyard filed a motion to relinquish jurisdiction to the trial court for further consideration of his lethal injection claims in light of some aspects of the recent decision in *Baze v. Rees*, decided on April 16, 2008. That motion is still pending before this Court at the time this brief is being submitted. Should the Court grant the motion, Henyard will seek leave to file supplemental briefing on the relinquishment proceeding.

JURISDICTION

This Court has jurisdiction. Art. V, § 3(b)(1) Fla. Const.

STANDARD OF REVIEW

Henyard requested an evidentiary hearing on his lethal injection claims. *See* PC-R Vol. I, 3. Fla.R. Crim.P. 3.851(f)(5)(B) provides that a defendant is entitled to an evidentiary hearing on postconviction claims for relief unless the motion,

files, and records in the case conclusively show that the movant is entitled to no relief. In reviewing a trial court's summary denial of postconviction relief without an evidentiary hearing, this Court must accept all allegations in the motion as true to the extent they are not conclusively rebutted by the record. To uphold the trial court's summary denial, the claims must be either facially invalid or conclusively refuted by the record. *Hodges v. State*, 885 So.2d 338 (Fla. 2004); *McLin v. State*, 827 So.2d 948 (Fla. 2002).

SUMMARY OF ARGUMENT

Baze v. Rees announces a standard for evaluating the constitutionality of lethal injection procedures that embraces the concept of risk, unlike the inherent cruelty standard that this Court established in *Jones* and has since applied to Florida's lethal injection method of execution in *Sims*, *Schwab* and *Lightbourne*. Because the lower court was bound by *Lightbourne*, and because the lower court erroneously acceded to the State's rush to judgment argument, the pending motion to relinquish jurisdiction to consider Henyard's specific allegations about the DOC's proposed method of execution should be granted, or the lower court's summary denial of relief should be reversed and remanded. Henyard's case is in a different and less urgent procedural posture than *Schwab* and *Lightbourne*.

In part because a risk standard requires greater scrutiny of DOC procedures,

Fla. Stat. §945.10 (2006), which conceals the identity of the participants in an execution, is unconstitutional.

Fla. Stat. §27.702 and 27.7001, which, as interpreted by this Court in *Diaz*, 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.

ARGUMENT I

NEWLY DISCOVERED EVIDENCE SHOWS THAT FLORIDA'S LETHAL INJECTION METHOD OF EXECUTION VIOLATES THE EIGHTH AMENDMENT

The newly discovered evidence Henyard relies on has come to light since the *Diaz* execution in December of 2006 and its aftermath. As stated in the motion, it comes from the following sources:

October 2006 when the Florida Department of Corrections' (hereinafter FDOC) secret protocol was made public; December 2006, when news reports carried accounts of Angel Diaz's execution; evidence made public in 2007 about FDOC procedures, training and

implementation of lethal injection and the undue risks of the procedures and practice presented to The Governor's Commission on the Administration of Lethal Injection (hereinafter Commission) and contained in their Report; the May 9, 2007 protocols issued by FDOC, the August 1, 2007 protocols issued by FDOC; FDOC's 2007 response to the Commission's report and testimony presented at hearings conducted by the Honorable Judge Carven Angel, 5th Judicial Circuit, Marion County, in the matter of Lightbourne v. State.

Moreover, an enormous fund of factual information about lethal injection has emerged over the past year that is available through traditional research sources such as law review articles, case authority and the like. Henyard alleged with specificity, inter alia, that the current (August 1, 2007) FDOC protocols and their proposed implementation were defective in that:

The executioner need merely be an adult who has undergone a criminal background check and who is sufficiently trained to administer the lethal chemicals. . . The new protocols do not require the "team warden" to obtain the employment records, error rates, and proficiency testing of the execution team members . . . The August 1, 2007 protocols require evidence of written quarterly training sessions but do not specify what should be included in the written record or specify what training was received . . . while the new protocols do require some written records of activities, there is still no written record of when the lethal chemicals begin to flow, nor is there a written printout of the data from the heart monitors . . . clothing and other apparatus used to conceal the identities of the executioners and medically qualified personnel . . . impair the executioners and medically qualified personnel's ability to monitor intravenous

infiltration and other potential problems. Deficiencies in the design and set up of the chamber . . . include but are not limited to: inadequate lighting, the placement of the team member administering the lethal chemicals, the length of tubing necessary because of the chamber decision which creates an undue risk that the executioners will fail to detect difficulty or problems with anesthetic consciousness or intravenous access. Additionally, the syringes are kept in a syringe holder, which is a departure from clinical practice. . . FDOC has also failed to obtain or require the use of a bispectral index monitor to monitor anesthetic depth . . . there is nothing in the new protocols that defines a procedure for notification to the inmate or the inmate's counsel should the medical examination reveal any potential complications with venous access or any other aspect of the lethal injection other than to say that the "team warden" will "resolve the issue." The August 2007 protocols do not address the possible remedies for complications noted in the medical examinations that take place a week prior to the execution. The protocols merely state that the "team warden" will consult with the other team members that performed the evaluation and "conclude what is the more suitable method for venous access (peripheral or femoral) for the lethal injection process given the individual circumstances of the condemned. Additionally, there is no provision for the inmate to have his own designated independent physician or medically qualified professional present for the examination . . . The provision for Periodic Review and Certificate from the Secretary is insufficient to insure that there will not be a risk of unnecessary pain during the execution procedure. For example, all that is required is that the Secretary of the Department of Corrections certify to the Governor that "the Department is adequately prepared to carry out executions by lethal injection." The Certification is not required to contain how the lethal injection procedure was reviewed, what

aspects the Secretary considered in his review of the procedures, or how the Secretary verified that he does in fact have all the "necessary procedures, equipment, facilities, and personnel in place..." In addition, the Certification is to be provided to the inmate and the inmate's counsel, after the review has been completed. There is no provision for the inmate or the inmate's counsel to be present during the actual reviewing process and certification . . . the consciousness assessment required by the protocols falls far short of medical standards. The warden, who is charged with making the consciousness assessment, has no medical expertise beyond that required of a law enforcement officer . . .

Henryard also alleged that the protocols and their proposed implementation were defective for failure to draw on the well established fields of risk analysis, quality assurance and medical auditing.

The trial court summarily denied relief. The court noted that since Henryard had filed his 3.851 motion, this Court decided *Lightbourne v. McCollum*, 969 So. 2d 326 (Fla. 2007) and *Schwab v. State*, 969 So.2d 318 (Fla. 2007). The court stated that "[i]n these two cases, the Florida Supreme Court fully considered and rejected the same arguments raised by the Defendant in Claim I of the postconviction motion." PC-R Vol. I, 57. The order of denial is dated January 8, 2008.

The *Schwab* and *Lightbourne* decisions relied on by the trial court reaffirmed this Court's "inherent cruelty" standard previously articulated in *Jones v.*

State, 701 So.2d 76 (Fla. 1997), where the Court reasoned that the “cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment.” *Jones, id.*, citing *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947).

The *Lightbourne* decision did contain an additional paragraph to the effect that the Court would have denied relief even under some proposed standards involving a measure of “risk” of cruelty rather than “inherent cruelty” which were being urged by Schwab and Lightbourne as well as by other death row prisoners around the country. However, in a subsequent case initiated by Schwab, the Court unequivocally reaffirmed its adherence to an inherent cruelty standard:

Even taking Schwab's allegations as true, Schwab has not met the standard that this Court set forth in *Jones v. State*, 701 So. 2d 76, 79 (Fla.1997):In order for a punishment to constitute cruel or unusual punishment, it must involve "torture or a lingering death" or the infliction of "unnecessary and wanton pain." *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 67 S.Ct. 374, 91 L.Ed. 422 (1947). As the Court observed in *Resweber*: "The cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely." *Id.* at 464, 67 S.Ct. at 376. See also *Lightbourne v. McCollum*, 969 So. 2d 326, 32 Fla. L. Weekly S687 (Fla. Nov. 1, 2007) (reaffirming the standard announced in *Jones*, 701 So. 2d at 79).

Schwab v. State, --- So.2d ----, (NO. SC07-2138) slip op. at 4-5 (Fla. Jan. 24, 2008).

On April 16, 2008, the United States Supreme Court decided *Baze v. Rees*, 551 U.S. ---- (2007) No. 07-5439. The *Baze* Court addressed the issue of what constitutional standard should be applied to method of execution cases. In fact, four standards emerged from the various opinions with only two having at least three justices joining. The opinion by Chief Justice Roberts, joined by Justices Kennedy and Alito articulated the standard as a "substantial risk of serious harm". Three other Justices, Breyer, Ginsburg and Souter, proposed a standard that requires a showing of an "untoward, readily avoidable risk of inflicting severe and unnecessary pain." *Baze v. Rees*, Slip Op. at 11 (Ginsburg, J., dissenting); *Baze*, at 1 (Breyer, J., concurring). At any rate, seven justices adopted some sort of standard involving the concept of risk. The inherent cruelty standard was embraced only by Justices Thomas and Scalia, who concurred in the judgment only because in their view the plurality standard, "along with petitioners' proposed 'unnecessary risk' standard and the dissent's 'untoward risk' standard' were not supported "in the original understanding of the Cruel and Unusual Punishments Clause." *Id.* J. Thomas joined by J Scalia concurring in judgment only. This Court's reaffirmation of the Jones inherent cruelty standard in *Schwab* and

Lightbourne, on which the court below expressly relied, is now in conflict with the plurality opinion in *Baze* and with the position taken by all but two of the members of the Supreme Court.

Schwab and *Lightbourne* also reaffirmed this Court's decision in *Sims v. State*, 754 So.2d 657 (Fla. 2000), in which the Court accorded heavy deference to the DOC with regard to virtually every aspect of the lethal injection protocols and the way they are implemented. Justice Thomas declined to join the plurality opinion in *Baze* in part because, in his view, comparative risk standards "require courts to resolve medical and scientific controversies" that he felt were "beyond judicial ken," and the judiciary should not, as he put it, "micromanage the State's administration of the death penalty in this manner." The language and reasoning he employed are strikingly similar to that expressed by this Court in *Sims*, *Lightbourne* and *Schwab*. Since those views now represent the losing side, presumably the courts must resolve at least some medical and scientific controversies and engage in at least some management of the administration of the death penalty. A standard that requires the court to assess the risk of severe pain involved in a procedure that admittedly will not cause unconstitutional pain if executed flawlessly necessarily requires the court to exercise greater scrutiny of the DOC's practices than a standard that merely requires determining whether a

proposed method of execution is inherently cruel in the abstract.

The lower court did not assess the allegations before it in light of the risk standards announced in the *Baze* decision because it was bound by *Lightbourne* and *Schwab* and because *Baze* had not been decided yet. Given the circumstances, the court did not address Henyard's factual allegations with any specificity at all. However, the court did accede to the State's urging that the case be rushed to judgment. Henyard argued that the case should be held in abeyance for what could only be a short period of time until *Baze* was decided. *See* PC-R Vol. I, 90. The State argued otherwise and won. *Id.* at 90-92. The result is that the trial court's decision is error, because Article I, section 17 of the Florida Constitution, the conformity clause, provides that: "The prohibition against cruel or unusual punishment, and the prohibition against cruel and unusual punishment, shall be construed in conformity with decisions of the United States Supreme Court which interpret the prohibition against cruel and unusual punishment provided in the Eighth Amendment to the United States Constitution."

Henyard's position is different from that of Schwab or Lightbourne in that there has not been a denial of certiorari by the Supreme Court regarding lethal injection in his case. His claims are timely because of the recent, fast-paced emergence of factual and legal developments regarding lethal injection in Florida

and elsewhere. This case should be remanded, or in the alternative proceedings in this Court stayed and jurisdiction relinquished to the trial court for consideration of the detailed factual allegations set out in Henyard's motion in light of the applicable risk standards of *Baze*.

ARGUMENT II

FLA. STAT. §945.10 (2006) AS IMPLEMENTED BY THE PROTOCOLS, WHICH CONCEALS THE IDENTITY OF THE PARTICIPANTS IN AN EXECUTION, IS UNCONSTITUTIONAL

Section 945.10, Fla. Stat. (2006) exempts from disclosure under Section 24(a), Article I of the Florida Constitution (the right to access public records):

(g) Information which identifies an executioner, or a person prescribing, preparing, compounding, dispensing, or administering a lethal injection.

Access to prisons by the press and public is a constitutional right. *Pell v. U.S. Procnier*, 417 U.S. 817 (1974). This access to prisons has been found to include access to view executions as well, based upon both historical traditions and the functional importance of public access to executions. *California First Amendment Coalition v. Woodford*, 299 F.3d 868 (C.A.9 2002). The right to view executions includes all parts of the execution, including the manner in which intravenous lines are injected. *Id.* at 883. The court held that limitations on what parts of the execution were viewed by the public based on safety concerns for the

prison staff members involved were not justified. *Id.* at 880. The court found that the concern that execution team members would be publicly identified and retaliated against was "an overreaction, supported only by questionable speculation." *Id.* Importantly, the court pointed out that numerous high profile individuals are involved with the implementation of executions, including a warden, a governor and judges, and there is a significant history of safety around these publicly known officials. *Id.* at 882. Pennsylvania courts have likewise found safety concerns as a basis for protecting the identity of execution witnesses as wholly unsupported speculation. *Travaglia v. Dept. of Corrections*, 699 A.2d 1317, 1323 n.5 (Pa. Commw. Ct. 1997).

The litany of problems in administering lethal injections to condemned inmates in several states requires the disclosure of the identity of the members of the execution team. Executions carried out by anonymous team members put inmates at unnecessary or foreseeable risk of infliction of pain and violate Due Process. The burden to show Eighth Amendment violations in capital punishment cases is on the condemned. Without access to the identities of the team members, Henyard is unconstitutionally deprived of his ability to establish a violation. To deprive him of this information violates his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to ensure his punishment is not cruel and unusual.

Likewise, safety concerns for the members of the execution team are purely speculation and run counter to the evidence that far more prominent individuals involved in executions, such as judges, governors, and wardens, have not been the target of any serious or widespread harm. Finally, the cases in Missouri and North Carolina show that merely requiring the involvement of medical personnel is not a sufficient protection. Without access to the identities of these individuals, there is no way for a condemned to determine whether they are competent and qualified to ensure the Eighth Amendment is not violated.

Since the identities of the members of the execution team are protected by statute, there is no way for Henyard to determine whether the involvement of any of these individuals creates a substantial risk of unnecessary pain during a lethal injection procedure. With the mounting evidence of botched executions continuing to grow, this statute deprives Henyard of his due process rights to ensure he is not subject to cruel and unusual punishment and therefore this statute is unconstitutional.

This argument was presented in Claim III of the motion for postconviction relief and summarily denied on the merits. PC-R Vol. I, 58. The court relied on *Bryan v. State*, 73 So.2d 1244 (Fla. 2000), in which this Court rejected a similar argument. However, as argued above, the Court's inherent cruelty standard for

evaluating the constitutionality of method of execution claims has been superseded by the risk standard in *Baze*, which requires greater scrutiny of the DOC's methods. Bryan should therefore be re-evaluated in light of *Baze*.

ARGUMENT III

FLA. STAT. §27.702, WHICH AS INTERPRETED BY THIS COURT PROHIBITS CCRC FROM FILING A §1983 FEDERAL RIGHTS SUIT CHALLENGING LETHAL INJECTION, IS UNCONSTITUTIONAL.

Although the statutory scheme creating the CCRCs does not speak specifically to actions brought pursuant to 42 U.S.C. §1983, this Court has held that CCRC lawyers are prohibited from bringing such an action to challenge a method of execution by (current) §27.7001 Fla. Stat. (prohibiting CCRC lawyers from representing capital defendants in “retrials, resentencings, proceedings commenced under chapter 940 [executive clemency], or civil litigation.”) *State ex rel. Butterworth v. Kenny*, 714 So.2d 404 (Fla. 1998). Fla. Stat. §27.702(1) states that “the CCRC counsel shall file only those postconviction or collateral actions authorized by statute.”

In *Diaz v. State*, 945 So.2d 1136 (Fla. 2006) the Court addressed the argument raised here and disposed of it this way:

Diaz has also filed a petition under the Court's constitutional all writs authority, in which he claims that

section 27.702, Florida Statute (2006), is unconstitutional both facially and as applied in his case. We find no merit to this claim.

Section 27.702 specifies the duties of Capital Collateral Regional Counsel in representing individuals convicted and sentenced to death in Florida in “collateral actions challenging the legality of the judgment and sentence imposed.” Id. § 27.702(1). Pursuant to the statute, CCRC attorneys “shall file only those postconviction or collateral actions authorized by statute.” This Court has held that the “postconviction or collateral actions authorized by statute” do not include civil rights actions under 42 U.S.C. § 1983 . *State ex rel. Butterworth v. Kenny*, 714 So. 2d 404, 410 (Fla.1998).

Diaz contends that his due process rights have been violated because his CCRC attorneys cannot file a section 1983 action in federal court to challenge Florida's lethal injection procedures and lethal injection as a method of execution. Diaz further alleges that he has no other avenue available to bring such a federal challenge in light of the holding in *Hill v. McDonough*, ---U.S. ----, 126 S.Ct. 2096, 165 L.Ed.2d 44 (2006). We conclude that Diaz has misinterpreted the *Hill* decision.

In *Hill*, the defendant filed a federal action under section 1983 to challenge the lethal injection procedure as cruel and unusual punishment. The federal district court and the Eleventh Circuit Court of Appeals both denied Hill's claim, holding that his section 1983 claim was the functional equivalent of a habeas petition. Because *Hill* had sought federal habeas relief earlier, his section 1983 action was deemed successive and thus procedurally barred. *Hill*, 126 S.Ct. at 2097. However, the United States Supreme Court reversed and held that a challenge to the constitutionality of the lethal injection procedure did not have to be brought in a habeas petition, but could

proceed under section 1983. *Id.* at 2098. However, contrary to Diaz's assertions here, the United States Supreme Court did not hold that a constitutional challenge to lethal injection procedures could not be brought under a habeas petition.

Accordingly, Diaz did have an alternative avenue for challenging the lethal injection procedure in federal court, but did not utilize it. In 1999, Diaz filed a federal habeas petition in federal district court. The petition was pending until January 2004. On January 14, 2000, section 922.105 was amended to provide for lethal injection as the method of execution in Florida. See ch. 2000-2, § 3, at 4, Laws of Fla. Also, while his federal habeas petition was pending, Diaz filed two habeas petitions in this Court [citing *Diaz v. Moore*, 828 So. 2d 385 (Fla.2001); *Diaz v. Crosby*, 869 So. 2d 538 (Fla.2003)].

Under 28 U.S.C. § 2254, an application for a writ of habeas corpus in a federal court may be granted if the applicant has exhausted the remedies available in the state courts. Thus, had Diaz raised a lethal injection claim in either of his two state habeas petitions that were filed after lethal injection was adopted as the method of execution in Florida, he could have then raised the claim in his initial federal habeas petition that was pending from 1999 until 2004. However, Diaz did not utilize this avenue that was available to him. 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. We deny Diaz's petition for all writs relief.

Id. (footnotes omitted).

After this Court denied a motion to stay his imminent execution in *Schwab*

v. State, 973 So.2d 427 (Fla., Nov. 7, 2007), Mark Schwab applied for leave to file a successive § 2254 petition challenging Florida's lethal injection method of execution. The Eleventh Circuit held:

Even if such a claim were properly cognizable in an initial federal habeas petition, instead of in a 42 U.S.C. § 1983 proceeding, see generally *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), *Rutherford v. McDonough*, 466 F.3d 970, 973 (11th Cir. 2006) (observing 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"), this claim 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: Mark Dean Schwab, Petitioner, 506 F.3d 1369 (2007). While admittedly the language, "Even if such a claim were properly cognizable in an initial federal habeas petition . . ." is equivocal, the indication is pretty clear that such an action should be brought by way of a §1983 civil rights suit rather than through a § 2254. Thus this Court's rationale for the *Diaz* decision appears to have been undermined. *Diaz* should be reconsidered.

Schwab subsequently filed a §1983 action [which has since been denied

without prejudice on the ground that counsel – who had filed a motion to withdraw from the case and have other counsel appointed (which has not been ruled on) – had not complied with a requirement that he move to reopen the case after *Baze* was decided] along with an application for a stay of execution on the premise that *In re Schwab, supra*, undermined the rationale in *Diaz*, and that the latter was not controlling in his case as to the authority of counsel to proceed. The application for stay was initially granted by the district court, but soon thereafter vacated by the Eleventh Circuit in part because it was sought too late under circuit law:

As the district court noted: “Turning to the subject of Plaintiff’s diligence, certainly an argument can be made that he delayed too long in bringing this suit. Ordinarily, that consideration alone might warrant denial of a stay.” *Schwab*, No. 6:07cv1798, at 6. That observation understates the law of this circuit concerning the extent to which laches-like considerations may bar relief in this type of case. See *Williams v. Allen*, 496 F.3d 1210, 1215 (11th Cir.), cert. dismissed, --- U.S. ----, 128 S.Ct. 370, 169 L.Ed.2d 4 (2007); *Grayson v. Allen*, 491 F.3d 1318, 1322 (11th Cir.), cert. denied, --- U.S. ----, 128 S.Ct. 6, 168 L.Ed.2d 784 (2007); *Jones v. Allen*, 485 F.3d 635, 639-40 (11th Cir.), cert. denied, --- U.S. ----, 127 S.Ct. 2160, 167 L.Ed.2d 887 (2007); *Rutherford*, 466 F.3d at 973-74; see also *Hill*, 126 S.Ct. at 2104 (“A court considering a stay must also apply ‘a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay.’” (citation omitted)); *Nelson v. Campbell*, 541 U.S. 637, 649-50, 124 S.Ct. 2117, 2126, 158 L.Ed.2d 924 (2004) (“[B]efore granting a stay, a district court must

consider not only the likelihood of success on the merits and the relative harms to the parties, but also the extent to which the inmate has delayed unnecessarily in bringing the claim.”). Under our precedent, Schwab's delay in bringing his § 1983 lawsuit mandates denial of a stay on laches grounds. Laches is not an issue in the *Baze* case.

Schwab v. Secretary, Dept. of Corrections, 507 F.3d 1297 (11th Cir. 2007). The time for Henyard to seek relief via §1983 and resolution of any attendant issues regarding representation is now.

Since then, this Court has decided *State v. Kilgore*, 976 So.2d 1066 (Fla. 2007) (rehearing denied Feb 28, 2008). Although a different factual setting, *Kilgore* may be informative in this case. A long-simmering issue has been whether the restrictions in chapter 27 also prohibit CCRC lawyers from representing their clients in postconviction challenges to noncapital cases which were used as aggravators in the capital case. Certain categorical language in *Kilgore* appears to say they do.

Kilgore is also notable in that it expressly recognized what appears to be a per se right to counsel for capital defendants who seek to collaterally attack noncapital convictions that were used as aggravators, although not necessarily to the same counsel. Appointment of counsel in a case similar to *Kilgore*'s would be for the purpose of litigation in the state court system. Thus the *Kilgore* court avoided the argument raised in *Diaz*, that the Court's restrictive interpretation of

chapter 27 would render the statutory scheme unconstitutional, because *Kilgore* articulated a remedy for nonrepresentation by the CCRC which could be enforced in the state court system, namely the appointment of other counsel. It is possible that a similar resolution would work here, but any such scheme would succeed or fail according to how the federal courts received it, meaning that the constitutionality of chapter 27.702 would rest or fall on the result in the federal courts. The mere fact that that may not be known until it is too late shows that there is an irremediable gap in the provision for capital representation under the current scheme.

CONCLUSION AND RELIEF SOUGHT

This case should be remanded, or in the alternative proceedings in this Court stayed and jurisdiction relinquished to the trial court for consideration of the detailed factual allegations set out in Henyard's motion in light of the applicable risk standards of *Baze v. Rees*.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief of Appellant has been furnished by United States Mail, first class postage prepaid, to all counsel of record and the Defendant on July 1, 2008.

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CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Initial Brief of Appellant,
was generated in Times New Roman, 14 point font, pursuant to Fla. R. App. 9.210.

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