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

CASE NO. 91-7249-CF-A

STATE OF FLORIDA,

Plaintiff,

v.

MARK DEAN SCHWAB,

Defendant

_____/

CAPITAL CASE
EXECUTION SCHEDULED

MOTION TO VACATE SENTENCE OR STAY EXECUTION

Mark Dean Schwab by undersigned counsel files this motion to vacate his sentence of death pursuant to Fla. R. Crim. P. 3.851, or stay execution. This is a successive motion filed under Rule 3.851(c)(2). A warrant has been signed and execution is scheduled for the week of November 12, 2007.

Information required by Rule 3.851(e): The defendant was convicted of first degree murder and capital sexual battery after a nonjury trial and sentenced to death on July 1, 1992. The judgment and sentence were affirmed on direct appeal to the Florida Supreme Court. *Schwab v. State*, 636 So.2d 3 (Fla. 1994) cert. den. 513 U.S. 950, 115 S.Ct. 364 (1994). Thereafter, Schwab filed an original motion for postconviction relief, the denial of which was affirmed in *Schwab v. State*, 814 So.2d 402 (Fla. 2002). The denial of Schwab's federal petition for a writ of habeas corpus was affirmed in *Schwab v. Crosby*, 451 F.3d 1308 (2006) cert. den.127 S.Ct. 1126 (Mem), 166 L.Ed.2d 897.

The State filed a memorandum on July 26, 2007 titled "The Issues Raised in Prior

Proceedings," which accurately quotes the appellate courts' description of the issues which were raised on direct appeal, in state postconviction proceedings and on federal review, and their disposition. Rule 3.851(e)(2)(B).

This motion is predicated on newly discovered evidence. The names, addresses and telephone numbers of witnesses supporting the claims raised in this motion are furnished on a witness list which is being filed simultaneously with this motion. Said witnesses will be available to testify under oath to the facts alleged herein should an evidentiary hearing be scheduled. Existing documentary evidence supporting the claims raised herein is attached hereto. Rule 3.851(e)(2)(C).

The relief sought in this proceeding is an order vacating the sentence of death. In the alternative Schwab moves for a stay of execution, or such other relief as this Court may deem appropriate.

CLAIM I

FLORIDA'S LETHAL INJECTION METHOD OF EXECUTION VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION

The Eighth Amendment prohibits "the unnecessary and wanton infliction of pain," *Gregg v. Georgia*, 428 U.S. 153 (1976). Nor may executions "involve torture or a lingering death." In re Kemmler, 136 U.S. 436, 447 (1890). In particular, the execution method cannot create a risk of unnecessary pain. *Farmer v. Brennan*, 511 U.S. 825, 842 (1994). In *Hill v. McDonough*, --- U.S. ----, ----, 126 S.Ct. 2096, 2101, 165 L.Ed.2d 44 (2006), the Supreme Court quoted the petitioner's statement of his claim, noting, "[t]he specific objection is that the anticipated protocol allegedly causes 'a foreseeable risk of ... gratuitous and unnecessary' pain." Id. at 2102. The Court expressed no dissatisfaction with that statement of the issue. Lower courts have routinely analyzed Eighth

Amendment challenges to lethal injection under a foreseeable risk standard:

> The State . . . argues that the district court erred in finding a constitutional violation on the basis of its determination that the Missouri lethal injection protocol involves an unnecessary risk of causing the wanton infliction of pain. The State asserts that the Supreme Court's articulation of the standard forbids only punishment that actually involves 'the unnecessary and wanton infliction of pain' . . . not a mere risk of pain. We respectfully disagree . . . Court of Appeals cases to the effect that the Eighth Amendment protects against sufficiently imminent dangers as well as current unnecessary and wanton infliction of pain and suffering are legion . . ."

Taylor v. Crawford, 487 F.3d 1072 (8th Cir. 2007).

Florida's lethal injection method of execution creates a foreseeable risk of unnecessary and extreme pain and therefore violates the Eighth Amendment to the U.S. Constitutional and Article I, Section 17 of the Florida Constitution, which prohibit cruel and unusual punishments. Because this challenge to Florida's method of execution is a valid claim for relief, denial of the Defendant's access to the Court in order to seek relief constitutes a denial of due process.

Recent events

On December 13, 2006, Angel Diaz was executed by lethal injection. Numerous reports by the press and other witnesses indicated that the execution was botched. The execution took almost three times as long as normal. Diaz grimaced, arched his body, appeared to be mouthing words, and otherwise evidenced that he was in pain, despite the injection of a paralytic. The medical examiner who conducted an autopsy reported that "the fluids to be injected were not going into a vein, but were going into small tissues in the arm." Later investigation showed that in both the primary venous access site in Diaz' left arm and a backup site in the other arm the needle and catheter had been pushed through the target vein into the tissue beyond. When the executioners encountered substantial resistance during the injection process, they improperly continued to inject the drugs into

Diaz, switching back and forth between the two failed IV lines.

As a result of the medical examiner's findings, the Governor suspended all executions in Florida and appointed a Commission to review the execution and make recommendations. The Commission Report concluded that the execution team failed to properly obtain and maintain venous access, failed to administer the chemicals properly, and failed to follow the execution protocols. The protocols as written were found to be insufficient to deal with complications that are known to have arisen in lethal injection executions around the country, and in any event the execution team had not been adequately trained as to the protocols then in effect. The Commission made detailed recommendations which included changes to the actual execution procedures and the physical structure where the execution was to take place, rewriting the protocols, thorough documentation of the actual execution, and proof of adequate training.

On December 14, 2006, the day after the botched Diaz execution, the Capital Collateral Regional Counsel, Southern Region, filed a petition in the Florida Supreme Court seeking to invoke that Court's all writs jurisdiction on behalf of all of its death row clients, alleging that Florida's lethal injection procedure was unconstitutional in itself and as applied, as evidenced by the Diaz execution. The court dismissed all of the petitioners' claims except for that of Ian Deco Lightbourne stating, "The dismissal is without prejudice to the petitioners filing any claim which they may have in the appropriate court for that individual petitioner." Lightbourne, SC06- 2391. The court relinquished jurisdiction to the Fifth Judicial Circuit Court in Marion County, where an evidentiary hearing continues to be conducted at the time the instant motion is being filed. State v. Lightbourne, Circuit Court Case No. 1981-170-CF-A-01, Marion County.

On July 18, 2007, the Governor signed a warrant for the execution of Mark Schwab. The

warrant and attachments scheduled the execution for the week of November 12, which is a notably longer time between the signing of a warrant and scheduled execution than has been the case in the past. The same morning, the Florida Supreme Court issued an order establishing a trial court litigation deadline and appellate briefing schedule in Lightbourne, with oral argument set for October 11. The next day, the Court issued a similar schedule in this case, with oral argument set at the same time as in Lightbourne.

In the meantime, on July 27, after the warrant was signed and after litigation schedules were established in the two cases, the presiding judge in Lightbourne, Judge Angel, granted relief in the form of a temporary injunction against the state carrying out an execution in that case. That injunction remains in effect at this time this motion is being drafted.

The DOC issued new protocols on May 9, 2007 in response to the Commission Report. The protocols came under heavy scrutiny during the Lightbourne hearings, and the State eventually revealed that they were being revised. New protocols were written for executions occurring after August1, 2007.

Sims and progeny are not controlling; timeliness; pleading requirements

A challenge to Florida's lethal injection method of execution is properly made by way of a motion for postconviction relief under Rule 3.851. *Diaz v. State*, 945 So.2d 1136 (2006) ("[E]xecution procedures . . . can and have been challenged through postconviction proceedings under rule 3.851 . . . In light of the exigencies inherent in the execution process, judicial review and oversight of the DOC procedures is preferable to chapter 120 administrative proceedings. ").

This claim is predicated on newly discovered evidence and recent changes in the law. It is therefore timely. The newly discovered evidence includes all that revealed by the Diaz execution,

the Commission proceedings and the Lightbourne hearings, all of which have occurred within the past year. F.S. 922.105 providing for execution by lethal injection is not self implementing, it must be implemented in accordance with the protocols written by the Florida Department of Corrections. Those protocols have been revised twice since the Diaz execution in December, 2006.

In *Sims v. State*, 754 So.2d 657 (Fla.2000) the Florida Supreme Court held that Florida's lethal injection procedure did not violate the Eighth Amendment. The court has reaffirmed that holding in a number of cases, including *Diaz v. State*, 945 So.2d 1136 (Fla.2006). A few days after that opinion was released, Diaz was the subject of a botched execution. That event led to the Governor's Commission, the Lightbourne hearings, and two revisions of the protocols. Sims and progeny were predicated on protocols that have been superseded. Within 48 hours of the signing of the instant warrant the Florida Supreme Court set both Lightbourne and this case on similar litigation tracks with oral argument set on the same day. The expectation that lethal injection would be raised and considered in this case is clear.

In *Darling v. State*, --- So.2d ----, 2007 WL 2002499, 32 Fla. L. Weekly S486, (Fla. July 12, 2007) the Florida Supreme Court denied a lethal injection claim raised in an original 3.851 proceeding, citing *Hill v. State*, 921 So.2d 579 (Fla.2006), one of Sims' progeny, but added this footnote: "This habeas claim was presented to the Court in connection with facts existing prior to the execution of Angel Diaz on December 13, 2006. No events that may have occurred in connection with the Diaz execution have been considered as part of this proceeding." Id.n.5. The court thus left open the door to reconsideration of Sims.

Finally, the text of Sims supports this view. The Sims court quoted from a federal case which referred to eyewitness accounts of two executions where the prisoner lost consciousness

within seconds and rejected the petitioner's argument as "speculation." The court also referred dismissively to Sims' expert testimony as a "parade of horribles." Since then, lethal injections have been botched around the country and if one theorizes that Diaz did not suffer pain despite all the evidence to the contrary, a careful examination of the record shows that it was only because the execution team managed to botch the second access site along with the first. Lethal injection is ripe for review.

Lethal injection as practiced is constitutionally flawed

Lethal injection is the method of execution used by 37 of the 38 capital punishment states. The basic procedure used by essentially all of these states, including Florida, is the three drug regimen first developed in Oklahoma in 1977. The procedure begins with securing venous access, followed by an injection of sodium thiopental, an ultra fast acting barbiturate, to render the prisoner unconscious.[1] The prisoner is then injected with a paralytic agent, pancuronium bromide, in sufficient quantities to stop respiration. Lastly, the prisoner receives an injection of potassium chloride, which induces cardiac arrest and permanently stops the prisoner's heartbeat. There is a general consensus that the administration of either of the second two drugs in a prisoner who is not adequately anesthetized will cause extreme and unnecessary pain and suffering.

The procedure embodies goals and policies that are inherently in conflict. Lethal injection is

[1]Florida uses a higher dose of sodium thiopental, 5 grams, which if fully injected into the prisoner's bloodstream will cause loss of consciousness within seconds and death due to respiratory failure within a few minutes. The fact that Diaz took over 30 minutes to die and that other Florida executions have taken a longer time than would be expected with an administration of that amount of thiopental indicates two possible alternative conclusions. First, an error occurred with the chemical delivery system and the inmate has not been adequately anesthetized. Second, the non-clinical dosage of sodium thiopental may suppress the cardiac function of the body to the extent where it delays the effect of subsequently administered drugs.

a method of committing an inherently violent and deadly act – execution of a condemned prisoner – masquerading as a peaceful and painless medical procedure. In particular, the use of a paralytic drug serves no legitimate clinical purpose during an execution. In the medical setting, pancuronium bromide (trade name "pavulon") is used legitimately to relax respiratory function to facilitate intubation and to keep the patient still during surgery. In an execution, the drug simply serves to make the procedure look palatable to witnesses. Due to the effects of the paralytic drug, several members of the Commission questioned the wisdom of using pancuronium bromide during an execution. The most notable and forceful of the opponents was Eighth Circuit Court Judge Stan Morris, who recommended that the DOC revisit the use of this drug. It is used for merely cosmetic reasons but it significantly increases the risk that the prisoner will be subjected to agonizing pain and be unable to communicate the fact. The use of pancuronium bromide or a similar paralytic serves at best minimal state interests, but greatly increases the risk of unnecessary and extreme pain. As such, its use violates the Eighth Amendment.

Nationally based medical associations including the American Medical Association, American Society of Anesthesiologists, American Nurses' Association, the National Association of Emergency Medical Technicians, and the National Commission on Correctional Health, all have ethics guidelines that oppose participation in lethal injections, as do numerous state level organizations.[2] Partly as a result of this opposition the traditional anonymity of the actual

[2]Code of Ethics E-2.06 (Am. Med. Ass'n. 2000), available at http://www.ama-assn.org/ama/pub/category/8419.html ("A physician, as a member of a profession dedicated to preserving life when there is hope of doing so, should not be a participant in a legally authorized execution."). Message from Orin F. Guidry, President, Am. Soc'y of Anesthesiologists, Observations Regarding Lethal Injection (June 30, 2006), available at http://www.asahq.org/news/asanews063006.htm (stating that the American Society of Anesthesiologists had adopted the American Medical Association's (AMA's) code of ethics

executioner has been extended to all “medically qualified personnel” who actually participate in the execution. In fact, the medically qualified personnel are in reality executioners every bit as much as the designated “executioner” whose main role is simply to push the drugs.

While ethical violations in themselves may not implicate the Eighth Amendment, the effect of the ethical prohibition for medical participation in executions can lead to a violation in the context of proper training of the execution team. Since the three chemicals are given in a dosage that, individually, may be lethal in themselves, it would be impossible to clinically test their efficacy.

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regarding capital punishment in 2001). Am. Nurses Association, Ethics and Human Rights Position Statements: Nurses' Participation in Capital Punishment, http://nursingworld.org/readroom/position/ethics/prtetcptl.htm (2007) ("The American Nurses Association (ANA) is strongly opposed to nurse participation in capital punishment. Participation in executions is viewed as contrary to the fundamental goals and ethical traditions of the profession."). The National Association of Emergency Medical Technicians takes the position that "assessment, supervision[,] or monitoring of the procedure or the prisoner; procuring, prescribing[,] or preparing medications or solutions; inserting the intravenous catheter; injecting the lethal solution; and/or attending or witnessing the execution as an EMT or Paramedic" are violations of the EMT Oath. NAEMT Position Statement on EMT and Paramedic Participation in Capital Punishment, https://www.naemt.org/aboutNAEMT/capitalpunishment.htm, (June 9, 2006). Standards for Health Services in Prisons P-I-08 (Nat'l Comm'n on Corr. Health Care 2003) (on file with the Fordham Law Review) ("The correctional health services staff do not participate in inmate executions.").

Every state authorizing the death penalty currently requires that official witnesses be present at each execution.[3] Reasons include First Amendment concerns as well as the fact that an execution carried out in secret smacks of the worst kind of tyranny. Florida provides that twelve citizens "shall witness the execution." F.S. 922.11(2). Counsel for the prisoner, clergy and members of the press are also permitted to view the execution under some limitations. *Id.*

Under these circumstances an execution by means of lethal injection can never meet medical standards. Ongoing monitoring of the prisoner's state of consciousness cannot be performed adequately by someone medically qualified to do so without compromising the anonymity of that person or constitutional and policy requirement that the execution be viewed by certain members of the public.

The length of tubing used in an execution will always be substantially longer than that used in a clinical setting because the executioner and anonymous medical personnel must be in a separate room. That concern is heightened because the executioners who push the drugs are not required to have any medical expertise at all, and because resistance to the push was one of the major concerns in the Diaz case, and the State refuses to provide any information about the executioner other than that he or she is over the age of 18.

The underlying constitutional requirements and policies that apply to executions by lethal injection are fundamentally in conflict, and as a result Florida lacks a constitutionally sound method of execution.

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[3]See John D. Bessler, Televised Executions and the Constitution: Recognizing a First Amendment Right of Access to State Executions, 45 Fed. Comm. L.J. 355 (1993).

Regardless of its protocols, Florida's lethal injection procedure violates the Eighth Amendment due to inadequate training and proficiency

Prior challenges to Florida's method of execution by lethal injection delved only into the adequacy of the protocols themselves without considering the inherent risks. In *Sims v. State*, 754 So.2d 657 (Fla. 2000), the Florida Supreme Court reviewed the Department of Correction's protocols for executions by lethal injection. Relying on the Arizona case of *LaGrand v. Lewis*, 883 F.Supp. 469 (D.Ariz.1995), aff'd, 133 F.3d 1253 (9th Cir.1998), and the lower court's order denying relief, the Florida Supreme Court concluded that the execution protocols were sufficient. In its opinion, the Court cited the lower court's order with approval which stated, in relevant part:

> After considering the testimony presented by the witnesses from the DOC and the defense's experts on lethal injection, the trial court ruled that "the manner and method of execution to be carried out by lethal injection in Florida is neither cruel nor unusual and that the Department of Corrections is both capable and prepared to carry out executions in a manner consistent with evolving standards of decency.

Sims at 667-68.

The Governor's Commission concluded otherwise. Its findings were that the Department of Corrections was neither "capable nor prepared to carry out" an execution in accordance within the dictates of the Eighth Amendment.[4] In the six years between the Sims decision and the Diaz execution we have learned that the DOC never trained the primary or secondary executioners, that the execution team was never trained on the effects of the lethal chemicals, nor did it train (or tell) the execution team which chemicals they were injecting at any time during the execution process. The DOC was never trained as to the proper and necessary injection sequence, a sequence now

[4]In short, Sims and progeny have been superseded by the Commission Report

known to be necessary under the Eighth Amendment. The DOC personnel were never properly trained to assess the patency of the IV lines, never trained to properly monitor the IV lines, let alone trained to insert them correctly (see GCALI testimony of Dr. Hamilton). The DOC personnel were never properly trained to identify a problem with the IV lines when there was substantial resistance during the injection process. Furthermore, the execution team members testified that on at least seven prior occasions they felt similar resistance but were never trained to realize that this was due to an improper IV insertion.

Had the DOC been "capable and prepared" in establishing the second of the two IV lines, Diaz would have immediately felt the immense pain of the potassium chloride because the poorly trained DOC personnel ignored the protocols and skipped the injection of the sodium pentothal into the second line.

Equally disturbing, every single member of the execution team testified that nothing extraordinary happened during the Diaz execution other than the amount of time it took to effectuate death. Warden Randall Bryant, Assistant Warden Randall Polk, physician's assistant William Mathews, the primary executioner, and the medically trained personnel, all testified that they did not observe anything unusual during the execution.

Every single expert who testified, whether before the Commission, or as either a defense or state witness in Lightbourne, has reached the opposite conclusion. Dr. Hamilton, Dr. Heath, Dr. Dershwitz, Dr. Sperry, and Dr. Clarke, all testified about the numerous errors committed by the poorly trained execution team in charge of the Diaz execution.

Simple arithmetic leads us to a troubling conclusion. At best, five percent of Florida's executions since the Sims Court declared that the DOC was "both capable and prepared to carry out

executions in a manner consistent with evolving standards of decency" have been botched. Worse yet, if the testimony of the DOC execution team members is to be taken into account, at least forty percent of Florida's lethal injection executions since Sims may have been botched.

Recent litigation in other jurisdictions has raised concerns with the qualifications, training and proficiency of the individuals delegated the responsibility of carrying out executions by lethal injection. In *Morales v. Tilton*, 465 F.Supp.2d 972, 973 (N.D.Cal.2006), the federal court analyzed many of the issues shared by the thirty-six states that use lethal injection as a method of execution. In its Memorandum of Intended Decision, the Federal District Court summarized the issues and its findings:

> In fact, this case presents a very narrow question: does California's lethal-injection protocol-as actually administered in practice-create an undue and unnecessary risk that an inmate will suffer pain so extreme that it offends the Eighth Amendment? Because this question has arisen in the context of previous executions, see *Beardslee v. Woodford*, 395 F.3d 1064 (9th Cir.2005); Cooper, 379 F.3d 1029, and is likely to recur with frequency in the future, the Court has undertaken a thorough review of every aspect of the protocol, including the composition and training of the execution team, the equipment and apparatus used in executions, the pharmacology and pharmacokinetics of the drugs involved, and the available documentary and anecdotal evidence concerning every execution in California since lethal injection was adopted as the State's preferred means of execution in 1992[.]...The Court concludes that absent effective remedial action by Defendants-the nature of which is discussed in Part IV of this memorandum-this exhaustive review will compel it to answer the question presented in the affirmative. Defendants' implementation of lethal injection is broken, but it can be fixed.

Morales, 465 F.Supp.2d at 974.

The court reached several conclusions. First, there was "Inconsistent and unreliable screening of execution team members". Id at 979. Second, there was a "lack of meaningful training,

supervision, and oversight of the execution team". Id. Third, there was "Inconsistent and unreliable record-keeping". Id. Fourth, the court found "Improper mixing, preparation, and administration of sodium thiopental by the execution team". Id. at 980. Finally, the court concluded that there was "Inadequate lighting, overcrowded conditions, and poorly designed facilities in which the execution team must work". Id. These issues are the same concerns raised in this case.

Since Morales, other states, in addition to Florida, have empanelled commissions in an attempt to assess and manage the risk of human error. Since the Florida Supreme Court decided Sims, there have been at least ten botched lethal injection executions in six states, all resulting from human error.

While the DOC has provided logs which reflect internal training sessions, there is no evidence that the DOC has changed its training to manage the risk of human error. Instead, the recently released training logs reflect that the DOC may be incorporating a 5%-40% error rate into its procedures.

In addition, the DOC has twice revised its execution protocols since the Diaz execution. The July 31st protocols now call for specific medical qualifications of several execution team members. These qualifications, however, are no different than those held by the Diaz execution team members. Without more, Florida is in the same situation it was immediately after the Diaz execution.

Florida's execution procedure is unconstitutional because of failure to ensure unconsciousness

Failure to anesthetize a prisoner before and throughout the lethal injection procedure will result in a violation of the Eighth Amendment. Ensuring unconsciousness in a clinical setting is a complicated and demanding task. Yet even there, accidents happen.[5] Clinical methods of

[5] "Intraoperative awareness occurs when a patient becomes conscious during a procedure

determining depth of unconsciousness include all of the abilities and judgment of an anesthesiologist or a certified registered nurse anesthetist who is present and monitoring the patient at all times. He or she monitors the appearance of the patient, response to stimuli, EKG, temperature, blood pressure, heart rate, moisture content of the skin, size of the pupils, carbon dioxide respiration levels, and oxygenation of the blood if on a heart lung machine. Sophisticated medical equipment is used. Before beginning the procedure the surgeon administers a painful stimulus to test the patient's condition.

By contrast, the consciousness assessment required by the protocols falls far short of medical standards. The warden, who is charged with making the consciousness assessment has no medical expertise beyond that required of a law enforcement officer. He testified that he intends to make that assessment by shaking the prisoner and speaking to him. That is not a medically acceptable way of

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performed under general anesthesia and subsequently has recall of these events . . . Intraoperative monitoring of depth of anesthesia, for the purpose of minimizing the occurrence of awareness, should rely on multiple modalities, including clinical techniques (e.g., checking for clinical signs such as purposeful or reflex movement) and conventional monitoring systems (e.g., electrocardiogram, blood pressure, HR, end-tidal anesthetic analyzer, capnography). The use of neuromuscular blocking drugs may mask purposeful or reflex movements and adds additional importance to the use of monitoring methods that assure the adequate delivery of anesthesia." American Society of Anesthesiologists, "Practice Advisory for Intraoperative Awareness and Brain Monitoring: A Report by the American Society of Anesthesiologists Task Force on Intraoperative Awareness" Anesthesiology 2006; 14:847-64:

making the required assessment.

The greater the painfulness of the stimulation the more the subject must be anesthetized. Administration of a high dose of potassium chloride is extremely painful and requires that the subject be in a surgical plane of anesthesia. Notably, the most painful stimulus in the lethal injection procedure occurs after the initial consciousness assessment is made and the execution is well underway.

The specifications for central venous access are inadequate

Central venous access through the femoral vein is a sophisticated surgical procedure. Protocol (3)(b) addresses the minimum qualifications required to conduct the procedure. However, only a minority of doctors or at minimum a physician's assistant are qualified to perform the procedure. Mere licensure as a physician or physician's assistant is not in itself sufficient. Moreover, the procedure requires hospital room equipment or a surgical kit containing scalpels, catheters, suture equipment, wires, suturing needle, and so on. Protocol (12)(c)(5) does not reflect any of these requirements. The protocols are inadequate.

The protocol's provisions for FDLE Monitors have not been met

The protocols assign an important role to two FDLE monitors. One is stationed in the executioner's room and the other is in the execution chamber. (Protocol 7). Both are to keep a detailed log of what they observe. Importantly, an independent observer from FDLE witnesses the mixing of the chemicals and preparation of the syringes and all the other equipment that will be used during the execution. FDLE is an independent agency within the executive branch and as such performs an important oversight role. These functions can only be performed usefully by someone who knows what to look for. Yet in response to a current public records request FDLE certified that

it does not have anyone assigned to these roles and generally had no documentation responsive to any of Schwab's public records requests.

Among other things, Schwab requested copies of any FDLE protocols, written procedures, and checklists that would be used by the FDLE monitors. None exist. The request was also directed to communications between FDLE and the DOC or the Office of the Governor with regard to any such protocols and procedures that FDLE would followed. None exist. Nothing exists demonstrating that FDLE monitors have the qualifications to perform their duties, yet the Secretary of Corrections certified on July 31 that the Department had available the personnel who have the qualifications, training and experience to carry out the execution procedures described in the protocols. That certification is flatly contradicted by the certification provided by FDLE, and supports the argument that written assurances by DOC must be verified.

Florida's lethal injection procedure is constitutionally flawed because it fails to provide for independent verification of compliance with the protocols and training and proficiency of those who implement them

Lethal injection is a complicated procedure which requires that the members of the execution team have considerable expertise. The protocols themselves, no matter how artfully drafted, cannot substitute for that expertise any more than a first year medical student reading from a textbook can substitute for a surgeon. An important finding reached by the Commission and the judge in Lightbourne was that the execution team members in Diaz lacked training and proficiency. For example, the "medically qualified" person in the Diaz execution who actually started the IV's testified (anonymously) that he or she did not detect anything indicating that they were compromised, although the autopsy and all the other evidence showed that both of them were. Moreover, vague assurances in the protocols to the effect that the Warden will select as executioner someone who is

"fully capable of performing the designated functions" (Protocol 2(a)) do not meet any objective standards of verifiability and accountability.

Such standards do exist, however. They can be drawn from the fields of quality assurance, medical auditing, and risk assessment.

Risk Assessment

Risk assessment is at heart of the Eighth Amendment requirement that the lethal injection method of execution not create an unnecessary risk of extreme pain. As such, denying Mr. Schwab access to records from which a risk assessment can be made or an opportunity to present his claim at an evidentiary hearing constitutes a denial of due process and access to the courts. This is particularly true in light of the Florida Supreme Court's rationale in Diaz that "judicial review and oversight of the DOC procedures is preferable to chapter 120 administrative proceedings."

Risk analysis is widely used throughout society. It is obviously an essential feature of the insurance industry. Risk analysis is used to study and assess the safety, reliability, and effectiveness of products, processes, facilities, and activities. The U.S. Government helped standardize such assessments when it published Risk Assessment in the Federal Government: Managing the Process (NRC, 1983), called the "Red Book."

As such, the field is well established and has specific standards which can be applied to Florida's lethal injection procedure. For example, the Sims court noted expert testimony to the effect that 5.2 per cent of executions across the country had resulted in what it called "mishaps." That was before the series of botched cases or faulty procedures that have been brought to light in the past few years, including the Diaz execution. Mr. Schwab will present expert testimony regarding risk assessment at an evidentiary hearing. For example, there is a nearly 30 per cent error rate in securing

venous access in clinical settings. This is especially important here, where the consciousness assessment and monitoring required by the protocols is so inadequate. The success of the procedure depends very heavily on properly securing venous access, exactly what was not done in the Diaz execution.

Quality assurance and medical auditing

Mr. Schwab seeks to conduct an audit of the Department of Corrections practices and procedures with regard to method of execution. To that end he has retained a quality assurance auditor and requested the documentation that would normally be reviewed in the course of such an audit.[6] The attached affidavit of the auditor states among other reasons for the production of requested documents and for conducting an audit:

> The theoretical principles and practical application of quality assurance are relevant to the Department of Correction's reliance on documented procedures and trained personnel for administration of executions by lethal injection. In applications throughout the country, written procedures are used to provide explicit instructions for reliably carrying out a method in a consistent and acceptable manner. The use of poorly documented, incomplete, or ineffectively trained procedures increases variability, decreases comparability, and may render the procedure unreliable in practice. Evaluations of procedures, systems, and controls are performed in accordance with international standards in the quality profession. The International Organization for Standardization (ISO) is a non-governmental organization and international standard-setting body. ISO standards are used by governments, industries, and quality auditors throughout the world; they provide guidelines to improve process management, enable better decision-making and oversight, and provide high quality operations.

An audit would go beyond the four corners of the protocols and examine whether implementation of

[6]A supplemental affidavit is attached to and incorporated into this motion. It addresses a host of issues raised by the protocols as written.

the procedures described therein, as well as the training, proficiency and qualifications of the personnel who will carry them out are up to the task. It will also provide accountability from an independent source. This is especially important here because the protocols contemplate that independent observation would be provided by FDLE. According to its response to Mr. Schwab's public records request, FDLE apparently has done nothing to fulfill that role. In light of that, neither the Secretary's current certification of readiness nor the assignment of FDLE observers at a later date can provide the reliability of an independent audit.

While independent, periodic audits would be appropriate in any event, one would be especially appropriate here. This is the first execution since the Diaz execution was botched. As a result of the subsequent investigation, the DOC twice revised its protocols, changed its personnel, and remodeled the execution facility. Such an audit can be performed as soon as the appropriate documents are provided and would not cause any delay in the execution. Nor would such a review implicate anonymity of the personnel involved in the execution because identifying information can simply be redacted from the documents provided.

Failure to authorize the release of the requested documentation or to allow Mr. Schwab the opportunity to present the results of an audit at an evidentiary hearing is a denial of due process.

CLAIM II

NEWLY DISCOVERED EVIDENCE REVEALS THAT MR. SCHWAB SUFFERS FROM NEUROLOGICAL BRAIN IMPAIRMENT WHICH MAKES HIS SENTENCE OF DEATH CONSTITUTIONALLY UNRELIABLE

In 1988, the Florida Department of Corrections (DOC) prepared a presentence investigation report (PSI) in reference to a prior sexual offense (victim Than Meyer). Following its recommendation, Schwab was sentenced as a mentally disordered sex offender with the requirement

that he enter a sexual offender treatment program while incarcerated. He was determined to be a pedophile. The program, however, was terminated, and therefore after serving approximately three and a half years, without sexual offender treatment, Mr. Schwab was released to outpatient treatment with Dr. Duncan Bowen.

Trial counsel called Dr. Howard Bernstein, a psychologist. Dr. Bernstein was not an neither a neuropsychologist nor an expert in mentally disordered sexual behavior. He conducted a mental status examination of Mr. Schwab a records review of records and video recorded testimony by Dr. Fred Berlin and Dr. Ted Shaw. He found no evidence of organicity. In rebuttal the state called Dr. William Samek. The court relied on Dr. Samek's testimony. Dr. Samek testified that he never interviewed Mr. Schwab. His testimony was based on a review of the record, observation of witness testimony, and observation of videotaped testimony of Drs. Berlin and Shaw.

Dr. Samek said that: "The biological mechanism of human sexuality is very complex. It involves not only the genital area, but it involves the brain. It involves the hypothalamus. It's a very complicated area that science has not unraveled even close to fully at this point" (ROA XVIII, 3339-40). "The issue of irresistible impulse is one that is very complicated and one that in my opinion that psychology has never really gotten a good handle on. . . . I think that's really not so much a psychological determination as a personal philosophical value judgment (Id. at 3356).

Since the conclusion of Mr. Schwab's trial and post conviction proceedings there have been new developments in the understanding of sexual offenses and their association with brain functioning which would have impacted Mr. Schwab's sentencing proceedings. Volume 1, No. 3, September 2006, pgs 84-94 of The International Journal of Forensic Psychology published an article entitled "Neuroanatomical Substrates for Sex Offenses." (Exhibit ___). This clinical research

reviewed clinical and forensic studies in order to understand the neuroanatomical basis of sexual behavior, and how dysfunctions in these systems result in deviant sexual behavior. Prefrontal-sub cortical systems involving the striatum and thalamus are involved in the regulation of sexual behavior, mediating functions such as initiation, inhibition, choice, empathy, reward, and punishment. Limbic structures such as extended amygdala, septal, nuclei, and hypothalamus mediate other aspects of sexuality such as sex drive, and likely mediate sexual orientation and gender identity. Dysfunction in these systems of various etiologies may lead to increased predisposition to commit sex offenses.

Additional scholarly research was presented in a look at the "Brain Pathology in Pedophilic Offenders," Arch Gen Psychiatry, 2007;64:737-746. (Exhibit __). After review of the neuroimaging profiles of pedophilic perpetrators as compared to nonoffenders, the authors conclude that pedophilic perpetrators show structural impairments of brain regions critical for sexual development. These impairments are not related to age, and their extent predicts how focused the scope of sexual offenses is on uniform pedophilic activity. Structural deficits of the right amygdale and closely connected structures, presumably of neurodevelopmental origin, are related to the sexual deviance of pedophilic offenders.

Neuropsycholgical Report

Recent neuropsychological testing reveals that Mr. Schwab suffers from brain impairment in the right brain and frontal lobe in nature. The basis for this opinion is established in the neuropsychological report prepared by Dr. Hyman Eisenstein, Ph.D., A.B.P.N. (Exhibit ___). Mr. Schwab has never been evaluated by a neuropsychologist and therefore the testing and evidence presented in previous court proceedings are not comprehensive in an assessment of Mr. Schwab's

brain functioning and constitutes newly discovered evidence. What has occurred is that Dr. Bernstein and Dr. Samek offered several suppositions regarding the causal factors that contributed to Mr. Schwab's behavior. However, each supposition fell short of recognizing that brain impairment was a major causative factor. Dr. Bernstein testified that Mr. Schwab did not suffer from organic brain impairment, despite not being qualified to render that opinion and not having conducted neuropsychological testing. The above cited research and current neuropsychological examination show that the evidence which was relied on at trial was substantially inaccurate. Dr. Eisenstein will testify unequivocally that there exists organic brain impairment.[7] His expert testimony based on new

[7]Dr. Eisenstein reports as follows: Schwab has a history of head trauma with several reported instances in infancy, childhood, and adolescence. Multiple head traumas have a synergistic effect, which is far greater than the sum of the effects of the individual episodes. On the Wechsler Adult Intelligence Scale, Mr. Schwab is of average intelligence but does show some difficulty with mathematical computations which have persisted throughout his education. On the Tactual Performance Task, Mr. Schwab scored within the mildly impaired range in correct location and severely impaired range with correct position. These results are significant in that one would expect the subject to improve over trials. The increase in time required by Mr. Schwab using his non-dominant left hand is highly atypical and suggestive of contra-lateral, right brain impairment. On the category test Mr. Schwab scored within the mildly impaired range of functioning. On the Wisconsin Card Sorting Test Mr. Schwab scores were eight times more than the normal error level and therefore are pathognomonic for brain damage, particularly in the frontal lobe region. On the Trail Making Test, a test of speed for attention, sequencing, mental flexibility, visual search and motor function, Mr. Schwab scores indicated deficits in both visual immediate and visual delayed memory which were significantly lower than to be expected based upon his IQ. Additionally, the significant differences in visual memory and auditory memory demonstrate impairment in right brain areas that mediate visual memory functioning. In the Language component, Mr. Schwab scored within the average range. The Stroop Color and Word Test proved difficult when the task required inhibition of on e response in favor of another, which is indicative of frontal lobe dysinhibition impairment. The Rey-Osterrieth Complex Test scores were within the mildly impaired range with a significant decay of information taken in. This is also indicative of right brain dysfunction. On the Motor Function grip strength test, mild and moderately impaired functioning is established and the discrepancies in performance further establish contra-lateral, right brain impairment. Dr. Eisenstein's neuropsychological evaluation concludes that the data establishes brain damage; the brain impairment is right, frontal lobe; uncontrolled sexual impulses, which are mediated by brain functioning are especially compromised when brain damage exists to frontal lobe structures; Mr. Schwab's thinking is

scientific findings will show that the brain impairment had a direct causative effect on Schwab's criminal behavior.

Schwab requests an evidentiary hearing in order to fully develop this claim. Dr. Bowen would testify that he examined Mr. Schwab in 1988 and determined that Schwab had been the victim of a sexual assault as a child. Defense counsel made this allegation during sentencing. The trial court rejected it but specifically commented on the fact that neither party had called Dr. Bowen as a witness. The new scientific findings coupled with Dr. Eisenstein's examination and conclusions would show that the trial court's assessment of the substantial impairment mitigator was based on faulty evidence. Dr. Bowen's testimony would show that there was an environmental event beyond Schwab's ability to control which reduced his culpability in the same way that mental retardation or illness or extreme emotional disturbance reduce the culpability of an offender. The new evidence would alter the balance of aggravating and mitigating circumstances such that there exists a reasonable probability of a different outcome, and would further show that Schwab is actually innocent of the death penalty.

The neuropsychological report of Dr. Eisenstein and the academic literature review indicate that neuroimaging will show that Mr. Schwab's brain functioning was a primary contributing factor to the crimes charged. Therefore it is further requested that Mr. Schwab be permitted to obtain neuroimaging testing, including MRI and PET scan to determine the nature of the organic involvement and brain pathology.

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chaotic, and preservative; He is unable to modify his method of problem solving. When he is stuck in a pattern, he becomes unstable to make appropriate decisions; when under stress his abilities are further compromised, and he tends to decompensate further; Mr. Schwab's feedback loop becomes impaired; the brain damage heightens his impulsivity and dyscontrol; and his inability to regulate his actions is decreased.

WHEREFORE, based on the foregoing claims for relief, Mr. Schwab requests a full and fair evidentiary hearing at which to present evidence in support thereof, and that this motion be granted.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Motion to Vacate Sentence or Stay Execution has been furnished by fax, e-mail and U.S. Mail, first class postage, to all counsel of record on this 15th day of August, 2007.

_____

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