IN THE SUPREME COURT OF FLORIDA

NO. 73,175

JOHN RICHARD MAREK

Petitioner,

v.

RICHARD L. DUGGER,

Respondent.

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

AND

RESPONSE TO REQUEST FOR STAY OF EXECUTION

(EXECUTION SET FOR NOVEMBER 10, 1988

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IN THE SUPREME COURT OF FLORIDA

JOHN RICHARD MAREK, Petitioner, v. RICHARD L. DUGGER, Secretary, Department of Corrections, State of Florida, Respondent.	)	CASE NO. 73,175

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS AND RESPONSE TO REQUEST FOR STAY OF EXECUTION

COMES NOW Respondent, RICHARD L. DUGGER, in his capacity as secretary of the Department of Corrections, by and through undersigned counsel, and files this response to the petition for writ of habeas corpus and request for stay of execution,[1] and in opposition thereto, states as follows:

A. INTRODUCTION

This Response is being filed with this Court, in opposition to Marek's[2] Petition for Writ of Habeas Corpus and Request for Stay of Execution regarding the sentence of death imposed upon Marek for the first-degree murder of Adella Simmons on July 3, 1984. Marek filed his petition on October 12, 1988. A death warrant was signed by the governor of the State of Florida on September 12, 1988 (SA Ex. 1). The death warrant is in effect for the period beginning at noon, November 9, 1988 and ending at noon, November 16, 1988. Marek's execution is presently set for Thursday, November 10, 1988 at 7:00 a.m..

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[1] Although the title of Petitioner's pleading lists "Application for Stay of Execution Pending Disposition of Petition for a Writ of Certiorari" as one of the grounds for relief, the body of the pleading makes no reference or presents any arguments to support such request. The United States Supreme Court, the Clerk's Office, has also confirmed that as of the filing of this response, no Petition for Writ of Certiorari has been filed by Petitioner.

[2] "SA" will refer to the State's Appendix attached to this Response and incorporated herein; "R" will refer to the Record of Marek's trial; "RV" will refer to the transcript of voir dire; "e.a." will mean emphasis added. The defendant John Richard Marek will be referred to by his surname, "Marek"; The State of Florida will be referred to as the "State".

B. PROCEDURAL HISTORY

Marek is presently in the custody of the State of Florida pursuant to valid judgments and sentences, entered by the Circuit Court of the Seventeenth Judicial circuit, in and for Broward County, Florida.

Marek was indicted on July 6, 1983 for murder in the first degree, kidnapping, burglary, sexual battery, and aiding and abetting a sexual battery (R 1358-1359). After a trial before a jury of his peers, Marek was found guilty on June 1, 1984 of first degree murder, kidnapping, attempted burglary with an assault and two (2) counts of battery (R 1438-1442).

On June 5, 1984, a separate sentencing proceeding was conducted by the trial jury for the purpose of advising the trial court whether Marek should be sentenced to death or life imprisonment for his conviction of murder in the first degree. The trial court instructed the jury on the following aggravating circumstances:

> 1. The defendant has been previously convicted of a felony involving the use or threat of violence to some person.
>
> The crime of kidnapping is a felony involving the use of threat of violence to another person;
>
> 2. The crime for which the defendant is to be sentenced was committed while he was engaged in the commission of the crime of attempted burglary with an assault;
>
> 3. The crime for which the defendant is to be sentenced was committed for financial gain;
>
> 4. The crime for which the defendant is to be sentenced was especially wicked, evil, atrocious or cruel. (R 1449)

The trial court then instructed the jury on the mitigating circumstances that they could consider (R 1450). Thereafter, the jury by a vote of ten (10) to two (2) advised and recommended to the court that it impose the death penalty (R 1453).

Subsequently, in its sentencing order, the trial court determined the above-cited, four aggravating circumstances to be applicable (R 1472). The trial court found no mitigating circumstances to be applicable to Marek (R 1473-1474).

The trial court accepted the jury's recommendation of death and sentenced Marek to death as to Count I (R 1462). Marek was sentenced by the trial court to thirty (30) years as to Count II and nine (9) years as to count III (R 1463-1464). The trial court suspended sentencing as to Counts IV and V (R 1465-1466).

Marek appealed his convictions and sentences to this Court. Marek raised the following six (6) issues on his direct appeal as phrased by Marek:

1. THE COURT ERRED IN SENTENCING JOHN MAREK TO DEATH FOR FIRST DEGREE MURDER, WHEN IT HAD PREVIOUSLY SENTENCED RAYMOND WIGLEY TO LIFE IN PRISON FOR THE SAME OFFENSE; THAT BEING A DENIAL OF JOHN MAREK'S RIGHTS UNDER THE UNITED STATES AND FLORIDA CONSTITUTIONS.

2. THE COURT ERRED IN FAILING TO GRANT A MISTRIAL WHEN THE STATE OF FLORIDA ELICITED TESTIMONY CONCERNING A FIREARM FOUND IN THE TRUCK WHERE SUCH TESTIMONY AND EVIDENCE WAS IRRELEVANT AND UNCONNECTED TO THE CASE AND HIGHLY INFLAMMATORY.

3. THE COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO DISQUALIFY THE ENTIRE JURY PANEL, WHERE THE PANEL HAD BEEN EXPOSED TO A JURY ORIENTATION VIDEO WHICH PORTRAYED CRIMINAL DEFENDANTS IN A FALSE AND DISFAVORABLE LIGHT AND DENIED THE DEFENDANT'S RIGHT TO COUNSEL A FAIR TRIAL AND MADE UNFAIR COMMENT ON HIS RIGHT TO REMAIN SILENT.

4. THE COURT ERRED IN DENYING THE DEFENDANT'S MOTIONS FOR JUDGMENT OF ACQUITTAL AS TO ALL COUNTS IN THE INDICTMENT, DUE TO LACK OF EVIDENCE.

5. THE COURT ERRED IN IMPOSING THE DEATH SENTENCE DUE TO THE LACK OF SUFFICIENT EVIDENCE, OR AGGRAVATING FACTORS, TO WARRANT IMPOSITION OF SUCH SENTENCE, IN VIOLATION OF DEFENDANT'S CONSTITUTIONAL RIGHTS.

6. THE COURT'S SENTENCE TO DEATH BY ELECTROCUTION AMOUNTS TO CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE UNITED STATES CONSTITUTION.

This Court affirmed the convictions and sentences on June 26, 1986. Marek v. State, 492 So.2d 1055 (Fla. 1986) (SA Ex. 2). Rehearing was denied September 8, 1986. Mandate issued on October 8, 1986.

Marek filed a Motion to Vacate Judgment and Sentences with Special Request for leave to Amend on October 10, 1988. He raised the following 22 claims for relief as phrased in his motion:

> 1. MR. MAREK'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS WERE ABROGATED BECAUSE HE WAS FORCED TO UNDERGO CRIMINAL JUDICIAL PROCEEDINGS ALTHOUGH HE WAS NOT LEGALLY COMPETENT.
>
> 2. MR. MAREK WAS DEPRIVED OF HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHT AMENDMENTS, BECAUSE THE SOLE MENTAL HEALTH EXPERT WHO SAW HIM PRIOR TO TRIAL DID NOT CONDUCT AN ADEQUATE EVALUATION, BECAUSE DEFENSE COUNSEL FAILED TO RENDER EFFECTIVE ASSISTANCE AND PROVIDE THE EXPERT WITH THE NECESSARY BACKGROUND INFORMATION. AS A RESULT AT TRIAL MR. MAREK WAS INCOMPETENT AND DENIED A COMPETENCY HEARING. MR. MAREK WAS ALSO DENIED AVAILABLE DEFENSES. THE DEPRIVATION OF MR. MAREK'S RIGHTS ALSO PRECLUDED AN INDIVIDUALIZED AND RELIABLE CAPITAL SENTENCING DETERMINATION.
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> 3. 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 INSTITUTION.
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> 4. 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. TRIAL COUNSEL'S FAILURE TO OBJECT AND COMBAT THE PROSECUTORIAL OVERREACHING WAS INEFFECTIVE ASSISTANCE.
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> 5. JOHN MAREK WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT BOTH THE GUILT-INNOCENCE AND SENTENCING PHASES OF HIS TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.
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> 6. DEFENSE COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO INVESTIGATE MR. MAREK'S ALCOHOL ABUSE AND TO PRESENT A DEFENSE BASED THEREON.
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> 7. THE TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE BY FAILURE TO ARGUE AND REQUEST INSTRUCTION ON THE

MITIGATING CIRCUMSTANCE OF NO SIGNIFICANT HISTORY OF PRIOR CRIMINAL ACTIVITY TO THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS, AND THE COURT DENIED MR. MAREK HIS EIGHTH AMENDMENT RIGHTS TO A RELIABLE, INDIVIDUALIZED, AND FUNDAMENTALLY FAIR CAPITAL SENTENCING DETERMINATION BY FAILING TO PROVIDE THE REQUESTED INSTRUCTION, IN VIOLATION OF HITCHCOCK, LOCKETT AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

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

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

10. 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.

11. MR. MAREK WAS DENIED HIS EIGHTH AND FOURTEENTH AMENDMENT RIGHTS BY AN IMPROPER AND MISLEADING INSTRUCTION ON AN AGGRAVATING CIRCUMSTANCE AND BY THE COURT'S FINDING OF A DIFFERENT AGGRAVATING CIRCUMSTANCE THAN PRESENTED TO THE JURY.

12. MR. MAREK WAS DENIED HIS EIGHTH AND FOURTEENTH AMENDMENT RIGHTS BY THE INSTRUCTION TO THE JURY AND RELIANCE BY THE TRIAL COURT ON AN AGGRAVATING CIRCUMSTANCE THAT HAS BEEN FOUND TO BE IMPROPER BY THE FLORIDA SUPREME COURT.

13. MR. MAREK WAS DENIED HIS EIGHTH AND FOURTEENTH AMENDMENT RIGHTS BY THE COURT'S INSTRUCTION ALLOWING THE JURY TO CONSIDER AN AGGRAVATING CIRCUMSTANCE NOT SUPPORTED BY THE RECORD, AND BY THE COURT'S OWN FINDING OF THAT AGGRAVATING CIRCUMSTANCE.

14. THE HEINOUS, ATROCIOUS OR CRUEL AGGRAVATING CIRCUMSTANCE WAS APPLIED TO MR. MAREK'S CASE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

15. 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.

16. THE TRIAL COURT'S UNCONSTITUTIONAL SHIFTING OF THE BURDEN OF PROOF IN ITS INSTRUCTIONS AT SENTENCING DEPRIVED MR.

MAREK OF HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION OF LAW, AS WELL AS HIS RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS.

17. 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.

18. 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.

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

20. MR. MAREK'S DEATH SENTENCE RESTS UPON AN UNCONSTITUTIONAL AUTOMATIC AGGRAVATING CIRCUMSTANCE.

21. THE ERRONEOUS JURY INSTRUCTION THAT A VERDICT OF LIFE MUST BE MADE BY A MAJORITY OF THE JURY MATERIALLY MISLED THE JURY AS TO ITS ROLE AT SENTENCING AND CREATED THE RISK THAT DEATH WAS IMPOSED DESPITE FACTORS CALLING FOR LIFE, AND MR. MAREK'S DEATH SENTENCE WAS THUS IMPOSED IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

22. THE INTRODUCTION AND USE OF MR. MAREK'S POST-MIRANDA SILENCE AS EVIDENCE THAT A DEATH SENTENCE SHOULD BE IMPOSED BECAUSE OF MR. MAREK'S PURPORTED LACK OF REMORSE VIOLATED THE FIFTH, EIGHTS, AND FOURTEENTH AMENDMENTS.

An evidentiary hearing on Marek's motion is scheduled for Friday,October 28,1988 in The Seventeenth Judicial Circuit, In and For Broward County, Florida.

Marek filed the instant petition for writ of habeas corpus with the Court on October 12, 1988. In his petition, Marek has raised 16 claims for relief. This response follows:

C. STATEMENT OF THE FACTS

Jerome Kasper, the lifeguard who discovered Adella Simmons' body in the observation deck of the lifeguard stand,

testified that the only way to enter the observation deck was through a door or through a window (R 464). Kasper testified that he locked the door to the observation deck when he left work the evening of June 16, 1983 (R 461). The ladder which was used to reach the observation deck was also locked away in the shed underneath the lifeguard stand (R 457). Kasper testified that when he arrived at work at approximately 7:15 A.M., the morning of June 17, 1983, he noticed that a overturned trash can had been placed at the entrance to the lifeguard stand (R 465). Kasper also noticed "drag marks" in the sand which were made by the trash can when it was dragged from its usual position thirty (30) yards down the beach, to the lifeguard stand (R 466). Kasper testified that there were some Budweiser beer cans lying near the trash can and that he found a blue and white tee shirt nearby (R 469-470). Kasper testified that he placed the tee shirt and bear cans in the trash can and dragged it back to its proper place (R 470). Kasper then went to the bottom area of the lifeguard stand to get the ladder and proceeded to climb up to the observation deck (R 471). Kasper testified that the door to the observation deck was unlocked (R 472). Upon entering the deck, Kasper found the victim's nude body sprawled on the floor (R 472). Kasper testified that it was possible to enter the observation deck through a window by just "jiggling" the window's shutters (R 463). Kasper also testified that there was an electric light inside of the observation deck and that when the shutters were closed, it was impossible to see into or out of the deck (R 477-480). Kasper immediately notified police of his find (R 473).

Robert Haarer of the Broward sheriff's office, forensic unit, testified that he arrived at the scene at approximately 8:10 A.M., June 17, 1983 (R 4840. Haarer testified that the interior of the observation deck was in disarray (R 494) Haarer testified that he found white cotton socks near the body, with the toes burned out (R 495). Haarer testified that the victim's pubic hairs had also been burned, the burns being consistent with

those inflicted by matches or a lighter (R 500). Haarer testified that he found the victim's shorts and underpants inside of the deck and that a red bandana had been tied around the victim's neck (R 500-501, 543). Haarer testified that he and Detective Gary Ayers processed the crime scene for fingerprints; Ayers processed the inside of the observation deck and Haarer the outside (R 508). Haarer specifically concentrated on processing the deck's windows and shutters (R 508). Haarer testified that he lifted nine (9) latent fingerprints from the exterior of the observation deck (R 511).

Patrol Sergeant George Hambleton of the Daytona Beach Shores Police Department testified that he first came into contact with Raymond Wigley at approximately 11:00 P.M., June 17, 1983 (R 549). Hambleton testified that Wigley was driving a Ford pickup truck down Daytona Beach when he stopped him (R 549-550). Hambleton testified that he found a ".25 auto, small, little chrome gun" in the passenger side glove compartment of the truck (R 550). Hambleton testified that he seized Wigley's truck and "sealed" it (R 555). Marek was not in the truck at the time it was stopped (R 559).

Michael Rafferty of the Florida Department of Law Enforcement proceesed the truck (R 563). Rafferty testified that in addition to finding a gold watch, gold pendant and gold earring in the truck, he also found a duffle bag and empty beer cans in the cargo bed of the truck (R 564).

Robert Schafer of the Daytona Shores Police Department testified that he came into contact with Marek at approximately 11:00 P.M. on June 17, 1983 on Daytona Shores beach (R 607-608). Schafer testified that after placing handcuffs on Marek he read Marek his rights (R 609). Schafer testified that Marek asked him why was being arrested and what was it all about. (R 609). Schafer told Marek that he was being "picked up" pursuant to a BOLO from another police agency in south Florida regarding a murder (R 610). Marek denied any knowledge of a murder (R 610). Schaffer then told Marek that Wigley and the truck had

already been taken into custody and Marek responded that he did not know Wigley and had only been a hitchhiker who had been picked up (R 610).

Detective Gary Ayers of the Broward sheriff's office testified that he processed the inside of the observation deck for fingerprints at approximately 8:30 A.M., on June 17, 1983 (R 620-621). Ayers testified that he lifted eighteen (18) latent fingerprints from the inside of the deck (R 623).

Sondra Yonkman testified as the latent print examiner for the Broward sheriff's office (R 632). Yonkman testified that prints matching both Marek's and Wigley's fingerprints were lifted from the exterior point of entry to the observation deck (R 636-6420. Yonkman further testified that only Marek's fingerprints were found inside of the observation deck (R 642-645). Yonkman testified that there was no doubt that the print identifications she made were from the individuals identified to her as being Wigley and Marek (R 659). Yonkman testified that all of her print identifications were verified by Detective Richtarick of the Broward sheriff's office (R 659).

Officer Dennis Satnick of the City of Dania Police Department, testified that he first came into contact with Marek and Wigley on Dania beach at approximately 3:35 A.M., on June 17, 1983 (R 660-661). Satnick testified that he was patrolling the beach, which was closed to the public at that time of morning, when he came across a Ford pickup truck parked on the beach (R 661-663). Satnick noticed there was a large amount of beer in the cargo bed of the truck (R 663). Satnick proceeded to walk up and down the beach looking for the truck's occupants (R 664-665). The pickup truck was parked approximately one-hundred (100) yards from the lifeguard shack (R 676). Satnick testified that while walking on the beach he saw a large sea turtle laying eggs in the sand approximately fifty (50) yards from the pickup truck (R 666). Satnick returned to his police car after being unable to spot anyone on the beach (R 665). Satnick testified that after he returned to his car he noticed two people coming

from the area of the lifeguard shack walking towards the pickup truck (R 667). Neither of the individuals were wearing shirts (R 667). Satnick asked both men for identification, and the men identified themselves as John Marek and Raymond Wigley (R 669). Satnick testified that he filled out a field contact card regarding his encounter with Marek and Wigley (R 667), and was in contact with the men for approximately forty (40) minutes (R 670). Satnick testified that Dania police officers Darby and D'Andrea were also present and were speaking with Marek and Wigley (R 679-680). Satnick testified that Marek was the more dominant of the two (R 671). He further testified that every time Wigley would attempt to speak, Marek would interrupt and prevent him from speaking (R 670). Satnick testified that Marek told some jokes to the officers and that Wigley laughed in response to these jokes (R 671). Satnick testified that Marek was very friendly and that Wigley "didn't say much" (R 681). Satnick testified that he was suspicious of Wigley because he wouldn't make eye contact (R 681). Satnick testified that he detected the odor of alcohol on both men and that Wigley was staggering and his speech slurred (R 672-673, 677). Satnick testified that in his opinion, Wigley was intoxicated (R 672). Satnick testified that Marek did not appear to be intoxicated and in and fact dominated the conversation (R 671, 675). Marek never gave Wigley a chance to speak (R 682). Satnick testified that after this encounter was over, Marek, not Wigley. drove the pickup truck away from the beach (R 676).

Jean Trach testified that she had been travelling with the victim, Adella Simmons, prior to her death (R 695). Trach testified that she and Simmons had been close friends for approximately nine (9) years and that Simmons was forty-seven (47) years old at the time of her death and a widow (R 694, 696, 722). Trach testified that Simmons had worked at Barry College in Miami as a Director of Business Affairs (R 696). Trach testified that she and Simmons drove up to Largo the afternoon of Sunday, June 12th in Trach's 1982 Chevy Monza (R 397, 737). The

women began their trip back to Miami on Thursday, June 16, 1983, at approximately 2:00 P.M. (R 699, 737). Trach testified that Simmons was driving and that the car began having problems about one (1) hour after the women left Largo (R 699). Trach and Simmons were travelling south on the Florida turnpike when their car broke down at mile marker 83, just north of Jupiter (R 695). Trach testified that Simmons put the car's flasher's on and pulled over to the side of the road at approximately 10:45 P.M. (R 701-702). Trach testified that when they pulled to the side of the road, a truck pulled off behind them (R 702). Trach identified Marek as being one of the persons in the truck who came up to the car and asked if he could help (R 707). Wigley remained in the truck. Trach told Marek he could help by going to the nearest service station and getting either a tow truck or a state trooper (R 707-708). Marek wasn't willing to do that because he had had a couple of beers, but offered to fix the car (R 708). Trach testified that Marek and Wigley stayed with the women's car for approximately forty-five (45) minutes (R 708). Trach testified that after Marek tried to fix the car, he offered to take the women to Miami (R 709). The women declined (R 709). Wigley finally got out of the truck approximately one-half hour after the truck followed the women's car off of the turnpike (R 709). Trach testified that Marek then offered to take one of the women to the nearest telephone on the turnpike to call for help (R 709). Marek specifically stated that he would take only one of the women, not both (R 709). Trach testified that Marek had been doing all of the talking and that Wigley had not said a word (R 709). Simmons suggested that Trach ride with Marek to the nearest telephone because she thought that would be safer than being left alone in the car (R 710). Trach testified that Simmons was concerned for Trach's safety and didn't want to leave her alone in the car (R 710). Trach refused to go with the men (R 710). Simmons then decided to go for help with Marek and Wigley since she and Trach "couldn't sit there all night" (R 711). Trach testified that she told Simmons not to go (R 711).

At approximately 11:30 P.M., Simmons got in the truck and sat between Marek and Wigley (R 723). This was the last time that Trach saw Adella Simmons (R 723).

Trach testified that at the time Simmons left with Marek she was wearing white shorts and a long-sleeve tee shirt (R 711). Trach identified at trial the shorts and tee shirt found on Dania beach at the scene of the murder as those that Simmons had been wearing (R 711-712). Trach also identified the jewelry found in the truck as belonging to Simmons (R 718). Trach testified that Wigley was silent and did not attempt to make any conversation with the women during the forty-five (45) minutes the four were together (R 739). Marek, however, was very friendly and talkative (R 740). Trach testified that at no time did she ever detect an odor of alcohol on Marek and that Marek did not appear to be in any way intoxicated (R 710). Trach also testified that during the five days she and Simmons were vacationing in Largo, Simmons had not been with any men and could not have had the opportunity for sexual intercourse (R 720). Trach testified that she and Simmons slept in her sister's condominium every night on the trip and that Simmons could not have had any sexual encounter with a man (R 720-722).

Dr. Ronald Wright, the Chief Medical Examiner for Broward County, Florida, testified as to the victim's injuries and cause of death. Dr. Wright performed the autopsy on the victim at 11:00 A.M., June 17, 1983 (R 809). Dr. Wright testified that the victim died from asphyxiation by ligature strangulation (R 781). Dr. Wright testified that the death occurred at approximately 3:00 to 3:30 A.M., June 17, 1983 (R 739, 753). Dr. Wright testified that a bandana had been tied tightly around the victim's neck and that the deep bruising on the neck itself was consistent with the victim being strangled (R 758-759). He further testified that "reddish" hemorrhages on the victim's face were consistent with her air passages being blocked off (R 749). Dr. Wright testified that he found five (5) fingerprint marks on the victim's neck which in his opinion

either resulted from the strangulation itself or from the victim's trying to get the bandana off her neck (R 757). Dr. Wright testified that in such a murder the victim's heart would stop beating within 10 to 15 minutes after the ligature was applied to the neck (R 823). Dr. Wright testified that the victim was probably conscious for one (1) minute after the ligature was applied (R 823).

Dr. Wright testified that the victim suffered numerous facial as well as external and internal scalp injuries which were consistent with her being struck with a fist, hand or blunt instrument (R 759-762). The victim's arms and chest area also had many bruises and contusions, and her right breast had an abrasion consistent with a heel mark (R 767, 778). Dr. Wright also testified that the victim had deep scrape marks and bruises on the center of her back (R 769). The victim also had an abrasion over her left hip (R 762, 769). Dr. Wright testified that the victim suffered an extensive amount of internal bruising in the area of her back (R 770). Also, the tissue surrounding the victim's kidneys was bruised and bleeding (R 771). Dr. Wright testified that this type of injury was consistent with the victim being kicked with a great deal of force (R 771).

Dr. Wright also testified that a large amount of sand was impacted on the victim's upper back, lower back and buttocks (R 783). It was Dr. Wright's opinion that the victim was unclothed on the beach prior to being taken up to the observation deck, due to the amount of sand found on her body which was not present in any kind of quantity in the shack itself (R 754-783). Dr. Wright testified that the injuries to the victim's breast and back occurred when she was unclothed due to the nature and extent of the injuries. (R 782-783). It was Dr. Wright's opinion that the injuries to the victim's hip and back were "exceptionally consistent" with her being dragged from the lower level of the lifeguard shack over the wooden siding to the upper level of the shack (R 782, 815, 822). Dr. Wright testified that it was his opinion that the contusions, abrasions and scrapes to

the victim's hip and back were caused by the wooden siding of the lifeguard stand (R 822). Dr. Wright further testified that the injuries to the victim's back, hip, chest, breast, arms, face and scalp all occurred while the victim was alive and had a beating heart since there was bleeding and bruising into the depths of those wounds (R 815). It was therefore Dr. Wright's opinion that the victim was alive at the time she was taken up to the observation deck of the lifeguard stand (R 815).

Dr. Wright also testified that he was certain that at least one person had had sexual intercourse with the victim within twenty-four (24) hours preceding his autopsy which was performed at 11:00 A.M., June 17, 1983 (R 808-809). Dr. Wright's examination of the victim revealed three spermatozoa present in the victim's cervix (R 775) Dr. Wright testified that these spermatozoa were intact, complete with tails (R 776). Dr. Wright testified that because the sperm had tails they were less than twenty-four (24) hours old since the tails ordinarily fall off after a twenty-four (24) hour period (R 776). Dr. Wright testified that it was highly unlikely that the sperm could be up to three (3) days old (R 809). Dr. Wright also testified that there is a wide variation in the number of sperm present in a normal ejaculation but many factors could affect that number rendering it significantly lower (R 798, 813). Dr. Wright testified that these factors included frequency of ejaculation, alcohol consumption before ejaculation and oral or external ejaculation preceding a vaginal ejaculation (R 798, 813).

Dr. Wright also testified that the victim's pubic hair had been singed (R 772). He further testified that there was "blistering" present on the tip of her right thumb (R 779). Dr. Wright testified that this blistering was consistent with a match or lighter being applied to the tip of the victim's finger and that this injury occurred after the victim was dead since the flame involved did not produce a "vital" reaction (R 780-781). Dr. Wright testified that blistering of this type was characteristically a post-morten injury (R 781).

The defense opened its case with Vincent Thompson, a City of Dania firefighter, who had been present when the police spoke with Marek and Wigley on Dania beach (R 875). Thompson testified that during Marek's conversation with police , Marek was very friendly and told several jokes (R 877). Wigley, however, did not speak at all and seemed very withdrawn (R 879). Thompson testified that Marek controlled the tempo of the conversation with police and appeared to be the more "predominant" of the two (R 8820. Thompson testified that Wigley appeared to be nervous and that Marek did not (R 888). Thompson testified that shortly after Marek and Wigley left the beach, they returned (R 883-884). Thompson testified that he spoke with Marek and Wigley and one of them indicated that they had returned to the beach to pick up some clothes (R 884-885). After the conversation, Marek and Wigley walked down the beach and picked up what appeared to be a pile of clothes (R 885). After they picked the clothes up, Marek and Wigley got back in their truck and drove away (R 886). Thompson testified that Marek and Wigley appeared to be in a "fog" rather than grossly intoxicated (R 878)

Officer Henry Rickmeyer of the Dania Police Department testified that he had taken a statement from Jean Trach on June 20, 1983 (R 892). Rickmeyer testified that Trach told him that although Wigley did get out of the truck on the turnpike, Wigley just stood by silently and didn't say anything (R 895).

Officer Robert Darby of the Dania Police Department testified that he had been present during the conversation Marek and Wigley had with police (R 893). Darby testified that while Marek was telling the police jokes, Wigley was looking at Marek with disbelief (R 904-905). Darby testified that Wigley seemed nervous and didn't say anything during the conversation but instead stood with his head down (R 902-903).

Marek testified on his own behalf. Marek testified that he was twenty-two (22) years old and worked on an oil rig in Fort Worth, Texas, his home town, before travelling to Florida (R 935-

936). Marek testified that on Monday, June 13, 1983, he and Raymond Wigley left Texas to come to Florida for a "fun-loving" two weeks (R 940). Marek testified that he had known Wigley for a couple of months prior to the trip and that he and Wigley were drinking two to four cases of beer a day during the trip to Florida (R 936, 940). Marek testified that he was driving the truck when it followed the victim's car off of the turnpike (R 942). Marek testified that he offered to take both women to a filling station and that after the women talked between themselves, the victim agreed to go ith Marek and Wigley for help (R 940, 946). Marek testified that he was the one who invited the victim to ride with him and that he, not Wigley, did all of the talking (R 972). Marek testified that Wigley drove the truck and that he fell asleep in the passenger seat approximately two minutes after he, Wigley and the victim got in the truck (R 947). Marek testified he woke up "sometime later" and asked Wigley if he dropped the victim off since he didn't see the victim in the cab of the trunk (R 948). Wigley told Marek that he dropped the victim off at a gas station (R 948). Marek testified that he then fell asleep and that when he woke up he was on the beach (R 949). Marek proceeded to look for Wigley on the beach and found him up on the observation deck of the lifeguard stand (R 950). Marek got up on top of a trash can, grabbed one of the railings and swung himself up to meet Wigley (R 951). Marek testified that he knew he was "trespassing" when he entered the observation deck (R 954). Marek testified that he never saw the victim's body inside of the observation deck because it was dark inside and a chair was obstructing his view (R 856). Marek testified that he "felt" his way along the walls of the deck and opened a shutter in order to exit the deck (R 954-956). Marek testified that he was in the shack for a total of 15 to 18 minutes (R 957). Marek testified that he and Wigley left their shirts on the beach to make it look like they were "messing around with the water or something" (R 957).

Marek testified that he and Wigley were confronted by police after they left the observation deck and that the police treated them with hospitality (R 960). Wigley was standing with his head hung down while Marek joked with police (R 960-961). Marek testified that he drove the truck away from the beach (R 960). After remembering that he had left his clothes on the beach, Marek drove back to the beach to pick them up (R 962-963). Marek testified that he never knew there was a body in the observation deck and that he had never asked Wigley what had happened to the victim, Adella Simmons (R 978). Marek also testified that he never knew Wigley's last name even though he had known him for a couple of months before the trip and that he himself drank sixty (60) beers on Thursday, June 16, 1983 (R 969). Marek testified that he didn't know where he was when he was at the beach but had told the police on the beach that he was looking for a couple of college friends (R 976-977). Marek explained "Well, I knew they was in Florida. I don't know where abouts they was" (R 977). Marek testified that he told police that he went to college (R 977). Marek admitted to having been previously convictd of a felony (R 977).

Marek never heard any yelling or struggling while he was asleep in the cab of the truck on the way to the beach (R 973). Marek denied strangling the victim or burning her pubic hair (R 976). Marek also denied burning the victim's finger to see if she was dead (R 976).

Marek explained that he denied knowing Wigley when he was picked up on Daytona beach because he didn't know Wigley's last name (R 978-980). Marek admitted hearing Detective Rickmeyer tell him while he was in a holding cell in Daytona Beach, "Congratulations, you made it to the big times" (R 1013). Marek testified that he then told Detective Rickmeyer, "SOB must have told all" (R 1014). Marek denied knowing that the Ford truck he was driving was stolen (R 1015).

In rebuttal, Detective Rickmeyer testified that he in fact told Marek while he was in the holding cell,

"Congratulations, you made it to the big time. You're now charged with murder, kidnapping, rape and robbery" (R 1019). Rickmeyer testified that Marek responded, "Oh shit, the SOB told all" (R 1019).

Officer Satnick testified on rebuttal that when he met Marek and Wigley on Dania beach, he addressed both by their last names after taking down the information for his contact report from Marek's and Wigley's driver's licenses (R 1023-1024). Marek told Satnick that he was at the beach to meet with some college kids whom he went to college with (R 1026-1027). When Satnick asked Marek what college he went to, Marek did not answer (R 1027).

D. RESPONSE IN OPPOSITION TO REQUEST FOR STAY OF EXECUTION

Marek boldly asserts that "the issues prescribed are substantial and warrant a stay." The State would maintain however that Marek has raised no grounds which warrant relief. The issues raised by Marek in this habeas corpus proceeding were raised in his motion for post-conviction relief or are barred. Thus, the present petition is an abuse of Florida's Collateral procedures. Blanco v. Wainwright, 507 So.2d 1377 (Fla. 1987).

The State would also point out because Marek's execution is not until November 10, 1988, there is plenty of time for this Court to resolve the instant petition in advance of the execution. Marek is not entitled to a stay of execution as this response will demonstrate.

E. REASONS FOR DENYING THE WRIT

On direct appeal Marek raised 6 issues. In his motion for post-conviction relief, he raised 22. The 16 issues he raises in this instant habeas corpus petition do not warrant relief. Specifically, 13 of the 16 issues raised were raised by Marek in his motion for post-conviction relief. Only 3 issues are new. However, even those issues are not properly before this Court for reasons set forth in the argument section of this response. It is thus clear that this Court will have addressed

13 of the 16 issues raised by Marek herein in the appeal from the 3.850 denial.

As this Court has found, by raising the same issues in the petition for writ of habeas corpus, as in the rule 3.850 peition, "collateral counsel has accomplished nothing except to unnecessarily burden this Court with redundant material." Blanco v. State, 507 So.2d 1377, 1384 (Fla. 1987). The State will respond to Marek's arguments, but wishes to make it clear at the outset that the law of the case doctrine precludes reconsideration of the matters as either disposed of on direct appeal, or on determination of the 3.850 proceeding. See Blanco, Id.; and Preston v. State, 444 So.2d 939, 942 (Fla. 1984). Marek's petition must therefore be denied.

Whether a particular issue has been raised on direct appeal, in the 3.850 proceeding or otherwise procedurally defaulted will be pointed out in the argument of each claim.

CLAIM I

MAREK'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS HAVE NOT BEEN VIOLATED AS PROSPECTIVE APPLICATION OF NEW RULES OF LAW IS MANDATED.

Notwithstanding Marek's accurate interpretation of Perry v. State, 522 So.2d 817 (Fla. 1988) and Lamb v. State, 13 F.L.W. 530 (Fla. September 1, 1988), the State maintains that these decisions are not retroactive to Marek's capital sentence. Further, Marek's argument in reference to Johnson v. Mississippi, 486 U.S. ___, 108 S.Ct. ___, 100 L.Ed.2d 575 (1988) is inapplicable sub judice.

The trial court found four aggravating circumstances and no mitigating circumstances. Assuming arguendo, the validity of Marek's argument as to his contemporaneous conviction for Kidnapping as being an invalid factor in aggravation, the State posits that "when there are one or more valid aggravating factors and none in mitigation, death is presumed to be the appropriate penalty." Jackson v. State, 502 So.2d 409 (Fla. 1986). If this one factor were invalid, the other three were and still are, proper. His sentence must be upheld.

Retroactive application of the rule enunciated in Wasko v. State, 505 So.2d 1314 (Fla. 1987), Perry and Lamb is inappropriate. The jury instruction herein contested does not constitute fundamental error requiring retroactive application. Smith v. State, 13 F.LW. 43 (Fla. Jan. 21, 1988) (Yohn v. State, 476 So.2d 123 (Fla. 1985) not fundamental error, requiring reversal where not preserved, when old instruction, though defective, still clearly imposed burden of proof on the State); Jackson v. State, 502 So.2d 409, 413 (Fla. 1986) (new procedure in Florida death penalty cases, requiring instruction to jury, on need for factual findings sufficient to permit imposition of the death penalty under Enmund v. Florida, 458 U.S. 782 (1982), to be applied prospectively; past failure to give such instruction, not reversible error); Tedder v. Video Electronics, Inc., 491 So.2d 533, 535 (Fla. 1986) (ruling, forbidding limits on "backstriking"

jurors, not so fundamental, so as to permit retroactive application).

Retroactive application of a newly announced rule of law, is contingent upon measuring the purpose, and impact of such a rule or procedure on the integrity of the fact-finding process; the extent of good faith reliance by various law enforcement authorities on the old standard, rule or procedure; and the impact of such a charge, on the overall administration of justice.[3] Allen v. Hardy, 478 U.S. ___, 106 S.Ct. 2878, 92 L.Ed.2d 199, 204 (1986); Solem v. Stumes, 465 U.S. 638, 643 (1984); Stovall v. Denno, 388 U.S. 293, 297 (1967); Bundy v. State, 471 So.2d 9, 18 (Fla. 1985); Witt v. State, 387 So.2d 922 (Fla. 1980). Application of these criteria to any such change as to jury instructions clearly favor prospective application only. Id.

There has been reliance on the use of this jury instruction or contemporaneous convictions being used in aggravation and relates back to consideration of multiple convictions from the same trial. Hardwick v. State, 461 So.2d 79, 81 (Fla. 1984). The extent of this reliance, under these compelling circumstances clearly supports non-retroactive application, of any change in jury instructions. Allen; Solem; Yohn; Bundy.

Perhaps most significantly, there is no way to measure the enormously destructive nature, of the impact of retroactive jury charge revisions, on the administration of justice. Id. Courts would be literally inundated with hundreds, perhaps thousands, of habeas corpus petitions, post-conviction and/or collateral motions, and appeals from such motions, by those whose trials have long since been complete. Retrials of those, who might be successful in obtaining relief, would be virtually

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[3] Similar considerations, plus those of public policy, the nature of the statute, and its prior application, govern the impact of a decision holding a statute constitutionally invalid, on those cases completed prior thereto. Lemon v. Kurtzman, 411 U.S. 192, 198-199, 201, 208-209 (1973); Linkletter v. Walker, 381 U.S. 618, 627 (1965).

impossible, given understandable lapses in time and memory. These perilous practical considerations, and the non-fundamental nature of the error, if any, clearly warrant relief, if any, solely on a prospective basis. Id. Any opinion of this Court, that seeks to invalidate the instruction under similar circumstances should apply only to those cases subsequent to Wasko.

Marek's reference to Johnson v. Mississippi, 486 U.S. ___, 108 S.Ct. ___, 100 L.Ed.2d 575 (1988) as applied to the case before this Court is inapposite. In Johnson the aggravating factor of a prior violent crime was invalidated because the conviction for that prior crime was vacated.

> The question in this case is whether allowing petitioner's death sentence to stand although based in part on a vacated conviction violates this principle [that such decisions imposing death] cannot be predicated on mere 'caprice' or on 'factors that are constitutionally impermissible or totally irrelevant to the sentencing process.' (citation omitted).

Johnson, 100 L.Ed.2d at 584. Sub judice, the prior felony conviction used in aggravation, although contemporaneous and therefore invalid in aggravation pursuant to Perry and Lamb, was not reversed. Therefore, it is sufficient that the trial court found one or more other valid aggravating factors and no mitigating factors to warrant denial of Marek's petition for writ of habeas corpus, if application of Perry and Lamb is applied retroactively.

The State further maintains that this point is procedurally barred from review as Marek raised the issue on direct appeal and his 3.850 moion. Initial Brief at 22. Clearly, a petition for writ of habeas corpus is not to be used as a second direct appeal. White v. Dugger, 511 So.2d 554, 555 (Fla. 1987). The State requests denial of Marek's petition.

CLAIM II

THE COURT PROPERLY INSTRUCTED THE JURY AS TO FACTORS IN AGGRAVATION; THE FINDINGS OF FACT, SENTENCE AND INSTRUCTION REFLECT THE SAME FACTORS IN AGGRAVATION.

Marek was convicted of Murder in the First Degree (R. 1438), Kidnapping (R. 1439), Criminal attempt: Burglary with an Assault (R. 1440) and of Battery, the lesser included offense of Sexual Battery. (R. 1441). One of the trial court's verbal instructions to the jury, at the penalty stage, was that they "can consider the crime for which the defendant is to be sentenced was committed while he was engaged in the commission of the crime of attempted burglary with an assault, as you found." (R. 1322). Marek herein argues that there was no basis for the jury verdict of criminal attempt: burglary with an assault.

Marek's contention of insufficient evidence to support the verdict of Criminal Attempt: Burglary with an Assault is procedurally barred. It was argued on direct appeal.

> Count III dealt with Burglary with intent to commit an assault. There was no evidence that the entering of the shack was done with the intent of assaulting Ms. Simmons. The State bootstrapped the Burglary charge along with the Sexual Battery, which the jury didn't believe because of the convictions for simple battery. Without the sexual battery, there cannot be a burglary with the intent to commit an assault because there was no other assault in the shack proved.

Initial Brief at 19. ""[H]abeas corpus is not a vehicle for obtaining additional appeals of issues which were raised ... on direct appeal ... or have been raised in rule 3.850 proceedings. White v. Dugger, 511 So.2d 554, 555 (Fla. 1987). This aspect of the claim is therefore without the court's purview, as well as being a diversion without merit.

Marek argues that the trial court erred in finding that the murder was committed while Appellant "was engaged in the commission of attempted burglary with intent to commit a sexual battery". (R. 1472). The State maintains however that because Marek was convicted under Count III of the indictment which reads:

> RAYMOND DEWAYNE WIGLEY and JOHN RICHARD MAREK between 11 p.m. on June 16, 1983 and 4 a.m. on June 17, in the year of our Lord One Thousand Nine Hundred and Eighty-three, in the County of Broward, State of Florida, did unlawfully enter or remain in a structure located at 100 North Beach Road, property of the City of Dania, with intent to commit sexual battery, and in the course thereof did make an assault upon one ADELLA MARIE SIMMONS, against the form of the statute in such case pursuant to Section 810.02 and 777.011. (R. 1358).

The trial court properly considered this aggravating circumstance in sentencing Appellant. The State maintains that there was overwhelming evidence to support this conviction. See Statement of Facts. Clearly the trial court did not err in applying this aggravating circumstance in sentencing Marek.

The jury found Marek guilty of criminal attempt: burglary with an assault. The aggravating factor reflected this verdict as read to the jury for consideration during its determination of whether to apply the death penalty or not. The trial court properly instructed the jury during the penalty phase. If Marek is arguing that the phrase "attempted burglary with an assault" is so completely different from "criminal attempt: burglary with an assault", the State disagrees with the contention and posits that such allegation is a smoke screen. For Example:

> It is well settled that a person on parole from a sentence of imprisonment continues to be under sentence of imprisonment for the purposes of section 921.141(5)(a) . . . To have been technically accurate, the trial judge should have found that appellant was under sentence of imprisonment, giving in support of the finding the fact of his parole. This minor inaccuracy does not affect the validity of the judge's finding of this aggravating circumstance.

Brown v. State, 473 So.2d 1260, 1266 (Fla. 1985). Sub judice, neither the slight change of language in the trial court's penalty phase instruction, nor in his written pronouncement[4],

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[4] The Court's finding was not that Marek committed burglary and the sexual battery with which he was charged, but not convicted of; but rather that during the course of the burglary an assault occurred. It is important to note that although the jury did not find that the burglary was committed with an intent to commit a sexual battery, the jury did find the kidnapping was done with the intent to commit a sexual battery (R. 1338, 1439), as charged (Con't on next page).

which paraphrased the charging document to the extent applicable (R. 1358), invalidates the application of either the capital sentence or the aggravating factor. There is no requirement that the statutory factor in aggravation must mirror the statutory language of the crime for which Marek was convicted.

Marek's application of Mills v. Maryland, 486 U.S. ___, 108 S.Ct. 1860, 91 L.Ed.2d 384 (1988),is not appropo beyond the quoted dicta that it is the jury's understanding of the charge that is controlling. Applied to the circumstances before the court, it is clear that the jury understood the charge of "attempted burglary with an assault," as they, the week before, found Marek guilty of criminal attempt: burglary with assault. There were no questions regarding the slight rewording. Further, the basis of the Mills decision, is a recognition that the Maryland statute and jury instruction on the necessary unanimity required for finding MITIGATING circumstances was inherently amgibuous. Mills, 486 U.S. at ___, 91 L.Ed at 400. The effect of the ambiguity in Mills is certain elimination of any miti-gating factor and automatic imposition of the death penalty. Mills has an entirely different premise from that argued by Marek, and is therefore inapplicable.

(R. 1358).

CLAIM III

THAT THE MURDER WAS COMMITTED FOR PECUNIARY GAIN WAS SUPPORTED BY THE EVIDENCE.

Marek is procedurally barred from contesting the application of the aggravating factor that the murder was committed for pecuniary gain. He raised this issue on direct appeal and in his 3.850 motion. Initial brief at 22. Marek cannot now use the instant petition as a second direct appeal. White, supra.

Marek argues that the trial court erred in finding that the murder of Adella Simmons was committed for pecuniary gain. Marek essentially contends that there was insufficient evidence to support this finding. The State disagrees. The evidence adduced at trial clearly support the trial court's finding. Michael Rafferty of the Florida Department of Law Enforcement testified that while processing the pickup truck which Marek and Wigley drove, he found a gold earring in the ashtray. (R. 565). Rafferty also found a gold watch, a gold necklace and another gold earing in the truck's storage console. (R. 566). Jean Trach positively identified these items of jewelry as belonging to the victim and worn the night of June 16, 1983. (R. 718). Further, numerous witnesses at trial testified that Marek was at various times either a driver or passenger in the pickup truck where the jewelry was found. Marek by his own admission drove the pickup truck away from Dania Beach the morning of June 17, 1983, after being confronted by police. (R. 960). Clearly, there can be no question that the jewelry found in the truck, after the murder, was identified as belonging to the victim and worn by the victim when she got into the truck with Marek.

In Hildwin v. State, 13 F.L.W. 528 (Fla. September 1, 1988) the Court determined, base on circumstantial evidence, that the murder was committed for pecuniary gain.

> Relying on the fact that appellant admitted forging one of the victim's checks, the fact that he testified that he needed money, and the fact that he was in possession of the victim's ring and radio the trial judge

> found the aggravating factor that the killing was committed for pecuniary gain.
>
> Appellant attacks this finding, saying that while proof of possession of recently stolen property raises an inference that the possessor stole it, possession alone does not prove that the goods were stolen by the defendant. Appellant argues the circumstantial evidence in this case does not rebut all reasonable hypotheses to the contrary.
>
> We disagree. 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 scrap up enough case 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.

Id. at 530 (emphasis added). In Porter v. State, 429 So.2d 293 (Fla. 1983) the Supreme Court of Florida rejected defense arguments similar to those posed by Marek. Marek maintains that the killing was not committed for pecuniary gain and in support thereof states that he was not in the truck when his victim's jewelry was found. Such argment is without merit.

> Porter also claims that the state did not prove, beyond a reasonable doubt, that he committed the murders for pecuniary gain because it did not prove that he profited from the murders. In his brief Porter admits that the state proved that he took his victims' automobile, television, silverware, jewelry and other items. We do not find his later giving away, throwing away, or abandoning these articles material in view of the proof that he stole them in the first place. Likewise, we find that the record supports the trial court's finding that the murders were heinous, atrocious, and cruel.

Id. at 296. The finding of the factor in aggravation that the killing was committed for pecuniary gain was affirmed by the Florida Supreme Court on direct appeal. This Court must again reject MAREK'S argument since it is clearly without merit.

CLAIM IV

APPLICATION OF THE HEINOUS, ATROCIOUS AND CRUEL AGGRAVATING CIRCUMSTANCE WAS NOT IN VIOLATION OF MAREK'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

Marek asserts a "constitutionally vague" argument in his efforts to invalidate application of the factor in agravation reflecting a murder committed in an especially heinous, atrocious or cruel manner. Marek's reference to Maynard v. Cartwright, 486 U.S. ___, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988) is not applicable as the Supreme Court of Florida has defined the terms alleged to be vague and ambiguous:

> It is our interpretaion that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies - the conscienceless or pitiless crime which is unnecessarily torturous to the victim.

State v. Dixon, 283 So.2d 1, 9 (Fla. 1973).

Marek suggests that review of the "hac" factor, by the Court on direct appeal must now be revisited, in light of Maynard, supra. Maynard cannot be characterized as new law, now cognizable collaterally, under Witt v. State, 387 So.2d 522 (Fla. 1980). The genesis of the Maynard claim, based on the express language of the United States Supreme Court's opinion therein, arises from Godfrey v. Georgia, 446 U.S. 420 (1980), and the basic premise of Furman v. Georgia, 408 U.S. 238 (1972), involving the requirement that the death penalty accurately channel the discretion of jurors and judges in determining those cases where a convicted murderer should receive the death penalty. Maynard, 100 L.Ed.2d, supra, at 381-382. This challenge, to the hac factor as constitutionally vague and/or over broad, was also the subject of the United States Supreme Court's opinion, determining the constitutionality of Florida's death penalty statute, in Proffit v. Florida, 428 U.S. 242, 254-

256 (1976). Since this claim, under such circumstances was clearly available at time of trial and/or direct appeal, and was not raised therein, this claim is not cognizable in this proceeding. Clark v. Dugger, 13 F.L.W. 548, 549 (Fla. September 8, 1988); Smith v. Murray, ___ U.S. ___, 106 S.Ct. 2661 (1986); Witt, supra

Assuming this claim is cognizable, the Maynard decision is fundamentally distinguishable, from this case, and other Florida death penalty cases on the issue. The Maynard case concerned construction of the "hac" aggravating circumstance by Oklahoma appellate courts; those courts differ substantially from Florida courts, facially and as applied in this case. The court in Maynard noted that Oklahoma appellate courts, had not adopted a "limiting construction" of the "hac" circumstance, having merely reviewed the facts, and deciding whether the facts supported an hac finding. Maynard, 100 L.Ed.2d, at 381-382. The Maynard decision found this to be a similar defect to the one in the Georgia "hac" factor review in Godfrey, supra. Id. In this analysis, the court did not overrule its review of the constitutionality of "hac" in Proffitt, supra; in fact, it favorably compared Proffitt, to Godfrey, and Maynard, by implicitly noting a distinction, between Proffitt and Godfrey. Maynard, at 381. In Proffitt, the United States Supreme Court specifically held that (unlike the Oklahoma courts in Maynard), the Florida statutory aggravating circumstance of hac, was not unconstitutionally overbroad or vague, because of the specific limiting construction, imposed by Florida courts on this factor. Proffit, 442 U.S. at 255-256, citing State v. Dixon, 283 So.2d 1, 9 (Fla. 1972) ("hac" is limited to those crimes clearly apart from the norm, that are "conscienceless" "pitiless," and "unnecessarily torturous to the victim"). Since the defect in Maynard, is not thus shared in Florida, Proffitt, Marek's claim lacks merit. The State therefore maintains that this term was easily understood by the court and jury and was clearly applicable to the facts of the instant case.

In finding the murder of Adella Simmons to be heinous, atrocious and cruel, the trial court stated:

> The Court finds that the murder was especially heinous, atrocious or cruel. The victim was terrorized for at least three (3) hours prior to her death. The victim was abducted late at night by Marek and Wigley. During the ordeal, she was beaten severely, stripped naked and dragged into a deserted lifeguard tower during the early morning darkness. Her pubic hair was burned and she was choked and strangled to death. The physical and mental torture would have had to make her realize the great propensity that she was going to be killed. Watching her killer choke the life from her for at least thirty (30) second before she lost consciousness would only add to her terror. The victim's finger was burned in the tower. If it was done before her death it was to make sure that the death contemplated had been finalized or to further degrade her body. This aggravating circumstance was also proved beyond any reasonable doubt.

(R. 1472) The State submits that beyond a shadow of doubt this aggravating factor is supported by the record.

Jean Trach testified that the last time she saw the victim was at approximately 11:30 P.M., June 16, 1983, when the victim got into the pickup truck with the Marek. (R. 723). Officer Dennis Stnick testified that he came into contact with Marek on Dania beach at 3:30 A.M., June 17, 1983, as Marek was walking away from the area of the lifeguard stand. (R. 660-663, 676). The victim's body was found in the observation deck of the lifeguard stand at 7:15 A.M., June 17, 1983. (R. 465, 472). The victim was nude and a red bandana was tightly knotted around her neck. (R. 472, 573, 758-759). The victim's pubic hair had been burned, the burns being consistent with those inflicted by matches or a lighter. (R. 500). The victim's right thumb had also been burned. (R. 779).

The victim suffered numerous facial as well as external and internal scalp injuries which were consistent with her being struck with a fist, hand or blunt instrument. (R. 759-762). The victim's arms and chest area also had many bruises and contusions, and her right breast had an abrasion consistent with a heal mark (R. 767, 778). The victim had deep scrape marks and bruises on the center of her back. (R. 769). Also, the tissue

surrounding the victim's kidneys was bruised and bleeding. (R. 771). This type of injury was consistent with the victim being kicked with a great deal of force. (R. 771).

A large amount of sand was impacted on the victim's upper back, lower back and buttocks. (R. 783). It was Dr. Wright's opinion that the victim was unclothed on the beach prior to being taken up to the observation deck, due to the amount of sand found on her body which was not present in any kind of quantity in the shack itself. (R. 754, 783). He testified that the injuries to the victim's breast and back occurred when she was unclothed due to the nature and extent of the injuries. (R. 782-783). It was his opinion that the injuries to the victim's hip and back were "exceptionally consistent" with her being dragged from the lower level of the lifeguard shack over the wooden siding to the upper level of the shack. (R. 782, 815, 822). Dr. Wright further testified that the injuries to the victim's back, hip, chest, breast, arms, face and scalp all occurred while the victim was alive and had a beating heart since there was bleeding and bruising into the depths of those wounds. (R. 815). It was therefore Dr. Wright's opinion that the victim was alive at the time she was taken up to the observation deck of the lifeguard stand. (R. 815).

Dr. Wright also testified that the victim was sexually assaulted within twenty-four (24) hours preceding his autopsy which was performed at 11:00 A.M. June 17, 1983. (R. 808-809). Dr. Wright's examination of the victim revealed spermatozoa present in the victim's cervix. (R. 775). Dr. Wright testified that because the sperm had tails they were less than twenty-four (24) hours old. (R. 776).

Dr. Wright testified that the victim died from asphyxiation by ligature strangulation. (R. 781). Dr. Wright testified that the death occurred at approximately 3:00 to 3:30 A.M., June 17, 1983. (R. 739, 753). He testified that a red bandana had been tied tightly around the victim's neck and that the deep bruising on the neck itself was consistent with the

victim being strangled. (R. 758-759). Dr. Wright testified that he found five (5) fingernail marks on the victim's neck which in his opinion either resulted from the stangulation itself or from the victim trying to get the bandana off her neck. (R. 757). Dr. Wright testified that in such a murder the victim's heart would stop beating within 10 to 15 minutes after the ligature was applied to the neck. (R. 823). Dr Wright testified that the victim was probably conscious for one (1) minute after the ligature was applied to the neck. (R. 823).

Clearly, these facts support the trial court's finding that the victim's murder was especially heinous, atrocious and cruel. The victim was severely beaten and her pubic hair burned before she was strangled to death. Murder by strangulation evinces a cold calculated design to kill and is a method of killing to which the Court has held the factor of heinousness applicable. Adams v. State, 412 So.2d 850 (Fla. 1982); Alvord v. State, 322 So.2d 533 (Fla. 1975). It cannot be seriously questioned that the vicitm, prior to losing consciousness, was subjected to agony over the prospect that death was soon to occur. Dr. Wright testified that the five (5) fingernail marks on the victim's neck could have resulted from the strangulation itself or from the victim trying to get the bandana off her neck. (R. 757). The victim's death was clearly torturous and heinous, atrocious and cruel. See, Swafford v. State, 13 F.L.W. 595, 597 (Fla. September 29, 1988); Jenkins v. State, 444 So.2d 947 (Fla. 1984); Routly v. State, 440 So.2d 1257 (Fla. 1983); Smith v. State, 407 So.2d 894 (Fla. 1981).

Marek's petition for writ of habeas corpus is without merit and is procedurally barred as this issue was raised collaterally and on direct appeal. White, supra; Blanco, supra.

The State maintains that Marek is unable to show that but for his counsel's actions the result would have been different. Assuming arguendo that the jury was not properly informed as to the connotations of heinous, atrocious and cruel, surely the trial court was. "In making the determination whether

the specified errors resulted in the required prejudice, a court should presume . . . that the judge or jury acted according to law." Strickland v. Washington, 466 U.S. 668, 694 (1984). Sub judice the court's order demonstrates the trial judge's cognition of the finding that a murder was committed in a manner that is deemed heinous, atrocious and cruel. Marek's petition is without merit and must be denied.

CLAIM V

THE TRIAL COURT CONSIDERED ONLY STATUTORY AGGRAVATING CIRCUMSTANCES.

The sentencing phase of Marek's trial was held on June 5, 1984. The transcript of said proceeding indicates the true picture as to which aggravating factors were argued and used by the State and the trial court. The prosecutor told the jury that they could "consider those aggravating circumstances that [they] find proven out of the following four . . . ." (R. 1300).

> Number one, the defendant has been previously convicted of a felony involving the use or threat of violence to some person.
>
> . . .
>
> Number two, the crime for which the defendant is to be sentenced was committed while he was engaged in the commission of the crime of attempted burglary with an assault . . . .
>
> . . .
>
> Number three, the crime for which the defendant is to be sentenced was committed for financial gain.
>
> . . .
>
> The fourth, the crime . . . was especially wicked, evil, atrocious or cruel . . . .

(R. 1300-1302). There is no mention of lack of remorse. Even defense counsel's argument to the jury, wherein he rebutted the applicability of the four enumerated aggravating circumstances, fails to mention remorse. (R. 1310-1313). The aggravating circumstances given to the jury, for their consideration, by the Court were the same four argued and rebutted by the State and Marek respectively. (R. 1322). The trial court's written order clearly states the same four aggravating factors. (R. 1472). That these aggravating factors are provided for by Florida law is clear. §921.141(5)(b), (d), (f) and (h), Fla. Stat.

Assuming arguendo that the State's comments reflected improper reliance on lack of remorse in aggravation, Marek remains unentitled to relief. It is beyond question that the evidence of the victim's struggle and intense suffering while being strangled and raped and kicked and dying over a 30 second span of such strangulation, proved the "hac" aggravating

circumstance, regardless of any lack of remorse consideration. Huff v. State, 495 So.2d 145, 153 (Fla. 1986); Pope, 441 So.2d, supra, at 1078; Phillips, 476 So.2d, supra at 197; see also, Hildwin supra; Tompkins, supra; Turner v. State, 13 F.L.W. 426, 428 (Fla., July 7, 1988). Thus, the trial court's finding of "hac", otherwise supported by the Record, was not fatally tainted by any existing defective considerations, under Pope v. State, 441 So.2d 1073 (Fla. 1984), Huff, supra; Phillips, supra.

The trial court's reference to lack of remorse (R. 1351) during sentencing had nothing to do with aggravation. It was strictly a negation of an alleged mitigating factor argued by defense counsel's proffer of the prison guard's testimony.

> Finally, the passing reference to [Marek's] lack of remorse at the end of the sentencing order cannot be error because this factor was not considered in determining the aggravating circumstances. Suarez v. State, 481 So.2d 1201 (Fla. 1985).

Koon v. State, 513 So.2d 1253, 1257 (Fla. 1987). Application of Koon is mandated sub judice in the denial of Marek's 3.850 Motion.

The State posits that the traditional guidance of Strickland v. Washington 466 U.S. 668 (1984) is appropriate and renders Marek's claim nugatory. Appellate counsel is not required to raise frivolous claims on direct appeal; to have objected to the State's closing argument during the guilt phase of the trial would have been erroneous as the prosecutor was making proper comment on the evidence.

> It is proper for a prosecutor in closing argument to refer to the evidence as it exists before the jury and to point out that there is an absence of evidence on a certain issue.

White v. State, 377 So.2d 1149, 1150 (Fla. 1979). Further, as to the guilt and penalty phase, Marek fails to demonstrate, or even allege, any prejudice. There was no prejudice to Marek as only statutory aggravating factors were considered. Appellate counsel was not ineffective for not raising the instant issue as there were no valid grounds for objection at trial.

CLAIM VI

THE TRIAL COURT DID NOT FAIL TO GIVE A NON-STATUTORY MITIGATING CIRCUMSTANCE INSTRUCTION TO THE JURY.

The State contends that Marek is procedurally barred from arguing the instant claim as it was raised on direct appeal. First, Marek ostensibly raised a similar issue on direct appeal:

> The Court erred in sentencing John Marek to death for first degree murder, when it had previously sentenced Raymond Wigley to life in prison for the same offense; that being a denial of John Marek's rights under the United States and Florida Constitutions.

(Initial Brief of Marek at p. 8). The argument on direct appeal was based on the propriety of sentence disparity, not, as is argued here, that the trial court erred in failing to give a jury instruction on potential disparate treatment.

This Court has upheld sentences disparate in terms as have the federal courts. See, Tafero v. State, 403 So.2d 355 (Fla. 1981); Jackson v. State, 366 So.2d 752 (Fla. 1978); Witt v. State, 342 So.2d 497 (Fla. 1977); Tafero v. Wainwright, 796 F.2d 1314, 1322 (11th Cir. 1986); United States v. Nesbitt, 852 F.2d 1502, 1522 (7th Cir. 1988). The Supreme Court of Florida opined as much in the affirmation of Marek's sentence.

> In prior cases we have approved the imposition of the death sentence when the circumstances indicate that the defendant was the dominating force behind the homicide, even though the defendant's accomplice received a life sentence for participation in the same crime.

Marek v. State, 492 So.2d 1055, 1058 (Fla. 1986). Marek next raised, albeit circuitously, the instant issue -- that the jury "should have been instructed that the co-defendant was convicted of greater degree offenses but yet sentenced to life in prison." (Initial Brief at 23). The Supreme Court of Florida stated this issue is appropriate "in the penalty phase that is properly addressed through the development of evidentiary facts." Marek at 1058. Marek's sentence was again upheld.

Notwithstanding the negation of Marek's argument by the Court, the State maintains further argument is barred. "[H]abeas corpus is not a vehicle for obtaining additional appeals of issues which were raised, or should have been raised, on direct appeal or which were waived at trial or which could have , should have or have been raised in rule 3.850 proceedings. White v. Dugger, 511 So.2d 554, 555 (Fla. 1987); Blanco v. Wainwright, 507 So.2d 1377, 1380 (Fla. 1987).

As to the merits of the claim, defense counsel chose not to go into the proportionality issue as he determined that the State's explanation, or appropriate response, would have been more prejudicial and detrimental to Marek's case.

> THE COURT: I think you have a right to bring up his [Wigley's] sentence also but I think Mr. Carney [the prosecutor] has a right to indicate to the jury the differences in the cases.

(R. 1288). In fact, the trial court did instruct the jury that they could consider in mitigation "that the defendant was an accomplice in the offense for which he is to be sentenced but the offense was committed by another person and the defendant's participation was relatively minor." (R. 1323). Nonetheless, it was Marek who determined not to mention Wigley's life sentence. The trial court's determination that the State could, in fair response to Marek's proposed proportionality argument, go into the differences in the cases -- the bottom line of the court's ruling (R. 1283-88) -- was entirely proper.

> We hold that it was within the discretion of the trial court to allow the state to explain to the jury, through the testimony of the state attorney, the reasons for the seemingly disparate treatment.

Messer v. State, 403 So.2d 341, 349 (Fla. 1981).

Clearly, Marek's tactical decision is barred from review. Smith v. Murray, 477 U.S. 527, 534 (1986). Equally lucid is the propriety of the trial court's instructions. The jury was instructed as to six mitigating factors (R. 1450, 1323-24), including "any other aspect of the defendant's character or record or any other circumstance of the offense." (R. 1324). It

was defense counsel's decision in light of the law, see Messer, not to present evidence of Wigley's sentence. The mitigating factors given by defense counsel were the defense of intoxication (R. 1315), Wigley's participation (R. 1316) -- trial strategy placed Marek asleep in Wigley's truck not to have awakened until after the murder, Marek's age (R. 1317) and any other aspect of Marek's character. (R. 1317).

The trial court did not limit the jury's consideration of factors in mitigation to those statutorily enunciated. Lockett v. Ohio, 438 U.S. 586 (1978). The jury heard Marek's theory of defense, although not specifically Wigley's sentence, and they did not believe him. The evidence showed that his participation in the murder was that of a dominant figure. The Supreme Court in Eddings v. Oklahoma, 455 U.S. 104 (1982) holds that the "sentencer, and the Court of Criminal Appeals on review, may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration." Id. at 114-15. Here the jury was instructed, as noted, to consider any other aspect they deem relevant. The trial court's sentencing order (R. 1468-1476) indicates the judge considered all relevant aspects of both the mitigating and aggravating circumstances. The court even assumed that Wigley, and not Marek, strangled the victim (R. 1471), and still found Marek a dominant actor deserving the most extreme sentence -- as did the jury.

> That the court's findings of fact did not specifically address appellant's evidence and arguments does not mean they were not considered. The trial court obviously rejected appellant's showing as having no valid mitigating weight. We perceive no error in this determination.

Brown v. State, 473 So.2d 1260, 1268 (Fla. 1985); see also, Straight v. Wainwright, 772 F.2d 674, 678 (11th Cir. 1985).

The State therefore suggests that the instant allegation is not only procedurally barred, but is wholly without merit.

CLAIM VII

TRIAL COUNSEL WAS NOT PRECLUDED FROM INTRODUCING MITIGATING EVIDENCE SO AS TO DENY MAREK HIS SIXTH AMENDMENT RIGHT TO PRESENT A DEFENSE.

The State maintains that this particular claim is subject to a procedural bar and therefore does not warrant this Court's consideration thereof. Marek could have raised this issue on direct appeal, and did raise it in his 3.850 motion. "[H]abeas Corpus is not a vehicle for obtaining additional appeals of issues which were raised, or should have been raised, on direct appeal or which were waived at trial or which could have, should have, or have been, raised in rule 3.850 proceedings. White v. Dugger, 511 So.2d 554, 555 (Fla. 1987); Blanco v. Wainwright, 507 So.2d 1377, 1380 (Fla. 1987).

However, should this Court determine otherwise, the State maintains that the trial court's ruling denying the admission of Dr. Krieger's report was proper. (R. 1284). The trial court did not preclude testimony of Dr. Kreiger.

> As far as Dr. Krieger's statement that you want to introduce, I think that's hearsay and if you want to have Dr. Krieger here to testify you are welcome to do so. I'm sure he's available and you can have him if you want so I won't allow a report of Dr. Krieger's. You can just as easily bring him in. You can't cross examine a doctor's report. So I think Mr. Carney would be at a disadvantage.

(R. 1284). This ruling is entirely appropriate. §921.141(1), Fla. Stat. clearly states that evidence may be admitted, where ordinarily it would be excluded "provided the defendant is accorded fair opportunity to rebut any hearsay statements." Id. The State maintains that the same would hold true for the State. Marek's juxtaposition of the trial court's determination with regard to Dr. Krieger's report to that of the court's determination that the State could use the essence of Wigley's confession as a fair response to his proposed proportionality argument is not a valid contention.

As noted, Dr. Krieger was not precluded from giving testimony. Further, the trial court's bottom line as to the use

of Wigley's confession was not that the confession would come in, but rather, and in response to Marek's proposed argument, simply to explain the disparate roles that the co-defendants took in the abduction and murder. (R. 1288). The trial court was not permitting the admission of Wigley's written confession; this allegation of Marek is incorrect.

Even if the ruling was erroneous, and the State strongly maintains the propriety of the trial court's actions, the report itself may not have warranted the finding of a mitigating circumstance. See Provenzano v. State, 497 So.2d 1177, 1184 (Fla. 1986). "The trial court has broad discretion in determining the applicability of the various mitigating circumstances, so long as all of the evidence and all of the mitigating circumstances are considered." Johnston v. State, 497 So.2d 863, 871 (Fla. 1986). The trial court did consider all this evidence and did not preclude Dr. Krieger's testimony.

Marek's contention, based on Rock v. Arkansas, 483 U.S. ___, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987), is not the clear cut basis for finding trial court error as argued. Rock recognizes a "state's legitimate interest in barring unreliable evidence does not extend to per se exclusions that may be reliable in an individual case." Rock, 97 L.Ed.2d at 52. Sub judice, there was no per se exclusion of the psychologist's testimony; it was the report that the trial court found offensive as the Doctor was available to testify and therefore available for cross examination.

> Just as a State may not apply an arbitrary rule of competence to exclude a material defense witness from taking the stand, it also may not apply a rule of evidence that permits a witness to take the stand, but arbitrarily excludes material portions of his testimony. In Chambers v. Mississippi, 410 U.S. 284, 35 L.Ed.2d 297, 93 S.Ct. 1038 (1973), the Court invalidated a State's hearsay rule on the ground that it abridged the defendant's right to "present witnesses in his own defense." Id., at 302, 35 L.Ed.2d 297, 93 S.Ct. 1038.

Rock, 97 L.Ed.2d at 48. Here defense was permitted to have the doctor testify. Marek's right to present witnesses was not

abridged. So too, Marek's application of Crane v. Kentucky, 476 U.S. 683 (1986) is misplaced. Crane addresses total exclusion of exculpatory evidence, whereas the facts sub judice, clearly allow testimony of the doctor. Further, as guidance in the application of the principles enunciated, the Crane court found "that the [alleged] erroneous ruling of the trial court is subject to harmless error analysis." Crane, 476 U.S. at 691. In the instant case Marek could have had the doctor testify and, as noted, chose not to. Marek's instant claim is therefore without merit and not grounds for granting the petition for writ of habeas corpus.

CLAIM VIII

ADVANCE PREPARATION OF SENTENCING ORDER.

Marek contends the trial court erred in preparing a sentencing order in advance of the July 3, 1984, sentencing (the jury had returned its recommendation on June 5, 1984). (R. 1453). This issue could have been raised on direct appeal and therefore it is procedurally barred. Witt v. Wainwright, 387 So.2d 922 (Fla.), cert. denied 449 U.S. 1067 (1980).

Marek's contention that the claim is properly before this Court because it "involves fundamental constitutional error" is incorrect. It is clear that "habeas corpus is not a vehicle for obtaining a second appeal of issues which were raised, or should have been raised, on direct appeal or which were waived at trial." Suarez v. Dugger, 13 FLW 386, 387 (Fla. June 14, 1988), quoting Blanco v. Wainwright, 507 So.2d 1377, 1384 (Fla. 1987). Simply labeling a claim "fundamental error" does not entile a death sentenced prisoner to abuse the procedures for redress that are provided by Florida law; the failure to raise the matter on direct appeal constitutes a waiver. White v. Dugger, 511 So.2d 554 (Fla. 1987).

Even if the court considers this issue on the merits, it is evident from the record that the trial court acted properly. The Florida Supreme Court's decision in Palmes v. State, 397 So.2d 648, 656 (Fla. 1981), is directly on point. In Palmes, the Court held the fact the trial judge recited findings from an order prepared before the final sentencing hearing did not compel the conclusion that she failed to consider the evidence presented by the defense. The findings in Palmes concerning the aggravating circumstance were based on evidence from the trial and there was nothing wrong with having these in mind. The fact the prepared order found no mitigating factors did not show they weren't considered; the recitation and filing of the court's findings merely indicates the court concluded nothing required her to add to or change her order. Id.

Palmes is directly on point with the instant case and requires denial of Marek's claim. This is especially true here where the record shows no evidence was even presented in mitigation at the July 3 sentencing hearing: defense counsel adopted his presentation from the sentencing phase of the trial and a memo he had filed on June 18. (R. 1334). He limited his argument to claiming that death was precluded under Enmund v. Florida, 458 U.S. 782 (1982). (R. 1335-1337). The prosecutor relied on his argument at the sentencing phase and a previously filed memorandum. (R. 1337-1338). Therefore, the trial court did not err in drafting its sentencing order in advance, particularly here where nothing else was presented at the sentencing hearing.

The second aspect of Marek's claim is that the advance preparation of the order somehow prevented the court from independently weighing the aggravating and mitigating factors. An examination of the order refutes this argument. (R. 1468-1476). The trial court carefully weighed the evidence, rejected Marek's Enmund claim, and considered, but rejected, the asserted mitigation. (R. 1474). It was within the trial court's province to make this assessment. Tompkins v. State, 502 So.2d 415, 421 (Fla. 1986); Lemon v. State, 456 So.2d 885, 887 (Fla. 1985).

The cases relied on by Marek to support his argument are not on point. In Patterson v. State, 513 So.2d 1257 (Fla. 1987), the trial court erred by directing the prosecutor to assess the aggravating and mitigating factors and prepare an order; this was held an unlawful delegation of his statutory responsibility. In Van Royal v. State, 497 So.2d 625 (Fla. 1986), the trial court failed to enter any order until six months after sentencing, by which time it had lost jurisdiction. In direct contrast to these two decisions, the trial court here carefully drafted an order and made the required findings, thus fulfilling the duty imposed by §921.141(3), Fla. Stats.

Predictably, citing Wilson v. Wainwright, 474 So.2d 1162 (Fla. 1985), Marek argues his appellate counsel on direct

appeal was ineffecive for failing to argue this point. Wilson is clearly distinguishable from and has no application to the case at bar. In Wilson, the appellate attorney failed to raise the sufficiency of the evidence when premeditation was clearly at issue to the point the dissenting judges on direct appeal raised it sua sponte. See, Wilson v. State, 436 So.2d 908 (Fla. 1983). Further, in Wilson the attorney failed to challenge the death penalty, and when ordered to do so by the Court, filed a cursory and unpersuasive supplemental brief. This total failure to perform in the role of an advocate for his client was prejudicial; ultimately, after granting a new appeal, this Court reduced one of the two first degree murder convictions to second degree and on the other, reduced the death penalty to life imprisonment. Wilson v. State, 493 So.2d 1019 (Fla. 1986).

Unlike the attorney in Wilson, appellate counsel here challenged the death penalty in Points I, V and VI, of his brief. (See, Marek v. State, FSC No. 65,821, Appellant's brief served February 11, 1985). There was no breakdown in the adversarial process. In view of the case of Palmes v. State, 397 So.2d 648 (Fla. 1981), which approved the advance preparation of a sentencing order, counsel could have quite reasonably concluded that relitigation of this issue in Marek's case would be pointless. When counsel chooses not to argue on issue due to his unfavorable evaluation of the chances for success, and the evaluation is reasonably accurate, reflecting reasonable competence, the omission cannot be characterized as ineffective counsel. Steinhorst v. Wainwright, 477 So.2d 537, 540 (Fla. 1985). As the trial court's advance preparation of the sentencing order was not a viable ground for appeal, appellate counsel can not be deemed ineffective in omitting it from his brief.

CLAIM IX

MAREK'S EIGHTH AMENDMENT RIGHTS HAVE NOT BEEN VIOLATED BY A FINDING THAT MITIGATING CIRCUMSTANCES DID NOT EXIST.

Marek's first contention of an erroneous finding of no mitigating factors is that he was a good prisoner. However, this alleged factor in mitigation is based on one prison guard's non-exclusive observation of Marek, specifically for a four day period. (R. 1073, 1280, 1298). Marek is attempting to mitigate his sentence by showing non-negative behavior; he is not demonstrating anything positive, just non-negative. (R. 1297-99). The jury considered this factor of alleged remorse, but appropriately determined it to be without merit, as did the trial court. The Court in Harmon v. State, 527 So.2d 182 (Fla. 1988) does not define what a model prisoner is: The Court states only that such finding is not, in and of itself, sufficient for a life sentence recommendation over capital punishment. Harmon at 189.

Marek argues that his age--21 at the time of the murder--should have been a factor considered in mitigation of his sentence. The trial court found otherwise and should be upheld. (R. 1474).

> We have previously addressed this question of whether age, without more, is to be considered a mitigating factor, ... but the question continues to be raised. It should be recognized that age is simply a fact, every murderer has one, and it can be considered under the general instruction that the jury may consider any aspect of the defendant's character or the statutory mitigating factor, section 921.141(6)(g), Florida, Statutes (1981). However, if it is to be accorded any significant weight, it must be linked with some other characteristic of the defendant or the crime such as immaturity or senility. In this case, for example, we see nothing in the record that would warrant finding any truly mitigating significance in the appellant's age. On the contrary, appellant's age, along with the other evidence, suggests that appellant is a mature, experienced person of fifty-eight years, of sound mind and body who knew very well what he was undertaking and, equally, that the undertaking was without any pretense of moral or legal justification.

Echols v. State, 484 So.2d 568 (Fla. 1985) (citations omitted) (emphasis added); see also Eutzy v. State, 458 So.2d 755 (Fla. 1984). Appellant has not linked his age to another

characteristic of himself or the crime. Accordingly, the trial court properly rejected this factor as a mitigator and that ruling should be upheld.

As to Marek's contention that his intoxication should have been considered in mitigation, as to incapacity and emotional and/or mental disturbance, the trial court determined the consequences of said intoxication did not warrant the application of a mitigating circumstance. (R. 1473). Koon v. State, 513 So.2d 1253, 1257 (Fla. 1987).

> While the Defendant claimed to be intoxicated, there was no evidence by any witness who observed the Defendant that would support this claim. To the contrary Jean Trach, who spoke to the Defendant for approximately forty-five (45) minutes testified that he did not appear intoxicated. Further, the crime as well as the location of the offense all suggest a requirement of mental and physical dexterity not associated with extreme intoxication.

(R. 1473).

Marek complains that the trial court erred by not instructing the jury during the sentencing phase of the proceedings that Wigley had been sentenced to life in prison. The State would point out that if Marek's jury had been instructed that the jury in Wigley's case recommended life, they undoubtedly would have been confused since they could not be aware of the evidence, confession and mitigating circumstances present in that case. See supra, claim six.

Marek was not precluded from arguing his alleged lack of a significant history of prior criminal activity. It was his decision given that his prior conviction for credit card fraud would be brought before the jury in contradiction of this circumstance.

> Appellant claims that a single conviction does not constitute a significant history of prior criminal activity. We disagree. In determining what is significant criminal activity, the trial judge may consider the severity as well as the number of prior offenses. . . . We have upheld holdings that this mitigating circumstance does not apply when a defendant has been previously convicted of a single serious offense such as murder . . . or breaking and entering . . . . We therefore hold that the trial judge was correct in not

> finding this as a mitigating circumstance. [citations omitted].

Johnson v. State, 442 So.2d 185, 189 (Fla. 1983). Clearly the precedent exists which invalidates not only Marek's claim as to trial court error in not giving this circumstance in mitigation, but also Marek's claim of ineffective assistance of appellate counsel. The trial court properly limited, but did not exclude, the mitigating circumstance of no significant history of prior criminal activity.

The trial court correctly sentenced Marek to death. There were no mitigating circumstances applicable to Marek. (R. 1473-1474). Even if the trial court improperly considered one or more aggravating factors or committed any other error in sentencing Marek, such is harmless in view of the fact there were no mitigating factors and there were present at least one or more aggravating factors which are listed in the statute. Sireci v. State, 399 So.2d 964 (Fla. 1981); Elledge v. State, 346 So.2d 998 (Fla. 1977).

The State would also point out that a proportionality review of this case will reveal that the death penalty was appropriate herein. The State maintains that in similar heinous killings by strangulation, this Court has determined a sentence of death to be proper. Adams, supra; Alvord, supra; Peek v. State, 395 So.2d 492 (Fla. 1980); Lemon v. State, 456 So.2d 885 (Fla. 1984).

CLAIM X

CALDWELL

Marek contends that certain statements by the trial court and prosecutor during his trial unconstitutionally diminished the jury's understanding of its sentencing responsibility, contrary to the principles announced in Caldwell v. Mississippi, 472 U.S. 320 (1985). The State maintains that controlling precedent from the Florida Supreme Court mandates rejection of this claim as both procedurally barred and without merit.

None of the statements complained of now were objected to at trial or cited as error on direct appeal. The Florida Supreme Court has consistently held that the Caldwell decision does not represent a change in the law upon which to justify a collateral attack. Ford v. State, 522 So.2d 345 (Fla. 1988); Tafero v. Dugger, 520 So.2d 287 (Fla. 1988); Phillips v. Dugger, 515 So.2d 227 (Fla. 1987); Card v. Dugger, 512 So.2d 829 (Fla. 1987). Therefore, the fact that Caldwell had not been decided at the time of Marek's trial does not excuse his procedural default, especially in this case where the direct appeal was decided on June 14, 1986, a year after Caldwell. See, Cave v. State, 529 So.2d 293 (Fla. 1988).

Thus, Marek may not use the instant petition for habeas corpus as a vehicle for obtaining a second appeal, raising the Caldwell claim, where it was clearly raisable on appeal. Suarez v. Dugger, 13 F.L.W. 386, 387 (Fla. June 14, 1988); Blanco v. Wainwright, 507 So.2d 1377, 1384 (Fla. 1987).

Marek's reliance on the Eleventh Circuit's misperception of Florida law in Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986), modified on rehearing, 816 F.2d 1493 (USSC cert. pending), is without merit. This exact argument has been rejected in Card v. Dugger, supra, because an Eleventh Circuit decision is not the type of "change in law" which will excuse procedural default under Witt v. State, 387 U.S. 922 (Fla.) cert. denied 449 U.S. 1067 (1980).

To the extent Marek contends the failure to raise a Caldwell objection was due to ineffective counsel, this argument is also without merit for there were no unconstitutional comments. Certainly, counsel can not be deemed ineffective under Strickland v. Washington, 446 U.S. 668 (1984), for not objecting to comments and instructions which correctly stated the law.

In the absence of a showing of prejudice, counsel's failure to have the voir dire transcribed did not render him ineffective on appeal. Compare, Thomas v. Wainwright, 495 So.2d 172 (Fla. 1986) [failure to include pre-sentence investigation]; Burford v. State, 492 So.2d 355, 358-359 (Fla. 1986) [failure to transcribe grand jury testimony.] As the State will show, an examination of the voir dire establishes there was no Caldwell violation; consequently, the omission of this issue from the direct appeal did not render appellate counsel ineffective. Pope v. Wainwright, 496 So.2d 798, 804-805 (Fla. 1986) [appellate counsel not ineffective for failing to raise nonmeritorious Caldwell claim]; Middleton v. Wainwright, 495 So.2d 748 (Fla. 1986) [appellate counsel not ineffective where the raising of a Lockhart v. McCree, 476 U.S. 162 (1986) issue which was clearly without merit would not have benefitted the appellant].

It is clear in this case, as in Combs v. State, 525 So.2d 853 (Fla. 1983), that the cited comments properly informed the jury of its role in sentencing, which, under Florida Law, is advisory to the trial court. §921.141(2), Fla. Stats. The advisory role of the jury has been upheld as constitutional by the United States Supreme Court. Spaziano v. Florida, 468 U.S. 47 (1984); Proffitt v. Wainwright, 428 U.S. 242 91976)

In Pope v. Wainwright, 496 So.2d 798, 805 (Fla. 1986), the Florida Supreme Court held that there is nothing erroneous about informing the jury of the limits of its sentencing responsibility, so long as the significance of its recommendation is adequately stressed. Such was done in the instant case. The trial court, towards the commencement of voir dire, informed the venire:

> The imposition of punishment is my function rather than your function, but because a verdict of guilty could lead to the sentence of death your qualifications to serve as jurors in this case depends upon your attitude toward rendering a verdict that could result in the death penalty.

(RV 25). The venire was further told: If you are willing to consider rendering a verdict that might result in the death penalty . . . .

(RV 26). At page 35 of the voir dire record, the Court's "I don't care" statement, read in context, was that the jury was free to recommend life or death, "as far as what your conscience tells you" and the Court would "strongly consider your advice". Therefore, the trial court's statements in voir dire correctly informed the jury that its verdict could result in the death penalty, and although its sentencing recommendation would be advisory, the court would "strongly consider" it. The prosecutor's voir dire statements likewise did no more than accurately inform the jury of its advisory role. (RV 216-218). The quote from page 244 concerning the "recommendation of death, but even that is not binding either", when read in context, was in fact the prosecutor telling the jury it could recommend life even if it found more aggravating than mitigating circumstances. (RV 245).

At sentencing, the trial judge read the standard instructions (RV 1292-1293; 1325), which, as the Florida Supreme Court held in Combs v. State, 525 So.2d 853, 857 (Fla. 1988), "properly explain the jury's role under the Florida Statute." Moreover, both the prosecutor and defense attorney pointed out that death penalty cases are the only type where the jury has input in the sentencing decision. (R. 1300, 1310). Therefore, viewing the record as a whole, the jury was accurately informed of its advisory function and the significance of same was adequately stressed. Pope v. Wainwright, supra; Combs v. State, supra; Grossman v. State, 525 So.2d 833 (Fla. 1988); see also, Harich v. Dugger, 844 F.2d 1464 (11th Cir. 1988) (en banc).

Finally, assuming arguendo there was Caldwell error, it is clear that any such error had no impact on the jury's advisory recommendation or the Court's sentence. This Court on direct appeal upheld four aggravating circumstances. Marek v. State, 492 So.2d 1055 (Fla. 1986). There were no mitigating factors. In view of the circumstances of the crime, it is apparent the only reasonable sentence was death.

CLAIM XI

ENMUND

Marek contends the imposition of the death penalty in his case is violative of the Eighth Amendment's Cruel and Unusual Punishment Clause, as interpreted in Enmund v. Florida, 458 U.S. 782 (1982). This claim is procedurally barred, for it was argued at trial (R. 1335-1337) and could have been raised on direct appeal: Enmund was decided in 1982, two years before Marek's trial took place. Although the Enmund decision was held to be such a change in the law as to be cognizable in post conviction proceedings for the cases predating the decision in Tafero v. State, 459 So.2d 1034 (Fla. 1984), it is clear that Tison v. Arizona, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987), upon which Marek relies, is merely an "evolutionary refinement" of Enmund.[5] As such, it can not be used as the springboard for a collateral attack, because the claim could clearly have been raised on direct appeal.

This court has repeatedly made it clear that it will not allow habeas corpus to be used as a vehicle for obtaining a second appeal. Suarez v. Dugger, 13 F.L.W. 386, 387 (Fla. June 14, 1988); Blanco v. Wainwright, 507 So.2d 1377, 1384 (Fla. 1987). In White v. Dugger, 511 So.2d 554 (Fla. 1987), the Court specifically held that an attempt to raise an Enmund claim via habeas corpus was procedurally barred. Pursuant to these decisions, Marek's Enmund claim should be denied on a procedural bar basis.

In any case, the Enmund issue has no merit. In Enmund v. Florida, supra, the United States Supreme Court held that the Eighth and Fourteenth Amendments were violated by the imposition of the death penalty on the defendant, who aided and abetted a felony by being a getaway driver for a robbery in the course of which a murder was committed by others, but who did not himself

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[5] The first paragraph of the United States Supreme Court's opinion in Tison states "We hold that the Arizona Supreme Court applied an erroneous standard in making the findings required by Enmund . . ." Tison at 95 L.Ed.2d 132.

kill, attempt to kill, intend to kill, or contemplate that life would be taken. Obviously aware of Enmund, the trial court in this case made specific findings in its sentencing order that Marek intended or contemplated that lethal force might be used or that a life might be taken:

> 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 rasonable to assume that the victim would have fought and scratched while being strangled since she would be conscious for approximately thirty (30) seconds. Neither men 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 presented 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. 1471-1472).

Additionally, on direct appeal, the Florida Supreme Court found, "the record of Appellant's trial is replete with evidence which justifies the conclusion that Appellant committed premeditated murder." Marek v. State, 492 So.2d 1055, 1057 (Fla.

1986). The Court further found, "The evidence in this case clearly established that appellant, not Wigley, was the dominant actor in this criminal episode." Marek, 492 So.2d at 1058.

The cited findings by the trial court and state supreme court are conclusive and satisfy the requirements of Cabana v. Bullock, 474 U.S. 376 (1986), that factual findings be made as to a defendant's culpability under the Eight Amendment. Marek's assertion that Tison expands the limitations on capital punishment set forth in Enmund is absurd. Rather, Tison redefines the "intent to kill language" of Enmund and holds that major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the Enmund culpability requirement. Tison at 95 L.Ed.2d 145. Thus, Tison expands, not limits, the class of felony-murderers upon whom the death penalty can be imposed. Based on the facts recited in the trial court's order quoted above, it is apparent that at the very least Marek was indifferent to the victim's life. The Eighth Amendment's culpability requirement was not violated by the decision to impose the death penalty in this case. Diaz v. State, 513 So.13 1045, 1048 (Fla. 1987); Engle v. State, 510 So.2d 881, 883 (Fla. 1987); see also, Elledge v. Dugger, 823 F.2d 1439, 1449-1450, modified, other grounds, 833 F.2d 250 (11th Cir. 1987); Tafero v. Wainwright, 760 F.2d 1505, 1519-1520 (11th Cir. 1986).

Finally, Marek contends his counsel was ineffective on direct appeal for failing to raise the Enmund issue. As discussed above, since the Enmund claim has no merit, appellate counsel cannot be deemed ineffective. Herring v. Dugger, 13 F.L.W. 407 (Fla. June 23, 1988); Ford v. State, 407 So.2d 907 (Fla. 1981).

Moreover, in Point I of the brief filed on direct appeal (Marek v. State No. 65,821), defense counsel argued the death penalty was disproportionate since the co-defendant, Wigley, received a life sentence. This argument necessarily involved an analysis of the relative culpability of each

participant in the crime. (See Appellant's brief, pp. 8-11). Although not labeled as an "Enmund" claim, through this argument, this Court's attention was focused on the Enmund inquiry: whether Marek's participation in the criminal episode was such that the death penalty was properly imposed. This Court concluded that Marek was the "dominant participant" (R. 1058), and affirmed the death penalty. Accordingly, appellate counsel did focus the Court's attention on the circusmtances relevant to an Enmund analysis, so his performance was not deficient. Furthermore, it is clear Marek was not prejudiced, because, as explained above, there is no merit to the Enmund claim.

CLAIM XII

PROSECUTORIAL COMMENTS AT MAREK'S TRIAL AND SENTENCING PHASE, DID NOT DEPRIVE HIM OF FAIR TRIAL, OR RENDER COUNSEL INEFFECTIVE FOR NOT RAISING THE ISSUE ON APPEAL.

MAREK has initially maintained that several comments, made by the prosecution at the guilt and sentencing phase of trial denied his rights to due process and a fair trial. He claims that appellate counsel was ineffective for not raising this issue on appeal. These claims lack procedural and independent merit.

Initially, the State would point out that MAREK has raised this exact claim in his motion for post-conviction relief filed in the trial court. There, he alleged the claim in terms of ineffective assistance of trial counsel for failure to object to comments made by the prosecutor. The propriety of the prosecutor's comments which is at the heart of both claims, is an issue that should have been raised on appeal. Cave v. State, 529 So.2d 293, 295-296 (Fla. 1988); Woods v. State, 13 F.L.W. 439, 441 (Fla. July 14, 1988); Mitchell v. State, 527 So.2d 179 (Fla. 1988); Blanco. However, in order to avoid an inevitable procedural bar, MAREK has now realleged this claim in his present habeas petition as one involving ineffective appellate counsel. Blanco. Thus, MAREK has bootstrapped a procedurally barred argument by way of alleging it as an appellate ineffectiveness claim.

However, Petitioner is still not entitled to relief. As this Court stated in Blanco:

> As we have said many times, habeas corpus is not a vehicle for obtaining a second appeal of issues which were raised, or which were waived at trial. Moreover, an allegation of ineffective counsel will not be permitted to serve as a means of circumventing the rule that habeas corpus proceedings do not provide a second or substitute appeal. Steinhorst v. Wainwright, 477 So.2d 537 (Fla. 1985); Harris v. Wainwright, 473 So.2d 1246 (Fla. 1985); McCrae v. Wainwright, 439 So.2d 868 (Fla. 1983).

at 1384.

In the present habeas corpus petition, Petitioner alleges that his appellate counsel rendered ineffective assistance by not raising this issue on his direct appeal. As with claim of ineffective assistance of trial counsel, this claim regarding appellate counsel's performance must be judged in light of the standards enunciated by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984); Johnson v. Wainwright, 463 So.2d 207, 209 (Fla. 1985).

In order to prevail, a defendant must demonstrate deficient performance and prejudice resulting therefrom. Strickland.

Regarding appellate counsel, the law is clear that appellate counsel is not required to press every conceivable claim upon appeal. Jones v. Barnes, 463 U.S. 745 (1983). Counsel is also not required to raise issues which are not properly preserved by trial counsel for appellate review, Jackson v. State, 452 So.2d 533, 536 (Fla. 1984), or raise issues reasonably considered to be without merit. Francois v. Wainwright, 741 F.2d 1275, 1285 (11th Cir. 1984); Funchess v. State, 449 So.2d 1283, 1286 (Fla. 1984). Because of the presumption of competence and the required deference to counsel's strategic choices, where appellate counsel's failure to raise certain issues on direct appeal could have been a tactical choice based on the need to concentrate the arguments on those issues likely to achieve success, counsel's performance will not be deemed ineffective. See Smith v. State, supra; McCrae v. Wainwright, supra; Demps v. State, 416 So.2d 808, 809 (Fla. 1982).

The State would maintain that none of the comments complained of were improper or so egregious, as to warrant a new trial or sentencing phase. Therefore, appellate counsel was not ineffective for failing to raise this unmeritorious issue on direct appeal. With specific regard to MAREK'S complaints, the State's argument in opening argument at the guilt phase, was no more than an assertion that the state would prove its case,

beyond a reasonable doubt, based on the evidence it intended to present. (R. 434). This did not amount to improper personal opinion, and was well within the wide latitude, afforded counsel in opening or closing statements. Ricardo v. State, 481 So.2d 1296 (Fla. 3rd DCA 1986); Whitted v. State, 362 So.2d 668, 673 (Fla. 1978). Moreover, the trial court immediately provided a curative instruction, stressing the jury's responsibilities and duties, to be governed by evidence, not attorney's arguments, in deciding the case. (R. 435). In light of this proper instruction, the State's comment did not deny "fundamental fairness" to Marek. Darden v. Wainwright, 477 U.S. ____, 106 S.Ct. 2464 91 L.Ed. 144 (1986); Bertolotti v. State, 476 So.2d 130 (Fla. 1985); Ferguson v. State, 417 So.2d 639 (Fla. 1982); Whitted, supra.

Marek cites two examples of closing argument at the guilt phase, where the State was accused of relying on an incomplete and/or inaccurate rendition of appropriate jury instructions. (R. 1131, 1142). In both instances, the State accurately stated the law, governing "principals" liability, (R. 1131,) and the reasonable doubt standard. (R 1141-1142.). Furthermore, the trial judge immediately and thoroughly informed the jury, that while the attorneys could offer their own interpretations of the law, the court would provide complete and accurate instructions, which were to be followed by the jury. (R. 1132, 1142). The jury was clearly, informed that it would follow the Court's rendition of instructions, and that the jury was the fact finder, based on the evidence presented. R. 1132. Under such circumstances, the State's comments, on instructions, was neither inaccurate or otherwise so erroneous, that a new trial is warranted. Cabrera v. State, 490 So.2d 200 (Fla. 3rd DCA 19860; Taylor v. State, 330 So.2d 91, 93 (Fla. 1st DCA 1976).

Finally, at both the guilt and sentencing phase, the prosecution based its argument, at those points referenced by Marek, on the evidence. (R. 1150-1152, 1307-1309). At trial, the prosecution urged the jury to convict Marek, based on

evidence, of the strangulation, beating, kicking and burning of Ms. Simmons, and to reject Marek's version of the crime. (R. 1151, 1152.)[6] References by the State, that Marek could not be believed, (R 1305-1306) were merely comments on the evidence which was in material dispute with Marek's version of the facts and as such were permissible. White v. State, 377 So.2d 1449 (Fla. 1979).[7] These comments were not used to aggravate Marek's sentence and were entirely permissible.

At sentencing, the State recommended the imposition of a death penalty recommendation, by urging that the facts of the murder, supported arrgavating circumstances, including the stripping, burning, and choking to death of Ms. Simmons. (R. 1307-1308). Additionally, the reference to Marek's imposition of death on Ms. Simmons, by "executing" her, (R. 1309), was also a comment on evidence at trial.[8] Such evidentiary references, in closing argument, were perfectly appropriate. Tacoronte v. State, 419 So.2d 789, 792 (Fla. 3rd DCA 1982); White v. State, 377 So.2d 1449 (Fla. 1979); Thomas v. State, 326 So.2d 413, 415 (Fla. 1975).

Assuming arguendo that any of the comments complained of, constituted error, the overwhelming evidence in support of Marek's conviction and death sentence, renders such error harmless. Darden; State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

Further, appellate counsel could not be held ineffective for failing to challenge on appeal comments which were not even objected to below (R 1151-1152; 1305-1309). Further, none of the unobjected to comments sub judice even approached fundamental error. Darden; Bertolotti; Ferguson; Clark. Counsel was therefore not ineffective for not raising these comments as an issue on appeal. Jackson. Other comments that were preserved

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[6] It should be noted that no objection was made to this comment, waiving any error, and that said commend did not even approach fundamental error. Darden, supra; Bertolotti; supra; Ferguson, supra; Clark v. State, 363 So.2d 331 (Fla. 1978).

[7] See n. 6.

[8] See n. 6.

were either not erroneous or did not warrant relief. Appellate counsel cannot be held to be ineffective for not raising these unmeritorious comments on appeal. Strickland.

Marek's "bootstrap" of this claim, under the guise of ineffective assistance of appellate counsel, does not make the claim any more meritorious. Woods, supra; Sireci v. State, 469 So.2d 117 (Fla. 1985). Since the prosecutor's comments, were not error, and if so, were harmless, counsel was not ineffective for not raising them on appeal. Strickland.

CLAIM XIII

MAREK'S RIGHTS WERE NOT VIOLATED BY THE TRIAL COURT'S REFUSAL TO GIVE A CIRCUMSTANTIAL EVIDENCE INSTRUCTION TO THE JURY

Marek complains that the trial court erred in refusing to give the jury a circumstantial evidence instruction and that appellate counsel was ineffective for not raising this issue on appeal. The State would point out that the trial court's refusal to give the jury a circumstantial evidence instruction was an issue raised by Marek in his motion for post-conviction relief filed in the trial court. Because this is essentially an issue which could have and should have been raised on direct appeal, but wasn't, Marek has realleged this claim in the present habeas corpus petition as a claim of ineffective assistance of appellate counsel in order to avoid an inevitable procedural bar. Blanco. Thus, Marek has bootstrapped a procedurally barred argument by way of alleging it as an appellate ineffectiveness claim. Marek, however, is still not entitled to relief. As this Court stated in Blanco:

> As we have said many times, habeas corpus is not a vehicle for obtaining a second appeal of issues which were raised, or which were waived at trial. Moreover, an allegation of ineffective counsel will not be permitted to serve as a means of circumventing the rule that habeas corpus proceedings do not provide a second or substitute appeal. Steinhorst v. Wainwright, 477 So.2d 537 (Fla. 1985); Harris v. Wainwright, 473 So.2d 1246 (Fla. 1985); McCrae v. Wainwright, 439 So.2d 868 (Fla. 1983).

at 1384.

In the present habeas corpus petition, Marek alleges that his appellate counsel rendered ineffective assistance by not raising this issue on his direct appeal. As with a claim of ineffective assistance of trial counsel, this claim regarding appellate counsel's performance must be judged in light of the standards enunciated by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984); Johnson v. Wainwright, 463 So.2d 207, 209 (Fla. 1985). Under Strickland a

defendant must demonstrate deficient performance and prejudice resulting therefrom.

Regarding claims of ineffectiveness of appellate counsel, the law is quite clear that appellate counsel is not required to press every conceivable claim upon appeal. Jones v. Barnes, 463 U.S. 745 (1983). Appellate counsel is not required to raise issues reasonably considered to be without merit. Francois v. Wainwright, 741 F.2d 12375 (11th Cir. 1984); Funchess v. State, 449 So.2d 1283 (Fla. 1984). It is for this reason that appellate counsel was not ineffective for not raising the trial court's denial of a circumstantial evidence instruction on appeal.

Instructions on circumstantial evidence are not part of the standard jury instructions. In In re Standard Jury Instructions in Criminal Cases, 431 So.2d 594 (Fla. 1981), this court specifically found that the instruction on circumstantial evidence to be unnecessary and deleted it from the standard instructions. This Court noted that the special treatment afforded circumstantial evidence had been eliminated in civil jury instructions and in the federal courts. Id.; Holland v. United States, 348 U.S. 121 (1954). This Court held that giving an instruction on circumstantial evidence would thus be discretionary with the trial court but that where the jury was instructed on reasonable doubt and burden of proof, a circumstantial evidence instruction would be unnecessary.

The State would maintain that where the jury was properly and correctly instructed by the trial court below as to reasonable doubt and the burden of proof, the trial court did not abuse its discretion in denying Marek a circumstantial evidence instruction (R 1249). There was nothing peculiar about the facts of this case which would warrant such an instruction. Rembert v. State, 445 So.2d 337 (Fla. 1984). Clearly, where the trial court did not err in refusing the instruction, appellate counsel cannot be held ineffective for not raising this unmeritorious issue on appeal. Strickland; Francois.

The State would point out that although appellate counsel did not raise the circumstantial evidence instruction on appeal, counsel did argue to the trial court and on appeal that the circumstantial nature of the case should be considered as a mitigating circumstance. This argument was specifically rejected by this Court. Marek at 1058. It was proper for this Court to reject this claim. Buford v. State, 403 So.2d 943 (Fla. 1981), cert. denied, 454 U.S. 1163 (1982); Franklin v. Lynaugh, 487 U.S. _____, 108 S.Ct. _____, 101 L.Ed 2d 155 (1988).

It is thus clear that appellate counsel did not render ineffective assistance. Appellate counsel at all times advanced meritorious issues on appeal and properly refrained from raising unmeritorious issues such as the issue raised herein by collateral counsel. Marek's claim must therefore be rejected.

CLAIM XIV

STATE'S EXERCISE OF ITS PEREMPTORY CHALLENGES

Marek alleges the death sentence can not stand because the prosecutor exercised peremptory challenges to excuse prospective jurors who expressed reservations about capital punishment, and his counsel on direct appeal was ineffective for failing to recognize and raise this matter. This claim must fail for several reasons: it is procedurally barred, appellate counsel was not ineffective, and it is without merit.

First, the State would point out that this claim, which concerns the exercise of peremptory challenges, was never raised at trial. No objection was made by defense counsel when prospective jurors Manta, Sherer, and Pluemer were stricken by the prosecutor. (RV 372, 376). The matter likewise was not raised in direct appeal. In State v. Neil, 457 So.2d 481, 486 (Fla. 1984), the Florida Supreme Court made it quite clear that a party concerned about the other side's use of its peremptory challenges must make a timely objection in order to preserve the issue. The court further held that Neil (which concerns the use of peremptories to challenge black jurors solely for racial reasons) would not apply retroactively and it was not a change that would warrant collateral relief under Witt v. Wainwright, 387 So.2d 922 (Fla.), cert. denied, 449 U.S. 1067 (1980). Likewise, in Batson v. Kentucky, 476 U.S. 79, 100 (1986), which also concerns the exercise of peremptory challenges for racially discriminatory reasons, the Supreme Court was careful to point out in its opinion that there had been a timely objection. Subsequently, in Allen v. Hardy, ___U.S.___, 92 LED 2d 199 (1986), the court held the rule in Batson would not be available as a basis for collateral attack on convictions that were final when Batson was decided.

Thus, pursuant to these authorities, Marek may not use habeas corpus as a second appeal for obtaining review of this issue, which is procedurally barred, White v. Dugger, 511 So.2d

554 (Fla. 1987); Steinhorst v. Wainwright, 477 So.2d 537 (Fla. 1985).

Counsel on direct appeal was not ineffective for failing to raise this issue. Marek suggests his counsel's performance was deficient per se in that he neglected to order the transcript of voir dire. In Buford v. State, 492 So.2d 355, 358-359 (Fla. 1986), this court held the failure to have grand jury testimony transcribed was not deficient performance. Similarly, in Thomas v. Wainwright, 495 So.2d 172 (Fla. 1986), the court held the omission of the presentence investigation from the appellate record was not deficient. Based on these authorities, the mere failure to have the voir dire transcribed does not, standing alone, render appellate counsel ineffective in the absence of a showing of prejudice. Strickland v. Washington, 466 U.S. 688 (1984); Rose v. Dugger, 508 So.2d 321 (Fla. 1987).

In the instant case, no objection was posed at the time the peremptory challenges were exercised (RV 372, 376). It is axiomatic that in order to preserve an issue for appellate review, the specific legal ground upon which it is based must be presented to the trial court. Bertolotti v. Dugger, 514 So.2d 1095, 1096 (Fla. 1987). If an issue was not preserved at the trial level, counsel cannot be deemed ineffective for failing to raise it on appeal. Id., Herring v. Dugger, 13 F.L.W. 407 (Fla. June 23, 1988); Magna v. Dugger, 523 So.2d 734 (Fla 4th DCA 1988). Therefore, even if the voir dire had been transcribed, since there is an absence of any objection at the trial level, the issue was waived. Appellate counsel's performance is not deficient for failing to raise an unpreserved, meritless issue. Doyle v. Dugger, 13 F.L.W. 409 (Fla. June 23, 1988).

Further, it is well established that an attorney cannot be found ineffective for failing to anticipate a case decided years later. Spaziano v. State, 489 So.2d 720 (Fla. 1986). Counsel should not be expected to anticipate developments in the law that make possible the raising of a novel issue. Cook v. State, 481 So.2d 1285. (Fla. 4th DCA 1986). The claim raised by

Marek sub judice is not grounded on Witherspoon v. Illinois, 391 U.S. 510 (1968). Witherspoon hold that veniremen who express general reservation about capital punishment cannot be excluded for cause. It does not forbid a prosecutor from using peremptory challenges to do so.

The only case cited by Marek to support the present, novel claim, Brown v. Rice, No. GC-87-0184-M (W.D.N.C. Aug. 16, 1988), was decided over two years after Marek's conviction was affirmed by this court. This decision is an anomaly. Florida law gives both sides in criminal cases the right to exercise peremptory challenges. See generally, Ch. 913, Fla. Stat.; Rules 3.300-3.350, Fla.R.Crim.P. By definition, a peremptory challenge in criminal practice is "a species of challenge which the prosecutor or the prisoner is allowed to have against a certain number of jurors, without assigning any cause" Black's Law Dictionary (4th Ed). Although in State v. Neil, 457 So.2d 481 (Fla. 1984), this court held peremptory challenges may not be used to exclude jurors solely on the basis of race, there has been no inclination by either this court to expand Neil or the Supreme Court to expand Batson v. Kentucky, 476 U.S. 79 (1986), into other areas. Therefore, appellate counsel was not ineffective, for the present claim is novel and was not available in 1985 when the appellant's brief on direct appeal was filed.

In any event, the claim as it is raised presently, has no merit. First, since no objection was made at the trial level, the factual predicate for Marek's legal argument cannot be established, i.e., the record does not show that the peremptory challenges were exercised for the purpose of eliminating from the panel those persons who expressed reservations about the death penalty but who were not "Witherspoon "excludables" that could be challenged for cause. The prosecution may very well have had other reasons.

The first juror, Mr. Manta, stated during voir dire that his brother had been arrested for possession of drugs a few times (RV 60). When asked by the court if that factor might affect his

decision in Marek's case in any way he responded "it might." Upon further inquiry, he stated:

> I just don't feel in general, though, the nature of this whole situation that I'd be a fair impartial juror. Just, I don't know. I feel funny.

(RV 62). Mr. Manta continued to express reservations about serving as a juror, stating, "I'm not 100 per cent sure whether I could make the right decision or I couldn't". (RV 63). Additionally, his sister-in-law had been arrested for drugs too. (RV 64). In light of these comments by Mr. Manta (RV 60-64), it is certainly reasonable to infer that the prosecutor would have excused him regardless of his feelings about the death penalty.

Mr. Sherer, the second juror, has a son who is a practicing attorney in Fort Lauderdale in the field of insurance defense. (RV 105, 227). He had seen his son in trial twice (RV 227) and had typed up all his assignments for him when he was in law school (RV 313). Mr. Sherer's son was in the courtroom the day before and taken him to lunch. (RV 310-311). His other son was a parole officer but had left that job and was currently unemployed. (RV 106). Mr. Sherer asked the judge if the jurors could take notes during the trial. (RV 363). Regarding capital punishment, Mr. Sherer would "keep an open mind". (RV 236). Thus, as to Mr. Sherer, it can be inferred the prosecutor may simply have thought that through his sons, he had too much exposure to the legal system. Furthermore, Mr. Sherer did not express reservations about capital punishment; he simply said he'd "keep an open mind."

The third juror, Ms. Pluemer, initially stated she had read about the case in the paper, would tend to "side with the victim" (RV 187-188), and was hesitant as to whether she could make a decision. (RV 191). The State may simply have wanted a juror who had more self-confidence.

The foregoing discussion establishes that Marek has merely speculated the prosecutor exercised his peremptory challenges to excuse jurors based solely on their feelings about

the death penalty. Such speculation does not entitle him to relief, for reversal -- especially on a collateral attack -- can not be based on conjecture. Sullivan v. State, 303 So.2d 632, 635 (Fla. 1974).

Even if, assuming arguendo, this Court finds the factual basis for the claim to be adequate, it has no legal merit. The decision in Witherspoon v. Illinois, 391 U.S. 510, 522 (1968) holds "a sentence of death can not be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." Witherspoon acts as a limitation on the State's power to exclude jurors for cause, and it is grounded in the Sixth Amendment right to an impartial jury. Wainwright v. Witt, 469 U.S. 412 (1985). Thereunder, jurors who merely express doubts about the death penalty cannot be challenged for cause.

Marek's claim, which concerns peremptory challenges, is distinct and cannot draw support from Witherspoon and its progeny. In fact, recent Supreme Court decisions clearly indicate the Court's disinclination to limit the State's exercise of peremptory challenges in capital cases. In Lockhart v. McCree, 476 U.S. 162 (1986), the Court held the Constitution does not prevent the State from "death-qualifying" juries in capital cases. Witherspoon-excludables or any other group defined solely in terms of shared attitudes that render members of the group unable to serve as jurors in a particular case may be excluded without contravening any of the Sixth Amendment's fair cross section requirements. Id. at 176-177. The Court observed that adopting the defendant's concept of jury impartiality would likely require the elimination of peremptory challenges, which are commonly used by both the state and defendant to produce a jury favorable to the challenger. Id. at 178-179. Therefore, in Lockhart v. McCree, by rejecting the defense argument, the Supreme Court in effect recognized that peremptory challenges may

be exercised to exclude jurors who have reservations about the death penalty without violating the Constitution's fair-cross-section requirement.

In Ross v. Oklahoma, ___ U.S. ___, 101 L.Ed.2d 80 (1988), the Court held that where the defendant had to use a peremptory challenge to excuse a juror who should have been stricken for cause under Witherspoon, no Constitutional error arose because the jurors who actually sat were impartial. Loss of the peremptory challenge did not violate the right to an impartial jury; because peremptory challenges are a creature of statute and not Constitutionally required, is is for the State to determine the number of peremptories allowed and to define their purpose and manner of their exercise. Ross v. Oklahoma, 101 L.Ed.2d at 90. Thus, in Ross the Court again made it clear that the exercise of peremptory challenges does not raise a federal Constitutional question.

Four justices of the Court in Gray v. Mississippi, 95 L.Ed.2d 622 (1987), have explicitly found no merit to the instant claim. The holding of Gray was that an erroneous Witherspoon excusal of a juror for cause is not harmless error. In dissent, Justice Scalia, joined by the Chief Justice and Justices White and O'Connor, noted that the error should have been harmless because the trial court could lawfully have given the State an additional peremptory challenge to remove the juror. Justice Scalia stated:

> Prosecutors can use peremptory challenges for many reasons, some of which might well be constitutionally insufficient to support a legislative exclusion. For example, I assume that a State could not legislate that those who are more sympathetic toward defendants than is the average person may not serve as jurors. But that surely does not mean that prosecutors violate the Constitution by using peremptory challenges to exclude such people. Since defendants presumably use their peremptory challenges in the opposite fashion, the State's action simply does not result in juries "deliberately tipped toward" conviction. The same reasoning applies to the exercise of peremptory challenges to remove potential jurors on the basis of the perceived likelihood that they would vote to impose a death sentence. In this case, for example, it appears that the defendant used peremptory

> challenges to exclude at least two potential jurors whose remarks suggested that they were relatively likely to vote to impose a death sentence.

Gray v. Mississippi, 95 L.Ed.2d at 646-647.

Therefore, read in combination, Lockhart v. McCree, Ross v. Oklahoma, and the dissent in Gray v. Mississippi, compel rejection of Marek's attempt to establish Constitutional error from the prosecutor's exercise of peremptory challenges.

The only United States Supreme Court case in which inquiry into the exercise of peremptories has been required is Batson v. Kentucky, 476 U.S. 79 (1986). Batson holds that the deliberate excusal of black jurors motivated soley by racial reasons violates the Equal Protection Clause of the Fourteenth Amendment. In Batson, the Court reaffirmed the view that a prosecutor may exercise peremptory challenges for any reason at all as long as it is relevant to the prospective juror's view of the case, but held he may not do so solely on account of race. Id. at 89. The Court recognized that peremptory challenges, while not Constitutionally mandated, occupy an important position in our trial procedure. Id. at 98-99. Thus, Batson is limited to its holding -- that the exclusion of blacks from jury service for racially discriminatory reasons violates the Fourteenth Amendment. Batson has no application to the case sub judice.

In light of the foregoing analysis, the State repeats its earlier characterization of Brown v. Rice, supra, relied on by Marek: it is an anomaly, unlikely to be affirmed on appeal and/or followed by other courts. Peremptory challenges are well established in Florida law, Ch. 913, Fla. Stats.; Rule 3.300 - 3.350, Fla.R.Crim.P. Both sides -- the state and the defendant -- benefit from them. Marek has shown no legal reason why, four years after his trial, we should now question their use by the prosecutor.

CLAIM XV

MAREK WAS NOT DENIED THE EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL WHERE COUNSEL DID NOT RAISE ON APPEAL THE TRIAL COURT'S REFUSAL TO ALLOW MAREK ADDITIONAL PEREMPTORY CHALLENGES DURING VOIR DIRE WHERE THIS ISSUE WAS AND IS ENTIRELY WITHOUT MERIT

Marek complains that he was denied the effective assistance of appellate counsel where counsel did not raise on appeal the trial court's refusal to allow Marek additional peremptory challenges during voir dire. As with a claim of ineffective assistance of trial counsel, this claim regarding appellate counsel's performance must be judged in the light of the standards enunciated by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984); Johnson v. Wainwright, 463 So.2d 207, 209 (Fla. 1985).

In Strickland the United States Supreme Court held that there are two parts in determining a defendant's claim of ineffective assistance of counsel:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense . This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id. In explaining the appropriate test for proving prejudice the Court held that "[t] he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland

In reviewing the Strickland standard as it applies to ineffectiveness of counsel on appeal, this Court has held that a Petitioner in a habeas corpus proceeding must show:

> ...first, that there were specific errors or omissions of such magnitude

> that it can be said that they deviated from the norm or fell outside the range of professionally acceptable performance; and second, that the failure or deficiency caused prejudicial impact on the appellant by compromising the appellate process to such a degree as to undermine confidence in the fairness and correctness of the outcome under the governing standards of decision.

Johnson, 463 So.2d at 209.

Specifically, in reviewing claims of ineffective assistance of appellate counsel, it is recognized that a habeas corpus petitioner's allegations of ineffective assistance of counsel should not be allowed to serve as a means for circumventing the rule that habeas corpus proceedings do not provide a second or substitute apeal. Steinhorst; Harris; McCrae; see also Smith v. State, 457 So.2d 1380, 1384 (Fla. 1984). Appellate counsel is not required to press every conceivable claim upon appeal. Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed 2d 987 (1983). The Supreme Court has recognized that experienced advocates "have emphasized the importance of winnowing out weaker arguments on appeal and fousing on one control issue if possible, or at most on a few key issues... A brief that raises every colorable issue runs the risk of burying good arguments...in a verbal mound made up of strong and weak contentions." 77 L.Ed 2d at 994. Thus, the Court held that "for judges to second guess reasonable professional judgments and impose on appointed counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy that underlies Anders."[9] See also Johnson; Cave v. State, 476 So.2d 180, 183 n. 1 (Fla. 1985).

Counsel is also not required to raise issues which are not properly preserved by trial counsel for appellate review, Jackson v. State, 452 So.2d 533, 536 (Fla. 1984), or raise issues reasonably considered to be without merit. Francois v. Wainwright, 741 F.2d 1275, 1285 (11th Cir. 1984); Funchess v.

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[9] Anders v. California, 386 U.S. 738 (1967).

State, 449 So.2d 1283, 1286 (Fla. 1984). Because of the presumption of competence and the required deference to counsel's strategic choices, where appellate counsel's failure to raise certain issues on direct appeal could have been a tactical choice based on the need to concentrate the arguments on those issues likely to achieve success, counsel's performance will not be deemed ineffective. See Smith, McCrae v. Wainwright, supra; Demps v. State, 416 So.2d 808, 809 (Fla. 1982).

The State submits that under these standards, Marek's appellate counsel was not ineffective for failing to raise this issue on appeal where this is was and is totally without merit.

Marek does not complain that he was not given the number of peremptory challenges to which he was entitled under Fla.R.Crim.P. 3.350. Indeed, Marek was allowed ten (10) peremptory challenges by the trial court. Rather he complains that the trial court refused his request for additional peremptory challenges and that appellate counsel was ineffective for failing to raise this issue on appeal. The State would point out however that it is axiomatic that the granting of additional peremptory challenges is a matter of discretion for the trial court. Parker v. State, 456 So.2d 436 (Fla. 1984). In Parker, this court held that the trial court did not abuse its discretion in denying a defense motion for additional peremptory challenges in the face of the defendant's claim that such challenges were necessary, in part because of the seriousness of the case and the nature of the multi-count charges. It is significant to note that in Parker the defendant had exhausted all of his peremptory challenges and yet the trial court's refusal of additional peremptory challenges was held not to an abuse of discretion. Id at 442.

Initially, the State is constrained to point out that Marek did not exhaust all of his peremptory challenges. When defense counsel requested the one (1) additional challenge, Marek still had one (1) peremptory left (RV 378-379, 381). Marek cannot be heard to complain that he was denied one (1) additional

peremptory challenge when he didn't even use the one (1) he had left. The State would also point out that defense counsel never exhausted his ten (10) challenges and accepted the jury even though he had one (1) strike left (RV 385). Nor did defense counsel use his remaining peremptory challenge during the selection of the alternate jurors (RV 386-425). Clearly, Marek cannot seriously complain that he was denied one (1) additional peremptory challenge when he did not even use all of the challenges to which he was entitled under Fla.R.Crim.P. 3.350.

The State would also point out that the reasons given for the requested additional challenges were and should remain unpersuasive. Indeed, defense counsel told the court that he needed additional challenges because "with five counts everyone has something on their mind." (RV 379). Under Parker the mere fact that the charges are serious or numerous does not entitle a defendant to additional peremptory challenges. Id at 442. None of the jurors defense counsel mentioned to the court in his argument for peremptory challenges indicated that they would be anything but fair in hearing the evidence and deciding the case. See Rivas v. State, 13 F.L.W. 319 (Fla. 3rd DCA February 2, 1988). Defense counsels reasons for asking for the additional peremptory challenge were not "real" as suggested by Marek. Francis v. State, 413 So.2d 1175 (Fla. 1982). The State would further point out that if the jurors that defense counsel mentioned to the trial court were so bad as defense counsel said, he undoubtedly would have stricken one of them with his one (1) remaining peremptory challenge. The fact that this last challenge was not even exercised is a clear indication that defense counsel and Marek were satisfied with the jury. Clearly, the trial court did not abuse its discretion. Parker. Marek's argument that the trial court erred in denying his request for an additional peremptory challenge is without merit. It therefore follows that appellate counsel was not ineffective for failing to have voir dire transcribed or to raise this issue on appeal where this claim is totally frivolous. Strickland; Francois; Funches. Appellate counsel was not ineffective.

CLAIM XVI

APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR NOT RAISING AS AN ISSUE ON APPEAL THE ADMISSION OF PHOTOGRAPHS OF THE CRIME SCENE OR THE VICTIM.

Marek complains that the trial court erred in admitting certain photographs into evidence and that appellate counsel was ineffective for not raising the issue on appeal. The State would remind this Court however, that habeas corpus is not a vehicle for obtaining a second appeal of issues which were raised, or should have been raised, on direct appeal. Blanco v. Wainwright. Moreover, an allegation of ineffective counsel will not be permitted to serve as a means of circumventing the rule that habeas corpus proceedings do not provide a second substitute appeal. Id. at 1384. This is an issue that could have been raised on direct appeal. Merely stating that counsel was ineffective for not raising same should not allow Marek relief on his present habeas petition. Blanco at 1384.

In any event, the State would maintain that appellate counsel was not ineffective for failing to raise this issue on appeal. Strickland, supra. Appellate counsel is not required to press every conceivable claim upon appeal. Jones v. Barnes, 463 U.S. 745 (1983). Counsel is certainly not required to raise unmeritorious issues on appeal such as this. Strickland. This issue is unmeritorious for several reasons.

It is well established that the admission into evidence of photographs of a deceased victim is within the sound discretion of the trial court. Wilson v. State, 436 So.2d 908 (Fla.1983). That determination should not be reviewed absent a showing of clear abuse. Wilson, supra. The key to admissibility is relevancy. Adams v. State, 412 So.2d 850 (Fla. 1982) Nettles v. Wainwright, 677 F.2d 410 (5th Cir. 1982). The fact that a picture may be gruesome and offensive does not bar admissibility. Id. Florida law mirrors that the standard set by the United States Supreme Court in Lisenba v. California, 314 U.S. 219, 624 Ct. 280, 866 (Ed. 166 (1940.

Marek complains that the photographs admitted into

evidence were repetitive, grotesque and inflamatory. Marek further claims that these photographs distorted the actual evidence against him.

Marek specifically makes reference to Exhibit Nos 6-8, 11,14,15, 34 and 36 but the complaint seems to center on the exhibits in general. Exhibits 6, 8, and 11 depict specific areas or items found at the crime scene (R 467-468, 474, 488) while exhibits 7, 14 and 15 depict different areas of the victim's injured body (R 496, 502, 473).

The State maintains that all the photographs were relevant to illustrate the nature and extent of the victim's injuries; Booker v. State, 397 So.2d 910 (Fla. 1981), to depict the victim's body in relation to the crime scene; Patterson v. State, 513 So.2d 1257 (Fla. 1987), or to explain the testimony of a witness; Garmise v. State, 311 So.2d 747 (Fla. 3rd DCA 1975).

During the testimony of Jerome Kasper, a lifeguard on Dania beach who found the body (R 447, 473), several photographs taken at different angles, including ariel view, were admitted (R 455, 456, 460). These pictures helped the jury visualize the crime area, specifically the lifeguard shack where Ms. Simmons was found (R 447-472). Garmise, supra. The other photographs introduced during Mr. Kasper's testimony were relevant to illustrate the difference between his lifeguard stand on Thursday, June 16, 1983 at 6:30 P.M. and Friday, June 17, 1983 at 7:15 A.M. (R 461-472, 474-475). The only other photograph introduced during this testimony was that of the victim depicted as Mr. Kasper found her.(R 473). The State maintains these pictures were relevant and illustrated the factual conditions relating to the crime. Mazzara v. State, 437 So.2d 716 (Fla. 1st DCA 1983).

Other photographs were admitted during the testimony of Robert Haarer, a deputy sheriff in the forensics division (R 480). Duputy Haarer was the crime scene detective investigating the murder (483-484). These photographs included aerial views of the entire beach and photographs of a trash can which contained

the victim's t-shirt (R 488) and a photograph of the shirt itself (R 489, 490). One other picture was a view of the shack where the victim was located (R 493). The victim's foot is visible (R 493). These photographs were purposely admitted as relevant to the conditions of the crime scene as well as the victim's body at the scene. Patteron; Garmise.

During the testimony of Dr. Wright the medical examiner, several photographs of the victim were admitted. Marek claims that the pictures were grotesque and merely cumulative. Given the nature of the subject the pictures were not unnecessarily gruesome. Grossman v. State, 525 So.2d 833 (Fla. 1988). The State maintains that the pictures were relevant and helpful to the medical examiner in explaining his testimony to the jury. Gilbert v. State, 487 So.2d 1185 (Fla. 4th DCA 1986); Mazzara, supra; Booker, supra.

Marek takes issue with the fact that since there were several pictures of the victim the evidence was cumulative, inflamatory and repetitious. The State submits that these pictures were of very specific areas of the victim's body such as, pubic area, face, elbow, breast and back (R 754, 759, 763, 768, 777). Each photograph depicted something different and therefore was not cumulative. Edwards v. State, 414 So.2d 1174 (Fla. 5th DCA 1982). The State submits that the trial court did not abuse its discretion when it properly admitted the photographs into evidence.

Even if there was error, it was clearly harmless. As the Supreme Court of Florida has stated:

> We presume that jurors are guided by logic and thus are aware that pictures... do not alone prove the guilt of the accused.

Henderson v. State, 462 So.2d 196 (Fla.), cert. denied. 473 U.S. 916, 105 S.Ct. 3542, 87 (Ed. 2d 665 (1985). In light of the overwhelming evidence of Marek's guilt any error in admitting any of the photographs did not effect the outcome of the trial. Statev. DiGuilio, 491 So.2d 1129 (Fla. 1986).

In summary, this issue is without merit and appellate counsel cannot be held ineffective for failing to raise it on appeal.

F. CONCLUSION

WHEREFORE, based on the foregoing reasons and authorities, the Respondent respectfully requests that the Petitioner's 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 certiorari be DENIED.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Response to Petition for Writ of Habeas Corpus and Response to Request for Stay of Execution has been furnished by overnight mail to MARTIN J. McCLAIN, Assistant Capital Collateral Representative, Office of the Capital Collateral Representative, 1533 South Monroe, Tallahassee, Florida 32301, this 26th of October, 1988.

Jay B Shearer

Of Counsel