IN THE SUPREME COURT OF FLORIDA

CASE NO.SC07-2138

MARK DEAN SCHWAB,

Appellant,

Death Warrant Signed
Execution Stayed

STATE OF FLORIDA

Appellee.

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

MOTION FOR REHEARING

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COMES NOW, the Appellant, Mark Dean Schwab, by and through undersigned counsel pursuant to Fla.R.App.P. 9.330, and submits this MOTION FOR REHEARING based upon the following:

As to Argument I in the original brief, the Appellant respectfully disagrees with this Court's opinion denying relief and relies on the arguments previously presented.

ARGUMENT II

THE LOWER COURT ERRED WHEN IT DENIED MR. SCHWAB'S NEWLY DISCOVERED EVIDENCE CLAIM BASED ON NEWLY DISCOVERED EVIDENCE, SPECIFICALLY THE DEPARTMENT OF CORRECTION'S TRAINING LOGS AND FDLE MOCK EXECUTION TRAINING NOTES. THIS EVIDENCE CLEARLY REVEALS THAT FLORIDA'S LETHAL INJECTION METHOD OF EXECUTION VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION

On January 24th, 2008, this Court issued its opinion in the instant case affirming the trial court's summary denial of this claim. In his initial brief, Mr. Schwab argued that his right to an evidentiary hearing was governed by constitutional law and this Court's Rules. As argued in the initial brief, on a previous occasion this Court clearly adopted revisions to the Florida Rules of Criminal Procedure in matters relating to postconviction relief. The purposes of these revisions were clearly spelled out in the Court's opening statement:

> In drafting these proposed rules, we have sought to identify and eliminate those capital postconviction procedures that have historically created unreasonable delays in the process, while still maintaining quality and fairness.

In re Amendments to the Florida Rules of Criminal Procedure 3.851, 3.852 and 3.993, 772 So.2d 488, 489 (Fla. 2000).

Also, this Court has stated when a claim has been summarily denied "we 'must accept all allegations in the motion as true to the extent they are not conclusively rebutted by the record.'" *Thompkins v. State*, 32 Fla. L. Weekly S232 (Fla. May 10, 2007). In other words, the factual allegations presented by Mr. Schwab in the lower court must be accepted as true.

Mr. Schwab submits that this Court erred when it affirmed the lower court's summary denial because the facts, accepted as true, were not conclusively rebutted by the record. In fact, the record in this case, inclusive of the record in *Lightbourne v. McCollum*, 32 Fla. L. Weekly S687 (Fla. Nov. 1, 2007), negates this assertion.

This Court's January 24th opinion, however, puts Mr. Schwab in a thorny position. His pleadings in the lower court included numerous factual allegations that were not conclusively rebutted by the record. These allegations, however, were not the totality of the evidence to be presented. Unfortunately, the trial court made its merit ruling based on only a small proportion of the factual evidence upon which Mr. Schwab's claim is based. This was error.

In denying relief, this Court stated

> Even taking Schwab's allegations as true, Schwab has not met the standard that this Court set forth in *Jones v. State*, 701 So.2d 76, 79 (Fla.1997):In order for a punishment to constitute cruel or unusual punishment, it must involve "torture or a **lingering death**" or the infliction of "**unnecessary** and wanton

> pain." *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 67 S.Ct. 374, 91 L.Ed. 422 (1947). As the Court observed in *Resweber*: "The cruelty against which the Constitution protects a convicted man is cruelty **inherent in the method of punishment**, not the **necessary suffering involved in any method employed to extinguish life humanely**." *Id.* at 464, 67 S.Ct. at 376. *See also Lightbourne v. McCollum*, 969 So.2d 326, 32 Fla. L. Weekly S687 (Fla. Nov. 1, 2007) (reaffirming the standard announced in *Jones*, 701 So.2d at 79).

Schwab v. State, Slip Op. at 4-5 (Fla. Jan. 24, 2008)(emphasis added).

While the United States Supreme Court has yet to define the proper standards for evaluating method of execution claims, this Court has announced its own standard for such cases by citing the language above. An analysis of how this standard applies to the facts of this case demonstrate that this motion for rehearing should be granted.

I. Defining the Terms

The words used to describe conduct that may demonstrate an Eighth Amendment violation are unclear. While the United States Supreme Court may add clarification this term when it decides *Baze v. Rees* (No. 07-5439), this Court's use of the *Jones* standard invites further analysis.

a. "Unnecessary" and "Necessary"

The term "unnecessary" is normally defined as "not necessary or essential; needless; unessential". The term "necessary" is likewise

generally defined as being "essential, indispensable, or requisite". As used within the meaning of the Eighth Amendment, unnecessary pain would be pain that is not necessary, essential, needless and unessential. Similarly, in an Eighth Amendment context, necessary suffering would be that amount of suffering that is essential, indispensable and requisite.

Standing alone, these terms add some insight but they are far from conclusive. They must be read in conjunction with the other relevant words offered by this Court.

b. "Lingering Death"

The term "lingering" can be defined as "to persist", "to be tardy in acting", and "to proceed slowly". In an Eighth Amendment context, the term "lingering" can be construed as an unnecessarily later than expected death or a death that was expected to occur at some point of time but has not.

Standing alone, the phrase "lingering death" does not conclusively shed any more insight. Reading this phrase *in pari materia* with the terms "necessary" and "unnecessary" does not assist in defining an Eighth Amendment violation because "lingering" applies to death and "necessary" and "unnecessary" applies to pain. We get a better understanding, however, when we analyze the remaining relevant language cited by this Court.

c. "Inherent in the Method of Punishment" and "Necessary Suffering

Involved in any Method Employed to Extinguish Life Humanely"

It would be unnecessary to precisely define each word in these phrases. A simple analysis of these phrases together, however, adds clarification not only to them but to the meaning of "unnecessary", "necessary" and "lingering death".

The focus of these phrases is shown by the shared use of the word "method", which refers to the method of execution. The method is the means used to execute an individual (whether by firing squad, hanging, gas chamber, lethal injection or electric chair). The amount and locus of pain experienced by the condemned differs with each method employed. For example, the pain, and the locus of that pain, experienced by a person facing a firing squad will undoubtedly differ from that experienced by a person who dies on the gallows. Thus, the threshold between constitutional and unconstitutional pain must stay within the confines of the challenged method of execution.

d. A Workable Standard

Combining these terms and phrases gives us a meaningful way to interpret this Court's standard announced in *Jones*. The first step is an objective analysis of the particular method based on the mechanics of the particular means necessary to carry out an execution. The second step is an objective determination of what pain, and the degree of pain, is requisite with or inherent in the method. The third step involves an objective determination when

death should occur. In other words, at what point of time should a person's death normally occur after the execution process has started? Lastly, unnecessary pain should be assessed by determining at what point deviations in the first three steps cross the constitutional threshold or, based on prior knowledge and evolving standards, does the risk of such deviations violate the Eighth Amendment.

II. Application of this Standard

Unfortunately, this Court erred when it failed to give the words in the *Jones* standard any meaning; it erred by ignoring the facts alleged in Mr. Schwab's motion and those facts already contained in the record and applying them to the *Jones* standard; and, this Court erred by affirming summary denial of Mr. Schwab's claim.

a. DOC Execution Training

Specifically, the inadequate and substandard training of the DOC execution team members clearly violates the Eighth Amendment. As found by the Governor's Commission on Administration of Lethal Injection("GCALI")in its Final Report, inadequate training was a major contributing factor leading to the events of the Diaz execution. To reduce the risk of these events recurring, GCALI determined that better and proper training of the DOC execution team was required.

Without better training, it is not a possibility but a statistical probability shown by the data in the record that the events of December 13th, 2006, will be repeated. With the current level of training, it has been shown that two of the five mock executions resulted in failed exercises. This is an error rate of 40%. In other words, this continued level of training will result in a probability of eight failed "exercises" for every twenty practice executions and sixteen failed "exercises" for every forty practice executions. This is shown in Table 1.

Table 1 : July 2007 Training Exercises

S = July 2007 Mock Executions (n=5)
A = Failed Exercises
B = Successful Exercises

Sets

S={1,2,3,4,5}
A={2,3}
B={1,4,5}

Calculations

Probability of A occurring:

P(A)= 2/5 = .40 or 40%

Expected Value of x over n times where n=20 and p=.40

$P(x) = E(x) = \Sigma\, xp(x) = \mu$
$\mu = (20)(.40) = 8$
Thus we can expect 8 failed exercises out of 20 mock executions.

Expected Value of x over n times where n=40 and p=.40

$P(x) = E(x) = \Sigma\, xp(x) = \mu$
$\mu = (40)(.40) = 16$
Thus we can expect 16 failed exercises out of 40 mock executions

The impact of this evidence is enormous. Without an increased level of proficiency through better training, the DOC execution team

is doomed to repeat the past, and they are unwilling to take even the simplest of measures to prevent these unconstitutional problems. There is absolutely no evidence that would support a prediction that these error rates will be any different during future lethal injection executions. In fact, testimony contained in the *Lightbourne* hearings, including the GCALI record admitted during *Lightbourne*, contains data that lead to the exact opposite conclusion: DOC is content performing executions that promise to violate the Eighth Amendment in a significant number of cases.

Evidence introduced during the *Lightbourne* proceedings, and included in Mr. Schwab's record as stated in this Court's November 1st, 2007 opinion, reveals three major areas of concern that speak squarely to a *Jones* analysis: 1) technical issues, 2) duration issues, and 3) myoclonic observation issues. These will be discussed below.

b. Technical Issues

Between 2000 and 2006, twenty executions by lethal injection were conducted in Florida. Investigation reports conducted by the medical examiner were introduced during the *Lightbourne* hearings. Contained in these reports is evidence of technical anomalies. Data are available for seventeen of the twenty lethal injection executions conducted during this time period. These technical anomalies included 1) irregular IV placements, along with evidence

of iatrogenic manipulation,1 2) surgical incisions for IV access, 3) recent multiple needle puncture marks indicating failure to gain IV access at the initial site, and 4) one instance indicating subcutaneous IV insertion. Out of the seventeen executions for which data are available, six post-execution investigative reports found technical anomalies, or in probability terms, a 35% percent error rate. Without an increased level of training, we can expect a total of fourteen technical anomalies after Florida has executed forty individuals by lethal injection. This is shown in Table 2.

Table 2: Technical Anomalies
S = Prior Lethal Injection Executions (n=17)
A = Medical Examiner Reports with Technical Anomalies
Sets
S = {1,2,3,4,5,6,7,8,9,10,11,12,13,14,15,16,20}
A = {2,3,4,7,10,20}
Calculations
Probability of A occurring
P(A) = 6/17 = .35 or 35%
Expected Value of x over n times where n=40 and p=.35
$P(x) = E(x) = \Sigma\, xp(x) = \mu$
$\mu = (40)(.35) = 14$
Thus we can expect 14 technical anomalies out of 40 executions

The existence of past technical anomalies and the high probability (or certainty) of their occurence in the future implicate the first and second steps of the *Jones* standard (involving the mechanics and necessary pain inherent in lethal

1 "Iatrogenic" is defined as being "induced inadvertently by a physician or surgeon or by medical treatment." Merriam-Webster Medical Dictionary (2005 Ed.).

injection). Execution by lethal injection is the most complex method of execution ever in this country. The mechanics of lethal injection require a level of proficiency greater than other execution methods. This point was underscored during the Diaz execution. The continuing constitutionality of execution by lethal injection requires a level of proficiency, through training, above that prior to December 2006. So far, the mock executions performed by DOC show that absolutely no improvements have been made.

c. Duration Issues

Relevant to the first and third step of the *Jones* analysis is the amount of time that elapses from the start of the lethal injection chemical sequence until death. Evidence about the mechanics of lethal injection and the pharmacological and pharmacokinetic properties of the chemicals is contained in the *Lightbourne* record in the testimony of Dr. Dershwitz.2 Additional evidence concerning the duration of execution by lethal injection, the third step of the *Jones* analysis, is found elsewhere in the *Lightbourne* record, including the GCALI record.

This evidence shows that the normal duration of an execution by lethal injection should last no more than eleven minutes. Based on the duration of prior executions in Florida (compiled mainly through the medical examiner investigative reports for which data was

2 *See* Vol. IV pp. 486-614.

available), ten out of nineteen, or 53%, of Florida's lethal injection executions exceeded this time parameter. The mean duration for these executions is 13.8 minutes. This is illustrated in Table 3.

Table 3: Historical Lethal Injection Execution Times

S = Prior Lethal Injection Executions (n=19)
A = Dr. Dershwitz Execution Time
B = A with +/- 1
C = S Event Greater than B

Sets

S={6,7,8,9,9,11,12,12,12,13,13,13,14,14,17,18,19,21,34}
A={11}
B={10,11,12}
C={13,13,13,14,14,17,18,19,21,34}

Calculations

Probability of C occurring:
P(C) = 10/19 = .53 or 53%

Expected Value of x over n times where n=40 and p=.53
$P(x) = E(x) = \Sigma\, xp(x) = \mu$
$\mu = (40)(.53) = 21.2$ or 21 events over B

Mean of event S
$\mu = 262/19 = 13.8$

Note: Based on a hypothesis test comparing the mean length of execution in the above sample with the 11 minute duration taken from Dr. Dershwitz's testimony and using an *alpha* of .10, there is evidence that the difference is statistically significant. The difference is also practical according to Cohen's *d*.

For Table 3, S set represents the time duration of lethal injection executions in Florida for which data is available. Set A represents the time duration for all chemicals to produce their pharmacological effects based on Dr. Dershwitz's expert testimony. Set B represents +/- 1 minute of these times, above which may implicate a violation of the Eighth Amendment according to the third

step of the *Jones* analysis.

If one defines a "lingering death" as a death that occurs beyond that which is expected under a particular method of execution, then 53% of Florida's prior lethal injection executions involve a lingering death.

The inadequate level of training of the DOC demonstrated by Mr. Schwab clearly shows a significant probability for a continuing trend of the number of lingering deaths.

d. Myoclonic or Other Observable Movements

The last area of concern involves witness observations during past lethal injections of certain involuntary movements, termed myoclonus, by the prisoner. This term includes spasms, convulsions or other involuntary movements witnessed during the injection of the lethal chemicals. This issue, focusing on the infliction of unnecessary pain, pertains to the first and second steps of the *Jones* analysis. This is especially true since the first drug administered is not supposed to produce these movements while the second drug is administered for the primary purpose of arresting these movements. For the prior twenty lethal injection executions in Florida, seven, or 35%, had observable myoclonic events. This is shown in Table 4.

Table 4: Myoclonic or Other Observable Movements

S = All Lethal Injection Executions in Florida (n=20)

A = Lethal Injection Executions with Observable Myoclonic Events or Movements During the Sequence

Sets

S = {1,2,3,4,5,6,7,8,9,10,11,12,13,14,15,16,17,18,19,20}

A = {2,4,6,7,9,19,20}

Calculations

Probability of A occurring:

P(A) = 7/20 = .35 or 35%

Expected Value of x over n times where n=40 and p=.35

$P(x) = E(x) = \Sigma\, xp(x) = \mu$

$\mu = (40)(.35) = 14$ executions with observable myoclonic events or movements during the sequence out of 40 executions

Based on the evidence contained in *Lightbourne*, these events should not occur during executions by lethal injections. These data shows that 35% of Florida's prior executions include either complications due to the pharmacological properties of the chemicals or inadequate training of the DOC execution team. Failure of the DOC to properly train the execution team may actually increase the number of myoclonic events in future executions, but will almost certainly do nothing to decrease the foreseeable and unconstitutional errors.

e. Combined Data

Taken together, the data presented above reveals that 40% of Florida's prior lethal injection executions had at least two shared areas of concern implicating the Eighth Amendment. Six executions

had at least two anomalies. Two executions had all three present (one of which was the execution of Angel Diaz). This is shown in Table 5.

Table 5: Florida Executions with the Presence of Two or More Anomalies

S = All Lethal Injection Executions in Florida (n=20)
A = Executions with Two Anomalies
B = Executions with Three Anomalies
C = A U B

Sets

S = {1,2,3,4,5,6,7,8,9,10,11,12,13,14,15,16,17,18,19,20}
A = {2,3,4,9,10,19}
B = {7,20}
C = {2,3,4,7,9,10,19,20}

Calculations

Probability of C occurring:

P(C) = 8/20 = .40 or 40%

f. Comparative Analysis

Discussed during *Lightbourne* was a study from the Netherlands summarizing its experience with euthanasia and physician assisted suicide ("EAS"). The Dutch study found that in EAS cases, there was a technical issue error rate of 5%, a duration issue error rate of 7%, and a myoclonic issue error rate of 4%. While Dutch EAS practices are done in a clinical setting, the difference between the EAS practices and Florida lethal injection executions are substantial. Mr. Schwab would have been able to develop this point further in an evidentiary hearing and counsel very strongly believes that he would have been granted relief. This Court clearly did not

recognize the inevitability of unconstitutional errors during executions when it erroneously affirmed the summary denial of relief.

III. Conclusion

Mr. Schwab respectfully submits that this Court erred when it affirmed the trial court's summary denial of his claims and that this Court further erred when it applied the *Jones* standard incorrectly to his claims. As noted above, the fourth step in a *Jones* analysis requires that unnecessary pain be assessed by determining at what point deviations in the first three steps cross the constitutional threshold or, based on prior knowledge and evolving standards, assessing the risk of such deviations and determine whether they violate the Eighth Amendment. Counsel submits that based on the available data outlined *infra*, past deviations and the probability of their reoccurrence implicate the Eighth Amendment.

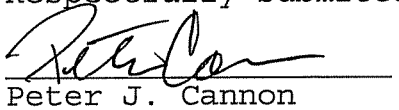
It should be noted that on January 7, 2008, the United States Supreme Court heard oral arguments in *Baze v. Rees*, (No. 07-5439). During argument, eight of the nine justices[3] either discussed or queried counsel regarding the issues of risk, probability, and comparative analysis (*see e.g.*, pp. 3, 4, 5, 8, 9, 27, 33, 36, 37, 38, 41, 48, 50, 51, 52, 53). These questions focused on the same

3 Justice Thomas did not ask any questions during argument. *Baze v. Rees*, (No. 07-5439) (transcript of oral argument heard before the United States Supreme Court on

issues raised by Mr. Schwab and would have been answered with specificity had this Court not erroneously affirmed the trial court's summary denial. Returning this case for such a risk and comparative analysis will help clarify these issues.

Counsel submits that had this Court correctly applied the *Jones* standard and taken into account all the evidence presented, Mr. Schwab would have been granted relief.

Respectfully Submitted,



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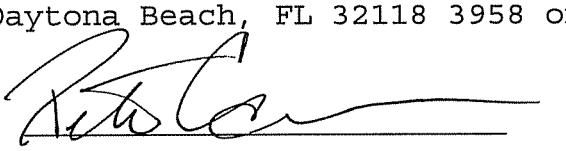
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Motion for Rehearing has been furnished by U.S. Mail, first class postage, to Kenneth Nunnely, Office of the Attorney General, 444 Seabreeze Blvd., 5th Floor, Daytona Beach, FL 32118 3958 on this 7th day of February, 2008.



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