IN THE SUPREME COURT OF FLORIDA

CASE NO. 73278
73175

JOHN RICHARD MAREK,

Petitioner,

v.

RICHARD L. DUGGER, Secretary,
Department of Corrections,
State of Florida,

Respondent.

JOHN RICHARD MAREK,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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PETITIONER/APPELLANT'S SUPPLEMENTAL APPLICATION FOR STAY OF EXECUTION ON HIS PETITION FOR WRIT OF HABEAS CORPUS AND APPEAL FROM THE DENIAL OF HIS MOTION FOR FLA. R. CRIM. P. 3.850 RELIEF

INTRODUCTION

John Richard Marek appears before this Court today on appeal of the trial court's denial of his Motion to Vacate Judgment and Sentence and in order to reply to the State's Response to his Petition for Writ of Habeas Corpus. Currently his execution is set for Thursday, November 10, 1988. The circuit court issued its order denying post-conviction relief on November 7, 1988, after an evidentiary hearing which commenced on November 3, 1988, and concluded on November 4, 1988 at 7:30 p.m. At the conclusion of the hearing, the circuit court had reserved five of Mr. Marek's claims for consideration; the other claims were denied at that time. In its order denying relief the circuit court found error on one claim but concluded that the error was harmless.

It is through no fault of Mr. Marek that he is before this Court some forty hours prior to his scheduled execution. Mr. Marek had been preparing to pursue his post-conviction remedies in the state courts in timely fashion when a warrant for his execution was signed September 12, 1988. On October 10, 1988, he filed his Rule 3.850 motion in a timely fashion. On October 12, 1988, he filed a Petition for a Writ of Habeas Corpus even though no court rule required the filing of that pleading at that time. He has at all times met all deadlines established by courts, statutes, and procedural rules.

On Tuesday, October 18, 1988, Martin J. McClain, as Mr. Marek's counsel, received notice that the State had set an evidentiary hearing on Mr. Marek's 3.850 motion for Friday, October 28, 1988. At that time no answer had been filed by the State. Mr. McClain had written the circuit court on October 12, 1988, setting forth his schedule and asking for a status hearing; a copy of this was sent to the State. In that letter, counsel explained his conflicting commitments through Mr. Marek's warrant period. Yet despite Mr. McClain's obligation to prepare and file 3.851 pleadings in Robert Teffeteller's case on October 27, 1988 and despite Mr. McClain's obligation to prepare for a federal evidentiary hearing on October 31, 1988 in James Agan's case, the State set the evidentiary hearing in Mr. Marek's case for October 28, 1988. Mr. McClain filed a motion for continuance of the hearing on October 21, 1988. Mr. McClain sought to have a telephonic status on his motion for continuance; however, the court refused to set one in advance of October 28, 1988.

On October 28th, Mr. McClain appeared in circuit court and renewed his request for a continuance. He explained that he was totally unprepared for an evidentiary hearing and that he had not been able to work on Mr. Marek's case since October 11th except for the time spent on the plane flying from Tallahassee to Fort Lauderdale the morning of the 28th. Mr. McClain explained that

because of conflicting scheduling he had to choose between his clients and he had chosen to prepare and file a fifty-eight page post-hearing memorandum in State v. Wright on October 24, 1988, a 3.850 motion and a state habeas on behalf of Robert Teffeteller on October 27, 1988, as well as prepare for an evidentiary hearing in Agan v. Dugger. At one point the circuit judge advised Mr. McClain, "You better get another job." (R. 3.850 hearing, at 52). Ultimately, the court granted Mr. McClain a motion for continuance but chastized his conduct as "disgraceful." (R. 3.850 hearing, at 64).

Later on the 28th, the Governor signed three more warrants further burdening CCR. Mr. McClain did in fact conduct an evidentiary hearing in Agan v. Dugger on October 31, 1988. However, the hearing was not concluded in one day, and has been set to reconvene December 1. Mr. Marek's evidentiary hearing took place on November 3rd and 4th. However, due to the lateness of the proceedings, Mr. McClain missed his plane and was not able to get to Tallahassee until 5:00 p.m., Saturday, November 5, 1988. Meanwhile, a status hearing was set in Robert Teffeteller's case for November 9, 1988, over Mr. McClain's reservations that this would interfere with his work for Mr. Marek.

At 11:00 a.m., November 7, 1988, Mr. McClain received word of the circuit court decision in Mr. Marek's case. At 1:00 p.m., Mr. McClain received a copy of the circuit court's order denying relief. At 7:00 p.m., Mr. McClain received a copy of the five hundred page transcript of the 3.850 hearing.

The substantial time constraints under which counsel is currently operating prevent full briefing of the claims presented in the Rule 3.580 Motion and litigated at the hearing. The instant pleading is intended as a supplement to all pleadings, applications, and motions heretofore filed in this Court in connection with Mr. Marek's convictions and sentences of death,

and as a renewed application for a stay of execution. Mr. Marek will discuss below some of the issues raised in and ruled on by the Rule 3.850 court -- the imminence of his execution prevents a complete discussion of all of the factual and legal issues involved in these actions. Mr. Marek does not intend to waive any of the issues presented in his Rule 3.850 motion; he incorporates into this pleading all matters heard in the proceedings heretofore conducted. Mr. Marek would respectfully urge this Court to stay his execution in order to allow the complete, proper, and needed briefing and judicious consideration of his substantial and compelling claims for relief.

A. A STAY OF EXECUTION IS REQUIRED

Mr. Marek presented twenty-two issues in his Rule 3.850 Motion. An evidentiary hearing was conceded by the State on five of the issues. That evidentiary hearing concluded on November 4, 1988. Counsel was not allowed to file post-hearing memoranda. The court issued its order denying relief on November 7, 1988.

The transcript from the proceedings in the court below is five hundred (500) pages in length. Defendant's Exhibit 1, consisting of four volumes of background material regarding Mr. Marek, is approximately a thousand (1,000) pages long. The trial transcript which was admitted into evidence at the close of the proceedings on Friday are over seventeen hundred (1,700) pages.

The findings made by the circuit court are in many respects erroneous, contrary to law and fact, and antithetical to the evidence presented. Mr. Marek will discuss below some of the errors contained in and embraced by the trial court's order, but the constraints of time and the imminence of his execution prevent full, considered, and professionally adequate briefing and analysis. Again, Mr. Marek would respectfully request that this Court stay his execution, to allow for complete briefing and judicious consideration.

Those claims summarily denied by the Rule 3.850 court presented substantial constitutional issues. The trial court's order denying those claims raises complex procedural issues and errors requiring careful analysis and argument, which Mr. Marek is unable to present to this Court in the short time remaining before his execution. Again, a stay is appropriate.

This Court has not hesitated to stay executions when warranted to ensure judicious consideration of the issues presented by capital prisoners litigating during the pendency of a death warrant. See Johnson v. State, No. 72,231 (Fla. April 12, 1988); Gore v. Dugger, No. 72,300 (Fla. April 28, 1988); Riley v. Wainwright, No. 69,563 (Fla. November 3, 1986); Groover v. State, No. 68,845 (Fla. June 3, 1986); Copeland v. State, Nos. 69,429 and 69,482 (Fla. October 16, 1986); Jones v. State, No. 67,835 (Fla. November 4, 1985); Bush v. State, Nos. 68,617 and 68,619 (Fla. April 21, 1986); Spaziano v. State, No. 67,929 (Fla. May 22, 1986); Mason v. State, No. 67,101 (Fla. June 12, 1986). See also Roman v. State, ___ So. 2d ___, No. 72.159 (Fla. 1988)(granting stay of execution and a new trial); Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987)(granting stay of execution and post-conviction relief); Kennedy v. Wainwright, 483 So. 2d 426 (Fla. 1986), cf. State v. Sireci, 502 So. 2d 1221 (Fla. 1987). The issues Mr. Marek presents are no less substantial than those involved in any of those cases. A stay is proper.

Moreover, a stay is warranted in order to provide Mr. Marek with the effective representation to which he is entitled. Spalding v. Dugger, 526 So. 2d 71, 72 (Fla. 1988). See also, State ex rel. Escambia County v. Behr, 354 So. 2d 974 (1st DCA 1978), affirmed Escambia County v. Behr, 384 So. 2d 147 (Fla. 1980). Counsel simply cannot prepare a brief and a reply to the State's habeas response under the present circumstances.

Present in this case is the question of whether the circuit judge erred in refusing to disqualify himself. The Florida Rules

of Criminal Procedure provide for the disqualification of a judge in Rule 3.230. The Florida Supreme Court has repeatedly held that where a petition demonstrates a preliminary basis for relief, a judge who is presented with a motion for disqualification "shall not pass on the truth of the facts alleged nor adjudicate the question of disqualification." Bundy v. Rudd, 366 So.2d 440 (Fla. 1978); Suarez v. Dugger, 527 So. 2d 190 (Fla. 1988). This rule is in keeping with the Code of Judicial Conduct which emphasizes the importance of an independent and impartial judiciary in maintaining the integrity of the judiciary. The purpose of the Code of Judicial Conduct and the Disqualification Rule is to prevent "an intolerable adversary atmosphere" between the trial judge and the litigant. Department of Revenue v. Golder, 322 So.2d 1, 7 (Fla. 1975) as cited in Bundy v. Rudd, supra.

Prior to the 3.850 hearing, counsel for Mr. Marek filed with the circuit court the following:

MOTION TO DISQUALIFY JUDGE

> The petitioner, JOHN MAREK, hereby moves this Court to enter an order disqualifying himself from hearing the Motion to Vacate Judgment and Sentence pursuant to Rule 3.230 Fla.R.Crim.P. and as grounds would state:
>
> 1. Judge Stanton S. Kaplan, heard the original trial of John Marek conducted May 22-June 1, 1984, and has been assigned to hear the Motion to Vacate Judgment and Sentence presently pending before this Court.
>
> 2. Mr. Marek respectfully requests that the Court recuse itself due to statements showing bias/prejudice against Mr. Marek resulting in the prejudgment of issues contrary to Mr. Marek prior to the taking of evidence.
>
> a. After the trial, the Court included matters in the written sentence that were directly contrary to the jury verdict:
>
> 1) The jury specifically acquitted Mr. Marek of the two counts of sexual battery and convicted only of the lesser included offense of battery.
>
> 2) In his sentence, Judge Kaplan

related that Wigley's confession indicates both Wigley and Marek repeatedly raped the victim both in the truck and in the tower, "but since that confession was not admissible in evidence against Marek this Court cannot consider its contents." (ROA 1471). However, the Court went on to state that a "[r]easonable interpretation of the evidence has both Marek and Wigley kidnapping the victim for the purpose of sexual battery." (Id.)

3) As one of the aggravating circumstances, the court found "that the murder was committed while the Defendant, Marek, was engaged in the commission of Attempted Burglary with intent to commit a Sexual Battery and in the course thereof made an assault." (ROA 1472).

b) After sentencing, the Court continued making public expressions demonstrating a special interest in the quick execution of the death sentence in Mr. Marek's case, and indicating a continuing refusal to recognize or accept the jury's acquittal of sexual battery. In a letter addressed to the Florida Parole and Probation Commission, which was found by undersigned counsel in his examination of the State Attorney's file on October 28, 1988, the Court expressed opinions concerning the good character of the victim contrasted to the purported bad character of the defendant and ignoring the jury's verdict:

> On June 16, 1983, a wonderful loving woman was viciously kidnapped, raped, tortured and murdered by John Marek and Raymond Wigley. She was a mother and outstanding member of society.
>
> Both of these men are unfit to live in our society. Marek was the leader and instigator. He was the "brains". I honestly believe Wigley would not have participated in this heinous and atrocious offense alone. However, Marek definitely has the inclination to commit these acts alone.
>
> Marek is capable of killing again and should not be released or be given any leniency by our Criminal Justice System.
>
> Marek showed no leniency to his victim. He could have released her at many stages but he did not. He enjoyed every minute of abuse that he inflicted upon her, including raping her repeatedly, burning her, kicking her, beating her and strangling her.

(Emphasis added). Letter to Florida Parole

and Probation Commission dated June 24, 1987. (See Exhibit A.)

3. It would be contrary to the right to due process and the precepts of evenhanded justice, as well as exert a chilling effect on the presentation of the petitioner's request for a stay of execution to present evidence to a Court that has already publicly announced a belief that Mr. Marek is "unfit to live in society" and "should not be released or be given any leniency by our Criminal Justice System."

4. In Suarez v. Dugger, 527 So. 2d 190 (Fla. 1988), the Supreme Court stated,

> The judge with respect to whom a motion to disqualify is made may only determine whether the motion is legally sufficient and is not allowed to pass on the truth of the allegations. Livingston v. State, 441 So.2d 1083 (Fla. 1983); Bundy v. Rudd, 366 So.2d 440 (Fla. 1978). As we noted in Livingston, "a party seeking to disqualify a judge need only show 'a well grounded fear that he will not receive a fair trial at the hands of the judge. It is not a question of how the judge feels; it is a question of what feeling resides in the affiant's mind and the basis for such feeling.'" 441 So.2d at 1086, quoting State ex rel. Brown v. Dewell, 131 Fla. 566, 573, 179 So. 695, 697-98 (Fla. 1938).

WHEREFORE, the petitioner moves this Court to disqualify itself from further proceedings in this cause and requests that another judge be designated pursuant to Rule 3.230, Fla. R. Crim. P., in that the judge has become a necessary witness and has publicly expressed opinions prejudging the merits of Mr. Marek's claims which are pending before the Court.

Certificate of Good Faith

The undersigned counsel certifies that he is a counsel of record in this cause and that the motion for disqualification is made in good faith for the purposes described in the Florida Rules of Criminal Procedure.

The motion was addressed by Judge Kaplan, the circuit court judge in question, in open court at the commencement of the 3.850 proceedings. Judge Kaplan did not dispute the factual accuracy of the motion. The judge denied any prejudice or bias in the case.

Judge Kaplan then denied the motion to disqualify. He also found the motion not timely even though Mr. Marek's counsel had not seen the clemency letter until he was given access to the State Attorney's file on October 28th.

This Court has explained at length the purpose behind the rule permitting disqualification of a judge:

> The Code of Judicial Conduct sets forth basic principles of how judges should conduct themselves in carrying out their judicial duties. Can 3-C(1) states that "[a] judge should disqualify himself in a proceeding in which his impartiality might be reasonably questioned . . . ." This is totally consistent with the case law of this Court, which holds that a party seeking to disqualify a judge need only show "a well grounded fear that he will not receive a fair trial at the hands of the judge. It is not a question of how the judge feels; it is a question of what feeling resides in the affiant's mind and the basis for such feeling." State ex rel. Brown v. Dewell, 131 Fla. 566, 573, 179 So. 695, 697-98 (1938). See also Hayslip v. Douglas, 400 So. 2d 553 (Fla. 4th DCA 1981). The question of disqualification focuses on those matters from which a litigant may reasonably question a judge's impartiality rather than the judge's perception of his ability to act fairly and impartially.
>
> When a party believes he cannot obtain a fair and impartial trial before the assigned trial judge, he must present the issue of disqualification to the court in accordance with the process designed to resolve this sensitive issue. The requirements set forth in section 38.10, Florida Statutes (1981), Florida Rule of Criminal Procedure 3.230, and Florida Rule of Civil Procedure 1.432 were established to ensure public confidence in the integrity of the judicial system as well as to prevent the disqualification process from being abused for the purposes of judge-shopping delay, or some other reason not related to providing for the fairness and impartiality of the proceeding. The same basic requirements are contained in each of these three processes. First, there must be a verified statement of the specific facts which indicate a bias or prejudice requiring disqualification. Second, the application must be timely made. Third, the judge with respect to whom the motion is made may only determine whether the motion is legally sufficient and is not allowed to pass on the truth of the allegations. Section 38.10 and Florida Rule of Criminal Procedure 3.230 also require two affidavits stating that the party making the motion for disqualification will

> not be able to receive a fair trial before the judge with respect to whom the motion is made, as well as a certificate of good faith signed by counsel for the party making the motion.
>
> * * * *
>
> What is important is the party's reasonable belief concerning his or her ability to obtain a fair trial. A determination must be made as to whether the facts alleged would place a reasonably prudent person in fear of not receiving a fair and impartial trial.

Livingston v. State, 441 So. 2d 1083, 1086-87 (Fla. 1983)(emphasis added).

Here Judge Kaplan did not address whether the motion set forth such facts as would "place a reasonably prudent person in fear of not receiving a fair and impartial [hearing]." Instead Judge Kaplan simply denied denied the motion. Certainly, the matters set forth in the motion would have placed anyone in Mr. Marek's position in fear of not receiving a fair and impartial hearing on his 3.850 motion. The judge's letter to parole and probation could reasonably be understood as indicating that the judge was prejudiced against Mr. Marek because he refused to give weight to the jury's acquittal of sexual battery. As a result, once the motion for disqualification was filed it was incumbent upon Judge Kaplan to disqualify himself. See Suarez v. Dugger, 527 So. 2d 190 (Fla. 1988).

Another substantial issue presented here concerns error in the aggravating circumstances found at sentencing. In his order denying relief, the circuit judge recognized that error had been committed in using the contemporaneous conviction of kidnapping as a prior conviction of a crime of violence. However, the judge found this to be harmless error because aggravating factors still remained and "there were and are not mitigating circumstances applicable to Marek." Order at 6. However, in Nibert v. State, 508 So. 2d 1 (Fla. 1987), this Court reversed and remanded for a resentencing in a similar situation because "[a]though death may be the proper sentence in this situation, it

is not necessarily so." 508 So. 2d at 5. Thus, the circuit court incorrectly found the error to be harmless beyond a reasonable doubt.

Moreover, the circuit court was wrong that no mitigating circumstances were presented at trial. Evidence was presented at trial that Mr. Marek was a model prisoner; however, the circuit court in its order denying 3.850 relief stated: "Being a 'model prisoner' is not a factor in mitigation." Order at 8. Yet in Skipper v. South Carolina, 106 S. Ct. 1669 (1986), the United States Supreme Court specifically found "a defendant's disposition to make a well-behaved and peaceful adjustment to life in prison" was a mitigating circumstance that the defendant was entitled to present to the jury. Clearly the circuit judge was operating under a grave misconception of law when he found good behavior in jail not to be a mitigating factor.

The judge was also wrong when he found that Mr. Marek had failed to show any mitigation even now. The testimony of five witnesses was presented along with considerable documentation from Mr. Marek's life. His biological mother, Margaret Begley, who was approximately the same age and height as the victim, testified that when John was nine years old she abandoned him, turning custody over to the State of Texas. Mrs. Begley testified that following an accidential overdose of valium, darvon, birth control pills, and other medication, given to John when he was less than a year old by an older brother, John displayed considerable learning disabilities and was diagnosed as ttrainable retarded by doctors who examined him. John could not speak so that others could understand him. He was placed in special education classes for the retarded. (Contemporaneous documentation supported Mrs. Begley's memory. John was labeled retarded, although he was at one point also diagnosed as autistic.) Mrs. Begley testified that John's father had rejected him because of his retardation. After she divorced John's father

him because of his retardation. After she divorced John's father when John was seven years old, she remarried. Her new husband would openly harrass John about being retarded. John, unlike her other children, never learned to stay away from her new husband. He always set himself up to be hurt over and over again by his stepfather, an alcoholic and a functional illiterate, who needed someone to torment in order to make himself feel big. Finally one night, John's stepfather lost control, grabbed a gun and began shooting his car while John was standing between him and the car he was shooting. Mrs. Begley decided that she should cope with the situation no longer. So she decided to give up her children so she could stay with her new husband. John's father agreed to take the other children, but no one wanted John. He was then turned over to the State of Texas when he was nine years old. By court order he was found to be "a dependent and neglected child." Exhibit 1, Appendix 2. John's school records from 1971 stated, "John is in need of a great deal of love and understanding. Needs to feel success and acceptance." Exhibit 1, Appendix 2. In 1971, John was diagnosed with "cerebral dysfunction." Exhibit 1, Appendix 4. An evaluation on November 17, 1971, found John to be "an emotionally deprived boy with minimal cerebral dysfunction syndrome and language disability who is having some situation reaction to a difficult foster and school placement." Exhibit 1, Appendix 4. A 1974 evaluation noted:

> John's story telling suggests that here is another foster child still fantasizing about and idealizing his natural parents years afer he has left the natural home. The boy in the story is afraid of his stepfather who is always hitting him and wishes he were dead. He hates his mother and stepfather, so he goes to the Child Study Center and talks to the psychiatrist who sees the mother and step-father are divorced and mother remarries natural father. Then mother stops "all that marrying and divorcing", and the family lives happily ever after. (A rather large order for the psychiatrist!)

Exhibit 1, Appendix 4.

Progress notes on John from January 3, 1972 provided:

> One of [his foster mother's] concerns is that John still wets the bed and she has John to change the bed linen when he does wet the bed. The other main problem is a great deal of rivalry towards his sister who is one year and seven months older. They fuss at each other, then they play together. Both parents appear to be warm and loving towards John and they were satisfied with the progress he has made. John indicated that his bedwetting may be related to him missing his biological mother and as a way of expressing resentment towards his step-father when he was living with them.

Exhibit 1, Appendix 4.

Progress notes from February 27, 1972 provided:

> [John's foster parents] wanted to know about John's progress and the prognosis. I told them it was my feeling that because of John being traumatized so much that it would be expected that he would continue having problems for years to come. John's welfare work mentioned that he had gotten a letter from John's father who is in Europe and that the father indicated in the letter that he is interested in John and hearing about him, but he definitely doesn't feel in the capacity to provide a home for him. Mrs. Marek indicated that she is not planning to adopt John but she is willing to continue having him, but she cannot promise that she will keep him until he is over his childhood and adolescence. She is just going to play it by ear.

Exhibit 1, Appendix 4.

Progress notes from March 10, 1972 provided:

> Today we had the session with John in the playroom. Immediately after entering, he started kicking the ball very hard repeatedly. I told him that it appeared to me he was quite angry. At first he denied it, then he said he was still angry at his step-father, Mr. Begley, for whipping him each time he wet the bed, which was something that he could not help and could not stop doing it. When I saw [John's foster mother] jointly with John and she indicated that last week he had gone to the house where he used to live with his natural parents. After that, during the rest of the week, his behavior was not good. He wet the bed every night and this seems to irritate his foster parents.

Exhibit 1, Appendix 4.

Progress notes from April 19, 1972 provided:

> John told me today that he feels his foster mother and his foster sister are keeping a secret from him, which is that his natural mother is not taking him back. He indicated that he was supposed to be away from his natural mother for one year and then after that be returned to her. He has ambivalent feelings towards his natural mother.

Exhibit 1, Appendix 4.

A detailed analysis of Exhibit 1 would reveal even more information regarding Mr. Marek's pathetic background and tragic history. Ultimately, he was abandoned by a series of foster parents. For a time he was placed in residential psychiatric treatment centers. One of these was paid for by his natural father's military insurance. When Champus funding was cut, John was forced to leave the center despite pleas from his psychologists that the government reconsider.

> To review you briefly, John is the son of a retired serviceman. The family abandoned John a number of years ago for all practical purposes. He was in the custody of Tarrant County Welfare before being placed in two different foster homes. John had reacted to neglect and abandonment primarily by an autistic-like withdrawal into himself and by lack of speech development. Mrs. Marek became interested in him and took him into their home in late 1971. She sought help for him on an outpatient basis through the Child Study Center in Fort Worth, and struggled to keep him functioning in their home and in the community. The boy's emotional problems prevented her being able to do that.
>
> We admitted John to Shady Brook June 11, 1974, and immediately placed him in individual therapy with Joseph Kugler, M.D. He has had remedial education, speech therapy, individual psychotherapy and group therapy. John's response has been good. School achievement is still approximately two years behind appropriate grade placement. We have seen him relinquish his introverted amateur adjustment in favor of periods of emotional stability, academic achievement, and outgoing peer relations. Psychological factors are difficult to describe in a concrete way and I will not go further in that direction.
>
> The gist of the matter with John is that he has made improvement but if he is discharged at this time it is unlikely that the Mareks

> or any other family can sustain him within their group. There is no educational facility in Fort Worth equipped to work with him. He continues to wet the bed almost nightly. He gravitates toward delinquent behavior as he is suggestible, immature and impulsive. It is our judgment that a considerable effort has been made by [his foster] family, by the community agencies in Fort worth, and by us as a residential treatment facility. To stop now will negate what has gone before.

Exhibit 1, Appendix 8.

The circuit judge was in error in concluding that "there were and are no mitigating circumstances applicable to Marek." Order at 6.

The issues presented in Mr. Marek's Rule 3.850 Motion and developed at the lengthy evidentiary hearing held below are substantial and compelling, and require deliberate and judicious consideration for their just resolution. The imminence of Mr. Marek's execution will prevent such a just resolution. This Court has not hesitated to stay executions when warranted to ensure judicious consideration of the issues presented by petitioners litigating during the pendency of a death warrant, and it should not do so now.

Mr. Marek's Rule 3.850 Motion was the first and only such motion he has filed. The claims presented therein are no less substantial than those presented in the cases cited above wherein this Court entered stays of execution. He has diligently pursued his post-conviction remedies, and the timing of his appearance before this Court is due to no fault of his own. He therefore respectfully urges that this Court stay his execution and allow him the opportunity to fully brief and argue his substantial compelling constitutional claims.

CLAIMS FOR RELIEF[1]

I. AGGRAVATING CIRCUMSTANCES IMPROPERLY CONSIDERED

In the circuit court's sentencing order, four aggravating factors were found to exist. These were the same, or similar circumstances given to the jury for consideration: 1) previously convicted of a felony, 2) committed while engaged in an attempted burglary, 3) pecuniary gain, and 4) "HAC". (ROA 1472). These four aggravating circumstances were attacked on direct appeal in a half of a page of total argument. (Brief of Appellant, p. 22). On appeal, this Court denied relief on these claims in one sentence. "We find that none of appellant's challenges to the aggravating factors have merit." Marek v. State, 492 So. 2d 1055 (Fla. 1986).

These aggravating factors were also raised as improper in Mr. Marek's Rule 3.850 Motion to Vacate (Claims XI, XII, XIII, XIV). In its Order Denying Motion to Vacate Judgment and Sentence, the circuit court struck one of the four aggravating factors:

> 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). However, 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 there were no and are no mitigating circumstances applicable to MAREK. Jackson v. State, 502 So. 2d 409 (Fla. 1988).

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[1]As forementioned, the time constraints under which Mr. Henderson proceeds and the imminence of his execution, prevents him from fully and adequately briefing the claims presented in his Rule 3.850 Motion and denied by the trial court. He here highlights and discusses only some of the claims raised below, to demonstrate to this Court the necessity of a stay of execution. He does not intend to, and does not, waive those claims not discussed herein. All claims presented below and any matters heard in the proceedings heretofore conducted are hereby incorporated into the instant pleading by specific reference.

The circuit court was correct in striking this aggravating circumstance, but incorrect in refusing to grant a new sentencing.[2] Also, the court was in err in failing to strike the remaining aggravating circumstance.

A. PECUNIARY GAIN

> The court instructed the jury as follows:
>
> > Third, you can consider that the crime for which the defendant is to be sentenced was committed for financial gain.

(R. 1322).[3]

The only possible evidence of financial gain in this case was the jewelry of the victim which was found in Mr. Marek's co-defendant's pickup truck (R. 565-66). When arrested, Mr. Marek was not in the vicinity of the pickup truck (R. 559); it was under the exclusive control of Mr. Wigley, the co-defendant (R. 608). The argument presented on direct appeal was that there was no showing that Mr. Marek was ever in possession of the jewelry, or that he even knew it was in the pickup truck (Brief of Appellant, p. 22).

Both the State in its response and the Court in its Order decided that this aggravating circumstance is proper because jewelry was taken and found in a truck that John Marek drove at one time. The Court also ruled that this issue was barred because it was raised on direct appeal (Order, p. 6). However, this all missed the point.

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[2]As will be argued infra, substantial mitigating evidence was presented at trial but the circuit court refused to recognize it as such. Still more evidence in mitigation was presented at the evidentiary hearing, but again the court refused to acknowledge it. When an aggravating circumstance is struck and there are mitigating circumstances present, a new sentencing hearing is mandated.

[3]The very wording of this instruction may have been interpreted by the jury as telling them that the murder was in fact committed for financial gain. This alone violates Mills v. Maryland, 108 S. Ct. 1860 (1988).

This Court has held that the aggravating circumstance of pecuniary gain is not properly found unless it is the primary motive for the killing. Scull v. State, ___ So. 2d ___ (13 F.L.W. 545, Case No. 68,919, decided Sept. 8, 1988). As in Scull, "[t]he record simply does not support the conclusion that [Simmons] was murdered for her [jewelry]." Id., 13 F.L.W. at 547.

This case is also similar to Peek v. State, 395 So. 2d 492, 499 (Fla. 1980), where it was held insufficient to support this aggravating circumstance that Mr. Peek "ransacked Mrs. Carlson's purse and made off with her automobile. . . . Considering all the circumstances, the evidence linking the murder to a motive for pecuniary gain is insufficient to establish this aggravating factor beyond a reasonable doubt."

The State cites Hildwin v. State, 13 F.L.W. 528 (Fla. Sept. 1, 1988) as an example of when this aggravating circumstance is proper. In that case, the evidence showed that prior to the killing the defendant "was reduced to searching for pop bottles to scrape up enough cash to buy sufficient gas to get home. After her death he had her property and had forged and cashed a check on her account." At 530.

There is simply no evidence that Mr. Marek stole the jewelry for financial gain, and there certainly is no evidence that the theft of the jewelry was the primary motive for the killing. This aggravating circumstance was improperly submitted to the jury and found by the court. It must be set aside now.

B. COMMITTED WHILE ENGAGED IN ATTEMPTED BURGLARY

This issue is more logically broken down into two parts. First, the jury was improperly instructed concerning the elements required to convict Mr. Marek of attempted burglary. Second, the jury was instructed on this aggravating circumstance in a different manner than the circuit court found in its sentencing

order. On direct appeal, this aggravating circumstance was attacked only on the basis of insufficient evidence to support the verdict. The second part of this argument was never presented, nor was the failure to instruct on the intent necessary in an attempted burglary.

1. Jury Instruction

Mr. Marek was charged with Burglary with an Assault. One of the lesser included crimes included in the instructions to the jury was Criminal Attempt: Burglary with an Assault. The jury was instructed that they could convict Mr. Marek of this lesser included crime if the State proved beyond a reasonable doubt that a) John Marek did some act toward committing the crime of Burglary with an Assault that went beyond just thinking or talking about it, and b) he would have committed the crime except that someone prevented him from committing the crime of Burglary with an Assault or he failed (R. 1411).

The jury was never instructed that an intent was a necessary element of this lesser crime. Under Jackson v. Virginia, 443 U.S. 307, 316 (1979), error was committed because the jury was not instructed on an essential element of the crime of attempted burglary. Thomas v. State, ___ So. 2d ___ 13 F.L.W. 464 (Fla. 1988). In fact, the crime of which they convicted Mr. Marek did not fit the evidence very well. The evidence showed that Mr. Marek's fingerprints were both on the outside and the inside of the lifeguard shack (R. 635-36). There is no doubt that he actually entered the shack, but there is no evidence as to his intent when he entered or as to what he did once inside except for his testimony.[4] The evidence would support a finding of trespass, but not attempted burglary with an assault.

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[4]Mr. Marek testified that he went into the shack to hide from the police because Mr. Wigley told him that he did not have the registration for the truck that they had been driving and that the police were looking at the truck (R. 953).

Regardless of the jury rationale, they should not have been instructed that they could find this lesser included crime as an aggravating circumstance when the verdict was unsupported by the evidence. However, they were instructed on this aggravating circumstance. It is the trial court's responsibility to correctly charge the jury on the applicable law. This is equally true of the sentencing jury in a capital case. It is "the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty," Lockett v. Ohio, 438 U.S. 586, 605 (1978), that "require[s] us to remove any legitimate basis for finding ambiguity concerning the factors actually considered." Eddings v. Oklahoma, 455 U.S. 104, 119 (1982)(O'Connor, J., concurring). See also Godfrey v. Georgia, 446 U.S. 420 (1980(condemning overly broad application of aggravating factors). The United States Supreme Court has recently explained that the question is "what a reasonable juror could have understood the charge as meaning." Mills v. Maryland, 108 S. Ct. 1860, 1866 (1988), quoting Francis v. Franklin, 471 U.S. 307, 316 (1985). In Mills the court found reversible sentencing error where the sentencing jury could have read the instructions in an erroneous and improper fashion. Here the jury was erroneously instructed. Under Mills, the question is thus whether there is a "substantial possibility" that the jury based its recommendation on the improper, unsupported aggravating circumstances. Mills, supra, 108 S. Ct. at 1867.

2. Court's Finding

To complicate matters, the judge in his sentencing order, included as an aggravating circumstance:

> 2. The Court finds that the murder was committed while the Defendant, Marek, was engaged in the commission of Attempted Burglary with intent to commit a Sexual Battery and in the course thereof made an Assault.

(R. 1472)(emphasis added).

This was not what the jury had been instructed on, see supra, and not what they found. The jury specifically acquitted Mr. Marek of any type of sexual battery, returning instead two verdicts of "guilty of the lesser included offense of battery" (R. 1441-42).

It is not documented whether the jury found the aggravating circumstance that the crime was committed while engaged in the commission of an attempted burglary with an assault, but the fact that they were allowed to consider that aggravating circumstance and the fact that the court found a different aggravating circumstance which was, in addition, contrary to the jury verdict, violates Mr. Marek's right to a reliable sentencing determination. See Mills v. Maryland, supra. Failure to object to this resulted in ineffective assistance of counsel in violation of Mr. Marek's sixth and fourteenth amendment rights. See Kimmelman v. Morrison, 106 S. Ct. 2574 (1986).

In regard to this claim, the State argues that because the Indictment included the "with intent to commit sexual battery" language in the burglary count, the judge's finding in aggravation is proper. This totally ignores the jury verdict, which acquitted on the crime charged in the Indictment and convicted merely on the lesser included offense of Attempt, to which there was absolutely no intent required by the instructions. The state is in error when it argues that the jury found this intent present when it convicted Mr. Marek of kidnapping (R. 1406).

C. HEINOUS, ATROCIOUS OR CRUEL

On direct appeal this aggravating circumstance was attacked merely by the sentence that "the description provided no guidance in the advisory phase as to precisely what was meant." (Brief of Appellant, p. 22). In its Order Denying Motion to Vacate Judgment and Sentence, the court held that the circumstances of

the crime were enough to meet this circumstance regardless of whether the jury's discretion was adequately narrowed, and that Maynard v. Cartwright, 466 U.S. ___, 108 S. Ct. 1853 (1988) is not new law. (Order, p. 7). Likewise, the State merely contends that strangulation has been held to be heinous, atrocious or cruel, and so the jury's instructions or lack thereof do not matter.

The circuit court is in error. Cartwright is a fundamental change in the law that gives rise to a substantially altered standard pursuant to which this claim must be determined. As this issue is fully set out in both the Motion to Vacate (see Claim XIV) and the Petition for Writ of Habeas Corpus (see Claim IV) it will not be repeated here.

Mr. Marek is entitled to relief. This aggravating factor should be struck and a new sentencing hearing ordered.

D. OTHER AGGRAVATING CIRCUMSTANCES

The aggravating circumstances specified in the statute are exclusive, and no other circumstances or factors may be used to aggravate a crime for purposes of the imposition of the death penalty. Miller v. State, 373 So. 2d 882 (Fla. 1979).

> This court, in Elledge v. State, 346 So.2d 998, 1003 (Fla. 1977) stated:
>
> > We must guard against any unauthorized aggravating factor going into the equation which might tip the scales of the weighing process in favor of death.
> >
> > Strict application of the sentencing statute is necessary because the sentencing authority's discretion must be "guided and channeled" by requiring an examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition.
>
> Proffitt v. Florida, 428 U.S. 242, 258, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976).

Miller v. State, supra(emphasis added). See also Riley v. State,

366 So. 2d 19 (Fla. 1979), and Robinson v. State, 520 So. 2d 1 (Fla. 1988).

In Mr. Marek's case, the prosecutor argued that John Marek showed no remorse (R. 1151-52; 1306-07). He also argued that John Marek was a liar (R. 1152-53). The prosecutor argued that the jury should recommend death because of these factors (R. 1306-07; 1308). In imposing the death penalty, the sentencing court specifically found that:

> The defendant, Marek, testified falsely at trial. He's not shown any reaction to the crimes he committed let alone remorse.

(R. 1351)(emphasis added).

In its Order Denying Motion to Vacate Judgment and Sentence, the circuit court found this issue procedurally barred "as it could have and should have been raised on direct appeal." (Order, p. 6). This is despite the evidence produced at the evidentiary hearing that trial counsel did not object to the prosecutor's arguments because he did not want his arguments objected to by the prosecutor. Defense counsel did not specify what objectionable arguments he had planned to make in order to justify this arrangement. Moreover, the state conceded lack of remorse may have been used to find heinous, atrocious and cruel.

In any event, the reliance on wholly improper and unconstitutional non-statutory aggravating factors starkly violated the eighth amendment.

II. MITIGATION NOT CONSIDERED

In the penalty phase, defense counsel attempted to introduce the report of the sole psychologist appointed to examine Mr. Marek. The court ruled that the report would be hearsay and thus denied its admission into evidence (R. 1283). In contrast, defense counsel wanted to argue in mitigation that Mr. Marek's co-defendant received a life sentence but was told by the court that if he did so, the State would be allowed to introduce the

co-defendant's statement without having to produce him for cross-examination. Thus the court would not allow the defense to introduce a written psychological report, but was willing to allow the State to introduce a written statement if the defense argued disparity in sentencing as mitigation. Mr. Marek was trapped no matter what counsel did.

This report introduced at the 3.850 hearing as Exhibit 1, Appendix 10, provided in part:

> Relevant Background Information: John R. Marek is a 22 year old (date of birth September 17, 1961) white male with a ninth grade education and no history of military service., He has never been married and has no children. At the time of his arrest he had been in the Fort Lauderdale area for only two days. Prior to that he had been living in Fort Worth and working as an oil field "computer analyst", monitoring oil wells. Prior to his one year with the oil company he worked at a gas station.
>
> Mr. Marek was born in Frankfurt, Germany; his father was in the service, stationed in Europe at the time. The family returned to the United States when the defendant was still an infant. Shortly thereafter his natural father left the family and his mother remarried, this time to an abusive alcoholic. At age nine the defendant was turned over to the state and lived in a variety of foster homes until striking out on his own at age 17. He is the third of four children in the family. In retrospect he regrets not having had a decent family life and not having had someone there when he was in need. All three of his brothers have also had troubled lives; his younger brother is in a mental hospital, another is in the Army as an alternative to jail, and the oldest has an arrest history, though has never served any time in prison.
>
> * * *
>
> The psychological screening done in the context of this evaluation suggests that there may be significant personality disturbance present in this young man. If more detailed description of the pathological processes present is desired it is recommended that more extensive psychological testing be done.
>
> * * *
>
> Based on the information presently available to me it would appear that the defendant's judgment was seriously impaired

> by alcohol intoxication at the time of the alleged offense. Whether or not cognitive deficiencies resulting from voluntary intoxication constitute legal insanity is a legal rather than clinical determination. At this point it does not appear that his ability to reason would otherwise have been so impaired that he would not have been able to appreciate the difference between right and wrong or understand the nature and consequences of his actions.

(Emphasis added).

The State argues that the exclusion of this psychological report was proper because sec. 921.141(1) Fla. Stat., though authorizing admission of hearsay at the penalty phase, limits its introduction to where "the defendant is accorded fair opportunity to rebut any hearsay statements." The State argues that the legislature implicitly meant both the defendant and the State when it stated "the defendant." This flies in the face of logic and State v. Perez, ___ So. 2d, 13 F.L.W. 605 (Fla. 1988), which provides: "This Court will follow the literal, plain meaning of the language unless such an interpretation would lead to an absurd or illogical result." Here the legislature plainly meant to honor a defendant's sixth amendment right to confrontation -- a constitutional right the State does not possess.

Moreover, the preclusion of this evidence violated Skipper v. South Carolina, 106 S. Ct. 1669 (1986), as well as Chambers v. Mississippi, 410 U.S. 284 (1973). Evidence of Mr. Marek's background of neglect, a mitigating factor, was precluded. In fact as a result, the jury was never informed of Mr. Marek's pathetic and tragic history. Nor was the jury informed that a mental health expert diagnosed Mr. Marek as having a significant personality disturbance, and further found that Mr. Marek's judgment was seriously impaired by alcohol at the time of the offense.

The jury was also precluded having evidence of the disparate treatment afforded Mr. Marek's co-defendant. Mr. Wigley, received a jury recommendation and sentence of life for his

participation in the homicide. This was in spite of the fact that Mr. Wigley was convicted of the more serious offenses in that Mr. Wigley was convicted of sexual battery with great force, while Mr. Marek was convicted of the lesser included offense of simple assault. Wigley was also convicted of burglary whereas Mr. Marek was convicted of attempted burglary with an assault. When Mr. Marek's trial counsel indicated that he was going to comment to the jury that Mr. Wigley had been sentenced to life imprisonment, the court told him that if he did, it would allow the State to introduce Wigley's confession which had been ruled inadmissible in Mr. Marek's trial. The court also indicated that even then it would not allow Mr. Marek's counsel to cross-examine Wigley, but would merely let the State read the confession to the jury (R. 1283).

The sentencing jury was thereby precluded from considering disparity in sentencing as a mitigating factor, in a case where the court specifically found that "both men acted in concert from beginning to end." (R. 1471). This was in violation of Lockett v. Ohio, 438 U.S. 586 (1978). In addition, the court refused to consider disparate treatment as a non-statutory mitigating factor, all in violation of the eighth and fourteenth amendments. Eddings v. Ohio, 455 U.S. 104 (1982); Magwood v. Smith, 791 F.2d 1438 (11th Cir. 1986). See Callier v. State, 523 So. 2d 158 (Fla. 1988), citing Brookings v. State, 495 So. 2d 135, 143 (Fla. 1986), and McCampbell v. State, 421 So. 2d 1072 (Fla. 1982).

Further, the circuit court refused to recognize the mitigating factors that were presented to the jury. Mitigating circumstances are set forth in the record. First, the record clearly establishes 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 (R. 1297-99).

In Eddings v. Oklahoma, 455 U.S. 104 (1982), by a 5-4

majority the Supreme Court reversed a death sentence. Justice O'Connor writing separately explained why she concurred in the reversal:

> In the present case, of course, the relevant Oklahoma statute permits the defendant to present evidence of any mitigating circumstance. See Okla. Stat., Tit. 21, Section 701.10 (1980). Nonetheless, in sentencing the petitioner (which occurred about one month before Lockett was decided), the judge remarked that he could not "in following the law . . . consider the fact of this young man's violent background." App. 189. Although one can reasonably argue that these extemporaneous remarks are of no legal significance, I believe that the reasoning of the plurality opinion in Lockett compels a remand so that we do not "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." 438 U.S., at 605, 98 S. Ct., at 2965.
>
> I disagree with the suggestion in the dissent that remanding this case may serve no useful purpose. Even though the petitioner had an opportunity to present evidence in mitigation of the crime, it appears that the trial judge believed that he could not consider some of the mitigating evidence in imposing sentence. In any event, we may not speculate as to whether the trial judge and the Court of Criminal Appeals actually considered all of the mitigating factors and found them insufficient to offset the aggravating circumstances, or whether the difference between this Court's opinion and the trial court's treatment of the petitioner's evidence is "purely a matter of semantics," as suggested by the dissent. Woodson and Lockett require us to remove any legitimate basis for finding ambiguity concerning the factors actually considered by the trial court.

455 U.S. at 119-20. Justice O'Connor's opinion makes clear that the sentencer is entitled to determine the weight due a particular mitigating circumstance; however, the sentencer may not refuse to consider that circumstance as a mitigating factor.

Here, that is undeniably what occurred. The judge said mitigating circumstances were not present and held that they were not to be considered. Under Eddings, supra, and Magwood, supra, the sentencing court's refusal to accept and find the statutory and non-statutory mitigating circumstances which were established

was error. Mitigating circumstances that are clear from the record must be recognized or else the sentencing is constitutionally suspect. How can the required balancing occur when the "ultimate" sentencer has failed to consider obvious mitigating circumstances? The sentencing proceedings here did not conform to basic eighth and fourteenth amendment requirements.

III. EVIDENTIARY ISSUES

A. INEFFECTIVE ASSISTANCE OF COUNSEL

All criminal defendants are entitled to the effective assistance of counsel. Counsel's role is to "assure that the adversarial testing process works to procure a just result." Strickland v. Washington, 466 U.S. 668, 687 (1984). "Counsel has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Id. at 688. As to certain issues which may arise in a criminal case, counsel's obligation may be to seek out an appropriate expert. Although a defendant's mental condition is not at issue in every case, where it is at issue "defense counsel is bound to seek the assistance of a mental health expert." Bertolotti v. State, __ So. 2d ___, No. 71,432 (Fla. April 7, 1988). See also Ake v. Oklahoma, 470 U.S. 68 (1985).

However, a mental health expert cannot conduct an adequate evaluation from just an interview of the criminal defendant: "In light of the patient's inability to convey accurate information about his history, and a general tendency to mask rather than reveal symptoms, an interview should be complemented by a review of independent data." Mason v. State, 489 So. 2d 734, 737 (Fla. 1986). Dr. Krieger, the expert counsel retained in this action testified that he was not asked to assist in the development of mitigation. He indicated he was unfamiliar with the term non-statutory mitigation circumstances. This clearly reflects his

lack of involvement in Mr. Marek's penalty phase. This is inconsistent with counsel's obligation to make a reasonable investigation or a reasonable decisions that a particular investigation is unnecessary. Strickland 466 U.S. at 691. It is counsel's duty to advise the expert as to what particular legal concerns may be present and seek the expert's skill and knowledge in determining the significance of the defendant's mental condition under the law. Here, counsel informed the expert of nothing -- he never even asked that his client be evaluated with regard to mitigating factors (R. 3.850 hearing at 282). However, in seeking the assistance of the mental health expert counsel must provide the expert with the information necessary for a reliable as well as useful evaluation. The mere appointment of a mental health expert is not an ends in itself; it is in fact a beginning.

In the present case, the appointment of a mental health expert was sought and obtained. However, counsel failed to obtain any real assistance. Cf. Ake v. Oklahoma. Without an understanding of what aggravating and mitigating circumstances were, or what factors may have been pertinent to this case, Dr. Krieger could not provide the defense any assistance. Dr. Krieger's ignorance must be laid at defense counsel's doorstep. When counsel requested a court-appointed psychiatrist, he specifically asked for Dr. Krieger. At the time of the evidentiary hearing, defense counsel could not contradict Dr. Krieger's claim that no pertinent, relevant background information was provided.

Moreover, counsel failed to conduct any investigation into Mr. Marek's background in order to establish mitigating factors. Counsel knew of Mr. marek's childhood abandonment and subsequent foster care, but he made no effort to contact Texas officials in order to obtain any records. He knew Mr. Marek's biological father was in the military but he made no effort to track him

down. He knew Mr. Marek had been incarcerated in Texas but he obtained no prison records. He knew Mr. Marek had been through the Texas court system but he failed to locate the court files which incidentally contained a competency evaluation. Counsel was provided with Mr. Marek's driver's license but he failed to learn that the address appearing there was the address of Mr. Marek's last foster parents. Had he followed any of these leads, he would have been able to track down other leads and ultimately unraveled Mr. Marek's whole background.

Counsel explained his failure in this regard as resulting from fiscal constraints imposed by the Broward County court system -- hardly an excuse -- and from Mr. Marek's expression that he did not know of anyone who could help. However, such jailhouse bravado hardly constitutes a basis for not conducting background investigation. Foster v. Dugger, 823 F.2d 402 (11th Cir. 1987); Thompson v. Wainwright, 787 F.2d 1447 (11th Cir. 1986); Martin v. Maggio, 711 F.2d 1273 (5th Cir. 1983).

At the 3.850 hearing, the circuit judge stated: "I agree with [collateral counsel] that if [trial counsel] would have found out about [Mr. Marek's background] he probably could have done some research on his own or asked for an investigator." (R. 3.850 hearing at 488). But it is clear from Dr. Krieger's report that counsel did know about the family history and did nothing.

Trial counsel was asked at the evidentiary hearing: "If you had had Mr. Marek's mother willing to testify that she had abandoned her son and was sorry, is that something you would have wanted to present?" Counsel responded: "I would have put her on the stand for sure. If she was willing to come here and testify to that, I would have put her on" (R. 3.850 hearing at 395) (emphasis added). Mr. Marek's mother testified she would have appeared before the jury and explained how she abandoned Mr. Marek if she had only been asked.

There was no true adversarial testing. Counsel failed to

conduct reasonable investigation which would have established a plethora of mitigation. Counsel also failed to ask for a competency hearing despite Dr. Krieger's report questioning Mr. Marek's competency on the basis of questions about a couple of -- the eleven point criteria (R. 3.850 hearing at 275). In fact at the 3.850 hearing, Dr. Krieger was asked if he ever got his doubts about Mr. Marek's competency resolved. He answered, "No, I didn't." (R. 3.850 hearing at 289). This is contrary to the circuit court's findings.

Under the circumstances, a bona fide doubt as to Mr. Marek's competence exists by virtue of Dr. Krieger's report and testimony. Under Hill v. State, 473 So. 2d 1253 (Fla. 1985), a competency hearing was required. Counsel's failure to pursue this was ineffective assistance which requires that the conviction be vacated and new proceedings ordered.

B. MENTAL HEALTH ISSUES

Dr. Krieger had no background materials to consider when evaluating Mr. Marek. This Court has previously addressed the mental health experts' need to review background information when conducting an evaluation. Mason v. State, 489 So. 2d 734 (Fla. 1986).

A criminal defendant is entitled to expert psychiatric assistance when the State makes his or her mental state relevant to guilt-innocence or sentencing. Ake v. Oklahoma, 105 S. Ct. 1087 (1985). What is required is an "adequate psychiatric evaluation of [the defendant's] state of mind." Blake v. Kemp, 758 F.2d 523, 529 (11th Cir. 1985). In this regard, there exists a "particularly critical interrelation between expert psychiatric assistance and minimally effective representation of counsel." United States v. Fessel, 531 F.2d 1278, 1279 (5th Cir. 1979). When mental health is at issue, counsel has a duty to conduct proper investigation into his or her client's mental health

background, see, e.g., O'Callaghan v. State, 461 So. 2d 1354, 1355 (Fla. 1984), and to assure that the client is not denied a professional and professionally conducted mental health evaluation. See Fessel, supra; Mason v. State, 489 So. 2d 734 (Fla. 1986); Mauldin v. Wainwright, 723 F.2d 799 (11th Cir. 1984).

The mental health expert also must protect the client's rights, and violates those rights when he or she fails to provide professionally adequate assistance. Mason v. State, supra. The expert also has the responsibility to properly evaluate and consider the client's mental health background. Mason, 489 So. 2d at 736-37. The expert appointed in this case, Dr. Krieger, failed to provide the professionally adequate expert mental health assistance to which Mr. Marek was entitled. His evaluation was, in fact, grossly inadequate because he was not provided the information necessary to evaluate Mr. Marek for competency or mitigating circumstances. None of the relevant and crucial background facts regarding John Marek's mental, emotional, and psychological background were ever sought out, reviewed, or considered. A cursory self-report interview and pro forma discussion of opinions based solely on what little was gleaned from a brief interview is the mental health "assistance" that Mr. Marek received. This is by no means enough, Mason v. State, 489 So. 2d at 735-37, and falls far short of what the law and the profession mandate.

The Due Process Clause protects indigent defendants against professionally inadequate evaluations by psychiatrists or psychologists. The fourteenth amendment mandates that an indigent criminal defendant be provided with an expert who is professionally fit to undertake his or her task, and who undertakes that task in a professional manner. Ake v. Oklahoma, 105 S. Ct. 1087 (1985). The expert shall be confidential. Accordingly, an appointed psychiatrist must render "that level of

care, skill, and treatment which is recognized by a reasonably prudent similar health care provider as being acceptable under similar conditions and circumstances." Fla. Stat. Sec. 768.45(1) (1983). In his or her diagnosis, an expert is required to exercise a professionally recognized "level of care, skill, and treatment." The expert is required to adhere to procedures that experts in the field deem necessary to render an accurate diagnosis. Olschefsky v. Fischer, 123 So. 2d 751 (Fla. 3d DCA 1960). Dr. Krieger did not exercise the requisite professional level of care, skill or treatment necessary to a competency determination, nor to a complete and thorough evaluation of Mr. Marek's mitigating circumstances.

Florida law also provides, and thus provided Mr. Marek, with a state law right to professionally adequate mental health assistance. See, e.g., Mason, supra; cf. Fla. R. Crim. P. 3.210, 3.211, 3.216; State v. Hamilton, 448 So. 2d 1007 (Fla. 1984). Once established, the state law interest is protected against arbitrary deprivation by the federal Due Process Clause. Cf. Hicks v. Oklahoma, 447 U.S. 343, 347 (1980); Vitek v. Jones, 445 U.S. 480, 488 (1980); Hewitt v. Helms, 459 U.S. 460, 466-67 (1983); Meachum v. Fano, 427 U.S. 215, 223-27 (1976). In this case, both the state law interest and the federal right were arbitrarily denied.

Here, Dr. Krieger was not asked to review for the presence of mitigating factors. (R. 3.850 hearing at 290.) As a result, Mr. Marek was deprived of mental health expert's assistance in preparing for the penalty phase. This was error under Ake v. Oklahoma.

IV. OTHER CLAIMS

Mr. Marek presented twenty-two claims in his Motion to Vacate Judgment and Sentence. In addition, Mr. Marek filed and subsequently argued a Motion to Disqualify Judge at the

evidentiary hearing. In all, this case involves twenty-six issues on which relief is proper. Due to the time constraints outlined supra, not all issues can be discussed. A few issues are discussed below, but no issues are waived by this selection.

A. CALDWELL

Numbered Claim XVII in the Motion to Vacate is argued at length, factually and legally, in the 3.850 pleading. Mr. Marek recognizes the view this Court has taken of this claim in the past, but respectfully urges this Court to stay his execution pending the decision of the United States Supreme Court in Adams v. Dugger, 56 U.S.L.W. 3601 (March 7, 1988), which will determine the applicability of Caldwell v. Mississippi, 472 U.S. 320 (1985). This Court should also recognize that the failure to have the voir dire transcribed precluded the presentation of this issue on appeal.

Caldwell and its application to Florida law is the quintessential example of a legal issue about which reasonable jurists differ. The state and federal courts cannot agree about Caldwell, compare Combs v. State, 13 F.L.W. 142 (Fla. February 18, 1988)("[W]e refuse to apply the Eleventh Circuit's decisions" . . . applying Caldwell in Florida), with Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986), modified, 816 F.2d 1493 (11th Cir. 1987), and the members of this Court cannot agree. Compare Combs, supra, 13 F.L.W. at 145 (Barkett, J., Kogan, J., specially concurring)("Caldwell indeed is applicable to Florida's sentencing scheme . . . [and] appellant's Caldwell claim should be sustained under the analysis of Justice O'Connor's concurrence, which constitutes the essential holding on which a majority of the Caldwell Court agreed"), with Combs, 13 F.L.W. at 142 (Overton, J.)("[W]e refuse to apply" Caldwell to Florida). The issue is now pending en banc consideration before the Eleventh Circuit in Harich v. Wainwright, 813 F.2d 1082 (11th Cir. 1986), vacated and rehearing en banc granted, 828 F.2d 1497

(11th Cir. 1987) and in Mann v. Dugger, 817 F.2d 1471 (11th Cir. 1987), vacated and rehearing en banc granted, 828 F.2d 1498 (11th Cir. 1987).

Oral arguments were held in the United States Supreme Court in Adams v. Dugger, on November 1, 1988. A decision is imminent. Since resolution of this claim is dependent on the decision in Adams, it is entirely appropriate for this Court to grant a stay of execution pending that decision in order for this Court to preserve its own jurisdiction. In fact, this Court has indicated that it will grant stays in appropriate cases. In Darden v. Dugger, Nos. 72,087 and 72,088 (Fla. March 14, 1988) this Court said:

> Mr. Darden takes the position that because this very issue is now pending before the United States Supreme Court in Adams v. Dugger, No. 87-121, this Court should issue a stay of execution and preserve its jurisdiction to address this claim after the issuance of Adams. If this were the first time Darden presented this Caldwell Claim to this Court, such a stay may be warranted. However, because this claim was previously rejected by this Court, we decline to issue a stay to reconsider the issue.

Id., slip. op. at 2-3 (emphasis added). This is the first time Mr. Marek has presented this claim. A stay is warranted.

B. PREEMPTORY CHALLENGES

This issue was presented for the first time as Claim XV in the Petition for Writ of Habeas Corpus. (It was not argued in the Motion to Vacate Judgment and Sentence.) It was not raised on direct appeal, although the objections by trial counsel were clearly preserved for the record.

The state responds to this issue by citing the standard for ineffective assistance of counsel out of Strickland v. Washington, 466 U.S. 668 (1984) and arguing that tactical decisions are the hallmark of an effective appellate attorney. See Jones v. Barnes, 463 U.S. 745 (1983). Because of a presumption of competence and the required deference to counsel's

strategic choices, the state argues that this cliam must fail. However, the state total ignores the fact that this was not a tactical choice. The voir dire, where this claim was necessarily documented, was not transcribed until undersigned counsel realized the omission upon preparation to file the underlying papers. Thus, until post-conviction proceedings had commenced, voir dire had never been transcribed. Appellate counsel cannot be deemed to have made a strategic choice concerning something of which he is unaware.

The basis of this issue is that after exercising nine peremptory challenges, the defense attorney realized that he still had several venire persons whom he wished to strike, but the next venire person who would be added to the jury was also someone that he did not want. He then requested additional peremptory challenges, but was denied. (R. 379-81).

Mr. Marek was charged with five of the most serious crimes imaginable, including one punishable by death, the ultimate punishment. In order to select an unbiased, impartial jury, he was allowed a mere 10 challenges. Under the circumstances set out more fully in the Petition for Writ of Habes Corpus, this was not enough to satisfy fundamental fairness. The purpose behind peremptory challenges is "the effectuation of the constitutional guaranty of trial by an impartial jury . . ." Meade v. State, 35 so. 2d 613, 615 (Fla. 1956). The right to peremptory challenges is inextricably linked to the defendant's sixth amendment right to fair trial. See, e.g., Francis v. State, 413 So. 2d 1175 (Fla. 1982).

Defense counsel articulated specific reasons as to each juror that he wanted to strike, and explained precisely his need for additional challenges. The trial court was in error in failing to grant additional peremptory challenges. No tactical decision can be ascribed to counsel. A stay in order to allow fruther briefing on this issue is warranted, and thereafter

relief is proper.

C. IMPROPER PROSECUTORIAL COMMENTS

This issue was presented as Claim IV in the Motion to Vacate Judgment and Sentence. It was not raised on direct appeal, although the circuit court, in its Order Denying Motion to Vacate Judgment and Sentence, held this claim barred becasue it "could have and should have been raised on direct appeal." (Order, 3)

The state argues that nothing said by the prosecution was prejudicial. Mr. Marek urges this Court to review the comments made at trial. The prosecutor began by making promises to the jury:

> As it unfolds before you, I ask two things. I ask number one, that you listen carefully to all of the evidence that's been presented and number two, that you take your common sense back into the jury room with you. If you do that, I will make a promise to you right now. I pormise to you that at the conclusion of this case you are not going to have any reasoanble doubt. In fact, -- .

(R. 434)(emphasis added). There was an objection made to this promise, but it was overruled. (Id.)

At other points during opening statement, the prosecutor misstated the law (R. 1130-31; 1141-42) and attacked the character of Mr. Marek (R. 1151-52). Still other improper comments were made in closing argument. These include calling Mr. Marek a liar (R. 1305; 1308) and finally, the prosecutor imposed his own "recommendation" on the jury:

> I'll tell you what my recommendation is and it's death in this case, and I want you to know why.

(R. 1308)(emphasis added).

Due process and the right to a fair trial are implicated when a prosecutor engages in improper comment. United States v. Young, 470 U.s. 1, 7-8 (1985).

> The line separating acceptable from improper advocacy is not easily drawn; there is often a gray zone. Prosecutors sometimes breach their duty to refrain from overzealous conduct by commenting on the defendant's guilt and offering unsolicited personal views

on the evidence. . . .

> '[it] is unprofessional conduct for the prosecutor to express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant.' ABA Standards for Criminal Justice 3-5.8(b) (2nd Ed. 1980)(footnotes omitted).

Id.(emphasis added).

Here the prosecutor personally "promised" that the evidence would prove guilt beyond a reasonable doubt. After Mr. Marek was convicted, he went further and gave his own, unsolicited, opinion on whether John Marek deserved to die. Comments such as these, which are more fully set out in the pleadings, demand a stay and the opportunity for further briefing. Thereafter, relief is warranted.

As stated, it is precisely these types of issues that need to be fully and properly briefed before they can be properly adjudicated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing motion has been forwarded by HAND DELIVERY to Carolyn McCann at Room 1401, Hilton Hotel, Tallahassee, Florida, this 8 day of November, 1988.

_____
Attorney