IN THE SUPREME COURT OF FLORIDA

CASE NO. 80289

MARK DEAN SCHWAB,

Appellant,

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

STATE OF FLORIDA

Appellee.

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

INITIAL BRIEF OF APPELLANT

MARK S. GRUBER
Fla. Bar No. 0330541
PETER J. CANNON
Fla. Bar No. 0109710
DAPHNEY GAYLORD
Fla.Bar No. 0136298
Capital Collateral Regional
Counsel-Middle Region
3801 Corporex Park Drive
Suite 210
Tampa, FL 33619-1136
(813) 740-3544
COUNSEL FOR APPELLANT

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases Cited **Page No.**

Other Authorities Cited

STATEMENT OF THE CASE

Case History

The defendant was convicted of first degree murder and capital sexual battery after a nonjury trial and sentenced to death on July 1, 1992. The judgment and sentence were affirmed on direct appeal to the Florida Supreme Court. *Schwab v. State*, 636 So.2d 3 (Fla. 1994) *cert. den*. 513 U.S. 950, 115 S.Ct. 364 (1994). Thereafter, Schwab filed an original motion for postconviction relief, the denial of which was affirmed in *Schwab v. State*, 814 So.2d 402 (Fla. 2002). The denial of Schwab's federal petition for a writ of habeas corpus was affirmed in *Schwab v. Crosby*, 451 F.3d 1308 (2006) *cert. den*. 127 S.Ct. 1126.

On direct appeal Schwab argued that the trial court erred in denying his motion to recuse the Brevard County State Attorney's Office, denying his motion to suppress certain statements, denying his defense counsel's motion to withdraw due to a conflict of interest, denying his motion for a judgment of acquittal, and admitting similar fact evidence. Schwab also argued that the death sentence was disproportionate in his case and that the heinous, atrocious , or cruel aggravator was unconstitutional. The claims raised in his postconviction appeal were described by this Court this way:

> Schwab's eleven claims are: (1) the trial

> judge should have recused himself due to his apparent bias; (2) the trial judge was actually biased; (3) Schwab did not knowingly, intelligently, and voluntarily waive his right to a jury; (4) trial counsel was ineffective during the guilt phase; (5) trial counsel was ineffective during the penalty phase; (6) the trial judge relied on facts outside the record, namely, Judge Richardson's experience on the criminal bench, in finding that as a child Schwab was not raped by his neighbor; (7) Schwab's death sentence is disproportionate; (8) the prior violent felony aggravator should be struck, as the predicate sexual battery conviction was obtained through an involuntary guilty plea; (9) the intent to torture element of the HAC aggravator was not proven beyond a reasonable doubt; (10) the murder during the course of an enumerated felony aggravator is an unconstitutional automatic aggravating circumstance; (11) section 921.141, Florida Statutes (1989), is unconstitutionally vague and overbroad.

Schwab v. State, 814 So.2d 402, 406 n.3. His state habeas petition contained three claims: 1. Appellate counsel was ineffective for not raising bias of the trial judge as fundamental error, 2. Ineffective assistance of appellate counsel for failing to ensure a complete record, 3. Possible incompetence to be executed.

On appeal of the federal district court's denial of his petition for a writ of habeas corpus, the Eleventh Circuit U.S. Court of Appeals considered and ultimately denied relief on five claims: 1. Conflict of interest with trial counsel, 2. Insufficient evidence of corpus delecti independent of inculpatory statements, 3. Waiver of trial by a jury was

not knowingly and intelligently made, 4. Ineffective assistance in the penalty phase of the trial, and 5. Constitutional error in the trial court's findings with regard to mitigating circumstances. All of these earlier claims for relief have been denied.

Recent Events Concerning Lethal Injection

On December 13, 2006, Angel Diaz was executed by lethal injection. Numerous reports by the press and other witnesses indicated that the execution was botched. The execution took almost three times as long as normal. Diaz grimaced, arched his body, appeared to be mouthing words, and otherwise evidenced that he was in pain, despite the injection of a paralytic. The medical examiner who conducted an autopsy reported that "the fluids to be injected were not going into a vein, but were going into small tissues in the arm". Later investigation showed that in both the primary venous access site in Diaz' left arm and a backup site in the other arm the needle and catheter had been pushed through the target vein into the tissue beyond. When the executioners encountered substantial resistance during the injection process, they improperly continued to inject the drugs into Diaz, switching back and forth between the two failed IV lines.

As a result of the medical examiner's findings, the Governor suspended all executions in Florida and appointed a

Commission to review the execution and make recommendations. The Commission Report concluded that the execution team failed to properly obtain and maintain venous access, failed to administer the chemicals properly, and failed to follow the execution protocols. The protocols as written were found to be insufficient to deal with complications that are known to have arisen in lethal injection executions around the country, and in any event the execution team had not been adequately trained as to the protocols then in effect. PC-W Vol VI 1005.[1] The Commission made detailed recommendations which included changes to the actual execution procedures and the physical structure where the execution was to take place, rewriting the protocols, thorough documentation of the actual execution, and proof of adequate training. *Id.*

On December 14, 2006, the day after the botched Diaz execution, the Capital Collateral Regional Counsel, Southern Region, filed an All Writs Petition on behalf of all of its clients, alleging that Florida's lethal injection procedure was unconstitutional in itself and as applied, as evidenced by the Diaz execution. This Court relinquished jurisdiction to the Fifth Judicial Circuit Court in Marion County which had trial jurisdiction over one of the petitioners' cases,

[1]Postconviction warrant record on appeal.

that of Ian Deco Lightbourne, to resolve the petitioners' request for an independent autopsy and "all other issues" raised in the petition. *Lightbourne v. McCollum*, SC06-2391. (Order dated December 14, 2006). The Court later dismissed all of other petitioners' claims with the proviso that "[t]he dismissal is without prejudice to the petitioners filing any claim which they may have in the appropriate court for that individual petitioner." *Lightbourne v. McCollum*, SC06-2391 (Order dated February 9, 2007).

The hearing in *Lightbourne* has been conducted over a number of months and has entailed an extensive examination of the Diaz execution and current and intended practices of the DOC in future executions. *State v. Lightbourne*, Marion County Circuit Court Case No. 1981-170-CF-A-01. On July 18, 2007, the Governor signed a warrant for the execution of Mark Schwab. The warrant and attachments scheduled the execution for the week of November 12. The same morning, this Court issued an order establishing a trial court litigation deadline and appellate briefing schedule in *Lightbourne*, with oral argument scheduled for October 11. The next day, the Court issued a similar schedule in this case, with oral argument set at the same time as in *Lightbourne*.[2]

In the meantime, on July 27, after the warrant was signed

[2]Appellant requests oral argument.

and after litigation schedules were established in the two cases, the presiding judge in *Lightbourne*, Judge Angel, granted relief in the form of a temporary injunction against the state carrying out an execution in that case.

The DOC had issued new protocols on May 9, 2007 in response to the Commission Report. The protocols came under heavy scrutiny during the *Lightbourne* hearings, and the State eventually revealed that they were being revised. New protocols have been written for executions occurring after August 1, 2007, and they are the ones now in effect.

Present Proceedings

The death warrant was signed on July 18, 2007, and this Court rendered an order establishing a briefing schedule and certain filing requirements the next day. (Order at SC80289 PC-W Vol. II 260). The lower court conducted a scheduling hearing on July 25 and set deadlines for any motions or evidentiary hearings which might be required. PC-W Vol I 3 et seq. The proceedings in *Lightbourne* were discussed Defense counsel indicated that he would be filing a motion for the court to take judicial notice of those proceedings, and the State agreed that that was something the court could do. PC-W Vol. I 21. The court said that if a motion along those lines were filed that he was “almost positive” that he would grant it. *Id*.

Both parties filed various pleadings and memoranda. Both parties filed copies of an excerpt from the *Lightbourne* hearings dated July 22, 2007 in which Judge Angel temporarily enjoined the State from carrying out an execution in that case. (E.g. PC-W Vol. II 319-51). His written order dated July 31, 2007 is at PC-W Vol. III 540. The DOC protocols for use in executions after August 1, 2007 were filed. PC-W Vol. III 435-50.

A petition and affidavit for attorney's fees had been filed by clemency counsel. PC-W Vol. IV 573-79. This document references a number of times that clemency counsel spoke with CCRC counsel and neuropsychologist Dr Eisenestein from January through April of 2007. The affidavit reflects that Dr. Eisenstein was actively working on the case during that time by speaking with family members, conducting an evaluation, and preparing a report.

Mr. Schwab filed requests for production of public records. (PC-W Vol. III 413-16, public records request directed to DOC; PC-W Vol. III 419 request directed to FDLE). The six paragraph request to FDLE sought production of records concerning the creation, revision or completion of the execution facilities, protocols, procedures, and checklists that would be followed by the Department in carrying out the sentence in the present case or a certification by the Department stating that such documents did not exist. It

additionally sought documentation listing or explaining the training, licensure, certification, medical specialization, highest degree obtained, educational institution attended, of the individuals that will assist or be present when the sentence is to be carried out in the present case. FDLE filed a response dated August 8, 2007 which said:

> 1. To the best of undersigned counsel's knowledge and belief, FDLE does not have any records responsive to paragraphs 1, 2, & 3 of the defendant's request.
>
> 2. FDLE has not currently assigned any individuals to attend the execution of the defendant and as such cannot respond to the request for records set forth in paragraphs 5 and 6 of the defendant's request.

PC-W Vol IV 645.

The request directed to the DOC was very detailed and specific. It sought copies of training manuals or other materials pertaining to the training of execution team members, use of execution chemicals and/or execution facilities; the identity of outside persons or agencies who participated in the training of execution team members, documentation regarding professional licensure, certification or other formal accreditation of execution team members, documentation regarding the procurement, maintenance and preparation of the chemicals used in lethal injection, and similar documentation regarding any of the equipment which would be used during the

process. PC-W Vol. III 413-16 It also requested a certification that such documentation did not exist if that were the case.

DOC filed a response containing objections to Schwab's request for public records on August 8, 2007. PC-W Vol. IV 595. Schwab filed a motion to compel production of public records and for a two day extension of time to file a 3.851 motion directed specifically to DOC because he learned from the Records Repository that certain records would be but had not yet been produced. PC-W Vol. IV 607.[3] The court conducted a hearing on these pleadings on August 10, 2007. PC-W Vol. I 26-95. Counsel for Schwab explained that he was not seeking the identity of persons whose anonymity was protected by statute, and argued that such information could be redacted as necessary. *Id.* 59. Counsel for DOC maintained his objections to any documents that might reveal anything about the identities of those protected under Sec. 945.10, and argued that the protocols provided sufficient information about the training and proficiency of such persons. *Id.* 51. Schwab's counsel agreed that a concern that permeated his requests was the conclusion of the Governor's Commission that the execution team members in the Diaz execution were not properly trained and were not proficient in the their

[3]The court granted the two day extension because some of the records were coming in over the weekend.

duties under the protocols, not merely the adequacy of the protocols themselves. *Id*. 53. There were repeated references to the information that had been brought out in the *Lightbourne* proceedings. *E.g. Id.* 75. The court denied the motion to compel. PC-W Vol. IV 653–57. Schwab filed a motion for reconsideration which is addressed below. Ultimately the court denied the motion for reconsideration as well.

Schwab filed a motion for judicial intervention to authorize contact with a trial witness, PC-W Vol. V 896-98, to which the State responded with a motion to strike and a motion for a protective order. PC-W Vol. IV 670. The issue arose over the efforts of Schwab's counsel to speak with psychologist Dr. Samek, who had been the State's expert mental health witness in the penalty phase of the trial. It turned out that the State had not rehired Dr. Samek, and the court permitted defense counsel to speak with him.

Schwab filed a Motion to Vacate Sentence or Stay Execution pursuant to Fla.R.Crim.P. 3.851(c)(2) on August 15, 2007 which raised the following two claims:

> CLAIM I: Florida's lethal injection method of execution violates the Eighth and Fourteenth Amendments and corresponding provisions of the Florida Constitution.
>
> CLAIM II: Newly discovered evidence reveals that Mr. Schwab suffers from neurological brain impairment which makes his sentence of death constitutionally unreliable.

PC-W Vol. IV 682. Schwab filed a motion for judicial notice of the record in *Lightbourne*. PC-W Vol. IV 674. He also filed a motion for an inspection of the execution facility. PC-W Vol.IV 679. He also filed a motion for reconsideration of denial of the motion to compel production of records, PC-W Vol. VI 1028-34, based on an attached affidavit from a quality assurance auditor after review of the August 1, 2007 protocols. The State filed a Response, PC-W 901-1022, and attached among other things a copy of the Final Report of Governor's Commission on Administration of Lethal Injection. PC-W Vol VI 1005. The court conducted a case management conference on August 17. Transcript at PC-W Vol II 152-259. Both sides stipulated to the introduction of the transcripts from the *Lightbourne* hearing at the beginning of the hearing, although the judge later pointed out that he had not decided whether to accept the stipulation. Later that evening, the court issued an order summarily denying the motion for postconviction relief and directing that the record be transmitted to this Court. PC-W Vol. IX 1239-57. The judge declined to review the *Lightbourne* materials. The court subsequently denied the motions for judicial notice, inspection of the execution facility, and for reconsideration of the order denying production of the requested DOC records.

This appeal follows.

STANDARD OF REVIEW

Florida Rule of Criminal Procedure 3.850(d) provides that a defendant is entitled to an evidentiary hearing on postconviction claims for relief unless "the motion, files, and records in the case conclusively show that the movant is entitled to no relief." Florida Rule of Criminal Procedure 3.851(f)(5)(B) applies the same standard to successive postconviction motions in capital cases. In reviewing a trial court's summary denial of postconviction relief without an evidentiary hearing, this Court "must accept all allegations in the motion as true to the extent they are not conclusively rebutted by the record." *Hodges v. State*, 885 So.2d 338, 355 (Fla. 2004) (quoting *Gaskin v. State*, 737 So.2d 509, 516 (Fla. 1999)). "To uphold the trial court's summary denial of claims raised in a 3.850 motion, the claims must be either facially invalid or conclusively refuted by the record." *McLin v. State*, 827 So.2d 948, 954 (Fla. 2002) (quoting *Foster v. Moore*, 810 So.2d 910, 914 (Fla. 2002)).

SUMMARY OF ARGUMENT

Argument I: The lower court erred in summarily denying Mr. Schwab's lethal injection claim. The claim for relief asserted in Mr. Schwab's Rule 3.851 motion for postconviction

relief was that Florida's lethal injection method of execution as practiced creates an unacceptable foreseeable risk of unnecessary and extreme pain and therefore violates the Eighth Amendment to the U.S. Constitutional and Article I, Section 17 of the Florida Constitution, which prohibit cruel and unusual punishments. This is not a claim that execution by lethal injection is unconstitutional *per se.* Rather, the claim is that the current practice of execution by lethal injection creates a substantial and foreseeable risk of causing extreme pain for a number of reasons. These include the cosmetic use of a paralytic drug, the refusal to employ expertise, personnel and equipment currently available in medical science, and the State's insistence on secrecy.

The lower court erred by rejecting Schwab's articulation of this claim in terms of a "foreseeable risk." In fact the court did not employ any general standard for evaluating such claims at all. By rejecting a "foreseeable risk" standard the court placed itself outside the purview of virtually all of the courts which have closely examined the issue as well as an extensive body of literature about lethal injection as a method of execution.

The court's error contributed to a number of others. Generally the court erred by deferring unblinkingly to the DOC, declining to take judicial notice of the *Lightbourne* case, and

by treating the botched Diaz execution as irrelevant. The court also erred by rejecting Mr. Schwab's request for a quality assurance audit. The court erred by refusing to entertain proffered expert testimony about particularized deficiencies in the current protocols. The court erred in finding that Claim I of the Rule 3.851 motion was insufficiently pled.

Argument II: The lower court erred in summarily denying Mr. Schwab's claim based upon newly discovered evidence of neurological brain impairment. The claim is based on recent scientific advances and on the report of a neuropsychologist who has been working on Mr. Schwab's case since 2006. Schwab specifically alleged innocence of the death penalty, inaccurate findings in the sentencing order, and that the newly discovered evidence would have altered the balance of the aggravating and mitigating factors.

ARGUMENT

ARGUMENT I

THE LOWER COURT ERRED IN SUMMARILY DENYING MR. SCHWAB'S LETHAL INJECTION CLAIM

The Eighth Amendment prohibits "the unnecessary and wanton infliction of pain," *Gregg v. Georgia*, 428 U.S. 153 (1976). Nor may executions "involve torture or a lingering death." *In re Kemmler*, 136 U.S. 436, 447 (1890). Florida's lethal injection

method of execution as practiced creates an unacceptable foreseeable risk of unnecessary and extreme pain and therefore violates the Eighth Amendment to the U.S. Constitutional and Article I, Section 17 of the Florida Constitution, which prohibit cruel and unusual punishments. The lower court's summary denial of this claim, and denial of Schwab's motions regarding public records production, judicial notice of the *Lightbourne* proceedings, and his request for inspection of the execution facility constitute a denial of due process.

Lethal injection is the method of execution of execution provided for by section 922.105, Florida Statutes (2006). The statute simply states that the means of execution shall be by lethal injection without providing a definition of the procedure or the drugs to be used. Instead, the statute delegates authority to the Department of Corrections (DOC) to create the lethal injection protocol and exempts these procedures from the requirements of Florida's Administrative Procedure Act, chapter 120 Florida Statutes (2006). F.S. § 922.10(7). This Court rejected constitutional challenges to Florida's lethal injection scheme based on arguments that it involved an unlawful delegation of powers and violated the eighth amendment prohibition of cruelty in *Sims v. State*, 754 So.2d 657 (Fla. 2000), and has reaffirmed that holding in a series of cases since. *Rolling v. State*, 944 So.2d 176 (Fla. 2006); *Rutherford v. State*, 926 So.2d

1100 (Fla. 2006); *Hill v. State*, 921 So.2d 579 (Fla. 2006); *Diaz v. State*, 945 So.2d 1136 (2006).

There is an extensive body of literature describing the lethal injection method of execution. Briefly, lethal injection is the method of execution used by 37 of the 38 capital punishment states.[4] The basic procedure used by essentially all of these states, including Florida, is the three drug regimen first developed in Oklahoma in 1977. The procedure begins with securing venous access, followed by an injection of sodium thiopental (trade name "sodium pentathol"), an ultra fast acting barbiturate, to render the prisoner unconscious.[5] The prisoner is then injected with a paralytic agent, pancuronium bromide (trade name "pavulon"), in sufficient quantities to stop respiration. Lastly, the prisoner receives an injection of potassium chloride, which induces cardiac arrest and permanently

[4]The lone holdout is Nebraska, where use of the electric chair is under judicial review.

[5]Florida now uses a higher dose of sodium thiopental, 5 grams, than is used in some jurisdictions, which if fully injected into the prisoner's bloodstream will cause loss of consciousness within seconds and death due to respiratory failure within a few minutes. The fact that Diaz took over 30 minutes to die and that other Florida executions have taken a longer time than would be expected with an administration of that amount of thiopental indicates two possible alternative conclusions. First, an error occurred with the chemical delivery system and the inmate has not been adequately anesthetized. Second, the non-clinical dosage of sodium thiopental may suppress the cardiac function of the body to the extent where it delays the effect of subsequently administered drugs.

stops the prisoner's heartbeat. A saline solution is injected in between each of these steps as a flushing agent.

There is a general medical and legal consensus that the administration of either of the second two drugs in a prisoner who is not adequately anesthetized will cause extreme pain and suffering.

Pavulon causes paralysis and respiratory failure. Injection of it into an aware subject will cause him to experience slow suffocation while being unable to breathe and unable to show by word or gesture what is happening. Potassium will cause severe burning in the subject's vascular system and eventually full cardiac arrest. Both drugs have important clinical uses. Pavulon is used to relax respiratory function to facilitate intubation of mechanical breathing apparatus and to keep the patient still during the procedure, and potassium chloride is used in heart surgery. Both require the full panoply of operating room care, including the attention of an anesthesiologist who induces initial unconsciousness, then maintains and monitors the patient's "plane of anesthesia" throughout the procedure. The use of either or both of the drugs on a prisoner who is not adequately anesthetized would be a violation of the eighth amendment's prohibition of cruel and unusual punishments. See generally *Sims v. State*, 754 So.2d 657 (Fla. 2000); Deborah W. Denno, *When Legislatures Delegate Death*, 63 Ohio St. L.J. 63

(2002).

The instant claim for relief is that lethal injection as practiced in Florida creates a substantial and foreseeable risk of pain so extreme as to violate the Eighth Amendment prohibition of cruel punishments. Despite some of the State's arguments to the contrary, the lower court correctly acknowledged that this is not a claim that lethal injection per se violates the constitution. (Order summarily denying motion to vacate or stay execution, PC-W Vol. VIII 1239). Such a claim would amount to an assertion that death brought about by the injection of lethal chemicals can never be a constitutionally acceptable method of carrying out a death sentence, any more than can death brought about by stoning or some other barbaric means. There is a general consensus that an execution by lethal injection in which a prisoner is properly anesthetized throughout the procedure will not violate the Eighth Amendment's prohibition of cruel punishments. E.g. *Morales v. Tilton, infra.*

On the other hand, execution by lethal injection has some unique problematic features which cannot be overlooked. Lethal injection is a method of committing an inherently violent and deadly act – execution of a condemned prisoner – masquerading as a peaceful and painless medical procedure. In particular, the use of a paralytic drug serves no legitimate clinical purpose during an execution. In the medical setting, pancuronium bromide is

used legitimately to relax respiratory function to facilitate intubation and to keep the patient still during surgery. In an execution, the drug simply serves to make the procedure look palatable to witnesses. Due to the effects of the paralytic drug, several members of the Governor's Commission questioned the wisdom of using pancuronium bromide during an execution. It is used for merely cosmetic reasons but it significantly increases the risk that the prisoner will be subjected to agonizing pain and be unable to communicate the fact. The use of pancuronium bromide or a similar paralytic serves at best minimal state interests, but greatly increases the risk of unnecessary and extreme pain.

Nationally based medical associations including the American Medical Association, American Society of Anesthesiologists, American Nurses' Association, the National Association of Emergency Medical Technicians, and the National Commission on Correctional Health, all have ethics guidelines that oppose participation in lethal injections, as do numerous state level organizations.[6]

---

[6]Code of Ethics E-2.06 (Am. Med. Ass'n. 2000), available at http:// www.ama-assn.org/ama/pub/category/8419.html ("A physician, as a member of a profession dedicated to preserving life when there is hope of doing so, should not be a participant in a legally authorized execution."). Message from Orin F. Guidry, President, Am. Soc'y of Anesthesiologists, Observations Regarding Lethal Injection (June 30, 2006), available at http://www.asahq.org/news/asanews063006.htm (stating that the American Society of Anesthesiologists had adopted the American

Medical Association's (AMA's) code of ethics regarding capital punishment in 2001). Am. Nurses Association, Ethics and Human Rights Position Statements: Nurses' Participation in Capital Punishment, http://nursingworld.org/readroom/position/ethics/prtetcptl.htm (2007) ("The American Nurses Association (ANA) is strongly opposed to nurse participation in capital punishment. Participation in executions is viewed as contrary to the fundamental goals and ethical traditions of the profession."). The National Association of Emergency Medical Technicians takes the position that "assessment, supervision[,] or monitoring of the procedure or the prisoner; procuring, prescribing[,] or preparing medications or solutions; inserting the intravenous catheter; injecting the lethal solution; and/or attending or witnessing the execution as an EMT or Paramedic" are violations of the EMT Oath. NAEMT Position Statement on EMT and Paramedic Participation in Capital Punishment, https://www.naemt.org/aboutNAEMT/capitalpunishment.htm, (June 9, 2006). Standards for Health Services in Prisons P-I-08 (Nat'l Comm'n on Corr. Health Care 2003) (on file with the Fordham Law Review) ("The correctional health services staff do not participate in inmate executions.").

In *Morales v. Hickman*, 415 F.Supp.2d 1037 (N.D. Cal. 2006), federal district court Judge Fogel gave the state two options: either provide medically qualified personnel who would ensure that Morales was unconscious during the procedure or use only the sodium pentathol or other barbiturate. The state opted to use two anesthesiologists. There was a "disconnect" between what the doctors thought they were going to do and what they were in fact expected to do, and shortly before the execution was to proceed they resigned. The execution remains on hold. See *Morales v. Tilton*, 465 F.Supp.2d 972 (N.D. Cal. 2006).

The three medical members of the Governor's Commission authored a "Physician's Statement" reflecting those concerns. PC-W Vol. VI 1020. It states:

The Physicians' Statement

> The American Medical Association has maintained a Code of Ethics for Physicians since 1847. This Code is regularly updated and revised and is currently relevant, it is also extremely specific when addressing physician participation in legal executions, including lethal injection. According to the Code a physician is prohibited from participating in an execution, observing an execution, and assisting in an execution including providing technical advice. Indeed, countless organizations representing medical and clinical professions have adopted a similar position.
> When asked to participate in the Lethal Injection Commission for the State of Florida we physicians were faced with a dilemma. Should we decline the request of the State and let others decide the direction of the Commission's actions, or should we involve

ourselves at the risk of being labeled unethical physicians? Ultimately we agreed to serve as we trust that the State neither wants to create unethical physicians, nor would it be interested in consulting physicians willing to operate outside of their ethical boundaries.

It is our contention from testimony of witnesses and interacting with the other Commission members that authoritative bodies in this country are tending to require more sophisticated medical techniques and personnel to administer the lethal injection. This is a legal and societal problem, not a medical one. A physician must always act in the best interest of the individual as they apply their knowledge and skill; otherwise they risk damage to the trust that patients place in their physician. Maintaining a patient's trust is paramount. A physician must always place the individual's interest above all else. Physician participation in lethal injection places this trust in jeopardy.

We physicians are aware that the Commission rendered specific recommendations in its report. We have refrained from rendering our medical expertise or consent to these specific recommendations. After hearing the testimony of the witnesses and through our deliberations, it is of great concern to us that this task may require the use of medical personnel. The participation of these individuals requires them to operate outside the ethical boundaries of their profession. This is a unique situation. We know of no other occasion where the State employs the services of individuals operating outside of the ethical boundaries of their profession. This is not a desirable situation. It is also our conclusion that because of the above noted points, the inherent risks, and therefore the potential unreliability of lethal injection cannot be fully mitigated.

Respectfully,

PC-W Vol VI 1020.

Partly as a result of the medical profession's "official" opposition to participation in executions the traditional anonymity of the actual executioner has been extended to all "medically qualified personnel" who participate in the execution. F.S. § 945.10(g) now exempts from disclosure "Information which identifies an executioner, or any person prescribing, preparing, compounding, dispensing, or administering a lethal injection." *Id.* The expansion of anonymity conflicts directly with a prisoner's interest in knowing what is about to happen to him and whether it will be carried out properly. It is made more problematic by the fact that lethal injection is a more complicated method of execution than others. Hence a prisoner has all the more interest in ensuring that the participants know what they are doing.

A question is whether these regulatory boards have teeth. A number of states, including Florida, have enacted laws declaring that lethal injection is not a medical procedure, or prohibiting any professional regulatory board from punishing medical personnel who participate in an execution. F.S. 922.105(8) provides that:

> Notwithstanding any law to the contrary, a person authorized by state law to prescribe medication and designated by the Department of Corrections may prescribe the drug or drugs necessary to compound a lethal injection. Notwithstanding any law to the contrary, a person authorized by state law to prepare, compound, or dispense medication and designated by the Department of Corrections may prepare, compound, or

> dispense a lethal injection. Notwithstanding chapter 401, chapter 458, chapter 459, chapter 464, chapter 465, or any other law to the contrary, for purposes of this section, prescription, preparation, compounding, dispensing, and administration of a lethal injection does not constitute the practice of medicine, nursing, or pharmacy.

Id.

Neither the three drug regimen nor the anonymity of the of the execution team members is inherent in execution by lethal injection. As such, a challenge to either does not constitute a per se claim that execution by lethal injection is constitutional. In particular, the use of a paralytic serves in addition to the other drugs serves no purpose other than to make the procedure more palatable to witnesses. Florida, like every state that practices lethal injection,[7] provides by statute that twelve citizens "shall witness the execution." F.S. 922.11(2). Counsel for the prisoner, clergy and members of the press are also permitted to view the execution under some limitations. *Id.* The reasons for permitting the execution to be viewed are compelling; they include First Amendment concerns as well as the fact that an execution carried out in secret smacks of the worst kind of tyranny. Any reports that a prisoner moved or made sounds as the lethal chemicals were administered into his body might well fuel concerns about the peacefulness of the procedure and

[7]See John D. Bessler, Televised Executions and the Constitution: Recognizing a First Amendment Right of Access to

lead to bad press about the death penalty, but that concern must be weighed against the possibility that the anesthesia has not been properly administered and the prisoner is experiencing pain so severe that it implicates the Eighth Amendment, and would then be unable to let anyone know about it because of the paralytic.

Anonymity of the execution team members is not an inherent feature of lethal injection, and a challenge to it is not a per se claim of unconstitutionality. A lethal injection by qualified personnel can successfully be carried out openly. The reasons for anonymity include historical tradition and concern that the executioners may be harassed. These are not constitutional issues. Rather, anonymity is a policy decision which has been codified by statute. It must be weighed against the Eighth Amendment requirement that the prisoner not be subject to cruel punishment and to his right to pursue his claim in the courts under the Fourteenth Amendment.

The court erred by rejecting a "Foreseeable Risk" standard

The instant Rule 3.851 motion asserted that "Florida's lethal injection method of execution creates a foreseeable risk of unnecessary and extreme pain and therefore violates the Eighth Amendment to the U.S. Constitutional and Article I, Section 17 of the Florida Constitution, which prohibit cruel and unusual

---

State Executions, 45 Fed. Comm. L.J. 355 1993).

punishments." The lower court rejected this articulation of the claim:

> The Defendant claims that there is "foreseeable risk" of unnecessary and extreme pain if the Department is permitted to carry out his execution under present protocol. The Florida courts have not adopted the standard that there be no "foreseeable risk" of pain in executions. Rather, as noted in Jones [v. State, 701 So.2d 76 (Fla. 1997)], 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.

PC-W Vol. 1241.

The court's rejection of a foreseeable risk standard led to errors throughout its handling of this claim. Although neither this Court nor the U.S. Supreme Court has explicitly adopted a foreseeable risk standard with regard to lethal injection method of execution claims, there is nothing in either Courts' commonly cited articulation of such claims that is inconsistent with such a standard.[8] Eighth amendment claims involving conditions of confinement have historically relied on a foreseeable risk

[8]The Eighth Amendment prohibits "the unnecessary and wanton infliction of pain," *Gregg v. Georgia*, 428 U.S. 153 (1976). Nor may executions "involve torture or a lingering death." *In re Kemmler*, 136 U.S. 436, 447 (1890).

approach. Moreover, the lower court's rejection of such a standard places it outside the practice of courts around the country that have considered the issue.

In a §1983 appeal the U.S. Eighth Circuit squarely addressed and rejected an argument that the assertion of an eighth amendment lethal injection claim in terms of a foreseeable risk of the infliction of extreme pain was insufficient. *Taylor v. Crawford*, 487 F.3d 1072 (8th Cir. 2007). The *Taylor v. Crawford* court ultimately held that Missouri's protocol did not violate the Eighth Amendment, but that was only after thorough evidentiary development in the court below. The court's full treatment of the issue is as follows:

> The State begins by challenging the standard used by the district court. The State first argues that the district court erred in finding a constitutional violation on the basis of its determination that the Missouri lethal injection protocol involves an unnecessary *risk* of causing the wanton infliction of pain. The State asserts that the Supreme Court's articulation of the standard forbids only punishment that actually involves " the unnecessary and wanton *infliction* of pain," id. at 173, 96 S.Ct. 2909 (emphasis added), not a mere risk of pain. We respectfully disagree. "An inmate's challenge to the circumstances of his confinement ... may be brought under § 1983." Hill v. McDonough, --- U.S. ----, ----, 126 S.Ct. 2096, 2101, 165 L.Ed.2d 44 (2006). In Hill, the Court included within this rule an action challenging a state's lethal injection protocol. The Court quoted the petitioner's statement of his claim, noting, " [t]he specific objection is that the anticipated protocol allegedly causes 'a

foreseeable risk of ... gratuitous and unnecessary' pain." Id. at 2102. While we do not imply that the Court thereby adopted a new constitutional standard, we do observe that the Court expressed no dissatisfaction with that statement of the issue, and further, we find it to be consistent with settled Eighth Amendment jurisprudence.

In general conditions-of-confinement claims involving either a prison condition allowed to exist or the specific conduct of prison officials, neither of which is sanctioned as part of the prisoner's sentence, the Court has recognized that " conditions posing a substantial risk of serious harm" may rise to the level of an Eighth Amendment violation. *Farmer v. Brennan*, 511 U.S. 825, 834, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994). " That the Eighth Amendment protects against future harm to inmates is not a novel proposition." *Helling v. McKinney*, 509 U.S. 25, 33, 113 S.Ct. 2475, 125 L.Ed.2d 22 (1993); see also id. at 34-35, 113 S.Ct. 2475 (rejecting the proposition " that only deliberate indifference to current serious health problems of inmates are actionable under the Eighth Amendment," and permitting the case to proceed). " Court of Appeals cases to the effect that the Eighth Amendment protects against sufficiently imminent dangers as well as current unnecessary and wanton infliction of pain and suffering are legion." *Id*. at 34, 113 S.Ct. 2475; see also *Aswegan v. Henry*, 49 F.3d 461, 464 (8th Cir.1995) (noting that deliberate indifference to " conditions posing a substantial risk of serious future harm" violates the Eighth Amendment).

Although Mr. Taylor's situation does not fit neatly within the general conditions-of-confinement context because the conduct of which he complains is necessary to carry out his punishment, as opposed to a mere condition of his imprisonment, we nevertheless see no logical reason to disregard a substantial *risk* that may exist

> in the procedure necessary to carry out a sentence of death. It is our grave responsibility to apply constitutional principles that will guard against the unnecessary and wanton *infliction* of pain in the procedure through which the State proposes to carry out a sentence of death, and to successfully do so in the death penalty context, we must consider whether the procedure to be used presents a substantial risk of inflicting unnecessary pain. We see no error in the district court's consideration of whether there is an unnecessary *risk* that the State's proposed lethal injection protocol will cause the unnecessary and wanton *infliction* of pain.

Taylor v. Crawford, id. 1079-80 (emphasis in the original).

Likewise, U.S. District Judge Fogel in his memorandum decision staying an execution by lethal injection in California expressed the issue this way: “In fact, this case presents a very narrow question: does California’s lethal injection protocol – as actually administered in practice – create an undue and unnecessary risk that an inmate will suffer pain so extreme that it offends the Eighth Amendment?” *Morales v. Tilton*, 465 F.Supp.2d 972, 974 (N.D. Cal. 2006) (finding serious but correctable deficiencies in the implementation of California's lethal injection protocol). Again, the *Morales* decision was reached after extensive evidentiary development.

The lower court’s rejection of a foreseeable risk standard led to an erroneously narrow interpretation of what an Eighth Amendment claim for relief should entail. The claim stated in the Rule 3.851 motion requires the court to determine whether

Florida's lethal injection procedure as practiced creates a substantial and foreseeable risk that the prisoner will experience extreme pain. That risk could arise from any of a variety of sources including inherent problems with the protocol, inadequate training or expertise of those who carry it out, inadequacy of the facility where the execution is to take place or of the equipment which will be used, or from the interplay between them. Allegations about any of those subjects are relevant to a claim for relief, as is evidence about the recently botched Diaz execution. In fact, the court did not articulate a standard by which to evaluate a non-per se lethal injection claim at all. Rather, the court cited a number of cases in which such a claim ultimately had been denied for one reason or another, and then generalized those holdings so as to apply to this case.

The lower court relied on this Court's precedent in *Jones v. State*, 701 So.2d 76 (Fla. 1997), which was decided after a relinquishment hearing on the circumstances of the botched Pedro Medina execution, for the proposition that the Eighth Amendment does not compel the State to "guarantee an execution will proceed as planned every single time without any human error." In the next sentence of its order, the court cites *Buenoano v. State*, 565 So.2d 309 (Fla. 1990), in which this Court upheld the summary denial of an Eighth Amendment challenge to the electric chair following the botched execution of Jesse Tafero, for the

proposition that "one malfunction is not sufficient to justify a judicial inquiry into the Department of Corrections' competence." The court here expressly found that it was bound by this Court's decision in *Sims*, which rejected a lethal injection claim predicated on expert witness testimony about what could go wrong. The Court in *Sims* cited the United States District Court for Arizona in *LaGrand v. Lewis*, 883 F.Supp. 469 (D.Ariz. 1995), which rejected a claim which it found to be based purely on speculation. The Court in *Sims* likewise referred to the expert witness testimony offered by the defense as a "list of horribles." None of the principles asserted in these cases say what a sufficient claim for relief is, rather they say what it is not. With the exception of *Buenoano* they were decided after an evidentiary hearing, and *Buenoano* prompted 4-3 split for that very reason. None of them are inconsistent with the articulation of a claim in terms of a foreseeable risk, although they could be viewed as limitations on its scope.[9] The court erred in rejecting that standard.

The use of a paralytic violates the Eighth Amendment

5g of sodium pentothal as required by the current protocols is a massive overdose which will cause rapid unconsciousness and

[9]From Schwab's point of view: by rejecting the positive and accentuating the negative, the court effectively ruled that there could be no claim at all.

then death. A challenge to the use of the paralytic was made in the instant Rule 3.851 motion:

> Due to the effects of the paralytic drug, several members of the Commission questioned the wisdom of using pancuronium bromide during an execution. The most notable and forceful of the opponents was Eighth Circuit Court Judge Stan Morris, who recommended that the DOC revisit the use of this drug. It is used for merely cosmetic reasons but it significantly increases the risk that the prisoner will be subjected to agonizing pain and be unable to communicate the fact. The use of pancuronium bromide or a similar paralytic serves at best minimal state interests, but greatly increases the risk of unnecessary and extreme pain. As such, its use violates the Eighth Amendment.

PC-W Vol. IV 689. This paragraph alone contains detailed factual allegations, the source for them, alleges that current, not past, protocols violate the Eighth Amendment, and its allegations are not conclusively refuted by the records. As noted above, Judge Fogel acted on similar concerns when he offered the state a choice between using a massive overdose of the barbiturate alone or ensuring that persons qualified to assess the prisoner's plane of anesthetic unconsciousness would attend the execution. There may be reasons for the use of the third of the three chemicals – sodium pentathol takes somewhat longer to cause death than use of a barbiturate alone. The reasons for using a paralytic, the consequences of using a barbiturate alone, the actual difference in the length of time until death, and the possibility of using the first and third drugs but not the paralytic are all issues

could and should have been explored at an evidentiary hearing.

The court erred by declining to take judicial notice of the Lightbourne case

As described above, the court had evinced a willingness to take judicial notice of the *Lightbourne* case prior to the CSM. At the beginning of the hearing, the parties stipulated to the introduction of the transcripts of the *Lightbourne* hearing. PC-W V II 158. Counsel for the State brought in a CD disk with the transcripts on it. *Id.* Both sides referred repeatedly to the *Lightbourne* case during argument. The hearing was bifurcated: first the lethal injection claim was argued by both sides, then the mental health claim was argued. At the conclusion of the hearing the court discussed scheduling of an evidentiary hearing should one be needed, and the mechanics of providing the *Lightbourne* transcripts. It was only then that the admissibility of the transcripts became an issue. See discussion at PC-W II 250-58. Defense counsel expressly requested that:

> The *Lightbourne* materials are in the record. So I would submit to the Court that – what I'm saying that because they are in the record, that this Court should review those. I'm saying that regardless whether there is an evidentiary hearing or not, I would submit that you still need those documents.

PC-W Vol. II 253. Later that evening, in the course of summarily denying an evidentiary hearing, the court ruled:

> The parties have stipulated that the

> *Lightbourne* hearing testimony may be judicially noticed in this case, but the Court has deliberately elected not to take judicial notice at this time and has not reviewed the evidence presented therein.

PC-W VIII 1244. The court erred in general because the parties had reasonably relied on the Lightbourne materials being in the record based on the court's representations and the stipulation up until the conclusion of the proceedings. Moreover, both sides had submitted numerous excerpts from the transcripts of the hearings along with various motions and orders in the Lightbourne case, so the complete record should have been admitted under the doctrine of completeness. In reality, the only reason the entire Lightbourne transcript was not submitted as an attachment to the pleadings of either side was the logistical problems in handling a voluminous file. Additionally, the transcripts should have been considered by the court in connection with the specific issues set out below.

The court erred in deferring unduly to the Department of Corrections

The court repeatedly referred to the holdings in Sims and Diaz that upheld the constitutionality of the Legislature's delegation of authority to the DOC to determine the methodology and chemicals to be used in an execution by lethal injection. E.g. PC-W Vol. VIII 1243-44. In fact the only statement in the judge's order acknowledging a role for the court is the following: "While [the Court] agrees that judicial oversight of the protocol

is appropriate, the Court does not find that judicial economy would be served by holding a hearing in this matter on the same issue which has been extensively explored by Judge Angel in *Lightbourne*." *Id*. 1244. Mr. Schwab argued that the litigation schedules established in Lightbourne and this case, as well as the footnote in *Darling v. State*, --- So.2d ----, 2007 WL 2002499, 32 Fla. L. Weekly S486, (Fla. July 12, 2007)[10] signaled that an evidentiary examination of lethal injection practice and procedure would be appropriate. The court dismissed those arguments as "reading tea leaves."

Immediately following the Diaz execution, spokesman for various departments, including the DOC, blamed the problem on a

[10]"This habeas claim was presented to the Court in connection with facts existing prior to the execution of Angel Diaz on December 13, 2006. No events that may have occurred in connection with the Diaz execution have been considered as part of this proceeding." Id.n.5. See also Kearse v. State, --- So.2d ----, 2007 WL 2438371, Fla., August 30, 2007 (NO. SC05-1876, SC06-942) n.8 (same).

pre-existing liver condition.[11] If the judge had taken judicial notice of the *Lightbourne* proceedings he would have seen detailed evidence of frank duplicity on the part of various DOC personnel:

> Warden Randall Bryant was in charge of the execution and present for the insertion of Mr. Diaz's IVs and present in the execution chamber during the administration of the chemicals. (T. 193, 676). Assistant Warden Willie Dixon and Assistant Warden Randall Polk were second and third in command, respectively, and were also present in the execution chamber during the administration of the chemicals. Major William Muse, Lieutenant Gregory Anders, Colonel Dwight Mallard, and Colonel Lorie Thomas were also present in the execution chamber.
>
> None of the DOC personnel present in the execution chamber with Mr. Diaz admitted to noticing the problems seen by the lay witnesses. The majority of the DOC personnel inside the chamber testified that they stood at parade rest, looking straight ahead and only occasionally glancing at Mr. Diaz. (T. 438, 707, 911, 1719). Nevertheless, several of them heard Mr. Diaz speak during the execution, heard him ask "what's happening" at one point, and saw him turn his head to look at the clock behind him. (T. 210, 261, 437, 459, 684, 912). Most noticed that the execution was taking longer than usual, but apparently they failed to consider the possibility that the longer duration might be indicative of a problem. (T. 218, 460, 684). None of the DOC

[11]A DOC spokesman stated: "He had liver disease, which required them to give him a second dose of the lethal chemicals. It was not unanticipated. The metabolism of the drugs to the liver is slowed." The Associated Press, December 13, 2006 .

personnel present in the chamber noticed any redness or swelling in Mr. Diaz's arms, and Colonel Mallard volunteered that he's "not trained to look at IVs and tell when something is wrong with them." (T. 1724-25). At one point, Assistant Warden Dixon, who was on the phone throughout the execution with Raquel Rodriguez, former counsel for the Governor, was asked by Ms. Rodriguez whether something was wrong and was requested to ask the medical staff if the chemicals were mixed correctly. (T. 264). Assistant Warden Dixon refused her request, and Warden Bryant then explained to Ms. Rodriguez that everything "was going okay" and to be patient and allow the chemicals to do their job. (T. 222). It was at that point, however, that Colonel Mallard, who was participating for the first time in an execution, and who had undergone no training, having started work at Florida State Prison five days prior to the execution, realized from the tone of the conversation that there might be a problem with the execution. (T. 1714, 1722).

3. The Department of Corrections' response to the Diaz execution

Following the execution of Angel Diaz, it was reported in the press that the Department of Corrections expected the execution of Angel Diaz to take longer due to "liver disease." Specifically, the press reported:

He had liver disease, which required them to give him a second dose of the lethal chemicals. It was not unanticipated. The metabolism of the drugs to the liver is slowed.

The Associated Press, December 13, 2006. Governor Bush affirmed the representations of the Department of Corrections:

As announced earlier this evening by the Department, a preexisting medical condition of the inmate was the reason tonight's procedure took longer than recent procedures carried out this year.

Ron Word, Execution of Fla. inmate takes 34

min., The Times-Picayune, December 13, 2006. See also All Writs Petition, December 14, 2006. Based on the Department of Corrections' representation, it expected problems to arise during Mr. Diaz's execution. Yet, despite knowing that a medical issue would interfere with the lethal injection procedure, the Department obviously did not resolve the issue prior to moving forward with the execution as dictated in its protocol. Additionally, counsel for Mr. Diaz was denied access to his medical records and it was never disclosed that DOC expected any such complications.

The testimony and evidence at the evidentiary hearing revealed that the concocted "liver story" had no medical basis and was never verified before releasing the information to the public. The testimony of Warden Bryant, James McDonough and George Sapp was conflicting on this issue. Warden Bryant had no prior knowledge of Mr. Diaz having a liver problem and believed that the liver story was a directive from the Governor's Office (T. 347), but Secretary McDonough and Mr. Sapp testified that they were told of Mr. Diaz's liver problem during the execution.

Secretary James McDonough and George Sapp waited in a room located in the "Q wing" at Florida State Prison during the Diaz execution. After about the "15-16 minute mark" Secretary McDonough became concerned about the length of time the execution was taking, so he sent Sapp to find out what was happening. (T. 2062-64). Mr. Sapp stepped into the hall and spoke with Correctional Officer Andrew Smith. (T. 1707). Subsequently, someone from the chemical room who was wearing "garb" told Mr. Sapp that there was something wrong with Mr. Diaz's liver. (T. 1708 - 1711).

Secretary McDonough testified that Mr. Sapp reported back that there was a problem with Diaz's liver. (T. 2064) However, when he provided statements to the Governor's Commission, the Secretary only said that Mr. Sapp had reported that there was difficulty pressing fluid into the bloodstream. (L.I.

Comm. T. 80-81, 2/19/07). Following the execution, Secretary McDonough questioned the executioners and was told that it was harder to push the syringes than it had been in the past.

Following the pronouncement of Mr. Diaz's death, Secretary McDonough then went to Warden Bryant's office where he spoke with Ali Faraj from the Governor's office and he relayed what he had heard about the liver. (T. 2068, 2070). The Secretary was emphatic that he told the Department of Corrections' public relations officer Gretl Plessinger to be "honest and straightforward" and not to "shade what happened in any way." (T. 2071). McDonough also expressed that he was a "party" to the formulation of the statement but not the "emphatic 'because' he had liver disease." (T. 2071).

Despite the Secretary's denial that he was responsible for informing the press that the execution took longer "because he had liver disease," Gretl Plessinger's notes contradict the Secretary's memory. Ms. Plessinger's notes from December 13, 2007 memorialized the initial statement to press indicating:

The condemned man had liver disease. It was not unanticipated that the metabolism of drugs through the liver is slowed and it takes longer than normal. That's why we have protocol to allow a second series of drugs to be introduced. The condemned man expired as expected.

(T. 2156, Def. Exh. 16). Ms. Plessinger testified that this statement was literally "dictated" to her by the Secretary. (T. 2156). Ms. Plessinger admitted that she knew that the media would be interested in what she had to say and that she did not independently verify the factual basis for the statement even though she has worked as a journalist. (T. 2157). Ms. Plessinger reported the time of death as 6:36 p.m.

The facts at the evidentiary hearing demonstrated that the "liver story" that was disseminated to the press by the Florida Department of Corrections was completely false. The medical examiner who performed

> the autopsy of Mr. Diaz confirmed:
> [Mr. Diaz] did not have actual sorosis [sic] yet or, in fact, he didn't have ongoing activity that would lead to sorosis [sic]. He did not have the so-called piecemeal necrosis which indicates an active inflammatory and destructive process of hepatocytes or liver cells. And he was not developing the scars that eventually result in sorosis [sic].
>
> (T. 849)(see also T. 2363). Nothing about Mr. Diaz's liver would have affected the way his body processed the chemicals. The medical examiner saw nothing in his examination that would indicate that Mr. Diaz had "a markedly deranged metabolism" (Id.). The identity and qualifications of the person who started the "liver story" remains unknown beyond some reference to personnel who DOC had previously determined to be "medically qualified." This misinformation can only be described as an attempt to hide the Department of Corrections own incompetence in carrying out the execution of Mr. Diaz.

Excerpt from Defense Closing Argument in *State v. Lightbourne*, Case No. 81-170-CF-A-01 (5th Cir. Marion Cty.) including transcript references.

Representations by DOC personnel that the problems with the Diaz execution was caused by his liver disease – and that there were not any problems anyway -- were conclusively refuted by the autopsy findings and all of the expert witnesses who have testified about the matter. The Governor's Commission found that:

> 1. The execution team failed to ensure that a successful IV access was maintained throughout the execution of Angel Diaz.
> 2. Failure of the execution team to follow the existing protocols in the delivery of the chemicals.

> 3. The protocols as written are insufficient to properly carry out an execution when complications arise.
> 4. Failure of the training of the execution team members.
> 5. Failure of the training to provide adequate guidelines when complications occur.
> 6. There was a failure of leadership as to how to proceed when a complication arose in the execution process.
> 7. There was inadequate communication between the execution team members and the warden who was not informed of the problem and the changes implemented.

PC-W Vol. VI 1013. The instant Rule 3.851 motion alleges that

> The Governor's Commission concluded otherwise. Its findings were that the Department of Corrections was neither "capable nor prepared to carry out" an execution in accordance within the dictates of the Eighth Amendment. In the six years between the Sims decision and the Diaz execution we have learned that the DOC never trained the primary or secondary executioners, that the execution team was never trained on the effects of the lethal chemicals, nor did it train (or tell) the execution team which chemicals they were injecting at any time during the execution process. The DOC was never trained as to the proper and necessary injection sequence, a sequence now known to be necessary under the Eighth Amendment. The DOC personnel were never properly trained to assess the patency of the IV lines, never trained to properly monitor the IV lines, let alone trained to insert them correctly (see GCALI testimony of Dr. Hamilton). The DOC personnel were never properly trained to identify a problem with the IV lines when there was substantial resistance during the injection process. Furthermore, the execution team members testified that on at least seven prior occasions they felt similar resistance but were never trained to realize that this was due to an improper IV insertion.

> Had the DOC been "capable and prepared" in establishing the second of the two IV lines, Diaz would have immediately felt the immense pain of the potassium chloride because the poorly trained DOC personnel ignored the protocols and skipped the injection of the sodium pentothal into the second line.
>
> Equally disturbing, every single member of the execution team testified that nothing extraordinary happened during the Diaz execution other than the amount of time it took to effectuate death. Warden Randall Bryant, Assistant Warden Randall Polk, physician's assistant William Mathews, the primary executioner, and the medically trained personnel, all testified that they did not observe anything unusual during the execution.
>
> Every single expert who testified, whether before the Commission, or as either a defense or state witness in Lightbourne, has reached the opposite conclusion. Dr. Hamilton, Dr. Heath, Dr. Dershwitz, Dr. Sperry, and Dr. Clarke, all testified about the numerous errors committed by the poorly trained execution team in charge of the Diaz execution.

PC-W Vol. 692-93. The factual allegations in the motion must be accepted as true to the extent they are not contradicted by the record.

As to the instant situation: The warrant was signed on July 18, 2007. By then, the May 2007 protocols had come under heavy scrutiny in the *Lightbourne* case and counsel for the DOC had revealed that they were being revised. On July 22, 2007 Judge Angel temporarily enjoined the State from carrying out an execution in that case. (E.g. PC-W Vol. II 319-51). The current protocols were signed and published July 31, 2007. In the order

summarily denying relief in this case the judge said:

> The Commission issued a report to Governor Crist on March 1, 2007. In response to its recommendations, the Department of Corrections has instituted new protocol for executions. The Governor, apparently satisfied that the new protocol provides sufficient safeguards to insure constitutional standards are met, signed the death warrant for Mr. Schwab in July 2007.

PC-W Vol. VIII 1241. In view of the above, the court's finding, apart from its speculative nature, is chronologically dubious.

In any event, the new protocols require that the Secretary of the Department of Corrections certify among other things that "The Secretary will confirm with the team warden that . . . all team members and executioners meet all training and certification requirements *as detailed in these procedures.*" PC-W Vol. III 449, protocol (15) (emphasis added). The protocols assign an important role to two FDLE monitors. One is stationed in the executioner's room and the other is in the execution chamber. *Id*. 441, Protocol (7). Both are to keep a detailed log of what they observe. Importantly, an independent observer from FDLE witnesses the mixing of the chemicals and preparation of the syringes and all the other equipment that will be used during the execution. FDLE is an independent agency within the executive branch and as such performs an important oversight role. These functions can only be performed usefully by someone who knows what to look for.

Yet in response to a current public records request FDLE certified that it does not have anyone assigned to these roles and generally had no documentation responsive to any of Schwab's public records requests.

Among other things, Schwab requested copies of any FDLE protocols, written procedures, and checklists that would be used by the FDLE monitors. None exist. PC-W Vol IV 645. The request was also directed to communications between FDLE and the DOC or the Office of the Governor with regard to any such protocols and procedures that FDLE would followed. None exist. Nothing exists demonstrating that FDLE monitors have the qualifications to perform their duties, yet the Secretary certified on July 31 that the Department had available the personnel who have the qualifications, training and experience to carry out the execution procedures described in the protocols. That certification is flatly contradicted by the certification provided by FDLE, and the contradiction supports the argument that written assurances by DOC must be verified.

The court's reliance on adherence to the progeny of Sims was misplaced. Hill, Rutherford etc. did not follow a botched execution. This case does. Under these circumstances, the court erred in denying an evidentiary hearing based on undue deference to the DOC.

The court erred by declining to find that the problems with the Diaz execution are relevant to this claim

The lower court found that "most of the facts found in the [Defendant's Motion to Vacate or Stay Execution] relate to the problems with the Diaz execution. As the protocol has changed, the Court is not convinced those facts are relevant to the present protocol." PC-W Vol. VIII 1243. That was error.

The series of events which were the result of the Diaz execution necessarily include the Department of Corrections December 14, 2006 Task Force to investigate the execution of Angel Diaz and subsequent findings,[12] Governor Bush's December 15, 2006 executive order, the Governor's Commission on the Administration of Lethal Injection, the Commission's March 1, 2007 Final Report, and the Department of Corrections Response to the Commission's final report.[13] Furthermore, the May 9, 2007 lethal injection procedures, and ultimately the August 1, 2007 lethal injection procedures, are the direct result of the events that occurred as a result of the Diaz execution. But for the Diaz execution and the events that followed, the Department of Corrections would not have twice promulgated new protocols.

---

[12] Summary of the Findings of the Department of Corrections' Task Force Regarding the December 13, 2006 Execution of Angel Diaz, submitted December 20, 2006 to James R. McDonough

[13] Department of Corrections' Amended Response to The Governor's Commission on Administration of Lethal Injection's Final Report With Findings and Recommendations, submitted 05/07/07.

The lower court erred by denying Mr. Schwab's requests for public records

The court denied Mr. Schwab's motion to compel production of records from the DOC regarding lethal injection. The court's order states in pertinent part:

> Based on what defense counsel has so far stated and on the nature of the records requested, the Court assumes the Defendant is seeking to challenge specific DOC personnel, procedures and protocol for carrying out executions by lethal injection. Presumably, he is seeking to prove that the current procedures violate the Eighth Amendment . . . the Court must consider whether the Defendant has established good cause for requiring disclosure of such matters as who trained the executions teams, what manuals did they use, where were the chemical bought, what equipment is being used and the like. . . . The Defendant's requests seem aimed at going behind the newly announced procedures to test their adequacy. In Rutherford, the Florida Supreme Court rejected the defendant's attempts to challenge the technical details of lethal injection, citing to Hill v. State, 921 So. 2d 579, 583 (Fla. 2006), and finding that the Court did not need to reconsider its holding that "the procedures for administering the lethal injection as attested do not violate the Eighth Amendment. Hill at 582-82." (emphasis added). The Rutherford Court also cited to Sims:
>
> > [I]n Sims, we rejected the claim that the mere possibility of technical difficulties during executions justified a finding that lethal injection was cruel and unusual punishment. Rutherford at 1114.
> >
> > * * *
>
> The Court finds that the Defendant has not demonstrated that the records requested in these paragraphs relate to a colorable claim for relief as required . . . It appears to the Court that this is merely an overly broad

> request for material that might be found to challenge the personnel and procedures used by the Department to carry out a sentence of death. . . The Defendant has made no showing or even any claim that the newly revised Department protocol is flawed or likely to violate the Defendant's Eighth Amendment rights or that any requested materials would provide evidence of this.

The order was rendered before the 3.851 motion was filed, but Schwab filed a motion for reconsideration with an attachment from a quality assurance auditor explaining why the requests were appropriate. It said:

> 1. I am a quality consultant and laboratory quality auditor located in Tijeras, NM 87059.
> 2. My education includes a B.S. degree in biochemistry (California Polytechnic State University at San Luis Obispo, 1976) and ABD in chemistry (University of New Mexico). I am certified as a Quality Auditor (American Society for Quality, certificate #19856) and I specialize in assessments of laboratories.
> 3. From 1982 - 1992, I was employed by EG&G Idaho, Inc. (operating contractor for the Department of Energy's Idaho National Engineering Laboratory). In the course of my career, I established and managed an analytical chemistry laboratory for the Department of Energy, developed and implemented quality assurance programs, and served as Lead Auditor for dozens of audits. I served as Program Manager for the U.S. Navy's nationwide laboratory Quality Assurance Program; in this capacity I managed the audit program that evaluated government and commercial laboratories, assessed operating procedures, and performed independent quality assessments.
> 4. In my capacity as a quality auditor, I conduct independent evaluations of diverse procedures, systems, and controls, and assess their efficacy in reliably meeting the

intended objectives. These assessments typically include an evaluation of procedures, guidelines, and instructional materials, as well as operating records related to the implementation of procedures.

5. Capital Collateral Resource Counsel attorneys for Mark Dean Schwab hired me to conduct a focused review and quality assessment of documents related to the Department of Correction's procedures and practices for carrying out an execution by lethal injection. Although I have reviewed copies of the recently revised procedure and a number of related documents, it is my understanding that counsel has been denied access to documents that provide important context and information relevant to an assessment of the reliability and efficacy of the DOC's execution procedure (identified as items 1, 2, 3, 4, 5, 9, 10, 11, 12, 16, and 17 in the Defendant's Motion to Compel). This affidavit provides my opinion that these requested records and documents are relevant and necessary to independently assess the efficacy of the DOC's execution procedure.

6. The theoretical principles and practical application of quality assurance are relevant to the Department of Correction's reliance on documented procedures and trained personnel for administration of executions by lethal injection. In applications throughout the country, written procedures are used to provide explicit instructions for reliably carrying out a method in a consistent and acceptable manner. The use of poorly documented, incomplete, or ineffectively trained procedures increases variability, decreases comparability, and may render the procedure unreliable in practice.

7. Item 1 (materials, documents, notes and the like from non-Departmental sources pertaining to the training of execution team members). Given the complexity of execution procedures, every member of the execution team needs effective training commensurate with their personal responsibilities and functional assignments; such training is not limited to that provided by Departmental

sources. This is particularly important because of the important quality control and oversight role that is prescribed for the two FDLE monitors.

8. Item 2 (identity and addresses of non-Departmental persons who consulted with the Department concerning execution training). The DOC's execution procedure relies in large measure on performance by effectively trained team members; if the training program has benefited from external experts, it may be an important factor in program quality.

9. Item 3 (documentation of the qualifications, licenses, training, education, etc. of execution team members). It is a matter of due diligence to verify the appropriate qualifications and training of execution team members through review of the appropriate records.

10. Item 4 (copies of training manuals, instructional materials and other items pertaining to the design and delivery of training of execution team members). Given the DOC procedure's reliance on trained execution team members, the quality of instructional design, content, and delivery is an essential element in a reliable system. Such documents should conform to established principles of instructional system design for adult instruction, and should provide objective evidence of achievement of learning objectives.

11. Item 5 (documents used by the Department to verify the training, education, etc. of execution team members). To the extent that the Department relies on records to verify the education and training of execution team members, copies of these records should be reviewed for accuracy and completeness.

12. Item 9 (medication management and chemical procurement protocols). The most recent version of the execution procedure provides instructions for preparation of the chemical solutions, but it does not explicitly document the provider, physical form, purity, concentration, shelf life, or storage conditions of the chemicals. Given

that procurement and control of these chemicals is so critical to the execution process, controls to ensure the proper procurement and management of the chemicals may be documented in separate protocols.

13. Item 10 (records of mock executions). The most recent procedure calls for simulations as a training device for the execution team. Review of records from mock executions, and their degree of conformance with procedural requirements, is a means of independently evaluating the efficacy of the procedure.

14. Item 11 (procurement records of lethal chemicals and records pertaining to their preparation). The most recent version of the execution procedure provides explicit instructions for preparation of the chemicals that cannot be performed as written (for example, requiring the use of a volumetric liquid syringe to measure a prescribed mass of a solid). Based on my experience as a laboratory auditor, such instructions increase chances for inconsistent or inaccurate preparation of chemical solutions.

15. Item 12 (scientific and research materials used by the Department utilized for preparing lethal chemicals). The scientific basis for the Department's approach to preparation of chemicals is important context for judging the validity of the approach.

16. Item 16 (documents describing the equipment used in the execution process). Because of the execution procedure's reliance on equipment, the procurement, maintenance, and testing of the equipment is an important factor in ensuring the reliability of the procedure.

17. Item 17 (any non-disclosure agreements between the Department and suppliers of the chemicals). As indicated for Item 9, records regarding chemical procurement, including reliance on specific or approved suppliers, are an important element for a quality assessment.

PC-W Vol. VI 1031-34.

In his Rule 3.851 motion Mr. Schwab said that he sought to conduct an audit of the Department of Corrections practices and procedures with regard to method of execution. PC-W Vol. VI 699. Such matters as "who trained the executions teams, what manuals did they use, where were the chemical bought, what equipment is being used and the like" are relevant to a claim that the procedure creates a foreseeable risk of extreme pain. *Sims* was decided after an evidentiary hearing at which the defense did not present evidence of a botched execution, but instead relied on expert testimony which listed potential problems that might arise during future executions. *Rolling, Rutherford, Hill* and *Diaz* were decided after Sims but before the botched Diaz execution and its aftermath. The court's reference to the finding in *Rutherford* that this Court did not need to reconsider its holding that "the procedures for administering the lethal injection as attested do not violate the Eighth Amendment" is at best a non sequitur, given that the Diaz execution was botched, the Commission found that the protocols in effect were inadequate, that they were not followed anyway, that training and expertise of the execution team were inadequate, that the protocols were then revised twice, a new execution team has been selected, and that there since has been an extensive investigation into Florida's lethal injection practice in the *Lightbourne* hearings (which the court declined to review). Under these circumstances, there is every reason to

seek independent professional confirmation that the Department's assurances that all of the concerns raised in the Commission Report and by Judge Angel in *Lightbourne* as well as those raised by Mr. Schwab have been addressed. See also the facts in the subclaim challenging the court's deference to the DOC.

There already exists a legal mechanism for the conduct of such an audit via Rule 3.852(I). This was simply a request for copies of documents already in existence, or a certification that they do not exist. It is reasonable to expect that records pertaining to DOC's execution practice and procedure would be kept in some organized form. Nor would the conduct of an audit have been unduly burdensome. It is in fact a routine practice in a wide variety of governmental and commercial settings. Nor would such an audit have been unduly time consuming. In *Darling v. State*, — So.2d --- 2007 WL 2002499, 32 Fla. L. Weekly S486 (Fla. July 12, 2007), the same individual conducted a limited audit of the FDLE lab in Orlando overnight in the middle of an evidentiary hearing. Identification information could have been redacted if required, as is routinely done in such cases.

The requests were only for documents which the auditor would then have reviewed at her location, physical inspections, tests, interviews, etc. would have to be submitted to the court. Although in this age of computerized record keeping there is no real reason why such a procedure could not be conducted every

time a warrant is signed, doing so here would have been especially appropriate for the reasons stated above. As it is, in contrast to the copy of Schwab's voluminous central inmate file which was easily and freely provided, the only records which have been turned over relating to lethal injection were the protocols themselves and some checklists.

Lethal injection is a complicated procedure which requires that the members of the execution team have considerable expertise. The protocols themselves, no matter how artfully drafted, cannot substitute for that expertise any more than a first year medical student reading from a textbook can substitute for a surgeon. An important finding reached by the Commission and the judge in *Lightbourne* was that the execution team members in Diaz lacked training and proficiency. For example, the "medically qualified" person in the Diaz execution who actually started the IV's testified (anonymously) that he or she did not detect anything indicating that they were compromised, although the autopsy and all the other evidence showed that both of them were. Moreover, vague assurances in the protocols to the effect that the Warden will select as executioner someone who is "fully capable of performing the designated functions" (Protocol 2(a)) do not meet any objective standards of verifiability and accountability.

The court erred by rejecting the argument that consciousness assessment must meet a clinical standard using medical expertise and equipment

The court ruled:

> The Defendant argues that the execution by lethal injection require [sic] medical personnel, sophisticated medical equipment and protocol appropriate to a clinical setting to carry out a constitutionally valid death by lethal injection. The Court rejects this argument. In a medical clinical setting, the personnel, equipment and procedures are designed to protect the life of the patient. In the DOC setting, the purpose is to terminate the life of a condemned person in a humane manner without intentionally inflicting pain. If the Defendant's premise is correct, there could be no execution by lethal injection because persons working in recognized medical fields will not participate in taking life, as the Defendant has stated in his Motion.

PC-W 1243.[14]

The motion alleged:

> Florida's execution procedure is unconstitutional because of failure to ensure unconsciousness
>
> Failure to anesthetize a prisoner before and throughout the lethal injection procedure will result in a violation of the Eighth Amendment. Ensuring unconsciousness in a clinical setting is a complicated and demanding task. Yet even there, accidents

[14]This is an oversimplification. After all, lethal injection was primarily created by one Dr. Chapman. See Denno, supra. It also evades the question. The claim is that the Eighth Amendment requires the participation of medically qualified personnel and a degree of clinical proficiency. If that causes problems, then those problems need to be examined.

> happen. Clinical methods of determining depth of unconsciousness include all of the abilities and judgment of an anesthesiologist or a certified registered nurse anesthetist who is present and monitoring the patient at all times. He or she monitors the appearance of the patient, response to stimuli, EKG, temperature, blood pressure, heart rate, moisture content of the skin, size of the pupils, carbon dioxide respiration levels, and oxygenation of the blood if on a heart lung machine. Sophisticated medical equipment is used. Before beginning the procedure the surgeon administers a painful stimulus to test the patient's condition.
>
> By contrast, the consciousness assessment required by the protocols falls far short of medical standards. The warden, who is charged with making the consciousness assessment has no medical expertise beyond that required of a law enforcement officer. He testified that he intends to make that assessment by shaking the prisoner and speaking to him. That is not a medically acceptable way of making the required assessment.
>
> The greater the painfulness of the stimulation the more the subject must be anesthetized. Administration of a high dose of potassium chloride is extremely painful and requires that the subject be in a surgical plane of anesthesia. Notably, the most painful stimulus in the lethal injection procedure occurs after the initial consciousness assessment is made and the execution is well underway.

PC-W Vol. VII 1051-52.

The procedure for assessing unconsciousness is set out in protocol (12) (c) (4) which states: “At this point [after injection of the barbiturate], the team warden will assess whether the inmate is unconscious. The team warden must determine, after consultation, that the inmate is indeed

unconscious." If the warden determine that the prisoner is unconscious, he orders the executioners to proceed. If he determines otherwise, then the secondary venous access line is assessed and the execution proceeds. There is no provision for ongoing monitoring of consciousness. Heart monitors are used during the execution, but they are used only to determine death, not to assess consciousness. Protocol 12 (e).

The court erred by rejecting wholesale the argument that consciousness assessment requires at least some input from medical science. While execution by lethal injection may not be a "medical" procedure, by its very nature it requires input from medical science. It was invented by a doctor and it uses medical chemicals and techniques. Moreover, the assertion that lethal injection is not a medical procedure has more to do with concerns about the identity and participation of medical team members than with how the procedure is carried out.

The reference in the motion to what the warden said was a reference to Warden Cannon's testimony in *Lightbourne*. The *Lightbourne* hearings examined the issue of consciousness assessment in some detail. Lightbourne's expert witness, Dr. Heath, said unequivocally that the DOC's past, present, and proposed procedures for assessing consciousness were wholly inadequate from any point of view, medical or not. "Consciousness" is in fact a lay concept. Proper administration

of anesthesia requires that the subject be in a “surgical plane of anesthesia” and that he be monitored to determine “anesthetic depth.” If an inmate is not sufficiently anesthetized when either of the two second drugs is administered he will suffer excruciating pain. Further, if an inmate is not sufficiently anesthetized when the pancuronium bromide is administered, the inmate would suffer the agony of suffocation. As alleged in the motion, the anesthesiologist monitors the appearance of the patient, response to stimuli, EKG, temperature, blood pressure, heart rate, moisture content of the skin, size of the pupils, carbon dioxide respiration levels, and oxygenation of the blood if on a heart lung machine using sophisticated medical equipment. The anesthesiologist (or certified registered nurse anesthetist) is normally at bedside constantly monitoring the subject directly and checking the equipment. By contrast, the testimony from the *Lightbourne* hearings shows that the person who will be making the consciousness assessment has no medical expertise beyond that typical of any law enforcement officer. His plan is to shake the prisoner and call his name. If that is the plan for maintaining an ongoing assessment of consciousness it is manifestly inadequate given the use of a paralytic. The protocols specify that he will assess consciousness “after consultation,” but not with whom. The warden testified that the consultation would be with one of the medically qualified personnel, but the protocols

do not require that. Nor do the protocols direct the use of any medical equipment to assess consciousness, the heart monitors are used only to determine death. In short, Florida's lethal injection procedure does not employ any input from medical science in assessing the prisoner's state of consciousness at any time during the execution. Given the use of a paralytic, this omission unnecessarily contributes to the foreseeable risk of extreme pain.

In North Carolina, a U.S. a district court refused to permit an execution until the state implemented measures to ensure that an inmate would remain unconscious both prior to and during the injection of the paralytic and potassium chloride. The state proposed instead that a bispectral index monitor (BIS monitor) be used instead, and the district court accepted this compromise. *Brown v. Beck*, Slip Copy, 2006 WL 3914717 (E.D.N.C., April 07, 2006). The U.S. Fourth Circuit affirmed this remedy in *Brown v. Beck,* 445 F.3d 752, 753 (4th Cir. 2006). A dissenting judge would have found that the use of a BIS monitor alone an insufficient for the employment of qualified personnel. Given the timing and public nature of these decisions, it is undeniable that the DOC knew of these options and deliberately chose to reject them in favor of a procedure that uses no input from medical science at all.

The court erred in finding that the Rule 3.851 motion was insufficiently pled

The court concluded that "the Defendant has alleged no facts which would require it to hold an evidentiary hearing on his claim that current DOC protocol might be found to violate his constitutional rights." PC-W Vol. VIII 1242. That conclusion is not supported by the record.

In considering whether to grant summary judgment, the court must accept the allegations in the motion as true unless they are conclusively rejected by the record.

Mr. Schwab's Rule 3.851 motion alleged inter alia that:

Florida's execution procedure is unconstitutional because of failure to ensure unconsciousness.

The specifications for central venous access are inadequate.

The protocol's provisions for FDLE Monitors have not been met.

Florida's lethal injection procedure is constitutionally flawed because it fails to provide for independent verification of compliance with the protocols and training and proficiency of those who implement them.

The court erred by summarily denying each of these subclaims..

Moreover, Schwab attached and incorporated a letter from proposed expert witness Jeannine Arvizu which she wrote in response to a request to examine the protocols in detail. The letter reads:

> As requested, I have conducted an independent quality assessment of the records and documents provided by your office in the above referenced case. Although all the documents that were requested for an independent quality assessment in the subject

case have not been received at this time, this letter provides a summary of the quality issues that have been identified based on review of the available records.

As referenced in the Department of Corrections Secretary's letter to the Governor certifying the Department's readiness for administration of an execution (dated July 31, 2007), the determination of readiness was based on having the necessary procedures, equipment, facilities, and personnel in place, as described in the revised lethal injection procedure (the version identified as effective for executions after August 1, 2007). Based on my review of the subject procedure and related documents, there are a number of areas in which the available records do not demonstrate that an efficacious system for meeting procedural objectives has been established.

Procedural Requirements (reference Execution by Lethal Injection Procedures Effective for executions after August 1, 2007, signed by James McDonough on July 31, 2007)
In the Definitions section of the procedure, the team warden is identified as a person designated by the Secretary whose qualifications have been demonstrated through experience and training. However, all the subsequent procedural references to training and qualification refer solely to training of the execution team members and the executioner; in fact, the team warden is the individual who selects and verifies the training of team members. Because the team warden's responsibilities and authority are distinctly different than those of team members, and because training and qualification should be commensurate with responsibilities, the means through which the team warden demonstrates sufficient training and qualification, and the standards for that training, are not apparent.

Throughout the procedure, references are made

to "designated" individuals as being responsible for specific activities or roles, but the process through which an individual is designated as the responsible party is not defined. In order to hold individuals accountable for their responsibilities, and to ensure that all functional assignments are made to appropriately qualified parties, designation of each responsible party should be documented in the permanent record. It is noted that this requirement should not be obviated by the necessity to protect the individual identities of execution team members.

In the procedure, the term "secure" is used without definition, and with contradictory intent. For example, 'secure' is used in reference to securing the restraining straps on the inmate, ensuring that the lethal chemicals remain 'secure,' and in reference to securing official witnesses in the witness room.

In the last sentence of Definitions section (4), it states that only the team warden can approve deviations from the procedure. It is appropriate to assign responsibility for approval of procedural deviations, but deviations should not be approved after the fact. Procedural deviations should be approved in advance, and all such approvals should be documented by the team warden.

On page 3, section (3) (f), the procedure states that team members are responsible for bringing concerns to the attention of the team warden. Given the objective of preventing unnecessary lingering, this requirement should explicitly require that concerns be immediately reported to the team warden.

On page 4, section (4) requires that there be a written record of any training activities. Such a requirement should explicitly require that the written record provide documentation of the scope and content of training. In

order for the warden to verify that team members have received necessary training (including training in the approved version of the procedure), training records must provide sufficient detail. A record of attendance is insufficient for this purpose.

Page 4, section (5) requires that procedural compliance be documented through use of checklists. However, the procedure does not provide or reference the specific checklists in question, and multiple versions of checklists, with different steps in different sequences have been used in training. In addition, the checklists used in training are ineffective and were poorly designed from a quality tool perspective, as indicated by the fact that the trainees completed the checklists in an incomplete and inconsistent manner.

Page 4, section (6) requires that a designated team member ensure a sufficient supply of necessary chemicals, but it neither describes nor provides reference to a systematic means of ensuring acceptable procurement, receipt, verification, storage, maintenance, control, and disposal of the chemicals in question.

Page 4, section (6) does not address or reference a systematic means of ensuring that the chemicals that are used are of appropriate quality and have been appropriately maintained. In effect, this section delegates such responsibility for quality control of the lethal chemicals to the FDLE agent in charge of monitoring chemical preparation. Despite this fact, there is no evidence that the FDLE agent in question is qualified to make such an assessment, or that the necessary records documenting the procurement, receipt and storage of the chemicals would be available for the agent's review.

Page 5, section (7) (b) states that an FDLE agent is responsible for observing the

preparation of the lethal chemicals, yet there is no indication that the agent in question has the technical skills and experience necessary to monitor the preparation of chemicals in a technical capacity. It is unlikely that an independent monitor without relevant technical experience would provide significant quality oversight value as a monitor of the chemical preparation process.

Page 5, section (7) (b) and (c) requires that the FDLE agents prepare detailed logs of activities. No member of the execution team is required to prepare a detailed activity log, yet this responsibility is effectively delegated to the FDLE monitors, who are not subject to the same training requirements as team members, and should not be expected to provide the sole documentary evidence of the sequence of events. In addition, the requirement for preparation of a detailed activity log should explicitly require that the log be prepared as a contemporaneous record, rather than being documented after the fact.

Page 5, section (8) (a) requires that results of a physical examination be documented in the inmate's file, and that the findings of the physical examination be reported verbally to the team warden. In order to prevent any misinterpretation or misunderstanding of the verbal report, and to ensure that the verbal message is entirely consistent with the written record, the report to the warden should include the verbal and a written report.

Page 6, section (f) provides fairly detailed instructions for preparation of the chemical solutions, yet the instructions are based on unstated assumptions, and in practice, the instructions cannot be followed precisely as written. Section (1) calls for injection of 10 ml of sterile water to a vial containing 500 mg of sodium pentothal. Because the materials used in the procedure are not

explicitly described, it is left to individual discretion whether to use purchased vials prefilled with precisely 500 mg of sodium pentothal, or whether to prepare the necessary vials by accurately measuring 500 mg of sodium pentothal on a calibrated analytical balance. In my experience as a laboratory auditor, this type of imprecise procedural instruction leads to unexpected and undesired variability, and can contribute to operational problems. In a similarly imprecise description of chemical preparation, section (2) calls for use of a volumetric syringe to draw 50 mg of pancuronium bromide. Syringes are used to measure volumes of liquids; they cannot be used to directly measure the mass of a solid. Implicit in this instruction is the assumption that the pancuronium bromide is procured and available as a solution of known and appropriate concentration. It also assumes that the individual responsible for preparing the chemicals is able to accurately compute the volume of solution necessary to contain 50 mg of pancuronium bromide. This lack of specificity is inconsistent with an otherwise detailed procedure, and it requires that a second qualified party be present to carefully review and observe the preparation of the chemical solution. Finally, the same lack of specificity compromises the instructions for preparation of potassium chloride in section (f) (3). The instructions call for use of a 60 cc syringe to withdraw 120 meq of KCl, yet the concentration of the stock or prepared KCl solution is not specified. Given the importance of the chemical solutions to the procedural objectives, it is important that these steps be accurately and completely documented in the procedure.

On page 7, section (g) implies that the lethal chemicals are prepared in a separate, but unspecified location, then they are transported, in the presence of at least one additional member of the execution team, to the executioner's room. This is inconsistent

with section (7) (b) which requires that the FDLE agent responsible for monitoring preparation of the chemicals be located in the executioner's room.

On page 8, section (k) indicates that the team warden is responsible for administering a presumptive drug test and a presumptive alcohol test to each team member. At the time this testing is performed, the team warden needs to be qualified to administer such tests, yet the training and qualification section does not address this requirement. In addition, approved procedures for performance of these presumptive tests should be available for review.

Page 9 section (j) requires that a specific team member be responsible for continuously monitoring the viability of the IV lines prior to and during the administration of the execution. It is not clear how a single individual would be capable of performing this function from a single location (either in the execution chamber or in the executioner's room). In addition, it is not clear which team member would be responsible for performing this extremely important function given the limitations on people present in each room (as specified in section (11) (d) and (e)).

Page 12 section (d) provides instructions in the event that the primary venous access is compromised during the administration of lethal chemicals. This provision should be broadened to address the situation in which it is recognized that access has been compromised prior to the administration of lethal chemicals.

Page 12 section (d) refers to opening of drapes, yet all other such references have been changed to more accurately address the facility's use of a window covering.

Training

Specific Procedures sections (2) and (3) describe requirements for training and qualification of execution team members. Given the distinctly different responsibilities of security team members and technical team members, the team members should receive training that is commensurate with their responsibilities. The training records from the period May 8 - August 1, 2007 document training in the subject "Execution by Lethal Injection Procedures." There is no indication that team members (presumably identified as STM-#) received training designed specifically to address learning objectives that were developed in consideration of their responsibilities.

Specific Procedures section (4) requires that training be sufficient to ensure that all personnel are prepared to carry out their roles. In order for any party to make a determination that delivery of a given training curriculum has been effective in this manner, the training should include objective evidence of which individuals achieved which learning objectives. This requirement is typically satisfied through a written examination or practical demonstration of skills. The available records provided no indication that the training in question was either designed to meet specific learning objectives (cognitive, affective, or psychomotor), or that individuals demonstrated satisfactory achievement through anything other than attendance.

Multiple training attendance reports were provided which document the delivery of eight hours of training to three separate groups of employees on the same day (STMs, EXs, and MPs). The training records indicate that a single presenter was responsible for delivery of the training in each instance. Although these records might seem to indicate that three different courses were delivered, consistent with the differing responsibilities of the three groups, a full

day of such training could clearly not have been delivered to all three groups by the same presenter. (See, for example, training attendance records for 7/11/07).

Functional Readiness

On page 2, section (2) (a) and (b), the procedure states that the team warden will select two (2) executioners to carry out the execution, and will designate one of the executioners as primary and the other as secondary. During the execution, the secondary executioner must be available to assume the role as primary at any time. Implicit in this requirement is the assumption that the team warden will have more than two qualified executioners to choose from. Review of the available training records indicates that since May 2007, only two individuals may have received training to fulfill the role of executioner (individuals identified on Training Attendance Reports as "EX-1" and "EX-2"), and neither of these parties has been trained in the provisions of the revised procedure that was approved on July 31, 2007. First, every party who may be designated as an executioner must have been trained on the approved version of the procedure. Second, certification of readiness should include qualification of sufficient backup personnel to fulfill procedural requirements in the event that a single key individual is unable to perform on the day in question.

According to training records provided, none of the medical team members have received training in the recently revised and approved procedure since it was released on July 31, 2007. Such training would be a necessary prerequisite to certifying the department's capability.

The number and nature of quality deficiencies and inconsistencies identified in the reviewed materials lead me to conclude that the department has not demonstrated that they

> have put in place the systems and controls necessary to ensure that they can predictably and reliably perform executions by lethal injection in accordance with their own objectives.
> Should you need any additional information, or have any questions regarding my review, please do not hesitate to contact me. Upon receipt and review of any of the requested documents that have been heretofore unavailable, I will provide additional or amended review comments, as appropriate.

PC-W VII 1104-09. The foregoing demonstrates compliance with the Rule requirements that there be detailed factual allegations and that the proposed witnesses be identified and show their readiness to testify. The proffered evidence is detailed and specific. While the State might challenge the qualifications of the proposed witnesses or any other aspect of their testimony, the appropriate forum for doing so is an evidentiary hearing. The court erred in summarily denying this claim.

ARGUMENT II

THE COURT ERRED IN SUMMARILY DENYING SCHWAB'S NEWLY DISCOVERED EVIDENCE CLAIM BASED ON BRAIN IMPAIRMENT

In a successive motion for post-conviction relief, Mr. Schwab's claimed that his sentence of death was constitutionally unreliable based upon newly discovered evidence of brain impairment. Mr. Schwab's claim was predicated in part based upon the findings of Dr. Hyman Eisenstein, Ph.D., A.B.P.N. Dr. Eisenstein's neuropsychological report reveals that Mr. Schwab

suffers from organic brain impairment in the right brain and is frontal lobe in nature. PC-W Vol. VII, 1111-24.

Mr. Schwab also submitted two scholarly articles which further establish a connection between brain pathology and sexual deviant behaviors. The International Journal of Forensic Psychology 1, no. 3 (2006): 84-94, published an article entitled "Neuroanatomical Substrates for Sex Offenses." This clinical research reviewed clinical and forensic studies in order to understand the neuroanatomical basis of sexual behavior and how dysfunctions in these systems result in increased predisposition to commit sex offenses. PC-W Vol. VII, 1126-36. Additional scholarly research was presented in a look at the "Brain Pathology in Pedophilic Offenders," Arch Gen Psychiatry, 64 (2007): 737-746. Id. at 1137-43. After review of the neuroimaging profiles of pedophilic perpetrators as compared to nonoffenders, the authors concluded that pedophilic perpetrators show structural impairments of brain regions critical for sexual development. These impairments are not related to age, and their extent predicts how focused the scope of sexual offenses is on uniform pedophilic activity. Structural deficits of the right amygdale and closely connected structures, presumably of neurodevelopmental origin, are related to the sexual deviance of pedophilic offenders.

In summarily denying relief, the lower court ruled that Mr.

Schwab's claim was procedurally barred and should have been presented in his original post-conviction motion. PC-W Vol. VIII, 1245. Alternatively, the lower court ruled on the merits of the claim stating:

> As to the first prong of the test, the Defendant has alleged that the fact of his brain damage was not known at the time of trial and that, even had it been, the scientific community has only recently recognized the impact of front lobe damage on sexual behaviors. The Defendant has provided the Court with two journal articles which discuss the subject of brain damage in sexual offenders, but neither article affirmatively asserts that this damage causes such crimes as committed by Mr. Schwab.
> But more importantly, even if the Defendant established that he has frontal lobe damage and there are new scientific theories as to its impact on behavior, he fails to meet the second prong of the test. He does not allege that this evidence was of such a nature that it would probably cause an acquittal, or in this case, have caused the trial court to impose a life sentence rather than death.

Id.

The lower court erred in finding this claim procedurally barred during Mr. Schwab's trial proceedings, trial counsel called Dr. Howard Bernstein, a psychologist. Dr. Bernstein was neither a neuropsychologist nor an expert in mentally disordered sexual behavior. He conducted a mental status examination of Mr. Schwab, reviewed records and video recorded testimony of Dr. Fred Berlin and Dr. Ted Shaw. He found no evidence of organicity. In rebuttal the state called Dr. William Samek whom the trial court

relied on exclusively. Dr. Samek testified that he never interviewed Mr. Schwab. His testimony was based on a review of the record, observation of witness testimony, and observation of videotaped testimony of Drs. Berlin and Shaw. Dr. Samek commented during his testimony on an essential point: "The biological mechanism of human sexuality is very complex. It involves not only the genital area, but it involves the brain. *It involves the hypothalamus. It's a very complicated area that science has not unraveled even close to fully at this point*." (Emphasis added) (ROA XVIII, 3339-40). "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. . . ." (*Id*. at 3356).

In postconviction, Mr. Schwab continued efforts to develop mental mitigation in the lower court proceedings by challenging his conviction and sentence alleging a denial of competent mental health experts in violation of *Ake v. Oklahoma*. Mr. Schwab retained the services of Dr. Faye Sultan. On March 16, 1999, one portion of the evidentiary hearing was held before Judge Holcomb, and the second portion was set for June 24, 1999 to present evidence of mental mitigation. PC-R VI 166. Prior to the June 24th court date, collateral counsel filed a motion to continue the evidentiary hearing. Dr. Faye Sultan, who had examined Mr. Schwab and who was ready to testify, "strongly recommended that

the defendant be examined by Dr. Berlin because of his greater expertise in the particular problems which afflict the defendant." Dr. Berlin, however, refused to participate without adequate time to prepare (PC-R1239-40) and was requesting a reasonable time to prepare for the evidentiary hearing. The postconviction court denied the continuance and Mr. Schwab did not have the opportunity to fully develop mental mitigation during the initial post-conviction proceedings.

In ruling on Mr. Schwab's claim, the lower court reasoned that there will always be advances in science and experts to re-analyze decisions from prior experts and by this fact alone should preclude a defendant from continuing to develop challenges against his conviction and sentence in a successive motion. This analysis is flawed.

The scholarly articles which were presented to the lower court were published in 2006 and 2007. Dr. Eisenstein's report also indicated continued attempts to develop mental mitigation. He began his investigation on May 8, 2006 and did not conclude until March 22, 2007, with a final report being generated on July 26, 2007. PC-W Vol. V, 756.

The lower court erred in finding that Mr. Schwab's claim of newly discovered evidence of neurological brain impairment was insufficiently pled under *Jones v. State*, 591 So.2d 911 (Fla. 1991). A claim based on newly discovered evidence must allege

facts which were 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. Second, the newly discovered evidence must be of such a nature that it would probably produce an acquittal on retrial. *Id*.

The lower court reasoned that Schwab's claim should be denied because although Schwab alleged that the "scientific community has only recently recognized the impact of front lobe damage on sexual behaviors," the two scholarly articles which were presented to the court do not "affirmatively assert that this damage causes such crimes as committed by Mr. Schwab." PC-W Vol VIII, 1246. That is where Dr. Eisenstein's evaluation is significant. As Mr. Schwab continued to appeal his case in federal court raising constitutional violations under Ake, Dr. Eisenstein began a neurological evaluation of Mr. Schwab on May 8, 2006. The billing record of Mr. Studstill, Schwab's clemency attorney, shows that Dr. Eisenstein worked collaboratively with CCRC investigating mental mitigation on Mr. Schwab's behalf. PC-W Vol. 4, 573-76.

The lower court found that even if the first prong of *Jones* was established, Schwab failed to allege that the evidence was of such a nature that it probably would have produced a different result. That finding was error. The new scientific findings coupled with Dr. Eisenstein's examination and conclusions would

show that the trial court's assessment of the substantial impairment mitigator was based on faulty evidence. In addition, Dr. Bowen's proffered testimony would show that there was an environmental event beyond Schwab's ability to control which reduced his culpability in the same way that mental retardation or illness or extreme emotional disturbance reduce the culpability of an offender. The new evidence would alter the balance of aggravating and mitigating circumstances such that there exists a reasonable probability of a different outcome, and would further show that Schwab is actually innocent of the death penalty.

CONCLUSION AND RELIEF SOUGHT

The lower court's order summarily denying relief should be reversed and the Appellant should have the opportunity to develop his claims in a full and fair hearing.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief of the Appellant has been furnished by United States Mail, first class postage prepaid, to all counsel of record and the Defendant on September _____, 2007.

_____
MARK S. GRUBER
Florida Bar No. 0330541
Assistant CCRC
CAPITAL COLLATERAL REGIONAL
COUNSEL-MIDDLE REGION
3801 Corporex Park Drive, Suite 210
Tampa, Florida 33619
(813)740-3544

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief of the Appellant, was generated in Courier New, 12 point font, pursuant to Fla. R. App. 9.210.

_____
MARK S.GRUBER
Florida Bar No. 0330541
Assistant CCRC
CAPITAL COLLATERAL REGIONAL
COUNSEL-MIDDLE REGION
3801 Corporex Park Drive, Suite 210
Tampa, Florida 33619
(813)740-3544
Counsel for Appellant