

IN THE SUPREME COURT OF FLORIDA

CASE NO. 07-1603

MARK DEAN SCHWAB,

Appellant,

v.

Death Warrant Signed
Execution Scheduled for
November 15, 2007 at 6:00
p.m.

STATE OF FLORIDA

Appellee.

RENEWED MOTION TO STAY EXECUTION
AND HOLD PROCEEDINGS IN ABEYANCE

Comes now Mark Dean Schwab, through counsel, and moves that the scheduled execution be stayed and that the current proceedings in this Court be held in abeyance.

1. Mr. Schwab's motion for postconviction relief was styled "Motion to Vacate Sentence or Stay Execution."
2. The State's most recent filing concedes that an issue before this Court in this case, namely the applicability of a "foreseeable risk" standard to Florida's lethal injection method of execution, is also before the U.S. Supreme Court in *Baze v. Rees*, SC #07-5439.¹
3. Within the past week the U.S. Supreme Court has granted a stay of execution because of *Baze*.

¹Appellant does not agree with the State's efforts to narrow the issues, but even so the key issues before this Court are substantially the same as those which have been taken up by the U.S. Supreme Court.

4. The decision of the Kentucky Supreme Court was described by that court as follows: "The single issue is whether the lethal injection provisions for execution protocol violate or threaten to violate the rights of Baze and Bowling to be free from cruel and unusual punishment." *Baze v. Rees*, 217 S.W.3d 207 (Ky. 2006).
5. According to reports, the Supreme Court modified its order agreeing to rule on the constitutionality of a three-drug protocol used in carrying out the death penalty by lethal injection, dropping one of the four questions raised in the appeal. In an order amending its grant, the Court said it was confining its review to questions directly bearing on that protocol. Thus, the question that will not be before the Court sought to test whether a state had a duty to have a medical team on hand at an execution to keep the inmate alive, if the process had been started but a court has stayed the execution before it was completed.
6. The three questions remaining are:
 - I. Does the Eighth Amendment to the United States Constitution prohibit means for carrying out a method of execution that create an unnecessary risk of pain and suffering as opposed to only a substantial risk of the wanton infliction of pain?
 - II. Do the means for carrying out an execution cause an unnecessary risk of pain and suffering in violation of the Eighth Amendment upon a showing that readily available alternatives that pose less risk of pain and suffering could be used?

III. Does the continued use of sodium thiopental, pancuronium bromide, and potassium chloride, individually or together, violate the cruel and unusual punishment clause of the Eighth Amendment because lethal injections can be carried out by using other chemicals that pose less risk of pain and suffering?

These are essentially the same issues that are now before this Court. Most of the other asserted errors by the lower court in this case derived from its rejection of an unnecessary risk standard, or any risk standard at all. The lower court here decided that Mr. Schwab's allegation, that Florida's lethal injection method of execution entailed a constitutionally significant risk of violating the Eighth Amendment, did not state a claim for relief. The Court then reasoned that there would be no evidentiary hearing and therefore, none of Mr. Schwab's requests for judicial notice, a walk through, further disclosure of public records, and so on would be granted. While those decisions are being appealed, they cannot decide without deciding their premise.

7. Article I, section 17 of the Florida Constitution provides that: "The prohibition against cruel or unusual punishment, and the prohibition against cruel and unusual punishment, shall be construed in conformity with decisions of the United States Supreme Court which interpret the prohibition against cruel and unusual punishment provided in the Eighth Amendment to the United States Constitution."

Given the foregoing, it would be appropriate to stay the execution and hold the present proceedings in abeyance

CERTIFICATE OF SERVICE

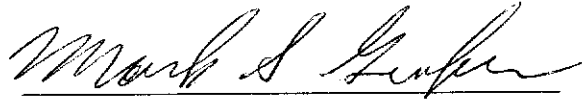
I HEREBY CERTIFY that a true copy of the foregoing Renewed Motion to Stay Execution and Hold Proceedings in Abeyance has been furnished by United States Mail, first class postage prepaid, and by e-mail to the Clerk of Court and to all counsel of record on October 3, 2007.



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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that a true copy of the foregoing Renewed Motion to Stay Execution and Hold Proceedings in Abeyance, was generated in Courier New, 12 point font, pursuant to Fla. R. App. 9.210.



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