

**IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT,
IN AND FOR BREVARD COUNTY, FLORIDA**

STATE OF FLORIDA,
Plaintiff,

v.

MARK DEAN SCHWAB,
Defendant.

CASE NO.: CR 91-7249-CF-A
DEATH PENALTY WARRANT
Execution Scheduled: November 15, 2007

REPLY TO STATE’S MOTION TO STRIKE AND
FOR PROTECTIVE ORDER

COMES NOW the Defendant by and through the undersigned attorney and hereby files this Reply to the State’s Motion to Strike and for Protective Order.

1. Nowhere in the state’s response does opposing counsel assert that the factual basis supporting the motion is inaccurate, false, or misleading. A such, opposing counsel offers no legal basis for striking the motion. The state’s unwillingness to allow discovery is a matter for judicial intervention and has been properly presented to the court to resolve the conflict so that the Defendant’s Fourteenth Amendments right to Due Process and Equal Protection under the law are protected.

2. The state is attempting to limit the defendant’s ability to prepare his own pleadings by claiming an interest or privilege regarding the testimony of Dr. Samek as a defense witness. Furthermore, the state replies that by defense counsel consulting with Dr. Samek regarding his prior testimony, this will somehow hinder the state’s preparation of its case. This argument is purely speculative. At no time since Mr. Schwab’s case became final did opposing attempt to initiate contact with Dr. Samek regarding any testimony he may provide. The state raises this issue for the first time only after Dr. Samek contacted the state in an abundance of caution.

3. The state's assertion of a privilege violates Section 90.501, Fla. Stat. (2006) which provides, in relevant part, that no person in a legal proceeding has a privilege to "prevent another from being a witness, from disclosing any matter, or from producing any object or writing." There is no recognizable "witness privilege" under the Rules, statutes or decisional law governing such procedures.

4. The State also asserts that Dr. Samek cannot testify for Schwab because of a conflict of interest relying upon *Walton v. State*, *** So.2d *** (Fla.***). The state's reliance on *Walton* in support of its argument is misplaced. Generally, conflict of interest claims arise in multiple representations or successive representations of co-defendants. No court has ever held that a conflict arises in such instances as the instant case.

5 For example, conflict of interest claims exist when a lawyer's personal obligations may be divergent to his client's interest. This rule regarding conflict of interest claims has been in place since *Cuyler v. Sullivan*, 446 U.S. 335 (1980). In *Cuyler*, the party must demonstrate that counsel actively represented conflicting interests and that an actual conflict of interest adversely affected his lawyer's performance.

6. In this case, *Walton* is inapplicable because the state and Mr. Schwab are not co-defendants. The holding of *Walton* has never been extended by any court in a manner in which the state argues. See generally the law of conflict cases, *Strickland v. Washington*, 466 U.S. 668 (1984); *Mickens v. Taylor*, 122 S.Ct. 1237 (2002); *Burger v. Kemp*, 483 U.S. 776 (1987); *Holloway v. Arkansas*, 435 U.S. 475 (1978).

7. The State also argues that they will not waive any privilege but fails to cite with specificity which privilege they are claiming under law. A claim of privilege must be by statute and not decisional law. See *Girardeau v. State*, 403 So.2d 513 (Fla. 1st DCA 1981). The burden is on the

party claiming the privilege to identify its statutory basis. *See C. Ehrhardt, Florida Evidence* §501.1 (2005). This only privileges recognizable under Florida law are specifically delineated by statute: Section 90.5015 (Journalist's privilege); Section 90.502 (Lawyer-client privilege); Section 90.503 (Psychotherapist-patient privilege); Section 90.5035 (Sexual assault counselor-victim privilege); Section 90.5036 (Domestic violence advocate-victim privilege); Section 90.505 (Privilege with respect to communication to clergy); and Section 90.5055 (Accountant-client privilege); Section 90.506 (Privilege with respect to trade secrets).

8. None of the foregoing privileges can be claimed by the state or by Dr. Samek. Dr. Samek's involvement with the case was limited to a review of materials and observations of witness testimony for rebuttal by the state.

9. The State has failed to meet the required burden by specifically stating which statutory privilege it is asserting. As such, Mr. Schwab would respectfully request an order from this Court allowing Dr. Samek to review portions of the record on appeal, neuropsychological reports, and scholarly journals and to consult with defense counsel and experts on this issue.

WHEREFORE, Mr. Schwab would respectfully request an Order from the Court allowing Dr. Samek to review portions of the record on appeal, neuropsychological reports, and scholarly journals and to consult with defense counsel on this issue.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply to State's Motion to Strike and for Protective Order has been furnished by fax, e-mail and U.S. Mail, first class postage, to all counsel of record on this 16th day of August, 2007.

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