IN THE SUPREME COURT OF FLORIDA

CASE NO. SC07-1603

MARK DEAN SCHWAB,

Appellant,

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

STATE OF FLORIDA,

Appellee.

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

RESPONSE TO REPLY BRIEF

BILL McCOLLUM
ATTORNEY GENERAL

KENNETH S. NUNNELLEY
SENIOR ASSISTANT ATTORNEY GENERAL
Fla. Bar #998818
444 Seabreeze Blvd., 5th FL
Daytona Beach, FL 32118
(386) 238-4990
Fax # (386) 226-0457
COUNSEL FOR APPELLEE

RESPONSE TO REPLY BRIEF

On September 25, 2007, the United States Supreme Court granted certiorari on a lethal injection case out of Kentucky. *Baze v. Rees*, No. 07-5439. The law is settled that a grant of certiorari has no precedential value. *Ritter v. Smith*, 811 F.2d 1398, 1404-05 (11th Cir. 1987) ("it is well established that the grant of certiorari has no precedential value"). For the reasons set out below, Schwab's claim that "it is inconceivable" that *Baze* will not impact this case is incorrect because the two cases are in completely different procedural postures.

Schwab's *"Baze"* claim is procedurally barred.

In his *Reply Brief*, Schwab argues that the questions presented in *Baze* are "indistinguishable from those raised in this proceeding." *Reply Brief,* at 7. The successive post-conviction relief motion does not bear out that claim. Instead, the motion **explicitly argued that the proper standard was the "foreseeable risk of unnecessary and extreme pain."** *Motion*, at 3. Schwab cannot now change his theory by adding to his circuit court argument to align his case with the *Baze* proceeding -- Schwab chose how he would argue the case in the State courts, and any issue other than the "foreseeable risk" component is procedurally barred because it could have been raised in the

trial court but was not.[1] That is a procedural bar under long-settled Florida law.

To the extent that further discussion of Schwab's attempt to make his case look like the *Baze* case is necessary, Schwab has set out the four questions presented in Baze's petition for certiorari review. *Reply Brief*, at 6-7. As to the first question, Schwab never argued that any standard other than "foreseeable risk" was appropriate -- he is bound by that election. The second and third *Baze* questions deal with the existence of "alternative" lethal injection procedures. Schwab did not raise such issues in the circuit court, and is procedurally barred from raising them now. **This Court should expressly hold that Schwab is procedurally barred from raising any issues relating to "alternative" procedures.** The final *Baze* question is likewise procedurally barred -- Schwab never argued anything about the possibility of a stay after the execution had begun, and cannot raise that claim here for the first time.[2]

Schwab loses on the "standard of review," anyway.

---

[1] And, only a part of any "foreseeable risk" argument is viable, and that is the distinct issue of whether the standard is "foreseeable risk," or the *Jones v. State,* 701 So. 2d 76 (Fla. 1997), standard that this Court has historically applied, and which was applied by the circuit court.

[2] The *Baze* claim that there must be a means in place to resuscitate the inmate in the event a stay is ordered after the execution has begun finds no basis in common law, for obvious reasons. In any event, Florida has communication procedures in place to prevent such an occurrence.

One of the issues in *Baze*, and the only issue which is even potentially relevant here, is whether a lethal injection claim is evaluated under a "deliberate indifference" to pain and suffering standard, or whether the claim is evaluated under a "foreseeable risk" of pain and suffering standard. **While Schwab litigated this case on the premise that "foreseeable risk" is the proper standard** (R1241), this Court need not decide the ultimate issue of which standard is "correct," because Schwab loses under either standard.

As discussed above, the United States Supreme Court has granted certiorari, *inter alia*, on the question of whether a lethal injection claim is evaluated under a "deliberate indifference" or a "foreseeable risk" standard.[3] In his filings in this Court and in circuit court, Schwab has never differentiated between "deliberate indifference" and "foreseeable" risk, and, in fact, seems to blend the two standards to arrive at the conclusion that there can be no possibility at all of any error, a requirement which is clearly not a part of any standard argued in *Baze.*

[3] In denying relief, the trial court noted that "[t]he Florida courts have not adopted the standard suggested that there be no 'foreseeable risk' of pain in executions. Rather, as noted in *Jones,* [701 So. 2d 76 (Fla. 1997)], the Eighth Amendment does not compel the State to ensure that no suffering is involved in the extinguishment of life or even that the State guarantee an execution will proceed as planned every single time without any human error." (R1241).

Assuming *arguendo* that those legal theories, which by definition refer to different underlying facts, are actually different, Schwab loses regardless of which standard the United States Supreme Court may ultimately decide to apply in the lethal injection context. And, for this Court's purposes, the reason Schwab loses is the same under either standard.

Under a "deliberate indifference" analysis (which in most instances is actually wholly retrospective in focus), Schwab cannot make out a colorable claim that the procedures in place for carrying out an execution by lethal injection do not put in place substantial, extensive and redundant safeguards to avoid injection of any potentially painful drug until the inmate is determined to be unconscious. Those safeguards are fatal to any claim of deliberate indifference.

Under a "foreseeable risk" analysis, the same safeguards are dispositive, as well. Schwab does not contest the fundamental fact that so long as the intended dose of thiopental sodium is administered to the inmate through a properly working IV line, there is **no possibility** that the inmate will not be rendered unconscious and insensate in short order. Redundant and appropriate procedures are in place to ensure that the IV line is functioning properly, and to ensure that the inmate is unconscious before any potentially painful drugs are

administered. In light of the procedures in place, there is no "foreseeable risk," either.

This Court should decide this case based on State procedural bar law.

Despite Schwab's claims to the contrary, the issues in *Baze*, which Schwab attempts to embrace, are procedurally barred in his case and, consequently, are not available to him. Those procedural bars are clear, and there is no considered reason that this Court should not follow well-settled Florida law and deny relief based on those adequate and independent State law grounds.

To the extent that Schwab seems to be arguing that this Court should defer its decision in this case until *Baze* is decided, the United States Supreme Court is well able to enter such orders as necessary to protect its jurisdiction. That Court has repeatedly emphasized that it is the prerogative of that Court to overrule its own decisions. *State Oil Company v. Kahn and Kahn & Associates, Inc.,* 522 U.S. 3, 20 (1997); *Rodriquez de Quijas v. Shearson/American Express, Inc.,* 490 U.S. 477, 484 (1989). The same rationale is applicable here. The grant of certiorari in *Baze* does not justify a departure from settled Florida law.

CONCLUSION

WHEREFORE, based upon the foregoing, the State submits that the trial court order denying Schwab's successive postconviciton relief motion should be denied in all respects.

Respectfully submitted,

BILL McCOLLUM
ATTORNEY GENERAL

KENNETH S. NUNNELLEY
SENIOR ASSISTANT ATTORNEY GENERAL
Florida Bar #0998818
444 Seabreeze Blvd., 5th FL
Daytona Beach, FL 32118
(386) 238-4990
Fax # (386) 226-0457

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by **Facsimile** and **U.S. Mail** to: **Mark Gruber**, Assistant CCRC-Middle, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619 (813)740-3554, **Judge Charles M. Holcomb**, Circuit Court Judge, 506 S. Palm Ave., Titusville, Florida 32796-3592 (321)264-6904, **Robert Wayne Holmes,** Assistant State Attorney, 2725 Judge Fran Jamieson Way, Building D, Viera, Florida 32940 (321)617-7546, on this _____ day of October, 2007.

Of Counsel

CERTIFICATE OF COMPLIANCE

This brief is typed in Courier New 12 point.

_____
Of Counsel