

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

**PLAINTIFF'S EMERGENCY MOTION TO STAY EXECUTION**

COMES NOW the Plaintiff, Mark Dean Schwab, by and through undersigned counsel,<sup>1</sup> and moves this Honorable Court to grant a preliminary injunction staying the execution date of November 15, 2007, set for Mr. Schwab by the Florida Supreme Court. Mr. Schwab's grievance petition regarding the method of execution intended to be used was denied on Friday, November 9, 2007, one business day before the filing of this motion. In support of this motion, Mr. Schwab would show the following:

THIS COURT SHOULD ISSUE A PRELIMINARY INJUNCTION IN THIS CASE  
BECAUSE THE UNITED STATES SUPREME COURT'S DECISION IN BAZE V.

\_\_\_\_\_  
<sup>1</sup> Mr. Schwab has been found to be indigent by this Court and requests that he be allowed to proceed in forma pauperis.

REES WILL SET THE STANDARD FOR DETERMINING WHAT IS CRUEL AND UNUSUAL PUNISHMENT UNDER THE EIGHTH AMENDMENT.

1. On September 25, 2007, the United States Supreme Court granted a petition for certiorari to the Kentucky Supreme Court raising four questions related to lethal injection procedures. *Baze v. Rees*, No. 07- 5439. Those questions include the standard for determining what is cruel and unusual punishment under the Eighth Amendment to the United States Constitution and whether the three-drug sequence employed by Kentucky- and by Florida-meets constitutional requirements.

A challenge to the constitutionality of lethal injection along with applications for a stay of execution were considered in *Siebert v. Allen*, U.S. 11<sup>th</sup> Circ. No. 07-14956. Although the case was eventually remanded for consideration of Siebert's as-applied claim, a stay which was entered sua sponte October 25, 2007 remains in effect.

2. On September 27, 2007, the United States Supreme Court granted a stay of execution in the Texas case of Carlton Turner, setting 90 days for the petitioner to file a petition for certiorari respecting lethal injection procedures in that state. See *Turner v. Texas*, --- U.S. ---, 2007 WL 2803693 (Sept. 27, 2007).

3. Subsequently, the Texas Court of Criminal Appeals on October 2, 2007, stayed the execution of Heliberto Chi. In *re Heliberto Chi*, Case No.WR-61,600-03, Order (Tex. Ct. Crim. App. Oct. 2, 2007) (granting stay of execution to allow state to "address the question of whether the current method of administering lethal injection in Texas constitutes cruel and unusual punishment such that the respondent would violate the Eighth Amendment if he complied with the Warrant of Execution").

4. On October 3, 2007, the Attorney General of Oklahoma requested that state's Court of Criminal Appeals to postpone setting any execution dates until a decision is rendered in

Baze. Short v. State, Case No. D-97-540, State's Notice of Exhaustion of State and Federal Appeals (Okla. Crim. App. Oct. 3, 2007) (asking the court not to set execution date for Terry Lyn Short "[o]ut of an abundance of caution" pending Supreme Court's decision in Baze).

5. In California, United States District Judge Jeremy Fogel has ordered changes to that state's lethal injection protocol to comply with constitutional requirements. Morales v. Tilton, 465 F. Supp. 2d 972 (N.D. Calif. 2006). Executions appear to be on hold since that decision was issued. In a recent order addressing the impact of the certiorari grant in Baze, Judge Fogel stated, "While the issues presented in Morales v. Tilton are not identical in all respects to those before the Supreme Court in Baze, it would appear that at the very least the Supreme Court's decision in Baze is likely to affect this Court's legal analysis and conclusions." Morales v. Tilton, No. 5:06-cv-219-JF (N.D. Calif. Sept. 26, 2007).

6. In Delaware, United States District Judge Sue L. Robinson issued an order on September 26, 2007, staying proceedings in the lethal injection challenge pending in her court explicitly as a result of the grant of certiorari in Baze. Jackson v. Danberg, Civ. No. 06-300-SLR (D. Del. Sept. 26, 2007).

7. The Supreme Court's action in granting a petition for certiorari on these Eighth Amendment matters to one petitioner and in granting a stay to another means that a national standard will be set in the not-too-distant future. The Texas courts have read the Supreme Court's actions as mandating that they, too, hold executions in abeyance while the issue is pending before that higher court. Similarly, the Morales court has indicated that, while discovery and an evidentiary hearing may continue before an opinion is issued in Baze, the Supreme Court's decision will have a significant impact on the determination

of the case before it. The Jackson court went further and suspended all proceedings pending a decision in Baze. Given these developments, for the State of Florida to proceed in its intent to execute Mr. Schwab prior to the Supreme Court's decision would be arbitrary, improper and unjust. See, e.g., *Timberlake v. State*, 859 N.E.2d 1209, 1212 (Ind. 2007) (granting stay of execution where a challenge was made under *Ford v. Wainwright*, 477 U.S. 399 (1986), because the Supreme Court had granted certiorari in *Panetti v. Quarterman*, 127 S. Ct. 2842 (2007)) ("If the Supreme Court interprets the Eighth Amendment in a manner significantly different from Justice Powell's concurrence in *Ford*, *Timberlake's* execution may prove to be prohibited by the Eighth Amendment. We grant a stay to prevent learning the answer to that question after it is too late").

8. Actual or virtual stays are in place in a number of other states as well. A recent decision of the United States District Court for the Middle District of Tennessee has halted executions in that state on the basis that a lethal injection protocol virtually identical to Florida's violates the constitutional prohibition against cruel and unusual punishment. *Harbison v. Little*, --- F. Supp. 2d ---, 2007 WL 2821230 (M.D. Tenn. Sept. 19, 2007). The State of Tennessee subsequently moved to vacate the execution order in light of this decision. *In re Harbison*, Case No. M1986-00093-SC-OT-DD, Motion to Vacate Order Setting Execution Date (Tenn. S.Ct. Sept. 24, 2007).

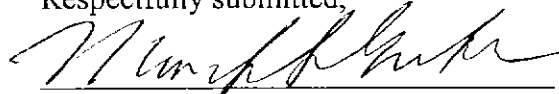
9. Executions are also on hold for various reasons related to lethal injection challenges in at least the following additional states: Florida, Maryland, New Jersey, North Carolina, and Ohio. See "Lethal Injections: Other Official Actions" at <http://www.deathpenaltyinfo.org/article.php?did=1686&scid=64>.

10. Given that the Supreme Court's decision in *Baze*, when rendered, will decide the

fundamental issue of what constitutes cruel and unusual punishment under the Eighth Amendment, it would be a waste of judicial resources for the parties in this case to make any argument beforehand and for this Court to reach any decision which will be necessarily premised on the very same question.

WHEREFORE, for the reasons stated above, or any other reason discernible by this Court, this Court should issue a preliminary injunction enjoining the execution of Mark Dean Schwab by the Defendants and the State of Florida pending the decision of the United States Supreme Court in *Baze v. Rees*.

Respectfully submitted,



\*Mark S. Gruber

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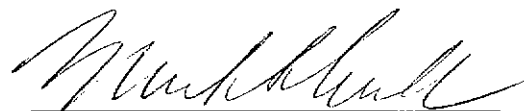
(813) 740 3544

\* Counsel of Record.

#### CERTIFICATE OF SERVICE

I, Mark S. Gruber, hereby certify that the foregoing Plaintiff's Emergency Motion for Preliminary Injunction to Stay Execution was served via hand delivery, electronic mail and/or overnight courier on the following counsel for Defendant:

Kenneth S. Nunnolley  
Assistant Attorney General  
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Mark S. Gruber