

IN THE SUPREME COURT OF FLORIDA

ROBERT HENRY,

Petitioner,

vs.

Case No. SC 08-1005

STATE OF FLORIDA,

Respondent.

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RESPONSE TO ORDER TO SHOW CAUSE

COMES NOW, THE State of Florida and responds to this Court's Order of June 3, 2008 requesting a response to Robert Henry's *pro se* petition of Belated Appeal and states as follows:

**PROCEDURAL HISTORY**

Petitioner Robert Henry, was convicted of two counts of first degree murder, robbery with deadly weapon and arson and was sentenced to death for the murders of Janet Thermidor and Phillys Harris. This Court affirmed Henry's convictions and sentences of death. Henry v. State, 613 So. 2d 429 (Fla. 1993).

In October of 1998, Henry filed a Motion To Vacate Judgments Of Conviction And Sentence With Special Request For Leave To Amend."

Following several amendments and a lengthy evidentiary hearing, all relief was denied. This Court affirmed the denial of postconviction relief. Henry v. McDonough, 937 So. 2d 563 (Fla. 2006).

Henry filed an Amended Motion for DNA testing on October 6, 2006. (EXHIBIT A). On May 10, 2007, Henry's counsel, the Office of Capital Collateral Regional Counsel-South, filed a Motion To Withdraw Due to Conflict. (EXHIBIT B). Notwithstanding the State's objection, the Motion was granted and Office of Capital Collateral Regional Counsel-Middle was appointed. (EXHIBIT C). An amended motion for DNA testing was filed on August 2, 2007. (EXHIBIT D). The Motion for DNA testing was denied on October 9, 2007. (EXHIBIT E).

In September of 2007, Henry filed a petition for federal habeas relief. Henry v. Florida Department of Corrections, Case No. 07-61281. Mr. Cannon from CCRC-Middle, represented Henry in that matter, that petition is still pending. Henry filed this Motion for Belated Appeal on March 31, 2008. On April 22, 2008, Mr. Cannon filed a Motion To Withdraw based on a conflict. (EXHIBIT F). The federal district court granted the motion on May 1, 2008. (EXHIBITS G and H).

## **ARGUMENT**

In his petition, Henry alleges that CCRC-Middle was instructed by him to file an appeal from the October 9, 2007 order denying DNA testing. Although counsel represented to Henry that an appeal would be taken, no timely notice was ever filed. Relying on Williams v. State, 777 So. 2d 947 (Fla. 2000) and State v. Trowell, 739 So. 2d 77 (Fla. 1999), Henry argues that he is entitled to file a belated appeal, due to former counsel's ineffectiveness. Specifically he requests that he be appointed an "independent counsel" in order to pursue an appeal of the denial of DNA testing. **Petition at 3.**

Respondent asserts that Henry is not entitled to a belated appeal as there is a genuine factual dispute regarding the "failure" to take an appeal. Based on Trowell supra, Respondent asserts that the appropriate course of action would be to remand this cause to the Circuit Court for an evidentiary hearing on Henry's claim. As this Court explained:

If the State raises a good faith basis to dispute the defendant's claims through affidavit or specific contrary allegations, the appellate court may order an evidentiary hearing in the trial court to determine the limited disputed issues of fact.

Id. at 81.

The respondent's good faith basis to dispute Henry's allegations are the representations made by Mr. Cannon to the Honorable Judge Paul Huck during the

hearing on Mr. Cannon's motion to withdraw as Henry's counsel. The nature of the conflict which necessitated Cannon's withdrawal from the federal habeas proceedings was this very Motion for Belated Appeal. Mr. Cannon explained:

MR. CANNON: Here's the situation, if I may for a second, the DNA issue is the source of the conflict with this office. There's a difference in understanding between myself and Mr. Henry with regard to the filing of the DNA--

THE COURT: Let me jump in. That may be a problem with any lawyer. They may have a different view of—than Mr. Henry as to what his rights might be.

MR. CANNON: Your honor, Mr. Henry claiming that we I guess negligently or somehow failed to file his appeal on any motion would be a conflict—

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Mr. CANNON: One of the issues---the DNA claim there's a disagreement or conflict as to how or why that was not appealed. I am being put in a difficult position also because I do not want to be a witness against my client on that claim.

Whether it is State or Federal if Mr. Henry is claiming---he has filed a motion in Florida Supreme Court for that DNA appeal. Whether it is State or Federal there is going to be an issue as to why that DNA claim was not appealed after it was denied.

That's going to involve more than me.. It's going to involve several not only lawyers but staff in this office. Essentially pitting Mr. Henry's word against my word. That creates a very difficult situation and a conflict.

(EXHIBIT H at 6-7)(emphasis added). Mr. Cannon's representations to the federal court establish a good faith basis that that there is a factual dispute

regarding the circumstances surrounding the decision not to pursue an appeal of the denial of the DNA motion. An evidentiary hearing is warranted. Trowell.

WHEREFORE, Respondent requests that this Court remand this cause to the circuit court so that the trial court can take relevant testimony and make specific factual findings regarding the disputed issue.

Respectfully submitted,

BILL McCOLLOM  
ATTORNEY GENERAL

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**COUNSEL FOR PETITIONER**

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed,

postage prepaid, on this 18<sup>th</sup> day of June, 2008, to Peter J. Cannon CCRC-Middle,  
3801 Corporex Park Dr. Suite 210, Tampa Florida, 33619 and to Robert Henry,  
#607497, Union Correctional Institution, 7819 N.W. 228<sup>th</sup> St. Raiford, Florida  
32026-4410:

S/Celia A. Terenzio  
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