IN THE SUPREME COURT OF FLORIDA

RICHARD HENYARD,

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

Case No. SC08-222
Lower Tribunal No. 93-159-CF
Active Death Warrant

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIFTH JUDICIAL CIRCUIT,
IN AND FOR LAKE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

State Cases

Federal Cases

Other Authorities

STATEMENT OF THE CASE AND FACTS

On February 16, 1993, the grand jury in and for Lake County, Florida returned an indictment charging Appellant, Richard Henyard, with three counts of armed kidnapping, one count of sexual battery with the use of a firearm, one count of attempted first-degree murder, one count of robbery with a firearm, and two counts of first-degree murder. Appellant proceeded to jury trial on May 23, 1994, with the Honorable Mark J. Hill, presiding.

The following factual summary is taken from this Court's opinion affirming Henyard's conviction and sentence on direct appeal:

> The record reflects that one evening in January, 1993, eighteen-year-old Richard Henyard stayed at the home of a family friend, Luther Reed. While Reed was making dinner, Henyard went into his bedroom and took a gun that belonged to Reed. Later that month, on Friday, January 29, Dikeysha Johnson, a long-time acquaintance of Henyard, saw him in Eustis, Florida. While they were talking, Henyard lifted his shirt and displayed the butt of a gun in the front of his pants. Shenise Hayes also saw Henyard that same evening. Henyard told her he was going to a night club in Orlando and to see his father in South Florida. He showed Shenise a small black gun and said that, in order to make his trip, he would steal a car, kill the owner, and put the victim in the trunk.
>
> William Pew also saw Henyard with a gun during the last week in January and Henyard tried to persuade Pew to participate in a robbery with him. Later that day, Pew saw Henyard with Alfonza Smalls, a fourteen-year-old friend of Henyard's. Henyard again displayed the gun, telling Pew that he needed a car and that he

intended to commit a robbery at either the hospital or the Winn Dixie.

Around 10 p.m. on January 30, Lynette Tschida went to the Winn Dixie store in Eustis. She saw Henyard and a younger man sitting on a bench near the entrance of the store. When she left, Henyard and his companion got up from the bench; one of them walked ahead of her and the other behind her. As she approached her car, the one ahead of her went to the end of the bumper, turned around, and stood. Ms. Tschida quickly got into the car and locked the doors. As she drove away, she saw Henyard and the younger man walking back towards the store.

At the same time, the eventual survivor and victims in this case, Ms. Lewis and her daughters, Jasmine, age 3, and Jamilya, age 7, drove to the Winn Dixie store. Ms. Lewis noticed a few people sitting on a bench near the doors as she and her daughters entered the store. When Ms. Lewis left the store, she went to her car and put her daughters in the front passenger seat. As she walked behind the car to the driver's side, Ms. Lewis noticed Alfonza Smalls coming towards her. As Smalls approached, he pulled up his shirt and revealed a gun in his waistband. Smalls ordered Ms. Lewis and her daughters into the back seat of the car, and then called to Henyard. Henyard drove the Lewis car out of town as Smalls gave him directions.

The Lewis girls were crying and upset, and Smalls repeatedly demanded that Ms. Lewis "shut the girls up." As they continued to drive out of town, Ms. Lewis beseeched Jesus for help, to which Henyard replied, "this ain't Jesus, this is Satan." Later, Henyard stopped the car at a deserted location and ordered Ms. Lewis out of the car. Henyard raped Ms. Lewis on the trunk of the car while her daughters remained in the back seat. Ms. Lewis attempted to reach for the gun that was lying nearby on the trunk. Smalls grabbed the gun from her and shouted, "you're not going to get the gun, bitch." Smalls also raped Ms. Lewis on the trunk of the car. Henyard then ordered her to sit on the ground near the edge of the road. When she hesitated, Henyard pushed her to the ground and shot her in the leg. Henyard shot her at

close range three more times, wounding her in the neck, mouth, and the middle of the forehead between her eyes. Henyard and Smalls rolled Ms. Lewis's unconscious body off to the side of the road, and got back into the car. The last thing Ms. Lewis remembers before losing consciousness is a gun aimed at her face. Miraculously, Ms. Lewis survived and, upon regaining consciousness a few hours later, made her way to a nearby house for help. The occupants called the police and Ms. Lewis, who was covered in blood, collapsed on the front porch and waited for the officers to arrive.

As Henyard and Smalls drove the Lewis girls away from the scene where their mother had been shot and abandoned, Jasmine and Jamilya continued to cry and plead: "I want my Mommy," "Mommy," "Mommy." Shortly thereafter, Henyard stopped the car on the side of the road, got out, and lifted Jasmine out of the back seat while Jamilya got out on her own. The Lewis girls were then taken into a grassy area along the roadside where they were each killed by a single bullet fired into the head. Henyard and Smalls threw the bodies of Jasmine and Jamilya Lewis over a nearby fence into some underbrush.

Later that evening, Bryant Smith, a friend of Smalls, was at his home when Smalls, Henyard, and another individual appeared in a blue car. Henyard bragged about the rape, showed the gun to Smith, and said he had to "burn the bitch" because she tried to go for his gun. Shortly before midnight, Henyard also stopped at the Smalls' house. While he was there, Colinda Smalls, Alfonza's sister, noticed blood on his hands. When she asked Henyard about the blood, he explained that he had cut himself with a knife. The following morning, Sunday, January 31, Henyard had his "auntie," Linda Miller, drive him to the Smalls' home because he wanted to talk with Alfonza Smalls. Colinda Smalls saw Henyard shaking his finger at Smalls while they spoke, but she did not overhear their conversation.

That same Sunday, Henyard went to the Eustis Police Department and asked to talk to the police about the Lewis case. He indicated that he was present at the

> scene and knew what happened. Initially, Henyard told a story implicating Alfonza Smalls and another individual, Emmanuel Yon. However, after one of the officers noticed blood stains on his socks, Henyard eventually admitted that he helped abduct Ms. Lewis and her children, raped and shot her, and was present when the children were killed. Henyard continuously denied, however, that he shot the Lewis girls. After being implicated by Henyard, Smalls was also taken into custody. The gun used to shoot Ms. Lewis, Jasmine and Jamilya was discovered during a subsequent search of Smalls' bedroom.
>
> The autopsies of Jasmine and Jamilya Lewis showed that they both died of gunshot wounds to the head and were shot at very close range. Powder stippling around Jasmine's left eye, the sight of her mortal wound, indicated that her eye was open when she was shot. One of the blood spots discovered on Henyard's socks matched the blood of Jasmine Lewis. "High speed" or "high velocity" blood splatters found on Henyard's jacket matched the blood of Jamilya Lewis and showed that Henyard was less than four feet from her when she was killed. Smalls' trousers had "splashed" or "dropped blood" on them consistent with dragging a body. DNA evidence was also presented at trial indicating that Henyard raped Ms. Lewis.

Henyard v. State, 689 So. 2d 239, 242-45 (Fla. 1996) (footnote omitted), cert. denied, 522 U.S. 846 (1997).

After hearing this evidence, the jury found Appellant guilty as charged. After conducting a penalty phase proceeding, the jury returned an advisory recommendation by unanimous vote that Henyard be sentenced to death for the murder of the two young girls.

In his written findings in support of the death sentences, the trial judge found in aggravation: (1) Appellant had been

convicted of a prior violent felony; (2) the murders were committed in the course of a felony; (3) the murders were committed for pecuniary gain; and (4) the murders were especially heinous, atrocious or cruel. The trial court found Henyard's age of eighteen at the time of the crime as a statutory mitigating circumstance, and accorded it "some weight." The trial court found that Appellant was acting under an emotional disturbance and his capacity to conform his conduct to the requirements of law was impaired, and accorded these mental mitigators "very little weight." Additionally, the trial court found the following mitigating circumstances but accorded them "little weight": (1) Appellant functions at the emotional level of a thirteen-year-old and is of low intelligence; (2) Appellant had an impoverished upbringing; (3) Appellant was born into a dysfunctional family; (4) Appellant can adjust to prison life; (5) Appellant could have received eight consecutive life sentences with a minimum mandatory fifty years. Finally, the trial judge accorded some weight to the nonstatutory mitigating circumstance that Henyard's codefendant, Alfonza Smalls, could not receive the death penalty as a matter of law due to his age of fourteen years. The court concluded that the mitigating circumstances did not offset the aggravating circumstances and sentenced Henyard to death for the two murders.

On December 19, 1996, this Court issued its opinion affirming Henyard's convictions and sentences on direct appeal. Henyard v. State, 689 So. 2d 239 (Fla. 1996), cert. denied, 522 U.S. 846 (1997).

On May 11, 1999, Henyard filed an amended motion for postconviction relief and raised nine claims. On October 14, 1999, the trial court conducted an evidentiary hearing and both the defense and the State presented witnesses. Subsequently, the trial court entered an order denying postconviction relief.

On appeal, this Court affirmed the trial court's denial of postconviction relief and also denied Henyard's contemporaneously-filed Petition for Writ of Habeas Corpus. Henyard v. State/Crosby, 883 So. 2d 753 (Fla. 2004).

Following denial of all relief in the state courts, on December 20, 2004, Henyard filed a Petition for Writ of Habeas Corpus in the United States District Court for the Middle District of Florida. On April 14, 2005, during the pendency of his federal habeas proceedings, Henyard filed a successive postconviction motion in state court alleging, in part, that his death sentences violated the Eighth Amendment's prohibition against cruel and unusual punishment in light of the United States Supreme Court's decision in Roper v. Simmons, 543 U.S. 551 (2005). Henyard contemporaneously filed a motion in the

district court to hold his federal habeas proceedings in abeyance until he exhausted his state remedies. On April 26, 2005, the district court denied Appellant's request to hold his federal habeas proceedings in abeyance. On June 27, 2005, the state trial court denied Appellant's successive postconviction motion. Henyard appealed to this Court which denied relief *per curiam* on April 11, 2006. Henyard v. State, 929 So. 2d 1052 (Fla. 2006).

On August 2, 2005, the federal district court issued an order denying Henyard's habeas petition with prejudice and entered judgment for Respondents on August 3, 2005. On January 3, 2006, the Eleventh Circuit Court of Appeals granted Henyard's renewed application for Certificate of Appealability as to three issues. On August 11, 2006, the Eleventh Circuit Court of Appeals issued its opinion affirming the district court's denial of habeas corpus relief. Henyard v. McDonough, 459 F.3d 1217, rehr'g en banc denied, 213 Fed. Appx. 973 (11th Cir. 2006). Appellant filed a petition for writ of certiorari in the United States Supreme Court on January 2, 2007. The United States Supreme Court denied certiorari review on March 19, 2007. Henyard v. McDonough, 127 S. Ct. 1818 (2007).

On October 18, 2007, Henyard filed a second successive motion for postconviction relief raising four claims relating to

Florida's lethal injection procedure. The trial court summarily denied the motion on January 8, 2008. Henyard filed the instant notice of appeal on February 5, 2008. On or about April 23, 2008, Henyard filed in the circuit court a Motion for Leave to Amend Successive Motion for Postconviction Relief. Because this Court had jurisdiction over the case, the State moved the circuit court to dismiss the motion for leave to amend. After conducting a hearing on this motion on May 13, 2008, the trial court reserved ruling so that Henyard's collateral counsel could file a motion to relinquish with this Court. On May 22, 2008, Henyard filed a Motion to Relinquish Jurisdiction in this Court. On July 3, 2008, Henyard filed his Initial Brief in the Florida Supreme Court. On July 9, 2008, Governor Charlie Crist signed a death warrant and Henyard's execution is scheduled for September 23, 2008, at 6:00 p.m. The following day, this Court issued an Order denying Henyard's motion to relinquish jurisdiction and directing Appellee to file its Answer Brief by July 29, 2008.

SUMMARY OF THE ARGUMENT

The court below properly denied Henyard's successive motion for postconviction relief alleging that Florida's procedures for judicial execution by lethal injection violate the Eighth Amendment proscription against cruel and unusual punishment. The court applied binding precedent to reject this claim. Henyard's claim that an incorrect standard was applied is refuted by the case law.

Henyard's challenges to the constitutionality of sections 945.10 and §27.702, Florida Statutes, are procedurally barred and without merit.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED IN SUMMARILY DENYING HENYARD'S CLAIM THAT FLORIDA'S LETHAL INJECTION METHOD OF EXECUTION VIOLATES THE EIGHTH AMENDMENT?

Henyard's primary claim asserts that the court below should not have rejected his argument that Florida's current procedures for judicial execution by lethal injection violate the Eighth Amendment prohibition against cruel and unusual punishment. The summary denial of Henyard's motion is a legal issue which is reviewed *de novo*. State v. Coney, 845 So. 2d 120, 137 (Fla. 2003) (holding pure questions of law discernible from the record to be subject to *de novo* review).

The court below rejected Henyard's claim that Florida's current procedures for judicial execution violate the Eighth Amendment, citing to Lightbourne v. McCollum, 969 So. 2d 326 (Fla. 2007), cert. denied, 128 S. Ct. 2485 (2008), and Schwab v. State, 969 So. 2d 318 (Fla. 2007) (V1/57). Henyard asserts that this was error, claiming that the United States Supreme Court decision in Baze v. Rees, 128 S. Ct. 1520 (2008), demonstrates that this Court applied an incorrect standard in Lightbourne. A review of the relevant cases, however, refutes this claim.

Henyard does not identify a particular standard from Baze to be applied, noting it is a split decision and discussing the

opinions of different justices. Henyard summarizes Baze by concluding that "seven justices adopted some sort of standard involving the concept of risk," (Appellant's Initial Brief at 10), which purportedly means this Court's application of an "inherent cruelty" standard in Lightbourne was improper. However, there is one standard to be taken from Baze; when the Court is split, the holding of the Court "may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." Marks v. United States, 430 U.S. 188, 193 (1977). This principle means that the appropriate standard to be applied from Baze requires a defendant to show that a particular method of execution presents a "substantial risk of serious harm," or an "objectively intolerable risk of harm." Baze, 128 S. Ct. at 1531.

The "substantial risk of serious harm" was one of several standards discussed and applied in Lightbourne. That case, of course, considered the constitutionality of Florida's current lethal injection procedures following an extensive evidentiary hearing in the circuit court. This Court concluded that, under the protocols adopted by the Department of Corrections in August, 2007, Florida's procedures do not present a substantial risk of harm and do not violate the Eighth Amendment. Lightbourne, 969 So. 2d at 353.

Henyard asserts, however, that Lightbourne must be reconsidered because this Court applied a higher, "inherent cruelty" standard in upholding Florida's current protocols. This assertion fails to acknowledge that this Court discussed and applied several standards. In fact, 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. Lightbourne, 969 So. 2d at 352 ("Alternatively, 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").

In Lightbourne, this Court specifically found that "Lightbourne has not shown a substantial, forseeable or unnecessary risk of pain." Lightbourne, 969 So. 2d at 353. While Baze did indeed reject the lower "unnecessary risk" standard, this Court found that Lightbourne had not met that standard or the higher "substantial risk" standard which Baze did apply. Clearly, Henyard cannot demonstrate any Eighth Amendment violation under Lightbourne or Baze.

In fact, the Baze decision itself affirms that Florida's procedures comply with the Eighth Amendment. In Baze, the Court specifically held that protocols similar to those used in Kentucky "would not create a risk that meets this standard," and Florida's protocols provide greater protection than Kentucky's protocols, thereby reducing the risk of unnecessary harm. See Baze, 128 S. Ct. at 1537 (discussing standard); Baze, 128 S. Ct. at 1570 (Ginsburg, J., dissenting, noting that Florida has adopted safeguards for protection not found in Kentucky's protocols). Clearly, Baze offers no support for the claim that Florida's procedures are constitutionally flawed, or that this Court misapplied the Eighth Amendment in Lightbourne.

As Lightbourne explains, the current protocols, adopted in August 2007, represent a concerted effort to improve the administration of the death penalty following recognition of weaknesses identified both by the Governor's Commission and the Department of Corrections following the Diaz execution. Lightbourne affirms the presumption of deference to the executive branch in administering lethal injection. Lightbourne, 969 So. 2d at 352; Provenzano v. State, 739 So. 2d 1150, 1153 (Fla. 1999); Buenoano v. State, 565 So. 2d 309, 311 (Fla. 1990).

Henyard makes no claim beyond the allegations already considered by this Court and rejected in Lightbourne. His argument does not identify any particular deficiency in the current protocols, or offer any Eighth Amendment analysis; Henyard merely asserts that Baze demonstrates that Lightbourne was decided under an incorrect standard and requests a remand so that the court below can reconsider his Eighth Amendment claim under Baze. Clearly, no reconsideration is necessary. The standard to be applied and the application of that standard to Florida's established protocols are legal issues which this Court can determine *de novo*. As explained above, such *de novo* review confirms that Florida's current procedures comply with the Eighth Amendment.

The court below properly denied relief, applying binding precedent from Lightbourne and Schwab. Baze has now confirmed that Florida's procedures are constitutionally valid. This Court must affirm the denial of relief on this issue.

ISSUE II

WHETHER THE TRIAL COURT ERRED IN DENYING HENYARD'S CLAIM THAT THE CONFIDENTIALITY GRANTED IN SECTION 945.10, FLORIDA STATUTES, IS UNCONSTITUTIONAL?

Henyard's next issue challenges the denial of his claim that the confidentiality of the execution team, codified in section 945.10, Florida Statutes, violates his constitutional rights. The court below summarily denied this claim based on this Court's prior precedent. (V1/59). The constitutionality of a statute is a legal question, subject to *de novo* review. State v. Rubio, 967 So. 2d 768, 771 (Fla. 2007).

The State submits that the instant issue is procedurally barred. Henyard's motion suggested that newly discovered evidence rendered the statute unconstitutional, citing to the Diaz execution, testimony before the Governor's Commission and the Lightbourne hearings, and evolving standards of decency (V1/19-21). However, none of these events had any impact on the statute at issue, the construction of the statute, or Henyard's particular challenge. Henyard offers no explanation as to why his claim was not presented previously; it is procedurally barred and the lower court could have summarily denied the claim on that basis alone.

Furthermore, as the lower court ruled, this claim is without merit. Henyard's substantive claim has already been

rejected by this Court in Bryan v. State, 753 So. 2d 1244, 1250-51 (Fla. 2000). Although Henyard claims that Bryan must be reconsidered because Baze requires greater scrutiny of lethal injection procedures, nothing in the Baze decision supports his claim that disclosure of the execution team identities is constitutionally required. Even if a particular situation required a court to consider testimony from an execution team member, this Court has recognized that accommodations could be taken to satisfy this requirement without compromising the identity of execution team members. Provenzano v. State, 761 So. 2d 1097, 1099 (Fla. 2000) (upholding exclusion of such testimony without foreclosing the possibility of taking such testimony in camera). This Court directly upheld the constitutionality of this statute in Bryan, and Henyard's argument provides no basis for retreat from that holding.

Henyard asserts, without citing any authority, that "[e]xecutions carried out by anonymous team members put inmates at unnecessary and foreseeable risk of infliction of pain and violate Due Process" (Appellant's Initial Brief at 14). Most states, like Florida, maintain the confidentiality of this information. See Adam Liptak, After Flawed Executions, States Resort to Secrecy, N.Y. Times, July 30, 2007. As noted in Baze, "it is difficult to regard a practice as 'objectively

intolerable' when it is in fact widely tolerated." Baze, 128 S. Ct. at 1532. At any rate, Henyard has failed to offer any reasonable basis for relief on this claim.

None of the cases cited by Henyard supports his claim that section 945.10 is unconstitutional. Much of his argument in this issue describes ongoing lethal injection challenges in other states. Reliance on those other situations to demonstrate that Florida's public record exemption is unconstitutional is misplaced; none of the other situations discussed involve the application of Florida's current protocols for execution or any constitutional requirement for disclosure of this information.

In California First Amendment Coalition v. Woodford, 299 F.3d 868 (9th Cir. 2002), the federal court found that California's "Procedure 770" unconstitutionally limited the public's right of access to executions conducted in that state. One of the factors supporting this conclusion was the court's determination that the identification of execution team members could be protected through less restrictive means, such as requiring team members to wear surgical masks to conceal their identities. Id., at 880, 884-85. Thus, while the court struck Procedure 770's restrictions in several respects, that case cannot be read as requiring disclosure of execution team member identities.

Similarly, Travaglia v. Department of Corrections, 699 A.2d 1317 (Pa. Commw. Ct. 1997), does not compel disclosure of execution team identities. Travaglia, decided under Pennsylvania's public records laws, held that the identities of *witnesses* to prior executions must be disclosed upon request. Travaglia upheld the confidentiality of a manual describing Pennsylvania's lethal injection procedures, and there is no indication that a records request seeking the identity of *execution team members* was before the court for consideration.

Henyard claims that this information is necessary for a successful challenge to Florida's current lethal injection protocols, yet he cites no authorities holding that disclosure of execution team members' identities is constitutionally required. This claim was properly summarily denied, and this Court must affirm the denial of relief.

ISSUE III

WHETHER THE TRIAL COURT ERRED IN DENYING HENYARD'S CLAIM THAT SECTION 27.702, FLORIDA STATUTES, IS UNCONSTITUTIONAL?

Henyard's final issue asserts that section 27.702, Florida Statutes, is facially unconstitutional. The court below denied this claim as procedurally barred and without merit (V1/57-58). The constitutionality of a statute and the propriety of finding a procedural bar are legal questions, subject to *de novo* review. Rubio, 967 So. 2d at 771; Coney, 845 So. 2d at 137.

Henyard does not acknowledge or address the trial court's finding of a procedural bar on this issue. A challenge to the facial validity 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. Henyard offers no explanation for his failure to raise this issue in prior proceedings.

In addition, 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. 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]

Henyard's reliance on this Court's decision in State v. Kilgore, 976 So. 2d 1066 (Fla. 2007), is similarly misplaced. In Kilgore, this Court held that Chapter 27 does not authorize CCRCs to represent capital defendants in collateral postconviction proceedings to challenge noncapital convictions, even when those convictions were used as aggravating factors to support the death penalty. Henyard claims that Kilgore "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 the same counsel" (Appellant's Initial Brief at

[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. 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, 969 So. 2d at 344, they have not changed substantially as to create a new cause of action under 42 U.S.C. § 1983.

21). However, Henyard does not cite to any particular language in the Kilgore opinion for this proposition. Kilgore does not address any right to counsel on noncapital convictions beyond noting that CCRCs and registry counsel are prohibited from such representation, although this Court has previously recognized that due process may require the appointment of counsel for indigents in noncapital postconviction proceedings in some situations. Graham v. State, 372 So. 2d 1363 (Fla. 1979); see also Russo v. Akers, 701 So. 2d 366 (Fla. 5th DCA 1997) (declining to vacate order appointing public defender to represent noncapital defendant in postconviction). At any rate, Kilgore offers no support for Henyard's claim that section 27.702 is unconstitutional; it affirms that there is no constitutional right to collateral counsel, even in capital cases. Kilgore, 976 So. 2d at 1068.

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 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. As the court below properly found this challenge to be both procedurally barred and without merit, this Court must affirm the summary rejection of this claim.

CONCLUSION

WHEREFORE, the State respectfully requests that this Honorable Court affirm the Order filed below denying Henyard's successive motion for postconviction relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF OF APPELLEE 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 25th day of July, 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. 9.210(a)(2).

/s/ Stephen D. Ake
COUNSEL FOR APPELLEE