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.

RESPONSE TO PETITION FOR ALL WRITS JURISDICTION

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JURISDICTION

The State recognizes that this Court stated in *Ventura v. State*, 2 So. 3d 194 (Fla. 2009):

> Any exercise of jurisdiction with regard to Ventura's pro se all-writs petition would necessarily aid this tribunal in the "complete exercise of its jurisdiction" concerning this capital case. Art. V, § 3(b)(7), Fla. Const.; see also art. V, § 3(b)(1), Fla. Const.; Williams v. State, 913 So. 2d 541, 543 (Fla. 2005)"[T]he all writs provision [of article V, section 3(b)(7)] 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 [C]onstitution." (emphasis supplied)); *State v. Fourth Dist. Court of Appeal*, 697 So. 2d 70, 71 (Fla. 1997) ("[W]e now hold 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." (emphasis supplied)); *Coleman v. State*, 930 So. 2d 580, 580-81 (Fla. 2006) (considering allegations with regard to the performance of assigned postconviction counsel under section 27.711(12), Florida Statutes (2005), and remanding to the circuit court with instructions for the assigned attorney to respond to these allegations).

The State also notes that this court denied Ventura's petition as meritless and rejected in that same opinion the postconviction challenge to Section 27.702, Florida Statutes, as having been "already addressed and rejected".

GROUNDS FOR RELIEF

Darling argues that Florida statutes which preclude Capital Collateral Counsel from representing defendants in federal §1983 actions conflict with the recent case of *Harbison v. Bell*, 129 S.Ct. 1481 (April 1, 2009). Thus:

> [f]ederal statutory law as recently interpreted in *Harbison*, preempts the restrictive provisions of chapter 27, particularly as applied to §1983 challenges to an intended method of execution.

(Petition at page 6).

This Petition fails to state a basis for relief. This Court has repeatedly rejected similar challenges to Section 27.702, Florida Statutes.[1] As this Court stated in *Cox v. State*, 5 So. 3d 659 (Fla. 2009):

> We have consistently rejected each of these claims. *See, e.g., Ventura v. State*, 2 So. 3d 194, 34 Fla. L. Weekly S71 (Fla. Jan. 29, 2009); *Tompkins v. State*, 994 So. 2d 1072 (Fla. 2008), *cert. denied*, No. 08-8614, 129 S. Ct. 1305, 173 L. Ed. 2d 482, 2009 U.S. LEXIS 1008 (U.S. Feb. 11, 2009); *Henyard v. State*, 992 So. 2d 120 (Fla. 2008), *cert. denied*, 129 S. Ct. 28, 171 L. Ed. 2d 930 (2008); *Lightbourne v. McCollum*, 969 So. 2d 326 (Fla. 2007), *cert. denied*, 128 S. Ct. 2485, 171 L. Ed. 2d 777 (2008); *Provenzano v. State*, 761 So. 2d 1097, 1099 (Fla. 2000); *Bryan v. State*, 753 So. 2d 1244, 1250 (Fla. 2000); *State ex rel. Butterworth v. Kenny*, 714 So. 2d 404, 410 (Fla. 1998).

Harbison v. Bell, 129 S.Ct. 1481 (2009), does not preempt Florida statutes, does not require this court to recede from established precedent, and is factually inapposite to the claim Petitioner advances. *Harbison* is a statutory construction

[1] Darling raises such a challenge as Claim 3 in the Rule 3.851 appeal filed concurrently with this Petition. *Darling v. State*, Case No. SC09-555.

case involving *clemency* proceeding. The federal statute at issue in *Harbison* -- 18 U.S.C. §3599(a)(2) -- entitles indigent federal habeas petitioners to the appointment of counsel "in accordance with" subsection (e). Subsection (e) of §3599 specifies, *inter alia*, that federally appointed counsel "shall" represent the defendant in "proceedings for executive or other clemency as may be available to the defendant." The questions before the Supreme Court was whether §3599(e)'s reference to "proceedings for executive or other clemency as may be available to the defendant" encompasses state clemency proceedings.

The Supreme Court concluded that §3599(e) authorized federally appointed counsel to represent clients in state clemency proceedings. As the majority in *Harbison* explained:

> Under a straightforward reading of the statute, subsection (a)(2) triggers the appointment of counsel for habeas petitioners, and subsection (e) governs the scope of appointed counsel's duties. See §3599(a)(2) (stating that habeas petitioners challenging a death sentence shall be entitled to "the furnishing of . . . services in accordance with subsections (b) through (f)"). **Thus, once federally funded counsel is appointed to represent a state prisoner in §2254 proceedings, she "shall also represent the defendant in such . . . proceedings for executive or other clemency as may be available to the defendant." §3599(e). Because state clemency proceedings are "available" to state petitioners who obtain representation pursuant to subsection (a)(2), the statutory language indicates that appointed counsel's authorized representation includes such proceedings**. (e.s.).

Contrary to Petitioner's arguments, there is nothing in the plain language of 18 U.S.C. § 3599(e) which gives him the right to the appointment of counsel for an

independent civil lawsuit under 42 U.S.C. §1983. In applying the plain language of §3599 to conclude that subsection (e) brought state inmates within the scope of this federal statute, the majority in *Harbison* concluded that the phrase "executive or other clemency" implicates state defendants, as only states allow non-executives to grant clemency. As the Court in *Harbison* noted, "[f]ederal clemency is exclusively executive: Only the President has the power to grant clemency for offenses under federal law. U. S. Const., Art. II, §2, cl. 1.5 By contrast, the States administer clemency in a variety of ways." Id., citing, Ga. Const., Art. IV, §2 (independent board has clemency authority); Nev. Const., Art. 5, §14 (governor, supreme court justices, and attorney general share clemency power); Fla. Const., Art. IV, §8 (legislature has clemency authority for treasonous offenses)." Thus, the reference to "proceedings for executive or other clemency," in § 3599(e) evidenced that "Congress intended to include state clemency proceedings within the statute's reach." *Harbison* not only does not "preempt" Florida statutes, it is inapplicable to the Petitioner's situation.

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. See, §27.51(5)(a), Fla. Stat. (2009) (providing for the appointment of state counsel for clemency proceedings). In Florida, capital defendants have attorneys during the

clemency process. See, *Remeta v. State*, 559 So. 2d 1132 (Fla. 1990). While *Harbison* gives inmates the right to appointment of federal counsel to assist in the preparation of available clemency proceedings, neither *Harbison* nor § 3599 *create any right* to counsel for filing an independent civil action under 42 U.S.C. §1983. Unlike the clemency provision of §3599 addressed in *Harbison*, there is <u>nothing</u> in the plain language of §3599 to require the appointment of counsel for the purpose of bringing an independent civil rights lawsuit under 42 U.S.C. §1983.

Even if the Petition were construed as a request for the discretionary appointment of counsel in a §1983 action, Petitioner still cannot establish any basis for relief. Florida statutorily created the Capital Collateral Regional Counsel [CCRC], an office employing attorneys dedicated to the sole purpose of representing persons sentenced to death in "collateral actions challenging the legality of the judgment and sentence imposed." *See* Florida Statutes, §27.702(1) (2008). Pursuant to statutory law, the CCRC are specifically precluded from representing defendants sentenced to capital crimes during any retrials, resentencings, or civil litigation. Florida Statutes, §§27.7001, §27.702 (2008). In *State ex rel. Butterworth v. Kenny*, 714 So. 2d 404, 410 (Fla. 1998), this Court interpreted these sections to include a prohibition against CCRC from filing civil rights actions under 42 U.S.C. §1983. This decision was later affirmed with regard to the CCRC filing a challenge to lethal injection in a §1983 action in *Diaz v. State*,

945 So. 2d 1136, 1154-55 (Fla. 2006).

Despite acknowledging that state law prohibits CCRC's representation in a section 1983 action (*State ex rel. Butterworth v. Kenny*, 714 So. 2d 404 (Fla. 1998), *Diaz v. Florida*, 945 So. 2d 1136, 1154 (Fla. 2006)) CCRC offers perfunctory citations to a concurring opinion in *Ventura v. State*, 2 So. 3d 194 (Fla. 2009). In fact, *Ventura* actually stands for the proposition that Petitioner is not entitled to any relief on his proposed lethal injection complaint and neither case provides any support for the claim that counsel must be provided under *Harbison.*

The United States Supreme Court has repeatedly held there is no constitutional right to counsel in postconviction proceedings. *Murray v. Giarratano*, 492 U.S. 1, 109 S. Ct. 2765 (1989) ; *Pennsylvania v. Finley*, 481 U.S. 551, 107 S. Ct. 1990 (1987). Likewise, there is no constitutional right to counsel for inmates seeking relief under 42 USC §1983, either under the Sixth, Eighth, or Fourteenth Amendment. *See DA's Office for the Third Judicial Dist. v. Osborne*, 2009 U.S. LEXIS 4536, 29-30 (U.S. June 18, 2009) (reiterating that when states choose to offer help to those seeking relief from convictions, due process does not "'dictat[e] the exact form such assistance must assume.' *Pennsylvania v. Finley*, 481 U.S. 551 (1987)" and holding that a postconviction litigant's "right to due process is not parallel to a trial right, but rather must be analyzed in light of the fact that he has already been found guilty at a fair trial, and has only a limited interest

in postconviction relief."); *Poole v. Lambert*, 819 F.2d 1025, 1028 (11th Cir. 1987) ("A civil litigant, including a prisoner pursuing a section 1983 action, has no absolute constitutional right to the appointment of counsel."); *Schwab v. Secretary, Dep't of Corr.*, 284 Fed. Appx. 643, n. 1 (2008) (unpublished opinion) ("We do not mean to imply that Schwab has the right to appointed counsel in this [1983] civil case. . . We recognize that 18 U.S.C. § 3006A(a)(2)(B) provides that counsel may be provided for any financially eligible person who 'is seeking relief under section 2241, 2254, or 2255 of title 28.'").

The state-created agency of CCRC was not authorized to represent a defendant in a federal civil rights action. Florida Statutes, section 27.702 does not deny Petitioner any constitutional right to challenge lethal injection procedures in a federal civil rights action. Rather, he is just precluded from using his state taxpayer-supplied capital collateral counsel for doing so. Petitioner, like every other death row inmate in Florida, is entitled to the statutory appointment of state-funded collateral counsel to challenge the validity of his judgment and sentence. He has established no firmly rooted right he is being denied which is necessary to vindicate any substantive rights. To the contrary, as expressed by the long line of this Court's and the United States Supreme Court cases, the right he is requesting does not exist.

Moreover, Petitioner has been afforded state-funded collateral counsel to

challenge the validity of his judgment and sentence. There is nothing in a proposed §1983 action that impacts the validity of that judgment and sentence. Indeed, as the United States Supreme Court emphasized in *Hill v. McDonough*, 547 U.S. 573, 580 (2006), a method of execution challenge is not a challenge to the inmate's judgment or sentence. *Id.* at 580. Instead, a section 1983 action is a distinctly ancillary proceeding available for review of isolated and discrete matters unrelated to the defendant's underlying judgment and sentence, such as challenges to conditions of confinement. Under *Hill*, an independent 1983 civil lawsuit is not a postconviction process available to challenge a defendant's underlying judgment and sentence and federal courts have repeatedly denied counsel appointments for §1983 actions. *See, Baker v. Coto*, 154 Fed. Appx. 854, 859 (11th Cir. 2005) ("A civil litigant, including a prisoner pursuing a section 1983 action, has no absolute constitutional right to the appointment of counsel. Although the court has broad discretion to appoint counsel for an indigent plaintiff, it should do so only in exceptional circumstances. See, 28 U.S.C. § 1915(e)(1); *Bass v. Perrin*, 170 F.3d 1312, 1320 (11th Cir. 1999). As the Eleventh Circuit recently underscored in *Smith v. Belle*, 2009 WL 724028 (11th Cir, Mar. 20, 2009):

> A civil litigant, including a prisoner pursuing a section 1983 action, has no absolute constitutional right to the appointment of counsel. The appointment of counsel is instead a privilege that is justified only by exceptional circumstances...." *Poole v. Lambert*, 819 F.2d 1025, 1028 (11th Cir. 1987). "[W]hether such circumstances exist is ... committed to district court discretion." *Steele v. Shah*, 87 F.3d 1266,

> 1271 (11th Cir. 1996). Exceptional circumstances exist "where the facts and legal issues are so novel or complex as to require the assistance of a trained practitioner." *Poole*, 819 F.2d at 1028. "The key is whether the pro se litigant needs help in presenting the essential merits of his or her position to the court. Where the facts and issues are simple, he or she usually will not need such help." *Kilgo v. Ricks*, 983 F.2d 189, 193 (11th Cir. 1993).

This Petition further fails to state a basis for relief because, even if CCRC were appointed to represent him in a section 1983 civil rights action, the statute of limitations expired on any such claim in 2004, four years after lethal injection became the method of execution in Florida. *See Crowe v. Donald*, 528 F.3d 1290, 1292-93 (11th Cir. 2007); *Henyard v. Does*, 543 F.3d 644, 649 (11th Cir. 2008).

CONCLUSION

Based on the foregoing arguments and authorities, Respondents respectfully request this Honorable Court deny all relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was furnished by U.S. mail to Mark Gruber, CCRC - Middle, 3801 Corporex Park Dr., Suite 210, Tampa, Florida 33619, this _____ day of July, 2009.

____
Assistant Attorney General

CERTIFICATE OF FONT

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

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Assistant Attorney General