IN THE SUPREME COURT OF FLORIDA

NO. 73175



JOHN RICHARD MAREK,

Petitioner,

v.

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

Respondent.

---

PETITION FOR EXTRAORDINARY RELIEF, FOR A WRIT OF HABEAS CORPUS, REQUEST FOR STAY OF EXECUTION, AND APPLICATION FOR STAY OF EXECUTION PENDING DISPOSITION OF PETITION FOR WRIT OF CERTIORARI

---

LARRY HELM SPALDING
Capital Collateral Representative

MARTIN J. McCLAIN
Assistant CCR

OFFICE OF THE CAPITAL
COLLATERAL REPRESENTATIVE
1533 South Monroe Street
Tallahassee, FL 32301
(904) 487-4376

Counsel for Petitioner

## I. JURISDICTION TO ENTERTAIN PETITION, ENTER A STAY OF EXECUTION, AND GRANT HABEAS CORPUS RELIEF

### A. JURISDICTION

This is an original action under Fla. R. App. P. 9.100(a). This Court has original jurisdiction pursuant to Fla. R. App. P. 9.030(a)(3) and Article V, sec. 3(b)(9), Fla. Const. The petition presents constitutional issues which directly concern the judgment of this Court during the appellate process, see Marek v. State, 492 So. 2d 1055 (Fla. 1986), and the legality of Mr. Marek's capital conviction and sentence of death. Jurisdiction in this action lies in this Court, see, e.g., Smith v. State, 400 So. 2d 956, 960 (Fla. 1981), for the fundamental constitutional errors challenged herein involved the appellate review process. See Wilson v. Wainwright, 474 So. 2d 1163 (Fla. 1985); Johnson v. Wainwright, 498 So. 2d 938 (Fla. 1987); Fitzpatrick v. Wainwright, 490 So. 2d 938 (1986); Riley v. Wainwright, 517 So. 2d 656 (Fla. 1987); cf. Brown v. Wainwright, 392 So. 2d 1327 (Fla. 1981). A petition for a writ of habeas corpus is the proper means for Mr. Marek to raise the claims presented herein. See, e.g., Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987). This petition is not being filed pursuant to Fla. Rule 3.851 because the warrant signed in Mr. Marek's case was not a sixty day warrant. Hence the 30 day deadline appearing in Rule 3.851 is inapplicable.

This Court has consistently maintained an especially vigilant control over capital cases, exercising a special scope of review, see Elledge v. State, 346 So. 2d 998, 1002 (Fla. 1977); Wilson v. Wainwright, supra, and has not hesitated in exercising its inherent jurisdiction to remedy errors which undermine confidence in the fairness and correctness of capital trial and sentencing proceedings. Wilson; Johnson; Downs; Riley, supra. This petition presents substantial constitutional

questions which go to the fundamental fairness and reliability of Mr. Marek's capital conviction and sentence of death and of this Court's appellate review process. Mr. Marek's claims are therefore of the type classically considered by this Court pursuant to its habeas corpus jurisdiction. This Court has the inherent power to do justice. As shown below, the ends of justice call on the Court to grant the relief sought in this case, as the Court has done in similar cases in the past. See, e.g., Riley; Downs; Wilson; Johnson, supra. The petition includes claims predicated on significant, fundamental, and retroactive changes in constitutional law. See, e.g., Thompson v. Dugger, 515 So. 2d 173 (Fla. 1987); Tafero v. Wainwright, 459 So. 2d 1034, 1035 (Fla. 1984); Edwards v. State, 393 So. 2d 597, 600 n.4 (Fla. 3d DCA), petition denied, 402 So. 2d 613 (Fla. 1981); cf. Witt v. State, 387 So. 2d 922 (Fla. 1980). The petition also involves claims of ineffective assistance of counsel on appeal that occurred before this Court. See Wilson v. Wainwright, supra, 474 So. 2d at 1165 ("no substitute for the careful partisan scrutiny of a zealous advocate [whose] . . . unique role . . . is to discover and highlight possible error . . . "); Johnson v. Wainwright, supra, 498 So. 2d at 939 (habeas relief appropriate where counsel fails to present clear claim of reversible error); Fitzpatrick v. Wainwright, supra, 490 So. 2d at 939-40 (habeas relief where counsel failed to appeal erroneous ruling that let state present evidence rebutting existence of statutory mitigating circumstance after petitioner had declined to present evidence of same circumstance). The appellate level right to counsel comprehends the sixth amendment right to effective assistance of counsel. Knight v. State, 394 So. 2d 997, 999 (Fla. 1981); Evitts v. Lucey, 469 U.S. 387 (1985). These and other reasons demonstrate that the Court's exercise of its habeas corpus jurisdiction, and of its authority to correct constitutional errors such as those pled here, is warranted in

this action. As this petition shows, habeas corpus relief would be more than proper on the basis of Mr. Marek's claims.

With regard to ineffective assistance of appellate counsel, the challenged acts and omissions of Mr. Marek's counsel occurred before this Court. Therefore this Court has jurisdiction to entertain Mr. Marek's claims. Knight v. State, 394 So. 2d at 999, and as will be shown, to grant habeas corpus relief. Wilson, supra; Johnson, supra.

This and other Florida courts have consistently recognized that the writ must issue where the constitutional right of appeal is thwarted on crucial and dispositive points due to the omissions or ineffectiveness of appointed counsel. See, Wilson v. Wainwright, supra; McCrae v. Wainwright, 439 So. 2d 768 (Fla. 1983); Beggett v. Wainwright, 229 So. 2d 239, 242 (Fla. 1969); Ross v. State, 287 So. 2d 372, 374-75 (Fla. 2d DCA 1973); Davis v. State, 276 So. 2d 846, 849 (Fla. 2d DCA 1973), affirmed, 290 So. 2d 30 (Fla. 1974). See also Matire v. Wainwright, 811 F.2d 1430 (11th Cir. 1987). The proper means of securing a hearing on such issues in this Court is a petition for writ of habeas corpus. Powe v. State, 216 So. 2d 446, 447-48 (Fla. 1968). With respect to the ineffective assistance of counsel claims, Mr. Marek will demonstrate that the inadequate performance of his appellate counsel was so significant, fundamental, and prejudicial as to require issuance of the writ.

Mr. Marek's claims are presented below. They demonstrate that habeas corpus relief is proper in this case.

B. REQUEST FOR STAY OF EXECUTION

Mr. Marek's petition includes a request that the Court stay his execution (presently scheduled for November 10, 1988). As will be shown, the issues presented are substantial and warrant a stay. 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. See Riley v. Wainwright (No. 69,563, Fla., Nov. 3, 1986); Groover v. State (No. 68,845, Fla., June 3, 1986); Copeland v. State (Nos. 69,429 and 69,482, Fla., Oct. 16, 1986); Jones v. State (No. 67,835, Fla., Nov. 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, Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987)(granting stay of execution and habeas corpus relief); Kennedy v. Wainwright, 483 So. 2d 426 (Fla.), cert. denied, 107 S. Ct. 291 (1986). Cf. State v. Sireci, 502 So. 2d 1221 (Fla. 1987); State v. Crews, 477 So. 2d 984 (Fla. 1985).

This is Mr. Marek's first and only petition for a writ of habeas corpus. The claims he presents are no less substantial than those involved in the cases cited above. He therefore respectfully urges that the Court enter an order staying his execution, and, thereafter, that the Court grant habeas corpus relief.

## II. GROUNDS FOR HABEAS CORPUS RELIEF

By his petition for a writ of habeas corpus, John Marek asserts that his convictions and his sentence of death were obtained and then affirmed during the Court's appellate review process in violation of his rights as guaranteed by the fifth, sixth, eighth and fourteenth amendments to the United States Constitution, and the corresponding provisions of the Florida Constitution, for each of the reasons set forth herein.

No person shall be twice put in jeopardy for the same offense. A contemporaneous conviction that was part of a single criminal episode against a single victim shall not serve as the basis for an aggravating circumstance. Pecuniary gain may only be used as an aggravator when it was the primary motive for the killing and the defendant's intention was to profit from his

illicit acquisition. Heinous, atrocious or cruel is a legitimate aggravator only when it is properly defined for the jury. Lack of remorse shall not be used as a nonstatutory aggravator, nor shall the sentencer's belief that the defendant committed perjury. These axioms are indisputable; yet here each, along with still others, was broken. Consequently Mr. Marek's conviction and sentence must be vacated.

In Mr. Marek's inital brief on appeal, his appellate counsel presented terse two sentence challenges to all four aggravating circumstances on which the trial judge based the death sentence (Brief of Appellant, pp. 22-23). No adequate argument or discussion of the laws was presented in order to provide a basis for the challenges. In response, this Court summarily disposed of the ineptly pled claims in one short sentence: "We find that none of appellant's challenges to the aggravating factors have merit." Marek v. State, supra, 492 So. 2d at 1058. However, had appellate counsel adequately presented and explained Mr. Marek's challenges to the four aggravating circumstances, this Court would have reached a far different conclusion.

No firm footing existed for a single one of the four aggravating factors found by the sentencer. The trial judge improperly sentenced the defendant for having intended to commit a sexual offense for which he was acquitted. The judge's sentencing order also led this Court astray on the same aggravating factor. The trial judge also incorrectly used a contemporaneous conviction as an aggravator, i.e., "prior violent felony". And he found "pecuniary gain" as an aggravator even though there was no evidence that the motive for the murder was pecuniary gain. As to the "heinous, atrocious or cruel" aggravator, it was not defined for the jury, hence violates the eighth amendment as Maynard v. Cartwright, 108 S. Ct. 1853 (1988), recently explained. Lastly the trial judge unconstitutionally used as an impermissible basis for his death

sentence, nonstatutory aggravating circumstances -- e.g., lack of remorse and the defendant's purported perjury. Without any solid legal basis for any of the four listed aggravating circumstances there can be no confidence in the reliability of the outcome of this case, particularly since mitigating circumstances appear of record.

Additionally, no transcript of the voir dire proceedings was ever made a part of the record on appeal. As a result appellate counsel did not review, because he could not, the voir dire proceedings for constitutional error. Counsel should have insured that this Court had a full record to review; just as he should have reviewed the full record in order to determine what challenges to the proceedings Mr. Marek had. No strategy reason can be ascribed to the failure to have a complete record before this Court. This failure caused those issues appearing of record in the voir dire proceedings to be precluded from appeal.

Appellate counsel did not perform his constitutionally mandated duties, and Mr. Marek was substantially prejudiced. Additionally, numerous other fundamental errors occurred at Mr. Marek's trial and were uncorrected on direct appeal. This Court should now also correct those errors. Mr. Marek is entitled to habeas relief.

## CLAIM I

### USING THE CONTEMPORANEOUS CONVICTION OF KIDNAPPING AS AN AGGRAVATING CIRCUMSTANCE (PRIOR VIOLENT FELONY) WAS UNCONSTITUTIONAL.

Over objection, the trial judge charged the jury that they could consider as an aggravating circumstance that the Defendant had <u>previously</u> been convicted of a felony involving the use or threat of violence, kidnapping being such a felony. <u>See</u> section 921.141(5)(b), Fla. Stat. (R. 1322, 1449). The kidnapping referred to by the trial judge was the one related to this particular criminal transaction. The prosecutor had also argued

that this same kidnapping constituted a prior crime of violence for purposes of sentencing (R. 1301).

In Lamb v. State, 13 F.L.W. 530, 531 (1988), this Court stated:

> We recently held in Perry v. State, 522 So. 2d 817, 8200 (Fla. 1988), that it 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." See also Patterson v. State, 513 So. 2d 1257 (Fla. 1987); Wasko v. State, 505 So. 2d 1314 (Fla. 1987).

(emphasis added). This Court explained the distinction in Perry:

> In Wasko [v. State, 550 So. 2d at 1317, 1318], the defendant was convicted of armed robbery, attempted sexual battery, and first-degree murder. The trial court there, as here, used the contemporaneous felonies in aggravation. On review, this Court distinguished contemporaneous felony convictions based on acts against the murder victim from contemporaneous convictions resulting from violence against multiple victims or in separate incidents which are combined in one trial. The Court then held it 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. We believe this is the proper interpretation, and to the extent it is in conflict with Hardwick v. State, 461 So. 2d 79 (Fla. 1984), cert. denied, 471 U.S. 1120, 105 S. Ct. 2369, 86 L.Ed.2d 267 (1985), we recede from that decision.

Id. at 820 (emphasis added).

In Patterson, this Court found the same error to have occurred and corrected it even though the defendant had not raised it. See 513 So. 2d at 1263. There can be no doubt that based on the above set of cases, this Court erred in affirming this particular aggravating circumstance. The kidnapping was a contemporaneous conviction that was part of a single criminal episode against a single victim; its use as an aggravator is unconstitutional.

An aggravating circumstance performs the crucial function in a capital sentencing scheme of narrowing the class eligible for

the death penalty. It is a standard established by the legislature to guide the sentencer in choosing between life imprisonment and the imposition of death. An aggravating circumstance is in essence a legislative determination that a particular murder with the circumstance present is different, and that this difference reasonably justifies "the imposition of a more severe sentence," Zant v. Stephens, 462 U.S. 862 (1983).

A trial judge has the responsibility to correctly charge the jury on the applicable law. See generally, Smith v. State, 424 So. 2d 726, 731-32 (Fla. 1982); Wilson v. State, 344 So. 2d 1315, 1317 (Fla. 2d DCA 1977); Bacon v. State, 346 So. 2d 629, 631 (Fla. 2d DCA 1977); Williams v. State, 366 So. 2d 817, 819 (Fla. 3d DCA 1979). A judge's duty to correctly charge a jury is no less applicable when it involves a sentencing jury in a capital case.

Under Florida's capital sentencing scheme, the trial judge must defer to a jury's recommendation of a life sentence unless the facts suggesting death are "so clear and convincing that virtually no reasonable person could differ." Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975). It is axiomatic that a death recommendation must be soundly based on correct and applicable law. This surely cannot occur when the trial judge can effectively determine the outcome, as the judge did in this case, by providing the jury with unsupported aggravating factors to consider. Because the jury recommendation was skewed by having four aggravating factors to choose among, the result is unreliable. Had the jury been instructed only on proper aggravating circumstances, the result could have been very different. See Mills v. Maryland, 108 S. Ct. 1860 (1988). A life sentence was warranted.

At the penalty phase of Mr. Marek's trial, the jury was instructed that in determining whether to recommend a death or life sentence, it could consider four aggravating circumstances:

1) prior conviction for a crime of violence; 2) the crime was committed during the commission of attempted burglary with an assault; 3) the crime was committed for pecuniary gain; 4) the crime was wicked, evil, atrocious or cruel (R. 1449). The trial court found, in its sentencing order, that all four aggravating circumstances had been established beyond a reasonable doubt and it refused to find the presence of mitigating circumstances appearing of record (R. 1472). On direct appeal, the Florida Supreme Court held that all of the aggravating circumstances were proper. 492 SO. 2d 1055 (Fla. 1986).

Since the finding that Mr. Marek had a prior conviction of a crime of violence must be vacated, Mr. Marek's sentence of death must also be vacated. In Johnson v. Mississippi, 108 S. Ct. 1981 (1988), the United States Supreme Court held that the Federal Constitution requires a re-examination of a death penalty where it was based in part on a vacated conviction which was used in aggravation. There, a New York conviction for second degree assault with intent to commit first degree rape was used to find the aggravating circumstance of "previously convicted of a felony involving the use or threat of violence to the person of another." The New York conviction was later reversed. The United States Supreme Court, holding that petitioner's death sentence be reversed, said:

> It is apparent that the New York conviction provided no legitimate support for the death sentence imposed on petitioner. It is equally apparent that the use of that conviction in the sentencing hearing was prejudicial. The prosecutor repeatedly urged the jury to give it weight in connection with its assigned task of balancing aggravating and mitigating circumstances 'one against the other.' 13 Record 2270; App. 17; see 13 Record 2282-2287; App. 26-30. Even without that express argument, there would be a possibility that the jury's belief that petitioner had been convicted of a prior felony would be 'decisive' in the 'choice between a life sentence and a death sentence.' Gardner v. Florida, 430 U.S. at 359 (plurality opinion).

Likewise, in Mr. Marek's case the jury improperly could have found that Mr. Marek's contemporaneous conviction for kidnapping could properly be found as aggravating the conviction of murder. The trial court clearly did so find. Moreover, mitigating circumstances appear of record. See Claim IX. As a result, habeas relief is warranted. Mr. Marek's death sentence should be set aside.

## CLAIM II

MR. MAREK WAS ACQUITTED OF "SEXUAL" BATTERY, THUS AN UNCONSTITUTIONAL BASIS FOR HIS DEATH SENTENCE AROSE WHEN THE COURT IGNORED THE VERDICT AND SENTENCED HIM FOR HAVING "INTENDED TO COMMIT A SEXUAL BATTERY."

Mr. Marek was originally charged in two counts with sexual battery and aiding and abetting a sexual battery. He was acquitted on both counts and was found guilty of two counts of simple battery (R. 1273). Mr. Marek had also been charged with burglary -- breaking and entering with the intent to commit a sexual battery (R. 1358). However, the jury convicted him of the lesser included offense of "attempted burglary with an assault" (but not "sexual")(R. 1273, 1440).

At sentencing the trial judge regarded as a "reasonable interpretation of the evidence . . . both Marek and Wigley kidnapp[ed] the victim for the purpose of sexual battery" (R. 1344). However, this was not what the jury's guilt phase verdict established. It was the court's fixation on his own "reasonable interpretation" that obviously obstructed his realizing that the jury had unanimously acquitted Mr. Marek of having committed or intended to commit any sexual offense. The trial judge in essence ignored the verdict and proceeded to sentence Mr. Marek as though he had been found guilty of a sexual offense, or at least for having intended to commit a sexual offense. As one of four aggravating factors the judge found that Mr. Marek committed an attempted burglary with intent to commit a sexual battery and

in the course thereof made an assault. This was palpable fundamental constitutional error.

On appeal this Court was misled by the sentencing court's finding. This is because appellate counsel did not explain that the judge had found an aggravating circumstance that was in fact not present. This Court's opinion stated that Mr. Marek was convicted of "kidnapping with the intent to commit a sexual battery." Marek v. State, 492 So. 2d at 1057 (emphasis added). The jury in fact convicted petitioner of straight kidnapping (see R. 1273, 1439 [verdict slip]). Moreover, this Court wrote that the trial judge found as an aggravating circumstance, inter alia, "(2) appellant committed the murder while engaged in the commission of attempted burglary with intent to commit sexual battery and in the course thereof committed an assault. . . ." Id. (emphasis added). This was one of the aggravating circumstances the judge found, but again it is directly contrary to the actual verdict. The trial judge proceeded to use the disproved allegation as an unconstitutional aggravating circumstance for imposing the death penalty. The trial judge did not hide the fact at sentencing that, regardless of the jury's acquittal of Mr. Marek as to the sexual battery, he nevertheless believed the two men "repeatedly raped the victim both in the truck and in the tower" (R. 1471).

What occurred is tantamount to putting the defendant twice in jeopardy in violation of the fifth amendment and Art. I, section 9 of the Florida Constitution. It is a well-established rule of law that the judgment of the trial court must conform to the jury's verdict, likewise must the sentence also conform to the verdict. A sampling of cases follow that indicate a derivation from due process occurs when an accused is penalized for a crime he or she did not commit. In such a case, the judgment and sentence must be vacated.

In Watson v. State, 496 So. 2d 992-93 (Fla. 2d DCA 1986), the trial court erred when it adjudicated the defendant on a charge of first degree sexual battery when the jury returned a verdict of guilty on the lesser charge of second degree sexual battery. See also Bowen v. State, 491 So. 2d 331 (Fla. 4th DCA 1986)(trial court erred when it adjudicated defendant on charge of trespass of an occupied conveyance when jury returned a verdict of guilt on lesser charge of trespass of a conveyance); Lopez v. State, 470 So. 2d 58, 59 (Fla. 3d DCA 1985)(sentence vacated because penalty was enhanced due to the judgment for attempted murder with a firearm where jury did not find that defendant had used a firearm); Hart v. State, 464 So. 2d 592 (Fla. 3d DCA 1985)(sentence for attempted first degree murder improper when jury found the defendant guilty of lesser charge of aggravated battery); Starkes v. State, 438 So. 2d 1004 (Fla. 2d DCA 1983)(judgment and sentence for kidnapping vacated when jury returned a guilty verdict for sexual battery, aggravated assault and false imprisonment and court entered a judgment and sentence on an adjudication for sexual assault, aggravated battery and kidnapping, even though error was "obvious[ly] clerical."); Thompson v. State, 335 So. 2d 633, 633-34 (Fla. 1st DCA 1976)(judgment and sentence reversed when the jury returned a verdict for possession of heroin and the court entered judgment for possession of heroin with intent to sell even though sentence for either charge the same); Vena v. State, 295 So. 2d 720, 723-24 (Fla. 3d DCA 1974)(judgment and sentence set aside when jury's verdict found the defendant guilty of breaking and entering into a dwelling with intent to commit grand larceny and court adjudged the defendant guilty of breaking and entering into a building with intent to commit robbery since the intent finding necessary to support a conviction for grand larceny could not support a conviction for robbery, larceny not being a lesser included offense of robbery).

A statutory aggravating circumstance, like any element of an offense must be proved beyond a reasonable doubt. The jury specifically refused to find an intent to commit a sexual battery. The trial judge committed grave constitutional error when he disregarded the jury's verdict and enhanced Mr. Marek's sentence because of that which he personally believed the verdict should have been.

Moreover, at the guilt phase of Mr. Marek's trial, the jury was instructed that they could find Mr. Marek guilty of Criminal Attempt: Burglary with an Assault 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 not instructed that an intent was a necessary element of the lesser crime. There was really no evidence to support the finding of guilt of Criminal Attempt: Burglary with an Assault. The evidence merely showed that Mr. Marek's fingerprints were found both on the outside of a window of the lifeguard shack, and inside the shack. There was no doubt that he actually entered the shack (R. 635-6), but there was no evidence as to his intent when he entered or as to what he did once inside, except for his testimony 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 it (R. 953). This would support a finding of guilt of trespass, but not attempted burglary with an assault. The jury may have convicted because it viewed this crime as really a trespass with an assault.

It is impossible to know how the jury reached their verdict. There was no objection to the verdicts, nor was the jury questioned about inconsistent verdicts. However, the jury should not have been instructed to use a verdict that is unsupported by the evidence in aggravation of first degree murder. A trial judge has the responsibility to correctly charge the jury on the applicable law. See generally, Smith v. State, 424 So. 2d 726, 731-32 (Fla. 1982); Wilson v. State, 344 So. 2d 1315, 1317 (Fla. 2d DCA 1977); Bacon v. State, 346 So. 2d 629, 631 (Fla. 2d DCA 1977); Williams v. State, 366 SO. 2d 817, 819 (Fla. 3d DCA 1979). A judge's duty to correctly charge a jury is no less applicable when it involves a 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.

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 violated Mr. Marek's right to a reliable sentencing determination. See Mills v. Maryland, supra. Habeas relief is warranted.

CLAIM III

PECUNIARY GAIN CANNOT SERVE AS A PROPER AGGRAVATING CIRCUMSTANCE SINCE IT WAS NOT A PRIMARY MOTIVE FOR THE CAPITAL FELONY.

At trial counsel objected to the jury being able to consider and the trial judge finding that the capital felony was committed for pecuniary gain (R. 1282). (R. 1322-23, 1346-47).

In Scull v. State, 13 F.L.W. 545, 547 (1988), this Court stated:

> While it is true that Scull took Villegas' car following the murder, it has not been shown beyond a reasonable doubt that the primary motive for this killing was pecuniary gain. As in Peek v. State, 395 So. 2d 492 (Fla. 1980), cert. denied, 451 U.S. 964 (1981), it is impossible that the car was taken to facilitate escape rather than as a means of improving his financial worth. The record simply does not support the conclusion that Villegas was murdered for her car. (emphasis added)

And in Peek v. State, 395 So. 2d 492 (Fla. 1980), this Court wrote:

> Although it appears that appellant ransacked Mrs. Carlson's purse and made off with her automobile, there is no evidence that any money or household belongings were taken. The record does not support the conclusion that Mrs. Carlson was murdered to facilitate the theft, or that appellant had any intention of profiting form his illicit acquisition. The more reasonable inference is that appellant stole the car in order to quicken his escape from the scene of the murder. 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.

Id. at 499 (emphasis added).

Several items of jewelry belonging to the victim were in the possession of the co-defendant Wigley at the time of his arrest. Nevertheless, the enigmatic circumstances surrounding this criminal event fail to establish beyond a reasonable doubt that pecuniary gain was a "primary motive for this killing," Scull v. State, supra, or that the murder was committed "to facilitate the theft or that [the defendant] had any intention of profiting from his illegal acquisition," Peek v. State, supra. Moreover, it was never determined which of the two men took the items from the victim, whether she was alive at the time and whether it was done while the men acted in concert. At best, the evidence tended to show that the jewelry had merely been left in the co-defendant's truck. In Hildwin v. State, 13 F.L.W. 528, 530 (1988), this Court affirmed a finding of pecuniary gain saying:

> The evidence, while circumstantial that appellant killed Ms. Cox to get money from her, is substantial. Before he killed Ms. Cox, appellant had no money and was reduced to searching for pop bottles on the road side 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. The record supports the judge's finding beyond a reasonable doubt that the killing was committed for pecuniary gain.

Such was not the case here. The State itself provided another implicit indicator that pecuniary gain was not a primary motive in the case in that the defendants were never charged with robbery or larceny.

Since this aggravating circumstance was clearly erroneous, the jury recommendation is unreliable. Had the jury been instructed properly concerning aggravating circumstances, the result could have been very different. A life sentence was warranted. To permit trial judges the opportunity to charge juries on unsupported aggravating factors is to tolerate a capital sentencing that is skewed toward death rather than life. In this instance, the application of Section 921.141, Fla. Stat., was unconstitutional. Rather than "genuinely narrow[ing] the

class of persons eligible for the death penalty," Zant v. Stephens, 462 U.S. 862, 877, 103 S. Ct. 2733, 2742 (1983), here the statute's application broadened the class and enhanced the likelihood of a death recommendation due to the instructions on invalid aggravating circumstances. See Mills v. Maryland, 108 S. Ct. 1860 (1988).

What occurred was fundamental error. The fundamental unfairness in this instance rendered Mr. Marek's capital sentencing proceeding unreliable. Rather than channelling sentencing discretion to avoid arbitrary and capricious results, Hopper v. Evans, 456 U.S. at 611, and narrowing the class of persons eligible for death, Zant v. Stephens, 462 U.S. at 877, the instruction on an unsupported aggravating circumstance worked just the opposite. Mr. Marek is entitled to relief under the eighth and fourteenth amendments.

## CLAIM IV

### THE "HEINOUS, ATROCIOUS, OR CRUEL" AGGRAVATING CIRCUMSTANCE IS IMPROPER IN LIGHT OF MAYNARD V. CARTWRIGHT.

The record is clear that the trial judge did not define heinous, atrocious or cruel for the jury. See State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973); Knight v. State, 394 So. 2d 997 (Fla. 1981)(failure to charge on elements of underlying felony and on results of NGI verdict). In Maynard v. Cartwright, 108 S. Ct. 1853 (1988), the Supreme Court held that the use of the aggravating circumstance in a capital case that the killing was "especially heinous, atrocious, or cruel" violated the eighth amendment in the absence of a limiting construction of that phrase which sufficiently channels the sentencer's discretion so as to minimize the risk of "arbitrary and capricious action." The fact that the state appellate court found and recited facts sufficient to support the jury finding does not cure the

constitutional problem flowing from the jury's unfettered discretion. Id. at 1859.

In Proffitt v. Florida, 428 U.S. 242 (1976), the Supreme Court approved the Florida Supreme Court's construction of this aggravating circumstance on the premise that this provision is directed only at "the conscienceless or pitiless crime which is unnecessarily torturous to the victim." Id. at 255-56. In Maynard v. Cartwright, Oklahoma had adopted the unnecessarily torturous element through its wholesale adoption of Florida's construction of heinous, atrocious or cruel set out in Dixon. However, as occurred here the jury was not instructed on the interpretation to be given heinous, atrocious or cruel.

The manner in which the jury and judge were allowed to consider "heinous, atrocious or cruel" provided for no genuine narrowing of the class of people eligible for the death penalty, because the terms were not defined in any fashion, and a reasonable juror could believe any murder to be heinous, atrocious or cruel under the instructions. Mills v. Maryland, 108 U.S. 1860 (1988). These terms require definition in order for the statutory aggravating factor genuinely to narrow, and its undefined application here violated the eighth and fourteenth amendments. Godfrey v. Georgia, 466 U.S. 420 (1980). Jurors must be given adequate guidance as to what constitutes "especially heinous, atrocious, or cruel." Maynard v. Cartwright, 108 U.S. 1853 (1988).

In Mr. Marek's case, the Court offered no explanation or definition of "heinous, atrocious, or cruel" but simply instructed:

> [Y]ou can consider that the crime for which the defendant is to be sentenced was especially wicked, evil, atrocious or cruel.

(R. 1322). In fact the judge's oral instructions may have been interpreted by the jury as telling them that in fact the murder

was wicked, evil, atrocious or cruel. This alone violated Mills v. Maryland, 108 S. Ct. 1860 (1988).

Even though the Florida Supreme Court had consistently held that in order to show "heinous, atrocious, and cruel" something more than the norm must be shown, see Cooper v. State, 336 So. 2d 1133 (Fla. 1976); Odom v. State, 403 So. 2d 936 (Fla. 1981); Parker v. State, 458 So. 2d 750 (Fla. 1984), the Court found that heinous, atrocious and cruel was properly found in Mr. Marek's case.

However, the Court did not have the benefit of Maynard v. Cartwright, decided by the United States Supreme Court in June of 1988. Cartwright did not exist at the time of Mr. Marek's trial, sentencing or direct appeal and it substantially alters the standard pursuant to which Mr. Marek's claim must be determined. As did Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), Cartwright represents a substantial change in the law that requires Mr. Marek's claim to be determined on the merits pursuant to Rule 3.850.

Moreover, the new precedent involves the most fundamental of constitutional errors -- proceedings which violate the standards enunciated in Cartwright render any ensuing sentence arbitrary and capricious. Id. For this reason also Mr. Marek's eighth amendment claim is properly before the Court. What Mr. Marek has presented involves errors of fundamental magnitude no less than those found cognizable in post-conviction proceedings in Reynolds v. State, 429 So. 2d 1331, 1333 (Fla. App. 1983)(sentencing error); Palmes v. Wainwright, 460 So. 2d 362, 265 (Fla. 1984)(suppression of evidence); Nova v. State, 439 So. 2d 255, 261 (Fla. App. 1983)(right to jury trial); O'Neal v. State, 308 So. 2d 569, 570 (Fla. 2d DCA 1975)(right to notice); French v. State, 161 So. 2d 879, 881 (Fla. 1st DCA 1964)(denial of continuance); Flowers v. State, 351 So. 2d 3878, 390 (Fla. 1st DCA 1977)(sentencing error); Cole v. State, 181 So. 2d 698 (Fla.

3d DCA 1966)(right to presence of defendant at taking of testimony). Moreover, because human life is at stake, fundamental error is more closely considered and more likely to be present where the death sentence has been imposed. See, e.g., Wells v. State, 98 So. 2d 795, 801 (Fla. 1957)(overlook technical niceties where death penalty imposed); Burnette v. State, 157 So. 2d 65, 67 (Fla. 1963)(error found fundamental "in view of the imposition of the supreme penalty").

Mr. Marek was denied the most essential eighth amendment requirement -- his death sentence was constitutionally unreliable. Here, the eighth amendment violations directly resulted in a capital proceeding at which an error of constitutional dimension directly affected the sentencer's consideration "concerning the ultimate question whether in fact [John Marek should have been sentenced to die]." Smith v. Murray, 106 S.Ct. 2661, 2668 (1986)(emphasis in original). Given such circumstances, the Supreme Court has explained that no procedural bar can be properly applied. Id. Beyond all else that Mr. Marek discusses herein, the ends of justice require that the merits of the claim now be heard, and that relief be granted.

In Proffitt v. Florida, 428 U.S. 242 (1976), the United States Supreme Court approved the Florida Supreme Court's construction of the "heinous, atrocious or cruel" aggravating circumstance, holding:

> [The Florida Supreme Court] has recognized that while it is arguable "that all killings are atrocious, . . . [s]till, we believe that the Legislature intended something 'especially' heinous, atrocious or cruel when it authorized the death penalty for first degree murder." Tedder v. State, 322 So. 2d, at 910. As a consequence, the court has indicated that the eighth statutory provision is directed only at "the conscienceless or pitiless crime which is unnecessarily torturous to the victim." State v. Dixon, 283 So. 2d, at 9. See also Alford v. State, 307 So. 2d 433, 445 (1975); Halliwell v. State, [323 So. 2d 557], at 561 [Fla. 1975]. We cannot say that the provision, as so construed, provides inadequate guidance to

> those charged with the duty of recommending or imposing sentences in capital cases.

Proffitt, 428 U.S. at 255-56 (footnote omitted).

The construction approved in Proffitt was not utilized at any stage of the proceedings in Mr. Marek's case. The jury was simply instructed that one of the aggravating circumstances was "the capital felony was especially heinous, atrocious, or cruel" (R. 1322). The explanatory or limiting language approved by Proffitt does not appear anywhere in the record. Nevertheless, on direct appeal, this Court affirmed. The sentencing judge then failed to apply any limiting construction, as did the Florida Supreme Court on direct appeal.

The deletion of the Proffitt limitations renders the application of the aggravating circumstance in this case subject to the same attack found meritorious in Cartwright. The Supreme Court's eighth amendment analysis fully applies to Mr. Marek's case; the identical factual circumstances upon which relief was mandated in Cartwright are present here, and the result here should be the same as in Cartwright:

> Claims of vagueness directed at aggravating circumstances defined in capital punishment statutes are analyzed under the Eighth Amendment and characteristically assert that the challenged provision fails adequately to inform juries what they must find to impose the death penalty and as a result leaves them and appellate courts with the kind of open-ended discretion which was held invalid in Furman v. Georgia, 408 U.S. 238 (1972).
>
> Furman held that Georgia's then-standardless capital punishment statute was being applied in an arbitrary and capricious manner; there was no principled means provided to distinguish those that received the penalty from those that did not. E.g., id., at 310 (Stewart, J., concurring); id., at 311 (White, J., concurring). Since Furman, our cases have insisted that 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. Gregg v. Georgia, 428 U.S. 153, 189, 206-207 (1976) (opinion of Stewart, Powell, and Stevens, JJ.); id., at 220-222 (White, J., concurring in judgment); Spaziano v. Florida, 468 U.S.

447, 462 (1984); Lowenfield v. Phelps, 484 U.S. ___, ___ (1988).

Godfrey v. Georgia, 446 U.S. 420 (1980), which is very relevant here, applied this central tenet of Eighth Amendment law. The aggravating circumstance at issue there permitted a person to be sentenced to death if the offense "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." Id., at 422. The jury had been instructed in the words of the statute, but its verdict recited only that the murder was "outrageously or wantonly vile, horrible or inhuman." The Supreme Court of Georgia, in affirming the death sentence, held only that the language used by the jury was "not objectionable" and that the evidence supported the finding of the presence of the aggravating circumstance, thus failing to rule whether, on the facts, the offense involved torture or an aggravated battery to the victim. Id., at 426-427. Although the Georgia Supreme Court in other cases had spoken in terms of the presence or absence of these factors, it did not do so in the decision under review, and this Court held that such an application of the aggravating circumstance was unconstitutional, saying:

> "In the case before us, the Georgia Supreme Court has affirmed a sentence of death based upon no more than a finding that the offense was 'outrageously or wantonly vile, horrible and inhuman.' There is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterized almost every murder as 'outrageously or wantonly vile, horrible and inhuman.' Such a view may, in fact, have been one to which the members of the jury in this case subscribed. If so, their preconceptions were not dispelled by the trial judge's sentencing instructions. These gave the jury no guidance concerning the meaning of any of [the aggravating circumstance's] terms. In fact, the jury's interpretation of [that circumstance] can only be the subject of sheer speculation." Id., at 428-429 (footnote omitted).

The affirmance of the death sentence by the Georgia Supreme Court was held to be insufficient to cure the jury's unchanneled discretion because that court failed to apply its previously recognized limiting construction of the aggravating circumstance. Id., at 429, 432. This Court concluded that, as a result of the vague construction

> applied, there was "no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." Id., at 433. Compare Proffitt v. Florida, 428 U.S. 242, 254-256 (1976). It plainly rejected the submission that a particular set of facts surrounding a murder, however, shocking they might be, were enough in themselves, and without some narrowing principle to apply to those facts, to warrant the imposition of the death penalty.
>
> We think the Court of Appeals was quite right in holding that Godfrey controls this case. First, the language of the Oklahoma aggravating circumstance at issue--"especially heinous, atrocious, or cruel"--gave no more guidance than the "outrageously or wantonly vile, horrible or inhuman" language that the jury returned in its verdict in Godfrey. . . .
>
> Second, the conclusion of the Oklahoma court that the events recited by it "adequately supported the jury's finding" was indistinguishable from the action of the Georgia court in Godfrey, which failed to cure the unfettered discretion of the jury and to satisfy the commands of the Eighth Amendment. The Oklahoma court relied on the facts that Cartwright had a motive of getting even with the victims, that he lay in wait for them, that the murder victim heard the blast that wounded his wife, that he again brutally attacked the surviving wife, that he attempted to conceal his deeds, and that he attempted to steal the victims' belongings. 695 P.2d, at 554. Its conclusion that on these facts the jury's verdict that the murder was especially heinous, atrocious, or cruel was supportable did not cure the constitutional infirmity of the aggravating circumstance.

Cartwright, supra.

In Mr. Marek's case, as in Cartwright, what was relied upon by the jury, trial court, and Florida Supreme Court did not guide or channel sentencing discretion. Likewise, here, no "limiting construction" was ever applied to the "heinous, atrocious or cruel" aggravating circumstance. As in Cartwright, Mr. Marek is entitled to relief. His sentence of death must be vacated.

## CLAIM V

THE INTRODUCTION OF NONSTATUTORY AGGRAVATING FACTORS SO PERVERTED THE SENTENCING PHASE OF MR. MAREK'S TRIAL THAT IT RESULTED IN THE TOTALLY ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

In considering whether the death penalty constitutes cruel and unusual punishment in violation of the eighth and fourteenth amendments, Justice Brennan wrote:

> In determining whether a punishment comports with human dignity, we are aided also by a second principle inherent in the Clause--that the State must not arbitrarily inflict a severe punishment. This principle derives from the notion that the State does not respect human dignity when, without reason, it inflicts upon some people a severe punishment that it does not inflict upon others. Indeed, the very words "cruel and unusual punishments" imply condemnation of the arbitrary infliction of severe punishments. And, as we now know, the English history of the Clause reveals a particular concern with the establishment of a safeguard against arbitrary punishments. See Granucci, "Nor Cruel and Unusual Punishments Inflicted": The Original Meaning, 57 Calif.L.Rev. 839, 857-60 (1969).

Furman v. Georgia, 408 U.S. 238, 274, 92 S. Ct. 2726, 2744 (1972)(Justice Brennan concurring)(footnote omitted).

When then faced with a challenge to Florida's capital sentencing scheme, the Supreme Court found it passed constitutional muster:

> While the various factors to be considered by the sentencing authorities do not have numerical weights assigned to them, the requirements of Furman are satisfied when the sentencing authority's discretion is guided and channeled by requiring 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.
>
> The directions given to judges and jury by the Florida statute are sufficiently clear and precise to enable the various aggravating circumstances to be outweighed against the mitigating ones. As a result, the trial court's sentencing discretion is guided and channeled by a system that focuses on the circumstances of each individual homicide and

> individual defendant in deciding whether the death penalty is to be imposed.

Gregg v. Georgia, 428 U.S. 242, 96 S. Ct. 2960, 2969 (1976).

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

Here, the State argued that Mr. Marek showed no remorse. The first argument was made during the closing argument in the guilt phase:

> Certainly, it's a person that's not walking the same path that everybody else walks. It's the kind of a person that certainly isn't going to have any remorse or any conscience or any feelings. That would be able to come into contact with a police officer within minutes as the body is still cooling up in the lifeguard shack and be able to joke and laugh, tell black jokes to the black officer. Certainly not someone that you would expect to have a conscience or feel particularly sorry about what he did.

(R. 1151-2)(emphasis added).

The prosecutor also began in his closing argument in the guilt phase to argue that Mr. Marek was a liar.

> Someone who could lie to the police that he is going to meet some college friends on

> the beach. That he is going to college but of course he can't remember what college he is going to.
>
> Just like he lied to Schafer when he was actually captured . . . .
>
> * * *
>
> The reason he couldn't admit it was because he lied to Schafer . . . .If he was innocent, why would he lie. If he were guilty, maybe he can get away.

(R. 1152-3)(emphasis added).

Then in argument during the penalty phase, the prosecutor carried those arguments a step further and argued that the jury should not find any mitigating factors because Mr. Marek had denied involvement in the homicide, and thus he was a liar:

> The only evidence is from the defendant. A man that by your very verdict you have said committed perjury because that's what he did on the stand. That's not applicable.

(R. 1306)(emphasis added).

The prosecutor also argued that the jury should recommend death because Mr. Marek did not show remorse for the crime and thus there were no aspects of his character that could be mitigating:

> There certainly aren't any circumstances of the offense that would be mitigating circumstances in this case. How about the defendant himself? I hope you all watched him as closely as I did during the course of the trial. He appeared to be sleeping during a couple of portions of it but never any emotion. Never any reaction. There was never any remorse that he showed.
>
> The first time apparently there is any action at all or reaction from him was from Deputy Webster after he was convicted but those almost tears that she testified to, those aren't tears for what he's done. Those aren't tears of remorse. Those are tears of sorrow because you convicted him. Because he got caught. That's what he is crying about.
>
> There's certainly been nothing in this case, nothing at all that he's ever been sorry for what he did. You certainly never heard that from the stand when he testified.

(R. 1306-7)(emphasis added).

Finally, the prosecutor argued that Mr. Marek should receive the death penalty because he joked with police officers after the crime.

> After doing that, be able to laugh about it to some police officers within minutes as if nothing had happened. To care so little about human life that you can joke within a couple of minutes about it.
>
> Or get up on the stand as he did here and smile to you and talk to you about Texas hospitality and lie through his teeth on everything he said.

(R. 1308).

The State relied heavily upon nonstatutory aggravating circumstances to justify the imposition of a death sentence. Mr. Marek's jury returned a death recommendation. It is clear that consideration of these nonstatutory aggravating circumstances resulted in that recommendation. This violated Mr. Marek's constitutional guarantee under the eighth and fourteenth amendments. At the time of sentencing by the trial court, the State relied entirely on the argument made to the jury, which included the above quoted non-statutory aggravating factors. As long as it is even possible that the jury relied on the non-statutory aggravating circumstances in recommending death this is error under Mills v. Maryland, 108 S. Ct. 1860 (1988). In addition, the judge relied on the non-statutory aggravating circumstances.

The court in imposing the death sentence 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).

This Court has specifically barred the use of lack of remorse as evidence of an aggravating circumstance. In its recent decision in Robinson v. State, 520 So. 2d 1 (Fla. 1988), this Court vacated Robinson's death sentence because the State,

inter alia, impermissibly argued lack of remorse as a nonstatutory aggravating factor. Id. at 5.

This Court wrote in Robinson that

> In Sireci v. State, 399 So.2d 964, 971-72 (Fla.1981), cert. denied, 456 U.S. 984, 102 S.Ct. 2257, 72 L.Ed.2d 862 (1982), this Court held that lack of remorse may be considered in finding that a murder was especially heinous, atrocious and cruel. However, as a result of the 1981 revision of the standard jury instructions in criminal cases as well as the consistent misapplication of the Sireci holding, this Court subsequently held that any consideration of a defendant's remorse was extraneous to the question of whether the murder was especially heinous, atrocious or cruel. Pope v. State, 441 So.2d 1073, 1077-78 (Fla.1983). Citing McCampbell v. State, 421 So.2d 1072 (Fla. 1982), the Court in Pope noted that lack of remorse is not an aggravating factor, in and of itself, and held:
>
> > [H]enceforth lack of remorse should have no place in the consideration of aggravating factors. Any convincing evidence of remorse may properly be considered in mitigation of the sentence, but absence of remorse should not be weighed either as an aggravating factor nor as an enhancement of an aggravating factor.
>
> 441 So.2d at 1078.

Id. at 6. See also Trawick v. State, 473 So. 2d 1235 (Fla. 1982); Jackson v. Wainwright, 421 So. 2d 1385, 1388 (Fla. 1982); Quince v. State, 414 So. 2d 185 (Fla. 1982).

The situation here is virtually identical and calls for equal application of the law. The introduction of evidence of lack of remorse, argument based upon that evidence, and reliance by the sentencing jury and judge on such evidence was clear eighth amendment error. This Court should have reversed Mr. Marek's sentence of death on direct appeal. It should now take corrective action on the basis of Robinson.

The prosecutor's introduction and use of, and the sentencers' reliance on, these wholly improper and unconstitutional non-statutory aggravating factors starkly violated the eighth amendment. Mr. Marek's sentence of death

therefore stands in violation of the eighth and fourteenth amendments, see Elledge v. State, 346 So. 2d 998, 1002-03 (Fla. 1977); Barclay v. Florida, 463 U.S. 939, 955 (Fla. 1983), and should not be allowed to stand.

Had appellate counsel raised this issue on direct appeal, Mr. Marek would have been entitled to the same relief as Mr. Robinson. Appellate counsel's failure to raise the issue amounted to fundamental and prejudicial constitutional ineffectiveness.

## CLAIM VI

FAILURE TO INSTRUCT THE JURY ON THE NON-STATUTORY MITIGATING CIRCUMSTANCE OF DISPARATE TREATMENT VIOLATED MR. MAREK'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS.

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). As a result, Mr. Marek's defense attorney did not argue this non-statutory mitigating factor because the judge would then have opened the door to the State's introduction of Wigley's confession taken shortly after Wigley's arrest. Mr. Marek's

attorney never had any opportunity to interview, examine or cross-examine Wigley. His statement was never subjected to adversarial testing by Mr. Marek's attorney or by anyone. (Mr. Wigley did not testify in his own trial.)

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).

Mr. Marek's sentence of death is inherently unreliable and fundamentally unfair. Mr. Marek was denied his fifth, sixth, eighth and fourteenth amendment rights. Habeas relief is warranted.

## CLAIM VII

MR. MAREK WAS DENIED HIS SIXTH AMENDMENT RIGHT TO PRESENT A DEFENSE WHEN HIS COUNSEL WAS NOT PERMITTED TO PRESENT MITIGATING EVIDENCE.

The United States Supreme Court has explained:

> The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations. The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process. Mr. Justice Black writing for the Court in In Re Oliver, 333 U.S. 257, 273, 63 S. Ct. 499, 507, 92 L.Ed. 6782 (1948), identified these rights as among the minimum essentials of a fair trial:
>
> > A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense

> -- a right to his day in court -- are basic to our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel.
>
> See also Morrissey v. Brewer, 408 U.S. 471, 488-89, 92 S. Ct. 2593, 2603-2604, 33 L.Ed.2d 484 (1972); Jenkins v. McKeithen, 395 U.S. 411, 428-429, 89 S. Ct. 1843, 1852-53, 23 L.Ed.2d 404 (1969); Specht v. Patterson, 386 U.S. 605, 610, 87 S. Ct. 1209, 1212, 18 L.Ed.2d 326 (1967).

Chambers v. Mississippi, 410 U.S. 284, 294-95 (1973). The United States Supreme Court has also stated:

> The rights to notice, confrontation, and compulsory process, when taken together, guarantee that a criminal charge may be answered in a manner now considered fundamental to the fair administration of American justice -- through the calling and interrogation of favorable witnesses, the cross-examination of adverse witnesses, and the orderly introduction of evidence. In short, the Amendment constitutionalizes the right in an adversary criminal trial to make a defense as we know it. (Emphasis added)

Faretta v. California, 422 U.S. 806, 818 (1975).

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. Defense counsel was trapped no matter what he did.

The United States Supreme Court has not hesitated to overturn convictions where evidentiary rulings or state action have encroached upon a defendant's fundamental constitutional

right to present a defense. See, Chambers v. Mississippi, supra; Rock v. Arkansas, 107 S. Ct. 2704 (1987); Crane v. Kentucky, 106 S. Ct. 2141 (1986). This Court should not hesitate to overturn Mr. Marek's sentence now. Presentation of evidence in mitigation during the penalty phase of a capital trial is every bit as crucial as presenting a defense during the guilt phase of a trial. Moreoever, the usual hearsay rules do not apply in the penalty phase of a capital trial anyway.

The proceedings were fundamentally unfair. The prosecutor obviously used the absence of statutory mitigating circumstances to argue that John Marek deserved the death penalty. But the failure to present additional mitigation was due not to its lack, but to the trial court's rulings. The failure to present Dr. Krieger's report or testimony as a mitigating circumstance "serve[d] to pervert the jury's deliberations concerning the ultimate question whether in fact [John Marek should be sentenced to death]." Smith v. Murray, 106 S. Ct. 2661, 2668 (1986). "'In appropriate cases the principle[] of . . . finality. . . 'must yield to the imperative of correcting a fundamentally unjust [sentence of death].'" Murray v. Carrier, 106 S. Ct. 2639, 2654 (1986), quoting Engle v. Isaac, 456 U.S. 107, 135 (1982).

Moreover, the claim is now properly brought pursuant to the Court's habeas corpus authority for it involves substantial and prejudicially ineffective assistance of counsel on direct appeal. This issue involved a classic violation of longstanding constitutional principles. See, Johnson v. Zerbst, supra. It virtually "leaped out upon even a casual reading of transcript." Matire v. Wainwright, 811 F.2d 1430, 1438 (11th Cir. 1987). This clear claim of per se error required no elaborated presentation -- counsel only had to direct this Court to the issue. The Court would have done the rest, based on long-settled Florida and federal constitutional standards. Yet counsel failed to present it to this Court.

No tactical decision can be ascribed to counsel's failure to urge the claim. No procedural bar precluded review of this issue -- it was properly litigated before the lower court. See Johnson v. Wainwright, supra, 498 So. 2d 938. However, counsel's failure, a failure which could not but have been based upon ignorance of the law, deprived Mr. Marek of the appellate reversal to which he was constitutionally entitled. See Wilson v. Wainwright, supra, 474 So. 2d at 1164-65; Matire, supra.

Mr. Marek's sentence of death is inherently unreliable and fundamentally unfair. Mr. Marek was denied his fifth, sixth, eighth and fourteenth amendment rights. Habeas relief is warranted.

CLAIM VIII

THE TRIAL COURT ERRED BY FAILING TO INDEPENDENTLY WEIGH THE AGGRAVATING AND MITIGATING CIRCUMSTANCES AND ARGUMENT OF COUNSEL CONTRARY TO MR. MAREK'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

The trial judge specifically indicated that he had reached a conclusion regarding Mr. Marek's sentence prior to the presentation of evidence and argument. The penalty phase in front of the jury was held on June 5, 1984. Judicial sentencing was not held until July 3, 1984. However, after defense and prosecution had argued their positions to the judge, he indicated that he had already made his decision prior to argument:

> Okay. Well, in a case of this magnitude, I've gone ahead and prepared a written sentence which I'll see that you get a copy of at the conclusion. I've made some written findings as I find the case. It's all in here.

(R. 1338).

It is a fundamental precept that constitutes a primary underpinning of the constitutionality of the death penalty that a trial judge must engage in an independent and reasoned process of

weighing aggravating and mitigating factors in determining the appropriateness of the death penalty in a given case:

> Explaining the trial judge's serious responsibility, we emphasized, in State v. Dixon, 283 So. 2d 1, 8 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed 2d 295 (1974):
>
> > [T]he trial judge actually determines the sentence to be imposed -- guided by, but not bound by, the findings of the jury. To a layman, no capital crime might appear to be less than heinous, but a trial judge with experience in the facts of criminality possesses the requisite knowledge to balance the facts of the case against the standard criminal activity which can only be developed by involvement with the trials of numerous defendants. Thus the inflamed emotions of jurors can no longer sentence a man to die. . . .
> >
> > The fourth step required by Fla. Stat. sec. 921.141, F.S.A., is that the trial judge justifies his sentence of death in writing, to provide the opportunity for meaningful review by this Court. Discrimination or capriciousness cannot stand where reason is required, and this is an important element added for the protection of the convicted defendant.

(emphasis added).

In this case the trial court clearly prepared his findings before allowing the parties to argue their case to him, and before they had had the opportunity to present additional evidence to him, had they chosen. It is unclear exactly when this order was written.

The Florida Supreme Court has addressed the ramifications of a failure of the trial judge to engage in a meaningful weighing of the aggravating and mitigating circumstances before imposing the death sentence. In a number of cases, the issue has been presented in the context of a finding of fact issued long after the death sentence was actually imposed. Nibert v. State, 508 So. 2d 1 (Fla. 1987); Muehleman v. State, 503 So. 2d 310 (Fla. 1987); Van Royal v. State, 497 So. 2d 625 (Fla. 1986). In Van Royal, the Florida Supreme Court set aside the death sentence because the record did not support a finding that the imposition

of the death sentence was based on a reasoned judgment. As stated by Justice Ehrlich in his concurring opinion:

> The statutory mandate is clear. This Court speaking through Mr. Justice Adkins in the seminal case of State v. Dixon, 283 So. 2d 1 (Fla. 1973), cert. denied sub nom. Hunter v. Florida, 416 U.S. 943, 94 S.Ct 1950, 40 L.Ed2d 295 (1974), said with respect to the weighing process:
>
> > It must be emphasized that the procedure to be followed by the trial judges and juries is not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances, but rather a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present.
>
> 283 So. 2d at 10. (emphasis supplied).
>
> How can this Court know that the trial court's imposition of the death sentence was based on a "reasoned judgment" after weighing the aggravating and mitigating circumstances when the trial judge waited almost six months after sentencing defendant to death before filing his written findings as to aggravating and mitigating circumstances in support of the death penalty? The answer to the rhetorical question is obvious and in the negative.

497 So. 2d at 629-30.

In Patterson v. State, 513 So. 2d 1257 (Fla. 1987), the Florida Supreme Court again emphasized the importance of an independent weighing process of the aggravating and mitigating circumstances. In Patterson the trial court failed to engage in an independent weighing process by delegating the responsibility to the state attorney:

> With regard to his first contention, we find that the trial judge improperly delegated to the state attorney the responsibility to prepare the sentencing order, because the judge did not, before directing preparation of the order, independently determine the specific aggravating and mitigating circumstances that applied in the case. Section 921.141, Florida Statutes (1985), requires a trial judge to independently weigh the aggravating and mitigating circumstances to determine whether the death penalty or a sentence of

> life imprisonment should be imposed upon a defendant.

Here, the trial court denied Mr. Marek's constitutional rights to due process, right to counsel, and the protection against cruel and unusual punishments by finding aggravating circumstances without argument or even the presence of counsel. The Florida Supreme Court has made it clear in Dixon, supra, and Van Royal, supra, that the trial court must (a) engage in a reasoned weighing process of aggravating and mitigating circumstances and (b) not abrogate the responsibility for that weighing process to another entity.

The trial court here abdicated its responsibility to independently weigh the aggravating and mitigating circumstances to the jury by stating that the court would follow the jury's recommendation prior to the possible admission of additional evidence or the argument of counsel at sentencing. A trial court cannot impose a death sentence in an arbitrary or capricious manner:

> In order to satisfy the requirements of the eighth and fourteenth amendments, a capital sentencing scheme must provide the sentencing authority with appropriate standards "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. 2542, 258, 96 S.Ct. 2960, 2969, 49 L.Ed.2d 913, 926 (1976). After reviewing the psychiatric evidence that was before the state court, we must conclude that the state court's rejection of the two mental condition mitigating factors is not fairly supported by the record and that, as such, Magwood was sentenced to death without proper attention to the capital sentencing standards required by the Constitution.

Magwood v. Smith, 791 F.2d 1438, 1449 (11th Cir. 1986). In Magwood the court found that it was error for the trial court to totally disregard evidence of mitigation. Similarly, the court here acted in an arbitrary and capricious manner in totally disregarding the non-statutory mitigating evidence that was presented during the penalty phase. Officer Webster testified

that Mr. Marek was a trouble free prisoner. It is clear that the court failed to conduct an independent sentencing.

This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Marek's death sentence. This Court has not hesitated in the past to exercise its inherent jurisdiction to remedy errors which undermine confidence in the fairness and correctness of capital proceedings, see Wilson v. Wainwright, 474 So. 2d 1163 (Fla. 1985), and it should now correct this error.

Moreover, the claim is now properly brought pursuant to the Court's habeas corpus authority for it involves substantial and prejudicially ineffective assistance of counsel on direct appeal. This issue involved a classic violation of longstanding principles of Florida law. See, Arango, supra; Dixon, supra. It virtually "leaped out upon even a casual reading of transcript." Matire v. Wainwright, 811 F.2d 1430, 1438 (11th Cir. 1987). This clear claim of per se error required no elaborate presentation -- counsel only had to direct this Court to the issue. The court would have done the rest, based on long-settled Florida and federal constitutional standards.

No tactical decision can be ascribed to counsel's failure to urge the claim. No procedural bar precluded review of this issue. See Johnson v. Wainwright, supra, 498 So. 2d 938. However, counsel's failure, a failure which could not but have been based upon ignorance of the law, deprived Mr. Marek of the appellate reversal to which he was constitutionally entitled. See Wilson v. Wainwright, supra, 474 So. 2d at 1164-65; Matire, supra.

Mr. Marek's sentence of death was imposed in violation of the sixth, eighth and fourteenth amendments. That error must be corrected now.

## CLAIM IX

THE EIGHTH AMENDMENT WAS VIOLATED BY THE SENTENCING COURT'S REFUSAL TO FIND THE MITIGATING CIRCUMSTANCES CLEARLY SET OUT IN THE RECORD.

Pursuant to the eighth and fourteenth amendments, a state's capital sentencing scheme must establish appropriate standards to channel the sentencing authority's discretion, thereby "eliminating total arbitrariness and capriciousness" in the imposition of the death penalty. Proffitt v. Florida, 428 U.S. 242 (1976). On appeal of a death sentence the record should be reviewed to determine whether there is support for the sentencing court's finding that certain mitigating circumstances are not present. Magwood v. Smith, 791 F.2d 1438, 1449 (11th Cir. 1986). Where that finding is clearly erroneous the defendant "is entitled to new resentencing." Id. at 1450. The sentencing judge in Mr. Marek's case found that no mitigating circumstances were present (R. 1474). Finding four aggravating circumstances the court imposed death (R. 1474). The court's conclusion that no mitigating circumstances were present, however, is belied by the record.

Both statutory and nonstatutory 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. 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 the jail.

(R. 1297-99). The State did not contest this evidence (R. 1299). However, the judge, in his sentencing order, refused to find this in mitigation. Instead, he noted a non-statutory aggravating factor:

> 8. Any other aspect of the Defendant's character or record, and any other circumstance of the offense. This circumstance does not apply for the reasons stated above. The Defendant, Marek, testified falsely at trial. He has not shown <u>any</u> reaction to the crimes he committed let alone any remorse.

(R. 1474)(emphasis in original).

The judge also refused to apply any of the statutory mitigating circumstances. He found that Mr. Marek's age at the time of the offense, 21, was not mitigating (R. 1474, No. 7). He found that the capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was not substantially impaired, even though there was evidence that Mr. Marek consumed a large quantity of alcohol on the date of the offense (R. 1474, No. 6). He also found the consumption of alcohol did not constitute the mitigating circumstance of extreme mental or emotional disturbance (R. 1473, No. 2). Finally he refused to consider the sentence that Mr. Marek's co-defendant received. Despite the presence of clearly mitigating circumstances, the court concluded that no mitigating circumstances were present. This even though the Florida Supreme Court has recognized that such factors are mitigating. <u>See</u>, <u>e.g.</u>, <u>Perry v. State</u>, 522 So. 2d 817 (Fla. 1988)(non-violent background is mitigating); <u>Harmon v. State</u>, 527 So. 2d 182, 189 (Fla. 1988)("model prisoner" is mitigating); <u>Cailler v. State</u>, 523 So. 2d 158 (Fla. 1988)(disparate treatment

of equally culpable accomplice can serve as basis of jury recommendation of life); Brookings v. State, 495 So. 2d 135 (Fla. 1986)(jury can reasonably consider treatment of another equally culpable); McCampbell v. State, 421 So. 2d 1072 (Fla. 1982)(jury can consider disposition of co-defendants' cases in making a life recommendation).

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?

Section 921.141(6)(a) Fla. Stat. sets out "no significant history of prior criminal activity" as a statutory mitigating circumstance (emphasis added). Counsel had wanted the jury to be able to outweigh this as a possible mitigating factor. Mr. Marek, however, had been convicted in Texas of credit card fraud (R. 1283-84).

The trial judge, over counsel's objection, ruled that the defendant could not rely on this mitigating factor without the State being able to introduce proof of this sole conviction (R. 1283-84). The trial judge accordingly instructed the jury as to the mitigating circumstances it could consider, but did so without mentioning this particular one (R. 1323-24). See Maggard v. State, 399 So. 2d 973, 978 (Fla. 1981); Fitzpatrick v. Wainwright, 490 So. 2d 938, 939-940 (Fla. 1986).

At judge-sentencing, the court found no statutory mitigating circumstance to exist. This was fundamental counsel error, a deprivation of due process and a denial of Mr. Marek's right to an accurate and reliable sentencing proceeding.

The trial judge had all the pertinent information before him relative to this issue. He was aware Mr. Marek's criminal history consisted of this single offense -- a nonviolent,

property crime, for which he originally had been sentenced to probation. As with the statutory aggravating circumstance involving convictions for prior violent felonies, see section 921.141(5)(b) likewise with this statutory mitigation,

> the purpose for considering aggravating and mitigating circumstances is to engage in a character analysis of the defendant to ascertain whether the ultimate penalty is called for in his or her particular case. Propensity to commit violent crimes surely must be a valid consideration for the jury and the judge. It is matter that can contribute to decisions as to sentence which will lead to uniform treatment and help eliminate "total arbitrariness and capriciousness in [the] imposition" of the death penalty. Proffitt v. Florida, supra, 96 S.Ct. at 2969.

Elledge v. State, 346 So. 2d 998, 1001 (Fla. 1977)(emphasis added); Hardwick v. State, 461 So. 2d 79, 81 (Fla. 1984)("section 921.141(5)(b) refers to life-threatening crimes in which the perpetrator comes in direct contact with a human victim."). The focus must be on whether the prior convictions involved violence and whether the "history" is "significant". Surely a single act of credit card fraud does not comport with either the legislative intent in this matter or with a plain reading of the statute; particularly when the dollar amount is considered. The trial judge's application was rigid and myopic. The net result of the court's error was that Mr. Marek lost the utility of this extremely valuable mitigating circumstance.

In the case at bar, the failure to consider Mr. Marek's lack of any significant prior criminal history deprived him of a valid mitigating circumstance. In either situation, the end result is the same, i.e., there has been reliance or lack of it upon "misinformation of constitutional magnitude," United States v. Tucker, 404 U.S. 443, 447 (1972).

In this case there were four aggravating circumstances presented to the jury and found by the court. Mr. Marek has presented argument in this Petition that each of those

aggravating circumstances are invalid. It cannot be said in this case that use of the invalid aggravating circumstances were harmless because there were other aggravating circumstances. Under Elledge v. State, 346 So. 2d 998, 1002-03 (Fla. 1977), when a sentencing judge erroneously considers improper as well as proper aggravating circumstances, and the judge finds no statutory mitigating circumstances, consideration of the improper aggravating circumstances will be deemed harmless. The United States Supreme Court upheld the general constitutionality of such a harmless error analysis in Zant v. Stephens, 462 U.S. 879 (1983), and Barclay v. Florida, 463 U.S. 939 (1983).

In this case all four aggravating circumstances are invalid, hence Elledge does not apply. Second, and more importantly, the error here extends beyond the mere invalidation of aggravating circumstances. Here, the jury was not allowed to consider evidence that was materially accurate and relevant to mitigation. The inquiry into Mr. Marek's prior criminal history or lack thereof was constitutionally permissible. Similarly, absence of such an inquiry had a constitutionally impermissible impact on the sentencing process. Hitchcock v. Dugger, 107 S. Ct. 1821 (1987). Nothing in Zant v. Stephens even remotely suggests that the federal courts should ignore an evidentiary error of independent constitutional magnitude simply because an untainted finding established an adequate statutory predicate for a death sentence. Johnson v. Mississippi, 108 S. Ct. 1981 (1988), suggests the opposite.

The sentencer's rejections of the pertinent mitigating factor is not fairly supported by the record and that, as such, Mr. Marek was sentenced to death without proper attention to the capital sentencing standards constitutionally required. See Magwood v. Smith, supra.

This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Marek's

death sentence. This Court has not hesitated in the past to exercise its inherent jurisdiction to remedy errors which undermine confidence in the fairness and correctness of capital proceedings, see Wilson v. Wainwright, 474 So. 2d 1163 (Fla. 1985), and it should now correct this error.

Moreover, the claim is now properly brought pursuant to the Court's habeas corpus authority for it involves substantial and prejudicially ineffective assistance of counsel on direct appeal. This issue involved a classic violation of longstanding principles of Florida law. See Eddings, supra. It virtually "leaped out upon even a casual reading of transcript." Matire v. Wainwright, 811 F.2d 1430, 1438 (11th Cir. 1987). This clear claim of per se error required no elaborate presentation -- counsel only had to direct this Court to the issue. The court would have done the rest, based on long-settled Florida and federal constitutional standards.

No tactical decision can be ascribed to counsel's failure to urge the claim. No procedural bar precluded review of this issue. See Johnson v. Wainwright, supra, 498 So. 2d 938. However, counsel's failure, a failure which could not but have been based upon ignorance of the law, deprived Mr. Marek of the appellate reversal to which he was constitutionally entitled. See Wilson v. Wainwright, supra, 474 So. 2d at 1164-65; Matire, supra.

Here, improper aggravating circumstances were considered and found to be present. Mitigating circumstances obviously present were arbitrarily rejected. The eighth amendment principles embodied in Eddings were violated. Mr. Marek's sentence of death was imposed in violation of the sixth, eighth and fourteenth amendments. That error must be corrected now.

CLAIM X

MR. MAREK'S SENTENCING JURY WAS REPEATEDLY MISINFORMED AND MISLED BY INSTRUCTIONS AND ARGUMENTS WHICH UNCONSTITUTIONALLY AND INACCURATELY DILUTED THEIR SENSE OF RESPONSIBILITY FOR SENTENCING, CONTRARY TO CALDWELL V. MISSISSIPPI, 105 S. CT. 2633 (1985), ADAMS V. DUGGER, 816 F.2D 1443 (11TH CIR. 1987), AND MANN V. DUGGER, 844 F.2D 1446 (11TH CIR. 1988), AND IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

Throughout the entire course of the proceedings, the jurors at Mr. Marek's trial were consistently misinformed, misled, and misinstructed. The jurors were never accurately or properly informed that the sentencing judge was bound to give great deference to their life recommendation, or that in fact judicial overrides are seldom affirmed by the Florida Supreme Court. See Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975); Radelet, Rejecting the Jury, 18 U. Cal. Davis L. Rev. 1409 (1985). To the contrary, the jurors were affirmatively informed that their recommendation was of little importance, that the appropriateness of sentencing the defendant to death had been determined by better authorities than the jurors, and that any other questions regarding the appropriateness of sentencing the defendant to death would be disposed of by yet another much more qualified authority -- the judge, who was free to disregard their advisory decision under any circumstances.

In Caldwell v. Mississippi, 472 U.S. 320, 105 S. Ct. 2633 (1985), the United States Supreme Court held that prosecutorial argument which tended to diminish the role of a capital sentencing jury violated the eighth amendment. The prosecutor in Caldwell had argued that the jury's sentencing decision would be automatically reviewable by the Mississippi Supreme Court. However, because the prosecutor failed to explain that the jury's decision would be reviewed with a presumption of correctness, the United States Supreme Court held that the jury was erroneously led to believe that the ultimate responsibility for the death

sentence rested elsewhere, a misleading impression which diminished the jurors' sense of responsibility and violated the eighth amendment. Because the "view of its role in the capital sentencing procedure" imparted to the jury by the prosecutor's improper and misleading argument was 'fundamentally incompatible with the Eighth Amendment's heightened 'need for reliability in the determination that death is the appropriate punishment in a specific case,'" the Court vacated Caldwell's sentence of death. Caldwell, 105 S. Ct. at 2645, citing Woodson v. North Carolina, 428 U.S. 280, 305 (1976). See also, Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986), reh. denied with opinion sub nom., Adams v. Dugger, 816 F.2d 1493 (11th Cir. 1987), cert. granted, 108 S. Ct. 1106 (1988); Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988)(en banc).

The diminution of jury responsibility which occurred here is far more egregious than that in Caldwell. Here it was the trial court that directly misinformed the jury as to their true role at sentencing, by informing every person on the panel from which Mr. Marek's jury was selected that it was he, the trial judge, and not they, the jury, who bore the ultimate and final responsibility for the sentencing decision (R. 774-75). Whatever decision the jury might arrive at, according to the trial judge, he was free to override their decision (Id.). The state echoed and reinforced the responsibility-diminishing theme established by the court (See R. 809, 810, 814, 902, 919). Those who were ultimately selected to serve on Mr. Marek's jury heard this inaccurate and misleading information again, during closing argument and in the judge's sentencing instructions, as the law which they were solemnly sworn to uphold.

This unconstitutionally inaccurate and misleading portrait of the Florida capital sentencing scheme was among the first things the members of the panel from which Mr. Marek's jury was selected heard from the judge and prosecutor. At the first stage

of voir dire, where venire persons were questioned regarding their views on the death penalty and their extra-judicial knowledge of the case, the court and the State took great pains to explain their jury-diminishing perception of the capital sentencing process and the jury's minimized role.

Early in voir dire, the judge explained what would occur if the jury convicted Mr. Marek of first degree murder:

> At that time, the State and the defense would present arguments for or against the sentence of death and the jury would then render an advisory opinion to me as to whether the defendant should be sentenced to life imprisonment or to death. . . .
>
> The Court could then sentence the defendant to life imprisonment or to death since the Court would not be required to follow the advise of the jury.
>
> So the jury doesn't impose any punishment if a verdict of guilty of murder in the first degree is rendered. The imposition of the punishment is my function rather than your function. . . .

(R. 24-25)(emphasis added).

After making it clear that he could ignore the jury's recommendation, the judge reemphasized throughout the voir dire that the jury recommendation was merely that, a recommendation. He continually referred to it as an advisory opinion:

> Now we would send you back with your fellow jurors to determine whether you should advise me as to whether the defendant should receive the death penalty. Now, I won't care. No one cares if your advisory opinion would recommend life imprisonment but the question I have for you is would you consider the death penalty?

(R. 30).

Again the judge made it clear that he did not have to follow the juror's recommendation:

> Now, let's take the second step. If you did that, and the defendant was found guilty of murder in the first degree, you would be sent back again with the same jury to decide whether or not you feel the defendant should be put to death or whether he should receive life in prison. It's strictly your feeling under the circumstances and to give me what you feel is advice.

> I don't have to accept your advice, no matter what it is but it's just for me to listen to your advice. I don't care. . . .
>
> Certainly, I'll strongly consider your advice but whatever it is I want no part of your thinking process. Do you understand that?

(R. 35)(emphasis added).

The judge's one reference to giving weight to the jury's "advice" is insignificant in comparison to the number of times that the jury was told that their "advice" did not have to be followed:

> The question is if you found the defendant guilty of murder in the first degree and I sent you back to deliberate again as to what advice you want to give me as far as a sentence is concerned, you had two choices: One for the death penalty and one for life in prison, would you at least think about the death penalty? I don't care if you come back with it because I don't have to listen to it, whatever it is. Even if you told me you wanted me give him the death penalty, I don't have to do that. I can give him life in prison.

(R. 36-37)(emphasis added).

> THE COURT: If he is, you wouldn't even think about the death penalty. You'd go ahead and advise me life in prison; is that it?

(R. 37)(emphasis added).

> THE COURT: I can accept that. A lot of people don't [believe in the death penalty]. What I want to know: If you found the defendant guilty of murder in the first degree would you at least think about advising me to give him death?

(R. 50)(emphasis added).

> THE COURT: I explained to these folks yesterday that if the jury came back with a verdict of guilty of murder in the first degree that we have a second trial with the same jury where we send the jury out to consider what sentence they think the defendant should receive for that type of conviction; whether it be death or life imprisonment, and it's an advisory type of opinion which they render to me who makes the ultimate decision but it's set up by law that I should listen to the jury and see what type of recommendation they have.

(R. 102-03)(emphasis added).

> THE COURT: Not necessarily. Okay. If you were chosen on this jury and if the jury came back with a verdict of murder in the first degree, and I asked you to go back to the jury room and consider advising me what you think the penalty ought to be, whether it be death or life imprisonment, would you be able to do that?

(R. 112).

The State took up this responsibility-diminishing theme, making certain the jurors understood that it was the judge, and not the jury, who was responsible for sentencing:

> MR. CARNEY: . . . I guess the big difference between a murder in the first degree trial and another trial, it's the only trial if you return a verdict of guilty as charged where the jury has any input at all or can make any recommendation on the sentence.
>
> Ordinarily, when you return a verdict of guilty that's the end of your job. At that point you leave and the Court at some point imposes a sentence but in a murder in the first degree case the jury as members of the community give the Court their input as to what they feel an appropriate sentence should be.
>
> * * * *
>
> MR. CARNEY: . . . You were told to disregard any possible consequences as far as a verdict and render a verdict based on the law and based on the evidence.
>
> Once you have done that, if you then return a verdict of murder in the first degree, at that point we then proceed into phase two of the trial which would be the advisory. . . . [A]nd you go back into the jury room again a second time and then make an advisory recommendation; either recommending life imprisonment or making a recommendation of the death penalty which recommendation is not binding on the Court. It's simply a recommendation that you as members of the jury feel would be an appropriate sentence. . . .

(R. 216-18)(emphasis added).

The prosecutor made it very clear that the sentence was for the judge to decide, and that the jury would be merely providing the judge with two sentencing options by rendering a guilty verdict to first degree murder:

> Now, if you don't have any trouble with that, you accept in your mind he is in fact guilty of murder in the first degree, you think under the circumstances in this case there's no way there should ever be a potential death penalty in the case and you feel very strong about that, would you be inclined to take the sentencing option away from the Court if I prove murder in the first degree to water down your verdict and come back, for example, with (b) which would be murder in the second degree to avoid any possibility of the Court imposing a death penalty?

(R. 220)(emphasis added).

> MR. CARNEY: It's only if the aggravating circumstances are present and if they outweigh the mitigating circumstances that you may consider a recommendation of death but even that is not binding either.

(R. 244-45)(emphasis added).

During the court's instructions to the jury at the guilt phase, the judge again emphasized that any penalty was his decision, not theirs:

> Your duty is to determine if the defendant is guilty or not guilty in accordance with the law. It's my job to determine what a proper sentence would be if the defendant is guilty.

(R. 1256).

> You are not responsible for the penalty in any way because of your verdict. The possible results of the case are to be disregarded as you discuss your verdict. Your duty is to discuss only the question of whether the State has proved the guilt of the defendant in accordance with these instructions regarding each count.

(R. 1257)(emphasis added).

After the jurors returned with a verdict of guilty, the court told them to return at a later date for the penalty phase, but again reminded them that their role in sentencing was merely advisory:

> The proceedings for that phase is naturally much quicker than this one. It usually takes about an hour. Maybe not even that long and then as long as it takes you to come back with an advisory opinion.

(R. 1277).

In his preliminary instructions to the jury in the penalty phase of the trial, the judge emphatically told the jury that the decision as to punishment was his alone:

> THE COURT: Welcome home. Ladies and gentlemen, you found Mr. Marek guilty of murder in the first degree last Friday evening and the punishment for this crime is either death or life imprisonment without the possibility of parole for 25 years.
>
> Now, the final decision as to what punishment shall be imposed rests solely with me. However, the law requires that you, the jury render to me an advisory sentence as to what punishment should be imposed upon Mr. Marek.

(R. 1292-3)(emphasis added).

In closing argument at the penalty phase, the State once again reminded the jury that their decision was only a recommendation:

> It's the only case where you as members of the community get to give the Court after having heard all the facts of the case what your input is as to what you feel an appropriate sentence in this case should be.
>
> To guide you in making that decision and making an advisory recommendation which is done by majority vote, the Court is going to give to you the same criteria that he uses when he makes his determination of what final sentencing will be.

(R. 1300)(emphasis added).

After closing arguments in the penalty phase of the trial, the judge reminded the jurors of the instruction they had already received regarding their lack of responsibility for sentencing Mr. Marek, but noted that the "formality of a recommendation was required:

> THE COURT: Ladies and gentlemen, of the jury, it's now your duty to advise me as to what punishment should be imposed upon Mr. Marek for his crime of murder in the first degree.
>
> As you have been told the final decision as to what punishment shall be imposed is my responsibility. However, it's your duty to follow the law that will now be given to you by me and render to me an advisory sentence based on your determination as to whether

> sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.

(R. 1321)(emphasis added).

It was continually stressed that the jury's decision as to penalty was merely advisory, or a recommendation:

> Now, the sentence that you recommend to me must be based upon the facts as you find them from the evidence and the law. You should weigh the aggravating circumstances against the mitigating circumstances and your advisory sentence must be based on these considerations.

(R. 1325)(emphasis added).

None of the comments and instructions at issue herein accurately portrayed the jury's role in the Florida capital sentencing scheme. The sentencing jury does play a critical role in Florida, and its recommendation is not a nullity which the trial judge may regard or disregard as he sees fit. To the contrary, the jury's recommendation is entitled to great weight, and is entitled to the court's deference when there exists any rational basis supporting it. See Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975); Brookings v. State, 495 So. 2d 135 (Fla. 1986); Garcia v. State, 492 So.2d 360 (Fla. 1986); Wasko v. State, 505 So. 2d 1314 (Fla. 1987); Ferry v. State, 507 So.2d 1373 (Fla. 1987); Fead v. State, 512 So. 2d 176 (Fla. 1987). Thus any intimation that a capital sentencing judge has the sole responsibility for the imposition of sentence, or is in any way free to impose whatever sentence he or she sees fit, irrespective of the sentencing jury's own decision, is inaccurate and is a misstatement of the law.

The role of the Florida sentencing judge is not that of the "sole" or "ultimate" sentencer. Rather, it is to serve as "buffer where the jury allows emotion to override the duty of a deliberate determination" of the appropriate sentence. Cooper v. State, 336 So. 2d 1133, 1140 (Fla. 1976); see also, Adams v.

Wainwright, supra, 804 F.2d at 1529. While Florida requires the sentencing judge to independently weigh the aggravating and mitigating circumstances and render sentence, the jury's recommendation, which represents the judgment of the community, is entitled to great weight. McCampbell v. State, 421 So. 2d 1072, 1075 (Fla. 1982); Adams, 804 F.2d at 1529. The jury's sentencing verdict may be overturned by the judge only if the facts are "so clear and convincing that virtually no reasonable person could differ." Tedder, 322 So. 2d at 910. Mr. Marek's jury, however, was led to believe that its determination meant very little, as the judge was free to impose whatever sentence he wished.

The constitutional vice condemned by the Caldwell Court is not only the substantial unreliability that comments such as the ones at issue in Mr. Marek's case inject into the capital sentencing proceeding, but also the danger of bias in favor of the death penalty which such "state-induced suggestions that the sentencing jury may shift its sense of responsibility" creates. Id. at 2640. Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988)(en banc).

A jury which is unconvinced that death is the appropriate punishment might nevertheless vote to impose death as an expression of its "extreme disapproval of the defendant's acts" if it holds the mistaken belief that its deliberate error will be corrected by the 'ultimate' sentencer, and is thus more likely to impose death regardless of the presence of circumstances calling for a lesser sentence. See Caldwell, 105 S. Ct. at 2641. Moreover, a jury 'confronted with the truly awesome responsibility of decreeing death for a fellow human," McGautha v. California, 402 U.S. 183, (1971), might find a diminution of its responsibility for sentencing attractive. Caldwell, 105 S. Ct. at 2641-42. As the Caldwell Court explained:

> In evaluating the prejudicial effect of the prosecutor's argument, we must also recognize

> that the argument offers jurors a view of their role which might frequently be highly attractive. A capital sentencing jury is made up of individuals placed in a very unfamiliar situation and called on to make a very difficult and uncomfortable choice. They are confronted with evidence and argument on the issue of whether another should die, and they are asked to decide that issue on behalf of the community. Moreover, they are given only partial guidance as to how their judgment should be exercised, leaving them with substantial discretion. Given such a situation, the uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize its role. Indeed, one could easily imagine that in a case in which the jury is divided on the proper sentence, the presence of appellate review [or judge sentencing] could effectively be used as an argument for why those jurors who are reluctant to invoke the death sentence should nevertheless give in.

Id. at 2641-42 (emphasis supplied).

The comments and instructions here went a step further -- they were not isolated, as were those in Caldwell, but were heard by all of the jurors at each stage of the proceedings. In Mr. Marek's case the Court itself made some of the statements at issue, and the error is thus even more substantial:

> [B]ecause . . . the trial judge . . . made the misleading statements in this case, . . . the jury was even more likely to have . . . minimized its role than the jury in Caldwell.

Adams v. Wainwright, 804 F.2d at 1531. There can be no doubt that the comments and instructions diminished Mr. Marek's jury's view of its role. The judge told the jury that he did "not care if you come back with [death] because [he did] not have to listen to it, whatever it is." (R. 36-37).

Caldwell teaches that, given comments such as those provided by the judge and prosecutor to Mr. Marek's capital jury, the State must demonstrate that the statements at issue had "no effect" on the jury's sentencing verdict. Id. at 2646. The State simply cannot carry that burden in this case. Here, as in Adams, the significance of the jury's role was minimized, and the

comments at issue thus "created a danger of bias in favor of the death penalty." Id. at 1532. Mr. Marek's rights under the eighth and fourteenth amendments were violated; and this Court must now correct these errors and grant Mr. Marek habeas relief.

The eighth amendment errors in this case denied Mr. Marek his rights to an individualized and reliable capital sentencing determination. Under no construction can it be said that the statements and instructions at issue had "no effect" on the jury's sentencing verdict. Caldwell, 105 S. Ct. at 2646; Adams v. Wainwright, 804 F.2d at 1531; Mann v. Dugger, supra. The comments and instructions assuredly had an effect. Caldwell, supra; Adams, supra; Dutton v. Brown, 812 F.2d 593 (10th Cir. 1987)(en banc).

This issue was not raised in Mr. Marek's appeal. No tactical decision can be ascribed to counsel's failure to urge the claim. Neither trial counsel nor appellate counsel had voir dire transcribed and submitted as part of the record on appeal. This was unreasonable performance. Counsel's failure, a failure which could not but have been based upon ignorance of the law, deprived Mr. Marek of the appellate reversal to which he was constitutionally entitled. See Wilson v. Wainwright, supra, 474 So. 2d at 1164-65; Matire, supra.

Mr. Marek's sentence of death was imposed in violation of the sixth, eighth and fourteenth amendments. That error must be corrected now.

## CLAIM XI

MR. MAREK'S SENTENCE OF DEATH CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT, AND VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS UNDER ENMUND V. FLORIDA BECAUSE IT CANNOT BE ESTABLISHED THAT HE KILLED, ATTEMPTED TO KILL OR INTENDED THAT KILLING TAKE PLACE OR THAT LETHAL FORCE WOULD BE EMPLOYED.

In Enmund v. Florida, 458 U.S. 782, 102 S. Ct. 3368, 73 L.Ed.2d 1140 (1982), the United States Supreme Court recognized

that the Cruel and Unusual Punishments Clause of the Eighth Amendment requires that a defendant's criminal culpability be limited to his participation in a crime, and his punishment be tailored to his personal responsibility and moral guilt. 102. S. Ct. at 3378. Thus, the death penalty may not be imposed in the absence of proof that a defendant killed or attempted to kill or contemplated that lethal force would be used. This limitation on capital punishment was expanded somewhat by Tison v. Arizona, 107 S. Ct. 1676 (1987), to exclude defendants whose participation in a crime is major rather than minor, and where "the record would support a finding of the culpable mental state of reckless indifference to human life. 107 S. Ct. at 1684. A finding in this regard may be made by the finder of fact, the trial court, or by an appellate court. Cabana v. Bullock, 106 S. Ct. 689 (1986).

The two factors required by Tison v. Arizona, supra, 1) a person must be found to have a reckless disregard to life and 2) the person must be found to have been a major participant in the underlying felony, cannot both be found in Mr. Marek's case. In order for the death penalty to prevail, both must be met. The evidence presented in Mr. Marek's case sheds absolutely no light on whether or not he evidenced a reckless disregard for human life. The fact that he was found by the jury to have been a major participant in the underlying felonies does not end the inquiry. There is absolutely no evidence that Mr. Marek ever anticipated, appreciated or intended that there be a killing.

Mr. Marek's participation in a kidnapping does not make him eligible for the death penalty. Even had he been convicted of sexual battery, which he was not, he would not be eligible for capital punishment. Coker v. Georgia, 433 U.S. 584, 97 S. Ct. 2861, 53 L.Ed.2d 982 (1972). Likewise, the jury's finding of guilt of first degree murder does not equal a finding required under Enmund or Tison because they were instructed on both felony

murder and premeditated murder, in addition to being instructed on the law of principals. Under their instructions, the jury easily could have found Mr. Marek guilty of first-degree murder for merely being an accomplice to the kidnapping and the sexual battery. Enmund and Tison require more.

In Tison the United States Supreme Court remanded to the Arizona Supreme Court, which had upheld the Tisons' death sentences, to determine whether they acted with reckless disregard for life and whether they were major participants in the underlying felony. Subsequently, the Arizona Supreme Court ordered the Tisons to be resentenced. The facts found by the state high court in Tison went beyond those found in Mr. Marek's case. Yet, under the Eighth Amendment, those findings were not enough. Briefly stated, the Tison brothers gathered a small arsenal of weapons in order to "break" their father and another out of prison. While on the run the four kidnapped a family, then drove them to the desert where the elder Tison shot and killed the family. The Arizona Supreme Court, relying upon Enmund, first sustained the death sentences, finding:

a. That because Tison knew that the person he broke out of prison was serving time for the killing of a guard, he "could anticipate the use of lethal force during this attempt to flee confinement." State v. Tison, 690 P.2d 747, 749 (Ariz. 1987);

b. That Tison assisted in abducting the victims by arming himself, hiding and escorting the victims to the murder site, and that he heard the victim beg "Jesus, don't kill me," heard the shooter say he was "thinking about it," and saw the shooter "brutally murder the four captives with repeated blasts from their shotguns." Tison, 107 S.Ct. at 1679; Tison, 690 P.2d at 749;

c. Tison did not make "an effort to help the victims," Tison, 107 S.Ct. at 1679, and, "[a]fter the killings, petitioner did nothing to disassociate himself [from his co-defendants], but

instead used the victims' car to continue on the joint venture . . ." Tison, 690 P.2d at 749; and,

d. Tison "intended to kill" because "petitioner's participation up to the moment of the firing of the fatal shots was substantially the same as [the shooters]." Then, he "did nothing to interfere with the murders, and after the murders even continued on the joint venture." Id.

As previously mentioned, the Tison state court analysis was reversed. There, the state courts had "applied an erroneous standard in making the findings required by Enmund v. Florida" Tison, 1107 S. Ct. at 1678. After the United States Supreme Court spoke, Mr. Tison was returned to the Arizona Supreme Court, which sent him to the trial court, where he is now in resentencing proceedings, "at which the parties may present evidence and oral arguments relevant solely to the issue of whether, in participating in the murders for which [he was] convicted, Tison exhibited reckless indifference to human life." Despite the findings already made, the Constitution was not satisfied in Tison's case. The United States Supreme Court remanded despite finding that Tison's "participation in the crime was anything but minor," and that Tison "subjectively appreciated that [his] acts were likely to result in the taking of innocent life." Tison, 107 S. Ct. at 1685; see also id., 107 S. Ct. at 1688. The Court concluded:

> Only a small minority of those jurisdictions imposing capital punishment for felony murder have rejected the possibility of a capital sentence absent an intent to kill and we do not find this minority position constitutionally required. We will not attempt to precisely delineate the particular types of conduct and states of mind warranting imposition of the death penalty here. Rather, we simply hold that major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the Enmund culpability requirement. The Arizona courts have clearly found that the former exists; we now vacate the judgments below and remand for determination of the latter in further proceedings not inconsistent with this

opinion. Cabana v. Bullock, 474 U.S. ___ (1986).

107 S. Ct. at 1688.

In Mr. Marek's case, the trial court attempted to make findings of fact sufficient under Enmund and Tison. In his sentencing order, it found:

> The evidence dictates that either Wigley or Marek strangled the victim to death. Wigley's confession indicates that Marek choked the life from the victim, after he and Marek repeatedly raped her 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. Wigley was convicted of Murder in the First Degree, Kidnapping, Burglary and Sexual Battery.
>
> To the benefit of Marek this court will assume for a moment that Marek's accomplice, Wigley, strangled the victim to death. Could the jury have reasonably inferred from the evidence that Marek, by his conduct intended or contemplated that lethal force might be used by Wigley or that Wigley might take the victim's life?
>
> This court feels that not only could the jury have answered that question in the affirmative, but evidenced by it's solid vote of ten (10) to two (2) for the imposition of the death penalty they did so find.
>
> A reasonable interpretation of the evidence has both Marek and Wigley kidnapping the victim for the purpose of sexual battery. The victim was a healthy, well developed woman who was dragged up the roof of the lifeguard shack and into the tower. It necessarily took both Marek and Wigley to get her up there as she was not a willing participant. Inside the tower she was stripped naked, battered and her pubic hair was burned. Unless a deadly weapon was used there is no reason to believe that the victim would have stood still for any abuse unless both Marek and Wigley forced her. It is reasonable to assume that the victim would have fought and scratched while being strangled since she would be conscious for approximately thirty (30) seconds. Neither man had any bruises or scratches on them which again points to the joint participation of both men to effectuate the strangulation. If Wigley held a gun on the victim, then Marek knew that Wigley intended or might use lethal force at any time.
>
> The evidence indicates that both men acted in concert from beginning to end. Marek could have prevented any and all the

> abuses that the victim sustained, but instead inflicted them upon her himself and assisted Wigley to abuse her and eliminate her as a witness. There is no question that a view of the totality of the circumstances leads to the conclusion that Marek intended or contemplated that lethal force might be used or that a life might be taken.

(R. 1471-2).

However, this purported analysis is even more erroneous than that reversed in Tison. The sole finding of fact is that Mr. Marek was a major participant in the kidnapping and sexual assault. This even flies in the face of the jury's acquittal on the sexual assault. Moreover, the court's finding of sufficient evidence to support the verdict did not comport with Cabana, supra.

After sentencing, defense counsel filed a Motion for New Trial (R. 1477-80). This included, as grounds for new trial,

> That the court improperly sentenced the defendant to death, on Count I, where there was no proof that the defendant either caused the death of the victim or contemplated the use of deadly force against the victim, and rather, there was only circumstantial evidence of the defendant's involvement in any of the facts or actions which led to the victims death. As a result, where there was a total reliance on circumstantial [sic] evidence to attempt to prove the defendant's culpability in the death of the victim, and the evidence is susceptible of two reasonable hypothesis, one of which indicates the defendant had no involvement in the death of the victim, nor contemplated the use of deadly force against the victim, the trial Court improperly applied the law, and violated the principles enunciated in Enmund v. Florida, 458 U.S. 782 (1982).

(R. 1480).

This Court, based upon Tison, should vacate the death sentence in this case. Tison requires findings, beyond a reasonable doubt, that a person have 1) major participation in the felony committed, and 2) reckless indifference to human life. Here, "major participation" is the only fact found. While "the possibility of bloodshed is inherent in the commission of any violent felony and . . . is . . . foreseen," Tison, 107 S. Ct. at

1684, sexual battery is nevertheless an offense for which the death penalty is plainly excessive, Coker, supra, as are kidnapping and assault. In short, the two Tison findings must be made. In Tison, "the standard applied by the Arizona Supreme Court was not a classic intent one, but rather whether a defendant contemplated, anticipated, or intended that lethal force would or might be used. As we have shown . . . this standard amounted to little more than a requirement that killing be foreseeable." Tison, 107 S. Ct. at 1687 (emphasis in original). Moreover under Cabana, a sufficiency of the evidence finding is likewise inadequate. Under Tison and Cabana, relief is proper here because no finding of reckless indifference to human life was made.

This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Marek's death sentence. This Court has not hesitated in the past to exercise its inherent jurisdiction to remedy errors which undermine confidence in the fairness and correctness of capital proceedings, see Wilson v. Wainwright, 474 So. 2d 1163 (Fla. 1985), and it should now correct this error.

Moreover, the claim is now properly brought pursuant to the Court's habeas corpus authority for it involves substantial and prejudicially ineffective assistance of counsel on direct appeal. This issue involved a classic violation of longstanding principles of Florida law. See, Enmund, supra. It virtually "leaped out upon even a casual reading of transcript." Matire v. Wainwright, 811 F.2d 1430, 1438 (11th Cir. 1987). This clear claim of per se error required no elaborate presentation -- counsel only had to direct this Court to the issue. The Court would have done the rest, based on long-settled Florida and federal constitutional standards.

No tactical decision can be ascribed to counsel's failure to urge the claim. No procedural bar precluded review of this

issue. See Johnson v. Wainwright, supra, 498 So. 2d 938. However, counsel's failure, a failure which could not but have been based upon ignorance of the law, deprived Mr. Marek of the appellate reversal to which he was constitutionally entitled. See Wilson v. Wainwright, supra, 474 So. 2d at 1164-65; Matire, supra.

Mr. Marek's sentence of death was imposed in violation of the sixth, eighth and fourteenth amendments. That error must be corrected now.

## CLAIM XII

MR. MAREK WAS DENIED HIS RIGHTS TO DUE PROCESS AND A FAIR TRIAL BY IMPROPER PROSECUTORIAL COMMENTS DURING THE OPENING AND CLOSING ARGUMENTS IN BOTH THE GUILT AND PENALTY PHASES.

In opening argument at the start of trial the prosecutor began by giving his personal promise to the jury that they would not have any doubt after the trial was over:

> 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 promise to you that at the conclusion of this case you are not going to have any reasonable doubt. In fact -- ."

(R. 434)(emphasis added). An objection was made to this comment, and overruled. Id.

In closing argument in the guilt phase, the prosecutor began by misstating the law in which the jury was to rely as to actions of principals:

> Now, what that means then, it means that the defendant is guilty of murder in the first degree by premeditation if you find anyone of the following situations:
>
> If you find the defendant himself took a ligature or his hands and placed them about the neck of Adella Marie Simmons and strangled her to death. Certainly there can be no question but that the doing of that act was premeditated. If you find that the defendant did it and

> strangled Adella Marie Simmons then he is guilty of murder in the first degree by premeditation. Or, under the principals instruction even if he didn't do it, if Wigley did it, but he aided or assisted Wigley in doing it in any way, if he opened the window to get Wigley inside knowing that Wigley was going to do the killing, if he aided or assisted Wigley in any way knowing what the result would be. It makes no difference who did the killing each is equally guilty."

(R. 1130-31). At that point defense counsel did object to a misstatement of law, and argued, "If he is going to quote the instruction, he should quote the entire instruction; not start to boil it down to what he wants." (R. 1131). The trial court overruled the objection and stated that he was going to allow the attorneys to argue the law, but that if their version of the law was different than his, the jury should follow the court's instructions (R. 1131-32).

The State went on to misstate the law another time:

> Well, I ask when you consider it, as the Court gives you his instructions, and he will give you instructions on the case. Among other things, one of the instructions that he will give you will be this: That a reasonable doubt is not a possible doubt, a speculative, imaginary or forced doubt. Such a doubt must not influence you to return a verdict of not guilty if you have an abiding conviction of guilt.

(R. 1141-42). Another objection was interposed at that point, and the court again told the jury that he would be giving complete instructions at the end of arguments (R. 1142). In neither instance did defense counsel request the court to give the instructions immediately to clear up the misapprehensions caused by the prosecutor's partial and selective statements of the law.

Finally in closing argument in the guilt phase, the prosecutor turned his attention to the character of Mr. Marek:

> Certainly, it's a person that's not walking the same path that everybody else walks. It's the kind of a person that certainly isn't going to have any remorse or any conscience or any feelings. That would

> be able to come into contact with a police officer within minutes as the body is still cooling up in the lifeguard shack and be able to joke and laugh, tell black jokes to the black officer. Certainly not someone that you would expect to have a conscience or feel particularly sorry about what he did.
>
> Someone who could lie to the police that he is going to meet some college friends on the beach. . . .

(R. 1151-52). No objection was made to this comment.

Then, in closing argument during the penalty phase, the prosecutor argued as follows:

> Where is there evidence in this case of intoxication? And it comes from only one place. <u>That's from the defendant who also stood up on the stand and said he didn't do it. That he wasn't involved in it and lied to you one lie after another</u>.

(R. 1305)(emphasis added).

* * *

> Where is the evidence from Vincent Thompson, somebody who saw him on the beach for approximately 20 minutes and said he wasn't intoxicated? There's no evidence of it. The only evidence is from the defendant. <u>A man that by your very verdict you have said committed perjury because that's what he did on the stand. That's not applicable</u>.

(R. 1305-06)(emphasis added).

> Or get up on the stand as he did here and smile to you and talk to you about Texas hospitality and <u>lie through his teeth</u> on everything he said.

(R. 1308)(emphasis added).

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

(R. 1307). And:

> Listen to Mr. Moldof, ladies and gentlemen. I ask you to consider one thing very, very carefully. There's one person in this courtroom that without question, with every fiber of his body believes in the death penalty. That person is John Richard Marek. He believes in its because that's exactly what he did to Adella Marie Simmons. He tried her, convicted her and he executed her in that shack. Thank you.

(R. 1308-09). No objections were made to these comments.

Recently the United States Supreme Court ruled that due process and the right to a fair trial may be breached when a prosecutor engages in improper comment. United States v. Young, 470 U.S. 1, 7-8 (1985). The Court noted:

> Nearly a half century ago this Court counseled prosecutors "to refrain from improper methods calculated to produce a wrongful conviction . . ." Berger v. United States, 295 U.S. 78, 88 (1935). The court made clear, however, that the adversary system permits the prosecutor to "prosecute with earnestness and vigor." Ibid. In other words, "while he may strike hard blows, he is not at liberty to strike foul ones." Ibid.
>
> 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. Accordingly, the legal profession, through its Codes of Professional Responsibility, and the federal courts, have tried to police prosecutorial misconduct. In complementing these efforts, the American Bar Association's Standing Committee on Standards for Criminal Justice has promulgated useful guidelines, one of which states that:
>
> '[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).

In Young the Court noted that the prosecutor may breach the constitutional guarantee when he implies he had more information than had been presented to the jury.

> "The prosecutor's vouching for the credibility of witnesses and expressing his personal opinion concerning the guilt of the accused pose two dangers: such comments convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury; and the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the government's judgment rather than its own view of the evidence. See Berger v. United States, 295 U.S. at 88-89." 470 U.S. at pp. 18-19.

Several Florida District Courts of Appeal have addressed the State's ability to aggravate or enhance criminal penalties because the defendant has "lied". Without exception, those courts have agreed that a trial judge may not consider a defendant's false testimony at trial in the sentencing decision. In Beauvais v. State, 475 So. 2d 1342, 1343 (Fla. 3d DCA 1985), the Court wrote:

> The aggravation of Mr. Beauvais' sentence under the guidelines constitutes punishment for perjury. Enhancement of the defendant's sentence impermissibly chills the defendant's assertion of the fifth amendment right not to plead guilty and exercise of the sixth amendment right to trial. It is a well-established rule that any judicially imposed penalty which discourages assertion of the fifth amendment right not to plead guilty and deters exercise of the sixth amendment right to demand a trial is patently unconstitutional. United States v. Jackson, 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968); Gillman v. State, 373 So.2d 935 (Fla. 2d DCA 1979), quashed on other grounds, 390 So.2d 62 (Fla. 1980).

Additional opinions on the matter from other DCA's include: Dixon v. State, 513 So. 2d 1378, 1379 (Fla. 3 DCA 1987)(court's belief that defendant lied on the witness stand is an invalid basis for enhancing sentence and departing from the standard sentencing guidelines); Quinones v. State, 510 So. 2d 348, 349 (Fla. 2 DCA 1987)(lying to probation officer is impermissible reason to depart from the sentencing guidelines); Anderson v. State, 503 So. 2d 388 (Fla. 2 DCA 1987)(defendant received an illegal sentence when she pleaded nolo contendre and then lied about her prior convictions after being warned by trial judge that if she lied he would depart from the sentencing guidelines. Untruthfulness cannot be a condition for departure from statutory sentencing guidelines); Washington v. State, 500 So. 2d 316, 317 (Fla. 2 DCA 1986)(the fact defendant committed perjury is an invalid basis for imposing a sentence higher than that prescribed by sentencing guidelines); Peters v. State, 485 So. 2d 30, 31 (Fla. 3 DCA 1986)(resentencing ordered when trial court relied on

the constitutionally impermissible factor that defendant declined to recant his trial testimony. The court penalized the defendant for exercising his right to testify in his own behalf); Ricardo v. State, 481 So. 2d 1296, 1297-98 (Fla. 3 DCA 1986)(court's disblief of defendant's testimony is an impermissible ground for departing from the sentencing guidelines); Bowdoin v. State, 596 So. 2d 596,597 (Fla. 4 DCA 1985)(rejection by the jury of alibi defense is not tantamount to proof that defendant lied and court may not enhance sentence because he fails to show remorse and maintains his innocence); Hubler v. State, 458 So. 2d 350, 353 (Fla. 1 DCA 1984)(improper for trial court to enhance the sentence based on its personal belief that defendant had suborned perjury when the defendant had not been charged or convicted of inducing witnesses to testify falsely). Cf. North Carolina v. Pearce, 395 U.S. 711, 726 (1969)(imposition of a greater penalty on defendant upon retrial after he had chosen to exercise his right to appeal his conviction is not barred by double jeopardy but is subject to due process restrictions; i.e., affirmative showing by judge to justify harsher penalty). See also Smith v. Wainwright, 664 F.2d 1194, 1196 (11th Cir. 1981)("the Constitution forbids the exaction of a penalty for a defendant's unsuccessful choice to stand trial" and to testify at his trial); United States v. Freeman, 514 F.2d 1314, 1318-1319 (D.C. Cir. 1975)(inferences of guilt that government sought to draw from defendant's taking the stand lacked probative value and only served to mislead the jury).

The prosecutor's argument portraying Mr. Marek as a perjurer amounted to blatant misconduct. Capital cases carry their own governing constitutional principles that distinguish them from noncapital cases, including the greater need for reliability, the need for specific and detailed channeling of sentencer discretion, and the need for individualized sentencing. Gardner v. Florida, 430 U.S. 349, 358 (1977). Therefore, just as a

defendant's exercise of constitutional rights may not be used to obtain his conviction, even more so may the exercise of those rights not be used to take his life. See, e.g., Estelle v. Smith, 451 U.S. 454, 462-463 (1981)("Just as the Fifth Amendment prevents a criminal defendant from being made 'the deluded instrument' of his own conviction, . . . it protects him as well from being made the 'deluded instrument' of his own execution. . . . We can discern no basis to distinguish between the guilt and penalty phase . . . so far as the protection of the Fifth Amendment is concerned.").

Here the prosecutor conveyed incomplete statements of the law and misled the jury as to the correct law to be applied to Mr. Marek's case. He also conveyed his personal opinion of the case to the jury. Here the line was crossed. Mr. Marek was denied his rights under the sixth, eighth, and fourteenth amendments to the United States Constitution. Given the fundamental violation of Mr. Marek's constitutional rights, it simply cannot be said that the proceedings resulting in Mr. Marek's conviction and sentence of death have comported with fundamental due process, equal protection, and eighth amendment prerequisites. See, Beck v. Alabama, 447 U.S. 625 (1980), Gardner v. Florida, 430 U.S. 349 (1977).

Moreover, the prosecutor's comments and argument "serve[d] to pervert the jury's deliberations concerning the ultimate question whether in fact [John Marek was guilty of murder]." Smith v. Murray, ___ U.S. ___, 106 S. Ct. 2661, 2668 (1986)(emphasis added). "'In appropriate cases the principle[] of . . . finality. . .' must yield to the imperative of correcting a fundamentally unjust incarceration.'" Murray v. Carrier, 106 S. Ct. 2639, 2654 (19860, quoting Engle v. Isaac, 456 U.S. 107, 135 (1982).

This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Marek's

death sentence. This Court has not hesitated in the past to exercise its inherent jurisdiction to remedy errors which undermine confidence in the fairness and correctness of capital proceedings, see Wilson v. Wainwright, 474 So. 2d 1163 (Fla. 1985), and it should now correct this error.

Moreover, the claim is now properly brought pursuant to the Court's habeas corpus authority for it involves substantial and prejudicially ineffective assistance of counsel on direct appeal. This issue involved a classic violation of longstanding principles of constitutional law. See, Young, supra; Berger v. United States, 295 U.S. 78 (1935); Beauvais, supra. It virtually "leaped out upon even a casual reading of transcript." Matire v. Wainwright, 811 F.2d 1430, 1438 (11th Cir. 1987). This clear claim of per se error required no elaborate presentation -- counsel only had to direct this Court to the issue. The court would have done the rest, based on long-settled Florida and federal constitutional standards.

No tactical decision can be ascribed to counsel's failure to urge the claim. No procedural bar precluded review of this issue. See Johnson v. Wainwright, supra, 498 So. 2d 938. However, counsel's failure, a failure which could not but have been based upon ignorance of the law, deprived Mr. Marek of the appellate reversal to which he was constitutionally entitled. See Wilson v. Wainwright, supra, 474 So. 2d at 1164-65; Matire, supra.

Mr. Marek's conviction and sentence of death was imposed in violation of the sixth, eighth and fourteenth amendments. That error must be corrected now.

## CLAIM XIII

MR. MAREK'S FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED BY THE TRIAL COURT'S REFUSAL TO PROVIDE THE JURY WITH A CIRCUMSTANTIAL EVIDENCE INSTRUCTION.

The entire State's case against Mr. Marek was based on

circumstantial evidence. The only direct evidence connected Mr. Marek to the scene of the crime. But there was absolutely no direct evidence that Mr. Marek did anything to the victim other than offer her a ride to a phone booth. Mr. Marek's trial attorney requested that the Court instruct the jury on "circumstantial evidence" (R. 1075-79). Trial counsel argued that the case was "riddled with circumstantial evidence" (R. 1075), and that the "entire case is leapfrogged up one circumstance on another." (R. 1076). Appellate counsel had also argued that "[t]his is a case of circumstantial evidence at its worst. It is built presumption upon presumption." The trial court refused to give the requested instruction (R. 1125, 1265).

A trial judge has the responsibility to correctly charge the jury on the applicable law. Under Florida law, if the defendant's request (i) clearly suggests to the trial judge the need for an instruction, (ii) on an issue that is critical to the defense, and (iii) that issue is not covered by standard jury instructions, a proper instruction should be given. See generally, Smith v. State, 424 So. 2d 726, 731-32 (Fla. 1982); Wilson v. State, 344 So. 2d 1315, 1317 (Fla. 2d DCA 1977); Bacon v. State, 346 So. 2d 629, 631 (Fla. 2d DCA 1977); Williams v. State, 366 So. 2d 817, 819 (Fla. 3d DCA 1979).

There can be no doubt that in a case such as this, where the state rests a substantial portion of its case on circumstantial evidence, a trial court's refusal to provide any instruction on how the jury is to consider, review, weigh, and use such evidence in its deliberations is error. Neither can there be any doubt that such error is one of constitutional magnitude. The failure to provide any instruction on circumstantial evidence denied Mr. Marek the right to have the jury adequately determine whether the State had proved his guilt beyond a reasonable doubt. See In re Winship, 397 U.S. 358 (1970); Cool v. United States, 409 U.S. 98, 104 (1972). The court's refusal may well have enhanced the risk

of an unwarranted conviction and, where a defendant's life is at stake, such a risk cannot be tolerated. Beck v. Alabama, 447 U.S. 625, 637 (1980). Moreover, the trial court's failure to instruct created a "substantial risk" that the jury was denied the opportunity to entertain a reasonable doubt, Clark v. Tago, 676 F.2d 1099, 1105 (6th Cir. 1982), and that the jury may never have adequately and fairly examined the evidence concerning the elements of the crimes charged. See Connecticut v. Johnson, 460 U.S. 73, 103 S. Ct. 969, 978 (1983); see also Mullaney v. Wilbur, 421 U.S. 684 (1975). Finally, the trial court's refusal may well have "serve[d] to pervert the jury's deliberations concerning the ultimate question whether in fact [John Marek was guilty of murder]." Smith v. Murray, ___ U.S. ___, 106 S. Ct. 2661, 2668 (1986)(emphasis supplied).

An instruction was necessary. Some instruction on circumstantial evidence was warranted. None was given. As a result the jury was inadequately instructed on how to consider, review, weigh and use circumstantial evidence.

This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Marek's death sentence. This Court has not hesitated in the past to exercise its inherent jurisdiction to remedy errors which undermine confidence in the fairness and correctness of capital proceedings, see Wilson v. Wainwright, 474 So. 2d 1163 (Fla. 1985), and it should now correct this error.

Moreover, the claim is now properly brought pursuant to the Court's habeas corpus authority for it involves substantial and prejudicially ineffective assistance of counsel on direct appeal. This issue involved a classic violation of longstanding principles of Florida law. See, Mullaney, supra; Winship, supra. It virtually "leaped out upon even a casual reading of transcript." Matire v. Wainwright, 811 F.2d 1430, 1438 (11th Cir. 1987). This clear claim of per se error required no

elaborate presentation -- counsel only had to direct this Court to the issue. The court would have done the rest, based on long-settled Florida and federal constitutional standards.

No tactical decision can be ascribed to counsel's failure to urge the claim. No procedural bar precluded review of this issue. See Johnson v. Wainwright, supra, 498 So. 2d 938. However, counsel's failure, a failure which could not but have been based upon ignorance of the law, deprived Mr. Marek of the appellate reversal to which he was constitutionally entitled. See Wilson v. Wainwright, supra, 474 So. 2d at 1164-65; Matire, supra.

Mr. Marek's conviction and sentence of death was imposed in violation of the sixth, eighth and fourteenth amendments. That error must be corrected now.

## CLAIM XIV

### THE PROSECUTOR'S SYSTEMATIC EXCLUSION OF NON-WITHERSPOON-EXCLUDABLES BY USE OF PEREMPTORY CHALLENGES VIOLATED MR. MAREK'S EIGHTH AMENDMENT RIGHT TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT.

The United States Supreme Court has said that a capital defendant's sixth and fourteenth amendment rights to an impartial jury are violated by the exclusion of venire members who voice general objections to the death penalty. Witherspoon v. State of Illinois, 391 U.S. 510 (1968). The exception to the general rule in Witherspoon is that class of prospective jurors whose views on the death penalty would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." Wainwright v. Witt, 469 U.S. 412, 424 (1985). In other words, prospective jurors who could never, under any circumstances, consider imposing the death penalty can be properly excluded from a capital trial. These people are referred to as Witherspoon-excludables.

The question presented in Mr. Marek's case does not involve Witherspoon-excludables, but rather prospective jurors who indicated some reservation against the death penalty, but were willing to consider imposing the death penalty in some circumstances, and who thus could not be excluded under Witherspoon and its progeny. These venire members were not excused for cause by the court. However, they were systematically excluded from sitting on Mr. Marek's capital trial by the State's use of its peremptory challenges.

The voir dire began with examination by the trial judge. He questioned the prospective jurors about general subjects, including the death penalty. One of the prospective jurors, Mr. Manta, responded as follows:

> MR. MANTA: Yes. I think I'd feel kind of a little funny about that, too. It sort of goes against my conscience, the thought of sending somebody to their death.
>
> THE COURT: Well, let's take it one step at a time. Let's say that during the trial you listened to the law. You listened to the arguments of the attorneys. After hearing all of that you go back to the jury room to deliberate your verdict and at the time you are convinced that the State proved the case beyond all reasonable doubt and that the defendant is guilty of murder in the first degree.
>
> My question to you is would you come back with a verdict of murder in the first degree?
>
> * * *
>
> MR. MANTA: Yes, I'd have to.
>
> THE COURT: Now, let's take the second step. If you did that, and the defendant was found guilty of murder in the first degree, you would be sent back again with the same jury to decide whether or not you feel the defendant should be put to death or whether he should receive life in prison. It's strictly your feeling under the circumstances and to give me what you feel is advice.
>
> I don't have to accept your advice, no matter what it is but it's just for me to listen to your advice. I don't care. No one here cares if your advice to me is he should not be put to death, that he should receive

life imprisonment. I don't care what it is, okay, as far as what your conscience tells you.

Certainly, I'll strongly consider your advice but whatever it is I want no part of your thinking process. Do you understand that?

MR. MANTA: Right.

THE COURT: What I want to know is would you at least think about the death penalty?

MR. MANTA: I would think about it.

THE COURT: Do you ever think - Have you ever heard of a case where you think the death penalty was appropriate?

MR. MANTA: Yes.

THE COURT: Give me an idea of what you think is good case for that?

MR. MANTA: I remember back quite a long ways but [sic] Manville or something --

THE COURT: Charles Manson?

MR. MANTA: Right.

THE COURT: You thought he should have got the death penalty?

MR. MANTA: Right.

THE COURT: So at least there are appropriate cases that you would consider --

MR. MANTA: Yes.

THE COURT: The death penalty should be imposed? Well, I think you'd be fine.

(R. 33-6)(emphasis added).

When the judge completed the initial questioning of the panel, the prosecutor began his voir dire. He also questioned the jurors about their opinions of capital punishment.

MRS. PLUEMER: I personally am against capital punishment.

MR. CARNEY: I can accept that, being against capital punishment. Nevertheless, the Court will tell you in Florida it's a possibility and what I'm interested in is a jury panel that will consider all possibilities. Obviously, I don't want you to commit one way or the other. You couldn't now [sic] as to what you would do but would be able to consider all possibilities.

Obviously, I don't want you to commit one way or the other. You couldn't now [sic] as to what you would do but would be able to consider all possibilities realistically if you are acceptable as a juror? Could you do that?

MRS. PLUEMER: Yes.

(R. 277-8)(emphasis added). Earlier in voir dire Mrs. Pluemer had indicated that if she were biased, it was in favor of the prosecution.

THE COURT: Okay. Well that sounds like this case; that the State is attempting to show just about that. The fact that you read something about that, would that affect you in deciding this case if you are chosen as a juror; the fact that you read about it?

MS. PLUEMER: I would have to say yes.

THE COURT: Why?

MS. PLUEMER: Well, I don't know. I just feel that if I didn't. I have my own opinion about the case. I mean. I'm obviously going to side with the victim.

I'm not sure that if selected as a juror I could really give a honest verdict.

THE COURT: Well, you say you are going to side with the victim. Well, everybody feels bad for the victim.

MS. PLUEMER: Well, I'm not sure.

THE COURT: Everybody would like to see the perpetrator in court and convicted and probably sent to prison or whatever but do you have any preconceived notions that Mr. Marek did this?

MS. PLUEMER: No, not that.

THE COURT: From the article?

MS. PLUEMER: No.

THE COURT: Do you think that looking at him over there, do you think you could presume him to be innocent at this time?

MS. PLUEMER: No, not at this time. No.

THE COURT: You can't presume him innocent?

MS. PLUEMER: Yes, I can presume him innocent. I'm sorry. I misunderstood your question.

(R. 188-9)(emphasis added). Mrs. Pluemer went on to say that she

could make her decision based solely on the facts presented in court (R. 191).

There was no reason for the State to peremptorily challenge Mrs. Pluemer, or Mr. Manta. They were the sole prospective jurors to acknowledge that they opposed the death penalty, and they were challenged. The State even challenged Mr. Scherer, whose response to questioning about capital punishment deviated slightly from the other jurors:

> [BY MR. CARNEY:] Mrs. Scribner, what are your feelings about capital punishment? Do you feel it's appropriate in certain circumstances, or never, always?
>
> MRS. SCRIBNER: In certain circumstances.
>
> MR. CARNEY: Mr. Greenberg, how about you? What are your feelings about it?
>
> MR. GREENBERG: Certain circumstances.
>
> MR. CARNEY: Ms. Gutman?
>
> MS. GUTMAN: Certain circumstances.
>
> MR. CARNEY: Mr. Berg?
>
> MR. BERG: I agree.
>
> MR. CARNEY: Ms. Pectol?
>
> MS. PECTOL: I agree.
>
> MR. CARNEY: Mr. Scherer?
>
> MR. SCHERER: I'll keep an an open mind.
>
> MR. CARNEY: I was doing well. Mr. Scheidt?
>
> MR. SCHEIDT: Certain circumstances.

(R. 235-6)(emphasis added).

The State exercised eight (8) out of ten (10) possible peremptory challenges. Three (3) of these were against non-Witherspoon-excludables. They were also the only three persons who indicated any reluctance with regard to capital punishment. (There were three (3) other members of the jury panel who were excused by the court because they would not under any

circumstances consider the death penalty (See R. 50 (Mrs. Young); R. 47 (Mrs. Grosel); R. 321 (Mrs. Barr)).

The State thus succeeded in excluding all six (6) persons from the venire who had reservations about death. Three (3) of these were not eligible for excusal for cause, but were systematically removed through peremptory challenges. This was in violation of John Marek's fifth, sixth, eighth and fourteenth amendment rights.

In Witherspoon, supra, the United States Supreme Court stated:

> If the State had excluded only those prospective jurors who stated in advance of trial that they would not even consider returning a verdict of death, it could argue that the resulting jury was simply "neutral" with respect to penalty. But when it swept from the jury all who expressed conscientious or religious scruples against capital punishment and all who opposed it in principle, the State crossed the line of neutrality. In its quest for a jury capable of imposing the death penalty, the State produced a jury uncommonly willing to condemn a man to die.

391 U.S. at 520-1 (footnotes omitted)(emphasis added).

The State did, in Mr. Marek's case, exactly what Witherspoon forbid: it "produced a jury uncommonly willing to condemn a man to die." This was achieved through the excusal for cause of those prospective jurors who were actually Witherspoon-excludables (R. 47) and through the peremptory challenge of all those remaining who expressed any opposition whatsoever to the death penalty (R. 372, 376).

> The peremptory challenge is not exempt from scrutiny under the Sixth Amendment. "The prosecutor's historical privilege of peremptory challenge free of judicial control," Batson v. Kentucky, 476 U.S. 79, 91 (1987), is an important right for the state as well as the accused, but it is certainly no more important than the accused's Sixth and Fourteenth Amendment rights to be tried by an impartial jury. The Supreme Court has repeatedly recognized, and recently reiterated, that "peremptory challenges are a creature of statute and are not required by the constitution." [Emphasis added.} Ross v. Oklahoma, 56 U.S.L.W. at 4678. Where a

constitutional right comes into conflict with the statutory right of peremptory challenges the constitutional right prevails. See Gary v. Mississippi, 55 U.S.L.W. at 4642.

The prosecution's statutory right to exercise peremptory challenges gave way to the constitution in Batson v. Kentucky, 476 U.S. 79 (1986). In Batson, the prosecutor used his peremptory challenges to strike all four black persons on the venire. The Supreme Court held that "[a]lthough a prosecutor ordinarily is entitled to exercise peremptory challenges for any reason, as long as that reason is related to his view concerning the outcome of the case to be tried (citation omitted), the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." Batson at 89. "The implication of the State's position [in this case] is that it is free to use its peremptory challenges to violate any constitutional command other than the Equal protection [sic] Clause." Brown v. North Carolina, 479 U.S. at _____. I respectfully disagree.

The Batson holding cannot mean that the state is prohibited from using its peremptories for racial reasons but permitted to use its peremptories for other unconstitutional reasons so long as the unconstitutional reasons are related to the prosecutor's views concerning the outcome of the case to be tried. The peremptory challenge has traditionally been viewed as a necessary and integral means for assuring that our trial by jury system affords the parties the process they are due. "The function of the challenge is not only to eliminate extremes of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise. In this way the peremptory satisfies the rule that "to perform its high function in the best way 'justice must satisfy the appearance of justice.'" Swain v. Alabama, 380 U.S. 202, 219 (1964),, citing In re Murchison, 349 U.S. 133, 136 (1954).

When used properly, "[peremptory challenges] are the means to achieve the end of an impartial jury," Ross v. Oklahoma, 56 U.S.L.W. at 4678; when used improperly to exclude all jurors who indicate even the slightest uncertainty about the death penalty, they become the means for violating the constitution. "[T]he decision whether a man deserves to live or die must be made on scales that are not deliberately tipped toward death." Witherspoon at 521-522, n.20.

> Excluding jurors who would be in the slightest way affected by the prospect of the death penalty, or by their views about such a penalty, tips the scales toward death and deprives the defendant of the impartial jury to which he or she is entitled. See Adams v. Texas, 448 U.S. 38, 50 (1980). No defendant can constitutionally be put to death at the hands of a tribunal so selected. See Witherspoon at 522-523.
>
> I conclude that it is unconstitutional for prosecutors to use peremptory challenges consistently to exclude potential jurors who express reservations about capital punishment so as to produce a jury that is uncommonly willing to condemn a man to death. But see Gray v. Mississippi, 55 U.S.W.L. [sic] at 4647 (Justice Scalia dissenting, with whom the Chief Justice, Justice White and Justcie [sic] O'Connor join).

Brown v. Rice, No. GC-87-0184-M, slip op. at 24-26 (W.D.N.C. Aug. 16, 1988), a copy of which is attached as an appendix.

As Judge McMillan points out in Brown, supra, Lockhart v. McCree, 476 U.S. 162, 106 S. Ct. 1758 (1985), is distinguishable from this claim. McCree involved an attack on the guilt phase of a capital trial, while Mr. Marek is challenging the penalty phase of his trial in this claim. (Separate issues appearing in this Petition For Habeas Corpus attack the guilt portion of Mr. Marek's trial.)

The United States Supreme Court has recognized that the standards to be applied in capital sentencing proceedings are different than in the guilt phase. In the context of informing prospective jurors of the race of the victim and questioning them on racial bias in the capital trial of a defendant accused of an interracial crime, the Supreme Court held:

> The inadequacies of voir dire in this case requires that petitioner's death sentence be vacated. It is not necessary, however, that he be retried on the issue of guilt. Our judgment in this case is that there is an unacceptable risk of racial prejudice infecting the capital sentencing proceeding. This judgment is based on a conjunction of three factors: the fact that the crime charged involved interracial violence, the broad discretion given the jury at the death-penalty hearing, and the special seriousness of the risk of improper sentencing in a capital case.

Turner v. Murray, 106 S. Ct. 1683 (1986).

As noted in McCree,

> . . . It is important to remember that not all who oppose the death penalty are subject to removal for cause in capital cases; those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they clearly state that they are willing to temporarily set aside their own beliefs in deference to the rule of law. Because the group of "Witherspoon-excludables" includes only those who cannot and will not conscientiously obey the law with respect to one of the issues in a capital case, "death qualification" hardly can be said to create an "appearance of unfairness."

106 S. Ct. at 1766.

As in Brown v. Rice, John Marek "is simply asking the court to reaffirm the principles of Witherspoon and hold that the State cannot achieve through its use of peremptory challenges what for cause is prohibited under Witherspoon." It was recently noted that when a constitutional right comes into conflict with the statutory right to peremptory challenges, the statutory right must give way.

"Peremptory challenges are not of constitutional origin. See Batson v. Kentucky, 476 U.S. ___, ___ (1986)(slip op. 10); Swain v. Alabama, 380 U.S. 202, 219 (1965); Stilson v. United States, 250 U.S. 583, 586 (1919). In a situation such as this where a Constitutional right comes into a conflict with a statutory right, the former prevails." Gray v. Mississippi, 481 U.S. ___, 107 S. Ct. 2045, ___ (1987).

This issue was not raised in Mr. Marek's appeal. No tactical decision can be ascribed to counsel's failure to urge the claim. Neither trial counsel nor appellate counsel had voir dire transcribed and submitted as part of the record on appeal. This was unreasonable performance. Counsel's failure, a failure which could not but have been based upon ignorance of the law, deprived Mr. Marek of the appellate reversal to which he was constitutionally entitled. See Wilson v. Wainwright, supra, 474

So. 2d at 1164-65; Matire, supra.

Mr. Marek's sentence of death was imposed in violation of the sixth, eighth and fourteenth amendments. That error must be corrected now, and Mr. Marek's sentence of death vacated.

## CLAIM XV

APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE TRIAL COUNSEL'S OBJECTION TO THE IMPROPER DENIAL OF DEFENDANT'S REQUEST FOR ADDITIONAL PEREMPTORY CHALLENGES.

The trial court has the discretion to grant the defendant additional peremptory challenges when it appears that the defendant may be prejudiced in the selection of the jury panel. Fla. R. Crim. P. 3.350. Mr. Marek was given his entitled ten peremptory challenges. Defense counsel used these wisely, but found the number inadequate under the circumstances. After he had exercised his penultimate challenge, he requested additional peremptory challenges in order to remove certain prospective jurors from the panel. He told the court:

> MR. MOLDOF: Judge, I'm going to ask you for more strikes. If I strike somebody I end up with somebody I don't want. Matula, I don't want.
>
> THE COURT: Mr. Moldof, you can ask for them. I'm not giving them to you. Ten strikes is absolutely sufficient in this case.
>
> MR. MOLDOF: With five counts everyone has something in their mind. This girl has been the victim of a burglary of her room.
>
> THE COURT: You went through four or five grounds with Mrs. Scribner and all of a sudden --
>
> MR. MOLDOF: I didn't want Scribner. I have so few strikes. I don't want Fishburn.
>
> THE COURT: I'm not giving you anymore exemptions. I accepted your problems. You accept mine. Ten strikes is plenty. You had 29 people to choose from.
>
> MR. MOLDOF: What I'm clear on. He accepts. If this isn't right on appellate level if I don't use up my tenth strike --

THE COURT: Use it up. Do what you have to do. I'm not giving any more than ten unless there's good cause shown. If you can show me good cause --

MR. MOLDOF: I'll tell you my dilemma. I would personally like to strike Lyons. If I strike him I wind up with Matula who is no better.

THE COURT: Give me grounds.

MR. MOLDOF: She has been the victim of a burglary of a room. She's got someone secretly coming into her bedroom, going through her things.

I think that woman, no matter what she says - My wife was robbed. No matter what that woman tells me - goes home at night and thinks something bad about that. This guy is sitting here charged with a burglary.

THE COURT: He didn't break into anybody's home.

MR. MOLDOF: But he is charged with secretly doing something against a woman. I think this woman is going to side against my client regardless of what she told us.

THE COURT: I don't think that's good grounds. Why do you want to get rid of Mr. Lyons.

MR. MOLDOF: He's been the victim of an armed robbery. Somebody came into his house with a mask over their face. I would really like to get rid of Fishburn. I don't know where she is coming from, but she's the lesser of two evils.

They both have a past that is something in this case. Give me one extra strike. Let me get rid of both of them.

THE COURT: No. Thank you anyway.

(R. 379-81). The trial court applied the rule rigidly and denied the request. This was an abuse of discretion. The denial of the request impinged upon Mr. Marek's right to exercise peremptory challenges. The right to the unfettered exercise of peremptory challenges was articulated in Meade v. State, 35 So. 2d 613, 615 (Fla. 1956):

> The purpose of peremptory challenges is the effectuation of the constitutional guaranty of trial by an impartial jury by the exercise of the right to reject a certain number of jurors whom the defendant for reasons best known to himself does not wish

> to pass upon his guilt or innocence. In this manner he may eliminate from service jurors who may be objectionable but who may not be shown so prejudiced as to be successfully challenged for cause.

(emphasis added).

This Court has recently reaffirmed the importance of the right to exercise peremptory challenges finding that it 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). Jury selection and counsel's exercise of peremptory challenges is a critical stage in the trial proceedings:

> The exercise of peremptory challenges has been held to be essential to the fairness of a trial by jury and has been described as one of the most important rights secured to a defendant. Pointer v. United States, 151 U.S. (1894); Lewis v. United States, 146 U. S. 370 (1892). It is an arbitrary and capricious right which must be exercised freely to accomplish its purpose. It permits rejection for real or imagined partiality and is often exercised on the basis of sudden impressions and unaccountable prejudices based only on bare looks and gestures of another or upon a juror's habits and associations. It is sometimes exercised on grounds normally thought irrelevant to legal proceedings or official action, such as race, religion, nationality occupation or affiliations of people summoned for jury duty. Swain v. Alabama, 380 U.S. 202 (1965).

Francis, 413 So. 2d at 1178-1179 (emphasis added).

As the record set out above indicates, counsel's need for additional peremptory challenges was neither "imagined" nor based on "sudden impressions and unaccountable prejudice" but was "real." In other capital cases this Court has recoginized that the defendant was entitled to additional peremptory challenges. See Hooper v. State, 476 So. 2d 1253, 1256 (Fla. 1985)(defendant granted thirty peremptory challenges); Jacobs v. State, 396 So. 2d 713, 717 (Fla. 1981)(defendant granted two additional peremptory challenges).

The right to seek additional peremptory challenges is preserved as long as counsel can articulate specific persons on the jury panel who would have been excused if additional

challenges had been granted. cf. Parker v. State, 456 So. 2d 436, 442 (Fla. 1984)(additional peremptory challenges not granted when the only prejudice results solely from seriousness of case, multi-count indictment and racial make-up of the jury venire). In view of the seriousness of the offenses that Mr. Marek faced, counsel's well articulated objection to a particular member of the prospective jury panel and his specific request for additional challenges should not have been denied. This was an abuse of discretion by the trial judge rising to level of fundamental constitutional error.

This issue was not raised in Mr. Marek's appeal. No tactical decision can be ascribed to appellate counsel's failure to urge the claim. Neither trial counsel nor appellate counsel had the voir dire transcribed and submitted as part of the record on appeal. This was unreasonable performance. Counsel's failure, a failure that could not but have been based upon ignorance of the law, deprived Mr. Marek of the appellate reversal to which he was constitutionally entitled. See Wilson v. Wainwright, supra, 474 So. 2d at 1164-65; Matire, supra.

Mr. Marek's sentence of death was imposed in violation of the sixth, eighth and fourteenth amendments. That error must be corrected now.

## CLAIM XVI

APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE AS AN ISSUE TRIAL COUNSEL'S MULTIFACETED OBJECTIONS TO THE STATE'S INTRODUCTION AND USE IN EVIDENCE, DUPLICITOUS GROTESQUE AND INFLAMATORY ENLARGED CRIME SCENE PHOTOGRAPHS OF THE VICTIM PRIMARILY.

At trial, the State presented a barrage of sixteen-by-twenty color enlargements of the crime scene and the deceased. The state's photographic presentation included, inter alia, four aerial pictures depicting the beach outside of the lifeguard station where the crime occurred, two pictures of a trash can

near the life guard station, and three pictures of a drag mark from the trash can. Having set the stage for its "larger than life" presentation of the crime scene, the State then introduced six enlargements of the front of the victim's body, including close-ups of her head, lower torso, upper torso, pubic hair, arm, hand, one photograph of her back, and one photograph of her foot. (See R. 471, 473, 475, 489, 493, 496, 763, 768, 778, Exhibit Nos. 6-8, 11, 14, 15, 34, 36).

Photographs of the crime are usually admitted into evidence when relevant to any matter that is in dispute, such as when they establish the element of intent, or the circumstances of death. See Adams v. State, 412 So. 2d 850, 854 (Fla. 1982)(photographs relevant to show crime scene, premeditation and the circumstances of death); Booker v. State, 397 So. 2d 910, 914 (photographs relevant to show intent and circumstances of death). In order to establish an exception to the normal rule allowing admission of photographs, the defendant must demonstrate that the trial court committed "clear abuse" when it received a prejudicial photograph into evidence. Duest v. State, 462 So. 2d 446 (Fla. 1985).

Photographs should be excluded when they demonstrate something so shocking that the risk of prejudice outweighs its relevancy. Alford v. State, 307 So. 2d 433, 441-442 (Fla. 1975) cert. denied, 428 U.S. 912 (1976). Photographs should also be excluded when they are repetitious or "duplicitous". Alford, supra (admission of photographs was proper when there were no duplications); Adams, supra (exclusion of two additional photographs was properly based on the trial court's exercise of reasonable judgment to prohibit the introduction of "duplicitious photographs"); see also Mazzarra v. State, 437 So. 2d 716, 718-719 (Fla. 1st DCA 1983)(gruesome photographs admissible when they are not repetitious).

The photgraphs presented in this case were not merely repetitive and cumulative, but were grotesque and inflamatory.

The State's use of these photographs distorted the actual evidence against Mr. Marek. There was no valid reason to enter into evidence four enlargements of the area outside of the crime scene since these pictures had no probative value. The State also presented three photographs, sixteen-by-twenty inches large, that showed a drag mark along the sand. The drag mark was merely caused by a trash can that had been removed from its proper place next to the lifeguard stand. The drag mark could have been easily illustrated by a single photograph. Two photographs showing an aerial and side view of a trash can that contained a T-shirt were presented. The trash can was also depicted in two of the three pictures of the drag mark thus, there were five pictures of the this item alone. These pictures were clearly repetitious.

After setting the stage for the depiction of the crime scene, the State presented a photograph of the darkened building where the crime occurred. Visible in the darkness was the foot of the victim. The presentation of sixteen-by-twenty inch color enlargements continued as the State introduced six pictures showing the front view of the deceased and various enlarged sections of her anatomy. One photograph showed her full body. This photograph clearly depicted the extent of her injuries and would have been sufficient. The State nevertheless continued the sensational, inflammatory barrage when it presented many close-ups of isolated areas of her anatomy. A color enlargement of the victim's pubic hair was displayed to the jury even though that which it purported to show, i.e. singed hairs, the State's witnesses were unable to say were visible (R. 499)(Ex. 14). This photograph was obviously designed to inflame the jury. The State also presented several close-up enlargements of the victim's head, upper torso, lower torso, head and arm. These pictures likewise were gruesome, repetitious, meant to inflame the jury and prejudice them against the defendant.

Trial counsel for Mr. Marek objected to enlargements of the victim's body. In Alford, supra, the trial court excluded a close up enlargement of the victim's pubic area finding that the photograph was grotesque and repetitious of the photographs already in evidence. Mr. Marek's trial judge clearly abused his discretion when he declined to restrict the State's use of these several close-up photographs of various parts of the victim's body.

Counsel raised objections to the number of photographs, but the trial judge declined to limit in any way the State's evidence. This constituted a clear abuse of discretion and would have been reversible error had appellate counsel been alert and capitalized on the multifaceted and well preserved trial record fashioned by trial counsel in this regard.

This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Marek's trial and death sentence. This Court has not hesitated in the past to exercise its inherent jurisdiction to remedy errors which undermine confidence in the fairness and correctness of capital proceedings, see Wilson v. Wainwright, 474 So. 2d 1163 (Fla. 1985), and it should now correct this error.

Moreover, the claim is now properly brought pursuant to the Court's habeas corpus authority for it involves substantial and prejudicially ineffective assistance of counsel on direct appeal. This issue involved a classic violation of longstanding principles of Florida law. See Alford, supra. It virtually "leaped out upon even a casual reading of transcript." Matire v. Wainwright, 811 F.2d 1430, 1438 (11th Cir. 1987). This clear claim of per se error required no elaborate presentation -- counsel only had to direct this Court to the issue. The court would have done the rest, based on long-settled Florida and federal constitutional standards.

No tactical decision can be ascribed to counsel's failure to urge the claim. No procedural bar precluded review of this issue. See Johnson v. Wainwright, supra, 498 So. 2d 938. However, counsel's failure, a failure which could not but have been based upon ignorance of the law, deprived Mr. Marek of the appellate reversal to which he was constitutionally entitled. See Wilson v. Wainwright, supra, 474 So. 2d at 1164-65; Matire, supra.

Mr. Marek's conviction and sentence of death were imposed in violation of the sixth, eighth and fourteenth amendments. That error must be corrected now, by means of habeas relief.

## CONCLUSION AND RELIEF SOUGHT

WHEREFORE, John Richard Marek, through counsel, respectfully urges that the Court issue its writ of habeas corpus and grant him the relief he seeks and a stay of execution. Since this action presents certain questions of fact, Mr. Marek requests that the Court relinquish jurisdiction to the trial court for the resolution of evidentiary factual questions regarding appellate counsel's decision making process or lack thereof. Mr. Marek alternatively urges that the Court grant him a new appeal for all of the reasons stated herein, and that the Court grant all other and further relief which the Court may deem just and proper.

Respectfully submitted,

LARRY HELM SPALDING
Capital Collateral Representative

MARTIN J. McCLAIN
Assistant CCR

OFFICE OF THE CAPITAL COLLATERAL
REPRESENTATIVE
1533 South Monroe Street
Tallahassee, Florida 32301
(904)487-4376

By: Julie D. Naylor for Martin J. McClain
Counsel for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished by U.S. Mail, first class, postage prepaid, to Carolyn V. McCann, Assistant Attorney General, 111 Georgia Avenue, Room 204, West Palm Beach, Florida, 33401, this 12 day of October, 1988.

Julie O. Naylor for Martin J. McClain
Attorney