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,

v.

MARK DEAN SCHWAB,

Defendant

_____/

CAPITAL CASE
EXECUTION SCHEDULED
NOVEMBER 15, 2007
6:00 P.M.

SUCCESSIVE MOTION TO VACATE SENTENCE OR STAY EXECUTION

Mark Dean Schwab by undersigned counsel files this motion to vacate his sentence of death pursuant to Fla. R. Crim. P. 3.851, or stay execution. This is a successive motion filed under Rule 3.851(c)(2). A warrant has been signed and execution is scheduled for the week of November 12, 2007.

Information required by Rule 3.851(e): The defendant was convicted of first degree murder and capital sexual battery after a nonjury trial and sentenced to death on July 1, 1992. The judgment and sentence were affirmed on direct appeal to the Florida Supreme Court. *Schwab v. State*, 636 So.2d 3 (Fla. 1994) cert. denied 513 U.S. 950, 115 S.Ct. 364 (1994). Thereafter, Schwab filed an original motion for postconviction relief, the denial of which was affirmed in *Schwab v. State*, 814 So.2d 402 (Fla. 2002). The denial of Schwab's federal petition for a writ of habeas corpus was affirmed in *Schwab v. Crosby*, 451 F.3d 1308 (2006) cert. denied 127 S.Ct. 1126 (Mem), 166 L.Ed.2d 897.

The State filed a memorandum on July 26, 2007 titled "The Issues Raised in Prior

Proceedings," which accurately quotes the appellate courts' description of the issues which were raised on direct appeal, in state postconviction proceedings and on federal review, and their disposition. Rule 3.851(e)(2)(B).

Mr. Schwab filed a successive motion to vacate on August 15, 2007. In it he raised two issues. The first challenged the constitutionality of Florida's lethal injection procedure. The second raised the claim that newly discovered mitigation evidence of neurological brain damage made his sentence of death unreliable. After a hearing, the postconviction court denied relief. Specifically, the court found that Florida's lethal injection procedures did not violate the Constitution and that the newly discovered evidence of neurological brain damage was procedurally barred. On November 1, 2007, the Florida Supreme Court affirmed the denial of all relief. *Schwab v. State*, No. SC07-1603 (November 1, 2007).

This motion is predicated on newly discovered evidence. The names, addresses and telephone numbers of witnesses supporting the claims raised in this motion are furnished on a witness list which is being filed simultaneously with this motion. Said witnesses will be available to testify under oath to the facts alleged herein should an evidentiary hearing be scheduled. Existing documentary evidence supporting the claims raised herein is attached hereto. Rule 3.851(e)(2)(C).

The relief sought in this proceeding is an order vacating the sentence of death. In the alternative Schwab moves for a stay of execution, or such other relief as this Court may deem appropriate.

CLAIM I

NEWLY DISCOVERED EVIDENCE OF DR. SAMEK'S CLARIFICATION OF HIS ORIGINAL TESTIMONY MAKES MR. SCHWAB'S SENTENCE OF DEATH FUNDAMENTALLY UNRELIABLE IN VIOLATION OF THE SIXTH, EIGHTH, AND

FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION

Newly discovered evidence may be grounds for relief in a proceeding on a motion to vacate a sentence where the facts on which the claim is based were unknown to the trial court and the moving party or counsel at the time of trial, and the evidence could not have been ascertained by the party or his counsel in the exercise of due diligence. *Jones v. State*, 591 So.2d 911 (Fla. 1991); 28A Fla. Jur 2d HABEAS CORPUS AND POSTCONVICTION REMEDIES § 169 (1998). In order to obtain relief on such newly discovered evidence the evidence must be of such a nature that it would probably produce an acquittal on retrial, *Jones*, or result in a life sentence rather than the death penalty. *Scott v. Dugger*, 604 So.2d 465 (Fla. 1992). Due diligence in evaluating new evidence under *Jones* does not imply perfect diligence. *See Williams v. Taylor*, 529 U.S. 420 (2000)(counsel duly diligent where not on notice of need for particular investigation). Mr. Schwab did not know and could not have known about these facts until counsel communicated appropriately with Dr. Samek. Due diligence does not require clairvoyance. As the Supreme Court held in *Michael Williams*, a habeas corpus petitioner has no duty to investigate misconduct that may provide a basis for relief until he has notice that the misconduct occurred. *Williams, supra.*

Dr. Samek, as argued by the state (see state's Motion to Strike Motion for Judicial Intervention; Motion for Protective Order, filed August 14, 2007)(Attachment "A"), was not available as a witness for the defense prior to the Court's ruling. The state is now estopped from arguing that the defendant lacked due diligence. *See, eg., Terry v. State*, 668 So.2d 954, 962 (Fla.1996); *Czubak v. State*, 570 So.2d 925, 928 (Fla.1990); *Pope v. State*, 441 So.2d 1073, 1076 (Fla.1983).

The Florida Supreme Court implicitly recognized that this form of evidence could be a basis

for newly discovered evidence. In the Court's November 1, 2007 opinion denying relief, the Court stated:

> Even if the articles were "newly discovered" evidence, we agree with the postconviction court that Schwab has not satisfied the second Jones prong. *Jones*, 591 So.2d at 915. The alleged newly discovered evidence is not of such a nature that it would probably yield a less severe sentence on retrial. While the sentencing judge found that the trial evidence established the "substantially impaired ability to conform one's conduct" mitigating factor, he also found that the trial evidence indicated that Schwab may have been "unwilling" rather than "unable" to control his desires. ***Accordingly, new evidence truly demonstrating that Schwab could not control his conduct could impact sentencing.*** However, we agree with the postconviction court that these scientific articles are not such evidence. As the postconviction court found, "neither article affirmatively asserts that [brain damage] causes such crimes as committed by Mr. Schwab." Neither article posits a solely neuroanatomical etiology for sexual offense, nor do the articles negate the sentencing judge's conclusion that carefully planned crimes such as those committed by Schwab are largely inconsistent with ***Schwab's claim that he could not control his behavior.***

Schwab v. State, Slip Op. at 13-14 (November 1, 2007)(emphasis added).

Mr. Schwab is not merely trying to present "new opinions" or "new research studies" of the type recognized by the Florida Supreme Court in its most recent opinion denying relief. *Schwab v. State*, Slip Op. at 13. Rather, it is an opinion rendered by the original trial expert hired by the state which the sentencing court greatly relied upon in sentencing Mr. Schwab to death. Dr. Samek was not given the essential information by the state to allow this Court or the Florida Supreme Court to perform its constitutional duty under Article V in reviewing death penalty appeals. Fla. Const., Art. V, Sec. 3(b)(1). Dr. Samek, in his recent report, indicates that a substantial amount of information was not previously made available to him at trial. See, eg., Review by Dr. Samek, November 6, 2007, at pp. 1-2 (hereinafter "Samek Report")(Attachment "B").

The distinction between "new opinions" and the one offered by Dr. Samek is shown by the above language from the Supreme Court. While the Court rejected "new opinions" or "new research

studies" the Court did note that "Accordingly, new evidence truly demonstrating that Schwab could not control his conduct could impact sentencing." *Schwab v. State*, Slip Op. at 14. The only reasonable evidence that would satisfy the Supreme Court's standard for newly discovered evidence in this case is exactly the expert evidence presented now by Dr. Samek. Instructive to this argument is the opinion by then-Chief Justice Pariente in her dissent, joined by Justice Anstead, in *Hodges v. State*, 885 So.2d 338, 363-64 (Fla. 2004), in which the Chief Justice discusses a similar distinction:

> Moreover, the psychiatrist who evaluated Hodges at the time of trial, Dr. Maher, drastically changed his opinion of Hodges' mental state during the postconviction stage. During the postconviction hearing, Dr. Maher testified that Hodges was likely under the influence of extreme emotional disturbance at the time of trial, and suffered from depression and brain damage. This evaluation of Hodges was corroborated by Dr. Craig Beaver, a forensic psychologist who also testified at the evidentiary hearing. What is critical is not that Dr. Maher's opinion changed but why it changed. Dr. Maher's changed opinion was caused, in large part, by the evaluation of records trial counsel failed to provide prior to the original penalty phase, including the academic, military, and mental health records contained in the postconviction record. Many of these records contained "red flags" cumulatively indicative of mental health dysfunction, including poor academic history, "poor" home life, speech deficit, IQ testing, and military discharge. Indeed, the military records indicate that Hodges was discharged after only fifty-five days by "reason of unsuitability"/"defective attitude." Internal military documents describe Hodges as "unable to adjust to a disciplined environment." Hodges was also described as a "mentally dull recruit." Although the majority concludes that these records contain no suggestion of brain damage or mental health problems, Drs. Maher and Beaver considered the records highly relevant evidence of mental mitigation. Even the State's own expert, Dr. Merin, testified that it was inappropriate for Hodges' defense counsel to fail to present this mental health information. Hodges' claim of deficient performance is supported not only by the United States Supreme Court decisions in *Wiggins and Williams*, but also by this Court's precedent. This case is like *Rose* and *Ragsdale v. State*, 798 So.2d 713, 716 (Fla.2001), where we found trial counsel ineffective for failing to present mitigating evidence. In *Rose*, we determined that trial counsel's failure to "investigate Rose's background and obtain the school, hospital, prison, and other records and materials that contained ... information ... as to Rose's extensive mental problems" deprived Rose of a reliable penalty phase. 675 So.2d at 572. In *Ragsdale*, we noted that counsel presented only one witness in mitigation, who provided minimal evidence, compared to the "abundance" of mitigating evidence available at the time of trial and presented during the evidentiary hearing. *See* 798 So.2d at 716. As in *Rose* and *Ragsdale*, Hodges' counsel in this case did not secure many critical records and did not provide the mental health expert with complete information, the result of which was a penalty phase in which only two witnesses testified to minimal

mitigation.

Hodges v. State, 885 So.2d at 363-64(Pariente, C.J. with Anstead, J., dissenting).

The Supreme Court denied relief, based on *Asay v. State*, 769 So.2d 974 (Fla. 2000) and *Rutherford v. State*, 727 So.2d 216 (Fla. 1998), in stating that the information relied upon by the experts in postconviction was similar to the information available to them at the time of trial. Again, the Chief Justice analyzed the distinction:

> In this case, we are not presented with a situation in which postconviction counsel has simply secured a more favorable diagnosis based on substantially the same information available at the time of trial. Rather, Hodges' trial expert has changed his opinion based on new information that trial counsel failed to provide and should have provided if he had conducted an adequate investigation.

Hodges, 885 So.2d at 364.

Dr. Samek bases this new opinion upon his recent review of Mr. Schwab's case. Dr. Samek, a state expert at the time of Mr. Schwab's trial, did not have access to the wealth of data then available. He was not asked by the state to conduct a clinical interview of Mr. Schwab nor was he requested to review the available information necessary to form a psychological opinion of Mr. Schwab consistent with the standard of care in the psychological community. Dr. Samek was hired by the state for a limited purpose: to review the given materials and form a psychological rebuttal opinion concerning the existence of aggravating factors. In Dr. Samek's view, he was asked to form an opinion concerning the impact of the crime on the victim, although he went beyond those confines during his testimony.

The original penalty proceeding was held on one day, May 22, 1992, without a jury. Schwab's counsel presented Dr. Bernstein, an expert in psychological evaluation, who testified as to mental mitigation evidence at the penalty phase. Dr. Bernstein testified that in conducting his evaluation he

interviewed Schwab twice and interviewed Schwab's mother once. Dr. Bernstein conducted a mental status examination and lengthy psychological tests, including the Minnesota Multiphasic Personality Inventory (MMPI) and the MMPI II, among various others. Dr. Bernstein also testified that he reviewed and relied on the videotaped opinions of Dr. Fred Berlin and Dr. Ted Shaw in forming his diagnosis of Schwab. Dr. Berlin and Dr. Shaw, experts in the diagnosis and treatment of mentally disordered sex offenders, interviewed and evaluated Schwab. Dr. Berlin gave a formal sexual disorder diagnosis, and Dr. Shaw provided information concerning the potential benefits Schwab could have received had he been admitted to certain treatment programs. *See Schwab v. State*, 814 So.2d 402, 413-14 (Fla. 2002).

In rebuttal, the state retained the services of Dr. William R. Samek, a licensed psychologist who also specializes in the treatment of sexual disorders. Dr. Samek was not given the wealth of information provided to Dr. Bernstein, Dr. Berlin or Dr. Shaw. He was not asked by the state to perform a clinical evaluation of Mr. Schwab. In fact, he never met Mr. Schwab until requested by current counsel. Instead, Dr. Samek was requested by the state to give his opinion regarding the impact of the crime upon the victim. All that he was asked to review were the police reports; Mr. Schwab's statements contained therein, or referenced by, those police reports; the statements made by the mother of Junny Martinez, again referenced in police reports as well as the statement given by Mr. Schwab's mother; documents relating to the Than Meyer case; and, two letters written by Mr. Schwab. (Tr. ROA 3359-60)

Based on the evidence presented by the state through the rebuttal testimony of Dr. Samek, the trial court sentenced Mr. Schwab to death in an order dated July 1, 1992. The trial court rejected much of the mitigation evidence presented by the defense experts based upon the testimony of Dr.

Samek. Dr. Samek was the only mental health expert presented by the state. Thus it should be emphasized that he was a crucial state witness.

This opinion regarding the importance of Dr. Samek is not counsel's alone. The Eleventh Circuit Court of Appeals, which denied Mr. Schwab habeas corpus relief, relied extensively upon Dr. Samek's testimony. After discussing the expert evidence presented by the defense, the Eleventh Circuit stated in its opinion:

> Dr. William R. Samek, a clinical psychologist specializing in treating sexual offenders and sexual abuse victims, testified as a rebuttal witness for the prosecution. ***Dr. Samek disputed Dr. Bernstein's conclusion that Schwab's sexual desires became "irresistible impulses" which he could not control.*** In Dr. Samek's view, such impulses can be resisted "if there's sufficient motivation to stop." He believed that Schwab's known assaults showed a progression and "that [Schwab] ha[d] learned each time to do things better, more carefully and slicker." ***Dr. Samek believed that Schwab is not a pedophile but that he has "an antisocial personality disorder" and is a "rape/murderer and mentally disordered sex offender."*** As a result, Schwab "would have been more difficult to treat ... than your average pedophile." ***Dr. Samek concluded that "it is highly unlikely that [Schwab] could be successfully rehabilitated and be safe without a lot of controls around him."*** In support of that conclusion, Dr. Samek noted that Schwab's "offenses were very cool, calm, [and] carefully planned," that Schwab went "well beyond what is needed to rape or even to [molest] ... a kid," and that Schwab "went to extreme lengths to ... seduce ... and charm the family." Dr. Samek found this last point notable because "most child molesters choose victims who are easily molestable." He testified that Schwab's choice of "good kids from good families who are happy" reflects "his own resentment that he didn't have a nice family" and that Schwab "gets back" at his victims "by destroying them." ***Dr. Samek also based his conclusion that Schwab is not treatable on the fact that he exhibited "a tremendous amount of remorse while in prison" but "that didn't stop his behavior when he got out."*** After considering all of those expert witness opinions and more evidence offered in support of aggravating and mitigating circumstances, *see Schwab*, 636 So.2d at 7-8, the state trial court judge found that the aggravating circumstances outweighed the mitigating circumstances and sentenced Schwab to death. *See id.* at 7.

Schwab v. Crosby, 451 F.3d 1308, 1317-18 (11th Cir. 2006)(emphasis added).

Finally, the importance of Dr. Samek's testimony is evident in the Florida Supreme Court's most recent opinion where it denied Mr. Schwab's claim of newly discovered evidence of mitigation.

The Supreme Court relies upon the trial court's order, an order wholly dependant upon the testimony and opinions of Dr. Samek:

> The alleged newly discovered evidence is not of such a nature that it would probably yield a less severe sentence on retrial. ***While the sentencing judge found that the trial evidence established the "substantially impaired ability to conform one's conduct" mitigating factor, he also found that the trial evidence indicated that Schwab may have been "unwilling" rather than "unable" to control his desires.***

Schwab, Slip Op. at 13-14.

The new evidence and opinions offered by Dr. Samek "would probably yield a less severe sentence". *Jones v. State*, 709 So.2d 512, 521 (Fla. 1998). In fact, the Supreme Court affirms this view when it stated most recently "Accordingly, new evidence truly demonstrating that Schwab could not control his conduct could impact sentencing." *Schwab*, Slip Op. at 14.

After a more exhaustive review of the record, evaluation of Mr. Schwab, and interviews with family members, Dr. Samek no longer holds the view that Mr. Schwab was "unwilling" rather than "unable" to control his desires. *See*, Dr. Samek's Report attached *supra*. Instead, Dr. Samek opines:

> Whether or not a person does or does not have the capacity to conform his or her conduct to the requirements of the law is, in truth, an issue that is more gray than black and white. Because of this the court sets the standard for this determination at a different level when considering insanity than when considering mitigating factors. I stated at trial my opinion that Mr. Schwab did have sufficient ability to control his behaviors such that he could stop doing a rape if someone walked in the room and offered him a million dollars to stop. Even with the newly discovered evidence I continue to feel that in such an unusual and dramatic situation he would have been able to conform his conduct to the requirements of the law. However, I also believe that he was at the time suffering from an extreme mental disturbance (MDSO and panic about being caught violating his probation) such that, in the actual situation in which he found himself, his ability to conform his conduct to the requirements of the law was substantially impaired.

Samek Report at 5.

This opinion is in stark contrast to the opinion reached by the trial court in its original

sentencing order. Sentencing Order at 10-13. Dr. Samek offers many reasons why Mr. Schwab was "unable" to conform his conduct to the requirements of law. For example, based on the additional information made available to him, Dr. Samek states in his report:

> It is my opinion that Mr. Schwab was under the influence of extreme emotional distress at the time of the murder. I believe that he deteriorated very quickly after his release from prison. At the time of the murder, Mr. Schwab was in a panic state that had been created by a chain of events that had occurred.

Samek Report at 4.

Likewise, this opinion is different than that found by the trial court in its sentencing order. There, the trial court found that this mitigator "has not been reasonably established by the greater weight of the evidence." Sentencing Order at 8.

Dr. Samek's original diagnosis, the one accepted by the trial court, has now changed. According to Dr. Samek:

> In my trial testimony (page 397) I diagnosed Mr. Schwab "Antisocial Personality Disorder, Rape/Murderer, and Mentally Disordered Sex Offender" (MDSO). In the Court's Judgment and Sentence (page 12) it was stated, "Dr. Samek diagnosed the defendant as an antisocial rapist murder." Based on the information that is available now, my diagnostic opinion has changed in one aspect. While Mr. Schwab clearly did engage in marked antisocial behavior, it appears now that he also engaged, over a considerable period of time, in other behaviors that were pro-social. Therefore it is my opinion now that he does not have an Antisocial Personality Disorder. It is apparent that, in addition to his primary diagnosis (MDSO), Mr. Schwab had some neurotic emotional problems including an overly high desire to gain acceptance from others, low self-esteem, considerable insecurities, and marked fear of rejection by others. He also had marked feelings of shame related to his sexual orientation. He had considerable feelings of guilt and shame related to his childhood victimizations including those by his mother [who over protected and enabled him], by his father [who was overly rigid, harsh, and punitive with him], by his being the victim of a violent forcible rape at gunpoint with death threats at the age of about 10 committed by his best (and at the time only) friend's father, and by his failure to tell anyone at the time about the rape (not an unusual occurrence for this type of rape on a 10 year old child). In addition to his antisocial sexual behaviors, there were also 23 incidents of pro-social behavior which the trial Court found "The defendant proved this (pro-social) fact by a greater weight of the evidence." (These were the non-statutory mitigating circumstances number 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23,

24, 25, 26, 27, 29, 32, 33, 34, 35, 36, 37, and 40.)

Samek Report at 3.

In addition, Dr. Samek's original opinion regarding Mr. Schwab's amenability to treatment, the one also cited by the Eleventh Circuit as well as the trial court, has changed. Dr. Samek now opines:

> My opinion at trial was that Mr. Schwab was not a good treatment candidate. This was based on the fact that he exhibited a tremendous amount of remorse while in prison but yet it did not stop him from re-offending when he got out. My opinion on this has changed due to the additional information newly obtained from Mr. Schwab, from his father and step-mother, and from Duncan Bowen. Now I believe that, if he had been provided good quality MDSO treatment, which had been previously provided by the Florida Department of Health and Rehabilitative Services (HRS) at the Dr. Geraldine Boozer Sex Offender Rehabilitation Program at South Florida State Hospital, there is a reasonable possibility that he would have been successfully rehabilitated and that this crime wound never have occurred. This is based on the program's success statistics in treatment of men like Mark and on the information that shows not only Mark's stated desire for treatment but also his admissions of guilt after sentencing and his numerous neurotic characteristics (e.g. low self-esteem, considerable insecurities, high desire for acceptance of others, shame related to his sexual orientation, guilt and shame related to his childhood victimizations by his mother and father, etc.)

Samek Report at 3.

Since Dr. Samek has changed his original opinion regarding his diagnosis of Mr. Schwab, his amenability to treatment and the existence of statutory mitigators, a larger and more complete picture of Mr. Schwab emerges with the additional information. Now, with this new and important information available, Dr. Samek gives this Court a better and more complete answer to the ultimate question: "Why?" In Dr. Samek's opinion:

> I respectfully do not concur with the Court's statement "Whether the defendant's unstable family life contributed to his sexual deviance is also in question." The Court said, "Are sexual deviates made or are they born? The answer is unclear to this Court." I believe that both in general and in this specific case it is clear that men are not born sexual deviates. Their early childhood experiences (often including significant victimization by passive and/or by active abuse, as happened in this case) cause the emotional illness that Mentally Disordered Sex

> Offenders have. Mr. Schwab was not born a sex offender. His early life experiences made him become who he was.
>
> If Mr. Schwab's parents had treated him differently as a child, if he had not been raised in a family with two episodically physically and verbally fighting parents at a sensitive time during his developmental years, if his mother had not continuously rescued him and enabled his dysfunctional behaviors, if his father had not been at times highly demanding, harshly punitive, and emotionally insensitive to him, if he had not been raped and threatened with death by his one friend's father, if he had not had to move from school to school so often; he would not have developed the mental illness that led to his raping and killing Junny.

Samek Report at 4.

The testimony that Dr. Samek would offer at an evidentiary hearing would provide this Court with a more complete picture of Mr. Schwab's mental and emotional development. As noted above, an important factor in Mr. Schwab's development was the brutal rape he experienced as a young child. During the original trial, the sentencing court discounted Mr. Schwab's account of the brutal rape, finding it a fabrication. In his report, Dr. Samek goes into great detail concerning Mr. Schwab's childhood rape:

> Mr. Schwab claimed (non-statutory mitigating circumstance number 5) that he "was raped (and traumatized) at gunpoint as a small child." The Court said, "A young child who had been anally raped at gunpoint by a known person in the community would surely show physical or mental signs of injury," "The defendant's school performance and general personality showed no ill effects from the alleged incident," "the incident was never related by the defendant to anyone in Ohio," and "no person was called to verify that the named attacker actually resided in the defendant's community." The Court therefore found that "This entire incident appears to be another effort of the defendant to fabricate a defense."
>
> A traumatic rape, such as that described by Mr. Schwab, would very likely cause a Post Traumatic Stress Disorder (PTSD). While PTSD often impairs school performance, this is not always the case. Some people with PTSD cope with their PTSD by "escaping into work." These victims may excel in their school performance as a result of their PTSD. Given the emotional damage caused by what had been going on in his family of origin that had occurred to Mr. Schwab before this rape, I would expect that his learned coping style would probably have been to hold in and hide his feelings. I believe that in order to survive in his family of origin he had already, by the age of 10, learned to lie, to hide his real feelings, to pretend to feel what he thought others would find acceptable, and to suppress and repress his

"unacceptable" feelings. Therefore, in this case, I find no apparent evidence of physical or mental signs of injury to not be significant.

It is common for sexually abused children feel ashamed and guilty and responsible for their abuse. Most abused children do not immediately report it. Mr. Schwab did not tell anyone about his being raped until some point during his first incarceration. The record shows that he did tell several of his close friends about his being raped long before he was arrested and charged with raping Junny.

Paul Schwab said that his son Mark never has told him about his being raped. While he did not remember the first name of the rapist (George Jones), he did remember the family name, he did remember that Mr. Jones's son was Mark's best friend at the time, and he was able to draw a map of the location of the Jones's home, the school, and the cornfield in which the rape allegedly occurred.

Based upon information available at trial combined with newly discovered evidence, it is my opinion now that Mr. Schwab was raped violently at gunpoint in a corn field next to his school when he was 10 years old and that he has suffered Post Traumatic Stress Disorder (PTSD) from this incident.

Samek Report at 5-6 (emphasis added).

Dr. Samek continues with his opinion that Mr. Schwab suffered other forms of abuse that were relevant to his development. See Samek Report at 6-7. These non-statutory mitigators were rejected by the original trial court. Dr. Samek now finds these mitigators to exist based on the new information available to him, including information he was able to gather during two interviews of Mr. Schwab's father, the Reverend Paul Schwab.

Under the *Jones* standard, it is clear that this newly discovered evidence truly demonstrates "that Schwab could not control his conduct" and thus it "could impact sentencing". *Schwab*, Slip Op. at 14. Remove the original references to Dr. Samek in the sentencing order and replace them now with Dr. Samek's changed opinion, this Court must come to the inevitable conclusion that his sentence of death cannot stand. Because of the impact Dr. Samek's changed opinion, this Court should decide that Mr. Schwab deserves another sentencing hearing before a jury so that it may make

a decision with all of the available evidence.

CLAIM II

NEWLY DISCOVERED EVIDENCE OF THE DEPARTMENT OF CORRECTION'S TRAINING LOGS AND FDLE MOCK EXECUTION TRAINING NOTES CLEARLY REVEAL THAT FLORIDA'S LETHAL INJECTION METHOD OF EXECUTION VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION

Newly discovered evidence may be grounds for relief in a proceeding on a motion to vacate a sentence where the facts on which the claim is based were unknown to the trial court and the moving party or counsel at the time of trial, and the evidence could not have been ascertained by the party or his counsel in the exercise of due diligence. *Jones v. State*, 591 So.2d 911 (Fla. 1991); 28A Fla. Jur 2d HABEAS CORPUS AND POSTCONVICTION REMEDIES § 169 (1998). In order to obtain relief on such newly discovered evidence the evidence must be of such a nature that it would probably produce an acquittal on retrial, *Jones*, or result in a life sentence rather than the death penalty. *Scott v. Dugger*, 604 So.2d 465 (Fla. 1992).

The newly discovered evidence of notes taken by four separate FDLE monitors during simulated execution exercises were requested prior to the time Mr. Schwab filed his most recent Successive Motion to Vacate. The DOC objected to the release of these and other documents. The Florida Department of Law Enforcement, in its response, responded that "FDLE has not currently assigned any individuals to attend the execution of the defendant and as such can not respond to the request". (Attachment "C") Counsel received these notes on September 19, 2007, after counsel filed the prior Motion to Vacate. Counsel was unaware that these FDLE notes existed. Furthermore, the DOC objected to the release of these notes which the court agreed. Finally, FDLE affirmatively denied the existence of these notes. The state is now estopped from arguing that the defendant lacked

due diligence. *See, eg., Terry v. State*, 668 So.2d 954, 962 (Fla.1996); *Czubak v. State*, 570 So.2d 925, 928 (Fla.1990); *Pope v. State*, 441 So.2d 1073, 1076 (Fla.1983).

On November 1, 2007, the Florida Supreme Court issued its opinion in *Lightbourne v. McCollum*, denying relief in an all writs petition challenging the constitutionality of Florida's lethal injection procedure. *Lightbourne v. McCollum*, No. SC06-2391 (November 1, 2007). The trial court in *Lightbourne* conducted an extensive evidentiary hearing, spanning 13 days during which approximately forty witnesses testified. *Lightbourne*, Slip Op. at 6. The trial court denied relief and the Supreme Court affirmed the denial of relief.

The Florida Supreme Court's opinion includes a survey of major federal and Florida cases concerning the death penalty. The Florida Supreme Court recognized that United States Supreme Court jurisprudence, while unclear, focused on two main areas of inquiry regarding executions: whether a particular method of execution was permissible and whether a particular type of punishment is excessive for the crime. *Lightbourne*, Slip Op. at 16. Inherent in the Florida Supreme Court's ruling is the recognition of a third constitutional challenge to executions under the Eighth Amendment: whether Florida's lethal injection protocol, as actually administered, violates the Eighth Amendment. See *Lightbourne*, Slip Op. at 4, 38, 56 ("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.)

The Florida Supreme Court recognized this issue and where its resolution lay: "We briefly detail the executive branch's efforts because its *response* to the Diaz execution and the *revisions* to the protocol affect our ultimate determination of the constitutionality of the current lethal injection procedures." *Lightbourne*, Slip Op. at 4. The Supreme Court noted the examination conducted by

the Governor's Commission on Administration of Lethal Injection, the DOC Task Force and the trial court in *Lightbourne*. *Lightbourne*, Slip Op. at 5-6. The Supreme Court recognized that all three efforts focused on both revisions to the protocols and improved training to carry out the revised protocols. *Id.* The Court also conducted a limited examination into the three chemicals currently in use during lethal injection.

To analyze these areas, the Court stated that its purpose was to analyze the record under what it considered to be the polestar of the case:

> Because it is disputed whether or not Diaz suffered pain, we view this issue based on what is undisputed: if Diaz was not unconscious before the other drugs were injected, he would have indeed suffered unnecessary pain. Therefore, we evaluate the procedures with the knowledge that the execution of Diaz raised legitimate concerns about the adequacy of Florida's lethal injection procedures ***and the ability of the DOC to implement them***.

Lightbourne, Slip Op. at 38(emphasis added).

While the Court discussed several issues of constitutional concern, from the adequacy of the written protocols to the chemicals themselves, each and every resolution relied upon one factor: the ability of the DOC to properly implement the protocols.

While the Florida Supreme chose to issue its opinion with the clear knowledge that the United States Supreme has accepted certiorari in *Baze v. Rees*, 76 U.S.L.W. 3154 (U.S. Sept. 25, 2007), the Florida Supreme Court declined to adopt a specific standard to review the Eighth Amendment challenge, finding that Lightbourne would not prevail under any standard. *Lightbourne*, Slip Op. at 55. However, based on the newly discovered evidence obtained, the defense claims that Mr. Schwab would prevail under any standard articulated by the United States Supreme Court.

In his previous motion for relief, Mr. Schwab submitted the affidavit and opinion of Janine Arvizu, a certified Quality Auditor. In her prior affidavit of August 14, 2007, Arvizu pointed out

numerous deficiencies with the current protocols related to the proper training of the execution team members and FDLE monitors. (Attachment "D") She stated:

> Page 4, section (6) does not address or reference a systematic means of ensuring that the chemicals that are used are of appropriate quality and have been appropriately maintained. In effect, this section delegates such responsibility for quality control of the lethal chemicals to the FDLE agent in charge of monitoring chemical preparation. Despite this fact, there is no evidence that the FDLE agent in question is qualified to make such an assessment, or that the necessary records documenting the procurement, receipt and storage of the chemicals would be available for the agent's review.
> Page 5, section (7) (b) states that an FDLE agent is responsible for observing the preparation of the lethal chemicals, yet there is no indication that the agent in question has the technical skills and experience necessary to monitor the preparation of chemicals in a technical capacity. It is unlikely that an independent monitor without relevant technical experience would provide significant quality oversight value as a monitor of the chemical preparation process.

Like a Cassandra in the night from ancient Greek myth, Arvizu's prescience, while ignored by the courts, turned out to be true. The newly discovered evidence in the form of FDLE training notes for July 11 and July 18, in which four FDLE Inspectors participated in DOC mock executions, (Attachment "E") reveals serious training errors resulting in several failed exercises.

Ms. Arvizu identifies numerous and consequential errors in the mock executions as observed by the FDLE monitors, as well as insufficient training of the FDLE monitors themselves. These facts and expert opinions are contained in her affidavit and incorporated herein. (Attachment "F")

According to the FDLE notes, five simulated execution training exercise took place on July 11 and July 18 of this year. Two exercises were conducted on July 11th and three exercises were conducted on July 18th. According to the notes of both FDLE monitors present on July 11th, members of the execution team failed to administer crucial Phase III syringes during the second of two training exercises resulting in a failed exercise.

On July 18th, two different FDLE monitors observed three simulated training exercises. Again, according to the notes of the FDLE monitors, DOC execution team members failed to administer two of the last three syringes resulting in a failed exercise.

Based on these findings alone certain assumptions can be made. First, the Department of Corrections "botched" two of the five mock executions, a 40% error rate. Second, "botched" executions are now becoming part of the training process, an institutionalization of failed executions.

Equally troubling are the observations by the FDLE monitoring the chemical preparation for the second simulated execution on July 11, 2007. According to Ms. Arvizu's Affidavit, the FDLE observed the following:

> 10.12 7/11/07 Exercise II. Inspector Bryant-Smith's log includes brief notes documenting preparation of the chemicals by members of the medical team. These notes clearly indicate that this Inspector lacks even the minimum knowledge and training necessary to serve as an independent observer responsible for monitoring the preparation of lethal chemicals. The notes appear to read as follows:
>
> "Group – of people – mix – chemicals
>
> Quali chemical mix medical team (never less than 2)
>
> Hand mix – powder in sterile glux (*not legible)* medium – drawn into syringe
>
> 1st chemical
>
> 2nd chemical just drawn approximate amount
>
> 3rd chemical same as second"
>
> These notes indicate that this Inspector is completely unfamiliar with the relevant chemistry principles and laboratory practices, and is completely unqualified to monitor preparation of lethal chemicals. Under provisions of the DOC procedure, the FDLE agent responsible for monitoring the preparation of chemicals is required to "confirm that all lethal chemicals are correct and current." This Inspector is not capable of performing this essential function.

Affidavit of Janine S. Arvizu, November 8, 2007 (hereinafter "Arvizu Affidavit").

As shown by these notes, the DOC execution team is not being trained properly in preparing and administering the correct chemical amounts which is required by the protocols. In addition, it is

clear here and elsewhere in the Arvizu Affidavit that the FDLE monitors are not properly trained to identify potential problems relating to the preparation of the lethal chemicals. *See* Arvizu Affidavit, ¶¶ 9, 10.4, 10.8, 10.12, 10.16, 10.17, 10.20, 10.22, 11.

These two errors cited above implicate constitutional concerns raised by the Florida Supreme Court in both the Lightbourne and Schwab opinions. The constitutionality of the lethal injection protocols depend on the efficacy of the DOC personnel to correctly carry them out. So far, by botching two of the five training exercises (possibly three out five depending on the "approximate amount" of the chemicals prepared), it is clear that the DOC is neither capable nor prepared to carry out an execution. Second, the constitutional viability of the three lethal chemicals used depends on the proper preparation and administration of all three chemicals. By preparing and administering approximate amounts of chemicals, the constitutionality of the actual three drugs used is questionable at best.

WHEREFORE, based on the foregoing claims for relief, Mr. Schwab requests a full and fair evidentiary hearing at which to present evidence in support thereof, and that this motion be granted.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Successive Motion to Vacate Sentence or Stay Execution has been furnished by fax, e-mail and U.S. Mail, first class postage, to all counsel of record on this 9th day of November, 2007.

Mark S. Gruber
Florida Bar No. 0330541
Assistant CCC
Peter J. Cannon
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IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT, IN AND FOR BREVARD COUNTY, FLORIDA

STATE OF FLORIDA, **Plaintiff,**	:	
v.	:	**CASE NO.: CR 91-7249-CF-A** **DEATH PENALTY WARRANT** **Execution Scheduled: November 15, 2007**
MARK DEAN SCHWAB, **Defendant.**	:	

VERIFICATION

STATE OF FLORIDA)

ss.)

COUNTY OF ~~UNION~~ Baker)

BEFORE ME, the undersigned authority, this day personally appeared **MARK DEAN SCHWAB,** who, being first duly sworn, says that he is the Defendant in the above-styled cause, that he has read the foregoing Successive Motion to Vacate Judgments of Sentence and has personal knowledge of the facts and matters therein set forth and alleged; and that each and all of these facts and matters are true and correct.

FURTHER AFFIANT SAYETH NAUGHT.

Mark Dean Schwab
MARK DEAN SCHWAB

SWORN TO AND SUBSCRIBED TO before me this 8 day of Nov, 2007, by MARK D. SCHWAB, who is personally known to me or who provided the following identification:

Rose Valdez
NOTARY PUBLIC, STATE OF FLORIDA
My Commission Expires:

Personally known to me

Rose M. Valdez
MY COMMISSION # DD341464 EXPIRES
August 15, 2008
BONDED THRU TROY FAIN INSURANCE INC

ATTACHMENT "A"

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

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 1991-7249-CF-A
DEATH WARRANT

MARK DEAN SCHWAB,

Defendant.
_____/

MOTION TO STRIKE MOTION FOR JUDICIAL INTERVENTION; MOTION FOR PROTECTIVE ORDER

COMES NOW the State of Florida, and responds as follows to Schwab's "Motion for Judicial Intervention":

1. To the extent that Schwab's motion amounts to a personal attack on counsel for the State, it is due to be stricken. To the extent that the motion contains factual averments about conversations to which the undersigned was not a party, those averments are inflammatory, speculative hearsay, which have no place in a pleading filed by a Florida lawyer.

2. To the extent that Schwab asserts that there is no "privilege" as to Dr. Samek, the State will or may call Dr. Samek should an evidentiary hearing be conducted. Schwab's attempts to "hire" Dr. Samek are no more than an inappropriate attempt to preclude the State from preparing its case. Of

course, since no pleading has yet been filed, the State is unable to determine which witnesses may be needed should a hearing even be ordered. Schwab should not be allowed to use the timing of the filing of his postconviction relief motion as a sword to foreclose the State from preparing its case.

3. Moreover, Dr. Samek cannot testify for Schwab due to the conflict of interest. In *Walton v. State*, 847 So.2d 438, 445-446 (Fla. 2003), the Florida Supreme Court held that a mental health expert who testifies for one party cannot testify for an adverse party due to conflict of interest:

> Walton next contends that his fundamental rights to confrontation, due process, and an individualized and reliable hearing were violated when Dr. Sidney Merin was allowed to testify at his postconviction evidentiary hearing. Because Merin was previously appointed as a confidential mental health expert to Richard Cooper, Walton's codefendant, Walton contends that the obvious conflict of interest violated his constitutional rights. Additionally, Walton contends that the error in allowing Dr. Merin to testify was compounded by the trial court's limitation of cross-examination regarding the doctor's conflict of interest.
>
> It is clear that because Dr. Merin assisted in preparing Richard Cooper's defense strategy, a conflict of interest existed. Merin agreed to evaluate the new evidence before the court in the postconviction proceeding to determine what impact, if any, the mitigating evidence obtained during postconviction discovery would have upon a mental health professional's diagnosis of Walton. He testified regarding his impressions, despite having consulted with Cooper's attorneys during Cooper's prior trial proceedings. Because these two codefendants' interests were antagonistic to each other, it is unlikely that Merin could render a truly objective opinion with

regard to both. Thus, it was error to allow Merin to testify as a witness for the State.

4. The State will not waive, nor is Schwab entitled to compel the State to waive, any existing privilege. No actions to support a finding of waiver have taken place.

5. Schwab's assertions that the State has somehow "hindered" his efforts to obtain anything are frivolous -- the State has acted to insure that a waiver of the applicable privilege does not occur. *See, Jones v. Butterworth,* 701 So. 2d 76, 80 (Fla. 1997). That is entirely proper, and is the responsibility of the State, which, like the defense, is entitled to a fair trial.

6. If the State cannot call a defense expert as its own witness, and that is the law, *Jones, supra*, there is, and can be, no colorable argument for a different result in this situation. Both the work-product privilege and a conflict of interest foreclose Schwab from retaining Dr. Samek, and calls the propriety of his discussions with the doctor into question.

WHEREFORE, Schwab's "motion for judicial intervention" should be stricken, and a protective order entered foreclosing Schwab from contacting potential State expert witnesses without notice to counsel for the State.

Respectfully submitted,

BILL McCOLLUM
ATTORNEY GENERAL

KENNETH S. NUNNELLEY
Senior Assistant Attorney General
Florida Bar #998818
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Daytona Beach, FL 32118
(386) 238-4990
FAX (386) 226-0457

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by **e-mail**, **Facsimile** 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, **Robert Wayne Holmes**, Assistant State Attorney, 2725 Judge Fran Jamieson Way, Building D, Viera, Florida 32940 (321)617-7546, and **Christopher R. White**, Assistant State Attorney, 101 Bush Blvd., Sanford, Florida 32773 (407)665-6400, on this 14th day of August, 2007.

Of Counsel

ATTACHMENT "B"

William R. Samek, Ph.D.

F.S.A.T.P., Inc.
7241 S.W. 63 Avenue, Suite 203-C
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Clinical Psychology
Forensic Psychology
Impaired Professionals

Florida Psychological Association, Past President

November 6, 2007

Peter Cannon, Esq.
CCRC
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Faxed to: 813-740-3554

Re: Mark Dean Schwab
Case #: 91-7249 Brevard

Dear Mr. Cannon:

I am writing pursuant to your request that I review my opinions after looking at the material that you have provided to me and interviewing four people. The material I have reviewed include both things that were available at time of sentencing and things that were not available at that time. The following are items that I have reviewed that were or that could have been available to me at time of the sentencing hearing (05/23/92):

1. Medical records of birth of Mr. Schwab.
2. Records of Duncan Bowen (Mr. Schwab's outpatient MDSO therapist).
3. Case notes of Howard Bernstein, Ph.D. (Defense retained expert).
4. Mr. Schwab's Florida Department of Corrections file (first imprisonment).
5. 01/29/88 "psychological evaluation" by Duncan Bowen.
6. 03/10/88 presentence investigation by T.C. Stedman, Correctional Probation Officer I.
7. 04/17/91 statement to the Brevard Sheriff's Department by Mike Schneider (one of Mr. Schwab's victims).
8. 04/20/91 statement to the police by James Miller (a friend of Mike Schneider, one of Mr. Schwab's victims).
9. 04/21/91 statement to the Cocoa police by Mr. Schwab.
10. 04/21/91 statement to the FBI of Mary Stiffler (Mr. Schwab's mother).
11. 04/21/91 statement to the FBI and the SAO of Mary Stiffler (Mr. Schwab's mother).
12. 04/21/91 statement to the Cocoa police by Beverly Kinsey (Mr. Schwab's maternal aunt).
13. 04/21/91 statement to the police by Michael Lay (a friend of Mike Schneider, one of Mr. Schwab's victims).

14. 04/21/91 statement to the police by Benjamin Tawney (a friend of Mike Schneider, one of Mr. Schwab's victims).
15. 04/22/91 statement to the Cocoa police by Mr. Schwab.
16. 04/24/91 statement to the FBI of Karen Parker (a friend of Mr. Schwab's who met Mr. Schwab while he was in prison the first time).
17. 04/24/91 statement to the Cocoa police by Mr. Schwab.
18. 05/17/91 statement to the Brevard Sheriff's Department by James Miller (a friend of Mike Schneider, one of Mr. Schwab's victims).
19. 05/28/91 statement to the Brevard Sheriff's Department by Mike Schneider (one of Mr. Schwab's victims).
20. 05/28/91 statement to the Brevard Sheriff's Department by Michael Lay (a friend of Mike Schneider, one of Mr. Schwab's victims).
21. 09/13/91 deposition of Benjamin Tawney (a friend of Mike Schneider, one of Mr. Schwab's victims).
22. 10/30/91 deposition of Tobey Law (an acquaintance of Junny Martinez's).
23. 12/16/91 deposition of Michael Lay (a friend of Mike Schneider, one of Mr. Schwab's victims).
24. 01/10/92 Deposition of Tim Turner (an acquaintance of Junny Martinez's).
25. 04/22/92 letter by Louis Legum, Ph.D. and Ted Shaw, Ph.D. (Defense retained experts).
26. 05/18/92 psychological assessment by Janet Helfand, Ph.D. (Defense retained expert).
27. 05/23/92 trial testimony of Shirley Muhs (Mr. Schwab's maternal aunt).
28. 05/23/92 trial testimony of Howard Bernstein, Ph.D. (Defense retained expert).
29. 05/23/92 trial testimony of Patricia Knittel (mother of Bill Runyon, a friend of Mr. Schwab's).
30. 05/23/92 trial testimony of William Samek, Ph.D. (State retained expert).

The documents that you provided also included the following newly discovered evidence that was not and could not have been known by me at time of my testifying at the sentencing hearing:

1. 07/01/92 Judgment and Sentence of the Brevard Circuit Court (Case # 91-7242-CFA).
2. 06/15/06 Judgment of the U.S. Court of Appeals (Case # 05-14253).
3. 07/26/07 Neuropsychological evaluation by Hyman Eisenstein, Ph.D.
4. 11/01/07 Opinion of the Supreme Court of Florida (Case # SC07-1603).

Finally, additional newly discovered evidence was available to me from four clinical interviews that I conducted as follows:

1. 09/06/07 for 5¼ hours face-to-face at Florida State Prison with Mark Schwab.
2. 10/06/07 for a little more than ½ hour on the telephone with Duncan Bowen.
3. 10/29/07 for 3 hours face-to-face at my office with Paul and Paula Schwab (Mr. Schwab's father and step-mother).
4. 11/06/07 for a little less than an hour on the telephone with Paul Schwab.

In my trial testimony (page 397) I diagnosed Mr. Schwab "Antisocial Personality Disorder, Rape/Murderer, and Mentally Disordered Sex Offender" (MDSO). In the Court's Judgment and Sentence (page 12) it was stated, "Dr. Samek diagnosed the defendant as an antisocial rapist murder." Based on the information that is available now, my diagnostic opinion has changed in one aspect. While Mr. Schwab clearly did engage in marked antisocial behavior, it appears now that he also engaged, over a considerable period of time, in other behaviors that were pro-social. Therefore it is my opinion now that he does not have an Antisocial Personality Disorder. It is apparent that, in addition to his primary diagnosis (MDSO), Mr. Schwab had some neurotic emotional problems including an overly high desire to gain acceptance from others, low self-esteem, considerable insecurities, and marked fear of rejection by others. He also had marked feelings of shame related to his sexual orientation. He had considerable feelings of guilt and shame related to his childhood victimizations including those by his mother [who over protected and enabled him], by his father [who was overly rigid, harsh, and punitive with him], by his being the victim of a violent forcible rape at gunpoint with death threats at the age of about 10 committed by his best (and at the time only) friend's father, and by his failure to tell anyone at the time about the rape (not an unusual occurrence for this type of rape on a 10 year old child). In addition to his antisocial sexual behaviors, there were also 23 incidents of pro-social behavior which the trial Court found "The defendant proved this (pro-social) fact by a greater weight of the evidence." (These were the non-statutory mitigating circumstances number 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 29, 32, 33, 34, 35, 36, 37, and 40.)

My present diagnosis of Mr. Schwab is Mentally Disordered Sex Offender, Rape and Humiliation of Teenage Boys Type. The closest DSM-IV TR diagnosis for this would be Paraphilia, Sexual Sadism Type (302.84). Based on the newly discovered information it is felt that he is not an Antisocial Personality Disorder.

My opinion at trial was that Mr. Schwab was not a good treatment candidate. This was based on the fact that he exhibited a tremendous amount of remorse while in prison but yet it did not stop him from re-offending when he got out. My opinion on this has changed due to the additional information newly obtained from Mr. Schwab, from his father and step-mother, and from Duncan Bowen. Now I believe that, if he had been provided good quality MDSO treatment, which had been previously provided by the Florida Department of Health and Rehabilitative Services (HRS) at the Dr. Geraldine Boozer Sex Offender Rehabilitation Program at South Florida State Hospital, there is a reasonable possibility that he would have been successfully rehabilitated and that this crime wound never have occurred. This is based on the program's success statistics in treatment of men like Mark and on the information that shows not only Mark's stated desire for treatment but also his admissions of guilt after sentencing and his numerous neurotic characteristics (e.g. low self-esteem, considerable insecurities, high desire for acceptance of others, shame related to his sexual orientation, guilt and shame related to his childhood victimizations by his mother and father, etc.)

I respectfully do not concur with the Court's statement "Whether the defendant's unstable family life contributed to his sexual deviance is also in question." The Court said, "Are sexual deviates made or are they born? The answer is unclear to this Court." I believe that both in general and in this specific case it is clear that men are not born sexual deviates. Their early childhood experiences (often including significant victimization by passive and/or by active abuse, as happened in this case) cause the emotional illness that Mentally Disordered Sex Offenders have. Mr. Schwab was not born a sex offender. His early life experiences made him become who he was.

If Mr. Schwab's parents had treated him differently as a child, if he had not been raised in a family with two episodically physically and verbally fighting parents at a sensitive time during his developmental years, if his mother had not continuously rescued him and enabled his dysfunctional behaviors, if his father had not been at times highly demanding, harshly punitive, and emotionally insensitive to him, if he had not been raped and threatened with death by his one friend's father, if he had not had to move from school to school so often; he would not have developed the mental illness that led to his raping and killing Junny.

It is my opinion that Mr. Schwab was under the influence of extreme emotional distress at the time of the murder. I believe that he deteriorated very quickly after his release from prison. At the time of the murder, Mr. Schwab was in a panic state that had been created by a chain of events that had occurred.

While in prison Mr. Schwab had adjusted well to the highly structured life there. He had, possibly for the first time in his adult life, developed some meaningful intimate relationships. While in prison he developed close, intimate, and sexual relationships with a few inmates of his age who were incarcerated with him. When he was released from prison he planned to continue his relationship with two of his close friends/lovers that were also released from prison. When he contacted them, both of them were extremely anti-homosexual, hostile towards his interest in maintaining a relationship with them, and they wanted nothing to do with him. This deeply hurt Mr. Schwab. In his pain, he turned towards sexual activities with teenage boys, an activity that had provided him an escape from pain in the past. As he deteriorated into the panic state, his behaviors with the boys increasingly involved humiliation and control in addition to the sex. To impress the boys he lied about who he was, pretended to have a lot of money, and pretended to be a successful, important person. He paid for sex and also broke his probation by taking a boy to a water park that was outside of the county.

Mr. Schwab became increasingly afraid of having his probation violated and of being sent to prison. Extorting him for money and/or a motorcycle, one of the boys threatened to tell the police what he was doing. While Mr. Schwab was panicking on the inside, on the outside he remained relatively calm. With a long history of hiding his feelings and pretending to be what he wasn't, Mr. Schwab lied to his mother, his probation officer, and to all others that he feared might turn him in. He felt that could not talk about it in his therapy group because Dr. Bowen had told him just to listen and not to talk yet, because his

therapy group was overly large and therefore there was little time or opportunity for him to talk in group, and because he was scared that if he did talk Dr. Bowen would report him to his probation officer. At the same time he was in a panic searching for a way to get out of the trouble that he knew he was in.

Unfortunately, he was caught in a vicious downward spiral. The more he feared being caught, paradoxically, the more he was driven to engage in antisocial acts. The more he felt fear and anxiety about getting in trouble, the more he needed to escape from these bad/painful feelings by engaging in his exciting fantasy life (pretending to be a reporter), by escaping into the "high" of planning and doing his sex crimes, and by escaping from his bad feelings in to the good feelings (for him) of sexual release, of domination and control of boys, and the good feelings of the excitement of the high of taking risks and of doing things that he should not do.

The issue of a person's capacity to conform his or her conduct to the requirements of the law is a very complex and complicated one. At what point does an impulse that is not resisted become an irresistible impulse? When is a person's behavior driven by unconscious thoughts based on past experiences, when is it driven by over powering emotions, and when is it driven by conscious free choice (volition)? Often it is driven by a combination of all three. Often a person's behavior a product of both volitional and non-volitional factors. Also, often behavior is controlled by a mix of both internal (personality factors) and external (situational factors).

Whether or not a person does or does not have the capacity to conform his or her conduct to the requirements of the law is, in truth, an issue that is more gray than black and white. Because of this the court sets the standard for this determination at a different level when considering insanity than when considering mitigating factors. I stated at trial my opinion that Mr. Schwab did have sufficient ability to control his behaviors such that he could stop doing a rape if someone walked in the room and offered him a million dollars to stop. Even with the newly discovered evidence I continue to feel that in such an unusual and dramatic situation he would have been able to conform his conduct to the requirements of the law. However, I also believe that he was at the time suffering from an extreme mental disturbance (MDSO and panic about being caught violating his probation) such that, in the actual situation in which he found himself, his ability to conform his conduct to the requirements of the law was substantially impaired.

Mr. Schwab claimed (non-statutory mitigating circumstance number 5) that he "was raped (and traumatized) at gunpoint as a small child." The Court said, "A young child who had been anally raped at gunpoint by a known person in the community would surely show physical or mental signs of injury," "The defendant's school performance and general personality showed no ill effects from the alleged incident," "the incident was never related by the defendant to anyone in Ohio," and "no person was called to verify that the named attacker actually resided in the defendant's community." The Court therefore found that "This entire incident appears to be another effort of the defendant to fabricate a defense."

A traumatic rape, such as that described by Mr. Schwab, would very likely cause a Post Traumatic Stress Disorder (PTSD). While PTSD often impairs school performance, this is not always the case. Some people with PTSD cope with their PTSD by "escaping into work." These victims may excel in their school performance as a result of their PTSD. Given the emotional damage caused by what had been going on in his family of origin that had occurred to Mr. Schwab before this rape, I would expect that his learned coping style would probably have been to hold in and hide his feelings. I believe that in order to survive in his family of origin he had already, by the age of 10, learned to lie, to hide his real feelings, to pretend to feel what he thought others would find acceptable, and to suppress and repress his "unacceptable" feelings. Therefore, in this case, I find no apparent evidence of physical or mental signs of injury to not be significant.

It is common for sexually abused children feel ashamed and guilty and responsible for their abuse. Most abused children do not immediately report it. Mr. Schwab did not tell anyone about his being raped until some point during his first incarceration. The record shows that he did tell several of his close friends about his being raped long before he was arrested and charged with raping Junny.

Paul Schwab said that his son Mark never has told him about his being raped. While he did not remember the first name of the rapist (George Jones), he did remember the family name, he did remember that Mr. Jones's son was Mark's best friend at the time, and he was able to draw a map of the location of the Jones's home, the school, and the cornfield in which the rape allegedly occurred.

Based upon information available at trial combined with newly discovered evidence, it is my opinion now that Mr. Schwab was raped violently at gunpoint in a corn field next to his school when he was 10 years old and that he has suffered Post Traumatic Stress Disorder (PTSD) from this incident.

Mr. Schwab claimed (non-statutory mitigating circumstance number 7) that "The defendant's father beat the defendant's mother and the defendant's attempts to intercede on his mother's behalf were futile ..." The Court found "This non-statutory mitigating circumstance has not been proven ..." Based upon information available at trial combined with newly discovered evidence, it is my opinion now that Mr. Schwab's parents did physically fight with each other when he was in the house and that Mr. Schwab did physically try to intercede in these fights and that the fights upset him so much at the time that afterwards he would run away and hide.

Mr. Schwab claimed (non-statutory mitigating circumstance number 8) that "The defendant was punished by his father by beating him on his burns." The Court found "This non-statutory mitigating circumstance has not been proven ..." Based upon information available at trial combined with newly discovered evidence, it is my opinion now that Mr. Schwab's father did likely hit him with his hands on his burns and/or on his sensitive burn scars.

Mr. Schwab claimed (non-statutory mitigating circumstance number 9) that "The defendant's father would punish and humiliate the defendant by pulling down his pants ..." The Court found "This non-statutory mitigating circumstance has not been proven ..." Based upon information available at trial combined with newly discovered evidence, it is my opinion now that Mr. Schwab's father did forcibly remove Mr. Schwab's pants, "de-panting" him to teach him a lesson.

Mr. Schwab claimed (non-statutory mitigating circumstance number 10) that "The defendant dressed up in his mother's clothes, the defendant's older brother held the defendant down, took his picture, and would tease the defendant with the photograph." The Court found "This non-statutory mitigating circumstance has not been proven ..." Based upon information available at trial combined with newly discovered evidence, it is my opinion now that Mr. Schwab's brother likely did do this.

All of the above being said, none of the newly discovered evidence has modified my primary opinion that Junny suffered a traumatic, horrific death.

Yours truly,

William R. Samek, Ph.D.

William R. Samek, Ph.D.
Clinical and Forensic Psychologist (PY 2915)

ATTACHMENT "C"

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

STATE OF FLORIDA,

Plaintiff,

vs. Case No.91-7249-CFA

MARK DEAN SCHWAB,

Defendant.
_____/

FLORIDA DEPARTMENT OF LAW ENFORCEMENT'S RESPONSE TO DEFENDANT'S REQUEST FOR PRODUCTION OF PUBLIC RECORDS

COMES NOW, the FLORIDA DEPARTMENT OF LAW ENFORCEMENT (hereinafter "FDLE"), by and through undersigned counsel, and files this Response to the Defendant's Request for Production of Public Records filed pursuant to Florida Rule of Criminal Procedure 3.852(h)(3), and states as follows:

1. To the best of undersigned counsel's knowledge and belief, FDLE does not have any records responsive to paragraphs 1, 2, & 3 of the defendant's request.

2. FDLE has not currently assigned any individuals to attend the execution of the defendant and as such can not respond to the request for records set forth in paragraphs 5 and 6 of the defendant's request.

Respectfully submitted,

JAMES D. MARTIN
Assistant General Counsel
Florida Department of Law Enforcement
P.O. Box 1489
Tallahassee, Florida 32302
(850) 410-7676
FBN 973580

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent by U.S. mail to Wayne Holmes, Assistant State Attorney, 2725 Judge Fran Jamieson Parkway, Building D, Viera, Florida 32940, Ken Nunnelley, Assistant Attorney General, Office of the Attorney General, 444 Seabreeze Blvd., 5th Floor, Daytona Beach, Florida 32118; and Mark Gruber, Assistant CCRC-Middle, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619, this 8th day of August, 2007.

JAMES D. MARTIN

ATTACHMENT "D"

August 14, 2007

Peter Cannon
Capital Collateral Regional Counsel
3801 Corporex Park Drive, Suite 210
Tampa, FL 33619

Subject: Lethal Execution Protocol Review and Quality Assessment, Mark Schwab

Dear Mr. Cannon,

As requested, I have conducted an independent quality assessment of the records and documents provided by your office in the above referenced case. Although all the documents that were requested for an independent quality assessment in the subject case have not been received at this time, this letter provides a summary of the quality issues that have been identified based on review of the available records.

As referenced in the Department of Corrections Secretary's letter to the Governor certifying the Department's readiness for administration of an execution (dated July 31, 2007), the determination of readiness was based on having the necessary procedures, equipment, facilities, and personnel in place, as described in the revised lethal injection procedure (the version identified as effective for executions after August 1, 2007). Based on my review of the subject procedure and related documents, there are a number of areas in which the available records do not demonstrate that an efficacious system for meeting procedural objectives has been established.

Procedural Requirements (reference *Execution by Lethal Injection Procedures Effective for executions after August 1, 2007*, signed by James McDonough on July 31, 2007)

In the Definitions section of the procedure, the team warden is identified as a person designated by the Secretary whose qualifications have been demonstrated through experience and training. However, all the subsequent procedural references to training and qualification refer solely to training of the execution team members and the executioner; in fact, the team warden is the individual who selects and verifies the training of team members. Because the team warden's responsibilities and authority are distinctly different than those of team members, and because training and qualification should be commensurate with responsibilities, the means through which the team warden demonstrates sufficient training and qualification, and the standards for that training, are not apparent.

Throughout the procedure, references are made to "designated" individuals as being responsible for specific activities or roles, but the process through which an individual is

designated as the responsible party is not defined. In order to hold individuals accountable for their responsibilities, and to ensure that all functional assignments are made to appropriately qualified parties, designation of each responsible party should be documented in the permanent record. It is noted that this requirement should not be obviated by the necessity to protect the individual identities of execution team members.

In the procedure, the term "secure" is used without definition, and with contradictory intent. For example, 'secure' is used in reference to securing the restraining straps on the inmate, ensuring that the lethal chemicals remain 'secure,' and in reference to securing official witnesses in the witness room.

In the last sentence of Definitions section (4), it states that only the team warden can approve deviations from the procedure. It is appropriate to assign responsibility for approval of procedural deviations, but deviations should not be approved after the fact. Procedural deviations should be approved in advance, and all such approvals should be documented by the team warden.

On page 3, section (3) (f), the procedure states that team members are responsible for bringing concerns to the attention of the team warden. Given the objective of preventing unnecessary lingering, this requirement should explicitly require that concerns be immediately reported to the team warden.

On page 4, section (4) requires that there be a written record of any training activities. Such a requirement should explicitly require that the written record provide documentation of the scope and content of training. In order for the warden to verify that team members have received necessary training (including training in the approved version of the procedure), training records must provide sufficient detail. A record of attendance is insufficient for this purpose.

Page 4, section (5) requires that procedural compliance be documented through use of checklists. However, the procedure does not provide or reference the specific checklists in question, and multiple versions of checklists, with different steps in different sequences have been used in training. In addition, the checklists used in training are ineffective and were poorly designed from a quality tool perspective, as indicated by the fact that the trainees completed the checklists in an incomplete and inconsistent manner.

Page 4, section (6) requires that a designated team member ensure a sufficient supply of necessary chemicals, but it neither describes nor provides reference to a systematic means of ensuring acceptable procurement, receipt, verification, storage, maintenance, control, and disposal of the chemicals in question.

Page 4, section (6) does not address or reference a systematic means of ensuring that the chemicals that are used are of appropriate quality and have been appropriately maintained. In effect, this section delegates such responsibility for quality control of the lethal chemicals to the FDLE agent in charge of monitoring chemical preparation.

Despite this fact, there is no evidence that the FDLE agent in question is qualified to make such an assessment, or that the necessary records documenting the procurement, receipt and storage of the chemicals would be available for the agent's review.

Page 5, section (7) (b) states that an FDLE agent is responsible for observing the preparation of the lethal chemicals, yet there is no indication that the agent in question has the technical skills and experience necessary to monitor the preparation of chemicals in a technical capacity. It is unlikely that an independent monitor without relevant technical experience would provide significant quality oversight value as a monitor of the chemical preparation process.

Page 5, section (7) (b) and (c) requires that the FDLE agents prepare detailed logs of activities. No member of the execution team is required to prepare a detailed activity log, yet this responsibility is effectively delegated to the FDLE monitors, who are not subject to the same training requirements as team members, and should not be expected to provide the sole documentary evidence of the sequence of events. In addition, the requirement for preparation of a detailed activity log should explicitly require that the log be prepared as a contemporaneous record, rather than being documented after the fact.

Page 5, section (8) (a) requires that results of a physical examination be documented in the inmate's file, and that the findings of the physical examination be reported verbally to the team warden. In order to prevent any misinterpretation or misunderstanding of the verbal report, and to ensure that the verbal message is entirely consistent with the written record, the report to the warden should include the verbal and a written report.

Page 6, section (f) provides fairly detailed instructions for preparation of the chemical solutions, yet the instructions are based on unstated assumptions, and in practice, the instructions can not be followed precisely as written. Section (1) calls for injection of 10 ml of sterile water to a vial containing 500 mg of sodium pentothal. Because the materials used in the procedure are not explicitly described, it is left to individual discretion whether to use purchased vials prefilled with precisely 500 mg of sodium pentothal, or whether to prepare the necessary vials by accurately measuring 500 mg of sodium pentothal on a calibrated analytical balance. In my experience as a laboratory auditor, this type of imprecise procedural instruction leads to unexpected and undesired variability, and can contribute to operational problems. In a similarly imprecise description of chemical preparation, section (2) calls for use of a volumetric syringe to draw 50 mg of pancuronium bromide. Syringes are used to measure volumes of liquids; they can not be used to directly measure the mass of a solid. Implicit in this instruction is the assumption that the pancuronium bromide is procured and available as a solution of known and appropriate concentration. It also assumes that the individual responsible for preparing the chemicals is able to accurately compute the volume of solution necessary to contain 50 mg of pancuronium bromide. This lack of specificity is inconsistent with an otherwise detailed procedure, and it requires that a second qualified party be present to carefully review and observe the preparation of the chemical solution. Finally, the same lack of specificity compromises the instructions for preparation of potassium chloride in section

(f) (3). The instructions call for use of a 60 cc syringe to withdraw 120 meq of KCl, yet the concentration of the stock or prepared KCl solution is not specified. Given the importance of the chemical solutions to the procedural objectives, it is important that these steps be accurately and completely documented in the procedure.

On page 7, section (g) implies that the lethal chemicals are prepared in a separate, but unspecified location, then they are transported, in the presence of at least one additional member of the execution team, to the executioner's room. This is inconsistent with section (7) (b) which requires that the FDLE agent responsible for monitoring preparation of the chemicals be located in the executioner's room.

On page 8, section (k) indicates that the team warden is responsible for administering a presumptive drug test and a presumptive alcohol test to each team member. At the time this testing is performed, the team warden needs to be qualified to administer such tests, yet the training and qualification section does not address this requirement. In addition, approved procedures for performance of these presumptive tests should be available for review.

Page 9 section (j) requires that a specific team member be responsible for continuously monitoring the viability of the IV lines prior to and during the administration of the execution. It is not clear how a single individual would be capable of performing this function from a single location (either in the execution chamber or in the executioner's room). In addition, it is not clear which team member would be responsible for performing this extremely important function given the limitations on people present in each room (as specified in section (11) (d) and (e)).

Page 12 section (d) provides instructions in the event that the primary venous access is compromised during the administration of lethal chemicals. This provision should be broadened to address the situation in which it is recognized that access has been compromised prior to the administration of lethal chemicals.

Page 12 section (d) refers to opening of drapes, yet all other such references have been changed to more accurately address the facility's use of a window covering.

Training

Specific Procedures sections (2) and (3) describe requirements for training and qualification of execution team members. Given the distinctly different responsibilities of security team members and technical team members, the team members should receive training that is commensurate with their responsibilities. The training records from the period May 8 – August 1, 2007 document training in the subject "Execution by Lethal Injection Procedures." There is no indication that team members (presumably identified as STM-#) received training designed specifically to address learning objectives that were developed in consideration of their responsibilities.

Specific Procedures section (4) requires that training be sufficient to ensure that all personnel are prepared to carry out their roles. In order for any party to make a determination that delivery of a given training curriculum has been effective in this manner, the training should include objective evidence of which individuals achieved which learning objectives. This requirement is typically satisfied through a written examination or practical demonstration of skills. The available records provided no indication that the training in question was either designed to meet specific learning objectives (cognitive, affective, or psychomotor), or that individuals demonstrated satisfactory achievement through anything other than attendance.

Multiple training attendance reports were provided which document the delivery of eight hours of training to three separate groups of employees on the same day (STMs, EXs, and MPs). The training records indicate that a single presenter was responsible for delivery of the training in each instance. Although these records might seem to indicate that three different courses were delivered, consistent with the differing responsibilities of the three groups, a full day of such training could clearly not have been delivered to all three groups by the same presenter. (See, for example, training attendance records for 7/11/07).

Functional Readiness

On page 2, section (2) (a) and (b), the procedure states that the team warden will select two (2) executioners to carry out the execution, and will designate one of the executioners as primary and the other as secondary. During the execution, the secondary executioner must be available to assume the role as primary at any time. Implicit in this requirement is the assumption that the team warden will have more than two qualified executioners to choose from. Review of the available training records indicates that since May 2007, only two individuals may have received training to fulfill the role of executioner (individuals identified on Training Attendance Reports as "EX-1" and "EX-2"), and neither of these parties has been trained in the provisions of the revised procedure that was approved on July 31, 2007. First, every party who may be designated as an executioner must have been trained on the approved version of the procedure. Second, certification of readiness should include qualification of sufficient backup personnel to fulfill procedural requirements in the event that a single key individual is unable to perform on the day in question.

According to training records provided, none of the medical team members have received training in the recently revised and approved procedure since it was released on July 31, 2007. Such training would be a necessary prerequisite to certifying the department's capability.

The number and nature of quality deficiencies and inconsistencies identified in the reviewed materials lead me to conclude that the department has not demonstrated that they have put in place the systems and controls necessary to ensure that they can predictably and reliably perform executions by lethal injection in accordance with their own objectives.

Should you need any additional information, or have any questions regarding my review, please do not hesitate to contact me. Upon receipt and review of any of the requested documents that have been heretofore unavailable, I will provide additional or amended review comments, as appropriate.

Very truly yours,

Janine Arvizu

ATTACHMENT "E"

Inspector Mark Mitchell

July 18, 2007

Florida State Prison Training (FSP)

7/18/07

Warden Cannon - lead
Warden Harris - Assistant lead

Next possible execution - 10/25/07

Exercise 7

Begin at 1042 for estimated 1100 event

1044 - warden make contact w/ Inmate told what will happen

1045 - Inmate B cuffed - Removed from cell - 3/staff

Four staff place (I) on gurney } while sitting up

R+L feet secured to gurney

R+L Legs secured at 3 locations

~~R+L arm tourniquets pla~~ Tourniquets placed on R+L

(I) laid back - uncuffed.

R+L wrists secured

Cuffs ~~pre~~replaced in bag

Hands wrapped in medical tape (Ace Bandages) to arm rests.

shirt unbuttoned

Did not capture first Time

Med staff attach EKG leads to Inmate Torso

Med staff confirmed EKG reading. WAVE captured

Shirt rebuttoned

Strap placed over chest + secured to gurney

Strap placed across over chest from right to left

Med. staff entered.
IV's Inmate left arm prepd and IV inserted - Taped to arm
Right arm prepd & IV inserted
Med staff leave Execution Chamber
White sheet placed over Inmate - exposing only head
Med staff (1) returned to check Inmate - Passes
IV's through wall to execution Booth
Curtain to Chamber Closed
Warden advised by Med staff that execution is "GO"
Warden signals for Witness Curtain to open - (it Does)
Warden asks on phone for Governor - asks for last minute stay
Asks Inmate for any last statements
Warden state prep phase has ended, execution will begin.

Phase ONE
Syringes begin - Radio contact advises of stages
Syringe one is complete - 1102 hrs
Syringe 2 is complete - 1103

Warden attempts to wake Inmate to see if concious - Inmate does not respond

Phase Two
Syringe 4 complete - 1106
5 complete - 1107.

Phase 3 - Complete - 1107

Med Staff returns - Checks inmate - confirms Death at 1110 hrs

Warden Contacts Gov. advises execution has been carried out.

Warden announces death to witnesses - 1111 hrs
Witness curtain is closed 1111 hrs.

Removal team enter Chamber at 1112 hrs.
Sheets/Tape/Straps & IV removed by Removal team 1113 hrs.

Exercise 2 from Execution R

1126 - Warden advised Inmate of imminent execution
1127 - Cuffed & removed from cell - led to chamber by 3 staff members
Same procedure as exercise One securing ~~Inmate~~ Inmate to gurney & ~~I V's placed in R/L arms~~
Inmate's legs secured
Shirt unbuttoned -
EKG Monitors placed on Torso
Med staff advises EKG Monitors are not capturing on One monitor
Med staff advised Monitors were capturing & to proceed.
Med Staff enters places IV's in Both arms
Video Monitor shows IV's & Inmate face
Med staff advises IV's look good
IV 1139 lines & saline bags are placed thru wall into Execution Room.
Sheet placed over Inmate - exposing head only
Med staff advised to proceed w/ Phase One - 1142
Phase One complete at 1144 - Syringe One was put into IV Lead - complete at 1143
- Syringe Two " " - Complete at 1143
- Syringe Three " " - Complete at 1144

Phase Two -

- Medical confirm unconciousness

Phase Two complete 1146

Syringe 4 complete at - 1145
Syringe 5 complete at - 1146
Syringe 6 complete at - 1146
5

Phase 3

Syringe 7 complete - 1148 (med staff says ~~Heart~~ Krate is irresponsive)
Syringe 8 complete - 1149
Phase 3 complete at 1149

Med staff says heart stopped left room to check cannula in Chamber.
- Med staff return & advise time of Death as 1149 hrs.

Exercise Three

1301 Warden advised team members to take positions for a 1320 event.

1305 Inmate brought in to Chamber - Placed on Gurney - feet, legs, thighs strapped to Gurney

1310 Med Staff advised that EKG transmitter had captured readings

1311 Med Staff enters Chamber and inserts IV's into inmates L&R arms.
Video cameras show IV insertions.

1315 Inmate covered with sheet.

1316 Med staff evaluates IV insertion - Advises executioner IV look good.

1320 Med team member does final survey & passes 2 IV Bags into Execution Room.

1321 Witness Curtain Opened

Phase One

1323 Syringe One began –
1323 Two began
1324 Three began

Phase Two

1325 Syringe ~~8~~ four began
1326 Syringe five
1327 Syringe 6

Phase Three

1327 Syringe 7 Began
1328 Syringe 8
Phase 3 complete at 1329

Med Staff confirms death at 1330

Inspector Rose Davis

July 18, 2007

Florida State Prison Training (FSP)

WARDEN CANNON

7/18/07

#1 10:42 - PX TO GOV

10:44 - WARDEN ADV. INMATE

10:44 - IM ESCORTED OUT CUFFED @ 3RD STRAP MED ENTERS.

1045 - 104 ANKLES, CALVES, KNEES 1046 THIGHS TURNQ. W/ HAND CUFF, HANDS DWN

1047 HANDS WRAPPED & TAPED

1048 SHIRT UNB. EKG LEADS 1049 - LEFT SIDE NOT CAPTURED. READJUST.

FAULTY - REPLACE OK @ 1051 W/ 2ND ANY! SHIRT REBUTTONED. CHEST STRAP 1052

CROSS STRAP TO LEFT SIDE

1052 - 1054 IV LEFT ARM TNQ OFF. - LINE SECURED TO TABLE.

1054 - 1055 IV RIGHT ARM TURNQ OFF

1056 - MED EXITS. SHEET COVERS

1057 DR ENTERS, checks LINES, PASSES IVS THROUGH BAGS.

1058 SEC. TEAMS LV. CURTAIN DOOR Closed DR RECHECKS

1059 CURTAIN OPENS.

1100 WARDEN ON W/ GOV. NO STAY - EX GO. NO LAST WDS.

3 SYRG PER PHASE

1101 BEG. PH 1 ORD LT

1102 SYG 1 COMPLT

1103 " 2 "

1104 " 3 " WARDEN ANN. INMATE UNCONSCIOUS

1104 BEGIN PH 2

1106 " 4 COMPLETE

1107 " 5 "

1107 BEG PH 3

1108

1109 SYG 8 DR enter. checks Heart ANN. DEC.

PRONC 1110. WARD. PX: GOV ANNOUNCED TO Gallery CURTAIN Closed

ACE BANDAGES

#1 11:12 REMOVAL TEAM ENTERS.

IVS REMOVED. UNSTRAPPED

#2 1127 cont w/ GOV. WARDEN ADV.

INSIDE 1129. IV STRAPPED DOWN. UNCUFFED.

1130 HANDS

1131 SHIRT.

RED LT PHASE. 1131 EKG LEADS ATTACHED

" NO CAPTURE ON 166 GE READJUST.

1133 CAPTURE ON 1 OKD SHIRT REBUTT 1134

1134 STRAP CHEST 166 ok now. CROSS STRAP.

1134 MED TEAM ENTERS.

1136 LEFT ARM ATT.

1137 RT ARM. ATT.

1138 MED TEAM EXITS DR CHECKS. OK

1139 SHEET DR RECHECKS OK

1139 BAGS PASSED.

1140 DR CHECKS OK

1140 CURTAIN OPENS WARDEN RT GOV.

WARDEN READS SENT

1141 PHASE 1 BEGIN.

1142 SYG 1 COMPLT.

1143 SYG 2 COMPLT

1143 SYG 3 " PH 1 comp.

" 1144 WARD check - ok ANM. UNCON.

Phase II 1145 BEG. SYG 4 comp. II

1146 SYG 5 "

III " WARDEN TO GOV. OK

PHASE 2

11:46 SYG 6 COMPLETE

PHASE 3

11:48 SYG 7 " HEART IRREGULAR.

ROOM 11:49 SYG 8 " HEART FLAT LINE

DR. CHECKS. ADV. WARDEN. TOD 11:49

1150 WARDEN AV. CURTAIN DOWN

1152 REMOVAL TEAM ENTERS

#3 CHAMBER

1103 WARDEN ADV. / contact w/ GOV.

CUFFED ESCORTED

1105 PLACED ON BED

ANKLES, CALVES, KNEES

1106 THIGHS - MED STAFF ENTERS, TOURNQ.

CUFFS OFF, HANDS SECURED

1107 HANDS WRAPPED / TAPED.

1108 SHIRT UNB.

1109 MED STAFF - SECURES EKG MONITORS.

1110 EKG ✓ SHIRT REBUTT. CHEST & CROSS STRAP

1112 L. ARM STICK ✓

1117 L ARM TOURNQ OFF

1113 R ARM STICK ✓ TOURNQ OFF

1114 LINES SECURE med STAFF OUT

1114 DR ✓ ASK IN MOVE OK? NOD yes

1115 Sheet DR Rechecks ok

1120 DR RE ✓ IV BAGS PASSED

1121 " " ✓ CURTAIN UP

1122 WARDEN TO GOV. OK

DONNIE JACKSON

WARDEN HARRIS

" CANNON

POLK

DICKSON

#3

122 NO SOUND.

122 BEGIN PHASE 1

Eliminated 123 SYG 1 Comp.

124 SYG 2 "

125 SYG 3 " INM. UNRESPONSIVE

125 BEG PHASE 2

126 SYG 4 "

127 SYG 5 "

128 SYG 6 " BEG Ph 3

128 SYG 7 "

129 SYG 8 "

130 DR. V INM Pronounced.

131 WARDEN TO GOV.

133 REMAINS TEAM Enters

Inspector Tim Westveer

July 11, 2007

Florida State Prison Training (FSP)

Checklist Items

Arrived @ FSP Time

" " Death Row

" " Death house

Valium offered @

[illegible]

[illegible]

Chemicals Mixed between 2-3 Pm.

Placed on gurney + Secured w/o incident Time

Lower body

(Loose) Tourniquets Applied L + R arm

L + R Arms secured to arm board Time

L + R Hands secured to gurney

Taped + Ace bandaged Time

Bio-Monitors Applied Time

Bio-Monitors Applied

Bio-Monitors Check + Working - not working Time

(R) [illegible] not working

2 [illegible] working

Standing Unit Captain _____

IV inserted (L) Arm Time _____

(L) IV secured & Taped to gurney

IV inserted (R) Arm. Time _____

(R) IV secured & Taped to gurney

Upper body secured Time _____

Tourniquets removed Time _____

Medical ✓ of IV's OK - Not OK _____

Saline IV Bags passed into

Chemo Room Time _____

Drip Verified Time _____

Final ✓ of IV's Time _____

(Communication Established with

30 min Prior to condemned exercise

Monitor

Final overhead room Go

1st Chemical drawn S E

2345678 S / E

Chemical Mix @ 230

Rx Time @ 2 10

Leak @ 1 / 10

Thiopental 2.5 mg
" "
Sodium Chloride Flush
Pancuronium 5D U
" "
Sodium Chloride Flush.

Potassium Chloride 120 mg.
" "

Amber Light = Phase 1 complete
Green Light = Phase 2 complete

Heart beat stopped _____
monitor flatlines _____
Time of death 1205
Physical check
Curtain closed

Chemicals mixed 2 ml ?

Cameras trained on L & R Arm & Face.

Comm est w/ EOC

Condemned Removed from Cell & Escorted to death chamber. Time

Seated - lowerbody secured Time

Touniquets loosly placed L+R Arm Time

Reclined + uncuffed ——

Arms, L + R secured to board tape + ACC bandages

Placed Time Time

Bio monitors working. Time

Upper body secured Time

IV inserted L Arm Time

" " R Arm "

IV Secured to gurney "

" " " " "

Touniquet Removed

IV (R) Arm ——

Touniquet removed

[illegible]

Medical ✓ of IV Time

Drip established L + R Arm ——

Sheet Given & Read
Second Time

IV Check L+R Arm
Time

IV Bags Disconnected & Chem
Room
Time

IV L+R Arm YOK Time.

LAST MINUTE STATS ✓
TIME

Sentence Announced to
Condemned
LAST STATEMENT Time
Statement Patients.

Execution Phase Began Time
1, 2, 3
Check of Vascular Time
4, 5, 6
Phase II Time
4, 5, 6
Phase 3 Time

Heart beat
Pronounced Dead
Death @ 1249 Time.
Cardiac Arrest 1250.

Chem Mix Mixing Time
Never less than Two.

Powder. Saline - Mixed

Liquid for remaining.

Inspector Tonja Bryant-Smith

July 11, 2007

Florida State Prison Training (FSP)

will Not be there
*Biohazard Bin on day of Execution

7/11/07

Training @ Florida State Prison for Execution

IV Line

Arrival @ FSP Death House - 11:20am Conversation w/ warden

Handcuffed —

condemned ~~was~~ brought over @ 9:00pm

Condemned removed from cell - 11:23am

dress/ shower

placed on gurney 11:23 am
strapped in ~~Legs~~ Ankles first / Legs / Arms

Total of 4 people

11:24- medical person placed items on arms round circular (tourniquet) -
Taped hands down 11:26am

Not uncomfortable not pain (u)

11:26am unbutton shirt
11:26am placed pad electronic monitoring on chest

street clothes no uniforms

Uniformed per strapdown

Technical problems with EKG monitoring 11:32am
change pads on chest had to reprogram unit
11:35am problem w/ system monitoring

11:42am- ready to go - button shirt up
Strap chest

11:43am - pulled IV's into room

All done before curtain opens

List persons in room
- warden
- FDLE
- one others

left arm – IV · 11.44am removed tourniquet

11:46am – right arm – NO IV removed taped to bed
also check both IVs

11:47. placed IV bags through hole

11.48am - Cover condemned

Final check 11:49am — Medical examine

11:53am curtain open

Telephone call – 11:54
warden asked last statements 11:54am
– None –

warden advised

Execution II Phase 11:54am begins

11:59am Light changed on. Recommend 2nd check

Called warden ~~shook~~ shook Dimate 11:59am
name

12:04pm changed phase ~~III~~

12:05pm Phase ~~III~~ IV

medical examiner came out

Call to Governor

12:05pm Deceased

Everyone agreed on time

Announcement to visitors

Curtain down 12:06pm

Turn volume up in witness area

30 minutes –

(2) Thiopental 25
(1) sodium
(2) Pancuroncum 50mg
(1) sodium
(2) Potassium chloride 120 mg

---

* 12:20pm start time
Actually in chamb 12:22pm
Leap restraint 12:23pm
First leg 12:23pm
3rd leg strap 12:23
Tourniquet 12:24 on
1224 removal handcuffs
Arms down 12:25pm
Hands taped 12:26pm

For Lawyer or Doctors

* Telemetry Attach 12:27pm
Electronic equipment for heart rate

Channel 4 properly working] 12:28pm
Chann 166 is not

12:28pm capture — Should look the same on monitor

12:29p chest strap – we have capture

last chest strap - 12:30pm —
Capture

IV's bought in — 12:30pm put on left arm -

Remove tourniquet 12:31pm
Taped IV's to bed

Medical person — Final check 12:33pm
placed sheet on individual 12:34pm

Follow up check after sheet 12:34pm
placed IV bags through Whole

medical person checked bags 12:36pm
checked monitors

12:38pm - curtain up —
2 meds in room

12:39pm 1st Thiopon in
12:40pm 1 complete Syringe
12:41pm 2nd Thiopental in
12:42pm 2 complete Syringe
12:42pm Sodium chloride in

Syringe 3 complet 1243pm
Phase I Complete "

Medical clearance - proceed 1243 pm
Syringe 4 in - Pancurium 12.43pm
Syringe 4 complete 12.44pm
Syringe 5 in - 1244pm Pancurium
Syringe 5 complete 12.45pm
Syringe 6 in - 12.45pm sodium
Syringe 6 complete 12.46pm
Syringe 7 - in 1246pm - Potassium chloride
Syringe 7 complete - 12.47pm
Phase III - 12.46pm Proceed

Syringe 8 in 1247 pm Potassium chloride
Syringe 8 complete 12.48pm

- Dead → 12:48 pm on monitor per doctor

12:49pm pronounced dead by ME / warden make announcement to Governor
Curtain down @ 1249pm

* Group - of people - mix - chemicals

Quiet
Chemical mix Medical team (Never less than 2)

Hand mix - powder in sterile diluent medium - drawn into syringe

1st Chemical

2nd chemical
just drawn
approximate amount

3rd chemical
same as second

ATTACHMENT "F"

AFFIDAVIT

JANINE S. ARVIZU, having been duly sworn, hereby states as follows:

1. I am a quality consultant and laboratory quality auditor located in Tijeras, NM 87059.
2. My education includes a B.S. degree in biochemistry (California Polytechnic State University at San Luis Obispo, 1976) and ABD in chemistry (University of New Mexico). I am certified as a Quality Auditor (American Society for Quality, certificate #19856) and I specialize in assessments of laboratories.
3. From 1982 – 1992, I was employed by EG&G Idaho, Inc. (operating contractor for the Department of Energy's Idaho National Engineering Laboratory). In the course of my career, I established and managed an analytical chemistry laboratory for the Department of Energy, developed and implemented quality assurance programs, and served as Lead Auditor for dozens of audits. I served as Program Manager for the U.S. Navy's nationwide laboratory Quality Assurance Program; in this capacity I managed the audit program that evaluated government and commercial laboratories, assessed operating procedures, and performed independent quality assessments.
4. In my capacity as a quality auditor, I conduct independent evaluations of diverse procedures, systems, and controls, and assess their efficacy in reliably meeting the intended objectives. These assessments typically include an evaluation of procedures, guidelines, and instructional materials, as well as operating records related to the implementation of procedures.
5. Capital Collateral Regional Counsel attorneys for Mark Dean Schwab hired me to conduct a focused review and quality assessment of documents related to the Department of Correction's procedures and practices for carrying out an execution by lethal injection. I provided counsel with an initial report of conclusions (dated August 14, 2007).
6. After my initial report of conclusions, I received and reviewed copies of additional records provided by the Department of Corrections. The records included notes prepared by FDLE Inspectors who received Florida State Prison training on July 11, 2007 (Tim Westveer and Tonja Bryant-Smith) and July 18, 2007 (Rose Davis and Mark Mitchell). I evaluated the accuracy and completeness of the records and assessed the training exercises' internal consistency and compliance with procedural requirements. This affidavit provides my conclusions as to the efficacy of the training administered by DOC, and its implications for the reliability of the Department's execution procedure.
7. Although I have reviewed copies of the recently received training records, it is my understanding that defense counsel has not yet been provided access to documents that provide important context and information relevant to an assessment of the reliability and efficacy of the DOC's execution procedure (previously identified as items 1, 2, 3, 4, 5, 9, 10, 11, 12, 16, and 17 in the Defendant's Motion to Compel). This affidavit conveys my continued opinion that the previously requested records and documents are relevant and necessary to independently assess the efficacy of the DOC's execution procedure. This conclusion is bolstered by my review of the FDLE agents' records from mock executions in July 2007 (reference item 10 on the Defendant's Motion to Compel). These records clearly indicate that in July 2007, the training program was deficient. The additional

requested records are needed to determine whether the current state of the training program has been improved, and will be adequate to ensure the reliability of the execution procedure.

8. The notes recorded by FDLE Inspectors are understood to represent their written record of the training exercises that were conducted by the DOC, in which their responsibility was to serve as monitors to observe the actions of the execution team and the condition of the condemned inmate at all times during the execution process, and to document their observations in a detailed log

9. My initial report of conclusions (dated 8/14/07) stated:

> Page 4, section (6) does not address or reference a systematic means of ensuring that the chemicals that are used are of appropriate quality and have been appropriately maintained. In effect, this section delegates such responsibility for quality control of the lethal chemicals to the FDLE agent in charge of monitoring chemical preparation. Despite this fact, there is no evidence that the FDLE agent in question is qualified to make such an assessment, or that the necessary records documenting the procurement, receipt and storage of the chemicals would be available for the agent's review.
>
> Page 5, section (7) (b) states that an FDLE agent is responsible for observing the preparation of the lethal chemicals, yet there is no indication that the agent in question has the technical skills and experience necessary to monitor the preparation of chemicals in a technical capacity. It is unlikely that an independent monitor without relevant technical experience would provide significant quality oversight value as a monitor of the chemical preparation process.

Based on my review of the FDLE agent's training records from simulated executions in July 2007, the validity of these quality concerns have been confirmed. It is apparent that the FDLE agents lack the qualifications that would enable them to effectively perform these essential control and oversight functions.

10. Findings and observations regarding these records follow.

10.1 The Inspectors' logs do not meet standards for quality records. The notes appear to have been recorded on looseleaf notebook pages, and some of the Inspectors' entries have been scratched out. Entries to quality records should be made in ink in bound notebooks with sequentially numbered pages; this helps to ensure that such records are contemporaneous, rather than subject to after-the-fact modifications and deletions. In addition, the Inspectors should avoid obliterating any entries. Errors should be lined out and initialed without obscuring the original entry.

10.2 The records for training conducted on July 11, 2007 document two execution exercises. Three separate attendance records were provided for training on this date. They document the attendees at three 8-hour training sessions (for 9 STMs; 2 EXs; and 5 MPs). Attendance of the two FDLE Inspectors was not documented.

10.3 The records for training conducted on July 18, 2007 document three execution exercises. Three separate attendance records were provided for training on this date.

They document the attendees at three 8-hour training sessions (for 11 STMs; 1 EX; and 2 MPs). Attendance of two FDLE Inspectors was documented.

10.4 Execution by Lethal Injection Procedures effective 8/1/07 require that "All team members shall be instructed on the effects of each lethal chemical" (section (4), page 4). The Inspectors' training records provide no indication that they received any such instruction. Rather, far from understanding the physiological effects to be expected from each chemical, the Inspectors' training records provide evidence that the Inspectors are only marginally familiar with the chemical names. Because the Inspectors are responsible for monitoring the condition of the condemned inmate at all times, their quality control role can not be effectively served if they do not understand the expected effects of each chemical. This is especially problematic since the Secretary of the Department of Corrections certified that everyone has been appropriately trained on the same day that the August 1, 2007 protocols were released; this certifies that the execution team members were previously trained as to the effects of each lethal chemical.

10.5 7/11/07 Exercise I. Inspector Bryant-Smith's log reveals a seriously limited understanding of the activities being observed, and their relative importance.

> The 11:24 entry states: "medical person placed items on arms round cercular (torniequet)"
>
> The 11:44 entry states: "left arm – IV. Removed tournequet"
>
> The 11:46 entry states: "NO IV right arm – removed tour – taped to bed. Also check both IV's"

These log entries do not provide a coherent record of the important activities related to gaining venous access. It isn't clear what "items" were placed on arms (11:24), it appears that a required second IV line was not inserted in the right arm (11:46), and it isn't clear whether primary and secondary venous access were secured and verified. Deficient records from monitors who lack the necessary understanding of the venous access activities they are observing are of particular concern in consideration of historical problems in this area.

10.6 7/11/07 Exercise I. Inspector Bryant-Smith's log does not document whether the heart monitors were verified as operational after the chest restraints were secured. This is a key requirement that should be verified and documented by the monitors.

10.7 7/11/07 Exercise I. Inspector Bryant-Smith's log includes the notation "not uncomfortable, not painful" adjacent to the 11:26 entry regarding placement of electronic monitoring. This type of subjective assessment is inappropriate for a record of observations.

10.8 7/11/07 Exercise I. Inspector Bryant-Smith's log of activities related to administration of execution is significantly incomplete, and it appears to improperly describe the execution phases (begins phase II at 11:54; 12:04 changed phase III; 12:05 phase IV).

10.9 7/11/07 Exercise II. In the log for the second exercise on this date, Inspector Bryant-Smith's record of activities appears to document the capture of telemetry data on the

monitor after a chest strap is secured (although this takes some extrapolation from the records).

10.10 7/11/07 Exercise II. Inspector Bryant-Smith's log for the second exercise on this date appears to document the fact that only a single IV was "put on left arm". There is no record of a second venous access site being secured and verified, although there is a record that the "medical person checked bags".

10.11 7/11/07 Exercise II. In this exercise, Inspector Bryant-Smith's log documents administration of each of eight syringes, with medical clearance to proceed after syringe 3. This conflicts with the log for this exercise by Inspector Westveer.

10.12 7/11/07 Exercise II. Inspector Bryant-Smith's log includes brief notes documenting preparation of the chemicals by members of the medical team. These notes clearly indicate that this Inspector lacks even the minimum knowledge and training necessary to serve as an independent observer responsible for monitoring the preparation of lethal chemicals. The notes appear to read as follows:

> "Group – of people – mix – chemicals
>
> Quali chemical mix medical team (never less than 2)
>
> Hand mix – powder in sterile glux *(not legible)* medium – drawn into syringe
>
> 1st chemical
>
> 2nd chemical just drawn approximate amount
>
> 3rd chemical same as second"

These notes indicate that this Inspector is completely unfamiliar with the relevant chemistry principles and laboratory practices, and is completely unqualified to monitor preparation of lethal chemicals. Under provisions of the DOC procedure, the FDLE agent responsible for monitoring the preparation of chemicals is required to "confirm that all lethal chemicals are correct and current." This Inspector is not capable of performing this essential function.

10.13 7/11/07 Exercise I. Inspector Westveer's log appears to document activities during two exercises, but the records are often illegible (original entries may have been made in pencil).

10.14 7/11/07 Exercise I. Inspector Westveer's log records a series of checklist items, often followed by an underscore where he sometimes entered "Time." The only time he actually entered a time was for the time of death. During this exercise, he apparently did not understand that it was his responsibility to record the times that relevant activities were performed.

10.15 7/11/07 Exercise I. Inspector Westveer's log includes a number of checklist items, but the outcome of those activities was never recorded. For example, it states: "Medical check of IV is OK – Not OK".

10.16 7/11/07 Exercise I. Inspector Westeer's log includes very brief notes documenting preparation of the chemicals by members of the medical team. These notes clearly indicate that this Inspector lacks even the minimum knowledge and training necessary

to serve as an independent observer responsible for monitoring the preparation of lethal chemicals. The notes appear to read as follows:

"Chem Mix Medical Team

Never less than Two.

Powder. Saline – Mixed

Liquid for remaining."

These notes indicate that this Inspector is completely unfamiliar with the relevant chemistry principles and laboratory practices, and is completely unqualified to monitor preparation of lethal chemicals. Under provisions of the DOC procedure, the FDLE agent responsible for monitoring the preparation of chemicals is required to "confirm that all lethal chemicals are correct and current." This Inspector is not capable of performing this essential function.

10.17 7/11/07 Exercise II. Inspector Westveer's log of checklist items includes an apparent reference to syringes 1, 2, and 3, followed by a check for unscious (*sic)*. The log includes an apparent reference to syringes 4, 5, and 6, but does not refer to any subsequent syringes. This is indicative of a failed exercise.

10.18 7/18/07 Exercises. Inspectors Mitchell and Davis prepared logs for three exercises during this day of training; the completeness of documentation declined with each subsequent exercise.

10.19 7/18/07 Exercise I, II, and III. Inspector Mitchell's logs and Inspector Davis' logs do not document whether the heart monitors were verified as operational after the chest restraints were secured. This is a key requirement that should be verified and documented by the monitors.

10.20 7/18/07 Exercise I. Inspector Mitchell's log documents completion times for syringes 1 and 2, but there is no record that syringe 3 was administered and completed (Note: Inspector Davis' log records completion of syringe 3). Similarly, while the log documents completion times of syringes 4 and 5, there is no indication that syringe 6 was administered and completed (Inspector Davis' log does not document completion of syringe 6). Finally, Inspector Mitchell's log does not document administration of syringes 7 and 8 (Inspector Davis' log does not document completion of syringe 7). This is indicative of a failed exercise.

10.21 7/18/07 Exercise II. The FDLE monitors' logs are supposed to provide a record of activities at intervals of not more than two minutes. Inspector Mitchell logged the time when the inmate was led to the chamber (11:27), but did not log another time until initiation of Phase One at 11:42.

10.22 7/18/07 Exercise I. Inspector Davis' log documents completion times for syringes 1 through 5, and syringe 8, but does not document administration or completion of syringes 6 and 7. This is indicative of a failed exercise.

11. The Execution by Lethal Injection Procedures effective 8/1/07 require that "There shall be sufficient training to ensure that all personnel involved in the execution process are prepared to carry out their distinct roles for an execution." Review of four Inspectors'

logs from training exercises reveals that at the time these exercises were performed (in the weeks immediately prior to the effective date of the procedure), the Inspectors were not prepared to effectively monitor or document an execution, and the team members' actual practices during mock executions did not meet procedural requirements.

The foregoing is true and correct to the best of my knowledge, information, and belief. Dated 11-8-07.

Janine S. Arvizu

NOTARY PUBLIC in and for the State of New Mexico

Residing at: Moriarty, New Mexico

My appointment expires:
12/1/07

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

STATE OF FLORIDA, **Plaintiff,**	:	
v.	:	**CASE NO.: CR 91-7249-CF-A** **DEATH PENALTY WARRANT** **Execution Scheduled: November 15, 2007**
MARK DEAN SCHWAB, **Defendant.** /	:	

DEFENSE WITNESS LIST

Comes now the Defendant, by and through undersigned counsel, and hereby gives notice of the names and addresses of the following persons whom the defendant tentatively expects to call as witnesses in the Evidentiary Hearing scheduled in this cause:

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Janine Arvizu
Certified Quality Auditor
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Tijeras, New Mexico 87059

Lay Witnesses:

Inspector Mark Mitchell
Florida Department of Law Enforcement
PO Box 1489
Tallahassee, FL 32302

Inspector Rose Davis
Florida Department of Law Enforcement
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Tallahassee, FL 32302

Inspector Tim Westveer
Florida Department of Law Enforcement
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Inspector Tonja Bryant-Smith
Florida Department of Law Enforcement
PO Box 1489
Tallahassee, FL 32302

Any State Witnesses.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing DEFENSE WITNESS LIST has been furnished by E-mail, Fax and United States Mail, first class postage prepaid, to all counsel of record on November 9, 2007.

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