

IN THE SUPREME COURT OF FLORIDA

MARK DEAN SCHWAB,

Appellant,

v.

CASE NO. SC97008

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE EIGHTEENTH JUDICIAL CIRCUIT
IN AND FOR BREVARD COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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CERTIFICATE OF FONT

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STATEMENT OF THE CASE AND FACTS

This is an appeal from the Circuit Court of Brevard County's October 12, 1999, Order denying Schwab's *Florida Rule of Criminal Procedure* 3.850 motion in which he sought relief from his conviction and sentence of death, which were affirmed by this Court in an opinion issued on March 3, 1994. In that opinion, this Court summarized the facts of this murder in the following way:

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

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

After school on April 18, 1991, a classmate saw Junny at a little league ball field and saw him get into a U-haul truck with a tall man. Two days later Schwab was in Ohio and called his aunt. He told her that someone named "Donald" had forced him to kidnap and rape the child or else Donald would kill Schwab's mother. On April 21 the police went to the aunt's home, and, when Schwab called while they were there, she allowed them to record the call. She also gave the officers permission to tap her telephone, and, when Schwab called later that evening, they traced the call and arrested him in a nearby town. Besides the recorded statements to his aunt, Schwab also gave statements to Sergeant Blubaugh, a Cocoa policeman, who flew to Ohio with assistant state attorney Chris White. The day after his arrest, Schwab, Blubaugh, and White flew back to Florida. Back in Brevard County Schwab

eventually indicated where the victim's body could be found. The police then found the body in a rural, undeveloped area of the county, stuffed into a footlocker.

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

Schwab v. State, 636 So.2d 3, 4 (Fla. 1994). The United States Supreme Court denied Schwab's petition for writ of certiorari on October 17, 1994. *Schwab v. Florida*, 513 U.S. 950 (1994).

On December 15, 1995, Schwab filed his first *Florida Rule of Criminal Procedure* 3.850 motion. (R177-314). The motion was later amended on April 15, 1998, and included some twenty-seven claims. (R1028-1172). Ultimately, a number of the claims were withdrawn, and, on June 24, 1999, an evidentiary hearing was conducted on some of the claims contained in the motion. (R1245-46). On October 12, 1999, the Circuit Court entered an order denying all relief. (R1247-60). Notice of appeal was filed on November 3, 1999. (R1261). The record was certified as complete and transmitted on March 31, 2000. Schwab filed his *Initial Brief* on August 8, 2000.

THE EVIDENTIARY HEARING

On June 24, 1999, the collateral proceeding trial court conducted an evidentiary hearing on Claims 1, 5, 6, 7, 9, 11-21, and 26. The evidence from that proceeding is summarized below.

Brevard County Assistant Public Defender Brian Onek testified that he represented the defendant, Mark Schwab, beginning in 1991,

and continuing through the filing of the notice of appeal from Schwab's conviction and sentence of death. (R9-10). Mr. Onek had previously been involved in death penalty cases, but this was the first case that went to trial in which the State was seeking the death penalty. (R11). Mr. Onek was assigned to this case as a replacement for Assistant Public Defender Randy Moore -- Schwab had waived a jury trial when Mr. Onek got into the case, and Mr. Onek believed that, due to the nature of the charges and the facts of the case, the jury waiver was a good strategy. (R12-16). As Mr. Onek put it, the emotional nature of the charges, not the publicity surrounding the case, called for waiving the jury. (R17).¹

Mr. Onek did not mislead Schwab by telling him that Judge Richardson had never imposed a death sentence when, in fact, Judge Richardson had never had the opportunity to do so. (R26). Mr. Onek told Schwab what was known about Judge Richardson, which was favorable in comparison to that which was known about the other judges. (R26-27).

Mr. Onek testified about a hearing on July 3, 1991, during which the State submitted two affidavits from then-Assistant State Attorneys which detailed an interaction with Judge Richardson. (R27-28). James Russo, the elected Public Defender for Brevard

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Of course, with a jury waiver, change of venue ceased to be an issue. (R17). A venire was waiting the day trial began, and the court instructed Schwab that if he wanted a jury and one could not be selected, the trial would be moved to another location. (R23).

County, was present at that hearing, and was annoyed that the State had suggested that the Public Defender's Office was unable to protect a client. (R29). Mr. Onek told Schwab that he could potentially seek Judge Richardson's recusal based upon the affidavits -- Mr. Onek was of the opinion that Judge Richardson was (from a defense perspective) preferable to the other choices, and thought that the State was trying to get Judge Richardson disqualified. (R29-31). Mr. Onek wanted Judge Richardson as the trier of fact. (R31).

Mr. Onek described the extensive penalty phase preparation that was done prior to trial, and testified that he consulted with five mental state experts, and presented the testimony of three such experts². (R38; 43-44). At the time of Schwab's trial, Mr. Onek had been practicing law for nine years solely in the area of criminal defense work, and had tried between 70 and 100 felony cases. (R46-47). Mr. Onek had previously dealt with clients who had mental disorders, and testified that he had no trouble communicating with Schwab, and that Schwab seemed to be of normal intelligence. (R47-48). Schwab understood his situation, and was forthcoming with information when asked to provide it. (R49).

Mr. Onek testified that he made a tactical decision to keep Judge Richardson as the trier of fact because he was preferable to

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The testimony of the experts that were not presented was not favorable. (R44).

the other criminal division judges. (R78). Judge Richardson was known to be extremely intelligent, quite religious, and not one to be influenced by political overtones. (R78-79). The final decision as to whether to waive a jury trial was left up to Schwab, and, in hindsight, Schwab might have been better off to plead guilty and proceed directly into the penalty phase. (R79). This option was discussed with Schwab, who decided against it because he felt that he would be waiving issues if he did not go to trial. (R80). On the morning that trial began, Schwab was not under the influence of any substances, and was well-able to communicate. (R80-81). The decision to proceed with a non-jury trial was based upon the probability that any jury that heard this case would recommend death, and the desire to avoid such a recommendation and its effect on the sentencing judge. (R88-89; 103).³

Judge Edward Richardson was the Circuit Judge who tried this case. (R52-53). He recalls that two affidavits were submitted, but that no motion to disqualify was ever filed based upon those affidavits. (R54-58). In his words, the affidavits were "just there", but he made sure that Schwab was aware of them. (R58). Schwab was specifically advised by the Judge of the consequences of waiving a jury trial. (R65). When asked (by Schwab's present

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Counsel had consulted with Michael Radelet, whose statistical analysis of Florida death cases suggested that a jury would recommend death in this case. (R100).

counsel) when he decided what sentence to impose on Schwab, Judge Richardson testified:

I think that's an insulting question, counsel, and I can't imagine that you're asking that question in good faith.

What appears in that Sentencing Order is the result of a very very -- very very difficult trial with much evidence being presented.

After the evidence was presented and the court determined its verdict of guilt, before the court made any judgment of penalty, the court permitted that we conducted several post-trial hearings, where additional extensive written and oral arguments were made, including the opportunity for Mr. Schwab to address the court.

It was after all of that and careful reflection by this court of all of the factors that were presented, both in aggravation and in mitigation, that the court reached the conclusions that I reached in the final Sentencing Order.

So to answer your question, my decision after -- the ultimate sentence occurred after all of that and after careful reflection on what was presented. I did not reach that decision easily.

(R68-69).

James Russo is the elected Public Defender for Brevard County. (R104-105). Mr. Russo believed at the time of trial, and still believes, that the jury should have been waived in this case. (R111). He testified that he thought at the time of trial, and still believes, that this was a good strategy. (R112).

Marlene Alva was the Chief Assistant Public Defender for Brevard County in 1991. (R119-20). Ms. Alva testified that her personal opinion was to not waive the jury, but that she could see the logic of such a waiver. (R124). A lot of thought went into the

decision of whether or not to waive a jury trial in this case. (R125).

Randy Moore is the Chief Assistant Public Defender for Brevard County, and, at the time of Schwab's case, was a staff lawyer in that office. (R128-29). He got out of Schwab's case after three or four weeks, but was handling the case when the jury waiver took place. (R130-31; 134-5). Because of the facts of this case, a judge was preferable to a jury -- Schwab's confession factored into the decision, and, moreover, Schwab had all of the information about the murder because he was there. (R139-40).

The defendant, Schwab, testified at the evidentiary hearing that his answers to Judge Richardson's questions at the July 3, 1991, hearing were truthful -- he had discussed the jury waiver with his attorneys, and was aware that he could seek to disqualify Judge Richardson. (R148-50). Schwab still desired to proceed without a jury. (R151). Likewise, his affirmation, on the day trial began, that he wished to waive the jury, was truthful. (R1515-52).

SUMMARY OF THE ARGUMENT

Schwab's claim that the trial court should have recused itself on its own motion is procedurally barred, as the collateral proceeding trial court found.

Schwab's claim of "judicial bias" is no more than a re-argument of the first claim contained in his brief, which is also procedurally barred. In any event, an adverse ruling by the trial

court does not establish "bias."

Schwab failed to present evidence to establish his claim that his waiver of a jury trial was not knowing, voluntary, and intelligent.

Schwab's claim of ineffective assistance of counsel at the guilt phase of his capital trial was properly denied by the collateral proceeding trial court. Schwab failed to establish deficient performance or prejudice, and, in light of such a failure of proof, is not entitled to relief.

Likewise, Schwab's claim of ineffective assistance of counsel at the penalty phase of his capital trial suffers from a failure of proof because he has not established deficient performance on the part of trial counsel, nor has he demonstrated prejudice. The collateral proceeding trial court's denial of relief should not be disturbed.

Schwab's claim that the sentencing judge relied on "extra record facts" is procedurally barred, and, alternatively, without merit.

Schwab's claim that he is "innocent of the death penalty" is, in fact, nothing more than a re-argument of the proportionality claim that he raised, and this Court rejected, on direct appeal. This claim is not a basis for relief.

Schwab's claim that the prior violent felony aggravating circumstance is supported by an "invalid" prior conviction is

unsupported by any evidence, and, for that reason, is not a basis for relief.

Schwab's claim concerning the application of the heinous, atrocious, or cruel aggravating circumstance is based upon his assertion that he did not "intend" to torture the victim. Under settled Florida law, there is no "intent element" to the heinousness aggravator.

Schwab's claim that the Florida Death Penalty Act is "facially vague and overbroad" is insufficiently pleaded and, moreover, is procedurally barred because it could have been, but was not, raised on direct appeal.

ARGUMENT

I. THE DISQUALIFICATION OF THE TRIAL COURT CLAIM IS PROCEDURALLY BARRED FROM REVIEW

On pages 13-28 of his brief, Schwab argues that the collateral proceeding trial court erroneously found his claim that Judge Richardson should have recused himself "on his own motion" procedurally barred. According to Schwab, this claim is not procedurally barred "because his attorneys made misrepresentations." *Initial Brief*, at 15. That assertion has nothing at all to do with whether the claim is procedurally barred.

The collateral proceeding trial court made the following findings with respect to this claim:

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. *Zeigler v. State*, 452 So.2d 537, 539 (Fla. 1984).

(R1250). The pertinent portion of the *Zeigler* decision reads as follows:

Zeigler makes several allegations in his argument on the issue of bias on the part of the trial judge, Judge Maurice Paul. All but one of these involve facts and circumstances known at the close of the trial. Therefore, those issues could have been addressed on direct appeal and are not cognizable under rule 3.850.

Zeigler v. State, 452 So.2d 537,539 (Fla. 1984).⁴ The collateral proceeding trial court's disposition of this claim is nothing more than a straightforward application of long-settled Florida law -- a claim that could have been but was not raised on direct appeal is procedurally barred from litigation in a collateral attack proceeding.⁵ See generally, F. R. Crim. P. 3.850. Nothing alleged in Schwab's brief provides a legal basis for ignoring a clear procedural bar. The lower court's denial of relief should be

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This Court remanded the case for a hearing on the matter that was alleged to have occurred after Zeigler's trial.

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Rule 2.160(e) of the *Rules of Judicial Administration* requires that a motion to disqualify be made within 10 days of the discovery of the facts on which it is based. That time limitation is consistent with the procedural bar found in this case, and, moreover, leaves no doubt that a judicial disqualification claim is subject to Florida's settled procedural bar rules.

affirmed in all respects.⁶

II. THE SECONDARY "JUDICIAL BIAS" CLAIM

On pages 28-37 of his *Initial Brief*, Schwab alleges that it was error for the trial court to deny relief on Claim IX of the Motion because he presented evidence of "judicial bias". When stripped of its pretensions, this claim is nothing more than a reargument of Claim I, above. As set out in connection with Claim I, this claim is procedurally barred, as the lower court found, because it could have been but was not raised on direct appeal from Schwab's conviction and sentence. See pages 9-10, above. This claim is not available to Schwab for the same reasons that Claim I is not a basis for relief.

To the extent that this procedurally barred and improperly briefed claim deserves further discussion, Florida law is settled that an adverse ruling does not establish bias on the part of the trial judge. See, e.g., *Patton v. State*, SC89,669 (September 28, 2000).

III. THE "INVOLUNTARY JURY TRIAL WAIVER" CLAIM

On pages 38-53 of his brief, Schwab alleges that he did not "knowingly, intelligently, and voluntarily" waive his right to a

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To the extent that this "claim" includes ineffective assistance of counsel overtones, that issue is addressed elsewhere. Claim IX in the motion is a substantive claim, and that is how the lower court ruled on it. Schwab's brief attempts to blend ineffective assistance of counsel and substantive components in an impermissible and legally meaningless fashion.

jury trial. The collateral proceeding trial court denied relief on this claim -- that determination should not be disturbed.

In its order denying relief, the collateral proceeding trial court stated:

Defendant's sixth claim of error states that he did not make a knowing and intelligent waiver of his right to a jury at sentencing. This claim raises two separate issues.

First, Defendant claims the waiver was not voluntary as he suffers from mental illness and brain damage. Defendant's motion alleges that if Defendant's counsel had Defendant properly examined, evidence of mental illness and brain damage would have been discovered, and Defendant's waiver would not have been accepted. At hearing, **Defendant presented no evidence to substantiate the claim that he suffered from any mental illness which would have presented him from understanding the consequences or his actions, nor was any evidence of brain damage presented.**

Secondly, 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.

(R1249-50). The collateral proceeding trial court's order is supported by the evidence, is not clearly erroneous, and should be

affirmed in all respects.

To the extent that discussion of this claim beyond the court's order is necessary, the evidence from the evidentiary hearing (which is set out in the statement of the facts) established that trial counsel was well aware of what they were doing in recommending that Schwab proceed to a non-jury trial. Schwab's trial counsel believed, based upon the facts of the crime, that the best chance for saving Schwab's life was a non-jury trial. In fact, statistics that counsel obtained from Dr. Radelet suggested that any Florida jury would recommend death under the facts of this case. (R100).⁷ Further, Schwab testified at the evidentiary hearing that he told the truth when he stated to Judge Richardson that he understood his right to a jury trial, but wanted to proceed to a non-jury trial, with the most recent affirmation of the jury waiver coming on the morning that trial began. (R151-52; 160). No evidence to dispute those facts was presented at the evidentiary hearing, even though Schwab had every opportunity to place whatever testimony he wished before the court. The collateral proceeding trial court should be affirmed in all respects.⁸

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Dr. Radelet is referred to as "Dr. Ratalick" in the transcript. (R100).

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Schwab's brief includes references to other issues that are raised elsewhere in his brief. Those issues are addressed elsewhere in the State's brief, as well. It is sufficient to state that they do not compel reversal of the denial of relief.

IV. THE GUILT PHASE INEFFECTIVE
ASSISTANCE OF COUNSEL CLAIM

On pages 53-71 of his brief, Schwab raises a multi-part claim asserting error in the denial of relief on his guilt phase ineffective assistance of counsel claim. For the reasons set out below, the collateral proceeding trial court correctly denied relief on the various sub-issues raised herein.

The first sub-issue contained within Claim IV is Schwab's assertion that defense counsel failed to investigate the waiver of the jury, and also made misrepresentations to Schwab about the trial judge. The collateral proceeding trial court rejected this claim, stating that "[t]his claim was refuted by every witness called to testify at Defendant's hearing on this motion." (R1252). That finding is correct, is supported by the evidence, and should not be disturbed. Further, as Schwab's former trial counsel testified, the decision to waive a jury trial was Schwab's (R79), that he made no misrepresentations to Schwab in order to convince him to waive a jury (R26-7), and that statistics regarding capital trials in Florida suggested that a jury would recommend death under the facts of this case. (R100). The Rule 3.850 trial court's denial of relief reflects a considered decision that explicitly rejected Schwab's testimony, to the extent that such testimony was inconsistent with that of the other, more credible, witnesses. Such a credibility determination should not be disturbed. *See, e.g., State v. Spaziano*, 692 So.2d 174 (Fla. 1997).

Finally, because this claim is one of ineffective assistance of counsel, Schwab must prove not only deficient performance, but also prejudice as a result thereof. *Strickland v. Washington*, 466 U.S. 668 (1984); *Cherry v. State*, SC90,511 (Fla. Sept. 28, 2000); *Waters v. Thomas*, 46 F.3d 1506 (11th Cir. 1995). As the *Waters* court pointed out, the standard is not what the best lawyer would do, nor is it what a good lawyer would do in defense of a client. Rather, the standard is whether **some** lawyer could reasonably conclude that the case should be defended in the manner challenged as ineffective. *Waters, supra*, at 1512. When that standard is applied to the jury waiver claim, there is no basis for relief. Counsel clearly had a reasonable basis for recommending that Schwab waive a jury trial, and even the one lawyer witness who disagreed with that strategy testified that she could see the logic of waiving the jury.⁹ (R124). Moreover, in addition to having failed to prove that counsel's performance was deficient, Schwab has also failed to allege or prove prejudice as that term applies in the ineffective assistance of counsel context. In the absence of an allegation that Schwab **would** have received a life sentence recommendation from a penalty phase jury, he has failed to carry his burden of pleading. In addition to being unable to demonstrate

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See, *Smith v. Armontrout*, 888 F.2d 530, 535 (8th Cir. 1989) ("We do not think that decisions of lawyers should be fly-specked long after the fact in an effort to turn up some arguable imperfection.").

deficient performance, Schwab also cannot establish that he was prejudiced by his decision to waive a jury trial. The Rule 3.850 court's denial of relief on this claim should not be disturbed.

The second sub-issue pressed by Schwab is his claim that counsel was ineffective for failing to move for a change of venue. This claim mixes inconsistent legal theories, and is not a basis for relief. Despite the hyperbole of Schwab's brief, the change of venue claim collapses because there is no evidence of deficient performance or prejudice. In the absence of both prongs of the *Strickland* standard, there can be no relief granted on an ineffective assistance of counsel claim.

As discussed in connection with the first sub-issue contained within this claim, Schwab waived the right to a jury trial. He has not, however, explained how a motion for change of venue would have been appropriate given that waiver, nor has he alleged either deficient performance or prejudice as a result of counsel's "failure" to seek a change of venue for a non-jury trial.¹⁰ The Rule 3.850 court's denial of relief should not be disturbed. (R1253). In fact, as Schwab's trial counsel testified, a motion for change of venue was not a factor because of the jury waiver. (R17). Stated in different terms, the claim that counsel was ineffective for failing

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To the extent that this sub-issue contains allegations with respect to the judicial bias claim, those allegations have been addressed at pages 9-11, above.

to move for a change of venue of a non-jury trial is a *non sequitur*. This claim is legally meaningless, and is not a basis for relief.¹¹

The third sub-issue contained within this claim is Schwab's claim that unspecified "misrepresentations" by trial counsel "prevented" him from moving to disqualify Judge Richardson from presiding over his case. Apparently, the basis for this claim is a "failure" on the part of trial counsel to seek Judge Richardson's recusal (even though that basis is inconsistent with the allegation of "misrepresentations"). Because this is an ineffective assistance of counsel claim, Schwab must establish that it was deficient performance for counsel to not seek Judge Richardson's disqualification, and that Schwab was thereby prejudiced. In other words, Schwab must establish that no lawyer would not have sought to disqualify the trial judge, **and** that Schwab was thereby prejudiced. The "judicial bias" allegations that are the core of this claim are addressed at pages 9-11, above -- there is no need to repeat that argument. However, to the extent that any further discussion of this claim is necessary, trial counsel's testimony

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Schwab makes much argument that counsel did not know enough about the facts of the case to make a recommendation with respect to waiver of a jury. He has not identified **any** fact as being wrong, and the horrific facts of this case, as found by this Court and set out above, certainly seem consistent with what was known at the time Schwab waived a jury. Of course, as counsel pointed out, Schwab knew what the facts were because he was there when the murder happened. (R139-40).

was unequivocal -- Judge Richardson was regarded as the best available choice, given the other judges who would take over the case if Judge Richardson was disqualified. (R30; 78-79). Moreover, Schwab was questioned under oath as to whether **he** desired to seek Judge Richardson's recusal. He stated, unequivocally, that he was aware of the contents of the "state attorney affidavits", that he was aware of the option of seeking Judge Richardson's recusal, that he did not desire to do so, and that he still believed that a non-jury trial was in his best interest. (R1477 *et seq*). At the evidentiary hearing, Schwab testified that he understood that a motion to disqualify the judge was available, but he did not want to file one. (R148; 150). Because of that testimony, it is clear that this claim has no basis in fact.

The final sub-issue contained in this claim is that trial counsel "failed to ensure [sic] that a reliable transcript" was prepared. The collateral proceeding trial court denied relief on this claim, stating:

Defendant claims the record in the instant case is incomplete, inaccurate, and unreliable due to error or omission on the part of trial counsel. There is no indication the record is incomplete, inaccurate or unreliable. Nor has Defendant presented any evidence to that 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 included in the record. This claim is simply untrue, as the complete transcript is included in the official court file.

Furthering Defendant's claim that the transcript is incomplete, Defendant alleges in his motion that

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

(R1254-55). That disposition of this claim is supported by the evidence, and should not be disturbed.

As with any other ineffective assistance of counsel claim, Schwab must carry his burden of proving not only deficient performance, but also prejudice. *See, Strickland v. Washington, supra*. Schwab has not demonstrated any deficiency on the part of trial counsel with respect to the contents of the record on appeal, nor has he demonstrated (or attempted to demonstrate) how he was prejudiced. Both components of *Strickland* must be established in order to prevail on an ineffective assistance of counsel claim, and Schwab has failed to carry his burden of proof. This claim is not a basis for relief.

V. THE PENALTY PHASE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM

On pages 71-84 of his brief, Schwab raises a multi-part claim of ineffective assistance of penalty phase counsel. The collateral proceeding trial court denied relief on this claim, and that finding should not be disturbed. (R1255-56).

In denying relief on this claim, the lower court stated:

The fifteenth claim raised by Defendant claims he was denied adversarial testing at the penalty phase of his trial due to the State's use of misleading and false evidence, the trial court's erroneous rulings, and defense counsel's failure to investigate and present mitigating circumstances. First, Defendant's motion and evidence presented at the hearing give no specifics as to what misleading/false evidence was presented, no specific instances of erroneous rulings, and no specifics as to what evidence defense counsel should have presented.

With regard to any error on the part of the State, Defendant has presented no evidence to support this claim, and it is denied. [citation omitted]. Furthermore, Defendant has made no showing of prejudice. As such, Defendant's motion is denied. Also, any claimed error on the part of the trial court is not properly brought in a motion for post-conviction relief. The proper venue for such claims would be on direct appeal. [citation and internal quotation omitted]. 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.

(R1255-56). Those findings are supported by the evidence, and should not be disturbed. To the extent that further discussion of this claim is necessary, the individual claims contained in Schwab's brief are addressed separately below.

The first sub-issue contained in Schwab's brief is his claim that trial counsel was ineffective because he presented the testimony of Schwab's mother and father because that testimony was, according to Schwab, contradictory. At the evidentiary hearing, Schwab's trial counsel testified that he knew that the testimony of Schwab's mother and father would differ, but that Schwab's father

testified very well. (R95). Counsel went on to testify that he called both of Schwab's parents because he felt the Court needed the full picture of Schwab's background. (R96). That is a reasonable strategic decision, and, as such, is not subject to second-guessing in collateral attack. *See, Strickland v. Washington, supra; Cherry, supra; Waters, supra.* Schwab cannot establish that no lawyer would have handled this issue in the same way, and, because that is so, cannot establish that counsel's performance was deficient. Moreover, Schwab cannot establish the prejudice prong of *Strickland*, either. In other words, Schwab cannot establish a reasonable probability of a different result if trial counsel had proceeded in a different fashion at trial. Because that is so, Schwab has failed to carry his burden of proof, and is not entitled to relief.

Further, this matter presented a square credibility choice for the finder of fact -- the fact that credibility choice was resolved adversely to Schwab does not create a basis for relief. The collateral proceeding trial court should be affirmed in all respects.

The second sub-issue contained in Schwab's brief is a claim that "defense counsel failed to investigate the waiver of the penalty phase jury." *Initial Brief*, at 76. The jury waiver issue has been fully addressed elsewhere in this brief, and need not be repeated here. See pages 11-13, above. For the reasons set out

herein, Schwab cannot establish either prong of the *Strickland* deficient performance/prejudice standard. Briefly stated, the waiver of the penalty phase jury, while ultimately Schwab's decision, was a valid (and well-considered) trial strategy that was not unreasonable. Likewise, Schwab cannot demonstrate that he was prejudiced by waiving the jury's advisory recommendation because he cannot demonstrate that the result with a jury would have somehow been different. There is no basis for relief.

The third sub-claim contained in Schwab's brief is an ineffective assistance of counsel claim based upon counsel's "failure" to "neutralize" two aggravators. The first aggravator at issue is the "prior violent felony" aggravating circumstance -- Schwab claims that the prior conviction was the product of an invalid guilty plea, but has presented no evidence to support that assertion, as the lower court found. (R1257). Because the substantive challenge to the validity of the prior conviction was denied on the merits, the ineffective assistance of counsel claim also fails. To the extent that Schwab complains that he received ineffective assistance of counsel because counsel stipulated "that the murder was committed during the commission of another violent felony", the most that demonstrates is a recognition of the obvious, given that Schwab had already been convicted. (R2079-80). Counsel cannot be faulted for conceding a matter that is not

subject to dispute.¹² (R1125). To the extent that Schwab complains that Dr. Samek's testimony allowed the State to present non-statutory aggravation, that claim has no legal basis. The fact that Schwab re-offended shortly after being released from prison is clearly relevant, is not "non-statutory aggravation", and is not a basis for relief. (R1123).

The final sub-issue contained in Schwab's brief is his claim that "defense counsel failed to provide the assistance of a competent mental health expert". This claim appears to be based on the lower court's denial of relief on claim XVI, which raised a substantive claim of the denial of a "competent mental health expert". (R1127). The trial court denied relief on this claim, finding that "[d]efendant has presented no evidence to support this claim, and has not showed any prejudice." (R1257). That ruling is correct, and should not be disturbed.

In his brief, Schwab complains that he presented no evidence on this claim because of a prior ruling by the collateral proceeding trial court. While it is true that the court denied Schwab's last-minute motion for a continuance, it is also true that

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In the context of a jury trial, the Eleventh Circuit Court of Appeals has held: "It is not good trial tactics to attempt to persuade a jury of the verity of a proposition when it is manifestly impossible to do so." *Alvord v. Wainwright*, 725 F.2d 1282, 1290 n.15 (11th Cir.), *modified*, 731 F.2d 1486, *cert. denied*, 469 U.S. 956 (1984). That observation applies equally in this context.

Schwab had known for months when he would be expected to go forward with expert testimony. (R1243). The trial court stated:

This cause came before this Court on the Defendant's Motion to Continue Evidentiary Hearing, received May 15, 1999. The Court has reviewed Defendant's Motion, and **DENIES** such without a hearing. Through his Motion, Defendant avers that another medical expert is needed to participate in these proceedings. The Motion states that the expert will require approximately three months to prepare. Defendant and his counsel were aware of the June 24, 1999 hearing date on March 10, 1999. At that time, Defendant again requested a continuance to allow expert medical testimony to be presented. Only now, three months later, does Defendant again request a continuance to adequately prepare for this hearing. The Court views this as an attempt to delay these proceedings. Accordingly it is

ORDERED AND ADJUDGED that Defendant's Motion to Continue Evidentiary Hearing is **DENIED**.

(R1243). The trial court did not abuse its discretion in denying the motion to continue, and Schwab should not be heard to complain.

Schwab's brief also makes reference to Schwab's ability to form the specific intent necessary to commit the crimes. The collateral proceeding court addressed that claim in the ineffective assistance of counsel context, stating: "Counsel for Defendant stated that he was hoping to present such evidence. However, after Defendant had been examined by numerous mental health experts, no such evidence existed." (R1253-54). Counsel cannot be faulted for

"failing" to produce non-existent evidence.¹³ The denial of relief should be affirmed in all respects.

VI. THE EXTRA-RECORD SENTENCING FACTS CLAIM

On pages 84-87 of his brief, Schwab argues that he is entitled to relief because, in sentencing him to death, Judge Richardson "relied on facts outside of the record". *Initial Brief*, at 87.¹⁴ The lower court correctly denied relief on this claim, and that ruling should not be disturbed.

In its order denying relief, the Rule 3.850 trial court stated:

Defendant's final claim for relief avers the trial court relied on facts outside the record in imposing the death penalty. 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 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. No error was committed which requires consideration. This claim is denied.

The trier of the facts, in the application of common sense and general experience, may give some evidence great weight and other evidence little or no weight, may draw or decline to draw inferences, may consider inferences to be strong or weak, and on the basis of credibility or lack of credibility may accept

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Stated differently, "[a] witness cannot be produced out of a hat." *Zettlemyer v. Fulcomer*, 923 F.2d 284, 298 (3rd Cir. 1991).

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This claim was Claim XXVI in Schwab's Rule 3.850 motion.

or reject all or any part of the testimony of any witness, including that of the defendant whether or not such testimony is contradicted or refuted.

Dunn v. State, 454 So.2d 641, 643-44 (concurring opinion) (Fla. 5th DCA 1984).

(R1257). Moreover, as the United States Supreme Court held:

Any sentencing decision calls for the exercise of judgment. It is neither possible nor desirable for a person to whom the State entrusts an important judgment to decide in a vacuum, as if he had no experiences.

Barclay v. Florida, 463 U.S. 939, 950 (1983). That denial of relief on the merits is correct, and should not be disturbed.

However, in addition to its lack of merit, this claim is not available to Schwab for the additional reason that it is procedurally barred because it could have been but was not raised at trial or on direct appeal. Florida law is well-settled that such a failure to timely raise a claim is a procedural bar to subsequent litigation of that claim. *See, Fla. R. Crim. P.* 3.850. While the collateral proceeding trial court did not address the procedural bar, that does not preclude this Court from disposing of this claim on that basis.¹⁵ This claim is procedurally barred in addition to being wholly meritless.

VII. THE "INNOCENCE OF THE DEATH PENALTY" CLAIM

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The State raised a procedural bar defense in its answer to the motion. (R418-19). This Court should address the procedural bar issue to further protect the adequacy and independence of Florida's state procedural rules. *See, e.g., Harris v. Reed*, 489 U.S. 255 (1989).

On pages 87-88 of his brief, Schwab argues that he is entitled to relief because he is "innocent of the death penalty". The apparent premise of this argument is Schwab's claim that the three aggravators found applicable to his case are "invalid", and that his sentence of death is "disproportionate". The Rule 3.850 Court denied relief on this claim. (R1257).

In its order denying relief on this claim, the Rule 3.850 trial court stated:

The seventeenth claim raised by Defendant claims he is "innocent of the death penalty" as there were insufficient aggravating circumstances to warrant the death penalty in this case. The Florida Supreme Court has previously addressed this issue, and disagrees with Defendant. *Schwab v. State*, 636 So.2d 3, 8 (Fla. 1994). This Court has been presented with no evidence that would enable it to call into question the propriety of the Court's decision. This claim is denied.

(R1257). That ruling is correct, and should not be disturbed.

To the extent that further discussion of this claim is necessary, this claim is, in fact, nothing more than Schwab's continuing argument with this Court's direct appeal decision affirming his conviction and death sentence. When stripped of its constitutional aspirations, this claim does nothing but quarrel with this Court's previous decision -- because that is so, summary denial is proper. *Eutzy v. State*, 536 So.2d 1014 (Fla. 1988). This claim is not a basis for relief.

VIII. THE "INVALID PRIOR CONVICTION" CLAIM

On pages 89-90 of his Brief, Schwab argues that his prior

conviction for sexual battery, which supported the prior violent felony conviction aggravating circumstance, is "invalid", thereby entitling him to relief.¹⁶ The Rule 3.850 trial court denied relief on this claim, stating:

Next, Defendant claims the prior conviction introduced by the State at the penalty phase of Defendant's trial was obtained in violation of his Constitutional rights. Defendant has presented no evidence to support this claim, and it is denied.

(R1257). Schwab has done nothing to call the accuracy of that determination into question, and, because of his failure to produce any evidence to support his claim, there is no basis for relief. The trial court should be affirmed in all respects.

IX. THE HEINOUS, ATROCIOUS, OR CRUEL AGGRAVATING CIRCUMSTANCE CLAIM

On pages 90-91 of his brief, Schwab argues that the heinous, atrocious, or cruel aggravating circumstance is invalid because he did not "intend" to torture his victim. The collateral proceeding trial court denied relief on this claim, stating:

Defendant's nineteenth claim of error states that the trial court erred in finding the heinous, atrocious, and cruel aggravator applied to the instant case. This is an issue properly addressed before the appellate court on direct appeal, and it was raised in Defendant's case on direct appeal. The Supreme Court found no error in the presentation of this factor by the State, or in the trial court's conclusion that this crime was in fact heinous, atrocious, and cruel. *Id.*, at 7. This claim is denied.

(R1257). That denial of relief, which amounts to a finding of

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This claim was Claim XVIII in Schwab's Rule 3.850 motion.

procedural bars (because the issue was raised and rejected on direct appeal) is supported by settled Florida law, and should not be disturbed.

To the extent that further discussion of this claim is necessary, Schwab's entire argument is based upon the false premise that the heinous, atrocious, or cruel aggravator includes an "intent element." This Court has flatly rejected such a claim, and, because that is so, this claim has no legal basis. *Guzman v. State*, 721 So.2d 1155 (Fla. 1988).

X. THE "AUTOMATIC AGGRAVATING CIRCUMSTANCE" CLAIM

On pages 92-96 of his brief, Schwab argues that the "during the course of an enumerated felony" aggravator must be stricken because the sentencing court found that any one of the three aggravating circumstances, standing alone, was sufficient to outweigh the mitigation. Schwab has not explained why that finding by the sentencing court requires the during the course of an enumerated felony aggravating circumstance to be stricken. The collateral proceeding trial court denied relief on this claim, stating:

The twentieth claim raised by Defendant is rather difficult to decipher, but appears to allege error on the part of the trial court in finding the prior felony introduced in the penalty phase, standing alone, would support the death sentence. This was not the finding of the trial court. The Final Order in Defendant's case states that, "any one of the aggravating circumstances outweighs all mitigating circumstances." First, this issue should have been, and was raised on direct appeal. The Florida Supreme Court found no error in the trial

court's finding. *Id.* This claim is denied.

(R1258).

The claim contained in Schwab's brief appears to be a claim that the "during the course of a felony" aggravator is invalid. That claim is procedurally barred because it could have been but was not raised on direct appeal to this Court. Schwab's failure to timely raise this claim bars it from review. *See, Fla. R. Crim. P.* 3.850. Alternatively and secondarily, this claim lacks merit. *Blanco v. State*, 706 So.2d 7, 11 (Fla. 1997) ("Blanco next argues that Florida's capital felony sentencing statute is unconstitutional because every person who is convicted of first-degree felony murder automatically qualifies for the aggravating circumstance of commission during the course of an enumerated felony. We disagree."). Schwab is not entitled to any relief.

XI. THE VAGUE AND OVERBROAD DEATH PENALTY ACT CLAIM

On pages 97-99 of his brief, Schwab raises a claim that the Florida death penalty act is "facially vague and overbroad". However, he does not identify any constitutional deficiency in the aggravating circumstances contained in the statute, nor has he identified what the claimed error is. In denying relief on this claim, the Rule 3.850 trial court stated:

Defendant's next claim for relief states that the Florida statute under which he was sentenced to death is vague and overbroad, constituting fundamental error. Any issue

relating to the constitutionality of a statute should have been raised on direct appeal, and is not properly raised in a motion for post-conviction relief. *Davis v. State*, 648 So.2d 107, 108 (Fla. 1994). Furthermore, the statute has consistently been ruled to pass constitutional muster, and is not vague or overbroad. This claim is denied.

(1258). That finding should not be disturbed.

CONCLUSION

Based upon the foregoing arguments and authorities, the State submits that the denial of relief pursuant to *Florida Rule of Criminal Procedure* 3.850 should be affirmed in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

Of Counsel