IN THE SUPREME COURT OF FLORIDA

CASE NO. SC00-253

JOHN C. MARQUARD,

Petitioner,

v.

MICHAEL W. MOORE,
Secretary,
Florida Department of Corrections,

Respondent.

and

ROBERT BUTTERWORTH,
Attorney General,

Additional Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

This is Mr. Marquard's first habeas corpus petition in this Court. Art. l, Sec. 13 of the Florida Constitution provides: "The writ of habeas corpus shall be grantable of right, freely and without cost." This petition for habeas corpus relief is being filed in order to address substantial claims of error under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, claims demonstrating that Mr. Marquard was deprived of the right to a fair, reliable, and individualized sentencing proceeding and that the proceedings resulting in his conviction and death sentence violated fundamental constitutional imperatives.

Citations shall be as follows: The record on appeal concerning the original court proceedings shall be referred to as "M ___" followed by the appropriate volume and page numbers. The co-defendant's original court proceedings shall be referred to as "A ___" followed by the appropriate volume and page numbers. The co-defendant's second penalty phase will be referred to as "A 1995 ___" followed by the appropriate volume and page numbers. The postconviction record on appeal will be referred to by the appropriate volume and page numbers. All other references will be self-explanatory or otherwise explained herein.

INTRODUCTION

Significant errors which occurred at Mr. Marquard's capital

trial and sentencing were not presented to this Court on direct appeal due to the ineffective assistance of appellate counsel.

The issues, which appellate counsel neglected, demonstrate that counsel's performance was deficient and that the deficiencies prejudiced Mr. Marquard. "[E]xtant legal principles...provided a clear basis for ... compelling appellate argument[s]." Fitzpatrick v. Wainwright, 490 So.2d 938, 940 (Fla. 1986). Neglecting to raise fundamental issues such as those discussed herein "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). Individually and "cumulatively," Barclay v. Wainwright, 444 So.2d 956, 959 (Fla. 1984), the claims omitted by appellate counsel establish that "confidence in the correctness and fairness of the result has been undermined." Wilson, 474 So.2d at 1165 (emphasis in original).

Additionally, this petition presents questions that were ruled on in direct appeal, but should now be revisited in light of subsequent case law or in order to correct error in the appeal process that denied fundamental constitutional rights. As this petition will demonstrate, Mr. Marquard is entitled to habeas relief.

PROCEDURAL HISTORY

On December 6, 1991, a St. John's County Grand Jury indicted Mr. Marquard for principle to first degree murder (M V1, 1). A superseding indictment charging Mr. Marquard with first degree murder and armed robbery was issued April 24, 1992 (M V1, 41). Mr. Marquard's jury trial commenced January 11, 1993, and concluded January 15, 1993, (M V4-V11, 696-1785). The jury found him guilty on both charges and recommended death (M V9,1465-66, V11,780). On February 5, 1993, the court adjudicated Mr. Marquard guilty of one count of first degree murder and, in accordance with the jury's recommendation, sentenced him to death (M V11,1809,1820).

Mr. Marquard unsuccessfully appealed his first degree murder conviction and death sentence. Marquard v. State, 641 So. 2d 542 (Fla. 1994). Mr. Marquard filed a Petition for Writ of Certiorari to the United States Supreme Court which was denied January 23, 1995. Marquard v. Florida, 115 S.Ct. 946 (1995).

Mr. Marquard filed a 3.850 Motion to Vacate Judgment of Convictions and Sentence on March 17, 1997, in conformance with the March 24, 1997, due date established by this Court (V1, 1-42). Mr. Marquard filed an amended motion to vacate judgment of conviction and sentence with special request for leave to amend on February 22, 1999 (V3, 443-507). The court found this amended motion to be legally sufficient and entered an order for the State Attorney to file an answer to the motion by May 7, 1999 (V3, 509). On May 7, 1999, the State filed its response (V3, 577-

585).

On May 12, 1999, the trial court issued an order on Mr. Marquard's amended motion to vacate judgment of conviction and sentence (V3, 585-586). The court granted an evidentiary hearing on Claims one and two. The court held Claims three, four, five, and eight were procedurally barred (V3, 585, 586). The court denied Claims six and seven (V3, 585, 586).

Mr. Marquard filed an amended motion to vacate judgment and sentence on November 16, 1999, adding the claim that the co-defendant's life sentence should be considered as newly discovered evidence of mitigation for proportionality consideration (V4, 647-656). Mr. Marquard's attempt to file a separate pro-se motion was denied, but the court did allow the separate pro-se motion to be filed and made a part of the record (V4, 657-660).

The court held an evidentiary hearing on Claims one and two on November 16 and 18, 1999 (V6, V7). Prior to closing arguments at the evidentiary hearing, the trial court granted Mr. Marquard's motion to amend the pleadings to conform to the evidence (V7, 287; V4, 661-663). Mr. Marquard filed a third amended motion to vacate judgment of conviction and sentence with special request for leave to amend on December 6, 1999 (V4, 664-722). On December 10, 1999, the state filed a response to the second and third amended motions to vacate judgment of conviction and sentence with special request for leave to amend (V4,

723–726).

The circuit court denied Mr. Marquard's 3.850 motion on December 21, 1999. Mr. Marquard filed his notice of appeal January 19, 2000. His appeal shall be filed contemporaneously with this petition.

JURISDICTION TO ENTERTAIN PETITION AND GRANT HABEAS CORPUS RELIEF

This is an original action under Fla.R.App.P. 9.l00(a). See Art. l, Sec. 13, Fla. Const. This Court has original jurisdiction pursuant to Fla.R.App.P. 9.030(a)(3) and Art. V, Sec. 3(b)(9), Fla. Const. The petition presents constitutional issues which directly concern the judgment of this Court during the appellate process and the legality of Mr. Marquard's sentence of death.

Jurisdiction in this action lies in this Court, see, e.g., Smith v. State, 400 So.2d 956, 960 (Fla. 1981), for the fundamental constitutional errors challenged herein arise in the context of a capital case in which this Court heard and denied Mr. Marquard's direct appeal. See Wilson, 474 So.2d at 1163 (Fla. 1985); Baggett v. Wainwright, 229 So.2d 239, 243 (Fla. 1969); cf. Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981). A petition for a writ of habeas corpus is the proper means for Mr. Marquard to raise the claims presented herein. See, e.g., Way v. Dugger, 568 So.2d 1263 (Fla. 1990); Downs v. Dugger, 514 So.2d 1069 (Fla. 1987); Rilev v. Wainwright, 517 So.2d 656 (Fla. 1987);

Wilson, 474 So.2d at 1162.

This Court has the inherent power to do justice. The ends of justice call on the Court to grant the relief sought in this case, as the Court has done in similar cases in the past. The petition pleads claims involving fundamental constitutional error. See Dallas v. Wainwright, 175 So.2d 785 (Fla. 1965); Palmes v. Wainwright, 460 So.2d 362 (Fla. 1984). The Court's exercise of its habeas corpus jurisdiction, and of its authority to correct constitutional errors such as those herein pled, is warranted in this action. As the petition shows, habeas corpus relief would be more than proper on the basis of Mr. Marquard's claims.

GROUNDS FOR HABEAS CORPUS RELIEF

By his petition for a writ of habeas corpus, Mr. Marquard asserts that his capital conviction and sentence of death were obtained and then affirmed during this Court's appellate review process in violation of his rights as guaranteed by the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.

CLAIM I

NEWLY DISCOVERED EVIDENCE ESTABLISHES JOHN MARQUARD'S DEATH SENTENCE IS DISPROPORTIONATE, DISPARATE, AND INVALID IN VIOLATION OF THE EIGHTH AMENDMENT OF THE UNITED STATES' CONSTITUTION.

A. Michael Abshire's Life Sentence

The circuit court sentenced both John Marquard and his co-defendant, Michael Abshire, to death on February 5, 1993 (M V3, 538); (A V3, 481). This Court vacated Michael Abshire's conviction and death sentence in 1994. Abshire v. State, 642 So.2d 542 (Fla. 1994). Upon remand, Abshire plead guilty and received a life sentence after a penalty phase at which he waived the right to a jury recommendation. The Fifth District Court of Appeal upheld Abshire's life sentence on November 7, 1995, more than one year after this Court denied rehearing on John Marquard's direct appeal. Abshire v. State, 663 So.2d 639 (Fla.App. 5th DCA 1995); Marquard v. State, 641 So.2d 542 (Fla. 1994). Because Abshire received a life sentence after this Court considered John Marquard's death sentence on direct appeal, Abshire's life sentence is newly discovered evidence which proves John Marquard's death sentence is disproportionate, disparate, and invalid under the Eighth and Fourteenth Amendments.

In Scott v. Dugger, this Court held that a codefendant's life sentence imposed after this Court reviews a defendant's death sentence on direct appeal constitutes newly discovered evidence:

> Even when a codefendant has been sentenced subsequent to the sentencing of the defendant seeking review on direct appeal, it is proper for this Court to consider the propriety of the disparate sentences in order to determine whether a death sentence is appropriate given

> the conduct of all participants in committing the crime. Witt v. State, 342 So. 2d 497 (Fla.), cert. denied, 434 U.S. 935, 98 S. Ct. 422, 54 L.Ed.2d 294 (1977). While Witt involved review of a death sentence on direct appeal, this case involves review in a 3.850 proceeding. Scott characterizes Robinson's life sentence, which was imposed after this Court affirmed Scott's conviction and death sentence, as "newly discovered evidence" and, thus, cognizable under Rule 3.850.

Scott v. Dugger, 604 So. 2d 465, 468 (Fla. 1992). This Court outlined two requirements to receive relief based on newly discovered evidence:

> Two requirements must be met in order to set aside a conviction or sentence because of newly discovered evidence. First, the asserted facts "must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known them by the use of diligence." Hallman, 371 So. 2d at 485. Second, "the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial." Jones v. State, 591 So. 2d 911, 915 (Fla. 1991). The Jones standard is also applicable where the issue is whether a life or death sentence should have been imposed. Id.

Scott 604 So. 2d at 468. In Mr. Marquard's case, both requirements are met and relief is necessary. Michael Abshire's life sentence was not imposed until after John Marquard's direct appeal was completed. Thus, Abshire’s life sentence could neither be known nor discovered at the time this Court reviewed Mr. Marquard's death sentence on direct appeal. The facts revealed during Abshire’s and John Marquard’s trials prove that Abshire was completely involved in all aspects of the crime, and

that Abshire is as culpable as John Marquard. Thus, newly discovered evidence of Abshire's life sentence would result in a life sentence for John Marquard on retrial or appeal.

In John Marquard's Judgement and Sentence, the sentencing court found four statutory aggravating circumstances: 1. John Marquard was under a sentence of imprisonment or placed on community control, 2. the crime was committed while Marquard was engaged in the commission of a robbery or committed for financial gain, 3. the crime was especially heinous, atrocious, or cruel, and 4. the crime was cold, calculated, and premeditated (M V3, 538-540). The court found no statutory mitigating circumstances and noted four possible non-statutory mitigating circumstances (M V3, 540-543).

In Michael Abshire's 1993 Judgement and Sentence, the sentencing court found five statutory aggravating circumstances: 1. Abshire was under a sentence of imprisonment, 2. Abshire was previously convicted of a threat or use of violence to some person, 3. the crime was committed while Abshire was engaged in the commission of a robbery or committed for financial gain, 4. the crime was especially heinous, atrocious, or cruel, and 5. the crime was cold, calculated, and premeditated (A V3, 481-484). The court found some evidence of the statutory mitigating circumstance that Abshire acted under extreme duress or under the substantial domination of another person:

There is some evidence to support that there

> was some dominance of Defendant by Marquard during the killing. Defendant insisted in the statements he gave that he stabbed and chopped Stacey because he was afraid of what Marquard would do to him. That evidence is weak, self-serving, inconsistent with the other evidence as to their relationship before and after the murder. Andrew Beyer did corroborate Defendant's statement, that Marquard liked to do things his way and Marquard said he made Defendant stab Stacey.
>
> Defendant had not followed Marquard's previous directions concerning killing Stacey. Defendant did not have to help plan nor help lure Stacey into the woods.
>
> However, the Court finds there was some dominance of Defendant by Marquard at the time of the killing.

(A V3, 485). The court also noted four possible non-statutory mitigating circumstances:

> . . . The principle circumstance is Defendant's testimony in the trial of John Christopher Marquard which resulted in a 12 - 0 recommendation of death and a verdict of guilty of armed robbery with a deadly weapon. Defendant's testimony was important and critical evidence in Marquard's case.
>
> Defendant cooperated with law enforcement after initially lying to them. He told law enforcement what happened. He minimized his participation, but his statements appear to be fairly accurate versions of how the crime occurred. Without his statements the State had difficult cases against both Defendants. Defendant's mother, Virginia Murray, testified that when she and her husband were divorced the Defendant was fifteen years old. She stated that was a bad time in his life and she and her husband did not consider Defendant as a child - they more or less allowed him to go and do things on his own, suggesting they failed to give him the emotional support and love he needed at that

> time.
>
> She further testified that before Defendant got involved with Marquard and the game of Dungeons and Dragons Defendant attended college, worked two jobs, rode a bicycle as his only transportation, attended church regularly, sang in a church group and made good grades.
>
> Mrs. Murray testified that Defendant goes along with anything to keep a friend and may need therapy to determine why, lending some support to the theory that Defendant was dominated by Marquard.
>
> The Court considers the testimony of Mrs. Murray to be true.

(A V3, 484-486).

During Abshire's 1995 penalty phase the state presented no new evidence except for the victim's mother as victim impact evidence (A 1995, 5-33). Abshire testified on his own behalf (A 1995, 39-53). The state argued for the five aforementioned aggravating circumstances the court found had been proven beyond a reasonable doubt in 1993 (A 1995, 54-55). Before announcing Abshire's sentence, the court stated:

> But I want to read a couple of things here that I think justifies the sentence that I will impose in your case. You were examined by Dr. Harry Krop, who is a clinical psychologist, and he found that you were a seriously disturbed individual with a number of personality deficiencies and defects. It is a documented fact previously testified to by your mother that your parents separated and divorced when you were seven years old, and you were separated from your father for four or five years. Your mother did not want you to see your father because you were afraid of him. You started drinking,

according to you, at the age of 8 and started using drugs at the age of 8 or 9. There is no documentation of that addiction and no indication in later years that you had an alcohol or drug problem.

You told Dr. Krop that you were sexually abused by an adult neighbor. I really don't have any reason to doubt that statement. But other than your statement, there is no corroboration of that particular abuse.

When you were 11 years old, you were sent to a group home for 18 months. When you returned home, you regressed and were then placed in therapeutic foster care where you remained for 15 months. You then lived with your father for approximately two years. You experienced problems adjusting and were placed in a group home for emotionally disturbed adolescents and transferred to the state hospital about 16 months. I'm sorry, that is incorrect. It's not you. Here it is.

The thing that I had previously noted in sentencing you the first time that you claim that you acted under extreme duress and under the substantial domination of Marquard. I found at that first sentencing that was not true. I have since changed my mind about that. There is evidence to support that not only did you act under his domination but that you were afraid of Marquard. And I don't think there is any question about the fact that if you had not done what Marquard told you to do on that night that he probably would have killed you, too.

Your mother did testify that she and your father were divorced when you were 15 years old and that they failed to give you both the emotional support and love that you needed at the time. And what is really surprising is that when you attended college, you worked two jobs and attended church regularly, sang in a church group and made good grades. I don't believe there is any doubt about the fact that if it hadn't been for John

> Marquard, that Stacey Willis[sic.] would have been alive today.
>
> . . . One is that Marquard, on his way down from North Carolina, indicated he wanted to kill Stacey Willis[sic.], that you would not participate in that, and, in fact, avoided putting Stacey Willis in a position where she could be killed. The fact that you were willing to protect her at that time does not mitigate the fact that you participated in her death at a later time. But it does show me that somewhere within that body of yours there has to be some humanity which is certainly not recognizable looking at you participation in the death of Stacey Willis[sic.].
>
> I believe you said it best, Mr. Abshire, when you told your attorney or the State Attorney that you, in fact, acted as a doormat through most of your life, that you let other people tell you what to do and you did it. Regardless of how serious it may be, such as the event in North Carolina where the guy was attacked with a brick and seriously injured, but the Germans had the same excuse in the second world was that they were simply following orders. I believe that's your defense here today that you were following orders. That's not an acceptable defense to any type of crime that I know.

(A 1995, 74-78).

Thus, the court's decision to sentence Abshire to life was not based on new evidence, it was merely a new interpretation of the facts of the case. The only new mitigation evidence presented at Abshire's 1995 penalty phase was Abshire's testimony. The same aggravators and mitigators were offered, and the court based Abshire's life sentence on the very same mitigators he found did not outweigh the aggravation in 1992. The

court stated he changed his mind, “The thing that I had previously noted in sentencing you the first time that you claim that you acted under extreme duress and under the substantial domination of Marquard. I found at that first sentencing that was not true.” (A 1995, 75-76). However, at the 1992 sentencing, the court did find that mitigating circumstance. “Defendant insisted in the statements he gave that he stabbed and chopped Stacey because he was afraid of what Marquard would do to him. That evidence is weak, self-serving, inconsistent with the other evidence as to their relationship before and after the murder. . . .However, the Court finds there was some dominance of Defendant by Marquard at the time of the killing.” (A V3, 485). The very same aggravation and mitigation that the court found justified a death sentence in 1992, the court interpreted to justify a life sentence in 1995. The only new evidence presented to change the mitigation was Abshire’s own testimony from which the court must have concluded “if you had not done what Marquard told you to do on that night that he probably would have killed you, too” (A 1995, 76). In 1992, the court found his similar statements “weak, self-serving, inconsistent with the other evidence as to their relationship before and after the murder” (A V3, 485).

The court found one less aggravator and more compelling non-statutory mitigation in John Marquard’s case, so his death sentence is clearly not proportionate. According to Abshire’s testimony, both Abshire and John Marquard led the victim to the

woods, stabbed the victim, and left with her car and other personal property.

Because only Michael Abshire remembers the murder and he admitted he participated in every aspect of the crime, the newly discovered evidence of his life sentence proves John Marquard's death sentence violates the constitutional principles explained in Lockett v. Ohio, 438 U.S. 586 (1978) and Eddings v. Oklahoma, 455 U.S. 104 (1982). *See also* Magwood v. Smith, 791 F.2d 1438 (11th Cir. 1986). The central constitutional concern of capital punishment jurisprudence is that any death sentence be proportionate. *See* Gregg v. Georgia, 428 U.S. 153 (1976). John Marquard's death sentence is no longer valid in light of Michael Abshire's life sentence entered post-trial and post-direct appeal. On newly discovered evidence of Michael Abshire's life sentence alone, John Marquard's death sentence is disparate, arbitrary and capricious.

B. Abshire's Testimony At John Marquard's Evidentiary Hearing

In addition to the newly discovered evidence of Abshire's life sentence, additional evidence presented at John Marquard's post-conviction evidentiary hearing established that John Marquard's death sentence is disproportionate because he is equally or less culpable than Abshire. At the evidentiary hearing, Abshire changed or recanted much of his prior testimony at John Marquard's trial. Abshire's change in testimony is newly

discovered evidence. *See* Robinson v. State, 707 So.2d 688, 691 n.4 (Fla. 1998); Jones v. State, 591 So. 2d 911, 914-915 (Fla. 1991). Abshire testified at the evidentiary hearing that at the time of trial, he would not have cooperated with John Marquard's counsel, and he wanted John to be sentenced to death (V 6, 50-51). This evidence was not available at the time of trial and it probably would result in a life sentence on retrial or appeal.

Abshire's testimony at John Marquard's November 1999, evidentiary hearing reveals that Abshire was much more culpable than his 1993 testimony indicated. Abshire testified at John's trial that the victim was dead before he stabbed her and tried to decapitate her (M V7, 431). At the evidentiary hearing, however, Abshire testified that the victim was alive when he chopped her neck, trying to decapitate her.

Q That night, the knife, How did you use it?

A Just like you would chopping wood.

Q Did you use it on Stacey?

A Yes, sir.

Q How did you do that?

A **I thought she might still be alive, might still be hurting, and I hit her as hard as I could with it on the neck, and I just didn't want to hear her hurt any more.**

(V6, 36)(*emphasis added*).

At trial, Abshire testified that he and John drove for 20 or 30 minutes after leaving Miss Rosa's, returned to the motel room,

showered and changed, and then left for the woods to kill the victim (M V7, 1114-1116). He testified they drank beer in the motel room before leaving (M V7, 1117, 1209). At the evidentiary hearing, Abshire testified that after 5:00 that evening he and John drank tequila and beer at the motel. After 8:30 that evening, they left the victim at the motel and went to bar called Scarlett O'Hara's. There, Abshire watched John drink two longneck beers, and then they separated for about an hour. They then went to the Tradewinds bar where they each drank approximately one pint of Killians beer every ten to fifteen minutes while listening to a band's entire set (V6, 31-34, 51-53). Throughout that day and evening Abshire and John took great quantities of ephedrine, and they smoked marijuana (V6, 33-34). John did manage to avoid a car accident while driving intoxicated that evening, but Abshire testified John always drove better while intoxicated, he did not pay attention to the driving, and few if any other people were driving in the torrential rain that late at night (V6, 44-45, 54). Abshire affirmatively recanted his prior statements that he and John did not go out to the bars that night.

> Q And at your trial testimony, you didn't mention anything about going to the Tradewinds or Scarlett O'Hara's on Wednesday night?
>
> A That had to have been when we went because that's when I met the other girl.
>
> Q Are you sure it's not Tuesday night that you went?

A No ma'am, because John and I were–I met her when John and I were alone looking for work. Stacey wasn't with us. If I said that, I was mistaken.

(V 6, 42).

Q She was just asking you whether you were sure it was Wednesday night.

A It was definitely Wednesday night.

(V6, 51).

"In assessing recanted testimony, we have stressed caution, noting that it may be unreliable and trial judges must 'examine all of the circumstances in the case'." Robinson v. State, 707 So.2d 688, 691 (Fla. 1998) (citing State v. Spaziano, 692 So.2d at 176). The circumstances of this case clearly indicate that Abshire's testimony at the evidentiary hearing was much closer to the truth than Abshire's testimony in 1993.

First, Abshire's testimony that the victim was alive when he chopped her neck is consistent with Hobart Harrison's testimony which the state presented at Abshire's trial.

Q He said who cut her head off?

A He did, Michael Abshire.

Q Did he tell you any of the details of the attack that lead to the death of Stacey Willets?

A Well, no. He just said that the girl was coming between him and John and John – he was sitting on the hood of the car and John stabbed her in the side and John couldn't kill her. He said, "You fucking pussy, let me show you how to do it and I'll finish it."

Q Is that a direct quote?

A Yes, sir.

(A V9, 1409-10). Mr. Harrison, though unwillingly brought to the evidentiary hearing, confirmed this testimony.

Q How do you know who did the crime?

A Because the man who did the crime told me.

Q And who was that?

A Michael Gene Abshire.

(V7, 161)

A We'll just put it this way, he told me he did the crime, he killed the girl, and that's as far as I want to go with that. I really don't want to be here.

(V7, 162).

Q He said he cut her head off and left a piece of skin to hold it on; do you remember saying that?

A Yeah, I remember saying that but last Friday when you came to see me at the prison, I told you I didn't want no part of this case and I would rather not go into the past with Mr. Abshire because that's over and done with. I appreciate y'all asking me to come up here and help the man, but like I told you, he ain't the one that did it. That's as far as I want to go with it. I would appreciate it if you'd leave me out of this.[1]

(V7, 163).

1Because Mr. Harrison did not want to testify, counsel asked the court to take judicial notice of Mr. Harrison's testimony in Abshire's case and asked that a copy of Mr. Harrison's testimony be attached to this record. The state objected because "I can't cross-examine that transcript". The court sustained the objection. The trial court erred. Because the state offered Mr. Harrison's testimony in Abshire's trial, the prior testimony was admissible under Florida Statutes § 90.803(22) and § 90.804(2)(a).

Second, Abshire testified at both the trial and the evidentiary hearing that he and John Marquard showered and changed after returning from their job hunting expedition but before going to the woods. This corroborates Abshire's evidentiary hearing testimony. Abshire and John probably showered and changed before going to bars where Abshire planned to meet a girl. Common sense dictates however, that they would not shower if, as Abshire testified at trial, they planned to go hiking in the rainy and muddy woods where they planned to stab the victim.

Though Abshire was tried before John Marquard, the court delayed Abshire's sentencing until after he testified at John Marquard's trial. While testifying at John Marquard's trial, Abshire had every motivation to minimize his culpability and exaggerate John's. Abshire offered as mitigating circumstances in his trial that he did not kill the victim and was merely an accomplice under Enmund/Tison, he cooperated in the case against John Marquard, and the statutory mitigating circumstances that he was an accomplice in the offense and his participation was relatively minor, and he acted under extreme duress or the substantial domination of another person (A V12, 1775, 1779-83, 484-485). Abshire also was motivated by revenge. At the evidentiary hearing, Abshire testified, "I knew I was going to death row. I knew I was going to die. And I felt like I deserved to die and I felt like he did too."(V1, 50).

Because John Marquard suffers psychogenic amnesia and has no memory of the event, and the body was decomposed when found, Michael Abshire is the only source of information about the actual events of the murder (V2, 183, M V2, 280, V3, 500-512). Abshire has given different versions of the murder to law enforcement officials, prosecutors, cell mates, and John Marquard's collateral counsel. Each version illuminates varying degrees of Abshire's culpability. At the very least, he is equally as culpable as John Marquard.

In light of the newly discovered evidence that Abshire admitted he chopped the victim's neck while she was alive, Abshire's admitted involvement in the entire murder, and the fact that only Michael Abshire knows exactly how the murder occurred, and newly discovered evidence of Abshire's life sentence, John Marquard's death sentence is clearly disparate. This Court held, "Defendants should not be treated differently upon the same or similar facts. When the facts are the same, the law should be the same." Slater v. State, 316 So.2d 539, 542 (Fla. 1975). According to Abshire's trial testimony, both Michael Abshire and John Marquard lured the victim into the woods, stabbed or chopped her, and took her car and personal property. Two of Abshire's three on the record versions of the facts of the actual murder state that Abshire stabbed and chopped the victim while she was alive. Abshire is at least as culpable as John Marquard who, according to the version Michael Abshire told Hobart Harrison and

David Blanks, stabbed the victim in the side but could not kill her. Imposition of the death penalty under the facts of this case is unconstitutional under Furman v. Georgia, 408 U.S. 238, 92 (1972); Slater v. State, 316 So.2d 539, 542 (Fla. 1975). The facts of the actual murder are uncertain. Because the "Florida sentencing scheme is not founded on mere tabulation of the aggravating and mitigating factors, but relies instead on the weight of the underlying facts", and only Michael Abshire, who has a life sentence, knows what actually transpired during the murder, John Marquard's death sentence is clearly disproportionate, disparate, and invalid. Terry v. State, 668 So.2d 954, 965 (Fla. 1996) (quoting Francis v. Dugger, 908 F.2d969, 705 (11th Cir.1990). If this evidence was available at the time of John Marquard's sentencing, he probably would have received a life sentence.

CLAIM II

THE PROSECUTOR'S IMPROPER INTRODUCTION OF NONSTATUTORY AGGRAVATORS DURING THE PENALTY PHASE RENDERED JOHN MARQUARD'S SENTENCE UNRELIABLE, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THIS CLAIM ON DIRECT APPEAL.

Florida's sentencing scheme attempts to prevent the arbitrary imposition of the death penalty. To do this, the aggravating circumstances specified in Florida's capital sentencing statute are exclusive, and no other circumstances or

factors may be used to aggravate a crime to impose the death penalty. Fla. Stat. § 921.141(6)(1996). The penalty phase of John Marquard's trial did not comport with this requirement. Rather, the State introduced evidence which was not relevant to any statutory aggravating factors. The prejudice is evidenced in John Marquard's judgment and sentence; the jury and the trial court relied upon several impermissible factors in sentencing him to death.

During his closing argument, the prosecutor introduced illegal non-statutory aggravating circumstances. The prosecutor argued to the jury that the murder was cold, calculated, and premeditated because "Now, this wasn't to do in a stranger, **but to do in somebody who trusted whom? Who trusted the defendant, Mr. Marquard**. Cold, calculated and premeditated? You bet." (M V11, 1733). The prosecutor continued, "cold, calculated and premeditated? You bet. **And to make it worse, this was somebody who trusted him**." (M V11, 1735) *(emphasis added*). Cold, calculated, and premeditated should have been determined solely from John Marquard's state of mind. Whether the victim trusted John Marquard was absolutely irrelevant to John Marquard's state of mind.

The prosecutor again argued to the jury that they consider a non-statutory aggravator when contemplating the heinous, atrocious, and cruel aggravator. The prosecutor argued that

heinous, atrocious, and cruel applied because

> Now, when somebody has a kurka knife, it's hard to explain any other purpose to have one of these things but to kill an individual (indicating). **And somebody who seems to take enjoyment in wearing one of these things and going out hunting with one of these things and taking his girlfriend on a date at night with one of these things derives great enjoyment in the process of using one of these things**.

(M V11, 1735-36) *(emphasis added)*. This bad character evidence, that John Marquard carried an unusual knife, was not relevant to whether the crime was heinous, atrocious, or cruel. The prosecutor simply used that argument to introduce yet another illegal non-statutory aggravator.

In its sentencing order, the court specifically weighed non-statutory aggravating circumstances. The court stated the murder of "Willets was brutal, senseless and completely unnecessary. The murder was Defendant's idea . . . She was no threat to Defendant. She shared with him her money, her property and her body. She **trusted** Defendant and Abshire." (M V3,. 542)(*emphasis added)*. The court also found that "Stacey was completely defenseless. The attack was unprovoked. Defendant attacked her from behind. She struggled, but she was no match for Defendant. Defendant could have taken her money, her car and property without a struggle." (M V3, 542). The court also noted: She was killed for three reasons:

> (1) Defendant wanted to get rid of her. She

argued with him and hadn't found a job and he, Abshire and Stacey were short on money, two people spend less money than three.

(2) Defendant wanted her car, her money and other property. Defendant and Abshire had no transportation without Stacey's car.

(3) Defendant and Abshire played games. They discussed killing people and how you would kill someone with knives. Defendant wanted to know what it was like to kill someone.

(M V3, 543). None of these facts relate to John Marquard's state of mind or the circumstances of the crime and do not form the basis for statutory aggravating circumstances. Though the court did not specifically state that he considered all these facts as aggravating circumstances, he specifically stated them in his summary. Thus, they impacted his decision to sentence John Marquard to death and are therefore, impermissible nonstatutory aggravating circumstances.

Even though Florida capital penalty phase proceedings require the sentencers to consider only the statutory aggravating circumstances, the prosecutor made irrelevant, inflammatory, and highly prejudicial arguments and encouraged the jury to render a death sentence based on improper non-statutory aggravating circumstances. This, in turn, infected the court's sentencing because the sentencing judge is required to give the jury's verdict great weight, and a judge can override a life sentence only if the facts suggesting a death sentence are "so clear and

convincing that virtually no reasonable person could differ." Tedder v. State, 332 So.2d 908, 910 (Fla. 1975). Moreover, the court did weigh non-statutory aggravators in John Marquard's Judgment and Sentence (M V3 538-44). The prosecutor's introduction and the court's consideration of non-statutory aggravators is fundamental error because it resulted in the standardless sentencing discretion which violates the Eighth Amendment. Godfrey v. Georgia, 446 U.S. 420, 427 (1980). Had appellate counsel raised this fundamental error on appeal, John Marquard would have received a new penalty phase proceeding. Elledge v. State, 346 So.2d 998 (1977). The introduction and court's consideration of improper and unconstitutional nonstatutory aggravating factors starkly violated the Eighth Amendment, Florida Statute, and prevented the constitutionally required narrowing of the sentencer's discretion. Maynard v. Cartwright, 486 U.S. 356, 358 (1988). As a result, these impermissible aggravating factors evoked a sentence that was based on an "unguided emotional response", a clear violation of John Marquard's constitutional rights. Penry v. Lynaugh, 492 U.S. 302 (1989). Both the jury's and the court's consideration of these non-statutory aggravating circumstances entitle John Marquard to a new sentencing because the error cannot be found harmless beyond a reasonable doubt. Elledge v. State, 346 So.2d 998 (1977). Thus, counsel's failure to raise this fundamental error on direct appeal was ineffective assistance of appellate

counsel.

CLAIM III

MR. MARQUARD'S JURY WEIGHED INVALID AND UNCONSTITUTIONALLY VAGUE AGGRAVATING CIRCUMSTANCES, IN VIOLATION OF HIS RIGHT TO AN INDIVIDUALIZED AND RELIABLE SENTENCING PROCEEDING, AS IS GUARANTEED BY THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THIS CLAIM ON DIRECT APPEAL.

1. Cold, Calculated, and Premeditated Jury Instruction

Defense counsel conceded the applicability of this aggravating factor, but then objected on the basis that Mr. Marquard had a "pretense of moral or legal justification." (M V10, 1515-16). The trial court overruled counsel's objection (M V10, 1518). John Marquard's sentencing jury was simply told:

> The crime for which the defendant is to be sentenced was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(M V11,1772). That instruction violated Jackson v. State, 648 So.2d 85 (Fla. 1994); Espinosa v. Florida, 112 S. Ct. 2926 (1992); Stringer v. Black, 112 S. Ct. 1130 (1992); Sochor v. Florida, 112 S. Ct. 2114 (1992); Maynard v. Cartwright, 108 S. Ct. 1853 (1988). Though counsel failed to specifically object to the form of the instruction during the charge conference, counsel previously objected to section 921.141 because the aggravating circumstances do not guide the jury in applying aggravating circumstances (M V1, 184-85). Thus, appellate counsel should

have raised this issue on appeal as preserved or as fundamental error. Counsel's failure to do so constituted prejudicially ineffective assistance of counsel.

In James v. State, 616 So. 2d 668 (Fla. 1993), this Court reversed the denial of Mr. James' postconviction claim that the heinous, atrocious and cruel aggravating factor is unconstitutionally vague. This Court held that James should have the benefit of Espinosa v. Florida because counsel objected to the instruction. This Court specifically addressed the cold, calculated and premeditated aggravator and declared that the same rule applies to it. James v. State, 616 So.2d at 669, n.3. Thus, had appellate counsel raised this claim on appeal, John Marquard would have received a new sentencing phase proceeding. Id.

Because counsel failed to request a limiting instruction, and the court failed to know the law and independently give it, the jury's sentencing discretion was prejudicially inadequately guided and channeled. The jury received the standard jury instruction regarding the "cold, calculated and premeditated" aggravating factor, but was not instructed on any of this Court's limiting constructions regarding this aggravating circumstance.

The only instruction John Marquard's jury ever received regarding the definition of "premeditated" was the instruction given at the guilt phase regarding the premeditation necessary to establish guilt of first-degree murder (M V9, 1430-1431). This

Court held that the definition of premeditation does not establish the "cold, calculated and premeditated" aggravating factor and adopted several narrowing constructions of this aggravator. *See* Rogers v. State, 511 So. 2d 526, 533 (Fla. 1987); Gorham v. State, 454 So. 2d 556 (Fla. 1984). Cold, calculated, and premeditated applies only to "murders more cold-blooded, more ruthless, and more plotting than the ordinarily reprehensible crime of premeditated first-degree murder." Porter v. State, 564 So.2d 1060, 1064 (Fla.1990). The killing involves "calm and cool reflection". Richardson V. State, 604 So.2d 1107, 1109 (Fla.1992). "Calculated" mandates a special plan or pre-arranged design. Rogers, 511 So.2d at 533. Premeditation is a "heightened premeditation" which distinguishes the aggravating circumstance from the element of first-degree premeditated murder. At the time of John Marquard's penalty phase, this Court adopted all of the above narrowing constructions. Appellate counsel deficiently failed to raise this issue on appeal.

This error was not harmless beyond a reasonable doubt. This erroneous instruction, combined with the other erroneous penalty phase instructions, resulted in John Marquard's death sentence based on unconstitutionally vague aggravating circumstances. Had appellate counsel raised this issue, John Marquard's case would have been remanded for a new constitutional sentencing proceeding.

2. During The Commission Of A Felony/Pecuniary Gain Instruction

John Marquard's jury was unconstitutionally instructed to consider an automatic aggravating factor: "committed while he was engaged in the commission of a robbery or for financial gain." (M V11 1771). The jury's consideration of this aggravating circumstance violated Mr. Marquard's Eighth and Fourteenth Amendment rights because it allowed the jury to consider an aggravating circumstance which applied automatically to Mr. Marquard's case once the jury convicted Mr. Marquard under the theory of felony murder during the guilt phase of the trial.

During the charge conference, the following occurred:

THE COURT: Number 4, the crime for which defendant is to be sentenced was committed while he was engaged in or an accomplice in the commission of the crime of –

MR. ALEXANDER: Armed robbery.

THE COURT: Armed robbery.. . . Six, the crime for which defendant is to be sentenced was committed for financial gain. That’s out because that would be doubling up on him.

MR. DALY: Well, Your Honor, essentially what the case law indicates the Court should do is – and the reason is, the Court should probably read both and tell them they can’t double it.

THE COURT: Well, I’m afraid to do that because I’m really afraid they will miss one or the other – I agree with you, because If they find – I don’t know how – I don’t know how they could not find aggravating circumstance 5.

MR. PEARL: Five?

THE COURT: No, 4. I don't know how they could not find that – having found him guilty of first degree murder, having found him guilty of armed robbery, I don't know how they could not now find that it wasn't committed during the commission of an armed robbery.

MR. PEARL: I make an objection to giving of the charge.

MR. ALEXANDER: That's fine. We're not going to ask for it.

MR. PEARL: And I make no further argument upon such.

MR. ALEXANDER: I agree with Judge Watson on it.

THE COURT: I think we'll leave six out because of the confusion it might entail.

(M V10, 1500-01). Though counsel, the court, and the state attorney agreed that both instructions should not be given, John Marquard's jury was instructed:

> The aggravating circumstances that you may consider are limited to any of the following that are established by the evidence ... number two, the crime for which the defendant is to be sentenced was committed while he was engaged in the commission of a robbery or was committed for financial gain.

(M V11, 1770-71). The jury was not instructed that they could not consider both aggravating factors. After the court instructed the jury, counsel renewed all prior objections, but deficiently failed to address this error (M V11, 1778). Appellate counsel failed to raise this error on appeal.

Combining the two aggravators and using "or" does not make the instructions received by John Marquard's jury constitutional. If the jury misunderstood the vague instruction and actually found both the "in the course of a felony" aggravator and the

pecuniary gain aggravator, the prejudice is doubled. Aggravators and instructions exist to guide the sentencer's discretion, to narrow the class of persons that are eligible for the death penalty. Sochor v. Florida, 504 U.S. 527 (1992). To that end, the jury, as a co-sentencer, must be constitutionally instructed. Johnson v. Singletary, 612 So. 2d 575 (Fla. 1993). John Marquard's jury was not properly instructed.

Appellate counsel also failed to raise the issue that the "in the course of a felony murder" aggravator is unconstitutional because it automatically applies to every felony murder. The jury's deliberation was obviously tainted by the unconstitutional and vague instruction. See Sochor v. Florida, 504 U.S. 527 (1992). The use of the underlying felony as an aggravating factor rendered the aggravator "illusory" in violation of Stringer v. Black, 503 U.S. 527 (1992). The jury was instructed regarding an automatic statutory aggravating circumstance. Thus, John Marquard entered the penalty phase already eligible for the death penalty. Other similarly (or worse) situated petitioners are not automatically eligible for the death penalty. John Marquard's death penalty was predicated upon an unreliable automatic finding of a statutory aggravating circumstance -- the very felony murder finding that formed the basis for conviction. A state cannot use such aggravating "factors which as a practical matter fail to guide the sentencer's discretion." Stringer v. Black. The use of this automatic aggravating circumstance did

not "genuinely narrow the class of persons eligible for the death penalty," Zant v. Stephens, 462 U.S. 862, 876 (1983), and therefore, the sentencing process was rendered unconstitutionally unreliable. Id.

The Wyoming Supreme Court addressed this issue in Engberg v. Meyer, 820 P.2d 70 (Wyo. 1991). In Engberg, the Wyoming court found the use of an underlying felony both as an element of first degree murder and as an aggravating circumstance violates the Eighth Amendment:

> In this case, the enhancing effect of the underlying felony (robbery) provided two of the aggravating circumstances which led to Engberg's death sentence: (1) murder during commission of a felony, and (2) murder for pecuniary gain. As a result, the underlying robbery was used not once but three times to convict and then enhance the seriousness of Engberg's crime to a death sentence. All felony murders involving robbery, by definition, contain at least the two aggravating circumstances detailed above. This places the felony murder defendant in a worse position than the defendant convicted of premeditated murder, simply because his crime was committed in conjunction with another felony. This is an arbitrary and capricious classification, in violation of the Furman/Gregg narrowing requirement.

820 P.2d at 89-90. See also United States v. McCullah, 76 F.3d 1087 (10th Cir. 1996); Davis v. Executive Director of Department of Corrections, 100 F.3d 750 (10th Cir. 1996).

Wyoming, like Florida, provides that the narrowing occur at the penalty phase. See Stringer v. Black, 503 U.S. 527 (1992).

The use of the "in the course of a felony" aggravating circumstance is unconstitutional. As the Engberg court held:

> [W]here an underlying felony is used to convict a defendant of felony murder only, elements of the underlying felony may not again be used as an aggravating factor in the sentencing phase. We acknowledge the jury's finding of other aggravating circumstances in this case. We cannot know, however, what effect the felony murder, robbery, and pecuniary gain aggravating circumstances found had in the weighing process and in the jury's final determination that death was appropriate.

820 P. 2d at 92. This error cannot be harmless in this case:

> [W]hen the sentencing body is told to weigh an invalid factor in its decision, a reviewing court may not assume it would have made no difference if the thumb had been removed from death's side of the scale. When the weighing process itself has been skewed, only constitutional harmless-error analysis or reweighing at the trial or appellate level suffices to guarantee that the defendant received an individualized sentence.

Stringer, 504 U.S. at 534.

This error was not harmless. The jury received unconstitutional instructions regarding three of the four aggravating circumstances (M V11, 1771-72). In each instance these instructions failed to channel and narrow the sentencers' discretion. Cumulatively, they resulted in a death sentence that violates the Eighth Amendment.

The use of the underlying felony, robbery, as a basis for any aggravating factor, rendered that aggravating circumstances "illusory" in violation of Stringer v. Black, 112 S. Ct. 1130

(1992). Due to the outcome of the guilt phase, the jury's consideration of automatic aggravating circumstances served as a basis for Mr. Marquard's death sentence. Because appellate counsel failed to raise this issue on appeal, John Marquard was denied effective assistance of counsel. Mr. Marquard's sentence of death is the resulting prejudice. Harris v. Dugger, 874 F.2d 756 (11th Cir. 1989). Had counsel raised these errors with the other fundamental errors, John Marquard would have received a new constitutional penalty phase.

3. Under A Sentence Of Imprisonment

The trial court erred in instructing the jury and finding the aggravator that John Marquard was under a sentence of imprisonment. To prove this aggravator, the state introduced a certified copy of John Marquard's February 13, 1991, Judgment and Commitment for misdemeanor larceny. John Marquard received a two year sentence for that charge. The state also called Patricia Rawls, John Marquard's North Carolina parole officer, who testified that John Marquard was under parole supervision during June 1991. Appellate counsel raised this issue on direct appeal and this Court held there was no error because John Marquard's parole officer testified that he was on parole at the time of the murder. Marquard v. State, 641 So.2d 54, 58 (Fla.1994). In light of the Florida legislature's 1996 amendment to this aggravator, changing it from "The capital felony was committed by

a person under sentence of imprisonment or placed on community control" to "The capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment or placed on community control or on felony probation", and the facts of that misdemeanor, this Court must again consider the validity of that aggravator. Fla.Stat. § 921.141(5)(a) (1993, 1996).

The North Carolina Statute of misdemeanor larceny under which John Marquard was sentenced provides:

> larceny of property, or the receiving or possession of stolen goods knowing or having reasonable grounds to believe them to be stolen, where the value of the property or goods is not more than one thousand dollars ($1,000), is a misdemeanor punishable under G.S. 14-3(a). In all cases of doubt, the jury shall, in the verdict, fix the value of the property stolen.

N.C. Stat § 14-72 (1991). G.S. 14-3(a) states

> Except as provided in subsections (b) and (c), every person who shall be convicted of any misdemeanor for which no specific punishment is prescribed by statute shall be punishable by fine, by imprisonment for a term not exceeding two years, or by both, in the discretion of the court.

N.C. Stat. §14-3 (1991). The warrant for John Marquard's arrest declared that John Marquard obtained $250.00 under false pretenses (M V2, 379). Thus, because the money value involved in that conviction was less than $300.00, the corresponding Florida conviction would have been petit theft.

The corresponding Florida Statute provision of petit theft

provided

> Theft of any property not specified in paragraph (a), or paragraph (b), or paragraph (c) is petit theft and a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.

Fla. Stat. §812.014 (1991). The second degree misdemeanor would have been punishable in Florida for a term of up to 60 days in county jail. Fla. Stat. §§ 812.014; 775.082; 775.083. In 1991, only inmates sentenced to 13 months or more were eligible for parole. Fla. Stat. § 947.16. Therefore, had John Marquard been convicted of this crime in Florida, he could not have been under a sentence of imprisonment. Because John Marquard was sentenced to death in Florida, Florida law should determine which aggravators apply. The North Carolina misdemeanor conviction, which would not result in parole in Florida, should not make John Marquard death eligible in Florida.

The legislature's 1996 amendment to 921.141(5)(a) indicates that the legislature did not intend that this aggravator apply to misdemeanor convictions. The facts of the conviction prove John Marquard would not have been under a sentence of imprisonment had he been convicted of the corresponding Florida crime. This Court must look at the basis of the parole and legislative intent and find this aggravator invalid.

CLAIM IV

MR. MARQUARD'S DEATH SENTENCE VIOLATES THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH

AMENDMENTS BECAUSE THE PENALTY PHASE JURY INSTRUCTIONS WERE INCORRECT UNDER FLORIDA LAW AND SHIFTED THE BURDEN TO MR. MARQUARD THAT DEATH WAS NOT THE APPROPRIATE SENTENCE.

Under Florida law, a capital sentencing jury must be:

> [T]old that the state must establish the existence of one or more aggravating circumstances before the death penalty could be imposed . . .
>
> [S]uch a sentence could be given **if the state showed the aggravating circumstances outweighed the mitigating circumstances**.

State v. Dixon, 283 So. 2d 1 (Fla. 1973)(*emphasis added*). Trial counsel submitted a proposed instruction reflecting this standard (M V 11, 1845). The court denied the proposed instruction, and the court shifted this burden of proof to John Marquard.

> If you find that one or more sufficient aggravating circumstances do exist, it will then -- then be your duty to determine whether any mitigating circumstance or circumstances exist that outweigh the aggravating circumstances.

(M V11, 1772). The instructions violated Florida law and the Eighth and Fourteenth Amendments in two ways. First, the instructions shifted the burden of proof to Mr. Marquard on the central sentencing issue of whether he should live or die. Under Mullaney, this unconstitutional burden-shifting violated Mr. Marquard's Due Process and Eighth Amendment rights. Mullaney v. Wilbur, 421 U.S. 684 (1975). *See also* Sandstrom v. Montana, 442 U.S. 510 (1979); Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988). The jury was not instructed in conformity with the

standard set forth in Dixon. Because in Florida the jury is a sentencer, it must be properly instructed. Johnson v. Singletary, 612 So. 2d 575 (Fla. 1993). Second, the instruction essentially told the jury that once aggravating circumstances were established, it need not consider mitigating circumstances unless those mitigating circumstances were sufficient to outweigh the aggravating circumstances. Cf. Mills v. Maryland, 108 S. Ct. 1860 (1988); Hitchcock v. Dugger, 481 U.S. 393 (1987). Appellate counsel deficiently failed to raise this issue on appeal.

Because John Marquard's sentencing jury was instructed that it could consider Florida's felony-murder aggravating circumstance, and he had been convicted of robbery, John Marquard was eligible for death upon conviction. Thus, John Marquard entered the penalty phase of his capital trial with the burden of proving that death was not the appropriate penalty.

John Marquard's penalty phase instructions required the jury to impose death unless John Marquard presented mitigation which outweighed the automatic and unconstitutional aggravation. The trial court then used the same standard in sentencing Mr. Marquard to death. See Zeigler v. Dugger, 524 So. 2d 419 (Fla. 1988)(trial court is presumed to apply the law in accord with manner in which jury was instructed).

This standard shifted the burden to John Marquard to establish that life was the appropriate sentence and limited consideration of mitigating evidence to only those factors proven

sufficient to outweigh the aggravation. The standard given to the jury violated state law. Fla. Stat. § 921.141. This burden-shifting standard thus "interfered with the consideration of mitigating evidence." Boyde v. California, 110 S. Ct. 1190, 1196 (1990). Because "[s]tates cannot limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the [death] penalty," McCleskey v. Kemp, 481 U.S. 279, 306 (1987), the argument and instructions provided to the jury and the standard used by the trial court violated the Eighth Amendment's "requirement of individualized sentencing in capital cases [which] is satisfied by allowing the jury to consider all relevant mitigating evidence." Blystone v. Pennsylvania, 110 S. Ct. 1078, 1083 (1990). See also Lockett v. Ohio, 438 U.S. 586 (1978); Hitchcock v. Dugger, 481 U.S. 393 (1987).

The unconstitutional instructions precluded the jurors from considering the mitigating evidence that was presented, Hitchcock, and from evaluating the "totality of the circumstances." State v. Dixon, 283 So.2d at 10. The jurors would reasonably have understood that only mitigating evidence which rose to the level of "outweighing" aggravation need be considered. This error, when combined with erroneous instructions on five aggravators was not harmless. Had appellate counsel raised this fundamental error on direct appeal, John Marquard would have received a new penalty phase.

CLAIM V

MR. MARQUARD'S EIGHTH AMENDMENT RIGHT AGAINST CRUEL AND UNUSUAL PUNISHMENT WILL BE VIOLATED AS MR. MARQUARD MAY BE INCOMPETENT AT THE TIME OF EXECUTION.

In accordance with Florida Rules of Criminal Procedure 3.811 and 3.812, a prisoner cannot be executed if "the person lacks the mental capacity to understand the fact of the impending death and the reason for it." This rule was enacted in response to Ford v. Wainwright, 477 U.S. 399, 106 S.Ct. 2595 (1986).

John Marquard acknowledges that under Florida law, a claim of incompetency to be executed cannot be asserted until a death warrant has been issued. Further, John Marquard acknowledges that before a judicial review may be held in Florida, the defendant must first submit his claim in accordance with Florida Statutes. The only time a prisoner can legally raise the issue of his sanity to be executed is after the Governor issues a death warrant. Until the death warrant is signed, the issue is not ripe. This is established under Florida law pursuant to Section 922.07, Florida Statutes (1985) and Martin v. Wainwright, 497 So.2d 872 (1986)(If Martin's counsel wish to pursue this claim, we direct them to initiate the sanity proceedings set out in section 922.07, Florida Statutes (1985).

The same holding exists under federal law. Poland v. Stewart, 41 F. Supp. 2d 1037 (D. Ariz 1999) (such claims truly are not ripe unless a death warrant has been issued and an

execution date is pending); Martinez-Villareal v. Stewart, 118 S. Ct. 1618, 523 U.S. 637, 140 L.Ed.2d 849 (1998)(respondent's Ford claim was dismissed as premature, not because he had not exhausted state remedies, but because his execution was not imminent and therefore his competency to be executed could not be determined at that time); Herrera v. Collins, 506 U.S. 390, 113 S. Ct. 853, 122 L.Ed.2d 203 (1993)(the issue of sanity [for Ford claim] is properly considered in proximity to the execution).

However, most recently, in In RE: Provenzano, No. 00-13193 (11th Cir. June 21, 2000), the 11th Circuit Court of Appeals stated:

> Realizing that our decision in In Re: Medina, 109 F.3d 1556 (11th Cir. 1997), forecloses us from granting him authorization to file such a claim in a second or successive petition, Provenzano asks us to revisit that decision in light of the Supreme Court's subsequent decision in Stewart v. Martinez-Villareal, 118 S.Ct. 1618 (1998). Under our prior panel precedent rule, See United States v. Steele, 147 F.3d 1316, 1317-18 (11th Cir. 1998)(en banc), we are bound to follow the Medina decision. We would, of course, not only be authorized but also required to depart from Medina if an intervening Supreme Court decision actually overruled or conflicted with it.[citations omitted]
> Stewart v. Martinez-Villareal does not conflict with Medina's holding that a competency to be executed claim not raised in the initial habeas petition is subject to the strictures of 28 U.S.C. Sec 2244(b)(2), and that such a claim cannot meet either of the exceptions set out in that provision.

Id. at pages 2-3 of opinion

This claim is necessary at this stage because federal law requires that, in order to preserve a competency to be executed claim, the claim must be raised in the initial petition for habeas corpus, and federal law requires all issues raised in a federal habeas petition to be exhausted in state court. Hence, John Marquard raises this claim now.

John Marquard has been incarcerated since 1992. Statistics show that incarceration over a long period of time will diminish an individual's mental capacity. Because John Marquard may well be incompetent at time of execution, his Eighth Amendment right against cruel and unusual punishment will be violated.

John Marquard was first diagnosed with mental problems at the age of ten. John Marquard suffers personality disorder, a pattern of paranoid schizophrenia in a subacute stage-- "he has a great deal of difficulty in dealing with reality and very often chose to create a reality of his own, either with the use of substances or in other ways. And in simplistic terms, schizophrenia is a thought disturbance in which a person creates their own reality" (V7, 207), great trouble with abstract reasoning (V7, 201-202), an auditory processing deficit in noises and spoken words, brain impairment consistent the long-term effects of fetal alcohol syndrome (V7, 205), and episodic discontrol or impulsivity. (V7, 213). John Marquard is a lycanthropist; he has a delusional belief that he is a werewolf. John Marquard has attempted suicide. For the last seven years,

John Marquard has lived on Florida's death row, in a cell approximately 6 feet wide, 9 feet long, and 9.5 feet high. Union Correctional Institution is located in central Florida and is not air conditioned, even during dangerously hot weather. Roaches often reach the food served to death row inmates before it is delivered to the inmates. John Marquard is allowed yard time only twice a week and showers every other day. The majority of John Marquard' fellow death row inmates, the people with whom he can routinely talk and associate, also suffer various forms of mental illness and personality disorders. John Marquard' already fragile mental condition could only deteriorate under these circumstances. His mental condition may well decline to the point that he is incompetent to be executed.

CONCLUSION AND RELIEF SOUGHT

For all the reasons discussed herein, Mr. Marquard respectfully urges this Honorable Court to grant habeas relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition for Writ of Habeas Corpus has been furnished by U.S. Mail to all counsel of record on August 14, 2000.

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