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 REPLY TO THE RESPONSES OF THE FEDERAL DEFENDER FOR THE MIDDLE DISTRICT OF FLORIDA AND OF THE STATE OF FLORIDA

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On June 3, 2008, the Plaintiff filed this *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*. The next day, the Court ordered both the State and the Office of the Federal Defender to submit expedited responses by June 9th at 9:00 A.M.

The submissions offered by the State (Doc. 27) and the Office of the Federal Defender (Doc. 29) introduce new facts into the record and raise issues that were beyond the scope of the Plaintiff's original papers. Specifically, the State has argued that the motion was untimely, and the Federal Defender explains that the prohibition against the appointment of federal defenders for collateral proceedings brought on behalf of state death-row inmates arises from an interpretation of the Administrative Office of the Courts, Office of Defender Services (ODS).

This reply addresses the new matter contained in those submissions.

SUMMARY OF REPLY

The State argues that Schwab's motion is untimely because the motion had not been signed when it was first filed, even though a signed version of the motion was filed at midday the next day. This is contradicted by Rule 11, which permits an unsigned pleading to be stricken only if omission of the signature is not "promptly corrected." This argument is addressed in Part I of this Reply.

The merits of the Eleventh Circuit policy are addressed in Parts II and III of this Reply. The Defender's Response contains a letter from the Administrative Office of the Court's, Office of Defender Services (ODS), which "confirm[s]" a hitherto unwritten policy of the Eleventh Circuit that had been in effect for the past thirteen years that district judges in Florida may not appoint federal defenders for postconviction

proceedings brought on behalf of state death row inmates. This policy does not appear anywhere on the Eleventh Circuit's website. Nor does the policy appear in the Eleventh Circuit's Internal Operating Procedures.

The policy arises from a letter dated October 23, 1995, from then-Chief Judge Tjoflat to then-Public Defender Robert W. Vossler (the "1995 Letter") denying Mr. Vossler permission to create a new attorney position to handle postconviction proceedings on behalf of death-row inmates in state court. The 1995 Letter was circulated only to the federal district courts and federal defenders' offices in Florida, but not to the corresponding offices of any other states within the embrace of the Eleventh Circuit.

It is evident from the ODS's clarification that the Eleventh Circuit's policy violates both the Criminal Justice Act as well as 28 U.S.C. § 332, the law governing the authority of judicial councils of the various U.S. courts of appeals.

(1) The Eleventh Circuit's policy violates the Criminal Justice Act by taking away the authority expressly conferred by Congress upon federal district and magistrate judges to appoint public defenders for postconviction proceedings on behalf of death-row inmates convicted by state courts.

(2) To the extent that the 1995 Letter embodies a policy of the Judicial Council for the Eleventh Circuit, the policy is a nullity because it was promulgated in a manner inconsistent with the procedures required by Congress under 28 U.S.C. § 332.[1]

[1] The State advises this Court to avoid the substantive issue of the policy's validity, on the ground that the Eleventh Circuit is "beyond [this Court's] purview." (Doc. 27, State Resp. at 12. No authority supports the State's proposition that this Court

REPLY

I. THE UNSIGNED MOTION MAY NOT BE STRICKEN UNDER THE THIS COURT'S ECF RULES OR THE SAVINGS PROVISIONS OF RULE 11(B)

The State correctly notes that that the Plaintiff's initial filing was unsigned, as required by Rule 11. (Doc. 27, State Resp. at 1.) However, the State erroneously concludes that the filing of the unsigned motion renders the filing a nullity.

In the first case, the State's argument rests on a fundamentally wrong understanding of how the ECF system works. As explained in the ECF Attorney Registration Form for the Middle District's ECF system, "[t]he electronic filing of a petition, pleading, motion, or other paper by an attorney who is a registered participant in

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is powerless to review policies of the Eleventh Circuit for conformity with various provisions of the United States Code. Indeed, there is no functional difference between the review sought here, and the routine function of federal courts to review agency actions of the Executive Branch for compliance with Acts of Congress. To the extent that this Court believes that the matter is better resolved by the Eleventh Circuit directly, Plaintiff respectfully submits that this Court is empowered to order Plaintiff to immediately appeal the question directly to the Eleventh Circuit pursuant to 28 U.S.C. § 1292(b):

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

the Electronic Filing System shall constitute the signature of that attorney under Federal Rule of Civil Procedure 11." (emphasis added.)[2] Consequently, Plaintiff's motion was timely filed because Plaintiff's attorney is a registered participant in the in the Electronic Filing System.

In any event, the State is also wrong in its interpretation of Rule 11. Rule 11 does not invalidate an unsigned pleading. Rather, the Rule permits an unsigned filing to be stricken only if the absence of a signature is not promptly rectified. Fed. R. Civ. P. 11(b) ("An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.") (emphasis added).

Here, the "omission of the signature [wa]s corrected promptly." As the State notes, the motion was filed at 5:03 P.M. on Tuesday, June 3. Upon learning that the papers filed had been inadvertently unsigned, by about midday of the next calendar day, the undersigned had already filed a signed copy of identical motion papers with the Court.

The State has not identified any prejudice arising from its receipt of unsigned papers for the four business hours between the afternoon June 3 and midday June 4. Indeed, the two supporting declarations and the certificate of service for the motion were all signed. Only the motion paper itself did not bear a signature. Moreover, the signed motion is identical to the unsigned motion papers, except for the appearance of a signature on the signature block.

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[2] The ECF Attorney Registration Form is available on the Court's ECF website, http://www.flmd.uscourts.gov/ (Visited June 9, 2008.)

Because the omission of the signature was "corrected promptly" and because the State has not alleged prejudice the plain language of Rule 11 contradicts the State's argument that the motion should be stricken.

II. THE ELEVENTH CIRCUIT'S POLICY VIOLATES THE EXPRESS REQUIREMENTS OF THE CRIMINAL JUSTICE ACT, 18 U.S.C. § 3006A

The Federal Defender's submission indicates that there is, in fact, an Eleventh Circuit policy that federal defenders within the circuit should not represent state death-row inmates in postconviction proceedings. (Doc. 29, Defender's Submission, ¶¶ 15-16. To the extent that this is accurate, the policy exceeds the authority granted by Congress to the courts of appeal under 18 U.S.C. § 3006A.

Section 3006A(a)(2)(B) of Title 18 of the United States Code requires every judicial district to establish a procedure for the appointment of a federal defender to represent, among others, any person convicted by a state court, in Section 2254 proceedings:

> **3006A. Adequate representation of defendants:**
>
> **(a) Choice of Plan**.— Each United States district court, with the approval of the judicial council of the circuit, shall place in operation throughout the district a plan for furnishing representation for any person financially unable to obtain adequate representation in accordance with this section. Representation under each plan shall include counsel and investigative, expert, and other services necessary for adequate representation. Each plan shall provide the following:
>
> . . . .
>
> (2) Whenever the United States magistrate judge or the court determines that the interests of justice so require, representation may be provided for any financially eligible person who—

> (B) is seeking relief under section 2241, **2254**, or 2255 of title 28.

18 U.S.C. § 3006A(a)(2)(B) (emphasis added). The statute draws no distinction between capital and non-capital inmates. Rather, the only requirement for federal representation is that the inmate be a "financially eligible person." Implementation of such a plan is not a matter of judicial discretion; the statute states that each district court "shall" place such a plan in operation "with the approval of the judicial council of the circuit."

The statute specifically authorizes the appointment of federal defenders in matters brought under Section 2254 of Title 28. Section 2254(a) requires federal judges to hear habeas petitions for postconviction relief brought on behalf of any person "in custody pursuant to the judgment of a State court." 28 U.S.C. § 2254(a).

The Eleventh Circuit's policy, as articulated in the 1995 Letter, states that federal defenders should not conduct post-conviction proceedings of death-row inmates convicted by state courts:

> [F]ederal public defenders in the Eleventh Circuit should not represent in post conviction proceedings--whether in state or federal court--those convicted of capital crimes in state court.

In a letter dated June 3, 2008—the date on which Plaintiff filed this motion—the Administrative Office of the Courts sent a letter to the Federal Defender's Office which "confirm[ed]" the existence of the policy:

> The 11th Circuit, of course, rather than the Administrative Office of the U.S. Courts, is the authority on the meaning and application of its policies. However, it is our view that a plain reading of the October 23 letter prevents your office from representing Mr. Schwab in any matter related to his conviction and death sentence.

The Eleventh Circuit's policy contravenes the express terms of the Criminal Justice Act insofar as the policy prevents Florida district courts from appointing federal defenders in "post conviction proceedings . . . [of] those convicted of capital crimes in state court." The policy and the Act are inconsistent to the extent that the Act authorizes district and magistrate judges to appoint federal defenders for all state inmates in Section 2254 proceedings, and not merely non-capital inmates. Accordingly, this blanket prohibition violates the express terms of the Criminal Justice Act.

The State, however, misconstrues the issue claiming that the issue is "whether it is the responsibility of CCRC to locate counsel." (Doc. 27, State Resp. at 10, n. 6.) That is not the correct interpretation. CCRC's initial motion to withdraw and appoint counsel was submitted to Judge Conway pursuant to 28 U.S.C. §1915(e)(1), which provides the Court with discretion to appoint counsel to an indigent civil litigant in "exceptional circumstances." (Doc. 14 at ¶¶ 11-13.) The central argument of the present motion is that this Court's congressionally-authorized discretion to grant the relief request by CCRC's motion—which Judge Conway's chambers was in fact undertaking prior to the case's dismissal—was unlawfully frustrated by the 1995 Letter, which letter violates the Criminal Justice Act, as described above, as well as 28 U.S.C. §332 as more fully described below.

Because the Eleventh Circuit's policy removes from federal district and magistrate judges the very authority that Congress had explicitly and unambiguously conferred, the policy violates the Criminal Justice Act and should be annulled.

III. THE ELEVENTH CIRCUIT'S POLICY DOES NOT COMPORT WITH THE REQUIREMENTS OF 28 U.S.C. § 332

The Eleventh Circuit's policy, as embodied by the 1995 Letter, also exceeds the authority conferred by Congress inasmuch as the policy was promulgated without public notice and comment. Section 332 of Title 28 of the United States Code sets forth the policies and procedures relating to judicial circuit councils for the federal courts of the United States, including the Circuit Council of the U.S. Court of Appeals for the Eleventh Circuit.

The statute authorizes the Council to make "all necessary and appropriate orders for the effective and expeditious administration of justice within its circuit." 28 U.S.C. § 332(d)(1) (sent.1). However, Congress mandated that such orders could only be made after public notice and an opportunity for the public to comment:

> Any general order relating to practice and procedure shall be made or amended only after giving appropriate public notice and an opportunity for comment. Any such order so relating shall take effect upon the date specified by such judicial council.

28 U.S.C. § 332(d)(1) (sents. 2-3). In addition, any orders rendered by a judicial council must be made available to the public. 28 U.S.C. § 332(d)(1) (sent.4) ("Copies of such orders so relating shall be furnished to the Judicial Conference and the Administrative Office of the United States Courts and be made available to the public.").

There is no record that the policy articulated by the 1995 Letter was subject to public notice or comment, as required by 28 U.S.C. § 332(d)(1) (sents. 2-3). Nor, as noted in Plaintiff's opening papers, does any public copy of the order establishing this policy appear on the Eleventh Circuit's website or the website of the Middle District of

Florida, even though other standing orders regarding the CJA plan are posted. *See* <http://www.flmd.uscourts.gov/> (visited June 8, 2008).

To the extent that the ODS is correct that the Eleventh Circuit Judicial Council—through the 1995 Letter—created a policy that precludes this Court from appointing a federal defender as counsel, that policy is nullity because it was promulgated beyond the authority conferred by Congress under 28 U.S.C. § 332(d)(1).

CONCLUSION

For the foregoing reasons, and the reasons stated in 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," Plaintiff requests that this Court 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 9, 2008

Respectfully submitted,

By: *s/Peter Cannon*

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CERTIFICATE OF SERVICE

I hereby certify that on June 9, 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.

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