UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT
CASE NO. 07-15329-P

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS and OTHER UNKNOWN EMPLOYEES AND AGENTS,
Florida Department of Corrections
Defendants/Appellants,

v.

MARK DEAN SCHWAB,
Plaintiff/Appellee.
_____/

APPELLEE'S RESPONSE TO APPELLANT'S MOTION TO VACATE STAY OF EXECUTION

The issue is whether the district court erred in granting a stay of execution. The court did not err. "The standard of review of a stay of execution issued by a district court is abuse of discretion." *Hauser v. Moore*, 223 F.3d 1316 (11th Cir.2000); *Jones v. Allen*, 485 F.3d 635 (11th Cir. 2007). The district court was well acquainted with the case, received and reviewed the pleadings filed by the parties, and entertained oral argument. The order granting the stay detailed the procedural history of the case accurately, summarized the allegations in the underlying complaint, addressed the merits of Schwab's motion to stay execution, and granted the relief requested in the form of a brief stay of execution. It is clear that, should the execution proceed as planned, that the court would lose jurisdiction of the case and the harm to the plaintiff would be irremediable.

As the court noted, a stay of execution is an equitable remedy. The court listed the allegations in the complaint and compared them to the questions presented in *Baze v. Rees*, 128 S.Ct. (October 3, 2007). The court fully acknowledged the state's interest in carrying out the execution without undue interference. The court also acknowledged the state's argument that the

Plaintiff lacked diligence, which is also the argument now brought before this Court. However, the court also considered the identity of issues raised in this case and in *Baze*, the fact that lower courts around the nation have also granted stays in similar situations, and the inadvisability of deciding the case in a vacuum. Considering the totality of the circumstances, the court found that "the fact that *Baze* is now before the Supreme Court is an extraordinary circumstance that overmatches considerations of delay, at least insofar as a stay is concerned." The court's decision to grant a relatively short stay until *Baze* is decided is in keeping with decisions that have been made by the Supreme Court and numerous courts around the country, and cannot be deemed an abuse of discretion.

The Defendants' argument in favor of vacating the stay is vulnerable to criticism. The Defendants point out that Schwab was not one of the petitioners in the original Lightbourne litigation that was filed in the wake of the Diaz execution, but neglects to point out that executions in Florida were suspended in the wake of that execution, and that the state argued in various lethal injection claims that were filed on behalf of death row prisoners, including Schwab, that *Lightbourne* was the lead case in the state on the issue. The Defendants argue that the court treated Baze's certiorari as if it had precedential value. The court was well aware of the law in this area and did no such thing. The court was aware, however, that the Supreme Court has not squarely addressed the constitutionality of a method of execution in over a century, whereas it is poised to do so now. The Defendants also that Schwab "has no likelihood of success on the merits." It is on this component of the equities involved in evaluating a stay application that the court appropriately considered not only the grant of certiorari in *Baze*, but also the fact stays of execution have been granted in that Court under the "Rule of Five," as well as in other courts around the country.

On this point, the Defendants' representations about the record on page 4 of their motion are simply incorrect. Contrary to their representations, Schwab did raise the three questions in the *Baze* petition in state court, both explicitly in his postconviction motion and explicitly at the Florida Supreme Court. The finding by the Florida Supreme Court that is quoted by the Defendants was addressed to the lower court's error in failing to grant Schwab an evidentiary hearing, which the Florida Supreme Court found to be harmless after it took judicial notice of the evidentiary hearing in *Lightbourne*.

Timeline of Events

Counsel for the State of Florida spends a great deal of time in its Emergency Motion to Vacate Stay of Execution discussing the timeliness of Mr. Schwab's instant §1983 action. See, eg., Schwab v. Crosby, et.al., Emergency Motion to Vacate Stay of Execution (November 14, 2007) at 2, 6-8 (Hereinafter "Emergency Motion"). Counsel for the State, however, ignores the timeline of events leading up to the Plaintiff's filing his §1983 claim, alleging that the filing was "dilatory and abusive". Emergency Motion at 6 fn.1.

On July 18, 2007, the Governor of the State of Florida signed Mr. Schwab's death warrant and scheduled his execution for November 15, 2007. The day after, the Florida Supreme Court issued an Order establishing case management guidelines. (Florida Supreme Court Order SC80289). On September 14, 2007, the Plaintiff submitted his initial brief on the merits to the Florida Supreme Court. Nearly two months later, On November 7, 2007, the Florida Supreme Court denied the Plaintiff's motion for rehearing and stay. That same day, the Florida Supreme Court issued its mandate.

The very next day, Thursday November 8, 2007, counsel for the plaintiff filed an application for leave to file a successive habeas corpus petition pursuant to 28 U.S.C. §2244(b) with this

Court. The next day, Friday, November 9, 2007, this Court denied the application. In this Court's denial, the order stated: "this claim cannot serve as a proper basis for a second or successive habeas petition". This Court noted that since Hill v. McDonough, 126 S.Ct. 2096 (2006), a §2254 proceeding is no longer valid. Instead, the proper vehicle for such a claim is a 42 U.S.C. §1983 claim.

The federal courts were closed on Saturday, Sunday as well as Monday, November 12, 2007, in observance of Veteran's Day. The very next business day available to the Plaintiff to file his Complaint was November 13, 2007. This was the day the Complaint was actually filed.

Counsel for the State of Florida should not be heard to complain that the Plaintiff has had years to litigate this claim but only waited until the "eve of execution" to file his Complaint. The current lethal injection protocols that serve as a basis for the instant Complaint were not promulgated and made effective until August 1, 2007. Counsel for the State has repeatedly, consistently and strenuously argued that any claim challenging the prior protocols is irrelevant. Counsel for the State should be estopped from making any inconsistent claim in an obvious attempt to "have his cake and eat it, too." See generally *United States v. Campa*, 459 F.3d 1121, 1152 (11th Cir.2006) (observing that doctrine of judicial estoppel "is designed to prevent parties from making a mockery of justice by inconsistent pleadings").

The concept of judicial estoppel is not knew and should have been known to opposing counsel prior to alleging that Mr. Schwab was "dilatory and abusive". The United States Supreme Court in *New Hampshire v. Maine*, 532 U.S. 742 (2000), discussed the application of this remedy:

> "[W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." *Davis v. Wakelee*, 156 U.S. 680,

> 689, 15 S.Ct. 555, 39 L.Ed. 578 (1895). This rule, known as judicial estoppel, "generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." *Pegram v. Herdrich*, 530 U.S. 211, 227, n. 8, 120 S.Ct. 2143, 147 L.Ed.2d 164 (2000); see 18 Moore's Federal Practice § 134.30, p. 134-62 (3d ed. 2000) ("The doctrine of judicial estoppel prevents a party from asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding"); 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4477, p. 782 (1981) (hereinafter Wright) ("absent any good explanation, a party should not be allowed to gain an advantage by litigation on one theory, and then seek an inconsistent advantage by pursuing an incompatible theory").

Id. at 749.

Properly characterized, the State of Florida's position is inconsistent. In defending against claims challenging the lethal injection protocols, the State has argued that only the most recent protocols are relevant and that the events of the Diaz execution are not to be considered as material because that execution took place pursuant to prior lethal injection protocols. Now, counsel for the State of Florida claims that the Plaintiff was both "dilatory and abusive" in not pursuing this claim earlier when, in fact, the claim is a fairly new.

Finally, opposing counsel's reliance on *Gomez v. United States Dist. Court*, 503 U.S. 653 (1992) is misplaced. Gomez was modified by the United States Supreme Court in *Lochnar v. Thomas*, 517 U.S. 314 (1996). There the Court stated:

> If the district court cannot dismiss the petition on the merits before the scheduled execution, it is obligated to address the merits and must issue a stay to prevent the case from becoming moot. That is, if the district court lacks authority to directly dispose of the petition on the merits, it would abuse its discretion by attempting to achieve the same result indirectly by denying a stay.

Lochnar at 1297.

While *Lochnar* involved an initial habeas petition, the principle equally applicable here based on the above arguments.

Nature of a 42 U.S.C. §1983 Action

Counsel for the State of Florida alleges that the Plaintiff waived his arguments concerning the constitutionality of Florida's current lethal injection method. Emergency Motion at 1, 4-5.

Opposing counsel misses the point, conflating the purposes of a 28 U.S.C. 2254 petition and a 42 U.S.C. 1983 Complaint. A plain reading of the two statutes in questions makes this point. 42 U.S.C. §1983 states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

On the other hand, an appeal under section 28 U.S.C. 2254 is exactly that – an appeal from a prior judgment. Section 2254 states, in relevant part:

> § 2254. State custody; remedies in Federal courts
> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.
> (b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that--
> (A) the applicant has exhausted the remedies available in the courts of the State; or
> (B)(i) there is an absence of available State corrective process; or
> (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

The United States Supreme Court discussed this distinction in *Hill v. McDonough*, 126 S.Ct. 2096 (2006), and reaffirmed the separate natures and pleading requirements. In fact, the Court especially noted that the specific pleading requirements of the Federal Rules of Civil Procedure, such as Rule 8 and Rule 9, were not overruled and still required in a §1983 complaint. *Hill*, 126 S.Ct. at 2103.

The Plaintiff's Complaint filed pursuant to 42 U.S.C. §1983 is an original complaint that does not attack the validity of a prior judicial ruling. It does not delve in to, or concern itself with, prior judicial proceedings in the manner in which the State of Florida advances.

Conclusion

For the reasons set forth in this response, the Court should deny the Defendants' motion to vacate a stay.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Mark S. Gruber, hereby certify that the foregoing Petition for Writ of Certiorari was served via electronic mail and overnight courier on the following counsel for Respondents:

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