DOCKET NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

JOHN RICHARD MAREK,

Petitioner,

vs.

RICHARD L. DUGGER, and
STATE OF FLORIDA,

Respondents.

APPLICATION FOR A STAY OF EXECUTION PENDING REVIEW OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

TO: THE HONORABLE ANTHONY M. KENNEDY, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Eleventh Circuit

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COURT OF FLORIDA

Petitioner, JOHN RICHARD MAREK, is a condemned prisoner in the State of Florida whose sentence of death is currently scheduled to be executed on October 11, 1989, at 7:00 a.m. On August 29, 1989, the Florida Supreme Court denied rehearing of its decision of May 11, 1989, denying Mr. Marek's petition for state habeas corpus relief and affirming the state trial court's denial of Mr. Marek's Motion To Vacate Sentence And Judgment. See Marek v. State, ___ So. 2d ___, 14 F.L.W. 247 (Fla. 1989). In the aforementioned proceedings, Mr. Marek had asked the state trial court and the Florida Supreme Court for a new sentencing proceeding because the sentencing jury received inaccurate and insufficient instructions regarding the aggravating circumstances that it could consider in light of this Court's decisions in Maynard v. Cartwright, 108 S. Ct. 1853 (1988); Johnson v. Mississippi, 108 S. Ct. 1981 (1988); Mills v. Maryland, 108 S. Ct. 1860 (1988); Eddings v. Oklahoma, 455 U.S. 104 (1982). The Florida Supreme Court, in what can only be described as a terse opinion, denied Petitioner relief with respect to the issues

presented in Mr. Marek's state habeas corpus petition saying only, "we find no basis for habeas corpus relief." Marek, supra, 14 F.L.W. at 247.

Given the opportunity, Mr. Marek will file a Petition for a Writ of Certiorari which will show that the decision of the Florida Supreme Court in his case is contrary to this Court's decisions in Cartwright, supra, Johnson, supra, Mills, supra, and Eddings, supra. Even the Florida Supreme Court in the context of Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), has said the jury must receive correct instructions and that instructional error requires a resentencing unless there is no evidence in the record upon which the jury could have recommended life. The issues Mr. Marek seeks to present are also directly related to Clemons v. Mississippi, 109 S. Ct. 3184 (cert. granted, June 19, 1989).[1] The resolution of the questions Mr. Marek seeks to present will determine the constitutionality of his sentence of death. If the eighth amendment strictures of Cartwright apply to Florida's capital sentencing scheme, Mr. Marek is entitled to relief under Cartwright on the facts of his case.

QUESTIONS TO BE PRESENTED

I. Whether, given the pendency of Clemons v. Mississippi, certiorari review should be granted to determine whether, in a capital penalty phase proceeding, the jury must, under the eighth amendment, be correctly and accurately instructed regarding the components of, or limiting qualifications placed upon,

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[1]In Clemons, the Mississippi Supreme Court found error under Maynard v. Cartwright, but ruled it harmless. The question presented to this Court in Clemons is:

> Does Eighth Amendment permit appellate court to save sentence of death by reweighing aggravating and mitigating factors where authority for capital sentencing under state law rests exclusively with jury?

aggravating circumstances which are presented to the jury for consideration, and are weighed by the jury against the evidence in mitigation, and whether the Florida Supreme Court's disposition of the eighth amendment question in this case is in direct and irreconcilable conflict with the Tennessee Supreme Court's disposition of this question in State v. Hines, 758 S.W.2d 515 (Tenn. 1988), the Mississippi's Supreme Court's disposition of this question in Pinkney v. State, 538 So. 2d 329 (Miss. 1988), and the Tenth Circuit Court of Appeals' disposition of this question in Coleman v. Saffle, 869 F.2d 1377 (10th Cir. 1989), and this Court's opinions in Maynard v. Cartwright and Mills v. Maryland.

II. Whether, given the pendency of Clemons v. Mississippi, certiorari review should be granted to determine whether the eighth amendment permits a court to save a sentence of death by reweighing aggravating and mitigating factors where state law requires a sentencing jury to weigh aggravating and mitigating factors in the first instance, where the jury must then determine the balance of aggravating and mitigating factors, and where the jury's resulting life recommendation must be followed unless there is no reasonable basis for that recommendation, and whether the Florida Supreme Court's disposition of this question is in direct and irreconcilable conflict with the Tennessee Supreme Court's disposition of this question in State v. Hines, 758 S.W.2d 515 (Tenn. 1988), the Tenth Circuit Court of Appeals' disposition of the question in Coleman v. Saffle, 869 F.2d 1377 (10th Cir. 1989), the Eleventh Circuit Court of Appeals' disposition of the question in Lindsey v. Thigpen, 875 F.2d 1509 (11th Cir. 1989), and this Court's opinions in Johnson v. Mississippi and Eddings v. Oklahoma.

JURISDICTION

Petitioner invokes this Court's jurisdiction to stay his execution under 28 U.S.C. Sections 2101(f) and 1651, and Rule 44 of the Rules of the Supreme Court of the United States. This Court's jurisdiction with regard to the Petition for a Writ of Certiorari to the Florida Supreme Court derives from 28 U.S.C. Section 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the eighth and fourteenth amendments to the United States Constitution. It further involves Florida Statute 921.141, which is set forth in its entirety in Appendix A of this Application.

STATEMENT OF THE CASE

Mr. Marek was convicted of first degree murder and kidnapping on June 1, 1984. After the presentation of evidence and testimony at the statutorily-mandated separate sentencing proceeding before a jury, see Fla. Stat. Section 921.141(a), the sentencing jury recommended a sentence of death on June 5, 1984. The sentencing court then imposed the death penalty on July 3, 1984. The Florida Supreme Court affirmed the conviction and sentence on June 26, 1986. See Marek v. State, 492 So. 2d 1055 (Fla. 1986).

On October 10, 1988, Mr. Marek filed in the state trial court a Motion to Vacate Judgment and Sentence pursuant to Florida Rule of Criminal Procedure 3.850. On October 12, 1988, Mr. Marek filed a state habeas corpus petition in the Florida Supreme Court. Mr. Marek argued that the jury was improperly, inadequately, and incorrectly instructed on the four aggravating circumstances which, in this case, were weighed against the evidence presented in mitigation. Mr. Marek argued that under this Court's holdings in Maynard v. Cartwright, 108 S. Ct. 1853

(1988), and Mills v. Maryland, 108 S. Ct. 1860 (1988), there was error which was not harmless under either Johnson v. Mississippi, 108 S. Ct. 1981 (1988), or Eddings Oklahoma, 455 U.S. 104 (1982). Mr. Marek's contention was that the use of inadequately defined aggravating circumstances rendered the capital sentencing in violation of the eighth amendment, and thus Mr. Marek's death sentence was unconstitutionally unreliable under eighth amendment principles.

Mr. Marek also presented this same challenge to his death sentence in his Motion to Vacate at the circuit court level. After a limited evidentiary hearing, the state trial court denied Mr. Marek's Motion to Vacate Sentence and Judgment, but agreed that at least one of the four aggravating circumstances had been improperly submitted to the jury.[2] The judge ruled the error was harmless because in his opinion no mitigating evidence existed. However, the evidence presented to the jury and argued by trial counsel was considerable, and is set out infra.[3]

In a single opinion, the Florida Supreme Court denied Mr. Marek's petition for habeas corpus relief and affirmed the trial

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[2]The judge's order stated:

> CLAIM XII - PRIOR VIOLENT FELONY IN AGGRAVATION
>
> This Court finds that this aggravating circumstance must be stricken in light of the Florida Supreme Court's latest pronouncement in Lamb v. State, 13 F.L.W. 530 (Fla. Sept. 1, 1988) and Perry v. State, 522 So. 2d 817 (Fla. 1988). Moreover, MAREK'S sentence of death is still valid where the remaining three aggravating factors were proven beyond a reasonable doubt and upheld on direct appeal and where there were and are no mitigating circumstances applicable to MAREK. Jackson v. State, 502 So. 2d 409 (Fla. 1985).

[3]Moreover, the Florida Supreme Court has said: "It is of no significance that the trial judge stated that he would have imposed the death penalty in any event. The proper standard is whether a jury recommending life imprisonment would have a reasonable basis for the recommendation." Hall v. State, 541 So. 2d 1125, 1128 (Fla. 1989).

court's denial of Mr. Marek's Motion to Vacate Judgment and Sentence. Marek v. State, ___ So. 2d ___, 14 F.L.W. 247 (Fla. May 11, 1989)(see Appendix B). The court denied rehearing of its decision on August 29, 1989 (See Appendix C). In the opinion the court merely said, "we now affirm the lower court's denial of Marek's motion." 14 F.L.W. at 247. As to the habeas corpus petition, the court said, "We also find no basis for habeas corpus relief." 14 F.L.W. at 247.

On September 6, 1989, the Governor of Florida signed a death warrant against Mr. Marek, scheduling his execution for October 11, 1989. On September 18, 1989, Mr. Marek filed to have the Florida Supreme Court stay Mr. Marek's execution pending the filing and disposition of a petition for a writ of certiorari in this Court. On September 20, 1989, the Florida Supreme Court denied the stay application (See Appendix D).

Mr. Marek seeks to have the Florida Supreme Court's decision, affirming his sentence of death in a manner contrary to Cartwright and Johnson, reviewed by writ of certiorari by this Court before the "irremediable act of execution is taken." See Shaw v. Martin, 613 F.2d 487, 492 (4th Cir. 1980). The claim to be presented in Mr. Marek's petition for writ of certiorari is certainly nonfrivolous, see Booker v. Wainwright, 675 F.2d 1150 (11th Cir. 1982), and is clearly "debatable among jurists of reason," Barefoot v. Estelle, 463 U.S. 880, 893 n.4 (1983), as reflected by the conflict between the Florida Supreme Court's analysis and the Tennessee Supreme Court. See State v. Hines, 758 S.W.2d 515 (Tenn. 1988). Further, the Florida Supreme Court has required a new sentencing before another jury when instructional error occurred in the penalty phase because of the significance of a jury recommendation in the Florida death penalty scheme. See Hall v. State, 541 So. 2d 1125 (1989); Mikenas v. Dugger, 519 So. 2d 601 (Fla. 1989); Riley v. Wainwright, 517 So. 2d 565 (Fla. 1987).

REASONS FOR GRANTING A STAY

The principles which govern the exercise of a Circuit Justice's power to grant a stay of execution in order to allow a party to file a petition for a writ of certiorari are well established and may be briefly summarized. A Petitioner must, and Mr. Marek herein shows: 1) Irreparable injury if no stay is granted; 2) A "reasonable probability that four (4) members of the Court will consider the issue [presented] sufficiently meritorious to grant certiorari," Graves v. Burnes, 405 U.S. 1201 (1972)(Powell, Circuit Justice); and 3) A likelihood of success on the merits.

A. IRREPARABLE INJURY

If no stay is granted, Mr. Marek will suffer the most irreparable injury known to the law. He will be electrocuted at 7:00 a.m. on October 11, 1989.

B. PROBABILITY THAT THE COURT WILL GRANT THE WRIT

The Florida Supreme Court has held that, under Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), the sentencing jury must be correctly and accurately instructed as to the mitigating circumstances available for consideration but that, under Maynard v. Cartwright, 108 S. Ct. 1883 (1988), the jury need not be instructed correctly and accurately regarding the aggravating circumstances to be weighed by it against the mitigation when it decides what sentence to recommend. In Mikenas v. Dugger, 519 So. 2d 601 (Fla. 1988), a new jury sentencing was ordered because the jury was instructed without objection that mitigating circumstances were limited by statute. A subsequent resentencing by trial judge alone did not cure the instructional error, although at the resentencing, the trial judge considered nonstatutory mitigation. Yet in Mr. Marek's case, the Florida Supreme Court found no reversible error where the jury did not

receive instructions narrowing aggravating circumstances in accord with the limiting and narrowing constructions adopted by the Supreme Court.

Florida has adopted a statutory scheme in which the "jury is specifically instructed to weigh statutory aggravating and mitigating circumstances in exercising its discretion whether to impose the death penalty," Zant v. Stephens, 462 U.S. 862, 890 (1983), unlike the scheme at issue in Stephens, which did not require a weighing process. Thus, Stephens on its face is not controlling as to the significance of consideration of an improper aggravating circumstance by sentencers who do weigh aggravating against mitigating circumstances. Maynard v. Cartwright, 108 S. Ct. 1853 (1988), first held that the principle of Godfrey v. Georgia, 446 U.S. 420 (1980), did apply to a state where the jury weighs the aggravating and mitigating circumstances found to exist. In Cartwright, this Court determined that error had occurred where the sentencing jury received no instructions regarding the limiting constructions of an aggravating circumstance, but concluded it was for the state court in the first instance to determine whether the error was harmless.

Since the Court's decision in Cartwright, a significant split has developed between the various federal circuit courts of appeal, as well as between circuit courts and the state courts as to how to apply Cartwright to jurisdictions not covered by Zant v. Stephens. See Edwards v. Scroggy, 849 F.2d 204 (5th Cir. 1988); Stringer v. Jackson, 862 F.2d 1108 (5th Cir. 1988); Mercer v. Armontrout, 864 F.2d 1429 (8th Cir. 1988); Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988)(in banc); Coleman v. Saffle, 869 F.2d 1377 (10th Cir. 1989); Lindsey v. Thigpen, 875 F.2d 1509 (11th Cir. 1989); Jones v. Dugger, 533 So. 2d 290 (Fla. 1988); Pinkney v. State, 538 So. 2d 329 (Miss. 1988); State v. Griffin, 756 S.W.2d 475 (Mo. 1988); State v. Fullwood, 373 S.E.2d

518 (N.C. 1988); Brogie v. State, 760 P.2d 1316 (Okla. Crim. 1988); State v. Hines, 758 S.W.2d 515 (Tenn. 1988). Because of these splits in authority, this Court has already granted a writ of certiorari in Clemons v. Mississippi, 109 S. Ct. 3184 (June 19, 1989). The decision to grant review in Clemons demonstrates that the issues presented by petitioner are not only sufficient to support a grant of certiorari review, but in fact have already led to such review in Clemons and probably will in Mr. Marek's case.

C. LIKELIHOOD OF SUCCESS ON THE MERITS

1. Mr. Marek's Sentence of Death Violates the Eighth and Fourteenth Amendments under Maynard v. Cartwright.

At the penalty phase of Mr. Marek's trial, four aggravating factors were submitted to the jury for its consideration. Specifically, the jury was instructed:

> The aggravating circumstances that you may consider are limited to any of the following that are established by the evidence:
>
> First, you can consider that the defendant has been previously convicted of a felony involving the use or threat of violence to some person. The crime of kidnapping is a felony involving the use or threat of violence to another person.
>
> Second, you can consider the crime for which the defendant is to be sentenced was committed while he was engaged in the commission of the crime of attempted burglary with an assault, as you found.
>
> Third, you can consider that the crime for which the defendant is to be sentenced was committed for financial gain.
>
> Fourth, you can consider that the crime for which the defendant is to be sentenced was especially wicked, evil, atrocious or cruel.
>
> Now if you find the aggravating circumstances do not justify the death penalty then your advisory sentence should be one of life imprisonment without the possibility of parole for 25 years.

> Should you find sufficient aggravating circumstances do exist, it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances.

(R. 1322-23).

As to the first aggravating circumstance, the prosecutor argued that Mr. Marek's contemporaneous conviction of kidnapping the same victim he had been convicted of murdering established the presence of this aggravating circumstance (R. 1301). However, in Wasko v. State, 505 So. 2d 1314 (Fla. 1987), while discussing this aggravating circumstance, the Florida Supreme Court noted that "[c]ontemporaneous convictions prior to sentencing can qualify as previous convictions of violent felony and may be used as aggravating factors," only when the contemporaneous conviction involved either a different victim, or a different incident or transaction. 505 So. 2d at 1317. In Lamb v. State, 532 So. 2d 1051, 1053 (Fla. 1988), the Florida Supreme Court reiterated this limitation on the prior-crime-of-violence aggravating circumstance: "[I]t is 'improper to aggravate for a prior conviction of a violent felony when the underlying felony is part of the single criminal episode against the single victim of the murder for which the defendant is being sentenced.'" Under this limitation, the prosecutor's argument that the jury should weigh this aggravating circumstance against the mitigating evidence was wrong and not corrected by the instructions. In Mr. Marek's case the jury did not receive an instruction regarding this limiting construction of this aggravating circumstance. As a result, the penalty phase instruction on this aggravating circumstance "fail[ed] adequately to inform [Mr. Marek's] jur[y] what [it] must find to impose the death penalty." Maynard v. Cartwright, 108 S. Ct. at 1858.

As to the third aggravating factor, the prosecutor argued that because the victim's watch, earrings, and bracelet were found in the truck that Mr. Marek and his co-defendant "had been

in, and the truck that both of them had traveled in, and the truck that both of them had kidnapped [the victim] in," the jury should find "that the killing occurred at least in part for financial gain" (R. 1302). He concluded that the jury should find this aggravating circumstance established and weigh it against the mitigating evidence. However, in Peek v. State, 395 So. 2d 492 (Fla. 1981), the Florida Supreme Court concluded that to find the aggravating circumstance of pecuniary gain it must be established beyond a reasonable doubt that the victim "was murdered to facilitate the theft, or that [the defendant] had [] intentions of profiting from his illicit acquisition." 395 So. 2d at 499. In Small v. State, 533 So. 2d 1137, 1142 (Fla. 1988), the Florida Supreme Court explained that Peek held that "it has [to] be [] shown beyond a reasonable doubt that the primary motive for this killing was pecuniary gain." In Mr. Marek's case, the jury did not receive an instruction regarding this limiting construction of this aggravating circumstance. In fact, the prosecutor argued that no such limitation was applicable. As a result, the penalty phase instruction on this aggravating circumstance "failed[ed] adequately to inform [Mr. Marek's] jur[y] what [it] must find to impose the death penalty." Maynard v. Cartwright, 108 S. Ct. at 1858.

As to the fourth aggravating factor, the prosecutor argued, "few crimes [] have ever been committed that are more wicked, evil, atrocious and cruel than the one that was done here" (R. 1302). The Florida Supreme Court has consistently held that in order to show "heinous, atrocious, and cruel" something more than the norm must be shown. In State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973), the Florida Supreme Court said that:

> It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the

> actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies--the conscienceless or pitiless crime which is unnecessarily tortuous to the victim.

In Mr. Marek's case, the jury did not receive an instruction regarding the limiting construction of this aggravating circumstance. As a result, the penalty phase instructions on this aggravating circumstance "fail[ed] adequately to inform [Mr. Marek's] jur[y] what [it] must find to impose the death penalty." Maynard v. Cartwright, 108 S. Ct. at 1858.

Under Florida law, aggravating circumstances "must be proven beyond a reasonable doubt." Hamilton v. State, ___ So. 2d ___, 14 F.L.W. 403, 405 (Fla. July 27, 1989). In fact, Mr. Marek's jury was so instructed. 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). Unfortunately, Mr. Marek's jury received no instructions regarding the elements of the aggravating circumstances submitted for the jury's consideration. There is no principled reason why Mr. Marek was singled out not to receive the benefit of specifically defined aggravating circumstances which other Florida capital defendants received and as a result obtained a binding life recommendation.

Florida law requires the jury to weigh the aggravating circumstances against mitigating evidence. In fact, Mr. Marek's jury was so instructed. This sets Mr. Marek's case apart from the situation in Zant v. Stephens, 462 U.S. 862 (1983). The Florida Supreme Court has produced considerable case law regarding the import of instructional error to a jury regarding the mitigation it may consider and balance against the aggravating circumstances. In Mikenas v. Dugger, 519 So. 2d 601 (Fla. 1988), the court ordered a new sentencing because the jury had not received an instruction explaining that mitigation was

not limited to the statutory mitigating factors. The error was cognizable in post-conviction proceedings even though there had been no objection at trial, the issue had not been raised on direct appeal, and at a resentencing to the judge alone, the judge had known that mitigation was not limited to the statutory mitigating factors. Because of the weight attached to the jury's sentencing recommendation in Florida, the court found that it could not "conclude beyond a reasonable doubt that an override would have been authorized." In other words, there was sufficient mitigation in the record for the jury to have a reasonable basis for recommending life and thus preclude a jury override. Similar conclusions have been reached in other cases where the jury was erroneously instructed. Meeks v. Dugger, ___ So. 2d ___, 14 F.L.W. 313, 314 (Fla. June 22, 1989)("Had the jury recommended a life sentence, the trial court may have been required to conform its sentencing decision to Tedder v. State, 322 So. 2d 908 (Fla. 1975), which requires that, if there is a reasonable basis for the recommendation, the trial court is bound by it."); Hall v. State, 541 So. 2d 1125, 1128 (Fla. 1989)("It is of no significance that the trial judge stated that he would have imposed the death penalty in any event. The proper standard is whether a jury recommending life imprisonment would have a reasonable basis for the recommendation."); Floyd v. State, 497 So. 2d 1211, 1216 (Fla. 1986)("In view of the inadequate and confusing jury instructions, we believe Floyd was denied his right to an advisory opinion. We cannot sanction a practice which gives no guidance to the jury for considering circumstances which might mitigate against death."). In Mr. Marek's case the jury received no guidance as to the "elements" of the aggravating circumstances which the evidence in mitigation was balanced against. In Florida, the jury's pivotal role in the capital process requires its sentencing discretion to be channeled and limited. The failure to provide Mr. Marek's sentencing jury the

proper "channeling and limiting" instructions violated the eighth amendment principle discussed in Maynard v. Cartwright.

2. The Florida Supreme Court Refuses to Apply Cartwright in Florida.

In denying relief on Mr. Marek's claim that the jury instructions "fail[ed] adequately to inform [his] jur[y] what [it] must find to impose the death penalty," Cartwright, 108 S. Ct. at 1850, and that as a result the jury was left "with the kind of open-ended discretion which was held invalid in Furman v. Georgia, 408 U.S. 238 (1972)," id., the Florida Supreme Court's discussion was simply, "We also find no basis for habeas corpus relief." Marek, 14 F.L.W. at 247. The Florida Supreme Court was a bit more verbose in Jones v. Dugger, 533 So. 2d 290 (Fla. 1988). There, Mr. Jones presented a challenge under Maynard v. Cartwright to the adequacy of the jury instructions describing the aggravating circumstance known as cold, calculated, and premeditated. In denying Mr. Jones relief, the court said:

> Jones also raises a number of other issues which merit only brief mention:
>
> * * *
>
> 5. An argument grounded on Maynard v. Cartwright, ___ U.S. ___, 108 S. Ct. 1853, 100 L.Ed.2d 372 (1988), that the jury instruction with respect to whether the murder was committed in a cold, calculated, and premeditated manner was overbroad. Maynard dealt with the validity of a jury instruction involving the definition of heinous, atrocious, and cruel. Because Jones' killing was not found to be heinous, atrocious, and cruel, Maynard is inapplicable to this case.

533 So. 2d 292-93.

In the case of Glock v. Dugger, 537 So. 2d 99 (Fla. 1989), as Claim VII of his state habeas corpus petition, Mr. Glock argued that the jury had not received adequate instructions under Maynard v. Cartwright regarding "heinous, atrocious and cruel." The Florida Supreme Court denied relief saying "we find no merit

in any of the grounds set forth in Glock's petition for habeas corpus relief." 533 So. 2d at 102. Similarly, in Tompkins v. Dugger, ___ So. 2d ___, 14 F.L.W. 455 (Fla. Sept. 14, 1989), the Florida Supreme Court denied another claim that the jury instructions violated Maynard v. Cartwright. The court simply held: "We also reject Claim 3 that Maynard v. Cartwright[], compels a reversal of the trial court's finding that the murder was 'especially heinous, atrocious, or cruel.'" 14 F.L.W. at 435.

3. Maynard v. Cartwright Requires Adequate and Accurate Jury Instructions Regarding Aggravating Circumstances

In Maynard v. Cartwright, this Court held "the channeling and limiting of 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." 108 S. Ct. at 1858. There must be a "principled way to distinguish [the] case, in which the death penalty was imposed, from the many cases in which it was not." Id. at 1859, quoting, Godfrey v. Georgia, 446 U.S. 420, 433 (1980). In Mr. Marek's case, the jury was not instructed as to the limiting constructions placed upon three of the aggravating circumstances. The failure to instruct on the "elements" of these aggravating circumstances in this case left the jury free to ignore those "elements," and left no principled way to distinguish Mr. Marek's case from a case in which the state-approved and required "elements" were applied and death, as a result, was not imposed. The limitations or the elements were not applied in Mr. Marek's case by mere chance. Mr. Marek has been arbitrarily chosen not to have the "elements" of the aggravating circumstances applied to him. The jury was left with open-ended discretion found to be invalid in Furman v. Georgia, 408 U.S. 238 (1972), and Maynard v. Cartwright.

In Pinkney v. State, 538 So. 2d 329, 357 (Miss. 1988), it was recognized that "Maynard v. Cartwright dictates that our capital sentencing juries in this State be more specifically instructed on the meaning of 'especially, heinous, atrocious, or cruel.'" The court then ruled, "hereafter capital sentencing juries of this State should and must be specifically instructed about the elements which may satisfy the aggravating circumstance of 'especially heinous, atrocious or cruel.'" Id. In Pinkney, the error was found harmless under Clemons v. State, 535 So. 2d 1354 (Miss. 1988), cert. granted, 109 S. Ct. 3184 (1989). The same error recognized in Pinkney occurred as to three of the four aggravating circumstances weighed in Mr. Marek's case against the evidence presented in mitigation.

The Tennessee Supreme Court has concluded that under Maynard v. Cartwright, juries must receive complete instructions regarding aggravating circumstances. State v. Hines, 758 S.W.2d 515 (Tenn. 1988). The court did not read Cartwright as applying only to the heinous, atrocious, and cruel aggravating circumstance. The court there also found that ambiguity in the instructions regarding any limiting constructions of an aggravating circumstance also violated Mills v. Maryland, 108 S. Ct. 1860 (1988). The court ruled that error under Maynard v. Cartwright and Mills could not be found to be harmless beyond a reasonable doubt. The Florida Supreme Court has refused to read Maynard v. Cartwright and Mills v. Maryland in this fashion.

The court in Brogie v. State, 760 P.2d 1316 (Okla. Crim. 1988), also found error under Maynard v. Cartwright. The court found eighth amendment error where jury instructions failed to include any qualifying or limiting constructions placed upon on aggravating circumstance. Under this construction of Maynard v. Cartwright, Mr. Marek's jury received inadequate instructions and his sentence of death violates the eighth amendment.

Mr. Marek's jury was not adequately or accurately instructed. The jury was in fact misled by the instructions and the prosecutor's argument as to what was necessary to establish the presence of the aggravating circumstances. The jury was not told that a prior crime of violence could not rest upon the jury's finding that Mr. Marek was guilty of kidnapping the murder victim at the time of her death. In fact, the prosecutor argued to the jury the exact opposite. The jury was not told that pecuniary gain could be found as an aggravating circumstance only if the jury found beyond a reasonable doubt that pecuniary gain was the prime motive for the homicide. In fact, the prosecutor argued that pecuniary gain could be found if "the killing occurred at least in part for financial gain" (R. 1302). The jury was given no instruction explaining the limiting construction placed upon heinous, atrocious or cruel. The instruction given here contained even less guidance than the one given in Maynard v. Cartwright. See Coleman v. Saffle, 869 F. 2d 1377, 1384 n.7 (10th Cir. 1989). Undeniably, the eighth amendment was violated.

4. The Error Cannot Be Found Harmless

Under Florida law, a capital defendant is entitled to "an advisory opinion" from his sentencing jury. Floyd, 497 So. 2d at 1216. That right includes the right to have the jury accurately and correctly instructed. Where the jury receives inaccurate instructions regarding the mitigating circumstances it must consider, the Florida Supreme Court requires a resentencing before another jury unless there is no reasonable basis in the record for a life recommendation. Meeks, supra; Hall, supra. In other words, if the record contains mitigation which would insulate a life recommendation from an override, then it is not the appellate court's role to substitute its judgment for the jury's. The eighth amendment requires no less. Instructional

error can only be found harmless in a "weighing" state where "no mitigating evidence" appears in the record. Coleman v. Saffle, 869 F.2d 1377 (10th Cir. 1989). See Clark v. Dugger, 834 F.2d 1561 (11th 1987).

In Mr. Marek's case, ample mitigating evidence had been presented. Both statutory and nonstatutory mitigating circumstances are set forth in the record. First, the record clearly established that Mr. Marek was a good prisoner who had caused no trouble while incarcerated prior to and during trial, and even after he had been convicted of first degree murder. Ms. Terry Webster, a detention officer in the jail, testified during the penalty phase that in the course of working at the jail she came to know John Marek:

> Q Did you get to know him at all in the sense of knowing him by sight and speaking with him?
>
> A I basically know most of the detainees in there. I make it a point to get to know them so I can be on a one to one basis with most of them.
>
> Q Did you get to know Mr. Marek in that fashion as well?
>
> A Yes, he was in one of the favored cells.
>
> Q In the course of getting to know him was he ever disrespectful towards you? Did he ever use any foul language in your presence?
>
> A He never used any foul language and he was always polite.
>
> Q Have there been male inmates who have been disrespectful towards you? As a female detention officer do you ever get the wrath?
>
> A Most definitely.
>
> Q Do you put Mr. Marek in that characterization of someone who is disruptive?
>
> A No, sir.
>
> Q Has he ever been anything other than polite with you?
>
> A No.
>
> Q Calling your attention to Mr. Marek in the last, I guess few days, since Friday; are you aware that he was convicted?

A Yes, I am.

Q Did you have any contact with him after that?

A Yes. I've been in contact with him every day since his sentencing or since his conviction.

Q Did you see him on Friday, specifically?

A Yes, I did.

Q Could you tell the ladies and gentlemen of the jury what his mood was after that?

A He was very upset.

Q Was he angry?

A No.

Q Was he crying?

A He was near crying.

Q Has he been anything other than that since Friday?

A He's been very upset since then.

Q Has he been disrespectful to you even throughout that?

A No.

Q Would you just tell the ladies and gentlemen of the jury, I guess in closing, whether he would fall into the category of someone you have trouble with in the jail or you don't?

A We have never had any problems with him in the jail.

(R. 1297-99). The State did not contest this evidence (R. 1299). Under Skipper v. South Carolina, 476 U.S. 1 (1986), this evidence could have justified a life sentence.

Moreover, Mr. Marek's age at the time of the offense, 21, could have been found to be mitigating and in fact was argued to be so (R. 1317). Additionally, Mr. Marek's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired by the large quantity of alcohol Mr. Marek consumed on the date of the offense (R. 1315). The evidence showed that Mr. Marek and his co-

defendant consumed five cases of beer between them on the day of the homicide (R. 1316). The consumption of alcohol would authorize the jury to find the mitigating circumstance of extreme mental or emotional disturbance (R. 1315). Finally, Mr. Marek's co-defendant received a life sentence (R. 1316).

The Florida Supreme Court has recognized that the factors urged by Mr. Marek are mitigating and would preclude a jury override if a life recommendation were returned. See, e.g., Perry v. State, 522 So. 2d 817 (Fla. 1988); Foster v. State, 518 So. 2d 901 (Fla. 1987); Harmon v. State, 527 So. 2d 182, 189 (Fla. 1988).

In Florida, the jury does not return a special verdict designating mitigation it considered. It is up to the trial judge to issue findings which reflect his opinion on the evidence presented. However, as the Florida Supreme Court explicitly stated in Hall, "[i]t is of no significance that the trial judge would have imposed the death penalty [in spite of the mitigating evidence]." 541 So. 2d at 1128. In Eddings v. Oklahoma, 455 U.S. 104 (1982), by a 5-4 majority, the Supreme Court reversed a death sentence. Justice O'Connor's concurring opinion made clear that the sentencer was entitled to determine the weight due a particular mitigating circumstance, and that an appellate court could not resolve ambiguity as to whether the sentencer had weighed a mitigating factor, by itself conducting a weighing of the aggravation and mitigation. 455 U.S. at 119-20. The jury, in Florida, is entitled to determine the weight of the aggravating circumstances after proper instructions have been given and the weight of the mitigating circumstances. A Florida jury determines the balance and whether to recommend life or death. If the jury recommends life, that recommendation must be followed if there is a reasonable basis, i.e., evidence in mitigation upon which a life sentence could rest. Instructional error cannot be harmless where there was evidence in mitigation

upon which a properly instructed jury could have premised a life recommendation. The jury must then be allowed to balance the statutorily defined aggravating circumstances and the evidence in mitigation and make a sentencing recommendation.

The Florida Supreme Court failed to comply with this Court's precedents in determining this issue. The decision in Mr. Marek's case is in conflict with this Couurt's decisions in Maynard v. Cartwright, Johnson v. Mississippi, Mills v. Maryland, and Eddings v. Oklahoma. At the very least, this Court should stay Mr. Marek's execution until this difficult area of law can be addressed in Clemons. The Court should also stay Mr. Marek's execution to permit him the opportunity to properly present the issues here, to the Court, and/or grant certiorari to reconcile the fundamental conflicts identified herein.

CONCLUSION

A stay of execution should be granted to enable Mr. Marek to obtain certiorari review of the substantial and important federal constitutional issues outlined above.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been forwarded by U.S. Mail, first class, postage prepaid, to Carolyn Snurkowski, Asssistant Attorney General, Department of Legal Affairs, Magnolia Park Courtyard, 111-29 North Magnolia Street, Tallahassee, Florida 32301 this 26th day of September, 1989.

Attorney