73278

IN THE SUPREME COURT OF FLORIDA

JOHN RICHARD MAREK.

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO.

APPEAL OF DENIAL OF MOTION
FOR POST-CONVICTION RELIEF

ANSWER BRIEF OF APPELLEE

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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.

This brief has been prepared in anticipation that the trial court will deny the Rule 3.850 motion for post conviction relief. Following the trial court's ruling, a supplemental brief will be filed if necessary.

STATEMENT OF THE CASE

The Defendant is presently under a death warrant, signed by Governor Martinez on September 12, 1988, for the week of November 9 - 16, 1988. His execution is scheduled for 7 a.m. on November 10, 1988.

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. Marek raised the following six (6) issues on his direct appeal as phrased by Marek:

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

2. THE COURT ERRED IN FAILING TO GRANT A MISTRIAL WHEN THE STATE OF FLORIDA

ELICITED TESTIMONY CONCERNING A FIREARM FOUND IN THE TRUCK WHERE SUCH TESTIMONY AND EVIDENCE WAS IRRELEVANT AND UNCONNECTED TO THE CASE AND HIGHLY INFLAMMATORY.

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

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

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

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

This Court affirmed the convictions and sentences on June 26, 1986. Marek v. State, 492 So.2d 1055 (Fla. 1986). 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. The Motion contained 22 claims. (SCP). 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. Listed below are the twenty-two (22) 3.850 issues, as phrased by Marek. Where the issues parallel the habeas corpus claims, the State has so indicated:

Habeas Corpus Claim Number		Rule 3.850 Claims
	1.	MR. MAREK'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS WERE ABROGATED BECAUSE HE WAS FORCED TO UNDERGO CRIMINAL JUDICIAL PROCEEDINGS ALTHOUGH HE WAS NOT LEGALLY COMPETENT.
	2.	MR. MAREK WAS DEPRIVED OF HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHT AMENDMENTS, BECAUSE THE SOLE MENTAL HEALTH EXPERT WHO SAW HIM PRIOR TO TRIAL DID NOT CONDUCT AN ADEQUATE EVALUATION, BECAUSE DEFENSE COUNSEL FAILED TO RENDER EFFECTIVE ASSISTANCE AND PROVIDE THE EXPERT WITH THE NECESSARY BACKGROUND INFORMATION. AS A RESULT AT TRIAL MR. MAREK WAS INCOMPETENT AND DENIED A COMPETENCY HEARING. MR. MAREK WAS ALSO DENIED AVAILABLE DEFENSES. THE DEPRIVATION OF MR. MAREK'S RIGHTS ALSO PRECLUDED AN INDIVIDUALIZED AND RELIABLE CAPITAL SENTENCING DETERMINATION.
13	3.	MR. MAREK'S FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED BY THE TRIAL COURT'S REFUSAL TO PROVIDE THE JURY WITH A CIRCUMSTANTIAL EVIDENCE INSTRUCTION.
12	4.	MR. MAREK WAS DENIED HIS RIGHTS TO DUE PROCESS AND A FAIR TRIAL BY IMPROPER PROSECUTORIAL COMMENTS DURING THE OPENING AND CLOSING ARGUMENTS IN BOTH THE GUILT AND PENALTY PHASES. TRIAL COUNSEL'S FAILURE TO OBJECT AND COMBAT THE PROSECUTORIAL OVERREACHING WAS INEFFECTIVE ASSISTANCE.

5. JOHN MAREK WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT BOTH THE GUILT-INNOCENCE AND SENTENCING PHASES OF HIS TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

6. DEFENSE COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO INVESTIGATE MR. MAREK'S ALCOHOL ABUSE AND TO PRESENT A DEFENSE BASED THEREON.

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

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

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

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

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

1 12. MR. MAREK WAS DENIED HIS EIGHTH AND FOURTEENTH AMENDMENT RIGHTS BY THE INSTRUCTION TO THE

JURY AND RELIANCE BY THE TRIAL COURT ON AN AGGRAVATING CIRCUMSTANCE THAT HAS BEEN FOUND TO BE IMPROPER BY THE FLORIDA SUPREME COURT.

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

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

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

16. THE TRIAL COURT'S UNCONSTITUTIONAL SHIFTING OF THE BURDEN OF PROOF IN ITS INSTRUCTIONS AT SENTENCING DEPRIVED MR. MAREK OF HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION OF LAW, AS WELL AS HIS RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS.

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

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

9 19. THE EIGHTH AMENDMENT WAS VIOLATED BY THE SENTENCING COURT'S REFUSAL TO FIND THE

MITIGATING CIRCUMSTANCES CLEARLY SET OUT IN THE RECORD.

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

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

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

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.

The trial court held a hearing on the Rule 3.850 motion. At the conclusion of the hearing, the trial court entered an order denying the Motion to Vacate Judgment and Sentence (SCP). Marek filed a timely notice of appeal. (SCP). [Anticipated]

STATEMENT OF THE FACTS

A. Facts Adduced at Trial

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

(R 472). Kasper testified that it was possible to enter the observation deck through a window by just "jiggling" the window's shutters (R 463). Kasper also testified that there was an electric light inside of the observation deck and that when the shutters were closed, it was impossible to see into or out of the deck (R 477-480). Kasper immediately notified police of his find (R 473).

Robert Haarer of the Broward sheriff's office, forensic unit, testified that he arrived at the scene at approximately 8:10 A.M., June 17, 1983 (R 4840). Haarer testified that the interior of the observation deck was in disarray (R 494) Haarer testified that he found white cotton socks near the body, with the toes burned out (R 495). Haarer testified that the victim's pubic hairs had also been burned, the burns being consistent with those inflicted by matches or a lighter (R 500). Haarer testified that he found the victim's shorts and underpants inside of the deck and that a red bandana had been tied around the victim's neck (R 500-501, 543). Haarer testified that he and Detective Gary Ayers processed the crime scene for fingerprints; Ayers processed the inside of the observation deck and Haarer the outside (R 508). Haarer specifically concentrated on processing the deck's windows and shutters (R 508). Haarer testified that he lifted nine (9) latent fingerprints from the exterior of the observation deck (R 511).

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

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

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

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

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

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

Officer Dennis Satnick of the City of Dania Police Department, testified that he first came into contact with Marek and Wigley on Dania beach at approximately 3:35 A.M., on June 17, 1983 (R 660-661). Satnick testified that he was patrolling the beach, which was closed to the public at that time of morning, when he came across a Ford pickup truck parked on the beach (R 661-663). Satnick noticed there was a large amount of beer in

the cargo bed of the truck (R 663). Satnick proceeded to walk up and down the beach looking for the truck's occupants (R 664-665). The pickup truck was parked approximately one-hundred (100) yards from the lifeguard shack (R 676). Satnick testified that while walking on the beach he saw a large sea turtle laying eggs in the sand approximately fifty (50) yards from the pickup truck (R 666). Satnick returned to his police car after being unable to spot anyone on the beach (R 665). Satnick testified that after he returned to his car he noticed two people coming from the area of the lifeguard shack walking towards the pickup truck (R 667). Neither of the individuals were wearing shirts (R 667). Satnick asked both men for identification, and the men identified themselves as John Marek and Raymond Wigley (R 669). Satnick testified that he filled out a field contact card regarding his encounter with Marek and Wigley (R 667), and was in contact with the men for approximately forty (40) minutes (R 670). Satnick testified that Dania police officers Darby and D'Andrea were also present and were speaking with Marek and Wigley (R 679-680). Satnick testified that Marek was the more dominant of the two (R 671). He further testified that every time Wigley would attempt to speak, Marek would interrupt and prevent him from speaking (R 670). Satnick testified that Marek told some jokes to the officers and that Wigley laughed in response to these jokes (R 671). Satnick testified that Marek was very friendly and that Wigley "didn't say much" (R 681).

Satnick testified that he was suspicious of Wigley because he wouldn't make eye contact (R 681). Satnick testified that he detected the odor of alcohol on both men and that Wigley was staggering and his speech slurred (R 672-673, 677). Satnick testified that in his opinion, Wigley was intoxicated (R 672). Satnick testified that Marek did not appear to be intoxicated and in fact dominated the conversation (R 671, 675). Marek never gave Wigley a chance to speak (R 682). Satnick testified that after this encounter was over, Marek, not Wigley. drove the pickup truck away from the beach (R 676).

Jean Trach testified that she had been travelling with the victim, Adella Simmons, prior to her death (R 695). Trach testified that she and Simmons had been close friends for approximately nine (9) years and that Simmons was forty-seven (47) years old at the time of her death and a widow (R 694, 696, 722). Trach testified that Simmons had worked at Barry College in Miami as a Director of Business Affairs (R 696). Trach testified that she and Simmons drove up to Largo the afternoon of Sunday, June 12th in Trach's 1982 Chevy Monza (R 397, 737). The women began their trip back to Miami on Thursday, June 16, 1983, at approximately 2:00 P.M. (R 699, 737). Trach testified that Simmons was driving and that the car began having problems about one (1) hour after the women left Largo (R 699). Trach and Simmons were travelling south on the Florida turnpike when their car broke down at mile marker 83, just north of Jupiter (R

695). Trach testified that Simmons put the car's flasher's on and pulled over to the side of the road at approximately 10:45 P.M. (R 701-702). Trach testified that when they pulled to the side of the road, a truck pulled off behind them (R 702). Trach identified Marek as being one of the persons in the truck who came up to the car and asked if he could help (R 707). Wigley remained in the truck. Trach told Marek he could help by going to the nearest service station and getting either a tow truck or a state trooper (R 707-708). Marek wasn't willing to do that because he had had a couple of beers, but offered to fix the car (R 708). Trach testified that Marek and Wigley stayed with the women's car for approximately forty-five (45) minutes (R 708). Trach testified that after Marek tried to fix the car, he offered to take the women to Miami (R 709). The women declined (R 709). Wigley finally got out of the truck approximately one-half hour after the truck followed the women's car off of the turnpike (R 709). Trach testified that Marek then offered to take one of the women to the nearest telephone on the turnpike to call for help (R 709). Marek specifically stated that he would take only one of the women, not both (R 709). Trach testified that Marek had been doing all of the talking and that Wigley had not said a word (R 709). Simmons suggested that Trach ride with Marek to the nearest telephone because she thought that would be safer than being left alone in the car (R 710). Trach testified that Simmons was concerned for Trach's safety and didn't want to leave

her alone in the car (R 710). Trach refused to go with the men (R 710). Simmons then decided to go for help with Marek and Wigley since she and Trach "couldn't sit there all night" (R 711). Trach testified that she told Simmons not to go (R 711). At approximately 11:30 P.M., Simmons got in the truck and sat between Marek and Wigley (R 723). This was the last time that Trach saw Adella Simmons (R 723).

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

Dr. Ronald Wright, the Chief Medical Examiner for Broward County, Florida, testified as to the victim's injuries and cause of death. Dr. Wright performed the autopsy on the victim at 11:00 A.M., June 17, 1983 (R 809). Dr. Wright testified that the victim died from asphyxiation by ligature strangulation (R 781). Dr. Wright testified that the death occurred at approximately 3:00 to 3:30 A.M., June 17, 1983 (R 739, 753). Dr. Wright testified that a bandana had been tied tightly around the victim's neck and that the deep bruising on the neck itself was consistent with the victim being strangled (R 758-759). He further testified that "reddish" hemorrhages on the victim's face were consistent with her air passages being blocked off (R 749). Dr. Wright testified that he found five (5) fingerprint marks on the victim's neck which in his opinion either resulted from the strangulation itself or from the victim's trying to get the bandana off her neck (R 757). Dr. Wright testified that in such a murder the victim's heart would stop beating within 10 to 15 minutes after the ligature was applied to the neck (R 823). Dr. Wright testified that the victim was probably conscious for one (1) minute after the ligature was applied (R 823).

Dr. Wright testified that the victim suffered numerous facial as well as external and internal scalp injuries which were consistent with her being struck with a fist, hand or blunt instrument (R 759-762). The victim's arms and chest area also

had many bruises and contusions, and her right breast had an abrasion consistent with a heel mark (R 767, 778). Dr. Wright also testified that the victim had deep scrape marks and bruises on the center of her back (R 769). The victim also had an abrasion over her left hip (R 762, 769). Dr. Wright testified that the victim suffered an extensive amount of internal bruising in the area of her back (R 770). Also, the tissue surrounding the victim's kidneys was bruised and bleeding (R 771). Dr. Wright testified that this type of injury was consistent with the victim being kicked with a great deal of force (R 771).

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

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

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

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

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

picked the clothes up, Marek and Wigley got back in their truck and drove away (R 886). Thompson testified that Marek and Wigley appeared to be in a "fog" rather than grossly intoxicated (R 878)

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

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

Marek testified on his own behalf. Marek testified that he was twenty-two (22) years old and worked on an oil rig in Fort Worth, Texas, his home town, before travelling to Florida (R 935-936). Marek testified that on Monday, June 13, 1983, he and Raymond Wigley left Texas to come to Florida for a "fun-loving" two weeks (R 940). Marek testified that he had known Wigley for a couple of months prior to the trip and that he and Wigley were drinking two to four cases of beer a day during the trip to Florida (R 936, 940). Marek testified that he was driving the

truck when it followed the victim's car off of the turnpike (R 942). Marek testified that he offered to take both women to a filling station and that after the women talked between themselves, the victim agreed to go ith Marek and Wigley for help (R 940, 946). Marek testified that he was the one who invited the victim to ride with him and that he, not Wigley, did all of the talking (R 972). Marek testified that Wigley drove the truck and that he fell asleep in the passenger seat approximately two minutes after he, Wigley and the victim got in the truck (R 947). Marek testified he woke up "sometime later" and asked Wigley if he dropped the victim off since he didn't see the victim in the cab of the trunk (R 948). Wigley told Marek that he dropped the victim off at a gas station (R 948). Marek testified that he then fell asleep and that when he woke up he was on the beach (R 949). Marek proceeded to look for Wigley on the beach and found him up on the observation deck of the lifeguard stand (R 950). Marek got up on top of a trash can, grabbed one of the railings and swung himself up to meet Wigley (R 951). Marek testified that he knew he was "trespassing" when he entered the observation deck (R 954). Marek testified that he never saw the victim's body inside of the observation deck because it was dark inside and a chair was obstructing his view (R 856). Marek testified that he "felt" his way along the walls of the deck and opened a shutter in order to exit the deck (R 954-956). Marek testified that he was in the shack for a total

of 15 to 18 minutes (R 957). Marek testified that he and Wigley left their shirts on the beach to make it look like they were "messing around with the water or something" (R 957).

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

Marek never heard any yelling or struggling while he was asleep in the cab of the truck on the way to the beach (R

973). Marek denied strangling the victim or burning her pubic hair (R 976). Marek also denied burning the victim's finger to see if she was dead (R 976).

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

In rebuttal, Detective Rickmeyer testified that he in fact told Marek while he was in the holding cell, "Congratulations, you made it to the big time. You're now charged with murder, kidnapping, rape and robbery" (R 1019). Rickmeyer testified that Marek responded, "Oh shit, the SOB told all" (R 1019).

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

B. FACTS ADDUCED AT THE HEARING ON THE MOTION TO VACATE

At this writing, the hearing has not yet been held; a factual statement regarding the hearing will be included in the supplemental brief.

SUMMARY OF THE ARGUMENT

I. Counsel was not ineffective for not requesting a competency hearing. The evidence adduced at the hearing on Marek's motion for post-conviction relief demonstrated that Marek's competency was never at issues and that he at all times appeared competent, intelligent and articolate throughout his trial . Therefore counsel was not ineffective for failing to raise a competency issue as the trial court so found. Strickland, infra.

II. Marek was evaluated by Dr. Kreiger in a professional, competent manner. He is not entitled to a psychiatrist of his choosing or one that would agree to give him a favorable evaluation. Ake, infra. This claim was properly rejected by the trial court.

III. The trial court correctly found that this claim was procedurally barred since it could have been raised on direct appeal but was not. Blanco v. Wainwright, 507 So.,2d 1377 (Fla. 1987). In any event this claim has no substantial merit since a jury instruction on circumstantial evidence was not warranted. Rembert v. State, 445 So.2d 337 (Fla. 1984).

IV. The trial court correctly found that this issue was procedurally barred. Marek should not be able to overcome that procedural bar by alleging that counsel was ineffective for not objecting to various comments made by the prosecution. Blanco.

In any event none of the complained of comments deprived Marek of a fair trial. This claim must be rejected.

V. The evidence adduced at the hearing below demonstrated that defense counsel was not ineffective at either the guilt or penalty phase of Marek's trial. Strickland, infra. This claim must be rejected.

VI.The trial court correctly found that defense counsel was not ineffective for not relying on an intoxication defense. Strickland, infra. The evidence adduced below supports the trial court's finding. This claim must be rejected.

VII. Defense counsel was not ineffective for making the tactical decision not to argue the mitigating circumstance of no significant history of prior criminal activity. Cave v. State, 529 So.2d 293 (Fla. 1988). This claim was properly rejected by the trial court.

VIII. This argument is procedurally barred as Marek raised it on direct appeal. O'Callaghan v. State, 461 So.2d 1345 (Fla. 1985). Furthermore, the subject matter of proportionality is a proper evidentiary matter that defense counsel could have raised but chose not to as the State's explanation would have presumably prejudiced Marek. Defense counsel's reasonable tactical decision is barred from review. Smith v. Murray, 477 U.S. 527 (1986).

IX. Defense counsel was not precluded from presenting evidence in mitigation. Notwithstanding the fact that this issue

is procedurally barred as it should have been raised on direct appeal. O'Callaghan, there is no substance to Marek's allegations. The trial court would have permitted Dr. Kreiger to testify and determined that the admittance of the Doctor's report would be improper. Even if the trial court should have permitted the report, the alleged error is harmless as the doctor would have testified.

X. The trial court considered only statutory aggravating circumstances. Allegations of improper reliance, by the prosecutor and Marek's lack of remorse was a comment on the evidence as well as a factor in the finding that the murder was committed in a heinous, atrocious and cruel manner, rather than an enunciation of a non-statutory, factor in aggravation. A trial court's reference to lack of remorse, as opposed to reliance thereon in mitigation, is not error. Kom v. State, 513 So.2d 1253 (Fla. 1987). Marek failed to allege any prejudice as to references to remorse thereby negating any merit to his claim of ineffective assistance of counsel. Strickland.

XI. Marek's claim of an erroneous jury instruction on criminal attempt and burglary with an assault is procedurally barred as it was argued on direct appeal. O'Callaghan. The factor in aggravation need not, or may, mirror the language of the charging document or statutory language.

XII. The aggravating factor of a conviction of a prior violent felony, when that felony conviction was contemporaneous

with the crime for which sentencing is occurring, was valid at the time of Marek's sentencing. Retroactive application of Lamb v. State, 13 F.L.W. 530 (Fla. Sept. 1, 1988) and Perry v. State, 522 So.2d 817 (Fla. 1988) is not mandated as the change in law does not constitute fundamental error. Judicial economy would be ill served by retroactive application if there was great reliance on the old rule of law. Even if the court does apply the change of law retroactively, Marek's capital sentence is still valid as there are other aggravating factors and no factors in mitigation. Jackson v. State, 502 So.2d 409 (Fla. 1986). Counsel was not ineffective for not anticipating a change in law. Knight v. State, 394 So.2d 997, 1003 (Fla. 1981)

XIII. That the murder was committed for pecuniary gain as the trial court properly found, was a factor in aggravation. This claim was raised on direct appeal and is therefore procedurally barred from further consideration. The circumstantial evidence of the victim's gold jewelry found in the truck Marek drove from the scene of the murder was sufficient. Hildwin State, 13 F.L.W. 528 (Fla. September 1, 1988). It is not a negation of this factor that Marek might not have ultimately proffited or may have, in fact abandoned the jewelry. Porter v. State, 429 So.2d 293 (Fla. 1983).

XIV. The trial court properly instructed the jury that the murder was committed in a heinous, atrocious and cruel manner. The instruction and finding were not unconstitutionally

vague as the court, if not, assuming arguendo, the jury is well aware of the interpratation of the "HAC" language. State v. Dixon, 283 So.2d 1,9 (Fla. 1973). The genesis of Marek's claim Maynard v. Cartwright, 486 U.S.___, 108 S.Ct. 1853, 100 (Ed. 2d 372 (1988) is not new and therefore said claim is not cognizable. Clark v. Dugger, 13 F.L.W. 548, 549 (Fla. September 8, 1988).

XV. Marek's claim that the trial court erred by preparing its written sentencing order in advance could have been raised on appeal; therefore, it is procedurally barred. Witt v. Wainwright, 387 So.2d 922 (Fla.), cert. denied, 449 U.S. 1067 (1980). Moreover, this Court's decision in Palmes v. State, 397 So.2d 648, 658 (Fla. 1981), which is directly on point, requires denial of this claim on the merits.

XVI. Any objection to the sentencing phase jury instructions should have been made at trial and should have been raised on direct appeal; this matter is not cognizable in the present Fla.R.Crim.P. 3.850 proceeding. Cave v. State, 529 So.2d 243 (Fla. 1988). The instructors merely guided the jury in the weighing process and did not impose a burden of proof on the defendant.

XVII. This Court has consistently held the decision in Caldwell v. Mississippi, 472 U.S. 320 (1985) is not a change in the law that will validate a collateral attack. see, e.g., Ford v. State, 522 So.2d 345 (Fla. 1988). Thus, Marek's Caldwell

claim is clearly barred. Moreover, it is without merit. As in Combs v. State, 525 So.2d 853 (Fla. 1983), and Pope v. Wainwright, 496 So.2d 798 (Fla. 1986), the comments and instructions in this case did no more than accurately informs the jury of its advisory role in Florida's capital sentencing procedure.

XVIII. The Enmund v. Florida 458 U.S. 782 (1982) claim is procedurally barred because this issue was decided contrary to Marek's position at trial (R 1471-1472), and it could have been raised on direct appeal. This trial court relied on its findings in the sentencing order as law of the case. Preston v. State, 444 So.2d 939 (Fla. 1984). The decision in Tison v. Arizona ___ U.S. ___, 107 So.Ct. 1676. 95 L.Ed. 2nd 127 (1987), does not require that the court's prior findings be revisited; if anything, Tison merely confirms the correctness of the court's brief.

XIX. Marek's allegations that the court should have found mitigating circumstances is without merit. The factors proponded were not applicable sub judice. Being a "model prisoner" is not a factor in mitigation. Harmon v. State, 527 So.2d 182 (Fla. 1988). Marek's age - 21 - was not a valid mitigating factor as it was not tied to any other characteristic of Marek. Echols v. State, 484 So.2d 568 (Fla. 1985). Marek's alleged intoxication was not sufficient to support the mitigating factors of incapacity or emotional and/or mental disturbance.

Koon v. State, 513 So.2d 1253, 1257 (Fla. 1987). This calim must therefore be rejected.

XX. Marek's claim that his death sentence rests on an unconstitutional aggravating circumstantial, felony-murder, is procedurally barred, as it is clearly a matter which could have been raised on direct appeal. Furthermore, this claim has been repeatedly rejected on its merits by this Court, most recently in Swafford v. State, 13 F.L.W. 595, 598 (Fla. Sept. 29, 1988). The decision in Lowenfield v. Phelps, ___U.S.___, 108 S.Ct. 546, 98 L.Ed 2d 568 (1988), does not require relief.

XXI. Marek's assertion that the jury was erroneously told its sentencing recommendation must be by a majority vote is procedurally barred as there was no objection at trial nor was the issue raised on direct appeal. Jackson v. State, 438 So. 2d. 4 (Fla. 1983). On the merits, Marek has failed to show prejudice since the jury recommended death by a vote of 10 to 2. Maxwell v. Wainwright, 490 So. 2d 927, 931 (Fla. 1986).

XXII. Marek's intent in that the prosecutor erroneously commented on the exercise of his right to remain silent is procedurally barred. This Court will not review the matter now on the basis of the claimed ineffectiveness of trial counsel because the claim has no merit and counsel can not be faulted in these circumstances. Martin v. Wainwright, 497 So.2d 872 (Fla. 1976). The prosecutor's comments were comments on the evidence, not comments on silence; Harris v. State, 438 So.2d 787 (Fla.

1983), as Marek made pre-trial statements and testified at his trial. Alternatively, any error was harmless because it is certainly the existence of the four aggravating witnesses and not only improper comments by the prosecutor that led the jury to recommend the death penalty.

POINT I

MAREK WAS NOT FORCED TO UNDERGO CRIMINAL JUDICIAL PROCEDINGS 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.[1]

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 (Fla. 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

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[1] As noted previously, this brief has been prepared in anticipation that the trial court will deny relief. The facts germane to this claim as developed at the hearing on MAREK'S motion for post-conviction relief, will be presented to this Court, by way of Supplemental Brief, if necessary, and it time permits.

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 defense counsel was not ineffective for not requesting a competency hearing and that Marek did not have to stand trial while legally incompetent.

POINT II

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.[1]

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

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[1] As pointed out previously, this brief has been prepared in anticipation that the trial court will deny relief. The facts germane to this claim as developed at the evidentiary hearing below will be presented to this Court by way of a Supplemental Brief, if necessary, and if time permits.

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.

POINT III

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

MAREK complains that the trial court erred in refusing to give the jury a circumstantial evidence instruction. 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 were defense counsel specifically requested such an instruction but was denied same. (R. 1075-1079; 1125). Clearly this issue is procedurally 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), this Court specifically found that the instruciton 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, 348 U.S. 121 (1954). This Court held that giving an instruction on circumstantial evidence would thus be

discretionary with the trial court but that where the jury was instructed on reasonable doubt and burden of proof a circumstantial evidence instruction would be unnecessary.

The State would maintain that where the jury was properly and correctly instructed by the trial court below as to reasonable doubt and the burden of proof, the trial court did not abuse its discretion in denying Marek a circumstantial evidence instruction (R 1249). There was nothing peculiar about the facts of 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.

POINT IV

PROSECUTORIAL COMMENTS AT MAREK'S TRIAL AND SENTENCING PHASE, DID NOT DEPRIVE HIM OF A 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 claims is barred, from collateral consideration and review as the trial court so noted. 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 an assertion that the state would prove its case, beyond a reasonable doubt, based on the evidence it intended to present. (R. 434). This did not amount to improper personal opinion, and

was well within the wide latitude, afforded counsel in opening or closing statements. Ricardo v. State, 481 So.2d 1296 (Fla. 3rd DCA 1986); Whitted v. State, 362 So.2d 668, 673 (Fla. 1978). Moreover, the trial court immediately provided a curative instruction, stressing the jury's responsibilities and duties, to by 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 US. ___, 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. 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).

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

[2] See n. 1.

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

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

POINT V

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). A defendant must show:

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

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). This test, involves application of a standard of reasonableness, examined in light of those facts and circumstances, then known to counsel, not those alleged to exist. in hindsight. Strickland, 466 U.S., at 689; Burger, 97 L.Ed 2d at 654; Foster v. Dugger, 823 F.2d 402 (11th Cir. 1987); Bertolotti, Downs. This standard, when applied, carries with it a strong measure of deferrence to counsel's actions as reasonable, and a presumption that counsel's performance was effective, and within "the wide range of professinally competent assistance." Strickland, 466 U.S., at 689, 690; Blanco, 507 S.2d, at 1381. Perhaps most significantly, in "reconstructing the circumstances" from counsel's perspective at time of trial, a reviewing court must "make every effort" to eliminate hindsight. Strickland; Burger.

Once a defendant establishes deficient performance, he must show that counsel's performance "actually had an adverse effect so severe that there is a reasonable probability that the results of the proceeding would have been different but for the inadequate performance." Blanco; Strickland; Burger; State v. Bucherie, 468 S.2d 229, 231 (Fla. 1985). This inquiry, as applied to representation at a defendant's capital sentencing, focuses upon "...whether there is a reasonable probability that, absent the errors, the sentencer--including an appellate court, to the extent it independently reweighs the evidence -- would

have concluded that the balance of aggravating and mitigating circumstances did not warrant death". Strickland, 466 U.S. at 695. In order to be considered "effective", a defendant's counsel need not have explored every conceivable avenue, and presented all available information, particularly if such evidence, testimony, or suggested different strategy, would have been inconsistent with counsel's chosen strategy, or would have lead to a more detrimental impact, on a defendant's trial or sentencing proceedings. Strickland; Burger, 97 L.Ed 2d, supra, at 656, 657; Elledge v. Dugger, 823 F.2d 1439, 1447 (11th Cir. 1987); Combs v. State, 13 FLW 142 (Fla, Feb. 18, 1988); Middleton v. State, 465 S.2d 1218 (Fla. 1985). Moreover under Strickland, speculative conjecture, as to the potential impact of presently evidence or testimony, does not meet the "prejudice" prong of Strickland. Strickland, 466 U.S., at 697; Bucherie; Downs. With these principles in mind the State will address each of Marek's allegations of ineffectiveness and demonstrate that the trial court properly denied relief.[1]

A. Guilt Phase

1. Marek complains that his defense counsel failed to effectively cross-examine Detective Rickmeyer about his

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[1] As pointed out previously, this brief has been prepared in anticipation that the trial court will deny relief. The facts germane to this claim as developed at the evidentiary hearing below will present to this Court by way of a Supplemental Brief, if necessary, and if time permits.

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

surrebuttal 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.

2. 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 counsels 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.

Further, during the testimony of Officer Darby, only the fact that a conversation occurred and adult jokes were told was ellicted from the witness (R 902-903). Again, 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.

Regarding Marek's allegations that counsel was ineffective because he did not adequately advise Marek as to whether he should testify and open the door as to this statement, evidence was adduced on this claim at the evidentiary hearing on Marek's motion for post-conviction relief and will be presented to this Court by way of Supplemental Brief, if necessary.

3. 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.

4. 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.

5. 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); Baford v. State, 492 So.2d 335 (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 XVII, 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. The State would again sumbit that evidence on this claim was adduced below and will be presented to this Court by way of Supplement Brief, if necessary. This evidence will demonstrate that counsel was not ineffective. The State would point out however the even if defense counsel's performance was 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. Specifically, MAREK must show that mitigating evidence, if presented, would have outweighed the aggravating evidence presented by the State and did not warrant the imposition of the death penalty. Whitley v. Bair, 802 F.2d 1487 (4th Cir. 1986). In Strickland counsel was held not to be ineffective even though he presented no mitigating background evidence where such evidence would not have made a difference. Thus, where as here, there are numerous aggravating factors, and where the crime was particularly horrible and violent it cannot be said that background, childhood or mental state evidence would have had any mitigating impact on the jury. Strickland. This is especially true where the alleged mitigating evidence was remote in time to

the offense for which MAREK was convicted and sentenced to death. Blanco; Burger.

C. FAILURE TO OBJECT TO AGGRAVATING CIRCUMSTANCES URGED BY STATE AND FOUND BY COURT

1. MAREK complains that defense counsel was ineffective for failing to object to the aggravating circumstance of his contemporaneous conviction for kidnapping as a prior crime of violence. The State maintains that counsel was not ineffective for failing to object to this circumstance where it was valid at the time of sentencing. Spaziano v. State, 489 So.2d 720 (Fla. 1986). For further discussion on the claim, the State would refer this Court to Claim XII of this response.

2. The State would note that defense counsel did object to the aggravating circumstance of "in the commission of an attempted burglary." Counse can thus not be held to be ineffective for not objecting to same. Strickland. Regarding counsel's failure to object to the phrasing of the trial court's sentencing order, the State would refer this Court to Claim XI of this response.

3. Counsel objected to the "heinous, atrocious and cruel" aggravating circumstnace. Thus, Counsel cannot be held ineffective for failing to object to same. Strickland. Regarding MAREK'S argument that counsel was ineffective for not arguing that the aggravating circumstance was unconstitutionally vague, and not seeking an "guiding" instruction on the circum-

stance, the State would refer the Court to Claim XIV of its response.

D. FAILURE TO EFFECTIVELY ARGUE IN FAVOR OF STATUTORY MITIGAGTING FACTORS

1. The State would point out that defense counsel made a reasonable stategic decision not to rely on the mitigating circumstance of no significant history of cirminal activity. See Claim VII. Therefore Counsel was not ineffective for not objecting to the trial court not reading that circumstance to the jury. Strickland.

2. MAREK complains that defense counsel did not argue his age in mitigation and that the failure to do so amounted to ineffective assistance. The record is clear however, that defense counsel did present this mitigating circumstance to the jury. Indeed, defense counsel told the jury that MAREK was 21 years old, that he was immature, and that his age influenced his judgment about how much he could drink and what effect alcohol would have on him. (R. 1317). The record is also clear that this mitigating circumstance was read to the jury. (R. 1324). The fact that the trial court did not find MAREK'S age as a mitigating circumstance does not change the fact that defense counsel did argue to the jury that MAREK'S age should be considered by the jury in mitigation. (R. 1317). The trial court was not required to find age as a mitigating factor since MAREK was an adult of 21 years of age. Washington v. State, 362

So.2d 658 (Fla. 1978); Songer v. State, 322 So.2d 481 (Fla. 1975). One is considered an adult, responsible for one's own conduct at the age of 18 years. Id.; Fitzpatrick v. State, 437 So.2d 1072 (Fla. 1983). The State therefore maintains that defense counsel was not ineffective where he presented MAREK'S age to the jury as a mitigating circumstance. Strickland.

3. MAREK complains that defense counsel did not argue extreme emotional distress or emotional distrubance and MAREK'S capacity to appreciate the criminality of his conduct in mitigation. The State would point out however that defense counsel did argue during the sentencing phase that MAREK did not have the capacity to commit the crime, that he was intoxicated, and that he was under emotional or mental disturbance. (R. 1315). Defense counsel further pointed out Wigley's complicity and relied heavily on the fact that MAREK was intoxicated. (R. 1315-1317). Clearly, defense counsel cannot be held to be ineffective when he did argue these mitigating factors to the jury. Strickland. Further, the record is clear that the jury was instructed as to those mitigating factors. (R. 1323).

In summary, the State would maintain that based on the foregoing arguments and authorities as well as the evidence to be developed at the evidentiary hearing on MAREK'S motion for post conviction relief, counsel will be shown to have performed as guaranteed under the Sixth Amendment.

POINT VI

MAREK WAS NOT DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL WHERE DEFENSE COUNSEL DID PRESENT EVIDENCE OF MAREK'S INTOXICATION TO THE JURY.

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.[1]

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

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[1] As pointed out previously, this brief has been prepared in anticipation that the trial court will deny relief. The facts germane to this claim as developed at the evidentiary hearing below will be presented to this Court by way of a Supplemental Brief, if necessary, and if time permits.

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).

In keeping with this defense, defense counsel also presented evidence and argued to the jury that MAREK had been drinking and was intoxicated which was the reason he was asleep during most of the incident. To that end, MAREK testified that he dran 2 to 4 case of beer a day on his ill-fated trip to Florida (R. 940), and that he had a drinking problem. (R. 940). MAREK testified that he had "only" had 60 beers on the date of the incident and that he was able to drive, converse with the victim and Jean Trach, and joke and laugh with police. (R. 969, 970, 971). Based on this testimony, 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). Knowing that the defense was not intoxication the prosecutor expressed his concerns, and the following discussion was had:

> MR. CARNEY: I'm slightly concerned about this. The defense is not an intoxication defense. The defense is he didn't do it period. If he is saying he didn't do it, why do we have an intoxication defense?
>
> MR. MOLDOF: There's every possibility the jury will not acknowledge that defense. They will take these back and decide on their

own volition to form the intent to commit any one of the offenses.

THE COURT: He said that day he had what: over 60 beers?

MR. MOLDOF: Yes.

THE COURT: And he didn't drink any whiskey that day.

MR. MOLDOF: No, he didn't drink any whiskey the whole trip.

MR. CARNEY: That's five gallons.

THE COURT: Five gallons of beer. Then I think we ought to give the intoxication.

(R. 1116-1117). 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 as follows:

I'm going to talk to you a little bit about intoxication.

Voluntary drunkenness or intoxication which is impairment of the mental faculties by the use of alcohol does not excuse nor justify the commission of a crime. <u>But intoxication may exist to such an extent that an individual is incapable of forming an intent to commit a crime, thereby rendering such person incapable of committing a crime of which a specific intent is an essential element.</u>

<u>When the evidence tends to establish intoxication to this degree, the burden is upon the State to establish beyond a reasonable doubt that the defendant did in fact have sufficient use of his normal faculties to be able to form and entertain the intent which is an essential element of a crime</u>.

> Drunkenness which does not go to the extent of making a person incapable of forming the intent which is an essential element of a crime, does not in any degree reduce the gravity of the offense.
>
> Drunkenness arising after the formation of the intent which is an essential element of a crime and voluntarily induced for the purpose of nerving the offender to commit a crime already planned does not excuse nor reduce the degree of the crime.
>
> Partial intoxication which merely arouses the passions or reduces the power of conscience neither mitigates nor lessens the degree of guilty if the offender still knew right from wrong, the probable consequences of his act and was capable of forming a specific intent to commit the crime.

(R. 1250-1252).

The record is clear that defense counsel, trying to get the best of both worlds, used MAREK'S testimony that he was intoxicated to show that not only did MAREK not commit the crime because he was drunk and had fallen asleep, but also to get an instruction on voluntary intoxication. Although the defense of voluntary intoxication was not argued to the jury, the jury was instructed thereon. The jury was fully aware that even they rejected MAREK'S testimony that he was asleep during the incident and did not commit the murder they could still find that he was not guilty if they found that he was voluntarily intoxicated and could not form a specific intent. 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.

The State would also point out that defense counsel, undettered by the jury's verdict, argued intoxication as a mitigating factor at the sentencing phase of the trial. (R. 1315-1316). Thus, MAREK'S allegation that such an argument was not made is totally refuted by the record.

The State thus maintains that a review of the record makes clear that MAREK'S claim is totally without merit. Counsel can not be held to be ineffective for not presenting an intoxication defense where such defense was presented to the jury as an alternative defense by way of jury instruction. (R. 1250-1252). Even if Counsel was ineffective fo not totally relying on an intoxication defense, MAREK has not suffered any prejudice where the jury found MAREK guilty of first degree murder after

being instructed on intoxication as a defense. Strickland. MAREK is not entitled to an evidentiary hearing on this issue since the record conclusively shows that MAREK is not entitled to relief on this claim.

POINT VII

COUNSEL WAS NOT INEFFECTIVE WHERE HE MADE A TACTICAL DECISION NOT TO HAVE THE JURY INSTRUCTED AS TO THE MITIGATING CIRCUMSTANCE OF NO SIGNIFICANT HISTORY OF PRIOR CRIMINAL ACTIVITY.

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.[1]

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).

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[1] As pointed out previously, this brief has been prepared in anticipation that the trial court will deny relief. The facts germane to this claim as developed at the evidentiary hearing below will be presented to this Court by way of a Supplemental Brief, if necessary and if time permits.

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.

POINT VIII

THE TRIAL COURT DID NOT ERR IN NOT INSTRUCTING THE JURY ON THE PROPORTIONALITY OF SENTENCES RECEIVED.

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.

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

(R. 1288). In fact, the trial court did instruct the jury that they could consider in mitigation "that the defendant was an accomplice in the offense for which he is to be sentenced but the offense was committed by another person and the defendant's

participation was relatively minor." (R. 1323). Nonetheless, it was Marek who determined not to mention Wigley's life sentence. The trial court's determination that the State could, in fair response to Marek's proposed proportionality argument, go into the differences in the cases -- the bottom line of the court's ruling (R. 1283-88) -- was entirely proper.

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

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

Clearly, Marek's tactical decision is barred from review. Smith v. Murray, 477 U.S. 527, 534 (1986). Equally lucid is the propriety of the trial court's instructions. The jury was instructed as to six mitigating factors (R. 1450, 1323-24), including "any other aspect of the defendant's character or record or any other circumstance of the offense." (R. 1324). It was defense counsel's decision in light of the law, see Messer, not to present evidence of Wigley's sentence. The mitigating factors given by defense counsel were the defense of intoxication (R. 1315), Wigley's participation (R. 1316) -- trial strategy placed Marek asleep in Wigley's truck not to have awakened until after the murder, Marek's age (R. 1317) and any other aspect of Marek's character. (R. 1317).

The trial court did not limit the jury's consideration of factors in mitigation to those statutorily enunciated.

Lockett v. Ohio, 438 U.S. 586 (1978). The jury heard Marek's theory of defense, although not specifically Wigley's sentence, and they did not believe him. The evidence showed that his participation in the murder was that of a dominant figure. The Supreme Court in Eddings v. Oklahoma, 455 U.S. 104 (1982) holds that the "sentencer, and the Court of Criminal Appeals on review, may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration." Id. at 114-15. Here the jury was instructed, as noted, to consider any other aspect they 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.

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

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

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

POINT IX

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

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.

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

(R. 1284). This ruling is entirely appropriate. §921.141(1), Fla. Stat. clearly states that evidence may be admitted, where ordinarily it would be excluded "provided the defendant is accorded fair opportunity to rebut any hearsay statements." Id. The State maintains that the same would hold true for the State. Marek's juxtaposition of the trial court's determination with regard to Dr. Krieger's report to that of the court's deter-

mination that the State could use the essence of Wigley's confession as a fair response to his proposed proportionality argument is not a valid contention.

As noted, Dr. Krieger was not precluded from giving testimony. Further, the trial court's bottom line as to the use of Wigley's confession was not that the confession would come in, but rather, and in response to Marek's proposed argument, simply to explain the disparate roles that the co-defendants took in the abduction and murder. (R. 1288). The trial court was not permitting the admission of Wigley's written confession; this allegation of Marek is incorrect.

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

Marek's contention, based on Rock v. Arkansas, 483 U.S. ___, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987), is not the clear cut basis for finding trial court error as argued. Rock recognizes a "state's legitimate interest in barring unreliable

evidence does not extend to per se exclusions that may be reliable in an individual case." Rock, 97 L.Ed.2d at 52. Sub judice, there was no per se exclusion of the psychologist's testimony; it was the report that the trial court found offensive as the Doctor was available to testify and therefore available for cross examination.

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

Rock, 97 L.Ed.2d at 48. Here defense was permitted to have the doctor testify. Marek's right to present witnesses was not abridged. So too, Marek's application of Crane v. Kentucky, 476 U.S. 683 (1986) is misplaced. Crane addresses total exclusion of exculpatory evidence, whereas the facts sub judice, clearly allow testimony of the doctor. Further, as guidance in the application of the principles enunciated, the Crane court found "that the [alleged] erroneous ruling of the trial court is subject to harmless error analysis." Crane, 476 U.S. at 691. In the instant case Marek could have had the doctor testify and, as noted, chose not to. Marek's instant claim is therefore without merit and does not provide grounds for reversal of the trial court's denial of Marek's 3.850 Motion.

POINT X

THE TRIAL COURT CONSIDERED ONLY STATUTORY AGGRAVATING CIRCUMSTANCES.

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

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

(R. 1300-1302). There is no mention of lack of remorse. Even defense counsel's argument to the jury, wherein he rebutted the applicability of the four enumerated aggravating circumstances, fails to mention remorse. (R. 1310-1313). The aggravating circumstances given to the jury, for their consideration, by the Court were the same four argued and rebutted by the State and

Marek respectively. (R. 1322). The trial court's written order clearly states the same four aggravating factors. (R. 1472). That these aggravating factors are provided for by Florida law is clear. §921.141(5)(b), (d), (f) and (h), Fla. Stat.

Assuming arguendo that the State's comments reflected improper reliance on lack of remorse in aggravation, Marek remains unentitled to relief. It is beyond question that the evidence of the victim's struggle and intense suffering while being strangled and raped and kicked and dying over a 30 second span of such strangulation, proved the "hac" aggravating circumstance, regardless of any lack of remorse consideration. Huff v. State, 495 So.2d 145, 153 (Fla. 1986); Pope, 441 So.2d, supra, at 1078; Phillips, 476 So.2d, supra at 197; see also, Hildwin supra; Tompkins, supra; Turner v. State, 13 F.L.W. 426, 428 (Fla., July 7, 1988). Thus, the trial court's finding of "hac", otherwise supported by the Record, was not fatally tainted by any existing defective considerations, under Pope v. State, 441 So.2d 1073 (Fla. 1984), Huff, supra; Phillips, supra.

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

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

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

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

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

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

POINT XI

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

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

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

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

Initial Brief at 19. 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 which reads:

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

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

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

contention and posits that such allegation is a smoke screen. For Example:

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

Brown v. State, 473 So.2d 1260, 1266 (Fla. 1985). Sub judice, neither the slight change of language in the trial court's penalty phase instruction, nor in his written pronouncement [1], 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

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[1] 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).

court, it is clear that the jury understood the charge of "attempted burglary with an assault," as they, the week before, found Marek guilty of criminal attempt: burglary with assault. There were no questions regarding the slight rewording. Further, the basis of the Mills decision, is a recognition that the Maryland statute and jury instruction on the necessary unanimity required for finding MITIGATING circumstances was inherently amgibuous. Mills, 486 U.S. at ___, 91 L.Ed at 400. The effect of the ambiguity in Mills is certain elimination of any mitigating factor and automatic imposition of the death penalty. Mills has an entirely different premise from that argued by Marek, and is therefore inapplicable.

The allegation of ineffective assistance of counsel due to 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). Trial counsel acted wisely in not making a frivolous objection. There is no requirement, nor does Marek reference any, mandating that the trial court phrase a factor in aggravation in the language of the conviction. This claim is without merit thereby requiring affirmation of the denial of Marek's 3.850 motion. (R. 1358).

POINT XII

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

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

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

Retroactive application of the rule enunciated in Wasko v. State, 505 So.2d 1314 (Fla. 1987), Perry and Lamb is inappropriate. The jury instruction herein contested does not constitute fundamental error requiring retroactive application. Smith v. State, 13 F.LW. 43 (Fla. Jan. 21, 1988) (Yohn v. State, 476 So.2d 123 (Fla. 1985) not fundamental error, requiring

reversal where not preserved, when old instruction, though defective, still clearly imposed burden of proof on the State); Jackson v. State, 502 So.2d 409, 413 (Fla. 1986) (new procedure in Florida death penalty cases, requiring instruction to jury, on need for factual findings sufficient to permit imposition of the death penalty under Enmund v. Florida, 458 U.S. 782 (1982), to be applied prospectively; past failure to give such instruction, not reversible error); Tedder v. Video Electronics, Inc., 491 So.2d 533, 535 (Fla. 1986) (ruling, forbidding limits on "backstriking" jurors, not so fundamental, so as to permit retroactive application).

Retroactive application of a newly announced rule of law, is contingent upon measuring the purpose, and impact of such a rule or procedure on the integrity of the fact-finding process; the extent of good faith reliance by various law enforcement authorities on the old standard, rule or procedure; and the impact of such a charge, on the overall administration of justice.[1] Allen v. Hardy, 478 U.S. ___, 106 S.Ct. 2878, 92 L.Ed.2d 199, 204 (1986); Solem v. Stumes, 465 U.S. 638, 643 (1984); Stovall v. Denno, 388 U.S. 293, 297 (1967); Bundy v. State, 471 So.2d 9, 18 (Fla. 1985); Witt v. State, 387 So.2d 922

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

(Fla. 1980). Application of these criteria to any such change as to jury instructions clearly favor prospective application only. Id.

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

Perhaps most significantly, there is no way to measure the enormously destructive nature, of the impact of retroactive jury charge revisions, on the administration of justice. Id. Courts would be literally inundated with hundreds, perhaps thousands, of habeas corpus petitions, post-conviction and/or collateral motions, and appeals from such motions, by those whose trials have long since been complete. Retrials of those, who might be successful in obtaining relief, would be virtually impossible, given understandable lapses in time and memory. These perilous practical considerations, and the non-fundamental nature of the error, if any, clearly warrant relief, if any, solely on a prospective basis. Id. Any opinion of this Court, that seeks to invalidate the instruction under similar

circumstances should apply only to those cases subsequent to Wasko.

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

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

Johnson, 100 L.Ed.2d at 584. Sub judice, the prior felony conviction used in aggravation, although contemporaneous and therefore invalid in aggravation pursuant to Perry and Lamb, was not reversed. Therefore, it is sufficient that the trial court found one or more other valid aggravating factors and no mitigating factors to warrant denial of Marek's 3.850 motion, if application of Perry and Lamb is applied retroactively.

Marek's appellate counsel was not ineffective for failing to raise this issue on direct appeal as it would not have been a valid objection. Wasko was decided in 1987. Hardwick, providing prior precedent for this aggravating factor was controlling. Counsel is not ineffective for not anticipating changes in the law. Knight v. State, 394 So.2d 997, 1003 (Fla.

1981). Marek's claim as to ineffective assistance is therefore without merit and his Motion should be denied.

The State further maintains that this point is procedurally barred from review as Marek raised the issue on direct appeal and his 3.850 moion. Initial Brief at 22. The State maintains that denial of Marek's 3.850 Motion is proper and must be affirmed sub judice.

POINT XIII

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

Marek is procedurally barred from contesting the application of the aggravating factor that the murder was committed for pecuniary gain. He raised this issue on direct appeal and in his 3.850 motion. Initial brief at 22. Marek cannot now use the 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. Michael Rafferty of the Florida Department of Law Enforcement testified that while processing the pickup truck which Marek and Wigley drove, he found a gold earring in the ashtray. (R. 565). Rafferty also found a gold watch, a gold necklace and another gold earing in the truck's storage console. (R. 566). Jean Trach positively identified these items of jewelry as belonging to the victim and worn the night of June 16, 1983. (R. 718). Further, numerous witnesses at trial testified that Marek was at various times either a driver or passenger in the pickup truck where the jewelry was found. Marek by his own admission

drove the pickup truck away from Dania Beach the morning of June 17, 1983, after being confronted by police. (R. 960). Clearly, there can be no question that the jewelry found in the truck, after the murder, was identified as belonging to the victim and worn by the victim when she got into the truck with Marek.

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

> Relying on the fact that appellant admitted forging one of the victim's checks, the fact that he testified that he needed money, and the fact that he was in possession of the victim's ring and radio the trial judge found the aggravating factor that the killing was committed for pecuniary gain.
>
> Appellant attacks this finding, saying that while proof of possession of recently stolen property raises an inference that the possessor stole it, possession alone does not prove that the goods were stolen by the defendant. Appellant argues the circumstantial evidence in this case does not rebut all reasonable hypotheses to the contrary.
>
> We disagree. The evidence, while circumstantial that appellant killed Ms. Cox to get money from her, is substantial. Before he killed Ms. Cox, appellant had no money and was reduced to searching for pop bottles on the road side to scrap up enough case to buy sufficient gas to get home. After her death he had her property and had forged and cashed a check on her account. The record supports the judge's finding beyond a reasonable doubt that the killing was committed for pecuniary gain.

Id. at 530 (emphasis added). In Porter v. State, 429 So.2d 293 (Fla. 1983) the Supreme Court of Florida rejected defense

arguments similar to those posed by Marek. Marek maintains that the killing was not committed for pecuniary gain and in support thereof states that he was not in the truck when his victim's jewelry was found. Such argment is without merit.

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

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

POINT XIV

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

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

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

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

Marek suggests that review of the "hac" factor, by the Court on direct appeal must now be revisited, in light of Maynard, supra. Maynard cannot be characterized as new law, now cognizable collaterally, under Witt v. State, 387 So.2d 522 (Fla. 1980). The genesis of the Maynard claim, based on the express language of the United States Supreme Court's opinion therein,

arises from Godfrey v. Georgia, 446 U.S. 420 (1980), and the basic premise of Furman v. Georgia, 408 U.S. 238 (1972), involving the requirement that the death penalty accurately channel the discretion of jurors and judges in determining those cases where a convicted murderer should receive the death penalty. Maynard, 100 L.Ed.2d, supra, at 381-382. This challenge, to the hac factor as constitutionally vague and/or over broad, was also the subject of the United States Supreme Court's opinion, determining the constitutionality of Florida's death penalty statute, in Proffit v. Florida, 428 U.S. 242, 254-256 (1976). Since this claim, under such circumstances was clearly available at time of trial and/or direct appeal, and was not raised therein, this claim is not cognizable in this proceeding. Clark v. Dugger, 13 F.L.W. 548, 549 (Fla. September 8, 1988); Smith v. Murray, ___ U.S. ___, 106 S.Ct. 2661 (1986); Witt, supra.

Assuming this claim is cognizable, the Maynard decision is fundamentally distinguishable, from this case, and other Florida death penalty cases on the issue. The Maynard case concerned construction of the "hac" aggravating circumstance by Oklahoma appellate courts; those courts differ substantially from Florida courts, facially and as applied in this case. The court in Maynard noted that Oklahoma appellate courts, had not adopted a "limiting construction" of the "hac" circumstance, having merely reviewed the facts, and deciding whether the facts

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

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

> The Court finds that the murder was especially heinous, atrocious or cruel. The victim was terrorized for at least three (3) hours prior to her death. The victim was abducted late at night by Marek and Wigley. During the ordeal, she was beaten severely, stripped naked and

> dragged into a deserted lifeguard tower during the early morning darkness. Her pubic hair was burned and she was choked and strangled to death. The physical and mental torture would have had to make her realize the great propensity that she was going to be killed. Watching her killer choke the life from her for at least thirty (30) second before she lost consciousness would only add to her terror. The victim's finger was burned in the tower. If it was done before her death it was to make sure that the death contemplated had been finalized or to further degrade her body. This aggravating circumstance was also proved beyond any reasonable doubt.

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

Jean Trach testified that the last time she saw the victim was at approximately 11:30 P.M., June 16, 1983, when the victim got into the pickup truck with the Marek. (R. 723). Officer Dennis 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 died from asphyxiation by ligature strangulation. (R. 781). Dr. Wright testified that the death occurred at approximately 3:00 to 3:30 A.M., June 17, 1983. (R. 739, 753). He testified that a red bandana had been tied tightly around the victim's neck and that the deep bruising on the neck itself was consistent with the victim being strangled. (R. 758-759). Dr. Wright testified that he found five (5) fingernail marks on the victim's neck which in his opinion either resulted from the stangulation itself or from the victim trying to get the bandana off her neck. (R. 757). Dr. Wright testified that in such a murder the victim's heart would stop beating within 10 to 15 minutes after the ligature was applied to the neck. (R. 823). Dr Wright testified that the victim was probably conscious for one (1) minute after the ligature was applied to the neck. (R. 823).

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

Marek's 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.

POINT XV

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.

POINT XVI

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 91984). This claim 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.

POINT XVII

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).

Marek's reliance on the Eleventh Circuit's misperception of Florida law in Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986), modified on rehearing, 816 F.2d 1493 (USSC cert. pending), is without merit. This exact argument has been rejected in Card v. Dugger, supra, because an Eleventh Circuit

decision is not the type of "change in law" which will excuse procedural default under Witt v. State, 387 U.S. 922 (Fla.) cert. denied 449 U.S. 1067 (1980).

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

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

In Pope v. Wainwright, 496 So.2d 798, 805 (Fla. 1986), 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. The trial court, towards the commencement of voir dire, informed the venire:

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

verdict that could result in the death penalty.

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

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

At sentencing, the trial judge read the standard instructions (RV 1292-1293; 1325), which, as 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.

POINT XVIII

ENMUND

Marek contends the imposition of the death penalty in his case is violative of the Eighth Amendment's Cruel and Unusual Punishment Clause, as interpreted in Enmund v. Florida, 458 U.S. 782 (1982). This claim is procedurally barred, for it was argued at trial (R. 1335-1337) and could have been raised on direct appeal: Enmund was decided in 1982, two years before Marek's trial took place. Although the Enmund decision was held to be such a change in the law as to be cognizable in post conviction proceedings for the cases predating the decision in Tafero v. State, 459 So.2d 1034 (Fla. 1984), it is clear that Tison v. Arizona, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987), upon which Marek relies, is merely an "evolutionary refinement" of Enmund.[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 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

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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.

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:

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

> Wigley intended or might use lethal force at any time.
>
> The evidence indicates that both men acted in concert from beginning to end. Marek could have presented any and all the abuses that the victim sustained, but instead inflicted them upon her himself and assisted Wigley to abuse her and eliminate her as a witness. There is no question that a view of the totality of the circumstances leads to the conclusion that Marek intended or contemplated that lethal force might be used or that a life might be taken. (R. 1471-1472).

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).

POINT XIX

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

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

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

> We have previously addressed this question of whether age, without more, is to be considered a mitigating factor, ... but the question continues to be raised. It should be recognized that age is simply a fact, every murderer has one, and it can be considered under the general instruction that the jury may consider any aspect of the defendant's character or the statutory mitigating factor, section 921.141(6)(g), Florida, Statutes

> (1981). However, if it is to be accorded any significant weight, it must be linked with some other characteristic of the defendant or the crime such as immaturity or senility. In this case, for example, we see nothing in the record that would warrant finding any truly mitigating significance in the appellant's age. On the contrary, appellant's age, along with the other evidence, suggests that appellant is a mature, experienced person of fifty-eight years, of sound mind and body who knew very well what he was undertaking and, equally, that the undertaking was without any pretense of moral or legal justification.

Echols v. State, 484 So.2d 568 (Fla. 1985) (citations omitted) (emphasis added); see also Eutzy v. State, 458 So.2d 755 (Fla. 1984). Appellant has not linked his age to another characteristic of himself or the crime. Accordingly, the trial court properly rejected this factor as a mitigator and that ruling should be upheld.

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

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

(R. 1473).

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

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

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

Johnson v. State, 442 So.2d 185, 189 (Fla. 1983). Clearly the precedent exists which invalidates not only Marek's claim as to trial court error in not giving this circumstance in mitigation, but also Marek's claim of ineffective assistance of appellate counsel.

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

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

POINT XX

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):

> Blanco's attempt to apply Lowenfield to obtain relief is not persuasive. Blanco reads Lowenfield to stand for the proposition that an aggravating factor can be considered at either the conviction stage, as in Texas and Louisiana, or the sentencing phase, as in Georgia, but not both. However, the Lowenfield Court's comparison of the various state death penalty schemes was not so mechanical. The Court's opinion does not

forbid the existence of duplicate factors in both stages, but rather directs that the statutory scheme be studied to determine whether it produces the constitutionally required narrowing effect.

It is now settled that Florida's death penalty statute is constitutional. In Proffitt v. Florida, 428 U.S. 242 (1976), the United States Supreme Court stated that "Florida,...has...enact[ed] legislation that passes constitutional muster....[T]his system serves to assure that sentences of death will not be 'wantonly' or 'freakishly' imposed." Proffitt, 428 U.S. at 259-260, citing Furman v. Georgia, 408 U.S. 238, 310 (1972). In the same regard,

> [t]he Florida capital-sentencing procedures seek to assure that the death penalty will not be imposed in an arbitrary or capricious manner. Moreover, to the extent that any risk to the contrary exists, it is minimized by Florida's appellate review system, under which the evidence of the aggravating and mitigating circumstances is reviewed and reweighed by the Supreme Court of Florida "to determine independently whether the imposition of the ultimate penalty is warranted."

Proffit, 428 U.S. at 253.

Here, Blanco fails to take into account that even if he was convicted of a murder without consideration of the underlying felony, the underlying felony would still exist as a factor which narrows the class and which, to Blanco's detriment, he still belongs. In other words, Blanco is not entitled to an automatic exclusion from the class of death-sentence qualified convicts if the factors which apply to him happen to overlap. The test is whether the statutory scheme is constitutionally appropriate, no more, no less. Therefore, Blanco's challenge to consideration of felony-murder as an aggravating factor cannot succeed.

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. In Shuman, the death sentence was reversed only because the Nevada statute in effect at the time the Defendant was sentenced in 1973 "precluded a determination whether any relevant mitigating circumstances justified imposing on him a sentence less than death." Shuman, 97 L.Ed.2d at 70. It is abundantly clear, therefore, that the Supreme Court's decision in Shuman does not give any support to Marek's contentions, as it is limited to its facts. On the contrary, Shuman reaffirms and approves Florida's Capital Sentencing Procedures as outlined in Proffitt; the mandatory death penalty aspect of the Nevada Statute in effect in 1973 which has no counter part in §921.141, Fla. Stats., was the reason why the statute did not comport with the Eighth and Fourteenth Amendments as required under Furman v. Georgia, 408 U.S. 238 (1972).

One final note: on direct appeal, this Court upheld the trial court's finding of 4 aggravating 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.

POINT XXI

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 XVII, supra). As the Appellee has detailed at pages ____ of this pleading, 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.

POINT XXII

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).[1] Certainly then, it is clear this issue is not cognizable collaterally.

Implicitly recognizing the procedural bar, Marek contended his trial counsel was ineffective for failing to make a timely objection. The trial court correctly found otherwise, for counsel can not be held ineffective for failing to raise a nonmeritorious issue. Martin v. Wainwright, 497 So.2d 872 (Fla. 1986); Card v. State, 497 So.2d 1169 (Fla. 1986); Middleton v. Wainwright, 495 So.2d 748 (Fla. 1986). As the following discussion will show, there was no error here.

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

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

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. Shortly after the murder, before the victim's body had been discovered, Marek and Wigley came into contact with the police on Dania Beach. (R. 660-661). During the encounter, Marek dominated the conversation, was friendly with the officers, and told some jokes. (R. 670-671, 681). When Marek was arrested by Officer Shafer, he stated he knew nothing of a murder, didn't know Wigley, and was simply a hitchiker who had been picked up. (R. 610). At the trial Marek claimed that although he was aware the victim got into the truck, he fell asleep and didn't know what had happened to her thereafter. (R. 947-957; 978). In rebuttal, Detective Rickmeyer testified he had told Marek shortly after his arrest that he was charged with murder, kidnapping, rape, and robbery. (R. 1019). Marek responded "Oh, shit, the SOB told all". (R. 1019).

During the sentencing phase of the trial, Defense counsel called Deputy Webster. In the course of her testimony, Deputy Webster stated 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"[2] 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

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

R. 1306 - 1307 are thus not an attempt to establish an improper aggravating circumstances, but rather, rebut the mitigation.[3]

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).

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 overnight mail to MARTIN J. McCLAIN, Assistant Capital Collateral Representative,

Office of the Capital Collateral Representative, 1533 South Monroe, Tallahassee, Florida 32301, this _____ of November, 1988.

Cooper V. McCain

Of Counsel