

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC00-1629

MARK DEAN SCHWAB,

Petitioner,

v.

MICHAEL W. MOORE,

Secretary, Florida Department of Corrections,

Respondent.

REPLY TO STATE'S RESPONSE TO
PETITION FOR WRIT OF HABEAS CORPUS

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CLAIM I

APPELLATE COUNSEL FAILED TO RAISE ON DIRECT APPEAL THE FUNDAMENTAL ERROR CAUSED BY THE BIAS OF THE TRIAL JUDGE, BY THE TRIAL JUDGE'S FAILURE TO DISQUALIFY HIMSELF FROM PRESIDING OVER THE CASE, AND BY TRIAL COUNSEL'S FAILURE TO MOVE TO RECUSE THE TRIAL JUDGE. SUCH OMISSIONS DENIED MR. SCHWAB OF HIS FUNDAMENTAL RIGHT TO A FAIR TRIAL IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION.

In its response to Claim I of Mr. Schwab's Petition for Writ of Habeas Corpus, Respondent states on page 4 that this claim is not cognizable in a state habeas petition "because there is no adverse ruling in the record that appellate counsel could have appealed to this Court." However, appellate counsel could have raised this claim on direct appeal even in the absence of an adverse ruling because the judicial bias that permeated Mr. Schwab's trial constituted fundamental error. "Only when error is fundamental can the error be raised on appeal in the absence of a contemporaneous objection." J.B. v. State, 705 So. 2d 1376 at 1378 (Fla. 1998).

Claim I of Mr. Schwab's Petition for Writ of Habeas Corpus has several components. First and foremost, Mr. Schwab was denied his fundamental constitutional right to a fair trial by a fair and impartial trier of fact due to the trial judge's actual bias and appearance of bias against Mr. Schwab. A fair hearing before an impartial tribunal is a basic requirement of due process. In re

Murchison, 349 U.S. 133 (1955). "Every litigant is entitled to nothing less than the cold neutrality of an impartial judge." State ex. rel. Mickle v. Rowe, 100 Fla. 1382, 1385, 131 So. 331, 332 (Fla. 1930). The bias of the trial judge was evidenced by two affidavits filed by Assistant State Attorneys Robin Lemonidis and John McBain (R. 4208- 4209). Prior to trial and prior to Judge Richardson being assigned this case, Ms. Lemonidis asked Judge Richardson if he would like a case like this (R. 4208-4209). At first, Judge Richardson said, "Not me." (R.4208-4209). He then said, "[S]ure, I'd like that case." (R.4208-4209). Judge Richardson then made his hand into an imaginary pistol and shook it several times at the two attorneys (R. 4208-4209).

The words and actions by the trial judge clearly indicated that he had prejudged the case. At first he didn't want the case-possibly due to the details of the crime. Robin Lemonidis had just read the details of the crime from the newspaper that identified Mark Schwab as the kidnapper and possible murderer (R.4208-4209). She even characterized the details of the crime as "grisly" (R. 4208-4209). However, after thinking about it, Judge Richardson decided that "[S]ure, I'd like that case." (R. 4208-4209). By making his hand into a gun and firing it, Judge Richardson indicated that he would administer the appropriate sentence. No jury trial. No due process. Just death.

This actual bias and appearance of bias could have been extinguished (and Mr. Schwab could have received a fair trial by a fair and impartial trier of fact) had one of two actions occurred.

First, defense counsel could have moved to recuse Judge Richardson. There were two legally sufficient affidavits that had been filed, and there was a sufficient basis under the rules to have Judge Richardson disqualified.

At the time of Mr. Schwab's trial, four rules addressed the disqualification of a judge in Florida: the Code of Judicial Conduct Canon 3-C; Section 38.10, Fla. Stat.(1981); Florida Rule of Criminal Procedure 3.230(now repealed and replaced with Rule 2.160, Florida Rules of Judicial Administration); and Florida Rule of Civil Procedure 1.432 (also now repealed and replaced with Rule 2.160 of the Florida Rules of Judicial Administration).

A party may present a motion to disqualify at any point in the proceedings as long as there remains some action for the judge to take. "If the motion is legally sufficient the judge shall proceed no further." Lake v. Edwards, 501 So. 2d 759, 760 (Fla. 5th DCA 1987), quoting Fla. R. Civ. P. 1.432(d)(emphasis in original). Fla. R. Crim. P. 3.230(d) contains virtually identical language to Fla. R. Civ. P. 1.432(d).

The criminal rule sets forth five basic requirements of a motion to disqualify: (1) a verified statement of the specific facts which indicate a bias or prejudice requiring

disqualification; (2) timely application; (3) two affidavits; (4) a certificate of good faith by counsel; and (5) a determination by the court as to whether the motion is legally sufficient [on its face] without passing on the truth of the allegations. Livingston v. State, 441 So. 2d 1083, 1086 (Fla. 1983). However, technical requirements need not be strictly applied. Livingston, 441 So. 2d at 1087. The Florida Supreme Court has held that where a movant meets these requirements and demonstrates, on the face of the motion, a basis for relief, a judge who is presented with a motion for disqualification "shall not pass on the truth of the facts alleged nor adjudicate the question of disqualification." Suarez v. Dugger, 527 So. 2d 190, 191 (Fla. 1988).

To establish a basis for relief a movant:

...need only show 'a well grounded fear that he will not receive a fair trial at the hands of the judge. It is not a question of how the judge feels; it is a question of what feeling resides in the affiant's mind and the basis for such feeling.' State ex rel. Brown v. Dewell, 131 Fla. 566, 573, 179 So. 695, 697- 98 (1938). The question of disqualification focuses on those matters from which a litigant may reasonably question a judge's impartiality rather than the judge's perception of his ability to act impartially. Livingston, 441 So. 2d at 1086 (emphasis added).

Defense counsel could easily have fulfilled the Livingston criteria. Two witnesses affirmed that they had observed Judge Richardson's graphic gesture. Trial counsel's failure to move to recuse Judge Richardson was the type of deficient performance

contemplated in Strickland, and such deficient performance prejudiced Mr. Schwab by denying him of his fundamental right to a jury trial by a fair and impartial trier of fact.

The second action that could have occurred in order to ensure that Mr. Schwab received a fair trial by a fair and impartial trier of fact was that Judge Richardson could have (on his own motion) recused himself from presiding over Mr. Schwab's non-jury trial. Moreover, Judge Richardson should have done so to avoid the resulting appearance of impropriety and the resulting violation of Canon 3C (now Canon 3E(1)). See Porter v. Singletary, 49 F.3d 1483, 1489 (11th Cir. 1995); Maharaj v. State, 684 So.2d 726 (Fla. 1996).

In Peek v. State, 488 So.2d (Fla. 1986), this Court commented on the duty of judges to recuse themselves "for future guidance of the bench." Id. at 56. This Court stated:

Trial judges not only must be impartial in their own minds, but also must convey the image of impartiality to the parties and the public. Judges must make sure that their statements, both on and off the bench, are proper and do not convey an image of prejudice or bias to any person or any segment of the community. This type of conduct is required of our judiciary because 'every litigant...is entitled to nothing less than the cold neutrality of an impartial judge.' State ex. rel. Mickle v. Rowe, 100 Fla. 1382, 1385 (Fla. 1930)(citations omitted). We write about this incident to emphasize the need for all judges to be constantly vigilant about their comments and demeanor both inside and outside the courtroom to assure that their impartiality may not 'reasonably be questioned.' Code of Judicial Conduct, Canon 3 C(1).

Id. at 56.

Because trial counsel was ineffective, they failed to move for recusal of Judge Richardson.¹ Hence, there is no adverse ruling in the record. However, the trial judge should have recused himself from presiding over Mr. Schwab's non-jury trial even in the absence of a motion for disqualification. See Maharaj v. State, 684 So. 2d 726 (Fla. 1996). "Justice must satisfy the appearance of justice," Offutt v. United States, 348 U.S. 11 at 14 (1954)(citations omitted). This "stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties." In re Murchison, 349 U.S. 133 at 136 (1955)(citations omitted).

Respondent also argues at page 4 of its Response that the waiver of jury trial and not moving for Judge Richardson's recusal were strategic choices. This was not strategy. Strategy does not come into play when one looks at the judge's duty to recuse himself. The Florida Judicial Canon of Ethics require judges to disqualify themselves "in a proceeding in which his impartiality might reasonably be questioned...." Florida Code of Judicial Conduct, Canon 3C(1).²

Respondent also asserts on page 5 of his response that Mr. Schwab's Petition "amounts to nothing more than Schwab's after-the

¹ Argument IV. C. of Mr. Schwab's Initial Brief appealing the denial of the 3.850 addresses trial counsel's ineffectiveness for failing to move to recuse Judge Richardson.

² Now Canon 3E(1).

-fact dissatisfaction with a decision that he made. Schwab was well aware of all of the facts now alleged to support Judge Richardson's recusal...."³

This argument also fails to address the judge's duty under the Judicial Canon of Ethics. Even if Mr. Schwab had been adequately informed of all of the facts (which he was not), even if Mr. Schwab had been informed that Judge Richardson had never had the opportunity to sentence anyone to death(which he was not), and even if Mr. Schwab had made a knowing, intelligent and voluntary waiver of jury trial(which he did not), Judge Richardson still had a solemn duty to recuse himself based on the state attorney's affidavits in order to avoid even the appearance of impropriety.

Furthermore, because misrepresentations were made to Mr. Schwab regarding Judge Richardson, Mr. Schwab's waiver of jury trial was not knowingly, intelligently, and voluntarily made. Prior to waiving jury trial, Mr. Schwab was told by his trial counsel that Judge Richardson had never sentenced anyone to death (PC-R. 24-25), yet Mr. Schwab was never told that Judge Richardson had never had the opportunity to do so (PC-R. 79). Had Mr. Schwab been aware of all of the facts, he would have asked for recusal of Judge Richardson (PC-R.145-146).

³ Mr. Schwab's lack of waiver have been more fully addressed in Argument III of the Initial Brief and Reply Brief.

Appellate counsel could have raised the denial of Mr. Schwab's constitutional right to have a fair trial by a fair and impartial trier of fact on direct appeal. The trial judge's bias and predetermination of the issues, the trial judge's failure to recuse himself, and trial counsel's failure to move to recuse Judge Richardson constituted fundamental error. "If an impropriety at trial rises to the level of a due process violation of a fundamental constitutional right, it may be considered fundamental error which can be raised on appeal in spite of a failure to object at trial." Hargrave v. State, 427 So. 2d 713 at 715 (Fla. 1983). The right to a fair trial by a fair and impartial trier of fact is a fundamental constitutional right assured by the Due Process Clause of Fourteenth Amendment. The failure of Judge Richardson to recuse himself and the failure of trial counsel to move for his recusal rose to the level of a due process violation. Therefore, the failure to raise this issue on direct appeal constituted ineffective assistance of appellate counsel which is cognizable in a state habeas petition. See Thompson v. State, 759 So. 2d 650, 660 (Fla. 2000); Teffeteller v. Dugger, 734 So. 2d 1009, 1026 (Fla. 1999).

Furthermore, even if the error had not made a difference in the outcome of the trial, such an error constitutes a structural error as opposed to a trial error. As a structural error, the bias of the trial judge is not subject to harmless error analysis.

"[T]here are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." Chapman v. California, 386 U.S. 18 at 23, 87 S.Ct. 824 (1967). In Arizona v. Fulminante, 499 U. S. 279, 310, 111 S.Ct. 1246, 113 L.Ed. 2d 302 (1991), the United States Supreme Court categorized the deprivation of the right to counsel, See Gideon v. Wainwright, 372 U.S. 335 (1963), and a partial judge presiding over a trial, See Tumey v. Ohio, 273 U.S. 510 (1927) as structural errors. The Supreme Court stated in Fulminante:

These are structural defects in the constitution of the trial mechanism, which defy analysis by 'harmless error' standards. The entire conduct of the trial from beginning to end is obviously affected by the absence of counsel for a criminal defendant, just as it is by the presence on the bench of a judge who is not impartial.

* * * *

Each of these constitutional deprivations is a similar structural defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself.

Id. at 309-310 (Emphasis added).

Because the actual bias and the appearance of bias of the trial judge rose to the level of a Due Process violation, this error constituted fundamental error. As such, appellate counsel could have and should have raised this issue on direct appeal, even in the absence of a contemporaneous trial objection. Failure to do so constituted ineffective assistance of appellate counsel.

Moreover, because the bias of the trial judge constituted structural error, it is not subject to harmless error analysis. This Court should grant Mr. Schwab habeas relief and remand the case to the trial court for a new trial before a fair and impartial trier of fact.

CLAIM II

MR. SCHWAB WAS DENIED A PROPER DIRECT APPEAL FROM HIS JUDGMENT AND CONVICTION AND A PROPER APPEAL FROM HIS SENTENCE OF DEATH IN VIOLATION OF HIS FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION DUE TO OMISSIONS IN THE RECORD ON APPEAL AND BY APPELLATE COUNSEL FAILING TO ENSURE A COMPLETE RECORD ON APPEAL.

Respondent, on page 7 of its Response, quotes the trial court's order denying Mr. Schwab's 3.850 motion where the trial court writes:

There is no indication the record is incomplete, inaccurate or unreliable. Nor has Defendant presented any evidence to that effect. Next, Defendant's (sic) claims grounds for relief regarding possible prejudice or bias on the part of the trial judge is not included in the record. This claim is simply untrue, as the complete transcript is included in the official court file.

While the trial judge and Respondent indicate that the July 3, 1991 hearing transcript regarding the judicial bias claim were a part of the trial court file, that transcript was not included by appellate counsel in the record on appeal before the Florida Supreme Court. Also not included in the record on appeal 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 supplemented by Florida Supreme Court Order dated August 21, 2000.

Respondent also asserts on page 7 that "Schwab has not demonstrated how appellate counsel's performance was sub-standard with regard to any of these omissions, nor has he alleged that he was prejudiced...." 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. The Sixth Amendment also mandates a complete transcript. In Hardy v. United States, 375 U.S. 277 (1964), Justice Goldberg emphasized the need for a complete record and for appellate counsel to not limit themselves to the designated portions. In his concurring opinion he wrote:

It cannot seriously be suggested that a retained and experienced appellate lawyer would limit himself to the portion of the transcript designated by his client or even by the trial attorney, especially where the Courts of Appeals may, and not infrequently do, reverse convictions for "plain errors" not raised at trial.

Id. at 287.

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 appellate counsel failed to ensure that the Florida Supreme Court had a complete and reliable record and instead limited himself to portions designated by trial counsel. Had Mr. Schwab's appellate attorney read only those portions that trial counsel designated, he would have found the affidavits filed by two assistant state attorneys which would have indicated bias on the part of the trial judge. These affidavits should have indicated that further investigation was necessary. Had further investigation been completed by appellate counsel, a hearing held

on July 3, 1991 would have been discovered. Had appellate counsel read the transcript from the July 3, 1991 hearing, the document entitled "State's Questions for In Camera Inquiry" would have been discovered. Appellate counsel should have ensured that Mr. Schwab's direct appeal was based on a complete and reliable record and should have moved to supplement the record with the missing portions.

Mr. Schwab was prejudiced by these omissions because he was denied his right to a complete review of his conviction and sentence. In addition, these omissions in the record relate to the previous claim of ineffective assistance of appellate counsel for failure to raise on direct appeal the issues of judicial bias and Mr. Schwab's denial of a fair trial by a fair and impartial trier of fact. As previously noted, judicial bias constituted fundamental error and therefore could have been raised on direct appeal even in the absence of a contemporaneous trial objection. Furthermore, because judicial bias constitutes a structural error, it is not subject to harmless error review.

Finally on page 8, Respondent characterizes Mr. Schwab's petition as "hyperbole." Yet, complaining of the denial of the fundamental constitutional right to a fair trial by a fair and impartial trier of fact (even when the facts of the case are of a "grisly" nature) is never hyperbole. In Williams v. State, 143 So. 2d 484 (Fla. 1962) this Court characterized our courts as "temples

of justice" and said that litigation before an impartial judge inspires confidence and makes the courthouse the temple of justice.

We canonize the courthouse as the temple of justice. There is no more appropriate justification for this than the fact that it is the only place we know where the rich and poor, the good and the vicious, the rake and the rascal—in fact every category of social rectitude and social delinquent—may enter its portal with the assurance that they may controvert their differences in calm (sic) and dispassionate environment before an impartial judge and have their rights adjudicated in a fair and just manner. Such a pattern for administering justice inspires confidence. The legend on the seal of this court—'sat cito si recte' (soon enough if right or just)—embossed on the floor in the rotunda of this building, encourages devotion to such a pattern. Litigation guided by it makes the courthouse the temple of justice. When judges permit their emotions or the misapplication of legal principles to shunt them away from it, they must be reversed. The judge must above all be neutral and his neutrality should be of the tough variety that will not bend or break under stress...The judge's neutrality should be such that even the defendant will feel that his trial was fair. In the trial of a capital case the judge's attitude or demeanor may speak louder than his words; in fact it may speak so loud that the jury cannot hear what he says.

Id. at 488.

For the reasons set forth above, this Court should grant Mr. Schwab habeas relief and grant Mr. Schwab a new trial before a fair and impartial trier of fact.

CLAIM III

**MR. SCHWAB'S EIGHTH AMENDMENT RIGHT AGAINST
CRUEL AND UNUSUAL PUNISHMENT WILL BE VIOLATED
AS HE MAY BE INCOMPETENT AT TIME OF EXECUTION.**

In reply to the State's Response, Petitioner relies on the argument set forth in his initial Petition for Writ of Habeas Corpus.

CONCLUSION AND RELIEF SOUGHT

For all the reasons discussed herein, Mr. Schwab respectfully urges this Honorable Court to grant habeas relief.

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 _____, 2001.

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