IN THE SUPREME COURT OF FLORIDA

CASE NO. SC07-1603

MARK DEAN SCHWAB,

Appellant,

v. **Death Warrant Signed Execution Scheduled for November 15, 2007 at 6:00 p.m.**

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT FOR BREVARD COUNTY, STATE OF FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE

Schwab was convicted and sentenced to death for the April 18, 1991, kidnapping, sexual battery, and murder of eleven-year-old Junny Rios-Martinez. *Schwab v. State*, 636 So. 2d 3, 4 (Fla. 1994). Those offenses occurred less than two months after Schwab's release from prison after serving a part of his sentence following a conviction for sexual battery on another young male victim. This Court affirmed his convictions and sentences, and subsequently affirmed the denial of Schwab's first post-conviction relief motion. *Schwab v. State*, 814 So. 2d 402 (Fla. 2002). The Eleventh Circuit Court of Appeals affirmed the denial of Schwab's federal petition for habeas corpus. *Schwab v. Crosby*, 451 F.3d 1308 (11th Cir. 2006).

On July 18, 2007, Governor Crist signed a warrant directing the execution of Schwab's death sentence. That execution is scheduled to be carried out on November 15, 2007. After the death warrant was signed, this Court entered a scheduling order, and, pursuant to that order, Schwab filed a successive motion for post-conviction relief on August 15, 2007. (V4, R682-706). The State filed its answer to the successive motion on August 16, 2007. The Circuit Court held a case management conference pursuant to the *Florida Rules of Criminal Procedure* on August 17, 2007. Later that same day, the Circuit Court entered its order denying all relief.

STATEMENT OF THE FACTS

The Underlying Offense.

In its decision affirming the denial of Schwab's petition for federal habeas corpus relief, the Eleventh Circuit summarized the facts of this case in the following way:

> In early March of 1991 Schwab was released from prison in Florida. *See Schwab v. State*, 636 So. 2d 3, 4 (Fla. 1994). His early release was not because he had received any type of treatment. He hadn't. Although he had been tentatively accepted into a sex offender program for inmates, before Schwab could complete the screening process that program was ended because of budget cuts. Still, even without treatment, Schwab was released from prison on probation only three years after he was given an eight-year sentence. He was required to participate in a sexual offender therapy program as a condition of his probation. In less than a month after his release, and during the time he was participating in the program, Schwab had found another victim.
>
> Junny Rios-Martinez was an eleven-year-old boy, who was 5' tall and weighed 76 pounds. He won a kite-flying contest which led to his picture being published in the March 21, 1991 edition of Florida Today, a local newspaper in Brevard County, Florida. Children are often excited to see their pictures in the newspaper, and Junny could not have suspected that it would ultimately cost him his life.
>
> The day after Junny's photograph ran in the paper his mother received a phone call from a man identifying himself as Malcom Denemark and saying that he was from the newspaper. The man told Mrs. Rios-Martinez that he had seen Junny's picture in the paper and wanted to interview Junny for another article. He called back later that day while Junny was at home and was allowed to speak with him. Junny agreed to be interviewed, and his mother and the man arranged for it to take place at the Rios-Martinez home before Junny's baseball game the following day.

That next day, which was Saturday, March 23, Schwab went to Junny's home for the interview and introduced himself as "Mark Dean." Schwab explained that Denemark, his associate from Florida Today, could not make the interview because of a conflict but that he was prepared to conduct it for Denemark. Schwab carried a spiral notebook with handwriting on several pages, which he said were questions that Denemark had prepared for the interview. Schwab did not work for any publication (he had a construction job), and he was not an associate of anyone named Malcolm Denemark. But neither Junny nor his mother knew that, and they certainly did not know the person they had let into their home was a child molester who had just gotten out of prison.

During the interview, Schwab sat on a couch in the living room, Junny sat across from him in a rocking chair, and Mrs. Rios-Martinez sat on the couch just a few feet away. Schwab asked Junny about the things he liked to do, his favorite subject in school, his grades, whether there were drugs in school or peer pressure, and about cars. Junny showed Schwab his baseball and surfing trophies, and Schwab told Mrs. Rios-Martinez: "You must be very proud of him." He gave Junny a gift certificate to McDonald's on which was written "To: Junny. From: Florida Today (Mark)."

After the interview was over, Schwab told Mrs. Rios-Martinez that he would like to interview Junny again for another, potentially national, story and that Junny should attend a photo shoot for the story at Florida Today's offices the next Monday. Mrs. Rios-Martinez agreed and told Schwab that he could also take photos of Junny playing drums at a club where his father worked on Sundays. Schwab asked Mrs. Rios-Martinez if he could go with them to Junny's baseball game that evening, telling her that he wanted to see Junny playing and get to know him and his family better. Mrs. Rios-Martinez consented to that, and Schwab spent a half hour at Junny's baseball game that night.

Schwab did not show up at the club to take photographs of Junny on the next Sunday. He called Mrs. Rios-Martinez that night and told her his deadline on the story had been extended and the photo shoot canceled.

The next day, Schwab called again. This time he told Mrs. Rios-Martinez that he would no longer be involved with the article for Florida Today, because he had taken a new position with a surfing magazine. In [**8] this way, Schwab began to exploit the information he had gained about Junny's interest in surfing during his visit to their home.

Two days later Mrs. Rios-Martinez and her husband received a letter from Schwab. In it he told them that their family was a special one, unlike any other he had ever met, and that he could tell all of the family members (there were two other children) loved each other very much. The following Sunday, which was Easter, Schwab personally delivered an Easter card to the Rios-Martinez family. Mrs. Rios-Martinez was at home alone. She and Schwab discussed the letter he had sent her and her husband. She told Schwab "that it had affected [her] deeply, emotionally and that [she] was very affected by and very moved by what he had written about [her] family."

They also discussed the new job Schwab claimed to have. He told Mrs. Rios-Martinez that he had gained a lot of contacts with surfing companies and that he would like to help Junny get sponsored by one of them. He asked her to write up a resume for Junny and to get together some pictures of him that Schwab could take to his contacts. She did.

Three days later Schwab told Mrs. Rios-Martinez that a surfing company was interested in sponsoring Junny. Later in the week, she put together more pictures of Junny, and Schwab came by the house and picked them up. He then told Mrs. Rios-Martinez that he wanted to take Junny to Daytona Beach to meet people from the surfing company over the weekend. That did not happen because the family was not able to make the necessary arrangements.

The following week Schwab dropped by the Rios-Martinez household and told them that a surfing company, which he named, had agreed to sponsor Junny. He brought Junny a t-shirt with the company's logo. Schwab told Junny that he could have whatever surfboard he wanted and that he could even design it himself. He said that

the company also would provide Junny with surfing clothes.

Over the next several days Schwab visited the family several times. He worked with Junny on designing his surfboard and clothes. He told Mrs. Rios-Martinez that he had met with the president of the surfing company, and he hand-delivered to Mrs. Rios-Martinez forged documents, purporting to be a sponsorship letter and contracts. Schwab provided the family with a list of the surfing tournaments that he claimed Junny would participate in.

During one of his visits with them Schwab again asked Junny's parents if he could take Junny to Daytona Beach to meet with the surfing company. They agreed. Schwab told them that he would pick Junny up at 10:00 a.m. on Sunday, April 14, 1991. That morning, however, he called and cancelled the trip. Mr. and Mrs. Rios-Martinez did not hear from Schwab again. Their son did.

Thursday, April 18, 1991, began like any other school day for Junny. At about 7:00 a.m., he left home for his sixth grade class at Clearlake Middle School in Brevard County. He may have been anxious about the baseball game he was going to play in that evening.

At about 2:15 p.m. that day a bookkeeper at Junny's school received a phone call from a man purporting to be his father. The man told her to deliver a message to Junny: "I'd like for him not to go home on the bus. I would like for him to meet me at the ball field." Believing the man to be Junny's father, she contacted Junny's classroom, had him sent to the office, and gave him the message.

At about 3:00 p.m. that day, one of Junny's schoolmates walked with him for a short while toward the baseball field. She saw him jump the fence into the baseball field. Another of Junny's friends later saw him and "some tall guy" getting out of a U-Haul truck. A short while later, the friend went back by the park but the truck, the man, and Junny were gone.

Junny's baseball game started at 6:30 that evening. Mrs. Rios-Martinez went to the baseball field right

after work, arriving shortly after 7:00 p.m. Junny was not there. Her husband, who was also at the park, had not seen Junny. Mrs. Rios-Martinez immediately left for home, but Junny was not there either. She called Schwab at the number he had given her but was unable to reach him. Later that evening she and her husband reported their son missing.

Early the next morning, April 19, Schwab learned from his mother that the police had been to the apartment he shared with her and wanted to question him about a missing child. About forty-five minutes later, Schwab called his mother and told her that he was going to see his probation officer. He did not. Instead, in the late afternoon of the next day, April 20, he called his aunt in Port Washington, Ohio, nearly a thousand miles from Cocoa, Florida. Schwab told her that a man named "Donald" had forced him at gunpoint to kidnap a boy named Junny. Schwab said that Donald had threatened to kill his mother if he did not do so. Schwab also told his aunt that Donald had forced him to have sexual relations with the young boy.

The next day, April 21, Ms. Kinsey was visited by law enforcement officers who were looking for Schwab in connection with Junny's disappearance. While they were at Ms. Kinsey's home, Schwab called. He called back later that day and the officers were able to trace the call to a nearby town where they arrested him while he was at a pay phone still talking with his aunt.

The night he was arrested Schwab voluntarily gave a recorded statement to law enforcement officers. Schwab's story, as recounted in that statement, is this. A man he identified as "Donald" confronted him outside a bar at about 2:00 a.m. on the Sunday before Junny disappeared, which would have been April 14, 1991, and threatened to get him put back behind bars. On Monday, April 15, Schwab received a call threatening to frame him for sexually assaulting a boy unless Schwab bought a motorcycle for another man. Because of those two threats Schwab rented a U-Haul truck -- he said he did it to make him look less conspicuous -- and he checked himself into a motel in Cocoa Beach, Brevard County.

According to Schwab's story, on Thursday, April 18, Donald accosted him at a restaurant near the motel and forced Schwab into his car at gunpoint. Donald drove him to a field and threatened to kill his mother if Schwab did not do everything he was told. Donald then drove the two of them to a pay phone Donald used to call Junny's school pretending to be Mr. Rios-Martinez and leaving the message that Junny should go to the baseball field after school. After making that call Donald took Schwab back to the U-Haul truck and warned Schwab that he had better return to his motel room with "some kid" or else his mother "was going to be dead." Schwab immediately went in his U-Haul truck and picked up Junny at the baseball field.

Schwab claimed that shortly after he returned to his motel room with Junny, Donald entered the room, locked the door behind him, drew his gun, and told Schwab: "Now I got you, you son of a bitch." Donald used duct tape to bind Junny's hands behind his back and a knife to cut Junny's clothes off of him. Donald told Schwab that he "was going to have to do something to this kid sexually." When Junny started to cry, Donald struck him "a couple times" and then taped his mouth shut. Donald then put his gun to the back of Schwab's head and forced him to have anal intercourse with Junny.

Schwab also told the officers that Donald forced him to leave the motel and told him not to come back for several hours. When Schwab returned to the hotel room sooner than he should have, Donald ordered him to pick up and handle a black footlocker that was in the room. Donald again forced Schwab to leave. After five or six hours, Schwab returned to the motel room but Donald and Junny were no longer there.

Schwab claimed that he did not know where Junny was. The officers returned him to Florida on April 23, 1991. While they were traveling from the airport to the police station, Schwab told one of the officers that he wanted to look for Junny's body. For several hours during that rainy, overcast afternoon and into the night, Schwab directed the officers accompanying him to various locations in Brevard County. At about 10:00 p.m., Schwab led the officers to a largely undeveloped part of the county. Once there Schwab walked down an unpaved road, stopped, began pacing

around in the road, and then pointed into the woods. The search team crossed a drainage ditch and walked into the woods in the direction that Schwab pointed. Not far from the road, they saw a small footlocker tied nearly shut with rope and covered with palm fronds and debris, which obviously had been placed there to hide it. The lid of the footlocker was slightly open and a white cloth was visible inside. Even from ten feet away, the team could tell from the smell that a human body was inside. It had been five days since Junny was last seen alive.

The officers took the footlocker to the Medical Examiner's office where it was carefully examined. When the ropes tied around the footlocker were cut and the lid opened, there was a blanket that had several stains on it. Under the blanket was a small boy's naked body in a "semi-fetal position." His face was not recognizable because of decomposition, but through fingerprints the body was identified as that of Junny Rios-Martinez.

Also found inside the footlocker were a pair of shoes, socks, underwear, shorts, a shirt, a watch, a yellow medal, a gold chain, two towels, some pieces of wadded-up duct tape, and a manila folder. Mrs. Rios-Martinez identified the clothing and jewelry items as belonging to her son. Some of the clothing she had bought for him the prior Easter, and the gold chain was a family heirloom his father had passed on to Junny.

An autopsy determined that Junny had died from "mechanical asphyxia," probably smothering or strangulation. In spite of the decomposition, signs of possible bruising around the anus were detected. One of the pieces of tape that had been wadded up in the footlocker had Schwab's fingerprint on it. A search of Schwab's car led to the discovery of a receipt from a K-Mart. The receipt, dated April 18, 1991, the day Junny was abducted, showed the purchase of a footlocker.

After Junny's body was found, Schwab gave another statement to officers. In it he retold his story about a man named Donald forcing him to kidnap and rape Junny. This time, however, Schwab added that after he

had intercourse with Junny, Donald had forced him and Junny, who was still alive, to get into the U-Haul that Schwab had rented. Donald drove them around various locations near Cocoa while discussing where he could dump Junny's body so that Schwab would be blamed for his death. One of those locations was near where Junny's body was found. Donald then returned Schwab to the motel and told him to "get lost" and not to come back for several hours. When Schwab returned the next morning he saw Donald carrying the black footlocker, which Donald handed to Schwab. He then ordered Schwab to leave again.

According to Schwab's supplemental story, after he returned to the motel a few hours later Donald forced him into his car and drove him out to where the footlocker was. He ordered Schwab to walk into the woods where Schwab spotted the footlocker. Donald then returned Schwab to the motel and threatened him for the last time. The next day, Schwab said, he drove to Ohio.

The state trial court judge, after hearing all of the evidence at a bench trial and sentence hearing, rejected Schwab's story about another man being involved and found that Schwab had acted alone. He found that Schwab had planned things so that the young victim left the baseball field thinking he was with a trusted friend. Once in the motel room, Schwab physically overpowered the slightly built child. He bound with duct tape the little boy's hands, his mouth, and part of his face. He took a knife and violently cut off the child's clothes, leaving him naked, crying, and terrified. He punched him twice in the stomach. He put a bed sheet or mattress cover over the head of the little boy who was so scared that he started to shake. Schwab anally raped him. The victim did not even have the solace of unconsciousness during the ordeal, which lasted a substantial amount of time. He continued to cry throughout, stopping only when Schwab finally strangled or smothered him to death. *See Schwab*, 636 F.3d at 7 n.6 (quoting from the trial court's findings). A few days before his brutal abuse of eleven-year-old Junny, Schwab had attended a group therapy session as part of the sexual offender program that was a condition of his probation.

Schwab v. Crosby, 451 F.3d 1308, 1311-1316 (11th Cir. 2006).

The Successive Petition.

In his successive post-conviction relief motion, Schwab raised two claims: (1) that the Florida Department of Corrections' procedures for carrying out an execution by lethal injection do not satisfy the Eighth Amendment prohibition against cruel and unusual punishment, and (2) whether "newly discovered evidence" regarding his mental state establishes that he suffers from a "brain impairment" that entitles him to some relief. The Circuit Court conducted a case management conference on August 17, 2007. Later that day, the Circuit Court entered a written order which denied relief on both claims without an evidentiary hearing. Briefly stated, the Circuit Court found that Schwab had alleged no facts related to his "lethal injection" claim which required the Court to hold an evidentiary hearing (R1245), and held that *Sims v. State*, 754 So. 2d 657 (Fla. 2000), was dispositive of the lethal injection issue. (R1244). With respect to the mental state claim, the Circuit Court held that that claim was not only procedurally barred, but also insufficiently pled. (R1245). For the convenience of the Court, a copy of the order is attached as Appendix A.

SUMMARY OF THE ARGUMENT

The Circuit Court properly denied Schwab's lethal injection claim without an evidentiary hearing. The identical issues were litigated in the *Lightbourne* hearing, and Florida law is settled that repetitive hearings on the same issue are not appropriate. To the extent that Schwab's claim can be construed as a *per se* challenge to lethal injection as a method of execution, that claim is procedurally barred because it could have been but was not raised in Schwab's prior post-conviction relief motion. To the extent that Schwab challenges the use of one of the drugs used in carrying out an execution by lethal injection, that is a *per se* challenge which is procedurally barred. To the extent that Schwab claims that "medical" assessment of his level of consciousness is necessary, there is no dispute that the amount of anesthetic drug he will receive is far more than enough to render him unconscious and insensate for a period of time far longer than his execution can reasonably be expected to take. Summary denial of this claim was appropriate.

Schwab's mental state claim is procedurally barred because it could have been but was not raised in his prior post-conviction relief motion.

ARGUMENT

I. SUMMARY DENIAL OF THE LETHAL INJECTION CLAIM WAS PROPER[1]

Despite the factual assertions and complex-sounding medical jargon contained in Schwab's brief, the issue before this Court is simple: whether Schwab was entitled to an evidentiary hearing on the same issue that was the subject of a 13-day hearing in the *Lightbourne* case. And, despite expending nearly 70 pages to discuss the issue, Schwab has not given this Court any reason to answer that question affirmatively. The true facts are that there is no presumption favoring multiple hearings on identical claims. This Court has long dealt with "method of execution" claims by litigating the issue in a lead case, and there is no reason that Schwab is entitled to preferential treatment. The Brevard County Circuit Court properly refused to waste judicial resources by re-trying an issue that the Marion County Circuit Court had already litigated and which this Court already had scheduled for briefing and set for oral argument simultaneous with the oral argument in this case.

[1] On September 19, 2007, a Federal District Court in Tennessee found that Tennessee's "lethal injection protocol violates the Eighth Amendment." *Harbison v. Little*, Case No. 3:06-01206 (M.D. Tenn., Sept. 19, 2007). The District Court made multiple references to the Florida Commission report and Florida's May 9, 2007, procedures as satisfying the concerns that court had with the Tennessee protocol. To the extent that it has any value as precedent, *Harbison* supports the finding that Florida's procedures are constitutional.

The Circuit Court Order.

In the order denying relief on Schwab's lethal injection claim, the trial court stated:

> The parties have filed in this case the new protocols established by the Department of Corrections to address the concerns of the Governor's Commission and the concerns of Judge Angel in the Circuit Court of Marion County, following hearings he has conducted in *State v. Lightbourne,* Circuit Court Case No. 1981-170-CF-A-01. The Court, having reviewed the submitted protocols, finds that the Defendant has not established the need for an evidentiary hearing to review the Department's protocol and training. The Defendant has not provided the Court with any reason to believe that the new protocol does not substantially meet the criteria set by the Governor's Commission or that the protocol will not be carried out. He was not provided reason to believe DOC personnel will not be appropriately trained or that future executions will likely result in the Diaz problem of subcutaneous injection, as the recently adopted protocol requires a venal assessment of an inmate a week prior to his scheduled execution to ascertain venal access. The protocol also provides for mandatory training and practice sessions.
>
> The Defendant argues that the execution by lethal injection require medical personnel, sophisticated medical equipment and protocol appropriate to a clinical setting to carry out a constitutionally valid death by lethal injection. The Court rejects this argument. In a medical clinical setting, the personnel, equipment and procedures are designed to protect the life of the patient. In the DOC setting, the purpose is to terminate the life of a condemned person in a humane manner without intentionally inflicting pain. If the Defendant's premise is correct, there could be no executions by lethal injection because persons working in recognized medical fields will not participate in taking life, as the Defendant has stated in his Motion.
>
> While the Court is required to accept as true the facts alleged in a Motion to Vacate if it denies that

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

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

The Defendant has argued that *Sims* is no longer controlling, as signaled by the Florida Supreme Court's scheduling calendar. The Supreme Court has scheduled oral arguments in Schwab and Lightbourne for the same date in October of this year. This Court cannot read the mind of the Supreme Court in its scheduling decisions, but suggests that it was possibly a matter of judicial economy, as the Supreme

> Court was aware that challenges to the lethal injection protocol would be made in both cases. This Court cannot assume that the Supreme Court intended for this circuit court to overturn or rewrite that protocol. As this Court is bound to follow the precedents of the Florida Supreme Court until that Court or the United State Supreme Court overturns or modifies that precedent, it is bound by *Sims* and progeny. It will not attempt to read tea leaves and guess what is intended by the scheduling docket or the footnote in *Darling v. State,* --So. 2d --- 2007 WL 2002499, 32 Fla. L. Weekly S486 (Fla. July 12, 2007), referenced in the Defendant's Motion at p. 6. It finds that *Sims* upholds the right and responsibility of the Department of Corrections to establish protocol for humane executions. While it agrees that judicial oversight of the protocol is appropriate, the Court does not find that judicial economy would be served by holding a hearing in this matter on the same issue which has been extensively explored by Judge Angel in *Lightbourne.* The parties have stipulated that the *Lightbourne* hearing testimony may be judicially noticed in this case, but the Court has deliberately elected not to take judicial notice at this time and has not reviewed the evidence presented therein.
>
> The Court therefore finds that the Defendant has alleged no facts which require it to hold an evidentiary hearing on his claim that current DOC protocol might be found to violate his constitutional rights.

(R1242-1245).

Those findings follow settled Florida law, and nothing contained in Schwab's brief supports his claim that the Brevard County Circuit Court was required to conduct an evidentiary hearing that, in all respects, was a mirror image of the hearing that was being conducted in Marion County. The Schwab Court followed settled Florida law, and should not be placed in error for doing so.

Multiple hearings on the same issue are neither necessary nor required.

On pages 14-68 of his brief, Schwab argues that he was entitled to an evidentiary hearing on his "lethal injection" claim. As this Court is well aware, the identical issues have been the subject of a 13-day evidentiary hearing in the Marion County Circuit Court in the case of *Lightbourne v. McCullum*, Case No. SC-06-2391. The Marion County Circuit Court denied all relief to Lightbourne in an order issued on September 10, 2007. Lightbourne's *Initial Brief* was filed in this Court on September 19, 2007. Lightbourne and Schwab are both set for oral argument on October 11, 2007.

The only lethal injection-based claim arguably available to Schwab is one based on the "events surrounding the execution of Angel Diaz"[2] which, according to Schwab, give rise to "new constitutional claims" regarding lethal injection as a method of execution. The lethal injection issue in *Lightbourne* is identical

[2] Most importantly, the only "evidence" that Schwab pleaded in his motion to support his lethal injection claim was in the form of **argument** in the motion. No citation was provided for any of the myriad factual assertions Schwab made. The Diaz execution has been investigated by a number of sources, including the Department of Corrections' Task Force and the Governor's Commission on the Administration of Lethal Injection. However, those investigations focused upon whether the Department followed existing protocols during the Diaz execution, not whether execution by lethal injection is *per se* unconstitutional. Neither the Task Force nor the Governor's Commission concluded that the procedures used in the Diaz execution were invalid, only that they could be improved.

to Schwab's claim as to the DOC protocols and the Diaz execution and necessarily involves the same issues, the same witnesses, and the same testimony, **a fact that was borne out by Schwab's separately-filed witness list**. (V4, R707-711).

This Court decided one lead case when lethal injection first became Florida's method of execution, and then affirmed summary denials of relief in subsequent cases. **This Court did not require that additional evidentiary hearings be held in every subsequent case.** *Sims v. State*, 754 So. 2d 657, 668 (Fla. 2000) (lead case with evidentiary hearing); *Rolling v. State*, 944 So. 2d 176, 179 (Fla. 2006)(affirming trial court's summary denial of lethal injection claim based on the *Lancet* article relying on *Hill v. State*, 921 So. 2d 579 (Fla.)), *cert. denied*, - U.S. -, 126 S.Ct. 1441, 164 L.Ed.2d 141 (2006) and *Rutherford v. State*, 926 So. 2d 1100, 1113-1114 (Fla.), *cert. denied*, - U.S. -, 126 S.Ct. 1191, 163 L.Ed.2d 1145 (2006).

Likewise, in repetitive litigation challenging the electric chair, this Court rejected the notion that multiple hearings on the same issues are required:

> "Hamblen's only contention rests upon the events which occurred during the recent execution of Jesse Tafero. During Tafero's execution, flames and smoke erupted from the headpiece of the electric chair. A subsequent investigation by the Department of Corrections attributed this to the use of a synthetic sponge which caught fire. Hamblen filed affidavits in support of his contention that Florida's electric chair is defective and the Department of Corrections is

incompetent to carry out its statutory duty to execute. He argues that the means selected by the state to carry out the death penalty is malfunctioning so that his execution will be carried out with unnecessary pain and suffering in violation of the eighth amendment's proscription against cruel and unusual punishment."

This issue was recently addressed by this Court in *Buenoano v. State*, 565 So. 2d 309 (Fla. June 20, 1990), in which we affirmed the summary denial of a similar motion. While recognizing that Buenoano's claim was not procedurally barred because it was based on recent events, we stated:

> Turning to the merits, we note that the execution of condemned prisoners is clearly a matter within the province of the executive branch of government. § 922.09, *Fla. Stat*. (1989). It must be presumed that members of the executive branch will properly perform their duties. The Department of Corrections conducted an investigation and concluded that the irregularities in Tafero's execution were caused by the use of a synthetic sponge. We do not find that the record as proffered justifies judicial interference with the executive function to require an evidentiary hearing to determine the competence of the Department of Corrections to carry out Buenoano's execution. Death by electrocution is not cruel and unusual punishment, and one malfunction is not sufficient to justify a judicial inquiry into the Department of Corrections' competence. *See Louisiana ex rel. Francis v. Resweber,* 329 U.S. 459, 463, 67 S. Ct. 374, 91 L.Ed 422 (1947) (plurality opinion).

Buenoano, slip op. at 4. *Accord Squires v. State*, 565 So. 2d 318 (Fla. July 5, 1990). The additional affidavits filed in support of Hamblen do not change our view.

We further note that the United States District Court, Middle District of Florida, Orlando Division, held an

> evidentiary hearing on this same issue and rejected the contention that the problems accompanying the Tafero execution had a substantial probability of recurring. Holding that the evidence was sufficient to negate any constitutional claim of cruel and unusual punishment, the district judge denied relief. *Buenoano v. Duqger*, No. 90-473-Civ-Orl-19 (M.D. Fla. June 22, 1990).

Hamblen v. State, 565 So. 2d 320, 321 (Fla. 1990) (emphasis added). *Accord Squires v. State*, 565 So. 2d 318, 319 (Fla. 1990) (affirming summary denial); *Buenoano v. State*, 717 So. 2d 529 (Fla. 1998); *Remeta v. State*, 710 So. 2d 543, 546 (Fla. 1998); *Stano v. State*, 708 So. 2d 271, 274 (Fla. 1998); *Stano v. State*, 1997 Fla. LEXIS 1933 (Fla. 1997) (unpub. order).[3]

Further, in deciding a similarly situated claim, the District Court for the Middle District of Florida rejected the defendant's lethal injection claim, stating:

> Smith supports his motion to hold proceedings in abeyance by pointing to the State's actions in two pending proceedings, *State v. Lightbourne*, Case No. 81-170-CF-A-01 (5th Jud.Cir. Marion County), and *Suggs v. McDonough*, 3:06-cv-111-RH/WCS. In *Lightbourne*, the State conceded that an evidentiary hearing was warranted on Petitioner's method-of-execution claim. In *Suggs*, the State moved to hold in abeyance Petitioner's lethal injection claims. Smith's reliance on these cases is misplaced. Smith cannot credibly

[3] *See, State v. Jason Dirk Walton*, Case No. CRC 83-00630CFANO (March 9, 2007, Order of Judge Baird, Pinellas County, denying an evidentiary hearing on lethal injection because "execution by lethal injection does not constitute cruel and unusual punishment", *citing Diaz v. State*, 945 So. 2d 1136 (Fla. 2006); *Rolling; Rutherford;* and *Hill*). The defendant in *Walton* had relied on *The Lancet*, which was flatly rejected by Lightbourne's own expert, Heath.

> claim that he is entitled to an amendment and abeyance in this case simply because the State exercised a cautionary stance in *Lightbourne.* And, unlike Suggs, Smith did not challenge Florida's lethal injection statute in his original habeas petition. Smith's *Lightbourne* and *Suggs* claims are meritless.

Smith v. Secretary, Department of Corrections, 2007 U.S. Dist. LEXIS 57703 (M.D. Fla., Aug. 8, 2007).

When the hyperbole and unsupported factual averments are stripped away from Schwab's brief, what remains is a bare claim that he is entitled to an evidentiary hearing at which he can present the same evidence that was presented in Lightbourne. There is no support for the notion of multiple hearings on the same issue, and the actual state of the law, which Schwab ignores, is directly contrary to such extravagant and dilatory litigation.

The lethal injection claim is procedurally barred.

Schwab has never before raised any claim challenging the method by which his death sentence is to be carried out. To the extent that Schwab is arguing that Florida's method of execution is unconstitutional, that issue was raised for the first time in the successive motion and is procedurally barred.

Schwab's challenge to lethal injection as the method of execution, and the means undertaken to enact that method of execution, are likewise procedurally barred. Schwab, like all other death row inmates, had a 30-day "window of time" following

the enactment of §922.105(1) & (2), *Florida Statutes* (2000), within which to elect the method of execution. Schwab made no election and is procedurally barred from challenging the change in method because he elected lethal injection as the method of execution by his waiver.

Schwab argues that in light of Diaz's execution, he can now properly raise his lethal injection claim -- however, **any** claims for relief based on **any** lethal injection-based ground "**other** than those arising from the execution of Angel Diaz," remain procedurally barred because they were not raised within one year of the time that lethal injection became a method of execution in Florida. *See Fla. R. Crim. P*. 3.851(d)(2); *Hill v. State*, 921 So. 2d 579, 584 (Fla. 2006); *Gudinas v. State*, 879 So. 2d 616, 618 (Fla. 2004); *King v. State*, 808 So. 2d 1237, 1244-45 (Fla. 2002).

The lethal injection claim was insufficiently pleaded.

Throughout the lethal injection claim in the successive motion, Schwab made numerous assertions of "fact." No authority was cited for **any** of those factual claims, and those unsupported statements which Schwab presented as "fact" in his motion would properly have been stricken. By way of example only, Schwab stated that "Diaz grimaced, arched his body, appeared to be mouthing words, and otherwise evidenced that he was in pain,

despite the injection of a paralytic."[4] *Motion*, at 3. As further example of the reckless pleading contained in Schwab's motion, at no point did the report of the Governor's Commission on the Administration of Lethal Injection state, find, or suggest that the Department of Corrections did anything "unconstitutional." (*See,* R685-687; 692). No support for those assertions, or any of the other many such assertions, was found anywhere in the motion. Summary denial on insufficiency grounds would have been appropriate. *Booker v. State*, 32 Fla. L. Weekly S537 (Fla., Aug. 30, 2007).

To the extent that further discussion is necessary, *Florida Rule of Criminal Procedure* 3.851(e)(2), sets out the requirements for pleading a successive postconviction motion. In finding the motion insufficiently pled, the trial court stated:

> The Court, having reviewed the submitted protocols, finds that the Defendant has not established the need for an evidentiary hearing to review the Department's protocol and training. The Defendant has not provided the Court with any reason to believe that the new protocol does not substantially meet the criteria set by the Governor's Commission or that the protocol will not be carried out. He was not provided reason to believe DOC personnel will not be appropriately trained or that future executions will likely result in the Diaz problem of subcutaneous injection, as the recently adopted protocol requires a venal assessment of an inmate a week prior to his scheduled execution to ascertain venal access. The protocol also provides for mandatory training and practice sessions.

[4] Schwab overlooks the obvious fact that, if Diaz was moving as described, the "paralytic" was not having any effect on him.

(R1242). That finding is supported by the record, and follows Florida law. *Booker, supra.* The current motion was insufficiently pled and was properly denied. *See Hill, supra; Gudinas, supra; King, supra*.

The "foreseeable risk" component.

To the extent that Schwab complains that a "foreseeable risk" of pain is the standard by which this claim must be evaluated, that standard has been squarely rejected by this Court. The Circuit Court stated:

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

(R1242). The Circuit Court followed settled Florida law, and there is no basis for reversal.

The "quality assurance" component

In a sub-claim found on pages 19-20 of the motion and repeated at length on pages 58-67 of his brief, Schwab asserts that he "seeks to conduct an audit" of the Department of Corrections' lethal injection procedure. The true facts are

that the "auditor" engaged by Schwab has no qualifications which would allow her to testify in any capacity on the adequacy of the Department of Corrections procedures for execution by lethal injection. That expert, Arvizu, appears to be an "all-purpose" expert, willing to conduct an "audit" of any entity a defendant may request. *See, Darling v. State*, 32 Fla. L. Weekly S486 (Fla. July 12, 2007) (criticisms of FDLE laboratory rejected). Schwab cites no authority for the proposition that a "quality assurance expert" can invade the province of the executive branch by conducting an "audit." That practice is nothing more than a blatant fishing expedition. Arvizu has no particularized experience that would enable her to evaluate the Department's procedures, and, more importantly to this case, has no medical training at all.[5] The eleventh-hour request for an "audit" was properly rejected.

Schwab's attempt to inject this "expert" into the proceedings is an unauthorized interference with the functioning of the executive branch which was mentioned for the first time in Schwab's August 15, 2007, Rule 3.851 motion – that timine supports the inference that the request is solely for the purpose of delay. This Court has noted:

[5] It is curious that Schwab's "expert" has no medical expertise at all, but yet is supposed to opine on lethal injection, which Schwab describes as a "complex" procedure.

> Turning to the merits, we note that the **execution of condemned prisoners is clearly a matter within the province of the executive branch of government**. § 922.09, *Fla. Stat*. (1989). **It must be presumed that members of the executive branch will properly perform their duties**. The Department of Corrections conducted an investigation and concluded that the irregularities in Tafero's execution were caused by the use of a synthetic sponge. We do not find that the record as proffered justifies judicial interference with the executive function to require an evidentiary hearing to determine the competence of the Department of Corrections to carry out Buenoano's execution.

Buenoano v. State, 565 So. 2d 309, 311 (Fla. 1990). (emphasis added). *See also, Allen v. Butterworth*, 756 So. 2d 52, 59 (Fla. 2000) ("Article II, section 3 of the *Florida Constitution* prohibits the members of one branch of government from exercising 'any powers appertaining to either of the other branches unless expressly provided herein.'"). The "audit" is inappropriate for this reason, as well, and the trial court properly denied Schwab's motion.

The "pancuronium bromide" component.

In his brief, Schwab claims that the use, in the execution procedure, of pancuronium bromide (which is a paralytic) "violates the Eighth Amendment." That drug has always been a component of the lethal injection procedure, *Sims, supra*, and Schwab's challenge to that drug is, effectively, a *per se* challenge to lethal injection as a method of execution. Despite his protestations to the contrary, Schwab has gone beyond a challenge to the procedures themselves and injected a challenge

to the process itself by challenging the specific drugs used. That is a *per se* challenge to lethal injection as an execution method, and is the claim that has been rejected repeatedly by this Court. *Hill; Rolling; Rutherford; Diaz.* That *per se* challenge is not available to Schwab because it is foreclosed by binding precedent.

Moreover, as this Court has expressly held,

> . . . **determining the methodology and the chemicals to be used are matters best left to the Department of Corrections to determine because it has personnel better qualified to make such determinations**. Finally, we note that the law in effect prior to the recent amendments stated simply that the death penalty shall be executed by electrocution without stating the precise means, manner or amount of voltage to be applied. Thus, we conclude that the lethal injection statute is not so indefinite as to constitute an improper delegation of legislative power, and the lack of specific details about the chemicals to be used does not violate the Eighth Amendment prohibition against cruel and unusual punishment.

Sims v. State, 754 So. 2d at 670. (footnote omitted, emphasis added). Further belying Schwab's claim about the complexity of execution by lethal injection, the **defense** expert in *Sims* testified that:

> . . . lethal injection is a simple procedure and that if the lethal substances to be used by DOC are administered in the proper dosages and in the proper sequence at the appropriate time, they will "bring about the desired effect." He also admitted that at high dosages of the lethal substances intended be used by the DOC, death would certainly result quickly and without sensation.

Sims v. State, 754 So. 2d at 668 n.19. Nothing has called the validity of *Sims* and the cases following it into question, and the Circuit Court properly followed settled Florida law in holding that selection of the drugs to be used and the methodology of carrying out an execution by lethal injection is an executive branch function.

The public records component.

At pages 42-44 of his brief, Schwab complains that he did not receive certain public records. This component of his brief has no basis in law or fact, because an agency is not required to create "public records" in **response** to a request for production. The response from the Florida Department of Law Enforcement clearly stated that no records responsive to Schwab's request existed. (V4, R595-601). That is all that is required, and Schwab should not be heard to complain.

To the extent that Schwab complains about production of records from the Department of Corrections, he neglects to mention that the Department sent records responsive to his requests **directly** to his counsel, in addition to sending those records to the records repository. (V1, R33-34, 37, 87). Further, Schwab neglects to mention that, in addition to the records he requested, he received all of the records filed with the repository in the **Lightbourne** case. (V1, R85-87). The complaints about production of records ring hollow.

The "assessment of consciousness" component.

In addressing the claim that medical personnel are necessary to "monitor" the defendant's "level of consciousness," the Circuit Court held:

> The Defendant argues that the execution by lethal injection require medical personnel, sophisticated medical equipment and protocol appropriate to a clinical setting to carry out a constitutionally valid death by lethal injection. The Court rejects this argument. In a medical clinical setting, the personnel, equipment and procedures are designed to protect the life of the patient. In the DOC setting, the purpose is to terminate the life of a condemned person in a humane manner without intentionally inflicting pain. If the Defendant's premise is correct, there could be no executions by lethal injection because persons working in recognized medical fields will not participate in taking life, as the Defendant has stated in his Motion.

(R1242-43). That ruling follows settled law.

The executive branch, in this case the Department of Corrections, is entitled to the presumption, which was clearly established in *Buenoano*, that it will properly perform its duties. The defendant is not entitled to relief based upon speculative testimony about what could go wrong -- this is the "parade of horribles" referred to in *Sims* and found insufficient to support relief. *See, Provenzano v. State*, 739 So. 2d at 1153.

In deciding the identical issue, the Eighth Circuit Court of Appeals stated:

> The Constitution does not require the use of execution procedures that may be medically optimal in clinical contexts. *See Hamilton v. Jones*, 472 F.3d 814, 816

> (10th Cir.), *cert. denied*, 127 S. Ct. 1054, 166 L. Ed. 2d 783 (2007). "The state has broad discretion to determine the procedures for conducting an execution . . . ." *McKenzie*, 57 F.3d at 1469. **"[W]e recognize that what could be done to update or even improve the protocol is not the appropriate legal inquiry to be undertaken by this or any other reviewing court."** *Abdur'rahman*, 181 S.W.3d at 309. Where the "procedures are reasonably calculated to ensure a swift, painless death," they are "immune from constitutional attack," *McKenzie*, 57 F.3d at 1469, as the Constitution protects only against the wanton and unnecessary infliction of pain. What the Sixth Circuit said about the Tennessee protocol is equally true about Missouri's: "The whole point of the [Missouri] lethal-injection protocol is to avoid the needless infliction of pain, not to cause it." *Workman*, 2007 U.S. App. LEXIS 10851, 2007 WL 1311330, at *9. The State's written protocol does not present any substantial foreseeable risk that the inmate will suffer the unnecessary or wanton infliction of pain. The abundant dose of thiopental, lethal in itself and over 17 times that given for surgeries, combined with built-in checks to ensure that the IV is properly placed by medical personnel trained for the procedure and that the IV is working and not obstructed, renders any risk of pain far too remote to be constitutionally significant. *See id*. at 12 (noting that the risks of pain in a similar protocol "remain remote []and do not occur when the procedure is properly implemented"); *Hamilton*, 472 F.3d at 816-17 (noting that the risk involved must be of constitutional magnitude; and denying an injunction upon concluding that the district court correctly determined, in light of the precautions built into Oklahoma's protocol, that the risk of failure to monitor resulting in the alleged pain is far too remote to rise to a constitutional level).

Taylor v. Crawford, 487 F.3d 1072, 1084-1085 (8th Cir. 2007). (emphasis added). The dosage of thiopental sodium at issue in *Taylor* (a Missouri case) is identical to the dosage used in Florida, *Taylor* is indistinguishable from this case, and is

dispositive of Schwab's claims.[6] Summary denial of this purely legal issue was proper.

The Florida procedures, especially following the August 1, 2007, revisions, more than satisfy the Constitutional requirements. Once again, the Eighth Circuit's *Taylor* decision addressed and decided the precise issues Schwab raises:

> The experts agree that if a 5-gram dose of thiopental is successfully delivered, there is virtually no risk that an inmate will suffer pain through Missouri's three-chemical sequence. The experts also agree that a properly functioning IV, even peripherally placed, will adequately deliver the dose and that the inmate will then be sufficiently unconscious in less than two minutes, **without the need of any further monitoring**. The written protocol requires a 5-gram dose of thiopental and a three-minute wait before injecting the final two chemicals. The written protocol sufficiently provides for proper delivery of that dose by requiring the IV insertions to be accomplished by medical personnel (a physician, nurse, or EMT) who is qualified to perform the task, who must confirm before the procedure begins that the IV is functioning properly and not obstructed, and who must inspect the site again before the final two chemicals are injected. The physician, nurse, or EMT is given discretion only with regard to determining the proper placement of the IV and the appropriate procedure for insertion of the IV. The physician, nurse, or EMT is required to examine the prisoner physically using standard clinical techniques to determine that he is unconscious before the second and third chemicals are administered.
>
> Because of the pain that undoubtedly would be inflicted by the third chemical if administered without adequate anesthetization, it is imperative for

[6] The Eighth Circuit described Missouri's protocol as a "four-page document divided into six sections." *Taylor v. Crawford*, 487 F.3d at 1082. If that protocol is constitutionally adequate, and that is the law, then Florida's is surely more than adequate.

the State to employ personnel who are properly trained to competently carry out each medical step of the procedure. **The protocol adequately requires trained medical personnel to carry out these steps and to verify that the IV is working properly**. The protocol provides no opportunity for personal judgment regarding the proper dose, because the protocol mandates a dose large enough to render anyone deeply unconscious, as long as it is delivered properly. **The protocol is designed to ensure a quick, indeed a painless, death, and thus there is no need for the continuing careful, watchful eye of an anesthesiologist or one trained in anesthesiology, whose responsibility in a hospital's surgery suite (as opposed to an execution chamber) is to ensure that the patient will wake up at the end of the procedure**. "For exceedingly practical reasons, no State can carry out an execution in the same manner that a hospital monitors an operation." *Workman v. Bredesen*, No. 07-5562, 486 F.3d 896, 2007 U.S. App. LEXIS 10851, 2007 WL 1311330, at *12 (6th Cir. May 7, 2007), *cert. denied*, 127 S. Ct. 2160, 167 L. Ed. 2d 887 (May 8, 2007). Absent some specific disqualifying characteristic of the chosen medical personnel, we would be hard pressed to say that a physician, a trained nurse, or a licensed pharmacist is not qualified to mix the chemicals. **We know of no decision holding that the Constitution requires a physician to become the executioner**. *See generally id*. at *12 (stating that the Constitution does not require the State to hire an anesthesiologist for each execution); *McKenzie v. Day,* 57 F.3d 1461, 1469 (9th Cir.), *cert. denied*, 514 U.S. 1104, 115 S. Ct. 1840, 131 L. Ed. 2d 846 (1995) (stating, "we are aware of no authority for the proposition that the prisoner is entitled, for example, to have a lethal injection administered by a physician").

Neither does the record justify requiring the continuous monitoring of the anesthetic depth of the inmate by one trained in anesthesia or by additional equipment. The written protocol requires a **5-gram dose** of thiopental to be delivered through a properly placed and working IV, combined with a three-minute wait and a physical confirmation of unconsciousness before the last two chemicals are administered. The experts agree that this dose, successfully delivered,

> will cause burst suppression in less than three minutes and **last at least 45 minutes, which eliminates any need for further monitoring**. Given the dose of thiopental provided in the protocol, the precautions taken to ensure it is successfully delivered, the three-minute wait built into the protocol before administration of the second and third chemicals, the ready availability of syringes containing an additional five grams of thiopental, and the physical examination of the prisoner and the IV site prior to administering the second and third chemicals, there simply is no realistic need for further monitoring of anesthetic depth by a physician or sophisticated equipment to prevent a constitutionally significant risk of pain.

Taylor v. Crawford, 487 F.3d 1072, 1084 (8th Cir. 2007) (emphasis added). Schwab's claim that "medical expertise" is necessary has no constitutional basis, and was properly denied without an evidentiary hearing.

The relevancy of Diaz and judicial notice of *Lightbourne*.

Schwab claims that the Circuit Court should have taken judicial notice of the proceedings in *Lightbourne*, and that the Court erred in not placing greater emphasis on the events of the Diaz execution. In addressing the lack of relevancy of Diaz to Schwab's upcoming execution, the Circuit Court stated:

> While the Court is required to accept as true the facts alleged in a Motion to Vacate if it denies that Motion without an evidentiary hearing, most of the "facts" alleged in the Motion relate to the problems with the Diaz execution. **As the protocol has changed, the Court is not convinced those facts are relevant to the present protocol.** The Defendant has not made specific factual allegations as to how the new protocol will result in a violation of the Eighth Amendment. He speculates as to potential flaws in the

> system and provides the affidavit and report of a person identified as a "quality assurance expert" to point out possible gaps in the protocol that could result in problems during execution. The Court surmises that any set of procedures describing the processes for carrying out any complex activity could be analyzed to reveal contingencies not explicitly provided for and no set of procedures can ever entirely eliminate the factor of human error.

(R1243) (emphasis added). The uncontroverted facts are, as the court found, that the procedure that will be followed in Schwab's execution has been refined since the Diaz execution to address those events and incorporate the additional safeguards recommended by the task forces, the Commission, and the Lightbourne court. Because that is so, whatever happened in the Diaz execution is not dispositive as to the procedures that will be followed when Schwab is executed, and Diaz is relevant in an historical sense only.[7]

To the extent that Schwab claims that the court should have taken judicial notice of the *Lightbourne* record, that claim likewise is extraneous to the issues before this Court. The Court stated:

> *. . . Sims* upholds the right and responsibility of the Department of Corrections to establish protocol for humane executions. While [the Court] agrees that judicial oversight of the protocol is appropriate, **the Court does not find that judicial economy would be served by holding a hearing in this matter on the same**

[7] As Schwab makes clear in his brief, the purpose of discussing the Diaz execution is to heap criticism on the Department of Corrections, regardless of whether it has anything at all to do with Schwab's execution.

> **issue which has been extensively explored by Judge Angel in *Lightbourne.*** The parties have stipulated that the *Lightbourne* hearing testimony **may** be judicially noticed in this case, but the Court has deliberately elected not to take judicial notice at this time and has not reviewed the evidence presented therein.

(R1244) (emphasis added). The court did not abuse its discretion in deciding this case without taking judicial notice of the *Lightbourne* files and records.[8]

Summary denial was appropriate

Nothing Schwab pleaded established any basis for further proceedings on the lethal injection issue. He was not entitled to present the same evidence that had been submitted in *Lightbourne* (over the course of 13 days), even though his witness list (insufficient though it was) made clear that that was exactly what he intended to do. The fact remains that **no court** of competent jurisdiction has ever found Florida's lethal injection procedures unconstitutional, and there is no basis for doing so in this case.[9] Schwab waited until his death warrant had

[8] The fact that the court had indicated at one point that it might be favorably disposed toward a motion to take judicial notice, and the fact that the State had prepared a CD of the *Lightbourne* record means nothing. As this case was before the Court, it could be, and properly was, decided based on the pleadings. Any other result would have been a *de facto* relitigation of *Lightbourne*, which was both unnecessary and inappropriate. No rule of law stands for the proposition that two Circuit judges, in different jurisdictions, should pass on the same proceeding, which is, effectively, what Schwab wanted.

[9] Even in the *Lightbourne* case, the issues before the trial court

been signed before raising a method of execution claim of any sort, even though he has known for seven years that he would be executed by lethal injection -- this claim is nothing more than a desperate attempt to avoid execution of his death sentence. This claim was properly summarily denied, because the motion, files and records demonstrated that there was no basis for relief.

II. THE MENTAL STATE CLAIM IS PROCEDURALLY BARRED

On pages 68-73 of his brief, Schwab sets out what he describes as "newly discovered evidence" that Schwab "suffers from neurological brain impairment." This claim is not a basis for relief for several independently adequate reasons, any one of which, standing alone, is an adequate and independent State law ground for denial of relief. Further, the files and records conclusively show that Schwab is not entitled to relief on this claim -- no evidentiary hearing was necessary, as the Circuit Court properly found.

The Circuit Court Order.

In denying relief on this claim, the Circuit Court held:

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changed from an emphasis on what might have occurred in the Diaz execution, to whether the Department has enhanced its lethal injection procedures to the satisfaction of the trial court in that case. On September 10, 2007, the *Lightbourne* Court found that the procedures were constitutional.

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

Even if the Court were not to conclude that this issue was procedurally barred, it finds that the Defendant failed to sufficiently plead the matter. "There are two requirements that must be met in order to set aside a sentence because of newly discovered evidence. First, the asserted facts 'must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known them by the use of diligence.' *Scott v. Dugger*, 604 So. 2d 465, 468 (Fla. 1992) (quoting *Hallman v. State*, 371 So. 2d 482, 485 (Fla. 1979), abrogated on other grounds by *Jones v. State*, 591 So. 2d 911, 915 (Fla. 1991)). Second, 'the newly discovered evidence must be of such nature that it would *probably* produce an acquittal on retrial.'). This 'standard is also applicable where the issue is whether a life or death sentence should have been imposed.' *Id.* (citing *Jones,* 591 So. 2d at 915). " *Miller v. State*, 926 So. 2d 1243, 1258 (Fla. 2006).

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

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

As is discussed in Judge Richardson's extensive Judgment and Sentence, the trial court considered all the mental health testimony offered by the Defendant and the State. He addressed the statutory mitigation of s. 921.141(6)(B) and (F), Fla. Stat. 1991. He concluded that the Defendant was a "mentally disordered sex offender." (Exhibit A, Judgment, p. 8). He found that the Defendant's ability to conform his conduct to the requirements of the law was "substantially impaired." (A, p. 11). The Court went on to state that "having found this statutory mitigator to exist, it must be given some weight."

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

Thus, the "newly discovered evidence" that persons with frontal lobe damage may act sexually inappropriately would not be the type of "new" evidence that would *probably* have changed the trial court's mind. The Defendant has not demonstrated or even alleged that had the trial court been given additional information about frontal lobe injury, it would have considered this as [a] mitigator that

> outweighed the three aggravators it used to impose the death penalty. Relief on this claim is denied.

(R1245-47). Both the procedural bar finding and the finding on the "newly discovered evidence" component are in accord with settled Florida law, and should be affirmed.

This Claim is Procedurally Barred.

Florida law is settled that claims that have previously been raised in a postconviction relief motion, or that could have been but were not raised in a prior postconviction relief motion, are subject to a procedural bar to further litigation of those claims. This claim overlaps both procedural bar rules, and should be summarily denied for that reason.

In his last appearance before the Circuit Court, Schwab raised various mental state claims. Despite the Court's extension of the hearing to allow Schwab to do so, no evidence was presented on those claims. The Circuit Court denied relief on Schwab's first post-conviction motion, and this Court affirmed, stating:

> Schwab next contends that his counsel was ineffective for failing to ensure that Schwab had access to a competent mental health expert for the purpose of evaluating, preparing, and presenting mitigation evidence for the defense. *See Ake v. Oklahoma*, 470 U.S. 68, 83, 84 L. Ed. 2d 53, 105 S. Ct. 1087 (1985); *see also Mann*, 770 So. 2d at 1164. The trial judge found that Schwab presented no evidence to support this claim. We agree. *Ake* requires that a defendant have access to a "competent psychiatrist who will conduct an appropriate examination and assist in

> evaluation, preparation, and presentation of the defense." *Ake*, 470 U.S. at 83. 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. Portions of these videotapes were presented to Judge Richardson. On the basis of this evaluation, Dr. Bernstein diagnosed Schwab as a pedophile operating at a regressed level of maturity who exhibited violent sexual deviant behavior. Schwab's counsel performed the essential tasks required by *Ake*. *See Mann*, 770 So. 2d at 1164. Therefore, we affirm the trial court's denial of this claim.

Schwab v. State, 814 So. 2d 402, 413-414 (Fla. 2002).

The time has passed for Schwab to present whatever mental state evidence he had, and, in the final analysis, this claim is nothing more than a successive claim of ineffectiveness of counsel.[10] Schwab had his chance to present his case, and did not

[10]Lest there be any doubt about the preclusion on bringing in new mental state experts in postconviction litigation, in *Hertz v. State*, 941 So 2d 1031, 1041 (Fla. 2006), this Court held:

> Hertz alleges that Rand failed to present evidence of his brain damage. As mentioned above, this alleged "brain damage" theory was presented by Dr. Mosman at

take it. He is bound by that decision, and is not entitled to a second bite at the apple. In deciding a similar claim, this Court held:

> Having failed to show any justification for his failure to raise the present claims in his earlier postconviction motions, the instant motion constitutes an abuse of process. *Spaziano v. State*, 545 So. 2d 843 (Fla. 1989); *Tafero v. State*, 524 So. 2d 987, 988 (Fla. 1987); *Booker v. State*, 503 So. 2d 888, 889 (Fla. 1987); *Christopher v. State*, 489 So. 2d at 25. [FN4]
>
> > [FN4] In addition, we note that the motion was filed outside of the limitations period established by rule 3.850. The motion fails to allege that the facts upon which his claims are based "could not have been ascertained by the exercise of due diligence." *Fla. R. Crim. P.* 3.850.

Foster v. State, 614 So. 2d 455, 459 (Fla. 1992). The Circuit Court's procedural bar finding follows settled law, and relief was properly denied on that basis.

The "Evidence" is not "Newly Discovered."

> the postconviction evidentiary hearing. The trial court found Dr. Mosman's testimony unconvincing. Even if the trial court had found Dr. Mosman's opinion on this point convincing, **it still would have simply been a more favorable opinion of a new and different doctor postconviction which would not have rendered Rand's reliance on other expert opinions ineffective assistance of counsel.** *See Asay v. State*, 769 So. 2d at 986. **Additionally, ample evidence of the mental health problems was in fact presented through the testimony of Dr. D'Errico during the penalty phase.**

In an effort to avoid application of the settled procedural bar rules, Schwab labels the “evidence” as “newly discovered.” That argument fails for two reasons.

First, a review of the unnumbered exhibits filed with the motion reveals that the research articles offered to support the “newness” of the claimed evidence are based on research that has existed for many years, and, at least in some cases, predates Schwab’s crimes. Because that is so, Schwab cannot in good faith assert that he could not have raised this theory in his first postconviction relief motion.

To the extent that Schwab claimed, on page 23 of the motion, that he “has never been evaluated by a neuropsychologist and therefore the testing and evidence presented in previous court proceedings are not comprehensive,” that argument is frivolous.[11] Schwab was represented by his present counsel in the

[11] The issue is not whether Schwab was evaluated by a particular type of medical professional but rather whether he was evaluated by experts. To the extent that he can locate a different medical discipline to now argue he should be reassessed, that claim is specious. *See Peede v. State*, 955 So. 2d 480, 495 (Fla. 2007), where this Court noted:

> **We have consistently held that a mental health investigation is not rendered inadequate "merely because the defendant has now secured the testimony of a more favorable mental health expert."** *Asay*, 769 So. 2d at 986 (citing *Jones v. State*, 732 So. 2d 313, 320 (Fla. 1999); *Rose v. State*, 617 So. 2d 291, 294 (Fla. 1993)). Obviously, defense counsel sought Dr. Kirkland's appointment because of Dr. Kirkland's reputation. However, there is no guarantee in such a

earlier postconviction proceedings, and counsel should and could have presented such evidence then had there been a good faith basis for doing so. This claim, which is really nothing but a successive and abusive ineffectiveness of counsel claim, is procedurally barred because it could have been but was not timely raised in the first collateral attack proceeding.[12]

The second deficiency with Schwab's claim is that, accepting the "newness" of the proffered evidence for the sake of argument, that evidence does **not** qualify as "newly

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> situation that the expert will develop only favorable opinions. In essence, Dr. Kirkland's evaluation produced a "mixed bag" of favorable and unfavorable opinions, but that is always the risk. Finally, as the circuit court noted in its order:
>
> [I]t appears that much of the difference between Dr. Kirkland's conclusions and those of the current defense experts is semantic. As explained by Dr. David Frank, testifying for the State, the earlier version of the Diagnostic and Statistical Manual (or "D[SM] III") references a "paranoid disorder" that is now referred to in the current version of the Manual (the "DSM-IV-TR") as a "delusional disorder." Therefore, although Dr. Kirkland did not label his diagnosis as a "delusional disorder," it appears that this was simply because he quite appropriately used the term ("paranoia") recognized by the then-current diagnostic manual.
>
> In short, we find no abuse of discretion or error in the trial court's ultimate conclusion that the mental health evaluations of Dr. Kirkland were adequate under *Ake*. Therefore, we affirm the circuit court's denial of this claim.

[12] There is, of course, no such thing as ineffectiveness of postconviction counsel.

discovered." By definition, "newly discovered evidence" **was in existence**, but unknown, at the time of trial. *Diaz v. State*, 945 So. 2d 1136, 1144 (Fla. 2006); *see also, Kearse v. State*, SC05-1876 (Fla., Aug. 30, 2007). This Court has emphasized:

> This Court has held that to obtain relief based on a newly discovered evidence claim a defendant must satisfy the following two requirements:
>
> > First, in order to be considered newly discovered, the evidence "must have been unknown by the trial court, by the party, or by counsel **at the time of trial**, and it must appear that defendant or his counsel could not have known [of it] by use of due diligence.
> >
> > "Second, the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial. . . .
> >
> > In considering the second prong, the trial court should initially consider whether the evidence would have been admissible at trial or whether there would have been any evidentiary bars to admissibility. . . . The trial court should further consider the materiality and relevance of the evidence and any inconsistencies in the newly discovered evidence.
> >
> > *Jones v. State*, 709 So. 2d 512, 521 (Fla. 1998) (citations omitted).

Sireci v. State, 773 So. 2d 34, 43 (Fla. 2000). *See also, Porter v. State,* 653 So. 2d 374, 380 (Fla. 1995); *Wright v. State*, 857 So. 2d 861, 871 (Fla. 2003). If Schwab's claim that this evidence did not exist at the time of the prior proceedings is credited, then he has conceded that he cannot carry his burden

of demonstrating that the evidence is "newly discovered." This claim is not a basis for relief for this reason, in addition to the procedural bar set out above.

This Claim is Refuted by the Record.

Incredibly, Schwab seems to be suggesting that his crimes were "impulsive." Nothing could be farther from the truth, as the facts of the offense make clear. Schwab planned the abduction, sexual battery and murder of Junny Rios-Martinez over a substantial period of time, and his claims to the contrary in his successive motion (where they were raised for the first time), strain credulity. To the extent that further discussion is necessary, the sentencing order entered by Judge Richardson leaves no doubt that these crimes were anything but impulsive.

CONCLUSION

Based upon the foregoing arguments and authorities, the State submits that the Circuit Court's denial of should be affirmed in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by **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, on this _____ day of September, 2007.

_____
Of Counsel

CERTIFICATE OF COMPLIANCE

This brief is typed in Courier New 12 point.

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Of Counsel