IN THE SUPREME COURT OF FLORIDA

CASE NO. SC07-2138

MARK DEAN SCHWAB,

Appellant,

Death Warrant Signed
Execution Stayed

STATE OF FLORIDA

Appellee.

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

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

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

The death warrant was signed on July 18, 2007, and this Court rendered an order establishing a briefing schedule and certain filing requirements the next day. (Order at SC80289 PC-W Vol. II 260). The lower court conducted a scheduling hearing on July 25 and set deadlines for any motions or evidentiary hearings which might be required. PC-W Vol I 3 et seq. The proceedings in *Lightbourne* were discussed Defense counsel indicated that he would be filing a motion for the court to take judicial notice of those proceedings, and the State agreed that that was something the court could do. PC-W Vol. I 21. The court said that if a motion along those lines were filed that he was "almost positive" that he would grant it. *Id.*

Both parties filed various pleadings and memoranda. Both parties filed copies of an excerpt from the *Lightbourne* hearings dated July 22, 2007 in which Judge Angel temporarily enjoined the State from carrying out an execution in that case. (E.g. PC-W Vol. II 319-51). His written order dated July 31, 2007 is at PC-W Vol. III 540. The DOC protocols for use in executions after August 1, 2007 were filed. PC-W Vol. III 435-50.

The State filed a memorandum on July 26, 2007 titled "The Issues Raised in Prior Proceedings," which accurately quotes the appellate courts' description of the issues which were raised on direct appeal, in state postconviction proceedings and on federal review, and their disposition. Rule 3.851(e)(2)(B).

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

November 7, 2007, the Court denied the Plaintiff's motion for rehearing and Renewed Motion to Stay Execution. That same day, the Court issued its mandate.

The very next day, Thursday November 8, 2007, Schwab filed an application for leave to file a successive habeas corpus petition pursuant to 28 U.S.C. §2244(b) with the Eleventh Circuit Court of Appeals. The next day, Friday, November 9, 2007, the Eleventh Circuit denied the application. In the Circuit Court's denial, the order stated: "this claim cannot serve as a proper basis for a second or successive habeas petition". The Eleventh Circuit noted that since *Hill v. McDonough*, 126 S.Ct. 2096 (2006), a §2254 proceeding is no longer the appropriate way to raise a method of execution claim. Instead, the proper vehicle for such a claim is a 42 U.S.C. §1983 claim.

Also that day, November 9th, the Petitioner filed an Application for a Stay of Execution with the United States Supreme Court and filed the instant successive motion to vacate. On November 13, a hearing was held in the lower court. That same day, the lower court denied Mr. Schwab an opportunity to present evidence at an evidentiary hearing. The United States Supreme court granted a stay of execution pending the filing and disposition of a certiorari petition to this Court's November 1 decision on November 15th.

STANDARD OF REVIEW

Florida Rule of Criminal Procedure 3.850(d) provides that a defendant is entitled to an evidentiary hearing on postconviction claims for relief unless "the motion, files, and records in the case conclusively show that the movant is entitled to no relief." Florida Rule of Criminal Procedure 3.851(f)(5)(B) applies the same standard to successive postconviction motions in capital cases. In reviewing a trial court's summary denial of postconviction relief without an evidentiary hearing, this Court "must accept all allegations in the motion as true to the extent they are not conclusively rebutted by the record." *Hodges v. State*, 885 So.2d 338, 355 (Fla.2004) (quoting *Gaskin v. State*, 737 So.2d 509, 516 (Fla.1999)). "To uphold the trial court's summary denial of claims raised in a 3.850 motion, the claims must be either facially invalid or conclusively refuted by the record." *McLin v. State*, 827 So.2d 948, 954 (Fla.2002) (quoting *Foster v. Moore*, 810 So.2d 910, 914 (Fla.2002)).

SUMMARY OF ARGUMENT

Based on the newly discovered evidence of Dr. Samek's changed opinion, Mr. Schwab can now demonstrate that there is new evidence truly demonstrating that he could not control his conduct which impacts his sentence of death. In addition, newly discovered training notes by FDLE inspectors during several DOC

mock execution training exercises demonstrates that the Department of Corrections is neither capable nor prepared to carry out an execution by lethal injection under the standards imposed by the Eighth Amendment.

ARGUMENT

ARGUMENT I:

THE LOWER COURT ERRED WHEN IT DENIED MR. SCHWAB'S NEWLY DISCOVERED EVIDENCE CLAIM OF DR. SAMEK'S CLARIFICATION OF HIS ORIGINAL TESTIMONY. THIS EVIDENCE MAKES MR. SCHWAB'S SENTENCE OF DEATH FUNDAMENTALLY UNRELIABLE IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION

A. The *Jones* Standard

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

under *Jones* does not imply perfect diligence. *See Williams v. Taylor*, 529 U.S. 420 (2000)(counsel duly diligent where not on notice of need for particular investigation). Mr. Schwab did not know and could not have known about these facts until counsel communicated appropriately with Dr. Samek. Due diligence does not require clairvoyance. As the Supreme Court held in *Michael Williams*, a habeas corpus petitioner has no duty to investigate misconduct that may provide a basis for relief until he has notice that the misconduct occurred. *Williams, supra*.

B. The Right to an Evidentiary Hearing

Mr. Schwab's right to an evidentiary hearing is governed by constitutional law and this Court's Rules. In April of 2000, this Court adopted revisions to the Florida Rules of Criminal Procedure in matters relating to postconviction relief. The purposes of these revisions were clearly spelled out in the Court's opening statement:

> In drafting these proposed rules, we have sought to identify and eliminate those capital postconviction procedures that have historically created unreasonable delays in the process, while still maintaining quality and fairness.

In re Amendments to the Florida Rules of Criminal Procedure 3.851, 3.852 and 3.993, 772 So.2d 488, 489 (Fla. 2000).

Maintaining judicial efficiency without sacrificing quality and fairness is a difficult balance with important constitutional and institutional concerns. Quality and fairness are not

linguistic niceties but ideals required by the Due Process Clause of the United States Constitution. But these rights, in practice, are not absolute. The right to present evidence is often measured against the doctrine of finality. Finality, as argued by the state, ensures that the judicial process moves at an efficient pace with respect of prior judicial opinions irrespective of new information of new law.

Finality in Mr. Schwab's case is death and, in capital cases, death is final. Neither this Court nor any other court, with all its power, can undue death. Thus, it is this Court's duty to weigh quality and fairness against the finality of death.

Long after we are gone, the actions of this Court and all parties involved, will be measured simply: has justice been served. As an institution essential to our very existence as a free people, the judicial system must act in accordance to those values core to our system of government. Each party claims to have justice on their side and both parties invoke justice to their cause before this Court. But justice is not swift nor is it vengeful. Justice is impartial, deliberative and consistent regardless of the litigants. Justice is easy in easy cases but it is no less necessary in difficult ones such as the present one. In fact, justice in the most difficult cases is more durable because it demonstrates that there is no exception to the Rule of Law.

Rights secured during times of peace are meaningless if they are useless in times of war. Equally so, rights of the accused in easy cases are meaningless if they are useless in Mr. Schwab's case.

Justice on this specific issue, the right to an evidentiary hearing, will not determine whether Mr. Schwab lives or dies. Justice here require only that he be heard. That's the purpose of the Rule 3.851. The revisions to that Rule were promulgated because this Court grew concerned that too many postconviction cases were delayed because the defendants were not given the opportunity to be heard. They were denied quality and fairness.

For example, this Court in *Mendoza v. State*, 964 So.2d 121 (Fla. 2007), found that the interests of quality and fairness outweighed the interests in finality not once but twice on remanding the case back for an evidentiary hearing on two separate occasions. There, this Court stated:

> Despite the six days of evidentiary hearings and extensive presentation of testimony, the circuit court's order essentially summarily denied Mendoza's postconviction claims. We expressly remanded the circuit court's previous summary denial of the postconviction motion for an evidentiary hearing on the ineffective assistance of counsel claims. As noted, evidentiary hearings were held, but following these extensive hearings, the circuit court neither stated on the record nor rendered an order detailing its factual findings and the reasons for its decision on the postconviction motion. A complete circuit court order enables this Court to review any factual and credibility questions with the appropriate standard of review. The evidentiary record here presents factual conflicts which must be resolved by the circuit court in findings of fact. Likewise, the circuit court's determination as to the credibility of expert testimony

> presented at the evidentiary hearing needs to be set forth in an order. Such factual and credibility determinations are not available in the instant case due to the brief and incomplete order of the circuit court.

Mendoza, 964 So.2d at 128 (footnote omitted).

To ensure the right of defendant to be heard, this Court has interpreted Rule 3.851 as such:

> Turning to the merits of Tompkins' claim, the circuit court denied Tompkins' motion without an evidentiary hearing. Thus, we "must accept all allegations in the motion as true to the extent they are not conclusively rebutted by the record." *Hodges v. State*, 885 So.2d 338, 355 (Fla.2004) (quoting *Gaskin v. State*, 737 So.2d 509, 516 (Fla.1999)); see also Fla. R.Crim. P. 3.850(d) (providing that the motion shall be denied without an evidentiary hearing if "the motion, files, and records in the case conclusively show that the movant is entitled to no relief"); Fla. R.Crim. P. 3.851(f)(5)(B) (providing that a successive postconviction motion in a capital case may be denied without an evidentiary hearing if "the motion, files, and records in the case conclusively show that the movant is entitled to no relief"). To have his conviction set aside based on newly discovered evidence, Tompkins must satisfy the two-prong test set forth in *Jones*. First, the "asserted facts 'must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known them by the use of diligence.'" *Jones*, 591 So.2d at 916 (quoting Hallman v. State, 371 So.2d 482, 485 (Fla.1979)). Second, "the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial." *Id.* at 915. The circuit court found, and the State argues, that Tompkins' claim is untimely because Davis was listed in police reports provided to the defense prior to trial. We do not address the timeliness of Tompkins' claim because we affirm the trial court's denial of relief based on the second prong of *Jones*.

Thompkins v. State, 32 Fla. L. Weekly S232 (Fla. May 10, 2007).

While Thompkins was denied an evidentiary hearing on his

successive motion, the case is instructive on two points. First, it reaffirmed this Court's jurisprudence regarding the right of a postconviction defendant to be heard, even in a successive postconviction motion posture. Second, the Court rejected the state's argument and found that that Thompkins satisfied the dual procedural bars of Rule 3.851 and *Jones v. State*. This Court reached the merits of Thompkins' claim pursuant to the second prong of *Jones*.

Mr. Schwab requests that he be afforded an opportunity to be heard on the merits of his claim. Dr. Samek was a crucial witness at the initial sentencing hearing. He is the only witness for this claim. Considering the fact that the United States Supreme Court has granted Mr. Schwab a stay of execution, this Court is under no undue time constraints in ensuring that Mr. Schwab be given the opportunity to be heard.

C. The Docrine of Judicial Estoppel

Dr. Samek, as argued by the state (see state's Motion to Strike Motion for Judicial Intervention; Motion for Protective Order, filed August 14, 2007)((PC ROA at 51-54), was not available as a witness for the defense prior to the Court's ruling. Contrary to the state's assertion, the state is now estopped from arguing that the defendant lacked due diligence. It is irrelevant whether this is Mr. Schwab's first motion for postconviction relief or his

last because the argument posited by the state was that Dr. Samek was, and never should be, available to the defense as a witness. *See, eg., Terry v. State*, 668 So.2d 954, 962 (Fla.1996); *Czubak v. State*, 570 So.2d 925, 928 (Fla.1990); *Pope v. State*, 441 So.2d 1073, 1076 (Fla.1983).

The United States Supreme Court in *New Hampshire v. Maine*, 532 U.S. 742 (2000), discussed the application of this remedy:

> "[W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." *Davis v. Wakelee*, 156 U.S. 680, 689, 15 S.Ct. 555, 39 L.Ed. 578 (1895). This rule, known as judicial estoppel, "generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." *Pegram v. Herdrich*, 530 U.S. 211, 227, n. 8, 120 S.Ct. 2143, 147 L.Ed.2d 164 (2000); see 18 Moore's Federal Practice § 134.30, p. 134-62 (3d ed. 2000) ("The doctrine of judicial estoppel prevents a party from asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding"); 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4477, p. 782 (1981) (hereinafter Wright) ("absent any good explanation, a party should not be allowed to gain an advantage by litigation on one theory, and then seek an inconsistent advantage by pursuing an incompatible theory").

Id. at 749.

Properly characterized, the State of Florida's position is inconsistent. First, the State argued that Dr. Samek was never available to the defense as a witness because he was previously retained by the prosecution. Now, counsel for the State of

Florida claims that Schwab was dilatory in not pursuing this claim earlier. *See generally United States v. Campa*, 459 F.3d 1121, 1152 (11th Cir.2006) (observing that doctrine of judicial estoppel "is designed to prevent parties from making a mockery of justice by inconsistent pleadings"). This cannot be allowed.

D. This Court's View of Newly Discovered Evidence in this Case

This Court implicitly recognized that this form of evidence could be a basis for newly discovered evidence. In the Court's November 1, 2007 opinion denying relief, this Court stated:

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

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

Mr. Schwab is not merely trying to present "new opinions" or "new research studies" of the type described by the Court in the most recent opinion denying relief. *Schwab v. State*, Slip Op. at 13. Rather, it is an opinion rendered by the original trial expert hired by the State which the sentencing court greatly relied upon in sentencing Mr. Schwab to death. Dr. Samek was not given the essential information by the State to allow the sentencing court or this Court to perform its constitutional duty under Article V in reviewing death penalty appeals. Fla. Const., Art. V, Sec. 3(b)(1). Dr. Samek, in his recent report, indicates that a substantial amount of information was not previously made available to him at trial. *See, eg.*, Review by Dr. Samek, November 6, 2007, at pp. 1-2 (hereinafter "Samek Report")(PC ROA 56-62)

The distinction between "new opinions" and the one offered by Dr. Samek is shown by the above language from this Court. While the Court rejected "new opinions" or "new research studies" this Court did note that "Accordingly, new evidence truly demonstrating that Schwab could not control his conduct could impact sentencing." *Schwab v. State*, Slip Op. at 14. The only reasonable evidence that would satisfy this Court's standard for newly discovered evidence in this case is exactly the expert evidence presented now by Dr. Samek. Instructive to this argument is the opinion by then-Chief Justice Pariente in her dissent, joined by Justice Anstead, in

Hodges v. State, 885 So.2d 338, 363-64 (Fla. 2004), in which the Chief Justice discusses a similar distinction:

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

> to the "abundance" of mitigating evidence available at the time of trial and presented during the evidentiary hearing. *See* 798 So.2d at 716. As in *Rose* and *Ragsdale*, Hodges' counsel in this case did not secure many critical records and did not provide the mental health expert with complete information, the result of which was a penalty phase in which only two witnesses testified to minimal mitigation.

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

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

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

Hodges, 885 So.2d at 364.

E. The Evidence Which Entitles Mr. Schwab to Relief

Dr. Samek bases this new opinion upon his recent review of Mr. Schwab's case. Dr. Samek, a state expert at the time of Mr. Schwab's trial, did not have access to the wealth of data then available. He was not asked by the state to conduct a clinical interview of Mr. Schwab nor was he requested to review the

available information necessary to form a psychological opinion of Mr. Schwab consistent with the standard of care in the psychological community. Dr. Samek was hired by the state for a limited purpose: to review the given materials and form a psychological rebuttal opinion concerning the existence of aggravating factors. In Dr. Samek's view, he was asked to form an opinion concerning the impact of the crime on the victim, although he went beyond those confines during his testimony.

The original penalty proceeding was held on one day, May 22, 1992, without a jury. Schwab's counsel presented Dr. Bernstein, an expert in psychological evaluation, who testified as to mental mitigation evidence at the penalty phase. Dr. Bernstein testified that in conducting his evaluation he interviewed Schwab twice and interviewed Schwab's mother once. Dr. Bernstein conducted a mental status examination and lengthy psychological tests, including the Minnesota Multiphasic Personality Inventory (MMPI) and the MMPI II, among various others. Dr. Bernstein also testified that he reviewed and relied on the videotaped opinions of Dr. Fred Berlin and Dr. Ted Shaw in forming his diagnosis of Schwab. Dr. Berlin and Dr. Shaw, experts in the diagnosis and treatment of mentally disordered sex offenders, interviewed and evaluated Schwab. Dr. Berlin gave a formal sexual disorder diagnosis, and Dr. Shaw provided information concerning the potential benefits Schwab could

have received had he been admitted to certain treatment programs. *See Schwab v. State*, 814 So.2d 402, 413-14 (Fla. 2002).

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

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

be emphasized that he was a crucial state witness.

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

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

> court judge found that the aggravating circumstances outweighed the mitigating circumstances and sentenced Schwab to death. *See id.* at 7.

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

Finally, the importance of Dr. Samek's testimony is evident in this Court's most recent opinion where it denied Mr. Schwab's claim of newly discovered evidence of mitigation. The Court relies upon the trial court's order, an order wholly dependant upon the testimony and opinions of Dr. Samek:

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

Schwab, Slip Op. at 13-14.

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

After a more exhaustive review of the record, evaluation of Mr. Schwab, and interviews with family members, Dr. Samek no longer holds the view that Mr. Schwab was "unwilling" rather than "unable"

to control his desires. Instead, Dr. Samek opines:

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

Samek Report at 5.

This opinion is in stark contrast to the opinion reached by the trial court in its original sentencing order. Sentencing Order at 10-13. Dr. Samek offers many reasons why Mr. Schwab was "unable" to conform his conduct to the requirements of law. For example, based on the additional information made available to him, Dr. Samek states in his report:

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

Samek Report at 4.

Likewise, this opinion is different than that found by the

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

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

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

Samek Report at 3.

In addition, Dr. Samek's original opinion regarding Mr.

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

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

Samek Report at 3.

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

> I respectfully do not concur with the Court's statement

> "Whether the defendant's unstable family life contributed to his sexual deviance is also in question." The Court said, "Are sexual deviates made or are they born? The answer is unclear to this Court." I believe that both in general and in this specific case it is clear that men are not born sexual deviates. Their early childhood experiences (often including significant victimization by passive and/or by active abuse, as happened in this case) cause the emotional illness that Mentally Disordered Sex Offenders have. Mr. Schwab was not born a sex offender. His early life experiences made him become who he was.
>
> If Mr. Schwab's parents had treated him differently as a child, if he had not been raised in a family with two episodically physically and verbally fighting parents at a sensitive time during his developmental years, if his mother had not continuously rescued him and enabled his dysfunctional behaviors, if his father had not been at times highly demanding, harshly punitive, and emotionally insensitive to him, if he had not been raped and threatened with death by his one friend's father, if he had not had to move from school to school so often; he would not have developed the mental illness that led to his raping and killing Junny.

Samek Report at 4.

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

> Mr. Schwab claimed (non-statutory mitigating circumstance number 5) that he "was raped (and traumatized) at gunpoint as a small child." The Court said, "A young child who had been anally raped at gunpoint by a known person in the community

would surely show physical or mental signs of injury," "The defendant's school performance and general personality showed no ill effects from the alleged incident," "the incident was never related by the defendant to anyone in Ohio," and "no person was called to verify that the named attacker actually resided in the defendant's community." The Court therefore found that "This entire incident appears to be another effort of the defendant to fabricate a defense."

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

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

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

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

Traumatic Stress Disorder (PTSD) from this incident.

Samek Report at 5-6 (emphasis added).

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

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

ARGUMENT II

THE LOWER COURT ERRED WHEN IT DENIED MR. SCHWAB'S NEWLY DISCOVERED EVIDENCE OF THE DEPARTMENT OF CORRECTION'S TRAINING LOGS AND FDLE MOCK EXECUTION TRAINING NOTES. THIS EVIDENCE CLEARLY REVEAL THAT FLORIDA'S LETHAL INJECTION METHOD OF EXECUTION VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS AND CORRESPONDING PROVISIONS OF THE

FLORIDA CONSTITUTION

A. The *Jones* Standard

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

B. The Doctrine of Judicial Estoppel

The newly discovered evidence of notes taken by four separate FDLE monitors during simulated execution exercises were requested prior to the time Mr. Schwab filed his most recent Successive Motion to Vacate. The DOC objected to the release of these and other documents. The Florida Department of Law Enforcement, in its response, responded that "FDLE has not currently assigned any individuals to attend the execution of the defendant and as such can not respond to the request". (PC ROA at 64-65) Counsel

received these notes on September 19, 2007, after counsel filed the prior Motion to Vacate. Counsel was unaware that these FDLE notes existed. Furthermore, the DOC objected to the release of these notes which the court agreed. Finally, FDLE affirmatively denied the existence of these notes. The state is now estopped from arguing that the defendant lacked due diligence. *See, eg., Terry v. State*, 668 So.2d 954, 962 (Fla.1996); *Czubak v. State*, 570 So.2d 925, 928 (Fla.1990); *Pope v. State*, 441 So.2d 1073, 1076 (Fla. 1983). See discussion of *New Hampshire v. Maine*, 532 U.S. 742 (2000), *supra*.

The State's position is inconsistent. In defending against claims challenging the lethal injection protocols in the state courts, the state has argued that only the most recent protocols are relevant and that the events of the Diaz execution are not to be considered as material because that execution took place pursuant to prior lethal injection protocols. Now, counsel for the state claims that Schwab was dilatory in not pursuing this claim earlier. See generally *United States v. Campa*, 459 F.3d 1121, 1152 (11th Cir.2006) (observing that doctrine of judicial estoppel "is designed to prevent parties from making a mockery of justice by inconsistent pleadings").

Furthermore, the state should be estopped based on the prior certification to the court by FDLE that no such notes existed. The

state cannot argue the position that the notes did not exist and then argue that they are irrelevant.

C. This Court's Recognition of a Claim for Relief

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

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

administered through the DOC, are constitutionally defective in violation of the Eighth Amendment of the United States Constitution.)

This recognized this issue and where its resolution lay: "We briefly detail the executive branch's efforts because its *response* to the Diaz execution and the *revisions* to the protocol affect our ultimate determination of the constitutionality of the current lethal injection procedures." *Lightbourne*, Slip Op. at 4. The Court noted the examination conducted by the Governor's Commission on Administration of Lethal Injection, the DOC Task Force and the trial court in *Lightbourne*. *Lightbourne*, Slip Op. at 5-6. The Court recognized that all three efforts focused on both revisions to the protocols and improved training to carry out the revised protocols. *Id.* The Court also conducted a limited examination into the three chemicals currently in use during lethal injection.

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

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

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

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

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

D. The Evidence Which Entitles Mr. Schwab to Relief

In his previous motion for relief, Mr. Schwab submitted the affidavit and opinion of Janine Arvizu, a certified Quality Auditor. In her prior affidavit of August 14, 2007, Arvizu pointed out numerous deficiencies with the current protocols related to the proper training of the execution team members and FDLE monitors. (PC ROA 67-72) She stated:

Page 4, section (6) does not address or reference a

> systematic means of ensuring that the chemicals that are used are of appropriate quality and have been appropriately maintained. In effect, this section delegates such responsibility for quality control of the lethal chemicals to the FDLE agent in charge of monitoring chemical preparation. Despite this fact, there is no evidence that the FDLE agent in question is qualified to make such an assessment, or that the necessary records documenting the procurement, receipt and storage of the chemicals would be available for the agent's review.
> Page 5, section (7) (b) states that an FDLE agent is responsible for observing the preparation of the lethal chemicals, yet there is no indication that the agent in question has the technical skills and experience necessary to monitor the preparation of chemicals in a technical capacity. It is unlikely that an independent monitor without relevant technical experience would provide significant quality oversight value as a monitor of the chemical preparation process.

Like a Cassandra in the night from ancient Greek lore, Arvizu's prescience, while ignored by the courts, turned out to be true. The newly discovered evidence in the form of FDLE training notes for July 11 and July 18, in which four FDLE Inspectors participated in DOC mock executions, (PC ROA 74-101) reveals serious training errors resulting in several failed exercises.

Ms. Arvizu identifies numerous and consequential errors in the mock executions as observed by the FDLE monitors, as well as insufficient training of the FDLE monitors themselves. These facts and expert opinions were contained in her affidavit and incorporated into the motion to vacate. (PC ROA 103-108)

According to the FDLE notes, five simulated execution training

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

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

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

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

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

"Group - of people - mix - chemicals

Quali chemical mix medical team (never less than 2)

Hand mix - powder in sterile glux (*not legible*) medium - drawn into syringe

1st chemical

2nd chemical just drawn approximate amount

3rd chemical same as second"

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

Affidavit of Janine S. Arvizu, November 8, 2007.

As shown by these notes, the DOC execution team is not being trained properly in preparing and administering the correct chemical amounts which is required by the protocols. In addition, it is clear here and elsewhere in the Arvizu Affidavit that the FDLE monitors are not properly trained to identify potential problems relating to the preparation of the lethal chemicals. *See* Arvizu Affidavit, ¶¶ 9, 10.4, 10.8, 10.12, 10.16, 10.17, 10.20, 10.22, 11.

These two errors cited above implicate constitutional concerns raised by this Court in both the *Lightbourne* and *Schwab* opinions. The constitutionality of the lethal injection protocols depend on the efficacy of the DOC personnel to correctly carry them

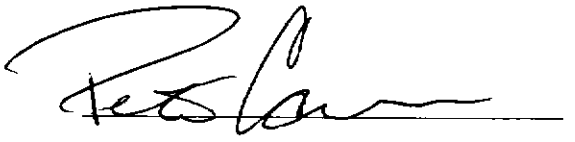
out. So far, by botching two of the five training exercises (possibly three out five depending on the "approximate amount" of the chemicals prepared), it is clear that the DOC is neither capable nor prepared to carry out an execution. Second, the constitutional viability of the three lethal chemicals used depends on the proper preparation and administration of all three chemicals. By preparing and administering approximate amounts of chemicals, the constitutionality of the actual three drugs used is questionable at best.

CONCLUSION

Based on the foregoing arguments, Mr. Schwab requests that he be permitted to present his claims at an evidentiary hearing or for such othe relief as this Court may deem appropriate.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief of Appellant has been furnished by e-mail and U.S. Mail, first class postage, to all counsel of record on this 28th day of November, 2007.



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CERTIFICATE OF COMPLIANCE

Pursuant to Fl.R.App.P. 9.210, I hereby certify that this brief is prepared in Courier New 12 point font and complies with the requirement of Rule 9.210.

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