CASE NO._____

IN THE SUPREME COURT OF THE UNITED STATES

MARK DEAN SCHWAB

Petitioner,
CAPITAL CASE - DEATH WARRANT
EXECUTION SCHEDULED FOR:
NOVEMBER 15, 2007

v.

FLORIDA, *et al*.
Respondents.

OPPOSITION TO MOTION FOR STAY OF EXECUTION

COME NOW the Respondents, by and through undersigned counsel, and respond as follows to Schwab's application for a stay of execution "pending filing and consideration of a petition for writ of certiorari," which was filed on the afternoon of November 9, 2007, six days before his scheduled execution. For the reasons set out below, Schwab's motion for stay should be denied:

INTRODUCTION

The basis of Schwab's motion for stay of execution is his assertion that he will raise exactly the same issues in his petition for writ of certiorari that are before this Court in *Baze v. Kentucky*. And, to support that claim, Schwab quotes the *Baze* questions verbatim and adopts them as his own. The problem for Schwab with that claim is twofold: first, Baze's *Merits Brief* does

not press each sub-claim subsumed in the questions, and, second, Schwab did not fairly present these issues to the Florida courts.

Further, the Florida Supreme Court's factfindings in this case and in *Lightbourne v. McCollum* demonstrate that there is no probability of success on the merits of Schwab's claim because Florida's execution procedures are designed to ensure that no potentially painful drugs are injected until such time as the inmate is deeply unconscious. Because that is so, Schwab's motion for a stay of execution should be denied.

THE *SCHWAB* ISSUES

In its decision affirming the trial court's denial of Schwab's successive state postconviction relief motion, the Florida Supreme Court framed the issues as follows:

> As to this issue, Schwab asserts that the postconviction court erred by: (1) summarily denying his Eighth Amendment claim; (2) **rejecting a foreseeable risk standard**; (3) rejecting his argument that the use of a paralytic violates the Eighth Amendment; (4) declining to take judicial notice of another case which was also raising this same claim (the case of *State v. Lightbourne*, No. 1981-170CF (Fla. 5th Cir. Ct.)); (5) deferring unduly to the Department of Corrections; (6) declining to find that the problems with Angel Diaz's execution are relevant to this claim; (7) denying Schwab's request for public records; (8) rejecting Schwab's argument that consciousness assessment must meet a clinical standard using medical expertise and equipment; and (9) finding the motion for postconviction relief was insufficiently pled.

Schwab v. State, 32 Fla. L. Weekly S697 (Fla. Nov. 1, 2007).

SCHWAB DID NOT PRESERVE THE ISSUES HE CLAIMS HE INTENDS TO RAISE

Contrary to Schwab's assertions, he did not claim, before the Florida Courts, that the Eighth Amendment prohibited "unnecessary risk" of pain and suffering in the carrying out of his execution. As the Florida Supreme Court pointed out, Schwab argued for a standard of "foreseeable risk." *Schwab v. State, supra.* Schwab cannot change his claim at this point in order to make his case appear like *Baze* – it is not, because he did not raise the same issues, and, further, Schwab is under an active death warrant and did not come to this Court until six days (**three** business days) before his scheduled execution. Likewise, the second *Baze* question fails because it was not presented to the Florida courts. Schwab alleged nothing about "readily available alternatives," and, in fact, a review of the *Baze Merits Brief* reveals that that petitioner has not done so, either. Finally, the third *Baze* question was not fairly presented to the Florida courts, either, beyond a simplistic claim that the use of a paralytic (pancuronium bromide) violates the Eighth Amendment. **Schwab has never claimed that the use of thiopental sodium or potassium chloride gives rise to an Eighth Amendment claim.** Because Schwab did not raise the issues he now claims he will raise before this Court, there is no basis for a stay of execution based on issues that were not fairly presented to the State courts.

THE FLORIDA EXECUTION PROCEDURES ARE DESIGNED TO ELIMINATE THE POSSIBILITY OF THE INMATE EXPERIENCING ANY "PAIN AND SUFFERING"

Florida's execution procedures are designed to eliminate the possibility of any conscious pain and suffering on the part of the inmate by ensuring that the inmate is unconscious as a result of anesthetic drugs before any potentially painful drugs are administered. In *Lightbourne*, which is the decision supplying the factual underpinnings of the Florida Supreme Court's *Schwab* decision, that Court emphasized that it is undisputed that the 5000 milligram dose of thiopental sodium (Pentothal) used in an execution in Florida is lethal, and that there is no likelihood that an inmate receiving that dose of the anesthetic will regain consciousness during the execution. *Lightbourne v. McCollum*, 32 Fla. L. Weekly S687, 697 n. 25 (Fla. 2007). Likewise, as the *Lightbourne* Court found, "[if] the sodium pentothal is properly injected, **it is undisputed that the inmate will not feel pain from the effects of the subsequent chemicals**." *Lightbourne, supra*. Those facts are not in dispute, and, in fact, were conceded by Lightbourne's counsel during oral argument. *Lightbourne*, *supra*, n. 25.[1]

In deciding this claim, to the extent that Schwab raised it in

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[1] The *Baze* petition for writ of certiorari makes little reference to thiopental sodium beyond stating that that drug "could be replaced with propafol." *Baze* Pet. at 4. In his *Merits Brief*, Baze has changed his argument to be that the **three-gram** dose of thiopental sodium used in Kentucky is sufficient, **by itself**, to "independently cause death." *Merits Brief*, at 53. Florida uses **five** grams of the same drug. *Lightbourne, supra.*

State Court, the Florida Supreme Court held:

> 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.**[2] 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, 32 Fla. L. Weekly S697, 698 (Fla. Nov. 1, 2007) (emphasis added).

Because the effect of the dose of thiopental sodium used in carrying out an execution in Florida is not in dispute, Schwab is in the peculiar position of asking this Court to grant a stay of execution so he can file a certiorari petition asking this Court to review facts that were undisputed in the State Courts. Given that there is no evidence to dispute the findings of the Florida Supreme Court about the effect of thiopental sodium, there is no case or controversy, and, thus, no matter worthy of this Court's discretionary jurisdiction. The application for stay of execution

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[2] The drugs are contained in six (6) separate syringes, and are injected separately. Between each drug, the intravenous tubing is flushed with saline solution. Appendix A at 6-7.

should be denied.

To the extent that the procedures for carrying out an execution are challenged as inadequate in some way, those procedures set out that the drugs will be mixed by a pharmacist; that medically qualified personnel will establish the intravenous lines; that medically qualified personnel having the necessary training, licensure and certification will be present in the event that a "central line" placement is necessary; that the IV sites will be monitored by a medically qualified person by means of closed circuit television to observe possible problems; that all members of the execution team are familiar with the purpose and effect of the drugs utilized; and that, before any potentially painful drugs are administered, the warden in charge, **in consultation with an appropriate medically-trained person**, will determine that the inmate is unconscious by conducting a basic neurological assessment. Appendix A at 11. Those procedures, as the Florida Supreme Court found, are adequate to avoid either unnecessary or foreseeable pain to the inmate.

The point in the execution process at which unnecessary or foreseeable pain can occur is with the injection of pancuronium bromide and potassium chloride. However, as the Florida Supreme Court found, Florida's execution procedures are designed to ensure that neither drug is injected until the inmate has been determined to be unconscious. The Florida Supreme Court held:

The next significant issue raised by Lightbourne focuses on whether DOC's protocol for assessing consciousness is adequate. If the inmate is not fully unconscious when either pancuronium bromide or potassium chloride is injected, or when either of the chemicals begins to take effect, the prisoner will suffer pain. Pancuronium bromide causes air hunger and a feeling of suffocation, and potassium chloride burns and induces a painful heart attack.

If the sodium pentothal is properly injected, it is undisputed that the inmate will not feel pain from the effects of the subsequent chemicals. While we cannot determine whether Diaz suffered pain, as detailed above, the protocol has changed since the Diaz execution, with the most significant change consisting of a pause after the sodium pentothal is injected in order to assess the inmate's consciousness. The DOC has clearly attempted to reduce the risk that the human errors will occur in future executions.

Although Lightbourne suggests that trained medical personnel would do a better job of assessing consciousness, based on the evidence presented below and after reviewing the newly revised protocol, we cannot conclude that Lightbourne has sufficiently demonstrated that the alleged deficiencies rise to the level of an Eighth Amendment violation. A claim that the protocol can be improved and the potential risks of error reduced can always be made. However, as this Court has already recognized, the Eighth Amendment is not violated simply because there is a mere possibility of human error in the process.

Moreover, this claim must be reviewed in light of the testimony presented. As mentioned above, sodium pentothal is an extremely fast-acting sedative which will have an immediate effect if it is injected properly. According to Dr. Dershwitz, a person will be rendered unconscious in a minute or less if only a few hundred milligrams are injected into the patient. **In lethal injection procedures in which five grams of this chemical are injected, it should be clear that there is a problem if the inmate is still talking minutes after the injection, as occurred in Diaz's execution. Moreover, the August 2007 procedures requires the warden to determine that the inmate is indeed unconscious "after consultation." Warden Cannon also testified that he would consult the medically**

> **qualified members of his team in making this assessment. If the warden determines that there is a problem and the inmate is not unconscious, he must suspend the execution process and the execution team will assess the viability of the secondary access site. Once a viable access site has been secured, the team warden will order the execution to proceed, and the executioners will inject another five grams of sodium pentothal into the inmate. Thus, even if the first five grams of the drugs were injected subcutaneously and took longer to be absorbed into the inmate's system, the inmate would have a total of ten grams in his system by the time that the warden made his second assessment of unconsciousness, which is required before the pancuronium bromide is injected.**

Lightbourne v. McCollum, 32 Fla. L. Weekly S687, 695 (Fla. Nov. 1, 2007). This issue turns wholly on its facts, and there is no claim that the Florida Supreme Court's factfindings are incorrect. Because of the redundant safeguards contained in Florida's execution procedures, there is no possibility of pain because the inmate will be unconscious before any drugs which could cause pain are allowed to be used. Obviously, if the inmate is unconscious, he is unable to feel pain, and thus unable to invoke the Eighth Amendment. Under Florida's execution procedures, there is no constitutional issue.

Under the facts of this case, the "Constitutional standard" does not make a difference in the result.

The first question at issue in *Baze* is whether the Eighth Amendment prohibits a means for carrying out an execution that creates an "unnecessary" risk of pain and suffering as opposed to

"only a substantial risk of the wanton infliction of pain."[3] As the Florida Supreme Court found, there is no dispute that the amount of anesthetic used in carrying out an execution is sufficient to ensure unconsciousness for a lengthy period of time, and, in fact, is given in an amount that is, itself, lethal. As the Florida Supreme Court further found, the Florida procedures are designed to ensure that the inmate is unconscious before any potentially painful drugs are administered. In other words, because the inmate will be unconscious before the other drugs are given, there is no possibility of pain and suffering, because, whatever the effects of the remaining drugs, the inmate will be unaware of them. Because there is no possibility of the inmate perceiving the effects of the remaining drugs, there are no Constitutional implications, because there can be no pain. Because there can be no pain, there is no federal question, and certiorari review is inappropriate.

To the extent that specific discussion of the applicable standard is necessary, the Florida Supreme Court held:

> 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, 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**. After Diaz's execution, **the DOC added additional safeguards into the protocol to ensure the**

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[3] Schwab framed the issue as being a "foreseeable risk."

> **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.
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> > [FN25] As defense counsel conceded during oral argument,[4] 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.

Ian Deco Lightbourne v. McCollum, 32 Fla. L. Weekly S687 (Fla. Nov. 1, 2007) (emphasis added). Against those facts, it is clear that however this Court may ultimately decide *Baze*, that decision will not benefit Schwab -- whatever standard this Court may decide to apply is satisfied by the Florida procedures.

The second and third questions presented in *Baze* are interrelated, because both questions concern the availability of alternative drugs which are claimed to "pose less risk of pain and suffering." In the context of Schwab's case, he raised no claim relating to the use of thiopental sodium to render the inmate

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[4] Schwab's counsel made the same concession at oral argument.

unconscious. That claim has never been fairly presented to the State Courts, and is not appropriate for certiorari review.

Further, there is, and has been, no claim that the 5000 milligram dose of thiopental sodium used in a Florida execution will not render the inmate rapidly unconscious and maintain that state of unconsciousness for many hours. Likewise, there is no dispute that once an inmate is rendered unconscious by the injection of thiopental sodium, he will not perceive the injection of the other drugs, and will suffer no pain. In other words, because the inmate will not feel anything when the pancuronium bromide and potassium chloride are injected, the existence of "alternative" drugs has no constitutional significance. Because Florida's execution procedures ensure that the inmate has been rendered unconscious from the injection of a massive dose of thiopental sodium[5] before the remaining drugs are injected, whether or not those drugs might cause "pain and suffering" to a conscious individual is not a factor.

In his *Merits Brief*, the petitioner in *Baze* argues that a barbiturate-only procedure should be used, or that a medical doctor is required to be present to "monitor anesthetic depth." Given that medical doctors make mistakes with anesthesia, *Merits Brief* at 11,

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[5] It is undisputed that the dose of thiopental sodium employed will cause rapid, deep unconsciousness that will last well beyond the duration of the execution process. Because that is so, there cannot be any pain, and there is no Eighth Amendment issue to begin with.

14, it seems that Baze does not intend to rectify any Eighth Amendment issue at all.[6] In any event, under the undisputed facts of Schwab's case, no constitutional issue exists, and this case is inappropriate for the exercise of this Court's discretionary jurisdiction because it fails on the facts.

Schwab was dilatory in raising his "lethal injection claim."

For all of these reasons, none of the claims Schwab says he intends to raise in his certiorari petition provide a colorable basis for granting relief, and no stay of execution is justified in this case. *See Delo v. Stokes*, 495 U.S. 320 (1990); *Antone v. Dugger*, 465 U.S. 200 (1984); *Buenoano v. State,* 708 So. 2d 941, 951 (Fla. 1998), *citing Bowersox v. Williams*, 517 U.S. 345 (1996) (recognizing that stay of execution on second or third petition for

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[6] In fact, Baze does not agree that either option would **satisfy** the Constitution -- he states only that the existence of these "alternatives" demonstrates that Kentucky's procedures are unconstitutional. *Merits Brief*, at 59. That *ipso facto* argument tips his hand that his true objective (as evidenced by his request for a remand) is to avoid his execution for as long as possible. And, by pleading in qualified alternatives, Baze shows that what today he likes, tomorrow he will complain about. In Florida, the clamor to change to lethal injection came after the argument was made that electrocution was untoward. Today, electrocution has not been found unconstitutional -- indeed recently this year there was an electrocution in Tennessee. When Florida enacted lethal injection as an alternative to electrocution, it was clear at that time that the defense was willing to change the method despite litigation in other states as to the possible concerns about the additional method. Now the defense is really only asking that the States bend to their will and set an execution under their most current plan, which will likely be challenged by another inmate who has another idea about what the "best" procedure would be.

postconviction relief is warranted only where there are substantial grounds upon which relief might be granted). Schwab's request must be denied. *See Booker v. Wainwright,* 675 F.2d 1150 (11th Cir. 1982) (proper to grant a stay only if the petitioner has presented colorable, non-frivolous issues); *Barefoot v. Estelle*, 463 U.S. 880 (1983) (stay only justified when the petitioner presents claims which are debatable among jurists of reason).

It is undisputed that the events giving rise to Schwab's challenge to lethal injection took place on December 13, 2006, when Angel Diaz was executed. It is likewise undisputed that Schwab raised no claim challenging lethal injection as a means of execution until August 15, 2007, when he filed his first state postconviction relief motion. There is no claim that Schwab could not have raised this claim in December of 2006, and, in fact, no such claim can be made, given that Lightbourne and a large number of other death-sentenced inmates raised just such a challenge on December 14, 2006, **the day after the Diaz execution.** Schwab's death warrant was not signed until July 18, 2007, some seven months later. It was not until a month after that when Schwab first raised such a claim. As Justice Rehnquist, writing as Circuit Justice pointed out in a similar last-minute case:

> There may be very good reasons for the delay, but there is also undoubtedly what Mr. Justice Holmes referred to in another context as a "hydraulic pressure" which is brought to bear upon any judge or group of judges and inclines them to grant last-minute stays in matters of this sort just because no mortal can be totally satisfied

> that within the extremely short period of time allowed by such a late filing he has fully grasped the contentions of the parties and correctly resolved them. To use the technique of a last-minute filing as a sort of insurance to get at least a temporary stay when an adequate application might have been presented earlier, is, in my opinion, a tactic unworthy of our profession.

Evans v. Bennett, 440 U.S. 1301, 1307 (1979). In discussing last-minute stay applications, this Court has emphasized:

> Equity must take into consideration the State's strong interest in proceeding with its judgment and Harris' obvious attempt at manipulation. *See In re Blodgett*, 502 U.S. 236, 116 L. Ed. 2d 669, 112 S. Ct. 674 (1992); *Delo v. Stokes*, 495 U.S. 320, 322, 109 L. Ed. 2d 325, 110 S. Ct. 1880 (1990) (KENNEDY, J., concurring). This claim could have been brought more than a decade ago. There is no good reason for this abusive delay, which has been compounded by last-minute attempts to manipulate the judicial process. A court may consider the last-minute nature of an application to stay execution in deciding whether to grant equitable relief.

Gomez v. United States Dist. Court, 503 U.S. 653, 654 (1992). Schwab has not been diligent in raising this claim, with the result that this Court received his stay application 3 business days before his scheduled execution, even though the claim could have been raised months before. Schwab's lack of diligence is not a basis for a stay of execution.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by **e-mail** and **U.S. Mail** to: **Mark Gruber**, Assistant CCRC-Middle, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619 (813)740-3554 on this _____ day of November, 2007.

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Of Counsel