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

CASE No. 91-7249-CF-A

STATE OF FLORIDA,
Plaintiff,

CAPITAL CASE
EXECUTION SCHEDULED
JULY 1, 2008
6:00 P.M.

v.

MARK DEAN SCHWAB,
Defendant.
_____/

ANSWER TO THIRD SUCCESSIVE MOTION TO VACATE AND OPPOSITION TO STAY OF EXECUTION

COMES NOW the State of Florida, by and through counsel, and responds as follows to Schwab's third successive motion for post-conviction relief. For the reasons set out below, that motion should be summarily denied:

INTRODUCTION

Schwab's motion is not only untimely, but also is procedurally barred. The State waives neither defense. However, putting those issues aside for the sake of argument, Schwab fails to plead a basis for relief under *Baze, Lightbourne,* and the Florida Supreme Court's two prior decisions in his own case. **Nothing Schwab has alleged could not have been raised in his prior post-conviction motions.**

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

THE MOTION IS UNTIMELY

Under the express terms of this Court's June 13, 2008, order, Schwab was directed to file any successive post-conviction motion by 1:00 PM on June 20, 2008. Schwab did not do that –- instead, counsel for the State did not receive the motion until after 2:00 PM, and, even then, the motion was incomplete. That motion refers to at least 14 exhibits, **none of which were e-mailed to the State along with the motion**. The e-mail to which the motion was attached stated that the exhibits would be sent by "overnight mail." Becuase of the intervening weekend, the State did not have the entire motion until Monday,

June 23, 2008. That deliberate refusal to comply with the order of this Court is a sufficient basis for denial of the motion.[1]

PROCEDURAL HISTORY

This motion is the third successive motion for post-conviction relief under *Florida Rule of Criminal Procedure* 3.851 that Schwab has filed since his death warrant was signed in July of 2007. Both previous motions contained lethal injection claims which were denied by this Court and which were affirmed on appeal to the Florida Supreme Court. *Schwab v. State*, 969 So. 2d 318 (Fla. 2007); *Schwab v. State,* 33 Fla. L. Weekly S67 (Fla. Jan. 24, 2008), *reh'g denied*, 2008 Fla. LEXIS 932 (Fla. May 24, 2008).[2] Schwab sought certiorari review of the November 1, 2007, decision, which the United States Supreme Court denied on May 19, 2008. *Schwab v. Florida*, 2008 U.S. LEXIS 4273 (U.S. May 19, 2008).[3] On that day, Schwab's execution was rescheduled for July

[1] Ultimately, the exhibits were e-mailed to the State after the close of business on Friday. That does not cure Schwab's non-compliance with this Court's order.

[2] Schwab filed a motion to withdraw opinion and permit supplemental briefing in light of the *Baze* decision. The Florida Supreme Court denied that motion on May 21, 2008. (Exhibit 1).

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

1, 2008. On May 23, 2008, Schwab filed a motion for production of additional public records from the Florida Department of Corrections. Following a June 12, 2008, hearing on the Department's objections, this Court entered an order on Friday, June 13, 2008, directing the Department to produce the requested records, and ordering Schwab to file any successive post-conviction relief motion by 1:00 PM on Friday, June 20, 2008.

RESPONSE TO CLAIM FOR RELIEF

Schwab's third successive motion consists entirely of a challenge to Florida's lethal injection procedure. The procedure at issue is the one that was upheld in Schwab's two prior successive motions; is the one that was upheld twice on appeal by the Florida Supreme Court in Schwab's case; is the one that the Florida Supreme Court upheld against an identical challenge in *Lightbourne v. McCollum*, 969 So. 2d 326 (Fla. 2007); is the one that was at issue when the United States Supreme Court denied certiorari review in *Schwab* and *Lightbourne*; and is the one that was cited with approval by the *Baze* **dissenters.**

This Successive Motion is Procedurally Barred.

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

> A second or successive motion may be dismissed if the judge finds that it fails to allege new or different

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

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

This motion is Schwab's **third successive** post-conviction relief motion challenging Florida's lethal injection procedures. At all times since Schwab's execution was scheduled, his execution was to be carried out using the lethal injection procedures put into place by the Florida Department of Corrections on August 1, 2007. **Those procedures have not changed since their adoption and are the procedures that were upheld in *Lightbourne* as well as in Schwab's own case on two separate occasions.** Neither the procedures to be used, nor the fact that they have not changed since their adoption on August 1, 2007, is in any way disputed by Schwab. Because that is so, Schwab's third successive motion presents nothing more than his attempt to litigate the same issue that has already been decided adversely to him on two prior occasions. That is an abuse of process. No new or different grounds for relief are alleged, and

Schwab's successive motion should be denied in all respects because it is procedurally barred. **Simply put, the claims contained in Schwab's most recent motion have already been decided adversely to him by this Court and the Florida Supreme Court in his two previous challenges to lethal injection.** To the extent that Schwab attempts to rely on the report of Arvizu, that is the "quality assurance expert" that this Court and the Florida Supreme Court rejected in Schwab's previous successive motion. Nothing has changed about that person's proposed testimony, knowledge or qualifications. And, most importantly, as the Florida Supreme Court noted previously, "Schwab fails to sufficiently explain how this auditor is qualified to provide a reliability and efficacy report on DOC's method of execution." *Schwab v. State*, 969 So. 2d 318, 324 (Fla. 2007).

Schwab's execution was scheduled on May 19, 2008. Nothing was filed in this Court until June 20, 2008, eleven calendar days before Schwab's execution is set to occur.[4]

To the extent that Schwab discusses Florida, Ohio and Georgia executions on pages 5-17 of the motion, and physician

[4] Schwab has apparently devoted substantial energy to litigating his 42 U.S.C. § 1983 action, even though § 27.702 of the *Florida Statutes*, and the decisions of the Florida Supreme Court, *see, e.g., State ex rel. Butterworth v. Kenny*, 714 So. 2d 404 (Fla. 1998), explicitly prohibit Schwab's CCRC attorneys from representing Schwab in that case.

assisted suicide in the Netherlands on pages 17-18 of the motion, **all of that information was readily available at the time of Schwab's prior filings in this case.** This evidence was available long ago, and is not "newly discovered." It is also not a basis for relief, and its inclusion in this motion is an abuse of process because it could and should have been raised in Schwab's prior post-conviction motions. Moreover, a statistical analysis cannot predict whether there will be an error in a particular case, nor can it show a "demonstrated risk of severe pain" as *Baze* requires. *Baze v. Rees*, 128 S. Ct. 1520, 1537 (2008); *see, McCleskey v. Kemp*, 481 U.S. 279, 293 (1987) ("Whether in a given case that is the answer [the presence of racial factors], **it cannot be determined from statistics**. [citation omitted]"). The "statistical analysis" demonstrates nothing. *See, United States v. Mitchell*, 502 F.3d 931, 982 (9th Cir. 2007) ("His related claim regarding disproportionate impact relies solely on statistical data and is, without more, likewise insufficient."), *cert. denied*, *Mitchell v. United States*, 2008 U.S. LEXIS 4848 (U.S., June 9, 2008).

To the extent that Schwab asserts, on pages 18-19 of the successive motion, that Arvizu identifies "examples" of Florida's procedures failing to meet the legal standard established in *Baze*, there is no showing that she is qualified

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

To the extent that Schwab attempts to offer "alternatives for Florida," Schwab's complaints about training are the same claims that either were, or could have been, raised in his previous successive motions. It is an abuse of process to raise those repetitive issues in this motion.

Schwab's second "alternative" calls for a **reduction** in the amount of sodium thiopental. The premise of this "alternative" is the effective delivery of the sodium thiopental. Subsumed within that premise is the recognition that the drug will render the inmate unconscious. If unconscious, as Schwab assumes he will be, there can be no risk of pain, let alone a "substantial risk" as required by *Baze*. This suggestion is not based on anything that was not known at the time his two previous lethal

injection challenges were filed, and could have been raised in either of those proceedings. Further, the irony of this position is that it accepts the use of pancuronium bromide, the very drug that Schwab argued should be removed from the procedure in his prior proceedings. *Schwab v. State*, 969 So. 2d 318, 322 n. 1 (Fla. 2007) (framing issues as, *inter alia* "rejecting his argument that the use of a paralytic violates the Eighth Amendment"). The inconsistent positions taken by Schwab regarding the three-drug protocol underscores the *Baze* Court's warning that "for many people who oppose it, no method of execution would ever be acceptable." *Baze*, 128 S.Ct. at 1537. In any event, *Baze* says nothing about "counting the minutes" -- again, the irony of Schwab's position is that after failing on the single-drug protocol that he (and Baze) advocated, he now wants to **lower** the dose of anesthetic claiming that that will speed up the execution process even though the protocol he wanted in November would significantly **lengthen** to duration of the execution. *See, Baze, supra,* at 1541 (Alito, J., concurring). Neither "alternative" is legitimate, and neither addresses a substantial risk of serious harm. *Baze, supra*, at 1532. Simply put, reducing the dose of sodium thiopental does not reduce a substantial risk of severe pain. Because it is undisputed that the dose of thiopental used in Florida will

absolutely anesthetize and render the inmate insensate, there can be no "pain" at all, let alone a "risk of severe pain." Schwab's argument ignores that reality, and posits no relevant "alternative."

Schwab's Claim has no Basis, Anyway.

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

In affirming the denial of relief as to a number of Schwab's "general" lethal injection claims,[5] the Florida Supreme Court found the following footnote sufficient for its purposes:

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

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

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

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

> In turning to the evidence presented in *Lightbourne* regarding this claim, we find that the toxicology and anesthesiology experts who testified in *Lightbourne* agreed that if the sodium pentothal is successfully administered as specified in the protocol, the inmate will not be aware of any of the effects of the pancuronium bromide and thus will not suffer any pain. Moreover, the protocol has been amended since Diaz's execution so that the warden will ensure that the inmate is unconscious before the pancuronium bromide and the potassium chloride are injected. Schwab does not allege that he has additional experts who would give different views as to the three-drug protocol. Given the record in *Lightbourne* and our extensive analysis in our opinion in *Lightbourne v. McCollum*, we reject the conclusion that lethal injection as applied in Florida is unconstitutional.

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

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

> Next, Schwab asserts that newly discovered evidence shows that the DOC execution team is not being trained properly in preparing and administering the correct chemical amounts as required and that FDLE agents are not sufficiently trained to identify potential problems. In support, Schwab attached the FDLE notes allegedly showing that: (1) the DOC execution team botched two of the five training practice sessions; and (2) the FDLE monitor observing the mixing of the chemicals is not sufficiently trained. Even taking Schwab's allegations as true, Schwab has not met the standard that this Court set forth in *Jones v. State*, 701 So. 2d 76, 79 (Fla. 1997):

> In order for a punishment to constitute cruel or unusual punishment, it must involve "torture or a lingering death" or the infliction of "unnecessary and wanton pain." *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L.Ed.2d 859 (1976); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 67 S. Ct. 374, 91 L. Ed. 422 (1947). As the Court observed in *Resweber*: "The cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely." *Id*. at 464, 67 S. Ct. at 376.

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

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

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

> Determining the specific methodology and the chemicals to be used are matters left to the DOC and the executive branch, and this Court cannot interfere with the DOC's decisions in these matters unless the petitioner shows that there are inherent deficiencies that rise to an Eighth Amendment violation. Lightbourne has failed to overcome the presumption of deference we give to the executive branch in fulfilling its obligations, and he has failed to show that there is any cruelty inherent in the method of execution provided for under the current procedures.

Alternatively, even if the Court did review this claim under a "foreseeable risk" standard as Lightbourne proposes or "an unnecessary" risk as the *Baze* petitioners propose,[6] we likewise would find that Lightbourne has failed to carry his burden of showing an Eighth Amendment violation. As stressed repeatedly above, it is undisputed that there is **no risk of pain if the inmate is unconscious before the second and third drugs are administered**.[7] After Diaz's execution, the DOC added additional safeguards into the protocol to ensure the inmate will be unconscious before the execution proceeds. In light of these additional safeguards and the amount of the sodium pentothal used, which is a lethal dose in itself, [FN25] we conclude that Lightbourne has not shown a substantial, foreseeable or unnecessary risk of pain in the DOC's procedures for carrying out the death penalty through lethal injection that would violate the Eighth Amendment protections.

> [FN25] As defense counsel conceded during oral argument, there was no evidence presented that once the five-gram dose of sodium pentothal has been properly administered and an inmate is rendered unconscious, there is any likelihood that he will become conscious during the execution, even if the procedure lasts for thirty minutes or more. The evidence clearly established that this dose is lethal and once unconsciousness is reached, the inmate will slip only deeper into unconsciousness until death results. This conclusion is borne out by the medical testimony.

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

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

> After reviewing the evidence and testimony presented below and the lethal injection procedures themselves, we affirm the circuit court's order denying relief for the reasons set forth above and deny Lightbourne's all writs petition. Lightbourne has failed to show that Florida's current lethal injection procedures, as actually administered through the DOC, are constitutionally defective in violation of the Eighth Amendment of the United States Constitution.

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

Baze Forecloses this Claim.

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

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

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

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

Baze v. Rees, 128 S. Ct. at 1528. There is no dispute that Florida’s procedure uses the same drugs in greater amounts. *See,*

Lightbourne, supra. **At least 30 of the 36 States that use lethal injection use this same combination of three drugs.** *Baze v. Rees*, 128 S. Ct. at 1527. Against these facts, there is no dispute that Florida's procedure is at least "substantially similar" to the Kentucky procedure (though the Florida procedure does include additional safeguards that Kentucky does not use). Coupled with the *Baze* dissent's approval of Florida's procedures, Schwab's claims collapse.

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

> Recognizing the importance of a window between the first and second drugs, other States have adopted safeguards not contained in Kentucky's protocol. *See* Brief for Criminal Justice Legal Foundation as Amicus Curiae 19-23. [footnote omitted] Florida pauses between injection of the first and second drugs so the warden can "determine, after consultation, that the inmate is indeed unconscious." *Lightbourne v. McCollum*, 969 So. 2d 326, 346 (Fla. 2007) (*per curiam*) (internal quotation marks omitted). The warden does so by touching the inmate's eyelashes, calling his name, and shaking him. *Id.,* at 347. [FN6] If the inmate's consciousness remains in doubt in Florida, "the medical team members will come out from the chemical room and consult in the assessment of the inmate." *Ibid*. During the entire execution, the person who inserted the IV line monitors the IV access point and the inmate's face on closed circuit television. *Ibid*.
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> > [FN6] Florida's expert in *Lightbourne v. McCollum*, 969 So. 2d 326 (Fla. 2007) (*per curiam*), who also served as Kentucky's expert in this case, testified that the eyelash test is "probably the most common first assessment that we use in the operating room to determine . . . when a

> patient might have crossed the line from being conscious to unconscious." 4 Tr. in *Florida v. Lightbourne,* No. 81-170-CF (Fla. Cir. Ct., Marion Cty.), p. 511, online at http://www.cjlf.org/files/LightbourneRecord.pdf (all Internet materials as visited Apr. 14, 2008, and in Clerk of Court's case file). "A conscious person, if you touch their eyelashes very lightly, will blink; an unconscious person typically will not." *Ibid*. The shaking and name-calling tests, he further testified, are similar to those taught in basic life support courses. *See id*., at 512.

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

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

> **What each of the forbidden punishments had in common was the deliberate infliction of pain for the sake of pain -- "superadd[ing]" pain to the death sentence through torture and the like.**
>
> We carried these principles further in *In re Kemmler*, 136 U.S. 436, 10 S. Ct. 930, 34 L. Ed. 519 (1890). There we rejected an opportunity to incorporate the Eighth Amendment against the States in a challenge to the first execution by electrocution, to be carried out by the State of New York. *Id.,* at 449, 10 S. Ct. 930, 34 L. Ed. 519. In passing over that question, however, we observed that "[p]unishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarous, something more than the mere extinguishment of life." *Id*., at 447, 10 S. Ct. 930, 34 L. Ed. 519. We noted that the New York statute adopting electrocution as a method of execution "was passed in the effort to

devise a more humane method of reaching the result." *Ibid.*

Petitioners do not claim that lethal injection or the proper administration of the particular protocol adopted by Kentucky by themselves constitute the cruel or wanton infliction of pain. **Quite the contrary, they concede that "if performed properly," an execution carried out under Kentucky's procedures would be "humane and constitutional."** Brief for Petitioners 31. That is because, as counsel for petitioners admitted at oral argument, **proper administration of the first drug, sodium thiopental, eliminates any meaningful risk that a prisoner would experience pain from the subsequent injections of pancuronium and potassium chloride.** *See* Tr. of Oral Arg. 5; App. 493-494 (testimony of petitioners' expert that, if sodium thiopental is "properly administered" under the protocol, "[i]n virtually every case, then that would be a humane death").

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

Simply because an execution method may result in pain, either by accident or as an inescapable consequence of

> **death, does not establish the sort of "objectively intolerable risk of harm" that qualifies as cruel and unusual.** In *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 67 S. Ct. 374, 91 L. Ed. 422 (1947), a plurality of the Court upheld a second attempt at executing a prisoner by electrocution after a mechanical malfunction had interfered with the first attempt. The principal opinion noted that **"[a]ccidents happen for which no man is to blame,"** *id.*, at 462, 67 S. Ct. 374, 91 L. Ed. 422, **and concluded that such "an accident, with no suggestion of malevolence,"** *id.,* at 463, 67 S. Ct. 374, 91 L. Ed. 422, **did not give rise to an Eighth Amendment violation**, *id.*, at 463-464, 67 S. Ct. 374, 91 L. Ed. 422.
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> As Justice Frankfurter noted in a separate opinion based on the Due Process Clause, however, "a hypothetical situation" involving "a series of abortive attempts at electrocution" would present a different case*. Id.*, at 471, 67 S. Ct. 374, 91 L. Ed. 422 (concurring opinion). In terms of our present Eighth Amendment analysis, such a situation -- unlike an "innocent misadventure," *id.*, at 470, 67 S. Ct. 374, 91 L. Ed. 422 -- would demonstrate an "objectively intolerable risk of harm" that officials may not ignore. *See Farmer*, 511 U.S., at 846, and n. 9, 114 S. Ct. 1970, 128 L. Ed. 2d 811. **In other words, an isolated mishap alone does not give rise to an Eighth Amendment violation, precisely because such an event, while regrettable, does not suggest cruelty, or that the procedure at issue gives rise to a "substantial risk of serious harm."** *Id.,* at 842, 114 S. Ct. 1970, 128 L. Ed. 2d 811.

Baze v. Rees, 128 S. Ct. at 1530-1531. (emphasis added). In the context of Florida's procedures, the standard applied by the Florida Supreme Court in *Lightbourne* and *Schwab* is a **lower** (more defense-friendly) standard than the one adopted by the United States Supreme Court. If Schwab cannot meet the standard established used by the Florida Supreme Court in his own case,

then he cannot meet the higher standard established by the United States Supreme Court in *Baze*. Coupled with the denial of certiorari review in both *Schwab* and *Lightbourne*, there is no rational basis for arguing that Florida's procedures do not satisfy the Eighth Amendment in all respects.

To the extent that Schwab attempts to suggest "alternative" procedures, that argument fails for two reasons. As previously stated, it is too late to raise this claim – Schwab could and should have raised this claim before, and is not allowed to litigate it on a piecemeal basis. The fact that Schwab waited until his third successive motion (which was filed 11 days prior to his scheduled execution) to propose "alternatives" to Florida's procedure (which has been known for years) is an abuse of process as well as a procedural bar.

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

> Much of petitioners' case rests on the contention that they have identified a significant risk of harm that can be eliminated by adopting alternative procedures, such as a one-drug protocol that dispenses with the use of pancuronium and potassium chloride, and additional monitoring by trained personnel to ensure that the first dose of sodium thiopental has been adequately delivered. Given what our cases have said

about the nature of the risk of harm that is actionable under the Eighth Amendment, a condemned prisoner **cannot successfully challenge a State's method of execution merely by showing a slightly or marginally safer alternative**.

Permitting an Eighth Amendment violation to be established on such a showing would threaten to transform courts into boards of inquiry charged with determining "best practices" for executions, with each ruling supplanted by another round of litigation touting a new and improved methodology. Such an approach finds no support in our cases, would embroil the courts in ongoing scientific controversies beyond their expertise, and would substantially intrude on the role of state legislatures in implementing their execution procedures -- a role that by all accounts the States have fulfilled with an earnest desire to provide for a progressively more humane manner of death. *See Bell v. Wolfish*, 441 U.S. 520, 562, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979) ("The wide range of 'judgment calls' that meet constitutional and statutory requirements are confided to officials outside of the Judicial Branch of Government"). Accordingly, we reject petitioners' proposed "unnecessary risk" standard, as well as the dissent's "untoward" risk variation. *See post*, at 2, 11 (opinion of GINSBURG, J.). [FN2]

> [FN2] The difficulties inherent in such approaches are exemplified by the controversy surrounding the study of lethal injection published in the April 2005 edition of the British medical journal the *Lancet*. After examining thiopental concentrations in toxicology reports based on blood samples drawn from 49 executed inmates, the study concluded that "most of the executed inmates had concentrations that would not be expected to produce a surgical plane of anaesthesia, and 21 (43%) had concentrations consistent with consciousness." Koniaris, Zimmers, Lubarsky, & Sheldon, *Inadequate Anaesthesia in Lethal Injection for Execution*, 365 Lancet 1412, 1412-1413. The study was widely cited around

> the country in motions to stay executions and briefs on the merits. *See, e.g.*, Denno, *The Lethal Injection Quandary: How Medicine Has Dismantled the Death Penalty*, 76 Fordham L. Rev. 49, 105, n. 366 (2007) (collecting cases in which claimants cited the *Lancet* study). But shortly after the *Lancet* study appeared, peer responses by seven medical researchers criticized the methodology supporting the original conclusions. See Groner, *Inadequate Anaesthesia in Lethal Injection for Execution*, 366 Lancet 1073-1074 (Sept. 2005). These researchers noted that because the blood samples were taken "several hours to days after" the inmates' deaths, the postmortem concentrations of thiopental -- a fat-soluble compound that passively diffuses from blood into tissue -- could not be relied on as accurate indicators for concentrations during life. *Id.,* at 1073. The authors of the original study responded to defend their methodology. *Id.,* at 1074-1076. *See also post*, at 2-4 (BREYER, J., concurring in judgment).
>
> We do not purport to take sides in this dispute. We cite it only to confirm that a "best practices" approach, calling for the weighing of relative risks without some measure of deference to a State's choice of execution procedures, would involve the courts in debatable matters far exceeding their expertise.

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

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

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

In order to meet their "heavy burden" of showing that Kentucky's procedure is "cruelly inhumane," *Gregg*, 428 U.S., at 175, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (joint opinion of Stewart, Powell, and STEVENS, JJ.), petitioners point to numerous aspects of the protocol that they contend create opportunities for error. **Their claim hinges on the improper administration of the first drug, sodium thiopental. It is uncontested that, failing a proper dose of sodium thiopental that would render the prisoner unconscious, there is a substantial, constitutionally unacceptable risk of**

> **suffocation from the administration of pancuronium bromide and pain from the injection of potassium chloride.** See Tr. of Oral Arg. 27. **We agree with the state trial court and State Supreme Court, however, that petitioners have not shown that the risk of an inadequate dose of the first drug is substantial. And we reject the argument that the Eighth Amendment requires Kentucky to adopt the untested alternative procedures petitioners have identified.**

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

As the Florida Supreme Court held in *Lightbourne,* there are a number of safeguards built into Florida's procedures to avoid the possibility of injecting potentially painful drugs into a conscious inmate -– those safeguards are not a part of the Kentucky procedures, and the United States Supreme Court held that they were not constitutionally required:

> Kentucky has adopted a method of execution believed to be the most humane available, one it shares with 35 other States. Petitioners agree that, if administered as intended, that procedure will result in a painless death. **The risks of maladministration they have suggested -- such as improper mixing of chemicals and improper setting of IVs by trained and experienced personnel -- cannot remotely be characterized as "objectively intolerable."** Kentucky's decision to adhere to its protocol despite these asserted risks, while adopting safeguards to protect against them, cannot be viewed as probative of the wanton infliction

> of pain under the Eighth Amendment. Finally, the alternative [single-drug procedure] that petitioners belatedly propose[8] has problems of its own, and has never been tried by a single State.

Baze v. Rees, 128 S. Ct. at 1537-1538. Florida's procedures are "substantially similar," and the result in *Baze* controls. This successive motion presents nothing that was not rejected by the United States Supreme Court.[9] All relief should be denied.

Finally, the Florida Supreme Court has upheld the summary denial of lethal injection claims in successive post-conviction relief motions on the authority of *Baze* and *Lightbourne. See, Griffin v. State*, SC06-1055 (Fla. June 2, 2008), (unpub. op.). (Exhibit 2). There is no reason that this case should be regarded differently –- summary denial is proper. Avoidance of the possibility of any pain is neither possible nor required under the Constitution. Because that is so, Schwab is not entitled to an evidentiary hearing, in addition to the procedural bars to such a hearing that are set out herein. *Baze*

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

[9] In fact, since *Baze* was decided, the United States Supreme Court has denied stays of execution in at least 7 cases. Each of those executions was carried out by lethal injection.

128 S.Ct. at 1529. Likewise, Schwab's attempt to offer yet another approach or refinement to the lethal injection procedure is not a basis for a stay or for any other relief. *Baze*, 128 S.Ct. at 1532. All relief should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by **E-mail, FAX** and **U.S. Mail** to: **Mark Gruber**, Assistant CCRC-Middle, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619 (813)740-3554, **Judge Charles M. Holcomb**, Circuit Court Judge, 506 S. Palm Ave., Titusville, Florida 32796-3592 (321)264-6904, and **Robert Wayne Holmes,** Assistant State Attorney, 2725 Judge Fran Jamieson Way, Building D, Viera, Florida 32940 (321)617-7546, on this _____ day of June, 2008.

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Of Counsel