IN THE SUPREME COURT OF FLORIDA

CASE NO. SC08-1199

MARK DEAN SCHWAB,

Appellant,

v.

Death Warrant Signed
Execution Scheduled for
July 1, 2008

STATE OF FLORIDA,

Appellee.

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

ANSWER BRIEF OF APPELLEE

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INTRODUCTION

This appeal is from the Circuit Court's denial of his third successive post-conviction relief motion, each of which raised, in some form, a challenge to Florida's procedures for carrying out executions by lethal injection. Unlike the two previous motions, this motion challenges neither Schwab's convictions nor his sentence -- the only claim relates to the method by which that sentence will be carried out.

Schwab's motion is not only untimely, but also is procedurally barred. The State waives neither defense. However, putting those issues aside for the sake of argument, Schwab fails to plead a basis for relief under *Baze, Lightbourne,* and the Florida Supreme Court's two prior decisions in his own case. **Nothing Schwab has alleged could not have been raised in his prior post-conviction motions**. The lower court specifically found that Schwab is barred from relitigating claims he could have raised at an earlier stage of the litigation, (*Order*, at 2), and further found, with respect to Schwab's claims based on the *Baze v Rees* decision and "mock execution" records subsequent to August of 2007, that he was entitled to no relief.[1]

[1] The trial court described the *Baze* component and the post-August 2007 records component as the "only possible two new facts."

It is undisputed that the thiopental sodium employed in executions in Florida, will, if properly delivered, render the inmate unable to perceive pain. Because that is conceded, Schwab's argument for a reduction in dose makes no sense and is clearly no basis for judicial intervention. Likewise, the criticisms of the training of the execution team do not establish a "substantial risk" that the inmate will not be unconscious. The Florida Procedures for ensuring unconsciousness are far beyond what the Constitution requires, *Baze*, *infra*, and Schwab's claims have no legal basis.

STATEMENT OF THE CASE AND FACTS

PROCEDURAL HISTORY

This motion is the third successive motion for post-conviction relief under *Florida Rule of Criminal Procedure* 3.851 that Schwab has filed since his death warrant was signed in July of 2007. Both previous motions contained lethal injection claims which were denied by the Circuit Court and which were affirmed on appeal to this Court. *Schwab v. State*, 969 So. 2d 318 (Fla. 2007); *Schwab v. State,* 33 Fla. L. Weekly S67 (Fla. Jan. 24, 2008), *reh'g denied*, 2008 Fla. LEXIS 932 (Fla. May 24, 2008).[2] Schwab sought certiorari review of the November 1, 2007,

[2] Schwab filed a motion to withdraw opinion and permit supplemental briefing in light of the *Baze* decision. This Court denied that motion on May 21, 2008.

decision, which the United States Supreme Court denied on May 19, 2008. *Schwab v. Florida*, 2008 U.S. LEXIS 4273 (U.S. May 19, 2008).[3] On that day, Schwab's execution was rescheduled for July 1, 2008. On May 23, 2008, Schwab filed a motion for production of additional public records from the Florida Department of Corrections. Following a June 12, 2008, hearing on the Department's objections, the Circuit Court entered an order on Friday, June 13, 2008, directing the Department to produce the requested records, and ordering Schwab to file any successive post-conviction relief motion by 1:00 PM on Friday, June 20, 2008. That motion was filed on that day, but was late. On June 24, 2008, the Circuit Court conducted a case management conference as required by the *Rules of Criminal Procedure.* On June 25, 2008, the Circuit Court entered an order summarily denying Schwab's third successive motion. This appeal follows.

THE CIRCUIT COURT ORDER

In its order denying relief, the Circuit Court held that while the constitutional safeguards applicable to the execution of a sentence of death must be met:

> This process does not require the Court to continually review claims which have already been found wanting.

[3] The issue contained in the certiorari petition was a square challenge to Florida's lethal injection procedures. The United States Supreme Court denied the petition **after** *Baze v. Rees* was decided, and was, of course, well aware of that decision when it denied review in Schwab's case.

> At this late stage in the legal process, Schwab is barred from relitigating prior claims and from raising any new claims which he could have raised at an earlier date. His Third Successive Motion reads very much like his prior challenges to Florida's lethal injection protocol, **the only possible two new facts** being the United States Supreme Court decision, *Baze v. Rees,* 128 S.Ct. 1520 (2008), and any information Schwab gleaned from records of mock executions conducted under the new Florida protocol since August, 2007.

Order, at 2. (emphasis added). That procedural bar holding is a sufficient basis for affirmance of the lower court's order.

In alternatively addressing the merits of the arguably new matters, the trial court summarized Schwab's claims in the following way:

> The Defendant's arguments are essentially two-fold. He contends that *Baze* sets a different and higher Eighth Amendment standard than *Lightbourne* and that the Florida protocol do not meet the *Baze* standard because Florida's procedures are not substantially similar to those of Kentucky, thus exposing him to a substantial risk of harm. He also argues that the Florida protocol, as applied during training, demonstrate that a substantial risk of harm remains in the Florida process.

Order, at 3. In rejecting the claim that this Court applied an "incorrect" standard in light of the *Baze* decision, the trial court stated:

> In *Lightbourne,* the Florida Supreme Court looked at the history of Eighth Amendment standards and found that cruel and unusual punishment is that which involves "torture or a lingering death" or the infliction of "unnecessary and wanton pain," *Id* at 341. This would indeed seem to be a different and lesser standard than *Baze,* lesser in terms of its protection of a defendant. However, the Court also

> looked at the question of risk and explicitly stated that Lightbourne "has not shown a substantial, foreseeable or unnecessary risk of pain" in the DOC procedures. It states that "even if the Court did review this claim under a 'foreseeable risk" standard ... or an 'unnecessary risk' . . . we would likewise find that [the petitioner] has failed to carry his burden of showing an Eighth Amendment violation."*Id* at 534-535. Thus, the Florida Supreme Court did analyze the risk in terms of whether it was "substantial," a standard very much in line with *Baze.* It also analyzed the risk in terms of whether it was "foreseeable" or "unnecessary," both of which provide a higher level of protection to defendants. *Baze* specifically rejected the "unnecessary risk" standard proposed by petitioners because it found that this standard would improperly involve the courts in determining "best practices" for execution standards. *Id.* at 1532. As to what constitutes a "substantial" risk, the Court notes that the word implies more than speculative or possible risks, but those which might be deemed significantly great, considerable, real, material and of substance.
>
> Since the *Baze* decision of April 2008, the Florida Supreme Court has summarily rejected challenges to the Florida lethal injection protocol three times, citing to *Lightboune: Lebron v. State,* 33 Fla. L. Weekly S294 (Fla. May 1,2008); *Woodel v. State,* 33 Fla. L. Weekly S290; (Fla. May 1, 2008); *Griffin v. State*, Slip Copy, 2008 WL 2415856 (Fla. June 2, 2008). *Griffin* cites to *Baze.* Although this Court does not know the specifics of the lethal injection claims raised in these three cases, it is clear that the Florida Supreme Court, post-*Baze*, has considered the constitutionality of the Florida lethal injection protocol and found it constitutional under the Eighth Amendment.

Order, at 4.

In rejecting Schwab's claim based on "error rates in executions and training exercises," the trial court noted that the "factual basis" for this claim is the same "certified quality auditor" whose "analysis was rejected by this Court and

the Florida Supreme Court in Schwab's prior motion." *Order*, at 5. The court went on to state that:

> Even assuming the Court accepts the analysis of "error" rates provided by Schwab as true, it finds that they do not rise to constitutional errors. If errors were made in prior Florida executions, no court has held that any of them created an Eighth Amendment violation. Despite the claim of numerous errors both in actual and mock executions, Schwab cites to no Florida lethal injection execution in which DOC's protocol or the implementation thereof were found to have errors arising to constitutional levels.
>
> As noted by Justice Roberts in *Baze,* "an isolated mishap alone does not give rise to an Eighth Amendment violation, precisely because such an event, while regrettable, does not suggest cruelty, or that the procedure at issue gives rise to a 'substantial risk of serious harm.'" *Id at* 1531.

Order, at 5.

In rejecting Schwab's claim based on what were labeled "technical errors," the trial court found that:

> **These alleged errors are not newly discovered evidence but could have been and were the subject of prior motions.** Additionally, Schwab fails to explain how these "anomalies" relate to a Eighth Amendment claim. As the Court noted in *Lightbourne,* and as anyone who has spent time in a hospital knows, problems inserting IV lines are common even under the best of medical circumstances. *Id.* at 348. Being pricked numerous times in the course of having an IV inserted is not cruel and unusual punishment, however uncomfortable it may be.

Order, at 5-6. (emphasis added). In addressing the training aspect of the persons responsible for establishing the intravenous lines, the court rejected Schwab's claim:

> . . . Warden Cannon testified in the *Lightbourne*

hearings that these certified persons must also be currently employed in their area of medical expertise and must perform their assigned functions in their daily duties. *Lightbourne* at 349. These certified professionals are the very same type of certified professionals we assume have sufficient training to save our lives in a medical setting and the same type of professionals required in Kentucky. *Baze* at 1528. The Court does not find that the failure to utilize actual IV insertions during mock executions has a significant impact in creating a risk of harm. The persons chosen to insert IV lines must have appropriate certification and. according to Warden Cannon, significant on-going experience in TV technology as part of their daily duties. Obtaining volunteers for practice IV insertions is not an enforceable criteria, as it would depend on the existence of living volunteers willing to subject themselves to the procedure, something which cannot be guaranteed.

While the Florida protocol calls for training sessions to be held quarterly at a minimum, Warden Cannon testified that monthly training sessions are held and that team members practice their responses to problems that might arise. *Lightbourne* at 349. The protocol dictates that a practice execution will be conducted one week prior to the scheduled date of an execution and that all persons involved in the actual execution are to participate in this practice. This level of scheduled practices is substantially similar to the ten sessions conducted annually by Kentucky.

The critical point at which the Eighth Amendment comes into play in the course of a lethal injection is the point at which the second drug is administered: "[P]roper administration of the first drug, sodium thiopental, eliminates any meaningful risk that a prisoner would experience pain from the subsequent injections of pancuronium and potassium chloride." *Baze* at 1530. *See also Lightbourne* at 351: "If the sodium pentathol is properly injected, it is undisputed that the inmate will not feel pain from the effects of the subsequent chemicals." Thus, the critical Eighth Amendment concern is whether the prisoner has, in fact, been rendered unconscious by the first drug, not whether there are "irregular IV placements," "surgical

> incisions," "multiple needle punctures" or even "subcutaneous IV insertion," errors alleged by Schwab to have occurred in actual executions. As to training exercises, where IVs are not actually inserted, the Court questions what criteria Schwab uses when he describes a training exercise as a "failed" one.
>
> The Court will address assessment of consciousness further below. **It rejects the argument that the alleged error rate in the insertion of IVs, by itself, creates a substantial risk of serious harm**, as did the United States Supreme Court when it concluded that 'asserted problems relating to the IV lines do not establish a sufficiently substantial risk of harm to meet the requirements of the Eighth Amendment" *Baze* at 1533. **Florida protocol with regard to the training and expertise of IV technicians is substantially similar to Kentucky procedures and does not create an "objectively intolerable risk of harm."** Florida protocol provides an extra safeguard apparently not in the Kentucky procedure as it requires that, one week prior to the execution, an assessment is made of the defendant to determine appropriate IV access. (Exhibit A, p. 5*)*

Order, at 6-7. (emphasis added).

The trial court found that Schwab's claims relating to the "duration of prior executions" was procedurally barred because that claim was based on executions that took place before he filed his prior motion. *Order*, at 8. Alternatively, the trial court rejected that claim on the merits, stating:

> Even assuming that some of the data is new, the Court does not view it as creating a constitutional challenge to Florida's protocol. The assertion that one expert determined an ideal time frame does not require the Court to stand over DOC personnel with a stopwatch. If it did, the Court suspects it could be accused of rushing executions and creating a greater risk of harm. **The Court does not find where in Dr. Derschwitz's testimony [from *Lightbourne,* which was attached as an exhibit] that he set the 11-minute**

standard and Schwab does not point it out in his Motion.

Order, at 9. The trial court rejected Schwab's newly-advanced claim that Florida's procedure uses **too much** of the anesthetic sodium pentothal because there was no claim that the dosage used would not render Schwab unconscious within seconds, "thus eliminating further Eighth Amendment concerns." *Order,* at 9. Citing *Baze*, the trial court rejected the claim that courts of law are the proper forum for determining "best practices" in the design of the execution protocol, noting that the "constitutional focus is unconsciousness, not the duration of the execution following unconsciousness." *Order*, at 10.

The trial court rejected as procedurally barred Schwab's third "error," which was based on the assertion that certain unnamed inmates exhibited involuntary movement during the execution process, finding that such claim was not newly discovered evidence, and noting that "this issue was at the heart of the investigation into the execution of Angel Diaz." *Order*, at 10.[4]

In discussing the assessment of consciousness contained in

[4] Further, as the trial court noted, the use of pancuronium bromide was approved in *Baze,* Florida's procedure is substantially similar to Kentucky's in this regard, and Schwab had not alleged that any pain results, noting that the *Lightbourne* testimony was that "movement does not reflect pain and this does not reflect consciousness." *Order*, at 11.

Florida's procedures, the trial court emphasized that if the inmate is rendered unconscious by the sodium pentothal, "any meaningful risk of pain has been eliminated." *Order*, at 11. The Court noted that the *Baze* dissenters cited Florida's procedure favorably, and concluded that:

> . . . the Florida protocol and methods of assessing unconsciousness are, at a minimum, substantially similar to Kentucky's as discussed in *Baze,* and, in fact, seem to provide a higher level of safety because of the written directive to halt the execution until a proper assessment is made.

Order, at 12.

In comparing the Florida and Kentucky procedures, the trial court rejected Arvizu's qualifications to opine on the subject, finding that expert testimony was not necessary for the court to compare the procedures. The trial court concluded that the procedures are substantially similar, noted that Florida utilizes safeguards not used in Kentucky, and found that "Schwab has failed to point out any significant differences that would impact an Eighth Amendment claim." *Order*, at 13-15.

The trial court rejected Schwab's "suggested alternatives" to Florida's lethal injection procedures, stating:

> *Baze* held that a defendant cannot not succeed on an Eighth Amendment objection to a method of execution unless he can proffer a "feasible, readily implemented" procedure that would, in fact, "significantly reduce a severe risk of pain." *Id.* at 1532 Schwab's suggestions for remedying the alleged defects in the Florida system are not such procedures. His suggestions are additional training of DOC

personnel and a reduction in the amount of sodium pentathol.

As discussed above, the Court does not believe it is a judicial function to determine the appropriate dose or identity of the chemicals used in the lethal injection process. *Lightbourne* reiterated the principal enunciated in *Sims v. State,* 754 So.2d 657, 670 (Fla. 2000) that **"determining the methodology and the chemicals to be used are matters best left to the Department of Corrections." It also stated, "Our precedent makes it clear that this Court's role is not to micromanage the executive branch in fulfilling its own duties with relating to executions *Id*. at 351. *Baze* reinforces that principal, advising that the courts should not be asked to become boards of "best practices."**

That same principal would apply to the oversight of DOC training. Like the United States Supreme Court, this Court assumes that the agencies charged with developing execution procedures have "an earnest desire to provide a progressively more humane manner of death." *Baze* at 1531. **At oral argument, Schwab's counsel made it clear that he was asking the Court to go behind the protocol and assess DOC's readiness to carry out an execution properly. He stated. "It's the training. . . [T]he issue is the proficiency of the DOC training." (Exhibit C, transcript of June 24, 2008 hearing, p. 30). Schwab's complaint all along has been that DOC personnel is inadequately trained; the Court has previously denied a hearing on this issue.**

Baze concerns itself with the procedures as described on the face of the Kentucky protocol. The petitioners argued that one basis for finding Kentucky protocol unconstitutional was "because of the risk that the protocol's terms might not be properly followed." *Id.* at 1529. Justice Roberts concluded that the "risks of maladministration cannot remotely be characterized as 'objectively intolerable.'" *Id.* at 1537. **The Court finds no language in *Baze* that suggests it should look behind the protocol to micromanage the training of DOC personnel. To allow Schwab to force court oversight of DOC training and review of mock execution records would open the door for all condemned inmates to seek such a review prior to their executions, improperly**

involving the courts in a continuous, on-going monitoring of executive functions.

Baze soundly rejected petitioner's arguments that the possibility of a malfunction in the protocol created an Eighth Amendment claim. It stated,

> A stay of execution may not be granted on grounds such as those asserted here unless the condemned prisoner establishes that the State's lethal injection protocol creates a demonstrated risk of severe pain. . . - *A State with a lethal injection protocol substantially similar to the protocol we uphold today would not create a risk that meets this standard Id.* at 1537 (emphasis added).

Schwab has not demonstrated that the Florida protocol is not substantially similar to the one approved by the United States Supreme Court or that this protocol creates a demonstrated risk of severe pain.

Order, at 15-17. (emphasis added).

Schwab gave notice of appeal shortly after the trial court's order was issued. This Court issued a briefing schedule on June 25, 2008.

SUMMARY OF THE ARGUMENT

The Circuit Court properly denied relief on Schwab's motion without an evidentiary hearing. The law, and competent substantial evidence, support the findings of the Circuit Court. *Diaz v. Dugger*, 719 So. 2d 865, 868 (Fla. 1998). There is no basis for any relief.

ARGUMENT

SUMMARY DENIAL OF SCHWAB'S THIRD SUCCESSIVE MOTION WAS PROPER

The Trial Court's Order is Correct.

In denying Schwab's third successive post-conviction relief motion, the Circuit Court entered an extensive order, which is set out at length in the Statement of the Facts. The Court's reasoning is supported by the law, and is supported by competent substantial evidence. Despite Schwab's complaints about the order, there is no defect in it. Schwab's brief does not present legitimate issues for this Court's review -– instead, it does no more than quarrel with an adverse result which is well-supported by the precedent of this Court and the United States Supreme Court. The denial of relief should be affirmed.

On page 11 of his brief, Schwab claims that the Court incorrectly characterized his argument as being that "*Baze* sets a different and higher Eighth Amendment standard than *Lightbourne.*" The significance of Schwab's argument is unclear, but there is no doubt that Schwab argued that *Baze* set a different standard from *Lightbourne*, even though Schwab never explained why the *Baze* ruling entitled him to any relief beyond criticizing this Court's decisions because *Baze* was decided later in time. (TR at 6-8).

On page 13 of his brief, Schwab says that:

> It is impossible to guess whether this Court utilized a narrow or broad interpretation of the standard in *Schwab II* simply because this Court offers no analysis, nor does it offer any satisfactory analysis in the *Lightbourne* decision.

The problem for Schwab, which he never acknowledges, is that this Court has subsequently relied squarely on *Baze* to reject lethal injection challenges like this one. *Griffin v. State*, SC06-1055 (Fla. June 2, 2008), (unpub. op.). This Court has already rejected Schwab's claim, and his continuing criticisms of this Court's decisions are meaningless.[5]

Schwab complains that the trial court did not have the actual Kentucky procedures before it when it rendered its decision. The order is clear that the comparison of the Florida and Kentucky procedures was based upon the description contained in the *Baze* decision. **Schwab did not attach the Kentucky procedures as an exhibit, and it is wholly inappropriate for him to attach them as an exhibit for the first time on appeal. That exhibit should be stricken.** In any event, it is spurious to complain that the trial court did not have the Kentucky procedures when Schwab could have submitted them had he wanted to. This argument is frivolous.

[5] It is true that the trial court misspoke when it described the potassium chloride dose as 480 milliequivalents. It is also true that that drug was never at issue in this proceeding -- Schwab's *ad hominem* abuse of the trial court on page 15 of his brief is unnecessary, and has nothing to do with the correctness of the trial court's order, especially since Schwab identifies no other inaccuracy.

Finally, to the extent that Schwab cites the *Kennedy v. Louisiana* decision on page 44 of his brief, that decision does not contradict the explicit holding in *Baze* that:

> Permitting an Eighth Amendment violation to be established on such a showing would threaten to transform courts into boards of inquiry charged with determining "best practices" for executions, with each ruling supplanted by another round of litigation touting a new and improved methodology. Such an approach finds no support in our cases, would embroil the courts in ongoing scientific controversies beyond their expertise, and would substantially intrude on the role of state legislatures in implementing their execution procedures -- a role that by all accounts the States have fulfilled with an earnest desire to provide for a progressively more humane manner of death. *See Bell v. Wolfish*, 441 U.S. 520, 562, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979) ("The wide range of 'judgment calls' that meet constitutional and statutory requirements are confided to officials outside of the Judicial Branch of Government").

Baze v. Rees, 128 S. Ct. 1520, 1531-1532 (2008). *Kennedy* is not to the contrary –- that case addressed the wholly different question of whether death is a constitutional punishment for a particular category of crime. *Baze*, and the precedent of this Court all recognize the proper separation of powers, and recognize the fundamental fact that the execution of sentences is an executive branch function. Schwab's argument is based on a faulty premise.

There is no Challenge to Schwab's Sentence.

Schwab titled his motion as one to "vacate sentence or stay execution." That motion contained no grounds on which Schwab's

sentence could be set aside and, in fact, contained no challenge to the sentence at all. The only claim concerned Florida's lethal injection procedures, or, stated differently, the only claim was a challenge to the means by which a constitutionally valid and presumptively correct sentence was to be carried out. As Justice Alito described the issue in his *Baze* concurrence:

> . . . the constitutionality of capital punishment is not before us in this case, and therefore we proceed on the assumption that the death penalty is constitutional. *Ante*, at 8. **From that assumption, it follows that there must be a constitutional means of carrying out a death sentence**.
>
> **We also proceed in this case on the assumption that lethal injection is a constitutional means of execution.** *See Gregg v. Georgia*, 428 U.S. 153, 175, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976) (joint opinion of Stewart, Powell, and STEVENS , JJ.) ("[I]n assessing a punishment selected by a democratically elected legislature against the constitutional measure, we presume its validity").

Baze v. Rees, 128 S. Ct. at 1538. (emphasis added).

This Successive Motion is Procedurally Barred.

In the context of this case, the procedure at issue is the one that was upheld in Schwab's two prior successive motions; is the one that was upheld twice on appeal by the Florida Supreme Court in Schwab's case; is the one that the Florida Supreme Court upheld against an identical challenge in *Lightbourne v. McCollum*, 969 So. 2d 326 (Fla. 2007); is the one that was at issue when the United States Supreme Court denied certiorari review in *Schwab* and *Lightbourne*; and is the one that was cited

with approval by the *Baze* **dissenters.** The trial court's denial of relief on procedural bar grounds was correct, and should be affirmed in all respects.[6]

Florida Rule of Criminal Procedure 3.850(f) governs the dismissal of successive motions. That rule, which is applicable to this case, reads as follows:

> A second or successive motion may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the movant or the attorney to assert those grounds in a prior motion constituted an abuse of the procedure governed by these rules.

Fla. R. Crim. P. 3.850(f). Schwab's third successive motion runs afoul of both of the prohibitions contained in the Rule -– some of the averments are essentially the same as those contained in Schwab's two prior motions, while others are based on facts that could have been, but were not, raised in the prior proceedings.

At all times since Schwab's execution was scheduled, his execution was to be carried out using the lethal injection procedures put into place by the Florida Department of Corrections on August 1, 2007. **Those procedures have not changed**

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[6] As discussed in the Statement of the Facts, *supra*, the trial court imposed a procedural bar to Schwab's claims, noting that the only possible exception to the bar concerned the *Baze* decision and any information based on records of execution team training conducted since August of 2007. *Order*, at 2, 5-10 (discussing "errors").

since their adoption and are the procedures that were upheld by this Court in *Lightbourne* as well as in Schwab's own case on two separate occasions. Neither the procedures to be used, nor the fact that they have not changed since their adoption on August 1, 2007, is in any way disputed by Schwab. Because that is so, Schwab's third successive motion was nothing more than his attempt to litigate the same issue that has already been decided adversely to him on two prior occasions. That is an abuse of process. No new or different grounds for relief are alleged, and Schwab's successive motion was properly denied as procedurally barred. **Simply put, the claims contained in Schwab's most recent motion have already been decided adversely to him by the Circuit Court and this Court in his two previous challenges to lethal injection.** He does not get yet another bite at the apple.

To the extent that Schwab attempts to rely on the report of Arvizu, that is the "quality assurance expert" that the Circuit Court and this Court rejected in Schwab's previous successive motion, as the Circuit Court found. *Order*, at 5, 13. Nothing has changed about that person's proposed testimony, knowledge or qualifications. And, most importantly, as this Court noted previously, "Schwab fails to sufficiently explain how this auditor is qualified to provide a reliability and efficacy report on DOC's method of execution." *Schwab v. State*, 969 So. 2d 318, 324 (Fla. 2007). Schwab has not remedied that pleading

defect, and he is not entitled to litigate the same claim for a second time, especially when this case is arriving at this Court on the eve of the scheduled execution.[7]

To the extent that Schwab discusses Florida, Ohio and Georgia executions and physician assisted suicide in the Netherlands, **all of that information was readily available at the time of Schwab's prior filings in this case.** This "evidence" was available long ago, and is not "newly discovered." It is also not a basis for relief because it amounts to no more than anecdotal assertions which do nothing to suggest any constitutional issue in carrying out Schwab's execution. The inclusion in the motion of those anecdotal statements is an abuse of process because they could and should have been raised in Schwab's prior post-conviction motions.

Moreover, a statistical analysis cannot predict whether there will be an error in a particular case, nor can it show a

[7] Schwab's execution was scheduled on May 19, 2008. Nothing was filed in the Circuit Court until June 20, 2008, eleven calendar days before Schwab's execution is set to occur. Schwab has apparently devoted substantial energy to litigating his 42 U.S.C. § 1983 action, even though § 27.702 of the *Florida Statutes*, and the decisions of the this Court, *see, e.g., State ex rel. Butterworth v. Kenny*, 714 So. 2d 404 (Fla. 1998), explicitly prohibit Schwab's CCRC attorneys from representing Schwab in that case. The eleventh-hour posture of Schwab's case is of his own making, and is an abuse of process that is an insufficient basis for any relief.

"demonstrated risk of severe pain" as *Baze* requires. *Baze v. Rees*, 128 S. Ct. 1520, 1537 (2008); *see, McCleskey v. Kemp*, 481 U.S. 279, 293 (1987) ("Whether in a given case that is the answer [the presence of racial factors], **it cannot be determined from statistics**. [citation omitted]"). The "statistical analysis" demonstrates nothing. *See, United States v. Mitchell*, 502 F.3d 931, 982 (9th Cir. 2007) ("His related claim regarding disproportionate impact relies solely on statistical data and is, without more, likewise insufficient."), *cert. denied*, *Mitchell v. United States*, 2008 U.S. LEXIS 4848 (U.S., June 9, 2008).

To the extent that Schwab asserts that Arvizu identifies "examples" of Florida's procedures failing to meet the legal standard established in *Baze*, there is no showing that she is qualified to offer that legal opinion, if such an opinion is ever proper in the first place. In any event, Arvizu's opinions are no more than a re-packaging of her prior opinions, which were rejected. *See, Motion,* at 19, 20 (referring to Arvizu reports that pre-date Schwab's first challenge to lethal injection). They offer nothing that has not already been adversely decided. To the extent that Arvizu purports to compare the Florida and Kentucky procedures, the *Baze* decision is the law of the land, and, under that decision, there is no infirmity with Florida's procedures. *Baze*, 128 S.Ct. at 1533. (describing

the Kentucky procedure). The trial court quite properly declined to credit anything offered by this "witness." *Order*, at 4-5, 13.

The "Alternatives"

To the extent that Schwab attempts to offer "alternatives for Florida," Schwab's complaints about training are the same claims that either were, or could have been, raised in his previous successive motions. It is an abuse of process to raise those repetitive issues in this motion. The trial court correctly rejected this claim on a separation of powers basis, pointing out that this Court and the United States Supreme Court have expressly rejected the notion that it is the responsibility of the judiciary to manage, administer and oversee all aspects of the executive branch's duties relating to capital punishment. *Order*, at 16. *Lightbourne v. McCollum, supra; Sims v. State*, 754 So. 2d 657, 670 (Fla. 2000).[8]

Alternatively, to the extent that Schwab criticizes the execution team's training, that has been Schwab's claim since the first successive motion was filed, and has been the issue on which an evidentiary hearing has consistently been denied. The

[8] Schwab could and should have raised this claim before, and is not allowed to litigate it on a piecemeal basis. The fact that Schwab waited until his third successive motion (which was filed 11 days prior to his scheduled execution) to propose "alternatives" to Florida's procedure (which has been known for years) is an abuse of process as well as a procedural bar.

state of the law is, as the trial court found, that the mere possibility of a "malfunction" of some sort does not state a constitutional claim, whether framed under *Baze* or under the precedent of this Court. *Order*, at 17. Schwab's second "alternative" calls for a **reduction** in the amount of sodium thiopental. The premise of this "alternative" is the effective delivery of the sodium thiopental. Subsumed within that premise is the recognition that the drug will render the inmate unconscious. If unconscious, as Schwab assumes he will be, there can be no risk of pain, let alone a "substantial risk" as required by *Baze*. This suggestion is not based on anything that was not known at the time his two previous lethal injection challenges were filed, and could have been raised in either of those proceedings. Further, the irony of this position is that it accepts the use of pancuronium bromide, the very drug that Schwab argued should be removed from the procedure in his prior proceedings. *Schwab v. State*, 969 So. 2d 318, 322 n. 1 (Fla. 2007) (framing issues as, *inter alia* "rejecting his argument that the use of a paralytic violates the Eighth Amendment"). The inconsistent positions taken by Schwab regarding the three-drug protocol underscores the *Baze* Court's warning that "for many people who oppose it, no method of execution would ever be acceptable." *Baze*, 128 S.Ct. at 1537. In any event, *Baze* says nothing about "counting the minutes" -– again, the irony of

Schwab's position is that after failing on the single-drug protocol that he (and Baze) advocated, he now wants to **lower** the dose of anesthetic claiming that that will speed up the execution process even though the protocol he wanted in November would significantly **lengthen** the duration of the execution. *See, Baze, supra,* at 1541 (Alito, J., concurring). Neither "alternative" is legitimate, and neither addresses a substantial risk of serious harm. *Baze, supra*, at 1532. Simply put, reducing the dose of sodium thiopental does not reduce a substantial risk of severe pain.[9] Because it is undisputed that the dose of thiopental used in Florida will absolutely anesthetize and render the inmate insensate, there can be no "pain" at all, let alone a "risk of severe pain." Schwab's argument ignores that reality, and posits no relevant "alternative."

Schwab's Claim has no Basis, Anyway.

[9] Under *Baze*, a three-gram dose of thiopental sodium is a proper and sufficient part of the drug protocol as a matter of law. The fact that Florida has opted to use a greater dose, when the only effect can be deeper unconsciousness, *Lightbourne, supra*, does not remove the Florida procedure from the reach of the controlling *Baze* decision. Instead, the greater quantity of the drugs, coupled with the consciousness assessments that Kentucky does not use, demonstrates that the Florida procedure is designed to carry out a humane and dignified execution. Schwab's last-minute claims to the contrary (which could have been raised long ago) do not establish a basis for relief, and do not justify any further proceedings.

Despite the pretensions of the claim contained in Schwab's motion, the true facts are that this Court has already rejected his claim. Because that is so, Schwab's successive motion has no legal or factual basis.

In affirming the denial of relief as to a number of Schwab's "general" lethal injection claims,[10] this Court found the following footnote sufficient for its purposes:

> Schwab raises numerous other Eighth Amendment challenges that were also presented in *Lightbourne*. This Court addresses those arguments in depth in that opinion. Accordingly, we do not repeat those same rulings here but rely on our concurrent holding in *Lightbourne v. McCollum,* No. SC06-2391, 969 So. 2d 326, 2007 Fla. LEXIS 2255 (Fla. Nov. 1, 2007), to dispose of Schwab's challenges as to whether the postconviction court erred when it rejected a foreseeable risk standard, deferred unduly to DOC, and rejected his argument that a consciousness assessment must meet a clinical standard using medical expertise and equipment.

Schwab v. State, 969 So. 2d 318, 324 (Fla. 2007).

With respect to Schwab's claim relating to the use of the paralytic drug pancuronium bromide, this Court rejected that claim, stating:

> In turning to the evidence presented in *Lightbourne* regarding this claim, we find that the toxicology and anesthesiology experts who testified in *Lightbourne* agreed that if the sodium pentothal is successfully administered as specified in the protocol, the inmate will not be aware of any of the effects of the pancuronium bromide and thus will not suffer any pain.

[10] Schwab's other lethal injection claims are no longer at issue.

> Moreover, the protocol has been amended since Diaz's execution so that the warden will ensure that the inmate is unconscious before the pancuronium bromide and the potassium chloride are injected. Schwab does not allege that he has additional experts who would give different views as to the three-drug protocol. Given the record in *Lightbourne* and our extensive analysis in our opinion in *Lightbourne v. McCollum*, we reject the conclusion that lethal injection as applied in Florida is unconstitutional.

Schwab v. State, 969 So. 2d at 325. Schwab has now, at least tacitly, accepted the use of the paralytic.

In his second successive motion, Schwab's claim changed slightly, and was likewise rejected:

> Next, Schwab asserts that newly discovered evidence shows that the DOC execution team is not being trained properly in preparing and administering the correct chemical amounts as required and that FDLE agents are not sufficiently trained to identify potential problems. In support, Schwab attached the FDLE notes allegedly showing that: (1) the DOC execution team botched two of the five training practice sessions; and (2) the FDLE monitor observing the mixing of the chemicals is not sufficiently trained. Even taking Schwab's allegations as true, Schwab has not met the standard that this Court set forth in *Jones v. State*, 701 So. 2d 76, 79 (Fla. 1997):
>
> > In order for a punishment to constitute cruel or unusual punishment, it must involve "torture or a lingering death" or the infliction of "unnecessary and wanton pain." *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L.Ed.2d 859 (1976); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 67 S. Ct. 374, 91 L. Ed. 422 (1947). As the Court observed in *Resweber*: "The cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to

> extinguish life humanely." *Id*. at 464, 67 S. Ct. at 376.
>
> *See also Lightbourne v. McCollum*, 969 So. 2d 326, 32 Fla. L. Weekly S687 (Fla. Nov. 1, 2007) (reaffirming the standard announced in *Jones,* 701 So. 2d at 79). As to Schwab's claim concerning the FDLE monitor for the chemicals, the circuit court correctly recognized that the "newly discovered" FDLE notes involve mock executions that occurred under the prior protocols. Under the new protocol, a licensed pharmacist must mix the necessary chemicals. We do not find that Schwab's allegations as to these training exercises implicate any constitutional violation. Summary denial was proper.

Schwab v. State, 2008 Fla. LEXIS 55, 5-6 (Fla., Jan. 24, 2008).

In *Lightbourne*, this Court upheld Florida's lethal injection procedures, saying:

> Determining the specific methodology and the chemicals to be used are matters left to the DOC and the executive branch, and this Court cannot interfere with the DOC's decisions in these matters unless the petitioner shows that there are inherent deficiencies that rise to an Eighth Amendment violation. Lightbourne has failed to overcome the presumption of deference we give to the executive branch in fulfilling its obligations, and he has failed to show that there is any cruelty inherent in the method of execution provided for under the current procedures.
>
> Alternatively, even if the Court did review this claim under a "foreseeable risk" standard as Lightbourne proposes or "an unnecessary" risk as the *Baze* petitioners propose,[11] we likewise would find that Lightbourne has failed to carry his burden of showing an Eighth Amendment violation. As stressed repeatedly

[11] *Baze* ultimately adopted neither standard, utilizing instead an "objectively intolerable risk of harm" standard. *Baze v. Rees*, 128 S. Ct. 1520, 1531 (2008). The standards utilized by this Court are far more favorable to the Defendant than the ultimate *Baze* result.

> above, it is undisputed that there is **no risk of pain if the inmate is unconscious before the second and third drugs are administered**.[12] After Diaz's execution, the DOC added additional safeguards into the protocol to ensure the inmate will be unconscious before the execution proceeds. In light of these additional safeguards and the amount of the sodium pentothal used, which is a lethal dose in itself, [FN25] we conclude that Lightbourne has not shown a substantial, foreseeable or unnecessary risk of pain in the DOC's procedures for carrying out the death penalty through lethal injection that would violate the Eighth Amendment protections.
>
> > [FN25] As defense counsel conceded during oral argument, there was no evidence presented that once the five-gram dose of sodium pentothal has been properly administered and an inmate is rendered unconscious, there is any likelihood that he will become conscious during the execution, even if the procedure lasts for thirty minutes or more. The evidence clearly established that this dose is lethal and once unconsciousness is reached, the inmate will slip only deeper into unconsciousness until death results. This conclusion is borne out by the medical testimony.
>
> After reviewing the evidence and testimony presented below and the lethal injection procedures themselves, we affirm the circuit court's order denying relief for the reasons set forth above and deny Lightbourne's all writs petition. Lightbourne has failed to show that Florida's current lethal injection procedures, as actually administered through the DOC, are constitutionally defective in violation of the Eighth Amendment of the United States Constitution.

Lightbourne v. McCollum, 969 So. 2d 326, 353 (Fla. 2007), *cert denied*, 2008 U.S. LEXIS 4194 (U.S. May 19, 2008). The facts

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[12] The *Baze* petitioner conceded this fact, too. *Baze*, 128 S.Ct. at 1571.

underlying Schwab's claim has not changed, and *Lightbourne, Schwab*, and *Baze* control this claim.

Baze Forecloses this Claim.

In holding that the lethal injection procedures utilized in Kentucky did not violate the Eighth Amendment, the United States Supreme Court held:

> A stay of execution may not be granted on grounds such as those asserted here unless the condemned prisoner establishes that the State's lethal injection protocol creates a demonstrated risk of severe pain. He must show that the risk is substantial when compared to the known and available alternatives. **A State with a lethal injection protocol substantially similar to the protocol we uphold today would not create a risk that meets this standard.**

Baze v. Rees, 128 S. Ct. 1520, 1537 (2008). (emphasis added). The Court described the Kentucky protocol in the following way:

> Kentucky's protocol called for the injection of 2 grams of sodium thiopental, 50 milligrams of pancuronium bromide, and 240 milliequivalents of potassium chloride. In 2004, as a result of this litigation, the department chose to increase the amount of sodium thiopental from 2 grams to 3 grams.

Baze v. Rees, 128 S. Ct. at 1528. There is no dispute that Florida's procedure uses the same drugs in greater amounts. *See, Lightbourne, supra; Order*, at 13-15. **At least 30 of the 36 States that use lethal injection use this same combination of three drugs.** *Baze v. Rees*, 128 S. Ct. at 1527. Against these facts, there is no dispute that Florida's procedure is at least "substantially similar" to the Kentucky procedure (though the

Florida procedure does include additional safeguards that Kentucky does not use). Coupled with the *Baze* dissent's approval of Florida's procedures, Schwab's claims collapse.

Justice Ginsberg had the following to say about Florida's August 1, 2007, procedures:

> Recognizing the importance of a window between the first and second drugs, other States have adopted safeguards not contained in Kentucky's protocol. *See* Brief for Criminal Justice Legal Foundation as Amicus Curiae 19-23. [footnote omitted] Florida pauses between injection of the first and second drugs so the warden can "determine, after consultation, that the inmate is indeed unconscious." *Lightbourne v. McCollum*, 969 So. 2d 326, 346 (Fla. 2007) (*per curiam*) (internal quotation marks omitted). The warden does so by touching the inmate's eyelashes, calling his name, and shaking him. *Id.,* at 347. [FN6] If the inmate's consciousness remains in doubt in Florida, "the medical team members will come out from the chemical room and consult in the assessment of the inmate." *Ibid*. During the entire execution, the person who inserted the IV line monitors the IV access point and the inmate's face on closed circuit television. *Ibid*.
>
> > [FN6] Florida's expert in *Lightbourne v. McCollum*, 969 So. 2d 326 (Fla. 2007) (*per curiam*), who also served as Kentucky's expert in this case, testified that the eyelash test is "probably the most common first assessment that we use in the operating room to determine . . . when a patient might have crossed the line from being conscious to unconscious." 4 Tr. in *Florida v. Lightbourne,* No. 81-170-CF (Fla. Cir. Ct., Marion Cty.), p. 511, online at http://www.cjlf.org/files/LightbourneRecord.pdf (all Internet materials as visited Apr. 14, 2008, and in Clerk of Court's case file). "A conscious person, if you touch their eyelashes very lightly, will blink; an unconscious person typically will not." *Ibid*. The shaking and name-calling tests, he

> further testified, are similar to those taught in basic life support courses. *See id*., at 512.

Baze v. Rees, 128 S. Ct. at 1571 (Ginsberg, J., dissenting).

To the extent that Schwab argues that *Baze* in some fashion is a change in the law, the true facts are that the *Baze* Court rejected the "unnecessary risk" standard pressed by the petitioner, holding instead that:

> **What each of the forbidden punishments had in common was the deliberate infliction of pain for the sake of pain -- "superadd[ing]" pain to the death sentence through torture and the like.**
>
> We carried these principles further in *In re Kemmler*, 136 U.S. 436, 10 S. Ct. 930, 34 L. Ed. 519 (1890). There we rejected an opportunity to incorporate the Eighth Amendment against the States in a challenge to the first execution by electrocution, to be carried out by the State of New York. *Id.,* at 449, 10 S. Ct. 930, 34 L. Ed. 519. In passing over that question, however, we observed that "[p]unishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarous, something more than the mere extinguishment of life." *Id*., at 447, 10 S. Ct. 930, 34 L. Ed. 519. We noted that the New York statute adopting electrocution as a method of execution "was passed in the effort to devise a more humane method of reaching the result." *Ibid.*
>
> Petitioners do not claim that lethal injection or the proper administration of the particular protocol adopted by Kentucky by themselves constitute the cruel or wanton infliction of pain. **Quite the contrary, they concede that "if performed properly," an execution carried out under Kentucky's procedures would be "humane and constitutional."** Brief for Petitioners 31. That is because, as counsel for petitioners admitted at oral argument, **proper administration of the first**

drug, sodium thiopental, eliminates any meaningful risk that a prisoner would experience pain from the subsequent injections of pancuronium and potassium chloride. *See* Tr. of Oral Arg. 5; App. 493-494 (testimony of petitioners' expert that, if sodium thiopental is "properly administered" under the protocol, "[i]n virtually every case, then that would be a humane death").

Instead, **petitioners claim that there is a significant risk that the procedures will not be properly followed -- in particular, that the sodium thiopental will not be properly administered to achieve its intended effect -- resulting in severe pain when the other chemicals are administered.** Our cases recognize that subjecting individuals to a risk of future harm -- not simply actually inflicting pain -- can qualify as cruel and unusual punishment. To establish that such exposure violates the Eighth Amendment, however, the conditions presenting the risk must be "sure or very likely to cause serious illness and needless suffering," and give rise to "sufficiently imminent dangers." *Helling v. McKinney*, 509 U.S. 25, 33, 34-35, 113 S. Ct. 2475, 125 L. Ed. 2d 22 (1993) (emphasis added). **We have explained that to prevail on such a claim there must be a "substantial risk of serious harm," an "objectively intolerable risk of harm" that prevents prison officials from pleading that** they were "subjectively blameless for purposes of the Eighth Amendment." *Farmer v. Brennan*, 511 U.S. 825, 842, 846, and n. 9, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994).

Simply because an execution method may result in pain, either by accident or as an inescapable consequence of death, does not establish the sort of "objectively intolerable risk of harm" that qualifies as cruel and unusual. In *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 67 S. Ct. 374, 91 L. Ed. 422 (1947), a plurality of the Court upheld a second attempt at executing a prisoner by electrocution after a mechanical malfunction had interfered with the first attempt. The principal opinion noted that **"[a]ccidents happen for which no man is to blame,"** *id.*, at 462, 67 S. Ct. 374, 91 L. Ed. 422, **and concluded that such "an accident, with no suggestion of malevolence,"** *id.,* at 463, 67 S. Ct. 374, 91 L. Ed. 422, **did not give rise**

> **to an Eighth Amendment violation**, *id.*, at 463-464, 67 S. Ct. 374, 91 L. Ed. 422.
>
> As Justice Frankfurter noted in a separate opinion based on the Due Process Clause, however, "a hypothetical situation" involving "a series of abortive attempts at electrocution" would present a different case. *Id.*, at 471, 67 S. Ct. 374, 91 L. Ed. 422 (concurring opinion). In terms of our present Eighth Amendment analysis, such a situation -- unlike an "innocent misadventure," *id.*, at 470, 67 S. Ct. 374, 91 L. Ed. 422 -- would demonstrate an "objectively intolerable risk of harm" that officials may not ignore. *See Farmer*, 511 U.S., at 846, and n. 9, 114 S. Ct. 1970, 128 L. Ed. 2d 811. **In other words, an isolated mishap alone does not give rise to an Eighth Amendment violation, precisely because such an event, while regrettable, does not suggest cruelty, or that the procedure at issue gives rise to a "substantial risk of serious harm."** *Id.,* at 842, 114 S. Ct. 1970, 128 L. Ed. 2d 811.

Baze v. Rees, 128 S. Ct. at 1530-1531. (emphasis added). In the context of Florida's procedures, the standard applied by this Court in *Lightbourne* and *Schwab* is a **lower** (more defense-friendly) standard than the one adopted by the United States Supreme Court, a significant factor that the trial court recognized. *Order*, at 3. If Schwab cannot meet the standard established used by this Court in his own case, then he cannot meet the higher standard established by the United States Supreme Court in *Baze*. Coupled with the denial of certiorari review in both *Schwab* and *Lightbourne*, there is no rational basis for arguing that Florida's procedures do not satisfy the Eighth Amendment in all respects.

Moreover, given that Florida's procedures are substantially similar (with various enhancements) to the procedures approved in *Baze*, there is no legitimate basis for arguing that Florida's procedure is not constitutional. Order, at 13-15. In rejecting this claim, the *Baze* Court said:

> Much of petitioners' case rests on the contention that they have identified a significant risk of harm that can be eliminated by adopting alternative procedures, such as a one-drug protocol that dispenses with the use of pancuronium and potassium chloride, and additional monitoring by trained personnel to ensure that the first dose of sodium thiopental has been adequately delivered. Given what our cases have said about the nature of the risk of harm that is actionable under the Eighth Amendment, a condemned prisoner **cannot successfully challenge a State's method of execution merely by showing a slightly or marginally safer alternative**.
>
> Permitting an Eighth Amendment violation to be established on such a showing would threaten to transform courts into boards of inquiry charged with determining "best practices" for executions, with each ruling supplanted by another round of litigation touting a new and improved methodology. Such an approach finds no support in our cases, would embroil the courts in ongoing scientific controversies beyond their expertise, and would substantially intrude on the role of state legislatures in implementing their execution procedures -- a role that by all accounts the States have fulfilled with an earnest desire to provide for a progressively more humane manner of death. *See Bell v. Wolfish*, 441 U.S. 520, 562, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979) ("The wide range of 'judgment calls' that meet constitutional and statutory requirements are confided to officials outside of the Judicial Branch of Government"). Accordingly, we reject petitioners' proposed "unnecessary risk" standard, as well as the dissent's "untoward" risk variation. *See post*, at 2, 11 (opinion of GINSBURG, J.). [FN2]

[FN2] The difficulties inherent in such approaches are exemplified by the controversy surrounding the study of lethal injection published in the April 2005 edition of the British medical journal the *Lancet*. After examining thiopental concentrations in toxicology reports based on blood samples drawn from 49 executed inmates, the study concluded that "most of the executed inmates had concentrations that would not be expected to produce a surgical plane of anaesthesia, and 21 (43%) had concentrations consistent with consciousness." Koniaris, Zimmers, Lubarsky, & Sheldon, *Inadequate Anaesthesia in Lethal Injection for Execution*, 365 Lancet 1412, 1412-1413. The study was widely cited around the country in motions to stay executions and briefs on the merits. *See, e.g.*, Denno, *The Lethal Injection Quandary: How Medicine Has Dismantled the Death Penalty*, 76 Fordham L. Rev. 49, 105, n. 366 (2007) (collecting cases in which claimants cited the *Lancet* study). But shortly after the *Lancet* study appeared, peer responses by seven medical researchers criticized the methodology supporting the original conclusions. See Groner, *Inadequate Anaesthesia in Lethal Injection for Execution*, 366 Lancet 1073-1074 (Sept. 2005). These researchers noted that because the blood samples were taken "several hours to days after" the inmates' deaths, the postmortem concentrations of thiopental -- a fat-soluble compound that passively diffuses from blood into tissue -- could not be relied on as accurate indicators for concentrations during life. *Id.,* at 1073. The authors of the original study responded to defend their methodology. *Id.,* at 1074-1076. *See also post*, at 2-4 (BREYER, J., concurring in judgment).

We do not purport to take sides in this dispute. We cite it only to confirm that a "best practices" approach, calling for the weighing of relative risks without some measure of deference to a State's choice of

> execution procedures, would involve the courts in debatable matters far exceeding their expertise.

Instead, the proffered alternatives must effectively address a "substantial risk of serious harm." *Farmer, supra*, at 842, 114 S. Ct. 1970, 128 L. Ed. 2d 811. To qualify, the alternative procedure must be feasible, readily implemented, **and in fact significantly reduce a substantial risk of severe pain**. If a State refuses to adopt such an alternative in the face of these documented advantages, without a legitimate penological justification for adhering to its current method of execution, then a State's refusal to change its method can be viewed as "cruel and unusual" under the Eighth Amendment. [FN3]

> [FN3] JUSTICE THOMAS agrees that courts have neither the authority nor the expertise to function as boards of inquiry determining best practices for executions, *see post,* at 9 (opinion concurring in judgment) (quoting this opinion); *post,* at 13, but contends that the standard we adopt inevitably poses such concerns. In our view, those concerns are effectively addressed by the threshold requirement reflected in our cases of a "'substantial risk of serious harm'" or an "'objectively intolerable risk of harm,'" *see supra*, at 11, and by the substantive requirements in the articulated standard.

In applying these standards to the facts of this case, we note at the outset that **it is difficult to regard a practice as "objectively intolerable" when it is in fact widely tolerated. Thirty-six States that sanction capital punishment have adopted lethal injection as the preferred method of execution. The Federal Government uses lethal injection as well.** *See supra*, at 3-4, and n. 1. **This broad consensus goes not just to the method of execution, but also to the specific three-drug combination used by Kentucky. Thirty States, as well as the Federal Government, use a series of sodium thiopental, pancuronium bromide, and potassium chloride, in varying amounts.** *See supra*, at 4. **No State uses or has ever used the alternative one-drug protocol belatedly urged by petitioners**. This

> consensus is probative but not conclusive with respect to that aspect of the alternatives proposed by petitioners.
>
> In order to meet their "heavy burden" of showing that Kentucky's procedure is "cruelly inhumane," *Gregg*, 428 U.S., at 175, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (joint opinion of Stewart, Powell, and STEVENS, JJ.), petitioners point to numerous aspects of the protocol that they contend create opportunities for error. **Their claim hinges on the improper administration of the first drug, sodium thiopental. It is uncontested that, failing a proper dose of sodium thiopental that would render the prisoner unconscious, there is a substantial, constitutionally unacceptable risk of suffocation from the administration of pancuronium bromide and pain from the injection of potassium chloride.** See Tr. of Oral Arg. 27. **We agree with the state trial court and State Supreme Court, however, that petitioners have not shown that the risk of an inadequate dose of the first drug is substantial. And we reject the argument that the Eighth Amendment requires Kentucky to adopt the untested alternative procedures petitioners have identified.**

Baze v. Rees, 128 S. Ct. at 1531-1533. (emphasis added). In the face of that explicit holding, Schwab cannot make out a claim for relief. To succeed, Schwab must show a substantial risk that first drug will be given in an inadequate dose - - he cannot make that showing (and the suggestion to **reduce** the dose is counter-intuitive under these facts), and it has already been rejected based upon the same allegations in the third successive motion.

As this Court held in *Lightbourne,* there are a number of safeguards built into Florida’s procedures to avoid the possibility of injecting potentially painful drugs into a

conscious inmate -– those safeguards are not a part of the Kentucky procedures, and the United States Supreme Court held that they were not constitutionally required:

> Kentucky has adopted a method of execution believed to be the most humane available, one it shares with 35 other States. Petitioners agree that, if administered as intended, that procedure will result in a painless death. **The risks of maladministration they have suggested -- such as improper mixing of chemicals and improper setting of IVs by trained and experienced personnel -- cannot remotely be characterized as "objectively intolerable."** Kentucky's decision to adhere to its protocol despite these asserted risks, while adopting safeguards to protect against them, cannot be viewed as probative of the wanton infliction of pain under the Eighth Amendment. Finally, the alternative [single-drug procedure] that petitioners belatedly propose[13] has problems of its own, and has never been tried by a single State.

Baze v. Rees, 128 S. Ct. at 1537-1538. Florida's procedures are "substantially similar," and the result in *Baze* controls. This successive motion presents nothing that was not rejected by the United States Supreme Court.[14] All relief should be denied.

Summary Denial was Proper.

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[13] *Baze* was pending at all times pertinent to this proceeding. The fact that Schwab waited until his third successive motion (which was filed 11 days prior to his scheduled execution) to propose "alternatives" to Florida's procedure (which has been known for years) is an abuse of process as well as a procedural bar to litigation of that component of Schwab's motion.

[14] In fact, since *Baze* was decided, the United States Supreme Court has denied stays of execution in at least 8 cases. Each of those executions was carried out by lethal injection.

Finally, this Court has upheld the summary denial of lethal injection claims in successive post-conviction relief motions on the authority of *Baze* and *Lightbourne. See, Griffin v. State*, SC06-1055 (Fla. June 2, 2008), (unpub. op.). (Exhibit 2). There is no reason that this case should be regarded differently –- summary denial was proper. Avoidance of the possibility of **any** pain is neither possible nor required under the Constitution. Because that is so, Schwab was not entitled to an evidentiary hearing, in addition to the procedural bars to such a hearing that are set out herein. *Baze* 128 S.Ct. at 1529. Likewise, Schwab's attempt to offer yet another approach or refinement to the lethal injection procedure is not a basis for a stay or for any other relief, especially when those "alternatives" do not address any constitutionally significant component of the execution procedures. *Baze*, 128 S.Ct. at 1532.

CONCLUSION

The lower court's denial of all relief should be affirmed.

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 **E-Mail** and **U.S. Mail** to: **Mark Gruber**, **Peter Cannon**, 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, on this _____ day of June, 2008.

_____
Of Counsel

CERTIFICATE OF COMPLIANCE

This brief is typed in Courier New 12 point.

_____
Of Counsel