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**RICHARD HENYARD v. STATE OF FLORIDA
CASE NOS. SC08-222; SC08-1544**

FLORIDA SUPREME COURT
MONDAY, SEPTEMBER 08, 2008

>> PLEASE RISE.

HEAR YE HEAR YE HEAR YE.

THE SUPREME COURT OF FLORIDA IS
NOW IN SESSION.

ALL WHO HAVE CALL PLEASE DRAW
NEAR, GIVE ATTENTION AND YOU
SHALL BE HEARD.

GOD SAVE THE UNITED STATES,
THIS GREAT STATE OF FLORIDA,
AND THIS HONORABLE COURT.

LADIES AND GENTLEMEN, THE
FLORIDA SUPREME COURT.

PLEASE BE SEATED.

>> GOOD MORNING AND WELCOME TO
THE FLORIDA SUPREME COURT, ORAL
ARGUMENT SESSION.

FOR MONDAY, SEPTEMBER 8th.

WE WOULD FIRST LIKE TO WELCOME
OUR NEW COLLEAGUES --

COLLEAGUE, JUSTICE CANADY.

AND THE CASE ON THE DOCKET THIS
MORNING IS RICHARD HENYARD
VERSUS STATE OF FLORIDA.

ARE THE PARTIES READY TO
PROCEED?

ALL RIGHT.

YOU MAY PROCEED.

>> PLEASE THE COURT, MARK
GRUBER STAFF COUNSEL ON BEHALF
OF RICHARD HENYARD.

THE ISSUE I HAVE -- RATHER
URGENTLY LIKE TO ADDRESS THIS
MORNING IS WHAT I CALL THE
27702 ISSUE, DEALING WITH
CCRC'S ABILITY OR INABILITY TO
PROCEED UNDER 1983, WITH REGARD
TO METHOD OF EXECUTION CLAIMS.

>> ARE YOU CLAIMING THAT THERE
IS SOME ISSUE AFFECTING THE
CRIMINAL CONVICTION OR SENTENCE
THAT YOU ARE UNABLE LEGALLY TO
ADDRESS, IN THE FEDERAL COURTS?

>> YES, YOUR HONOR.
AS -- UNDER DIAZ -- WELL, I'LL
JUMP RIGHT TO THAT.
ONE THING THAT IS STRIKING HERE
IS THAT.
IS THAT -- IF YOU LOOK AT THE
TREATMENT OF THE CLAIM, IN THE
DIAZ DECISION IN DECEMBER OF
2006, COMPARED TO THE
RUTHERFORD DECISION OF OCTOBER
2006, THAT I HAVE ALSO CITED
AND LAY THEM SIDE BY SIDE AND
GO DOWN INTO THE VERBIAGE IS
ALMOST IDENTICAL, THERE IS THE
REFERENCE TO THE HILL DECISION.

AND EFFORTS TO FILE A 19 --

>> WELL, WHAT DECISION
EXPLICITLY HOLDS THAT YOU CAN'T
RAISE THIS BY A HABEAS IN THE
FEDERAL COURT?

>> WELL, THE --

>> THE CHALLENGE, TALKING ABOUT
THE CHALLENGE TO THE METHOD OF
EXECUTION.

>> YES, SIR.

>> AND WHAT FEDERAL DECISION
HOLDS THAT YOU ARE UNABLE -- WE
ALL RECOGNIZE THAT YOU CAN'T
REPRESENT THIS DEFENDANT IN A
HABEAS PROCEEDINGS, IN THE
FEDERAL COURT.

RIGHT?

>> YES, SIR.

>> AND THE STATE DOESN'T
DISPUTE THAT.

WHAT DECISION IS IT THAT HOLDS
THAT THIS ISSUE CANNOT BE
RAISED BY A STATE DEFENDANT AND
-- IN FEDERAL COURT, THROUGH A
HABEAS PROCEEDING?

>> I UNDERSTAND THE QUESTION,
AND IT IS TRUE THAT A
CATEGORICAL DECISION WHERE THE
ISSUE HAS BEEN SQUARELY BROUGHT
BEFORE THE COURT, BY THAT I
MEAN THE FEDERAL COURT, 11TH
CIRCUIT, AND THAT THE 11th
CIRCUIT HAS SAID THAT YOU
CANNOT PROCEED BY WAY OF AN
ORIGINAL 2254, I MEAN, THAT
CATEGORICAL HOLDING DOES NOT
EXIST.

ON THIS OTHER HAND, THE

RUTHERFORD DECISION I JUST REFERRED TO, OF COURSE WAS CITED IN THE SCHWAB DECISION LAST NOVEMBER, WHERE WE ATTEMPTED TO DO THE SAME THING THE DIAZ ATTORNEYS DID AND AS WE ATTEMPTED TO FILE A SUCCESSIVE 2254 AND OF COURSE THAT IS -- AND THAT WAS ESSENTIALLY DOOMED BECAUSE OF THE SUCCESSIVE MOTION. BUT, THE COURT INCLUDED THE LANGUAGE THAT EVEN IF SUCH A CLAIM OR -- WERE COGNIZABLE IN A 2254, AND UNDER THE CIRCUMSTANCES WOULD BE DENIED BUT AT THE END OF THAT PARTICULAR CLAUSE, WHICH I CITED IN THE PLEAD, REPEATEDLY, THERE IS A STRING CITATION, TO HILL, TO NELSON AND THEN THERE IS A SPECIFIC REFERENCE TO RUTHERFORD, AND IT WAS PRECISELY THE LANGUAGE I WAS GETTING AT, WHERE THE RUTHERFORD DECISION SAID THAT LAW THAT SAID THAT THESE CITES OF CLAIMS SHOULD BE PURSUED BY 2254, IS NO LONGER VALID.

>> LET ME ASK YOU A MORE BASIC QUESTION.

WE'RE HERE WITH MR. HENYARD'S EXECUTION IMPENDING AND YOU ARE CHOOSING TO SPEND YOUR TIME IN THIS ORAL ARGUMENT STATING THERE IS SOME PARTICULAR WAY THAT YOU CANNOT PURSUE A METHOD OF EXECUTION CLAIM IN THE FEDERAL COURTS, IS THAT CORRECT.

>> YES, YOUR HONOR.

>> ALL RIGHT.

AND IF THIS COURT DENIES YOUR CLAIM THAT LETHAL INJECTION IS UNCONSTITUTIONAL UNDER THE 8th AMENDMENT, FOR ANY OF THE REASONS YOU HAVE RAISED, YOU CAN DIRECTLY PETITION TO THE UNITED STATES SUPREME COURT FOR RELIEF ON THAT CLAIM.

>> WHICH --

>> NOW, HOW IS IT, JUST IN TERMS OF -- SO WE MAKE SURE WE ARE DEALING WITH SUBSTANCE AND

NOT JUST FORM, HOW IS IT THAT
EVEN IF WE SAY, NO, YOU CAN'T
-- THE STATUTE SAYS WHAT IT
SAYS AND THE JUSTICE SAYS YOU
-- IT DOESN'T SAY YOU CAN'T
RAISE BY THE HABEAS, HOW IS
MR. HENYARD PREJUDICED OR HOW
IS -- IN TERMS OF THIS
PARTICULAR CLAIM, IN TERMS OF
IT NOT BEING CONSIDERED BY THE
SPECIFIC PROCEDURAL ROUTE THAT
YOU ARE ALLEGING?

>> WELL, WE CAN SEEK RUIN THIS
U.S. SUPREME COURT BUT
HISTORICALLY THE REVIEW IS NOT
GRANTED VERY OFTEN.
WE CAN -- WISH TO BE ABLE TO
SEEK IT IN THE INTERMEDIATE
FEDERAL COURTS WHICH WE ARE
PROHIBITED FROM DOING BECAUSE
OF WHAT I BELIEVE IS A DECISION
FROM THIS COURT IN DIAZ, THAT
WOULD HAVE BEEN RIGHT IF IT HAD
BEEN RELEASED A COUPLE OF
MONTHS PRIOR, BUT THAT IS NO
LONGER CONSISTENT WITH FEDERAL
LAW, THE FEDERAL LAW,
PROCEDURAL LAW IS TURNED ON ITS
HEAD, SO IT HAS DIRECT IMPACT
ON WHAT WE ARE GOING TO BE
DOING.

AND AS I'VE ALREADY INDICATED
IF THE COURT DENIES RELIEF ON
OUR LETHAL INJECTION CLAIMS AND
OUR OTHER CLAIMS WEISS, NO
DOUBT, WILL SEEK -- CERT.

>> THAT IS THE QUESTION,
THOUGH, IT BREAKS DOWN, TO HOW
ARE YOU DENIED DUE PROCESS?
YOU HAVE AN OPPORTUNITY TO
BRING YOUR CLAIMS IN STATE
COURT.

YOU HAVE AN OPPORTUNITY TO
BRING IT IN FEDERAL COURT IF
YOU BRING IT OTHER THAN AS AN
-- A SUCCESSIVE MOTION.
YOU HAVE AN OPPORTUNITY TO TAKE
IT TO THE UNITED STATES SUPREME
COURT.

SO, WHERE IS THE DENIAL OF DUE
PROCESS?

>> BY DENIAL OF ACCESS TO THE
INTERMEDIATE FEDERAL COURTS, I
HAVE --

>> BUT YOU DON'T REALLY HAVE THAT DENIAL, BECAUSE IF YOU BRING IT IN YOUR FIRST PETITION, UNDER 2254, YOU CAN ACTUALLY BRING THAT CLAIM IN FEDERAL COURT, CAN'T YOU?

>> WELL, WHAT I AM -- AND I BELIEVE THAT IS THE ORIGINAL QUESTION FROM JUSTICE AM STEAD, THERE IS A CATEGORY -- AND SAID STEAD, IS THERE A CATEGORICAL DECISION FROM THE 11th CIRCUIT, WE NO LONGER CAN AND NO, IT DOESN'T EXIST BUT I AM -- SCHWAB AND RUTHERFORD DECISION, BUT THE SCHWAB DECISION IN PARTICULAR FROM LAST NOVEMBER WAS A PROVERBIAL SHOT ACROSS THE BOW THAT THERE -- TECHNICALLY THE LANGUAGE WAS DICTA. EVEN IF SUCH A CLAIM COULD BE BROUGHT BY WAY OF AN ORIGINAL 2254, BUT WITH THE DIRECT CITATION AND THE QUOTATION FROM RUTHERFORD, AND THE TRAJECTORY OF THE CASES SINCE THEN, THERE HAS BEEN CROW AND McNAIR THAT I HAVE CITED AND IN FACT HAS A REFERENCE TO SCHWAB AND RECENTLY IN THE AULDER MAN CASE, 1983 CASES THAT HAVE BEEN BROUGHT THROUGH THE FEDERAL COURTS AND HAVE BEEN HEARD AND ULTIMATELY, EXPOSED OF ON STATUTE OF LIMITATIONS GROUNDS, SO I'M SAYING THE MESSAGE FROM THE 11th CIRCUIT IS CLEAR AND WE HAVE TO BRING THE CLAIMS BY WAY OF 1938, NOT BY WAY OF AN ORIGINAL 2254 AND NOT BY 2254 AT ALL AND OUR ACCESS TO THE INTERMEDIATE FEDERAL COURTS, I'M CLAIMING, CURRENTLY HAS BEEN CUT OFF, BY WHAT I AM -- BY A DECISION THAT THIS COURT SHOULD NOW RECEDE FROM IN LIGHT OF THE CHANGE IN FEDERAL LAW.

>> YOU ARE ASKING US TO ALLOW CCRC ATTORNEYS TO BRING CIVIL ACTIONS

>> NOT THAT BROUGHT BY ANY STRETCH.

>> 1983 ACTION IS A CIVIL

ACTION.

>> WELL, IN -- YES, AND IN THEORY, EVERYTHING WE DO BY HISTORICAL ORIGIN IS A CIVIL ACTION.

THAT'S WHY THE COURT IN BUTTERWORTH HAD TO CONSTRUE THE STATUTE TO SOME EXTENT, BECAUSE ON ONE HAND, IT TELLS US TO PROCEED AND CHALLENGES TO THE JUDGMENT AND SENTENCE AND ON THE OTHER HAND, EVERY, SINGLE CHALLENGE WE DO AT LEAST HISTORICALLY, AS I SAID IS A CIVIL ACTION.

SO, THE WAY THE COURT ADDRESSED THE MATTER, IS ALSO CONSISTENT WITH WHAT I'M ARGUING NOW, THE COURT RECEIVED TO THOSE TRADITIONAL TYPES OF ACTIONS THAT HAD BEEN BROUGHT, THAT COLLATERAL REALLY CHALLENGED THE JUDGMENT AND SENTENCE AND SAID WE WERE AUTHORIZED TO DO THOSE.

NOW UP UNTIL THE LATTER PART OF 2006, A TRADITIONAL TYPE OF ACTION THAT WOULD CHALLENGE THE JUDGMENT AND SENTENCE IN FEDERAL COURT, WOULD HAVE TO BE BROUGHT, ACTUALLY BY WAY OF A 2254 AND BY WAY OF 1983, AND THE JURISPRUDENCE WAS CONSISTENT WITH THE FEDERAL PROCEDURE AT THAT TIME.

THAT CHANGED, OKAY, AND I'M ARGUING CONSISTENT WITH THE SPIRIT AT LEAST OF BUTTERWORTH, WE SHOULD BE NOW ALLOWED TO CHALLENGE THE JUDGMENT AND SENTENCE IN PARTICULAR, THE SENTENCE AND THE METHOD OF EXECUTION THE NARROW CLASS OF CASES IN FEDERAL COURT BY THE MEANS THEY NOW TELL TO US USE, WHICH IS 1983.

AND I'M CERTAINLY NOT ARGUING FOR A BROAD AUTHORITY TO PROCEED UNDER 1983.

I BELIEVE THE STATUTE FROM MY UNDERSTANDING HISTORICALLY WAS WRITTEN AS IT WAS TO ADDRESS WHAT WE SEE AS ABUSES BY USING 1983, IN MUCH TOO BROAD A WAY.

>> THERE ARE THREE OTHER ISSUES, IN THIS PETITION, THEE PETITIONS YOU WOULD LIKE TO ADDRESS?

>> I WANT TO TALK BRIEFLY ABOUT THE EVIDENTIARY HEARING WITH REGARD TO THE CLAIMS, AN INDIVIDUAL WHO WAS TURNED UP AND -- AS I ADMITTED AT THE HEARING, I'M NOT SURE HOW HE CAME ACROSS THE CLAIM AND HE SAID IN HIS AFFIDAVIT NOBODY FROM ANY SIDE CONTACTED HIM ABOUT THE CASE AT ALL AND THE NAME SURFACED IN A TRANSCRIPT, IN -- AND -- WE COULDN'T FIGURE OUT WHERE THIS TRANSCRIPT CAME FROM AND WE KNEW THIS DEFENSE ATTORNEYS DIDN'T HAVE IT.

>> AT WHAT POINT, I THOUGHT YOU FOUND IT IN THE DEFENSE ATTORNEY'S FILES.

>> THAT IS NOT MY RECOLLECTION.

WE FOUND IT IN FILES, BUT I DON'T RECALL FINDING IT IN THE TRIAL COUNSEL'S FILES.

>> THE ISSUE ON THIS, LET'S JUST ASSUME THAT THE DUE DILIGENCE CAN'T BE CONCLUSIVELY REFUTED.

GO TO THE SECOND PRONG OF JONES.

THIS COURT AND THE TRIAL COURT IN THE ORIGINAL SENTENCING HAD A THOROUGH DISCUSSION OF THE RELATIVE CULPABILITY OF THE TWO DEFENDANTS AND THE CO-DEFENDANTS -- HE WAS CONSTITUTIONALLY IN ELIGIBLE AT THAT TIME FOR THE DEATH PENALTY.

THE -- YOUR CLIENT HAD BLOOD ON HIM.

THERE IS NOT -- REFUTING ANYTHING ABOUT HIM PLANTING THE -- PLANNING THE MURDER AN BRAGGING ABOUT IT AND ON TOP OF IT, HE -- THE STATEMENT, EVEN ACCEPTING IT AS TRUE AN EVEN ACCEPTING THAT IT COULD BE ADMISSIBLE WHICH IT PROBABLY ISN'T, SIMPLY TALKS ABOUT HE'S A CHILD KILLER -- A KILLER, NOT

A CAR THIEF, DOESN'T EVEN
RELATE TO THIS SHOOTING.
HOW COULD IT POSSIBLY MEET THE
SECOND PRONG OF JONES?

>> WELL, THERE HAVE BEEN CASES
WHERE THE ACTUAL EVENT -- STILL
THERE HAS BEEN RELIEF GRANTED.

AND TAYLOR COMES TO MIND BUT
THE DEFENSE FROM THE OPENING
STATEMENT, ALL THE WAY THROUGH,
AT TRIAL, WAS A QUESTION ABOUT
WHO IS THIS SHOOTER.

AND THE TESTIMONY WE WOULD HAVE
INTRODUCED FROM THE WOULD HAVE
SPOKEN DIRECTLY TO THAT.
IT WOULD HAVE BOLSTERED THE
TRIAL DEFENSE.

AND --

>> HOW DO YOU THINK IT WOULD BE
ADMISSIBLE?

LET'S GO BACK TO THAT.

HOW IS THAT ADMISSIBLE AND YOU
KNOW, THIS IS -- I DON'T KNOW
HOW OLD -- 19 -- 1994?

FIRST TALKED ABOUT IN 2008.

YOU NOW, A 14-YEAR-OLD KID
BRAKING ABOUT SOMETHING.

IT'S NOT EVEN ADMISSION AGAINST
INTEREST.

BECAUSE IT -- RELATED TO
ANYTHING AND I DON'T EVEN SEE
HOW IT GETS TO ADMISSIBILITY.

>> WELL, WE HAVE ARGUED IT
WOULD COME UNDER THE EXCEPTION,
921-141 FOR ADMISSIBLE HEARSAY.

AND THAT IT WOULD IN FACT HAVE
BEEN A STATEMENT BY SMALLS
AGAINST HIS INTEREST.

AND ALSO, SMALLS WOULD HAVE
BEEN UNAVAILABLE AT THE TIME OF
TRIAL.

>> LET ME ASK YOU THIS
QUESTION.

DID YOU CLOAK THIS CLAIM THAT
YOU ALL HAVE BEEN DISCUSSING AS
A WAY OF ESTABLISHING THIS
MITIGATOR ON -- NOT ONLY BEING
A MINOR PARTICIPANT IN A CRIME
COMMITTED BY SOMEONE ELSE, THE
WAY THE CLAIM WAS CLOAKED, AT
THE TRIAL COURT LEVEL?

>> AT THE -- IN A

POSTCONVICTION PROCEEDINGS,
YES.

AND THE WAY IT WAS DISCUSSED IN
THE -- I MEAN, IN THE ORDER,
AND GENERALLY IN THE BRIEFING
AND I BELIEVE THE STATEMENT BY
THE COURT WAS IN ORDER TO EVEN
BE CONSIDERED UNDER THE JONES
STANDARDS, THAT IT WOULD HAVE
TO BE TREATED AS THE STATUTORY
MITIGATOR WHICH INCLUDES THE
COMPONENT OF -- ONLY BEING A
MINOR PARTICIPANT.

>> AND THAT IS THE WAY THE
COLLATERAL WAS CLOAKED IN THE
TRIAL COURT, IS THAT CORRECT.

>> I DON'T BELIEVE SO.

I BELIEVE --.

>> IT WASN'T.

>> I --

>> THE TRIAL COURT AS YOU SAY,
THE TRIAL COURT SAID THAT THE
CLAIM WAS ESSENTIALLY THAT --
WITH THIS NEW EVIDENCE, THAT
THE STATUTORY MITIGATOR OF
BEING A MINOR PARTICIPANT IN A
CRIME COMMITTED BY SOMEONE
ELSE, WOULD BE ABLE TO BE
ESTABLISHED.
SO, HE'S INCORRECT IN HIS
CHARACTERIZATION OF THE CLAIM.

>> YES, SIR.

THE CLAIM WAS SIMPLY -- SIMPLY
--

>> A NEW EVIDENCE CLAIM.

>> IT WAS A NEW EVIDENCE CLAIM
AND WE WERE TRYING TO ARGUE
THAT RELATIVE CULPABILITY IS
WHAT I WOULD CALL IT AND
WHETHER THAT APPLIES DIRECTLY
STRICTLY TO THE STATUTORY
MITIGATOR OR A MITIGATOR IN
GENERAL.

>> I WANTED TO BE SURE THAT IF
WE LOOK AT THE CLAIM, IT WILL
NOT BE CLOAKED IN THE LANGUAGE
OF JUST ESTABLISHING THIS
MITIGATOR.

>> YES, SIR.

>> I BELIEVE I HAVE -- WILL GO
AHEAD AND RESERVE TIME.

>> MAY IT PLEASE THIS COURT,
STEPHEN AKE REPRESENTING THE

STATE OF FLORIDA IN THE CASE.

>> COUNSEL, WOULD YOU ADDRESS THE QUESTION I ASKED ORIGINALLY?

BECAUSE THIS COURT GENERAL HAD NO INTENTION OF DEPRIVING A DEFENDANT UNDER SENTENCE OF DEATH OF MAKING A CONSTITUTIONAL CHALLENGE TO HIS CRIMINAL SENTENCE, AND -- TALKED ABOUT CAPITAL COLLATERAL COUNSEL NOT OFF FILING CIVIL RIGHTS ACTIONS IN THE -- AND SO MY UNDERSTANDING, AT LEAST, IN READING THE LAW HAS ALWAYS BEEN THIS KIND OF CLAIM COULD BE FILED IN A STATUTORY FEDERAL HABEAS CORPUS PROCEEDING. HELP US WITH THAT ISSUE.

>> I BELIEVE THAT THAT IS CORRECT.

YOUR HONOR.

I BELIEVE THE UNITED STATES SUPREME COURT SAID SO IN HILL VERSUS McDONOUGH THAT ALTHOUGH THEY ACKNOWLEDGED IT MAY BE PRESENTED IN 1983 THEY ALSO, ACKNOWLEDGE THAT IT COULD BE PRESENTED IN A HABEAS PETITION.

IN FACT, CCRC ROUTINELY DOES IT IN HABEAS PETITIONS.

>> WHAT DO YOU SAY ABOUT THE LANGUAGE THAT THE -- THAT HE HAS CITED?

>> WELL, YOUR HONOR, FIRST OF ALL, WE HAVE TO GO WAY, WAY BACK TO THE ORIGINAL CLAIM, AS IT WAS PRESENTED IN THE TRIAL COURT IN THE POST-CONVICTION MOTION AND THAT IS, IT IS PROCEDURALLY BARD AND I THINK THE COURT IN -- AND COUNSEL IS TRYING TO CONCERN THE COURT WITH AVENUES AVAILABLE IN FEDERAL COURT WHEN THAT IS NOT THE QUESTION WE ARE DEALING WITH HERE AND WE ARE DOING WITH A CONSTITUTIONAL ATTACK TO SECTION --

>> LET'S ASSUME --

>> OKAY.

, I AM FINE WITH THAT.

>> IT IS A FRESH SITUATION,

PROCEDURALLY AND NOW WANT TO GO OVER TO FEDERAL COURT AND PRESENT THE DEFENDANT IN MAKING A CLAIM THAT THE METHOD OF EXECUTION AS IT IS CURRENTLY ADMINISTERED, DOES NOT MEET CONSTITUTIONAL STANDARDS.

>> FIRST I WOULD SAY CCRC HAS AVAILABLE 2254 WHICH WE DISCUSSED BUT, ALSO, THERE HAS BEEN NO PROHIBITION AGAINST FILING THIS 1983 ACTION THEM. ONLY PROHIBITION IS AGAINST CCRC ATTORNEYS FROM DOING THAT.

AND TENURE DOES NOT PROHIBIT IT FROM FILING THAT ON HIS OWN BEHALF AND HE CAN FILE IT PRO SE OR AS IN THE SCHWAB CASE.

>> WE HAVE ALSO RECOGNIZED THAT CRC COULD FILE FEDERAL STATUTORY HABEAS PROCEEDINGS ON BEHALF OF THE DEFENDANT AND INCLUDE ANY CONSTITUTIONAL CLAIMS THAT MAY BE THERE.

>> RIGHT.

>> AND THAT IS BACK IN BUT YOURWORTH AFTER KENNEDY 1988 -- BUTTERWORTH AFTER KENNEDY, THIS 1988 DECISION AND THAT IS WHY

--

>> TRYING NOT TO DANCING AROUND THE FACT THAT UP UNTIL THIS POINT, THAT WE WOULD HAVE, I THINK SO IF BY NO OTHER WAY BY INFERENCE RECOGNIZED THAT THEY COULD ASSERT SUCH A CLAIM, AS THE --

>> I'M NOT --

>> FEDERAL STATUTORY HABEAS PROCEEDINGS.

UNDER THE CIVIL RIGHTS ACT.

>> I'M NOT DENYING THEY COULD FILE A HABEAS.

>> THAT IS THE LAW AND I'M NOT AWARE OF ANY DECISION THAT PROHIBITS SUCH AN ACTION.

AND THAT IS OUR POSITION, AND I THINK HILL VERSUS McDONOUGH FROM THE U.S. SUPREME COURT SAYS THEY COULD DO EITHER DEPENDING ON THE NATURE OF THE CLAIM.

>> AND AGAIN, I'M NOT -- I

DIDN'T REALLY FEE CUSS ON THE ISSUE, FRANKLY, SO I HAVE TO GO BACK.

BUT, IF FOR WHATEVER REASON, NOW, 1983, IS A SUPERIOR METHOD FOR CHALLENGING METHOD OF EXECUTION, ISN'T IT A LITTLE RIDICULOUS TO SAY, WELL, TEN YEARS OF COLLEGE PRO SE, WHEN IT IS THE EXACT SAME CLAIM THAT'S HABEAS WHICH IS CHANGING THE -- WE'RE JUST CHANGE THE LABEL AND IN OTHER WORDS WHEN WE CAME OUT WITH OUR PRIOR DECISION WE DIDN'T HAVE THE BENEFIT OF WHAT THE UNITED STATES SUPREME COURT WAS SAYING ABOUT THESE 1983 ACTIONS AND FRANKLY I WAS A LITTLE SURPRISED THEY EVEN TALKED ABOUT IT.

BUT THEY DID.

SO, WHY SHOULDN'T WE CLARIFY AS LONG AS, THE METHOD OF EXECUTION CLAIM, THAT THEY CAN BRING IT, BY 1983.

BECAUSE IT IS THE EXACT SAME THING AS BRINGING IT BY HABEAS BUT MAYBE THERE IS SOMETHING AS TO WHY ONE IS BETTER THAN THE OTHER.

>> I THINK THE POLICY REASON STATED BY THE COURT IN THE KENNEDY DECISION BACK IN 1988 ARE APPLICABLE TO THAT, IS THAT THE STATE LEGISLATURE HAS A LIMITED AMOUNT OF FUNDS AND THEY CAN AUTHORIZE HOW THEY WANT TO USE THOSE FUNDS AND CCRC ATTORNEYS CAN OPERATE AND IF YOU OPEN FLOODGATES TO THE 1983 --

>> AGAIN, I AM TO THE TALKING ABOUT FLOODGATES, I'M SAYING THIS EXACT SAME CLAIM IS -- YOU ARE ACKNOWLEDGING THEY CAN BRING IT OVER BY HABEAS OR 198

--

>> I'M NOT ACKNOWLEDGELING CCRC CAN FILE OUT BY 1983.

>> YOU ARE SAYING CCRC CAN FILE THE HABEAS.

>> YES.

CORRECT AND THEY DID.

>> AND FILE THIS 1938.

WHY WOULD WE WANT TO LIKE GET THE FEDERAL COURTS IN WITH A PROCESS -- WE KNOW WHAT IT IS LIKE WHEN DEFENDANTS ARE PRO SE, A PRO SE ON THIS HAND AND THAT AND SEEMS TO ME WE HAVE BEEN REALLY --

>> AGAIN --

>> CAN I FINISH MY QUESTION?

>> YES.

>> WE HAVE MUDDIED THE SITUATION FOR THE FEDERAL COURTS AS OPPOSED TO STREAMLINE IT AND WE HAVE DONE REALLY NOT A SERVICE TO WHAT THE LEGISLATURE INTENDED, BUT, A DISSERVICE BY SAYING, LISTEN YOU CAN FILE ONE OR THE OTHER AND CAN'T GO BOTH WAYS, IF YOU ARE CHALLENGING METHOD OF EXECUTION.

>> WELL, OBVIOUSLY, YOUR HONOR, WE WOULD DISAGREE WITH THAT CHARACTERIZATION AND THINK THE LEGISLATURE, AS THE COURT -- THE COURT SHOULDN'T CONCERNED WITH WHAT THE AVENUES ARE AVAILABLE IN FEDERAL COURT TO CCRC DEFENDANTS REALLY, THIS BOILS DOWN TO WHAT THIS COURT'S CONTROL OF IS THIS STATUTE THATS IN QUESTION AND CONTROLLING CCR'S REPRESENTATION, AND HOWEVER THEY RAISE IT IN FEDERAL COURT

--

>> I WANT TO UNDERSTAND THIS. SO WE END -- AND THIS LEGISLATURE NEEDS CLARIFY. YOU ARE SAYING IT WOULD BE -- CONSISTENT WITH LEGISLATIVE INTENT TO LET CCRC FILE THE HABEAS.

>> CORRECT.

>> AND HAVE SOMEONE GHOST-WRITE A PETITION FOR THE DEFENDANT TO FILE PRO SE IN 1983, THAT THAT WOULD BE A BETTER PAT FOR THE ADMINISTRATION OF JUSTICE?

>> I THINK THAT YOU CANNOT PIGEON-HOLE OUT A LETHAL INJECTION 1983 ACTION AND SAY CCRC CAN NOW FILE THIS BASED ON

FEDERAL CASE LAW.

I DON'T --

>> YOU SAY WE CAN'T ACTUALLY
NARROWLY SAY IT.

>> NO, I DON'T HOW THE COURT
CAN DO THAT.

>> WHAT -- I WOULD LIKE AN
EXPLANATION.

YOU SAY IT CAN'T BE DONE.

WHY NOT?

CERTAINLY THE 1983, CIVIL
RIGHTS DAMAGE-TYPE CLAIMS THAT
COULD GO ON AND ON OF A CIVIL
DAMAGE NATURE, CERTAINLY, IS
NOT WITHIN THIS, BUT, WHY COULD
IT NOT BE SO TAILOR AND I
THOUGHT YOU ANSWERED, JUSTICE
ANSTEAD'S QUESTION SAYING
NOTHING EXISTS TO PROHIBIT THAT
AS I UNDERSTOOD YOUR ANSWER TO
HIS QUESTION AND YOU SEEMED TO
CHANGE WITH THE JUSTICE
PARIENTE'S QUESTION.

>> NOTHING PROHIBITS HENYARD
FROM FILING IT.

>> WE ARE TALKING ABOUT CCR --

>> NOT TALK ABOUT --

>> GOES HAND IN HAND, YOUR
HONOR, HENYARD IS NOT DENIED
ACCESS TO THE COURTS --

>> BECAUSE HE CAN DO IT
INDIVIDUALLY.

>> YES. CERTAINLY.

>> AND WOULD YOU ANSWER, THEN,
THAT IS FINE.

I UNDERSTAND YOUR ANSWER NOW.

BUT, WOULD YOU ANSWER THE
ASPECT OF THE WHY?

THE COURT COULD NOT TAILOR AN
OPINION, OR DECISION, THAT
WOULD VERY CLEARLY DELINEATE
THAT IT DOESN'T OPEN THESE
FLOODGATES TO ALL OF THE CIVIL
LITIGATION AND IT IS BECAUSE
THE FEDERAL COURTS MAY HAVE
CHANGED THE PROCEDURAL
MECHANISM THROUGH WHICH THEY
WILL LOOK AT THESE THINGS, THAT
WOULD ALLOW CCRC TO DO WHAT
THEY'VE DONE IN THE PAST,
HISTORICALLY.

>> WELL, YOUR HONOR FIRST I
WOULD CONTEND THE FEDERAL
COURTS HAVE NOT CHANGE ANYTHING

AND ALWAYS HAD A 1983
AVAILABLE, AND THAT HAS NOT
BEEN CHANGED.

IT IS JUST, CCR'S COMPLAINING
THEY CAN'T GO AND DO IT.
AND THE CASE LAW REALLY HAS NOT
CHANGED THAT DRASTICALLY, I
WOULD SUBMIT.

>> LET'S GO BACK THEN AND YOU
KNOW, WE ARE REALLY DANCING ALL
AROUND THE QUESTION AND IT IS A
VERY SIMPLE QUESTION AND I
THINK YOU NO E WHAT WE ARE
TRYING TO GET TO.

AND THAT IS, IF THE FEDERAL
COURTS ARE ONLY GOING TO LOOK A
THOSE UNDER A 1938 PROCEDURAL
MECHANISM, WHY SHOULD THIS
COURT NOT WRITE NARROWLY
AENOUGH TO ALLOW CCRC TO DO
EXACTLY WHAT THEY HAVE DONE
HISTORICALLY AND THAT IS, TO BE
ABLE TO CHALLENGE IN A
COLLATERAL ATTACK POSTURE, THE
LEGALITY OF A PARTICULAR METHOD
OF EXECUTION?

>> WELL, I WOULD THINK IT WOULD
RUN CONTRARY TO LEGISLATIVE
INTENT BUT I DON'T KNOW HOW THE
COURT CAN NARROWLY CONSTRUE
THAT SO IT WOULD JUST BE
APPLICABLE TO THESE LETHAL
INJECTION CLAIMS.

>> YOU THINK IF WE'D SAY THAT
IT WOULD OPEN UP THE CIVIL
REMEDIES AND DAMAGES AND THE
WHOLE THING.

>> RIGHT, YOUR HONOR.

>> OKAY.

>> REGARDING THE SECOND CLAIM
WITH MR.^NAWARA COUNSEL RAISED
THAT AS A NEWLY DISCOVERED
EVIDENCE CLAIM AND THE TRIAL
COURTS FOUND FOR THE SAKE OF
ARGUMENT THAT IT MET THIS FIRST
PRONG OF JONES BUT SAID THAT IT
DID NOT MEET THE SECOND PRONG
AND IT WOULD NOT PRODUCE A
DIFFERENT RESULT.

AND THAT IS A CORRECT RULING IN
THE CASE THE TRIAL COURT NOTED
TWO REASON AND ONE THE EVIDENCE
WOULDN'T BE ADMISSIBLE IN THE
PENALTY PHASE AND MORE

IMPORTANTLY WOULD NOT HAVE CHANGED ANYTHING IN THE CASE, AND NAWAR A'S AFFIDAVIT SAYS THE CO-DEFENDANT SAID, WAS BRAGGING IN JAIL WHEN HE WAS 14 YEARS OLD HE WAS A KILLER AS JUSTICE PARIENTE POINTED OUT NOTHING TIED IT INTO THIS CASE WHATSOEVER AND THE TRIAL COURT'S ORDER DOES A GOOD JOB OF BASICALLY SAYING THEIR ARGUMENT IS THE HOUSE OF CARDS COMES TUMBLING DOWN ON THE CLAIM BECAUSE UNDER NO SCENARIO WHATSOEVER IS HENYARD EVER GOING TO BE ENTITLED TO THAT STATUTORY MITIGATOR OF A MINOR PARTICIPANT IN THE CASE.

I THINK THE EVIDENCE IS OVERWHELMING, AS TO HIS MAJOR ROLE IN THE CASE.

THAT HE WAS THE ONE THAT STOLE THE GUN AND --

>> WHETHER WE CLOSE IT AS THE STATUTORY MITIGATOR, RELATIVE CULPABILITY OR PROPORTIONALITY IT -- YOUR ARGUMENT IS THE SAME.

>> CORRECT, YOUR HONOR.

>> EVEN IF FOR SOME REASON THERE WERE CO-SHOOTERS OR -- THE GUN WAS FOUND IN SMALLS' POSSESSION.

>> CORRECT.

>> AND LET ME MAKE SURE WE ARE CLEAR ON THIS.

IT ISN'T LIKE I REMEMBER LEO JONES, WHERE I MEAN, THERE IS A NEW DEFENDANT OR SOMETHING. THIS IS THE PERSON THAT MR. HENYARD'S ALWAYS BLAMED FOR THE SHOOTING, THE 14-YEAR-OLD.

>> THE JURY HEARD ALL OF THIS AND THE STATE AT TRIAL NEVER CLAIMED HENYARD WHAT'S THE TRIGGER MAN AND IT WASN'T UNTIL THIS PENALTY PHASE WHEN THE STATE TRIED REBUT THE MITIGATOR THEY INDUCED THE BLOOD STAIN EVIDENCE FROM THE EXPERT INDICATING THAT HENYARD HAD THE HIGH VELOCITY BLOOD STAIN ON HIM AS OPPOSED TO HIS

CO-DEFENDANT BUT --

>> THAT IS IMPORTANT -- LET ME MAKE SURE I UNDERSTAND, THEY DIDN'T RELY ON WHO WAS THE SHOOTER FOR THE GUILT PHASE. >> NO, YOUR HONOR, CAME OUT IN THE PENALTY PHASE, ONCE THE DEFENSE WAS MAKE ANGLE ISSUE OF THE MITIGATOR IN -- THERAPY STATE CALLED LEROY PARKER IN THE PENALTY PHASE AND WAS NOT PRESENTED IN THE GUILT PHASE AND THE STATE'S THEORY ALL ALONG WAS THE TWO INDIVIDUALS DID IT TOGETHER, BUT THAT THE EVIDENCE AFTER THIS PENALTY PHASE DEFINITELY STRONGLY INDICATED HENYARD WAS THE TRIGGER MAN BUT THE STATE NEVER CLAIMED HENYARD WAS THE TRIGGER MAN AND EVEN IF YOU GIVE SMALLS OR NAWARA'S STATEMENT, TAKE IT, YOU KNOW, PAST ITS LOGICAL CONCLUSION, IT'S NOT GOING TO INDICATE SMALLS WAS THE TRIGGER MAN.

HE NEVER, NEVER SAID THAT IN THE AFFIDAVIT, AND I BELIEVE THE TRIAL COURT PROPERLY SOME SUMMARILY DENIED THE CLAIM. -- SUMMARILY DENIED THE CLAIM.

NO FURTHER QUESTIONS.
I'LL TURN IT OVER.
THANK YOU.

>> COUNSEL, WOULD YOU RESPOND TO YOUR OPPONENT'S LAST REPORT OF THE WAY THAT THE STATE ACTUALLY TREATED THIS CASE AT TRIAL, SAYING THAT IT -- IT WAS NEVER THEIR STRATEGY AT TRIAL TO FOCUS SOLELY ON HENYARD AS FAR AS BEING THE SHOOTER, THAT IT WAS ONLY DURING THE PENALTY PHASE THAT THE BLOOD SPLATTER EVIDENCE WAS PRINTED TO REFUTE AND CLAIMS OF THE STATUTORY MITIGATOR OF A MINOR PARTICIPANT IN A CRIME COMMITTED BY ANOTHER? IS COUNSEL CORRECT INSCRIBING THAT.

>> THE FIRST PART, I BELIEVE IS CORRECT.

>> WHAT PART OF HIS NARRATIVE DO YOU DISPUTE?

>> IF YOU DO.

>> THE TRIAL COUNSEL ARGUED THAT HENYARD WAS NOT THE TRIGGER MAN FROM THE BEGINNING OF THE CASE AN ARGUED THAT -- EVERY CHANCE HE COULD THAT POINT AND IT WAS DURING THE PENALTY PHASE THIS EVIDENCE -- THAT THAT ISSUE WAS FOCUSED ON MORE -- THAT IS THE ONLY DISPUTE.

I DID WANT TO TAKE A MOMENT HERE TO EXPRESS CONCERN THAT -- I THINK THIS ISSUE ABOUT COUNSEL IS AN EXTREMELY IMPORTANT ONE.

>> LET ME -- REMIND ME HOW SCHWAB PROCEEDED, BECAUSE MY RECOLLECTION IS THAT SCHWAB PROCEEDED THROUGH THIS COURSE AND THEN WHEN THE UNITED STATES SUPREME COURT... [INAUDIBLE] HABEAS, IT.

>> U.S. SUPREME COURT, FILED A CERT PETITION.

>> AND ON THAT CERT PETITION THE U.S. SUPREME COURT STEPPED IN AND STAYED IT.

>> YES, SIR.

>> AND THEN, RESOLVED THE DIAZ CASE AND THERE WAS ALSO A -- SCHWAB PROCEEDED THROUGH THE 11th CIRCUIT.

>> LET ME GIVE A QUICK CHRONOLOGY BECAUSE IT ILLUSTRATES THE URGENCY OF THE ISSUE.

IN THE SHORT PERIOD OF TIME, BEFORE THE DECISION BECAME FINAL IN THE COURT IN NOVEMBER, AND THE ACTUAL EXECUTION, WE FILED AN APPLICATION OF FILE 2254 SUCCESSIVE MOTION AND THAT WAS DENIED.

AND IT WAS DENIED BECAUSE UNLIKE THIS COURT, THE FEDERAL COURTS DO NOT RECOGNIZE A NEW NEWNESS-TYPE CLAIM, WHICH IS TYPICAL IN METHOD OF EXECUTION CLAIMS IN THE COURT WHERE SOMETHING NEW AND CURRENT IS YOU A MATTER --

>> UNDER THE SAFE STREETS ACT THE FEDERAL COURT HASST UP CERTAIN PROCEDURES FOR WARRANT-TYPE SITUATIONS. ACTUALLY, ON SUCCESSIVE SITUATIONS, OF GOING THROUGH THE FEDERAL COURT WHICH YOU HAVE TO GET ACCESS IN ORDER TO GO TO THE TRIAL COURT FROM THE CIRCUIT.

CORRECT?

>> [INAUDIBLE].

>> WELL, THE PROCEDURES ARE THERE.

I'M NOT EVEN SURE I AM RESPONDING TO YOUR QUESTION. BUT IF THE ARGUMENT IS THAT THERE IS SOMETHING NEW AND CURRENT AS I SAID IT ONLY APPLIES TO GUILT OR INNOCENCE AND WILL NOT HEAR A METHOD OF EXECUTION CLAIM UNDER THAT EXCEPTION.

UNDERTY 54.

I HOPE THAT IS AN ANSWER.

>> WASN'T THERE AN APPEAL FROM THE 11th CIRCUIT DECISION TO THE U.S. SUPREME COURT IN SCHWAB?

MY RECOLLECTION IS CORRECT.

I THOUGHT THERE WERE 2 AVENUES THAT SCHWAB PROCEEDED, TO THE UNITED STATES SUPREME COURT, THE UNITED STATES SUPREME COURT STEPPED IN AND STAYED IT AND STAYED BOTH OF THEM AND THEN, AFTER THE DIAZ CASE CAME OUT THEY DISSOLVED THE STAY.

>> THERE WAS A CERT PETITION FILED IN THE STATE COURT AND A STAY AND THEY COURT GRANTED IT AND THEN DISSOLVE IT AFTER BAZE.

AND ACTUALLY IT WAS DISSOLVED BY OPERATION OF THEIR DENIAL OF THE CERT PETITION WE FILED IN THE CASE AND WITH REGARD TO THE ACTUAL 2254 APPLICATION WE FILED, I DON'T BELIEVE WE PURSUED THE CERT PETITION AT THE TIME AND IN ANY EVENT, THERE WAS NO STAY FROM THE SUPREME COURT, ONLY IN FACT -- AS I RECALL, I THINK WE

ACTUALLY HAD ONE -- ACTUALLY AT THE COURT BUT DIDN'T FORMALLY GET FILED.

AND THAT WAS BECAUSE THE STAY HAD BEEN GRANTED IN THE STAYED PROCEEDING AND AFTER THAT I FILED A 1983, AND IN DOING SO, I STUCK MY NEXT OUT AND APPARENTLY STATEWIDE THERE WAS A VIEW THERE WAS A VIOLATION OF ALL CCRC POLICY AND STATE LAW, AND SO ON AND SO FORTH AND I FILED IT ANYWAY AND IN THE I MOVED TO WITHDRAW, AFTER A FRUITLESS SEARCH FOR PRIVATE COUNSEL TO TAKE IT OVER, AND AFTER THAT, ON WHAT AMOUNTED TO A TECHNICALITY, THE MOTION WAS DENIED -- TECHNICALITY THE MOTION WAS DENIED WITHOUT PREJUDICE SIS AND WE -- THEY APPEALED AND APPEALED THE DENIAL TO THE 11TH CIRCUIT AND AN PETITION WAS ISSUED ON JUNE 28th OR 29th AND DENIED RELIEF AND THAT COUNSEL, MORRISON AND -- DECLINED TO FILE THE CERT PETITION AND THAT IS WHAT HAPPENED.

AS FAR AS AN ORIGINAL PETITION, JUST LIKE THIS COURT, IF THERE IS YOU A BOILERPLATE-TYPE METHOD OF EXECUTION CLAIM THAT IS INCLUDED IN A 3850 OR LATER ON 2254 AND THERE IS NOT SOME NEWNESS ASPECT TO IT, SOME CURRENTNESS ASPECT TO IT IT WILL ROUTINELY BE DENIED.

THAT HAS HAPPENED OVER AND OVER AGAIN, ON THE OTHER HAND, THE TRADITIONAL PRACTICE OF THIS COURT AS REFLECTED IN KENNEDY VERSUS BUTTERWORTH IS WHERE THERE HAS BEEN SOME RECENT EVENT, TYPICAL A BOTCHED EXECUTION AND MIGHT BE LIKE THE LANCE SET ARTICLE OR SOMETHING OF THAT SORT, THEN THE COURT WILL ALLOW THAT MATTER TO BE HEARD, ON THE MERITS.

THAT HAS BEEN THE TRADITIONAL PATTERN IN THE COURT OVER YEARS AND YEARS.

THAT CANNOT BE DONE BY WAY OF

SUCCESSIVE -- CORRESPONDING
SUCCESSIVE PETITION.

HOWEVER, IF A 1983, ON THAT
LIMITED ISSUE, IS FILED, WITH
IN THE STATUTE OF LIMITATIONS,
WHICH IS WHAT THEY ARE COMING
DOWN ON NOW, THEN WE CAN GET
FEDERAL RUIN THE INTERMEDIATE
COURTS, AND I HAVE ARGUED THAT
THAT IS THE WAY WE MUST GET A
FEDERAL REVIEW, AND THE ONLY
WAY TO BE ALLOWED TO DO THAT IS
FOR THIS COURT TOOT LEAST
RECONSIDER THAT PORTION OF THE
DIAZ OPINION.

INTO THANK YOU VERY MUCH.

THANKS TO BOTH OF COUNSEL FOR
THEIR ARGUMENTS.

THIS COURT WILL NOW BE IN
RECESS, UNTIL TOMORROW MORNING.

>> PLEASE RISE.