IN THE SUPREME COURT OF FLORIDA

JOHN RICHARD MAREK,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 73,278

ANSWER BRIEF OF APPELLEE

On Appeal from the Circuit Court
for the Seventeenth Juidicial Circuit,
In and For Broward County, Florida

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PRELIMINARY STATEMENT

The Appellant was the Defendant and the Appellee was the Prosecution in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, In and For Broward County, Florida. In the brief, the parties will be referred to as they appeared at the trial court, or by name.

The following symbols will be used

"R" Record on Direct Appeal (on file in this Court's Case Number 65,821)

"RV" Record of Voir Dire

"SCP" The Record on Appeal from the proceedings re: the State Post-Conviction Relief Motion.

STATEMENT OF THE CASE

Marek was indicted on July 6, 1983, for first degree murder, kidnapping, burglary, sexual battery, and aiding and abetting a sexual battery. (R. 1358-1359). On June 1, 1984, he was convicted by a jury of first degree murder, kidnapping attempted burglary with an assault, and two 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. This Court affirmed the convictions and sentences on June 26, 1986. Marek v. State, 492 So.2d 1055 (Fla. 1986). 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. On

October 12, 1988, Marek filed an Original Petition for Habeas Corpus in this Court. Marek v. Dugger, FSC No. 73,175. There are 16 claims in the habeas corpus petition, of which 13 parallel the Rule 3.850 issues.

The State served its response to the Fla.R.Crim.P. 3.850 motion on October 20, 1988, and its response to the habeas corpus petition on October 26, 1988.

On November 3rd and 4th, the trial court held an evidentiary hearing on MAREK'S motion for post-conviction relief. At the conclusion of the hearing, the trial court entered an order denying the Motion to Vacate Judgment and Sentence. Marek filed timely notice of appeal.

STATEMENT OF THE FACTS

Facts Adduced Post-Conviction

MEREK'S natural mother, Margaret Bagley testified on his behalf at the hearing on MAREK'S motion for post-conviction relief. Bagley testified that MAREK was her third oldest son and that he was born in Germany in September of 1961 (SCP 79). She testified that she had a difficult pregnancy with MAREK and that during her pregnancy she took diet pills, birth control pills and pills for nerves (SCP 80). She and her family returned to the United States in 1962 when her husband, who was in the military, was transferred (SCP 80-81). She testified that her first husband and MAREK'S father, Bill, was a disciplanarian who had little sense of love for his children (SCP 81). She thought that their father loved them (SCP 81). According to Bagley, Bill, was in the "field" alot and that she ran the house and took care of the children (SCP 83). She also testified that Bill was a womanizer and had numerous girlfriends during their marriage (SCP 84). Bagley testified that Bill treated MAREK differently from his other sons (SCP 84). She testified that Bill was disappointed that MAREK was a special education child and didn't pay much attention to him (SCP 85). Bagley testified that she too rejected MAREK because she had wanted him to be a girl and even had dressed him in pink as a baby (SCP 85). She testified that she took out her bad feelings on her "kids" and didn't think of herself as a "mom" and Bill as a "dad" (SCP 85). As a child MAREK was loving and trustworthy according to Bagley (SCP 86).

MAREK however had a speech problem and was teased (SCP 87). However, MAREK could speak plainly when he wanted to be understood according to Bagley (SCP 87). Bagley testifed that MAREK had been a bed-wetter and that MAREK went to special education schools as a child (SCP 88). According to Bagley, MAREK had been tested and was said to be retarded although trainable (SCP 88). Bagley testified that another one of her sons was slow too (SCP 88). Bagley farther testified that Bill couldn't accept the fact that MAREK was retarded and denied that he was MAREK'S father (SCP 91). They finally divorced in November of 1968 (SCP 92). Bagley had custody of the boys, including MAREK (SCP 93).

Bagley testifed that when MAREK was less than 1 year old he ate some of her pills including darvon, valium, vitamins, diet pills and birth control pills (SCP 107). As a result, MAREK went into convulsions and had his stomach pumped (SCP 108). She was told by the doctors that MAREK could have died (SCP 108).

Bagley testified that she heard about MAREK'S conviction from her youngest son (SCP 104). She did not learn of MAREK'S problems until after the trial and was not contracted by defense counsel (SCP 106). She has lived in the same spot for 14 years. If she had been contacted, she would have done everything to help MAREK (SCP 106). Bagley testified that she wrote a letter to MAREK while he was in prison but that he wrote back telling her not to write because he didn't need a mother (SCP 112).

Regarding non-statutory mitigating factors, Dr. Krop stated he needed some background information and that the MMPI test is a

general screening for neuro-psychological problems (SCP 140). As to what he, Dr. Krop, specifically does, the testimony indicates an evaluation of background information of the sort provided him by C.C.R. (SCP 141-42). Dr. Krop found that Marek had a troubled childhood, he was removed from home a number of times, he had run away and he had an early speech disorder (SCP 143-47). Krop's findings, in conjunction with past recommendations and classifications (SCP 140) suggest neurological testing and therefore some organic brain damage (SCP 141). Mark's early I.Q. was 75 as compared to 109 at a later period (SCP 144).

The reports provided to Dr. Krop resulted in his finding that MAREK has been in special education classes from the first grade on, he had an overdose of pills when he was less than a year old and tha the doctors at the time told his father there would be brain damage (SPC 144). The information also showed that MAREK thought he was taken away from home because he had a speech defect which resulted in an impaired self concept (SCP 145). MAREK learned to survive on the streets, was emotionally abused by his step father and neglected by his mother (SCP 145). MAREK had an alcohol problem from his teenage years and had bladder control problems (SCP 146-47).

Dr. Krop testified that it is difficult to question competency in retrospect (SCP 148). Krop reviewed Kreiger's profile based on eleven criteria, which resulted in 3 or 4 rating in the unacceptable range (SCP 148). These factors were that MAREK may not be able to testify in a relevant fashion or to cross-examine

witnesses or to disclose information to his attorney (SCP 148).

Dr. Kropp stated that MAREK is competent at present except as to motivation (SCP 149). Dr. Krop stated that although he wanted to do follow-up testing, he didn't have the time (SCP 150). Dr. Krop testified that he spoke to Dr. Kreiger who stated that his report was based on MAREK'S self report (SCP 151).

Testimony regarding Krop's evaluation in relation to mitigating circumstances followed. Dr. Krop testified that he found no statutory mitigating factors (SCP 153). He did find chronic emotional disturbance, a poor self concept, speech defect, alcoholism and early abuse and neglect (SCP 154). MAREK had a history of abandonment which resulted in feelings of rejection and consequently anti-social behavior (SCP 154). Dr. Kropp testified he was aware of MAREK'S prior criminal history (SCP 155). His environmental history indicates he was in and out of foster homes (SCP 156) and was eventually adopted by the MAREK'S, whose name he took (SCP 157-58). Dr. Krop stated that the events of MAREK'S early life are significant and not tainted by remoteness (SCP 161-62). Krop stated it is diffcult to determine competency in hindsight as it is stress related (SCP 173). Krop stated that MAREK is competent at present (SCP 173). Upon further cross-examination Krop testified as to his interpretation of the MMPI test results. Krop stated that although it appeared MAREK was attempting to answer in a reliable manner the "F" scale, faking factor, was shakey (SCP 174-75). Other scales indicated long standings character deficits, poor impulsive control and anti-

social behavior (SCP 175). Krop stated the Dr. Kreiger found the MMPI test results were invalid particularily due to the "F" scale (SCP 175). Kreiger's opinion was that MAREK was faking real bad (SCP 175-76). Krop couldn't state whether MAREK had organic brain damage (SCP 177), but he does not see any indication or documentation that would lead him to that conclusion (SCP 177-78).

Krop, still in cross-examination, stated that at the interview Marek was cooperative (SCP 178). Krop stated again that he did not find any statutory factors in mitigation (SCP 178). The brain damage information considered by the doctor came only from MAREK'S mother (SCP 181). Dr. Krop determined factors in mitigation , non-statutory, would be MAREK'S poor self concept, his alcoholism and his chronic emotional disturbance (SCP 181-82). Dr. Krop further testified that the violence exhibited in the murder of Ms. Simmons is not consistent with MAREK'S past antisocial behavior (SCP 183).

The next witness called was MAREK'S father, Jesse William Grimm (SCP 208). Grimm is fifty years old and a retired U.S. Army serviceman. Grimmm related the incident where MAREK overdosed on his mother's pills (SCP 211). He stated that he had come home around 8:30 that night and after sometime his wife told him that MAREK and his brother Jay Michael had eaten her pills - valium, birth control pills, diet pills (SCP 211). Grimm went to the kids who were in convulsions and rushed them to the hospital (SCP 212). Both children had their stomachs pumped and were transported to a hospital in Frankfort (SCP 212). The doctor

told him that although the children would live, that alot could not be expected of them (SCP 212). MAREK was approximately eight months old at the time (SCP 213). Grimm noticed that after the incident that MAREK didn't sleep well and cried during the day; he was unable to do things at the proper age -- he did not crawl until 18 months and didn't walk with until age 2 (SCP 213). Grimm stated that MAREK'S speech was slurred, that he couldn't learn to ride a bike or do things other kids did (SCP 213). Grimm believed MAREK was retarded and got help through the military service (SCP 214). Grimm testified that his wife was nasty to MAREK (SCP 214). Grimm got medical insurance for MAREK - (SCP 225). This insurance was later stopped and MAREK had to leave the institution he was in (SCP 225). Grimm feels he was a good father to all his sons even though he was unable to spend alot of time with them due to his career (SCP 227).

On cross-examination Grimm testified that he tried to teach MAREK how to throw a ball and ride a bike; he didn't ignore him (SCP 228). Grimm testified that he spent more time with MAREK then the other boys (SCP 229). Grimm never disclaimed MAREK (SCP 229). Grimm's impression that MAREK was retarded came from the Doctor's reports, school and medical records; he was told MAREK was a slow learner (SCP 229). Grimm stated that had he been contacted in 1983 he would have come to Florida to testify (SCP 238). The next witness called by MAREK was SALLY HAND (SCP 239). Mrs. Hand was a foster mother to MAREK after he was thrown out of the MAREK home (SCP 239). She was told by the welfare people

that MAREK had trouble telling the truth (SCP 240). Mrs. Hand had 37 other foster children, two of her own and one adopted child (SCP 240). When MAREK came to her he was bout 16 or 17 years old and she was aware that he had been in at least one other foster home (SCP 241). The first foster family helped him to learn how to talk (SCP 241). MAREK felt that the MAREK'S didn't love or understand him and that MAREK was searching for love (SCP 241). Mrs. Hand stated that he didn't talk about his mother, that he was shy, a sweet kid, that he didn't get in trouble and that he showed affection and came back to visit (SCP 242). Mrs. Hand did state that he had trouble with bed-wetting (SCP 243). MAREK got along with the other foster children (SCP 243). She testified that had defense counsel contacted her she would have testified (SCP 244). She was contacted by a police officer before the trial (SCP 244).

The next witness was MAREK'S foster father JACK HAND (SCP 253). Mr. Hand testified that when MAREK came to them he was calm and quiet, with no problems, he was easy going with the little kids (SCP 254). Mr. Hand did not know anything about the trial until it was over (SCP 255). He would have testified had he been asked (SCP 255).

On cross-examination Mr. Hand testified that he did not know that MAREK was "retarded" (SCP 256). Additionally, Mr. Hand discerned no evidence of a drug or alcohol problem (SCP 256). In June of 1983 Mr. Hand was not in contact with MAREK and knew nothing about the trial until after the conviction (SCP 257).

Dr. Seth Krieger was called as a witness by MAREK and testified he was a clinical psychologist who specilized in sex offenders (SCP 263). Dr. Krieger became a doctor in 1975 and for 10 years practiced criminal forensic work and was available for court appointments (SCP 264). He testfied that he initially came into contact with MAREK after he was appointed by the Court to help Attorney Hilliard Moldof with MAREK'S case (SCP 265). He evaluated MAREK for competency and sanity and was aware that the case was a potential death penalty case when he performed his evaluation of MAREK (SCP 266). Prior to this evaluation, Dr. Krieger had performed 2000 evaluations (SCP 265). Dr. Krieger was aware that if convicted, MAREK would go through a penalty phase at his trial and that mental illness could be a itigating factor (SCP 266). However, after Dr. Krieger had evaluated MAREK twice, he was not asked to look at any mitigating circumstances and was not called at the penalty phase (SCP 266).

Dr. Krieger testified that his initial evaluation of MAREK was in late October of 1983 (SCP 268). Prior to meeting with MAREK, Dr. Krieger spoke with Attorney Moldof who told him about the case and gave him some relevant information about MAREK and the case (SCP 267). Dr. Krieger testified that the initial evaluation consisted of 50 minutes of conversation and interviews with MAREK and that during that time MAREK gave him his family background (SCP 267). Dr. Krieger testified that MAREK told him that he came from a very unstable family environment, that he had had an abusive alcoholic step-father and that he was turned over

to state custody when he was 9 years old. MAREK also told Dr. Krieger that he had lived in foster homes, that his brothers had troubled lives and that he had not been in contact with his family for some time (SCP 270). Dr. Krieger relied upon what MAREK said for his history (SCP 268). After the conversation and interview, Dr. Krieger tested MAREK (SCP 268). Dr. Krieger performed competency screening , a mental status test, and the Carlson Test (SCP 268). He explained that the Carlson Test is designed and normed on the inmate population to detect mental illness and management problems (SCP 268-269). The Carlson Test was about 1 year old when it was performed on MAREK and it is still currently in use by psychologists (SCP 299-300). Dr. Krieger wrote a report based upon this first evaluation of MAREK (SCP 273). It will be appended hereto as exhibit II. It was Dr. Krieger's testimony in court that MAREK had exaggerated his responses to the test questions and that MAREK was not being straight with him (SCP 274). This initial evaluation of MAREK did not yield a valid profile and Dr. Krieger did not get a true picture of MAREK (SCP 300). Dr. Krieger told Moldof that MAREK had a serious anti-social personality disorder but that MAREK had attempted to exaggerate his symptons (SCP 272). Dr. Krieger told Moldof that even though the test results indicated a thought disorder, he didn't have any faith in the results (SCP 272 . Dr. Krieger told Moldof that he wanted to do additional testing on MAREK to see if he could find anything else. Dr. Krieger then evaluated MAREK a second time in April of 1984 and performed an MMPI and conducted a second interview with MAREK (SCP 268). Dr.

Krieger testified that the results of the MMPI was consistent with the screening inventory performed in October (SCP 302). Again, MAREK had exaggerated his symptoms (SCP 272). According to Dr. Krieger, MAREK scored 10 points higher than individuals who have the most bizarre symptons and that this exaggeration of symptoms was to get additional treatment or attention (SCP 276). The only realistic responses had to do with depressive traits (SCP 277). Dr. Krieger testified however that while MAREK was depressive he was not psychotic (SCP 277). The "bottom line" of the second evaluation was that MAREK exaggerated his symptoms and responses as he did in the first evaluation (SCP 277). The test results were totally inconsistent with the personal interview which revealed MAREK as being "intact, rational and sequential" in his explanations and personal history (SCP 277). Dr. Krieger did not feel that additional testing was necessary since he could not get a valid test result from MAREK "no matter what he did" (SCP 278). Dr. Krieger had no concerns about MAREK'S background information as provided by MAREK and stated that a background such as MAREK'S was common to people who got into trouble with the law (SCP 281). People such as MAREK got their "do it to them before they do it to you attitude" from their upbringings (SCP 284-285) Dr. Krieger specifically testified that MAREK'S claim that he had alcoholic amnesia and couldn't remember the crime was a defensive strategy (SCP 274). Dr. Krieger testified that anti-social persons commit crimes for self-gratification and that boredom, not anger is a major component of sex crimes (SCP 285). Dr. Krieger updated the

findings of this second evaluation to Attorney Moldof but did not write up a second report (SCP 302).

Dr. Krieger testified that it would not have been significant to know that MAREK had overdosed on pills when he was less than 1 year old because the brain at that time is very elastic (SCP 280). Dr. Krieger testified that such an occurance would be significant if it had happened when MAREK was 3 to 5 years old when the brain is not formed. (SCP 282). He also testified that MAREK'S speech defect as a child had no bearing on MAREK'S competency or sanity (SCP 282). The fact that MAREK was teased as a child and his family relationship would be relevant to his characteristics but Dr. Krieger testified that he had already had that type of background information when he evaluated MAREK (SCP 283). When asked if he had seen any mitigating factors in MAREK'S personality and background, Dr. Krieger responded that MAREK'S personality disorder and depression could be considered as mitigating (SCP 291). Whether or not these things would be mitigating, Dr.Krieger did not know (SCP 291). Dr. Krieger justified however that MAREK was not suffering from any major mental illness or psychosis (SCP 291).

On cross-examination, Dr. Krieger testified this case was not his first with Attorney Moldof and that they had had 2 or 3 cases together before MAREK'S (SCP 294). Dr.Krieger testified that he was opposed to the death penalty and was aware that in capital cases "you had to cover all the basis " (SCP 294-295). Dr. Krieger testified the purpose he was to evaluate was for exploration (SCP 295). Moldof did not ask Dr. Krieger to perform

the evaluation because he had trouble communicating with MAREK (SCP 295). Dr. Krieger also did not have trouble communicating with MAREK during the two interviews (SCP 297). Dr. Krieger described MAREK as being rational and coherent and very cooperative except with providing the details of the offense (SCP 297). Dr. Krieger concluded in his written report that MAREK was conpetent (SCP 297). Dr. Krieger also recalled that MAREK readily admitted to other crimes during the interview process (SCP 298-299). Dr. Krieger testified that he told Moldof that MAREK had exaggerated his test responses and that if MAREK wasn't faking the responses than he could not communicate with Moldof or anyone (SCP 301) According to Dr. Krieger, if MAREK'S test results were valid, he would be "dancing off the walls" (SCP 301). If had had been called at the penalty phase to testify, Dr. Krieger would have testified that MAREK had a mixed personality disorder with borderline anti-social features (SCP.302).

Hillard Moldof, MAREK'S trial attorney, was called as MAREK'S witness and testified that he recived his law degree in 1975 (SCP.312). From 1976 on, Moldof has practiced solely criminal law (SCP 312). Moldof worked as a public defender for almost 4 years than went into private practice in 1980 (SCP 312). His first, first degree murder case was in 1979, and MAREK'S case was his 15th or 16th first degree murder case (SCP 313). Moldof testified that 5 or 6 of those cases went to the penalty phase (SCP 313).

Moldof was appointed to represent MAREK as a special public

defender in August of 1983 (SCP 313). Moldof testified that he had met with CCR about 1 month before the hearing (SCP 314). Moldof testified that prior to MAREK'S trial he filed numerous motions including a motion to sever and a motion to suppress statements (SCP 315). Both motions were granted and MAREK was tried separately from co-defendant Raymond Wigley and also had his statements supressed (SCP 315). Moldof knew that this case was a possible death penalty and wanted to call MAREK'S family members for the penalty phase to show MAREK was loved and to show that the truck MAREK was driving was given to him to use and was not stolen (SCP 315-16). MAREK told Moldof that he had lived with foster families a long time ago and that they would have little to say (SCP 316-317). He also told Moldof that the whereabouts of his real family were unknown to him (SCP 317). Moldof didn't contact anyone in Texas because of what MAREK had told him (SCP 317-318). Moldof also testified that the last people MAREK was with in Texas were undesirable in that MAREK had been in a homosexual relationship there and Moldof did not want this information to get before the jury (SCP 318). Moldof did not check out the address on MAREK'S driver license since MAREK had not been living there before he left Texas (SCP 319-320). As far as mitigating evidence went, Moldof was looking for anything that might bear well on MAREK (SCP 320). The fact that MAREK was abandoned and in foster care would only be mitigating depending upon what other evidence from MAREK'S past would come out (SCP 322). MAREK had told Moldof that anything that would come out from his family and foster care would be negative (SCP 322).

Moldof didn't see any reason to investigate this area based on what MAREK had said (SCP 322-23). Moldof also pointed out that MAREK had not lived with his real family or foster parents for years (SCP 323). According to Moldof, even if MAREK had been labeled retarded at age 9 or 10, this would be remote in time. Further, MAREK'S recent past showed homosexualty which he did not want the jury to hear about (SCP 324). Moldof did not believe that this information would be favorably received by the jury (SCP 324). When shown background information from school and welfare authorities in Texas, Moldof said he would have liked to have had this information since it could show MAREK'S poor upbringing (SCP 330). Moldof reinterated that he didn't write to the authorities in Texas because he didn't feel he would receive anything positive from them (SCP 330). Moldof testified that MAREK was resisting him in this area and although the information would have been nice to have, he couldn't get it as a practical matter where MAREK was resisting him (SCP 331). Moldof had told MAREK that if he was convicted it would be important to bring out his past and family but MAREK didn't seem concerned or even interested in the case (SCP 333). As an example of MAREK'S lack of interest in the case, Moldof related that prior to trial he had had MAREK transferred to a facility where he could get sun so he could look tan in front of the jury so they wouldn't knew he was incarcerated. MAREK never went to the facility or got any sun because he wanted to stay in the gay cell (SCP 334-35).

Moldof knew that MAREK was in prison in Texas and decided not to argue the statutes mitigating circumstance of no signifi-

cant history of prior criminal activity because he didn't want the state to bring out that MAREK had been in prison (SCP.336-37).

Moldof also testified that before Dr. Krieger evaluated MAREK he told MAREK to tell Dr. Krieger everything and to "unload on him" (SCP.338). The reason Moldof wanted Dr. Krieger to evaluate MAREK was so Moldof could see what he was dealing with psychologically (SCP 338). He thought that Dr. Krieger might be able to come up with something along the lines of a defense if he found something during the evaluation (SCP 340). Moldof testified that he had told Dr. Krieger to look for mitigating evidence in the aspects of MAREK'S character and the crime (SCP 341). Moldof testified that Dr. Krieger in his initial evaluation of MAREK concluded that he was competent and knew what was going on (SCP 340). Dr. Krieger had expressed reservations to Moldof about the fact that MAREK was faking his test responses and based on that Moldof had Dr. Krieger reappointed to do further testing of MAREK (SCP 342).

After MAREK had been re-evaluated, Dr. Krieger reportd back to Moldof that MAREK was again faking his responses (SCP 342). Dr. Krieger told Moldof that the test responses MAREK gave were totally inconsistent with his behavior during the interviews (SCP 342). Moldof testified that if he went any further with Dr. Krieger, such as calling him at trial or claiming incompetency he would have to provide the report to the State and the State could use it against MAREK and that was the reason why Moldof did not pursue the issue of MAREK'S mental health (SCP 342). Moldof testified that he didn't have Dr. Krieger write up a second

report because it was Dr. Krieger's opinion that MAREK was malingering. Moldof wanted to stay away from Dr. Krieger himself after the second evaulation (SCP 342).

Moldof decided not to call Dr. Krieger at the penalty phase because if he did he would be cross-examined by the State. This was the reason Moldof wanted to introduce only Dr. Krieger's report (SCP 345).

Moldof testified that he decided not to pursue arguing to the jury during the penalty phase that Wigley had got a life sentence since it would have opened the door to the fact that MAREK was the dominant action (SCP 352). This would have bolstered the State's theory of the case (SCP 352).

Moldof testified that he didn't argue the stautory mitigating factor of no significant history of prior criminal activities since he was aware of MAREK'S prison term in Texas and that the truck he was driving was stolen (SCP 354). Moldof was afraid to open up the door to MAREK'S criminal past so decided against arguing this factor in mitigation (SCP 354).

Moldof tetified that he did not pursue intoxication as a defense since it would have been impossible to present (SCP 356). Moldof said that where the medical examiner testified that the victim was tortured and pulled into the shack by 2 men, the amount of dexterity necessarily involved in this would have negated the theory that MAREK did not have the specific intent to commit the crime (SCP 356). Moldof testified that this was especially true where the crime was of a long duration and where MAREK had been observed before and after the crime by witnesses

who testified that MAREK did not appear intoxicated (SCP 356). Moldof did not present MAREK'S intoxication at the penalty phase because MAREK had testified at trial that he was not drunk despite the fact he had allegedly consumed large amounts of alcohol and because he had seen juror reaction when MAREK testified as to his drinking and amnesia (SCP 357). Moldof did not feel that it was in MAREK'S best interest to embellish on this incredible testimony (SCP 338).

Moldof testified that whether or not MAREK would testify was MAREK'S own decision and that he had warned MAREK to stay away from the statements that had already been suppresed and not to exaggerate (SCP 358).

Moldof testified that the jury instruction on burglary did refer to specific intent and that it wouldn't have made a difference if there was a disparity between the assault instruction and the verdict form since the trial court would have found the aggravating factor of "in the course of" either way (SCP 361-364). Moldof testified that he did not have voir dire transcribed because he didn't feel that anything pertinent would be in there (SCP 364). Moldof did not object to comments made by the prosecutor during closing argument because he knew the prosecutor and knew that if he didn't object to the prosecutor's argument, he could run all over the place with his (SCP 368).

On cross-examination, Moldof testified that over-objecting to the to the prosecutor's argument would have had a negative effect on the jury (SCP 369). He further testified that he knew the trial court would be instructing the jury that the arguments

of counsel was not evidence and that he therefore did not find it necessary to object to the prosecutor's argument (SCP 370). Moldof did not think that MAREK'S psychiatric records would have had any effect on the jury, which had many women on it (SCP 370). Moldof further testified that these records would not have affected the trial court as the ultimate sentencer where he had practiced before Judge Kaplan for many years and knew that these records would not have altered the jury's on trial courts sense of repugnance at the crime (SCP 372). School and psychiatric records had their negative side and would have showed that MAREK had a sexually deviant background and that he hated his mother (SCP 374). This was not the sort of information Moldof wanted the jury to hear about (SCP 374).

Moldof testified that out of all the fist degree murder cases he had tried, this was the only one where a defendant was sentenced to death (SCP 375).

Regarding MAREK'S competency to stand trial, Moldof testified that he was able to communicate with MAREK, that MAREK answered Moldof's questions intelligently and that MAREK did not seem slow or retarded (SCP 376). MAREK had even told him that he had worked with computors in Texas prior to the crime.

Moldof testified that MAREK would change his story as time went on and that he would forget some details while adding others (SCP 377). Moldof tried to get MAREK to keep his story straight (SCP 378).

Moldof told MAREK how important it was to get his family to come to trial for the penalty phase but MAREK'S position was that

his family and foster parents were far removed in time and that he was alienated from them and that they would only have negative things to say (SCP 381). Moldof didn't pursue the matter because he was afraid they would have made bad remarks about MAREK'S behavior (SCP 381). Moldof did not want the jury to hear that MAREK had been kicked out of his foster home (SCP 381).

Regarding Dr. Krieger's evaluation, Moldof testified that he thought Dr. Krieger was an excellent psychologist and had used him in prior cases (SCP 383). According to Moldof, Dr. Krieger had appeared in front of Judge Kaplan before and had an excellent reputation in the courthouse (SCP 384). Moldof testified that he had wanted Dr. Krieger to explore MAREK'S amnesia (SCP 385). He had the second evaluation performed because he was running into a dead end in terms of coming up with a defense and thought Dr. Krieger could help him (SCP 386). Moldof testified that he didn't feel that Dr. Krieger's first report hurt MAREK but that he didn't want a second report written up so that in case he decided to use the first report, the State wouldn't know about the second evaluation and use it against MAREK (SCP 387). Moldof testified that he tried to gently dissuade MAREK from testifying but that MAREK wanted to tell his story for the jury (SCP 368). Moldof prepped MAREK for cross-examination and instructed MAREK on how he wanted MAREK to look, act and sound on the stand (SCP 388) Moldof spent hours on this and told MAREK that on cross-examination just answer the questions and don't volunteer anything (SCP 389). Moldof was surprised by MAREK'S cross-eximination (SCP 391). MAREK had exaggerated his drinking

and brought up the conversation which had been surppressed (SCP 391). Moldof had cautioned MAREK about the obvious pitfalls of testifying in this area (SCP 391).

Moldof testified that he did not want to insault the jury with an intoxication defense (SCP 394).

On re-direct examination, Moldof testified that bringing out MAREK'S background information during the penalty phase would not evoke sympathy from the jury but would have had the opposite affect (SCP 395-396). Moldof explained that bringing out this information would show the jury that they were right that MAREK committed the crime (SCP 398). Moldof preferred to argue that the jury could not be sure who did what, MAREK or Wigley (SCP 398). Moldof knew that if the jury recommended life, Judge Kaplan would go along with it since he would not override the jury's verdict (SCP 399). Moldof concluded that he knew a lot about MAREK and didn't feel that it would play well to the jury (SCP 400). The hearing was concluded at 8:45 P.M. on Friday, November 4, 1988.

ISSUE I

THE TRIAL COURT DID NOT PRECLUDE INTRODUCTION OF MITIGATING EVIDENCE.

A. DISPARATE TREATMENT

Marek's allegation that the trial court erroneously failed to instruct the jury on a nonstatutory mitigating circumstance is without merit and was properly found not to be a basis for post-conviction relief. Alleged trial court errors in the handling of the sentencing procedure can and should be raised on direct appeal. The instant claim was addressed to this Court on direct appeal (Point I) and rejected. Marek v. State, 492 So.2d 1055 (Fla. 1986). Thus, the claim is precluded from review in this collateral proceeding. Darden v. State, 521 So.2d 1103 (Fla. 1988); Johnson v. State, 522 So.2d 356 (Fla. 1988).

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. 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). 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 deemed 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.

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

B. PSYCHOLOGICAL REPORT

Marek herein alleges that the trial court precluded admission of favorable evidence during the penalty phase of the trial -- the psychologist's report. Alleged trial court errors in the handling of the sentencing procedure can and should be raised on direct appeal. Johnson v. State, 522 So.2d 356 (Fla. 1988); Darden v. State, 521 So.2d 1103 (Fla. 1988)..

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. (R. 1284)

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.

ISSUE II

THE TRIAL COURT AND JURY PROPERLY CONSIDERED FACTORS IN AGGRAVATION NOTWITHSTANDING THE SUBSEQUENT INVALIDATION OF ONE OF THE FOUR FACTORS.

A. PECUNIARY GAIN

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 denied motion as a second direct appeal. Johnson v. State, 522 So.2d 356 (Fla. 1988); Darden v. State, 521 So.2d 1103 (Fla. 1988).

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 supports the trial court's finding. (R. 565, 566, 718).

In Hildwin v. State, 13 F.L.W. 528, 530 (Fla. September 1, 1988) the Court determined, base on circumstantial evidence, that the murder was committed for pecuniary gain.

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.

"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." Id. at 296 (emphasis added). Marek's reliance on Scull v. State, 13 F.L.W. 545 (Fla. Sptember 8, 1988) is misplaced. This Court specfically found that Scull's possession of the victim's car did not prove that the murder was committed for pecuniary because "it is possible that the car was taken to facilitate escape rather than as a means of improving his financial worth." Id. at 547. 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.

B. HEINOUS, ATROCIOUS AND CRUEL

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. 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.

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.

Officer Dennis Satnick 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 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'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 motion for collateral relief was found to be without merit and is procedurally barred as this issue was raised collaterally and on direct appeal. Darden, supra; Johnson, 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 claim is without merit and the trial court's ruling must be affirmed.

C. IN THE COURSE OF AN ATTEMPTED BURGLARY

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. Initial Brief at 19. This aspect of the claim is therefore without the court's purview as it is procedurally barred, 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,the trial court properly considered this aggravating circumstance in sentencing Appellant. The State maintains that there was overwhelming evidence to support this conviction. Clearly the trial court did not err in applying this aggravating circumstance in sentencing Marek.

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[5], 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.

The allegation of ineffective assistance of counsel due to

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[5] 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 (R. 1358).

trial counsel's decision not to object to the phrasing of the factor in aggravation is without merit. Conviction was, as to Count III, for Criminal Attempt: Burglary with an Assault. (R. 1440). The statutory aggravating factor, as applied to this case, See §921.141(5)(d), Fla. Stat., was read and recorded as attempted burglary with an assault. (R. 1322). The State discerns no difference in the two, and therefore no prejudice to Marek. Strickland v. Washington, 466 U.S. 668 (1984).

D. FELONY MURDER AS AN AGGRAVATING FACTOR.

The trial court correctly rejected Marek's contention that his death sentence rests on an unconstitutional aggravating circumstance, felony murder, as procedurally barred. Since this claim relates to an aggravating factor found by the trial court, it is obviously a matter which could have been raised on direct appeal. The decision of Lowenfield v. Phelps, ___ U.S. ___, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988), upon which Marek relies, is not new law that will excuse his procedural default. The Lowenfield claim was based on the "narrowing" issue of Zant v. Stephens, 462 U.S. 862 (1983), and thus was available at the time of direct appeal, as further evidenced by the fact that this same claim was considered and rejected by this Court in 1982 in Menendez v. State, 419 So.2d 312, 314-315 (Fla. 1982). Thus, under Witt v. State, 387 So.2d 922 (Fla.) cert. denied 449 U.S. 1067 (1982), it is clear the claim is not cognizable collaterally.

Furthermore, Marek's claim has been repeatedly rejected on its merits by this Court, and the correctness of this determination has been confirmed, not cast in doubt, by

Lowenfield. First, the Florida decisions: in Menendez v. State, supra, the Court found the claim "without merit". Subsequently, in Clark v. State, 443 So.2d 973, 978 n. 2 (Fla. 1983), the court again rejected the claim, and added, "We take this opportunity, however, to make it abundantly clear our view that §921.141, Fla. Stat, does not unconstitutionally mandate the death penalty for felony murder and that it comports fully with the constitutional requirements of equal protection and due process, as well as the prohibition against cruel and unusual punishment." In Mills v. State, 476 So.2d 172, 178 (Fla. 1985), the Court added, "The legislative determination that a first degree murder that occurs in the course of another dangerous felony is an aggravated capital felony is reasonable". Most recently, in Swafford v. State, 13 F.L.W. 595, 598 (Fla. Sept. 29, 1988), the Court again stated, "we have held that the engaged-in-felony aggravating circumstance can be found even where the conviction rests on the felony murder rule."

Pursuant to these controlling authorities, it is clear that if Marek's conviction rested on felony murder (the prosecutor argued that both premeditation and felony murder existed (R. 1129-1133)), this fact did not preclude consideration of felony murder in the second phase as an aggravating circumstance. As explained by the District Court's opinion in Blanco v. Dugger, No. 87-6685-Civ-HASTINGS (July 12, 1988) (slip op. 19-21). The case of Sumner v. Shuman, ___ U.S. ___, 107 S.Ct. 2716, 97 L.Ed.2d 56 (1987), further shows Marek's claim to be without merit.

One final note: on direct appeal, this Court upheld the trial court's finding of 4 aggravating[1] and 0 mitigating circumstances. Marek v. State, 492 So.2d 1055 (Fla. 1986). Additionally, the court found the record "replete with evidence which justifies the conclusion that Appellant committed premeditated murder." Marek, supra at 1057. Thus, it is clear that Marek's death sentence does not "rest" only on the felony-murder aggravating factor and further, that the guilty verdict is supported by ample evidence of premeditation. These facts clearly show Marek is not entitled to relief.

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[1] The Circuit Court's denial of Marek's 3.850 motion holds one of the four factors to be invalid.

ISSUE III

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

The trial court did determine, pursuant to Lamb v. State, 13 F.L.W. 530 (Fla. September 1, 1988) and Perry v. State, 522 So.2d 817 (Fla. 1988), that the factor in aggravation regarding prior violent felony was erroneous.

> However, MAREK'S sentence of death is still valid where the remaining three aggravating factors were proven beyond a reasonable doubt and upheld on direct appeal and where there were and are no mitigating circumstances applicable to Marek. Jackson v. State, 502 So.2d 409 (Fla. 1986).

Order Denying Motion to Vacate Judgment and Sentence, p. 6, November 7, 1988.

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). See Echols v. State, 484 So.2d 568 (Fla. 1985); 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). See Koon v. State, 513 So.2d 1253, 1257 (Fla. 1987).

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.

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. 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 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 three 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).

ISSUE IV

THE TRIAL COURT CONSIDERED ONLY THE STATUTORILY ENUNCIATED FACTORS IN AGGRAVATION.

A. LACK OF REMORSE

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). 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.

B. ALLEGED COMMENT ON SILENCE

The trial court was correct in ruling that Marek's claim that at the sentencing phase of trial the prosecutor commented on his exercise of his right to remain silent was procedurally barred. It is well established that in order for such an issue to be raised even on direct appeal, there must have been a timely objection or it is deemed waived. Clark v. State, 363 So.2d 331 (Fla. 1978). Even then it is not fundamental error, but subject to harmless error analysis. State v. DiGuilio, 491 So.2d 1129, 1134-1135 (Fla. 1986); State v. Marshall, 476 So.2d 150, 153 (Fla. 1985).[8] Certainly then, it is clear this issue is not cognizable collaterally.

It is well settled that if a comment which is alleged to be one on silence is, when read in context, a comment on the evidence, there is no error. Harris v. State, 438 So.2d 787 (Fla. 1983); Hall v. State, 403 So.2d 1321 (Fla. 1981); Wesley v. State, 498 So.2d 1276 (2 DCA Fla. 1986); Kennedy v. State, 490 So.2d 195 (2 DCA Fla. 1986). These authorities are controlling here.

The evidence is clear that Marek did not remain silent; he made statements to the police and testified in his own defense at trial. (R. 660-61, 670-71, 681, 947-57, 978, 1019). During the sentencing phase of the trial, Defense counsel called Deputy Webster. In the course of her testimony, Deputy Webster stated

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[8] See also; Chapman v. California, 366 U.S. 18 (1967); United States v. Hasting, 461 U.S. 449, 510-511 (1983).

that Marek had been very upset and near tears since the jury had found him guilty. (R. 1298). It was therefore appropriate for the prosecutor to point out, in commenting on Deputy Webster's testimony, that Marek was only sorry he had been caught. This is clear when the language excised from Marek's quote of pages 1306 to 1307 of the record is put back in:

> Those aren't tears of remorse. Those are tears of sorrow because you convicted him. Because he got caught. That is what he is crying about. There's certainly been nothing in this case, nothing at all that he's ever been sorry for what he did. You certainly never heard that from the stand when he testified.

(R. 1307).

The prosecutor's comments were fairly based on the evidence that in all Marek's encounters with the police and where he made statements and in his trial testimony, he never expressed sorrow that the victim had been killed. Thus, they could not possibly have been construed by anyone as "fairly susceptible" of being a comment in silence when in fact Marek was not silent. Moreover, the remarks were not designed to establish a non-statutory aggravating factor but rather, as a comment on why the jury should not find mitigation from Deputy Webster's testimony about Marek's post-verdict upset emotional state. The prosecutor's comments concerning the aggravating factors appear at pages 1300 - 1303 of the record. He then discussed mitigation, beginning at R. 1303. The comments complained of at R. 1306 - 1307 are thus not an attempt to establish an improper aggravating circum-

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[2] State v. Kinchen, 490 So.2d 21 (Fla. 1985).

stances, but rather, rebut the mitigation. United States v. Robinson, 485 U.S. ___, 99 L.Ed.2d 23 (1987).

Finally, even if this Court were to find error, the State maintains it is harmless. The harmless error standard of Chapman v. California, 386 U.S. 18 (1967), is applicable to the sentencing phase of a capital trial. Satterwhite v. Texas, ___ U.S. ___, 100 L.Ed.2d 284 (1988); Ford v. State, 522 So.2d 345 (Fla. 1988). Here, there were four aggravating and no mitigating circumstances. It is certainly the existence of the valid aggravating factors and not the prosecutor's remarks which caused the jury to recommend and the trial court to impose the death sentence.

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[3] This is how they were interpreted by the trial court. See, the sentencing order at (R. 1474).

ISSUES V AND XVI

MAREK WAS NOT DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT AND PENALTY PHASES OF HIS CAPITAL TRIAL

The standard for evaluating a claim of ineffectiveness of counsel was set forth by the United States Supreme Court in Strickland v, Washington, 466 U.S. 668 (1984). Strickland makes clear that a defendant must demonstrate both deficient performance and prejudice in order to prevail on a claim of ineffective assistance of counsel. Burger v. Kemp, 483 U.S. ___, 107 S.Ct. 3114, 97 L.Ed 2d 638 (1987).

This standard, as recently applied by the Florida Supreme Court places the burden on a capital defendant to establish that his counsel's actions and/or omissions were below the level of competent counsel, under prevailing norms, to such a severe degree, that confidence in the reliability and outcome of the proceedings is undermined. Strickland, 466 U.S., at 689-690; Bertolotti v. State, 13 FLW 253 (Fla. April 17, 1988); Blanco v. Wainwright, 507 S.2d 1377, 1381 (Fla. 1987); Bush v. Wainwright, 505 S.2d 409, 411 (Fla.1987); Downs v. State, 453 S.2d 1102 (Fla. 1984).

A. Guilt Phase

1. MAREK complains that trial counsel was ineffective because he did not investigate MAREK'S alcohol abuse and did not present a defense based thereon to the jury. The State maintains that MAREK'S argument is totally without merit and that defense counsel at all times rendered effective assistance under Strickland. Therefore, the trial court properly rejected this claim.

The record is clear that MAREK'S defense at trial was that Raymond Wigley, and not MAREK, murdered the victim. MAREK himself testified that he fell asleep in the truck shortly after the victim got in the truck and that he woke up "sometime later" and asked where the victim was. (R. 948). According to MAREK, Wigley told him he had dropped her off. (R. 948). MAREK also testified that after he fell asleep again, he finally woke upon the beach and that Wigley was in the observation deck of the lifeguard stand. (R. 950). Even though MAREK admitted to going inside the observation deck, he denied that he ever saw the victim's body. (R. 856). MAREK denied hearing any yelling or struggling while he was asleep in the cab of the truck on the way to the beach (R. 973), denied strangling the victim or burning her pubic hair (R. 976), and denied burning the victim's finger to see if she was dead. (R. 976).

Accordingly, defense counsel argued to the jury in both opening and closing arguments that MAREK did not commit the crimes charged. Rather, defense counsel argued that Wigley was responsible for the murder. (R. 1157, 1184, 1187, 1200, 1202).

Defense counsel specifically argued that the State's evidence made a case against Wigley and not MAREK. (R. 1203).R. 969, 970, 971).

Based on trial testimony (R. 940, 969-71), defense argued in opening and closing argument that MAREK had been drinking and intoxicated at the time of the incident which explained how he had fallen asleep in the truck only to awaken and find the victim missing and how he also later woke up on the beach. (R. 1181-1182, 1189, 1203).

The State maintains that where MAREK insisted that he had not committed the murder of the victim and that he was not guilty, defense counsel cannot be held to be ineffective for not presenting a voluntary intoxication defense. Such a defense is inconsistent with the theory that MAREK did not commit the murder. Groover v. State, 489 So.2d 15 (Fla. 1986); Harich v. State, 484 So.2d 1239 (Fla. 1986); Bertolotti v. State, 13 F.L.W. 253 (Fla. April 7, 1988). Clearly, defense counsel was not ineffective for not presenting a defense based on voluntary intoxication where MAREK'S at all times claimed that he did not commit the murder. Groover. The decision not to present a voluntary intoxication defense was based on this defense strategy and counsel cannot be held ineffective for not pursuing same. Strickland.

The State would point out that even though the defense was that MAREK did not commit the crime, defense counsel asked for an intoxication instruction since there was evidence of intoxication. Bertolotti. (R. 1079).

It is thus clear that defense counsel requested an intoxication instruction in apparent concern that the jury might not buy MAREK'S testimony that he didn't commit the murder. (R. 1117). Accordingly the jury was instructed on intoxication. (R. 1250-52).

Having the jury instructed as to a voluntary intoxication defense instead of arguing it was a valid strategic decision. Middeton v. State, 465 So.2d 1218, 1224 (Fla. 1985); Funchess v. State, 449 So.2d 1283 (Fla. 1984); Straight v. Wainwright, 422 So.2d 827 (Fla. 1982). This decision maintained the integrity of MAREK's stated defense and yet allowed the jury an "out" to find MAREK not guilty even if they didn't believe his testimony. To have argued both that MAREK didn't commit the crime and that he was too intoxicated to form the specific intent to do so would have been contrary to the defense that he simply didn't murder the victim. Magill v. State, 457 So.2d 1367 (Fla. 1984).

The tactical decision not to argue intoxication as a defense to the jury does not render defense counsel ineffective. Harich; Groover.

2. Marek complains that his defense counsel failed to effectively cross-examine Detective Rickmeyer about his interrogation techniques. Marek claims that when defense counsel tried to do this after the State had presented Rickmeyer on rebuttal, he was disallowed because the trial court said the cross-examination as to Rickmeyer's interrogation techniques should have been done during defense counsel cross-examination of Rickmeyer. This, Marek claims, amounted to ineffective assistance. Marek's argument is without merit for several reasons. Rickmeyer testified for the first time during Marek's case, not during the State's presentation of its case (R 890-897). During his direct examination by defense counsel, Rickmeyer testified as to the truck found in Daytona Beach, how much beer had been in the truck, and to the statement he had taken from Jean Trach (R 890-894). Since Rickmeyer was Marek's witness, defense could not have cross-examined him, and could clearly not be held ineffective for not doing so. Strickland.

Further, when Rickmeyer testified on rebuttal, he only testified that he had told Marek while he was in a 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). This rebuttal testimony was properly admissable to rebut Marek's own testimony that Rickmeyer only told him "Congratulations, you made it to the big time" when he responded (R 1013). Harris v. New York, infra. After Rickmeyer's rebuttal testimony, defense counsel wanted to call Rickmeyer as a surre-

buttal witness to ask him if he had told Marek that Wigley had confessed and had told Wigley Marek had confessed during a previous conversation Rickmeyer had had with Marek (R 1037). To that end, defense counsel proferred Rickmeyer's testimony during which Rickmeyer testified that he had told Wigley that Marek confessed but denied telling Marek that Wigley confessed (R1037-1039). The trial court ruled that it would allow defense counsel to ask Rickmeyer about what he had told Marek, but not Wigley, since it was irrelevant. (R 1039-1040). The trial court did not rule that defense counsel should have asked that question earlier. Defense counsel then declined to call Rickmeyer on surrebuttal since he had denied telling Marek that Wigley had confessed (R 1040).

The State has presented this court the full details of defense counsel's attempt to call Rickmeyer in surrebuttal to show that Marek's claim ignores the record and is in fact an attempt to fabricate events. Defense counsel could not have cross-examined Rickmeyer. Defense could not have questioned Rickmeyer in this regard except on surrebuttal which he in fact tried to do. The fact that defense counsel did not pursue this line of questioning in light of the trial court's ruling cannot be said to be ineffective performance since such questions could not have helped Marek where Marek never testified that Rickmeyer told him that Wigley confessed. This claim is thus clearly without merit. Strickland.

3. Marek claims that defense counsel failed to argue against the introduction of Marek's statements which had been suppressed, but were admitted during the defense case and on rebuttal by the State. The State would maintain however that defense counsel was

not ineffective. Strickland. The record is clear that prior to trial, the trial court granted Marek's motion to suppress statements made by Marek while he was on the beach in Dania, to Officer Satnick, Vincent Thompson, Walter Miller, and Officer Darby (R 96). The trial court also granted Marek's motion to suppress the statement he made to Officer Rickmeyer in Daytona Beach that "The SOB told all" (R 117). The record is also clear that during the presentation of the defense case, Vincent Thompson, testified on cross-examination only that a friendly conversation occurred and that there was joking. (R 877-878). He did not testify as to the content of the conversation or what Marek said. Defense counsel's objection to the prosecutor's question regarding what Marek said was sustained by the trial court (R 884-885). Clearly none of Marek's statements were introdued during the testimony of Vincent Thompson.

The prosecutors attempt to get into what kind of jokes Marek told was objected to by defense counsel and the objection was sustained (R 905-909). It is thus clear that Marek's current allegation that his statements were used against him during his case-in-chief is patently false. Therefore, counsel could not have been ineffective for letting these statements into evidence since his objections to the introduction of these statements were sustained (R 884-885; 905-909). Strickland.

Regarding Marek's statements which were brought out on rebuttal through the testimony of State's witness, Officer Rickmeyer, the State would point out that Marek's statement "Oh shit, the SOB told all" (R 1019) was admissible under Harris v. New York, 401 U.S. 222 (1971) and White v. State, 446 So.2d 1031 (Fla. 1984) since it was

without question voluntarily made. Thus, defense counsel was not ineffective for allowing this statement to be introduced during the State's rebuttal. Strickland; Harris.

4. Marek complains that counsel was ineffective for calling as a witness forensic serologist George Duncan because he allegedly only had expertise regarding "live sexual battery victims, not dead ones." Marek specifically complains that Duncan was not able to state whether the studies he had read stated how long spermatozoa live in a cervix apply when the victim is dead for a period of time before the cervix swab is taken. Marek's argument is without merit for several reasons. First Duncan did testify that the studies he had read were conducted on live people (R 928). Although Duncan did not know if there was a difference between the time sperm would stay alive in a live woman's cervix as opposed to a dead woman's cervix, Marek has not shown here that there is any difference whatsoever. This argument is therefore without merit since Marek cannot even allege that there is a difference. Further, Marek was charged with the sexual battery of a live victim since he could not have been charged with a sexual battery on a corpse. Therefore, Duncan was qualified to testify about the factual circumstances of this case. Lastly, the State would point out that Marek was not found guilty of sexual battery, but rather the lesser included offense of battery. (R 1441-1442). It is thus clear that defense counsel was not ineffective for calling forensic serologist George Duncan to testify on Marek's behalf and even if he was ineffective, Marek has not suffered prejudice. Strickland.

5. Marek complains that defense counsel was ineffective when he

failed to insure that the jury was properly instructed on the lessor included offense of "attempted burglary with an assault." However, the record is clear that the jury was properly instructed (R 1241). Indeed, the jury was fully and completely instructed pursuant to the Florida Standard Jury Instructions. Thus, counsel cannot be held to be ineffective where the jury was properly instructed (R 1237-1238; 1240). Strickland. Marek's argument is completely without merit.

6. Marek claims that defense counsel was ineffective for not having voir dire transcribed. He claims that had voir dire been transcribed appellate counsel could have raised a Caldwell claim on direct appeal to the Florida Supreme Court. The State would maintain however that failing to have voir dire transcribed did not render defense counsel ineffective. Thomas v. State, 495 So.2d 172 (Fla. 1986) (Counsel not ineffective to make PSI part of record on appeal); Buford v. State, 492 So.2d 355 (Fla. 1986) (Counsel not ineffective for having grand jury testimony transcribed). Further, Marek was not prejudiced by the failure to transcribe voir dire where his Caldwell claim, than or now, is totally without merit (see Claim VI, infra). Clearly, Marek has not shown counsel to be ineffective and has also failed to establish prejudice. His claim must therefore be denied. Strickland.

B. PENALTY PHASE

MAREK claims that defense counsel was ineffective for failing to investigate, develop and present mitigating evidence regarding MAREK'S childhood, mental state, and background. This evidence will demonstrate that counsel was not ineffective. The State would point

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out however the even if defense counsel's performance as outside the range of competence demanded of attorneys in criminal cases such as this, MAREK must still establish that any deficiencies in counsel's performance were actually prejudicial. Strickland.

MAREK complains that defense counsel was ineffective for failing to argue to the jury the mitigating circumstances of no significant history of prior criminal activity. The State would maintain however, that defense counsel was not ineffective. Strickland. Accordingly, the trial court properly rejected this claim for relief.

In the case sub judice, defense counsel sought to have the jury instructed as to the mitigating circumstance of no significant history of prior criminal activity. (R. 1284). The trial court, ruled however, that if the jury was so instructed, the prosecutor would be able to bring up MAREK'S felony conviction in Texas for credit card abuse. (R. 1284). Defense counsel objected to the Court's ruling but decided not to argue to the jury the mitigating circumstance of no significant history of prior criminal activity in light of the ruling. (R. 1284).

The record is thus clear that defense counsel did ask the trail court to instruct the jury on this mitigating circumstance despite MAREK'S claim that no such request was made as alleged in MAREK'S claim for relief. It is equally clear that the trial court was correct in ruling that if the jury was so instructed, the State could bring out MAREK'S prior felony conviction since the law is clear that the State could rebut this mitigating circumstance with evidence of MAREK'S prior criminal record. Maggard v. State, 399 So.2d 973 (Fla. 1981). Indeed, the State could have and would have shown that not only had MAREK pled guilty in Texas to the felony of credit card abuse, it would have also shown that subsequent to MAREK being placed on probation for

tht conviction, he violated his probation and was sentenced to two (2) years in prison. (R. 1473).

It is thus clear that knowing the State could rebut MAREK'S reliance on this mitigating circumstance, defense counsel made the tactical decision to forego arguing this mitigating circumstance to the jury. (R. 1284). Defense counsel obviously felt that the State's rebuttal evidence would on balance, harm MAREK'S case. In Cave v. State, 529 So.2d 293 (Fla. 1988), the Florida Supreme Court held that it is a reasonable tactical decision for defense counsel to forego an instruction on the mitigating circumstance of no significant history of prior criminal activity where he is of the opinion that the introduction of the State's rebuttal evidence on this circumstance, would harm a defendant's case. Clearly, when defense counsel made the reasonable tactical decision to forego arguing this mitigating circumstance to the jury, defense counsel cannot be held to be ineffective on this ground. Strickland.

The State would also point out that this tactical decision was not only reasonable but shrewd where the record is clear that the jury was instructed that it could consider in mitigation "any other aspect of the defendant's character or record or any other circumstances of the offense". (R. 1324). Thus, the jury could have considered the fact that MAREK had no significant criminal record in mitigation of sentence, since the jury was only aware that MAREK had once been convicted of a felony, according to MAREK'S own testimony. (R. 961). Thus, defense counsel's tactical decision not to have the jury so instructed kept the

State from bringing in specific evidence of MAREK'S prior record, and allowed the jury to consider the lack of evidence as to specific criminal activity as a mitigating circumstance. Clearly, this was a reasonable strategic decision under Strickland. Accordingly defense counsel was not ineffective for not have the jury instructed as to the mitigating circumstance of no significant history of prior criminal activity. Strickland. MAREK'S claim for relief must thus be denied.

ISSUE VI

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 this 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. This 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).

It is clear in this case, as in Combs v. State, 525 So.2d 853 (Fla. 1988), 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 (1976).

In Pope v. Wainwright, 496 So.2d 798, 805 (Fla. 1986), this 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. (R. 25, 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 this 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.

ISSUE VII

APPELLATE COUNSEL'S NOT RAISING, ON APPEAL, THE TRIAL COURT'S DENIAL OF ADDITIONAL PEREMPTORY CHALLENGES WAS NOT A DENIAL OF EFFECTIVE ASSISTANCE.

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).

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 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 counel was not ineffective for failing to raise this issue on appeal where this 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).

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). 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 441. 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). It therefore follows that appellate counsel is not ineffective for failing to have voir dire transcribed or to raise this issue on appeal where this claim is totally frivolous. Strickland; Francois; Funchess. Appellate counsel was not ineffective.

ISSUE VIII

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 Supeme Court was careful to point out in its opinion that there had been a timely objection. Subsequently, in Allen v. Hardy, ___ U.S. ___, 92 L. Ed.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 this collateral proceeding as a second appeal for obtaining review of this issue, which is procedurally barred, Witt v. Wainwright,387 So.2d 922 (Fla.), cert. denied 449 U.S. 1067 (1980).

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's 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 holds 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 case cited by Marek to support the present, novel claim, Brown v. Rice, No. GC-87-0184 (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 3.00-3.50, 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). 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).

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. 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, it 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.

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 solely 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. 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.

ISSUE IX

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 the trial court correctly held it is procedurally barred. Witt v. Wainwright, 387 So.2d 922 (Fla.), cert. denied 449 U.S. 1067 (1980).

Even if the court considers this issue on the merits, it is evident from the record that the trial court acted properly. The decision in Palmes v. State, 397 So.2d 648, 656 (Fla. 1981), is directly on point. In Palmes, this 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 circumstances 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.

ISSUE X

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). The trial court determined that 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.[1] As such, the trial court correctly found it can not be used as the springboard for a collateral attack, because the claim could clearly have been raised on direct appeal.

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

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[1] 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.

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 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. (R. 1471-72)

In addition to the trial court's findings, this Court, on direct appeal, 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 this 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).

ISSUE XI

SENTENCING PHASE INSTRUCTIONS.

Marek alleges that the sentencing phase instructions, which informed the jury that it must first determine whether aggravating circumstances existed to support the death penalty, and, if so, whether mitigating circumstances exist that outweigh them, (R. 1323), improperly shifted the burden of proof to him, in alleged violation of the principles of Sandstrom v. Montana, 422 U.S. 510 (1979), and Mullaney v. Wilbur, 421 U.S. 684 (1984). This claim, as found by the trial court,is procedurally barred; and substantively lacking in merit.

There was no objection to the instructions at trial when they were given (R. 1321-1327), nor was the issue raised on direct appeal. Therefore, the trial court correctly ruled this claim is not cognizable in a collateral attack. Cave v. State, 529 So.2d 243 (Fla. 1988); Henderson v. Dugger, 522 So.2d 835, 836 n. 1 (Fla. 1988); Blanco v. Wainwright, 507 So.2d 1377 (Fla.

1987); Maxwell v. Wainwright, 490 So.2d 297 (Fla. 1985).

On the merits, Marek has misinterpreted the nature and purpose of aggravating and mitigating circumstances, in capital sentencing. He has relied on decisions which require that the State be obligated to meet the burden of proof, and/or persuasion, as to the existence of an element of a crime, beyond any reasonable doubt. Sandstrom, 442 U.S., at 512-516; Rose v. Clark, 478 U.S. ___, 106 S.Ct. ___, 92 L.Ed.2d 460, 472 (1986); Francis v. Franklin, 471 U.S. ___ 105 S.Ct. ___, 85 L.Ed.2d 344 (1985); In re Winship, 397 U.S. 358, 364 (1970). Under these cases, an instruction which creates a mandatory presumption that requires a jury to place the burden of proof of the element of a crime on the defendant, violates due process. These decisions have no application to the Florida Statute and jury instructions which involve the weighing of aggravating and mitigating circumstances in capital sentencing.

The instructions given here (R. 1321-1377), reflect a statutory scheme that does not place the burden of proof, of either aggravating or mitigating circumstances, on either party. Harper v. Grammer, 654 F.Supp. 515, 536-537 (D Neb. 1987); §921.141 (1), (2), (3), Fla. Stat. Under §921.141 et seq, Fla Stats., evidence can be submitted by either party, and thereafter, the jury and sentencing judge must render advisory and actual sentences, based on whether aggravating circumstances exist, whether mitigation exists which outweighs aggravation, and whether, based on these circumstances, a defendant should receive life or death. §921.141 (1), (2), (3), Fla. Stats.

No party, least of all a defendant, is obligated to prove that mitigation outweighs aggravation. No jury or judge is required to find, or presume, merely from the existence of aggravation, that mitigation does not exist. In short, there is no irrebuttable presumption created, that a jury is instructed must result or flow, from proof of a particular predicate fact.

Even more significantly, Marek's efforts to equate the weighing process of aggravating and mitigating circumstances, with a burden-shifting presumption on an element of a crime, is a proverbial "apples and oranges" comparison. As noted by the en banc Eleventh Circuit in Ford v. Strickland, 696 F.2d 804, 818 (11th Cir. 1983) (en banc), the Florida death penalty scheme, as bifurcated in nature, makes the sentencing determination and weighing process, completely separate from the determination of guilt. The weighing of aggravating and mitigating circumstances is not a "fact," an "element of the crime," or a series of "mini-trials," establishing proof of particularized factors. Poland v. Arizona, 476 U.S. 147 (1986); Bullington v. Missouri, 451 U.S. 430, 438 (1981); Ford, 696 F.2d, supra, at 818. Aggravating and mitigating factors are designed to be guides, that "channel and restrict the sentencer's discretion in a structural way, after guilt has been fixed." Ford, 696 F.2d, at 818; Poland, supra; Proffitt v. Florida, 428 U.S. 242, 258 (1976). While the particular existence of aggravating and mitigating factors may be proved, the weighing process is not susceptible of proof, by anyone. Ford, at 818-819. It has been consistently held that sentencers, be they jury or judge, are not constitutionally

required to apply a set formula to such a weighing process, nor are states constitutionally mandated to create one. Zant v. Stephens, 462 U.S. 862, 875; 875, n. 13 (1983); Sonnier v. Maggio, 720 F.2d 401, 408 (5th Cir. 1983); Gray v. Lucas, 677 F.2d 1086, 1106 (5th Cir. 1982). Thus, the present instruction does not create a Sandstrom-related violation.

In sum, an acceptance of Marek's position, would require this Court to overrule the U.S. Supreme Court's decision in Proffitt, supra, upholding the constitutionality of the Florida statutory scheme, including the aggravation/mitigation weighing process, as well as the Eleventh Circuit's still-binding en banc determination on the issue, in Ford. The instructions given did not fundamentally affect Marek's sentencing proceeding or determination.

The jury instructions did not state that the death sentence was appropriate, or to be presumed, from a finding of one or more aggravating circumstances. (R. 1402). Rather, the court informed the jury that if they did not find aggravating circumstances to "justify" the death penalty, a life advisory sentence should be returned, and if "sufficient" aggravating circumstances did so exist, the jury would then have to determine if mitigation existed, to outweigh the aggravating circumstances. (R. 1322-1323). Rather than being "directed" to a death sentence recommendation, the jury was instructed that "[I]f one or more aggravating circumstances are established, you should consider all the evidence tending to establish one or more mitigating circumstances," and "[G]ive that evidence such weight

as you feel it should receive, in reaching your conclusion as to the sentence that should be imposed". (R. 1324). This is a very far cry from the offending instruction in Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988), relied on by Marek, which expressly created a presumption of the death sentence, in the presence of one or more aggravating circumstances.

The decision in Arango v. State, 411 So.2d 172, 174 (Fla. 1982), likewise has no favorable application, for Marek. In Arango, supra, this Court rejected a similar Sandstrom-type challenge, to instructions which, like herein, conveyed that the sentencing jury, inter alia, should determine if mitigating circumstances exist that outweigh aggravating factors in existence. The Court noted that, in examining the totality of the instructions, rather than isolating one phrase, the insructions did not improperly shift the burden of proof to the defendant. Arango, 411 So.2d, at 174. The Court based its decision, in part, on the fact that the jury was also told that the State had to prove the existence of aggravation, beyond a reasonable doubt. Id. Since the trial court in the instant case made this allocation of the burden of proof clear, (R. 1324) no improper burden-shifting occurred. Arrango, at 174.

Finally, Marek's contention that the prosecutor at voir dire "enhanced" the burden-shifting, citing (RV 244), the State would point out that the prosecutor made it quite clear that the jury could recommend life even if it found more aggravating than mitigating circumstances. (RV 245). The jury was not misled by these remarks.

ISSUE XII

JURY INSTRUCTIONS: MAJORITY VOTE

Marek contends the jury was misinformed by instructions that its sentencing recommendation was to be made by a majority vote; it was not told a six to six split is sufficient to recommend a life sentence. The trial court ruled in accordance with settled law that this claim must be preserved by an objection at trial and raised on direct appeal; it cannot be a basis for collateral relief. Maxwell v. Wainwright, 490 So.2d 927, 931 (Fla. 1986); Ford v. Wainwright, 451 So.2d 471, 474 (Fla. 1984), Jackson v. State, 438 So.2d 4 (Fla. 1983). The very case relied on by Marek to support his argument, Harich v. State, 437 So.2d 1082 (Fla. 1983), was decided before Marek's trial and further, has been specifically held not to be a "change in the law" under Witt v. State, 387 So.2d 922 (Fla.), cert. denied 449 U.S. 1067 (1980), so as to permit a collateral attack. Jackson v. State, 438 So.2d 4 (Fla. 1983). Thus, this issue was correctly held to be procedurally barred.

Moreover, there is no indication in the record that at any time the jury was ever deadlocked. Its recommendation of death was by a substantial majority vote of 10 - 2. (R. 1453). At the time the advisory verdict was returned, the Court polled the jury members and was assured by each juror individually that the death recommendation was that of ten members of the jury. (R. 1328-1330). In Maxwell v. Wainwright, supra, this Court held, "unless it can be shown that the jury erroneously believed it had to have a vote of seven to make a recommendation and that this mistake

affected their deliberations in that at some point a tie was reached, it cannot be established that any prejudice resulted from the erroneous instruction." 490 So.2d at 931. As this Court observed when discussing the issue in Ford v. Wainwright, 451 So.2d 471, 474 (Fla. 1984), reversible error cannot be predicated on conjecture. There is clearly no basis for reversal in this case, for no prejudice has been shown.

Finally, Marek attempts to strengthen the instant claim by linking it with his Caldwell claim (discussed in Point VI, supra). As the Appellee has detailed, the Caldwell claim has no merit. It has no logical relevance to the instant claim, because it is clear from the 10 - 2 recommendation the jury was not misled and there was no prejudice. Furthermore, in Lowenfield v. Phelps, ___ U.S. ___, 108 S,Ct. 546, 98 L.Ed.2d 568 (1988), the Supreme Court held that giving an Allen v. United States, 164 U.S. 492 (1896), instruction in the sentencing phase of a capital trial was constitutionally permissible, even though under Louisiana law a deadlock requires the imposition of a life sentence. The Court reasoned the State has a strong interest in having the jury express the conscience of the community on the issue of life or death and the capital context doesn't require a different rule regarding an Allen change than the rule generally applicable. Thus, since Lowenfield approves using an Allen change to break a sentencing recommendation deadlock, even where a deadlock will result in a life sentence, it is evident that telling the jury in this case that their recommendation was to be by a majority vote poses no Constitutional problems.

ISSUE XIII

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. 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.

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 L.Ed. 166 (1940).Marek specifically makes

reference to Exhibit Nos. 6-8, 11, 13, 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).

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. Henderson v. State, 462 So.2d 196 (Fla.), cert. denied 473 U.S. 916, (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. State v. 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.

ISSUE XIV

MAREK WAS NOT FORCED TO UNDERGO CRIMINAL JUDICIAL PROCEEDINGS WHILE LEGALLY INCOMPETENT AND DEFENSE COUNSEL WAS NOT INEFFECTIVE FOR NOT REQUESTING A COMPETENCY HEARING

Marek complains that he was forced to stand trial while legally incompetent and that defense counsel was ineffective for failing to raise a competency issue. Marek's argument is totally without merit and was properly rejected by the trial court.

Mental health is not necessarily an issue in every criminal proceeding. Blanco v. Wainwright, 507 So.2d 1377, 1383 (Fla. 1987). However, where there is evidence calling into question a defendant's sanity, defense counsel is bound to seek the assistance of a mental health expert. See Bush v. Wainwright, 505 So.2d 409 (Fla. 1986); see also Ake v. Oklahoma, 470 U.S. 68 (1985). In keeping with these principles, defense counsel moved the trial court to appoint Marek a psychiatrist (R 1376). That motion was granted by the trial court and Dr. Seth Krieger was appointed to examine Marek (R 1377-1378). Dr. Krieger so examined Marek, although the State has not been made privy to Dr. Krieger's report. Thereafter, defense counsel moved the trial court for an additional psychiatric evaluation stating that although Dr. Krieger had examined Marek, additional tests would be necessary to further evaluate Marek in terms of his sanity at the time of the offense and his competency to stand trial (R 1387-1388). The trial court granted the motion and appointed Dr. Krieger to conduct a further examination of Marek (R 1391). The second examination was to take place by April 19,1984 (R 1391). It is thus clear that counsel had Marek evaluated. Ake; Bush.

Marek now complains that counsel was ineffective for not pursuing the issue of his competency in the trial court and that as a result, he was forced to undergo criminal proceedings while legally incompetent. The State would maintain however that the trial court properly rjected this claim.

In Florida, the trial court has the responsibility to conduct a hearing for competency to stand trial only when it "reasonably appears necessary", Christopher v. State, 416 So.2d 450, 452 9Fla. 1982); Fla.R.Crim. P. 3.210 (b). Federal law requires as a matter of procedural due process, that a criminal defendant be entitled to an evidentiary hearing on his claim of incompetency solely if he presents clear and convincing evidence to create a "real, substantial and legitimate doubt as to [his] mental capacity...to meaningfully participate and cooperate with counsel..." Bruce v. Estelle, 483 F.2d 1031, 1043 (5th Cir. 1973); see also Zapata v. Estelle, supra, 588 F.2d 1017, 1021-22; (5th Cir. 1979) Nathaniel v. Estelle, 493 F.2d 794, 798 (5th Cir. 1974). The standard of proof is high. The facts must "positively, unequivocally and clearly generate" the legitimate doubt. Bruce v. Estelle, supra, 483 F.2d at 1043; see also Pride v. Estelle, 649 F.2d 324, 326 (5th Cir. 1981) (requiring "more than a showing by a preponderance of the evidence" that the petitioner might have been incompetent at the time of the state trial), see also Adams v. Wainwright, infra at 1360.

Marek's demeanor, testing and statements at trial reflect his understanding of the proceedings and thus his competency. Drope v. Missouri, 420 U.S. 162 (1975); Reese v. Wainwright, 600 F.2d

1085 (5th Cir. 1979). Marek's pre-trial as well as trial behavior is monitored by the court and the prosecutor in addition to defense counsel, Fla.r.Crim.P. 3.120 (b). The court's observations of Marek as well as defense counsel's failure to raise a competency issue is persuasive evidence that Marek's mental competence was not in doubt, Adams v. Wainwright, 764 F.2d 1356, 1360 (11th Cir. 1985) ("highly significant" that defense counsel did not claim incompetence during trial or sentencing); U.S. v .Rodriquez, 799 F.2d 649, 655 (11th Cir. 1986) (defense counsel's failure to raise competency persuasive) Reese v. Wainwright, 600 F.2d 1085, 1092 (5th Cir. 1979); Harkins v. Wyrick, 552 F.2d 1308, 1312 (8th Cir. 1976) (Court's own observations); Rodriquez, supra at 655 (court's observation of Defendant as he testified). Marek set through the entire trial as well as the sentencing proceeding without a problem. Indeed, Marek's testimony was articulate. He was able to remember many specifics about the incident and vigorously maintained his innocence. Further, the record is clear that Marek was able to assist defense counsel in his defense. Throughout voir dire, the trial and the sentencing proceedings, Marek interracted and counsulted with defense counsel. In short, Marek was unlike the defendants in Hill v. State, 473 So.2d 1253 (Fla. 1985), and Mason v. State, 489 So.2d 734 (Fla. 1986). In Mason the evidence established Mason's life had been "marked by the usage of a spectrum of psychotropic drugs" since a very young age; his mother attempted to have him involuntarily committed to a state mental hospital when he was diagnosed as "schizophrenic -

paranoid type", Defendant heard voices; had difficulty remembering; saw things others didn't see. In Hill the Defendant was placed in a special education program for the mentally handicapped; had severe speech problems; exhibited unusual behavior at trial; "did not have the ability to testify with coherence, relevance and independence of judgment" and "was unable to disclose pertinent facts to an attorney." In contrast, Marek's competency during the trial has never been called into question. See Pate v. Robinson, 383 U.S. 375 (1966); Funchess v. Wainwright, 772 F.2d 683 (11th Cir. 1985); Fallada v. Dugger, 819 F.2d 1564 (11th Cir. 1987).

Counsel cannot be deemed ineffective for merely determining not to pursue the path of psychiatric evaluations until it bore fruit. Loweth v. Florida, 627 F.2d 706 (8th Cir. 1980); Bush. Although an attorney should raise honest and debatable issues, he is not obligated to raise every conceivable issue and certainly not when he regards the argument as futile because of its lack of merit. Palmes v. State, 425 So.2d 4 (Fla. 1983); Strickland. Counsel is not under any obligation to fabricate false evidence or claims. Williams v. Kemp, No. 87-8698 (11th Cir. May 17, 1988) [2 F.L.W. Fed. C735, 736]. The State thus maintains that the trial court's ruling that defense counsel was not ineffective for not requesting a competency hearing is proper and mandates affirmation as Marek did not have to stand trial while legally incompetent.

ISSUE XV

MAREK WAS NOT DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AND HIS PRE-TRIAL EVALUATION BY A PSYCHIATRIST WAS CONDUCTED IN A COMPETENT MANNER.

MAREK complains that defense counsel was ineffective because he did not provide crucial background information to Dr. Seth Kreiger and that as a result, Dr. Kreiger did not perform his evaluation of MAREK in a competent manner. The state would maintain that the trial court properly rejected this claim since it is totally without merit.

The record is clear that Dr. Kreiger did perform his evaluation of MAREK in a competent manner. Dr. Kreigor evaluated MAREK, not once but twice and found that MAREK was competent. Furthermore, Dr. Kreiger's report belies MAREK'S assertions that the evaluations was conducted without knowledge of MAREK'S background. Indeed, the report itself makes specific reference to MAREK'S background as relayed by MAREK himself. Clearly, the evaluation by Dr. Kreiger was done in a competent manner. This claim is totally without merit.

In reality, MAREK is claiming that he does not like the result of the evaluation performed by Dr. Kreiger. He claims that a recent evaluation by Dr. Harry Krop is "more valid" than his previous evaluations. However, Ake v. Oklahoma merely requires that a defendant be provided "a psychiatrist." MAREK had just that. There is no constitutional right to two evaluations. D'Oleo-Valdez v. State, 13 F.L.W. 618 (Fla. October 13, 1988); Drape. Further, a defendant does not have the constitutional right to "choose a psychiatrist of his personal

liking." Ake at 83. Similarly, a defendant is not entitled to a battery of experts or a repeated psychiatric examination after substantial competent evidence has already been obtained. Finney v. Zant, 709 F.2d 643 (11th Cir. 1983); Magwood v. Smith, 791 F.2d 1438 (11th Cir. 1986). In short, a defendant is not constitutionally entitled to the appointment of an expert who would agree to make a favorable psychiatric evaluation in accordance with the defendant's wishes. Martin v. Wainwright, 770 F.2d 918 (11th Cir. 1985); Finney at 645. Indeed, Ake only discusses the need for a competent, independent psychiatrist to assist in the "evaluation, preparation and presentation of the defense." The State thus maintains that where MAREK has not demonstrated that his evaluation by Dr. Kreiger was not competent, his claim must therefore be rejected.

ISSUE XVII

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 instruciton. He alleges that the failure to so instruct the jury left the jury "inadequately instructed on how to consider, review, weigh and use circumstantial evidence." The State would point out however that this claim is procedurally barred because it could have been presented on direct appeal but was not. Blanco v. Wainwright, 507 So.2d 1377 (Fla. 1987). This is especially true where defense counsel specifically requested such an instruction but was denied same (R. 1075-1079; 1125). Clearly this issue is proce-

durally barred. Id. As the trial court so noted, this claim is without procedural or substantive merit and must be rejected.

Even if this claim were properly before this Court, the State would point out that in In re Standard Jury Instructions in Criminal Cases, 431 So.2d 594 (Fla. 1981), the Florida Supreme Court specifically found that the instruction on circumstantial evidence to be unnecessary and deleted it from the standard instructions. The 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). The 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 his 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, relief must be denied.

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.

ISSUE XVIII

PROSECUTORIAL COMMENTS AT MAREK'S TRIAL AND SENTENCING PHASE, DID NOT DEPRIVE HIM OF FAIR TRIAL, OR RENDER COUNSEL INEFFECTIVE FOR FAILURE TO OBJECT.

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. Accordingly, the trial court properly rejected this claim.

It is well-settled, that claims involving prosecutional comments, or misconduct, should have or could have been raised, on direct 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 v.

Wainwright, 507 So.2d 1377 (Fla. 1987). Since not so raised, this claim is barred, from collateral consideration and review. Id.

Assuming arguendo this Court reaches the merits, none of the alleged comments, were improper, or so egregious, as to warrant a new trial or sentencing phase. The State's referring, in opening argument at the guilt phase, was no more than as 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 1986); 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.)[1] At sentencing, the State recommended the imposition of a death penalty recommendation, by urging that the facts of the murder, supported aggravating circumstances, including the stripping, burning, and choking to death of Ms.

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[1] 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).

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.[2] 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. Daren; State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

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, in not objecting to some of them. Strickland.

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[2] See n. 1.

ISSUE XIX

THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION FOR DISQUALIFICATION.

MAREK contends that the trial judge's letter to Parole and Probation warranted, pursuant to Rule 3.230, Fla.R.Crim.P., his recusal. Marek's motion was denied, as it was found to be legally insufficient. Preliminarily, Appellee posits that the evidence adduced at trial leading to Marek's conviction, is separate, and basically distinct from the issues raised collaterally. The trial court's letter to Parole and Probation does not indicate pre-judgment of the issues to be addressed collaterally. Nor did the trial court consider in its written sentence crimes for which Marek was acquitted; the judge specifically excluded said consideration: "but since that confession was not admissible in evidence against Marek this Court cannot consider its contents." (R. 1471).

Appellant's reference to, and reliance upon Suarez v. State, 527 So.2d 190 (Fla. 1988) is misplaced as this Court, therein, determined that the specific comment to the newspaper, regarding the judge's interest in the expeditious execution of Suarez, warranted recusal. This Court determined that the other basis for the motion, a letter to Parole and Probation, did not warrant the judge's recusal. Id. at 192. Sub judice, Appellant claims the letter to Parole and Probation shows prejudice. "We conclude that the comments in the instant case did not rise to the level of prejudice such that the trial judge could not impartially address the specific issues of ineffective assistance of

counsel." Jones v. State, 446 So.2d 1059, 1061 (Fla. 1984). The fact alleged sub judice, as in Jones, "are not reasonably sufficient to create such a fear and, therefore, the motion was properly denied as insufficient." Id. at 1061; Suarez.

It is most telling as to the merits of Appellant's claim that he does not provide this Court with the introductory paragraph of Judge Kaplan's responsive letter to Parole and Probation.

> In reference to your letter of June 8, 1987, regarding the above-named inmate [Marek] being considered for Executive Clemency, I wish to make know my feelings in this matter.

(ROA of 3.850 Motion at 255). The trial court made no indication as to the merits of a potential 3.850 claim so as to warrant an allegation by Marek that he "could have a reasonable fear that he could not receive a fair trial." Livingston v. State, 441 So.2d 1083, 1087 (Fla. 1983). Additionally, contrary to the specific finding in Suarez that the jduge's "statements were made subsequent to the signing of the death warrant," the Parole and Probation letter was written over a year prior to the warrant sub judice.

Appellee accordingly maintains the propriety of the trial court's denial of the motion and respectfully requests this Court's affirmation thereof.

CONCLUSION

Based on the foregoing reasons and citations of authority, the Appellee respectfully requests that the order of the trial court, denying Appellant's motion for post-conviction relief, be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing "Answer Brief of Appellee" has been furnished, by United States Mail, to MARTIN J. McCLAIN, Assistant Capital Collateral Representative, Office of the Capital Collateral Representative, 1533 South Monroe, Tallahassee, Florida 32301 this 21st day of February, 1989.

Of Counsel