IN THE SUPREME COURT OF FLORIDA

CASE NO. _____

JOHN RICHARD MAREK,

Appellant,

v.

STATE OF FLORIDA.

Appellee.

INITIAL BRIEF OF APPELLANT

ON APPEAL FROM THE CIRCUIT COURT
FOR THE SEVENTEENTH JUDICIAL CIRCUIT,
IN AND FOR BROWARD COUNTY, FLORIDA

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PRELIMINARY STATEMENT

The following symbols will be used to designate references to the record:

"R" -- Record on Direct Appeal to this Court;

"PC" -- Record on Appeal of Motion to Vacate Judgment and Sentence.

All other citations will be self-explanatory or will be otherwise explained.

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STATEMENT OF THE CASE AND PROCEDURAL HISTORY

At 7:15 a.m. on June 17, 1983, the body of Adele Simmons was discovered in a lifeguard shack on Dania Beach. Later that day John Richard Marek and Raymond Dewayne Wigley were arrested in Daytona Beach Shores. Several hours prior to the discovery of Adele Simmons' body, Mr. Marek and Mr. Wigley had been seen by law enforcement personnel in the vicinity of the lifeguard shack. Subsequently Mr. Marek and Mr. Wigley were charged with Ms. Simmons' murder. The indictment issued on July 6, 1983, charging Mr. Marek with first-degree murder, kidnapping, burglary, sexual battery, and aiding and abetting sexual battery.

At Mr. Marek's trial, the State presented a circumstantial evidence case. Evidence was presented that Ms. Simmons was last seen alive late on June 16, 1983. She and her companion, Jean Trach, were having car trouble on the Florida Turnpike. Ms. Simmons got into a pickup truck with Mr. Marek and his companion in order to seek assistance. Testimony was also presented that Mr. Marek and Mr. Wigley were questioned by a police officer in the early morning hours of June 17th on Dania Beach near the lifeguard shack where Ms. Simmons' body was found.

After lengthy deliberations the jury returned a verdict finding Mr. Marek guilty of first degree murder and kidnapping as charged. The jury found Mr. Marek not guilty of burglary, but guilty of the lesser offense of attempted burglary with an assault. They also found Mr. Marek not guilty of sexual battery and aiding and abetting sexual battery, but guilty of the lesser offenses of battery and aiding and abetting battery.

At the ensuing penalty phase Mr. Marek attempted to present in mitigation a psychological evaluation prepared by Dr. Krieger. However the presiding judge ruled the report was inadmissible. The judge also refused to allow Mr. Marek's counsel to present to the jury the fact that Mr. Wigley had already been tried and convicted of first degree murder but had received a life recommendation.

Defense counsel did call jail personnel to testify as to Mr. Marek's demeanor and behavior while in jail. Mr. Marek's good behavior in jail was not disputed, nor was his sorrow after conviction.

The jury was instructed on four aggravating circumstances. They were: 1) pecuniary gain, 2) previously convicted of a crime of violence, 3) in the course of an attempted burglary, and 4) heinous, atrocious or cruel. The jury returned a death recommendation. The judge imposed a death sentence finding the presence of four aggravating circumstances and no mitigating circumstances.

Mr. Marek appealed to this Court. On June 26, 1986, this Court affirmed his conviction and sentence.

On September 12, 1988, the Governor signed a death warrant in Mr. Marek's case. On October 10, 1988, Mr. Marek filed a timely Rule 3.850 motion challenging his convictions and sentence of death. On October 12, 1988, Mr. Marek filed a timely petition for writ of habeas corpus in this court challenging the affirmance on appeal of his conviction and sentence of death.

An evidentiary hearing was conducted in circuit court on the Rule 3.850 motion commencing November 3, 1988. The hearing concluded late on November 4, 1988. On November 7, 1988, the circuit court judge issued his order denying Rule 3.850 relief. In the order the judge did find error in the sentencing. Specifically the judge found it was improper to have used the kidnapping conviction to establish the presence of the aggravating circumstance -- previously convicted of a crime of violence. The judge, however, ruled the error was harmless.

Mr. Marek filed a timely notice of appeal. The State did not file a cross-appeal from the circuit court's finding of error. See Rule 9.140(c)(1)(H) and (c)(2). Following oral arguments on November 8, 1988, this Court stayed Mr. Marek's execution in order to permit briefing of the issues presented in both the appeal from the denial of Rule 3.850 relief and the habeas proceeding.

SUBSTANTIVE FACTS

John Richard Marek was born September 16, 1961, to Margaret and Jesse William Grimm. Margaret and Jesse had been married in 1956. Jesse was a U.S. Army serviceman. Their first child, Mark William Grimm, was born in 1957; their second, J. Michael Grimm in 1959 (T. 79-80, 209-10).

At the time of John's birth, Jesse was a sergeant and stationed in Germany. The pregnancy was Margaret's first difficult one. "[Her] body tried to abort him. [She] had to spend a lot of time in bed." (T. 79). She was taking a considerable amount of medication at the time. She had been overweight for many years and was taking diet pills throughout the pregnancy. She also had a large amount of nerve medication because of high levels of stress. She and Jesse were having a lot of marital problems during the pregnancy, she had discovered Jesse had a girlfriend. Additionally Margaret was worried about her grandmother's health. She knew her grandmother, to whom she was very close, was seriously ill, although the news of the grandmother's death was kept from her until after John's birth. Margaret was homesick for the states. She also took birth control pills during the pregnancy. "[A]t that time the army doctors were very liberal with medicine. [She] had a whole shoe box full of medicine of different kinds. [She] took what they prescribed for [her]. [She] remember[ed] taking a lot of pills each day." (T. 80-81, 210).

Following John's birth, Margaret's emotional problems continued. "[She] was the type of mother that cared more for herself and her father and grandmother in the states than she did for the rest of the family." (T. 210). She continued to take a plethora of medication. The shoe box she kept her pills in was filled with birth control pills, darvon, valium, diet pills, and sleeping pills (T. 107-08). When John was eight or nine months old, his older brother, J. Michael who was over two years old, got into the shoe box and fed the medication both to himself and John. When Margaret discovered this she did not know what to do:

I was afraid to tell their daddy and I was afraid not to. So finally I decided well I have to, you know. Even if he hurts me. I've got to tell him, you know, it happened.

Q Were you afraid he would hurt you if you told him?

A Yes. Because, see, I was supposed to be taking care of them and I didn't. So I called him and told him he had to come home. I had something to show him and tell him. And he come home and we took them in the ambulance to Frankfurt. Before we got there they started going into convulsions and by the time we got there, you know, they were more out than conscious. And they had to pump their stomachs. And they said if we hadn't got them when we did they would have died. Especially John would have died because he was littler and Michael had shared more with him than he had took himself.

Bill says that the doctor told us then that John's mind would be affected by it.

(T. 108)(emphasis added).

Jesse vividly recalled the incident:

I'd come in from the field. There wasn't anything around to eat, 8:30. It was during the winter months. It was dark. The children were all in bed. I'd been gone for 14, 15 days. I don't remember now. I was home for about an hour. Margaret was telling me about her mother and her grandmother and her father and this, that and the other and I was arguing. I was quite disciplined about taking care of -- Then she informed me that Jay Michael, the second son, had fed the baby, which was John, pills. Vitamin pills. Valium. Birth control. Diet eat pills. Whatever.

I immediately, as soon as she said pills, I immediately went in their room and grabbed them. They were both in convulsions at the time. And rushed them to the dispensary. We were in an outlying area and it was not full medical facilities there. They pumped their stomachs. Both boys the same. You know. Two different areas but both at the same time, for about approximately an hour and then we transported them by ambulance to Frankfurt, Germany, which is a general hospital for the military services in Europe.

I stayed with them until the doctors came out of the emergency room and told me they would live but not to expect anything as far as the babies being able to cope with life. In other words, that he was brain dead. It was hard for them to learn anything. It would be hard for them to do anything and to expect the worse. Especially little John. Jay Michael, from what he had told me, Jay Michael did not take as many as the pills as he had fed John.

(T. 211-12)(emphasis added).

Following this drug overdose there were obvious changes in John's behavior. Jesse explained the changes he noticed:

> John could never sleep. At night he would cry. Walk the floors with him. He cried during the day. As he got older he was suppose to come to the age of where he could do things. He could never do them. He didn't start crawling until he was almost 18 months old. And he was well over two years old before he started to walking. Way over two years old.
>
> His speech was never clear. It was a slurred speech. You had to listen real close. This is as he grew older until he started talking. He could never learn how to ride a tricycle, bicycle, normal like the other children. We'd have to work with him work with him, work with him to be able to get him to do something like this. Catch a ball. Throw a ball. He was even into his first years of school he was never able to do what the other children were doing at three or four years old.
>
> Q Did you think he was retarded?
>
> A Yes. I do. I did. I requested help for him through the military services, through the County social services. Through the school board.
>
> Q Was he different than your other children?
>
> A Yes, he was. Very, very different in every way. The normal playing in the yards and stuff, as children will do, John was never in the group playing. John was always off to the side doing something else or just watching.

(T. 213-14)(emphasis added).

John was labeled retarded. His relationship with his parents suffered as a result. Jesse described Margaret's relationship with John:

> Her relationship was like get out of here. Don't talk to me. I can't stand your talking. I can't stand your shrill voice. I can't stand this. I can't do that. Go sit down and shut up more than the other children.

(T. 214).

Jesse blamed Margaret for John's condition. He also questioned whether he had fathered John. "[H]e couldn't accept that he could have a child that was like that." (T. 92). Jesse treated John differently than the other children.

> Mark was the oldest. Michael was the second one but Michael was bigger earlier so they were like twins sizewise and he would set up competition like between them. Mark, you are just a baby. Look here, Michael is doing this; climbing this tree already, you know, and things like that. He didn't do that with John. He was. He was disappointed that John was a special education child and mostly he just did nothing with John. Ignored him.
>
> Q Do you know why or did John know why?
>
> A John would ask me times why Daddy didn't play with him. Why Daddy didn't do anything with him. Why Daddy pushed him away. Yeah. John was aware of the attitudes. Yeah. A special education child or if you have to call him a retarded child is more tuned in on feelings than we are. They feel rejection even if the words are acceptance. And in a way I had rejected him too. I was so hoed in on wanting a girl and disappointed the. He wore pink as a baby because I was determined he was going to be a girl. I love John but I was negectful [sic] of him because of my emotional state at the time.

(T. 85)(emphasis added).

Jesse was frequently not around. His military duties required him to be gone from home for long periods of time. He never spent a full year at home with the family. His trips lasted anywhere from one week to fifteen months. While in Europe he was away from home about ten months out of the year. He frequently had concern that in his absences Margaret was neglecting the children. When he came home he found inadequate food and clothing (T. 216-17).

Margaret felt that Jesse was neglectful of her and the children.

> I wanted him to have time for our family but he didn't. I felt he chose the army over us everytime. I was furious with him when he went the second time to Vietnam.

(T. 86).

In 1965, a fourth child was born to Margaret and Jesse. This was a son named Charles (T. 79). Yet the marital strife continued. According to Margaret, Jesse

grew up "with very little sense of worth." "[H]e liked women to tell he was worth something so he was a womanizer." "He had five girlfriends in the length of [the] marriage that [Margaret knew] of and [she did not] know how many more." She was very jealous (T. 84).

Through the emotional strife which ravaged his family, John's problems continued and grew worse.

> You never knew how he would react to things because he doesn't react the way I would have or the other boys would have. He saw things as sudden. He didn't understand cause and effect. He just knew he never could have a good time. Things always messed it up and he didn't understand why.
>
> The kids made fun of him. Didn't want to play with him because he had a speech impediment and they couldn't understand except if he didn't want to be understood and they understood every word he said.
>
> I remember one time he was trying to get the minister to understand something and he told him and he told him and the minister wanted to understand so bad and he told him like a dozen times and the minister said tell me one more time and this time I promise I'll understand and John just as plain as you or I said aw, hell, forget it. New words he could say plainer than other words.
>
> A He always went to special education. He never went to regular school. He had a bladder problem. Clear up to - Well, actually when he went into foster care he still occasionally had accidents under stress.
>
> Q Was that regularly or was it just once in a while?
>
> A It wasn't like several times a day but it was frequent. It was almost daily. It was frequent. It was embarrassing to him. He'd say things like me spill water, you know. But he didn't. He didn't fabricate big stories like his brothers would to get out of being in trouble. He generally would say I did it even though he didn't do it. He didn't show much imagination. He showed a lot of love. He was precious when he was little.
>
> Q You mentioned the word retarded. Did you ever have John tested?
>
> A Yes, he was evaluated as trainable but not educable.

Q Was he ever made fun of for being retarded?

A Oh, yes. Yes. A lot.

(T. 87-88)(emphasis added).

In 1968, Margaret and Jesse terminated their marriage. Margaret kept the children, but Jesse had visitation. John was upset by the breakup. During the visitations with Jesse, John was upset by Jesse's leaving (T. 219).

In 1970, Margaret remarried. Her new husband, Arlis Bagley, was an irresponsible alcoholic. He was "a functional illiterate" (T. 93). Margaret explained:

> I mean if he will take a check for a million he will ride it. He hasn't a penny in the bank. I mean he will take the food money, the rent money, the utility money. He will take your last dime if you will loan it. He's going to drink one way or another.
>
> Q Did that cause any problems for you with four still -- they were still small boys at that time?
>
> A Yes, yes and they needed a father. And what they got was belittle meant [sic] and not wanting to be bothered. What they got was a hundred times worse than what their father had been but it took me years to see that.
>
> Q How would Arlis treat John?
>
> A John he treated the worse because John was the most forgiving of the four. The other three soon realized you don't try to hug Arlis. You don't try to. You stay away as much as you can from Arlis.
>
> But John always tried again and again and be rejected again and again. He was a very loving child.
>
> Q How would Arlis reject him, just by not hugging him or?
>
> A No, he generally told him to get away, retard.
>
> Q He would call him that?
>
> A Oh, yes. I couldn't get him not to. He would make him go to bed if nothing else. He didn't want to be bothered with any of the children. He didn't want to have to provide for them. And he wanted the use of the support money that [Jesse] give us. But he didn't --

When we were going together I was going to college and he said I could finish college and he would, you know, take care of us. I like John believed him. I wanted to, I think. You know. I had such a need to be loved that I wanted to believe him. I still want to believe him but I finally had to accept the fact that his words don't fit his actions.

(T. 93-94)(emphasis added).

Mark Grimm, John's brother, recalled Arlis as an uncaring alcoholic. He was "mean" and "vulgar" (T. 189). Arlis had merely tolerated the boys. There was neither love nor acceptance (T. 190-91).

During her marriage to Arlis, an incident occurred which caused her to give up her children.

I had had a job washing dishes there in a restaurant but I'd lost it because Arlis came in drunk there. Lost me the job.

His mother and her boy friend had been helping to feed us but then they left and I didn't have anything. So I went to Red Cross and because their father was in the military Red Cross helped us once. Then Arlis got mad that night because the car wouldn't start. And he took a handgun and fired it into the car. The bigger boys had run around to the back of the house but John started to walk between the car and Arlis and scared me to death and of course I went hysterical screaming at John to go round back and tried to get Arlis not to empty the gun into the car.

So I called [Jesse] and told him he's going to have to take the boys; that I couldn't handle the situation. Until I could figure out what to do. They were about to put us out of the house because we hasn't paid the rent. That day they had turned the electricity off. It was going into winter. He had no job.

Q You were living in?

A Fort Worth.

Q Northern Texas?

A Kind of out in the country. I was totally scared to death. I don't know what to do so I called [Jesse]. He said he'd take the three boys but he wouldn't take John.

Q Did he say why he wouldn't take John?

A Because John wasn't his.

Q Did he tell John that or did John know that?

A Arlis told John. John - the welfare people came and got John before [Jesse] came for the boys. [Jesse] came to the house and I gave him their clothes and everything and it was supposed to be a temporary thing. But it became a life changing decision. They never were back in my custody ever again. I visited singularly but never as a family. We were never a family again.

Q How soon after the shooting incidents did child welfare come and get John?

A Next day.

Q Did he know why they were taking him?

A I think I explained to him I couldn't take care of him and that as soon as I could he'd come back. I don't remember for sure what I said.

Q But he knew that he wasn't going with his father?

A Yes.

Q And that the other boys were?

A Yeah. Yeah.

Q And Arlis told him something about that?

A Yeah.

Q What did Arlis tell him?

A That his Daddy wouldn't take him. That his Daddy didn't want him because he was retarded.

Q Do you know whether Arlis ever told him that you didn't want him because he was retarded or that he didn't want him?

A He had borrowed a bicycle because he wanted one to ride and Arlis had told him that was why I didn't want him; because he stole the bicycle.

Q When was that?

A That day that the welfare took him. The police had brought him home over the bicycle and it was one of the

reasons that they went ahead and child welfare accepted him without any rigamarole because they saw that it was a situation completely out of control.

Arlis was having a drunken fit when the policemen came.

Q Was Arlis drunk a lot at that time?

A Yes. Most of the time.

Q What was he like when he was drunk?

A Not very nice. And he's mean when he is drunk. He's little and he picks fights.

Q Would he pick fights with the boys?

A Yes, he felt very competitive with them. Mark was as big sizewise as him even though he was still a child. I mean John is about the shortest of my boys. They're all good looking big guys and Arlis is small. And he felt threatened by them. He doesn't want to spend any time with them or pay any attention.

If I was paying attention to them I'd have to get him a beer or some do something for him. He was very jealous of them and he was very jealous of his own child. He didn't want to be at home with us. But he wanted me to be at home. He didn't mind anything that he said or did. But I had to be like Caesar's wife, above reapproach [sic] and at home.

Q Ultimately who did you choose to stay with, your kids or with Arlis?

A Arlis and they felt that. They felt I chose Arlis over them. At the time I rationalized it and said the foster care is, you know, they're giving.

(T. 97-100)(emphasis added).

Subsequent to the abandonment, Margaret spent time in a sanitarium.

The Tarrant County Child Welfare Unit obtained custody of John on October 21, 1970. At that time John was adjudged a "dependent and neglected child." The order indicated that Margaret had consented to the decree but that Jesse who was in Vietnam had been served. Exh. 1, Tab 2, p. 3.

Following the adjudication of John as a neglected child, he was placed in foster care with Lena and Virgil Cos. He was enrolled in Saginow Elementary School on

November 16, 1970. School records contained the notation that John was "put in foster home due to rejection by new stepfather." His teacher commented "John is in need of a great deal of love and understanding. Needs to feel success and acceptance." Exh. 1, Tab 2, p. 1. He was placed in a class for the emotionally disturbed. Exh. 1, Tab 2, p. 6. On November 30, 1970, John was withdrawn from his new school when he was moved to a new foster home. Exh. 1, Tab 2, p. 1.

In December of 1970, a psychological evaluation of John was conducted. A Wechsler intelligence scale for children was administered. It established that John was not retarded as everyone had believed. His verbal I.Q. was 91, performance I.Q. was 117, and full scale I.Q. 104. The evaluation indicated that while in foster care in Saginow John was in a class for the "minimally brain injured." However, the foster placement was not successful.

John's speech difficult was explained:

> John is a nine-year old boy of normal size and appearance. His most obvious disability is a severe speech and language handicap. His speech would be unintelligible to most listeners much of the time. And even an experienced examiner occasionally would have difficulty understanding his speech out of context.
>
> His speech and language problem is characterized by severe articulation difficulties, frequent non-fluency, immature grammar and syntax, the use of gesture to aid self-expression, and occasionally the use of devices to get out of talking altogther (a shrug with a "don't know" response). At times when John is trying to say something, he becomes very non-fluent; when the listener tries to put together a sequence of incorrect sounds over a prolonged period of time, comprehension becomes almost impossible.
>
> . . .
>
> This youngster had had a previous psychological evaluation which suggested he was of borderline potential intellectually. It is easy to understand how this estimate of John's ability might have been obtained.
>
> John seems to be a sensitive child who is acutely aware of feelings and perhaps expectation of others toward him -- it may be that he responds in his "borderline" manner when he

thinks this is how the significant person with him feels about him.

Exh. 1, Tab 4, pp. 2-3 (emphasis added).

Subsequently John was placed in an excellent foster home and a small private school for children with learning disabilities. He made very good progress in learning to speak in an intelligible fashion. However, John had to be removed from the placement because of the foster mother's ill health. He was placed with new foster parents who enrolled him in public school where he attended a special class for children with cerebral dysfunction. Exh. 1, Tab 4, p. 8.

An evaluation conducted on November 12, 1971, contained the following:

> John produces an unusually long Rorschach in comparison to most youngsters of his mental age. The length is partly a function of many detail responses, which may suggest a need to select limited aspects of an environment to achieve a sense of stability in almost a compulsive manner.
>
> Edged and tiny detail are also characteristic of protocols of children with cerebral dysfunction. There are many elements of this Rorschach which suggest organicity. First of all, John is a "slow starter." He begins with extremely poor perceptions, but as he moves along, he gradually begins to get the idea, and by the last few cards he is doing a rather good job in responding. This sort of approach is often typical of MBI children.
>
> John's protocal contains many other "organic indicators". He displays excessive perseveration ("Butterfly" is the first response for five straight cards!) He is hung up on lines and symmetry. He does some color naming, and as mentioned previously he shows a large number of detail responses with a tendency to tiny and edged detail.
>
> . . .
>
> John seems to have a deep sense of inadequacy and poor self concept. The boy has "one leg broken off" and the butterfly has "only bones, no wings". This seems to be an oversensitive and easily hurt youngster who tries to hide his sensitivity. John seems to be anxious and may see himself in a tenuous situation with possible repercussions. Thus the boy is pictured as "sitting on a cannon", and the cloud is "blowing air and getting everything around it all hot and bothered".

. . .

John's story telling involves a little boy who likes to play cards and got involved in sports, such as bowling, football and basketball. He also likes to play with army men, and sometimes at night when his light is supposed to be off, he stays up and plays with his army men in a "little bit of light." He doesn't like it because other kids call him squirt, and he is worried about his daddy who is over in Vietnam. He is unhappy when he has no one to play with. He wants to change from being a boy who is sad all the time to being a boy who is happy all the time. For his three wishes he chooses army men, a bicycle mirror and turn signals for his bike. He wants to grow up to be a policeman.

When the story was finished, John grinned in a somewhat poignant manner and siad, "Did you know the little boy in the story was me?" He then told of a recent very happy experience. He had spent the night at another little boy's house, and they had stayed up late and watched an Elvis Presley movie.

SUMMARY

John has previously been diagnosed as a youngster with cerebral dysfunction, and the Rorschach would certainly seem to confirm this diagnosis. John's protocol actually suggests somewhat better ego strengths then would be predicted on the basis of history, and intelligence not markedly reduced, but rather erratic and disorganized, probably on a basis of organicity. There is no suggestion of psychopathology. Rather this seems to be an immature youngster with rather basic defenses who is probably making some sort of neurotic adjustment to his very real problems. Psychotherapy might be of help, but there are certainly many reality problems confronting this youngster.

Exh. 1, Tab 4, pp. 5-6.

A psychiatric evaluation was conducted on November 17, 1971, by Dr. Henry Burks. It concluded:

> Grossly, his mental processes seem intact except for the difficulty in relating and the affective disturbances. I would consider him as an emotionally deprived boy with minimal cerebral dysfunction syndrome and language disability who is having some situational reaction to a difficult foster and school placement. He is currently taking Dexedrine, 5 mg. twice a day, and I added Mellaril, 10 mg. three times a day to this program to see if it could help his anxiety level. I think this boy is probably in need of supportive psychotherapy or casework services, but I don't know where they are available.

Exh. 1, Tab 4, p. 7 (emphasis added).

Thereafter John was seen by a psychiatrist on a regular basis. Progress notes from the sessions were maintained. These notes reflected the persistance of John's emotional difficulties arising from his abandonment by his parents.

> 12-17-71: John was brought to the office by James B. Parnell of the Public Welfare who reported that John had been in three different foster homes during the past year since the natural mother decided to give him for placement. There are no complaints of John's behavior either at school or at home except that he continues being enuretic at night. Mr. Parenell was given a prescription for Dexadrine spansules, 15 mg., No. 50, to be administered one daily at 7 A.M., and another prescription for Mellaril, 10 mg. tablets, No. 100 to be administered one at 4 P.M. and two at 8 P.M.
>
> 1-3-72: John caused disruption in the adolescent group last Wednesday by burning some pop gun caps so that I though it would be better to see him individually. Today I saw him in a joint interview with his parents. Mrs. Marek is the dominant partner of these two foster parents. She is quite articulate in expressing John's problems. One of her concerns is that John still wets the bed and she has John to change the bed linen when he does wet the bed. . . . John indicated that his bedwetting may be related to him missing his biological mother and as a way of expressing resentment towards his step-father when he was living with them. The mother had just started giving the Dexadrine, 15 mg. capsules today so it is too early to say what effect they will have. The mother was given a new prescription for Mellaril, 25 mg. No. 100 to be administered one at 4 P.M. and one at 8 P.M.
>
> 1-10-72: The problems of his resistive and antagonistic behavior towards his foster mother was brought up and connected with the anger that he may feel towards her. He admitted getting angry at her and calling her "pig". He also indicated that he feels like running away from home when he is angry, and he remembered that this is what he used to do when he was living with his biological mother and this was the reason why she decided to give him up. His problem of bedwetting was also connected with his resentment that he feels toward all mothers.
>
> 1-17-72: John was seen today individually. He started playing with the dart gun set and shot at a toy man, which later he made believe was his step-dad and indicated that he was quite angry at him. Then later, in playing with the clay and still making believe it was his step-day, he threw

it repeatedly on the floor and stepped on it, and then divided it into pieces.

2-28-72: John was seen jointly with his foster mother, Mrs. Marek, and she indicated that this past week has been very bad. John soilded [sic] his pants a couple of times and he has been difficult to handle, has wet his pants almost every night. I asked Mrs. Marek to change the medication to Dexedrine, 10 mg. at 7 a.m. and Mellaril, 25 mg. at 4 p.m. and 8 p.m., and Elavil 10 mg. at 4 p.m. and 8 p.m. I indicated that some children used soiling of their pants to express their feelings of anger. John indicated that this was not his case.

3-27-72: This was a joint interview with Mrs. Marek. John's foster mother, and Mr. Purnell, John's welfare worker. They wanted to know about John's progress and the prognosis. I told them it was my feeling that because of John being traumatized so much that it would be expected that he would continue having problems for years to come. Mr. Purnell mentioned that he had gotten a letter from John's father who is in Europe and that the father indicated in the letter that he is interested in John and hearing about him, but he definitely doesn't feel in the capacity to provide a home for him. Mrs. Marek indicated that she is not planning to adopt John but she is willing to continue having him, but she cannot promise that she will keep him until he is over his childhood and adolescence. She is just going to play it by ear.

4-10-72: Today we had the session with John in the playroom. Immediately after entering, he started kicking the ball very hard repeatedly. I told him that it appeared to me he was quite angry. At first he denied it, then he said he was still angry at his step-father, Mr. Begley, for whipping him each time he wet the bed, which was something that he could not help and could not stop doing it. Then I saw Mrs. Marek jointly with John and she indicated that last week he had gone to the house where he used to live with his natural parents. After that, during the rest of the week, his behavior was not good. He wet the bed every night and this seems to irritate his foster parents.

4-19-72: John told me today that he feels his foster mother and his foster sister are keeping a secret from him, which is that his natural mother is not taking him back. He indicated that he was supposed to be away from his natural mother for one year and then after that be returned to her. He has ambivalent feelings towards his natural mother.

6-9-72: John is a child who has been seen by Dr. Serrano. He has evidences of deprivation, the foster child syndrome, and learning disability which is probably on both psychological and neurological basis. He had been improving

greatly through his psychotherapy. When Dr. Serrano left, however, there was a fairly massive regression, some self-destructive behavior, and a return of the enuresis.

2-20-74: First I interviewed John jointly with his foster mother, Mrs. Marek. John mentioned the incident in which he stole some medication from an apartment. Mrs. Marek mentioned the difficulties she has had with John, such as one time running away from home and another running away from school, twice messing in his pants. Mrs. Marek expressed her anger at John's misbehaviors. John mentioned his anger at Mrs. Marek for sending him to bed without his supper on a couple of occasions and also the curfew time of 7 p.m. John denied being angry at Mrs. Marek for running for office again, but it is interesting that on the two occasions she has run for office John's behavior became worse.

2-28-74: First I interviewed Mrs. Marek and she said that during the past week John was gone on Saturday for 8 hours. He has continued wetting his pants, and he also had an episode of soiling. Mrs. Marek expressed the opinion that John needs more structure than she is able to provide, more so now when she is running for office, and I agree that John needs more structure than he is getting right now. She is considering the Adventure Trails of the Salesmanship Club in Dallas, and St. Joseph's School of the Catholic Charities a possible placement possibilities, and I also gave her the name and address of Shadybrook School in Richardson as another possibility. She is going to check on them and see what kind of placement she can come up with. Champus Insurance will 80% and the rest will be paid by the Welfare Department.

Exh. 1, Tab 4, pp. 12-28 (emphasis added).

Another psychological evaluation of John was conducted in April of 1974. It found:

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

> of significance on the Tasks for Emotional Development Test. In one John's present foster parents come through as helpful, fair and concerned. In another the boy sees himself as ugly looking and rejected by his peers and lacking in abilities and confidence. Also there are suggestions John is still having difficulty getting along with his present foster sister.

Exh. 1, Tab 4, pp. 10-11.

In the spring of 1974, John's foster mother, Mrs. Marek, decided it would be best to remove John from her home by sending him away to a residential treatment facility. Funding for this move came from Jesse Grimm's Champus Insurance obtained through the military. John arrived at Shady Brook Residential Treatment Center for Children in Richardson, Texas, on June 11, 1974. Ex. 1, Tab 5.

In August 1974, an Academic Progress Report was prepared on John and his initial adjustment at Shady Brook. It noted that John "appears to lack assertiveness in some peer interactions which results in his being bullied by the more aggressive group members." Exh. 1, Tab 8, p. 4. It also explained "John's weak ego seems to cause him to withdraw when there is any conflict, either with other students or with the teacher." Id. Another report in March of 1975 noted that John had shown much improvement, although his bedwetting was continuing. Ex. 1, Tab 8. On the Stanford Achievement Test administered in April of 1975 John's scores were in 5.2 to 6.1 grade equivalent levels. This was shortly before John's fourteenth birthday when he should have been near the end of an eighth grade level. In June of 1975 John was administered the Wechsler Intelligence Scale for Children and obtained a verbal score of 87, a performance score of 103 and a full scale of 94. Exh. 1, Tab 5.

In September of 1975, Champus notified Jesse Grimm, Shady Brook, and Mrs. Marek that funding would soon be terminated for John's placement in Shady Brook. The medical director wrote Congressman Jim Wright protesting the funding cut:

> To review you briefly, John is the son of a retired serviceman. The family abandoned John a number of years ago for all practical purposes. He was in the custody of Tarrant County Welfare before being placed in two different

> foster homes. John had reacted to neglect and abandonment primarily by an autistic-like withdrawal into himself and by lack of speech development. Mrs. Marek became interested in him and took him into her home in late 1971. She sought help for him on an outpatient basis through the Child Study Center in Fort Worth, and struggled to keep him functioning in their home and in the community. The boy's emotional problems prevented her being able to do that.
>
> We admitted John to Shady Brook June 11, 1974, and immediately placed him in individual therapy with Joseph Kugler, M. D. He has had remedial education, speech therapy, individual psychotherapy and group therapy. John's response has been good. School achievement is still approximately two years behind appropriate grade placement. We have seen him relinquish his introverted amateur adjustment in favor of periods of emotional stability, academic achievement, and outgoing peer relations. Psychological factors are difficult to describe in a concrete way and I will not go further in that direction.
>
> The gist of the matter with John is that he has made improvement but if he is discharged at this time it is unlikely that the Mareks or any other family can sustain him within their group. There is no educational facility in Forth Worth equipped to work with him. He continues to wet the bed almost nightly. He gravitates toward delinquent behavior as he is suggestible, immature and impulsive. It is our judgment that a considerable effort has been made by the Marek family, by the community agencies in Fort Worth, and by us as a residential treatment facility. To stop now will negate what has gone before.

Ex. 1, Tab 8, p. 27 (emphasis added).

The medical director also wrote Dr. Dane Prugh in an effort to convince him to help prevent the cutback on Champus funding affecting John's case. In this letter the medical director acknowledged that there was a tendency at Shady Brook to underdiagnosis:

> I have wondered whether we have hurt our position by a tendency to "under diagnose". I am sure that you can appreciate our often not wanting to label a seriously disorganized child from a chaotic home situation as psychotic, even though at times under stress he functions at a psychotic level. Even though it hurts our presentation of the case now, I have always felt that such labeling hurts the child even more and particularly those whom we feel have a good prognosis. Does your committee take this viewpoint into account?

> Also, most of our children have had extensive out-patient diagnostic workups and many have had good attempts at psychotherapy and psychoanalysis before they come to us. When we accept them from competent child psychiatrists and psychologists and then confirm their need for long-term residential care, does it make any sense for still another group of "nationally recognized specialists" to review these decisions on paper and tell us that not only are we wrong but the child psychiatrist who saw the child in Los Angeles or New Orleans was wrong also?
>
> While making every effort to meet all of the criteria of the JCAH and operate as a medical facility, for the good of not only the CHAMPUS patients but for the other 75% who are private and/or insurance patients, we have attempted to maintain a consistent therapeutic environment within which to help all of these children achieve. Believe me, it rocks the boat, not only with out staff but with all of the children who are here for a couple of years, to see more seriously disturbed children get to go home in three or six months when the private patients even can recognize that they have not made enough progress to be discharged!

Ex. 1, Tab 8, p. 30 (emphasis in original).

Despite the efforts to continue funding for John, Champus refused to extend funding. Shady Brook's director of admissions wrote Mrs. Marek and described how John was taking the news of the funding cutback:

> Dr. Kugler saw John for the last time on Thursday morning, October 2nd. He chose to do this at his own expense as he felt it was something he wanted to do. I had explained the financial situation which would prevail after September 30th and told Dr. Kugler that we would be unable to continue the individual therapy sessions. It was a tearful parting for both of them. I spent some time with John later in the morning trying to simplify as best I could the arbitrary CHAMPUS decision. One of the boys in John's dormitory had already left earlier in September because of a termination of CHAMPUS, so that part was not new to him.

Ex. 1, Tab 8, p. 34.

On October 28, 1975, the program director of the Tarrant County Child Welfare Unit wrote Champus making a last ditch appeal for a continuation of the funding for John:

> This is a formal request from this agency that the decision to terminate the CHAMPUS cost-sharing benefits to John R. Grimm be reconsidered. John has been in residential

care at Shady Brook School in Richardson, Texas since June 11, 1974. As you are aware, John Grimm has been in the custody of the Tarrant County Child Welfare Unit of the Texas State Department of Public Welfare since October 21, 1970. This agency and other community resources have made all possible efforts to address the emotional problems of the child evidenced in such symptoms as enuresis, encoprisis, fire-setting, a handicapped speech, intraversion and acting-out behavior. He further has had educational difficulties resulting from minimal cerebral dysfunction syndrome.

John was placed in the licensed foster home of Mr. and Mrs. Gabriel Marek on August 21, 1971. Mr. and Mrs. Marek have responded to John's needs and demands with more patience, understanding, love and concern than many children receive from natural parents. The Mareks have certainly done more for John than any foster parent would ever be asked to do.

Prior to placement at Shady Brook, John was receiving out-patient therapy and attending special classes with children who have cerebral dysfunction. However, these resources were not sufficient to enable John to live successfully in the community. Jose N. Serrano, M.D. recommended John be placed at Shady Brook. (Dr. Serrano was John's psychiatrist at the Child Study Center.)

This agency has been very pleased with the care which John has received at Shady Brook. In the milieu program of remedial education, speech therapy, individual psychotherapy and group psychotherapy, John has made substantial progress in his peer relations, speech and educational achievements and has exhibited a higher level of emotional stability and maturity. However, it is the opinion of treatment staff that John has not yet reached a level where he could be sustained in a foster family or sufficiently assisted by existing educational facilities in the community. As Dr. Jack Martin Medical Director of Shady Brook, notes: "He continues to wet the bed almost nightly. He gravitates toward delinquent behavior as he is suggestible, immature and impulsive." Additionally, the Mareks also do not see John as yet ready to return to their home. It is projected that John will require an additional nine to twelve months of residential treatment before he can successfully reenter the community.

Because of their desire to see John's treatment continued, the staff at Shady Brook have allowed him to remain while they receive only the $300 per month supplied by Tarrant County. (This is the limit that the county will pay.) However, this arrangement cannot continue beyond the end of the year. A great deal of effort from many sources has gone into the progress made thus far by this child. To stop the treatment now could negate the progress and

> drastically diminish this child's chances to be an emotionally stable and productive member of the community.

Ex. 1, Tab 8, pp. 38-39.

In December 1975, Shady Brook issued its last progress report on John.

> In the dormitory, John has made gains in some areas, with considerable difficulty remaining in others. He shows increasing willingness to deal with his problems in a realistic manner, seeming to be able now to correlate his own actions to the consequences that follow. This is contrasted with earlier attitudes that unpleasant consequences were forced upon him unfairly by elements beyond his control. Behavioral outbursts occur less frequently, as John is slowly learning to replace external forms of discipline with self-control.
>
> Peer relationships remain more difficult than adult relationsips. He has not been able to form a close friendship in the dormitory, although dorm acceptance of him is increasing. His immature responses to the others have diminished to some degree, as have their complaints of him. John relates well to the staff, with dependency expressions being most frequent.
>
> John's bedwetting has increased since the summer.

Ex. 1, Tab 8, p. 41.

On January 23, 1976, John left Shady Brook. Ex. 1, Tab 5. He was abandoned once again. After living with the Marek's for a short while and after taking their name in April of 1976 (Ex. 1, Tab 29), although never actually adopted by them, it was decided to place John with the Devereux Foundation in Victoria, Texas. He was enrolled in June of 1976 under the name John Marek. An admissions psychological evaluation revealed that much of the progress made at Shady Brook was already gone:

> The intellectual picture requires some explanation. A Full Scale Wechsler Bellevue I.Q. of 82 was obtained placing the patient in the Dull Normal range of intelligence. The Verbal I.Q. was 64 and the Performance I.Q. was 104. Subtest scores ranged from a low of 1 on Arithmetic to a high of 12 on Picture Completion and Block Design. This young man at some time in the past was potentially capable of functioning in the Bright Normal range. His low standing emotional disturbance has significantly lowered his overall intellectual functioning, but his basic cognitive grasp remains average.

. . .

> A fairly complicated picture with the chief diagnostic impression being ego diffusion/ fragility with moderately severe general emotional disturbance. Emotional integration is poor with inability to form goals, frequent outbursts of impulsivity and, perhaps most important, thinking disorganization. At least borderline or latent thinking disturbance is seen as present. In fact, the common denominator behind much of the patient's fairly self-defeating behavior is seen as a thought disturbance. Currently this is not crystalized, and the next several years will determine future levels of adjustment. Level of depression is only mild with the level of anxiety being only mild as well. This young man's inability to form goals reflects his vacuous view of himself in the world. There is a fluid, changing, fragmented quality to this young man.

Ex. 1, Tab 7, pp. 29-30.

An evaluation conducted at Devereux on October 19, 1977, was very insightful:

> A Full Scale Weschler Bellevue I.Q. of 80 was obtained, placing the patient in the Dull Normal range of intelligence. However, this figure must be interpreted with caution because of the wide verbal performance discrepancy. Verbal I.S. was 67; Performance I.Q. was 99. The overall profile is similar to one obtained in 1976, when John entered Devereux. At some time in the past this young man was potentially capable of functioning in the Bright Normal range of intelligence, but due to his various problems have been unable to realize this potential.
>
> The tests strongly suggest underlying organicity, reflected in a language/learning disability syndrome. Academic information is very poor, and general verbal skills are also poor. Perceptual motor dysfunction is indicated. However, in terms of specific etiological contributors, organicity must rate a second place to this young man's severe emotional disturbance.
>
> . . .
>
> This young man shows many indications of developing an inadequate personality disturbance. That is, he is increasingly seeing himself as an inadequate person, partially due to his bed wetting, but chiefly due to the lack of any kind of positive male identification. Increasingly, he sees himself as a bummer, a fool, a dummy, etc. This does not constitute a step backward, but more accurately a clarification in diagnoses. This young man had all of these features when he entered Devereux, but they have become more clearly evident diagnostically during the time he has been at Devereux. Accompanying his inadequacy

> feelings and the overall inadequacy constellation are a variable morass of underlying depressive feelings. While John is only mildly depressed, his depression extends very far back in time and is fairly well and deeply set.
>
> This young man is beginning to experience some sexual conflicts, chiefly on an unconscious level. He sees women as frightening, chiefly because he views himself as inadequate and bumbling. There are many indications that previous infantile or early childhood conflicts with the mother are recrystalizing with his adolescence. He certainly has many anxieties about sex and sexual assertiveness.

Ex. 1, Tab 7, pp. 17-18.

In May 1978, John still had a bedwetting problem which caused him much embarassment in residential treatment. "[H]e continue[d] to feel so worthless -- feeling that he [was] a nothing." The Devereux staff felt that John's biggest need was to "find something he can do and find successes and gain more self-confidence to strengthen his feeling of self-worth." Ex. 1, Tab 7, p. 11. John was discharged from Devereux at his request on September 18, 1978. The discharge summary noted "John's feelings of inadequacy among peers and a feeling he would like to return to a Unit where there were younger and smaller children." Ex. 1, Tab 7, p. 5.

John returned to the Marek's where he attended public school and worked at a gas station. In October 1978, Mrs. Marek reported that John had "regressed in his enuresis problem after his birthday because his natural father had not called or sent a present to John as he was supposed to. Since his birthday, John ha[d] resumed his bedwetting." Ex. 1, Tab 29.

In December, John quit school. In January, the Mareks kicked John out. Texas Welfare officials picked John up and placed him in a shelter. He wanted Jesse Grimm's phone number which the welfare officials obtained from Margaret Begley. After talking with Jesse, John agreed to sign a contract -- the condition the Mareks had imposed for his return to their house. Thereafter, John's situation deteriorated with the Mareks. Ex. 1, Tab 29. In March of 1979 he was placed with new foster

parents, Sallie and Jack Hand (T. 239). In May of 1979, John was arrested on charges of credit card abuse.

On July 30, 1979, John pled guilty to credit card abuse, a felony under Texas law, even though the dollar amount was only $52. John received three years probation. His probation was revoked on July 10, 1980, because of John's failure to pay court costs and probation fee. He received a two year sentence. Ex. 1, Tab 30.

Following his release from prison in Texas, John briefly visited his mother, Margaret Begley in Cyril, Oklahoma. At the .cp3 time, he was apparently living in Fort Worth driving a cab (T. 111).

Later Margaret received a call from her son Charles, who has been diagnosed as a paranoid schizophrenic (T. 122). Charles told Margaret that "John was trying to kill [her]. But he couldn't kill [her]. So this woman had died [instead]." (T. 105). Margaret Begley is five foot three (T. 114). The victim was five foot two.

None of these facts concerning John's background were presented to the jury.

ISSUE I

FAILURE TO ALLOW MR. MAREK TO PRESENT MITIGATING EVIDENCE VIOLATED HIS FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS.

A capital sentencer may not be precluded from considering "any relevant mitigating evidence." Skipper v. South Carolina, 106 S. Ct. 1669, 1671 (1986); Hitchcock v. Dugger, 107 S. Ct. 1821 (1987); Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio; 438 U.S. 586 (1978). Mr. Marek tried to present mitigating evidence to the jury that his co-defendant received a life sentence for the same conduct (disparate treatment given to a cooperating accomplice is a mitigating factor, Brookings v. State, 495 So. 2d 135 (Fla. 1986) accord McCampbell v. State, 421 So. 2d 1072 (Fla. 1982)) and he tried to present the report of the sole psychiatrist appointed to examine him. The Circuit Court refused to allow Mr. Marek to present evidence on either of these mitigating factors. The failure to allow

presentation of disparate treatment was raised in the Rule 3.850 Motion to Vacate as Claim VIII and in the Petition for Writ of Habeas Corpus as Claim VI. The refusal to permit the introduction of the psychological report was raised as Claim IX in the Rule 3.850 Motion and Claim VII in the Habeas Petition.

A. DISPARATE TREATMENT

Mr. Marek's co-defendant, Mr. Wigley, received a jury recommendation and sentence of life for his participation in the homicide. This was in spite of the fact that Mr. Wigley and Mr. Marek were convicted of virtually identical offenses except that Mr. Wigley was convicted of sexual battery, while Mr. Marek was convicted of the lesser included offense of assault.

At the commencement of the penalty phase, Mr. Marek's trial counsel indicated that he was going to comment to the jury that Mr. Wigley had been sentenced to life imprisonment. The court responded that if counsel did, it would allow the State to introduce Wigley's confession, which was patently inadmissible under the Confrontation Clause of the sixth amendment. The court indicated that even then it would not allow Mr. Marek's counsel to cross-examine Wigley, but would merely let the State read the confession to the jury (R. 1283). The court's position was clearly wrong under the statute allowing hearsay only if a fair opportunity to rebut is afforded the defendant; and it was clearly wrong under the sixth amendment. Ohio v. Roberts, 448 U.S. 56 (1980).

Mr. Marek's defense attorney foolishly gave into the judge's blackmail and did not argue this nonstatutory mitigating factor because the judge threatened to open the door to the State's introduction of Wigley's statement. This statement was never subjected to adversarial testing by Mr. Marek's attorney or by anyone. (Mr. Wigley did not testify in his own trial.) It certainly had no indicia of reliability. Mancusi v. Stubbs, 408 U.S. 204 (1972).

The sentencing jury was thereby precluded from considering disparate treatment as a mitigating factor, in a case where the court specifically found that "both men acted in concert from beginning to end." (R. 1471). This was a violation of Lockett v. Ohio, 438 U.S. 586 (1978). In addition, the court refused to consider proportionality as a non-statutory mitigating factor, all in violation of the eighth and fourteenth amendments. Eddings v. Oklahoma, 455 U.S. 104 (1982); Magwood v. Smith, 791 F.2d 1438 (11th Cir. 1986). This mitigating circumstance is established of record; though the sentencing court is free to attach little weight to a mitigating circumstance it is not free to ignore it altogether.

Moreover, this Court's caselaw has consistently recognized disparate treatment as a mitigating circumstance. Brookings v. State, supra. Yet counsel failed to argue this mitigating circumstance to the jury. Counsel's performance was unreasonable in this regard as it was based upon ignorance. Counsel accepted the court's threat to permit introduction of Wigley's statement despite its patent inadmissible. Counsel should have noted that neither the death penalty statute nor the sixth amendment would permit the introduction of the statement. Counsel should have argued vigorously to the jury and to the judge that Wigley's life sentence dictated that Mr. Marek receive a life sentence since there was absolutely no evidence indicating who did what, or that either partner was more morally culpable. Counsel should have also objected to the court's reliance on Wigley's statement for rejecting disparate treatment as a mitigating circumstance. The sentencing court's use of such a statement violated basic sixth amendment principles.

This Court's decision in Mr. Marek's direct appeal does not dictate a different result because Mr. Marek's trial counsel's ineffective assistance at the trial level precluded the development of the record. More importantly counsel's deficient performance precluded the jury from having a mitigating circumstance presented to it for its consideration. Mills v. Maryland, 108 S. Ct. 1860 (1988). Under Kimmelman

v. Morrison, counsel's performance cost Mr. Marek the presentation of this mitigating circumstance.

B. PSYCHOLOGICAL REPORT

In a virtually reverse situation, the Circuit Court ruled at trial that it would not allow the defense to put into evidence the report of Dr. Seth Krieger, which was a written psychological report discussing John Marek, without having Dr. Krieger testify (R. 1283). The court's position was that the introduction of such a report would cost the State its right to cross-examine Dr. Krieger. Yet the same court had been willing to allow the State to introduce a written statement if the defense argued disparate treatment as mitigation.

This report provided in part:

> Relevant Background Information: John R. Marek is a 22 year old (date of birth September 17, 1961) white male with a ninth grade education and no history of military service. He has never been married and has no children. At the time of his arrest he had been in the Fort Lauderdale area for only two days. Prior to that he had been living in Fort Worth and working as an oil field "computer analyst", monitoring oil wells. Prior to his one year with the oil company he worked at a gas station.
>
> Mr. Marek was born in Frankfurt, Germany; his father was in the service, stationed in Europe at the time. The family returned to the United States when the defendant was still an infant. Shortly thereafter his natural father left the family and his mother remarried, this time to an abusive alcoholic. At age nine the defendant was turned over to the state and lived in a variety of foster homes until striking out on his own at age 17. He is the third of four children in the family. In retrospect he regrets not having had a decent family life and not having had someone there when he was in need. All three of his brothers have also had troubled lives; his younger brother is in a mental hospital, another is in the Army as an alternative to jail, and the oldest has an arrest history, though has never served any time in prison. The defendant no longer has contact with any other members of his family.
>
> Mr. Marek says that he is currently in good health, with no history of serious illnesses or injuries other than appendicitis at age 15. He was first treated for emotional problems at age 10. He says he went to a psychologist 3 times a week until age 16 with no real benefit. He

acknowledges that he spent the treatment sessions "running a game", and telling the therapists what they wanted to hear. Apparently he was thought to be hyperactive for a time and was given medication.

Since he was a teenager Mr. Marek has been abusing alcohol and other intoxicants. He indicates that he frequently drinks from one to three cases of beer in the course of a day. He has a history of alcohol related blackouts. Usually he does his drinking along with friends. He has also used "a lot of speed" (sometimes injected), marijuana, LSD "a couple of times", and "a little coke". He indicates that he once attended A.A. meetings for about six months, and he is currently participating in the A.A. program in the jail.

. . .

Conclusions: Mr. Marek is a young man with a disturbed family background and a long history of anti-social conduct. At the present time he appears to be depressed, but he is not psychotic. He is of at least average intelligence and should be able to participate meaningfully in the proceedings facing him. Nevertheless, he does claim an amnesia for the time during which the offense was committed. A toxic amnesia of the sort he describes is certainly plausible if he actually consumed the amount of alcohol he claims. It is also the case that when memory functions are blocked by toxic levels of chemical, such as alcohol, the memory may be irrecoverable. Hypnosis or sodium amytol interview techniques may be used in an attempt to bring back whatever memory is there, but it is expected that little additional information would be recovered.

The psychological screening done in the context of this evaluation suggests that there may be significant personality disturbance present in this young man. If more detailed description of the pathological processes present is desired it is recommended that more extensive psychological testing be done.

None of the mitigation contained in this report reached the jury. The jury knew nothing of Mr. Marek's family history, the abuse, the neglect, and the abandonment. The jury did not have the history of drug and alcohol abuse. The jury did not know of Dr. Krieger's conclusion that there may be the presence of a "significant personality disturbance." The jury was denied this mitigating evidence by the judge's erroneous ruling. Florida law allows the introduction of hearsay at the

penalty phase so long as the defendant has an opportunity to rebut it. Fla. Stat. 921.141.

The sixth amendment guarantees to all criminal defendants in Mr. Marek's situation the right to defend:

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

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

In Lockett v. Ohio, 438 U.S. 586 (1978) and Skipper v. South Carolina, 106 S. Ct. 1669 (1986), the United States Supreme Court made clear that under the eighth amendment a criminal defendant can not be precluded from presenting evidence of mitigating circumstances -- any aspect of the defendant's character or background calling for a sentence of less than death. Thus the capital defendant's defense in the penalty phase is the presentation of these mitigation circumstances.

The United States Supreme Court has not hesitated to reverse where evidentiary rulings or state action have encroached upon a defendant's fundamental constitutional right to present a defense. See, Chambers v. Mississippi, 410 U.S. 284 (1973); Rock v. Arkansas, 107 S. Ct. 2704 (1987); Crane v. Kentucky, 106 S. Ct. 2141 (1986). This Court should not hesitate to overturn Mr. Marek's sentence now. Presentation of evidence in mitigation during the penalty phase of a capital trial is every bit as crucial as presenting a defense during the guilt phase of a trial. Moreoever, the statute makes clear that the usual hearsay rules do not apply in the penalty phase of a capital trial.

The proceedings were fundamentally unfair. The prosecutor obviously used the absence of statutory mitigating circumstances to argue that John Marek deserved the

death penalty. But the failure to present mitigation was due not to its lack, but to the trial court's rulings.

The Circuit Court's ruling as to this issue was that it should have been raised on appeal, but in any event it has no substantial merit because "defense counsel was not precluded from presenting evidence in mitigation." (Order Denying Motion to Vacate Judgement and Sentence, page 5). However, the court gives no reason for this statement. Nor can a reason be given; counsel clearly was precluded from presenting mitigating evidence. To the extent that the issue should have been raised on appeal it was blatant ineffective assistance of counsel not to have argued this error to this Court. Lockett is basic eighth amendment law. Counsel's failure to argue obvious error under Lockett must be premised on ignorance. Had counsel but pointed this Court to the issue, the law would have been clear and a reversal required. Because of ineffective assistance of appellate counsel, Mr. Marek's sentence of death must be vacated now.

C. CONCLUSION

The trial judge's rulings denied Mr. Marek's rights to due process of law, to reliable and individualized sentencing proceedings and to effective assistance of counsel under the fifth, sixth, eighth, and fourteenth amendments. Mr. Marek's sentence of death is inherently unreliable and fundamentally unfair. A new sentencing hearing is warranted.

ISSUE II

MR. MAREK'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS WERE DENIED BY THE CONSIDERATION BY THE SENTENCING JURY AND COURT OF IMPROPER AGGRAVATING CIRCUMSTANCES.

At the penalty phase of Mr. Marek's trial, four aggravating factors were submitted to the jury: 1) pecuniary gain; 2) previously convicted of a crime of violence; 3) in the course of an attempted burglary; and, 4) heinous, atrocious and cruel. As noted previously, the Circuit Court Order Denying Motion to Vacate

Judgment and Sentence struck the second of these aggravating circumstances, relying on Lamb v. State, 13 F.L.W. 530 (Fla. Sept. 1, 1988) and Perry v. State, 522 So. 2d 817 (Fla. 1988)(Order, Claim XII, p. 6). The court went on to find the sentence of death still valid because of the other aggravating factors. As will be discussed infra, the other aggravating factors are also invalid and must likewise be thrown out.

A. PECUNIARY GAIN

Mr. Marek contends that this aggravating circumstance must be stricken. This appeared in the Rule 3.850 Motion as Claim XIII and in the Habeas Petition as Claim III. The trial court instructed the jury as follows:

> Third, you can consider that the crime for which the defendant is to be sentenced was committed for financial gain.

(R. 1322). In fact, the judge's oral instruction may have been interpreted by the jury as telling them that in fact the murder was committed for financial gain. This alone violates Mills v. Maryland, 108 S. Ct. 1860 (1988)(where jurors may misread the instructions and thus violate constitutional principles a reversal is required). The only evidence of financial gain in this case was the jewelry of the victim which was found in Mr. Marek's co-defendant's pickup truck (R. 565-6). When arrested, Mr. Marek was not even in the vicinity of the truck (R. 559); it was under the exclusive control of Mr. Wigley (R. 608). It is also undisputed that the victim was in the truck prior to her death.

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

The pecuniary gain aggravating factor was also not established in Scull v. State, ___ So. 2d ___ (13 F.L.W. 545, Case No. 68,919, decided Sept. 8, 1988).

> While it is true that Scull took Villegas' car following the murder, it has not been shown beyond a reasonable doubt that the primary motive for this killing was pecuniary gain . . . . The record simply does not support the conclusion that Villegas was murdered for her car.

13 F.L.W. at 547 (emphasis added). Scull is new case law establishing that for the pecuniary gain aggravating circumstance to be present the State must establish that it was the primary motive for the killing.

Applying Scull here, there is absolutely no support in this record that the victim was murdered for her jewelry. This was not alleged in the indictment nor proved by the evidence. It is clear that the victim was in the truck and the jewelry could have been left there inadvertently. That coupled with the fact that the jewelry was not even found in the possession or control of Mr. Marek, leads to the inescapable conclusion that the aggravating circumstance of pecuinary gain was improperly submitted to the jury, and improperly found by the trial court. In fact the State argued and the court found that the primary motive was the intent to commit a sexual assault.

Since this aggravating circumstance was clearly erroneous, the jury recommendation was unreliable. Had the jury been instructed properly concerning aggravating circumstances, the result could have been very different. To permit trial judges the opportunity to charge juries on unsupported aggravating factors is to tolerate a capital sentencing that is skewed toward death rather than life. In this instance, the application of Section 921.141, Fla. Stat., was unconstitutional. Rather than "genuinely narrow[ing] the class of persons eligible for the death penalty," Zant v. Stephens, 462 U.S. 862, 877, 103 S. Ct. 2733, 2742 (1983), here the statute's application broadened the class and enhanced the likelihood of a death recommendation due to the instructions on invalid aggravating circumstances. What

occurred was fundamental error. The fundamental unfairness in this instance rendered Mr. Marek's capital sentencing proceeding unreliable.

Below both the State and the court misperceived this issue. The State argued that since jewelry was taken and was in the truck driven by John Marek, this aggravating circumstance must be supported. Likewise, the circuit court concluded that this issue was raised on direct appeal and thus is barred (Order, p. 6). However, on direct appeal the argument was that the jewelry was not in Mr. Marek's possession when he was arrested.

The point to this issue is that pecuniary gain was not the primary motive for this murder. This is the requirement clearly set forth by this Court in Scull v. State, supra. This was not addressed on appeal or by the circuit court in its denial of relief under this claim. To the extent that Scull is not new law it was clearly ineffective assistance of appellate counsel not to argue that for this circumstance to be present the State must prove beyond a reasonable doubt that the primary motive for the homicide was pecuniary gain. Had counsel argued that this aggravating circumstance would have been stricken. It must accordingly be stricken now, and a new sentencing ordered. Relief is proper.

B. HEINOUS, ATROCIOUS OR CRUEL

Mr. Marek contends this aggravating circumstance must also be struck. This argument appeared in the Rule 3.850 Motion as Claim XIV and in the Habeas Petition as Claim IV. The manner in which the jury and judge were allowed to consider "heinous, atrocious or cruel" provided for no genuine narrowing of the class of people eligible for the death penalty, because the terms were not defined in any fashion, and a reasonable juror could believe any murder to be heinous, atrocious or cruel under the instructions. Mills v. Maryland, 108 U.S. 1860 (1988). These terms require definition in order for the statutory aggravating factor genuinely to narrow, and its undefined application here violated the eighth and fourteenth amendments. Godfrey v.

Georgia, 466 U.S. 420 (1980). Jurors must be given adequate guidance as to what constitutes "especially heinous, atrocious, or cruel." Maynard v. Cartwright, 108 U.S. 1853 (1988). Accordingly, Mr. Marek's death sentence was obtained in violation of the eighth and fourteenth amendments, and must be vacated.

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

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

(R. 1322). In fact the judge's oral instructions may have been interpreted by the jury as telling them that in fact the murder was wicked, evil, atrocious or cruel. This alone violated Mills v. Maryland, 108 S. Ct. 1860 (1988).

Even though the Florida Supreme Court had consistently held that in order to show "heinous, atrocious, and cruel" something more than the norm must be shown, see Cooper v. State, 336 So. 2d 1133 (Fla. 1976); Odom v. State, 403 So. 2d 936 (Fla. 1981); Parker v. State, 458 So. 2d 750 (Fla. 1984), the instructions in this case faild to explain that in any kind of adequate fashion to the jury.

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

Moreover, the new precedent involves the most fundamental of constitutional errors -- proceedings which violate the standards enunciated in Cartwright render any ensuing sentence arbitrary and capricious. Id. For this reason also Mr. Marek's eighth amendment claim is properly before the Court.

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

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

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

The construction approved in Proffitt was not utilized at any stage of the proceedings in Mr. Marek's case. The jury was simply instructed that it could consider that the homicide "was especially wicked, evil, atrocious, or cruel" (R. 1322). The explanatory or limiting language approved by Proffitt does not appear anywhere in the record.

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

In Mr. Marek's case, as in Cartwright, what was relied upon by the jury, trial court, and Florida Supreme Court did not guide or channel sentencing discretion. Likewise, here, no "limiting construction" was ever applied to the "heinous, atrocious or cruel" aggravating circumstance. Counsel failed to object to the oral instruction and failed to proffer adequate instructions defining heinous, atrocious and cruel. This failure was ineffective assistance. Kimmelman v. Morrison, 106 S.

Ct. 2574 (1986). Finally, the Florida Supreme Court can not cure the unlimited discretion exercised by the jury and trial court by its recitation of facts. As in Cartwright, Mr. Marek is entitled to post-conviction relief. This aggravating circumstance must be struck at this time.

C. IN THE COURSE OF AN ATTEMPTED BURGLARY

Mr. Marek contends that this aggravating circumstance is invalid on two separate bases. First, because the jury was improperly instructed as to the intent necessary to find this factor (this appeared as Claim XI in the Rule 3.850 Motion and as Claim II in the Habeas Petition), and because it constitutes an improper automatic aggravating factor which does not accomplish the constitutionally required narrowing of the class of people eligible for the ultimate punishment (this also appeared as Claim XX in the Rule 3.850 Motion).

1. Jury Instruction

At the penalty phase, Mr. Marek's jury was instructed that they could consider in aggravation that 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." (R. 1449). He was originally charged with breaking and entering with the intent to commit a sexual battery (R. 1358), but the jury returned a verdict of guilty of the lesser included offense of Criminal Attempt: Burglary with an Assault (R. 1440).

At the guilt phase, the jury was instructed that they could find Mr. Marek guilty of Criminal Attempt: Burglary with an Assault if the State had proved beyond a reasonable doubt that: a) John Marek did some act toward committing the crime of Burglary with an Assault that went beyond just thinking or talking about it, and b) He would have committed the crime except that someone prevented him from committing the crime of burglary with an Assault or he failed (R. 1411).

The jury was never instructed that an intent was a necessary element of the lesser crime. The failure to instruct fully and accurately on all the elements of a crime is fundamental error. Franklin v. State, 403 So. 2d 975 (Fla. 1981).

In Robles v. State, 188 So. 2d 789 (Fla. 1966), an insufficient instruction on the elements of burglary, the underlying felony, was given. The Court said:

> The jury is left to its own devices as to what constitutes breaking and entering and as to the character of the felonious intent that is required. As to the precise intent that appellant was alleged to have, these instructions fail to identify the felony that he allegedly intended to commit or even define the term "felony," in the abstract. It is true that the court agreed to give such instructions and the defendant's trial counsel agreed to prepare same but failed to do so. But this failure of counsel does not relieve the court of the duty to give all charges necessary to a fair trial of the issues. We hold that since proof of these elements was necessary in order to convict appellant under the felony-murder rule, the court was obligated to instruct the jury concerning them, whether or not requested to do so. Canada v. State, Fla.App.1962, 139 So.2d 753; Motley v. State, 1945, 155 Fla. 545, 20 So.2d 798; Croft v. State, 1935, 117 Fla. 832, 158 So. 454; 32 Fla. Jur. "Trial," sec. 186.

Id. at 793 (emphasis added).

The failure to instruct as to all the elements of a crime pursuant to Robles is fundamental error. State v. Jones, 377 So. 2d 1163 (Fla. 1979). See also Jackson v. Virginia, 443 U.S. 307 (1979).

Here there was really no evidence to support the finding of guilt of Criminal Attempt: Burglary with an Assault. The evidence merely showed that Mr. Marek's fingerprints were found both on the outside of a window of the lifeguard shack, and inside the shack. There was no doubt that he actually entered the shack (R. 635-6), but there was no evidence as to his intent when he entered or as to what he did once inside, except for his testimony that he went into the shack to hide from the police because Mr. Wigley told him that he did not have the registration for the truck that they had been driving and that the police were looking at it (R. 953). This would support a finding of guilt of trespass, but not attempted burglary with an assault.

The jury may have convicted because the crime it convicted on was really a trespass with an assault; the jury may have convicted without finding an intent. In any event, the jury was not instructed that they needed to find any intent whatsoever in regard to this lesser offense. It is impossible to know how the jury reached their verdict. There was no objection to the verdicts, nor was the jury questioned about inconsistent verdicts. However, the jury should not have been instructed to use a verdict that is unsupported by the evidence in aggravation of first degree murder.

It is the trial judge's responsibility to correctly charge the jury on the applicable law. See generally, Smith v. State, 424 So. 2d 726, 731-32 (Fla. 1982); Wilson v. State, 344 So. 2d 1315, 1317 (Fla. 2d DCA 19770; Bacon v. State, 346 So. 2d 629, 631 (Fla. 2d DCA 1977); Williams v. STate, 366 so. 2d 817, 819 (Fla. 2d DCA 1979). A judge's duty to correctly charge a jury is no less applicable when it involves a sentencing jury in a capital case.

It is "the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty," Lockett v. Ohio, 438 U.S. 586, 605 (1978), that "require[s] us to remove any legitimate basis for finding ambiguity concerning the factors actually considered." Eddings v. Oklahoma, 455 U.S. 104, 119 (1982)(O'Connor, Jr., concurring). See also Godfrey v. Georgia, 446 U.S. 420 (1980)(condemning overly broad application of aggravating factors).

The error here was fundamental error. See Frankline, supra; see Jones, supra; see Robles, supra. Thus the error may properly be presented at this stage in the proceedings. See, e.g., Dozier v. State, 361 So. 2d 727, 728 (Fla. 4th DCA 1978). Thus this aggravating circumstance resting on a fundamentally flawed conviction must be struck.

Moreover, in his sentencing order, the judge included, as an aggravating circumstance:

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

(R. 1472)(emphasis added). This was not what the jury's verdict provided. As noted above, the jury convicted Mr. Marek of "the lesser included offense of Criminal Attempt: Burglary with an Assault" (R. 1440), and specifically acquitted him of two counts of sexual battery with great force, returning instead two verdicts of "guilty of the lesser included offense of battery" (R. 1441-2). There was no conviction of attempted burglary "with intent to commit a sexual battery."

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

In regard to this issue, the State argued that because the Indictment included the "with intent to commit sexual battery" language in the burglary count, the judge's finding in aggravation is proper. This totally ignores the jury verdict, which acquitted on the crime charged in the Indictment and convicted merely in the lesser included offense of attempt, to which there was absolutely no intent required by the instructions.

In its Order Denying Motion to Vacate Judgment and Sentence, the Circuit Court merely stated that this issue is barred because it was raised on direct appeal and that this "issue cannot stand where the jury was not misled by this Court's instructions" (Order 6). Even the State recognizes that only a part of this claim

was raised on direct appeal, that part being the insufficiency of the evidence to support the jury's verdict.

The issue concerning the improper instruction at the penalty phase was never raised, nor considered by any court. Neither was the circuit court's improper consideration of an intent not found by the jury ever raised. This is due simply to appellate counsel's failure to properly argue this issue, and trial counsel's failure to properly object. These failures resulted in ineffective assistance of counsel in violation of Mr. Marek's sixth and fourteenth amendment rights. See Kimmelman v. Morrison, 106 S. Ct. 2574 (1986). Moreover the error is fundamental in nature and properly cognizable in collateral proceedings.

2. Automatic Aggravating Factor

Mr. Marek was charged with first-degree murder in the "usual form": murder "from a premeditated design to effect the death of" the victim in violation of Florida Statute 782.04. An indictment such as this which "tracked the statute" charges felony murder: section 782.04 is the felony murder statute in Florida. Lightbourne v. State, 438 So. 2d 380, 384 (Fla. 1983). In this case, it is likely that Mr. Marek was convicted on the basis of felony murder. The State relied extensively on the felonies charged, and argued that the victim was killed in the course of the kidnapping and sexual battery. The jury received instructions on both theories and returned a general verdict, but specifically finding no sexual battery.

If felony murder was the basis of Mr. Marek's conviction, then the subsequent death sentence is unlawful. Cf. Stromberg v. California, 283 U.S. 359 (1931). This is because the death penalty in this case was predicated upon an unreliable automatic finding of a statutory aggravating circumstance -- the very felony murder finding that formed the basis for conviction. Automatic death penalties upon conviction of first-degree murder violate the eighth and fourteenth amendments, as was recently stated by the United States Supreme Court in Sumner v. Shuman, 107 S. Ct. 2716

(1987). In this case, felony murder was found as a statutory aggravating circumstance. ("[T]he murder was committed while the defendant was engaged, or was an accomplice in the commission of an Attempted Burglary with an Assault." (R. 1472). The sentencer was entitled automatically to return a death sentence upon a finding of guilt of first degree (felony) murder. Every felony-murder would involve, by necessity, the finding of a statutory aggravating circumstance, a fact which, under the particulars of Florida's statute, violates the eighth amendment: an automatic aggravating circumstance is created which does not narrow ("[A]n aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty . . . ." Zant v. Stephens, 462 U.S. 862, 876 (1983)). In short, since Mr. Marek was convicted for felony murder, he then faced statutory aggravation for felony murder. This is too circular a system to meaningfully differentiate between who should live and who should die, and it violates the eighth and fourteenth amendments. Lowenfield v. Phelps, 108 S. Ct. 546 (1988).

Under Lowenfield, if narrowing occurs either in the conviction stage (as in Louisiana and Texas) or at the sentencing phase (as in Florida and Georgia), then the statute may satisfy the eighth amendment as written. However, as applied, the operation of Florida law in this case did not provide constitutionally adequate narrowing at either phase, because conviction and aggravation were predicated upon a non-legitimate narrower -- felony-murder.

The conviction-narrower state schemes require something more than felony-murder at guilt/innocence. Louisiana requires intent to kill. Texas requires intentional and knowing murders. This narrows. Here, however, Florida allows a first-degree murder conviction based upon a finding that does not legitimately narrow -- felony murder. Mr. Marek's conviction and sentence required only a finding that he committed a felony during which a killing occurred, and no finding of intent was necessary.

Clearly, "the possibility of bloodshed is inherent in the commission of any violent felony, and . . . is foreseen," Tison v. Arizona, 107 S. Ct. 1676, 1684 (1987), but armed robbery, for example, is nevertheless an offense "for which the death penalty is plainly excessive." Id. at 1683. The same is true of burglary, as Proffitt, 428 U.S. 242 (1976)(burglary felony murder insufficient for death penalty) and other Florida cases have made clear. With felony-murder as the narrower in this case, neither the conviction nor the statutory aggravating circumstance meet constitutional requirements. There is no constitutionally valid criteria for distinguishing Mr. Marek's sentence from those who have committed felony (or, more importantly, premeditated) murder and not received death.

This analysis cannot be sidestepped by any appellate finding of premeditation: first, it cannot be said that the jury found premeditation; second, neither the Florida Supreme Court, nor any other Court, can affirm a premeditation finding, since there is absolutely no evidence on which to base it. If one or the other basis for the conviction results in an unconstitutional sentence, then a new sentencing hearing is necessary. See Stromberg v. California, supra. Consequently, if a felony-murder conviction in this case has collateral constitutional consequences (i.e. automatic aggravating circumstance, failure to narrow), a Florida Supreme Court, or any other court's, finding of premeditation does not cure those collateral reversible consequences.

The circuit court in its Order Denying Motion to Vacate Judgment and Sentence finds that this issue is procedurally barred because it could have been raised on direct appeal and that this issue has been rejected by the Fla. Sup. Ct. on its merits. Swafford v. State, 13 F.L.W. 595, 598 (Fla. Sept. 29, 1988).

It is important to read Lowenfield very carefully. The analysis in Lowenfield was premised on the constitutional requirement that a capital sentencing scheme "genuinely narrow the class of persons eligible for the death penalty." Zant v.

Stephens, 462 U.S. 866, 877 (1982). This "narrowing" may be done in one of two ways: either the legislature may broadly define capital offenses and provide for the narrowing to be done through the jury findings of aggravating circumstances, as in Florida, or the legislature can accomplish the narrowing itself by limiting the definition of a capital offense, as in Louisiana. Lowenfield, 56 U.S.L.W. at 4075.

In Louisiana, first-degree murder is defined to include a narrower class of homicides than is first-degree murder in Florida. Thus while in Florida, to pass constitutional muster, an aggravating circumstance must be found before the death penalty can be imposed, that is not true in Louisiana because there the function of the aggravating circumstance has already been accomplished by the finding of first-degree murder, i.e., the narrowing.

So even though the United States Supreme Court rejected this issue in Lowenfield, it was because the Louisiana sentencing scheme did not rely on the aggravating factor to narrow the class of death eligible.

In Swafford, supra, this court did hold that the engaged-in-felony aggravating circumstance may be proper upon conviction for felony murder or for premeditation. However, no mention of Lowenfield is made, and it is unclear whether the same issue was argued in Swafford as in Mr. Marek's case. In any event, the utilization of an aggravating circumstance which is applied automatically upon conviction for felony murder violates Mr. Marek's constitutional right to an individualized and fair capital sentencing.

D. CONCLUSION

The jury was improperly allowed to consider or inadequately instructed upon the aggravating circumstances of pecuniary gain, heinous, atrocious or cruel, and in the course of an attempted burglary. Because of this, these aggravating circumstances must be set aside and Mr. Marek's death sentence reversed.

ISSUE III

MR. MAREK WAS DENIED HIS EIGHTH AND FOURTEENTH AMENDMENT RIGHTS BY THE USE OF AN IMPROPER AGGRAVATING CIRCUMSTANCE AND THE REFUSAL TO RECOGNIZE MITIGATION OF RECORD.

In Claim XII of the Rule 3.850 Motion, Mr. Marek argued that the jury and judge improperly considered a contemporaneous conviction as a prior crime of violence. In support of this Mr. Marek relied upon Wasko v. State, 505 So. 2d 1314 (Fla. 1987) and Perry v. State, 522 So. 2d 817 (Fla. 1988). In the Rule 3.850 proceedings in circuit court, the judge reached the merits of this issue and concluded that in fact error had been committed. The judge then struck the previous finding of the aggravating circumstance of a prior violent felony. The judge, however, concluded that because three aggravating circumstances remained and no mitigating circumstance had been found, the error was harmless.

First it must be noted that the State has not appealed from the circuit court's finding of error. Thus that finding is law of the case at this point. The issue now on appeal is whether having struck an aggravating circumstance the circuit court properly found that a new sentencing was not required. See Rule 9.140(c)(1)(H) of the Fla. R. App. P.

In making the determination that a new sentencing was not in order the judge relied upon the presence of three remaining aggravating circumstances. However, as set out in Issue II, supra, these aggravators were improperly considered. Moreover, the judge's reliance upon no mitigation was in error.

Both statutory and nonstatutory mitigating circumstances are set forth in the record. First, the record clearly established that Mr. Marek was a good prisoner who had caused no trouble while incarcerated prior to and during trial, and even after he had been convicted of first degree murder. Ms. Terry Webster, a detention officer in the jail, testified during the penalty phase that in the course of working at the jail she came to know John Marek.

Q Did you get to know him at all in the sense of knowing him by sight and speaking with him?

A I basically know most of the detainees in there. I make it a point to get to know them so I can be on a one to one basis with most of them.

Q Did you get to know Mr. Marek in that fashion as well?

A Yes, he was in one of the favored cells.

Q In the course of getting to know him was he ever disrespectful towards you? Did he ever use any foul language in your presence?

A He never used any foul language and he was always polite.

Q Have there been male inmates who have been disrespectful towards you? As a female detention officer do you ever get the wrath?

A Most definitely.

Q Do you put Mr. Marek in that character- ization of someone who is disruptive?

A No, sir.

Q Has he ever been anything other than polite with you?

A No.

Q Calling your attention to Mr. Marek in the last, I guess few days, since Friday; are you aware that he was convicted?

A Yes, I am.

Q Did you have any contact with him after that?

A Yes. I've been in contact with him every day since his sentencing or since his conviction.

Q Did you see him on Friday, specifically?

A Yes, I did.

Q Could you tell the ladies and gentlemen of the jury what his mood was after that?

A He was very upset.

Q Was he angry?

A No.

Q Was he crying?

A He was near crying.

Q Has he been anything other than that since Friday?

A He's been very upset since then.

Q Has he been disrespectful to you even throughout that?

A No.

Q Would you just tell the ladies and gentlemen of the jury, I guess in closing, whether he would fall into the category of someone you have trouble with in the jail or you don't?

A We have never had any problems with him the jail.

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

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

(R. 1474)(emphasis in original).

The judge also refused to apply any of the statutory mitigating circumstances. He found that Mr. Marek's age at the time of the offense, 21, was not mitigating (R. 1474, No. 7). He found that the capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was not substantially impaired, even though there was evidence that Mr. Marek consumed a large quantity of alcohol on the date of the offense (R. 1474, No. 6). He also found the consumption of a alcohol did not constitute the mitigating circumstance of extreme mental or emotional disturbance (R. 1473, No. 2). Finally he refused to consider the sentence that Mr. Marek's co-defendant received. Despite the presence

of clearly mitigating circumstances, the court concluded that no mitigating circumstances were present.

The Florida Supreme Court has recognized that the factors were urged by Mr. Marek mitigating. See, e.g., Perry v. State, 522 So. 2d 817 (Fla. 1988)(non-violent background were mitigating); Harmon v. State, 527 So. 2d 182, 189 (Fla. 1988)("model prisoner" is mitigating).

In Eddings v. Oklahoma, 455 U.S. 104 (1982), by a 5-4 majority the Supreme Court reversed a death sentence. Justice O'Connor wrote separately and explained why she concurred in the reversal. Her opinion made clear that the sentencer was entitled to determine the weight due a particular mitigating circumstance; however, the sentencer could not refuse to consider that circumstance as a mitigating factor, 455 U.S. at 119-20.

Here, that is undeniably what occurred. The judge said mitigating circumstances were not present and held that they were not to be considered.

Under Eddings, supra, and Magwood v. Smith, 791 F.2d 1438 (11th cir. 1986), the sentencing court's refusal to accept and find the statutory and non-statutory mitigating circumstances which were established was error. As a result the circuit court was in error when it concluded that the striking of an aggravating circumstance did not require a new sentencing. Certainly in reviewing the harmlessness of this error, consideration must be given to the effect of other sentencing errors as set out in Issue II, supra, and Issue IV, infra. Moreover, even where aggravation remains and no mitigation has been found a death sentence is not necessarily required. Nibert v. State, 508 So. 2d 1 (Fla. 1987). Thus the striking of an aggravating circumstance requires that the death sentence be vacated.

ISSUE IV

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, AND IN VIOLATION OF DOYLE V. OHIO, 426 U.S. 610 (1976).

A. VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS

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

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

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

Here the state argued two nonstatutory aggravating factors to the jury. The state first argued that Mr. Marek showed no remorse. The first argument was made during the closing argument in the guilt phase:

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

(R. 1151-2).

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

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

(R. 1152-3).

Then in argument during the penalty phase, the prosecutor carried those arguments a step further and argued that Mr. Marek should be sentenced to death because Mr. Marek had denied involvement in the homicide, and thus he was a liar:

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

(R. 1306).

The prosecutor also argued that the jury should recommend death because Mr. Marek did not show remorse for the crime:

> There certainly aren't any circumstances of the offense that would be mitigating circumstances in this case. How about the defendant himself? I hope you all watched him as closely as I did during the course of the trial. He appeared to be sleeping during a couple of portions of it but never any emotion. Never any reaction. <u>There was never any remorse that he showed</u>.
>
> The first time apparently there is any action at all or reaction from him was from Deputy Webster after he was convicted but those almost tears that she testified to, those aren't tears for what he's done. <u>Those aren't tears of remorse</u>. Those are tears of sorrow because you convicted him. Because he got caught. That's what he is crying about.

> There's certainly been nothing in this case, nothing at all that he's ever been sorry for what he did. You certainly never heard that from the stand when he testified.

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

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

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

(R. 1308).

The State relied heavily upon nonstatutory aggravating circumstances to justify the imposition of a death sentence. Mr. Marek's jury returned a death recommendation. It is clear that consideration of these nonstatutory aggravating circumstances resulted in that recommendation. This violated Mr. Marek's constitutional guarantee under the eighth and fourteenth amendments.

At the time of sentencing by the trial court, the State relied entirely on the argument made to the jury, which included the above quoted non-statutory aggravating factors. The court in imposing the death sentence specifically found that:

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

(R. 1351)(emphasis added).

Trial counsel testified at the evidentiary hearing that he did not know of a reason for his not objecting to the no remorse argument (T. 368). As to this aspect of this issue (raised as Claim X in the Rule 3.850 Motion to Vacate), the circuit court held that this issue was barred as it should have been raised on appeal, and that it was meritless. As to the failure to raise on appeal, had appellate counsel raised this issue, Mr. Marek would have been entitled to relief. This Court has

specifically barred the issue of lack of remorse as evidence of an aggravating circumstance Robinson v. State, 520 So. 2d 1 (Fla. 1988). Counsel's failure to raise this issue amounts to fundamental and prejudicial constitutional ineffectiveness. No tactical decision can be ascribed to appellate counsel's failure to urge this claim; no procedural bar precluded review of this issue. See Johnson v. Wainwright, 498 So. 2d 935 (Fla. 19870. However, counsel's failure deprived Mr. Marek of the appellate reversal to which he was entitled. See Wilson v. Wainwright, 474 So. 2d 1163 (Fla. 1985); Matire v. Wainwright, 811 F. 2d 1430 (11th Cir. 1987). Mr. Marek's sentence, imposed in violation of the eighth and fourteenth amendments, must now be reversed.

B. VIOLATION OF DOYLE V. OHIO

During closing argument at the penalty phase, the State argued that Mr. Marek deserved a death sentence because he had never said he was "sorry":

> The first time apparently there is any action at all or reaction from him was from Deputy Webster after he was convicted but those almost tears she testified to, those aren't tears of remorse . . .
>
> 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 witness stand when he testified.

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

Such "evidence," however, was clearly not a part of Mr. Marek's "character" but rather Mr. Marek's exercise of his constitutional right to silence. The prosecutor's introduction of Mr. Marek's silence as evidence either supporting aggravation or rebutting mitigation was fundamentally unfair and a violation of due process. Doyle v. Ohio, 426 U.S. 610 (1976).

After his arrest in Daytona Beach, Florida, Mr. Marek was given Miranda warnings (R. 583). The next day, when an investigator from the City of Dania Police Department interviewed Mr. Marek, he was again advised of his Miranda rights (R. 99).

Despite the fact that Mr. Marek had been advised of his right to silence, the State used that silence to urge that Mr. Marek be sentenced to death.

The court accepted the State's argument, finding that Mr. Marek deserved the death sentence in part because "[h]e's not shown any reaction to the crimes he committed let alone any remorse" (R. 1351). In its written findings as to Aggravating and Mitigating Circumstances, the court found that Mr. Marek's silence rebutted mitigation:

> He has not shown any reaction to the crimes he committed let alone any remorse.

(R. 1474)(emphasis in original).

The presentation and use of evidence of post-Miranda silence is forbidden by the United States Constitution. Doyle v. Ohio, 426 U.S. 610 (1976). Doyle reversed a criminal conviction where the prosecution attempted to impeach a defendant's exculpatory trial testimony by eliciting testimony that the defendant remained silent following Miranda warnings. The Court reasoned that the promise of a right to remain silent carries with it the implicit promise that silence will not be penalized. Doyle, 426 U.S. 610, 619, quoting United States v. Hale, 422 U.S. 171, 182-83 (1975)(White, J., concurring). Thus, use of a defendant's post-Miranda silence is fundamentally unfair, in violation of the due process clause of the fourteenth amendment. Doyle, 426 U.S. 610, 619.

Similarly, post-Miranda silence may not be used to rebut an insanity defense. Wainwright v. Greenfield, 106 S. Ct. 634 (1986). Using post-Miranda silence as affirmative proof is indistinguishable from using such silence for impeachment:

> The point of the Doyle holding is that it is fundamentally unfair to promise an arrested person that his silence will not be used against him and thereafter to breach that promise by using the silence to impeach his trial testimony. It is equally unfair to breach that promise by using silence to overcome a defendant's plea of insanity. In both situations, the state gives warnings to protect constitutional rights and implicitly promises that any exercise of those rights will not be penalized. In both

> situations, the State then seeks to make use of the defendant's exercise of those rights in obtaining his conviction. The implicit promise, the breach, and the consequent penalty are identical in both situations.

Greenfield, 106 S.Ct. 634, 639. The Court concluded that just like Doyle, "Greenfield received 'the sort of implicit promise to forego use of evidence that would unfairly "trick" [him] if the evidence were later offered against him at trial.'" Id. at 640, quoting South Dakota v. Neville, 459 U.S. 533, 566 (1983).

The considerations highlighted in Doyle and Greenfield are especially important at a capital sentencing phase. The Constitution requires heightened reliability at a penalty proceeding where a defendant's life is at stake. Gardner v. Florida, 430 U.S. 349 (1977). Therefore, just as a defendant's exercise of constitutional rights may not be used to obtain his conviction, even more so may the exercise of those rights not be used to take his life. See, e.g., Estelle v. Smith, 451 U.S. 454, 462-63 (1981)("Just as the Fifth Amendment prevents a criminal defendant from being made 'the deluded instrument' of his own conviction, . . . it protects him as well from being made the 'deluded instrument' of his own execution. . . . We can discern no basis to distinguish between the guilt and penalty phase . . . so far as the protection of the Fifth Amendment is concerned.").

The invocation of the right to silence following Miranda warnings may not be used in any fashion against an accused. Here, that principle was violated as the State argued silence to establish a nonstatutory aggravating factor. The prosecutor clearly was directing the jury's attention to pretrial and sentencing silence. Clearly, the court believed Mr. Marek's silence was admissible and could be considered in imposing the death sentence. This was fundamental error.

Furthermore, it was deficient performance for either Mr. Marek's trial counsel or appellate counsel not to recognize a Doyle violation and timely raise the issue. Since Mr. Marek's silence was clearly used against him to at least negate "mitigating circumstances," under Kimmelman v. Morrison, 106 S. Ct. 2574 (1986), the death

sentence must be vacated. But for the error, a mitigating circumstance would have been found and as a result on direct appeal a reversal would have occurred.

The circuit court, in its Order Denying Motion to Vacate Judgment and Sentence, held that the prosecutor was commenting on the evidence, not on Mr. Marek's silence, and that any error was harmless. (This issue was raised as Claim XXII in the Rule 3.850 Motion to Vacate.) The court relies on Harris v. State, 438 So. 2d 787 (Fla. 1983)(the Order's reference to "Haines v. State, 438 So. 2d 787 (Fla. 1983)" is apparently in error). However, Harris involved an alleged comment on the failure to testify at trial, not a comment on failure to express remorse. Also, Harris indicates that a comment on the failure to testify can never be harmless.

Here, the comment on silence is clearer than the alleged comment in Harris. The prosecutor said there's nothing in this case to show that he's ever been sorry for what he did (R. 1306-7).

Mr. Marek's death sentence rested on nonstatutory aggravating factors argued to the jury in violation of his fifth, eighth and fourteenth amendment rights. The circuit court was incorrect in finding this issue meritless, and it should now be reversed and remanded for new sentencing proceedings.

ISSUE V

MR. MAREK RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE OF HIS TRIAL.

Defense counsel must discharge very significant constitutional responsibilities at the sentencing phase of a capital trial. The Supreme Court has held that in a capital case, "accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die [made] by a jury of people who may have never made a sentencing decision." Gregg v. Georgia, 428 U.S. 153, 190 (1976)(plurality opinion). In Gregg and its companion cases, the Court emphasized the importance of focusing the jury's attention on "the particularized

characteristics of the individual defendant." Id. at 206. See also Roberts v. Louisiana, 428 U.S. 325 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976).

The state and federal courts have expressly and repeatedly held that trial counsel in capital sentencing proceedings has a duty to investigate and prepare available mitigating evidence for the sentencer's consideration, object to inadmissible evidence or improper jury instructions, and make an adequate closing argument. Tyler v. Kemp, 755 F.2d 741, 745 (11th Cir. 1985); Blake v. Kemp, 758 F.2d 523, 533-35 (11th Cir. 1985); King v. Strickland, 714 F.2d 1481, 1490-91 (11th Cir. 1983), vacated and remanded, 467 U.S. 1211 (1984), adhered to on remand, 748 F.2d 1462, 1463-64 (11th Cir. 1984), cert. denied, 471 U.S. 1016, 85 L.Ed.2d 301 (1985); Douglas v. Wainwright, 714 F.2d 1532 (11th Cir. 1983), vacated and remanded, ____ U.S. ____, 82 L.Ed.2d 874, 879, 104 S. Ct. 3575 (1984), adhered to on remand, 739 F.2d 531 (1984), cert. denied, ____ U.S. ____, 84 L.Ed.2d 321 (1985); Goodwin v. Balkcom, 684 F.2d 794 (11th Cir. 1982); Thomas v. Kemp, 796 F.2d 1322, 1325 (11th Cir. 1986). Trial counsel here did not meet these rudimentary constitutional standards. Cf. King v. Strickland, 714 F.2d 1481 (11th Cir. 1983), vacated and remanded for reconsideration, 467 U.S. 1211 (1984), adhered to on remand, 748 F.2d 1402 (11th Cir. 1984); see also O'Callaghan v. State, supra; Douglas v. Wainwright, 714 F.2d 1532 (11th Cir. 1983), vacated and remanded for reconsideration, 104 S. Ct. 3575, adhered to on remand, 739 F.2d 531 (11th Cir. 1984); Thomas v. Kemp, supra, 796 F.2d at 1325. As explained in Tyler v. Kemp, 755 F.2d 741 (11th Cir. 1985):

> In Lockett v. Ohio, the Court held that a defendant has the right to introduce virtually any evidence in mitigation at the penalty phase. The evolution of the nature of the penalty phase of a capital trial indicates the importance of the jury receiving accurate information regarding the defendant. Without that information, a jury cannot make the life/death decision in a rational and individualized manner. Here the jury was given no information to aid them in the penalty phase. The death penalty that resulted was thus robbed of the reliability essential to assure confidence in that decision.

Id. at 743 (citations omitted). Mr. Marek is entitled to the same relief.

The judge in his order denying relief on this issue justified the deficient performance on the basis that even if Mr. Moldof had had the information he may not have used it. At the evidentiary hearing the judge orally denied this claim saying:

> I agree with you that if he would have found out about that he probably could have done some research on his own or asked for an investigator but I think if he would have found out what he found out today, what I heard over the last couple of days I think that would have only cemented a reasonable person's fear that this man should never be on the street again, in connection with the faces and circumstances of this case.
>
> So I really don't think this in any way would have changed the circumstance of the jury's recommendation. I'll deny five.

(T. 488).

The judge obviously was mixing apples and oranges. He concluded there was no deficient performance because he did not think Mr. Moldof would have used the mitigation anyway. However, the real question in this case is whether the failure to investigate was deficient performance. If there was deficient performance then the prejudice prong of the Strickland standard clearly requires reversal. Confidence in the outcome is undermined because, Mr. Moldof testified:

> Q If you had had Mr. Marek's mother willing to testify that she had abandoned her son and was sorry, is that something you would have wanted to present?
>
> A I would have put her on the stand for sure. If she was willing to come here and testify to that, I would have put her on.
>
> Q If you had had a way to present the background information without opening some of those doors you were afraid of, would you have done that?
>
> A Sure. In other words, you are saying if I could get out some mitigating testimony without the fear of any.
>
> Q If you had written documents to establish the history?

A Sure. Potential mitigating factors and there's no way it's going to come back to hurt me. Sure, want to put that on.

Q In this case, do you recall whether the jury had any background information presented to them on Mr. Marek?

A Just what they got in the guilt phase through his testimony.

(T. 395-96).

John Marek was sentenced to death despite the existence of a plethora of factors calling for a sentence of life imprisonment; this mitigation is set out in the Statement of the Case in some detail and is not repeated here. A wealth of compelling mitigating evidence was easily available and accessible to trial counsel, but was simply ignored. As a result of trial counsel's unreasonable failures, Mr. Marek was sentenced to death by a judge and jury which heard virtually nothing in mitigation, nothing which humanized him, see O'Callaghan v. State, 461 So. 2d 1354, 1355 (Fla. 1984), and nothing which would have allowed for an individualized capital sentencing determination. See Thomas v. Kemp, 796 F.2d 1322 (11th Cir. 1986); Tyler v. Kemp, 755 F.2d 741 (11th Cir. 1985). Here, as in Jones v. Thigpen, "[d]efense counsel neglected [and] ignored critical matters of mitigation at the point when the jury was to decide whether to sentence [John Richard Marek] to death." 788 F.2d 1101, 1103 (5th Cir. 1986).

Evidence concerning Mr. Marek's character and background, his early life, marked by his serious speech deficit and his being labeled "retarded", culminated in his being rejected by his mother after her divorce from his father. His parents had abused him and he spent years in foster homes and residential treatment facilities for emotionally disturbed children. These were facts the jury should have known about John Marek. Since defense counsel failed to present this important information, Mr. Marek was sentenced to death by a judge and jury who knew virtually nothing about him save what the State told them.

Under Florida law there is no question but that the background information that counsel did not pursue would have been admissible as evidence of available mitigating circumstances. The Florida Supreme Court has recognized that the kinds of information available through investigation of Mr. Marek's background were mitigating. For example, a deprived and abusive childhood is mitigating. Holsworth v. State, 522 So. 2d 348 (Fla. 1988)("Childhood trauma has been recognized as a mitigating factor"); DuBoise v. State, 520 So. 2d 260, 266 (Fla. 1988)(jury could have considered "deprived family background"); Burch v. State, 522 So. 2d 810, 813 (Fla. 1988)(jury could have considered "family history of physical and drug abuse"); Brown v. State, 526 So. 2d 903 (Fla. 1988)("family background and personal history . . . must be considered"); Livingston v. State, 458 So. 2d 235 (Fla. 1988)("childhood . . . marked by severe beatings" is mitigating); see also Eddings v. Oklahoma, 455 U.S. 104, 107 (1982).

Counsel had a duty to investigate Mr. Marek's background in order to ascertain whether mitigating circumstances were present. Trial counsel's assertion that Mr. Marek failed to encourage him to investigate the Texas background and provide him with names and addresses is far from an adequate excuse. As the Fifth Circuit held in Martin v. Maggio, 711 F.2d 1273, 1280 (5th Cir. 1983):

> Because a defendant's trial "can be decisively affected by actions of defense counsel in preparing the case," we have insisted that "effective counsel conduct a reasonable amount of pretrial investigation." Washington v. Strickland, 693 F.2d at 1251; accord Baldwin, 704 F.2d at 1332; Bell v. Watkins, 655 F.2d at 1355; Rummell v. Estelle, 590 F.2d 103, 104 (5th Cir. 1979); Davis v. Alabama, 596 F.2d 1214, 1217 (5th Cir. 1979), vacated as moot, 446 U.S. 903, 100 S.Ct. 1827, 64 L.Ed.2d 256 (1980). The extent and scope of the required investigation depend on the "number of issues in the case, the relative complexity of those issues, the strength of the government's case, and the overall strategy of trial counsel." Washington v. Strickland, 693 F.2d at 1251; accord Baldwin, 704 F.2d at 1333.
>
> * * *

> Martin's instruction that his lawyers obtain an acquittal or the death penalty did not justify his lawyers' failure to investigate the intoxication defense. It is undisputed that the attorneys never discussed that option with him. Uncounseled jailhouse bravado, without more, should not deprive a defendant of his right to counsel's better-informed advice. "[M]eaningful discussion with one's client" is one of the "cornerstones of effective assistance of counsel." Gaines v. Hopper, 575 F.2d 1147, 1149-50 (5th Cir. 1978).
>
> Martin's counsel "failed to conduct a reasonably substantial investigation" into the intoxication defense because they had chosen to rely on another defense at trial. See Washington v. Strickland, 693 F.2d at 1254. While their decision to pursue only one of the available defense options does not, by itself, constitute ineffective assistance, "[t]he basis for judicial deference to such a choice . . . is eroded measurably." Id. at 1255. If our review of the record convinced us that counsel had relied on unreasonable assumptions or strategies in deciding not to pursue the defense, a finding of ineffective assistance would be warranted. Id. at 1256.

The Eleventh Circuit adopted the reasoning of Martin in Thompson v. Wainwright, 787 F.2d 1447, 1451 (11th Cir. 1986):

> The reason lawyers may not "blindly follow": such commands is that although the decision whether to use such evidence in court is for the client, Foster v. Strickland, 707 F.2d 1339, 1343 (11th Cir. 1983)(lawyer bound by client's counseled decision to not rely on insanity defense), cert. denied, 466 U.S. 993, 104 S. Ct. 2375, 80 L.Ed.2d 847 (1984) the lawyer first must evaluate potential avenues and advise the client of those offering possible merit. Here, Solomon did not evaluate potential evidence concerning Thompson's background. Thompson had not suggested that investigation would be fruitless or harmful; rather, Solomon's testimony indicates that he decided not to investigate Thompson's background only as a matter of deference to Thompson's wish. Although Thompson's directions may have limited the scope of Solomons' duty to investigate, they cannot excuse Solomon's failure to conduct any investigation of Thompson's background for possible mitigating evidence. Solomon's explanation that he did not investigate potential mitigating evidence because of Thompson's request is especially disturbing in this case where Solomon himself believed that Thompson had mental difficulties. An attorney has expanded duties when representing a client whose condition prevents him from exercising proper judgment.

(emphasis added).

Mr. Marek asked for counsel to represent him in the proceedings. Where he has asked for counsel it is not Mr. Marek's obligation to make binding strategy decisions based on ignorance of the law. Mr. Moldof acknowledged that Mr. Marek was generally lethargic. Regarding the investigation of background materials in Texas, Mr. Moldof had the "impression" that Mr. Marek did not want Mr. Moldof to go there. (T. 333). Under Martin and Thompson, this impression that the defendant did not want counsel to contact those with background information is not a reasonable basis for deficient investigation.

Despite the recognized importance of mitigating evidence, Mr. Marek's counsel conducted a wholly inadequate penalty phase investigation -- he conducted no adequate investigation at all into the critical issues surrounding the jury's and judge's determination of whether his client should live or die (See id.). He knew that the assistance of a mental health professional was necessary, but he did not provide such expert with the information necessary to render such assistance meaningful. See State v. Michael, 13 F.L.W. ___ (Fla. Sept. 22, 1988); see also State v. Sireci, ___ So. 2d ___, No. 70,937 (Fla. December 22, 1988).

Counsel's highest duty is the duty to investigate and prepare. Where, as here, counsel unreasonably flouts that duty, the defendant is denied a fair adversarial testing process and the proceedings' results are rendered unreliable. See, e.g., Kimmelman v. Morrison, supra, 106 S. Ct. at 2588-89 (1986) (failure to request discovery based on mistaken belief state obliged to hand over evidence); Code v. Montgomery, 799 F.2d 1481, 1483 (11th Cir. 1986)(failure to interview potential alibi witnesses); Thomas v. Kemp, 796 F.2d 1322, 1324 (11th Cir. 1986) (little effort to obtain mitigating evidence), cert. denied, 107 S. Ct. 602 (1986); Aldrich v. Wainwright, 777 F.2d 630, 633 (11th Cir. 1985)(failure to depose any of the state's witnesses), cert. denied, 107 S. Ct. 324 (1986); King v. Strickland, 748 F.2d 1462, 1464 (11th Cir. 1984)(failure to present additional character witnesses was not the

result of a strategic decision made after reasonable investigation), cert. denied, 471 U.S. 1016 (1985); Gaines v. Hopper, 575 F.2d 1147 (5th Cir. 1978)(defense counsel presented no defense and failed to investigate evidence of provocation); Gomez v. Beto, 462 F.2d 596 (5th Cir. 1972) (refusal to interview alibi witnesses); see also Nealy v. Cabana, 764 F.2d 1173, 1178 (5th Cir. 1985)(counsel did not pursue a strategy, but "simply failed to make the effort to investigate").

According to counsel, the investigation was not conducted because counsel was busy with other cases and he did not expect to find any useful information from people in Texas. Yet counsel knew Mr. Marek was from Texas. Certainly from Dr. Krieger's report counsel knew that Mr. Marek had been abandoned by his mother and turned over to the custody of the State of Texas. Further he had to know from Dr. Krieger's report that there was numerous psychological evaluations there. It was established at the hearing that if counsel had gone to the address appearing on Mr. Marek's Texas driver's license, a copy of which was in Mr. Moldof's file, he would have found Sallie and Jack Hand, Mr. Marek's last set of foster parents. They in turn would have directed Mr. Moldof to the Texas welfare officials who had addresses on all of the important people in Mr. Marek's background as well as documentation of his history. (The mitigating facts discoverable in Texas were set out in detail in the Statement of the Case and are not repeated here.) Counsel could have written Texas welfare directly; he knew Mr. Marek had been placed in the custody of the State of Texas. Yet none of this was done.

Trial counsel's unreasonable omissions did not end with the failure to investigate and present the evidence detailed above: there was even more compelling mitigating evidence which never made its way to the jury because trial counsel simply failed to look. Had trial counsel conducted a reasonable investigation and effectively employed the assistance of a mental health expert, substantial mental health-related mitigating evidence would have been developed. Such an expert has now

evaluated Mr. Marek, and his preliminary conclusions are compelling. Dr. Harry Krop has diagnosed John as having a long standing chronic emotional disturbance, with a possibility of a neurological disorder. Dr. Krop's report also notes John's background and that John has never had a close friend. Finally, it notes that John's judgment was most likely seriously impaired on the date of the incident and that John demonstrates a serious lack of motivation to help himself. Finally, Dr. Krop's evalution reveals the immaturity that has been repeatedly documented about John since his young childhood. At the time of the offense, John was 21 years old. But he was operating at a much younger level.

An expert's account of Mr. Marek's impairments -- throughout his life and as they may have affected his conduct at the time of the offense -- would have been compelling mitigation. Counsel simply failed to look. That failure was patently unreasonable. All of this evidence was highly mitigating. All of it was available to trial counsel. All of it should have been uncovered and presented to Mr. Marek's jury and judge. Trial counsel's failure to do so was deficient performance that rendered the penalty phase an unreliable, ineffectual, non-adversarial testing. Confidence in the outcome must be undermined when the plethora of mitigation as set out in the statement of the case, supra. The penalty phase was not an adversarial testing of whether Mr. Marek should live or die.

Defense counsel failed to present the great wealth of mitigating circumstances available. He also failed to object to the court's failure to read the entire list of statutory mitigating factors, including the lack of significant history of prior criminal activity. Counsel failed to reasonably investigate and know the facts of the credit card conviction in Texas. He unreasonably failed to argue Mr. Marek's lack of significant criminal history. He unreasonably failed to have the jury instructed on all of the possible statutory mitigating circumstances.

John Marek had no prior convictions for violent felonies at the time of his murder trial. Counsel was ineffective for failing to argue this mitigating circumstance on his behalf. Mr. Marek's only prior conviction of any kind was for credit card fraud, a property crime. But the court ruled that it would allow the State to introduce evidence of this property crime if defense counsel were to argue the mitigating circumstance of no significant history of prior crimes. Counsel did not argue this in mitigation.

When the judge instructed the jury on the factors they could consider in mitigation, he read all of the statutory factors except the first: no significant history of prior criminal activity. The failure of defense counsel to argue that all of the statutory mitigants should be read to the jury was also ineffective assistance. See Eddings v. Oklahoma, 455 U.S. 104 (1982).

Counsel unreasonably failed to obtain an instruction on no significant criminal history as a mitigating circumstance. Certainly the one prior felony conviction for credit card fraud involving the attempt to purchase $52.00 worth of merchandise does not establish a significant criminal history. Counsel's performance was unreasonable. As a result Mr. Marek was substantially prejudiced because a statutory mitigating circumstance available for the jury's consideration was not presented and pursued. The jury was in essence precluded from considering Mr. Marek's lack of criminal history as mitigating circumstance. See, Mills v. Maryland, 108 S. Ct. 1860 (1988).

Relief is appropriate, and the trial court erred in the novel approach it chose to employ (an approach which does not conform to Strickland v. Washington) in order to deny the instant claim.

ISSUE VI

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.

This issue was raised as Claim XVII in the Rule 3.850 motion to vacate and Claim X in the petition for writ of habeas corpus. It will be presented in shortened form here.

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

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

> At that time, the State and the defense would present arguments for or against the sentence of death and the jury would then render an advisory opinion to me as to whether the defendant should be sentenced to life imprisonment or to death. . . .
>
> The Court could then sentence the defendant to life imprisonment or to death since the Court would not be required to follow the advise of the jury.

> So the jury doesn't impose any punishment if a verdict of guilty of murder in the first degree is rendered. The imposition of the punishment is my function rather than your function. . . .

(R. 24-25).

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

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

(R. 30).

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

> Now, let's take the second step. If you did that, and the defendant was found guilty of murder in the first degree, you would be sent back again with the same jury to decide whether or not you feel the defendant should be put to death or whether he should receive life in prison. It's strictly your feeling under the circumstances and to give me what you feel is advice.
>
> I don't have to accept your advice, no matter what it is but it's just for me to listen to your advice. I don't care. . . .
>
> Certainly, I'll strongly consider your advice but whatever it is I want no part of your thinking process. Do you understand that?

(R. 35).

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

> The question is if you found the defendant guilty of murder in the first degree and I sent you back to deliberate again as to what advice you want to give me as far as a

sentence is concerned, you had two choices: One for the death penalty and one for life in prison, would you at least think about the death penalty? I don't care if you come back with it because I don't have to listen to it, whatever it is. Even if you told me you wanted me give him the death penalty, I don't have to do that. I can give him life in prison.

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

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

(R. 37)(emphasis added).

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

(R. 50)(emphasis added).

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

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

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

(R. 112).

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

MR. CARNEY: . . . I guess the big difference between a murder in the first degree trial and another trial, it's the

only trial if you return a verdict of guilty as charged where the jury has any input at all or can make any recommendation on the sentence.

Ordinarily, when you return a verdict of guilty that's the end of your job. At that point you leave and the Court at some point imposes a sentence but in a murder in the first degree case the jury as members of the community give the Court their input as to what they feel an appropriate sentence should be.

* * * *

MR. CARNEY: . . . You were told to disregard any possible consequences as far as a verdict and render a verdict based on the law and based on the evidence.

Once you have done that, if you then return a verdict of murder in the first degree, at that point we then proceed into phase two of the trial which would be the advisory. . . . [A]nd you go back into the jury room again a second time and then make an advisory recommendation; either recommending life imprisonment or making a recommendation of the death penalty which recommendation is not binding on the Court. It's simply a recommendation that you as members of the jury feel would be an appropriate sentence. . . .

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

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

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

(R. 220)(emphasis added).

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

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

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

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

(R. 1256).

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

(R. 1257).

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

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

(R. 1277).

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

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

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

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

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

(R. 1300)(emphasis added).

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

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

(R. 1321)(emphasis added).

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

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

(R. 1325)(emphasis added).

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

Caldwell v. Mississippi, 472 U.S. 320, 105 S. Ct. 2633 (1985), held that prosecutorial argument which tended to diminish the role of a capital sentencing jury violated the eighth amendment. Because the "view of its role in the capital sentencing procedure" imparted to the jury by the prosecutor's improper and misleading argument was 'fundamentally incompatible with the Eighth Amendment's heightened 'need for reliability in the determination that death is the appropriate punishment in a specific case,'" the Court vacated Caldwell's sentence of death. Caldwell, 105 S. Ct. at 2645, citing Woodson v. North Carolina, 428 U.S. 280, 305 (1976). See also, Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986), reh. denied with opinion sub nom., Adams v. Dugger, 816 F.2d 1493 (11th Cir. 1987), cert. granted, 108 S. Ct. 1106 (1988); Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988)(en banc).

The diminution of jury responsibility which occurred here is far more egregious than that in Caldwell. Here it was the trial court that directly misinformed the

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

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

In Mr. Marek's case the Court itself made some of the statements at issue, and the error is thus even more substantial:

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

Adams v. Wainwright, 804 F.2d at 1531. There can be no doubt that the comments and instructions diminished Mr. Marek's jury's view of its role.

The circuit court's holding on this issue was that it was procedurally barred and further without merit. However, this claim cannot be barred. Voir dire was never transcribed until the instant Rule 3.850 motion to vacate was filed. This issue was not raised before not due to any tactical decision, but due to the ineffective failure to have voir dire transcribed. As set out more fully in the Rule

3.850 motion and the habeas petition, the comments and instructions did not accurately explain the law in Florida. Relief is now proper.

ISSUE VII

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

This issue was raised as Claim XV in the Petition for Writ of Habeas Corpus, and is hereby specifically incorporated herein. It will not be repeated in detail in this brief. In the interest of completeness, however, the State's response will be addressed.

In claiming that appellate counsel was not ineffective for failing to raise this issue, the State ignores the fact that appellate counsel never had voir dire transcribed, except to note in passing that the issue is frivolous and thus it does not matter that the claim was never reviewed. The State fails to recognize that appellate counsel cannot strategically decide not to raise an issue that he has not reviewed. While the hallmark of an experienced advocate may be the ability to "winnow[] out weaker arguments on appeal and focus[] on one central issue if possible" Jones v. Barnes, 103 S. Ct. 3308, 3312 (19830, it certainly cannot be said that that was done in Mr. Marek's case. This issue deserves to be addressed now, and relief is thereafter appropriate.

ISSUE VIII

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

This issue is set out in the Petition for habeas Corpus as Claim XIV, which is hereby specifically incorporated herein, and will not be repeated in detail in this brief.

This issue involves fundamental error which infected both the guilt and penalty phases of Mr. Marek''s trial, and is thus cognizable in these proceedings. The

State's response to this issue is that it is procedurally barred without merit. However, this claim is not procedurally barred because it was ineffective assistance of counsel to fail to have the voir dire proceedings transcribed so that this issue could be seen. This is the first time this issue has been presented, because it is the first time voir dire has been reviewed. Relief is appropriate.

ISSUE IX

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.

This issue was raised as Claim XV in the Rule 3.850 motion to vacate.

It is a fundamental precept that constitutes a primary underpinning of the constitutionality of the death penalty that a trial judge must engage in an independent and reasoned process of weighing aggravating and mitigating factors in determining the appropriateness of the death penalty in a given case:

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

(emphasis added).

In this case the trial court clearly prepared his decision prior to the sentencing proceeding, as he announced prior to arguments:

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

(R. 1338).

This Court has discussed the failure of a trial judge to engage in a meaningful weighing of aggravating and mitigating circumstances before imposing the death sentence. See Nibert v. State, 508 So. 2d 1 (Fla. 1987); Muehleman v. State, 503 So. 2d 310 (Fla. 1987); Van Royal v. State, 497 So. 2d 625 (Fla. 1986); Patterson v. State, 513 So. 2d 1257 (Fla. 1987).

Here, the court came to its conclusion prior to hearing evidence or argument at sentencing. A trial court cannot impose a death sentence in an arbitrary or capricious manner:

> In order to satisfy the requirements of the eighth and fourteenth amendments, a capital sentencing scheme must provide the sentencing authority with appropriate standards "that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition." Proffitt v. Florida, 428 U.S. 2542, 258, 96 S.Ct. 2960, 2969, 49 L.Ed.2d 913, 926 (1976). After reviewing the psychiatric evidence that was before the state court, we must conclude that the state court's rejection of the two mental condition mitigating factors is not fairly supported by the record and that, as such, Magwood was sentenced to death without proper attention to the capital sentencing standards required by the Constitution.

Magwood v. Smith, 791 F.2d 1438, 1449 (11th Cir. 1986). In Magwood the court found that it was error for the trial court to totally disregard evidence of mitigation. Similarly, the court here acted in an arbitrary and capricious manner in totally disregarding the nonstatutory mitigating evidence offered by Terry Webster at the penalty phase, that Mr. Marek was a trouble free prisoner.

It is clear that the court failed to conduct an independent sentencing. The

circuit court's ruling on this claim, in its Order Denying Motion to Vacate Judgment and Sentence, was that this claim is procedurally barred because it could and should have been raised on appeal. The court further cites Palmes v. State, 397 So. 2d 648 (Fla. 1981), as authority for denying this claim on the merits. However, it appears that Palmes has not survived Van Royal, supra, which is new case law which justifies the presentation of this issue at this juncture.

There is no indication in the record that the trial judge considered the matters presented at the sentencing. He cannot cure that error now by simply denying this claim. The error is evident, and a new sentencing should be ordered.

ISSUE X

MR. MAREK'S SENTENCE OF DEATH CONSTITUTES CRUEL AD 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.

This issue was raised as Claim XVIII in the Rule 3.850 Motion to Vacate Judgment and Sentence. The circuit court held that this issue is procedurally barred, and that its prior findings are sufficient and need not be revisited. Mr. Marek respectfully disagrees and restates that Tison v. Arizona, 107 S. Ct. 1676 (1987), changes the standard by which a person may be found to have the criminal culpability required before imposition of the death penalty. Further, the trial court's findings of fact were not sufficient under either Enmund v. Florida, 458 U.S. 782, 102 S. Ct. 3368 (1982), or Tison, supra, and so cannot stand now. Relief is more than proper.

ISSUE XI

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.

This issue was set forth in Mr. Marek's Rule 3.850 Motion to Vacate as Claim XVI, which is hereby incorporated by reference, and will not be repeated in detail.

The circuit court's ruling on this issue was that it was procedurally barred and that on the merits, the instructions did not impose a burden of proof on Mr. Marek.

The court's ruling did not consider that this claim alleged fundamental error and eighth amendment principles involving Mr. Marek's right to a reliable verdict in a capital case. See Beck v. Alabama, 447 U.S. 625 (1980). The court also failed to consider the ineffective assistance of appellate counsel for failing to raise this issue. As reflected by the allegations presented by the Rule 3.850 motion and by the entire record in this case, this claim was properly raised and its merits require relief.

ISSUE XII

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.

This issue was raised as Claim XXI in Mr. Marek's Rule 3.850 Motion to Vacate, which is hereby specifically incorporated by reference, and will not be repeated here in detail. The circuit court denied this cliam as procedurally barred, and as not meriting relief.

The court's procedural ruling did not consider the ineffective assistance of counsel alleged. Additionally, this claim alleged fundamental due process and eighth amendment principles. Mr. Marek is entitled to a reliable sentencing recommendation. Here the jury was erroneously informed that its verdict must be by a majority vote. The reliability of the sentencing determination was undermined. Relief is appropriate now.

ISSUE XIII

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

This issue was raised as Claim XVI in Mr. Marek's Petition for Writ of Habeas Corpus, which is incorporated herein by reference. This claim is being added here for completeness. The State's response to this issue is that it should have been raised on appeal, and that it is unmeritorious.

Mr. Marek restates that this issue involves a classic violation of longstanding principles of Florida law. See Alford v. State, 307 So. 2d 433 (Fla. 1975). It virtually "leaped out upon even a casual reading of transcript." Matire v. Wainwright, 811 F. 2d 1430, 1438 (11th cir. 19870. It undermines confidence in the fairness and correctness of this capital proceeding. See Wilson v. Wainwright, 474 So. 2d 1163 (Fla. 19850. This claim involves fundamental due process and the ineffective assistance of counsel. Relief is now proper.

ISSUE XIV

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.

This issue was raised as Claim I in the Rule 3.850 Motion to Vacate, which is incorporated herein by reference, and will not be repeated in detail. The Circuit Court's Order Denying Motion to Vacate Judgment and Sentence held that defense counsel was not ineffective for failing to request a competency hearing. However, at the evidentiary hearing testimony was presented that the original psychologist, Dr. Krieger, who examined Mr. Marek had questions about his competency and communicated them to defense counsel (T. 289). Counsel indicated that he had his own questions about competency (T. 384) and he initially asked for a psychological report because he was concerned about his lack of rapport with Mr. Marek (T. 340).

Finally, Dr. Krieger testified that he never really resolved his questions about Mr. Marek's competency (T. 289). However, a competency hearing was never requested. Defense counsel indicated that throughout his preparation for this trial, he was concerned that Mr. Marek was not motivated to help himself. Just before the trial, counsel went to great pains to arrange for Mr. Marek to be transported to another jail where he would be able to get some sun so he would not look so pale for trial. However, even though he knew the purpose of this transfer, Mr. Marek chose to be placed in a homosexual cell block where he could not get any sun rather than be placed where he would get sun to look better for trial (T. 334-5). Defense counsel testified that Mr. Marek was never very interested in his case, he was just there (T. 334).

Dr. Krop, a psychologist who evaluated Mr. Marek prior to the Rule 3.850 hearing, testified that he was unable to retrospectively determine Mr. Marek's competency at the time of trial, it was clear from Dr. Krieger's report that there were questions about Mr. Marek's self-motivation at the time of trial. Dr. Krop testified that he did not believe Dr. Krieger had enough information at the time of trial to adequately determine Mr. Marek's level of motivation (T. 149).

Mr. Marek was forced to proceed to trial without an adequate determination having been made as to his competency. Consequently, his conviction and sentence to death stand in stark violation of his rights under the fifth, sixth, eighth and fourteenth amendments to the United States Constitution. See Pate v. Robinson, 383 U.S. 375 (1966); Hill v. State, 473 So. 2d 1253 (Fla. 1985); Mason v. State, 489 So. 2d 734 (Fla. 1986). Counsel clearly was ineffective for failing to have this fundamental question of competency determined. Relief is now warranted.

ISSUE XV

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 EIGHTH 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.

This issue was raised as Claim II in Mr. Marek's Rule 3.850 Motion to Vacate, which is specifically incorporated herein by reference, and which will not be repeated here in detail.

A criminal defendant is entitled to expert psychiatric assistance when the State makes his or her mental state relevant to guilt-innocence or sentencing. Ake v. Oklahoma, 470 U.S. 68 (1985), State v. Sireci, ___ so. 2d ___, No. 70,937 (Fla. December 22, 1988). What is required is an "adequate psychiatric evaluation of [the defendant's] state of mind." Blake v. Kemp, 758 F.2d 523, 529 (11th Cir. 1985). In this regard, there exists a "particularly critical interrelation between expert psychiatric assistance and minimally effective representation of counsel." United States v. Fessel, 531 F.2d 1275, 1279 (5th Cir. 1976). When mental health is at issue, counsel has a duty to conduct proper investigation into his or her client's mental health background, see, e.g., O'Callaghan v. State, 461 So. 2d 1354, 1355 (Fla. 1984), and to assure that the client is not denied a professional and professionally conducted mental health evaluation. See Fessel, supra; Mason v. State, 489 So. 2d 734 (Fla. 1986); Mauldin v. Wainwright, 723 F.2d 799 (11th Cir. 1984).

On this issue, the Circuit Court ruled, in its Order Denying Motion to Vacate Judgment and Sentence, that Mr. Marek was evaluated in a professional, competent manner. However, at the Rule 3.850 evidentiary hearing, Dr. Krieger, the original evaluating psychologist, testified that he was given virtually no background or outside information pertaining to Mr. Marek, but that he relied exclusively on Mr.

Marek's self-report (T. 268). Further, Dr. Krieger testified that he ran two psychological tests on Mr. Marek, the Minnesota-Multiphasic Personality Inventory (MMPI) and the Carlson Screening test (T. 269; 268). both tests indicated that Mr. Marek was exaggerating his symptoms, and Dr. Krieger determined that neither test was valid (T. 269; 275). Still, Dr. Krieger relied entirely on Mr. Marek's self-report, and did not request additional background information (T. 279). Dr. Krieger explained his reasoning for a limited evaluation was premised on financial concerns:

> A. Well, we have a reality here in Broward County which is a limited budget. In the best of all possible worlds each expert evaluation would mean that the examiner could spend a week working up the case. Go through piles or documents. Interview family members. This sort of thing. And sometimes that would add to the end result of evaluation.
>
> Those of us who work in a more metropolitan, higher pressure, higher volume kind of situation have found that you can do a credible job without getting all of that information. It may add something but the question is what the returns are for the investment.
>
> Initially, when I started working in this County doing these evaluations I did about three or four hours of testing and interview. Perhaps a year or two after I started I remember Judge Coker was chief judge at that time and there was a decision made by financial people or whomever that there was going to be a flat fee for the evaluation.
>
> I went and spoke with him and explained that there wasn't any way that I could make a living and do the sort of evaluation I was doing before for a third of the dollars. And he said well, he understood that and, you know, as long as they were able to get people who would do an evaluation and present findings for that amount of money that that's the way it was going to be and so that's kind of the reality which has continued for the next whatever, 8 years of my practice.

Dr. Krop, a psychologist who also testified at the evidentiary hearing, testified that background information is essential in order to render a psychiatric opinion; it is necessary to corroborate, or contradict, what the client relates in his self-report (T. 138). Also, background information is critical to provide

information about a client's childhood that he might not be aware of, such as difficulties during his birth, and childhood accidents (T. 139).

Such was the case here. Four volumes of background material were introduced at the evidentiary hearing as Exhibit 1. Also, Mr. Marek's mother, father and brother, along with two foster parents testified at the evidentiary hearing. Among other things, which are more fully set out in the introduction, the background information showed that John Marek was born after a very difficult pregnancy. His mother, Margaret Begley, took a variety of medication during her pregnancy, for depression and weight loss and other things (T. 80) and her body tried to abort John before he was born (T. 79). When John was about 8 months old, he was fed pills as if they were candy by his brother, and went into convulsions as he was being taken to the hospital to have his stomach pumped (T. 107-109; 211-13). The doctors told John's father that he should not expect John to grow up normally because he had been brain dead (T. 212). Through his history John was diagnosed as having either organic brain dysfunction or brain damage. See Ex. 1. No consideration was ever given to that by Dr. Krieger.

These were just a few of the things that Dr. Krieger did not know about (T. 282). The background information also included years of psychological and psychiatric evaluations done on Mr. Marek by Texas Welfare Services, and by the residential treatment facilities in which John was enrolled. Even prior to the evidentiary hearing Dr. Krieger refused to review the background materials and thus when he testified he could not express an opinion regarding those materials.

The Due Process Clause protects indigent defendants against professionally inadequate evaluations by psychiatrists or psychologists. The fourteenth amendment mandates that an indigent criminal defendant be provided with an expert who is professionally fit to undertake his or her task, and who undertakes that task in a professional manner. Ake v. Oklahoma, 470 U.S. 68 (1985).

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

In this case, Mr. Marek was denied both his federal and state right to professionally adequate mental health assistance. As a result Mr. Marek was prejudiced by not having a timely competency determination and by not having mental health mitigation to the jury. Relief is appropriate now.

ISSUE XVI

JOHN MAREK WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE OF HIS CAPITAL TRIAL IN VIOLATION OF HIS SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

Courts have repeatedly pronounced that "[a]n attorney does not provide effective assistance if he fails to investigate sources of evidence which may be helpful to the defense." Davis v. Alabama, 596 F.2d 1214, 1217 (5th Cir. 1979), vacated as moot, 446 U.S. 903 (1980). See also Beavers v. Balkcom, 636 F.2d 114, 116 (5th Cir. 1981); Rummel v. Estelle, 590 F.2d 103, 104-105 (5th Cir. 1979); Gaines v. Hopper, 575 F.2d 1147, 1148-50 (5th Cir. 1978). See also Goodwin v. Balkcom, 684 F.2d 794, 805 (11th Cir. 1982)("[a]t the heart of effective representation is the independent duty to investigate and prepare"). Likewise, courts have recognized that in order to render reasonably effective assistance an attorney must present "an intelligent and knowledgeable defense" on behalf of his client. Caraway v. Beto, 421 F.2d 636, 637 (5th Cir. 1970). Thus, an attorney is charged with the responsibility of presenting legal argument in accord with the applicable principles of law. See, e.g., Nero v. Blackburn, 597 F.2d 991 (5th Cir. 1979); Beach v. Blackburn, 631 F.2d 1168 (5th Cir.

1980); Herring v. Estelle, 491 F.2d 125, 129 (5th Cir. 1974); Rummel v. Estelle, 590 F.2d at 104; Lovett v. Florida, 627 F.2d 706, 709 (5th Cir. 1980).

A. FAILURE TO INVESTIGATE AND PRESENT A DEFENSE ON ALCOHOL ABUSE INTOXICATION

This aspect of this issue was set out as Claim VI in Mr. Marek's Rule 3.850 Motion to Vacate, which is hereby specifically incorporated by reference, and will not be repeated in detail. The Circuit Court's ruling, in its Order Denying Motion to Vacate Judgment and Sentence, was that counsel was not ineffective for failing to present a defense based on intoxication because Mr. Marek's "actions during the crime as well as his appearance before and after the crime belie his contention that he was too intoxicated to form a specific intent." (Order, p. 4).

At the evidentiary hearing, the defense counsel, Mr. Moldof, testified that he did not present an intoxication defense because of the dexterity required to get the victim into the lifeguard shack (T. 356). Mr. Marek's testimony at trial was that he had passed out in the pickup truck after offering Ms. Simmons a ride, and that he did not know what happened to her (R. 946-48). If he was not conscious at the time of the assault, then the dexterity of the killer would not affect his intoxication defense.

In any event, defense counsel never investigated Mr. Marek's problem with alcohol to determine whether an intoxication defense was viable. The jury should have been made aware of Mr. Marek's alcohol abuse and the effects alcohol would have had on a person with his mental and emotional limitations.

Defense counsel also never investigated Mr. Marek's history of alcohol abuse for use with a diminished capacity defense, or for mitigation. Trial counsel's ineffectiveness deprived Mr. Marek of his rights under the sixth, eighth and fourteenth amendments and prejudiced his rights under the standard set forth in Strickland v. Washington, 466 U.S. 668 (1984). Relief is proper.

B. INEFFECTIVENESS IN OTHER AREAS

Ineffectiveness in the quilt phase of Mr. Marek's trial was raised as Claim V in his Rule 3.850 Motion to Vacate, which is specifically incorporated by reference herein, and will not be repeated in detail. Claim V of the Motion to Vacate also raised ineffective assistance in the penalty phase, which is addressed in this brief as Issue V. The Circuit Court's ruling on this issue, in its Order Denying Motion to Vacate Judgment and Sentence, discusses only ineffectiveness going toward the penalty phase, and does not specifically discuss any allegation of ineffectiveness as to the guilt phase. However, the Order denies the ineffectiveness claim (Claim V, Rule 3.850 Motion to Vacate) in its entirety.

Mr. Marek argues that his defense counsel was ineffective in significant areas during the guilt phase of his trial, including failure to effectively cross-examine Officer Rickmeyer (R. 1034-48), to effectively argue against the introduction of Mr. Marek's statements in the State's case in rebuttal, in failing to have voir dire transcribed, and other areas more fully set forth in the Rule 3.850 motion. None of these were addressed by the Circuit Court except by way of the blanket denial of this claim.

Even if counsel provides effective assistance at trial in some areas, the defendant is entitled to relief if counsel renders ineffective assistance in his or her performance in other portions of the trial. Washington v. Watkins, 655 F.2d 1346, 1355, rehearing denied with opinion, 662 F.2d 1116 (5th Cir. 1981), cert. denied, 456 U.S. 949 (1982). See also Kimmelman v. Morrison, 106 S. Ct. 2574 (1986). Even a single error by counsel may be sufficient to warrant relief. Nelson v. Estelle, 642 F.2d 903, 906 (5th Cir. 1981)(counsel may be held to be ineffective due to single error where the basis of the error is of constitutional dimension); Nero v. Blackburn, 597 F.2d at 994 ("sometimes a single error is so substantial that it alone causes the attorney's assistance to fall below the Sixth Amendment .cp3 standard");

Strickland v. Washington, supra; Kimmelman v. Morrison, supra.

This issue should be addressed on its merits, and relief is thereafter warranted.

ISSUE XVII

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.

This issue was raised as Claim III in Mr. Marek's Rule 3.850 Motion to Vacate and claim XIII of the Habeas Petition, which is specifically incorporated herein by reference, and will not be repeated here in detail. The Circuit Court's ruling on this issue was that it could and should have been raised on appeal, and that it has no substantive merit.

As noted in the Motion to Vacate, trial counsel did request an instruction on circumstantial evidence, but was refused (R. 1075-79; 1225). In ruling that this claim is procedurally barred, the lower court ignored the ineffective assistance of appellate counsel in failing to raise this claim. The court also cites Rembert v. State, 445 So. 2d 337 (Fla. 1984) for the proposition that no instruction was warranted. Rembert merely states that a trial court can give such an instruction if, in its discretion, it finds it necessary "due to the facts of any particular case." Supra at 339.

Mr. Marek was on trial for his life. The evidence against him was entirely circumstantial. The court's refusal to grant an instruction may well have enhanced the risk of an unwarranted conviction and, where a defendant's life is at stake, such a risk cannot be tolerated. Beck v. Alabama, 447 U.S. 625, 637 (1980). This issue should have been raised on appeal. The failure to argue this issue of appeal was ineffective assistance of counsel. Kimmelman v. Morrison, 106 S. Ct. 2574 (1986). Relief is now proper.

ISSUE XVIII

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.

This issue was raised as Claim IV in the Rule 3.850 Motion to Vacate and as Claim XII in the Habeas Petition, which is specifically incorporated by reference hereby, and will not be repeated in detail. The Circuit Court's ruling on this claim was that it could and should have been raised on appeal, and that counsel was not ineffective for failing to object at trial to various comments made by the prosecution.

This ruling does not consider, to the extent that objections were made during trial, the ineffective assistance of appellate counsel. Additionally, this claim involves fundamental due process and eighth amendment principles involving Mr. Marek's right to a reliable verdict in a capital case. See Beck v. Alabama, 447 U.S. 625, 637 (1980). As reflected by the allegations presented by the Rule 3.850 motion and by the entire record in this case, this claim was properly raised and its merits require relief.

ISSUE XIX

THE CIRCUIT COURT JUDGE WAS IN ERROR IN REFUSING TO DISQUALIFY HIMSELF FROM PRESIDING OVER THE 3.850 PROCEEDING.

The Florida Rules of Criminal Procedure provide for the disqualification of a judge as follows:

VII. DISQUALIFICATION AND SUBSTITUTION OF JUDGE

RULE 3.230. DISQUALIFICATION OF JUDGE

(a) The State or the defendant may move to disqualify the judge assigned to try the cause on the grounds: that the judge is prejudiced against the movant or in favor of the adverse party; that the defendant is related to the said judge by consanguinity or affinity within the third degree; or that said judge is related to an attorney or counselor of

> record for the defendant or the state by consanguinity or affinity with the third degree; or that said judge is a material witness for or against one of the parties to said cause.
>
> (b) Every motion to disqualify shall be in writing and be accompanied by two or more affidavits setting forth facts relied upon to show the grounds for disqualification, and a certificate of counsel of record that the motion is made in good faith.
>
> (c) A motion to disqualify a judge shall be filed no less than 10 days before the time the case is called for trial unless good cause is shown for failure to so file within such time.
>
> (d) The judge presiding shall examine the motion and supporting affidavits to disqualify him for prejudice to determine their legal sufficiency only, but shall not pass on the truth of the facts alleged nor adjudicate the question of disqualification. If the motion and affidavits are legally sufficient, the presiding judge shall enter an order disqualifying himself and proceed no further therein. Another judge shall be designated in a manner prescribed by applicable laws or rules for the substitution of judges for the trial of causes where the judge presiding is disqualified.

(emphasis added).

The Florida Supreme Court has repeatedly held that where a petition demonstrates a preliminary basis for relief, a judge who is presented with a motion for disqualification "shall not pass on the truth of the facts alleged nor adjudicate the question of disqualification." Bundy v. Rudd, 366 So. 2d 440 (Fla. 1978).

The Code of Judicial Conduct emphasized the importance of an independent and impartial judiciary in maintaining the integrity of the judiciary:

> Canon 1
>
> A JUDGE SHOULD UPHOLD THE INTEGRITY AND INDEPENDENCE OF THE JUDICIARY
>
> An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should himself observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.

Canon 2

A JUDGE SHOULD AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY IN ALL HIS ACTIVITIES

A. A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary

. . .

C. Disqualification.

(1) A judge should disqualify himself in a proceeding in which his impartiality might reasonable be questioned, including but not limited to instances where:

(a) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(emphasis added).

The purpose of the Code of Judicial Conduct and the Disqualification Rule is to prevent "an intolerable adversary atmosphere" between the trial judge and the litigant. Department of Revenue v. Golder, 322 So. 2d 1, 7 (Fla. 1975) as cited in Bundy v. Rudd, supra.

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

MOTION TO DISQUALIFY JUDGE

The petitioner, JOHN MAREK, hereby moves this Court to enter an order disqualifying himself from hearing the Motion to Vacate Judgment and Sentence pursuant to Rule 3.230 Fla.R.Crim.P. and as grounds would state:

1. Judge Stanton S. Kaplan, heard the original trial of John Marek conducted May 22-June 1, 1984, and has been assigned to hear the Motion to Vacate Judgment and Sentence presently pending before this Court.

2. Mr. Marek respectfully requests that the Court recuse itself due to statements showing bias/prejudice against Mr. Marek resulting in the prejudgment of issues contrary to Mr. Marek prior to the taking of evidence.

a. After the trial, the Court included matters in the written sentence that were directly contrary to the jury verdict:

1) The jury specifically acquitted Mr. Marek of the two counts of sexual battery and convicted only of the lesser included offense of battery.

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

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

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

On June 16, 1983, a wonderful loving woman was viciously kidnapped, raped, tortured and murdered by John Marek and Raymond Wigley. She was a mother and outstanding member of society.

Both of these men are unfit to live in our society. Marek was the leader and instigator. He was the "brains". I honestly believe Wigley would not have participated in this heinous and atrocious offense alone. However, Marek definitely has the inclination to commit these acts alone.

Marek is capable of killing again and should not be released or be given any leniency by our Criminal Justice System.

Marek showed no leniency to his victim. He could have released her at many stages but he did not. He enjoyed every minute of abuse that he inflicted upon her, including raping her repeatedly, burning her, kicking her, beating her and strangling her.

(Emphasis added). Letter to Florida Parole and Probation Commission dated June 24, 1987. (See Exhibit A.)

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

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

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

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

Certificate of Good Faith

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

The motion was heard by Judge Kaplan, the circuit court judge in questin, in open court at the commencement of the 3.850 proceedings. After argument on the motion, the judge's only comment was as follows:

> THE COURT: For all three grounds in the response the Court would rule that the motion should be denied.
>
> Okay. Where do we head from here?

(T. 75).

The State's response, to which the judge was referring, urged denial of the motion because it was untimely filed, because of the ruling in Suarez v. State, 527 So. 2d 190 (Fla. 1988), and because the motion did not state a well-founded fear that Mr. Marek would not receive a fair trial (T. 72-3).

Mr. Marek's counsel in turn responded that he had filed the Motion to Disqualify as soon as he had become aware of the letter to the Parole and Probation Commission. Further, counsel was aware of the Suarez case, and the letter to the Board in Mr. Marek's case was more egregious than in Suarez where that letter was held insufficient to warrant disqualification (T. 73-5). As to the third basis, two affidavits were attached to the motion indicating familiarity with the case, and a belief that Judge Kaplan was predisposed to rule against Mr. Marek on his Motion for Stay of Execution and Vacation of Judgment and Sentence. Clearly no trial was yet to be held. At no time did the judge deny writing the letter to the Parole and Probation Commission nor its contents, and he likewise did not dispute the other allegations in the motion.

Since this Court's decision in Bundy v. Rudd, the law in this state has been clear. Where a facially sufficient motion to disqualify has been presented, the judge may not refute the charges of partiality. His or her only choice is to grant the motion. Canady v. Johnson, 481 So. 2d 983 (Fla. 4th DCA 1986); Suarez v. State, 527 So. 2d 190 (Fla. 1988). When a judge attempts to refute the allegations

contained in the motion to disqualify, "he [has] exceeded the proper scope of his inquiry and on that basis established sufficient grounds for his disqualification" Lake v. Edwards, 501 So. 2d 759, 760 (Fla. 5th DCA 1987); Suarez, supra. A judge's attempt to respond to the allegations contained in the motion and establish his or her own impartiality is itself cause for disqualification. A.T.S. Melbourne, Inc. v. Jackson, 473 So. 2d 280 (Fla. 5th DCA 1985). Such action by the judge causes the judge to assume "the posture of an adversary" and requires disqualification. Gieseke v. Moriarty, 471 So. 2d 80, 81 (Fla. 4th DCA 1985). Further it matters not when in the proceedings the motion to disqualify is presented. As long as there is something further for the judge to do in the proceedings a motion to disqualify may be presented, and if sufficient "the judge 'shall proceed no further.'" Lake v. Edwards, supra, 501 So. 2d at 760, quoting Florida Rule of Civil Procedure 1.432(d)(emphasis in original). It should be noted that Florida Rule of Criminal Procedure 3.230(d) contains virtually identical language.

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

> The Code of Judicial Conduct sets forth basic principles of how judges should conduct themselves in carrying out their judicial duties. Can 3-C(1) states that "[a] judge should disqualify himself in a proceeding in which his impartiality might be reasonably questioned . . . ." This is totally consistent with the case law of this Court, which holds that a party seeking to disqualify a judge need only show "a well grounded fear that he will not receive a fair trial at the hands of the judge. It is not a question of how the judge feels; it is a question of what feeling resides in the affiant's mind and the basis for such feeling." State ex rel. Brown v. Dewell, 131 Fla. 566, 573, 179 So. 695, 697-98 (1938). See also Hayslip v. Douglas, 400 So. 2d 553 (Fla. 4th DCA 1981). The question of disqualification focuses on those matters from which a litigant may reasonably question a judge's impartiality rather than the judge's perception of his ability to act fairly and impartially.

> When a party believes he cannot obtain a fair and impartial trial before the assigned trial judge, he must present the issue of disqualification to the court in accordance with the process designed to resolve this sensitive issue. The requirements set forth in section 38.10, Florida Statutes (1981), Florida Rule of Criminal Procedure 3.230, and Florida Rule of Civil Procedure 1.432 were established to ensure public confidence in the integrity of the judicial system as well as to prevent the disqualification process from being abused for the purposes of judge-shopping delay, or some other reason not related to providing for the fairness and impartiality of the proceeding. The same basic requirements are contained in each of these three processes. First, there must be a verified statement of the specific facts which indicate a bias or prejudice requiring disqualification. Second, the application must be timely made. Third, the judge with respect to whom the motion is made may only determine whether the motion is legally sufficient and is not allowed to pass on the truth of the allegations. Section 38.10 and Florida Rule of Criminal Procedure 3.230 also require two affidavits stating that the party making the motion for disqualification will not be able to receive a fair trial before the judge with respect to whom the motion is made, as well as a certificate of good faith signed by counsel for the party making the motion.
>
> . . . .
>
> What is important is the party's reasonable belief concerning his or her ability to obtain a fair trial. A determination must be made as to whether the facts alleged would place a reasonably prudent person in fear of not receiving a fair and impartial trial.

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

Here Judge Kaplan did not address whether the motion set forth such facts as would "place a reasonably prudent person in fear of not receiving a fair and impartial [hearing]." Instead Judge Kaplan simply denied the motion.

Certainly, the matters set forth in the motion would have placed anyone in Mr. Marek's position in fear of not receiving a fair and impartial hearing on his 3.850 motion. The judge's letter to parole and probation and his persistent reliance on a sexual battery when none was found by the jury could reasonably be understood as prejudgment of the matter and the need for 3.850 proceedings. As a result, once the

motion for disqualification was filed it was incumbent upon Judge Kaplan to disqualify himself.

In Livingston, supra, the issue arose in this Court on appeal from a conviction of first degree murder and the imposition of the death sentence. There this Court concluded that the failure of the judge to disqualify himself was error. Consequently, this Court ruled that resulting conviction and sentence of death had to be reversed and the matter remanded for a new trial presided over by a different judge. A fair hearing before a fair tribunal is a basic requirement of due process. In re Murchison, 349 U.S. 133 (1955). "Every litigant[] is entitled to nothing less than the cold neutrality of an impartial judge." State ex rel. Mickle v. Rowe, 131 So. 331, 332 (Fla. 1930). Absent a fair tribunal there is no full and fair hearing.

In this case, it was reversible error for the judge to refuse to recuse himself. At this point the order denying relief must be vacated and the case remanded for new proceedings before another duly assigned judge. Moreover, the patent unconstitutionality attendant to a capital proceeding involving a biased judge also raises significant questions about the validity of Mr. Marek's capital conviction and sentence of death. The lack of impartiality herein at issue has infected the process. The conviction, sentence and post-conviction resolution in this action are invalid under the fifth, sixth, eighth and fourteenth amendments. Relief is proper.

CONCLUSIONS AND RELIEF SOUGHT

For the foregoing reasons, Mr. Marek respectfully requests that this Honorable Court vacate theconviction and sentence of death.

Respectfully Submitted,

LARRY HELM SPALDING
Capital Collateral Representative

MARTIN J. MCCLAIN
Assistant CCR

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By: _____
COUNSEL FOR DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing motion has been forwarded by U.S. Mail, first-class, postage prepaid, to Carolyn V. McCann, Assistant Attorney General, Department of Legal Affairs, 111 Georgia Avenue, Suite 204, West Palm Beach, Florida, 33401, this 9th day of January, 1989.

_____
Attorney