IN THE SUPREME COURT OF FLORIDA

CASE NO. 08-1199

MARK DEAN SCHWAB,

Appellant,

Death Warrant Signed
Execution July 1, 2008

STATE OF FLORIDA

Appellee.

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

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

The defendant was convicted of first degree murder and capital sexual battery after a nonjury trial and sentenced to death on July 1, 1992. The judgment and sentence were affirmed on direct appeal to the Florida Supreme Court. *Schwab v. State*, 636 So.2d 3 (Fla. 1994) cert. denied 513 U.S. 950, 115 S.Ct. 364 (1994). Thereafter, Schwab filed an original motion for postconviction relief, the denial of which was affirmed in *Schwab v. State*, 814 So.2d 402 (Fla. 2002). The denial of Schwab's federal petition for a writ of habeas corpus was affirmed in *Schwab v. Crosby*, 451 F.3d 1308 (2006) cert. denied 127 S.Ct. 1126 (Mem), 166 L.Ed.2d 897.

On July 18, 2007, a death warrant was signed for Schwab with a scheduled execution date of November 15, 2007. Schwab filed a Successive Motion to Vacate Sentence and Stay Execution in the circuit court on August 15, 2007 challenging the constitutionality of Florida's lethal injection procedure and that newly discovered mitigation evidence of neurological brain damage made his sentence of death unreliable. After a case management hearing, the circuit court denied relief. Specifically, the circuit court found that Florida's lethal injection procedures did not violate the Constitution and that the newly discovered evidence of neurological brain damage was procedurally barred. On November 1, 2007, this Court affirmed the denial of all relief. *Schwab v. State*, 973

So.2d 427 (Fla. 2007). On November 7, 2007, this Court denied Schwab's Motion for Rehearing and Renewed Motion to Stay Execution and the mandate was issued.

On November 8, 2007, Schwab filed an application for leave to file a successive habeas corpus petition pursuant to 28 U.S.C. §2244(b) with the Eleventh Circuit Court of Appeals. On November 9, 2007, the Eleventh Circuit denied the application. In the Circuit Court's denial, the order stated: "this claim cannot serve as a proper basis for a second or successive habeas petition". The Eleventh Circuit noted that since *Hill v. McDonough*, 126 S.Ct. 2096 (2006), a §2254 proceeding is no longer the appropriate way to raise a method of execution claim. Instead, the proper vehicle for such a claim is a 42 U.S.C. §1983 claim. *In re Schwab*, 506 F.3d 1369 (11th Cir. 2007).

On November 9, 2007, Schwab filed a Second Successive Motion to Vacate Sentence and Stay Execution in the circuit court challenging Florida's method of execution and that newly discovered evidence would establish that Schwab's sentence of death is unreliable in light of Dr. William Samek, a key state witness, clarification of his original trial testimony. On November 13, 2007 after a case management hearing, the lower court summarily denied relief which was affirmed by this Court on January 24, 2008. *Schwab v. State*, --- So.2d ---, 2008 WL 190575 (Fla. 2008),

rehearing denied May 21, 2008.

On November 9, 2007, Schwab also filed a Petition to Stay Execution in the United States Supreme Court in light of the Court's grant of certiorari in *Baze v. Rees*. The US Supreme Court granted a stay of execution on November 15, 2007 and denied certiorari May 19, 2008, which effectively dissolved the stay of execution. *Schwab v. Florida*, ---S.Ct. ---, 2008 WL 953622 (2008). On May 20, 2008, the Governor rescheduled Schwab's execution date for July 1, 2008.

On June 20, 2008, Schwab filed a Third Successive Motion to Vacate Sentence and Stay Execution challenging Florida lethal injection procedures in light of *Baze v. Rees* which clarified the legal standard to be applied in a review of challenges to lethal injection procedures under the Eighth Amendment to the United States Constitution. On June 24, 2008, the circuit court conducted a case management hearing and summarily denied relief by Order dated June 25, 2008. Schwab filed a timely notice of appeal of the circuit court's Order on June 25, 2008.1

STANDARD OF REVIEW

Florida Rule of Criminal Procedure 3.850(d) provides that a defendant is entitled to an evidentiary hearing on postconviction

1 Exhibits listed in the brief are the exhibits submitted with the Motion to Vacate filed with the lower court on June 20, 2008. Exhibit "A" is attached to this brief which are the Kentucky lethal injection protocols.

claims for relief unless "the motion, files, and records in the case conclusively show that the movant is entitled to no relief." Florida Rule of Criminal Procedure 3.851(f)(5)(B) applies the same standard to successive postconviction motions in capital cases. In reviewing a trial court's summary denial of postconviction relief without an evidentiary hearing, this Court "must accept all allegations in the motion as true to the extent they are not conclusively rebutted by the record." *Hodges v. State*, 885 So.2d 338, 355 (Fla.2004) (quoting *Gaskin v. State*, 737 So.2d 509, 516 (Fla.1999)). "To uphold the trial court's summary denial of claims raised in a 3.850 motion, the claims must be either facially invalid or conclusively refuted by the record." *McLin v. State*, 827 So.2d 948, 954 (Fla.2002) (quoting *Foster v. Moore*, 810 So.2d 910, 914 (Fla.2002)).

SUMMARY OF ARGUMENT

Florida's method of execution creates a substantial risk of serious harm as interpreted by the United States Supreme Court in Baze. First, this Court must decide this case in light of Baze which superceded this Court's prior precedent establishing a standard of review for method of execution cases. Second, a facial review of the Florida and Kentucky Protocols reveal that they are substantially different. Finally, Florida's implementation of its execution protocols create a substantial risk of serious harm.

ARGUMENT

THE LOWER COURT ERRED WHEN IT SUMMARILY DENIED MR. SCHWAB'S CHALLENGE TO FLORIDA'S LETHAL INJECTION PROCEDURES AND PROFICIENCY OF THE FLORIDA DEPARTMENT OF CORRECTIONS IN ADMINISTERING LETHAL INJECTIONS IN CONFORMITY WITH THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AS INTERPRETED BY THE UNITED STATES SUPREME COURT IN *BAZE V. REES* AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

I. The *Baze* Decision

On April 16, 2008, the United States Supreme Court issued its plurality opinion in *Baze v. Rees*, No. 07-5439, (April 16, 2008). The Supreme Court in *Baze* attempted to define the standard applicable to method of execution cases. Due to the nature of the *Baze* opinion, no clear standard was affirmatively adopted by a majority of the Court. In fact, four standards emerged from the various opinions with only two having at least three justices joining. In an opinion by Chief Justice Roberts, joined by Justices Kennedy and Alito, the three members of the Court proposed that the proper standard should be a "substantial risk of serious harm". *Baze v. Rees*, Slip Op. at 10-11 (Opinion of Roberts, C.J.)(hereinafter "*Baze* decision"). Further, this three-justice opinion requires an additional showing by a "condemned prisoner" for a stay of execution of a comparison between the challenged execution procedures and "known and available alternatives". *Id.* at 22. Three other Justices,

Breyer, Ginsburg and Souter, proposed a standard that requires a showing of an "untoward, readily avoidable risk of inflicting severe and unnecessary pain". *Baze v. Rees*, Slip Op. at 11 (Ginsburg, J., dissenting); *Id.*, at 1 (Breyer, J., concurring).

The Chief Justice's opinion is perhaps the one to be adopted by the lower courts. This opinion explains the standard which should be applied by the lower courts:

> Our cases recognize that subjecting individuals to a risk of future harm-not simply actually inflicting pain-can qualify as cruel and unusual punishment. To establish that such exposure violates the Eighth Amendment, however, the conditions presenting the risk must be "sure or very likely to cause serious illness and needless suffering," and give rise to "sufficiently imminent dangers." … We have explained that to prevail on such a claim there must be a "substantial risk of serious harm," an "objectively intolerable risk of harm" that prevents prison officials from pleading that they were "subjectively blameless for purposes of the Eighth Amendment.

Baze v. Rees, Slip Op. at 10-11 (Opinion of Roberts, C.J.)

Additionally, the United States Supreme Court now requires an additional evidentiary showing for Mr. Schwab in order to obtain a stay of execution. The Supreme Court now requires that Mr. Schwab proffer alternatives that effectively address a substantial risk of serious harm. Further, the Court stated that "the alternative procedure must be feasible, readily implemented, and in fact significantly reduce a substantial risk of severe pain." *Baze v. Rees*, Slip Op. at 13.

II. The Florida Standard

This Court's January 24th, 2008, opinion articulated the standard of review relied upon by this Court in reviewing method of execution cases. 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).

The Standards announced in *Baze* squarely conflict with the standard relied upon by the Court in the January 24th, 2008, opinion in which it reviewed Mr. Schwab's claim under a conflated "unnecessary and wanton pain" and "inherent cruelty" standard.

The government in its answer to the motion to vacate filed in the lower court asserted that since this Florida standard is lower than the one announced in Baze, Mr. Schwab would not be able to prevail. (Answer to Third Successive Motion to Vacate and Opposition to Stay of Execution, *State v. Schwab*, Brevard County

Case No. 91-7249-CF-A, filed June 23rd, 2008 at 16-18)(hereinafter "answer motion"). Additionally, the government argues that since the *Lightbourne* decision "analyzed" the DOC protocols under several standards, Mr. Schwab would not be able to obtain relief. (answer motion at 12-13) This Court in *Lightbourne* stated:

> Alternatively, even if the Court did review this claim under a ***"foreseeable risk"*** standard as Lightbourne proposes or ***"an unnecessary"*** risk as the Baze petitioners propose, we likewise would find that Lightbourne has failed to carry his burden of showing an Eighth Amendment violation. As stressed repeatedly above, it is undisputed that there is no risk of pain if the inmate is unconscious before the second and third drugs are administered. After Diaz's execution, the DOC added additional safeguards into the protocol to ensure the inmate will be unconscious before the execution proceeds. In light of these additional safeguards and the amount of the sodium pentothal used, which is a lethal dose in itself, we conclude that Lightbourne has not shown a ***substantial, foreseeable or unnecessary risk of pain*** in the DOC's procedures for carrying out the death penalty through lethal injection that would violate the Eighth Amendment protections.

Lightbourne v. McCollum, 969 So. 2d 326, 353 (Fla. 2007)(footenote omitted, emphasis added).

The lower court in its order denying relief, relied upon this comparative analysis. (Order Denying Defendant's Third Successive Motion to Vacate or Stay Execution, *State v. Schwab*, Brevard County Case No. 91-7249-CF-A, filed June 25, 2008, at 3-4) (hereinafter "Order").[2] Both the government and the lower court erred in reaching this conclusion.

Until the *Baze* decision, the United States Supreme Court

2 The Order states incorrectly that the defendant argued that "*Baze* sets a different and higher Eighth Amendment standard than *Lightbourne*". Order at 3. This is entirely incorrect as shown in the transcripts from the CMC at 7.

hadn’t decided a case for one-hundred and thirty years involving methods of execution. During this time, the various courts presented arguably eight different standards of review. For example the Ninth Circuit Court of Appeals utilized an “unnecessary risk of unconstitutional pain or suffering” standard. *See Cooper v. Rimmer*, 379 F.3d 1029, 1033 (9th Cir. 2004). The Sixth, Eighth and Tenth Circuits relied upon a narrower standard of “unnecessary and wanton infliction of pain”. *See Hamilton v. Jones*, 472 F.3d 814, 816 (10th Cir. 2007); *accord, Taylor v. Crawford*, 2007 WL 1583874, *6 (8th Cir.); *Workman v. Bredesen*, 486 F.3d 896, 906-07 (6th Cir. 2007). For example, regarding the confusion involving these standards, the United States Court of Appeals for the Sixth Circuit stated that a method of execution is cruel and unusual punishment when it involves the “unnecessary and wanton infliction of pain,” but could not resolve the difficulty of figuring out how the U.S. Supreme Court intended for the cruel and unusual punishment test to be applied to method of execution cases, noting that this Court “has considered three [method of execution] challenges under the Eighth Amendment, only one of which reached the merits,” and since then “has had ample opportunities to constrain methods of execution that seem to raise far greater risk of cruel and unusual punishment than lethal injection, but it has declined

to do so." *Workman*, at 906-07 (6th Cir. 2007).

The question presented by the Petitioners in *Baze* articulated the standards which were at issue:

> Does the Eighth Amendment to the United States Constitution prohibit means for carrying out a method of execution that create an *unnecessary risk of pain and suffering* as opposed to only a *substantial risk of the wanton infliction of pain*?

Baze v. Rees, No. 07-5439, Petition for a Writ of Certiorari to the Supreme Court of Kentucky at iii.

Neither standard presented to the U.S. Supreme Court in *Baze* is the standard relied upon by this Court in the *Schwab II* decision. Nor can it be determined whether the *Schwab II* standard is "lower" or "higher" than the *Baze* standard because it is a conflation of several standards with broad and narrow applications. Likewise, the statement in *Lightbourne* regarding a "substantial, foreseeable or unnecessary risk of pain" are inapplicable because this is not the standard utilized by this Court in *Schwab II* nor is it a correct formulation of the *Baze* standard.

Finally, it is impossible to guess whether this Court utilized a narrow or broad interpretation of the standard in *Schwab II* simply because this Court offers no analysis, nor does it offer any satisfactory analysis in the *Lightbourne* decision.

III. Facial Comparative Analysis of the Florida and Kentucky Protocols

The *Baze* plurality opinion stated that "A State with a lethal injection protocol substantially similar to the protocol

we uphold today would not create a risk that meets this standard." *Baze*, at 22. By its own language, it is clear that the *Baze* Court's opinion was only a facial review of the Kentucky protocols. This comparative analysis has never been required before by the High Court or this Court. In his Motion to Vacate, Mr. Schwab presented the report of Ms. Arvizu as exhibit 8 to the motion which outlined a comparative analysis of the two states.

A comparative review of the Florida and Kentucky protocols finds that they are not substantially similar. Based on a facial review of the protocols, Ms. Arvizu concluded that Florida's protocols were deficient in many important respects:

> Despite the fact that the Florida procedure has the potential to function as a better means of controlling and ensuring the acceptability of an execution, its potential is unrealized. It suffers from a number of serious deficiencies and inconsistencies (as identified in my letter to your attention, dated August 14, 2007) that render it ineffective in achieving its goal of controlling the execution process to achieve an acceptable result.
>
> In contrast, despite the fact that the Kentucky protocol provides relatively little detail, it addresses issues that have the potential to cause critical failure of the execution process, but that are not addressed in the Florida procedure.

See exhibit 8.

In her report, Ms. Arvizu identifies several examples where the Florida protocols fail to meet the standards approved by the *Baze* Court. *Id*.

The lower court in its Order finds that the Florida and Kentucky protocols are substantially similar. Order at 15. This

despite the fact that the lower court admits in its order that the Kentucky protocols themselves were not in evidence. Order at 6, 13. While it is legally inconceivable how a court can decide an issue of fact without the actual evidence before it, the lower court's finding that the two protocols are substantially similar are errors of fact and thus an abuse of discretion. *See Williams v. State*, 967 So.2d 735 (Fla. 2007); *Cox v. State*, 966 So.2d 337 (Fla. 2007). For example, the lower court states that Kentucky and Florida are substantially similar even though Kentucky utilizes 3 grams of sodium pentothal and Florida uses 5 grams. Order at 13-14. Casting further doubt on the lower court's factfinding ability, it states that Florida utilizes "480 millieqivalents" of potassium chloride. This is clearly wrong since Florida uses half that amount. Order at 14. Most of the other procedures cited by the lower are irrelevant to this analysis. Of the seven procedure examples, only the ones in paragraphs 1, 3, and 6 can be considered of consequence (again, with the finding regarding paragraph 1 being wrong). The fact that the executions in both states use saline between injections (¶ 2), take place in "an execution chamber" (¶ 4), deliver the drugs remotely (¶ 5), or utilize a heart monitor (¶ 7), are not relevant to a Baze analysis. Rather, as pointed out in the Arvizu report, the differences between the two protocols are more

substantial than the meaningless similarities cited by the Court.

One example cited in the Arvizu report addresses a substantial difference between the Kentucky and Florida training exercises. The *Baze* decision discussed in great length this issue of proper IV placement, the issue that lead to the events of the Diaz execution. *Baze*, Slip Op. at 15. The *Baze* Court discussed Kentucky's training procedure in this area:

> Moreover, these IV team members, along with the rest of the execution team, participate in at least 10 practice sessions per year. These sessions, required by the written protocol, encompass a complete walk-through of the execution procedures, ***including the siting of IV catheters into volunteers.***

Baze, Slip Op. at 16 (record citation omitted, emphasis added).

Kentucky trains the IV team by "siting" or placing the lines into a person. (exhibit "A" at 984). Florida does not, even though improper IV placement was major cause of the problems during the Diaz execution. Florida's substandard training of the technical team members responsible for gaining IV access create conditions that present a risk of harm which is "sure or very likely to cause serious illness and needless suffering," and give rise to "sufficiently imminent dangers." *Id.* at 10-11.

The lower court did not find this a substantial difference since Florida requires "appropriate certification". Order at 7. This is an incorrect analysis since Kentucky does concededly have a similar requirement. (Exhibit "A" at 984). The

difference being the quality of training these certified team members participate in prior to an execution.

The lower court also makes a clear error of fact when discussing the medical assessment of the inmate prior to an execution. The court states that the Florida protocol provides an extra safeguard apparently not in the Kentucky procedure as it requires that, one week prior to the execution, an assessment is made of the defendant to determine appropriate IV access. Order at 8. This is entirely incorrect as noted both by Ms. Arvizu and the Kentucky protocols. In fact, the first five pages of the Kentucky protocols outline a very detailed procedure for thoroughly examining the inmate, including an examination seven days prior to an execution (exhibit "A" at 973) and continuing observation for any changes in medical or psychiatric condition. *Id*. at 974. Florida, on the other hand, requires only a "limited" medical examination. See exhibit 8.

Mr. Schwab was not granted an evidentiary hearing on this matter. Since the lower court summarily denied the motion, the facts asserted must be accepted as true by this Court. Furthermore, this comparative analysis is not a question of law. It requires factfinding that was not afforded to Mr. Schwab.

IV. Comparative of the Kentucky Protocols and The Florida Protocols as Implemented by the Department of Corrections.

Furthermore, the recently received DOC training session

notes and the prior training notes from July and August of 2007, also show that the Florida protocols are not substantially similar to the Kentucky Protocols. While a proper *Baze* analysis concerns a facial comparison, a comparative review of Kentucky and how Florida implements its execution protocols was addressed by Ms. Arvizu. She states in her report:

> The problems identified through review of Florida's training records are more readily apparent in comparison to the relevant provisions of the Kentucky protocol. Florida's training records document the nature and scope of the contingencies that have been addressed during training. The substantive contingencies that have been addressed during training are largely limited to blocked lines. During practice exercises, Florida has not addressed some of the contingencies that have been experienced in past Florida executions or that have the potential to compromise the execution process (e.g., execution duration of >12 minutes, or an inability to site the IV lines within more than an hour); requirements for addressing these serious contingencies are explicitly addressed in the Kentucky protocols.
>
> Based on the recently received training records, Florida has not provided training to address an inmate's known medical problems. In contrast, the Kentucky protocol is designed to ensure that the inmate's recent, and potentially changing medical and psychiatric condition is well documented in advance of the execution.

See exhibit 8.

Again, it is clear that the DOC is not training in a manner that is consistent with the standards announced in *Baze*.

V. Florida Department of Corrections Execution Training

Assuming *arguendo* that Florida's protocols are facially similar to those in Kentucky, one question must be addressed by this Court: whether the implementation of a facially valid execution protocol

in a manner creating a substantial risk of serious harm violates the Eighth Amendment. Mr. Schwab states that it does based on the below arguments.

On December 13, 2006, the execution of Angel Diaz created concerns whether Florida's lethal injection protocols were being adequately implemented by the Florida Department of Corrections. As a result, then Governor Jeb Bush created the Governor's Commission on the Administration of Lethal Injection to review the method in which the lethal injection protocols are administered by the Department of Corrections ("DOC") and to make findings and recommendations as to how administration of the procedures and protocols can be revised. 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. (exhibit 3) The DOC, pursuant to the newly revised protocols of May, 2007, conducted several training sessions for the execution team. These initial training sessions included both the DOC execution team members and observers from the Florida Department of Law Enforcement ("FDLE")(exhibit 4).

As previously noted before this Court, Mr. Schwab obtained the services of Janine Arvizu, a certified quality auditor, to review

the protocols and session notes. After a review of the notes taken during the mock executions, it was determined that two of the five July 2007 mock executions resulted in failed exercises.3 This was an error rate of 40%. This continued level of training would 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 exhibit 14, Table 1a.

As a result of the *Lightbourne* litigation, the DOC revised their protocols which were effective August 1, 2007. The execution process remained the same except for the inclusion of an extra step to "assess consciousness" just prior to the injection of the second chemical. Using these revised protocols, the DOC conducted seven mock executions. (exhibit 4) Again, based on these training session notes, it was determined that two of the seven August 2007 mock executions resulted in failed exercises. This is a 29% error rate. This continued level of training would result in a probability of six failed exercises for every twenty practice executions and twelve failed exercises for every forty practice executions. These August training notes were not addressed in Mr. Schwab's prior motion for relief. This is shown in exhibit 14,Table 1b.

Combining July and August, there were twelve trials in which

3 The definition of a "failed exercise" for the purposes of this analysis has several key aspects. First, a failure does not encompass an exercise where the error or errors would result in "some risk of pain", *Baze*, at 8, or an "isolated mishap". *Id.* at 11. A failed exercise would encompass a substantial error where an Eighth Amendment violation would be presented or where the error shows objective evidence that the achievement of significant learning

four were failed exercises. This is a 33% error rate with a probability of seven failed exercises for every twenty practice executions and thirteen failed exercises for every forty practice executions. This combined analysis is shown in exhibit 14, Table 1c.

On May 27th, 2008, Mr. Schwab filed a renewed records request for the DOC training session notes for the period between September, 2007, to the present. This Court granted the motion and the DOC records were received on June 16, 2008. These records indicate that between September, 2007 and May, 2008, the DOC conducted thirty training exercises. Again, after review of these records, Ms. Arvizu found significant training failures. (exhibit 8). The records indicated that nine of the thirty exercises were failures resulting in an error rate of 30%.

VI. Prior Florida Executions

Objectively, the data from the DOC training sessions and data obtained from Florida's prior twenty lethal injection executions are relevant to show a substantial risk of harm. In *Baze*, the Court distinguished between two types of error:

> In terms of our present Eighth Amendment analysis, such a situation-unlike an "innocent misadventure," -would demonstrate an "objectively intolerable risk of harm" that officials may not ignore. In other words, ***an isolated mishap alone does not give rise to an Eighth Amendment violation***, precisely because such an event, while regrettable, does not

objectives were not obtained.

> suggest cruelty, or that the procedure at issue gives rise to a "substantial risk of serious harm."

Baze, Slip Op. at 11-12 (citations omitted, emphasis added).

This objective analysis based on the data discussed *infra* establish that these errors are not "isolated" mishaps but, instead, reoccurring errors in both training and past executions.

Florida's prior lethal injection execution data were collected in order to focus on three major areas of concern 1) technical issues, 2) duration issues, and 3) myoclonic observation issues. Specifically, the data set to be included involved the executions by lethal injection conducted in Florida between 2000 and 2006.

a. Florida Technical Issues

Investigation reports conducted by the medical examiner provided the basis for the data. The only data available were for seventeen of the twenty lethal injection executions conducted during this time period. These reports were reviewed for technical anomalies which included 1) irregular IV placements, along with evidence of iatrogenic manipulation,[4] 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 were available, six post-execution investigative reports found technical anomalies, or in probability

4 "Iatrogenic" is defined as being "induced inadvertently by a physician or surgeon or by medical treatment."

terms, a 35% error rate with an expected total of fourteen technical anomalies after Florida executes forty individuals by lethal injection. This is shown in exhibit 14, Table 2.

The existence of past technical anomalies and the high probability (or certainty) of their occurrence in the future implicate deviations in the execution mechanics and show that due to inadequate training, the execution team is routinely incapable of finding proper IV access without several attempts. While the argument can be made that such problems occur in a clinical setting, the fact that the DOC fails 35% of the time indicates a high level of failure due to inadequate training.

Under a *Baze* analysis, these data establish that Florida is "subjecting individuals to a risk of future harm". *Id.* at 10. The *Baze* decision discussed in great length this issue of proper IV placement, the issue that lead to the events of the Diaz execution. *Baze*, Slip Op. at 15. The *Baze* Court discussed Kentucky's training procedure in this area:

> Moreover, these IV team members, along with the rest of the execution team, participate in at least 10 practice sessions per year. These sessions, required by the written protocol, encompass a complete walk-through of the execution procedures, ***including the siting of IV catheters into volunteers.***

Baze, Slip Op. at 16 (record citation omitted, emphasis added).

Kentucky trains the IV team by siting the lines into a

MERRIAM-WEBSTER MEDICAL DICTIONARY (2005 Ed.).

person. Florida does not, even though improper IV placement was major cause of the problems during the Diaz execution. Florida's substandard training of the technical team members responsible for gaining IV access create conditions that present a risk of harm which is "sure or very likely to cause serious illness and needless suffering," and give rise to "sufficiently imminent dangers." *Id.* at 10-11.

b. Florida Duration Issues

Relevant to the *Baze* standard 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 was obtained from the *Lightbourne* record through the testimony of the state's expert Dr. Dershwitz. (exhibit 1)

Based on this evidence, the normal duration of an execution by lethal injection should last no more than eleven minutes. Compared to the duration of prior executions in Florida, ten out of nineteen, or 53%, of Florida's lethal injection executions exceeded this time parameter. Further, this trend will continue and after twenty more executions (for a total of forty), there is a statistical certainty that twenty-one executions will exceed the constitutional duration limit. The mean duration for these executions is 13.8 minutes. (exhibit 11) This is illustrated in

exhibit 14, Table 3a.

Applying a *t* test, where the null hypothesis is true, shows that 83% of Florida's future executions will take longer than the eleven minute parameter established through Dr. Dershwitz's testimony. These findings show that 34% of future executions will take between 13.79 and 20.12 minutes and 16% of future executions will take more than 20.12 minutes. Finally, the top 25% of Florida's future executions will take more seventeen minutes. (exhibit 11) Exhibit 14, Table 3b shows the *t* test and results.

These data are relevant to a *Baze* analysis in several respects. First, the execution duration parameter is based on the scientific testimony of Dr. Dershwitz. The foundation of this testimony is the pharmacokinetic and pharmacological properties of the three drugs used in Florida and the weight and volume of their administration. According to this testimony, an execution should take no longer than eleven minutes. Clearly, this is not the case in Florida since a majority of past executions exceeded this parameter. This means that these drugs are being "maladministered" as understood by the *Baze* Court. It is more probable than not that this error rate is due to the improper administration of the chemicals because of the 35% technical error rate, an error that featured prominently during the Diaz execution. Since there is a statistical correlation

between the training session error rates and past lethal injection error rates, there is no doubt that these errors will continue.

Second, the *Baze* Court also recognized the notion of "needless suffering" as part of the Court's Eighth Amendment jurisprudence. *See id.* at 10-11. The touchstone of "needless suffering" is the mechanics of a particular method of execution, *See id.* at 8, which were established by Dr. Dershwitz. Thus the high duration error rate in past executions objectively shows a "substantial risk" of "unnecessary suffering".

Third, the choice by Florida to use a large dose of sodium pentathol, as opposed to the smaller doses used by other states, appears to prolong an execution rather than hasten death.5 This is again supported by the testimony of Dr. Dershwitz concerning the pharmacokinetic properties of sodium pentothal which slow the circulatory and respiratory systems.6 This leads to a troubling conclusion concerning the "proper administration of the first drug". *Baze*, Slip. Op. at 5. Since there are no clinical studies with this amount of sodium pentothal, the definition of a "proper administration" can only be based on the pharmacokinetic properties of the first drug. This, however, creates a conflict: either the testimony of Dr. Dershwitz is wrong or the drug is being improperly

5 This issue is fully developed in part III, *infra*.

6 See exhibit 6. It should be noted that when discussing the pharmacokinetics of the three drugs, the sodium pentothal reaction time is measured from the start of administration as opposed to the completion of administration for the other two drugs. *See Baze*, at 6.

administered. In other words, “we know not what we do”, or we know what to do but cannot do it right.

c. Florida 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 as used here includes spasms, convulsions or other involuntary movements witnessed during the injection of the lethal chemicals. For the prior twenty lethal injection executions in Florida, seven, or 35%, had observable myoclonic events. (exhibit 11) This is shown in exhibit 14, Table 4.

Based on the evidence contained in *Lightbourne*, these events should not occur during executions by lethal injections. These data show 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.

Under a *Baze* analysis, myoclonic observations are relevant for several reasons. First, the propriety of using pancuronuim bromide was debated by the *Baze* litigants. The *Baze* Court found its use proper:

> ***First, it prevents involuntary physical movements during unconsciousness that may accompany the injection of potassium chloride.*** The Commonwealth has an interest in preserving the dignity of the procedure, especially where convulsions or seizures could be misperceived as signs of consciousness or distress. Second, pancuronium stops respiration, hastening death. Kentucky's decision to include the drug does not offend the Eighth Amendment.

Baze, Slip Op. at 19 (record cite omitted, emphasis added). While the *Baze* Court found the state's interest compelling, Florida's myoclonic error rate disputes this finding.

Second, the myoclonosis observation is evidence that the DOC is not properly administering the chemicals. If properly administered, the pancuronium bromide should prevent involuntary physical movements according to the testimony of Dr. Dershwitz. Since his testimony is the only definition of "proper administration" on the record, then it is clear that Florida has not met this standard 35% of the time in the past.

Third, this again raises the issue of the "proper administration" of sodium pentothal. The large dose of sodium pentothal greatly reduces the rate of circulation. Based on the data, this dose inhibits the progress and efficacy of the pancuronium bromide. This would result in a failures to prevent involuntary movements and hasten death.

d. Florida 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). These results rebut any argument that the errors are "isolated"

since 40% of Florida executions show two or more errors. (exhibit 11) This is shown in exhibit 14, Table 5.

The combined Florida data is relevant to a *Baze* analysis. The proportion of anomalies that occurred during the reported training period discussed above was 33%. The proportion of executions with two or more anomalies that occurred was 40%. Based on the evidence presented with this motion (see exhibit 11), one of Mr. Schwab's experts calculated whether the difference between these two proportions is statistically significant.

This expert found that it is reasonable to assume (in this case with 98% certainty) that the number of anomalies that will occur in actual executions will be not be significantly lower or higher in the future real executions than the 33% that was observed in the training exercises. (see attachment 11) Based on the data analysis, the expert's conclusion is that there is a significant (and thus legally relevant) relationship between the DOC training error rate and the combined error rate for past executions. *Id.*

Thus, under a *Baze* analysis, Florida's current procedure for executions by lethal injection creates a "substantial risk of serious harm" by providing data that proves an "objectively

intolerable risk of harm."7 Florida's prior lethal injection procedures created a substantial risk of serious harm that culminated in the events of the Diaz execution. Based on the above objective analysis, it is clear that the DOC has not significantly reduced this risk. As the *Baze* Court stated: "subjecting individuals to a risk of future harm-not simply actually inflicting pain-can qualify as cruel and unusual punishment." *Id.* at 10. This is the situation in Florida.

e. The Additional Consciousness Assesment

The only major difference for this analysis between the May 2007 protocols and the August 2007 protocols is the addition of a consciousness assessment between the injection of the first and second chemicals. The Florida Supreme Court relied upon this added step heavily in its *Lightbourne* opinion.

However, under a "step error analysis" this addition does not decrease the error rate. As with any process, each step of a process is dependent upon the prior step being successfully completed. The number of steps and the accuracy at each step are relational in determining the risk of error in any process. Thus there is a statistical relationship at every step of the process and the more steps there are, a cumulative risk of error based on the number of steps. From a statistical point of view, this only

7 It should be noted that in statistics terminology, a "significant relationship" supports evidence for hypothesis.

increases the level of risk. Under the assumption that there are twenty-five steps from insertion of a periphery IV access line up to, but not including, the injection of the second drug (with no consciousness assessment), the probability of success per step can be calculated using three different accuracy values of .95, .97, and .99. When the DOC adds a single step to the process, this statistical example shows a reduction in the probability of success.

Number of Steps	**95% accuracy**	**97% accuracy**	**99% accuracy**
26	26%	45%	77%
25	28%	47%	78%

A similar example is shown from the data in section VII(a)(2) below with the analysis of Ohio's error rates. After the execution of Joseph Clark (#21) on May 2, 2006, that featured problems with gaining and maintaining IV access, Ohio added additional steps to assess the IV lines after the first and second chemicals were injected. Instead of lowering the error rates, they increased. For all Ohio executions up to Joseph Clark, there was a technical error rate of 45%, a duration error rate of 50% and a myoclonic error rate of 14%. The executions after the additional steps were added had a technical error rate

"Proves" is a legal term applying this evidence.

of 60%, a duration error rate of 80% and myoclonic error rate of 20%.

These data support the hypothesis that Ohio did not adequately assess the problems illustrated by the Clark execution including such factors as the IV cannulae size and type, the adequacy of the pre-execution medical exam or the adequacy of the IV team training. Instead, Ohio opted to add an additional step that most probably relied upon inadequate factors, such as inadequately trained IV team members, to correct the problem.

There is no evidence that the Florida DOC currently trains for assessing consciousness in a manner that would significantly impact the statistical relationship between the current DOC error rate and the prior execution error rate. Furthermore, the high DOC training error rate supports the hypothesis that the success of this extra step to reduce errors still relies upon poorly training personnel. As such, Florida will fare no better than Ohio in this regard.

VII. Comparative Analysis of Florida, Ohio, Georgia and the Netherlands

Relevant to this issue is a comparative analysis mandated by the *Baze* Court's plurality opinion, see *Baze*, Slip Op. at 22, and that any comparison by this court is a finding of fact rather than a conclusion of law.

a. Ohio and Lethal Injection

Florida and Ohio use similar methods for execution by lethal injection.8 Like Florida, Ohio has also experienced recent problems with lethal injection executions.9 Problems with IV access were well documented, leading to revisions in Ohio's protocols. Errors still occurred, however, during attempts to gain IV access during subsequent executions. The Ohio data included all information available for the twenty-six executions by lethal injection from 1999 to 2007.

1.Ohio Technical Issues

Technical issues for Ohio were gathered from data contained in the execution logs prepared by the Ohio Department of Rehabilitation and Correction (DRC). This information was corroborated from other sources. Out of the twenty-five executions for which data was available, twelve executions had technical anomalies resulting in a 48% error rate. Using a probability formulation, there will be an expected total of twenty-four technical anomalies after Ohio executes fifty individuals by lethal injection. This is shown in exhibit 14, Table 6.

Ohio's recent history of lethal injection executions was

8 See fn.9.

9 For example, on May 2, 2006, the execution of Joseph Clark took an "unprecedented amount of time" to effectuate death. Due to a failure to gain proper IV access, Clark's execution lasted fifty-three minutes.

plagued by technical errors. Ohio's DRC recognized this issue in June, 2006, and attempted to address problems with gaining proper IV access after the execution of Joseph Clark (#21). As shown by the data, however, these problems continue to persist (executions 22,25,26).

2. Ohio Duration Issues

Ohio execution duration issue data were collected from the execution logs created by the DRC and pertained to the time from the start of the chemical injection process to the time that death was pronounced. The expected execution duration was again calculated from the affidavits and testimony of Dr. Dershwitz pertaining to an injection of two grams of thiopental sodium and 100 milliequivalents of potassium chloride. This analysis shows that the period from 1999 to May of 2006, Ohio's mean execution time was 8.6 minutes.10 Using the data provided by Dr. Dershwitz with a +/- time of one minute, the mean is 2.6 minutes above the expected execution duration. Also, during this period, ten out of twenty of Ohio's lethal injection executions exceeded the time parameter. This is a 50% execution duration error rate with an expected twenty-five executions having duration errors after Ohio conducts a total of fifty executions. This is shown in exhibit 14, Table 7a.

10 The analysis of the Ohio data was divided because the chemical injection procedure was changed after the Joseph

During the period from July 2006 to 2007, Ohio conducted five executions.11 Four of these five executions exceeded the execution duration resulting in an 80% error rate. This is shown in exhibit 1, Table 7b. One can reasonably conclude from this and the data in Table 6 that Ohio's revised protocols did not prevent error but instead increased its occurrence.12

Combining the data during this period (from Table 7a and Table 7b), finds that fourteen executions by lethal injection out of the twenty-five, or 56%, for which data was available, exceeded the established time parameters.

3. Ohio Myoclonic or Other Observable Movements

Myoclonic data for Ohio were collected from witness observations during executions by lethal injection. For the twenty-six executions by lethal injection in Ohio, only four had reported evidence of myoclonic movements, a 15% error rate with an expected eight executions having observable myoclonic events during the injection sequence out of fifty executions in Ohio. This is shown in exhibit 14, Table 8.

4. Ohio Combined Data

The combined data presented above reveals that like Florida, 40% of Ohio's prior lethal injection executions had at least two

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Clark execution. Beginning with the Rocky Barton execution in July, 2006, two separate sixty second saline flushes and assessments were added in lieu of the previous 20mL saline flush. No other significant changes were made.
11 The longer time for this flush and assessment replacement was added into the execution duration originally calculated from Dr. Dershwitz's testimony and sworn statements.

shared areas of concern implicating the Eighth Amendment. Seven executions had at least two anomalies. Three executions had all three present (one of which was the execution of Joseph Clark). This is shown in exhibit 14, Table 9.

b. Georgia and Lethal Injection

Georgia has also experienced problems with lethal injection executions since the state first used this method back in 2001. Like Florida and Ohio, Georgia uses the same three chemicals has had persistent problems with gaining proper IV access.13

Data collection for Georgia was done using information

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12 *See* section II(e) above for a complete discussion.

13 Since 2000, Georgia has adopted three different lethal injection protocols. The original execution protocols became effective in May of 2000 with revisions in September of 2002 and June of 2007. Georgia's chemical weights are different in some respects to Florida and Ohio. First, similar to Ohio, Georgia uses two grams of thiopental sodium. Next, Georgia uses only 50 mg of pancuronium bromide compared to the 100 mg used by Florida and Ohio. Lastly, where Florida uses 240 milliequivalents of potassium chloride and Ohio relies on a lower amount of 100 milliequivalents of potassium chloride, Georgia utilizes 120 milliequivalents of potassium chloride. Like Florida and Ohio, Georgia injects saline after the administration of the first two drugs. Ohio and Georgia, unlike Florida, also ends the chemical sequence with an injection of saline.

Also different is the injection delivery process, specifically, the syringe volumes used for the injection sequence. Florida utilizes eight total volume 60cc (ml) syringes. Syringes 1 and 2 inject the sodium pentothal. Syringe 3 is a saline solution. Syringes 4 and 5 inject the pancuronium bromide. Syringe 6 is again saline. Finally syringes 7 and 8 inject the potassium chloride. In Ohio, syringes 1 and 2 each inject a volume of 40cc of sodium pentothal. Syringe 3 is a 20cc of saline flush. Syringes 4 and 5 each inject a volume of 25cc of pancuronium bromide. Syringe 6 is another 20cc of saline flush. Syringe 7 is a 50cc injection of the potassium chloride. Finally, syringe 8 is a 20cc saline flush. Georgia uses seven total volume 60cc syringes. Syringes 1 and 1a each inject the sodium pentothal. Syringe 2 (the third in the sequence), is a 60cc saline flush. Syringe 3 delivers the pancuronium bromide. Syringe 4 is another saline flush. Syringe 5 is the potassium chloride. Finally, syringe 6 (the seventh in the sequence) is a saline flush.

It should be noted that the Georgia 2002 and 2007 protocols are similar with respect to the injection process. The original 2000 protocols appear to be different. They also are vague as to the volumes used for each chmical. However, based on testimony given in the *State v. Nance* hearings held on April 30th and July 30th, 2002, the injection process appears the same.

For example, during the execution of Jose High in November of 2001, the medical technicians had difficulty establishing IVs in both his arms. While IV access was established in High's left hand, the technicians were unable to establish an IV line in the right arms, hand or foot. As a result, technicians had to perform the much more complicated procedure of establishing a central line in his neck. Jose High's execution, however, was not a solitary occurance. In fact, Georgia's first four lethal injection executions all had problems with establishing proper IV

gathered primarily from the *Alderman v. Donald* proceedings, a federal §1983 challenge in the United States District Court for the Northern District of Georgia which concluded in May of 2008.14 These data included all information available from Georgia lethal injection executions from 2001 to 2007 during which time seventeen executions by lethal injection were conducted.

1. Georgia Technical Issues

Technical issues for Georgia were gathered from data contained in the medical examiner reports and the execution logs maintained by the Georgia Department of Corrections (GDOC). Technical issues data were available for all seventeen executions in this area in which thirteen had technical anomalies resulting in a 76% error rate with an expected total of 30 technical anomalies after Georgia executes forty individuals by lethal injection. This is shown in exhibit 14, Table 10.

This is a substantial error rate that appears to have gone unrecognized and thus uncorrected. The reason why Georgia has such a high technical error rate, even though the IV team consists of two nurses, is most likely a result of the training schedule which does not require periodic sessions.15

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access.

14 *Alderman v. Donald*, Case No. 1:07-CV-1474-BBM (N.D. Atlanta).

15 According to the testimony in *Alderman*, even though the protocols require only one nurse on the IV team, Georgia in practice uses two. Order and Opinion, *Alderman v. Donald*, Case No. 1:07-CV-1474-BBM, at 5.

Further supporting this data are the initial reports about the June 6, 2008, execution of Curtis Osborne. According to press accounts, the IV team took thirty-five minutes to find a suitable vein. This is consistent with Georgia's high technical error rate (76%) and our probability calculation for future executions.

2. Georgia Duration Issues

Georgia execution duration data were collected from the execution logs maintained by the GDOC. The relevant Georgia information pertained to the start of the chemical injection process to the time that death was pronounced. The expected execution duration was calculated from the affidavits and testimony of Dr. Dershwitz specific to the chemical weight and volume used in Georgia.

Data was available for fifteen of the seventeen executions conducted from 2001 to 2007. Georgia's mean execution time was 10.3 minutes. Based on the evidence provided by Dr. Dershwitz, the expected execution duration in Georgia is nine minutes. Using the same +/- one minute as before, the longest execution duration should be ten minutes. While the mean duration was only .3 above the expected duration, 33% of Georgia executions, or five out of fifteen, still exceeded the duration time parameter with an expected thirteen executions having duration errors after

Georgia executes forty individuals. This is shown in exhibit 14, Table 11.

Georgia's duration error rate is lower than that for Florida which may be due to the significantly lower amount of sodium pentothal. For the difference between Georgia and Ohio, it appears that the difference may involve the chemical volume being injected. While Georgia's injection process should take no more than seven minutes to complete, Ohio should take no more than four minutes. This is a difference of three minutes whereas the difference between the two means is only 1.7 minutes.

As noted in section VII(b)(2), recent Georgia executions after *Baze* support the data and conclusions concerning the duration error rate. According to initital press reports, on May 6, 2008, William Earl Lynd's execution took seventeen minutes and the June 4th execution of Curtis Osborne took fourteen minutes. Both executions were above the calculated duration parameter and above Georgia's mean execution duration of 10.3 minutes. While the term "proof" is not a statistical term, it can be said that these reports support the conclusion concerning Georgia's duration error rate.

3. Georgia Myoclonic or Other Observable Movements

For the seventeen total executions in Georgia by lethal injection, only four had recorded instances of myoclonosis. This

is an error rate of 24% for an expected total of ten myoclonic errors after forty executions. This is shown in exhibit 14, Table 12.

4. Georgia Combined Data

The combined data presented above reveals that 35% of Georgia's prior lethal injection executions had at least two shared areas of concern implicating the Eighth Amendment. Four executions had at least two anomalies. Two executions had all three present. This is shown in exhibit 14, Table 13.

The combined results for Florida, Ohio and Georgia show a technical issue error rate of 43%, a duration issue error rate of 55%, and a myoclonic issue error rate of 24%. In addition, the combined data show that 39% of the executions had the presence of two or more anomalies.

	Florida	**Ohio**	**Georgia**	**Florida,Ohio,Georgia**
Technical Errors	35%	48%	76%	53%
Duration Errors	53%	56%	33%	49%
Myoclonic Errors	35%	15%	24%	24%
Two or More Errors	40%	40%	35%	38%

c. Mean Duration Comparison

As noted above, a comparison between Florida, Ohio and

Georgia is relevant to a *Baze* analysis where some conclusions can be made about the pharmacokinetics of these chemicals which have never been studied before in these amounts. Most relevant is the sodium pentothal that seems to impact the duration of an execution with the assumption, or hypothesis, that Florida uses 5grams of sodium pentothal to hasten the death of an individual.

Florida uses five grams of sodium pentothal and 100 milligrams of pancuronium bromide. The mean execution duration is 13.8 minutes. Next, Ohio uses 2 grams of sodium pentothal and 100 milligrams of pancuronium bromide. Ohio's most recent five executions under the new protocols had a mean execution duration of 10.4 minutes. The prior twenty executions in Ohio had a mean of 8.6 minutes. Georgia, which uses 2grams of sodium pentothal and 50 milligrams of pancuronium bromide, has a mean execution duration time of 10.3 minutes.

The data does not support Florida's hypothesis that more sodium pentothal hastens death. In fact the data is contrary to the hypothesis. The difference between the Florida mean and the Georgia mean is 3.5 minutes. The difference between the Florida mean and the Ohio mean under Ohio's newest protocols is 3.4 minutes. The difference between the Florida mean and the Ohio mean under the prior protocols is 5.2 minutes.

d. The Netherlands

Discussed during both *Lightbourne* and *Baze* was the Netherlands and its experience with euthanasia and physician assisted suicide ("EAS"). (see exhibit 5) The comparison is relevant because both practices are designed to end life and both profess to do so in a humane manner. 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%. As noted above, Florida lethal injection executions have a technical issue error rate of 35%, a duration issue error rate of 53%, and a myoclonic issue error rate of 35%. Ohio lethal injection executions have a technical issue error rate of 48%, a duration issue error rate of 56%, and a myoclonic issue error rate of 15%. Georgia lethal injection executions have a technical issue error rate of 76%, a duration issue error rate of 33%, and a myoclonic issue error rate of 24%.While Dutch EAS practices are done in a clinical setting, the difference between the EAS practices, Florida, Ohio and Georgia lethal injection executions are substantial.

	Florida	**Ohio**	**Georgia**	**Netherlands**
Technical Errors	35%	48%	76%	5%
Duration Errors	53%	56%	33%	7%
Myoclonic Errors	35%	15%	24%	4%

VIII. Executive Discretion vs. Judicial Oversight

Schwab and *Lightbourne* reaffirmed this Court's decision in *Sims v. State*, 754 So.2d 657 (Fla. 2000) to accord heavy deference to the DOC with regard to virtually every aspect of the lethal injection protocols and the way they are implemented. The lower court in its Order likewise followed this reasoning. Justice Thomas declined to join the plurality opinion in *Baze* in part because, in his view, comparative risk standards "require courts to resolve medical and scientific controversies" that he felt were "beyond judicial ken," and the judiciary should not, as he put it, "micromanage the State's administration of the death penalty in this manner." The language and reasoning he employed are strikingly similar to that expressed by this Court in *Sims*, *Lightbourne* and *Schwab*. Since those views now represent the losing side, presumably the courts must now resolve at least some medical and scientific controversies and engage in at least some management of the administration of the death penalty.

However, executive discretion in the area of capital punishment has long been diminished. Article I, section 17 of the Florida Constitution, the conformity clause, provides that: "The prohibition against cruel or unusual punishment, and the prohibition against cruel and unusual punishment, shall be

construed in conformity with decisions of the United States Supreme Court which interpret the prohibition against cruel and unusual punishment provided in the Eighth Amendment to the United States Constitution." This constitutional amendment, ratified by the electorate, removed any separate and independent discretion that the DOC may have had in this area and firmly placed it with the United States Supreme Court.

Furthermore, judicial oversight of capital punishment at the expense of executive discretion has a long tradition in our jurisprudence. This principle was again reaffirmed this term in the U.S. Supreme Court's decision in *Kennedy v. Louisiana* (June 25, 2008). In *Kennedy*, the Supreme Court is very clear as to which branch of government controls the process of capital punishment in the country. The Court stated:

> This is of particular concern when the Court interprets the meaning of the Eighth Amendment in capital cases. When the law punishes by death, it risks its own sudden descent into brutality, transgressing the constitutional commitment to decency and restraint. For these reasons we have explained that capital punishment must "be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.' " Roper, supra, at 568, 125 S.Ct. 1183 (quoting Atkins, supra, at 319, 122 S.Ct. 2242). Though the death penalty is not invariably unconstitutional, see Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), the Court insists upon confining the instances in which the punishment can be imposed. Applying this principle, we held in Roper and Atkins that the execution of juveniles and mentally retarded persons are punishments violative of the Eighth Amendment because the offender had a diminished personal responsibility for the crime. See Roper,

> supra, at 571-573, 125 S.Ct. 1183; Atkins, supra, at 318, 320, 122 S.Ct. 2242. The Court further has held that the death penalty can be disproportionate to the crime itself where the crime did not result, or was not intended to result, in death of the victim. In Coker, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982, for instance, the Court held it would be unconstitutional to execute an offender who had raped an adult woman. See also Eberheart, supra (holding unconstitutional in light of Coker a sentence of death for the kidnaping and rape of an adult woman). And in Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), the Court overturned the capital sentence of a defendant who aided and abetted a robbery during which a murder was committed but did not himself kill, attempt to kill, or intend that a killing would take place. On the other hand, in Tison v. Arizona, 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987), the Court allowed the defendants' death sentences to stand where they did not themselves kill the victims but their involvement in the events leading up to the murders was active, recklessly indifferent, and substantial. In these cases the Court has been guided by "objective indicia of society's standards, as expressed in legislative enactments and state practice with respect to executions." Roper, 543 U.S., at 563, 125 S.Ct. 1183; see also Coker, supra, at 593-597, 97 S.Ct. 2861 (plurality opinion) (finding that both legislatures and juries had firmly rejected the penalty of death for the rape of an adult woman); Enmund, supra, at 788, 102 S.Ct. 3368 (looking to "historical development of the punishment at issue, legislative judgments, international opinion, and the sentencing decisions juries have made"). The inquiry does not end there, however. Consensus is not dispositive. Whether the death penalty is disproportionate to the crime committed depends as well upon the standards elaborated by controlling precedents and by the Court's own understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose. See id., at 797-801, 102 S.Ct. 3368; Gregg, supra, at 182-183, 96 S.Ct. 2909 (joint opinion of Stewart, Powell, and STEVENS, JJ.); Coker, supra, at 597-600, 97 S.Ct. 2861 (plurality opinion).Based both on consensus and our own independent judgment, our holding is that a death sentence for one who raped but did not kill a child, and who did not intend to assist another in killing the child, is unconstitutional under the Eighth and Fourteenth Amendments.

Kennedy, Slip Op. at 9-10.

It is very clear that the United States Supreme Court mandates that judicial oversight of capital punishment must never give way to any claim of executive discretion. The Court is very clear in stating which branch of government sets the limits of the Eighth Amendment, reaffirming the primacy of judicial oversight.

CONCLUSION

Based on the foregoing arguments, Mr. Schwab requests that this Court issue an Order remanding his case for a full and fair evidentiary hearing or for such other relief as this Court may deem appropriate.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief of Appellant has been furnished by e-mail and U.S. Mail, first class postage, to all counsel of record on this 26th day of June, 2008.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fl.R.App.P. 9.210, I hereby certify that this brief is prepared in Courier New 12 point font and complies with the requirement of Rule 9.210.

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