

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

STATE OF FLORIDA,

Petitioner,

v.

MARK DEAN SCHWAB,

Defendant.

CASE NO. 1991-7249-CF-A
DEATH WARRANT

BY _____

CLERK, SUPREME COURT

2001 AUG 15 A 8:18

FILED
THOMAS D. HALL

MOTION TO STRIKE MOTION FOR JUDICIAL INTERVENTION;
MOTION FOR PROTECTIVE ORDER

COMES NOW the State of Florida, and responds as follows to Schwab's "Motion for Judicial Intervention":

1. To the extent that Schwab's motion amounts to a personal attack on counsel for the State, it is due to be stricken. To the extent that the motion contains factual averments about conversations to which the undersigned was not a party, those averments are inflammatory, speculative hearsay, which have no place in a pleading filed by a Florida lawyer.

2. To the extent that Schwab asserts that there is no "privilege" as to Dr. Samek, the State will or may call Dr. Samek should an evidentiary hearing be conducted. Schwab's attempts to "hire" Dr. Samek are no more than an inappropriate attempt to preclude the State from preparing its case. Of

course, since no pleading has yet been filed, the State is unable to determine which witnesses may be needed should a hearing even be ordered. Schwab should not be allowed to use the timing of the filing of his postconviction relief motion as a sword to foreclose the State from preparing its case.

3. Moreover, Dr. Samek cannot testify for Schwab due to the conflict of interest. In *Walton v. State*, 847 So.2d 438, 445-446 (Fla. 2003), the Florida Supreme Court held that a mental health expert who testifies for one party cannot testify for an adverse party due to conflict of interest:

Walton next contends that his fundamental rights to confrontation, due process, and an individualized and reliable hearing were violated when Dr. Sidney Merin was allowed to testify at his postconviction evidentiary hearing. Because Merin was previously appointed as a confidential mental health expert to Richard Cooper, Walton's codefendant, Walton contends that the obvious conflict of interest violated his constitutional rights. Additionally, Walton contends that the error in allowing Dr. Merin to testify was compounded by the trial court's limitation of cross-examination regarding the doctor's conflict of interest.

It is clear that because Dr. Merin assisted in preparing Richard Cooper's defense strategy, a conflict of interest existed. Merin agreed to evaluate the new evidence before the court in the postconviction proceeding to determine what impact, if any, the mitigating evidence obtained during postconviction discovery would have upon a mental health professional's diagnosis of Walton. He testified regarding his impressions, despite having consulted with Cooper's attorneys during Cooper's prior trial proceedings. Because these two codefendants' interests were antagonistic to each other, it is unlikely that Merin could render a truly objective opinion with

regard to both. Thus, it was error to allow Merin to testify as a witness for the State.

4. The State will not waive, nor is Schwab entitled to compel the State to waive, any existing privilege. No actions to support a finding of waiver have taken place.

5. Schwab's assertions that the State has somehow "hindered" his efforts to obtain anything are frivolous -- the State has acted to insure that a waiver of the applicable privilege does not occur. See, *Jones v. Butterworth*, 701 So. 2d 76, 80 (Fla. 1997). That is entirely proper, and is the responsibility of the State, which, like the defense, is entitled to a fair trial.

6. If the State cannot call a defense expert as its own witness, and that is the law, *Jones, supra*, there is, and can be, no colorable argument for a different result in this situation. Both the work-product privilege and a conflict of interest foreclose Schwab from retaining Dr. Samek, and calls the propriety of his discussions with the doctor into question.

WHEREFORE, Schwab's "motion for judicial intervention" should be stricken, and a protective order entered foreclosing Schwab from contacting potential State expert witnesses without notice to counsel for the State.

Respectfully submitted,

BILL McCOLLUM
ATTORNEY GENERAL

KENNETH S. NUNNELLEY
Senior Assistant Attorney General
Florida Bar #998818
444 Seabreeze Blvd., 5th Floor
Daytona Beach, FL 32118
(386) 238-4990
FAX (386) 226-0457

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by **e-mail, Facsimile** and **U.S. Mail** to: **Mark Gruber**, Assistant CCRC-Middle, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619 (813)740-3554, **Judge Charles M. Holcomb**, Circuit Court Judge, 506 S. Palm Ave., Titusville, Florida 32796-3592 (321)264-6904, **Robert Wayne Holmes**, Assistant State Attorney, 2725 Judge Fran Jamieson Way, Building D, Viera, Florida 32940 (321)617-7546, and **Christopher R. White**, Assistant State Attorney, 101 Bush Blvd., Sanford, Florida 32773 (407)665-6400, on this _____ day of August, 2007.

Of Counsel