UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

MARK DEAN SCHWAB,

Plaintiff,

v. Case No. 3:08-cv-507-J-33

WALTER A. MCNEIL, et al.,

Defendants.

ORDER

This cause is before the Court on 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. #25) (hereinafter Motion), filed June 4, 2008.[1] On June 4, 2008, the Court directed the Defendants and the Federal Public Defender to file an expedited response to the Motion on or before Monday, June 9, 2008, at 9:00 a.m.

Defendants filed a timely Response to Motion to Alter or Amend Judgment (Doc. #27) (hereinafter Response) on June 9, 2008. The 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) was also filed on June 9, 2008. Plaintiff's Reply to the

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[1] The same Motion was filed on June 3, 2008, but terminated due to the lack of signature, electronic or otherwise, of counsel.

Responses of the Federal Defender for the Middle District of Florida and of the State of Florida (Doc. #30) was filed on June 9, 2008.

On November 14, 2007, the Court entered an Order (Doc. #8), in pertinent part, as follows:

> 2. This case (6:07-cv-1798-Orl-22KRS)[2] is also **STAYED** pending resolution of the *Baze*[3] case.
>
> 3. The Clerk of the Court is directed to administratively close this case[.]
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> 4. **Plaintiff shall file a motion to reopen this case within thirty (30) days after a final decision has been rendered in the *Baze* case. The failure to do so will result in the dismissal of this case without further notice.**

Order (Doc. #8), filed November 14, 2007 (emphasis added). The case was administratively closed on November 14, 2007. On May 16, 2008, the case was transferred to the Jacksonville Division. Order of Transfer (Doc. #17).

On May 19, 2008, this Court found that a final decision was rendered in the *Baze*[4] case on April 16, 2008, and further found that Plaintiff had failed to move to reopen this case within the designated period set forth in the Court's Order (Doc. #8). As a result of these determinations, the case was dismissed without

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[2] The current Case No. is 3:08-cv-507-J-33.

[3] *Baze v. Rees*, 128 S.Ct. 372 (2007).

[4] *Baze v. Rees*, 128 S.Ct. 1520 (2008).

prejudice, all pending motions were denied as moot and were directed to be terminated by the Clerk, and the Clerk was directed to close the case and enter judgment accordingly. Order (Doc. #20), filed May 19, 2008; Order (Doc. #21), filed May 19, 2008. Judgment was entered on May 19, 2008. (Doc. #22).

Plaintiff asks the Court to reconsider its order of dismissal and to reinstate the Complaint (Doc. #1). He asserts that the deadline to re-open the case had not expired, arguing that the final decision in *Baze* should be calculated from the date of the mandate in *Baze*. Additionally, he contends that the dismissal of the Complaint was premature and there are grounds for reconsideration under applicable law. Alternatively, Plaintiff asks that the Court reinstate the Complaint due to the incapacity of counsel prior to dismissal.

Plaintiff further asks, if the Complaint is reinstated, for the Court to grant the Office of Collateral Capital Counsel-Middle Region (hereinafter CCRC) leave to withdraw, asserting that CCRC is conflicted from representing Plaintiff. Finally, Plaintiff asks that the Federal Public Defender be appointed as replacement counsel, claiming the October 23, 1995, Letter from the Honorable Gerald B. Tjoflat, United States Court of Appeals, Eleventh Judicial Circuit, does not prohibit the Federal Public Defender from representing Plaintiff. (Doc. #25-4).

Plaintiff states that the Motion is raised pursuant to Fed.R.Civ.P. 59(e) and 60(b); however, Plaintiff does not distinguish the basis of the Motion under the two different rules in the body of the Motion. Under Rule 59(e), "[a] motion to alter or amend a judgment must be filed no later than 10 days after the entry of the judgment." Judgment was entered on May 19, 2008. (Doc. #22). As noted by Plaintiff, Motion at 3, the deadline for filing a motion to alter or amend judgment was June 3, 2008. The Motion was filed on June 4, 2008. Therefore, the Motion to Alter or Amend Final Judgment pursuant to Fed.R.Civ.P. 59(e) is untimely filed. *See* Response at 1-2. Alternatively, assuming *arguendo* the Rule 59(e) Motion is timely filed as Plaintiff filed a corrected Motion upon notification by the Clerk of the Court of the absence of his signature, the Motion has no merit and is due to be denied.

The Motion is also raised pursuant to Fed.R.Civ.P. 60(b), and the Motion under Rule 60(b) is timely. *See* Rule 60(c)(1). Under Rule 60(b), "the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party; (4) the judgment is void; (5) the

judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or (6) any other reason that justifies relief." As noted by Defendants, Plaintiff has not identified which provision of that Rule supplies a basis for relief. Response at 2.

Under either Rule 59(e) or Rule 60(b), the fundamental argument raised in Plaintiff's Motion is: "[r]econsideration of this dismissal is sought on the ground that the final decision in *Baze* did not issue from the U.S. Supreme Court until May 19, 2008--the date on which the Supreme Court mandate issued." Motion at 5. Plaintiff references Supreme Court Rule 45(2), which states:

> In a case on review from a state court, the mandate issues 25 days after entry of the judgment, unless the Court or a Justice shortens or extends the time, or unless the parties stipulate that it issue sooner. The filing of a petition for rehearing stays the mandate until disposition of the petition, unless the Court orders otherwise. If the petition is denied, the mandate issues forthwith.

Plaintiff then cites Supreme Court Rule 44(1), which, in pertinent part states: "[a]ny petition for the rehearing of any judgment or decision of the Court on the merits shall be filed within 25 days after entry of the judgment or decision, unless the Court or a Justice shortens or extends the time." He argues that the possibility of a rehearing in *Baze* was not remote, and that the

Court should construe the date that a final decision was rendered in the *Baze* case to be the date on which the mandate issued.

Defendants contend that Plaintiff's position is unsupported by decision or Court rule. They further note that Plaintiff provides no citation of authority for his proposition, other than a comparison citation to Supreme Court Rule 45(2). In response to Plaintiff's contention, Defendants explain:

> 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 of 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.

Response at 4.

Defendants additionally point to well-settled law on when finality attaches in post-conviction cases: when the conviction is affirmed on the merits or a petition for a writ of certiorari is denied or when the time for filing a petition for writ of certiorari expires. *Caspari v. Bohlen*, 510 U.S. 383, 390 (1994) (citing *Griffith v. Kentucky*, 479 U.S. 314, 321 n.6 (1987)). In

the instant case, Defendants assert, that date was April 16, 2008, the date of affirmance by the Supreme Court in *Baze*, under the well-established definition of finality.

This Court looks first and foremost to the date *Baze* was decided, April 16, 2008, and what that decision meant, particularly with respect to finality. Immediately after the decision was rendered, the federal district courts and the United States Supreme Court considered the decision to be the law of the land. On May 1, 2008, in *Jackson v. Houk*, No. 3:07CV0400, 2008 WL 1946790, at *76, at *76 n.11 (N.D. Ohio 2008), the District Court cited *Baze*, and said the Supreme Court recently held that Kentucky's method of execution, the same method used by Ohio (and at least 30 of 36 states) is constitutional. On May 2, 2008, in *Moeller v. Weber*, No. Civ. 04-4200, 2008 WL 1957842, at *2 (D.S.D. 2008), the District Court referenced the *Baze* decision leading the court to a specific conclusion. On May 16, 2008, in *Walker v. Epps*,[5] No. 4:07CV176-P-B, 2008 WL 2095704, at *1 (N.D.Miss. 2008) (emphasis added), the District Court said:

> On April 16, 2008, the United States Supreme Court decided *Baze v. Rees*, — U.S.-, 128 S.Ct, 1520 (2008), **which established** a

[5] The opinion concerns Plaintiff Earl Wesley Berry. "On October 30, 2007, the United States Supreme Court stayed his execution pending disposition of his petition for writ of certiorari. *See Berry v. Epps*, - U.S. -, 128 S.Ct. 531 (October 30, 2007)." *Walker v. Epps*, 2008 WL 2095704, at *1. On October 18, 2007, Berry had filed a challenge to Mississippi's lethal injection protocol pursuant to 42 U.S.C. § 1983. *Id*.

> means of determining whether a State's particular method of execution violates the Eighth Amendment. The plurality of the Court found that the Eighth Amendment is violated by a State's method of execution where that protocol presents a "substantial risk of serious harm" in light of "feasible, readily implemented" alternative procedures. *Id*. at 1531, 532. **On April 21, 2008, Berry's petition for writ of certiorari was denied by the Supreme Court, and his stay of execution was lifted.** *See Berry v. Epps*, - S.Ct. -, 2008 WL 1775034 (April 21, 2008).

Thus, within as little as five days after the April 16, 2008, *Baze* decision, a stay of execution was lifted by the Supreme Court of the United States. Moreover, prior to the issuance of the mandate in *Baze*, the federal district courts were citing *Baze* as final authority and binding Supreme Court precedent.

Even the Supplemental Brief of Plaintiff/Appellant Christopher Scott Emmett,[6] filed in the Fourth Circuit on May 2, 2008 (prior to the issuance of the mandate in *Baze*) states "[b]ecause Emmett's case is on direct review, this Court is **bound to apply *Baze* as the law currently in effect**." *Emmett v. Johnson*, No. 07-18, 2008 WL 2127245, at *3 n.2 (4th Cir. 2008) (Supplemental Brief of Plaintiff-Appellant) (emphasis added).

For example, in another context, the Court looks to the June 24, 2004, decision in *Blakely v. Washington*, 542 U.S. 296 (2004).

[6] Emmett asserts in his brief that the district court erred in awarding summary judgment to Virginia in an Eighth Amendment lethal injection protocol case.

Rehearing was denied by the Supreme Court on August 23, 2004. *Blakely v. Washington*, 542 U.S. 961 (2004). Prior to rehearing being denied, however, on July 12, 2004, the decision was immediately taken into account in questioning the validity of sentences. *United States v. Penaranda*, 375 F.3d 238, 239 (2nd Cir. 2004), *certified question dismissed*, 543 U.S. 1117 (2005). Also, on July 9, 2004, the Eleventh Circuit, in denying an application seeking authorization to file a second or successive motion to vacate, referred to the 5-4 *Blakely* decision finding Blakely's enhanced sentence violated *Apprendi v. New Jersey*, 530 U.S. 466 (2000), but recognizing that the Supreme Court had not made the decision retroactive to cases on direct review. *In Re Dean,* 375 F.3d 1287, 1288-90 (11th Cir. 2004).

Looking closer to home, this Court, in *Bashir v. United States of America*, Case No. 3:05-cv-1165-J-12HTS, Order (Doc. #39) at 15, filed June 14, 2007, ordered:

> This case is **STAYED** pending the final resolution of the Ali case in the United States Supreme Court, and Defendant shall notify the Court when the United States Supreme Court has made its final ruling in Ali, at which time the stay will be lifted, and this Court thereafter will rule upon the remaining portions of the following motions[.]

Ali v. Federal Bureau of Prisons, 128 S.Ct. 831 (2008) was decided on January 22, 2008, affirming the decision of the Eleventh Circuit. Promptly thereafter, on January 25, 2008, the Defendant United States of America, in Case No. 3:05-cv-1165-J-12HTS, filed

a Motion to Reopen Case (Doc. #40) at 1 (emphasis added) stating:

> 1. On June 13, 2007, this Court entered an Order directing defendant to provide notice when the United States Supreme Court made its **final ruling** in Ali v. Federal Bureau of Prisons et al., -S.Ct.-, 2008 WL 169359 (US).
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> 2. On January 22, 2008, the United States Supreme Court entered its pronouncement, holding that a federal inmate's claim that prison guards mishandled his personal property during an inter-prison transfer is barred by 28 U.S.C. § 2680(c), and that therefore, such claims are excluded under the Federal Torts Claims Act. A copy of said opinion is attached hereto as Exhibit A.
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> 3. The Supreme Court having entered its ruling in the Ali case, it is therefore respectfully requested that this Honorable Court lift the stay imposed in the Order of June 13, 2007, and that the case be reopened so the Court can proceed to adjudicate and rule on Defendant's Motion to Dismiss or, in the Alternative, for Summary Judgment (Doc. 33) and Plaintiff's Motion to Preclude Summary Judgment and Motion to Dismiss Defendant's Request for Summary Judgment (Doc. 38) as it relates to the applicability of 28 U.S.C. § 2680(c).

The stay of the *Bashir* case was lifted and the case reopened on January 31, 2008, Case No. 3:05-cv-1165-J-12HTS, Order (Doc. #41). The Supreme Court "judgment issued"[7] in the *Ali* case on February 25, 2008. *Ali v. Federal Bureau of Prisons*, No. 06-9130 (Docket) (U.S.).

[7] The terminology used in the Supreme Court docket. *See* Supreme Court Rule 45(3).

The above cases support this Court's conclusion that the *Baze* decision of April 16, 2008, was a final decision. The Court is not convinced that Supreme Court Rules 44 (Rehearing) and 45 (Process; Mandates) prevent this Court from considering the April 16, 2008, *Baze* decision to be a final decision. In fact, it is quite apparent that the Supreme Court and the United States District Courts must abide by the Supreme Court decision when it is rendered. In this instance, the *Baze* decision was made on April 16, 2008, and the Plaintiff had a clear obligation to move to reopen within thirty days of that decision.

Plaintiff attempts to distinguish his case by stating that the Supreme Court did not treat the *Baze* decision as a final decision because Justice Thomas, in granting the application for stay of execution of sentence of death pending the timely filing and disposition of a petition for writ of certiorari, said: "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).

This Court is not convinced that this language meant that the Supreme Court would not consider the *Baze* decision to be a final decision when rendered on April 16, 2008. *See* Response at 6-7. The petition for writ of certiorari was ultimately denied, not

granted. *Schwab v. Florida*, No. 07-10275, 2008 WL 953622 (U.S. 2008). The stay was automatically lifted on May 19, 2008, when the petition for writ of certiorari was denied.

Again, this Court notes that after *Baze* was decided on April 16, 2008, the Supreme Court immediately lifted a stay of execution in a lethal injection protocol case even though the judgment of the Supreme Court in *Baze* had not yet been "sent down" to the Circuit Court. *See Berry v. Epps*, No. 07-7348, 2008 WL 1775034, at *1 (U.S. April 21, 2008); *Berry v. Epps*, 128 S.Ct. 531 (2007) (stating that in the event the petition for writ of certiorari was denied, the stay shall terminate automatically, and in the event the petition for writ of certiorari was granted, the stay shall terminate "upon the sending down of the judgment of this Court").

Plaintiff's argument does not carry the day in light of *Berry v. Epps* and the lifting of the stay of his execution on April 21, 2008, less than a week after the *Baze* decision on April 16, 2008. Clearly, the lifting of the stay of execution was not dependent on the issuance of the mandate in *Baze*.

In sum, for the reasons stated above, this Court is not persuaded by Plaintiff's contentions that the decision rendered in *Baze* on April 16, 2008, was not the final decision rendered by the Supreme Court which triggered his obligation to move to reopen the case within thirty days. Plaintiff has not shown that relief is justified under Rule 60(b).

Plaintiff asserts that the dismissal of his Complaint without prejudice effectively deprives him of any meaningful ability to litigate civil rights claims and reconsideration is warranted to prevent manifest injustice.[8] He contends that if he files a new civil rights case the state would be given twenty days to respond, and Plaintiff is scheduled to be executed on July 1, 2008, depriving him of meaningful review. This argument is due to be denied. This Court has required expedited responses when presented with various urgent circumstances, and certainly with the advent of electronic filing, the speed of receiving responses has been tremendously enhanced.

Alternatively, Plaintiff argues the incapacity of his counsel, CCRC, after the Florida Supreme Court's decision in *State v. Kilgore*, 976 So.2d 1066 (Fla. 2007) (concluding that CCRC is not authorized to represent a death sentenced petitioner in a collateral post conviction proceeding attacking the validity of a prior conviction used as an aggravator in the death case), *petition for cert. filed*, (U.S. May 28, 2008) (No. 07-11177), as cause for the inaction of counsel in response to the Court's order to file a motion to reopen the case within thirty days after a final decision was rendered in *Baze*. Based on the decisions in *State ex rel.*

[8] Of course, this argument seems much less persuasive in light of the fact that Plaintiff did not promptly seek to reopen his case after the *Baze* decision in order to obtain an expeditious ruling in his own case.

Butterworth v. Kenny,[9] 714 So.2d 404 (Fla. 1998) (granting the state's petition and directing that CCRC has no authority to represent capital defendants in civil rights actions) and *Diaz v. State*, 945 So.2d 1136, 1154 (Fla.) (finding that by statute, § 27.702, Fla. Stat., CCRC cannot file § 1983 actions in federal court to challenge Florida's lethal injection procedures and as a method of execution), *cert. denied*, 127 S.Ct. 850 (2006), Plaintiff's argument has no merit. There was no change in the legal landscape after the Complaint was filed; the Supreme Court of Florida had already found that CCRC's representation was limited by statute to actions challenging the validity of the conviction and sentence, and that a civil rights action was not such a challenge. *State ex rel. Butterworth v. Kenny*, 714 So.2d at 410.

The case will not be reinstated. Since the Complaint is not going to be reinstated, the Court will not be appointing counsel as the case is closed. All pending motions were denied as moot and were terminated by the Court's Order of May 19, 2008. (Doc. #20).

This Court did require a response from the Federal Public Defender in light of Plaintiff's request that the Federal Public Defender be appointed as replacement counsel for CCRC, even though

[9] CCRC initiated a civil rights case under 42 U.S.C. § 1983 seeking declaratory and injunctive relief claiming the functioning of Florida's electric chair, leading to fires during the electrocution process, rendered it an unconstitutional method of execution. *State ex rel. Butterworth v. Kenny*, 714 So.2d at 406.

it appeared that the Federal Public Defender was prohibited from representing Plaintiff with regard to his conviction and death sentence. The Federal Public Defender has filed a 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).[10] The Defender confirms therein that the Defender has been specifically advised that it cannot represent Plaintiff in any matter related to his conviction and death sentence, including a civil rights action raised pursuant to 42 U.S.C. § 1983.[11] The Defender states that Judge Tjoflat's letter is still in effect today, and the Defender does not have the authority to represent Florida death sentenced inmates in state or federal court in any matters related to the convictions and death sentences. (Doc. #29-3, June 3, 2008, Letter from the Administrative Office of the United States Courts).

Accordingly, it is now

ORDERED AND ADJUDGED:

1. Plaintiff's June 4, 2008, Motion for an Order Pursuant to Fed.R.Civ.P. 59(e) and 60(b) to Alter or Amend Final Judgment,

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[10] The Federal Public Defender is not a party, nor counsel for any party.

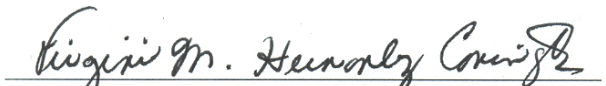
[11] The letter from the Honorable Gerald B. Tjoflat states: "The Court has determined as a matter of policy that federal public defenders in the Eleventh Circuit should not represent in post conviction proceedings–-whether in state or federal court–- those convicted of capital crimes in state court." (Doc. #29-2).

Reinstate Case, and for Appointment of Counsel (Doc. #25) is **DENIED**.

2. Plaintiff's June 9, 2008, Reply to the Responses of the Federal Defender for the Middle District of Florida and of the State of Florida (Doc. #30) is **STRICKEN** pursuant to Local Rule 3.01(c).

3. The Clerk of the Court shall immediately, by facsimile, provide the Warden at Florida State Prison with a copy of this Order, and the Warden shall immediately provide a copy of this Order to Mark Dean Schwab.

DONE AND ORDERED at Jacksonville, Florida, this 9th day of June, 2008.



VIRGINIA M. HERNANDEZ COVINGTON
UNITED STATES DISTRICT JUDGE

sa 6/9
c:
Mark Dean Schwab
Warden, FSP
Daphney Elaine Gaylord, Esquire
Mark S. Gruber, Esquire
Peter J. Cannon, Esquire
Kenneth S. Nunnelley, Ass't AG
James Skuthan, Federal Public Defender