

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS MARK DEAN SCHWAB (b) County of Residence of First Listed Plaintiff <u>UNION</u> (EXCEPT IN U.S. PLAINTIFF CASES) (c) Attorney's (Firm Name, Address, and Telephone Number) Mark Gruher, Peter Cannon, Daphney Gaylord Capital Colateral Regional Council, Middle District 3801 Corporate Park Drive, Suite 210 Tampa, Florida 33619 (813) 740.3544	DEFENDANTS STATE OF FLORIDA County of Residence of First Listed Defendant <u>BREVARD</u> (IN U.S. PLAINTIFF CASES ONLY) NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED. Attorneys (If Known) <small>Kenneth Neaseley, Barbara Davis Office of the Attorney General 444 Statehouse Boulevard, 4th Floor Daytona Beach, Florida 32114</small>
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II. BASIS OF JURISDICTION (Place an "X" in One Box Only) <input type="checkbox"/> 1 U.S. Government Plaintiff <input type="checkbox"/> 2 U.S. Government Defendant <input checked="" type="checkbox"/> 3 Federal Question (U.S. Government Not a Party) <input type="checkbox"/> 4 Diversity (Indicate Citizenship of Parties in Item III)	III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant) <small>(For Diversity Cases Only)</small> <table style="width:100%; border-collapse: collapse;"> <tr> <td style="width:33%;">Citizen of This State</td> <td style="width:10%; text-align: center;">PTF</td> <td style="width:10%; text-align: center;">DEF</td> <td style="width:33%;">Incorporated or Principal Place of Business In This State</td> <td style="width:10%; text-align: center;">PTF</td> <td style="width:10%; text-align: center;">DEF</td> </tr> <tr> <td></td> <td style="text-align: center;"><input checked="" type="checkbox"/> 1</td> <td style="text-align: center;"><input checked="" type="checkbox"/> 1</td> <td></td> <td style="text-align: center;"><input type="checkbox"/> 4</td> <td style="text-align: center;"><input type="checkbox"/> 4</td> </tr> <tr> <td>Citizen of Another State</td> <td style="text-align: center;"><input type="checkbox"/> 2</td> <td style="text-align: center;"><input type="checkbox"/> 2</td> <td>Incorporated and Principal Place of Business In Another State</td> <td style="text-align: center;"><input type="checkbox"/> 5</td> <td style="text-align: center;"><input type="checkbox"/> 5</td> </tr> <tr> <td>Citizen or Subject of a Foreign Country</td> <td style="text-align: center;"><input type="checkbox"/> 3</td> <td style="text-align: center;"><input type="checkbox"/> 3</td> <td>Foreign Nation</td> <td style="text-align: center;"><input type="checkbox"/> 6</td> <td style="text-align: center;"><input type="checkbox"/> 6</td> </tr> </table>	Citizen of This State	PTF	DEF	Incorporated or Principal Place of Business In This State	PTF	DEF		<input checked="" type="checkbox"/> 1	<input checked="" type="checkbox"/> 1		<input type="checkbox"/> 4	<input type="checkbox"/> 4	Citizen of Another State	<input type="checkbox"/> 2	<input type="checkbox"/> 2	Incorporated and Principal Place of Business In Another State	<input type="checkbox"/> 5	<input type="checkbox"/> 5	Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6
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IV. NATURE OF SUIT (Place an "X" in One Box Only)					
CONTRACT	TORTS		FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury	PERSONAL INJURY <input type="checkbox"/> 362 Personal Injury - Med. Malpractice <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs. <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark	<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY	CIVIL RIGHTS	PRISONER PETITIONS	LABOR	SOCIAL SECURITY	FEDERAL TAX SUITS
<input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	<input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input checked="" type="checkbox"/> 440 Other Civil Rights	<input type="checkbox"/> 510 Motions to Vacate Sentence Habeas Corpus: <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition	<input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act	<input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g))	<input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609

V. ORIGIN (Place an "X" in One Box Only)

1 Original Proceeding
 2 Removed from State Court
 3 Remanded from Appellate Court
 4 Reinstated or Reopened
 5 Transferred from another district (specify)
 6 Multidistrict Litigation
 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
42 U.S.C. section 1983

Brief description of cause:
Action seeking declaratory and injunctive relief to prevent imposition of death penalty on November 15, 2007.

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23 **DEMAND \$** _____

CHECK YES only if demanded in complaint:
JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY (See instructions): **JUDGE** _____ **DOCKET NUMBER** _____

DATE 11/13/2007 **SIGNATURE OF ATTORNEY OF RECORD**


FOR OFFICE USE ONLY

RECEIPT # _____ **AMOUNT** _____ **APPLYING IFP** _____ **JUDGE** _____ **MAG. JUDGE** _____

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

MARK DEAN SCHWAB,

Plaintiff,

v.

CASE NO. _____

JAMES R. MCDONOUGH,
Secretary, Florida Department of
Corrections, and
OTHER UNKNOWN EMPLOYEES
AND AGENTS,
Florida Department of Corrections
Defendants.

DEATH WARRANT CASE
EXECUTION SCHEDULED FOR
THURSDAY, NOVEMBER 15,
2007 AT 6:00 PM

_____/

Prisoner's name:
Prisoner's number:
Place of Confinement:

Mark Dean Schwab
DOC No. 111129
UNION CORRECTIONAL
INSTITUTION
Raiford, Florida

COMPLAINT¹

1. This is a civil rights action brought under 42 U.S.C. § 1983 and the United States Constitution for violations and threatened violations of Plaintiff Mark Dean Schwab's rights to be free from cruel and unusual punishment under the Eighth and Fourteenth Amendments.

2. Mr. Schwab is a death-sentenced Florida prisoner who seeks declaratory and injunctive relief to prevent the Defendants from using Florida's current lethal injection procedures to execute him. The Defendants' improper use of anesthesia as a precursor to

¹ Mr. Schwab has been found to be indigent by this Court and requests that he be allowed to proceed in forma pauperis.

execution unnecessarily risks infliction of severe pain and suffering. In addition, because the chemicals used for execution require the proper induction and maintenance of anesthesia, the Defendants' failure to use medically approved procedures and equipment and properly trained personnel creates an unacceptable risk that Mr. Schwab will suffer excruciating pain during the course of his execution.

JURISDICTION

3. Jurisdiction over this matter arises under 42 U.S.C. § 1983, 28 U.S.C. § 1331, 28 U.S.C. § 1343(a)(3), 28 U.S.C. § 2201, and 28 U.S.C. § 2202.

VENUE

4. Venue is appropriate in the Middle District of Florida under 28 U.S.C. § 1391(b).

THE PARTIES

5. Plaintiff Mark Dean Schwab is a United States citizen and a resident of the State of Florida. Mr. Schwab is a death-sentenced prisoner currently being held in the custody of the Florida Department of Corrections at the Florida State Prison at Raiford, Florida.

6. Defendant James P. McDonough is the Secretary of the Florida DOC. Other Unknown Employees and Agents of the Florida DOC are involved in the development and execution of lethal injections. Plaintiff does not yet know the identity of these persons.

All of the Defendants are being sued in their individual and official capacities. The named Defendants are citizens and residents of the State of Florida.

JUSTICIABLE CASE OR CONTROVERSY

7. There is a real and justiciable case or controversy between the parties.

8. Plaintiff Mark Dean Schwab is a death-sentenced prisoner who has been convicted of capital murder in the state courts of Florida.

9. The Florida DOC has adopted a written and confidential execution protocol for administering capital punishment by lethal injection.
10. Plaintiff challenges the constitutionality of Florida's lethal injection procedures under 42 U.S.C. § 1983.
11. Mr. Schwab has filed an administrative grievance process available at Florida State Prison by which death-sentenced prisoners can challenge the procedures to be employed in their execution. His grievance was denied, and he has now exhausted administrative remedies.
12. Absent judicial intervention, Mr. Schwab will be executed pursuant to Florida's lethal injection procedures. There is a justiciable case or controversy regarding the constitutionality of Florida's lethal injection procedures.

GENERAL ALLEGATIONS

13. The defendant was convicted of first degree murder and capital sexual battery after a nonjury trial and sentenced to death on July 1, 1992.
14. The judgment and sentence were affirmed on direct appeal to the Florida Supreme Court. Schwab v. State, 636 So.2d 3 (Fla. 1994) cert. den. 513 U.S. 950, 115 S.Ct. 364 (1994).
15. 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).
16. 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. den. 127 S.Ct. 1126 (Mem), 166 L.Ed.2d 897.

CAUSE OF ACTION

17. The combination of drugs utilized by the State of Florida in its execution protocol unlawfully risks subjecting Mr. Schwab to an excruciatingly painful and torturous death. The first drug, Thiopental (also known as sodium pentothal), is an ultra-short-acting barbiturate that depresses the central nervous system to produce unconsciousness and anesthesia. Thiopental derives its utility from its rapid onset and rapid redistribution through the body at surgical doses. Typically, Thiopental is used in the induction phase of anesthesia to temporarily anesthetize patients for sufficient time to, for example, intubate the trachea.

18. If it is necessary to maintain a patient in a surgical plane of anesthesia for longer than just a few minutes, physicians typically use drugs that are longer lasting than Thiopental. If Thiopental is used not only to induce, but also to maintain, a surgical plane of anesthesia, a qualified person must be present to continually monitor the patient to ensure that the Thiopental has been correctly administered (repeated intravenous doses are usually required) and is maintaining the patient in a state of unconsciousness.

19. Next, Defendants administer pancuronium bromide, also referred to as Pavulon, which paralyzes voluntary muscles, including the diaphragm. Pavulon does not affect consciousness or the perception of pain. To the extent that the first chemical, Thiopental, is improperly administered and fails to establish and maintain a sufficient plane of anesthesia, the Pavulon serves only to mask from observers (but not the prisoner) the pain and suffering that would attend a paralyzed diaphragm. In addition, the paralysis that Pavulon induces ultimately causes an intense, painful death by asphyxiation. Pavulon

masks the telltale physical signs that would signal a properly trained observer whether or not a prisoner had been sufficiently anesthetized.

20. Finally, the drug that is used to fatally poison the prisoner is potassium chloride.

Potassium chloride disrupts the normal electrical activity of the heart and stops it from pumping blood, thereby causing cardiac arrest. As it travels in the bloodstream from the site of injection towards the heart, potassium chloride activates all the nerve fibers inside the vein, causing a burning sensation as it courses through the body and ravages the internal organs.

21. This causes excruciating pain that is agonizing for a recipient who has not been properly anesthetized. Because of this risk of excruciating pain, the use of potassium chloride requires an appropriate anesthesia protocol prior to its administration to ensure an adequate depth of anesthetic plane. However, anesthetic depth cannot be reliably determined during Florida executions because Pavulon blocks an accurate assessment by observers by paralyzing all of the muscles which would otherwise move when a prisoner is in excruciating pain. Because no one can reliably assess anesthetic depth using this process (and make appropriate adjustments), the procedures the Defendants use can result in the extreme terror and suffering of conscious suffocation.

22. The American Veterinary Medical Association (AVMA) states that the use of neuromuscular paralyzing drugs, including pancuronium bromide (Pavulon), solely or in conjunction with other drugs, is unacceptable as a method of euthanasia. The AVMA further states that the use of potassium chloride in a euthanasia protocol requires a surgical plane of anesthesia, which is characterized by loss of consciousness, loss of reflex muscle response, and loss of response to noxious stimuli. The AVMA recommends

the use of a longer lasting barbiturate for animal euthanasia than the Thiopental that is used in Florida executions of death-sentenced prisoners. Florida law also does not authorize the use of neuromuscular blocking agents in animal euthanasia. See Ala. Code 1975 § 34-29-131(a).

23. Defendants do not conduct lethal injections that comport with the appropriate standards of practice for inducing and monitoring anesthesia as a precursor to execution. Nor do Defendants take effective measures to ensure that a prisoner will not suffer a conscious and painful death, constituting cruel and unusual punishment under the current anesthesia procedures.

24. Defendants' anesthesia procedures lack medically necessary safeguards and, therefore, substantially increase the risk that an inmate such as Mr. Schwab will suffer unnecessarily severe pain during the course of his execution. For example, there is no standardized time to administer each of the three chemicals. There are no procedures for ensuring that the anesthetic agent is properly flowing into the prisoner, and no procedures for ensuring that the prisoner is properly sedated prior to the administration of other chemicals, as would be required in any medical or veterinary procedure before the administration of a neuromuscular blocking agent (such as pancuronium bromide) or the administration of a painful potassium chloride overdose.

25. Defendants' existing procedures do not require the personnel who perform the tasks in the anesthesia and execution processes to have any minimum qualifications or expertise. Defendants do not adequately ensure that the individuals responsible for inducing and maintaining unconsciousness are credentialed, licensed, and proficient in the knowledge, skills, and procedures necessary to establish an appropriate plane of

anesthesia throughout the lethal injection process, notwithstanding the fact that it is a complex medical procedure requiring expertise to be performed correctly.

26. The absence of medical personnel who are credentialed, licensed, and proficient in the field of anesthesiology and the lack of adequate procedures greatly increases the risk that a prisoner will not receive the necessary amount of anesthetic prior to being paralyzed by the pancuronium bromide and then experiencing the extremely painful internal "burn" of the potassium chloride, and greatly increases the risk that a conscious prisoner will experience excruciating pain and suffering.

27. The Defendants do not have appropriate emergency procedures established, nor do they provide equipment appropriate to deal with emergencies, such as inability to access a peripheral vein.

28. The lack of adequate standards for administration of chemicals, the lack of qualifications of the personnel involved in the process, the lack of emergency protocols and equipment, and the combination of the drugs the Defendants use as a precursor to an execution, as well as for the execution, create an unlawful risk that Mr. Schwab will be conscious throughout the execution process and, as a result, will experience an excruciatingly painful and protracted death.

VIOLATION OF THE RIGHT TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT PURSUANT TO THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

29. Secretary McDonough, and Other Unknown Employees and Agents of the Florida Department of Corrections are acting under color of Florida law in undertaking to execute Plaintiff Mark Dean Schwab by lethal injection using an insufficient, improperly designed and improperly administered procedure for inducing and maintaining anesthesia

prior to execution; by using chemicals that cause severe pain in the process of causing death; by employing inadequately trained personnel; and by failing to provide emergency plans and equipment, such that Plaintiff will unnecessarily suffer an excruciating death in violation of his right to be free from cruel and unusual punishment under the Eighth and Fourteenth Amendments to the United States Constitution.

30. Although it is possible to conduct executions in a constitutionally compliant manner, Defendants have chosen not to do so. While Defendants could select additional or alternative chemicals and retain qualified medical personnel to administer its chosen chemicals to ensure the constitutionality of its lethal injection procedure, Defendants have failed to do so and have acted with deliberate indifference. Defendants' current lethal injection procedures violate evolving standards of decency. See *Estelle v. Gamble*, 429 U.S. 87, 102 (1976) (noting that the Eighth Amendment requires courts to assess “evolving standards of decency that mark the progress of a maturing society”) (quoting *Trop v. Dulles*, 356 U.S.86,101 (1958); *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (stating that the Eighth Amendment prohibits infliction of unnecessary and wanton pain).

PRAYER FOR RELIEF

For these reasons, Plaintiff Mark Dean Schwab respectfully requests this Court to:

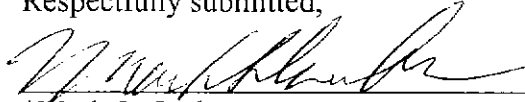
- A. Enter a declaratory judgment that Defendants' inadequate anesthesia and execution procedures violate Plaintiff's right to be free from cruel and unusual punishment under the Eighth and Fourteenth Amendments to the United States Constitution;
- B. Grant injunctive relief to enjoin the Defendants from executing Plaintiff with inadequate anesthesia and execution procedures which violate Plaintiff's right to be free from cruel and unusual punishment under the Eighth and Fourteenth Amendments to the

United States Constitution;

C. Grant reasonable attorneys' fees pursuant to 42 U.S.C. § 1988 and the laws of the United States, as well as costs of suit; and

D. Grant any further relief as it deems just and proper.

Respectfully submitted,



*Mark S. Gruber

Florida Bar No: 0330541

Peter Cannon

Florida Bar No. 0109710

Daphney E. Gaylord

Florida Bar No: 0136298

Office of the Capital Collateral

Regional Counsel - Middle Region

3801 Corporex Park Drive, Suite 210

Tampa, fl 33619-1136

(813) 740 3544


* Counsel of Record.

CERTIFICATE OF SERVICE

I, Mark S. Gruber, hereby certify that the foregoing Complaint was served via hand delivery, electronic mail and/or overnight courier on the following counsel for

Defendant:

Kenneth S. Nunnelley
Assistant Attorney General
444 Seabreeze Blvd., 5th Floor
Daytona Beach, FL 32118-3951



Mark S. Gruber