

CASE NO. 07-10275
CAPITAL CASE

IN THE SUPREME COURT OF THE UNITED STATES

MARK DEAN SCHWAB

Petitioner,

v.

FLORIDA,

Respondent.

BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF FLORIDA

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QUESTIONS PRESENTED

[Capital Case]

Respondents state the questions presented in the following way:

Whether this Court should exercise its certiorari jurisdiction to review a claim that is foreclosed by binding precedent, and that, alternatively, does not present a federal question in the context of the case, and that was decided correctly by the State courts.

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JAMES R. MCDONOUGH,
Secretary of Department of Corrections, et al.
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BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI

The Respondent respectfully suggests that the petition for writ of certiorari should be denied for the reasons set out below. This case, as Schwab has always maintained, is controlled by this Court's decision in *Baze v. Rees*, 2008 WL 1733259 (U.S. Apr. 16, 2008), where this Court upheld the constitutionality of lethal injection.

And, to the extent that discussion beyond the *Baze* holding is necessary, while Schwab presents his claims as if they were fully raised and decided by the Florida courts, that is not the case. This case presents nothing more than the unremarkable decision of the Florida Supreme Court that Schwab's successive

motion for post-conviction relief was properly denied without an evidentiary hearing. That decision does not implicate the Constitution, and does not supply a basis for the exercise of this Court's certiorari jurisdiction.

CITATION TO OPINION BELOW

The decision of the Florida Supreme Court is reported as *Schwab v. State*, 969 So. 2d 318 (Fla. 2007). A copy of that decision is attached as Appendix 1.¹

RESPONSE TO STATEMENT OF JURISDICTION

Schwab asserts that this Court's jurisdiction rests on 28 U.S.C. § 1257(a). The Florida Supreme Court issued its decision on November 1, 2007, two weeks before Schwab's scheduled November 15, 2007, execution date. Subsequent to the release of this decision, Schwab filed a 42 U.S.C. § 1983 action in the District Court for the Middle District of Florida. That court issued a stay of execution, which was reversed by the Court of Appeals for the Eleventh Circuit. Schwab also filed a successive state post-conviction relief motion on November 9, 2007, which was denied by the trial court on November 13, 2007. The Florida Supreme Court

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The Florida Supreme Court's denial of Schwab's subsequent motion for stay of execution is referred to repeatedly in Schwab's petition as if the concurring opinion has some precedential value. That decision is not a part of this petition. *Schwab v. State*, 973 So. 2d 427 (Fla. 2007).

affirmed the denial of relief on January 24, 2008. *Schwab v. State*, 33 Fla. L. Weekly S67 (Fla. Jan. 24, 2008).

RESPONSE TO CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Schwab asserts that the Eighth and Fourteenth Amendments to the Constitution of the United States are implicated.

RESPONSE TO STATEMENT OF THE CASE

THE COURSE OF PROCEEDINGS IN THIS CASE²

On July 18, 2007, the Governor of Florida signed a death warrant setting Schwab's execution for November 15, 2007. On or about August 15, 2007, Schwab filed a successive *Florida Rule of Criminal Procedure* 3.851 motion which, *inter alia*, challenged lethal injection as a means of carrying out his death sentence.³ A copy of that pleading is attached as Appendix 2. The trial court denied relief without an evidentiary hearing, and Schwab appealed, arguing, in relevant part, that summary denial was error under Florida law. The Florida Supreme Court described the case in the following way:

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Throughout his petition, Schwab cites to concurring opinions in the Florida Supreme Court proceedings, the transcript of oral argument in *Baze v. Rees*, and the briefs of *Baze amici* as if those sources were binding in some fashion. They are not, and reliance on them is inappropriate.

3

Schwab was explicit, in his filings in the Florida Supreme Court, to emphasize repeatedly that he was **not** raising a *per se* challenge to lethal injection as a method of execution. Appendix 3. Such a claim would be procedurally barred, as Schwab recognized.

This case involves the kidnapping and murder of eleven-year-old Junny Rios-Martinez in April 1991. Schwab was convicted of first-degree murder, sexual battery of a child, and kidnapping,⁴ and was sentenced to death. The factual background and procedural history of this case are detailed in this Court's opinion on Schwab's direct appeal. See *Schwab v. State*, 636 So. 2d 3 (Fla. 1994). After we affirmed his conviction and sentence of death, Schwab unsuccessfully sought postconviction relief, both before this Court and before the federal courts. See *Schwab v. State*, 814 So. 2d 402 (Fla. 2002) (affirming circuit court's denial of motion for postconviction relief and denying petition for writ of habeas corpus); *Schwab v. Crosby*, 451 F.3d 1308 (11th Cir. 2006) (affirming trial court's denial of federal habeas corpus relief), *cert. denied*, 127 S. Ct. 1126, 166 L. Ed. 2d 897 (2007). On July 18, 2007, Governor Charlie Crist signed a death warrant setting Schwab's execution for November 15, 2007. In response to the signing of the death warrant, Schwab filed a second motion for postconviction relief, raising two claims: (1) Florida's lethal injection method of execution violates the Eighth and Fourteenth Amendments of the United States Constitution and corresponding provisions of the Florida Constitution; and (2) newly discovered evidence reveals that Schwab suffers from neurological brain impairment, which makes his sentence of death constitutionally unreliable.⁵ After the State filed its response, the postconviction court summarily denied all claims presented in the successive motion. This appeal follows.

In his first claim, Schwab raises numerous subissues relating to whether Florida's lethal injection **protocol** violates the Eighth Amendment. [FN1] Schwab first asserts that the postconviction court erred in summarily denying this claim without holding an evidentiary hearing. The State contends that Schwab's challenge to Florida's method of execution is procedurally barred because Schwab should have raised it within one year of the time that lethal injection

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Schwab omitted the fact that his victim was a child, and that he was convicted of kidnapping, as well as murder and sexual battery.

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The second claim is not a part of the petition.

became a method of execution. We disagree that this claim is procedurally barred. Schwab relies on the execution of Angel Diaz and alleges that the newly created lethal injection protocol does not sufficiently address the problems which occurred in the case of Diaz -- a claim that did not exist when lethal injection was first authorized. As this Court has held before, when an inmate presents an Eighth Amendment claim which is based primarily upon facts that occurred during a recent execution, the claim is not procedurally barred. See *Buenoano v. State*, 565 So. 2d 309, 311 (Fla. 1990) (holding Eighth Amendment challenge to electrocution was not procedurally barred because the "claim rest[ed] primarily upon facts which occurred only recently during Tafero's execution"); see also *Lightbourne v. McCollum*, No. SC06-2391 (Fla. order filed Dec. 14, 2006) (relinquishing this same claim to the circuit court for an evidentiary hearing after problems occurred during Diaz's recent execution and implicitly recognizing that this claim was not procedurally barred).

[FN1] As to this issue, Schwab asserts that the postconviction court erred by: (1) summarily denying his Eighth Amendment claim; (2) rejecting a foreseeable risk standard; (3) rejecting his argument that the use of a paralytic violates the Eighth Amendment; (4) declining to take judicial notice of another case which was also raising this same claim (the case of *State v. Lightbourne*, No. 1981-170CF (Fla. 5th Cir. Ct.)); (5) deferring unduly to the Department of Corrections; (6) declining to find that the problems with Angel Diaz's execution are relevant to this claim; (7) denying Schwab's request for public records; (8) rejecting Schwab's argument that consciousness assessment must meet a clinical standard using medical expertise and equipment; and (9) finding the motion for postconviction relief was insufficiently pled.

Schwab v. State, 969 So. 2d 318 (Fla. 2007) (emphasis added).⁶

In affirming the denial of relief on the lethal injection claims that were before it, the Florida Supreme Court held:

In the final lethal injection subissue that we specifically address, [FN4] Schwab **challenges the use of a paralytic drug** during an execution, **alleging that there is no legitimate clinical reason for using a paralytic and that the Governor's Commission on Administration of Lethal Injection questioned the wisdom of using such a drug.**⁷ [FN5] Without commenting specifically on the argument concerning the chemical mix used during lethal injection, the trial court concluded that Schwab did not allege facts which required an evidentiary hearing regarding whether the current DOC protocol might be found to violate his constitutional rights. **On appeal, Schwab argues that the trial court erred in summarily rejecting his claim because his factual allegations were not conclusively refuted by the record.**

[FN4] Schwab raises numerous other Eighth Amendment challenges that were also presented in *Lightbourne*. This Court addresses those arguments in depth in that opinion. Accordingly, we do not repeat those same rulings here but rely on our concurrent holding in *Lightbourne v. McCollum*, No. SC06-2391, 2007 Fla. LEXIS 2255 (Fla. Nov. 1, 2007), **to dispose of Schwab's challenges as to whether the postconviction court erred when it rejected a foreseeable risk standard, deferred unduly to DOC, and rejected his**

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Claims 4-7 and 9 do not implicate the Constitution -- these claims are purely claims of error under Florida law.

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Contrary to the assertion on page 14 of the petition, the *Governor's Commission* did **not** find the procedures followed in the Diaz execution "inadequate." Various improvements and enhancements were suggested, and the Department of Corrections implemented those suggestions. *Lightbourne v. McCollun*, 969 So. 2d 326, 330-31 (Fla. 2007).

argument that a consciousness assessment must meet a clinical standard using medical expertise and equipment. Schwab also contends that the circuit court erred in finding that his motion was insufficiently pled. We do not interpret the lower court's order as denying the motion as insufficiently pled and thus reject this claim.

[FN5] The Commission recommended that: [T]he Governor have the Florida Department of Corrections on an ongoing basis explore other more recently developed chemicals for use in a lethal injection execution with specific consideration and evaluation of the need for a paralytic drug like pancuronium bromide in an effort to make the lethal injection execution procedure less problematic. The Governor's Commission on Administration of Lethal Injection, *Final Report with Findings and Recommendations* (March 1, 2007) at 13 (emphasis added).

Before addressing Schwab's specific challenge [to the denial of relief without an evidentiary hearing], it is important to note: (1) Schwab does not assert that he would have presented any additional testimony or other evidence regarding pancuronium bromide than that presented in *Lightbourne*; and (2) Schwab relies upon no new evidence as to the chemicals employed since this Court's previous rulings rejecting this very challenge. In *Sims v. State*, 754 So. 2d 657, 668 (Fla. 2000), after reviewing the evidentiary hearing, including testimony from defense experts which questioned the chemicals to be administered during executions, this Court held that "the procedures for administering the lethal injection . . . do not violate the Eighth Amendment's prohibition against cruel and unusual punishment." 754 So. 2d at 668. The Court reiterated its *Sims* holding in *Hill v. State*, 921 So. 2d 579 (Fla. 2006), where the petitioner challenged the use of specific chemicals in lethal injection, asserting that a research study published in the medical journal *The Lancet* presented new evidence that Florida's lethal injection procedures may subject the inmate to unnecessary pain. See *id.* at 582 (discussing Leonidas G. Koniaris et al., *Inadequate Anaesthesia in Lethal Injection for Execution*, 365 *Lancet* 1412 (2005)). This

Court held that the study did not justify holding an evidentiary hearing in the case and relied on its prior decision in *Sims*. *Id.* at 583; *see also Rutherford v. State*, 926 So. 2d 1100, 1113-14 (Fla.) (rejecting the argument that the study published in *The Lancet* presented new scientific evidence that Florida's lethal injection procedure created a foreseeable risk of the gratuitous infliction of unnecessary pain on the person being executed), *cert. denied*, 546 U.S. 1160, 126 S. Ct. 1191, 163 L. Ed. 2d 1145 (2006); *Rolling v. State*, 944 So. 2d 176, 179 (Fla. 2006) (same).

In turning to the evidence presented in *Lightbourne* regarding this claim, we find that the toxicology and anesthesiology experts who testified in *Lightbourne* agreed that if the sodium pentothal is successfully administered as specified in the protocol, the inmate will not be aware of any of the effects of the pancuronium bromide and thus will not suffer any pain.⁸ Moreover, **the protocol has been amended since Diaz's execution so that the warden will ensure that the inmate is unconscious before the pancuronium bromide and the potassium chloride are injected.** Schwab does not allege that he has additional experts who would give different views as to the three-drug protocol. Given the record in *Lightbourne* and our extensive analysis in our opinion in *Lightbourne v. McCollum*, we reject the conclusion that lethal injection as applied in Florida is unconstitutional.

Schwab v. State, 969 So. 2d 318 (Fla. 2007). (emphasis added).

The *Lightbourne* Decision.

The *Schwab* decision relies on the Florida Supreme Court's decision in *Lightbourne v. McCollum*, 969 So. 2d 326 (Fla. 2007), which was released concurrently with the decision in this case. The issue in *Schwab* was the pure State law issue that it was

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This evidence, **which is undisputed**, wholly contradicts the conclusions stated in *The Lancet*. In *Lightbourne*, the inmate disavowed reliance on *The Lancet* -- Schwab has not taken a contrary position.

error for the collateral proceeding trial court to deny the successive post-conviction relief motion without conducting an evidentiary hearing. The Florida Supreme Court relied on its *Lightbourne* decision to conclude that there was no error.

The issue in *Lightbourne* was not the constitutionality *per se* of lethal injection (which is not the claim in *Schwab*, either), but rather that “if it [the execution] is not properly carried out, there will be a risk of **unnecessary pain.**” *Lightbourne*, 969 So. 2d at 349. (emphasis added). In the penultimate holding in *Lightbourne*, the Florida Supreme Court found that Lightbourne “has failed to show that there is any cruelty inherent in the method of execution provided for under the current procedures,” and further stated that:

it is undisputed that there is no risk of pain if the inmate is unconscious before the second and third drugs are administered. After Diaz's execution, the DOC added additional safeguards into the protocol to ensure the inmate will be unconscious before the execution proceeds. **In light of these additional safeguards and the amount of the sodium pentothal used, which is a lethal dose in itself, [FN25] we conclude that Lightbourne has not shown a substantial, foreseeable or unnecessary risk of pain in the DOC's procedures for carrying out the death penalty through lethal injection that would violate the Eighth Amendment protections.**⁹

[FN25] **As defense counsel conceded during oral argument, there was no evidence presented that once the five-gram dose of**

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This holding, coming before *Baze*, presages this Court's ultimate resolution of the issue.

sodium pentothal has been properly administered and an inmate is rendered unconscious, there is any likelihood that he will become conscious during the execution, even if the procedure lasts for thirty minutes or more. The evidence clearly established that this dose is lethal and once unconsciousness is reached, the inmate will slip only deeper into unconsciousness until death results. This conclusion is borne out by the medical testimony.

Lightbourne v. McCollum, 969 So. 2d at 352-353. (emphasis added).

In reaching that conclusion, the court said:

Lightbourne contends that the protocol fails to appropriately ensure proper training and certification of both the executioners and the technical team members and that the protocol fails to adequately assess and ensure unconsciousness. [FN22] Lightbourne does not assert that the amount of sodium pentothal is inadequate, thereby disavowing any agreement with the *Lancet* article, which had been the subject of prior challenges to lethal injection. [FN23] Lightbourne does not **explicitly** challenge the use of the three-drug combination, although he does **question** the necessity for the use of pancuronium bromide, given that the dosage of sodium pentothal is sufficient to cause death. [FN24]

[FN22] Lightbourne raises the following specific allegations regarding the sufficiency of the August 2007 procedures: the revised procedures do not meaningfully increase the qualifications of executioners; there is no requirement that the team warden or executioners have experience in conducting executions; the protocol does not require that training sessions use more accurate simulations than pushing syringes into a bucket; there is no reason for using a syringe holder; positioning executioners in a separate room from the inmate results in long lengths of IV tubing, which creates greater opportunity for malfunction; the procedures do not specifically indicate the

qualifications needed by each designated team member; phlebotomists are not trained to place catheters in veins; the procedures leave inmates to guess if the execution team members are adequately experienced and "medically qualified"; the warden is not qualified to make hiring decisions regarding medical personnel; the procedures do not provide any method for monitoring the inmate's consciousness after administration of sodium pentothal, and the warden is not qualified to make this assessment; anesthetic depth should be assessed by a variety of indicators to reach an accurate reading; the warden is not qualified to make the final decision regarding the appropriate method of obtaining venous access; pancuronium bromide is used for purely cosmetic reasons; the contingency portion of the protocols does not detail any responses to contingencies; and the certification portion of the protocols does not result in individual accountability of team members. In a related case where another inmate is also challenging the protocol after a death warrant was signed in his case, **Mark Dean Schwab raises similar concerns, focusing primarily on whether the protocols adequately ensure the assessment of consciousness and whether the use of a paralytic drug during the execution is warranted.** See *Schwab v. State*, No. SC07-1603, 969 So. 2d 318, 2007 Fla. LEXIS 2011 (Fla. Nov. 1, 2007).

[FN23] Both Lightbourne's expert, Dr. Heath, and the State's expert, Dr. Dershwitz, testified at the evidentiary hearing and criticized The Lancet article that claimed inadequate thiopental sodium has been used in executions, asserting that the study employed flawed methodology and the conclusions are not supported by the data because of the delay in drawing blood. See *supra* note 18.

[FN24] The petition for certiorari filed in *Baze v. Rees* raises as the third issue whether "the continued use of sodium thiopental, pancuronium bromide and potassium

chloride, individually or together, violate the cruel and unusual punishment clause because lethal injections can be carried out by using other chemicals that pose less risk of pain."

It is important to review these claims in conjunction with each other since the chemicals used, the training and certification, and the assessment of consciousness all affect each other. **If all of the team members have the appropriate training, experience, and certification, the risk of complications will be greatly reduced. If the inmate's consciousness is appropriately assessed and monitored after the dosage of sodium pentothal is administered, he or she will not suffer any pain from the injection of the remaining drugs.** In reviewing the alleged risk of an Eighth Amendment violation, whether framed as a substantial risk, an unnecessary risk, or a foreseeable risk of extreme pain, the interactions of these factors must be considered.

Again, Lightbourne's **most significant challenge is not to the chemicals themselves, but to whether they will be administered "properly" and whether the protocol has sufficient safeguards in place to prevent harm in the event that, as in the Diaz execution, the protocol is not properly followed.** Lightbourne expends considerable effort disputing whether the lethal injection procedures set forth sufficient detail as to the training, qualifications, and experience required for the executioners and the various medically qualified team members. While the lethal injection procedures do not spell out in exact detail what training each team member must have, they do provide significant guidance and clearly require that the medically qualified personnel chosen for the execution team have adequate certification and training for their respective positions.

Our precedent makes clear that this Court's role is not to micromanage the executive branch in fulfilling its own duties relating to executions. We will not second-guess the DOC's personnel decisions, so long as the lethal injection protocol reasonably states, as it does here, relevant qualifications for those individuals who are chosen.

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

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

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

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

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

Lightbourne v. McCollum, 969 So. 2d at 351-352. (emphasis added).

REASONS WHY THE WRIT SHOULD BE DENIED

THIS COURT'S DECISION IN *BAZE V. REES* IS DISPOSITIVE OF ALL CLAIMS CONTAINED IN THE PETITION

On April 16, 2008, this Court issued its decision in *Baze v. Rees*, upholding the constitutionality of Kentucky's lethal injection procedures. Those procedures are substantially similar to Florida's procedures, which contain procedures for the assessment of unconsciousness not found in the Kentucky procedures. (Ginsberg, J., dissenting, at 7). The drugs used in Florida and Kentucky are the same, but Florida uses five (5) grams of thiopental sodium, where Kentucky uses three (3) grams. *Ms. op.*, at 5, 6. In upholding the constitutionality of the Kentucky procedures, this Court stated:

. . . an inmate cannot succeed on an Eighth Amendment claim simply by showing one more step the State could

take as a failsafe for other, independently adequate measures. This approach would serve no meaningful purpose and would frustrate the State's legitimate interest in carrying out a sentence of death in a timely manner.

Ms. op., at 22. This Court went on to state that:

A State with a lethal injection protocol substantially similar to the protocol we uphold today would not create a risk that meets this standard.

Id. Florida's procedures more than satisfy that standard, and *Baze* is dispositive of Schwab's petition. The petition should be denied, and the previously-entered stay of execution vacated.

SCHWAB'S PETITION DOES NOT PRESENT
A FEDERAL QUESTION BECAUSE THE
FLORIDA SUPREME COURT DECIDED THE
CASE BEFORE IT ON STATE LAW
GROUND¹⁰

To the extent that further discussion of the petition is necessary, Schwab ignores the grounds that were actually presented to, and decided by, the Florida Supreme Court. Despite the Constitutional pretensions of the petition, the issue the Florida Supreme Court decided was whether it was error, **under State law**, to deny Schwab's successive motion without an evidentiary hearing. *See, Schwab v. State, supra*, at n. 1. Schwab's claims for relief were, in every respect, based upon

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The discussion, *infra*, of other reasons that certiorari review is inappropriate is not intended to waive, in any way, Schwab's total failure to present a federal question.

that State law claim. And, because that is true, the Constitution is not implicated and certiorari review is not appropriate.

In finding that summary denial of Schwab's petition was proper, the Florida Supreme Court relied on its concurrent decision in *Lightbourne v. McCollum*, as discussed herein. Lightbourne's petition for writ of certiorari is pending before this Court, and is styled *Lightbourne v. McCollum*, Case No. 07-10265. That decision speaks for itself, and, under the facts developed in that case, there is nothing in the Florida Supreme Court's decision sufficient to give this Court pause regarding the constitutional validity of Florida's lethal injection procedures. *Baze v. Rees* found execution by lethal injection Constitutional, and, based upon the *Lightbourne* factfindings, there is no basis for finding infirmity with Florida's procedures given the specific, detailed safeguards that are incorporated therein for the express purpose of insuring a humane and dignified execution.

However, the Florida Supreme Court's citation to its *Lightbourne* decision is secondary to Schwab's state court argument that summary denial was error. That claim does not present a federal question, and certiorari review is not appropriate.¹¹

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Lightbourne's case is concerned with **Florida's** execution procedures, and, more importantly, contains alternate holdings from

THE FLORIDA SUPREME COURT'S
ALTERNATIVE HOLDING BASED ON THE
CONSTITUTIONAL STANDARD IS
CORRECT¹²

Putting aside Schwab's failure to raise the Constitutional standard claim contained in the petition in the Florida courts, and assuming *arguendo* that that issue, which is not discussed in the Florida Supreme Court's decision, is properly addressed at all, the Florida Supreme Court made secondary findings concerning the "Constitutional standard" in the *Lightbourne* decision:

Alternatively, even if the Court did review this claim under a "foreseeable risk" standard as *Lightbourne* proposes or "an unnecessary" risk as the *Baze* petitioners propose, we likewise would find that *Lightbourne* has failed to carry his burden of showing an Eighth Amendment violation. **As stressed repeatedly above, it is undisputed that there is no risk of pain if the inmate is unconscious before the second and third drugs are administered. After Diaz's execution,**

the Florida Supreme Court expressly finding that Florida's lethal injection procedures satisfy **any** of the proposed Constitutional standards for assessing an Eighth Amendment challenge. The Florida Supreme Court's anticipatorily considered the various proposed Constitutional standards and rejected of *Lightbourne's* claim under each of them. Further consideration by the State courts is unnecessary under the facts of this case, given that the various applicable standards have already been considered, unlike the posture of *Schor*, where further consideration was required because the Florida Supreme Court's decision was silent on the requisite issue. *Sochor v. Florida*, 504 U.S. 527, 540-43 (1992). In this case, the Florida Supreme Court's interpretation of Federal law was entirely appropriate. See, e.g., *Medellin v. Texas*, 170 L.Ed.2d 190, 221-22 (2008).

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If anything, the alternate Constitutional standards considered by the Florida Supreme Court are **higher** than the "substantial risk of serious harm" standard this Court adopted in *Baze*. In any event, Schwab cannot satisfy the *Baze* standard.

the DOC added additional safeguards into the protocol to ensure the inmate will be unconscious before the execution proceeds. In light of these additional safeguards and the amount of the sodium pentothal used, which is a lethal dose in itself, [footnote omitted] we conclude that Lightbourne has not shown a substantial, foreseeable or unnecessary risk of pain in the DOC's procedures for carrying out the death penalty through lethal injection that would violate the Eighth Amendment protections.

Lightbourne v. McCollum, 969 So. 2d at 352-353. (emphasis added).¹³ Contrary to Schwab's disparaging description of that holding as a "postscript," the true facts are the Florida Supreme Court made that alternative holding based upon the possible Constitutional standards that have been suggested in the context of this claim, and followed its own precedent in deciding this case. Those alternate findings, which were wisely included in the decision given the fact that *Baze* was pending at the time, obviate any argument that any further State Court proceedings would serve any purpose other than delaying the execution of Schwab's valid sentence.

In light of *Baze*, and in view of the Florida Supreme Court's decision in *Lightbourne*, Schwab cannot demonstrate that Florida's execution procedures, which are substantially similar to

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Lightbourne, like Schwab, argued for a "foreseeable risk" standard, **not the "unnecessary risk" argument advanced in *Baze***. It stands reason on its head to suggest that the Florida Supreme Court erred when it did not apply a standard that was not argued.

Kentucky's, do not satisfy the Eighth Amendment in all respects. Certiorari is inappropriate.

ANY CLAIM THAT LETHAL INJECTION IS
UNCONSTITUTIONAL *PER SE* IS NOT
PRESERVED

To the extent that Schwab's petition can be construed as claiming that lethal injection is *per se* an unconstitutional method of execution, that claim is not properly raised in a petition for writ of certiorari because it was abandoned below. In his *Reply Brief* in the Florida Supreme Court, Schwab explicitly disavowed any claim that lethal injection is *per se* unconstitutional. Appendix 3. He cannot now claim that that claim was presented to the Florida Supreme Court. The decision of the Florida Supreme Court is not to the contrary, but rather makes plain that the events occurring during a **recent** execution were **not** procedurally barred. *Schwab v. State*, 969 So. 2d at 322.¹⁴ The Florida Supreme Court did not speak to the *per se* claim because it was not before them -- this Court should not exercise its discretionary jurisdiction to consider a claim that was not presented in State court. And, in any event, *Baze* is dispositive of such a claim, anyway.

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The Florida Supreme Court later made it plain that it was considering an "as applied" claim that lethal injection is unconstitutional. *Schwab v. State*, 969 So. 2d at 325.

CONCLUSION

This Court's decision in *Baze v. Rees* is dispositive of Schwab's petition in all respects. While additional reasons for denial of the petition are present, *Baze* settles all underlying issues, and, in following the precedent of that case, the petition should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by **e-mail and U.S. Mail** to: **Mark S. Gruber, gruber @ccmr.state.fl.us**, Assistant CCRC - Middle, 3801 Corporex Park Dr., Suite 210, Tampa, Florida 33619-1136, on this _____ day of April, 2008.

Of Counsel