IN THE SUPREME COURT OF FLORIDA

CASE NO. SC08-60

PETER VENTURA,

Appellant,

STATE OF FLORIDA

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTH JUDICIAL CIRCUIT FOR VOLUSIA COUNTY,
STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

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ARGUMENT

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

I. MR. VENTURA'S CLAIMS ARE NOT PROCEDURALLY BARRED.

The State of Florida argues in its answer brief that Mr. Ventura's claim

that Florida's lethal injection method of execution violates the Eighth Amendment is "procedurally barred because Ventura failed to raise this claim within one year of the enactment of the lethal injection statute in January 2000." (Answer Brief of Appellee at 7). Likewise, the State argues that the claims regarding the constitutionality of Section 945.10, Florida Statutes, and Section 27.792, Florida Statutes, are also procedurally barred. (Answer Brief of Appellee at 16 and 19).

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 probably every other death row inmate around the country have not been challenges to lethal injection as such; they have all focused on particular aspects of the way the state or federal governments proposed to carry it out.

Mr. Ventura's claims are based on the recent execution of Angel Diaz, as well as the newly created lethal injection protocols. F.S. 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 implantation 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. Ventura, 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. Ventura's claims are not procedurally barred and should be decided on the merits.

II. POST-BAZE ANALYSIS

The State of Florida asserts that *Baze v. Rees*, 551 U.S. __, 128 S.Ct. 1520, 170 L.Ed. 2d 428 (2008) and its impact on this Court's previous decision in *Lightbourne v. McCullum*, 969 So. 2d 326, 353 (Fla. 2007) is not reviewable on appeal because the issue was not raised at the trial level. (Answer Brief of Appellee at 9). 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*, 968 So. 2d at 334. Although *Baze* had not been decided at the time Mr. Ventura filed his successive motion in the trial court, this Court is bound to follow *Baze* because it is a decision of the United States Supreme Court.

The State of Florida further argues in its answer brief that *Baze* disposes with Mr. Ventura's lethal injection claim because the Supreme Court held that "an isolated mishap alone does not give rise to an Eighth Amendment violation." (Answer Brief of Appellee at 9 (quoting *Baze*, 128 S.Ct. at 1531)). Mr. Ventura, however, does not base his claim on an isolated mishap, but rather on the assertion "that the current (August 1, 2007) FDOC protocols and their proposed implementation were defective." (Initial Brief of Appellant at 5-6). 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.

Additionally, the State argues that Mr. Ventura's argument is based entirely on the "unnecessary risk" standard, which was rejected by the United

States Supreme Court in *Baze*. (Answer Brief of Appellee at 9). In fact, not only did Mr. Ventura not rely on the unnecessary risk standard in his initial brief, but he stated in the brief that "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." (Initial Brief of Appellant at 10).

Furthermore, the State argues that Ventura has not alleged an alternative method of execution. (Answer Brief of Appellee at 10). Indeed, the Supreme Court in *Baze* requires 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." *Baze*, 128 S.Ct. at 1537. However, a death warrant has not been signed in Mr. Ventura's case, and he is not seeking a stay of execution. Therefore, he is not required under *Baze* to allege an alternative method of execution.

III. The 27.702 Claim

The F.S. § 27.702 claim Fla. Stat. §§ 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 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 US Eleventh Circuit Court of Appeals rejected Mark Schwab's application to file a § 2254 petition challenging lethal injection. The gist of Ventura'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 US Eleventh Circuit has now said that the opposite is true.

Appellant's F.S. § 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. Ventura 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. Ventura, 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 1, 2007. The response merely cited *Diaz* verbatim and argued that the claim should therefore be denied on the merits. The State's response did not offer

[1]The assertion about registry counsel was mistaken.

any procedural bar arguments, or argue any reason for denying the claim other than that *Diaz* was binding precedent. The lower court did not conduct a Huff hearing and its order summarily denying relief simply copied the State's response verbatim.

Some of the events which 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 US 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), *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").[2] Ventura's argument here is that this language confirms that a

[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 it decided in Diaz that a CCRC attorney could be constitutionally required by statute to proceed

federal challenge to Florida's lethal injection method of execution in this circuit must be brought by way of a §1983 action rather than a § 2254 petition.

The State's Answer Brief, for the first time, adds two new arguments. The first is a procedural bar argument to the effect that Ventura could have raised his lethal injection method of execution claim in 2000 when lethal injection was adopted by statute, and that he could have asserted his lethal injection claim in his original federal habeas petition (filed in October of 2002). The second is that "recent developments in the Mark Dean Schwab case . . . are improperly before this Court as they are not based on any published decision and were not raised at the trial level." AB 19.

The second argument is spurious. "Recent developments" in the

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under only one of the two available ways.

Schwab case were predicated on *In Re: Mark Dean Schwab, Petitioner*, 506 F.3d 1369, *supra*, which was cited verbatim along with the appropriate court reporter citation and discussed in Ventura's Initial Brief.[3]

The first of the State's additional arguments has already been addressed in this brief, but it should also be noted that, at the State's urging, the lower court decided this claim on the merits only, and in fact the lower court simply adopted the State's own response to this claim verbatim. There are significant timing issues which 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

[3]That they were not raised at the trial level was because they had not yet happened, but this raises a point that the State has not argued either here or in the lower court, which is that the (essentially the same) claim was raised by way of an all writs petition directly to this Court in *Diaz*. If this Court deems that the argument should be made by way of such a petition rather than by way of Rule 3.851 litigation, then Ventura moves that this Court treat this appeal as such a petition for the purpose of adjudicating this claim.

exhaustion requirements of §2254. The "start date" for a §2254 petition 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. With regard to a proposed method of execution claim, the two events are not only timed differently, they are different in kind.

This issue was recently addressed in *McNair v. Allen*, 515 F.3d 1168 (C.A.11 (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.[4] However, the court specifically noted that " The statute of

[4]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.

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.

Ventura argues here that a significant and material changes in Florida's protocol ***did*** occur on August 1, 2007. In fact two of the many changes which 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

requirement.[5]

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 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, the DOC must establish "policies and procedures" for

[5]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.

carrying out an execution by lethal injection.

Thus Ventura's cause of action for §1983 purposes accrued on August 1, 2007 and he has two years from that date to file a claim. However, he faces a laches issue if he does not pursue his claim before a warrant is signed and then moves for a stay of execution. *Schwab v. Secretary*, Dept. Of Corrections, 507 F.3d 1297 (11th Cir. (Fla.) Nov. 15, 2007); *McNair, supra*.. Any federal claim he might wish to assert in the federal court is ripe now but possibly not later. At the moment, he believes that he has counsel representing him on claims for relief from his Judgment ***and sentence***, but unless this Court reconsiders *Diaz*, the truth is otherwise.

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. Ventura'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.

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 _____ day of _____, 2008.

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

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