IN THE SUPREME COURT OF FLORIDA

CASE NO. 73,278

JOHN RICHARD MAREK,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

25 pgs
O.K. per
SJW

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

REPLY BRIEF OF APPELLANT

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TABLE OF AUTHORITIES

PRELIMINARY STATEMENT

Mr. Marek's Reply Brief will not discuss every claim raised in his Initial Brief. For the convenience of the Court, the claims follow the same numbering system employed in the Initial Brief. Mr. Marek does not waive any claim previously discussed and relies upon the presentations in his Initial Brief regarding any claims not specifically addressed herein. Also for the Court's convenience, Mr. Marek uses the same record citation abbreviations as used by the State.

STATEMENT OF THE FACTS

There are numerous errors in the Statement of the Facts contained in the Answer Brief of Appellee. Appellant will attempt herein to point out those errors and clarify them.

The State at page 5 of its brief stated "However, MAREK could speak plainly when he wanted to be understood according to Begley (SCP 87)." The testimony of Mrs. Begley was in fact quite different. Speaking of Mr. Marek as a child, she said, "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." (SCP 87)(emphasis added). Mrs. Begley's testimony in fact portrayed Mr. Marek as a child with no control over his ability to communicate: when he wanted to be understood, he was

not; when he got frustrated and wanted to tell the world off, others understood.

The State at page 6 of its brief stated "Mark's [sic] early I.Q. was 75 as compared to 109 at a later period (SCP 144). "The cite was to Dr. Krop's testimony. In fact, his testimony indicates he did no testing of Mr. Marek's I.Q. Instead, he relied upon the background materials provided him for the results of previous testing. In this regard, the transcript reflects the following: "Early I.Q. tests showed him to have an IQ of 75 which is in the borderline range. Later IQ tests show that he had an IQ of 109e [sic]." The records Dr. Krop relied upon were admitted into evidence as defense exhibit No. 1 (SCP 203). An examination of this exhibit indicates that later IQ testing of Mr. Marek yielded the following results: "A Full Scale Wechsler Bellevue IQ of 82 was obtained placing the patent in the Dull Normal range of intelligence. The Verbal IQ was 64 and the Performance IQ was 104." Ex. 1, Tab 7, pp. 29-30.

The State at page 7 of its brief claimed Dr. Krop stated "[Mr. Marek's] environmental history indicates he was in and out of foster homes (SCP 156) and was eventually adopted by the MAREKS, whose name he took (SCP 157-58)." Dr. Krop in fact testified that "I don't know whether he was adopted by the Mareks. I know he had the desire to be." (SCP 157). In fact, Mr. Marek was not adopted by the Mareks.

The State at page 8 of its brief indicated that Dr. Krop testified that "[Dr.] Krieger's opinion was that MAREK was faking real bad." (SCP 175-76). The transcript in fact reflects that Dr. Krop stated, "I don't know if Dr. Krieger concluded he was faking badly." (SCP 176). Also at page 8 of its brief, the State set forth "Dr. further testified that the violence exhibited in the murder of Ms. Simmons is not consistent with MAREK'S past antisocial behavior." (SCP 183). In fact, Dr. Krop testified, "As far as I know almost all of previous antisocial acts were not violent." (SCP 183).

The State at page 13 of its brief discussed Dr. Krieger's testimony as to the results of his evaluation of Mr. Marek. However, the State failed to note that Dr. Krieger had not reviewed any of the background material contained in defense exhibit No. 1 (SCP 303). Thus, his testimony was limited to what he recalled of interviewing Mr. Marek five years before. (Id.)

The State at page 14 of its brief stated: "Dr. Krieger justified however that MAREK was not suffering from any major mental illness or psychosis." (SCP 291). In fact, Dr. Krieger's testimony was:

> The term mitigating circumstances I don't think is my prerogative here. Do I see the presence of a serious mental disorder? Sure. Very severe personality disorder at the very least.

> At the time I examined him there was clinically labelable depressive overlay. I did not see any major mental illness in terms of psychosis. Personality disintegration. As I said, that kind of personality disorder. It doesn't arise in a vacuum.

(SCP 291).

ISSUE I

MR. MAREK WAS PRECLUDED FROM PRESENTING EVIDENCE IN MITIGATION IN VIOLATION OF LOCKETT.

In its brief the State argues that this issue should not be addressed now since it was not raised on direct appeal. However, the State fails to address the adequacy of appellate counsel's performance in failing to present this claim on direct appeal. This claim is premised upon Lockett v. Ohio, 438 U.S. 586 (1978), and Section 921.141 of the Florida Statutes which provides in pertinent part: "Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence." Mr. Marek's appellate attorney's failure to raise this error on direct appeal was patent ineffective assistance of counsel.

The State did not specifically address the effective assistance of appellate counsel. However, the State argued that the trial court did consider "all this evidence," apparently contending that any error was harmless since the contents of Dr. Krieger's report was made known to the trial court and thus

counsel's decision not to raise the issue did not prejudice Mr. Marek since this Court would not have reversed under pre-Hitchcock law. However, this supports Mr. Marek's claim that the issue was properly before the circuit court on the merits in the Rule 3.850 motion. Prior to Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), the State's position may have had some validity. However, in Hitchcock the old standards of reviewing Lockett error were overturned. This Court has repeatedly held that Hitchcock represents a substantial change in law. See Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987)(capital defendant has right to have sentencing jury, not just sentencing judge to actually weigh non-statutory mitigation); Thompson v. Dugger, 515 So. 2d 173 (Fla. 1987)(capital defendant cannot be precluded from presenting all nonstatutory mitigating evidence). Thus, the only way to justify appellate counsel's deficient performance would be to say this Court would have applied pre-Hitchcock law. However, Hitchcock is a substantial change in law which requires this Court to visit this issue on the merits.

In any event, Lockett is basic eighth amendment law. Counsel's failure to argue obvious error under Lockett must have been premised on ignorance. Had counsel but pointed this Court to the issue, resentencing would have been required under Hitchcock.

As has been explained:

> To make a successful claim of ineffective assistance of counsel, a defendant must show that his counsel's performance was deficient and that the deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)... Prejudice is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694, 104 S.Ct. at 2068. The standard for ineffective assistance is the same for trial and appellate counsel. Peoples v. Bowen, 791 F.2d 861 (11th Cir.), cert. denied ___ U.S. ___, 107 S.Ct. 597, 93 L.Ed.2d 597 (1986).

Matire v. Wainwright, 811 F.2d 1430, 1435 (11th Cir. 1987). The result of the proceedings here would have been different -- given the eighth amendment error reflected in this record, the Court would have reversed. The trial court precluded the jury from receiving Dr. Krieger's report[1] and learning of the co-defendant's sentence.

Where deficient performance has been shown on the part of appellate counsel, the question is whether "there was more than a reasonable probability that the outcome of the appeal would have been different." 811 F.2d at 1439. See also, Lockhart v. McCotter, 782 F.2d 1275 (5th Cir. 1986). Here, unquestionably

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[1]The State argues that if counsel wanted the jury to know of Dr. Krieger's opinion he still could have called him. That ignores the fact that Dr. Krieger's report was erroneously held to be inadmissible hearsay. The trial court's ruling was simply wrong. The report should have been admitted and if the State wanted to cross-examine Dr. Krieger it would have been its obligation to call him if he was available.

Mr. Marek's appellate counsel's performance was deficient. He failed to present this clear claim of eighth amendment error to the Court on appeal. Trial counsel litigated the trial court's refusal to admit Dr. Krieger's report and the co-defendant's sentence. The claim was apparent in the record. Had appellate counsel raised this issue, resentencing would have been ordered under Hitchcock. The trial judge's rulings denied Mr. Marek's rights to due process of law, to a reliable and individualized capital sentencing determination, and to effective assistance of counsel. Appellate counsel rendered prejudicially ineffective assistance.

This Court in Hall v. State, ___ So. 2d ___, No. 73,029 (Fla. decided March 9, 1989), recently explained when a new sentencing before a new jury is required in order to cure Lockett error, "The proper standard is whether a jury recommending life imprisonment would have a reasonable basis for that recommendation." Slip op. at 6. In other words, would a life recommendation based upon Dr. Krieger's report or on the co-defendant's life sentence withstand an override. Certainly, considering either of these in combination with the evidence that was in fact presented in mitigation establishes that a life recommendation could not have been overriden. See Holsworth v. State, 522 So. 2d 348 (Fla. 1988); DuBoise v. State, 520 So. 2d

260 (Fla. 1988); Burch v. State, 522 So. 2d 810 (Fla. 1988); Brown v. State, 526 So. 2d 908 (Fla. 1988).

Accordingly, the error cannot be found to be harmless and a new sentencing before a new jury must be ordered.

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.

The State in its brief does not contest Mr. Marek's claim that the sentencing jury and judge improperly considered the "previously convicted of a crime of violence" aggravating circumstance. The circuit judge, on consideration of the Rule 3.850 motion, concluded that this aggravating circumstance had been improperly considered by the jury and found by the judge. The circuit judge thus struck that aggravating circumstance. This left only three aggravating circumstances standing.

In response to Mr. Marek's attack on the "pecuniary gain" aggravating circumstance, the State contends that this same attack was mounted on direct appeal, and that on the merits two cases support the application of the aggravating circumstance here. First, as to whether this claim was presented on direct appeal, Mr. Marek would cite to the brief on direct appeal. There the entirety of the attack on this aggravator was but:

> (c) The Court in paragraph 3 found that the murder was committed for pecuniary gain; re: 921.141(5)(f). There was no evidence that Appellant was ever in possession of the victim's jewelry, or that he even knew it was in the truck.

Brief of Appellant, p. 22. No argument was asserted that there was no evidence to establish that the motive for the killing was pecuniary gain. Mr. Marek asserts that this failure on appellate counsel's part to present such an argument was deficient performance.[2]

New case law clearly establishes that in order for the "pecuniary gain" aggravating circumstance to be present the State must establish beyond a reasonable doubt that "the pecuniary motive for this killing was pecuniary gain." Scull v. State, 13 F.L.W. 545, 547 (Fla. 1988). The State responded to the merits of Mr. Marek's claim and to the reliance on Scull, by citing Hildwin v. State, 13 F.L.W. 528 (Fla. 1988) and Porter v. State, 429 So. 2d 293 (Fla. 1983). However, these cases do not help the State. In Hildwin, the defendant, prior to the homicide, had no money. After the homicide, he was seen with money. Still later,

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[2]However, to the extent that this Court disagrees, Mr. Marek argues that new case law establishes that this aggravating circumstance was improperly applied to him, or at least its application in his case was inconsistent with its application to other similarly situated individuals in violation of Furman v. Georgia, 408 U.S. 238 (1972). See Scull v. State, 13 F.L.W. 545 (Fla. 1988).

he cashed a check written on the victim's checking account. The defendant testified that he had forged the check because he needed money. In his possession, the police found the victim's ring and radio. This Court found that from these circumstances it could be inferred "beyond a reasonable doubt that the killing was committed for pecuniary gain." 13 F.L.W. at 530.

The State's reliance on Porter is misplaced because it is old law now to the extent it is inconsistent with Scull. But even more interestingly, Porter does not conflict with Scull. In Porter the defendant admitted that "the state proved he took his victims' automobile, television, silverware, jewelry, and other items." The argument on appeal was that a subsequent abandonment of these items negated the "pecuniary gain" aggravating circumstance. That is not the situation here.

Here, the issue is whether the victim was killed for her loop earrings, bracelet, and watch. There is an obvious difference between the value of the property in Porter and Hildwin as well as the liquidity. No evidence was received in Mr. Marek's case as to the value of the jewelry, nor was any evidence received as to Mr. Marek's need for money. Under the circumstances, the State did not prove beyond a reasonable doubt that Adela Simmons was killed for her loop earrings, bracelet, and watch.

This aggravating circumstance was improperly considered by the jury and found to exist by the judge.

In response to Mr. Marek's attack upon the "heinous, atrocious or cruel" aggravating circumstance, the State argued first that Maynard v. Cartwright, 108 S. Ct. 1853 (1988) was not applicable because this Court adopted a limiting definition of the vague and ambiguous words in State v. Dixon, 283 So. 2d 1 (Fla. 1973). The State's argument ignored the fact that the Oklahoma courts had adopted the limiting definition found in Dixon. The issue in Maynard v. Cartwright was the failure to instruct the jury on the limiting definition. Thus, Maynard v. Cartwright is directly on point since here too the jury received no instruction as to the limiting construction of heinous, atrocious or cruel.

The State also contends that Maynard v. Cartwright is not new case law. In Witt v. State, 387 So. 2d 922 (Fla. 1980), cert. denied, 449 U.S. 1067 (1980), the Florida Supreme Court held that state post-conviction relief is available to a litigant on the basis of a "change of law" which:

> (a) emanates from [the Florida Supreme] Court or the United States Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance.

Id., 387 So. 2d at 922.

Maynard v. Cartwright, 108 S. Ct. 1853 (1988), like Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), satisfies the three Witt requirements. It is a United States Supreme Court decision. It is premised upon the eighth amendment to the United States Constitution. Finally, it constitutes a development of fundamental significance by concluding that state courts, such as the Florida Supreme Court, were misconstruing Godfrey v. Georgia, 446 U.S. 420 (1980). State courts had interpreted Godfrey as not requiring a sentencer to be instructed on or to apply limiting principles which were to guide and channel the sentencer's construction of the "heinous, atrocious or cruel" aggravating circumstance. Thus, the decision in Maynard v. Cartwright is very much akin to the decision in Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), which held that the Florida Supreme Court and the Eleventh Circuit Court of Appeals had failed to properly construe Lockett v. Ohio, 438 U.S. 586 (1978). Cartwright, like Hitchcock, changed the standard of review previously applied. See Thompson v. Dugger, 515 So. 2d 173 (Fla. 1987); Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987).

Indeed, this Court has previously passed off Godfrey as only effecting its own appellate review of death sentences. Brown v. Wainwright, 392 So. 2d 1327, 1332 (Fla. 1981)("Illustrative of the Court's exercise of the review function is Godfrey v. Georgia.") This Court has declined to consider the impact of

Godfrey upon the adequacy of jury instructions regarding this aggravating circumstance.[3]

In its decision in Maynard v. Cartwright, the United States Supreme Court held that state courts had failed to comply with Godfrey when they did not require adequate jury instructions which guided and channelled the jury's sentencing discretion. More is required than simply asking the jury if the homicide was "wicked, evil, atrocious or cruel." Maynard v. Cartwright also applies to the judge's sentencing where there has been a failure to apply a limiting construction to "heinous, atrocious, or cruel." Adamson v. Ricketts, ___ F.2d ___, No. 84-2069 (9th Cir. Dec. 22, 1988)(en banc). The prior constructions of Godfrey (as only effecting appellate review of a death sentence) were thus in error. That standard has been altered by Maynard v. Cartwright which is thus new case law. The rule in Witt applies and post-conviction proceedings are available to address the failure to apply the limiting construction of "heinous, atrocious or cruel"

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[3]In fact, in Mr. Marek's direct appeal, counsel argued that "the description [of the phrase heinous, atrocious or cruel] provided no guidance in the advisory phase as to precisely what was meant." Brief of Appellant, p. 22. For this, counsel relied upon Godfrey v. Georgia, 446 U.S. 420 (1980).

in Mr. Marek's case.[4] Maynard v. Cartwright changed the relevant eighth amendment standard of review, and it applies to this case, as Witt makes clear. See also Thompson v. Dugger, supra; Downs v. Dugger, supra. The jury was not adequately instructed and thus error occurred as to this aggravating circumstance.

The State in its brief argues that the aggravating factor "in the course of an attempted burglary with the intent to commit a sexual battery" was properly found because "the jury did find the kidnapping was done with the intent to commit a sexual battery."[5] Answer Brief of Appellee, p. 35 n.5. This is a blatant misrepresentation of the record. The indictment reflected that the kidnapping charge was originally premised on an intent to commit a sexual battery. However, the jury instruction outlining the elements of the crime of kidnapping did not match the indictment. It simply provided:

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[4]In fact, through 1988, Shepards' United States Citations shows that the Florida Supreme Court cited Godfrey three times, once in Brown, once in Witt v. State, 387 So. 2d 922 (Fla. 1980), and once in the dissent in Hitchcock v. State, 413 So. 2d 741, 748 (Fla. 1982).

[5]The State argued that the homicide was heinous, atrocious or cruel because the victim was sexually assaulted. However, the State ignored the fact that Mr. Marek was acquitted of either committing or aiding in the commission of a sexual battery. See Atkins v. State, 452 So. 2d 529 (Fla. 1984).

> The essential elements of this crime which must be proved beyond and to the exclusion of every reasonable doubt before there can be a conviction in this case are that:
>
> 1. JOHN RICHARD MAREK forcibly, secretly or by threat confined, abducted or imprisoned ADELLA MARIE SIMMONS.
>
> 2. The confinement, abduction and/or imprisonment of the said ADELLA MARIE SIMMONS was against her will and without lawful authority.
>
> 3. The confinement, abduction and/or imprisonment of the said ADELLA MARIE SIMMONS was committed by JOHN RICHARD MAREK with the intention of:
>
> (a) holding the said ADELLA MARIE SIMMONS for ransom or reward or as a shield or hostage; or
>
> (b) committing or facilitating the commission of a felony; or
>
> (c) inflicting bodily harm upon the said ADELLA MARIE SIMMONS or terrorizing the said ADELLA MARIE SIMMONS.

R. 1406. The instruction contained no reference to an intent to commit a sexual battery.

As to Mr. Marek's claim that the underlying felony in his felony murder conviction was improperly used to create a presumption of death which could only be overcome by presenting evidence of mitigating circumstances which outweighed the aggravating circumstances, the State completely ignores Mr.

Marek's claim that his appellate attorney was ineffective in not presenting this claim on direct appeal. This issue in conjunction with Issue XI should have been presented on direct appeal. The failure to present these claims was ineffective assistance of counsel. See Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988)(in banc); Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988), cert. denied, 108 S. Ct. 2005; Mullaney v. Wilbur, 421 U.S. 684 (1975).

The three aggravating factors affirmed by the circuit court in these Rule 3.850 proceedings were improperly applied. All three circumstances should be strickened.

ISSUE III

THE IMPROPER USE AND CONSIDERATION BY THE JURY OF THE "PREVIOUSLY CONVICTED OF A CRIME OF VIOLENCE" AGGRAVATING CIRCUMSTANCE WAS NOT ERROR THAT CAN BE CONSIDERED HARMLESS BEYOND A REASONABLE DOUBT.

The State contends that the circuit judge correctly concluded that the evidence of mitigating circumstances presented by Mr. Marek did not at the time of the sentencing or at the time of the Rule 3.850 hearing establish any "mitigating circumstances applicable to Marek." Order Denying Motion to Vacate Judgment and Sentence, p. 6, November 7, 1988. The argument ignores this Court's ruling in Hall v. State, ___ So. 2d ___, No. 73,029 (Fla. decided March 9, 1989). There, this Court addressed the harmless

error test to be applied when error occurs in the penalty phase conducted before a jury. This Court concluded: "It is of no significance that the trial judge stated that he would have imposed the death penalty in any event. The proper standard is whether a jury recommending life imprisonment would have a reasonable basis for that recommendation." Slip op. at 6.

The State in its brief concedes that mitigation was presented to the jury. It stated at page 25 of its brief:

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

At pages 59-60, the State observed:

> Thus, the jury could have considered the fact that MAREK had no significant criminal record in mitigation of sentence, since the jury was only aware that MAREK had once been convicted of a felony, according to MAREK'S own testimony. (R. 961).[6] Thus, defense counsel's tactical decision not to have the jury so instructed kept the State from bringing in specific evidence of MAREK'S prior record, and allowed the jury to

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[6]In fact, the testimony did not refer to the word "felony" but was simply that Mr. Marek had once been convicted of a crime which carried more than a year in prison.

consider the lack of evidence as to specific criminal activity as a mitigating circumstance.[7]

Undeniably, mitigating circumstances could have been used by the jury to recommend a life sentence which could not have been overridden by the judge. Under Hall the error cannot be held to have been harmless.[8]

ISSUES V AND XVI[9]

MR. MAREK RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT HIS CAPITAL TRIAL.

While addressing Mr. Marek's claim that trial counsel was ineffective for failing to ask a question on cross-examination

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[7]The presence of this statutory mitigating circumstance is certainly strengthened when the facts of Mr. Marek's felony conviction are reviewed. Mr. Marek was convicted of credit card abuse in Texas for fraudulently charging $55.13 worth of merchandise on Thursday, May 10, 1979 at a store in Fort Worth, Texas. (Ex. 1, Tab 19, p. 9). Under Forehand v. State, 14 F.L.W. 26 (Fla. 1989), "the elements of the subject crime, not the stated degree or the sentence received, control in determining" the severity of the crime for purposes of subsequent sentencing in Florida. Section 817.61 of the Florida Statutes provides that Mr. Marek's prior conviction in Texas should be treated as a misdemeanor for Florida purposes.

[8]In Mr. Marek's initial brief, additional non-statutory mitigating circumstances were identified which were not contested and which also would have served as a reasonable basis for a life recommendation.

[9]Issue V as set out in Mr. Marek's initial brief argued that Mr. Marek received ineffective assistance at the penalty phase.

(footnote continued on following page)

that he was precluded from asking the witness later when counsel recalled the witness to the stand, the State at page 52 of its brief states: "The trial court did not rule that defense counsel should have asked that question earlier." The State then claimed that "Marek's claim ignores the record and is in fact an attempt to fabricate events." However, the transcript fully supports Mr. Marek's allegation. When counsel sought to recall the witness to the stand and ask a question he neglected to ask on cross-examination, the trial court sustained an objection that the question did not seem relevant and was outside the scope of surrebuttal. The trial court then stated: "Why didn't you ask him this on cross examination?" R. 1040.

The State claims the jury was fully and completely instructed at the guilt phase, and thus counsel was not ineffective as to the failure to have the jury instructed as to the elements of the crime of attempted burglary with an assault. However, this ignores the fact that the jury received no instruction on the intent element of that crime and that counsel failed to object.

(footnote continued from previous page)

In Issue XVI, Mr. Marek argued that counsel was ineffective at the guilt phase. Since the State combined the two issues for purposes of their response. Mr. Marek does likewise in order to reply to the State's contentions.

The State also asserts that there was no ineffective assistance in failing to have the voir dire transcribed. For this doubtful proposition, the State relied on "Thomas v. State, 495 So. 2d 172 (Fla. 1986).[10] (Counsel not ineffective to make PSI part of record on appeal)." However, the reasoning in Thomas would not seem to be applicable to the voir dire transcript:

> However, there was no possibility of prejudice from the fact that the report was not before this Court in that the information provided and opinions expressed in the report were merely cumulative and repetitive of the information and views brought out by testimony at the sentencing phase of the trial.

495 So. 2d at 172(emphasis added). Certainly, the voir dire transcript would not have been merely cumulative.

Moreover, Mr. Marek was prejudiced by the failure to have voir dire transcribed. As a result of this failure, Caldwell error occurring in the voir dire was not raised on direct appeal. See Issue VI infra. The failure also precluded the presentation on appeal of Issues VII and VIII of the initial brief.

As to Mr. Marek's claim that he received ineffective assistance at the penalty phase when counsel failed to adequately investigate mitigating evidence, the State merely set forth that

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[10]The case is actually Thomas v. Wainwright.

deficient performance and prejudce had to be shown. No argument on those questions were presented. Answer Brief of Appellee at pp. 55-57. The State seems to improperly present argument on this issue in its Statement of the Case. Apparently, the State alleges no prejudice because of the particular jury involved and because of trial counsel's speculation as to what he may have done with the background information he failed to uncover.

In essence, the State argued that prejudice cannot be shown without any evidence that trial counsel would had altered his penalty phase strategy and presented the mitigation he failed to discover. The State asserted that trial counsel's strategy, which was formulated without benefit of the family and mental health background information may have caused counsel to chose not to put it on if he had discovered it. In this regard the State improperly mixes apples and oranges. The State's analysis of the prejudice prong is in essence that unreasonable performance may have been reasonable anyway. The State argues that strategies based upon unreasonable investigation and deficient performance were legitimate choices which may have caused counsel to reject the fruits of adequate investigation. Of course, because counsel did not adequately investigate and prepare mental health issues, no "strategy" can be ascribed to his "decisions" in this regard. See Strickland, 466 U.S. at 691; cf. Stephens v. Kemp, 846 F.2d 642 (11th Cir. 1988), cert.

denied, 109 S. Ct. 189 (1988). This Court cannot use counsel's conduct in ignorance to find counsel would have acted the same way had he been fully informed. To do so would place an impossible burden upon Mr. Marek which directly conflicts with Strickland. Under the prejudice prong in Strickland the Supreme Court observed:

> An assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, caprice, "nullification," and the like. A defendant has no entitlement to the luck of a lawless decisionmaker, even if a lawless decision cannot be reviewed. The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision. It should not depend on the idiosyncracies of the particular decisionmaker, such as unusual propensities toward harshness or leniency. Although these factors may actually have entered into counsel's selection of strategies and, to that limited extent, may thus affect the performance inquiry, they are irrelevant to the prejudice inquiry. Thus, evidence about the actual process of decision, if not part of the record of the proceeding under review, and evidence about, for example, a particular judge's sentencing practices, should not be considered in the prejudice determination.

104 S. Ct. at 2068. Certainly the same considerations should apply in considering how counsel would have performed following reasonable investigation. This question of prejudice cannot turn upon how trial counsel would have responded if he had discovered the mitigation at issue. The question is what a reasonable

lawyer would have done and whether a reasonable probability of a different outcome exists. The State's analysis that Mr. Marek must show trial counsel would have presented the evidence is simply the wrong test. It imposes an even higher burden than the test specifically rejected in Strickland: i.e., "counsel's deficient conduct more likely than not altered the outcome in the case." 104 S. Ct. at 2068. There should be no burden on Mr. Marek to show what Mr. Marek's trial court would have done had he conducted adequate investigation.

Trial counsel's performance was deficient and but for that deficiency the record from the evidentiary hearing shows a reasonable probability of a different outcome had the wealth of mitigation in Mr. Marek's background been discovered and presented at the penalty phase.

ISSUE VI

MR. MAREK'S JURY RECEIVED INACCURATE INFORMATION REGARDING ITS ROLE IN THE PENALTY PHASE.

This issue was not presented on direct appeal because voir dire was not transcribed. During voir dire the judge told the jurors that as to whatever sentencing recommendation they made, "Now, I won't care." (RV 30). Then again later, "I don't care if you come back with [death] because I don't have to listen to it." (RV 37). These statements by the trial judge deviated from

the standard jury instructions and the law. Thus, the State's reliance on Grossman v. State, 525 So. 2d 833 (Fla. 1988), is misplaced. There, this Court found the instructions and the comments of court and counsel were not inaccurate and thus not error under Caldwell v. Mississippi, 472 U.S. 320 (1985). The comments here were thus more akin to what occurred in Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988)(in banc). Thus, the trial court's comment constituted error. Under Hall v. State, ___ So. 2d ___, No. 73,029 (Fla. decided March 9, 1989), this error cannot be found to be harmless beyond a reasonable doubt.

CONCLUSIONS AND RELIEF SOUGHT

For the foregoing reasons and the reasons stated in the initial brief, Mr. Marek respectfully requests that this Honorable Court vacate the conviction and sentence of death.

Respectfully submitted,

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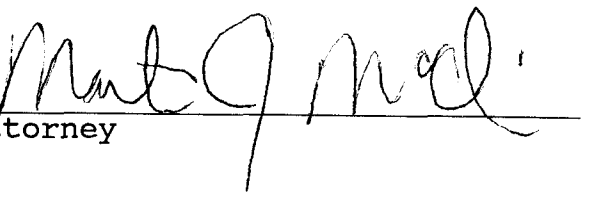
By: 
Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail, postage prepaid, to Debra Guller, Assistant Attorney General, Department of Legal Affairs, 111 Georgia Avenue, Suite 204, West Palm Beach, Florida 33401, this 20th day of March, 1989.

Attorney