

No. 08-6392

IN THE
SUPREME COURT OF THE UNITED STATES

RICHARD HENYARD,
Petitioner

v.

STATE OF FLORIDA,
Respondent

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA**

**CAPITAL CASE
EXECUTION SCHEDULED
SEPTEMBER 23, 2008 6:00 pm**

APPLICATION FOR STAY OF EXECUTION

**TO THE HONORABLE CLARENCE THOMAS, Associate Justice of Supreme Court of
the United States and Circuit Justice for the Eleventh Circuit:**

Richard Henyard, by counsel, respectfully applies to this Court pursuant to 28 U.S.C. §§
1651 and 2101(f) for a stay of his execution, currently scheduled for Tuesday, September 23,
2008 at 6:00 pm. Henyard has filed a petition for a writ of certiorari in this Court which presents
the following question:

Does a state court violate due process if it construes a state law
that affords counsel to criminal defendants in state and federal
capital postconviction proceedings so as to prohibit that attorney
from filing a challenge to the state's proposed method of execution
by way of 28 U.S.C. §1983?

Relevant factual and procedural history

Richard Henyard was convicted of two counts of first degree murder, three counts of armed kidnapping, one count of attempted first degree murder, and sexual battery and sentenced to death. The judgment and sentence were affirmed on direct appeal. *Henyard v. State*, 689 So.2d 239 (Fla. 1996), cert. den. 522 U.S. 846. He then unsuccessfully sought postconviction relief in the state and federal courts. *Henyard v. State*, 883 So.2d 753 (Fla. 2004); *Henyard v. McDonough*, 459 F.3d 1217 (11th Cir. 2006) cert. den. S.Ct. 1818 (2007).

In the wake of the execution of Angel Diaz, Henyard filed a successive motion for postconviction relief in the state trial court raising claims which challenged Florida's lethal injection method of execution. Section 27.702 Florida Statutes, which as interpreted by the Florida Supreme Court prohibits CCRC from filing a 28 U.S.C. §1983 federal civil rights suit challenging the state's lethal injection method of execution, is unconstitutional. On July 9, 2008, while the summary denial of Henyard's motion was on appeal, Governor Charlie Crist signed a death warrant, setting Henyard's execution for 6 p.m., September 23, 2008. Henyard then filed a motion styled "Motion to Vacate Sentence and Stay Execution" raising additional claims about his death sentence, reasserting his lethal injection claims and his argument that Florida's statutory scheme was unconstitutional because it prevented him from seeking review in the intermediate federal courts. That motion was denied, and the appeal of that denial along with a petition filed directly with the Florida Supreme Court asserting that its construction of Florida's statutory scheme was unconstitutional was consolidated with his then pending appeal. All relief was denied on September 10, 2008 *Henyard v. State*, --- So.2d ----, 2008 WL 4148992 (Fla.

2008) (Cert. Pet. Appendix A). Henyard filed a petition for a writ of certiorari with this Court on September 18, 2008.

Reasons why Henyard is entitled to a stay of execution

The traditional standard for granting a stay of execution was articulated in *Barefoot v. Estelle*, 463 U.S. 880 (1983). *Barefoot* requires the applicant to show (i) a reasonable probability that four Members of the Court will consider the issues raised in the petition sufficiently meritorious for a grant of certiorari, (ii) the significant possibility that the Court will reverse the decision below, and (iii) that irreparable harm will occur if the execution is not stayed. *Id.* at 895. Henyard must also establish that he did not unduly delay in the filing of the action in which he now seeks a stay of execution. See, e.g., *Nelson v. Campbell*, 541 U.S. 637 (2004). The first three standards are established by the contents of the pending petition for a writ of certiorari itself, which are incorporated here. Irreparable harm will occur if the execution is not stayed until the petition is granted and considered. *Wainwright v. Booker*, 473 U.S. 935 n.1 (1985) (Powell, J., concurring) (recognizing that there is little doubt that a prisoner facing execution will suffer irreparable injury if the stay is not granted); *In re Holladay*, 331 F.3d 1169, 1177 (2003) (holding in a death penalty case involving a mental retardation claim that "the irreparability of the injury that petitioner will suffer in the absence of a stay to be self-evident").

Henyard has not caused undue delay

As asserted in Henyard's cert. petition, the cause of action for a suit under 28 U.S.C. §1983, were his lawyers able to file one, accrued on August 1, 2007 when Florida's current lethal injection protocols went into effect. He raised his claim that the Florida Supreme Court's construction of the statutory scheme is unconstitutional in a motion for postconviction relief filed

with the trial court on October 16, 2007. The appeal of the summary denial of that motion was in the middle of briefing when Henyard's death warrant was signed on July 9, 2008. He reasserted that claim in subsequently filed pleadings with the trial court and the Florida Supreme Court. All relief was denied on September 10, 2008.

Undue delay is an equitable principle that must take into consideration the harm that will be suffered by the state if Schwab is not executed on September 23, 2008. The State has no interest in denying Henyard counsel, as manifested by ch. 27 Florida Statutes. Nor does the State have an interest in preventing Henyard's appointed counsel from pursuing the "traditional" remedies sought by capital postconviction defendants in the intermediate federal courts. Section 27.702(1) (2002), Florida Statutes, provides in pertinent part:

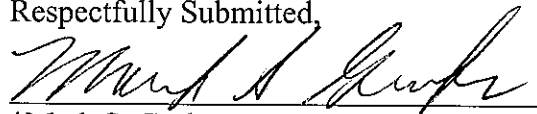
The capital collateral regional counsel shall represent each person convicted and sentenced to death in this state for the sole purpose of instituting and prosecuting collateral actions challenging the legality of the judgment and sentence imposed against such person in the state courts, federal courts in this state, the United States Court of Appeals for the Eleventh Circuit, and the United States Supreme Court.

Id. Equitable principles justify a stay of execution.

Conclusion

For the reasons set forth in this application, the Court should grant Henyard a stay of execution.

Respectfully Submitted,



*Mark S. Gruber
Assistant CCC-Middle Region
Florida Bar No.: 0330541
Daphney E. Branham
Assistant CCRC-Middle Region


Florida Bar No.: 0136298
Office of the Capital Collateral Regional
Counsel- Middle Region
3801 Corporex Park Drive, Suite 210
Tampa, Fl 33619
(813) 740-3544

*Attorney of Record

CERTIFICATE OF SERVICE

I, Mark S. Gruber, hereby certify that the foregoing Application for Stay of Execution was sent via electronic mail with a hard copy to follow by United States mail on the following counsel for Respondents on September 19, 2008.

Stephen Ake
Assistant Attorney General
Concourse Center 4
3507 E. Frontage Road, Suite 200
Tampa, FL 33607


Mark S. Gruber

Copies furnished to:

Mr. William Gross
Assistant State Attorney
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deborah.speer@myfloridalegal.com

maas.roger@leg.state.fl.us

warrant@flcourts.org
williamstr@flcourts.org

U. S. Supreme Court
ATTN: Danny Bickell
dbickell@supremecourt.gov

No. 08-6392

IN THE
SUPREME COURT OF THE UNITED STATES

RICHARD HENYARD — PETITIONER
(Your Name)

VS.

STATE OF FLORIDA — RESPONDENT(S)

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The petitioner asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis*.

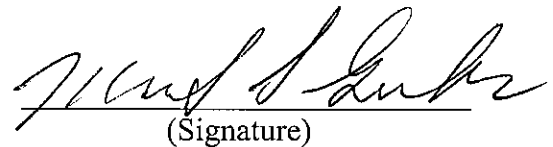
Petitioner has previously been granted leave to proceed *in forma pauperis* in the following court(s):

SUPREME COURT, FLORIDA SUPREME COURT,

US ELEVENTH CIRCUIT, US DISTRICT COURT

Petitioner has **not** previously been granted leave to proceed *in forma pauperis* in any other court.

Petitioner's affidavit or declaration in support of this motion is attached hereto.


(Signature)

Docket No. 08-6392

DEATH WARRANT
Execution Set: September 23, 2008

**IN THE
SUPREME COURT OF THE UNITED STATES**

RICHARD HENYARD,
Petitioner,

versus,

THE STATE OF FLORIDA, et al,
Respondents.

*On Petition for a Writ of Certiorari
to the Florida Supreme Court*

**AFFIDAVIT IN SUPPORT OF PETITIONER'S
MOTION TO PROCEED IN FORMA PAUPERIS**

I, RICHARD HENYARD, being first duly sworn, depose and say that I am the Petitioner in the above-styled cause; that in support of my Motion to Proceed *In Forma Pauperis* in a Petition for federal habeas relief without being required to prepay fees, costs or give security therefore, I state that because of my poverty I am unable to pay the costs of said proceeding or give security therefor; that I believe I am entitled to redress upon the issues presented in the petition for writ of habeas corpus.

I further swear that:

1. I was convicted of first-degree murder in the Fifth Judicial Circuit Court, Lake County, Florida, Case Number 93-159-CF, following a jury trial.
2. I received a death sentence and am presently in custody on death row at Florida State

Prison.

3. I am not employed and have no source of income.

4. I have been represented by appointed counsel throughout my state trial and appeal proceedings. I have been represented in my federal proceedings by counsel appointed under the Criminal Justice Act, 18 U.S.C. § 3006A.

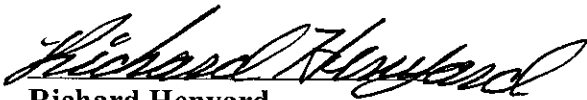
5. I have not received within the past twelve months any income from a business, profession or other form of employment, or in the form of rent payments, interest, dividends, or other source.

6. I do not own any cash, checking account or savings account.

7. I do not have any real estate, stocks, bonds, notes, automobiles or any other valuable property.

8. There is no one who is dependent on me for support.

9. My prison account contains \$1.81.



Richard Henyard
Petitioner

STATE OF FLORIDA
COUNTY OF BRADFORD

Sworn to and subscribed before me
this 17th day of September, 2008.

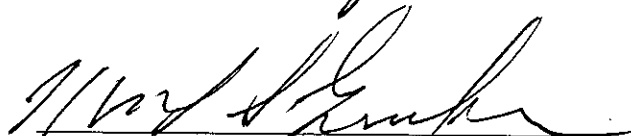


Rose M Valdez
NOTARY PUBLIC, STATE OF FLORIDA
My Commission Expires: _____

personally known to me

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Affidavit in Support of Petitioner's Motion to Proceed in Forma Pauperis has been furnished electronically via email ~~and United States~~ Mail, first class postage prepaid, to all counsel of record on this 19 day of September, 2008.



MARK S. GRUBER
Florida Bar No. 0330541
Assistant CCRC
MARIA PERINETTI
Florida Bar No. 0013837
Capital Collateral Regional Counsel
Middle Region
3801 Corporex Park Drive, Suite 210
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(813) 740-3544
Counsel for Petitioner

Copies furnished to:

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William Gross, Esq.
Assistant State Attorney
Lake County Judicial Center
550 West Main Street
P.O. Box 7800
Tavares, FL 32778

ACCT NAME: HENYARD, RICHARD
BED: Q2101S
PO BOX:

ACCT#: 225727
TYPE: INMATE TRUST

BEGINNING BALANCE 01/01/08

\$1.58

POSTED DATE	NBR	TYPE	REFERENCE NUMBER	FAC	REMITTER/PAYEE	+/-	AMOUNT	BALANCE
01/11/08	273	PROCESSING FEE	011108500190	000		-	\$0.50	\$1.08
01/11/08	500	MONEY ORDER	11973782733	999	LEE, ROBERT	+	\$25.00	\$26.08
01/25/08	003	CANTEN SALES	21320080124	000		-	\$0.92	\$0.92
01/28/08	151	PROCESSING FEE	WEEKLY DRAW	000		-	\$0.25	\$0.67
02/08/08	366	PROCESSING FEE	020808520651	000		-	\$0.50	\$0.17
02/08/08	520	MONEY ORDER	001088235759	999	HOWARD, DELPHINE	+	\$10.00	\$10.17
02/21/08	003	CANTEN SALES	21320080220	000		-	\$7.28	\$2.89
02/25/08	155	PROCESSING FEE	WEEKLY DRAW	000		-	\$0.07	\$2.82
03/06/08	003	CANTEN SALES	21320080305	000		-	\$1.63	\$1.19
03/10/08	157	PROCESSING FEE	WEEKLY DRAW	000		-	\$0.02	\$1.17
04/08/08	003	CANTEN SALES	21320080407	000		-	\$0.96	\$0.21
04/14/08	157	PROCESSING FEE	WEEKLY DRAW	000		-	\$0.01	\$0.20
04/15/08	358	PROCESSING FEE	041508508032	000		-	\$0.50	\$0.30-
04/15/08	508	MONEY ORDER	005506518529	999	HOWARD, DELPHINE	+	\$15.00	\$14.70
04/24/08	003	CANTEN SALES	21320080423	000		-	\$3.82	\$3.82
04/28/08	153	PROCESSING FEE	WEEKLY DRAW	000		-	\$0.11	\$3.71
05/02/08	003	CANTEN SALES	21320080501	000		-	\$3.25	\$0.46
05/05/08	156	PROCESSING FEE	WEEKLY DRAW	000		-	\$0.03	\$0.43
06/12/08	281	PROCESSING FEE	061208505248	000		-	\$0.50	\$0.07-
06/12/08	505	MONEY ORDER	38769958	999	HOWARD, DELPHINE	+	\$15.00	\$14.93
06/24/08	003	CANTEN SALES	21320080623	000		-	\$12.95	\$1.98
06/25/08	290	PROCESSING FEE	062508501754	000		-	\$0.50	\$1.48
06/25/08	501	MONEY ORDER	93382801053	999	NOLAN, GARY	+	\$10.00	\$11.48
06/30/08	155	PROCESSING FEE	WEEKLY DRAW	000		-	\$0.13	\$11.35
07/09/08	003	CANTEN SALES	21320080708	000		-	\$4.87	\$6.48
07/11/08	041	CANTEN SALES	20520080710	000		-	\$6.45	\$0.03
07/12/08	041	CANTEN SALES	20520080711	000		-	\$1.87)	\$1.90
07/14/08	157	PROCESSING FEE	WEEKLY DRAW	000		-	\$0.09	\$1.81

ENDING BALANCE 07/14/08

\$1.81

IBSR176 (90)

FLORIDA DEPARTMENT OF CORRECTIONS
INITIAL PAYMENT FOR FILE FEE
FOR: 07/13/2008

07/14/08
17:04:52
PAGE 1

DC # : 225727 INMT NAME : HENYARD, RICHARD CURR BAL : \$ 1.81
HOLDS : \$ 0.00 LIENS : \$ 0.00 SPENDABLE : \$ 0.00

DATE RANGE	MONTHLY AVERAGE DEPOSITS	MONTHLY AVERAGE BALANCES
01/15 - 02/13	\$ 10.00	\$ 11.07
02/14 - 03/14	\$ 0.00	\$ 4.05
03/15 - 04/13	\$ 0.00	\$ 0.98
04/14 - 05/13	\$ 15.00	\$ 5.60
05/14 - 06/12	\$ 15.00	\$ 0.91
06/13 - 07/12	\$ 10.00	\$ 11.36

AVERAGE OVER 6 MONTHS DEPOSITS : \$ 8.33
BALANCES : \$ 5.66

CALCULATED INITIAL PAYMENT : \$ 1.67

**AFFIDAVIT OR DECLARATION
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS***

I, Richard Henryard, am the petitioner in the above-entitled case. In support of my motion to proceed *in forma pauperis*, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	Average monthly amount during the past 12 months		Amount expected next month	
	You	Spouse	You	Spouse
Employment	\$ 0	\$ _____	\$ 0	\$ _____
Self-employment	\$ _____	\$ _____	\$ _____	\$ _____
Income from real property (such as rental income)	\$ _____	\$ _____	\$ _____	\$ _____
Interest and dividends	\$ _____	\$ _____	\$ _____	\$ _____
Gifts	\$ _____	\$ _____	\$ _____	\$ _____
Alimony	\$ _____	\$ _____	\$ _____	\$ _____
Child Support	\$ _____	\$ _____	\$ _____	\$ _____
Retirement (such as social security, pensions, annuities, insurance)	\$ _____	\$ _____	\$ _____	\$ _____
Disability (such as social security, insurance payments)	\$ _____	\$ _____	\$ _____	\$ _____
Unemployment payments	\$ _____	\$ _____	\$ _____	\$ _____
Public-assistance (such as welfare)	\$ _____	\$ _____	\$ _____	\$ _____
Other (specify): _____	\$ _____	\$ _____	\$ _____	\$ _____
Total monthly income:	\$ 0	\$ _____	\$ 0	\$ _____

2. List your employment history for the past two years, most recent first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
NONE	/	/	/
			\$
			\$
			\$

3. List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
/	/	/	/
			\$
			\$
			\$

4. How much cash do you and your spouse have? \$ _____
 Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial institution	Type of account	Amount you have	Amount your spouse has
		\$ _____	\$ _____
		\$ _____	\$ _____
		\$ _____	\$ _____

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

<input type="checkbox"/> Home NONE Value _____	<input type="checkbox"/> Other real estate NONE Value _____
<input type="checkbox"/> Motor Vehicle #1 NONE Year, make & model _____ Value _____	<input type="checkbox"/> Motor Vehicle #2 NONE Year, make & model _____ Value _____
<input type="checkbox"/> Other assets NONE Description _____ Value _____	

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse
NONE	_____	_____
_____	_____	_____
_____	_____	_____

7. State the persons who rely on you or your spouse for support.

Name	Relationship	Age
NONE	_____	_____
_____	_____	_____
_____	_____	_____

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, or annually to show the monthly rate.

	You	Your spouse
Rent or home-mortgage payment (include lot rented for mobile home)	\$ 0	\$ _____
Are real estate taxes included? <input type="checkbox"/> Yes <input type="checkbox"/> No		
Is property insurance included? <input type="checkbox"/> Yes <input type="checkbox"/> No		
Utilities (electricity, heating fuel, water, sewer, and telephone)	\$ _____	\$ _____
Home maintenance (repairs and upkeep)	\$ _____	\$ _____
Food	\$ _____	\$ _____
Clothing	\$ _____	\$ _____
Laundry and dry-cleaning	\$ _____	\$ _____
Medical and dental expenses	\$ _____	\$ _____

	You	Your spouse
Transportation (not including motor vehicle payments)	\$ <u>0</u>	\$ _____
Recreation, entertainment, newspapers, magazines, etc.	\$ _____	\$ _____
Insurance (not deducted from wages or included in mortgage payments)		
Homeowner's or renter's	\$ _____	\$ _____
Life	\$ _____	\$ _____
Health	\$ _____	\$ _____
Motor Vehicle	\$ _____	\$ _____
Other: _____	\$ _____	\$ _____
Taxes (not deducted from wages or included in mortgage payments)		
(specify): _____	\$ _____	\$ _____
Installment payments		
Motor Vehicle	\$ _____	\$ _____
Credit card(s)	\$ _____	\$ _____
Department store(s)	\$ _____	\$ _____
Other: _____	\$ _____	\$ _____
Alimony, maintenance, and support paid to others	\$ _____	\$ _____
Regular expenses for operation of business, profession, or farm (attach detailed statement)	\$ _____	\$ _____
Other (specify): _____	\$ _____	\$ _____
Total monthly expenses:	\$ <u>0</u>	\$ _____

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

Yes No If yes, describe on an attached sheet.

10. Have you paid – or will you be paying – an attorney any money for services in connection with this case, including the completion of this form? Yes No

If yes, how much? _____

If yes, state the attorney's name, address, and telephone number:

11. Have you paid—or will you be paying—anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

Yes No

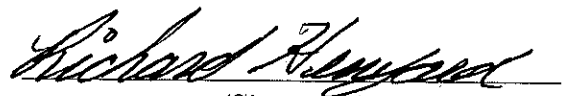
If yes, how much? _____

If yes, state the person's name, address, and telephone number:

12. Provide any other information that will help explain why you cannot pay the costs of this case.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: September 17, 2008


(Signature)