

**IN THE SUPREME COURT OF FLORIDA**

**CASE NO. SC08-564**

**MARTIN GROSSMAN,**

**Appellant,**

**STATE OF FLORIDA**

**Appellee.**

**ON APPEAL FROM THE CIRCUIT COURT  
OF THE TWELFTH JUDICIAL CIRCUIT FOR PINELLAS COUNTY,  
STATE OF FLORIDA**

**REPLY BRIEF OF APPELLANT**

**Ali A. Shakoor  
Florida Bar No. 0669830  
Capital Collateral Regional  
Counsel Middle Region  
3801 Corporex Park Drive  
Suite 210  
Tampa, FL 33619-1136  
(813) 740-3544  
COUNSEL FOR APPELLANT**



TABLE OF CONTENTS

	Page
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES .....	ii
ARGUMENT .....	1
II. Post-BAZE Analysis.....	2
III. The 27.702 Claim .....	3
CONCLUSION AND RELIEF SOUGHT .....	8
CERTIFICATE OF SERVICE .....	10
CERTIFICATE OF COMPLIANCE.....	11

## TABLE OF AUTHORITIES

<i>Allen v. Butterworth</i> , 756 So. 2d 52, 66-67 (Fla. 2000) .....	3
<i>Baze v. Rees</i> , 128 S. Ct. 1520 (2008).....	2
<i>Buenoano v. State</i> , 565 So. 2d 309, 311 (Fla. 1990) .....	2
<i>Diaz v. State</i> , 945 So. 2d 1136 (Fla. 2006) .....	4
<i>Griffin v. State</i> , 2008 Fla. LEXIS 1086 (Fla. June 2, 2008).....	3
<i>Hill v. McDonough</i> , 547 U.S. 573, 126 S.Ct. 2096, 2099, 165 L.Ed.2d 44 (2006) .....	5
<i>Lebron v. State</i> , 982 So. 2d 649, 666 (Fla. 2008) .....	3
<i>Lightbourne v. McCollum</i> , 969 So. 2d 326 (Fla. 2007).....	2
<i>Lightbourne v. McCollum</i> , 969 So. 2d 326, 334 (Fla. 2007) .....	2
<i>Nelson v. Campbell</i> , 541 U.S. 637, 124 S.Ct. 2117, 158 L.Ed.2d 924 (2004) .....	5
<i>Rutherford v. McDonough</i> , 466 F.3d 970, 973 (11th Cir. 2006) .....	6
<i>Schwab v. State</i> , 969 So. 2d 318, 321 (Fla. 2007) .....	1
<i>Schwab v. State</i> , 973 So. 2d 427 (Fla. 2007) .....	6
<i>Schwab v. Secretary, Dept. of Corrections</i> , 507 F.3d 1297 (11th Cir. 2007) .....	8
<i>State ex rel. Butterworth v. Kenny</i> , 714 So. 2d 404 (Fla. 1998) .....	3

*Woodel v. State*,  
33 Fla. L. Weekly S290 (Fla. May 1, 2008).....3

**Other Cites**

Art. I, § 17 Fla. Const.....2  
42 U.S.C. §1983.....3  
27.7001 Fla. Stat.....3  
Fla. Stat. §27.702(1).....3  
§27.7001 Fla. Stat.....3  
Fla. Stat. § 27.702.....8



## ARGUMENT

Counsel relies on the arguments presented in the Initial Brief and refers to the Answer Brief as follows:

### **Mr. Grossman's challenges are not procedurally barred.**

The State of Florida argues in its Answer Brief that Mr. Grossman's challenges are procedurally barred. Answer Brief of Appellee at 11-13. Mr. Grossman's claims are based on the recent execution of Angel Diaz and the newly created lethal injection protocols. 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 implementation 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, 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. Grossman's claims are not

procedurally barred and should be decided on the merits.

## II. **Post-BAZE Analysis**

The State argues that the trial court properly denied Mr. Grossman's claim that Florida's lethal injection method of execution violates the Eighth Amendment when it applied *Lightbourne* and *Schwab* as precedent. Answer Brief of Appellee at 6-10. However, 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 v. McCollum*, 969 So. 2d 326, 334 (Fla. 2007). This Court is bound to follow *Baze v. Rees*, 128 S. Ct. 1520 (2008) because it is a decision of the United States Supreme Court. His claim is not based on an isolated mishap, but rather on the assertion that the current (August 1, 2007) Florida Department of Corrections protocols and their proposed implementation were defective.

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. This Court's reaffirmation of an inherent cruelty standard in *Lightbourne v. McCollum*, 969 So. 2d 326 (Fla. 2007) and *Schwab v. State*, 969 So. 2d 318 (Fla. 2007) is now in conflict with the plurality decision in *Baze* and with the position

taken by all but two of the members of the Supreme Court. Thus, this Court must reexamine Florida's lethal injection procedures in light of *Baze*, and based on the *Baze* standard of review. The cases cited in the State's Answer Brief on page 7 don't even include a thorough *Baze* analysis. *Griffin v. State*, 2008 Fla. LEXIS 1086 (Fla. June 2, 2008); *Woodel v. State*, 33 Fla. L. Weekly S290 (Fla. May 1, 2008); *Lebron v. State*, 982 So. 2d 649, 666 (Fla. 2008). Moreover, the fact that Mr. Grossman was denied a hearing on his claim in spite of his obesity problems reflect a blatant refusal to evaluate Grossman's individual issues, and disregards the language in *Allen v. Butterworth*, 756 So. 2d 52, 66-67 (Fla. 2000).

### III. **The 27.702 Claim**

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 Apostconviction 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. 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 seems 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.

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 (AA 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) ( A[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 Grossman to seek relief via §1983 and resolution of any attendant issues

regarding representation is still ripe and laches grounds do not apply.

### **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. Mr. Grossman's counsel should be authorized to pursue a method of execution claim in the federal courts. Fla. Stat. § 27.702 should be deemed unconstitutional or this Court should reconsider its interpretation of those statutes so as to permit CCRC counsel to pursue a motion of execution claim in the federal courts.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief of Appellant has been furnished by email and U.S. Mail, first class postage, to all counsel of record on this 9<sup>th</sup>, day of September, 2008.

---

Ali A. Shakoor  
Florida Bar No. 0669830  
Capital Collateral Regional Counsel -  
Middle  
3801 Corporex Park Drive,  
Suite 210  
Tampa, Florida 33619  
(813) 740-3544  
Attorneys for Appellant

Copies furnished to:  
Carol M. Dittmar  
Assistant Attorney General  
Office of the Attorney General  
3507 East Frontage Road, Suite 200  
Tampa, Florida 33607-7013

Douglas Crow  
Assistant State Attorney  
Office of the State Attorney  
14250 49<sup>th</sup> Street North  
Clearwater, Florida 33762-2800

Martin Grossman  
DOC # 089742  
Union Correctional Institution

7819 NW 228<sup>th</sup> Street  
Raiford, Florida 32026

**CERTIFICATE OF COMPLIANCE**

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

---

Ali A. Shakoor  
Florida Bar No. 0669830  
Capital Collateral Regional Counsel -  
Middle  
3801 Corporex Park Drive,  
Suite 210  
Tampa, Florida 33619  
(813) 740-3544  
Attorneys for Appellant

