IN THE SUPREME COURT OF FLORIDA

CASE NO. SC_____

DOLAN DARLING, A/K/A SEAN SMITH

Petitioner,

v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS &
STATE OF FLORIDA et al.,

Respondents.

PETITION TO INVOKE ALL WRITS JURISDICTION

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JURISDICTIONAL STATEMENT

This is an original proceeding under Rule 9.142(a)(5) of the Florida Rules of Appellate Procedure. This Court has original jurisdiction pursuant to Art. V, sec. 3(b) (7), Fla. Const. ("[The Supreme Court m]ay issue . . . all writs necessary to the complete exercise of its jurisdiction.")

In *Williams v. State*, 913 So.2d 541, 543 (Fla. 2005), this Court explained that "the all writs provision does not constitute a separate source of original or appellate jurisdiction. Rather, it operates in furtherance of the Court's 'ultimate jurisdiction,' conferred elsewhere in the constitution." In *State v. Fourth Dist. Court of Appeal*, 697 So.2d 70, 71 (Fla. 1997) the Court held "that in addition to our appellate jurisdiction over sentences of death, we have exclusive jurisdiction to review all types of collateral proceedings in death penalty cases." See *Ventura v. State*, 2 So.3d 194 (2009), n.9. This Petition is being filed concurrently with the initial brief in *Darling v. State*, SC09-555, in which this Court has appellate jurisdiction. Moreover, in *Ventura, supra*, this Court entertained on the merits a pro se petition to invoke its all writs jurisdiction, thereby invoking its supervisory authority over capital postconviction attorney representation under section Fla. Stat. §27.711(12). This Court has supervisory

jurisdiction to consider the scope of capital postconviction representation under chapter 27.

In *Allen v. Butterworth*, 756 So.2d 52 (Fla. 2000), this Court entertained death row inmates' petitions challenging various provisions of the Death Penalty Reform Act of 2000 on constitutional grounds as petitions for writs of mandamus. The Court said that while ordinarily the initial challenge to the constitutionality of a statute should be made before a trial court, mandamus is the appropriate vehicle for addressing claims of unconstitutionality where the functions of government will be adversely affected without an immediate determination. (Internal quotes and citations omitted.) This Court has mandamus jurisdiction to entertain the claims raised herein.

GROUNDS FOR RELIEF

1. The Petitioner is a death sentenced prisoner who is seeking such

postconviction relief in the state and federal courts as may be available to him. At all stages of his postconviction proceedings he has been represented by either CCR or CCRC attorneys. This Petition argues that Florida's legislative scheme for the appointment of counsel in capital postconviction cases is preempted by federal statute to the extent that it prohibits CCRC (and registry) attorneys from challenging the State's intended method of execution by way of a 42 USC §1983 and that those provisions are constitutionally invalid under the Supremacy Clause.

2. This Court originally determined that capital postconviction lawyers did have the ability to raise such a claim in the federal courts via a federal habeas corpus petition – which is authorized by chapter 27 – so the legislative restrictions could not be faulted if the attorneys failed to exercise that option in a timely manner. More recently such defendants have argued that the federal

landscape has changed. In particular, the Supreme Court authorized federal method of execution challenges by way of §1983 rather than 28 USC §2254 in *Hill v. McDonough*, 547 U.S. 5734 (2006) and *Nelson v. Campbell*, 541 U.S. 637 (2004), and the U.S. Eleventh Circuit Court has indicated that they can only be brought that way. *Rutherford v. McDonough*, 466 F.3d 970, 973 (11th Cir. 2006) (observing that pre-*Nelson* circuit law requiring challenges to lethal injection procedures to be brought in a §2254 proceeding is "no longer valid in light of the Supreme Court's *Hill* decision"). Moreover, as a practical matter a method of execution claim will often be raised in a successive rather than an original habeas petition, however such a claim will be barred as a matter of federal statutory law. *In re Schwab*, 506 F.3d 1369 (11th Cir. 2007). Thus, the argument presented here and in other similarly situated cases has been that this Court's rationale has been undermined, leaving an unintended gap in

Florida's statutory scheme for providing counsel for capital postconviction prisoners. That argument has recently gained some traction. *See Ventura v. State*, 2 So.3d 194 (Fla. 2009) --- S.Ct. ---- (U.S.Fla. Jun 22, 2009) (NO. 08-10098), ANSTEAD, Senior Justice, specially concurring; *Cox v. State*, 5 So.3d 659 (Fla. 2009) LEWIS, J., dissenting.

3. The Supreme Court decided *Harbison v. Bell*, 129 S.Ct. 1481, on April 1, 2009. The *Harbison* Court held that the provisions of 18 U.S.C. §3599 [attached], the Federal Death Penalty Act (FDPA) governing appointment of counsel for indigent state prisoners seeking federal habeas corpus relief to vacate a death sentence, also authorizes such counsel to represent the prisoner in subsequent state clemency proceedings. §3599 applies to "any defendant" in "any post conviction proceeding under section 2254 or 2255 of title 28, United

States Code, seeking to vacate or set aside a death sentence." *Id.* (a)(2).[1] While the specific holding speaks to clemency proceedings only, the Court got to that point because the federal statute broadly directs that attorneys who are appointed to represent a death sentenced state prisoner in an original §2254 proceeding also "shall represent the defendant throughout every subsequent stage of available judicial proceedings, including . . . all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures." §3599(2)(e).

4. Of note is that the *Harbison* Court explicitly rejected the contention that §3599(2)(e) referred only to subsequent federal proceedings. CCRC and registry attorneys, including undersigned counsel in this case, routinely seek and

[1]§2254 governs applications in federal court for habeas relief by state prisoners and §2255 is the corresponding section governing such applications by federal prisoners.

obtain appointment under the Criminal Justice Act (CJA), 18 U.S.C. § 3006A. Darling filed a federal petition for writ of habeas corpus after Court denied relief in at *Darling v. State*, 808 So.2d 145 (Fla. 2002). Undersigned counsel has been appointed to represent Darling pursuant to 18 U.S.C. § 3599. See attached order.

5. Under the Supremacy Clause, U.S. Const. Art. 6, cl. 2, the provision of the FDPA authorizing subsequent representation in all available proceedings preempts state legislative restrictions on a federally appointed capital postconviction attorney's scope of representation. E.g. *State v. Harden*, 938 So.2d 480 (Fla. 2006) ("implied conflict preemption" occurs where compliance with both federal and state regulations is a physical impossibility or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress); *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*,

505 U.S. 88, 98 (1992) (plurality opinion) (explaining categories of preemption recognized in Supreme Court case law). The Federal Death Penalty Act begins with a preemption clause: "Notwithstanding any other provision of law to the contrary . . ." 18 U.S.C. §3599 (a)(1).

6. Challenges in this Court to chapter 27 scope of representation restrictions have generally been couched either as arguments that this Court has construed the statute more narrowly than the Legislature intended or, assuming that the construction was correct, that the statute as construed violates Due Process or Equal Protection. At the federal level, the Due Process and Equal Protection arguments have been unavailing. The Supreme Court has adhered to its position in *Murray v. Giarratano*, 492 U.S. 1 (1989) and *Pennsylvania v. Finley* 481 U.S. 551 (1987) that there is no constitutional right to postconviction counsel; it follows that limitations on a statutory grant of counsel do not violate

Due Process or Equal Protection. This Court followed *Murray v. Giarratano* and *Finley* in *State ex rel. Butterworth v. Kenny*, 714 So.2d 404 (Fla. 1998) and *Diaz v. State*, 945 So.2d 1136, 1142-45 (Fla. 2006). The argument presented by this Petition has a different basis, namely that federal statutory law as recently interpreted in *Harbison* provides the relief sought by the defendant and that it conflicts with and therefore preempts the restrictive provisions of chapter 27, particularly as applied to §1983 challenges to an intended method of execution.

7. The Tennessee legislative scheme described in *Harbison* is different from Florida's, but different in a way that reinforces the contentions made here. *Harbison* was a death sentenced state prisoner who was represented by the Federal Defender's Services during his original §2254 proceedings. After his federal habeas petition was denied, he sought counsel to represent him in a state

clemency proceeding. Ultimately the Tennessee Supreme Court held that state law did not authorize the appointment of state public defenders as clemency counsel and upheld the removal of Harbison's state appointed counsel from the case. Thereafter, Harbison's federal defender moved to expand the scope of her appointment to include state clemency proceedings, which prompted the litigation that eventually led to the Court's April 1 decision.

8. In Florida, CCRC attorneys are authorized (in fact directed) to file §2254 federal habeas corpus petitions by §27.702 (1). The statute also provides that "The capital collateral regional counsel shall file motions seeking compensation for representation and reimbursement for expenses pursuant to 18 U.S.C. §3006A when providing representation to indigent persons in the federal courts, and shall deposit all such payments received into the General Revenue Fund." §27.702 (3)(a). The corresponding provisions regarding

registry counsel are located at §§27.710, 27.711(1)(c), and 27.711(11). Collateral representation by registry counsel includes "any authorized federal habeas corpus litigation with respect to the sentence" and also authorizes the attorney to seek compensation under the CJA. §27.711(3).

9. In contrast with the situation in *Harbison*, federal defenders in this jurisdiction not only do not represent state prisoners in capital postconviction proceedings under §2254, they are prohibited from representing state capital prisoners in any litigation at all, whether in state or federal court. By letter dated October 23, 1995, the Honorable Gerald Tjoflat, writing on behalf of the U.S. Eleventh Circuit Court of Appeals, advised Mr. Robert J. Vossler, Federal Public Defender for the Northern District of Florida: "The Court has determined as a matter of policy that federal 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 June 2008, Mr. James T. Skuthan, Acting Federal Defender for the Middle District of Florida, cited this letter in response to an effort to appoint his office in at least some capacity to represent Mark Schwab, then under a warrant, in a pending §1983 action challenging lethal injection. Mr. Skuthan reported that "the undersigned subsequently contacted ODS [Administrative Office of the United States Courts, Offices of Defender Services] personnel for clarification after reading Judge Tjoflat's 1995 letter. In subsequent conversations with ODS personnel, the undersigned confirmed that the policy set forth in Judge Tjoflat's 1995 letter was still in effect today. As a result, this Defender does not have the authority to represent Florida death sentenced inmates in state or federal post-conviction proceedings." See attachment, Federal Public Defender's Response to 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, Doc. 29, *Schwab v. McNeil, et al.*, Case No. 3:08-cv-507-J-33 USMD (Fla. 2008), with attached letters.

10. 18 U.S.C. §3599 (a)(1) conditions the operation of the statute on the defendant being or becoming "financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services." Here, a finding of indigency was necessarily a part of the appointment of counsel to pursue a §2254 habeas petition, so that provision is satisfied.

11. An argument to the effect that §3599 would not authorize CCRC attorneys or registry attorneys to continue to represent their §2254 habeas clients in subsequent "retrials, resentencings, [or] proceedings commenced under chapter 940" because Florida's statutory scheme provides for such representation by attorneys other than CCRC attorneys would not apply to §1983

challenges to method of execution, because there is no such state legislative provision for §1983 actions.[2]

12. It is true that noncapital state prisoners who file §1983 lawsuits seek and sometimes obtain appointment of counsel under 28 U.S.C. §1915 (e)(1). However, under the FDPA the triggering event for state capital prisoners is appointment under the CJA to pursue a §2254 habeas petition, and under basic rules of statutory construction the more recent, detailed and specific provisions of §3599 supersede the one sentence general grant of discretion to appoint counsel in any prisoner litigation case in §1915 (e)(1). Thus there is not an argument that §1915 (e)(1) provides an alternative federal avenue of relief.

CONCLUSION AND RELIEF SOUGHT

[2]While the narrow remedy sought in this case is that this Court recede from its construction of Ch. 27 only so as to permit CCRC and registry attorneys to pursue a method of execution claim in the federal courts via §1983, the plain language of the opening clause of §3599 as well as its detailed list of attorney qualifications indicates that it preempts these other restrictions as well.

This Court should recede from those portions of *State ex rel. Butterworth v. Kenny*, 714 So.2d 404 (Fla. 1998) and *Diaz v. State*, 945 So.2d 1136 (Fla. 2006) and progeny that restrict the scope of CCRC and registry attorney representation in a manner which is inconsistent with the provisions of 18 U.S.C. §3599, or in the alternative declare that those portions of chapter 27 which conflict with 18 U.S.C. §3599 are invalid under the Supremacy Clause.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition to Invoke

All Writs Jurisdiction has been furnished by United States Mail, first class postage prepaid, to all counsel of record and the Defendant on June 29, 2009.

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CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Initial Brief of Appellant, was generated in Times New Roman, 14 point font, pursuant to Fla. R. App. 9.210.

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Attachments:

Order Appointing CCRC under the CJA

Harbison v. Bell

18 U.S.C. §3599

Schwab v. McNeil, et al., Federal Defender's *Response*