UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

MARK DEAN SCHWAB,

Plaintiff,

- v. -

WALTER A. MCNEIL, et al.,

Defendants.

Case No. 3:08-cv-507-J-33
CAPITAL CASE – DEATH WARRANT

PLAINTIFF'S MOTION FOR AN ORDER PURSUANT TO FED. R. CIV. P. 59(e) AND 60(b) TO ALTER OR AMEND FINAL JUDGMENT, REINSTATE CASE, AND FOR APPOINTMENT OF COUNSEL

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Plaintiff, Mark D. Schwab, by and through his counsel, respectfully moves this Court, pursuant to Rule 59(e) of the Federal Rules of Civil Procedure (Fed. R. Civ. P.), or alternatively pursuant to Fed. R. Civ. P. 60(b) and upon the declarations of Peter Cannon, Esq. and Robin M. Maher, Esq. dated June 3, 2008, for relief from a judgment of dismissal entered May 19, 2008 (Doc. 22). In addition, Schwab requests this Court grant the then-pending Motion to Withdraw and for Appointment of Counsel (Doc. 14).

SUMMARY OF ARGUMENT

Schwab requests two separate forms of relief.

First, Schwab requests reconsideration of this Court's order of dismissal entered May 19, 2008. The dismissal was based on Schwab's purported failure to interpose a motion to reopen the case "within thirty (30) days after a final decision" from the U.S. Supreme Court in *Baze v. Rees*, 128 S. Ct. 372 (2008). The order of dismissal was entered on May 19, 2008, and had been rendered on the ground that over thirty days had elapsed since April 16, 2008—the date of the judgment in *Baze*. However, the mandate in *Baze* did not issue until May 19, 2008. Because the U.S. Supreme Court treated the date of mandate as the date on which its decision became final with respect to an unrelated stay application from Schwab, this Court should reconsider its order of dismissal in order to bring its interpretation of the date of "final decision" in line with that of the U.S. Supreme Court. In addition, the dismissal of Schwab's complaint occurred after his attorneys indicated their statutory inability to proceed, and reconsideration is necessary to prevent manifest injustice.

Second, Schwab requests that this Court grant the pending motion to permit the CCRC to withdraw and for appointment of counsel.

RELEVANT PROCEDURAL HISTORY

1. On November 13, 2007, Plaintiff filed a Civil Rights Complaint with the Orlando Division pursuant to 42 U.S.C. § 1983 challenging the Florida Department of Correction's lethal injection protocol. ("Complaint," Doc. 1.)[1]

2. That same day, Plaintiff filed an *Emergency Motion to Stay Execution* (Doc. 2) requesting a preliminary injunction enjoining his execution pending the United States Supreme Court' deliberations in *Baze* v. *Rees*, 128 S. Ct. 372 (2007). After briefing and oral argument, Judge Conway of the Orlando Division (1) granted the stay, (2) stayed the present case pending final decision in the *Baze* case, and (3) directed Plaintiff to file a motion to re-open within 30 days after a final decision was rendered in the *Baze* case. (Doc. 8.)[2]

3. Before *Baze* was decided, Plaintiff's counsel, Office of the Capital Collateral Regional Counsel ("CCRC"), filed a *Motion to Withdraw and for Appointment of Counsel* on the basis that CCRC could no longer represent Schwab in his 42 U.S.C. §1983 claim. (Doc. 14 at 7.) Indeed, for practical intents and purposes, Plaintiff was without counsel during this time in connection with his claim.

4. An opinion in *Baze* was issued on April 16, 2008. 128 S. Ct. 1520 (2008). However, the U.S. Supreme Court did not issue a final mandate until May 19, 2008.

5. Upon information and belief, shortly after CCRC filed their motion to withdraw and appoint new counsel, Judge Conway's chambers inquired about appointing the Office of the Federal Defender as Schwab's counsel. Maher Decl., ¶ 5. The Office of

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[1] This case was transferred to this Court on May 16, 2008 by Judge Conway of the Orlando Division. (Docs. 17 and 18.) Plaintiff is incarcerated at Florida State Prison and therefore any execution is likely to take place in this Division.

[2] The Eleventh Circuit ultimately vacated Judge Conway's stay of execution. (Doc. 11.)

the Federal Defender was, at that time, ready and willing to serve as appointed counsel on the condition of obtaining the assistance of additional private counsel. Maher Decl., ¶ 6. To that end, Judge Conway's chambers and the Federal Defender sought the assistance of the American Bar Association to locate additional resources. *Id*. Over the ensuing period of time, the ABA attempted to locate additional assistance. Maher Decl., ¶ 7.

6. Upon information and belief, at some point thereafter, the Office of the Federal Defender for the Middle District of Florida was subsequently advised that the 1995 Letter prohibits Federal Defenders from representing Schwab in his challenge to the method of his execution under 42 U.S.C. § 1983. Maher Decl. ¶ 8, Exh. A, Maher Decl. [Letter from The Honorable Gerald Tjoflat to Robert J. Vossler, Esq.] ("1995 Letter").

7. On May 16, 2008, Schwab's case was transferred from Judge Conway in the Orlando Division to the Jacksonville Division, where the case was assigned to Judge Covington. (Docs. 17-18.)

8. On May 19, 2008, the Court issued an order that, *inter alia*, dismissed this case without prejudice and denied pending motions as moot. (Doc. 20.) The Court simultaneously directed the Clerk to enter judgment (Doc. 21), and the Clerk entered the judgment that same day. (Doc. 22.)

9. A motion to alter or amend a judgment must be filed "no later than 10 days after the entry of judgment." Fed. R. Civ. P. 59(e). The deadline is therefore June 3, 2008. *See* Fed. R. Civ. P. 6 (intervening weekend days are excluded when the period of time is less than 11 days).

10. This motion is being filed and served on June 3, 2008, and the motion is therefore timely.

11. Specifically, pursuant to Rules 59(e) and/or 60(b), Plaintiff requests that this Court alter or amend the following matters addressed by this Court's May 19th Order (Doc. 20): (1) dismissing the case without prejudice; and (2) denying pending motions as moot.

12. The Plaintiff is presently under a warrant of execution scheduled for July 1, 2008.

ARGUMENT

I. THIS COURT SHOULD RECONSIDER ITS ORDER OF DISMISSAL AND REINSTATE SCHWAB'S COMPLAINT

A. Schwab's Complaint Should Be Reinstated Because Schwab's Deadline To Re-Open The Case Has Not Expired

Reconsideration is appropriate where, as here, there is (1) new evidence, (2) a need to correct clear error, and (3) to prevent manifest injustice. *See, e.g.*, *Moton v. Cowart*, 2007 WL 2288152, at *1 (M.D.Fla. Aug. 7, 2007). As described below, dismissal of Schwab's complaint on May 19, 2008 was premature and made without evidence of the date on which the U.S. Supreme Court deemed *Baze* to be finally decided. Likewise, the Order is manifestly unjust because it deprives Schwab of a meaningful opportunity to litigate his claims.

1. The Date Of "Final Decision" In *Baze* Should Be Calculated From The Date Of *Baze*'s Mandate

On November 14, 2007, Judge Conway stayed this case pending the disposition of *Baze v. Rees*, 128 S. Ct. 372 (2008), which was then pending before the Supreme Court. The Order directed Schwab to move to reopen the case "within thirty (30) days after a final decision has been rendered in the *Baze* case." *See* Cannon Decl. Exh. A [Nov. 14,

2007 Order (Doc. 8)] at 8. The Order further admonished that "[f]ailure to do so will result in the dismissal of this case without further notice." (emphasis added.) *Id.*

On May 19, 2008, the Court dismissed this action without prejudice. The Court stated that Schwab had not made a timely motion because"[a] final decision was rendered in the Baze case on April 16, 2008." *See* Cannon Decl. Exh. B [May 19, 2008 Order (Doc. 20)] at 5. Reconsideration of this dismissal is sought on the ground that the final decision in *Baze* did not issue from the U.S. Supreme Court until May 19, 2008—the date on which the Supreme Court mandate issued. *See* Cannon Decl. Exh. C. [*Baze v. Rees*, Docket Sheet, No. 07-5439 (U.S.)] at 1. Thus, the time for Schwab to move to reopen the case has not yet expired.

A judgment of the Supreme Court is not "final" until the issuance of the Court's mandate. *Cf.* Supreme Court Rule 45(2) (sents. 2-3). This is because a litigant may seek rehearing on any substantive decision of the U.S. Supreme Court up to 25 days after the substantive decision. *See* Supreme Court Rule 44(1) (sent.1) ("Any petition for the rehearing of any judgment or decision of the Court on the merits shall be filed within 25 days after entry of the judgment or decision, unless the Court or a Justice shortens or extends the time."). The possibility of a rehearing is therefore the reason why the Supreme Court does not issue a mandate until the petition for rehearing has been decided. *See* Supreme Court Rule 45(2) (sent. 2) ("The filing of a petition for rehearing stays the mandate until disposition of the petition, unless the Court orders otherwise. If the petition is denied, the mandate issues forthwith.").

The possibility of a rehearing in *Baze* was not a remote abstraction. As the preeminent treatise on Supreme Court practice explains, "rehearing petitions have been

granted in the past where the prior decision was by an equally divided Court and where it appeared likely that upon reargument a majority one way or the other might be mustered." *See* Cannon Decl. Exh. D [SUPREME COURT PRACTICE (9th ed. 2008)] at 816 (emphasis added). *Baze* produced seven separate opinions, and was able to marshal only a plurality opinion of three justices (one of whom additionally wrote a separate concurrence). Thus, *Baze* was a credible candidate for a rehearing, and until mandate had issued, it could not have been said with confidence that the Supreme Court's April 16 opinion in *Baze* was a "final decision" from the Court.

Indeed, even the Supreme Court did not treat the date of *Baze's* judgment as the date of its final decision. Rather, in an application for a stay pending *certiorari* by Schwab, the Supreme Court chose to peg the end of Schwab's stay on the date of *Baze's* mandate. On November 15, 2007, Schwab filed with U.S. Supreme Court Justice Clarence Thomas an application for a stay of execution pending filing and consideration of a petition for a writ of certiorari to the Eleventh Circuit's denial of his *habeas* petition. Justice Thomas, sitting as the circuit justice, granted the motion for an emergency stay, and ordered that termination of the stay upon "the issuance of the mandate of this Court," rather than an earlier date:

> Application for stay of execution of sentence of death presented to Justice THOMAS and by him referred to the Court granted pending the timely filing and disposition of a petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay shall terminate automatically. In the event the petition for writ of certiorari is granted, *the stay shall terminate upon the issuance of the mandate of this Court*.

Schwab v. Florida, 128 S. Ct. 644, 644 (U.S. Nov. 15, 2007) (Thomas, J., Cir. Justice) (emphasis added).

In addition, the Court denied Schwab's petition on May 19, 2008—the very same day that the mandate in *Baze* issued (i.e., not the date of the April 16 judgment). *Cf. Baze* v. *Rees*, Docket Sheet, No. 07-5439 (U.S.), attached as Exh. D to the Maher Decl., with *Schwab v. Florida*, 2008 WL 953622, at *1 (U.S. May 19, 2008).

This Court should therefore construe the date on which "final decision has been rendered in the *Baze* case" in a manner consistent with the Supreme Court's own understanding of its "final decision." Accordingly, the date on which on which "final decision has been rendered in the *Baze* case" (Doc. 7) should be interpreted to mean May 19, 2008—the date on which the mandate in *Baze* issued. Consequently, the Plaintiff still has until June 18, 2008 to move to reopen the case, and this action should not have been dismissed as untimely on May 19, 2008.

2. Premature Dismissal of Schwab's Complaint Is Grounds for Reconsideration Under Applicable Law

A court should grant reconsideration when one of three grounds are shown: "(1) an intervening change in controlling law; (2) the availability of new evidence; or (3) the need to correct clear error or prevent manifest injustice." *Moton v. Cowart*, 2007 WL 2288152, at *1 (M.D.Fla. Aug. 7, 2007).

Here, the Court dismissed Schwab's complaint without the benefit of any evidentiary findings on the date of the "final decision" in *Baze*. Nor did this Court have before it evidence of the manner in which the U.S. Supreme Court treated the date of decision in *Baze*. These two considerations constitute "new evidence" warranting reconsideration under the second prong of *Moton*. Further, this Court's calculation of the date of "final decision" from the date of the judgment, as opposed to the mandate constitutes "clear error" under the third prong of *Moton*. Additionally, this Court's

dismissal of the complaint would require Schwab to file a new complaint, thereby entitling the State 20 days to respond under Fed. R. Civ. P. 12(a)(1)(A). Because Schwab is scheduled to be executed in 28 days, the Court's dismissal effectively deprives Schwab of any meaningful ability to litigate his claims, and reconsideration is warranted to "prevent manifest injustice" under the third prong of *Moton*.

In sum, this Court's dismissal of Schwab's complaint on May 19, 2008 was premature. Accordingly, under Fed.R.Civ.P. 59(e) and 60(b), this Court should reconsider its order of dismissal and reinstate Schwab's complaint.

B. Alternatively, The Court Should Reinstate Schwab's Complaint In View Of The Incapacity Of His Counsel

The incapacity of Schwab's counsel is an additional, independent ground for reinstating Schwab's complaint. Schwab is presently represented by the Capital Collateral Regional Counsel (CCRC). On April 14, 2008, the CCRC sought permission to withdraw from this case and appointment of counsel. (Doc. 14.) That motion was pending when this Court dismissed the complaint.

The CCRC moved to withdraw following the Florida Supreme Court's decision in *State* v. *Kilgore*, 976 So.2d 1066 (Fla. 2007)(rehearing denied February 28, 2008), which effectively removed any lingering authority CCRC had to represent Schwab in his 42 U.S.C. § 1983 claim. (Doc. 14 at ¶¶ 8-9.) The Court is respectfully referred to that motion for its contents.[3]

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[3] CCRC counsel are limited by State statute as to the cases they may bring on behalf of their clients. §27.7001 Fla. Stat. At the time Schwab's complaint was filed, however, undersigned counsel believed in good faith that they had authority to proceed with Schwab's action because Schwab's claim was distinguishable from the Florida's Supreme Court's holding in *Diaz* v. *State*, 945 So.2d 1136 (Fla. 2006). (Doc. 14 at ¶ 8.) *Kilgore*'s interpretation of the Florida Statute removed

The CCRC had filed its motion to withdraw as counsel a month before this Court dismissed Schwab's complaint. Thus, the CCRC was no longer able to act ethically as Schwab's attorneys long before the time of the dismissal. Dismissal of Schwab's complaint is therefore inappropriate on account of the inaction of his conflicted attorneys.

In *In re Greenberg*, the Eleventh Circuit reversed a district court's refusal to reinstate an action under strikingly similar circumstances. 2006 WL 1594202 (11th Cir. June 9, 2006) (per curiam) (unpublished disposition). In *Greenberg*, the plaintiff's attorney left his law firm to join another. *Id.* at *1. The attorney sent a letter to the plaintiff explaining that he had left his prior firm, and that the plaintiff was free to retain him if the plaintiff wished. *Id.*

The plaintiff's principal was out of the country and did not respond immediately. *Id.* Thus, the attorney "felt that he was no longer empowered to represent [the plaintiff] and could not file [papers] on its behalf" after the attorney had left his prior firm. *Id.* As a consequence, the unrepresented plaintiff missed certain deadlines and a hearing, and the court dismissed his case. *Id.* at *2. Upon its principal's return, the plaintiff formally engaged the attorney, who promptly sought reconsideration of the dismissal. *Id.* The court denied reconsideration. *Id.*

On appeal, the Eleventh Circuit reversed. The appellate tribunal held, "Though evidence of deficient performance, the omissions of [plaintiff's] counsel transpired over only a few weeks and did not demonstrate a 'clear record of delay.'" *Id.* at *4.

Here, the CCRC was in an identical situation with that of the attorney in *Greenberg*. Recent law from the Florida Supreme Court unambiguously precludes

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CCRC's good faith belief that any distinction between Schwab and Diaz could ground their continued representation.

CCRC from acting on behalf of Schwab in this action. Like the attorney in *Greenberg*, the CCRC "felt that he was no longer empowered to represent [Schwab] and could not file [papers] on [Schwab's] behalf." *Id.* at *2. Thus, even if the 30-day deadline were to be calculated from the April 16 date of the *Baze* decision, the CCRC (like the attorney in *Greenberg*) was in no position to act. On the principles stated in *Greenberg*, this Court should grant Schwab's motion for reconsideration, and upon reconsideration, reinstate Schwab's complaint.[4]

II. AFTER REINSTATING THIS CASE, THIS COURT SHOULD GRANT THE CCRC'S MOTION FOR LEAVE TO WITHDRAW

A. CCRC is Conflicted From Representing Schwab and Should be Permitted to Withdraw

As discussed above (*supra* Section I.B), the CCRC moved to withdraw from this case and appoint new counsel on the basis of recent caselaw of the Florida Supreme Court holding that State law removes CCRC's authority to represent Schwab in this action. (Doc. 14; *supra* Section I.B.)[5] A decision on the merits of that motion was not reached; instead, the motion was denied as moot. (Doc. 20 at p. 5.) If this Court reconsiders its May 19, 2008 Order, it should subsequently consider and grant CCRC's motion to withdraw.

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[4] Although the dismissal in *Greenberg* was one with prejudice, whereas the dismissal here was without prejudice, the effect of a dismissal in this case carries similar weight. Here, Schwab is scheduled to be executed in 29 days. Requiring Schwab to refile would allow the State at least 20 days to answer under Fed.R.Civ.P. 12(a)(1)(A) and would therefore effectively deprive Schwab of his ability to test his rights before this Court. The proper course of action here, rather, would be to reinstate Schwab's complaint—on which the State has already filed a motion to dismiss—and to permit the case to proceed as expeditiously as possible.

[5] The State did not oppose the motion to withdraw, but editorialized that Schwab was not entitled to appointment of counsel. (Doc. 16.) The Court is respectfully referred to those papers for their contents.

B. This Court Should Grant Schwab's Motion for the Appointment of Replacement Counsel

In view of the CCRC's statutory incapacity to proceed as Schwab's counsel, this Court should decide CCRC's motion to appoint counsel. (Doc. 14.) Specifically, this Court should appoint the Office of the Federal Defender as replacement counsel.

Pursuant to Florida Rule of Professional Conduct 4-3.3(a)(3),[6] the undersigned believe that they are obligated to disclose the existence of potentially adverse authority that may be construed to circumscribe this Court's authority to appoint the Office of the Federal Defender as replacement counsel. The purportedly adverse authority is a letter dated October 23, 1995, from The Honorable Gerald Tjoflat, then Chief Judge of the U.S. Court of Appeals for the Eleventh Circuit, to Robert J. Vossler, the then Federal Defender for the Northern District of Florida. *See* Maher Decl. Exh. A [1995 Letter].

Judge Tjoflat's letter appears to be written in response to a request by Mr. Vossler to create a new attorney position in the Federal Defender's Office to handle postconviction proceedings for inmates convicted of capital crimes. Judge Tjoflat denied Mr. Vossler's request. As the letter notes, at the time of the request, inmates convicted of capital crimes in state court "normally would be represented by Capital Collateral Representative ('CCR'), the state-created and financed post-conviction defender organization in Tallahassee." *See* Maher Decl. Exh. A [1995 Letter] ¶1.

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[6] Rule 4-3.3(a)(3) states:

> **RULE 4-3.3 CANDOR TOWARD THE TRIBUNAL**
> **(a) False Evidence; Duty to Disclose.** A lawyer shall not knowingly:
> . . .
> (3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel . . . .

Since that correspondence, Judge Tjoflat's letter has been construed to preclude the Federal Defender's Office from representing inmates convicted by state courts of capital crimes. This construction of Judge Tjoflat's letter should, however, be regarded erroneous for at least two reasons.

First, Judge Tjoflat's letter merely denied permission for the Federal Defender in the Northern District of Florida to create a new attorney position within the Federal Defender's Office; the letter did not impose a blanket prohibition against attorneys in the Office of the Federal Defender from participating in such postconviction proceeding altogether.

Second, even if Judge Tjoflat's letter could be construed to prohibit the Federal Defender's Office from participating in postconviction proceedings for persons convicted in state court of capital crimes, changes to the statutory landscape warrant reexamination of the Eleventh Circuit's policy. At the time of the letter, inmates convicted in state court of capital crimes "normally would be represented by Capital Collateral Representative ('CCR')." *See* Maher Decl. Exh. A [1995 Letter] ¶1. Since the time of the letter, the Florida Supreme Court has stripped authority from the CCRC to represent such clients in Section 1983 proceedings such as the one at bar.[7] Consequently, if the Federal

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[7] The Court is respectfully referred to the CCRC's memorandum in support of its motion to withdraw (Docket Entry No. 13) for a full exposition of the issue. For the Court's convenience, however, the key Florida decisions rendered on this matter since the 1995 Letter include: *State ex rel. Butterworth v. Kenny*, 714 So.2d 404 (Fla.1998) (prohibiting CCRC lawyers from representing capital defendants in "retrials, resentencings, proceedings commenced under chapter 940 [executive clemency], or civil litigation."); *Diaz v. State*, 945 So.2d 1136 (Fla. 2006) (same); and *State v. Kilgore*, 976 So.2d 1066 (Fla. 2007) (rehearing denied Feb 28, 2008) (restrictions in chapter 27 also prohibit CCRC lawyers from representing their clients in postconviction challenges in noncapital cases which were used as aggravators in the capital case).

Defender's Office is not permitted to represent such clients, the clients would effectively be left without counsel. This was plainly not what the Eleventh contemplated in 1995.

These two arguments are addressed in greater depth below.

1. The 1995 Letter Does Not Prevent The Federal Defender's Office From Participating In Postconviction Proceedings On Behalf Of Death-Row Inmates Convicted In State Court

It is plainly erroneous to interpret the 1995 Letter as a blanket prohibition upon the Federal Defender's Office from participating in postconviction proceedings for death-row inmates convicted in state court.

The 1995 Letter begins by stating that it is written in response to Mr. Vossler's "letter of September 20, 1995, seeking the Court of Appeals' approval of a new attorney position for [the N.D.Fla. Federal Defender's] office." *See* Maher Decl. Exh. A [1995 Letter] ¶1. The 1995 Letter then states that the judges of the Eleventh Circuit "have disapproved [the] request." *See* Maher Decl. Exh. A [1995 Letter] ¶2 (sent.1). The 1995 Letter then requests that if Mr. Vossler has already "filled the requested position . . . in anticipation of the Court's approval," he should "act forthwith to terminate such position(s)." *See* Maher Decl. Exh. A [1995 Letter] ¶3. Nothing in this exchange states that Federal Defenders may never participate in postconviction proceedings on behalf of capital inmates convicted in state court.

Although the 1995 Letter also states that "[t]he Court has determined as a matter of policy that federal public defenders in the Eleventh Circuit should not represent in post conviction proceedings . . . those convicted of capital crimes in state court," this statement was made to justify the denial of permission for Mr. Vossler to hire a new employee. *See* Maher Decl. Exh. A [1995 Letter] ¶2 (sent.2). It is unfathomable that the Eleventh Circuit intended for that one sentence to divest all authority from the Federal

Defender's Office to participate in postconviction proceedings. This Court should therefore construe the 1995 Letter to mean only that permission for the Federal Defender's Offices to hire committed staff for postconviction matters, but that the Federal Defender's Office is still empowered to participate in such proceedings as necessary.

Moreover, nothing in the CJA section of the Eleventh Circuit's website contains any reference to a prohibition against federal defenders representing death row inmates in postconviction proceedings. In fact, shortly after CCRC filed their motion to withdraw and appoint new counsel, Judge Conway's chambers inquired about appointing the Office of the Federal Defender as Schwab's counsel. Maher Decl., ¶ 5. The Office of the Federal Defender was, at that time, ready and willing to serve as appointed counsel on the condition of obtaining the assistance of additional private counsel. Maher Decl., ¶ 6. To that end, Judge Conway's chambers and the Federal Defender sought the assistance of the American Bar Association to locate additional resources. *Id*. Over the ensuing weeks, the ABA attempted to locate additional assistance.

Only after about May 15, 2008, notwithstanding their willingness to proceed, was the Federal Defender advised that representing Schwab in this action was inconsistent with Eleventh Circuit judicial policy as expressed in a letter dated October 23, 1995. The lack of awareness of this purported policy is further indicia that the 1995 Letter does not, in fact, create any blanket prohibition against federal defenders representing death-row inmates in postconviction proceedings.

2. The Rationale Behind The 1995 Letter Has Been Superseded By Changes In The Statutory Landscape

The 1995 Letter discloses the reason behind the Eleventh Circuit's decision not to permit the Federal Defender's Office to hire a new attorney for postconviction matters: an office under Florida state law—the CCR—was already in place to perform this task. *See* 1995 Letter at ¶ 1 (these "inmates . . . normally would be represented by Capital Collateral Representative ('CCR')"). It was therefore eminently sensible that the Eleventh Circuit would not wish that the scarce resources of the circuit be devoted to performing tasks that were already handled by the CCRC established under the State of Florida.

The notion that the Eleventh Circuit denied approval for a new attorney position for postconviction relief because of the existence of Florida's CCR is particularly great in view of the fact that the policy was addressed only to the federal defenders in Florida, and not to any of the other states within the embrace of the Eleventh Circuit. *See* 1995 Letter ¶ 4 ("By copy of this letter, I am advising the chief district judges and the other two federal public defenders of the Florida districts of the Court's policy decision on this issue.").

However, when Judge Tjoflat issued the letter in 1995, the Eleventh Circuit could not have foreseen that the Florida Supreme Court subsequently would render a line of decisions stripping the CCRC of the power to participate in Section 1983 collateral proceedings. Nor could the Eleventh Circuit have foreseen in 1995 that the U.S. Supreme Court would decide 11 years later in *Hill* v. *McDonough*, 547 U.S. 573 (2006), that a collateral proceeding was the exclusive vehicle to challenge the constitutionality of lethal injection procedures. It is particularly unlikely that the Eleventh Circuit would

have foreseen this in view of the fact that *Hill* reversed an Eleventh Circuit decision based on a long line of Eleventh Circuit precedent.

It is plain that the legal landscape has materially changed since the 1995 Letter was issued. In view of the fact that the rationales upon which the Eleventh Circuit based its decision have already been superseded, and the grave harm that would befall Schwab and similar litigants in the future of non-representation, this Court should narrowly hold that the Federal Defender's Office is empowered to participate in Section 1983 proceedings in the few cases that the CCRC is statutorily precluded from participating.

CONCLUSION

For the foregoing reasons, this Court should order:

(1) that Schwab's motion for reconsideration be granted, and upon reconsideration, that Schwab's complaint be reinstated;

(2) that CCRC be permitted to withdraw as counsel;

(3) that CCRC's motion to appoint counsel is granted; and

(4) that the 1995 Letter does not operate to bar the Federal Defender from representing Schwab in this action.

Dated: June 3, 2008

Respectfully submitted,

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that on June 3, 2008, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following: Kenneth S. Nunnelley, Assistant Attorney General, 444 Seabreeze Blvd., 5th Floor, Daytona Beach, FL 32118-3951.

I further certify that I mailed the foregoing document and the notice of electronic filing by first-class mail to the following non-CM/ECF participant: Mark Schwab, DOC #111129, Florida State Prison, 7819 NW 228th Street, Raiford, FL 32026.

s/Peter Cannon
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