IN THE SUPREME COURT OF FLORIDA

NO. 80,351

JOHN RICHARD MAREK,

Petitioner,

v.

HARRY K. SINGLETARY,
Secretary, Florida Department of Corrections,

Respondent.

AMENDMENT TO PETITION FOR EXTRAORDINARY RELIEF AND FOR A WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

Mr. Marek filed a petition for habeas corpus relief on August 18, 1992. On July 1, 1993, this Court issued its opinion in Garcia v. State, 18 Fla. L. Weekly S382 (Fla. July 1, 1993). In that decision, this Court reaffirmed that hearsay evidence may be presented by a capital defendant in penalty phase proceedings in an effort to establish mitigation which calls for a sentence less than death. Further, this Court held it was deficient performance for a capital defense attorney not to know that hearsay could be presented by a capital defendant in penalty phase proceedings.

The Garcia decision establishes that the Eighth Amendment was violated in Mr. Marek's case, and that this Court erroneously denied Mr. Marek a resentencing when he presented this issue in a previous habeas corpus petition and on appeal from the denial of Fla. R. Crim. P. 3.850 relief.[1]

In light of Garcia, Mr. Marek presents this amendment to his previously filed habeas corpus petition. Under Garcia, habeas relief must issue, and a resentencing be ordered for Mr. Marek so that mitigation can be presented to Mr. Marek's jury.

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[1]The issue presented in this amendment was presented as Claim IX of Mr. Marek's Rule 3.850 motion (Fla. Sup. Ct. Case No. 73,278, Record on Appeal, p. 54) and as Issue I of Mr. Marek's Initial Brief on appeal of the denial of Rule 3.850 relief (Fla. Sup. Ct. Case No. 73,278, Initial Brief of Appellant, pp. 25-31). The issue presented herein, including the argument that direct appeal counsel was ineffective, was also presented as Claim VII of Mr. Marek's prior habeas corpus petition (Fla. Sup. Ct. Case No. 73,175, Petition for Extraordinary Relief, pp. 30-33).

CLAIM III

MR. MAREK WAS DENIED HIS SIXTH AND EIGHTH AMENDMENT RIGHTS TO PRESENT TO HIS SENTENCING JURY MITIGATING EVIDENCE WHICH WAS IN THE FORM OF HEARSAY (A PSYCHOLOGIST'S WRITTEN REPORT), AND MR. MAREK WAS DENIED EFFECTIVE REPRESENTATION ON APPEAL WHEN APPELLATE COUNSEL FAILED TO RAISE THIS PRESERVED ISSUE ON APPEAL.[2]

On July 1, 1993, this Court ruled:

> Garcia's appointed counsel declined to introduce Yancey's statement at trial and now, as the second part of Issue 2, Garcia claims that this constituted ineffectiveness. On collateral review, trial counsel Bone stated that he did not use the statement in the penalty phase because he considered it to be inadmissible hearsay. Garcia correctly points out, however, that the exclusionary rules of evidence, including the rule barring use of hearsay statements, are inapplicable in the penalty phase of a capital trial. Section 921.141(1), Florida Statutes (1979), provides in part:
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> > In the [penalty] proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements.
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> Thus, the hearsay rule was not an automatic bar to Yancey's statement.

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[2]The State has argued that this issue was not presented on direct appeal. Accepting that arguendo, appellate counsel's performance was deficient in not raising this meritorious issue in his twenty-four page initial brief.

> We conclude that trial counsel's failure to seek admission of Yancey's statement during the penalty phase constitutes ineffectiveness under the two-pronged Strickland test. See Strickland v. Washington, 466 U.S. 668, 688, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) (counsel's error must be both "[un]reasonable considering all the circumstances" and sufficiently prejudicial "to undermine confidence in the outcome"). Counsel's failure to comprehend the most fundamental requirement governing the admissibility of evidence in capital sentencing proceedings was clearly unreasonable, particularly where the provision is set out plainly in Florida Statutes. The error also was sufficient to undermine confidence in the jury recommendation of death. The fact that a number of months after the crime codefendant Torres, in a statement adverse to his own self-interest, allegedly told Yancey substantially the same version of the shootings that Garica himself had told police on the night of the killings--that Torres shot one woman, and Ribas, the seventeen-year-old known to Garcia as Joe Perez, shot the other two persons--would have immeasurably bolstered Garcia's claim that he was not a shooter. We note that four jurors voted for life imprisonment even in the absence of Yancey's statement.

Garcia v. State, 18 Fla. L. Weekly S382-83 (Fla. July 1, 1993).

Here, Judge Kaplan ruled at trial that he 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 was inadmissible hearsay. 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.
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> 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 know that Mr. Marek had been in various foster homes since age nine and that he had been treated for emotional problems since age ten. 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; Garcia v. State. Yet, appellate counsel failed to present this issue on direct appeal even though it had been preserved at trial.

At the time of Mr. Marek's direct appeal, "extant legal principle[s]. . . provided a clear basis for a compelling appellate argument." Fitzpatrick v. Wainwright, 490 So. 2d 938, 940 (Fla. 1986). The issue regarding the trial court's refusal to admit Dr. Krieger's report was preserved at trial and available for presentation on appeal. Johnson v. Wainwright, 498 So. 2d 938, 939 (Fla. 1986); Fitzpatrick, 490 So. 2d at 940. Neglecting to raise "so fundamental an issue" such as the denial of the opportunity to present mitigation evidence "is far below the range of acceptable appellate performance and must undermine confidence in the fairness and correctness of the outcome." Wilson v. Wainwright, 474 So. 2d 1162, 1164 (Fla. 1985). When "[t]he propriety of the death penalty is in every case an issue requiring the closest scrutiny," appellate counsel's failure to raise the denial of the opportunity to present mitigation evidence demonstrates appellate counsel's "fail[ure] to grasp the vital importance of his role as a champion of his client's cause." Wilson, 474 So. 2d at 1164. This omission by appellate counsel establishes that "confidence in the correctness and fairness of the result has been undermined." Wilson, 474 So. 2d at 1165 (emphasis in original).

Under this Court's reasoning in Garcia, had this issue been

presented on direct appeal a resentencing would have been required. Certainly, there can be no strategic reason for not presenting an issue which was preserved at trial and which would have resulted in a reversal of the death sentence. Garcia held that ignorance of the statutory language providing that hearsay is admissible at penalty phase proceedings is deficient performance. Moreover, Mr. Marek was prejudiced. At the penalty phase, Mr. Marek's jury was prevented from hearing any evidence regarding Mr. Marek's sad childhood and background, which was relevant and admissible in any case, but which was particularly relevant in this case where Mr. Marek was only twenty-one (21) years old at the time of the offense and thus had just barely concluded his childhood. Moreover, the jury was prevented from hearing any evidence regarding Mr. Marek's history of drug and alcohol abuse or regarding his "significant personality disturbance." Then, on direct appeal, Mr. Marek was denied the resentencing to which controlling law said he was entitled.

Mr. Marek was deprived of his right to present mitigation evidence to his sentencers. Appellate counsel's performance was deficient, and Mr. Marek was prejudiced. Habeas relief must issue.

I HEREBY CERTIFY that a true copy of the foregoing amendment has been furnished by United States Mail, first class postage prepaid, to all counsel of record on July 27, 1993.

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