IN THE SUPREME COURT OF FLORIDA

PETER VENTURA,
Appellant,

v. **CASE NO. SC08-60**

STATE OF FLORIDA,
Appellee.
_____/

ON APPEAL FROM THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

There are several cases pending before this Court which involve related issues:

Atwater v. State, Case No. SC08-565;

Burns v. State, SC08-192;

Cox v. State, Case No. SC 08-887;

Garcia v. State, Case No. SC08-943;

Grossman v. State, SC08-564;

Henyard v. State, Case No. SC08-222;

Mann v. State, SC08-62;

Marquard v. State, SC08-148;

Power v. State, Case No. SC07-1139;

Walton v. State, Case No. SC07-704.

Further, on June 2, 2008, this Court entered an order in *Griffin v. State*, Case No. SC06-1055, citing *Baze v. Rees*, 128 S.Ct. 1520 (2008) (Attachment #1).

STANDARD OF REVIEW

Because Ventura's successive post-conviction relief motion was summarily denied, that ruling will be affirmed so long as the law and competent substantial evidence supports the findings of the Circuit Court. *Diaz v. Dugger*, 719 So. 2d 865, 868 (Fla. 1998).

STATEMENT OF THE CASE AND FACTS

The timeline of this case dates back to 1981 and includes:

April 15, 1981: body of Robert Clemente found in rural area of Volusia County;[1]

June 25, 1981: Peter Ventura arrested for the murder in Chicago;

June 30, 1981: Ventura indicted for first-degree murder, released on bond in Chicago while awaiting extradition;

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[1] A brief summary of the facts found by this Court include:

> In brief, the evidence established that Jerry Wright held a keyman insurance policy on the victim. Wright, in the midst of financial trouble, asked Jack McDonald to find someone to murder Clemente in exchange for a split of the insurance proceeds. McDonald, familiar with Ventura as a result of their dealings in a bank fraud scheme in Chicago, approached Ventura with the plan, and Ventura agreed to murder the victim. After several meetings, Ventura and McDonald arranged to commit the murder in an abandoned gravel pit off of Route 44 in DeLand, Florida.
>
> On April 15, 1981, Ventura called Clemente, who worked at a marina as a boat salesman, under the guise of purchasing a boat and arranged to meet Clemente outside a Barnett Bank in DeLand. McDonald watched Ventura meet Clemente and then followed the two in his truck, observing Ventura and Clemente drive off into the aforementioned gravel pit. After about ten minutes, Ventura returned to McDonald's truck and commented that it had been more difficult than he had anticipated. Clemente's body was found in his truck off of Route 44 later that afternoon. Three bullets were recovered from Clemente's body, the fatal wound being a bullet to the heart.

Ventura v. State, 794 So. 2d 553, 558 (Fla. 2001).

August 18, 1981: Ventura failed to appear at extradition hearing;

June 11, 1986: Ventura apprehended on fugitive warrant in Austin, Texas;

January 15, 1988: Jury finds Ventura guilty;

January 19, 1988: Jury recommends death sentence by vote of 11 to 1;

January 21, 1988: Trial judge sentences Ventura to death;

May, 1990: Supreme Court of Florida affirms conviction and the death sentence. *Ventura v. State*, 560 So. 2d 217 (Fla. 1990);

October 29, 1990: United States Supreme Court denies certiorari review. *Ventura v. Florida*, 498 U.S. 951 (1990);

March 2, 1992: Ventura files first motion for postconviction relief in the state trial court pursuant to Florida Rule of Criminal Procedure 3.850. Trial court dismisses motion;

April, 1996: Supreme Court of Florida reverses dismissal as premature, directing the trial court to permit Ventura to amend his postconviction motion after public records issues are resolved. *Ventura v. State*, 673 So. 2d 479 (Fla. 1996);

June 19, 1996: Trial court holds hearing on remand and finds public records demands complied with;

August 19, 1996: Ventura files amended postconviction motion raising fifteen issues;[2]

[2] Ventura raised the following claims: (1) withholding of public records; (2) ineffective assistance of counsel at the pretrial and guilt phases; (3) ineffective assistance of counsel during the penalty phase; (4) violation of *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963) and *Giglio v. United States*, 405 U.S. 150, 31 L. Ed. 2d 104, 92 S. Ct. 763 (1972); (5) ineffective assistance of counsel

April 2, 1998: Trial court summarily denied ten claims and scheduled evidentiary hearing on remaining issues;

June 1, 1998: Evidentiary hearing held;

July 28, 1998: Trial court denies remainder of claims;

September, 2001: Supreme Court of Florida affirms denial of postconviction relief. *Ventura v. State*, 794 So. 2d 553 (Fla. 2001);

May 28, 2002: United States Supreme Court denies certiorari review. *Ventura v. Florida*, 535 U.S. 1098 (2002).

October 4, 2002: Ventura files petition for a writ of habeas corpus in the United States District Court for the Middle District of Florida;

July 30, 2004: District court denies the petition. *Order*, *Ventura v. Moore*, 2004 U.S. Dist. LEXIS 29077, No. 6:02-cv-1159-Orl-19KRS (M.D. Fla. July 30, 2004);

October 28, 2004: Certificate of appealability granted only as to Ventura's *Giglio* claim.

August 2005: Eleventh Circuit Court of Appeals denies relief. *Ventura v. Att'y Gen., Fla.*, 419 F.3d 1269, 1276-77 (11th Cir. 2005).

October 22, 2007: Ventura files Successive Motion to Vacate Judgment

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due to a conflict of interest; (6) newly discovered evidence (co-defendant's life sentence); (7) trial judge's use of Ventura's silence to find aggravating circumstances; (8) trial court's failure to find mitigating circumstances set out in the record; (9) burden-shifting penalty-phase instructions; (10) violation of *Espinosa v. Florida*, 505 U.S. 1079 (1992); (11) trial court's use of defendant's silence and declaration of innocence during sentencing to support aggravating circumstances; (12) trial court's failure to find mitigating circumstances supported by the record; (13) burden-shifting jury instructions; (14) improper instruction and imposition of aggravating circumstances; and (15) cumulative error.

of Sentence (R1-27);

November 1, 2007: State files Response to Defendant's Successive Motion for Post Conviction Relief (R28-39);

December 7, 2007: Trial judge summarily denies Successive Motion for Post Conviction Relief (R40-47);

January 3, 2008: Ventura files Notice of Appeal (R49-50);

June 6, 2008: Ventura files Initial Brief on Appeal.

SUMMARY OF THE ARGUMENT

To the extent that Ventura's lethal injection claim is construed as a *per se* challenge to lethal injection as a means of execution, that claim is untimely and procedurally barred because it could have been, but was not, raised within one year of January 2000 when lethal injection became Florida's method of execution. To the extent that this claim is based on the December 2006 execution of Angel Diaz, that claim is foreclosed by binding precedent from this Court. To the extent Ventura argues *Baze v. Rees*, 551 U.S. ___ , 128 S. Ct. 1520, 170 L. Ed. 2d 420 (2008), has some impact on Florida, that issue was never raised at the trial level, is not reviewable on appeal, and has no merit.

Whether Section 945.10, Florida Statutes, is unconstitutional is untimely, has no merit, and is foreclosed by binding precedent.

Whether Section 27.702, Florida Statutes, is unconstitutional is untimely, has no merit, and is foreclosed by binding precedent.

ARGUMENT

CLAIM I – THE LETHAL INJECTION CLAIMS

This claim is procedurally barred because Ventura failed to raise this claim within one year of the enactment of the lethal injection statute in January 2000. To the extent that Ventura's challenge to lethal injection *per se* as the method of execution, and the means undertaken to enact that method of execution, are based on facts other than the events of the Diaz execution, those are claims that are not available to him. Ventura, like all other death row inmates, was provided a 30-day "window of time" following the enactment of §922.105(1) & (2), *Florida Statutes* (2000), within which to elect the method of execution. Ventura made no election. As such, he is procedurally barred from challenging the change in method because he elected lethal injection as the method of execution by such waiver. Any claims for relief on any lethal injection-based grounds **other** than those arising from the execution of Angel Diaz remain procedurally barred and untimely because they were not raised within one year of the time that lethal injection became a method of execution in Florida. *See Fla.R.Crim.P*. 3.851(d)(2); *Hill v. State*, 921 So. 2d 579, 584 (Fla. 2006); *Gudinas v. State*, 879 So. 2d 616, 618 (Fla. 2004); *King v. State*, 808 So. 2d 1237, 1244-45 (Fla. 2002).

To the extent this claim is based on the execution of Angel Diaz, the Circuit

Court denied relief on Ventura's lethal injection claim on the authority of this Court's decision in *Lightbourne* as follows:

> GROUND 1 – THE LETHAL INJECTIONS ARGUMENTS
>
> Defendant alleges that newly discovered evidence proves Florida's method of execution by lethal injection violates the Eight Amendment prohibition against cruel and unusual punishment and therefore his sentence of death is unconstitutional.
>
> The Supreme Court of Florida recently issued a comprehensive decision addressing the claims raised by defendant (*Lightbourne v. State*, Case No. SC06-2391 (Fla. Nov. 1, 2007). Based on that decision, and the prior decisions of the Florida Supreme Court, the Court finds that none of the issues raised by Defendant have merit. *Id*., *Sims v. State*, 654 So. 2d 657 (Fla. 2000), *Rolling v. State*, 944 So. 2d 176, 179 (Fla. 2006)(affirming trial curt's summary denial of lethal injection claim based on the *Lancet* article, relying on *Hill v. State*, 921 So. 2d 579 (Fla.), *cert. denied*, 126 S.Ct. 1441, 164 L.Ed.2d 141 (2006), and *Rutherford v. State*, 926 So. 2d 1100, 1113-1114 (Fla.), *cert. denied*, 126 S.Ct. 1191, 163 L.Ed.2d 1145 (2006), and *Diaz v. State*, 945 So. 2d 1136 (Fla. 2006). Those cases set out the current state of Florida law, and control the lethal injection claims contained in Defendant's motion. Accordingly, based on the foregoing caselaw, Defendant's claims are denied.

(R41).

The trial judge properly followed this Court's precedent. Florida Supreme Court decisions hold that execution by lethal injection does not constitute cruel and unusual punishment, and nothing before the Court calls the validity of that precedent into question. *See Diaz v. State*, 945 So. 2d 1136 (Fla. 2006); *Rolling v. State*, 944 So. 2d 176, 179 (Fla. 2006); *Rutherford v. State*, 926 So. 2d 1100, 1113 (Fla. 2006); *Hill*

v. State, 921 So. 2d 579, 583 (Fla. 2006); *See also Lightbourne v. McCollum*, 969 So. 2d 326, 353 (Fla. 2007); *Schwab v. State*, 969 So. 2d 318, 325 (Fla. 2007); *Israel v. State*, 33 Fla. L. Weekly S211 (Fla. March 20, 2008); *Green v. State*, 975 So. 2d 1090, 1115 (Fla. 2008); *Lebron v.* State, 33 Fla. L. Weekly S294 (Fla. May 1, 2008); *Woodel v. State*, 33 Fla. L. Weekly S290 (Fla. May 1, 2008).

To the extent Ventura claims that the United State's Supreme Court decision in *Baze v. Rees*, 551 U.S. ___ , 128 S. Ct. 1520, 170 L. Ed. 2d 428 (2008), issued April 16, 2008, calls into question this Court's decision in *Lightbourne*, this issue was never raised at the trial level. Thus, this issue is not reviewable on appeal. *See Lawrence v. State*, 969 So. 2d 294, 311 (Fla. 2007).

Further, this claim has no merit. *Baze* disposes completely of Ventura's lethal injection claim because the Court held that "an isolated mishap alone does not give rise to an Eighth Amendment violation, precisely because such an event, while regrettable, does not suggest cruelty, or that the procedure at issue gives rise to a 'substantial risk of serious harm.' *Id*., at 842, 114 S. Ct. 1970, 128 L. Ed. 2d 811." *Baze v. Rees*, 128 S. Ct. 1520, 1531 (2008). The *Baze* Court expressly rejected the "unnecessary risk" standard that Ventura discusses at length in his brief. *Baze v. Rees*, 128 S. Ct. at 1532 ("Accordingly, we reject petitioners' proposed 'unnecessary risk' standard ..."). Ventura's argument is, in its entirety, based upon a legal standard that

the United States Supreme Court expressly rejected, a fact which he does not acknowledge.

The *Baze* Court held that:

> But an inmate cannot succeed on an Eighth Amendment claim simply by showing one more step the State could take as a failsafe for other, independently adequate measures. This approach would serve no meaningful purpose and would frustrate the State's legitimate interest in carrying out a sentence of death in a timely manner. *See Baze v. Parker*, 371 F.3d 310, 317 (6th Cir. 2004) (petitioner Baze sentenced to death in 1994); *Bowling v. Parker*, 138 F. Supp. 2d 821, 840 (ED Ky. 2001) (petitioner Bowling sentenced to death in 1991).

Baze v. Rees, 128 S.Ct. at 1537. Ventura has not even alleged any "alternative," and has done nothing to attempt to plead a cognizable claim. Moreover, *Baze* holds that:

> A stay of execution may not be granted on grounds such as those asserted here unless the condemned prisoner establishes that the State's lethal injection protocol creates a demonstrated risk of severe pain. He must show that the risk is substantial when compared to the known and available alternatives. **A State with a lethal injection protocol substantially similar to the protocol we uphold today would not create a risk that meets this standard.**

Baze v. Rees, 128 S.Ct. at 1537. (emphasis added). Florida's lethal injection procedures are substantially the same as the Kentucky procedures, with the notable differences being that Florida's procedure uses a larger dose of thiopental sodium, and incorporates a consciousness assessment that was cited approvingly by the *Baze* **dissenters**.

Justice Ginsberg described this part of Florida's procedure as follows:

Recognizing the importance of a window between the first and second drugs, other States have adopted safeguards not contained in Kentucky's protocol. *See* Brief for Criminal Justice Legal Foundation as Amicus Curiae 19-23. [FN5] **Florida** pauses between injection of the first and second drugs so the warden can "determine, after consultation, that the inmate is indeed unconscious." *Lightbourne v. McCollum*, 969 So. 2d 326, 346 (Fla. 2007) (*per curiam*) (internal quotation marks omitted). The warden does so by touching the inmate's eyelashes, calling his name, and shaking him. *Id.*, at 347. [FN6] If the inmate's consciousness remains in doubt in Florida, "the medical team members will come out from the chemical room and consult in the assessment of the inmate." *Ibid.* During the entire execution, the person who inserted the IV line monitors the IV access point and the inmate's face on closed circuit television. *Ibid.*

> [FN5] Because most death-penalty States keep their protocols secret, a comprehensive survey of other States' practices is not available. *See* Brief for American Civil Liberties Union et al. as *Amici Curiae* 6-12.
>
> [FN6] Florida's expert in *Lightbourne v. McCollum*, 969 So. 2d 326 (Fla. 2007) (*per curiam*), who also served as Kentucky's expert in this case, testified that the eyelash test is "probably the most common first assessment that we use in the operating room to determine . . . when a patient might have crossed the line from being conscious to unconscious." 4 Tr. in *Florida v. Lightbourne*, No. 81-170-CF (Fla. Cir. Ct., Marion Cty.), p. 511, online at http://www.cjlf.org/files/LightbourneRecord.pdf (all Internet materials as visited Apr. 14, 2008, and in Clerk of Court's case file). "A conscious person, if you touch their eyelashes very lightly, will blink; an unconscious person typically will not." *Ibid.* The shaking and name-calling tests, he further testified, are similar to those taught in basic life support courses. *See id.*, at 512.

Baze v. Rees, 128 S.Ct. at 1570-1571. (emphasis added).

No court of competent jurisdiction has ever held that execution by lethal

injection is unconstitutional on its face or as applied. Indeed, the controlling case law from the United States Supreme Court and the Florida Supreme Court is squarely to the contrary. *Baze*, supra; *Lightbourne*, supra; *Sims v. State*, 754 So. 2d 657, 668 (Fla. 2000) (lead case with evidentiary hearing); *Rolling v. State*, 944 So. 2d 176, 179 (Fla. 2006) (affirming trial court's summary denial of lethal injection claim based on the *Lancet* article, relying on *Hill v. State*, 921 So. 2d 579 (Fla.), *cert. denied*, 126 S.Ct. 1441, 164 L.Ed.2d 141 (2006), and *Rutherford v. State*, 926 So. 2d 1100, 1113-1114 (Fla.), *cert. denied*, 126 S.Ct. 1191, 163 L.Ed.2d 1145 (2006)), and *Diaz v. State*, 945 So. 2d 1136 (Fla. 2006). Those cases, along with *Lightbourne v. McCollum*, 969 So. 2d 326 (Fla. 2007), *cert. denied*, 2008 U.S. LEXIS 4194 (U.S. May 19, 2008), and *Schwab v. State*, 969 So. 2d 318 (Fla. 2007), *cert. denied*, 2008 U.S. LEXIS 4273 (U.S. May 19, 2008), set out the current state of Florida law.

In *Lightbourne*, this Court expressly considered and rejected the argument that the adoption of a different standard in *Baze* would affect this Court's ruling to uphold the constitutionality of Florida's execution procedures. In so doing, this Court decided, for all purposes, the significance and import of the events surrounding the execution of Angel Diaz in December of 2006. And, this Court's comment in *Lightbourne*, that "[a]lternatively, even if the Court did review this claim under a 'foreseeable risk' standard as Lightbourne proposes or 'an unnecessary' risk as the

Baze petitioners propose, we likewise would find that Lightbourne has failed to carry his burden of showing an Eighth Amendment violation," *Lightbourne*, 969 So. 2d at 352, has now been proven gratuitous, since the United States Supreme Court rejected the lesser, "unnecessary risk" standard sought by the *Baze* petitioners.

II. SECTION 945.10, FLORIDA STATUTES, IS NOT UNCONSTITUTIONAL

Ventura claims Section 945.10, Florida Statutes, deprives him of his constitutional right to due process because he precluded from ascertaining the personal identity of his execution team, thus subjecting him to cruel and unusual punishment. This claim is untimely and has no merit. The circuit court judge followed binding precedent in holding:

> GROUND III – THE SECTION 945.10 CLAIM
>
> Defendant claims Section 945.10, Fla. Stat. is unconstitutional. The Court finds that this claim has no merit. *Provenzano v. State*, 761 So. 2d 1097, 1099 (Fla. 2000); *Bryan v. State*, 753 So. 2d 1244, 1250-51 (Fla. 2000). In *Bryan*, the Florida Supreme Court held:
>
> > Bryan's second issue is whether public records disclosure exemptions under section 945.10(1)(e), Florida Statutes (1999), and chapters 2000-2 and 2000-1 of the Laws of Florida are unconstitutional. The Court holds that the trial court properly decided that the statutory exemptions are constitutional. Article I, section 24 of the Florida Constitution provides that "every person has the right to inspect or copy any public record made or received in connection with the official business of any public body . . ., except with respect to records exempted pursuant to this section . . . . " Art. I, § 24(a), Fla. Const. To that end, the legislature "may provide by general law for the exemption of

records from the requirements of subsection (a) . . . provided that such law shall state with specificity the public necessity justifying the exemption and shall be no broader than necessary to accomplish the stated purpose of the law." Id. § 24(c).

Section 945.10 provides, in part:

> Confidential information.-
>
> (1) Except as otherwise provided by law or in this section, the following records and information of the Department of Corrections are confidential and exempt from the provisions of s. 119.07(1) and s. 24(a), Art. I of the State Constitution:
>
> . . . .
>
> (e) Information which if released would jeopardize a person's safety.

§ 945.10, Fla. Stat. (1999). The exemption satisfies the requirements established in article I, section 24 in that the legislature provided a specific public necessity for the exemption as follows:

> The Legislature finds that it is a public necessity that the department records enumerated in section 945.10(1), Florida Statutes, remain confidential and exempt from public disclosure as envisioned by the existing statute and rules because to provide otherwise would in some cases conflict with other existing law or would reveal information that would jeopardize the safety of the guards, inmates, and others. Thus, the harm from disclosure would outweigh any public benefit derived therefrom. . . . It is mandatory that prisons function as effectively, efficiently, and as nonviolently as possible. To release the exempted information to the public or to provide inmates with the information described in

> section 945.10, Florida Statutes, would severely impede that function and would jeopardize the health and safety of those within and outside the prison system.

Ch. 94-83, § 2, at 303-04, Laws of Fla.; compare *Halifax Hosp. Med. Ctr. v. News-Journal Corp.*, 724 So. 2d 567, 569-70 (Fla. 1999)(holding that an exemption as to "strategic plans" was unconstitutional under article I, section 24(c) where there was no "justification for the breadth of the exemption"). Therefore, section 945.10(1)(e) satisfies the constitutional requirements for an exemption to the public records disclosure law since it provides a meaningful exemption that is supported by a thoroughly articulated public policy. n6

> n6 Bryan also attacks section 945.10 under article II, section 3 of the Florida Constitution, which provides that the "powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein." Art. II, § 3, Fla. Const. This argument is misplaced since the DOC is acting as a litigant by claiming a statutory exemption to a disclosure requirement; contrary to Bryan's argument, the DOC is not promulgating regulations on disclosure exemptions. Thus, whether the DOC is properly claiming an exemption is properly examined pursuant to an analysis under article I, section 24(c).

Next, section 922.10, Florida Statutes (1999), as amended by chapter 2000-2, section 1 of the Laws of Florida, provides that "information which, if released, would identify the executioner is confidential and exempt from the provisions of s. 119.07(1) and s. 24(a), Art. I of the State Constitution." § 922.10 Fla. Stat. (1999). Bryan's claim that this exemption is not supported by a public necessity is likewise unavailing. Chapter 2000-1, section 3 of the Laws of Florida provides the legislative finding that "the disclosure of information identifying a person . . . administering

> a lethal injection for purposes of death sentence execution would jeopardize the person's safety and welfare by exposing that person to potential harassment, intimidation, and harm." Ch. 2000-1, § 3, Laws of Fla. Thus, the legislature provided the requisite public necessity for the exemption.
>
> Bryan's claim that chapter 2000-1, section 1 of the Laws of Florida (amending section 922.106, Florida Statutes (1999)), is unconstitutional is also without merit. The statute exempts from public disclosure the identity of persons involved in the "prescribing, preparing, compounding, [and] dispensing" of lethal injections. Ch. 2000-1, § 1, Laws of Fla. As provided above, however, chapter 2000-1 provides that the identity of these persons should remain anonymous to ensure their safety, thereby satisfying the specific public necessity requirement for the exemption. See ch. 2000-1, § 3, Laws of Fla. Because the three statutory exemptions satisfy the requirements mandated in article I, section 24(c) of the Florida Constitution, the trial court properly denied Bryan's claim for relief.

Accordingly, Defendant's claim has no merit and is denied.

(R43-45). Ventura has cited no case law which would require this Court to recede from precedent. Further, any claim as to the constitutionality of this section could have been brought within one year after the enactment of the lethal injection statute in 2000. As such, the motion is now untimely and procedurally barred.

III. SECTION 27.702, FLORIDA STATUTES, IS NOT UNCONSTITUTIONAL

Ventura complains that §27.702 of the *Florida Statutes* unconstitutionally restricts his CCRC attorneys from filing a "civil rights claim" attacking lethal injection as a means of execution. This claim is untimely and has no merit. The Circuit

Court properly denied relief on this claim because binding precedent is dispositive:

> GROUND II – THE SECTION 27.702 CLAIM
>
> In this Ground, Defendant argues that Florida Statute §27.702, is unconstitutional facially and as applied in violation of the due process and equal protection clauses of the Florida and Federal constitution. Specifically, on page 14 of the motion, Defendant argues that §27.702 of the Florida Statutes unconstitutionally restricts his CCRC attorneys for filing a "civil rights claim" attacking lethal injection as a means of execution. As the State has noted, binding precedent is dispositive of this claim:
>
> > 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*, 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. *See Diaz v. Moore*, 828 So. 2d 385 (Fla. 2001); [FN9] *Diaz v. Crosby*, 869 So. 2d 538 (Fla. 2003). [FN10]

> [FN9] This petition was filed in June 2000 and denied by this Court in July 2001.
>
> [FN10] This petition was filed in February 2003 and denied by this Court in October 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.
>
> *Diaz v. State*, 945 So. 2d 1136, 1154-1155 (Fla. 2006). Accordingly, this claim is without merit and is denied on that basis.

(R41-43).

Ventura's claim has no more basis than did Diaz's claim. Like Diaz, Ventura could have raised a lethal injection claim as long ago as 2000 when that became the method of execution in Florida, but did not. Likewise, he made no attempt to raise such a claim in his federal habeas corpus petition, even though lethal injection became the method of execution before that petition was filed. As such, the motion is now untimely and procedurally barred. If Ventura is foreclosed from litigating this claim in a federal proceeding, it is due to his own lack of diligence. The Circuit Court properly followed *Diaz* and denied all relief.

To the extent Ventura argues recent developments in the Mark Dean Schwab case, these arguments are improperly before this Court as they are not based on any published decision and were not raised at the trial level. *See Altchiler v. State*, *Dept.*

of Professional Regulation, 442 So. 2d 349, 350 (Fla. 1st DCA 1983)("That an appellate court may not consider matters outside of the record is so elemental that there is no excuse for any attorney to attempt to bring such matters before the court.").

CONCLUSION

WHEREFORE, based upon the foregoing arguments and authorities, the Appellee respectfully requests that all requested relief be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above was furnished by U.S. Mail to **Mark Gruber**, CCRC-Middle, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619, this ___ day of June, 2008.

BARBARA C. DAVIS

CERTIFICATE OF COMPLIANCE

This brief is typed in Times New Roman, 14 point.

BARBARA C. DAVIS