CAPITAL CASE

NOV 15 2007

EXECUTION DATE

Docket No. 07A383

IN THE
SUPREME COURT OF THE UNITED STATES

MARK DEAN SCHWAB,
Petitioner,

versus,

THE STATE OF FLORIDA, and
JAMES R. MCDONOUGH,
Secretary, Florida Department of Corrections,
Respondents.

On Petition for a Writ of Certiorari
to the Supreme Court of Florida

APPLICATION FOR STAY OF EXECUTION
PENDING FILING AND CONSIDERATION OF A
PETITION FOR WRIT OF CERTIORARI
Execution Scheduled for November 15, 2007 at 6:00 p.m.

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TO THE HONORABLE CLARENCE THOMAS, Associate Justice of Supreme Court of the United States and Circuit Justice for the Eleventh Circuit:

FILED

NOV 09 2007

OFFICE OF THE CLERK
SUPREME COURT, U.S.

Mark Dean Schwab, by counsel, respectfully applies to this Court pursuant to 28 U.S.C. §§ 1651 and 2101(f) for a stay of his execution, currently scheduled for November 15, 2007 at 6:00 p.m. The Supreme Court of Florida denied Schwab's challenge to Florida's lethal injection chemicals and procedures. Days later, on November 7, 2007, the court denied Schwab's motion for a stay of execution pending this Court's decision in *Baze v. Rees*, No. 07-5439. The concurring opinion said "Schwab should seek a stay from the United States Supreme Court." He now does just that, seeks a stay of execution from this Court on either of two alternative grounds. First, pending the filing, consideration, and disposition of a petition for a writ of certiorari before judgment to review the decision of the Supreme Court of Florida. *See*, 28 U.S.C. 1257(a). Second, to preserve this Court's jurisdiction to review the petition for a writ of certiorari under the ordinary time frame, rather than in matter of days, or, perhaps even hours, as a result of the Florida Supreme Court's delay in ruling on Schwab's motion for a stay.

Schwab's petition for a writ of certiorari will present the following questions:

I. Does the Eighth Amendment to the United States Constitution prohibit means for carrying out a method of execution that create a constitutionally significant and unnecessary risk of pain and suffering?

II. Do the means for carrying out an execution cause an unnecessary risk of pain and suffering in violation of the Eighth Amendment upon a showing that readily available alternatives that pose less risk of pain and suffering could be used?

III. Does the continued use of sodium thiopental, pancuronium bromide, and potassium chloride, individually or together, violate the cruel and unusual punishment clause of the Eighth Amendment because lethal injections can be carried out by using other chemicals that pose less risk of pain and suffering?

These are the same questions presented in *Baze v. Rees*, No. 07-5439, in which certiorari has been granted. They are also the same questions presented in three other cases in which the Court granted stays of execution after the grant of certiorari in *Baze*. *Berry v. Epps*, No. 07-

7348; *Emmett v. Johnson*, NO. 07A304; and, *Turner v. Texas*, ___ S.Ct. ___, 2007WL2803693 (Sept.27, 2007). In *Turner*, the Court granted a stay of execution pending the filing and disposition of the petition for a writ of certiorari. Because Schwab's petition will present the same issues as *Baze*, *Emmett*, *Turner*, and *Berry*, there is a reasonable probability that the Court will grant certiorari. This is particularly so because Schwab filed his action in a much more timely manner than Turner, or even, Berry. Unlike Berry who filed his lawsuit twelve days before his scheduled execution and unlike Turner who filed his suit on the day of his scheduled execution, Schwab filed his lethal injection suit approximately four months before his scheduled execution. For these reasons and because the rest of the traditional factors for granting a stay of execution favor Schwab, the Court should take the same action it has taken in the post-*Baze* cases that have come before it - - stay Schwab's execution pending the filing of and disposition of a petition for a writ of certiorari, or in the alternative, stay Schwab's execution pending *Baze*.

I. Relevant factual and procedural history

A. The chemicals used in Florida lethal injections - - the same chemicals at issue in *Baze*.

Florida uses the same three drug regimen as that used in all states other than New Jersey that carry out executions by means of lethal injection: sodium thiopental, pancuronium bromide, and potassium chloride. Sodium thiopental is a barbiturate used to render the inmate unconscious. Pancuronium bromide (trade name pavulon) is a paralytic agent that paralyzes all voluntary muscles. Potassium chloride is injected to stop the prisoner's heartbeat. A saline solution is injected in between each of these steps as a flushing agent. The propriety of the use of these chemicals is at issue in *Baze*.

"It is undisputed that, without proper anesthesia, the administration of pancuronium bromide and potassium chloride, either separately or in combination, would result in a terrifying,

excruciating death." *Harbison v. Little*, 2007 WL 2821230, *11 (M.D.Tenn. Sept. 19, 2007). Potassium chloride will cause severe burning in the subject's vascular system and eventually full cardiac arrest. Pancuronium bromide, in a conscious person, leaves the prisoner awake and fully aware, but causes paralysis and slow suffocation. Injection of it into a conscious person will cause him to experience slow suffocation while being unable to show by word or gesture what is happening. As the petition for a writ of certiorari in *Baze* and Baze's recently filed merits brief make clear, pancuronium bromide is not necessary to cause death. Likewise, *Baze* makes clear that potassium chloride could be eliminated from the chemical protocol or replaced with a less painful chemical to cause cardiac arrest. As long as pancuronium bromide remains part of Florida's execution protocol, means must be taken to ensure that the condemned inmate is unconscious before and after the injection of pancuronium. It is the use of these chemicals, the qualifications of the members of the execution team, and the means for monitoring for consciousness that were raised in the lower courts and that are at issue here and in *Baze*.

B. Case background

1. The commencement of the suit.

On December 13, 2006, the State of Florida executed Angel Diaz by lethal injection. The execution took three times longer than usual and the inmate was seen grimacing in pain and moving throughout. An autopsy showed that in both the primary venous access site and a backup site the needle and catheter had been pushed through the target vein into the tissue. Both arms had 12 inch burns. When the executioners encountered substantial resistance during the injection process, they improperly continued to inject the drugs into Diaz, switching back and forth between the two failed IV lines.

The next day, Ian Lightbourne and other death row inmates filed an emergency petition

in the Florida Supreme Court, arguing that Florida's lethal injection procedure violates the Eighth Amendment. Lightbourne's case was remanded to the trial court to conduct an evidentiary hearing, and the Lightbourne case has been treated as the lead case on the subject. While *Lightbourne* was still being litigated, the governor signed Schwab's death warrant, the first warrant since the Diaz execution. The same morning, the Florida Supreme Court issued an order establishing a parallel track litigation schedule for both Lightbourne and Schwab. This was well-before the grant of certiorari in *Baze* and approximately four months before Schwab's scheduled execution.

Schwab raised issues regarding the means for carrying out lethal injections in Florida, focusing primarily on whether the protocols adequately ensure the assessment of consciousness and whether the use of a paralytic drug and potassium chloride during the execution is warranted. The trial court denied Schwab an evidentiary hearing and refused to take judicial notice of the lengthy evidentiary hearing held in *Lightbourne*.

2. The appeal to the Florida Supreme Court

Schwab appealed to the Florida Supreme Court, which held oral argument and took judicial notice of *Lightbourne*. Nonetheless, the court denied Schwab's lethal injection claim on the merits; simultaneously, the court denied relief in *Lightbourne* in a separately filed opinion. Rehearing was denied five days later - - resulting in *Lightbourne* and *Schwab* being on parallel tracks for filing petitions for a writ of certiorari. In other words, if Schwab receives a stay of execution, both cases will arrive at the Court at the same time, and like *Baze*, the Court will have the opportunity to address the questions presented on a fully developed record.

Schwab's motion for a stay of execution was not ruled upon in either the Florida Supreme Court's merits ruling or the ruling for rehearing. Instead, on November 7, 2007, the

Florida Supreme Court issued a separate order denying Schwab's motion for a stay of execution pending *Baze*, over two dissenting opinions and a concurring opinion.

3. The concurring opinion

The concurring opinion acknowledged the Court's recently granted stay of execution in *Berry* and expressly stated that "Schwab should seek a stay from the United States Supreme Court." The concurring opinion then explained that, if it were a member of the executive branch, it "would urge the adoption of a one-drug protocol so that only a lethal dose of sodium thiopental would be necessary. Alternatively, I would explore the use of other drugs that carry less risk of pain than pancuronium bromide or potassium chloride. Further, I would consider other means to monitor the state of consciousness, such as the Bispectral Index (BIS) monitor, and would employ individuals who have the medical training and expertise necessary to adequately assess consciousness." But, the concurring opinion noted that the United States Supreme Court has not granted it that authority.

The concurring opinion then noted that it "anticipate[s] that the United States Supreme Court in Baze will clarify both the precise legal standard that should be used in method of execution cases and, more importantly, to what extent the judiciary should scrutinize the specific choices made by the executive branch in deciding how to carry out lethal injections. **I am hopeful that our decision in Lightbourne, which was reviewed based on a fully developed record, will assist the United States Supreme Court in making its determination, including answering the second question posed in Baze regarding whether an unnecessary risk of pain and suffering is established 'upon a showing that readily available alternatives that pose less risk of pain and suffering could be used.'"** (emphasis added).

4. The dissenters.

The dissenting justices noted that *Baze* is a "case directly on point in the Supreme Court," and, thus "constitutes a compelling reason for the entry of a stay." The dissenters also expressed another "fundamental and obvious" reason for granting a stay: "the consequences of failing to enter a stay will be irremediable. That is, once the appellant is put to death any decision by the United States Supreme Court impacting the use of lethal injection cannot possibly be applied here no matter the merits of the constitutional claim."

II. Reasons why Schwab is entitled to a stay of execution. This case raises the exact same issues as *Baze*, and thus Schwab is entitled to a stay of execution pending the filing and disposition of his petition for a writ of certiorari, or in the alternative, until *Baze* is decided. Any doubt about the fact that this case is indistinguishable from *Baze* is resolved by the concurring opinion that said it is "hopeful that our decision in Lightbourne, which was reviewed based on a fully developed record, will assist the United States Supreme Court in making its determination, including answering the second question posed in Baze regarding whether an unnecessary risk of pain and suffering is established 'upon a showing that readily available alternatives that pose less risk of pain and suffering could be used.'" Because the Florida Supreme Court took judicial notice of *Lightbourne* in deciding *Schwab*, *Schwab* should be just as useful to the Court in deciding *Baze*. And, it would be a travesty of justice if the party to a case that may aid the Court in deciding a pending case is executed before that case is decided. The language of the concurring opinion from the denial of Schwab's stay is sufficient in itself to grant Schwab a stay of execution pending *Baze*. But, that is not all that supports granting a stay of execution. The traditional factors for granting a stay of execution weigh heavily in Schwab's favor.

The traditional standard for granting a stay of execution was articulated in *Barefoot v. Estelle*, 463 U.S. 880 (1983). *Barefoot* requires the applicant to show (i) a reasonable probability

that four Members of the Court will consider the issues raised in the petition sufficiently meritorious for a grant of certiorari, (ii) the significant possibility that the Court will reverse the decision below, and (iii) that irreparable harm will occur if the execution is not stayed. *Id.* at 895. Schwab must also establish that he did not unduly delay in the filing of the action in which he now seeks a stay of execution. *See, e.g., Nelson v. Campbell*, 541 U.S. 637 (2004). Schwab easily satisfies this standard.

A. A reasonable probability that four members of the Court will grant certiorari has already been satisfied.

Schwab's petition for a writ of certiorari presents the same questions that this Court granted certiorari in *Baze v. Rees*, No. 07-5439, to review. This, in itself, establishes a reasonable probability that four members of the Court will grant certiorari. "Where the petition for certiorari presents a question that is identical with, or similar to, an issue already pending before the Supreme Court in another case in which certiorari has been granted, the issue is obviously important and the Court will either grant the petition and set the case for argument or postpone consideration of the petition until the other case has been decided and then make summary disposition of the case in accordance with that decision." Stern, et al., Supreme Court Practice, 8th ed. 2002, at 255. The Court seems to have recently applied that practice in *Taylor v. Crawford*, No. 07-303, a lethal injection case that has been conferenced and appears to be being held pending *Baze*. The Court has also granted motions for stay of execution raising the exact same legal challenges Schwab raises in three other cases: *Turner v. Texas*, ___ S.Ct. ___, 2007WL2803693 (Sept.27, 2007) (staying execution date pending the filing and disposition of cert petition challenging state lethal injection procedures that will raise the same questions raised in *Baze* and that Schwab intends to raise before the Court); *Emmett v. Johnson*, ___ S.Ct. ___, --- S.Ct. ----, 2007 WL 3018923, 76 USLW 3223 (U.S. Oct 17, 2007) (NO. 07A304) (granting stay

pending disposition of appeal of § 1983 action challenging lethal injection procedures); and, *Berry v. Epps*, No. 07-7348 (October 30, 2007) (granting motion for stay of execution predicated on challenge to lethal injection that raised the same questions as *Baze*); *see also*, *Norris v. Jones*, --- S.Ct. ----, 2007 WL 2999165 (U.S.), 76 USLW 3223 (October 16, 2007) (refusing to vacate a stay of execution granted by the United States Court of Appeals for the Eighth Circuit in light of *Baze* in a § 1983 action challenging lethal injection). The hold in *Taylor* and the stays of executions in light of *Baze* establishes, without a doubt, a reasonably probability that four members of the Court will vote to grant certiorari. Thus, Schwab has satisfied this prong.

B. There exists a significant possibility that the Court will reverse the decision below.

This standard is satisfied if the case "reflects the presence of substantial grounds upon which relief can be granted." *Barefoot*, 463 U.S. at 883. This standard is also easily satisfied. Like *Baze*, Schwab will argue that the chemicals used in lethal injections could be replaced by other chemicals that pose substantially less risk of pain and suffering. If *Baze* prevails, the chemicals and procedures Florida intends to use to execute Schwab will have been found unconstitutional, making his execution a violation of the Eighth Amendment that cannot be remedied. This situation occurring is not an aberration, but instead a significant possibility. The vast majority of the rulings handed down by this Court reverse the lower court decision. If that pattern holds true here, the Court's grant of certiorari in *Baze* is a strong indication that the Court will rule in Baze's favor. Such a ruling would also mean that Schwab must prevail, but to do so he must remain alive. The record in this case and the lower court's ruling also supports the conclusion that there exists a significant possibility that the Court will reverse the decision below.

The concurring opinion from the Florida Supreme Court order denying a stay of

execution stated, "Schwab will likely seek a stay in the United States Supreme Court as was done by the defendant in *Berry v. Epps* and, in my view, that is exactly the procedure that should be followed in this case." The Justice added that this "provides the State of Florida and this Court with the best chance of receiving specific guidance from the United States Supreme Court as to the constitutionality of future lethal injection procedures." In other words, the concurring opinion was asking the Court to provide it with guidance and to take the appropriate action to do so. The record in this case and the lower court's rulings make clear why this unusual "request" has been made.

Schwab had challenged the state courts' unblinking deference to the DOC with regard to virtually every aspect of Florida's lethal injection procedure, including the use of the three drug regimen. In response, the state court emphatically reaffirmed its previous holdings that "the specific methodology and the chemicals to be used are matters left to the DOC and the executive branch, and this Court cannot interfere with the DOC's decisions in these matters unless the petitioner shows that there are inherent deficiencies that rise to an Eighth Amendment violation." *Lightbourne*, Slip Op. 23 The separate concurring opinion to the denial of a stay said: "I anticipate that the United States Supreme Court in Baze will clarify both the precise legal standard that should be used in method of execution cases and, more importantly, to what extent the judiciary should scrutinize the specific choices made by the executive branch in deciding how to carry out lethal injections." Staying Schwab's execution pending the filing and disposition of a petition for a writ of certiorari (and likely pending *Baze*) is the appropriate way to provide this guidance, to ensure that Schwab is not executed in an unconstitutional manner, and to determine whether the Florida Supreme Court's ruling cannot stand in the wake of *Baze*..

The Florida Supreme Court adhered to the "inherent cruelty" standard that it has taken

since lethal injection was adopted as the method of execution in the state, along with its additional hurdle that a petitioner must "overcome the presumption of deference we give to the executive branch in fulfilling its obligations . . ." In the alternative, the court added as a brief postscript that if it had evaluated the claim under a standard involving risk it would have denied relief anyway. The court's rationale was that "there is no risk of pain if the inmate is unconscious before the second and third drugs are administered." However, as pointed out in the concurring opinion to the order denying a stay: "The converse is also true; that is, if the inmate is not fully unconscious before pancuronium bromide is administered there is a high probability that an inmate will suffer unnecessary pain." The court's assertion that it would have denied relief under an "unnecessary risk" standard is also dubious. As pointed out in the *Baze* petition, "even when 'unnecessary' is found to be part of the legal standard, courts are only paying lip-service to the word, for upholding the use of particular lethal injection chemicals when other chemicals could be used that pose less risk of pain and suffering flies in the face of the ordinary meaning of 'unnecessary.' Simply, if a readily available alternative exists, the risk of pain and suffering from not using this alternative is unnecessary." There is no showing here nor in any other case where the issue has been examined that the use of a paralytic is anything other than a cosmetic device. No real or thorough evaluation of the Florida Supreme Court's "ad hock" pick-a-standard approach can be conducted without first determining the appropriate standard to apply. That decision will be made in *Baze*. At that point, a thorough evaluation of the Florida Supreme Court's ruling can be undertaken.

Considering that most cases in which certiorari is granted are reversed, and that the Florida Supreme Court acknowledged that the applicable standard was unknown, would like be settled in *Baze*, and that *Lightbourne* (and its companion case, *Schwab*) could aid the Court in

deciding *Baze*, there is a significant possibility that *Schwab* will be reversed or at least remanded for further consideration in light of *Baze*.

C. Schwab will suffer irreparable injury if a stay of execution is not granted.

If a stay of execution is not granted, Schwab will suffer the most irreparably injury known to law; he will be executed before it is determined whether his execution will be carried out in a manner that will cause a risk of pain and suffering that violates the Eighth Amendment. If the Court rules in *Baze* that the chemicals used to carry out lethal injections in Kentucky (the same chemicals used in Florida) or the lack of adequate procedures for monitoring for consciousness violate the Eighth Amendment, without the Court's intervention, Schwab will have been executed in an unconstitutional manner. This satisfies the irreparable injury prong. *See*, *Wainwright v. Booker*, 473 U.S. 935 n.1 (1985) (Powell, J., concurring) (recognizing that there is little doubt that a prisoner facing execution will suffer irreparable injury if the stay is not granted); *In re Holladay*, 331 F.3d 1169, 1177 (2003) (holding in a death penalty case involving a mental retardation claim that "the irreparability of the injury that petitioner wil suffer in the absence of a stay to be self-evident").

D. Schwab has not unduly delayed in filing this suit.

The cases that have come before this Court where undue delay weighed heavily against staying an execution were cases where the inmate had truly delayed for no justifiable reason - - filing a lawsuit days or weeks before the scheduled execution. This is not one of those cases.

Schwab filed his lawsuit approximately four months before his scheduled execution, which was enough time for a hearing to take place in *Lightbourne* and for the Florida Supreme Court to render a decision in that parallel/companion case. The Florida trial court and Supreme Court then addressed Schwab's claims on the merits without any finding of delay. Principles of

comity suggest the Court should defer to the Florida courts ruling on the timeliness of this action in regard to a stay of execution - - a recognition by the state court that filing about four months before the scheduled execution was easily timely.

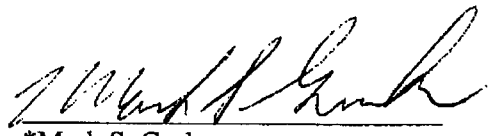
Further, the landscape in regard to undue delay has clearly changed in light of the grant of certiorari in *Baze*. Since then, the Court has stayed executions based on litigation that was filed twelve days before the scheduled execution and in another case, based on litigation filed on the day of the execution. Schwab is, without a doubt, substantially more timely than either of those litigants.

Finally, undue delay is an equitable principle that must take into consideration the harm that will be suffered by the state if Schwab is not executed on November 15, 2007. That harm is minimal. *Baze* will be argued in January and a decision will surely be handed down no later than June. If *Baze* loses, Florida could immediately reschedule Schwab's execution. If Baze prevails, Florida will have avoided carrying out an execution in a manner that shortly thereafter would be determined to be unconstitutional. Florida has no interest in carrying out an execution in an unconstitutional manner. Thus, the short delay that will be incurred by granting a stay of execution pending the filing and disposition of a petition for a writ of certiorari or pending *Baze* will not substantially harm the state. This fact also favors granting Schwab a stay of execution.

III. Conclusion.

For the reasons set forth in this application, the Court should grant Schwab a stay of execution pending the filing and disposition of a petition for a writ of certiorari, or in the alternative, pending the outcome of *Baze*.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Mark S. Gruber, hereby certify that the foregoing Application for Stay of Execution was sent via electronic mail and overnight courier on the following counsel for Respondents on November 9, 2007:

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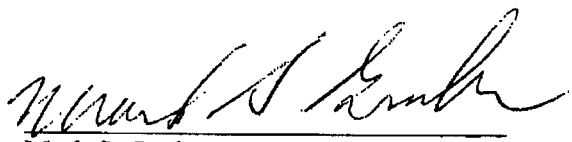

Mark S. Gruber

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ATTACHMENTS

Mark Dean Schwab, Case No. SC07-1603 – Order Denying Appellant's Motion to Stay

Mark Dean Schwab, Case No. SC07-1603 – Opinion

Mark Dean Schwab, Case No. SC07-1603 – Order Denying Appellant's Motion for Rehearing

Ian Deco Lightbourne, Case No. SC06-2391 – Opinion

Ian Deco Lightbourne, Case No. SC06-2391 – Order Denying Petitioner's Motion for Rehearing

Supreme Court of Florida

WEDNESDAY, NOVEMBER 7, 2007

CASE NO.: SC07-1603
Lower Tribunal No.: 05-1991-7249-AXXX

MARK DEAN SCHWAB vs. STATE OF FLORIDA
Appellant(s) Appellee(s)

Appellant's Motion to Stay Execution has been considered by the Court and is hereby denied.

LEWIS, C.J., and WELLS, PARIENTE, CANTERO, and BELL, JJ., concur.
PARIENTE, J., concurs with an opinion.
ANSTEAD, J., dissents with opinion, in which QUINCE, J., concurs.

PARIENTE, J., concurring.

I agree with this Court's denial of the motion to stay execution and hold proceedings in abeyance and write to explain my reasoning. Schwab will likely seek a stay in the United States Supreme Court as was done by the defendant in Berry v. Epps[1] and, in my view, that is exactly the procedure that should be

1. Berry v. Epps, No. 07-70042, 2007 WL 3121824 (5th Cir. Oct. 26, 2007), petition for cert. filed, (U.S. Oct. 29, 2007) (No. 07-7348). In Berry, the United States Supreme Court granted a stay pending disposition of Berry's petition for writ of certiorari, providing that if the petition for writ of certiorari is denied, the stay "shall terminate automatically." Id. (U.S. Oct. 30, 2007) (unpublished order). The order also provides that if Berry's petition is granted, "the stay shall terminate upon the sending down of the judgment of the Court." Id. In this case, if Schwab moves the United States Supreme Court for a stay in conjunction with the filing of a petition for writ of certiorari, that Court can decide whether to grant the stay and petition, and can then consider the facts of Schwab and Lightbourne in conjunction

followed in this case. Schwab should seek a stay from the United States Supreme Court and it should be that Court's decision to determine whether it intends a de facto moratorium on the death penalty and whether the issues it is presently reviewing regarding lethal injection justify a stay of Schwab's execution.

More importantly, as to whether this Court should grant a stay, if this were a case involving the guilt or innocence of Mark Dean Schwab, or a case involving the fairness of his penalty phase, or a case involving the broad question of the constitutionality of the death penalty as a sentence in Florida, I would without hesitation vote to grant a stay. If any of these circumstances were present here, it would truly be a travesty of justice to allow an execution to proceed.

The issue in this case, however, is not even an Eighth Amendment challenge to the constitutionality of lethal injection as a method of executing defendants in Florida. Rather, as explained in detail in Lightbourne v. McCollum, No. SC06-2391 (Fla. Nov. 1, 2007), the claim is "whether the method of execution through lethal injection, as currently implemented in Florida, is unconstitutional because it constitutes cruel and unusual punishment" under the Eighth Amendment. Id. slip op. at 14-15 (emphasis added). Specifically, unlike challenges to "prior methods

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with Baze v. Rees, 76 U.S.L.W. 3154 (U.S. Sept. 25, 2007) (No. 07-5439). This provides the State of Florida and this Court with the best chance of receiving specific guidance from the United States Supreme Court as to the constitutionality of future lethal injection procedures.

of execution, Lightbourne does not assert that lethal injection is inherently cruel and inhumane, only that if it is not properly carried out, there will be a risk of unnecessary pain." Id. at 48.

Justice Anstead's dissent relies heavily on the fact that the United States Supreme Court has accepted review in a case raising the very issue of lethal injection, Baze v. Rees, 76 U.S.L.W. 3154 (U.S. Sept. 25, 2007) (No. 07-5439), and since we are obligated to follow the Supreme Court's interpretation of the United States Constitution (as are all states), we should grant Schwab a stay and wait for the United States Supreme Court to rule in Baze. Our unanimous decision in Lightbourne acknowledged:

> [T]he [United States Supreme] Court recently granted certiorari jurisdiction in Baze v. Rees, 76 U.S.L.W. 3154 (U.S. Sept. 25, 2007) (No. 07-5439), to review a Kentucky Supreme Court decision which held that Kentucky's protocol for lethal injection did not violate the Eighth Amendment. In the Baze petition, the petitioners urge the United States Supreme Court to adopt a standard that would interpret the Eighth Amendment to prohibit a method of execution that creates "an unnecessary risk of pain and suffering." Petitioner's Petition for Writ of Certiorari at 6, Baze v. Rees, No. 07-5439, (U.S. Sept. 25, 2007).

Lightbourne, slip op. at 25-26. In fact, in reviewing Florida's current procedures, we used as an alternative standard the one urged by the Baze petitioners—that is, whether the procedures as currently implemented create "an unnecessary risk of pain and suffering." Specifically, we stated in our conclusion in Lightbourne:

> [E]ven 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 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, 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.

Id. at 55-56 (footnote omitted). The converse is also true; that is, if the inmate is not fully unconscious before pancuronium bromide is administered there is a high probability that an inmate will suffer unnecessary pain.

The fact remains that since lethal injection was adopted as the primary method of execution by the Florida Legislature in 2000, there have been many executions by lethal injection.[2] These executions have been carried out without problems in the administration of the chemicals, other than the admitted

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2. Those executions have been as follows: Terry Melvin Sims (02/23/2000); Anthony Braden Bryan (02/24/2000); Bennie Demps (06/07/2000); Thomas Harrison Provenzano (06/21/2000); Dan Patrick Hauser (08/25/2000); Edward Castro (12/07/2000); Robert Dewey Glock, II (01/11/2001); Rigoberto Sanchez-Velasco (10/02/2002); Aileen Carol Wuornos (10/09/2002); Linroy Bottoson (12/09/2002); Amos Lee King, Jr. (02/26/2003); Newton Carlton Slawson (05/16/2003); Paul Jennings Hill (09/03/2003); Johnny Leartice Robinson (02/04/2004); John Blackwelder (05/26/2004); Glen James Ocha (04/05/2005); Clarence Edward Hill (09/20/2006); Arthur D. Rutherford (10/18/2006); Danny Harold Rolling (10/25/2006).

complications that occurred in the well-publicized Diaz execution. As a result of the Diaz execution, and the subsequent inquiries by the Governor's Commission and the Department of Corrections into what caused the complications in the Diaz execution, changes in the procedures were made. As we observed in Lightbourne:

> Determining the specific methodology and the chemicals to be used are matters left to the DOC and the executive branch, and this Court cannot interfere with the DOC's decisions in these matters unless the petitioner shows that there are inherent deficiencies that rise to an Eighth Amendment violation. Lightbourne has failed to overcome the presumption of deference we give to the executive branch in fulfilling its obligations, and he has failed to show that there is any cruelty inherent in the method of execution provided for under the current procedures.

Id. at 55.

If I were in the executive branch and in charge of lethal injections for this state, I would urge the adoption of a one-drug protocol so that only a lethal dose of sodium pentothal would be necessary.[3] Alternatively, I would explore the use of other drugs that carry less risk of pain than pancuronium bromide or potassium chloride.[4] Further, I would consider other means to monitor the state of

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3. A one-drug protocol, utilizing only a lethal dose of sodium pentothal (sodium thiopental), was recommended by the Protocol Committee appointed by the Corrections Commissioner pursuant to Tennessee Governor Bredesen's Executive Order directing review and adoption of new execution protocols. The recommendation was not adopted. See Harbison v. Little, No. CIV.3:06-1206, 2007 WL 2821230 at *22 (M.D. Tenn. Sept. 19, 2007).

4. "After the Diaz execution, the report of the Governor's Commission suggested that the Governor have DOC 'on an ongoing basis explore other more

consciousness, such as the Bispectral Index (BIS) monitor, and would employ individuals who have the medical training and expertise necessary to adequately assess consciousness. However, to date, the United States Supreme Court has not signaled that it intends for the judiciary to engage in that level of scrutiny.

I anticipate that the United States Supreme Court in Baze will clarify both the precise legal standard that should be used in method of execution cases and, more importantly, to what extent the judiciary should scrutinize the specific choices made by the executive branch in deciding how to carry out lethal injections. I am hopeful that our decision in Lightbourne, which was reviewed based on a fully-developed record, will assist the United States Supreme Court in making its determination, including answering the second question posed in Baze regarding whether an unnecessary risk of pain and suffering is established "upon a showing that readily available alternatives that pose less risk of pain and suffering could be used." Baze, 76 U.S.L.W. 3154 (U.S. Sept. 25, 2007) (petition).

ANSTEAD, J., dissenting.

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recently developed chemicals for use in a lethal injection with specific consideration and evaluation of the need of a paralytic drug like pancuronium bromide in an effort to make the lethal injection execution procedure less problematic.'" Lightbourne, slip op. at 39 (quoting Governor's Commission, Final Report with Findings and Recommendations (March 1, 2007) at 13).

The circumstances of this case, and especially the United States Supreme Court's pending review of the constitutional issues involved, present this Court with a compelling case for ordering that the execution of the appellant be stayed pending the Supreme Court's resolution of the constitutionality of the use of lethal injection as it is administered in Florida and other states. While the pendency of a case directly on point in the Supreme Court alone constitutes a compelling reason for the entry of a stay, this factor is especially compelling in Florida because our state constitution mandates that this Court must apply the United States Supreme Court's decision on the issue before us. The majority is clearly ignoring that mandate in refusing to grant a stay here.

Present Circumstances

Presently, the defendant is scheduled to be put to death by lethal injection through the administration of what has been referred to as a three-drug cocktail. With the majority's denial of a stay, this execution will be the first in Florida since the execution of Angel Diaz in December 2006. That execution has been widely viewed as "botched" because of the difficulty and the extraordinary amount of time it took to administer the lethal three-drug cocktail, and the perception that Diaz was subjected to extensive and unnecessary pain before finally dying. The Diaz execution resulted in the Governor ordering an immediate halt to any further executions in Florida, and the appointment of a commission to investigate the Diaz

execution and the protocols utilized by the Department of Corrections for administering the three-drug cocktail, with a view towards ensuring that any problems, constitutional or otherwise, be identified and remedied. In turn, the findings and recommendations of the special commission and the heightened scrutiny on this method of execution has resulted in modifications to the protocol used by the Department of Corrections to administer lethal injection. It is the resulting modifications in the Department of Corrections' protocols that were ultimately approved by the trial court in rejecting the constitutional claims in Lightbourne v. McCollum, No. SC06-2391 (Fla. Nov. 1, 2007), and that this Court has in turn approved on appeal in both Lightbourne and this case.

The Stay

There are several important factors that operate together to produce a compelling case for staying the appellant's execution pending the United States Supreme Court's resolution of the constitutionality of lethal injection and the manner in which it is administered. The first is fundamental and obvious: the consequences of failing to enter a stay will be irremediable. That is, once the appellant is put to death any decision by the United States Supreme Court impacting the use of lethal injection cannot possibly be applied here no matter the merits of the constitutional claims; on the other hand, the grant of a stay will result in no detriment to the State because immediately following any United States

Supreme Court's decision denying relief to Baze the State will be free to execute the appellant in accord with that decision.

Two other factors, however, in favor of granting a stay are, perhaps, the most compelling: First, Florida's Constitution expressly mandates that this Court apply the United States Supreme Court's decisions on the cruel and unusual punishment clause of the United States Constitution to any decision we render on the meaning of Florida's cruel and unusual punishment constitutional provision. In other words, in this case there is an explicit command in Florida's Constitution that this Court must follow the United States Supreme Court's decisions on whether death by lethal injection as it is currently being administered constitutes cruel and unusual punishment, the very issue before us. However, as the majority opinion in Lightbourne makes abundantly clear, there is presently no United States Supreme Court decision on this issue. If that was the end of the story, this dissent would not be written. But, that is not the end of story, since we know as an absolute fact that the United States Supreme Court has this very issue pending before it and will be rendering a decision that, pursuant to the mandate in Florida's Constitution, will control the outcome of this case. See Baze v. Rees, 76 U.S.L.W. 3154 (U.S. Sept. 25, 2007) (No. 07-5439). In other words, there is no controlling Supreme Court decision on point at this precise instance, but such a decision is pending. Under these circumstances it is pure sophistry to suggest this Court can ignore the

mandate in Florida's Constitution that we apply Supreme Court law to the constitutional issue before us in this case. Why would we rely on speculating on Supreme Court law, as the majority opinion in Lightbourne does, when we know a Supreme Court decision on this very issue is forthcoming? While the majority may be confident in the correctness of its analysis and decision, this Court is constitutionally bound to look to the decision of the United States Supreme Court in the pending case. And, while the risk of some contrary decision by that Court may seem small, there is absolutely no risk of adverse consequences to the State in entering a stay. As the majority opinion in Lightbourne acknowledges, other courts around the country have applied a variety of standards and some have invalidated similar lethal injection procedures. Similarly, stays of execution have been entered in other jurisdictions.

Finally, as noted above, the last execution in Florida obviously did not proceed as contemplated, and, despite our approval of the revised protocols of the Department of Corrections, we cannot know what may happen with the next execution. This is especially true because one of the primary claims of those contesting lethal injection, the necessity of professional medical supervision, remains absent in Florida's protocol. Schwab's plea for a stay is particularly compelling, because unlike Lightbourne, he has not been afforded an evidentiary hearing on any of his claims, including his claim that the three-drug protocol

presents a substantially greater risk of inflicting pain than would the administration of a single lethal dosage of sodium pentothal. As noted in Justice Pariente's concurring opinion, this specific issue is before the United States Supreme Court in Baze. Of course, Schwab's right to a hearing on this issue will be mooted by his execution. Further, the defendant is not going anywhere, and, under Florida's law keeping death warrants alive indefinitely, the setting of a prompt date for execution following a United States Supreme Court decision favorable to the State will be a simple task.

For all these reasons I would grant a stay pending the United States Supreme Court's resolution of the constitutional issues involved herein.

QUINCE, J., concurs.

A True Copy
Test:

Thomas D. Hall
Clerk, Supreme Court

jn
Served:

WAYNE HOLMES
DAPHNEY ELAINE GAYLORD
MARK S. GRUBER
BARBARA C. DAVIS

KENNETH S. NUNNELLEY
HON. SCOTT ELLIS, CLERK
HON. CHARLES M. HOLCOMB, JUDGE

Supreme Court of Florida

No. SC07-1603

MARK DEAN SCHWAB,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

[November 1, 2007]

PER CURIAM.

Mark Dean Schwab, a prisoner under sentence of death and under an active death warrant, appeals the circuit court's order denying his successive motion for postconviction relief, which was filed pursuant to Florida Rule of Criminal Procedure 3.851. Because the order concerns postconviction relief from a sentence of death, this Court has jurisdiction of the appeal under article V, section 3(b)(1), Florida Constitution. For the reasons stated below, we affirm the postconviction court's order denying relief.

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, 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 (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. After the State filed its response, the postconviction court summarily denied all claims presented in the successive motion. This appeal follows.

ANALYSIS

In his first claim, Schwab raises numerous subissues relating to whether Florida's lethal injection protocol violates the Eighth Amendment.[1] 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 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

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1. 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.

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).

In a somewhat related subclaim, Schwab asserts that the circuit court erred in failing to take judicial notice of the circuit court record in State v. Lightbourne, No. 1981-170CF (Fla. 5th Cir. Ct.) (Lightbourne). Before addressing this claim on the merits, it is important to review the unique circumstances of the Lightbourne case and its impact here.

On December 13, 2006, Angel Diaz was executed by lethal injection, but the lethal chemicals were injected subcutaneously, resulting in an execution which took substantially longer than any previous lethal injection execution in Florida. The next day, Ian Lightbourne and other death row inmates filed an emergency all writs petition, challenging whether Florida's lethal injection protocol violates the Eighth Amendment and requesting a hearing on the matter. This Court relinquished jurisdiction to the circuit court to decide the issues that required factual development, thus implicitly recognizing that the petitioners raised a legally cognizable claim. See Lightbourne v. McCollum, No. SC06-2391 (Fla. order filed

Dec. 14, 2006) (relinquishing jurisdiction). While the Eighth Amendment claim was still being litigated in Lightbourne, Governor Crist signed Schwab's death warrant. Schwab then filed a motion for postconviction relief, raising the claim that the procedure for lethal injection is unconstitutional and relying on the newly discovered evidence pertaining to Diaz's execution and the findings of the Governor's Commission on Administration of Lethal Injection.

In the order denying postconviction relief, the court below recognized that judicial oversight of the protocol was appropriate but found that judicial economy would not be served by holding a hearing on the matter when this same issue was already extensively explored by Judge Angel in Lightbourne. Despite this ruling, the court then stated without elaboration: "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." Schwab challenges this decision, asserting that the postconviction judge should have granted the motion, particularly since both parties stipulated to the introduction of this material and reasonably relied upon the Lightbourne materials being in the record based on the court's initial representations indicating that it would take notice of that testimony.

Section 90.202, Florida Statutes (2006), provides in relevant part:

> A court may take judicial notice of the following matters, to the extent that they are not embraced within s. 90.201 [setting forth those items that "must" be judicially noticed]:
>
> . . . .
>
> (6) Records of any court of this state or of any court of record of the United States or of any state, territory, or jurisdiction of the United States.

See § 90.202(6), Fla. Stat. (2006). Taking judicial notice of such matters is purely a matter of judicial discretion. See id.; Elmore v. Fla. Power & Light Co., 895 So. 2d 475, 478 (Fla. 4th DCA 2005). Under the unique circumstances of this case and based on the court's other ruling summarily denying relief, we hold that the postconviction court erred in failing to take judicial notice of the record in Lightbourne. Since Schwab's allegations were sufficiently pled, the postconviction court should have either granted Schwab an evidentiary hearing, or if Schwab was relying upon the evidence already presented in Lightbourne, the court should have taken judicial notice of that evidence.[2] Cf. Sims v. State, 750 So. 2d 622, 623 n.3 (Fla. 1979) (taking judicial notice of records in Provenzano v. Moore, 744 So. 2d 413 (Fla. 1999); Provenzano v. State, 739 So. 2d 1150 (Fla. 1999); Jones v. State, 701 So. 2d 76 (Fla. 1997); and Jones v. Butterworth, 691 So. 2d 481 (Fla. 1997)). Nevertheless, the postconviction court's error is harmless

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2. In this case, judicial notice would have been sufficient because Schwab has not presented any argument as to specific evidence he wanted to present in this case that had not been presented in the Lightbourne proceeding.

because this Court considered all of the evidence presented in Lightbourne when reviewing the Eighth Amendment challenge presented here.

In the third subissue that we address, Schwab challenges the circuit court's ruling which denied his public records requests. Schwab filed an initial motion to compel the production of numerous records from Florida's Department of Corrections (DOC), including materials pertaining to the training of execution team members; the records pertaining to the identity and addresses of non-departmental persons who consulted with the DOC concerning execution training; documentation of the qualifications, licenses, training, and education of execution team members; copies of training manuals and other items pertaining to the training of execution team members; medication management and chemical procurement protocols; records of mock executions; scientific and research materials used by the DOC for preparing lethal chemicals; and any nondisclosure agreements between the DOC and suppliers of the chemicals. The DOC responded with numerous objections. After holding a hearing on the requests and objections, the circuit court issued a lengthy order, finding that Schwab did not demonstrate that the requested records related to a colorable claim for relief and concluded that Schwab was on a fishing expedition.[3] In order to dispute the finding as to a fishing

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3. Schwab filed the motion to compel prior to filing his motion for postconviction relief, and the court ruled on the motion before the rule 3.851 motion was filed. In its order, the court recognized that it was difficult to assess

expedition, Schwab filed a motion for reconsideration with an attachment from a "quality assurance auditor," explaining in detail that the quality assurance auditor needed the requested documents in order to provide an assessment as to the reliability and efficacy of the DOC's execution procedures. The circuit court denied the motion for reconsideration, explaining that since it found that an evidentiary hearing was not warranted, the court found no reason to reconsider its prior decision in denying the motion to compel.

As recognized above, Schwab was either entitled to an evidentiary hearing or to have the court below take judicial notice as to the evidence presented in Lightbourne. Schwab does not allege that there were public records that he needed which were not produced or admitted into evidence in Lightbourne. Moreover, while Schwab's motion for consideration did provide more detail as to how the requested information was relevant to his claims, his argument for production relied upon the affidavit of a "quality assurance auditor." Schwab fails to sufficiently explain how this auditor is qualified to provide a reliability and efficacy report on DOC's method of execution. Accordingly, we deny this claim.

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how certain requested materials would relate to any claim since no claims had yet been filed.

In the final lethal injection subissue that we specifically address,[4] 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.[5] 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,

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4. 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 (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 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.

5. 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).

Schwab argues that the trial court erred in summarily rejecting his claim because his factual allegations were not conclusively refuted by the record.

Before addressing Schwab's specific challenge, 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 (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. 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.

In his second claim for relief, Schwab argues that his sentence of death is constitutionally unreliable based upon newly discovered evidence of neurological impairment and a connection between brain pathology and sexual offense. Schwab submitted, as attachments to his rule 3.851 motion, a report by Dr. Hyman H.

Eisenstein, Ph.D., a neuropsychologist, which concluded that Schwab suffers from organic brain impairment in the frontal lobe of the right brain, and two recent scholarly articles regarding brain anatomy and sexual offense.

To obtain a new trial based on newly discovered evidence, a defendant must meet two requirements. First, the evidence must not have been known by the trial court, the party, or counsel at the time of trial, and it must appear that the defendant or defense counsel could not have known of it by the use of diligence. Second, the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial. See Jones v. State, 709 So. 2d 512, 521 (Fla. 1998). If the defendant is seeking to vacate a death sentence, the second prong requires that the newly discovered evidence would probably yield a less severe sentence. See Jones v. State, 591 So. 2d 911, 915 (Fla. 1991). Claims in successive motions may be denied without an evidentiary hearing "[i]f the motion, files, and records in the case conclusively show that the movant is entitled to no relief." White v. State, 32 Fla. L. Weekly S494, S495 (Fla. July 12, 2007) (citing Fla. R. Crim. P. 3.851(f)(5)(B)).

We affirm the circuit court's holding that Schwab's claim regarding neurological impairment is procedurally barred because it could have been raised in Schwab's initial postconviction proceeding. The record reveals that Schwab repeatedly alleged that he suffers from brain damage in his initial postconviction

motion. The trial court granted Schwab an evidentiary hearing on the claims that included brain damage allegations, and Schwab presented no evidence regarding his brain damage. Schwab had an opportunity to pursue this topic as potential mitigation and failed to do so. Thus, he is now procedurally barred from doing so.

As for Schwab's argument that he is entitled to a new trial due to two recent scientific articles regarding brain anatomy and sexual offense, this Court has not recognized "new opinions" or "new research studies" as newly discovered evidence. Cf. Diaz v. State, 945 So. 2d 1136, 1144 (Fla.) (holding doctor's letter discussing lethal injection research was not newly discovered evidence because author's conclusions were based on data from 1950), cert. denied, 127 S. Ct. 850 (2006); Rutherford v. State, 940 So. 2d 1112, 1117 (Fla. 2006) (holding American Bar Association report published in 2006 was not newly discovered evidence because it was "a compilation of previously available information related to Florida's death penalty system"), cert. denied, 127 S. Ct. 465 (2006).

Even if the articles were "newly discovered" evidence, we agree with the postconviction court that Schwab has not satisfied the second Jones prong. Jones, 591 So. 2d at 915. The alleged newly discovered evidence is not of such a nature that it would probably yield a less severe sentence on retrial. While the sentencing judge found that the trial evidence established the "substantially impaired ability to conform one's conduct" mitigating factor, he also found that the trial evidence

indicated that Schwab may have been "unwilling" rather than "unable" to control his desires. Accordingly, new evidence truly demonstrating that Schwab could not control his conduct could impact sentencing. However, we agree with the postconviction court that these scientific articles are not such evidence. As the postconviction court found, "neither article affirmatively asserts that [brain damage] causes such crimes as committed by Mr. Schwab." Neither article posits a solely neuroanatomical etiology for sexual offense, nor do the articles negate the sentencing judge's conclusion that carefully planned crimes such as those committed by Schwab are largely inconsistent with Schwab's claim that he could not control his behavior.

Based on the foregoing, Schwab is not entitled to a new trial on the basis of this allegedly newly discovered evidence.

CONCLUSION

For the reasons stated above, we affirm the circuit court's order denying Schwab's successive motion for postconviction relief.

It is so ordered.

LEWIS, C.J., and WELLS, PARIENTE, QUINCE, CANTERO, and BELL, JJ., concur.
ANSTEAD, J., concurs in result only.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND IF FILED, DETERMINED.

An Appeal from the Circuit Court in and for Brevard County,
Charles M. Holcomb, Judge - Case No. 05-1991-7249-AXXX

Bill Jennings, Capital Collateral Regional Counsel, Mark S. Gruber, Peter J. Cannon, and Daphney Gaylord, Assistant CCRC, Middle Region, Tampa, Florida

for Appellant

Bill McCollum, Attorney General, Tallahassee, Florida, Kenneth S. Nunnelley, Senior Assistant Attorney General, Daytona Beach, Florida,

for Appellee

Supreme Court of Florida

WEDNESDAY, NOVEMBER 7, 2007

CASE NO.: SC07-1603
Lower Tribunal No.: 05-1991-7249-AXXX

MARK DEAN SCHWAB vs. STATE OF FLORIDA
Appellant(s) Appellee(s)

Appellant's Motion for Rehearing is hereby denied.

LEWIS, C.J., and WELLS, PARIENTE, QUINCE, CANTERO, and BELL, JJ., concur.
ANSTEAD, J., dissents: I would grant rehearing, especially on the issue of whether Schwab was denied the right to an individualized evidentiary hearing in which he would be given an opportunity to present his own evidence and contentions in addition to those presented in the Lightbourne case. Unlike Lightbourne, who was granted this opportunity, Schwab has been denied this fundamental right to articulate and prosecute his own claim.

A True Copy
Test:

Thomas D. Hall
Clerk, Supreme Court

jn
Served:

WAYNE HOLMES
MARK S. GRUBER
BARBARA C. DAVIS
HON. CHARLES M. HOLCOMB, JUDGE
DAPHNEY ELAINE GAYLORD
PETER JAMES CANNON
KENNETH S. NUNNELLEY

Supreme Court of Florida

No. SC06-2391

IAN DECO LIGHTBOURNE,
Petitioner,

vs.

BILL MCCOLLUM, etc., et al.,
Respondents.

[November 1, 2007]

PER CURIAM.

This case is before the Court on the all writs petition of Ian Deco Lightbourne, challenging Florida's lethal injection procedures after complications occurred in the administration of chemicals during the execution of Angel Diaz on December 13, 2006.[1] The main issue in this case is whether Florida's current

1. The Court has authority to issue all writs necessary to the complete exercise of its jurisdiction, see art. V, § 3(b)(7), Fla. Const., based on the Court's ultimate jurisdiction under article V, section 3(b)(1) of the Florida Constitution. This Court accepted review of the all writs petition because an appeal relating to Lightbourne's successive claims for postconviction relief, including a claim challenging the constitutionality of the lethal injection procedures, was pending before this Court at the time in Lightbourne v. State, 956 So. 2d 456 (Fla. 2007) (No. SC06-1241).

lethal injection procedures violate the Eighth Amendment to the United States Constitution.[2]

FACTUAL AND PROCEDURAL BACKGROUND

On December 13, 2006, Angel Diaz was executed by lethal injection, but his execution "took 34 minutes, which was substantially longer than in any previous lethal injection in Florida."[3] The day after Diaz's execution, Lightbourne and other death row inmates filed the instant emergency all writs petition, requesting that this Court: (1) address whether Florida's lethal injection procedures violate the

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2. Lightbourne is a prisoner under sentence of death but with no outstanding death warrant. His conviction and death sentence were originally affirmed in Lightbourne v. State, 438 So. 2d 380 (Fla. 1983), cert. denied, 465 U.S. 1051 (1984). After a death warrant was signed, Lightbourne filed a motion for postconviction relief, which was denied by the circuit court. This Court affirmed the denial of postconviction relief in Lightbourne v. State, 471 So. 2d 27 (Fla. 1985). Lightbourne filed a petition for writ of habeas corpus in the federal district court, which initially stayed the execution until it ruled on the merits of the claim and ultimately denied relief. The district court denied relief, and the Eleventh Circuit affirmed the denial. Lightbourne v. Dugger, 829 F.2d 1012 (11th Cir. 1987), cert. denied, 488 U.S. 934 (1988). Before his scheduled execution, Lightbourne filed another postconviction motion in state court which was summarily denied. We entered a stay of execution and granted relief in part, remanding one claim for an evidentiary hearing. Lightbourne v. Dugger, 549 So. 2d 1364 (Fla. 1989). Denial of relief was affirmed in Lightbourne v. State, 644 So. 2d 54 (Fla. 1994). Lightbourne filed another postconviction motion, which the trial court denied after an evidentiary hearing on part of the claims. This Court again remanded for another evidentiary hearing. Lightbourne v. State, 742 So. 2d 238, 250 (Fla. 1999). After the evidentiary hearing, the circuit court denied relief, and this Court affirmed in Lightbourne v. State, 841 So. 2d 431 (Fla. 2003).

3. The Governor's Commission on Administration of Lethal Injection, Final Report with Findings and Recommendations (March 1, 2007) ("Governor's Commission Report") at 8.

Eighth Amendment; (2) enjoin Diaz's autopsy and order that the autopsy be conducted by an independent medical examiner or with petitioners' independent expert present; (3) order the production of all records previously requested by Lightbourne; and (4) appoint a special master to hear and receive evidence regarding the pain suffered during lethal injection.

On December 14, 2006, this Court entered an order allowing Lightbourne to designate a representative to attend the Diaz autopsy and relinquishing jurisdiction to the circuit court for an immediate determination of Lightbourne's request for an independent autopsy and "all other issues raised" by Lightbourne. By our order of December 14, 2006, we essentially ruled on two of Lightbourne's requests in his petition, first by addressing the issue of the autopsy and then by relinquishing to the trial court to decide the issues that required factual development. On February 9, 2007, the Court dismissed without prejudice all petitioners' claims in Case No. SC06-2391 other than Lightbourne's.

At the time that the emergency all writs petition was filed in this case, Lightbourne had another appeal pending before this Court which challenged the constitutionality of the lethal injection statute and procedures and raised a public records issue. See Lightbourne v. State, 956 So. 2d 456 (Fla. 2007) (SC06-1241) (unpublished decision affirming the denial of his successive motion for postconviction relief). In affirming the denial, this Court stated by order:

> [A]s a result of Angel Diaz's execution by lethal injection, a series of events occurred that the trial court could not have considered in denying Lightbourne's motion. The impact of those events on the issue of the constitutionality of Florida's lethal injection procedures is currently being litigated in Lightbourne v. McCollum, SC06-2391. Accordingly, we conclude that the better course is to allow that case to proceed, in which Lightbourne has reasserted his public records request and in which an evidentiary hearing will be held in May 2007.

Lightbourne v. State, No. SC06-1241 (Fla. Apr. 16, 2007) (unpublished order).

At the same time that Lightbourne has been pursuing relief in this Court, the executive branch has also responded to the Diaz execution, working expeditiously on a parallel track with the goal of addressing issues regarding Florida's lethal injection procedures. We briefly detail the executive branch's efforts because its response to the Diaz execution and the revisions to the protocol affect our ultimate determination of the constitutionality of the current lethal injection procedures.

Shortly after the Diaz execution, on December 15, 2006, then-Governor Bush stayed all executions and issued an executive order creating a Governor's Commission on Administration of Lethal Injection to "review the method in which the lethal injection procedures are administered by the Department of Corrections and to make findings and recommendations as to how administration of the procedures and protocols can be revised." The Commission held hearings over four days and submitted a final report to the Governor on March 1, 2007. After noting that Diaz's execution "called into question the adequacy of the lethal

injection protocols," the Commission found that during the execution of Angel Diaz, the Department of Corrections ("DOC") and the execution team failed to follow its protocols, failed to ensure successful intravenous ("IV") access, failed to provide adequate training, and failed to have guidelines in place for handling complications. Governor's Commission Report at 2, 8-9. Based on conflicting expert medical opinions and witnesses' observations of the inmate, the Commission was unable to reach a conclusion as to whether inmate Angel Diaz was in pain during the execution. Even though the Commission found these numerous failures during the Diaz execution, it opined that an agency following procedures framed in its recommendations could carry out an execution in a constitutional manner using the current three-chemical combination. The Commission provided detailed recommendations regarding how the DOC should modify its protocols and practices.

DOC Secretary James McDonough also responded to the Diaz execution by creating an initial task force to collect information as to what occurred during the Diaz execution. Subsequent to the Governor's Commission's report, Secretary McDonough established another task force to recommend modifications to the existing lethal injection protocols in accord with the findings and recommendations previously made, including planned renovations to the execution facility. As a result of the findings of the DOC task force and the findings and recommendations

of the Governor's Commission, the DOC revised its lethal injection procedures, effective May 9, 2007.

Although this Court relinquished jurisdiction in the Lightbourne proceedings in December 2006, the trial court appropriately waited until after the Governor's Commission studied the matter and issued its report before it held evidentiary hearings on the claims raised. The evidentiary hearings lasted thirteen days, and approximately forty witnesses testified, resulting in a record exceeding 6,500 pages. The testimony and evidence focused on three main topics: (1) whether Diaz suffered pain during his execution; (2) what deficiencies existed in the lethal injection procedures and how those alleged deficiencies contributed to the complications; and (3) whether the risk of pain in future executions had been sufficiently minimized by changes made to the protocol as a result of the Diaz execution.

On July 22, 2007, the trial court verbally issued a temporary stay of any death warrant for Lightbourne and ordered the State to revise its lethal injection procedures in accord with the DOC's testimony about anticipated revisions to the protocol and the trial court's comments. The trial court expressed its concerns regarding the qualifications, training, licensure, and credentials for members of the execution team. The trial court commented on the need for training for contingencies, as well as the need for creating checklists, providing for periodic

review of DOC procedures, providing for certification of readiness by the DOC to carry out an execution according to the protocol, and providing clear directions that any observed problems or deviations from the protocols should be immediately brought to the attention of the warden.

The DOC again revised its lethal injection procedures in response to the trial court's comments and in line with its anticipated revisions, submitting its revised procedures (the "August 2007 procedures") which provided more detail as to the qualifications of the execution team members, more clarification that the warden is to ensure that the team members are properly trained, and procedures that require the team members to report any problems or concerns to the warden. After this revision, the parties were allowed to present additional evidence to the trial court.

On September 10, 2007, the trial court entered a final order, which denied the relief sought by Lightbourne, lifted the temporary stay of execution, and found that the August 2007 lethal injection procedures were not unconstitutional. The trial court found that the DOC addressed the irregularities that occurred in the Diaz execution and had taken appropriate action in the revised protocol to reduce the risk of similar irregularities happening in the future. The trial court found that when properly injected, the three-drug protocol used by the State will produce a sequence of unconsciousness, cessation of all muscular function, and cessation of heart function, resulting in death. The trial court also found that Diaz's execution

took longer than expected because the drugs were injected subcutaneously, rather than delivered intravenously as intended, because the needles penetrated through the veins in both arms. The trial court concluded that the lethal injection procedures now in place in Florida do not violate the constitutional prohibition against cruel and unusual punishment.

Lightbourne appeals to this Court raising three issues: (1) whether he was denied a full and fair hearing in violation of his constitutional right to due process; (2) whether the lower court erred in refusing to consider certain memoranda on the grounds that they fall under the definition of attorney work-product and are thus protected by the lawyer-client privilege; and (3) whether Florida's lethal injection procedures violate the Eighth Amendment. We treat these claims in the order in which they were presented.

DENIAL OF A FULL AND FAIR HEARING

In his first issue on appeal, Lightbourne alleges that he was denied a full and fair hearing for several reasons, including the time limits imposed by this Court and the trial court as well as his inability to present certain evidence after the DOC revised the protocol in August 2007. He also complains about his counsel not being able to observe a "walk through" lethal injection training session conducted in the actual death chamber. We conclude that none of these issues individually or collectively denied Lightbourne a full and fair hearing or prevented this Court from

obtaining a complete picture of the issues raised by Lightbourne regarding his lethal injection claim and any alleged deficiencies.

The bottom line, despite numerous complaints raised by Lightbourne, is that Lightbourne was given ample opportunity over four months, with thirteen days of hearings and voluminous documentary evidence, to present his own witnesses and to cross-examine the witnesses presented by the State concerning both the Diaz execution and the revised lethal injection procedures. While this Court's interest is in the quality rather than the quantity of the testimony presented, the evidentiary hearing was quite extensive. Even after the lethal injection procedures were revised, Lightbourne was given the further opportunity to visit the death chamber and to present additional testimony, including the affidavit of his expert who had already testified and which affidavit was accepted as if he had testified in person.

We further conclude that the trial court spent considerable time addressing the issue of public records and that no abuse of discretion occurred in any of its rulings. See Rodriguez v. State, 919 So. 2d 1252, 1272-74 (Fla. 2005); Provenzano v. Moore, 744 So. 2d 413, 415 (Fla. 1999). In conclusion, we reject Lightbourne's claim, based on the specific assertions in his brief, that he was denied a full and fair hearing in the proceedings below as a result of the manner in which the trial court conducted the evidentiary hearing and its rulings on

evidentiary matters. Cf. Sims v. State, 754 So. 2d 657, 665-66 (Fla. 2000) (rejecting similar claim).

THE "DYEHOUSE" MEMORANDA

Lightbourne next claims error in the trial court's exclusion of two memoranda, dated June 16, 2006, and August 15, 2006, and prepared by Sara Dyehouse, an assistant general counsel for the Department of Corrections. The trial court concluded these memoranda both constituted work product and were protected by attorney-client privilege. In this case, the memoranda were actually provided to Lightbourne in August 2007 as part of a public records request. After producing the memoranda, the State belatedly filed a motion for protective order, arguing that the memoranda were protected by work-product and attorney-client privilege. The memoranda were transmitted to this Court under seal, although they also appear in a separate portion of the record on appeal that is not under seal.

Chapter 119, Florida Statutes, makes broad provision for agency records to be made available to the public. The exemption that is provided by statute is set forth in section 119.071(d)1, Florida Statutes (2006), which provides:

> A public record that was prepared by an agency (including an attorney employed or retained by the agency or employed or retained by another public officer or agency to protect or represent the interests of the agency having custody of the record) or prepared at the attorney's express direction, that reflects a mental impression, conclusion, litigation strategy, or legal theory of the attorney or the agency, and that was prepared exclusively for civil or criminal litigation or for adversarial administrative proceedings, or that was

> prepared in anticipation of imminent civil or criminal litigation or imminent adversarial administrative proceedings, is exempt from s. 119.07(1) and s. 24(a), Art. I of the State constitution until the conclusion of the litigation or adversarial administrative proceedings. For purposes of capital collateral litigation as set forth in s. 27.7001, the Attorney General's office is entitled to claim this exemption for those public records prepared for direct appeal as well as for all capital collateral litigation after direct appeal until execution of sentence or imposition of a life sentence.

Therefore, the exemption only extends to those records that contain the attorney's mental impressions, litigation strategy, or legal theory and are prepared exclusively for litigation or in anticipation of imminent litigation. Importantly, any exemption under this section exists only until the conclusion of the litigation or, in the case of public records prepared for an appeal or postconviction proceedings, only until the execution of the sentence.

The public records act "is to be construed liberally in favor of openness, and all exemptions from disclosure are to be construed narrowly and limited in their designated purpose." City of Riviera Beach v. Barfield, 642 So. 2d 1135, 1136 (Fla. 4th DCA 1994). Under section 119.071, the State has the burden of showing that the Dyehouse memoranda fall within the statutory requirements. The State asserts the memoranda were prepared for or in anticipation of litigation because lethal injection litigation is and has been ongoing in Florida since January of 2006. The State also contends that the memoranda were prepared for litigation because they were prepared for use in litigation concerning imminent executions, citing the

cases of Clarence Hill and Arthur Rutherford. When the State asserted privilege based on these cases, however, the litigation in these cases was concluded, and these defendants had been executed.[4] The State appears to be contending that it is entitled to a continuing exemption as to these memoranda because lethal injection litigation is ongoing. We reject this contention.

Further, neither memorandum on its face relates to any pending litigation or appears to have been prepared "exclusively for litigation." The first memorandum, dated June 16, 2006, relates generally to the lethal injection procedures and describes the process by which the chemicals were administered at that time. The second memorandum, dated August 15, 2006, relates to the possible use of a "bispectral index monitor" (BIS monitor) to assess the inmate's level of consciousness during an execution.

Although the two memoranda were prepared by a DOC attorney, each memorandum appears to be final in form and conveyed specific factual information rather than mental impressions or litigation strategies.[5] Accordingly,

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4. Clarence Hill and Arthur Rutherford were executed by lethal injection prior to the Diaz execution. See Diaz v. State, 945 So. 2d 1136, 1148 (Fla.), cert. denied, 127 S. Ct. 850 (2006).

5. Cf. Ragsdale v. State, 720 So. 2d 203, 205 (Fla. 1998) (holding that an attorney's notes and preliminary documents are not public records); Johnson v. Butterworth, 713 So. 2d 985, 986 (Fla. 1998) (holding that rough drafts and notes intended as "mere precursors" of agency records or made only to aid the attorney in remembering are not public records subject to disclosure under chapter 119).

we conclude that the trial court erred in excluding these memoranda on the basis of either work-product or attorney-client privilege.

Even if the memoranda were otherwise exempt under chapter 119, Lightbourne contends that any privilege that might have existed was waived by actions of the Department of Corrections and the State. The State produced the memoranda to Lightbourne's counsel as part of a public records response. The State also filed copies of the memoranda in the court file along with other public records submitted on August 7. The State confirmed on the record with the trial court that the memoranda had been filed in at least one other postconviction proceeding.

The State contends, however, that the privilege should apply because the disclosure was inadvertent. Although some courts have held that any disclosure waives the privilege, others have applied a "relevant circumstances" test which looks at various factors to determine if inadvertent disclosure should constitute a waiver. See Abamar Hous. & Dev., Inc. v. Lisa Daly Lady Decor, Inc., 698 So. 2d 276, 278 (Fla. 3d DCA 1997).[6] Nothing in the record supports the State's

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6. A five-part test has been applied to determine if the release is inadvertent. The court must consider: (1) the reasonableness of the precautions taken to prevent inadvertent disclosure in view of the extent of document production; (2) the number of inadvertent disclosures; (3) the extent of disclosure; (4) any delay and measures taken to rectify the disclosures; and (5) whether the overriding interests

contention that reasonable precautions were taken to prevent the release of the memoranda or that the interests of justice would be served by suppressing these documents. Accordingly, we conclude that, even assuming a privilege attached to these memoranda, the privilege was waived by the State's own actions.

In short, we conclude that neither memorandum is privileged, and in any event, any asserted privilege was waived as a result of the manner of production in this case. Although we conclude that the trial court erred in excluding the memoranda, we also conclude that its exclusion is not a basis to return this case to the trial court. Because this petition was filed as an original writ petition, we relinquished the proceeding to the trial court only for the purpose of conducting an evidentiary hearing to ascertain the facts. Accordingly, we will consider the Dyehouse memoranda in consideration of the Eighth Amendment claim, specifically Lightbourne's claim of the inadequacy of the procedures in assessing consciousness.

EIGHTH AMENDMENT CHALLENGE

At the outset, we emphasize what this claim is about and what this claim is not about. The claim is not about whether the death penalty is per se unconstitutional or whether lethal injection is per se unconstitutional under the Eighth Amendment. The claim is specifically about whether the method of

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of justice would be served by relieving a party of its error. Abamar Hous. & Dev., Inc., 698 So. 2d at 279.

execution through lethal injection, as currently implemented in Florida, is unconstitutional because it constitutes cruel and unusual punishment. Because the Court has already upheld the method of lethal injection against attacks beginning with Sims v. State, 754 So. 2d 657 (Fla. 2000), the more specific inquiry is whether the concerns raised as a result of the execution of Angel Diaz and the response of the executive branch to those concerns compel us to recede from the essential holding of Sims which upholds as constitutional lethal injection as administered in Florida. The exact constitutional measuring stick, based on our own precedent and United States Supreme Court precedent, will be further discussed with due regard to the specifics of the evidence adduced in this case and the claims raised.

CRUEL AND UNUSUAL PUNISHMENT: ANALYSIS OF UNITED STATES SUPREME COURT PRECEDENT

We begin with acknowledging as critical that in 2002, the Florida Constitution was amended to provide that Florida's interpretation of the cruel and unusual punishment clause is be construed in conformity with the United States Supreme Court's decisions. The amendment specifically provides:

> The death penalty is an authorized punishment for capital crimes designated by the legislature. The prohibition against cruel or unusual punishment, and the prohibition against cruel and unusual punishment, shall be construed in conformity with decisions of the United States Supreme Court which interpret the prohibition against cruel and unusual punishment provided in the Eighth Amendment to the United States Constitution. Any method of execution shall be

> allowed, unless prohibited by the United States Constitution. Methods of execution may be designated by the legislature, and a change in any method of execution may be applied retroactively.

Art. 1, § 17, Fla. Const. (emphasis added). Accordingly, we must evaluate whether lethal injection is unconstitutional "in conformity with decisions of the United States Supreme Court." Id.

The Eighth Amendment forbids the infliction of "cruel and unusual punishments."[7] This amendment has been applied to claims regarding the method and type of punishment (such as to electrocution), to claims involving a particular class of individuals (such as to minors or those who are mentally retarded), to claims of excessive punishment (such as to the death penalty per se), and to claims involving prison conditions. A claim, as here, that the lethal injection procedures are unconstitutional is a method of execution challenge, and we will primarily limit our discussion to those cases.

The Eighth Amendment has historically been the vehicle used to measure whether a particular method of execution was permissible. See Wilkerson v. Utah, 99 U.S. 130, 136 (1878) (holding that the sentence of being shot until the inmate was dead did not violate the Eighth Amendment). The Eighth Amendment also addresses whether a particular type of punishment is excessive for the crime. In

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7. The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

Gregg v. Georgia, 428 U.S. 153 (1976) (plurality opinion), the United States Supreme Court was faced with the question of whether the imposition of the death sentence itself constitutes cruel and unusual punishment.

The plurality in Gregg recognized that the earliest Eighth Amendment cases dealt primarily with determining whether particular methods of execution were too cruel to pass constitutional muster, although the death sentence itself was not at issue. 428 U.S. at 170. Relying on the prior decision in Weems v. United States, 217 U.S. 349, 373 (1910), Justice Stewart explained the principles behind the Eighth Amendment as follows:

> [T]he Court has not confined the prohibition embodied in the Eighth Amendment to "barbarous" methods that were generally outlawed in the 18th century. Instead, the Amendment has been interpreted in a flexible and dynamic manner. The Court early recognized that "a principle to be vital, must be capable of wider application than the mischief which gave it birth." Weems v. United States, 217 U.S. 349, 373 (1910). Thus the Clause forbidding "cruel and unusual" punishments "is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice." Id., at 378.

Gregg, 428 U.S. at 171 (emphasis added). Accordingly, the plurality stated that "[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." Id. at 173 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion)).[8] In making this assessment, courts

8. Although both Gregg and Trop were plurality opinions, the Supreme Court has reaffirmed the importance of this principle numerous times. See, e.g.,

are to look to objective indicia that reflect the public attitude and ensure the penalty accords with the dignity of man, including whether it is inhumane or is excessive. A punishment is excessive if: (1) the punishment involves the "unnecessary and wanton infliction of pain"; or (2) the punishment is grossly out of proportion to the severity of the crime. Id. As the plurality stressed, the role of the judicial branch is limited; courts cannot require the legislature to select the least severe penalty so long as the penalty is not inhumane or disproportionate to the crime. Gregg, 428 U.S. at 175. Instead, courts must presume validity when assessing a punishment that was selected by a democratically elected legislature. Id.

After discussing this background, the plurality then turned its attention to whether the death penalty itself was constitutional. In making this determination, Justices Stewart, Powell, and Stevens reviewed the common law, the history of capital punishment, whether society currently endorsed capital punishment as a necessary criminal sanction, and whether the punishment comports with the basic concept of human dignity, and concluded that there was no constitutional ban on this form of punishment.

Atkins v. Virginia, 536 U.S. 304, 311-12 (2002); Hudson v. McMillian, 503 U.S. 1, 8 (1992); Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 264 n.4 (1989).

In short, while Gregg v. Georgia addressed whether the penalty of death violated the Eighth Amendment and first introduced the "unnecessary and wanton infliction of pain" standard, that case was not a "method of punishment" case but instead addressed a challenge to the excessiveness of the punishment. See also Weems, 217 U.S. at 382 (holding that a sentence of fifteen years of imprisonment for the crime of the falsification of a public and official document was cruel and unusual punishment); Robinson v. California, 370 U.S. 660, 667 (1962) (holding that the Eighth Amendment imposes substantive limits on what can be made criminal and punished, and to that end, a state cannot criminalize an illness like a narcotic addiction without violating the Eighth Amendment); Coker v. Georgia, 433 U.S. 584, 592 (1977) (holding that the sentence of death for the crime of rape of an adult woman was a "grossly disproportionate and excessive punishment" and thus forbidden by the Eighth Amendment).

Few United States Supreme Court cases address whether a method of execution violates the Eighth Amendment. In Wilkerson v. Utah, 99 U.S. 130 (1878), the Court considered its first case regarding a challenge to a method of execution. In that case, the petitioner was sentenced to be "publicly shot until you are dead." Id. at 131. In analyzing this claim, the Court first reviewed typical laws providing for execution, most of which involved execution by hanging or shooting, and then contrasted those methods of execution to some forms of execution from

pre-revolutionary times in England, including being emboweled alive, beheaded, and quartered; public dissection; and burning alive. The Court did not set forth a specific standard to apply to these claims, but found that the sentence at hand did not fall within the same category as those involving torture: "Cruel and unusual punishments are forbidden by the Constitution, but the authorities referred to are quite sufficient to show that the punishment of shooting as a mode of executing the death penalty for the crime of murder in the first degree is not included in that category, within the meaning of the eighth amendment." Id. at 134-35. The Court did not provide significant guidance as to what constitutes cruel and unusual punishment, stating: "Difficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted; but it is safe to affirm that punishments of torture, such as those mentioned by the commentator referred to, and all others in the same line of unnecessary cruelty, are forbidden by that amendment to the Constitution." Id. at 135-36.

Twelve years later, the Court issued another method of execution case. See In re Kemmler, 136 U.S. 436 (1890). In that case, the petitioner asserted that his sentence of death by electrocution was cruel and unusual punishment within the meaning of the Eighth Amendment. At the time, electrocution was a new method of execution and was statutorily authorized in New York after a state legislative

commission found that it was the most humane method of execution and much less barbaric than hanging. After noting its prior holding in Wilkerson, the United States Supreme Court provided more analysis as to the meaning of cruel and unusual punishment: "Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarous, something more than the mere extinguishment of life." Id. at 447. The Court concluded that electrocution, as a more humane form of execution, did not constitute cruel and unusual punishment.

Electrocution gradually became the accepted method of execution over the next century for those states that had a death penalty. Since 1890, the Court has not specifically decided a method of execution case. One opinion comes close, although the circumstances of that case are slightly different. In Louisiana ex rel. Francis v. Resweber, 329 U.S. 459 (1947), the state attempted to use the electric chair to execute Willie Francis, a convicted murderer, but due to a mechanical failure that occurred, Francis did not die. Francis asserted that a second attempt to electrocute him would violate the double jeopardy clause and would constitute cruel and unusual punishment in violation of the Eighth Amendment. The Court denied Francis's claim that a second attempt at electrocution would subject him to a lingering death or cruel and unusual punishment, holding as follows:

> Even the fact that petitioner has already been subjected to a current of electricity does not make his subsequent execution any more cruel in the constitutional sense than any other execution. The cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely. The fact that an unforeseeable accident prevented the prompt consummation of the sentence cannot, it seems to us, add an element of cruelty to a subsequent execution. There is no purpose to inflict unnecessary pain nor any unnecessary pain involved in the proposed execution. The situation of the unfortunate victim of this accident is just as though he had suffered the identical amount of mental anguish and physical pain in any other occurrence, such as, for example, a fire in the cell block.

Id. at 464 (emphasis added).

The final case that bears on the United States Supreme Court precedent is Hill v. McDonough, 126 S. Ct. 2096 (2006), wherein a Florida death row inmate sought to challenge whether Florida's three-drug protocol violates the cruel and unusual punishment clause. The issue before the United States Supreme Court was narrow: whether Hill's claim must be brought by a writ of habeas corpus, as statutorily authorized by 28 U.S.C. § 2254, or whether it may proceed as an action for relief under 42 U.S.C. § 1983, which is generally used to challenge an inmate's condition of confinement. The Court distinguished between these two vehicles, holding that habeas corpus is to challenge the lawfulness of the confinement or the particulars affecting its duration, while a challenge to the circumstances of the confinement may be brought under § 1983. The Court held that because the challenged protocol, including the three-drug mix, was not mandated by law, the injunctive relief sought would not prevent the State from implementing the

sentence; hence, the claim was not a challenge to the sentence itself and not cognizable under a habeas action. Id. at 2101. In reaching this decision, the Court noted that Hill's complaint was that the protocol allegedly causes a "foreseeable risk of . . . gratuitous and unnecessary" pain and that other methods of lethal injection would be constitutional. Id. at 2102. While the Supreme Court did not explicitly adopt this standard, other courts have begun to use the "foreseeable risk" standard.[9]

State and federal courts have used an array of standards in gauging what constitutes a sufficient risk such that the protocol for lethal injection violates the Eighth Amendment's prohibition against cruel and unusual punishment. A number of courts use a "substantial risk" standard.[10] See, e.g., Baze v. Rees, 217 S.W.3d 207, 209 (Ky. 2006) (holding that in order for a method of execution to be considered cruel and unusual punishment, the procedure for execution must create

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9. See, e.g., Taylor v. Crawford, 487 F.3d 1072, 1079 (8th Cir. 2007) ("While we do not imply that the Court [in Hill] thereby adopted a new constitutional standard, we do observe that the Court expressed no dissatisfaction with that statement of the issue [whether the protocol allegedly causes foreseeable risk of gratuitous and unnecessary pain], and further, we find it to be consistent with settled Eighth Amendment jurisprudence."), petition for cert. filed, 76 U.S.L.W. 3094 (U.S. Sept. 5, 2007) (No. 07-303); Harbison v. Little, No. 3:06-1206, 2007 WL 2821230 (M.D. Tenn. Sept. 19, 2007).

10. United States Supreme Court cases addressing condition of confinement claims have used a "substantial risk" standard. See Farmer v. Brennan, 511 U.S. 825, 834 (1994) (recognizing that "conditions posing a substantial risk of serious harm" may rise to the level of an Eighth Amendment violation) (emphasis added).

"a substantial risk of wanton and unnecessary infliction of pain, torture or lingering death"), cert. granted, 76 U.S.L.W. 3154 (U.S. Sept. 25, 2007) (No. 07-5439); Taylor v. Crawford, 487 F.3d 1072, 1080 (8th Cir. 2007) ("If Missouri's protocol as written involves no inherent substantial risk of the wanton infliction of pain, any risk that the procedure will not work as designated in the protocol is merely a risk of accident, which is insignificant in our constitutional analysis."); LaGrand v. Stewart, 173 F.3d 1144, 1149 (9th Cir. 1999) (holding that the district court's findings of "extreme pain, the length of time this extreme pain lasts, and the substantial risk that inmates will suffer this extreme pain for several minutes require the conclusion that execution by lethal gas is cruel and unusual"). The United States District Court in Morales declared that the operative issue is whether the lethal injection protocol, as actually administered in practice, creates an undue and unnecessary risk that an inmate will suffer pain so extreme that it offends the Eighth Amendment. See Morales v. Hickman, 415 F. Supp. 2d 1037 (N.D. Cal.), aff'd, 438 F.3d 926 (9th Cir.), cert. denied, 546 U.S. 1163 (2006). However, a number of other courts have used different standards, including "an undue and unnecessary risk,"[11] a "foreseeable risk,"[12] and a "constitutionally significant

11. Morales v. Tilton, 465 F. Supp. 2d 972, 974 (N.D. Cal. 2006) (phrasing the issue as: "does California's lethal-injection protocol—as actually administered in practice—create an undue and unnecessary risk that an inmate will suffer pain so extreme that it offends the Eighth Amendment?"); Evans v. Saar, 412 F. Supp. 2d 519, 524 (D. Md. 2006) (holding that an inmate must show "that he is subject to

risk."[13] Some courts have even used the "deliberate indifference" standard, although our review of the United States Supreme Court case law demonstrates that phrase has been used in connection with prison condition cases, not method of execution cases.[14]

We recognize that the Court recently granted certiorari jurisdiction in Baze v. Rees, 76 U.S.L.W. 3154 (U.S. Sept. 25, 2007) (No. 07-5439), to review a Kentucky Supreme Court decision which held that Kentucky's protocol for lethal injection did not violate the Eighth Amendment. In the Baze petition, the petitioners urge the United States Supreme Court to adopt a standard that would interpret the Eighth Amendment to prohibit a method of execution that creates "an

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an unnecessary risk of unconstitutional pain or suffering . . . . Inherent in this formulation is the requirement that the risk must be substantial.").

12. Harbison v. Little, No. 3:06-1206, 2007 WL 2821230, at *8 (M.D. Tenn. Sept. 19, 2007) (holding that in determining the objective component, the court looked to whether there was "a foreseeable risk of . . . gratuitous and unnecessary pain").

13. See Taylor, 487 F.3d at 1080 (emphasizing that the proper focus is not the risk of accident, but "whether the written protocol inherently imposes a constitutionally significant risk of pain"); Nooner v. Norris, No. 5:06CV00110SWW, 2007 WL 2710094, at *7 (E.D. Ark. Sept. 11, 2007) (stating the standard as "whether the written protocol inherently imposes a constitutionally significant risk of pain").

14. In fact, in this case Lightbourne argues that without "an adequate medical determination of unconsciousness before the administration of drugs known to produce pain and continuing monitoring of unconsciousness throughout the lethal injection procedure, there is a deliberate indifference to the risk of the infliction of unnecessary pain in violation of the Eighth Amendment."

unnecessary risk of pain and suffering." Petitioner's Petition for Writ of Certiorari at 6, Baze v. Rees, No. 07-5439, (U.S. Sept. 25, 2007). Still, given the current uncertainty in the exact standard that the United States Supreme Court might employ, we deem it important to review our own precedent as to this issue.

FLORIDA'S JURISPRUDENCE ON METHOD OF EXECUTION

Although the issue in this case is the constitutionality of lethal injection procedures, a review of this Court's jurisprudence involving challenges to electrocution, the previous method used in Florida, is instructive. In Buenoano v. State, 565 So. 2d 309 (Fla. 1990), the petitioner challenged whether the electric chair violated the Eighth Amendment, based on a malfunction during the execution of inmate Jesse Tafero. The governor ordered an investigation into the circumstances of Tafero's execution, and it was determined that a synthetic sponge caused the smoke and flames to shoot from his head. The attending physician and the medical examiner both stated that the first surge of electricity caused Tafero to become unconscious so he did not suffer.

Buenoano asserted that a faulty electrode in the electric chair did not properly conduct electricity and that the DOC was not competent to carry out executions. This Court found that Buenoano's claim was not procedurally barred, but denied relief, holding that execution is clearly within the province of the executive branch and that the record as proffered did not justify judicial

interference with the executive function. Id. at 311. Relying on the United States Supreme Court's decision in Resweber, 329 U.S. at 463, the Court held that "one malfunction is not sufficient to justify a judicial inquiry into the Department of Corrections' competence." Buenoano, 565 So. 2d at 311.

In 1997, a similar malfunction occurred during the execution of Pedro Medina, where flames and smoke again erupted from the headpiece shortly after the electrocution began. Leo Jones, who was under a warrant of death, filed a petition to invoke this Court's all writs jurisdiction, challenging whether Florida's electric chair in its then-present condition violated the Eighth Amendment. Jones v. State, 701 So. 2d 76 (Fla. 1997). This Court stayed the pending execution and relinquished jurisdiction to the trial court for an evidentiary hearing. The trial court denied relief, finding that the electric chair was working properly and that inmates did not suffer conscious pain within a millisecond of the initial surge of electricity.

Jones appealed to this Court, raising an Eighth Amendment challenge. Jones asserted that a state official's failure to prevent harm to prisoners constitutes cruel and unusual punishment if the official shows "deliberate indifference to the prisoner's well-being" and thus the trial court erred by requiring him to show electrocuted inmates experienced conscious pain. Id. at 79. Jones then argued that

the state has shown "deliberate indifference" through its executions. After rejecting Jones' contention as "totally without merit," the Court held:

> In order for a punishment to constitute cruel or unusual punishment, it must involve "torture or a lingering death" or the infliction of "unnecessary and wanton pain." Gregg v. Georgia, 428 U.S. 153, 96 S. Ct. 2909, 49 L.Ed.2d 859 (1976); Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 67 S. Ct. 374, 91 L. Ed. 422 (1947). As the Court observed in Resweber: "The cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely."

Id. The Court then noted that there was substantial evidence that Florida executions are conducted "without any pain whatsoever" and that the record was devoid of evidence "suggesting deliberate indifference to a prisoner's well-being."[15]

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15. This Court did not explicitly adopt the "deliberate indifference" standard in Jones, but limited its analysis to the standard adopted by the United States Supreme Court in method of execution cases—the "inherent in the method" standard. Some federal courts have applied a "deliberate indifference" standard to method of execution cases to determine whether the wanton element was met in terms of the "unnecessary and wanton infliction of pain" standard. Again, it is important to note that this "deliberate indifference" standard was first mentioned by the United States Supreme Court when the Court expanded the Eighth Amendment protections to condition of confinement cases, and it has used the deliberate indifference standard only in those cases to determine a state actor's mental intent when that actor inflicted harm or potential harm that was not part of the prescribed punishment. See, e.g., Wilson v. Seiter, 501 U.S. 294, 300 (1991) (holding that in prison condition cases, a mental element must be attributed to the inflicting officer "[i]f the pain inflicted is not formally meted out as punishment . . . by the sentencing judge."). Here, death is clearly part of the penalty and thus United States Supreme Court precedent does not require a showing as to any mental element in this type of claim.

Following Jones, challenges to the electric chair continued. In 1999, Thomas Provenzano asserted that the electric chair in its then-present condition constituted cruel or unusual punishment, alleging that it malfunctioned in the four executions since the Court's decision in Jones. Provenzano v. State, 739 So. 2d 1150, 1153 (Fla. 1999) (Provenzano I). The trial court rejected all of Provenzano's claims concerning the electric chair, finding most of the claims were decided adversely to him in Jones. The trial court further rejected Provenzano's claim as to newly discovered evidence pertaining to electrical engineers that contracted with the DOC to work on the chair, holding that the fact that the DOC was actively testing and maintaining the chair established that the DOC was attempting to maintain the reliability of the electric chair. On appeal, this Court held that the trial court did not err in relying on Jones and noted that this Court had repeatedly rejected the claim that death was not instantaneous. Id. at 1153. The Court further affirmed the trial court's holding that evidence pertaining to recent work on the electric chair is insufficient to overcome the presumption that members of the executive branch will properly perform their duties in carrying out the next execution. Id. Despite the Court's holding, the Court expressed concern that the DOC had repeatedly failed to follow the protocol established for executions. However, because there was no showing that any of the last four executions caused

"unnecessary and wanton pain" or that they involved "torture or a lingering death," the Court declined the stay of execution. Id. at 1154.[16]

Shortly after Provenzano I, in Provenzano v. Moore, 744 So. 2d 413 (Fla. 1999) (Provenzano II), the Court stayed Provenzano's execution after problems occurred during inmate Allen Lee Davis's execution and permitted another evidentiary hearing before the trial court. In Provenzano II, the Court again affirmed its statement in Jones: "[I]n order for a punishment to constitute cruel or unusual punishment, it must involve 'torture or a lingering death' or the infliction of 'unnecessary and wanton pain.'" Id. at 415 (quoting Jones, 701 So. 2d at 79). The Court stressed that "[t]he record in this case reveals abundant evidence that execution by electrocution renders an inmate instantaneously unconscious, thereby making it impossible to feel pain." Id. at 415. The Court also concluded that based on the record, the electric chair was functioning properly, and the electric circuitry was being maintained. While holding that the execution protocol was followed in the Davis execution, we also observed that "it may be appropriate for DOC to revisit the protocol, including the use of the mouth strap, to ensure that it is consistent with the functioning of the electric chair." Id. We rejected

16. The Court did require the DOC to provide an open file policy relating to "any information regarding the operation and functioning of the electric chair" and further directed the DOC to certify prior to any execution that the electric chair was able to perform consistent with the "Execution Day Procedures" and "Testing Procedures for Electric Chair."

Provenzano's claim that the current use of electrocution is unconstitutional because it "violates the evolving standards of decency that mark the progress of a maturing society." Id.

HISTORY OF LETHAL INJECTION IN FLORIDA

In 2000, the Florida Legislature provided for a new method of execution: lethal injection. See ch. 2000-1, §1, Laws of Fla.[17] Section 922.105(1) now provides: "A death sentence shall be executed by lethal injection, unless the person sentenced to death affirmatively elects to be executed by electrocution." See § 922.105(1), Fla. Stat. (2006). The statute does not provide the specific procedures to be followed or the drugs to be used in lethal injection; instead it expressly provides that the policies and procedures created by the DOC for execution shall be exempt from the Administrative Procedure Act, chapter 120, Florida Statutes. See § 922.105(7), Fla. Stat. (2006); Sims v. State, 754 So. 2d 657, 670 (Fla. 2000).

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17. On October 26, 1999, the United States Supreme Court granted certiorari in Bryan v. Moore, 744 So. 2d 452 (Fla. 1999) (table), a case where the constitutionality of Florida's electric chair was at issue. Bryan v. Moore, 528 U.S. 960 (1999). In direct response, on December 7, 1999, Governor Bush announced that a special session of the Florida Legislature would be held for the sole purpose of considering a piece of legislation that would authorize that "death sentences be carried out by lethal injection or electrocution." After section 922.105, Florida Statutes, was amended to provide for lethal injection, the United States Supreme Court dismissed its grant of certiorari in Bryan as improvidently granted "[i]n light of the representation by the State of Florida, through its Attorney General, that petitioner's 'death sentence will be carried out by lethal injection, unless petitioner affirmatively elects death by electrocution.'" Bryan v. Moore, 528 U.S. 1133, 1133 (2000).

Shortly after the amendment of section 922.105, Terry Sims challenged the lethal injection protocol in effect in 2000 as failing to provide sufficient details and procedures for administering lethal injection. Sims, 754 So. 2d at 666. The issues raised by Sims included: reported problems in correctly administering lethal injections in other states; lack of guidelines for handling problems that may occur; lack of specification as to the duties of each participant; and conflict between the protocol and testimony as to what should occur if the inmate does not expire after the initial injections. Id.

At an evidentiary hearing before the circuit court, Sims presented expert testimony concerning specific examples of "botched" executions that occurred in other states. He further presented expert testimony concerning potential problems such as too low a dose of sodium pentothal being administered, which would make pain more acute, or the drugs not being given in the proper order. It was undisputed in Sims that the dosage levels set forth in the protocol, if administered correctly, would result in a quick and relatively painless death. The Court rejected Sims' claim that the DOC's execution day protocol failed to provide sufficient details and procedures for administering lethal injection, relying upon LaGrand v. Lewis, 883 F. Supp. 469 (D. Ariz. 1995), aff'd sub nom. LaGrand v. Stewart, 133 F.3d 1253 (9th Cir. 1998), where that court held that the Arizona lethal injection protocol did not expose a prisoner to "more than a negligible risk of being

subjected to a cruel and wanton infliction of pain." Sims, 754 So. 2d at 667 (quoting LaGrand, 883 F. Supp. at 471). After noting that Sims raised similar challenges to the sufficiency of the written protocol and after reviewing all of the evidence presented in that case, this Court denied Sims' challenge, concluding:

> Sims' reliance on Professor Radelet and Dr. Lipman's testimony concerning the list of horribles that could happen if a mishap occurs during the execution does not sufficiently demonstrate that the procedures currently in place are not adequate to accomplish the intended result in a painless manner. Other than demonstrating a failure to reduce every aspect of the procedure to writing, Sims has not shown that the DOC procedures will subject him to pain or degradation if carried out as planned. Sims' argument centers solely on what may happen if something goes wrong. From our review of the record, we find that the DOC has established procedures to be followed in administering the lethal injection and we rely on the accuracy of the testimony by the DOC personnel who explained such procedures at the hearing below. Thus, we conclude that the procedures for administering the lethal injection as attested do not violate the Eighth Amendment's prohibition against cruel and unusual punishment.

Sims, 754 So. 2d at 668. After this Court rejected Sims' challenges to the lethal injection protocol, the United States Supreme Court denied certiorari review. See Sims v. Florida, 528 U.S. 1183 (2000).

In the same year Sims was decided, this Court decided Provenzano v. State, 761 So. 2d 1097 (Fla. 2000) (Provenzano III), upholding lethal injection as follows:

> [T]his Court [previously] stated that there is a presumption that the members of the executive branch will properly perform their duties in carrying out an execution. The circuit court determined that there has

> been no showing of abuse or cruel or unusual punishment in this case. There is competent, substantial evidence in the record to support this conclusion. Therefore, we hold that execution by lethal injection does not amount to cruel and/or unusual punishment.

Id. at 1099 (citation omitted). The Sims holding has been since reaffirmed in many cases.[18] See, e.g., Diaz v. State, 945 So. 2d 1136, 1144 (Fla. 2006); Rolling v. State, 944 So. 2d 176, 179 (Fla. 2006); Rutherford v. State, 926 So. 2d 1100, 1133 (Fla. 2006); Hill v. State, 921 So. 2d 579, 583 (Fla. 2006); Parker v. State, 904 So. 2d 370, 380 (Fla. 2005); Thompson v State, 796 So. 2d 511, 515 (Fla. 2001); Bryan v. State, 753 So. 2d 1244, 1254 (Fla. 2000).

THIS CASE

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18. Subsequent to Sims, a research study reported in a publication called The Lancet was offered in several cases as newly discovered evidence that execution by lethal injection exposes inmates to a substantial risk of unnecessary and wanton pain. See Leonidas G. Koniaris et al., Inadequate Anaesthesia in Lethal Injection for Execution, 365 Lancet 1412 (2005). This Court found the study to be inconclusive and did not justify holding an evidentiary hearing to review the newly discovered evidence claim. See Diaz v. State, 945 So. 2d 1136, 1144 (Fla.), cert. denied, 127 S. Ct. 850 (2006); Rolling v. State, 944 So. 2d 176, 179 (Fla.), cert. denied, 127 S. Ct. 466 (2006); Rutherford v. State, 926 So. 2d 1100, 1113-14 (Fla.), cert. denied, 546 U.S. 1160 (2006); Hill v. State, 921 So. 2d 579, 583 (Fla.), cert. denied, 546 U.S. 1219 (2006). As the Court explained in Hill, the study in The Lancet "does not assert that providing the inmate with 'no less than two grams' of sodium pentothal, as is Florida's procedure, is not sufficient to render the inmate unconscious. Nor does it provide evidence that an adequate amount of sodium pentothal is not being administered in Florida, or that the manner in which this drug is administered in Florida prevents it from having its desired effect." Hill, 921 So. 2d at 583 (citation omitted) (quoting Sims, 754 So. 2d at 665 n.17).

With this legal background in mind, we turn to the primary issue for us to decide in this case: whether the lethal injection procedures currently in place in Florida, as actually administered, violate the constitutional prohibition against cruel and unusual punishment. We start from the proposition that in Sims we upheld the constitutionality of lethal injection and the chemicals employed during lethal injection against a challenge that the procedures in effect in 2000 did not provide sufficient detail for administering lethal injection. There are two reasons that we revisit our holding in Sims, which was decided shortly after lethal injection was adopted.

First, in Sims we rejected as speculative Sims' arguments concerning the "list of horribles" that Sims argued could occur in a lethal injection execution, holding that the testimony presented did not "sufficiently demonstrate that the procedures currently in place are not adequate to accomplish the intended result in a painless manner." Sims, 754 So. 2d at 668. We noted that "Sims' argument centers solely on what may happen if something goes wrong." Id. In the Diaz execution, we now have actual experience of complications that can arise in the carrying out of a lethal injection execution. However, rather than ignoring what might have gone wrong during the Diaz execution, the executive branch under the direction of the Governor and the DOC instituted an extensive and comprehensive

review of the problem and proposed solutions, many of which have been enacted by the DOC.

The second and more important difference is that the protocol has become increasingly more specific and more detailed as to the drugs administered and the procedures to be followed. Yet, Lightbourne still criticizes the protocol as inadequate to prevent the unnecessary risk of pain and in fact claims that the most recent revisions are essentially no more than "window dressing."

Most of Lightbourne's claims rely on the assertion that Diaz suffered pain during his execution and that the current protocol does not adequately guarantee that this risk is sufficiently minimized so as to comply with the Eighth Amendment. However, as the trial court noted, the Governor's Commission could not determine whether Diaz suffered pain and the trial court found that "it is unclear and disputed whether inmate Diaz suffered any pain." The trial court ultimately concluded that Diaz did not suffer any pain, stating as follows:

> It is unclear and disputed whether inmate Diaz suffered any pain. It is unclear exactly how conscious or unconscious inmate Diaz was after injection of the sodium pentothal into the soft body tissue. It is unknown what the absorption rate is for that chemical or the other chemicals injected into soft body tissue. It is medically clear that anyone would experience pain if pancuronium bromide or potassium chloride were injected into a body that was not properly anesthetized. It is not uncommon for this to happen in the best of hospital settings. Medical experts testified to patients screaming or yelling from severe pain from injection of drugs before being properly anesthetized. No witness testified that inmate Diaz screamed or yelled after the injection of pancuronium bromide or potassium chloride. Therefore,

> the Court concludes and so finds that inmate Diaz did not suffer any pain from the process of injecting these chemicals. The Governor's Commission which investigated this execution could not find whether or not inmate Diaz suffered any pain.

In reviewing the trial court's order and the facts as developed in the evidentiary hearing, we note that it is undisputed that in the execution of Angel Diaz, the intravenous lines were not functioning properly because the catheters passed through his veins in both arms and thus delivered the lethal chemicals into soft tissue, rather than into his veins. Lay witnesses to the execution, including Mr. Diaz's spiritual advisor, an interpreter, and a press representative, testified that several minutes after the injections began, Diaz was still moving, squinting, taking deep breaths, and clenching his jaw. It is also undisputed that if pancuronium bromide or potassium chloride, the second and third chemicals administered, are injected into a conscious person, significant pain would result from each of the chemicals.

The medical experts differed in opinion as to whether the subcutaneously injected sodium pentothal was absorbed into Diaz's blood stream to a sufficient degree to prevent him from feeling the effects of the pancuronium bromide and potassium chloride. Lightbourne's expert, Dr. Heath, a board certified anesthesiologist, could not say with certainty whether Diaz was "awake" when the second and third drugs were administered and also could not say with certainty which drug caused Diaz's death. Based on the witness observations, he opined that

Diaz likely suffocated from the pancuronium bromide. On the other hand, Dr. Kris Sperry, chief medical examiner for the State of Georgia, testified for the State and opined that Diaz did not feel the pain of injection of potassium chloride, which caused blisters under his skin, because "he had already been given the sodium pentothal, which is what would have rendered him unconscious and insensate." Dr. Sperry did concede the possibility that if the sodium pentothal was injected into soft tissue, its effect would be delayed, and Diaz could have felt the suffocating effects of the pancuronium bromide, although in his opinion, the sodium pentothal would be absorbed before the remaining two chemicals.

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

As the amount and sequence of chemicals used in Florida have not changed from the time of the Diaz execution, we begin with a review of the combination of chemicals administered under the current lethal injection procedures. Specifically, the protocols in effect both at the time of the Diaz execution (the August 2006 procedures) and at the present time (the August 2007 procedures) provide for

intravenous administration of five grams of sodium pentothal[19] (a fast-acting sedative), 100 milligrams of pancuronium bromide (a paralytic agent that can stop respiration), and 240 milliequivalents of potassium chloride (a substance that will cause the heart to stop).[20] A saline solution is injected before a new drug is administered in order to clear the line between chemicals.

After the Diaz execution, the report of the Governor's Commission suggested that the Governor have the DOC "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 of a paralytic drug like pancuronium bromide in an effort to make the lethal injection execution procedure less problematic." However, the Commission did not expressly recommend any modification to the current three-drug protocol or to the individual amounts of the chemicals used in the lethal injection procedures.

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19. Sodium pentothal is a brand name, which is the name used in Florida's lethal injection protocol. This drug is also known by its chemical name, thiopental sodium.

20. Challenges to the mix of chemicals have been a recurrent theme both in this State and around the country. Notably, this Court has previously rejected requests for evidentiary hearings on the issue of whether Florida's lethal injection procedures that directed that an inmate receive "no less than two" grams of sodium pentothal provided inadequate anesthesia. Hill v. State, 921 So. 2d 579, 583 (Fla. 2006); see Rutherford v. State, 926 So. 2d 1100, 1114 (Fla. 2006). Florida's protocols now direct that an inmate be given five grams of sodium pentothal.

The Commission did make a number of other specific recommendations, including that DOC: develop written procedures to clearly establish the chain of command and include that the warden has the final decision-making authority; require documentation as to all stages of the lethal injection process; add a second Florida Department of Law Enforcement (FDLE) agent and require that both keep documented logs during the execution; develop and implement a process to determine the most suitable method of venous access which does not require movement of the inmate after venous access is obtained; ensure the inmate is unconscious after sodium pentothal is administered and proceed no further until the warden authorizes the team to do so; require that if a second IV site is utilized at any time, that the entire lethal chemical administration process be reinitiated from the beginning; develop procedures that clearly establish and define the role of each person; develop a training program for all persons involved; and review foreseeable contingencies and formulate responses to those contingencies. In light of these recommendations and its own examination of the Diaz execution, the DOC first revised its procedures, effective May 9, 2007 (the May 2007 procedures). After additional questions were expressed by the trial court in this case and as part of its own continuing internal review, the DOC revised its lethal injection procedures again, resulting in the August 2007 procedures. In the

introduction to its August 2007 procedures, the DOC stated that the "foremost objective of the lethal injection process is a humane and dignified death."

This stated objective is reflected in the most significant difference between the August 2006 procedures under which Diaz was executed and the May 2007 procedures: the inclusion of a pause during which the DOC personnel will assess the inmate for the presence or absence of unconsciousness. The August 2006 procedures that were in effect at the time of the Diaz execution did not require that any determination of unconsciousness be made before the pancuronium bromide was injected. The May 2007 procedures added the requirement that the team warden must "determine, after consultation, that the inmate is indeed unconscious. Until the inmate is unconscious and the Warden has ordered the executioners to continue, the executioners shall not proceed . . . ." Further, the warden is required to stop the execution at any point when venous access becomes compromised and must take appropriate action to remedy the problem before proceeding.

The August 2007 procedures are even more specific. These procedures require the warden to "assess whether the inmate is unconscious" after injection of the two syringes of sodium pentothal and the first saline syringe. If the inmate is not determined to be unconscious at that point, the warden shall suspend the execution process, order the window closed, and consider a secondary access site. The August 2007 procedures make clear that the process of assessing

consciousness is a critical step that must be conducted before the execution proceeds. The August 2007 procedures state that the warden makes the determination of consciousness "after consultation."[21]

As to the critical issue of consciousness, Warden Cannon, who is currently designated by the Secretary of the DOC as team warden in charge of future executions, testified that he would assess consciousness by employing an "eyelash touch," calling the inmate's name, and shaking the inmate. Warden Cannon testified that if there is a disagreement as to consciousness, the execution will be temporarily suspended—the curtains will close and the medical team members will come out from the chemical room and consult in the assessment of the inmate. When a determination of unconsciousness is made, the curtains will reopen, and the process will continue. Under the August 2007 procedures, the second and third drugs will not be administered until the inmate is deemed unconscious and the warden orders that the execution proceed.

While the August 2007 procedures do not expressly state that a medically qualified team member will continuously monitor the IV sites, Warden Cannon testified that he will require the person who inserted the IV lines to monitor by closed circuit television cameras each IV access point, as well as the inmate's face,

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21. We acknowledge, however, that while the procedures as well as the checklist now in use require an assessment of consciousness, neither the procedures nor the checklist specifies what procedures are to be followed for such an assessment or with whom the warden is to consult.

throughout the execution process. This camera system is part of the renovated execution facility.

The Governor's Commission recommended that the DOC establish a clear hierarchy of authority and provide open communication between team members during the execution. The August 2007 procedures address these recommendations by establishing the position of "team warden" who is ultimately responsible for every aspect of the execution process and by providing that the security team members will be in radio contact with the team warden during the execution in order to report any problems that may occur. The August 2007 procedures state that "each execution member is responsible and authorized to raise concerns that become apparent during the execution and bring them to the attention of the team warden."

Lightbourne, however, contends that these changes are inadequate and submitted expert testimony, as well as the testimony of DOC personnel, in an attempt to show that the training, qualifications, and consciousness assessment under the new procedures were still insufficient. In support of this claim, Lightbourne relies primarily on the opinion of Dr. Heath. In an affidavit submitted to the trial court (which has been considered as record evidence), Dr. Heath stated that the revised August 2007 procedures fail to require that qualified personnel ensure a "surgical plane of anesthesia," which he considers essential. He found

fault with the procedures calling for the determination of consciousness to be made by the warden, whom Dr. Heath characterized as one of the least qualified persons present to make such an assessment. According to Dr. Heath, the methods Warden Cannon would use to assess consciousness are inadequate when performed by a person without clinical experience. Because of ethical considerations surrounding any participation in lethal injection procedures, Dr. Heath did not provide any specific recommendations as to how to carry out the lethal injection procedure or to assess consciousness in a lethal injection setting. He did testify, however, that in a surgical setting, a surgical plane of anesthesia is required to ensure the person will be insensate to the painful procedures to follow and that this can be assessed accurately only by applying a noxious stimulus, such as a surgical incision, a pinch with a hemostat, or a needle prick. This determination should be made by medically trained personnel positioned by the side of the person being assessed.

Dr. Heath criticized the Florida procedures for requiring administration of the drugs remotely from a separate room, making it difficult to monitor the "anesthetic depth." He alleges that, given their location outside the death chamber, the executioners and medically trained team members will not be able to hear the inmate, which also impedes assessment of "anesthetic depth." He concluded that the changes made in the August 2007 procedures were merely cosmetic.

Dr. Heath also disapproved the use of a syringe holder in which to place the syringes while they are being used to deliver the drugs because he believes it will impede any ability to detect "back pressure," which indicates if the IV is working correctly. He testified that competence in IV injections requires clinical experience because when an IV is not inserted properly into a vein, extravasation occurs and fluids flow outside the vein into surrounding tissue. Extravasation can sometimes be detected by looking at the patient and can also be determined by palpation of the site. He further testified that failure of the drug injectors to have clinical experience in intravenous drug injection fails to meet any reasonable standard. Lack of experience in the executioners, who inject the syringes into the IV, is exacerbated by the lack of clinically trained personnel at the bedside, who could palpate the IV site and observe any problems.

However, other experts disagreed with Dr. Heath's conclusions. Dr. Sperry testified that an appropriate method to assess consciousness is to put hands on the person's shoulders, shake them, and call their name. This is a basic neurological assessment of consciousness and responsiveness which lay persons are taught and which any paramedic, emergency medical technician, registered nurse, or licensed practical nurse knows. The technique is "extremely fundamental" and is also a part of cardiopulmonary resuscitation (CPR) training. As to any concerns with IV lines, Dr. Sperry testified that problems inserting IV lines are common even in a

hospital setting. He also disagreed that the syringe-holding apparatus would interfere with the ability to feel resistance or "back pressure" since back pressure is felt through the plunger, not the barrel of the syringe. According to Dr. Sperry, the apparatus stabilizes the syringe and prevents a person from pulling back on the barrel of the syringe while pushing the drugs.

Lightbourne also challenged the training and qualifications of personnel who perform the lethal injection procedures. Warden Cannon testified in the evidentiary hearing as to this issue as well. As the designated team warden in charge of lethal injections, he selects the members of the execution team. He testified to the role of groups of the execution team: security team members; technical team members (or medical team); and executioners. In addition, two agents from the FDLE will monitor the actions of the execution team. The "medically qualified" team members are responsible for the chemicals and IVs necessary to carry out an execution. Two medical personnel insert IVs. Two medical personnel are on standby in case the execution requires a central venous line placement, which is a more complicated procedure for placing an IV. A pharmacist will mix the lethal chemicals. The pharmacist's license and credentials, as well as those of all the medically qualified personnel, are verified through the Department of Health, and a background check is conducted. Each member of the

team has a back-up person trained to step into the designated role in the event of contingencies.

Warden Cannon stated that team members are selected based on their training, licensure, certifications, background checks, and everyday duties. The medically qualified personnel must also be currently employed in the area of medical expertise for which they are selected and must perform their assigned functions in their daily duties. Warden Cannon explained that the executioners, who are not required to have any specific professional experience or certifications, will only inject the drugs into the IV lines after receiving instructions from the team warden. Warden Cannon testified that monthly training sessions are held and include mock executions where the team also practices their responses to problems which might arise like equipment failure or a blocked IV line. However, the IVs are not actually placed into a person, and Warden Cannon would simply call out the hypothetical contingency.

Lightbourne also points out that the August 2007 procedures place the responsibility on the team warden, normally not a medically trained individual, to make the final decision as to the unconsciousness of the inmate. Even though Warden Cannon, or likely any other team warden chosen for future executions, does not have medical training beyond basic CPR training, the August 2007 procedures state that the team warden shall make the consciousness assessment in

consultation with other team members. Warden Cannon testified that he would consult with those members of the team who are medically qualified in making his determination.

After considering the findings of the DOC investigative teams, the findings of the Governor's Commission, the most recently adopted procedures, and all of the witnesses and evidence presented below, the trial court concluded that there was no Eighth Amendment violation. Based on our analysis of the evidence presented as discussed above and, based on the application of the law to the evidence as discussed below, we agree.

APPLICATION OF LAW TO THE FACTS OF THIS CASE

This Court's obligation is to ensure that the method used to execute a person in Florida does not constitute cruel and unusual punishment. Unlike prior methods of execution, Lightbourne does not assert that lethal injection is inherently cruel and inhumane, only that if it is not properly carried out, there will be a risk of unnecessary pain. This Court set forth the constitutional standard for method of execution claims in Jones v. State, 701 So. 2d 76, 79 (Fla. 1997), a standard which is based solely upon rulings from the United States Supreme Court:

> In order for a punishment to constitute cruel or unusual punishment, it must involve "torture or a lingering death" or the infliction of "unnecessary and wanton pain." Gregg v. Georgia, 428 U.S. 153, 96 S. Ct. 2909, 49 L.Ed.2d 859 (1976); Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 67 S. Ct. 374, 91 L. Ed. 422 (1947). As the Court observed in Resweber: "The cruelty against which the

> Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely."

Id. In Sims, we elaborated on our decision in Jones. Relying on LaGrand, which held that the punishment is not cruel and unusual if a state's protocol does not expose the prisoner to "more than a negligible risk of being subjected to cruel and wanton infliction of pain," we held that an inmate's speculative list of horribles that could happen is insufficient to demonstrate more than a negligible risk. Sims, 754 So. 2d at 667 (quoting LaGrand, 883 F. Supp. at 471). The mere possibility of human error or a technical malfunction cannot constitute a sufficient showing to meet this burden. See, e.g., Resweber, 329 U.S. at 464 (holding that an accident which occurred during the first attempt at execution did not render a second attempt an Eighth Amendment violation); Buenoano, 565 So. 2d at 311 (holding that one malfunction is "not sufficient to justify a judicial inquiry into the Department of Corrections' competence"). Moreover, we held that the DOC need not reduce every minute detail of the lethal injection process to writing in order to pass constitutional muster. See Sims, 754 So. 2d at 668.

Turning to this case, 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.[22] 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.[23] Lightbourne

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22. 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 (Fla. Nov. 1, 2007).

23. 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.

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.[24]

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

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24. 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."

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.

With regard to the Dyehouse memorandum recommending the use of a BIS monitor to more accurately assess the level of consciousness of the inmate, it might be beneficial to incorporate a device that could monitor the inmate's level of sedation to ensure the inmate will not experience subsequent pain of execution. However, the Court's role regarding the executive branch in carrying out executions is limited to determining whether the current procedures violate the constitutional protections provided for in the Eighth Amendment.

We do not believe that it is within this Court's purview to mandate the use of a specific device to assess consciousness. We reaffirm the Court's essential holding in Sims that "determining the methodology and the chemicals to be used are matters best left to the Department of Corrections." Sims, 754 So. 2d at 670. Unless the United States Supreme Court intends for the judicial branch to exercise detailed supervisory authority over the process of lethal injection, we do not consider the failure of the DOC to incorporate the use of the BIS monitor to constitute an Eighth Amendment violation in itself.

Determining the specific methodology and the chemicals to be used are matters left to the DOC and the executive branch, and this Court cannot interfere with the DOC's decisions in these matters unless the petitioner shows that there are inherent deficiencies that rise to an Eighth Amendment violation. Lightbourne has failed to overcome the presumption of deference we give to the executive branch in fulfilling its obligations, and he has failed to show that there is any cruelty inherent in the method of execution provided for under the current procedures.

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 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,[25] 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.

CONCLUSION

After reviewing the evidence and testimony presented below and the lethal injection procedures themselves, we affirm the circuit court's order denying relief for the reasons set forth above and deny Lightbourne's all writs petition. Lightbourne has failed to show that Florida's current lethal injection procedures, as actually administered through the DOC, are constitutionally defective in violation of the Eighth Amendment of the United States Constitution.

It is so ordered.

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25. As defense counsel conceded during oral argument, there was no evidence presented that once the five-gram dose of 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.

LEWIS, C.J., and WELLS, PARIENTE, QUINCE, CANTERO, and BELL, JJ., concur.
ANSTEAD, J., concurs in result only.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND IF FILED, DETERMINED.

Original Proceeding – All Writs

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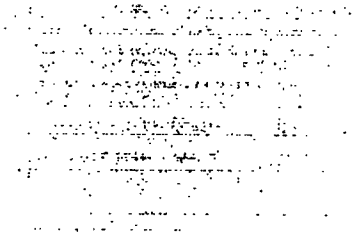

Supreme Court of Florida

WEDNESDAY, NOVEMBER 07, 2007

CASE NO.: SC06-2391

IAN DECO LIGHTBOURNE vs. BILL MCCOLLUM, ETC., ET AL.
Petitioner(s) Respondent(s)

Petitioner's Motion for Rehearing is hereby denied.

LEWIS, C.J., and WELLS, ANSTEAD, PARIENTE, QUINCE, CANTERO, and BELL, JJ., concur.

A True Copy
Test:

Thomas D. Hall
Clerk, Supreme Court

jn
Served:

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HON. CARVEN D. ANGEL, JUDGE