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

CASE NO 05-1991-7249-AXXX

STATE OF FLORIDA,

Plaintiff,

v

MARK DEAN SCHWAB,

Defendant

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CLERK OF CIR CT
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SCOTT ELLIS

**ORDER ON DEFENDANT'S MOTION FOR JUDICIAL INTERVENTION,
STATE'S MOTION TO STRIKE AND
STATE'S MOTION FOR PROTECTIVE ORDER**

This matter came before the Court upon the Defendant's Motion for Judicial Intervention and the State's Motion to Strike Motion for Judicial Intervention and Motion for Protective Order. The Court held a hearing on the Motions on August 16, 2007. Daphne Gaylord, Peter Cannon, Ken Nunnelley and Wayne Holmes appeared by telephone. Having heard the arguments of counsel, the Court makes the following conclusions of law:

A. The Defendant's Motion seeks an order authorizing Dr. William Samek, an expert witness for the State at trial, to speak to defense counsel. The Court has no jurisdiction over Dr. William Samek and no authority to direct him to do or not do any action.

B. The State seeks to strike the Defendant's Motion and asks the Court to enter

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an order prohibiting the Defendant's counsel from contacting Dr Samek

C The Court finds that there would be no conflict of interest in allowing the Defendant's attorneys to speak to Dr Samek The case cited by the State, *Walton v State*, 847 So 2d 438, concerns conflict of interest among co-defendants' experts and has no relevance to this matter

D The request of the Defendant appears to be designed to allow his counsel to consult privately with Dr Samek to review prior records and testimony and consider "newly discovered evidence," namely scholarly articles and recent examinations of the Defendant, evidence not yet determined by the Court to be authoritative The Defendant is apparently seeking the consultation to develop his case that, based on the evidence now available, Dr Samek would have testified differently at trial

E The State asserts this is an attempt to "convert" a State witness Although Dr Samek did testify for the State at trial fifteen years ago, he is not currently listed as a State witness for current proceedings in this case

F The State asserts a work product privilege based on its work with Dr Samek in preparation for trial The Court cannot tell if any work product exists as the State has failed to specify any communications or documents that would meet the definition of work product "The rationale supporting the work product doctrine is that one party is not entitled to prepare his case through the investigatory work product of his adversary" *Southern Bell Tel & Tel Co v Deason*, 632 So 2d 1377, 1384 (Fla 1994) and the definition includes documents and papers prepared in anticipation of trial, even if not confidential client communications *Hickman v Taylor*, 329 U S 495, 67 S Ct 385, 91 L Ed 451 (1947) However, the party asserting the claim must specifically

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identify the documents or communications it claims are protected *Nationwide Mutual Fire Ins Co v Harmon*, 580 So 2d 192 (Fla 4th DCA 1991) The Court therefore cannot rule as to whether there is privileged work product in this instance

G The Court can find no law prohibiting an adverse party from contacting a person who formerly testified for the opposing party at trial or to consult with that witness As of the time of this Order, Dr Samek has not been listed as a witness for the State in any current proceedings in this case and the Court finds no reason why defense counsel cannot contact him

H If Dr Samek chooses to speak with defense counsel, he may assert any work product privilege which should not be disclosed to the Defendant, as a non-party may claim the privilege for a party *Zaban v McCombs*, 568 So 2d 87 (Fla 1st DCA 1990)

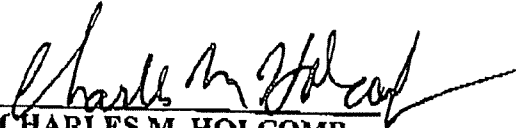
THEREFORE it is ORDERED and ADJUDGED

1 The State's Motion to Strike is DENIED

2 The State's Motion for Protective Order is DENIED

3 The Defendant's Motion for Judicial Intervention is GRANTED to the extent that the Court finds there is no legal reason why he may not contact and consult with Dr Samek

DONE AND ORDERED in Titusville, Brevard County, Florida this 16 day of August 2007


CHARLES M HOLCOMB
Circuit Court Judge

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was provided by facsimile to Mark Gruber and Daphne Gaylord, Capital Collateral Regional Counsel, Middle District, 3801 Complex Drive, Suite 210, Tampa, FL 33619, fax (813) 740-3554, Wayne Holmes, Assistant State Attorney, fax (321) 617-7542, Ken Nunnelley and Barbara Davis, Office of the Attorney General, 444 Seabreeze Blvd , Fifth Floor, Daytona Beach, FL 32118-3951, fax (386) 226-0457 this 16 day of August 2007

Marcia Newell

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