

IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT, IN
AND FOR BREVARD COUNTY, FLORIDA

Case No. 05-1991-CF-7249-AXXX

STATE OF FLORIDA,

Plaintiff,

v.

MARK DEAN SCHWAB,

Defendant.

**ORDER DENYING DEFENDANT'S THIRD SUCCESSIVE
MOTION TO VACATE SENTENCE OR STAY EXECUTION**

This matter comes before the Court upon the Defendant's Third Successive Motion to Vacate Sentence or Stay Execution, filed on June 21, 2008. The Court denied a successive motion to vacate on August 20, 2007 and denied a second successive motion on November 13, 2007. Both denials were affirmed on appeal. *Schwab v. State*, 973 So.2d 427 (Fla. 2007); *Schwab v. State*, 33 Fla. L. Weekly S67 (Fla., January 24, 2008).

The Court heard oral arguments on the Motion on June 24, 2008. Peter Cannon, Esq., of the Middle District, Regional Capital Collateral Counsel, provided argument on behalf of the Motion. Ken Nunnally, Esq., of the Florida Attorney General's Office argued on behalf of the State. The Court has carefully considered the Motion, the State's Answer, the exhibits provided by the Defendant and oral arguments.

The Court recognizes that the execution of a condemned criminal is among the most serious and solemn acts a state can undertake and careful deliberation is necessary

to assure that constitutional safeguards are met. However, this process does not require the Court to continually review claims which have already been found wanting. At this late stage in the legal process, Schwab is barred from relitigating prior claims and from raising any new claims which he could have raised at an earlier date. His Third Successive Motion reads very much like his prior challenges to Florida's lethal injection protocol, the only possible two new facts being the United States Supreme Court decision, *Baze v. Rees*, 128 S. Ct. 1520 (2008), and any information Schwab gleaned from records of mock executions conducted under the new Florida protocol since August, 2007. Because of these facts, the Court will rule upon the claims asserted.

Constitutional Standards: Risk and the Eighth Amendment

This Court first emphasizes that the Florida Supreme Court, in *Lightbourne v. McCollum* 969 So. 2d 326 (Fla. 2007), carefully reviewed the current DOC protocol for lethal injection and the extensive record created by the Circuit Court of Marion County during its evidentiary hearing on lethal injection. It concluded, "[The petitioner] has failed to show that Florida's current lethal injection procedures, *as actually administered* though the DOC, are constitutionally defective." *Id.* at 353. (emphasis added).

Since the *Lightbourne* decision, the United States Supreme Court issued *Baze v. Rees*, 128 U.S. 1520 (2008), which analyzed the lethal injection standards of the State of Kentucky. Justice Roberts, writing the plurality opinion of the Court, began with the principal that capital punishment is constitutional. He noted that the Court has never invalidated a State's chosen procedure for carrying out a sentence of death as violative of the Eighth Amendment and then stated,

It necessarily follows that there must be a means of carrying [a death sentence] out. Some risk of pain is inherent in any method of execution—no matter how

humane—if only from the prospect of error in following the required procedure. It is clear, then, that the Constitution does not demand the avoidance of all risk of pain in carrying out executions.

The Court stated that a method of execution does not constitute cruel and unusual punishment unless it creates “a substantial risk of serious harm,” or “an objectively intolerable risk of harm.” It also found that the “conditions presenting the risk must be ‘sure or very likely to cause ... needless pain’ and give rise to ‘sufficiently imminent dangers.’” It concluded that “[a] State with lethal injection protocol substantially similar to [Kentucky’s] would not create a risk that meets this standard.” *Id.* at 1531, 1537.

The Defendant’s arguments are essentially two-fold. He contends that *Baze* sets a different and higher Eighth Amendment standard than *Lightbourne* and that the Florida protocol do not meet the *Baze* standard because Florida’s procedures are not substantially similar to those of Kentucky, thus exposing him to a substantial risk of harm. He also argues that the Florida protocol, as applied during training, demonstrate that a substantial risk of harm remains in the Florida process.

The Lightbourne Standard

In *Lightbourne*, the Florida Supreme Court looked at the history of Eighth Amendment standards and found that cruel and unusual punishment is that which involves “torture or a lingering death” or the infliction of “unnecessary and wanton pain,” *Id.* at 341. This would indeed seem to be a different and lesser standard than *Baze*, lesser in terms of its protection of a defendant. However, the Court also looked at the question of risk and explicitly stated that *Lightbourne* “has not shown a substantial, foreseeable or unnecessary risk of pain” in the DOC procedures. It states that “even if the Court did review this claim under a ‘foreseeable risk’ standard . . . or an ‘unnecessary risk’ . . . we

would likewise find that [the petitioner] has failed to carry his burden of showing an Eighth Amendment violation. “*Id* at 534-535. Thus, the Florida Supreme Court did analyze the risk in terms of whether it was “substantial,” a standard very much in line with *Baze*. It also analyzed the risk in terms of whether it was “foreseeable” or “unnecessary,” both of which provide a higher level of protection to defendants. *Baze* specifically rejected the “unnecessary risk” standard proposed by petitioners because it found that this standard would improperly involve the courts in determining “best practices” for execution standards. *Id.* at 1532. As to what constitutes a “substantial” risk, the Court notes that the word implies more than speculative or possible risks, but those which might be deemed significantly great, considerable, real, material and of substance.

Since the *Baze* decision of April 2008, the Florida Supreme Court has summarily rejected challenges to the Florida lethal injection protocol three times, citing to *Lightbourne: Lebron v. State*, 33 Fla. L. Weekly S294 (Fla. May 1, 2008); *Woodel v. State*, 33 Fla. L. Weekly S290; (Fla. May 1, 2008); *Griffin v. State*, Slip Copy, 2008 WL 2415856 (Fla. June 2, 2008). *Griffin* cites to *Baze*. Although this Court does not know the specifics of the lethal injection claims raised in these three cases, it is clear that the Florida Supreme Court, post-*Baze*, has considered the constitutionality of the Florida lethal injection protocol and found it constitutional under the Eighth Amendment.

Error Rates in Executions and Training Exercises

The Defendant asserts that “error” rates in recent DOC mock executions demonstrate that the new DOC protocol fails to remedy the problems of the previous procedures and therefore create a substantial risk of serious harm violative of *Baze*. He

provides the analysis of Janine Arvizu, whom he identifies as a “certified quality auditor.” Ms. Arvizu is the same auditor whose analysis was rejected by this Court and the Florida Supreme Court in Schwab’s prior motion because the Defendant failed to demonstrate how this person was qualified to offer an opinion on this subject. (“Schwab fails to sufficiently explain how this auditor is qualified to provide a reliability and efficacy report on DOC’s method of execution.” *Schwab v. State*, 969 So.2d 318 (Fla. 2007)).

Even assuming the Court accepts the analysis of “error” rates provided by Schwab as true, it finds that they do not rise to constitutional errors. If errors were made in prior Florida executions, no court has held that any of them created an Eighth Amendment violation. Despite the claim of numerous errors both in actual and mock executions, Schwab cites to no Florida lethal injection execution in which DOC’s protocol or the implementation thereof were found to have errors arising to constitutional levels.

As noted by Justice Roberts in *Baze*, “an isolated mishap alone does not give rise to an Eighth Amendment violation, precisely because such an event, while regrettable, does not suggest cruelty, or that the procedure at issue gives rise to a ‘substantial risk of serious harm.’” *Id.* at 1531.

Technical Errors

Schwab lists three areas of concern which, he contends, require the Court to take a closer look at the Florida protocol, alleging it fails to meet the standard of *Baze*. He first addresses “technical errors” that have allegedly occurred in actual past executions, such as irregular IV placements and multiple needle punctures indicating failure to gain IV access at the initial site. These alleged errors are not newly discovered evidence but

could have been and were the subject of prior motions. Additionally, Schwab fails to explain how these “anomalies” relate to a Eighth Amendment claim. As the Court noted in *Lightbourne*, and as anyone who has spent time in a hospital knows, problems inserting IV lines are common even under the best of medical circumstances. *Id.* at 348. Being pricked numerous times in the course of having an IV inserted is not cruel and unusual punishment, however uncomfortable it may be.

Schwab claims that a critical distinction exists between the approved Kentucky procedures and the Florida protocol when it comes to training for IV insertions and that errors in the recent mock executions demonstrate DOC’s inability to perform an execution without creating a risk of harm. Schwab has not provided the Court with a copy of the Kentucky protocol, leaving the Court to assess that protocol as described in *Baze*. Kentucky procedure requires that the execution team participate in at least ten mock executions a year and those practices include the actual insertion of IV lines into volunteers. Florida, on the other hand, apparently does not actually insert IV lines during training. *Lightbourne* at 349. However, the Florida personnel inserting IVs during execution must be phlebotomists certified by a national certification agency or emergency medical technicians or paramedics certified under Chapter 401, Florida Statutes. (Exhibit A, Defendant’s Exhibit 2, Florida Lethal Injection Protocol, p. 2).

Additionally, Warden Cannon testified in the *Lightbourne* hearings that these certified persons must also be currently employed in their area of medical expertise and must perform their assigned functions in their daily duties. *Lightbourne* at 349. These certified professionals are the very same type of certified professionals we assume have sufficient training to save our lives in a medical setting and the same type of

professionals required in Kentucky. *Baze* at 1528. The Court does not find that the failure to utilize actual IV insertions during mock executions has a significant impact in creating a risk of harm. The persons chosen to insert IV lines must have appropriate certification and, according to Warden Cannon, significant on-going experience in IV technology as part of their daily duties. Obtaining volunteers for practice IV insertions is not an enforceable criteria, as it would depend on the existence of living volunteers willing to subject themselves to the procedure, something which cannot be guaranteed.

While the Florida protocol calls for training sessions to be held quarterly at a minimum, Warden Cannon testified that monthly training sessions are held and that team members practice their responses to problems that might arise. *Lighbourne* at 349. The protocol dictates that a practice execution will be conducted one week prior to the scheduled date of an execution and that all persons involved in the actual execution are to participate in this practice. This level of scheduled practices is substantially similar to the ten sessions conducted annually by Kentucky.

The critical point at which the Eighth Amendment comes into play in the course of a lethal injection is the point at which the second drug is administered: “[P]roper administration of the first drug, sodium thiopental, eliminates any meaningful risk that a prisoner would experience pain from the subsequent injections of pancuronium and potassium chloride.” *Baze* at 1530. *See also Lighbourne* at 351: “If the sodium pentathol is properly injected, it is undisputed that the inmate will not feel pain from the effects of the subsequent chemicals.” Thus, the critical Eighth Amendment concern is whether the prisoner has, in fact, been rendered unconscious by the first drug, not whether there are “irregular IV placements,” “surgical incisions,” “multiple needle punctures” or even

“subcutaneous IV insertion,” errors alleged by Schwab to have occurred in actual executions. As to training exercises, where IVs are not actually inserted, the Court questions what criteria Schwab uses when he describes a training exercise as a “failed” one.

The Court will address assessment of consciousness further below. It rejects the argument that the alleged error rate in the insertion of IVs, by itself, creates a substantial risk of serious harm, as did the United States Supreme Court when it concluded that “asserted problems relating to the IV lines do not establish a sufficiently substantial risk of harm to meet the requirements of the Eighth Amendment.” *Baze at* 1533. Florida protocol with regard to the training and expertise of IV technicians is substantially similar to Kentucky procedures and does not create an “objectively intolerable risk of harm.” 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. (Exhibit A, p. 5).

Duration of Execution

A second “error” problem in the execution process which Schwab alleges is the length of the execution process, which might lead to a “lingering death.” He cites to the deposition of Dr. Dershwitz, an expert for the State in the *Lightbourne* hearing, who has allegedly stated an execution should take 11 minutes, while Florida’s average is 13.8 minutes. Schwab’s claim is either that the drugs are being administered improperly or that the high dosage of sodium pentathol used by Florida actually slows down the process of death. Again, this is not newly discovered evidence, as he is citing to executions which occurred before he filed his last motion. He does not demonstrate that the data he

provides from Ohio and Georgia is newly discovered, as it related to executions occurring prior to this year.

Even assuming that some of the data is new, the Court does not view it as creating a constitutional challenge to Florida's protocol. The assertion that one expert determined an ideal time frame does not require the Court to stand over DOC personnel with a stopwatch. If it did, the Court suspects it could be accused of rushing executions and creating a greater risk of harm. The Court does not find where in Dr. Derschwitz's testimony that he set the 11-minute standard and Schwab does not point it out in his Motion.

Concerning an appropriate dose of sodium pentathol, the Court determines that there was testimony at the *Lightbourne* hearing that the higher dose of sodium pentathol used in the Florida protocol (five grams as opposed to three grams in Kentucky, two in Ohio and Georgia) may cause the subsequent drugs to act more slowly (Exhibit B, from Defendant's Exhibit 1, testimony of Dr. Dershwitz, p. 32). But Dr. Dershwitz did not testify and Schwab does not claim that this actually results in any pain or risk of pain. Dr. Dershwitz testified that "once the thiopental [sodium pentathol] is administered, nothing that is done to the inmate after that is perceptible by the inmate." He also testified that once the first few hundred milligrams of sodium pentathol were administered, the onset of unconsciousness is typically between thirty and sixty seconds. (Exhibit B, pp. 33, 60). Even if Schwab is correct that the higher sodium pentathol dose used by Florida delays death, his motion does not allege that this dosage would fail to render him unconscious within seconds, thus eliminating any further Eighth Amendment concerns.

What constitutes a correct dose of sodium pentathol is not a matter which should be decided by a court of law. As the *Baze* court pointed out, the courts should not be transformed into boards of inquiry charged with determining “best practices” for executions, *Id.* at 1531. Again, the constitutional focus is unconsciousness, not the duration of the execution following unconsciousness.

Myclonic and Other Observable Movements

The third “error” problem alleged by Schwab is testimony from various witnesses that prisoners demonstrated various involuntary movements during their executions, including spasms and convulsions, which allegedly demonstrates that the second drug used in the lethal injection process, pancuronium bromide, is either not being properly administered or is not acting as predicted.

Again, this is not newly discovered evidence. In fact, this issue was at the heart of the investigation into the execution of Angel Diaz, who reportedly made movements and sounds after the point at which the sodium pentathol was supposed to have rendered him unconscious. The Governor’s Commission on Administration of Lethal Injection and the *Lightbourne* trial court looked extensively into evidence concerning the execution of Diaz. The Commission found it could not reach a conclusion as to whether Diaz had suffered (*cited in Lightbourne at 330*). The trial court found that, despite the fact that the subcutaneous IV delayed drug absorption rates, the high level of sodium pentathol rendered Diaz “totally unconscious and insensate throughout the entire death process.” *Florida v. Lightbourne*, in the Circuit Court for the Fifth Judicial Circuit, in and for Marion County, Case No. 1981-170 CF, Order dated September 10, 2007. The Florida

Supreme Court, reviewing the Marion County evidence, stated, "it is disputed whether or not Diaz suffered pain." *Lightbourne* at 345.

Schwab cites to Dr. Dershwitz's testimony again. Dr. Dershwitz indicated that the purpose of pancuronium bromide is to prevent involuntary physical movement. Therefore, Schwab concludes, the drug must not be administered properly, creating yet another "error" in the execution process. Schwab fails to note that Dr. Dershwitz also testified that "movement does not reflect pain and this does not reflect consciousness." (Exhibit B, p. 60). Schwab alleges only that the failure to properly administer this drug "would result in a failure to prevent involuntary movements and hasten death," not that its administration or maladministration results in pain or a substantial risk of pain. He does not allege how the Florida protocol for the use of this drug is not substantially similar to Kentucky's and thus this claim must fail. Given the fact that the use of pancuronium bromide and its relationship to movement or pain has been extensively investigated in Florida and given the fact that *Baze* approved the use of this particular chemical, the Court concludes that further inquiry into this subject is neither necessary nor useful.

Assessment of Consciousness

As noted above, in terms of the Eighth Amendment, the critical point in the lethal injection process comes immediately prior to the injection of the second drug. The question is, has the condemned been rendered unconscious by the sodium pentathol? If so, then any meaningful risk of pain has been eliminated. *Baze at 1530*.

Under the Kentucky protocol approved by the United States Supreme Court, an assessment of consciousness is apparently not written into the procedures. Justice

Ginsberg, in her dissent in *Baze*, noted that there seems to be the lack of such a safeguard in the Kentucky procedures at this point. She cited favorably to the Florida procedures, which do contain specific written directions for the execution procedure to pause for an assessment of unconsciousness. *Baze*, J. Ginsberg, dissenting at 1571.

Baze did not find a constitutional problem with the assessment of consciousness by a lay person without the use of particular medical equipment suggested by petitioners. In discussing the assessment of consciousness, it reiterated that “a proper dose of sodium thiopenthal obviates the concern that a prisoner will not be sufficiently sedated.” It found no constitutional violation in the use of a lay “rough and ready” test—which would include such measures as eyelash touching and calling the person’s name. *Id.* at 1536.

Lightbourne reports the testimony of an expert who stated that a basis neurological assessment of consciousness can be taught to lay persons and that paramedics and EMTs know this “extremely fundamental” technique. Warden Cannon testified that the team warden would apply these basic techniques, which include eyelash touch, shaking the inmate and calling his name. Under the current protocol, the team warden will consult with the medical members of the execution team in making his assessment of unconsciousness. *Id.* at 347-348. The Florida Supreme Court found that Lightbourne’s objections to this method did not rise to the level of an Eighth Amendment violation. *Id.* at 351. The Court finds that the Florida protocol and methods of assessing unconsciousness are, at a minimum, substantially similar to Kentucky’s as discussed in *Baze*, and, in fact, seem to provide a higher level of safety because of the written directive to halt the execution until a proper assessment is made.

Comparison of Florida and Kentucky Protocol

Schwab provided the Court with Ms. Arvizu's analysis of variations between Kentucky and Florida protocol on various issues but, as noted above, has not yet demonstrated this person is qualified to offer an opinion on this specific subject. Expert testimony is not required for the Court to compare the two sets of protocol. Oddly enough, neither Schwab nor the State saw fit to include a copy of the Kentucky protocol as an exhibit.

In any event, in reviewing Defendant's Exhibit 8, Ms. Arvizu's analysis of the differences between the two State's procedures, the Court is not convinced that she has stated any variations that amount to constitutional errors. For instance, she states that the Kentucky protocol provides for ongoing psychiatric assessment of the condemned while Florida does not, but as Schwab is not making a complaint that he is incompetent to be executed, this difference is irrelevant here. She states that Kentucky provides for a second dose of sodium pentathol within one minute if the condemned has not been rendered unconscious, but the Florida protocol likewise has a backup dose of the drug to be used upon a finding that the first dose failed to render the condemned unconscious. (Exhibit A, p. 11)

Florida's procedures are very similar to the Kentucky procedures as discussed in *Baze*. A comparison of the two demonstrates the following parallels (*from Baze at 1528*, Exhibit B, Florida Lethal Injection Protocol and *Lightbourne at 346-349*):

1. Kentucky: A three-drug procedure of 3 grams of sodium thiopental, 50 mgs of pancuronium bromide and 240 milliequivalents of potassium chloride.

Florida: A three-drug procedure of 5 grams of sodium pentathol (the brand name of sodium thiopental), 50 mgs. of pancuronium bromide and 480 milliequivalents of potassium chloride.

2. Kentucky: Between injections, the IV lines are flushed with saline to prevent clogging.

Florida: Between injections, the IV lines are flushed with saline.

3. Kentucky: IVs are inserted by certified phlebotomists and emergency medical technicians with at least one year of experience.

Florida: IV: IVs are inserted by certified phlebotomists or certified EMTs and paramedics whose are currently employed in the field and use their skills in their daily duties. After insertion of one IV line into each of the prisoner's arms (unless a medical check has revealed another site is necessary) a check will be made with saline solution to determine if the line is flowing correctly. A designated team member is responsible for continually monitoring the viability of the IV lines throughout the entire execution procedure by closed circuit TV.

4. Kentucky: the facilities consists of an execution chamber, a control room with a one-way window and a witness room. The warden and deputy warden remain in the execution room with the prisoner.

Florida: the facilities consist of an execution chamber, an executioner's room and a witness room. The team warden, one additional execution team member and an FLDE observer remain in the execution chamber. The executioner's room is secured and only specified personnel may remain in the room.

5. Kentucky: the execution team delivers the drugs remotely from the control room through five feet of IV tubing.

Florida: the executioner delivers the drugs remotely from the executioner's room through a length of IV tubing. The procedure for setting up the IV lines are covered, including the use of back-flow valves, a clamp to regulate flow and a luer lock tip. Designated team members are responsible for determining that the tubing from the IV lines to the drip bags has not been compromised and are responsible for continuously monitoring the viability of the IV lines before and during the execution procedure.

6. Kentucky: After one minute following administration of the first drug, the warden and deputy warden make a visual inspection for consciousness. If the prisoner is not unconscious, a second dose of sodium thiopental is administered.

Florida: After the administration of the first drug, the warden makes an inspection for consciousness. He must determine, after a consultation with other

team members, that the prisoner is unconscious. If not, the execution process is suspended and the IV access lines reassessed. Once it is determined that a viable IV line is available, the execution resumes and a second dose of sodium pentathol is administered. After that dose, the warden must again do an assessment of consciousness before proceeding.

7. Kentucky: A heart monitor is attached to the prisoner. An electrocardiogram verifies his death.

Florida: A heart monitor is connected to the inmate by a certified paramedic or EMT. One or more team members will be charged with observing the monitor and will be situated in the executioner's room. After the monitor indicates a cessation of heart activity, a physician will examine the inmate to determine that death has occurred.

Carefully comparing the Florida protocol to Kentucky's as described in *Baze*, the Court finds them substantially similar. Florida has several additional safeguards not mentioned in *Baze*. For example, the drugs used for execution must be prepared by a licensed pharmacist and, one week before execution, the inmate must be physically examined to determine whether there are issues which could compromise proper administration of the lethal injection process. Schwab has failed to point out any significant differences that would impact an Eighth Amendment claim.

Suggested Alternatives

Baze held that a defendant cannot not succeed on an Eighth Amendment objection to a method of execution unless he can proffer a "feasible, readily implemented" procedure that would, in fact, "significantly reduce a severe risk of pain." *Id.* at 1532 Schwab's suggestions for remedying the alleged defects in the Florida system are not such procedures. His suggestions are additional training of DOC personnel and a reduction in the amount of sodium pentathol.

As discussed above, the Court does not believe it is a judicial function to determine the appropriate dose or identity of the chemicals used in the lethal injection

process. *Lightbourne* reiterated the principal enunciated in *Sims v. State*, 754 So.2d 657, 670 (Fla. 2000) that “determining the methodology and the chemicals to be used are matters best left to the Department of Corrections.” It also stated, “Our precedent makes it clear that this Court’s role is not to micromanage the executive branch in fulfilling its own duties with relating to executions. *Id. at 351.* *Baze* reinforces that principal, advising that the courts should not be asked to become boards of “best practices.”

That same principal would apply to the oversight of DOC training. Like the United States Supreme Court, this Court assumes that the agencies charged with developing execution procedures have “an earnest desire to provide a progressively more humane manner of death.” *Baze* at 1531. At oral argument, Schwab’s counsel made it clear that he was asking the Court to go behind the protocol and assess DOC’s readiness to carry out an execution properly. He stated, “It’s the training. . . [T]he issue is the proficiency of the DOC training.” (Exhibit C, transcript of June 24, 2008 hearing, p. 30). Schwab’s complaint all along has been that DOC personnel is inadequately trained; the Court has previously denied a hearing on this issue.

Baze concerns itself with the procedures as described on the face of the Kentucky protocol. The petitioners argued that one basis for finding Kentucky protocol unconstitutional was “because of the risk that the protocol’s terms might not be properly followed.” *Id. at 1529.* Justice Roberts concluded that the “risks of maladministration . . . cannot remotely be characterized as ‘objectively intolerable.’” *Id. at 1537.* The Court finds no language in *Baze* that suggests it should look behind the protocol to micromanage the training of DOC personnel. To allow Schwab to force court oversight of DOC training and review of mock execution records would open the door for all

condemned inmates to seek such a review prior to their executions, improperly involving the courts in a continuous, on-going monitoring of executive functions.

Baze soundly rejected petitioner's arguments that the possibility of a malfunction in the protocol created an Eighth Amendment claim. It stated,

A stay of execution may not be granted on grounds such as those asserted here unless the condemned prisoner establishes that the State's lethal injection protocol creates a demonstrated risk of severe pain. . . . *A State with a lethal injection protocol substantially similar to the protocol we uphold today would not create a risk that meets this standard. Id.* at 1537 (emphasis added).

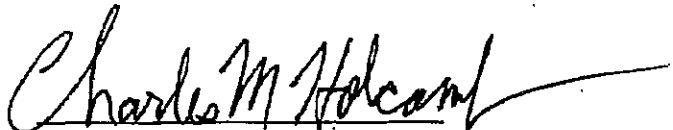
Schwab has not demonstrated that the Florida protocol is not substantially similar to the one approved by the United States Supreme Court or that this protocol creates a demonstrated risk of severe pain.

THEREFORE, it is ORDERED and ADJUDGED:

The Defendant's Third Successive Motion to Vacate Sentence or Stay Execution is DENIED.

The Clerk of the Court shall immediately transport the record of these proceedings to the Supreme Court of Florida. No Notice of Appeal shall be required.

DONE AND ORDERED in Titusville, Florida this 25 day of JUNE, 2008.


Charles M. Holcomb
Circuit Court Judge

CERTIFICATE OF SERVICE

I hereby certify that true copies of the above Order have been sent to following persons by facsimile or email this 25 day of June 2008.



Marcia Newell
Judicial Assistant
Eighteenth Judicial Circuit
Titusville Courthouse
506 S. Palm Ave.
Titusville, FL 32796

Peter Cannon, Esq.
Capital Collateral Regional Counsel, Middle District,
Fax (813) 740-3554,

Wayne Holmes, Esq.
Assistant State Attorney
Fax (321) 617-7542

Ken Nunnelley, Esq.
Office of the Attorney General,
Fax (386) 226-0457

Alan R. Dakan, Esq.
Assistant General Counsel
Florida Department of Corrections
Fax (850) 922-4355

Thomas Hall, Clerk
Florida Supreme Court
warrant@flcourts.org
Fax:

EXHIBIT A

From Defendant's Exhibit 2

Florida Lethal Injection Protocol



FLORIDA
DEPARTMENT of
CORRECTIONS

An Equal Opportunity Employer

2601 Blair Stone Road • Tallahassee, FL 32399-2500

Governor
CHARLIE CRIST

Secretary
JAMES R. McDONOUGH

<http://www.doc.state.fl.us>

EXECUTION BY LETHAL INJECTION PROCEDURES
Effective for executions after August 1, 2007

PURPOSE: To establish the procedures for the execution by lethal injection of inmates sentenced to death, pursuant to the dictates of Chapter 922, Florida Statutes and adhering to the requirements imposed under the Constitution of the State of Florida and the United States Constitution. The foremost objective of the lethal injection process is a humane and dignified death.

DEFINITIONS:

- (1) **Execution team**, where used herein, refers to correctional staff and other persons who are selected by the team warden designated by the Secretary to assist in the administration of an execution by lethal injection, and who have the training and qualifications, including the necessary licensure or certification, required to perform the responsibilities or duties specified. Individuals on the execution team will be referred to as "execution team member" or "team member" in these procedures.
- (2) **Executioner**, where used herein, refers to an individual selected by the team warden to initiate the flow of lethal chemicals into the inmate. The executioner's sole function is to inject the chemicals into the IV access port by physically pushing the chemicals from the syringe. The executioner is only authorized to carry out this specific function under the direction of the team warden. An executioner shall be an adult, undergo a criminal background check and be sufficiently trained to administer the flow of lethal chemicals. The executioner must demonstrate to the satisfaction of the team warden, that s/he is competent, trained, and of sufficient character to carry out the required function under the team warden's direction.
- (3) **Institutional warden**, where used herein, refers to the warden of Florida State Prison, who shall be responsible for handling support functions necessary to carry out the lethal injection process.
- (4) **Team warden**, where used herein, refers to the warden designated by the Secretary. The team warden shall be a person who has demonstrated through experience, training, and good moral character the ability to perform an execution by lethal injection. The team warden has the final and ultimate decision making authority in every aspect of the lethal

injection process. No deviation from any part of this procedure is authorized unless approved and directed by the team warden.

SPECIFIC PROCEDURES:

- (1) **Receipt of Warrant:** These execution procedures will commence upon receipt of the Governor's Warrant of Execution. The institutional warden will schedule the execution for a date and time certain that is within the period of time designated in the warrant. The institutional warden will provide a copy of the Warrant of Execution to the department's Secretary and General Counsel, deliver a copy to the named inmate and the team warden, and notify the Florida Department of Law Enforcement, any state correctional institutions, and any local agencies that may be affected by the issuance of the warrant and of the date and time selected for the execution.
- (2) **Selection of the Executioners:**
 - (a) The team warden will select two (2) executioners who are fully capable of performing the designated functions to carry out the execution. The team warden will provide each executioner with a copy of this procedure and will explain fully their respective duties and responsibilities and assure that each executioner is trained for the function assigned. The identities of the executioners will be kept strictly confidential as provided by statute.
 - (b) The team warden will designate one of the selected executioners as the primary executioner and the other as the secondary executioner. The primary executioner will be solely responsible for administering the flow of lethal chemicals into the inmate during the execution. The secondary executioner will be present and available during the execution to assume the role of the primary executioner if the primary executioner becomes unable for any reason, as determined by the team warden, to carry out his/her functions.
- (3) **Selection of the Execution Team:** The team warden will designate the execution team members and verify that each team member has the training and qualifications, and possesses current, necessary licensure or certification, required to perform the responsibilities or duties specified. The team warden will ensure that all execution team members and other involved staff have been adequately trained to perform their requisite functions in the execution process. The team warden shall select personnel with sufficient training and experience to perform the technical procedures needed to carry out an execution by lethal injection, including the mixing of the chemicals and placement of the venous access lines. The identities of any team members with medical qualifications shall be strictly confidential.
 - (a) The team warden shall select the team member(s) responsible for achieving and monitoring peripheral venous access from the following classes of trained professionals: a phlebotomist certified by the American Society of Clinical Pathologists (ASCP), National Certification Agency for Medical Laboratory Personnel (NCA), American Society of Phlebotomy Technicians (ASPT) or American Medical Technologists (AMT); a paramedic or emergency medical technician, certified under Chapter 401, Florida Statutes; a licensed practical nurse, a registered nurse, or an advanced registered nurse practitioner licensed under Chapter 464, Florida Statutes, or a

physician or physician's assistant licensed under Chapter 458 or Chapter 459, Florida Statutes.

- (b) The team warden shall select the team member(s) responsible for achieving and monitoring central venous access, if necessary, from the following classes of trained professionals: an advanced registered nurse practitioner licensed under Chapter 464, Florida Statutes; a physician or physician's assistant licensed under Chapter 458 or Chapter 459, Florida Statutes.
- (c) The team warden shall select the team member(s) responsible for examining the inmate prior to execution to determine health issues from the following classes of trained professionals: a paramedic or emergency medical technician, certified under Chapter 401, Florida Statutes; a licensed practical nurse, a registered nurse, or an advanced registered nurse practitioner licensed under Chapter 464, Florida Statutes, or a physician or physician's assistant licensed under Chapter 458 or Chapter 459, Florida Statutes.
- (d) The team warden shall select the team member(s) responsible for attaching the leads to the heart monitors and observing the monitors during the administration of execution from the following classes of trained professionals: a paramedic or emergency medical technician, certified under Chapter 401, Florida Statutes; a licensed practical nurse, a registered nurse, or an advanced registered nurse practitioner licensed under Chapter 464, Florida Statutes, or a physician or physician's assistant licensed under Chapter 458 or Chapter 459, Florida Statutes.
- (e) The team warden shall select the team member(s) responsible for purchasing, maintaining and mixing the lethal chemicals from the following classes of trained professionals: a physician, licensed under Chapter 458 or Chapter 459, Florida Statutes or a pharmacist licensed under Chapter 465, Florida Statutes.
- (f) The team warden shall select other execution team members to carry out the following tasks:
 - 1. Showering and preparation of the inmate.
 - 2. Ensuring that the equipment necessary for an execution is in proper working order.
 - 3. Escorting the inmate from his/her cell to the execution chamber.
 - 4. Applying restraints to the inmate prior to applying the heart monitor leads and acquiring venous access.
 - 5. Maintaining the open telephone line with the Office of the Governor.
 - 6. Reporting the actions inside the executioner's room to the team warden.
 - 7. Maintaining the checklists that detail the events surrounding the execution.
 - 8. Opening and closing the window covering to the witness gallery and turning on and off the public address system.

This list is not intended to be exhaustive. There may be other necessary tasks to carry out an execution and such tasks will be assigned by the team warden.

Each execution team member is responsible and authorized to raise concerns that become apparent during the execution and bring them to the attention of the team warden.

- (4) **Training of the Execution Team and Executioners:** There shall be sufficient training to ensure that all personnel involved in the execution process are prepared to carry out their distinct roles for an execution. All team members shall be instructed on the effects of each lethal chemical. All simulations or reviews of the process shall be considered training exercises. The team warden, or his/her designee, will conduct simulations of the execution process on a quarterly basis at a minimum or more often as needed as determined by the team warden. Additionally, a simulation shall be conducted the week prior to any scheduled execution. All persons involved with the execution should participate in the simulations. If a person cannot attend the simulation, the team warden shall provide for an additional training opportunity or otherwise ensure that the person is adequately trained to complete his or her assigned task. There shall be a written record of any training activities. The simulations should anticipate various contingencies. Examples of possible contingencies shall include:

- (a) Issues related to problems with equipment needed to carry out an execution.
- (b) Problems related to venous access of the inmate, including the necessity to obtain an alternate venous access site during the execution process.
- (c) The inmate is not rendered unconscious after the administration of the sodium pentothal.
- (d) Combative inmate.
- (e) Incapacity of any execution team member or executioner.
- (f) Unanticipated medical emergency concerning the inmate, an execution team member or executioner.
- (g) Problems related to the order and security at the Florida State Prison.
- (h) Power failure or other facility problems.

This list is not meant to be exhaustive but only provides examples of the types of contingencies that could arise during the course of an execution. The team warden is responsible for ensuring that training addresses, at a minimum, the above situations.

- (5) **Use of Checklists:** Compliance with this procedure will be documented on appropriate checklists. Upon completion of each step in the process, an execution team member will indicate when the step has been completed. Prior to the administration of the lethal chemicals, the team warden will consult with the designated team member and verify that all steps in the process have been performed properly. At the conclusion of the process, the team warden will again consult with the designated team member and verify that the remaining steps in the process were performed properly. The team warden will then sign the forms, attesting that all steps were performed properly.
- (6) **Purchase and Maintenance of Lethal Chemicals:** A designated execution team member will purchase, and at all times ensure a sufficient supply of, the chemicals to be used in the lethal injection process. The designated team member will ensure that the lethal chemicals have not reached or surpassed their expiration dates. The lethal chemicals will be stored securely at all times as required by state and federal law. The FDLE agent in charge of

monitoring the preparation of the chemicals shall confirm that all lethal chemicals are correct and current.

(7) FDLE Monitors:

- (a) Two FDLE agents shall serve as monitors and shall be responsible for observing the actions of the execution team and the condition of the condemned inmate at all times during the execution process.
- (b) The first FDLE agent shall be located in the executioner's room and is responsible for observing the preparation of the lethal chemicals and documenting and keeping a detailed log as to what occurs in the executioner's room at a minimum of two minute intervals. A copy of the log shall be provided to the team warden and shall be available at the post-execution debriefings.
- (c) The second FDLE agent shall be located in the execution chamber, and will be responsible for keeping a detailed log of what is occurring in the execution chamber at a minimum of two minute intervals. A copy of the log shall be provided the team warden and shall be available for the post execution debriefings.

(8) Approximately One (1) Week Prior to Execution:

- (a) The team warden will designate one or more execution team members to review the inmate's medical file and to make a limited physical examination of the inmate to determine whether there are any medical issues that could potentially interfere with the proper administration of the lethal injection process. The team member(s) will verbally report his/her findings to the team warden as soon as is practicable following the file review and physical examination. The results of this examination shall be documented in the inmate's file. After reviewing the results of the examination which should include a determination of the best access site and conferring with the team member(s) that performed the examination, the team warden shall conclude what is the more suitable method of venous access (peripheral or femoral) for the lethal injection process given the individual circumstances of the condemned inmate based on all information provided.
- (b) If a team member reports any issue that could potentially interfere with the proper administration of the lethal injection process, the team warden will consult with any or all of the members of the execution team and resolve the issue.

(9) On the day of execution:

- (a) A food service director, or his/her designee, will personally prepare and serve the inmate's last meal. The inmate will be allowed to request specific food and non-alcoholic drink to the extent such food and drink costs forty dollars (\$40) or less, is available at the institution, and is approved by the food service director.
- (b) The inmate will be escorted by one or more team members to the shower area where a team member of the same gender will supervise the showering of the inmate. Immediately thereafter, the inmate will be returned to his/her assigned cell and issued appropriate clothing. A designated member of the execution team will obtain and deliver the clothing to the inmate.

- (c) A designated execution team member will ensure that the telephone in the execution chamber is fully functional and that there is a fully-charged, fully-functional cellular telephone in the execution chamber. Telephone calls will be placed from the telephone to ensure proper operation. Additionally, a member of the team shall ensure that the two-way audio communication system and the visual monitoring equipment are fully functional.
- (d) A designated execution team member will ensure that the public address (P.A.) system is fully functional.
- (e) The only staff authorized to be in the Execution Chamber area are members of the execution team and others as approved by the team warden, including two monitors from the Florida Department of Law Enforcement.
- (f) A designated execution team member, in the presence of one or more additional team members and an independent observer from the Florida Department of Law Enforcement, will prepare the lethal injection chemicals as follows, ensuring that each syringe used in the lethal injection process is appropriately labeled, including the name of the chemical contained therein:
 - (1) Sodium pentothal: A sterile, disposable twenty cubic centimeter (20cc) syringe will be used to draw ten milliliters (10ml) of sterile water for injection from a vial containing same and then inject those ten milliliters (10ml) of sterile water for injection into a vial containing 500 milligrams of sodium pentothal to create a five percent (5%) solution of sodium pentothal. This procedure will be repeated until twenty (20) vials of sodium pentothal have been reconstituted, for a total of ten grams (10g) of sodium pentothal in solution. The syringe used to reconstitute the sodium pentothal will be discarded. A new, sterile, disposable, sixty cubic centimeter (60cc) syringe and needle will be used to draw the entire contents of five vials of sodium pentothal in solution, for a total of two and one-half grams (2.5g) of sodium pentothal in solution. That syringe will then be fitted with an eighteen (18) gauge, one (1) inch, blunt cannula (tube), clearly labeled with the number one (1), and placed in the first slot on a stand designed to hold eight (8) such syringes in separate slots. The stand will be clearly labeled with the letter "A." This process will be repeated with a second syringe, which will be clearly labeled with a number two (2) and placed in the second slot on stand "A." Two additional syringes will be drawn in the same manner, fitted with the blunt cannula, and clearly labeled with the numbers one (1) and two (2), respectively. These two syringes will be placed in the first two slots on a second stand that has been clearly labeled with the letter "B." All materials used to prepare these syringes will be removed from the work area and discarded pursuant to state and federal law.
 - (2) Pancuronium bromide: A sterile, disposable sixty cubic centimeter (60cc) syringe will be used to draw fifty milligrams (50mg) of pancuronium bromide from one or more vials containing same. The syringe will then be fitted with an eighteen (18) gauge, one (1) inch, blunt cannula (tube). This procedure will be repeated until there are four (4) syringes, each containing fifty milligrams (50mg) of pancuronium bromide, for a total of 200 milligrams. Two syringes will be clearly labeled with the numbers four (4) and five (5), respectively, and

placed into slots four (4) and five (5) on stand "A." This procedure will be repeated with the other two syringes, each of which will be fitted with a blunt cannula, labeled appropriately and placed in slots four (4) and five (5), respectively, on stand "B." All materials used to prepare these syringes will be removed from the work area and discarded pursuant to state and federal law.

- (3) Potassium chloride: A sterile, disposable sixty cubic centimeter (60cc) syringe will be used to draw one hundred twenty milliequivalents (120mEq) of potassium chloride from one or more vials containing same. The syringe will then be fitted with an eighteen (18) gauge, one (1) inch blunt cannula (tube). This procedure will be repeated until there are four (4) syringes, each containing one hundred twenty milliequivalents (120mEq) of potassium chloride, for a total of 480 milliequivalents. Two syringes will be clearly labeled with the numbers seven (7) and eight (8), respectively, and placed into slots seven (7) and eight (8) on stand "A." This procedure will be repeated with the other two syringes, each of which will be fitted with a blunt cannula, labeled appropriately, and placed in slots seven (7) and eight (8), respectively, on stand "B." All materials used to prepare these syringes will be removed from the work area and discarded pursuant to state and federal law.

- (4) Saline solution: A sterile, disposable twenty cubic centimeter (20cc) syringe will be used to draw twenty milliliters (20ml) of sterile saline solution from one or more vials containing same. This procedure will be repeated until there are four (4) syringes, each containing twenty milliliters (20ml) of sterile saline solution, for a total of eighty (80) milliliters. Each syringe will then be fitted with an eighteen (18) gauge, one (1) inch, blunt cannula (tube). Two syringes will be clearly labeled with the numbers three (3) and six (6), respectively, and placed into slots three (3) and six (6) on stand "A." This procedure will be repeated with the other two syringes, each of which will be placed in slots three (3) and six (6), respectively, on stand "B." All materials used to prepare these syringes will be removed from the work area and discarded pursuant to state and federal law.

- (g) The execution team member who has prepared the lethal chemicals will transport them personally, in the presence of one or more additional members of the execution team, to the executioner's room. Stand "A" will be placed on the worktop for use by the primary executioner, to be used during the execution by lethal injection. Stand "B" will be placed on a shelf underneath the worktop within easy reach of the executioners should they be needed during the execution. Stand "B" will not be used unless expressly ordered to be used by the team warden. The lethal chemicals will remain secure until the executioners arrive. No one other than the executioners will have access to the lethal chemicals, unless a stay is granted, in which case the execution team member who prepared the lethal chemicals will retrieve them from the locked room and dispose of them according to state and federal law.

- (h) A designated execution team member will prepare, using an aseptic technique, two (2) standard intravenous (IV) infusion sets, each consisting of a pre-filled, sterile plastic bag of normal saline for IV use (a solution of sodium chloride at 0.9% concentration) with an attached drip chamber, a long sterile tube fitted with a back check valve and a clamp to regulate the flow, a connector to attach to the access device, and an extension set fitted with a luer lock tip for a blood cannula to allow for the infusion of the lethal

chemicals into the line. The extension set that will be used to infuse the lethal chemicals into the primary injection line will be clearly marked with a "1," and the additional extension set that will be attached to the secondary injection line will be clearly marked with a "2."

- (i) The team warden will explain the lethal injection preparation procedure to the inmate and ensure the provision of any medical assistance or care deemed appropriate. The inmate will be offered and, if accepted, will be administered an intramuscular injection of diazepam, in an appropriate dosage relative to weight, to ease anxiety.
- (j) Authorized media witnesses will be picked up at the designated media on-looker area located at New River Correctional Institution by two designated Department of Corrections escort staff, transported to the main entrance of Florida State Prison as a group, cleared by security, and escorted to the population visiting park, where they will remain until being escorted to the witness room of the execution chamber by the designated escort staff.
- (k) The team warden will administer both a presumptive drug test (oral swab method) and a presumptive alcohol test (breath analyzer) to each execution team member. A positive indication for the presence of alcohol or any chemical substance that may impair their normal faculties will disqualify that person from participating in the execution process. Upon the arrival of the executioners to perform their duties, the team warden will administer both a presumptive drug test (oral swab method) and a presumptive alcohol test (breath analyzer) to each executioner. A positive indication for the presence of alcohol or any chemical substance that may impair their normal faculties will disqualify that person from participating in the execution process. If one or both of the executioners is disqualified, the team warden will continue to select and test as many additional executioners as is necessary to ensure the presence of two qualified executioners at the execution.

(10) Approximately Thirty (30) Minutes Prior to Execution:

- (a) A designated execution team member will establish telephone communication with the Governor's office on behalf of the team warden. The phone line will remain open to the Governor's office during the entire execution procedure. The team member will use this open line to report the ongoing activities of the execution team and other personnel to the Governor's office.
- (b) A designated member of the execution team will escort the two executioners into the executioner's room, where they will remain until the execution process is complete.
- (c) The team warden will read the Warrant of Execution to the inmate. The inmate may waive the reading of the warrant.
- (d) Designated members of the execution team will apply wrist restraints to the inmate and escort him/her from his cell to the execution chamber.
- (e) Designated members of the execution team will assist the inmate, if necessary, in positioning himself/herself onto the execution gurney in the execution chamber.

- (f) Designated members of the execution team will secure the restraining straps.
 - (g) One or more designated members of the execution team will attach the leads to two (2) heart monitors to the inmate's chest, ensuring that the monitors are operational both before and after the chest restraints are secured.
 - (h) Unless the team warden has previously determined to gain venous access through a central line, a designated team member will insert one intravenous (IV) line into each arm at the medial aspect of the antecubital fossa of the inmate and ensure that the saline drip is flowing freely. The team member will designate one IV line as the primary line and clearly identify it with the number "1." The team member will designate the other line as the secondary line and clearly identify it with the number "2." If venous access cannot be achieved in either or both of the arms, access will be secured at other appropriate sites until peripheral venous access is achieved at two separate locations, one identified as the primary injection site and the other identified as the secondary injection site.
 - (i) If peripheral venous access cannot be achieved, a designated team member will perform a central venous line placement, with or without a venous cut-down (wherein a vein is exposed surgically and a cannula is inserted), at one or more sites deemed appropriate by that team member. If two sites are accessed, each line will be identified with a "1" or a "2," depending on their identification as the primary and secondary lines.
 - (j) One or more designated members of the execution team will remove, one at a time, from the pole attached to the gurney, the two (2) saline bags and pass the bags, along with the extension sets attached to lines labeled "1" and "2," through a small opening into the executioner's room, where a team member will hang the bags on separate hooks inside the room. The designated team member(s) will ensure that the tubing from the IV insertion points to the bags has not been compromised and that the saline drip is flowing freely. The team member will be responsible for continuously monitoring the viability of the IV lines prior to and during the administration of the execution.
- (11) Approximately Fifteen (15) Minutes Prior to Execution:
- (a) Official witnesses will be secured in the witness room of the execution chamber by two designated Department of Corrections escort staff.
 - (b) Authorized media witnesses will be secured in the witness room of the execution chamber.
 - (c) The only persons authorized in the witness room are: twelve (12) official witnesses, including family members of the victim, four (4) alternate official witnesses, one (1) nurse or medical technician, twelve (12) authorized media representatives, one (1) representative from the department's public affairs office, one (1) designated staff escort, and one (1) designated team member. Any exception must be approved by the institutional warden.
 - (d) The execution chamber will be secured. Only the team warden, one additional execution team member, and one FDLE monitor shall be allowed in the chamber during the administration of the execution. Any exception must be approved by the team warden.

- (c) The executioner's room will be secured. Only the executioners, the team member reporting actions in the executioner's room to the warden, the team member reporting actions to the Office of the Governor, the team member observing the heart monitors, the team member maintaining the checklists, and the FDLE agent assigned to the executioner's room shall be allowed in the executioner's room. Any exception must be approved by the team warden.

(12) Administration of Execution:

- (a) An execution team member will open the covering to the witness gallery window. The team warden will use the open telephone line to determine from the Governor whether there has been a stay of execution. If the team warden receives a negative response, s/he will then proceed with the execution.
- (b) An execution team member will turn on the public address (P.A.) system. The team warden will permit the inmate to make an oral statement, which will be broadcast into the witness gallery over the P.A. system. At the conclusion of the inmate's statement, or if the inmate declines to make a statement, the team warden will announce that the execution process has begun. A designated member of the execution team will turn off the P.A. system.
- (c) In the presence of the secondary executioner and within sight of one or more execution team members and one of the FDLE monitors, the primary executioner will administer the lethal chemicals in the following manner:
 - (1) The executioner will remove from the stand on the worktop the syringe labeled number one (1), which contains two and one-half grams (2.5g) of sodium pentothal in solution, place the blunt cannula into the open port of the IV extension set connected to the primary line and push the entire contents of that syringe into the IV port at a rate that meets the injection resistance of the cannula. When the syringe is depleted, s/he will hand the empty syringe to the secondary executioner for safe disposal.
 - (2) The executioner will remove from the stand on the worktop the syringe labeled number two (2), which contains two and one-half grams (2.5g) of sodium pentothal in solution, place the blunt cannula into the open port of the IV extension set connected to the primary line and push the entire contents of that syringe into the IV port at a rate that meets the injection resistance of the cannula. When the syringe is depleted, s/he will hand the empty syringe to the secondary executioner for safe disposal.
 - (3) The executioner will remove from the stand on the worktop the syringe labeled number three (3), which contains twenty milliliters (20ml) of saline solution, place the blunt cannula into the open port of the IV extension set connected to the primary line, and push the entire contents of that syringe into the IV port at a rate that meets the injection resistance of the cannula. When the syringe is depleted, s/he will hand the empty syringe to the secondary executioner for safe disposal.

- (4) At this point, the team warden will assess whether the inmate is unconscious. The team warden must determine, after consultation, that the inmate is indeed unconscious. If the inmate is unconscious and the team warden orders the executioners to continue, the executioners shall proceed to step (6).
- (5) In the event that the inmate is not unconscious, the team warden shall signal that the execution process is suspended and note the time and order the window covering to the witness gallery to be closed. The execution team shall assess the viability of the secondary access site. If the secondary access site is deemed viable, then the team member shall designate this site as the new primary access site. If the secondary access site is compromised, a designated execution team member will secure peripheral venous access at another appropriate site or will perform a central venous line placement, with or without a venous cut-down, at one or more sites deemed appropriate by that team member. Once the team warden is assured that the team has secured a viable access site, the team warden shall order the drapes to be opened and signal that the execution process will resume. The executioners will then be directed to initiate the administration of lethal chemicals from stand "B" into the newly established primary line, starting with the syringes of sodium pentothal, labeled one (1) and two (2) and the first syringe of saline. The executioners will continue to use the remaining chemicals from stand "B" throughout the execution at the direction of team warden. The team warden will then again proceed to step (4) and assess whether the inmate is unconscious.
- (6) The executioner will remove from the stand on the worktop the syringe labeled number four (4), which contains fifty milligrams (50mg) of pancuronium bromide, place the blunt cannula into the open port of the IV extension set connected to the primary line, and push the entire contents of that syringe into the IV port at a rate that meets the injection resistance of the cannula. When the syringe is depleted, s/he will hand the empty syringe to the secondary executioner for safe disposal.
- (7) The executioner will remove from the stand on the worktop the syringe labeled number five (5), which contains fifty milligrams (50mg) of pancuronium bromide, place the blunt cannula into the open port of the IV extension set connected to the primary line, and push the entire contents of that syringe into the IV port at a rate that meets the injection resistance of the cannula. When the syringe is depleted, s/he will hand the empty syringe to the secondary executioner for safe disposal.
- (8) The executioner will remove from the stand on the worktop the syringe labeled number six (6), which contains twenty milliliters (20ml) of saline solution, place the blunt cannula into the open port of the IV extension set connected to the primary line, and push the entire contents of that syringe into the IV port at a rate that meets the injection resistance of the cannula. When the syringe is depleted, s/he will hand the empty syringe to the secondary executioner for safe disposal.
- (9) The executioner will remove from the stand on the worktop the syringe labeled number seven (7), which contains one hundred twenty milliequivalents (120mEq) of potassium chloride, place the blunt cannula into the open port of the IV extension set connected to the primary line, and push the entire contents

of that syringe into the IV port at a rate that meets the injection resistance of the cannula. When the syringe is depleted, s/he will hand the empty syringe to the secondary executioner for safe disposal.

- (10) The executioner will remove from the stand on the syringe labeled number eight (8), which contains one hundred twenty milliequivalents (120mEq) of potassium chloride, place the blunt cannula into the open port of the IV extension set connected to the primary line, and push the entire contents of that syringe into the IV port at a rate that meets the injection resistance of the cannula. When the syringe is depleted, s/he will hand the empty syringe to the secondary executioner for safe disposal.
 - (11) The primary executioner shall at all times administer the lethal injection chemicals. Only if the primary executioner becomes incapacitated shall the secondary executioner administer the lethal chemicals. At no time shall more than one executioner inject any lethal chemicals to complete the execution.
- (d) If at any time during the administration of the lethal chemicals the primary venous access becomes compromised, the team warden shall order the execution process stopped and order the window covering to the witness gallery to be closed. The execution team shall assess the primary access site and assess the viability of the secondary access site and take appropriate remedial action at the access site, if necessary. If neither access site is viable, a designated execution team member will secure peripheral venous access at another appropriate site or will perform a central venous line placement, with or without a venous cut-down, at one or more sites deemed appropriate by that team member. Once the team warden is assured that the execution team has secured a viable access site, the warden shall order the drapes to be opened and direct that the execution process will resume using the newly established primary line. The executioners will be directed to initiate the administration of lethal chemicals from stand "B" into the IV set attached to the newly established primary line, starting with the syringes of sodium pentothal, labeled one (1) and two (2) and the first syringe of saline, labeled number three (3). The team warden will then proceed to step (c)(4), as described above.
 - (e) Throughout the execution process, one or more designated execution team members will observe the heart monitors. If the heart monitors reflect a flat line reading during or following the complete administration of the lethal chemicals, a physician will examine the inmate to determine whether there is complete cessation of respiration and heartbeat.
 - (f) Once the inmate is pronounced dead by the physician, a designated member of the execution team will record the time of death on the appropriate lethal injection procedures checklist.
 - (g) The team warden will notify the Governor via the open phone line that the sentence has been carried out and the time of death.
 - (h) A designated execution team member will turn on the P.A. system. The team warden shall make the following announcement to the witnesses in the gallery: "The sentence of the State of Florida vs. [Inmate Name] has been carried out at [time of day]."

- (i) The designated Department of Corrections escort staff will escort the official witnesses and all of the media pool from the witness room of the execution chamber.

(13) Immediate Post-Execution Procedures:

- (a) Designated execution team members will dispose of the equipment and any remaining chemicals as required by state and federal law.
- (b) The institutional warden will coordinate the entry of hearse attendants for recovery of the inmate's body.
- (c) The inmate's body will be removed from the execution table by hearse attendants under the supervision of the designated team member.
- (d) The institutional warden, or his/her designee, will obtain a certification of death from the physician and will deliver the certification to the hearse attendants prior to their departure.
- (e) The inmate's body will be transported by the hearse attendants to the medical examiner's office in Alachua County for an autopsy.
- (f) The team warden shall conduct a brief debriefing interview with every execution team member and the executioners, documenting any exceptional circumstances that arose during the execution. Subsequent debriefings will take place, as appropriate.

(14) Follow-Up Procedures:

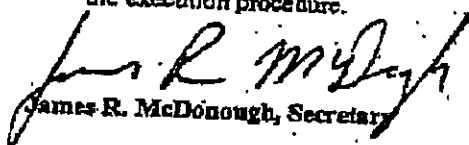
- (a) The institutional warden will forward the Warrant of Execution and a signed statement of the execution to the Secretary of State.
- (b) The institutional warden will file an attested copy of the Warrant of Execution and a signed statement of the execution with the clerk of the court that imposed the sentence.
- (c) The institutional warden, or his/her designee, will advise central office records by e-mail of the inmate's name and the date and time of death by execution.

- (15) Periodic Review and Certificate from Secretary:** There will be a review of the lethal injection procedure by the Secretary of the Florida Department of Corrections, at a minimum, once every two years, or more frequently as needed. The review will take into consideration the available medical literature, legal jurisprudence, and the protocols and experience from other jurisdictions. The Secretary of the Department of Corrections shall, upon completion of this review, certify to the Governor of the State of Florida confirming that the Department is adequately prepared to carry out executions by lethal injection. The Secretary will confirm with the team warden that the execution team satisfies current licensure and certification and all team members and executioners meet all training and qualifications requirements as detailed in these procedures. A copy of the certification shall be provided to the Attorney General and the institutional warden shall provide a copy to a condemned inmate and counsel for the inmate after a warrant is signed.

The certification shall read:

As Secretary of the Florida Department of Corrections, I have reviewed the Department's Execution by Lethal Injection Procedures to ensure proper implementation of the Department's statutory duties under Chapter 922, Florida Statutes. The procedure has been reviewed and is compatible with evolving standards of decency that mark the progress of a maturing society, the concepts of the dignity of man, and advances in science, research, pharmacology, and technology. The process is not going to involve unnecessary lingering or the unnecessary or wanton infliction of pain and suffering. The foremost objective of the lethal injection process is a humane and dignified death. Additional guiding principles of the lethal injection process are that it should not be of long duration, and that while the entire process of execution should be transparent, the concerns and emotions of all those involved must be addressed.

I hereby certify that the Department is prepared to administer an execution by lethal injection and has the necessary procedures, equipment, facilities, and personnel in place to do so. The Department has available the appropriate persons who meet the minimum qualifications under Florida Statutes and in addition have the education, training, or experience, including the necessary licensure or certification, required to perform the responsibilities or duties specified and to anticipate contingencies that might arise during the execution procedure.


James R. McDonough, Secretary

31 July 2007
Date

EXHIBIT B

From Defendant's Exhibit 1

Dr. Dershwitz's Testimony
in the Lightbourne proceedings

EXHIBIT B

From Defendant's Exhibit 1

Dr. Dershwitz's Testimony
in the Lightbourne proceedings

Volume IV Lightbourne 5-21-07

18 There is a plausible explanation that may have
19 applied in some of these cases that at least should have
20 been discussed, it should be raised as a possibility. And
21 that is that with the very large doses of thiopental that
22 are used in some states the circulation can slow to such a
23 trickle that the pancuronium and the potassium chloride that
24 are injected sub -- subsequently might literally remain in
25 the arm.

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1 And I believe that there are very good reports, or
2 raw data, from some California executions in which the
3 potassium chloride appeared not to work. And I believe that
4 a plausible explanation is because California also uses five
5 thousand milligrams of thiopental that subsequently
6 administered drugs literally did not circulate.

7 And I'm not saying that that is always the answer
8 in all cases, but it is a plausible explanation that should
9 have been --

10 MR. DUPREE: objection, your Honor. Not --
11 is this just beyond the degree of real medical
12 certainty, that's a plausible explanation?

13 THE COURT: Overruled. You may answer.

14 THE WITNESS: I raise this just that in a
15 scientific article authors have a responsibility
16 to discuss all possible explanations for their
17 data, those that are likely as well as those that
18 may be unlikely. And so this is a plausible
19 explanation that should have been considered by
20 the authors.

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21 BY MR. NUNNELLEY:

22 Q And the fact that they did not consider that
23 explanation is a deficiency in that article; is that what
24 you're saying?

25 A Yes.

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1 Q Doctor, let me ask you this, do you have an
2 opinion to a reasonable degree of medical certainty as to
3 what the effect of the administration of five grams of
4 thiopental sodium followed by one hundred milligrams of
5 Pavulon, followed by two hundred and forty milliequivalents
6 of potassium chloride would be on a human being?

7 A Yes.

8 Q What is it, sir?

9 A It's lethal.

10 Q If that series of drugs in those doses is
11 administered to a human being in the proper sequence through
12 a proper -- through a properly functioning IV line will the
13 individual have any perception of pain?

14 A No. Once the thiopental is administered nothing
15 that is done to the inmate after that is perceptible by the
16 inmate.

17 Q What is the most common, in your experience, IV
18 mal -- Intravenous Line malfunction in a hospital setting?

19 A Well, actually, the most common malfunction is
20 when the IV is accidentally or deliberately ripped out by
21 the patient.

22 Q Okay. And the second most?

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1 Q Okay.

2 A Whereas the patients didn't move at a Cp50 of 15,
3 and it took 80 or 79 for them not to move in response to
4 having a breathing tube put into their trachea, which is
5 generally taken to being the most uncomfortable thing you
6 can do to a patient.

7 Q So they were measuring the levels of pain; is that
8 correct?

9 A No, they're actually measuring movement. Movement
10 does not reflect pain, and this does not reflect
11 consciousness. Movement is different.

12 Q Are you familiar with a textbook by Goodman and
13 Gilman, the Pharmacological Properties of Parenteral
14 Anesthetics?

15 A Yes.

16 MR. DUPREE: Again, may I approach?

17 MR. NUNNELLEY: Do you have something for us
18 to read? Let's -- yeah. Is this my copy or is
19 this something you want?

20 MR. DUPREE: Can I approach, your Honor?

21 THE COURT: Sure.

22 BY MR. DUPREE:

23 Q Have you had an opportunity to look at that table,
24 sir?

25 A Yes.

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1 Q And that book is that -- by the way, is that book
2 authoritative?

3 A It is accepted a typographical error there, which
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9 reflect a real world scenario because never in my life had I
10 used thiopental, even when I used it, I never used it as a
11 sole drug.

12 Q When you're talking about the effects of the drug
13 with Mr. Nunnolley on direct examination, one of the effects
14 of thiopental would be to decrease respiration and
15 circulation; is that correct?

16 A Correct.

17 Q Okay. And how about pancuronium bromide, would
18 you tell me what the effects of that would be?

19 A Pancuronium bromide paralyzes the skeletal
20 muscles.

21 Q And going back to thiopental, could you tell me
22 how rapidly somebody would be induced to be unconscious?

23 A Typically, after a few hundred milligrams have
24 been delivered the onset of unconsciousness is typically
25 between thirty and sixty seconds.

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1 Q And how about pancuronium bromide?

2 A The -- well, first of all, I would have to tell
3 you that the onset is dosed dependant, so the larger the
4 dose the more rapid the onset. And there are no studies in
5 humans or animals that reflect the sort of dose that's been
6 used here.

7 So typically when a dose of ten milligrams is
8 given to a human of average size, the onset is somewhere in
9 the vicinity of four to five minutes. I could tell you that
10 given a hundred milligrams it will be more rapid, but I

EXHIBIT C

From Transcript of
Oral Arguments
Held before Judge Holcomb in
Schwab v. State
Case No. 05-1991-CF-7249-AXXX
June 24, 2008

1 the opposite Your Honor. Baze says now we've given you
2 the standard, go back to your state courts and figure it
3 out.

4 And Your Honor, again, that comparative analysis
5 was done by Ms. Arvizu and again, there are substantial
6 differences. The training has not improved. For
7 example, one of the facts brought out by Ms. Arvizu is
8 that the executioners aren't even showing up for the
9 training all the time. They're not even showing up.

10 This is the problem: It's the training. We're not
11 here because we have a moral outrage against the death
12 penalty. That's not the issue before this Court, the
13 issue is the proficiency of the DOC training, and we
14 allege Your Honor that the DOC fails to live up to the
15 standards announced in Baze.

16 THE COURT: Okay, I have all the motions, I have
17 the exhibits, I have the argument. I don't have much
18 time, but I'll give you a decision either this afternoon
19 or some time tomorrow.

20 MR. CANNON: Your Honor, just I don't mean -- I
21 guess I do mean to interrupt. I understand that the
22 rule because we are under a warrant. Are you going to
23 order the transcript of these proceedings today? And
24 I'm not sure if from the Court Reporter if we can get
25 those e-mailed.