

FILED

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2007 NOV 19 PM 4: 04

IN THE UNITED STATES COURT OF APPEALS

U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO, FLORIDA

FOR THE ELEVENTH CIRCUIT

FILED

U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
NOV 09, 2007
THOMAS K. KAHN
CLERK

No. 07-15258

IN RE:

6:07CV1798

MARK DEAN SCHWAB,

Petitioner,

Appeal from the United States District Court for the
Middle District of Florida

Before: DUBINA, CARNES and HULL, Circuit Judges.

BY THE COURT:

We have previously affirmed the denial of federal habeas relief to Mark Dean Schwab, a Florida death row inmate. Schwab v. Crosby, 451 F.3d 1308 (11th Cir. 2006). Before us now are his application to file a second or successive federal habeas corpus petition pursuant to 28 U.S.C. § 2244(b), and a motion for stay of execution in order to permit us time to consider that application. The only

claim Schwab wants to raise in a second petition involves the constitutionality of Florida's lethal injection procedures and protocols.

Even if such a claim were properly cognizable in an initial federal habeas petition, instead of in a 42 U.S.C. § 1983 proceeding, see generally Hill v. McDonough, 126 S.Ct. 2096, 2099 (2006); Nelson v. Campbell, 541 U.S. 637, 124 S.Ct. 2117 (2004), Rutherford v. McDonough, 466 F.3d 970, 973 (11th Cir. 2006) (observing that pre-Nelson circuit law requiring challenges to lethal injection procedures to be brought in a § 2254 proceeding is “no longer valid in light of the Supreme Court’s Hill decision.”), this claim cannot serve as a proper basis for a second or successive habeas petition. It cannot because it neither relies on a new rule of constitutional law made retroactive to cases on collateral review by the Supreme Court, 28 U.S.C. § 2244(b)(2)(A), nor involves facts relating to guilt or innocence, see 28 U.S.C. § 2244(b)(2)(B)(ii).

Our disposition of the application renders the motion for stay of execution moot.

APPLICATION DENIED; MOTION FOR STAY DENIED AS MOOT.

United States Court of Appeals

Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Thomas K. Kahn
Clerk

November 09, 2007

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U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO, FLORIDA

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 07-15258-P
Case Style: In Re: Mark Dean Schwab
District Court Number: ()

The following action has been taken in the referenced case:

The enclosed order has been ENTERED.

Sincerely,

THOMAS K. KAHN, Clerk

Reply To: Nancy Gilman (404) 335-6151