IN THE 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
EXECUTION SCHEDULED FOR:
July 1, 2008

RESPONSE TO MOTION TO ALTER OR AMEND JUDGMENT

COME NOW the Defendants, and respond as follows to Schwab's motion to alter or amend this Court's final judgment pursuant to Rules 59(e) and 60(b) of the *Federal Rules of Civil Procedure.* That motion should be denied for the following reasons.

THE MOTION IS NOT TIMELY

On June 3, 2008, at 5:03 PM, counsel for the defendants received Schwab's motion to alter or amend through the CM/ECF system. That motion was unsigned. *See, Motion,* at 16. On June 4, 2008, at approximately 1:19 PM, counsel for the defendants received a signed motion through the CM/ECF system. Under the express terms of Rule 59(e) of the *Federal Rules of Civil Procedure*, Schwab's motion is untimely unless this Court accepts

the unsigned pleading as being sufficient to satisfy the filing requirements contained in the Rules. Rule 11(a) of the *Federal Rules of Civil Procedure* requires that all papers be signed by the attorney of record, and that unsigned papers shall be stricken unless the deficiency is promptly corrected. Schwab has articulated no reason why he did not file a motion that complies with the Rules until after the time for filing that motion had expired.

Insofar as Schwab attempts to obtain relief under Rule 60(b), he has not identified which provision of that Rule supplies a basis for relief. In any event, the United States Supreme Court denied Schwab's petition for writ of certiorari on May 19, 2008, and Schwab's execution was scheduled for July 1, 2008, on the same day. Under the particular circumstances of this case, Schwab's motion was not filed within a reasonable time as required by Rule 60(c)(1).

RESPONSE TO PROCEDURAL HISTORY

Paragraph 1 is substantially correct.

Paragraph 2 is substantially correct. The Court of Appeals for the Eleventh Circuit vacated the stay entered by the District Court in a decision which is reported as *Schwab v. Sec'y, Dep't of Corr.*, 507 F.3d 1297 (11th Cir. 2007).

Paragraph 3 correctly states that Schwab's CCRC counsel filed a motion to withdraw from this case. The remainder of Paragraph 3 is argumentative.

Paragraph 4 correctly states that a decision was issued by the United States Supreme Court in *Baze v. Rees*, 128 S.Ct. 1520 (2008), on April 16, 2008, and that that Court issued its mandate on May 19, 2008. The defendants deny that that is the date on which the *Baze* decision became final.

The Defendants have no information regarding the averments contained in Paragraphs 5 and 6.

Paragraphs 7, 8, 9, 10, 11, and 12 are substantially correct.

MEMORANDUM OF LAW

This Court's Dismissal for Failure to Move to Reopen this Case was Correct.

Schwab takes the position, unsupported by decision or Court Rule, that the United States Supreme Court's decision in *Baze v. Rees* was not "final" until the mandate was issued by that Court on May 19, 2008. According to Schwab, that means that he had 30 days from that date in which to move to re-open this case under the terms of the predecessor Court's order. Schwab provides no citation of authority for that proposition -– the most he can do is provide a "*Cf.*" citation to *Supreme Court Rule* 45(2), which does not help him.

Supreme Court Rule 45 provides that the mandate issues 25 days after "entry of judgment" in a case on review from a State court (which was the case in *Baze*), and further provides that a "**formal mandate does not issue**" in a case on review from a Court of the United States unless specifically directed. If a case on review from a federal court becomes final for all purposes on the date the decision is issued (and that is the only possible relevant date since a mandate is not issued), it makes no sense to then argue, as Schwab does, that a different date of finality attaches to cases arising from the state courts. There is no principled reason for treating the cases differently, nor is there any reason to conclude that a case on review from a state court becomes final at a different time than a case on review from a federal court.

Further, in the context of post-conviction[1] cases (which is where the majority of litigation on this issue has occurred), the law is settled that "[f]inality attaches when this Court **affirms a conviction** on the merits on direct review or **denies a petition for a writ of certiorari**, or **when the time for filing a**

[1] For AEDPA purposes, cases become "final" on the day that the United States Supreme Court denies certiorari. *Johnson v. Fla. Dep't of Corr.*, 513 F.3d 1328, 1330 (11th Cir. 2008) ("Johnson's convictions and death sentences became final on January 26, 1998 and February 23, 1998, the dates on which the United States Supreme Court denied his certiorari petitions.").

certiorari petition expires. *See, e.g., Caspari v. Bohlen*, 510 U.S. 383, 390, 127 L. Ed. 2d 236, 114 S. Ct. 948 (1994); *Griffith v. Kentucky*, 479 U.S. 314, 321, n. 6, 93 L. Ed. 2d 649, 107 S. Ct. 708 (1987); *Barefoot v. Estelle*, 463 U.S. 880, 887, 77 L. Ed. 2d 1090, 103 S. Ct. 3383 (1983); *United States v. Johnson*, 457 U.S. 537, 542, n. 8, 73 L. Ed. 2d 202, 102 S. Ct. 2579 (1982); *Linkletter v. Walker*, 381 U.S. 618, 622, n. 5, 14 L. Ed. 2d 601, 85 S. Ct. 1731 (1965)." *Clay v. United States*, 537 U.S. 522, 527, 123 S. Ct. 1072, 155 L. Ed. 2d 88 (2003). (emphasis added). Under that well-established definition of "finality," *Baze* became final on April 16, 2008, and Schwab had 30 days from that date to seek to re-open this case. He did not do so, and this Court properly dismissed the case.[2]

In any event, the situation at issue in Schwab's motion is not a jurisdictional time limit, but rather is one set by the District Court. **Nothing in the District Court's order suggests that the Court intended for the triggering date to be the date the mandate issued.** Rather than attempting to rely on an argument for the interpretation of the date on which *Baze* became "final," prudence suggests that the motion to re-open the

[2] No motion for rehearing was filed in *Baze* – while such a motion would have stayed the mandate under the *Supreme Court Rules*, it does not follow that the fact that such a motion was **not** filed would have the same effect.

proceedings ordered by the District Court should have been filed as soon as possible after that decision was released rather than waiting until less than 30 days before the scheduled execution to file anything at all related to this case. In light of the consistent authority from the Eleventh Circuit affirming dismissals and denying stays of execution in cases like this one when brought close in time to an execution date, *See, Crowe v. Donald*, U.S. App. LEXIS 11827 (11th Cir. May 20, 2008), counsel's motive in late-filing this motion appears to be an attempt to inject delay into these proceedings. *See, Evans v. Bennett*, 440 U.S. 1301, 1303 (1979) (Rehnquist, J., as Circuit Justice); *Franklin v. Lynaugh*, 860 F.2d 165, 166 (5th Cir. 1988).

In his motion, Schwab asserts that the United States Supreme Court "chose to peg the end of Schwab's stay on the date of *Baze's* mandate." *Motion,* at 6. The Supreme Court's stay order reads, in its entirety, as follows:

> 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 (2007).[3] The stay order makes no mention of *Baze*, and, in any event, the stay terminated with the denial of Schwab's petition for writ of certiorari on May 19, 2008. *Schwab v. Florida*, 2008 U.S. LEXIS 4273 (U.S. May 19, 2008).[4] Schwab's argument has no basis in fact, and does not support setting aside this Court's dismissal of his untimely 42 U.S.C. § 1983 proceeding.

The "Incapacity of Counsel" Claim is Illusory.

Schwab claims that it was not until *State v. Kilgore*, 976 So. 2d 1066 (Fla. 2007), was decided that it was "clear" that his CCRC counsel were not authorized to represent him in this 42 U.S.C. § 1983 proceeding. *Kilgore* has nothing at all to do with whether CCRC is authorized to prosecute this case -– instead, *Kilgore* dealt with the distinct issue of whether CCRC is authorized to represent a death-sentenced inmate in a challenge to a non-capital conviction that was used as an aggravator in

[3] The language of the stay order clearly refers only to the disposition of **Schwab's** petition for writ of certiorari. No other interpretation of that order makes any sense.

[4] Schwab claims that the petition for writ of certiorari sought review of the Eleventh Circuit's denial of his habeas corpus petition. *Motion*, at 6. That is incorrect – the petition sought review of a decision of the Florida Supreme Court. *Schwab v. State*, 969 So. 2d 318 (Fla. 2007).

the capital case. The Florida Supreme Court held that CCRC was not authorized to undertake such representation. *Id*.[5]

Rather than being controlled by *Kilgore*, the scope of CCRC's authority as related to this case is defined and limited by § 27.7001 of the *Florida Statutes,* which reads as follows:

> It is the intent of the Legislature to create part IV of this chapter, consisting of §§ 27.7001-27.711, inclusive, to provide for the collateral representation of any person convicted and sentenced to death in this state, so that collateral legal proceedings to challenge any Florida capital conviction and sentence may be commenced in a timely manner and so as to assure the people of this state that the judgments of its courts may be regarded with the finality to which they are entitled in the interests of justice. **It is the further intent of the Legislature that collateral representation shall not include representation during retrials, resentencings, proceedings commenced under chapter 940, or civil litigation.**

§ 27.7001, *Fla. Stat*. (2002) (emphasis added). The emphasized portion of the statute took effect in May of 1996, less than a year after Judge Tjoflat's October 1995 letter, discussed *infra*. Despite Schwab's claims, it has been clear, for years, that CCRC has no authority to represent anyone in § 1983 litigation, which is indisputably "civil litigation." In fact, the Florida Supreme Court held as long ago as 1998 that "[a]ccordingly, for the reasons expressed, we grant the State's petition and issue a

[5] Ironically, despite the clear language of the Florida Supreme Court's decision, CCRC has sought certiorari review of that ruling.

writ of *quo warranto* directing that CCRC has no authority to represent capital defendants in the federal civil rights action at issue and has **no authority to represent capital defendants in any civil action** not directly challenging the legality of the judgments and sentences of such defendants." *State Ex Rel Butterworth v. Kenny*, 714 So. 2d 404, 411 (Fla. 1998). (emphasis added). Subsequently, the Florida Supreme Court explicitly held that:

> 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 "postconviction 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 v. State, 945 So. 2d 1136, 1154 (Fla. 2006). (emphasis added). Well before Schwab filed his § 1983 action in November of 2007, Florida law was well-settled that CCRC counsel was not authorized to represent Schwab in such a case. That had been the law for years, and Schwab chose to ignore it -– despite his claims, *Kilgore* did not announce that rule, and any reliance upon that decision is disingenuous.

The Motion to Withdraw.

Schwab's § 1983 action was filed in November of 2007. As long ago as 1996, Florida law was explicit that CCRC is not authorized to file such actions, but Schwab's counsel did so, anyway. His claims that recent caselaw made that prohibition clear ring hollow. Because that is so, this Court is left with a lawsuit that was filed on behalf of a death-sentenced inmate by counsel who had no authority, under well-established State law, to initiate that litigation. The result of those actions is that this litigation has again arrived at the Court in the face of a scheduled execution.

Regardless of whether this Court requires present counsel to continue representing Schwab or determines that they should be allowed to withdraw,[6] the fact remains that the underlying lawsuit, if the prior dismissal does not stand, should be dismissed under the authority of *Crowe v. Donald* and *McNair v. Allen* as untimely. In January of 2008, the Eleventh Circuit decided *McNair v. Allen*, 515 F. 3d 1168 (11th Cir., 2008), which left no doubt that a lethal injection challenge filed outside of the applicable statute of limitations under State law (which, in

[6] Whether it is the responsibility of CCRC to locate counsel for Schwab to pursue the § 1983 action is debatable. In any event, the procedural posture of the case does not change –- the lawsuit is still properly dismissed for the reasons set out in the Defendant's previous filings. No previously-pled defenses are waived.

this case, is four years) is time-barred. Lethal injection became the method of execution in Florida in January of 2000, and Schwab had a 30-day period within which to elect the method of his execution. He made no such election, and the statute of limitations, pursuant to *McNair*, began to run on February 14, 2000. Schwab did not file his federal civil rights claim until November of 2007, more than three years after the statute of limitations contained in 768.28(14) of the *Florida Statutes* had expired. *Crowe v. Donald*, U.S. App. LEXIS 11827 (11th Cir. May 20, 2008), followed *McNair* in the context of a motion for stay of execution, finding that, because the lethal injection claim was untimely under the applicable statute of limitations, there was no likelihood of success on the merits. Under any view of the facts, Schwab's case is time-barred.[7]

To the extent that Schwab claims that this Court should disregard Judge Tjoflat's 1995 letter prohibiting the Federal Public Defender from representing state inmates under sentence of death, that appears to ask this Court to take action that is

[7] As set out in *McNair,* Alabama made minor revisions to their lethal injection procedures. Since the Diaz execution, Florida has enhanced the execution procedure in various ways, the most notable of which is the addition of a pause after the injection of the anesthetic drug during which the inmate is confirmed to be unconscious. *Lightbourne v. McCollum,* 969 So. 2d 326, 346 (Fla. 2007). Those enhancements do not re-start the statute of limitations clock.

beyond its purview. The facts are that this issue was raised, **for the first time**, 29 days before Schwab's execution is scheduled to be carried out. Since 1996, there has been an explicit prohibition on CCRC filing this type of proceeding, and as long ago as 1998 the Florida Supreme Court had explicitly so held, and reiterated that holding in 2002.

Under any reasonable view of the statues and the case law, it was very clear, well before Schwab's death warrant was signed in July of 2007 and his execution scheduled for November 15, 2007, that CCRC was statutorily prohibited from filing cases such as this one. Schwab's own actions have created the situation confronting this Court, and Schwab should not profit from his lack of diligence, especially when he is not entitled to a stay of execution anyway, given that Florida's execution procedures are substantially similar (with various enhancements) to those approved by the United States Supreme Court in *Baze. Baze v. Rees,* 128 S. Ct. 1520, 1537 (2008) ("A State with a lethal injection protocol substantially similar to the protocol we uphold today would not create a risk that meets this standard."). Schwab is entitled to no relief of any sort.

Respectfully submitted,

BILL McCOLLUM
ATTORNEY GENERAL

s/KENNETH S. NUNNELLEY

KENNETH S. NUNNELLEY
SENIOR ASSISTANT ATTORNEY GENERAL
Florida Bar #0998818
444 Seabreeze Blvd., 5th FL
Daytona Beach, FL 32118
(904) 238-4990
Fax (904) 226-0457

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been electronically filed with the Clerk of the Court using CM/ECF system which will send notice of electronic filing to the following: **Mark Gruber**, gruber@ccmr.state.fl.us, Assistant CCRC-Middle, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619, and **Peter J. Cannon**, cannon@ccmr.state.fl.us, support@ccmr.state.fl.us, **James Skuthan,** jim_skuthan@fd.org, on this 9th day of June, 2008.

s/KENNETH S. NUNNELLEY
Of Counsel