IN THE SUPREME COURT OF FLORIDA

CASE NO. 07-1603

MARK DEAN SCHWAB,

Appellant,

v.

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

STATE OF FLORIDA,

Appellee.
_____/

MOTION FOR REHEARING

Comes now, Appellant MARK DEAN SCHWAB, pursuant to Fla. R. App. P. 9.330, and respectfully moves this Court to reconsider its opinion of November 1, 2007 affirming the circuit court's denial of his motion for postconviction relief. By this motion Mr. Schwab submits that the Court has overlooked and/or misapprehended points of law and facts critical to the resolution of the claims presented in his appeal. No claim previously raised is hereby abandoned.

Incorporated Claims

The Court expressly incorporated its concurrent holding in Lightbourne v. McCollum in disposing of numerous eighth amendment challenges to lethal

injection made in this case. Many of these claims were disposed of without any further discussion in the Schwab opinion:

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

Slip Op. Page 9 n.4; and:

> Lightbourne raises the following specific allegations regarding the sufficiency of the August 2007 procedures: the revised procedures do not meaningfully increase the qualifications of executioners; there is no requirement that the team warden or executioners have experience in conducting executions; the protocol does not require that training sessions use more accurate simulations than pushing syringes into a bucket; there is no reason for using a syringe holder; positioning executioners in a separate room from the inmate results in long lengths of IV tubing, which creates greater opportunity for malfunction; the procedures do not specifically indicate the qualifications needed by each designated team member; phlebotomists are not trained to place catheters in veins; the procedures leave inmates to guess if the execution team members are adequately experienced and "medically qualified"; the warden is not qualified to make hiring decisions regarding medical personnel; the procedures do not provide any method for monitoring the inmate's consciousness after administration of sodium

> pentothal, and the warden is not qualified to make this assessment; anesthetic depth should be assessed by a variety of indicators to reach an accurate reading; the warden is not qualified to make the final decision regarding the appropriate method of obtaining venous access; pancuronium bromide is used for purely cosmetic reasons; the contingency portion of the protocols does not detail any responses to contingencies; and the certification portion of the protocols does not result in individual accountability of team members. In a related case where another inmate is also challenging the protocol after a death warrant was signed in his case, Mark Dean Schwab raises similar concerns, focusing primarily on whether the protocols adequately ensure the assessment of consciousness and whether the use of a paralytic drug during the execution is warranted. See Schwab v. State, No. SC07-1603 (Fla. Nov. 1, 2007).

Lightbourne v. McCollum, Slip. Op. P.50 n.22.

Any reconsideration of these claims with regard to the Lightbourne decision necessarily will impact this case as well.

The three drug regimen

To some extent the Court did expressly address Schwab's claim that the three drug regimen employed by the Florida DOC is unconstitutional. The Court also noted a distinction between the two cases. In the Lightbourne opinion the Court noted that:

> Lightbourne does not explicitly challenge the use of the three-drug combination, although he does question the necessity for the use of pancuronium bromide, given that the dosage of sodium pentothal is sufficient to cause

> death.

Lightbourne v. McCollum, Slip. Op. P. 51. Particularly the Court noted that:

> Lightbourne's most significant challenge is not to the chemicals themselves, but to whether they will be administered "properly" and whether the protocol has sufficient safeguards in place to prevent harm in the event that, as in the Diaz execution, the protocol is not properly followed.

Slip. Op. 21.

The Court noted that Schwab focused "primarily on whether the protocols adequately ensure the assessment of consciousness and whether the use of a paralytic drug during the execution is warranted." Lightbourne n.22, supra. As acknowledged by the Court, Schwab did explicitly challenge the use of the three drug regimen. 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 allegation was quoted verbatim in Schwab's Initial Brief.[1]

Nevertheless, despite the fact that the use of the three drug regimen was a primary focus of the litigation in Schwab and not a primary focus in Lightbourne, the Court relied on Lightbourne in denying relief on this claim:

> "Given the record in Lightbourne and our extensive analysis in our opinion in Lightbourne v. McCollum, we reject the conclusion that lethal injection as applied in Florida is unconstitutional." Schwab Slip. Op. 4.

The Court also found that the lower court had erred by declining to grant Schwab's request for an evidentiary hearing. While the lower court would not have been required to entertain exactly the same evidence that had been received in the Lightbourne hearing if the court had taken judicial notice of the Lightbourne hearing as requested, to the extent that there was a difference in focus between the two cases, Schwab should have been allowed to develop the evidence in support of his claim that the three drug regimen is unconstitutional. As asserted in Schwab's Initial Brief:

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[1]The report of the Governor's Commission suggested that the Governor have the DOC "on an ongoing basis explore other more recently developed chemicals for use in a lethal injection execution with specific consideration and evaluation of the need of a paralytic drug like pancuronium bromide in an effort to make the lethal injection execution procedure less problematic." Although the DOC responded politely to this recommendation, the State objected to it and has vigorously defended the use of a paralytic ever since. Nothing in the Lightbourne hearings, or for that matter in cases around the country where the issue has come up, suggests that the State has any intention of abandoning the use of a paralytic.

> 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 [when used] 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.

IB 33, citing Morales v. Hickman, 415 F.Supp.2d 1037 (N.D. Cal. 2006), where District Court Judge Fogel after an extensive evidentiary enquiry into these issues 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. Even if Schwab were to call only the same experts that were called in Lightbourne, he has not been given the ability to explore these issues at a full and fair hearing because the focus of the litigation in the two cases was different.

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. The Court's disposition of this issue also implicates its

discussion at the end of the Lightbourne opinion of the various "risk" standards that have been proposed in different settings, particularly that of an "unnecessary risk." The State has not even tried to show desirability, let alone necessity. The State cannot do so. All of the experts who have weighed in on the subject in any forum agree that the use of a paralytic is not necessary to the execution process.

The problem with the use of a paralytic is not so much that it causes extreme pain, although used alone it causes a subject the agonizing death of slow suffocation while struggling helplessly to breathe. Rather, it is constitutionally problematic precisely because it is a paralytic.

Eliminating pancuronium bromide from the execution process would lessen the risk of pain and suffering because it would make monitoring for consciousness substantially easier. The warden, who has at best the minimal lay training of a law enforcement officer in assessing consciousness, has no training or experience in assessing the plane of anesthesia of one who is paralyzed by the use of pancuronium bromide or a similar agent. Eliminating pancuronium bromide would lessen the risk of pain and suffering because it would increase the likelihood that the inmate would be unconscious throughout the execution. The use of pancuronium bromide or a similar paralytic serves minimal if any state interests, but greatly increases the risk of unnecessary and extreme pain. As such, its use

violates the Eighth Amendment.

The physician's statement

The argument made above is reinforced by the position taken by the physicians who sat on the Governor's Commission on the Administration of Lethal Injection, who expressly "refrained from rendering our medical expertise or consent to these specific recommendations." The experts who testified in Lightbourne also expressed varying degrees of reluctance to engage in telling the State "how to do it." Nevertheless, the Physician's Statement appended to the Commission Report concluded that: "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 . . . **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**." (Emphasis added.) This statement was incorporated verbatim in Schwab's Rule 3.851 motion and cited in the Initial Brief. PC-W Vol VI 1020; IB 23. Although the Court expressed respect for the Commission's work and expressly relied on it, the Court did not address the Physician's Statement in either of the Schwab or Lightbourne decisions.

Section 922.105, Florida Statutes (2006) authorizes execution by lethal

injection without providing a definition of the procedure or the drugs to be used. Instead, the statute delegates authority to the DOC) to create the lethal injection protocol and exempts these procedures from the procedural safeguards of chapter 120 Florida Statutes (2006). F.S. §922.10(7). The Lightbourne decision analyzed at length this Court's jurisprudence in Sims v. State, 754 So.2d 657 (Fla.2000) and progeny and expressly reaffirmed its position that the use of the three drug regimen would be left to the discretion of the executive branch. "We reaffirm the Court's essential holding in Sims that 'determining the methodology and the chemicals to be used are matters best left to the Department of Corrections.'" Lightbourne Slip. Op. 23, citing Sims, 754 So.2d at 670. The Court held that "the specific methodology and the chemicals to be used are matters left to the DOC and the executive branch, and this Court cannot interfere with the DOC's decisions in these matters unless the petitioner shows that there are inherent deficiencies that rise to an Eighth Amendment violation." Lightbourne, Slip Op. 23. The facts alleged in Schwab's Rule 3.851 motion for postconviction relief must be taken as true because the motion was summarily denied. The Physician's Statement, made in the course of an executive investigation of an execution that actually was botched, squarely conflicts with the Court's holding. The reliance on a "presumption of deference" to the DOC (Lightbourne Slip Op. 23) when the executive process itself

had undermined it was misplaced.

Judicial Notice and Public Records.

The Court disposed of Schwab's public record's claim solely on the basis that Schwab's quality assurance auditor had not demonstrated sufficient qualifications to provide a reliability and efficacy report on DOC's method of execution. The Court correctly reasoned that the lower court's reason for denying Schwab's request, namely that Schwab was not entitled to an evidentiary hearing, could not stand because the Court found that Schwab *was* entitled to an evidentiary hearing. The Court also held that the lower court erred by denying Schwab's motion to take judicial notice of the Lightbourne proceedings, but ruled that the error was harmless because the Court held that Schwab had not proffered evidence beyond that presented in Lightbourne. The Court's ruling on these two issues is a Catch-22. The evidence Schwab would have presented in addition to what was presented in Lightbourne would have been based on these records. That would have supported Schwab's argument that the lower court's error was not harmless.

Moreover, the Court's holding on this claim is inconsistent with its earlier precedent on this matter. In Provenzano v. State, 739 So.2d 1150, 1153 (Fla.1999), the Court required the DOC to provide an "open file" policy relating to "any information regarding the operation and functioning of the electric chair."

There is no reason here to create here, for the first time, a qualifications requirement in order for defense counsel to obtain the same kinds of records. If the proposed expert did not have sufficient qualifications to offer an expert opinion, the issue could have been raised at the appropriate time in the proceedings and Schwab could have obtained another expert. A major issue in this case is whether the DOC lay personnel themselves are qualified to perform the tasks they are assigned to do. It is incongruous to deny Schwab access to records about the DOC's proposed lethal injection procedure because of a lack of "sufficient" qualifications. The Court's ruling is a dangerous retreat from the position taken in Provenzano.[2]

[2] The Appellant contends that this Court erred in the manner in which judicial notice was taken of the *Lightbourne* proceedings in denying his lethal injection claims. The opinion states that it was error for the postconviction court to deny Schwab an evidentiary hearing without taking judicial notice of *Lightbourne*. *Schwab v. State,* Slip. Op at 6. This Court then cites to *Sims*, *Provenzano*, *Jones v. State* and *Jones v. Butterworth*. In *Sims*, the appellants filed an extraordinary writ to this Court to take judicial notice of *Provenzano*, *Jones v. State* and *Jones v. Butterworth* which this Court granted. Thus, all of the litigants in *Sims* knew the content and extent of the record they were briefing. Both *Provenzano* and *Jones* were instances in which this Court directed the postconviction court to hold an evidentiary hearing to consider the evidence to be introduced. Again, the litigants in both *Provenzano* and *Jones* knew the content and extent of the record to be briefed.

WHEREFORE, the Appellant respectfully requests that the Court grant rehearing in this cause.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Motion for Rehearing has been furnished by E-mail and by overnight courier to all counsel of record on November 5, 2007.

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