**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.
_____/

ORDER DENYING DEFENDANT'S SUCCESSIVE MOTION TO VACATE OR STAY EXECUTION

This matter came before the Court upon the Defendant's Successive Motion to Vacate Sentence or Stay Execution, filed late in the afternoon on Friday, November 9, 2007. Monday, November 12 was a legal holiday, Veteran's Day. The Court held a hearing at the first possible time on the Motion on Tuesday, November 13, 2007. In attendance were Peter Cannon and Daphne Gaylord, Capital Collateral Regional Counsel for the Defendant, Ken Nunnelley and Barbara Davis, Office of the Attorney General and Wayne Holmes, Office of the State Attorney.

The Court recognizes that the death penalty is a unique sanction in the law and must be approached with great deliberation. Each crime, each victim and each defendant are unique as well, and the Court must take into account all of the legal standards that must be met before the State has established that the death penalty is appropriate. The Defendant in this case has had many opportunities over many years to present his arguments to this and to other courts as to why he should not be executed. He was

convicted and sentenced to death in 1992; the Florida Supreme Court affirmed the conviction and sentence. *Schwab v. State, 636 So.2d 3 (Fla.1994).* He unsuccessfully sought postconviction relief, both before this Court, the Florida Supreme Court and before the federal courts. *See Schwab v. State,* 814 So.2d 402 (Fla.2002) (affirming circuit court's denial of motion for postconviction relief and denying petition for writ of habeas corpus); *Schwab v. Crosby,* 451 F.3d 1308 (11th Cir.2006) (affirming trial court's denial of federal habeas corpus relief), *cert. denied,* --- U.S. ----, 127 S.Ct. 1126, 166 L.Ed.2d 897 (2007). On November 1, 2007, the Florida Supreme Court affirmed this Court's denial of the Defendant's August 2007 Motion to Vacate. *Schwab v. State*, --- So.2d ----, 2007 WL 3196523 (Fla. 2007). With the Defendant's execution scheduled for November 15, 2007, he has filed another Motion to Vacate. The Court has carefully considered the merits of the Motion and the arguments of counsel and makes the following findings of fact and conclusions of law:

PROCEDURAL BAR TO CLAIM ONE

In order to succeed on a successive motion for post conviction relief, a defendant must first establish that the evidence he brings before the court is newly discovered. There are two requirements that must be met in order to set aside a sentence because of newly discovered evidence. First, the asserted facts 'must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known them by the use of diligence.' *Scott v. Dugger*, 604 So.2d 465, 468 (Fla.1992) (quoting *Hallman v. State,* 371 So.2d 482, 485 (Fla.1979), abrogated on other grounds by *Jones v. State*, 591 So.2d 911, 915 (Fla.1991)). Second, 'the newly discovered evidence must be of such nature that it would *probably* produce an

acquittal on retrial.' *Scott,* 604 So.2d at 468 (quoting *Jones v. State,* 591 So.2d 911, 915 (Fla.1991)). This 'standard is also applicable where the issue is whether a life or death sentence should have been imposed.' *Id.* (citing *Jones,* 591 So.2d at 915). "*Miller v. State,* 926 So.2d 1243, 1258 (Fla. 2006).

The Defendant now alleges that the new psychological evaluation by Dr. Samek, the State's expert witness at trial is such newly discovered evidence. The Court disagrees. While the evaluation and report itself were only generated in the last several weeks, the underlying information and the persons necessary to produce this report are not "new." Dr. Samek testified at the penalty phase of the trial in 1992. The Defendant offers no reason as to why he could not have allowed Dr. Samek to evaluate him at that time. Certainly, by the time of the first post-conviction motion in 1995, the Defendant could have contacted Dr. Samek concerning his diagnosis. The Defendant was given the opportunity during the initial post-conviction evidentiary hearing to present mental health evidence. He did not present Dr. Samek at that time and provides no reason for delaying until weeks before his scheduled execution.

Additionally, Dr. Samek's report cites to no newly discovered evidence. He lists the evidence which was available to him at the time of trial. He then lists as "newly discovered evidence" the decisions issued by the courts in this matter, which are not "evidence," and lists the neurological exam previously rejected by this Court and the Florida Supreme Court as not decisive. He then lists the persons to whom he most recently spoke in making his new evaluation, namely, the Defendant, his father and stepmother, and Duncan Bowen, a sexual offender treatment provider. The Defendant fails to allege that any of these persons were unknown to him at the time of trial or were

not available. Obviously, the Defendant was available for examination. Duncan Bowan was the counselor from whom the Defendant was receiving sexual offender treatment at the time of the murder (See Exhibit A, Judgment and Sentence, July 1, 1992, p. 23). The Defendant's father, Paul Schwab, testified for the Defendant during the penalty phase at trial. The Court has no knowledge of where the stepmother was at that time, but the Defendant offers no reason why these two persons could not have been interviewd by Dr. Samek at some much earlier point in these proceedings. Claim One does not present newly discovered evidence that could not have been discovered earlier through the exercise of due diligence.

IMPACT OF THE NEW EVIDENCE

Even assuming that the Court accepts the report of Dr. Samek as newly discovered evidence, it finds that the evaluation does not rise to the level required by *Jones, Id*., namely that it be of such a nature that it would probably produce an acquittal upon retrial. *Jones* advises the trial court to consider the materiality and relevance of the evidence and any inconsistencies in the newly discovered evidence in making a determination as to whether the new evidence would have impacted the trial court's decision. Dr. Samek's new evaluation might be considered relevant in evaluating two statutory mitigators, namely whether the Defendant was under extreme emotional distress at the time of the crime and whether the Defendant was able to conform his conduct to the requirements of the law. The Court now looks at the likelihood of whether, had Dr. Samek's recent evaluation been available to the Court at the time of trial, the evaluation would probably have changed the outcome of the penalty phase and would have resulted in a sentence of life imprisonment rather than death.

EXTREME EMOTIONAL DISTRESS AT THE TIME OF THE CRIME

In his new report, Dr. Samek now asserts that he believes Mr. Schwab was acting under emotional distress. The Court has re-read the trial testimony of Dr. Samek and found that he never gave an opinion on this issue at trial. The issue of impulsiveness was discussed at length, but Dr. Samek was not asked and did not offer an opinion as to whether Mr. Schwab was acting under emotional distress. It is clear from Judge Richardson's order that the Court did not rely on anything Dr. Samek said in regard to this mitigator in making its finding that the mitigator was not established by the greater weight of the evidence. Judge Richardson cited the testimony of the Defendant's mother, who described her son's mental state on the morning of the murder. According to Judge Richardson, the mother testified she did not notice anything unusual about her son and that, in fact, he was a bit more relaxed than he had been because he did not think his probation would be violated.(A, pp. 8-9)

Judge Richardson also based his conclusion about Mr. Schwab's mental state on his own review of hours of taped conversations the Defendant had with various law enforcement personnel before and after his arrest. Judge Richardson found that there was no indication in these tapes that the Defendant was under the influence of any mental or emotional distress (A, pp. 8-9). The Court wonders whether Dr. Samek should now be allowed to offer an opinion on a question he was never asked at trial and a question on which the Judge Richardson did not use expert testimony to answer, instead relying on the testimony of a lay witness who knew the Defendant very well, and upon his own impressions of the evidence. The Court cannot say that this new opinion as to the

Defendant's emotional distress would probably have changed Judge Richardson's mind on this mitigator.

DEFENDANT'S ABILITY TO CONFORM HIS CONDUCT TO THE REQUIREMENTS OF LAW

In determining whether the Defendant had the ability to conform his behavior to the requirements of law, Judge Richardson had the opinions of the defense experts and Dr. Samek to consider. At trial, Dr. Samek discussed the issue of whether Mr. Schwab was acting under an irresistible impulse. Interestingly, he noted,

> The issue of irresistible impulse is one that is very complicated and one that in my opinion that psychology has never really gotten a good handle on. When does a desire become an impulse? When does an impulse become irresistible? I think that's really not so much a psychological determination as a personal philosophical judgment.

He went on to testify that "if there is sufficient motivation to stop. . . most people's irresistible impulses can be resisted." (Exhibit B, trial testimony pp. 411-12). In his new evaluation, he does not specifically use the term, "irresistible impulse," and does not conclude that Mr. Schwab could not have conformed his conduct. Instead, he concludes only that Mr. Schwab's ability to conform his conduct was "substantially impaired." Significantly, this is exactly what Judge Richardson concluded. Judge Richardson found that "the greater weight of the evidence does support the conclusion that the defendant's ability to conform his conduct to the requirements of law was *substantially impaired." (emphasis added).* The Court also admitted that "whether the Defendant was 'unable' or 'unwilling' to conform his conduct to the law is open for debate." (A, p. 24). Thus, Dr. Samek's "new" opinion would not have impacted the Court's conclusion as to this mitigator. The Court found that this mitigator did exist (A, p. 14).

The significant change in Dr. Samek's opinion is his diagnosis as to Mr. Schwab's mental disorder. At trial, Dr. Samek testified that he did not need to personally examine Mr. Schwab to make a diagnosis. He stated that it was not uncommon for him to make a diagnosis based on records provided to him, rather than on a face-to-face interview. (B, pp. 388-89, 434). He diagnosed Mr. Schwab as having an antisocial personality disorder, rape/murderer and mentally disordered sex offender (B, p. 397). He now recants, stating that, while he still diagnoses Mr. Schwab as a mentally disordered sex offender (MDSO), Mr. Schwab is more accurately diagnosed as a MDSO, Rape and Humiliation of Teenage Boys. He states the closest DSM-IV TR diagnosis would be Paraphilia, Sexual Sadism Type. Although Judge Richardson specifically adopted Dr. Samek's antisocial personality disorder diagnosis, (A, p. 10), the Court does not find that a change in diagnosis from antisocial to one including rape and sadism would probably have changed Judge Richardson's mind.

Dr. Samek stresses in his report that he now believes Mr. Schwab's assertions that he was raped and abused as a child. At trial, he did not testify that he did not believe the Defendant. Although he raised a question about the rape, he went on to factor the rape, as well as the alleged family violence, humiliation and abuse into his discussion of the Defendant's psychology. He told the Court that such events would be highly traumatic but that these events did not necessarily rise to a level of harm that inevitably led to the Defendant becoming a rapist and murderer (B, pp. 430, 432-33). Although interviewing the Defendant may have given him more information concerning the alleged rape and abuse, he had knowledge of these issues at the time of his original diagnosis and apparently took them into account in making his original diagnosis.

Judge Richardson only discussed the antisocial diagnosis in the context of one statutory mitigator namely, the issue of whether Mr. Schwab had the ability to conform his conduct to law. As noted above, Judge Richardson found that this mitigator did exist, so the change in diagnosis is essentially irrelevant. The Court also notes that Dr. Samek does not opine in his new evaluation that the Defendant could not have resisted his impulses or conformed his conduct, but only that his ability to do so was impaired.

Even were the Court now to conclude that the trial court might have found the existence of the statutory mitigator of emotional distress and given greater weight to the mitigator of the defendant's inability to conform his conduct, the Court still does not find that these two mitigators would have outweighed the aggravators found by the trial court. Judge Richardson wrote that any one of the three statutory aggravators (prior violent crime, murder committed during sexual battery/kidnapping, and heinous, atrocious and cruel murder) outweighed all mitigating circumstances.

Even where a court found that the mitigators of emotional distress and inability to conform were entitled to moderate weight and considerable weight, respectively, the death penalty was affirmed because of the violent nature of the crime. See *Troy v. State* 948 So.2d 635 (Fla. 2006):

> Upon review, we conclude that the circumstances of this case are similar to other cases in which this Court has upheld the death penalty. *See* *Butler*, 842 So.2d at 833 (holding the death sentence proportional for the first-degree murder conviction where only the HAC aggravator was found); *Singleton v. State*, 783 So.2d 970, 979 (Fla.2001) (holding the death sentence proportional for the first-degree murder conviction where the aggravators included prior violent felony conviction and HAC); *Johnston*, 863 So.2d at 278 (holding death sentence proportional for first-degree murder conviction where the court found two aggravating factors, one statutory mitigator, and twenty-six nonstatutory mitigators). Comparing the circumstances in this action to the cases cited above and other capital cases, we conclude that death is proportionate in this action.

Thus, the Court concludes that even if the new evaluation of Dr. Samek were taken into account, this "newly discovered evidence" would not have sufficiently established that any of the alleged mitigating factors would have required the court to refrain from imposition of the death penalty. Prong one of the *Jones* test was not met, as the evidence was not truly newly discovered. Prong two of the test, requiring that the evidence would likely change the outcome and resulted in a life sentence was also not met. Relief on Claim One is denied.

CLAIM TWO: INADEQUATE TRAINING OF DOC EXECUTION TEAM

The Defendant has once again raised his claim that the Department of Corrections is not yet ready to carry out lethal injections without the likelihood of error. He claims that his documentation establishes at least a 40% error rate during training sessions, demonstrating that a botched execution is all too likely. As noted in *Jones, Id.,* the Eighth Amendment does not compel the State to ensure that no suffering is involved in the extinguishment of life or even that the State guarantee an execution will proceed as planned every single time without any human error. As the Court stated in *Buenoano v. State,* 565 So. 2d 309 (Fla. 1990), following a botched electrocution, "one malfunction is not sufficient to justify a judicial inquiry into the Department of Corrections' competence." In passing, the Court notes that the "affidavit" from the quality control expert, Ms. Janine Arvizu, does not meet the statutory definition of an affidavit. Ms. Arvizu does not swear that the information is true as required by s. 92.525, Fla. Stat. but only that upon her information and belief, it is true. Ignoring the legal defect of the affidavit, the Court does not find it provides newly discovered evidence requiring a stay or vacation of the death sentence.

The Florida Supreme Court dealt extensively with the issue of DOC training in its recent opinion, *Lightbourne v. McCollum,* No. SC06-2391, November 1, 2007. As found by the Supreme Court, the Department's newest protocol requires that medically qualified team members will be responsible for the execution. A pharmacist is given the responsibility to mix the chemicals to be injected. The licensing and credentials of all these persons will be verified by the Department of Health and a back-up person is trained to step into the designated role in the event of any unforeseen contingencies. (slip op., pp. 46-47). The Court concluded that "while the lethal injection procedures do no spell out in exact detail what training each team member must have, they do provide significant guidance and clearly require that the medically qualified personnel . .. have adequate certification and training for their respective positions." (slip op., p. 52). The Court went on to state that the Court's role "is not to micromanage the executive branch in fulfilling its own duties relating to executions. We will not second-guess the DOC's personnel decisions, so long as lethal injection protocol reasonably states, as it does here, relevant qualifications for those individuals who are chosen ." *(Id.).*

The training notes submitted by the Defendant relate to training under the prior protocol, as they relate to July 2007 sessions. They are therefore not directly relevant to the current procedures adopted in August 2007. The new protocol requires that a licensed pharmacist mix the necessary chemicals. The Court sees no reason to assume that such a highly educated and professionally trained individual will not be able to perform this task correctly. The Court reiterates its adherence to the to the principle that the Department is entrusted with developing adequate protocol, revising as necessary to meet evolving societal concerns and that the mere possibility of human error in the

process of execution does not render the current protocol or the training of personnel to carry them out inadequate.

THEREFORE it is ORDERED and ADJUDGED

The Defendant's Successive Motion to Vacate Sentence or Stay Execution is DENIED.

The Clerk of the Court shall immediately transport the record of these proceedings to the Supreme Court of Florida. No Notice of Appeal shall be required.

DONE AND ORDERED in Titusville, Brevard County, Florida this _____ day of _____ 2007.

_____
CHARLES M. HOLCOMB
Circuit Court Judge

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was provided by facsimile to Peter Cannon and Daphne Gaylord, Capital Collateral Regional Counsel, Middle District, 3801 Corplex 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 _____ day of _____ 2007.

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