IN THE SUPREME COURT OF FLORIDA

CASE NO. SC07-2138

MARK DEAN SCHWAB,

Appellant,

Death Warrant Signed
Execution Stayed

STATE OF FLORIDA

Appellee.

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

REPLY BRIEF OF APPELLANT

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ARGUMENT

Counsel relies on the arguments posited in the initial brief and only addresses

ARGUMENT I:

THE LOWER COURT ERRED WHEN IT DENIED MR. SCHWAB'S NEWLY DISCOVERED EVIDENCE CLAIM OF DR. SAMEK'S CLARIFICATION OF HIS ORIGINAL TESTIMONY. THIS EVIDENCE MAKES MR. SCHWAB'S SENTENCE OF DEATH FUNDAMENTALLY UNRELIABLE IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION

A. The Florida Rules Govern This Case

The State in its Supplemental Answer brief claims that Mr. Schwab is attempting to side-step "settled rules" in his claim of newly discovered evidence.(Supplemental Answer Brief at 2) Nothing is further from the truth. In fact, Mr. Schwab is asking for this Court to apply those rules for it is the State that ignores the very plain wording of Fl.R.Crim.P. 3.851(f)(5)(B):

> **(B) Successive Postconviction Motion.** Within 30 days after the state files its answer to a successive motion for postconviction relief, the trial court shall hold a case management conference. At the case management conference, the trial court also shall determine whether an evidentiary hearing should be held and hear argument on any purely legal claims not based on disputed facts. ***If the motion, files, and records in the case conclusively show that the movant is entitled to no relief, the motion may be denied without an evidentiary hearing.*** If the trial court determines that an evidentiary hearing should be held, the court shall schedule the hearing to be held within 60 days. If a death warrant has been signed, the trial court shall expedite these time periods in accordance with subdivision (h) of this rule.

Fl.R.Crim.P. 3.851(f)(5)(B)(emphasis added).

The records in the instant case do not conclusively show that Mr. Schwab is entitled to no relief. The affidavit of Dr. Samek is in clear contrast to the testimony and evidence offered at Mr. Schwab's penalty phase proceeding. Dr. Samek's affidavit is, as this Court stated, ***"new evidence truly demonstrating that Schwab could not control his conduct" and thus "could impact sentencing."*** *Schwab v. State*, Slip Op. at 13-14 (November 1, 2007).

B. The Need for an Evidentiary Hearing

The State's objection to the need for an evidentiary hearing as argued in its Supplemental Answer Brief is exactly the same argument offered by the State in *Swafford v. State*, 679 So.2d 736 (Fla. 1996). In Swafford, the defendant offered newly discovered evidence in the form of a witness affidavit. There, as in this case, the postconviction trial court summarily denied the motion. This Court, on appeal, remanded the case back to the lower court for an evidentiary hearing. This Court stated:

> We accept as sufficient for the purpose of demonstrating that an evidentiary hearing is required, Swafford's claim that Lestz's statement amounts to newly discovered evidence. Our acceptance is based in part on the State's failure to assert, with regard to this issue, anything more than an allegation that defense counsel had years to find Lestz. We specifically hold, however, that our acceptance of Swafford's claim in this regard does not mean Lestz's statement is newly discovered evidence as a matter of law. Rather, Swafford's newly discovered evidence claim remains to be factually tested at the evidentiary hearing. Accordingly, we direct the trial court on remand to determine whether Swafford has demonstrated as a threshold requirement that his untimely and successive

> motion for postconviction relief was filed within two years of the time when Lestz's statement could have been discovered through the exercise of due diligence. *See Bolender v. State*, 658 So.2d 82 (Fla.), *cert. denied*,515 U.S. 1173, 116 S.Ct. 12, 132 L.Ed.2d 896 (1995). If the trial court determines that Lestz's statement is newly discovered evidence, it must then determine whether the statement, in conjunction with the evidence introduced in Swafford's first rule 3.850 motion and the evidence introduced at trial, would have probably produced an acquittal.

Swafford v. State, 679 So.2d at 739.

Under *Swafford*, the lower Court was required to conduct an evidentiary hearing on these two prongs of the newly discovered evidence test.

The right of Mr. Schwab to have an evidentiary hearing is settled law, contrary to the argument by the State. Worse yet, however, is the State's assertion that there is no "colorable argument that there is a different set of rules for death-sentenced defendants." (Supplemental Answer Brief at 3). Here, the State is on the wrong side of history for this Court has recognized the long standing principle of greater scrutiny in such cases:

> I concur with the majority opinion and write separately only to comment on the issue of finality raised by Justice Wells in his opinion concurring in part and dissenting in part. Justice Wells is correct in his expressed concern regarding the importance of finality in legal proceedings. The doctrine of finality is a necessary and strong thread that runs through the fabric of our judicial system. Without finality, the affairs of a free society and the rights of its citizens would be severely jeopardized. Thus, I believe that the doctrine of finality should be given great deference and should be an important consideration in determining whether a proceeding will be reopened or overturned. However, in recognition of the "qualitative difference of death from all other punishments," our jurisprudence also embraces the

> concept that "death is different" and affords a correspondingly greater degree of scrutiny to capital proceedings. *California v. Ramos*, 463 U.S. 992, 998-999, 103 S.Ct. 3446, 3451-3452, 77 L.Ed.2d 1171 (1983);*see also Ford v. Wainwright*, 477 U.S. 399, 411, 106 S.Ct. 2595, 2602, 91 L.Ed.2d 335 (1986) (Marshall, J., plurality opinion). Such heightened scrutiny ensures, as much as is humanly possible, that only those who are legally subject to execution are executed. However, because human decisions are subject to error, some individuals may be wrongly convicted. Thus, the concept of finality must sometimes yield to the fact that "execution is the most irremediable and unfathomable of penalties." *Ford*, 477 U.S. at 411, 106 S.Ct. at 2602 (Marshall, J., plurality opinion).

Swafford v. State, 679 So.2d at 740 (Harding, J, concurring specially)

Contrary to the State's position, neither this Court nor the United States Supreme Court has disregarded the principle that "death is different". *See Eddings v. Oklahoma*, 455 U.S. 104, 117-118, 102 S.Ct. 869, 877-878, 71 L.Ed.2d 1 (O'CONNOR, J., concurring); *Beck v. Alabama*, 447 U.S. 625, 637-638, 100 S.Ct. 2382, 2389-2390, 65 L.Ed.2d 392 (1980) (opinion of STEVENS, J., joined by BURGER, C.J., BRENNAN, Stewart, BLACKMUN, and POWELL, JJ.); Lockett v. Ohio, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978) (opinion of BURGER, C.J., Stewart, POWELL, and STEVENS, JJ.); *Gardner v. Florida*, 430 U.S. 349, 357-358, 97 S.Ct. 1197, 1204, 51 L.Ed.2d 393 (1977) (opinion of STEVENS, Stewart, and POWELL, JJ.); *id.*, at 363-364, 97 S.Ct., at 1207 (WHITE, J., concurring in the judgment); *Woodson v. North Carolina*, 428 U.S. 280, 305, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944

(1976) (opinion of Stewart, POWELL, and STEVENS, JJ.); *see also e.g.*, *Amendments to Fla. R.Crim. P. & Fla. R.App. P.*, 875 So.2d 563, 567-68 (Fla.2004) (Cantero, J., concurring) ("As we have repeatedly recognized, 'death is different.' "); *State v. Davis*, 872 So.2d 250 (Fla. 2004); *Sheppard & White, P.A. v. City of Jacksonville*, 827 So.2d 925, 932 (Fla.2002);*Walker v. State*, 707 So.2d 300, 319 (Fla.1997); *Crump v. State*, 654 So.2d 545, 547 (Fla.1995);*State v. Dixon*, 283 So.2d 1, 7 (Fla.1973) (stating that because "[d]eath is a unique punishment in its finality and in its total rejection of the possibility of rehabilitation ..., the Legislature has chosen to reserve its application to only the most aggravated and unmitigated of most serious crimes"). Accordingly, Mr. Schwab requests that this Court observe this bedrock principle and apply the longstanding law that affords him the right to an evidentiary hearing.

C. The Docrine of Judicial Estoppel

Counsel for the State ignores the doctrine of judicial estoppel and continues to claim that this evidence is procedurally barred. (Supplemental Answer Brief at 3). In fact, in its Supplemental Brief, the State makes no mention of this long-standing equitable doctrine. Implicitly, it can be argued then that the State has no reply to this argument, that this argument has merit and it is only up to this Court to enforce this remedy.

ARGUMENT II

THE LOWER COURT ERRED WHEN IT DENIED MR. SCHWAB'S NEWLY DISCOVERED EVIDENCE OF THE DEPARTMENT OF CORRECTION'S TRAINING LOGS AND FDLE MOCK EXECUTION TRAINING NOTES. THIS EVIDENCE CLEARLY REVEAL THAT FLORIDA'S LETHAL INJECTION METHOD OF EXECUTION VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION

A. The Doctrine of Judicial Estoppel

As stated in the Initial Brief, the newly discovered evidence of notes taken by four separate FDLE monitors during simulated execution exercises were requested prior to the time Mr. Schwab filed his most recent Successive Motion to Vacate. The DOC objected to the release of these and other documents. Counsel received these notes on September 19, 2007, after counsel filed the prior Motion to Vacate.

There has been a clear, persistent and trouble pattern of conduct on the part of the state in releasing records relating to lethal injection. First, the state objects to the release of records. Next, the state releases the records, in part or in whole, after motions have been filed or arguments presented to the courts. Finally, the state asserts that the defense is dilatory.

The state has not been forthcoming in providing records to the defense, contrary to the dictates of this Court. It has seen fit to ignore both the plain command of Fl.R.Crim.P. 3.852 and the orders of this Court. For example this Court stated in a

disturbingly similar situation:

> However, we deem it appropriate that the results of any and all tests and any other records generated relating to the operation and functioning of the electric chair be promptly submitted to this Court, the Attorney General's Office, the regional offices of the Capital Collateral Regional Counsel (CCRC), and the capital cases statewide registry of attorneys, on an ongoing basis. By this, we contemplate an open file policy relating to any information regarding the operation and functioning of the electric chair. In light of the recent history regarding the execution of persons sentenced to death, we further direct DOC to certify prior to the execution of Provenzano and all other inmates under death warrant that the electric chair is able to perform consistent with the "Execution Day Procedures" and "Testing Procedures for Electric Chair." DOC must send copies of this certification to the Attorney General's Office and the attorney representing the inmate under death warrant.
>
> *Provenzano v. State*, 739 So.2d 1150 (Fla. 1999).

Also, the State's position is still inconsistent as shown in its Supplemental Answer Brief. *Id.* at 4. In defending against claims challenging the lethal injection protocols in the state courts, the state has argued that only the most recent protocols are relevant and that the events of the Diaz execution are not to be considered as material because that execution took place pursuant to prior lethal injection protocols. Not only is counsel for the state once again arguing that Schwab was dilatory in not pursuing this claim earlier, the state also advances the argument that the records are not relevant because they refer to the protocols prior to August 1, 2007 (Equally troubling is the fact that the State refuses to release the records it asserts are

relevant). This argument fails because the Secretary of the Department of Corrections certified on the same day that the new execution protocols were released that his department personnel were properly trained and capable to carry out an execution under these new protocols. It would be impossible to have the DOC personnel properly trained as to these protocols on the same day they were released if they were not previously trained under the prior protocols. In fact, the changes were minimal and not sufficiently material to negate the relevancy of the prior protocols. See *Schwab v. State*, Slip Op.(November 1, 2007)(Events during Diaz execution under prior protocols relevant).

The state's attempt to withhold information from both the judicial system and the defense is anathema to our constitutional principles which requires a free and open society in order to maintain our system of justice. Long ago, one United States Supreme Court justice aptly noted:

> It is outside our basic scheme to condemn men without giving reasonable opportunity for preparing defense; in capital or other serious crimes to convict on 'official documents ...; affidavits; ... documents or translations thereof; diaries ..., photographs, motion picture films, and ... newspapers' or on hearsay, once, twice or thrice removed, more particularly when the documentary evidence or some of it is prepared ex parte by the prosecuting authority and includes not only opinion but conclusions of guilt. Nor in such cases do we deny the rights of confrontation of witnesses and cross-examination."

Application of Yamashita, 327 U.S., at 44, 66 S.Ct. 340 (footnotes omitted).

CONCLUSION

Not only has Mr. Schwab been denied relief by the lower court, he has also been denied his right to present evidence that may decide whether he lives or dies. Such summary denials of justice, regardless of the facts or the individual facing execution, are fundamental denials of due process. As this Court recently noted, Due Process is a core principle of postconviction proceedings:

> Furthermore, this Court has recognized that postconviction proceedings must comport with due process. *See, e.g., Teffeteller v. Dugger*, 676 So.2d 369, 371 (Fla.1996) (finding that postconviction hearing was procedurally flawed and violated the appellants' right to due process where court excluded the appellants from the courtroom while much of the evidence was presented and prevented appellants' counsel from cross-examining many of the witnesses). In *Johnson v. Singletary*, 647 So.2d 106 (Fla.1994), and *Provenzano v. State*, 750 So.2d 597 (Fla.1999), we determined that the postconviction defendants had been deprived of due process because they were not given an opportunity to present evidence or witnesses. Furthermore, as in *Provenzano*, "the purpose of our previous remand was never realized" in Roberts' case because the court never heard from Roberts' recanting witness even though he repeatedly requested a means to compel her attendance. 750 So.2d at 597.

Roberts v. State, 840 So.2d 962 (Fla. 2002).

As such, Mr. Schwab requests no more than what the Constitution requires.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief of Appellant has been furnished by e-mail and U.S. Mail, first class postage, to all counsel of record on this 11th day of December, 2007.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fl.R.App.P. 9.210, I hereby certify that this brief is prepared in Courier New 12 point font and complies with the requirement of Rule 9.210.

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