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

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Schwab's motion for postconviction relief. The motion was brought pursuant to Fla. R. Crim. P. 3.850.

The following symbols will be used to designate references to the record in the instant case:

"R." -- The record on direct appeal to this Court.

"PC-R." -- The record on instant 3.850 appeal to this Court.

REQUEST FOR ORAL ARGUMENT

The resolution of the issues in this action will determine whether Mr. Schwab lives or dies. This Court has allowed oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be appropriate in this case, given the seriousness of the claims involved and the fact that a life is at stake. Mr. Schwab accordingly requests that this Court permit oral argument.

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STATEMENT OF THE CASE

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). On June 28, 1991 Assistant State Attorneys John McBain and Robin Lemonidis prepared affidavits R. 4208-4209) regarding judicial bias and had them notarized. On July 3, 1991 the court held a hearing regarding these affidavits (P. 1-33)[1].

The state filed notice of intent to admit similar fact evidence, 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).

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).

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[1]Undersigned counsel has moved to supplement the record with the transcripts of the 7-3-91 hearing.

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). Over defense objection, the trial court permitted the family of the victim to make statements (R. 4078-4079). However, Judge Richardson stated that in determining the penalty for the first degree murder conviction he did not consider anything said or done on that day (R. 4108). 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 one portion of the evidentiary hearing was held (PC-R. 6-166), and the second portion was set for June 24, 1999 to present evidence of mental mitigation. Prior to the June 24th court date, postconviction counsel filed a motion to continue the evidentiary hearing. Dr. Faye Sultan, who had examined Mr. Schwab and who was ready to testify, "strongly recommended that the defendant be examined by Dr. Berlin because of his greater expertise in the particular problems which afflict the defendant" (PC-R. 1239). Dr. Berlin, however, refused to participate without adequate time to prepare (PC-R. 1240). Judge Holcomb denied the motion without a hearing (PC-R. 1243). On June 24, 1999 no witnesses were presented, and arguments on the evidentiary hearing were held (PC-R. 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). This appeal is properly before this

Court.

STATEMENT OF THE FACTS

A. TRIAL

Mr. Schwab was arrested on April 21, 1991 in Ohio for the murder of Junny Rios-Martinez (R. 1441-1460). On April 23, 1991 the body of Junny Martinez was located in the Canaveral Groves section of central Brevard County, Florida (R. 76-81). Dr. Dennis Wickham, a forensic pathologist, conducted an autopsy on the body (R. 243). Dr. Wickham testified that the cause of death was mechanical asphyxia (R. 250). An examination of the neck area showed no signs of ligature or bruise marks either internally or externally (R. 253). Dr. Wickham testified that mechanical asphyxia is not a natural cause of death but can be accidental (R. 259). Dr. Wickham further testified that mechanical asphyxia could have been accidental from eating a popsicle, having something lodged in the throat, or from drowning (R. 280). Dr. Wickham found nothing to contradict either drowning or accidental cause of death (R. 280). Dr. Wickham also stated that the death could have been caused by some type of seizure disorder (R. 282). The victim could have been unconscious when the mechanical asphyxia began (R. 283). Although Dr. Wickham testified that he had no opinion whether the victim was alive or dead when placed in the trunk, he had previously stated in his deposition that the victim was probably dead when he was placed in the trunk (R. 90, 298).

Prior to trial, before an arrest had been made in the case, Assistant State Attorney Robin Lemonidis (along with Assistant

State Attorney John McBain and Assistant Public Defender Randy Moore) was in the clerk's office reading an article in the newspaper regarding the kidnaping and possible murder of Junny Rios-Martinez (R. 4208-4209). Mark Schwab had just been identified in the paper as a suspect (R. 4208-4209). As she was reading the details Judge Edward Richardson came into the office (R. 4208-4209). Ms. Lemonidis asked the judge if he would like a case like that (R. 4208-4209). At first he said no; then he said, "(S)ure I'd like that case" (R. 4208-4209). He then made his hand into an imaginary pistol and shook it at the group (R. 4208-4209).

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). On July 3, 1991, at the urging of the State Attorneys Office, Judge Richardson held a hearing on the state attorney affidavits that were filed regarding possible trial judge bias (P. 1-33). During this hearing, the public defenders made no motion to recuse Judge Richardson, and Judge Richardson did not on his own motion disqualify himself (P. 1-33).

B. EVIDENTIARY HEARING

To prove the claims of ineffective assistance of counsel and judicial bias, six witnesses were presented at the evidentiary hearing.

James Russo (Public Defender of the 18th Judicial Circuit,

presently and in 1991), Marlene Alva (chief assistant public defender in 1991), and Randy Moore (assistant public defender in 1991) all testified during the evidentiary hearing. Marlene Alva recalled that she, Mr. Russo, Randy Moore and possibly Mr. Onek discussed waiver of jury trial early in Mr. Schwab's case (PC-R. 121). Ms. Alva's position was that jury trial should **not** be waived, but she could not recall if she discussed this with Mr. Schwab (PC-R. 122,125) (emphasis added).

Mr. Schwab's case was first assigned to Randy Moore. During this time, Mr. Moore had no capital experience, and the office had no capital investigators or mitigation specialists (PC-R. 21) (PC-R. 130-131, 134). Mr. Moore had not talked to witnesses, had not contacted any experts, and has no recollection of reviewing any evidence or receiving discovery (PC-R. 131-133). Mr. Moore was assigned to the case for approximately three weeks to a month, and during this time he obtained a waiver of jury trial from Mr. Schwab (PC-R. 131, 134). Mr. Moore could not recall if he advised Mr. Schwab of change of venue (PC-R. 136).

Brian Onek, Mr. Schwab's second lead trial attorney, testified that when he was assigned to the case, he had never been the lead attorney in a jury trial where the state sought the death penalty (PC-R. 10-11, 37). In addition, a waiver of jury trial was on the record prior to Mr. Onek taking over the case (PC-R. 12).

When Mr. Onek first met with Mr. Schwab, Mr. Schwab asked him about waiver of jury trial that had previously been entered (PC-R. 14). Mr. Schwab wanted to know if Mr. Onek thought waiver was a

good idea (PC-R. 14). Mr. Onek testified that he had two thoughts. He said:

> ...I wanted to gain a confidence because he was now getting a new lawyer. So I wanted to gain his confidence without losing the trust he had built into our office by his previous lawyer. I was coming into a situation where he had already had counsel and they had already had conversations as to the best route to take a non-jury trial...I had no disagreement with that position.

(PC-R. 14-15).

Mr. Onek did not do any research on whether a judge or jury was more likely to recommend death (PC-R. 96). Mr. Onek continued to advise Mr. Schwab to proceed non-jury even though Mr. Onek was aware of two affidavits from assistant state attorneys-Robin Lemonidis and John McBain (R. 4209-4208, PC-R. 27). These attorneys witnessed Judge Richardson (prior to being assigned the case) being asked if he wanted Mr. Schwab's case and initially saying no (PC-R. 27). Then the judge made "a gesture of pulling a trigger on a gun or firing a gun" (PC-R. 27). In addition Mr. Onek testified that at the time of Mr. Schwab's trial, Judge Richardson was an unknown entity on the bench (PC-R. 25, 87). Mr. Onek told Mr. Schwab that Judge Richardson had never sentenced anyone to death (PC-R. 24), when in fact Judge Richardson had not had any death penalty trials prior to Mr. Schwab's (PC-R. 79).

Mr. Onek recalls that there was extensive publicity in this case (PC-R. 22), but that he could not recall if he explained or discussed change of venue with Mr. Schwab (PC-R. 17). He testified that if he did explain change of venue, it would have been a one

sentence explanation of, "If we're having a non-jury trial, we wouldn't be moving-we wouldn't be changing venue" (PC-R. 24).

During the penalty phase, Mr. Onek presented the testimony of Mr. Schwab's mother and father (R. 3018-3046,3104-3171). Mr. Onek knew that Mr. Schwab's mother would testify favorably and that Mr. Schwab's father would contradict what his ex-wife said, yet he presented the testimony of both (PC-R. 95). Mr. Onek reasoned that he wanted the judge to have a "full picture" (PC-R. 96).

After Mr. Schwab was sentenced and Mr. Onek filed his notice of appeal, he did not request that the 7-3-91 transcript of the hearing regarding the state attorney affidavits and waiver of jury trial be transcribed (PC-R. 35) or the questions which were submitted to the judge by the state.

During the evidentiary hearing, Mr. Schwab testified that he signed a waiver of jury trial because of Mr. Moore's representations (PC-R. 144). Mr. Moore asked Mr. Schwab to waive jury trial and presented Mr. Schwab with a waiver of jury trial form (PC-R. 143-144). Mr. Schwab said,

> He said that was the best way to go. With all the publicity, that I wasn't going to be able to get a fair jury and they like the judge that had been assigned to my case, that he had never given anybody a death sentence before

(PC-R. 144).

However, Mr. Moore did not discuss change of venue. Mr. Schwab testified that he was not aware of other options (PC-R. 144). Had Mr. Schwab known of the option of moving the case to another county, he never would have waived jury trial (PC-R. 145).

After Mr. Moore had been on the case for three to four weeks, Mr. Onek and Mr. Rhoden were assigned to the case (PC-R. 145). Mr. Onek also told Mr. Schwab that Judge Richardson had never sentenced anyone to death, but did not explain that Judge Richardson had never had a capital case where someone had been found guilty of first degree murder (PC-R. 144-145). Prior to trial, Mr. Schwab became aware of two affidavits filed by assistant state attorneys Robin Lemonidis and John McBain (PC-R. 146). Although Judge Richardson asked Mr. Schwab (during a hearing held on 7-3-91) if he had read the affidavits, he never asked if Mr. Schwab wanted a new judge, nor did he ask Mr. Schwab the questions submitted by the state (PC-R. 146-147).

During cross examination of Mr. Schwab at the evidentiary hearing, Assistant Attorney General Nunnelley quoted from the July 3, 1991 hearing where Judge Richardson asked:

> Strictly based upon the affidavits that I have before me here and the affidavits you acknowledge you've read, the point being that if you don't make the motion and later on attempt to complain about it by way of an appeal, based upon the contents of these affidavits, the appellate court would not undertake to consider that issue. Do you understand?

(PC-R. 150).

In response, Mr. Schwab testified that he was doing his best to pay attention to what the judge was asking and the meaning of the words. But he didn't know what "filing a motion at this time" meant (PC-R. 157). Mr. Nunnelley also cross-examined Mr. Schwab about his waiver of jury trial and the colloquies regarding waiver

that he had with Judge Richardson. While Mr. Schwab said that at those colloquies he testified truthfully, he said that his answers were truthful but uninformed answers (PC-R. 150-155).

Mr. Schwab testified on redirect examination:

> Mr. Reiter: Okay. Did either of them tell you what would happen if you answered those questions in any other manner than you did?
>
> Mr. Schwab: Yes.
>
> Mr. Reiter: What was told to you?
>
> Mr. Schwab: That I wouldn't be able to waive the jury.
>
> Mr. Reiter: Whose request was it to waive the jury?
>
> Mr. Schwab: It was their request.

(PC-R. 156).

Judge Richardson testified during the evidentiary hearing that he had a vague recollection of the affidavit of one assistant state attorney, Robin Lemonidis, but not John McBain (PC-R. 53-54). Judge Richardson testified:

> ...an Assistant State Attorney named Robin Lemonidis had filed an affidavit alleging that at some point in time prior to the Schwab case being assigned to me, that-as I recall, she said that in a conversation, or some kind of an encounter that occurred in the hallway of the court house, that she had said something like, "What if you get this case," or "you might get this case," or something. She alleged at the time that I made some sort of gesture or remark to her that could been construed to be unfavorable to the person who allegedly committed the crimes... she alleged some sort of a -I made a gesture with my fingers or my hand at the time when she mentioned the subject case.

(PC-R. 54, 56).

While Judge Richardson testified that he was familiar with the canons of ethics that require a judge to disqualify himself, Judge Richardson's description of that covered only situations where a legally sufficient motion has been filed (PC-R. 57-58). He never addressed the procedure where a judge can sua sponte recuse himself. As to the affidavits filed with the court, Judge Richardson said, "There was no motion to recuse me filed by any party to this case. The only thing that was filed was these affidavits...these affidavits were just there (PC-R. 58)."

When questioned about the July 3, 1991 pre-trial hearing where these affidavits were discussed, Judge Richardson recalled:

> I simply made Mr. Schwab aware of the fact that the affidavits were filed and I gave each side the opportunity to either file a formal motion for me to recuse myself based on the affidavits, or to otherwise do so verbally, and neither side elected to do so.

(PC-R. 58).

Again, Judge Richardson did not discuss the possibility of recusal on the judge's own motion. In addition, Judge Richardson could not recall if he specifically asked Mr. Schwab, during the July 3,1991 hearing, if he (Mr. Schwab) wanted the judge recused (PC-R. 59).

The state presented no witnesses during the evidentiary hearing, and the Judge Holcomb denied all claims from the Fla. R. Crim. P. 3.850 Motion to Vacate in his October 12, 1999 Order (PC-R. 1247-1260).

SUMMARY OF ARGUMENT

1. The Trial Court should have recused himself from presiding over Mr. Schwab's case because of his (Judge Richardson's) actual bias against Mr. Schwab and because of the appearance of bias.

2. Mr. Schwab was denied his right to a fair and impartial trial and a fair and impartial trier of fact because of Judge Richardson's bias against him.

3. Mr. Schwab did not knowingly, intelligently, and voluntarily waive his right to a jury trial.

4. Trial counsel was ineffective at the guilt phase of his non-jury trial for failing to investigate and adequately explain waiver of jury trial. Mr. Schwab proved at his evidentiary hearing that misrepresentations were made to him regarding Judge Richardson.

5. Defense counsel was ineffective for failing to move for change of venue, for failing to move for recusal of Judge Richardson, and for failing to ensure a complete and reliable transcript was prepared for review by the Florida Supreme Court on direct appeal.

6. Defense counsel was ineffective at the penalty phase of his trial by waiving the penalty phase jury, by failing to investigate Mr. Schwab's prior convictions, by stipulating to two aggravating circumstances, by failing to provide a competent mental health professional, and by presenting a witness who defense counsel knew would impeach another mitigation witness.

7. Mr. Schwab proved at his evidentiary hearing that Judge Richardson relied on facts outside the record in sentencing Mr. Schwab.

8. Mr. Schwab is innocent of the death penalty.

9. Mr. Schwab's prior conviction was unconstitutionally obtained.

10. The statutory aggravator of "heinous, atrocious, or cruel" was improperly found by the trial judge.

11. The trial judge improperly found an automatic aggravating circumstance.

12. Florida's statute setting forth aggravating circumstances is facially vague and overbroad.

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 HIS 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.

Claim IX of Mr. Schwab's Motion to Vacate alleged with specificity the basis for Judge Richardson to have recused himself, upon his own motion.

> 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 the morning that Mr. Schwab was identified in the FLORIDA TODAY newspaper as the prime suspect in the case, Assistant State Attorney Robin Lemonides causally asked Judge Richardson how he would like to get a case like that. Judge Richardson responded "not me..." And then said "sure, I'd like that case. He then made his hand into an imaginary pistol and shook it at Lemonides. 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. Yet despite his demonstrated predisposition, Judge Richardson did not recuse himself but proceeded to preside over the non-jury trial of the case.

(PC-R. 1064).

In the trial court's order denying relief of Mr. Schwab's Claim IX, the court stated:

> Defendant's ninth claim alleges he was not afforded a fair trial due to the bias and predetermination of guilt on the part of the trial judge, who also eventually acted as the trier of fact in the case. 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. This issue is not cognizable under a 3.850 motion, and is therefore denied.[2] Zeigler v. State, 452 So.2d 537 (Fla. 1984).

(PC-R. 1250).

It is the contention of Mr. Schwab that the trial court's

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[2]This issue was not raised by appellate counsel on direct appeal. Although the undersigned believes the trial court is inaccurate as to the procedural bar in a 3.850 motion, this issue will also be raised contemporaneously in Mr. Schwab's state habeas petition.

determination that the recusal issue of Judge Richardson is procedurally barred is inaccurate. Mr. Schwab's claims in his 3.850 motion and testimony at the evidentiary hearing establish that his attorneys misrepresented to him -- which does not appear in the trial record -- material facts which caused him not to challenge the bias of Judge Richardson and constituted a sufficient basis for attack in a 3.850 motion. 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.); 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).

The trial court cites Zeigler as support for its conclusion. However, the case at bar is distinctively different than the case cited by the trial court. 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 someone in a capital case[3] (PC-R. 187-188).

Further, at the evidentiary hearing, Mr. Schwab testified that he believed that his attorneys had misled him and made misrepresentations in order to make him believe that although Judge Richardson had presided over other capital cases, he had never sentenced anyone to death (PC-R. 144-146). He further stated that had he known that Judge Richardson had never had a capital case before, he would not have waived trial by jury:

> DIRECT EXAMINATION OF MARK SCHWAB BY MR. REITER
>
> Q. Mark, with regard to this case, do you know Mr. Moore, Public Defender?
>
> A. I do.
>
> Q. Was he an attorney on your case?
>
> A. Yes, he was.
>
> Q. Was he the first attorney that you -- being here in Brevard County, was he the first attorney that you met?
>
> A. He was.
>
> Q. Did you discuss -- did he discuss with you an issue of waiver of jury trial?
> A. He did.
>
> Q. How did that conversation come up? Did you bring it up or did he?
>
> A. He brought it up.
>
> Q. Do you have a recollection as to him asking you to waive?

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[3]A claim of ineffective assistance of counsel is discussed more fully in another argument.

A. Yes.

Q. Did you, in fact, sign a waiver for jury trial that he presented to you?

A. I did.

Q. Why?

A. He said that was the best way to go. With all the publicity, that I wasn't going to be able to get a fair jury and they like the judge that had been assigned to my case, that he had never given anybody a death sentence before. And they said that was the best thing to do.

Q. Did he ever explain to you that you had an opportunity to file a motion for change of venue to move the case somewhere else?

A. No.

Q. Did you know you had another option?

A. No.

Q. When you say he told you about Judge Richardson having never given anyone the death penalty before, did he ever -- what did you take that to mean?

A. That he had had capital cases before but just never gave anybody the death sentence.

Q. Had he -- had Mr. Moore explained that to you, would you have waived jury trial?

A. Had he explained what to me?

Q. Had Mr. Moore explained to you that you had an opportunity, or another option, perhaps to move the case to another county, would you have -- or did he explain to you that Judge Richardson had never had a capital case before, would you have waived jury trial?

A. Absolutely not.

(PC-R. 143-145).

At the evidentiary hearing, Mr. Schwab presented **four** witnesses who testified to knowledge of affidavits filed prior to trial (June 28, 1991) by assistant state attorneys regarding trial judge bias (PC-PR. 27-31, 35, 54-59,110, 146-150). Assistant State Attorney 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 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 kidnaper 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.

(PC-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 Richarson 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. 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.

(PC-R. 4208).

There is no question that Judge Richardson was aware of the affidavits and knew of the appearance of impropriety. At a hearing held on July 3, 1991[4], the following occurred:

> 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

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[4]This hearing was not requested to be transcribed by trial counsel or appellate counsel and was not included in the original record on direct appeal.

> 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 I couldn't care less about this.
>
> 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.
>
> And only because of that do I think that we need to go any further with this than just exactly as you suggested, and I don't think that 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. But I think that-
>
> I want to make sure, in open court, that Mr. Schwab has read these allegations; and I want to make sure he still wants to proceed in the manner in which he told me he did the other day. And I'm going to limit it to that.
>
> If that's not satisfactory to everybody, well, that's just too bad. I think that's the right thing to do. Anything further?

[Hearing held 7/3/91, page 18-19] [emphasis added].

For some reason, Judge Richardson had the belief that the accusations alleged in the affidavits had an effect on whether Mr. Schwab would have a non-jury trial. The affidavits only pertained to the potential bias of Judge Richardson and not as to whether Mr. Schwab would receive a non-jury trial. Judge Richardson could have and should have recused himself, which still would have provided Mr. Schwab the ability to obtain a non-jury trial.

During the evidentiary hearing, lead trial attorney Brian Onek testified that he was aware of two affidavits from assistant state attorneys Robin Lemonidis and John McBain and also recalled being

present at the 7-3-91 hearing where the affidavits were discussed (PC-R. 27). Mr. Onek remembered that in the affidavits the assistant state attorneys said they witnessed Judge Richardson, after being asked if he wanted the case, initially saying no and then making "a gesture of pulling a trigger on a gun or firing a gun" (PC-R. 27).

Judge Edward J. Richardson also testified at the evidentiary hearing, and he recalled being presented with the affidavits from the State Attorney's Office (PC-R. 53). He recalled the affidavit of Robin Lemonidis, but did not remember John McBain's affidavit (PC-R. 54). Judge Richardson testified:

> ...an Assistant State Attorney named Robin Lemonidis had filed an affidavit alleging that at some point in time prior to the Schwab case being assigned to me, that-as I recall, she said that in a conversation, or some kind of an encounter that occurred in the hallway of the court house, that she had said something like, "What if you get this case," or "you might get this case," or something. She alleged at the time that I made some sort of gesture or remark to her that could been construed to be unfavorable to the person who allegedly committed the crimes... she alleged some sort of a -I made a gesture with my fingers or my hand at the time when she mentioned the subject case.

(PC-R. 54, 56).

While Judge Richardson testified that he was familiar with the canons of ethics that require a judge to disqualify himself, Judge Richardson's description of that covered only situations where a legally sufficient motion has been filed (PC-R. 57-58). He never addressed the procedure where a judge should sua sponte

recuse himself when impartiality could reasonably be questioned. As to the affidavits filed with the court, Judge Richardson said, "There was no motion to recuse me filed by any party to this case. The only thing that was filed was these affidavits...these affidavits were just there" (PC-R. 58).

During a pretrial hearing held on 5-23-91, Judge Richardson recognized the intense publicity this case was receiving (R. 3701). He instructed the attorneys to read over the rules of professional conduct saying:

> I would ask all of you to take a few moments-I think it's good for all of us every once in a while to go back and look over the rules and look at the rules, the disciplinary rules and rules of ethics, that govern the profession of law; and every time I've done that I always find something new that I didn't even know was in there before, and specifically there (sic) is a couple of rules that deal with trial publicity, and they do relate very specifically to criminal trials.
>
> I'm just going to caution both the defense and the State to please take time to go back and look at Disciplinary Rule 4-3.6 relative to trial publicity and also 4-3.8, responsibilities of the prosecutor in the criminal case. I'll ask all of you to read those things within the next couple of days and make sure that everybody complies strictly with the terms and conditions of those disciplinary rules...So, please, all of you carefully review the disciplinary rules because the Court has done so, and I do intend to hold your feet to the fire as to the content of those rules.

(R. 3701-3703).

While the court was concerned with trial publicity during the

pendency of the trial, he should have also been concerned with the appearance of judicial bias. Had Judge Richardson carefully reviewed the "disciplinary rules and rules of ethics, that govern the profession of law", specifically Canon 3E(1), he would have recused himself as soon as the state attorney affidavits were before him.

The requirement of judicial impartiality is at the core of our system of criminal justice. The Florida Supreme Court has said:

> This Court is committed to the doctrine that every litigant is entitled to nothing less than the cold neutrality of an impartial judge. It is the duty of Courts to scrupulously guard this right and to refrain from attempting to exercise jurisdiction in any matter where his qualification to do so is seriously brought in question. The exercise of any other policy tends to discredit the judiciary and shadow the administration of justice. State ex. rel. Davis v. Parks, 141 Fla. 516, 519-520, 194 So. 613 (1939) (emphasis added).

In a similar vein, the Court has said:

> 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 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 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. Williams v. State, 143 So.2d 484 (Fla. 1962) (emphasis added).

Judge Richardson's actions prior to being assigned to the case

did not inspire confidence in the administration of justice. In fact, his actions were so egregious that they prompted the two assistant state attorneys who witnessed them to come forward and file affidavits recounting what they saw (R. 4208-4209).

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).

During criminal trials, jurors are continually and firmly admonished not to pre-determine the issues before hearing all of the evidence. See Standard Jury Instruction 1.01 (1995) ("You should not form any definite or fixed opinion on the merits of the case until you have heard all the evidence, the argument of the lawyers and the instructions on the law by the judge"). While it should go without saying that the same admonishment applies to a judge, especially a judge acting as the sole trier of fact, such did not occur in Mr. Schwab's trial. Before hearing the evidence presented Judge Richardson had decided Mr. Schwab's guilt and determined his sentence.

Not only did Judge Richardson's prejudged decision violate his constitutional and statutory duties, but his conduct constituted a blatant disregard for the canons of judicial conduct:

> Our legal system is based on the principle that an independent, fair and competent judiciary will interpret and apply the laws that govern us. The role of the judiciary is central to American concepts of justice and the rule of law. Intrinsic to all sections of this Code are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to enhance and maintain confidence in our legal system. The judge is an arbiter of facts and law for the resolution of disputes and a highly visible symbol of government under the rule of law.
> In Re Code of Judicial Conduct, 643 So. 2d 1037, 1041 (Fla. 1994).

Even if Judge Richardson had managed to cast aside his prejudice during the pretrial period, his appearance of bias was such as to violate Mr. Schwab's right to a fair and impartial finder of fact. The United States Supreme Court has explained that in deciding whether a particular judge cannot preside over a litigant's trial:

> the inquiry must be not only whether there was actual bias on respondent's part, but also whether there was such a likelihood of bias or an appearance of bias that the judge was unable to hold the balance between vindicating the interests of the court and the interests of the accused. Ungar v. Sarafite, 376 U.S. 575, 588, 84 S. Ct. 841, 849, 11 L.Ed. 2d 921 (1964)(emphasis added). Such a 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, but due process of law requires no less. In Re: Murchison, 349 U.S. 133, 136, 75 S. Ct. 623, 625, 99 L.Ed. 942 (1955) (emphasis added).

In capital cases, judicial scrutiny must be more stringently applied than in non-capital cases. As the United States Supreme

Court indicated in Beck v. Alabama, 447 U.S. 625 (1980), special procedural rules are mandated in death penalty cases in order to insure the reliability of the sentencing determination. "In a capital case, the finality of the sentence imposed warrants protections that may or may not be required in other cases." Ake v. Oklahoma, 470 U.S. 68, 87 (1985) (Burger, C. J., concurring). Thus, in a capital case such as Mr. Schwab's the Eighth Amendment imposes additional safeguards over and above those required by the Fourteenth Amendment.

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. Livingston at 1084 and Suarez at 192. Consequently, the Court reversed and the matter was remanded for proceedings before a different judge. 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.

More recently 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 reasonable by questioned) (emphasis added).

The trial court's reliance on Zeigler to find Claim IX as barred is misplaced. The facts of the instant case and the law cited regarding judicial impartiality clearly indicate that the instant case is more akin to Porter v. State, 723 So.2d 191 (Fla. 1998). First, Mr. Schwab was induced to waive a fundamental Constitutional right to a jury trial based upon misrepresentations by his trial counsel. Second, trial counsel and appellate counsel failed to have the 7-3-91 hearing and the "State's questions for In Camera Inquiry" -- that would have indicated to this Court on direct appeal the actions of Judge Richardson -- transcribed and included as part of the record on direct appeal.

In Porter, this Court stated:

> In sum, due process under Florida's capital sentencing procedure requires a trial judge who is not precommitted to a life sentence or a death sentence but rather is committed to impartially weighing aggravating and mitigating circumstances.

Id. at 196.

> The issue next becomes whether the constitutional infirmity concerning due process which we find based upon the determination that the trial judge lacked impartiality overcomes the procedural bar we found to exist in out 1990 review. We find that the infirmity does overcome the procedural bar because it is the trial judge who must make the determination as to whether there is a reasonable basis in the record for the jury's recommendation.

Id. at 197.

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).

Judge Holcomb erred by finding that Claim IX is not cognizable under rule 3.850. Further, the record reflects that had Judge Holcomb considered the claim, the only reasonable determination would be that Mr. Schwab was not afforded due process because his trial court was not an impartial tribunal.

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 U.S. CONSTITUTION.

Mr. Schwab's Motion to Vacate Judgments of Conviction and Sentence alleges that Mr. Schwab was denied a fair trial due to the trial judge's bias. Claim IX of Appellant's 3.850 motion states:

> 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 the morning that Mr. Schwab was identified in the FLORIDA TODAY newspaper as the prime suspect in the case, Assistant State Attorney Robin Lemonides casually asked Judge Richardson how he would like to get a case like that. Judge Richardson responded "not me..." and then said "sure, I'd like that case. He then made his hand into an imaginary pistol and shook it at Lemonides. 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 (PC-R. 1065).
>
> * * * *
>
> Before hearing the evidence presented Judge Richardson had decided Mr. Schwab's guilt and determined his sentence (PC-R. 1067).
>
> * * * *
>
> The record contains numerous instances in which Judge Richardson appeared to use the absence of the jury as a pretext for erroneous rulings. For example, Judge Richardson let in hearsay evidence explicitly on the ground that he, and not a jury, was the trier of fact. Over defense objection Judge Richardson admitted victim impact evidence, stating that "this is one of the luxuries of a non jury trial."

(PC-R. 1067).

The record is replete with instances where Judge Richardson demonstrated his actual bias:

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.

2. During a 7-3-91 hearing on the issue of the affidavits alleging the behavior of Judge Richardson, Judge Richardson refused 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 Mr.

Onek, 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: I want to get through here. 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: I notice that more and more. We spend half a day sometimes arguing over a point that turns out to be worthless.
>
> 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 (although much of the mother's testimony was corroborated by other witnesses). 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 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. 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 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.

Judge Holcomb, however, denied relief on Claim IX of Mr. Schwab's 3.850 Motion, stating in his order that "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 (PC-R. 1250)." However, the cumulative impact of Judge Richardson's 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) As fundamental error, this issue should not be precluded from review. 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).

Throughout the trial, Judge Richardson exhibited bias and predisposition against Mr. Schwab, by failing to recuse himself in the face of affidavits filed by the State Attorney's Office, by his impatience with counsel's arguments which is evidenced by his comment, "We spend half a day sometimes arguing over a point that turns out to be worthless" (R. 3422), by his failure to find non-statutory mitigators when they were supported by corroborated testimony, and by his failure to ensure a complete record on appeal. This bias was exacerbated by the fact that there was no jury to counterbalance the overt one-sidedness of the court's rulings. This bias denied Mr. Schwab the fundamental right of a fair trial and a fair and impartial trier of fact.

A fair hearing before an impartial tribunal is a basic requirement of due process. See In re: Murchison, 349 U.S. 133 (1955). In Rapp v. Van Dusen, 350 F.2d 806 (3rd Cir.1965) the court stated that "the proper administration of justice requires of a judge not only actual impartiality, but also the appearance of a detached impartiality." In U.S. v. Brown, 539 F.2d 467, 469 (5th Cir. 1976) the trial judge prior to Mr. Brown's trial was heard to say "that he was going to get that nigger." 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. Relief requires that the conviction and sentence be vacated.

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.

In Claim VI of Mr. Schwab's Motion to Vacate Judgments of Conviction and Sentence he alleged that his waiver of jury trial was not knowingly, voluntarily and intelligently waived (PC-R. 1059). Judge Holcomb granted an evidentiary hearing on this claim (PC-R.1200-1201) but denied relief stating in his order:

> This Court has reviewed the motion, reviewed the official court file and the trial testimony and proceedings, and weighed the testimony of witnesses testifying concerning issues in the motion and makes the following determination of fact and law: (PC-R. 1247).
>
> * * * *
>
> At the hearing, Defendant presented no evidence to substantiate the claim that he suffered from any mental illness which would have prevented him from understanding the consequences of his actions, nor was any evidence of brain damage presented

(PC-R. 1249).

If the trial court in fact reviewed the entire record as he indicated, he must have disregarded the facts pertinent to the claim and the case law. The trial record and the evidentiary hearing record is clear as to the circumstances that unfolded regarding Mr. Schwab's waiver of jury trial. Prior to trial a hearing was conducted by Judge Richardson on May 23, 1991, to

determine whether Mr. Schwab was making a knowing, intelligent, and voluntary waiver of jury trial. The following occurred:

EXAMINATION OF MR. SCHWAB BY JUDGE RICHARDSON

Q. All right, sir. I have received and read your written Waiver of Trial by Jury in this case, and I have some questions I want to ask you about that. I want to make sure and satisfy myself that that's exactly what you want to do in this case. Okay?

A. Okay.

Q. Now, sir, can you read and write and understand the English language?

A. Yes, sir, I can.

Q. Did you read and sign and understand this particular Waiver of Trial by Jury that has been field in this case?

A. Yes, sir, I did.

Q. Is everything in that written Waiver of Trial by Jury true and correct?

A. Yes, sir, it is.

Q. Prior to your signing that waiver, did you carefully confer with your attorneys relevant to the scope and effect of that Waiver of Trial by Jury?

A. Yes, sir, I did.

Q. Are you satisfied with the service of your attorneys up to this point in time?

A. Yes, sir, I am.

Q. Were they able to answer all of your questions that you may have as to the consequences of waiving a trial by jury in a case like this?

A. Yes, sir.

Q. Do you have any additional questions of them that they did not answer for you?

A. No, sir.

Q. At this time do you have any particular questions of the Court relevant to that Waiver of Trial by Jury?

A. No, sir, I don't.

Q. Have you had any pills or drugs or alcohol in the last twenty-four hours?

A. No, sir, I haven't.

Q. As you stand here before the Court, do you feel you are mentally alert and capable of exercising your best judgment today?

A. Yes, sir, I do.

Q. Mr. Schwab, do you understand that you have been charged by a Grand Jury Indictment in this case in Count I with first-degree murder from a premeditated design? In Count II you are charged with sexual battery upon a child under the age of twelve year of age, and in Count III you're charged with kidnapping of a child under the age of thirteen years of age? Do you understand those are the charges that are pending in this case?

A. Yes, sir, I do.

Q. As to Count I, this charge of first-degree murder, I want to advise you that that charge is punishable under our law -- these are the maximum penalties a person could receive for each one of these offenses. As to the murder charge, it is punishable by death or life imprisonment without parole for twenty-five years.
Do you understand that?

A. Yes, sir, I do.

Q. As to the sexual battery charge, that is

also a capital felony, and it is punishable by life in prison with no chance of parole for twenty-five years. Do you understand that?

A. Yes, sir.

Q. Kidnapping is also punishable by a term o f imprisonment for life. That would be life not exceeding forty years, Do you understand that?

A. Yes, sir.

Q. Now, do you understand, sir, that you have a right under the Constitution of the United States and the Constitution of the State of Florida to a trial in this type of case by a twelve-person, fair and impartial jury?

A. Yes, sir.

Q. You also have a right to participate with your attorneys actively in the selection of that jury. Do you understand that?

A. Yes, sir, I do.

Q. Do you understand that by giving up the jury trial you're giving up all of these rights?

A. Yes, sir.

Q. Now, this twelve-person jury that you have an absolute right to in a case like this, their function would be to hear the evidence that is presented in court and deliberate, and then they must reach a unanimous verdict on the issue of guilt or innocence.
Do you understand that?

A. Yes, sir, I do.

Q. In other words, all twelve people would have to agree you are guilty before the verdict can come back finding you guilty. Do you understand that?

A. Yes, sir.

Q. Now, the verdict of guilty or innocent must be unanimous; that is, the verdict must be the verdict of each juror as well as the jury as a whole. Do you understand what I mean by that then?

A. Yes, sir.

Q. In addition to that, sir, if you are found guilty of premeditated first-degree murder, for instance, which is Count I charge that is pending against you, you have a right to an advisory twelve-person jury during that penalty phase of Count I, the murder charge. Do you understand that?

A. Yes, sir.

Q. If the jury finds you guilty of premeditated murder or felony murder, then there would be a second phase to that proceeding, and that phase would be called th penalty phase. In that phase the function of that twelve-person jury will be to advise the Court what a proper sentence would be in that case. The choices would be either death or life imprisonment with no chance of parole for twenty-five years.
Do you understand the function of the advisory jury?

A. Yes, sir.

Q. Now, as to the advisory portion of the trial, or the penalty phase as we call it, the recommendation of death must be by a majority vote of that twelve-person jury. That means seven persons or more must advise the Court that death would be the appropriate sentence. If the twelve-person jury votes six to six, in other words, if they're deadlocked on that issue, then the Court would construe that to be a recommendation for a life sentence rather than a death sentence.
Do you understand that?

A. Yes, sir.

Q. Now, I've been saying this is an advisory verdict, and I want yo to understand, however, that although this verdict, this advisory recommendation by the jury, is not binding upon the Court, it must be given great weight by the Judge in deciding what a proper sentence would be in the case. In other words, the decision of that jury would play a big part in this Court's decision as to what the ultimate sentence would be under those circumstances.
Do you understand that?

A. Yes, sir.

Q. If you're waiving the jury trial as to the guilt phase and the penalty phase, that means you will not have the benefit of that advisory-type verdict for the judge. Do you understand?

A. Yes, sir.

Q. Now, do you have any questions about any of that so far that I've gone through with you?

A. No, sir, I don't.

Q. So by waiving a jury in this particular case, sir, what that means is the judge becomes the fact finder in this case. The judge would then determine guilt or innocence. The findings of fact by the judge would be given great weight on appeal just as a jury verdict would be given great weight on appeal as to factual questions that were involved in the case.
Do you understand?

A. Yes, sir.

Q. Sir, do you understand and have you thought through the ramifications of having one person decide guilt or innocence rather than twelve people?

A. Yes, sir.

Q. You're satisfied that you wish to proceed without a jury in both phases of this particular case?

A. Yes, sir.

Q. I want to also tell you this: I told you that you're entitled to a fair and impartial jury, and, of course, I think you understand that now. I want you to further understand that if we cannot select a jury in this particular venue, in the Brevard County areas, because of publicity or whatever, this trial will be moved by this Court to a location in another part of this state where we are able to find a fair and impartial jury of twelve people to try the case. In other words, there's no requirement that you be tried in Brevard County.
Do you understand that?

A. Yes, sir.

Q. Now, based upon everything that I have told you here this morning concerning this issue of Waiver of Trial by Jury, sir, do you still wish to proceed on that basis and waive your right to a trial by jury as to the guilt phase and penalty phase of this trial?

A. Yes, sir.

Q. Sir, as it stands right now then, the Court will make the following findings of fact:
I do find, sir, that your Waiver of Trial by Jury in this case is freely, voluntarily, and knowingly and intelligently made, and I do hereby accept your waiver at this time.

(R. 3690-3697)(emphasis added).

Moreover, Judge Richardson indicated, at the same hearing, his concern as to Mr. Schwab's competence:

> 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 states of this proceeding...

(R. 3702)(emphasis added).

There should have been no question that waiving a jury trial amounts to a critical stage of the proceeding. The colloquy conducted of Mr. Schwab was inadequate because Judge Richardson could not get a reasonable determination as to Mr. Schwab's competence or even his understanding of the proceedings by mere YES and NO answers, especially in light of the fact that Judge Richardson was on notice of the possible mental incompetence of Mr. Schwab. See Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1919 (1938)(The determination of whether there has been an intelligent waiver of right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.); United States v. Christensen, 18 F.3d 812 (9th Cir. 1993)(We now hold that district courts may not discharge this responsibility in cases where they have reason to suspect a defendant may suffer from mental or emotional instability without an in-depth colloquy which reasonably assures the court that under the particular facts of the case, the signed waiver was voluntarily, knowingly, and intelligently made); Miles v. Stainer, 108 F.3d 1109 (9th Cir. 1996)(The state-court plea colloquy consisted almost entirely of

yes or no questions which shed little light on complex reasoning ability); Wilkins v. Bowersox, 145 F.3d 1006 (8th Cir. 1997)(While Wilkins' simple "yes" and "no" answers indicated an intention to waive his right to counsel, this does not conclusively establish that his waiver of counsel was valid. A judge has an obligation to penetrate the surface with a more probing inquiry to determine if the waiver is made knowingly, intelligently, and voluntarily)(emphasis added).

Although Judge Richardson inquired of counsel as to whether Mr. Schwab was able to confer with them (R. 3704), counsel's failure to raise an issue of competency does not waive the defendant's right to a competency hearing. Drope v. Missouri, 95 S.Ct. 896 (1975). The record on direct appeal does not indicate that Judge Richardson ordered a competency evaluation. At the beginning of the trial, Judge Richardson again conducted an almost identical colloquy with Mr. Schwab regarding waiver of jury trial. Still, the answers given were purely "yes" and "no" answers (R. 13-20).

Further, at the evidentiary hearing, Mr. Schwab testified that he was under medication for almost the entire time he was in the county jail (PC-R. 150). At trial Dr. Bernstein testified that Mr. Schwab does suffer from mental illness, such that "his personality disorders, character and temperament at the present time certainly show personality disintegration, confusion and decomposition." (R. 3299). Dr. Bernstein also testified that Mr. Schwab attempted suicide while incarcerated in the county jail.

Also, Judge Holcomb by a previous order (prior to the second portion of the evidentiary hearing) prevented postconviction counsel from presenting such evidence of mental illness. A continuation of the evidentiary hearing was set for June 24, 1999, to present evidence of mental mitigation. Prior to the June 24th court date, postconviction counsel filed a motion to continue the evidentiary hearing. Dr. Faye Sultan, who had examined Mr. Schwab, "strongly recommended that the defendant be examined by Dr. Berlin because of his greater expertise in the particular problems which afflict the defendant"(PC-R. 1239). Dr. Berlin, however, refused to participate without adequate time to prepare (PC-R. 1239-1240). Judge Holcomb denied the motion without a hearing (PC-R. 1243).

Judge Holcomb also stated in his order, regarding claim VI, denying relief:

> Defendant claims he was never told of the increased risk of receiving the death penalty with a judge acting as the trier of fact versus a jury of twelve people. Initially, the Court would like to address the fact that Defendant presented no evidence to support this premise, other than the statements of conclusions contained within the motion. 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. Moreover, trial counsel for Defendant stated emphatically that the decision to have a non-jury trial, and if necessary, a penalty phase, was a trial strategy, as counsel determined that any twelve people, from anywhere in the State of Florida, upon hearing the facts would recommend death. Counsel believed that Judge Richardson was the best chance for Defendant. Defendant's motion on this basis is denied.

(PC-R. 1249-1250)(emphasis added).

What emerges from Judge Holcomb's order is that he has combined the requirement of Judge Richardson's obligation to assure that Mr. Schwab made a knowing, intelligent, and voluntarily waiver with counsel's strategy to waive jury trial. Judge Richardson's failure to adequately inquire and inform Mr. Schwab was discussed above.

As to trial counsel strategy, this issue will be discussed more fully in the issue of effective assistance of counsel claim. However, the undersigned is compelled to point out certain aspects of the record that are inapposite of Judge Holcomb's findings regarding trial strategy.

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). Randy Moore, Assistant Public Defender, 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, yet 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

questioned regarding his lack of information regarding the case, and therefore, his inability to give Mr. Schwab enough information with which to make an informed, intelligent and voluntary decision regarding waiver, Mr. Moore even admitted that Mr. Schwab had more information regarding the case than the Public Defender's Office:

> MR. REITER: Okay. So primarily, your decision being made here is to do specifically with the facts that you receive on the police report, conversation with Mr. Schwab, and your previous position of how this was going to turn out?
>
> MR. MOORE: And his input, as well. It was his decision.
>
> MR. REITER: That's what I said, when you spoke with Mr. Schwab. But when you say it was his decision, he didn't have all the information, did he?
>
> MR. MOORE: He had as much as we had, and he was the Defendant, and he had probably a better idea of what kind of case the State had than we did.

(PC-R. 140) (emphasis added).

Mr. Moore said that Marlene Alva (Chief Assistant Public Defender for Brevard and Seminole County in 1991) and James Russo (Public Defender) proposed the idea to waive jury trial (PC-R. 134); however, at the evidentiary hearing Marlene Alva contradicted Mr. Moore's testimony and stated emphatically that her position at the time was that jury trial should not be waived (PC-R. 122) (emphasis added).

Brian Onek, Mr. Schwab's second lead trial attorney, took over the case after Mr. Moore had handled it for 3-4 weeks (PC-R. 131). He testified that when he was assigned to the case, he had never

been the lead attorney in a jury trial where the state sought the death penalty (PC-R. 10-11, 37). Mr. Schwab wanted to know if Mr. Onek thought waiver was a good idea. Mr. Onek testified that he had two thoughts:

> ...I wanted to gain a confidence because he was now getting a new lawyer. So I wanted to gain his confidence without losing-without losing the trust he had built into our office by his previous lawyer. I was coming into a situation where he had already had counsel and they had already had conversations as to the best route to take a non-jury trial...I had no disagreement with that position.

(PC-R. 14-15).

Mr. Onek did not do any research on whether a judge or jury was more likely to recommend death (PC-R. 96). Mr. Onek continued to advise Mr. Schwab to proceed non-jury even though Mr. Onek was aware of two affidavits from assistant state attorneys-Robin Lemonidis and John McBain (R. 4209-4208, PC-R. 27). These attorneys witnessed Judge Richardson (prior to being assigned the case) being asked if he wanted Mr. Schwab's case and initially saying no (PC-R. 27). Then the judge made "a gesture of pulling a trigger on a gun or firing a gun" (PC-R. 27). In addition Mr. Onek testified that at the time of Mr. Schwab's trial, Judge Richardson was an unknown entity on the bench (PC-R. 25, 87), yet he told Mr. Schwab that Judge Richardson had never sentenced anyone to death; thereby, giving Mr. Schwab a false impression that although Judge Richardson had presided over a capital case, he hadn't sentenced anyone to death (PC-R. 24, 144).

When confronted with this at the evidentiary hearing, Mr. Onek

testified to the following:

> MR. ONEK: 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-
>
> MR. REITER: I appreciate that.
>
> MR. ONEK: Well, I'm-so-
>
> MR. REITER: 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.
>
> MR. ONEK: I don't remember ever saying that.
>
> MR. REITER: Okay. If Mr. Schwab were to take the stand and testify that you told him that, would you refute that?
>
> MR. ONEK: I could not say that that would be untrue either. I'm just saying I don't remember saying that.

(PC-R. 26-27).

Mr. Schwab did, in fact, testify at the evidentiary hearing that he was told that Judge Richardson had never sentenced anyone to death.

> MR. REITER: Did you , in fact, sign a waiver of jury trial that he presented to you?
>
> MR. SCHWAB: I did.
>
> MR. REITER: Why?
>
> MR. SCHWAB: He said that was the best way to go. With all the publicity, that I wasn't going to be able to get a fair jury and they like the judge that had been assigned to my case, that he had never given anybody a death sentence before. And they said that was the best thing to do.

(PC-R. 144).

* * * *

> MR. REITER: When you say he told you about Judge Richardson having never given anyone the death penalty before, did he ever -- what did you take that to mean?
>
> MR. SCHWAB: That he had had capital cases before but just never gave anybody the death sentence.

(PC-R. 144).

It is quite apparent by Mr. Onek's testimony at the evidentiary hearing that it wasn't the strategy of a non-jury trial per se that counsel was attempting to acquire, but that counsel wanted Judge Richardson at any cost -- even after it was established that Judge Richardson was biased.

> MR. REITER: Did you ever tell Mr. Schwab that based on those two affidavits, that he could have Judge Richardson recused, potentially?
>
> MR. ONEK: yes.
>
> MR. REITER: What was his response?
>
> MR. ONEK: I think it gets back to -- well, I think he asked for our opinion. And I think it gets back to what I was saying before, that we wanted to keep Richardson in lieu of the other choices. (PC-R. 29).

* * * *

> MR. REITER: I understand that. Are you saying, then, that regardless of whether or not it could be established that Mr. Judge Richardson had a bias, that regardless of that, you would ignore it and want him to sit on the case?
>
> MR. ONEK: We wanted Judge Richardson to be the trier of fact.

(PC-R. 31).

Mr. Schwab's counsel were bound and determined to have Judge Richardson sit as the trier of fact by making misrepresentations to Mr. Schwab and despite Judge Richardson's apparent bias. Judge Holcomb's order fails to consider or discuss any of the facts cited above.

Mr. Schwab's waiver of jury trial was obtained prior to his own attorneys obtaining enough information which suggests that they also had pre-judged the case. They continued to advise waiver even in the face of state attorney affidavits that had been filed regarding trial judge bias. In addition, Mr. Schwab's waiver was obtained through misrepresentations of his trial counsel regarding the trial.

The cumulative effect of trial counsel's failure to investigate Mr. Schwab's mental condition and his ability to make a knowing and intelligent waiver, their failure to investigate and inform their client of sentencing patterns of judges sitting alone as compared with juries, and the court's misleading and inaccurate statements of the law was enough to lull Mr. Schwab into a false sense that the jury had comparatively little responsibility as to the sentencing decision. As a result, Mr. Schwab was unaware of the magnitude of the fundamental right he was waiving. The Court's inadequate inquiry of Mr. Schwab served to deprive Mr. Schwab of a fundamental right.

Judge Holcomb's analysis of the facts and law, as well as the order denying Mr. Schwab relief, is erroneous.

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 U.S. CONSTITUTION.

At the evidentiary hearing, Mr. Schwab presented evidence substantiating his claims regarding ineffective assistance of counsel at the guilt phase of his trial. Based on the testimony presented, Mr. Schwab was entitled to a new trial.

In Strickland v. Washington, 466 U.S. 668 (1984), the Supreme Court held that counsel has "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." 466 U.S. at 668 (citation omitted). Strickland requires a defendant to plead and demonstrate: 1) deficient attorney performance, and 2) prejudice.

"One of the primary duties defense counsel owes to his client is the duty to prepare himself adequately prior to trial." Magill v. Dugger, 824 F.2d 879, 886 (11th Cir. 1987); "pretrial preparation, principally because it provides a basis upon which most of the defense case must rest, is, perhaps, the most critical stage of a lawyer's preparation." House v. Balkcom, 725 F.2d 608, 618 (11th Cir.), cert. denied, 469 U.S. 870 (1984); Weidner v. Wainwright, 708 F.2d 614, 616 (11th Cir. 1983). As stated in Strickland, an attorney has a duty to undertake reasonable investigation or "to make a reasonable decision that makes particular investigations unnecessary." 466 U.S. at 691.

A. DEFENSE COUNSEL FAILED TO INVESTIGATE WAIVER OF JURY TRIAL AND

MADE MISREPRESENTATIONS TO MR. SCHWAB REGARDING JUDGE RICHARDSON.

In Claim XI of Mr. Schwab's Motion to Vacate Judgments of Conviction and Sentence, it was alleged that "Counsel failed to investigate the possible consequences of waiving a jury trial in a capital case (PC-R. 1087)." Not only did trial counsel fail to investigate the consequences of waiving jury trial, they also failed to investigate the case itself prior to advising Mr. Schwab to waive his right to a jury trial.

In Judge Holcomb's order denying relief based on this claim (with respect to this issue only), he wrote: "This claim was refuted by every witness called to testify at Defendant's hearing on this motion" (PC-R. 1252). However, Judge Holcomb's finding failed to consider or address the testimony at the evidentiary hearing of the attorneys who handled the case:

1. 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).

2. 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).

3. Maureen Alva, then the Chief Assistant Public Defendant and the most experienced attorney in the office, advised that a jury trial not be waived, which was ignored (PC-R. 122).

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 no 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 a self-serving misrepresentation, and an uninformed decision to continue non-jury because they (trial

counsel) specifically wanted Judge Richardson. Trial counsel continued to advocate to Mr. Schwab that Judge Richardson try the case 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) and that he was new to the bench (PC-R. 87-88).

Mr. Schwab inquired of his attorneys' waiver of jury trial. He asked Mr. Moore if waiving was a good idea (PC-R. 135-136), and when Mr. Onek was assigned to the case, he also asked him regarding waiver of jury trial (PC-R.14,22). Mr. Onek wanted "Judge Richardson to be the trier of fact," so much so that he advised Mr. Schwab that Judge Richardson had never sentenced anyone to death (PC-R. 24), when in fact, Judge Richardson had never had the opportunity (PC-R. 79).

For all intents and purposes, the Public Defender's office treated Mr. Schwab similar to that of a sales force who are intent on selling their product -- Judge Richardson -- at all costs, even if it requires false advertising and misrepresentation. When the Public Defender's Office was first assigned to the case, <u>they</u> met together to brainstorm how to handle the case (analogous to a sales meeting). <u>They</u> decided that a non-jury trial with Judge Richardson would be the best avenue to take, even though no investigation had been done at that point. Just as salesmen do not present their competitor's brand to customers, Mr. Schwab's attorneys did not present the options of jury trial, change of venue, or recusal of Judge Richardson to Mr. Schwab. To Mr. Schwab's attorneys, Judge

Richardson was the only option, and they were going to "sell him" to Mr. Schwab. However, unlike a salesman at arms-length, Mr. Schwab's attorneys had a fiduciary responsibility to inform Mr. Schwab of all options and information known to the attorney.

Trial by jury is a fundamental right for criminal defendants. Duncan v. Louisiana, 391 U.S. 145 (1968); Floyd v. State, 90 So. 2d 105, 106 (Fla. 1956). Jury trial is granted to criminal defendants in order to prevent oppression by the Government.

The protection provided by a jury "lies in the interposition between the accused and his accuser of the common sense judgment of a group of laymen." Williams v. Florida, 90 S. Ct. 1893, 1904 (1970). Because the right of an accused to trial by jury is fundamental, an infringement of that right constitutes fundamental error. Chapman v. California, 386 U.S. 18 (1967); Clark v. State, 363 So. 2d 331 (Fla. 1978).

The fact that counsel failed to investigate easily obtainable data is incomprehensible. The consequence of their omission was prejudicial to Mr. Schwab, since he was not made aware of information crucial to his consent to waiving the jury.

The lower court erred in finding that every witness refuted the allegation of failure to investigate. The trial court did not address the facts as testified by every witness. As can be deduced from the argument above, the mere fact that every witness (except Ms. Alva) indicated that they felt that waiver of a jury trial was a good idea, it did not relieve them of the obligation to investigate the case and Judge Richardson before advising Mr.

Schwab. Their conclusion that they "wanted Judge Richardson as the trier of fact" certainly did not purge them of their obligation to fully and adequately inform Mr. Schwab of all options before obtaining his waiver of jury trial.

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

In addition to the aforementioned deficiencies, counsel was ineffective by failing to request a change of venue or at least discuss the option to have a change of venue with Mr. Schwab. Claim XI of Mr. Schwab's Motion to Vacate asserts the following:

> Trial counsel's decision to advise their client to waive a jury trial was premised on their failure to investigate the level of publicity afforded the case in other areas of the state. They blithely assumed that because the case received saturation level coverage in the surrounding vicinity, that the coverage would be statewide. Furthermore, had counsel successfully moved for a change of venue, they could have shielded their client from the effects of any spillover publicity through sequestered voir dire of prospective jurors. Counsel's failure to investigate the level of publicity afforded the case throughout Florida led to their failure to move for a change of venue and thus to their advice to their client to waive a jury instead. There can be no strategic or tactical reason for defense counsel's omission in light of the pretrial media coverage in this case, which irreparably prejudiced Mr. Schwab. (PC-R. 1090-1091).

In ruling on the issue, the lower court stated:

> As stated by each of the attorneys that testified at the hearing, the decision to proceed with a non-jury trial and therefore not request a change of venue was clearly a trial strategy. It was firmly believed that Defendant would be found guilty and receive a recommendation of the death penalty from any jury selected. There was no need to request a change of venue.

(PC-R. 1253).

Judge Holcomb's finding presumes that because trial counsel stated that they didn't believe that any jury would recommend life, that to "not request a change of venue was clearly a trial strategy." Determination of ineffective assistance of counsel is an issue of fact and law. Judge Holcomb was required to make his own objective determination, given the totality of the circumstances, whether the attorneys actions amounted to deficient performance and prejudice to the client.

Judge Holcomb failed to address the facts testified to by counsel in their decision. Mr. Russo testified that he never discussed change of venue with Mr. Schwab, and Mr. Moore said that "we had enough sense of the case to feel like we would not get a fair jury" (PC-R. 113, 137). Judge Holcomb failed to consider that Mr. Moore and Mr. Russo made this decision with nothing more than a booking report and newspaper articles. Further, it was obvious that Mr. Moore presumed that facts contained in the booking report and newspaper articles were in fact true, because "we had enough sense of the case." How could they have enough sense of the case when no discovery had yet been provided?

Mr. Onek echoed Mr. Moore's feelings: "It was <u>our</u> position that any jury anywhere in the State of Florida that heard this case, and under our estimation is going to recommend death, that it didn't matter where the case was tried, the facts were the facts" (PC-R. 89)(emphasis added).

Again, this presumed that at the time of the decision to waive

jury trial the facts reported were true. Further, what Mr. Moore and Mr. Onek failed to recognize (whether through inexperience of design) was that with a jury in another location, the attorneys would have the opportunity to potentially weed out those jurors who could not be impartial. The attorneys would have the opportunity to question them and determine their prejudices. Mr. Onek and Mr. Moore gave up the opportunity for any inquiry, because they were unable to (or chose not to) inquire of Judge Richardson about his bias. In fact, failing to inquire of Judge Richardson regarding his bias, in light of the affidavits, underscores the fact that counsel was so determined on having Judge Richardson preside over the case at all cost, they were blinded to the potential harm such bias would have upon Mr. Schwab.

The lower court erred by finding that the mere statement of "trial strategy" trumps the claim of ineffective assistance of counsel without addressing the facts in association with the decisions made.

Further, in Claim XI, Mr. Schwab asserted:

> Furthermore, counsel's failure to move for change of venue and their related decision to advise Mr. Schwab to waive a jury overlooked the possibility that the trial court might have been influenced by the media coverage of the case. In fact, the trial court was thoroughly familiar with the case through pervasive pretrial publicity. In such an atmosphere of public hostility towards Mr. Schwab, even absent overt judicial bias, it was impossible for any trier of fact not to be swayed by the extensive and sensational pretrial news coverage of the case. The failure to investigate and to move for a change of venue as opposed to a jury waiver

> substantially prejudiced Mr. Schwab in that it subjected him to a trial before a biased judge with no jury. As a result, Mr. Schwab was denied a fair trial before an impartial tribunal.

(PC-R. 1091-1092).

In denying Mr. Schwab's claim, the lower court found the following:

> Again, Defendant has presented no evidence to support the finding that the trial judge was biased or that the decision not to request a change of venue was anything but sound trial strategy. Furthermore, Defendant has made no showing of prejudice as required in Strickland v. Washington, 466 U.S. 668, 669, 104 S.Ct. 2052, 2064, 80 L.Ed. 2nd 674 (1984)

(PC-R. 1253).

Judge Holcomb was well aware of the affidavits asserting Judge Richardson's actions. Judge Holcomb stated in his order that he had read the entire record and was present at the evidentiary hearing. An excerpt of Ms. Lemonidis' affidavit states:

> 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.

(R. 4209)

An excerpt of Mr. McBain's affidavit states:

> 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.

(R. 4208)

It is inconceivable that Judge Holcomb could find that these affidavits amounted to "no evidence to support the finding that the trial judge was biased..."

As to the finding by Judge Holcomb that no prejudice has been established: Judge Richardson, via the affidavits, implied that if he received this case he would sentence Mr. Schwab to death, and he did in fact do so. Unfortunately for Mr. Schwab, he believed his attorneys were leading him down the prim rose path, when in fact, unbeknownst to Mr. Schwab, he was being led into the lion's den.

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 voir dire a jury in another location basically substituted his preference for that of Mr. Schwab, especially since trial counsel failed to inform Mr. Schwab of his options.

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

In Claim XI of Mr. Schwab's Motion to Vacate Judgments of Conviction and Sentence he alleges the following:

> Mr. Schwab was represented at trial by Brian Onek and Kenneth Rhoden, from the Titusville and Rockledge offices of the Public Defender's office for the Eighteenth Judicial Circuit. Neither of the two attorneys had taken a capital case through to trial before being assigned to Mr. Schwab's case. At the time of Mr. Schwab's trial there was no separate cadre of attorneys in the Public Defender's Office dedicated to trying capital cases. There were no investigators trained in capital trial work, and no mitigation specialists on the staff to assist counsel. Mr. Schwab's attorneys were together assigned to conduct their first capital trial on an unusually complex case in the full glare of relentless media publicity. The system of case assignment that allowed two lawyers so inexperienced in capital litigation to take on Mr. Schwab's case without proper assistance virtually guaranteed that Mr. Schwab would be denied the effective assistance of trial counsel.
>
> The record of the proceedings shows numerous instances of obvious judicial bias and predisposition against Mr. Schwab. Even before judicial proceedings had been instigated Judge Richardson publicly indicated his belief that Mr. Schwab deserved the death penalty. Such prejudice against a defendant would normally indicate to defense counsel that the trial proceedings would not be conducted in a fair minded and impartial fashion. Yet, counsel failed to move for disqualification of Judge Richardson.

(PC-R. 1083-1084)(emphasis added).

No where in Judge Holcomb's order denying postconviction relief does he ever address the issue of ineffectiveness of the trial attorneys based on their failure to move to recuse Judge Richardson. He only speaks to the fact that Mr. Schwab's trial attorneys and the Public Defender's Office were experienced and

prepared. He writes, "There is nothing in the record to indicate Mr. Onek or the Office of the Public Defender did anything but represent Defendant in a zealous, competent, and accomplished manner" (PC-R. 1252). In addition, Judge Holcomb abused his discretion by failing to consider evidence presented at the evidentiary hearing that showed trial counsel should have moved to disqualify Judge Richardson.

Mr. Onek testified that he was aware of two affidavits filed by two assistant state attorneys regarding trial judge bias, and he was present during a hearing on 7-3-91 specifically held to address these affidavits (PC-R. 27). During the 7-3-91 hearing, the State submitted questions to Judge Richardson to ask Mr. Schwab in camera regarding these affidavits and to see if Mr. Schwab still wanted Judge Richardson to preside over the trial. (P. 5-6) Even in the face of these affidavits, Mr. Onek continued to advocate keeping Judge Richardson on the case and failed to move to disqualify him. During the evidentiary hearing, he was asked to explain his reasoning:

> MR. REITER: So are you saying that-well, let me ask this question: I think you also made in the record a statement that those two affidavits, themselves, did not constitute sufficient grounds for recusal. Do you recollect making that statement on the record?
>
> MR. ONEK: No, my recollection is, and maybe I'm wrong, is that I wasn't conceding that they-that they were sufficient. I didn't say they weren't, but we weren't filing them. (PC-R. 30).
>
> * * * *
>
> MR. ONEK: I believe what I was saying was that-I was trying to prevent the State from

> filing them, is my view, and I wasn't trying to get Judge Richardson off the case. I thought the State might be trying to do that and I was trying to prevent that.
>
> MR. REITER: I understand that. Are you saying, then, that regardless of whether or not it could be established that Mr. Judge Richardson had a bias, that regardless of that, you would ignore it and want him to sit on the case?
>
> MR. ONEK: We wanted Judge Richardson to be the trier of fact. (PC-R. 31)(emphasis added).

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).

Two witnesses affirmed that they had observed Judge Richardson's graphic gesture. Trial counsel's failure to move for recusal of Judge Richardson is inexplicable. Here there is no strategy or tactic. 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's right to a fair trial by a fair and impartial trier of fact.

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.

Complete and effective appellate advocacy requires a complete trial record. A trial record should not have missing portions. Yet, in Mr. Schwab's case, there are several missing parts, which renders reliable appellate review impossible. Trial counsel was ineffective for failing to assure that a complete record was provided to this Court. This issue was raised in Claim XII of Mr. Schwab's Motion to Vacate Judgments of Conviction and sentence (PC-R. 1094-1098).

Before Mr. Schwab's trial, the state presented defense counsel and Judge Richardson with affidavits from two assistant state attorneys who witnessed Judge Richardson's verbal and non- verbal actions which demonstrated his bias and prejudgment of the case (R. 4208-4209). Judge Richardson conducted a hearing on 7-3-91 during which the issue was raised (P.1-33). During this hearing, the State Attorney's Office also prepared questions for Judge Richardson to ask of Mr. Schwab and Mr. Onek. The questions were designed to be asked in camera to ensure that Mr. Schwab was informed of the affidavits and their contents. However, no transcript of the hearing was designated by Mr. Onek. During the evidentiary hearing Mr. Onek testified that he filed the Notice of Appeal, the Directions to the Clerk, and the Designation to the Court Reporter (PC-R. 32). When asked to explain why he failed to request the court reporter to prepare the 7-3-91 transcript, he responded, "I don't think we preserved an issue because we didn't move to recuse the judge" (PC-R. 35). However, Mr. Onek failed to consider Judge Richardson's failure to recuse himself in violation

of Canon 3(C)as an issue for appeal. Mr. Schwab was denied his right to effective assistance of counsel.

During the penalty phase of Mr. Schwab's trial, the defense called a psychologist, Dr. Bernstein to testify (R. 3225-3244). Dr. Bernstein, in forming his expert opinion, had relied on the opinions of two additional authorities in the diagnosis and treatment of sex offenders, Dr. Ted Shaw and Dr. Fred Berlin. Both Dr. Shaw and Dr. Berlin had been videotaped. As part of Dr. Bernstein's expert testimony, a part of both videotapes was played in the courtroom. The court reporter did not transcribe the content of the videotapes. There is therefore no record as to what portion of the tape the sentencing court heard, and what he considered in making his sentencing determination.

Judge Holcomb, in his order denying relief on Mr. Schwab's Motion, stated:

> First, any claimed error on the part of appellate counsel is not properly before this court. Any claim regarding ineffective assistance of appellate counsel should be brought by a Petition for Writ of Habeas Corpus. (PC-R. 1254).[5]
>
> * * * *
>
> There is no indication the record is incomplete, inaccurate or unreliable. Nor has Defendant presented any evidence to that affect. 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

[5]The undersigned counsel will also be filing a State Habeas Petition, and will address the issue of ineffective assistance of appellate counsel.

> included in the record. This claim is simply untrue, as the complete transcript is included in the court file. Furthering Defendant's claim that the transcript is incomplete, Defendant alleges in his motion that... portions of two videotapes played at trial were not transcribed in the record. The video tapes themselves were introduced into evidence, and therefore if an issue arose as to the content, it would be available for review.

(PC-R. 1254-1255)(emphasis added).

Judge Holcomb erred in failing to consider the fact, that while the court file may have contained the transcript of the 7-3-91 hearing, it was not contained in the Record on Appeal. In addition, while the tapes of Dr. Shaw and Dr. Berlin were introduced into evidence, only portions of those tapes were played. Because the portions that were played were not transcribed, Mr. Schwab has no way of knowing what Judge Richardson heard and relied upon in making his sentencing determination.

The circuit court is required to certify the record on appeal in capital cases. Art. 5, § 3(b)(1), Fla. Const.; § 921.141(4), Fla. Stat. 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).

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. 12 (1956). An accurate trial transcript is crucial for adequate appellate review. Id. at 19. The Sixth Amendment also mandates a complete transcript. In Hardy v. United States, 375 U.S. 277, 288 (1964),

Justice Goldberg, in his concurring opinion, wrote that, because the function of appellate counsel is to be an effective advocate for the client, counsel must be equipped with "the most basic and fundamental tool of his profession . . . the complete trial transcript . . . anything short of a complete transcript is incompatible with effective appellate advocacy." See also Dobbs v. Zant, 506 U.S. 357 (1993). Entsminger v. Iowa, 386 U.S. 748 (1967), held that appellants are entitled to a complete and accurate record. Lower courts rely upon Entsminger. Entsminger was cited in Evitts v. Lucey, 469 U.S. 387 (1985), in which the Supreme Court reiterated that effective appellate review begins with giving an appellant an advocate, and the tools necessary to do an effective job.

The issue is whether Mr. Schwab should be made to suffer the ultimate sentence of death where he did not have the benefit of a constitutionally guaranteed review of a bona fide record of the trial proceedings. Fla. Const. art. V, sec. 3(b)(1). See Delap v. State, 350 So. 2d 462, 463 (Fla. 1977); Dobbs v. Zant, 506 U.S.357 (1993).

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 Sixth, Eighth and Fourteenth Amendments. Dobbs. In addition, Mr. Schwab asserts that his trial counsel rendered ineffective assistance in failing to assure that a proper record was provided to the Court.

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.

In the penalty phase of a capital trial, "[T]he basic concerns of counsel . . . are to neutralize the aggravating circumstances advanced by the state, and to present mitigating evidence." Starr v. Lockhart, 23 F.3d 1280, 1285 (8th Cir. 1994). In Mr. Schwab's case, counsel failed to undertake the necessary investigation and preparation to do either. There was abundant mitigation available to present to the sentencing court that defense counsel failed to present. Defense counsel presented an adverse witness during the penalty phase who denied the existence of Mr. Schwab's abuse as a child; Defense counsel failed to investigate the ramifications of waiving the penalty phase jury; Defense counsel failed to investigate the validity of Mr. Schwab's prior conviction; and Defense counsel failed to provide the assistance of a competent mental health expert. There was a wealth of mitigating evidence that the defense could have presented, which would have given the court a basis for imposing a life sentence.

In Strickland v. Washington, 466 U.S. 668 (1984), the United States Supreme Court held that counsel has "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Strickland requires a defendant to plead and demonstrate (1) unreasonable attorney performance, and (2) prejudice.

At the evidentiary hearing, Mr. Schwab presented evidence substantiating Claim XV of his Motion to Vacate regarding ineffective assistance of counsel at the penalty phase of his trial. Based on the testimony presented, Mr. Schwab was entitled to a new penalty phase. Judge Holcomb addressed this claim in his order stating:

> Defendant has made no showing that counsel was deficient in any way, nor has Defendant shown how he was prejudiced as a result of the evidence presented or omitted in the penalty phase of his trial. Defendant states facts in his motion in an attempt to support this claim, but again, no evidence was presented at the hearing to support this claim. This claim is denied.

(PC-R. 1256).

The trial court erred in denying Mr. Schwab's Motion to Vacate Judgments of Conviction and Sentence by failing to consider the evidence that was presented at the evidentiary hearing along with evidence from the record.

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

Judge Holcomb erred in failing to consider the testimony at

the evidentiary hearing regarding ineffective assistance at the penalty phase. During the trial's penalty phase, Defense counsel presented evidence from both Mr. Schwab's father and mother (R. 3018-3046,3104-3171). Mr. Onek knew that the mother's testimony would be favorable, but that the father's testimony would contradict the mother's (PC-R. 94-96). 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). During the evidentiary hearing Mr. Onek explained his reasoning:

> MR. REITER: Well, were you apprised that they were going to be competing, or in opposite answers to questions presented to them at trial, before you spoke to them-I mean, before they took the stand?
>
> MR. ONEK: Yes.
>
> MR. REITER: You knew the mother was going to say A and the father was going to contradict it, didn't you?
>
> MR. ONEK: I knew that the mother was going to say A and the father was going to contradict it (PC-R. 95).

* * * *

> MR. REITER: And you chose to put them on, both, as mitigation, when one had a tendency to negate the other, didn't you?
>
> MR. ONEK: I didn't think it negated. I felt that the judge needed to have a full picture.

(PC-R. 96).

Mr. Onek, in essence, unnecessarily impeached his own witnesses. As a result, the court discounted most of Mr. Scwhab's traumatic early life both as mitigating evidence and as supporting the mental health evidence. Despite Mr. Schwab's mother's testimony, Judge Richardson, in his sentencing order, did not find the non-statutory mitigators in her testimony to exist and instead accepted the conflicting testimony of the father, even though the mother's testimony was corroborated by other witnesses. Judge Richardson's order states:

> 7) The defendant's father beat the defendant's mother and the defendant's attempts to intercede on his mother's behalf were futile as his father tossed him aside and continued the assaults on his mother.
>
> This non-statutory mitigating circumstance has not been proven by the greater weight of the evidence. The Court has accepted the evidence presented in conflict with this mitigation.
>
> 8) The defendant was punished by his father by beating him on his burns.
>
> This non-statutory mitigating circumstance has not been proven by the greater weight of the evidence. The Court has accepted the evidence presented in conflict with this mitigation.
>
> 9) The defendant's father would punish and humiliate the defendant by pulling down his pants and would laugh at him. The defendant's mother was not allowed to comfort her son

following these incidents.

This non-statutory mitigating circumstance has not been proven by the greater weight of the evidence. The Court has accepted the evidence presented in conflict with this mitigation.

(R. 4658) (emphasis added).

Defense counsel must discharge very significant constitutional responsibilities at the sentencing phase of a capital trial. The Supreme Court has held that in a capital case, "accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die [made] by a jury of people who may have never made a sentencing decision." Gregg v. Georgia, 428 U.S. 153, 190 (1976) (plurality opinion). In Gregg and its companion cases, the court emphasized the importance of focusing the jury's attention on the "particularized characteristics of the individual defendant." Id. at 206. See also Penry v. Lynaugh, 109 S. Ct. 2934 (1989); Roberts v. Louisiana, 428 U.S. 325 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976). The state and federal courts have expressly and repeatedly held that trial counsel in capital sentencing proceedings has a duty to investigate and prepare available mitigating evidence for the sentencer's consideration, object to inadmissible evidence or improper jury instructions, and make an adequate closing argument. Harris v. Dugger, 874 F.2d 756 (11th Cir. 1989); Evans v. Lewis, 855 F.2d 631 (9th Cir. 1988); Stephens v. Kemp, 846 F.2d 642 (11th Cir. 1988); Tyler v. Kemp, 755 F.2d 741, 745 (11th Cir. 1985); Blake v. Kemp, 758 F.2d 523, 533-35 (11th Cir. 1985).

Trial counsel here did not meet these rudimentary constitutional standards. Knowingly presenting conflicting testimony to the trier of fact (Judge Richardson) constituted unreasonable attorney performance and prejudiced Mr. Schwab's case. The prejudice is established in Judge Richardson's sentencing order where he fails to find the mitigating circumstances testified to by the mother, and instead relies on the conflicting testimony of the father.

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

In Claim XI of Mr. Schwab's Motion to Vacate Judgments of Conviction and Sentence, it is alleged that "Counsel failed to investigate the possible consequences of waiving a jury trial in a capital case" (PC-R. 1087). Not only did trial counsel fail to investigate the consequences of waiving jury trial, they also failed to investigate the case itself prior to advising Mr. Schwab to waive his right to a jury during the penalty phase. Such failure to investigate constitutes ineffective assistance of counsel.

In Judge Holcomb's order denying relief based on this claim (with respect to this issue only), he writes: "This claim was refuted by every witness called to testify at Defendant's hearing on this motion"(PC-R. 1252). Yet, Judge Holcomb failed to consider the testimony at the evidentiary hearing where Mr. Onek admits that he did not do any research regarding who was more likely to sentence to death-a judge or a jury (PC-R. 96).

The record supports Mr. Schwab's claim that trial counsel failed to investigate and adequately advise Mr. Schwab regarding waiver of jury trial. 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).

However, Mr. Onek continued to advocate to Mr. Schwab that 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 never handled a case where the jury had been waived in a felony case (PC-R. 62)(emphasis added).

Mr. Schwab inquired of his attorneys regarding waiver of jury trial. He asked Mr. Moore if waiving was a good idea (PC-R. 135-136), and when Mr. Onek was assigned to the case, he also asked him regarding waiver of jury trial (PC-R.14,22). Both attorneys advised Mr. Schwab to proceed non-jury (PC-R. 78, 136). Mr. Onek wanted "Judge Richardson to be the trier of fact," so much, so that he advised 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 (PC-R. 79)(emphasis added).

During the evidentiary hearing, Mr. Onek was questioned regarding waiving the penalty phase jury:

> MR. REITER: But in reality though, with a jury trial, you get two bites of the apple versus the judge getting one, correct? Do you agree or disagree with that statement?
>
> MR. NUNNELLEY: Objection. Leading.
>
> MR. ONEK: I don't know. I mean there are many ways to view that. If you have a jury recommendation for death, then certainly the judge can come back with his own decision. That did not in this case-in this case, if the jury recommended death, it seemed remote that a judge would do otherwise.
>
> MR. REITER: I understand that, but at least in reality though, just for factual issues, you're aware of the fact that a jury can make a recommendation, right?
>
> MR. ONEK: Yes.

MR. REITER: And the judge can follow or not follow, correct?

MR. ONEK: Yes.

MR. REITER: Given certain legal ramifications?

MR. ONEK: Yes.

MR. REITER: But with a judge trial, all you have to depend on was one opinion, right, one shot?

MR. ONEK: Yes.

(PC-R. 102-103).

Trial by jury is a fundamental right for criminal defendants Duncan v. Louisiana, 391 U.S. 145 (1968); Floyd v. State, 90 So. 2d 105, 106 (Fla. 1956). Jury trial is granted to criminal defendants in order to prevent oppression by the Government. The protection provided by a jury "lies in the interposition between the accused and his accuser of the common sense judgment of a group of laymen." Williams v. Florida, 90 S.Ct. 1893, 1904 (1970). Because the right of an accused to trial by jury is fundamental, an infringement of that right constitutes fundamental error. Chapman v. California, 386 U.S. 18 (1967); Clark v. State, 363 So. 2d 331 (Fla. 1978).

Waiver of the penalty phase jury by the Defendant has been recognized by this Court, "provided the waiver is voluntarily, intelligently, and knowingly made." Pangburn v. State, 661 So.2d 1182 (Fla. 1995)(emphasis added). See also State v. Hernandez, 645 So.2d 432 (Fla. 1994); Palmes v. State, 397 So.2d 648 (Fla. 1981), cert. denied, 454 U.S. 882 (1981).

Defense counsel failed to adequately investigate the waiver of

the penalty phase jury. The consequence of their omission was prejudicial to Mr. Schwab, since he was not made aware of information crucial to his consent to waiving the penalty phase jury.

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.

Counsel failed to neutralize the aggravating circumstances advanced by the state. Indeed trial counsel actually stipulated to two aggravating circumstances - that Mr. Schwab had been convicted of a prior violent felony and that the murder was committed during the commission of another violent felony (R. 3432). The prior violent felony conviction rested on a copy of the conviction together with testimony at the guilt phase. Mr. Schwab had pleaded guilty to the prior felony. In fact Mr. Schwab's mental condition at the time of the prior offense was such that he was incapable of making a valid plea. This unconstitutional prior conviction cannot be used to support the sentence of death in this matter. Johnson v. Mississippi, 486 U.S. 578 (1988). However, trial counsel made no effort to determine whether the conviction was obtained in violation of Mr. Schwab's constitutional rights or whether Mr. Schwab knowingly, intelligently, and voluntarily entered the guilty plea. Trial Counsel failed to investigate the facts, failed to litigate the error, and failed to present the case as to why this aggravating circumstance should not apply. They therefore conceded an aggravating factor and failed to effectively challenge the

state's case. As a result of counsel's deficient performance the sentencing court found the aggravator as upon which Mr. Schwab's death sentence rests.

Counsel stipulated to the aggravating factor that the murder was committed during the commission of another violent felony. This was error. Mr. Schwab had not pleaded guilty to either sexual battery or kidnapping during the guilt phase of the trial. By conceding guilt at the penalty phase, trial counsel impeached their own overall credibility and thus tainted their assertions at the penalty phase. Trial counsel actually bolstered the state's case by stipulating to this aggravating factor. This deprived Mr. Schwab of an adversarial testing during the penalty phase.

Dr. Samek testified as to Mr. Schwab's lack of remorse for the crime (R. 3373). 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. 3373). 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. Counsel failed to know the law, and denied their client an adversarial testing.

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

Claim XVI of Mr. Schwab's Motion asserts the following:

> Mr. Schwab did not receive a professionally adequate mental health evaluation by a qualified expert who had reviewed sufficient background information to make a reliable judgment about Mr. Schwab's mental condition as it relates to ability to form specific

> intent, and statutory and nonstatutory mitigating circumstances. As a result of this failure to adequately evaluate Mr. Schwab, critical issues regarding ability to make a knowing and intelligent waiver of constitutional rights, ability to form the intent necessary for the crimes charged, and statutory and nonstatutory mitigation were never presented to the judge.

(PC-R. 1127).

During the penalty phase of the trial Defense counsel presented Dr. Howard Bernstein as a mental health expert; however, Dr. Bernstein relied on videotaped testimony of Dr. Berlin and Dr. Ted Shaw to form his opinion regarding Mr. Scwhab. Portions of these videotapes were shown to the court (R. 3225-3320). Dr. Bernstein was tendered as an expert in psychological evaluation (R. 3228), but repeatedly testified that he was not an expert in mentally disordered sex offenders. Dr. Berlin was an expert in this (R. 3236-3237). Defense counsel was ineffective for failing to present live testimony of Dr. Berlin.

Judge Holcomb denied relief on this claim because "Defendant has presented no evidence to support this claim, and has not showed any prejudice" (PC-R. 1257). The prejudice to Mr. Schwab is apparent because he is presently on death row.

Postconviction counsel presented no evidence on this claim because of a prior ruling by Judge Holcomb. On March 16, 1999 one portion of the evidentiary hearing was held (PC-R. 6-166), and the second portion was set for June 24, 1999 to present evidence of mental mitigation. Prior to the June 24th court date, postconviction counsel filed a motion to continue the evidentiary

hearing. Dr. Faye Sultan, who had examined Mr. Schwab and who was ready to testify, "strongly recommended that the defendant be examined by Dr. Berlin because of his greater expertise in the particular problems which afflict the defendant." Dr. Berlin, however, refused to participate without adequate time to prepare (PC-R. 1239-1240). Judge Holcomb denied the motion without a hearing (PC-R. 1243). Judge Holcomb erred in not only denying relief on this claim, but also in denying the motion for continuance so that Dr. Berlin's testimony could be presented.

The law is clear that a capital defendant is entitled to the effective assistance of a qualified mental health professional. In fact, Florida law provides that "an indigent defendant has a constitutional right to choose a competent psychiatrist of his or her personal choice and is entitled to receive funds to hire such an expert." Morgan v. State, 639 So. 2d 6, 12 (Fla. 1994) (citing Ake v. Oklahoma, 470 U.S. 68 (1985); Burch v. State, 522 So. 2d 810 (Fla. 1988)). It is ineffective assistance when counsel unreasonably fails to investigate mental health issues, Futch v. Dugger, 874 F.2d 1483 (11th Cir. 1989); Agan v. Singletary, 12 F.3d 1012 (11th Cir. 1994), and to obtain the services of a qualified mental health expert to assist in the defense and evaluate for the presence of mitigating circumstances. See, e.g., Hill v. Lockhart, 28 F.3d 832 (8th Cir. 1994).

While Dr. Bernstein was qualified as an expert in psychological evaluation, he was not an expert in mentally disordered sex offenders as was Dr. Berlin. Dr. Bernstein, while

testifying during the penalty phase, repeatedly said that he was not an expert in this area. In Mr. Schwab's case, an expert in mentally disordered sex offenders should have testified. Dr. Berlin's live testimony should have been presented. Failure to do so denied Mr. Schwab effective assistance of counsel and prejudiced the outcome of his case.

ARGUMENT VI

THE LOWER COURT'S RULING FOLLOWING THE POSTCONVICTION EVIDENTIARY HEARING WAS ERRONEOUS WHERE MR. SCHWAB PRESENTED EVIDENCE THAT HE WAS DENIED HIS RIGHT TO DUE PROCESS AND A FAIR AND RELIABLE SENTENCING WHEN THE TRIAL COURT RELIED ON FACTS NOT OF RECORD IN SENTENCING MR. SCHWAB IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION.

In Claim XXVI of Mr. Schwab's Motion to Vacate Judgments of Conviction and Sentence Mr. Schwab alleges that Judge Richardson relied on facts not of record in sentencing Mr. Schwab. Specifically, Mr. Schwab points to the penalty phase of the trial where Judge Richardson questions 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 goes 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 relies 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).

During the evidentiary hearing, Judge Richardson refused to comment on his sentencing order. He was asked about his failure to delineate what evidence was credible and what evidence was not. He responded:

> 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. 69-71).

Judge Holcomb denied relief on this claim. In his order he wrote:

> In this case, the trial court obviously acted as both judge and jury. It is the function of the jury to weigh the facts and make findings and determinations based upon the facts presented. Clearly, the trial court, in the instance referred to by Defendant in his motion, was reviewing the evidence, determining the credibility of the witnesses, and evaluating those factors in relationship to other evidence presented in light of the knowledge and experience possessed by the trial judge.

(R. 3319).

Clearly Judge Holcomb was in error in denying relief. Judge Richardson was not just weighing the facts and making findings and determinations based upon the facts presented. Judge Richardson relied on facts outside the record-specifically, the experience he had sitting on the criminal bench for almost four years. He makes specific mention in his sentencing order that Mr. Schwab's grades seemed to be doing well even during the time of his parent's divorce and the traumatic event of being sexually battered by a friend's father.

In Baldez v. State, 679 So.2d 825 at 826 (Fla. 4th DCA 1996) the court held (in reversing and remanding for a new trial) that "Bolstering credibility of the witnesses by reference to matters outside the record is improper in closing argument." See Cisneros v. State, 678 So. 2d 888 (Fla. 4th DCA 1996); Clark v. State, 632 So. 2d 88 (Fla. 4th DCA 1994)(overruled on other grounds). Section

921.141 of the Florida Statutes provides for the following:

> In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. (emphasis added)

Yet, Judge Richardson's sentence was not based "upon records of the trial and sentencing proceedings," but on facts outside of the record, i.e. previous cases over which he had presided. This reliance on non-record evidence denied Mr. Schwab a fair and reliable sentencing and his right to due process.

ARGUMENT VII

MR. SCHWAB IS INNOCENT OF THE DEATH PENALTY. MR. SCHWAB WAS SENTENCED TO DEATH IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The United States Supreme Court has held that, where a person is sentenced to death and can show innocence of the death penalty, he is entitled to relief for constitutional errors which resulted in a sentence of death. Sawyer v. Whitley, 112 S. Ct. 2514 (1992). The Florida Supreme Court has recognized that innocence is a claim that can be presented in a motion pursuant to Rule 3.850. Johnson v. Singletary, 612 So. 2d 575 (Fla. 1993); Jones v. State, 591 So. 2d 911 (Fla. 1991). The Florida Supreme Court has recognized that innocence of the death penalty constitutes grounds for Rule 3.850 relief. Scott (Abron) v. Dugger, 604 So. 2d 465 (Fla. 1992).

Innocence of the death penalty is shown by demonstrating insufficient aggravating circumstances so as to render the

individual ineligible for death under Florida law. In this case, Mr. Schwab's trial court relied upon three aggravating circumstances to support his death sentence: (1) previous conviction of a felony involving the use or threat of violence; (2)murder was committed during the course of kidnapping and sexual battery (3) heinous, atrocious, or cruel (R. 4649). Each of these aggravating factors is invalid, to wit: prior violent felony is based on a prior conviction that is constitutionally infirm; the elements of the sexual battery and kidnapping not established; and the sentencing judge relied on facts not in the record to find the heinous atrocious, or cruel aggravating circumstance. Absent constitutionally adequate constructions, the aggravating circumstances cannot be said to have been proven beyond a reasonable doubt.

Mr. Schwab's death sentence is disproportionate. In Florida, a death sentenced individual is rendered ineligible for a death sentence where the record establishes that the death sentence is disproportionate. Here, the lack of aggravating circumstances coupled with the overwhelming evidence of mitigating evidence discussed elsewhere render the death sentence disproportionate. Mr. Schwab is innocent of the death penalty.

ARGUMENT VIII

THE PRIOR CONVICTION INTRODUCED TO SUPPORT THE FINDINGS OF THE "PRIOR CONVICTION OF A VIOLENT FELONY" AGGRAVATING CIRCUMSTANCE WAS UNCONSTITUTIONALLY OBTAINED AND INADMISSIBLE TO SUPPORT THIS AGGRAVATOR UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The prior conviction introduced to support the "prior conviction of a violent felony" was obtained in violation of the United States Constitution. It was used to support this aggravating circumstance in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

The plea of guilty by Mr. Schwab in the sexual battery of Than Meyer is unconstitutional. Mr. Schwab could not make a knowing and intelligent waiver of any rights at the time he entered a plea of guilty.

This unconstitutional prior conviction cannot be used to support the sentence of death in this matter. Johnson v. Mississippi, 486 U.S. 578 (1988).

This error cannot be deemed harmless because the sentence of death rests on the prior conviction. The trial court used the conviction to support its finding of an aggravating circumstance (R. 2622). The failure of trial counsel to effectively litigate this issue is a violation of Mr. Schwab's right to effective assistance of counsel.

The use of this prior conviction to support Mr. Schwab's sentence of death is a violation of the Eighth and Fourteenth

Amendments to the United States Constitution.

ARGUMENT IX

MR. SCHWAB WAS DENIED HIS EIGHTH AND FOURTEENTH AMENDMENT RIGHTS WHEN THE JUDGE CONSIDERED AND FOUND THE INVALID "HEINOUS, ATROCIOUS OR CRUEL" AGGRAVATING CIRCUMSTANCE.

The heinous, atrocious and cruel aggravating circumstance was improperly found by the court. The court did not apply any narrowing construction to the heinous, atrocious or cruel aggravating circumstance in his sentencing order.

The "heinous, atrocious or cruel" aggravator only applies where evidence shows beyond a reasonable doubt that the defendant knew or intended the murder to be especially heinous, atrocious or cruel because the murder exhibits a desire to inflict a high degree of pain, or an utter indifference to or enjoyment of the suffering of another. Kearse v. State, No. 79,037 (Fla. June 22, 1995), citing Chesire v. State, 568 So. 2d 908 (Fla. 1990) ("The factor of heinous, atrocious or cruel is proper only in torturous murders -- those that evidence extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another").

The "heinous, atrocious, and cruel" aggravator and instruction does not apply unless evidence was presented to demonstrate an intent on the defendant's part to inflict a high degree of pain or to otherwise torture the victims. Stein v. State, 632 So. 2d 1361 (Fla. 1994). This narrowing construction has repeatedly been required by the Florida Supreme Court. Bonifay v. State, 626 So.

2d 1310, 1313 (Fla. 1993); Santos v. State, 591 So. 2d 160, 163 (Fla. 1991); Omelus v. State, 584 So. 2d 563, 566 (Fla. 1991); Chesire v. State, 568 So. 2d 908, 912 (Fla. 1990); Amoros v. State, 531 So. 2d 1256, 1260 (Fla. 1988); Lewis v. State, 377 So. 2d 640, 646 (Fla. 1979). See also Scull v. State, 533 So. 2d 1137 (Fla. 1988)(heinous, atrocious or cruel was not established as to victim who died from blow to head by a baseball bat); Rhodes v. State, 547 So. 2d 1201, 1208 (Fla. 1989) (victim died from "manual strangulation;" however "we decline to apply this aggravating factor in a situation in which the victim who was strangled, was semiconscious during the attack. In Mr. Schwab's case, the medical examiner testified that the victim died from mechanical asphyxiation, but was unable to conclude whether this was caused intentionally or accidentally. Here, this aggravator was not supported by the evidence presented by the state at trial. In fact, due to his mental condition, Mr. Schwab was incapable of forming the intent required to prove the existence of the heinous, atrocious or cruel aggravating circumstance,.

The state did not indicate to the court that this narrowing construction existed and was constitutionally required and the Judge did not consider it in his sentencing order. The state ignored its obligation to prove an element of this aggravator.

ARGUMENT X

MR SCHWAB WAS DENIED HIS RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS WHEN THE COURT FOUND AN AUTOMATIC AGGRAVATING CIRCUMSTANCE THAT THE MURDER WAS COMMITTED DURING THE COURSE OF ANOTHER VIOLENT FELONY.

Mr. Schwab was convicted of one count of first-degree murder, with sexual battery and kidnapping being the underlying felonies. Trial counsel stipulated and the judge found the aggravating factor "committed during the course of another violent felony" based on the kidnapping and sexual battery convictions. However, the sentencing court disregarded the fact that this aggravating factor standing alone was insufficient to support a death sentence. Proffitt v. State, 510 So. 2d 896 (Fla. 1987). Indeed the court specifically found that "any one of the three aggravating circumstances outweighs all mitigating circumstances" (R. 4666). Accordingly, this factor must be stricken.

Stringer v. Black holds that Lowenfield v. Phelps, 484 U.S. 231 (1988), which addressed Louisiana's capital sentencing scheme, does not apply in states where capital sentencers weigh aggravating factors against mitigating factors in determining the sentence. Stringer, 112 S. Ct. at 1138. "Florida . . . is a weighing State." Id. at 1137. "[I]n Louisiana the jury is not required to weigh aggravating against mitigating factors." Id. at 1138. Thus, Stringer explicitly indicates that the analysis of Lowenfield does not apply to weighing states like Florida.

The Stringer Court emphasized, "if a State uses aggravating

factors in deciding who shall be eligible for the death penalty or who shall receive the death penalty, it cannot use factors which as a practical matter fail to guide the sentencer's discretion." Id. at 1139. The Supreme Court then explained that use of an improper aggravating factor in a weighing scheme (like Florida's) has the potential for creating greater harm than it does in an eligibility scheme (like Louisiana's):

> Although our precedents do not require the use of aggravating factors, they have not permitted a State in which aggravating factors are decisive to use factors of vague or imprecise content. A vague aggravating factor employed for the purpose of determining whether a defendant is eligible for the death penalty fails to channel the sentencer's discretion. A vague aggravating factor used in the weighing process is in a sense worse, for it creates the risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise be by relying upon the existence of an illusory circumstance. Because the use of a vague aggravating factor in the weighing process creates the possibility not only of randomness but also of bias in favor of the death penalty, we cautioned in *Zant* that there might be a requirement that when the weighing process has been infected with a vague factor the death sentence must be invalidated.

Stringer, 112 S. Ct. at 1139. Stringer thus also teaches that in a weighing state, reliance upon an invalid aggravating factor is constitutional error requiring a harmless error analysis, even if other aggravating factors exist.

In Arave v. Creech, 52 Cr.L. 2373 (Mar. 30, 1993), the Supreme Court held, "If the sentencer fairly could conclude that an aggravating circumstances applies to every defendant eligible for

the death penalty the circumstance is constitutionally infirm." 52 Cr.L. at 2376 (emphasis in original). The constitutional infirmity arises because the function of aggravating factors is to "genuinely narrow the class of defendants eligible for the death penalty." Id., quoting Zant v. Stephens, 462 U.S. 862, 877 (1983). Thus, an aggravating circumstance "must provide a principled basis" for determining who deserves capital punishment and who does not. Arave, 52 Cr.L. at 2376.

Stringer and Arave establishes the validity of Mr. Schwab's claim that the felony murder aggravating factor is an unconstitutional automatic aggravating factor which does not provide the requisite narrowing. Under Florida law, capital sentencers, whether judge or jury, may reject or give little weight to any particular aggravating circumstance. A sentencer may return a binding life recommendation because the aggravators are insufficient. Hallman v. State, 560 So. 2d 233 (Fla. 1990). The sentencer's understanding and consideration of aggravating factors may lead to a life sentence.

Mr. Schwab was tried and convicted for first-degree murder. The State primarily relied on felony murder in seeking the first-degree murder convictions, and the court returned a general verdict (R. 2079). Based on the underlying felony convictions the state sought and the court found an automatic statutory aggravating circumstance. Mr. Schwab thus entered the sentencing hearing already eligible for the death penalty, whereas other similarly (or worse) situated petitioners would not. Under these circumstances,

Mr. Schwab's conviction and sentence of death violated his Sixth, Eighth and Fourteenth Amendments.

It is clear that Mr. Schwab was convicted on the basis of felony-murder. The State argued for a conviction based on a felony-murder theory charged (R. 2034) and argued that the victim was killed in the course of a felony. The judge used the standard instructions covering both premeditated and felony murder (R. 4494). It returned a general verdict of guilt on first-degree murder (R. 2079).

A state cannot use aggravating "factors which as a practical matter fail to guide the sentencer's discretion." Stringer v. Black, 112 S. Ct. 1130 (1992). The sentencer was entitled automatically to return a death sentence upon a finding of first degree felony murder. Every felony murder would involve, by necessity, the finding of a statutory aggravating circumstance, a fact which, under the particulars of Florida's statute, violates the eighth amendment. Arave v. Creech. This is so because an automatic aggravating circumstance is created, one which does not "genuinely narrow the class of persons eligible for the death penalty," Zant v. Stephens, 462 U.S. 862, 876 (1983), and one which therefore renders the sentencing process unconstitutionally unreliable. Id. "Limiting the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." Maynard v. Cartwright, 486 U.S. 356, 362 (1988). If Mr. Schwab was convicted of felony murder, he then automatically faced

statutory aggravation for felony murder. These aggravating factors were "illusory circumstance[s]" which "infected" the weighing process; these aggravators did not narrow and channel the sentencer's discretion as they simply repeated elements of the offense. Stringer, 112 S. Ct. at 1139. The Florida Supreme Court has recognized that aggravating factors do not perform the necessary narrowing if they merely repeat elements of the offense. Porter v. State, 564 So. 2d 1060, 1063-64 (Fla. 1990). In fact, the Florida Supreme Court has held that the felony murder aggravating factor alone cannot support the death sentence. Rembert v. State, 445 So. 2d 337 (Fla. 1984). The trial court totally disregarded this requirement to Mr. Schwab's disadvantage.

ARGUMENT XI

FLORIDA'S STATUTE SETTING FORTH THE AGGRAVATING CIRCUMSTANCES TO BE CONSIDERED IN A CAPITAL CASE IS FACIALLY VAGUE AND OVERBROAD IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS. THE FACIAL INVALIDITY OF THE STATUTE WAS NOT CURED IN MR. SCHWAB'S CASE BECAUSE THE TRIAL COURT DID NOT SPECIFICALLY NARROW THE CONSTRUCTION OF THE STATUTE IN HIS WRITTEN FINDINGS. AS A RESULT, MR. SCHWAB'S SENTENCE OF DEATH IS PREMISED UPON FUNDAMENTAL ERROR THAT NOW MUST BE CORRECTED.

At the time of Mr. Schwab's sentencing, the language of § 921.141 (5), Fla. Stat. (1989), which defined the "under sentence of imprisonment," "heinous, atrocious, or cruel," "pecuniary gain," and "prior violent felony" aggravating factors was facially vague and overbroad. Godfrey v. Georgia, 446 U.S. 420 (1980).

"[I]n a `weighing' State [such as Florida], where the aggravating and mitigating factors are balanced against each other, it is constitutional error for the sentencer to give weight to an unconstitutionally vague aggravating factor, even if other, valid aggravating factors [exist]." Richmond v. Lewis, 113 S. Ct. 528, 534 (1992). A facially vague and overbroad aggravating factor may be cured where "an adequate narrowing construction of the factor" is adopted and applied. Id. However, in order for the violation of the Eighth and Fourteenth Amendments to be cured, "the narrowing construction" must be applied during a "sentencing calculus" free from the taint of the facially vague and overbroad factor. Id. at 535. In addition, "[N]ot just any limiting construction will do; a constitutionally sufficient one is required." Turner v.

Williams, 35 F.3d 872, 880 (4th Cir. 1994)(emphasis in original). Thus, in order to cure the facially vague and overbroad statutory language, the sentencer must receive the constitutionally adequate narrowing construction. Id. at 2928.

Richmond and Espinosa establish that Mr. Schwab's sentence of death rests on fundamental error. Fundamental error occurs when the error is "equivalent to a denial of due process." State v. Johnson, 616 So. 2d 1, 3 (Fla. 1993). Fundamental error includes facial invalidity of a statute due to "overbreadth," which impinges upon a liberty interest. Trushin v. State, 425 So. 2d 1126, 1129 (Fla. 1983). The failure to consider the necessary elements of an aggravating circumstance constitutes fundamental error. State v. Jones, 377 So. 2d 1163 (Fla. 1979).

Under Florida law, aggravating circumstances "must be proven beyond a reasonable doubt." Hamilton v. State, 547 So. 2d 630, 633 (Fla. 1989). The State, however, failed to prove these aggravating circumstances beyond a reasonable doubt. Florida law also establishes that limiting constructions of the aggravating circumstances are "elements" of the particular aggravating circumstance. "[T]he State must prove [the] element[s] beyond a reasonable doubt." Banda v. State, 536 So. 2d 221, 224 (Fla. 1988). Fundamental error occurred when the trial court as sole sentencer relied upon wholly inadequate constructions regarding the elements of these aggravating circumstances. Jones.

The statute is facially vague and overbroad in violation of the Eighth and Fourteenth Amendments and it impinges upon a liberty

interest. Richmond v. Lewis. Thus, the application of the statute violated Mr. Schwab's right to due process. State v. Johnson, 616 So. 2d at 3.

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 **INITIAL 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 August 8, 2000.

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