

IN THE SUPREME COURT OF FLORIDA

MARK DEAN SCHWAB

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. SC07-2138 BY signed
Capital Case, Warrant

FILED
THOMAS D. HALL
2008 FEB 15 A 10:46
CLERK, SUPREME COURT

**RESPONSE TO MOTION FOR REHEARING
AND MOTION TO STRIKE**

The State of Florida, by and through the undersigned Assistant Attorney General, replies to the "Motion for Rehearing" and asks that the motion be denied for the following reasons. In addition, to the extent that the motion attempts to add "evidence" in the form of "tables," that portion of the motion should be stricken as improper and unauthorized.

1. The motion is improper because it constitutes an attempt to re-argue the case. *Fla. R. App. P. 9.330(a); Whipple v. State*, 431 So. 2d 1011 (Fla. 2d DCA 1983). The motion for rehearing does nothing more than quarrel with this Court's decision. That is not the purpose of a motion for rehearing. *Department of Revenue v. Leadership Housing, Inc.*, 322 So. 2d 7, 9 (Fla. 1975); *Elliott v. Elliott*, 648 So. 2d 137 (Fla. 4th DCA 1994); *Parker v. Baker*, 499 So. 2d 843 (Fla. 2d DCA 1986). No arguments contained in the motion was unavailable at the time Schwab filed his *Initial Brief*, and his delay in making

arguments that have been available at all pertinent times is inexcusable.


2. A party cannot present arguments in a motion for rehearing that have not been presented to the Court in appellate briefs or oral argument. *Sag Harbour Marine, Inc. v. Fickett*, 484 So.2d 1250 (Fla. 1st DCA 1986). This Court did not overlook any aspect of fact or law in its opinion affirming the denial of Schwab's successive post-conviction relief motion -- the motion for rehearing should be denied.

3. At various points in the motion, Schwab argues based on "tables" that have been presented for the first time in the motion for rehearing. There is no justification for his failure to present this argument sooner, and it is inappropriate to include that argument here. That portion of the motion should be stricken.

WHEREFORE, the State respectfully requests that the motion for rehearing be denied.

Respectfully submitted,

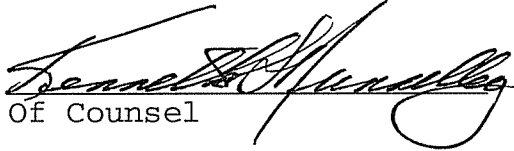
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by U.S. Mail to: **Peter J. Cannon**, Assistant CCRC, and **Mark S. Gruber**, Assistant CCRC, Capital Collateral Regional Counsel - Middle, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619-1136 on this 14th day of February, 2008.


Of Counsel