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IN THE SUPREME COURT OF FLORIDA

CASE NO. 97,008

MARK DEAN SCHWAB,

Appellant,

v.

STATE OF FLORIDA

Appellee.

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

REPLY BRIEF OF APPELLANT

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ARGUMENT I

THE TRIAL COURT ERRED IN DENYING MR. SCHWAB A NEW TRIAL PURSUANT TO HIS MOTION TO VACATE JUDGMENTS OF CONVICTION AND SENTENCE IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION IN FAILING TO FIND THAT JUDGE RICHARDSON SHOULD HAVE RECUSED HIMSELF UPON HIS OWN MOTION.

On page 9-10 of Appellee's Answer, Appellee quotes the trial court's order denying relief where the trial judge writes: "All of the facts raised by Defendant in his motion were known prior to trial, and therefore, this issue could have been addressed on direct appeal." The assistant state attorney affidavits regarding judicial bias were known prior to trial and were part of the record on appeal. However, testimony at the evidentiary hearing (that Mr.Schwab's attorneys made misrepresentations to him regarding Judge Richardson that caused Mr. Schwab to not seek recusal of Judge Richardson) was not a part of the record.

During the evidentiary hearing Mr. Onek testified that he told Mr. Schwab that Judge Richardson had never sentenced anyone to death (PC-R. 24-25). He then testified that, at the time of Mr. Schwab's trial, Judge Richardson was an unknown entity on the bench (PC-R. 25) and had never done any death penalty trials (PC-R. 79). Mr. Schwab's testimony confirmed that he was told by Mr. Onek that Judge Richardson had never before sentenced anyone to death and was of the belief by Mr. Onek's statement that Judge Richardson had

presided over other capital cases, but didn't sentence anyone to death (PC-R. 145). Had Mr. Schwab known that Judge Richardson had never had a capital case where the State sought the death penalty(PC-R. 145), he never would have waived jury trial and would have sought Judge Richardson's recusal (PC-R. 145). While the judicial bias issue--with respect the state attorney affidavits--could have been addressed on direct appeal,[1] the issue regarding the misrepresentations by trial counsel was not within the record and could not have been a direct appeal issue.

Also on page 10 of Appellee's brief, Appellee cites Zeigler v. State, 452 So.2d 537 (Fla. 1984) for the proposition that the facts regarding judicial bias were known prior to the close of trial and, therefore, they could have been raised on direct appeal and were not cognizable in a 3.850 motion.[2] Yet, further along in Zeigler this Court (attempting to serve the ends of justice) held, "We also hold that, although the allegation of bias is based on a fact newly discovered by the defense, it is an issue properly considered in the rule 3.850 motion in this instance." Id. at 540. While newly discovered evidence should be addressed in an application for a

[1]Undersigned counsel simultaneously filed a state habeas petition with the initial brief alleging ineffective assistance of appellate counsel for failing to raise the judicial bias issue on direct appeal.

[2]In Zeigler, there was one statement by the trial judge that was not known by Defense Counsel at the close of trial. The trial judge supposedly made the following statement to the state attorney: "Bob, you get me one first degree murder conviction and I'll fry the son of a bitch." Id. at 539.

discovered evidence should be addressed in an application for a writ of error coram nobis, Id. at 540, this Court wrote:

> [I]f the statement was made, it was certainly within the knowledge of the trial court at the time of the trial and Zeigler would therefore be denied a writ of error coram nobis if we treated this appeal as such. This would have the unfortunate result of leaving an appellant with no remedy when there is possible misconduct or bias on the part of the trial judge relating to sentencing and discovered after trial. The law does not intend such unjust results, particularly in the case of a death-sentenced individual.

Id. at 540(emphasis added).

Mr. Schwab's case is also more akin to cases where a defendant enters a plea of guilty based on misrepresentations made by trial counsel. See Wilson v. State, 2000 WL 640572 (Fla. App. 2nd DCA 2000) (For Wilson's claim to be conclusively refuted by the record, the trial court would have had to inquire of Wilson during the plea colloquy whether any promises were made to him concerning the amount of time he would serve on his sentence); Cottle v. State, 733 So.2d 963 (Fla. 1999) (An inherent prejudice results from a defendant's inability, due to counsel's neglect, to make an informed decision whether to plea bargain, which exists independently of the objective viability of the actual offer.);and State v. Leroux, 689 So.2d 235 (Fla. 1997) (Misrepresentations by counsel as to the length of a sentence or eligibility for gain time can be the basis for postconviction relief in the form of leave to withdraw a guilty plea). In Zeigler, there was no claim that the

reason the issue was not raised at trial or on appeal was because his attorneys made misrepresentations. In the instant case, Mr. Schwab explicitly stated in his 3.850 motion, at Claim XI, that his attorneys were ineffective for failing to fully inform him that Judge Richardson had never had the experience of sentencing a defendant in a capital case (PC-R. 187-188). Furthermore, even in Zeigler, this Court allowed the newly discovered evidence to be addressed in a 3.850 motion (when an application for a writ of error coram nobis was more appropriate) to serve the ends of justice. Id. at 540.

While the facts of Zeigler are distinguishable from Mr. Schwab's case, Mr. Schwab is in precisely the same conundrum as was Mr. Zeigler. In Mr. Schwab's case, Appellee argues that the bias of Judge Richardson should have been raised on direct appeal (Answer Brief, page 10), yet in his Habeas Response he argues that the judicial bias could not have been raised on direct appeal because of trial counsel's failure to object (Response, page 4). To follow Appellee's reasoning would "have the unfortunate result of leaving an appellant with no remedy when there is possible misconduct or bias on the part of the trial judge...The law does not intend such unjust results, particularly in the case of a death-sentenced individual." Zeigler,120 452 So.2d at 540 (emphasis added). Further, in the instant case, it was appellant's counsel and the trial judge that caused the record on direct appeal

to be quiet an issue. The state specifically requested the court to inquire of appellant incamera. However, appellant's counsel objected and the trial court refused.

Finally, Appellee never addresses the main argument within Appellant's Initial Brief-that Judge Richardson had a duty to recuse himself- and that duty existed even in the absence of a motion. See Porter v. Singletary, 49 F.3d 1483 (11th Cir. 1995); Maharaj v. State, 684 So.2d 726 (Fla. 1996); Canon 3C(1) of the Florida Code of Judicial Conduct.

ARGUMENT II

THE LOWER COURT'S DENIAL OF APPELLANT'S POSTCONVICTION MOTION WAS ERRONEOUS WHERE MR. SCHWAB PRESENTED EVIDENCE THAT HE WAS DENIED A FAIR AND IMPARTIAL TRIAL DUE TO JUDICIAL BIAS PRIOR TO AND DURING HIS TRIAL IN VIOLATION OF HIS FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Because Judge Richardson failed to recuse himself from presiding over Mr. Schwab's trial, Mr. Schwab was denied the fundamental right to a fair trial by a fair and impartial trier of fact. On page 11 of Appellee's Brief, Appellee states, "When stripped of its pretensions, this claim is nothing more than a reargument of Claim I above. [T]his claim is procedurally barred, as the lower court found, because it could have been but was not raised on direct appeal from Schwab's conviction and sentence." While Argument II is, in fact, related to Argument I, it is not a reargument. While Argument I addressed the trial judge's duty to

recuse himself, Argument II claims that Mr. Schwab was denied a fair and impartial trial due to the bias of the trial judge. While the failure to afford Mr. Schwab a fair trial by a fair and impartial trier of fact could have been raised on direct appeal (because the assistant state attorney affidavits were part of the record), the issue regarding misrepresentations made to Mr.Schwab by trial counsel was not part of the record and could not have been a direct appeal issue.

Also on page 11, Appellee argues that an "adverse ruling does not establish bias on the part of the trial judge. See Patton v. State, 2000 WL 1424526, SC 89.669 (September 28, 2000)." Yet, the facts alleging judicial bias in Mr. Schwab's case are distinguishable from the facts in Patton. In Patton, the judicial bias issue was alleged in Patton's 3.850 motion, and the incidents of the alleged bias only involved adverse rulings of the trial and re-sentencing judge. Id. at 10. However, in Mr. Schwab's case, the factual basis alleging and proving judicial bias stems mainly from Judge Richardson's pretrial actions and comments substantiated by two assistant state attorney affidavits (R. 4208-4209). There is also a thread of bias that runs throughout Mr. Schwab's trial and sentencing that is evidenced by adverse rulings of Judge Richardson, e.g. failure to recuse himself from hearing a pretrial motion in limine alleging similar fact evidence when he knew this case would be proceeding non-jury (R. 4453-4454), but the main

claim of bias is rooted in Judge Richardson's pretrial words and actions and his failure to recuse himself upon his own motion. In Patton, this Court found the judicial bias issue was not supported by the record. Id. at 10. Yet in Mr. Schwab's case, the record clearly supports the claim of Judge Richardson's bias.

Again, Appellee never addresses the main argument within Argument II-that Mr. Schwab was denied his fundamental right to a fair trial by a fair and impartial trier of fact due to Judge Richardson's apparent and actual bias.

ARGUMENT III

MR. SCHWAB DID NOT KNOWINGLY, INTELLIGENTLY AND VOLUNTARILY WAIVE HIS RIGHT TO A JURY TRIAL, AND THE TRIAL COURT ERRED BY DENYING MR. SCHWAB A NEW TRIAL IN VIOLATION OF MR. SCHWAB'S FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

On page 12 of its Answer, Appellee quotes the trial court order denying R. 3.850 relief where the court stated: "Defendant was repeatedly cautioned about the possible ramifications of the decision to proceed with a guilt phase non-jury trial, and if necessary a penalty phase. These cautions came from both the judge and trial counsel." While Mr. Schwab was, in fact, informed of his right to a jury trial on several occasions, and while the judge went through a colloquy with Mr.Schwab on several occasions, these colloquies must be viewed along with the underlying misrepresentations that were made to Mr. Schwab by his trial

counsel. Trial counsel told Mr. Schwab that Judge Richardson had never sentenced anyone to death (PC-R. 24), when in fact, Judge Richardson had never had the opportunity to do so (PC-R.25). Mr. Schwab was under the impression that Judge Richardson had presided over cases where the State was seeking the death penalty but had never elected to impose death (PC-R.144). With this thought in mind, Mr. Schwab answered the questions in the colloquy. Further along on page 12 and 13, Appellee states that "[t]he collateral proceeding trial court's order is supported by the evidence, is not clearly erroneous, and should be affirmed in all respects." However, the collateral proceeding trial court erred by failing to consider the misrepresentations that were made to Mr. Schwab regarding Judge Richardson's sentencing habits. This evidence was established through testimony at the evidentiary hearing (PC-R.9-50; 76-103; 142-160). Therefore, the trial court's order is not supported by the evidence, is erroneous, and should be reversed.

The postconviction record is telling and reveals that Mr. Schwab wanted to preserve all issues and maintain all of his rights. The Friday before trial, Mr. Rhoden and Mr. Onek wanted Mr. Schwab to plead guilty and proceed to the penalty phase (PC-R.79). On the day of the trial Mr. Schwab indicated that he did not want to plead guilty because Mr. Schwab wanted to preserve any issues that he might have (PC-R. 80). This fact illustrates that Mr. Schwab wanted to exercise all of his constitutional rights.

Had Mr. Schwab been aware of all of the facts regarding Judge Richardson, he never would have waived jury trial (PC-R. 145-147).

On page 13 of Appellee's brief, Appellee asserts that "Schwab testified at the evidentiary hearing that he told the truth when he stated to Judge Richardson that he understood his right to a jury trial, but wanted to proceed to a non-jury trial." Yet, this is a mischaracterization of Mr. Schwab's statements at the evidentiary hearing. At the evidentiary hearing, Mr. Schwab testified during Mr. Nunnelly's cross examination of him about his waiver of jury trial and the colloquies regarding the waiver. While Mr. Schwab said that during the colloquies he testified truthfully, he, in fact, said that his answers were truthful but uninformed answers (PC-R. 149-155).

Because Mr. Schwab's apparent waiver of jury trial was a product of the misrepresentations made to him by his trial attorney, his waiver was not knowingly, intelligently, or voluntarily waived. This Court should reverse the trial court's order and remand for a new trial.

ARGUMENT IV

THE LOWER COURT ERRED IN DENYING RELIEF ON MR. SCHWAB'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS AT GUILT PHASE IN VIOLATION OF HIS FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A. DEFENSE COUNSEL FAILED TO INVESTIGATE WAIVER OF JURY TRIAL AND MADE MISREPRESENTATIONS TO MR. SCHWAB REGARDING JUDGE RICHARDSON.

On page 14 of Appellee's Answer, Appellee quotes the collateral proceeding trial court where the court stated that "[t]his claim was refuted by every witness called to testify at Defendant's hearing on this motion." This particular statement shows that the collateral proceeding trial court failed to consider all of the testimony. During the evidentiary hearing the testimony established the following:

1. After only fifteen days on the case, James Russo, Public Defender of the 18th Judicial Circuit, filed an Affidavit and Request for Non-Jury Trial on behalf of Mr. Schwab (R. 4197-4198). Randy Moore, Assistant Public Defender, testified that when he was assigned to the case, he had no capital experience, he couldn't recall receiving any discovery, he hadn't utilized any investigative services, hadn't contacted any experts, could not recall reviewing any evidence, hadn't talked to any witnesses, yet he still proceeded to obtain a waiver of jury trial from Mr. Schwab (PC-R. 129-136). In fact, when Mr. Moore went to speak to Mr. Schwab regarding waiver of jury trial, Mr. Moore already had a written waiver of jury trial form in hand (PC-R. 135-136). Mr. Moore's decision was based solely on a booking report and news articles. Obviously he believed these reports without any investigation into the case.

2. Maureen Alva, then the Chief Assistant Public Defendant and the most experienced attorney in the office, advised that a

jury trial <u>not</u> be waived, which was ignored (PC-R. 122).

3. Mr. Onek admitted that he didn't do any research as to who was more likely to sentence to death -- a judge or a jury (PC-R. 96).

4. Mr. Onek testified that this case was his first capital case that went to trial (PC-R. 11); the publicity of the case was of <u>no</u> consideration to him in seeking a non-jury trial (PC-R. 15); that because the case was proceeding to a non-jury trial the issue of change of venue was not discussed (PC-R. 17,24); he did not make any specific request of Mr. Schwab's jail records (PC-R. 19), which would have indicated that Mr. Schwab was on medication; that he knew that Judge Richardson had never presided over a death case before (PC-R. 25-26); that he would not refute Mr. Schwab's testimony that he told Mr. Schwab that Judge Richardson had never sentenced anyone to death before (PC-R. 27); that he knew about the affidavits asserting that Judge Richardson had "made a gesture of pulling a trigger on a gun or firing a gun," regarding Mr. Schwab (PC-R. 27); that regardless of the affidavits "we wanted Judge Richardson to be the trier of fact" (PC-R. 31).

While the decision to waive a jury trial was Mr. Schwab's alone to make (with the advice of his trial counsel), his trial counsel's advice was based on misinformation and a lack of preparation.

On page 14 of Appellee's Answer, Appellee states that trial

counsel testified "that he made no misrepresentations to Schwab in order to convince him to waive a jury." Yet, that is not an accurate summary of the testimony from the evidentiary hearing. At the hearing the following occurred:

DIRECT EXAM OF MR. ONEK BY MR. REITER:

> Q. Do you have any recollections of discussing Judge Richardson with Mr. Schwab?
>
> A. Yes.
>
> Q. Did you ever tell him that Judge Richardson had never sentenced anyone to death?
>
> A. I believe we-that would have been part of our conversation, yes.
>
> Q. At that time, do you have knowledge of whether or not Judge Richardson had ever had a capital case that went to a jury trial where someone was found guilty and they went into the penalty phase?
>
> A. It's-I reviewed your motion and I don't know if my memory is based on your motion or not, but my memory-from-my memory as to what I understood at that time was that Judge Richardson was an unknown entity on the bench.
>
> Q. Well isn't that then a misrepresentation to Mr. Schwab in the fact that if he-isn't that the same as saying that you've never sentenced anybody to death, when the fact is that you have no knowledge of the fact that the judge had never had that trial, and to tell a Defendant that the judge had never sentenced anybody to death is a misrepresentation?
>
> MR. NUNNELLEY:

Objection. It's compound and also argumentative, Your Honor.

THE COURT:
Objection sustained. Rephrase, please.

BY MR. REITER:

Q. Would you consider telling someone that a judge has never sentenced anybody to death, knowing yourself that the judge had never had a case to do so, is a misrepresentation?

A. I don't think that-I hope I didn't misunderstand your initial question. My initial response was that part of our conversation about Judge Richardson was what we knew about Judge Richardson. I don't think I was telling you that I told Mark he had never sentenced anyone to death, and that's what we said about him. I told Mark what we did know about the other judges in the circuit. And what we knew about Judge Richardson, although limited in scope, was favorable comparative to the other judges who were on the criminal bench at the time. So I don't know how else to answer that. I don't think I specifically said, "Mark, he's never sentenced anyone to death," and left out that, "but he's never had a chance."

Q. Do you have a specific recollection of not having said that or having said that?

A. What we knew about Judge Richardson was that he was new to the criminal bench at that time. He was an extremely intelligent man. It was our understanding that he was fairly-

Q. I appreciate that.

A. Well, I'm-so-

Q. I'm asking if you have a specific recollection as to whether or not you

told Mark Schwab that the judge had never sentenced anybody to death.

A. I don't remember ever saying that.

Q. Okay. If Mr. Schwab were to take the stand and testify that you told him that, would you refute that?

A. I could not say that that would be untrue either. I'm just saying I don't remember saying that.

(PC-R. 24-27).

Whether the misrepresentations were intentional or negligent is up for debate; however, it is clear that the misrepresentations misled Mr. Schwab into thinking that Judge Richardson had tried capital cases where death was possible, but where Judge Richardson had elected not to impose death (PC-R. 144).

On page 15 of Appellee's Answer, Appellee states "counsel clearly had a reasonable basis for recommending that Schwab waive a jury trial, and even the one lawyer witness who disagreed with that strategy testified that she could see the logic of waiving the jury." However, this argument fails to take into consideration the misinformation under which Mr. Schwab was operating-that Judge Richardson had never sentenced anyone to death.

Trial counsel had a duty to investigate and communicate to Mr. Schwab all options and consequences of waiving a jury trial. Trial counsel also had a duty to make sure that Mr. Schwab understood the facts regarding Judge Richardson's sentencing habits and the options and consequences of waiving jury trial. Failure to do this

denied Mr. Schwab effective assistance of counsel and denied him his fundamental right to a jury trial. Because of this ineffectiveness and because Mr. Schwab was denied his constitutional rights, Mr. Schwab was prejudiced.

B. DEFENSE COUNSEL FAILED TO MOVE FOR CHANGE OF VENUE.

On page 16 of Appellee's Answer, Appellee states the following:

> ...Schwab waived the right to a jury trial. He has not, however, explained how a motion for change of venue would have been appropriate given that waiver, nor has he alleged either deficient performance or prejudice as a result of counsel's 'failure' to seek a change of venue for a non-jury trial.

While Mr. Schwab waived his right to a jury trial, his waiver was not knowingly, intelligently, nor voluntarily made. Mr. Schwab gave up his right to a jury trial based on his trial counsel's misrepresentations to him that Judge Richardson had never sentenced anyone to death (PC-R. 144-146), when in fact Judge Richardson had never had the opportunity to do so (PC-R.79). By waiving the right to a jury trial, it follows that requesting a motion for change of venue is waived also. However, it also follows that if the waiver of jury trial was not knowingly, intelligently, nor voluntarily made, then the waiver a request for change of venue is also not knowing, intelligent or voluntary.

Mr. Schwab's trial attorneys had a duty to investigate and to inform Mr. Schwab of the option of a request for change of venue.

The adversarial testing process generally will not function properly unless defense counsel has done some investigation into the prosecution's case and into various defense strategies. Kimmelman v. Morrison, 477 U.S. 365 (1986) Such an investigation includes, at a minimum, an independent examination of the relevant facts, circumstances, pleadings and laws. Mulligan v. Kemp, 771 F.2d 1436, 1442 (11th Cir. 1985)(quoting Rummel v. Estelle, 590 F.2d 103, 104 (5th Cir. 1979); see also Nealy v. Cabana, 764 F.2d 1173, 1178 (5th Cir. 1985)(counsel did not pursue a strategy, but "simply failed to make the effort to investigate").

Counsel's failure to investigate or even consider the potential bias of Judge Richardson and the ability to move to change venue in order to voir dire a jury in another location denied Mr. Schwab effective assistance of counsel and prejudiced the outcome of his trial.

C. DEFENSE COUNSEL MADE MISREPRESENTATIONS TO MR. SCHWAB, THEREBY PREVENTING HIM FROM SEEKING TO RECUSE JUDGE RICHARDSON.

On page 18 Appellee states the following:

> Moreover, Schwab was questioned under oath as to whether he desired to seek Judge Richardson's recusal. He stated, unequivocally, that he was aware of the contents of the "state attorney affidavits", that he was aware of the option of seeking Judge Richardson's recusal, that he did not desire to do so, and that he still believed that a non-jury trial was in his best interest. (R1477 et seq). At the evidentiary hearing, Schwab testified that he understood that a motion to disqualify the judge was

> available, but he did not want to file one. (R.148;150). Because of that testimony, it is clear that this claim has no basis in fact.

Yet, during this same testimony, Mr. Schwab also explained that his answers were truthful, yet uninformed (PC-R. 151, 153-154). During the colloquy with the trial judge, Mr Schwab was under the impression that Judge Richardson had presided over death cases, but had never sentenced anyone to death (PC-R. 144). His trial attorneys had told him that Judge Richardson had never sentenced anyone to death (PC-R.144-145). These misrepresentations that trial counsel made to Mr. Schwab prevented him from seeking Judge Richardson's removal from the case (PC-R.145). Not only were Mr. Schwab's attorneys ineffective for misrepresenting Judge Richardson's sentencing record, they were also ineffective for failing to move for his recusal.

D. DEFENSE COUNSEL FAILED TO ENSURE THAT A RELIABLE TRANSCRIPT OF MR. SCHWAB'S PRETRIAL PROCEEDINGS AND CAPITAL TRIAL WAS PREPARED AND FAILED TO DESIGNATE THAT ALL PROCEEDINGS BE TRANSCRIBED FOR APPELLATE REVIEW.

On page 19 Appellee claims that "Schwab has not demonstrated any deficiency on the part of trial counsel with respect to the contents of the record on appeal, nor has he demonstrated (or attempted to demonstrate) how he was prejudiced."

While the collateral proceeding trial judge and Appellee indicated that the July 3, 1991 hearing transcript regarding the judicial bias claim were a part of the trial court file (Answer

Brief, page 18), the transcript was not included by trial counsel in his designation to the court reporter (R. 4682-4685). Also not included were the "State's Questions for In Camera Inquiry." In fact, post-conviction counsel had to move to supplement the record on appeal with these two items, and the record was, in fact, supplemented by Florida Supreme Court Order dated August 21, 2000.

Appellate counsel's performance was, in fact, substandard as he failed to ensure a complete record for review on direct appeal by failing to include these two items.

Florida recognizes the right of a defendant who has been convicted of first degree murder and sentenced to death to a complete review of his conviction and sentence. Delap v. State, 350 So.2d 462 (Fla. 1977). In addition, Article V, Section 3(b)(1) of the Florida Constitution, Section 921.141 of the Florida Statutes, and Rule 9.030(a)(1)(A)(i) also ensure this right. In order to ensure the defendant's right to a complete review, a complete and reliable record is required. Florida Rule of Appellate Procedure 9.140(b)(6)(A) requires, in death penalty cases, that "...the chief justice will direct the appropriate chief judge of the circuit court to monitor the preparation of the complete record for timely filing in the supreme court." The due process constitutional right to receive trial transcripts for use at the appellate level was acknowledged by the United States Supreme Court in Griffin v. Illinois, 351 U.S. 212 (1956). An

accurate trial transcript is crucial for adequate appellate review. Id. at 219.

However, in Mr. Schwab's direct appeal to the Florida Supreme Court of his conviction and sentence of death, he was denied his right to a complete review based on a complete and reliable record. His trial counsel failed to ensure that the Florida Supreme Court had a complete and reliable record. Mr. Schwab was prejudiced by these omissions because he was denied his right to a complete review of his conviction and sentence. In addition, two omissions in the record relate to the state habeas claim of ineffective assistance of appellate counsel for failure to raise the issue of judicial bias on direct appeal.

ARGUMENT V

THE LOWER COURT'S RULING FOLLOWING THE POSTCONVICTION EVIDENTIARY HEARING WAS ERRONEOUS WHERE MR. SCHWAB PRESENTED EVIDENCE THAT HE WAS DENIED EFFECTIVE ASSISTANCE AT THE PENALTY PHASE OF HIS TRIAL IN VIOLATION OF HIS FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION.

A. DEFENSE COUNSEL PRESENTED MR. SCHWAB'S FATHER AS A MITIGATION WITNESS KNOWING THAT MR. SCHWAB'S FATHER WOULD DENY CHILDHOOD ABUSE.

Appellee on page 21 of Appellee's Answer responds that trial counsel presented "both of Schwab's parents because he felt the court needed the full picture of Schwab's background. (R96). That is a reasonable strategic decision, and, as such, is not subject to second-guessing in collateral attack." Mr. Onek knew that the

testimony would contradict the mother's (PC-R. 94-96). In particular, Mr. Onek knew that Mr. Schwab's mother would testify that there were physical altercations between her and her husband, that her husband would hit her and push her to the ground and that on one occasion he gave her a black eye (R. 3111). Mr. Schwab's mother also testified that Mr. Schwab's father would "force Mark down on the floor and strip him from the waist down and then laugh and say that he was just doing it as a joke" (R. 3107-3113). Yet, Mr. Onek also presented Mr. Schwab's father who contradicted his ex-wife's testimony by saying that he never struck his wife, he only "restrained her" (R. 3031). This type of contradictory testimony cannot be characterized as "strategic," especially when Mr. Schwab's father (who abused Mr. Schwab and Mr. Schwab's mother) would have a motive to lie.

Further along on page 21 Appellee states that "this matter presented a square credibility choice for the finder of fact-the fact that credibility choice was resolved adversely to Schwab does not create a basis for relief." However, trial counsel, by knowingly presenting mutually exclusive testimony, caused the trial court to have to make that "credibility choice." Such action was ineffective assistance of counsel and prejudiced Mr. Schwab's case.

B. DEFENSE COUNSEL FAILED TO INVESTIGATE THE WAIVER OF THE PENALTY PHASE JURY.

On page 22 Appellee asserts that "the waiver of the penalty phase jury, while ultimately Schwab's decision, was a valid (and

phase jury, while ultimately Schwab's decision, was a valid (and well-considered) trial strategy that was not unreasonable."

Trial counsel's decision should not be characterized as "well-considered" especially under the circumstances in which it was waived. The record supports Mr. Schwab's claim that trial counsel failed to investigate and adequately advise Mr. Schwab regarding waiver of jury trial at the penalty phase. The Brevard County Public Defender's Office was first assigned to the case on April 30, 1991 (R. 4193-4194). After only fifteen days on the case, James Russo, Public Defender of the 18th Judicial Circuit, filed an Affidavit and Request for Non-Jury Trial on behalf of Mr. Schwab (R. 4197-4198). During the evidentiary hearing Randy Moore, Assistant Public Defender, testified that he was initially assigned to Mr. Schwab's case (PC-R. 130). When he was assigned to the case, he had no capital experience, he couldn't recall receiving any discovery, he hadn't utilized any investigative services, hadn't contacted any experts, could not recall reviewing any evidence, hadn't talked to any witnesses, but he proceeded to obtain a waiver of jury trial from Mr. Schwab (PC-R. 129-136). In fact, when Mr. Moore went to speak to Mr. Schwab regarding waiver of jury trial, Mr. Moore already had a written waiver of jury trial form in hand (PC-R. 135-136). When Mr. Onek was assigned to the case, he testified that he had the authority to ask for a jury trial anew (PC-R. 18).

Judge Richardson try the case without a jury and to conduct the penalty phase without a jury, even though trial counsel knew nothing of Judge Richardson. Mr. Onek testified that "Judge Richardson was an unknown entity on the bench," (PC-R. 25) that he was new to the bench, and they did not know how Judge Richardson "would sentence someone in a death case."(PC-R. 86). Had Mr. Schwab's trial attorneys investigated Judge Richardson, they also would have found that Judge Richardson had <u>never</u> handled a case where the <u>jury had been waived in a felony case</u> (PC-R. 62)(emphasis added). Further, Mr. Onek agreed at the evidentiary hearing that with a jury trial you get "two bites at the apple" in that you would have a jury recommendation followed by the judge's sentence (PC-R. 102-103).

Waiver of the penalty phase jury under the above circumstances violated Mr. Schwab's right to effective assistance of counsel and had a prejudicial effect on Mr. Schwab's case.

C. DEFENSE COUNSEL FAILED TO NEUTRALIZE THE STATE'S AGGRAVATING CIRCUMSTANCES BY FAILING TO INVESTIGATE MR. SCHWAB'S PRIOR CONVICTION AND BY STIPULATING TO TWO AGGRAVATING CIRCUMSTANCES.

On page 22 Appellee addresses Mr. Schwab's claim regarding counsel's stipulation to an aggravator and states, "[T]he most that demonstrates is a recognition of the obvious, given that Schwab had already been convicted. (R2079-80)." However, trial counsel, at the very least, could have held the State to its burden of proving each aggravator beyond a reasonable doubt. <u>See</u> <u>Nixon v. Singletary</u>, 758

So.2d 618, 625 (Fla. 2000). This should have been done in Mr. Schwab's case.

On page 23 Appellee responds to the State's use of non-statutory aggravation with the following:

> To the extent that Schwab complains that Dr. Samek's testimony allowed the State to present non-statutory aggravation, that claim has no legal basis. The fact that Schwab re-offended shortly after being released from prison is clearly relevant, is not "non-statutory aggravation", and is not a basis for relief. (R1123).

Dr. Samek was presented by the prosecution as their mental health expert and testified as to Mr. Schwab's lack of remorse for the crime (R. 3374-3375). He noted that while Mr. Schwab was in prison he showed tremendous remorse for the prior offense, but that this didn't stop him once he got out (R. 3374-3375). This Court has held that lack of remorse is a nonstatory aggravating circumstance and cannot be considered in a capital sentencing. See Colina v. State, 570 So.2d 929 (Fla. 1990); Trawick v. State, 473 So.2d 1235 (Fla. 1985); and Pope v. State, 441 So.2d 1073 (Fla. 1983). Counsel for Mr. Schwab failed to object to this characterization and so effectively allowed the state to bolster their case with a non-statutory aggravating circumstance.

D. DEFENSE COUNSEL FAILED TO PROVIDE THE ASSISTANCE OF A COMPETENT MENTAL HEALTH EXPERT.

The collateral proceeding trial court denied relief based on this claim because Mr. Schwab presented no evidence to support this

this claim because Mr. Schwab presented no evidence to support this claim (PC-R 1257). Appellee responds to this denial in his Answer on page 23 by stating, "While it is true that the court denied Schwab's last-minute motion for a continuance, it is also true that Schwab had known for months when he would be expected to go forward with expert testimony. (R1243)."

As was discussed in Mr. Schwab's initial brief, Dr. Faye Sultan was retained to examine Mr. Schwab. After her examination, Dr. Sultan recommended that Mr. Schwab be examined by Dr. Berlin because of his greater expertise (PC-R. 1239). Dr. Berlin, however, refused to participate without adequate time to prepare (PC-R. 1240). It was after this recommendation that post conviction counsel filed a motion to continue the evidentiary hearing (PC-R. 1239). Judge Holcomb denied the motion without a hearing (PC-R. 1243). The trial court's denial of this motion and this claim was error.

ARGUMENTS VI - XI

In reply to Appellee's Answer Brief, Appellant relies on the argument set forth in Arguments VI - XI in his initial Brief appealing denial of his Rule 3.850 Motion.

CONCLUSION AND RELIEF SOUGHT

Based on the forgoing, the lower court improperly denied Mr. Schwab's Rule 3.850 relief. This Court should order that his conviction and sentence be vacated and remand the case for a new

trial, new evidentiary hearing, or for such relief as the Court deems proper.

CERTIFICATE OF FONT SIZE AND SERVICE

I HEREBY CERTIFY that a true copy of the foregoing **REPLY BRIEF OF APPELLANT, which has been typed in Courier, Font Size 12,** has been furnished by United States Mail, first-class postage prepaid, to all counsel of record on January 5th, 2001.

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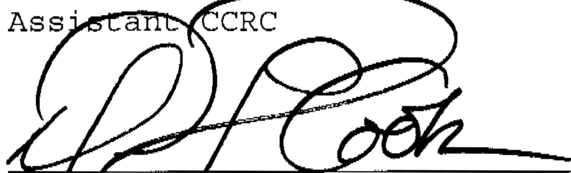

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