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IN THE SUPREME COURT OF FLORIDA

JOHN RICHARD MAREK,)
)
 Appellant,)
)
 v.)
)
 STATE OF FLORIDA,)
)
 Appellee.)
)
 _____)

CASE NO. 73278

SUPPLEMENTAL ANSWER BRIEF

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

CAROLYN V. McCANN
Assistant Attorney General
111 Georgia Avenue, Suite 204
West Palm Beach, Florida 33401
(407) 837-5062

JOY B. SHEARER
Assistant Attorney General

DEBORAH GULLER
Assistant Attorney General

Counsel for Appellee

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PRELIMINARY STATEMENT

Appellee would rely and adopt the preliminary statement as found on page 1 of its anticipatory answer brief.

STATEMENT OF THE CASE

Appellee would rely and adopt the statement of the case as found on pages 2 through 8 of its anticipatory answer brief but would add the following:

On November 3rd and 4th, the trial court held an evidentiary hearing on MAREK'S motion for post-conviction relief. At the time of this writing Sunday, November 6th, the trial court had not yet ruled on MAREK'S motions. The facts adduced at that hearing can be found herein in supplemental statement of the facts.

STATEMENT OF THE FACTS

B. Facts Adduced Post-Conviction

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

MAREK was loving and trustworthy according to Bagley (SCP 86). MAREK however had a speech problem and was teased (SCP 87) However, MAREK could speak plainly when he wanted to be understood according to Bagley (SCP 87). Bagley testified that MAREK had been a bed-wetter and that MAREK went to special education schools as a child (SCP 88). According to Bagley, MAREK had been tested and was said to be retarded although trainable (SCP 88). Bagley testified that another one of her sons was slow too (SCP 88). Bagley farther testified that Bill couldn't accept the fact that MAREK was retarded and denied that he was MAREK'S father (SCP 91). They finally divorced in November of 1968 (SCP 92). Bagley had custody of the boys, including MAREK (SCP 93). Bagley remarried Arliss Bagley in 1970 (SCP 92). She described Arliss as being an alcoholic, irresponsible and functionally illiterate (SCP 93). Arliss was worse than Bill according to Bagley (SCP 93). Arliss allegedly treated MAREK worse than the other boys and always told MAREK "get away retard" (SCP 94). Arliss however, didn't want to be bothered by any of Bagley's kids (SCP 94). He treated his own son David as badly as he treated MAREK and his brothers (SCP 95). Bagley testified that Arliss was abusive both physically and verbally (SCP 95). Finally, Bagley decided that she could no longer care for her sons by Bill, and gave them back to Bill, except for MAREK (SCP 97). According to Bagley, Bill would not take MAREK, claiming that MAREK wasn't his son (SCP 97). that year, 1970, at the age

of 9, MAREK was turned over to the Texas Child Welfare Board by Bagley (SCP 98). Bagley said that this was supposed to be a temporary situation but it became a permanent one (SCP 98). Bagley told MAREK that she couldn't take care of him and that someday he would come back (SCP 98). Arliss allegedly told MAREK that Bill didn't want him because he was retarded and that his mother didn't want him because he had stolen a bicycle (SCP 98). Bagley testified that she finally gave MAREK up for adoption (SCR 100-101). She never tried to get him back after that (SCP 102). Bagley testified that she had chosen Arliss over her children and that she went to a sanitarium and was told there that she "had to accept Arliss or leave him" (SCP 102). After MAREK left Bagley in 1970, she did not keep in touch with him and only saw him about 5 times (SCP 104-111). She talked in the plane and wrote to him a few times and only heard about him from hearsay (SCP 104).

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

Bagley testified that she heard about MAREK'S conviction from her youngest son (SCP 104). She did not learn of MAREK'S problems until after the trial and was not contracted by

defense counsel (SCP 106). She has lived in the same spot for 14 years. If she had been contacted, she would have done everything to help MAREK (SCP 106). Bagley testified that she wrote a letter to MAREK while he was in prison but that he wrote back telling her not to write because he didn't need a mother (SCP 112).

On cross-examination, Bagley testified that as a child MAREK "borrowed" bicycles and various things but was never arrested (SCP 118-119). She denied knowing that MAREK had been arrested at the age of eight for shoplifting (SCP 119). Bagley did remember that MAREK had gone to prison in Texas for credit card abuse (SCP 117). She couldn't remember if MAREK had committed other burglaries and robberies in Texas (SCP 119-120). She maintained that there was "no meanness" in MAREK (SCP 120) Bagley had lost touch with MAREK before 1983), when this crime was committed (SCP 116). She had not visited MAREK in jail in Texas and did not visit him in Florida either (SCP 115-117). Bagley was contacted to testify at the hearing by C.C.R. and stated that she understood the purpose of the hearing was to get MAREK off death row (SCP 114).

MAREK'S next witness was DR. HARRY KROP, a psychologist! (SCP 123). The trial court declared Krop an expert and admitted his resume into the record (SCP 128) Dr. Krop has been involved in death penalty litigation both on a pre-trial basis (SCP 130) and in post-conviction proceedings (SCP 130). He has worked with C.C.R. in the past having done approximately fifty evaluations (SCP 132); he has also testified about seven or eight times (SCP 132). Krop's past testimony has been 60% for defense and 40% for the state (SCP 133).

In relation to MAREK, Dr. Krop set up an appointment to evaluate Marek for September 2, 1988, and met with a representative from CCR (SCP 134). MAREK, however, declined to leave his cell as he was partaking in a rare opportunity to eat ice cream (SCP 134,149-50). On September 20, 1988, Dr. Krop did, however, meet with MAREK (SPC 134). Prior to Krop's meeting with MAREK, he had been asked to do a personality profile and other tests as required (SCP 134-135). He was also asked to determine whether MAREK was competent at the time of the offense (SCP 135). C.C.R. provided Krop with a chronology of MAREK'S life events, psychology reports, data from Dr. Kreiger, D.O.C. records, medical and school records, and past psychiatric records (SCP 135). Dr. Krop testified that since September 20, 1988 he received family affidavits and more school, medical and prison records (SCP 135-136). The materials received and used by Dr. Krop were eventually admitted into evidence (SCP 202-03). Dr. Krop's

report regarding MAREK'S evaluation is attached hereto as Appendix Exhibit 2.

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

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

bladder control problems (SCP 146-47).

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

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

Testimony regarding Krop's evaluation in relation to mitigating circumstances followed. Krop stated he was not looking for specifics because non-statutory mitigating factors are open ended (SCP 157, 153). Krop looks for psychosis, intellectual or cognitive deficits, personality and any other factors to help explain why MAREK committed the crimes (SCP 152). Krop stated he needed background information in order to do this (SCP 152). Dr. Krop testified that he found no statutory mitigating factors (SCP 153). He did find chronic emotional disturbance, a poor self concept, speech defect, alcoholism and early abuse and neglect (SCP 154). MAREK had a history of abandonment which resulted in feelings of rejection and consequently anti-social

behavior (SCP 154). Dr. Kropp testified he was aware of MAREK'S prior criminal history (SCP 155). His environmental history indicates he was in and out of foster homes (SCP 156) and was eventually adopted by the MAREK'S, whose name he took (SCP 157-58). Dr. Krop stated that the events of MAREK'S early life are significant and not tainted by remoteness (SCP 161-62).

On cross-examination Dr. Krop testified that he had been contacted by C.C.R. about 40 or 50 times in the past and has testified about seven or eight times for them (SCP 163). Dr. Krop testified that he reviewed Dr. Kreiger's report and attached data and the MMPI profile (SCP 166). Dr. Krop stated that Kreiger's tests were the competency rating scales, Carlson psychological survey and the MMPI (SCP 167). Krop spent about 2-1/2 hours into viewing MAREK and one hour giving him the MMPI (SCP 168).

Krop stated that he respects Dr. Kreiger and has referred patients to him (SCP 169). His criticism of Kreiger's instant examination of MAREK was that it was done without documented background information (SCP 170). Krop then reviewed the information available to Kreiger (SCP 170-72). Krop again stated it is difficult to determine competency in hindsight as it is stress related (SCP 173). Krop stated that MAREK is competent at present (SCP 173).

Upon further cross-examination Krop testified as to his interpretation of the MMPI test results. Krop stated that al-

though it appeared MAREK was attempting to answer in a reliable manner the "F" scale, faking factor, was shakey (SCP 174-75). Other scales indicated long standings character deficits, poor impulsive control and anti-social behavior (SCP 175). Krop stated the Dr. Kreiger found the MMPI test results were invalid particularly due to the "F" scale (SCP 175). Kreiger's opinion was that MAREK was faking real bad (SCP 175-76). Krop couldn't state whether MAREK had organic brain damage (SCP 177), but he does not see any indication or documentation that would lead him to that conclusion (SCP 177-78).

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

On redirect examination Dr. Krop stated that MAREK'S warrent was probably after September 2, 1988 and that MAREK'S antisocial acts were similar to those of institutionalized individual's (SCP 186).

The next witness called by MAREK'S was his brother MARK

GRIMM (SCP 188). Mark is five years older than MAREK (SCP 188). MAREK testified that he was thirteen years old when his mother remarried to an uncaring and alcoholic man, Arliss Bagley (SCP 189). Mark did not remember how Bagley treated MAREK (SCP 189). Mark testified that MAREK did not have much contact with his step-mother Theresa (SCP 191). Mark testified that Marek had a learning disability and did nothing on his own (SCP 192). He stated that people could understand MAREK when they had been around him for awhile (SCP 192). MAREK went to special education classes and Mark stated that he stuck up for his brother and loves him (SCP 192).

On cross-examination Mark stated that he was aware that the instant proceeding, a 3.850 evidentiary hearing, was to help his brother and that he heard about it from C.C.R. and his mother (SCP 193). Mark testified that in 1983, when the murder occurred, he was living in Cemest, Oklahoma and didn't know where MAREK was living or that he had been in prison in Texas (SCP 194). Mark didn't know about the instant crime until after MAREK'S conviction (SCP 194). Mark testified that he did not write, call or visit MAREK in prison as MAREK did not want him to (SCP 195). Mark had never been in trouble with the law (SCP 195). In response to the trial court's query, Mark stated that he had no knowledge as to whether his step-mother Theresa abused MAREK (SCP 1967).

On redirect examination MAREK stated that his memory

prior to age thirteen was mostly gone (SCP 197). He stated he has bad memories of Theresa (SCP 198). Mark was not contacted by his brother's trial counsel and had he been he stated he would have testified to the same things (SCP 198).

The next witness called was MAREK'S father, Jesse William Grimm (SCP 208). Grimm is fifty years old and a retired U.S. Army serviceman. He retired in September 1973 (SCP 209). Grimm testified that MAREK was born in September of 1961 and he had three other sons with MAREK'S mom (SCP 209). MAREK was born while he was stationed in Germany (SCP 210). Grimm recalled that his wife's pregnancy was difficult and that she was homesick and that she did not want to be in Europe (SCP 210). Grimm stated that his wife was more concerned about herself, her father and grandmother than she was about him and the children (SCP 210). Although he was not home alot, Grimm stated that when he was at home that his wife kept house poorly (SCP 210). Grimm related the incident where MAREK overdosed on his mother's pills (SCP 211). He stated that he had come home around 8:30 that night and after sometime his wife told him that MAREK and his brother Jay Michael had eaten her pills - valium, birth control pills, diet pills (SCP 211). Grimm went to the kids who were in convulsions and rushed them to the hospital (SCP 212). Both children had their stomachs pumped and were transported to a hospital in Frankfort (SCP 212). The doctor told him that although the children would live, that alot could not be expected of them (SCP

212). MAREK was approximately eight months old at the time (SCP 213). Grimm noticed that after the incident that MAREK didn't sleep well and cried during the day; he was unable to do things at the proper age -- he did not crawl until 18 months and didn't walk with until age 2 (SCP 213). Grimm stated that MAREK'S speech was slurred, that he couldn't learn to ride a bike or do things other kids did (SCP 213). Grimm believed MAREK was retarded and got help through the military service (SCP 214). Grimm testified that his wife was nasty to MAREK (SCP 214).

Grimm testified that he was not at home much (216). He felt that the children were not fed properly and he often bought them cloths for school when his wife had them dressed poorly (SCP 217). Grimm testified that MAREK was enrolled in type of schools and that although strangers had a hard time understanding MAREK, he did not (SCP 217).

Grimm stated that his marriage ended in 1968 and that MAREK, would cling to him after visits (SCP 218). Grimm remarried in 1970 (SCP 218). MAREK visited Grimm and his new wife only one time for about a week (SCP 220). The children told him they didn't get along with their stepfather (SCP 221). As a point after the divorce the Red Cross brought him home from Vietnam as his children needed him (SCP 221). Marek was separated from the rest of the family (SCP 222). Grimm got custody of the other three boys (SCP 223), but couldn't get in contact with MAREK through social services as they felt he did not have

custody pursuant to his divorce (SCP 223). Grimm did not have contact with MAREK until MAREK was in the foster care of his namesake, the MAREK'S (SCP 224). Grimm got medical insurance for MAREK - (SCP 225). This insurance was later stopped and MAREK had to leave the institution he was in (SCP 225). Grimm feels he was a good father to all his sons even though he was unable to spend alot of time with them due to his career (SCP 227).

On cross-examination Grimm testified that he tried to teach MAREK how to throw a ball and ride a bike; he didn't ignore him (SCP 228). Grimm testified that he spent more time with MAREK than the other boys (SCP 229). Grimm never disclaimed MAREK (SCP 229). Grimm's impression that MAREK was retarded came from the Doctor's reports, school and medical records; he was told MAREK was a slow learner (SCP 229).

As to the overdose incident, Grimm stated that he was told MAREK had inbibed valium diet and birth control pills (SCP 230). Grimm also stated that MAREK was more attached to him than to his wife (SCP 230). Grimm tried to speed alot of time with MAREK when he was home (SCP 230-231). Grimm had asked for custody of all the boys after the divorce (SCP 231) and in fact had tried again when he found out how bad Bagley was to the children (SCP 232). Grimm did not attempt to get custody of MAREK through the courts.

Grimm did not know where MAREK was in 1983, the time of the murder (SCP 233). Grimm had been out of touch with him since

1975 (SCP 234). He found out about the crime about one year ago (SCP 234), but had not made contact with MAREK, although he did speak to the prison administration (SCP 236). Grimm stated that the purpose of the instant proceeding was to get a stay of execution (SCP 237).

On redirect examination Grimm stated he did not know why his wife had been taking valium (SCP 237). Grimm stated that between 1961 and 1968 he was gone about five or six month's a year (SCP 238). Grimm stated that had he been contacted in 1983 he would have come to Florida to testify (SCP 238). The next witness called by MAREK was SALLY HAND (SCP 239). Mrs. Hand was a foster mother to MAREK after he was thrown out of the MAREK home (SCP 239). She was told by the welfare people that MAREK had trouble telling the truth (SCP 240). Mrs. Hand had 37 other foster children, two of her own and one adopted child (SCP 240). When MAREK came to her he was bout 16 or 17 years old and she was aware that he had been in at least one other foster home (SCP 241). The first foster family helped him to learn how to talk (SCP 241). MAREK felt that the MAREK'S didn't love or understand him and that MAREK was searching for love (SCP 241). Mrs. Hand stated that he didn't talk about his mother, that he was shy, a sweet kid, that he didn't get in trouble and that he showed affection and came back to visit (SCP 242). Mrs. Hand did state that he had trouble with bed-wetting (SCP 243). MAREK got along with the other foster children (SCP 243). She testified

that had defense counsel contacted her she would have testified (SCP 244). She was contacted by a police officer before the trial (SCP 244).

On cross-examination she stated that MAREK was with her in 1978 or 1979 for a couple of years, notwithstanding that he was in and out (SCP 246). Mrs. Hand testified that MAREK was never in trouble when he was with her (SCP 246). His credit card fraud case was at a point in time when he was not in her care (SCP 247). MAREK did not exhibit a drinking problem when he was with her (SCP 249). Mrs. Hand testified that the MAREK family threw him out because he lied to Ann MAREK, even though it is a pattern with foster children to lie (SCP 249). In 1983, when the murder occurred, MAREK was not living with her, nor did she know where he lived or how he earned a living (SCP 250). When the officer told her of the crime she made no effort to find out what happened (SCP 249). Mrs. Hand later found out about the conviction from MAREK when he wrote to her (SCP 249). MAREK never told her the facts, only that he had passed out (SCP 252). Mrs. Hand was contacted by C.C.R. to testify in order to help get MAREK out of a death sentence (SCP 253). She does not believe he committed the crime as he was always sweet and loving (SCP 253).

The next witness was MAREK'S foster father JACK HAND (SCP 253). Mr. Hand testified that when MAREK came to them he was calm and quiet, with no problems, he was easy going with the little kids (SCP 254). Mr. Hand did not know anything about the

trial until it was over (SCP 255). He would have testified had he been asked (SCP 255).

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

On redirect examination Mr. Hand stated that the social worker had told Mrs. Hand about MAREK'S problems (SCP 257). When MAREK was with the Hand family, Mr. Hand was not with him all the much (SCP 259). Mr. Hand had never heard any information as to MAREK'S drinking (SCP 259).

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

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

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

on MAREK to see if he could find anything else (SCP). Dr. Krieger then evaluated MAREK a second time in April of 1984 and performed an MMPI and conducted a second interview with MAREK (SCP 268). Dr. Krieger testified that the results of the MMPI was consistent with the screening inventory performed in October (SCP 302). Again, MAREK had exaggerated his symptoms (SCP 272). According to Dr. Krieger, MAREK scored 10 points higher than individuals who have the most bizarre symptoms and that this exaggeration of symptoms was to get additional treatment or attention (SCP 276). The only realistic responses had to do with depressive traits (SCP 277). Dr. Krieger testified however that while MAREK was depressive he was not psychotic (SCP 277). The "bottom line" of the second evaluation was that MAREK exaggerated his symptoms and responses as he did in the first evaluation (SCP 277). The test results were totally inconsistent with the personal interview which revealed MAREK as being "intact, rational and sequential" in his explanations and personal history (SCP 277). Dr. Krieger did not feel that additional testing was necessary since he could not get a valid test result from MAREK "no matter what he did" (SCP 278). Dr. Krieger had no concerns about MAREK'S background information as provided by MAREK and stated that a background such as MAREK'S was common to people who got into trouble with the law (SCP 281. People such as MAREK got their "do it to them before they do it to you attitude" from their upbringings (SCP 284-285) Dr.

Krieger specifically testified that MAREK'S claim that he had alcoholic amnesia and couldn't remember the crime was a defensive strategy (SCP 274). Dr. Krieger testified that anti-social persons commit crimes for self-gratification and that boredom, not anger is a major component of sex crimes (SCP 285). Dr. Krieger updated the findings of this second evaluation to Attorney Moldof but did not write up a second report (SCP 302).

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

any major mental illness or psychosis (SCP 291)

On cross-examination, Dr. Krieger testified this case was not his first with Attorney Moldof and that they had had 2 or 3 cases together before MAREK'S (SCP 294). Dr.Krieger testified that he was opposed to the death penalty and was aware that in capital cases "you had to cover all the basis " (SCP 294-295). Dr. Krieger testified the purpose he was to evaluate was for exploration (SCP 295). Moldof did not ask Dr. Krieger to perform the evaluation because he had trouble communicating with MAREK (SCP 295). Dr. Krieger also did not have trouble communicating with MAREK during the two interviews (SCP 297). Dr. Krieger described MAREK as being rational and coherent and very cooperative except with providing the details of the offense (SCP 297). Dr. Krieger concluded in his written report that MAREK was competent (SCP 297). Dr. Krieger also recalled that MAREK readily admitted to other crimes during the interview process (SCP 298-299). Dr. Krieger testified that he told Moldof that MAREK had exaggerated his test responses and that if MAREK wasn't faking the responses than he could not communicate with Moldof or anyone (SCP 301) According to Dr. Krieger, if MAREK'S test results were valid, he would be "dancing off the walls" (SCP 301). If had had been called at the penalty phase to testify, Dr. Krieger would have testified that MAREK had a mixed personality disorder with borderline anti-social features (SCP.302). Additionally, Dr. Krieger testified that MAREK did

not try to act crazy in the interview, just on the test (SCP.302). During the interview MAREK spoke very specifically about the presence of fingerprints and semen and was very detailed about everything except the crime itself during which MAREK had claimed to be sleeping (SCP 308).

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

Moldof was appointed to represent MAREK as a special public defender in August of 1983 (SCP 313). Moldof testified that he had met with CCR about 1 month before the hearing (SCP 314). Moldof testified that prior to MAREK'S trial he filed numerous motions including a motion to sever and a motion to suppress statements (SCP 315). Both motions were granted and MAREK was tried separately from co-defendant Raymond Wigley and also had his statements suppressed (SCP 315). Moldof knew that this case was a possible death penalty and wanted to call MAREK'S family members for the penalty phase to show MAREK was loved and to show that the truck MAREK was driving was given to him to use

and was not stolen (SCP 315-16). MAREK told Moldof that he had lived with foster families a long time ago and that they would have little to say (SCP 316-317). He also told Moldof that the whereabouts of his real family were unknown to him (SCP 317). Moldof didn't contact anyone in Texas because of what MAREK had told him (SCP 317-318). Moldof also testified that the last people MAREK was with in Texas were undesirable in that MAREK had been in a homosexual relationship there and Moldof did not want this information to get before the jury (SCP 318). Moldof did not check out the address on MAREK'S driver license since MAREK had not been living there before he left Texas (SCP 319-320). As far as mitigating evidence went, Moldof was looking for anything that might bear well on MAREK (SCP 320). The fact that MAREK was abandoned and in foster care would only be mitigating depending upon what other evidence from MAREK'S past would come out (SCP 322). MAREK had told Moldof that anything that would come out from his family and foster care would be negative (SCP 322). Moldof didn't see any reason to investigate this area based on what MAREK had said (SCP 322-23). Moldof also pointed out that MAREK had not lived with his real family or foster parents for years (SCP 323). According to Moldof, even if MAREK had been labeled retarded at age 9 or 10, this would be remote in time. Further, MAREK'S recent past showed homosexuality which he did not want the jury to hear about (SCP 324). Moldof did not believe that this information would be favorably received by the

jury (SCP 324). When shown background information from school and welfare authorities in Texas, Moldof said he would have liked to have had this information since it could show MAREK'S poor upbringing (SCP 330). Moldof reiterated that he didn't write to the authorities in Texas because he didn't feel he would receive anything positive from them (SCP 330). Moldof testified that MAREK was resisting him in this area and although the information would have been nice to have, he couldn't get it as a practical matter where MAREK was resisting him (SCP 331). Moldof had told MAREK that if he was convicted it would be important to bring out his past and family but MAREK didn't seem concerned or even interested in the case (SCP 333). As an example of MAREK'S lack of interest in the case, Moldof related that prior to trial he had had MAREK transferred to a facility where he could get sun so he could look tan in front of the jury so they wouldn't know he was incarcerated. MAREK never went to the facility or got any sun because he wanted to stay in the gay cell (SCP 334-35).

Moldof knew that MAREK was in prison in Texas and decided not to argue the statutes mitigating circumstance of no significant history of prior criminal activity because he didn't want the state to bring out that MAREK had been in prison (SCP.336-37).

Moldof also testified that before Dr. Krieger evaluated MAREK he told MAREK to tell Dr. Krieger everything and to "unload

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

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

after the second evaluation (SCP 342).

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

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

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

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

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

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

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

On cross-examination, Moldof testified that over-objecting to the to the prosecutor's argument would have had a

negative effect on the jury (SCP 369). He further testified that he knew the trial court would be instructing the jury that the arguments of counsel was not evidence and that he therefore did not find it necessary to object to the prosecutor's argument (SCP 370). Moldof did not think that MAREK'S psychiatric records would have had any effect on the jury, which had many women on it (SCP 370). Moldof further testified that these records would not have affected the trial court as the ultimate sentencer where he had practiced before Judge Kaplan for many years and knew that these records would not have altered the jury's on trial courts sense of repugnance at the crime (SCP 372). School and psychiatric records had their negative side and would have showed that MAREK had a sexually deviant background and that he hated his mother (SCP 374). This was not the sort of information Moldof wanted the jury to hear about (SCP 374).

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

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

Moldof testified that MAREK would change his story as time went on and that he would forget some details while adding

others (SCP 377). Moldof tried to get MAREK to keep his story straight (SCP 378).

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

Regarding Dr. Krieger's evaluation, Moldof testified that he thought Dr. Krieger was an excellent psychologist and had used him in prior cases (SCP 383). According to Moldof, Dr. Krieger had appeared in front of Judge Kaplan before and had an excellent reputation in the courthouse (SCP 384). Moldof testified that he had wanted Dr. Krieger to explore MAREK'S amnesia (SCP 385). He had the second evaluation performed because he was running into a dead end in terms of coming up with a defense and thought Dr. Krieger could help him (SCP 386). Moldof testified that he didn't feel that Dr. Krieger's first report hurt MAREK but that he didn't want a second report written up so that in case he decided to use the first report, the State wouldn't know about the second evaluation and use it against MAREK (SCP 387). Moldof testified that he tried to gently

dissuade MAREK from testifying but that MAREK wanted to tell his story for the jury (SCP 368). Moldof prepped MAREK for cross-examination and instructed MAREK on how he wanted MAREK to look, act and sound on the stand (SCP 388) Moldof spent hours on this and told MAREK that on cross-examination just answer the questions and don't volunteer anything (SCP 389). Moldof was surprised by MAREK'S cross-eximination (SCP 391). MAREK had exaggerated his drinking and brought up the conversation which had been surppressed (SCP 391). Moldof had cautioned MAREK about the obvious pitfalls of testifying in this area (SCP 391).

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

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

The hearing was concluded at 8:45 P.M. on Friday,

November 4, 1988. At the time this factual supplemental was prepared November 5th and 6th, the trial court had not yet ruled on MAREK'S motion for post-conviction relief. The page cites have been leftout since as of this writing, the record had not been prepared.

SUMMARY OF THE ARGUMENT

Appellee would rely and adopt the Summary of the Argument as sound in its anticipatory answer brief at pages 26 through 33.

ARGUMENT

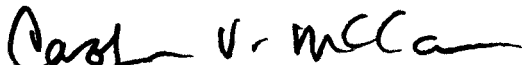
Appellee would rely on the arguments as sound in its anticipatory answer brief as to claims 1 through 22.


CONCLUSION

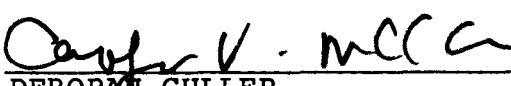
Based on the foregoing reasons , the Appellee respectfully requests that the order of the trial court, denying Appellant's motion for post-conviction relief, be affirmed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Florida Attorney General
Tallahassee, Florida

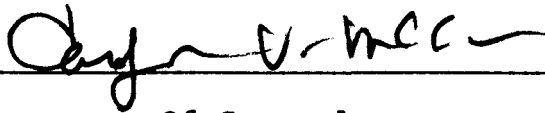

CAROLYN V. McCANN
Assistant Attorney General
111 Georgia Avenue, Suite 204
West Palm Beach, Florida 33401
(407) 837-5062


JOY B. SHEARER
Assistant Attorney General


DEBORAH GULLER
Assistant Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Supplemental Answer Brief has been hand delivered to: MARTIN J. McCLAIN, Assistant Capital Collateral Representative, Office of the Capital Collateral Representative, 1533 South Monroe, Tallahassee, Florida 32301, this 7th day of November, 1988.



Of Counsel