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

_____

REPLY BRIEF OF APPELLANT

_____

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ARGUMENT I

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

Rejection of the foreseeable risk standard

The court's error in rejecting the application of a foreseeable risk standard to Schwab's lethal injection claim, an error which the State now endorses, lies in raising a distinction in wording between the articulation of a general Eighth Amendment principle that punishments not be cruel and the application of that principle to case of lethal injection to the status of a meaningful dispute. The Eighth Amendment prohibits wanton and unnecessary infliction of pain in all methods of execution. It is generally agreed that injection of lethal chemicals into a properly anesthetized prisoner does not violate that prohibition, but if the prisoner is not properly anesthetized administration of either of the second two drugs will cause extreme pain and suffering. The use of a paralytic, followed by potassium chloride, creates a substantial risk that a prisoner will experience slow suffocation, burning from inside out, and full cardiac arrest, all the while being awake and aware but unable to do or say anything about it.

The State's argument that the risk of that happening is not a cognizable Eighth Amendment claim was anticipated and addressed

in the Initial Brief. It was an argument that was presented by the state of Missouri in *Taylor v. Crawford*, 487 F.3d 1072 (8th Cir. 2007). The court analyzed the issue in depth and rejected the state's position. That portion of the court's opinion was quoted verbatim in the Initial Brief and is relied on here. Confronted with the same argument as that presented by the state in *Taylor v. Crawford*, a U.S. district court in Tennessee recently came to the same conclusion in *Harbison v. Little*, Case No. 3:06-01206 (M.D. Tenn., Sept. 19, 2007). Also, as discussed in the Initial Brief, the court in *Morales v. Tilton*, 465 F.Supp.2d 972, 974 (N.D. Cal. 2006) expressed the issue in terms of a foreseeable risk.

The State asserts that a "foreseeable risk" standard has been squarely rejected by this Court. That is not the case, but if this Court should conclude otherwise then Appellant respectfully urges the Court to reconsider its position. In support of its assertion the State simply quoted the judge's discussion of *Jones v. State*, 701 So.2d 76 (Fla. 1997) and *Buenoano v. State*, 565 So.2d 309 (Fla. 1990) without further argument or citation of authority. Both of those cases followed botched electric chair executions (Jesse Tafero and Pedro Medina). Both prompted dissenting opinions. Justice Anstead's dissent in *Jones* expressly spoke in terms of a foreseeable risk.

Id. at 89. Justice Shaw's opinion, which was joined by the other dissenting Justices, pointed out that the electric chair was running an 11% botch rate. In those cases the Court concluded that the Eighth Amendment does not require a guarantee that an execution will proceed as planned every single time without any human error and that a single mishap would not invalidate a method of execution. In *Sims v. State*, 754 So.2d 657 (Fla. 2000), the Court rejected a challenge to lethal injection which it found to be based on a speculative "list of horribles." Likewise, the courts in *Morales* and *Crawford v. Taylor* were careful to distinguish between a mere risk of accident or negligence and the inquiry into whether the lethal injection method of execution under consideration created a foreseeable risk of an Eighth Amendment violation. These limitations on the scope of the inquiry are just that, no more. They do not even attempt to establish a standard by which an Eighth Amendment claim should be evaluated, and they do not amount to a rejection of such a standard.

The argument that this is a per se challenge to lethal injection

The State's argument is that, if a foreseeable risk standard is rejected, then the only option left is an up or down question whether lethal injection violates the Eighth Amendment by its very nature. Because there is a general consensus that lethal

injection of a properly anesthetized prisoner is not cruel such a claim could never prevail on the ground of cruelty.

The mistaken premise behind the State's per se argument is that the three drug cocktail invented by Dr. Chapman in 1977 is the one and only way to carry out a lethal injection. (AB 25, styled "The 'pancuronium bromide' component.) The Governor's Commission urged the DOC to investigate other drug combinations. The recommendation prompted a dissent by a representative from the Attorney General's Office. The dissent asserted that an examination of the possibility of using some other drug regimen went beyond the Commission's mandate to look at the ways lethal injection was being carried out without questioning the statute. The statute, however, does not prescribe any drug regimen. F.S. 922.105(1). The choice of drugs is left entirely to the DOC. There is no evidence at all that the current three drug regimen, especially the use of a paralytic, is a necessary component of the lethal injection method of execution.

Sodium pentothol was the anesthetic of choice when the three drug regimen was invented back in the seventies, but it is no longer.[1] The Commission urged that the regimen be re-examined,

[1] Deborah W. Denno, *When Legislatures Delegate Death*, 63 Ohio St. L.J. 63 (2002).

but it is clear from the Asst. Atty. General's addendum to the Commission report and the new protocols as written that the Commission's recommendation was rejected.

A per se claim would challenge the basic idea of using of lethal drugs to carry out an execution. That is not the claim here. Nevertheless, the lower court evidently accepted the State's argument. The effect of doing so was to rule that an Eighth Amendment challenge to lethal injection could never prevail, because it would either challenge particular matters which were wholly left to the DOC or it would be a per se challenge to lethal injection as a method of execution, both of which, in the court's view, were ruled out by *Sims*.

The substantial and foreseeable risk standard employed in *Morales, Crawford v. Taylor* and *Harbison* is not a per se challenge to execution by lethal injection and it does not require the court to micromanage the Department of Corrections. It does, however, require that the court examine the circumstances under which the DOC plans to carry out an execution to determine whether there is a substantial and foreseeable risk that the Eighth Amendment will be violated.

Baze v. Rees

On Tuesday, September 25, 2007, the U.S. Supreme Court agreed to hear *Baze v. Rees*, SC #07-5439. The petitioners are

two Kentucky death-row inmates. The order granting certiorari states in its entirety:

> BAZE, RALPH, ET AL. V. REES, COMM'R, KY DOC, ET AL.
>
> The motion of the petitioners for leave to proceed in Forma Pauperis and the petition for a writ of certiorari are granted. The brief of petitioners is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Monday, November 5, 2007. The brief of the respondents is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Monday, December 3, 2007. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Friday, December 28, 2007. Briefs of amici curiae are to be filed with the Clerk and served upon counsel for the parties on or before 2 p.m., 7 days after the brief for the party supported is filed, or if in support of neither party, within 7 days after petitioners' brief is filed.

The questions presented as framed by the petitioners are:

> I. Does the Eighth Amendment to the United States Constitution prohibit means for carrying out a method of execution that create an unnecessary risk of pain and suffering as opposed to only a substantial risk of the wanton infliction of pain?
>
> II. Do the means for carrying out an execution cause an unnecessary risk of pain and suffering in violation of the Eighth Amendment upon a showing that readily available alternatives that pose less risk of pain and suffering could be used?
>
> III. Does the continued use of sodium thiopental, pancuronium bromide, and potassium chloride, individually or together, violate the cruel and unusual punishment clause of the Eighth Amendment because lethal

> injections can be carried out by using other chemicals that pose less risk of pain and suffering?
>
> IV. When it is known that the effects of the chemicals could be reversed if the proper actions are taken, does substantive due process require a state to be prepared to maintain life in case a stay of execution is granted after the lethal injection chemicals are injected?

The issues presented are indistinguishable from those raised in this proceeding. The case is a petition for certiorari review from the opinion of the Kentucky Supreme Court decision affirming a denial of a declaratory judgment action which resulted in a seven day trial. *Baze, et al. v. Rees, et al.*, 217 S.W.3d 307 (Ky. 2006). The petition cites (among other authority of course) *Hill v. McDonough*, 126 S.Ct. 2096 (2006); *Rolling v. State*, 944 So.2d 176 (Fla. 2006); and *Rutherford v. Crist*, 945 So.2d 1113 (Fla. 2006). It also refers to the *Lightbourne* hearings.

The text of the petition contains a list of issues which the petitioners say left the lower courts to "fumble around."

> Is a method of execution cruel and unusual punishment in violation of the Eighth Amendment only if it causes "torture or a lingering death?" Or, is it cruel and unusual if the pain is "purposeless and needless," even if it is known to not cause "torture or a lingering death?" Does this mean that chemicals or procedures used in lethal injection are purposeless and needless in violation of the cruel and unusual punishment when other chemicals that are less painful could be used? Perhaps, all that needs to be

> shown is that the chemicals and procedures inflict "unnecessary" pain? But, does this mean that whenever a state does not replace the lethal injection chemicals with readily available less painful chemicals, the Eighth Amendment is violated? Or is "unnecessary and wanton infliction of pain" considered to be one thing, whereby it must be shown that it is both "unnecessary" and "wanton" for an Eighth Amendment violation to be found? Or, is establishing an "objectively intolerable risk of harm" all that is needed? Is a risk of pain automatically objectively intolerable where alternative chemicals could be used, or does the risk need to be shown to be "substantial?" Do these different articulations of the cruel and unusual punishment standard work together so that the Eighth Amendment is violated where a risk of pain and suffering becomes "unnecessary" because other chemicals could be used that pose less of a risk? And, now that this Court, in Nelson and Hill, has characterized 42 U.S.C. §1983 suits challenging the chemicals and procedures used in lethal injections as most akin to prison condition cases, must a death-row inmate establish both cruel and unusual punishment and that prison officials are acting "deliberately indifferent" to that?

The decision of the Kentucky Supreme Court was purely on the merits. Assuming that the case is ultimately decided on the merits as well, this will be the first method of execution case that the Supreme Court has addressed on the merits in over a century. It is inconceivable that it would not have a significant impact of this case.

***Sims* and the docket**

Sims was a case where capital defense advocates, after a long and ultimately successful battle to get rid of the electric chair and use lethal injection instead, fought against the way lethal injection was being administered. With the benefit of an evidentiary hearing, the Court upheld lethal injection as a constitutional method of execution and decided that the means of carrying it out should be left to the executive branch; but only after concluding that the DOC was "ready and able" to carry out an execution without violating the Eighth Amendment. The Court dismissed Sims' concerns as a speculative "list of horribles."

Now the DOC has botched the execution of Angel Diaz. The concerns raised in Sims are no longer speculative. That event prompted a suspension of executions pending a commission review, two revisions of the protocol, the *Lightbourne* hearings, and the pointed litigation schedule established by this Court. The Governor's Commission found that the protocols then in effect were inadequate, but it also found that the execution team failed to properly obtain and maintain venous access, failed to administer the chemicals properly, and had not been adequately trained as to the protocols then in effect. These factual allegations were pled in the motion for postconviction relief. The mere fact that the protocols have been rewritten does nothing to allay concerns that they will not be followed, and does not

render the circumstances of the Diaz execution irrelevant. The claim is that current practice of lethal injection carries a substantial foreseeable risk of violating the Eighth Amendment. The lower court misstated the claim as being "that the current DOC protocol might be found to violate his constitutional rights." PC-W Vol. VIII 1245. The question is not one of grading the protocols, it is one of how lethal injection will be carried out.

Failure to judicially notice *Lightbourne*

The State's argument that an evidentiary hearing should not have been granted because it would have been a lengthy reprise of the *Lightbourne* hearings is puzzling in view of the fact that the State brought a compact disk containing the transcripts to the case management conference, both sides stipulated to its admission, and both assumed in argument that the transcripts were in evidence. Presumably merely repetitive evidence would not have been admitted. The fact is that both sides had submitted numerous transcripts along with various motions and orders in the *Lightbourne* case, and 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.

The procedural bar argument

The State argues that a procedural bar exists with regard to "any claims for relief based on any lethal injection-based ground 'other than those arising from the execution of Angel Diaz,'" because they were not raised within one year of the time that lethal injection became a method of execution in Florida. AB 21. The State does not say what those claims might be, but presumably they would be per se challenges to lethal injection, which this case is not. The State's argument also reinforces the point that the court erred by declining to take judicial notice of the *Lightbourne* transcripts. If the "arguable" claim that Schwab has available comes from the circumstances of the Diaz execution, the *Lightbourne* case would have been an important source of information about those circumstances.

The "insufficiently pled" argument

The State argues that the motion for postconviction relief was insufficiently pled and further complains of reckless pleading. AB 22. The reality is that every allegation in the motion was based on testimony before the Governor's Commission, the evidence presented in *Lightbourne*, documented in recognized sources such as law review articles, or based on input from experts. Rule 3.851(e)(2) requires detailed factual allegations, not record citations. The evidentiary hearing is the opportunity to make the record. The motion also incorporated an affidavit

from a proposed expert witness detailing alleged flaws in the protocols with a great deal of specificity. The State's complaint that the expert lacked the qualifications to testify about those flaws could and should have been considered at an evidentiary hearing.

Consciousness assessment

A properly anesthetized prisoner will not experience pain, whereas a person who is not properly anesthetized will experience pain and suffering sufficient to violate the Eighth Amendment from either of the second two drugs used in an execution.

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. The protocols require the team warden to make that judgment, but they lack any specifics. The warden does not have any medical training beyond that required to be a law enforcement officer, and that training does not encompass situations where a person is being injected with a paralytic.

The State points out the distinction which the *Harbison* court noted between Florida's protocol and that of Tennessee, which is that Florida provides for a consciousness assessment and Tennessee does not. While that may be true, it still remains to determine whether the consciousness assessment provided for in

the Florida protocols is a meaningful one which mitigates the substantial risk that the prisoner will not have attained and been kept at a required plane of anesthesia. Protocol (12) (c) (4) 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." The warden does not have any specialized training beyond that required of a law enforcement officer, which does not include dealing with individuals who are being administered a paralytic. If the warden determines that the prisoner is unconscious, he orders the executioners to proceed. 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).

Successful administration of the anesthetic is therefore critical. The experts agree that a 5 gram dose of sodium thiopental properly administered will render anyone unconscious. The experts also agree that accidents can happen, which is why medical personnel go to great lengths to avoid them. The motion for postconviction relief alleged that expert testimony would be presented that "there is a nearly 30 per cent error rate in securing venous access in clinical settings." The Court in *Sims*

noted expert testimony to the effect that 5.2 per cent of executions across the country had resulted in "mishaps." That was before the autopsy of Diaz confirmed that venous access had failed in both sites, despite the fact that those charged with securing venous access were "medically qualified personnel."

The DOC has insisted on keeping the medically qualified personnel concealed in the executioners' station. That is not required in other jurisdictions, and there is no reason why a medically trained person could not attend the prisoner while wearing what has variously been called a beekeeper's outfit or "moon suit" to conceal his or her identity. Instead, the DOC has opted to rely on remote monitors.

The *Harbison* court cited expert testimony about the inadequacy of relying on remote monitoring under the heading "The Failure to Adequately Monitor the Administration of the Drugs."

> Tied in with deficiencies of the protocol in training the executioners is a deficiency involving a specific task that one executioner is charged with performing: monitoring the IV lines during the administration of the three drugs. Under the new protocol, the IV lines are monitored only visually, by looking through the one-way window and at a video screen in the separate executioners' room. Neither the executioners nor anyone else palpates the injection site. According to Dr. Higgins and Dr. Lubarsky, this is a significant problem. Dr. Higgins testified that Tennessee's decision to use only visual observation of the IV site to detect errors "would definitely increase the

> risk of error." At his deposition, Dr. Higgins further elaborated on this risk, stating "visual observation is certainly better than none, but you can't sense some of the more subtle changes that really require tactile monitoring during injection. And again, there are relative levels of veracity or detection, but the highest level would be to actually be able to physically monitor the injection site during the injection processes with your hand on the site, which is what I do every time I induce a patient." Especially in circumstances where the observors have only minimal training – as in the situation at hand – Dr. Higgins testified that visual observation "would not be adequate."
>
> Similarly, Dr. Lubarsky testified that visual monitoring was "absolutely not" adequate, especially when the injection site is located in the arm, because "the body has various different compartments, especially in the arm," and the compartments are "not fully communicative with each other." Therefore, "[i]f the IV catheter is in one compartment and you're looking at a superficial compartment, that is the subcutaneous area, you might not see anything."
>
> Dr. Dershwitz was somewhat less concerned about the visual monitoring but did testify that, "[i]f an error is going to occur in this whole process, the most likely error would be that the intravenous catheter is not in the vein." Dr. Dershwitz later added that "the visual inspection who7uld be the first step. But if one detected or had a high suspicion that there might be a malfunction, one would also want to touch and palpate the IV site to check for things like a collection of fluid."

Harbison v. Little, Case No. 3:06-01206 Slip Op. 34-35 (record citations omitted). Dr. Dershwitz testified for the State in Lightbourne. In that case, Dr. Heath also addressed the

inadequacy of the current protocol protocols in an affidavit which he prepared after reviewing them:

> No amount of practice will prepare clinically naive personnel to competently and reliably "detect and correct" IV infiltration or other problems with the IV site. This situation is exacerbated in the extreme by the apparent lack of clinically experienced personnel at "bedside" where they might be able, by close inspection and or palpitation, to recognize IV infiltration, drug extravasation, or other problems with the IV site or system."
>
> * * *
>
> The protocol remains deficient in its failure to ensure the induction and maintenance of a surgical plane of anesthesia by qualified personnel. The administration of the drugs and the assessment of consciousness is being undertaken by the least medically qualified personnel who are present. In order to ensure that a surgical plane of anesthesia is reached and maintained throughout the execution, qualified personnel would need to be present at the "bedside" for the duration of the execution. The FDOC has provided no reason, to my knowledge, to justify or explain why the medical personnel who are present during the procedure are not at the bedside of the prisoner during the execution.

In *Brown v. Beck*, Slip Copy, 2006 WL 3914717 (E.D.N.C., April 07, 2006) the U.S. 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, and the district court accepted this compromise. The U.S. Fourth Circuit affirmed this remedy in *Brown v. Beck*, 445 F.3d 752, 753 (4th Cir. 2006).

Because of the timing and other circumstances of the North Carolina proceeding the DOC here had to have known about the option of using such equipment and rejected it in favor of a more casual option, a fact which is evinced by internal memoranda which were revealed during the *Lightbourne* hearings and have since been reported in the press. The court rejected wholesale the argument that lethal injection requires some input from available clinical expertise and equipment to assess and monitor consciousness. The court's rationale was that 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." PC-W VIII 1243. That rationale may be consistent with the court's rejection of a foreseeable risk standard in favor of the view that the Eighth Amendment only prohibits wanton infliction of pain or those methods of execution which involve torture. It is not consistent with a foreseeable risk standard, because the circumstances of the North Carolina litigation, the current protocols which do not employ the use of any medical equipment or

expertise, and now the internal memos, all are relevant to show that the DOC deliberately chose the more risky course.

ARGUMENT II

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

In summarily denying relief, the lower court ruled that Mr. Schwab's claim was procedurally barred. PC W Vol. VIII, 1245. At trial the State offered the testimony of Dr. William Samek, which the trial court ultimately relied on to the exclusion of the testimony of witnesses called by the defense. Dr. Samek testified that there was an organic component to Schwab's behavior but said that the science was still very incomplete. "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." (ROA XVIII, 3339-40). In postconviction, Mr. Schwab continued efforts to develop mental mitigation. As Mr. Schwab continued to appeal his case in federal court, Dr. Eisenstein began a neurological evaluation of Mr. Schwab early in 2006.

In the days before the motion for postconviction relief was due in this proceeding a dispute arose over the efforts of Schwab's counsel to speak with psychologist Dr. Samek. The State

filed a motion for a protective order. PC-W Vol. IV 670. The State's argument was that due solely to Dr. Samek's appearance as a state witness at trial there exists a work product privilege. The court conducted a hearing and denied the State's motion.

Dr. Eisenstein ultimately concluded that Mr. Schwab suffers from organic frontal lobe impairment. PC W Vol. VII, 1111 24. Mr. Schwab also alleged that recent research in the neurology of criminal sex offenses had revealed newly discovered evidence of a mitigating character. He submitted two recent scholarly articles which further establish a connection between brain pathology and sexual deviant behaviors. 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.

The motion was based on recent research that did not exist at the time of the original Rule 3.850 proceedings. The issue was whether the files and record would conclusively show that this claim could have been developed during the initial post-conviction proceedings. The scholarly articles which were presented to the lower court were published in 2006 and 2007. The court therefore could not have made this finding without the benefit of an evidentiary hearing.

The court provisionally addressed the motion on the merits. The court found that advances in advances in science are always happening and therefore cannot support a challenge against his conviction and sentence in a successive motion. In fact, advances in science have often been the basis of motions for postconviction relief, most notably with regard to DNA. The motion for postconviction relief included detailed allegations regarding Dr. Eisenstein's findings and proposed testimony. The motion also alleged: "Dr. Bowen would testify that he examined Mr. Schwab in 1988 and determined that Schwab had been the victim of a sexual assault as a child. Defense counsel made this allegation during sentencing. The trial court rejected it but specifically commented on the fact that neither party had called Dr. Bowen as a witness. 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." These court erred by rejecting these allegations without the benefit of an evidentiary hearing.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief of the Appellant has been furnished by United States Mail, first class postage prepaid, and by e-mail to the Clerk of Court and to all counsel of record on September 26, 2007.

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

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