IN THE SUPREME COURT OF FLORIDA

NO. ___________________

MARK DEAN SCHWAB,

Petitioner,

v.

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

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

This is Mr. Schwab's first habeas corpus petition in this Court. Art. 1, Sec. 13 of the Florida Constitution provides: "The writ of habeas corpus shall be grantable of right, freely and without cost." This petition for habeas corpus relief is being filed in order to address substantial claims of error under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, claims demonstrating that Mr. Schwab was deprived of the right to a fair, reliable, and individualized sentencing proceeding and that the proceedings resulting in his conviction and death sentences violated fundamental constitutional imperatives.

Citations shall be as follows: The record on appeal concerning the original court proceedings shall be referred to as "R. ____" followed by the appropriate page number. The postconviction record on appeal will be referred to as "PC-R. ____" followed by the appropriate page number.

All other references will be self-explanatory or otherwise explained herein.

INTRODUCTION

Significant errors which occurred at Mr. Schwab's capital trial and sentencing were not presented to this Court on direct appeal due to the ineffective assistance of appellate counsel. For example, Appellate counsel failed to raise the issue that Mr.

Schwab was denied the fundamental right to a fair trial and a fair and impartial trier of fact due to the trial judge's bias and predetermination of the issues. This bias was exhibited by the trial judge against Mr. Schwab even before Mr. Schwab was arrested and prior to the judge being assigned to preside over the case. The trial judge's bias was evidenced by two affidavits filed by two assistant state attorneys who witnessed the trial judge, after being asked if he would like a case like Mr. Schwab's, making his hand into a gun and firing it (R. 4208-4209). Even in the face of these two affidavits (in spite of the appearance of bias), Judge Richardson failed to disqualify himself from this case and presided over Mr. Schwab's non-jury trial.

In addition, Mr. Schwab was denied his right to a full review on appeal and his right to effective assistance of appellate counsel due to omissions in the record on appeal and due to appellate counsel's failure to ensure that a complete record on appeal was prepared. Appellate counsel failed to present this and other significant matters to this Court on direct appeal. Had counsel done so, Mr. Schwab would have received a new trial.

Appellate counsel's failure to present the meritorious issues discussed in this petition demonstrates that his representation of Mr. Schwab involved "serious and substantial deficiencies." Fitzpatrick v. Wainwright, 490 So. 2d 938, 940 (Fla. 1986). The issues which appellate counsel neglected demonstrate that counsel's performance was deficient and that the deficiencies prejudiced Mr.

Schwab. "[E]xtant legal principles...provided a clear basis for ...compelling appellate arguments[s]." Fitzpatrick, 490 So. 2d at 940. Neglecting to raise fundamental issues such as those discussed herein "is far below the range of acceptable appellate performance and must undermine confidence in the fairness and correctness of the outcome." Wilson v. Wainwright, 474 So. 2d 1162, 1164 (Fla. 1985). Individually and "cumulatively," Barclay v. Wainwright, 444 So. 2d 956, 959 (Fla. 1984), the claims omitted by appellate counsel establish that "confidence in the correctness and fairness of the result has been undermined." Wilson, 474 So. 2d at 1165 (emphasis in original). As this petition will demonstrate, Mr. Schwab is entitled to habeas relief.

PROCEDURAL HISTORY

On May 14, 1991, the grand jury in and for Brevard County returned an indictment charging Mr. Schwab with one count of first degree murder, one count of capital sexual battery, and one count of kidnaping. (R. 4184-4186). Mr. Schwab filed an affidavit and request for a non-jury trial. (R. 4197-4199). The state also filed a waiver of jury trial. (R. 4207). This request was granted. (R. 20).

Mr. Schwab proceeded to a non-jury trial on May 18-22, 1992, before the Honorable Edward J. Richardson, Circuit Judge. (R. 1-2080). At the conclusion of the trial, Judge Richardson found Mr. Schwab guilty as charged on all counts. (R. 2079-2080, 4491-4493).

The penalty phase was conducted on May 23, 1992 before Judge Richardson. (R. 2954-3426). On July 1, 1992, Mr. Schwab appeared before Judge Richardson for sentencing. (R. 4073-4115). Judge Richardson sentenced Mr. Schwab to death for the first degree murder conviction. For the sexual battery, Mr. Schwab was sentenced to life. For the kidnaping, Mr. Schwab was sentenced to life. All sentences were to run consecutive to the murder sentence and to each other. (R. 4639-4668). In addition, the court revoked Mr. Schwab's probation and sentenced him to life imprisonment, to run concurrently with the kidnaping sentence. (R. 4147-4152, 4636-4642).

On direct appeal, Mr. Schwab's conviction and sentence was affirmed. Schwab v. State, 636 So.2d 3 (Fla. 1994). Mr. Schwab then filed a Petition for a Writ of Certiorari in the United States Supreme Court, which was denied on October 17, 1994. Schwab v. Florida, 513 U.S. 950 (1994). On December 15, 1995 Mr. Schwab filed his first Motion to Vacate Conviction and Sentence with Special Request for Leave to Amend. (PC-R. 177-314). A Motion to Disqualify Judge Richardson was then filed on December 21, 1995. (PC-R. 315-331). On May 29,1996, Judge Richardson granted the motion (PC-R. 332), and Judge Charles M. Holcomb was assigned to preside over Mr. Schwab's postconviction proceedings by order filed on June 5, 1996. (PC-R. 335-336).

On April 15, 1998, pursuant to Fla. R. Crim. P. 3.850, Mr. Schwab filed his Amended Motion to Vacate Judgments of Conviction

and Sentence. (PC-R. 1028-1172). A hearing was held on August 12, 1998. (PC-R. 1293-1374) in accordance with Huff v. State, 622 So. 2d 982 (Fla. 1992). On October 21, 1998 the circuit court issued an order granting an evidentiary hearing on Claims I, V, VI, VII, IX, XI, XII, XIII, XIV, XV, XVI, XVII, XVIII, XIX, XX, XXI, and XXVI. The remainder of the claims were denied because they had been voluntarily withdrawn by postconviction counsel. (PC-R.1200-1201). On March 16, 1999 and on June 24, 1999 the evidentiary hearing was held. (PC-R. 6-166, 1378-1455). Judge Charles Holcomb entered an order on October 12, 1999 denying all claims of Appellant's 3.850 motion. (PC-R. 1247-1260). Timely notice of appeal was filed on November 8, 1999. (PC-R. 1261). Mr. Schwab filed his initial brief on August 8, 2000, and it is pending before this Court. In addition, Mr. Schwab has prepared and filed this petition for habeas corpus relief.

JURISDICTION TO ENTERTAIN PETITION AND GRANT HABEAS CORPUS RELIEF

This is an original action under Fla. R. App. P. 9.100(a). See Art. 1, Sec. 13, Fla. Const. This Court has original jurisdiction pursuant to Fla. R. App. P. 9.030(a)(3) and Article V, sec. 3(b)(9), Fla. Const. The petition presents constitutional issues which directly concern the judgment of this Court during the appellate process and the legality of Mr. Schwab's sentence of death.

Jurisdiction in this action lies in this Court, see, e.g., Smith v. State, 400 So. 2d 956, 960 (Fla. 1981), for the fundamental constitutional errors challenged herein arise in the context of a capital case in which this Court heard and denied Mr. Robinson's direct appeal. See Wilson, 474 So. 2d at 1163; Baggett v. Wainwright, 229 So. 2d 239, 243 (Fla. 1969); cf. Brown v. Wainwright, 392 So. 2d 1327 (Fla. 1981). A petition for a writ of habeas corpus is the proper means for Mr. Schwab to raise the claims presented herein. See, e.g., Way v. Dugger, 568 So. 2d 1263 (Fla. 1990); Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987); Riley v. Wainwright, 517 So. 2d 656 (Fla. 1987); Wilson, 474 So. 2d at 1162.

This Court has the inherent power to do justice. The ends of justice call on the Court to grant the relief sought in this case, as the Court has done in similar cases in the past. The petition pleads claims involving fundamental constitutional error. See Dallas v. Wainwright, 175 So. 2d 785 (Fla. 1965); Palmes v. Wainwright, 460 So. 2d 362 (Fla. 1984). The Court's exercise of its habeas corpus jurisdiction, and of its authority to correct constitutional errors such as those herein pled, is warranted in this action. As the petition shows, habeas corpus relief would be more than proper on the basis of Mr. Schwab's claims.

GROUNDS FOR HABEAS CORPUS RELIEF

By his petition for a writ of habeas corpus, Mr. Schwab asserts that his capital conviction and sentence of death were

obtained and then affirmed during this Court's appellate review process in violation of his rights as guaranteed by the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United State Constitution and the corresponding provisions of the Florida Constitution.

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.

Judge Edward J. Richardson presided over the non jury trial of this capital case and ultimately imposed the sentence of death. Even prior to the commencement of judicial proceedings against Mr. Schwab, Judge Richardson demonstrated bias and prejudice against Mr. Schwab which indicate his prejudgment of the case. On June 21,1991 (prior to the trial), Assistant State Attorneys Robin Lemonidis and John McBain filed affidavits[1] regarding Judge Richardson's bias. Robin Lemonidis stated in her affidavit:

> During a break in our afternoon court session, I was standing in Pat Knox's office reading the paper. She was sitting at her desk. John

[1]These affidavits were part of the record on direct appeal. However, transcripts of a hearing held on 7-3-91 regarding these affidavits was not included in the original record, nor were they requested to be transcribed by trial or appellate counsel.

> McBain was pacing in and out the courtroom side entrance of her office. Randy Moore was standing against the wall just outside Pat's door, 4 (four) feet from me. Mark Schwab had just been identified in the newspaper as the kidnapper and probable murderer of Junny Martinez. I was reading the article with all the grisly details. Schwab had not yet been found or charged, and no one knew if he would ever be.
>
> Judge Richardson poked his head in Pat's office from his hallway side to ask if we were ready to start up again. I looked up from the paper and said something like "Judge, how would you like a case like this?" He paced away and said "not me...". He turned back and said, "sure I'd like that case." He made his hand into and imaginary pistol and shook it at us. McBain and I laughed. I assumed Randy Moore had heard the whole thing too, since he was standing about arms length from me.
>
> When I returned to the office I described this exchange to Phil Williams just as one of the day's anecdotes. As Schwab was still at large, I had no idea this case would ever be before Judge Richardson.

(R. 4209).

Assistant State Attorney John McBain stated in his affidavit:

> On the morning Mark Dean Schwab was identified in the Florida Today Newspaper as the prime suspect in the killing of Junny Martinez, I was looking at the newspaper article with Robin Lemonidis, Assistant State Attorney, and Pat Knox the Court Clerk. We were all in the court clerk's office. Randy Moore, Assistant Public Defender was standing just at the entrance to the court clerk's office. Judge Richardson walked by the opposite door of the court clerk's office. As he was passing by, Ms. Lemonidis asked the Judge how he would like to get a case like this. Judge Richardson responded "not me." He then pointed his finger in the shape of a gun and shook it several times at us. This event did not even seem significant to any of us present at the time, until Judge Richardson

> was assigned as the presiding judge on the case several days later. When this incident occurred the suspect was still at large and no judge had been assigned. Upon learning of Judge Richardson's assignment to this case, I promptly recounted this incident to our Division Chief, Phil Williams, for appropriate action.

(R. 4208).

The message relayed by this gesture is unmistakable. Judge Richardson had made up his mind that Mr. Schwab not only was guilty of first degree murder, but also deserved the death penalty. There is no question that trial counsel and Judge Richardson were aware of the affidavits as they were both present during the 7-3-91 hearing that was held to address the state attorney affidavits. Further, Judge Richardson knew of the predicament caused by the case continuing non-jury with him presiding as the trier of fact:

> THE COURT: It does become a little bit more significant in light of the fact that Mr. Schwab has requested the court try this case without a jury, obviously. That's why this has become more of a significant issue.
>
> And because of that, I think it's appropriate for the court to make a special inquiry on those issues.
>
> Now, you've told me he's read them and I believe you. I don't question any of these lawyers in this room when they tell me something at all.
>
> But I think, because he still apparently maintains his desire to be tried without a jury, that I need to satisfy myself that he's read it and that's what he still wants to do.
>
> Frankly, I agree with you and I agree with what you said: that basically, under normal circumstances, there would be nothing to do at that point in time for this court, and <u>I couldn't care less about this</u>.

> But when the man is asking me to try this case without a jury, that heightens it to a level that makes me want to be sure that I have satisfied all the process requirements.

(Hearing held 7/3/91, page 19)(emphasis added).

In order to satisfy all due process requirements, Judge Richardson could have and should have disqualified himself from presiding over this case. Absent that, trial counsel should have moved to recuse Judge Richardson because of the affidavits. In fact, Judge Richardson's bias was so apparent that the State Attorney's Office, not only took it upon themselves to file the two state attorney affidavits, but also to prepare a document entitled State's Questions for In Camera Inquiry.[2] During the 7-3-91 hearing, Judge Richardson commented on these questions saying:

> ...and I don't think the inquiry has to be as detailed at all as what was presented by the State here. I don't think it's necessary to make an effective ruling by asking a question as to the sufficiency of these affidavits to support a recusal.

(Hearing held 7-3-91, page 19).

However, the State's Questions for In Camera Inquiry had nothing to do with the sufficiency of the state attorney affidavits. Based on just these affidavits alone, Judge Richardson should have recused himself--not only because of his actual bias, but also because of the appearance of bias. A fair hearing before

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[2]These questions were not included in the record on appeal, but postconviction counsel has moved to supplement the record to include them.

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).

Even the appearance of prejudgment is sufficient to warrant reversal. The trial court's failure to recuse himself therefore constitutes reversible error. In Livingston v. State, 441 So. 2d 1083, 1086 (Fla. 1983) and Suarez v. Dugger, 527 So. 2d 190, 191 (Fla. 1988), the Florida Supreme Court concluded that the failure of the judge to disqualify himself was error due to apparent prejudgment and bias against counsel, and predetermination of the facts at issue. Consequently, the Court reversed and the matter was remanded for proceedings before a different judge. Livingston at 1084 and Suarez at 192. In Suarez, the issue arose after a post-conviction hearing in a death case. There the trial court erred in failing to grant a motion to disqualify after expressing an opinion as to the issues before the court prior to receiving testimony. Id. at 192.

The United States Court of Appeals for the Eleventh Circuit has recently held, while discussing the Judicial Canon of Ethics:

> CANON 3E(1) requires a judge to sua sponte disqualify himself if his impartiality might reasonably be questioned...We conclude that both litigants and attorneys should be able to rely upon judges to comply with their own canon of ethics. A contrary rule would presume that litigants and counsel cannot rely

> on an impartial judiciary. Porter v. Singletary, 49 F.3d 1483, 1489 (11th Cir. 1995).

In Porter, the Clerk of the Glades County Circuit Court informed both defense counsel and the State Attorney's Office that the presiding judge in the case had made comments regarding his changing venue in the case. The judge stated to the Clerk that Glades County "had good, fair minded people here who would listen and consider the evidence and then convict the son-of-a-bitch." The judge then told the Clerk that he would then send Porter to the chair. These comments were made either before or during the trial. Id. at 1486.

In Maharaj v. State, 684 So.2d 726 (Fla. 1996) the Florida Supreme Court held:

> ... that the trial judge should have recused himself from the entire case if he believed he was ineligible to preside over an evidentiary hearing, regardless of whether a motion to disqualify was filed. Canon 3(E), Code of Judicial Conduct (a judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned).

(emphasis added)

"The proper administration of justice requires of a judge not only actual impartiality, but also the appearance of a detached impartiality." Rapp v. Van Dusen, 350 F.2d 806 (3rd Cir. 1965). In U.S. v. Brown, 539 F.2d 467 (5th Cir. 1976) the trial judge prior to Mr. Brown's trial was heard to say "that he was going to get

that nagger." The court, in vacating the conviction and sentence, declared:

> The truth pronounced by Justinian more than a thousand years ago that, "Impartiality is the life of justice," is just as valid today as it was then. Impartiality finds no room for bias or prejudice. It countenances no unfairness and upholds no miscarriage of justice. Bias and prejudice can deflect the course of justice and effect the measure of its judgments.

Id. at 469.

Judge Richardson's statements and actions before and during the trial not only denied Mr. Schwab of a fair trial, but also did not comport with the appearance of justice.

The record is replete with other examples of Judge Richardson's bias that could have been found and raised by appellate counsel:

1. During a 5-23-91 hearing on the issue of waiver of jury trial, Judge Richardson acknowledged the potential need for a competency examination of Mr. Schwab, but failed to order the examination. (R. 3686-3708).

2. During a 7-3-91 hearing on the issue of the affidavits alleging the behavior of Judge Richardson, Judge Richardson refused to submit to Mr. Schwab the questions posed by the state. (P. 1-33). Yet, in spite of the affidavits, Judge Richardson failed to recuse himself and did not address this failure to do so at the evidentiary hearing. (PC-R. 54-59).

3. During the direct examination of Dr. Bernstein by defense counsel, Judge Richardson made the following comments:

> THE COURT: We're back to Dr. Bernstein.
>
> MR. ONEK: Yes, sir.
>
> THE COURT: Now, what I'd like you to do with Dr. Bernstein is get to the bottom line.
>
> MR. ONEK: Excuse me?
>
> THE COURT: Get to the bottom line as quickly as you could.

(R. 3244).

4. During the penalty phase, while the state's expert was being cross-examined by defense counsel, the state objected to one of Mr. Onek's questions. Judge Richardson again showed his impatience:

> THE COURT: <u>I want to get through here</u>. Overruled. You may answer the question, sir.
>
> THE WITNESS: No.
>
> BY MR. ONEK:
> Q. Hypothetically speaking–
>
> THE COURT: We spend a lot of time arguing about nothing. Do you notice that?
>
> THE WITNESS: Yes.
>
> THE COURT: <u>I notice that more and more. We spend half a day sometimes arguing over a point that turns out to be worthless.</u>
>
> THE WITNESS: I've been impressed with judges' patience. It's not easy sometimes.
>
> THE COURT: You may proceed.

(R. 3421-3422)(emphasis added).

5. In determining the sentence, Judge Richardson relied on facts outside the record. Judge Richardson questioned defense mitigation witness Dr. Bernstein:

> Doctor, I've had a chance to look over the school records...I always found the school records are oftentimes very indicative of what's going on in a child's life at a particular time. It's always my experience that a child who is involved in a significant sad or strenuous or traumatic period of life, that there's no place better where that's reflected than how he performs in school and the comments made by his teachers and all during that time.

(R. 3317).

Judge Richardson went on to comment that in Mr. Schwab's case, during the time of his parent's divorce and his rape at gunpoint, his school records do not reflect that he is having a difficult time. (R. 3318-3319). Dr. Bernstein explained that, "it's only in a very narrow area where he shows this disorder. It may not have at that time ...transferred generalized and associated with the factors at school." (R. 3318). With respect to testimony that Mr. Schwab was raped at gunpoint as a young child, Judge Richardson again relied on evidence outside of the record:

> A young child in the fourth or fifth grade that is raped at gunpoint off of a school yard and in a cornfield, the experience I had sitting on the criminal bench for almost four years is victims of sexual abuse are extremely traumatized by that and that is manifested in their behavior fairly soon by people that know them.

(R. 3319)(emphasis added).

Judge Richardson, in his sentencing order, then went on to find that Mr. Schwab had not proven that he had been raped, based on the fact that his school records did not immediately show deteriorating performance. (R. 4657A).

6. In Judge Richardson's sentencing order he exhibited bias and a predisposition against Mr. Schwab by:

A. Not finding non-statutory mitigation established by the mother's testimony, and instead relying on the father's testimony only. Judge Richardson, in his sentencing order, failed to find the non-statutory mitigating circumstances that Mr. Schwab's mother had been beaten by his father, that Mr. Schwab also was beaten by his father, and that Mr. Schwab's father would punish Mr. Schwab by pulling down his pants and laughing at him. (R. 4658A). Not only did the mother testify to these non-statutory mitigating circumstances, but other witnesses corroborated much of her testimony. (R. 3051, 3077, 3079, 3050-3051, 3256-3257). While the father's testimony remained uncorroborated, Judge Richardson exhibited his predisposition against Mr. Schwab by relying on the father's uncorroborated testimony and by failing to find these mitigators.

B. Not finding that Mr. Schwab had been brutally raped at gunpoint by a friend's father as a child, when an independent witness, Patricia Knittel (as well as Dr. Bernstein) testified to this fact. Further, Ms. Knittel testified that Mr. Schwab told her

of his sexual abuse prior to his first arrest. (R. 2997-3004, 3253).

C. Relying on Dr. Samek's testimony and diagnosis only when Dr. Samek never interviewed Mr. Schwab. In his sentencing order, Judge Richardson wrote: "Dr. Samek diagnosed the defendant as an antisocial rapist murderer. This court accepts that diagnosis as fact and hereby rejects other expert opinion to the contrary." (R. 4654A). Yet, during the trial, Dr. Samek admitted that he had never spoken to Mr. Schwab. (R. 3380) While Dr. Bernstein testified that he had interviewed Mr. Schwab for over ten hours. (R. 3229). Furthermore, Dr. Samek's diagnosis was accepted even though rape/murderer is not a recognized diagnosis under the American Psychiatric Association DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (Third and Fourth Editions).

At the evidentiary hearing, Judge Richardson was confronted with the fact that the sentencing order did not reflect a finding of what evidence was credible and what evidence was not. Judge Richardson refused to address this issue saying:

> Well, I think you're getting into area now that really invades my province as the judge, and also as the fact finder in this case, and I don't think it's appropriate for you to ask me questions about my thought processes in reaching the conclusions that I reached.

(PC-R. 70-71).

7. Judge Richardson failed to ensure that an adequate record

was prepared for the direct appeal. (See Claim II) There were five major omissions in Mr. Schwab's record on appeal. The first omission consists of transcripts from a hearing held on 7-3-91. During the 7-3-91 hearing, the affidavits (R. 4208-4209) of the two assistant state attorneys were discussed. The State Attorney's Office also prepared a document entitled State's Questions for In Camera Inquiry. The questions were designed to be asked by Judge Richardson of Mr. Schwab and Mr. Onek in camera to ensure that Mr. Schwab was informed of the affidavits and their contents. This document was the second item not included in the record on appeal. During the penalty phase of Mr. Schwab's non-jury trial, the defense called Dr. Bernstein to testify. Dr. Bernstein, in forming his expert opinion, had relied on the opinions of Dr. Ted Shaw and Dr. Fred Berlin who were authorities in the diagnosis and treatment of sex offenders. Both Dr. Shaw and Dr. Berlin had been videotaped. As part of Dr. Bernstein's expert testimony. (R. 3225-3244), a part of each videotape was played in the courtroom. However, the court reporter did not transcribe the portion of the two videos that was played nor did Judge Richardson instruct the court reporter to do so. Therefore, there is no record as to what portion of the tapes the sentencing court heard, and what the sentencing court considered in making his sentencing determination. The portions of each videotape not transcribed constitute the third and fourth items omitted from the record on direct appeal. Finally, a videotape of Mike Schwab (R. 3007-3008) was presented by

defense counsel during the penalty phase. Again, this tape was not transcribed by the court reporter, and again Judge Richardson did not advise that this be done. The transcription was not included in the record on appeal.

8. Judge Richardson failed to grant a defense motion requesting a separate judge to hear a motion in limine regarding similar fact evidence. On April 28, 1992 the state filed notice of intent to admit similar fact evidence (R. 4453-4454), and Mr. Schwab filed a motion in limine to prevent the evidence from being admitted. (R.4411-4415). Mr. Schwab also filed a motion requesting that a separate judge hear the motion in limine since the trial was to proceed before the judge only. (R.4460-4461). At the hearing on these motions, Judge Richardson ruled that there was no need for another judge, and that the court would hear the evidence at the time of trial and if not relevant would not consider it. (R. 4024-4030). This ruling exhibited Judge Richardson's predisposition to rule against Mr. Schwab. During the evidentiary hearing, Judge Richardson testified (with respect to the assistant state attorney affidavits) that if there was a legally sufficient allegation in the court file, he would withdraw. (PC-R. 57). Yet, he failed to withdraw when defense counsel presented him with a "legally sufficient" motion requesting a separate judge.

While the issue of trial judge bias was not preserved at trial by defense counsel with either a contemporaneous objection or a

motion to recuse Judge Richardson, it would not have been precluded from review had it been raised on appeal. Judge Richardson's bias, his failure to disqualify himself from presiding over the case, and trial counsel's failure to move to recuse Judge Richardson constituted fundamental error. This Court has held:

> 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 (Fla. 1983).

While the singular impact of Judge Richardson's bias and his failure to disqualify himself denied Mr. Schwab his fundamental right to a fair and impartial trial, the cumulative impact of his bias had "...a qualitative effect on the sentencing process;" and therefore, constituted fundamental error. Parks v. State, 2000 WL 963861 (Fla. Jul 13, 2000) (NO. SC9286).

In State v. Townsend, 635 So. 2d 949 (Fla. 1994) this Court remanded the case for a new trial due to the cumulative error involved. (Townsend involved the sexual abuse of a two-year-old victim.) The Court said:

> Consequently, were we not reviewing these errors as a whole, we might find that some of the errors to which no objection was made were procedurally barred. When, however, we consider the errors in this case as a whole, we must conclude that Townsend was denied the fundamental right to due process and the right to a fair trial. State v. Johnson, 616 So.2d 1 (Fla. 1993)(Error so basic to the judicial decision under review that an accused is denied the right to due process is

> fundamental); Fuller v. State, 540 So. 2d 182 (Fla. 5th DCA 1989)(cumulative effect of the errors in child sexual abuse case was so fundamental as to require reversal); Nazareth v. Sapp, 459 So. 2d 1088 (Fla. 5th DCA 1984); Dukes v. State, 356 So. 2d 873 (Fla. 4th DCA 1978).

Id. at 959-960.

Just as Townsend was denied his fundamental right to due process and the right to a fair trial, so also was Mr. Schwab denied these rights due to Judge Richardson's bias. Because this was fundamental error, and because it should not have been precluded from review on direct appeal, appellate counsel was ineffective for failing to raise this issue. Ineffective assistance of appellate counsel occurs when 1) there is a substantial omission by appellate counsel and 2) resulting prejudice to the appellate process sufficient to undermine confidence in the outcome. Fitzpatrick v. Wainwright, 490 So.2d 938 (Fla. 1986); Suarez v. Dugger, 527 So. 2d 190, 192-193 (Fla. 1988). Failing to raise this issue on appeal was clearly a substantial omission by appellate counsel. Appellate counsel could have easily located the affidavits of the two assistant state attorneys as they were part of the record on direct appeal to this Court. (R. 4208-4209). These affidavits should have indicated to appellate counsel that Mr. Schwab had been denied his fundamental right to a fair trial due to Judge Richardson's bias and pre-determination of the issues. This bias was exacerbated by the fact that this case proceeded non-jury, thus there was no jury to

counterbalance Judge Richardson's overt one-sidedness. Because of this bias and the affidavits supporting such bias, appellate counsel should have investigated this issue further and raised it in the direct appeal. Further, this omission on direct appeal was sufficient to prejudice the appellate process by undermining the confidence in the outcome.

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.

Complete and effective appellate advocacy requires a complete trial record. A trial record should not have missing portions. Yet, Mr. Schwab's record on direct appeal to this court contained numerous omissions. Appellate counsel was ineffective for failing to ensure a complete record for Mr. Schwab's appeal. Absent a complete record, the resulting prejudice to the appellate process was sufficient to undermine the confidence in its outcome.

There were five major omissions in Mr. Schwab's record on appeal. First, transcripts from a hearing held on 7-3-91 were not designated by trial counsel nor did appeal counsel move to supplement the record with them. During the 7-3-91 hearing, the affidavits (R. 4208-4209) of the two assistant state attorneys were discussed. (See Claim I) During this hearing, the State

Attorney's Office also prepared a document entitled State's Questions for In Camera Inquiry. The questions were designed to be asked by Judge Richardson of Mr. Schwab and Mr. Onek in camera to ensure that Mr. Schwab was informed of the affidavits and their contents. This document was the second item not included in the record on appeal. During the penalty phase of Mr. Schwab's non-jury trial, the defense called Dr. Bernstein to testify. Dr. Bernstein, in forming his expert opinion, had relied on the opinions of Dr. Ted Shaw and Dr. Fred Berlin who were authorities in the diagnosis and treatment of sex offenders. Both Dr. Shaw and Dr. Berlin had been videotaped. As part of Dr. Bernstein's expert testimony (R. 3225-3244), a part of each videotape was played in court. However, the court reporter did not transcribe the portion of the two videos that was played. Therefore, there is no record as to what portion of the tapes the sentencing court heard, and what the sentencing court considered in making his sentencing determination. The portions of each videotape not transcribed constitute the third and fourth items omitted from the record on direct appeal. Finally, a videotape of Mark Schwab was presented by Defense counsel during the penalty phase. Again, this tape was not transcribed by the court reporter, and the transcription was not included in the record on appeal.

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, 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 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 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 7-3-91 should have been discovered. Had appellate counsel read the transcript from the 7-3-91 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.

By failing to ensure that Mr. Schwab's review by the Florida Supreme Court was based on a complete and reliable record, he ceased to act as Mr. Schwab's advocate. Justice Goldberg, in his concurring opinion in Hardy, described the appellate counsel's role as an advocate:

> If this requirement is to be more than a hollow platitude then appointed counsel must be provided with the tools of an advocate. As any effective appellate advocate will attest, the most basic and fundamental tool of his profession is the complete trial transcript, through which his trained fingers may leaf and

> his trained eyes may roam in search of an error, a lead to an error, or even a basis upon which to urge a change in an established and hitherto accepted principle of law. Anything short of a complete transcript is incompatible with effective appellate advocacy.

Id. at 288 (emphasis added).

In order to grant habeas relief on the basis of ineffective assistance of appellate counsel, this court must determine "first, whether the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance and, second, whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result." Groover v. Singletary, 656 So.2d 424, 425 (Fla. 1995)(quoting Pope v. Wainwright, 496 So. 2d 798, 800 (Fla. 1986); see, e.g., Teffeteller v. Dugger, 734 So.2d 1009, 1027 (Fla. 1999).

Appellate counsel has a duty to ensure a complete and reliable transcript for review. In Johnson v. Singletary, 695 So. 2d 263 (Fla. 1996). Justice Anstead, in his concurring opinion wrote, "...when...new counsel represents the indigent on appeal, how can he faithfully discharge the obligation which the court has placed on him unless he can read the entire transcript?" Mr. Schwab's appellate attorney failed to discharge this duty by failing to ensure the Florida Supreme Court had a complete record. Failure to raise omissions in the record as an appeal issue and failure to

ensure a complete record constituted a serious error by appellate counsel. Absent a complete record, the resulting prejudice to the appellate process was sufficient to undermine the confidence in its outcome. Moreover, when errors or omissions appear, re-examination of the complete record in the lower tribunal is required. Delap v. State, 350 So. 2d 462 (Fla. 1977). In Delap it was impossible to reconstruct the needed portions of the record. This Court held:

> Since the full transcript of the proceedings requested by the defendant is unavailable for review by this Court, and since the omitted requested portions of the transcript are necessary to a complete review of this cause, this Court has no alternative but to remand for a new trial of the cause.

Id. at 463.

In Mr. Schwab's case, it is also impossible to reconstruct the needed portions of the record. During the penalty phase of Mr. Schwab's non-jury trial, the defense called Dr. Bernstein to testify. Dr. Bernstein, in forming his expert opinion, had relied on the opinions of Dr. Ted Shaw and Dr. Fred Berlin who were authorities in the diagnosis and treatment of sex offenders. Both Dr. Shaw and Dr. Berlin had been videotaped. As part of Dr. Bernstein's expert testimony (R. 3225-3244), a part of each videotape was played in court. However, the court reporter did not transcribe the portion of the two videos that was played. Therefore, there is no record as to what portion of the tapes the sentencing court heard, and what the sentencing court considered in

making his sentencing determination. Just as in Delap, Mr. Schwab's case should be remanded for a new trial.

The record in this case is incomplete, inaccurate, and unreliable. Confidence in the record is undermined. Mr. Schwab was denied due process, a reliable appellate process, effective assistance of counsel on appeal, and a meaningful and trustworthy review of his conviction and sentence of death. Mr. Schwab was denied his statutory and constitutional rights to have his sentence reviewed by the highest court in the State upon a complete and accurate record, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments.

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 accordance with Florida Rules of Criminal Procedure 3.811 and 3.812, a prisoner cannot be executed if "the person lacks the mental capacity to understand the fact of the impending death and the reason for it." This rule was enacted in response to Ford v. Wainwright, 477 U.S. 399, 106 S. Ct. 2595 (1986).

The undersigned acknowledges that under Florida law, a claim of incompetency to be executed cannot be asserted until a death warrant has been issued. Further, the undersigned acknowledges that before a judicial review may be held in Florida, the defendant must first submit his claim in accordance with Florida Statutes.

The only time a prisoner can legally raise the issue of his sanity to be executed is after the Governor issues a death warrant. Until the death warrant is signed the issue is not ripe. This is established under Florida law pursuant to Section 922.07, Florida Statutes (1985) and Martin v. Wainwright, 497 So.2d 872 (1986) (If Martin's counsel wish to pursue this claim, we direct them to initiate the sanity proceedings set out in section 922.07, Florida Statutes (1985).

The same holding exists under federal law. Poland v. Stewart, 41 F. Supp. 2d 1037 (D. Ariz 1999) (such claims truly are not ripe unless a death warrant has been issued and an execution date is pending); Martinez-Villareal v. Stewart, 118 S. Ct. 1618, 523 U.S. 637, 140 L.Ed.2d 849 (1998) (respondent's Ford claim was dismissed as premature, not because he had not exhausted state remedies, but because his execution was not imminent and therefore his competency to be executed could not be determined at that time); Herrera v. Collins, 506 U.S. 390, 113 S. Ct. 853, 122 L.Ed.2d 203 (1993) (the issue of sanity [for Ford claim] is properly considered in proximity to the execution).

However, most recently, in In Re: Provenzano, No. 00-13193 (11th Cir. June 21, 2000), the 11th Circuit Court of Appeals has stated:

> Realizing that our decision in In Re: Medina, 109 F.3d 1556 (11th Cir. 1997), forecloses us from granting him authorization to file such a claim in a second or successive petition, Provenzano asks us to revisit that decision in

> light of the Supreme Court's subsequent decision in Stewart v. Martinez-Villareal, 118 S.Ct. 1618 (1998). Under our prior panel precedent rule, See United States v. Steele, 147 F.3d 1316, 1317-18 (11th Cir. 1998) (en banc), we are bound to follow the Medina decision. We would, of course, not only be authorized but also required to depart from Medina if an intervening Supreme Court decision actually overruled or conflicted with it.[citations omitted]
>
> Stewart v. Martinez-Villareal does not conflict with Medina's holding that a competency to be executed claim not raised in the initial habeas petition is subject to the strictures of 28 U.S.C. Sec 2244(b)(2), and that such a claim cannot meet either of the exceptions set out in that provision.

Id. at pages 2-3 of opinion.

Federal law requires that, in order to preserve a competency to be executed claim, the claim must be raised in the initial petition for habeas corpus. Hence, the filing of this petition. In order to exhaust state court remedies, the claim is being filed at this time.

Mr. Schwab, even prior to his trial, was exhibiting a lack of competency. During a hearing held on 5-23-91, the trial court questioned Mr. Schwab's competency based on information that he had read in the papers. Judge Richardson said:

> There has been a certain amount of information in the papers concerning a problem that Mr. Schwab may have had at the jail, and that, of course, causes the Court certain amount of concern as to whether or not an evaluation would need to be done in this case to make sure that Mr. Schwab is totally one hundred percent competent to proceed at all critical stages of this proceeding. However, the Court has nothing before it at all to substantiate

> any type of order at this time. The only thing I know about what happened is what I read in the paper, and basically that's it.

(R. 3703-3704).

In addition, during the trial, Dr. Bernstein testified Mr. Schwab had attempted suicide while at the Brevard County Detention Center (R. 3267).

Further, Mr. Schwab has been incarcerated since 1991. Statistics have shown that incarceration over a long period of time will diminish an individual's mental capacity. Inasmuch as Petitioner may well be incompetent at time of execution, his Eighth Amendment right against cruel and unusual punishment will be violated.

CONCLUSION AND RELIEF SOUGHT

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing **PETITION FOR WRIT OF HABEAS CORPUS** has been furnished by United States Mail, first-class postage prepaid, to all counsel of record on August 8, 2000.

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