IN THE SUPREME COURT OF FLORIDA

CASE NO.

MARK DEAN SCHWAB,

Appellant,

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

STATE OF FLORIDA

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE EIGHTEENTH JUDICIAL CIRCUIT FOR BREVARD COUNTY,
STATE OF FLORIDA

MOTION FOR STAY OF EXECUTION

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COMES NOW, MARK DEAN SCHWAB, by and through undersigned counsel and submits this motion to stay execution of death sentence for the reasons herein:

1. On November 9, 2007, the appellant filed a successive motion to vacate judgment and sentence pursuant to Fl.R.Cr.P. 3.851(e)(2) based on "new evidence truly demonstrating that Schwab could not control his conduct" which, under Jones v. State, 591 So.2d 911 (Fla. 1991), "could impact sentencing." *See Schwab v. State*, Slip Op. at 13-14 (November 1, 2007). The newly discovered evidence that Mr. Schwab presented in his November 9, 2007, successive motion was the changed opinion of Dr. Samek, the original expert who testified for the state, finding that Mr. Schwab was "unable" rather than "unwilling" to control his conduct.

2. Mr. Schwab also alleged a claim of newly discovered evidence based on notes taken by four separate FDLE monitors during simulated execution exercises. Mr. Schwab submitted the affidavit and opinion of Janine Arvizu, a certified Quality Auditor, which identifies numerous and consequential errors in the mock executions as observed by the FDLE monitors, as well as insufficient training of the FDLE monitors themselves.

3. According to the FDLE notes, five simulated execution training exercise took place on July 11 and July 18 of this year. Two exercises were conducted on July 11th and three exercises were conducted on July 18th. According to the notes of both FDLE monitors present on July 11th, members of the execution team failed to administer crucial Phase III syringes during the second of two training exercises resulting in a failed exercise. On July 18th, two different FDLE monitors observed three simulated training exercises. Again, according to the notes of the FDLE monitors, DOC execution team members failed to administer two of the last three syringes resulting in a failed exercise.

4. As stated in the motion it is clear that the Department of Corrections "botched" two of the five mock executions, a 40% error rate. Second, "botched" executions are now becoming part of the training process, an institutionalization of failed executions.

5. On November 13th, the postconviction court held a case management conference and heard argument from counsel. That same day, the court denied the appellant an evidentiary hearing on both claims.

6. Current counsel is now briefing the issued raised below. In order for counsel to adequately brief these issues to this Court, the appellant is requesting that this Court stay the execution of Mr. Schwab scheduled for

November 15, 2007. These claims are important and constitutional in nature. Counsel submits that a stay is necessary to protect the jurisdiction of this Court under Article V, section 3(b) of the Florida Constitution.

7. Furthermore, a stay of execution is authorized under section 922.14, Fla. Stat. (2007), which contemplates such situations.

8. This Court has previously issued a stay of execution in situations where the jurisdiction of the courts and their constitutional duties under Article V are threatened by an impending execution date. See *Provenzano v. State*, 750 So.2d 597 (Fla. 1999). In *Provenzano*, the postconviction court denied defense counsel a short continuance in order to have their expert testify at a competency hearing. The postconviction court denied the request, although it would not have interfered with the execution date. This Court found that the lower court abused its discretion and issued a stay in order to allow the judicial branch to correctly carry out its constitutional duties:

> Accordingly, for the reasons stated in this opinion, we remand this case to the circuit court. The circuit court shall afford Provenzano a reasonable opportunity to present the testimony of Dr. Fleming. Dr. Fleming shall be accepted as an expert in clinical psychology. Further, counsel for Provenzano shall have the opportunity to cross-examine Dr. Parsons regarding Provenzano's rational appreciation of the connection between his crime and the punishment he is to receive. Finally, the circuit court may take any further steps which it deems appropriate consistent with rule 3.812. We stay Provenzano's execution, which was scheduled for September 24, 1999. After the hearing, if the circuit court determines that Provenzano is competent to be executed, the stay which we have granted will continue until 7

> a.m. on the twenty-first day following the date of the circuit court's order.

Provenzano, 750 So.2d at 603.

9. Equally illuminating on this subject are two concurring opinions from *Provenzano* by current members of this Court. Justice Anstead wrote:

> I concur in the majority's remand in order for the appellant to be provided with a reasonable opportunity to present evidence, including expert opinion evidence, of his competency to be executed. Unfortunately, it appears that these proceedings were driven by the perceived need to be certain that there would be no delay in the date of execution set for the defendant. We must share the blame for that perception by not being more explicit in our opinion that the critical focus of the trial court should be on determining the competency of the defendant, rather than on rushing to get the proceedings over in time for the scheduled execution to take place.

Provenzano, 750 So.2d at 603 (Anstead, J., specially concurring).

Justice Wells, specially concurring, wrote more broadly about the concerns raised by such improvident haste:

> I concur in the majority opinion and write only because we once again encounter imposition of the ultimate penalty without the full measure of the deliberative process. The issue of competency for execution, by its very nature, can only be confronted in close proximity to an execution. That does not mean, however, that the process to resolve the issue deserves less consideration than other steps in the judicial processing of this type of case. There is an established right under the Eighth Amendment of the United States Constitution which prohibits the execution of one who is insane, as set forth by the United States Supreme Court in *Ford v. Wainwright*, 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986)…. The constitutional right involved in this consideration would be rendered a hollow shell, and indeed meaningless, without proper interpretation and application of the procedures for enforcement. This right, unfortunately, is not self-executing, and the right is of no value if procedures such as those utilized here are the standard by which the right is protected. *Cf.*

> *Ramirez v. State*, 542 So.2d 352, 355-56 (Fla. 1989). Procedures are not simply "technical" niceties which serve no purpose other than to complicate or delay judicial proceedings. Procedures give life to due process rights afforded all citizens, whether those citizens are challenging a speeding ticket or, as here, presenting evidence during an evidentiary hearing to determine sanity to be executed. Procedures count.

Provenzano, 750 So.2d at 604 (Wells, J., specially concurring).

10. Procedures do count. Unfortunately, Mr. Schwab has not had the benefit, or the protection of, these procedures. At least one member of this Court voiced this concern. *See* Order Denying Appellant's Motion for Rehearing, *Schwab v. State,* Case No. SC07-1603 (November 7, 2007)(Anstead, J., dissenting)("Unlike *Lightbourne*, who was granted this opportunity, Schwab has been denied this fundamental right to articulate and prosecute his own claim.").

11. The analogy to a *Ford* claim is appropriate in considering the instant stay motion. Both claims challenging lethal injection and competency to be executed are proper pending a set execution date. Competency is a fluid concept, *see Panetti v. Quarterman*, 127 S.Ct. 2842 (2007), subject to change as a prisoner nears execution. Likewise, lethal injection challenges may change as an execution nears. This point was evident during the instant proceedings in which the Department of Corrections issued three different sets of execution by lethal injection protocols in less than a year.

12. Much has been made by the state and the court concerning the timing of

the instant motion on appeal. This ignores the fact posited by current counsel during the proceedings on the previous Rule 3.851 successive motion. Prior to the signing of Mr. Schwab's death warrant, counsel began investigating various areas of mitigation. In April of this year, counsel retained the services of an expert to conduct a neurological assessment of Mr. Schwab. During this inquiry, the Governor signed Mr. Schwab's death warrant. While Mr. Schwab is not entitled to any notice that his warrant will be signed, it is not accurate to state that the current mitigation claim is a result of Mr. Schwab's death warrant. The postconviction court ignored the fact that the state sought to block counsel from communicating with Dr. Samek by petitioning the court for a protective order.

Wherefore, based on the aforementioned reasons, counsel moves for a stay of execution.

CERTIFICATE OF SERVICE

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

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