

IN THE SUPREME COURT OF FLORIDA

MARK DEAN SCHWAB,

Petitioner,

v.

CASE NO. SC00-1629

MICHAEL W. MOORE, Secretary,
Florida Department of Corrections,

Respondent.

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

KENNETH S. NUNNELLEY
ASSISTANT ATTORNEY GENERAL
Fla. Bar #0998818
444 Seabreeze Blvd. 5th FL
Daytona Beach, FL 32118
(904) 238-4990
Fax - (904) 226-0457

CERTIFICATE OF FONT

This brief is typed in Courier New 12 point.

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RESPONSE TO INTRODUCTION

On pages 1-3 of the petition, Schwab has set out an "Introduction" which is argumentative, self-serving, and conclusory. To the extent that grounds for relief may be contained within the "Introduction", such averments are denied.

PROCEDURAL HISTORY

In its direct appeal opinion affirming Schwab's conviction and death sentence, this Court summarized the facts of the case as follows:

Mark Schwab appeals his convictions of first-degree murder, sexual battery of a child, and kidnapping and his sentence of death. We have jurisdiction pursuant to article V, section 3(b)(1), Florida Constitution, and affirm Schwab's convictions and sentence.

Early in March 1991 Schwab was released from prison after serving three and one-half years of an eight-year sentence for committing sexual battery on a thirteen-year-old boy. In the middle of March a picture of eleven-year-old Junny Rios-Martinez appeared in a local newspaper. Several days later Schwab called the Rios-Martinez home, pretended to be a reporter, and claimed that he wanted to write an article on Junny. Schwab ingratiated himself with the family over the next several weeks, eventually claiming that he could get Junny a contract to represent a surfing company.

After school on April 18, 1991, a classmate saw Junny at a little league ball field and saw him get into a U-haul truck with a tall man. Two days later Schwab was in Ohio and called his aunt. He told her that someone named "Donald" had forced him to kidnap and rape the child or else Donald would kill Schwab's mother. On April 21 the police went to the aunt's home, and, when Schwab called while they were there, she allowed them to record the call. She also gave the officers permission to tap her telephone, and, when Schwab called later that evening, they traced the call and arrested him in a nearby town.

Besides the recorded statements to his aunt, Schwab also gave statements to Sergeant Blubaugh, a Cocoa policeman, who flew to Ohio with assistant state attorney Chris White. The day after his arrest, Schwab, Blubaugh, and White flew back to Florida. Back in Brevard County Schwab eventually indicated where the victim's body could be found. The police then found the body in a rural, undeveloped area of the county, stuffed into a footlocker.

The state indicted Schwab for first-degree premeditated murder, sexual battery of a child, and kidnapping. Schwab waived a jury, and, after a week-long trial, the judge convicted him as charged. Following the penalty proceeding, the judge sentenced him to death.

Schwab v. State, 636 So.2d 3, 4 (Fla. 1994). In upholding Schwab's sentence of death, this Court stated:

The trial court found that the following aggravators had been established beyond a reasonable doubt: previous conviction of a violent felony; committed during a kidnapping and sexual battery; and heinous, atrocious, or cruel. The trial court considered the statutory mitigators and forty items of allegedly nonstatutory mitigation, but found little in the tendered material actually to be of a mitigating nature or to have been established by the record. The court concluded its analysis by stating: "In weighing the aggravating and mitigating circumstances, the Court finds that any one of the three aggravating circumstances outweighs all mitigating circumstances." Schwab argues that his death sentence is not appropriate. We disagree.

The record supports all three aggravators. The state introduced Schwab's prior conviction of sexual battery, and the evidence supports his instant convictions of kidnapping and sexual battery of a child. We agree with the trial court's conclusion that the facts also demonstrate the murder to have been committed in a heinous, atrocious, or cruel manner. (FN6) The court cited to *Rogers v. State*, 511 So.2d 526 (Fla. 1987), *cert. denied*, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988), and *Campbell v. State*, 577 So.2d 932 (Fla. 1991), and conscientiously applied the dictates of those cases in analyzing the proposed mitigating evidence. We see no error in the trial court's findings of fact and agree that death is the appropriate penalty for this murder.

Id., at 7-8. Schwab's petition for writ of certiorari to the United States Supreme Court was denied. *Schwab v. Florida*, 513 U.S. 950 (1994). Schwab filed his *Florida Rule of Criminal Procedure* 3.850 motion on or about December 15, 1995, and, ultimately, following an evidentiary hearing, the Circuit Court of Brevard County denied relief on the motion on October 12, 1999. (R1247-1260). Schwab appealed the denial of Rule 3.850 relief, and filed the instant habeas petition along with his *Initial Brief* on appeal from the denial of post-conviction relief.

RESPONSE TO JURISDICTIONAL STATEMENT

The Respondent does not contend that this petition is not properly filed in this Court, nor does the Respondent contend that the petition is untimely, given that it was filed simultaneously with the filing of Schwab's *Initial Brief* on appeal from the denial of his *Florida Rule of Criminal Procedure* 3.850 motion. *See, Fla. R. Crim. P.* 3.851(b)(2). This Court should not grant habeas corpus relief for the reasons set out herein.

RESPONSE TO GROUNDS FOR RELIEF

I. THE JUDICIAL BIAS CLAIM

On pages 7-22 of his petition, Schwab alleges that he is entitled to relief because Circuit Judge Edward Richardson did not recuse himself from presiding over Schwab's trial. The precise nature of this claim is somewhat unclear, and, moreover, it is equally unclear as to why this claim is cognizable in a habeas

corpus proceeding. For the reasons set out below, this claim is not a basis for relief.

The first reason that this claim is not a basis for relief is because there is no adverse ruling in the record that appellate counsel could have appealed to this Court. Despite Schwab's best efforts, the fact remains that trial counsel made a tactical decision not to seek Judge Richardson's recusal from this case. As the collateral proceeding trial court found (and as is set out in the State's *Answer Brief* in the appeal from the denial of Rule 3.850 relief), trial counsel believed that Schwab's best chance was with Judge Richardson rather than with a jury. *See, Appendix A, (R1249-50)*. That strategic choice was not unreasonable, and is not ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984), and the cases decided subsequently.

Habeas law is well-settled that appellate counsel cannot be "ineffective" for "failing" to raise, as an issue on appeal, an issue that was not preserved by timely objection. *See, Suarez v. Dugger*, 527 So.2d 190, 193 (Fla. 1988); *King v. Dugger*, 555 So.2d 355 (Fla. 1990). Because the "recusal" issue was not preserved by objection at trial, appellate counsel cannot be faulted for not raising that issue on appeal.¹ The petition should be denied.

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In fact, it would approach sharp practice to raise the recusal claim on appeal when trial counsel had expressly declined to seek

This claim is also not a basis for habeas relief because, when stripped of its pretensions, it amounts to nothing more than Schwab's after-the-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, but he nonetheless made a conscious and informed decision **not** to seek recusal based upon those facts. The July 3, 1991 hearing, the transcript of which is attached hereto as Appendix B, leaves no doubt that Schwab's decision to waive a jury trial, as well as his decision no to seek Judge Richardson's recusal, was knowing, voluntary, and intelligent. Appendix B, at 22-25. He cannot now use his own decision as the underpinning of an ineffective assistance of counsel claim.²

Moreover, to the extent that Schwab claims that various events from trial are "evidence of bias", those events do not demonstrate bias at all. The most that the various matters set out on pages 14-20 of Schwab's petition show are correct rulings that were

Judge Richardson's disqualification.

²
Based upon the allegations in Schwab's petition, Randy Moore, Schwab's first Assistant Public Defender, was present when Judge Richardson is alleged to have made the remarks at issue. *Petition*, at 8. Randy Moore testified at the evidentiary hearing on Schwab's Rule 3.850 motion, but was never asked about the conversation -- Schwab has the burden of proof, but failed to present any evidence on this claim.

adverse to him.³ An adverse ruling is not evidence of "bias" that will support a motion to disqualify, nor is an adverse resolution of a credibility choice⁴. *Thompson v. State*, 2000 WL 373757, (Fla. 2000); *Barwick v. State*, 660 So.2d 685, 691 (Fla.1995); *Jackson v. State*, 599 So.2d 103, 107 (Fla.1992). The petition for writ of habeas corpus should be denied.⁵

II. THE INCOMPLETE RECORD CLAIM

On pages 23-29 of the petition, Schwab alleges that appellate counsel was ineffective because he "failed to ensure a complete record on appeal." This claim, which fails to identify either deficient performance or prejudice, is not a basis for relief for the reasons set out below.

In the context of a claim of ineffective assistance of trial counsel, this claim was before the Rule 3.850 trial court. In resolving this claim, that court held:

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Of course, "A court's ruling on a discretionary matter will be sustained unless no reasonable person would take the view adopted by the court." *Quince v. State*, 732 So.2d 1059, 1062 (Fla. 1999), citing *Huff v. State*, 569 So.2d 1247, 1249 (Fla. 1990).

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Likewise, Schwab's claim that a judge cannot use common sense in deciding a matter is contrary to centuries of practice. It is not the basis for a claim of bias.

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To the extent that Schwab may argue that the recusal issue could have been raised by appellate counsel in the absence of an objection at trial, such a suggestion is incorrect. Rule 2.160 of the *Rules of Judicial Administration* requires that a motion to disqualify must be made within 10 days of the discovery of the basis for the motion.

Defendant claims the record in the instant case is incomplete, inaccurate, and unreliable due to error or omission on the part of trial counsel. **There is no indication the record is incomplete, inaccurate or unreliable. Nor has Defendant presented any evidence to that effect.** Next, Defendant's claims grounds for relief based upon the fact that transcript of hearing held 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.

Furthering Defendant's claim that the transcript is incomplete, Defendant alleges in his motion that "several" unrecorded sidebar conversations occurred and portions of two videotapes played at trial were not transcribed in the record. The videotapes themselves were introduced into evidence, and therefore if an issue arose as to the content, it would be available for review. The other issue raised by Defendant within this claim refers to "several" unrecorded sidebar conversations. Defendant has not cited any specific instances and furthermore, Defendant has presented no evidence showing how he was prejudiced. Therefore, this claim is also denied.

Appendix A, (R1254-55). Those findings of fact, while not made in squarely the same context as the claim before this Court, are nonetheless relevant to the issue that this Court has before it. If Schwab has presented no evidence to establish any deficiency with the transcript, and the collateral proceeding trial court found that he had not, then Schwab cannot be entitled to relief on his claim of appellate ineffective assistance of counsel because such a claim has no factual basis.

In his petition, Schwab claims that there are "five major omissions" in the record -- however, 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 within the meaning of *Strickland v. Washington, supra*. In light of the overwhelming evidence of guilt, Schwab cannot establish a reasonable probability of a different result. As the party seeking relief, Schwab has the burden of proof -- he has failed to carry it, and the petition should be denied.

To the extent that further discussion of this claim is necessary, Schwab's appellate counsel pressed a number of issues on direct appeal to this Court -- despite the hyperbole of the petition, Schwab has not identified any issue that he claims should have been, but was not, raised, nor has he identified any unraised issue that would have been a basis for relief. In any event, as the Eleventh Circuit Court of Appeals has pointed out in the ineffective assistance of appellate counsel context:

First, I cannot agree that the quality of counsel's performance can be judged much by the length of briefs or the number of issues raised. Especially in the death penalty context, too many briefs are too long; and too many lawyers raise too many issues. Effective lawyering involves the ability to discern strong arguments from weak ones and the courage to eliminate the unnecessary so that the necessary may be seen most clearly. The Supreme Court -- as today's court recognizes -- has never required counsel to raise every nonfrivolous argument to be effective. See *Smith v. Murray*, 477 U.S. 527, 536, 106 S.Ct. 2661, 2667, 91 L.Ed.2d 434 (1986). That the custom in death penalty cases is for lawyers to file long briefs with lots of issues means little to me. This kind of "custom" does not define the standard of objective reasonableness. See *Gleason v. Title Guar. Co.*, 300 F.2d 813 (5th Cir. 1962). While compliance with custom may generally shield a lawyer from a valid claim of ineffectiveness, noncompliance should not necessarily mean he is ineffective. Not all customs are good ones, and customs can obstruct the creation of better practices.

Heath v. Jones, 941 F.2d 1126, 1141 (11th Cir. 1991) (Edmondson, J., concurring). Schwab's habeas petition should be denied in all respects.

III. THE INCOMPETENCE AT THE TIME OF EXECUTION CLAIM

On pages 29-32 of his petition, Schwab alleges that his federal constitutional right against cruel and unusual punishment **will** be violated because he **may** be incompetent at the time of his execution. Putting aside the completely speculative and unsupported nature of this "claim", the fact remains that, because Schwab's execution has not been scheduled, this claim is not ripe for review. *See*, § 922.07, *Fla. Stat.*; *see also*, *Martinez-Villareal v. Stewart*, 523 U.S. 637, 118 S.Ct. 1618, 140 L.Ed.2d 849 (1998). This claim should be denied as premature.

CONCLUSION

For the reasons set out above, this Court should deny the habeas petition in all respects.

Respectfully submitted,

ROBERT A BUTTERWORTH
ATTORNEY GENERAL

KENNETH S. NUNNELLEY
ASSISTANT ATTORNEY GENERAL
Florida Bar #0998818
444 Seabreeze Blvd. 5th FL
Daytona Beach, FL 32118
(904) 238-4990
Fax (904) 226-0457

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by U.S. Mail to Robert T. Strain, Assistant CCRC and Denise L. Cook, Assistant CCRC, Capital Collateral Regional Counsel - Middle Region, 3801 Corporex Park Drive, Suite 210, Tampa Florida 33619-1136, on this _____ day of November, 2000.

Of Counsel