IN THE SUPREME COURT OF FLORIDA

CASE NO. SC09-1249

DOLAN DARLING, A/K/A SEAN SMITH

Petitioner,

v.

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

Respondents.

PETITIONER'S REPLY TO RESPONSE TO PETITION TO INVOKE ALL WRITS JURISDICTION

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ARGUMENT IN REPLY

Respondents appear to agree that this Court has jurisdiction to consider the instant petition.

This Petition contends that 18 U.S.C. §3599 as recently construed by the Supreme Court in *Harbison v. Bell*, 129 S.Ct. 148, 1173 L.Ed.2d 347 (2009) preempts those provisions of Ch.27, Florida Statutes, which, as construed by this Court in *Butterworth v. Kenney*, 714 So.2d 404 (Fla. 1998) and *Diaz v. State*, 945 So.2d 1136 (Fla. 2006), prohibit CCRC and Registry lawyers from filing federal civil rights lawsuits pursuant to 42 U.S.C. §1983 challenging the state's intended method of execution. §3599(e) delineates the scope of representation by attorneys appointed under the CJA to represent state as well as federal capital prisoners. Its language is sweeping. If the rationale of this petition is well founded, other state legislative restrictions on the scope of capital postconviction representation in ch. 27 should fall as well.

The Respondents cite numerous cases in which this Court has rejected challenges to the constitutionality of Section 27.702 Fla. Stats., and further argue that *Harbison* is factually distinguishable because it dealt with a federally appointed attorney's ability to represent her client in state clemency proceedings rather than a method of execution claim. Both of those arguments miss the point. ***All*** prior

challenges to the constitutionality of §27.702 and related statutory restrictions on the scope of capital postconviction representation in Florida have been brought under the Sixth, Eighth or Fourteenth Amendment rights to counsel and due process. This case presents a challenge under the Supremacy Clause, U.S.C.A. Const. Art. VI cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

Once counsel has been appointed by a federal district court under the CJA to prosecute a petition for a federal writ of habeas corpus, the scope of representation authorized by §3599 is broad:

> Unless replaced by similarly qualified counsel upon the attorney's own motion or upon motion of the defendant, each attorney so appointed shall represent the defendant throughout every subsequent stage of available judicial proceedings, including pretrial proceedings, trial, sentencing, motions for new trial, appeals, applications for writ of certiorari to the Supreme Court of the United States, and all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures, and shall also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant.

18 U.S.C. §3599(e).[1] This Court addressed the doctrine of federal preemption in *State v. Harden*, 938 So.2d 480 (Fla. 2006):

> Under the Supremacy Clause, a federal law may expressly or impliedly preempt state law. A state cannot assert jurisdiction where Congress clearly intended to preempt a field of law. See *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 101 S.Ct. 1124, 67 L.Ed.2d 258 (1981). The United States Supreme Court has recognized three categories of preemption: (1) express preemption where a federal statute contains "explicit pre-emptive language"; (2) implied field preemption, where the scheme of federal regulation is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it"; and (3) implied conflict preemption, in which "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."

Id. 486 citing *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98, 112 S.Ct. 2374, 120 L.Ed.2d 73 (1992) (plurality opinion) (explaining categories of preemption recognized in Supreme Court case law). §3599 begins with an express preemption clause: "Notwithstanding any other provision of law to the contrary . . ." As the *Harbison* Court recognized, §3599(a)(2) explicitly refers to state postconviction capital litigants because of its reference to 28 U.S.C. §2254. The legislative restrictions contained in ch. 27 Fla. Stats. on the scope of CCRC or

[1]Justice Scalia called the statute "a paragon of shoddy draftsmanship."

Registry lawyers' representation render compliance with both statutes a physical impossibility and stand as an obstacle to the purposes and objectives of Congress set forth in §3599(e). Thus the cases cited by the Respondents are inapposite.

The Respondents' attempt to limit the application of *Harbison* to state clemency proceedings is refuted by the text of *Harbison* itself, as well as the text of §3599(e). The main topic addressed by the different concurring and dissenting opinions in *Harbison* was how far to reign in the scope of representation authorized by the statute, if at all. Yet even the limitation urged by the dissent, "to provide federally funded counsel to capital defendants appearing in a federal forum," would not preclude the minimum relief which the Petitioner seeks here, which is the authority to have counsel who has already been appointed to represent him in federal habeas proceedings pursuant to the CJA continue to represent him in a federal §1983 action challenging the state's intended method of execution without being constrained by state statutory restrictions. The Respondents' argument about Florida's provision for the appointment of clemency counsel does not add up. They say:

> Respondents recognize that *Harbison* permits duly appointed §3599 counsel to represent a petitioner in a state clemency action. However, the State of Florida already provides for appointed counsel for a state clemency application.

Response, page 4, citing §27.51(5)(a), Fla. Stat. Perhaps so, but it does not matter. The Florida statutory scheme as construed by this Court in *Butterworth v. Kenney* and *Diaz* does not provide for counsel in §1983 actions challenging method of execution, and as shown by the correspondence between the Eleventh Circuit Court of Appeals and the Federal Public Defender's Office attached to the original Petition, the latter are not permitted to represent capital state prisoners at all. In Florida, there is currently no provision, state or federal, to appoint qualified counsel for state capital prisoners to raise a method of execution claim in federal court in the only way the federal courts now require it to be raised.

Moreover, the Respondents' interpretation of §3599 flatly contradicts its text. Once counsel is appointed under (a)(2), he or she "shall" represent the defendant through "every subsequent stage of available proceedings . . . and all available post-conviction process," unless replaced by similarly qualified counsel "upon the attorney's own motion or upon motion of the defendant." If the Florida Legislature chooses to appoint one or more attorneys to assist CJA appointed CCRC or Registry counsel in clemency or any of the other proceedings listed in §3599(e) it is free to do so, but it cannot substitute a lawyer who may or may not meet the qualifications required by §3599(b) and (c), who has not been appointed by the federal district court under the CJA, and where there has been no motion by

previously appointed CJA counsel or by the defendant to substitute counsel, without being in conflict with the plain text of §3599. The state statute cannot direct CCRC and Registry attorneys to seek and obtain appointment under the CJA, which it does, but then direct them not to do what the federal statute directs them to do, without there being a conflict.[2]

The Respondents are also incorrect in asserting that nothing in the text of §3599 requires the appointment of counsel to bring a §1983 method of execution challenge. As recognized by certain members of this Court (see *Ventura v. State*, 2 So.3d 194 (Fla. 2009) ANSTEAD, Senior Justice, specially concurring; *Cox v. State*, 5 So.3d 659 (Fla. 2009) LEWIS, J., dissenting.), the rationale in *Butterworth v. Kenney* and *Diaz* – that CCRC and Registry counsel can raise a method of execution claim in federal court via 28 U.S.C. §2254 – has been undermined by the Supreme Court's decisions in *Hill v. McDonough*, 547 U.S. 573 (2006) and *Nelson v. Campbell*, 541 U.S. 637 (2004), and the U.S. Eleventh Circuit Court of Appeals has indicated that a method of execution claim can only raised in federal court by way of a §1983 lawsuit. *Rutherford v. McDonough*, 466 F.3d 970, 973 (11th Cir.

[2]If the Respondents really do "recognize that *Harbison* permits duly appointed §3599 counsel to represent a petitioner in a state clemency action," they would appear to have conceded this point. Clemency attorneys appointed under ch. 27.51 are not duly appointed §3599 counsel. There is no mechanism to insure that they are even admitted to practice in federal court.

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"). This Court has repeatedly recognized that method of execution claims can be viable postconviction claims. E.g. *Lightbourne, Schwab et al.* §3599 requires that CJA federally appointed counsel "shall" pursue "all available post-conviction process." Thus the plain language of §3599 does require counsel to bring a §1983 action if he or she wishes to challenge a state's intended method of execution in federal court, and as such it preempts the Florida scheme to the extent the two are in conflict.

The Respondents' reliance on footnote 1 in *Schwab v. Secretary, Dept. of Corrections,* 284 Fed.Appx. 643, 2008 WL 2571991, (unpublished opinion), (11th Cir. 2008) is misplaced. *Schwab* is not controlling on this Court. *Schwab* is an unpublished opinion, and as such is not considered binding precedent. U.S. 11th Circ. Rule 36-2. The comment in the footnote was meant to explain the court of appeals' rejection of Schwab's argument that his case should be treated as an appeal from a dismissal with, rather than without, prejudice, thereby rendering the case ripe for appellate review. The interplay between Florida's statutory scheme and §3599 was not before the court, and was not addressed in the opinion except to observe obliquely that CCRC had filed the complaint regardless of its authority or

lack thereof to do so under Florida law before private counsel were engaged. Thus, the court reasoned, CCRC's legal status viz-a-viz the state statutory scheme did not change from the filing of the §1983 complaint to its dismissal without prejudice, whatever that status might be. Finally it is doubtful that the court would adopt the interpretation of the comment in footnote 1 urged by the Respondents in light of *Harbison*.

The Respondents' reliance (Response, pages 8-9) on a number of federal cases dealing with requests for the appointment of counsel to litigate a §1983 civil rights lawsuit pursuant to the broad discretionary authority contained in 28 U.S.C. §1915 (e)(1)[3] is also misplaced because none of them were capital cases and therefore none of them even mention §3599. §3599 is the statute that expresses Congress's intent regarding representation of both state and federal capital defendants under the CJA. 28 U.S.C. §1915 (e)(1) grants discretionary authority to the district court to appoint counsel for noncapital prisoners in any of the wide variety of §1983 civil rights lawsuits, or in any case before it. The Respondents seem to be arguing that the one clause grant of authority in §1915 (e)(1) somehow satisfies the specific requirements of §3599 while allowing them to be ignored.

[3]"The court may request an attorney to represent any person unable to afford counsel." *Id*. (e)(1).

That makes no sense.

Finally, the Respondents add a two sentence argument that "even if CCRC were appointed" to pursue a method of execution claim under §1983 the statute of limitations has expired. The Respondents, of course, are free to raise such defenses as they think are proper, in the appropriate time and place, which would be as a defensive pleading in the federal district court. However, their reliance on *Crowe v. Donald*, 528 F.3d 1290 (U.S. 11th Cir. 2008) and *Henyard v. Secretary*, DOC, 543 F.3d 644 (U.S. 11th Cir. 2008) is misplaced, and in fact highlights the problem addressed by this Petition. Crowe's complaint failed because it was filed outside of Georgia's two year statute of limitations. Florida's statute of limitations is four years. In *Henyard*, the court denied relief based alternatively on the statute of limitations as applied to the specific allegations in Henyard's complaint, see *infra*, and laches. Both complaints were filed on the eve of a scheduled execution. Both were treated as motions for a stay of execution and as such were treated with great scrutiny and ultimately rejected because of undue delay. Of the *Henyard* three judge panel, one concurred only in the laches portion of the opinion, and another concurred because she deemed the particular allegations in Henyard's complaint insufficient to restart the statute of limitations period as of August 1, 2007, when a new set of protocols went into effect. The implication is that a sufficiently pled

complaint challenging the protocols might be timely under the statute of limitations if filed prior to August of 2011. With regard to laches, Henyard was faulted for waiting 13 months after the August 2007 revisions to the protocols and until he was under a warrant to file his § 1983 action.[4] The Eleventh Circuit has not been called on to address the recurring situation where a recent execution has been allegedly botched or there is new scientific evidence calling an existing method of execution into question.[5] With regard to the statute of limitations, the Henyard opinion was limited to the particular facts of his case regarding the sufficiency of his complaint. In other words, the Eleventh Circuit has ***not*** categorically ruled that any and all federal §1983 lethal injection method of execution claims brought by Florida prisoners are barred by the statute of limitations, only that they are likely to fail under laches if they are not brought until after a warrant is signed. Thus these considerations suggest that the issues raised in these proceedings should be addressed sooner rather than later.

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[4]Henyard, like Schwab, was represented in his §1983 action by private counsel who was "recruited" for the purpose.

[5]This Court has repeatedly rejected arguments that such claims are procedurally barred. E.g. *Schwab v. State*, 969 So.2d 318, 321 (Fla. 2007)("As this Court has held before, when an inmate presents an Eighth Amendment claim which is based primarily upon facts that occurred during a recent execution, the claim is not procedurally barred. ").

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply to Response to 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 September ___, 2009.

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CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Reply to Response to Petition to Invoke All Writs Jurisdiction, was generated in Times New Roman, 14 point font, pursuant to Fla. R. App. 9.210.

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