

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

STATE OF FLORIDA,

Plaintiff,

v.

Case No. 91-7249-CF-A

MARK DEAN SCHWAB,

Defendant.

_____ /

RESPONSE TO MOTION TO VIEW EXECUTION CHAMBER
AND WITNESS "WALK THROUGH"

COMES NOW the State of Florida, and responds as follows to Schwab's motion to view execution chamber and witness a walk-through. For the reasons set out below, that motion should be denied:

1. Schwab has not yet filed a successive *Florida Rule of Criminal Procedure* 3.851 motion, despite have previously stated that he might raise a "lethal injection claim," and despite the fact that the Diaz execution took place in December, some eight months ago. By not raising that claim sooner, Schwab is attempting to inject delay into this case. At this point, there is nothing pending in this Court, and Schwab's motion is nothing more than an unauthorized and inappropriate request for discovery.

2. In *Smith v. Secretary, Florida Department of Corrections*, Case No. 8:06-cv-01330-T-17MAP entered an order on August 8, 2007, which decided Smith's lethal injection claim in the following way:

The constitutionality of Florida's lethal injection protocol is clearly established. See *Diaz v. State*, 945 So. 2d 1136, 1144 (Fla. 2006); *Sims v. State*, 754 So. 2d 657 (Fla. 2000). The protocol has been in effect for about seven years as of the date of this Order. See FLA. STAT. § 922.105(1) (as amended by 2000 Fla. Sess. Law Serv. Ch. 00-2 (S.B. No. 10A § 2)). See also *Sims*, 754 So. 2d at 663 n.11. Smith's Eighth Amendment challenge to the State's protocol, raised for the first time in 2007, is neither "potentially meritorious,"¹¹ *Rhines*, 544 U.S. at 278, nor timely. FLA. R. CRIM. P. 3.851(d)(1) ("Any motion to vacate judgment of conviction and sentence of death shall be filed by the prisoner within 1 year after the judgment and sentence become final."). Smith's Eighth Amendment claim is meritless.

Lightbourne/Suggs Claims

Smith supports his motion to hold proceedings in abeyance by pointing to the State's actions in two pending proceedings, *State v. Lightbourne*, Case No. 81-170-CF-A-01 (5th Jud.Cir. Marion County), and *Suggs v. McDonough*, 3:06-cv-111-RH/WCS. In *Lightbourne*, the State conceded that an evidentiary hearing was warranted on Petitioner's method-of-execution claim. In *Suggs*, the State moved to hold in abeyance Petitioner's lethal injection claims. Smith's reliance on these cases is misplaced. Smith **cannot credibly claim that he is entitled to an amendment and abeyance in this case simply because the State exercised a cautionary stance in *Lightbourne***. And, unlike *Suggs*, Smith did not challenge Florida's lethal injection statute in his original habeas petition. Smith's *Lightbourne* and *Suggs* claims are meritless.

Lightbourne has no more impact on this case than it did on *Smith*, and the same rationale applies equally here.

3. To the extent that Schwab argues that he should be allowed to view the execution area because the defendant in Lightbourne has been allowed to do so, Schwab has neglected to inform this Court that the circuit court order allowing Lightbourne to view the execution area is the subject of an extraordinary writ which was filed by the State on August 10, 2007, seeking relief from that order. A copy of that petition for extraordinary relief is attached. Lightbourne has been ordered to respond to the State's petition by noon on August 15, 2007. *State v. Lightbourne*, Florida Supreme Court Case No. SC07-1499.

4. To the extent that Schwab includes various factual averments in his motion, a response to those claims is, at this juncture, premature other than to state that no factual averments contained in Schwab's motion are admitted.

5. The production of public records is not intended to authorize fishing expeditions for records unrelated to claims properly before the Court. *Diaz v. State*, 945 So. 2d 1136, 1150 (Fla. 2006); *Rutherford v. State*, 926 So. 2d 1100, 1116 (Fla. 2006); *Sims v. State*, 753 So. 2d 66, 70 (Fla. 2000). *See, Syken v. Elkins*, 644 So. 2d 539, 545 (Fla. 3d DCA 1994) (finding the requests to the defense expert physicians to be unduly burdensome, while yielding "little useful information.") Schwab has not shown how observation of the execution area or of an

unscheduled walk-through by his attorney will yield any relevant information.

WHEREFORE, based upon the foregoing, the State moves this Court to deny Schwab's motion to view execution chamber and witness "walk through".

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by **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