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

CASE NO 05-1991-7249-AXXX

STATE OF FLORIDA,

Plaintiff,

v

MARK DEAN SCHWAB,

Defendant

_____/

ORDER ON DEFENDANT'S MOTION TO VACATE OR STAY EXECUTION

This matter came before the Court upon the Defendant's Motion to Vacate Sentence or Stay Execution The Court held a case management conference as required by Fl R Crim Pro 3 851 In attendance were Mark Gruber, Peter Cannon and Daphne Gaylord, Capital Collateral Regional Counsel for the Defendant, Ken Nunnelley and Barbara Davis, Office of the Attorney General and Wayne Holmes, Office of the State Attorney Having heard the argument of counsel and having reviewed the Court file, the Court makes the following findings of fact and conclusions of law

LETHAL INJECTION PROTOCOL

The Defendant filed a Motion to Vacate Sentence premised on two claims Claim One addresses the issue of lethal injection and whether the Department of Corrections' protocol and procedures meet the Eighth Amendment's prohibition against cruel and unusual punishment Defense counsel denies they are making a per se attack on the constitutionality of lethal injection

Lethal injection as a means of execution has consistently been found constitutional by courts across the country The Florida Supreme Court has ruled numerous times that it finds no constitutional bar to death by lethal injection *Sims v State*, 754 So 2d 657 (Fla 2000), *Rolling v State*, 944 So 2d 176, 179 (Fla 2006), *Rutherford v State*, 926 So 2d 1100, 1113-14 (Fla 2006), *Hill v State*, 921 So 2d 579, 582-83 (Fla 2006), *Diaz v State*, 945 So 2d 1136 (Fla 2006)

The Defendant contends that, while the general process of lethal injection has not been found unconstitutional, the specific procedures and protocol recently adopted by the Department of Corrections fail constitutional standards as they do not protect the Defendant against the infliction of "unnecessary and wanton pain," *Gregg v Georgia*, 428 U S 153, 173, 49 L Ed 2d 859, 96 S, Ct 2909 (1976) or "involve[s] torture or a lingering death " *In re Kemmler*, 136 U S 86, 101, 2 L Ed 2d 519, 10 S Ct 930 (1890) *But see also, 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 " *Jones v State*, 701 So 2d 76 (Fla 1997)

As the Florida Supreme Court upheld the lethal injection process up through *Diaz v State*, 945 So 2d 1136 (Fla 2006), the only "newly discovered evidence" upon which the Defendant might base a claim for relief is the execution of Angel Diaz, which occurred shortly after the *Diaz* decision The Diaz execution has been referred to by the Defendant as "botched " Mr Diaz took longer than previous defendants to die and some experts have testified in various forums that he suffered pain prior to that death It is Mr

Schwab's claim that the methods used by the Department of Corrections were demonstrated to be inadequate to insure a prompt and pain-free death and that the current DOC procedures do not sufficiently remedy the problem

Following the Diaz execution, Governor Jeb Bush temporarily suspended executions and appointed an executive commission to study the issue The Commission issued a report to Governor Crist on March 1, 2007 In response to its recommendations, the Department of Corrections has instituted new protocol for executions The Governor, apparently satisfied that the new protocol provides sufficient safeguards to insure constitutional standards are met, signed the death warrant for Mr Schwab in July 2007

The Defendant claims that there is "foreseeable risk" of unnecessary and extreme pain if the Department is permitted to carry out his execution under present protocol The Florida courts have not adopted the standard that there be no "foreseeable risk" of pain in executions Rather, as noted in *Jones, Id*., the Eighth Amendment does not compel the State to ensure that no suffering is involved in the extinguishment of life or even that the State guarantee an execution will proceed as planned every single time without any human error As the Court stated in *Buenoano v State*, 565 So 2d 309 (Fla 1990), following a botched electrocution, "one malfunction is not sufficient to justify a judicial inquiry into the Department of Corrections' competence "

The botched Diaz execution, according to the Governor's Commission, resulted because "venous access at the time of the execution was improperly maintained and administered " (Governor's Commission on Administration of Lethal Injection, p 8) Some of the chemicals were accidentally administered subcutaneously, rather than intravenously The Commission concluded that, based on the testimony it heard, "it is

impossible for the Commission to reach a conclusion as to whether inmate Angel Diaz was in pain " It made recommendations as to changes needed in the Department's protocol and training to ensure that executions are carried out humanely

The parties have filed in this case the new protocols established by the Department of Corrections to address the concerns of the Governor's Commission and the concerns of Judge Angel in the Circuit Court of Marion County, following hearings he has conducted in *State v Lightbourne,* Circuit Court Case No 1981-170-CF-A-01 The Court, having reviewed the submitted protocols, finds that the Defendant has not established the need for an evidentiary hearing to review the Department's protocol and training The Defendant has not provided the Court with any reason to believe that the new protocol does not substantially meet the criteria set by the Governor's Commission or that the protocol will not be carried out He was not provided reason to believe DOC personnel will not be appropriately trained or that future executions will likely result in the Diaz problem of subcutaneous injection, as the recently adopted protocol requires a venal assessment of an inmate a week prior to his scheduled execution to ascertain venal access The protocol also provides for mandatory training and practice sessions

The Defendant argues that the execution by lethal injection require medical personnel, sophisticated medical equipment and protocol appropriate to a clinical setting to carry out a constitutionally valid death by lethal injection The Court rejects this argument 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 If the Defendant's premise is correct, there could be no executions by lethal injection

because persons working in recognized medical fields will not participate in taking life, as the Defendant has stated in his Motion

While the Court is required to accept as true the facts alleged in a Motion to Vacate if it denies that Motion without an evidentiary hearing, most of the "facts" alleged in the Motion relate to the problems with the Diaz execution As the protocol has changed, the Court is not convinced those facts are relevant to the present protocol The Defendant has not made specific factual allegations as to how the new protocol will result in a violation of the Eighth Amendment He speculates as to potential flaws in the system and provides the affidavit and report of a person identified as a "quality assurance expert" to point out possible gaps in the protocol that could result in problems during execution The Court surmises that any set of procedures describing the processes for carrying out any complex activity could be analyzed to reveal contingencies not explicitly provided for and no set of procedures can ever entirely eliminate the factor of human error

It is the function of the executive branch to carry out the sentences of the courts of this State, including executions The Florida Supreme Court affirmed this separation of powers in *Sims v State*, 745 So 2d 657 (Fla 2000), finding that "determining the methodology and chemicals to be used are matters best left to the Department of Corrections " Id at 670 The *Sims* Court further stated that "testimony concerning the list of horribles that could happen if a mishap occurs during execution does not sufficiently demonstrate that the procedures currently in place are not adequate to accomplish the intended result in a painless manner " Id at 668 Although the procedures in effect at the time of the Sims ruling have been updated and revised, as discussed above, the principle remains that the Department is entrusted with developing adequate protocol, revising as

necessary to meet evolving societal concerns and that the mere possibility of human error in the process of execution does not render the current protocol inadequate

The Defendant has argued that *Sims* is no longer controlling, as signaled by the Florida Supreme Court's scheduling calendar The Supreme Court has scheduled oral arguments in Schwab and Lightbourne for the same date in October of this year This Court cannot read the mind of the Supreme Court in its scheduling decisions, but suggests that it was possibly a matter of judicial economy, as the Supreme Court was aware that challenges to the lethal injection protocol would be made in both cases This Court cannot assume that the Supreme Court intended for this circuit court to overturn or rewrite that protocol As this Court is bound to follow the precedents of the Florida Supreme Court until that Court or the United State Supreme Court overturns or modifies that precedent, it is bound by *Sims* and progeny It will not attempt to read tea leaves and guess what is intended by the scheduling docket or the footnote in *Darling v State,* --So 2d --- 2007 WL 2002499, 32 Fla L Weekly S486 (Fla July 12, 2007), referenced in the Defendant's Motion at p 6 It finds that *Sims* upholds the right and responsibility of the Department of Corrections to establish protocol for humane executions While it agrees that judicial oversight of the protocol is appropriate, the Court does not find that judicial economy would be served by holding a hearing in this matter on the same issue which has been extensively explored by Judge Angel in *Lightbourne* The parties have stipulated that the *Lightbourne* hearing testimony may be judicially noticed in this case, but the Court has deliberately elected not to take judicial notice at this time and has not reviewed the evidence presented therein

The Court therefore finds that the Defendant has alleged no facts which require it to hold an evidentiary hearing on his claim that current DOC protocol might be found to violate his constitutional rights

NEWLY DISCOVERED NEUROLOGICAL EVIDENCE

In Claim II, the Defendant asserts that he has newly discovered evidence with regard to his mental state, namely that recent neuropsychological testing reveals he suffers from brain impairment and that new scientific findings will show that this brain impairment had a direct causative effect on his criminal behavior

The Court finds that the Defendant's claim is procedurally barred Other than the general advance of the science of neuropsychology, he presents no reason why he could not have presented mental health or brain injuries claims when he filed his original post-conviction motion The Court held an evidentiary hearing on that motion and denied relief The denial was affirmed on appeal *Schwab v State*, 814 So 2d 402 (Fla 2002) There will always be advances in science and experts available to reanalyze what earlier experts concluded But where the Defendant failed to raise the issue of neurological damage in his original defense or his first post-conviction motion, he is precluded from raising it now

Even if the Court were not to conclude that this issue was procedurally barred, it finds that the Defendant failed to sufficiently plead the matter "There are two requirements that must be met in order to set aside a sentence because of newly discovered evidence First, the asserted facts 'must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known them by the use of diligence ' *Scott v Dugger*, 604 So 2d

465 468 (Fla 1992) (quoting *Hallman v State*, 371 So 2d 482, 485 (Fla 1979), abrogated on other grounds by *Jones v State*, 591 So 2d 911, 915 (Fla 1991)) Second, 'the newly discovered evidence must be of such nature that it would *probably* produce an acquittal on retrial ' *Scott*, 604 So 2d at 468 (quoting *Jones v State*, 591 So 2d 911, 915 (Fla 1991)) This 'standard is also applicable where the issue is whether a life or death sentence should have been imposed ' *Id* (citing *Jones*, 591 So 2d at 915) "*Miller v State*, 926 So 2d 1243, 1258 (Fla 2006)

As to the first prong of the test, the Defendant has alleged that the fact of his brain damage was not known at the time of trial and that, even had it been, the scientific community has only recently recognized the impact of front lobe damage on sexual behaviors The Defendant has provided the Court with two journal articles which discuss the subject of brain damage in sexual offenders, but neither article affirmatively asserts that this damage causes such crimes as committed by Mr Schwab

But more importantly, even if the Defendant establishes that he has frontal lobe damage and there are new scientific theories as to its impact on behavior, he fails to meet the second prong of the test He does not allege that this evidence was of such a nature that it would *probably* cause an acquittal, or in this case, have caused the trial court to impose a life sentence rather than death

As is discussed in Judge Richardson's extensive Judgment and Sentence, the trial court considered all the mental health testimony offered by the Defendant and the State He addressed the statutory mitigation of s 921 141(6)(B) and (F), Fla Stat 1991 He concluded that the Defendant was a "mentally disordered sex offender " (Exhibit A, Judgment, p 8) He found that the Defendant's ability to conform his conduct to the

requirements of the law was "substantially impaired" (A, p 11) The Court went on to state that "having found this statutory mitigator to exist, it must be given some weight"

The trial court clearly recognized that the Defendant had mental health problems and was possibly not entirely able to control his behavior He gave this factor "some weight" He also stated that "the three aggravating circumstances proven beyond every reasonable doubt are entitled to great weight" (A, p 23) He admitted that he did know what caused persons to become sexual deviants but that, whatever the reason, the "mitigating factors have been given little weight by the court" (A, p 24) He concluded, "in weighing the aggravating and mitigating circumstances, the Court finds that any one of the three aggravating circumstances outweighs all mitigating circumstances" (A, p 24)

Thus, the "newly discovered evidence" that persons with frontal lobe damage may act sexually inappropriately would not be the type of "new" evidence that would *probably* have changed the trial court's mind The Defendant has not demonstrated or even alleged that had the trial court been given additional information about frontal lobe injury, it would have considered this as mitigator that outweighed the three aggravators it used to impose the death penalty Relief on this claim is denied

THEREFORE it is ORDERED and ADJUDGED

The Defendant's Motion to Vacate Sentence or Stay Execution is DENIED

The Clerk of the Court shall immediately transport the record of these proceedings to the Supreme Court of Florida No Notice of Appeal shall be required

DONE AND ORDERED in Titusville, Brevard County, Florida this 17th **day of** August **2007**

CHARLES M HOLCOMB
Circuit Court Judge

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was provided by facsimile to Mark Gruber and Daphne Gaylord, Capital Collateral Regional Counsel, Middle District, 3801 Corplex Drive, Suite 210, Tampa, FL 33619, fax (813) 740-3554, Wayne Holmes, Assistant State Attorney, fax (321) 617-7542, Ken Nunnelley and Barbara Davis, Office of the Attorney General, 444 Seabreeze Blvd , Fifth Floor, Daytona Beach, FL 32118-3951, fax (386) 226-0457 this 17th day of August 2007

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case. The state has not requested that the Court consider this issue.

STATUTORY MITIGATING CIRCUMSTANCES
FLORIDA STATUTES 921.141(6)

(A) THE DEFENDANT HAS NO SIGNIFICANT HISTORY OF PRIOR CRIMINAL ACTIVITY.

This mitigating circumstance has not been reasonably established by the greater weight of the evidence. The defendant has been previously convicted of two counts of sexual battery upon Than Meyer in case No 87-3147-CFA. These were crimes of violence in that the defendant used a knife to force himself on the victim. Such criminal conduct constitutes a significant history.

(B) THE CAPITAL FELONY WAS COMMITTED WHILE THE DEFENDANT WAS UNDER THE INFLUENCE OF EXTREME MENTAL OR EMOTIONAL DISTURBANCE.

This mitigating circumstance has not been reasonably established by the greater weight of the evidence

The facts show that the defendant is a mentally disordered sex offender. He is antisocial and dangerous to male children. However, he was not under the influence of any extreme mental or emotional disturbance on the date of the crime. The defendant was not psychotic, schizophrenic or paranoid He is above average in his intelligence level and was in touch with reality

His emotional state on the day of the crime was described by his mother Incredibly, the defendant visited with his mother on his way to kidnap Junny Rios Martinez! The defendant and his mother had a short conversation His mother did not notice anything unusual about the defendant. In fact she indicated that

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Exhibit "A"

they both felt more relaxed because it did not look like the defendant's probation would be violated. The defendant told his mother that he planned to leave the state, but that he would obtain permission from his probation officer before leaving town.

This Court had the opportunity of listening to many hours of taped conversations of the defendant These conversations involved both pre-arrest and post-arrest situations. Notwithstanding the fact that the defendant had to be under stress when these conversations occurred, there was no indication that the defendant was under the influence of any mental or emotional disturbance. The defendant was clear thinking and articulate. He was aware of the fact that the police were looking for him and that he was in serious trouble. He was able to fabricate and communicate the "Donald" defense in great detail to family and law enforcement.

Prior to the commission of the subject crimes, the defendant attended group therapy sessions with Dr. Duncan Bowen. No evidence or testimony was presented from Dr Bowen supporting this mitigating circumstance.

The facts show that the defendant was able to relate well with people. While in prison, the defendant performed his daily tasks in a proper manner. He was able to convince the victim's family that he was a newspaper reporter and surf-magazine representative He was able to gain the confidence and trust of the victim's family

This Court finds that at the time the defendant murdered Junny Rios Martinez, he was not under the influence of extreme mental or

emotional disturbance.

(C) THE VICTIM WAS A PARTICIPANT IN THE DEFENDANT'S CONDUCT OR CONSENTED TO THE ACT.

This mitigating circumstance does not apply. The defendant has not requested that the Court consider this issue

(D) THE DEFENDANT WAS AN ACCOMPLICE IN CAPITAL FELONY COMMITTED BY ANOTHER PERSON AND HIS PARTICIPATION WAS RELATIVELY MINOR.

This mitigating circumstance has not been proven and does not apply. This Court has rejected the "Donald" defense and specifically finds that "Donald" does not exist in this case.

(E) THE DEFENDANT ACTED UNDER EXTREME DURESS OR UNDER THE SUBSTANTIAL DOMINATION OF ANOTHER PERSON.

This mitigating circumstance does not exist in this case. The Court has completely rejected the "Donald" defense.

(F) THE CAPACITY OF THE DEFENDANT TO APPRECIATE THE CRIMINALITY OF HIS CONDUCT OR TO CONFORM HIS CONDUCT TO THE REQUIREMENTS OF LAW WAS SUBSTANTIALLY IMPAIRED.

There was no evidence presented that shows the defendant's ability to appreciate the criminal nature of his conduct was substantially impaired. In fact, the proof is all to the contrary. After the murder, the defendant made an effort to hide the body and flee from the State. In one taped telephone conversation with his aunt, the defendant acknowledged that he could be facing life in prison or the death penalty for these crimes. When he became aware of the fact that the police were after him, he contrived the complex "Donald made me do it" defense These are all actions of

a person who knows right from wrong. While in prison, the defendant sought entry into the state sponsored mentally disordered sex offender program, because he knew he had a problem The defendant's ability to appreciate the criminality of his conduct was further established by the expert testimony.

However, the greater weight of the evidence does support the conclusion that the defendant's ability to conform his conduct to the requirements of law was substantially impaired. Having found this statutory mitigating circumstance to exist, it cannot be dismissed, and must be given some weight However, the relative weight to be given is within the province of this Court **Campbell** v. **State**, 577 So.2d 932 (Fla.1991).

The defendant meets the criteria for a mentally disordered sex offender. He is a person who is not insane, but who has a mental disorder and is dangerous to others because of a propensity to commit deviate sexual acts. The defendant enjoys sadism which further supports his feelings of power and control over his child victims The use of a knife and the slow death associated with strangulation or suffocation are consistent with the defendant's sadistic disorder.

The extent to which the defendant's ability to conform his conduct to law is unclear to the Court In the instant case, the defendant showed significant restraint. He developed and nurtured a plan to gain the trust of the victim so that he could lure him away from his home when the time was right Over a period of several weeks, the defendant continued to relate with the victim

and his family. He did not act upon impulse, rage or sexual frenzy The defendant patiently bided his time and contrived his plan of attack. In the past case involving victim Than Meyer, the defendant followed much the same course of conduct

This Court accepts the expert opinion of Dr Samek, that if given the right stimulus, the defendant would be able to stop a sexual advance, even in the late stages of an attack.

The defendant is a predator of young male children. He clearly knows right from wrong The defendant is manipulative and capable of gross distortions of truth Thus, the information provided by the defendant to the examining experts is suspect

Dr. Samek diagnosed the defendant as an antisocial rapist murderer. This Court accepts that diagnosis as fact and hereby rejects other expert opinion to the contrary Notwithstanding the testimony of Dr. Berlin and Dr. Bernstein, the evidence indicates that the defendant may be "unwilling" rather than "unable" to control his desires. The defendant may get such enjoyment out of sadistic sex upon children, that he is willing to accept the consequences of his acts.

It is interesting to note that while the defendant was planning the subject crime, he was on probation for the Than Meyer rape. As a part of this probation, the defendant was required to participate in a sex offender program presented by Dr. Duncan Bowen. The defendant had in fact attended a group therapy session a few days before the abduction of Junny Rios Martinez. Dr Bowen was not called as a witness The record is void of any proof that

the defendant sought the help of Dr. Bowen to avoid the subject crimes Clearly, the defendant knew what he was about to do. He had a professional sex therapist available to talk to He chose to keep his secret and follow through with the plan.

(G) THE AGE OF THE DEFENDANT AT THE TIME OF THE CRIME.

The defendant's age at the time of the offense was twenty-two. He had moved out of his mother's house in 1987 and lived on his own until he was arrested in July 1987 for the sexual battery of Than Meyer The defendant spent the next three years or so in an adult prison. While in prison, the defendant performed the job duties of an adult. He had no disciplinary problems in the prison system and was able to conform to the adult rules of the prison. The defendant's post-prison association with teenagers is consistent with his desire to dominate or control rather than an indication of a low level of maturity.

This mitigating circumstance has not been proven by the greater weight of the evidence

NON-STATUTORY MITIGATING CIRCUMSTANCES

The defendant is allowed great latitude in presenting evidence which he feels constitutes non-statutory mitigating circumstances. When addressing mitigating circumstances, the trial judge must expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of non-statutory factors, it is truly of a mitigation nature **Rogers** v. **State**, 511 So.2d 526 (Fla.1987); **Campbell** v. **State**, 577 So.2d 932 (Fla.1991).

while in prison.

The defendant proved this fact by a greater weight of the evidence. However the Court does not consider this a mitigating circumstance.

39) Alternative forms of treatment are available for persons who suffer from the defendant's mental illness.

The defendant proved this fact by a greater weight of the evidence. However, the Court does not consider this a mitigating circumstance.

40) The defendant went to Dr. Duncan Bowen's weekly sessions as required by the terms of his probation. However, the progressive nature of the defendant's mental illness could not be treated in this non-intensive out-patient setting.

The defendant did, in fact attend the sex offender program of Dr Duncan Bowen He was required to do so by his probation officer. However, the defendant made no effort to gain any benefit from that program. At the same time he was in therapy, he was associating with young boys and planning the abduction and rape of Junny Rios Martinez Had the defendant confided in Dr Bowen, action could have been taken to prevent tragedy. This non-statutory mitigating circumstance has not been proven by the greater weight of the evidence.

SUMMARY

The three statutory aggravating circumstances proven beyond every reasonable doubt are entitled to great weight by this Court. The aggravating circumstances all relate to violent crimes by the

ant perpetuated against children In the case of Junny Rios rtinez, the crimes involved capital sexual battery and kidnapping of a child eleven years of age The facts show that death was caused by strangulation or suffocation of a conscious child

On the other hand, the one statutory mitigating circumstance and the non-statutory mitigating circumstance found to exist are entitled to little weight.

Whether the defendant is "unable" or "unwilling" to conform his conduct to law is open for debate

Whether the defendant intended to help himself or the victim's family in leading police to the child's body is not certain.

Whether the defendant's unstable family life contributed to his sexual deviance is also in question Experts differed on causation. Are sexual deviates made or are they born? The answer is unclear to this Court. However, for these reasons the mitigating circumstances have been given little weight by this Court

In weighing the aggravating and mitigating circumstances, the Court finds that any one of the three aggravating circumstances outweighs all mitigating circumstances

SENTENCE

MARK DEAN SCHWAB, having been given the opportunity to be heard and show legal cause why judgment and sentence should not now be imposed and to offer matters in mitigation, and no legal cause having been shown to preclude imposition of judgment and sentence,