

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC07-2138

MARK DEAN SCHWAB,

Appellant,

v.

Active Death Warrant

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE EIGHTEENTH JUDICIAL CIRCUIT FOR BREVARD COUNTY,
STATE OF FLORIDA

SUPPLEMENTAL ANSWER BRIEF OF APPELLEE

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STATE'S SUPPLEMENTAL ANSWER BRIEF

COMES NOW the State of Florida and files this supplemental answer brief in compliance with the terms of this Court's prior order.

STATEMENT OF THE CASE

The "statement of the case" set out on pages 2-4 of Schwab's brief is incomplete. The State relies on the statement of the case contained in the previously-filed answer brief with the following additions.

On November 13, 2007, Schwab, through counsel, filed a civil lawsuit pursuant to 42 U.S.C. § 1983 in Federal District Court for the Middle District of Florida.¹ On November 14, 2007, the district judge heard oral argument on the contemporaneously-filed motion for stay of execution, and, later in the day, entered a temporary stay. The State appealed the stay of execution to the Court of Appeals for the Eleventh Circuit. On

¹ On November 21, 2007, this Court decided *State v. Kilgore*, 32 Fla.L.Weekly S743 (Fla. Nov. 21, 2007), which explicitly held that the *Florida Statute* §27.702 restrictions on the scope of representation by Capital Collateral Regional Counsel mean exactly what they say. *State Ex Rel Butterworth v. Kenny*, 714 So. 2d 404, 410 (Fla. 1998) ". . . the legislature, in expressing its intent to prohibit CCRC from engaging in civil litigation on behalf of capital defendants, meant only to prohibit CCRC from engaging in civil litigation other than for the purpose of instituting and prosecuting the traditional collateral actions challenging the legality of the judgment and sentence imposed. **A federal civil rights action filed under section 1983 for a declaratory judgment or for injunctive relief is a civil action that does not test the legality of the conviction and sentence.**") (emphasis added).

November 15, 2007, that Court issued a decision vacating the stay of execution. *Schwab v. McDonough*, 21 Fla.L.Weekly Fed.C183 (11th Cir. Nov. 15, 2007).

SUMMARY OF THE ARGUMENT

The collateral proceeding trial court correctly denied relief.

ARGUMENT

I. THE "MENTAL STATE EVIDENCE" CLAIM

On pages 6-26 of his brief, Schwab argues that summary denial of his claim concerning the trial mental state expert was error. Florida law is well-settled that a trial court's summary denial of a motion for post-conviction relief will be affirmed where the law and competent substantial evidence support its findings. *Diaz v. Dugger*, 719 So. 2d 865, 868 (Fla. 1998). For the reasons set out in the State's *Answer Brief*, the trial court's order satisfies that standard and should be affirmed in all respects.

To the extent that further discussion of the claims contained in Schwab's brief is necessary, the arguments contained in that brief seem to be based on the premise that the settled rules do not apply to Schwab, or, at the least, should be disregarded for his benefit. That notion finds no support in law or common sense, and, in fact has been expressly rejected. There is no doubt that the "Constitution does not require one-

sidedness in favor of the defendant," *Davis v. Kemp*, 829 F.2d 1522, 1528 (11th Cir. 1987), nor is there a colorable argument that there is a different set of rules for death-sentenced defendants. In speaking to that issue, the Eleventh Circuit said, "[w]e do not have one set of rules for petitioners and their attorneys in capital cases and another set for everyone else." *Jackson v. Crosby*, 375 F.3d 1291, 1300 (11th Cir. 2004) (Carnes, J., concurring). That observation is equally applicable here, where Schwab would have this Court excuse his failure to even attempt to speak with former State expert Samek until after his death warrant was signed. While it is true that "due diligence does not require clairvoyance," due diligence does require that the defendant do **something**. Schwab did not do that, despite the fact that Samek has been known to him since the time of his capital trial - Schwab could have attempted to contact Samek at any time between 1994 and August of 2007, and simply did not.² Whatever that demonstrates, it is assuredly not diligence of any sort, let alone due diligence that would excuse the untimely submission of this claim.

Finally, the State could not have compelled Schwab to submit to a mental state evaluation at the time of his capital

² Schwab did not present any mental state testimony at the hearing on his first post-conviction relief motion. He could have attempted to use Samek at that time, and did not. He should not be heard to complain.

trial. Schwab's claim that the State somehow "limited" the information available to Samek is false. Any limitation on the information Samek had was the product of Schwab's own actions, and it is disingenuous to now attempt to use a scenario orchestrated by Schwab as a basis for accusing the State of some imagined impropriety. The Circuit Court properly denied relief, and that decision should not be disturbed.

II. THE "TRAINING LOGS" CLAIM

On pages 26-35 of his brief, Schwab argues that he should have been given an evidentiary hearing based on notes made by Florida Department of Law Enforcement personnel during execution training during **July** of 2007.³ The State relies on the arguments contained in its previously filed *Answer Brief*. It is important to note that the "training notes" at issue related to an earlier version of the execution procedures, **not the August 1, 2007, procedures which will be used in Schwab's execution.** The Circuit Court correctly denied relief.

³ Schwab's brief also refers to Department of Corrections "training logs" in the heading on page 26 of his brief, but makes no argument about any such documents. His brief is expressly limited to FDLE notes, as was his claim in the Circuit Court.

CONCLUSION

WHEREFORE, the State submits that the collateral proceeding trial court's denial of relief should be affirmed in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by **e-mail** and **U.S. Mail** to: **Mark Gruber**, Assistant CCRC-Middle, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619 on this _____ day of December, 2007.

Of Counsel

CERTIFICATE OF COMPLIANCE

This brief is typed in Courier New 12 point.

Of Counsel